THE RISE OF THE "JUST-IN-TIME WORKFORCE": ON-DEMAND WORK, CROWDWORK, AND LABOR PROTECTION IN THE "GIG-ECONOMY"

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I. INTRODUCTION

This Article provides an analytical overview of the labor implications of the so-called "gig-economy." The gig-economy is usually understood to include chiefly two forms of work: "crowdwork" and "work-on-demand via app."[1] The first term is usually referred to working activities that imply completing a series of tasks through online platforms.[2] Typically, these platforms put in contact an indefinite number of organizations and individuals through the internet, potentially allowing connecting clients, and workers on a global basis. "Work-on-demand via app," instead, is a form of work in which the execution of traditional working activities such as transport, cleaning, and running errands, but also forms of clerical work, is

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1. *See* Sarah Kessler, *The Gig-Economy Won't Last because It's Being Sued to Death*, FAST CO., Feb. 17, 2015, http://www.fastcompany.com/3042248/the-gig-economy-wont-last-because-its-being-sued-to-death; Carolyn Said, *Growing Voices Say Gig Workers Need Protections, Benefits*, SFGATE, Feb. 17, 2015, http://www.sfgate.com/business/article/Growing-voices-say-gig-workers-need-protections-6079992.php; Rebecca Smith & Sarah Leberstein, *Rights on Demand: Ensuring Workplace Standards and Worker Security In the On-Demand Economy* (New York, National Employment Law Project, 2015). For a broader analysis of digital labor, see also DOMINIQUE CARDON & ANTONIO CASILLI, QU'EST-CE QUE LE DIGITAL LABOR? (Bry-sur-Marne, INA Éd., 2015).

2. A ground-breaking contribution in this respect is the piece of John Howe, *The Rise of Crowdsourcing*, WIRED MAG., June 2006, http://www.wired.com/2006/06/crowds/. This Article will only focus on "external" crowdwork. It will not, instead, address "internal" crowdwork. i.e., when business set up crowdsourcing platforms on their intranet for their internal workforce to contribute to projects as a crowd. *See* David David Durward et al., *Crowd Work*, BUSN. & INFO. SYSTS. ENGINEERING (2016). On external crowdwork, in the scientific literature, see Birgitta Bergvall-Kåreborn & Debra Howcroft, *Amazon Mechanical Turk and the Commodification of Labour*, 29 NEW TECH., WORK & EMP. 213 (2014); Miriam Cherry, *A Taxonomy of Virtual Work*, 45 GA. L. REV. 951 (2011); EUROFOUND, NEW FORMS OF EMPLOYMENT (2015); Alek Felstiner, *Working the Crowd: Employment and Labor Law in the Crowdsourcing Industry*, 32 BERKELEY J. EMP. & LAB. L. 143 (2011); Six Silberman & Lili Irani, *Operating an Employer Reputation System: Lessons from Turkopticon, 2008–2015*, 37 COMP. LAB. L. & POL'Y J (2016).

channeled through apps managed by firms that also intervene in setting minimum quality standards of service and in the selection and management of the workforce.[3]

Estimating the number of workers in the gig-economy is difficult. Businesses are sometimes reluctant to disclose these data and, even when figures are available, it is hard to draw a reliable estimate because workers may be registered and work with several companies in the same month, week, or even day.[4] Recently collected data, however, show that this is clearly a non-negligible phenomenon.[5]

This Article analyzes opportunities and risks of the gig-economy from the perspective of labor protection. Part II first discusses the case of jointly analyzing crowdwork and "work-on-demand via app." Whilst these forms of work present significant differences among themselves, they also share non-negligible similarities. It is indeed highlighted how, whereas on the one hand they can provide a good match of job opportunities, allow flexible working schedules and potentially contribute to redefining the boundaries of the firm, on the other hand they pave the way to a severe commodification of work. The theoretical implications of this commodification and also its immediate practical consequences are discussed as well as the risk of work being hidden under catchphrases such as "gigs," "tasks," "rides" etc. Part III argues that the gig-economy should not be seen as parallel and watertight dimension of the labor market with structurally separated feature and needs. Some of the

3. *See* Antonio Aloisi, *Commodified Workers: A Case Study Research on Labor Law Issues Arising from a Set of "On-Demand/Gig Economy" Platforms*, 37 COMP. LAB. L. & POL'Y J (2016); Emanuale Dagnino, *Uber Law: Prospettive Giuslavoristiche Sulla Sharing/On-Demand Economy, Adapt Labour Studies* (Bergamo, Adapt, 2015), http://www.bollettinoadapt.it/uber-law-prospettive-giuslavori stiche-sulla-sharingon-demand-economy/; Brishen Rogers, *The Social Costs of Uber*, 82 U. CHI. L. REV. DIALOGUE 85 (2015).

4. 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.

5. Smith & Leberstein, *supra* note 1 report this data for the principal platforms and apps. Please see this publication for original references.

Principal Platforms and Apps in the Gig-Economy

Name	Field	Size of Workforce	Operating Areas
Uber	Transportation	160,000	International
Lyft	Transportation	50,000	United States
Sidecar	Transportation	6000	Major U.S. Cities
Handy	Home Services	5000	United States
Taskrabbit	Home Services	30,000	International
Care.com	Home Services	6,600,000	International
Postmates	Delivery	10,000	United States
Amazon Mechanical Turk	Crowdwork	500,000	International
Crowdflower	Crowdwork	5,000,000	International
Crowdsource	Crowdwork	8,000,000	International
Clickworker	Crowdwork	700,000	International

relevant unresolved questions, such as employment status and the potential misclassification of employment relationships, extend indeed well beyond the boundaries of the gig-economy and, as such, it is preferable to examine them taking into account broader phenomena such as the casualization of the workforce, the informalization of the formal economy and the so-called "demutualization of risk" in modern labor markets. It will be highlighted that forms of work in the gig-economy share several dimensions and issues with other non-standard forms of employment as they were recently described by the International Labour Office.[6] Parts IV and V investigate some of the specific issues concerning misclassification of employment relationships that surround the gig-economy; in Part IV, some clauses contained in the terms and conditions of crowdwork platforms and work-on demand apps will be reviewed, as they show some inconsistencies with the independent-contractor status of workers and with the platforms' and apps' purported role of mere facilitators of the business transactions between workers and customers; Part V argues that some practices that are widespread in the sector such as giving workers stringent instructions about performance of the service that can also be monitored through customers' reviews and ratings and enforced through deactivation of workers' account and, therefore, termination of their relationship, may be compatible with fulfilling tests of employment status, including the "control test." On the basis of this analysis, Part VI reviews critically the proposal of introducing an intermediate category of workers, between employees and independent contractors to whom to partially extend labor protections; on the basis of a comparative analysis of existing regulation governing similar categories, it is argued that this option would not solve most of the labor issues surrounding the gig-economy and would indeed increase complexity and uncertainty for businesses and workers in this sector. Part VII concludes, by suggesting initial directions for policy and actions for labor market actors.

II. THE "GIG-ECONOMY," CROWDWORK, AND "WORK-ON-DEMAND VIA APP": RISKS AND OPPORTUNITIES FOR LABOR PROTECTION

As mentioned in the Introduction, this Article addresses the labor dimensions of the gig-economy, understood as including both crowdwork, and "work-on-demand via app." Crowdwork is work that is executed through online platforms that put in contact an indefinite number of organizations,

6. ILO, NON-STANDARD FORMS OF EMPLOYMENT: REPORT FOR DISCUSSION AT THE MEETING OF EXPERTS ON NON-STANDARD FORMS OF EMPLOYMENT (Feb. 16-19, 2015); ILO, CONCLUSIONS OF THE MEETING OF EXPERTS ON NON-STANDARD FORMS OF EMPLOYMENT, Governing Body (323d Sess., Mar. 12-27, 2015), *available at* http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_354090.pdf.

businesses, and individuals through the internet, allowing connecting clients and workers on a global basis. The nature of the tasks performed on crowdwork platforms may vary considerably. Very often it involves "microtasks": extremely parceled activities, often menial and monotonous, which still require some sort of judgement beyond the understanding of artificial intelligence (e.g., tagging photos, valuing emotions, or the appropriateness of a site or text, completing surveys).[7] In other cases, bigger and more meaningful works can be crowdsourced such as the creation of a logo, the development of a site or the initial project of a marketing campaign.[8]

In "work-on-demand via app," jobs related to traditional working activities such as transport, cleaning and running errands, but also forms of clerical work, are offered and assigned through mobile apps. The businesses running these apps normally intervene in setting minimum quality standards of service and in the selection and management of the workforce.

These forms of work, of course, present some major differences among each other, the more obvious being that the first is chiefly executed online and principally allows platform, clients, and workers to operate anywhere in the world, whilst the latter only matches online supply and demand of activities that are later executed locally. An obvious consequence is that this matching can only occur on a much more local basis than what happens with crowdwork.[9]

Accordingly, grouping these two different parts of the gig-economy in a common analysis can be slippery. Nonetheless, various arguments also exist to treat them jointly. First and foremost, crowdwork and "work-on-demand via app" are not monolithic or homogenous concepts in themselves. Crowdwork platforms, for instance, employ different methods for adjudicating tasks and for payment.[10] Some of them may launch competitions with more persons working simultaneously on the same task and the client selecting and paying only the best product. Some may operate on a first-come-first-served basis. In some cases, no relationship exists between the client and the worker: she executes the task and is paid by the platform, which then provides the result to the client. In other cases, the platform acts more

7. On this aspect, see LILI IRANI, JUSTICE FOR "DATA JANITORS" (2015), *available at* www.publicbooks.org/nonfiction/justice-for-data-janitors.

8. Alan Kittur et al., *The Future of Crowd Work* (Paper Presented at the 16th ACM Conference on Computer Supported Coooperative Work (CSCW 2013), Feb. 23-27, 2013), *available at* http://hci.stanford.edu/publications/2013/CrowdWork/futureofcrowdwork-cscw2013.pdf; Jan Marco, Leimeister & David Durward, *New Forms of Employment and IT – Crowdsourcing* (Paper Presented at the IV Regulating for Decent Work Conference, ILO, Geneva, July 8-10, 2015), *available at* http://www.rdw2015.org/download; WORLD BANK, THE GLOBAL OPPORTUNITIES IN ONLINE OUTSOURCING (2015).

9. *See* Steven Greenhouse, *Uber: On the Road to Nowhere*, AM. PROSPECT (Dec. 7. 2016), http://prospect.org/article/road-nowhere-3; Aloisi, *supra* note 3; Singer, *supra* note 4.

10. EUROFOUND, *supra* note 2; URSULA HUWS, ONLINE LABOUR EXCHANGES, OR "CROWD-SOURCING": IMPLICATIONS FOR OCCUPATIONAL SAFETY AND HEALTH. REVIEW ARTICLE ON THE FUTURE OF WORK (EU-OSHA, June 11, 2015).

as a facilitator of the relationship between clients and workers.[11] Some platforms set minimum compensation for certain tasks whilst other let the compensation be set by their requester.[12] Moreover, as already mentioned, the nature and the complexity of the tasks may vary significantly, also within the same platform.

Also work-on-demand apps are not homogenous: the most relevant distinction can be drawn between apps that match demand and supply of different activities such as cleaning, running errands, home-repairs, and other apps that offer more specialized service such as driving, or even some forms of clerical work such as legal services or consultancy.[13]

All these differences are not only technical but also bear important consequences on the proposal, acceptance, and execution of the contracts between the parties involved.[14] The combination of proposal, acceptance, and execution may affect other aspects such as the moment and place in which the contract is legally deemed to be concluded, which, in turn, may trigger important consequences on the applicable legislation. In some jurisdictions, the structure of the contracts concluded via the platforms or using the apps could also trigger the application of specific regulatory regimes governing contractual entitlements, obligations, and liabilities.

Despite these dissimilarities, however, these forms of work share several features that make a common analysis opportune. First and foremost, they are both enabled by IT and make use of the internet to match demand and supply of work and services at an extremely high speed. This, in general, allows minimizing transaction costs and reducing frictions on markets. The rapidity within which job opportunities are offered and accepted and the great accessibility to platforms and apps for workers makes it possible to accede to vast pools of people available to complete tasks or execute chores in a precise moment of time.[15] A considerable part of this people may be formed by persons that make use of a particular platform or app in their spare time or to maximize the use of an underutilized asset, for instance by offering rides to passengers while commuting to and fro work. In other cases, however, the compensation received from one or more companies in the gig-economy may

11. 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.

12. Some examples are provided in EUROFOUND, *supra* note 2. *See also* Jeremias Prassl & Martin Risak, *Uber, Taskrabbit, & Co.: Platforms as Employers? Rethinking the Legal Analysis of Crowdwork*, 37 COMP. LAB. L. & POL'Y J. (2016).

13. *See* Aloisi, *supra* note 3.

14. Risak & Warter, *supra* note 11.

15. *See* A LABOUR MARKET THAT WORKS: CONNECTING TALENT WITH OPPORTUNITY IN THE DIGITAL AGE (2015).

represent the main or sole source of income for the workers.[16] In any case, these work practices show the potential of resettling the boundaries of enterprises and challenging the current paradigm of the firm. In Coasian terms, they facilitate a further reshaping of "market" and "hierarchy" patterns,[17] in addition to the already known "fissured workplace"[18] and "hierarchical outsourcing" discourses.[19] In fact, both crowdwork and "work-on-demand via app" allow for a far-reaching "personal outsourcing" of activities to individuals rather than to "complex businesses." This, as it will be shown below, grants even more leverage to standardizing terms and conditions of contracting out and assigning work whilst keeping a considerable control of business processes and outputs.

In fact, in the "gig-economy" technologies provide access to an extremely scalable workforce. This, in turn grants unheard levels of flexibility for the businesses involved.[20] Workers are provided "just-in-time" and compensated on a "pay-as-you-go" basis; in practice they are only paid during the moments the actually work for a client. There is no better way to describe this model of work organization than using the words of the CEO of CrowdFlower, a company engaging in crowdwork:

> Before the Internet, it would be really difficult to find someone, sit them down for ten minutes and get them to work for you, and then fire them after those ten minutes. But with technology, you can actually find them, pay them the tiny amount of money, and then get rid of them when you don't need them anymore.[21]

Or, to put it in another way, quoting an expression used by the CEO of Amazon, which owns the Amazon Mechanical Turk, one of the most famous

16. *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) (Forty percent of respondents to the ILO survey carried out by Berg reported that they rely on crowdwork as their main source of income.). Some data on Uber are provided in Jonathan Hall & Alan Krueger, *An Analysis of the Labor Market for Uber's Driver-Partners in the United States* (Jan. 15, 2015), *available at* https://s3.amazon aws.com/uber-static/comms/PDF/Uber_Driver-Partners_Hall_Kreuger_2015.pdf; see also, for anecdotal evidence, Kessler, *supra* note 1; Singer, *supra* note 4.

17. *See* Ronald H. Coase, *The Nature of the Firm*, 4 ECONOMICA 386 (1937); Ronald H. Coase, *The Problem of Social Costs*, 3 J. L. & ECON. 1 (1960); *see also* Oliver E. Williamson, *The Economics of Organizations: The Transaction Cost Approach*, 87 AM. J. SOCIOLOGY 548 (1981) and, more recently, see Ronald J. Gilson et al., *Contracting for Innovation: Vertical Disintegration and Interfirm Collaboration*, 109 COLUM. L. REV. 431 (2009).

18. *See* DAVID WEIL, THE FISSURED WORKPLACE (2014) and the collection of essays published on this book and the related issues in *Symposium: The Fissured Workplace*, 37 COMP. LAB. L. & POL'Y J. 3-220 (2015).

19. See also, for further references, Ulrike Muehlberger, *Hierarchies, Relational Contracts and New Forms of Outsourcing* (ICER Working Paper No. 22/2005).

20. However, for a comparison of crowdwork with pre-and proto-industrial arrangements, such as the "putting-out system" and the *Verlagssystem*, see Matthew W. Finkin, *Beclouded Work, Beclouded Workers in Historical Perspective*, 37 COMP. LAB. L. & POL'Y J. (2016) and Miriam Cherry, *Beyond Misclassification: The Digital Transformation of Work*, 37 COMP. LAB. L. & POL'Y J. (2016).

21. Quoted by Moshe Z. Marvit, *How Crowdworkers Became the Ghosts in the Digital Machine*, NATION, Feb. 5, 2014, www.thenation.com/article/how-crowdworkers-became-ghosts-digital-machine/.

and used crowdwork platforms, these practices give access to "humans-as-a-service."[22] And, despite these quotations only refer to crowdwork, again, they also hold true for "work-on-demand via app." They also give the best explanation possible to why they deserve serious attention by labor researchers and institutions, governments, and society at large. "Humans-as-a-service" perfectly conveys the idea of an extreme form of commodification of human beings. Commodification and recommodification of workers, of course, are not confined to the gig-economy as they concern a much vaster part of the labor market. Nonetheless, some of the features of the gig-economy can significantly exacerbate the effects of this commodification for a series of reasons.[23]

First, transactions that only occur virtually, such as it mainly happens in crowdwork, contribute to hide human activities and workers that structurally operate at the other side of a screen.[24] Almost no human contact happens in most crowdwork transactions: this contributes to the creation of a new group of "invisible workers," yet another phenomenon that is by no means limited within the boundaries of the gig-economy but is shared with other sectors, such as domestic work and home-work.[25] The risk, here, is that these workers are yet more invisible because they operate in a new fashion and through new technologies, something that is not normally associated with invisible work. Another serious risk is that the fact work is "supplied" through IT channels, being them online platforms or apps that match the demand and offer of physical chores, can "distort" the perception businesses and customers may have of these workers and significantly contribute to a perceived dehumanization of their activity.[26] This has both theoretical and practical implications.

From the theoretical point of view, the risk is that these activities are not even recognized as work. Indeed, they are often designated as "gigs," "tasks,"

22. *See* Lili Irani & Michael Six Silberman, *Turkopticon: Interrupting Worker Invisibility in Amazon Mechanical Turk* (Paper presented at the *SIGCHI Conference on Human Factors in Computing Systems*, Paris, Apr. 27-May 2, 2013), *available at* https://hci.cs.uwaterloo.ca/faculty/elaw/cs889/reading/turkopticon.pdf.

23. Bergvall-Kåreborn & Howcroft, *supra* note 2; Rogers, *supra* note 3.

24. Lili Irani, *Difference and Dependence among Digital Workers: The Case of Amazon Mechanical Turk*, 114 S. ATLANTIC Q. 225 (2015).

25. Risak & Warter, *supra* note 11, indeed, argue that crowdwork can be paralleled to homework and may fall into the definition of the ILO Home Work Convention, 1996 (No. 177). Indeed, this Convention encompasses provision of either a product or a *service*, by the relevant home-worker. The Convention, however, does not apply to persons that have "the degree of autonomy and of economic independence necessary to be considered an independent worker under national laws, regulations or court decisions" – the solution of the problems connected to employment status and its potential misclassification, described below in the text, will thus still be relevant.

26. See on this point, based on his personal work experience, 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.

"favors," "services," "rides," etc. The terms "work," "labor," or "workers" are very scarcely used in this context, and the very same catchphrase "gig-economy" epitomizes this, as the term is often used to indicate a sort of parallel dimension in which labor protection and employment regulation are assumed not to apply by default.

As already said, the practical consequences of concealing the "work" nature of these activities and their human components are also potentially detrimental. Workers that can be "summoned" by clients and customers at a click of their mouse or at a tap on their mobile, perform their task, and disappear again in the crowd or in the on-demand workforce materially risk being identified as an extension of an IT device or online platform. They could be expected to run as flawlessly and smoothly as a software or technological tool and then, if something goes amiss, they might receive worse reviews or feedbacks than their counterparts in other sections of the economy. This, in turn, might have severe implications on their ability to work or earn in the future as the possibilities to continue working with a particular app or to accede to better-paying jobs on crowdsourcing platforms are strictly dependent on the rates and reviews of past activities. Particularly for activities that are carried out in the physical world, this also requires a significant amount of "emotional labor": to show kindness and be cheerful with customers as this would likely affect the rating of one's work.[27] The technology-enabled possibility of receiving instant feedbacks and rates of workers' performance is pivotal in ensuring businesses both flexibility and control at the same time.[28] First of all, it reduces the need of internal performance-review personnel and mechanisms, contributing to keeping organizations lean. It also allows "shifting" or outsourcing a good deal of customer care to individual workers. In many circumstances, workers may also take the brunt for occasional disruption in the service that is not strictly dependent on their own performance. It is sufficient to think of a client of a car-hailing app that had to wait a long time before being able to find a driver on the app: the chance of them venting their frustration against the app by giving the individual driver a poor rate is far from remote.

The possibility of shifting risks and responsibilities to individual workers is of course not limited to these aspects. In the vast majority of cases, workers in the gig-economy are classified as independent contractors.[29] This

27. Josh Dzieza, *The Rating Game: How Uber and Its Peers Turned Us into Horrible Bosses*, VERGE (Oct. 28, 2015), http://www.theverge.com/2015/10/28/9625968/rating-system-on-demand-economy-uber-olive-garden.

28. 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/.

29. *See* 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); Risak & Warter, *supra* note 11; Smith & Leberstein, *supra* note 1.

allows shedding not only potential vicarious liabilities and insurance obligations toward customers but also a vast series of duties connected to employment laws and labor protections, including – depending on the jurisdiction – compliance with minimum wage laws, contributions to social security, antidiscrimination regulation, sick pay and holidays.[30]

The risks reported above are often said to be traded-off by workers with the flexibility connected to a self-employment status: there is no fixed working hours and workers are able to offer their activities on apps and platforms whenever they want.[31] The gig-economy, then, may enable workers to benefit from job opportunities that they might not be able to access otherwise and on a flexible-schedule basis, allowing to match work with the performance of other working, family-related, study, or leisure activities. Moreover, it may enhance the possibilities of moonlighting and, for jobs offered in the virtual world, it can offer the opportunity to earn some income to people that are home-bound for various possible reasons, for instance for disabilities.[32] This flexibility on the workers' side is often assumed to equate the undisputable flexibility the gig-economy generally affords to businesses.

However, despite the potential beneficial benefits of the gig-economy for the workers' welfare, also in terms of flexibility, these aspects should not be overestimated. Whilst it is certainly true that most jobs in the gig-economy come with a flexible schedule, this does not say really much on the overall sustainability of these arrangements: competition between workers, that in some cases is extended on a global dimension through the internet,[33] pushes compensations so down that people may be forced to work very long hours and to give up a good deal of flexibility in order to make actual earnings.[34] In addition, jobs may be posted or need to be executed chiefly at certain times of the day: this may significantly limit the flexibility in setting one's hours of work. Particularly when transactions involve parties in different geographical

30. Brishen Rogers, *Employment as a Legal Concept* (Temple Univ. Legal Studies Research Paper No. 2015-33), *available at* http://dx.doi.org/10.2139/ssrn.2641305.

31. *See* Sett Harris & Alan 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 (Dec. 21, 2015); Hall & Krueger, *supra* note 16; WORLD BANK, *supra* note 8.

32. *See* Berg, *supra* note 16.

33. Ajay Agraval et al., *Digitization and the Contract Labor Market: A Research Agenda* (NBER Working Paper 19525, 2013); Sara C. Kingsley et al., *Monopsony and the Crowd: Labor for Lemons?* (Paper presented at the *3rd Conference on Policy and Internet*, Oxford, Sept. 25-26, 2014), *available at* http://ipp.oii.ox.ac.uk/sites/ipp/files/documents/Monopsony_and_theCrowd_SCK_MLG_SS.pdf.

34. In addition, they might also spend a vast part of their time looking for jobs on platforms or carrying out unpaid preparatory activities to execute paid jobs, see Berg, *supra* note 16. *See* Miriam Cherry, *Working for (Virtually) Minimum Wage: Applying the Fair Labor Standards Act in Cyberspace*, 60 ALA. L. REV. 1077 (2009); Aloisi, *supra* note 3; EUROFOUND, *supra* note 2; Felstiner, *supra* note 2.

and time zones, such as it often happens in crowdwork, this may also require working at night or during unsociable hours.[35]

Needless to say, income stability remains a mirage for most of the workers in the gig-economy: as praised in the words of one of the businesses' managers quoted above, one of the chief sources of flexibility is exactly the possibility to hire people and "fire them after . . . ten minutes." This is all the more serious in countries where basic social instruments such as health insurance and pension plans are mainly provided by employers to regular employees, leaving the rest of the workforce uncovered.[36] The problem is even more widespread if we take into account other social entitlements such as unemployment benefits: in jurisdictions where they are reserved to formerly "employed" persons, most workers that are allegedly self-employed in the gig-economy risk to find themselves excluded from coverage.[37]

III. NOT A PARALLEL UNIVERSE: THE GIG-ECONOMY, BROADER LABOR MARKET TRENDS, AND NONSTANDARD-FORMS OF EMPLOYMENT

The problem of exclusion from labor and social protection coverage, of course, is by no means confined to the gig-economy and actually allows reframing some of the narrative surrounding it within a broader picture. It has almost become commonplace that the gig-economy poses issues to policy makers that are totally unheard-of before and unique thereto. Indeed, whilst it is true that some of its dimensions are peculiar, and that the chief role of technologies in matching demand and supply of work is certainly one of those, it would be wrong to assume that the gig-economy is a sort of watertight dimension of the economy and the labor market. Nor would it be correct to take for granted that existing labor market institutions are entirely outdated in its respect or unsuitable to govern it and that therefore we would necessarily have to abandon existing institutions and regulation and to introduce new, and possibly "lighter," ones to keep pace with the challenges presented by the gig-economy.[38] The fact is, instead, that extreme flexibility, shifting of risks to workers and income instability have long become a reality

35. Neha Gupta et al., *Understanding Indian Crowdworkers* (Paper presented at *17th ACM Conference on Computer Supported Coooperative Work (CSCW 2014)*, Baltimore, Maryland, Feb. 15-19, 2014), *available at* http://www.cs.nott.ac.uk/~pszaxc/work/CSCW_2014b.pdf; *see* Singer, *supra* note 4.

36. *See* Berg, *supra* note 16, discussing how less than 10% of U.S. respondents to the survey on crowdworkers report contributing to social security.

37. For instance, in Florida, the Department of Economic Opportunity, Reemployment Assistance Appeals, *Rasier LLC v. State of Florida, Department of Economic Opportunities* (Sept. 30, 2015), reversed a previous administrative decision that had recognized an Uber driver to be an employee for the purpose of qualification for unemployment benefits.

38. For a confutation of some of these arguments see Benjamin Sachs, *Do We Need an "Independent Worker" Category?*, ON LABOR (Dec. 8, 2015), http://onlabor.org/2015/12/08/do-we-need-an-independent-worker-category/; *see also* Rogers, *supra* note 30.

for a portion of the workforce in current labor markets that goes far beyond the persons employed in the gig-economy. It can indeed be argued that forms of work such as crowdwork and "work-on-demand via app" are part of a much vaster trend towards the casualization of labor.[39]

Developed economies are experiencing the rise of various work arrangements such as zero-hour and on-call contracts that afford the possibility to "hire and fire" or, more precisely, to mobilize and demobilize a significant portion of the workforce on an on-demand and "pay-as-you-go" basis.[40] In turn, extreme forms of casualization are part of a process of "demutualization of risks" that has taken place in a great number of developed and developing countries in recent decades and that is also a consequence of the increased recourse to nonstandard forms of work in numerous labor markets.[41] In particular, this demutualization can also occur through the use of "disguised employment relationships," or sham self-employment, in order to circumvent labor and social security regulation or fiscal obligations that may be attached exclusively to employment within a given jurisdiction.[42] Disguised employment can thus also contribute to the informalization of parts of the formal economy, by allowing a portion of the workforce to be unduly excluded from labor and social protection. All the more, the related savings in costs can significantly result in unfair competition with law-abiding businesses and, ultimately, spur social dumping toward worse terms and conditions of work. Despite being often overlooked, these more general issues are extremely relevant in the analysis of the gig-economy. And indeed, one of the chief legal issues that concern it, one that has already triggered major litigation in this field, is precisely the classification of the workers involved as employees or independent contractors. This also adds to the argument that the gig-economy should not be regarded as a separate silo of the labor market because the problem of

39. See the articles published in *Symposium: Pathway from Casual Work to Economic Security: Canadian and International Perspectives, Edited by Paul Bowles & Fiona Macphail*, 88 SOC. INDICATORS RES. 1-213 (2008); *see also* Iain Campbell, *Casual Work and Casualisation: How Does Australia Compare?*, 15 LAB. & INDUS. 85 (2004); Janine Berg & Valerio De Stefano, *Beyond "Casual Work": Old and New Forms or Casualization in Developing and Developed Countries and What to Do about It* (Presentation at the *IV Regulating for Decent Work Conference*, ILO, July 8-10, 2015), *available at* http://www.rdw2015.org/download.

40. *See* Martine Humblet, *Horaires de Travail Variables et Imprévisibles : Contrats Zéro Heure et Autre Formes de Travail sur Appel* (INWORK Policy Brief, Geneva, ILO, forthcoming); CASUALIZATION AT WORK: INCLUDING ZERO HOURS CONTRACT – A GUIDE FOR TRADE UNION REPS (Labour Research Department, 2014) [hereinafter CASUALIZATION AT WORK]; EUROFOUND, *supra* note 2; Valerio De Stefano, *Casual Work Beyond Casual Work in the EU: The Underground Casualization of The European Workforce - and What To Do About It*, 2016 EUR. LAB. L.J. (forthcoming).

41. *See* MARK FREEDLAND & NICOLA KOUNTOURIS, THE LEGAL CONSTRUCTION OF PERSONAL WORK RELATIONS (2011).

42. See data provided in EUROFOUND, *Self-Employed or Not Self-Employed? Working Conditions of "Economically Dependent Workers"* (Background paper, 2013) and in Organisation for Economic Co-Operation and Development (OECD), OECD EMPLOYMENT OUTLOOK (Paris, 2014).

misclassification extends much beyond its realm. In fact, in the Unites States, the Department of Labor recently issued guidelines to address this general problem in the U.S. labor market.[43]

Problems related to disguised employment relationships, then, link aspects of the gig-economy with broader trends in labor markets such as the increase in recourse to nonstandard forms of employment in recent decades.[44] The ongoing debate on nonstandard work is extremely vast and it is not possible to go through it here.[45] For the purpose of this Article, it is sufficient to notice that there is not a fixed or official definition of what nonstandard employment is. A recent high-level discussion on the topic was held at the International Labour Office (ILO), where a Tripartite Meeting of Experts on Non-Standard Forms of Employment reached some significant conclusions on the topic, later endorsed by the Governing Body of the ILO. According to the conclusions, nonstandard forms of employment "include, among others, fixed-term contracts and other forms of temporary work, temporary agency work and other contractual arrangements involving multiple parties, disguised employment relationships, dependent self-employment and part-time work."[46]

Workers in disguised employment relationships are arguably an important component of the nonstandard workforce.[47] It can thus be worthwhile reframing some of the labor-related issues of the gig-economy into a broader discourse on how to secure decent working conditions for nonstandard workers at large. Moreover, whilst disguised employment is one of the key aspects in the gig-economy, crowdwork and "work-on-demand via app" share several relevant dimensions with all the nonstandard forms of employment mentioned above. As already pointed out, these two forms of work present many points in common with casual work, an extreme form of temporary work. Very often, casual work takes the form of work on-demand

43. 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. DEP'T LAB. (July 15, 2015).

44. ILO, NON-STANDARD FORMS OF EMPLOYMENT, supra (n. 6).

45. See also, for further references, Zoe Adams & Simon Deakin, *Institutional Solutions to Inequality and Precariousness in Labour Markets*, 52 BRIT. J. INDUS. REL. 779 (2014); 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*); Jill Rubery, *Reregulating for Inclusive Labour Markets* (ILO Conditions of Work and Employment Series Working Paper No. 65, 2015) and the essays published in RETHINKING WORKPLACE REGULATION: BEYOND THE STANDARD CONTRACT OF EMPLOYMENT (Katherine V.W Stone & Harry Arthurs eds., 2013).

46. ILO, CONCLUSIONS OF THE TRIPARTITE MEETING OF EXPERTS ON NON-STANDARD FORMS OF EMPLOYMENT, *supra* note 6, at 50.

47. *See* WEIL, *supra* note 18; CASUALIZATION AT WORK, *supra* note 40.

with unpredictable working hours and unreliable source of income.[48] As already mentioned, in several developed countries, work relations are spreading whereby interaction between the parties can extend for a significant amount of time even if the contractual arrangement is concluded explicitly or implicitly for very short periods, very often weeks, days, or even hours, and the working activity is activated or deactivated depending on the employer's needs. In these cases, depending on the relevant national regulation and the parties' agreement, the worker may be obliged to accept the work at the employer's call.[49] This, however, is by no means always the case as in some forms of casual and on-call work the parties can agree that the worker is not required to accept work from the employer and the latter is not required to provide any work to the former: this occurs, for instance, for some on-call arrangements in Italy and some zero-hours arrangements in the United Kingdom.[50]

Workers in the gig-economy have neither to show up for work regularly (in their case, this would be done by acceding to the platform or activating the app) nor to accept jobs or calls. However, when they do show up for work they are usually bound to follow rules and guidelines set out by platforms and apps and, in some cases, also to accept a certain percentage of jobs coming through the app.[51] They are generally classified as independent contractors and, as such, they have no access to the vast bulk of employment protection. Even if they were classified as employees, however, the intermittent nature of their activity could be an obstacle to accede to important employment or social rights, such as maternity leave, paid holidays, full unemployment benefits, when these rights are dependent upon a minimum length of service. Unless they are able to establish an umbrella relationship "connecting the dots" represented by any completed job, workers risk being excluded from important labor protection: this risk they share with temporary and casual workers in several jurisdictions.[52] The same is also true for some part-time workers and in particular marginal part-timers who also are not easily distinguished from some forms of casual and on-demand work.[53]

48. See Tim O'Reilly, *Workers in a World of Continuous Partial Employment*, MEDIUM, Aug. 31, 2015, https://medium.com/the-wtf-economy/workers-in-a-world-of-continuous-partial-employment-4d7b53f18f96#.r6lfvzeg4; Berg, *supra* note 16; Berg & De Stefano, *supra* note 39.

49. See examples in EUROFOUND, *supra* note 2, at 46-71 and in De Stefano, *supra* note 40.

50. *See* Abi Adams, Mark Freedland & Jeremias Prassl, *The "Zero-Hours Contract": Regulating Casual Work or Legitimising Precarity?*, 148 GIORNALE DI DIRITTO DEL LAVORO E DI RELAZIONI INDUSTRIALI 52 (2015); Zoe Adams & Simon Deakin, *Re-Regulating Zero Hours Contracts* (Inst. of Employment Rights, 2014). On the practical reluctance to refuse calls for fear that no work be offered in the future, however, see Humblet, *supra* note 40.

51. *See infra* Part V; Prassl & Risak, *supra* note 12.

52. Adams & Deakin, *supra* note 50; De Stefano, *supra* note 40.

53. Jon Messenger & Paul Wallot, *The Diversity of Marginal Part-Time*, INWORK (Policy Brief No. 7, ILO, 2015).

Workers in the gig-economy may also share some of the issues faced by another class of nonstandard workers, namely those in "contractual arrangements involving multiple parties" such as temporary agency workers and workers engaged via subcontracting or other outsourcing practices. For some of these workers it is might be difficult to identify who their "employer" is for certain purposes, such as collective bargaining or compliance with health and safety obligations.[54] Similar difficulties could be experienced by workers in the gig-economy. As to crowdwork, for instance, platforms and clients on the platforms may interact jointly with the worker in a number of possible ways, with the clients setting out the tasks and the platforms providing the environment where to discharge these tasks but also some ways of monitoring, rating, and compensating the performance and, in some cases, also acting as an adjudicator in settling disputes between workers and clients.[55] This could cause some lack of transparency as workers may find it difficult to identify the party who is responsible for a particular action with whom to argue with in case of disagreements.

Also, a number of intermediaries can operate within the platforms: specialized firms may offer clients services such as disaggregating complex tasks into mini-tasks and liaise with platforms and crowdworkers for the completion of the tasks.[56] This increases the number of actors involved in the process and can add further complication in allocation of rights and responsibilities. The same may also occur in connection to "work-on-demand via app," as workers using the apps may be employed or engaged as freelancers by companies that organize their activity and, also, provide them with the means to execute it or other services, for instance by buying cars and putting them at the disposal of the workers for a percentage of their earnings or leasing them those cars.[57] The gig-economy thus is not only an extreme form of fissurization of businesses' organization but is in turn affected by the same fragmentation of workplaces, and the related multiplication of centers of interests involved in the provision of services, as other sectors of the economy. Arguably, indeed, platform and apps may carry out, in some cases, the activities that private employment agencies execute in other sectors, normally without being subject to the systems of licensing and regulation of these agencies.[58]

54. Prassl & Risak, *supra* note 12 analyze these issues in depth with regard to the gig-economy. For a general discussion of these issue see JEREMIAS PRASSL, THE CONCEPT OF THE EMPLOYER (2015); Luisa Corazza & Orsola Razzolini, *Who Is an Employer?* (Working Papers del Centro Studi di Diritto del Lavoro Europeo Massimo D'Antona .*INT – 110/2014*) and *supra* note 18.

55. Agraval et al., *supra* note 33.

56. Bergvall-Kåreborn & Howcroft, *supra* note 2.

57. *See* Hall & Krueger, *supra* note 16.

58. Recently, some members of the Chamber of Deputies of the Italian Parliament filed an official parliamentary question to both the Ministry of Labor and the Ministry of Infrastructure and Transport concerning the operation of a car-hailing app, arguing that the app acts as a temporary work agency

Finally, whilst the relation between work in the gig-economy and disguised self-employment has already been discussed, a close relation also exists with "dependent self-employment," namely a form of work that some jurisdictions recognize as a sort of intermediate category between employment and self-employment whereby some labor protection is extended to the relevant workers as they are found to be in need of this protection even if they do not qualify as "employees" under the applicable legislation. Some commentators have indeed argued that a possible solution to fill the regulation gap affecting the gig-economy would be to introduce this intermediate category in jurisdictions where it does not exist and cover workers with some limited form of labor protection. The potential shortcomings of this approach are investigated at Part VI below.

This Part has thus drawn comparisons and links between work in the gig-economy and nonstandard form of employment in other sectors of the economy: it has been highlighted how many similar or identical problems in labor protection these forms of work have in common, leaving alone the fact that in the gig-economy as well as in other sectors of the labor market two or more "nonstandard" dimensions of work may often sum up. For instance, workers may very well be hired under temporary contracts and work through several intermediaries in situations where their employment status may be misclassified. Forms of nonstandard work are thus more often than not associated. Being mindful of this, the next two Parts concentrate on the issue of disguised employment, and in particular on some of the practices and disputes concerning classification of workers in the gig-economy.

IV. INCONSISTENT AGREEMENTS: INDEPENDENT-CONTRACTOR CLAUSES AND SELF-CONTRADICTION IN TERMS AND CONDITIONS

The issue of workers' classification in the gig-economy is not an exclusive concern of labor advocates: businesses are also very much attentive to this and, most often, terms and conditions of utilization of platforms and apps explicitly specify that the relationship between the persons executing work and the business running the platform or the app will be one of self-employment. This kind of clause is quite frequent in personal service agreements as individuals engaging persons to execute tasks may seek to avoid costs and regulation associated with employment. Of course, these clauses are perfectly legitimate when the classification of the relationship between the parties corresponds to the reality of the transaction, i.e., when

without the licenses and authorizations required for agencies under Italian Law. The parliamentary question is available at http://aic.camera.it/aic/scheda.html?numero=5/05539&ramo=C AMERA&leg=17 (last visited Apr. 29, 2016).

the person hired fully preserves her autonomy in the actual execution of the task. If this is not the case, however, in a vast number of jurisdictions the relationship could be reclassified as one of employment, according to the so-called "primacy of fact" principle, whereby the determination of the existence of an employment relationship is to be guided by the facts relating to the actual performance of work and not on the basis of how the parties described the relationship.[59]

As already mentioned, classifying workers as independent contractors is a very frequent business practice, one that is also followed by most companies in the gig-economy. In some cases, however, these companies may recur to provisions in their agreements that go beyond the ordinary extent of "independent-contractor clauses." A crowdwork company, for instance, represents that the platform only "provides a venue for third-party Requesters and third-party Providers to enter into and complete transactions[,]" and therefore it is "not involved in the transactions between Requesters and Providers." Nonetheless, the terms and conditions also specify that

> [A]s a Provider you are performing Services for a Requester in your personal capacity as an independent contractor and not as an employee of the Requester. . . . This Agreement does not create an association, joint venture, partnership or franchise, employer/employee relationship between Providers and Requesters, or Providers and Amazon Mechanical Turk.[60]

A very similar clause is provided in the service agreement of a work on demand app, establishing that "nothing in this Agreement is intended or should be construed to create a partnership, joint venture, or employer-employee relationship between Wonolo and you or between the Customer and you."[61] These clauses could indeed be described as "enhanced independent contractor clauses" as they do not only exclude the existence of an employment relationship between the platform or app and the worker but also exclude that the worker and the client may enter into an employment relationship, even when the terms and conditions of the service specify that these actors are "third parties" to the platform. It has been argued that, in doing so, businesses in the gig-economy actually dictate terms and conditions

59. This principle is also provided at Paragraph 9 of the ILO Employment Relationship Recommendation, 2006 (No. 198) ("For the purposes of the national policy of protection for workers in an employment relationship, the determination of the existence of such a relationship should be guided primarily by the facts relating to the performance of work and the remuneration of the worker, notwithstanding how the relationship is characterized in any contrary arrangement, contractual or otherwise, that may have been agreed between the parties."). For same examples of national instantiations of this principle see ILO, *supra* note 6.

60. *Amazon Mechanical Turk Participation Agreement*, AMAZON MECHANICAL TURK (last updated Dec. 2, 2014), https://www.mturk.com/mturk/conditionsofuse.

61. *Wonolo Terms of Service*, WONOLO, http://wonolo.com/terms/ (last updated May 1, 2015).

of employment between workers and clients, something that could indeed go in favor of the recognition of the platform as a "joint employer" of the worker in a particular transaction, in the United States.[62] Whether this is sufficient to find a joint-employment status or not, it is certain that these clauses interfere significantly with the relationships between clients and workers, even if the gig-economy businesses purportedly claim to remain extraneous to those relationships.[63]

As already mentioned, "independent-contractor clauses" and, all the more, "enhanced independent-contractor clauses" are not dispositive, given the just discussed "primacy of fact" principle in force in most jurisdictions. Businesses in the gig-economy seem to be quite aware of the risk of reclassification of workers as employees due to this principle. As a consequence, agreements concerning the use of platform and apps contain "representation and warranties" aimed at mitigating the risks and liabilities possibly arising in this respect. For instance, terms and conditions of usage of a crowdwork platform require clients to 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."[64] Other businesses go further and require that Users keep them indemnified from any liability connected with the potential reclassification of workers. For instance, users of a work-on-demand platform agree:

> to indemnify, hold harmless and defend Company from any and all claims that a Tasker was misclassified as an independent contractor, any liabilities arising from a determination by a court, arbitrator, government agency or other body that a Tasker was misclassified as an employee (including, but not limited to, taxes, penalties, interest and attorney's fees), any claim that Company was an employer or joint employer of a Tasker, as well as claims under any employment-related laws, [such as claims regarding] employment termination, employment discrimination, harassment or retaliation, as well as any claims for overtime pay, sick leave, holiday or vacation pay, retirement benefits, worker's compensation benefits, unemployment benefits, or any other employee benefits.[65]

These clauses show how companies in the gig-economy are conscious of the fact that outright classification of the work relationships occurring through platforms and apps as ones of self-employment is not watertight. And

62. Felstiner, *supra* note 2.

63. Lisa J. Bernt, *Suppressing the Mischief: New Work, Old Problems*, 62 NORTHEASTERN U. L.J. 311 (2014).

64. *Amazon Mechanical Turk Participation Agreement*, *supra* note 60.

65. *Terms of Service*, TASKRABBIT, https://www.taskrabbit.com/terms (last visited Apr. 29, 2016); *see also Sweeps Terms of Use*, pt. 4, https://sweeps.jobs/terms (last visited Apr. 29, 2016).

indeed some clauses in the very same terms and conditions may contradict this classification. Significant in this sense, as discussed above, are the "enhanced independent-contractor clauses." But the same could be said of other provisions in the service agreements at hand. For instance, some of the agreements aim at channeling all the contacts and transactions between workers and clients connected via a platform or app through the same platform or app. An agreement concerning crowdwork, for instance, aims at binding clients to "only accept work product from Providers that has been submitted through the Site."[66] Another agreement is instead directed at workers, as they undertake not to provide any information connected to the platform, including their rating, "to any third party for the purpose of pursuing employment opportunities without the written consent of topcoder." Moreover, should they be "contacted by a third-party regarding employment opportunities," according to the same terms of use, workers "agree to promptly notify topcoder of such contact."[67] These clauses seem to provide some sort of exclusivity obligation upon clients and workers.[68] As such, they might be at odds with classification of the status of workers rendering services through platforms or apps as an independent-contractor one as opposed as one of employment: in the first case, they could indeed have a restraint-of-trade effect that could be questionable under competition law.

Other examples of clauses whereby platforms interfere with the transaction between the parties and go beyond merely providing venues for these transactions can be brought forward, such as those allowing clients on platform to refuse payment of work done if deemed unsatisfactory, without having to provide any reason for doing so.[69] At the same time these clauses may provide for the right of the client to retain the work done and to be vested of all the rights, including intellectual property rights, arising from this work.[70] Indeed, this is another way of interfering with the relationship between workers and clients and possibly dictating terms and condition of employment, one that may also give rise to severe abuses from the clients' side spanning from unjust enrichment to wage theft, leaving alone the fact that refusals of work done have normally a direct impact on the rating of workers and consequently have a very detrimental effect on their ability to work in the future and to accede to the best paid tasks on the platform.

66. *Amazon Mechanical Turk Participation Agreement*, *supra* note 60.

67. *Terms and Conditions*, TOPCODER, https://www.topcoder.com/community/how-it-works/terms/ (last visited Apr. 29, 2016).

68. Other companies in the gig-economy seem to apply similar policies, as documented in the litigation of both Uber and Lyft. *See* Cotter et al. v. Lyft Inc., Order Denying Cross-Motion for Summary Judgement, Doc. 94 (N.D. Cal. 2015); O'Connor et al. v. Uber Technologies, Inc., et al., Order Denying Cross-Motion for Summary Judgement, Doc. 251 (N.D. Cal. 2015).

69. Felstiner, *supra* note 2.

70. *Amazon Mechanical Turk Participation Agreement*, *supra* note 60.

As already said, thus, even when terms and conditions of agreements classify workers as independent contractors, the very same agreements contain elements inconsistent with this classification. Other inconsistencies may take place during the very execution of the task and, as it is discussed in Part V, provided room for challenging the alleged employment status of workers in the gig-economy in an increasing number of cases.

V. CONTROL OF WORKERS IN THE DIGITAL AGE: LITIGATION AND EMPLOYMENT-STATUS TESTS

A vast part of litigation on the gig-economy has concentrated on car-hailing services and is taking place, as mentioned, in the United States.[71] In one of such cases, the Labor Commissioner of the State of California recognized that a driver was an employee of Uber and, as such, she was entitled to recover expenses incurred in the discharge of her duties, such as mileage and toll costs.[72] The arguments used by the Labor Commissioner in ruling in favor of employment status are quite similar to those held by the U.S. District Court in the Northern District of California in two separate cases against Uber and Lyft, another car-hailing business.[73] In the Lyft case, the District Court denied a cross-motion of summary judgment submitted by the two parties, as it ruled that "if reasonable people could differ on whether a worker is an employee or an independent contractors based on the evidence in the case, the question is not for a court to decide; it must go to the jury."[74] The same decision was adopted in the Uber case before the District Court.[75]

In both Uber and Lyft cases, the District Court dismissed the companies' argument that they act merely as "tech companies" providing a platform to match demand and supply for rides. In the Uber case, actually, the court openly stated that "it is clear that Uber is most certainly a transportation company, albeit a technologically sophisticated one,"[76] rather than just a tech company. Similar arguments were used in the Lyft case and were also followed by the Labor Commissioner to rule against Uber in the decision

71. *See* Cherry, *supra* note 20; Sprague, *supra* note 29; Rogers, *supra* note 30.

72. Berwick v. Uber Technologies, Inc., CGC-15-546378 (Cal. Labor Comm'ner, June 3, 2015).

73. The decisions are cited at *supra* note 68. The case in *O'Connor et al. v. Uber Technologies, Inc., et al.* was later partially granted a class action status, see *O'Connor et al. v. Uber Technologies, Inc. et al.,* Order Granting in Part and Denying in Part Plaintiff's Motion for Class Certification, Doc. 341 (N.D. Cal. Sept. 1, 2015). See also Uber's comments to this order in Uber, 2015. The class had also been expanded to drivers that had signed arbitration clauses in their agreements with the company, see *O'Connor et al. v. Uber Technologies, Inc. et al.*, Order Granting in Part and Denying in Part Plaintiff's Supplemental Motion for Class Classification, Docket 357 (Dec. 9, 2015).

74. Cotter et al. v. Lyft Inc., Order Denying Cross-Motion for Summary Judgement, Doc. 94, at 10 (N.D. Cal. Mar. 11, 2015).

75. A settlement has now been reached in both these two cases. *See infra* in this Part.

76. *Cotter et al.*, Doc. 94, at 10.

mentioned above.[77] Both companies, according to the District Court, do not only provide an intermediary platform for drivers and clients to use: quoting the relevant decisions, Uber "does not simply sell software; it sells rides" and Lyft "markets itself to customers as an on-demand ride service, and it actively seeks out those customers." Lyft provides drivers with "detailed instructions on how to conduct themselves" whilst "Uber would not be a viable business entity without its drivers."[78] Both these arguments look valid for the two companies respectively, reading the information provided by the different decisions.

In rebutting the argument that Uber and Lyft only act as tech companies, the Court and the Commissioner could establish that drivers provide service to them and not only to clients. As a consequence, this kind of transaction falls under California's law presumption that "a service provider is presumed to be an employee unless the principal affirmatively proves otherwise"[79]: in such a situation, thus, the burden of proving that individuals performing personal services for a counterpart do so on an independent-contractor capacity lies with the putative employer. Both the District Court and the Commissioner could also refer to the decision of the Supreme Court of California in *Borello*[80] under which, in determining if sufficient control exists over a person to trigger employment status, the "right of control need not extend to every possible detail of the work. Rather, the relevant question is whether the entity retains 'all necessary control' over the worker's performance."[81] The question is "not how much control a hirer exercises, but how much control the hirer retains the right to exercise."[82] Under another precedent of the Supreme Court, moreover, the right to discharge at will, without providing any cause, a right that is expressly reserved by both Uber and Lyft, is "perhaps the strongest evidence of the right to control."[83] Furthermore, under *Borello*, the control test cannot be "applied rigidly and in isolation": other secondary indicia can be given weight in determining

77. It is worth noting that, in the European Union, a Spanish court requested the European Court of Justice to issue a preliminary ruling on whether Uber should be classified as a transportation services or as a technology company (C-434/2015); see Filipa Azevedo & Mariusz Maciejewski, *Social Economic and Legal Consequences of Uber and Similar Transportation Network Companies (TNC)*, Briefing, DG IPOL Policy Department B – Structural and Cohesion Policies, European Parliament, PE 563.398 (Brussels and Strasbourg: European Parliament, Oct. 2015). M. Ahmed, *Judge Refers Spanish Uber Case to European Court of Justice*, FIN. TIMES, July 20, 2015, http://www.ft.com/intl/cms/s/0/02e83fd e-2ee6-11e5-8873-775ba7c2ea3d.html#axzz3uwo8MzEF.

78. Cotter et al., Doc. 94, at 14; O'Connor et al., Doc. 251, at 10-11.

79. The court quotes Yellow *Cab Coop. Inc. v. Worker's Comp. Appeals Bd.*, 226 Cal. App.3d 1288, 1294 (1991) and *Narayan v. EGL, Inc.*, 616 F.3d 895, 900 (9th Cir. 2010).

80. S.G. Borello & Sons, Inc. v. Dep't of Indus. Relations (Borello), 48 Cal. 3d 341, 350 (1989).

81. *Cotter et al.*, Doc. 94, at 7.

82. Ayala v. Antelope Valley Newspapers Inc., 59 Cal. 4th 522, 531 (2014).

83. *Id.* at 533. The settlement agreement Lyft reached to end the dispute at hand also provides for a limitation of Lyft's possibility to deactivate a driver's account at will; see Cherry, *supra* note 20.

whether employment status exists and they are not to be applied "mechanically as separate tests," since none of them is determinative.[84]

However, even focusing only on the right to control, as it could be necessary in jurisdictions where multifactor tests do not accompany the control test, it does not seem possible to exclude the existence of a far-reaching control of workers' performance in the situations at hand. It is true that drivers are under no obligation to show up for work: this is a feature shared by the majority of work arrangements in the gig-economy. Nonetheless, when drivers, and workers in general, accede to platforms or apps and take jobs channeled therein they accept to abide by the policies and instructions unilaterally set by the platforms and apps.[85] From the decisions currently available, it emerges for instance that Lyft drivers are instructed to, among other things, "be the only non-passenger in the car," "keep [the] car clean on the inside and outside," "go above and beyond good service such as helping passengers with luggage or holding an umbrella for passengers when it is raining," "greet every passenger with a big smile and a fist bump"[86]: all this while driving their own car and supposedly being independent contractors.

Uber drivers must pass a background check and "city knowledge exam" before being hired.[87] Background checks are also carried out by Lyft[88] and other apps such as Taskrabbit, Wonolo, and Handy.[89] As to the ability to accept or reject tasks, whilst, in one of the cases tried about Uber, it is reported that the service agreement provided that a driver "shall be entitled to accept, reject and select" among the rides offered by the app and "shall

84. These factors are:

> (a) whether the one performing services is engaged in a distinct occupation or business; (b) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the principal or by a specialist without supervision; (c) the skill required in the particular occupation; (d) whether the principal or the worker supplies the instrumentalities, tools, and the place of work for the person doing the work; (e) the length of time for which the services are to be performed; (f) the method of payment, whether by the time or by the job; (g) whether or not the work is a part of the regular business of the principal; and (h) whether or not the parties believe they are creating the relationship of employer-employee.

Moreover, some additional factors are relevant:

> (1) the employee's opportunity for profit or loss depending on his managerial skill; (2) the alleged employee's investment in equipment or materials required for his task, or his employment of helpers; (3) whether the service rendered requires a special skill; (4) the degree of permanence of the working relationship; and (5) whether the service rendered is an integral part of the alleged employer's business.

85. *See* Aloisi, *supra* note 3.

86. Cotter et al. v. Lyft Inc., Order Denying Cross-Motion for Summary Judgement, Doc. 94, at 7 (N.D. Cal. 2015).

87. O'Connor et al. v. Uber Technologies, Inc., et al., Order Denying Cross-Motion for Summary Judgement, Doc. 251, at 12 (N.D. Cal. 2015).

88. Cotter et al., Doc. 94, at 3.

89. *Terms of Service*, *supra* note 65; *Wonolo Terms of Service*, *supra* note 61; *Terms of Use*, HANDY, https://www.handy.com/terms (last visited May 3, 2016).

have no obligation to accept" any ride[90]; in other decisions, it is reported that an Uber Driver Handbook states: "We expect on-duty drivers to accept all [ride] requests," and that the company will "follow-up with all drivers that are rejecting trips."[91] On at least one occasion, Uber was reported to suspend drivers due to "low acceptance rate."[92] Handy, another work-on-demand app, has instead been reported to provide suggestions "about how to listen to music (only with headphones, with permission from the customer) and go to the bathroom (discreetly)" whilst cleaning at the customer's home.[93]

All these practices and policies seem to contradict the idea that control is never exerted on the work performance. This is all the more true because platforms and apps can also constantly monitor this performance by means of the rates and reviews provided by customers.[94] They also communicate to workers that they can be deactivated unless they do not maintain a certain satisfaction rate, which can indeed be very high. Nor do companies just retain the theoretical right to do so: according to the District Court, "Uber regularly terminates the accounts of those drivers who do not perform up to Uber's standards."[95]

In the case of crowdwork, as already mentioned, rejection of a work by a client in a platform may determine a dramatic loss in one's ranking, which would prevent acceding to the most remunerable jobs reserved only to those workers with the highest rates.[96] This system allows to automatically disciplining performance that is poor or perceived to be as such and can therefore also amount to a way of exerting control. In addition, control can be exerted by allotting a fixed amount of time for a specific task or set of tasks and by monitoring systems that are peculiar to virtual work, such as taking screenshots of workers' monitors. It has been argued that "this often results in determination of work that is so pronounced that it equals 'classical'

90. Berwick v. Uber Technologies, Inc., CGC-15-546378, at 2 (Cal. Labor Comm'ner, June 3, 2015).

91. O'Connor et al., Doc. 251, at 21.

92. 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_protested_cheap_uberx_fares_uber_backed_down.html.

93. Kessler, *supra* note 1.

94. Callaway, *supra* note 26; Dzieza, *supra* note 27; Sachs, *supra* note 28.

95. O'Connor et al., Doc. 251, at 12, where it is also reported that Uber managers instruct colleagues to cut drivers performing below 4.5 out of 5.

96. See Marvit, *supra* note 21 who reports the opinion of a worker in the Amazon Mechanical Turk stating:

> If you have a 99.8 percent approval rating and then you work for some jack-wagon who rejects 500 of your HITs, you're toast . . . . Because for every rejection, you have to get 100 HITs that are approved to get your rating back up. Do you know how long that takes? It can take months; it can take years.

However, for a different account of MTurk Stats Math, see MTURKGRIND, (Aug. 29, 2014), www.mturkgrind.com/threads/mturk-stats-math.26512/. I owe thanks, without implicating, to Rochelle LaPlante for this observation.

personal dependency necessary for an employment relationship."[97] On the basis of what has been highlighted above, this observation can indeed be extended to other work arrangements in the gig-economy.

Of course the matter is far from being finally resolved[98] and, most likely, litigation on the classification of workers in the gig-economy will flourish in several countries in the coming years,[99] as most of the issues at hand are at the core of employment regulation and, more generally, of labor protection in most jurisdictions and require the solution of very complex legal questions on employment status. In the United States, bills were introduced or passed in several states mandating that drivers working for businesses such as Uber and Lyft be classified as independent contractors.[100] Moreover, the decisions of the District Court of California described above had merely allowed the matter to be further tried before a jury and did not constitute a decision in favor of recognizing drivers the status of employees. Furthermore, in both these cases the parties eventually reached a settlement in which the workers agreed to remain classified as independent contractors; in turn, the companies agreed to pay a sum of money to end the dispute and to review the terms and conditions of service by, *inter alia*, limiting their right to terminate drivers at will and, in the case of Uber's tentative settlement, also loosening the duty of drivers to accept the calls once they accede to the app.[101] Even after the settlements, the preliminary decisions of the District Court of California will

97. Risak & Warter, *supra* note 11, at 8.

98. For instance, consider the decision in *Rasier LLC v. State of Florida*, Docket No. 0026 2825 90-02 (37). In Oregon, an Advisory Opinion of the Commissioner of the Bureau of Labor and Industries of the State of Oregon, *The Employment Status of Uber Drivers* (Oct. 14, 2015), was released arguing that under Oregon Law, Uber drivers qualify as employees. In Belgium, the Secretary of State for the Fight against Social Fraud recently referred to a study of the National Social Security Office, according to which Uber Drivers are to be considered contractors with regard to social security law. *See* Zoya Sheftalovich, *Belgian Government: Uber Drivers Are Contractors, Not Employees*, SLATE (Sept. 14, 2015), www.politico.eu/article/belgian-government-uber-drivers-are-contractors-not-employees/; Pierre Vassart, *Pour l'ONSS, les chauffeurs Uber Sont des Indépendants*, LE SOIR, Sept. 16, 2015, http://www.lesoir.be/989273/article/actualite/belgique/2015-09-14/pour-l-onss-chauffeurs-uber-sont-des-independants.

99. Litigation also regards crowdwork. For instance, a settlement has been reached in a dispute between some workers and a business involved in crowdwork, Crowdflower, managing activities and tasks through the Amazon Mechanical Turk. The Plaintiffs claimed reclassification as employees under the FLSA and Oregon's laws and the consequent payment of outstanding remuneration for the services rendered to Crowdflower in compliance with the relevant minimum wage rates. Collective action status had been conditionally granted by the Court so that other workers could join the claim. A gross settlement amount of c. $585,000 was paid to settle the dispute. *See* Otey et al. v. Crowdflower, Inc. et al., Second Modified Stipulation of Settlement of Collective Action, Doc. 218-1 (N.D. Cal. 2015); Cherry, *supra* note 20.

100. Jon Weinberg, *Gig News: Uber Successfully Pursuing State Legislation on Independent Contractor Status*, ON LABOR (Dec. 11, 2015), http://onlabor.org/2015/12/11/gig-news-uber-successfully-pursuing-state-legislation-on-independent-contractor-status/.

101. *See* Carolyn Said, *Lyft Drivers to Remain Contractors in Lawsuit Settlement*, SFGATE, Jan. 27, 2016, www.sfgate.com/business/article/Lyft-drivers-to-remain-contractors-in-lawsuit-6787390.php; Douglas Macmillan et al., *Uber Drivers Settle With Ride-Hailing Company in Labor Dispute*, WASH. POST, Apr. 21, 2016, http://www.wsj.com/articles/uber-drivers-settle-with-ride-hailing-company-in-labor-dispute-1461292153; Cherry, *supra* note 20.

remain extremely significant in the debate on employment classification in the gig-economy. In the Lyft's case, the court had explicitly remarked the complexity of this debate by stating that "the jury in this case will be handed a square peg and asked to choose between two round holes" because the "test the California courts have developed over the 20th Century for classifying workers isn't very helpful in addressing this 21st Century problem," since some factors went in favor of recognizing drivers as employees whilst some others weighted in the direction of independent contractor status and "absent legislative intervention, California's outmoded test for classifying workers will apply in cases like this."[102] In addition, the Court had also advanced an idea of legislative intervention to solve these issues, which is discussed in the next Part.

VI. OCCAM'S RAZOR AND NEW FORMS OF WORK: WHY CREATING AN INTERMEDIATE CATEGORY OF WORKERS BETWEEN EMPLOYEES AND INDEPENDENT CONTRACTORS WOULD NOT SOLVE PROBLEMS IN THE GIG-ECONOMY

In highlighting some of the complexities of classifying workers in the gig-economy, the Court in the Lyft case also suggested: "perhaps Lyft drivers should be considered a new category of worker altogether, requiring a different set of protections."[103] Nor would it be isolated in advocating similar solutions. It was for instance proposed that, in the United States, it would be "better to create a third legal category of workers, who would be subject to certain regulations, and whose employers would be responsible for some costs (like, say, reimbursement of expenses and workers' compensation) but not others (like Social Security and Medicare taxes)," following the examples of "other countries, including Germany, Canada, and France" that "have rewritten their laws to expand the number of worker categories."[104] A

102. Cotter et al. v. Lyft Inc., Order Denying Cross-Motion for Summary Judgement, Doc. 94, at 19 (N.D. Cal. 2015). The Judge, however, did not provide a detailed explanation about why California's tests should be considered outmoded: the tests reported at *supra* note 84 seem to be sufficiently clear and not necessarily tied to a definite and historically limited business model and are similar to tests and criteria concerning classification of employment status adopted in other jurisdictions. *See* Nicola Countouris, *The Employment Relationship: A Comparative Analysis of National Judicial Approaches*, *in* THE EMPLOYMENT RELATIONSHIP A COMPARATIVE OVERVIEW (Giuseppe Casale ed., 2011); *see also* Rogers, *supra* note 30) and discussion infra Part VII.

103. Cotter et al., Doc. 94, at 19.

104. James Surowiecki, *Gigs with Benefits*, NEW YORKER, July 6, 2015, http://www.newyorker.com/magazine/2015/07/06/gigs-with-benefits; *see also* Noam Scheiber, *A Middle Ground Between Contract Worker and Employee*, N.Y. TIMES, Dec. 10, 2015, http://www.nytimes.com/2015/12/11/business/a-middle-ground-between-contract-worker-and-employee.html; Andrei Hagiu, *Work 3.0: Redefining Jobs and Companies in the Uber Age*, WORKING KNOWLEDGE, HARV. BUSN. SCH. (Sept. 29, 2015), http://hbswk.hbs.edu/item/work-3-0-redefining-jobs-and-companies-in-the-uber-age?utm_content=buffera539c&utm_medium=social&utm_source=linkedin.com&utm_campaign=buffer; 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.

detailed proposal in this respect, aimed at introducing the category of "independent workers" was advanced by Sett Harris and Alan Krueger.[105]

Whilst these proposals are interesting, as they challenge some of the existing boundaries to the application of labor protection, there are many potential negative implications that should not be underestimated. First and foremost, proposing a new legal bucket for grey-zone cases may complicate matters, rather than simplifying the issues surrounding classification. Creating an intermediate category of worker such as dependent contractors, dependent self-employed persons, or independent workers implies to identify suitable definitions.[106] Legal definitions, however, are always slippery when they are applied in practice: the real risk is shifting the grey-zone somewhere else without removing the risk of arbitrage and significant litigation in this respect, especially if the rights afforded to workers in that category afford any meaningful protection.

Protection for workers in intermediate categories and the tests for applying them also change significantly among national regulations.[107] Some of the applicable tests, for instance, require that a certain percentage of the dependent contractor's business comes from the same principal for the worker to be presumed or considered as a dependent contractor: in the various jurisdictions concerned (Canada, Germany, Spain) this percentage varies between 50% and 80%.

It goes without saying that applying any such criteria would be extremely difficult in the gig-economy.[108] As a matter of fact, this test could be even more complicated than one based on the control exerted on workers. It would be difficult to assess whether the sources of the workers' income are the platforms or apps or the final clients and costumer on those apps. In the latter case, it would almost be impossible to qualify as falling into the intermediate category, particularly in crowdwork.[109] Such a test would also be quite unpredictable for workers and particularly for businesses as they would have to take into account which percentage of their overall earnings a worker is making on their platform. In an era of casualized employment with many workers carrying out several jobs for several employers, be more

105. Sett Harris & Alan Krueger, *A Proposal for Modernizing Labor Laws for Twenty-First-Century Work: The "Independent Worker"* (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.

106. *See* Rogers, *supra* note 30.

107. For a comparative overview, see the articles published in *Symposium: Labor Law and Development – Perspectives on Labor Regulation in Africa and the African Diaspora*, 32 COMP. LAB. L. & POL'Y J. 303 (2010); *see also* Adalberto Perulli, *Subordinate, Autonomous and Economically Dependent Work: A Comparative Analysis of Selected European Countries*, *in* THE EMPLOYMENT RELATIONSHIP A COMPARATIVE OVERVIEW, *supra* note 102.

108. Rogers, *supra* note 30; Sachs, *supra* note 38.

109. *See* Thomas Klebe & Julia Neugebauer, *Crowdsourcing: Für eine Handvoll Dollar Oder Workers of the crowd Unite?*, 1 ARBEIT UND RECHT 4-7 (2014).

traditional ones or gig-economy business, during a same month, week, or even day, this would be extremely burdensome.[110] Both workers and businesses would not improve their situation in terms of certainty of protections, costs and liabilities.

Significant, in this respect, is the case of Italy. In 1973, Italian lawmakers extended labor procedural rules to those work arrangements where the worker undertakes to carry out an activity in the interests of a principal, on a mainly-personal, continuous, and self-employed basis, coordinating with the latter about how the activity is performed: in Italian labor studies, they started to became known as *para-subordinate* relationships.[111] At the beginning, only procedural rules were extended to them, apart from minor exceptions. However, the fact that lawmakers had mentioned these business-integrated working activities as self-employed relationships had unforeseen effects. Businesses started to recur to these relationships as a cheap alternative to employment relationships, both because of their lack of protection and the fact that no social security contributions had to be paid in their regard by the principal, at that time. Accordingly, besides genuine self-employment relationships, a large number of disguised employment relationships were, increasingly, being entered into. When, in 1995, modest social security contributions were extended to them, this, far from constituting a disincentive, reinforced the idea that they were a low-cost substitute for employment and their number increased significantly.[112]

Courts, pursuant to the "primacy of fact" principle mentioned above reclassified sham para-subordinate arrangements as employment relationships, but this resulted in uncertainty for workers and businesses and in an upsurge of litigation. As from the early 2000s, regulation was progressively introduced to marginally increase labor and social security protections for para-subordinate workers, to combat their abuse as forms of bogus self-employment and discourage their use as a cheap alternative to employment relationships. These reforms were only partially successful and, by 2012, it was estimated there were 1.5 million para-subordinate workers in a labor force of around 23 million.[113] Moreover, the body of regulation and case law regarding these relationships had significantly grown in number and complication, adding even more legal uncertainty. In 2015, a new reform was passed aimed at enlarging the scope of application of employment regulation and, at the same time, repealing most of the protections afforded to para-

110. Sprague, *supra* note 29.

111. GIUSEPPE SANTORO PASSARELLI, IL LAVORO PARASUBORDINATO (1979).

112. ARES ACCORNERO, SAN PRECARIO LAVORA PER NOI (2006); LUCIANO GALLINO, IL LAVORO NON È UNA MERCE: CONTRO LA FLESSIBILITÀ (2007).

113. See data available at AMICI DI MARCO BIAGI (Dec. 12, 2012), http://www.amicimarcobiagi.com/istat-ecco-litalia-2012-cala-loccupazione-soprattutto-giovanile/.

subordinate work, without abolishing it, which may further complicate classifying workers' employment status in practice.[114]

The Italian case, therefore, shows that regulating dependent self-employment is no panacea for addressing the changes in business and work organization driven by the disintegration of vertical firms. Nor should it be overseen that the workers that would qualify for full protection as employees under the current legal tests would likely become deprived of many rights if they were crammed into an "intermediate bucket."

In the United Kingdom, for instance, where the law distinguishes between a range of categories, including notably "self-employed and contractors," "workers," and "employees," workers are covered only by parts of employment protection such as the National Minimum Wage, protection against discrimination, working hours, and annual holidays; they are not entitled to important rights such as protection against unfair dismissal and redundancy pay and the right to request flexible working. This, coupled with a particular restrictive application of the doctrine of mutuality of obligation in U.K. courts, which poses serious hurdles for workers engaged in arrangements with discontinuous work schedules or casual employment to claim employment status,[115] may have serious implications on the protection of workers in the gig-economy. Indeed, when drivers recently filed a lawsuit against Uber in the United Kingdom to claim reclassification of their relationship, they asked to be reclassified merely as "workers" given the difficulties realistically foreseen to claim full employment status in that jurisdiction.[116]

Intermediate categories can, therefore, prove to be an obstacle in achieving full labor protection when employment relationships are disguised. Nor are they necessary, in the United States, for providing workers with at least some labor protection. First, it would be wrong to assume that the control test is so narrow that it cannot provide guidance in securing employment protection in modern times.[117] As it was highlighted in Part V above, control tests do not necessarily require that the employer "retain the right to control every last detail" of the work: micromanaging workers is not an essential element of control. As the court in the Lyft case pointed out,

114. Adalberto Perulli, *Il Lavoro Autonomo, le Collaborazioni Coordinate e le Prestazioni Organizzate dal Committente* (Working Papers del Centro Studi di Diritto del Lavoro Europeo Massimo D'Antona *IT – 272/2015*); Orsola Razzolini, *La Nuova Disciplina delle Collaborazioni Organizzate dal Committente: Prime Considerazioni* (Working Papers del Centro Studi di Diritto del Lavoro Europeo Massimo D'Antona *IT – 266/2015*).

115. *See* Nicola Countouris, *Uses and Misuses of "Mutuality of Obligations" and the Autonomy of Labour Law*, *in* THE AUTONOMY OF LABOUR LAW (Alan Bogg et al. eds., 2015); Adams, Prassl & Freedland, *supra* note 50.

116. *See Uber Driver Not Paid the Minimum Wage*, GMB, Sept. 7, 2015, http://www.gmb.org.uk/newsroom/uber-driver-not-paid-minimum-wage.

117. Weil, *supra* note 43.

moreover, having sparse work schedules "does not necessarily preclude a finding of employee status."[118] The flexibility in choosing hours of work does not preclude that, once a worker decides to work and accede to the app or platform she is subject to far-reaching control and invasive monitoring of her performance, similar to those who are applicable upon traditional employees. Moreover, some fundamental statutes providing labor protection in the United States already provide for a broad definition of employment when determining the scope of their application. For instance, the U.S. Department of Labor recently highlighted how the Fair Labor Standards Act (FLSA) provides a definition of "employ" as to "suffer and permit to work" that is to be construed more broadly than the Common Law's "control test." The definition under the FLSA took after the definitions used in earlier statutes against child labor in order to encompass also work executed through middlemen and similar arrangements.[119] This is all the more relevant as the FLSA was enacted in 1938, therefore in an age in which the trend was and had been for several years toward "vertical integration" and very hierarchical and bureaucratical managerial prerogatives.[120] By that time, the mere control test might have sufficed to embrace a wider range of working activities than today; still, lawmakers went beyond the control test to ensure the broadest application possible of the statute. This should be borne in mind when applying it nowadays, in the age of fissurization,[121] and allegedly less hierarchical management's power over workers.[122] These developments do not render the statute outmoded; on the contrary, the broad definition is almost more significant at present times than it was in 1938.

Moreover, the introduction of an intermediate category would be even more debatable if it were applicable only to workers in the gig-economy. As it was pointed out above, problems concerning employment status and misclassification extend much beyond the boundaries of the gig-economy and providing for a specific category of worker in this sector would

118. *Cotter et al. v. Lyft Inc.*, Order Denying Cross-Motion for Summary Judgement, Doc. 94, at 18 & n. 7 (N.D. Cal. 2015) referring to decision of the Supreme Court of California in *Burlingham v. Gray*, 137 P.2d 9, 16 (Cal. 1943). Other relevant judgments in this respect are *Dole v. Snell*, 875 F.2d 802 (10th Cir. 1989) and *Doty v. Elias*, 733 F.2d 720 (10th Cir. 1984). In Italy, for instance, on-call workers are considered subordinated employees during shifts, even when they do not undertake to accept all the employer's calls.

119. *See* Weil, *supra* note 43; *see also* Finkin, *supra* note 20.

120. See, also for further reference, KATHERINE V.W STONE, FROM WIDGETS TO DIGITS (2004).

121. *See supra* note 18.

122. For a critical analysis of the "narrative" regarding the supposed loosening of managerial prerogatives in Post-Fordist organizations, see Paul Thompson & Diane van den Broek, *Managerial Control and Workplace Regimes: An Introduction*, 24 WORK EMP. SOC'Y 1 (2010); Vicki Smith, *New Forms of Work Organization*, 23 ANNUAL REV. SOC. 315 (1997); ANGELO SALENTO, POSTFORDISMO E IDEOLOGIE GIURIDICHE. NUOVE FORME D'IMPRESA E DIRITTO DEL LAVORO (2003); Dan Coffey & Carole Thornley, *Legitimising Precarious Employment: Aspects of the Post-Fordism and Lean Production Debates*, *in* GLOBALISATION AND PRECARIOUS FORMS OF PRODUCTION AND EMPLOYMENT: CHALLENGES FOR WORKERS AND UNIONS (Carole Thornley et al. eds., 2010).

artificially segment the labor market and employment regulation and it would also add complexity becuse a definition of the gig-economy would be extremely difficult to identify.

In light of all the above, the proposal of introducing a new category of employment to regulate forms of work in the gig-economy does not seem a viable solution to enhance labor protections of the relevant workers and provide a predictable framework of rights, costs, and liabilities for the parties involved. The next Part tentatively advances some preliminary policy solutions to deal with the challenges raised by the gig-economy.

VII. CONCLUSIONS: PROTECTING WORK IN THE GIG-ECONOMY, WHICH WAY FORWARD?

To promote labor protection in the gig-economy, the first thing that is needed is a strong advocacy to have jobs in this sector fully recognized as work. This is an essential step to counter the strong risk of commodification that these practices entail. In the light of what was argued above, a cultural struggle to avoid that workers are perceived as extensions of platforms, apps, and IT-devices is pivotal not only from the theoretical perspective of combating dehumanization and the risk of creating a new group of invisible workers but also, from a practical standpoint, to stress the recognition of the ultimate human character of the activities in the gig-economy, even if they are mediated by IT tools.[123] Doing so could also mitigate excessively harsh reviews and rating of workers, and the subsequent detrimental impact on their possibility to work.

Second, the gig-economy should not be conceived as a separate silo in the economy. As argued above, the strong links of the gig-economy with broader trends in labor markets such as casualization of work, demutualization of risks, and informalization of the formal economy should not be overlooked, to designate comprehensive solutions to labor problems in modern and future labor markets. In this respect, it is essential to consider how many important dimensions of work in the gig-economy share similar attributes with other nonstandard forms of employment. Recognizing these similarities helps to avoid unnecessary subdivisions in labor discourses and allows including work in the gig-economy into policies and strategies aimed at improving protection and better regulation of nonstandard work, both in general and when addressing specific work arrangements such as casual work or disguised employment relationships.

This will also be pivotal in avoiding hastened legislative responses, such as creating specific categories of employment to classify workers in the gig-

123. *See* Irani, *supra* note 7.

economy or weakening existing regulation to allegedly better the prospect of developments of businesses in this sector: it is far from being demonstrated that deregulation of labor markets and of nonstandard forms of work in particular has positive impacts on growth, innovation or employment rates.[124] It has also been argued above that basic concepts of employment regulation, such as control are not alien to the gig-economy and some existing regulation seems to compatible with forms of work in this sector. When this is not the case, however, efforts should be made to adapt protection to the modern reality of labor markets: for instance, a presumption of employment status could be introduced when a contract of personal service is in place or other indicators are present.[125] Nor should it be taken for granted that work in the gig-economy is incompatible with recognizing the relevant workers as employees: some companies, such as Alfred, Instacart, Munchery, have indeed already spontaneously reclassified their workers as employees.[126]

Measures should also be taken to ensure transparency in ratings and, above all, fairness in business decisions such as deactivation of profiles or changes of terms and conditions of use and payment of workers and to reduce the idiosyncratic character of one of the most important "capitals" in the gig-economy: reputation. Allowing the "portability" of workers' existing good ratings from one platform to another would reduce the dependency of workers upon single platforms: resistance to this development would indeed be inconsistent with the purported role of platforms as facilitators rather than traditional employers. Most importantly, and this is as important for the gig-economy as for any other section of the labor market, some protection should be considered universal and be provided regardless of the employment status.

This is the certainly of the case of basic human rights such as freedom of association and the right to collective bargaining, freedom from forced and

124. See, for data and further references, ZOE ADAMS & SIMON DEAKIN, QUANTITATIVE LABOUR LAW IN NEW FRONTIERS OF EMPIRICAL LABOUR LAW RESEARCH (Amy Ludlow & Alysia Blackham eds., 2015) and the contributions published in LABOUR MARKETS INSTITUTIONS AND INEQUALITY: BUILDING JUST SOCIETIES IN THE 21ST CENTURY (Janine Berg ed., 2015); IN DEFENCE OF LABOUR MARKET INSTITUTIONS. CULTIVATING JUSTICE IN THE DEVELOPING WORLD (Janine Berg & David Kucera eds., 2008) and REGULATING FOR DECENT WORK: NEW DIRECTIONS IN LABOUR MARKET REGULATION (Sangheon Lee & Deirdre McCann eds., 2011).

125. Paragraph 11 of the ILO Employment Relationship Recommendation, 2006 (No. 198) suggests ILO Member States to:

> consider the possibility of the following: (a) allowing a broad range of means for determining the existence of an employment relationship; (b) providing for a legal presumption that an employment relationship exists where one or more relevant indicators is present; and (c) determining, following prior consultations with the most representative organizations of employers and workers, that workers with certain characteristics, in general or in a particular sector, must be deemed to be either employed or self-employed.

126. Lydia De Pillis, *Why Homejoy's Collapse Is Not a Harbinger of Doom for the On-Demand Economy*, WASH. POST, July 17, 2015, http://www.washingtonpost.com/news/wonkblog/wp/2015/07/17/why-homejoys-collapse-is-not-a-harbinger-for-the-on-demand-economy/; Berg, *supra* note 16; Smith & Leberstein, *supra* note 1.

child labor, and the right not to be discriminated.[127] These rights, that correspond to the Fundamental Principles and Rights at Work enshrined in the in the eight Fundamental Conventions of the ILO are regarded to be universal.[128] According to the ILO Supervisory Bodies, indeed, no worker – irrespective of their employment status – should be denied access to these rights, including self-employed persons.[129] Policies oriented toward this direction would already render the protective gap between employment and self-employment less dramatic, without incurring in the potential abovementioned problems that might arise from the introduction of an intermediate category of workers.

Of course, all of the above would require multifaceted efforts, in particular for forms of work having a global dimension such as crowdwork: cooperation between regulators and labor market operators will be essential to ensure that the opportunities of development and employment that could accompany crowdwork in developing countries do not occur at the expense of decent work conditions. In doing so, the role of workers' and employers' organization and social dialogue will be fundamental.

Indeed, several forms of organizations are already a reality in this sector, both for crowdwork – with platforms that try to connect workers online and make them cooperate, for instance, by reducing information asymmetries vis-à-vis platforms and clients[130] – and for workers executing activities in the "real" world.[131] These organizations can be either grassroots or promoted by existing actors, also on a sector level, and – most interestingly – in some cases, new realities cooperate with more traditional and structured actors to organize workers in the gig-economy.[132] An example of cooperation is the

127. An extended version of this study, also addressing in depth risks and opportunities arising from the gig-economy to all these human rights, is V. De Stefano, *The Rise of the "Just-in-Time Workforce": On-Demand Work, Crowdwork and Labour Protection in the "Gig-Economy"* (Working Paper No. 71, ILO, 2015).

128. *See* ILO, *Declaration on Fundamental Principles and Rights at Work* (1998), *available at* http://www.ilo.org/declaration/lang--en/index.htm (Oct. 26, 2015).

129. *See* ILO, COMMITTEE OF EXPERTS ON THE APPLICATION OF CONVENTION AND RECOMMENDATIONS (CEACR), GENERAL SURVEY ON THE FUNDAMENTAL CONVENTIONS CONCERNING RIGHTS AT WORK IN LIGHT OF THE ILO DECLARATION ON SOCIAL JUSTICE FOR A FAIR GLOBALIZATION (Report III (Part 1B), International Labour Conference, 101st Session, 2012); for the ILO Committee on Freedom of Association (CFA) see, recently, POLAND – CFA, REPORT NO. 363, Case No, 2888, *available at* http://www.ilo.org/dyn/normlex/en/f?p=1000:50002:0::NO:50002:P5 0002_COMPLAINT_TEXT_ID :3057194. Further reference to the opinions of these committees on the right of self-employed workers to accede to freedom of association and collective bargaining in De Stefano, *supra* note 45.

130. Silberman & Irani, *supra* note 2; Niloufar Salehi et al., *We Are Dynamo: Overcoming Stalling and Friction in Collective Action for Crowd Workers* (Paper presented at the 33rd Annual ACM Conference on Human Factors in Computing Systems, Seoul, Apr. 18-23, 2015,) *available at* http://hci.stanford.edu/publications/2015/dynamo/DynamoCHI2015.pdf.

131. *See, e.g.*, *Les chauffeurs d'Uber manifestent contre leur employeur "voleur*," LE MONDE, Oct. 13, 2015, http://www.lemonde.fr/economie/article/2015/10/13/les-chauffeurs-parisiens-uber-creent-un-syndicat_4788221_3234.html#sSvWD7jmftqkWID2.99.

132. This is, for instance, the case of the Global Taxi Network organized by the *International Road Transport Union* (IRU), https://www.iru.org/en_global_taxi_network (last visited May 1, 2016); with

platform FairCrowdWork that was created by the German labor union IG Metall, which is now also collaborating with some of the creators of the Turkopticon, a platform gathering workers on the Amazon Mechanical Turk.[133] Very importantly, employers' associations are also engaging in the debate on the digital economy.[134]

Recognizing in full the human character of activities in the gig-economy and their nature as work is fundamental to support these organizations, also by removing legal barriers, where they exist, such as those that may arise from antitrust laws.[135] In this respect, for instance, the Seattle City Council approved a bill allowing drivers for car-hailing apps to form unions, in December 2015.[136] Self-organization will enhance the opportunities of workers being made aware of their rights; it will thus be fundamental to support activities aimed at reaching the vastest number of workers possible with campaigns oriented at workers in developing countries. Besides participating in the organization of workers, the role of established unions and employees' representative bodies could also concentrate on how to use existing instruments with regard to work in the gig-economy. An example would be to exercise codetermination and information and consultation rights, where present, with regard to the decisions of outsourcing activities via crowdwork or other forms of work on demand.[137] Social partners could also be involved in the creation, support, and spread of codes of conduct addressing issues of labor protection in the gig-economy: an existing example in this respect is a Code of Conduct concerning paid crowdsourcing, already signed by three crowdwork platforms in Germany and supported by the German Crowdsourcing Association.[138]

All this will be fundamental to make sure that workers have a real voice in the future developments of the gig-economy and of the world of work at

reference to the domestic work sector, see Sarah Kessler, *The Domestic Workers Alliance Creates New Framework For Improving Gig-economy Jobs*, FAST CO., (Oct. 6, 2015), http://www.fastcompany.com/3051899/the-domestic-workers-alliance-creates-new-framework-for-improving-gig-economy-jobs.

133. *See* TURKOPTICON, https://turkopticon.ucsd.edu/ (last visited May 1, 2016); FAIR CROWD WORK, http://www.faircrowdwork.org/en/watch (last visited May 1, 2016).

134. See the interesting considerations contained in the position paper of the Bundesvereinigung der Deutschen Arbeitgeberverbände, Confederation of German Employers' Associations (BDA), *Seize the Opportunities of Digitisation. BDA Position on the Digitisation of Business and the Working World* (May 2015); *see also* A LABOUR MARKET THAT WORKS, *supra* note 15.

135. *See* De Stefano, *supra* note 45.

136. Nick Wingfield & Mike Isaac, *Seattle Will Allow Uber and Lyft Drivers to Form Unions*, N.Y. TIMES, Dec. 14, 2015, http://www.nytimes.com/2015/12/15/technology/seattle-clears-the-way-for-uber-drivers-to-form-a-union.html; litigation regarding this decision has been almost immediately introduced, see *Seattle Sued over City Ordinance that Allows Uber, Lyft Drivers to Unionize*, GUARDIAN, Mar. 4, 2016, http://www.theguardian.com/us-news/2016/mar/03/uber-lyft-seattle-lawsuit-us-chamber-of-commerce-unions.

137. Klebe & Neugebauer, *supra* note 109.

138. *See Code of Conduct Paid Crowdsourcing for the Better Guideline for a Prosperous and Fair Cooperation between Companies, Clients & Crowdworkers*, CROWDSOURCING, http://crowdsourcing-code.com/ (last visited Apr. 29, 2016).

large. Calls for self-regulation in this context are worth exploring but the fundamental voice of workers must not be overlooked and self-regulation cannot be unilaterally set by businesses or aimed at satisfying only the "consumer" part of the stakeholders.[139]

As already mentioned, the challenges the gig-economy poses to the world of work are enormous: simplistic and hastened responses aimed at deregulation and shrinking workers' protection must be avoided if opportunities stemming from the gig-economy and future technology-enabled developments in the economy are to be seized for everyone.

139. *See, e.g.*, Molly Cohen & Arun Sundararajan, *Self-Regulation and Innovation in the Peer-to-Peer Sharing Economy*, 82 U. CHI. L. REV. DIALOGUE 116 (2014).