Tennessee Law Review

Volume 87
Issue 1 *Fall 2019*

Article 4

2019

UBERIZING DISCRIMINATION: EQUAL EMPLOYMENT AND GIG WORKERS

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What does the growth of online gig work mean for the future of employment discrimination law? While customers may not care about the sex and race of their Uber driver, elements of explicit and implicit bias can be expected when it comes to personal, home-based services like TaskRabbit or Care.com, or professional business services such as Catalant. In fact, the ubiquity of photographs and other personal data on these apps facilitates discrimination, as some empirical data suggests. Since predictions indicate that gig workers may soon account for 40% of the workforce, the goals of our employment discrimination laws—ensuring equal access and opportunity—may well be thwarted if current doctrine is applied.

The employment discrimination statutes were drafted at a time when the definition of "employee" was not highly contested, and judicial interpretations have excluded independent contractors from their coverage. Whether gig workers are independent contractors under the wage and hour laws has been the subject of significant

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litigation and scholarly commentary, but no consideration has been given to the question of discrimination in their hiring and firing. This Article explores that question. It draws distinctions between discrimination and wage and hour policies; develops several innovative legal theories to protect gig workers under current law; analyzes cases that are just beginning to raise these issues; and finally suggests a normative taxonomy for determining statutory coverage that would replace the outmoded employee/independent contractor dichotomy.

INTRODUCTION

What does Uber-like work mean for the future of employment discrimination law? Litigation over the status of Uber drivers—whether they should be considered employees or independent contractors for purposes of the wage and hour laws—has been closely chronicled in the press,[1] and the legal issues raised have been explored at length by employment law scholars.[2] But almost no

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1. *See* Mike Isaac, *Judge Overturns Uber's Settlement with Drivers*, N.Y. TIMES (Aug. 18, 2016), https://www.nytimes.com/2016/08/19/technology/uber-settlement-california-drivers.html; Mike Isaac & Noam Scheiber, *Uber Settles Cases with Concessions, but Drivers Stay Freelancers*, N.Y. TIMES (Apr. 21, 2016), https://www.nytimes.com/2016/04/22/technology/uber-settles-cases-with-concessions-but-drivers-stay-freelancers.html; Noam Scheiber, *Uber Drivers Ruled Eligible for Jobless Payment in New York State*, N.Y. TIMES (Oct. 12, 2016), https://www.nytimes.com/2016/10/13/business/state-rules-2-former-uber-drivers-eligible-for-jobless-payments.html.

2. For a bibliography of employment law scholarship related to gig work, see GIG ECON. RESOURCES, https://gigeconomyresources.com (last visited Feb. 15, 2020). *See generally* Miriam A. Cherry, *A Taxonomy of Virtual Work*, 45 GA. L. REV. 951 (2011) (discussing the effect of work in "virtual economies," such as online games, on the real economy); Miriam A. Cherry & Antonio Aloisi, *"Dependent Contractors" in the Gig Economy: A Comparative Approach*, 66 AM. U. L. REV. 635 (2017) (exploring the feasibility of a "hybrid category" of workers in an on-demand gig economy, with elements of both employee work and independent contractor work, based on other countries' attempts to do the same); Valerio De Stefano, *The Rise of the "Just-in-Time Workforce": On-Demand Work, Crowdwork, and Labor Protection in the "Gig-Economy,"* 37 COMP. LAB. L. & POL'Y J. 471 (2016) (analyzing workforce concerns in the "gig economy" from the perspective of labor protection); Orly Lobel, *The Gig Economy & the Future of Employment and Labor Law*, 51 U.S.F. L. REV. 51 (2017) (discussing the "multitude of conceptual and practical challenges for the law and public policy" that the rising "gig economy" poses); Orly Lobel, *The Law of the Platform*, 101 MINN. L. REV. 87 (2016) (analyzing the regulatory possibilities for a "platform" or "gig" economy that "defies conventional regulatory theory"); Benjamin Means & Joseph A. Seiner, *Navigating the Uber Economy*, 49 U.C. DAVIS L. REV. 1511 (2016) (proposing a "worker flexibility" test for determining independent

consideration has been given to the question of discrimination in the hiring and firing of gig workers and the effect of "customer preference" on the terms of their employment. While this may not be a critical issue when it comes to taxi drivers, it has major ramifications as Uber-like platforms—for example, TaskRabbit, Rover, Upwork, Postmates, BlueCrew, Catalant, Wonolo, to name just a few—take over many service-related and professional employment opportunities, where employment discrimination indisputably has a significant impact. What protections can be afforded these workers, as compared to those available in traditional employment settings?

What has been variously called Uberization, the sharing economy, the on-demand economy, the gig economy, and the permanent temp economy represents a sea change in how we think about work. According to one study, by the year 2020, over 40% of the United States workforce, some 7.6 million, "will be so-called contingent workers"—freelancers and temporary workers—doubling the current total of 3.2 million.[3] It is further estimated that almost 80% of these contingent workers will be part time.[4] For some portion of these workers, wage and hour regulation will not be a significant concern because they perform white collar services at a level of compensation well beyond minimum wage. But all of these workers face the possibility of discrimination on the basis of protected classifications: race, sex, national origin, religion, disability, age, and sexual orientation, at least in some jurisdictions.[5] In fact, Uber-like

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contractor status in a "gig economy"); Brishen Rogers, *The Social Costs of Uber*, 82 U. CHI. L. REV. DIALOGUE 85 (2015) (comparing the costs and benefits of Uber as a disruptive change from the prior-existing taxi sector).

3. Jeremy Neuner, *40% of America's Workforce Will Be Freelancers by 2020*, QUARTZ (Mar. 20, 2013), https://qz.com/65279/40-of-americas-workforce-will-be-freelancers-by-2020/.

4. *See* Steven Hill, *Medium: How BIG Is the GIG (Economy)?*, STEVEN HILL (Sept. 9, 2015), http://www.steven-hill.com/how-big-is-the-gig-economy/; Christopher Rugaber, *How Big Is Gig Economy? Gov't Study Shows How Little We Know*, FIN. POST (June 8, 2018, 10:29 PM), https://business.financialpost.com/pmn/business-pmn/how-big-is-gig-economy-govt-study-shows-how-little-we-know; Steve Sharpe, *Intuit Forecast: 7.6 Million People in On-Demand Economy by 2020*, BUS. WIRE (Aug. 13, 2015, 4:00 PM), https://www.businesswire.com/news/home/20150813005317/en/Intuit-Forecast-7.6-Million-People-On-Demand-Economy.

5. Employment discrimination against certain groups is outlawed by federal, state, and local laws that vary to some extent. The federal prohibition is in Title VII of the Civil Rights Act of 1964. *See* 42 U.S.C. § 2000e (2018); *see also, e.g.*, Patrick Dorrian, *EEOC Gets $435K for Black Temp Workers in Mississippi*, BLOOMBERG L. (Aug. 30, 2016, 4:02 PM), https://news.bloomberglaw.com/daily-labor-report/eeoc-

platforms may encourage discrimination, since they typically provide the ultimate customer/employer with a prospective worker's name and photograph, and in some cases age, thereby allowing for the possibility of what may be either explicit or implicit bias.[6]

To understand how discrimination plays out in the gig economy, it is helpful to briefly describe the common features of Uber-like platforms. These smartphone applications are designed to match persons or businesses who need a particular service[7] with available workers having the requisite level of skills. Uber, which calls itself a "technology company," as opposed to a "transportation company,"[8] provides the simplest example. Drivers must pass a screening process and background check, then are interviewed, and their own

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gets-435k-for-black-temp-workers-in-mississippi (providing an example of a Title VII action); Elaine Glusac, *As Airbnb Grows, So Do Claims of Discrimination*, N.Y. TIMES (June 21, 2016), https://www.nytimes.com/2016/06/26/travel/airbnb-discrimination-lawsuit.html (discussing discrimination claims related to Airbnb users). The applicability of Title VII to sexual orientation discrimination is currently unsettled, but at least twenty-one states include it among the protected categories. *See Non-Discrimination Laws*, MOVEMENT ADVANCEMENT PROJECT, https://www.lgbtmap.org/equality-maps/non_discrimination_laws (last visited Feb. 17, 2020).

6. There is an extensive body of scholarship on the subject of implicit bias, which will not be reviewed here. It is generally defined as the bias in judgment, behavior, or both that results from subtle cognitive processes (e.g., implicit attitudes and implicit stereotypes) that often operate at a level below conscious awareness and without intentional control. *See* John F. Dovidio, Kerry Kawakami & Kelly R. Beach, *Implicit and Explicit Attitudes: Examination of the Relationship Between Measures of Intergroup Bias*, *in* BLACKWELL HANDBOOK OF SOCIAL PSYCHOLOGY: INTERGROUP PROCESSES 175–76 (Rupert Brown & Samuel L. Gaertner eds., 2003). Implicit bias is caused by underlying implicit attitudes and stereotypes, which are beliefs or associations an individual makes between an object and its evaluation that "are automatically activated by the mere presence (actual or symbolic) of the attitude object." *Id.* at 176.

7. This Article does not address discrimination in housing accommodations like Airbnb, a subject that has been addressed by several scholars. *See generally* Norrinda Brown Hayat, *Accommodating Bias in the Sharing Economy*, 83 BROOK. L. REV. 613 (2018) (examining claims of discrimination against Airbnb); Nancy Leong & Aaron Belzer, *The New Public Accommodations: Race Discrimination in the Platform Economy*, 105 GEO. L.J. 1271, 1271 (2017) ("Available evidence suggests that, in many circumstances, race discrimination affects the platform economy in much the same way that it affects the traditional economy.").

8. Omri Ben-Shahar, *Are Uber Drivers Employees? The Answer Will Shape the Sharing Economy*, FORBES (Nov. 15, 2017, 11:24 AM), https://www.forbes.com/sites/omribenshahar/2017/11/15/are-uber-drivers-employees-the-answer-will-shape-the-sharing-economy/#6dad82685e55; *see* O'Connor v. Uber Techs., Inc., 82 F. Supp. 3d 1133, 1137 (2015) (stating that Uber argues they are a technology company).

vehicles inspected.[9] If they are accepted, they sign a contract stating that they are independent contractors.[10] The drivers are then matched through the Uber algorithm with those needing transportation. Once the match is made, a photograph of the driver appears on the rider's cellphone;[11] the rider can cancel the ride without charge within a short time period.[12] When the ride is completed, the driver is credited with a proportion of the fare set by Uber, which retains the remainder of the cost.[13] The driver's performance is monitored through customer ratings of one to five stars, and drivers can be disciplined or terminated if their ratings are not satisfactory.[14]

These ratings are a serious matter. As one journalist noted, the impact of "falling below a certain rating and into the 'death zone' is something that's appeared in virtually every news story about Uber . . . . Uber can cut off access to this app at any moment for any number of reasons, reasons that haven't been made entirely clear."[15] The "death zone" seems to be anything between a 4.4 and 4.7 rating.[16] Thus, what we typically think of as at-will discharge of employment is a feature of the Uber platform.

The possibility of discrimination in this model is obvious at several intersections, but perhaps not highly likely. At the initial stage of the driver and company relationship—what we think of as hiring—it is conceivable that Uber would be disinclined to accept drivers who are female, older, disabled, or even of certain ethnicities. In the customer and driver relationship, explicit or implicit bias may

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9. *See, e.g.*, *O'Connor*, 82 F. Supp. 3d at 1136, 1142.

10. *See, e.g.*, *id.*

11. *See Driver Profile Photos*, UBER HELP, https://help.uber.com/driving-and-delivering/article/driver-profile-photos?nodeId=c9b448d0-21eb-4316-800e-7a93ee654461 (last visited Feb. 15, 2020).

12. *See Cancelling an Uber Ride*, UBER HELP, https://help.uber.com/riders/article/cancelling-an-uber-ride-?nodeId=56270015-1d1d-4c08-a460-3b94a090de23 (last visited Feb. 15, 2020).

13. *See, e.g.*, *O'Connor*, 82 F. Supp. 3d at 1136.

14. *See, e.g.*, *O'Connor*, 82 F. Supp. 3d at 1150–51.

15. Samantha Allen, *The Mysterious Way Uber Bans Drivers*, DAILY BEAST (Apr. 14, 2017, 12:25 PM), www.thedailybeast.com/the-mysterious-way-uber-bans-drivers; *see* Jeff Bercovici, *Uber's Ratings Terrorize Drivers and Trick Riders. Why Not Fix Them?*, FORBES (Aug. 14, 2014, 12:31 PM), https://www.forbes.com/sites/jeffbercovici/2014/08/14/what-are-we-actually-rating-when-we-rate-other-people/#2c6e0b40ebca (discussing the impact of these Uber ratings); Benjamin Sachs, *Uber: A Platform for Discrimination?*, ONLABOR (Oct. 22, 2015), https://onlabor.org/uber-a-platform-for-discrimination/ (same).

16. *See* Allen, *supra* note 15.

find its way into how riders allocate their ratings, giving free rein to "customer preference," which Title VII and its sister statutes prohibit as a justification for disparate treatment.[17] As noted above, the ending of the driver and company relationship seemingly can occur without explanation. But with Uber, the interaction between driver and rider is fleeting and relatively impersonal. Therefore, it is unlikely that riders would actually go to the trouble of rejecting available drivers because of bias stemming from viewing their photograph.

But let us consider the Uber model applied to services of a personal or professional nature. According to its website, the company Zeel offers in-home or mobile massage services on-demand "with as little as an hour's notice."[18] Its massage therapists are "licensed, insured, and thoroughly vetted using . . . industry-leading security protocols."[19] Like Uber drivers, massage therapists sign into the app when they are available and log off when they are not.[20] A customer booking an appointment may request a male or female therapist and once the match is made, Zeel sends the customer "a confirmation with the therapist's full name and professional bio."[21] The customer may cancel the appointment up to four hours before the appointment without charge,[22] and after the service, rate the therapist, also using a five-star system.[23]

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17. The employment discrimination statutes have been interpreted to bar employers from discriminating on the basis of customer or co-worker preference for workers of a particular race or sex. This principle was established soon after Title VII's adoption in 1964. *See, e.g.*, Fernandez v. Wynn Oil Co., 653 F.2d 1273, 1276–77 (9th Cir. 1981); Diaz v. Pan Am. World Airways, Inc., 442 F.2d 385, 389 (5th Cir. 1971); EEOC v. Sephora USA, LLC., 419 F. Supp. 2d 408, 416–17 (S.D.N.Y. 2005).

18. *The Perfect In-Home Massage*, ZEEL, https://www.zeel.com/in-home-massage (last visited Feb. 15, 2020).

19. *Id.*

20. *See id.*

21. *Id.* The preference for a male or female massage therapist would most likely come under an exception to the customer preference doctrine, which applies where sex is considered a bona fide occupational qualification necessary to protect bodily privacy interests. *See, e.g.*, Healey v. Southwood Psychiatric Hosp., 78 F.3d 128, 133–34 (3d Cir. 1996).

22. *See I Need to Cancel*, ZEEL, https://www.zeel.com/help-center/faqs/table/54/id (last visited Feb. 15, 2020).

23. *See* Marcy Lerner, *Why Zeel Is the Best In-Home Massage*, ZEEL (Apr. 1, 2016), https://www.zeel.com/blog/lifestyle/massage-experience/why-zeel-is-the-best-massage/.

Catalant is a business consulting application that matches businesses with consultants.[24] Clients post a project, ranging from researching a market to starting, growing, managing, or selling a business.[25] Clients select a consultant after reviewing relevant experience, including photographs, of those who have applied.[26] The service provider is rated by the client after completion of the project.[27] The online service contract makes clear that Catalant is not an employer of the consultants, and the consultants are independent contractors to the client using the platform:

> Customer acknowledges, agrees and understands that: (a) Catalant does not employ or subcontract with any Expert on behalf of Customer; (b) Catalant does not, in any way, supervise, direct, or control the performance of the Expert Services by Experts; (c) Catalant is not a party to any contract Customer may enter into with Experts and will not have any liability or obligations whatsoever under any such contracts; and (d) Catalant makes no representations regarding, and does not guarantee: (i) the reliability, capability, qualifications, background or identities of any Expert, (ii) the quality, safety, security or legality of any services advertised or provided by such Expert, including but not limited to the Expert Services, (iii) the truth or accuracy of the listings and Expert profiles, (iv) the ability of an Expert to deliver Expert Services, or (v) that an Expert can or will actually complete a transaction or Project.

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24. *See What We Do*, CATALANT, https://gocatalant.com/about-2/ (last visited Feb. 15, 2020).

25. *See* Adrya Sanchez, *What Types of Projects Are Completed via the Expert Marketplace?*, CATALANT, https://support.gocatalant.com/hc/en-us/articles/360020509911-What-types-of-projects-are-completed-via-the-Expert-Marketplace- (last visited Feb. 15, 2020).

26. *See* Adrya Sanchez, *Marketplace Services Quick Start Guide*, CATALANT, https://catalantexperts.zendesk.com/hc/en-us/articles/360025367771-Services-Quick-Start-Guide (last visited Feb. 15, 2020); Adrya Sanchez, *What's a Pitch*, CATALANT, https://support.gocatalant.com/hc/en-us/articles/360026124312-What-s-a-Pitch- (last visited Feb. 15, 2020).

27. *See* Adrya Sanchez, *An Overview of Catalant's Process*, CATALANT, https://catalantexperts.zendesk.com/hc/en-us/articles/360024656212-An-Overview-of-Catalant-s-Process (last visited Feb. 15, 2020).

> The Parties are independent contractors and will have no power or authority to assume or create any obligation or responsibility on behalf of each other. This Agreement will not be construed to create or imply any partnership, agency, joint venture or employment relationship between the Parties.[28]

Given the structure of these platforms, explicit bias is given free rein—customers can reject potential workers on the basis of their gender, name, or photograph. If clients do not want to have a Black massage therapist, for example, they need only cancel and then reschedule the appointment. But implicit bias—the unconscious mental processes which cause us to act upon negative stereotypes of stigmatized groups[29]—is even more problematic.

The effect of implicit bias in the workplace and in society generally has been the subject of much popular attention, as well as theoretical and empirical research.[30] It will not be explored in depth here, but a summary of a few studies will give a flavor of the potential for implicit bias to infect the gig economy. In one experiment, two sets of identical resumes—one with "white-sounding" names and one with traditionally Black names—were submitted in response to employment advertisements across a range of occupations and industries.[31] Those with traditionally white names received 50% more callbacks for interviews than those with

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28. *Master Subscription Agreement*, CATALANT (Feb. 28, 2020), https://gocatalant.com/policy/client-terms-of-use/; *see also* Nichole Opkins, *Independent Contractor Versus Employee Status: A Global Perspective*, ASS'N CORP. COUNS. (Dec. 30, 2010), https://web.archive.org/web/20180731083331/http://www.acc.com/legalresources/quickcounsel/Independent-Contractor-verses-Employee-Status-A-Global-Perspective.cfm?makepdf=1 (analyzing the differences between independent contractors and employees).

29. *See Implicit Bias*, PERCEPTION INST., https://perception.org/research/implicit-bias/ (last visited Feb. 15, 2020).

30. *See, e.g.*, Unber Ahmad, *Implicit Bias in the Workplace*, TRAINING INDUSTRY (June 8, 2017), https://trainingindustry.com/articles/performance-management/implicit-bias-in-the-workplace/; Hilarie Bass, *Implicit Bias in the Workplace*, LAW PRAC. TODAY (Feb. 14, 2017), https://www.lawpracticetoday.org/article/implicit-bias-workplace/.

31. Marianne Bertrand & Sendhil Mullainathan, *Are Emily and Greg More Employable than Lakisha and Jamal? A Field Experiment on Labor Market Discrimination*, 94 AM. ECON. REV. 991, 997–98 (2004).

traditionally Black names.[32] Another study used a similar methodology to explore bias in the consideration of applicants for a lectureship at a British university and found that participants were ten times as likely to choose applicants with traditionally white names over applicants with Black or ethnic sounding names with identical curricula vitae.[33]

Implicit bias is generally most pronounced when quick decisions are made.[34] Therefore, Uber-like platforms may be particularly susceptible to its effect. For example, two Stanford economists found that online shoppers were significantly more likely to buy a new model iPod when a photograph showed it being held by a white hand, as compared to a dark-skinned hand.[35] Black sellers were also offered less money for the item.[36]

Perhaps the response to explicit or implicit bias in the gig economy should be "so what?" It might be argued that these platforms do nothing more than provide a technological assist to business arrangements that have always functioned on the independent contractor model. Some massage therapists and some MBA degree holders are salaried employees and are entitled to protections against discrimination. Those who choose to work for themselves are left to their own devices. Their clients select them at their complete discretion and may exercise any biases or prejudices they may hold.

But this view of employment relationships ignores important considerations. First, if statistical projections bear out, it will not be long before half or more of the United States workforce is trying to make a living in the gig economy.[37] It seems contrary to the goals of

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32. *See id.*

33. *See* Geoffrey Beattie et al., *An Exploration of Possible Unconscious Ethnic Biases in Higher Education: The Role of Implicit Attitudes on Selection for University Posts*, 197 SEMIOTICA 171, 191 (2013).

34. *See* Pragya Agarwal, *Here Is Why Organisations Need to Be Conscious of Unconscious Bias*, FORBES (Aug. 26, 2018, 8:59 AM), https://www.forbes.com/sites/pragyaagarwaleurope/2018/08/26/here-is-why-organisations-need-to-be-conscious-of-unconscious-bias/#56032557726b.

35. *See* Louis Bergeron, *Online Shoppers More Likely to Buy from White Sellers than Black, Stanford Researchers Say*, STAN. NEWS (July 19, 2010), https://news.stanford.edu/news/2010/july/hands-craigslist-study-071910.html.

36. *Id.*

37. *See* A.J. Brustein, *Data on the Gig Economy and How It Is Transforming the Workforce*, WONOLO (Feb. 15, 2018), https://www.wonolo.com/blog/data-gig-economy-transforming-workforce/. In 2016, the United States Department of Labor announced that it was undertaking a major study to determine the size of gig economy. *See* Bureau of Labor Statistics: Proposed Collection, Comment Request, 81

our antidiscrimination statutes to leave so many workers without protection. Second, while they may fall within the current legal definition, many gig workers are not truly independent contractors, in the sense that they pick and choose among clients and work at their own pace.[38] Despite the argument put forward by the "technology" companies, a good portion of these workers have a goal to make a full-time salary with one company and are in most respects indistinguishable from salaried employees.

To include some or all gig workers within antidiscrimination protections may require statutory reinterpretation or amendment, or less drastically, a more generous reading of current doctrine, issues that will be explored in this Article. However, it is worth noting that not every problem necessarily requires a legal fix. In fact, Susan Sturm has written that what she calls "second generation" discrimination may best be remedied with a problem-solving approach at an organizational level.[39] In this context, a technological solution could guard against implicit bias, at least at the customer and worker juncture.

Photographs are ubiquitous in Uber-like apps—for no legitimate reason. Why does a customer need a picture, or a real name, of the TaskRabbit worker who is coming to fix his or her toilet? Security concerns could easily be addressed by passwords or codes. In fact, "blind" hiring in traditional employment contexts is a burgeoning method of dealing with implicit bias and was the subject of an extensive New York Times magazine article, showcasing software that scrubs biographical information from resumes before they are vetted for interviews.[40] Scrubbing such identifying information from Uber-like platforms is a reasonable means of insulating workers from implicit bias. In the face of mounting examples of discrimination, Airbnb announced analogous efforts to ensure that Black renters are not denied accommodations by white householders.[41]

Fed. Reg. 67,394, 67,394 (Sept. 30, 2016), https://www.govinfo.gov/content/pkg/FR-2016-09-30/pdf/2016-23625.pdf#page=1.

38. *See infra* Part I.

39. Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458, 567 (2001).

40. Claire Cain Miller, *Is Blind Hiring the Best Hiring?*, N.Y. TIMES (Feb. 25, 2016), https://www.nytimes.com/2016/02/28/magazine/is-blind-hiring-the-best-hiring.html.

41. *See* Katie Benner, *Airbnb Adopts Rules to Fight Discrimination by Its Hosts*, N.Y. TIMES (Sept. 8, 2016), https://www.nytimes.com/2016/09/09/technology/airbnb-anti-discrimination-rules.html; Nick Statt, *Airbnb Teams Up with the NAACP to*

Nonetheless, litigation over discrimination in gig employment will undoubtedly arise soon, and this Article addresses the issues that will come to the fore. Part I explores a bit of labor history to contextualize the gig economy's relationship to regulation and addresses global solutions to rationalizing employment law encompassing the gig worker. In Part II, I consider the question of who is an employee under Title VII and its companion discrimination statutes. Part III looks at the recent ongoing wage and hour litigation over the status of Uber drivers and analyzes how those cases may impact discrimination claims. In Part IV, I examine the handful of discrimination cases brought by gig workers to date. Part V discusses three theories under which gig employers might be brought under antidiscrimination statutes, including: (1) the relevance of § 1981[42] as a strategy to protect some classes of workers and how its utilization may serve as a vehicle for redefining "employee" in other contexts; (2) the application of the *Sibley* doctrine,[43] which bars discriminatory interference with access to jobs by non-employers; and (3) the possibility of considering these employers as "employment agencies" under Title VII. Finally, I conclude by developing a taxonomy of worker, company, and consumer relationships that can be used to determine who should be protected by antidiscrimination statutes.

I. OLD AND NEW UNDERSTANDINGS OF EMPLOYMENT RELATIONSHIPS

It is worth noting that distinction between independent contractor and employee has gained in legal significance over time, particularly with regard to the ordering of employment relationships.[44] And it may be that we are now entering a historic turning point that will result in another reordering of individuals' relationship to work. In this Section, I will briefly explore the

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Fight Racism on Its Platform, VERGE (July 26, 2017, 3:38 PM), https://www.theverge.com/2017/7/26/16037492/airbnb-naacp-partnership-racism-diversity-hosts.

42. 42 U.S.C. § 1981 (2018).

43. Sibley Memorial Hosp. v. Wilson, 488 F.2d 1338, 1341–42 (D.C. Cir. 1973).

44. *See* MATTHEW TAYLOR ET AL., GOOD WORK: THE TAYLOR REVIEW OF MODERN WORKING PRACTICES 35–36 (2017), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/627671/good-work-taylor-review-modern-working-practices-rg.pdf; *see also* Micah Prieb Stolzfus Jost, *Independent Contractors, Employees, and Entrepreneurialism Under the National Labor Relations Act: A Worker-by-Worker Approach*, 68 WASH. & LEE L. REV. 311 (2011) (discussing the importance of the difference between independent contractors and employees in labor and employment law).

antecedents of our current understanding of work relationships and look to the possibility of a future reorganization that will require new paradigms to protect workers from discrimination.[45]

Before the advent of industrial capitalism, work was largely viewed as activity that provided for subsistence. Farming and skilled craft work represented the majority of occupations and were not based on the wage labor model.[46] The structure of work in these enterprises closely approached our understanding of independent contracting today. Servants—another category of employment—were viewed as somewhat attenuated household members; thus arose the early designation of employment law as "master and servant."[47]

In the United States, industrialization led to the creation of the factory, which in turn resulted in a vast migration from rural environments and the growth of cities.[48] It also created a large-scale workforce in the new category of "unskilled labor," decreasing the prevalence of apprenticeships and the passing down of family trades and farming enterprises.[49] Labor became commoditized. Workers gave up an ownership interest in the means of production and in return received the security and certainty of wage labor.

The period from the late nineteenth century until the Great Depression is generally characterized as the laissez-faire era of employment law.[50] Also known as the *Lochner* era, the Supreme

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45. *See generally* Jim Stanford, *The Resurgence of Gig Work: Historical and Theoretical Perspectives*, 28 ECON. LAB. REL. REV. 382 (2017) (asserting that a better understanding of the forces precipitating the changing work environment can better help policymakers and regulators).

46. *See* JEREMY ATAK ET AL., RAILROADS AND THE RISE OF THE FACTORY: EVIDENCE FROM THE UNITED STATES, 1850-70, at 2 (2008), http://www-siepr.stanford. edu/conferences/GWright2008/Atack-Haines-Margo.pdf; *Agriculture Then and Now*, USDA NAT'L AGRIC. LIBR., https://www.nal.usda.gov/topics/agriculture-then-and-now (last visited Feb. 28, 2020).

47. *See, e.g.*, Evelyn Atkinson, *Out of the Household: Master-Servant Relations and Employer Liability Law*, 25 YALE J.L. & HUMAN. 205, 210 (2013).

48. *See Rise of Industrial America, 1876-1900*, LIBR. CONGRESS, http://www.loc.gov/teachers/classroommaterials/presentationsandactivities/presentations/timeline/riseind/ (last visited Feb. 28, 2020); *Rise of Industrial America, 1876-1900: Work in the Late 19th Century*, LIBR. CONGRESS, http://www.loc.gov/teachers/classroommaterials/presentationsandactivities/presentations/timeline/riseind/work (last visited Feb. 28, 2020).

49. *See, e.g.*, William English Walling, *The New Unionism–The Problem of the Unskilled Worker*, 24 ANNALS AM. ACAD. POL. & SOC. SCI. 12, 13 (1904).

50. *See generally* David E. Bernstein, Lochner *Era Revisionism, Revised:* Lochner *and the Origins of Fundamental Rights Constitutionalism*, 92 GEO. L.J. 1 (2003) (discussing the laissez-faire policies in this era).

Court regularly struck down state efforts to improve working conditions or allow for worker organization.[51] That era ended when the Depression created a degree of social upheaval and unrest that threatened the economy's capitalist structure.[52] Two major features of this reversal were the passage of the National Labor Relations Act, giving workers the right to organize and bargain collectively,[53] and the Fair Labor Standards Act (FLSA), establishing minimum wage and overtime pay for non-managerial employees.[54]

Both statutes represent a government effort to equalize the bargaining power between workers and management and to provide greater job security. However, the statutes are creatures of a time when the division between labor and management, as well as between a salaried or hourly wage earner and a contractual type of worker, was clearly delineated and easily determined.[55]

These developments, together with the era of prosperity following World War II, led to the structuring of employment relationships featuring long-term, if not lifelong, security and permanence.[56] It was against this backdrop that workers traded autonomy for a steady paycheck and a limited reprieve from entirely at-will employment.[57]

The era of civil rights legislation, beginning in the early 1960s and stretching through the 1990s, marked a new kind of reordering of employment relationships.[58] The thrust of these statutes was very

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51. *See id.* at 21–35; *see also* Lincoln Fed. Labor Union v. Nw. Iron & Metal Co., 335 U.S. 525, 535 (1949) (stating that the *Lochner* era mindset resulted in the Court striking "down laws fixing minimum wages and maximum hours in employment, laws fixing prices, and laws regulating business activities").

52. *See* Bernstein, *supra* note 50, at 5.

53. National Labor Relations Act, 29 U.S.C. §§ 151–169 (2018).

54. Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201–219 (2018).

55. *See generally* Aarti Shahni, *Service Jobs, Like Uber Driver, Blur Lines Between Old Job Categories*, NPR (June 26, 2015, 5:04 AM), https://www.npr.org/2015/06/26/417675866/service-jobs-like-uber-driver-blur-lines-between-old-job-categories (discussing the blurring of employee categories).

56. *See* LOUIS HYMAN, TEMP: HOW AMERICAN WORK, AMERICAN BUSINESS, AND THE AMERICAN DREAM BECAME TEMPORARY 4–5 (2018) (detailing the rise of temporary work in the United States).

57. *See id.* at 15.

58. *See The Civil Rights Act of 1964: A Long Struggle for Freedom*, LIBR. CONGRESS, https://www.loc.gov/exhibits/civil-rights-act/epilogue.html (last visited Feb. 27, 2020) (discussing the impact of the Civil Rights Act of 1964); *see also Laws Enforced by the EEOC*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION, https://www.eeoc.gov/laws/statutes/ (last visited Feb. 27, 2020) (discussing the various acts that the EEOC is responsible for enforcing).

different from those of the Great Depression era. They were not concerned with the type of immediate economic rewards that result from labor organizing and minimum wage requirements.[59] Instead, they sought to open up the workplace and to ensure that equal employment opportunity would not be limited by race, national origin, religion, sex, age, or disability.[60] These statutes made no distinction between labor and management, nor did they dwell on the question of who should be covered.[61] As discussed in Part II, the statutes apply to "employees," defined as those who work for an employer. Again, they reflect a time when an employee was easily identified: the employee went to work every day at a particular location and collected a paycheck at the end of the week.

With the decline of an industrial economy, exacerbated by the recession of 2008,[62] we appear to be on the cusp of another reordering of employment relationships. While there is some debate about the trajectory of gig work,[63] there is little doubt that it now has and will continue to have a significant impact on our understanding of the legal relationships between workers and employers.

Some scholars—most notably Seth Harris and Alan Krueger—have proposed a global rethinking of employment relationships.[64] They acknowledge that workers in the "online gig economy" do not fit easily into existing employee and independent contractor legal distinctions but put forward a proposal that allocates legal benefits and protections on the basis of a functional analysis rather than on the basis of outmoded labels.[65] Thus, they propose a new category—

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59. *See, e.g.*, *Laws Enforced by the EEOC*, *supra* note 58.

60. *See id.*

61. *See* Age Discrimination in Employment Act, 29 U.S.C. §§ 621–634 (2018); Equal Employment Opportunities Act, 29 U.S.C. § 2000e (2018); Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e–2000e-17 (2018); Equal Opportunities for Individuals with Disabilities, 42 U.S.C. §§ 12101–12117 (2018).

62. *See, e.g.*, USAFacts, *The Declining Economic Impact of Manufacturing*, U.S. NEWS & WORLD REP. (Dec. 18, 2019, 6:00 AM), https://www.usnews.com/news/elections/articles/2019-12-18/the-declining-economic-impact-of-manufacturing-no-longer-made-in-america.

63. *See* Robert McGuire, *Ultimate Guide to Gig Economy Data: A Summary of Every Freelance Survey We Can Find*, NATION1099 (July 16, 2018), https://nation1099.com/gig-economy-data-freelancer-study/.

64. SETH D. HARRIS & ALAN B. KRIEGER, THE HAMILTON PROJECT, A PROPOSAL FOR MODERNIZING LABOR LAWS FOR TWENTY-FIRST-CENTURY WORK: THE "INDEPENDENT WORKER" 5 (2015), http://www.hamiltonproject.org/assets/files/modernizing_labor_laws_for_twenty_first_century_work_krueger_harris.pdf.

65. *See id.*

the independent worker—who would not qualify for wage and hour or unemployment benefits but would be covered by labor organizing and civil rights protections.[66] They argue that civil rights protections are part of the social compact between employers and employees that has evolved over time—a synthesis between enhancing efficiencies in the labor market and ensuring fairness in the treatment of workers with unequal bargaining power.[67]

To effectuate their recommendations, Harris and Krieger assert that "this approach would require congressional action to amend" federal employment discrimination laws, although acknowledging that "civil rights laws have been traditionally contentious topics in Congress."[68] A similar proposal to recategorize workers' status was recently put forward in a major review of working practices in the United Kingdom.[69]

These proposals provide theoretical foundations for thinking about employment discrimination law in relation to the gig economy. But in the near term, they offer little in the way of guidance for the courts and litigants as these issues begin to present themselves. Amending a statute is an easy but unrealistic solution. In the remainder of this Article, I consider alternative paths to achieve the same result.

II. WHO IS—OR SHOULD BE CONSIDERED—AN EMPLOYEE UNDER TITLE VII

Title VII does not define "employee" in any meaningful way.[70] When the statute was enacted in 1964, employment relationships were viewed as straightforward arrangements. People worked full time or part time in blue-collar or white-collar jobs.[71] Specificity about the details of the employment relationship likely did not seem important. The only mention in the Act's legislative history states

66. *See id.* at 15, 17.

67. *Id.* at 17–18.

68. *Id.* at 18.

69. *See* TAYLOR ET AL., *supra* note 44, at 74–81 (discussing the feasibility of increased protections for "self-employed" people within the gig economy—the equivalent of gig work as an "independent contractor" in the United States).

70. *See* Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e–2000e-17 (2018).

71. *See generally* Alexander Monge-Naranjo & Juan I. Vizcaino, *Shifting Times: The Evolution of the American Workplace*, FED. RES. BANK ST. LOUIS (Dec. 11, 2017), https://www.stlouisfed.org/publications/regional-economist/fourth-quarter-2017/evolution-american-workplace (discussing the changes in the American workplace).

that the term employer was "intended to have its common dictionary meaning, except as expressly qualified by the act."[72]

An employee is defined as "an individual employed by an employer."[73] An employer is defined as "a person engaged in an industry affecting commerce who has fifteen or more employees."[74] With this limited guidance, the task of defining the employment relationship has fallen to the courts.[75]

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72. 110 CONG. REC. 7216 (1964) (response memorandum of Sen. Clark to Sen. Dirkson).

73. Civil Rights Act of 1964, 42 U.S.C. § 2000e(f) (2018).

74. 42 U.S.C. § 2000e(b). The Age Discrimination in Employment Act of 1967, 29 U.S.C. § 630(b) (2018), and the Americans with Disabilities Act of 1990, 42 U.S.C. § 12111(5)(A) (2018), contain nearly identical definitions of employer.

75. The Equal Employment Opportunity Commission guidance on the subject mirrors the case law discussed *infra* in this Part:

> In most circumstances, an individual is only protected if s/he was an "employee" at the time of the alleged discrimination, rather than an independent contractor, partner, or other non-employee. An "employee" is "an individual employed by an employer." An individual may have more than one employer. The question of whether an employer-employee relationship exists is fact-specific and depends on whether the employer controls the means and manner of the worker's work performance. This determination requires consideration of all aspects of the worker's relationship with the employer. Factors indicating that a worker is in an employment relationship with an employer include the following:
>
> - The employer has the right to control when, where, and how the worker performs the job.
> - The work does not require a high level of skill or expertise.
> - The employer furnishes the tools, materials, and equipment.
> - The work is performed on the employer's premises.
> - There is a continuing relationship between the worker and the employer.
> - The employer has the right to assign additional projects to the worker.
> - The employer sets the hours of work and the duration of the job.
> - The worker is paid by the hour, week, or month rather than the agreed cost of performing a particular job.
> - The worker does not hire and pay assistants.
> - The work performed by the worker is part of the regular business of the employer.
> - The employer is in business.
> - The worker is not engaged in his/her own distinct occupation or business.

Spirides v. Reinhardt, one of the early cases defining the employment relationship, dealt with the question of whether the plaintiff—an announcer for Voice of America—was an independent contractor, as her employment contract specified, for Title VII purposes.[76] The court reversed the dismissal of the complaint, holding that the district failed to engage in appropriate fact finding, and adopted the "economic realities" test, derived from general principles of the law of agency:

> Consideration of all of the circumstances surrounding the work relationship is essential, and no one factor is determinative. Nevertheless, the extent of the employer's right to control the "means and manner" of the worker's performance is the most important factor to review here, as it is at common law and in the context of several other federal statutes. If an employer has the right to control and direct the work of an individual, not only as to the result to be achieved, but also as to the details by which that

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- The employer provides the worker with benefits such as insurance, leave, or workers' compensation.
- The worker is considered an employee of the employer for tax purposes (i.e., the employer withholds federal, state, and Social Security taxes).
- The employer can discharge the worker.
- The worker and the employer believe that they are creating an employer-employee relationship.

This list is not exhaustive. Other aspects of the relationship between the parties may affect the determination of whether an employer-employee relationship exists. Furthermore, not all or even a majority of the listed criteria need be met. Rather, the determination must be based on all of the circumstances in the relationship between the parties, regardless of whether the parties refer to it as an employee or as an independent contractor relationship.

EEOC Compliance Manual, Section 2: Threshold Issues, EEOC (footnotes omitted), www.eeoc.gov/policy/docs/threshold.html (last updated Aug. 6, 2009) (deriving factors from *Nationwide Mutual Insurance Co. v. Darden*, 503 U.S. 318, 323–24 (1992), where "the Court adopted the 'common law test' for determining who qualifies as an 'employee' under the Employee Retirement Income Security Act of 1974 (ERISA)."); *see also id.* at n.71 ("The test for determining who qualifies as an 'employee' under the EPA is the 'economic realities test.' Under that test, an employee is someone who, as a matter of economic reality, is dependent upon the business to which s/he renders service.") (citing Equal Pay Act, 29 C.F.R. § 1620.8 (2012))).

76. 613 F.2d 826, 827 (D.C. Cir. 1979).

> result is achieved, an employer/employee relationship is likely to exist.[77]

Another circuit court adopted a slightly different and more liberal interpretation, within the broad framework of the economic realities test. Relying on FLSA precedent and the broad social goals of the statute, the court in *Armbruster v. Quinn* held that it must primarily examine the economic dependence of the worker and extend "coverage to all those who are in a position to suffer the harm the statute is designed to prevent."[78] There, the Sixth Circuit remanded for further fact finding on the question of whether the manufacturer's representatives—outside salespeople who sold defendant's products, as well as others, on an untaxed commission basis—should be considered independent contractors or employees for purposes of determining whether the employer met the jurisdictional threshold of fifteen employees.[79]

Still other courts have created more, albeit slight, test variations: the common law agency test and the common law hybrid test, for example.[80] Recently, however, several circuit courts have concluded that these labels only create unnecessary confusion. In *Murray v. Principal Financial Group, Inc.*, the Ninth Circuit "[took] this

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77. *Id.* at 831–32. The court also added the following factors for consideration:

> (1) the kind of occupation, with reference to whether the work usually is done under the direction of a supervisor or is done by a specialist without supervision; (2) the skill required in the particular occupation; (3) whether the "employer" or the individual in question furnishes the equipment used and the place of work; (4) the length of time during which the individual has worked; (5) the method of payment, whether by time or by the job; (6) the manner in which the work relationship is terminated; *i.e.*, by one or both parties, with or without notice and explanation; (7) whether annual leave is afforded; (8) whether the work is an integral part of the business of the "employer"; (9) whether the worker accumulates retirement benefits; (10) whether the "employer" pays social security taxes; and (11) the intention of the parties.

Id. at 832; *cf. EEOC Compliance Manual*, *supra* note 75.

78. 711 F.2d 1332, 1341 (6th Cir. 1983).

79. *Id.* at 1341–42.

80. *See* Nationwide Mut. Ins. v. Darden, 503 U.S. 318, 322–24 (1992) (quoting Cmty. for Creative Non-Violence v. Reid, 490 U.S. 730, 739–40 (1989)) (discussing the common law agency doctrine); Adcock v. Chrysler Corp., 166 F.3d 1290, 1292 (9th Cir. 1999) (same); Lutcher v. Musicians Union Local 47, 633 F.2d 880, 883 (9th Cir. 1980) (applying the common law hybrid test).

opportunity to clarify what the district court ultimately recognized: there is no functional difference between the three formulations."[81] It adopted as controlling the Supreme Court's definition of "employee" set forth in the *Darden* ERISA decision, which turns on "the hiring party's right to control the manner and means by which the product is accomplished," as judged by twelve factors:

> "In determining whether a hired party is an employee under the general common law of agency, we consider the hiring party's right to control the manner and means by which the product is accomplished. Among the other factors relevant to this inquiry are the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party."[82]

In *Salamon v. Our Lady of Victory Hospital*, the Second Circuit also adopted the *Darden* formulation, reversing summary judgment for the employer against a gastroenterologist who had staff privileges at the defendant hospital, and finding that the degree of control that the hospital exerted over her was a jury question.[83]

All of this doctrine does little to clarify the status of Uber-type workers. Moreover, it leaves open the possibility that that not all gig workers will be treated the same. For example, in *Salamon*, the court noted that, "[w]hile summary judgment [for the defendant] may be appropriate in some cases concerning staff physicians . . . , it is not appropriate in all."[84]

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81. 613 F.3d 943, 945 (9th Cir. 2010).

82. *Darden*, 503 U.S. at 323 (footnotes omitted) (quoting *Reid*, 490 U.S. at 751–52).

83. *See* 514 F.3d 217, 231–32 (2d Cir. 2008).

84. *Id.* at 232.

Compare, for example, the driver who works a sixty-hour week only for Uber, which is the driver's sole source of income, with the graduate student who supplements his or her salary as a teaching assistant by driving when they have free time, about ten hours a week. Other than the difference in working hours, the *Darden* factors all come out the same.[85] Should the "economic realities" of the two drivers' situations—one more dependent on Uber than the other—be a sufficient rationale for calling our first driver an employee and the graduate student an independent contractor?

While this approach has a superficial appeal, it does not comport with how the courts and the Equal Employment Opportunity Commission (EEOC) have interpreted Title VII in a related context. There is no question that part-time employees are entitled to the same antidiscrimination protections as full-time workers.[86] Thus, paid interns, for example, are covered under the statute, and even unpaid volunteers may be protected if the volunteer service is required for, or regularly leads to, employment.[87]

A number of scholars have considered the problem of defining employees under the discrimination laws,[88] and some have called for their amendment to specifically include independent contractors. For example, Maltby and Yamada argued in a 1997 article that it was

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85. *See Darden*, 503 U.S. at 323.

86. *See Frequently Asked Questions*, U.S. EQUAL EMP'T OPPORTUNITY COMMISSION, https://www.eeoc.gov/employers/smallbusiness/faq/who_is_an_employee.cfm (last visited Mar. 5, 2020).

87. *See EEOC Compliance Manual*, *supra* note 75; *Frequently Asked Questions*, *supra* note 86.

88. *See generally* John Bruntz, *The Employee/Independent Contractor Dichotomy: A Rose Is Not Always a Rose*, 8 HOFSTRA LAB. & EMP. L.J. 337 (1991) (discussing the employee versus independent contractor determination and the consequences); Patricia Davidson, *The Definition of "Employee" Under Title VII: Distinguishing Between Employees and Independent Contractors*, 53 U. CIN. L. REV. 203 (1984) (same); James E. Holloway, *A Primer on Employment Policy for Contingent Work: Less Employment Regulation Through Fewer Employer-Employee Relations*, 20 T. MARSHALL L. REV. 27 (1994) (same); Valerie U. Jacobson, *Bringing a Title VII Action: Which Test Regarding Standing to Sue Is the Most Applicable?*, 18 FORDHAM URB. L.J. 95 (1990) (discussing the tests and issues with defining employees under Title VII); Henry H. Perritt, Jr., *Should Some Independent Contractors Be Redefined as "Employees" Under Labor Law?*, 33 VILL. L. REV. 989 (1988) (discussing the definition of employees in labor law and its impact); William J. Duensing, Comment, Equal Employment Opportunity Commission v. Zippo Manufacturing Co.: *Choice of a Test for Coverage of the Age Discrimination in Employment Act*, 64 B.U. L. REV. 1145 (1984) (discussing the issue of defining employees under the Age Discrimination in Employment Act).

time to move beyond even the liberal "economic realities" test[89] and suggested that a statutory amendment to expressly cover independent contractors would provide legal protections without "twisting out of shape" the common meaning of "employee," reduce incentives for employers' misclassifying workers, and limit jurisdictional litigation.[90] Their article is largely a response to studies showing a movement in the labor market to a more contingent workforce: part-time and temporary help, often misclassified by employers as independent contractors.[91]

Statutory amendment is a neat but obviously unrealistic solution, as the lack of any legislative interest in this direction over the past twenty years illustrates. Moreover, the uberization of employment relationships is of a different order than the problem of misclassified and temporary workers, which can be remedied by enforcement of current standards. Gig workers present real questions of line drawing, which I address in the Conclusion of this Article.

III. WAGE AND HOUR LITIGATION AND ITS RELATIONSHIP TO DISCRIMINATION CLAIMS

The question whether Uber workers are employees is the subject of active litigation under the FLSA, which establishes minimum wage and hour rules.[92] Dozens of cases—largely class actions—are currently pending in federal courts around the country.[93] Probably the most prominent of these is *O'Connor v. Uber Technologies, Inc.*, a class action filed in 2013 in the U.S. District Court for the Northern

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89. Lewis L. Maltby & David C. Yamada, *Beyond "Economic Realities": The Case for Mending Federal Employment Discrimination Laws to Include Independent Contractors*, 38 B.C. L. REV. 239, 240 (1997).

90. *Id.* at 266; *cf.* Ellen Huet, *Homejoy Shuts Down, Citing Worker Misclassification Lawsuits*, FORBES (July 17, 2015, 2:58 PM), https://www.forbes.com/sites/ellenhuet/2015/07/17/cleaning-startup-homejoy-shuts-down-citing-worker-misclassification-lawsuits/#72a9dd4e78be (providing an example of misclassifying workers as independent contractors).

91. *See* Maltby & Yamada, *supra* note 89, at 245–47.

92. *See* 29 U.S.C. § 206 (2018).

93. *See* Omri Ben-Shahar, *Are Uber Drivers Employees? The Answer Will Shape the Sharing Economy*, FORBES (Nov. 15, 2017, 11:24 AM), https://www.forbes.com/sites/omribenshahar/2017/11/15/are-uber-drivers-employees-the-answer-will-shape-the-sharing-economy/#2314e56a5e55; *see also* Melissa M. Shirley, *Fair Labor Standards Act Claims Continue Their Rise*, BREAZEALE, SACHSE & WILSON, L.L.P. (Apr. 2018), https://www.bswllp.com/fair-labor-standards-act-claims-continue-their-rise- (discussing the general rise of FLSA claims).

District of California.[94] *O'Connor* provides the most detailed analysis of the employee/independent contractor issue and is summarized below.[95]

But a cautionary note is in order here. Regardless of the outcome of the independent contractor issue in the FLSA context, the same result does not necessarily obtain when it comes to discrimination, given the differences in statutory purpose. The 1938 FLSA was a cornerstone of the New Deal legislation, directly responding to massive unemployment brought on by the Depression.[96] The wage rules were intended to guarantee "the minimum standard of living necessary for health, efficiency, and general well-being of workers" and the hour limitations were intended to spread a scarce commodity—employment—among distressed workers.[97] Title VII addresses entirely different concerns.[98]

The *O'Connor* action, although brought in federal court, alleged violations only of the California Labor Act, which offers similar protections to FLSA, although the California law is generally regarded as more liberally interpreted.[99] In March 2015, the U.S. District Court for the Northern District of California denied Uber's motion for summary judgment to declare plaintiffs to be independent contractors as a matter of law.[100] Later that year, the court certified a sub-class of Uber drivers and held that Uber's arbitration clause was unenforceable under a California statute.[101] The Ninth Circuit granted Uber's request for an immediate appeal of the class and

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94. 82 F. Supp. 3d 1133 (N.D. Cal. 2015).

95. *Id.* Other scholars have also explored the ins and outs of the FLSA issue. *See* sources cited *supra* note 88.

96. *See* Irving Bernstein, *Chapter 5: Americans in Depression and War*, U.S. DEP'T LAB., https://www.dol.gov/general/aboutdol/history/chapter5 (last visited Mar. 5, 2020) (discussing the climate at the time the FLSA was adopted).

97. *See* 29 U.S.C. § 202(a) (2018); *see also Fact Sheet: Application of the Fair Labor Standards Act to Domestic Service, Final Rule*, U.S. DEP'T LAB. (Sept. 2013), https://www.dol.gov/agencies/whd/fact-sheets/flsa-domestic-service (stating that the purpose of the FLSA was to "provide minimum wage and overtime protections for workers, to prevent unfair competition among businesses based on subminimum wages, and to spread employment by requiring employers whose employees work excessive hours to compensate employees at one-and-one-half times the regular rate of pay for all hours worked over 40").

98. *See* 42 U.S.C. § 2000e-2 (2018).

99. *See O'Connor*, 82 F. Supp. 3d at 1135.

100. *See id.* at 1153.

101. *See* Mohamed v. Uber Techs., Inc., 109 F. Supp. 3d 1185, 1190 (N.D. Cal. 2015), *aff'd in part, rev'd in part*, 848 F.3d 1201 (9th Cir. 2016).

arbitration decision,[102] and Uber then moved to stay the June 2016 trial date.[103] While that motion was pending, the parties reached a settlement agreement in which Uber agreed to pay drivers as much as $100 million, but the agreement was rejected as insufficient by the district court in August 2016.[104]

Under California law, once an employee comes forward with evidence that he or she provided services for an employer, the burden of proof shifts to the employer to show that the worker is in fact an independent contractor.[105] In *S.G. Borello & Sons, Inc. v. Department of Industrial Relations*, the California Supreme Court set out a number of factors relevant to this determination, the most significant of which is the right to control work details, which encompasses the right to discharge at will.[106] "Secondary factors" include the level of skill, the provision of instrumentalities, the place of work, the length of time services are performed, the degree of permanence of the relationship, and whether the service is an integral part of the business.[107] The *O'Connor* court found that these factors present mixed questions of law and fact, and since reasonable jurors could come to different conclusions, summary judgment was inappropriate.[108]

However, in September 2018, the Ninth Circuit held that the district court's denial of Uber's motion to compel arbitration in *O'Connor*, along with four other pending appeals on the same issue,

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102. *See Mohamed*, 848 F.3d at 1206 (reversing the district court's denial of Uber's motion to compel arbitration and upholding the arbitration clause).

103. *See* Alison Frankel, *Uber and the Gig Economy's Existential Litigation Threat*, REUTERS (Apr. 6, 2016), http://blogs.reuters.com/alison-frankel/2016/04/06/uber-and-the-gig-economys-existential-litigation-threat/.

104. Mike Isaac, *Judge Overturns Uber's Settlement with Drivers*, N.Y. TIMES (Aug. 18, 2016), https://www.nytimes.com/2016/08/19/technology/uber-settlement-california-drivers.html.

105. *See also* Linda Chiem, *GrubHub Fights Ex-Driver's Bid to Undo Contractor Ruling*, LAW 360 (Jan. 10, 2019), https://www.law360.com/articles/1117215/grubhub-fights-ex-driver-s-bid-to-undo-contractor-ruling (highlighting the burden-shifting framework required by California law); Linda Chiem, *GrubHub Slams Drivers Bid for 'Gig Economy' Ruling Redo*, LAW 360 (Sept. 19, 2018), https://www.law360.com/articles/1083905/grubhub-slams-driver-s-bid-for-gig-economy-ruling-redo (providing information on the GrubHub case).

106. 769 P.2d 399, 404 (Cal. 1989).

107. *See id.* at 404, 406–07.

108. *See* O'Connor v. Uber Techs., Inc., 82 F. Supp. 3d 1133, 1138–42, 1148 (N.D. Cal. 2015).

must be reversed.[109] Because the court found the arbitration agreements were enforceable, it also reversed the district court's class certification orders on the ground that the issue was moot.[110]

Prior to the Ninth Circuit decision in *O'Connor*, it appeared that the California litigation was an Uber drivers' best chance to escape independent contractor status. Not only did state law provide a unique avenue for plaintiffs to avoid Uber's arbitration clause, it also shifted the burden of proof on the independent contractor issue to the employer.[111] Moreover, in April 2018, the California Supreme Court issued an even more generous interpretation of the independent contractor test in the *Dynamex* case.[112] Rejecting the multifaceted *Borello* test, it adopted a simpler—and highly worker friendly—version, commonly known as the ABC test.[113] The test provides that a worker is deemed to be an employee unless the employer proves each of the following:

> (a) that the worker is free from the control and direction of the hirer in connection with the performance of the work, both under the contract for the performance of the work and in fact; *and* (b) that the worker performs work that is outside the usual course of the hiring entity's business; *and* (c) that the worker is customarily engaged in an independently established trade, occupation, or business of the same nature as that involved in the work performed.[114]

The test used in *Dynamex*, if widely adopted, would most likely result in the reclassification of a large percentage of gig workers. The sticking point for employers is primarily the second or B prong, which requires employers to show that the workers are not engaged in the primary business of the platform.[115] But California is notoriously liberal in its interpretation of employment law, and a few other—also liberal—states have adopted the ABC test, such as

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109. *See* O'Connor v. Uber Techs., Inc., 904 F.3d 1087, 1090 (9th Cir. 2018); *see also* Mohamed v. Uber Techs., Inc., 109 F. Supp. 3d 1185, 1198–1204 (N.D. Cal. 2015) (discussing California law surrounding arbitration agreements).

110. *See O'Connor*, 904 F.3d at 1090–91.

111. *See O'Connor*, 82 F. Supp. 3d at 1138 (discussing the shifting burden of proof).

112. Dynamex Operations W. Inc., v. Superior Court, 416 P.3d 1 (Cal. 2018).

113. *See id.* at 33–34.

114. *Id.* at 34.

115. *See id.*

Massachusetts and New Jersey.[116] There will be years of litigation before there is a nationwide consensus in the courts with regard to the applicability of wage and hour laws to gig workers.

Moreover, Uber and its cohorts seem intent upon avoiding a final determination of the issue. First, if arbitration clauses are enforced, the outcome of wage and hour claims are largely shielded from public view.[117] Second, even when claims make their way to the courts, employers seem to be choosing to settle the cases, with provisions that include a recognition that the workers will remain classified as independent contractors. Lyft entered into such a settlement in 2017, with a payout of $27 million to over 200,000 drivers.[118] In the oldest nationwide misclassification class action against Uber, pending in a North Carolina federal district court, a settlement was approved in January 2019 under which 5200 drivers will share in $1.3 million, but the settlement does not resolve the employment status issues.[119]

IV. LITIGATION UNDER THE DISCRIMINATION STATUTES

As compared to the plethora of litigation over wage and hour claims, there are almost no reported decisions addressing claims of employment discrimination against Uber, and a search for cases against other popular Uber-like platforms, such as TaskRabbit, reveals no cases. In this Section, I explore a number of possible explanations that may account for the apparent dearth of litigation, and then consider those cases that have been filed.

It should not be assumed from the fact that few cases have been filed, however, that employment discrimination is not a problem in

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116. *See* Mike Kappel, *The End of an Era? How the ABC Test Could Affect Your Use of Independent Contractors*, FORBES (Aug. 8, 2018, 9:10 AM), https://www.forbes.com/sites/mikekappel/2018/08/08/the-end-of-an-era-how-the-abc-test-could-affect-your-use-of-independent-contractors/#562aa7311f66 (noting that Massachusetts and New Jersey already use the ABC test in relation to independent contractors and that other states use the ABC test for unemployment compensation). As of January 2020, the ABC test was codified in California. *See* CAL. LAB. CODE § 2750.3(a)(1) (2020).

117. *See* Cynthia Estlund, *The Black Hole of Mandatory Arbitration*, 96 N.C. L. REV. 679, 679–81 (2018).

118. Lorene D. Park, *$27M Misclassification Settlement Gets Final Approval*, WOLTERS' KLUWER, http://www.employmentlawdaily.com/index.php/news/27m-lyft-misclassification-settlement-gets-final-approval/ (last visited Mar. 5, 2020).

119. Hood v. Uber Techs., Inc., No. 1:16-CV-998, 2019 WL 93546, at *5–7 (M.D.N.C. Jan. 3, 2019).

the platform economy. While I have been unable to locate any directly applicable empirical studies, there is some evidence that is tangentially relevant. In one well publicized study, researchers found that Airbnb hosts were 16% more likely to refuse to rent to guests with Black sounding names.[120] Similarly, a field experiment of Uber and Lyft services found that drivers cancelled on riders with Black sounding names twice as often as riders with white sounding names and that customers with Black sounding names had to wait longer.[121] This study also found women were cheated, by being driven farther than necessary, more on these apps.[122] A study of TaskRabbit found that Taskers were unwilling to provide services in areas with heavy concentrations of non-white residents.[123]

These studies all refer to discrimination by workers towards customers, which implicates concerns other than those related to employment discrimination and could be addressed under the public accommodation provisions of the civil rights statutes.[124] But the studies do show that the gig economy is not exempt from racial and sexual bias. If a TaskRabbit worker does not want to provide services in non-white neighborhoods, it seems more than possible that some white customers may decide not to choose non-white workers solely on the basis of their race. Indeed, as discussed above, in their ubiquitous use of photographs, I suggest these platforms encourage racial and gender-based selection criteria.[125]

A. The Dearth of Cases

At least six hypotheses might explain the dearth of filed employment discrimination matters against platform companies. First, workers may simply assume that they are not entitled to the protection of the discrimination statutes. It is likely that all workers sign an agreement acknowledging that they are independent

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120. *See* Benjamin Edelman et al., *Racial Discrimination in the Sharing Economy: Evidence from a Field Experiment*, 9 AM. ECON. J. 1, 1 (2017), https://www.aeaweb.org/articles?id=10.1257/app.20160213.

121. Yanbo Ge et al., *Racial and Gender Discrimination in Transportation Network Companies* 17–19 (Nat'l Bureau of Econ. Research, Working Paper No. 22776, 2016), https://www.nber.org/papers/w22776.

122. *Id.* at 18.

123. *See* Jacob Thebault-Spieker et al., *Avoiding the South Side and the Suburbs: The Geography of Mobile Crowdsourcing Markets*, *in* CSCW 2015–PROCEEDINGS OF THE 2015 ACM INTERNATIONAL CONFERENCE ON COMPUTER-SUPPORTED COOPERATIVE WORK AND SOCIAL COMPUTING 265 (2015).

124. *See supra* notes 120–23.

125. *See supra* Introduction.

contractors,[126] and without legal advice they may believe that the contractual provision is determinative of their status. As discussed below, it is difficult for a low-wage gig worker to find legal representation in these matters.

Second, the same contracts may contain a clause requiring any dispute with the company to be resolved through arbitration.[127] These clauses present another stumbling block to bringing discrimination claims and, as discussed above, are being widely used to prevent public litigation. For workers who clearly qualify as "employees" within the meaning of the discrimination statutes, the Supreme Court has upheld contractual agreements that bar the bringing of claims outside of private arbitration.[128] The *O'Connor* litigation discussed above demonstrates the difficulties of circumventing arbitration clauses, even in a state that does not view them with favor.[129]

Third, Title VII, the Age Discrimination in Employment Act (ADEA), and the Americans with Disabilities Act (ADA) all require exhaustion of administrative remedies, either with the EEOC or a state human rights agency that has a work-sharing agreement with the EEOC.[130] With the typical process, the employee fills out a

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126. *See, e.g.*, O'Connor v. Uber Techs., Inc., 82 F. Supp. 3d 1133, 1136 (N.D. Cal. 2015) (stating that the Uber drivers had to sign an agreement stating they were independent contractors); *see also* Gene Zaino, *The Importance of a Written Agreement When Engaging Independent Contractors*, FORBES (July 2, 2018, 9:00 AM), https://www.forbes.com/sites/forbeshumanresourcescouncil/2018/07/02/the-importance-of-a-written-agreement-when-engaging-independent-contractors/#63383cfbd9ef (providing advice on executing a written agreement with independent contractors).

127. *See, e.g.*, Mohamed v. Uber Techs., Inc., 848 F.3d 1201, 1206 (9th Cir. 2016) (discussing arbitration agreements in Uber driver contracts). The Supreme Court upheld the mandatory arbitration of employment discrimination claims in 2001. *See generally* Circuit City Stores, Inc. v. Adams, 532 U.S. 105 (2001). In its recent decision in *Epic Systems Corp. v. Lewis*, the Court signaled that it would continue to give employers wide latitude, holding that employment agreements barring collective or class based arbitration did not violate the National Labor Relations Act or the Federal Arbitration Act. 138 S. Ct. 1612, 1632 (2018).

128. *See* 14 Penn Plaza LLC v. Pyett, 556 U.S. 247, 265–66 (2009).

129. *See supra* note 109 and accompanying text.

130. *See* Age Discrimination in Employment Act, 29 U.S.C. §§ 621–634 (2018); Civil Rights Act of 1964, 42 U.S.C. §§ 2000e–2000e-17 (2018); Americans with Disabilities Act, 42 U.S.C. §§ 12101–12117 (2018); *see also Filing a Charge for Discrimination*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION, https://www.eeoc.gov/employees/charge.cfm (last visited Mar. 5, 2020) ("All of the laws enforced by EEOC, except for the Equal Pay Act, require you to file a Charge of Discrimination with us before you can file a job discrimination lawsuit against your employer.").

questionnaire, and then agency personnel completes the charge.[131] It may well be that the agencies simply do not accept charges from workers whom they consider to be independent contractors or dismiss them after the company's response raises a defense.

Fourth, even if workers are able to surmount these hurdles, their claims still may not show up in reported decisions. If a case is settled, it will remain invisible. Settlement agreements are typically governed by confidentiality agreements and are not recorded in court dockets.[132] Uber may be following the same settlement strategy it is using in the wage and hour matters to avoid any judicial resolution of the status of its workers.

Fifth, it may be that the discrimination cases are too recent to appear as reported decisions yet and are wending their way through the discovery and motion process, which frequently takes years to complete.[133]

Finally, these cases are unlikely to be attractive to competent private counsel. It is only as a result of the publicity surrounding the wage and hour litigations that attorneys may begin to take an interest in these claims. But there are significant differences between wage and hour and discrimination claims that may dampen that interest. Unlike Title VII claims, which most often turn on individual factual circumstances,[134] FLSA cases lend themselves to

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131. *See, e.g., How to Submit an Employment Discrimination Complaint*, TEX. WORKFORCE COMMISSION, https://twc.texas.gov/jobseekers/how-submit-employment-discrimination-complaint (last visited Mar. 5, 2020).

132. *See* Minna J. Kotkin, *Invisible Settlements, Invisible Discrimination*, 84 N.C. L. REV. 927, 929 (2006). *Compare, e.g.*, Ronald L. Burdge, *Confidentiality in Settlement Agreements Is Bad for Clients, Bad for Lawyers, Bad for Justice*, AM. BAR ASS'N (Nov. 1, 2012), https://www.americanbar.org/groups/gpsolo/publications/gp_solo/2012/november_december2012privacyandconfidentiality/confidentiality_settlement_agreements_is_bad_clients_lawyers_justice/, *with Confidentiality in Settlement Agreements Is a Virtual Necessity*, AM. BAR ASS'N (Nov. 1, 2012), https://www.americanbar.org/groups/gpsolo/publications/gp_solo/2012/november_december2012privacyandconfidentiality/confidentiality_settlement_agreements_is_virtual_necessity/.

133. A four- to five-month period for discovery in an adverse employment action is common. *See generally, e.g.*, James v. Newspaper Agency Corp., 591 F.2d 579 (10th Cir. 1979) (illustrating discovery disputes and the length of time that may pass during); Henderson v. Nat'l R.R. Passenger Corp., 113 F.R.D. 502 (N.D. Ill. 1986) (same); Woods v. Coca-Cola Co., No. C80-1201A, 1982 WL 31056 (N.D. Ga. June 10, 1982) (same); David A. Green, *The Fallacy of Liberal Discovery: Litigating Employment Discrimination Cases in the E-Discovery Age*, 44 CAP. U. L. REV. 693 (2016) (discussing the issues with discovery, including length and costs).

134. *See, e.g.*, Kobos v. Target Corp., No. 2:15-CV-5573(DRH)(SIL), 2018 WL 2943575, at *3 (E.D.N.Y. June 12, 2018) (stating that "discrimination claims under the ADEA and Title VII are generally fact-specific inquiries").

class action treatment, thereby making them more financially attractive to the plaintiff's bar.[135]

B. The Reported Decisions

In two reported decisions, plaintiffs brought claims against Uber alleging discrimination. Both were brought *pro se* and ended with successful motions to dismiss. Neither were litigated in a manner that would give rise to a serious consideration of the issues.

In *Alatraqchi v. Uber Technologies, Inc.*, the plaintiff Uber driver, a naturalized citizen born in Iraq, alleged that he was "employed by" and "'entered into [a] business arrangement' with Uber in late 2011," after being interviewed and having his personal vehicle inspected.[136] The relationship lasted only two weeks, however.[137] Although he had no mishaps or complaints, he received a customer rating of 4.2 out of 5 stars.[138] A manager told him to come to the office with his phone, provided by Uber, took it from him and told him "they don't need [him] anymore."[139] When questioned, the manager told him he was "an aggressive driver," but refused to show him any documentation, and also said that there was not enough business at the time.[140] Plaintiff alleged that his dismissal was based on "Anti-Iraqi, Anti-Shiia" discrimination, that the manager "had hatred towards Iraqis or Shiite Muslims," and that "he heard from other drivers that [the manager] is a JEW."[141] Defendants removed the action from the San Francisco Superior Court to federal court.[142]

In its 2013 decision, the court interpreted the *pro se* complaint as raising discrimination claims under both the California Fair Employment and Housing Act and Title VII.[143] Because plaintiff failed to exhaust administrative remedies under either statute, the court granted Uber's motion to dismiss.[144] Uber also moved to

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135. *See FLSA Collective Actions–Dream or Nightmare?*, WARNER NORCROSS & JUDD (May 15, 2008), http://www.wnj.com/Publications/FLSA-Collective-Actions-Dream-or-Nightmare.

136. No. C-13-03156 JSC, 2013 WL 4517756, at *1 (N.D. Cal. Aug. 22, 2013).

137. *Id.*

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.* at *2.

142. *Id.*

143. *Id.* at *6–7.

144. *Id.* at *4, *7.

dismiss on the ground that plaintiff was an independent contractor, and the court dismissed on this ground as well, but without actually deciding the issue on the merits and allowing leave to amend.[145] The court found that plaintiff made contradictory allegations, at times referring to a business relationship or a partnership and at others to his status as an employee.[146] The court refused to find as a matter of law, as Uber argued, that the plaintiff was not an employee, noting that plaintiff was entitled to come forward with evidence that would meet the *Borello* test under California law.[147] On the merits, the court found that plaintiff had failed to allege sufficient facts, as opposed to conclusory allegations, to support his claim that defendants' conduct was done because of his protected status or that he was treated differently than others similarly situated.[148] Finally, the court read the complaint as alleging a violation of section 1981 of the Civil Rights Act, which, as discussed *supra*, does not require an employment relationship, but held that the insufficiently pleaded facts precluded that claim as well.[149]

The second reported decision, *Jallow v. Uber Tech*, even more perfunctorily dismisses the complaint with leave to amend.[150] It appears that the dismissal—issued in May 2016—was *sua sponte*, given that no counsel for defendant is noted. Plaintiff submitted a form complaint, checking the "race, gender and color boxes on the form complaint to indicate the basis of the discrimination alleged" and attaching a statement alleging that "his partnership with Uber was terminated after he was falsely accused of harassment," without any further factual support.[151] The court found that "even under the most liberal interpretation of plaintiff's allegations, he provides no facts that could possibly connect any adverse employment action to a protected status."[152] No mention was made of plaintiff's employment status.

No subsequent history appears for either of the aforementioned reported cases. The plaintiffs may have stopped pursuing their claim or accepted a settlement. Perhaps the only conclusion to be drawn from these decisions (or the lack thereof) is that issues of

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145. *Id.* at *5.
146. *Id.*
147. *Id.*
148. *Id.* at *6.
149. *Id.* at *8.
150. No. 16-CV-2244(BMC)(LB), 2016 WL 2758270 (E.D.N.Y. May 12, 2016).
151. *Id.* at *1.
152. *Id.* at *2.

discrimination have yet to surface or to attract the attention of the private bar.

Two other decisions indicate that cases are being siphoned off into arbitration, as suggested above. In *Okereke v. Uber Technologies, Inc.*, a driver, appearing *pro se*, claimed that her termination was racially motivated.[153] Uber successfully moved to compel arbitration.[154] The court determined that clear and convincing evidence demonstrated that even the question of arbitrability had been contractually delegated to an arbitrator.[155] The same result was reached in *McIntosh v. Uber Technologies, Inc.*, in an action alleging age discrimination.[156] In neither of these cases was the factual allegation set forth in any detail, however.

C. *What's in the Pipeline?*

An August 2018 case, *Reese v. Uber Technologies, Inc.*,[157] raises some of the issues posed here. The amended complaint in this case alleges that the plaintiff successfully drove for Uber for approximately one year.[158] He was terminated following a criminal background check, allegedly in violation of Pennsylvania law, which bars the use of convictions more than seven years old in making employment decisions.[159] He claims that Uber follows a policy and practice of terminating Black men with old convictions, and that its policies in general with regard to criminal records have a disparate impact on that protected class, in violation of Title VII and § 1981,[160] discussed below. As to the driver's status, the amended complaint merely states that the plaintiff "was employed" by Uber,[161] and no answer has yet been filed.

This action is the first to present a significant theory of discrimination addressed to platform employment, and unlike the prior claims, the plaintiff is represented by counsel.[162] But it is

153. No.16-12487-PBS, 2017 WL 6336080, at *1, *8 (D. Mass. June 13, 2017).

154. *Id.* at *7.

155. *See id.*

156. *See* No. 17-C-3273, 2018 U.S. Dist. LEXIS 10989, at *10–11 (N.D. Ill, Jan. 24, 2018). Plaintiff was represented by counsel in this action.

157. Amended Complaint, Reese v. Uber Techs., Inc., No. 2:18-cv-03300-NIQA (E.D. Pa. Nov. 16, 2018).

158. *See id.* at 5.

159. *See id.* at 6–7.

160. *See id.* at 8–9.

161. *Id.* at 2, 11.

162. *See id.* at 1.

unclear whether a disparate impact analysis will be successfully applied.[163] The EEOC's enforcement guidance with respect to criminal records states:

> [T]here is Title VII disparate impact liability where the evidence shows that a covered employer's criminal record screening policy or practice disproportionately screens out a Title VII-protected group and the employer does not demonstrate that the policy or practice is job related for the positions in question and consistent with business necessity.[164]

However, the Fifth Circuit recently affirmed an injunction on this EEOC rule's enforcement on the grounds that it was improperly adopted by the agency.[165]

Nevertheless, the *Reese* case filing suggests that advocates are beginning to think more broadly about the application of equal employment principles to gig workers. In addition, it has garnered some press attention,[166] which may result in additional filings along these lines.

V. THREE THEORIES OF RELIEF

The cases discussed above do not even attempt to grapple with the complications inherent in the application of Title VII to platform work, given that they have not proceeded much beyond the pleadings stage. In this Section, I outline several theories that might be used to overcome the obvious defense that these workers are not "employees" within the meaning of the antidiscrimination statutes.

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163. The court has stayed the action against Uber, pending the completion of arbitration.

164. *See* U.S. EQUAL EMP'T OPPORTUNITY COMM'N, EEOC ENFORCEMENT GUIDANCE: CONSIDERATION OF ARREST AND CONVICTION RECORDS IN EMPLOYMENT DECISIONS UNDER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964, at 9 (2012), https://www.eeoc.gov//laws/guidance/arrest_conviction.cfm.

165. *See* Texas v. EEOC, 933 F.3d 433, 450–51 (5th Cir. 2019) ("We agree that the Guidance is a substantive rule subject to the APA's notice-and-comment requirement and that EEOC thus overstepped its statutory authority in issuing the Guidance. That conclusion follows naturally from our holding that the Guidance is a final agency action.").

166. *See, e.g.*, Victor Fiorillo, *Uber Fired This Philly Man Over a Crime He Committed in the 1980s*, PHILADELPHIA (Oct. 16, 2018, 11:41 AM), https://www.phillymag.com/news/2018/10/16/uber-background-check-lawsuit-kendall-reese/.

A. 42 U.S.C. § 1981

Section 1981 of the Civil Rights Act of 1866[167] provides the most obvious path to litigating discrimination claims for at least some workers, and if it is so utilized, it might spur an amendment to cover more classes of workers. Enacted as part of Reconstruction legislation, § 1981 prohibits racial discrimination in the making and enforcing of contracts and was intended solely to benefit those freed from slavery.[168] Its language is straightforward:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.[169]

Over the last 150 years, the courts have substantially broadened its reach, however. That history has been extensively chronicled by scholars[170] and will only be briefly summarized here. But the history is noteworthy because it illustrates why there is the possibility that § 1981 may be even further broadened, legislatively or judicially, to encompass all those protected by twentieth century employment discrimination statutes.

For its first 100 years, § 1981 was interpreted coextensively with—and duplicative of—the Fourteenth Amendment, as applying

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167. 42 U.S.C. § 1981 (2018).

168. *Id.*; *see also* Carmen D. Caruso, *Section 1981 Litigation: Making Free Markets Free*, AM. BAR ASS'N (Apr. 23, 2013), https://www.americanbar.org/groups/litigation/committees/civil-rights/articles/2013/section-1981-litigation-making-free-markets-free/ ("Without question, section 1981 was intended to protect the rights of the newly freed slaves and their descendants, and thus the act guaranteed them the same rights as enjoyed by 'white citizens.'").

169. 42 U.S.C. § 1981(a).

170. *See generally, e.g.*, George Rutherglen, *The Improbable History of Section 1981: Clio Still Bemused and Confused*, 2003 SUP. CT. REV. 303 (tracing the history and development of § 1981 and its "dual enactment" with the Fourteenth Amendment).

only to state action.[171] It was not until 1976 that the statute took on a life of its own, when the Supreme Court held in *Runyon v. McCrary* that it was applicable to private contracts.[172] Thereafter, employees began to utilize the statute as an alternative to Title VII for race-based claims, since it carried with it several advantages: there was no need to exhaust administrative remedies;[173] it had a significantly longer statute of limitations;[174] and most importantly, it allowed the award of damages rather than only back pay.[175] This statutory windfall briefly came to an end with the Supreme Court's 1989 decision in *Patterson v. McLean Credit Union*, which held that § 1981 applied only to contract formation (that is, hiring in the employment context), not to discharge or harassment,[176] which made up the large bulk of discrimination claims. Two years later, however, Congress overrode *Patterson* with the passage of the Civil Rights Act of 1991.[177] It redefined the "make and enforce contracts" language to include "the making, performance, modification and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship."[178]

In the 1991 Act, Congress also took the opportunity to address the disparities between race claims brought under § 1981 and sex, national origin, and religion claims that could only be brought under

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171. *See id.* at 307.

172. 427 U.S. 160, 169–71 (1976).

173. *See id.* at 186 n.* (Powell, J., concurring) (noting "the proposition, now often accepted uncritically, that 42 U.S.C. § 1983 does not require exhaustion of administrative remedies under any circumstances").

174. *See* Jones v. R.R. Donnelley & Sons Co., 541 U.S. 369, 370 (2004) (holding that a four-year statute of limitations for § 1981 claims was appropriate); *5 Differences Between Title VII and Section 1981 that Can Help Your Employment Race Discrimination Case*, NAT'L L. REV. (June 12, 2017) [hereinafter *Differences Between Title VII and Section 1981*], https://www.natlawreview.com/article/5-differences-between-title-vii-and-section-1981-can-help-your-employment-race.

175. *See Runyon*, 427 U.S. at 182 ("And whether the damages claim of the [plaintiffs] be properly characterized as involving 'injured feelings and humiliation,' as the Court of Appeals held, or the vindication of constitutional rights, as the petitioners contend, there is no dispute that the damage was to their persons, not to their realty or personalty."); *see also Differences Between Title VII and Section 1981*, *supra* note 174.

176. 491 U.S. 164, 179–82 (1989).

177. 42 U.S.C. § 1981(b) (2018); *see* CBOCS West, Inc. v. Humphries, 553 U.S. 442, 450 (2008).

178. 42 U.S.C. § 1981 (originally enacted as Civil Rights Act of 1991, § 101, 105 Stat. 1071).

Title VII and disability claims brought under the ADA.[179] It amended the Title VII and the ADA to allow for compensatory and punitive damages up to a cap, as well as jury trials.[180] This amendment went a long way towards equalizing the remedies available to protected classes, although it still allowed race claimants the advantages of no cap on damages, no exhaustion requirement, and a longer statute of limitations under § 1981.[181] Today, race claimants will typically litigate under both Title VII and § 1981, and some number of actions are brought only under § 1981, most commonly when there exist procedural barriers to a Title VII action.[182]

One other aspect of § 1981 affects its application to the issues under consideration here: who is to be considered non-white under the language of the statute and thus entitled to its protection? The Supreme Court answered this question in two 1987 companion cases. In *Saint Francis College v. Al-Khazraji*, the Court decided that a United States citizen born in Iraq had properly alleged racial discrimination under § 1981, even though he was Caucasian, after determining that "Congress intended to protect from discrimination identifiable classes of persons who are subject to intentional discrimination solely because of their ancestry or ethnic characteristics" regardless of whether that discrimination involved skin color or other "racial" identifiers.[183] After reviewing the legislative history of § 1981, the Court concluded that the plaintiff must prove that he was subjected to "intentional discrimination based on the fact that he was born an Arab, rather than solely on the place or national of his origin, or his religion."[184] The companion case made the same finding with regard to Jewish people.[185]

Independent contractors have had some success in asserting employment discrimination claims based on race under § 1981 that, because of their employment status, would not be cognizable under Title VII.[186] For example, in *Brown v. J. Kaz, Inc.*, the plaintiff, a

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179. *See id.*

180. *See id.*

181. *See Differences Between Title VII and Section 1981*, *supra* note 174.

182. *See id.* ("Courts often analyze legal claims under these two statutes in a very similar, if not identical, fashion and the same set of facts can be pursued under both laws simultaneously.").

183. 481 U.S. 604, 612–13 (1987).

184. *Id.* at 613.

185. Shaare Tefilia Congregation v. Cobb, 481 U.S. 615, 617 (1987).

186. *See generally* CBOCS West, Inc. v. Humphries, 553 U.S. 442, 454–55 (2008) (discussing the overlap between Title VII and § 1981 claims and re-affirming that

Black woman, attended a training program to work as a sales representative for a distributor of adjustable beds and on the final day signed an "Independent Contractor Agreement."[187] Later the same day, a manager engaged her in a racially derogatory exchange and then arranged to have her agreement terminated.[188] The Third Circuit rejected her claim that she was actually an employee under Title VII, using the *Darden* test, but held as a matter of first impression that she was entitled to bring her claim under § 1981,[189] noting its agreement with three other circuits.[190]

A more complex scenario was presented in *Danco, Inc. v. Wal-Mart Stores, Inc.*[191] The plaintiffs, a corporation and its Mexican-American owner, entered into a contract with a Wal-Mart store to maintain its parking lot.[192] Evidence at trial suggested that the maintenance supervisor had spray-painted the words "White Supremacy" near where the plaintiff unloaded his equipment.[193] Another maintenance worker yelled a racial slur at the plaintiff when he was in his truck, and in another instance said, "I don't like your kind."[194] The plaintiff reported the incidents, and shortly thereafter his contract was terminated.[195] At trial, the district judge gave a standard jury instruction "for a Title VII hostile work environment claim, but omitted any references to 'employee.'"[196] The jury awarded $650,000, and the plaintiffs accepted a remittitur of $300,000.[197] On appeal, the First Circuit considered whether § 1981 encompasses hostile work environment claims, analogous to those

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"Title VII was designed to supplement, rather than supplant, existing laws and institutions relating to employment discrimination" (quoting Alexander v. Gardner-Denver Co., 415 U.S. 36, 48–49 (1974))).

187. 581 F.3d 175, 178 (3d Cir. 2009).

188. *See id.* at 178 ("The details of what happened . . . are disputed, although it is undisputed that [the plaintiff] and [her manager] had a heated argument.").

189. *See id.* at 180–81.

190. *See id.* (citing Taylor v. ADS, Inc., 327 F.3d 579, 581 (7th Cir. 2003); Webster v. Fulton Cty., 283 F.3d 1254, 1257 (11th Cir. 2002); Danco, Inc. v. Wal-Mart Stores, Inc., 178 F.3d 8, 13–14 (1st Cir. 1999)). More recently, the Tenth Circuit also reached the same conclusion in *Allstate Sweeping, LLC v. Black*. 706 F.3d 1261, 1265 (10th Cir. 2013).

191. 178 F.3d 8 (1st Cir. 1999).

192. *Id.* at 10.

193. *Id.*

194. *Id.* at 11.

195. *Id.*

196. *Id.* at 12.

197. *Id.*

brought under Title VII.[198] Wal-Mart argued that this would result in "liability run amok" if it were to be responsible for protecting not only its employees but all of its independent contractors from racial harassment.[199] The court found that harassment fell within the purview of § 1981, but that it was error to allow damages because the individual owner was not a contractual party and there was no evidence of damage to the corporation rather than to the individual.[200] Nevertheless, because Wal-Mart failed to raise these issues below, the parties consented "to treat [the individual owner] and [the corporation] interchangeably,"[201] and because damages against the corporation could have been proven, the court found that there was no miscarriage of justice sufficient to vacate the award under the plain error rule.[202]

These cases make it apparent that gig workers who qualify as a racial group are entitled to the basic protections against intentional employment discrimination of the disparate treatment type—covering hiring, promotion, termination, compensation, and other terms and conditions, including harassment and retaliation—equivalent to that provided under Title VII. Obviously, however, a substantial swath of workers is not covered—sex, sexual orientation, gender identity, disability, age, national origin, and religious discrimination all remain unregulated.

Another consequence of this disparity concerns disparate impact discrimination. Title VII, as well as the ADA and the ADEA, provide a remedy to overturn policies and practices that are not job related or business necessities and have the effect of excluding protected groups, known as disparate impact analysis. For example, the classic and first Supreme Court case adopting this doctrine, *Griggs v. Duke Power Co.*, held that requiring factory workers to have a high school degree to get higher paying jobs, thus excluding many Blacks in the South of the 1960s, violated Title VII, even without a showing of intent to discriminate, because the requirement was not reasonably related to job performance.[203]

Unfortunately for gig workers, however, the Supreme Court has held that disparate impact analysis is not applicable to § 1981 claims, relying on the statute's legislative history to support the view

198. *Id.* at 12–13.
199. *Id.* at 14.
200. *Id.* at 14–15.
201. *Id.* at 15.
202. *See id.* at 16.
203. 401 U.S. 424, 429–33, 436 (1971).

that Congress wished to address only intentional discrimination.[204] This has significant ramifications. Disparate impact cases frequently lend themselves to class action treatment and are therefore most attractive to experienced employment discrimination counsel. And some policies of Uber-like applications may be ripe for disparate impact analysis. Most obviously, the use of photographs might well run afoul of this doctrine if it could be shown that workers who can be identified as belonging to a protected racial group regularly receive fewer gigs than white workers with similar credentials. Proving that photographs are job-related or a business necessity would seem to be an uphill battle. The *Reese* case, discussed above, alleges disparate treatment under § 1981.[205] It also asserts a disparate impact theory based on Title VII, however, claiming that Uber's reliance on criminal background checks has a disparate impact on Black applicants.[206]

Some scholars have argued for the amendment of § 1981 to cover all those protected by other discrimination statutes.[207] In today's political climate, that seems to be an unlikely prospect, unless the disparity in remedies attracts public attention. For example, the 1991 amendments to Title VII, allowing for additional damages, were in part spurred by the fact that those damages were available to Blacks under § 1981 but not to women.[208] If disparate treatment litigation for Black gig workers meets with success, the fact that women have no equivalent remedy may spur legislative action.

B. Sibley *Interference*

Another theory of recovery is based upon an older Title VII decision that addressed the status of independent contractors. In *Sibley Memorial Hospital v. Wilson*, a male private duty nurse brought a sex discrimination action against the hospital where he

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204. Gen. Bldg. Contractors Ass'n v. Pennsylvania, 458 U.S. 375, 382–91 (1982).

205. Amended Complaint, Reese v. Uber, No. 2:18-cv-03300-NIQA, at 2 (E.D. Pa. Nov. 16, 2018).

206. *Id.* at 2, 8.

207. *See* John Dexter Marble, Note, *Civil Rights: Qualifying for Protection Under 42 U.S.C. § 1981 and 1982*, 41 OKLA. L. REV. 151, 153 (1988); Danielle Tarantolo, Note, *From Employment to Contract: Section 1981 and Antidiscrimination Law for Independent Contractor Workforce*, 116 YALE L.J. 170, 174, 193 (2006).

208. *See* Lynn Ridgeway Zehrt, *Twenty Years of Compromise: How the Caps on Damages in the Civil Rights Act of 1991 Codified Sex Discrimination*, 25 YALE J.L. & FEMINISM 249, 256 (2014); *cf. also* Glass Ceiling Act of 1991, Pub. L. 102-166, § 201, 105 Stat. 1071, 1081 (discussing the issue of barriers to women and minorities).

performed services for individual patients and was paid directly by the patients, not by the hospital.[209] He claimed that the hospital, which facilitated his assignments by contacting a nursing registry, prevented him from working for female patients.[210]

The system worked much like a low-tech version of a gig app. A patient seeking private duty nursing would contact the hospital, which in turn would communicate with one of several nursing registries.[211] The patient is informed that neither the hospital nor the registries discriminate on the basis of race, sex, or age.[212] When the registry makes the match, the nurse is told to report directly to the patient's room.[213] If dissatisfied once the nurse arrives, the patient must nevertheless pay the nurse for the day.[214]

The plaintiff claimed that on several occasions, supervisory nurses refused to allow him access to female patients to which he had been assigned, and that over a thirty-four-year period of working at the hospital, he had only worked with male patients, while female nurses worked with both sexes.[215]

Acknowledging that the plaintiff was not an employee of the hospital, the circuit court nevertheless held that a Title VII claim was not barred.[216] The court relied on the statute's goal of providing equal access to the job market and noted that it explicitly governed other non-employers who controlled job access—labor organizations and employment agencies.[217] It also noted that the statutory language itself bars an employer from discriminating against "any individual," interpreted not to limit claims to claims of former employees and applicants, and that the remedial section of the Act refers to "persons aggrieved," not employees.[218] Given the "highly visible nexus" of the hospital to the "creation and continuation of direct employment relationships between third parties," the court found that "the spirit [and] the language of the Act" called for coverage under Title VII.[219]

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209. 488 F.2d 1338, 1339 (D.C. Cir. 1973).
210. *Id.* at 1339–40.
211. *Id.* at 1339.
212. *Id.*
213. *Id.*
214. *Id.*
215. *Id.* at 1339–40.
216. *Id.* at 1342.
217. *Id.* at 1340–42
218. *Id.* at 1341.
219. *Id.* at 1342.

The "*Sibley* interference theory," as it has come to be called, obviously offers a clear line of recovery for gig workers, both under a disparate impact and disparate treatment analysis. A worker who claims not to have been offered a contract by a platform could argue that it was an interference with the worker's prospective employment. Moreover, a worker could claim that the platform's neutral policies—using photographs or the star rating system—had a disparate impact on the worker's ability to continue employment.

The problem is that while the *Sibley* theory has not been overruled by the D.C. Circuit, neither has it been widely utilized, and it has been disapproved by several other circuits. In *Lopez v. Massachusetts*,[220] the First Circuit rejected a disparate impact claim based upon an interference theory, brought by minority police officers against the state agency that administered promotional examinations.[221] It held that the *Darden* common law factors must govern when a statute does not define the term "employee," noting that the Supreme Court applied *Darden* in determining whether physician shareholders were employees or employers under the ADA, which contains the same definitions as Title VII.[222]

A similar challenge was raised in *Gulino v. New York State Education Department*.[223] In that case, Black and Latino educators alleged that a teacher certification program violated Title VII because of its disparate impact.[224] In explicitly rejecting *Sibley*, the Second Circuit held that by specifically including labor unions and employment agencies, Congress limited the scope of Title VII to those non-employers and none other.[225]

Although these two cases are widely cited as discrediting *Sibley*, they present entirely different factual circumstances. There is simply not the same close nexus between the defendants and employment opportunities in those cases as with the hospital personnel who refused the *Sibley* plaintiff from gaining access to his client.[226] On the other hand, the *Sibley* facts are closely analogous to Uber-like employment. In the next Section, however, I will explore

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220. 588 F.3d 69 (1st Cir. 2009).

221. *Id.* at 72, 89.

222. *Id.* at 83–86 (citing Clackamas Gastroenterology Assocs., P.C. v. Wells, 538 U.S. 440 (2003); Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 323–24 (1992)).

223. 460 F.3d 361, 363–64 (2d Cir. 2006).

224. *Id.*

225. *Id.* at 375.

226. *Compare Lopez*, 588 F.3d at 73–76, *and Gulino*, 460 F.3d at 369–70, *with* Sibley Mem'l Hosp. v. Wilson, 488 F.2d 1338, 1339 (D.C. Cir. 1973).

an alternate theory that would encompass *Sibley* type facts but exclude the broader reach of *Lopez* and *Gulino* type claims.

C. *Apps as Employment Agencies*

When Title VII was enacted in 1964, employment agencies served as a significant gateway to obtaining work. Throughout the latter half of the twentieth century, they were a first stop for those seeking white-collar jobs, both temporary and permanent,[227] just as union membership was the entry to blue-collar employment.[228] Thus, it is hardly surprising that Congress singled out these two non-employer entities to include in the scope of Title VII.

The relevant sections of the statute define "employment agency" and describe the conduct prohibited:

> The term "employment agency" means any person *regularly undertaking* with or without compensation to procure employees for an employer or to procure for employees opportunities to work for an employer and includes an agent of such a person.[229]

Further,

> It shall be an unlawful employment practice for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin, or to classify or refer for employment any individual on the basis of his race, color, religion, sex, or national origin.[230]

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227. *See* Ken Sundheim, *From Ancient Greece to WWII–A Look at the History of the Recruiting Industry*, EZINE ARTICLES (June 16, 2010), https://ezinearticles.com/?From-Ancient-Greece-to-WWII---A-Look-at-the-History-of-the-Recruiting-Industry&id=4494614; *see also* 5 EMPLOYMENT COORDINATOR EMPLOYMENT PRACTICES §§ 20:160–20:214, Westlaw (database updated Oct. 2019).

228. *See* Jill Maxwell, *Unifying Title VII and Labor Law to Expand Working Class Women's Access to Non-traditional Occupations*, 11 GEO. J. GENDER & L. 681, 682 (2018) (stating that "Union density–the number of workers who are union members–in blue-collar jobs is high").

229. 42 U.S.C. § 2000e (2018).

230. 42 U.S.C. § 2000e-2(b) (2018).

At first glance, this prohibition seems like a perfect fit for Uber-like platforms. If, for example, TaskRabbit declined to take on women workers, it would be refusing to refer them for employment.[231] If the use of photographs could be shown to have a disparate impact on the individual being selected for employment, this would fall under the "otherwise to discriminate" language of Title VII, or perhaps even the provision making a classification according to sex.[232] In fact, it might well be argued that the use of photographs is the equivalent of employment listings by gender, a practice specifically outlawed by another section of Title VII:

> It shall be an unlawful employment practice for an employer, labor organization, *employment agency* . . . to print or publish or cause to be printed or published any notice or advertisement relating to employment by such an employer . . . or referral for employment by such an employment agency . . . indicating any preference, limitation, specification, or discrimination, based on race, color, religion, sex, or national origin . . . .[233]

However, judicial and EEOC interpretations of the statute raise certain roadblocks. As one district court recently commented, "[t]he contours of what constitutes 'employment agencies' are unclear and few courts have confronted the issue as this section of Title VII is not often litigated."[234] One limiting factor that courts have established is that in order to be considered an employment agency, the entity must regularly engage in placement activities as their business or profession.[235] This rule would not impact Uber-like apps, as their business clearly meets this test. Other courts have read in a *Sibley*-like interpretation to define employment agencies, concluding that if

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231. Unlike Title VII, the ADEA does not define "employment agency" to include "to procure for employees opportunities to work for an employer." *See* Veasy v. Teach for Am., Inc., 868 F. Supp. 2d 688, 698–99 (M.D. Tenn. 2012); Wynn v. Nat'l Broad. Co., 234 F. Supp. 2d 1067, 1105 (C.D. Cal. 2002).

232. 42 U.S.C. § 2000e-2(a).

233. 42 U.S.C. § 2000e-3(b) (2018).

234. Axness v. Aqreva LLC, 118 F. Supp. 3d 1144, 1158 (D.S.D. 2015) (citing E.E.O.C. v. Kelly Servs., Inc., 598 F.3d 1022 (8th Cir. 2010)).

235. Brush v. S.F. Newspaper Printing Co., 315 F. Supp. 577, 580 (N.D. Cal. 1970).

an entity interferes with employment opportunities by not making referrals, it is covered regardless of its regular business activities.[236]

Some litigants have attempted to use the "employment agency" provision creatively. For example, a sixty-four-year-old Black applicant to Teach for America (TFA) claimed that he was discriminatorily rejected from the program based on his age and race.[237] TFA qualified as an employment agency under Title VII because it "procures" for its members the opportunity to work in school districts around the country.[238] Because the applicant offered only broad, conclusory and subjective allegations of race discrimination, however, that claim was dismissed.[239] With regard to the age claim, where the applicant alleged direct evidence of discrimination in the interview, the court determined that the ADEA contains a narrower definition of "employment agency," in that it does not include entities that procure employment opportunities but only those that procure employment with employers, and thus dismissed this claim as well.[240] Other examples include:

- an age claim by television writers against talent agencies,[241] in which the court also relied on the narrow ADEA definition to dismiss the claim;[242]
- a sexual harassment claim against a vocational truck driving program, in which the court denied summary judgment on the issue of whether the program came within the "employment agency" definition;[243] and
- a claim against the University of Chicago Law School, alleging that it functioned as an employment agency and allowed on-campus interviewers to engage in sex discrimination, in which summary judgment was granted to defendants on procedural grounds, although the court found that the law school did in fact function as an employment agency for Title VII purposes.[244]

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236. Scaglione v. Chappaqua Cent. Sch. Dist., 209 F. Supp. 2d 311, 318–19 (S.D.N.Y. 2002).

237. Veasy v. Teach for Am., Inc., 868 F. Supp. 2d 688, 689 (M.D. Tenn. 2012).

238. *Id.* at 695–96.

239. *Id.* at 696.

240. *Id.* at 698–702.

241. Wynn v. Nat'l Broad. Co., 234 F. Supp. 2d 1067, 1074 (C.D. Cal. 2002).

242. *Id.* at 1109–10.

243. Wilborn v. S. Union State Cmty. Coll., 720 F. Supp. 2d 1274, 1291–95 (M.D. Ala. 2010).

244. Kaplowitz v. Univ. of Chi., 387 F. Supp. 42, 43–46 (N.D. Ill. 1974).

As these and other cases make apparent, attempts to creatively employ Title VII and ADEA to reach beyond the standard employer-employee relationship have been met with mixed success. The Uber-driver scenario appears much more analogous to the traditional employment agency model.

There is one significant stumbling block to its utilization in this context, however. In a 1988 policy statement, apparently still in effect, the EEOC considered the question of "[w]hether an employer with which an employment agency or union deals must have fifteen or more employees in order for the agency or union to be covered by Title VII."[245] It answered as follows:

> [I]n order to be considered an employment agency within the meaning of Title VII, an entity or person must regularly deal with at least one person or entity employing fifteen or more employees. In the particular case, the Commission's inquiry will be a factual one designed to ascertain the frequency with which an employment agency deals with a Title VII employer or employers. If an agency regularly procures employees for at least one Title VII employer, it qualifies as an employment agency under § 701(c) with respect to all of its activities whether or not such activities are for employers covered by the Act. It would not matter that the employing entity in the charge at issue has fewer than fifteen employees. A corollary of this situation is one where, in a particular instance, an employing entity has more than fourteen employees, but the agency is found not to regularly deal with that employer, or others that large. In such a case, the employment agency would not be covered by Title VII.[246]

The EEOC cites no independent authority for this proposition, other than to note that it "has consistently interpreted the term

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245. *Policy Statement: Whether an Employer with Which an Employment Agency or Union Deals Must Have 15 or More Employees in Order for the Agency or Union to Be Covered by Title VII*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION (July 11, 1988), https://www.eeoc.gov/policy/docs/employers_dealing_with_unions.html.

246. *Id.*

'employer' as used in Title VII to mean a Title VII employer (i.e., a person engaged in an industry affecting commerce who has fifteen or more employees . . .)," and that it had, days earlier, adopted regulations to this effect under its ADEA regulatory authority (having no power to adopt regulations under Title VII).[247]

While there is a superficial symmetry to using the same definition of employer for all purposes, the policy statement does not do that. Instead, it attempts to further define "employment agency" by reference to the professional character of the entity or person.[248] It must at least deal with some substantial employers to be covered.[249] But if professionalism is the goal, it would seem that the application of the term "regularly" accomplishes that goal.[250]

Despite this policy guidance, the ultimate resolution of whether Uber-like apps can be considered employment agencies will rest with the courts. The Supreme Court has repeatedly refused to defer to EEOC guidance with regard to antidiscrimination statutes, and prefers, in Justice Stevens' words, "to chart its own course."[251] But considering the purpose of including employment agencies within Title VII at the time of its passage, a good argument can be made that since apps now serve the same gatekeeping function, they should be similarly regulated.

V. CONCLUSION: A TAXONOMY OF WORKER RELATIONSHIPS

All of the above addresses the question of whether Uber-like platforms are subject to antidiscrimination laws. It does not consider the normative issue of whether they, or the ultimate consumers of services, should be liable for discrimination under these statutes. I conclude that there is no one answer. A number of variables come into play: the degree to which the worker relies on the app for steady and consistent full or part-time employment, the qualities and size of the ultimate consumer, and the nature of the discrimination, whether intentional disparate treatment or as a result of policies that create a disparate impact.

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247. *Id.*

248. *See id.*

249. *Id.*

250. *Id.*

251. Melissa Hart, *Skepticism and Expertise: The Supreme Court and the EEOC*, 74 FORDHAM L. REV. 1937, 1937 (2006) (quoting Sutton v. United Air Lines, Inc., 527 U.S. 471, 513 (1999) (Stevens, J., dissenting)).

Take, for example, the platform Care.com, which provides childcare referrals, ranging from a one-off Saturday night babysitter to a full-time nanny.[252] The site provides care requesters a first name and photograph (identifying in most instances race and gender), age, neighborhood of residence, years of experience, information written by the care provider, a star rating, and written reviews of the care providers.[253]

Consider first the ultimate consumer of this service, or in common parlance, the employer, which in this case is typically the parents requesting the service. Is there discrimination in the choice of a babysitter or nanny? Undoubtedly yes, but there always has been. Small employers are exempt from Title VII's reach. Much as we might like to eliminate bias in this context, it seems an unlikely legislative change.

But what about the liability of the platform itself? If Care.com were to refuse to list an older applicant, or one with a disability, for example, should that be actionable? This might be an unlikely scenario, given that the platform has nothing to lose by listing as many applicants as possible. Nevertheless, this is classic disparate treatment and should fall within the statute either on the interference theory or by categorizing the platform as an employment agency. And if Care.com policies with regard to the information that it displays can be shown to have a disparate impact on selection, it should have to prove that the information is job related and its disclosure is a business necessity.

But as to the app, should it matter whether the applicant is a student seeking a Saturday night gig for a bit of extra spending money (clearly an independent contractor) or someone who wants a permanent nanny position (clearly an employee) under the common law test? I suggest that it should not make a difference with regard to platform liability. When an app serves as a gatekeeper for employment, the gate should be open to all.

How does this analysis change if the ultimate consumer is a business with fifteen or more employees, and therefore an employer under Title VII? Assuming the app is liable using the above theories, what about the consumer? A business looking for a marketing specialist through Catalant[254] could be seeking a spectrum of worker types:

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252. *See Company Overview*, CARE.COM, https://www.care.com/company-overview (last visited Mar. 5, 2020).

253. *See* CARE.COM, https://www.care.com/ (last visited Mar. 5, 2020).

254. *About*, CATALANT, https://gocatalant.com/about/ (last visited Mar. 5, 2020).

1) a full-time, unlimited term worker;
2) a part-time, unlimited term worker;
3) a full-time, short-term worker; or
4) a part-time, short-term worker.

Under scenarios one and two, I suggest that Title VII should apply. The statute makes no distinction between full and part-time work, and unlimited long-term work is the antithesis of independent contractor status. The temporary status presented by scenarios three and four raises more difficult questions. A one-month part-time gig or a one-week full-time gig sound like classic independent contractor situations. If the worker does, or can theoretically, pick and choose among jobs, the terms and conditions of employment are a matter of negotiation and should not be subject to Title VII.

In this regard, the Family and Medical Leave Act, which gives workers twelve weeks of unpaid leave to meet health needs for themselves or family members,[255] presents an interesting and very simple model. It defines "eligible employees" as those who have been employed for at least twelve months for at least 1250 hours of service during the previous twelve-month period.[256] Assuming a forty-hour work week, this means that employees are covered if they work 31.25 weeks in a year, slightly more than half time. Congress made the determination that this level of work entitles the employee to benefits. A similar calculus could be applied to platform work with regard to discrimination claims.

Obviously, line drawing will not be simple, but an analysis from this perspective makes more sense that the outdated *Darden* analysis, which also involves close fact finding. For example, that someone works from home or uses his or her own computer and cell phone are no longer determinative factors for employment status.[257] And in many employment situations, the business does not "control the manner and means by which the product is accomplished" for its traditional employees.[258] Indeed, the very language of the overarching *Darden* test seems anachronistic.

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255. 29 U.S.C. § 2612(a)(1) (2018).

256. 29 U.S.C. § 2611(2)(A) (2018).

257. *See* Nationwide Mut. Ins. v. Darden, 503 U.S. 318, 323–24 (1992) (discussing the *Darden* factors).

258. *See id.* at 323.

On the other hand, the ABC test recently adopted by the California Supreme Court may go too far.[259] The B prong requires an employer to prove "that the worker performs work that is outside the usual course of the hiring entity's business"[260] to be considered an independent contractor. This standard would seem to result in virtually all online platform workers being considered employees and would encompass the aforementioned student babysitter paid by Care.com and the marketing expert paid by Catalant.com.

In the world of apps, it is time to consider who is an independent contractor from a perspective that more nearly reflects the realities of today's workplace. Case by case line drawing may seem inefficient, but we are at the beginning stages of sorting out new employment relationships. In the absence of any political impetus for new or amending legislation, it makes sense for the courts to take on this task, keeping in mind that discrimination laws serve a different function than wage and hour legislation.

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259. *See* Dynamex Operations W. Inc. v. Superior Court, 416 P.3d 1, 34 (Cal. 2018) (outlining the ABC test).

260. *Id.* at 34.