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## "Dependent Contractors" In the Gig Economy: A Comparative Approach

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# "Dependent Contractors" In the Gig Economy: A Comparative Approach

## **Keywords**

gig economy, independent contractor, employee, employer, worker's rights, employee protection

## ARTICLES

### “DEPENDENT CONTRACTORS” IN THE GIG ECONOMY: A COMPARATIVE APPROACH

MIRIAM A. CHERRY AND ANTONIO ALOISI\*

*In recent years, lawsuits alleging the misclassification of workers as “independent contractors” rather than “employees” have become widespread in the United States. Determining employee status is important because such status is a gateway to many substantive legal rights. In response, some commentators have proposed an in-between hybrid category just for the gig economy. However, such an intermediate category is not new. In fact, it has existed in many countries for decades, producing successful results in some and misadventure in others. We use a comparative approach to analyze the experiences of Canada, Italy, and Spain with the intermediate category. In Italy, the quasi-subordinate category created an opportunity for arbitrage that*

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resulted in less worker protection. The end result was confusion, and since 2015, the third category's use has been extremely limited. Spain's third category, the TRADE, was only made available to a small percentage of self-employed workers because of the burdensome nature of its regulations and the high dependency threshold required for inclusion. As for Canada, the practical result of the "dependent contractor" category was to expand the definition of employee and to bring more workers under the ambit of labor law protection. We ultimately conclude that workable proposals for a third category must also encompass other forms of precarious employment. Working within the existing framework, one solution would be to change the default presumptions regarding the two categories that already exist. Above a minimum threshold of hours worked or income earned, the default rule would be an employment relationship for most gig workers except those that may fit into a "safe harbor" for de minimis amateurs or volunteers.

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## INTRODUCTION

Recently, there has been a spate of lawsuits across the United States alleging that platforms in the “on demand” economy have misclassified their workers as independent contractors.<sup>1</sup> In response to the litigation and widespread confusion about how these workers should be classified, there have been proposals for a “third” or “hybrid” category to be created in the United States, situated between the categories of “employee” and “independent contractor.” Regardless of whether these workers would be denominated “dependent contractors” or “independent workers,” these proposals for establishing a hybrid category have sparked debate and controversy.<sup>2</sup> Proponents advocate that an intermediate category is necessary for the modern economic and technological realities of the gig economy. They also suggest that a third category is a novel innovation, appropriately crafted for the era of digital platform work.<sup>3</sup>

In fact, the intermediate category between employee and independent contractor is not new. Many foreign legal systems have already had decades of experience with implementing an intermediate category.<sup>4</sup> In this Article we employ a comparative approach and examine the laws of three countries that have such

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1. For a listing of the ongoing litigation surrounding the on-demand economy, see Miriam A. Cherry, *Beyond Misclassification: The Digital Transformation of Work*, 37 *COMP. LAB. L. & POL’Y J.* 577, 584–85 (2016).

2. See *infra* Part II.

3. See, e.g., Vin Gurreri, *Uber Cases Could Spur New Employee Classification*, LAW360 (May 6, 2016, 8:50 PM), <http://www.law360.com/articles/793584>.

4. See VALERIO DE STEFANO, INT’L LABOUR OFFICE, *THE RISE OF THE “JUST-IN-TIME WORKFORCE”: ON-DEMAND WORK, CROWDWORK AND LABOUR PROTECTION IN THE “GIG-ECONOMY”* 19 (2016) (comparing different countries’ approaches to workers in intermediate categories and highlighting Italy’s system of extending labor protections beginning in 1973).

experiences with a third category: Canada, Italy, and Spain.<sup>5</sup> These legal systems have had varying success in some instances and misadventure in others.<sup>6</sup> Before reflexively launching a hybrid category for platform work in the United States, we should seek to understand and evaluate the experiences of other nations in their implementation of the intermediate category.

Classification as an employee is a “gateway” to determine who deserves the protections of labor and employment laws, including the right to organize, minimum wage, and unemployment compensation, to name just a few of the benefits that are part and parcel of employee status.<sup>7</sup> As such, classification as an employee is “an important instrument for the delivery of workers’ rights.”<sup>8</sup> Further, it is important to note that lessons we can draw from the on-demand economy are not specific only to platforms or gig jobs. Increasingly, work in the modern economy is becoming casualized, outsourced,

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5. We chose Canada, Italy, and Spain for this comparative study in particular because these countries illustrated a broad array of experiences with the third category. In addition, we are aware of a comparative study that is in progress to examine the German and the Japanese experiences. Germany is an intriguing example because of the presence of a category that applies to “worker-like persons.” See Wolfgang Däubler, *Working People in Germany*, 21 COMP. LAB. L. & POL’Y J. 77, 77–78 (1999) (describing employee-like persons as “formally independent contractors without any personal subordination, but [that] are characterized by a position of economic independence”); Ryuichi Yamakawa, *New Wine in Old Bottles? Employee/Independent Contractor Distinction Under Japanese Labor Law*, 21 COMP. LAB. L. & POL’Y J. 99, 103 (1999) (describing how German labor law influenced Japanese courts and administrative agencies). We are also aware that the third category’s historical origins are somewhat apocryphal. When Canada was contemplating a third category in the 1960s, they referenced Sweden. Modern day Sweden’s legal landscape is described in Kent Källström, *Employment and Contract Work*, 21 COMP. LAB. L. & POL’Y J. 157 (1999). In any event, the third category is well-known in jurisdictions outside the United States.

6. The categories in these legal systems were formulated before the on-demand economy existed, but they tried to address other forms of non-standard or contingent work. For example, in Canada, the third category developed in response to a perceived problem with small tradespeople who were nominally self-employed but who were—for all intents and purposes—economically dependent on one large customer. See *infra* Section III.A.

7. See Matthew W. Finkin, *Beclouded Work, Beclouded Workers in Historical Perspective*, 37 COMP. LAB. L. & POL’Y J. 603, 611 (2016).

8. Guy Davidov, *The Reports of My Death Are Greatly Exaggerated: “Employee” as a Viable (Though Over-Used) Legal Concept*, in BOUNDARIES AND FRONTIERS OF LABOUR LAW: GOALS AND MEANS IN THE REGULATION OF WORK 133, 134 (Guy Davidov & Brian Langille eds., 2006).

and broken apart.<sup>9</sup> Workers are being managed by and through data, often through algorithms, and—even without a platform—many sectors are seeing the rise of the just-in-time workforce.<sup>10</sup> Rather than create a special classification category only for the gig economy, any proposal for a new category would ideally be formulated to ameliorate conditions for other forms of precarious work and fissured workplaces.

This Article proceeds by first providing a brief context on crowdwork and the gig economy. Part II summarizes the current proposals for an intermediate category for the gig economy in the United States. Part III describes the legal systems of Canada, Italy, and Spain, and their experiences with implementation of the third category. Canada’s implementation was perhaps the most successful, focusing on expanding the coverage of laws aimed at “employees” to encompass vulnerable small businesses and tradespeople. Italy, on the other hand, saw systemic arbitrage between the standard employment category and the intermediate category. The result was confusion and the stripping of workers’ rights by misclassifying them downwards. Spain revised its laws fairly recently, but because of burdensome requirements and a seventy-five percent dependency threshold to enter the third category, the category covered few Spanish workers.

Informed by these experiences, Part IV provides a detailed analysis of the larger implications of the three national case studies for labor law. These policy suggestions are guided by two overarching values: fairness for workers and safe harbors for platforms that are truly engaging in volunteerism-based work, community-organized business models, or only *de minimis* engagement with the paid labor force. For the first value of worker protection, legislators, legal scholars, and commentators must be cognizant of how establishing a third category could result in increasing arbitrage between the categories. In the Italian case, some workers actually *lost* protections as businesses took

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9. See DAVID WEIL, *THE FISSURED WORKPLACE: WHY WORK BECAME SO BAD FOR SO MANY AND WHAT CAN BE DONE TO IMPROVE IT* 94–95 (2014) (listing mechanisms used by employers to outsource and break apart work, including subcontracting and franchising); see also Judy Fudge, *Fragmenting Work and Fragmenting Organizations: The Contract of Employment and the Scope of Labour Regulation*, 44 *OSGOODE HALL L.J.* 609, 616 (2006) (describing the impact of the changing organization of labor on employment relationships).

10. Cherry, *supra* note 1, at 596–97.

advantage of the legal confusion engendered by the creation of an intermediate category.<sup>11</sup>

The default rule, we propose, should be employee status or something that, at the very least, resembles it closely. Numerous on-demand companies are already moving in this direction because they want the ability to control, train, and maintain a stable workforce—hallmarks of the employment relationship.<sup>12</sup> At the same time, we readily acknowledge that there are parts of the on-demand economy that are not about labor relations or potential exploitation of workers; rather, they are about communities, genuine sharing, and innovation. Any reform to address labor issues for platforms should include safe harbors for people who are genuinely sharing in such a way that paid work is secondary or tertiary to their goals. In our proposal, the threshold would be low, providing a way of separating one-off transactions or volunteerism from various forms of employment. The balancing of these interests will further worker protection and coverage of those who are using platforms as an equivalent to professional employment, while exempting those who are using these platforms to create community.

## I. THE CONTEXT OF CROWDWORK

### A. *The Scope of the On-Demand Economy*

Technology is increasingly changing the efficiencies and modalities of work.<sup>13</sup> In an earlier article, one of the Authors referred to this

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11. DE STEFANO, *supra* note 4, at 19 (explaining how businesses used the legal confusion “as a cheap alternative to employment relationships”).

12. Greg Bensinger, *Startups Scramble to Define “Employee,”* WALL ST. J. (July 30, 2015, 12:01 AM), <http://www.wsj.com/articles/startups-scramble-to-define-employee-1438228860> (highlighting companies that have reclassified their contractors as employees).

13. This Section is a broad review of the legal landscape of the on-demand economy. As much of it has been covered elsewhere, we will be correspondingly brief. We have largely adapted this section from both of the Authors’ earlier work that described the particular features, structures, economics, and legal issues of the gig economy. See generally Antonio Aloisi, *Commoditized Workers: Case Study Research on Labor Law Issues Arising from a Set of “On-Demand/Gig Economy” Platforms*, 37 COMP. LAB. L. & POL’Y J. 653 (2016); Cherry, *supra* note 1. For additional background information on the gig economy, see generally Valerio De Stefano, *The Rise of the “Just-in-Time Workforce”: On-Demand Work, Crowdwork, and Labor Protection in the “Gig-Economy,”* 37 COMP. LAB. L. & POL’Y J. 471 (2016); Orly Lobel, *The Law of the Platform*, 101 MINN. L. REV. 87, 87 (2016); Benjamin Means & Joseph A. Seiner, *Navigating the Uber Economy*, 49 U.C. DAVIS L. REV. 1511 (2016); Brishen Rodgers, *The Social Costs of Uber*, 82 U. CHI. L. REV. DIALOGUE 85 (2015).



trend as “virtual work,”<sup>14</sup> and it has also been described as “labor as a service,” “peer production,” “playbor,” or “crowdwork.”<sup>15</sup> Some processes of “crowdwork” or “micro-labor” involve computer-based work that is performed wholly in cyberspace, where work is broken down into its smallest constituent parts—such as coding, describing, or tagging the thousands of items for sale on a website.<sup>16</sup> Other types of crowdwork are aided by cellphone applications (“apps”) or websites. They rely on technology to deploy workers to perform tasks—such as driving, grocery delivery, or home repair services—for requesters in the real world paying for these services, with the app or platform keeping a percentage of the exchange.<sup>17</sup>

According to a recent survey conducted by *Time Magazine*, over fourteen million people currently work in the “gig,” “on-demand,” “platform,” or “sharing” economy.<sup>18</sup> While these statistics have been

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14. Miriam A. Cherry, *A Taxonomy of Virtual Work*, 45 GA. L. REV. 951, 954 (2011) (using the term “virtual work” broadly not only to encompass virtual worlds but also to refer to work taking place online, including the type of micro-labor crowdwork performed on Amazon’s Mechanical Turk).

15. See TREBOR SCHOLZ & LAURA Y. LIU, SITUATED TECHNOLOGIES PAMPHLETS 7: FROM MOBILE PLAYGROUNDS TO SWEATSHOP CITY 22 (Omar Khan et al. eds., 2010), [http://www.situatedtechnologies.net/files/ST7-MobilePlaygrounds\\_SweatshopCity.pdf](http://www.situatedtechnologies.net/files/ST7-MobilePlaygrounds_SweatshopCity.pdf); Derrick Harris, *Why Labor as a Service Is as Cloudy as It Gets*, GIGAOM (Aug. 22, 2010, 9:00 AM), <https://gigaom.com/2010/08/22/why-labor-as-a-service-is-as-cloudy-as-it-gets> (analogizing “labor as a service” to cloud computing); Julian Kücklich, *Precarious Playbour: Modders and the Digital Games Industry*, FIBRECULTURE J. (Dec. 5, 2005, 12:00 AM), <http://five.fibreculturejournal.org/fcj-025-precious-playbour-modders-and-the-digital-games-industry> (explaining the rise of “playbour” in the entertainment industry).

16. See, e.g., Debora Halbert, *Mass Culture and the Culture of the Masses: A Manifesto for User-Generated Rights*, 11 VAND. J. ENT. & TECH. L. 921, 929 (2009) (“Computer technology in the hands of the masses has made available software programs that can create music, documents, and art just as well as expensive studios did in the past. This democratization of technology disrupts the monopoly on the creative means of production. The world of amateur production also demonstrates that many are motivated by noncommercial reasons.”); Jeff Howe, *The Rise of Crowdsourcing*, WIRED (June 1, 2006, 12:00 PM), <https://www.wired.com/2006/06/crowds> (using the term “crowdsourcing” to describe work performed with the aid of contributions from diverse groups of users on the Internet); see also Irene Mandl, *Working Conditions in Crowd Employment and ICT-Based Mobile Work*, in THE DIGITAL ECONOMY AND THE SINGLE MARKET: EMPLOYMENT PROSPECTS AND WORKING CONDITIONS IN EUROPE, 111, 115 (Werner Wobbe et al. eds., 2016), <http://www.feeps-europe.eu/assets/4200c007-f19f-4aec-be49-1789d5804674/book-feeps-hd-okpdf.pdf>.

17. See De Stefano, *supra* note 13, at 471–72 (describing the types of work activities that use apps to facilitate business).

18. Katy Steinmetz, *Exclusive: See How Big the Gig Economy Really Is*, TIME (Jan. 6, 2016), <http://time.com/4169532/sharing-economy-poll>.

the subject of controversy,<sup>19</sup> there can be no doubt that technology is re-shaping the future of work. Examples include websites and apps that range from Amazon Mechanical Turk,<sup>20</sup> Handy,<sup>21</sup> Instacart,<sup>22</sup> to Uber.<sup>23</sup> These new companies' labor practices have sparked intense litigation in the United States.<sup>24</sup> Currently, the litigation is focusing on a common doctrinal issue: whether the workers in the on-demand economy have the status of employees or independent contractors.<sup>25</sup> The question of employee status is particularly important because it is a threshold question to determine the rights and benefits owed in U.S. employment law. Important substantive rights—including “minimum wage, protection from discrimination, unemployment insurance, [and] worker’s compensation,” to name a few—are only triggered for those workers who are deemed to be “employees.”<sup>26</sup>

### B. *Legal Standards for Determining Worker Status*

Under U.S. law, whether a worker is an employee or independent contractor is determined through various multi-factored tests dependent on the facts of the relationship.<sup>27</sup> The “control” test

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19. Cole Stangler, *December Jobs Report: How Many Gig Economy Workers Are There, Really?*, INT'L BUS. TIMES (Jan. 8, 2016, 7:33 AM), <http://www.ibtimes.com/december-jobs-report-how-many-gig-economy-workers-are-there-really-2255765> (describing prominent economists Alan Krueger and Larry Mishel's quibble with the numbers in the *Time* survey, and their argument that the numbers of on-demand economy workers are far lower); see also *id.* (highlighting consulting firm McKinsey & Company's study finding that “less than one percent of the U.S. working-age population work in the gig economy”). Interestingly, both economists have ideological reasons for minimizing the number of workers. If the number of workers in the on-demand economy is small, it supports the argument that there is no need for regulation—a notion that Krueger, who once consulted for Uber, could get behind. The reason for Mishel's minimization of the on-demand economy may have to do with the idea that labor unions should continue to appeal to their traditional base and ignore technological change. Lawrence Mishel, *Uber Is Not the Future of Work*, ATLANTIC (Nov. 16, 2015), <http://www.theatlantic.com/business/archive/2015/11/uber-is-not-the-future-of-work/415905>. Regardless of whose numbers we believe, or what conclusions we are to draw from them, the fact is that these estimates and analyses are subject to debate and controversy.

20. AMAZON MECHANICAL TURK, <https://www.mturk.com/mturk/welcome> (last visited Feb. 5, 2017).

21. HANDY, <http://www.handy.com> (last visited Feb. 5, 2017).

22. INSTACART, <https://www.instacart.com> (last visited Feb. 5, 2017).

23. UBER, <https://www.uber.com> (last visited Feb. 5, 2017).

24. See *supra* note 1 and accompanying text.

25. See, e.g., Cherry, *supra* note 1, at 581–82.

26. See *id.* at 578.

27. See Katharine V.W. Stone, *Legal Protections for Atypical Employees: Employment Law for Workers Without Workplaces and Employees Without Employers*, 27 BERKELEY J. EMP.

derives from case law and decisions on agency law, and focuses on a principal’s right to control the worker.<sup>28</sup> Some of the factors for finding employee status are whether the employer may direct the way in which the work is performed, determine the hours involved, and provide the employee with direction.<sup>29</sup> On the other hand, elements that lean toward independent contractor classification include high-skilled work, workers providing their own equipment, workers setting their own schedules, and workers getting paid per project, not per hour.<sup>30</sup> In an alternate test, courts examine the economic realities of the relationship to determine whether the worker is exhibiting entrepreneurial activity or whether the worker is financially dependent upon the employer.<sup>31</sup> The label affixed to the relationship is a factor in the outcome, but it is certainly not dispositive. In any event, the tests are notoriously malleable, difficult, and fact-dependent, even when dealing with what should be a fairly straightforward analysis.<sup>32</sup>

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& LAB. L. 251, 257–58 (2006) (listing factors from the cases); *see also* *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 326–27 (1992) (rejecting the Fourth Circuit’s test, describing it as circular and non-predictive, and discussing with approval the test that “turns on factual variables within an employer’s knowledge, thus permitting categorical judgments about the ‘employee’ status of claimants with similar job descriptions”); *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 728–29 (1947) (explaining that when workers complete tasks as though they are employees, the workers are protected as though they are employees even if the employer labels the workers independent contractors); *Ira S. Bushey & Sons, Inc. v. United States*, 398 F.2d 167, 170–71 (2d Cir. 1968) (discussing employee classification within the context of the respondeat superior doctrine).

28. *See* Stone, *supra* note 27, at 262, 280 (describing the “common law agency test”).

29. *See, e.g.*, *Herman v. Express Sixty-Minutes Delivery Serv., Inc.*, 161 F.3d 299, 303 (5th Cir. 1998).

30. *See, e.g.*, Richard R. Carlson, *Variations on a Theme of Employment: Labor Law Regulation of Alternative Worker Relations*, 37 S. TEX. L. REV. 661, 663 (1996) (“Most labor and employment laws assume a paradigmatic relationship between an ‘employer’ and ‘employee.’ The employer in this model contracts directly with an individual employee to perform an indefinite series or duration of tasks, subject to the employer’s actual or potential supervision over the employee’s method, manner, time and place of performance. This model describes most workers well enough, but there has always been a large pool of workers in alternative relationships with recipients of services. Some workers are ‘independent contractors’ who contract to perform specific tasks or achieve particular results, but who retain independence and self-management over their performance.”).

31. Stone, *supra* note 27, at 257–58.

32. Richard R. Carlson, *Why the Law Still Can’t Tell an Employee When It Sees One and How It Ought to Stop Trying*, 22 BERKELEY J. EMP. & LAB. L. 295, 298 (2001) (“Indeed, in the case of employee status, the law encourages ambiguity. On the one hand, employers often crave the control they enjoy in a normal employment

### C. *The Uber Litigation and Settlement*

Many commentators hoped disputes over worker classification would end, or at least be shaped by, the wage and hour lawsuits within platform companies that have been pending in the Northern District of California.<sup>33</sup> In the largest of these suits, *O'Connor v. Uber Technologies, Inc.*,<sup>34</sup> over 400,000 drivers for the popular ridesharing service were certified as a class to seek employee status and redress under the Fair Labor Standards Act (FLSA)<sup>35</sup> for minimum wages and overtime pay.<sup>36</sup> In May 2016, however, *O'Connor* settled for a \$100 million payment to the workers and an agreement that workers would receive a hearing before an arbitrator prior to dismissal.<sup>37</sup> While this was a brokered compromise, the settlement failed to bring about any definitive resolution to the classification problem.<sup>38</sup> As of the present writing, the court rejected the settlement as inadequate, and the parties are continuing to negotiate.<sup>39</sup>

Throughout the litigation, the judges struggled to characterize these working relationships within the “on/off” toggle of employee status.<sup>40</sup>

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relationship. On the other, the advantages (to employers) of employing workers who are plausibly not employees motivate a good deal of arbitrary and questionable ‘non-employee’ classification. It is not uncommon to find employees and putative contractors sitting side by side, performing the same work without any immediately visible distinguishing characteristics. And the trend of the working world is toward greater complexity and variation, driven partly by the temptation to capitalize on the fog that obscures the essence of many working relationships.” (footnotes omitted).

33. See Cherry, *supra* note 1, at 578.

34. No. C-13-3826 EMC, 2015 WL 5138097, at \*1 (N.D. Cal. Sept. 1, 2015).

35. 29 U.S.C. §§ 201–219 (2012).

36. *O'Connor*, 2015 WL 5138097, at \*37.

37. Having the claims for dismissal heard by an arbitrator was an important aspect of the settlement. Many Uber drivers complained that they were disconnected from the platform because of a complaint or because their customer ratings dropped below a certain threshold. Many felt that these dismissals were arbitrary and particularly cruel because of their automated nature. ALEX ROSENBLAT & LUKE STARK, *UBER’S DRIVERS: INFORMATION ASYMMETRIES AND CONTROL IN DYNAMIC WORK* 12 (2015), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2686227](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2686227).

38. Miriam A. Cherry, *Gig Economy: Settlement Leaves Legal Issues Unsettled*, LAW360 (May 5, 2016, 10:26 AM), <http://www.law360.com/articles/791341/gig-economy-settlements-leave-labor-issues-unsettled>.

39. Jon Weinberg, *Gig News: Federal Judge Rejects Uber Settlement*, ON LABOR (Sept. 8, 2016), <https://onlabor.org/2016/09/08/gig-news-federal-judge-rejects-uber-settlement>.

40. Again, this has been a longstanding problem. See, e.g., Alan Hyde, *Employment Law After the Death of Employment*, 1 U. PA. J. LAB. & EMP. L. 99, 101 (1998) (identifying new ways of working that challenge the current legal system, including new employment relationships, such as temporary workers placed by an agency and part-time employees treated as contingent workers, and “ways of working that are not,

Regarding Uber, some of the factors in the control test point toward an employee relationship while others are reminiscent of an independent contractor relationship.<sup>41</sup> On the one hand, crowdworkers—who can readily sign on and off their platform apps based on availability and desire to work—have more control over their own schedules than do traditional employees with set shifts or duty stations, such as a workplace desk or factory floor.<sup>42</sup> Additionally, crowdworkers must provide their own tools, including cars, computer equipment, Internet access, and mobile phones.<sup>43</sup> Further, end user license agreements (EULAs) label crowdworkers as “independent contractors” and force them to click “I agree” in order to proceed with work.<sup>44</sup>

On the other hand, many factors lean toward an employment relationship. Control may be high, given that companies like Uber use customer ratings to maintain almost a constant surveillance over workers. Uber has essentially deputized its customers to manage the workforce and make detailed reports on how service is provided.<sup>45</sup> In fact, many on-demand companies spend significant time and effort implementing quality control policies.<sup>46</sup> With low-skilled and low-paid crowdwork, the opportunity for entrepreneurship—and, with it, risk-and-reward—is barely, if at all, present. Further, the terminology in a EULA is far from dispositive, as such online contracts are known to be extremely one-sided and are construed against the drafter. Although courts have yet to develop a clear formulation of which of, and to what extent, these factors are determinative, it is clear that the greatest possibility of exploitation falls on low-skilled workers who are most in need of FLSA protections.

The above factors and resulting issues left the judges in the Northern District of California with a malleable test and an indeterminate legal outcome.<sup>47</sup> With the uncertainty of the jury looming, both sides in *Cotter v. Lyft*<sup>48</sup> and *O'Connor* would have taken a significant risk by proceeding with a trial. Given the incentive structure of settlements and payments to plaintiffs’ class action attorneys, and the presence of arbitration clauses in the EULAs,

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technically, ‘employment’ relations under any statute [such as] independent contractors, free-lancers, [and] consultants”).

41. Means & Seiner, *supra* note 13, at 1516–17; Rodgers, *supra* note 13, at 98–99.

42. Cherry, *supra* note 38.

43. *Id.*

44. *Id.*

45. Rosenblat & Stark, *supra* note 37, at 11–12.

46. Cherry, *supra* note 38.

47. *Cotter v. Lyft*, 60 F. Supp. 3d 1067, 1081–82 (N.D. Cal. 2015).

48. 60 F. Supp. 3d 1067 (N.D. Cal. 2015).

perhaps settlement in these cases was inevitable.<sup>49</sup> The drivers in *O'Connor*, however, stood only to recover small or nominal payments, which led the court to reject that version of the settlement.<sup>50</sup> While we will have to wait and see what the parties and the court decide, what is certain is that the initial question of whether the workers are misclassified as independent contractors is left unresolved. Notwithstanding the settlement, a government agency (like the Internal Revenue Service), a worker's compensation board, or an unemployment agency could determine that these workers are actually employees; in fact, some agencies already have.<sup>51</sup>

## II. RECENT PROPOSALS FOR A THIRD CATEGORY FOCUSED ON THE GIG ECONOMY

As litigation over worker misclassification lawsuits continues in various U.S. jurisdictions, there have been corresponding calls to create a hybrid category situated between employee and independent contractor status. If such a third category were to exist, proponents argue that the dilemmas surrounding proper worker classification would conveniently disappear.<sup>52</sup> Having an intermediate category for gig workers would provide certainty and stability to businesses implementing a crowdsourcing model. Proponents claim that the third category would have advantages for gig workers as well, who would at least receive some portion of the benefits that accrue to employees. These proposals all seem to be focused on the gig economy and creating a special carve out. Proponents cite innovation and the novelty of these forms of work and organization as a reason for special treatment. The argument is that innovative business models cannot survive if overly regulated.<sup>53</sup> Many of the calls

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49. On the role of arbitration clauses in the *O'Connor v. Uber* settlement, see Katherine V.W. Stone, *The Uber Litigation Shows How the Company Gets Around Employment Laws*, ALTERNET (May 24, 2016), <http://www.alternet.org/labor/uber-litigation-shows-how-company-gets-around-employment-laws>.

50. See Weinberg, *supra* note 39.

51. Mike Isaac & Natasha Singer, *California Says Uber Driver Is Employee, Not a Contractor*, N.Y. TIMES (June 17, 2015), <http://www.nytimes.com/2015/06/18/business/uber-contests-california-labor-ruling-that-says-drivers-should-be-employees.html>.

52. See SETH D. HARRIS & ALAN B. KRUEGER, A PROPOSAL FOR MODERNIZING LABOR LAWS FOR TWENTY-FIRST-CENTURY WORK: THE "INDEPENDENT WORKER" 5 (2015), [http://www.hamiltonproject.org/assets/files/modernizing\\_labor\\_laws\\_for\\_twenty-first\\_century\\_work\\_krueger\\_harris.pdf](http://www.hamiltonproject.org/assets/files/modernizing_labor_laws_for_twenty-first_century_work_krueger_harris.pdf).

53. Note that this trope is certainly not limited to technology businesses in Silicon Valley or recent events in the gig economy. Businesses for years have criticized regulations for stifling innovation.

for a third category originated in Silicon Valley; however, these proposals create a third category that, while called something different, virtually mirrors independent contractors.<sup>54</sup>

Intuitively appealing, a third category would resolve many of the ongoing disputes over misclassification plaguing the on-demand sector. Rather than litigate the issue of whether a particular worker or group of workers deserves employee status, gig workers would automatically be sorted into the hybrid “dependent contractor” category.<sup>55</sup> This would eliminate the uncertainty that goes along with litigation connected to the “all or nothing” scheme and, at least, offer some labor protection to workers who “present only *some* characteristics of ‘employees’ but not others.”<sup>56</sup> However, media stories and blog posts have debated the third category and its possibilities, and the conclusions are mixed. For example, a news story in the *Wall Street Journal* discussed the advantages of creating a new third category.<sup>57</sup> A writer for the *Washington Post* also discussed the possibility of a third category but ended critically, noting that gig workers were unlikely to receive the protection they needed through an intermediate category. Likewise, in a series of blog posts debating the merits of creating a third category, Professor Benjamin Sachs has approached the concept with some skepticism.<sup>58</sup>

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54. “At a recent on-demand economy event, Simon Rothman, a venture capitalist and advisor to companies like Lyft and Taskrabbit, said, ‘I think it’s not 1099 versus W-2. I think the right answer is a third class of worker.’” Caroline Donovan, *What a New Class of Worker Could Mean for the Future of Labor*, BUZZFEED NEWS, (June 18, 2015, 5:01 PM), <https://www.buzzfeed.com/carolineodonovan/meet-the-new-worker-same-as-the-old-worker>.

55. See Guy Davidov et al., *The Subjects of Labor Law: “Employees” and Other Workers* 16 (Hebrew Univ. of Jerusalem Legal Studies Research Paper Series, No. 15-15, 2013), <http://ssrn.com/abstract=2561752> (describing the unsatisfactory pace of litigation that leads to legislatures considering adding a third group of workers).

56. *Id.* at 14.

57. See Lauren Weber, *What if There Were a New Type of Worker? Dependent Contractor*, WALL ST. J. (Jan. 28, 2015, 10:28 AM), <http://www.wsj.com/articles/what-if-there-were-a-new-type-of-worker-dependent-contractor-1422405831> (highlighting benefits such as control over payment and wage rates and the ability to negotiate work contracts).

58. Benjamin Sachs, *A New Category of Worker for the On-Demand Economy?*, ON LABOR (June 22, 2015), <https://onlabor.org/2015/06/22/a-new-category-of-worker-for-the-on-demand-economy> (arguing that a “dependence” test will not cover many of the workers that a third category is designed to protect); Benjamin Sachs, *Do We Need an “Independent Worker” Category?*, ON LABOR (Dec. 8, 2015), <https://onlabor.org/2015/12/08/do-we-need-an-independent-worker-category> (arguing that Uber drivers can be classified as employees under current law and that

Recently, two in-depth studies called for the creation of a third category. The first was a report sponsored by the Hamilton Project, a subsidiary of the Brookings Institute.<sup>59</sup> Written by former Deputy Secretary of Labor Seth Harris and Princeton economist Alan Krueger,<sup>60</sup> the report advocates the creation of a hybrid category as a default for gig workers.<sup>61</sup> The proposal terms this category “independent worker.”<sup>62</sup> Under the report’s proposal, all gig economy workers would default into this “independent worker” status.<sup>63</sup> Interestingly, while arguing that weak independent workers deserve better benefits and protections, the report asserts that neither the platforms nor the customers could be considered employers as they are in a triangular relationship with the independent workers.<sup>64</sup> Paradoxically, this argument leads to the logical conclusion that there is no employer present whatsoever, a proposition that other authors have strongly disputed.<sup>65</sup>

Under the Hamilton Project proposal, such “independent workers” would gain rights to organize and bargain collectively under the National Labor Relations Act<sup>66</sup> and would also gain anti-discrimination protections under Title VII.<sup>67</sup> However, the proposal

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the current legal framework is sufficient to deal with the “work time” issue by tracking a driver’s time spent driving to and transporting a customer).

59. HARRIS & KRUEGER, *supra* note 52.

60. Krueger carried out this study independently but has also previously co-edited a study commissioned by Uber. See JONATHON HALL & ALAN KRUEGER, AN ANALYSIS OF THE LABOR MARKET FOR UBER’S DRIVER-PARTNERS IN THE UNITED STATES (2015), [https://s3.amazonaws.com/uber-static/comms/PDF/Uber\\_Driver-Partners\\_Hall\\_Krueger\\_2015.pdf](https://s3.amazonaws.com/uber-static/comms/PDF/Uber_Driver-Partners_Hall_Krueger_2015.pdf).

61. HARRIS & KRUEGER, *supra* note 52, at 5.

62. *Id.* at 2.

63. *Id.*

64. See *id.* at 9 (explaining that intermediaries create a platform or communication channel but do not assign customers to workers). But see *O’Connor v. Uber Techs., Inc.*, 82 F. Supp. 3d 1133, 1141–42 (N.D. Cal. 2015) (explaining that Uber does not only serve as a communication channel, nor does it “simply sell software; it sells rides” and “Uber simply would not be a viable business entity without its drivers”); *Cotter v. Lyft, Inc.*, 60 F. Supp. 3d 1067, 1078 (N.D. Cal. 2015) (explaining that Lyft “markets itself to customers as an on-demand ride service, and it actively seeks out those customers” and provides drivers with “detailed instruction on how to conduct themselves”).

65. See Jeremias Prassl & Martin Risak, *Uber, Taskrabbit, and Co.: Platforms as Employers? Rethinking the Legal Analysis of Crowdwork*, 37 COMP. LAB. L. & POL’Y J. 619, 620, 646 (2016) (arguing for a flexible approach to defining an “employer” based on a functional analysis of a potential employer).

66. 29 U.S.C. §§ 151–169 (2012).

67. 42 U.S.C. § 2000e; HARRIS & KRUEGER, *supra* note 52, at 17–18.



excludes payment for overtime and minimum wage arrangements because—at least according to Harris and Kreuger—the gig economy business model does not allow for tracing hours in a precise way or even attributing hours to a particular platform.<sup>68</sup> Further, the Hamilton Project claims that an hours-based rate of pay does not make sense when dealing with work paid by the gig.<sup>69</sup> Other commentators have criticized this stance for ignoring the role of big data in the on-demand economy.<sup>70</sup> They argue that if anything, the gig economy enables constant tracking of workers’ data, allowing for far better calculations of time and work performed than any previous form of work ever could.<sup>71</sup>

The second proposal, from business law professor Abbey Stemler, will appear in the *Fordham Urban Law Journal*.<sup>72</sup> Titled “Betwixt and Between: Regulating the Shared Economy,” Stemler advocates for the creation of new legislation to address multiple aspects of the on-demand economy, including fraud, safety, and privacy. In terms of labor rights, Stemler advocates for creating a hybrid category between employee and independent contractor. As she puts it,

Instead of classifying Uber drivers and other supply-side users in the sharing economy as either employees or independent contractors, regulators should create a new classification. This new classification has been identified as “dependent contractors,” or for the purposes of this Article “microbusiness”—workers who fall between clear-cut employees and traditional independent contractors. This new classification would enable regulators to think differently about how to fill regulatory gaps.<sup>73</sup>

While a footnote references the Canadian experience with dependent contractors, it is only a passing reference. The article does not devote any background or in-depth discussion to the historical or international origins of the category.

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68. HARRIS & KRUEGER, *supra* note 52, at 2.

69. *Id.* at 13.

70. Ross Eisenbrey & Lawrence Mishel, *Uber Business Model Does Not Justify a New “Independent Worker” Category*, ECON. POL’Y INST. (Mar. 17, 2016), <http://www.epi.org/publication/uber-business-model-does-not-justify-a-new-independent-worker-category> (arguing that Harris and Krueger’s analysis was flawed because they ignore Uber’s data collection methodology).

71. Matthew Bodie et al., *The Law and Policy of People Analytics*, 49, 63 (Saint Louis Univ. Sch. of Law Legal Studies Research Paper Series, No. 2016-6, 2016), <https://ssrn.com/abstract=2769980>.

72. Abbey Stemler, *Betwixt and Between: Regulating the Shared Economy*, 43 *FORDHAM URB. L.J.* 31 (2016).

73. *Id.* at 61–62.

On the political front, Senator Mark Warren of Virginia has recently begun discussing the need for legislation to address some of the issues surrounding gig-work.<sup>74</sup> A recent message from his office noted that many younger Americans were finding themselves working at multiple gigs without benefits.<sup>75</sup> This type of arrangement is reasonable when all goes well, but if there is a problem, many workers—who would be without health benefits, unemployment, or worker’s compensation—could find themselves without a safety net. As the statement continued, “While litigation is underway about whether on-demand workers are independent contractors or employees, this question is too important to leave to the courts alone. As policymakers, we should begin discussing whether our 20th-century definitions work in a 21st-century economy.”<sup>76</sup> In other words, regardless of how the doctrinal legal questions around worker misclassification are worked out within the court system, Senator Warren proposes that the problems of the gig economy might be better addressed through legislative action.

### III. A COMPARATIVE APPROACH

To date, the recent calls to establish a third category of “dependent contractor” have focused only on the present state of the gig economy. Likewise, these calls have been centered almost wholly on the United States, where many popular crowdwork services were created. Situating the “dependent contractor” category within a historical and global context, however, we note that other countries have already experimented with an intermediate category and have seen various and mixed results. Granted, these legal reform efforts pre-dated the platform economy, but these approaches arose in response to a perceived lack of coverage by the binary switch of employee status. In this Part, we compare the experiences of Canada, Italy, and Spain, respectively. Our goal is to learn from context and experience, capitalizing on those elements of the third category that were successful and avoiding the aspects of those systems that worked poorly. We begin with the Canadian experience.

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74. Mark Warner, *Asking Tough Questions About the Gig Economy*, MARK R. WARNER (June 19, 2015), [http://www.warner.senate.gov/public/index.cfm/newsclips?ContentRecord\\_id=9ec95aab-a96c-4dd5-8532-b45667013d2e](http://www.warner.senate.gov/public/index.cfm/newsclips?ContentRecord_id=9ec95aab-a96c-4dd5-8532-b45667013d2e).

75. *Id.*

76. *Id.*

A. *The Canadian Experience: Professor Harry Arthurs and “Dependent Contractors”*

Historically, Canadian law used the term “employee” as a gateway to coverage, employing the binary employee/independent contractor distinction.<sup>77</sup> As most statutory definitions of “employee” in Canadian statutes were circular and unhelpful,<sup>78</sup> the starting point for most analyses was the control test, which evolved under the principle of vicarious liability for torts.<sup>79</sup> In 1947, the well-known case *Montreal v. Montreal Locomotive Works*<sup>80</sup> supplemented the traditional control test used in Canada with a “fourfold” test analyzing “(1) control; (2) ownership of the tools; (3) chance of profit; [and] (4) risk of loss.”<sup>81</sup> As one commentator has put it, these are “merely different ways of expressing the same ultimate question of ‘whose business is it?’”<sup>82</sup> and they bear a similarity to the “entrepreneurial activities test” developed in the United States.<sup>83</sup>

The doctrine around employee status took an interesting turn with the Canadian adoption of the concept of “dependent contractor.” The development of the category is largely due to the efforts of one law professor, Harry Arthurs. Professor Arthurs, one of the leading academics of Canadian labor law, wrote about the problem of misclassification in a now-classic 1965 law review article.<sup>84</sup> The third category was certainly not Arthurs’ invention out of whole cloth, however. Indeed, he claimed to have come across the idea of

77. Judy Fudge et al., *Employee or Independent Contractor? Charting the Legal Significance of the Distinction in Canada*, 10 CANADIAN LAB. & EMP. L.J. 193, 193 (2003).

78. *Id.* at 209; see Ontario Labour Relations Act, S.O. 1995, c 1, sch. A, s. 1 (Can.) (defining employee as “includ[ing] a dependent contractor,” and defining dependent contractor as one whose working relationship “more closely resembl[es] that of an employee than that of an independent contractor”).

79. See 671122 Ontario Ltd. v. Sagaz Industries Canada Inc., [2001] 2 S.C.R. 983, 999 (Can.) (discussing policy justifications for imposing vicarious liability in the case of an employee but not an independent contractor based on the control test).

80. [1947] 1 D.L.R. 161 (Can.).

81. *Id.* at 169.

82. See Brian A. Langille & Guy Davidov, *Beyond Employees and Independent Contractors: A View from Canada*, 21 COMP. LAB. L. & POL’Y J. 7, 21 (1999); *Sagaz Industries Canada, Inc.*, [2001] 2 S.C.R. at 1001; see also Fudge et al., *supra* note 77, at 199 (noting that during the course of the twentieth century, Canadian courts stopped looking only at the issue of control and developed the more complex fourfold test).

83. *Sagaz Industries Canada, Inc.*, [2001] 2 S.C.R. at 1001 (“It has been suggested that a fourfold test would in some cases be more appropriate, a complex involving (1) control; (2) ownership of the tools; (3) chance of profit; (4) risk of loss. Control in itself is not always conclusive.”).

84. Harry W. Arthurs, *The Dependent Contractor: A Study of the Legal Problems of Countervailing Power*, 16 U. TORONTO L.J. 89, 89 (1965).

another category while studying Swedish labor law.<sup>85</sup> Regardless of its provenance, Arthurs seized on the idea of a third category of “dependent contractors” as a reaction to a trend he was seeing increasingly in the labor markets that created injustice for certain groups of Canadian workers.<sup>86</sup>

Professor Arthurs’ article noted that small tradespeople, artisans, plumbers, craftsmen, and the like were increasingly structuring themselves as separate business entities.<sup>87</sup> Yet, despite setting up shop as separate companies, and thus falling outside the traditional purview of “employees,” these tradespeople had no other employees but the one worker-owner.<sup>88</sup> Further, these tradespeople would work effectively full-time for one company that paid them a retainer for all of their services and time.<sup>89</sup> As a matter of economic reality, Arthurs noted that these putative independent businesses were often almost wholly dependent on the patronage of the larger company.<sup>90</sup> These ostensible business owners had little in the way of control and would often stand or fall on the continued business from the larger company.

As such, Arthurs argued that the law did these small business people an injustice in ruling them outside of the bounds of the traditional labor relationship.<sup>91</sup> In fact, he argued, such businesspeople were economically dependent upon a large company in virtually the same subordinate position as an employee.<sup>92</sup> The two situations were so analogous, he argued, that employee-like protections should apply: “Insofar as dependent contractors share a particular labour market with employees . . . they should be eligible for unionization.”<sup>93</sup> Arthurs reasoned persuasively that these workers should truly be called “dependent contractors.”<sup>94</sup> He then argued

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85. *Id.* at 89, n.1. Arthurs relied on the work of Axel Adelcreutz, *The Definition of an Employee* 54, in *THE LAW OF LABOUR RELATIONS IN SWEDEN* (Folke Schmidt ed., 1962). In fact, the Swedish law is somewhat murkier as later noted by another author. See Källström, *supra* note 5, at 164 (stating that a characteristic of Swedish law is the absence of “statutory categorization of employees”).

86. Arthurs, *supra* note 84, at 89.

87. *Id.*

88. *Id.* (listing occupations that have no other employers except the one worker-owner, thus “personify[ing] the dependent contractor”).

89. See *id.* at 114.

90. See *id.*

91. *Id.* at 89.

92. *Id.*

93. *Id.* at 114.

94. *Id.* at 89.

that this group should be included within the definition of employees and that employee protections should be extended to them.<sup>95</sup>

If devising a new application of the third category in Canada and highlighting the struggle of small tradespeople was all Professor Arthurs had done, that still would have been a worthwhile effort. But the influence of his article spread far beyond academic circles. As the court in *Fownes Construction Co. v. Teamsters Local Union 213*<sup>96</sup> noted, Arthurs’ article truly “had an impact on the real world.”<sup>97</sup> Arthurs’ influence was such that the concept of “dependent contractor” became established within Canadian Law during the 1970s.<sup>98</sup> The effect was, in the words of subsequent commentators, “beneficial for a significant number of workers formerly excluded from the ambit of collective bargaining laws.”<sup>99</sup> In effect, Arthurs’ academic work resulted in substantial law reform and an extension of employment laws to a previously subordinate group that had few protections.<sup>100</sup> Even a critic of the third category, who largely viewed it as superfluous, still credited Professor Arthurs with instigating a rapid process of legal change.<sup>101</sup>

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95. *Id.* (“They are often economically vulnerable as individuals because of the dominance of a monopoly buyer or seller of their goods or services, or because of disorganized market conditions. If viewed as ‘independent contractors’ rather than ‘employees’ they lack the legal status which is a prerequisite to the right to bargain collectively under labour relations legislation. As businessmen, they cannot legally employ collective tactics to buy or sell or otherwise stabilize conditions because of the combines legislation. They are prisoners of the régime of competition.”).

96. 1974 CarswellBC 641 (Can. B.C. Labour Relations Board) (WL).

97. *Id.* at para. 12.

98. See Langille & Davidov, *supra* note 82, at 25 (“During the 1970s, most Canadian jurisdictions adopted ‘dependent contractor’ provisions to include such workers within the definition of ‘employee’ for collective bargaining purposes.”); Michael Bendel, *The Dependent Contractor: An Unnecessary and Flawed Development in Canadian Labour Law*, 32 U. TORONTO L.J. 374, 376 (1982) (“Although the notion of the dependent contractor did not surface in Canada until 1965, concern for his status had become part of the conventional wisdom on labour relations by the early 1970s. Between 1972 and 1977 seven jurisdictions in Canada adopted legislation to grant dependent contractors employee status under their labour relations legislation.”).

99. Langille & Davidov, *supra* note 82, at 26.

100. PRIVY COUNCIL OFFICE, CANADIAN INDUSTRIAL RELATIONS: THE REPORT OF THE TASK FORCE ON LABOUR RELATIONS 30 n.19 (1969); COMM’R MAXWELL COHEN, REPORT OF THE ROYAL COMMISSION ON LABOUR LEGISLATION IN NEWFOUNDLAND AND LABRADOR 243–46 (1972).

101. Bendel, *supra* note 98, at 378 (“[I]t seems safe to assume that all these amendments were inspired, in part at least, by the recommendations of Professor Arthurs and the task force to the effect that labour relations laws should be extended to persons who are not regarded as employees . . . but who shared the employees’ economic dependence on the persons for whom they worked.”).

Over time the government “introduced this intermediate category into statutes in order to extend the reach of the statute beyond typical employees.”<sup>102</sup> For example, the 1995 Ontario Labour Relations Act<sup>103</sup> defined “employee” to include a “dependent contractor” and a dependent contractor to be

a person, whether or not employed under a contract of employment, and whether or not furnishing tools, vehicles, equipment, machinery, material, or any other thing owned by the dependent contractor, who performs work or services for another person for compensation or reward on such terms and conditions that the dependent contractor is in a position of economic dependence upon, and under an obligation to perform duties for, that person more closely resembling the relationship of an employee than that of an independent contractor.<sup>104</sup>

The gig economy in Canada has yet to achieve the same market saturation as it has in the United States, and, as a consequence, there has been little legal adjudication as of the date of this writing. We might have expected Uber, as one of the more dominant gig economy companies, to have asserted itself as aggressively in Canada as it has in many U.S. cities. But Uber is largely an urban phenomenon, and its growth in the larger Canadian cities seems to have been stymied by wrangling with municipal governments in Toronto, Calgary, and Edmonton over insurance and driver licensure requirements.<sup>105</sup> Uber operates sporadically in Edmonton and Calgary because of its uncertain legal status.<sup>106</sup> On May 4, 2016, the Toronto City Council ultimately voted to allow Uber to operate after a protracted series of negotiations and legal wrangling.<sup>107</sup>

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102. DAVID J. DOOREY, *THE LAW OF WORK: COMMON LAW AND THE REGULATION OF WORK* 24 (2016).

103. Ontario Labour Relations Act, S.O. 1995, c 1, sch. A, s. 1 (Can.).

104. *Id.*

105. John Rieti, *Toronto Uber Regulations May Match Those in Edmonton, Ottawa*, CBC NEWS (Apr. 7, 2016, 5:00 AM), <http://www.cbc.ca/news/canada/toronto/uber-regulations-canada-1.3524429>.

106. *Id.* For an interesting viewpoint, see Jerry Dias, *Letting Uber Break the Law Legalizes the Underground Economy*, HUFFINGTON POST (Feb. 17, 2016, 4:52 PM), [http://www.huffingtonpost.ca/jerry-dias/uber-canada-controversy\\_b\\_9252656.html](http://www.huffingtonpost.ca/jerry-dias/uber-canada-controversy_b_9252656.html) (arguing that Uber must compete on the same level, with the same regulations, as existing taxicab companies).

107. The Canadian Press, *Uber to Be Legal in Toronto After City Council Vote*, HUFFINGTON POST CAN. (May 4, 2016, 1:49 PM), [http://www.huffingtonpost.ca/2016/05/04/uber-gets-green-light-from-city-council-to-operate-legally-in-toronto\\_n\\_9840722.html](http://www.huffingtonpost.ca/2016/05/04/uber-gets-green-light-from-city-council-to-operate-legally-in-toronto_n_9840722.html). For a flavor of some of the litigation over these issues, see *Abdullah v. Naziri*, 2016 CanLII 2168, para. 57 (Can. Ont. Sup. Ct. J.) (dismissing

The labor issues around platform work have yet to be heard by a Canadian court or adjudicative body. As such, predictions are inherently uncertain. But it does seem that the “dependent contractor” category, and accordingly expansive definition of “employee,” will make it more likely that gig economy workers will gain access to labor protections. Analogous cases involving drivers of taxicabs, limousines, and cars for hire have largely resulted in findings of employee status. For example, drivers working on a part-time basis were held to be employees for purposes of the Canadian collective bargaining legislation and, as such, enjoyed the protective right to organize.<sup>108</sup> Similar cases finding employee status for part-time drivers in Canada have been decided in the context of minimum wage<sup>109</sup> and workers’ compensation.<sup>110</sup> Of course, each of these cases, like all cases dealing with employee status, looked very carefully at the individualized work arrangements of the drivers, their shifts, the dispatch policies, and other factors in order to determine whether these individuals were dependent contractors under Canadian law.

One concern with finding Uber drivers and other gig workers to be “dependent contractors” is that the “dependent contractor” definitions in Canadian law focus on the concept of economic dependency on a single company.<sup>111</sup> In an instance where a driver performed services for multiple online platforms or perhaps was only using gig work as a supplement to income from other employment, the definition might not provide coverage. But as Uber and other companies have increasingly pushed workers into standard shifts that preclude the possibility of employment on other platforms, workers become more likely to fit within the definition of “dependent contractor.”

Ultimately, in Canada the third category of “dependent contractor” has essentially resulted in an expansion of the definition of employee. The earlier tests had been too rigid and made it difficult for small

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taxicab union’s motion for a preliminary injunction, given that the City Council would be taking action on the issue of the Uber driver’s licensure and insurance requirements); *Edmonton (City) v. Uber Can., Inc.*, 2015 ABQB 214, para. 24–25 (Can. Alta.) (finding that Uber Canada does not require a business license).

108. This comparison was drawn in *Ontario Taxi Workers’ Union v. Hamilton Cab*, 2011 CanLII 7282, para. 35 (Can. O.N.L.R.B.): “The single plate owner/lessee operators and the drivers are both economically dependent upon Hamilton Cab, notwithstanding the fact that neither receives compensation from it (other than the charge account fares paid by Hamilton Cab to the owner/lessee operators).”

109. *Castegar Taxi (1988) Ltd. v. Director of Employment Standards*, 1991 CanLII 1088 (Can. B.C.S.C.).

110. Decision No. 934/98, 2000 ONWSIAT 3346, para. 6 (CanLII).

111. Ontario Labour Relations Act, S.O. 1995, c 1, sch. A, s. 1 (Can.).

business workers to claim benefits and protections. The category was enacted to help those workers who were essentially working on their own in a position of economic dependency, thus requiring labor protections. The expansive and inclusive protection of Canadian labor law may help legislators, law professors, and commentators as they evaluate current proposals for a third category in the on-demand economy in the United States.

*B. The Italian Case: Unintended Consequences and Arbitrage of the Categories*

The Italian system of worker classification originated in the ancient Roman Law notion of “*locatio operarum*” (right to control the worker) and “*locatio operis*” (contract for a specific result).<sup>112</sup> This dichotomy was translated into the two categories of independent contractor and employee (in Italian, “subordinate worker”) in the Civil Code of 1942,<sup>113</sup> with those categories still in force today.<sup>114</sup> A fundamental binary divide applies: only the employee is the subject of the labor laws, and most workers are considered employees.<sup>115</sup> Article 2094 of the Civil Code (contract of service) covers employees but contains a vague definition: “a subordinate employee is a person who binds himself, for a remuneration, to cooperate in the enterprise by contributing his intellectual or manual work, in the employment and under the management of the [entrepreneur].”<sup>116</sup> The provision allows for the implementation of a hierarchical structure, enabling the employer to organize work activities and to react to insubordination. According to article 2104 of the Civil Code, the employee has to observe the entrepreneur’s directions while performing work tasks.<sup>117</sup> As building

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112. The Roman distinction was between *locatio conductio operarum*, which refers to the classic master and servant contract and implies the right to control and encompasses respondeat superior, and *locatio conductio operis*, which was based on the production of a specific result. See generally WILLIAM BURDIK, PRINCIPLES OF ROMAN LAW AND THEIR RELATIONS TO MODERN LAW 447, 450 (2d ed. 2004); Matthew Finkin, *Introduction*, 21 COMP. LAB. L. & POL’Y J. 1, 1 (1999).

113. R.D. 16 marzo 1942, n.262, in G.U. 4 aprile 1942, n.79 (It.).

114. C.c. arts. 2094, 2222, translated in THE ITALIAN CIVIL CODE AND COMPLEMENTARY LEGISLATION 444, 474 (Susanna Beltramo ed., trans., 2012) [hereinafter ITALIAN CIVIL CODE] (giving statutory definitions for subordinate employee and independent labor contract).

115. STEFANO LIEBMAN, ILO NAT’L STUDIES, EMPLOYMENT SITUATIONS AND WORKERS’ PROTECTION, [http://www.ilo.org/wcmsp5/groups/public/-ed\\_dialogue/-dialogue/documents/genericdocument/wcms\\_205366.pdf](http://www.ilo.org/wcmsp5/groups/public/-ed_dialogue/-dialogue/documents/genericdocument/wcms_205366.pdf).

116. C.c. art. 2094, translated in ITALIAN CIVIL CODE, *supra* note 114, at 444.

117. C.c. art. 2104, translated in ITALIAN CIVIL CODE, *supra* note 114, at 446.



blocks of the employment relationship, the jurisprudence adopted the concept of “collaboration” or “co-working”—i.e., the prolonged availability or continuance of the relationship and technical and structural subordination of the employee—and “dependence,” a socio-economic concept, to mean that the assets and tools of the business belong to the employer. These elements are considered the “legal distinctive feature of both subordination and employment contract.”<sup>118</sup>

The definition of “employee” under article 2094 of the Civil Code of 1942 has been widely criticized because of its vagueness.<sup>119</sup> According to Professor Lodovico Barassi, one of the great scholars of Italian labor law, the distinctive element of “contract of employment” (literally “*contratto di lavoro*”) concept was “*eterodirezione*,” which means managerial and disciplinary powers; for example, the ability of the employer (*conductor operarum*) to modify the content of the contractual relationship unilaterally.<sup>120</sup> Managerial power is a hallmark of employee status because it allows for internal flexibility; i.e., the possibility of rearranging, even on a daily basis, an employee’s duties within the business.<sup>121</sup>

Other scholars have since grappled with this concept. Although the bedrock of *eterodirezione* came from Roman law—as a hierarchical description of the relationship<sup>122</sup>—the label was unable to describe comprehensively the complexity of the employee category and the idea of worker dignity. Scholars realized that *eterodirezione* was an incomplete concept and thus developed other theories to explain the employment relationship.<sup>123</sup> One line of thought developed the concept of socio-economic inferiority of the worker “who is

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118. Orsola Razzolini, *The Need to Go Beyond the Contract: “Economic” and “Bureaucratic” Dependence in Personal Work Relations*, 31 COMP. LAB. L. & POL’YJ. 267, 270 (2010).

119. Michele Tiraboschi & Maurizio Del Conte, *Employment Contract: Disputes on Definition in the Changing Italian Labour Law*, in 1 JILPT REPORT, THE MECHANISM FOR ESTABLISHING AND CHANGING TERMS AND CONDITIONS OF EMPLOYMENT/THE SCOPE OF LABOR LAW AND THE NOTION OF EMPLOYEES 153 (2004), <http://www.jil.go.jp/english/reports/documents/jilpt-reports/no1.pdf>.

120. Razzolini, *supra* note 118, at 269–70.

121. *Id.* at 269. Industrial relations at the time was conceived of as a way to further the interest of workers through socialist ideology. Remarkably, Professor Barassi wanted to distinguish the socio-economic background of capitalist employment from the legal structure of the employment contract.

122. ADALBERTO PERULLI, ECONOMICALLY DEPENDENT/QUASI-SUBORDINATE (PARASUBORDINATE) EMPLOYMENT: LEGAL, SOCIAL AND ECONOMIC ASPECTS 8, 30 (2002).

123. Razzolini, *supra* note 118, at 270.

considered—legally and socially—to be the weaker party in the contract,” but there was no precise threshold for this definition.<sup>124</sup>

Besides the *eterodirezione* or managerial power factor,<sup>125</sup> the case law developed a wide spectrum of subsidiary factors that could indicate the presence of an employment relationship.<sup>126</sup> A judge could disregard the contractual label when the substance of the work relationship contained legal indicia of subordination—the so-called “primacy of facts” principle.<sup>127</sup> The analysis includes a variety of factors: (1) the requirement that the worker follow reasonable work rules, (2) the length of relationship, (3) the respect of set working hours, (4) salaried work, and (5) absence of risk of loss related to the production.<sup>128</sup> The test is multifactorial, and no single factor is dispositive.<sup>129</sup>

Turning to independent contractors, surprisingly, a definition does not exist in Italian law. The self-employed worker contract is not a part of the chapter of the Civil Code devoted to labor. Article 2222 of the Civil Code, which governs businesses, defines “*contratto d’opera*” (contract for service) as one carried out by a person who “binds himself to perform a piece of work or render a service for compensation, primarily by his own effort and without a relation of subordination with respect to the principal.”<sup>130</sup>

Roughly speaking, general principles of civil and commercial law apply to the self-employed worker—including some particularities because human dignity is at stake—with the independent contractor

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124. Adalberto Perulli, *Subordinate, Autonomous and Economically Dependent Work: A Comparative Analysis of Selected European Countries*, in *THE EMPLOYMENT RELATIONSHIP: A COMPARATIVE OVERVIEW* 137, 138 (Giuseppe Casale ed., 2011).

125. Cass., sez. Lavoro, 22 novembre 1999, n.12,926, *Foro it.* I 2000, 123, 1, 75 (It.). Moreover, in order to prove a subordinate relationship, this power should imply specific and well-defined directives rather than programmatic and vague instructions because the latter’s are also compatible with the independent contractor’s category. Their compatibility with autonomous work are not sufficient for establishing an employment relationship.

126. Cass. sez. lav., 27 marzo 2000, n.3674 (“When an assessment of unambiguous elements such as the exercise of the managerial and disciplinary power is not enough to distinguish among employee and self-employed (being the presence of the two powers a safe index of subordination, while its absence is not an indisputable sign of autonomy) . . .”).

127. Article 1362 of the Italian Civil Code provides that a contract must be interpreted with regard to the common intention and the behavior of the parties, and not merely to the literal meaning of its wording. C.c. art. 1362, *translated in ITALIAN CIVIL CODE*, *supra* note 114, at 293.

128. Maurizio Del Conte, *Lavoro autonomo e lavoro subordinato: la volontà e gli indici di denotazione*, in *ORIENTAMENTI DELLA GIURISPRUDENZA DEL LAVORO* 66 (1995).

129. *Id.*

130. C.c. art. 2222, *translated in ITALIAN CIVIL CODE*, *supra* note 114, at 474.

considered “as substantially and formally equal to the counterparty.”<sup>131</sup> The statute operates by contrast, as it refers “*a contrario*” to article 2094 of the Civil Code: independent work is performed *without* subordination.<sup>132</sup> Moreover, an independent contractor relationship is supposed to eliminate economic subordination. However, the concrete content of the job performance could be identical between an employee and an independent contractor. The principle is that one could carry out “every kind of labour for which payment is calculated, whether intellectual or manual,” in either category.<sup>133</sup> This confirms that, for the purposes of the distinction between an employee and an independent contractor, the core of the two definitions is the way in which tasks are accomplished and structured.<sup>134</sup>

A leading case regarding misclassification by a courier service highlights these principles.<sup>135</sup> Despite the label the courier service used to describe its workers in their contracts, the labor court ruled that the worker was actually an employee on the basis of socioeconomic dependence.<sup>136</sup> The court reasoned that the delivery driver was part of the economic and business organization of the principal.<sup>137</sup> An appellate court, however, subsequently deemed the worker to be an independent contractor.<sup>138</sup> The highest judicial authority, *Corte di Cassazione*, agreed that the worker was an independent contractor.<sup>139</sup> The courier case demonstrates that in labor cases, judges have considerable discretion to weigh the day-to-day facts on a case-by-case basis, notwithstanding Italy’s civil law framework. More recently, however, courts have given greater importance to the factual intentions of the parties, the so-called

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131. See Perulli, *supra* note 124, at 138.

132. Tiraboschi & Del Conte, *supra* note 119, at 154.

133. *Id.*; Cass., sez. Lavoro, 03 aprile 2000, n.4036.

134. Tiraboschi & Del Conte, *supra* note 119, at 154.

135. It is surprising how after decades and in a very different context, the jobs—i.e., driving and courier service—are so similar to what is offered in the gig economy today.

136. Pret. Milano, 20 giugno 1986, Foro it. V 1987, 110, 7/8, 2264 (It.).

137. *Id.* at 2264 (“The work, performed by the biker assigned to pick up and delivery and by using the own vehicle, has to be considered “subordinate,” in spite of the length, the possibility of refusing to execute the request for the performance and even in presence if of a monitoring activity (in radio contact).”).

138. Trib. Milano 10 ottobre 1987, in Riv. it. dir. lav., 1987, II, p. 688 (“The work, performed by the biker assigned to pick up and delivery and by using the own vehicle, has not to be considered ‘subordinate,’ in the absence of the critical requirement of continuity. Those workers are not required to appear everyday at the workplace and can refuse to execute the request for the performance.”).

139. Cass. 14 aprile 1989 n.5671 (mass.).

“*nomen iuris*” (i.e., contractual label), expressed at the signature of the contract.<sup>140</sup> Subsequent elaboration made clear that workers could have a considerable amount of autonomy—granted by general and functional directives—yet still be classified as employees.

1. *The introduction of the legislation on “para-subordinazione”*

The Italian case is instructive for our purposes because in 1973, the legislature extended some protection to a tranche of self-employed workers, planting the seeds of what later would become the intermediate category of worker (literally “*lavoratore parasubordinato*” or “quasi-subordinate”) situated between employee and independent contractor.

Italian Law 533/1973<sup>141</sup> sought to extend certain procedural protections to the weakest of the independent contractors and, perhaps incidentally, brought about the genesis of the third category, deemed *lavoratore parasubordinato*.<sup>142</sup> Comprised of a subset of self-employed workers, these *lavoratore parasubordinato* were distinguished as workers “when the provision of the service presents itself as characterized, in practice, by a predominantly personal activity of continuous and coordinated collaboration.”<sup>143</sup> Four “concurrent” factors need to be present to denote this intermediate category: (1) collaboration, (2) continuity and length of the relationship, (3) functional coordination with the principal, and (4) a predominantly personal service.<sup>144</sup> These

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140. This idea could seem inconsistent with the multifactorial test aimed at inferring the nature of the contract by analyzing the concrete ways in which the overall performance is accomplished, disregarding the wording of the contracts (“primacy of facts”). See Cass. 29 maggio 1996 n.4948, DPL 1996, 3338.

141. Legge 11 agosto 1973, n.533, Disciplina delle controversie individuali di lavoro e delle controversie in materia di previdenza e di assistenza obbligatorie. (G.U. 13 settembre 1973, n.237).

142. MARK FREEDLAND & NICOLA KOUNTOURIS, THE LEGAL CONSTRUCTION OF PERSONAL WORK RELATIONS 122 n.61 (2011) (“The emergence of the notion of *parasubordinati* in the Italian legal domain is traditionally linked to Law 533/1973, . . . which prescribed that the rules of procedure for labour litigation also apply to the ‘relationship of agency, of commercial representation and other relations of collaboration materialising in a continuous and coordinated provision, predominantly personal, even if not of subordinate character.’”).

143. See NICOLA COUNTOURIS, THE CHANGING LAW OF THE EMPLOYMENT RELATIONSHIP: COMPARATIVE ANALYSES IN THE EUROPEAN CONTEXT 72–73 (2011) (“In the context of *parasubordinazione*, the element *collaboration* differs from the one applying in the context of standard dependent work under Article 2094 of the Italian civil code and requires that a subordinated worker be one who commits himself to ‘collaborate in the enterprise.’”).

144. This element is listed among the causes of this legal tool as the difference between managerial power (“*eterodirezione*”) and the notion of “coordination” seems too subtle.

quasi-subordinate workers were commonly called “co.co.co” as an abbreviation for “continuous and coordinated collaborators.”<sup>145</sup>

The 1973 law did not, however, extend all the rights of employees to quasi-subordinate workers. On the one hand, the protections included access to labor courts.<sup>146</sup> The effect of such access, however, was limited and basically procedural as the quasi-subordinate workers were still considered outside the scope of the substantive labor law. Hiring a quasi-subordinate worker was much cheaper than hiring an employee because employees were entitled to substantive labor rights, annual leave, sick leave, maternity leave, other employee benefits, overtime, and job security against unfair dismissal.<sup>147</sup> The 1973 law did not grant quasi-subordinate workers any of these substantive protections.

Nonetheless, the legislation was partly responsible for a relaxation of the rigid employee/independent contractor dichotomy. Remarkably, however, the 1973 law was not a reaction against disguised employment relationships; conversely, “it is something physiologically connected to certain kinds of economic organizations that the law has to recognize and regulate.”<sup>148</sup>

The third category sparked undesirable effects within its first decade. Businesses increasingly began to hire workers under the *lavoratore parasubordinato* category.<sup>149</sup> Most of these quasi-subordinate workers would all previously have been classified as employees. Consequently, the *lavoratore parasubordinato* category was used to hide bona fide employment relationships in order to reduce costs and evade the protections workers were entitled to under article 2094 of the Civil Code.

Over time, the result was employer arbitrage between the categories.<sup>150</sup> As a consequence, workers saw a “gradual erosion of the protections afforded to employees through jobs that are traditionally deemed to constitute master-servant relationships in the strict sense[,] progressively entering the no man’s land of an

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145. COUNTOURIS, *supra* note 143, at 72.

146. Legge 11 agosto 1973, n.533.

147. Tiraboschi & Del Conte, *supra* note 119, at 156 (“[S]ome 90[%] of the two and a half million quasi-subordinate workers actually work for just one ‘client,’ and of these some 66% carry out their work on the client’s premises, often with working hours and conditions that are no different to those of company employees working alongside them.”).

148. Razzolini, *supra* note 118, at 296.

149. DE STEFANO, *supra* note 4, at 19.

150. Ministero del lavoro e delle politiche sociali, Libro Bianco sul mercato del lavoro in Italia, ottobre 2001, n.3.

inadequately defined notion.”<sup>151</sup> This state of affairs persisted for two decades without intervention from the legislature. Towards the end of the last century, the number of quasi-subordinate workers increased dramatically.<sup>152</sup> They were seen as a “low-cost” alternative to stable employment relationships, especially because quasi-subordinate workers are not afforded certain employment protections that full-time employees enjoy.<sup>153</sup> In 1995 with the Pension Reform Act,<sup>154</sup> the legislature did enact a modest intervention by granting self-employed workers social security contributions previously reserved for employees.<sup>155</sup>

In 2003, the legislature amended the content of the quasi-subordinate category with Legislative Decree No. 276/2003 (the so-called Biagi Reform).<sup>156</sup> To prevent the common practice of businesses incorrectly classifying employees as quasi-subordinate workers, the legislature required the collaboration between the business and employee be linked to at least one “project.” Thus, a new definition emerged for quasi-subordinate workers: “*lavoro a progetto*” (i.e., project work, also “co.co.pro”).<sup>157</sup> The legislature intended the measure to verify the authenticity of the collaborations and protect against businesses disguising employees as quasi-subordinate.<sup>158</sup> Under the updated law, the “accomplishment of a specific project, programme or phase of production” was an indispensable element for checking the validity of a project work contract.<sup>159</sup> These projects were required to be fixed term contracts with a definite end date.<sup>160</sup> If there was not an actual project—i.e., the work was continuous and managed by the business—the worker could be reclassified into a standard employment contract and the business would be liable for back pay.

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151. LIEBMAN, *supra* note 115.

152. See Michele Tiraboschi, *The Italian Labour Market After the Biagi Reform*, 21 INT’L J. COMP. LAB. L. & INDUS. REL. 149, 153 (2005), [http://adapt.it/adapt-indice-a-z/wp-content/uploads/2013/09/Tiraboschi\\_Journal.pdf](http://adapt.it/adapt-indice-a-z/wp-content/uploads/2013/09/Tiraboschi_Journal.pdf).

153. Ulrike Muehlberger & Silvia Pasqua, *Workers on the Border Between Employment and Self-Employment* 3 (Int’l Ctr. for Econ. Research, Working Paper No. 11/2006, 2006).

154. Legge 8 agosto 1995, n.335, Riforma del sistema pensionistico obbligatorio e complementare. (GU n.190 del 16-8-1995 - Suppl. Ordinario n.101).

155. See Matteo Jessoula, *A Risky Combination in Italy: ‘Selective Flexibility’ and Defined Contributions Pensions*, in LABOUR MARKET FLEXIBILITY AND PENSION REFORMS: FLEXIBLE TODAY, SECURE TOMORROW? 62, 83 (Karl Hinrichs & Matteo Jessoula eds., 2012).

156. D.L. n. 276/2003; see Tiraboschi, *supra* note 152, at 149.

157. See COUNTOURIS, *supra* note 143, at 77.

158. D.L. n. 276/2003; COUNTOURIS, *supra* note 143, at 77.

159. COUNTOURIS, *supra* note 143, at 77.

160. See *id.*

However, the *lavoro a progetto* reduced the role of the continuity and coordination elements of the original 1973 definition by discouraging long-term employment and also limiting the managerial influence over the quasi-subordinate worker.<sup>161</sup> This modification was supposed to counter-balance the contractual power of the employer by defining in advance the details and conditions of the project.<sup>162</sup> The central aim of Law 276/2003 was to reduce the number of precarious forms of employment leading to illicit work and evasion of social insurance contributions.<sup>163</sup> In addition to requiring a linkage to a project, the legislature extended a series of social security benefits for maternity, sick leave, and worker’s compensation to quasi-subordinate workers.<sup>164</sup> Professor Perulli theorized that the quasi-subordinate group was only a “zone,” rather than its own category or “tertium genus.”<sup>165</sup> As a general policy evaluation, a Green Paper issued by the Commission of the European Communities in 2006 defined these reform efforts as “somewhat tentative and partial,” although they expressed the will of the Italian legislature “to tackle problems in this complex area.”<sup>166</sup>

Although the centrality of the notion of the project was greeted as “the most innovative [and critical] element . . . in the legislative decrees implementing the Biagi law,” the law was not as successful as its proponents expected it would be.<sup>167</sup> The Biagi law was criticized

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161. See generally Riccardo Del Punta, *La scomparsa dei co.co.co.*, LAVOCE.INFO (June 12, 2003), <http://www.lavoce.info/archives/21781/la-scomparsa-dei-co-co-co>.

162. See Tiraboschi & Del Conte, *supra* note 119, at 155–56.

163. Gabriele Piazza & Martin Myant, *Italy’s Labour Market Reforms of 2012: Did They Reduce Unemployment?* 8 (Eur. Trade Union Inst. Working Paper, 2015.11, 2016), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2715566](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2715566).

164. D.L. n. 276/2003.

165. See INT’L FED’N OF ACTORS, TACKLING DEPENDENT AND BOGUS SELF-EMPLOYMENT IN THE LIVE PERFORMANCE AND MEDIA ENTERTAINMENT SECTORS 3 (2016), [http://fia-actors.com/fileadmin/user\\_upload/News/Documents/2016/January/FINAL-Discussion-Note-Ljubljana.pdf](http://fia-actors.com/fileadmin/user_upload/News/Documents/2016/January/FINAL-Discussion-Note-Ljubljana.pdf); ADALBERTO PERULLI, COMM. ON EMP’T & SOC. AFFAIRS, STUDY ON ECONOMICALLY DEPENDENT WORK/PARASUBORDINATE (QUASI-SUBORDINATE) WORK 3, 5, 8 (2003), [http://www.europarl.europa.eu/hearings/20030619/empl/study\\_en.pdf](http://www.europarl.europa.eu/hearings/20030619/empl/study_en.pdf).

166. Commission of the European Communities, *Green Paper: Modernising Labour Law to Meet the Challenges of the 21st Century*, at 12, COM (2006) 708 final (Nov. 22, 2006) [hereinafter *Modernising Labour Law*], <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52006DC0708&from=EN>.

167. Adalberto Perulli, *Un Jobs Act per il lavoro autonomo: verso una nuova disciplina della dipendenza economica?*, (Ctr. for the Study of Eur. Labour Law “Massimo D’Antona,” Working Paper No. 235, 2015), [http://csdle.lex.unict.it/Archive/WP/WP%20CSDLE%20M%20DANTONA/WP%20CSDLE%20M%20DANTONA-IT/20150114-124113\\_perulli\\_n235-2015it-pdf.pdf](http://csdle.lex.unict.it/Archive/WP/WP%20CSDLE%20M%20DANTONA/WP%20CSDLE%20M%20DANTONA-IT/20150114-124113_perulli_n235-2015it-pdf.pdf).

“for questionable techniques, the unsuitability of the selection requirements, deficient protective measures and the inappropriateness of the severe yet inefficient sanction system.”<sup>168</sup> Despite the legislature’s effort to safeguard the rights of quasi-subordinate workers, their overall level of rights and protection remained lower than those granted to employees.

In 2012, the Italian legislature passed Law No. 92/2012 (the so-called Monti-Fornero Reform)<sup>169</sup> to counteract the misuse of the “*lavoro a progetto*” definition by making employee status the default.<sup>170</sup>

For quasi-subordinate workers, businesses could no longer exercise or interfere in the project worker’s autonomy; they could not exercise managerial power over the day-to-day work.<sup>171</sup> Moreover, the Monti-Fornero Reform stated that the project may not merely overlap with the employer’s core business or consist merely of executing low-skilled or routine duties.<sup>172</sup> The law also granted a substantive set of rights to the quasi-subordinate workers by requiring compensation compliant with minimum compensation levels.<sup>173</sup> The Monti-Fornero Reform affirmed that, in the absence of a project, the worker was to be considered an employee, backdated to the beginning of the relationship. The intervention was one of several policies aimed at promoting “a general reshaping of labour protection [to] . . . counter[] the misuse of legal schemes already introduced in order to

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168. Perulli, *supra* note 124.

169. Legge 28 giugno 2012, n.92, G.U. July 3, 2012, n.153 (Disposizioni in materia di riforma del mercato del lavoro in una prospettiva di crescita).

170. During this time, project workers were estimated at 3.2% of the employed, a level that rose to 10.1% among the young, to 4.5% in the South, and to 3.8% among women. Emiliano Mandrone et al., *Is Decline in Employment the Outcome or Cause of Crisis in Italy?* 3, 7 (Astril Working Paper No. 7/2014, 2014), [http://www.astril.org/files/WP\\_7\\_2014\\_mandrone.pdf](http://www.astril.org/files/WP_7_2014_mandrone.pdf); see also Marco Biasi, *The Effect of the Global Crisis on the Labor Market: Report on Italy*, 35 COMP. LAB. L. & POL’Y J. 371, 372–73, 381 (2014).

171. Michele Tiraboschi, *Italian Labour Law After the So-Called Monti-Fornero Reform (Law No. 92/2012)*, 1 E-JOURNAL OF INT’L & COMP. LAB. STUD. 48, 61–62 (2012); Orsola Razzolini, *La nuova disciplina delle collaborazioni organizzate dal committente. Prime considerazioni* 18 (Ctr. for the Study of Eur. Labour Law “Massimo D’Antona,” Working Paper No. 266, 2015), [http://csdle.lex.unict.it/Archive/WP/WP%20CSDLE%20M%20DANTONA/WP%20CSDLE%20M%20DANTONA-IT/20150921-093331\\_razzolini\\_n266-2015itpdf.pdf](http://csdle.lex.unict.it/Archive/WP/WP%20CSDLE%20M%20DANTONA/WP%20CSDLE%20M%20DANTONA-IT/20150921-093331_razzolini_n266-2015itpdf.pdf).

172. Tiraboschi, *supra* note 171, at 62.

173. The law refers to levels set out by national collective bargaining agreements for parasubordinate workers or consistent with minimum wage due to employees as determined by collective agreements. See *id.* at 63.



provide flexibility.”<sup>174</sup> The Monti-Fornero Reform made it clear that using the quasi-subordinate category was disfavoured and discouraged. Not only did the cost of using workers in that category increase, the reform also created burdensome regulations and bureaucracy.

Finally, the 2015 “Jobs Act”<sup>175</sup> fundamentally eliminated the concept of project work that had its genesis in the 2003 Biagi law.<sup>176</sup> This change was intended to reduce the use of atypical contracts and to establish as the default the “employee” classification. The trend of eliminating the project work concept has been part of long-lasting political action aimed at “moving as many employment contracts as possible, in a gradual manner over a period of time, from the uncertain grey area of atypical employment to the area of salaried employment.”<sup>177</sup> The legislature implemented incentives, including funding of some employee benefits and liberalizing dismissal requirements, which made classifying a worker as an employee a more favoured option.<sup>178</sup> While the quasi-subordinate category still exists, it is now limited in its scope as well as its protections, further emphasizing the shift of workers into the employee category.<sup>179</sup>

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174. Valerio De Stefano, *A Tale of Oversimplification and Deregulation: The Mainstream Approach to Labour Market Segmentation and the Recent Responses to the Crisis in European Countries*, 43 *INDUS. L.J.* 253, 264 (2014).

175. D.L. 15 giugno 2015, n.81, *Disciplina organica dei contratti di lavoro e revisione della normativa in tema di mansioni, a norma dell'articolo 1, comma 7, della legge 10 dicembre 2014, n.183.* (15G00095) (GU Serie Generale n.144 del 24-6-2015 - Suppl. Ordinario n.34).

176. See Gavin Jones & Francesca Piscioneri, *Italy's Renzi Completes Labour Reform, Growth Needed for Jobs*, *REUTERS* (Sept. 4, 2016, 12:15 PM), <http://www.reuters.com/article/italy-economy-reform-idUSL5N11A2IE20150904>. See generally *Italy's Jobs Act*, *NORTON ROSE FULBRIGHT*, Dec. 2014, <http://www.nortonrosefulbright.com/knowledge/publications/124079/italys-jobs-act>.

177. Michele Tiraboschi, *The Italian Labour Market After the Biagi Reform*, 21 *INT'L J. COMP. LAB. L. & INDUS. REL.* 149, 170 (2005), [http://adapt.it/adapt-indice-a-z/wp-content/uploads/2013/09/Tiraboschi\\_Journal.pdf](http://adapt.it/adapt-indice-a-z/wp-content/uploads/2013/09/Tiraboschi_Journal.pdf).

178. A monetary incentive was introduced that consisted of a reduction in the contribution burden per employee. The measure is provided to businesses that are willing to hire under a permanent contract of employment or transform other existent contracts into permanent ones.

179. After June 2015, a worker could still enter a co.co.co contract, but the legislature introduced this new notion of collaborations involving the accomplishment of work that is “mainly” (not “exclusively”) personal and organized in coordination with the principal. The most recent Italian labor market reform could eventually provide a solution for the current disputes on how work in the gig economy could be regulated. In fact, the scheme of *collaborazioni organizzate dal committente* could represent a useful template because it broadens the scope of the protections granted to standard employees. See Antonio Aloisi, *Il Lavoro “A Chiamata” e le*

Essentially, the result is a return to the binary distinction of employee and independent contractor. The legislature introduced a new notion of “collaborations organized by the principal,” offering scholars and courts a definition that raises many doubts as to framework, boundaries and practical effects. The Jobs Act is still new and has not been fully implemented, so we will need to wait to determine what the impact will be for the classification question.<sup>180</sup>

2. *Policy lessons from the Italian experience with the quasi-subordinate category*

For the past two decades, the story of the quasi-subordinate category in Italy has been one of struggle, second-guessing, and revision. After its promulgation, the third category became a discounted alternative to a standard employment contract. Introducing a third category initially resulted in arbitrage of the classifications and an increase in precarious and non-standard work. That remained the case, up until 2015, in spite of the gradual extension of protective measures through the reforms. Businesses used the quasi-subordinate category as a way to hide what should have been standard employees into a discounted status with fewer rights and benefits. While the goal of the original legislation establishing and supporting the quasi-subordinate category was to extend labor protections and increase flexibility, those goals were never realized.

Instead, in 2015, the Jobs Act changed course by implementing a strong presumption of employee status. In light of the serious misuses of the quasi-subordinate category, the category itself has now been minimized and discouraged.<sup>181</sup> Unfortunately, in the words of Professor Perulli, the history of the quasi-subordinate category is an “unfortunate series of legislative interventions.”<sup>182</sup> The third category was not a panacea for the misclassification issue. Instead, the changes created even more uncertainty for both businesses and workers.

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*Piattaforme Online Della “Collaborative Economy”*: *Nozioni e tipi Legali in Cerca di Tutele/On-Demand Work and Online Platforms in the Collaborative Economy*, 2 LLI 2421 (2016).

180. Emanuele Dagnino & Pietro Manzella, *Le Parole del Lavoro. Il Lavoro Etero-Organizzato: Una Sfida per i Comparatisti*, BOLLETTINO ADAPT (Apr. 18, 2016), [http://www.bollettinoadapt.it/wp-content/uploads/2016/04/Parole\\_Lavoro\\_PM\\_ED\\_15\\_04.pdf](http://www.bollettinoadapt.it/wp-content/uploads/2016/04/Parole_Lavoro_PM_ED_15_04.pdf); see also Jones & Piscioneri, *supra* note 176.

181. See Adalberto Perulli, *Il lavoro autonomo, le collaborazioni coordinate e le prestazioni organizzate dal committente* 3 (Ctr. for the Study of Eur. Labour Law “Massimo D’Antona,” Working Paper No. 272, 2015), [http://csdle.lex.unict.it/Archive/WP/WP%20CSDLE%20M%20DANTONA/WP%20CSDLE%20M%20DANTONA-IT/20151015-010522\\_perulli\\_n272-2015itpdf.pdf](http://csdle.lex.unict.it/Archive/WP/WP%20CSDLE%20M%20DANTONA/WP%20CSDLE%20M%20DANTONA-IT/20151015-010522_perulli_n272-2015itpdf.pdf).

182. Perulli, *supra* note 124, at 167.

Turning to the gig economy itself, to date Italy has largely considered ridesharing services under the auspices of fair competition law. In 2015, the *Tribunale di Milano* banned Uber from operating a service that resembled services provided by licensed and regulated taxis.<sup>183</sup> Italian courts have yet to make a determination about the classification status of the drivers on ridesharing platforms.<sup>184</sup> More comprehensive regulation may be coming as there was a proposal in March 2016 to regulate the sharing economy in Italy.<sup>185</sup> This proposal, however, did not focus on the misclassification or labor issues. At the EU level, there is a movement to harmonize legislation across Europe to become more attractive to digital platforms and new economy companies.<sup>186</sup> Nevertheless, the EU is also concerned about these platforms disguising employment relationships. As of the date of this Article, policymakers are just beginning to study and debate various reforms and proposals.

*C. An Economic Threshold for the Third Category: The Spanish Case*

The Spanish Workers’ Act<sup>187</sup> was passed in 1980, roughly ten years after Italy had engaged in major legislative reform. This law, *Estatuto de los Trabajadores*, covers only employees, defined as “those individuals who voluntarily perform their duties, in exchange for compensation, within the limits of the organisation and under the directions of a natural or juridical person, referred to as employer or entrepreneur.”<sup>188</sup> Spanish independent contractors were left to constitutional, civil, and commercial provisions of the law.<sup>189</sup> Just like the Italian and Canadian examples, the Spanish law started with a

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183. Trib. Milano, 25 maggio 2015, Ordinanza nel procedimento cautelare iscritto al N.16612/2015; Trib. Milano, sez. spec. impresa, ord., 9 luglio 2015; *see, e.g.*, Alessio Di Amato, *Uber and the Sharing Economy*, 2 ITALIAN L.J. 177, 177–80 (2016), <http://www.theitalianlawjournal.it/data/uploads/italj-vol-02-no-01-2016/10-di-amato-177.pdf>; Stephanie Kirchgaessner, *Uber Ordered to Discontinue Pop Service in Italy*, GUARDIAN (May 26, 2015, 1:38 PM), <https://www.theguardian.com/technology/2015/may/26/uber-pop-italy-order-discontinue-unfair-competition-taxi>; Danilo Masoni, *Italian Court Bans Unlicensed Taxi Services like Uber*, REUTERS (May 26, 2015, 9:16 AM), <http://www.reuters.com/article/us-italy-uber-idUSKBN0OB1FQ20150526>.

184. Di Amato, *supra* note 183, at 178.

185. Atto Camera, Presentata il 27 gennaio 2016, n.3564, Jan. 27, 2016, n.3564 (It).

186. *See generally Resolution on Action Towards a Digital Single Market*, EUR. PARL. DOC. 2015/2147(INI) (2016).

187. Estatuto de los Trabajadores (B.O.E. 1980, 8) (Spain) de 10 de marzo 1980, del B.O.E. 1989.

188. Estatuto de los Trabajadores art. I.I (B.O.E. 1980, 8) (Spain) de 10 de marzo 1980, del B.O.E. 1989.

189. Constitución Española 27 diciembre 1978 (cited as Art. 40 C.E.).

binary divide between independent contractor and employee status. The rest of this section will describe the Spanish system and the 2007 reforms in more depth.

The traditional binary classification between employees and independent contractors in Spain depended upon a determination of self-organization as an exercise of contractual autonomy. Spanish case law has interpreted the definition of an employee to be a combination of two concurrent elements: (1) the exercise of managerial power (“*dirección*”) and (2) how much autonomy the workers have.<sup>190</sup> Spanish legal scholars have focused on the element of “alienness” (“*ajenidad*,” also defined as “ownership by another”) as a factor in determining whether an individual is an employee.<sup>191</sup> “Alienness” focuses on the allocation of risk and, consequently, the ownership of “the means of production and the financial benefits obtained by the company from the employee’s work.”<sup>192</sup> As with other jurisdictions, such as Italy and the United States, the contractual label set by the parties is not dispositive. Rather, a judicial assessment of the substance of the relationship (e.g., day-by-day arrangements) is dispositive.<sup>193</sup>

More recently, Spanish case law has paid more attention to the presence of a hierarchy and the organizational integration of the employee—i.e., the presence of directorial/managerial power. Until a few years ago, labor courts interpreted the definition of employee expansively, using a default assumption of an employment relationship.<sup>194</sup> To determine whether an individual is an employee, case law has analyzed the following concurrent elements: (1) the level of integration within the organization; (2) the dependency upon one employer; (3) fixed working time; (4) provision of

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190. See generally Perulli, *supra* note 124, at 173–74.

191. See generally *Ajenidad*, ENCICLOPEDIA JURÍDICA, <http://www.encyclopedia-juridica.biz14.com/d/ajenidad/ajenidad.htm> (last visited Feb. 5, 2017).

192. See Miguel Ramón Alarcón Caracuel, *Dipendenza e alienità nella discussione spagnola sul contratto di lavoro*, in *LAVORO SUBORDINATO E DINTORNI: COMPARAZIONI E PROSPETTIVE* 296 (1989); Perulli, *supra* note 124, at 173–74.

193. S.T.S., Dic. 29, 1999 (R.J. 2000, p. 1427) (Spain).

194. See *Por el que se aprueba el texto refundido de la Ley del Estatuto de los Trabajadores art. VIII.I* (B.O.E. 1995, 1) (Spain) (“El contrato de trabajo . . . [s]e presumirá existente entre todo el que presta un servicio por cuenta y dentro del ámbito de organización y dirección de otro y el que lo recibe a cambio de una retribución a aquél.”).

professional tools and uniform; and (5) the extent of an employee’s decision-making power.<sup>195</sup>

According to the government-funded research center EurWORK, in Spain and many other European countries the independent contractor category was used to hide bona fide employment relationships.<sup>196</sup> Hiding employees as independent contractors was especially prevalent in the building and construction sector of the economy.<sup>197</sup> Both large and medium businesses in the construction industry resorted to subcontracting for tasks “that demanded relatively low levels of skills and qualification and were easily controllable.”<sup>198</sup> Over time, the growth towards a “new generation” of self-employment (freelance consulting, for example) accelerated because recruiting self-employed workers was more convenient than hiring employees. Self-employed workers were further desirable because businesses wanted to mobilize and de-mobilize their workforces rapidly to ensure a certain degree of flexibility and fluidity.

These trends caused concern among Spanish labor groups and the government. In 1995, Spanish social partners “*Confederacion Sindical de Consumes Obrera*” (“CCOO”), “*Union General de Trabajadores*,” (“UGT”), and the Government jointly signed the Toledo Compact (“*Pacto de Toledo*”), criticizing the absence of legislation governing independent contractors.<sup>199</sup> Five years later, the European Council of Lisbon (2000) envisioned a plan to shape a more competitive social Europe.<sup>200</sup> Subsequently, in 2002, a trade union proposed the widening of rights for independent contractors who were economically dependent.<sup>201</sup> The proposal was engendered by a trend of modernization as well as flexibility of the national industrial

195. Miguel Rodríguez-Piñero, *Contrato de trabajo y autonomía del trabajador*, in *TRABAJO SUBORDINADO Y TRABAJO AUTÓNOMO EN LA DELIMITACIÓN DE FRONTERAS DE DERECHO DEL TRABAJO: ESTUDIOS EN HOMENAJE AL PROFESOR JOSÉ CABRERA BAZÁN* 21, 21 (Jesús Cruz Villalón ed., 1999); Martínez Barroso & María de los Reyes, *Trabajo autónomo y trabajo subordinado. Delimitación, análisis y propuestas de reforma*, 273 *ESTUDIOS FINANCIEROS* 71, 122 (2005).

196. See Antonio Corral & Esteban Villarejo, *Spain: Self-Employed Workers*, EURWORK (Feb. 24, 2009), <http://www.eurofound.europa.eu/observatories/eurwork/comparative-information/national-contributions/spain/spain-self-employed-workers>.

197. *Id.*

198. *Id.*

199. Carmen Parra, *Aznar y los sindicatos sellan el pacto sobre pensiones*, *EL PAIS* (Oct. 10, 1996), [http://elpais.com/diario/1996/10/10/economia/844898426\\_850215.html](http://elpais.com/diario/1996/10/10/economia/844898426_850215.html).

200. See *Lisbon European Council 23 and 24 March 2000 Presidency Conclusion*, EUROPEAN PARLIAMENT (2000), [http://www.europarl.europa.eu/summits/lis1\\_en.htm](http://www.europarl.europa.eu/summits/lis1_en.htm).

201. *Id.*

relations that ended the era of the employee as “protagonist” of the social and political life of Spain.<sup>202</sup>

In 2007, after consultations with non-governmental partners, the Spanish legislature enacted a new law, *Estatuto del trabajo autónomo* (“LETA,” or the Statute for Self-Employed Workers).<sup>203</sup> LETA regulated all forms of self-employed or independent contractor-type work and covered all aspects of self-employment.<sup>204</sup> This comprehensive scope is the most commonly recognized virtue of the Spanish legislative intervention towards an “experimental direction.”<sup>205</sup> Self-employed workers are defined as individuals “not subject to the authority or organization of another person.”<sup>206</sup> This comprehensive and systematic intervention was justified in light of the profound changes that the Spanish labor market was undergoing.<sup>207</sup>

Workers who are part of this self-employed or independent contractor category are entitled to benefits in the case of termination (“*prestación por cese de actividad*”), maternity and paternity leave, temporary sickness (“*prestación social por incapacidad temporal*”), and beneficial social security programs for special groups (disabled, artisans or young entrepreneurs, *inter alia*).<sup>208</sup> Moreover, self-employed workers in dangerous industries can retire early (“*jubilación anticipada*”) without forfeiting social security benefits.<sup>209</sup> Lastly, self-employed workers can collectively organize and exercise collective rights, including the right to strike and to bargain collectively (“*acuerdos de interés profesional*”).<sup>210</sup>

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202. Antonio Ojeda Avilés, *La “externalización” del derecho del trabajo*, 128 REVISTA INTERNACIONAL DEL TRABAJO 51–72 (2009).

203. Jaime Cabeza Pereiro, *The Status of Self-Employed Workers in Spain*, 147 INT’L LAB. REV. 91, 91 (2008) (citing Estatuto del Trabajo autónomo (B.O.E. 2007, 20) (Spain)).

204. Spain was also the first country to systematically regulate self-employed relationships by drafting a “comprehensive and systematic legal framework covering all aspects of self-employment.” See Corral & Villarejo, *supra* note 196. See generally Pereiro, *supra* note 203, at 91–94.

205. See Pereiro, *supra* note 203, at 98.

206. *Id.* at 93 (referencing the Estatuto del Trabajo autónomo (B.O.E. 2007, 20) (Spain)).

207. What matters is that the worker does not employ any other workers in performing the services (Article 11, lett. a). This interpretation seems to be correct in light of the law’s introduction that, in defining the scope of the economically dependent worker’s protection, refers to “*empresarios sin asalariados*” (entrepreneurs without employees).

208. Constitución Española 27 diciembre 1978 (cited as Art. 16 C.E.).

209. *Id.* Art. 26(4) C.E.

210. See Pereiro, *supra* note 203, at 96–97.

Law No. 11/1985 of 2 August 1985, Official Gazette, No. 189, dated 8 August 1985, pp. 25,119.

1. *The creation of the TRADE*

Most interestingly for our analysis, LETA also crafted a third category of workers: “*Trabajador Autonomo Economicamente Dependiente*” (TRADE or economic dependent self-employed worker).<sup>211</sup> Because Spain has a civil legal system, workers needed to rely on legislation to claim their rights. The legislature, in creating the TRADE category, was trying to ensure increased protections for a subset of independent contractors. However, these workers did not receive the complete set of protections reserved to employees but “only protections specifically provided by LETA.” This intermediate category captures the Italian notion of legal dependency in the quasi-subordinate or “*lavoratori parasubordinati*” category.

TRADE workers enjoy some legal protections, such as minimum wage, annual leave, entitlements in case of wrongful termination, leave for family or health reasons, and collective bargaining.<sup>212</sup> They are entitled to an annual vacation, a set number of days off per week, a limit on working hours, the right to be covered by insurance against work-related accidents and diseases, and protection for workers unemployed as a result of business failure.<sup>213</sup> As a result, they enjoy a set of rights “beyond the statement of basic rights and duties of self-employed workers—vaguely reminiscent of those of employees, albeit without equivalent guarantees or legal status [of employees].”<sup>214</sup> The distinction between the employee and the TRADE categories lies in the notion of “alienness,” or *ajenidad*, described above. While the employee does not own the means of production and the productive tools and infrastructure, the TRADE owns his or her tools and is equipped with all the hallmarks of genuine self-employment.<sup>215</sup>

Interestingly, the category was not a reaction to disguised employment relationships but a way to offer a special legal arrangement for authentic self-employed workers.<sup>216</sup> The legislative intervention represents a wider trend of expanding the class of individuals protected by labor law. The trend is motivated by the desire to protect workers in the “grey area,” or at the margin of the self-employment category. In particular, according to Professor Cruz

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211. Estatuto del Trabajador Autónomo (B.O.E. 2007, 20) (Spain).

212. *Id.* arts. 4, 8, 10, 16, 19.

213. *Id.*; see Pereiro, *supra* note 203, at 94, 98.

214. Pereiro, *supra* note 203, at 93.

215. See Perulli, *supra* note 167, at 12–13 (defining one hallmark of self-employment as control over materials necessary for activities separate from those of the client).

216. See, e.g., Pereiro, *supra* note 203, at 93–94 (explaining the intention to regulate and define parasubordination, or economic dependence).

Villalón, the focus on managerial power and the degree of organization was reduced progressively, to such an extent that self-employment ended up being included within the employee category—namely, domestic work, teleworking, work in group.<sup>217</sup> The introduction of the TRADE classification essentially ended the traditional “binary divide.”

The crucial component for determining whether a worker is a TRADE rests on a threshold of economic dependency measured, by law, at seventy-five percent.<sup>218</sup> There are other criteria, framed as multifactorial tests, that inform the distinction between TRADE and other categories of workers. Four factors help distinguish TRADE workers from employees: (1) amount of independent work or reliance on the principal’s directives; (2) the worker undertakes an obligation of personal service, without using subcontractors; (3) the worker bears the entrepreneurial risk; and (4) actual ownership of the tools and instrumentalities of production.<sup>219</sup> To distinguish TRADE from independent contractors or self-employed workers, three factors are instructive: (1) a dependence on the principal for at least seventy-five percent of the worker’s income,<sup>220</sup> (2) not hiring subcontractors, and (3) the performance of an economic or professional activity directly and predominantly vis-à-vis one single principal.<sup>221</sup> An implicit requirement of the TRADE category encompasses “continuity in the relationship”; hence, the 2007 LETA also regulates working hours, holidays, time and place of the duties rendered.<sup>222</sup> In sum, the critical element of the TRADE test is the

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217. The “expansive trend” was slowed down first by removing some form of work from the employee category (in the case of goods transport workers who, in 1994, were excluded from the scope of labor law). See Jesús Cruz Villalón, *Il lavoro autonomo economicamente dipendente in Spagna*, 2 DIRITTI LAVORI MERCATI 287, 291 (2013).

218. Estatuto del Trabajador Autónomo art. 11 (B.O.E. 2007, 20) (Spain).

219. *Id.*

220. See *Modernising Labour Law*, *supra* note 166, at 11 n.33 (stating that this requirement does not imply that “these workers are necessarily in a vulnerable position”). Controversially, a TRADE could be at the same time an independent contractor. See Juan Antonio Hernández Nieto, *La desnaturalización del trabajador autónomo: el autónomo dependiente*, in ASPECTOS COLECTIVOS DE LAS RELACIONES LABORALES 177, 184–85 (2010).

221. *Modernising Labour Law*, *supra* note 166.

222. See Eduardo Rojo Torrecilla, *El trabajador autónomo económicamente dependiente (TRADE) puede ser (temporalmente) empleador de un solo trabajador por cuenta ajena. Una nota a la reforma de los artículos 11 y 16 de la Ley 20/2007 de 11 de julio por la Ley 31/2015 de 9 de septiembre*, EDUARDO ROJO BLOG (Sept. 14, 2015), <http://www.eduardorojotorrecilla.es/2015/09/el-trabajador-autonomo-economicamente.html>.



percentage of income gained from work-related, economic, or professional activities from a single principal.

There are numerous formal and procedural requirements to become classified as a TRADE worker. In furtherance of contractual freedom, article 12 of LETA states that workers themselves must disclose their status as TRADE to the principal at the time of inception of the contract and “register” the position with the social administration agency.<sup>223</sup> Furthermore, workers must disclose to the principal and the administrative agency any change in the workers’ situation that affects their status as TRADE (e.g., alteration of the percentage of the worker’s economic dependence) because the principal may need to verify information provided by the workers.<sup>224</sup> These strict requirements are burdensome and time-consuming for both workers and businesses.<sup>225</sup>

A debate developed among scholars and judges about the legal effect of not following these procedural elements. In 2011, the *Tribunal Supremo* resolved the debate by stating that the disclosure of the worker as TRADE is an “*ad solemnitatem*” requirement (i.e., mandatory),<sup>226</sup> while the social security registration has an *ad probationem*” effect (i.e., permissive).<sup>227</sup> The New Spanish Labour Procedure Act 36/2011<sup>228</sup> affirmed that the TRADE contract must be formalized in order to be valid.<sup>229</sup> Absent a written contract, the presumption is that a worker is an employee. In 2015, a new reform granted the TRADE worker a number of additional safeguards, such as subcontracting for an annual period as a worker in the case of maternity or paternity leave, among other situations.<sup>230</sup> The reform

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223. Estatuto del Trabajador Autónomo art. 12 (B.O.E. 2007, 20) (Spain).

224. *Id.*

225. See, e.g., Mark Freedland, *Application of Labour and Employment Law Beyond the Contract of Employment*, 146 INT’L LAB. REV. 3, 11 (2007) (explaining the complicated dynamics that encourage the greater security of standard employee relations).

226. S.T.S., June 12, 2012 (R.J., No. 8539, p. 26,566–67) (Spain).

227. S.T.S., June 11, 2011 (R.J., No. 6391, p. 17,820–26) (Spain).

228. Reguladora de la jurisdicción social, disposición final segunda (B.O.E. 2011, 36) (Spain).

229. See Tiziano Treu, *Le riforme del lavoro: Spagna e Italia*, DIRITTO DELLE RELAZIONI INDUSTRIALI No. 3/XXV (2015), [http://www.bollettinoadapt.it/wp-content/uploads/2015/09/dri\\_3\\_2015\\_treu.pdf](http://www.bollettinoadapt.it/wp-content/uploads/2015/09/dri_3_2015_treu.pdf) (noting the rigid establishment of the new economic dependent autonomous worker category).

230. Por la que se modifica y actualiza la normativa en materia de autoempleo y se adoptan medidas de fomento y promoción del trabajo autónomo y de la Economía Social art. 1.3 (B.O.E. 2015, 31) (Spain); see Torrecilla, *supra* note 222.

was intended to reconcile private and professional life by preventing such situations from causing the termination of the contract.<sup>231</sup>

2. *The low number of TRADE workers and developments on the EU level*

In Spain, few workers have actually become classified as TRADE due to the burdensome procedural requirements. In 2014, according to *Servicio Público de Empleo de TRADE*,<sup>232</sup> the population of self-employed workers was several million, while the number of TRADE was less than 16,000.<sup>233</sup> This number is inconsistent with calculations made by *Instituto Nacional de Estadística*, who counted 258,000 TRADE.<sup>234</sup> Still, even if we use the higher number, that would still only account for “12.5% of the total number of self-employed workers without employees.”<sup>235</sup>

Meanwhile, Spanish labor unions complained that the TRADE category was inappropriately covering what should be traditional employment relationships.<sup>236</sup> Conversely, employers’ associations were afraid of the opposite risk: that the category would swallow up authentic self-employed workers, augmenting business costs.<sup>237</sup>

Unfortunately, the European Commission had predicted an unsuccessful outcome of the TRADE category in a Green Paper: “while increasing certainty and transparency and ensuring a minimum level of protection of the self-employed, such requirements could, however, have the effect of limiting the scope of these contractual arrangements.”<sup>238</sup> The legislature may need to revisit the content of this law because it offers protections too close to those of the typical employee.

In terms of developments around the gig economy in Spain, a Barcelona judge has referred several questions about the on-demand economy to the European Court of Justice. The European Court of

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231. Torrecilla, *supra* note 222.

232. *Datos estadísticos de empleo: Estadísticas desde mayo 2005*, SERVICIO PÚBLICO DE EMPLEO ESTATAL, [http://www.sepe.es/contenidos/que\\_es\\_el\\_sepe/estadisticas/datos\\_estadisticos/empleo/datos/estadisticas\\_nuevas.html](http://www.sepe.es/contenidos/que_es_el_sepe/estadisticas/datos_estadisticos/empleo/datos/estadisticas_nuevas.html) (last visited Feb. 5, 2017).

233. Teresa Alvarez Martín-Nieto, *Caída de los Autónomos Económicamente Dependientes*, CINCO DIAS (Feb. 10, 2015, 9:11 PM), [http://cincodias.com/cincodias/2015/02/09/autonomos/1423494891\\_645557.html](http://cincodias.com/cincodias/2015/02/09/autonomos/1423494891_645557.html).

234. *Id.*

235. *Id.*

236. See Villalón, *supra* note 217, at 295.

237. *Id.*

238. *Modernising Labour Law*, *supra* note 166, at 12.

Justice is expected to decide whether Uber is a taxi service or a digital service provider.<sup>239</sup>

*D. Summary and Assessment of the Outcomes in Canada, Spain, and Italy*

Having examined in detail the ways that the Canadian, Italian, and Spanish legal systems have established frameworks for dealing with the third category, we can develop some guidelines from these experiences. Some of these lessons are directly applicable to the recent proposals for creating a third category for gig economy platform workers. We have seen three different histories and three different outcomes, showing us mistakes as well as successes. Spain provided an example of a legal system that adopted a third category only to see it limited to a small percentage of self-employed workers. The law assumes that TRADE workers are predominantly working for one business; this assumption could be a problem for platform workers who are working for multiple platforms. The burdensome requirements to be met and the use of a strict economic threshold are the primary reasons that the law has seen only very limited use.

From Italy’s various experiments with the third category, we saw an indecisive and almost mercurial modification of the third category in the years since its adoption. Businesses used the Italian third category as a discounted alternative to what should have been a standard employment relationship. In fact, companies used the presence of the third category of *parasubordinato* to evade regulations applicable to employees, such as social security contributions. In essence, the quasi-subordinate category created a loophole that actually resulted in *less* protection for workers as an unintended consequence. Through the years, lawmakers attempted to adjust the category in order to provide appropriate coverage. Each successive action by the Italian legislature was an emergency intervention as a reaction to the misuse of the third category. The end result was confusion. Since 2015, the third category is extremely limited and workers are presumed to be employees.

There is a difference in the genesis, the content, and the effects of the intermediate category between Spain and Italy.<sup>240</sup> Italy’s

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239. See Murad Ahmed, *Judge Refers Spanish Uber Case to European Court of Justice*, FIN. TIMES (July 20, 2015), <http://on.ft.com/1DqITdc> (explaining that the decision could lift bans on Uber across Europe).

240. See Giuseppe Santoro Passarelli, *El Trabajo Autónomo Económicamente Dependiente en Italia*, 98 DOCUMENTACIÓN LABORAL 2, 10 (2013) (explaining that Spain’s understanding of economic dependence differed from Italy in that Italy’s focused on “coordinated and sustained collaborations”).

framework, enacted by the 1973 Reform, does not provide substantive protections. Protections reserved to TRADE are much stronger than the ones reserved to *lavoratori parasubordinati*. However, there are similarities in that the intermediate category was misused in both Spain and Italy. In Italy, the intermediate category was used to disguise bona fide employment relationships. In Spain, arbitrage of the categories shifted what should have been TRADE workers into independent contractor status because of the high level of legal protection and burdensome procedures associated with the TRADE category.

As for Canada, the passage of legislation in the 1970s technically created a third category of “dependent contractors” through amending the definition of “employee” in various statutes. The practical result of the “dependent contractor” category was to expand the definition of employee and to bring more workers under the ambit of labor law protection. As a result, there was increased coverage and a provision for a safe harbor for workers in need of protections based on economic dependency. The third category seems to have worked well in terms of expanding the coverage of the laws to an increasing number of workers.

#### IV. ANALYSIS OF WORKER MISCLASSIFICATION IN THE GIG ECONOMY: SOLUTIONS AND IMPLICATIONS

The implementations of the hybrid category in Canada, Italy, and Spain long predated the development of platform crowdwork. Even before platforms and mobile apps, the binary test between employee classification and independent contractor left many workers in a no man’s land. Those workers included delivery drivers, errand runners, odd job workers, and couriers, with several providing services that, in many respects, resemble the services provided by modern-day gig economy companies, such as TaskRabbit, Postmates, Grubhub, and Uber. As such, these countries’ experiences with adopting the third category are useful in terms of evaluating what types of policies are successful and which have been problematic.

At the outset, we should note that the debate over misclassification can be interpreted two different ways. One way to view the issue is to acknowledge that there has been legitimate confusion about forms of gig work that do not fit easily into the binary distinctions currently recognized under U.S. law. After all, gig-workers have some characteristics that are common to independent contractors and yet others that are reminiscent of employees. In fact, the question of proper classification may be confusing even without the addition of technology; work can be structured in varying ways. The problem,

under this view, lies with a legal test that is malleable, fact-intensive, and difficult to apply. The other way to consider the misclassification issue is to acknowledge that there has long been arbitrage of the law, meaning illegitimate practices that lead to misclassification of what truly are employment relationships. These practices hide employment relationships under the guise of false or bogus contractor situations. Note that these two views of the misclassification problem are not mutually exclusive. It is possible to have a poorly constructed multi-factorial test and, at the same time, to have businesses arbitraging the test to take advantage of the savings from classifying a worker as an independent contractor.

Any legislative or judicial intervention on this issue must take account of both views. One potential solution to the first problem might be establishing a third category to alleviate confusion over how to apply the test to gig workers. However, if the consequences of establishing such a third category would be arbitrage and result in downgrading employees to intermediate status, that would do nothing to eliminate the problem of bogus contractor status. In fact, adding a third category would only increase the amount of arbitrage. Three categories create more room for mischief than two, and we can see from the Italian case that such arbitrage became widespread in response to the adoption of the quasi-subordinate workers.

A. *Working Backwards to Determine Rights for the Third Category*

Another way to look at this problem is to work backwards and ask: Which of the rights and responsibilities that employees enjoy would not be appropriate for workers in the intermediate category? As we saw from the Italian and Spanish cases, the kinds of rights and responsibilities that go along with the third category are just as important, if not more so, than the creation of the category itself. The rights available could be very few, mirroring independent contractor status, or, as in Spain, the rights could closely resemble those of employees. Either way, there are serious risks to face. Construct the third category with too few rights, as in the Italian case, and it will run the risk of arbitrage, with businesses forcing genuine employees into the third category to try to lower costs. But make the third category either too generous or too burdensome to opt into, as has been the case with the TRADE in Spain, and very few will bother using the category. Continuing with this line of inquiry, the process of trying to work backwards to determine which rights these gig workers would have available and which they would not be entitled to

is far more complicated than it appears. What rights and obligations would be left out of the hybrid category?

As an example of engaging with this line of analysis, consider the Harris and Krueger proposal in which those workers falling into the independent worker category would not be guaranteed minimum wage.<sup>241</sup> The reasoning behind the proposed exclusion, Harris and Krueger argue, is that in the gig economy, it is difficult to determine an hourly wage, and the hours may be impossible to trace across platforms.<sup>242</sup> However, that argument shows a lack of understanding about the technology that is used for crowdwork. Contrary to Harris and Krueger's assertion, there is no lack of data or any difficulty tracing hours. In fact, the platforms that enable matching workers with consumers who need their services also allow for the gathering of data about the work and the workers on a completely unprecedented scale.

Indeed, most ridesharing apps feature real-time GPS tracking and updated ratings from customers, but those are just the features that are visible to users. Both workers and customers generate additional data that platform companies collect and analyze, much of which is used to improve future performance. Indeed, many platforms can measure precisely how much time and effort a worker spends on a task, down to the minutes spent waiting in traffic (in the case of a ridesharing app) or the number of keystrokes (in the case of crowdwork). In fact, one of the major concerns with platform work is not difficulty tracing time, work, and hours, as Harris and Krueger posit, but rather the constant and pervasive surveillance through GPS, phone, and app data.<sup>243</sup>

The idea of exempting gig workers from minimum wage requirements seems poorly thought-out.<sup>244</sup> To date, many of the gig-worker cases that have alleged worker misclassification have been FLSA claims.<sup>245</sup> One of the most salient complaints that gig workers have brought forward is the lack of a living wage or decent pay. As documented in one of the author's previous articles, many crowdwork

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241. HARRIS & KRUEGER, *supra* note 52, at 13.

242. *Id.* at 20.

243. See Bodie et al., *supra* note 71, at 1–3 (describing the rise of people analytics and the use of big data at work, and expressing concerns for both user and worker privacy).

244. Miriam A. Cherry, *Mindestlohn für Crowdarbeit? [A Minimum Wage for Crowdwork?]*, in CROWDWORK—ZURÜCK IN DIE ZUKUNFT?: PERSPEKTIVEN DIGITALER ARBEIT [CROWDWORK—BACK TO THE FUTURE?: PERSPECTIVES ON DIGITAL LABOR] 231–40 (Christiane Benner ed., 2014).

245. Cherry, *supra* note 1, at 584–85 (cataloging the currently pending gig economy company cases).

platforms pay less than minimum wage, with some paying amounts that are on average less than half that of the federal minimum wage.<sup>246</sup>

Meanwhile, there has been a widespread move by the “Fight for Fifteen” campaign to raise the minimum wage in the United States to fifteen dollars per hour.<sup>247</sup> Statistics show that the current federally mandated minimum wage is low enough that a full-time minimum wage salary will not cover food and rent for a working family.<sup>248</sup> If there is generally a movement to raise the federal minimum wage, why have a proposal concurrently to eliminate minimum wage completely for gig workers? This is a rhetorical question, of course; but, as one of the authors has previously written, exempting certain work from minimum wage would only exacerbate the problem of exploitation of workers in the gig economy.<sup>249</sup>

If retracting the minimum wage for the gig economy seems problematic, what about excluding other rights from the gig worker hybrid category? Would we choose to exempt platforms from generally applicable laws that prohibit employers from making employment decisions based on prohibited factors such as race, sex, age, and disability?<sup>250</sup> On platforms, especially those involving purely digital labor, individual workers are often faceless and nameless. But that too may be a flawed assumption as even a screen name or a picture of dark skin—or even an avatar with darker skin—might result in employment discrimination. In reality, provision of services through platforms has the potential to be biased based on customer prejudice. Researchers have begun to document the biases embedded in the review and rating systems that many platforms

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246. Miriam A. Cherry, *Working for (Virtually) Minimum Wage*, 60 ALA. L. REV. 1077, 1078, 1093–94 (2009).

247. See Katrina vanden Heuvel, *How a \$15 Minimum Wage Went from “Extreme” to Enacted*, WASH. POST (Apr. 5, 2016), [https://www.washingtonpost.com/opinions/how-a-15-minimum-wage-went-from-extreme-to-enacted/2016/04/05/6cf53d20-fa9f-11e5-80e4-c381214de1a3\\_story.html?utm\\_term=.839aa4cdf6e9](https://www.washingtonpost.com/opinions/how-a-15-minimum-wage-went-from-extreme-to-enacted/2016/04/05/6cf53d20-fa9f-11e5-80e4-c381214de1a3_story.html?utm_term=.839aa4cdf6e9) (estimating that eighteen percent of the workforce will be on their way to \$15 an hour after New York and California pass their minimum wage laws).

248. See HEATHER BOUSHEY ET AL., ECON. POLICY INST., *HARDSHIPS IN AMERICA: THE REAL STORY OF WORKING FAMILIES* 3–4, 44, 48 (2001) (finding that working full-time does not isolate families from hardship); BARBARA EHRENREICH, NICKEL AND DIMED: ON (NOT) GETTING BY IN AMERICA 61 (2001) (describing the author’s experiment with minimum wage jobs).

249. See Cherry, *supra* note 1, at 586–87 (arguing against an exemption for minimum wage); see also Cherry, *supra* note 244.

250. For a general overview of the scope of anti-discrimination laws, see Marcia L. McCormick, *The Truth Is out There: Revamping Federal Anti-Discrimination Enforcement for the Twenty-First Century*, 30 BERKELEY J. EMP’T & LAB. L. 193, 193–231 (2009).

use.<sup>251</sup> There is a great deal of jurisprudence under Title VII holding that so-called “customer preference” for workers of a certain race or gender is not an excuse for employment discrimination.<sup>252</sup> The fact that customer ratings are now embedded in online platforms, and in fact may sometimes be the only factor used to terminate a worker’s access to the app, is troubling.<sup>253</sup>

What about excluding other protections from the category? Should gig workers have the ability to report crimes that they notice on the job to law enforcement without retaliation? If a gig worker is injured while carrying out an assignment obtained from a platform, should the worker have the right to collect worker’s compensation, or is redress for the tort system? Ultimately, the “working backwards” plan to determine which of the rights allocated by labor and employment law are expendable for gig workers is a losing proposition. Determining which rights to eliminate is an impossible dilemma, especially when those granted to employees in the United States are meager compared to those guaranteed to workers in many industrialized nations.<sup>254</sup> Each of these laws or sets of laws was passed in order to give workers basic protections that they could not achieve on their own due to the imbalance of power between workers and employers. Cutting protections only for the sake of creating a discounted category seems not only artificial, but bears no rational relationship to the realities of gig work or the technology that is being used on platforms themselves.

#### B. *Practical Difficulties with Implementation of a Third Category*

Apart from difficulties in defining the third category and the protections or exclusions it would contain, we also feel that it is important to note that, solely on a practical level, it might be difficult to create a third category exclusively for gig workers in the United

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251. See Aaron Belzer & Nancy Leong, *The New Public Accommodations*, 105 GEO. L.J. (forthcoming 2017) (manuscript at 30–32), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2687486](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2687486) (predicting that platform users of minority races will receive worse service until they are eventually denied altogether); Rosenblat & Stark, *supra* note 37, at 14 (suggesting a new study on bias in ratings analyzing heterosexual white men compared to minority populations).

252. See, e.g., *Wilson v. Sw. Airlines Co.*, 517 F. Supp. 292, 297, 299, 302, 304 (N.D. Tex. 1981).

253. See Rosenblat & Stark, *supra* note 37, at 12 (stating that drivers need to maintain, on average, a 4.6/5 stars or above to remain active on Uber, and they cannot remove a rating even if it is given to them unfairly).

254. SAMUEL ESTREICHER & MIRIAM CHERRY, *GLOBAL ISSUES IN EMPLOYMENT LAW* 170–86 (Samuel Estreicher & Miriam Cherry eds., 2008).



States. Proponents have made it seem like creating the third category will be natural or easy.<sup>255</sup> But it would actually be a complex legislative intervention, largely in part because there would have to be hard decisions, as mentioned above, about which rights and responsibilities to include and exclude from the categories. Additionally, determining where a worker would fit within the three categories would have its own doctrinal elements and the potential for misclassification, arbitrage, and confusion.

It is possible that judges and administrative bodies could, on their own authority, shift their interpretation of the statutes so as to carve out or constitute an intermediate category. But this is unlikely, given the way that the statutes are written. Adding a third classification when the statutes only call for two categories would constitute a vast feat of judicial activism. It would also be seen as the kind of process that would likely require political debate and discussion associated more with legislation than with judicial decision making. In light of the political decisions and consequences that surround the issue of the third category, judges would likely demur from creating a new category without guidance from the legislature.

The ridesharing cases provide an illustrative example. In *Cotter v. Lyft*, Judge Vince Chhabria famously stated that the case was like being “handed a square peg and asked to choose between two round holes.”<sup>256</sup> Yet, even acknowledging that the gig workers were not a particularly good fit for either employee or independent contractor status, Judge Chhabria turned the case over to the jury and is now presiding over the settlement agreement. Therefore, even though some judges recognize that the on/off switch between independent contractor and employee is an imperfect fit for the realities of work today, they have not dared to create another category on their own initiative.

Creating a third category in the United States for gig workers would most likely require legislative action. It is true that legislation has lagged woefully behind technological developments.<sup>257</sup> However, there has recently been some legislation that directly responded to

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255. Seth Harris was quoted as stating that “[a]fter we produced the paper, we joked that we succeeded in making everybody mad by coming up with the right answer.” Guerrieri, *supra* note 3.

256. *Cotter v. Lyft, Inc.*, 60 F. Supp. 3d 1067, 1081 (N.D. Cal. 2015).

257. David Mercer, *Technology and the Law: Dealing with the “Law Lag,”* AUSTRALIAN (July 4, 2011, 12:00 AM), <http://www.theaustralian.com.au/archive/business/technology-and-the-law-dealing-with-the-law-lag/story-fn8ex0p1-1226086951328> (explaining how new advances in science and technology demand the knowledge necessary to properly apply appropriate legal principles and consideration of the contexts in which they arise).

recent technological developments, such as the JOBS Act<sup>258</sup> for online crowdfunding.<sup>259</sup> There has also been legislation that ended or otherwise cracked down on the use of technology; for instance, online prediction markets that allowed participants to engage in forecasting about future political, economic, or social events were unwittingly outlawed by the Unlawful Internet Gambling Act of 2006.<sup>260</sup> Legislative change can be slow, unwieldy, and difficult to predict. There are also changes that would need to happen in state legislatures, as many states have statutes that similarly only apply to employees. Ultimately, the possibility of political change is uncertain, and the intervention is far from a panacea.

*C. Shifting Towards a Default Presumption of Employee Status*

One way to govern the difficult classification issues that have arisen is to make changes regarding the default presumptions around employee and independent contractor status. Because it will be difficult to implement a third category and there is, as of yet, little or no consensus on how to constitute the category or how it might meet the needs of platforms and gig workers, a third category may not be feasible. To address current misclassification issues, one solution might be to change the default presumptions regarding the two categories that already exist. Currently, many platform companies operate in an environment where the triangular relationship between the platform, customer, and worker obscures the role of the platform as employer.<sup>261</sup> If a company deems workers to be independent contractors, it is left up to the workers, or perhaps to government agencies (like the Social Security Administration or the Internal Revenue Service), to contest that status as misclassification. Such a default actually encourages misclassification as there is the potential that no one will want to invest the time, patience, and effort in starting an administrative action or lawsuit to challenge the firm's

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258. Jumpstart Our Business Startups Act, Pub. L. No. 112-106, 126 Stat. 306 (2012).

259. See Joan MacLeod Hemmingway, *What Is a Security in the Crowdfunding Era?*, 7 OHIO ST. ENTREPRENEURIAL BUS. L.J. 335, 336, 340–41, 357 (2012) (focusing on Congress's move for capital formation for small businesses).

260. See Miriam A. Cherry & Robert L. Rogers, *First Amendment and Prediction Markets*, 2008 U. ILL. L. REV. 833, 833–37 (2008) (explaining how legislation can damage predictive speech).

261. See Jeremias Prassl & Martin Risak, *Uber, TaskRabbit, and Co.: Platforms as Employers? Rethinking the Legal Analysis of Crowdwork*, 37 COMP. LAB. L. & POL'Y J. 619, 634 (2016) (stating that crowdwork "challenges the very existence of a contract of employment, leaving individual workers without recourse to the majority of domestic employment protective legislation").

initial misclassification. It is true that misclassification can result in costly legal challenges and in some instances lead to penalties, but many companies are willing to take that risk. In other words, companies feel it is better to risk asking for forgiveness rather than first getting permission.<sup>262</sup> Meanwhile, workers face high transaction costs in trying to get the work re-classified: the time and expense of becoming involved in a lawsuit. As the jobs involved often encompass low-paid casual work, the effort may not be worthwhile.

Instead of the current system in which the firm chooses how to classify workers and then later justifies its position in litigation, we should consider working with a different presumption. Assume that above a minimum threshold of hours worked, the default classification would be an employment relationship. That would be the case even if the work was on a platform or completely took place in cyberspace. It would be an employment relationship even if the arrangement were flexible, even if the worker provided his or her own tools of the trade, and even if it were considered part-time employment. There would then be opt-outs for those who are truly independent businesses and genuinely self-employed. However, such an opt-out could not be a condition of work on a platform. Currently, such coerced choice is stuck into online EULAs, which are little more than adhesion contracts. In these EULAs, workers have no other choice but a “take it or leave it” bargain with an online form that many users have not even read.

There are some on-demand economy companies that have already, on their own initiative, engaged in shifting their workers to be employee status. HomeHero is a mobile platform that provides home health care and elder care. It recently shifted from an independent contractor to an employee based model. The company’s CEO claimed that it did so “[i]n order to ensure a consistent experience as we scale nationwide.”<sup>263</sup> In the words of the CEO of Shyp, a package delivery service that also moved from independent contractors to an employee model, the company’s

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262. Indeed, this seems to be a key lynchpin of Uber’s regulatory and compliance strategy: do business first, and ask questions later. *See, e.g.*, Becki Smith, *Uber’s Labor Relations Is Driving It into a Ditch*, NEWSWEEK (Feb. 2, 2016, 2:57 PM), <http://www.newsweek.com/ubers-labor-relations-driving-it-ditch-422285> (highlighting the ways in which Uber ignores regulations and fights against worker accountability so they can “litigate, litigate, litigate” later).

263. Annlee Ellingson, *Why HomeHero Is Converting All of Its Independent Contractors to W-2 Employees*, L.A. BIZ (Mar. 1, 2016, 12:07 PM), <http://www.bizjournals.com/losangeles/news/2016/03/01/why-homehero-is-converting-all-of-its-independent.html> (quoting Kyle Hill, CEO of HomeHero).

“investment in a longer-term relationship with our couriers” would “ultimately create the best experience for our customers.”<sup>264</sup>

Other platform companies have classified their workers as employees from their inception. Examples of these companies include Hello Alfred; Managed by Q; Munchery; the transit service, Bridj; and the temporary agency, BlueCrew.<sup>265</sup> The CEO of Hello Alfred noted a commitment between the company and the workers who want more than a gig; these workers want a career path.<sup>266</sup> Because many of the platform businesses are based on people serving other people who are often repeat customers rather than one-off transactions, providing appropriate training and career advancement to workers makes business sense. Some platform companies have provided benefits, including health insurance.<sup>267</sup> Their hope is to stand out from other platforms and attract the most talented workers.

These experiences demonstrate that the platform economy can still exist when workers are provided with the rights afforded to employees. The concerns that burdensome regulations will drive platforms out of business seem to be overblown, much like earlier arguments that regulation—of minimum wage, maximum hours, child labor, and safety—would end various phases or components of the industrial revolution. To address current misclassification issues, we come back to the thought that perhaps the best answer is not to create a third category with an as yet to be determined set of rights but instead to change the default presumptions vis-a-vis the two pre-existing categories. But businesses need certainty, and the safe harbor that we discuss below would surely be helpful when navigating the uncertain question of classification.

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264. NAT'L EMP'T LAW PROJECT, EMPLOYERS IN THE ON-DEMAND ECONOMY: WHY TREATING WORKERS AS EMPLOYEES IS GOOD FOR BUSINESS 2 (2016), <http://www.nelp.org/content/uploads/Fact-Sheet-Employers-in-the-On-Demand-Economy.pdf> (quoting Kevin Gibbon, CEO of Shyp).

265. Smith, *supra* note 262.

266. See Oscar Perry Abello, *This “Gig Economy” Firm Prefers to Have Employees, Not Contractors*, NEXT CITY (Aug. 5, 2015), <https://nextcity.org/daily/entry/sharing-economy-jobs-employees-not-contractors> (“We believe treating our employees as our primary customer is how we can best satisfy our end users. It can become difficult to achieve this with the 1099 classification, because it inherently distances the worker from the company. There is no onus to provide meaningful work, training, or career advancement.” (quoting Marcela Sapone, CEO of Hello Alfred)).

267. Cole Stangler, *Meet the Gig Economy Companies that See Investing in Workers as a Smart Business Strategy*, IB TIMES (Mar. 15, 2016, 11:24 AM), <http://www.ibtimes.com/meet-gig-economy-companies-see-investing-workers-smart-business-strategy-2336721> (using Managed by Q as an example of a company offering health insurance to gig workers).

D. *Safe Harbor for Volunteerism and Alternative Business Models*

Many supporters and lobbyists for Uber or other platform-based companies have suggested that these businesses deserve room to maneuver with special rules that amount to a moratorium on existing labor regulations because they are new, interesting, and will create more jobs in the future. What would be the justification for granting platform economy companies such an exemption? A new business should not be exempted from labor and employment law simply because it has “cool” technology. Is there a reason that gig businesses deserve special treatment even better than that of non-profits, which have to pay minimum wage and follow the other aspects of the labor and employment laws? The premise of the argument is difficult to accept as the platform economy is largely for-profit and comprised of workers who are plying a trade that more or less mimics other work done as a full-time profession for remuneration.

Some of this confusion and the calls for exemptions certainly come from the obfuscated language that platform companies use and the rhetoric around their origins. The “sharing economy” began as a way for neighbors to assist each other and to engage in more sustainable modes of production. Rather than ownership, participants in the sharing economy were interested in gaining access to resources that would be held in common as shared resources.<sup>268</sup> Based on models of community volunteerism and pooled assets, such as lending libraries and tool collections, the sharing economy sought to reduce consumption and increase access to resources. For example, early commercials for Lyft in the Bay Area showed neighbors assisting their friends and neighbors without cars, making it more feasible to exist without a car in an area that was already jammed with traffic.<sup>269</sup> The sharing economy was seen as a “green,” more sustainable choice that avoided excess consumption.<sup>270</sup> The idea of giving others a ride

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268. Juho Hamari et al., *The Sharing Economy: Why People Participate in Collaborative Consumption*, 67 J. ASS'N FOR INFO. SCI. & TECH. 2047, 2048 (2015) (describing the individual economic benefits as well as the collective interest in the environment of “sharing, helping others, and engaging in sustainable behavior”).

269. See Maureen Morrison, *Lyft's First Big Ad Campaign: We're Not Just a Transportation Service, We Create Community*, ADVERT. AGE (Jan. 27, 2015), <http://adage.com/article/digital/lyft-launches-national-campaign/296819> (emphasizing Lyft's campaign in San Francisco, where it was founded, focusing on humanity, technology, and community); *What Is Lyft?*, YOUTUBE (Mar. 26, 2014), <https://www.youtube.com/watch?v=X2bQdf408T8>.

270. See Miriam A. Cherry & Winifred R. Poster, *Crowdwork, Corporate Social Responsibility, and Fair Labor Practices*, in RESEARCH HANDBOOK ON DIGITAL TRANSFORMATIONS 291, 293 (F. Xavier Olleros & Majlinda Zhegu eds., 2016)

within the community and helping out one's neighbors was akin to volunteerism; payments were to help out with the cost of owning and garaging a car in the Bay Area, not to constitute a substitute for full-time employment.

Other crowdwork platforms with innovative business models developed based on a "prosumer" idea in which those who do work for the platform (producers) also comprise the audience for the work (the consumers). For example, on the Threadless platform, designers can work on creating new styles for T-shirts.<sup>271</sup> The community votes on the designs to be produced and has first access to purchase the T-shirts. The designer then profits by receiving a portion of the shirt sales as compensation for their work.<sup>272</sup> This type of work defies many of the traditional characteristics of either employees or independent contractors.

The problem, as we noted before, is distinguishing between authentic innovators, who could compete on a level playing field or who have a distinct and interesting new business model, and those platforms that are profiteers who exist "only because [of] the current haze of legal and regulatory uncertainty."<sup>273</sup> Arbitrageurs who are merely looking for legal loopholes to undercut traditional service providers through cheap labor are not creating a "special" or "different" form of business that would deserve an exemption from labor and employment law. But business models that either are truly "sharing," some mix of profit and non-profit (for example, "B" corporations),<sup>274</sup> or those that engage in prosumer transactions, genuinely might deserve a break from labor regulations. To the extent that the sharing economy is about green choices and involves shared ownership and resources, there should be a safe harbor created if the work looks more like volunteerism undertaken for altruistic reasons or community-minded motivations.

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("Crowdwork already presents a myriad of environmental benefits, as the use of technology and remote work has the potential to reduce fuel from daily commuting."); *see also* Morrison, *supra* note 269 (describing Lyft's intention to combine "humanity and technology").

271. THREADLESS, <https://www.threadless.com> (last visited Feb. 5, 2017).

272. For more on Threadless, see JEFF HOWE, CROWDSOURCING: WHY THE POWER OF THE CROWD IS DRIVING THE FUTURE OF BUSINESS 1–3, 6, 8, 228–29, 281, 285 (2008).

273. Jeff Bercovici, *Why the Next Uber Wannabe Is Already Dead*, INC.COM (Nov. 2015), <http://www.inc.com/magazine/201511/jeff-bercovici/the-1099-bind.html>.

274. *See* Miriam A. Cherry, *The Law and Economics of Corporate Social Responsibility and Greenwashing*, 14 U.C. DAVIS BUS. L.J. 281, 294 (2014) (describing "B" corporations that benefit the environment and communities).

There are also some instances where the provision of a service is *de minimis* and thus does not merit employee status. For example, if a businessperson used a ridesharing service once a week to pick up her neighbor on her way into work, that businessperson should not be considered an employee of Lyft. Neither are those who use Uber pool or a similar mobile app service to set up and participate in a carpool to save fuel, parking, and expenses. Nor are we suggesting that a person who signs up to do a fifteen-minute task on TaskRabbit once a month is an employee of the platform. These activities seem to be *de minimis* or one-off, casual transactions that should not amount to an employment relationship. Trying to sweep those extremely casual forms of work into burdensome legalities would serve no one. Rather, we are more concerned with platforms that seem to be competing with, or in some instances replacing, full-time paid employment with on-demand work.<sup>275</sup>

The concept of a threshold percentage of income or time to determine the safe harbor seems a sensible one. At this point we are in no place to determine exactly where to set such a threshold, but it would serve to separate out an occasional temp or the carpooling Uber driver from those who are working a solid number of hours on the platform. Could this look like eight hours per week, roughly only one working day? Likewise, we do not want to discourage neighbors or volunteers from providing their services to others in their community when those efforts are *truly voluntary* or used only to defray legitimate expenses. The safe harbor could be constituted in such a way that it would sweep in these forms of volunteerism or altruistic work.

#### E. Broader Implications

The gig economy has brought several economic and labor tensions to the forefront: the need for managerial power and stability versus the need for flexibility; traditional organizational dependency versus working for multiple platforms; the choice to label as a self-employed worker versus such “coerced” labeling in a EULA; geographic diffusion versus efforts toward a collective voice for crowdworkers. As we wrote in the previous section, these features define the gig-economy as a subset of a much broader trend: the contingent, precarious, and increasingly fissured workplace. The new standard is the so-called non-standard work. As a consequence, we resist the notion that all will be well when we have created a separate contractual category for gig

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275. See, e.g., Janine Berg, *Income Security in the On-Demand Economy: Findings and Policy Lessons from a Survey of Crowdworkers*, 37 COMP. LAB. L. & POL'Y J. 543, 570–71 (2016).

workers. Rather, we aim to look for solutions that will ameliorate conditions for other forms of precarious work in the workplace.

If we are looking for reforms that would genuinely advance the welfare of gig workers, we could look to some suggested reforms for crowdwork. One of the authors describes standards for decent crowdwork in a recent paper, focusing on fair wages, transparency, and due process.<sup>276</sup> Fair wages may be self-explanatory, but the other two categories may be less obvious. Suffice it to say that transparency involves clear listing of payment for work completed as well as accurate time estimates for how long it takes to complete the work. It also would include some disclosure of information so that crowdworkers especially would be able to understand what goals or projects their small tasks were advancing.<sup>277</sup> Additionally, it would include sharing information about the companies that use the platform, including information like whether they pay promptly and treat crowdworkers fairly. Finally, due process would prevent wage theft and allow workers to contest or question a poor rating before it would be used against them.<sup>278</sup> Workers need security, and a solution could be “to expand the scope of labour protection beyond employment.”<sup>279</sup>

#### CONCLUSION

Calls for a new “dependent contractor” hybrid category in the United States reflexively appear as an attractive and easy solution, especially as they are touted as being tailor-made for the gig economy. That initial reaction, however, is tempered upon further study of the content and history of the implementation of the third category in other nations. In this paper we have examined the hybrid worker categories in Canada, Italy, and Spain to learn from their experiences.

In Italy, the adoption of the third category led to widespread arbitrage of the categories with businesses moving employees into a “bogus” discounted status in the quasi-subordinate category. In Spain, the requirements for attaining the third category were burdensome enough that the third category only is applicable to a small number of workers. Viewed in this light, experimenting with a third category might be seen as more risky than just the easy or obvious solution as it first appears.

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276. See Cherry & Poster, *supra* note 270.

277. *Id.*

278. *Id.*

279. See Fudge, *supra* note 9, at 633–34 (arguing against seeing employment “as a personal bilateral contract characterized by subordination”).



Rather than risking arbitrage between the categories, and the possibility that some workers will actually end up losing rights, it makes sense to think about employment status as the default rule for most gig workers, except those that may fit into a safe harbor because they are either not working very much (true “amateurs”) or are engaged in volunteerism for altruistic reasons (truly “sharing”). If there is to be a third category, one like Canada’s “dependent contractor,” which expands the scope of the employment relationship, would best meet the needs of gig workers. Such a default rule or expanded definition makes sense whether we are thinking about gig workers, those in fissured workplaces, franchises, or other non-standard or contingent work arrangements. The gig economy is only the most visible or extreme example of workplace fissuring, but they are all part of the same larger trend.