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BEYOND MISCLASSIFICATION: THE DIGITAL TRANSFORMATION OF WORK

*Miriam A. Cherry**

As the Internet and computer technology have become increasingly ubiquitous, new ways to buy and sell not only objects, but also time, effort, and labor have been developed. In an earlier article I termed this trend “virtual work,”¹ and it has been alternately described as “labor as a service,” “peer production,” “playbor,” or “crowdwork.”² Some processes of “crowdwork” or “micro-labor” involve computer-based work that is performed wholly in cyberspace, where work is broken down into its smallest constituent parts (such as coding, describing, or tagging the thousands of items for sale on a website).³ Other types of crowdwork are aided by cellphone applications (“apps”) or websites, and they rely on technology to deploy workers to perform tasks (such as driving, grocery delivery, or home repair services) for requesters in the real world who pay for these services, with the app or platform keeping a percentage of the exchange.

According to a recent survey conducted by *Time Magazine*, over 14 million people currently work in the “gig,” “on demand” or “sharing” economy.⁴ While these statistics have been the subject of controversy,⁵

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¹ Miriam A. Cherry, *A Taxonomy of Virtual Work*, 45 GA. L. REV. 951 (2011) (using term “virtual work” broadly not only to encompass virtual worlds but also to refer to work taking place online, including the type of micro-labor crowdwork performed on Amazon’s Mechanical Turk).

² See Trebor Scholz & Laura Liu, *From Mobile Playgrounds to Sweatshop City*, SITUATED TECHNOLOGIES PAMPHLETS 7 (2010), <http://www.situatedtechnologies.net/?q=node/105>.

³ See, e.g. Jeff Howe, *The Rise of Crowdsourcing*, WIRED, June 2006, at 176, 178-79 (using term “crowdsourcing” to describe work performed with the aid of contributions from diverse groups of users on the internet); Deborah Halbert, *Mass Culture and the Culture of the Masses, A Manifesto for User-Generated Rights*, 11 VAND. J. ENT. & TECH. L. 921, 929 (2009) (“Computer technology in the hands of the masses has made available software programs that can create music, documents, and art just as well as expensive studios did in the past. This democratization of technology disrupts the monopoly on the creative means of production. The world of amateur production also demonstrates that many are motivated by noncommercial reasons.”).

⁴ Katy Steinmetz, *Exclusive: See How Big the Gig Economy Really Is*, TIME, Jan. 6, 2016 available at <http://time.com/4169532/sharing-economy-poll/>

⁵ Cole Stangler, *December Jobs Report: How Many Gig Economy Workers are There, Really?*, INT’L BUS. TIMES, Jan. 8, 2016, available at <http://www.ibtimes.com/december-jobs-report-how-many-gig-economy->

there can be no doubt that technology is re-shaping the future of work. Examples include websites and apps that range from Amazon Mechanical Turk,⁶ Handy,⁷ Instacart,⁸ to Uber.⁹ These new companies' labor practices have sparked intense litigation in the United States. Currently, the litigation is focusing on a common doctrinal issue – whether the workers in the platform, on-demand economy have the status of employees or independent contractors. The question of employee status is particularly important because many of the rights and benefits provided for in U.S. employment law (minimum wage, protection from discrimination, unemployment insurance, worker's compensation) are only triggered for those who are deemed to be “employees.”¹⁰

The first part of this article provides a brief litigation update on the various worker lawsuits within the on-demand economy. While *O'Connor v. Uber*¹¹ has received the lion's share of attention and analysis,¹² similar lawsuits on labor standards have been filed against other on-demand economy platforms. Analysis of the ongoing litigation reveals several important themes, including an emphasis on the labor law of California. The second part of the article shifts from the doctrinal issues around misclassification to look at the larger picture. Based on the work of Katherine Van Wezel Stone,¹³ the second part argues that we are currently experiencing a far-reaching *digital transformation of work*. The changes include the growth of automatic management and a move toward ever more precarious work. To the extent that technology can help us realize Stone's vision of knowledge work with increased training and the “boundary-less career,” that is positive. It is questionable, however, if

[workers-are-there-really-2255765](http://www.mturk.com/mturk/welcome). In the article, prominent economists Alan Krueger and Larry Mishel both quibble with the numbers in the Time survey, *supra* note [], arguing that the numbers of on-demand economy workers are far lower. What is interesting is that both economists have ideological reasons for minimizing the number of workers. If the number of workers in the on-demand economy is small, that supports the argument that there is no need for regulation, a notion that Krueger, who once consulted for Uber, could get behind. The reason for Mishel's minimization of the on demand economy is cloudy, but it may have to do with the idea that labor unions should continue to appeal to their traditional base and ignore technological change. Lawrence Mishel, *Uber is Not the Future of Work*, THE ATLANTIC, Nov. 16, 2015. Such a stance seems extremely short-sighted. In any event, the idea that technology is not important to work is belied by many examples, from Ned Ludd's displacement by the power loom to John Henry's defeat by the steam engine.

⁶<https://www.mturk.com/mturk/welcome>

⁷<http://www.handy.com/>

⁸<https://www.instacart.com/>

⁹www.uber.com

¹⁰ See *infra* Part I.

¹¹ *O'Connor v. Uber*, 3:13-cv-03826-EMC (N.D. Cal.).

¹²For just a small sampling of press coverage, see, e.g. James Surowiecki, *Gigs with Benefits*, NEW YORKER, July 6, 2015, available at <http://www.newyorker.com/magazine/2015/07/06/gigs-with-benefits>; Mark R. Warner, *Asking Tough Questions About the Gig Economy*, WASH. POST, June 18, 2015, https://www.washingtonpost.com/opinions/asking-tough-questions-about-the-gig-economy/2015/06/18/b43f2d0a-1461-11e5-9ddc-e3353542100c_story.html.

¹³ KATHERINE V.W. STONE, FROM WIDGETS TO DIGITS (2004).

crowdwork truly extends the framework for digital work. In some aspects, the new crowdwork seems a throwback to the de-skilled industrial processes associated with Taylor, but without the loyalty and job security.

I. Litigation in the On Demand Economy

This section provides an update of current on-demand worker litigation in the United States.¹⁴ Of necessity this article provides a temporal snapshot, as these cases are rapidly developing. As of this writing many of the important legal issues are uncertain, as they were settled out of court or are currently set for trial. Why the wait from the time when these companies began operating and when these litigations were filed? I would posit that the lag is due to the fact that fundamental questions about labor standards have been obscured by the rhetoric of the “sharing economy” or “cooperative economics.”

Ridesharing company Lyft originally positioned itself within the Bay Area as a type of collective service where neighbors with cars helped those who were without. The result was supposed to build on community spirit and to encourage environmentally-conscious behavior such as ridesharing or carpooling. This putative “sharing economy” tapped into the long and venerable history of collective community sharing initiatives.¹⁵ In the past, resources were often shared amongst a community based on ties of kinship, friendship, or religious affiliation. Communities also set up exchange systems based on “barter” or timeshares, where individuals were able to bank and trade the time and skills, and groups shared tools or machinery.¹⁶ Indeed, we need look no further than the institution of the lending library to see instances where collective resources keep citizens well-informed and educated.¹⁷ These collective efforts depended on a mixture of trade, volunteerism, and altruism.¹⁸

For some time these roots in cooperative sharing structures obscured the commercial component of the on-demand economy. In my 2013 article, *Cyber Commodification*, I analyzed the ways in which segments of cyberspace were becoming either free and open access or, on the other hand, becoming commodified spaces.¹⁹ The lines between the monetized

¹⁴ The importance of keeping track of these cases and analyzing their outcomes is detailed in Claire Zillman, *California’s Uber Driver Decision Could Throw a Wrench into the Sharing Economy*, FORTUNE, June 17, 2015, available at <http://fortune.com/2015/06/17/uber-drivers-are-employees-sharing-economy/>.

¹⁵ Jenny Kassan & Janelle Orsi, *The Legal Landscape of the Sharing Economy*, 27 J. ENVIRONMENTAL L. & LITIG., 1, 4 (2012).

¹⁶ *Id.* See generally JANELLE ORSI, PRACTICING LAW IN THE SHARING ECONOMY (2012).

¹⁷ *Id.*

¹⁸ On altruism, see LYNN STOUT, CULTIVATING CONSCIENCE: HOW GOOD LAWS MAKE GOOD PEOPLE (2010).

¹⁹ See generally Miriam A. Cherry, *Cyber Commodification*, 72 MD. L. REV. 381 (2013).

and the free seemed in some instances to blur, causing confusion and sparking contests and disputes.²⁰ In some instances, businesses struggled to monetize the value that was being created through new efficiencies, connections between people, and use of underutilized resources.²¹ With the rise of the on-demand apps, it seems that business owners have, (at least in part), figured out how to harness some of the value and efficiencies created by these technologies.²²

In terms of the litigation update, the ridesharing/taxi services Uber and Lyft have probably garnered the most attention over their labor practices, so we will begin with them.²³ Uber alone has approximately 400,000 drivers in the United States,²⁴ and ridesharing services have become especially popular with customers in densely populated east and west coast cities. Rather than hailing or flagging down a cab in a crowded street, or calling a phone number to order a cab, the customer summons a taxi by using an application (“app”) on their cellphone, which is GPS-enabled. The app matches available drivers, who are using their privately-owned vehicles, with passengers nearby who need rides. Customers often prefer this type of model as opposed to hailing or calling a cab because the app is faster and more convenient, and has the benefit of allowing the passenger to track where the driver is and thus to have a better sense of scheduling the trip.

Originally, some of the litigation and opposition to these ridesharing services came either from existing taxicab owners and from local governments. Largely unregulated and unlicensed, (and in many instances even perhaps uninsured), questions existed about safety concerns. Uber has largely brushed those concerns aside, adopting an aggressive litigation stance.²⁵ For example, the Metropolitan Taxi Commission in St. Louis originally refused to let Uber operate in the city limits because of a lack of background checks for drivers. Uber then sued

²⁰ *Id.* at 426-439.

²¹ *Id.* at 435-439 (noting difficulty of businesses in monetizing WiFi service).

²² See also Rashmi Dyal-Chand, *Regulating Sharing: The Sharing Economy as an Alternative Capitalist System*, 90 TUL. L. REV. 241 (2015) (arguing that current forms of regulation do not fit well with the sharing economy because of a lack of fit with traditional business models). The qualifier of “at least in part” is due to the fact that some Internet companies, such as Facebook, still have not figured out optimal monetization.

²³ Benjamin Means & Joseph A. Seiner, *Navigating the Uber Economy*, 49 U.C. DAVIS L. REV. ___ (2016) (examining doctrinal tests for employee and independent contractor status in the Uber litigation).

²⁴ This was the approximate size of the class certified in *O'Connor v. Uber*.

²⁵ Brishen Rogers, *The Social Costs of Uber*, 82 U. CHI. L. REV. DIALOGUE 85, 102 (2015) (“Which brings us back to the public’s mistrust of Uber. The company’s name clearly evinces Nietzsche’s vision of a new morality and a new class dedicated to human excellence. But in Uber executives’ hands, that ideal has become little more than a defense of privilege. The company’s leaders seem just fine with a future in which the many are supplicant to the few, and the few are licensed to disregard ordinary rules. Uber’s slogan--“Everyone’s private driver”--speaks volumes. Perhaps the public’s intuitive skepticism toward Uber reflects a widespread sense that our economy should reflect basic democratic values.”) (internal citation omitted).

the Taxi Commission in federal court, alleging antitrust violations for their exclusion.²⁶ The St. Louis Taxi Commission has in return also brought a lawsuit seeking to enjoin Uber's operations, and Uber is being sued by individual taxi drivers as well.²⁷

In the litigation in the Northern District of California, Uber drivers filed suit, seeking minimum wage protections and overtime pay under the Fair Labor Standards Act ("FLSA").²⁸ The availability of the FLSA, however, depends first and foremost upon a finding that a worker, or class of workers, are "employees."²⁹ Under U.S. law, whether a worker is an employee or independent contractor is determined through various multifaceted tests dependent on the facts of the relationship.³⁰ The "control" test derives from the caselaw and decisions on agency law, and focuses on a principal's right to control the worker. Other papers in this colloquium will address these issues more in-depth,³¹ but suffice it to say that some of the factors for finding employee status are whether the employer may direct the way in which the work is performed, determine the hours involved, and provide the employee with direction.³² On the other hand, elements that lean toward independent contractor classification include high-skilled work, workers providing their own equipment, workers setting their own schedules, and getting paid per project, not per hour.³³ In an alternate test, courts examine the economic realities of the relationship to determine whether the worker is exhibiting entrepreneurial activity, or whether the worker is financially dependent upon the

²⁶ For a short summary of the long and tortured story of Uber in Saint Louis, Missouri, see Leah Thorsen, *St. Louis Area Taxi Drivers File Suit Against Uber*, ST. LOUIS POST-DISPATCH, Nov. 16, 2015, available at http://www.stltoday.com/news/local/metro/st-louis-area-taxi-drivers-file-suit-against-uber/article_f2c2a69f-90cb-58a6-b513-d122cb6189cd.html. The various cases that are pending in court include *St. Louis Metropolitan Taxicab Commission v. Uber, Inc. et al.*, 4:15-cv-01562-HEA (E.D. Mo. 2015); *Wallen et al v. St. Louis Metropolitan Taxicab Commission et al.*, 4:15-cv-01432-HEA (E.D. Mo. 2015); *Vilcek, et al. v. Uber USA, LLC, et al.*, 4:15-CV-1900 (E.D. Mo. 2015).

²⁷ *Id.*

²⁸ Fair Labor Standards Act, 29 U.S.C. § 203(e)(1).

²⁹ 29 U.S.C. § 203(g).

³⁰ See Katharine V.W. Stone, *Legal Protections for Atypical Employees: Employment Law for Workers without Workplaces and Employees without Employers*, 27 BERKELEY J. EMP. & LAB. L. 251, 257-58 (2006) (listing factors from the cases). Oft-cited cases on this subject include *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 728-29 (1947); *Ira S. Bushey & Sons, Inc. v. U.S.*, 398 F.2d 167 (2d Cir. 1968); *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 326 (1992).

³¹ [Insert cross references to other papers in the volume].

³² See, e.g. *Herman v. Express Sixty-Minutes Delivery Service, Inc.*, 161 F.3d 299 (5th Cir. 1998).

³³ See, e.g. Richard R. Carlson, *Variations on A Theme of Employment: Labor Law Regulation of Alternative Worker Relations*, 37 S. TEX. L. REV. 661, 663 (1996) ("Most labor and employment laws assume a paradigmatic relationship between an "employer" and "employee." The employer in this model contracts directly with an individual employee to perform an indefinite series or duration of tasks, subject to the employer's actual or potential supervision over the employee's method, manner, time and place of performance. This model describes most workers well enough, but there has always been a large pool of workers in alternative relationships with recipients of services. Some workers are "independent contractors" who contract to perform specific tasks or achieve particular results, but who retain independence and self-management over their performance.").

employer.³⁴ The label affixed to the relationship is a factor in the outcome, but it is certainly not dispositive. In any event, the tests are notoriously malleable, even when dealing with what should be a fairly straightforward analysis.³⁵

Thus Uber's situation has been seen as legally problematic, and the federal judges of the Northern District of California have struggled to characterize it within the "on/off" toggle of employee status.³⁶ As some have noted, with Uber some of the factors in the control test point toward an employee relationship while others are reminiscent of an independent contractor relationship.³⁷ On the one hand, crowdworkers have some flexibility to set their own schedules and can sign on and off the app more readily than do real workers in a traditional environment who work a set shift or who are otherwise tethered to a workplace desk or factory floor. Crowdworkers also use their own cellular telephones, computer equipment, Internet connections, and other instrumentalities. Further, EULAs contractually label crowdworkers as "independent contractors."

On the other hand, many factors lean toward an employment relationship. Control may be high, given that companies like Uber use customer ratings to maintain almost a constant surveillance over workers, with consumers deputized to manage the workforce. Many on-demand companies spend a great deal of time and effort to implement quality control policies. With low skilled crowdwork, the opportunity for entrepreneurship, and with it risk-and-reward, is barely, if at all, present. The terminology in a EULA is far from dispositive, as such online contracts are known to be extremely one-sided and are construed against the drafter. The possibility for exploitation is high, and low-skilled workers are those that are most in need of FLSA protection.

All of this has left the judges in the Northern District of California

³⁴ Stone, *supra* note [] at 257-58.

³⁵ Richard R. Carlson, *Why the Law Still Can't Tell an Employee When It Sees One and How It Ought to Stop Trying*, 22 BERKELEY J. EMP. & LAB. L. 295, 298 (2001) ("Indeed, in the case of employee status, the law encourages ambiguity. On the one hand, employers often crave the control they enjoy in a normal employment relationship. On the other, the advantages (to employers) of employing workers who are plausibly not employees motivate a good deal of arbitrary and questionable "non-employee" classification. It is not uncommon to find employees and putative contractors sitting side by side, performing the same work without any immediately visible distinguishing characteristics.¹³ And the trend of the working world is toward greater complexity and variation, driven partly by the temptation to capitalize on the fog that obscures the essence of many working relationships.")

³⁶ Again, this has been a longstanding problem. See, e.g. Alan Hyde, *Employment Law After the Death of Employment*, 1 U. PA. J. LAB. & EMP. L. 99, 101 (1998) ("The new ways of working, that I believe challenge normal legal analyses, include such new relations of employment as temporary employment placed by an agency and part-time employment rendered by people who have no other employer but are treated as contingent workers without benefits or implicit promises. They also include ways of working that are not, technically, "employment" relations under any statute: independent contractors, free-lancers, consultants, and people out of the labor market after downsizing or other elimination of former career jobs.")

³⁷ Means & Seiner, *supra* note []. Brishen Rodgers

with a malleable test and an indeterminate legal outcome. Perhaps Judge Vince Chhabria said it best when he noted in ruling on a motion that “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 . . .”³⁸

The case Judge Chhabria was hearing was *Cotter v. Lyft*. The case settled on January 27, 2016, with Lyft paying a settlement of \$12 million to its drivers. In addition, the company agreed to provide drivers with additional due process rights before termination. As is the case with many settlements, it was a compromise for both sides. While workers did not get the employee status they had been seeking, they did at least receive some compensation and can no longer be “deactivated” from their accounts without going through a grievance process heard by an arbitrator. Although Lyft may have dodged liability based on employee status in this case, that is no guarantee that the Internal Revenue Service or another governmental regulator will reach the same conclusion, despite the settlement.³⁹ Because the case was settled, there is no precedential effect; and as of now *O’Connor v. Uber* is set for trial in June of 2016. Given Uber’s aggressive legal stance in the past and their unwillingness to pay drivers benefits, they seem poised to go forward with the trial.

While the ridesharing cases are definitely the most high-profile in terms of media coverage and sheer number of workers, there are many other lawsuits pending within the on-demand economy that go far beyond ridesharing. One arbitrary, but easy, way to start is alphabetically with the top of the list, remarking upon common aspects and insights among the cases included.

Table 1. On-Demand Economy Litigation

Casename	Case No.	Jurisdiction	Gravamen of Litigation	Status
Agruss v. Homejoy	1:15-cv-00767	N.D. Ill.	FLSA; Home handyperson services	Class claims dismissed without prejudice on 05/05/2015;

³⁸ *Cotter v. Lyft*, No. 13-cv-04065-VC, *19 (N.D. Cal. Mar. 11, 2015).

³⁹ For an example of a tax case where liability was also imposed by the IRS for employee misclassification, see *Vizcaino v. Microsoft*, 97 F.3d 1187 (9th Cir. 1996)

				Homejoy ceased operations.
Shardae Bennett v. Wash. Io, Inc.	BC603067	CA Superior Court - Los Angeles County	Violation of Cal. Labor Code Sect. 226.8	Class Action Complaint filed 12/8/2015. No response filed to date.
Cobarruviaz v. Mapbear	3:15-cv-00697-EMC 2015 WL 694112	N.D. Cal.	FLSA; Grocery delivery service app	Court granted Instacart's (Mapbear's) motion to compel arbitration on an individual basis granted except for the Private Attorney General (PAGA) representative claim.
Cotter v. Lyft	3:13-cv-04065-VC	N.D. Cal.	Employee benefits, cost reimbursements; Ridesharing/driver app	Settlement agreement for \$12 million agreed to on 1/27/16. Due process rights on termination also granted as part of settlement.
Ehret v. Uber	3:14-cv-00113-EMC 68 F.Supp.3d 1121	N.D. Cal.	Employee benefits, cost reimbursements; Ridesharing/driver app	Motion to Certify Class & Consolidate Cases granted 10/22/15; Case management conference set for 1/28/16.
Jeung et al. v. Yelp	3:15-cv-02228-RS 2015 WL 4776424	N.D. Cal.	Unjust enrichment / Restitution for time spent writing online reviews	Case dismissed on 9/29/15.

Levin v. Try Caviar	3:15-cv-01285 2015 WL 7529649	N.D. Cal.	FLSA; Grocery delivery service app	Individual claims sent to arbitration; Awaiting further briefing on Plaintiff's PAGA claims.
Mohamed v. Uber, a/k/a In Re Uber FCRA Litigation	3:14-cv-05200-EMC <u>Consolidated with</u> 14-cv-05241-EMC 15-cv-03009-EMC 109 F.Supp.3d 1185	N.D. Cal.	Employee benefits, cost reimbursements; Ridesharing/ driver app	Class Certification & Motion to Consolidate Cases granted 10/22/15; Defendant's motion to compel arbitration denied
O'Connor v. Uber	3:13-cv-03826-EMC	N.D. Cal.	Employee benefits, Cost reimbursements; Overtime under FLSA; Ridesharing/ Driver app	Class certified and trial was set for June, 2016; Uber is appealing ruling on new mandatory arbitration clause inserted to driver contracts.
Otey v. Crowdfunder	3:12-cv-05524-JST	N.D. Cal.	FLSA; Crowdfunder	Settlement agreement approved by the Court. Parties now seeking to amend the settlement; Court denied Motion to Modify.
Rojas-Lozano v. Google, Inc.	3:15-cv-03751-JSC 2015 WL 4779245	N.D. Cal.	FLSA or Unjust Enrichment / Word transcription ("Captchas") or identification for	Motion to Dismiss filed by Google heard 12/15; Court has requested supplemental

			Google Earth (without pay)	briefing.
Sherry Singer et al v. Postmates, Inc.	4:15-cv-01284 JSW	U.S. District Court California Northern District	Violation of FLSA and Cal. Labor Code Sect. 226.8 et seq.	Class Action Complaint filed 3/19/2015. Motion for Partial Summ. Judgment filed by Defendant 6/2015
Andrew Tan v. Grubhub, Inc.	3:15-cv-05128	N.D. Cal.	Violation of Cal. Labor Code; Restaurant/Food delivery website/app	Removed from state court. First Amended Complaint filed 12/15/16.
Zenelaj et al. v. Handybook, Inc.	3:14-cv-05449- THE 109 F.Supp.3d 125	N.D. Cal.	FLSA; Home handyperson services	Parties mediated the dispute without success. Case is headed toward arbitration.

The first case listed is *Arguss v. Homejoy*,⁴⁰ a case in which workers sued a home repair services app for minimum wage violations under the FLSA. The case was dismissed on May 5, 2015 as Homejoy had filed for bankruptcy and then subsequently ceased operations.⁴¹ Boosters of the on-demand economy were quick to blame Homejoy's failure on the actions of the workers, in particular their decision to bring a lawsuit.⁴² Many prognosticators used this case as a way to raise the salience of these employment litigations, noting that increased labor costs might result in the demise of existing companies and retard the growth of new on-demand

⁴⁰ *Agruss v. Homejoy*, 1:15-cv-00767 (N.D.Ill. Mar. 5, 2015).

⁴¹ Daniel D'Addario, *Homejoy Cleaning Company Shuts Down*, TIME, July 18, 2015, available at <http://time.com/3963565/homejoy-cleaning-shuts-down/>

⁴² Kia Kokalitheva, *Startup Homejoy Bites the Dust – Literally*, FORTUNE, July 17, 2015, available at <http://fortune.com/2015/07/17/homejoy-closing-cleaning-google/> (noting lack of venture funding for company as well as labor lawsuit woes); Sarah Kessler, *The Gig Economy Won't Last Because It's Being Sued to Death*, FAST COMPANY (Feb. 17, 2015), <http://www.fastcompany.com/3042248/the-gig-economy-wont-last-because-its-being-sued-to-death>.

apps.⁴³

The rhetoric that Homejoy failed because its workers sued for minimum wage and overtime protections failed to establish a key element: causality. While labor unrest is certainly not good for business, it is not clear that paying workers minimum wage was the cause of Homejoy's bankruptcy filings. In fact, Homejoy's business model was in financial trouble before the company's legal troubles began, because the company overextended itself chasing new customers on bargain websites like Groupon.⁴⁴ Homejoy then could not retain customers and suffered from quality control issues.⁴⁵ As such, it would be overblown to conclude from only this one isolated example that paying workers minimum wage would mean the immediate bankruptcy of the on demand economy. Some have claimed that perhaps these new businesses should receive an exemption from minimum wage either because they are involved in sharing or because they involve new jobs.⁴⁶ Regardless, the argument that on-demand companies should somehow be exempt from minimum wage because otherwise their business models and very existence would be at risk is a problematic argument. In the United States, the requirement of a minimum wage was established as a response to downward wage spirals in the Great Depression.⁴⁷ Wage and hour laws are requirements of general applicability to all businesses; and it is difficult to see why they would not apply to on-demand economy companies.⁴⁸

Indeed, many of the "sharing" companies of yesteryear have moved away from "sharing" and in fact are fully for-profit businesses pursuing a shareholder value maximization model at all costs, often driven by the demands of their venture capitalist investors. In addition, even true non-profits must pay minimum wage to their regular employees. And, while cell phone apps and online markets for work may be new, the

⁴³ Carmel DeAmicis, *Homejoy Shuts Down After Battling Worker Classification Lawsuits*, RE/CODE, July 17, 2015, available at <http://recode.net/2015/07/17/cleaning-services-startup-homejoy-shuts-down-after-battling-worker-classification-lawsuits/> (interview with co-founder of Homejoy blaming misclassification lawsuits and legal woes for company's shutdown)

⁴⁴ Ellen Huet, *What Really Killed Homejoy? It Couldn't Hold on to its Customers*, FORBES, Jul. 23, 2015 available at <http://www.forbes.com/sites/ellenhuet/2015/07/23/what-really-killed-homejoy-it-couldnt-hold-onto-its-customers/#764ce4f5114c> ("Former employees [stated that]... the startup pushed relentlessly for high growth numbers instead of fixing its poor retention rates, which persisted both because Homejoy relied too heavily on deal sites like Groupon for new customers and failed to improve its core service because it couldn't train its independent contractor cleaners.")

⁴⁵ *Id.* Of course, a lack of control, quality or otherwise, is a problem when using independent contractors who truly are independent.

⁴⁶ Seth Harris & Alan Kreuger, *A Proposal for Modernizing Labor Law 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_kreuger_harris.pdf.

⁴⁷ See Cherry, *A Minimum Wage for Crowdwork*, *supra* note [].

⁴⁸ *Id.*

roles of driver, cleaner, and errand runner are well-established. The tasks that these workers perform are by no means new jobs, even if those jobs are enabled, enhanced, or made more efficient by technology.

The *Zenalaj v. Handybook* case (last alphabetically but similar in business and work tasks to Homejoy) involves a similar dispute over misclassification for housecleaners booked through cell phone apps.⁴⁹ Handybook, which goes about its business as “Handy,” is being sued by workers for alleged wage and hour violations under the FLSA. Interestingly, at this point the case predominantly involves the question of whether these worker complaints are appropriate to be heard in arbitration.⁵⁰ Increasingly, this has become an issue throughout the economy as many employers (as well as website operators and stores) attempt to minimize liability through mandatory pre-dispute arbitration clauses in form contracts or EULAs.⁵¹ In this case, the court was inclined to enforce these arbitration provisions.⁵² As of this writing, the workers were entering mediations with the company to try to resolve the issues.⁵³

The next case, *Bennett v. Washio* involves an alleged state labor law violation for a dry-cleaning delivery service. I group this litigation along with *Tan v. Grubhub*⁵⁴ and *Singer v. Postmates*, both cases involving restaurant delivery services. A similar case is pending against Instacart, a

⁴⁹ *Zenalaj v. Handybook*, 109 F.Supp.3d 125 (2015).

⁵⁰ *Id.*

⁵¹ While not the main topic of this article, a longstanding trend has been the growth of these arbitration provisions and courts’ willingness to enforce them, even when they seem one-sided and the product of adhesion contracts. For an old look at many of the arbitration issues as they appeared in 1998, see Miriam A. Cherry, *Note, Not-So-Arbitrary Arbitration*, 21 HARVARD WOMEN’S L. J. 267 (1998). For more updated and recent accounts of the movement toward arbitration as a way of managing workplace liability for employers, see Jean R. Sternlight, *Disarming Employees How American Employers Are Using Mandatory Arbitration to Deprive Workers of Legal Protection*, 80 BROOK. L. REV. 1309, 1310 (2015) (“Today employers, with substantial assistance from the Supreme Court, are using mandatory arbitration clauses to “disarm” employees, effectively preventing them from bringing most individual or class claims and thereby obtaining access to justice. It has been estimated that roughly 20% of the non-unionized American workforce is covered by mandatory arbitration provisions, and this number may well increase.”) For more on arbitration as a method of containing costs toward consumers, see Theodore Eisenberg et. al., *Arbitration’s Summer Soldiers: An Empirical Study of Arbitration Clauses in Consumer and Nonconsumer Contracts*, 41 U. MICH. J.L. REFORM 871 (2008) (“We provide the first study of varying use of arbitration clauses across contracts within the same firms. Using a sample of 26 consumer contracts and 164 nonconsumer contracts from large public corporations, we compared the use of arbitration clauses in firms’ consumer and nonconsumer contracts. Over three-quarters of the consumer agreements provided for mandatory arbitration but less than 10% of the firms’ material nonconsumer, nonemployment contracts included arbitration clauses. The absence of arbitration provisions in the vast majority of material contracts suggests that, ex ante, many firms value, even prefer, litigation over arbitration to resolve disputes with peers. Our data suggest that the frequent use of arbitration clauses in the same firms’ consumer contracts may be an effort to preclude aggregate consumer action rather than, as often claimed, an effort to promote fair and efficient dispute resolution.”); *But see* Christopher Drahozal & Stephen J. Ware, *Why Do Businesses Use (or not Use) Arbitration Clauses?*, 25 OHIO ST. J. ON DISP. RESOL. 433, 433-4 (2010).

⁵² *Zenalaj v. Handybook*, 109 F.Supp.3d 125 (2015). A court’s decision to enforce an arbitration agreement will be influenced by many factors under state law, and that analysis is largely beyond the scope of the present article.

⁵³ *Id.*

⁵⁴ *Tan v. Grubhub*, 3:15-cv-05128 (N.D. Cal. 2015).

grocery delivery service. The Instacart case is styled as *Cobarruviaz v. Maplebear*.⁵⁵ Interestingly, in response to this litigation and the attention that it received, Instacart made the decision to reclassify its grocery shoppers as employees.⁵⁶ The reasoning from the company was that employee classification would allow for stability in its workforce, as well as allow for training and quality control.⁵⁷ Instacart noted that choosing groceries actually took skill, and if the company was to make an investment in training, they wanted those trained workers remaining with the company.⁵⁸ Even though that litigation is still pending, one assumes that on a going-forward basis, the issue of which workers are independent contractors and which are employees will be a moot point.

Continuing with the list, a case that was of interest but was then dismissed was *Jeung v. Yelp*.⁵⁹ The Yelp site exists for the purpose of rating everything commercial – restaurants, bars, hotels, car dealerships – and anyone who is a Yelp member can write a review, variously praising or ranting about the service received, value for the money, or any other aspect of the business that they deem relevant, subject to certain guidelines.⁶⁰ While many people treat writing Yelp reviews as an occasional pastime, or something to do only in the event of truly awful or outstanding service, others spend a considerable amount of time on the site. In fact, some reviewers become so well-known that others rely on them for advice and recommendations. While Yelp does not pay for reviews, these types of active content-contributors help it build value on its site. Therefore over the years, Yelp has sought to encourage loyalty among its most active and well-respected reviewers by awarding them “Elite” status along with certain perks.⁶¹

The plaintiffs in *Jeung v. Yelp* case alleged that they were entitled to minimum wage for time spent writing customer reviews on the Yelp website. In the alternative, the plaintiffs argued that they should be entitled to recover in unjust enrichment for restitution.⁶² After all, Yelp

⁵⁵ *Cobarruviaz v. Maplebear*, 2015 WL 694112 (N.D. Cal. 2015).

⁵⁶ Sara Ashley O’Brien, *The Uber Effect: Instacart Shifts away from Contract Workers*, CNN MONEY (New York), June 22, 2015, <http://money.cnn.com/2015/06/22/technology/instacart-employee-option/>

⁵⁷ Davey Alba, *Instacart Shoppers Can Now Choose to be Real Employees*, WIRED, Jun. 22, 2015, available at <http://www.wired.com/2015/06/instacart-shoppers-can-now-choose-real-employees/> (discussing reasons that company made the switch to part-time employees, which included training and quality control).

⁵⁸ *Id.*

⁵⁹ *Jeung v. Yelp*, 2015 WL 4776424 (N.D. Cal. 2015).

⁶⁰ www.yelp.com

⁶¹ Lydia O’Connor, *Yelp Reviewers File Class Action Lawsuit Claiming They are Unpaid Writers*, THE HUFFINGTON POST, Oct. 31, 2013, available at http://www.huffingtonpost.com/2013/10/30/yelp-lawsuit-_n_4179663.html.

⁶² Also known as an action in quasi-contract or *quantum meruit*, unjust enrichment is an alternative to contract theory. Here, there was no express contract between Yelp and the reviewers, but under an unjust

would hardly be a valuable site without the content written by its crowd of users. Finally, the plaintiffs argued that they had been injured when their status as “Elite” reviewers was taken away from them and when their accounts were deactivated. However, on June 19, 2015, *Jeung v. Yelp* was dismissed. The court characterized the dismissal as essentially a default judgement. Plaintiffs’ counsel had filed some questionable and bizarre filings before abandoning the case.⁶³

Another case about unpaid work on the Internet is *Rojas-Lazano v. Google*.⁶⁴ Here, plaintiffs sued Google for the value of work done on an unpaid basis for Google without knowledge. How could someone work without being aware of it? Most Internet users are familiar with the process during posting a comment on a web blog or signing up for a mailing list where they are asked to input a code of letters and numbers to establish that they are a real person, and not an automated program (or “bot”). The codes that websites ask users to input are known as “captchas” or “recaptchas.” The plaintiffs in this case argued that when they were inputting these captchas to verify that they weren’t bots, they were also working for Google.

Google had been putting small bits of transcription work (for books or Google Earth) up on the web through the vehicle of the captchas. While filling out a captcha only took a few seconds, as millions of people posted comments on blogs or signed up for a website, in the aggregate this added up to quite an outstanding amount of time. Most people just thought they were establishing personhood, and even after the lawsuit, most people do not know that they are actually generating profit for Google every time they enter a captcha. However, as the plaintiffs in *Yeung v. Yelp* found out, the landscape for plaintiffs for these types of unpaid online work, just based on what little existing precedent there is unwelcoming.

A dispute over payment for blog posts illustrates the unfriendly reception such cases have received in the courts. The case involved the Huffington Post, a popular weblog that serves as a forum for current news events and left-leaning political commentary.⁶⁵ Leading up to the 2008

enrichment theory, no agreement is necessary. It is enough if a benefit was conferred, there was an appreciation of the benefit, and then acceptance and retention of the benefit. For more generally on unjust enrichment, see e.g. See, e.g. Caprice Roberts, *Restitutory Disgorgement as a Moral Compass of Breach of Contract*, 77 U. CINN. L. REV. 991 (2009); Caprice Roberts, *A Commonwealth of Perspective on Restitutory Disgorgement for Breach of Contract*, 65 WASH. & LEE L. REV. 945 (2008).

⁶³ Eric Goldman, *Court Says Yelp Reviewers Aren’t Employees*, FORBES, Aug. 17 2015, available at <http://www.forbes.com/sites/ericgoldman/2015/08/17/court-says-yelp-reviewers-arent-employees/#512432103fec>.

⁶⁴ *Rojas-Lazano v. Google*, 2015 WL 4779245 (N.D. Cal. 2015).

⁶⁵ www.huffingtonpost.com.

election, many Huffington Post bloggers wrote accounts critical of then-President George W. Bush, specifically his administration's treatment of the Guantanamo Bay prisoners, while others wrote to assist fellow Democratic voters to become more familiar with the primary candidates.⁶⁶ Regardless of one's personal political leanings, what is certain is that the website was able to attract a relatively sophisticated level of writing in its posts.⁶⁷ The featured authors included professional journalists and attorneys who contributed their efforts to the Huffington Post for free, despite normally being paid for their writing. Freshly updated content helped attract an additional audience to the blog, which grew rapidly, reaching 15 million hits per weekday.⁶⁸

In March 2011 media giant AOL submitted a \$315 million acquisition bid for the Huffington Post.⁶⁹ The web traffic that was driven to the HuffPo website was valuable to AOL, a company that had been searching both for more content providers and an expanded audience for existing content. Arianna Huffington and her financial backers stood to make a handsome profit from the acquisition. The bloggers, on the other hand, who had built the blog's readership by dint of their hard work, were to receive nothing.⁷⁰ Frustrated, Jonathan Tasini, a journalist and labor activist,⁷¹ along with other unpaid bloggers, filed a lawsuit challenging the terms of the deal.⁷² The bloggers claimed that as their hard work had built the blog's value, they therefore deserved a share of the profits, either through a contract claim or a claim for unjust enrichment and restitution.⁷³

⁶⁶See e.g. Shayana Kadidal, *Guantanamo, Six Years Later*, HUFFINGTON POST (Jan. 11, 2008) http://www.huffingtonpost.com/shayana-kadidal/guantanamo-six-years-late_b_81025.html; For the Huffington Post's current stance on this issue, see Ben Fox, *Guantanamo Closure Hopes Fade as Prison Turns Ten*, HUFFINGTON POST (Jan. 10, 2012), http://www.huffingtonpost.com/2012/01/10/guantanamo-closure-anniversary_n_1195984.html.

⁶⁷See Paul Farhi, *Freelancer to File Class-Action Suit Against HuffPo and AOL Over Compensation*, WASHINGTONPOST.COM (Apr. 12, 2011), http://www.washingtonpost.com/lifestyle/style/freelancer-to-file-class-action-suit-against-huffpost-and-aol-over-compensation/2011/04/12/AFa9QGQD_story.html.

⁶⁸Nate Silver, *The Economics of Blogging and the Huffington Post*, NYTIMES.COM (Feb. 12, 2011), <http://fivethirtyeight.blogs.nytimes.com/2011/02/12/the-economics-of-blogging-and-the-huffington-post/> (estimating 15 million page hits per weekday on HuffPo and analyzing types of posts and attention they typically were attracting).

⁶⁹*Id.* See also Julianne Pepitone, *Huffington Post blogger sues AOL for \$105 million*, CNNMONEY.COM (Apr. 12, 2011), http://money.cnn.com/2011/04/12/technology/huffington_post_blogger_lawsuit/index.htm.

⁷⁰Jeff Berovici, *AOL, Arianna Huffington Hit with Class Action Suit*, FORBES.COM (April 12, 2011), available at <http://www.forbes.com/sites/jeffbercovici/2011/04/12/aol-arianna-huffington-hit-with-class-action-suit/>. See also Tim Rutten, *AOL? HuffPo. The Loser? Journalism*, L.A. TIMES, Feb. 9, 2011, available at <http://articles.latimes.com/2011/feb/09/opinion/la-oe-rutten-column-huffington-aol-20110209> ("To grasp its business model... you need to picture a galley rowed by slaves and commanded by pirates.").

⁷¹Jonathan Tasini was previous the successful lead plaintiff in a lawsuit challenging the rights of newspapers to license the work of freelance writers to electronic databases without additional compensation. See *New York Times Co. v. Tasini*, 533 U.S. 483 (2001) (ruling in favor of freelance writers).

⁷²See *Tasini v. AOL Inc.*, Class Action Complaint, 11 CV 2472 (April 12, 2011) (SDNY).

⁷³The claim would be that, although a formal contract was lacking, the organizers of the Huffington Post were unjustly enriched and a restitution theory would be applied to compensate the bloggers. *Do Huffington*

The heart of the Huffington Post bloggers' claims seemed to rest, as many contract disputes do, in the differing expectations that the parties brought with them to the deal. From the bloggers' perspective, they performed work without payment because they believed that they were contributing to a political website that advanced the causes in which they believed. Retroactively, they learned that the founders of the website were to profit from the Huffington Post, and they therefore felt taken advantage of by the organizers.⁷⁴ On the other hand, the Huffington Post claimed that the bloggers did receive a substantial benefit, as they used the HuffPo "to connect and help their work be seen by as many people as possible. It's the same reason people go on TV shows: to promote their views and ideas."⁷⁵ In other words, according to the HuffPo, the blog provided unknown writers with an important benefit: a platform for expression and free publicity to a growing audience.⁷⁶ The District Court sided with the HuffPo and dismissed the bloggers' complaint, which was then affirmed by the Second Circuit.⁷⁷ Perhaps as a delayed reaction, the Huffington Post writers unionized in January 2016.⁷⁸

The last case for discussion in this section is *Otey v. Crowdfunder*.⁷⁹ Crowdfunder is a crowdworking platform that hired thousands of workers both in the US and globally to carry out small micro-tasks. Unlike Uber, which involves a platform matching up a driver who is performing a service in the real world, *Otey* involved work performed solely on computer. In this type of crowdwork, large tasks such as constructing a website is broken down into its constituent parts such as coding, tagging, and describing items or pictures.⁸⁰ Platforms then farm out these micro-tasks to hundreds or thousands of individual workers across the world. After completion the tasks are then re-aggregated and compiled to finish the job. Workers sued Crowdfunder for failure to pay minimum wage under the FLSA and Oregon's minimum wage law. The workers' allegations were coextensive with media coverage describing the poor

Post Bloggers Deserve to Get Paid?, LAW BLOG, WSJ.COM, available at <http://blogs.wsj.com/digits/2011/04/12/should-huffington-post-bloggers-get-paid/tab/print/>.

⁷⁴ The unpaid bloggers posted on the Twitter account #huffpuff, claiming that the HuffPo "built a blog-empire on the backs of thousands of citizen journalists."

⁷⁵ Jeremy W. Peters, *Huffington Post Is Target of Suit on Behalf of Bloggers*, NYTIMES.COM (Apr. 12, 2011), available at <http://mediacoder.blogs.nytimes.com/2011/04/12/huffington-post-is-target-of-suit-on-behalf-of-bloggers/?pagemode=print>.

⁷⁶ *Id.* For academic commentary discussing the rise of amateurism and peer production of blogs, see, e.g. John Quiggen & Dan Hunter, *Money Ruins Everything*, 30 HASTINGS COMM. & ENT. L. J. 203, 220 (2008).

⁷⁷ *Tasini v. AOL, Inc.*, F.Supp.2d 734, 745 (S.D.N.Y. 2012), aff'd No. 12-1428-cv, 2012 WL 61766559 at *1 (2nd Cir. Dec. 12, 2012).

⁷⁸ Frank Pallotta, *Huffington Post Becomes Biggest Unionized Digital Media Outlet*, CNN MONEY, Jan. 14, 2016, available at <http://money.cnn.com/2016/01/14/media/huffington-post-union/index.html>

⁷⁹ *Otey v. Crowdfunder*, 3:12-cv-05524-JST (N.D. Cal. 2013).

⁸⁰ See Randall Stross, *When the Assembly Line Moves Online*, N.Y. TIMES, Oct. 30, 2010.

wages of crowdwork.⁸¹ Crowdfunder unsurprisingly argued that these platform workers were independent contractors, not employees.

Before the issue could be decided, however, the case moved into settlement negotiations. During the first round of negotiations, the parties reached an agreement by which Crowdfunder would compensate for the difference between what workers were paid and the statutory minimum wage. They also agreed to pay for attorney's fees and to cease operations as a crowdwork platform for a period of ten years. Judge Tigar, however, rejected the settlement as inadequate. The revised settlement increased the amount of monetary compensation for plaintiffs, including administrative costs and attorney's fees to \$585,507, but contained no ban on Crowdfunder continuing to broker crowdwork.

The monetary settlement in the Crowdfunder case surely encouraged other plaintiffs and their attorneys to bring suit. How were the plaintiffs in this case able to succeed in brokering the settlement? Their success can likely be traced back to the statements of Crowdfunder's CEO. Although the videos referenced in the complaint have been taken off YouTube, the complaint alleged that these videos had the CEO noting that he did not have to pay workers minimum wage. In an interview with the BBC the record of which is still available online, the CEO stated that "we almost trick the game players into doing something useful for the world while playing these games. Just do ten minutes of real work that a real company can use, and we'll give you a virtual tractor. That way everyone wins."⁸² Altogether, that would establish a willing violation of the minimum wage laws. Such a knowing and intentional violation that would then be established could result in treble damages. It is entirely viable to suggest that Crowdfunder did not want to risk such a result; at various points in the litigation it pled poverty and noted that paying workers minimum wage would bankrupt the company. Ironically, Crowdfunder received a large venture capital investment only a short time after the settlement.

Having reviewed the cases listed from the chart, note that there are a number of remarkable commonalities. The vast majority of the litigation

⁸¹ See, e.g. Alyson Shontell, *My Nightmare Experience as a Task Rabbit Drone*, BUSINESS INSIDER, Dec. 7, 2011, available at <http://www.businessinsider.com/confessions-of-a-task-rabbit-2011-12> (noting no guarantee of minimum wage); Moshe Z. Marvit, *How Crowdworkers Became the Ghosts in the Digital Machine*, THE NATION, Feb. 24, 2014, available at <http://www.thenation.com/article/178241/how-crowdworkers-became-ghosts-digital-machine> (recounting stories of two workers on AMT who earned less than minimum wage); Randall Stross, *When the Assembly Line Moves Online*, N.Y. TIMES, Oct. 30, 2010 available at <http://www.nytimes.com/2010/10/31/business/31digi.html>; Matthew Bingham & Joseph Dunn, *Wanted: Digital Drones to Earn ½ p an Hour*, SUNDAY TIMES (U.K.), Jan. 11, 2009 (journalists performing tasks on the Amazon Mechanical Turk and earning a little over \$2 for four hour's work).

⁸² Fiona Graham, *Crowdsourcing Work: Labour on Demand or Digital Sweatshop?*, BBC NEWS, Oct. 22, 2010, available at <http://www.bbc.co.uk/news/mobile/business-11600902>.

is taking place in federal court, in the Northern district of California. There are several reasons for this geographic anomaly. First, the Bay Area is the natural testing ground for many of the start-up businesses in the on-demand economy. With its close proximity to Silicon Valley, many of the platforms use the neighborhood near them in order to experiment and build their brands. The other point about this, however, is that California also has enacted generally plaintiff-friendly labor laws.⁸³ This makes California an attractive jurisdiction for plaintiffs to file class actions. These cases are important to watch because there is a “first mover” effect. There is no precedential value from one case to another, or even from one district or circuit to another. When faced with a difficult and new fact pattern, however, judges often try to learn from and rely on the work done by the courts that have already put in the time and effort to resolve the dispute in the first instance.⁸⁴

The chart excludes decisions by administrative entities. These mostly have dealt with individual state law claims.⁸⁵ Other issues that did not quite make it onto the chart but are important nonetheless are Uber’s widespread lobbying in various states to have its workers continue as independent contractors. In fact, Uber has pressed state legislators to pass “model codes” for the regulation of on-demand transportation companies. While such codes make sense from the perspective of wanting drivers to have insurance and minimum licensing requirements, Uber has sneakily inserted provisions about labor laws. Uber’s model transportation legislation contains language that says its workers are independent contractors. Aside from indicating industry capture, such legislation may not have much meaning for worker status. For each statute (e.g. FLSA, unemployment, worker’s compensation) has its own individual definition of employee elaborated by the courts. Having another definition randomly inserted in the transportation code will likely not be dispositive of the issue, despite Uber’s efforts.

At the time of this writing, no clear consensus has emerged on how the courts will determine employee versus independent contractor status for workers in the on-demand economy. As noted above, the legal tests for discerning such status are largely malleable and based on past

⁸³ See, e.g. Alan Hyde, High Velocity Labor Market.

⁸⁴ The Uber case thus literally becomes the Uber case.

⁸⁵ The California Labor Commission made headlines in ruling that Uber driver Barbara Berwick was an employee and thus entitled to reimbursement for certain work-related expenses. *Berwick v. Uber Techs., Inc.*, No. 11-46739 EK (Cal. 2015), available at <http://www.scribd.com/doc/268980201/Uber-v-Berwick-California-Labor-Commission-Ruling#scribd>. Other administrative bodies have been split, with a Florida administrative decision that an Uber driver was an independent contractor. See Davey Alba, *Florida Says Uber Driver Isn’t an Employee After All*, WIRED, Oct. 1, 2016, available at <http://www.wired.com/2015/10/florida-uber-decision-reversal/>.

precedent, largely indeterminate. It is only after we pass the threshold questions of whether these workers are employees that we will get to some of the more substantive regulatory issues. Crowdwork litigation is important because it ties into vexing meta-questions about the future of work. The next section explores these larger concerns.

II. THE ON-DEMAND ECONOMY AND THE DIGITAL TRANSFORMATION OF WORK

The previous section provided an update on litigation in the on-demand economy. Apart from the issues being explored in the cases, (most of which are still in their early stages), it is important to take a step back and examine the larger context of how work is changing with response to technology. The framework for the discussion in this section relies upon Katherine Van Wezel Stone's book *From Widgets to Digits*.⁸⁶ I propose adding the category of "crowdwork" to the model of industrial and digital work that Stone articulates.

Stone's book describes the changing landscape of work toward the end of the millennium.⁸⁷ As she notes, the United States has been in the process of moving from an industrial, manufacturing-based economy to a knowledge-based one.⁸⁸ The old manufacturing economy was characterized by the "life cycle" model of employment.⁸⁹ Promotion throughout a career was achieved through vertical job ladders and was structured hierarchically.⁹⁰ Original thought and creativity were largely downplayed. In the manufacturing economy jobs were often broken down into their constituent parts, and job training was not important, nor expected. Loyalty and longevity, however, were prized traits as they helped to manage the workforce, and workers were rewarded with benefits that depended on longevity. Unions were an expected representation of stable, long-term employee interests.

The known characteristics of the industrial system owed much to earlier theorizing about how best to maximize the productivity of workers. Apart from the notion of the invisible hand, Adam Smith wrote of the division of labor among pin makers as a method of increasing production.

⁹¹ Frederick Taylor further refined the deconstruction of work through

⁸⁶ See generally KATHERINE V.W. STONE, *FROM WIDGETS TO DIGITS* (2004).

⁸⁷ KATHERINE V.W. STONE, *FROM WIDGETS TO DIGITS* 67-77 (2004) (describing major changes and shifts in the economy as there is a transition in the U.S. away from manufacturing jobs).

⁸⁸ *Id.*

⁸⁹ *Id.* at 54-55.

⁹⁰ *Id.* at 60.

⁹¹ ADAM SMITH, *THE WEALTH OF NATIONS*, ch. 1 ("To take an example, therefore, from a very trifling

so-called scientific management.⁹² So-called “Taylorism” sought to calibrate each worker’s actions to achieve the highest level of efficiency.⁹³ The assembly lines and social welfare policies of Ford Motor Company took these principles into account. Ford wanted a stable and loyal workforce, and in order to get that, he had to pay higher wages to those performing repetitious and occasionally hazardous tasks.⁹⁴

The shift to a knowledge-based, information-rich economy at the end of the millennium also engendered a shift to a new model of work.⁹⁵ Some of the characteristics of the new digital work described by Stone are an increased emphasis on worker knowledge, training and skills. The digital era, as Stone defines, refers to mid to late 20th century, when computers and the internet became “the central nervous system of global production networks.”⁹⁶ Based on a shift towards fluid workplaces and permeable borders between firms, the digital model places a high value on the intellectual capital of employees.⁹⁷ Gone was the idea of a “life cycle” model of employment. Instead, workers had shorter job tenure, and were expected to advance by moving horizontally across different firms.⁹⁸ Worker loyalty, having been eroded by mass layoffs and movement of manufacturing jobs overseas in the 1980s, was instead replaced by the notion of “employability.”⁹⁹ Rather than seeking the elusive idea of job security, workers instead focused on increasing their job skills and remaining competitive within the market external to the firm.

Other characteristics of this new digital model included the flattening of organizations and subtracting middle management. As workers are hired for their knowledge and expertise, their employment often was centered around a certain project or projects.¹⁰⁰ While employment might not last beyond a particular project, workers were often promised opportunities to enhance their skills to provide motivation.

manufacture; but one in which the division of labour has been very often taken notice of, the trade of the pin-maker; a workman not educated to this business (which the division of labour has rendered a distinct trade), nor acquainted with the use of the machinery employed in it (to the invention of which the same division of labour has probably given occasion), could scarce, perhaps, with his utmost industry, make one pin in a day, and certainly could not make twenty. But in the way in which this business is now carried on, not only the whole work is a peculiar trade, but it is divided into a number of branches, of which the greater part are likewise peculiar trades.

⁹² See generally FREDERICK WINSLOW TAYLOR, PRINCIPLES OF SCIENTIFIC MANAGEMENT 31 (1911).

⁹³ Stone, *supra* note [], at 34-36.

⁹⁴ Dodge v. Ford Motor Company, 170 N.W. 668 (Mich. 1919) (classic corporate law case discussing Ford’s management style of paying above prevailing wages for assembly line workers).

⁹⁵ Stone, *supra* note [], at 44-45.

⁹⁶ *Id.* at 5.

⁹⁷ *Id.* at 92 (describing what Stone terms the “boundaryless career”).

⁹⁸ *Id.* at 96.

⁹⁹ *Id.* at 74.

¹⁰⁰ *Id.* at 111.

Some forms of these knowledge jobs will tout the ability to network with others, increasing the chance of other horizontal job opportunities. Job changes and moves are common in this new digital model of work.¹⁰¹ The rest of Stone's book centers on describing the ways in which the traditional labor law model falls short in protecting the needs and rights of worker in the new digital model. She especially calls for legal reform around the issue of non-competition clauses, which prevent workers from using their skills and their network for rival firms.¹⁰²

How does the recent development of crowdwork fit with the industrial or digital model? Many would be quick to classify crowdwork as another branch or outgrowth of the digital knowledge work model. After all, crowdwork is intermediated by technology, whether that is by cell phone app or via the Internet, and some forms of crowdwork take place solely in cyberspace. Crowdwork takes place by the project, indeed, with small gigs or microlabor on the Internet, workers are only hired for one particular task, even if that task takes only seconds or minutes.¹⁰³ The focus on work by the project also seems to be a commonality between crowdwork and digital work. However, some aspects of crowdworking look more like a throwback to the earlier industrial model. In fact, the idea of breaking down tasks to their lowest common denominator is nothing new – in fact it is paradigmatic Taylorism. The analysis here is to focus on two features of crowdwork: automatic management of workers through computer code coupled with what has been termed “precarity.”

A salient feature of crowdwork infrastructure is the predominance of code in mediating work relations. The literature refers to this process as automatic management or “algocracy.”¹⁰⁴ Indeed, a new trend is that algorithms are absorbing many organizational functions that managers traditionally would perform. Computer code may perform a variety of supervisory tasks from the mundane to the sophisticated: assigning tasks to workers, speeding up work processes, determining the timing and length of breaks, monitoring quality, ranking employee, and more. Code makes crucial on-the-spot decisions about individualized employees and what they need to be doing in real time. Labor practices that used to be run through bureaucracy (and other organizational control regimes) are becoming embedded within computer programs. Workers are directed by

¹⁰¹ *Id.* at 74.

¹⁰² *Id.* at 127-156.

¹⁰³ See Stross, *supra* note [] (describing short time frame for tasks in crowdsourced micro-labor).

¹⁰⁴ A. Aneesh, *Global Labor: Algocratic Modes of Organization*, 27(4) SOCIOLOGICAL THEORY, 347 (2009).

imperatives programmed into the algorithms, which replace the traditional external schemes carried out by managers.

Amazon Mechanical Turk provides one example of such automatic management.¹⁰⁵ Built into the code are easy filtering criteria for selection of workers, performance assessment of their work, and the provision of incentives, whether positive or negative. Significantly, communication and dispute resolution are almost entirely absent from automatic management systems. Communication and dispute resolution systems are neither time nor cost-efficient for the employer. As noted by one task assigner, “the time spent looking at the email costs more than what you paid them [the worker]”¹⁰⁶

Uber also embraces the idea of automatic management.¹⁰⁷ Rather than conduct background checks, having a dispatch system, or spot checks by supervisors, Uber has essentially outsourced its quality control to its passengers.¹⁰⁸ Upon the completion of a ride, passengers are asked to rate their driver on a scale of one to five, with five stars as the best score. The ratings are then averaged in order to provide a composite score. If a driver has their customer satisfaction rating fall below a certain average, they can no longer sign in to the app. They are essentially booted off Uber and can no longer sign in. Currently the threshold for being cut off is high, approximately 4.7 out of five stars.¹⁰⁹ Some have alleged that these ratings could be reflecting racial or religious bias, whether conscious or unconscious and are problematic as such.¹¹⁰ In fact, the idea of the automatic deactivation or “firing by algorithm” has proven to be so unpopular with drivers that the recent Lyft settlement addressed it. One major point of the settlement in *Cotter v. Lyft* was that drivers received the right to an arbitration hearing before their dismissal. No longer can Lyft

¹⁰⁵ Lily Irani & Six Silberman, *Turkopticon: Interrupting Worker Invisibility in Amazon Mechanical Turk*, PROCEEDINGS OF THE SIGCHI CONFERENCE ON HUMAN FACTORS IN COMPUTING SYSTEMS, AIM, April 4, 2013.

¹⁰⁶ *Id.*

¹⁰⁷ Elizabeth Dwoskin, *At Uber, the Algorithm is more Controlling Than the Real Boss*, WALL ST. J. BLOG, Nov. 4, 2015, available at <http://blogs.wsj.com/digits/2015/11/04/uber-as-employer-the-boss-is-an-algorithm/>.

¹⁰⁸ Alex Rosenblatt & Luke Stark, *Uber's Driver: Information Asymmetries and Control in Dynamic Work*, *11, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2686227.

¹⁰⁹ *Id.* at 12 (noting that it is never explained to riders that a “4” is a dangerously low rating); Samantha Allen, *The Mysterious Way Uber Bans Drivers*, THE DAILY BEAST, Jan. 27, 2015, available at <http://www.thedailybeast.com/articles/2015/01/27/the-mysterious-way-uber-bans-drivers.html>.

¹¹⁰ Noah Zatz, *Beyond Misclassification: Gig Economy Outside Employment Law*, ON LABOR, Jan. 19 2016, available at <http://onlabor.org/author/noahzatzonlabor/>. There is also another phenomenon whereby drivers also rate their passengers. Perhaps unsurprisingly, some passengers are shocked to realize that they have low ratings, and some have wondered if this is due to racial or ethnic bias by drivers, or in some instances, a failure by women to “flirt” or act submissively. Nancy Leong, *Uber, Privacy, and Discrimination*, THE RIGHTS BLOG, April 20, 2013 available at <http://www.nancyleong.com/race-2/uber-privacy-discrimination/>.

dismiss workers by booting them from an app.¹¹¹

Understanding the growth of crowdwork also requires attention to a second trend: the expansion of precarious labor. By “precarious,” scholars are referring to labor that is more than just part-time and temporary. The notion encompasses a deeper undercutting of reliability and security in labor systems. Arne Kalleberg discusses precarious work as work that is uncertain, unpredictable, and risky.¹¹² Stone also refers to work that has no explicit promise of continuity. This notion of precarious work spans the range of occupations. This degradation of labor is felt by the full range of workers, from fast food service, to retail worker, to engineering consultants.

Kalleberg charts dramatic trends. Through precarious labor systems, we are seeing an increasing likelihood of unemployment, a growth of general job insecurity, expanding contingent and nonstandard work, and risk-shifting (that is, the transfer of labor expenses like health insurance and pensions from the employer to the employee). Impacts on the daily lives of workers can be problematic. For working parents, the rise of “just in time” scheduling means difficulty in arranging childcare.

Furthermore, precarious labor can put workers in a trap: while a worker might need an extra job to survive, having a second job means that the scheduling may get a worker fired from the first.¹¹³ Precarious labor has been particularly pernicious in service and retail jobs where women and people of color predominate. However, one of the important markers of precarious labor is how it is moving up the occupational ladder. Increasingly, jobs in knowledge work and information are experience precarity as well, which leads to our next point.

Micro labor is identified for its small scope, short duration, tiny output, and limited remuneration. At the same time, it is characterized by an opposing feature: massive scale. Employees doing tiny jobs are being hired and aggregated in huge numbers. For employers, the gain is substantial productivity out of legions of low-paid micro-workers. For employees, however, their livelihoods are increasingly dependent on searching and carrying out tiny tasks. Promises of micro labor are enticing:

¹¹¹ Of course, establishing industrial due process does undercut the idea that Lyft drivers are independent contractors, and regardless of what the settlement says, another governmental or regulatory agency could decide that these workers are employees, notwithstanding the settlement.

¹¹² Arne L. Kalleberg, *Precarious Work: Insecure Workers: Employment Relations in Transition*, 74 AM. SOCIOLOGICAL REV. 1 (2009).

¹¹³ LINDA TIRADO, *HAND TO MOUTH: LIVING IN BOOTSTRAP AMERICA* (2014) (describing challenges of working multiple jobs with precarious hours and schedules).

The work will come to you, via apps on your smartphone, making the process of finding work as easy as checking your Twitter feed. Whatever you do, it will be your choice. Because you are no longer just an employee with set hours and wages working to make someone else rich. In the future, you will be your very own mini-business.¹¹⁴

Indeed, there are many advantages to crowdwork in terms of easy access, quick turnaround, and flexible scheduling.¹¹⁵

In fact, these trends in crowdwork represent a new phase in employment. Table 2 illustrates the digital transformation of work more completely. Spinning off of the classic model of “industrial” employment, the information society has spurred not just the one additional stage, but a third, focused on crowdwork. This “crowdwork” system of employment is focused on precariousness, completion of small discrete tasks (microlabor) and promises of job flexibility.

**Table 2. Transformation of Employment Systems:
Industrial, Digital, Crowdwork¹¹⁶**

Features of Job	Employment Systems		
	Industrial	Digital	Crowdwork
Training	Firm-Specific	General	None
Structure of Tasks	Jobs, Narrowly-defined	Projects, Broadly-defined	Tasks, Micro-defined
Location of Work	Employer’s Office	Variable, Often the Worker’s Home	Variable, Often Online or the Task-Poster’s Home, Office, Etc.
Duration of Work	Employee’s Lifetime	Weeks, Months, Years	Hours, Minutes, Seconds
Decision-Making	Hierarchical Supervision and Evaluation	Peer Group	Automatic Management
Authority Relations	Top-Down, Command and Control	Bounded Discretion	Automatic Management

¹¹⁴ Kessler at 2.

¹¹⁵ Indeed, Means & Seiner, *supra* note [] at FN [] comb through many company websites and reproduce their promises of flexibility for workers. Unfortunately, Means & Seiner advocate only using flexibility to determine independent contractor status without looking at the other side of the coin, i.e. precarious work.

¹¹⁶ Elements of the first two columns are adapted and elaborated from Stone, *supra* note [] at 114. Column three is the author’s contribution.

Security	Of Job	Of Employability (i.e., gaining portable skills for future jobs)	Little to None
Remuneration	Longevity-linked	Market-based	Piece rate / Pay as you go
Career Benefits	Lifetime Tenure	Training	Flexible scheduling
Promises by Employer	Opportunities for Promotion	Forming Networks	Be your own mini-business; Freedom from wage labor; Work will come to you via your cell phone
Due Process	Collective Bargaining and Grievance Arbitration	Dispute-Resolution Procedures for Individual Fairness Claims	Little to None

Interest in collective efforts such as prediction markets,¹¹⁷ the use of spare computer cycles to search for intelligent life in the universe, and collective efforts like Wikipedia began to grow in the early 2000s.¹¹⁸ The crowdwork model had its genesis in approximately 2005 with the spread of mobile computing and the emergence of prosumer websites where collective communities created goods that they would then purchase.¹¹⁹ The “official” crowdwork platform for the Mechanical Turk was launched in 2007.

There are fundamental differences between these models in the construction of the labor and its conditions. While the industrial model had a modicum of stability and secure remuneration, and arguably the digital model had some of these features as well, the crowdwork model is marked by rapid job fluctuation, decreasing authority of worker, a decrease in skill required and along with it decreasing remuneration. The impact of precarity, especially within the context of information technology, is striking in crowdwork. If the digital era broke schedules down into part-time or project-based shifts, crowdwork breaks those schedules down even further into the micro-level. It moves from “project” based work (with coherent aims and stages) occurring over a

¹¹⁷ See generally MICHAEL ABRAMOWITZ, PREDICTOCRACY (2007); Miriam A. Cherry & Robert L. Rogers, *Prediction Markets and the First Amendment*, 2008 U. ILL. L. REV. 833 (2008).

¹¹⁸ YOCHAI BENKLER, THE WEALTH OF NETWORKS 9 (2006).

¹¹⁹ The portmanteau “prosumer” is comprised of the words producer and consumer. It is a new business model that suggests that those that buy also have role in the creation of the item they purchase. Howe, *supra* note [], describes the growth of Threadless, a T-shirt company built on a prosumer model. Community members would enter contests to design shirts, and the ones with the most votes were then produced and sold.

duration of weeks, months, or years, into “task” based work (the purpose of which may not ever be explained to workers) occurring in just hours, minutes, or seconds. Micro labor is described as “taking the division of labor to once-unthinkable extremes.”¹²⁰

Furthermore, some of the advantages of the digital era are even weaker or non-existent in the “crowdsourcing” system. No longer are there investments in employees for increased training, skills acquisition, or networking opportunities. No longer is there any security of stable or predictable work, not to mention a living or even, in some as alleged in legal complaints, a minimum wage. Through automatic management, there is little employee discretion over tasks, and almost no communication with an actual supervisor who might train or coach the worker to improve. Through automatic management, there are few requirements or systems of due process. These are part of what sociologists have termed “bad jobs”: no training, no advancement, low pay, and no job security.¹²¹

Further, many forms of crowdwork require prior ownership of major equipment or property as a prerequisite for the job (a car to provide rides, an apartment to rent out, a private Internet connection, as examples). In applying for a job, one may experience many immediate rejections. A worker may have difficult odds in terms of facing a large number of similar workers with the same skillset. They may also see many posts by prospective employers that only want skills that are specialized or rare. Rejection rates are high – the journalistic account of her crowdwork noted that her success rate in obtaining tasks was only one in six.¹²²

There is temporal chaos and pressure as well: Tasks can be cancelled while a worker is in the midst of completion. In those instances, the requester typically does not pay. Rather, the worker must eat the cost. Other times, tasks can get double-booked, as they are filled automatically across websites that lack coordination. Even if a worker receives a full day’s schedule of jobs, sometimes the commute between them, which is unpaid, subtracts from net wages. Added to this is the competitiveness and surveillance in the crowdwork model. Workers have to achieve high ratings, which are posted on the website. High ratings are not enough in isolation, rather their scores are ranked, ordered, and the workers are

¹²⁰ Glazer, NYT 2011

¹²¹ Francois Carre, et al., *Job Quality: Scenarios, Analysis and Interventions* in ARE BAD JOBS INEVITABLE? TRENDS, DETERMINANTS, AND RESPONSES TO JOB QUALITY IN THE TWENTY-FIRST CENTURY (EDS. WARHURST, ET AL.) 2 (2012).

¹²² Sarah Kessler, *Pixel and Dime: On (Not) Getting By in the Gig Economy*, FAST COMPANY, Mar. 18, 2014, available at <http://www.fastcompany.com/3027355/pixel-and-dime-on-not-getting-by-in-the-gig-economy>.

expected to out-achieve each other. Workers also spend significant time searching for jobs, finding and applying for each task, and do so quickly so as to beat out colleagues working for the same website. As Kessler summarizes: “I’m essentially competing for every hour of my employment.”¹²³

In many ways then, crowdsourcing is a return to industrial (or even pre-industrial in terms of its pay by the piece and work at home) systems. Crowdwork features highly rigid control systems and deskilled work. While some observers describe that platform sites are efficient in matching employers and workers, others point out that they drive down wages. At the end of her run, Kessler earned on average \$1.94 an hour on AMT (5 cents for every 55 clicks in labeling images); and a total of \$166 a week on TaskRabbit, which was slightly above the median rate for other workers in her neighborhood on this website.¹²⁴ Meanwhile, crowdworkers must rely on meager wages to make ends meet without traditional employee benefits such as sick days or health insurance.

Ideally, technology should be a tool to assist workers, making work easier and safer while boosting productivity. The logical outcome of technology would be less time spent on work, coupled with better and more satisfying jobs. “Bad jobs” – those that are dirty, dangerous, and low-paying should increasingly be automated. The work week should decrease and the gains from productivity should raise the average worker’s standard of living. Unfortunately to date, that is not the story of crowdwork. In fact the last few years have seen rising economic inequality, a bimodal distribution of good jobs and income, and bad jobs and low pay, with no reduction in the average work week.¹²⁵ Although this is a complex phenomenon, it is safe to say that the productivity gains of technology are unevenly distributed.¹²⁶ Stone’s intermediate digital model may have lacked job security, but at the least knowledge and “employability” played an important role in knowledge economy jobs.

The crowdwork model may be more of a throwback to the industrial model, incorporating the efficiency and control of automatic management, without the industrial model’s job security or stability. But this result is not inevitable. Technology should help us improve work systems and work design, not facilitate a race to the bottom of deskilling of work and lowered wages. So the real question with crowdwork and the

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ THOMAS PIKETTY, *CAPITAL IN THE TWENTY-FIRST CENTURY* (2013).

¹²⁶ See Carre, *supra* note [], at 5 (discussing potential scenarios including widening gap between good and bad jobs).

on-demand economy is not whether the workers fall into a particular doctrinal category of “employee” or “independent contractor,” as the current legal cases have structured the question. Rather the question is whether the crowdwork model that the on-demand economy moves us into is a sustainable and desirable future of work.

III. Conclusion

In this article, I hope to have first given the reader a timely update regarding labor litigation in the on-demand economy litigation. Currently these lawsuits mainly focus on the gateway question: Are the gig economy workers “employees”? As of this writing, no clear consensus seems to have emerged, and the tests that would be applied historically are malleable. The litigation chart that was herein produced shows that the issues have a similar and remarkable homogeneity even when looking at forms of work as diverse as home repair, driving, and grocery delivery.

The second part of the paper sought to take a step back and analyze the major issues that are lurking behind the cases and the doctrinal labels. Crowdwork represents a new phase in the digital transformation of work. Situated as it is in the cross-current of precarious work, automatic management, and deskilling, the way crowdwork is currently formulated presents a bleak and disturbing picture. But by recognizing the factors that lead these to be considered “bad jobs,” perhaps we can then begin the work that needs to be done to avoid this outcome.