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**A Global System of Work, A Global System of Regulation?:  
Crowdwork and Conflicts of Law**

Miriam A. Cherry

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# A Global System of Work, A Global System of Regulation?: Crowdwork and Conflicts of Law

Miriam A. Cherry\*

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\* © 2019 Miriam A. Cherry, Professor of Law, Co-Director of the William C. Wefel Center of Employment Law, Saint Louis University Law School; J.D., 1999; Harvard Law School, B.A., 1996, Dartmouth College. This paper is the result of a visit at the UN-ILO, and I thank Janine Berg, Naj Ghosheh, and Uma Rani for being such gracious hosts. I was fortunate to present the ideas in this paper at the UN-ILO, the Swiss Institute of Comparative Law, the University of Geneva Internet Law Colloquium, University of Pittsburgh Law School, Florida State University, and Northern Illinois University Law School. The paper benefited from comments and discussion with Antonio Aloisi, Harry Arthurs, Matthew T. Bodie, Pat Chew, Keith Cunningham-Parmeter, Valerio De Stefano, Karen Druckman, Monica Eppinger, Matthew Finkin, Charlotte Garden, Bill Johnson, Miriam Kullman, Tobias Lutzi, Marcia McCormick, Michael Madison, Guy Mundlak, Jeremias Prassl, Ilaria Pretelli, Martin Risak, M. Six Silberman, and Mathias Wouters. Specifically the material on conflicts of law benefited from discussion with Susan Franck, Erin O’Hara O’Connor, and Rhonda Wasserman. Appreciation to David Kullman, librarian at SLU Law and to Faculty Fellows Madhav Bhatt, Alex Gass, and Brett Weber for excellent help with research. Finally, thanks to the editors of the *Tulane Law Review* for assisting with publication.

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## I. INTRODUCTION

The on-demand economy has truly gone global. Consider online platform TaskRabbit, a U.S.-based site for odd jobs.<sup>1</sup> A high number of TaskRabbit’s users were seeking help with the construction of furniture they purchased at IKEA, and skilled carpenters started using the platform to find customers.<sup>2</sup> Corporate management at Swedish company IKEA noticed the trend, and as a result acquired TaskRabbit in 2017.<sup>3</sup> As a result, a Swedish company now owns a platform labor service in the United States and Britain, with plans to expand the TaskRabbit platform to twenty-seven more countries where IKEA currently owns brick and mortar stores.<sup>4</sup> Throughout its operation, however, TaskRabbit has claimed it only has a handful of employees, and the terms and conditions on its website list its workers as “independent contractors.”<sup>5</sup>

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1. TASKRABBIT, <https://taskrabbit.com> (last visited Dec. 16, 2019).

2. See Trisha Thadani, *Behind IKEA’s Purchase of TaskRabbit, Amazon Looms*, SFGATE (Oct. 17, 2017, 4:31 PM), <https://www.sfgate.com/business/article/Behind-Ikea-s-purchase-of-Taskrabbit-amazon-12239062.php>.

3. Cf. Richard Milne, *IKEA Looks for Further Deals After TaskRabbit Purchase*, FIN. TIMES (Oct. 10, 2017), <https://www.ft.com/content/79661ccc-ada0-11e7-aab9-abaa44b1e130> (describing further acquisitions following the purchase of TaskRabbit).

4. Brian Fung, *IKEA Has Purchased TaskRabbit, Because #adulting Is Hard*, WASH. POST (Sept. 28, 2017), <https://www.washingtonpost.com/news/the-switch/wp/2017/09/28/ikea-has-purchased-taskrabbit-to-help-you-bypass-those-assembly-instructions/?noredirect=on>.

5. Jeff John Roberts, *IKEA’s Latest Acquisition Will Help Assemble Your IKEA Furniture*, FORTUNE (Sept. 28, 2017), <https://fortune.com/2017/09/28/ikea-task-rabbit/>.

Two other examples effectively illustrate the global nature of on-demand work. Digital platform Upwork, headquartered in Mountain View, California, hosts and parcels out assorted computer programming, graphic design, and data-entry tasks.<sup>6</sup> Upwork posts tasks from requesters around the world, and likewise, the workers on the platform live around the world, most often working from their homes.<sup>7</sup> A final example is U.K. company Chatterbox, which uses its platform to connect remote workers in Syrian refugee camps with users in many other countries who pay to learn Arabic.<sup>8</sup> In the past, foreign companies have used platforms to engage Kenyan nationals living in refugee camps with tasks as diverse as computer programming and customer support calls.<sup>9</sup>

On-demand platforms are changing and reshaping our conceptions of both the firm and work relationship in far-reaching and critical ways, allowing companies to hire workers and to seek customers across national boundaries.<sup>10</sup> Meanwhile, as on-demand platforms have scaled their operations in the last decade, regulators

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6. See Erika Fry, *The Gig Economy Isn't Just for Startups Anymore*, FORTUNE (Aug. 29, 2017), <https://fortune.com/2017/08/29/the-gig-economy-isnt-just-for-startups-anymore/> (noting Fortune 500 companies outsourcing tasks to platforms like Upwork); see also Mariya Aleksynska et al., *Work on Digital Labour Platforms in Ukraine: Issues and Policy Perspectives*, INT'L LABOUR ORG. (ILO) (2018), [https://www.ilo.org/travail/WCMS\\_635370/lang--en/index.htm](https://www.ilo.org/travail/WCMS_635370/lang--en/index.htm) (discussing how Ukraine ranks fourth for work on digital labour platforms and the consequences for labour market and society); Carey Wodehouse, *What Kind of Freelance Talent Can You Hire Through Upwork?*, UPWORK (Nov. 14, 2017), <https://www.upwork.com/hiring/for-clients/kinds-of-freelancers-on-upwork/> (listing types of work available on the Upwork platform).

7. The nations supplying the most labor on Upwork are India, Philippines, Ukraine, Russia, Pakistan, Bangladesh, United States, China, Canada, Poland, Belarus, Romania, Vietnam, Indonesia, Argentina, Serbia, Armenia, Germany, and Egypt. The diversity of these supplier countries demonstrates the truly global nature of these platforms. See John Horton et al., *Digital Labour Markets and Global Talent Flows* tbl.3B (Harvard Bus. Sch. Working Paper No. 17-096, 2017), [https://www.hbs.edu/faculty/Publication%20Files/17-096\\_813abb74-09c5-4ea6-989f-5ef03b2d7f31.pdf](https://www.hbs.edu/faculty/Publication%20Files/17-096_813abb74-09c5-4ea6-989f-5ef03b2d7f31.pdf).

8. Lorraine Charles, *How Remote Work Could Help Refugees*, WORLD ECON. F. (Nov. 22, 2017), <https://www.weforum.org/agenda/2017/11/remote-work-could-help-refugees/> (noting language tutoring and computer programming work in Syrian refugee camps and encouraging the growth of such work).

9. See Stephanie Hegarty, *How Silicon Valley Outsources Work to African Refugees*, BBC NEWS (June 18, 2011), <https://www.bbc.com/news/world-africa-13784487>; *Our Impact*, SAMASOURCE, <https://www.samasource.com/our-impact> (last visited Nov. 21, 2019).

10. YOCHAI BENKLER, *THE WEALTH OF NETWORKS: HOW SOCIAL PRODUCTION TRANSFORMS MARKETS AND FREEDOM* 19 (2006). Also note the use of the terms “on-demand” or “gig work,” rather than the terminology of the “sharing economy.” The author believes that “sharing” is a misnomer, given that systems of platform work involve remuneration and participation on these platforms is highly commoditized. See Miriam A. Cherry, *Corporate Social Responsibility and Crowdfunding in the Gig Economy*, 63 ST. LOUIS U. L.J. 1, 1 (2018).

around the world have struggled to keep pace with the challenges to labor regulation that platforms have presented.<sup>11</sup> While some commentators believe existing forms of labor and employment regulations can stretch to cover on-demand work,<sup>12</sup> others have called for new legal initiatives specifically crafted for online platforms.<sup>13</sup> Confronted with low pay and problematic working conditions,<sup>14</sup> gig workers around the world have turned to the courts, attempting to invoke the protections of traditional labor and employment law.<sup>15</sup> Court cases were first seen in the United States, where many platforms had their origins.<sup>16</sup> As the platforms have spread to many countries, similar

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11. Miriam A. Cherry, *Beyond Misclassification: The Digital Transformation of Work*, 37 COMP. LAB. L. & POL'Y J. 577, 584-85 (2016) [hereinafter Cherry, *Digital Transformation of Work*] (listing lawsuits about employment in the gig economy filed in the United States and discussing the digital transformation of work).

12. See JEREMIAS PRASSL, HUMANS AS A SERVICE: THE PROMISE AND PERILS OF WORK IN THE GIG ECONOMY 78 (2018) (noting similarities between old forms of work and new forms of work, in instances like “open calls” for work by stevedores on the docks); see also Matthew W. Finkin, *Beclouded Work, Beclouded Workers in Historical Perspective*, 37 COMP. LAB. L. & POL'Y J. 603, 608 (2016) (drawing links between piecework and homework in traditional industrialization and computer crowdwork).

13. SETH D. HARRIS & ALAN B. KRUEGER, HAMILTON PROJECT, DISCUSSION PAPER 2015-10, A PROPOSAL FOR MODERNIZING LABOR LAWS FOR TWENTY-FIRST-CENTURY WORK: THE “INDEPENDENT WORKER” 2 (Dec. 2015), [http://www.hamiltonproject.org/assets/files/modernizing\\_labor\\_laws\\_for\\_twenty\\_first\\_century\\_work\\_krueger\\_harris.pdf](http://www.hamiltonproject.org/assets/files/modernizing_labor_laws_for_twenty_first_century_work_krueger_harris.pdf) (proposing a third intermediate category of “independent worker” located in between employee and independent contractor); see, e.g., Vin Gurrieri, *Uber Cases Could Spur New Employee Classification*, LAW360 (May 6, 2016, 8:50 PM), <https://www.law360.com/articles/793584/print?section=classification>; see also Miriam A. Cherry & Antonio Aloisi, “*Dependent Contractors*” in *the Gig Economy: A Comparative Approach*, 66 AM. U. L. REV. 635, 650-56 (2017) (discussing a comparative and historical approach to the third category).

14. See Mark R. Warner, *Asking Tough Questions About the Gig Economy*, WASH. POST (June 18, 2015), [https://www.washingtonpost.com/opinions/asking-tough-questions-about-the-gig-economy/2015/06/18/b43f2d0a-1461-11e5-9ddc-e3353542100c\\_story.html](https://www.washingtonpost.com/opinions/asking-tough-questions-about-the-gig-economy/2015/06/18/b43f2d0a-1461-11e5-9ddc-e3353542100c_story.html). In the 2016 ILO study, crowdworkers were asked about the upsides and downsides of their work and there were some common themes. Complaints about low pay were common. The ILO data show that American crowdworkers averaged \$5.55 an hour, below the federal minimum wage of \$7.25 an hour. See Fair Labor Standards Act, 29 U.S.C. § 8 (2018). Many crowdworkers in the ILO survey remarked that they had high search costs, i.e., that it took them a long time to find appropriate tasks on the website, so that they spent more time looking for work than they actually spent doing it. Still others noted that their work could be rejected by the requester on a summary basis, without reasons provided. All of these led to dissatisfaction among those surveyed. Janine Berg, *Income Security in the On-Demand Economy: Findings and Policy Lessons from a Survey of Crowdworkers* 14-15 (ILO, Conditions of Work and Employment Series No. 74, Working Paper, 2016) [hereinafter Berg, *Income Security*].

15. See Cherry, *Digital Transformation of Work*, *supra* note 11 (listing the ongoing litigation surrounding the on-demand economy in the United States); see also SARAH KESSLER, GIGGED: THE END OF THE JOB AND THE FUTURE OF WORK 111 (2018) (“Soon it was difficult to find any company that brokered independent workers and didn’t have a lawsuit on its hands.”).

16. See Cherry, *Digital Transformation of Work*, *supra* note 11.

types of litigation have followed in their wake. Currently, cases are being heard around the world on the question of whether gig workers are “employees” or “independent contractors.”<sup>17</sup> These include ongoing litigation in the United Kingdom,<sup>18</sup> Brazil,<sup>19</sup> Spain,<sup>20</sup> Belgium,<sup>21</sup> Colombia,<sup>22</sup> and Australia.<sup>23</sup> So far, these decisions have applied different standards, and to date have been reaching conflicting conclusions.<sup>24</sup>

Despite crowdwork being a genuine global system of work, these precedents set the stage for inconsistent rulings and conflicts of law. Transnational ownership and international worker participation on crowdwork platforms present timely and compelling business, technology, and labor law questions. Many digital platforms are truly multinational enterprises, and we can expect to see difficult compliance issues come into play for these businesses. Within the next decade, the spread of online crowdwork will result in even more litigation, creating difficult questions in the labyrinth of rules that comprise private international law, i.e., jurisdiction, choice of law, and conflicts of law.<sup>25</sup>

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17. Valerio De Stefano, *Platform Work and Labour Protection. Flexibility Is Not Enough*, REG. FOR GLOBALIZATION BLOG (May 23, 2018), <http://regulatingforglobalization.com/2018/05/23/platform-work-labour-protection-flexibility-not-enough/> [hereinafter De Stefano, *Platform Work*].

18. For more on the situation in the United Kingdom and Europe, see, for example, Anna Birtwistle & Clare Murray, *Around the World in 80 Ubers: Is the Law Keeping Up with the Uberisation of Work in Europe?*, WHO’S WHO LEGAL (July 7, 2017), <https://whoswholegal.com/features/features/around-the-world-in-80-ubers-is-the-law-keeping-up-with-the-uberisation-of-work-in-europe>.

19. Maria Cristina Frias, *Uber Drivers Are Employees, Court Decides in Brazil*, FOLHA DE S. PAULO (Aug. 28, 2018, 12:18 PM), <https://www1.folha.uol.com.br/internacional/en/business/2018/08/uber-drivers-are-employees-court-decides-in-brazil.shtml>.

20. De Stefano, *supra* note 17.

21. *Id.*

22. Rico, *Court Rules Against Uber and Its 83,000 Drivers*, TODAY COLOM. (Jan. 19, 2018), <http://todaycolombia.com/court-rules-against-uber-and-its-83000-drivers/> (noting Colombia’s Corte Constitutional decision requiring Uber to comply with employment laws as well as laws applying to taxi companies).

23. See discussion *infra* Part II; see also Ignasi Beltran de Heredia Ruiz, *Employment Status of Platform Workers*, UNA MIRADA CRÍTICA A LAS RELACIONES LABORALES (Dec. 9, 2018), <https://ignasibeltran.com/2018/12/09/employment-status-of-platform-workers-national-courts-decisions-overview-australia-brazil-chile-france-italy-united-kingdom-united-states-spain/#%C3%ADndice> (listing court cases across various jurisdictions). For Australia, see Andrew Stewart & Jim Stanford, *Regulating Work in the Gig Economy: What Are the Options?*, 28 ECON. & LAB. REV. 420, 425-29 (2017) (noting uncertainty as to the legal status of gig workers).

24. De Stefano, *Platform Work*, *supra* note 17; see discussion *infra* Part III.

25. In Europe, the legal terminology used for these concepts is “private international law.” While both terms are used interchangeably in this Article, I tend to prefer “conflicts of law” as the term seems more expressive.

Jurisdiction refers to the ability of a court to decide a dispute.<sup>26</sup> Choice of law pertains to the law that a court with jurisdiction will apply.<sup>27</sup> Conflicts of law is the body of law determining, in the absence of a choice-of-law provision, what law to apply when a foreign element is involved.<sup>28</sup> At the moment the pending cases about the on-demand economy have largely focused on the issue of employee/independent contractor status.<sup>29</sup> Misclassification, however, is only the threshold question. Beyond the threshold of employee status lies additional issues, such as the application of substantive rights for workers that vary drastically depending on the law that is applied.<sup>30</sup> For example, minimum wage and working time laws vary drastically depending on which jurisdiction's laws are applied.<sup>31</sup> The same is true for collective bargaining, worker's compensation, or unemployment insurance.<sup>32</sup> Different countries' conflicts-of-law rules could potentially yield different answers for each phase of doctrinal law and policy.

The conundrum is that work has traditionally been conceived of as a localized activity, largely regulated on a national basis, while the

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26. LOUISE MERRETT, EMPLOYMENT CONTRACTS IN PRIVATE INTERNATIONAL LAW 2 (2011). *But see* Paul Schiff Berman, *The Globalization of Jurisdiction*, 151 U. PA. L. REV. 311, 319 (2002) (using "jurisdiction" to stand in not only for the concept of being able to hear a dispute, but also to the determination that a certain jurisdiction's law will apply).

27. MERRETT, *supra* note 26.

28. *See* GEERT VAN CALSTER, EUROPEAN PRIVATE INTERNATIONAL LAW 5 (2d ed. 2016).

29. De Stefano, *Platform Work*, *supra* note 17.

30. Basic rights, like the freedom to organize and bargain collectively as part of a union, rest on the outcome of the classification debate, and in many legal systems, only "employees" have these types of rights. *See* Hannah Johnston & Chris Land-Kazlauskas, *Organizing On-Demand: Representation, Voice, and Collective Bargaining in the Gig Economy 2* (ILO, Conditions of Work and Employment Series No. 94, Working Paper, 2019). Classification can also have implications for intellectual property rights. California law states that employers own the work of their employees under the work made for hire, but there is no such rule for independent contractors. *See* CAL. LAB. CODE § 3351.5(c) (West 2019); CAL. UNEMP. INS. CODE §§ 686, 621(b) (West 2019); Matthew Swanlund, *Work Made for Hiring*, L.A. LAW., Mar. 2016, at 25, 25 ("California businesses face a critical decision . . . They may take advantage of the benefits afforded by the work-made-for-hire doctrine . . . but be treated under California law as an employer, or they may sacrifice the benefits of the work-made-for-hire doctrine yet maintain the independent contractor status of [their] creative workers.").

31. *See* Miriam A. Cherry, *Mindestlohn für Crowdarbeit? [A Minimum Wage for Crowdwork?]*, in CROWDWORK-ZURÜCK IN DIE ZUKUNFT? PERSPEKTIVEN DIGITALER ARBEIT [CROWDWORK—BACK TO THE FUTURE? PERSPECTIVES ON DIGITAL LABOR] 231-40 (2014) (Ger.) (chapter translated into German for book publication); Miriam A. Cherry, *Working for (Virtually) Minimum Wage: Applying the Fair Labor Standards Act in Cyberspace*, 60 ALA. L. REV. 1077, 1093-94 (2009).

32. For example, most crowdwork websites lack a way to verify with certainty that they are free of child labor; they rely almost entirely on self-reporting and self-certification of age.

incontrovertible fact is that many crowdwork platforms either are or aspire to become genuine multinational enterprises.<sup>33</sup> With crowdwork performed wholly on the computer, like the Upwork example, the company or person who is ordering work could be located in one nation, the platform itself could be located in a second nation, and the workers could be located in many other nations.<sup>34</sup> Indeed, the innovative promise of crowdwork lies in its global nature, allowing more workers and companies to participate.<sup>35</sup> Global crowdwork can take advantage of temporal differences (the shift in time zones around the world) as well as allowing companies to hire skilled workers, regardless of their location.

For on-demand platforms, this may present difficult legal compliance problems. Currently some platforms have aspirations of becoming “global workspaces,” hosting both requesters and workers from dozens of countries.<sup>36</sup> At the moment, there is a void in regulation.<sup>37</sup> However, as courts continue to make decisions and countries begin to pass laws with differing and particular regulations requiring compliance, those laws will likely not be uniform between nations. The need to calculate dozens of minimum wages or to comply with various procedural and administrative rules will likely result in time-consuming and potentially costly compliance issues for platforms. While platforms may attempt to engage in self-help through private ordering through the terms and conditions of online contracts, some labor and employment laws are considered mandatory or nonwaivable.<sup>38</sup> Such practices might also raise a concern about forum shopping, or the “race to the bottom” in labor standards.<sup>39</sup>

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33. See Miriam A. Cherry, *The Global Dimensions of Virtual Work*, 54 ST. LOUIS U. L.J. 471, 487 (2010) [hereinafter Cherry, *Global Dimensions*] (describing transnational work relationships within video games and in virtual worlds).

34. Aniket Kittur et al., *The Future of Crowd Work*, CONF. ON COMPUTER SUPPORTED COOPERATIVE WORK & SOC. COMPUTING 1301 (2013), <https://dl.acm.org/citation.cfm?id=2441923>.

35. Cherry, *Global Dimensions*, *supra* note 33, at 483.

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

37. Cherry, *Global Dimensions*, *supra* note 33, at 487.

38. See BOB HEPPLER, LABOUR LAWS AND GLOBAL TRADE 156 (2005); Alex Rosenblat & Luke Stark, *Algorithmic Labor and Information Asymmetries: A Case Study of Uber's Drivers*, 10 INT'L J. COMM. 3758, 3764 (2016).

39. For a discussion of arbitration in the on-demand economy, see Charlotte Garden, *Disrupting Work Law: Arbitration in the Gig Economy*, 2017 U. CHI. LEGAL F. 205 (2017).



These are challenging sets of problems. The beginnings of solutions may be found by thinking about other regulatory structures that exist outside of territorial boundaries. Here, specifically, I make reference to the recently passed General Data Protection Regulation in the European Union,<sup>40</sup> which has extraterritorial application to the protection of privacy; to the international rules that govern employment of transportation workers, specifically those engaged in maritime employment; and to the corporate codes of conduct and social responsibility followed by many multinational companies.<sup>41</sup> In essence, we can profit from thinking about on-demand platforms as another way that labor moves through the global supply chains, except that those supply chains are for services, not products.

The goal of this Article is to provide a global framework for thinking about the on-demand business model and these assorted conflicts-of-law and jurisdictional issues.<sup>42</sup> Part II provides the theoretical background, supplied by labor and employment law scholarship. As Part II notes, the on-demand model provides a challenge to the received wisdom that employment is inherently local. Part III then discusses the specific context of on-demand crowdwork, providing background themes, an explanation of the legal issues, and a survey of the current state of the literature. Part IV analyzes the jurisdiction and conflict-of-law issues through the lenses of three jurisdictions that are of great importance to crowdwork: California, the European Union, and India. Part IV also looks at terms of use and forum selection clauses. As the toolkit of private international law provides few definite answers, Part V looks at alternative ways of thinking about regulation, drawing parallels to the European Union's General Data Protection Regulation (GDPR), international maritime law, and multinational codes of conduct and corporate social responsibility. Throughout, this Article emphasizes the need for further coordinated multilateral study, discussion, and regulatory action to assist both crowdworkers and businesses as they navigate the on-demand model of production.

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40. Council Regulation 2016/679, art. 1, 2016 O.J. (L 119) 32 (EU).

41. See discussion *infra* Part V.

42. While this Article formulates an initial framework and adumbrates the issues in three jurisdictions, this Article is not intended as a comprehensive study of how each jurisdiction across the world would approach these issues. Apart from treaties like the Rome Convention, each national legal system has its own method for determining jurisdiction, choice-of-law, and conflicts-of-law issues.

## II. THEORETICAL FRAMEWORK

Previous scholarship provides the context for discussing the jurisdiction, choice-of-law, and conflict-of-law issues that arise around transnational employment relationships. For many decades, labor and employment lawyers tended to neglect jurisdictional issues; and lawyers who were studying conflicts of law tended to ignore labor law issues.<sup>43</sup> In 1984, International Labour Organization (ILO) attorney Felice Morgenstern wrote the first English full-length treatment of the intersection of these fields in her book entitled *International Conflicts of Labour Law*.<sup>44</sup> Morgenstern described complex sets of legal issues that she had encountered at the ILO, all of which dealt with labor and employment issues involving a “foreign element.”<sup>45</sup> The book covered many of the issues raised by the employment of itinerant workers, posted workers, offshoring and outsourcing operations, and labor relations within multinational corporations.<sup>46</sup>

Within her book and a preceding article,<sup>47</sup> Morgenstern notes the development of rules and concepts surrounding transnational employment. As her book describes, some approaches looked at the location of the contract’s execution, while others looked at the domicile and nationality of the parties or the location of the company’s headquarters, and still others to the location where the work occurred.<sup>48</sup> Overall, however, Morgenstern noted that the received wisdom seemed to converge on the idea of looking at the physical location of where the work took place, supplemented by the law of the employing firm’s

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43. See, e.g., Martin Franzen, *Conflicts of Laws in Employment Contracts and Industrial Relations*, in *COMPARATIVE LABOUR LAW AND INDUSTRIAL RELATIONS IN INDUSTRIALIZED MARKET ECONOMIES* 245, 245 (Roger Blanpain ed., 11th ed. 2014) (“Truly international sources governing conflicts of law in our field [labor and employment law] are not numerous, though of growing importance.”).

44. FELICE MORGENSTERN, *INTERNATIONAL CONFLICTS OF LABOUR LAW: A SURVEY OF THE LAW APPLICABLE TO THE INTERNATIONAL EMPLOYMENT RELATION* (1984). This was the first book-length treatment of the subject to appear in the English language, and it cited and quoted cases from around the world. Rolf Birk, *International Conflicts of Labour Law*, 79 AM. J. INT’L L. 1120, 1120 (1985) (book review) (“The book is, in fact, the first English-language monograph on international conflicts of labor law.”).

45. MORGENSTERN, *supra* note 44, at 1.

46. *Id. passim*.

47. Felice Morgenstern & Blaise Knapp, *Multinational Enterprises and the Extraterritorial Application of Labour Law*, 27 INT’L & COMP. L.Q. 769, 770 (1978).

48. MORGENSTERN, *supra* note 44, at 61-64. For more on the triangular nature of the relationship with the platform, see Jeremias Prassl & Martin Risak, *Uber, TaskRabbit, and Co.: Platforms as Employers? Rethinking the Legal Analysis of Crowdwork*, 37 COMP. LAB. L. & POL’Y J. 619, 634 (2016).

“home base.”<sup>49</sup> Her approach was doctrinal and practical, looking to statutes and case law, where applicable.

Since that time, the intersection of labor and private international law as a doctrinal category has received only sporadic interest from academics. Within the United States, there is some attention to the issue when the employment laws of one state conflict with another state’s laws. Most notably, the fact that California bans noncompetition agreements (while other states recognize them) has prompted a discussion among legal scholars.<sup>50</sup> In the European Union, scholars have tended to focus on the impact and application of the rules around the Rome Regulation.<sup>51</sup> These accounts and ones like it tend to be more practical than theoretical.<sup>52</sup> There has also been a robust discussion about the longstanding issues with posted workers throughout the European Union, as well as workers who live on one side of a border yet work in another.<sup>53</sup> In all of this scholarship, which is focused on the practical outcomes for certain groups of workers or multinational companies, employment law is generally conceived of as largely a local issue.<sup>54</sup>

During the approximately thirty-five years between when Morgenstern was writing and the date of this Article, the globalization

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49. MORGENSTERN, *supra* note 44, at 121 (“Many of the conflicts and uncertainties inherent in the subject would seem to be due to the difficulty of establishing a clear dividing line between the legitimate scope of the law of the place of work and that of the home base . . .”).

50. Timothy P. Glynn, *Interjurisdictional Competition in Enforcing Noncompetition Agreements: Regulatory Risk Management and the Race to the Bottom*, 65 WASH. & LEE L. REV. 1381, 1386-87 (2008); Gillian Lester & Elizabeth Ryan, *Choice of Law and Employee Restrictive Covenants: An American Perspective*, 31 COMP. LAB. L. & POL’Y J. 389, 389 (2010); Viva R. Moffat, *Making Non-Competes Unenforceable*, 54 ARIZ. L. REV. 939, 941-43 (2012).

51. See MERRETT, *supra* note 26; Uglješa Grušić, *Jurisdiction in Employment Matters Under Brussels I: A Reassessment*, 61 INT’L & COMP. L.Q. 91, 97-99 (2012).

52. See MERRETT, *supra* note 26; Grušić, *supra* note 51.

53. See Cecilia Pérez Martínez, *Where Will the Case Be Heard? Which Is the Applicable Law? Approach to Selected Problems of Transnational Employment Relationships*, 5 AM. U. LAB. & EMP. L.F. 5, 5-6 (2015).

54. See, e.g., Ron McCallum, *Conflicts of Laws and Labour Law in the New Economy*, 16 AUSTL. J. LAB. L. 50, 52 (2003) (“Throughout history, the performance of paid work has been a local affair. This is because workers are flesh and blood human beings who live in family groups, and who undertake employment to support themselves and their families by earning money to provide food, shelter, clothing, recreation and the education of children.”); see also Martínez, *supra* note 53 (“[L]abor and employment has always been regulated locally and for local employee-employer relationships. Traditionally, domestic regulations have not contemplated transnational employment relationships . . .”).

of work and the pace of technological change has vastly accelerated.<sup>55</sup> In the words of Professor Marie-Ange Moreau, “[t]he relationship between time, place, and space of action has . . . changed in profound ways” due to technology and globalization.<sup>56</sup> Legal doctrine, Professor Moreau argues, has yet to “come to conceptual terms with this transnationalization.”<sup>57</sup> In the late 1990s and early 2000s, legal theorists such as Katherine Van Wezel Stone began to grapple with transnational labor law as well as problems of labor standards in the global supply chain.<sup>58</sup>

In his 2001 article *Labour Law Beyond Borders*, Professor Patrick Macklem noted that flexible forms of production and economic globalization were creating profound challenges for systems of labor and employment law traditionally based on national regulation.<sup>59</sup> As a counterweight, Macklem pointed to international minimum standard setting by the ILO, the insertion of human rights norms and labor standards in trade liberalization treaties, and multinational firms’ corporate codes of conduct and social responsibility.<sup>60</sup>

In 2009, Professor Guy Mundlak picked up on Macklem’s proposals, emphasizing the need to de-territorialize labor law.<sup>61</sup> In his article, Mundlak argues that with the ongoing process of globalization, the territorial solutions previously created within labor law are no longer adequate.<sup>62</sup> Interestingly, he suggests identifying the location of the ultimate beneficiaries of products and services as the appropriate place to look for labor and employment regulation.<sup>63</sup> As Mundlak puts it, “Regulation of the labor market should be associated with the de-

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55. Marie-Ange Moreau, *The Reconceptualization of the Employment Relationship and Labor Rights Through Transnationality*, 34 COMP. LAB. L. & POL’Y J. 697, 697 (2013).

56. *Id.*

57. *Id.* at 698.

58. See, e.g., Katherine Van Wezel Stone, *Labor and the Global Economy: Four Approaches to Transnational Labor Regulation*, 16 MICH. J. INT’L L. 987 (1995) (examining the challenges to domestic and international labor regulation); Katherine Van Wezel Stone, *To the Yukon and Beyond: Local Laborers in a Global Labor Market*, 3 J. SMALL & EMERGING BUS. L. 93 (1999) (discussing certain “survival necessities” of global labor workers).

59. Patrick Macklem, *Labour Law Beyond Borders*, 5 J. INT’L ECON. L. 605, 605 (2002).

60. *Id.* at 637-45.

61. See Guy Mundlak, *De-Territorializing Labor Law*, 3 LAW & ETHICS HUM. RTS. 189, 189 (2009).

62. *Id.*

63. *Id.* at 212.

facto employment relationship, as viewed in terms of social and economic reliance.”<sup>64</sup>

International expert Professor Harry Arthurs has also discussed transnational labor law extensively. In his article *Extraterritoriality by Other Means*, Arthurs notes that labor law has a tendency to “sneak” or to be smuggled across borders.<sup>65</sup> Sometimes one state’s laws present a strategy or template for the law in another country, as Arthurs notes is true of the United States and Canada.<sup>66</sup> Other times, multinational companies import their own standards and norms into the countries where they employ workers.<sup>67</sup> This can be a positive experience for workers, raising local standards; or multinationals can receive exemptions even from lower standards, because some governments are desperate for foreign investment.<sup>68</sup>

In light of this theoretical background, computer crowdwork on global technological platforms presents a unique and almost existential challenge for traditional territorial thinking. In essence, crowdwork turns the dependence on national systems for regulation of employment and labor law upside down. The received wisdom in private international law doctrine, which is based on territoriality, physical presence, and habitual place of work fundamentally does not comport with the global nature of crowdwork. While theorists such as Arthurs, Stone, Macklem, and Mundlak have all noted this disconnect as it pertained to earlier forms of globalized work and global supply chains, computer crowdwork puts these issues into even sharper relief.<sup>69</sup> With this theory in place, we now turn to examine how platform businesses have truly “gone global.”

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64. *Id.*

65. Harry Arthurs, *Extraterritoriality by Other Means: How Labor Law Sneaks Across Borders, Conquers Minds, and Controls Workplaces Abroad*, 21 STAN. L. & POL’Y REV. 527, 529 (2010) [hereinafter Arthurs, *Extraterritoriality*] (“[L]abor laws in fact ‘sneak across borders’ relatively unconstrained by the extraterritoriality doctrine . . .”).

66. *Id.* at 534-35; see also Harry Arthurs, *Reinventing Labor Law for the Global Economy: The Benjamin Aaron Lecture*, 22 BERKELEY J. EMP. & LAB. L. 271, 279 (2001) (describing the adoption of American labor laws in Canada).

67. Arthurs, *Extraterritoriality*, *supra* note 65, at 540.

68. See *id.* at 544; see also Susan Bisom-Rapp, *Exceeding Our Boundaries: Transnational Employment Law Practice and the Export of American Lawyering Styles to the Global Worksite*, 25 COMP. LAB. L. & POL’Y J. 257, 321-22 (2004) (noting the development of lawyering styles to accommodate clients seeking less regulation).

69. Arthurs, *Extraterritoriality*, *supra* note 65; Macklem, *supra* note 59; Mundlak, *supra* note 61; Stone, *supra* note 58 (referring to both).

### III. THE GLOBAL REACH OF PLATFORM BUSINESSES

#### A. Background on Platform Development

Overviews of how on-demand platforms operate are by now well-covered in the popular press<sup>70</sup> and the academic literature.<sup>71</sup> In 2016, a survey by *Time Magazine* found that over forty-five million people in the United States were working in the “gig,” “on-demand,” or “sharing” economy.<sup>72</sup> Since the time of that study, the popularity of online platforms has continued to grow around the world, making gig work a truly global phenomenon.<sup>73</sup> As the vanguard of these trends toward more flexible and contingent work, labor in the on-demand economy has received both its share of positive and negative attention in the media and in the courts. Positive news stories focus on the opportunities generated for people who need and want more flexible days and more flexible hours than a typical forty-hour-a-week job

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70. Moshe Z. Marvit, *How Crowdworkers Became the Ghosts in the Digital Machine*, NATION (Feb. 5, 2014), <https://www.thenation.com/article/how-crowdworkers-became-ghosts-digital-machine/>.

71. As such, this Part has been adapted from the Author’s earlier work that described the particular features, structures, economics, and legal issues of the gig economy. See Cherry, *Digital Transformation of Work*, *supra* note 11. See generally Antonio Aloisi, *Commoditized Workers: Case Study Research on Labor Law Issues Arising from a Set of “On-Demand/Gig Economy” Platforms*, 37 COMP. LAB. L. & POL’Y J. 653 (2016) (presenting case study analysis of on-demand platforms and their terms of service); Deepa Das Acevedo, *Regulating Employment Relationships in the Sharing Economy*, 20 EMP. RTS. & EMP. POL’Y J. 1 (2016) (discussing how the sharing economy demonstrates an employment relationship that demands a regulatory response); Valerio De Stefano, *The Rise of the “Just-in-Time Workforce”: On-Demand Work, Crowdwork, and Labor Protection in the “Gig-Economy,”* 37 COMP. LAB. L. & POL’Y J. 471 (2016) (analyzing opportunities and risks within the gig economy using the lens of labor protection); Orly Lobel, *The Law of the Platform*, 101 MINN. L. REV. 87 (2016) (arguing the platform economy presents a paradigm shift for business); Benjamin Means & Joseph A. Seiner, *Navigating the Uber Economy*, 49 U.C. DAVIS L. REV. 1511 (2016) (arguing that flexibility in time, place, manner, and frequency should determine work classification); Brishen Rodgers, *The Social Costs of Uber*, 82 U. CHI. L. REV. DIALOGUE 85 (2015) (discussing Uber’s impact on the car-hire sector, its standards, and the future of low-wage work).

72. Katy Steinmetz, *Exclusive: See How Big the Gig Economy Really Is*, TIME (Jan. 6, 2016), <http://time.com/4169532/sharing-economy-poll/>. According to a 2016 report from the Congressional Research Service, if temporary work, on-call work, part-time work, and “self-employment” in the United States are included in this trend, the issues around alternative work arrangements have an impact on nearly one-third of the labor force. See SARAH A. DONOVAN ET AL., CONG. RESEARCH SERV., R44365, WHAT DOES THE GIG ECONOMY MEAN FOR WORKERS? 4-7 (2016).

73. JANINE BERG ET AL., DIGITAL LABOUR PLATFORMS AND THE FUTURE OF WORK: TOWARDS DECENT WORK IN THE ONLINE WORLD 29 (2018) [hereinafter BERG ET AL., DIGITAL LABOUR PLATFORMS].

would provide.<sup>74</sup> Sharing websites and mobile apps also may provide a quick and easy way for customers to seek out assistance. Negative stories, on the other hand, focus on the terms and conditions of the work, including a lack of benefits and opportunity for advancement.<sup>75</sup> These stories detail the uncertainty of on-demand platforms for workers, the low rates of pay provided on some platforms, and the amount of unpaid search time that goes into finding the next gig.<sup>76</sup> Ever since Uber became a popular app, most people have at least a passing familiarity with how on-demand platforms operate.<sup>77</sup> Accordingly, the background provided herein is streamlined.

The on-demand business model has offered important innovations; instead of buying or selling a good, users of certain platforms could rent access to what they needed.<sup>78</sup> A driver with a car could transform an ordinary morning commute into a profit-generating enterprise by picking up a passenger on Uber or Lyft. Other websites, like Amazon's Mechanical Turk, crowdsourced computer tasks to a global market of workers, using only very small slices of time.<sup>79</sup> Websites that were part of "prosumer" movements involved customers in design or marketing decisions, only to then sell them products.<sup>80</sup> These business models in and of themselves were different compared to the standard models of sales that firms had typically employed.

The specifics and mechanics may differ, but crowdworking platforms share common characteristics. Through a market-making function they create an "open call" that then matches discrete tasks to the on-demand workers.<sup>81</sup> One category of on-demand work involves tasks that take place in the real world, and that are powered by a website or app.<sup>82</sup> Well-known examples include websites and apps that range

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74. Charles, *supra* note 8.

75. Marvit, *supra* note 70; Kittur et al, *supra* note 34.

76. See, e.g., KESSLER, *supra* note 15, at 78-79 (noting call center platforms that advertised paying minimum wage, as if that were something to brag about).

77. MadeinTYO, *Uber Everywhere*, YOUTUBE (Aug. 21, 2015), <https://www.youtube.com/watch?v=BcyFJLrBVhA> (not-safe-for-work rap about taking Uber everywhere because of its ubiquity); cf. Brian De Los Santos, *Rapper Who Got Famous off Uber Declares Beef, Is Switching to Lyft*, MASHABLE (Jan. 30, 2017), <https://mashable.com/2017/01/30/madeintyo-hates-uber/> (noting rapper's change of heart toward Uber).

78. Cf. KESSLER, *supra* note 15, at 46 (describing an art rental platform).

79. See Steinmetz, *supra* note 72.

80. JEFF HOWE, CROWDSOURCING: WHY THE POWER OF THE CROWD IS DRIVING THE FUTURE OF BUSINESS 1-4 (2008) (describing the "Threadless" website).

81. Steinmetz, *supra* note 72. Some platforms set prices, while others have an auction function that allow requesters to bid and the workers to accept bids.

82. *Id.*

from Uber (ridesharing),<sup>83</sup> GrubHub (food delivery),<sup>84</sup> and Handy (home repair).<sup>85</sup> The other category, exemplified by Upwork or by Amazon's Mechanical Turk (AMT), involves completion of computer tasks online. On these computer sites, the requests, the hosting, and the work itself are all performed online.<sup>86</sup>

A convergence of critical thought and attention is beginning to crystalize around the gig economy, contained in the popular press, in computer science accounts, sociological studies, economic studies, in business schools, in law reviews, and in the courts. Various accounts have emerged that document and analyze key characteristics of on-demand platforms: (1) reliance upon, and placement within, the information society;<sup>87</sup> (2) the globalization of the platforms, the requesters, and the workforces involved;<sup>88</sup> (3) dependence on trust and reputation proxies such as rating systems;<sup>89</sup> (4) use of big data and surveillance to track work and workers;<sup>90</sup> (5) use of just-in-time scheduling of labor relations;<sup>91</sup> and (6) the management of workers by algorithm.<sup>92</sup>

While the traditional employment relationship involved a steady forty-hour work week, hierarchical structure and advancement, along with accompanying benefits, the on-demand model instead stresses limited commitment and extreme flexibility.<sup>93</sup> Rather than having an assigned employee take on tasks as work arises, work is broken down into smaller pieces and placed out via Internet or cellular phone app on an "open call."<sup>94</sup> Workers sign in and complete tasks at their own pace and on their own time. There are no obligations of the worker or the platform to each other past the conclusion of one particular gig or

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83. UBER, [www.uber.com](http://www.uber.com) (last visited Dec. 16, 2019).

84. GRUBHUB, [www.grubhub.com](http://www.grubhub.com) (last visited Dec. 16, 2019).

85. HANDY, [www.handy.com](http://www.handy.com) (last visited Dec. 16, 2019).

86. De Stefano, *Platform Work*, *supra* note 17, makes the distinction between work performed entirely in cyberspace and work that originates on an app or Internet platform, and then is performed in the "real world." See DONOVAN ET AL., *supra* note 72, at 1-3.

87. Cherry & Poster, *supra* note 36, at 294.

88. See Cherry, *Digital Transformation of Work*, *supra* note 11, at 595.

89. Rosenblat & Stark, *supra* note 38, at 3775.

90. Matthew T. Bodie et al., *The Law and Policy of People Analytics*, 88 U. COLO. L. REV. 961, 962, 988 (2017).

91. De Stefano, *Platform Work*, *supra* note 17.

92. Rosenblat & Stark, *supra* note 38, at 3762.

93. Cherry, *Digital Transformation of Work*, *supra* note 11, at 598-99.

94. HOWE, *supra* note 80.



task.<sup>95</sup> Yet systems of surveillance sit atop the workflow, and algorithmic management controls and directs work activities.<sup>96</sup>

### *B. Conflicting Law in the Gig Economy*

A recurring critical legal issue in considering work in the on-demand economy stems from confusion over the proper employment classification of platform workers. Many platforms have labeled workers who used their platforms as “independent contractors” through terms of service listed on a website or on a mobile app.<sup>97</sup> The matter of employment classification, however, is not decided by a company’s label or terms of service. Rather, courts determine classification based on a number of factors, primarily the amount of control exerted over the worker or how the work is performed, and whether the workers look like an independent business, based on their indicia of entrepreneurial activity.<sup>98</sup> Classification as an employee is a “gateway” to determine who deserves the protections of labor and employment laws, including the right to organize, minimum wage, and unemployment compensation, to name just a few of the benefits that are part and parcel of employee status.<sup>99</sup> As such, classification as an employee is actually “an important instrument for the delivery of workers’ rights.”<sup>100</sup>

Under U.S. law, whether a worker is an employee or independent contractor is determined through various multifactor tests dependent on the facts of the relationship.<sup>101</sup> The “control” test derives from case law

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95. Cherry, *Digital Transformation of Work*, *supra* note 11, at 596; *see also* Garden, *supra* note 39 (discussing arbitration agreements in the on-demand economy).

96. *See* Rosenblat & Stark, *supra* note 38, at 3762, 3765.

97. Miriam A. Cherry, *The Sharing Economy and the Edges of Contract Law: Comparing U.S. and U.K. Approaches*, 85 GEO. WASH. L. REV. 1804, 1809 (2017) [hereinafter Cherry, *The Sharing Economy*].

98. Cherry, *Digital Transformation of Work*, *supra* note 11, at 582.

99. Finkin, *supra* note 12, at 611.

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

101. *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) [hereinafter Stone, *Legal Protections*] (listing factors from the cases); *see also* Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 326 (1992) (examining the definition of “employee” in the FLSA); Rutherford Food Corp. v. McComb, 331 U.S. 722, 728-29 (1947) (defining what it means to “employ” a worker); Ira S. Bushey & Sons, Inc. v. United States, 398 F.2d 167, 170 (2d Cir. 1968) (considering the scope of employment in a maritime case).

and decisions on agency law and focuses on a principal's right to control the worker.<sup>102</sup> In brief, the factors for finding employee status are whether the employer may direct the way in which the work is performed, determine the hours involved, and provide the employee with direction.<sup>103</sup> On the other hand, elements that lean toward independent contractor classification include high-skilled work, workers providing their own equipment, workers setting their own schedules, and getting paid per project, not per hour.<sup>104</sup> In an alternate test, courts examine the economic realities of the relationship to determine whether the worker is exhibiting entrepreneurial activity, or whether the worker is financially dependent upon the employer.<sup>105</sup> A third test that has recently been gaining ground is the ABC test.<sup>106</sup> Under all these tests, the label affixed to the relationship is a factor in the outcome, but it is certainly not dispositive.<sup>107</sup> In any event, the tests are notoriously malleable, difficult, and fact-dependent, even when dealing with what should be a fairly straightforward analysis.<sup>108</sup>

Many commentators had hoped that the wage and hour lawsuits within platform companies that have been pending in the United States District Court for the Northern District of California would conclude,

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102. See Stone, *Legal Protections*, *supra* note 101, at 257.

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

104. 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.").

105. Stone, *Legal Protections*, *supra* note 101, at 257-58.

106. 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, 354 n.327 (2001).

107. *Id.* at 299-300.

108. *Id.* at 298 ("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. 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.").

or at least shape, these disputes over worker classification.<sup>109</sup> In the largest of these suits, *O'Connor v. Uber Technologies, Inc.*,<sup>110</sup> over 160,000 drivers for the popular ridesharing service were certified as a class to seek employee status and redress, under the Fair Labor Standards Act (FLSA), for minimum wages and overtime pay.<sup>111</sup> 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.<sup>112</sup> The case was settled.<sup>113</sup>

### 1. Litigation in the United States

In the United States, recent cases have planted the seeds for inconsistent holdings about the status of gig economy workers. For example, two federal trial courts reached opposing conclusions about employment status despite the cases involving the same company, the same platform business model, and the same way of structuring the work relationship. In *Search v. Uber Technologies, Inc.*, the United States District Court for the District of Columbia allowed a case involving *respondeat superior* liability of Uber to move forward.<sup>114</sup> In that case, the plaintiff alleged that he had been stabbed by an Uber driver who had been behaving erratically.<sup>115</sup> In responding to Uber’s motion to dismiss the case, the court noted its skepticism about Uber’s claim that its workers were all independent contractors, thus absolving it of liability for wrongs that were committed in the furtherance of Uber’s business.<sup>116</sup> In about the same time period, the United States

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109. See Cherry, *Digital Transformation of Work*, *supra* note 11, at 584-85.

110. 311 F.R.D. 547, 550 (N.D. Cal. 2015).

111. *Id.* at 550-51.

112. 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.”).

<sup>113</sup> UBER CLASS ACTION SETTLEMENT, <https://www.uberlitigation.com/> (last updated Oct. 21, 2019).

114. 128 F. Supp. 3d 222, 234, 238 (D.D.C. 2015).

115. *Id.* at 227.

<sup>116</sup> Memorandum Opinion at 14, *Search v. Uber Technologies, Inc.*, (No. 15-257 (JEB)) (“In sum, the court cannot determine as a matter of law that [the driver] was an independent contractor.”).

District Court for the Eastern District of Pennsylvania decided *Razak v. Uber Technologies, Inc.*, a decision under the FLSA minimum wage and hour law.<sup>117</sup> Looking primarily at the control test, the court decided that because the Uber drivers could work as much or as little as they wanted, they looked more like independent contractors.<sup>118</sup> The court also discussed entrepreneurial activities and that Uber drivers shouldered the risk of profit or loss, which also made them look more like independent contractors.<sup>119</sup>

Meanwhile, the California Supreme Court handed down the decision in *Dynamex Operations West, Inc. v. Superior Court*.<sup>120</sup> While not an on-demand economy case, the California decision fundamentally changed the test for determining employee status throughout the state.<sup>121</sup> In *Dynamex*, the court established the so-called ABC test, which states that a business wanting to classify workers as independent contractors must satisfy three elements:

- (A) that the worker is free from the control and direction of the hirer in connection with the performance of the work, both under the contract for the performance of such work and in fact; (B) that the worker performs work that is outside the usual course of the hiring entity's business; and (C) that the worker is customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed for the hiring entity.<sup>122</sup>

While all of these seem difficult for Uber to meet, probably the most difficult and fatal element for Uber—and companies like it—will be prong B. To date, Uber has had little luck convincing courts that it is a software company.<sup>123</sup> Courts have recognized that Uber is in the business of providing transportation, and that drivers are an integral part of shuttling passengers from one location to another.<sup>124</sup> While the matter may be indeterminate now, under the new expansive ABC test

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117. No. CV 16-573, 2018 WL 1744467, at \*1 (E.D. Pa. Apr. 11, 2018).

118. *Id.* at \*16.

119. *Id.* at \*17.

120. 416 P.3d 1, 1 (Cal. 2018).

121. Noam Scheiber, *Gig Economy Business Model Dealt a Blow in California Ruling*, N.Y. TIMES (Apr. 30, 2018), <https://nytimes.com/2018/04/30/business/economy/gig-economy-ruling.html>.

122. *Dynamex*, 416 P.3d at 7.

123. O'Connor v. Uber Techs., Inc., 82 F. Supp. 3d 1133, 1141 (N.D. Cal. 2015) (“Uber is no more a ‘technology company’ than Yellow Cab is a ‘technology company’ because it uses CB radios to dispatch taxi cabs, John Deere is a ‘technology company’ because it uses computers and robots to manufacture lawn mowers, or Domino Sugar is a ‘technology company’ because it uses modern irrigation techniques to grow its sugar cane.”).

124. See *Razak*, 2018 WL 1744467, at \*3.

in California, the most likely outcome will be that Uber drivers are employees. Indeed, in Bill AB-5, the California legislature codified the ABC test, solidifying the *Dynamex* decision into statute.<sup>125</sup>

## 2. Litigation Within the European Union

The gig economy model only gained momentum later in the European Union, and as such, the litigation about employee status was a few years behind the United States.<sup>126</sup> However, EU jurisdictions are now grappling with the same set of difficult problems around employee misclassification that the U.S. courts have been struggling with for several years. A 2018 blog post by Valerio De Stefano discussed the gig economy litigations across Europe and the reasoning of the courts deciding the cases, which are being decided inconsistently.<sup>127</sup> This initial round of litigation has resulted in uncertainty and confusion. Some tribunals have found gig workers to be employees and others have found them to be independent contractors.<sup>128</sup> Making matters more complicated is that some EU jurisdictions have a third category of “dependent contractor” or “self-employed worker,” which can make classification lawsuits even more complicated.<sup>129</sup>

One of the first cases in Europe that received a great deal of attention was *Aslam v. Uber*, in which the London Employment Tribunal ruled that the Uber drivers bringing the case were “workers,” an intermediate status between employee and independent contractor.<sup>130</sup> The Tribunal noted that Uber had imposed a great number of conditions on the drivers, managed and instructed the drivers through the cellphone app, and overall, controlled the drivers’ working conditions.<sup>131</sup> The United Kingdom’s Employment Appeals Tribunal

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125. John Myers et al., *Newsom Signs Bill Rewriting California Employment Law, Limiting Use of Independent Contractors*, L.A. TIMES (Sept. 18, 2019), <https://www.latimes.com/california/story/2019-09-18/gavin-newsom-signs-ab5-employees-independent-contractors-california>.

126. Compare Cherry, *Digital Transformation of Work*, *supra* note 11, at 584-85 (listing American cases), with De Stefano, *Platform Work*, *supra* note 17 (listing European cases).

127. De Stefano, *Platform Work*, *supra* note 17; see also Ruiz, *supra* note 23 (listing court cases across various jurisdictions).

128. De Stefano, *Platform Work*, *supra* note 17.

129. Cherry & Aloisi, *supra* note 13, at 636 (comparing systems of worker classification in Canada, Italy, Spain, and the United States).

130. [2016] EW Misc B68, [97] (ET) (28 Oct. 2016), <http://www.bailii.org/ew/cases/Misc/2016/B68.html>.

131. *Id.* [92].

upheld the decision on appeal.<sup>132</sup> Courts in other European nations have also held on-demand workers to be employees. In Belgium, the Administrative Commission for the Governance of the Employment Relationship decided that Deliveroo food-delivery bicycle riders were employees under Belgian law.<sup>133</sup> In its decision, the Commission noted that Deliveroo riders do not control their working time, since they must reserve their work slots more than one week in advance.<sup>134</sup> In Spain, the Labor Inspectorates of Valencia and Madrid determined that Deliveroo and Glovo drivers were employees because they work in conditions of subordination to the platform.<sup>135</sup>

Contrast these outcomes with the recent decision of the Labor Tribunal of Turin, Italy, which rejected a claim from Foodora delivery riders who sought employee classification.<sup>136</sup> The Tribunal relied heavily on the fact that the workers had control over their schedules and could decide when they wanted to work.<sup>137</sup> As such, the Tribunal found that these riders were not employees.<sup>138</sup> A similar argument convinced the Paris Court of Appeal, which found that a Deliveroo rider was not an employee, in part because the riders could choose their shifts and decide when to work.<sup>139</sup> The reasoning about work flexibility

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132. *Id.* [106].

133. Commission Administrative de règlement de la relation de travail (CRT) [Administrative Commission for the Settlement of Work Relationship] Feb. 23, 2018, No. 116-FR-20180209 [hereinafter Commission Administrative (Belg.)], <http://commissiearbeidsrelaties.belgium.be/docs/dossier-116-fr.pdf>, (Belg.); see also *Les Coursiers Deliveroo Sont de Faux Indépendant, Selon la CRT*, TRENDS (Mar. 27, 2018, 9:58 AM), <http://trends.levif.be/economie/entreprises/les-coursiers-deliveroo-sont-de-faux-independant-selon-la-crt/article-normal-817847.html?> (describing the court's decision).

134. Commission Administrative (Belg.), *supra* note 133, at 7.

135. S. Juz. Soc., June 1, 2018 (No. 244/2018), <https://adriantodoli.com/wp-content/uploads/2018/06/documento-2.pdf> (Spain); see also África Semprún & Javier Romera, *La Inspección de Trabajo Acorrala a Deliveroo y Glovo por los Falsos Autónomos*, ELECONOMISTA.ES (Feb. 5, 2018, 7:34 AM), <http://www.eleconomista.es/empresas-finanzas/noticias/8914943/02/18/Trabajo-acorrala-a-Deliveroo-y-Glovo-por-los-falsos-autonomos.html> (describing labor inspections of “false autonomous” workers).

136. Vincenzo Di Gennaro & Attilio Pavone, *Italian Labour Court Hands Down Landmark Decision on Foodora Case with Potentially Far-Reaching Implications for Any Company Active in Italy's Growing Gig Economy*, GLOBAL WORKPLACE INSIDER BLOG (May 24, 2018), <https://www.globalworkplaceinsider.com/2018/05/italian-labour-court-hands-down-landmark-decision-on-foodora-case-with-potentially-far-reaching-implications-for-any-company-active-in-italys-growing-gig-economy/>; see also Avvocati Giuslavoristi Italiani, *Motivazioni Caso Foodora—La Sintesi*, LINKEDIN (May 7, 2018), <https://www.linkedin.com/pulse/motivazioni-caso-foodora-la-sintesi-agi/> (describing the court's decision).

137. Gennaro & Pavone, *supra* note 136.

138. Avvocati Giuslavoristi Italiani, *supra* note 136.

139. Cour d'appel de Paris [CA] [Paris Court of Appeal], Paris, Chambre 2, Nov. 9, 2017, 16/12875 (Fr.); see also *La Justice Déboute un Livreur de Deliveroo qui Voulait Être*

and selection of shifts also convinced the Paris Conseil des Prud'hommes, a lower judicial body in France, which held that an Uber driver was not an employee.<sup>140</sup> Ultimately, these precedents illustrate different approaches to dealing with national law and the classification of on-demand workers. As these cases wend their way through employment tribunals and national courts, the differing outcomes and confusing conclusions will only multiply.

#### IV. PRIVATE INTERNATIONAL LAW AND THE PLATFORM ECONOMY: AN ANALYSIS OF THREE JURISDICTIONS

“[I]t only takes two facing mirrors to construct a labyrinth.”

—Jorge Luis Borges<sup>141</sup>

To date, the cases about employment in the gig economy have not delved into the issues surrounding jurisdiction, choice of law, and conflict of law in any depth.<sup>142</sup> In part, that is because there has not yet been enough law developed to enable the parties to make strategic decisions about where to bring suit, or to ask courts to apply a particular jurisdiction's law. Without knowing how any particular jurisdiction will rule, the parties can only guess about which legal system might result in a favorable ruling. Some jurisdictions generally have more favorable labor and employment laws, or have precedents that strongly favor employee rather than independent contractor status, which might influence a decision about where a plaintiff might want to bring suit.<sup>143</sup>

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*Reconnu Salarié*, L'EXPRESS L'ENTREPRISE (Nov. 17, 2017, 11:27 AM), [https://lentreprise.lexpress.fr/rh-management/droit-travail/la-justice-deboute-un-livreur-de-deliveroo-qui-voulait-etre-reconnu-salarie\\_1961503.html](https://lentreprise.lexpress.fr/rh-management/droit-travail/la-justice-deboute-un-livreur-de-deliveroo-qui-voulait-etre-reconnu-salarie_1961503.html) (describing the court's decision).

140. Conseil de Prud'hommes de Paris [CP] [Paris Labor Court], Paris, Jan. 29, 2018, No. RG:F 16/11460; *see also* Clément Bohic, Les Chauffeurs Uber Salariés: C'est Non Pour les Prud'hommes, ITESPRESSO (Feb. 9, 2018, 11:34 AM), <https://www.itespresso.fr/chauffeurs-uber-salaries-non-prud-hommes-183124.html> (describing the court's decision).

141. JORGE LUIS BORGES, *Nightmares*, in SEVEN NIGHTS 33 (Eliot Weinberger trans., Faber & Faber 1984) (“I remember seeing, in the house of Dora de Alvear in the Belgrano district, a circular room whose walls and doors were mirrored, so that whoever entered the room found himself at the center of a truly infinite labyrinth.”).

142. The litigations so far have treated the employee status question as one of national or state law. *See* O'Connor v. Uber Techs., Inc., 311 F.R.D. 547, 547 (N.D. Cal. 2015); *Cotter v. Lyft, Inc.*, 60 F. Supp. 3d 1059, 1060-61 (N.D. Cal. 2014); *see also* Yuki Noguchi, *Gig Economy Renews Debate over Whether Contractors Are Really Employees*, NPR (Mar. 7, 2018, 3:00 PM), <https://www.npr.org/2018/03/07/589840595/gig-economy-renews-debate-over-whether-contractors-are-really-workers> (discussing how freelancers and contract workers do not have access to traditional benefits).

143. *See Cotter*, 60 F. Supp. 3d at 1061 (noting that the plaintiffs contended that California's laws are more worker-protective than those of other states); Kia Kokalitcheva, *Judge to Lawyer Suing Uber: Stop Filing in California*, FORTUNE (Oct. 14, 2015), <http://>

In addition, apart from the *Otey v. Crowdfunder, Inc.* case, most of the litigation to date has concerned platforms that facilitate work in the real world, i.e., transportation, home repair, cleaning, or odd jobs.<sup>144</sup> As such, the workers have tended to bring suit based on where they live and perform their work.<sup>145</sup>

This is not the case with the three examples that were set out in the Introduction. Upwork could be sued in many of the jurisdictions in which it has recruited requesters and workers. Calculating the permutations of the different countries involved in this interaction is practically a matter of factorial combinatorics.<sup>146</sup> TaskRabbit platform workers in the United Kingdom, who work for a platform based in the United States but owned by a Swedish company, might have a very difficult time figuring out what their minimum wage would be. Sweden has no minimum wage.<sup>147</sup> What about the workers in refugee camps performing piecework computer tasks for a multinational company with a platform based in yet another country and end users in many nations? This is an incredibly difficult problem.

These difficult issues will soon become important in future litigation and policy discussions. Conflicts of law is a “sleeper,”<sup>148</sup> a dormant and unexpected legal issue for the gig economy now, that will have considerable significance in the future. In the three- to five-year period following the publication of this Article, there will be indicators or rough outlines of different national approaches to the labor and employment law problems the gig economy has provoked. In some instances, the response will be the work of courts, either stretching current laws to cover the gig economy, or declining to do so on the

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fortune.com/2015/10/14/labor-lawyer-california-license (stating that the judge informed prominent plaintiffs’ attorney Shannon Liss-Riordan that she wasn’t eligible for admission pro hac vice in California because she “regularly engaged in substantial legal activities in California.”).

144. See Cherry, *Digital Transformation of Work*, *supra* note 11, at 584-85. *But see* No. 12-cv-05524-JST, 2016 WL 304747, at \*1 (N.D. Cal. 2016) (considering a platform that facilitates online work, such as verifying business listings).

145. See *Razak v. Uber Techs., Inc.*, No. CV 16-573, 2018 WL 1744467, at \*1 (E.D. Pa. Apr. 11, 2018) (stating that the plaintiffs are Pennsylvania drivers who filed the lawsuit in Pennsylvania).

146. Cf. Brett Berry, *Combinations vs Permutations*, MEDIUM (June 14, 2017), <https://medium.com/i-math/combinations-permutations-fa7ac680f0ac> (explaining how to calculate combinations and permutations).

147. Per Skedinger, *Sweden: A Minimum Wage Model in Need of Modification?* 1 (Res. Inst. of Indus. Econ., Working Paper No. 774, 2008), <http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.493.6418&rep=rep1&type=pdf>.

148. *Sleeper*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/sleeper> (last visited Nov. 22, 2019).



grounds that it is beyond the bounds of existing regulation. In the ensuing years, the issues will make their way up to the appellate courts. In other instances, legislatures will be key actors, either passing laws to provide courts with clear guidance as to appropriate approaches or to correct approaches where legislatures disagree with the courts. Legislatures may enact “fixes” to bring gig workers within the ambit of existing laws, to repeal the effect of judicial decisions they do not like, or to pass legislation specifically to regulate the gig economy.

Based on the preliminary rulings we have seen, a high degree of divergence is likely in various national final rulings.<sup>149</sup> Because the decision about classification is like “being ‘handed a square peg and [being] asked to choose between two round holes,’” some jurisdictions will decide that gig workers are employees, and some will decide that they are independent contractors.<sup>150</sup> Where a legal system recognizes an intermediate category, that third category is also a permissible choice.<sup>151</sup> It is at that point that the conflicts-of-law problems will emerge. In selecting a place to bring suit, workers will try to choose the jurisdiction with the highest or most favorable labor standards. Likewise, platforms could also attempt to choose a favorable forum, either by writing clauses into their online terms or by arguing for removal.<sup>152</sup> Choosing regulation by searching for the jurisdiction that provides either a “race to the bottom” or “race to the top” seems more like a jurisdictional shell game than a coherent regulatory approach.

While so far this Article has been somewhat abstract in its discussion of the conflict-of-law and choice-of-law rules, the following discussion is designed to cover three jurisdictions that have important connections with crowdwork: California, the European Union, and India. These issues are described only in brief. While the application to crowdwork platforms has not occurred yet, the analysis below is intended as a starting point.

#### A. *United States: California’s Governmental Interest Approach*

An analysis of California law is included because many of the well-known on-demand platforms originated in Silicon Valley and

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149. See De Stefano, *Platform Work*, *supra* note 17.

150. Cherry & Aloisi, *supra* note 13, at 681 (quoting *Cotter v. Lyft, Inc.*, 60 F. Supp. 3d 1067, 1081 (N.D. Cal. 2015)); see De Stefano, *Platform Work*, *supra* note 17.

151. Cherry & Aloisi, *supra* note 13, at 637.

152. See BERG ET AL., DIGITAL LABOUR PLATFORMS, *supra* note 73, at 22-23.

many platforms continue to operate there.<sup>153</sup> Further, many platforms were tested in the San Francisco Bay area, and so California is home to many requesters and on-demand workers as well.<sup>154</sup> The focus here is on California and not the entire United States because conflict-of-law rules vary between the states.<sup>155</sup> The Restatement (Second) of Conflicts of Laws has only been adopted by roughly twenty states; some states continue to follow the Restatement (First), while others take a common law approach.<sup>156</sup> This problem with lack of uniformity can be sidestepped by focusing on the conflicts laws of California.

The focus on California also makes sense as many gig economy cases have been brought in California, although most of those cases have either settled or are in the process of settling.<sup>157</sup> Currently, there is no consensus in California law about whether platform workers are employees or independent contractors.<sup>158</sup> As noted in Part III, the California Supreme Court's decision in *Dynamex* sets out the ABC test, which contains a strong presumption in favor of employment status.<sup>159</sup> With this change in the controlling precedent, it is safe to assume that under California law, a substantial fraction of on-demand workers will be found to be employees. From a worker's perspective, California is also a jurisdiction within the United States that has some of the more worker-friendly sets of labor and employment laws. For example, noncompetition clauses are not enforceable in California, unlike their status in most other states.<sup>160</sup> As another example, California's Unruh Act extends antidiscrimination protection to LGBT workers, whereas the federal law has not yet done so.<sup>161</sup> As a third example, California is also phasing in a state minimum wage that is higher than the amount

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153. Tracey Lien, *On-Demand Business Models Have Put Some Startups on Life Support*, L.A. TIMES (June 18, 2016, 6:00 AM), <http://www.latimes.com/business/technology/la-fi-tn-end-of-on-demand-snap-story.html>.

154. *Id.*

155. See PETER HAY ET AL., CONFLICT OF LAWS 72 (5th ed. 2010).

156. *Id.*

157. See Miriam A. Cherry, *Gig Economy: Settlements Leave Labor Issues Unsettled*, LAW360 (May 5, 2016, 10:26 AM), <https://www.law360.com/articles/791341/gig-economy-settlements-leave-labor-issues-unsettled>.

158. Lydia DePillis, *California Ruling Puts Pressure on Uber, Lyft and Other Gig Economy Employers*, CNN MONEY (May 3, 2018, 1:22 PM), <https://money.cnn.com/2018/05/01/news/economy/california-gig-employer-ruling/index.html>.

159. 416 P.3d 1, 29, 30, 35 (Cal. 2018).

160. Glynn, *supra* note 50; Lester & Ryan, *supra* note 50; Moffat, *supra* note 50, at 941-43.

161. See CAL. DEP'T FAIR EMP'T & Hous., DFEH-U01P-ENG, UNRUH CIVIL RIGHTS ACT (Apr. 2019), [https://www.dfeh.ca.gov/wp-content/uploads/sites/32/2017/12/DFEH\\_UnruhFactSheet.pdf](https://www.dfeh.ca.gov/wp-content/uploads/sites/32/2017/12/DFEH_UnruhFactSheet.pdf).

under the FLSA, with the ultimate goal of a \$15 hourly wage by 2023.<sup>162</sup>

### 1. Conflict of Laws: Governmental Interest Approach

California courts apply the governmental interest approach and comparative impairment analysis when resolving conflict-of-laws issues.<sup>163</sup> The governmental interest approach involves three steps. First, the court determines whether the relevant law of each of the potentially affected jurisdictions with regard to the particular issue in question is the same or different.<sup>164</sup> Second, if there is a difference, the court examines each jurisdiction's interest in the application of its own law under the circumstances of the particular case to determine whether a "true conflict" exists.<sup>165</sup> Third, if the court finds a true conflict, it carefully evaluates and compares the nature and strength of each jurisdiction's interest in the application of its own law "to determine which state's interest would be more impaired if its policy were subordinated to the policy of the other state" and then ultimately applies "the law of the state whose interest would be the more impaired if its law were not applied."<sup>166</sup> This last step is a comparative impairment analysis.<sup>167</sup>

Two recent cases concerning conflicts of employment law are illustrative of the approach and provide some guidance for application of the tests to crowdwork. In *Kearney v. Salomon Smith Barney, Inc.*,

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162. Labor Comm'rs Office, *Minimum Wage*, CAL. DEP'T INDUS. REL. (Dec. 2016), [https://www.dir.ca.gov/dlse/faq\\_minimumwage.htm](https://www.dir.ca.gov/dlse/faq_minimumwage.htm).

163. *Kearney v. Salomon Smith Barney, Inc.*, 137 P.3d 914, 922 (Cal. 2006) (citing *Reich v. Purcell*, 432 P.2d 727 (Cal. 1967)). For an excellent summary of choice-of-law and conflict-of-law rules in California, see Michael H. Hoffheimer, *California's Territorial Turn in Choice of Law*, 67 RUTGERS U. L. REV. 167 (2015).

164. *Kearney*, 137 P.3d at 922. The California government interest approach owes a heavy debt to the judicial opinions of California Supreme Court Justice Roger Traynor. See BRAINERD CURRIE, *SELECTED ESSAYS ON THE CONFLICT OF LAWS* 629-89 (1963). See generally Herma Hill Kay, *Chief Justice Traynor and Choice of Law Theory*, 35 HASTINGS L.J. 747 (1984) (recognizing Justice Traynor's contributions to the field).

165. *Kearney*, 137 P.3d at 922; see also WILLIAM LINDSLEY, 12 CAL. JUR. 3D § 30, Westlaw (database updated Aug. 2019) ("Although the two potentially concerned states have different laws, when only one of two states related to a case has a legitimate interest in the application of its law and policy and the other has none, the law of the interested state should be applied. A true conflict of laws arises only if the laws of the two jurisdictions differ and each state has a legitimate interest in having its law applied."); Harold W. Horowitz, *The Law of Choice of Law in California—A Restatement*, 21 UCLA L. REV. 719, 743-47 (1974) (explaining "false-false conflicts").

166. *Bernhard v. Harrah's Club*, 546 P.2d 719, 723 (Cal. 1976).

167. *Id.*

the court held that the privacy laws of California and Georgia differed, conflicted, and the failure to apply California's privacy law would have impaired California's interest more severely than the application of California law would have impaired Georgia's interests.<sup>168</sup> In *Kearney*, the Atlanta-based branch of Salomon Smith Barney (SSB) recorded the telephone conversations between SSB's employees and California clients without the California clients' knowledge or consent.<sup>169</sup> Under California's invasion of privacy statute, *all* parties must have knowledge and consent to the recording of a telephone conversation.<sup>170</sup> However, under Georgia's privacy statute, only *one* party in the conversation needs to give prior consent to the recording of the telephone conversation.<sup>171</sup> The court reasoned that both California and Georgia had a legitimate interest in the application of its law.<sup>172</sup> California had an interest in protecting the privacy of its citizens. Georgia's privacy statute can be reasonably interpreted to establish the ground rules under which persons in Georgia may act in regards to recording private conversations and therefore seeks to protect the liability of persons or businesses who acted in reasonable reliance on Georgia law.<sup>173</sup>

Accordingly, the court concluded that the case presented a true conflict.<sup>174</sup> After a true conflict is identified by the court, the comparative impairment approach seeks to determine which state's interest would be more impaired if its policy were subordinated to the policy of the other state.<sup>175</sup> However, the comparative impairment approach is not a weighing test because a "balancing" of conflicting state policies creates federalism concerns.<sup>176</sup> Instead, the comparative impairment process attempts to accommodate conflicting state policies and achieve the "maximum attainment" of underlying governmental

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168. 137 P.3d at 917.

169. *Id.* at 918.

170. *Id.* at 929.

171. *Id.* at 932.

172. *Id.* at 933.

173. *Id.*

174. *Id.*; see JOHN K. DIMUGNO & PAUL E.B. GLAD, CALIFORNIA INSURANCE LAW HANDBOOK § 17:2, Westlaw (database updated Mar. 2019). True conflicts differ from "false conflicts." Brainerd Currie termed a "false conflict" as "a situation in which only one state had an actual interest in having its law applied." DIMUGNO & GLAD, *supra*.

175. *Kearney*, 137 P.3d at 933 (citing *Bernhard v. Harrah's Club*, 546 P.2d 719, 723 (Cal. 1976).

176. *Id.* at 934 (citing *Bernhard*, 546 P.2d at 723).

purpose.<sup>177</sup> The *Kearney* court looked to the legislative history of the invasion of privacy statute's enactment to determine the statute's principle purpose.<sup>178</sup> Since 1967, the California legislature has continually modified and added to the invasion of privacy statutory scheme.<sup>179</sup> Additionally, the California courts have repeatedly invoked and vigorously enforced the invasion of privacy provisions.<sup>180</sup> Accounting for the many national and international firms that have headquarters, offices, or telephone operators in California, the *Kearney* court reasoned that the failure to enforce California's invasion of privacy provision would substantially undermine the protection afforded by the statute.<sup>181</sup> By contrast, applying California law to a Georgia business's recording of telephone calls between its employees and California customers will not severely impair Georgia's interests because California law does not totally prohibit a party to a telephone call from recording the call but rather prohibits only the *undisclosed* recording of telephone conversations.<sup>182</sup> Accordingly, the court held that "California law should apply in determining whether the alleged secret recording of telephone conversations at issue in this case constitutes an unlawful invasion of privacy" because California's interests would be severely impaired if its law were not applied, and Georgia's interest would not be significantly impaired if California law rather than Georgia law were applied.<sup>183</sup>

In *Sullivan v. Oracle Corp.*, the Court held that the California Labor Code applied to overtime work performed in California for a California-based employer by out-of-state plaintiffs.<sup>184</sup> In *Sullivan*, former non-California resident employees sued Oracle alleging misclassification as "exempt" from overtime and sought unpaid

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177. *Id.* (quoting *Offshore Rental Co. v. Cont'l Oil Co.*, 583 P.2d 721, 728 (Cal. 1978)); see also Note, *Comparative Impairment Reformed: Rethinking State Interests in the Conflict of Laws*, 95 HARV. L. REV. 1079, 1083 (1982) ("The spirit of our Constitution and the values underlying our federal system sanction and encourage the separate development of policy and law in each state in accordance with its own environment. If this uniquely federalist value—maximum attainment of policy objectives by each state—is itself a systemic policy whose promotion is important to each state, the comparative impairment principle follows quite naturally.").

178. *Kearney*, 137 P.3d at 934.

179. *Id.* at 935.

180. *Id.* at 934.

181. *Id.* at 936.

182. *Id.*

183. *Id.* at 937.

184. 254 P.3d 237, 247 (Cal. 2011).

overtime compensation.<sup>185</sup> The employees contended California's overtime law governed their work in the state of California, whereas Oracle contended the laws of the plaintiffs' home states, Colorado and Arizona, governed.<sup>186</sup> The relevant laws differed between the three states because California law had an additional overtime compensation provision increasing the rate of pay to twice the regular rate, for work in excess of eight hours, on the seventh workday.<sup>187</sup> Unlike California law, neither Colorado law nor Arizona law required double pay.<sup>188</sup>

The California Supreme Court reasoned that neither Colorado nor Arizona expressed any "interest in disabling their residents from receiving the full protection of California overtime law when working [in California], or in requiring their residents to work side-by-side with California residents in California for lower pay."<sup>189</sup> "Consequently, neither Colorado nor Arizona ha[d] a legitimate interest in shielding Oracle from the requirements of California wage law as to work performed [in California]" because Oracle is a multistate operation.<sup>190</sup> "[A] company that conducts business in numerous states ordinarily is required to make itself aware of and comply with the law of a state in which it chooses to do business."<sup>191</sup> Even if a genuine "true conflict" existed, permitting nonresidents to work in California without the protection of California's overtime law would have sacrificed "the state's important public policy goals of protecting health and safety and preventing the evils associated with overwork."<sup>192</sup> "Colorado overtime law expressly d[id] not apply outside the state's boundaries, and Arizona ha[d] no overtime law."<sup>193</sup> In this situation, the California Supreme Court held that the California Labor Code applied to overtime work performed in California for a California-based employer by out-of-state plaintiffs.<sup>194</sup>

One last point about why *Sullivan* is an important case. In the last part of its opinion, the court declined to extend California overtime pay provisions to work performed by the plaintiffs for Oracle in states other

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185. *Id.* at 239.

186. *Id.* at 244.

187. *Id.* at 245.

188. *Id.*

189. *Id.* at 246.

190. *Id.*

191. *Id.* (quoting *Kearney v. Salomon Smith Barney, Inc.*, 137 P.3d 914, 920 (Cal. 2006)).

192. *Id.* at 247.

193. *Id.*

194. *Id.*

than California. The discussion is limited to the last section of the opinion, and it is fact-specific, noting that the plaintiffs were trying to reinstate time-barred FLSA claims as restitution claims under California's unfair competition law.<sup>195</sup> Nonetheless, the court noted the presumption against extraterritorial application of laws, and noted no intent to overcome that presumption in the Unfair Competition Law (UCL) by the California legislature.<sup>196</sup> This was enough to prompt one commentator to note that this decision and ones like it marked a return of California to territorial application of rules, with a tendency to apply "the law of the place where the events occurred" rather than apply the governmental interest approach.<sup>197</sup>

## 2. Choice of Law

In addition to the default rules of the governmental interest approach and the comparative impairment test set out above, California follows the rules set out in the Restatement (Second) of Conflicts of Laws.<sup>198</sup> "[W]hen the parties intend the law of a certain state to govern a dispute, that intention is usually respected. . . . In the absence of countervailing public policy considerations, agreements of the parties as to the applicable law are enforced."<sup>199</sup> However, an escape clause qualified this statement. The Restatement (Second) of Conflict of Laws states as follows:

The law of the state chosen by the parties to govern their contractual rights and duties will be applied, . . . unless . . . application of the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue . . . .<sup>200</sup>

In determining which state has a "materially greater interest" in the resolution of an issue,

court[s] may consider (1) the place of contracting, (2) the place of negotiation of the contract, (3) the place of performance, (4) the location of the subject matter of the contract, (5) the domicile, residence, nationality, place of incorporation and place of business of the parties,

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195. *Id.* at 248.

196. *Id.*

197. Hoffheimer, *supra* note 163, at 241-42.

198. *See id.* at 168 n.4.

199. *Connolly Data Sys., Inc. v. Victor Techs., Inc.*, 114 F.R.D. 89, 92 (S.D. Cal. 1987).

200. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187(2) (AM. LAW INST. 1971).

(6) the impact of the transaction on the state or its citizens, and (7) the extent to which the state has sought to regulate the issue.<sup>201</sup>

Three cases are particularly relevant for the crowdwork discussion. In *Hammerl v. Acer Europe, S.A.*, the plaintiff's employment contract contained a choice-of-law clause.<sup>202</sup> The plaintiff sought to bring his claim under the California Labor Code whereas the defendant, Acer Europe, sought to enforce the contractual choice-of-law provision and have Swiss law govern the dispute.<sup>203</sup> The court stated that the defendant's American subsidiary corporation, Acer America, exercised a degree of control over the plaintiff's employment duties, compensation, and benefits to the extent that it would be reasonable to consider the plaintiff an employee of Acer America and, therefore, eligible to state a claim for violations of the California Labor Code.<sup>204</sup>

In *Application Group, Inc. v. Hunter Group, Inc.*, the court declined to enforce the parties' contractual choice-of-law provision because the interests of the forum state, California, were "materially greater" than those of the chosen state, Maryland.<sup>205</sup> In this case, a Maryland corporation sought to enforce a noncompetition covenant within a consultant's contract after a California corporation recruited and hired the consultant.<sup>206</sup> The court was convinced that "California ha[d] a materially greater interest than d[id] Maryland in the application of its law to the parties' dispute, and that California's interests would be more seriously impaired if its policy were subordinated to the policy of Maryland" because California had consistently expressed a public policy "ensur[ing] that every citizen shall retain the right to pursue any lawful employment and enterprise of their choice."<sup>207</sup> The case of *In re Gault South Bay Litigation*, which involved an Indiana corporation's attempt to enforce a noncompetition clause, had a similar impact.<sup>208</sup> The conflicts-of-law analysis required

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201. *In re Gault S. Bay Litig.*, No. C 07-04659 JW, 2008 WL 4065843, at \*4 (N.D. Cal. 2008) (citing RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 187, 188).

202. No. C 08-4754 JF (RS), 2009 WL 30130, at \*2 (N.D. Cal. 2009).

203. *Id.* at \*3.

204. *Id.* at \*7.

205. 72 Cal. Rptr. 2d 73, 83-84 (Cal. Ct. App. 1998).

206. *Id.* at 75-76.

207. *Id.* at 85-86 (quoting *Metro Traffic Control, Inc. v. Shadow Traffic Network*, 27 Cal. Rptr. 2d 573, 577 (Cal. Ct. App. 1994)).

208. No. C 07-04659 JW, 2008 WL 4065843, at \*1 (N.D. Cal. 2008).



the court to apply California law to the agreement, holding the non-compete provision of the agreement to be void.<sup>209</sup>

Finally, *Pinela v. Neiman Marcus Group, Inc.* involved a contractual mandatory arbitration provision within an employment agreement.<sup>210</sup> The plaintiffs alleged various wage and hour violations under the California Labor Code.<sup>211</sup> The employer, a Texas-based corporation, sought to enforce the mandatory arbitration provision under Texas law whereas the plaintiffs sought to argue unconscionability using California public policy.<sup>212</sup> The court held the California law enforceable because enforcing Texas law would be contrary to the “fundamental policy” of California’s interest to protect California-based workers.<sup>213</sup> These cases seem to indicate that rather than accepting a choice-of-law clause written by an employer at face value, California courts are willing to undertake a more searching review, looking at the governmental and public policy interests involved.

### *B European Union*

The European Union is included in this study because of its large number of requesters and workers performing gig work, as well as a substantial number of platforms that are either hosted or EU-owned.<sup>214</sup> In addition, European countries have had a long history of dealing with cross-border workers and posted workers.<sup>215</sup> As background to this discussion, it is important to note that a number of issues, such as worker safety, maximum hours, or employment discrimination are in many nations in the European Union considered “public law,” enforced by a national governmental authority.<sup>216</sup> Each such authority is responsible for either taking action (or not) to enforce the rules within its territorial boundaries.<sup>217</sup>

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209. *Id.* at \*5.

210. 190 Cal. Rptr. 3d 159, 164 (Cal. Ct. App. 2015).

211. *Id.*

212. *Id.* at 171.

213. *Id.* at 185.

214. *Cf.* De Stefano, *Platform Work*, *supra* note 17 (noting litigation involving crowdworking platforms in the European Union).

215. *See generally* Directive 96/71/EC of the European Parliament and of the Council of December 1996 Concerning the Posting of Workers in the Framework of the Provision of Services, 1997 O.J. (L 18) (dealing with posted workers).

216. *See* Franzen, *supra* note 43, at 245.

217. *Id.* at 246-47 (“As a rule—this is universally accepted—the application of these protective norms is contingent on the fact that the work is executed within national boundaries.”)

Some components of the employment relationship, however, are considered a subset of contractual matters, and these are classified as private law.<sup>218</sup> As such, these matters are generally left up to the individual employee to claim his or her rights through grievance procedures or the courts.<sup>219</sup> The rules of jurisdiction over such claims are set out in the Brussels I regulation. Section 5 of the Brussels I Regulation allows employees who act as claimants to commence proceedings in a number of places: in the courts of the employer's domicile, in the courts of the habitual place of work, and in the courts of the engaging place of business.<sup>220</sup> As such, Brussels I is quite permissive in where an employee can bring a claim, with the ultimate intent of furthering employee protection.<sup>221</sup>

Private international law problems are set out in the Rome I Regulation,<sup>222</sup> in which the European Union adopted an extremely comprehensive and sophisticated system for dealing with private international law problems and labor and employment.<sup>223</sup> Based on the Rome Convention of 1980,<sup>224</sup> the Rome I Regulation has as its goal a uniform approach that will yield predictable outcomes throughout the member states.<sup>225</sup> There is also a special section, article 8, specifically

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The Conflict of Law norm is unilateral. For example, the German factory inspectorate . . . is only responsible and German safety regulations only apply if the work is done in Germany.”). Collective norms pertaining to industrial relations do not easily fit into the public law/private law dichotomy. *Id.* at 246.

218. *Id.*

219. *Id.*

220. Council Regulation 44/2001, art. 5, 2001 O.J. (L 12) 1 (EC). The regulation also allows for a dispute arising out of an employer's branch or agency to take place in the courts in those places, and on a counterclaim, the court in which the original claim is pending. *Id.*

221. See Grušić, *supra* note 51 (noting that even though Brussels I jurisdictional rules were enacted to protect workers, recent decisions had not been employee friendly).

222. Council Regulation 593/2008, 2008 O.J. (L 177) 6 (EC). For more on the history of the enactment of Rome I, see Franzen, *supra* note 43, at 247.

223. See, e.g., MIRIAM KULLMANN, ENFORCEMENT OF LABOUR LAW IN CROSS-BORDER SITUATIONS: A LEGAL STUDY OF THE EU'S INFLUENCE ON THE DUTCH, GERMAN, AND SWEDISH ENFORCEMENT SYSTEMS 4 (Sebastian Kortmann & Dennis Faber eds., 2015) (discussing enforcement issues that arise around posted workers in Germany, the Netherlands, and Sweden); Sebastian Krebber, *Conflict of Laws in Employment in Europe*, 21 COMP. LAB. L. & POL'Y J. 501, 503 (2000).

224. The 1980 Rome Convention on the law applicable to contractual obligations is the predecessor law. Before the Rome Convention, traditional approaches to continental European private international law of contracts had as their object finding the “seat” of the dispute. See generally FRIEDRICH CARL VON SAVIGNY, A TREATISE ON THE CONFLICT OF LAWS AND THE LIMITS OF THEIR OPERATION IN RESPECT OF PLACE AND TIME (2d. ed. 1880) (nineteenth-century treatise on conflict of laws). For tort law, private international law is set out in the Rome II Regulation. Council Regulation 864/2007, 2007 O.J. (L 199) 40 (EC).

225. Council Regulation 593/2008, 2008 O.J. (L 177) 6 (EC).

dealing with employment contracts.<sup>226</sup> Rome I attempts to respect the parties' choice of the applicable law in their contracts, reinforce predictability and stability, and allow some discretion to default rules to favor the nation with the closest connection to the contract to supply the rules.<sup>227</sup>

### 1. Problems with Characterization

In his book chapter, Professor Wolfgang Kozak sets out some thoughts as to how the private international law issues created by crowdwork might be treated in the European Union.<sup>228</sup> Most of Kozak's discussion, however, focuses on the preliminary question of how to characterize the relationship between the worker and the platform.<sup>229</sup> So, if there is an employment contract, then you would use article 8 to analyze the problem. If, on the other hand, the contract between the worker and the platform is not an employment contract, then it would receive the analysis specified for general contracts in article 4. The problem that gives Kozak a great deal of trouble is that if EU national systems are using different standards to decide if gig workers have employment contracts, there is no way to determine which article of the Rome Regulation to apply.<sup>230</sup> The problem that Kozak ran into was, in effect, a type of difficult question of characterization.<sup>231</sup> The Rome Regulation requires a determination about whether there is an employment contract, but such a determination of characterization<sup>232</sup> is the very issue that is the conflict

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226. *Id.* art. 8, 2008 O.J. (L 177) 13 (EC).

227. VAN CALSTER, *supra* note 28, at 203.

228. Wolfgang Kozak, *Crowdwork mit Auslandsbezug: Anwendbares Recht und Gerichtsstände*, in *ARBEIT IN DER GIG-ECONOMY* 305-19 (Doris Lutz & Martin Risak eds., 2017) (Austria).

229. *Id.*

230. *Id.*

231. VAN CALSTER, *supra* note 28, at 6-7. Perhaps it is not an exact match but the issue could also be viewed as analogous to the limited doctrine of *vorfrage* (a German doctrine that roughly translates into English as "preliminary question"). The entire scenario provides a very difficult thought problem. *Cf.* JORGE LUIS BORGES, *The Garden of Forking Paths*, in *LABYRINTHS: SELECTED STORIES & OTHER WRITINGS* 19, 25 (Donald A. Yates trans., Donald A. Yates & James E. Irby eds., 1964) (1958) ("Before unearthing this letter, I had questioned myself about the ways in which a book can be infinite. I could think of nothing other than a cyclic volume, a circular one. A book whose last page was identical with the first, a book which had the possibility of continuing indefinitely.").

232. Professor Louise Merrett describes the question of whether there is an employment contract as one of characterization. *See* MERRETT, *supra* note 26, at 49.

between the different legal systems.<sup>233</sup> In essence, Kozak spends his chapter describing this very difficult problem of characterization and notes the questions it raises.

The analysis need not stop there, however. Kozak was correct to raise the issue of characterization, but that does not present an insurmountable bar to the analysis. Other parts of the Rome Regulation itself describe what to do in these types of infinite regress problems. For example, article 10 attempts to correct the characterization problem that comes up with contractual validity, noting that courts should decide the validity of a contract based on the law that would govern if it were found to be valid.<sup>234</sup> Rather than get bogged down in this difficult characterization problem, the answer lies in setting out the alternatives and following them to their conclusions. What law would a worker suing a platform receive if they attempted to bring the case under article 8, and alternately, what would the result be if they attempted to bring the case under article 4? The next subparts explore these two paths.

## 2. Two Paths of the Rome Convention

Let us assume that the correct determination is to treat platform work as a contract of employment, and further let us assume that no choice of law has been set forth in the contract. In that instance, Rome I article 8 states, “[T]he contract shall be governed by the law of the country in which or, failing that, from which the employee habitually carries out his work in performance of the contract.”<sup>235</sup> Thus a geographical location, that is, the habitual place of work, has considerable importance and gravity in making the determination of applicable law.<sup>236</sup> Article 8 goes on to state that, when the habitual place of work cannot be determined, “the contract shall be governed by the law of the country where the place of business through which the employee was engaged is situated.”<sup>237</sup> An escape clause is also included, and if it appears from the totality of the circumstances that

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233. As discussed by Professor Geert van Calster, a *vorfrage* concern may arise when EU law may have “determined which applicable law is connected to a given legal category, however before one may apply it, one needs to decide on the actual existence of the category in the facts at issue.” VAN CALSTER, *supra* note 28, at 6.

234. Council Regulation 593/2008, art. 10(1), 2008 O.J. (L 177) 13 (EC).

235. *Id.* art. 8(2), 2008 O.J. (L 177) 13 (EC).

236. VAN CALSTER, *supra* note 28, at 216. The habitual place of employment would not be changed by temporary employment. *Id.*

237. Council Regulation 593/2008, art. 8(3), 2008 O.J. (L 177) 13 (EC).

the contract is more related with another country than those enumerated in the preceding sections, then the law of the other country will apply.<sup>238</sup>

If on the other hand, we say that the user and the platform have not entered a contract for employment, and we instead have a general contract, then the correct place to look is Rome I article 4(1). Under this section, “a contract for the provision of services shall be governed by the law of the country where the service provider has his habitual residence.”<sup>239</sup> In case this is not a proper classification, then article 4(2) states that the contract shall be governed “by the law of the country where the party required to effect the characteristic performance of the contract has his habitual residence.”<sup>240</sup> Escape clauses also apply here, with Rome I article 4(3) and 4(4) noting that if it seems that the contract is more closely connected with another country then that country’s laws will apply.<sup>241</sup>

While it is true that habitual place of work might not be different than the worker’s place of residence, since most platform workers choose to work from their homes, this might be a distinction without a difference. In any event, it should not lead to an infinite regress problem as both article 4 and article 6 contain sufficient escape clauses that lead back to the idea of applying the country’s law that has the most connection to contract or the contract of employment, whichever we determine it to be. A larger impact might be felt because of specialized rules for employment contracts and choice of law, the rules for which are set out in the next subpart.

### 3. Choice of Law

Just as in the United States, many employment contracts in the European Union contain a choice-of-law clause, so as to minimize transaction costs.<sup>242</sup> These clauses can provide certainty, especially when a transaction has an international aspect.<sup>243</sup> Pursuant to Rome I article 3, parties are free to specify in their contract the law that they would elect to apply to a dispute arising from the contract.<sup>244</sup> The

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238. *Id.*

239. *Id.* art. 4(1)(b), 2008 O.J. (L 177) 11 (EC).

240. *Id.* art. 4(2), 2008 O.J. (L 177) 11 (EC).

241. *Id.* art. 4(3-4), 2008 O.J. (L 177) 11 (EC).

242. Eric A. Posner, *The Questionable Basis of the Common European Sales Law: The Role of an Optional Instrument in Jurisdictional Competition*, 50 COMMON MKT. L. REV. 261, 261-62 (2013).

243. *Id.*

244. Council Regulation 593/2008, art. 3, 2008 O.J. (L 177) 10-11 (EC).

freedom of choice embraced by article 3 is expansive, even including the ability to choose the law of a country that is not part of the European Union.<sup>245</sup> However, there is a countervailing concern, which is that the employer will forum-shop and through a choice-of-law clause, seek to dictate the choice of law unilaterally.<sup>246</sup> Employees are recognized to have less bargaining power, and the concern is that choice-of-law provisions might work to their disadvantage.<sup>247</sup> Therefore, the Rome Regulation instead seeks to set a “minimum standard of employment protection that cannot be undermined by the chosen law.”<sup>248</sup>

The Rome Regulation does this first by allowing the parties a choice of law in their contract under article 3.<sup>249</sup> Then, in article 8, we are told that “[s]uch a choice of law may not, however, have the result of depriving the employee of the protection afforded to him by provisions that cannot be derogated from by agreement under the law that, in the absence of choice, would have been applicable.”<sup>250</sup> In short, the choice-of-law rules allow some flexibility, but not at the expense of worker rights. As noted by Franzen,

[T]he idea of the principle of the most favourable law has achieved a breakthrough. Its purpose is to prevent abuse of the party autonomy as well as to allay misgivings about submitting the employment contract to an unfamiliar or underdeveloped local law. This theory involves the joint application of both legal systems. The employee is entitled to claim the norm more favourable to him.<sup>251</sup>

### C. *India and Private International Law*

This Article includes a summary of the Indian system for private international law because of the large numbers of Indian workers who perform platform work.<sup>252</sup> For decades now, many companies have

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245. *Id.*

246. Case C-384/10, *Jan Voogsgeerd v. Navimer S.A.*, 2011 E.C.R. I-13275; *see also* HEPPLE, *supra* note 38 (“The reason for the application of mandatory employment rules is the need to secure ‘protection for the party who from the socio-economic point of view is regarded as the weaker in the contractual relationship.’” (quoting Mario Giuliano & Paul Lagarde, Council Report on the Convention on the Law Applicable to Contractual Obligations, at 25, 1980 O.J. (C 282) (Oct. 31, 1980))).

247. Franzen, *supra* note 43, at 254 (“[T]he main idea is to protect the worker against an abuse of power by the employer. This fear of abuse with regard to the freedom of contract is enhanced with a growing distrust of large multinational enterprises (MNEs).”).

248. Krebber, *supra* note 223, at 527.

249. Council Regulation 593/2008, art. 3, 2008 O.J. (L 177) 10-11 (EC).

250. *Id.* art. 8(1), 2008 O.J. (L 177) 13 (EC).

251. Franzen, *supra* note 43, at 259.

252. BERG ET AL., DIGITAL LABOUR PLATFORMS, *supra* note 73, at 29-32.

outsourced their backroom operations and call centers to India and other parts of the global south.<sup>253</sup> India is an attractive location for many businesses because there is a group of highly educated university graduates to perform skilled work at lower cost.<sup>254</sup> India is also an attractive site to offshore because of its temporal advantage.<sup>255</sup> While workers in other parts of the world are asleep, call centers in India can provide staffing to run round-the-clock technical support and customer service hotlines.<sup>256</sup> While in some ways the virtual work engaged in by platforms like Amazon Mechanical Turk seem new, in some ways they are just another step along a system of global offshoring that has been a trend over the past decades.<sup>257</sup> While the labor and employment laws on the books in India provide protections for workers, enforcement of those laws on the ground continues to be a problem.<sup>258</sup> A recent blog post commented on the state of gig workers in India, which confirms that as of the time of the writing of this Article, there had been no determination about the employment status of Uber drivers.<sup>259</sup>

### 1. The Approach of “Proper Law”

Until 1952, Indian courts followed the common law British rules for private international law.<sup>260</sup> After this date, courts in India were free to establish an alternate set of rules for conflict-of-law problems, but as a practical matter, the paucity of case law meant a continued reliance on the law of the United Kingdom, and to a lesser extent the law of the United States, Canada, and Australia.<sup>261</sup> As a common law system, few

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253. See Carolyn Penfold, *Off-Shored Services Workers: Labour Law and Practice in India*, 19 *ECON. & LAB. REL. REV.* 91, 91-92 (2009).

254. *Id.* at 92 (noting that India has the advantage of a “large, well-educated, English-speaking work force”); see also Dev Nathan et al., *Labour Practices in India* 13-15 (ILO, Asia Pacific Working Paper Series, 2016) (noting increasing automation and degree requirements among engineering staff).

255. See Winifred R. Poster, *Who’s on the Line? Indian Call Center Agents Pose as Americans for U.S.-Outsourced Firms*, 46 *INDUS. REL.* 271, 274 (2007).

256. *Id.*

257. See generally OFFSHORING AND WORKING CONDITIONS IN REMOTE WORK (Jon C. Messenger & Naj Ghosheh eds., 2010) (examining the development of global offshoring).

258. Penfold, *supra* note 253, at 95.

259. Sonam Srivastava & Kushagra Srivastava, *The Gig Economy Calls for Identification Within the Indian Labour Laws*, *OXFORD BUS. L. BLOG* (July 4, 2019), [https://www.law.ox.ac.uk/business-law-blog/blog/2019/07/gig-economy-calls-identification-within-indian-labour-laws?utm\\_source=dlvr.it&utm\\_medium=facebook](https://www.law.ox.ac.uk/business-law-blog/blog/2019/07/gig-economy-calls-identification-within-indian-labour-laws?utm_source=dlvr.it&utm_medium=facebook).

260. See *Indian & Gen. Inv. Tr. Ltd. v. Raja of Khalikote*, AIR 1952 (Cal.) 508 (India).

261. F.E. NORONHA, *PRIVATE INTERNATIONAL LAW IN INDIA: ADEQUACY OF PRINCIPLES IN COMPARISON WITH COMMON LAW AND CIVIL LAW SYSTEMS* 7-10 (2010) (analyzing opinions

codifications of the private international law rules exist, and instead the bulk of principles have been set out in various judicial decisions, largely drawing on U.K. precedents.<sup>262</sup> There are efforts in India in support of uniformity and unification, in the areas of insolvency, e-commerce, international banking and secured credit, and international secured interests.<sup>263</sup> To date, there are no specific scholarly works looking just at employment contracts and private international law. As such, one must look at the general rules for contracts and then extrapolate the principles to employment and labor, which are a subset of contracts.

Jurisdiction in the Indian courts is far-reaching and encompasses situations where a company “actually and voluntarily . . . carries on business, or personally works for gain.”<sup>264</sup> The term “employee” is used in several pieces of legislation in India but is defined in different ways. For example, the 1948 Minimum Wages Act contains a circular definition, holding that an employee is “in a scheduled employment in respect of which minimum rates of wages have been fixed.”<sup>265</sup> On the other hand, under the Payment of Gratuity Act of 1972, employee means “any person, other than an apprentice, employed on wages in any establishment.”<sup>266</sup>

## 2. India and Conflicts in Employment and Labor Law

For conflicts of law involving contracts, India applies the “proper law” approach, a concept historically developed under U.K. law.<sup>267</sup> The

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of the Indian Supreme Court and listing the foreign precedents compiled and used therein, which are overwhelming).

262. Y. Narasimha Rao & Ors. v. Y. Venkata Lakshmi & Anr., (1991) 2 SCR 821, 830 (India); *see also* K.B. AGRAWAL & VANDANA SINGH, PRIVATE INTERNATIONAL LAW IN INDIA 19 (2010) (“Presently, in Indian private international law, in some areas there is an absolute dearth of rules . . . Indian courts have largely relied on English precedents, unfortunately even many years after Indian independence.”).

263. NORONHA, *supra* note 261, at 40–42. *See generally* SATISH CHANDRA, DOCUMENTS ON PRIVATE INTERNATIONAL LAW (2011) (reproducing texts of conventions and international treaties to which India is a party).

264. AGRAWAL & SINGH, *supra* note 262, at 229–30 (citing CODE CIV. PROC. § 20 (1908), <https://indiacode.nic.in/handle/123456789/2191?view-type=browse&sam-handle=123456789/1362> (last visited Dec. 16, 2019)); *accord* NORONHA, *supra* note 261, at 54–55 (citing U.S. precedents on minimum contacts for jurisdiction).

265. CHANDRA KUMAR JOHRI, LABOUR LAW IN INDIA 62 (2012).

266. *Id.*

267. It seems that India has continued to follow the “proper law approach,” despite the United Kingdom—as part of the European Union—following the rules for conflicts under the Rome Regulation. Will this change again with Brexit, and what approach would India take in



“proper law” approach means that a court will use the law that the parties have expressly or impliedly chosen to govern their dispute.<sup>268</sup> If the parties haven’t chosen a source of law or none is implied to the parties, then Indian courts will impute the law that has the “closest and most intimate connection with the contract.”<sup>269</sup> The judge then approaches the question of the “proper law” from the perspective of the “reasonable man,” asking how a just and reasonable person would view the problem. Elements that an Indian court might consider would include:

[T]he place where the contract was made, the form and object of the contract, the place of performance, the place of residence or business of the parties, reference to the courts having jurisdiction and such other links . . . to determine the system of law with which the transaction has its closest and most real connection.<sup>270</sup>

Even though the parties’ choice of law will generally be respected by Indian courts, parties may not choose a foreign law to avoid the application of Indian law. For example, Indian prohibition of speculation in groundnut oil could not be circumvented through a choice-of-law clause invoking foreign law.<sup>271</sup>

With reference to employment contracts, the starting point would be to ascertain the intent of the parties as to their choice of law. If that is not possible, or no intent can be ascribed, an Indian court would then look at the law of the place with which the employment contract is most closely connected.<sup>272</sup> In the case of an employment contract,

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the face of Brexit? This speculation is beyond the scope of this Article, and as such this Article will analyze the jurisdiction according to the common law proper law approach.

268. See PARAS DIWAN, *PRIVATE INTERNATIONAL LAW: INDIAN AND ENGLISH* 506-08 (3d ed. 1993); accord R.S. CHAVAN, *INDIAN PRIVATE INTERNATIONAL LAW* 175 (1982) (“It means that parties to the contract are free to stipulate their terms of contract and also free to lay down the law by which their contract would be governed. The law by which the contract is intended by the parties to be governed is called ‘the proper law of contract.’”).

269. *Nat’l Thermal Power Corp. v. Singer Co. & Ors.*, (1992) 3 SCR 106, 109 (India); *Delhi Cloth & Gen. Mills Co. Ltd. v. Harnam Singh & Ors.*, AIR 1955 SC 590, 592 (India); NORONHA, *supra* note 261, at 72 (“[T]he expression refers to the substantive principles of the domestic law of the chosen system and not to its conflict of law[] rules.”).

270. NORONHA, *supra* note 261, at 74; see *Owners of Cargo Lately Laden on Board the Ship or Vessel “Assunzione” v. Owners of the Ship or Vessel “Assunzione”* [1953] 1 All ER 278 (Eng.); *Mount Albert Borough Council v. Australasian Temperance & Gen. Mut. Life Assurance Soc’y Ltd.*, (1938) AC 224 (SC) 227-28 (N.Z.).

271. *Se. Oil v. Messrs. Gorakhram Gokalchand*, (1962) 64 Bom LR 113 (India).

272. AGRAWAL & SINGH, *supra* note 262, at 105; see also *Schinas v. Nemazie*, AIR 1952 (Cal.) 859, 863-64 (describing the case of a seafarer, in which court noted its willingness to first look at the law selected by the parties; and if there was no selection made, then to look

commentators have noted that a choice-of-law clause shall not have the result of depriving the employee of the protection afforded by the mandatory rules of the law of the state that would be applicable in the absence of a choice-of-law clause.<sup>273</sup> In Indian labor and employment law, employment status is determined based on the employer's ability to dismiss the employee.<sup>274</sup> Realizing that there are few "truly" Indian sources and that the U.K. law itself may be in a state of flux due to Brexit, the following is a limited discussion of some of the issues that might arise in litigation around Indian crowdwork.

#### D. *Application of Choice of Law*

A common issue to California, the European Union, and India (and, likely, many additional jurisdictions) is the use of choice-of-law clauses in contracts to specify which country's labor and employment law will govern the relationship.<sup>275</sup> But in all three systems, California, the European Union, and India, these choice-of-law clauses, which as a practical matter almost entirely are dictated by employers, will not be considered absolute.<sup>276</sup> California's application of the governmental interest test and precedent in the context of noncompetition agreements in fact seems to take a dim view of clauses selecting another state's law when it results in fewer rights than the California Labor Code provides for workers.<sup>277</sup> The European Union's Rome Regulation allows choice-of-law clauses, but not if it causes workers to lose the rights they would have enjoyed in the absence of such a clause.<sup>278</sup> India's approach is similarly in accord, holding that a choice-of-law clause would not be valid if it caused workers to lose rights they would have had under the default choice-of-law provisions.<sup>279</sup>

These are important points to keep in mind, because crowdwork environments are largely intermediated by and through standardized form contracts, the "terms and conditions" or "terms of service" put

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at the place where the contract was made or was to be performed, and if uncertain, to look at the *lex fori*).

273. AGRAWAL & SINGH, *supra* note 262, at 108.

274. *Id.*

275. See *Hammerl v. Acer Europe, S.A.*, No. C 08-4754 JF (RS), 2009 WL 30130, at \*2 (N.D. Cal. Jan. 5, 2009); Posner, *supra* note 242.

276. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 (AM. LAW INST. 1971); AGRAWAL & SINGH, *supra* note 262, at 105; Krebber, *supra* note 223.

277. See discussion *supra* Part IV.A.1.

278. See discussion *supra* Part IV.B.

279. See discussion *supra* Part IV.C.

forth in order for a user to register an account.<sup>280</sup> These terms and conditions are displayed in an online format, sometimes with scrollable texts. Some are presented in a format that requires the user to click “I agree” before continuing to use the site or platform. Courts in the United States have been reaching a consensus that the “click” signifies an objective assent or agreement to the form terms.<sup>281</sup> Other sets of terms may be presented in a scattered way throughout the website or platform. Known as “browsewrap,” these kinds of contracts require no manifestation of assent and U.S. courts have been reluctant to enforce them.<sup>282</sup>

In fact, the “terms of service raise many of the same kinds of issues for online workers that terms of use and end user licensing agreements (EULAs) have long raised for software [user]s.”<sup>283</sup> The 2018 ILO study *Digital Labor Platforms and the Future of Work* notes that many platforms come along with terms and conditions that are largely unfriendly to workers.<sup>284</sup> Many contain statements purporting to govern employment status and others may contain arbitration or choice-of-law clauses. Online workers may not even have seen the terms, or they may be presented in a piecemeal fashion, or during inopportune times.<sup>285</sup> Even if the workers are able to access the terms and conditions that may not help them. The terms and conditions are often long and dense, with some running to over ten thousand words of legalese.<sup>286</sup> Needless to say, just like busy consumers, most gig workers are trying to piece together a living and do not have the time to read all the terms. Even if they did, a feature of online adhesion contracts is their “take it or leave it” nature.<sup>287</sup> Even if a worker did read the terms and conditions fully, any attempt to bargain would likely be futile.<sup>288</sup>

The terms of service for many on-demand platforms “contain a statement that the work is done on an ‘independent contractor’ basis

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280. See BERG ET AL., DIGITAL LABOUR PLATFORMS, *supra* note 73, at 22-23.

281. *Fteja v. Facebook, Inc.*, 841 F. Supp. 2d 829, 840-41 (S.D.N.Y. 2012).

282. *Specht v. Netscape Commc'ns Corp.*, 306 F.3d 17, 20 (2d Cir. 2002).

283. BERG ET AL., DIGITAL LABOUR PLATFORMS, *supra* note 73, at 22 (citing Miriam A. Cherry, *A Eulogy for the EULA*, 52 DUQ. L. REV. 335, 336-37 (2014)).

284. BERG ET AL., DIGITAL LABOUR PLATFORMS, *supra* note 73, at 22-24.

285. *Id.* at 23.

286. *Id.*

287. See generally MARGARET JANE RADIN, *BOILERPLATE: THE FINE PRINT, VANISHING RIGHTS, AND THE RULE OF LAW* (2013) (describing problems of adhesion contracts).

288. NANCY S. KIM, *WRAP CONTRACTS: FOUNDATIONS AND RAMIFICATIONS* 55 (2013); Todd D. Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 HARV. L. REV. 1173, 1187 (1983) (noting that dickering of terms is not likely to be successful in an adhesion contract situation).

and that no employee benefits are designated or even desired.”<sup>289</sup> That is sidestepping the fact that in most jurisdictions, such labels are not dispositive and that the true question of employee status is a matter to be decided by a legislature or court.<sup>290</sup> Further questionable clauses in platform terms of service agreements may seek to impose mandatory binding arbitration.<sup>291</sup> Others seek to limit class actions or impose choice-of-law provisions.

In a recent case from the United Kingdom’s Employment Tribunal about Uber, the tribunal analyzed the web of contracts between Uber and its drivers as well as Uber and its passengers in some depth.<sup>292</sup> Regarding the former relationship, the Tribunal was extremely critical, noting as follows:

[T]he terms on which Uber rely do not correspond with the reality of the relationship between the organisation and the drivers. Accordingly, the Tribunal is free to disregard them. As is often the case, the problem stems at least in part from the unequal bargaining positions of the contracting parties . . . . Many Uber drivers (a substantial proportion of whom, we understand, do not speak English as their first language) will not be

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289. See Cherry, *The Sharing Economy*, *supra* note 97.

290. See discussion *supra* Part II.

291. For recent accounts of the use of EULAs and pre-dispute mandatory arbitration as a way of managing workplace liability for employers in the United States, see Jean R. Sternlight, *Disarming Employees: How American Employers Are Using Mandatory Arbitration to Deprive Workers of Legal Protection*, 80 BROOK. L. REV. 1309, 1310 (2015) (“Today employers, with substantial assistance from the Supreme Court, are using mandatory arbitration clauses to ‘disarm’ employees, effectively preventing them from bringing most individual or class claims and thereby obtaining access to justice. It has been estimated that roughly 20% of the non-unionized American workforce is covered by mandatory arbitration provisions, and this number may well increase.”). For more on arbitration as a method of containing costs toward consumers, see Theodore Eisenberg et al., *Arbitration’s Summer Soldiers: An Empirical Study of Arbitration Clauses in Consumer and Nonconsumer Contracts*, 41 U. MICH. J.L. REFORM 871, 871 (2008) (“We provide the first study of varying use of arbitration clauses across contracts within the same firms. Using a sample of 26 consumer contracts and 164 nonconsumer contracts from large public corporations, we compared the use of arbitration clauses in firms’ consumer and nonconsumer contracts. Over three-quarters of the consumer agreements provided for mandatory arbitration but less than 10% of the firms’ material nonconsumer, nonemployment contracts included arbitration clauses. The absence of arbitration provisions in the vast majority of material contracts suggests that, *ex ante*, many firms value, even prefer, litigation over arbitration to resolve disputes with peers. Our data suggest that the frequent use of arbitration clauses in the same firms’ consumer contracts may be an effort to preclude aggregate consumer action rather than, as often claimed, an effort to promote fair and efficient dispute resolution.”). *But see* Christopher R. Drahozal & Stephen J. Ware, *Why Do Businesses Use (or Not Use) Arbitration Clauses?*, 25 OHIO ST. J. ON DISP. RESOL. 433, 433-34 (2010) (discussing issues in previous studies on the use of arbitration clauses).

292. *Aslam & Ors. v. Uber B.V. & Ors.*, [2016] EW Misc B68, [89] (ET) (28 Oct. 2016), <http://www.bailii.org/ew/cases/Misc/2016/B68.html>.

accustomed to reading and interpreting dense legal documents couched in impenetrable prose. This is . . . an excellent illustration . . . of “armies of lawyers” contriving documents in their clients’ interests which simply misrepresent the true rights and obligations on both sides.<sup>293</sup>

Instead, the tribunal relied on a discussion of thirteen points of analysis to show that Uber was not working for the drivers; that instead, the drivers were working for Uber.<sup>294</sup> These points included key issues of recruitment; control over information regarding the passengers; Uber’s setting of default routes, pricing structures, conditions on drivers, instructions for drivers, and the establishment of disciplinary and rating systems; and that Uber handles complaints from passengers.<sup>295</sup>

Choice-of-law and forum-selection clauses are certainly useful for reducing wasteful litigation about where a dispute should be heard and what rules should apply.<sup>296</sup> It is also understandable that platforms would desire to manage risk. The concern is that if multinational platform operators can choose the law that they impose through an adhesive contract, they might decide to pick jurisdictions in which there either is no law; ones in which there seems to be a favorable precedent or the likelihood of one; or jurisdictions where labor standards are quite low.<sup>297</sup> In other words, the race to the bottom in labor standards.

The material that I have set out above on choice of law in labor and employment law cases shows that this approach will not work, at least not in California, India, and the European Union. And it might not work in other jurisdictions, if it is determined that platforms are skirting at the edge of regulation or engaged in strategic forum shopping. In some countries, that might take the form of national governments telling platforms that they must classify platform workers as employees or else they need to do business elsewhere.<sup>298</sup>

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293. *Id.* at [96].

294. *Id.* at [92]. The analysis proceeded under the 1996 Act, Section 230(b), referred to in the decision as a “limb b” type case.

295. *Id.* at [92].

296. See Posner, *supra* note 242, at 261-62.

297. Cf. Peter Link, *One Small Step for the United States, May Be One Giant Leap for Seafarers’ Rights*, 33 HOFSTRA LAB. & EMP. L.J. 167, 178-79 (2015) (explaining the race to the bottom in maritime cases).

298. See, e.g., Eliana Dockterman, *Uber and Lyft Are Leaving Austin After Losing Background Check Vote*, TIME (May 8, 2016), <http://time.com/4322348/uber-lyft-austin-background-check-vote/>; cf. Johana Bhuiyan, *Uber and Didi Are Now Legal in China but the Struggle to Sign Up Drivers May Continue*, VOX (July 28, 2016, 1:42 PM), <https://www.recodene.net/2016/7/28/12311362/uber-didi-china-legal> (explaining Chinese regulatory guidelines for Uber drivers such as minimum experience and maximum mileage); Josh Horwitz, *One Year After the Uber-Didi Merger, It’s Only Getting Harder to Hail a Ride in China*, QUARTZ

Private ordering cannot and will not provide a complete solution to these problems. Because of the power imbalances embodied in many of the online terms of service used by platforms, they are not the product of equal bargaining power.<sup>299</sup> Traditional choice-of-law doctrines have recognized this with the Rome Regulation presenting workers with probably the most favorable structure for enforcing their rights of the three examined.<sup>300</sup> All of the systems recognize that any choice-of-law rules must work in tandem with the background private international rules.<sup>301</sup>

*E. Conflicts of Law in the Gig Economy (Without Choice-of-Law Clauses)*

As of the date of this Article's publication, no case law, statutes, directives, or other precedent are on point for dealing with the issues of jurisdiction, conflict of law, or choice of law and crowdwork platforms in California, the European Union, or India. Yet with that said, we can use some of the existing private international law concepts and precedents discussed above to make some general predictions about how a court in each of these jurisdictions might consider the issues if seized with a question that involves multiple jurisdictions and gig work, without the application of a choice-of-law clause. As there currently is no live case or controversy where arguments are being asserted, the discussion herein is of necessity rather abstract.

Beginning with California, a company's decision to set up its headquarters or even to host its server in the state of California would establish the necessary minimum contacts for jurisdiction. Beyond initial jurisdiction, with California's territorial turn along with the governmental interest approach, the location of the other parties involved would be important.<sup>302</sup> Because the questions around employment of platform workers generally involve a claim that the platform is the employer and not generally the requester, the requester seems to fall out of the equation.<sup>303</sup> Even though the relationship is

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(Aug. 3, 2017), <https://qz.com/1045268/one-year-after-the-uber-didi-merger-its-only-getting-harder-to-hail-a-ride-in-china/> (discussing the decline in availability of Uber due to decreased wages and local laws).

299. See *Aslam*, EW Misc B68 at [102].

300. See discussion *supra* Part IV.B.

301. See discussion *supra* Part IV.D.

302. See discussion *supra* Part IV.A.

303. See Prassl & Risak, *supra* note 48, at 630-32.

triangular, it is difficult to go back as against the requester.<sup>304</sup> There might be an exception through the application of the joint employer doctrine, in the case of a company that was perhaps posting an enormous number of tasks to a crowdsourcing platform, creating the equivalent of a virtual workforce on these platforms. The jurisdictional issues with minimum contacts would also be true in both the European Union and India.

In all three jurisdictions, focus would largely remain on the place where the work was habitually carried out, which is similar to the received wisdom about where the worker is physically located.<sup>305</sup> This approach will cause major problems for platforms with the need to comply with many sets of jurisdictional rules and regulations, once statutes and judicial rulings begin to regulate.<sup>306</sup> So, if there is truly a globalized platform, and it is ethical and wants to comply with the law, and it has workers from fifty different countries, the platform will need compliance with all fifty of the regulatory regimes and will also be subject to suit under all of them. Right now, the process “works” because there is no regulation, and thus the platforms do what they want. However, that will not be case five or ten years from now, when there is regulation.

Thinking about India, specifically, consider Indian private international law rules.<sup>307</sup> Assume that a group of Indian crowdworkers wanted to bring a claim for wage theft or failure to pay minimum wage against a platform based in the United States or the European Union. Note that such situations are commonplace on crowdwork platforms, where requesters have a great deal of power to reject work, in some instances not paying the workers who completed the tasks but retaining the benefit of the work.<sup>308</sup> If crowdworkers in India were to bring a lawsuit in an Indian court, for example,<sup>309</sup> the court would have

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304. *Id.*

305. MORGENSTERN, *supra* note 44, at 121.

306. *See* Cherry, *Global Dimensions*, *supra* note 33, at 487.

307. All of these instances are hypothetical but entirely possible.

308. *See* Cherry & Poster, *supra* note 36, at 387; Berg, *Income Security*, *supra* note 14, at 15. In the ILO Survey, some workers noted that the requester could reject their work on a summary basis, without providing reasons. All of these led to dissatisfaction among those surveyed.

309. *Cf.* Tom Batchelor, *India to Introduce Minimum Wage for Millions of Workers*, INDEPENDENT (Oct. 17, 2017, 6:26 PM), <https://www.independent.co.uk/news/world/asia/india-minimum-wage-domestic-workers-labour-ministry-a8005711.html> (reporting that domestic workers on zero hours contracts would be covered by the Indian minimum wage laws).

jurisdiction to hear the case, regardless of the location of the platform, thanks to the jurisdictional element.

Although Part IV has employed a methodical approach, setting out the private international law in three jurisdictions, and then applying the doctrines, though without current concrete cases, the issues are still nascent. Further, even applying the best knowledge we have through the toolkit of private international law, many of these questions do not have cut-and-dried answers. Returning to the examples provided in the beginning of this Article—what rights would Syrian national refugees have when temporarily located in a camp in Jordan, and the platform they use is hosted in the United Kingdom, and the customers for the website who are trying to learn a language are located in eighty different countries around the world? If private ordering will only result in a race to the bottom, and the toolkit of private international law is unwieldy in its application and yields uncertain results, we need to look elsewhere for appropriate solutions. Part V discusses regulatory options and helpful constructs for dealing with these emergent problems.

## V. REGULATORY OPTIONS AND SOLUTIONS

“The best way to predict the future is to invent it.”

—Alan Kay<sup>310</sup>

As crowdwork is a genuinely global enterprise, it runs counter to the received wisdom that labor and employment law is a matter only for national authorities and local regulation.<sup>311</sup> At the moment, the stage is set for disagreement and conflicting regulations between nations about how to characterize or even approach the labor problems associated with gig work.<sup>312</sup> Moreover, as with any type of labor regulation, there is a worry about capital flight and races to the bottom in labor standards.<sup>313</sup> In some ways, these problems are just a heightened form of some of the enduring and difficult conundrums of global labor law and the global supply chain.<sup>314</sup>

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310. Elaine Williams, *Kay's Hand Rocks the Cradle of Creativity*, FIN. TIMES, Nov. 1, 1982, at 13, LexisNexis.

311. See discussion *supra* Part II.

312. See De Stefano, *Platform Work*, *supra* note 17.

313. Indeed, as platforms have few physical assets tying them to any geographic location, the race to the bottom may present an even more important concern.

314. Arthurs, *Extraterritoriality*, *supra* note 65, at 534.



This Part sets out several strategies for thinking about transnational regulation of crowdwork and the harmonization that is necessary for a successful system of international regulation. The first possibility is to look at regulations, like the European Union's GDPR, that of necessity have an extraterritorial reach. Second, one idea that may prove fruitful would be to examine other employment sectors where the physical location of workers has been subtracted from the law's calculus. The third option might seek to link crowdwork to the discussion over ethical sourcing throughout the global supply chain. Corporate social responsibility and corporate codes of conduct can set best practices and standards for computer crowdwork; these forms of "soft law" cross borders and are influential. Part V ends by thinking backwards about preferences for decent crowdwork and then calling upon national governments, unions, employers, and policymakers to plan for what compliance looks like. As an international standard-setting body of importance, it is crucial that the ILO continue to study the problem closely, whether through the mechanism of a committee of experts or through solicitations for guidelines that might help in the process of harmonization.

*A. Extraterritorial Reach of Statutes: The Example of the General Data Protection Regulation*

The European Union's 2018 enactment of the GDPR is of interest worldwide, applying to any company that collects data from or employs citizens of the European Union.<sup>315</sup> Its expansive jurisdictional reach and liberal interpretation of "personal data" has created interest and concern among multinational firms, engendering discussion and the need for legal insight.<sup>316</sup> At a glance, the GDPR pertains to the processing of personal data "wholly or partly by automated means" or

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315. Council Regulation 2016/679, art. 1(2), 2016 O.J. (L 119) 32 ("This Regulation protects fundamental rights and freedoms of natural persons and in particular their right to the protection of personal data."). For more on the theoretical background of data protection as a fundamental right in the European Union, see generally MARIA TZANOU, *THE FUNDAMENTAL RIGHT TO DATA PROTECTION: NORMATIVE VALUE IN THE CONTEXT OF COUNTER-TERRORISM SURVEILLANCE* (2017) (discussing the scope of the right, current state of legal scholarship and case studies in communications meta data, travel data, financial data, and Internet data surveillance).

316. See Bryan Dunne, *The GDPR Countdown: Employers Are You Ready?—Consent*, MATHESON (May 4, 2018), <https://www.matheson.com/news-and-insights/article/the-gdpr-countdown-employers-are-you-ready-employee-consent>. In addition, consent must be able to be as easily withdrawn as given, which would open scenarios of consent being withdrawn and that data requiring expungement.

where personal data forms part of a filing system.<sup>317</sup> A list of the basic principles of data are set forth in article 5,<sup>318</sup> and article 6 sets forth legal limits for processing the data.<sup>319</sup>

Perhaps most interestingly for purposes of this Article, in article 3 the GDPR sets out the jurisdiction of the GDPR, which “applies to the processing of personal data in the context of the activities of an establishment of a controller or a processor in the Union,” even if the processing does not take place within a Member State.<sup>320</sup> A controller not established in the Union has it apply to them “by virtue of public international law.”<sup>321</sup> Article 83, among other recitals, states that the penalties for noncompliance with certain provisions of the GDPR can range from ten million<sup>322</sup> to twenty million Euro yearly.<sup>323</sup>

The threshold for determining whether someone is offering goods or services for sale in the European Union is a key point for determining applicability of the GDPR.<sup>324</sup> Recitals in the GDPR mention that among other things, offering multiple languages, offering payment in Euro, using domain names of Member States, or offering local testimonials will trigger GDPR compliance issues.<sup>325</sup> Privacy specialists have also noted that tracking and monitoring of data has a “wide net,” and they generally urge companies to engage in compliance measures to see if they fall under the regulations.<sup>326</sup> Thus, locating computer servers in the United States<sup>327</sup> does not exempt a company

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317. Council Regulation 2016/679, art. 2(1), 2016 O.J. (L 119) 32 (EU).

318. *Id.* art. 5(1)(a)-(f), 2016 O.J. (L 119) 35-36. Among these principles are transparency with the data subject, limitation on collecting purpose, limitation of collecting, and accuracy.

319. *Id.* art. 6(1)(a)-(f), 2016 O.J. (L 119) 37.

320. *Id.* art. 3(1), 2016 O.J. (L 119) 32.

321. *Id.* art. 3(3), 2016 O.J. (L 119) 33.

322. *Id.* art. 4, 2016 O.J. (L 119) 82.

323. *Id.* art. 83(5), 2016 O.J. (L 119) 83.

324. Kevin Kish, *What Does Territorial Scope Mean Under the GDPR?*, INT’L ASS’N PRIVACY PROFS. (Jan. 23, 2018), <https://iapp.org/news/a/what-does-territorial-scope-mean-under-the-gdpr/#>; see also MEG LETA JONES, CTRL+Z: THE RIGHT TO BE FORGOTTEN 168-71 (2016) (discussing extraterritorial reach of GDPR and noting controversies).

325. Kish, *supra* note 324.

326. *Id.* A few examples of monitoring as analyzed by IAPP include online advertising based on behavior, fitness tracking, location tracking via apps, and tracking of public transportation.

327. Aaron Winston, *How the EU Can Fine US Companies for Violating GDPR*, SPICEWORKS (June 21, 2017, 11:11 AM), <https://community.spiceworks.com/topic/2007530-how-the-eu-can-fine-us-companies-for-violating-gdpr>. U.S. companies with a physical presence within the European Union will have the Regulation “enforced directly” upon them just as it would be for a totally EU-based company. Cf. JONES, *supra* note 324, at 168 (noting that enforcement may encounter problems around the world).

from following the strictures of the GDPR.<sup>328</sup> Traditionally the United States and European Union have been cooperative regarding reciprocal enforcement of respective laws.<sup>329</sup>

While the GDPR's applicability to crowdwork, big data,<sup>330</sup> and people analytics<sup>331</sup> shall have to be addressed in other articles, the main reason for discussing it here is to examine how the regulations of the European Union on privacy could have an impact on privacy practices around the world. A similar approach, involving a statute regulating crowdwork with a far-reaching extraterritorial jurisdiction is one possibility for overcoming the private international law challenges that crowdwork poses. Although we typically think of employment and labor regulation as part of national law, the example of the GDPR should make regulators take notice. Rather than decline to regulate at all because of problems with jurisdiction, it might make more sense to learn from the far-reaching implementation of the GDPR.

### *B. The Possibility of Sectoral Regulation*

Another option for thinking about crowdwork is to compare it to other forms of work that are divorced from physical location. Traditionally there are some occupations, such as traveling sales, transportation workers, or seafarers, which have fallen outside and apart from the territorial jurisdiction of national regulation.<sup>332</sup> In thinking about solutions to the regulatory and jurisdictional problems posed by crowdwork, one possible answer is a specific sectoral approach. Here is a description of some of the issues that maritime employment law practitioners used to confront:

It is not unusual for a seafarer to work on a vessel registered in a foreign country, sailing on the high seas and calling at ports in countries other than that of her flag, owned by citizens of yet other countries, insured in other countries, perhaps chartered by interests in other countries, managed by a company in another country, and carrying cargo owned by citizens of other countries. More than a half-dozen different countries

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328. Cf. Kurt Wimmer, *Free Expression and EU Privacy Regulation: Can the GDPR Reach U.S. Publishers?*, 68 SYRACUSE L. REV. 547, 548-49 (2018) (explaining how companies based outside of the European Union are subject to the GDPR and lawsuits arising from it).

329. See *id.*

330. See generally Tal Z. Zarsky, *Incompatible: The GDPR in the Age of Big Data*, 47 SETON HALL L. REV. 995 (2017) (discussing the problems of the GDPR's implementation on Big Data).

331. See Bodie et al., *supra* note 90, at 987.

332. See MORGENSTERN, *supra* note 44, at 31.

may be directly connected to a vessel's operations. When problems arise, which country has jurisdiction? Which country's or countries' laws apply—and what laws within that country affect seafarers?<sup>333</sup>

These issues sound remarkably similar to the transnational issues pertaining to gig work and computer crowdwork. While crowdworkers are not physically traveling in the same way that ships' crews are, the work that they produce certainly is in motion, given that it often arrives from a foreign nation and is sent back to another, while other parts of the work are being amalgamated from workers in other nations.

Effective international regulation of maritime workers took over a century of effort to achieve. In the nineteenth century, a seafarer's life was a difficult one, with few, if any safeguards against wage theft, safety hazards, or poor working conditions.<sup>334</sup> At that time, the dominant international law regulating the seas was the centuries-old concept of freedom of the seas.<sup>335</sup> Apart from this paradigm of *mare liberum*, antagonistic powers created rigid codes that constituted a “harmful corollary” of regulation.<sup>336</sup> As the amount of goods shipped at sea increased, so too did concern over potentially exploitative or poor working conditions for seafarers.<sup>337</sup> Positions on ships were often temporary. Workers faced isolation, enduring separations from friends and families for months at a time.<sup>338</sup> In extreme situations, workers could find themselves abandoned at foreign ports with no money and no passage to return home.<sup>339</sup>

Beginning in 1897, the International Maritime Committee (IMC) began advocating for greater unification of maritime law and adopted

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333. Douglas B. Stevenson, Book Review, 36 J. MAR. L. & COM. 567, 567 (2005) (reviewing SEAFARER'S RIGHTS (Deirdre Fitzpatrick & Michael Anderson eds., 2005)).

334. GERARD J. MANGONE, UNITED STATES ADMIRALTY LAW 117 (1997) (“From antiquity to modern times the life of the ordinary seaman has been woeful: exposed to the frightful perils of the world ocean for months or years; . . . deprived of family or normal human society for long periods; and, until recently, subjected to the arbitrary command of a master at sea.”); see also *Life Aboard*, NEW BEDFORD WHALING MUSEUM, <https://www.whalingmuseum.org/learn/research-topics/overview-of-north-american-whaling/life-aboard> (last visited Dec. 16, 2019) (describing conditions aboard whaling ships).

335. See ALBERT LILAR & CARLO VAN DEN BOSCH, INTERNATIONAL MARITIME COMMITTEE: 1897-1972, at 4-6 (1972).

336. *Id.*

337. MANGONE, *supra* note 334 (noting that the flogging of seamen was not outlawed in the United States until 1850 and that brutal discipline continued throughout the century, and that the system of “crimping,” i.e., pressing alcoholics or penniless people onto ships continued until the late 1800s).

338. Link, *supra* note 297, at 174.

339. *Id.*

regulations and protocols to further harmonization.<sup>340</sup> In the ensuing years, the IMC began to fashion the standards and organization necessary to provide cooperation between seafaring states.<sup>341</sup> In 1948, the United Nations established a department, the International Maritime Organization (IMO), which had as its goal regulating the resources of the ocean and the people who work on it.<sup>342</sup> The many international treaties overseen by the IMO include the United Nations Convention on the Law of the Sea (UNCLOS)<sup>343</sup> and the International Convention for the Safety of Life at Sea (SOLAS), both promulgated and adopted in the 1970s and 1980s.<sup>344</sup> These sets of regulations established that ship owners would register their ships with a nation and subject themselves to the jurisdiction of the country whose flag they flew. The duties of a flag state included maintaining a register, assuming jurisdiction of laws, legal liability, and proper regulations including compliance with labor conditions.<sup>345</sup> However, problems remained because ships could register with so-called flags of convenience, states with low standards or lax enforcement that in fact encouraged a race to the bottom.<sup>346</sup>

In 2006, under the auspices of the UN-ILO, the International Labor Conference took up the project of consolidating and modernizing the sixty-plus instruments that concerned various aspects of maritime employment in the Maritime Labor Convention (MLC).<sup>347</sup>

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340. F.L. Wiswall, *A Brief History*, COMITE MAR. INT'L (June 2018), <https://comitemaritime.org/wp-content/uploads/2018/06/a-brief-history-wiswall.pdf>.

341. Nigel H. Frawley, *A Brief History: The CMI and Its Relationship with IMO, the IOPC Funds and Other UN Organisations*, COMITE MAR. INT'L (Jan. 7, 2011), <https://comitemaritime.org/wp-content/uploads/2018/06/A-brief-History-Frawlye.pdf>. Over time, IMO would adopt most of CMI's protocols.

342. *Brief History of IMO*, IMO, [www.imo.org/en/About/HistoryofIMO/pages/Default.aspx](http://www.imo.org/en/About/HistoryofIMO/pages/Default.aspx) (last visited Dec. 16, 2019).

343. United Nations Convention on the Law of the Sea (UNCLOS) pmbl., Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter UNCLOS].

344. International Convention for the Safety of Life at Sea ch. II-1, Nov. 11, 1974, 1184 U.N.T.S. 289. See generally Michael A. Becker, *International Law of the Sea*, 41 INT'L L. 671, 671 (2007) (discussing UNCLOS, international security, agreements, disputes, and the law of the sea in U.S. federal courts).

345. UNCLOS, *supra* note 343, art. 94.

346. See Tina Shaughnessy & Ellen Tobin, *Flags of Inconvenience: Freedom and Insecurity on the High Seas*, 5 U. PA. J. INT'L L. & POL'Y 1, 3 (2006-2007); see also Link, *supra* note 297, at 178-79 (noting race to the bottom).

347. Maritime Labour Convention pmbl., Feb. 23, 2006, 2952 U.N.T.S. 7; see also Iliana Christodoulou-Varotsi, *Critical Review of the Consolidated Maritime Labour Convention (2006) of the International Labour Organization: Limitations and Perspectives*, 43 J. MAR. L. & COM. 467, 468 (2012) (noting the ILO has adopted more than sixty instruments on labor conditions).

Every seafarer under the MLC has a right to working conditions that comply with international standards, fair terms of employment, medical care, and decent living conditions, and these rights are set out in five titles.<sup>348</sup> Title I sets forth minimum and basic requirements, such as age requirements, adequate training, and employment notification standards.<sup>349</sup> Title II covers the conditions of employment, including notice of termination periods, regular wage payment and calculation, hours, leave, repatriation, and compensation.<sup>350</sup> Title III concerns decency of accommodation and recreation, including quality of food served aboard.<sup>351</sup> Title IV ensures adequate healthcare provisions, places liability for workers' health on the owner of the ship, requires safety standards to be followed, and provides for social insurance for seafarers.<sup>352</sup>

Finally, Title V discusses the enforcement of the other titles. Each signatory must agree to implementation through authorization of compliance inspections and maintaining Maritime Labor Certificates certifying compliance once those inspections are complete.<sup>353</sup> Title V also concerns inspections in port states, complaint procedures on shore, and maintenance of the labor supply.<sup>354</sup> The goal of the MLC is to ensure parity of maritime laborers with those performing the same types of tasks on land.

Since its promulgation in 2006 and its effectuation in 2013, the MLC can by all accounts be considered a success. As of the date of this writing, eighty-two states have ratified the convention.<sup>355</sup> While that may only sound like half of the states needed, the MLC actually covers over ninety percent of the tonnage shipped.<sup>356</sup> Because ships can be stopped and checked for violations by the flag state, the port of departure, and the port of entry, regulators in many different countries

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348. Maritime Labour Convention, *supra* note 347, at 10, art. IV.

349. *Id.* tit. I, regulations 1.1-1.4, at 19-27.

350. *Id.* tit. II, regulations 2.1-2.3, at 28-35.

351. *Id.* tit. III, regulation 3.2., at 54-56.

352. *Id.* tit. IV, regulations 4.1-4.3, at 57-70.

353. *Id.* tit. V, regulations 5.1.1-5.1.4, at 76-86.

354. *Id.* tit. V, regulations 5.2-5.3., at 88-93.

355. *MLC, 2006: What It Is and What It Does*, ILO, <https://www.ilo.org/global/standards/maritime-labour-convention/what-it-does/lang--en/index.htm> (last visited Dec. 16, 2019).

356. *Id.*

have uniform measures to ensure that wages have been paid and that working conditions onboard are safe for seafarers.<sup>357</sup>

Some issues present in maritime employment stand out as directly applicable to the situation and status of online crowdworkers.<sup>358</sup> Both the jobs on many online work sites and the crewing of a ship are meant as temporary or transitory, lasting only as long as the job. There is potential for social isolation in both types of work. On a ship, this is because of physical distance from family and friends. With computer crowdwork, because the work is performed in isolation, rather than in a workplace. The specter of wage theft is a shared threat as well. However, the most striking parallel is, of course, the international aspect of both types of work with work being transitory and mobile. In the case of the maritime worker, that is because the job of necessity involves transport and travel over long distances. In the case of online crowdworkers, work is being generated, sent, processed, and stored in many different locations and fellow workers are located around the world.

As such, crowdwork might benefit from the type of sectoral regulation that exists in maritime employment. That would mean regulations specifically crafted and tailored to fit the requirements, special issues, and needs of online crowdworkers. Like the ports that can check for compliance with the MLC, various host or entry points could be checked for compliance in the network that comprises crowdwork. Because the workers behind the platform are largely invisible, such regulatory checks would necessarily involve the turnover of data.

The idea of sectoral regulation is likely controversial. I have no doubt there are some academics writing about labor relations who would object to the idea that crowdwork is in any way different than offline work or deserving of special status or treatment. This group might complain that crowdwork is not a *sui generis* type of employment that deserves its own set of rules. The reasoning would be that if crowdworkers are treated as a special category, they would somehow not be seen as deserving of the same kinds of labor rights that other workers have. One response would be to refer to the other types

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357. Link, *supra* note 297, at 190 (advocating that the United States ratify the Maritime Labour Convention).

358. See Cherry, *Digital Transformation of Work*, *supra* note 11, at 596; Cherry & Poster, *supra* note 36, at 307; Penfold, *supra* note 253, at 91.

of workers that receive sectoral regulation and to point to the benefits that have accrued to them.

*C. Corporate Social Responsibility, Global Supply Chains, and Best Practices for Crowdwork*

The issue of fair standards for online work has connections to existing issues that have already been discussed in the context of global supply chains for products. Global supply chains may obscure poor labor practices by dispersing businesses geographically and breaking down the operations, functions, and participants in work into many segments, some of which involve invisible labor.<sup>359</sup> Through global labor arbitrage, multinational companies may move jobs to countries where hiring workers is less expensive, where they can save money on rent and physical infrastructure, and where they may receive exemptions from legal regulations in return for foreign investment.<sup>360</sup> The phenomenon is now standard for business practice: approximately eighty percent of Fortune 500 companies in the United States outsource some of their functions abroad, and a large percentage of that outsourcing is to the global south.<sup>361</sup> Unfortunately, there is little transparency in these global supply chains for products, and because foreign workers are largely invisible to the parent company and consumers, poor working conditions can prevail. For example, in 2014, a fire and building collapse in Bangladesh killed over 1100 workers who were sewing clothes for American labels including Walmart, Target, and The Gap.<sup>362</sup> Due to the growth of crowdwork and many of the trends that accompany the trend toward increasingly temporary and precarious work arrangements, it is important to think about how these new forms of work fit into the existing legal regulation of work, including the need to trace labor in global supply chains. If regulation along a global supply chain is a problem, then corporate social

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359. See Miriam A. Cherry, *Virtual Work and Invisible Labor*, in *INVISIBLE LABOR: HIDDEN WORK IN THE CONTEMPORARY WORLD* 52 (Marion G. Crain et al. eds., 2016) [hereinafter Cherry, *Invisible Labor*].

360. See David J. Doorey, *In Defense of Transnational Domestic Labor Regulation*, 43 *VAND. J. TRANSNAT'L L.* 953, 987-88 (2010) (exhaustive treatment of issues with global supply chains in Canada).

361. DELOITTE, *GLOBAL OUTSOURCING AND INSOURCING SURVEY* 7 (2014).

362. Steven Greenhouse & Elizabeth A. Harris, *Battling for a Safer Bangladesh*, *N.Y. TIMES* (Apr. 21, 2014), <https://www.nytimes.com/2014/04/22/business/international/battling-for-a-safer-bangladesh.html> (describing garment factory collapse).



responsibility and corporate codes of conduct may help to provide an answer.

Corporate social responsibility takes a wider view of a corporation's purpose than a single-minded focus on shareholder primacy and profit.<sup>363</sup> Generally, corporate social responsibility means managing a business with equal regard for the triple bottom line,<sup>364</sup> that is financial performance, environmental consequences and labor standards, and social impact.<sup>365</sup> In addition to "the traditional bottom line of financial performance (most often expressed in terms of profits, return on investment (ROI), or shareholder value)" a firm should also mind its "impact on the broader economy, the environment, and on the society in which [it] operate[s]."<sup>366</sup> In fact, this triple focus often improves firms' financial bottom lines as much as it helps the environment and society. To take one example, efforts to reduce waste and pollution often result in greater efficiency and the discovery of innovative techniques and materials.<sup>367</sup>

Compliance with labor standards is often discussed as a form of corporate social responsibility. But following the law, surely, is a basic obligation of corporations, as well as citizens. How then is basic compliance considered socially responsible? It helps to think of

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363. See, e.g., *Dodge v. Ford Motor Co.*, 170 N.W. 668, 684 (Mich. 1919); Jonathan R. Macey, *A Close Read of an Excellent Commentary on Dodge v. Ford*, 3 VA. L. & BUS. REV. 177, 181-84 (2008); D. Gordon Smith, *The Shareholder Primacy Norm*, 23 J. CORP. L. 277, 290-91 (1998).

364. See generally JOHN ELKINGTON, *CANNIBALS WITH FORKS: THE TRIPLE BOTTOM LINE OF 21ST CENTURY BUSINESS* (1998) (advocating for companies to pursue corporate social responsibility to ensure future market success).

365. See Michael C. Jensen, *Value Maximization, Stakeholder Theory, and the Corporate Objective Function*, 14 J. APPLIED CORP. FIN. 8, 9 (2001) (positing that a firm best maximizes its long-term value by tending to all of its stakeholder groups); Marc Orlitzky et al., *Corporate Social and Financial Performance: A Meta-Analysis*, 24 ORG. STUD. 403, 427 (2003) ("[P]ortraying managers' choices with respect to [sustainability] and [profitability] as an either/or trade-off is not justified in light of 30 years of empirical data.").

366. See ANDREW W. SAVITZ WITH KARL WEBER, *THE TRIPLE BOTTOM LINE: HOW TODAY'S BEST-RUN COMPANIES ARE ACHIEVING ECONOMIC, SOCIAL, AND ENVIRONMENTAL SUCCESS—AND HOW YOU CAN TOO*, at xii (2006). Elkington notes that, by considering society and the environment, the triple bottom line internalizes costs that firms would otherwise externalize. See ELKINGTON, *supra* note 364, at 92-94, 307 (discussing the "full cost accounting" method of "assessing the total cost of making, using, and disposing of products").

367. See ELKINGTON, *supra* note 364, at 314 (discussing DuPont's successful ninety-nine percent reduction in toxic emissions at a Texas plant—"achieved through the use of closed-loop recycling, off-site reclamation, selling former wastes as products, and substituting raw materials"—which saved "\$2.5 million of capital and more than \$3 million in annual operating costs"); see also SAVITZ WITH WEBER, *supra* note 366, *passim* (containing numerous such anecdotes).

corporate social responsibility as a type of continuum, with firms integrating these concepts in their operations to varying degrees. At one end of the spectrum, a firm may have no ambition to be socially responsible and in fact be out of compliance with applicable labor and environmental laws and regulations.<sup>368</sup> At this stage, the focus is on profits to the exclusion of all other considerations and the firm may even deliberately violate laws in order to maximize corporate profits.

Slightly more socially responsible is the firm that complies with applicable laws and perhaps engages in generic corporate philanthropy but does little beyond that.<sup>369</sup> These firms see “no business case” for going beyond compliance or serving stakeholders’ interests.<sup>370</sup> To these firms, “the business of business is business” and by bare compliance (and paying taxes) they see themselves as fulfilling their societal obligations.<sup>371</sup> A third type of firm moves beyond bare compliance but only does so where it would be profitable.<sup>372</sup> These firms may view corporate social responsibility primarily as a public relations matter, for particularly in consumer-focused industries, social responsibility attracts customers and social irresponsibility repels.<sup>373</sup> These

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368. See Janet E. Kerr, *The Creative Capitalism Spectrum: Evaluating Corporate Social Responsibility Through a Legal Lens*, 81 TEMPLE L. REV. 831, 857 (2008) [hereinafter Kerr, *Creative Capitalism*] (arranging corporate social responsibility levels along a spectrum); Marcel van Marrewijk & Marco Werre, *Multiple Levels of Corporate Sustainability*, 44 J. BUS. ETHICS 107, 112 (2003) (terming this level “pre-corporate sustainability”). Interestingly, Marrewijk and Werre derive their levels of corporate social responsibility from Clare Graves’s psychology research on value systems and levels of existence. See Marrewijk & Werre, *supra*, at 107.

369. See SUSTAINABILITY LTD., *GEARING UP: FROM CORPORATE RESPONSIBILITY TO GOOD GOVERNANCE AND SCALABLE SOLUTIONS* 34-37 (2004) [hereinafter *GEARING UP*] (terming this category “compliance”); Kerr, *Creative Capitalism*, *supra* note 368, at 857 (terming this category “mere [or] reactive compliance”); Marrewijk & Werre, *supra* note 368, at 112 (terming this category “compliance-driven” corporate sustainability).

370. See *GEARING UP*, *supra* note 369, at 35.

371. See *id.* (paraphrasing Milton Friedman, *The Social Responsibility of Business Is to Increase Its Profits*, N.Y. TIMES, Sept. 13, 1970, at SM17); Kerr, *Creative Capitalism*, *supra* note 368, at 640.

372. See *GEARING UP*, *supra* note 369, at 35 (labeling this type of firm a corporate social responsibility “volunteer”); Marrewijk & Werre, *supra* note 368, at 112 (describing this level as “profit-driven” corporate sustainability).

373. See Janet E. Kerr, *Sustainability Meets Profitability: The Convenient Truth of How the Business Judgment Rule Protects a Board’s Decision to Engage in Social Entrepreneurship*, 29 CARDOZO L. REV. 623, 664-65 (2007) (citing studies measuring “a strong positive relationship between CSR behaviors and consumers’ reactions to a company’s products and services”); Ray Fisman et al., *Corporate Social Responsibility: Doing Well by Doing Good? 1* (Sept. 2005) (unpublished manuscript), [pdfs.semanticscholar.org/389a/e50f1d85a6d6941762a5d90effcf4f7471b.pdf](https://pdfs.semanticscholar.org/389a/e50f1d85a6d6941762a5d90effcf4f7471b.pdf) (noting that corporate social responsibility is more positively related to profitability in advertising-intensive, consumer-oriented industries).

companies may also pursue a socially responsible agenda to save resources, reduce waste, achieve production efficiencies, and anticipate changing conditions, regulations, and consumer preferences.<sup>374</sup> These firms may incorporate environmental, ethical, and social considerations at all levels of their operations and decision making, but only act upon them when it would benefit their financial bottom lines.<sup>375</sup>

A fourth type of firm routinely balances economic, social, and environmental considerations and does so not in order to comply with applicable laws or to make a profit.<sup>376</sup> Rather, these firms are motivated by altruism to “do good”—for their various constituencies and for the planet—while still producing handsome returns for their shareholders.<sup>377</sup> These firms also tend to be more proactive, partnering with government, “suppliers, customers, [and] others in the[ir] industry” to together innovate sustainable solutions to environmental and other problems.<sup>378</sup> At the next level of corporate social responsibility, firms integrate social responsibility principles into their strategy and business processes (starting with product or service development) such that the way of doing business is “built in, not bolted on.”<sup>379</sup> For example, companies at this stage may rethink their design and production processes to reduce waste, utilize improved, sustainable, and even reusable materials, and in some cases eliminate the use of harmful materials altogether. These firms aim to serve all

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This may be the case in business-to-business transactions, as well. See ELKINGTON, *supra* note 364, at 110, 119 (relating anecdotes).

374. See Jayne W. Barnard, *Corporate Boards and the New Environmentalism*, 31 WM. & MARY ENVTL. L. & POL’Y REV. 291, 291 (2007) (noting that “sophisticated corporate managers” are “tak[ing] into account the possibility of increased governmental regulation; the increasing risk of a costly response to changing environmental conditions . . . ; and growing consumer preference for products sold by companies that are good corporate citizens”).

375. See Marrewijk & Werre, *supra* note 368, at 110.

376. See GEARING UP, *supra* note 369, at 36 (labeling this the “partner” level); Kerr, *Creative Capitalism*, *supra* note 368, at 857-58 (labeling these firms “pro-active” in corporate social responsibility); Marrewijk & Werre, *supra* note 368, at 112 (describing this level as “caring” corporate sustainability).

377. See Marrewijk & Werre, *supra* note 368, at 112.

378. See CYNTHIA A. McEWEN & JOHN D. SCHMIDT, AVASTONE CONSULTING LEADERSHIP AND THE CORPORATE SUSTAINABILITY CHALLENGE 14 (2007); Marrewijk & Werre, *supra* note 368, at 110.

379. McEwen & Schmidt, *supra* note 378, at 17 (quoting a pharmaceutical manufacturer’s vice president of corporate responsibility) (“What you have to do is build responsibility into every aspect of the way you do business, so it’s built in, not bolted on.”); see GEARING UP, *supra* note 369, at 36 (labeling this level “integrate”); Marrewijk & Werre, *supra* note 368, at 112 (describing this level as “synergistic” corporate sustainability).

their stakeholders, creating value for shareholders, by matching “corporate objectives [with] wider societal challenges.”<sup>380</sup> At the sixth and highest level, corporate social responsibility “is fully integrated and embedded in every aspect of the organization,” which is committed to “contributing to the quality and continuation of life of every being and entity, now and in[to] the future.”<sup>381</sup> Here, companies also redesign or “reengineer” their business models, financial institutions, and markets to identify and root out any underlying causes inconsistent with social responsibility. Aside from a few outliers,<sup>382</sup> however, corporate social responsibility rarely moves beyond the third, profit-driven level described above. This encompasses a great deal of socially responsible behavior and business practices, to be sure.

Specifically for global labor standards, many approaches have tended to focus on the level of the articulation of corporate codes of conduct and compliance with those codes.<sup>383</sup> Several studies report that socially responsible business practices tend to be profitable,<sup>384</sup> and the

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380. See GEARING UP, *supra* note 369, at 36.

381. Marrewijk & Werre, *supra* note 368, at 112 (terming this level “holistic” corporate sustainability); see GEARING UP, *supra* note 369, at 36 (calling this level “re-engineer”); Kerr, *Creative Capitalism*, *supra* note 368, at 857 (calling this “creative capitalism”).

382. See, e.g., Murray Carpenter, *A Coffee Conundrum: Disposal of Single-Use Pods Offsets Eco-Friendliness*, N.Y. TIMES, Aug. 4, 2010, at B1 (profiling Green Mountain Coffee Roasters); Cornelia Dean, *Executive on a Mission: Saving the Planet*, N.Y. TIMES, May 22, 2007, at F1 (profiling Ray Anderson of Interface Carpets); Tom Foster, “No Such Thing as Sustainability,” FAST COMPANY, July 1, 2009, Business Source Complete, Doc. No. 10859241; Sarah Lyall, *Anita Roddick, Body Shop Founder, Dies at 64*, N.Y. TIMES (Sept. 12, 2007), <https://www.nytimes.com/2007/09/12/world/europe/12roddick.html>; Andrew Martin, *Is a Food Revolution Now in Season?: In Washington, the Gardener in Chief Embraces the Activists*, N.Y. TIMES, Mar. 22, 2009, at BU1 (interviewing Stonyfield Farms CE-Yo Gary Hirshberg); Booth Moore, *Toms Shoes: The Model: Sell 1, Give 1*, L.A. TIMES, Apr. 19, 2009, at P5; Danielle Sacks, *Jeffrey Hollender: Seventh Generation, Triple Bottom Line Entrepreneur*, FAST COMPANY (Feb. 2, 2010), <https://www.fastcompany.com/1535762/jeffrey-hollender-seventh-generation-triple-bottom-line-entrepreneur>; *Seth Goldman: Brewing Organic Tea with a Mission-Based Business Model*, KNOWLEDGE@WHARTON (Dec. 23, 2008), <http://knowledge.wharton.upenn.edu/article.cfm?articleid=2124> (interviewing Honest Tea cofounder and TeaEO Seth Goldman).

383. See Elisa Westfield, Note, *Globalization, Governance, and Multinational Enterprise Responsibility: Corporate Codes of Conduct in the 21st Century*, 42 VA. J. INT’L L. 1075, 1079 (2002).

384. See Joshua D. Margolis et al., *Does It Pay to Be Good? A Meta-Analysis and Redirection of Research on the Relationship Between Corporate Social and Financial Performance* 21 (July 2007) (unpublished manuscript), [http://papers.ssrn.com/5013/papers.cfm?abstract\\_id=1866371](http://papers.ssrn.com/5013/papers.cfm?abstract_id=1866371). The percentages do not total one hundred because thirteen percent of the studies did not use statistically significant sample sizes. An earlier meta-study reached similar results. See Orlitzky et al., *supra* note 365 (“[P]ortraying managers’ choices with respect to [sustainability] and [profitability] as an either/or trade-off is not justified in light of 30 years of empirical data.”). A more recent, individual study concludes that voluntary

popular business press is replete with anecdotal evidence in further support of this hypothesis.<sup>385</sup> While corporate codes of conduct are typically voluntary,<sup>386</sup> and thus an exercise in “soft law,” they can be extremely important sources of self-regulation and also a way for industries to develop “best practices.”<sup>387</sup> Those best practices of an industry often form the basis for the starting point of regulation. After all, industry leaders who have participated in and helped to craft the codes of conduct and who are already meeting those standards are most likely to endorse compliance. In fact, such codes provide a type of “buy in” for those industry leaders who would rather compete on a level playing field, free from competitors who ignore or flout minimum labor standards.

In the crowdwork sector, such efforts have already begun. As noted in my coauthored book, *Invisible Labor*, “Technology may hide workers from a Web site’s ultimate users or consumers, who . . . may not even know that a human is working at all.”<sup>388</sup> Labor activists have attempted to change this dynamic over the years, through protests specifically designed to make workers more visible. In 2015, Stanford researchers and crowdworkers organized the Dynamo campaign, which was described as “a community platform designed to gather ideas, energy, and support directed towards collective action.”<sup>389</sup> A primary focus of Dynamo was overcoming the twin issues that seemed to be opposing collective action in the sector, which they described as

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overcompliance beyond applicable environmental regulations does sacrifice shareholder profits, albeit only very slightly. See Karen Fisher-Vanden & Karin S. Thorburn, *Voluntary Corporate Environmental Initiatives and Shareholder Wealth* 7 (CEPR Discussion Paper No. DP6698, 2010), [http://papers.ssrn.com/5013/papers.cfm?abstract\\_id=1141020](http://papers.ssrn.com/5013/papers.cfm?abstract_id=1141020) (reporting that overcompliance depressed firms’ stock prices by about one percent).

385. See, e.g., ELKINGTON, *supra* note 364, at 314; SAVITZ, *supra* note 366, *passim*; Allison Linn, *Wal-Mart Aims to Cut Energy Use—and Costs*, NBCNEWS (Apr. 19, 2007, 8:23 PM), <http://www.nbcnews.com/id/18075223/ns/business-going-green/t/wal-mart-aims-cut-energy-use-costs/#.xwhkxihkiuk..>

386. Professor Afra Afsharipour has analyzed the fact that certain Indian provinces have made corporate codes of conduct mandatory and enforced through a tax regime, with a percentage of profits to be turned over to social causes. See, e.g., Afra Afsharipour, *Directors as Trustees of the Nation? India’s Corporate Governance and Corporate Social Responsibility Reform Efforts*, 34 SEATTLE U. L. REV. 995, 1018-24 (2011); Afra Afsharipour & Shruti Rana, *The Emergence of New Corporate Social Responsibility Regimes in China and India*, 14 U.C. DAVIS BUS. L.J. 175, 208-26 (2013).

387. See GEARING UP, *supra* note 369, at 18, 31.

388. Cherry, *Invisible Labor*, *supra* note 359, at 50.

389. Niloufar Salehi et al., *We Are Dynamo: Overcoming Stalling and Friction in Collective Action for Crowd Workers*, 2015 CHI 1621, 1621 (conference paper).

“stalling” and “friction.”<sup>390</sup> Two of Dynamo’s initiatives secured significant media attention: the articulation of guidelines for academic researchers and a letter-writing campaign targeted at Amazon CEO Jeff Bezos.<sup>391</sup>

The guidelines were aimed at academic researchers, who commonly post surveys, psychological tests, and other similar tasks online. Many of the tasks came under fire because of the low rates of pay offered. Amazon now officially suggests that requesters use Dynamo’s Guidelines for Academic Requesters as a basis “[t]o help new Requesters get started successfully with MTurk.”<sup>392</sup> The guidelines include standards of identification, timeliness, and fair pay.<sup>393</sup> As such, this part of the Dynamo effort seems to have had a lasting impact.

Codes of conduct prompt a discussion of what “socially responsible” or “sustainable” online or app platforms might look like. In fact, some of the platforms might actually be run and owned by crowdworkers. Professors Trebor Scholz and Nathan Schneider have written extensively about platform cooperatives.<sup>394</sup> Rather than work for a wage, workers who are also cooperative owners are able to keep most of the money earned from their platform. Only a percentage of their earnings go back to the platform in order to invest in upkeep and functionality, rather than pay dividends out to shareholders.

Even in businesses not owned by workers, we could imagine socially responsible on-demand platforms. First, we should assume that such a business wanting to establish such norms would likely adhere to a corporate code of conduct and corporate social responsibility norms.<sup>395</sup> These would encompass the idea of fair remuneration and compliance with minimum wage laws. Disclosure and transparency are

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390. *Id.*

391. *Id.* at 1626.

392. *How to Be a Great MTurk Requester*, HAPPENINGS MTURK (Sept. 10, 2017), <https://blog.mturk.com/how-to-be-a-great-mturk-requester-3a714d7d7436>.

393. *Id.*

394. OURS TO HACK AND TO OWN: THE RISE OF PLATFORM COOPERATIVISM, A NEW VISION FOR THE FUTURE OF WORK AND A FAIRER INTERNET (Trebor Scholz & Nathan Schneider eds., 2016); *see also* Eillie Anzilotti, *Worker-Owned Co-Ops Are Coming for the Digital Gig Economy*, FAST COMPANY (May 31, 2018), <https://www.fastcompany.com/40575728/worker-owned-co-ops-are-coming-for-the-digital-gig-economy> (noting the potential replacement of major platforms by worker-owned co-ops); Trebor Scholz, *Platform Cooperativism vs. The Sharing Economy*, MEDIUM (Dec. 5, 2014), <https://medium.com/@trebors/platform-cooperativism-vs-the-sharing-economy-2ea737f1b5ad> (imagining a movement for better working conditions on crowdworking platforms).

395. For more on this point, see Cherry & Poster, *supra* note 36, at 293.

also important, so that workers understand the projects they are working on (and supporting through their labor).<sup>396</sup> Finally, there would be procedural safeguards for workers on platforms. If there are rating systems that are being built up over time, then workers should be able to have access to that data.<sup>397</sup> It is also important to ensure for procedural protections so that wage theft does not occur if the work is performed, but the task is “rejected.” As these soft law standards develop, we can hope for a code of conduct for crowdwork that applies regardless of jurisdiction, and that balances the needs of gig workers along with those of the platforms.

## VI. CONCLUSION

Online crowdwork presents endlessly fascinating conflicts-of-law, jurisdiction, and choice-of-law problems that will only become more salient as platforms become more established, more legal systems begin to enforce existing regulations or pass new ones, and the legal issues around the gig economy reach an increasing number of legislatures and courts. This Article has sought, on a practical level, to work through the labyrinth of doctrinal issues, using the available toolkit of private international law and its intersection with nationally based labor and employment laws. The analysis, however, only serves to point out the shortcomings of the existing laws and approaches.

Working through the maze of corporate compliance concerns and labor standards issues that global crowdwork has created exposes far deeper fault lines in the territorial-based approach to labor and employment law. As long as the focus for regulation remains on “workplaces” and physical locations where work is performed, effective regulation of crowdwork will remain elusive. Returning to the Introduction, there will be no easy answers for what law to apply to TaskRabbit, Upwork, or Chatterbox. Rather than focus on geographical approaches, this Article has tried to marshal a number of suggestions, looking at extraterritorial applications of law, sectoral regulation, and the soft law of corporate codes of conduct, to provide the possibility for ways forward. Socially responsible crowdwork is possible, but it will require creative thinking and the cooperation of platforms, workers, and regulatory organizations.

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396. *Id.* at 302-07.

397. *Id.* at 307.