

AGE DISCRIMINATION IN THE ON-DEMAND ECONOMY AND CROWDWORK

Miriam A. Cherry[†]

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†. Miriam A. Cherry, Professor of Law, Co-Director of the William C. Wefel Center of Employment Law, Saint Louis University Law School (SLU Law); J.D., 1999, Harvard Law School, B.A., 1996, Dartmouth College. This article was made possible by a summer grant from the American Association for Retired Persons (AARP), and I specifically wish to thank AARP Policy Integration Director Christina S. Fitzpatrick for her support of this project. Thank you to my colleagues at SLU Law for their input, commentary and review of this work, especially Professors Marcia McCormick and Elizabeth Pendo. Thank you also to Winifred Poster and Marion Crain at Washington University in St. Louis for their valuable insights into invisible labor. I also wish to convey my gratitude to Janine Berg, Senior Economist at the United Nations-International Labour Office (ILO), who provided invaluable help with access to the ILO's dataset on the survey of crowdworkers and to Panos Iperiotis for his assistance with demographic data from his study of crowdworkers. Thanks also to SLU Law reference librarian David Kullman, Rose Tanner, and Donte Tamprateep for research assistance.

INTRODUCTION

The dominant narrative about the on-demand or gig economy focuses on the plight of Millennials, the generation born between 1982 and 2004.¹ Reporters, bloggers, and commentators have largely confined their account of gig platforms to what the on-demand economy means for Millennials who are just beginning their careers.² Media sources have spotlighted the hardships facing young, tech-savvy workers who are forced to cobble together a living through a combination of part-time work, entrepreneurial activities, and insecure gigs online. These sources note that these Millennials are barely scraping by and often lack job security or benefits.³ When discussing the problems of on-demand work, such as lack of stability and minimum wages, the author has routinely received the comment that on-demand work is solely a problem for young, entry-level Millennial workers.⁴

As an example of this type of assumption, a blogger recently wrote:

The force behind these shake ups [i.e. the rise of on-demand platforms] and many more? Millennials. Perhaps this force deserves a moniker all to itself—the ‘Millennial Force!’ It is the millennial generation that is driving the demand for all industries to embrace the use of technology and the convenience of providing services on demand, leading us to expect services instantaneously.⁵

As another example, a story in *The New Yorker* recounted the plight of several younger workers trying to carve out a place for themselves in New

1. Philip Bump, *Here is When Each Generation Begins and Ends According to Facts*, THE ATLANTIC (Mar. 25, 2014), <https://www.theatlantic.com/national/archive/2014/03/here-is-when-each-generation-begins-and-ends-according-to-facts/359589>.

2. See, e.g., Sarah Berger, *Side Hustle Nation: Millennials are Making Major Money with Side Gigs*, BANKRATE (July 12, 2017), <https://www.bankrate.com/personal-finance/smart-money/side-hustles-survey> (reporting results of survey finding that over 44 million Americans engage in odd jobs or second jobs to make extra money, specific focus on issues of Millennials); Jesse Cervantes, *Forget 9-to-5: College Students Find Alternate Ways to Make Extra Cash*, THE FORUM, WESTMINSTER COLLEGE (Oct. 16, 2017), <http://www.wcforummedia.com/2017-10-12-forget-9-to-5-college-students-find-alternate-ways-to-earn-extra-cash>.

3. See, e.g., Lydia O’Neal, *How Many People Have Side Hustles? Young Workers are Most Likely to Have Secondary Income*, INT’L BUS. TIMES, (July 12, 2017), <https://www.ibtimes.com/how-many-people-have-side-hustles-young-workers-are-most-likely-have-secondary-income-2564400>; Andrew N. White, *Millennials More Likely To Have A Side Hustle To Pay Bills, Study Finds*, INT’L BUS. TIMES (June 27, 2018), <https://www.ibtimes.com/millennials-more-likely-have-side-hustle-pay-bills-study-finds-2695364>.

4. Anecdotally, some within the labor and employment law community have been hesitant to take online workers seriously, either because they are young, seen as part-time or hobbyist workers, or difficult to organize through ordinary unionization campaigns. While it is true that the federal age discrimination law, the Age Discrimination in Employment Act (ADEA) only protects those age forty and above, see 29 U.S.C. § 631 (2018), neutral rules like the Fair Labor Standards Act (FLSA), see 29 U.S.C. §§ 201-219 (2018), apply to all workers, regardless of age.

5. Anant Argawal, *How Millennials and the On-Demand Economy Are Revolutionizing Skills Training*, MEDIUM (Aug. 31, 2017), <https://medium.com/@edxononline/how-millennials-and-the-on-demand-economy-are-revolutionizing-skills-training-daace8404419>.

York City's on-demand economy.⁶ The piece also featured quotes from Chris Lehane, AirBnB head of global policy and public affairs, who noted that: "To 'speak millennial,' you ought to be talking about the sharing economy, because it is core and central to their economic future[.]"⁷

In contrast to these various accounts of Millennials and the problems they face when navigating the gig economy, there has been little scholarly examination of the issues facing older workers in these settings. While issues of race⁸ and gender⁹ in the on-demand economy have recently received increased attention from legal scholars, age has yet to be discussed in any meaningful depth.

This article aims to fill that gap, looking at participation rates of older workers in the on-demand economy and examining age discrimination in online crowdwork.¹⁰ The focus lies at the intersection of structural change in the labor market and demographic trends showing a steady increase in the number of older workers in the overall economy. Along the way, the author proposes several ideas to re-conceptualize crowdwork and make it a better proposition for workers of all ages.

This article proceeds in four parts. The first part provides an overview of the on-demand economy, highlighting some of the technical, legal, and sociological aspects of deploying labor through cell phone apps and platforms. The second part discusses the demographic aspects of the on-demand economy, focusing on two datasets of online crowdworkers that include both age and disability status. This demographic data shines a spotlight on the neglected status of seniors in the on-demand economy. This quantitative information is supplemented with qualitative research involving interviews with crowdworkers aged 50-plus from the TurkerNation message board. The third part discusses an analysis under the Age Discrimination in Employment Act (ADEA) and the challenging implications of using platforms that may either reinforce or de-bias attitudes about older workers.

6. Nathan Heller, *Is the Gig Economy Working?*, THE NEW YORKER (May 15, 2017), <https://www.newyorker.com/magazine/2017/05/15/is-the-gig-economy-working>.

7. *Id.*

8. See, e.g., Nancy Leong, *New Economy, Old Biases*, 100 MINN. L. REV. 2153 (2016); Jamila Jefferson-Jones, *Shut Out of AirBnB: A Proposal for Remedyng Housing Discrimination in the Modern Sharing Economy*, FORDHAM URBAN L. J., CITY SQUARE, <http://urbanlawjournal.com/shut-out-of-airbnb-a-proposal-for-remedyng-housing-discrimination-in-the-modern-sharing-economy/>; Nancy Leong & Aaron Belzer, *The New Public Accommodations: Race Discrimination in the Platform Economy*, 105 GEO. L.J. 1271 (2017).

9. Naomi Schoenbaum, *Gender and the Sharing Economy*, 43 FORDHAM URB. L.J. 1023 (2016).

10. Crowdwork is work performed online, in response to an "open call" in which anyone can sign up to participate. Principle examples of crowdwork platforms include Amazon's Mechanical Turk, Upwork, and Threadless. Computer crowdwork is distinguished from other forms of work that may be facilitated by an app, but in which the actual work itself takes place in the real world. Examples would include Uber and TaskRabbit. See Valerio De Stefano, *Introduction: Crowdsourcing, the Gig-Economy and the Law*, 36 COMP. LAB. L. & POL'Y. J. 461, 462 (2015) (defining crowdwork).

At times, the on-demand economy highlights stereotypes that disadvantage older workers. However, it can also de-bias age through the anonymization of work. Finally, the last section discusses various policy-based solutions to improve on-demand work for older workers. These proposals could improve on-demand work for all workers.

I. LEGAL ISSUES IN THE ON-DEMAND ECONOMY

The labor market is changing rapidly. New work arrangements that promise workers more flexibility and control over their working time and career direction are becoming increasingly prevalent. According to a recent survey conducted by *Time Magazine*, over fourteen million people currently work in the “gig,” “on demand,” or “sharing” economy, in which platforms create an “open call” for work that can be distributed by technology to a crowd of on-demand workers.¹¹ These new jobs can be performed either wholly online, or in part in the real world. Examples include websites and apps that range from Uber (ridesharing),¹² GrubHub (food delivery),¹³ and Amazon’s Mechanical Turk (crowdwork computer tasks performed remotely).¹⁴ The size and extent of the on-demand economy depends on the definitions used to define its boundaries and whether it is classified as part of a larger scale move to contingent or alternative work arrangements. According to a 2016 report from the Congressional Research Service, if temporary work, on-call work, part-time work, and “self-employment” are included in the definition of “alternative work arrangement,” this sector encompasses nearly one-third of the labor force.¹⁵

Technological platforms offer innovations. Instead of buying or selling a good, users of certain platforms can rent access to what they need. A driver with a private car can transform an ordinary morning commute into a profit-generating enterprise by picking up a passenger on Uber or Lyft. Other websites, like Amazon’s Mechanical Turk, crowdsource computer tasks to a global market of workers, using only very small slices of time. “Prosumer” websites involved customers in design or marketing decisions, and made them feel part of a community that would also buy the products.¹⁶ On-demand

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

12. UBER, www.uber.com (last visited Jan. 21, 2019).

13. GRUBHUB, www.grubhub.com (last visited Jan. 21, 2019).

14. AMAZON MECHANICAL TURK, www.mturk.com (last visited Jan. 21, 2019).

15. Sarah Donovan, et al., *What Does the Gig Economy Mean for Workers*, CONGRESSIONAL RESEARCH SERVICE (Feb. 5, 2016), https://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=2512&context=key_workplace.

16. JEFF HOWE, CROWDSOURCING: WHY THE POWER OF THE CROWD IS DRIVING THE FUTURE OF BUSINESS 1–2 (2008) (describing the “Threadless” website).

services thrive in an environment that is increasingly globalized, anonymous, and operates with lowered transaction costs and greater efficiency.

As the vanguard of these trends toward more flexible and contingent work, labor in the on-demand economy has received both its share of positive and negative attention in the media and in the courts. Positive news stories focus on the opportunities generated for people who need and want more flexible days and more flexible hours than a typical forty-hour-a-week job would provide.¹⁷ News stories that have focused on older adults portray a narrative of extremely active workers, sometimes in altruistic and volunteer endeavors, creating widespread social benefit.¹⁸ These stories focus on how platforms can help older people make use of otherwise underutilized assets, using websites like AirBnB to rent out their spare guest room or Turo, to rent out an infrequently-used spare car.¹⁹ Sharing websites and mobile apps also may provide a quick and easy way for customers to seek assistance, whether for grocery shopping (Instacart), odd jobs and errands (TaskRabbit), or home repair (Handy). The negative accounts, on the other hand, focus on the terms and conditions of the work, including a lack of benefits and opportunity for advancement. These stories detail the uncertainty of on-demand platforms for workers, the low rates of pay provided on some platforms, and the amount of unpaid search time that goes into finding the next gig.

A critical recurring legal issue stems from confusion over the proper employment classification of on-demand workers. Early on, many platforms decided to classify their workers as independent contractors through terms of service listed on a website or on a mobile app.²⁰ But, the question of employee versus independent contractor status is not decided based on a label provided by a company.²¹ Rather it is a determination made by courts based on a

17. *Id.*

18. Ed Rosenberg & Irene L. Letrero, *Using Age, Cohort, and Period to Study Elderly Volunteerism*, 32 EDUC. GERONTOLOGY 313, 315–316 (2006).

19. Amy Zipkin, *Sharing Economy Attracts Older Adults*, N.Y. TIMES (Sept. 25, 2015) (noting that older workers may have more assets, such as a spare car, or rooms that are empty due to children leaving home).

20. Miriam A. Cherry, *The Sharing Economy and the Edges of Contract Law: Comparing U.S. and U.K. Approaches*, 85 GEO. WASH. L. REV. 1804, 1809 (2018).

21. For recent accounts of the use of EULAs and pre-dispute mandatory arbitration as a way of managing workplace liability for employers, see Jean R. Sternlight, *Disarming Employees How American Employers Are Using Mandatory Arbitration to Deprive Workers of Legal Protection*, 80 BROOK. L. REV. 1309, 1310 (2015) (“Today employers, with substantial assistance from the Supreme Court, are using mandatory arbitration clauses to ‘disarm’ employees, effectively preventing them from bringing most individual or class claims and thereby obtaining access to justice. It has been estimated that roughly 20% of the non-unionized American workforce is covered by mandatory arbitration provisions, and this number may well increase.”). For more on arbitration as a method of containing costs toward consumers, see Theodore Eisenberg et. al., *Arbitration’s Summer Soldiers: An Empirical Study of Arbitration Clauses in Consumer and Nonconsumer Contracts*, 41 U. MICH. J. L. REFORM 871, 871 (2008) (“We provide the first study of varying use of arbitration clauses across contracts within the same firms. Using a sample of 26 consumer contracts and 164 nonconsumer contracts from large public corporations, we compared the use of arbitration clauses in firms’ consumer and nonconsumer contracts. Over three-quarters of the consumer

number of factors, primarily the amount of control exerted over the worker or how the work is performed, and whether the workers look like an independent business, based on their indicia of entrepreneurial activity.²²

Meanwhile, in the late Spring of 2018, the Supreme Court of California handed down the *Dynamex* decision.²³ While not an on-demand economy case, the California decision fundamentally changed the test for determining employee status throughout the state.²⁴ In *Dynamex*, the court established the so-called ABC test, which states that a business wanting to classify workers as independent contractors bears the burden of satisfying three elements: (A) that the worker is free from control and direction of the hirer in connection with the performance of the work, both under the contract for the performance of such work and in fact; (B) that the worker performs work that is outside the usual course of the hiring entity's business; and (C) that the worker is customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed for the hiring entity.²⁵ While all of these seem difficult for Uber to meet, probably the most difficult and fatal element for Uber – and on-demand companies like it – will be prong B. To date, Uber has had little luck convincing courts that it is a software company. Courts have recognized that Uber is in the business of providing transportation, and that drivers are an integral part of shuttling passengers from one location to another. While the matter may be indeterminate at the moment, under the new expansive ABC test in California, employee status will likely become the default rule.

Perhaps the most high profile of these cases involved ridesharing. In *O'Connor v. Uber* and *Cotter v. Lyft*, drivers filed suit in the Northern District of California, seeking minimum wage protections and overtime pay under the Fair Labor Standards Act (“FLSA”).²⁶ The availability of protections afforded under the FLSA, however, depends first and foremost upon a finding that a worker, or class of workers, are “employees.”²⁷ Under federal

agreements provided for mandatory arbitration but less than 10% of the firms’ material nonconsumer, nonemployment contracts included arbitration clauses. The absence of arbitration provisions in the vast majority of material contracts suggests that, *ex ante*, many firms value, even prefer, litigation over arbitration to resolve disputes with peers. Our data suggest that the frequent use of arbitration clauses in the same firms’ consumer contracts may be an effort to preclude aggregate consumer action rather than, as often claimed, an effort to promote fair and efficient dispute resolution.”). *But see* Christopher Drahoszal & Stephen J. Ware, *Why Do Businesses Use (or not Use) Arbitration Clauses?*, 25 OHIO ST. J. ON DISP. RESOL. 433, 433–34 (2010) (disputing conclusions of Eisenberg’s study).

22. See Miriam A. Cherry, *Beyond Misclassification: The Digital Transformation of Work*, 37 COMP. LAB. L. & POL’Y J. 557, 581 (2016).

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

24. Noam Scheiber, *Gig Economy Business Model Dealt a Blow in California Ruling*, N.Y. TIMES, Apr. 30, 2018, at B6.

25. *Dynamex*, 416 P.3d at 7.

26. Fair Labor Standards Act, 29 U.S.C. § 203(e)(1) (2018); *O’Connor v. Uber Techs., Inc.*, 82 F. Supp. 3d 1133, 1135 (N.D. Cal. 2015); *Cotter v. Lyft, Inc.*, 176 F. Supp. 3d 930, 932 (N.D. Cal. 2016).

27. 29 U.S.C. § 203(g).

law, whether a worker is an employee or independent contractor is determined through various multifactor tests that examine the employer-worker relationship.²⁸

The “control” test derives from case law and agency decisions. It focuses on a principal’s right to control the worker. Factors that tilt in favor of classification as an employee are whether the employer may direct the way in which the work is performed, determine the hours involved, and provide the employee with direction.²⁹ On the other hand, elements that lean toward independent contractor classification include high-skilled work, workers providing their own equipment, workers setting their own schedules, and per-project as opposed to per-hour wages.³⁰ In an alternate test, courts examine the economic realities of the relationship to determine whether the worker is exhibiting entrepreneurial activity, or whether the worker is financially dependent upon the employer.³¹ The label affixed to the relationship is a factor in the outcome, but it is certainly not dispositive. The tests are notoriously malleable, even when analyzing what should be fairly straightforward facts.³²

As a result, the federal judges of the Northern District of California have struggled to characterize the drivers’ triangular working relationship with the customers and the platforms within the “on/off” toggle of employee status.³³

28. See Katharine V.W. Stone, *Legal Protections for Atypical Employees: Employment Law for Workers without Workplaces and Employees without Employers*, 27 BERKELEY J. EMP. & LAB. L. 251, 257–58 (2006) (listing factors from the cases); see, e.g., Rutherford Food Corp. v. McComb, 331 U.S. 722, 728–29 (1947); Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 326 (1992).

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

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

31. Stone, *supra* note 28 at 257–58.

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

33. See, e.g., Alan Hyde, *Employment Law After the Death of Employment*, 1 U. PA. J. LAB. & EMP. L. 99, 101 (1998) (“The new ways of working, that I believe challenge normal legal analyses, include such new relations of employment as temporary employment placed by an agency and part-time

As some have noted, with Uber and Lyft, some of the factors in the control test point toward an employee relationship while others are reminiscent of an independent contractor relationship.³⁴

On the one hand, crowdworkers have some flexibility to set their own schedules and can sign on and off an app more readily than can workers in a traditional environment who work a set shift or who are otherwise tethered to a workplace desk or factory floor. Crowdworkers also use their own cellular telephones, computer equipment, Internet connections, and other instrumentalities. Further, end user licence agreements (“EULAs”) contractually label crowdworkers as “independent contractors.”

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

Strong arguments on both sides left the judges in the Northern District of California with a malleable test and an indeterminate legal outcome.³⁵ Perhaps Judge Vince Chhabria in *Cotter v. Lyft* said it best when he noted in ruling on a motion:

the jury ... will be handed a square peg and asked to choose between two round holes. The test the California courts have developed over the 20th Century for classifying workers isn't very helpful in addressing this 21st Century problem . . .³⁶

Although the ridesharing cases involving Uber and Lyft have been the most high profile on-demand economy cases, there are many other ongoing cases regarding the employee status of platform workers.³⁷ Despite the

employment rendered by people who have no other employer but are treated as contingent workers without benefits or implicit promises. They also include ways of working that are not, technically, “employment” relations under any statute: independent contractors, free-lancers, consultants, and people out of the labor market after downsizing or other elimination of former career jobs.”).

34. Benjamin Means & Joseph A. Seiner, Navigating the Uber Economy, 49 U.C. DAVIS L. REV. 1511, 1530–31 (2016). See, e.g., Brishen Rogers, *Employment Rights in the Platform Economy: Getting Back to Basics*, 10 HARV. L. & POL'Y REV. 479, 491 (2016) (noting that some aspects of both employee and independent contractor relationships are present in Uber's business model, but that policy reasons would favor coverage of workers as employees).

35. *Cotter v. Lyft Inc.*, 60 F. Supp. 3d 1067, 1081–82 (N.D. Cal. 2015).

36. *Id.* at 1081.

37. See Cherry, *supra* note 22 at 559–62 (offering a full discussion of these ongoing cases).

varying nature of platform-based work, the central issue in all of these cases is the same: whether the contract's description of the work as that done by an "independent contractor" should control, or whether the control or economic realities test would lead to a different result. Some of these cases have been sent to arbitration, per the contract's terms and conditions, never to be heard from again.³⁸ Others, including the original *O'Connor v. Uber* case, have settled without resolving the question of employee status.³⁹ And, as noted above, states have taken their own approaches to regulating these distinctions, as the *Dynamex* case attests.

Indeed, the distinction between an employee and independent contractor is particularly important because many of the rights and benefits provided for in U.S. law (for example, minimum wage, protection from age, sex, race discrimination, unemployment insurance, worker's compensation, and the right to organize) are only triggered for those workers deemed to be "employees." This is important for older workers because unless they are "employees," they cannot seek the protection against age discrimination guaranteed to them in the ADEA. Settlement agreements in the significant cases have so far dodged the ultimate issue of employee status. Federal courts have yet to squarely address the issue of proper legal classification. In the meantime, workers exist in a "gray zone," with a great deal of confusion about how they should be treated by the law.

II. OLDER WORKERS IN CROWDWORK AND THE ON-DEMAND ECONOMY

Our sense of who is working in the on-demand economy is incomplete, but it is beginning to take shape. A 2016 study by Lawrence Katz and Alan Krueger noted that older workers are a major factor in the rise of alternative work arrangements, that is, workers classified as independent contractors rather than employees.⁴⁰ In addition, senior workers are continuing to work for longer periods than their predecessors worked before retirement.⁴¹ According to a December 2015 Bureau of Labor Statistics report, between 2004 and 2014, the number of Americans at least fifty-five years old who

38. See Miriam A. Cherry, *Gig Economy: Settlements Leave Labor Issues Unsettled*, in ST. LOUIS U. SCH. OF L. LEGAL STUD. RES. PAPER SER. NO. 2016-9 (2016).

39. *Id.*

40. LAWRENCE F. KATZ & ALAN B. KRUEGER, NAT'L BUREAU OF ECON. RES., THE RISE AND NATURE OF ALTERNATIVE WORK ARRANGEMENTS IN THE U.S., 1995-2015 12 (2016) https://krueger.princeton.edu/sites/default/files/akrueger/files/katz_krueger_cws_-march_29_20165.pdf.

41. DREW DESILVER, PEW RES. CENTER, MORE OLDER AMERICANS ARE WORKING, AND WORKING MORE, THAN THEY USED TO (2016), <http://www.pewresearch.org/fact-tank/2016/06/20/more-older-americans-are-working-and-working-more-than-they-used-to>; Sara E. Rix, *The Aging of the American Workforce*, 81 CHI.-KENT L. REV. 593, 598 (2006) (discussing long-term demographic trends).

were active in the civilian labor force ballooned by 47.1%.⁴² At the same time, alternative work arrangements continue to rise.⁴³ A study published jointly by platform Elance-oDesk (now known as Upwork) and the Freelancer's Union claimed that over fifty-three million Americans, or approximately thirty-four percent of the workforce, work in some way as freelancers.⁴⁴ A 2015 report from PricewaterhouseCoopers suggested that seven percent of Americans call themselves "providers" in the sharing economy, but that of those surveyed who were over fifty-five, almost one-quarter would call themselves "providers."⁴⁵ These survey results provide support for the contention that seniors increasingly participate in the on-demand economy.⁴⁶

A. Demographic Data: Age and Crowdworking

Between the international reach of crowdwork and workers' use of more than one platform, researchers have found it difficult to get a clear picture of the workers who perform crowdwork.⁴⁷ Furthermore, at least in the United States, little work has been done to study the category of self-employed workers. Unlike major standard employers who may fill out forms for the Equal Employment Opportunity Commission (EEOC), on-demand firms' tendency to classify workers as independent contractors has left a major gap in our knowledge about them. Alexander Acosta, the newly appointed Secretary of Labor, has promised to study the rise and prevalence of non-traditional work.⁴⁸

42. MARION G. CRAIN, WINIFRED R. POSTER, AND MIRIAM A. CHERRY, INVISIBLE LABOR HIDDEN WORK IN THE CONTEMPORARY WORLD (University of California Press 2016).

43. *Contingent and Alternative Employment Arrangements Summary*, U.S. DEP'T OF LAB. BUREAU OF LAB. STATISTICS, (June 7, 2018), <https://www.bls.gov/news.release/conemp.nr0.htm>.

44. FREELANCERS UNION & ELANCE-oDESK, FREELANCING IN AMERICA: A NATIONAL SURVEY OF THE NEW WORKFORCE 3 (2016) (categories include independent contractors, moonlighters, diversified workers, temporary workers, and freelance business owners).

45. PRICEWATERHOUSECOOPERS, CONSUMER INTELLIGENCE SERIES: THE SHARING ECONOMY 10 (2015), <https://www.pwc.com/us/en/advisory-services/publications/consumer-intelligence-series/sharing-economy.html>.

46. Mark Miller, *Seniors Want in on the Sharing Economy*, MONEY (Aug. 20, 2015), <http://time.com/money/4005009/sharing-economy-senior-citizens-uber-airbnb/>.

47. Ming Lim, *Why many click farm jobs should be understood as digital slavery*, THE CONVERSATION (Jan. 17, 2018), <http://theconversation.com/why-many-click-farm-jobs-should-be-understood-as-digital-slavery-83530> (finding that workers may shift platforms suddenly to take advantage of new opportunities or better paying work. The platforms themselves are constantly changing their business practices and policies, and new platforms seem to be continuously appearing.).

48. Vin Guerrieri, *Unions, Republicans May Find Common Ground*, LAW360 (Nov. 9, 2017) (describing Secretary of Labor Alexander Acosta's speech at the ABA Section of Labor & Employment Law Section).

While concrete data has been difficult to find or subject to dispute,⁴⁹ one particular segment of the on-demand workforce has been more well-documented than the rest. Crowdwork performed solely on the computer, i.e. remote computer-task work, has been the subject of more intensive study. There have been a number of efforts to discern who the crowdworkers are, including their genders, ages, family statuses, and household earnings. The reason that this information is more readily available is that many crowdworking platforms are used to recruit subjects for academic research surveys. Thus, researchers concerned with labor trends and human-computer interaction have been able to send out paid tasks on these platforms and in the process, gather data about worker populations. These periodic surveys have allowed researchers to get a better sense of who the crowdworkers are. The author supplemented these quantitative surveys with interviews with older workers who regularly perform crowdwork.⁵⁰ These older workers were found on the TurkerNation message board, which is a gathering and informational space for crowdworkers, mostly for those working on Amazon Mechanical Turk ("Mechanical Turk").

One study of crowdworkers is based on data collected since 2010. In that year, Professor Panos Ipeirotis at New York University began sending out surveys to gather data from workers who completed tasks on Mechanical Turk. Using these surveys, he was able to collect data from workers on a daily basis.⁵¹ Thus, he could follow who these workers worked for and what their earnings were across the site. He was also able to collect information on how many large companies were requesting computer tasks and how much they were paying for them. Professor Ipeirotis's blog aggregates the data collected from these surveys over time.

Due to platform preferences and restrictions, most of the work on Mechanical Turk in recent years has been performed within the United States and India, according to the Ipeirotis blog. In 2010, the average wage for

49. Cole Stangler, *December Jobs Report: How Many Gig Economy Workers are There, Really?*, INT'L BUS. TIMES (Jan. 8, 2016), <http://www.ibtimes.com/december-jobs-report-how-many-gig-economy-workers-are-there-really-2255765>; Lawrence Mishel, *Uber is Not the Future of Work*, THE ATLANTIC (Nov. 16, 2015), <https://www.theatlantic.com/business/archive/2015/11/uber-is-not-the-future-of-work/415905/>. Regardless of whose numbers we believe, or what conclusions we are to draw from them, the fact is that these estimates and analyses are subject to debate and controversy.

50. In November 2017 the author conducted a series of informal interviews of Amazon Mechanical Turk workers who were "fifty or better" in order to get a sense of the issues that were of concern to this group. The workers were selected through an inquiry on the TurkerNation bulletin board, and were posted by Kristy Milland, the moderator for the group. As the author knew that the workers' time was valuable and that most were on Mechanical Turk to make a living, the questions came along with the promise of a \$5 Amazon gift card. The author told the participants not to take longer than half an hour, thus promising an effective rate of pay of \$10/hour, above the federal minimum wage of \$7.25 per hour. The cover email that went out to them promised that if they were selected to be quoted in a paper, that their names and identities would not be revealed.

51. Panagiotis G. Ipeirotis, *Analyzing the Amazon Mechanical Turk Marketplace*, ACM XRDS 17:2, 16–17 (Winter 2010).

Mechanical Turkers was approximately \$5.00 per hour, which is below the U.S. minimum federal wage of \$7.25 per hour, but above the minimum wage in India.⁵²

Because Ipeirotis regularly conducts surveys, his blog functions as an ersatz demographic census. One can narrow the results down by country, and I have limited my analysis of the figures from this informal census to results within the United States. Based on Ipeirotis's data, we can surmise that, within the United States, roughly the same number of men and women participate on Mechanical Turk. Further, workers are concentrated among the lower to middle income categories; very few toward the top of the income distribution participate in Mechanical Turk work.⁵³

While it was not possible to get a full report on respondents based on age, the Ipeirotis blog can be programmed to allow a user to view the records of the last two hundred respondents. As year of birth is one of the questions asked, data can then be calculated based on age cohorts. These results were calculated by the author based on the Ipeirotis data⁵⁴ for the last two hundred respondents as of November 20, 2017:

Birth Year	Number of Workers	Percent of Workers
1940-1950	1	0.51%
1950-1960	9	4.55%
1960-1970	16	8.08%
1970-1980	40	20.20%
1980-1990	84	42.42%

52. Joel Ross et al., *Who are the Crowdworkers? Shifting Demographics in Mechanical Turk*, ACM CONFERENCE ON HUM. FACTORS IN COMPUTING SYS.: IMAGINE ALL THE PEOPLE 2863, 2869 (2010). But see Six Silberman, *Stop Citing Ross et al., Who are the Crowdworkers?*, MEDIUM (Mar. 16, 2015), <https://medium.com/@silberman/stop-citing-ross-et-al-2010-who-are-the-crowdworkers-b3b9b1e8d300>. In this blog post, one of the original authors of the Ross, et al paper notes that the demographic data from 2010 is no longer accurate, and further that many people have begun to “professionalize,” that is, to use scripts to help them find large numbers of bulk tasks that they can work on practically full-time. Because they use these automated scripts, this group of professionalized workers does not typically find and complete surveys. As such, their demographic data is typically dropped from many of the surveys. *Id.* The divergence between “casual” and “professional” Turkers is an important aspect that needs further research.

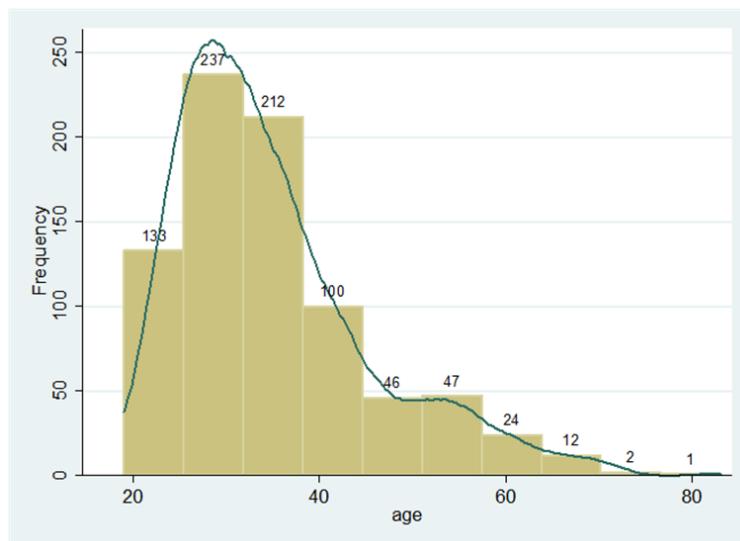
53. Ipeirotis, *supra* note 51.

54. *See id.* This information was captured by the author from the Ipeirotis blog using the “API” function on the left corner to return the last two hundred responses, of which the respondent’s age was one factor. Data compiled on other dates will likely show varying results. The survey does not include workers younger than eighteen, as one needs to be of the age of consent to fill out the survey. Of course, it is possible that some workers have lied about their age, so as to be old enough to take the survey and get paid the money to complete it. This is actually one of the drawbacks of Mechanical Turk, because there is no way to verify that the person on the other end is performing the task is not a child worker. Child labor is prohibited by international treaty and the ILO must enforce many of those basic guarantees, but in the case of crowdwork, this is an extremely difficult task.

1990-2000	48	24.24%
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The bulk of the workers surveyed were younger, yet there was a sizeable contingent, over one-third, born before 1980.

Another source of data comes from a 2016 survey of crowdworkers. The United Nations International Labour Office (ILO) commissioned the study as a census of workers on Mechanical Turk to inform potential policy interventions. Janine Berg, a labor economist at the ILO whose research focuses on income security, conducted the study and analyzed the outcomes.⁵⁵ Taking the raw data from the survey, the author has produced a histogram based on worker age:



55. JANINE BERG, INT'L LABOUR OFFICE, INCOME SECURITY IN THE ON-DEMAND ECONOMY: FINDINGS AND POLICY LESSONS FROM A SURVEY OF CROWDWORKERS 2 (2016) [hereinafter ILO SURVEY OF CROWDWORKERS], http://www.ilo.org/wcmsp5/groups/public/-ed_protect/-protrav/-travail/documents/publication/wcms_479693.pdf. The data quoted herein was part of the ILO survey, but the results as it pertains to age were unpublished. The ILO allowed the author to access the results, which were then analyzed through a data editor and an excel spreadsheet.

Again, the bulk of the workers in this survey were younger, clustering around age twenty-five. Yet there are substantial numbers of older workers on the platform too, comprising workers in their forties and fifties. Aside from demographics, Berg sought to discover the motivations of the crowdworkers. The survey asked a series of questions to attempt to get at why the crowdworkers chose this type of work, as opposed to another more traditional job. Twelve percent of U.S workers said they engaged in crowdwork because they had a physical or mental disability and needed or preferred to work from home.⁵⁶ This group of workers was more likely to rely on crowdwork as their main source of income, since disability prevented other types of work.⁵⁷ When narrowing down the data further to only examine older adults, the number rose dramatically. Roughly one quarter of those older adults surveyed cited a health concern or disability as a reason that they needed to work from home.⁵⁸

These results point to a disabled population that is underemployed, and that result seems to be multiplied when looking at disabled older workers. Take the example of a worker interviewed by the author:

I work on [Mechanical Turk] to supplement my disability income. I also love it because of it being so flexible. I have to take medication at certain times throughout the night and I am constantly up at odd times of the night. So I can jump on [Mechanical Turk] and check for my favorite HITs [human intelligence tasks]. Kind of like right now. It is 4:30 am on Thanksgiving and I am able to get some work done and make a little extra money.⁵⁹

While some respondents cited enjoyment or a leisure hobby as a reason for their work, the number who did so was low. It is clear that the crowdworkers take this activity seriously, with many relying on the income to increase their household earnings, either as a primary means of support or as a way to supplement income from other sources. As Berg notes in her analysis of the ILO data:

In our survey of crowdworkers, nearly 40 per cent crowdworked as their main source of income and an additional 35 per cent crowdworked to complement pay from other jobs. Fewer than 15 per cent crowdworked out of enjoyment or as a form of leisure. The survey respondents, both American and non-

56. *Id.* at 8.

57. *Id.*

58. BERG, *supra* note 55 (data analysis by author). The data quoted herein was part of the ILO survey, but the results as it pertains to age were unpublished. The ILO allowed the author to access the results, which were then analyzed through a data editor and an excel spreadsheet.

59. Email Interview with Worker #10, Mechanical Turk, Amazon (Nov. 19, 2017) (on file with author).

American, considered it work and felt they should be compensated with a ‘fair’ or ‘minimum’ rate of pay.⁶⁰

Another common reason given for engaging in crowdwork was the difficulty in finding another job.⁶¹ Other research has shown that unemployment is a much more serious problem for the elderly. On average it takes longer for an older worker to find a job than for a younger worker of similar qualifications.⁶² As one interview subject told the author:

Knowing that there are limited opportunities out there for us 50+ motivates me as well – the work is variable, so instead of looking for work elsewhere that may or may not exist, I know that it does exist on [Mechanical Turk] so I might as well make the best of what’s right in front of me.⁶³

In the ILO study, crowdworkers were asked about the upsides and downsides of their work, and there were some common themes. Complaints about low pay were common. The ILO data show that American crowdworkers averaged \$5.55 an hour, below the federal minimum wage.⁶⁴ Some of the older workers noted that they relied on outside forums, like TurkerNation, to help with technical advice. One worker the author interviewed noted that she often felt isolated when working on crowdsourced work, but that finding message boards and online communities helped to alleviate her sense of being alone.⁶⁵

At least one crowdworker remarked that they had high search costs, i.e., that it took them a long time to find appropriate tasks on the website, so that they spent more time looking for work than they actually spent doing it.⁶⁶ Still others noted that their work could be rejected by the requester on a summary basis, without reasons provided. All of these led to dissatisfaction among those surveyed. The author’s interviews of older workers who post on TurkerNation supported these findings. One worker the author interviewed noted that “even if I put a lot of time looking for hits [tasks] to do it does not

60. BERG, *supra* note 55 at 19.

61. See *id.* at 10. The problem seems to be especially pronounced for American workers.

62. See BUREAU OF LAB. STATISTICS, CURRENT POPULATION SURVEY 31 (2014), <https://www.bls.gov/cps/aa2014/cpsaat31.pdf> (showing that in 2014, 22.1% of unemployed adults under age 25 had looked for work for 27 weeks or longer, whereas for adults over 55, that number was 44.6%).

63. Email Interview with Worker #2, Mechanical Turk, Amazon (Nov. 19, 2017) (on file with author).

64. BERG, *supra* note 55 at 11; Fair Labor Standards Act § 8, 29 U.S.C. § 206 (2012).

65. *Id.* See also BERG, *supra* note 55 (data analysis by author). The data quoted herein was part of the ILO survey, but the results as it pertains to age were unpublished. The ILO allowed the author to access the results.

mean I will be able to do many of them. It seems to be a matter of luck if I can grab one to work on. This is the most frustrating part.”⁶⁷

B. Better Choices?: Older Workers Choosing Between Platforms

Which platforms succeed at encouraging market participation by older workers, and which ones fail? If left out of the on-demand economy, older workers could miss out on a vital opportunity to earn additional income and stay physically and mentally active. At the same time, the drawbacks of the on-demand economy are not well understood, and seniors may face low wages, lack of benefits, and discrimination. These issues highlight the importance of studying how the potential risks and benefits of gig work differ based on the age of the workers participating.

Work is not evenly distributed among older adults. There is an important divide between seniors able to take advantage of higher-paying options and those shunted into lower-paying task or perhaps left out altogether. This problem is not isolated to older workers; it is an issue across the age spectrum for all American workers. In her book *A New Deal for Old Age*, Professor Anne Alstott notes that “inequality is a defining feature of old age,” in which the wealthy elderly have better health outcomes than those that struggle financially.⁶⁸ She notes that there is divide between healthy and wealthy seniors who may retire only to start “encore careers” and blue collar workers, who work in physically demanding jobs. The workers in this second group are often in poor health or lack access to good healthcare.⁶⁹ This group may lack some of the skills needed to succeed in the on-demand economy, yet it may be this group of older workers who most need supplemental income.

The ability to take advantage of the on-demand economy relies to a great extent on the older worker’s access to resources that are the product of previously accumulated wealth. Some opportunities in the on-demand economy require access to resources. While some “empty nesters” may have extra room after their children have moved out, many of the elderly never had much room to begin with. Those in the latter category cannot make use of services like AirBnB. Similarly, some seniors do not have a car at all, let alone a spare one to rent on Turo or RelayRides.

Most platforms aim to provide services and bring in workers on a neutral basis, without regard to age. Several older workers interviewed by the author noted that the on-demand economy seems to present a level playing field. For example, Worker #2 noted that “what makes a platform friendly or unfriendly is general user friendliness. If a site is easy to navigate, has friendly support,

67. Email Interview with Worker #4, Mechanical Turk, Amazon (Nov. 19, 2017) (on file with author).

68. ANNE L. ALSTOTT, *A NEW DEAL FOR OLD AGE* 26–27, 37, 66–67 (2016).

69. JO ANN JENKINS, *DISRUPT AGING* 88 (2016) (noting that only one in four adults from age 50 to 64 is “up to date with basic recommended cancer screenings and other preventative health care”).

is easy to read, I feel they are pretty 50+ friendly.”⁷⁰ As another example, take the comments from Worker #1, a semi-retired school librarian:

I haven’t done any other on-demand services because none of them appeals to me (I hate driving) but Amazon’s idea of being artificial artificial intelligence really appealed to me. . . . I read about it in a New York Times article in 2007 about Amazon’s idea of artificial artificial intelligence and gave it a try. . . . I think that any worker, regardless of age, can do this as long as they are reasonably skilled in computer use. Being a librarian, I probably have more skills . . . but the platform itself is not any more unfriendly to older workers than younger ones as long as you give the time and reasonable computer skills. You don’t need to be able to drive anywhere! . . . It doesn’t take strength . . . For me, the platform that offers fair wages is the more friendly platform. This is perhaps the biggest problem with all online work . . . [A]mazon allows requesters to set their price and the going feeling is that \$6 an hour is ok. \$8.44 is the minimum wage [in my state] so \$6 is pretty shameful.⁷¹

A number of the interview subjects noted that they like doing the tasks on crowdworking platforms because it allows for them to work from home and on their own schedules. For example, Worker #3 stated that she enjoyed flexibility, working when she wanted, and being able to be barefoot if she wanted.⁷² But this same worker noted later certain conditions that made it seem as if her work was far from optional. As she put it, “My motivation for working on [Mechanical Turk] is to supplement my Social Security for survival. Without it I wouldn’t be able to support myself. I have COPD and am on oxygen 24/7, so working from home is ideal for me.”⁷³

One study conducted in 2015, however, raised doubts about the compatibility of on-demand crowdwork platforms with older workers.⁷⁴ Researchers observed older workers who had never performed crowdwork before and concluded that these workers failed to grasp why completing the tasks was important, and that the workers completed the tasks more slowly than expected.⁷⁵ Further, the researchers noted that the participants asked questions about the rate of pay, with commenters wondering why you would put in that much effort to make five cents.⁷⁶ While the researchers seemed to

70. Email Interview with Worker #2, Mechanical Turk, Amazon (Nov. 19, 2017) (on file with author).

71. Email Interview with Worker #1, Mechanical Turk, Amazon (Nov. 19, 2017) (on file with author).

72. Email Interview with Worker #3, Mechanical Turk, Amazon (November 19, 2017) (on file with author).

73. *Id.*

74. See Robin Brewer, Meredith Ringel Morris & Anne Marie Piper, “*Why Would Anybody Do This??: Older Adults’ Understanding of and Experiences with Crowd Work*, CHI CONFERENCE ON HUMAN FACTORS IN COMPUTING SYSTEMS 2246 (2016), <https://dl.acm.org/citation.cfm?id=2858198>.

75. *Id.* at 2251.

76. *Id.* at 2252.

think that this was a “problem” for older people wanting to get into crowdwork, perhaps that is not accurate. Rather, the older workers were simply pointing out a common complaint about fair pay and minimum wage on these platforms that many other workers have already noted.

Thus, the question of which platform is a good match for any particular older worker is of necessity an individualized inquiry. Some of the issues include whether the individual has access to additional or under-utilized resources, like extra space in their house or an extra car, which might be in high demand. Other questions would involve any particular skills training and degree of technical knowledge. But the question of which work is friendly for seniors is also bound up with issues of employment discrimination. Although work on-demand is thought to be freer of bias, and the possibility of employment discrimination is reduced, that is not always the case. Unfortunately, a set of interlocking stereotypes about older workers may cause difficulty in navigating the on-demand economy.

III. AGE DISCRIMINATION AND THE ON-DEMAND ECONOMY

This year the Age Discrimination in Employment Act (ADEA) turns fifty, with a mixed record of success in fighting age discrimination at work.⁷⁷ The current conversation in antidiscrimination law has shifted to stereotyping and more subtle forms of discrimination, rather than blatant or obvious discrimination.⁷⁸ Blatant age discrimination, such as mandatory retirement policies based only on age, age-motivated reductions in force, or overt statements stereotyping older workers, have certainly seen a substantial reduction as a direct result of court cases under the ADEA as well as educational efforts by the EEOC.⁷⁹ Managers, human resources professionals, in-house counsel, and others have been made aware of the liabilities associated with using legally prohibited characteristics such as age and have as a result banned the use of such criteria in critical hiring, promotion, and firing decisions.⁸⁰ State law analogues to the ADEA have also

77. See, e.g., Joanna N. Lahey, *Age, Women, and Hiring: An Experimental Study*. 43 J. HUM. RESOURCES 30 (2008); RICHARD W. JOHNSON & CORINA MOMMAERTS, AGE DIFFERENCES IN JOB LOSS, JOB SEARCH, AND REEMPLOYMENT (2011).

78. See generally Audrey J. Lee, *Unconscious Bias Theory in Employment Discrimination Litigation*, 40 HARV. C.R. C.L. L. REV. 481 (2005). In the context of age discrimination, see Michael S. North & Susan T. Fiske, *Resource Scarcity and Prescriptive Attitudes Generate Subtle, Intergenerational Older-Worker Exclusion*, J. SOC. ISSUES (March 2016), <https://spssi.onlinelibrary.wiley.com/doi/abs/10.1111/josi.12159>.

79. See *id.*

80. See generally Linda Hamilton Kreiger & Susan T. Fiske, *Behavioral Realism in Employment Discrimination Law: Implicit Bias and Disparate Treatment*, 94 CAL. L. REV. 997 (2006).

been enacted, many of which including language that is broader than the language of the ADEA itself.⁸¹

While blatant discrimination has been reduced, the less obvious types of discrimination may still be operating. In fact, EEOC filings for age discrimination have actually risen in recent years.⁸² The fact that bias is now less obvious makes it more difficult to prove age discrimination in court, and employers use excuses such as “overqualification.”⁸³ Much of this discrimination is not based on hatred, but rather on fear and unconscious biases. In the instance of age, that often has to do with an unconscious fear of aging and stereotypes that aging is synonymous with retirement. In this age of increased longevity, these stereotypes and hidden biases can be especially damaging for older workers. Other biases are coming to the forefront in recent news. Older workers may not even see targeted demographic ads on Facebook or other social media platforms, because employers can select the age ranges that they want target.⁸⁴

Returning to excuses such as “overqualification,” in 2009, in *Gross v. FBL Financial Services, Inc.*, the Supreme Court held that because Congress did not expressly amend the ADEA to address mixed motive claims, such claims – which exist in Title VII jurisprudence – were unavailable.⁸⁵ Due to the decision in *Gross*, members of Congress recently proposed amendments to ADEA to allow mixed-motive claims.⁸⁶ Senators and Representatives introduced “Protecting Older Workers Against Discrimination Act,” which would allow discrimination to be found as long as age was a motivating factor even if other factors were present. Even though it had bipartisan support, the bill is unlikely to pass.⁸⁷

81. Some of these state laws increase the coverage to include younger workers who are discriminated against because they “look young.” See e.g. N.J. REV. STAT. §10:5-4 (“All persons shall have the opportunity to obtain employment . . . without discrimination because of . . . age”); Bergen Commercial Bank v. Sisler, 723 A.2d 944, 957 (N.J. 1999) (interpreting the language above to mean this that protects “[a]ll persons” from discrimination based on age as protecting a 25-year-old bank employee denied promotion because of youth).

82. U.S. EQUAL OPPORTUNITY COMM’N, *Age Discrimination in Employment Act* (Charges Filed by the EEOC), <https://www.eeoc.gov/eeoc/statistics/enforcement/adea.cfm> (last visited Jan. 21, 2019).

83. Michelle Y. DiMaria, *The Fine Line Employers Walk: Is It a Justified Business Practice, or Discrimination?*, 6 AM. U. LAB. & EMP. L.F. 1, 8–9 (2016).

84. Julie Angwin, Noam Scheiber & Ariana Tobin, *Facebook Job Ads Raise Concerns About Age Discrimination*, N.Y. TIMES, Dec. 20, 2017, <https://www.nytimes.com/2017/12/20/business/facebook-job-ads.html>; Robert Reed, *Not Much to ‘Like’ if Facebook Job Ads Ignore Older Workers*, CHI. TRIB., Dec. 29, 2017.

85. *Gross v. FBL Financial Services, Inc.*, 557 U.S. 167, 172 (2009).

86. Protecting Older Workers Against Discrimination Act, H.R. 2650, 115th Cong. (2017); Protecting Older Workers Against Discrimination Act, S. 443, 115th Cong. (2017).

87. Elizabeth Olson, *Shown the Door, Older Worker Find Bias Hard to Prove*, N.Y. TIMES (Aug. 7, 2017), available at B1 (stating the bill is given “little chance of passage”).

Online work presents interesting challenges for those interested in studying employment discrimination. On the one hand, many commentators, including the author,⁸⁸ have advanced the theory that online work contains many opportunities for de-biasing. The theory is that because many online crowdwork platforms allow for anonymous completion of work, there is less opportunity for bias to creep into decisions about hiring and quality of performance. For example, a worker's race, gender, age, or disability status should make no difference to the completion of online computer tasks. The only relevant criteria would be having the necessary skills, time, and motivation to work on the task. Ideally, the work would be judged on its merits, since the person assessing the work has never met or even seen the person completing it.

In the case of crowdwork computer tasks, where no one sees the worker performing the task, such objective measurement should be possible. For tasks intermediated by a platform yet carried out in real life, however, it becomes more difficult to disaggregate factors such as race, gender, and age from job performance. The customer sees the Uber driver who will pick them up or the worker from TaskRabbit who will assemble their IKEA furniture and receives information about the worker's age, race, and gender.⁸⁹ On Uber, stereotypes about older drivers as slower, less reactive, and less safe may come into play – although statistics show that older drivers have no more accidents on average than drivers in other age groups.⁹⁰ Such biases may have an impact when it comes time for the passenger to rate the driver, as Uber, Lyft, and other services request of the users.

88. See generally Miriam A. Cherry, *Teaching Employment Discrimination, Virtually*, 58 ST. LOUIS UNIV. L. J. 83 (2013) (making the argument that using avatars in Second Life, and elsewhere, might reduce the quantity of employment discrimination). See also Brittany Corners, *How Crowdsourced Labor Helps Eliminate Employment Discrimination*, ONESPACE (Jan. 18, 2016), <https://www.onespace.com/blog/2016/01/how-crowdsourced-labor-helps-eliminate-employment-discrimination/>.

89. See Laura Padin, *New Report Highlights Discrimination Issues in Online Platforms*, NAT'L EMP. L. PROJECT (Aug. 13, 2018), <https://www.nelp.org/blog/new-report-highlights-discrimination-issues-online-platforms/> (discussing how lack of familiarity with online platforms might cause discrimination issues); Ray Fisman & Michael Luca, *Fixing Discrimination in Online Marketplaces*, HARVARD BUS. REV. (Dec. 2016,) <https://hbr.org/2016/12/fixing-discrimination-in-online-marketplaces> (discussing what can be done to limit discrimination on online platforms, and how algorithms might affect this).

90. *Facts and Research*, SENIORDRIVING.AAA.COM, <https://seniordriving.aaa.com/resources-family-friends/conversations-about-driving/facts-research/> ("Seniors are safe drivers compared to other age groups, since they often reduce risk of injury by wearing safety belts, observing speed limits, and not drinking and driving."). See also AAA FOUND. FOR TRAFFIC SAFETY, *Older American Drivers and Traffic Safety Culture: A LongROAD Study* (Nov. 2014), <http://newsroom.aaa.com/wp-content/uploads/2014/12/TSCI-Older-Drivers-Final-Report.pdf> (noting that older drivers report less cellphone usage and support safety culture; however, results of survey are self-reported).

A. Stereotypes about Older Workers

Older workers confront a particular set of pernicious stereotypes when dealing with technology and on-demand platforms. Common stereotypes about older workers include the idea that they cost too much money;⁹¹ that they do not understand technology; that older workers are unmotivated,⁹² more-accident prone, and resistant to change.⁹³ These outdated stereotypes, along with a deeply engrained cultural fear around the aging process, lead to wasted productivity.

Stereotypes and canards about seniors being universally bad with technology are disturbingly widespread at work.⁹⁴ Further, they are common in the culture. Jokes about setting the timer on a DVD player or using grandchildren as tech support, or even websites making fun of seniors trying to use computers⁹⁵ – all have the common theme that older people not only dislike technology, but are actively bad at using it. This overlooks the fact that technology is constantly changing; even if you are good at using technology at one point, that may not help you navigate the next program or cellphone app. It also overlooks the many older people who love new technology because it helps them stay in touch with far-flung friends and family.⁹⁶

In addition, these stereotypes are overbroad and often inaccurate. There are many younger workers who need to learn much more about technology than they already know; if anything, these younger workers may be overconfident about their technical abilities compared to older workers. Studies show that once seniors are taught to use technology, they use the

91. JENKINS, *supra* note 69, at 161.

92. See, e.g., Robert McCann & Howard Giles, *Ageism in the Workplace*, in AGEISM: STEREOTYPING AND PREJUDICE AGAINST OLDER AMERICANS 163-77 (Todd D. Nelson ed., 2002) (describing ageist stereotypes about older workers and mental decline, inflexibility and resistance to change); Richard A. Posthuma & Michael A. Campion, *Age Stereotypes in the Workplace: Common Stereotypes, Moderators, and Future Research Directions*, 35 JOURNAL OF MANAGEMENT 158, 161, 166 (2009); Scott J. Adams & David Neumark, *Age Discrimination in US Labor Markets: A Review of the Evidence*, in HANDBOOK ON THE ECONOMICS OF DISCRIMINATION 187, 190 (William M. Rodgers III ed., 2006).

93. See, e.g., Scott J. Adams & David Neumark, *Age Discrimination in US Labor Markets: A Review of the Evidence*, in HANDBOOK ON THE ECONOMICS OF DISCRIMINATION 187, 190 (William M. Rodgers III ed., 2006); see also JENKINS, *supra* note 72, at 161 (noting the need to fight against these stereotypes).

94. HRM, *Age Discrimination Against Younger Workers*, HC ONLINE (Jan. 9, 2013), <http://www.hcamag.com/hr-news/age-discrimination-against-younger-workers-147776.aspx> [https://perma.cc/B9PZ-KNUJ] (citing a survey of hiring managers finding that they believe older workers need to improve their technological skills).

95. See, e.g. Daniel Horowitz, *A Hilarious Gallery of Old People Trying to Use Computers*, COMPLEX (Oct. 6, 2013), <http://www.complex.com/pop-culture/2013/10/old-people-using-computers/>.

96. See JENKINS, *supra* note 69, at 25.

technology regularly.⁹⁷ However, people may assume that seniors cannot learn, and then do not provide the needed training. Instead of treating the older worker the same way as younger workers, they are simply passed over. Just as in other areas, where expectations come to define reality,⁹⁸ the idea that seniors are poor users of technology becomes a self-fulfilling prophecy.

A case from 2014, *Peterson v. Mid-State Group*, serves to illustrate the point.⁹⁹ In the case, Kenneth Peterson, aged 69, had worked for a company as a service manager for over twenty years, and had been a high-performing employee during this time.¹⁰⁰ After Mid-State made plans to acquire the company, they required all employees to re-interview in order to keep their jobs.¹⁰¹ Mid-State kept Peterson on, but when he asked questions about why benefits were being cut, he was placed on probation.¹⁰² During this probationary period, a new computer system for managing the business was introduced. Training on the new computer system was provided to most of the workforce, but through a series of scheduling snafus, the training was never provided to Peterson. After Peterson continued to struggle with the system for another week, his new managers fired him and replaced him with a worker in his twenties.¹⁰³ The court found that Peterson had proved enough to survive a motion for summary judgment.¹⁰⁴

Resistance to change is another stereotype that has particular resonance for seniors working in the gig economy.¹⁰⁵ Moving from a traditional way of working to new methods and business models might be thought to be more difficult for seniors to adapt to. Again, this stereotype breaks down because such traits are not tied to age; being stubborn about doing things a certain way can be observed in both older and younger workers. The idea that older workers are unmotivated could also work against them in the on-demand economy, where workers are expected not just to complete tasks, but in many instances to create a “personal brand” for themselves. In tandem, these

97. Aaron Smith, *Older Adults and Technology Use*, PEW RESEARCH CENTER (Apr. 3, 2014), <http://www.pewinternet.org/2014/04/03/older-adults-and-technology-use/> (71% of seniors in the study report everyday use of digital devices such as a smartphone or tablet after being taught to use the technology).

98. This is a problem in other settings and with other groups subject to stereotyping as well. A recent study confirmed that if teachers have lowered expectations for students, they tend to underperform. See Seth Gershenson & Nicholas Papageorge, *The Power of Teacher Expectations*, 18 EDUCATIONNEXT 1 (Winter 2018) (arguing that racial bias can become a self-fulfilling prophecy).

99. *Peterson v. Mid-State Group*, 54 F. Supp. 3d 1039 (E.D. Wisc. 2014).

100. *Id.* at 1040.

101. *Id.*

102. *Id.*

103. *Id.* at 1042.

104. *Id.* at 1046.

105. Naomi Schoenbaum, *The Case for Symmetry in Antidiscrimination Law*, 2017 WIS. L. REV. 69, 100 (2017) (noting stereotypes).

stereotypes could work against seniors who are trying to make their way in the on-demand economy.

B. Digital Natives: No Older Workers Need Apply

In 2001, author Marc Prensky wrote an essay in which he coined the term *digital native* to reference people young enough to have grown up with digital technology.¹⁰⁶ According to the essay, digital natives had inherent knowledge of technology due to being immersed in it from a young age. In contrast, Prensky proposed the term *digital immigrants* (including himself in this category) to refer to people too old to have grown up with computer and cellular technology, who had a “foot in the past.”¹⁰⁷ Prensky likened digital immigrants’ lack of knowledge to a “foreign accent” and noted that while digital immigrants certainly could learn about technology, that learning would be slow. Prensky noted that some of the hallmarks of being a digital native were familiarity with email, multi-tasking, games, and turning to the Internet as a first resort.¹⁰⁸

While Prensky was ostensibly using his essay to discuss different learning styles across generations, his article also planted the seeds for a series of stereotypes about older workers.¹⁰⁹ After all, Prensky noted, older workers had to print out email or even get an assistant to print it out for them.¹¹⁰ Despite its anecdotal nature and use of casual stereotyping, the essay became quite influential.¹¹¹ The terminology in the article seems to have had a generative impact on thinking about technology and age groups. In the years following publication of the essay, the term *digital native* started to become a descriptive term in job listings and descriptions.¹¹²

A recent case demonstrates how the term *digital native* can be used to mask age discrimination. In *Marlow v. Chesterfield County School Board*,¹¹³

106. Marc Prensky, *Digital Natives, Digital Immigrants*, 9 ON THE HORIZON 5 (MCB University Press, October 2001).

107. *Id.* at 2.

108. *Id.*

109. See *id.* at 5. The article also discussed the fact that when a company needed to convey a set of difficult learning tasks to its workers, it conveyed that learning through a first-person shooter game. *Id.* The article only seems to mention men who enjoyed learning this way, and thus likely perpetuated gender bias as well. *Id.*

110. *Id.* at 2. Note that Prensky has backed off using the term “digital natives” and instead has begun using the phrase “digital wisdom.” *Id.*

111. While there has been some research about lessened ability to multi-task accompanying age, this information has been largely inconclusive. Some researchers have noted a tendency toward more empathy and creativity in the thinking of older people. See generally Amanda Enayati, *The Aging Brain: Why Getting Older Just Might be Awesome*, CNN.COM (June 19, 2012), <https://www.cnn.com/2012/06/19/health/enayati-aging-brain-innovation/index.html>.

112. Vivian Giang, *This is the Latest Way Employers Mask Age Bias, Lawyers Say*, FORTUNE (May 4, 2015) <http://fortune.com/2015/05/04/digital-native-employers-bias/>.

113. *Marlow v. Chesterfield Cty. Sch. Bd.*, 749 F. Supp. 2d 417 (E.D. Va. 2010).

a worker who performed community relations for a school board alleged violations of the ADEA.¹¹⁴ A new superintendent adopted a strategic plan to implement “21st Century Skills” within the school system, including “modern technologies for research, organization, evaluation, and communication of information.”¹¹⁵ While considering lay-offs, the superintendent showed a PowerPoint presentation that explained the difference between digital natives and digital immigrants, and then showed a slide that appeared “to demonstrate that brain function while using technology is higher in those who are ‘digital natives.’”¹¹⁶ Considering the PowerPoint presentation together with other job reductions that resulted in the oldest teachers losing their jobs, the court determined that there was enough evidence for Marlow to show that her dismissal could have been age discrimination. The court ruled that Marlow’s ADEA claim would survive summary judgement and be heard by a jury.¹¹⁷

In 2015, Fortune Magazine did an expose on the term “digital natives” in advertisements, asking whether the term is just a new way of restating ageist stereotypes.¹¹⁸ Reporter Vivian Giang did a search of job listing board and found dozens of listings containing the term “digital natives.”¹¹⁹ She also included opinions from several employment attorneys who stated that the use of the phrase “digital natives” is risky from a legal standpoint.¹²⁰

The Equal Employment Opportunity Commission (EEOC) has issued guidelines that phrases like *young blood*, *recent college grad* or *college student*, violate the ADEA, but has yet to promulgate a rule on the phrase *digital native*.¹²¹ While the phrase could just mean someone who is technologically sophisticated or has computer skills, at the same time, it could also be a euphemism for “no older workers need apply.” While the EEOC has yet to single out this phrase because no charge has been filed about it, in connection with other facts or circumstances it could leave an employer vulnerable to litigation. For example, it could be used as one piece of evidence in a larger claim, as it was in *Marlow*.

A later expose in the publication *Fast Company* found widespread use of the term *digital natives*, often coupled the term with the phrases “young,

114. *Id.* at 423.

115. *Id.* at 426.

116. *Id.* at 426.

117. After trial, the jury found in favor of the school board. Judgement in a Civil Action at 1, Marlow v. Chesterfield Cty. Sch. Bd., No. 3:10-cv-00018 (E.D. Va. Nov. 19, 2010) (judgment for the defendant).

118. Giang, *supra* note 112.

119. *Id.*

120. *Id.*

121. See *Prohibited Employment Policies/Practices*, U.S. EQUAL OPPORTUNITY COMM’N, <http://www.eeoc.gov/laws/practices/> (“recent college grad”); Rebecca Moore, *Company Seeking “Young Blood” Charged with Age Bias*, PLANSPONSOR (Feb. 9, 2016), <https://www.plansponsor.com/company-seeking-young-blood-charged-with-age-bias/> (“young blood”).

dynamic startup,” and “young, hungry team.”¹²² The overall effect of these ads is to make it clear that older talent is not welcome. It would be preferable for companies to identify the precise skill set that they are looking for, like the ability to update an Excel spreadsheet or maintain a social media presence,¹²³ and then advertise for those skills, rather than use an ill-defined term like *young and hungry* or *digital native* that evince ageist stereotypes.

A recent case illustrates the point. In 2017, a fifty-eight-year-old worker named Andrew Tsounos sued his employer, International Business Machines (IBM) for age discrimination under the ADEA.¹²⁴ Tsounos alleged that he had been part of a high-performing team, and in fact received several performance bonuses, raises, and complimentary performance reviews, only months before being fired in a reduction in force (“RIF”).¹²⁵ However, Tsounos alleged that IBM continued hiring individuals for the jobs that had been cut during the RIF, except that they were replacing the older workers with younger ones.¹²⁶ Tsounos alleged that IBM had adopted a special push to hire Millennials, and in fact had gone through a corporate rebranding effort to appeal to a younger and hipper demographic that might adopt IBM products. In fact, Tsounos alleged:

At an IBM conference in 2014 titled “Reinvention In The Age of The Millennial,” IBM expressly linked its business success . . . to Millennials, asserting that [success is] . . . “driven by Millennial Traits.” By “reinventing” itself, IBM sought to “leapfrog[] the existing perception of IBM to become a leader in Millennial engagement” . . . IBM intended to become “exponentially relevant with the Millennial demographic” by “showcas[ing] IBM’s capabilities . . . driven by the digitally native millennials.”¹²⁷

Tsounos’s complaint also pointed out that IBM managers publicized the fact that Millennials would be best able to relate to, and make purchases from, other Millennials, thus incorporating stereotypical “customer preferences” into their model.¹²⁸ According to his complaint, there were also multiple instances where IBM had provided special work opportunities to Millennials, whereas none of these same possibilities were offered to workers of other

122. Anne Loehr, *Why Your Company Needs to Stop Recruiting “Digital Natives,”* FAST COMPANY, March 16, 2016, <https://www.fastcompany.com/3059834/the-not-so-hidden-age-bias-in-recruiting-digital-natives>.

123. Catherine Skrzypinski, *Job Ads for “Digital Natives” Raise Age Bias Concerns,* SOCIETY FOR HUMAN RESOURCE MANAGEMENT (SHRM) BLOG (June 18, 2015), <https://www.shrm.org/ResourcesAndTools/hr-topics/talent-acquisition/Pages/Job-Ads-Digital-Natives-Age-Bias.aspx>.

124. Complaint at 1, Tsounos v. Int’l Bus. Mach. Corp., No. 2:17-cv-00409-DSC (W.D. Pa. Apr. 3, 2017).

125. *Id.* at 15–19.

126. *Id.* at 20–22.

127. *Id.* at 3.

128. *Id.* at 4.

generations. The term “digital native” was used throughout many of these campaigns.¹²⁹

While Tsounos ultimately settled his case with IBM for a confidential amount, many of the issues raised in his complaint are troubling and persist far beyond his individual situation. In fact, thousands of older workers lost their jobs during the reduction in force that led to Tsounos’s termination, but they may not have sued because they were asked to sign away their claims or agree to bring them in confidential arbitrations before receiving severance bonuses.¹³⁰ And IBM is only one technology company out of many; how many of these may be engaged in some of the same alleged strategies, we simply have no way to know.

C. Analysis and Implications for Older Workers

A finding of age discrimination is dependent on meeting the criteria set forth in the ADEA statute, and one of the threshold criteria is employee status. As such, there is a great deal riding on the classification issue for both younger and older platform workers alike. Only employees enjoy the right to minimum wages, the right to bargain collectively and to organize into unions or the right to have a workplace free of age discrimination under the ADEA. Thus, if age discrimination becomes a problem on platforms – which it well might, given the interlocking stereotypes that older workers face – older workers who are independent contractors may find few avenues for remedies.

Numerous Mechanical Turk workers reported that opportunities to complete work were in some instances artificially limited to younger workers. Several of the older crowdworkers whom the author interviewed pointed out that many researchers and marketers conducting surveys on the Mechanical Turk platform will limit the age groups that they are looking for. Age limitations certainly make sense in some instances. For example, suppose an advertising agency that hopes to craft the right message to sell diapers to new parents wants to test its ad campaign on Mechanical Turk. The diaper campaign has a valid reason for looking at a younger demographic. The Mechanical Turk data that such a marketer would receive is only useful if they can survey this particular group to find out what is appealing to them. One would expect that surveys that prefer responses from younger workers would be balanced out by other surveys that prefer responses from older workers, such as those trying to sell a product that would skew more toward the Boomer generation.

129. See, e.g., General Electric, *What’s the Matter with wen – Zazzies GE*, YOUTUBE (Aug. 30, 2016), https://www.youtube.com/watch?v=SW_7Q_tAk9I.

130. This has long been a problem. See generally Charlotte Garden, *Disrupting Work Law: Arbitration in the Gig Economy*, 2017 U. CHI. L. F. 205 (2018).

From what the Mechanical Turk workers told the author, however, the preference for younger workers to complete tasks happens with a greater frequency than one would expect, and it is not being limited to instances where there are business reasons for doing so (as in the example just discussed regarding the diaper campaign). Rather, many surveys or tasks that could be open to anyone contain seemingly arbitrary age limitations that favor younger workers on the platform rather than older workers.

IV. TOWARD A BETTER FUTURE FOR ON-DEMAND WORK

This part of the article shifts the discussion from analyzing trends in work and technology to suggesting policy interventions that could assist older workers in navigating the on-demand economy.¹³¹ The first step, though, is making sure that workers who are hidden by platforms do not remain invisible. We have seen this before in the technology sector, where consumers believe that computers and algorithms are doing the work, but they do not realize that there are real workers, with human needs, who operate behind the website.¹³² While Amazon delivers packages so quickly that it feels “like magic,” real workers scan, package, and ship the boxes. They often do so on a demanding schedule, and with no benefits or under an independent contractor status.¹³³ Many of the seasonal and part time workforce that Amazon employs to step up production during business gift and shipping seasons is actually an older workforce. Known as “workcampers,” this group of older workers and retired people live in RVs and campers across the country and find seasonal work in Amazon warehouses.¹³⁴ With crowdwork, platforms hide the people who are performing the work. While in some ways this advantages older workers who might otherwise be discriminated against,

131. Lauren Eyster, Richard W. Johnson, Eric Toder, *Current Strategies To Employ And Retain Older Workers*, THE URBAN INSTITUTE (Jan. 2008), <http://www.urban.org/sites/default/files/publication/31531/411626-Current-Strategies-to-Employ-and-Retain-Older-Workers.PDF>.

132. *Id.* at 75.

133. Jessica Brouder, *Meet the CamperForce, Amazon's Nomadic Retiree Army*, WIRED, (Sep. 4, 2017), <https://www.wired.com/story/meet-camperforce-amazons-nomadic-retiree-army/>.

134. Ann Brenoff, *The New Migrant Workers: Living on the Road in RVs, Working Temp Jobs*, AOL.COM (Dec. 16, 2010), <https://www.aol.com/2010/12/16/the-new-migrant-workers-living-on-the-road-in-rvs-working-temp/>; Steven Rosenfeld, *Workamping – The New Vagabond Lifestyle of Living in an RV and Chasing Seasonal Jobs*, ALTERNET (Aug. 15, 2014), <https://www.alternet.org/culture/workamping-new-vagabond-lifestyle-living-rv-and-chasing-seasonal-jobs>; Jessica Bruder, *The End of Retirement: When You Can't Afford to Stop Working*, HARPER'S MAGAZINE (June 15, 2016), <https://harpers.org/archive/2014/08/the-end-of-retirement/> (documenting the plight of workcampers who have no secure retirement). For more on income insecurity among the elderly, see A. Barry Rand, *Offering Real Help for the Long-Term Unemployed*, AM. ASS'N RETIRED PERSONS, <http://www.aarp.org/work/job-hunting/info-2014/help-for-unemployed-older-workers.html> (last visited July 31, 2017); see also Phillip C. Aka, Aref A. Hervani and Elizabeth Arnott-Hill, *Protection against the Economic Fears of Old Age: Six Micro and Macro Steps for Bridging the Gap in Retirement Security Between Blacks and Whites*, 40 VT. L. REV. 1 (2015).

an increasing number of crowdwork tasks include age ranges or suggested demographic components. These forms of age discrimination are troubling and might leave workers (who the platform labels as independent contractors) without proper redress or remedy.

As we consider some of these policy solutions, it is important to keep in mind that not all are age-specific. While the discussion below is designed to address the issues that older workers face in the on-demand economy, many of these suggestions will help workers across age groups. Reducing the amount of employment discrimination helps expand opportunities for meritocratic achievement, and that helps workers across the board. Further, improving working conditions for on-demand platforms means they will realistically have a broader appeal, and that online workers will be treated with parity to their “in real life” counterpart jobs.¹³⁵

A. *Technological Solutions for Age Discrimination*

Many have thought about the general problem of unconscious bias in the workforce, and technological solutions have been developed to address discrimination, especially in hiring. For instance, Google features an extension on its Chrome web browser called “Unbias Me,” intended for managers and human resource professionals looking at resumes and applications from job seekers. The extension hides candidate names and pictures from the manager who is browsing. It is well-documented that pictures associated with webpages may produce bias. Applicant names that are associated with certain immutable characteristics such as race or gender have also been shown to result in unconscious bias.¹³⁶ Certainly a picture would, in many instances, result in a revelation about a candidate’s age. While perhaps not as correlated as name and gender, or name and race, there are certain names, like “Mildred,” for example, that “skew” older and might result in unconscious discrimination.

Another technological solution that may prove to be a good option is a program called Textio.¹³⁷ Hiring managers and human resources professionals can run the text of their job search advertisement through the Textio program. The program highlights potentially discriminatory, legally problematic, or biased language within advertisements, job descriptions, and recruiting emails. Described as a “spell check” for gender bias, the program

135. The author has discussed this point before in previous work. There is no reason to treat crowdworkers any differently than their counterparts performing tasks in the real world. See, e.g., Miriam A. Cherry, *A Taxonomy of Virtual Work*, 45 GA. L. REV. 951 (2011).

136. See, e.g., Marianne Bertrand & Sendhil Mullainathan, Are Emily and Greg More Employable than Lakisha and Jamal?: A Field Experiment in Market Discrimination, 94 AM. ECON. REV. 991 (2004); Angela Onwuachi-Willig & Mario Barnes, *By Any Other Name?: On Being “Regarded As” Black and Why Title VII Should Apply Even if Lakisha and Jamal are White*, 2005 WIS. L. REV. 1283, 1283–84 (2005).

137. See TEXTIO, <https://textio.com/>.

can analyze even small language changes and help to look for unconscious biases.¹³⁸ While some of the articles about Textio highlight its focus on eliminating gender bias, it could work for age discrimination as well. For example, a job posting that describes company culture as “work hard, play hard” could unintentionally be sending a message that only twenty-somethings who drink frequently are acceptable candidates.¹³⁹ Such text analysis tools may address potentially hidden age discrimination issues in online job postings.

B. Solutions Around the Classification Issue

One way to resolve the difficult classification issues that have arisen is to change the default presumptions around employee and independent contractor status, perhaps creating a third category that would sit in between the binary divide and provide those workers with some benefits. A third category, however, would be difficult to implement, and there is little consensus on how it would be constituted or how it might meet the needs of platforms and gig workers. Instead, misclassification issues might be addressed by changing the default presumptions vis-a-vis the two categories that already exist. Currently, many platform companies operate in an environment where the triangular relationship between the platform, customer, and worker obscures the role of the platform as employer.¹⁴⁰ If a company deems workers to be independent contractors, it is left up to the workers, or perhaps to government agencies like the Social Security Administration or the Internal Revenue Service, to contest that status. Such a default actually encourages misclassification, as there is the potential that no one will notice or want to invest the time, patience, and effort in starting an administrative action or lawsuit to challenge it. It is true that misclassification can result in costly legal challenges and in some instances lead to penalties, but many companies are willing to take that risk in the hopes that it will not get to that point. In other words, they feel it is better to risk asking for forgiveness, rather than first receiving permission. Meanwhile, workers face high transaction costs in trying to get the work re-classified, such as the time and expense of becoming involved in a lawsuit. When low-paid casual work is involved, the effort may feel even less worthwhile.

Instead of the current system in which the firm chooses how to classify workers and then later justifies its position in litigation, what if we began

138. Liz Gannes, *Textio Spell Checks for Gender Bias*, RECODE (Apr. 20, 2015), <https://www.recode.net/2015/4/20/11561646/textio-spell-checks-for-gender-bias>.

139. Emily Peck, *Here are the Words that May Keep Women from Applying for Jobs*, HUFFINGTON POST (June 2, 2015), https://www.huffingtonpost.com/2015/06/02/textio-unitive-bias-software_n_7493624.html.

140. Jeremias Prassl & Martin Risak, *Uber, TaskRabbit, and Co.: Platforms as Employers? Rethinking the Legal Analysis of Crowdwork*, 37 COMP. LAB. L. & POL'Y J. 619, 634 (2016).

with a different presumption? Assume that under the *Dynamex*¹⁴¹ decision, the default rule would be that of an employment relationship, even if work was performed on a platform or online. The default of employee status would exist even if the arrangement was flexible, even if the worker provided his or her own tools of the trade, and even if it were considered part-time employment.¹⁴² Currently, workers make a coerced “choice” of independent contractor status through online terms of service that many have not even read. This kind of “take it or leave it” bargain would not be good enough under the *Dynamex* standard.

Currently, there are some on-demand companies that have already, on their own initiative, engaged in shifting their workers to employee status. Take the example of HomeHero, a mobile platform that provides home health care and elder care. They recently shifted from an independent contractor to an employee model. Their CEO claimed that they did so “in order to ensure a consistent experience as we scale nationwide.”¹⁴³ In the words of the CEO of Shyp, a package delivery service that also moved from independent contractors to an employee model, their “investment in longer term relationships with our couriers” would “ultimately create the best experience for our customers.”¹⁴⁴

Other platform companies have classified their workers as employees from their inception. Examples of these companies include Hello Alfred, Managed by Q, Munchery, the transit service Bridj, and the temporary agency BlueCrew.¹⁴⁵ The CEO of Hello Alfred noted a commitment between the company and the workers who want more than a gig – these workers want a career path. As many of the platform businesses are based on people serving repeat customers rather than on one-off transactions, it makes business sense to provide appropriate training and career advancement to workers. Some of these platform companies have provided benefits, including mileage and health insurance. Their hope is to stand out from other platforms and attract the most talented workers.

These experiences demonstrate that the platform economy can still exist when online workers are provided with the same rights afforded to employees. The concerns that burdensome regulations will drive platforms out of business seem to be overblown, much like earlier arguments that regulation (of minimum wage, maximum hours, child labor, safety) would

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

142. See *supra* text accompanying notes 23–25.

143. *Why Home Hero is converting all of its independent contractors to W-2 employees*, L.A. BIZ (Mar. 1, 2016), <http://www.bizjournals.com/losangeles/news/2016/03/01/why-homehero-is-converting-all-of-its-independent.html>.

144. *Employers in the On-Demand Economy: Why Treating Workers as Employees is Good for Business*, NAT'L EMP. LAW PROJECT (Mar. 18, 2016), <http://www.nelp.org/content/uploads/Fact-Sheet-Employers-in-the-On-Demand-Economy.pdf>.

145. *Id.*

stop the industrial revolution. To address current misclassification issues, one idea is to change the default presumptions around the categories, thus ensuring that older workers (and younger workers) are able to ensure basic rights and protections if they mirror the work typically done by employees. An accompanying safe harbor would surely be helpful for businesses when navigating the uncertain question of classification.

There are also some instances where the provision of a service is *de minimis* and thus could be seen an exception or carve out to the default rule of employee status. For example, if a businessperson used a ridesharing service once a week to pick up her neighbor on her way into work, that businessperson should not be an employee of Lyft. Neither are people who use Uber pool or a similar mobile app service to set up a carpool to save fuel, parking, and expenses. Nor should a person who signs up to do a fifteen-minute task on TaskRabbit once a month be an employee of the platform. These activities seem to be *de minimis* or one-off casual transactions that should not amount to an employment relationship. Rather, the author is more concerned with platforms that seem to be competing with, or in some instances replacing, full-time employment with on-demand independent contractors.

C. Agenda for Further Research

This paper has begun an exploration of the issues around older workers and the on-demand economy, yet there are still many aspects that need for further investigation. For example, the interviews with older crowdworkers indicated that certain tasks on the Mechanical Turk platform were being assigned arbitrary age limitations. There may be a way to test this empirically, if a researcher were to design a script that would search for age limitations within tasks. The age limitations could then be classified as either “needed” or “arbitrary” and percentages could be calculated.

In addition, crowdwork and Mechanical Turk is only one area of the on-demand economy. While this data was the most accessible, there are cohorts of older and semi-retired workers on various other on-demand platforms, including platforms as diverse as Uber, Task Rabbit, Fiverr, and Instacart. While much of the data on these platforms is proprietary and their workers cannot be surveyed in the way that Ipeirots and the UN-ILO were able to survey crowdworkers, there may still be opportunities for qualitative research. Drivers on rideshare platforms have their own message boards and Facebook pages, as do grocery shoppers on Instacart. If a researcher was able to gain access to these pages and let some of the retired members know that they were looking to talk, additional opportunities for research would become available. Finally, another avenue of research would be to concentrate on older adults not as workers in the on-demand economy, but as consumers

who might need additional help with household chores, like grocery shopping, as they age.

CONCLUSION

Work in the on-demand economy has advantages for older workers, especially for those with additional assets (such as an additional room or a spare car) and for those who are looking to supplement or top-off their income. The current way that many of these “gigs” are structured, however, leaves much to be desired. The gap between the senior “haves” and “have nots” is exacerbated in the on-demand economy. Given the proliferation of independent contractor arrangements, most crowdworkers lack the rights traditionally associated with the employment relationship. Basic protections such as minimum wage, freedom from discrimination in the workplace, and the ability to organize are, at the moment, a questionable proposition for gig workers, both young and old.

Many older workers appreciate the flexibility of on-demand work and being able to work from home. Often, however, this “choice” is constructed both by disability concerns and by age discrimination in the market for traditional jobs. Many workers at the bottom of the socio-economic ladder would rather take the below-minimum wage job that they know is certain, rather than risk repeated rejection trying to seek out other employment. Reforms are needed to ensure that these new opportunities for on-demand work do not exacerbate existing inequalities.