

## COMMODITIZED WORKERS: CASE STUDY RESEARCH ON LABOR LAW ISSUES ARISING FROM A SET OF “ON-DEMAND/GIG ECONOMY” PLATFORMS

Antonio Aloisi<sup>†</sup>

In the framework of the so-called “on-demand/gig economy,” the number of on-demand companies matching labor supply and demand is on the rise. These schemes may enlarge opportunities for people willing to find a job or to top up their salaries. Despite the upside of creating new “peer marketplaces,” these platforms may also be used to circumvent employment regulation, by operating informally in traditionally regulated markets.

The literature showed how, by 2009, millions of worker accounts have been generated within these frameworks. Productivity may be fostered but, at the same time, a new version of Taylorism is disseminated (i.e., the fragmentation of labor into hyper-temporary jobs – called microtasks – on a virtual or local assembly line), strengthened by globalization and computerization. All these intermediaries recruit freelance or casual workers who are labelled as independent contractors even though many indicators seem to reveal a disguised employment relationship. Uncertainty and insecurity are the price for extreme flexibility. A bulk of business risk is shifted to workers, and potential costs such as benefits or unemployment insurance are avoided. Minimum wages are often far from being reached.

This Article presents a case study analysis of several “on-demand work” platforms, starting from Uber and Amazon Mechanical Turk, one of the first schemes founded in 2005, which is arguably “employing humans-as-a-service.” It splits a single service in several micro “Human Intelligence Tasks” (such as tagging photographs, writing short descriptions, transcribing podcasts, processing raw data). “Turkers/Providers” (workers) are selected by “Requesters” (firms) to quickly accomplish assignments online, and then rated according to an internal system and finally paid only if delivery is accepted. I comment upon the business model of TaskRabbit (thousands of

---

<sup>†</sup> Ph.D. candidate in Legal Studies, Luigi Bocconi University, Milan. The author wishes to thank Valerio De Stefano and Miriam A. Cherry for their helpful support, feedback, comments, and suggestions on this Article.

people using the service who bid to do simple manual tasks), Handy and Wonolo (personal assistance at a local level, specifically designed to cater to business market), UpWork (online staffing), Uber and Lyft (peer-to-peer ridesharing), InnoCentive (engineering solutions), Axiom (legal research or service).

Finally, I highlight the downside and upside of work in the main two platforms by studying terms of service or participation agreements that both parties have to agree to. I look into several key features such as (1) means of exchange/commodities; (2) systems of payment; (3) population; (4) legal issues concerning status and statutory protection of workers, indicators of subordination, treatment of sickness, benefits and overtime, potential dispute resolution, and deprived “moral valence of work” and also discuss potential strategies to address these issues.

## I. INTRODUCTION

Lawyers and economists have recently dedicated a lot of enthusiasm in the study of the so-called “sharing economy”<sup>1</sup> and the debate on whether and how to regulate this sector is now fierce. In the present Article, we neglect the terminological struggle about definitions and labels; in particular, expressions like “on-demand economy” and, interchangeably, “gig-economy” are used as a general umbrella, in order to be widely understood.

Although nearly everyone has become familiar with websites and mobile apps such as Amazon Mechanical Turk or Uber, this Article scrutinizes these two platforms as well as a few others. Indeed, a few companies are actually skyrocketing their profits thanks to the gigantic use of new technologies that allow cutting transaction costs and containing fixed costs by outsourcing (also offshoring) the workforce.

In the context briefly outlined, virtual platforms and apps for wireless devices (smartphones and tablets) play the role of “invisible infrastructure” or rather “central gathering hall,” by connecting supply and demand of services and facilitating interaction between individuals and firms. In short,

---

1. Taking for granted the on-going debate on terminology, the author would indifferently use a number of quasi-synonymizes, disregarding the nuances of their meaning (e.g., “sharing economy,” “gig-economy,” “1099 economy,” “participatory economy,” “peer economy,” “asset-light lifestyle,” “collaborative consumption,” “reputation economy,” “asset-light lifestyle”). For a complete picture, see also Rachel Botsman, *The Sharing Economy Lacks a Shared Definition*, FASTCOEXIST (Nov. 21, 2013), <http://www.fastcoexist.com/3022028/the-sharing-economy-lacks-a-shared-definition#8>. Moreover, “coming up with a solid definition of the sharing economy that reflects common usage is nearly impossible. There is great diversity among activities as well as baffling boundaries drawn by participants[.]” Juliet Schor, *Debating the Sharing Economy* (Essay, The Great Transition Initiative, Tellus Institute, 2014), available at <http://www.greattransition.org/publication/debating-the-sharing-economy>. See also *The Sharing Economy, New Opportunities, New Questions*, Global Investor 2.15, CREDIT SUISSE (Nov. 2015), <http://publications.credit-suisse.com/index.cfm/publikationen-shop/global-investor/global-investor-2-15-it/> [hereinafter *The Sharing Economy*].

they are “brokers.” However, it could be said that in some ways they act as employers, playing a role that entails “something more than [being] just a data base” in the light of many factors described at a later stage in the following Parts.<sup>2</sup>

It can, therefore, be argued that such a model increases flexibility for businesses and enables the connection between the most suitable work and available independent contractors.<sup>3</sup> In a sense, firms and workers select each other in a global or local open space for sourcing contract work. Uber – the world’s most renowned car-hailing company – is undermining traditional taxi companies and UpWork – a global freelancing platform<sup>4</sup> – is providing clerical or high-skill activities. These tools have the potential to “chop up” a broad array of jobs into several detached tasks that can be allocated to “on-demand” workers, just when they are needed, so that “parts of knowledge work can be parcelled out to individuals.”<sup>5</sup> Furthermore, such business strategies may become a means of circumventing the employment laws.

At first glance, some could add that, beyond the interest generated by the “collaborative economy,” these new digital formulas are exploitative tendencies similar to those which were already predominant a century ago: “web-based work environments [might be] devoid of the worker protections of even the most precarious working-class jobs.”<sup>6</sup> To sum up, these ubiquitous platforms have profound social implications because they challenge traditional business models and undermine the common structure of the “employer-employee” scheme. Even more, these platforms “are taking advantage of comparatively low-wage workers such as housekeepers”<sup>7</sup> thanks to a controversial classification of workers.

This Article explores these features from a labor law perspective. Indeed, the by-now common focus on consumer protection or competition

2. Adrián Todolí-Signes, “Uber Economy”: *Employee, Self-Employed or a Need of a Special Employment Regulation?* (Presentation given at the CEPS Winter School “From Uber to Amazon Mechanical Turk: Non-traditional labour markets driven by technological and organisational change,” INGRID FP7, CEPS, Brussels, Nov. 23-25, 2015), [www.ceps.eu/content/2015-winter-school](http://www.ceps.eu/content/2015-winter-school).

3. Brent Frei, *Paid Crowdsourcing, Current State & Progress Toward Mainstream Business Use* (2009), [www.smartsheet.com](http://www.smartsheet.com).

4. See UPWORK, <https://www.upwork.com/legal/> (last visited May 14, 2016).

5. Farhad Manjoo, *Uber’s Business Model Could Change Your Work*, N.Y. TIMES, Jan. 28, 2015, [http://www.nytimes.com/2015/01/29/technology/personaltech/uber-a-rising-business-model.html?partner=rss&emc=rss&\\_r=1](http://www.nytimes.com/2015/01/29/technology/personaltech/uber-a-rising-business-model.html?partner=rss&emc=rss&_r=1); Nick Booth, *Penny for Your Thoughts*, GUARDIAN, May 21, 2009, <http://www.theguardian.com/technology/2009/may/21/answering-services>; see also Emanuele Dagnino, *Uber Law: Prospettive Giuslavoristiche Sulla Sharing/On-Demand Economy* (2015), available at <http://www.bollettinoadapt.it/uber-law-prospettive-giuslavoristiche-sulla-sharingon-demand-economy/>.

6. Matthew W. Finkin, *Beclouded Work, Beclouded Workers in Historical Perspective*, 37 COMP. LAB. L. & POL’Y J. (2016); see DIGITAL LABOR: THE INTERNET AS PLAYGROUND AND FACTORY (Trebort Scholz ed., 2013).

7. Lydia De Pillis, *New Tech Companies Say Freelancing Is the Future of Work – But There’s a Downside for Workers*, WASH. POST, Feb. 3, 2015, <https://www.washingtonpost.com/news/storyline/wp/2015/02/03/new-tech-companies-say-freelancing-is-the-future-of-work-policy-needs-to-catch-up/>.

law eclipses a deeper set of regulatory issues that are emerging also in connection with the current reshaping of labor relations.

More accurately, what is significant here is the content of the three-sided contractual relationship between platform, requester (it could be a firm or an individual) and worker (often defined “partners,” “turkers,” and even “kangaroos” or “rabbits”). From a different perspective, the legal issue can be summarized as follows: must workers in the gig-economy continue to be classified as independent contractors – so called “1099 workers,” i.e., those who are paid via 1099 forms? Are they employees in the light of many criteria that reveal a disguised employment relationship grounded on their disproportionate vulnerability? Or “do they represent a genuinely novel form of work, deserving of its own legal status and regulatory apparatus?”<sup>8</sup>

In order to develop this analysis, the Article is organized as follows. After a brief introduction presenting on-demand/gig economy as a double-edged sword, Part II provides a picture of the “sharing ecosystem” framework and focuses on a few trends in a global scenario of “flexibilization” of employment relationships, along with deindustrialization and tertiarization of the economy. This Part distinguishes among crowdwork and work-on-demand via apps, palpable manifestation of much more general trends linked to digitization.

Following an overview of the main topics, Part III sketches out the common characteristics of a set of online platforms and apps thought to exemplify this new “crowdwork movement” and describes their operation in general. Accordingly, the role of platforms, which claim to be mere intermediaries providing a great deal more flexibility than traditional employers, is investigated in depth. The Part also explains the effects of technologies on labor, claiming that the Internet is merely accelerating well-known risks. Obviously, this Part deals with those economic players that operate informally in traditionally regulated markets providing “people-as-a-service” within virtual venues. Part IV is intended to provide the necessary elements to approach the issue from a different perspective: the shift from the idea of ownership to the idea of membership.

Part V describes Amazon Mechanical Turk by studying participation agreements and concrete circumstances of the performance. The features of one the most known crowdsourcing platforms are illustrated, along with the reasons why this model has been deemed as exploitative. Part VI clarifies why and how the “uberizing” approach has now been called into question. It aims at scrutinizing Uber’s business model, a sort of telling paradigm in the on-demand/gig economy. Next, Part VII illustrates Uber’s operation by

---

8. Jeremias Prassl & Martin Risak, *Uber, Taskrabbit, and Co.: Platforms as Employers? Rethinking the Legal Analysis of Crowdwork*, 37 COMP. LAB. L. & POL'Y J. (2016).

describing the “5-stars” rating model, considered an efficient monitoring system, as well as the related nontransparent virtual reputation, the low remuneration mechanism, the debatable terms and conditions, and the legal insecurities. Moreover, it analyzes the litigation in this field, concerning the classification of the workers as employees or independent contractors for purposes of labor and employment laws. Part VIII resents some attempts to organize crowdworkers, by building up promising movements of interest, even though global competition and geographical disaggregation make it difficult for collective action to be carried out.

This Article considers that the consequences of this paradigm shift will be highly impactful. Ultimately, Part IX concludes, by pointing out policy recommendations and options to strengthen protection of vulnerable digital workers. In the light of the on-going regulatory challenge, this Part comments on the most important platforms that are currently redefining their business model, also regarding the legal treatment of workers.

## II. THE DIGITAL ECONOMY’S REPERCUSSIONS ON LABOR MARKET

Nowadays, we are facing an interesting combination of “immense promise and peril for workers in the new digital economy.”<sup>9</sup> Researchers, lawyers and regulators have to prepare themselves since chaos, surrounding the on-demand economy, is in a sense a prediction – or a “disturbing possibility” – regarding the trajectories of the labor framework. Legal scholars are faced not only with a buzzword, but also with a significant approximation; the topic deserves attention because it represents a piece of the global puzzle of a “flexibilization” trend in the field of employment relationships.<sup>10</sup>

Moreover, a global drift toward the decentralization of structures and facilities as well as the creation of dense and dispersed production networks can be observed: as a result, “shared” assets – including labor – have never been so affordable, accessible on a large-scale, with low entry barriers, manageable hyper-temporarily, available at will and in “pay-as-you-go” mode. In this respect, examining the causes of the on-going paradigm shift, one might at least encounter the “death of the distance,”<sup>11</sup> the facilitating role

---

9. Miriam A. Cherry, *Working for (Virtually) Minimum Wage: Applying the Fair Labor Standards Act in Cyberspace*, 60 ALA. L. REV. 1077 (2009).

10. Natasha Singer, *In the Sharing Economy, Workers Find Both Freedom and Uncertainty*, N.Y. TIMES, Aug. 16, 2014, [http://www.nytimes.com/2014/08/17/technology/in-the-sharing-economy-workers-find-both-freedom-and-uncertainty.html?\\_r=0](http://www.nytimes.com/2014/08/17/technology/in-the-sharing-economy-workers-find-both-freedom-and-uncertainty.html?_r=0); Katherine V.W. Stone, *Flexibilization, Globalization, and Privatization: Three Challenges to Labor Rights in Our Time*, 44 OSGOODE HALL L.J. 77 (2006).

11. FRANCES CAIRNCROSS, *THE DEATH OF DISTANCE; HOW THE COMMUNICATIONS REVOLUTION WILL CHANGE OUR LIVES* (1997).

of information and communication technologies (“ICT”) along with the spread of the broadband, thus allowing ubiquitous communications, user-friendly software and comfortable user-experience.<sup>12</sup>

While opening new virtual markets, websites like TaskRabbit – running errands, Lyft – car hailing, Axiom – legal services (just to list a few, both from the “commodities market” and the “knowledge based economy,” concerning “real world” and “virtual world” tasks) threaten to dismantle traditional labor markets since they do not seem to ensure a fair protection of workers’ rights.

It is also undeniable that these virtual venues often represent an important source of income for workers, in some cases they represent the main living.<sup>13</sup> Moreover they might offer job opportunities to many people, including, in some cases, to those bound to stay at home, or give the chance to top-up income for persons already in employment.<sup>14</sup> Furthermore, these emerging markets “give people in poor countries access to buyers in rich countries.”<sup>15</sup> Nevertheless, incomes are much less predictable. And, for as much as disruptive these systems can be, from a certain point of view, their fleeting diffusion can be controversial, since it is not clear whether we are facing a digital version of Taylorism, i.e., the efficient exploitation (and expropriation) of work at the detriment of security, education, and skill development of workers.

In my opinion, this risk seems equally as serious as the legal implications since these jobs do not entail the possibility of accessing any employment protection measures or upgrading schemes, also because of their intrinsically contingent and casual nature.<sup>16</sup>

---

12. Benedikt Frey & Michael A. Osborne, *The Future of Employment: How Susceptible Are Jobs to Computerisation?* (OMS Working Paper, 2013), available at [http://www.oxfordmartin.ox.ac.uk/downloads/academic/The\\_Future\\_of\\_Employment.pdf](http://www.oxfordmartin.ox.ac.uk/downloads/academic/The_Future_of_Employment.pdf).

13. According to a recent survey, “over a third of those willing to divulge this information (a quarter of all crowd workers) say they rely on this income as their sole or main source of income” (the sample was composed of 2,238 U.K. adults aged 16-75). See Ursula Huws & Simon Joyce, *Size of the UK’s “Gig Economy” Revealed for the First Time* (Crowd Working Survey, Feb. 2016), available at [www.feps-europe.eu/assets/a82bcd12-fb97-43a6-9346-24242695a183/crowd-working-survey.pdf](http://www.feps-europe.eu/assets/a82bcd12-fb97-43a6-9346-24242695a183/crowd-working-survey.pdf). Moreover “in September 2015, 1 percent of adults actively earned income from the Online Platform Economy.” Among them, “platform income represented more than 75 percent of total income for 25 percent of active participants.” *Paychecks, Paydays, and the Online Platform Economy: Big Data on Income Volatility*, JPMORGAN CHASE & CO. INSTITUTE (Feb. 2015), <https://www.jpmorganchase.com/corporate/institute/report-paychecks-paydays-and-the-online-platform-economy.htm>.

14. See Janine Berg, *Income Security in the On-Demand Economy: Findings and Policy Lessons from a Survey of Crowdworkers*, 37 COMP. LAB. L. & POL’Y J. (2016).

15. John J. Horton, *The Condition of the Turking Class: Are Online Employers Fair and Honest?*, 111 ECON. LETTERS 10 (2011).

16. Katherine V.W. Stone, *The Decline in the Standard Employment Contract: Evidence from Ten Advanced Industrial Countries* (UCLA Sch. of Law, Law-Econ. Res. Paper No. 12-19, 2012), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2181082](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2181082); AFTER THE STANDARD CONTRACT OF EMPLOYMENT: INNOVATIONS FOR REGULATORY DESIGN (Katherine V.W. Stone & Harry Arthurs eds., 2013).

However, simple objections can be raised: all these shortcomings also sound familiar for well protected workers; what changes here is the timing (around the clock), the speediness (just a click on a button), the scale (global dimension), the lack of transparency and predictability (no explanations apart from “no-reply” pre-drafted e-mails).<sup>17</sup>

In such a complex setting, it is possible to observe some characteristics of this rising “e-lance” market.<sup>18</sup> The total turnover is estimated between \$15 and \$26 billion,<sup>19</sup> anything but small and ready to grow. Conversely, according to a recent study, the value of the “sharing economy” should reach approximately 0.1% of GDP of a developed country, such as the United States or European countries. According to a study carried out by Time Magazine, over 14 million people work in this economic sector.<sup>20</sup>

Despite the intense collection and smart use of big data, it is unrealistic to exactly count how many persons work in the gig-economy. There is no clear distinction between active and inactive accounts (the definition lacks a quantitative specification) and a worker – in the absence of an exclusivity clause – could sign up in several platforms. It is worth nothing that we also lack data measuring the role of the gig-economy in fostering formalization of activities that would have otherwise occurred in the informal economy and, vice versa, its role in driving informalization and lack of protection in traditionally regulated sectors.

In the following Part, we discuss a few common patterns in this new labor market “fringe.”

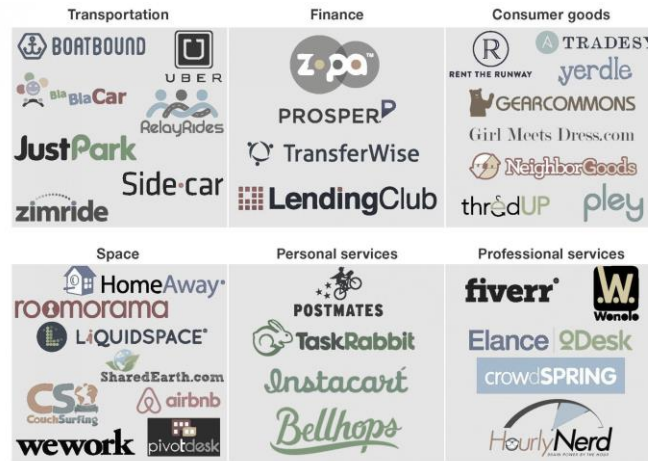
---

17. In addition to this, workers in fact often shift from an activity to a totally different one – ignoring which would pay more in return. It has also been argued that an evident downside of the on-demand economy model is that “each individual sharer has to learn on his or her own what works and what doesn’t.” This is the result of the partial absence of union warning regarding risks (like safety, minimum wage protection, etc.). The aforementioned scheme makes it more difficult for workers to understand and judge the content and the “moral valence” of their entire performance, thus leading to serious ethical concerns (just think of a pacifist working for the weapons industry). See Sophie-Charlotte Moatti, *The Sharing Economy’s New Middlemen*, HARV. BUSN. REV. (Mar. 5, 2015), <https://hbr.org/2015/03/the-sharing-economy-s-new-middlemen>; Jonathan Zittrain, *Ubiquitous Human Computing* 1-2 (Univ. of Oxford Legal Research Paper Series, Paper No. 32, 2008), available at <http://ssrn.com/abstract=1140445>.

18. Thomas W. Malone & Robert Laubacher, *The Dawn of the E-Lance Economy*, 76 HARV. BUSN. REV. 144-52 (1998), <https://hbr.org/1998/09/the-dawn-of-the-e-lance-economy>; see also David H. Autor, *Wiring The Labor Market*, 15 J. ECON. PERSPECTIVES 25 (2001).

19. RACHEL BOTSMAN & ROO ROGERS, *WHAT’S MINE IS YOURS: THE RISE OF COLLABORATIVE CONSUMPTION* (2010).

20. *The Sharing Economy*, *supra* note 1; Katy Steinmetz, *Exclusive: See How Big the Gig Economy Really Is*, TIME, Jan. 6, 2016, <http://time.com/4169532/sharing-economy-poll/>. TIME’s poll of 3,000 people, carried out in late November, “found that 22% of American adults, or 45 million people, have already offered some kind of good or service in this economy.” Steinmetz, *supra*. Moreover, it has been appraised that in five years over 40% of the American workforce will have uncertain work. Tianxiang Zhuo, *The Secret Number to the Sharing Economy*, TNW NEWS (2015), <http://thenextweb.com/insider/2015/06/25/the-secret-number-to-the-sharing-economy/>.

Figure 1. Crowdfunding Industry Landscape<sup>21</sup>

### III. NOTHING NEW: HOW TO DISMANTLE AN ATOMIZED MARKET

Not all crowdsourcing platforms are alike. That notwithstanding, the literature tends to consider these kinds of jobs as a unique category: this choice underestimates the dimension of the phenomenon and helps researchers in describing this dimension at large. The ways in which tasks are adjudicated and payments are completed vary from platform to platform, also the population (as for education and professionalism level, social background, and motivations), contents of the assignments, prices and fares are extremely heterogeneous. As many lawyers have aptly pointed out, the combination of the different concrete elements of the employment relationships leads to several legal concerns regarding rights, obligations and liabilities.<sup>22</sup>

First and foremost, some commentators distinguish between “crowd-work” and “work-on-demand via apps,” the difference mainly consisting in the way of accomplishing the performance.<sup>23</sup> The first expression covers jobs

21. Forrester Research, Inc. (2015); see Denise Lee Yohn, *What You Can Learn About Customer Experience from Sharing Economy Companies*, FORBES, Mar. 4, 2015, [www.forbes.com/sites/denise-lyohn/2015/03/04/what-you-can-learn-about-customer-experience-from-sharing-economy-companies/#50642258288d](http://www.forbes.com/sites/denise-lyohn/2015/03/04/what-you-can-learn-about-customer-experience-from-sharing-economy-companies/#50642258288d).

22. Martin Risak & Johannes Warter, *Legal Strategies Towards Fair Conditions in the Virtual Sweatshop* (Paper presented at the *IV Regulating for Decent Work Conference*, ILO, July 8-10, 2015), available at <http://www.rdw2015.org/download>.

23. EUROFOUND, *NEW FORMS OF EMPLOYMENT* (2015); Steven Greenhouse, *Uber: On the Road to Nowhere*, AM. PROSPECT (Dec. 15, 2015), <http://prospect.org/article/road-nowhere-3>; Janine Berg & Valerio De Stefano, *Regulating Work in the “Gig-Economy,”* WORK IN PROGRESS (July 10, 2015), <http://iloblog.org/2015/07/10/regulating-work-in-the-gig-economy/>; see also Valerio De Stefano, *The Rise of the “Just-in-Time Workforce”: On-Demand Work, Crowd Work and Labor Protection in the “Gig-*

completed remotely on virtual platforms by workers, in response to on-line calls and potentially involving people from all over the world (HourlyNerd, CrowdSpring, Fiverr, CoContest<sup>24</sup>). The second one refers to types of work performed in the real world and therefore locally (WoNoLo, JustPark, PostMates, Deliveroo): apps and platforms, in this case, just offer a digitized solution for the selecting/hiring process. What links “crowd-work” and “work-on-demand via apps” is, at first glance, the enabling role of technology and the common business model.

New platforms turn to more skilled workers that “can complete multi-hour tasks on professional online marketplaces such as oDesk (now UpWork) or work for months to solve R&D challenges on open innovation platforms (e.g., Innocentive).”<sup>25</sup> Platforms like Thumbtack, essentially operating such as Uber, foster the interaction with “contractors who provide more premium services.” In this case, in terms of business arrangements, the role of the platforms is the following: they facilitate pulling down transaction costs (for instance, coming into contact with consumers) serving as a global and virtual “notice board.”

Accordingly, this work can be done from anywhere, thus crowdworkers are in a global labor market, competing with their “colleagues” in developing countries. Therefore, frontiers may play a much more marginal role and a vendor can recruit a contingent worker from a different geographical area for a quick or instant job task, which raises serious problems regarding anti-discrimination law, workplace health and safety, and social arbitrage.

It has been argued that this structure has an impact on the polarization of the businesses: on the one hand, there is a global and creative professional who can submit bids for specific pieces of work on the web, on the other, local professionals who act as service providers, executing the work, implementing the design and ensuring the relationship with local authorities.<sup>26</sup>

The platforms do not mandate schedules, shifts, or specific tasks. Obviously, the myth of flexibility (or rather “agility”) has not to be considered as a universal panacea. It is, in fact, debatable whether the alleged

---

*Economy*,” 37 COMP. LAB. L. & POL’Y J. (2016); see also *Regulating the Gig Economy*, WORLD BANK (Dec. 22, 2015), <http://www.worldbank.org/en/news/feature/2015/12/22/regulating-the-gig-economy>.

24. Born in Italy, CoContest is a good example of crowdsourcing platform for interior design. See Ilaria Maselli & Brian Fabo, *Digital Workers by Design? An Example from the On-demand Economy* (CEPS Working Document No. 414, CEPS, Oct. 2015).

25. Aniket Kittur et al., *The Future of Crowd Work* (16th ACM Conference on Computer Supported Cooperative Work, CSCW, 2013).

26. Dario Di Vico, *L’Uber degli architetti: il progetto per la casa si può scegliere in Rete*, IL CORRIERE DELLA SERA (Feb. 11, 2016), [http://www.corriere.it/cronache/16\\_febbraio\\_12/uber-architetti-68358b34-d108-11e5-9819-2c2b53be318b.shtml](http://www.corriere.it/cronache/16_febbraio_12/uber-architetti-68358b34-d108-11e5-9819-2c2b53be318b.shtml).

flexibility is popular among workers.<sup>27</sup> There is much evidence regarding the fact that some workers are taking advantage of this opportunity, although they seem aware of what they are actually renouncing: “the security and benefits they’ve traded for [flexibility].”<sup>28</sup> Furthermore, my argument is that a contradictory idea of flexibility has been developed. Although workers can autonomously decide when to log in the app or accomplish their duties from any place equipped with Wi-Fi, the time they spend on the platform is a key issue for their daily compensation or the purpose of the internal ranking. In this sense, flexibility is just a kind of solace: to earn a significant sum of money, workers might also have to work more hours every day than a “standard” worker. Since they have to be available “around the clock,” this kind of flexibility does not entail a greater freedom for the worker.<sup>29</sup>

Moreover, it seems like “firms are able to make use of outsourcing without renouncing hierarchy in the management of the relevant business relationships by means of extra-legal mechanisms,” namely economic dependence and reputation.<sup>30</sup> Tools such as ranking system and approval rating – politely defined “five-star reviews” – confirm this assumption. Generally speaking, this new configuration implies wages fixed by a dynamic calculation of the law of supply and demand, and every worker’s act constantly traced, monitored and appraised under “the harsh light of customer satisfaction” as the supervisory power – a prerogative traditionally exclusive to the management – is partially delegated to users.<sup>31</sup>

Nonetheless, it is worth observing this phenomenon by taking into account broader trends. A larger movement is worth looking into: “sharing economy” has not “introduc[ed] the serpent of casual labour into the garden of full employment: it is exploiting an already casualised workforce in ways that will ameliorate some problems even as they aggravate others.”<sup>32</sup> In this

---

27. Seth D. Harris & Alan B. Krueger, *A Proposal for Modernizing Labor Laws for Twenty-First-Century Work: The “Independent Worker”* (The Hamilton Project, Discussion Paper 2015-10, Dec. 2015), available at [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).

28. Berg, *supra* note 14; Greenhouse, *supra* note 23; Jonathan V. Hall & Alan B. Krueger, *An Analysis of the Labor Market for Uber’s Driver-Partners in the United States* (Princeton Univ. Indus. Relations Section, Working Paper No. 587, 2015), available at <http://arks.princeton.edu/ark:/88435/dsp010z708z67d>.

29. Alyson Shontell, *My Nightmare Experience as a TaskRabbit Drone*, BUSN. INSIDER, Dec. 2011, <http://www.businessinsider.com/confessions-of-a-task-rabbit-2011-12>.

30. For a description of these phenomena, in a different context, see Valerio De Stefano, *Smuggling in Flexibility: Temporary Work Contracts and the “Implicit Threat” Mechanism* (LAB/ADMIN – Working Document No. 4, ILO, 2009), available at [http://www.ilo.org/wcmsp5/groups/public/---ed\\_dia\\_logue/---lab\\_admin/documents/publication/wcms\\_116294.pdf](http://www.ilo.org/wcmsp5/groups/public/---ed_dia_logue/---lab_admin/documents/publication/wcms_116294.pdf).

31. Manjoo, *supra* note 5; Alex Rosenblat & Luke Stark, *Uber’s Drivers: Information Asymmetries and Control in Dynamic Work*, VALUE WALK (Dec. 9, 2015), <http://www.valuewalk.com/2015/12/ubers-drivers-information-asymmetries-and-control-in-dynamic-work/>.

32. Eyal Peer et al., *Beyond the Turk: An Empirical Comparison of Alternative Platforms for Crowdsourcing Online Behavioral Research* (Apr. 14, 2015), <http://ssrn.com/abstract=2594183>; *The*

regard, it is vital to carefully admit that any attempt to describe the rise in the number of the self-employed workers as a pure product of peer-to-peer economy is inaccurate. However, the fact that the expansion of this segment of the economy entails an acceleration of self-employment is undeniable. On the other hand, all these schemes (such as on-call jobs, zero-hour contracts, short fixed-term contracts, other nonstandard forms) might have been fostered by the Great Recession, so could be considered as a collateral effect of the high unemployment rate.<sup>33</sup>

It has been said that, in a not so distant future, being full-time employed by a corporation or government agency could probably be the exception rather than the rule.<sup>34</sup> In this sense, Evgeny Morozov pointed out that the so-called “sharing economy” is nothing but the continuation of “traditional” outsourcing by other means.<sup>35</sup>

Something new but largely predictable is now happening: workers are starting to sue some companies (the car-hailing apps Uber or Lyft and the cleaning platform Handy, for instance) for inappropriately classifying them as contractors although they do not enjoy the amount of freedom that the label is supposed to entail. To give a comprehensive reply on this acute issue, we should evaluate the content of each agreement on a case-by-case basis. Nevertheless, we can pinpoint a set of conditions under which the “independent contractor veil” is irremediably pierced: the lack of personal control over the work or the well-defined manner in which the task is performed, for instance. Therefore, an in-depth inspection on how work is carried out could lead to a re-examination of the contractual label.

The current legal battle could be strenuous but it has already reached the goal of raising awareness on this thorny topic. At the moment, Uber is embroiled in a class-action lawsuit in California over how it classifies its

---

*Future of Work: There's an App for That*, ECONOMIST, Jan. 3, 2015, <http://www.economist.com/news/briefing/21637355-freelance-workers-available-moments-notice-will-reshape-nature-companies-and>.

33. See Valerio De Stefano, *A Tale of Oversimplification and Deregulation: The Mainstream Approach to Labour Market Segmentation and the Recent Responses to the Crisis in European Countries*, 43 INDUS. L.J. 253 (2014); see also GUY STANDING, *THE PRECARIAT: THE NEW DANGEROUS CLASS* (2011). According to Standing, the spread of social and economic insecurity was not caused by the global economic crisis, merely seen as one of the latest shocks. See also Marco Biagi, *The Effect of the Global Crisis on the Labor Market: Report on Italy*, 35 COMP. LAB. L. & POL'Y J. 371 (2014).

34. Andrea Broughton, Isabella Biletta & Mats Kullander, *Flexible Forms of Work: “Very Atypical” Contractual Arrangements*, EURWORK (Mar. 10, 2010), <http://www.eurofound.europa.eu/observatories/eurwork/comparative-information/flexible-forms-of-work-very-atypical-contractual-arrangements>; Arun Sundararajan, *The New “New Deal?” Sharing Responsibility in the Sharing Economy*, POLICY NETWORK, (Oct. 30, 2014), [http://www.policy-network.net/pno\\_detail.aspx?ID=4762&title=The-new-New-Deal-Sharing-responsibility-in-the-sharing-economy](http://www.policy-network.net/pno_detail.aspx?ID=4762&title=The-new-New-Deal-Sharing-responsibility-in-the-sharing-economy); Derek Thompson, *A World Without Work*, ATLANTIC, July/Aug. 2015, <http://www.theatlantic.com/magazine/archive/2015/07/world-without-work/395294/>.

35. Evgeny Morozov, *The “Sharing Economy” Undermines Workers’ Rights*, FIN. TIMES (Sept. 2015), <http://www.ft.com/intl/cms/s/0/92c3021c-34c2-11e3-8148-00144feab7de.html>.

drivers<sup>36</sup>; if anything, this case was able to shed light on this subject, especially throwing some light on worker conditions.<sup>37</sup>

#### IV. FROM OWNERSHIP TO MEMBERSHIP, THE ORIGINS OF “CROWDWORK”

Previous Part argues that “sharing economy” practices and the underlying business model entail the recourse to precarious forms of employment. In the following paragraphs of this Article, we analyze the origins of “crowdwork.”

In particular, if we take as valid the description of the on-demand economy as a model capable of exploiting underutilized or unutilized power of (dormant) assets to gain an income, increasing competition in the markets and providing users with more choice, we need to include human capital among those resources. The rising paradigm could be summarized as follows: use value takes precedence over ownership (with cars, housing, tools) and repair prevails over replacement. From the theoretical standpoint, and in accordance with empirical observations, the subsidiary “currency” of these business exchanges is trust.

In such a context, it is worth noting that a crowd of individuals appear to be offering their “personal assets” as part-time workers or micro-entrepreneurs (often of a sole proprietorship), so that “sharing” could be seen as a euphemism for “selling.”<sup>38</sup> Indeed, that businesses normally recruit workers with no entitlement to a fixed amount of working hours, paid sick or annual leave, and notice in case of termination. Businesses also often totally or partially avoid social security costs.

The following Parts address platforms that “dis-intermediate” digital labour (i.e., tasks accomplished online). Amazon Mechanical Turk is the best example of the first model. Taking a step backwards, we are still asking for a little bit more than what has been provided for according to the recent debate on this subject. In the 1980s, Toffler coined the term “prosumer” to describe the blurring and merging of the roles of producer and consumer.

---

36. A Barcelona judge has referred several questions to the European Court of Justice, the Court will decide whether Uber has to be considered a courier or a digital service provider. See Murad Ahmed, *Judge Refers Spanish Uber Case to European Court of Justice*, FIN. TIMES (July 20, 2015), <http://on.ft.com/1DqITdc>.

37. For a complete litigation (and settlement agreement) update on the various worker lawsuits within the on-demand economy, see Miriam A. Cherry, *Beyond Misclassification: The Digital Transformation of Work*, 37 COMP. LAB. L. & POL'Y J. (2016).

38. Even though reports denounce decline in those who report themselves as self-employed. Josh Zumbun, *An Enduring Mystery of the “Gig Economy”: Why Are So Few People Self-Employed?*, WALL ST. J., Oct. 22, 2015, <http://blogs.wsj.com/economics/2015/10/22/an-enduring-mystery-of-the-gig-economy-why-are-so-few-people-self-employed/>.

Nowadays, commentators tend to use the expression “produser.”<sup>39</sup> This grey area seems to be increasingly enhanced by the on-demand economy. The term “crowdsourcing” was coined by Jeff Howe in an article on Wired, to designate “the act of taking a job traditionally performed by a designated agent (usually an employee) and outsourcing it to an undefined, generally large group of people in the form of an open call.”<sup>40</sup>

A remarkable change of pace has recently led to the emergence of very well-structured platforms, so that the alteration is enormous, almost comparable to the one led by the Industrial revolution.<sup>41</sup> Until recently, crowdsourcing has been considered as “hiring a neighbourhood teen to mow your lawn twice a summer, but on a grand and global scale.”<sup>42</sup> However, today, we are facing an evolutionary leap, and “the sharing economy is becoming professionalized,”<sup>43</sup> with two immediately evident outcomes: on the one hand, the “sharers” (those who enjoy an on-demand system) need to be considered factual workers; on the other, platforms are something more than mere intermediaries in charge of developing the network of connections and overseeing the formal property of transactions. It could be defined as a prototype based on social costs and private profits – the online platforms retain for themselves, on average, 15% of the fee as commission and exclude all liabilities, thereby trying to depict their role as limited to the sole activity of an intermediary.

Moreover, as previously pointed out, many platforms lack a physical workplace and the performance is accomplished at the user’s or worker’s home. This entails advantages such as speedy transactions and the alleged “democratization” process of the market but also disadvantages such as anonymity and potential frauds. The question concerning identity comes up: on the one hand, there is a concrete risk that behind an “avatar” one can hide forms of child or forced labor. On the other hand, this mechanism may potentially enhance a sort of global labor arbitrage and potential workers discrimination, since – in the selection process – employers could give place to users residing in countries where the cost of labor is lower than in the United States.<sup>44</sup>

---

39. David Bollier, *Trebor Scholz’s New Report on Platform Cooperativism* (The Foundation for P2P Alternatives, 2016), <https://blog.p2pfoundation.net/trebor-scholzs-new-report-on-platform-cooperativism/2016/02/22>.

40. Jeff Howe, *The Rise of Crowdsourcing*, WIRE MAG., June 2006, [http://www.wired.com/wired/archive/14.06/crowds\\_pr.html](http://www.wired.com/wired/archive/14.06/crowds_pr.html).

41. Noam Scheiber, *Corporate America Is Using the Sharing Economy to Turn Us Into Temps*, NEW REPUBLIC, (Nov. 24, 2014), <https://newrepublic.com/article/120378/wonolo-temp-worker-app-shows-scary-future-sharing-economy>.

42. Richard A. Epstein, *The Moral and Practical Dilemmas of an Underground Economy*, 103 YALE L.J. 2157 (1994) (quoted in Miriam A. Cherry, *A Taxonomy of Virtual Work*, 45 GA. L. REV. 951 (2011)).

43. The expression comes from Moatti, *supra* note 17.

44. The idea of cyberspace as a place “in and of itself” is still contested.

The following Part examine case by case the main characteristics of two of the most popular platforms of the on-demand economy.

#### V. AMAZON MECHANICAL TURK, A PIONEER

The Amazon Mechanical Turk (“AMT” or “MTurk”) was started on November 2, 2005 and has not undergone profound transformations over recent years: it is still a “beta version.”<sup>45</sup> The way it operates is exemplary because, over the last years, many other platforms have tried to duplicate it and also because, according to Felstiner, it “is almost certainly the largest crowdsourcing platform on the web, and has become the first stop for many individuals and firms seeking cheap, on-demand crowd labor.”<sup>46</sup>

As mentioned above, the platform – providing “humans-as-a-service”<sup>47</sup> – allows tasks to be accomplished by sending them down a wire through APIs (i.e., Application Programming Interface). Workers in the AMT are the “scaffolding” behind the Internet; their activities consist in doing something online that everybody takes for granted but that, in many cases, computers are still unable to accomplish.<sup>48</sup>

At the present time, there are over a thousand pages of HITs (“Human Intelligence Tasks”), activities that can only be performed by individuals, since “cognitive tasks remained a largely human province,” and are later consolidated.<sup>49</sup> These activities include copying or translating texts, identifying spelling errors, processing raw data, participating in some experiments, grouping items and labeling them, hunting for email addresses, participating in an online behavioral study and sorting data spread-sheet. It is also used to find samples for surveys.<sup>50</sup>

---

45. Amazon’s founder and CEO Jeff Bezos personally followed the project, meaning that, from the very beginning, this creature was treated as the spearhead of Amazon’s ventures. The website is named after an eighteenth century mechanical wooden device, life-sized, adorned with a turban, that could compete against human players at the game of chess (the stratagem is as follows: a dwarf was hidden and moved pawns from inside – so no technology at all, aside from mock cogs and clockwork machinery).

46. Alek Felstiner, *Working the Crowd: Employment and Labor Law in the Crowdsourcing Industry*, 32 BERKELEY J. EMP. & LAB. L. 143 (2011). Actually it is not “the largest crowdsourcing platform on the web”; since the details given in the report *Rights on Demand: Ensuring Workplace Standards and Worker Security in the On-Demand Economy* disclose that Crowdflower has 5,000,000 accounts and Crowdsource 8,000,000. See also Michelle Chen, *Is Crowdsourcing Bad for Workers?*, NATION (Jan. 5, 2015), <http://www.thenation.com/article/crowdsourcing-bad-workers/>.

47. Those words were uttered by Jeff Bezos at the MIT Emerging Technologies Conference (2006), <http://mit.tv/wjaF7b>.

48. Howe, *supra* note 40.

49. FRANK LEVY & RICHARD J. MURNAN, THE NEW DIVISION OF LABOR: HOW COMPUTERS ARE CREATING THE NEXT JOB MARKET (2005). For a detailed description of the platform see also Berg, *supra* note 14; M. Six Silberman & Lilly Irani, *Operating an Employer Reputation System: Lessons from Turkopticon, 2008-2015*, 37 COMP. LAB. L. & POL’Y J. (2016).

50. Ursula Huws, *Platform Labour or “Crowdsourcing”* (Presentation given at the CEPS Winter School *From Uber to Amazon Mechanical Turk: Non-Traditional Labour Markets Driven by Technological and Organisational Change*, INGRID FP7, CEPS, Nov. 23-25, 2015), [www.ceps.eu/con tent/2015-winter-school](http://www.ceps.eu/con tent/2015-winter-school).

At the time of registration, each user must indicate whether he/she intends to participate as a “Requester” or as a “Provider.” Requesters post HITs to be fulfilled and indicate compensation (defined as “reward”). There are enormous differences in bargaining power between Requesters and Providers. Requesters can set hiring conditions and also refuse to accept the performance result, while still retaining the work done (in this case, Turkers do not get paid).<sup>51</sup> Moreover, their evaluation impacts on Providers’ virtual reputation, thus affecting the likelihood to be hired in the future. “A worker’s history on Mechanical Turk primarily measures the percentage of work that has been approved” – not the amount of assignments finished.<sup>52</sup> In addition, Amazon itself can suspend or terminate a Provider’s account.<sup>53</sup>

Requesters can specify the structure of the data Turkers must enter, define instructions, circumscribe the pool of information that must be handled, and fix a price. They can also “define criteria that candidate workers must meet to work on the task,” for example, the worker’s “approval rating” and his portfolio of completed skill-specific qualification exams. Discrimination runs along a wire, indeed, it is unclear whether a worker’s IP address could affect the selection process, by potentially putting whoever has been registered in the United States, in the position of taking some of the better jobs. This filtering system allows selecting among thousands of contingent workers in a matter of hours.<sup>54</sup> Obviously, the delivered work quality is far from being guaranteed because there are no in-depth accountability checks, this is the reason why MTurk provides for a satisfaction clause: the Requester could reject jobs already accomplished, and thus avoid payment, for any reason or no reason.<sup>55</sup> Moreover, this type of clause does not entail an enforcement mechanism should the Requester arbitrarily refuse to pay the worker whilst still retaining the work already done.

---

51. “If a Requester is not reasonably satisfied with the Services, the Requester may reject the Services.” *Amazon Mechanical Turk Participation Agreement*, § 3, AMAZON MECHANICAL TURK, <https://www.mturk.com/mturk/conditionsofuse> (last updated Dec. 2, 2014).

52. Kittur et al., *supra* note 25.

53. See *Amazon Mechanical Turk Participation Agreement*, *supra* note 51.

54. Lilly C. Irani & M. Six Silberman, *Turkopticon: Interrupting Worker Invisibility in Amazon Mechanical Turk* (Proceedings of CHI 2013, ACM, 2013).

55. See also *Guarantee*, [www.oDesk.com](http://www.oDesk.com) (last visited May 2, 2016).

Figure 2: All HITs, 1-10 of 2,522 Results. Sorted by: HITs Available (Most First)

<b>Find email addresses and web page of American High School!</b>	HIT Expiration Date: Mar 2, 2016 (1 week 1 day)	Reward: \$0.03
Requester: Olga Svensen	Time Allotted: 30 minutes	
<b>Find Android App (Google Play) on Website</b>	HIT Expiration Date: Feb 29, 2016 (6 days 18 hours)	Reward: \$0.01
Requester: Sarah Catanzaro	Time Allotted: 15 minutes	
<b>Classify Receipt</b>	HIT Expiration Date: Mar 1, 2016 (6 days 23 hours)	Reward: \$0.03
Requester: Jon Breilig	Time Allotted: 20 minutes	
<b>Type the text from the images, carefully. Productivity and bonuses guaranteed.</b>	HIT Expiration Date: Mar 1, 2016 (6 days 23 hours)	Reward: \$0.01
Requester: CopyText Inc.	Time Allotted: 10 minutes	
<b>Get Product Codes and Prices from a receipt (\$4 BONUS UP TO 50 CENTS)</b>	HIT Expiration Date: Mar 15, 2016 (2 weeks 6 days)	Reward: \$0.01
Requester: Shopping Receipts US	Time Allotted: 45 minutes	
<b>Is Entity Part Of Hierarchy</b>	HIT Expiration Date: Feb 29, 2016 (6 days 9 hours)	Reward: \$0.15
Requester: OCMF7	Time Allotted: 15 minutes	
<b>Judge privacy preference of an user</b>	HIT Expiration Date: Mar 7, 2016 (1 week 6 days)	Reward: \$0.16
Requester: Taraneh	Time Allotted: 60 minutes	
<b>Grade and Correct the task: Find the URL of the Business</b>	HIT Expiration Date: Mar 24, 2016 (4 weeks 1 day)	Reward: \$0.04
Requester: zTask by zCrowd.com	Time Allotted: 2 hours	

In order to effectively carry out the analysis, one needs to ascertain Amazon's role: avowedly, it merely consists in building a marketplace and allowing Requesters get in touch with Turkers. The terms of use clearly state that Turkers are independent contractors. Many commentators refuse to agree upon this controversial classification.<sup>56</sup>

Introducing minimum wage and antidiscrimination provisions, the Fair Labor Standards Act ("FLSA") only concerns "employees." The Supreme Court has specified that definitions under the FLSA are to be interpreted broadly and that employee status is determined by an "economic reality test" rather than the narrow common law master-servant test.<sup>57</sup>

Nevertheless, as mentioned, the AMT Participation Agreement classifies a Turker as an independent contractor. This AMT "label" is beyond the scope of any labor legislation covering employees: the National Labor Relations Act ("NLRA"), Title VII of the Civil Rights Act, and related antidiscrimination legislation, the Family Medical Leave Act ("FMLA"), the Occupational Safety and Health Act ("OSHA"), or other analogous statutes.

We first need to clarify one point. In the United States, as well as in many European countries (like Italy), labels placed by the parties are not dispositive. This means that the classification imposed by terms of use could

56. For a deeper analysis of "the legal status of crowds" see Felstiner, *supra* note 46.

57. Katherine 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 (2006); see also David Weil, *The Application of the Fair Labor Standards Act's "Suffer or Permit" Standard in the Identification of Employees Who Are Misclassified as Independent Contractors*. Administrator's Interpretation No. 2015-1, U.S. DEPARTMENT OF LABOR (July 15, 2015) (asserting that the definition of "employ" must be construed more broadly than the Common Law's "control test").

be deemed as not corresponding to the reality of the work relationship. In this case, workers could be reclassified as employees and be entitled to relevant protection. For instance, in this connection, the U.S. Supreme Court stated that “[w]here the work done, in its essence, follows the usual path of an employee, putting on an ‘independent contractor’ label does not take the worker from the protection of the Act.”<sup>58</sup> Whether a worker should be considered an employee or a contractor often depends on a “multifactorial” test based on the facts emerging from the employment relationship.<sup>59</sup> Methods and procedures of this test have been defined by case law and decisions on agency law. The items include the possibility of having free personal judgement and control over one’s work, how tasks are performed, the “economic realities,” and the concrete dependency on the employer as well as the continuity of the relationship. There are also other subsidiary elements in this assessment: number of working hours, power of direction exercised by the employee, freedom of managing the time schedule, ownership of equipment, method of payment (time versus specific tasks or outputs), degree of flexibility and protections, and disparity of relative bargaining power. As the reader can well imagine, the crowdworking structure includes and merges many of the above-listed factors.<sup>60</sup>

In the AMT, workers are required to waive and bear all the risk.<sup>61</sup> Paradoxically, MTurk seems to be aware of this imprecise distinction and admits “[y]ou acknowledge that, while Providers are agreeing to perform Services for you as independent contractors and not employees, repeated and frequent performance of Services by the same Provider on your behalf could result in reclassification of that employment status.” The reference to the chance of reclassification sounds sarcastic, especially if read in conjunction with the following waivers:

(vii) you will not be entitled to any of the benefits that a Requester or Amazon Mechanical Turk may make available to its employees, such as vacation pay, sick leave, insurance programs, including group health insurance or retirement benefits; (viii) you are not eligible to recover workers’ compensation benefits in the event of injury.<sup>62</sup>

---

58. Rutherford Food Corp. v. McComb, 331 U.S. 722 (1947).

59. Stone, *supra* note 57; see also Brishen Rogers, *Employment Rights in the Platform Economy: Getting Back to Basics* (Temple Univ. Legal Stud. Research Paper No. 2015, 2016), available at <http://ssrn.com/abstract=2641305>.

60. A 1985 case, *Donovan v. DialAmerica*, seems to represent a precursor of AMT-style labour. An employer sent cards to home workers hired as independent contractors. Contractors had to verify phone numbers, getting paid per task. “Courts decided that these workers were in fact employees entitled to minimum wage under the Fair Labor Standards Act (FLSA)” in Irani & Silberman, *supra* note 54.

61. *Amazon Mechanical Turk Participation Agreement*, *supra* note 51, § 2 (“We do not conduct any screening or other verification with respect to Requesters or Providers, nor do we provide any recommendations. As a Requester or a Provider, you use the Site at your own risk”).

62. *Id.* § 3(b).

The mechanism also prevents parties from contracting freely outside the platform and eventually shrinking their contractual freedom.<sup>63</sup> It has been observed that these provisions seem to be inconsistent with the declared independent-contractor status of “Turkers.”<sup>64</sup>

## VI. THE “UBERIZATION” PROCESS: AN ORGANIZATIONAL DECOMPOSITION

So far, we analyzed one of the most known crowdwork platforms; next, we discuss the main features of the work-on-demand via apps in the gig economy. The on-demand economy has the potential to generate surplus value for the benefit of the consumer. The platforms “function as a multi-sided market,” because users are both on the demand and the supply side.<sup>65</sup> Generally speaking, the benefits for consumers are, at first glance, quite obvious: on the one hand, Uber fees are, at least in principle, competitive with those of conventional taxi cooperatives, as well as Airbnb landlords provide comfortable and low-cost housing solutions if compared to those offered by big hotel chains. Consumers could be seen as unequivocal winners if they were not also, in turn, workers. On the other, the risk of market and regulatory failures is very considerable, since the services at issue could potentially provide an advantage to certain economic operators (especially incumbents that can leverage their strong competitive advantage) at the expense of others. Other research, investigating these side effects, argues that the “gig-economy” is being turned into a “skimming economy.”<sup>66</sup> Further research is needed to investigate these topics in more depth and to explore the “distributional effects” of these trends.<sup>67</sup>

A good description of what “uberizing” actually means is “trapping” a set of innovative procedures – geo-location, online payments, workforce management, and distribution – into an “app-accessible service” or a “sweatshop,” according to its critics, with lower entry barriers because people monetize resources they already own.<sup>68</sup>

---

63. Guy Davidov, *Who Is a Worker?*, 34 *INDUS. L.J.* 57 (2005); Bob Simpson, *The National Minimum Wage Five Years on: Reflections on Some General Issues*, 33 *INDUS. L.J.* 29 (2004).

64. De Stefano, *supra* note 23.

65. Paula Gori, Pier Luigi Parcu & Maria Luisa Stasi, *Smart Cities and the Sharing Economy* (EUI Working Paper RSCAS 2015/96).

66. “It is not about meeting your neighbours anymore, it’s about putting them to work.” Janko Roettgers, *Disrupting Reality: Silicon Valley Is Busy Ignoring the Real World*, GIGAOM (Feb. 15, 2015), <https://gigaom.com/2015/02/15/disrupting-reality-silicon-valley-is-busy-ignoring-the-real-world/>; see also Guido Smorto, *Verso la disciplina giuridica della sharing economy*, 17 *MERCATO CONCORRENZA REGOLE* (2015).

67. Ilaria Maselli & Marco Giuli, *Uber: Innovation or Déjà Vu?* (CEPS Commentary, 2015), <http://www.ceps.eu/system/files/COMUBERMandIM.pdf>.

68. “Ateliers de misère” according to Antonio Casilli, *Digital Labor: Travail, Technologies et Conflictualités. Qu’est-ce que le Digital Labor?*, 10-42 (Editions de l’INA, 2015).

At the time of registration (“sign up”), the user becomes part of a contract that, in fact, ends up by reducing or excluding the likelihood of litigation, thanks to binding pre-dispute arbitration clauses in form contracts. On the other hand, if controversies arise, the dominant position of this activity seems to be put on the shoulders of the “platform,” seen as an “arbiter of compliance of the contract.” All this is made possible because of the so-called “click-wrap agreements” (or “click-through agreements”), binding guidelines that, taken together, define the rules of the game. They are used to disclaim warranties, restrict liability, indicate the applicable law and forum for dispute resolution; the user can only click “I accept” before entering the website. In the long run, these inescapable procedures could represent a race to the bottom because the balance of power appears to be lacking.<sup>69</sup>

Obviously, the selection process is orientated by the internal ranking, entailing moral hazard, or determining a struggle in order to be recruited in the future. As previously explained, reputation has a prominent role: all these exchanges involve an ex post evaluation that affects the ex ante selection.<sup>70</sup> As previously clarified, the internal rating system, in fact, has an impact on the successive hiring. Moreover, it puts the workers in an endless probation period, thus resulting in an increased vulnerability (or enhanced feeling of precariousness), and ties them to a specific platform. Should they decide to move to a new competitor, their “professional career” would be irremediably lost.<sup>71</sup> In a sense, the ranking system, combined with the approval rating and other obscure elements of an indescribable algorithm, is a though way of implementing internal rules and condition workers’ autonomy.<sup>72</sup>

These conditions and their related shortcomings are examined in more depth in the next Part.

---

69. Last December, Uber has redrafted the arbitration clause in its latest agreement; the new wording was aimed at preventing present and future Uber drivers from participating in class action lawsuits. U.S. District Judge Edward Chen has ruled that Uber’s arbitration clause is unenforceable, and thus it cannot be used to exclude drivers from the class action obtained by Shannon Liss-Riordan, a plaintiffs’ attorney. As a result, the ruling considerably enlarged the number of potential plaintiffs. However, in May 2016, a proposal for settlement provided for a \$100 million payment to the workers and an agreement to send worker dismissals to an arbitrator. Remarkably, the classification problem is still unresolved.

70. See also Adam Thierer et al., *How the Internet, the Sharing Economy, and Reputational Feedback Mechanisms Solve the “Lemons Problem”* (Mercatus Working Paper, May 2015), available at <http://mercatus.org/sites/default/files/Thierer-Lemons-Problem.pdf>.

71. Prassl & Risak, *supra* note 8.

72. Andrew Callaway, *Apploitation in a City of Instaserfs: How The “Sharing Economy” Has Turned San Francisco into a Dystopia for the Working Class*, CAN. CTR. POL’Y ALTERNATIVES (Jan. 1, 2016), <https://www.policyalternatives.ca/publications/monitor/apploitation-city-instaserfs>.

VII. UBER AND ITS SISTERS, THE PARADIGM OF  
WORK-ON-DEMAND VIA APPS

Uber is the most renowned ridesharing company, an “obvious inspiration” for many other apps of the “gig economy.”<sup>73</sup> Founded in 2009 and headquartered in San Francisco, its business model has become the paradigm for many other platforms. At this point, it operates in about 68 countries, has a current valuation of \$62.5 billion and “had sales exceeding \$1 billion in 2014.”<sup>74</sup> Indeed, the platform threatens the model applied by transportation firms by facilitating the efficient matching between suppliers and consumers. In many places, Uber has rapidly become the most successful “cab” company although it does not own a fleet of its own: this represents one of the most telling differences in reducing fixed costs between a traditional taxi company and Uber.

In order not to lag behind new competitors like Lyft<sup>75</sup> and SideCar – whose business models are very similar to Uber’s one – UberX, a cheaper and unlicensed spinoff of Uber’s original black-car limo service, has been launched. As mentioned earlier, UberX (or “Pop” according to the Italian adaptation) is the peer-to-peer version of the service: private drivers can register and serve as “taxi drivers.” Passengers that use the app to hail “ubercabs” can rate the ride.

Its operation is very easy: after downloading the mobile app and creating a personal account, every user can request the nearest available Uber driver (both to sedan or to town car) using a GPS to pinpoint the driver’s position. Instead, in order to become a “partner” driver, it is necessary to complete Uber’s application process, providing driver license information and evidence of the vehicle’s registration and insurance. A driver does not need to prove special requirements (apart from a “light” background check), many tutorials are available online for training.<sup>76</sup> Aspiring drivers could be required

---

73. Joel Stein, *Baby, You Can Drive My Car, and Do My Errands, and Rent My Stuff...*, TIME, Jan. 29, 2015, <http://time.com/3687305/testing-the-sharing-economy/>; Jason Tanz, *How Airbnb and Lyft Finally Got Americans to Trust Each Other*, WIRED (Apr. 23, 2014), <http://www.wired.com/2014/04/trust-in-the-share-economy/>.

74. See *Find a City*, UBER, <https://www.uber.com/cities> (last visited May 3, 2016); see also *The On-Demand Economy: Workers on Tap*, ECONOMIST, Jan. 3, 2015, <http://www.economist.com/news/leaders/21637393-rise-demand-economy-poses-difficult-questions-workers-companies-and>.

75. The company (60,000 drivers) recently “decreased fares 30 per cent in many cities as part of a price war with Uber, its chief rival. To compensate drivers, Lyft temporarily suspended charging them its 20 percent commission fee on fares.” Singer, *supra* note 10.

76. E.g., YOUTUBE, <https://youtu.be/makYbqd7mGA> (last visited May 3, 2016). Nevertheless, drivers could lack appropriate training and experience of extensive driving. See Peter Holley, *What the Michigan Shooting Spree Reveals about Uber’s Background Checks*, WASH. POST, Feb. 21, 2016, <https://www.washingtonpost.com/news/the-switch/wp/2016/02/21/what-the-bizarre-nature-of-the-kalam-azoo-shooting-says-about-ubers-background-checks/>.

to pass a “city knowledge test”<sup>77</sup> and have an interview with an Uber employee. Arguably, however, nobody seems to be seriously concerned about checking drivers’ criminal background.<sup>78</sup> Also, they do not necessarily have signed a commercial driving insurance.<sup>79</sup>

Drivers complain that Uber forces them to pay for their own gasoline, insurance, maintenance costs, and potential leasing costs. Moreover, Uber can terminate them at will and slash rates without warning, while taking a bite of their commissions (even 20-30%, depending on the service). In addition, collecting tips is not mandatory, but discretionary.<sup>80</sup> Being classified as independent contractors, in the United States, Uber drivers are not covered by minimum wage, overtime, and antidiscrimination laws while the company avoids contributing Social Security, Medicare, Affordable Care Act, workers’ compensation and unemployment insurance.<sup>81</sup>

Recent reports claim that, in major U.S. cities, Uber drivers are averaging more than \$17 an hour. But the figures seem to be “pre-expenses.”<sup>82</sup>

At this juncture, one should always bear in mind that the drivers’ behavior has a direct impact on the rating, according to which, they will get the chance to be recruited again in the future. Riders can rate the ride,

---

77. The rider is transported by a driver that “very often does not know the area very well and will use the Uber app to find her way or simply follow the rider’s instructions.” Lydia Emmanouilidou, *Drivers, Passengers Say Uber App Doesn’t Always Yield Best Routes*, NPR (Sept. 21, 2014), [www.npr.org/2014/09/18/349560787/drivers-passengers-say-uber-app-doesnt-always-yield-best-routes](http://www.npr.org/2014/09/18/349560787/drivers-passengers-say-uber-app-doesnt-always-yield-best-routes).

78. In the light of a journalistic investigation, Uber apologized for hiring a man “who had been convicted of a felony offense, an offense that was not picked up by our multi-state background check process.” *Statement On Chicago Uberx Background Check*, UBER, <http://blog.uber.com/chiuberx-backgroundcheck> (last visited May 3, 2016). After the experience, Uber promised to improve its check process. Nevertheless, last February, Jason Brian Dalton was accused of killing six people and injuring two more in a shooting rampage in Kalamazoo. Between the shootings, the man “apparently picked up passengers for Uber,” according to a CNN’s source. In a detailed post, Uber explained that all drivers must undergo a process carried out by Checkr, “nationally accredited by the National Association of Professional Background Screeners.” Kevin Conlon & Nick Valencia, *Kalamazoo Uber Driver Picked up Fares between Killings, Source Say*, CNN (Feb. 22, 2016), <http://edition.cnn.com/2016/02/22/us/kalamazoo-michigan-what-we-know-and-dont-know/>.

79. Although we need to say, as an aside, that Lyft has recently made efforts to face such problems by expanding the insurance, but still ambiguities remain about the case in which claims should exceed the protection with a \$1 million cap.

80. “You don’t need cash when you ride with Uber. Once you arrive at your destination, your fare is automatically charged to your credit card on file – there’s no need to tip.” *FAQ*, UBER, <https://help.uber.com/h/1be144ab-609a-43c5-82b5-b9c7de5ec073> (last visited May 3, 2016). See also Dara Kerr, *Uber Drivers Can Now Accept Tips Electronically, without Uber’s Help*, CNET (Aug. 7, 2015), <http://www.cnet.com/news/uber-drivers-can-now-accept-tips-electronically-without-ubers-help/>. While working on this Article, drivers were protesting in order to have the right to collect tips.

81. Greenhouse, *supra* note 23. Greenhouse also reports a statement released by David Plouffe, now Uber’s chief adviser, according to whom “Platforms like Uber are boosting the incomes of millions of American families. They’re helping people who are struggling to pay the bills earn a little extra spending money or transitioning between jobs.”

82. Emily Guendelsberger, an investigative journalist, found that it was “around \$10 an hour after expenses.” Emily Guendelsberger, *I Was an Undercover Uber Driver*, PHILADELPHIA CITYPAPER (May 7, 2015), <http://citypaper.net/uberdriver/>.

evaluations ranging from 1 to 5 stars. If the rate falls below a certain threshold (4.6 out of 5), the driver could lose access to Uber application. Is account deactivation a new form of dismissal? In that respect, this scheme “suggest[s] that Uber and Lyft are exercising employer-like control over termination decisions.”<sup>83</sup> Uber and Lyft can also use the star ratings as a means of enforcing specific rules: for instance, cleanliness, beverage to be served, how to dress. Uber controls and supervises the methods and means of its drivers’ provision of transportation services.

As already noted, drivers are supposed to be independent, manage their time, and decide when turning their own car into a taxi – the operation consists in being online or offline on the app. Moreover, the user has a potentially complete knowledge of fees (he can calculate estimated prices of the rides beforehand by measuring the distance from the desired destination and the potential traffic and applicable fare).

The user “establishes a contractual relationship” with Uber and not with the driver. The platform “may immediately terminate these Terms or any Services with respect to [the user], or generally cease offering or deny access to the Services or any portion thereof, at any time for any reason.”<sup>84</sup> After all, Uber does not claim to be a transportation carrier.<sup>85</sup>

With an eye to the online marketplace legislation, one must refer to § 230 of the U.S. Communications Decency Act according to which “provider or user of an interactive computer service” are not liable for the offline connections they generate. However, this is not the issue. This Section might not apply to the case at issue since the platform can control some of the matchmaking, so that Uber should not be qualified as a free marketplace even though, arguably, “there’s a fine line between an online marketplace and a retailer.”<sup>86</sup>

---

83. “The firms are (1) soliciting customer feedback, (2) setting relevant performance levels, and then (3) making termination decisions when the customer feedback reveals that drivers are not meeting the performance levels set by the firms. This is what employers do.” Actually the firm is shifting toward a new system, entirely customer driven perhaps in order to exclude the idea of control by the firm itself. See Benjamin Sachs, *Uber and Lyft: Customer Reviews and the Right-to-Control*, ON LABOR (May 20, 2015), <http://onlabor.org/2015/05/20/uber-and-lyft-customer-reviews-and-the-right-to-control/>.

84. *Terms and Conditions*, UBER, <https://www.uber.com/legal/usa/terms> (last updated Apr. 8, 2015).

85. *Id.* (“The quality of the transportation services requested through the use of the Application or the Service is entirely the responsibility of the Transportation Provider who ultimately provides such transportation services to you. Uber under no circumstance accepts liability in connection with and/or arising from the transportation services provided by the Transportation Provider or any acts, actions, behavior, conduct, and/or negligence on the part of the Transportation Provider. Any complaints about the transportation services provided by the Transportation Provider should therefore be submitted to the Transportation Provider.”).

86. According to Eric Goldman, a Santa Clara University law professor, interviewed by Hellen Huet. In this regard, there has been more of a fuss made about the case of a driver who attacked his rider with a hammer in San Francisco in September 2014 – the passenger had been seriously injured. Ellen Huet, *Uber Rider Might Lose an Eye from Driver’s Hammer Attack – Could Uber Be Held Liable?*, FORBES (Sept. 30, 2014), <http://www.forbes.com/sites/ellenhuet/2014/09/30/uber-driver-hammer-attack-liability/> (“Ride at your own risk of hammer attack, in other words. But law experts say that a company’s terms of service

Uber, but also Lyft and many other ridesharing companies, are blamed for (mis)classifying their drivers as independent contractors.<sup>87</sup> In a class action lawsuit brought against Uber and pending in front of the Northern District of California Court, Uber drivers have sued the platform, alleging violations of the California Labor Code, and arguing that they are actually employees under California law although they were denied the relevant benefits and protections such as minimum wage, expense reimbursement, overtime, etc.<sup>88</sup> Lyft drivers did the same thing and used the same arguments.<sup>89</sup> The following paragraph tackles this fundamental question that we have postponed until now.

Judge Chhabria's reasoning is worth reading as it explains, in an evocative way, the paradox of being an "on-demand driver":

At first glance, Lyft drivers don't seem much like employees. We generally understand an employee to be someone who works under the direction of a supervisor, for an extended or indefinite period of time, with fairly regular hours, receiving most or all his income from that one employer (or perhaps two employers). Lyft drivers can work as little or as much as they want, and can schedule their driving around their other activities. A person might treat driving for Lyft as a side activity, to be fit into his schedule when time permits and when he needs a little extra income.

But Lyft drivers don't seem much like independent contractors either. We generally understand an independent contractor to be someone with a

---

are far from waterproof – plaintiff's lawyers usually find ways to poke holes in them.”). Many similar cases concerning Uber drivers have been recorded, from creepy sex text stalking to kidnapping and allegedly raping a passenger to killing a young girl. The driver was an Uber contractor at the time of the accident; he was logged on to the UberX app and was waiting for a ride request, when he fatally struck the six-year-old girl at a time, maybe when he was distracted by Uber's app. “The crash that killed Sofia happened at 8 p.m. when Syed Muzaffar . . . failed to yield to the girl, her mother and brother as they crossed Polk Street in a crosswalk near the Civic Center, San Francisco police and prosecutors said.” The driver has been released; district prosecutors announced they were not charging him with the alleged assault. Sam Biddle, *When Your Smartphone Chauffeur Becomes a Stalker*, VALLEYWAG (July 16, 2013), <http://valleywag.gawker.com/when-your-smartphone-chauffeur-becomes-a-stalker-801080008>; Doug Henwood, *What the Sharing Economy Takes*, NATION, Feb. 16, 2015, <http://www.thenation.com/article/196241/what-sharing-economy-takes>; Alyson Shontell, *Uber Driver in D.C. Arrested for Allegedly Raping a 20-Year-Old Passenger, Now Released and Not Being Charged*, BUSN. INSIDER (Mar. 14, 2013), <http://www.businessinsider.com/uber-driver-in-dc-arrested-for-alleged-sexual-assault-after-dropping-of-f-a-woman-at-233-am-2013-3>; Kale Williams, *Uber Denies Fault in S.F. Crash that Killed Girl*, SF GATE (May 7, 2014), <http://www.sfgate.com/bayarea/article/Uber-denies-fault-in-S-F-crash-that-killed-girl-5458290.php>.

87. E.g., Robert Sprague, *Worker (Mis)Classification in the Sharing Economy: Square Pegs Trying to Fit in Round Holes*, 31 A.B.A. J. LAB. & EMP. L. 53 (2015) (“Massachusetts provides a good example of a comprehensive misclassification statute, focusing on the level of control exercised by the employer, whether the work performed is outside the employer's normal business, and whether the worker is customarily engaged in an independently established trade or occupation.”).

88. O'Connor et al. v. Uber Technologies, Inc., No. 13-03826-EMC (N.D. Cal. 2015).

89. Cotter et al. v. Lyft Inc., Order Denying Cross-Motion for Summary Judgement, No. 13-cv-04065-VC (N.D. Cal. 2015). More recently, Lyft has agreed to settle a class action lawsuit in California by granting drivers more protection without (re)classifying them as employees. See *infra* Part IX and Dan Levine & Heather Somerville, *Lyft Settles California Driver Lawsuit over Employment Status*, REUTERS (Jan. 27, 2016), <http://www.reuters.com/article/us-lyft-drivers-settlement-idUSKCN0V50FR>.

special skill (and with the bargaining power to negotiate a rate for the use of that skill), who serves multiple clients, performing discrete tasks for limited periods, while exercising great discretion over the way the work is actually done. Traditionally, an independent contractor is someone a principal might have found in the Yellow Pages to perform a task that the principal or the principal's own employees were unable to perform—often something tangential to the day-to-day operations of the principal's business. Lyft drivers use no special skill when they give rides. Their work is central, not tangential, to Lyft's business.

Lyft might not control when the drivers work, but it has a great deal of power over how they actually do their work, including the power to fire them if they don't meet Lyft's specifications about how to give rides. And some Lyft drivers no doubt treat their work as a full-time job—their livelihood may depend solely or primarily on weekly payments from Lyft, even while they lack any power to negotiate their rate of pay. Indeed, this type of Lyft driver—the driver who gives “Lyfts” 50 hours a week and relies on the income to feed his family—looks very much like the kind of worker the California Legislature has always intended to protect as an “employee.”<sup>90</sup>

Last March, a U.S. District Judge in San Francisco applied a similar line of reasoning to Uber.<sup>91</sup> Among other things, Uber objects that it does not carry out any performance inspections or ride-alongs. What matters is that the court itself found this argument unpersuasive, since customers (and Uber itself) constantly monitor drivers through the “stars system” on a scale of one to five. Paradoxically, a firm named “Project 5 Starr” had the idea to launch training courses aimed at having “back on Uber in a matter of hours.” Uber representatives attend training classes, offering tricks, thus enhancing the opinion of an employer-employee relationship. The relationship between “Project 5 Starr” and Uber is still not clear but “collaborative” (the company cooperates to optimize the training course in order to grant a minimum level of quality and consistency to its “partners”). Indeed, the program coordinator registers drivers' attendance and reports it to Uber, which quickly reactivates their accounts on the platform. This puts the ridesharing company in an ambiguous position: “Uber could be dangerously close to crossing the legal gray line [as] receiving company-specific training has been a significant marker of an employer-employee relationship.”<sup>92</sup>

One issue for drivers is that Uber can alter its terms freely, based on the preformulated standard contract. Workers often refuse to contest these

---

90. As the excerpt implies, the court focuses on a significant test for employee/independent contractor classification: the right to control that “tends to cut the other way.” The court in the Lyft case noted that the company does not need to check every last detail, and the fact that a certain amount of freedom is left to the employee is not pivotal.

91. De Stefano, *supra* note 23.

92. Johana Bhuiyan, *Why Is Uber New York Funneling Thousands of Drivers to This Training Class?*, BUZZFEED, Mar. 29, 2015, [https://www.buzzfeed.com/johanabhuiyan/why-is-uber-new-york-funneling-thousands-of-drivers-to-this?utm\\_term=.lcGyB18rze#.ie8ylbd1WZ](https://www.buzzfeed.com/johanabhuiyan/why-is-uber-new-york-funneling-thousands-of-drivers-to-this?utm_term=.lcGyB18rze#.ie8ylbd1WZ).

modifications since they know they could be excluded from the platform at any time. The legal tactic carried out by Uber discloses its awareness of the potential risk of reclassification. In 2014, Uber modified the wording of its agreements interpolating an arbitration clause that prevents drivers from suing the company in regular court. On December 9, 2015, the court issued its final order: the case will now concern all “partners” who have worked with (“for”) Uber directly and in their own name (not through intermediate companies) since 2009, since the contractual provision limiting their number was deemed illicit. The case was set for trial in June 2016. More recently, a settlement was reached in California and Massachusetts. While the classification issue is unresolved, some internal rules have been updated in some points “addressing just a few of the concerns that drivers had expressed throughout the case” (i.e., transparency about the internal algorithm, disclosure of the deactivation procedures, creation of an appeals panel, promotion of a driver association).<sup>93</sup>

If the company loses the class-action suit, Uber may have to pay its drivers like employees, remitting health insurance, workers’ compensation and reimbursing expenses such as fuel, vehicle costs, car insurance and maintenance. On the basis of the potential outcome, its business model would have to change, being “disrupted” in its turn, and drivers would have to work in shifts. In this respect, we may be facing unpredictable consequences: the case may result “in a large, one-time cash transfer to the drivers. In the long run, however, the entire set of regulations is capable of transforming the business for the worse, by casting massive doubt on a successful business model.”<sup>94</sup>

Uber asked two scholars to conduct a comprehensive research on its drivers.<sup>95</sup> Despite the potential conflict of interest, results of the research “based on survey data and anonymized and aggregated administrative data” achieved some publicity in the press all over the world. They found that “Uber’s driver-partners are well matched to the type of work they are doing.”

---

93. O’Connor et al. v. Uber Technologies, Inc., No. 13-03826-EMC (N.D. Cal. 2015). It is worth noting that Uber still retains a serious amount of surveillance and decentralized managerial control, as the company could deactivate accounts and tie the workers’ prosperity to the internal rating system. Miriam A. Cherry, *Gig Economy: Settlement Leaves Legal Issues Unsettled*, LAW 360 BLOG (May 5, 2016), <http://ssrn.com/abstract=2776213>; see also Marcus Wohlsen, *Uber Settlement Doesn’t Really Settle Much of Anything*, WIRED, Apr. 22, 2016, <http://www.wired.com/2016/04/uber-settlement-doesnt-really-settle-much-anything/>. Davey Alba, *Some Drivers Really Aren’t Happy About the \$100M Uber Settlement*, WIRED, May 16, 2016, <http://www.wired.com/2016/05/drivers-really-arent-happy-100m-uber-settlement/>.

94. Richard A. Epstein, *Uber and Lyft in California: How to Use Employment Law to Wreck an Industry*, FORBES (Mar. 16, 2015), <http://www.forbes.com/sites/richardepstein/2015/03/16/uber-and-lyft-in-california-how-to-use-employment-law-to-wreck-an-industry/#497f3cbc506f>; Interview with Richard A. Epstein, *The Libertarian: “The Death of Independent Contractors?”*, HOOVER INST. (Mar. 24, 2015), <http://www.hoover.org/research/libertarian-death-independent-contractors>.

95. Hall & Krueger, *supra* note 28.

Drivers end up working less and earning more per hour than “ordinary” cab drivers. That amount could reach “anywhere between \$10 and \$13 an hour after subtracting the cost of gasoline, insurance, auto payments, and auto maintenance.” Taking into account these expenses, however, hourly compensation could also fail to meet minimum-wage requirements.

It should be, however, be borne in mind that this outcome could have also been influenced by the “double” use of the car and the difficulty accounting for their expenses, indeed, differentiating expenses between private and commercial use of the car is rather difficult.

The above-mentioned research argues that Uber “driver-partners” are looking for flexibility, in line with an alleged social desire to enjoy freedom. In this regard, “fifteen times as many driver-partners said Uber had made their lives better, rather than worse, by giving them more control over their schedule (74 percent versus five percent).” On average, Uber drivers are younger than taxi drivers, figures demonstrate a tendency toward innovation and the direct effect of “entry barriers into the taxi driver and chauffeur professions,” although it seems audacious to think that young “contingent worker” are keen on becoming taxi drivers and consider Uber only a valid alternative to a traditional career.<sup>96</sup>

Although many reporters maintain that “success is not based just on regulatory arbitrage,”<sup>97</sup> skepticism seems to have been validated in the labor law field. The following Part claims that crowdworkers may indeed face intense hardships in exercising their social “voice.”

### VIII. ORGANIZING FOR CROWD-ACTION, OVERCOMING THE DISAGGREGATION

Having described the shortcomings originating from the “sharing economy” business model, this Part discusses strategies for sincere “digital organizing.” To this end, this Part devotes particular attention on potential sources of worker organization (from virtual spaces like blogs and forums, to app-based drivers’ associations, or worker-owned coops). From the above clarification, the rising model of “crow-action” would be two-fold.

As a preliminary remark, we should distinguish among traditional means of unionization (e.g., lawful strikes, collective bargaining) and soft tools of organization (e.g., blog-posts or Facebook groups aimed at reducing information asymmetries). In a sound and well-structured industrial relations environment, communication spaces, such as discussion forum or sector-

---

96. Surprisingly, the research also reveals that about 49% of Uber’s driver-partners “had previously worked as a driver at some point in their career prior to partnering with Uber (with black car, limo, and for-hire car service most common (20 percent)), and half had never previously worked as a driver (51 percent).”

97. Brishen Rogers, *The Social Costs of Uber*, 82 U. CHI. L. REV. DIALOGUE 85 (2015).

based websites, should be considered a warning sign of the potential rise of a union. They are the necessary first step, usually followed by a real world interaction. The specific question to be addressed for the sake of this work is, therefore, whether these preliminary efforts will lead to the emergence of an authentic labor union.

In some sense, one should not underestimate the importance of social media in creating a “sense of community” (or a “fantasy of community in an atomized population,” according to detractors): all these platforms use merchandising, instant marketing, and “ambassadors” in order to engage people and get them involved toward an artificial challenge between “old/boring/institutionalized” and “new/amazing/entrepreneurial.”<sup>98</sup> It is not for us to decide upon whether the idea is earnest or instrumental, but it seems to be effective.<sup>99</sup>

That having been said, crowdworkers are facing a challenging goal, since it is structurally hard to create solidarity that links “scatter” workers, in fact, the “cloud-based nature of the service creates a relatively tenuous connection to other workers.”<sup>100</sup> Fragmenting the labor force could prevent workers from entering into contact and nip “sodality” in the bud.<sup>101</sup> Cooperation could be discouraged, while opportunistic behaviors may be fostered. In the attempt to bridge this gap and foster interchanges, technologies themselves could be helpful. From a different point of view, these tactics might also raise many questions on how to consider these coalitions from a competition law perspective: it is highly debatable whether gig-workers could unionize, especially if they are labeled as contractors. Nevertheless, these crowdworkers represent a new community for the unions, which want to organize them also in order to increase their membership. They therefore could regard workers in the on-demand economy as a huge pool of new members.

In a nutshell, new organizational and social infrastructures might appear (probably in the form of “movements of interests” focused on sectorial

---

98. McKee v. Reid’s Heritage Homes Ltd., [2009] O.J. 5489 (Can.); see also Doug Henwood, *What the Sharing Economy Takes*, NATION, Jan. 27, 2015, <http://www.thenation.com/article/196241/what-sharing-economy-takes>. Just think of Lyft and to its logo – pink moustaches. Lyft drivers ask passengers to sit in the front seat in order to create a friendly atmosphere; this approach has been defined as “a more human vision for the service industry.” Arguably, they helped generating “a brand identity and emblemize the touchy – feely spirit that Lyft has adopted as its credo. Drivers bump fists with their passengers at the end of each ride.”

99. Edward T. Walker, *The Uber-ization of Activism*, N.Y. TIMES, Aug. 7, 2015, [http://www.nytimes.com/2015/08/07/opinion/the-uber-ization-of-activism.html?\\_r=0](http://www.nytimes.com/2015/08/07/opinion/the-uber-ization-of-activism.html?_r=0).

100. Adrian Chen, *An Uber Labor Movement Born in a LaGuardia Parking Lot*, NEW YORKER, Feb. 8, 2016, <http://www.newyorker.com/business/currency/an-uber-labor-movement-born-in-a-laguardia-parking-lot>. Uber reached an agreement with a union “to create an association for drivers in New York that would establish a forum for regular dialogue and afford them some limited benefits and protections — but that would stop short of unionization.” See also Noam Scheiber & Mike Isaac, *Uber Recognizes New York Drivers’ Group, Short of a Union*, N.Y. TIMES, May 10, 2016, <http://nyti.ms/1rQuqqz>.

101. See Finkin, *supra* note 6.

issues) and become an effective advocate for decent work in the on-demand economy. Nonetheless, the alleged rivalry between different groups – separated by default because of the exclusivity clause, as previously highlighted, could threaten or undermine the energy of a cross-platform workers' movement. The road toward this achievement entails many hurdles. For instance, workers in temporary relationships “may be reluctant to exercise some of the labour rights they could be entitled to, in fear that their contract may not be renewed or prolonged at its expiry.”<sup>102</sup>

Next, we illustrate a group of “first-aid” communities. First of all, these tools could also represent a way to reduce information asymmetries, compare gig-providers, join forces and, ultimately, increase bargaining power. The next step is easily foreseeable: workers could gather in societies where it is feasible to exchange knowledge, tricks, reviews in order to maximize one's opportunity cost. The blog “Ride share guy,” for instance, provides guidance and instructions to drivers to maximize their income comparing the diverse car sharing marketplaces.<sup>103</sup> “Peers.org” could be considered a “power-organizer.” This platform represents the natural evolution in the inflated panorama of apps and websites: it offers a system of pooling many accounts, organizing, caring, supporting participants in the sharing economy and helping both workers and customers make the most suitable choice.<sup>104</sup> “Guild” is an insurance group that negotiates between major insurance companies and on-demand platforms. The company “Zen99” has designed an all-in-one dashboard that helps 1099 workers organize finances, taxes, and any insurance policies they may be part of.

These “mutual aid societies” are also starting to engage in a struggle aimed at pooling bargaining power, in order to let independent contractors access promotional health insurance and telecom tariffs.<sup>105</sup> By building a

---

102. Although there is no room for investigating the topic in depth, businesses in the gig-economy are somehow using their platforms as “top-down political movements” pretending to advocate legal changes and influence, for instance, city council decisions by lobbying or organizing protests and mail-bombing by its “citizen-users.” Richard Cohen, *Uber Mows Down Bill de Blasio*, WASH. POST, July 27, 2015, [https://www.washingtonpost.com/opinions/ubers-bare-knuckle-battle-against-the-taxi-industry/2015/07/27/e0e7be98-3483-11e5-8e66-07b4603ec92a\\_story.html](https://www.washingtonpost.com/opinions/ubers-bare-knuckle-battle-against-the-taxi-industry/2015/07/27/e0e7be98-3483-11e5-8e66-07b4603ec92a_story.html). See also Valerio De Stefano, *Non-Standard Workers and Freedom of Association: A Critical Analysis of Restrictions to Collective Rights from a Human Rights Perspective* (Working Papers del Centro Studi di Diritto del Lavoro Europeo Massimo D'Antona. INT. 123/2015).

103. See RSG040: Kyle Reninger on *Driving for Uber in a Super Small Market*, THE RIDESHARE GUY <http://therideshareguy.com> (last visited May 3, 2016).

104. Moatti, *supra* note 17.

105. Sean Savett, *What Millennials Really Think about Unions (You'll Be Surprised)*, AFL-CIO (Nov. 8, 2013), <http://www.aflcio.org/Blog/Other-News/What-Millennials-Really-Think-about-Unions-You-ll-Be-Surprised>; *Can the Sharing Economy Provide Good Jobs?*, WALL ST. J., May 10, 2015, <http://www.wsj.com/articles/can-the-sharing-economy-provide-good-jobs-1431288393>; see also LYFT VS UBER, <http://www.lyftvsuber.com> (last visited May 3, 2016) and FAIR CROWD WORK WATCH, <http://faircrowdwork.org/en/platform-search> (last visited May 3, 2016) (“Obtaining high quality results can be difficult especially for creative tasks such as content creation. There is no feedback to workers and communication is not easily facilitated between workers and requesters. There's little opportunity for a

very comprehensive crowdwork life, “[w]e may end up with a future in which a fraction of the work force would do a portfolio of things to generate an income — you could be an Uber driver, an Instacart shopper, an Airbnb host, and a Taskrabbit,” Sundararajan said.<sup>106</sup> This could be interpreted not only as a claim on the way to a fairer crowdworking, but above all a means to make platforms more responsible and less oligopolistic.<sup>107</sup>

Other contributions in this issue examine the Turkopticon, “an activist system that allows workers to publicize and evaluate their relationships with employers” on the Amazon Mechanical Turk.<sup>108</sup> Also relevant is Dynamo, a community designed, founded, adapted and analyzed by scholars, which could be seen as the first step toward granting Turkers a collective voice. It “offers a platform to gather, gain critical mass, and mobilize,” the goal sounds ambitious: “generat[ing] change, whether that take the form of pixels, profit, or progress.”<sup>109</sup> This trend deserves attention because workers are fundamental economic inputs for the platforms, therefore AMT might not tolerate the loss of accounts that disagree with the system since “Uber would not be a viable business entity without its drivers.”<sup>110</sup> In Hirschman’s terms this reaction would be an “exit.”<sup>111</sup>

In addition to that, however, a group of drivers established the California App-based Drivers Association, a sort of Uber drivers’ union.<sup>112</sup> The same happened in Seattle and New York City following a number of protests. Indeed, threats of work stoppage are the order of the day.<sup>113</sup> This

---

worker to receive feedback or change or improve the work output. . . . An interactive feedback system built into a microtask market could significantly improve performance and motivate workers to persevere and accept additional tasks.”).

106. Manjoo, *supra* note 5.

107. Platform “cooperativism” has been suggested as a way to experience new forms of solidarity aimed at fighting for better conditions for “cloud workers” and vulnerable workforce. See Trebor Scholz, *Platform Cooperativism vs. the Sharing Economy*, MEDIUM (Dec. 5, 2014); Trebor Scholz, *Think Outside the Boss*, PUBLIC SEMINAR (2015), <http://www.publicseminar.org/2015/04/think-outside-the-boss/>.

108. Silberman & Irani, *supra* note 49. They clarify how the Turkopticon works, providing data on the number of users and reviews.

109. The infrastructure is an experiment conducted by scholars. Niloufar Salehi et al., *We Are Dynamo: Overcoming Stalling and Friction in Collective Action for Crowd Workers* (Proceedings of CHI 2015), <http://hci.stanford.edu/publications/2015/dynamo/DynamoCHI2015.pdf>; see also DYNAMO, [www.wearedynamo.org/about](http://www.wearedynamo.org/about) (last visited May 3, 2016).

110. See O’Connor et al. v. Uber Technologies, Inc., No. 13-03826-EMC (N.D. Cal. 2015).

111. ALBERT O. HIRSCHMAN, EXIT, VOICE, AND LOYALTY, RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES (1970).

112. CADA, <http://www.cadateamsters.org/aboutus.php> (last visited May 4, 2016) (“The California App-Based Drivers Association (CADA) is a not-for-profit membership association that promotes fairness, justice, and transparency in the App-Based Drivers industry throughout California. The CADA represents owners and drivers from Uber, Lyft, Sidecar, Toro Ride, Opali and others and it has a democratically-elected Leadership Council that consists of 7 members. The CADA works closely with Teamsters Local 986 to ensure that app-based drivers have the resources they need so that they can speak with a unified voice and build a better life for themselves and their families.”).

113. Alison Griswold, *Uber Just Caved on a Big Policy Change After Its Drivers Threatened to Strike*, SLATE (Sept. 12, 2014), [http://www.slate.com/blogs/moneybox/2014/09/12/uber\\_drivers\\_strike\\_they\\_protected\\_cheap\\_uberx\\_fares\\_uber\\_backed\\_down.html#f\\_comment=211939154](http://www.slate.com/blogs/moneybox/2014/09/12/uber_drivers_strike_they_protected_cheap_uberx_fares_uber_backed_down.html#f_comment=211939154).

demonstrates a feeling of dissatisfaction toward this employment model and also toward low incomes. What crowdworkers want to face are unilateral changes in terms and conditions.<sup>114</sup> Last February, a big strike took place in New York City to contrast Uber's decision to reduce fares in around eighty cities in the United States and Canada. More recently, a new California bill allowed crowdworkers to organize<sup>115</sup> and Seattle was the first U.S. city to pass collective bargaining legislation. This legal tool will give drivers more weight in negotiations.

Since networks are considered the secret weapon of platforms, is there room for building new ones between cloud-workers and gain momentum for collective action? The "Fight-For-15" campaign has left a promising legacy and demonstrated that digital unionizing should be taken seriously.<sup>116</sup> Indeed, as previously clarified, "the trade union movement could perhaps discover in these new technologies an additional tool for exchange, cooperation, mobilisation, action, visibility."<sup>117</sup> These networks could thus represent a tool for social emancipation. The next task could, therefore, consist in strengthening ties between workers in the gig-economy and putting pressure on platforms in order to improve participation agreements to the benefit of vulnerable workforce.

## IX. CONCLUSIONS

This work was not expressly aimed at providing a definitive answer to the legal battle concerning the (mis)classification of workers in the sharing economy. Still, the case-by-case analysis was supposed to lift the "veil of enthusiasm" on this attractive topic. There are two lines of opinion, with opposing approaches, on this concern.

---

114. A San Francisco newspaper asked an Uber executive about the first strike carried out by Uber drivers to oppose rate cuts and fight against firings (i.e., the company's decision of banning drivers), he candidly answered: "a driver contracting with Uber is not a bona fide employee," this means that "firing, in this case, amounts to deactivating a driver's account because he's received low ratings from passengers." Rachel Swan, *Chopped Livery: Start-Ups Revolutionize the Cab Industry*, SFWeekly (Mar. 27, 2013), [www.sfweekly.com/sanfrancisco/chopped-livery-start-ups-revolutionize-the-cab-industry/Content?oid=2188427](http://www.sfweekly.com/sanfrancisco/chopped-livery-start-ups-revolutionize-the-cab-industry/Content?oid=2188427).

115. Eric Newcomer, *How Unions Could Change the Way Uber and Lyft Work*, BLOOMBERG (Dec. 17, 2015), <http://www.bloomberg.com/news/articles/2015-12-17/how-unions-could-change-the-way-uber-and-lyft-work>. The City Council of Seattle has recently enacted an ordinance allowing Uber drivers to bargain collectively – in the light of the "independent contractor" definition within the scope of the National Labor Relations Act. City of Seattle Ordinance No. 118499 (Dec. 2015).

116. Also the *Fight for 15* movement cannot be undervalued. FIGHT FOR \$15, <http://fightfor15.org/> (last visited May 4, 2016). Like great unions' campaigns of the past, #FF15 raised questions about social citizenship.

117. CHRISTOPHE DEGRYSE, *DIGITALISATION OF THE ECONOMY AND ITS IMPACT ON LABOUR MARKETS* (2016).

On the one hand, on-demand/gig economy could represent a cutting-edge opportunity in connected and app-driven economies<sup>118</sup> and “the transformations brought about by digital technology will be profoundly beneficial ones.”<sup>119</sup> On the other hand, this new model must not end up exploiting and degrading human dignity at work. In fact, despite the radical changes in the frame of labor, the risk is that these new-born schemes are worse off in terms of worker protection.

As seen in the previous Parts, the “e-topia,” apparently driven by an altruistic spirit (as the Wikipedia example seemingly suggests), could eventually become a social “downward spiral” when risks traditionally borne by firms are being “pushed back” to individuals – shifting costs to workers. Hence, the rise of the sharing economy can also act as a midwife for further growth of “precarious employment.”<sup>120</sup> The boundary between “micro-entrepreneur” and “precarariat” (or rather “cybertariat”) has never been so blurred.<sup>121</sup>

It can be argued that the multi-faceted process of casualization of work has also created new job opportunities by inspiring extraordinary growth in consumer demand for contracted labor.<sup>122</sup> In the long run, however, this trend could be “toxic.” New actors entered the social-economic scene: unconventional workers, smart workers, micro-entrepreneurs. At the same time, a worrisome issue emerges: where to find new sources for essential worker protection measures like health coverage, insurance against injuries, vacation pay, and other rights traditionally guaranteed to “ordinary” employees. The “insecurity” (i.e., the erosion) of such rights might seriously jeopardize welfare in countries like the United States, where the welfare system is strictly connected to a stable employment contract.

Regulators are at a crossroads: on the one hand, dynamic potential of “collaborative forces” in the on-demand economy cannot be hindered by strict rules; on the other hand, labor regulations have to protect both users and workers. Is there a solution to this conundrum? First, lawmakers should

---

118. Moreover, not inconceivably, the Europe 2020 Strategy is perfectly plain and is regarded as a step toward a “more competitive, sustainable and inclusive economy” and according to Eurostat, 40.9% of those aged between 18 and 24 were unemployed in April 2015. INNOVATION UNION COMPETITIVENESS REPORT 1, EUROPEAN COMMISSION (2011), <http://ec.europa.eu/research/innovation-union/pdf/competitiveness-report/2011/iuc2011-full-report.pdf#view=fit&pagemode=none>.

119. ERIK BRYNJOLFSSON & ANDREW MCAFEE, *THE SECOND MACHINE AGE* (2016); SANGEET PAUL CHOUDARY & MARSHALL W. VAN ALSTYNE & GEOFFREY G. PARKER, *PLATFORM REVOLUTION, HOW NETWORKED MARKETS ARE TRANSFORMING THE ECONOMY—AND HOW TO MAKE THEM WORK FOR YOU* (2016).

120. Kevin Zawacki, *Amazon's Turkers Kick Off the First Crowdsourced Labor Guild*, DAILY BEAST (Dec. 3, 2014), <http://www.thedailybeast.com/articles/2014/12/03/amazon-s-turkers-kick-off-the-first-crowdsourced-labor-guild.html>.

121. See URSULA HUWS, *THE MAKING OF A CYBERTARIAT: VIRTUAL WORK IN A REAL WORLD* (2003).

122. STANDING, *supra* note 33.

support the new peer-to-peer marketplaces by encouraging their internal controls, even though “the reallocation of regulatory responsibility to parties other than the government” fails to convince legal scholars.<sup>123</sup>

Moreover, online platforms and apps should improve and humanize their model by building technology that does not endanger workers’ rights. The social contract needs to be protected by guaranteeing fair conditions to workers in the gig-economy. In this respect, the judicial reclassification as employees is the result of a legal tactic aimed at expanding the social safety net: virtual, indeed, does not mean exploitable,<sup>124</sup> and independent contractors, still lacking formal and stable protection in contingent work, should not be seen as “powerless cogs.”<sup>125</sup>

Unquestionably, some progress has been made in the last months. Instacart, a grocery delivery app, asked some of its workers (particularly, in-store shoppers) to become part-time employees, also in order to retain better-trained working force, as well as granting allowances for training programs and quality checks.<sup>126</sup> TaskRabbit has started offering its independent contractors access to discounted health insurance and accounting systems. Shyp, an on-demand courier pickup, took the decision to classify its couriers as employees, “not out of benevolence but because it wanted to control operations openly and directly.”<sup>127</sup> The company Hello Alfred, providing automate weekly errands and home chores thanks to a team of local workers, converted the independent contractor contracts into W-2 employee ones. The

---

123. Molly Cohen & Arun Sundararajan, *Self-Regulation and Innovation in the Peer-to-Peer Sharing Economy*, 82 U. CHI. L. REV. DIALOGUE 116 (2014) (“[O]ne possible regime involv[ing] a tripartite model in which third-party watchdogs evaluate SROs (self-regulatory organizations), and the level of governmental oversight and regulation determined by a firm’s history of compliance.”); Arun Sundararajan, *Trusting the “Sharing Economy” to Regulate Itself*, N.Y. TIMES, Mar. 3, 2014, [http://economix.blogs.nytimes.com/2014/03/03/trusting-the-sharing-economy-to-regulate-itself/?\\_r=1](http://economix.blogs.nytimes.com/2014/03/03/trusting-the-sharing-economy-to-regulate-itself/?_r=1).

124. “I am a human being, not an algorithm, and yet [employers] seem to think I am there just to serve their bidding,” quoting from the letter that Kristy Milland, a Canadian Turker, sent to Bezos (jeff@amazon.com) in 2014. The letter writing campaign, aimed at asking Bezos to stop selling workers as cheap labor and to give them instruments to represent themselves, was hosted on Dynamo. Mark Harris, *Amazon’s Mechanical Turk Workers Protest: “I am a Human Being, Not an Algorithm,”* GUARDIAN (Dec. 3, 2014), <https://www.theguardian.com/technology/2014/dec/03/amazon-mechanical-turk-workers-protest-jeff-bezos>.

125. The definition comes from J. Bradford Delong, *Marx and the Mechanical Turk* (Project Syndicate, 2015), <https://www.project-syndicate.org/commentary/j--bradford-delong-wonders-whether-capital-now-substitutes-for--rather-than-complements--labor?barrier=true>.

126. Cobarruviaz v. Maplebear, 2015 WL 694112 (N.D. Cal. 2015). Instacart understood that it needs skilled workers because groceries actually require experience and commitment. See Davey Alba, *Instacart Shoppers Can Now Choose to be Real Employees*, WIRED, June, 2016, <http://www.wired.com/2015/06/instacart-shoppers-can-now-choose-real-employees/>; Sara Ashley O’Brien, *The Uber Effect: Instacart Shifts away from Contract Workers*, CNN MONEY (JUNE 22, 2015), <http://money.cnn.com/2015/06/22/technology/>.

127. Adam Brinklow, *Year in Preview: What the Uber Lawsuit Means for Workers in the Sharing Economy*, SFWEEKLY (Dec. 30, 2015), [www.sfweekly.com/sanfrancisco/news-san-francisco-uber-tech-law-court-shannon-liss-riordan-edward-chen-lawsuit-labor-employee-contractor-1099/Content?oid=4375240](http://www.sfweekly.com/sanfrancisco/news-san-francisco-uber-tech-law-court-shannon-liss-riordan-edward-chen-lawsuit-labor-employee-contractor-1099/Content?oid=4375240).

valet service Luxe decided to do the same.<sup>128</sup> “Food service and delivery company Munchery, cleaning company Managed by Q, transit service Bridj and temp agency BlueCrew treated their workers as employees from the start.”<sup>129</sup>

Lyft has signed a partnership with Freelancers Union, allowing its drivers to enter the pressure group’s health plan and other benefit plans.<sup>130</sup> What is more, in order to settle charges in the Northern District of California, the car-hailing company “agreed to pay the drivers \$12.25 million and make two changes in its terms of service for drivers.”<sup>131</sup> Lyft will offer its drivers stronger protections. The at-will termination provision will be eliminated and the company will bear the costs of arbitration for claims promoted by drivers regarding a number of issues (namely, deactivation of driver status, payment or employment relationship). While some steps forward have been made, it is possible to demonstrate, however, that a fair treatment of workers will not twist the sharing economy business model.

In addition, those who claim that the new fabric of the job market has made legal definitions and categories obsolete could be wrong. According to some commentators, “a third category becomes necessary when people are borderline”: the “independent worker.”<sup>132</sup> Their argument is the following: the “independent contractor” formula protects only the traditional freelancer, who is a skilled professional, and the “employee” formula does not seem to fit the new modalities previously sketched out. This does not seem to be a convincing response to Judge Vince Chhabria’s famous dilemma: “The jury . . . will be handed a square peg and asked to choose between two round holes. The test the California courts have developed over the 20th Century for classifying workers isn’t very helpful in addressing this 21st Century problem.”<sup>133</sup> The “employment-status” test needs to be considered an attempt to provide a broad-brush approximation and still represents a hallmark. The conclusion that can be drawn is that we do not need to redefine the notion of

---

128. Douglas Macmillan, *Luxe Valet to Convert Independent Contractors to Employees*, WALL ST. J., July 29, 2015, <http://www.wsj.com/articles/luxe-valet-to-convert-independent-contractors-to-employees-1438210444>; Becki Smith, *Uber’s Labor Relations Is Driving It Into A Ditch*, NEWSWEEK, Feb. 2, 2016, <http://europe.newsweek.com/ubers-labor-relations-driving-it-ditch-422285?rx=eu>.

129. *Employers in the On-Demand Economy, Fact Sheet*, NELP (Mar. 2016), <http://nelp.org/content/uploads/Fact-Sheet-Employers-in-the-On-Demand-Economy.pdf>.

130. *Lyft Partners with Freelancers Union*, FREELANCERS UNION (June 30, 2014), <https://blog.lyft.com/posts/2014/6/30/lyft-partners-with-freelancers-union>.

131. Carolyn Said, *Lyft Drivers to Remain Contractors in Lawsuit Settlement*, SF GATE (Jan. 27, 2016), <http://www.sfgate.com/business/article/Lyft-drivers-to-remain-contractors-in-lawsuit-6787390.php>.

132. Lauren Weber, *What If There Were a New Type of Worker? Dependent Contractor*, WALL ST. J. Jan. 28, 2015, <http://www.wsj.com/articles/what-if-there-were-a-new-type-of-worker-dependent-contractor-1422405831>. In 2005, in a dissenting opinion regarding a newspaper carrier case, Liebman remarked that Canada and Germany protect such workers. *See also* Harris & Krueger, *supra* note 27.

133. For a complete picture, see De Stefano, *supra* note 23.

employment; we just need to enforce the existing regulations “aggressively” and “adapt them where and as needed.”

As discussed in this Article, we need to rebut the “tecnodeterminist” argument, according to which pre-existing laws cannot rule a set of social phenomena. These virtual sourcing platforms have somehow developed “in the wild,” at least from a legal standpoint<sup>134</sup>: entering a market first, taking advantage of its dominant position, exercising a significant degree of control over workers, evading regulations and only then dealing with legal compliance.<sup>135</sup> Innovation, whatever it means, should not merely consist of these practices.

In contributing to this debate, my aim is to encourage a big cultural shift. For this to happen, we need to “update our policies, organizations, and research to seize the opportunities and address the challenges these [technological] tools give rise to.”<sup>136</sup> We also need to offer better protection to what (or, even better, who) is behind the scenes of innovation and on-demand/gig economy, by building and strengthening a new social safety net.<sup>137</sup>

According to many commentators, “too much of the welfare state is delivered through employers, especially pensions and health care: both should be tied to the individual and made portable.”<sup>138</sup> Policy makers need to focus on a potential extension of social protection and develop new tools for “delivering core labor rights.”<sup>139</sup> As it has been argued, we need to rethink whether and how workers have the right to enjoy the benefits attached to traditional jobs,<sup>140</sup> since – as Parts V, VI, and VII have demonstrated – many factors of the employment relationship reveal a role of the platform as employer.

An ideal roadmap for “decent crowdwork” should include, at least: (1) banning discrimination based on geographical preferences or rating charts;

---

134. Obinna Anya, *Bridge the Gap! What Can Work Design in Crowdwork Learn from Work Design Theories?* (2015), <http://dl.acm.org/citation.cfm?id=2675133.2675227>.

135. Julian Nowag, *Between an UBER Rock and an UBER Hard Place*, LA LIBRE COMPETENCIA (Nov. 22, 2015), <http://lalibrecompetencia.com/2015/11/22/between-and-uber-rock-and-an-uber-hard-place/>; Frank Pasquale & Siva Vaidhyanathan, *Uber and the Lawlessness of “Sharing Economy” Corporates*, GUARDIAN, July 28, 2015), <http://www.theguardian.com/technology/2015/jul/28/uber-lawlessness-sharing-economy-corporates-airbnb-google>.

136. Erik Brynjolfsson et al., *Open Letter on the Digital Economy*, MIT TECH. REV. (June 4, 2015), <https://www.technologyreview.com/s/538091/open-letter-on-the-digital-economy/>.

137. Denise Cheng, *Reading between the Lines: Blueprints for a Worker Support Infrastructure in the Peer Economy* (May 8, 2014), <http://ssrn.com/abstract=2510656>.

138. Conversely, “portability and increased flexibility in a benefit system, while certainly a desirable feature, is not synonymous with security.” For a critical review of the proposals of providing stronger protection through portable individual social security accounts, see Berg, *supra* note 14.

139. REBECCA SMITH & SARAH LEBERSTEIN, RIGHTS ON DEMAND: ENSURING WORKPLACE STANDARDS AND WORKER SECURITY IN THE ON-DEMAND ECONOMY (National Employment Law Project, Sept. 2015), <http://www.nelp.org/content/uploads/Rights-On-Demand-Report.pdf>.

140. STANDING, *supra* note 33.

2016]

## COMMODITIZED WORKERS

687

(2) avoiding and hindering potential risks of child labor or forced labor; (3) preventing “labor brokerage” from shifting into “social arbitrage”; (4) making ratings “portable” across platforms, leading to a comprehensive “digital identity”; (5) overcoming the exclusivity clause that ties workers to a given platform and keeping switching costs low; (6) promoting forms of collective engagement between workers, clients and platform.

Only this would allow the word “sharing” actually implying “an equitable split in wealth and responsibility”<sup>141</sup> among platforms and workers.

---

141. Cheng, *supra* note 137.

## APPENDIX

Table 1. Some Key Variables from a Set of "On-Demand/Gig Economy" Platforms

<i>Platform</i>	<i>Means of Exchange</i>	<i>System of Payment</i>	<i>Population</i>	<i>Employment Status</i>
<b>-Amazon Mechanical Turk</b> <b>- Crowdfunder,</b> <b>- Crowdsourc,</b> <b>- Click-Worker</b>	Many millions of microtask ("Human Intelligence Tasks") like data collection, transcription, tagging, content review, categorization, transcriptions, marketing spam.	USD in USA, gaming credits to be spent on Amazon. It pays pennies per hour for crowd-sourced work (from nothing to few dollars in virtual currencies = average 2 \$ an hour).	500,000 on AMT 80% American, 20% Indian. Median age: 30. The gender participation seems to be balanced. 500,000 on Crowdfunder; 8,000,000 on Crowdsourc, 700,000 on Click-worker.	Turkers are considered independent contractors. Self-determination, flexibility, but "approval rating," full intellectual property rights to employers over submission regardless of rejection.
<b>Uber</b>	Peer-to-peer ridesharing.	A driver could get \$11 to \$12 an hour after daily expenses. Uber charged 20% commission.	Thousands of drivers in over 70 cities.	They do not regard the workers who provide services to users as employees.
<b>Lyft</b>	Peer-to-peer ridesharing. To create a profile you need to authenticate with Facebook.	A driver could make up to \$35/hour Lyft gets 20%. Lyft charges workers who drive more than 50hrs a week nothing.	More than 50,000 drivers.	"Lyft does not provide transportation services, and [it] is not a transportation carrier."
<b>TaskRabbit</b>	Small-jobs marketplace. The platform matches people with workers for odd jobs like cleaning and moving. The app is considered an "eBay for real-world labor": an auction site where clients post tasks and "rabbits" bid openly for them.	TaskRabbit earns money by taking a cut of every transaction, a service fee of about 15% from the client. Now clients pay by the hour. Introduction of a wage floor, impossible for workers to earn less than \$12.80 an hour.	About 30,000. TaskRabbit added 1.25 million users to its system in 2013 and doubled its force of contractors to 25,000.	They do not regard the workers who provide services to users as employees. There is the possibility for workers to communicate with potential clients.

2016]

## COMMODITIZED WORKERS

689

<b>ArticleOne Partners and Axiom</b>	End-to-end management and delivery of complex legal processes like commercial contracts, derivatives agreements and compliance activities, by segmenting the work. Axiom is not a law firm, its claims are not subject to bar regulation.	AOP does not pay for one's time. In order to earn money, one has to win the competition or be one of the Most Valuable Researchers. (The platform also provides feedback on submissions).	N.D. Business and legal talent— alumni of the nation's best law firms and companies. What Axiom does, a law firm is prohibited from making since it would be in violation of the advertising and disclosure rules.	"Axiom maintains a lawyer's professional liability insurance policy that provides coverage for all attorneys, regardless of W-2 or independent contractor status."
<b>Freelancer</b>	Virtual marketplace that allows employers to publish job offers and tasks to get done. Anybody is able to provide quotes to complete the project.	The platform takes a 10% fee, which can be cut with paid monthly membership, with a minimum fee of \$5. Free accounts can only bid on 8 projects per month. They cannot make direct deposit withdrawals.	7,000.	Workers are considered independent contractors.
<b>InnoCentive</b>	The platform connects with brainpower outside the company, as for R&D. It accepts by commission research and development problems in engineering, computer science, math, chemistry, life sciences, physical sciences and business.	The methodology is called Challenge Driven Innovation. Solvers can select any Challenge and submit solutions without being charged. If the company accepts the feasibility of the solution provided, it repays the "provider" with an award in exchange for the acquisition to the IP rights.	The network hosts more than 355,000 Solvers from nearly 200 countries. Most of them are well-educated, with a majority (65.8%) holding a PhD.	"Seeker agrees to indemnify and hold InnoCentive and its Affiliates and each of their employees, agents, contractors, officers, and directors, harmless from, any and all third party claims, costs, damages, expenses and liabilities."

<p><b>Wonolo</b> (Short for “Work. Now. Locally”)</p>	<p>Companies post job listings to an online platform the same way people in need of a house-cleaner post a job to TaskRabbit. A user (“Wonoloer”) can claim the job and report to work as soon as a few minutes or hours. It is a way to bulk up a company’s workforce.</p>	<p>There is no bidding on Wonolo. Because the wage they pay a temp amounts to a small portion of their overall costs, chances are they care much more about having the work performed well than saving a few bucks. It could be considered as a sophisticated way to react to demand peaks.</p>	<p>N.D.</p>	<p>“Nothing in this Agreement is intended or construed to create a partnership, joint venture, or employer-employee relationship between Wonolo and you or between the Customer and you” “You may also be terminated for failure to complete an engagement, failure to show up when you have accepted an engagement.”</p>
<p><b>Handy (formerly Handybook)</b></p>	<p>Personal assistance at a local level, cleaning service.</p>	<p>15% to 20% commission of every hour worked.</p>	<p>5000 handymen, 150 employees worldwide.</p>	<p>Handy gives workers suggestions for how to clean and asks them to wear a shirt with the Handy logo.</p>
<p><b>Upwork, formerly Elance-oDesk</b></p>	<p>Contingent workers, contractors, freelancers collaborate remotely and project-based. Areas of expertise include app and software development, engineering and data science, creative and administrative services.</p>	<p>“The Upwork Service Fee is 10% of the total amount charged to the client. The fee is paid automatically each time your client is charged on a contract.”</p>	<p>It offers 4 million companies the services of 10 million registered users.</p>	<p>“The company provides voluntary skills tests in various disciplines, and include[s] a feedback mechanism. The platform allows a client to have confidence in the billing done by a contractor whom the buyer may never have met.”</p>