WHOSE GIG IS IT ANYWAY? TECHNOLOGICAL CHANGE, WORKPLACE CONTROL AND SUPERVISION, AND WORKERS' RIGHTS IN THE GIG ECONOMY

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Under the current regime of employment and labor laws, coverage is determined on the basis of whether a given worker is an employee as opposed to an independent contractor. These laws contain inadequate definitions of "employee," leaving it up to the court system and administrative agencies to define the term. The current tests that they use fail to capture the realities of the gig economy, a system that purports to promote greater worker freedom through the fragmentation of work assignments into smaller tasks or gigs. The gig economy has offered consumers lower prices and has given workers greater autonomy in choosing when to work. But if you take a look under the hood, there are problems within the gig economy. Workers complain about their lack of control over their work lives and workplace decisions, as well as their lack of economic opportunity. Indeed, within the gig economy, workers are subject to invisible yet powerful methods of supervision and control. These methods of control make it difficult for courts to find comparisons between the gig economy and more traditional work relationships. This Comment examines the gig economy, the factors behind its success, and the issues for workers that have followed. It then makes the argument that, if measures are not taken to reform existing employment and

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labor laws, gig economy workers, regardless of an individual's education level, could endure the same problems that graduate assistants at American universities currently face: dwindling economic opportunity and workplace isolation. This Comment then presents some current proposals for creating a new regime of employment and labor laws for the gig economy. This new regime of laws is going to require its own test that better reflects how companies like Uber and Lyft control, supervise, and manage their workforce in ways both new and old. Accordingly, this Comment ends by proposing a two-part test that looks at (1) the kind of service the worker is providing and (2) whether the employer is economically dependent on the service that the workers in question are providing.

INTRODUCTION

Everyone has had a boss or a supervisor who they have dreaded seeing on at least one occasion. Whether it's simply to avoid a conversation about work, or to just avoid conversation altogether, awkward interactions with authority punctuate our working lives.[1] But what if people could work whenever they wanted, freeing them from the micromanagement tactics of supervisors and from having to work a fixed schedule? Companies operating in the "gig" economy[2] seem to offer that very possibility: a work life on an individual's terms, not those of a company.[3] But the opportunity to be your own boss in the gig economy does not come without risk. Most gig workers are not employees of companies like Uber and Lyft, but independent contractors.[4] This distinction is a vital one

1. *See* OFFICE SPACE (Twentieth Century Fox 1999).

2. At its simplest, the gig economy is characterized by the "prevalence of short-term contracts or freelance work, as opposed to permanent jobs." Bill Wilson, *What is the 'Gig' Economy?,* BBC (Feb. 10, 2017), http://www.bbc.com/news/business-38930048 [https://perma.cc/3PR5-Q7CY].

3. The ride-share application company Uber offers potential drivers "work that puts you first" and the opportunity to "drive when you want, earn what you need." *Drive With Uber: Make Money On Your Schedule*, UBER, https://www.uber.com/drive/ (last visited Aug. 5, 2017) [https://perma.cc/DJU9-2BTX]. Taskrabbit, a company that matches customers with workers to perform household tasks like furniture assembly and basic maintenance, states that future taskers can "make a schedule that fits your life." *Taskrabbit connects you to safe and reliable help in your neighborhood*, TASKRABBIT, https://www.taskrabbit.com/become-a-tasker (last visited Aug. 5, 2017) [https://perma.cc/UN87-J9BF] [hereinafter *Taskrabbit*]. Lyft, another ride-share application company, offers potential drivers the chance to "choose when you drive." *Become a Driver – Lyft*, LYFT, https://www.lyft.com/drive-with-lyft (last visited Aug. 5, 2017) [https://perma.cc/QAN8-VTSP].

4. Under the current employment and labor laws, a worker is either an employee or an independent contractor. In essence, any worker who is not an employee is deemed to be an independent contractor.

because unlike independent contractors, employees are entitled to rights like the right to form a union, a minimum wage, and leave for illness and childcare.[5] Gig economy companies like Uber and Lyft can offer lower prices to consumers by shifting costs like health insurance and payroll taxes onto their workers.[6] And gig economy companies capture a greater share of the market during peak times because they can quickly scale their independent contractor workforce to meet consumer demand.[7] As the gig economy grows, the distinction between an employee and an independent contractor will likely define the next generation of American work life. Uber and Lyft drivers have already begun to challenge this distinction in the court system, claiming that the companies have misclassified them as independent contractors.[8] Uber and Lyft counter that they do not have an employer/employee relationship with their drivers because they exert minimal control over their drivers and do not directly supervise them, some of the main factors needed to establish an employer/employee relationship.[9]

Lyft and Uber are correct in their claim that they do not directly supervise their drivers or exert control over many aspects of their job performance. However, this does not mean that these companies are uninterested middlemen. In the case of an Uber driver in Vermont, he learned that Uber had deactivated his account, an action that blocked him from working for the company, not from a person, but from a notification on his smartphone.[10] When the driver tried to find out what happened and what he could do to reactivate his account, he discovered that he had little recourse.[11] Instead, he confronted an impenetrable web of online forms, generic emails, and no human interaction.[12] In a series of events that seem like a twenty-first century Kafka story,[13] the Vermont

5. *See* discussion *infra* Section I.A.
6. *See* discussion *infra* Sections I.A & I.B.
7. *See* discussion *infra* Section I.B.
8. *See* discussion *infra* Section III.C.
9. *See* discussion *infra* Section III.C.
10. Aarti Shahani, *The Faceless Boss: A Look into the Uber Driver Workplace*, NPR (June 9, 2017, 7:10 AM), http://www.npr.org/sections/alltechconsidered/2017/06/09/531642304/the-faceless-boss-a-look-into-the-uber-driver-workplace [https://perma.cc/6ZTP-UZ2H].
11. *Id.*
12. *Id.*
13. Kafka's novels are known for their emphasis on individual isolation in the face of complex bureaucratic structures. *See, e.g*, FRANZ KAFKA, THE TRIAL (1925);

driver learned that it would take Uber fifteen days to review his deactivation, only to later learn from an email that it would take thirty.[14]

The trials and tribulations of ride-share drivers and the companies that rely on them reveal both the promise of the gig economy and its major pitfalls. Gig economy work offers greater worker autonomy than traditional employment and provides consumers with lower costs.[15] However, gig economy workers forego many of the benefits afforded to full-time employees and toil in an isolated work environment that leaves them subject to the decisions of superiors they will never see.[16] More importantly, the gig economy has yet to solve some of the fundamental issues of our time: income inequality and a lack of workplace democracy.[17]

Lawmakers and other policy makers have proposed a variety of solutions for modernizing employment and laborlaws: one of the more innovative ideas would create a system of "portable benefits" that would follow individual workers from job to job.[18] Similar to the "hour bank" concept used by trade worker unions, a third-party would collect benefit payments from employers and disburse these benefits to workers based on hours worked.[19] While "portable benefits" would offer gig economy workers access to healthcare, retirement savings, and leave, new classifications like "independent workers," would offer them some rights, such as the right to form a union, while foregoing others, such as overtime pay and a minimum wage.[20]

FRANZ KAFKA, THE CASTLE (1926).

14. Shahani, *supra* note 10.

15. *See* discussion *infra* Section I.B.

16. *See* discussion *infra* Section I.B.

17. *See* discussion *infra* Section I.B.

18. Senator Mark Warner and Representative Suzan DelBene introduced legislation to fund pilot programs to explore the feasibility of portable benefits. *See* Portable Benefits for Independent Workers Pilot Program Act, S. 1251, 115th Cong. (2017).

19. Mark Warner, *It's Time to Build a Portable Safety Net for Today's Workers*, SOC'Y FOR HUMAN RESOURCE MGMT.: HR MAG. (Sept. 20, 2016), https://www.shrm.org/hr-today/news/hr-magazine/1016/pages/its-time-to-build-a-portable-safety-net-for-todays-workers.aspx [https://perma.cc/YV82-G9ZY]. For an overview of how a portable benefit system might work, see *Benefits at a Glance*, LIUNA LOCAL 252, https://www.laborerslocal252.org/benefits-at-a-glance/ (last visited July 1, 2017) [https://perma.cc/C3S7-VKPE] (discussing hours requirement for benefits such as healthcare).

20. *See* SETH D. HARRIS & ALAN B. KRUEGER, HAMILTON PROJECT, A

Although concepts like portable benefits and independent workers are meant to solve the problems of the gig economy, they raise questions of their own: Who will be entitled to portable benefits? And why would a category like independent workers stop companies from misclassifying their workers like they are accused of doing now? Within employment and labor law, lines must be drawn to separate those who are required to be covered and those who are not. Accordingly, there needs to be a test that can properly classify workers in the gig economy.

Currently, courts and administrative agencies primarily use one of two tests to determine if a worker is an employee: the economic realities test or the common law agency test.[21] The economic realities test looks at the employer's and worker's economic dependence on one another. The common law agency test looks at multiple factors, but the determining factor is often the right to control the means and the method by which the worker achieves the desired result.[22] Yet, as this Comment will argue, these tests begin with the flawed presumption that supervision and control emanate from an employee supervisor.[23] Such supervision, a hallmark of more traditional work environments, is notably absent from the gig economy.[24] Thus, courts and administrative agencies will have to develop a new understanding of supervision and control that better reflects the practices of companies like Uber and Lyft. Such a test could grant gig economy workers some protection under current employment and labor law. And, if any of the proposals for modernizing employment and labor laws becomes law, courts and administrative agencies could continue to use this test to determine the status of workers.

In place of the existing tests, this Comment proposes a two-part test for classifying workers in the gig economy. First, a court or administrative agency would look to see what kind of service the worker is providing. For example, is the worker

PROPOSAL FOR MODERNIZING LABOR LAWS FOR TWENTY-FIRST-CENTURY WORK: THE "INDEPENDENT WORKER" 2 (2015) (discussing the "independent worker").

21. *See* discussion *infra* Section III.B.

22. For example, for federal tax purposes, the right to control is the most important criterion, but other factors may be considered as well. *See* Hoosier Home Improvement Co. v. United States, 350 F.2d 640, 642–43 (7th Cir. 1965) (discussing factors for determining employee status for the levy of unemployment and social security tax).

23. *See* discussion *infra* Section III.B.

24. *See* discussion *infra* Section III.C.

driving a car, hanging picture frames, or providing some other kind of labor? Or are they renting a room through a company like Airbnb? Second, the court or administrative agency would ask if the company is economically dependent on the kind of services the workers at issue provide. Generally, economic dependence appears when companies seek to control the method and means by which the worker achieves the desired result. As this Comment will argue, courts and administrative agencies should consider customer rating systems and data collection as indications of employer control. This is because companies such as Uber and Lyft no longer rely on physical supervision to monitor their workers. Rather, they rely on smart phone applications to gather information such as the number of fares accepted, the average road speed of their drivers, and customer satisfaction, which passengers measure on a scale of one to five stars.[25]

Policy makers must resolve these tests. With each passing year, more and more Americans work in the gig economy. No gig economy worker is immune from the gig economy's pressures, such as a lack of benefits and a lack of input in workplace decisions. Graduate students who work as graduate assistants[26] at private American universities have already found themselves in difficult economic circumstances. Their story serves as a warning of what could befall gig economy workers if they remain outside America's employment and labor laws.

This Comment contains five sections. Part I provides background information on the gig economy, its economic model, and the changes it has brought to the American economy. Part II will provide a brief overview of the history of graduate assistants and show how their workplace struggles could become those of gig economy workers. Part III will provide an overview of the employment and labor laws in the United States. It will then explore proposals to reshape employment and labor laws to be more responsive to the needs of the gig economy. It will end with an analysis of the current tests for determining employee status and why these tests are inadequate. Part IV will explore historical notions of

25. *See* discussion *infra* Section IV.A & B.

26. Graduate assistants are graduate students who work as teachers, graders, and lab assistants in universities, often in exchange for a stipend and other benefits.

supervision and control and show the novel ways in which Uber and Lyft supervise their employees. Part V will propose a test for determining employee status within the gig economy that focuses on (1) the kind of service the worker is providing and (2) whether the employer is economically dependent on the service that the workers in question provide.

I. THE GIG ECONOMY: NEW WINE IN OLD BOTTLES?

The American economy has undergone a profound transformation since the late 1970s, with finance supplanting manufacturing as the most profitable sector of the economy.[27] This transformation is part of a broader shift in the American economy away from manufacturing and toward the service industry. Since 1994, the United States has lost about 4.5 million manufacturing jobs.[28] In that same time period, the number of Americans working in the service sector has actually surpassed the amount working in manufacturing, with the gap standing at four million workers and counting.[29] Union membership has also declined along with the United States' manufacturing base and now represent only 10.7 percent of wage and salary earners in the United States.[30] Wage growth also remains stagnant despite increases in productivity.[31] Accordingly, income inequality has also grown. In 2010, income inequality reached levels not seen since 1928[32] and this trend continues well into the present.[33] One factor that might explain

27. Noah Smith, Opinion, *How Finance Took Over the Economy*, BLOOMBERG VIEW (Apr. 20, 2016), https://www.bloomberg.com/view/articles/2016-04-20/how-finance-came-to-dominate-the-u-s-economy [https://perma.cc/V2RW-U2SD].

28. Ben Casselman, *Manufacturing Jobs are Never Coming Back*, FIVETHIRTYEIGHT (Mar. 18, 2016), https://fivethirtyeight.com/features/manufacturing-jobs-are-never-coming-back/ [https://perma.cc/T6GH-DSVU].

29. *Id.*

30. Bureau of Labor Statistics, *Union Members Summary* (Jan. 26, 2017), https://www.bls.gov/news.release/union2.nr0.htm [https://perma.cc/LP2M-E5KR].

31. From 1973 to 2013, hourly compensation increased only nine percent, while productivity has increased 74 percent. LAWRENCE MISHEL ET AL., ECON. POLICY INST., WAGE STAGNATION IN NINE CHARTS (2015), http://www.epi.org/publication/charting-wage-stagnation/ [https://perma.cc/HL3R-65P2].

32. John Cassidy, *Piketty's Income Inequality Story in Six Charts*, NEW YORKER (Mar. 26, 2014), http://www.newyorker.com/news/john-cassidy/pikettys-inequality-story-in-six-charts [https://perma.cc/Z9UL-YQJE].

33. Michael Hiltzik, *America's Explosion of Income Inequality, in One Amazing Animated Chart*, L.A. TIMES (Mar. 20, 2016), http://www.latimes.com/business/hiltzik/la-fi-hiltzik-ft-graphic-20160320-snap-htmlstory.html

both stagnant wages and income inequality is the decline of full-time employment. In 2015, the U.S. Government Accountability Office estimated that nearly 40 percent of American workers work in a contingent job or other "alternative work arrangement," up from 30.6 percent in 2005.[34] The appeal of such work arrangements for employers is that contingent workers make less money and receive fewer benefits than workers in traditional work relationships.[35]

The rise of contingent labor has led to the gig economy. In this economic model, workers eschew traditional full-time work with one employer in favor of working for multiple employers.[36] Initially popularized in the world of computer programmers and independent consultants,[37] the gig economy has grown to include homeowners who rent out their homes through the website Airbnb,[38] drivers who give rides through apps like Uber and Lyft,[39] and people who do just about anything through the app TaskRabbit.[40] Supporters of the gig economy have praised the freedom that it gives workers to choose when they work, as well as the marketplace that it gives small-business owners and other entrepreneurs.[41] However,

[https://perma.cc/F7A8-XCMD].

34. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-15-168R, CONTINGENT WORKFORCE: SIZE, CHARACTERISTICS, EARNINGS, AND BENEFITS 4 (2015). As part of a survey, participants were asked to respond to statements such as "I am a regular permanent employee (standard work arrangement)" and "I work as an independent contractor, independent consultant, or freelance worker." *Id.* at 12.

35. *Id.* at 5–6.

36. *See* discussion *infra* Section I.A.

37. Micha Kaufman, *The Gig Economy: The Force that Could Save the American Worker?*, WIRED (Sept. 2013), https://www.wired.com/insights/2013/09/the-gig-economy-the-force-that-could-save-the-american-worker/ [https://perma.cc/4CTM-U5A6]; Arun Sundararajan, *The 'Gig Economy is Coming.' What Will it Mean for Work*, GUARDIAN (July 25, 2015), https://www.theguardian.com/commentisfree/2015/jul/26/will-we-get-by-gig-economy [https://perma.cc/9VEG-ZFJA] (discussing the emergence of the gig economy and its potential impact).

38. *Become a Host*, AIRBNB, https://www.airbnb.com/host?from_footer=1 (last visited July 1, 2017) [https://perma.cc/PT99-L4KV].

39. Sundararajan, *supra* note 37. *See also Drive with Uber*, UBER, https://www.uber.com/a/us/?var=org1&exp=70622_t1 (last visited July 2, 2017) [https://perma.cc/VYY4-XL73]; *Become a Driver – Lyft*, *supra* note 3.

40. *Taskrabbit*, *supra* note 3.

41. Sundararajan, *supra* note 37; Abha Bhattarai, *The 'Gig Economy' Benefits Some More Than Others, Research Shows*, BOSTON GLOBE (July 3, 2017), https://www.bostonglobe.com/business/2017/07/03/the-gig-economy-benefits-some-more-than-others-research-shows/LP2uygw8BCdXTpHJoho25L/story.html [https://perma.cc/WP89-KA8N] (discussing the benefits of the gig economy for certain individuals, especially higher-income individuals).

companies like Uber and Lyft do not merely create the marketplace; they also act as market participants who actively set prices and take into account user feedback.[42] More importantly, the vast majority of employment or labor laws do not protect workers in the gig economy, leaving them on the outside looking in.[43] The sections that follow will further define what this Comment means by the "gig" economy, and will explain the changes that it has wrought upon the U.S. economy and the workers who, for better or worse, earn their living one gig at a time.

A. Defining the Gig Economy

The gig economy goes by many names, including the "sharing" economy and the "on-demand" economy. These terms generally define two work relationships. One, known as "crowdsourcing,"[44] involves an employer breaking a complex project into thousands of "microtasks" that can take as a little as a few minutes to complete and pay as little as ten cents per task.[45] The employer then shops these microtasks to an undefined group of prospective workers on the internet.[46] These workers will never see one another and will labor in relative isolation.[47] The second work relationship is known as "work-on-demand" and usually involves services such as driving, delivery, cleaning, and home repair that are bought and sold through smart phone apps.[48] The benefits of the two

42. Sundararajan, *supra* note 37. Nairi, *Feedback is a Two-Way Street*, UBER: NEWSROOM (Apr. 23, 2014), https://newsroom.uber.com/feedback-is-a-2-way-street/ [https://perma.cc/G8C7-H8FY] (discussing Uber's rationale for taking customer ratings).

43. Sundararajan, *supra* note 37. *See also* discussion *infra* Section I.B.

44. *See* Alek Felstiner*, Working the Crowd: Employment and Labor Law in the Crowdsourcing Industry*, 32 BERKELEY J. EMP. & LAB. L. 143, 145 (2011) (discussing the origins of the term "crowdsourcing").

45. Juliet Webster, *Microworkers of the Gig Economy*, 25 NEW LAB. F. 56, 57–58 (2016).

46. Felstiner, *supra* note 44, at 151.

47. Webster, *supra* note 45, at 58–59; Anne Fisher, *There's a Loneliness Epidemic Among Freelancers*, FORTUNE (Sept. 6, 2016), http://fortune.com/2016/09/07/freelancers-gig-economy-happiness-satisfaction/ [https://perma.cc/X572-VVRD] (discussing feelings of isolation among gig economy workers).

48. *See* 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, 474 (2016) (discussing "on-demand" work and its parameters).

systems are the same: employers can save hundreds of thousands of dollars in labor costs by employing thousands of workers, each working on his or her own small task.[49] An on-demand workforce also provides a flexible, easily scalable supply of labor that can be tailored to the requirements of a specific job[50] or customer-demand.[51] In the words of the CEO of one crowdsourcing company:

> Before the Internet, it would be really difficult to find someone, sit them down for ten minutes and get them to work for you, and then fire them after those ten minutes. But with technology, you can actually find them, pay them the tiny amount of money, and then get rid of them when you don't need them anymore.[52]

Because they are not in long-term employment relationships, gig economy companies rely almost exclusively on independent contractors.[53] Indeed, the gig economy arguably could not exist without this legal distinction. Employers that make use of gig workers can offer lower prices than their competitors who must pay their workers a salary and benefits.[54] The results have been positive for consumers of these services, who frequently enjoy lower prices compared to services that use salaried employees.[55] Workers, too, enjoy increased flexibility in choosing their schedule and are provided with a means of supplementing their income.[56] But the gig economy has also created economic uncertainty for many and has yet to solve some of the more pressing issues of the modern economy: income inequality, as well as worker isolation and powerlessness.

49. Felstiner, *supra* note 44, at 151–53.
50. *Id.*
51. De Stefano, *supra* note 48, at 475–77.
52. *Id.* at 476 (quote from CEO of CrowdFlower) (citation omitted).
53. For example, Uber makes clear that the opportunity to drive with it is for independent contractors only. *See Drive With Uber*, *supra* note 3.
54. *See* discussion *infra* Section I.B.
55. *See* discussion *infra* Section I.B.
56. *See* discussion *infra* Section I.B.

B. A Gig for Everyone? The Promises and Pitfalls of the Gig Economy

Proponents of the gig economy point to the benefits that it has granted to consumers and workers. To begin, firms that utilize gig workers can often offer lower prices compared to traditional employers.[57] In the case of companies like Uber and Lyft, the companies do not have to spend money on taxi medallions, which serve as the license needed to operate a taxi.[58] In 2014, the value of a medallion was around $1.4 million, but that price has fallen to $250,000 due to the rise of ride-share companies.[59] Also, companies like Uber and Lyft save a substantial amount of money by relying on independent contractors because they do not have to pay taxes, overtime, minimum wage, or provide healthcare benefits.[60] As a result, Uber and Lyft can consistently offer lower prices than traditional taxi companies.[61] Uber has also succeeded in cutting response times in comparison to traditional taxi companies, meaning that the Uber customer spends less time waiting for a ride.[62] Using independent contractors allows Uber

57. JAMES SHERK, HERITAGE FOUND., THE RISE OF THE "GIG ECONOMY": GOOD FOR WORKERS AND CONSUMERS 5 (2016). *See also* Andrew Bender, *Uber's Astounding Rise: Overtaking Taxis in Key Markets*, FORBES (Apr. 10, 2015), https://www.forbes.com/sites/andrewbender/2015/04/10/ubers-astounding-rise-overtaking-taxis-in-key-markets/#5d19466443d8 [https://perma.cc/N8V6-8NHC] (discussing key price differences between Uber and taxis in certain markets).

58. Elena Holodny, *Uber and Lyft are Demolishing New York City Taxi Drivers*, BUS. INSIDER (Oct. 12, 2016), http://www.businessinsider.com/nyc-yellow-cab-medallion-prices-falling-further-2016-10 [https://perma.cc/NF56-PPC3].

59. *Id.*

60. It's difficult to determine the exact amount of money these companies save on a national level, but in California, Lyft saved a possible $126 million by classifying its employees as independent contractors. *See* Dan Levine & Heather Somerville, *Exclusive: Lyft Drivers, If Employees, Owed Millions More – Court Documents*, REUTERS (Mar. 20, 2016), http://www.reuters.com/article/us-lyft-drivers-pay-exclusive-idUSKCN0WM0NO [https://perma.cc/29GT-EN8Y]. *See also* Alison Griswold, *Uber Saved $730 Million by Hiring Drivers in Two States as Contractors Instead of Employees*, QUARTZ (May 10, 2016), https://qz.com/680503/uber-saved-730-million-by-hiring-drivers-in-two-states-as-contractors-instead-of-employees/ [https://perma.cc/WAP7-UDLT] (citing court documents from class actions in Massachusetts and California).

61. SHERK, *supra* note 57, at 5 (citation omitted). However, others have found that it may be cheaper to take a taxi when the fare will be lower than $35. *See* Aimee Picchi, *Uber v. Taxi: Which is Cheaper?*, CONSUMER REP., (June 10, 2016), http://www.consumerreports.org/personal-finance/uber-vs-taxi-which-is-cheaper/ [https://perma.cc/ZL99-H49J].

62. SHERK, *supra* note 57, at 5 (citation omitted). *See also* Ellen Huet, *Uber,*

and Lyft to accomplish this goal by giving them the ability to put more drivers on the road at times of high demand. Uber, in particular, achieves this objective through the use of "surge pricing," which raises prices during times of peak demand.[63] By giving its drivers greater incentive to stay on the road, Uber greatly increases the number of drivers during times of peak demand.[64]

Pro-business advocates have also hailed the positive impact that the gig economy has had on individual workers. In the case of Uber, a survey completed by former taxi drivers who now drove for Uber showed that nearly three-fifths of those surveyed earned more money, while only 17 percent reported losing money.[65] Furthermore, nearly 73 percent said that they have more control over their schedule.[66] This notion of greater worker autonomy is central to the gig economy. Uber's surveys of its workforce have revealed that drivers on its app have a strong preference for setting their own schedules and "being their own boss."[67] For many Uber drivers, flexibility allows them to earn an income while balancing work obligations, family responsibilities, and their own personal desire for more work freedom.[68]

With such potential, it is not a surprise that the gig economy is a current topic of discussion at the highest echelons of American politics. During the 2016 Democratic National Convention, a four-person panel embraced the gig economy as

Lyft Cars Arrive Much Faster Than Taxis, Study Says, FORBES (Sept. 8, 2014), https://www.forbes.com/sites/ellenhuet/2014/09/08/uber-lyft-cars-arrive-faster-than-taxis/#71588067f2cb [https://perma.cc/XDZ8-N4GY] (discussing the faster arrival times of ride-share drivers in comparison to traditional taxis).

63. Dan Kedmey, *This is How Uber's 'Surge Pricing' Works*, TIME (Dec. 15, 2014), http://time.com/3633469/uber-surge-pricing/ [https://perma.cc/FX8S-2N9F]; *Uber Surge Pricing*, UBER ESTIMATOR, https://uberestimator.com/uber-surge-pricing (last visited July 3, 2017) [https://perma.cc/XN6F-8H9N] (discussing Uber's reasons for surge pricing).

64. Kedmey, *supra* note 63. Uber surge pricing does not come without its detractors, *see* Ann Schmidt, *Now That is SURGE Pricing: Couple Stunned as Uber Charges Them Nearly $900 for a 30-mile Ride That They Thought Would Cost $214*, DAILY MAIL (July 4, 2017, 2:03 PM), http://www.dailymail.co.uk/news/article-4660184/Couple-charged-898-Uber-ride-Milwaukee.html [https://perma.cc/G8PM-X86Y].

65. SHERK, *supra* note 57, at 4 (citation omitted).

66. *Id.*

67. *Id.* at 3–4 (citation omitted).

68. *Id.* (citation omitted).

largely in step with the Left's progressive values.[69] Greater worker autonomy is a means for "democratizing capitalism" and freeing workers from the confines and restrictions of the traditional office or factory job.[70] Chris Lehane, a former strategist in the Clinton-Kaine Campaign and former press secretary to Al Gore, who now serves as Airbnb's head of global policy and public affairs, argues that, at least in the case of Airbnb, the gig economy acts as a mechanism for "driving wealth down to the people."[71] Lehane reasons that wealthy Americans have traditionally earned money passively through real estate, inheritances, and investments, while most Americans have had to rely on their wages: Airbnb opens up this possibility to anyone with a couch or a spare bedroom.[72] More importantly, the gig economy offers American workers who struggle to find work in the "regular" economy an outlet. Some Amazon Mechanical Turkers[73] have stated that the income they receive from their work keeps their bills paid and food on the table.[74] Airbnb has even marketed itself as "an economic lifeline for the middle class."[75] And, due to the increasing inadequacy of the social safety net, more workers are turning to the gig economy as a way of securing their own welfare.[76] However, not all workers and activists share in these sentiments of optimism.

69. Nathan Heller, *Is the Gig Economy Working?*, NEW YORKER (May 15, 2017), https://www.newyorker.com/magazine/2017/05/15/is-the-gig-economy-working [https://perma.cc/F4KH-SCQT].

70. *Id.*

71. *Id.*

72. *Id.*

73. This term is used to identify workers on Amazon's Amazon Mechanical Turk, which farms out work, such as identifying photos and testing online surveys. *See* Felstiner, *supra* note 44, at 161–67 (discussing Amazon Mechanical Turk business model).

74. *Id.* at 165–66 (interview excerpts with workers on Amazon Mechanical Turk).

75. Heller, *supra* note 69.

76. *See* Elaine Pofeldt, *On-Demand Work: The New Social Safety Net*, FORBES (Feb. 21, 2017), https://www.forbes.com/sites/elainepofeldt/2017/02/21/on-demand-work-the-new-social-safety-net/#fbca916b9168 [https://perma.cc/6BHJ-LZ5Z] (discussing economic pressure, such as medical expenses, as a reason people enter the gig economy).

1. What Lurks Beneath the Surface: Worker Isolation and a Precarious Existence

Despite the gig economy's benefits, it has not gone without criticism. The portrayal of gig work solely as a *supplement* to one's income is misplaced because nearly 32 percent of American workers use gig work as their primary source of income.[77] These workers do not benefit from the gig economy's much-touted flexibility and are typically forced to work irregular hours in order to earn the wages they require. Take Jennifer Guidry: she drives for multiple ride-share apps and takes jobs through TaskRabbit.[78] Despite this platform diversity, her pay declined after Uber and Lyft cut their rates and TaskRabbit overhauled its selection process, which resulted in fewer tasks for her.[79] Accordingly, on a day-to-day basis she does not know how many tasks she will receive.[80] To make sure she receives enough jobs, Guidry now makes herself available to drive most days of the week and during the predawn hours.[81] Guidry is no different than many other gig economy workers who compete in an invisible and expansive labor market. These workers must move from task to task quickly to avoid losing out to thousands of other potential workers.[82] Competition in this invisible labor market tends to drive prices downward because workers can no longer band together to ask for better wages.[83] Wages are also driven down because employers can now distill tasks into component parts that require anywhere from no specialization to a highly advanced skillset.[84] Yet because workers have no idea with

77. Andrew Soergel, *1 in 3 Workers Employed in Gig Economy, But Not All by Choice*, U.S. NEWS (Oct. 11, 2016), https://www.usnews.com/news/articles/2016-10-11/1-in-3-workers-employed-in-gig-economy-but-not-all-by-choice [https://perma.cc/5JXV-F2HN].

78. Natasha Singer, *In the Sharing Economy, Workers Find Both Freedom and Uncertainty*, N.Y. TIMES (Aug. 16, 2014), https://www.nytimes.com/2014/08/17/technology/in-the-sharing-economy-workers-find-both-freedom-and-uncertainty.html?_r=0 [https://perma.cc/GY43-8VFN].

79. *Id.*

80. *Id.*

81. *Id.*

82. Ursula Huws, *Logged In*, JACOBIN MAG. (Jan. 1, 2016), https://www.jacobinmag.com/2016/01/huws-sharing-economy-crowdsource-precarity-uber-workers/ [https://perma.cc/VAF2-UFKJ] (discussing the constant state of readiness that gig economy workers must possess).

83. Webster, *supra* note 45, at 60.

84. Huws, *supra* note 82.

whom they are competing or what the larger project is they are working on, they are often forced to accede to employers' demands.[85]

The benefit of operating a highly flexible labor pool is that Uber and Lyft can offer lower prices than their competitors. But it also means that most of the risk is shifted away from the companies and onto the drivers, with one study finding that Uber drivers earn far less than the company claims once expenses are taken into account.[86] This state of affairs has led some drivers to complain that their satisfaction with Uber is merely a mirage: "We just sit there and smile, and tell everyone that the job's awesome, because that's what they want to hear," said one driver.[87] In the words of another driver, Uber was a "pimp" that took 20 percent of his earnings and "cut prices whenever [it] want[ed]."[88] Other Uber drivers share these sentiments, especially in the face of Uber's reduction of its rates, a move that one driver claimed forced him to work seventeen hours to earn what he used to make in eight.[89] When the driver reached out to the company to complain, he claims that Uber ignored his complaints.[90]

Isolation is built into the gig economy. Workers often work alone at home, in their own cars, or when traveling from one home to another. As one worker for TaskRabbit bemoaned, "The gig economy is such a lonely economy," with only rare meetings between himself and other taskers.[91] The mundane nature of the gig economy further contributes to a sense of isolation and helplessness. Work is fragmented into small, discrete tasks that isolate workers from the productive process.[92] Outside of the knowledge it takes employees to complete their tasks, the gig economy requires nothing else.[93]

85. Webster, *supra* note 45, at 60–61.

86. Caroline O'Donovan & Jeremy Singer-Vine, *How Much Uber Drivers Actually Make Per Hour*, BUZZFEED (June 22, 2016), https://www.buzzfeed.com/carolineodonovan/internal-uber-driver-pay-numbers?utm_term=.vdBZ3nRGV#.woNAmR4E7 [https://perma.cc/WKX4-XH7Z].

87. Avi Asher-Schapiro, *Against Sharing*, JACOBIN (Sept. 19, 2014), https://www.jacobinmag.com/2014/09/against-sharing/ [https://perma.cc/K4HQ-B5Z9].

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.*

92. Webster, *supra* note 45, at 59.

93. *Id.*

Once they have mastered the skills it takes to perform their tasks, there is nowhere else for workers to go.[94]

The consumer-driven rating systems of the gig economy exacerbate worker isolation. By its very nature, the gig economy prevents employers from engaging in direct control and supervision of its workers.[95] Thus, it must rely on other means, usually rating systems, to enforce worker discipline.[96] Ultimately, it is the end-user or the customer that is in charge of the rating system.[97] The customer is now the supervisor, making authority an ever-present reality for gig economy workers.[98] In short, the gig economy achieves standardization and control not through physical presence and direct supervision, but through the devolution of supervisory authority to the customer.[99] Customers seem to understand this new authority all too well and use it as a bargaining tool.[100] Drivers understand these implications and often preface giving a ride on receiving a five-star rating.[101] And when a low rating can mean a substantial drop in income, gig economy workers have little recourse other than to concede to the customer's demands.

For workers, the gig economy remains a mixed bag. It has undoubtedly offered workers new opportunities and a chance to supplement their incomes. But its price is a precarious economic existence with few options for escape. For the time being, it is lower-skilled workers who primarily feel the effects of the gig economy and have chosen to fight back through the formation of worker groups[102] and court

94. *Id.*

95. Alex Rosenblat & Luke Stark, *Algorithmic Labor and Information Asymmetries: A Case Study of Uber's Drivers*, 10 INT'L J. COMM. 3758, 3772 (2016) (discussing Uber's surveillance of drivers on its app).

96. *Id.* at 3772–75.

97. *Id.*

98. *Id.*; *see also* Caroline O'Donovan, *The Four-Star Rating You Left Could Cost Your Uber Driver Her Job*, BUZZFEED (Apr. 11, 2017), https://www.buzzfeed.com/carolineodonovan/the-fault-in-five-stars [https://perma.cc/4ENP-7C58] (discussing the stress that drivers feel over their ranking).

99. Rosenblat & Stark, *supra* note 95, at 3772–75.

100. Heller, *supra* note 69.

101. Jeff Bercovici, *Uber's Ratings Terrorize Drivers and Trick Riders. Why not Fix Them?*, FORBES (Aug. 2014), https://www.forbes.com/sites/jeffbercovici/2014/08/14/what-are-we-actually-rating-when-we-rate-other-people/#58ac5a3debca [https://perma.cc/8E66-87F4].

102. *See* APP-BASED DRIVERS ASSOCIATION, http://www.teamstertnc.org/ (last visited Aug. 6, 2017) [https://perma.cc/Y5AX-UW87].

battles.[103] But as the next section argues, even the highly educated can be subject to the negative effects of the gig economy.

II. GRADUATE ASSISTANTS: A HARBINGER OF THINGS TO COME IN THE GIG ECONOMY?

Graduate assistants are ubiquitous across college campuses in the United States.[104] They teach courses, run laboratories, help with research, and grade exams.[105] Graduate assistants often perform their job functions while working towards an advanced degree, usually a Ph.D.[106] Like workers in the gig economy, graduate assistants face numerous workplace challenges: (1) a lack of job security that is often exploited by their employer, (2) no opportunity for meaningful participation in the terms and conditions of their employment, and (3) their engagement in a profession that occurs outside the bounds of the traditional employer-employee relationship. Graduate assistants face these challenges despite their education levels, which demonstrates that the highly-educated workers who currently benefit the most from the gig economy are not immune from the pitfalls that affect less educated workers.

A. Precariousness on Campus: Graduate Assistants' Lack of Job Security and Meaningful Workplace Participation

Like workers in the gig economy, graduate assistants have relatively little job security. Most work on awards of financial aid that are contingent on their enrollment in advanced degree programs.[107] These financial aid packages often include a

103. *See* discussion *infra* Section III.C.

104. There are an estimated 2.916 million graduate students in the United States. *See* NAT'L CTR. FOR EDUC. STATISTICS, DIGEST OF EDUCATION STATISTICS tbl.105.20 (2016), https://nces.ed.gov/programs/digest/d15/tables/dt15_105.20.asp?current=yes [https://perma.cc/5TFY-R5YQ].

105. *See Graduate and Teaching Assistant Requirements*, NW. UNIV.: GRADUATE SCH., http://www.tgs.northwestern.edu/funding/assistantships/graduate-and-teaching.html (last visited Aug. 6, 2017) [https://perma.cc/A9WQ-AXM5].

106. *Id.*

107. *See Graduate Program*, HARV. UNIV. DEP'T OF GERMANIC LANGUAGES & LITERATURE, http://german.fas.harvard.edu/graduate (last visited Nov. 15, 2016)

tuition waiver, a stipend, and benefits, but this is not universal.[108] The average financial aid amount for full-time, fully-year students is $31,600.[109] Given the competiveness for admission into graduate programs, universities have a nearly limitless supply of this kind of labor.[110] Accordingly, graduate assistants have little in the way of negotiating power with universities. The inherently temporary nature of a graduate education only exacerbates this problem, as the average graduate education lasts anywhere from three to seven years.[111] Universities make use of this pool of labor to fulfill essential elements of their business model (teaching undergraduate courses and running laboratories) at a lower cost than higher-paid workers like professors. Tenured and tenure-track faculty's average salaries are $53,892 to $111,053 per year at four-year public universities and $60,012 to $119,105 per year at four-year private universities.[112] As a result, graduate assistants and part-time faculty jobs have increased by 123 percent and 286 percent, respectively, from 1975 to 2011.[113] Yet the increasing use of graduate assistants has not resulted in cost savings for students.[114] What has occurred is greater inequality within the university workforce: university presidents earn as much as $800,000 in base salary

[https://perma.cc/DG4U-ECL7] (listing requirements for graduate program).

108. *See Fellowships and Financial Aid*, COLUM. UNIV. DEPT. HIST., http://history.columbia.edu/graduate/doctoral-program/fellowships-and-financial-aid/#fellowship (last visited Aug. 6, 2017) [https://perma.cc/SVU8-W6UM] ("Every student entering our Ph.D. program will receive a full fellowship (tuition, fees, and a stipend) upon admission.").

109. U.S. DEP'T OF EDUC., PROFILE AND FINANCIAL AID ESTIMATES OF GRADUATE STUDENTS: 2011–2012 tbl.3.3 (2014).

110. COUNCIL OF GRADUATE SCHOOLS, GRADUATE ENROLLMENT AND DEGREES: 2005 TO 2015 fig.1 (2016) (universities with research characterizations of "high" and "very high" had acceptance rates into doctoral programs of 27.4 percent and 19.1 percent, respectively).

111. Colleen Flaherty, *Where the Time Goes*, INSIDE HIGHER EDUC. (Nov. 25, 2014), https://www.insidehighered.com/news/2014/11/25/analysis-says-humanities-phds-get-take-longer-coursework-dissertations [https://perma.cc/J4FH-YCVH] (discussing average length of Ph.D. programs).

112. Chronicle of Higher Educ., *Faculty and Staff Salaries at More Than 4,300 Colleges*, http://data.chronicle.com/ (last visited Aug. 5, 2017) [https://perma.cc/JH2X-YJBY].

113. AM. ASS'N OF UNIV. PROFESSORS, LOSING FOCUS: THE ANNUAL REPORT ON THE ECONOMIC STATUS OF THE PROFESSION, 7 fig.1 (2014).

114. Adam Davidson, *Is College Tuition Really Too High?*, N.Y. TIMES MAG. (Sept. 8, 2015), https://www.nytimes.com/2015/09/13/magazine/is-college-tuition-too-high.html?_r=0 [https://perma.cc/3JUD-9RLH].

and up to $1.3 million in total compensation.[115] This pales in comparison to the $31,600 average financial aid for graduate assistants.[116] In the case of universities, this difference in salary reveals not only the widening financial gap between the highest and lowest earners, but also the difference in control over the workplace.

Graduate assistants recognize their role in the modern university and many have articulated their grievances in terms that workers in the gig economy would understand: payment to graduate students is not financial aid, but paychecks; working in the lab or teaching an extra course is not done as a labor of love, but as a job that deserves compensation; and grievances at the workplace are not those of "slightly older undergraduates," but of employees.[117] A survey conducted in 2004 revealed that the top two concerns for graduate assistants were health insurance and salary, respectively.[118] Other concerns were class size, the "corporatization" of the university, undergraduate education, and teaching load.[119] More importantly, many graduate assistants feel like they have no way of effectively participating in their community.[120] In the words of one graduate assistant, "[w]e still don't receive equal recognition in the university's highest decision-making bodies, such as the Board of Directors, where our undergraduate counterparts currently represent the entirety of the student body's collective voice."[121]

115. *Executive Compensation at Private and Public Colleges*, CHRON. OF HIGHER EDUC., http://www.chronicle.com/interactives/executive-compensation#id=table_public_2015 (last visited Nov. 19, 2016) [https://perma.cc/TV8M-9554].

116. U.S. DEP'T OF EDUC., *supra* note 109.

117. Sara Matthiesen, *Academic Work is Labor, Not Romance*, CHRON. HIGHER EDUC. (Aug. 26, 2016), http://www.chronicle.com/article/Academic-Work-Is-Labor-Not/237592 [https://perma.cc/DEW7-JRLB] (arguing that graduate assistants' work is not some ideal form of labor and fits classic definitions of labor).

118. Gerilynn Falasco & William J. Jackson, *The Graduate Assistant Labor Movement, NYU and Its Aftermath: A Study of the Attitudes of Graduate Teaching and Research Assistants at Seven Universities*, 21 HOFSTRA LAB. & EMP. L.J. 753, 786 (2004).

119. *Id.* at 787.

120. *See* Isabel Gensler, *Grad Students Voice Concerns to New Dean*, BROWN DAILY HERALD (Oct. 4, 2016), http://www.browndailyherald.com/2016/10/04/grad-students-voice-concerns-new-dean/ [https://perma.cc/2T5J-J8PN]; *see also* Anna Delwiche, *Graduate Students 'Torn,' Debating Necessity of Union*, CORNELL DAILY SUN (Nov. 1, 2016), http://cornellsun.com/2016/11/01/graduate-students-torn-disputing-necessity-of-union/ [https://perma.cc/B8BB-59YG].

121. Noah Telerski, *Grad Students Discuss Unionization at Town Hall*, GEO. VOICE (Nov. 7, 2016), http://georgetownvoice.com/2016/11/07/grad-students-

B. Students or Employees? The Lack of a Traditional Employment Relationship

Much like gig economy workers, graduate assistants have struggled to assert that they deserve protection under the current employment and labor laws. In the case of graduate assistants, their history with the National Labor Relations Board (NLRB) stretches back decades.[122] Since the previous century, the NLRB has frequently denied graduate assistants the standing of employee because they were "primarily students."[123] In this view, the relationship between a student and a university was an educational one based on the student's scholarly benefit.[124] Accordingly, even though students worked under the direction of faculty members, they could not be employees.[125] The control and supervision exercised over graduate assistants was for their educational benefit, not for the university's benefit as an employer.[126]

Yet graduate students have refused to accept that they are not workers. Graduate assistants at Yale University have even gone as far as engaging in a hunger strike.[127] This recognition is spreading across campuses nationwide, and there are now thirty-three member unions within the Coalition of Graduate

discuss-unionization-at-town-hall/ [https://perma.cc/QY9Q-BNV2].

122. The National Labor Relations Board is a federal agency that administers the National Labor Relations Act. The Board's duties include administering union elections, investigating charges of unfair labor practices, facilitating settlements between employers and employees, and enforcing orders. *See What We Do*, NLRB, https://www.nlrb.gov/what-we-do (last visited Aug. 6, 2017) [https://perma.cc/VL6B-9DKX]. Among these duties are determining who is an employee and thus covered by the Act. *See* Nat'l Labor Relations Bd. v. Hearst Publ'ns, 322 U.S. 111, 130 (1944) (discussing NLRB's adjudicative authority). The National Labor Relations Act excludes employees of state governments and political subdivisions thereof, meaning that state, not federal, labor laws cover the vast majority of graduate students who study at public universities. *See* 29 U.S.C. § 152(2) (defining employer under the Act). For a history of graduate assistants and Board decisions, *see* Josh Rinschler, *Students or Employees? The Struggle Over Graduate Student Unions in America's Private Colleges and Universities*, 36 J.C. & U.L. 615, 617–29 (2010).

123. Adelphi Univ., 195 NLRB 639, 640 (1972).

124. St. Clare's Hosp. and Healthcare Ctr., 229 NLRB 1000, 1002–03 (1977).

125. Brown Univ., 342 NLRB 483, 488–89 (2004).

126. *Id.*

127. Jennifer Klein, Opinion, *Why Yale Graduate Students Are on a Hunger Strike*, N.Y. TIMES (May 9, 2017), https://www.nytimes.com/2017/05/09/opinion/why-yale-graduate-students-are-on-a-hunger-strike.html [https://perma.cc/NS2M-C4NT].

Employee Unions.[128] In addition to these unions, there are twenty-three graduate assistant labor organizations seeking recognition from public and private universities in the United States.[129] These unions have achieved tangible benefits for many graduate assistants, including better pay, benefits, and working conditions.[130]

Cognizant of their struggle for recognition, the NLRB recognized graduate assistants as employees under the National Labor Relations Act in its 2016 decision of *Columbia University*.[131] For the NLRB, the only relationship that mattered was the economic one between the graduate assistants and the university.[132] The graduate assistants performed tasks under the control of the university for which they received compensation.[133] It did not matter that the graduate assistants were also students. Graduate assistants could be both "a student *and* an employee; a university may be both the student's educator *and* employer."[134] And as an employer, universities had a significant economic interest in their graduate assistants because they taught the undergraduate classes and ran labs.[135] Thus, universities had a significant economic dependence on their graduate assistants. This economic dependence also led to control by the university.[136] In this regard, evidence that a graduate assistant had been relieved of his duties due to inadequate performance was sufficient to establish that the university had control over the graduate assistant's work.[137] The same was true for research assistants who conducted laboratory research because

128. *United States Student Employee Unions*, COAL. OF GRADUATE EMP. UNIONS, http://www.thecgeu.org/wiki/United_States (last visited Nov. 18, 2016) [https:// perma.cc/8LTS-PAYS] (noting that of these thirty-seven, seventeen were recognized since 2000).

129. *Unrecognized Unions and Affiliated Organizing Drives in the USA*, COAL. OF GRADUATE EMP. UNIONS, http://www.thecgeu.org/wiki/Unrecognized_Unions_and_Affiliated_Organizing_Drives_in_the_USA (last visited Nov. 18, 2016) [https://perma.cc/Z3ZL-NLHT].

130. *Frequently Asked Questions*, CORNELL UNIV. GRADUATE STUDENTS UNITED, https://cornellgsu.org/faq/#other.unions (last visited July 3, 2017) [https://perma.cc/X6XC-KVJU].

131. *See* Trs. of Colum. Univ., 364 NRLB No. 90 (2016).

132. *Id.* at *17–18.

133. *Id.* at *7.

134. *Id.* at *8.

135. *Id.*

136. *Id.* at *17.

137. *Id.*

their financial aid package was contingent on meeting certain performance goals and the university received a portion of the assistants' research grants.[138]

In making its determination that graduate assistants were also employees, the Board made a powerful argument in favor of protections for gig economy workers. For too long, the Board declined to grant graduate assistants any sort of recognition based on the notion that universities were somehow different from other economic institutions. This is the same argument that gig economy companies are making now: their business is not compatible with current employment and labor laws, so those laws should not apply to them. But as the history of graduate assistants suggests, even well-educated, sophisticated employees could find themselves in an environment where an increased labor supply drives wages down, employers offer workers little opportunity for meaningful participation, and the lack of traditional employment relationships benefit a few at the expense of many.

Unfortunately, the graduate assistant labor movement also shows the perils of relying on existing laws. Since the *Columbia University* decision, the graduate assistant unions at private universities have yet to agree to terms on a single collective bargaining agreement.[139] Through challenges to election results and procedures, universities have effectively delayed the implementation of unionization.[140] Columbia University, in particular, has stated that it will continue to resist the efforts of its graduate students to unionize because it believes "that the defining identity of Columbia's teaching and research assistants is that of a student who aspires to become a scholar . . . not that of an employee."[141] Gig economy companies like Uber and Lyft have chosen to adopt the same strategy, and have so far resisted all efforts that would make their workers

138. *Id.* at *21.

139. Colleen Flaherty, *'Running Out the Clock' on Grad Unions?*, INSIDE HIGHER EDUC. (May 4, 2017), https://www.insidehighered.com/news/2017/05/04/graduate-student-union-bids-private-institutions-have-succeeded-flopped-and-been [https://perma.cc/SC7Y-GC3C].

140. *Id.*

141. Conor Skelding, *How Trump Could Help Columbia With Its Union Problem*, POLITICO (Mar. 3, 2017), http://www.politico.com/states/new-york/albany/story/2017/03/how-trump-could-help-moron-ivy-league-president-with-grad-union-110432 [https://perma.cc/HY9P-M9X8].

into employees.[142] With a better idea of what is at stake, this Comment now turns to how the law determines who is an employee and who is not, and why it matters.

III. HAS THE NEW DEAL BECOME A RAW DEAL? A NEW SOCIAL CONTRACT FOR A NEW GENERATION OF WORKERS

Since the passage of the National Labor Relations Act (NLRA) in 1935, employees have been granted a series of economic rights, ranging from the right to form a union to the right to a minimum wage.[143] Born out of the stark inequality that emerged during the 1920s[144] and 1930s,[145] the concept of economic rights encompassed two fundamental goals: income equality and workplace democracy. These two principles were meant to serve as a new political and economic foundation for American democracy where a higher standard of living was a "right of citizenship" available to every American within the consumer economy.[146] Through collective bargaining, workers would become active participants in a new industrial democracy.[147] Among the hard-earned democratic values introduced in this era was workers' ability to determine their

142. *See* discussion *infra* Section III.C.

143. For example, the National Labor Relations Act states that it will protect "the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing." 29 U.S.C. § 151 (2012). The Fair Labor Standards Act seeks to eliminate "labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers." 29 U.S.C. § 202(a) (2012). The Family Medical Leave Act seeks to "balance the demands of the workplace with the needs of families, to promote the stability and economic security of families, and to promote national interests in preserving family integrity." 29 U.S.C. § 2601(b)(1) (2012).

144. *See generally* Thomas Piketty & Emmanuel Saenz, *Income Inequality in the United States*, 118 Q. J. ECON. 1 (2003) (discussing wealth gap between the highest and lowest earners). *See also* PETER FEARON, WAR, PROSPERITY & DEPRESSION 67 (1987) (discussing how in 1928 the top one percent of income recipients received 13.7 percent of all income and how in 1929 an income of $2,000 was considered sufficient to cover basic necessities, but 60 percent of families were below this level).

145. The top income brackets accounted for 40 percent to 45 percent of income, excluding capital gains, during the 1920s and 1930s. Piketty & Saenz, *supra* note 144, at 10 fig. 1.

146. NELSON LICHTENSTEIN, STATE OF THE UNION: A CENTURY OF AMERICAN LABOR 26 (2012).

147. 78 CONG. REC. 2926 (1934) (Statement of Secretary of Labor Perkins).

own work conditions and wages.[148]

For a while, the results of New Deal principles were impressive. At its peak in 1954, union density among wage and salary workers in the United States reached 34.8 percent.[149] This gave unions greater bargaining parity with their employers and unions put this power to use: in 1952, the United States had more than 470 work stoppages involving 1,000 or more employees, the highest number in the twentieth century.[150] Greater bargaining power also meant greater income equality, as wages nearly doubled between 1940 and 1967 and lower-income groups increased their share at the expense of the higher earners.[151] However, underlying the New Deal employment and labor laws was the assumption that most workers would be employees and not independent contractors. Now, with more and more workers working as independent contractors in the gig economy, the question becomes how to maintain the principles of the New Deal employment and labor laws in a new era.

A. Portable Benefits and Independent Workers: A New Social Contract?

Labor and employment experts have struggled to develop a system of laws that will protect gig economy workers. Borrowing from the multi-employer plans used in the construction industry, David Rolf and others have proposed creating a system of "portable benefits" that would follow an employee from job to job.[152] The basic principle behind these plans is that each employer makes a pro-rated contribution to the plan based on the amount of time a given worker works for the employer.[153] Another concept from multi-employer plans is

148. LICHTENSTEIN, *supra* note 146, at 30–31.

149. GERALD MAYER, CONG. RESEARCH SERV., UNION MEMBERSHIP TRENDS IN THE UNITED STATES 12 (2004).

150. Matt Phillips, *American Labor-Union Strikes are Almost Completely Extinct*, QUARTZ (Feb. 11, 2015), https://qz.com/342311/american-workers-have-pretty-much-stopped-using-their-most-powerful-weapon/ [https://perma.cc/JM3K-T7Y5].

151. LICHTENSTEIN, *supra* note 146, at 56–57; Piketty & Saenz, *supra* note 144, at 10 fig.1.

152. DAVID ROLF ET AL., ASPEN INST., PORTABLE BENEFITS IN THE 21ST CENTURY: SHAPING A NEW SYSTEM OF BENEFITS FOR INDEPENDENT WORKERS 6–7 (2016).

153. *Id.* at 7. For a model on how these contributions might work, see Nick

the idea of the "hour bank." In order to qualify under most multi-employer plans, a worker must work a minimum number of hours per month, with any extra hours going into the "hour bank."[154] The worker can then use the extra hours to maintain coverage during months when he does not meet the minimum hours requirement.[155] Because multi-employer plans and hour banks would allow gig economy workers to work for multiple employers and could be easily scaled to meet increases in the number of workers and employers in the plan, they are a viable option for providing benefits to gig economy workers.[156]

Another potential system for bringing benefits to workers in the gig economy is the Black Car Fund, a benefits system for livery drivers in New York City. Every driver who drives for a qualifying company is eligible for benefits from the fund.[157] More importantly for gig economy companies concerned about losing their competitive advantage, the Black Car Fund is funded through a surcharge on all rides taken in New York City with qualifying companies.[158] Thus, it is customers, not companies, that fund the benefit system.[159]

The type of benefit system established between gig economy companies and workers might very well be determined by worker organizations. However, independent contractors do not have a legal right to form labor organizations.[160] A new category of worker, the independent worker, would solve this problem by granting gig economy workers protections under laws like the NLRA and Title VII.[161]

Hanauer & David Rolf, *Shared Security, Shared Growth*, DEMOCRACY (Summer 2015), http://democracyjournal.org/magazine/37/shared-security-shared-growth/ [https://perma.cc/NME3-J86T].

154. ROLF ET AL., *supra* note 152, at 7. For how an hour bank might work, *see* LIUNA, *supra* note 19 (a worker must accrue 350 hours within a six-month period to become eligible).

155. *Id.*

156. *Id.* at 8–9.

157. *Id.* at 10.

158. *Id.*

159. *Id.*

160. HARRIS & KRUEGER, *supra* note 20, at 15–16.

161. *Id. See also* Carl Shaffer, Note, *Square Pegs Do Not Fit Into Round Holes: The Case for a Third Worker Classification for Sharing Economy and Transportation Network Company Drivers*, 119 W. VA. L. REV. 1059 (2017) (arguing that a third classification is needed for gig economy workers and that at "bare minimum, the third party should owe the platform contractor minimum wage for the work performed and liability insurance for actions performed in furtherance of the parties' mutual business objectives").

Independent workers, then, could form labor unions and sue their employers for racial, gender, and other types of discrimination.[162] The key distinction between independent workers and employees would be wage protection.[163] Because microwork and short-term gigs can be so difficult to quantify in terms of time spent on work, calculating wages and overtime would prove difficult, if not impossible, for gig economy workers and companies.[164]

The above proposals are designed to maintain the flexibility of the gig economy while offering protections to its workers. Portable benefits would ensure that gig economy workers have some sort of safety net that is not dependent on them working for one specific company.[165] Pro-rating contributions, or having them paid by customers through a surcharge, would allow gig economy employers to maintain a flexible, on-demand workforce. Giving gig economy workers more of a say in their work lives would also help to alleviate the feelings of powerlessness that so many of them feel.[166] Unfortunately, these proposals would require amending a vast array of employment and labor laws, as well as passing new legislation, something unlikely to happen in the near future. Moreover, companies are likely to continue to resist any kind of new classification for their workers, and new court cases challenging misclassifications are likely to continue.[167] Thus, it is imperative that courts and administrative agencies have a means for determining who is an employee or independent worker and who is not. As the next part will argue, current tests for determining employee status are inadequate and a new test must be developed that appreciates the nuances of the gig economy.

162. HARRIS & KRUEGER, *supra* note 20, at 15–16.

163. *Id.* at 18.

164. *Id.*

165. *See* ROLF ET AL., *supra* note 152, at 2.

166. *See* Michelle Chen, *Driving Uber Toward Unionization*, NATION (Dec. 16, 2016), https://www.thenation.com/article/driving-uber-toward-unionization/ [https://perma.cc/7CXB-H2PR] (discussing Uber drivers' attempts to organize).

167. *See* Joel Rosenblatt & Edvard Pettersson, *Uber Settlement Giving Drivers $1 Each Doesn't Fly With Judge*, CHI. TRIB. (Mar. 10, 2017), http://www.chicagotribune.com/bluesky/technology/ct-uber-drivers-settlement-blm-bsi-20170310-story.html [https://perma.cc/J6LP-LK5S] (discussing Uber's attempts to settle class action against it).

B. Economic Realities and Common Law Agency: Where's the Boss?

There are two main tests that courts and administrative agencies have used to determine who is an employee under federal employment and labor laws: the economic realities test and the common law agency test.[168] Despite the differences between these tests, both primarily focus on the nature of control that the alleged employer exercises over the alleged employee. As the following paragraphs highlight, courts often find control where there are other workers supervising and controlling the employees.

The first test used by the courts is the economic realities test, which sees an employer-employee relationship where the employees are "dependent upon the business to which they render service."[169] Some factors in determining economic dependence include the duration of the economic relationship between the worker and putative employer, the skill needed by the workers, and workers' opportunities for profit or loss.[170] The Supreme Court endorsed the economic realities test in *Hearst Publications*, a decision that upheld the NLRB's designation of newsboys in Los Angeles as employees under the NLRA.[171] The Court justified its decision on several grounds,[172] the most important of which was the mutual economic relationship between the newspapers and the newsboys. The Court found several indications of economic dependence: first, the newspapers set the prices at which the newsboys bought and sold the newspapers.[173] Second, the newspapers controlled how many papers the newsboys got to sell and where they could sell them.[174] Third, the newspapers depended on the newsboys as an integral part of their business because without

168. The third test, known as the hybrid test, adopts many of the features of the common law agency test and several circuits consider the hybrid to be no different from the common law agency test. *See* Lambertsen v. Utah Dep't of Corrections, 79 F.3d 1024, 1028 (10th Cir. 1996) (discussing agreement between circuits on the hybrid test's similarity to the common law agency test). For a discussion on what employment and labor laws use which test, see Bales & Woo, *infra* note 190, at 468–72.

169. Bartels v. Birmingham, 332 U.S. 126, 130 (1947).

170. *Id.*

171. Nat'l Labor Relations Bd. v. Hearst Publ'ns, 322 U.S. 111, 134 (1944).

172. *Id.* at 124–29.

173. *Id.* at 117.

174. *Id.* at 117–18.

them, their newspapers would not get sold.[175] The Court made this determination by looking at employer control, noting that the newspapers' district managers sanctioned newsboys who were late and ensured that "minimum standards of diligence and good conduct while at work are sought to be enforced."[176] The district managers even provided sales tips to the newsboys that they expected them to follow.[177] Thus, the newspapers and the newsboys not only had an economic dependence on one another, but the newspapers used that economic dependence to control the newsboys.[178]

Congress rejected the economic realities test and its focus on "economic and policy concerns" when it passed the Taft-Hartley amendments to the NLRA.[179] In place of the economic realities test, Congress sought to ground the courts in the general principles of agency law and the common law agency test.[180] The common law agency test contains multiple factors, such as whether payment is made by the hour or by the job, the skill required to do the job, and whether the worker or the business provides the tools to do the job,[181] but the right to

175. *Id.* at 119.
176. *Id.*
177. *Id.*
178. *Id.* at 117–19.
179. *See* Nat'l Labor Relations Bd. v. United Ins. Co. of Am., 390 U.S. 254, 256 (1968) (discussing congressional intent and the legislative history behind the insertion of the independent contractor exclusion into the NLRA).
180. *Id.*
181. The factors include:

> (a) the extent of control which, by the agreement, the master may exercise over the details of the work;
> (b) whether or not the one employed is engaged in a distinct occupation or business;
> (c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;
> (d) the skill required in the particular occupation;
> (e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work;
> (f) the length of time for which the person is employed;
> (g) the method of payment, whether by the time or by the job;
> (h) whether or not the work is a part of the regular business of the employer;
> (i) whether or not the parties believe they are creating the relation of master and servant; and
> (j) whether the principal is or is not in business.

RESTATEMENT (SECOND) OF AGENCY § 220 (AM. LAW INST. 1958).

control is the most significant factor.[182] Following Congress's lead, the Court strongly suggested that physician-shareholders could not be employees under the Americans with Disabilities Act because it was the four physician-shareholders who directed the day-to-day operations of the clinic and shared its revenues.[183] To put it more simply, there was nobody else above them to give orders.[184] The circuit courts have largely followed the same logic. The Third Circuit overruled summary judgment for a retailer, in part, on grounds that "store personnel gave [the worker] assignments, directly supervised him, provided site-specific training, furnished any equipment and materials necessary, and verified the number of hours he worked on a daily basis."[185] Elsewhere, the Tenth Circuit held that a schoolteacher was not an employee of the prison where she worked because, while she was subject to prison guidelines and safety instructions while at work, the prison did not exercise control over her.[186] Among the factors cited by the court in the prison's favor was the fact that the plaintiff's supervisor worked for the local school district, and not the prison.[187] The absence or presence of a supervisor is usually a factor cited by courts when deciding whether an individual is an employee or independent contractor.[188] But what happens when a worker doesn't have a supervisor? This is the very question confronted by courts deciding cases involving Uber and Lyft.

182. *See* Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 323 (1992) ("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.") (citation omitted).

183. *See* Clackamas Gastroenterology Assocs. v. Wells, 538 U.S. 440, 450–51 (2003) (remanded for further fact finding).

184. *Id.*

185. Faush v. Tuesday Morning, Inc., 808 F.3d 208, 216 (3d Cir. 2015).

186. Lambertsen v. Utah Dept. of Corr., 79 F.3d 1024, 1027 (10th Cir. 1996).

187. *Id.*

188. For example, see Speen v. Crown Clothing, Corp., 102 F.3d 625, 633 (1st Cir. 1996) ("The evidence overwhelmingly shows, however, that Speen was kept on a rather long leash, if not actually allowed to run free in a rather large yard, and was allowed to follow procedures that afforded him the type of independence for which employees typically yearn."). *See also* Adcock v. Chrysler Corp., 166 F.3d 1290, 1292–93 (9th Cir. 1999) (auto dealership owner not an employee where dealer controls the dealership and the day-to-day vehicle-selling operations).

C. The Gig Economy on Trial: The Uber and Lyft Cases

Uber and Lyft were each involved in court cases challenging the classification of their drivers as independent contractors: *O'Connor v. Uber* and *Cotter v. Lyft*.[189] These cases highlight the issues of economic dependence and control that are so difficult to determine in the gig economy.[190]

Uber and Lyft's main defense is that the principles of common law agency favor their classification of their drivers as independent contractors. In a case involving employee misclassification under the California Labor Code, Uber has insisted that it does not control its drivers because it is a "technology company" that connects "businesses that provide transportation" with customers.[191] In its defense against claims that it also violated California wage and hour laws, Lyft portrayed itself as "an uninterested bystander of sorts, merely furnishing a platform that allows drivers and riders to connect, analogous perhaps to a company like eBay."[192] Towards this end, both Uber and Lyft have highlighted the fact that drivers on its applications have the freedom to work whenever they choose.[193] Moreover, Uber and Lyft did not provide the drivers

189. This Comment will also make use of the complaint from a case from the Eastern District of New York, *Ortega v. Uber Techs., Inc. See* Verified Complaint, Ortega v. Uber Techs., Inc., 1:15-CV-07387, 2017 WL 1737636 (E.D.N.Y. filed Dec. 29, 2015) [hereinafter Ortega Complaint].

190. These trials have garnered significant scholarly attention. *See generally* Richard A. Bales & Christian Patrick Woo, *The Uber Million Dollar Question: Are Uber Drivers Employees or Independent Contractors?*, 68 MERCER L. REV. 461 (2017); Nicholas L. DeBruyne, Note, *Uber Drivers: A Disputed Employment Relationship in Light of the Sharing Economy*, 92 CHI.-KENT L. REV. 289 (2017); Keith Cunningham-Parmeter, *From Amazon to Uber: Defining Employment in the Modern Economy*, 96 B.U. L. REV. 1673 (2016); Robert L. Redfearn III, *Sharing Economy Misclassification: Employees and Independent Contractors in Transportation Network Companies*, 31 BERKELEY TECH. L.J. 1023 (2016).

191. O'Connor v. Uber Techs., Inc., 82 F. Supp. 3d 1133, 1137 (N.D. Cal. 2015). As of publication, this case has yet to settle or go to trial. This case remains pending while the Supreme Court resolves the legality of employee agreements to waive class actions in favor of individual arbitration. *See* Order at 3, O'Connor v. Uber, D.C. No. 3:13-cv-03825-EMC (N.D. Cal. Sept. 22, 2017).

192. Cotter v. Lyft, Inc., 60 F. Supp.3d 1067, 1078 (N.D. Cal. 2015). This case has settled without an admission from Lyft that drivers on its app are employees. *See* Joel Rosenblatt, *Lyft's $27 Million Accord with Drivers Wins Court Approval*, BLOOMBERG (June 23, 2016), https://www.bloomberg.com/news/articles/2016-06-23/lyft-s-27-million-settlement-with-drivers-wins-court-approval [https://perma.cc/CU2Y-4WKR].

193. *O'Connor*, 82 F. Supp. 3d at 1138; *Cotter*, 60 F. Supp. 3d at 1069.

with cars, another factor strengthening the argument that the drivers are independent contractors and not employees.[194] Thus, in Uber and Lyft's estimation, they generate income through their software and not through the activities of the drivers.[195] This is not the case. Uber and Lyft both earn a substantial amount of money from the drivers because they take a percentage of the drivers' fares.[196] Quite simply, Lyft and Uber could not exist without the drivers. However, what is not clear is whether Uber and Lyft drivers need Uber and Lyft. As the companies point out, a driver can drive as much or as little as he wants for the company.[197] The existing data seems to support this argument, as the vast majority of Uber drivers, 62 percent, work other full-time or part-time jobs.[198]

Yet the most powerful argument that Uber and Lyft can make is that they do not exercise control over their drivers. Uber argues that by giving its drivers the freedom to choose when they work, it has effectively surrendered any control over them. In addition, drivers are free to reject requests for rides that they receive through the Uber smartphone application.[199] But when Uber and Lyft drivers do accept rides, they are under a great deal of control: the companies set the prices, they set the standards for drivers, and they can terminate the work relationship when these standards are not met.[200] Before even starting their employment, potential Uber drivers must pass a background check, a "city knowledge exam," a vehicle inspection, and complete a personal interview.[201] They also have to watch a training video that instructs them on the proper dress code, how to properly interact with customers, and suggestions for improving the rider's experience, including stocking their cars with water and cell phone chargers.[202]

194. *O'Connor*, 82 F. Supp. 3d at 1138; *Cotter*, 60 F. Supp. 3d at 1069.

195. *O'Connor*, 82 F. Supp. 3d at 1137; *Cotter*, 60 F. Supp. 3d at 1078.

196. *O'Connor*, 82 F. Supp. 3d at 1136; *Cotter*, 60 F. Supp. 3d at 1070–71.

197. *O'Connor*, 82 F. Supp. 3d at 1138; *Cotter*, 60 F. Supp. 3d at 1069.

198. Sam Frizell, *Uber Just Answered Everything You Want to Know About Your Driver*, TIME (Jan. 22, 2015), http://time.com/3678507/uber-driver-questions/ [https://perma.cc/4DYD-YUN6].

199. *O'Connor*, 82 F. Supp. 3d at 1149. Lyft made the same argument. *Cotter*, 60 F. Supp. 3d at 1078.

200. *See* discussion *infra* Section III.C.

201. *O'Connor*, 82 F. Supp. 3d at 1143–44. For Lyft's standards, see *Cotter*, 60 F. Supp.3d at 1071–72.

202. *See* Ortega Complaint ¶¶ 62–63, 1:15-CV-07387, 2017 WL 1737636 (E.D.N.Y. filed Dec. 29, 2015).

Drivers on the Lyft app are encouraged not to speak on their phones, to keep their seats and trunks clear for passengers, to help passengers with luggage, to hold umbrellas out for them when it is raining, and to greet them with a fist bump.[203]

After meeting all the requirements and completing training, drivers for Uber or Lyft are still subject to the companies' supervision and control. It is Uber and Lyft, not the drivers, who determine the price of a trip.[204] Drivers are even discouraged from accepting tips from their fares.[205] Uber monitors the performance of drivers on its app, and a driver must maintain an approval rating of at least 4.5 stars to avoid account deactivation.[206] Lyft suggests to drivers on its app that an acceptance rate below 75 percent "needs improvement" and that an acceptance rate higher than 90 percent is "excellent."[207] If a driver has a rating that is consistently below the community standards, he or she will receive up to three email warnings.[208] If the driver's performance does not improve, he or she will be barred from driving for Lyft.[209]

To help drivers on its application maintain a 4.5 star rating, Uber sends them weekly emails containing suggestions for improvement and reminders that the drivers could earn more money if they worked during peak pricing periods.[210] Uber also provides incentives for drivers to work more hours, such as access to exclusive geographic locations, like the Hamptons on Long Island, as well as long distance rides with VIP users.[211] Furthermore, a driver may get to decide when he or she drives for Uber, but they must give at least one ride within a certain time period in order to keep their account active.[212] And when drivers have switched the app to "online,"

203. *Cotter*, 60 F. Supp. 3d at 1072.
204. Ortega Complaint, 2017 WL 1737636, ¶66; *Cotter*, 60 F. Supp.3d at 1071.
205. Ortega Complaint, 2017 WL 1737636, ¶73.
206. *Id.* ¶70.
207. A driver's "acceptance rate" refers to the number of requests for rides that a driver accepts. For example, if a driver receives ten requests for rides and accepts nine of them, he or she will have an acceptance rate of 90 percent. *Cotter*, 60 F. Supp. 3d at 1071.
208. *Id.*
209. *Id.*
210. Ortega Complaint, 2017 WL 1737636, ¶ 68.
211. *Id.* ¶71.
212. Drivers for UberX must give one ride every 180 days and drivers for UberBlack must give one ride every thirty days. O'Connor v. Uber Techs., Inc., 82 F. Supp. 3d 1133, 1149 (N.D. Cal. 2015).

they generally must have an 80 percent acceptance rate; Uber considers anything less to be a performance issue that could result in deactivation.[213] Lyft has a slightly different system: (1) drivers can submit hours about one week in advance; (2) if less than one week in advance, a driver can log onto Lyft's website and take available hours; or, (3) drivers can turn on the app at anytime, and they will get fares based on demand.[214] When Lyft and Uber drivers are on the road, their companies forbid them from certain activities. For example, Lyft forbids drivers from asking for passengers' contact information[215] and Uber forbids drivers on its app from making private pickup arrangements for customers, handing out business cards, and arranging for any kind of transportation outside of their apps.[216] Clearly, Uber and Lyft have a set of standards that they want to maintain. How they have chosen to enforce those standards through a smartphone application and a rating system is perhaps their single greatest innovation, and one that must be properly understood in order to understand work relationships in the gig economy.

IV. NOBODY (AND EVERYBODY) IS WATCHING: REDEFINING SUPERVISION AND CONTROL IN THE GIG ECONOMY

Technology has blurred the once bright lines of control between the employer and the employee.[217] In the case of Uber, its drivers may not see another employee from the company during their entire time driving for Uber.[218] Instead of direct supervision by human supervisors, Uber and Lyft rely on data collection and customer rating systems to enforce their standards and determine whether they need to deactivate a driver.[219] These ratings may seem benign, but they have

213. *Id.* at 1149.
214. *Cotter*, 60 F. Supp.3d at 1071.
215. *Id.* at 1073.
216. *O'Connor*, 82 F. Supp. 3d at 1142.
217. Joan T.A. Gabel & Nancy R. Mansfield, *The Information Revolution and its Impact on the Employment Relationship: An Analysis of the Cyberspace Workplace*, 40 AM. BUS. L.J. 301, 304–12 (2003) (discussing issues with online remote work, including jurisdiction and employee classification).
218. As part of its argument, Uber tried to distinguish its case from that of other transportation companies by highlighting that it never sends supervisors into the field to monitor drivers. *See O'Connor*, 82 F. Supp. 3d at 1151–52.
219. *See* discussion *infra* Section IV.B.

created a powerful system of supervision that in many ways surpasses old supervisory regimes.[220] In order for courts and agencies to understand the gig economy, they must recognize the power that employers have under these devolved systems of supervision and control.

A. The Gaze: Control and Supervision As They Used to Be

All readers of this Comment have undoubtedly experienced the type of supervision and control that has defined the previous two centuries. School classrooms, prison cells, and factory floors all share a common trait: there are few places to hide from the teacher, the guard, or the foreman.[221] As Michel Foucault argued, these institutions reveal the reality of our modern world: internal discipline.[222] Using the abolishment of corporal punishment and the foundation of the prison system as a model, Foucault demonstrated that the last two centuries have seen a shift in the way people are disciplined.[223] Violence and corporal punishment have been replaced by careful observation.[224] The main characteristic of this supervision is that the subject must believe that, at any time, he or she is being observed.[225] Thus, the power of Foucault's gaze does not come from the ability to achieve constant observation, but rather the subject's belief that he or she could be under observation at any given time.[226] Accordingly, the individual develops a system of internal discipline, which ensures compliance without the need for direct physical control.[227]

The power of the disciplinary regime described by Foucault emanated not just from its ability to present the specter of supervision, but also from the acquisition of knowledge

220. *See* discussion *infra* Sections IV.A & B.

221. MICHEL FOUCAULT, DISCIPLINE AND PUNISH 138–39 (Alan Sheridan, trans., Vintage Books 1979).

222. *Id.* at 220.

223. *Id.* at 170.

224. *Id.*

225. *Id.* at 201.

226. *Id.*

227. *See also* Jonathan Simon, *Ghosts of the Disciplinary Machine: Lee Harvey Oswald, Life-History, and the Truth of Crime*, 10 YALE J.L. & HUMAN. 75, 80–82 (1998) ("The goal of the prison was to restore this norm by rehabilitating offenders through a meticulous categorization and coordination of their behavior using mechanisms of external and internal surveillance.").

regarding its subjects and through concealing its nature.[228] The most salient example for many readers is the elementary school classroom. Each student has his or her own desk or place in the classroom; the teacher stands in the front of the room, with full view of the classroom.[229] Students who misbehave can quickly be identified and given special instruction.[230] Even students who do not misbehave are under the supervision of their teacher, who observes how they learn and tailors his or her approach to make sure that the student is learning the material in the correct way.[231] Because observation and discipline are a part of the teaching process and aid in its effectiveness, the entire process seems natural to the teacher and the pupil: observation, learning, and discipline go hand-in-hand. In the words of Foucault, disciplinary power "functions permanently and largely in silence."[232] The gig economy claims that it frees workers from this kind of supervision, but as the next section argues, it has merely transferred supervisory control to its smart phone application and to customers.[233]

B. The Customer Is Always Right: Devolved Control and Supervision in the Gig Economy

In many ways, ride-share companies embody the kind of disciplinary regime described by Foucault in that they relentlessly acquire and use data regarding their drivers. Uber's application collects information on traffic patterns,[234] the routes drivers take,[235] the speeds at which they

228. FOUCAULT, *supra* note 221, at 176.
229. *Id.* at 176–77.
230. *Id.* at 176.
231. *Id.*
232. *Id.* at 177.
233. Others too have noted the applicability of Foucault to Uber and Lyft, notably the *O'Connor* court. *See* O'Connor v. Uber Techs., Inc., 82 F. Supp. 3d 1133, 1152 (N.D. Cal. 2015) (citing FOUCAULT, *supra* note 221). *See also* Julia Tomasetti, *Does Uber Redefine the Firm? The Postindustrial Corporation and Advanced Information Technology*, 34 HOFSTRA LAB. & EMP. L.J. 1, 55–56 (2016) (noting the *O'Connor* court's reference to Foucault).
234. Jay Cassano, *How Uber Profits Even While Its Drivers Aren't Earning Money*, VICE: MOTHERBOARD (Feb. 2, 2016), https://motherboard.vice.com/en_us/article/wnxd84/how-uber-profits-even-while-its-drivers-arent-earning-money [https://perma.cc/TY3A-S2P9].
235. Colleen Sheehey-Church, *New App Features and Data Show How Uber Can Improve Safety on the Road*, MEDIUM: UBER UNDER THE HOOD (June 29,

drive,[236] and their customer rating.[237] Uber collects all of this information in a way that is integrated into its very business model: drivers must have the application switched to "on" when they are working so that it can properly calculate the fare.[238] Uber uses the data it collects in several ways. First, Uber uses data on driver speed to send "suggestions" for safe driving, so that fast drivers will "curb their enthusiasm."[239] Second, Uber relies on the data it collects to calculate its surge pricing and to determine pickup times.[240] Thus, even when Uber drivers are not driving or picking up fares, they are still providing the company with valuable information.[241] Ride-share drivers, it would seem, are always on the clock.

While Uber and Lyft can gather a great deal of information through their smart phone applications, the only way they can ensure that their drivers maintain the companies' standards is by asking the passengers. By placing the customers in charge of measuring quality, Uber and Lyft have created a system of discipline that is arguably more powerful than the old system of direct supervision. The customer now determines the driver's fate through a rating system, ensuring that drivers work to serve both the customers and their employer.[242] Reinforcing this notion is the fact that there seems to be no method for vetting customer complaints, which are taken at face value.[243] Thus, the customer *becomes* the supervisor, one who is now constantly in the car with the driver.[244] Uber and Lyft, then, have embraced a supervisory regime that constantly conditions their drivers to adhere to the companies' standards and

2016), https://medium.com/uber-under-the-hood/new-app-features-and-data-show-how-uber-can-improve-safety-on-the-road-4934da828eb9 [https://perma.cc/Z8FJ-V2DR].

236. @Uber_Comms, *Curb Your Enthusiasm*, MEDIUM: UBER UNDER THE HOOD (Jan. 26, 2016), https://medium.com/uber-under-the-hood/curb-your-enthusiasm-443e4b7f2ce3 [https://perma.cc/ER3M-9ENH].

237. *See Star Ratings: What to Know as a Driver-Partner*, UBER, https://www.uber.com/drive/resources/how-ratings-work/ (last visited Aug. 6, 2017) [https://perma.cc/Y7EV-PYJ9].

238. *Selecting a Navigation App*, UBER, https://help.uber.com/h/bdeb7821-30f0-45eb-b073-2e9dc7b508eb (last visited Aug. 8, 2017) [https://perma.cc/4PRL-KFAE].

239. *See* @Uber_Comms, *supra* note 236.

240. *See* Cassano, *supra* note 234 (discussing Uber's data collection policies).

241. *See id.* (discussing how drivers still work even during their "dead" time).

242. Rosenblat & Stark, *supra* note 95, at 3772–75.

243. *Id.* at 3765.

244. *Id.* at 3772–75.

guidelines without the need for direct supervision. In a sense, Uber and Lyft drivers are not competing with one another for prices and for services, but are instead competing for ratings, because the higher the ratings, the better the benefits for the driver.[245] The opposite is also true. The lower the ratings, the greater the risk that the driver's account will be deactivated.[246] This system guarantees compliance in ways that seem benign, but it is just as effective as direct supervision in guaranteeing that drivers adhere to the companies' guidelines and standards. Recognizing this kind of control and supervision is vital to understanding the gig economy and its classification of workers.

V. CREATING A NEW WAY FORWARD: AN EMPLOYEE TEST FOR THE GIG ECONOMY

The United States still struggles with the same issues—income inequality and workplace democracy—that Congress attempted to address beginning with the NLRA. But the rise of the gig economy has created novel forms of economic reliance in which an employee no longer depends on a single employer. New methods of supervision and control allow employers to subvert the employment tests of the last half-century. Supervision comes not in the form of an individual, but from a rating system or a smart phone application. Accordingly, any test must take these factors into account. The sections that follow will outline these concepts of economic reliance and employer control, and then propose a two-part test designed to better classify workers in the gig economy.

A. Economic Reliance and Supervision in the Gig Economy

The gig economy has upended traditional economic reliance. Microwork and task-based economic output mean that

245. O'Connor v. Uber Techs., Inc., 82 F. Supp. 3d 1133, 1138 (N.D. Cal. 2015); Cotter v. Lyft, Inc., 60 F. Supp. 3d 1067, 1069 (N.D. Cal. 2015). *See also* Tomasetti, *supra* note 233, at 25–26 (discussing how Uber and Lyft create competition among their drivers).

246. Ortega Complaint ¶ 70, 1:15-CV-07387, 2017 WL 1737636 (E.D.N.Y. Dec. 29, 2015); *Cotter*, 60 F. Supp. 3d at 1071.

many workers are no longer dependent on any one employer.[247] They exist in a perpetual state of being "online," awaiting their next task from an employer they may never know.[248] Yet employers remain economically dependent on their workers. The gig economy gives them access to a highly specialized, highly flexible workforce that can be deployed for one task or for many.[249] Employers in the gig economy also have the ability to set standards in ways workers cannot. For example, while Uber can set the standards for its drivers,[250] the drivers cannot determine their own standards for the routes they will drive or the passengers they will select.[251] Accordingly, any test for determining employee status must account for the fact that, in many cases, workers are no longer dependent on a single employer, but many.

Second, when courts have previously looked at "control" and "supervision," they have focused on direct supervision by another employee of the employer, usually a supervisor.[252] This type of control is the more traditional variety and has a foundation in Blackstone's formation of the master and servant relationship, which he described as "the master's domination over and paternalistic interest in the worker, with rules that resembled the relationship between a husband/father and his family."[253]

Yet Uber and Lyft do not employ supervisors. In fact, there is no indication that Uber or Lyft use human employees to supervise drivers while they are driving. Instead, Uber and Lyft rely on two measures for supervising drivers: (1) the smartphone application, which measures the acceptance rate for the drivers and determines the fare schedule, and (2) the passengers themselves, who rate the drivers according to their performance.

247. Huws, *supra* note 82.
248. *Id.*
249. *Id.*
250. *O'Connor*, 82 F. Supp. 3d at 1143–44.
251. Rosenblatt & Stark, *supra* note 95, at 3763 (discussing Uber's blind acceptance policy).
252. *See* Seattle Opera v. Nat'l Labor Relations Bd., 292 F.3d 757, 765 (D.C. Cir. 2002) (discussing the opera company's evaluation standards).
253. Richard R. Carlson, *Why the Law Still Can't Tell an Employee When It Sees One and How It Ought To Stop Trying*, 22 BERKELEY J. EMP. & LAB. L. 295, 302 (2001) (discussing Blackstone's commentaries on the master-servant relationship).

In light of these developments within the gig economy, this Comment proposes a two-fold solution to the problem of worker misclassification in the gig economy. First, the definition of economic reality must be redefined to include how an employer in the gig economy can be economically reliant on its employees, without having those employees be economically reliant on the employer. Second, the definition of control must be updated to reflect the invisible, yet powerful, means employers in the gig economy have to control their employees. Such a test would ask two questions: (1) what kind of service is the worker providing and (2) is the employer economically dependent on the service that the worker is providing?

B. The Two-Part Employee Test for the Gig Economy

This Comment argues for a two-part test that asks (1) what kind of service the worker is providing, and (2) whether the company is economically dependent on the service that the workers in question are providing. Of course, the problem with this test, as with any test that looks at work relationships, is that it will be intensely fact-driven and subject to interpretation. Why does the service that workers provide matter? And what does economic dependence look like in the gig economy?

First, the court or administrative agency should look at the kind of work that the worker is doing for the company. Are they selling their labor or something else, like their spare bedroom? So much of the gig economy is shrouded in the idea that the Internet, and companies that work in it, are an intermediary of sorts. Yet, as the *Cotter* court noted, there is little difference between a company like Lyft and a traditional taxi company. Both receive requests for rides, dispatch drivers, and take a part of the driver's fare.[254] Indeed, Uber and Lyft are not "technology companies" so much as they are transportation companies that take advantage of technology to sell labor. And these companies control the price of that labor: it is Uber and Lyft, not the drivers, who set the prices. Further supporting the idea that these companies are trying to sell labor is the fact that Uber and Lyft prevent drivers from seeing their passengers' destination until after they have accepted the

254. Cotter v. Lyft, Inc., 60 F. Supp. 3d 1067, 1078 (N.D. Cal. 2015).

fare.[255] Such activity highlights that Uber and Lyft are not merely interested in taking a percentage of their drivers' fares, but also in maximizing their labor output.

Second, courts and administrative agencies need to ask if the putative employer is dependent on the kind of labor provided by the workers in question. In other words, are the workers a central component of the employer's business?[256] If the answer is yes, that serves as a strong indication that the workers in question are employees. If the answer is no, then the court should still weigh the other factors of the common law agency test. However, economic dependence should be fairly easy for a court to determine, because where there is economic dependence, there is inevitably control and supervision. In the case of Uber and Lyft, their innovative technology is useless without their drivers.[257] Because of this economic dependence, these companies must supervise and control their workers. This is the reason why Uber gathers data on its drivers, asks its passengers to rate drivers, and deactivates driver accounts when they do not maintain a satisfactory rating. These activities are all part of a largely invisible matrix of control that ensures that drivers meet the companies' standards. As the gig economy becomes a larger part of economic life in the United States, courts and administrative agencies must recognize this fact.

This two-part test for determining employee status in the gig economy is designed to be simple. For example, when the NLRB determined that graduate assistants were employees, it focused only on whether they provided a service to the universities and whether the universities exercised some control over them.[258] In the case of Uber and Lyft, drivers for these companies would be classified as employees under the two-part test because (1) the drivers provide a service and (2) Uber is economically dependent on the drivers to provide that service. The two-part test is intentionally broad because it

255. Rosenblat & Stark, *supra* note 95, at 3763 (discussing Uber's blind acceptance policy).

256. Robert Sprague, *Worker (Mis)classification in the Sharing Economy: Trying to Fit Square Pegs into Round Holes*, 31 A.B.A. J. LAB. & EMP. L. 53, 73–76 (2015) (arguing that the focus must be on the company's economic dependence, not the worker's).

257. O'Connor v. Uber Techs., Inc., 82 F. Supp. 3d 1133, 1138 (N.D. Cal. 2015); *Cotter*, 60 F. Supp. 3d at 1069.

258. *See* discussion *supra* Section II.B.

must be able to respond to changes that occur within the gig economy. There are constantly new companies being created, and established companies are finding novel ways to employ their workforces. In this sense, the two-part test continues the historical development of the employment and labor laws, which ultimately chose to adopt the word "employee," as opposed to industry-specific terms or words like "laborer." The term "employee" encompassed work relationships ranging from office work to mining.[259] The result was a broad coverage model rooted in the principles of the New Deal: economic equality and workplace democracy. And while the economy of the New Deal is now gone, the principles behind it, including achieving the broadest possible coverage, must remain the focus of all employment and labor laws.

The two-part test this Comment has proposed is not perfect. In the first place, without reform of the existing employment and labor laws, a broad coverage model would create thousands of new employees for Uber and Lyft. Some of these employees may drive exclusively for Uber or Lyft, while others may only drive part time. The former could potentially claim more benefits because of their longer work hours,[260] resulting in a time-consuming process of adjudicating claims on an individual basis.[261] However, the cost and time involved in making these determinations should not absolve gig economies of the responsibility to provide their employees with benefits. The manufacturing industries of the twentieth century also revolutionized their industries and created new work relationships, yet this did not halt the implementation of employment and labor laws, nor prevent those industries from adapting to them.[262]

The pressure to provide benefits to their workers could also lead gig economy employers to change the way they interact

259. Carlson, *supra* note 253, at 308–11 (discussing legislative choice of the term "employee" and court interpretations of other terms such as "laborer" and "workman" to mean specific kinds of employment).

260. *See* Family Medical Leave Act, 29 U.S.C. § 2611(2)(A) (eligible employee must have worked for at least twelve months with the same employer and have worked at least 1,250 hours during the period).

261. *See* Bales & Woo, *supra* note 190, at 485–86 (arguing that employee status determinations should be made on a case-by-case basis).

262. *See* Brishen Rogers, *Employment Rights in the Platform Economy: Getting Back to Basics*, 10 HARV. L. & POL'Y REV. 479, 508–09 (2016) (arguing that Uber should be treated no differently than previous industries).

with their workers, such as scaling back their efforts at data collection or deemphasizing or removing customer ratings. In that case, control and economic dependence become more difficult to spot. For instance, Uber has recently begun to implement some of these very measures. Following accusations of sex discrimination[263] and putting its drivers' and passengers' safety at risk,[264] Uber has begun a campaign to improve its relationship with its drivers. Called "180 Days of Change," the campaign involves monthly unveilings of new company policies.[265] To date, Uber has announced new policies for driver support and pay.[266] For example, Uber will now screen ratings and remove those that were influenced by factors out of a driver's control, such as pricing and GPS directions.[267] Drivers also will earn money if they have to wait for a fare longer than two minutes and may designate a personal destination through the application that limits fare requests on their route to and from home.[268] Not surprisingly, Uber has couched its policy changes as a means for granting its drivers "more control."[269] However, Uber still cannot shake its need for its drivers, frankly admitting that Uber would not exist without them.[270] Thus, it seems likely that Uber will continue to rely on its drivers, as well as continue to observe and control them from afar.

CONCLUSION

Innovation has a propensity to excite and terrify; the gig economy is no different. It promises to remake entire industries

263. Sam Levin, *Uber's Sexual Harassment Case Shines Light on a Startup's Culture of Defiance*, GUARDIAN (Feb. 21, 2017), https://www.theguardian.com/technology/2017/feb/21/uber-sexual-harassment-discrimination-scandal [https://perma.cc/Y8QE-9LLS].

264. Laurel Walmsley, *Uber Knowingly Leased Unsafe Cars to Its Drivers in Singapore, Report Says*, NPR (Aug. 4, 2017), http://www.npr.org/sections/thetwo-way/2017/08/04/541692151/uber-knowingly-leased-unsafe-cars-to-its-drivers-in-singapore-report-says [https://perma.cc/L76H-AZBQ].

265. *180 Days of Change*, UBER, https://www.uber.com/c/180-days/ (last visited Aug. 6, 2017) [https://perma.cc/UM4L-PZKU].

266. *See id.*

267. *Ratings Protection*, UBER, https://www.uber.com/c/180-days/lost-items/ (last visited Aug. 5, 2017) [https://perma.cc/S2R3-UU9G].

268. *Control Your Earnings*, UBER, https://www.uber.com/c/180-days/control-your-earnings/ (last visited Aug. 5, 2017) [https://perma.cc/57CL-SAK6].

269. *See id.*

270. *180 Days of Change*, *supra* note 265.

in its image and fundamentally alter our way of life. In a relatively short period of time, it has altered the way we think about our work lives and our work relationships. Yet we must be mindful of the workers who make the gig economy function. By choice or necessity, they have embarked on a journey with no set path. With the New Deal legacy of the current employment and labor laws in mind, lawmakers must ensure that the economic rights of the past continue to have meaning in a new century. They must confront the ways in which technology has disrupted old methods of supervision and control, and create a new social contract for the gig economy. The history of graduate assistants serves as a stark reminder of the costs of inaction and reliance on current employment and labor laws. In the current political climate of uncertainty, the gig economy remains a constant. It will continue to change the way we live our day-to-day lives. Whether it will change the way we view employment and labor laws remains to be seen.