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

*Miriam A. Cherry & Antonio Aloisi**

In response to worker misclassification lawsuits in the United States, there have been recent calls for the creation of a hybrid category in between employee and independent contractor specifically for the gig economy. However, such an intermediate category is not new. In fact, the intermediate category has existed in many countries for decades, producing successful results in some, and misadventure in others. In this article, we use a comparative approach to analyze the experiences of Canada, Italy, and Spain with the intermediate category. In our analysis we focus on a set of questions: Is labour law fundamentally outdated for the digital age? Does the gig economy need its own specialized set of rules, and what should they look like? What role does digitalization and technology play in the casualization of work? We ultimately conclude that workable proposals for a third category must also encompass other forms of precarious employment.

Recently there have been a spate of lawsuits across the United States alleging that platforms in the “on demand” economy have misclassified their workers as independent contractors.¹ 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.² Proponents advocate that an intermediate category is necessary for the modern economic and technological realities of the gig

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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 Section III, *infra*.

economy. They also suggest that a third category is a novel innovation, appropriately crafted for the era of digital platform work.³

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.⁴ In this paper we employ a comparative approach, and examine the laws of three countries that have such experiences with a third category: Canada, Italy, and Spain.⁵ These legal systems have had varying success, in some instances, or misadventure, in others.⁶ Before reflexively launching a hybrid category only for platform work in the U.S, we should seek to understand evaluate the experiences of other nations in their implementation of the intermediate category.

Classification as an employee is an important practical question. Classification 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.⁷ As such, classification as an employee is actually “an important instrument for the delivery of workers’ rights.”⁸ 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, and broken apart.⁹ 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.¹⁰ Rather than create a

³ See, e.g. Vin Guerrieri, *Uber Cases Could Spur New Employee Classification*, LAW360 BLOG, May 6, 2016.

⁴ Valerio De Stefano, ILO Report on Classification. [source to be inserted].

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, and so further examination of those two nations will be forthcoming. Germany is an intriguing example because of the presence of a category that applies to “worker-like persons.” See Wolfgang Daubler, *Working People in Germany*, 21 COMP. LAB. L. & POL’Y J. 77 (1999-2000); Ryuichi Yamakawa, *New Wine in Old Bottles: Employee/Independent Contractor Distinction under Japanese Labor Law*, 21 COMP. LAB. L. & POL’Y J. 99 (1999-2000). We are also aware that the third category’s historical origins are somewhat apocryphal. In the 1960s when Canada was contemplating a third category, they referenced Sweden. Modern day Sweden’s legal landscape is described in Kent Kallstrom, *Employment and Contract Work*, 21 COMP. LAB. L. & POL’Y J. 157 (1999-2000). 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 did try 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 Section IV, *infra*.

⁷ Matthew W. Finkin, *Beclouded Work, Beclouded Worker in Historical Perspective*, 37 COMP. LAB. L. & POL’Y J. 603 (2016), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2712722.

⁸ Guy Davidov, *The Three Axes of Employment Relationships: A Characterization of Workers in Need of Protection*, 52 U. TORONTO L. J. 357 (2002), available at <http://ssrn.com/abstract=555998>

⁹ See generally DAVID WEIL, *THE FISSURED WORKPLACE* (2014). See also JUDY FUDGE, *Fragmenting Work and Fragmenting Organizations: The Contract of Employment and the Scope of Labour Regulation*. OSGOODE HALL LAW JOURNAL, Vol. 44, No. 4, (2006), available at <http://ssrn.com/abstract=974916>

¹⁰ Cherry, *supra* note 1 at 596-97.

special classification category only for the gig economy, we keep in mind the idea that any proposal for a new category would ideally be formulated to ameliorate conditions for other forms of precarious work and fissured workplaces.

This paper will proceed by first providing a brief context on crowdwork and the gig economy. The next section will summarize the current proposals for an intermediate category for the gig economy in the United States. The next section 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 business and tradespeople. Italy, on the other hand, saw systemic arbitrage between the standard employment category and the intermediate category. The result was confusion and a movement to strip workers of their rights by misclassifying them downwards. Spain, on the other hand, revised its laws fairly recently, but because of burdensome requirements and a seventy-five percent dependency threshold to enter the third category, the category has failed to catch on, covering only a tiny portion of Spanish workers.

Informed by these experiences, the last section provides a detailed analysis of the larger implications of the three national case studies for labour 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, we must be cognizant of how establishing a third category could result in increasing arbitrage between the categories. In the Italian case, some workers actually happened to lose protections as businesses took advantage of the legal confusion engendered by the creation of an intermediate category.

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 would like the ability to control, train, and maintain a stable workforce, which are hallmarks of the employment relationship. At the same time, we readily acknowledge that there are parts of the on-demand economy that are not about labour relations or potential exploitation of workers; rather, they are about communities, genuine sharing, and innovation. Any reform to address labour 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 and 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 equivalent to professional employment, while exempting those who are using these platforms to create community or to volunteer.

II. THE CONTEXT OF CROWDWORK

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

Technology is increasingly changing the efficiencies and modalities of work.¹¹ In an earlier article one of the authors referred to this trend as “virtual work,”¹² and it has been also been described as “labor as a service,” “peer production,” “playbor,” or “crowdwork.”¹³ 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).¹⁴ Other types of crowdwork are aided by cellphone applications (“apps”) or websites, and 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 who pay for these services, with the app or platform keeping a percentage of the exchange.

According to a recent survey conducted by *Time Magazine*, over 14 million people currently work in the “gig,” “on demand,” “platform,” or

¹¹ 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 Cherry, *supra* note 1; Antonio Aloisi, *Commoditized Workers*, 37 COMP. LAB. L. & POL’Y J. 653 (2016). For additional background information on the gig economy, see Valerio De Stefano, *The Rise of the “Just-in-Time Workforce”: On Demand Work, Crowd Work and Labour Protection in the “Gig-Economy,”* 37 COMP. LAB. L. & POL’Y J. 471 (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. 85 (2015); Orly Lobel, *The Law of the Platform*, __ MINN. L. REV. __ (forthcoming, 2016), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2742380;

¹² Miriam A. Cherry, *A Taxonomy of Virtual Work*, 45 GA. L. REV. 951 (2011) (using 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).

¹³ See Trebor Scholz & Laura Liu, *From Mobile Playgrounds to Sweatshop City*, SITUATED TECHNOLOGIES PAMPHLETS 7 (2010), <http://www.situatedtechnologies.net/?q=node/105>.

¹⁴ See, e.g. Jeff Howe, *The Rise of Crowdsourcing*, WIRED, June 2006, at 176, 178-79 (using term “crowdsourcing” to describe work performed with the aid of contributions from diverse groups of users on the internet); Deborah 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.”). See also IRENE MANDL, *Working conditions in crowd employment and ICT-based mobile work*, The Digital Economy and the Single Market, Foundation for European Progressive Studies, available at <http://www.feps-europe.eu/en/publications/details/417>

“sharing” economy.¹⁵ While these statistics have been the subject of controversy,¹⁶ 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,¹⁷ Handy,¹⁸ Instacart,¹⁹ to Uber.²⁰ These new companies’ labor practices have sparked intense litigation in the United States. Currently, these litigations are focusing on a common doctrinal issue – whether the workers in the on-demand economy have the status of employees or independent contractors. 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, worker’s compensation to name a few, are only triggered for those workers who are deemed to be “employees.”

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.²¹ The “control” test derives from the caselaw and decisions on agency law, and focuses on a principal’s right to control the worker. In brief we will suffice to say that 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.²² On the other hand, elements that lean toward independent contractor classification include high-skilled work, workers

¹⁵ Katy Steinmetz, *Exclusive: See How Big the Gig Economy Really Is*, TIME, Jan. 6, 2016 available at <http://time.com/4169532/sharing-economy-poll/>

¹⁶ Cole Stangler, *December Jobs Report: How Many Gig Economy Workers are There, Really?*, INT’L BUS. TIMES, Jan. 8, 2016, available at <http://www.ibtimes.com/december-jobs-report-how-many-gig-economy-workers-are-there-really-2255765>. In the article, prominent economists Alan Kreuger and Larry Mishel both quibble with the numbers in the Time survey, *supra* note 15, arguing that the numbers of on-demand economy workers are far lower. What is interesting is that both economists have ideological reasons for minimizing the number of workers. If the number of workers in the on-demand economy is small, that supports the argument that there is no need for regulation, a notion that Kreuger, who once consulted for Uber, could get behind. The reason for Mishel’s minimization of the on demand economy is cloudy, but it 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*, THE ATLANTIC, Nov. 16, 2015. 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.

¹⁷ AMAZON MECHANICAL TURK, <https://www.mturk.com/mturk/welcome>.

¹⁸ HANDY, <http://www.handy.com/>.

¹⁹ INSTACART, <https://www.instacart.com/>.

²⁰ UBER, www.uber.com.

²¹ See Katharine V.W. Stone, *Legal Protections for Atypical Employees: Employment Law for Workers without Workplaces and Employees without Employers*, 27 BERKELEY J. EMP. & LAB. L. 251, 257-58 (2006) (listing factors from the cases). Oft-cited cases on this subject include *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 728-29 (1947); *Ira S. Bushey & Sons, Inc. v. U.S.*, 398 F.2d 167 (2d Cir. 1968); *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 326 (1992).

²² See, e.g. *Herman v. Express Sixty-Minutes Delivery Service, Inc.*, 161 F.3d 299 (5th Cir. 1998).

providing their own equipment, workers setting their own schedules, and getting paid per project, not per hour.²³ 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.²⁴ 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.²⁵

C. *The Uber Litigation and Settlement*

Many commentators had hoped these disputes over worker classification would be concluded, or at least be shaped, by the wage and hour lawsuits within platform companies that have been pending in the Northern District of California.²⁶ In the largest of these suits, *O'Connor v. Uber*,²⁷ over 400,000 drivers for the popular ridesharing service were certified as a class to seek employee status and redress under the FLSA for minimum wages and overtime pay. In May 2016, however, *O'Connor v. Uber* settled for a \$100 million payment to the workers and an agreement that workers would receive a hearing before an arbitrator before dismissal.²⁸ While this was a brokered compromise, the settlement failed to bring about any definitive resolution to the classification problem.²⁹ As of the present writing, the court had rejected the settlement as inadequate, and the parties

²³ 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.”)

²⁴ Stone, *supra* note 21 at 257-58.

²⁵ 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 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.¹³ 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.”)

²⁶ See Cherry, *supra* note 1 at 584-85.

²⁷ *O'Connor v. Uber*, 3:13-cv-03826-EMC (N.D. Cal.).

²⁸ Having the claims for dismissal heard by an arbitrator was actually an important aspect of the settlement. Many Uber drivers had complained that they would find themselves disconnected from the platform because of a complaint or because their customer ratings had 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*, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2686227.

²⁹ Miriam A. Cherry, *Gig Economy: Settlement Leaves Legal Issues Unsettled*, LAW 360 BLOG, May 5, 2016, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2776213.

are continuing to negotiate.³⁰ [This section will be updated as events unfold].

Throughout the litigation, the judges in the Northern District of California struggled to characterize these working relationships within the “on/off” toggle of employee status.³¹ As some have noted, with Uber some of the factors in the control test point toward an employee relationship while others are reminiscent of an independent contractor relationship.³² On the one hand, crowdworkers have some flexibility to set their own schedules and can sign on and off the app more readily than do real workers in a traditional environment who work a set shift or who are otherwise tethered to a workplace desk or factory floor. Crowdworkers also use their own cellular telephones, computer equipment, Internet connections, and other tools. Further, EULAs label crowdworkers as “independent contractors” and force them to click “I agree” in order to proceed with work.

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.³³ In fact, many on-demand companies spend a great deal of time and effort to implement quality control policies. With low-skilled crowdwork, the opportunity for entrepreneurship, and with its 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. The possibility for exploitation is high, and low-skilled workers are those that are most in need of FLSA protection.

All of this left the judges in the Northern District of California with a malleable test and an indeterminate legal outcome.³⁴ With the uncertainty of the jury looming, both sides in *Cotter v. Lyft* and *O'Connor v. Uber* would be taking 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, perhaps

³⁰ Jon Weinberg, *Gig News: Federal Judge Rejects Uber Settlement*, On Labor, available at <https://onlabor.org/2016/09/08/gig-news-federal-judge-rejects-uber-settlement/>

³¹ 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) (“The new ways of working, that I believe challenge normal legal analyses, include such new relations of employment as temporary employment placed by an agency and part-time employment rendered by people who have no other employer but are treated as contingent workers without benefits or implicit promises. They also include ways of working that are not, technically, “employment” relations under any statute: independent contractors, free-lancers, consultants, and people out of the labor market after downsizing or other elimination of former career jobs.”).

³² Means & Seiner, *supra* note 11 at 1516-17; Rodgers, *supra* note 11 at 98-99.

³³ Rosenblat & Stark, *supra* note 28 at 11-12.

³⁴ *Cotter v. Lyft*, 60 F. Supp. 3d 1069, 1081-82 (N.D. Cal. 2015).

settlement in these cases was inevitable.³⁵ The drivers, however, stood only to recover small or nominal payments, which led the court to reject that version of a compromise. While we will have to wait and see what the parties and the court will decide, what is certain is that the initial question of whether the workers are misclassified as independent contractors is as of yet 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 already have.³⁶

III. 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 in 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. 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 attain 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.³⁷ Many of the calls for a third category originated in Silicon Valley and these proposals create a third category that, while called something different, virtually mirror independent contractors.³⁸

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 deserve employee status, gig workers would automatically be

³⁵ 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.COM (May 24, 2016), <http://www.alternet.org/labor/uber-litigation-shows-how-company-gets-around-employment-laws>.

³⁶ *Uber Techs. v. Berwick*, No. CGC-15-546378, LEXIS 9488, at *1-2 (Cal. Ct. App. Sept. 21, 2015); Mike Isaac & Natasha Singer, *California Says Uber Driver Is Employee, Not a Contractor*, N.Y. TIMES, June 18, 2015 at B1.

³⁷ 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 bureaucracy for stifling innovation.

³⁸ "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, available at https://www.buzzfeed.com/carolineodonovan/meet-the-new-worker-same-as-the-old-worker?utm_term=.uipR68pav#.qe99zxMmQ

sorted into the hybrid “dependent contractor” category. 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.”³⁹ Media stories and blog posts have debated the third category and its possibilities. For example, a news story in the *Wall Street Journal* discussed the advantages of creating a new third category.⁴⁰ 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, Professor Benjamin Sachs has authored a series of blog posts debating the merits of creating a third category, and has approached the concept with some skepticism.⁴¹

Recently, two more in-depth studies appeared that have called for the creation of a third category. The first was a report sponsored by the Hamilton Project, a subsidiary of the Brookings Institute.⁴² Written by former Deputy Secretary of Labor Seth Harris and Princeton economist Alan Krueger,⁴³ the report advocates the creation of a hybrid category as a default for gig workers. The proposal terms this category, neutrally if perhaps confusingly, “independent worker.”⁴⁴ All gig economy workers would default into this “independent worker” status.⁴⁵ Interestingly, while arguing that weak independent workers deserve better benefits and protections, the Hamilton project report asserts that the platforms could not be considered employers, and neither could the customers, as they are in a triangular relationship.⁴⁶ Paradoxically that leads to the logical conclusion

³⁹ Guy Davidov et al, *The Subjects of Labor Law: 'Employees' and Other Workers*, forthcoming in RESEARCH HANDBOOK IN COMPARATIVE LABOR LAW (Matthew Finkin & Guy Mundlak Eds. Edward Elgar 2015), Hebrew University of Jerusalem Legal Research Paper No. 15-15, available at SSRN: <http://ssrn.com/abstract=2561752>

⁴⁰ Lauren Weber, *What if there were a New Type of Worker? Dependent Contractor*, WALL ST. J., Jan. 28, 2015, available at <http://www.wsj.com/articles/what-if-there-were-a-new-type-of-worker-dependent-contractor-1422405831>.

⁴¹ Benjamin Sachs, *A New Category of Worker for the On-Demand Economy*, June 22, 2015, ON LABOR, available at <https://onlabor.org/2015/06/22/a-new-category-of-worker-for-the-on-demand-economy/>; Benjamin Sachs, *Do We Need an “Independent Worker” Category*, ON LABOR, Dec. 8, 2015, available at <https://onlabor.org/2015/12/08/do-we-need-an-independent-worker-category/>.

⁴² Seth D. Harris & Alan B. Krueger, *A Proposal for Modernizing Labor Laws for Twenty-First-Century Work: The “Independent Worker”*, THE HAMILTON PROJECT, available at http://www.hamiltonproject.org/assets/files/modernizing_labor_laws_for_twenty_first_century_work_krueger_harris.pdf.

⁴³ Krueger carried out this study independently, but - in the past - 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*, available at https://s3.amazonaws.com/uber-static/comms/PDF/Uber_Driver-Partners_Hall_Krueger_2015.pdf

⁴⁴ Harris & Krueger, *supra* note 41 at 2.

⁴⁵ *Id.*

⁴⁶ Conversely, according to the District Court, do not only provide an intermediary platform for drivers and clients to use: quoting the relevant decisions, Uber “does not simply sell software; it sells rides” and Lyft “markets itself to customer as an on-demand ride service, and it actively seeks out those customers”. Lyft provides drivers

that there is no employer present whatsoever, a proposition which other authors have strongly disputed.⁴⁷

Under the Hamilton project proposal, such “independent workers” would gain rights to organize and bargain collectively under the NLRA and would also gain anti-discrimination protections under Title VII.⁴⁸ However, the Hamilton project proposal excludes payment for overtime and minimum wage arrangements, since – at least according to Harris and Kreuger – the gig economy business model does not allow anyone for tracing hours in a precise way or even for attribution of hours to any particular platform. Further, the Hamilton project claims that an hours-based rate of pay does not make sense when dealing with work that is paid by the gig. This stance has been criticized for ignoring the role of big data in the on demand economy.⁴⁹ If anything, there is constant tracking of data of workers in the gig economy that allows for far better calculations of time and work performed than any previous form of work ever could.⁵⁰

The second proposal, from business law professor Abbey Stemler, will appear in the *Fordham Urban Law Journal*.⁵¹ Titled “*Betwixt and Between: Regulating the Shared Economy*,” Stemler advocates 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 creating a hybrid category between employee and independent contractor. As she puts it, “[i]nstead 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.”⁵² While a footnote references the Canadian experience with dependent contractors, this is only a passing reference. No background or in-depth discussion is devoted to the historical or international origins of the category.

On the political front, Senator Mark Warren of Virginia has recently

with “detailed instruction on how to conduct themselves” whilst “Uber would not be a viable business entity without its drivers”.

⁴⁷ See Jeremias Prassl & Martin Risak, *Who is the Employer?*, 37 J. COMP. LAB. L. & POL’Y 619, 620 (2016).

⁴⁸ Harris & Krueger, *supra* note 41 at 17-18.

⁴⁹ Ross Eisenbrey & Lawrence Mishel, *Uber business model does not justify a new ‘independent worker’ category*, Economic Policy Institute (Mar. 17, 2016), available at <http://www.epi.org/publication/uber-business-model-does-not-justify-a-new-independent-worker-category>.

⁵⁰ Matthew Bodie et al, *The Law and Policy of People Analytics*, __ COLO. L. REV. __ (forthcoming 2017).

⁵¹ Abbey Stemler, *Betwixt and Between: Regulating the Shared Economy*, __ FORDHAM URB. L. J. __ (forthcoming 2016).

⁵² *Id.* at 30-31.

begun discussing the need for legislation to address some of the issues surrounding gig-work.⁵³ A recent message from his office noted that many younger Americans were finding themselves working at multiple gigs without benefits. This type of arrangement is reasonable when all goes well, but if there is a problem and no health benefits, unemployment, or worker's compensation, many workers could find themselves without a safety net. As the statement continued it noted that "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."⁵⁴ 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.

IV. 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 an historical and global context, however, we note that other countries have already experimented with an intermediate category, with 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 that is the hallmark of the worker misclassification issue. In this section, we undertake comparisons of the experiences of Canada, Italy, and Spain, in that order. Our goal is to learn from context and experience, so that we can capitalize on those elements of the third category that were successful, and to avoid the aspects of those systems that worked poorly. We will begin with the Canadian experience.

A. The Canadian Experience: Professor Harry Arthurs and "Dependent Contractors"

Historically, Canadian law used the term "employee" as a gateway

⁵³ 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.

⁵⁴ *Id.*

to coverage, employing the binary employee / independent contractor distinction. As most statutory definitions of “employee” in Canadian statutes were circular and unhelpful, the starting point for most analyses was the control test that had evolved under the principle of vicarious liability for torts. In 1947, the traditional control test used in Canada was supplemented with a “fourfold” test that was explained in the well-known case *Montreal v. Montreal Locomotive Works*, including “(1) control; (2) ownership of the tools; (3) chance of profit; (4) risk of loss.”⁵⁵ As one commentator has put it, these are “merely different ways of expressing the same ultimate question of ‘whose business is it?’”⁵⁶ and they bear a similarity to the “entrepreneurial activities test” that has been developed in the United States.

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, widely credited as one of the leading academics of Canadian labor law, wrote about the problem of misclassification in a now-classic 1965 law review article.⁵⁷ The third category was certainly not Arthurs’ invention out of whole cloth, however. Indeed, he claimed to have come across the idea of another category while studying Swedish labor law.⁵⁸ 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.

Professor Arthurs’ article noted that small tradespeople, artisans, plumbers, craftsmen, and the like were increasingly structuring themselves as separate business entities.⁵⁹ 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. Further, these tradespeople would work effectively full-time for one company that effectively paid them a retainer for all of their services and time. As a matter of economic reality, Arthurs noted that these putative

⁵⁵ *Montreal v. Montreal Locomotive Works*, [1947] 1 D.L.R. 161, 169.

⁵⁶ See Brian A. Langille & Guy Davidov, *Beyond Employees and Independent Contractors*, 21 COMP. LAB. L. & POL’Y J. 7. 21 (1999-2000); see also 671122 Ontario Ltd. V. Sagaz Industries Canada, 2001 SCC 59. See also Judy Fudge, Eric Tucker and Leah Vosko, *Employee or Independent Contractor? Charting the Legal Significance of the Distinction in Canada* (July 22, 2011). Canadian Labour and Employment Law Journal, Vol. 10, No. 2, pp. 193-230, 2003, available at: <http://ssrn.com/abstract=1888625>

⁵⁷ Harry W. Arthurs, *The Dependent Contractor: A Case Study of the Legal Problems of Countervailing Power*, 16 U. TORONTO L.J. 89 (1965).

⁵⁸ *Id.* Arthurs relied on the work of Schmidt, *The Law of Labour Relations in Sweden* ch.III (Axel Adlercreutz) (1962). In fact, the Swedish law is somewhat more murky, as later noted by a later author. See Kallstrom, *supra* note 5.

⁵⁹ Arthurs, *supra* note 56.

independent businesses were often almost wholly dependent on the patronage of the larger company.⁶⁰ 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.⁶¹ In fact, he argued, such businesspeople were economically dependent upon a large company in virtually the same subordinate position as an employee.⁶² 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.”⁶³ Arthurs reasoned persuasively that these workers should truly be called “dependent contractors.” He then argued that this group should be included within the definition of employees and that employee protections should be extended to them.⁶⁴

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 v. Teamsters* noted, this was “one law review article which has had an impact on the real world.”⁶⁵ Arthurs’ influence was such that the concept of “dependent contractor” became established within Canadian Law during the 1970s.⁶⁶ The effect was, in the words of subsequent commentators, “beneficial for a significant number of workers formerly

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.* at 114.

⁶⁴ *Id.* at 89. As Arthurs explained: “Unequal power between private persons, no less than between citizen and state, is an unhappy fact of modern society. In one area – employment relations – public policy has clearly adopted collective bargaining as a technique for redressing this imbalance of power. In another area – commercial competition – collective action is generally suspect as the vehicle by which a powerful group may overwhelm weak individuals. This study concerns the paradoxical plight of groups of competitors who may find survival difficult without collective action. 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 combined legislation. They are prisoners of the regime of competition.”

⁶⁵ *Fownes Construction Co. Ltd. and Teamsters*, [1974] 1 CLRBR 452 (British Columbia Labour Relations Board).

⁶⁶ See Brian A. Langille & Guy Davidov, *Beyond Employees and Independent Contractors*, 21 COMP. LAB. L. & POL’Y J. 7, 25 (1999-2000) (“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*, 22 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 labor relations legislation.”).

excluded from the ambit of collective bargaining laws.”⁶⁷ In effect, Arthurs’ academic work resulted in substantial law reform and the extension of the employment laws to a group that had previously been subordinate but that had few protections.⁶⁸ Even a critic of the third category, who largely viewed the category as largely superfluous, still credited Professor Arthurs with instigating a rapid process of legal change.⁶⁹

For an example, the Ontario Labour Relations Act defines “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, or any other thing owned by the dependent contractor, who perform 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.⁷⁰

As another leading commentator has noted, the government has “introduced this intermediate category into statutes in order to extend the reach of the statute beyond typical employees.”⁷¹

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 in way of 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 aggressively asserted itself in Canada as it has in many U.S. cities. But Uber is largely an urban phenomenon, and Uber’s 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. Uber has been operating only sporadically in Edmonton and Calgary because of its uncertain legal

⁶⁷ Langille & Davidov, *supra* note 65 at 26.

⁶⁸ CANADIAN INDUSTRIAL RELATIONS: THE REPORT OF THE TASK FORCE ON LABOUR RELATIONS (1969) AT 30; REPORT OF THE ROYAL COMMISSION ON LABOUR LEGISLATION IN NEWFOUNDLAND AND LABRADOR 243-6 (1972).

⁶⁹ Bendel, *supra* note 65 at 378 (“it 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 to the persons for whom they worked.”).

⁷⁰ Ontario Labour Relations Act, S.O. 1995, c. 1, Sched. A, Section 1.

⁷¹ DAVID J. DOOREY, THE LAW OF WORK: COMMON LAW AND THE REGULATION OF WORK 24 (2016).

status.⁷² On May 4, 2016, the Toronto City Council ultimately voted to allow Uber to operate, after a protracted series of negotiations and legal wrangling.⁷³

The labour 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 be able to access labour protections. One could reason by analogy to cases involving taxicab services, limousines, and cars for hire, and those cases largely found 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.⁷⁴ Similar cases finding employee status for part-time drivers in Canada have been decided in the context of minimum wage⁷⁵ and workers’ compensation.⁷⁶ 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 make the determinations that these were employees under Canadian law.

The 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. In an instance where a driver performed services for multiple online platforms or perhaps was only using gig work as a supplement to the income from other employment, the definition might not provide coverage. But as Uber and other companies have increasingly pushed workers into

⁷² For an interesting viewpoint, see Jerry Dias, *Letting Uber Break the Law Legalizes the Underground Economy*, HUFFINGTON POST, Feb. 17, 2016, available at 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).

⁷³ *Uber To Be Legal in Toronto After City Council Vote*, HUFFINGTON POST, May 4, 2016, available at 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 ONSC 2168 (CanLII) (dismissing 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*, 2015 ABQB 214 (CanLII).

⁷⁴ This comparison was drawn in *Ontario Taxi Workers’ Union v. Hamilton Cab*, 2011 CanLII 782 (ONLB): “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). As stated by the Board in *Niagara Veteran Taxi*: “The purpose of the dependent contractor amendments to the Act was, generally, to enable persons engage [sic] in collective bargaining who, despite numerous earmarks of independent contractors, are in essence dependent for their livelihood on the person or company for whom they perform services for compensation or reward. It would thwart the intention of the Legislature if such persons were denied dependent contractor status just because they receive their compensation directly from the client serviced rather than their employer. This is especially true when neither the scheme of the Act nor the definition of “dependent contractor” stipulates that compensation or reward must come directly from the employer.”

⁷⁵ *Castegar Taxi (1988) Ltd. V. Director of Employment Standards*, 1991 CanLII 1088 (BCSC).

⁷⁶ Decision No. 934/98, 2000 ONWSIAT 3346 (CanLII).

standard shifts that function to preclude the possibility of employment on other platforms, perhaps that is not an obstacle to their inclusion in the category.

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 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 labour protections. The expansive and inclusive protection of Canadian labour law may help us as we 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).⁷⁷ This dichotomy was translated into the two categories of independent contractor and employee (in Italian, “subordinate worker”) in the Civil Code of 1942, with those categories still in force today. A fundamental binary divide applies: only the employee is the subject of the labour laws, and most workers are considered employees.⁷⁸ Article 2094 of the Civil Code (contract of service) covers employees, but contains a vague definition: “a subordinate worker agrees to collaborate with an employer in exchange for a remuneration, performing intellectual or manual labour in the employment of and under the direction of the entrepreneur.”⁷⁹ The provision allows for the implementation of a hierarchical structure, allowing the employer to organize work activities and to react to insubordination. According to Article 2104 of the Civil Code,⁸⁰ the employee has to observe the entrepreneur’s directions while performing work tasks. As building 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

⁷⁷ 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 (1938); Matthew Finkin, *Introduction*, COMP. LAB. L. & POL’Y J. 1, 1 (1999-2000).

⁷⁸ Stefano Liebman, *Employment situations and workers’ protection*, National Studies, ILO, 1999, available at http://www.ilo.org/wcmsp5/groups/public/---ed_dialogue/---dialogue/documents/genericdocument/wcms_205366.pdf

⁷⁹ Article 2094 of the Civil Code (Regio Decreto 16 marzo 1942, n. 262).

⁸⁰ Article 2104 of the Civil Code (Regio Decreto 16 marzo 1942, n. 262).

and structural subordination of the employee) and “dependence,” a socio-economic concept, as the assets and tools of the business belonged to the employer. These elements are considered the “legal distinctive feature of both subordination and employment contract.”⁸¹

The definition of employee under Article 2094 of the Civil Code of 1942 has been widely criticized because of its vagueness.⁸² According to Professor Lodovico Barassi, one of the great scholars of Italian labour law, the distinctive element of “contract of employment” (literally “*contratto di lavoro*”) concept was “*eterodirezione*,” which means managerial and disciplinary powers, *i.e.* the ability of the employer (*conductor operarum*) to modify the content of the contractual relationship unilaterally. 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 – the concrete duties of the employee within the business.⁸³

Other scholars have since grappled with this concept. Although the bedrock of *eterodirezione* came from the Roman law (as a hierarchical description of the relationship),⁸⁴ 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. One line of thought developed the concept of socio-economic inferiority of the worker “who is considered—legally and socially—to be the weaker party in the contract,” but there was no precise threshold for this definition.⁸⁵

Besides the “*eterodirezione*” or managerial power factor,⁸⁶ the case law developed a wide spectrum of subsidiary factors that could indicate the presence of an employment relationship.⁸⁷ A judge could disregard the

⁸¹ Orsola Razzolini, *The Need to Go Beyond the Contract: ‘Economic’ and ‘Bureaucratic’ Dependence in Personal Work Relations*, 31 COMP. LAB. L. & POL’Y J. 267, 270 (2010), available at <http://ssrn.com/abstract=1607938>

⁸² Michele Tiraboschi & Maurizio Del Conte, *Employment Contract: Disputes on Definition in the Changing Italian Labour Law*, available at http://www.jil.go.jp/english/events/documents/ccls04_delconte2.pdf

⁸³ Razzolini, *supra* note 80 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.

⁸⁴ For a critical review, see LUCIANO SPAGNUOLO VIGORITA, *SUBORDINAZIONE E DIRITTO DEL LAVORO: PROBLEMI STORICO-CRITICI* (1967); LAURA CASTELVETRI, *IL DIRITTO DEL LAVORO DELLE ORIGINI*, 222 (1994); Luigi Mengoni, *La questione della subordinazione in due trattazioni recenti*, *Riv. It. Dir. Lav.*, 1986, *Id.* IL CONTRATTO DI LAVORO, MARIO NAPOLI, MILANO (2004).

⁸⁵ Adalberto Perulli, *Subordinate, Autonomous and Economically Dependent Work: A Comparative Analysis of Selected European Countries*, 137 in GIUSEPPE CASALE (ed), *THE EMPLOYMENT RELATIONSHIP – A COMPARATIVE OVERVIEW* (2011).

⁸⁶ Cass. 22 November 1999 no 12926, RIDL 200011633. Moreover, in order to prove a subordinate relationship, this power should imply specific and well-defined directives rather than programmatic and vague instructions, since the latter are also compatible with the independent contractor’s category. Their compatibility with autonomous work are not sufficient for establishing an employment relationship

⁸⁷ Cass. sez. lav., 27/03/2000, n. 3674. “When an assessment of unambiguous elements such as the exercise of the managerial and disciplinary power is

contractual label when the substance of the work relationship contained legal indicia of subordination (the so-called “primacy of facts” principle).⁸⁸ These factors include: (i) the requirement that the worker follow reasonable work rules; (ii) the length of relationship; (iii) the respect of set working hours; (iv) salaried work; and (v) absence of risk of loss related to the production. This is a multifactorial test and none of these elements is dispositive.⁸⁹

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 labour. Article 2222 of the Civil Code, which governs businesses, defines “*contratto d’opera*” (contract for service) as one carried out by a person “who performs work or services for remuneration, mainly by means of his own labour and in the absence of a relationship of subordination vis-a-vis the client.”⁹⁰

Roughly speaking, general principles of civil and commercial law apply to the self-employed worker (with some particularities since human dignity is at stake), with the independent contractor considered “as substantially and formally equal to the counterparty.”⁹¹ The statute operates by contrast, as it refers “*a contrario*” to Article 2094 of the Civil Code: independent work is performed without subordination. Moreover, an independent contractor relationship is supposed to eliminate economic subordination. The concrete content of the job performance could be identical between an employee and an independent contractor, however. The principle is that one could carry out “every kind of labour for which payment is calculated, whether intellectual or manual,” in either category.⁹² This confirms that, for the purposes of the distinction between being an employee and being an independent contractor, the core of the two definitions is the way in which tasks are accomplished and structured.⁹³

A leading case regarding misclassification by a courier service highlights these principles.⁹⁴ Despite the contractual label given to the workers in the contract, the labour court ruled that the worker was actually an employee on the basis of socioeconomic dependence. The court reasoned that the delivery driver was part of the economic and business

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)...”

⁸⁸ Art. 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.

⁸⁹ Maurizio Del Conte, *Lavoro autonomo e lavoro subordinato: la volontà e gli indici di denotazione*, Orientamenti Della Giurisprudenza Del Lavoro 66 (1995).

⁹⁰ Article 2222 of the Civil Code (Regio Decreto 16 marzo 1942, n. 262).

⁹¹ See Perulli, *supra* note 84.

⁹² Cass., Sez. Lav., 03/04/2000, n. 4036

⁹³ Tiraboschi & Del Conte, *supra* note 81 at 153.

⁹⁴ It is surprising how, after decades and in a very different context, the job, i.e. driving and courier service are so similar to what is offered in the gig economy today.

organization of the principal.⁹⁵ The case was appealed and the worker was deemed to be an independent contractor.⁹⁶ The highest judicial authority, *Corte di Cassazione*,⁹⁷ agreed that this worker was an independent contractor. The courier case demonstrates that in labour 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, greater importance is given to the factual intentions of the parties, the so-called "*nomen iuris*" (i.e. contractual label) expressed at the signature of the contract.⁹⁸ Subsequent elaboration made it clear that workers could still have a considerable amount of autonomy (granted by general and functional directives) yet still be classified as employees.

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 sought to extend certain procedural protection to the weakest of the independent contractors, and perhaps incidentally brought about the genesis of the third category, deemed "*lavoratore parasubordinato*." Comprised of a sub-set of self-employed workers, these *lavoratore parasubordinato* were distinguished as those workers who were "collaborating with a principal/buyer under a continuous, coordinated and predominantly personal relationship, although not of subordinate character." Four "concurrent" factors need to be ascertained in order to denote this intermediate category: (i) collaboration; (ii) continuity and length of the relationship; (iii) functional coordination with the principal; (iv) a predominantly personal service.⁹⁹

The quasi-subordinate workers were commonly called "co.co.co" as an abbreviation for "continuous and coordinated collaborators." As a

⁹⁵ Pret. Milano 20 giugno 1986, in Riv. it. dir. lav., 1987, II, p. 70. "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)"

⁹⁶ 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"

⁹⁷ Cass. 14 aprile 1989 n. 5671 (mass.).

⁹⁸ This idea could seem inconsistent with the multifactorial test aimed at inferring the nature of the contract by analysing the concrete ways in which the overall performance is accomplished, disregarding the wording of the contracts ("primacy of facts"). See Cass 29 May 1996 no 4948, DPL 1996, 3338.

⁹⁹ 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.

consequence, the legislation was partly responsible for a relaxation of the rigid employee/independent contractor dichotomy. What is remarkable is the fact that the 1973 Italian law does not aim at reacting against disguised employment relationships, conversely “it is something physiologically connected to certain kinds of economic organizations that the law has to recognize and regulate.”¹⁰⁰

Looking at the content of the *lavoratore parasubordinato* category, not all rights of employees were extended to these workers. On the one hand, the protections did include access to labour courts. These rights, however, were limited, and basically procedural, as these quasi-subordinate workers were still considered outside the scope of the substantive labour law. It was much cheaper to hire a quasi-subordinate worker than an employee, because employees are entitled to substantive labor rights, annual leave, sick leave, maternity leave, other employee benefits, overtime, and job security against unfair dismissal.¹⁰¹ At that time, the quasi-subordinate workers enjoyed none of these substantive protections.

Within the first decade after the introduction of the third category, undesirable effects occurred. Businesses increasingly began to hire workers on under the *lavoratore parasubordinato* category. Most of these quasi-subordinate workers would all previously have been classified as employees. Consequently, the *lavoratore parasubordinato* category was being used to hide *bona fide* employment relationships in order to reduce costs and evade the protections workers are entitled to under Article 2094 of the Civil Code.

Over time, the result was employer arbitrage between the categories. 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 inadequately defined notion.”¹⁰² 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. They were seen as a “low-cost” alternative to stable employment relationships, especially because “no social security contributions had to be paid in their regard by the principal, at that time.”¹⁰³ In 1995, with the Pension Reform, Act No 335 of 1995, the legislature did enact a modest intervention by granting self-employed

¹⁰⁰ Razzolini, *supra* note 80 at 296.

¹⁰¹ “[S]ome 90 per cent 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.” See Tiraboschi, & Del Conte, *supra* note 81 at 156.

¹⁰² Liebman, *supra* note 77.

¹⁰³ ULRIKE MUEHLBERGER, *DEPENDENT SELF-EMPLOYMENT, WORKERS ON THE BORDER BETWEEN EMPLOYMENT AND SELF-EMPLOYMENT* (2007).

workers social security contributions previously reserved for employees.¹⁰⁴

In 2003, the legislature amended the content of the quasi-subordinate category with the Legislative Decree No. 276/2003 (the so-called Biagi Reform). Since many workers that functioned as employees were incorrectly classified as quasi-subordinate by businesses, the legislature required the [collaboration] 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”). The legislature intended the measure to verify the authenticity of the [collaborations] and protect against businesses disguising employees as quasi-subordinate. The “accomplishment of a specific project, programme or phase of production” was an indispensable element for checking the validity of a project work contract. If there was no 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 backpay. These projects were required to be fixed term contracts with a definite end date.

However, the “*lavoro a progetto*” (i.e. project work, “co.co.pro”) 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.¹⁰⁵ This modification was supposed to counter-balance the contractual power of the employer by defining in advance the details and conditions of the project.¹⁰⁶ The central aim of the intervention at issue was to reduce the number of precarious forms of employment leading to illicit work and evasion of social insurance contributions.¹⁰⁷ In addition to the requirement of 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. Professor Perulli theorized that the quasi-subordinate group was only a “zone,” rather than its own category or “tertium genus.” As a general policy evaluation, a Green Paper issued by the Commission of the European Communities in 2006 defined these reform efforts “somewhat tentative and partial,” although they expressed the will of the Italian legislature “to tackle problems in this complex area.”¹⁰⁸

Although the centrality of the notion of the project was greeted as “the most innovative [and critical] element . . . in the legislative decrees

¹⁰⁴ KARL HINRICH & MATTEO JESSOLA, LABOUR MARKET FLEXIBILITY AND PENSION REFORMS: FLEXIBLE TODAY, SECURE TOMORROW? (2012).

¹⁰⁵ Riccardo Del Punta, *La scomparsa dei co.co.co.*, *lavoce.info*, available at <http://www.lavoce.info/archives/21781/la-scomparsa-dei-co-co-co/>

¹⁰⁶ Tiraboschi & Del Conte, *supra* note 81 at 155-56.

¹⁰⁷ Gabriele Piazza & Martin Myant, *Italy’s labour market reforms of 2012: did they reduce unemployment?* European Trade Union Institute Working Paper, 2015.11.

¹⁰⁸ Commission of the European Communities, *Modernising Labour Law to Meet the Challenges of the 21st Century: Green Paper*, COM (2006) 708 final (2006), available at <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52006DC0708&from=EN>

implementing the Biagi law,” it was not as successful as its proponents had expected it would be.¹⁰⁹ The Biagi law was criticized “for questionable techniques, the unsuitability of the selection requirements, deficient protective measures and the inappropriateness of the severe yet inefficient sanction system.”¹¹⁰ Despite the legislature’s effort to safeguard the rights of quasi-subordinate workers, their overall level of rights and protection remained less than those granted to employees.

In 2012, the Italian legislature passed Law No. 92/2012 (the so-called Monti-Fornero Reform)¹¹¹ to counteract the misuse of the “*lavoro a progetto*” definition by making employee status the default.¹¹² 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.¹¹³ Moreover, the Monti-Fornero Reform stated that the project may not merely overlap the employer’s core business or consist merely of executing low-skilled or routine duties. The law also granted a substantive set of rights to the quasi-subordinate workers, in that it required compensation compliant with minimum compensation levels.¹¹⁴ 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 just one of several policies aimed at promoting “a general reshaping of labour protections to “counter the misuse of the legal schemes already introduced in order to provide flexibility.”¹¹⁵ 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, it also created burdensome regulations and bureaucracy.

¹⁰⁹ Adalberto Perulli, *Un Jobs Act per il lavoro autonomo: verso una nuova disciplina della dipendenza economica?*, WP C.S.D.L.E. “Massimo D’Antona”.IT – 235/2015, available at http://csdle.lex.unict.it/Archive/WP/WP%20CSDLE%20M%20DANTONA/WP%20CSDLE%20M%20DANTONA-IT/20150114-124113_perulli_n235-2015it-pdf.pdf

¹¹⁰ Perulli, *supra* note 84.

¹¹¹ Legge 28 giugno 2012, n. 92 - Disposizioni in materia di riforma del mercato del lavoro in una prospettiva di crescita.

¹¹² At those times, project workers were estimated at 3.2% of the employed, a level which 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?* Astril Working Paper n° 7/2014, available at http://www.astril.org/files/WP_7_2014_mandrone.pdf. See also Marco Biagi, *The Effect of the Global Crisis on the Labor Market: Report on Italy*, 35 COMP. LAB. L. & POL’Y J. 371-396 (2014).

¹¹³ Michele Tiraboschi, *Italian Labour Law after the so-called Monti-Fornero Reform* (Law No. 92/2012), E-Journal of International and Comparative LABOUR STUDIES, Volume 1, No. 3-4 October-December 2012; Orsola Razzolini, *La nuova disciplina delle collaborazioni organizzate dal committente. Prime considerazioni*, WP C.S.D.L.E. “Massimo D’Antona”.IT – 266/2015, available at http://csdle.lex.unict.it/Archive/WP/WP%20CSDLE%20M%20DANTONA/WP%20CSDLE%20M%20DANTONA-IT/20150921-093331_razzolini_n266-2015itpdf.pdf

¹¹⁴ 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.

¹¹⁵ 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 (2014), available at <http://ssrn.com/abstract=2363932>. Maria Vittoria Ballestrero, *L’ambigua nozione di lavoro parasubordinato*, *Lavoro e diritto*, 1987, 41.

Finally, the 2015 “Jobs Act” fundamentally eliminated the concept of project work that had its genesis in the 2003 Biagi law. This was intended to reduce the use of atypical contracts and to establish the principle that the default category is employee. This trend 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.”¹¹⁶ The legislature implemented incentives, including funding of some employee benefits and liberalizing dismissal requirements, that made the classification as an employee a more favoured option.¹¹⁷ While the quasi-subordinate category stills exists, it is now limited in its scope as well as its protections, further emphasizing the shift of workers into the employee category.¹¹⁸ Essentially, this 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 to 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.¹¹⁹

*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 resulted in an increase in precarious and non-standard work. That remained the case in spite of the gradual extension of protective measures through the reforms up until 2015. 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

¹¹⁶ Michele Tiraboschi, *The Italian Labour Market after the Biagi Reform*, 21 INT’L. J. COMP. LAB. L. & INDUS. REL. 149 available at http://adapt.it/adapt-indice-a-z/wp-content/uploads/2013/09/Tiraboschi_Journal.pdf

¹¹⁷ 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.

¹¹⁸ 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 which is ‘mainly’ (not ‘exclusively’) personal and organized in coordination with the principal. Only co.co.co contract complying with this provision will be valid and fully effective also after January 1, 2016.

¹¹⁹ Emanuele Dagnino and Pietro Manzella, *Le parole del lavoro. Il lavoro etero-organizzato: una sfida per i comparatisti*, Bollettino Adapt, available at http://www.bollettinoadapt.it/wp-content/uploads/2016/04/Parole_Lavoro_PM_ED_15_04.pdf

and supporting the quasi-subordinate category was to extend labour 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.¹²⁰ Unfortunately, in the words of Professor Perulli, the history of the quasi-subordinate category is an “unfortunate series of legislative interventions.”¹²¹ The third category was not a panacea for the misclassification issue. Instead the changes created even more uncertainty for both businesses and workers.

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 that provided by licensed and regulated taxis. Italian courts have yet to make a determination about the classification status of the drivers on ridesharing platforms¹²². More comprehensive regulation may be coming as there was a proposal in March 2016 to regulate the sharing economy in Italy. This proposal, however, also did not focus on the misclassification or labour issues. At the level of the EU, there is a movement to harmonize legislation across Europe so as to become more attractive to digital platforms and new economy companies. The EU, however, is also concerned about these platforms disguising employment relationships. As of the date of this article, various reforms and proposals are just beginning to be studied and debated.

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

The Spanish Workers’ Act 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.”¹²³ Spanish independent

¹²⁰ Adalberto Perulli, *Il lavoro autonomo, le collaborazioni coordinate e le prestazioni organizzate dal committente*, WP C.S.D.L.E. “Massimo D’Antona”.IT – 272/2015, available at http://csdle.lex.unict.it/Archive/WP/WP%20CSDLE%20M%20DANTONA/WP%20CSDLE%20M%20DANTONA-IT/20151015-010522_perulli_n272-2015itpdf.pdf

¹²¹ Perulli, *supra* note 84.

¹²² Alessio Di Amato, *Uber and the Sharing Economy*, The Italian Law Journal No. 1 (2016), available at <http://www.theitalianlawjournal.it/data/uploads/italj-vol-02-no-01-2016/10-di-amato-177.pdf>

¹²³ Article 1.1 Ley, 8/1980, de 10 de marzo 1980. “Those persons who carry out a trade or profession for economic gain on a regular, personal and direct basis on their own account, in the absence of any supervision or direction from a third party, whether or not they employ other workers on another’s account.” Ley, 8/1980, de 10 de marzo.

contractors were left to constitutional, civil and commercial provisions of the law.¹²⁴ Just like Italy and Canada, the law started with a 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: (i) the exercise of managerial power (“*dirección*”), and (ii) how much autonomy the workers have.¹²⁵ 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. “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.”¹²⁶ 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.¹²⁷

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, labour courts interpreted the definition of employee expansively, using a default assumption of an employment relationship.¹²⁸ To determine whether an individual is an employee, case law analyses the following concurrent elements: (i) the level of integration within the organization; (ii) the dependency upon one employer; (iii) fixed working time; (iv) provision of professional tools and uniform; (v) the extent of an employee’s decision-making power.

According to the government-funded research centre EurWORK, in Spain and many other European countries, the independent contractor

¹²⁴ A relatively recent one, Constitución Española 27 diciembre 1978.

¹²⁵ Perulli, *supra* note 84; J. Lujan Alcaraz, *Introducción*, *El Estatuto del Trabajo Autónomo*. Análisis de la Ley 20/2007, de 11 de julio, Laborum, 2007, 20. Royal legislative decree No. 1/1995 of 24 March, through which is approved the recast text of the law on the Statute of Workers, Official Gazette, No. 75, dated 29 March 1995, pp. 9654–9688.

¹²⁶ 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); Consejo General del Poder Judicial, *Trabajadores autónomos*, 146 estudio de derecho judicial 100 (2008); Perulli, *supra* note 84.

¹²⁷ STS 29 dic. 1999 (RJ 1427/2000)

¹²⁸ “El contrato de trabajo [...] se 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”. Real Decreto Legislativo 1/1995, de 24 de marzo, por el que se aprueba el texto refundido de la Ley del Estatuto de los Trabajadores (Vigente hasta el 13 de Noviembre de 2015).

category was used to hide *bona fide* employment relationships.¹²⁹ Hiding employees as independent contractors was especially prevalent in the building and construction sector of the economy. 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.”¹³⁰ Over time, the growth towards a “new generation” of self-employment (e.g., freelance consulting) accelerated, since recruiting self-employed workers was more convenient than hiring employees. Also, self-employed workers were desirable because businesses wanted to mobilize and de-mobilize their workforces rapidly to ensure a certain degree of flexibility and fluidity.

In 1995, Spanish social partners (CCOO, “*Confederacion Sindical de Consumes Obrera*,” UGT, “*Union General de Trabajadores*,” and the Government jointly signed the Toledo Compact (“*Pacto de Toledo*”).¹³¹ The aim of the Toledo Compact was to criticize the absence of legislation governing independent contractors. In 2002, a trade union proposed the widening of rights for independent contractors who were economically dependent.¹³² The proposal was engendered by a trend of modernization as well as flexibilization of the national industrial relations that ended the era when the employee was the “protagonist” of the social and political life of Spain.¹³³ It was developed after the final plan envisioned by the European Council of Lisbon (2000) that aimed to shape a more competitive social Europe.¹³⁴

In 2007, the Spanish legislature, after debates and proposals,¹³⁵ enacted a new law (Law 20/2007, July 11, *Estatuto del trabajo autónomo*, LETA, *i.e.* Statute for Self-Employed Workers).¹³⁶ LETA regulated all forms of self-employed or independent contractor-type of work and covered

¹²⁹ Antonio Corral and Esteban Villarejo, *Spain: Self-employed workers*, EURWork, 2009, available at <http://www.eurofound.europa.eu/observatories/eurwork/comparative-information/national-contributions/spain/spain-self-employed-workers>

¹³⁰ *Id.*

¹³¹ Alberto Valdés Alonso, *La regulación del trabajo autónomo económicamente dependiente en la ley 20/2007: apuntes para un debate*, REVESCO, Revista de Estudios Cooperativos, 96, 2008, 133.

¹³² *Id.*

¹³³ Antonio Ojeda Avilés, *La «externalización» del derecho del trabajo*, Revista Internacional del Trabajo, Volume 128, 1-2, 51–72, June 2009.

¹³⁴ Lisbon Council, 23 and 24 march 2000, Conclusions of the Presidency. Available at http://www.europarl.europa.eu/summits/lis1_en.htm

¹³⁵ See LAS TRANSFORMACIONES DEL DERECHO DEL TRABAJO EN EL MARCO DE LA CONSTITUCIÓN ESPAÑOLA: ESTUDIOS EN HOMENAJE AL PROFESOR MIGUEL RODRÍGUEZ-PIÑERO Y BRAVO-FERRER (María Emilia Casas Baamonde et al eds., 2006).

AA. VV. UN ESTATUTO PARA LA PROMOCIÓN Y TUTELA DEL TRABAJADOR AUTÓNOMO, Informe de la Comisión de Expertos, designada por el Ministerio de Trabajo y Asuntos Sociales, para la elaboración de un Estatuto del Trabajador Autónomo

¹³⁶ Law No. 20/2007, Official Gazette, No. 166, 12 July 2007, pp. 29964–29978.

all aspects of self-employment.¹³⁷ This is the most commonly recognized virtue of the Spanish legislative intervention towards an “experimental direction.”¹³⁸ Self-employed workers are defined as individuals “not subject to the authority or organization of another person.” This comprehensive and systematic intervention was justified in the light of the profound changes that the Spanish labour market was undergoing.¹³⁹

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*). Moreover, self-employed workers can retire early when employed in dangerous industries (“*jubilación anticipada*”), without forfeiting social security benefits. Lastly, they can collectively organize and exercise collective rights, including the right to strike and to bargain collectively (“*acuerdos de interés profesional*”).¹⁴⁰

The Creation of the TRADE

Most interestingly for our analysis, LETA also crafted a third category of workers: “*Trabajador Autonomo Economicamente Dependiente*” (or TRADE, *i.e.* economic dependent self-employed worker). Since Spain has a civil legal system workers needed to rely on legislation to claim their rights. The legislature, in passing TRADE was trying to ensure increased protections for a subset of independent contractors. The TRADE were not extended 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, right to

¹³⁷ It is worth noting that Spain was the first country to systematically regulate self-employed relationships by drafting a “comprehensive and systematic legal framework covering all aspects of self-employment.” See EURWork, Id.

¹³⁸ Jaime Cabeza Pereriro, *The status of self-employed workers in Spain*, 147 INT’L. LAB. REV. 91, 93 (2008), available at http://www.ilo.org/Wcmsp5/Groups/Public/---Ed_Dialogue/---Actrav/Documents/Meetingdocument/Wcms_161302.Pdf.

¹³⁹ 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 the 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).

¹⁴⁰ The Law on the Right to Organize is implicated by the right to collectively bargain, since it admits the right to freedom of association and also, according to Cruz Villalón, the right to set up a unions of their own. Law No. 11/1985 of 2 August 1985, Official Gazette, No. 189, dated 8 August 1985, pp. 25119-25123. http://www.ilo.org/wcmsp5/groups/public/---ed_dialogue/---actrav/documents/meetingdocument/wcms_161302.pdf p 97

suspend work for family or health reasons, and collective bargaining. They are entitled to an annual vacation, a set number of days off per week, a limit on working hours, and the right to be covered by insurance against work-related accidents and diseases and protection for workers unemployed as a result of business failure.¹⁴¹ 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].”¹⁴² 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.¹⁴³

It should be emphasized that the category was not a reaction to disguised employment relationships, but a way to offer a special legal arrangement for authentic self-employed workers. The legislative intervention represents a wider trend of expanding the class of individuals protected by labour 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 Villalon, the focus on managerial power and the degree of organization was reduced progressively, to such an extent that self-employed jobs ended up being included within the employee category (namely, domestic work, teleworking, work in group).¹⁴⁴ As a result of the introduction of TRADE, the traditional “binary divide” was ended.

The crucial component for determining whether a worker is a TRADE rests on a threshold of economic dependency measured by a percentage, in the law, 75%. There are other criteria, framed as multifactorial tests that may also be considered. To distinguish TRADE from employees, the factors include: (i) amount of independent work or reliance on the principal’s directives; (ii) the worker undertakes an obligation of personal service, without using subcontractors; (iii) the worker bears the entrepreneurial risk; (iv) actual ownership of the tools and instrumentalities of production. To distinguish TRADE from independent contractors or self-employed workers, the factors include: (i) a dependence

¹⁴¹ Pereriro, *supra* note 136.

¹⁴² *Id.* at 93.

¹⁴³ Adalberto Perulli, *Un Jobs Act per il lavoro autonomo: verso una nuova disciplina della dipendenza economica?*, WP C.S.D.L.E. “Massimo D’Antona”.IT – 235/2015. Available at <http://csdle.lex.unict.it/docs/workingpapers/Un-Jobs-Act-per-il-lavoro-autonomo-verso-una-nuova-disciplina-della-dipendenza-economica/5299.aspx>

¹⁴⁴ The “expansive trend” was slowed down first by removing some form of work from the employee category (it is the case of goods transport workers, who – in 1994 – were excluded from the scope of labour law). See J. Cruz Villalon, *Il lavoro autonomo economicamente dipendente in Spagna*, Diritto, Lavoro, Mercati, 2013, p. 287 ss.

on the principal for at least 75% of the worker's income;¹⁴⁵ (ii) not hiring subcontractors, (iii) the performance of an economic or professional activity directly and predominantly vis-à-vis one single principal. An implicit requirement of TRADE encompasses "continuity of the performance," this is why the 2007 LETA also regulates working hours, holidays, time and place of the duties rendered. In sum, the critical element of the TRADE test is the percentage of income gained from work-related or 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 the worker himself has to disclose his status as a TRADE to the principal at the time of inception of the contract and to "register" the position with the social administration agency. Furthermore, any change in the worker's situation that affects the worker's status as a TRADE (e.g., alteration of the percentage of the worker's economic dependency) needs to be disclosed to the principal and the administrative agency. The principal may need to verify information provided by the worker. These strict requirements are burdensome and time-consuming for both workers and businesses.¹⁴⁶

A debate has developed both among scholars and judges about the legal effect when these procedural elements are not followed. In 2011, the Tribunal Supremo has resolved the debate by stating that the disclosure of the worker as a TRADE is an "*ad substantiam*" requirement (i.e. it is mandatory),¹⁴⁷ while the social security registration has an "*ad probationem*" effect (i.e. permissive).¹⁴⁸ The New Spanish Labour Procedure Act 36/2011 affirmed that the TRADE contract must be formalized in order to be valid.¹⁴⁹ Absent a written contract, the presumption is that a worker is an employee. In 2015 a new reform granted the TRADE 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.¹⁵⁰ The reform was intended to reconcile private

¹⁴⁵ 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*, Revista universitaria de ciencias del trabajo, Nº 11, 2010, 177-194

¹⁴⁶ Mark Freedland, *Application of labour and employment law beyond the contract of employment*, 146 INT'L LAB. REV. 3 (2007).

¹⁴⁷ STS, June 12, 2012, RJ 8539.

¹⁴⁸ STS, June 11, 2011, RJ 6391.

¹⁴⁹ Law 36/2011 (Boletín Oficial del Estado October 11, 2011). See also Tiziano Treu *Le riforme del lavoro: Spagna e Italia*, Diritto delle Relazioni Industriali, n. 3/2015 http://www.bollettinoadapt.it/wp-content/uploads/2015/09/dri_3_2015_treu.pdf

¹⁵⁰ Ley 31/2015, de 9 de septiembre, 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 «BOE» núm. 217, de 10 de septiembre de 2015. See Eduardo Rojo Torrecilla, *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*. <http://www.eduardorjotorrecilla.es/2015/09/el-trabajador-autonomo-economicamente.html>

and professional life by preventing such situations from causing the termination of the contract.¹⁵¹

The Low Number of TRADE Workers and Developments on the EU Level

In Spain, few workers have actually become classified as TRADE. This is a result of the burdensome procedural requirements required for TRADE status. Only 9,000 TRADE contracts were signed in 2012 compared to the 400,000 forecasted.¹⁵² In 2014, according to *Servicio Público de Empleo TRADE*,¹⁵³ the population of self-employed workers was several million, while the number of TRADE was less than 16,000. This number is inconsistent, as in the same year, Instituto Nacional de Estadística counted 258,000 TRADE. 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[.]”¹⁵⁴

Meanwhile, Spanish labour unions complained that the TRADE category was inappropriately covering what should be traditional employment relationships. Conversely, employers’ associations were afraid of the opposite risk: that the category would swallow up authentic self-employed workers, augmenting business costs. According to Professor Cruz Villalón, each category is being devalued; employees are pushed to reclassify as TRADE, and TRADE are being pushed to reclassify as self-employed or independent contractors. Moreover, Villalón criticized TRADE as creating an artificial economic dependency threshold and, ultimately, an artificial category.¹⁵⁵

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.”¹⁵⁶ It could be concluded that this legislation should be revisited, also in terms of content, because it offers protections too close to those of the typical

¹⁵¹ Also while breastfeeding a child under nine months, or to take rest periods for adoption or pre-adoptive or permanent foster care, or to take care of a child under the age of seven in charge, or a family member in a dependent or a relative disability.

¹⁵² According to recent surveys by the Spanish organization “*Unión de Asociaciones de Trabajadores Autónomos y Emprendedores*,” only 2.4% of the workforce have one principal and consequently “were covered by the fairly extensive protections [for TRADE] afforded by the Law of 2007.”

¹⁵³ [Insert latest statistic]

¹⁵⁴ V. T. Alvarez Martín Nieto, *Caída de los autónomos económicamente dependientes*, available at http://cincodias.com/cincodias/2015/02/09/autonomos/1423494891_645557.html.

¹⁵⁵ Juan Antonio Hernández Nieto, *La desnaturalización del trabajador autónomo: el autónomo dependiente*, *Revista universitaria de ciencias del trabajo*, N. 11, 2010, 177-194

¹⁵⁶ Commission of the European Communities, *Modernising Labour Law to Meet the Challenges of the 21st Century: Green Paper*, COM (2006) 708 final (2006), available at <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52006DC0708&from=EN>

employee.

Interestingly, a Barcelona judge has referred several questions about on demand economy to the European Court of Justice. The European Court of Justice is expected to decide whether Uber is a taxi service or a digital service provider.¹⁵⁷

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 take 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, but saw it only made applicable to a small percentage of self-employed workers. The law assumes that TRADE workers are predominantly working for one business; this could be a problem for platform workers who are working for multiple platforms. Looking at the causes of this very limited use of the category, it comes down to a heavy burden of requirements to be met, including the use of a strict economic threshold.

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. Attempts were made through the years 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 and 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.¹⁵⁸ Italy's framework enacted

¹⁵⁷ See Murad Ahmed, *Judge refers Spanish Uber case to European Court of Justice*, FT.COM, available at <http://on.ft.com/1DqITdc>.

¹⁵⁸ Giuseppe Santoro Passarelli, *El trabajo autónomo económicamente dependiente en Italia*, Documentación Laboral, N° 98, 2, 2013, 9-18.

by the 1973 Reform does not provide substantive protections. Protections reserved to TRADE are much stronger than the ones reserved to *lavoratori parasubordinati*. In both Spain and Italy, the intermediate category was misused. 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 being in 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 labour law protection. The end result was increased coverage and the provision of 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.

V. 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, many providing services that in many respects resemble the services provided by modern-day gig economy companies TaskRabbit, Postmates, Grubhub, and Uber. As such these countries’ experiences with adoption of the third category are useful in terms of evaluating what types of policies are successful and which have met with problems.

At the outset, we should note that the debate over misclassification actually 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 – illegitimate practices that lead to misclassification of what truly are employment relationships. These practices serve to 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 arbitrating 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. If establishing a third category might alleviate legitimate confusion about how to apply to the test to gig workers, that would solve the first problem. However, if the consequences of establishing such a third category would be arbitrage and downgrading of employees to intermediate status, that would do nothing to eliminate 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 there became widespread in response to the adoption of the quasi-subordinate workers.

A. Working Backward 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, what kinds of rights and responsibilities go along with the third category are just as important, if not more important, 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 then 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 then 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 engagement with this line of analysis, consider the Harris and Krueger proposal in which those falling into the “independent worker” category would not be guaranteed minimum wage. The reasoning

behind the proposed exclusion is that, Harris and Krueger argue that in the gig economy it is difficult to determine an hourly wage and that, in addition, the hours may be impossible to trace across platforms.¹⁵⁹ However, that argument shows a lack of understanding about the technology that is used for for crowdwork. Contrary to Harris and Krueger’s assertion, there is no lack of data or difficulty tracing hours. In fact, the platforms that enable the matching of workers with those 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. There is other data generated by both workers and customers that is collected and analyzed by platform companies, much of which is used to improve future performance. Indeed, many platforms can measure precisely how much time and effort was spent on a task, down to the minute spent waiting in traffic, in the case of a ridesharing app, or down to the keystroke 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.¹⁶⁰

The idea of exempting gig workers from minimum wage requirements seems poorly thought-out.¹⁶¹ To date, many of the gig-worker cases that have alleged worker misclassification umbrella have been FLSA claims.¹⁶² 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 dating back to 2009, many crowdwork platforms pay less than minimum wage, with some paying amounts that are on average less than half that of the federal minimum wage.¹⁶³

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.¹⁶⁴ 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.¹⁶⁵ If there is a generally a

¹⁵⁹ Harris & Kreuger, *supra* note 41 at 14.

¹⁶⁰ Bodie et al, *supra* note 49 (describing the rise of people analytics and the use of big data at work, and expressing concerns for both user and worker privacy).

¹⁶¹ Miriam A. Cherry, “A Minimum Wage for Crowdwork?” in CROWDWORK – BACK TO THE FUTURE? PERSPECTIVES ON DIGITAL LABOR, CROWDWORK – ZURUCK IN DIE ZUKUNFT? PERSPEKTIVEN DIGITALER ARBEIT (2014) (book chapter translated into German for book publication).

¹⁶² Cherry *supra*, note 1 at 584-85 (chart cataloging the currently pending gig economy company cases).

¹⁶³ Miriam A. Cherry, *Working for (Virtually) Minimum Wage*, 60 ALA. L. REV. 1077, 1093-94 (2009).

¹⁶⁴ Katrina vanden Heuvel, *How a \$15 minimum wage went from “extreme” to enacted*, WASH. POST, April 5, 2016, available at 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.

¹⁶⁵ BARBARA EHRENREICH, NICKEL AND DIMED: ON (NOT) GETTING BY IN AMERICA (2001).

movement to raise the federal minimum wage, how does it make sense to have a proposal concurrently to eliminate minimum wage completely for gig workers? This is a rhetorical question of course; 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.¹⁶⁶

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?¹⁶⁷ On platforms, especially those involving purely digital labor, individual workers are often faceless and nameless. But that too may be a flawed assumption, a even a screen name or a picture of dark skin – or even an avatar with darker skin – might result in employment discrimination. Real world provision of services through platforms has even more potential for biases based on customer prejudice. Researchers have begun to document that in fact biases can be embedded deep in the review and rating systems that many platforms use.¹⁶⁸ 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.¹⁶⁹ 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.¹⁷⁰

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 aspects of labour and employment law are expendable for gig workers is a losing proposition. The analysis set out above creates an impossible dilemma, in terms of which rights to eliminate, especially when those granted to employees in the United States are meager compared to those guaranteed to workers in many industrialized nations.¹⁷¹ Each of these laws or sets of laws was passed in order to give workers basic protections that they could

¹⁶⁶ Cherry, *supra* note 159.

¹⁶⁷ 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 BERKLEY J. EMP. & LAB. L. 193 (2009).

¹⁶⁸ Nancy Leong, *The New Public Accommodations*, 105 GEORGETOWN L. J. (forthcoming 2016); Rosenblat & Stark, *supra* note 28 at 14.

¹⁶⁹ *Wilson v. Southwest Airlines Co.*, 517 F. Supp. 292, 303-04 (N.D. Tex. 1981).

¹⁷⁰ Rosenblat & Stark, *supra* note 28 at 12.

¹⁷¹ SAMUEL ESTREICHER & MIRIAM CHERRY, *GLOBAL ISSUES IN EMPLOYMENT LAW* (Samuel Estreicher & Miriam Cherry, eds., 2008).

not achieve on their own, due to the imbalance of power between workers and employers. Cutting one or two 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 what 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 solely for gig workers in the United States. Proponents have made it seem like creating the third category will be natural or easy.¹⁷² 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. Then determining where a worker would fit within the three categories would also 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. Finally, the content of the hybrid category would need to be discussed and debated. In light of the political decisions and consequences that surround the issue of the third category, judges would like demur from creating a new category without guidance from the legislature.

The ridesharing cases provide an illustrative example. In the *Cotter v. Lyft* case in the Northern District of California, Judge Vince Chhabria famously stated that the case was like being “handed a square peg and asked to choose between two round holes...”¹⁷³ 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 now is presiding over the settlement agreement. And so, even judges who have criticized the on/off switch as not a particularly good

¹⁷²Seth 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.

¹⁷³ *Cotter*, 60 F. Supp. 3d at 1081.

match for the realities of work today have not gone so far as to create another category.

Therefore, creating a third category in the U.S. for gig workers would most likely require legislative action. It is true that there has recently been some legislation that has directly responded to recent technological developments, such as the JOBS Act for online crowdfunding.¹⁷⁴ At the same time, there have been other situations where legislation has lagged woefully behind technological developments. In still other situations, legislation has ended or otherwise cracked down on technology. 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 2006.¹⁷⁵ 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 that involve 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 vis-a-vis 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.¹⁷⁶ 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 notice or want to invest the time, patience, and effort in starting an administrative action or lawsuit to challenge the firm's initial misclassification. It is true that misclassification can result in costly legal

¹⁷⁴ Jumpstart Our Business Startups Act, Pub. L. No. 112-106, 126 Stat. 306 (2012); Joan MacLeod Hemmingway, *What is a Security in the Crowdfunding Era?*, 7 OHIO ST. ENTREPEN. BUS. L. J. 335, 336 (2012).

¹⁷⁵ See Miriam A. Cherry & Robert L. Rogers, *First Amendment and Prediction Markets*, 2008 U. ILL. L. REV. 833, 833 (2008).

¹⁷⁶ 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).

challenges and in some instances lead to penalties, but many companies are willing to take that risk in the hopes that it will not get to that point. In other words, they feel it is better to risk asking for forgiveness, rather than first getting permission.¹⁷⁷ 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, what if we began with a different presumption. Assume that above a minimum threshold of hours worked, the default rule would be an employment relationship. That would be the case even if the work was on a platform or worked online. It would be an employment relationship even if the arrangement was flexible, even if the worker provided his or her own tools of the trade, and even if it were considered part-time employment. There then would be options available for those who truly are independent businesses or self-employed to opt-out of regulations with accompanying standards to winnow out those who genuinely self-employed. However, such an opt-out could not be a condition of work on a platform. Currently such as 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 have not even read.

Currently, there are some on-demand economy companies that have already, on their own initiative, engaged in shifting their workers to be employee status. Take the example of Instacart, which uses a platform to coordinate grocery delivery services. While Instacart’s business model, like many on demand economy companies, had included classifying its workers as independent contractors, they were taken to court in a misclassification lawsuit.¹⁷⁸ Rather than continue to litigate with their workers, Instacart management instead decided to shift workers to become either full or part-time employees. Not only was this a positive development for the workers, who received the access to benefits that employees would typically have, but it was also advantageous for the company. Instacart management wanted a work force that they could rely on and train. Customer satisfaction and return business is important. If spoiled grocery items were selected or delivered, the platform stood to lose customers. For those platforms that are seeking quality control, a stable workforce, lower turnover and lower recruiting costs, a change to employee status could be substantial piece of the solution.

¹⁷⁷ Indeed, this seems to be a key lynchpin of Uber’s regulatory and compliance strategy – do business first, and ask questions later. [article on Uber]

¹⁷⁸ *Cobarruviaz v. Maplebear, Inc.*, No. 13-cv-04065-VC, 2015 U.S. Dist. LEXIS 149045 (N.D. Cal. Nov. 3, 2015).

There are other examples. HomeHero is a mobile platform that provides home health care and elder care. They also recently shifted from an independent contractor to an employee based model. Their CEO claimed that they did so “in order to ensure a consistent experience as we scale nationwide.”¹⁷⁹ In the words of the CEO of Shyp, a package delivery service that also moved from independent contractors to an employee model, their “investment in longer term relationships with our couriers” would “ultimately create the best experience for our customers.”¹⁸⁰

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.¹⁸¹ 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. As many of the platform businesses are based on people serving other people who are often repeat customers rather than one-off transactions, it makes business sense to provide appropriate training and career advancement to workers. Some of these platform companies have provided benefits, including mileage and health insurance. 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, 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 creation of 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 categories that we already have. But businesses do need certainty, and a safe harbor that we discuss below would surely be helpful when navigating the uncertain question of classification.

D. Safe Harbor for Volunteerism and Alternative Business Models

Many of those that have been supporting or lobbying for Uber or other platform-based companies have suggested that these businesses deserve

¹⁷⁹ Kyle Hill, quoted in *Why Home Hero 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?utm_source=example.com&utm_medium=link&utm_campaign=article

¹⁸⁰ Kevin Gibbon, quoted in *Employers in the On-Demand Economy: Why Treating Workers as Employees is Good for Business*, NATIONAL EMPLOYMENT LAW PROJECT (Mar. 18, 2016), <http://www.nelp.org/content/uploads/Fact-Sheet-Employers-in-the-On-Demand-Economy.pdf>.

¹⁸¹ [Need an article, or a couple articles, that mentions these companies]

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 labour and employment law simply because it has cool technology and it might create additional employment opportunities in the future. 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 labour and employment laws? The premise of the argument is difficult to accept, as the platform economy is for-profit and is comprised of workers who are plying a trade that more or less mimics other work that is 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. 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. The sharing economy was seen as a “green,” more sustainable choice that avoided excess consumption.¹⁸² The idea of giving others a ride 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). To take an example, on the Threadless platform, designers can work on creating new styles for T-Shirts.¹⁸³ The community will vote on the designs to be produced, and they also then have first access to purchase the T-shirts. The designer then profits by receiving a portion of the shirt sales as compensation for their work.¹⁸⁴ This type of work combined with consumption defies many of the traditional characteristics of either employees or independent contractors.

¹⁸² See Cherry, *supra* note [], at []. See also Lyft Commercial [Need to get].

¹⁸³ THREADLESS, <https://www.threadless.com>.

¹⁸⁴ For more on Threadless, see JEFF HOWE, CROWDSOURCING: WHY THE POWER OF THE CROWD IS DRIVING THE FUTURE OF BUSINESS (2008).

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 the current haze of legal and regulatory uncertainty.”¹⁸⁵ Arbitrageurs who are merely looking for legal loopholes and to undercut traditional service providers through cheap labor are not creating a “special” or “different” form of business that would deserve an exemption from labour and employment law. But business models that either are truly “sharing,” some mix of profit and non-profit (for example, “B” corporations),¹⁸⁶ or those that engage in prosumer transactions, genuinely might deserve a break from labour 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.

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 an employee of Lyft. Neither are people 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, the type of full-time employment with on-demand work.¹⁸⁷

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 when those efforts are *truly voluntary* or used only to

¹⁸⁵ Jeff Bercovici, *Why the Next Uber Wannabe Is Already Dead*, INC.COM, <http://www.inc.com/magazine/201511/jeff-bercovici/the-1099-bind.html>

¹⁸⁶ Miriam A. Cherry, *The Law and Economics of Corporate Social Responsibility and Greenwashing*, 14 U.C. DAVIS BUS. L. J. 281, 294 (2014).

¹⁸⁷ Janine Berg, *Uber, Income Security in the On-Demand Economy: Findings and Policy Lessons from a Survey of Crowdworkers*, 37 COMP. LAB. L. & POL'Y J. 543 (2016), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2740940##.

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 labour 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 workers. Rather, we aim to look for solutions that will ameliorate conditions for other forms of precarious work and for those laboring in fissured workplaces.

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 what it would take to get decent crowdwork in a recent paper, focusing on fair wages, transparency, and due process.¹⁸⁸ 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 one small task was advancing. It would also 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 allows a worker to contest or question a poor rating before it would be used against them.¹⁸⁹ Workers need security, and a solution could be – in a word – “to expand the scope of labour protection beyond employment.”¹⁹⁰

IV. CONCLUSION

¹⁸⁸ Miriam A. Cherry & Winifred R. Poster, *Crowdwork, Corporate Social Responsibility, And Fair Labor Practices*, in RESEARCH HANDBOOK ON DIGITAL TRANSFORMATION (F. Xavier Olleros & Majlinda Zhegu eds., forthcoming, 2016), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2777201.

¹⁸⁹ *Id.*

¹⁹⁰ JUDY FUDGE, *Fragmenting Work and Fragmenting Organizations: The Contract of Employment and the Scope of Labour Regulation*. OSGOODE HALL LAW JOURNAL, Vol. 44, No. 4, (2006), available at <http://ssrn.com/abstract=974916>

Calls for a new “dependent contractor” hybrid category in the United States reflexively appear attractive and an 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 tiny 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.

Rather than risking arbitrage of 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, establishing one that, like Canada’s “dependent contractor,” 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.