THE NEW PEONAGE: LIBERTY AND PRECARITY FOR WORKERS IN THE GIG ECONOMY

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According to a 2016 Time *magazine article, over 45 million people currently work in the "gig," "on demand," or "sharing" economy. In the past ten years, 94 percent of net new jobs have appeared outside of traditional employment. The gig economy presents a paradox for workers in the United States. On its face, the gig economy represents the height of liberty. Part-time, temporary, and platform workers are not tied to any single employer and can theoretically choose when to work and whom they want to work for. However, while workers in the gig economy enjoy nominal autonomy, they also lack many protections to which employees are legally entitled. Gig economy workers lack job security and must constantly search for new work. Most gig economy workers do not receive health insurance, pensions, or other benefits*

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from their employers. The reality of the gig economy is greater economic inequality, insecurity, and precarity. The recent COVID-19 pandemic has exposed this reality and heightened the vulnerability of gig economy workers. Despite the promise of liberty in the gig economy, workers are increasingly subject to a new form of peonage: exploitative practices reminiscent of slavery and involuntary servitude.

This Article starts from firsthand accounts and empirical research and applies an interdisciplinary approach to understanding what liberty of contract means, and can mean, to workers in the gig economy. It explores the ideology of the liberty of contract and presents an alternative approach: the freedom from undue coercion promised by the Thirteenth Amendment. This is the first article to consider what the Thirteenth Amendment could mean for gig economy workers. It draws on the work of labor scholars who have largely focused on the question of whether gig economy workers should be classified as employees, and constitutional scholars exploring what the promise of liberty in the Thirteenth Amendment means for US workers. The Thirteenth Amendment offers a promise to these workers—a promise of freedom from undue coercion. However, that promise has yet to be enforced.

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I. INTRODUCTION

In 1950, Elmer Winter founded Manpower, Inc. in Milwaukee, Wisconsin, as an agency to help married women work part-time for employers who needed occasional help.[1] The 1950 help wanted ad promised autonomy and control for workers: "Work when you want as long as you want."[2] Over fifty years later, Winter's model of work has become prevalent in our gig economy.[3] According to a 2016 *Time* article, over 45 million people currently work in the "gig," "on demand," or "sharing" economy.[4] In the past ten years, 94 percent of net new jobs appeared outside of traditional employment.[5] On its face, the gig economy represents the height of liberty.[6] Part-time, temporary, and platform workers are not tied to any single employer and theoretically can choose when to work, and for whom they want to work.[7] Lyft ads for drivers promise schedule flexibility and freedom from a "9 to 5 job."[8] As Lyft driver Kevin Banks explained,

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1. LOUIS HYMAN, TEMP: THE REAL STORY OF WHAT HAPPENED TO YOUR SALARY, BENEFITS, & JOB SECURITY 51–53 (2018).

2. *Id.* at 52.

3. *See* Miriam A. Cherry, *Beyond Misclassification: The Digital Transformation of Work*, 37 COMP. LAB. L. & POL'Y J. 577, 579 (2016) ("[C]hanges include the growth of automatic management and a move toward ever more precarious work."); V.B. Dubal, *Winning the Battle, Losing the War?: Assessing the Impact of Misclassification Litigation on Workers in the Gig Economy*, 2017 WIS. L. REV. 739, 749 (2017).

4. Katy Steinmetz, *Exclusive: See How Big the Gig Economy Really Is*, TIME (Jan. 6, 2016, 1:07 PM), https://time.com/4169532/sharing-economy-poll/.

5. HYMAN, *supra* note 1, at 10.

6. *See* Deepa Das Acevedo, *Unbundling Freedom in the Sharing Economy*, 91 S. CAL. L. REV. 793, 797 (2018) (pointing out that gig economy work structures are linked "to a particular vision of individual autonomy that is very compelling in America"); Kathleen Thelen, *The American Precariat: U.S. Capitalism in Comparative Perspective*, 17 PERSP. ON POL. 5, 6 (2019) (arguing that the gig economy provides possibilities for personal autonomy).

7. *See* Das Acevedo, *supra* note 6, at 808 (quoting workers saying that the freedom of platform labor is "nobody tells me when to work, how to work, or how much I can earn").

8. *See* V.B. Dubal, *Wage Slave or Entrepreneur? Contesting the Dualism of Legal Worker Identities*, 105 CAL. L. REV. 65, 103 (2017).

"I want to be able to go, you know, take my daughter fishing on Wednesday in the summer instead of going to work if I want."[9] The ideology behind the gig economy is one of liberty and from one perspective, the gig economy represents the American dream and the Jeffersonian promise of life, liberty, and the pursuit of happiness.[10] In postcolonial America, labor republicans idealized the artisan and sole proprietor as emblematic of American freedom.[11] Like the yeoman farmer of the Revolutionary era, the gig economy worker is arguably self-employed and free of the "wage slavery" of industrial work.[12]

In the years leading up to March 2020, the gig economy's promise of liberty for workers was enhanced by the strength of the economy. At a time of record low unemployment, a worker who felt underpaid or poorly treated at her job could ostensibly leave that job and find a new, better job.[13] However, the COVID-19 pandemic has devastated our economy and laid bare the truth behind the gig economy: The regular wage of salary had given way to the unstable and unpredictable wages of independent contractors, temps, and freelancers, which has had a disproportionately negative impact on women and workers of color.[14] Now, millions of low-wage workers are given the "choice" of returning to work in dangerous conditions or losing unemployment benefits.[15] Millions more have had difficulty receiving unemployment benefits because they are not legally classified as "employees," rendering them ineligible for those

9. V.B. Dubal, *An Uber Ambivalence: Employee Status, Worker Perspectives, & Regulation in the Gig Economy*, *in* BEYOND THE ALGORITHM: QUALITATIVE INSIGHTS FOR GIG WORK REGULATION 33, 35 (Deepa Das Acevedo ed., forthcoming 2021).

10. *See* Arne L. Kalleberg, *Precarious Work: Insecure Workers: Employment Relations in Transition*, 74 AM. SOCIO. REV. 1, 3 (2009); THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) ("We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain inalienable Rights, that among them are Life, Liberty and the pursuit of Happiness.").

11. *See* DAVID MONTGOMERY, CITIZEN WORKER: THE EXPERIENCE OF WORKERS IN THE UNITED STATES WITH DEMOCRACY AND THE FREE MARKET DURING THE NINETEENTH CENTURY 26 (1993).

12. *But see* Das Acevedo, *supra* note 6, at 812, 814 (arguing that gig economy workers who work for platforms such as Uber are not autonomous but controlled by the algorithmic platforms).

13. Council of Economic Advisers, *U.S. Unemployment Rate Falls to 50-Year Low*, WHITE HOUSE (Oct. 4, 2019), https://www.whitehouse.gov/articles/u-s-unemployment-rate-falls-50-year-low/.

14. HYMAN, *supra* note 1, at 10–11; Thelen, *supra* note 6, at 10.

15. *See* Michelle Goldberg, *The Phony Coronavirus Class War*, N.Y. TIMES (May 18, 2020), https://www.nytimes.com/2020/05/18/opinion/coronavirus-reopen-workers.html.

benefits.[16] COVID-19 has revealed that the reality of the gig economy is greater economic inequality, insecurity, and instability.[17]

Even before COVID-19, to millions of US workers, the "liberty" of contract promised by the Lyft ad was far from their lived reality. Gig economy workers include not just Uber drivers and workers choosing to be independent contractors but also the millions of workers who are stuck in part-time jobs or are designated independent contractors despite doing the work of full-time employees because that is the only work that is available.[18] Moreover, at the heart of the gig economy are millions of undocumented workers who work without any meaningful legal protections.[19] French sociologist Robert Castel calls workers in the gig economy the "new precariat"—vulnerable, contingent, and largely unregulated workers who are left to fend for themselves in the labor market.[20]

Despite the promise of liberty in the gig economy, workers are increasingly subject to the new peonage—exploitative practices reminiscent of slavery and involuntary servitude. Undocumented workers live and work in conditions reminiscent of Jim Crow era debt peonage.[21] Workers who owe debts are being imprisoned and forced to work off their fines.[22] Low-wage workers are subject to covenants not to compete and on-demand scheduling.[23] Platform workers are managed by algorithms and are forced to give up privacy rights.[24] Recipients of public benefits are subjected to onerous work requirements for paltry benefits.[25] All of these measures deprive workers of meaningful control over their lives and subject them to undue coercion.

This Article starts from firsthand accounts and empirical research, applying an interdisciplinary approach to understanding

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16. With the March 2020 CARES Act, Congress created a new form of unemployment benefits for workers who are considered to be independent contractors, not employees. Coronavirus Aid, Relief, and Economic Security (CARES) Act § 2104, 15 U.S.C. §§ 9023, 9025. However, this short-term program expired on July 31, 2020. *Id.*

17. *See* Kalleberg, *supra* note 10, at 8.

18. HYMAN, *supra* note 1, at 299; Thelen, *supra* note 6, at 6 (citing a recent study by the Pew Research Center revealing that over half (56 percent) of American workers who earned money on digital platforms indicated that this income was either "essential" or "important" to making ends meet).

19. Lissandra Villa, *'We're Ignored Completely.' Amid the Pandemic, Undocumented Immigrants Are Essential But Exposed*, TIME (Apr. 17, 2020, 4:46 PM), https://time.com/5823491/undocumented-immigrants-essential-coronavirus/.

20. *See* Dubal, *supra* note 8, at 67; Thelen, *supra* note 6, at 6.

21. *See infra*, Subpart IV.A.

22. *See infra*, Subpart IV.B.

23. *See infra*, Subpart IV.C.

24. *See infra*, Subparts IV.D, IV.E.

25. *See infra*, Subpart IV.F.

what liberty of contract means, and can mean, to workers in the gig economy. While independent contractor status provides workers with nominal autonomy, it also deprives them of many protections to which US employees are legally entitled.[26] The legal protections that still exist for workers are tied to the employment relationship and mostly do not apply to independent contractors.[27] In the new model of work, a "network of contracts" replaces long-term, stable employment.[28] Most gig economy workers do not receive health insurance, pensions, or other benefits from their employers.[29] Our legal structure is simply not designed to create the preconditions necessary for workers to enjoy the gig economy's promise of liberty.

One approach to addressing the precarity of gig economy workers is to strengthen their labor contracts. Labor scholars have largely taken this approach, asking whether gig economy workers should be classified as employees, entitled to New Deal and Civil Rights era protections.[30] To classify gig economy workers as employees, it is necessary to show that they are not free, but rather are under the control of their employers.[31] The recently enacted, widely publicized California AB5 adopts such an approach.[32]

However, the classification debate affects more than platform workers (like Uber drivers), and it is just one example of the workers affected by the long-term transition of US workers toward precarious forms of employment.[33] Gig economy and part-time work is the new paradigm for all US workers, from childcare providers to Walmart clerks, health care workers, and many white-collar jobs.[34] The new precariat includes millions of undocumented immigrants, who have

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26. NAT'L EMP. L. PROJECT, RIGHTS AT RISK: GIG COMPANIES' CAMPAIGN TO UPEND EMPLOYMENT AS WE KNOW IT 13–14 (2019) (detailing the level of control that platform companies exert over workers); *see also* Das Acevedo, *supra* note 6, at 800 (detailing the numerous benefits and protections that attach to "employee" status, including protection from discrimination, family and medical leave protections, equal pay guarantees, fiduciary standards regarding health and retirement benefits, workplace safety protections, and protections for workers engaging in union activity).

27. *See* Dubal, *supra* note 3, at 751–52.

28. K. Sabeel Rahman & Kathleen Thelen, *The Rise of the Platform Business Model and the Transformation of Twenty-First Century Capitalism*, 47 POL. & SOC'Y 178, 178 (2019).

29. *See id* at 183.

30. *See, e.g.*, Cherry, *supra* note 3, at 602; Das Acevedo, *supra* note 6, at 835–37; Brishen Rogers, *Employment Rights in the Platform Economy: Getting Back to Basics*, 10 HARV. L. & POL'Y REV. 480, 519–20 (2016).

31. *See, e.g.*, Cherry, *supra* note 3, at 581; Das Acevedo, *supra* note 6, at 793, 795; Rogers, *supra* note 30, at 482, 484–85.

32. *See* Dubal, *supra* note 9, at 40, 52.

33. *See* Thelen, *supra* note 6, at 6.

34. *See* HYMAN, *supra* note 1, at 11; Thelen, *supra* note 6, at 8.

virtually no enforceable rights.[35] Classification legislation would not help them, nor would it aid the millions of other gig economy workers who are trapped in part-time jobs. Moreover, as firms turn increasingly to short-term contracts for labor, which eliminate the cost of investment in employee health care benefits and training, the gig economy undermines conditions for all workers in our society.[36] Liberty of contract is insufficient to create the necessary preconditions for workers in the gig economy to experience liberty.

This Article is the first to consider another source of rights for gig economy workers: the Thirteenth Amendment's protection against involuntary servitude.[37] The Article draws on another ongoing conversation about workers' rights, exploring what the promise of liberty in the Thirteenth Amendment means for US workers.[38] The Thirteenth Amendment guarantees the preconditions necessary for workers to truly experience the freedom from undue coercion in their lives. Although the Thirteenth Amendment was enacted in response to chattel slavery, its provisions are relevant to today's workers. As Anthony Rendon, the Speaker of the California State Assembly, recently declared, many workers experience the gig economy as "fucking feudalism."[39] Moreover, the rise of the new peonage has occurred at the same time as our nation's workforce has become increasingly racially diverse, and its negative aspects disproportionately affect workers of color.[40] The Thirteenth Amendment's protections against undue coercion should be the guiding principle behind measures to empower and protect workers in the gig economy.

Part II of the Article explores the meaning of liberty of contract in liberal ideology and juxtaposes that liberty with labor republicanism. It then describes an alternative vision of liberty of contract for workers: the right to be free of undue coercion, which is protected by the Thirteenth Amendment. Part III briefly explores the history of liberty of contract for workers in the twentieth century and the rise of the gig economy. Part IV describes the new peonage: a series of unfree labor practices in today's gig economy. Part V

35. Maria L. Ontiveros, *Immigrant Workers' Rights in a Post-Hoffman World: Organizing Around the Thirteenth Amendment*, 18 GEO. IMMIGR. L.J. 651, 651, 653–58 (2004).

36. *See* Thelen, *supra* note 6, at 8–9.

37. *See* U.S. CONST. amend. XIII, § 1 ("Neither slavery nor involuntary servitude . . . shall exist within the United States . . . .").

38. *See, e.g.*, Ruben J. Garcia, *The Thirteenth Amendment and Minimum Wage Laws*, 19 NEV. L.J. 479, 491–92 (2018); James Gray Pope, *Contract, Race, and Freedom of Labor in the Constitutional Law of "Involuntary Servitude"*, 119 YALE L.J. 1474, 1502–07 (2010); Ontiveros, *supra* note 35, at 651–52, 672–74; Aviam Soifer, *Federal Protection, Paternalism, and the Virtually Forgotten Prohibition of Voluntary Peonage*, 112 COLUM. L. REV. 1607, 1616–18 (2012).

39. *See* Dubal, *supra* note 9, at 53.

40. *See* Thelen, *supra* note 6, at 10–12.

suggests some measures to enforce the right of undue coercion for gig economy workers and establishes the liberty for workers that has been promised by the gig economy—a promise that until now has remained unfulfilled.

II. LIBERTY OF CONTRACT, LABOR REPUBLICANISM, AND THE RIGHT TO BE FREE OF UNDUE COERCION

Since the Thirteenth Amendment abolished slavery and involuntary servitude, liberty of contract has been the central paradigm for US labor.[41] Prior to the Civil War, enslaved people lacked any legal rights, including the right to contract for their labor. Liberty of contract, one of the natural rights recognized in classic liberal theory, formed a central component of abolitionist ideology.[42] "In the age of slave emancipation contract became a dominant metaphor for social relations and the very symbol of freedom."[43] Abolitionists "idealized ownership of self and voluntary exchange between individuals who were formally equal and free."[44] For the worker, the right to enter a contract to sell one's labor is an essential component of the right to free labor established by the Thirteenth Amendment.[45] But liberty of contract raises important questions about the meaning of free labor and the role of the state in establishing the conditions necessary for free labor.

Freedom of contract is premised on the worker enjoying individual autonomy to bargain over their conditions of labor. Liberty of contract for workers is reflected in the at-will employment doctrine, under which workers can leave their jobs but can also be fired at any time and for any reason.[46] Contract libertarians argue that the state should refrain from intervening in contractual relationships because such intervention violates workers' individual autonomies.[47]

Labor republicans also champion the individual autonomy of workers, but they are skeptical that workers who are employees can ever truly be autonomous.[48] Labor republicans argue that working

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41. *See* Roscoe Pound, *Liberty of Contract*, 18 YALE L.J. 454, 455 (1909)

42. The right to contract is implicit in the right to "the pursuit of happiness," one of the "unalienable rights" which are "endowed by their Creator" and recognized as a "self-evident" truth in the Declaration. THE DECLARATION OF INDEPENDENCE, *supra* note 10, para. 2.

43. AMY DRU STANLEY, FROM BONDAGE TO CONTRACT: WAGE LABOR, MARRIAGE AND THE MARKET IN THE AGE OF SLAVE EMANCIPATION x (1998).

44. *Id.*

45. *See* Rebecca E. Zietlow, *A Positive Right to Free Labor*, 39 SEATTLE U. L. REV. 859, 860 (2016).

46. *See* Richard A. Epstein, *In Defense of the Contract at Will*, 51 U. CHI. L. REV. 947, 948 (1984).

47. *Id.* at 951.

48. *See* Alex Gourevitch, *Labor Republicanism and the Transformation of Work*, 41 POL. THEORY 591, 608 (2013).

for another person in and of itself intrudes on a worker's individual autonomy by subjecting them to "wage slavery."[49] They insist that workers can only achieve true liberty by owning and controlling the means of production.[50] In the late nineteenth century, labor republicans advocated cooperative ownership of the means of production as a method of achieving economic independence.[51] Today, some scholars and activists have argued that labor republicanism provides the best paradigm for enhancing the rights of gig economy workers.[52]

The problem with both of these theories of liberty of contract is that liberty alone is not a guarantee of freedom in the workplace. The right to contract is premised on the notion of two autonomous and free people engaging in a voluntary relationship.[53] For the relationship to be voluntary, however, the worker must be free from undue coercion. Government intervention is needed to address the unequal bargaining power between the worker and the purchaser of their labor because a worker who is subject to undue coercion cannot be said to be truly enjoying liberty of contract.[54] The Thirteenth Amendment's protection from involuntary servitude invites the state to intervene in labor contracts to protect workers from coercion in the employment relationship.[55] Without that protection, liberty of contract is a hollow promise for workers.

A. The Right to Contract

The founders of our nation considered the right to contract to be one of the natural rights referred to in the Declaration of Independence.[56] According to classic liberal theory, a contract is "a consensual transaction, which changes the legal situation between the parties by engaging their wills in the appropriate way."[57] It is part of the social contract in the Lockean philosophy underlying the Framers' theory of democracy.[58] When making a contract, two persons engage their capacity for choice in a voluntary transaction

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49. William E. Forbath, *The Ambiguities of Free Labor and the Law in the Gilded Age*, 1985 WIS. L. REV. 767, 787 (1985); Gourevitch, *supra* note 48, at 593–94.

50. Gourevitch, *supra* note 48, at 602.

51. Forbath, *supra* note 49, at 813.

52. *See* Das Acevedo, *supra* note 6, at 829; Rogers, *supra* note 30, at 500.

53. *See* ARTHUR RIPSTEIN, FORCE AND FREEDOM: KANT'S LEGAL AND POLITICAL PHILOSOPHY 115–16 (2009); *id.* at 112 ("Arrangements between private persons are expressions of their respective freedom . . . .").

54. *See* Rebecca E. Zietlow, *Slavery, Liberty, and the Right to Contract*, 19 NEV. L.J. 447, 449–50, 473 (2018).

55. *See id.* at 449.

56. *See* MARTHA ALBERTSON FINEMAN, THE AUTONOMY MYTH 11 (2004).

57. RIPSTEIN, *supra* note 53, at 111.

58. FINEMAN, *supra* note 56, at 11.

that "unite[s] their wills to create new rights and duties between them."[59] According to Richard Epstein, "[f]reedom of contract is an aspect of individual liberty, every bit as much as freedom of speech, or freedom in the selection of marriage partners or in the adoption of religious beliefs or affiliations."[60] Epstein argues that the state should refrain from intervening in employment contracts because it is "presumptively unjust to abridge the economic liberties of individuals."[61]

The right to contract is also an essential attribute of our capitalist economic system, which is based on the buying and selling of commodities, including labor. Freedom of contract is essential to a capitalist economy because the market only functions properly when people have the freedom to buy and sell commodities.[62] Thus, contract libertarians like Epstein argue that people owe each other a duty to refrain from interfering with their person or property.[63] According to philosopher Arthur Ripstein, under this theory, "the only 'interest' that matters to my rights is the interest in having no other person determine my purposes."[64] It follows that the role of government must be limited in order to avoid interfering with the right to contract.

Liberty of contract is premised on the view that autonomous individuals are free to exercise their own will.[65] Under this view, government intervention to alter the balance of power between those entering into contracts intrudes on the freedom of contract of both parties to the bargain.[66] According to Epstein, "the rights under the contract at will are fully bilateral, so that the employee can use the contract as a means to control the firm, just as the firm uses it to control the worker."[67] The United States Supreme Court relied on this reasoning when striking down the New York state law limiting the hours of work of bakers in *Lochner v. New York*.[68] In the name of

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59. RIPSTEIN, *supra* note 53, at 109.

60. Epstein, *supra* note 46, at 953.

61. *Id.*

62. *See* ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 19–20 (J.M. Dent & Sons Ltd. 1910) (1776).

63. *See* RIPSTEIN, *supra* note 53, at 109.

64. *Id.* at 111.

65. *See* FINEMAN, *supra* note 56, at 9 (noting that in liberal ideology, autonomy is defined as being free from government regulatory action and "through governmental structures from interference by other private actors" (emphasis removed)); Epstein, *supra* note 46, at 954.

66. *See* DAVID E. BERNSTEIN, REHABILITATING LOCHNER: DEFENDING INDIVIDUAL RIGHTS AGAINST PROGRESSIVE REFORM 8–9 (2011); Richard A. Epstein, *Toward a Revitalization of the Contract Clause*, 51 U. CHI. L. REV. 703, 705 (1984).

67. *See* Epstein, *supra* note 46, at 957.

68. 198 U.S. 45 (1905), *abrogated by* W. Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937).

protecting worker autonomy, the Court held that liberty of contract precluded regulation of the workplace.[69]

Although the liberty of contract jurisprudence of the *Lochner* era is no longer good law, liberty of contract still manifests itself in labor and employment law through the employment-at-will doctrine. Under the at-will doctrine, an employer can terminate her employee at any time and for any reason.[70] An at-will employee does not have any enforceable rights other than the right to be paid for work already completed.[71] At-will employees also have the liberty to leave their jobs at any time.[72] Neither slaves nor indentured servants had such liberty. At least nominally, the right to quit enables workers to leave their job for any reason.[73] However, the at-will relationship is far from a symmetrical liberty. Workers have much more at stake from losing their job than employers do from losing one employee. Moreover, in practice, the employee-at-will doctrine undermines a variety of protections for workers, including civil rights laws and laws establishing workers' right to organize.[74]

Workers are also entitled to some protections and remedies from contract law, including protection from unconscionable labor contracts and duress.[75] However, those common law remedies have done little to protect workers. Though courts have often noted the inequality of bargaining power between employees and employers,[76] they rarely intervene to address that inequality.[77] This is largely because courts have held that inequality of bargaining power is a necessary precondition for a finding of unconscionability, but it is only one element of a multifactored test.[78] For example, it is difficult to get a mandatory arbitration clause for a nonunion employee invalidated on the grounds of unconscionability.[79] The financial need

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69. *Id.* at 57.

70. *See* Charles J. Muhl, Bureau of Lab. Stats., *The Employment-At-Will Doctrine: Three Major Exceptions*, MONTHLY LAB. REV., Jan. 2001, at 3, 3.

71. *Id.*

72. *See* Epstein, *supra* note 46, at 966 (noting that with employment at will, "the worker can quit whenever the net value of the employment contract turns negative").

73. *But see infra* Subpart II.C.

74. *See* Joseph E. Slater, *The "American Rule" That Swallows the Exceptions*, 11 EMP. RTS. & EMP. POL'Y J. 53, 58, 71–82 (2007).

75. *See* Daniel D. Barnhizer, *Inequality of Bargaining Power*, 76 U. COLO. L. REV. 139, 144–48 (2005).

76. *See* Allison E. McClure, *The Professional Presumption: Do Professional Employees Really Have Equal Bargaining Power When They Enter into Employment-Related Adhesion Contracts?*, 74 U. CIN. L. REV. 1497, 1506 (2006).

77. *See* Barnhizer, *supra* note 75, at 196.

78. *See id.* at 195–97.

79. *See* Aaron-Andrew P. Bruhl, *The Unconscionability Game: Strategic Judging and the Evolution of Federal Arbitration Law*, 83 N.Y.U. L. REV. 1420, 1436–37 (2008).

for a job is not considered duress. Only a handful of jurisdictions even allow for any "good faith and fair dealing" claims in employment contracts, and even then, they only do so under very limited circumstances.[80] According to labor scholar Joseph Slater, "I still can't literally put a gun to your head to induce you to sign an employment contract, but beyond that, employment-at-will concepts will trump those sorts of theories."[81]

Over the years, workers in the United States have learned that liberty of contract alone is insufficient to protect them from undue coercion by their employers. As a result, many labor activists advocated for the right to bargain collectively in order to even the power imbalance between employers and workers.[82] Those workers sought government intervention to enhance their individual liberty of contract.

B. Labor Republicanism: Gig Workers as Yeoman Farmers

An alternative vision of the right to contract for workers is the view that "freedom of contract" between employer and employee is illusory because anyone working for another person is not truly free.[83] Labor republicans in the nineteenth century made this argument, which has recently been revived by labor scholars studying the gig economy. As editor of *The Nation*, Edwin Godkin argued in 1867 that "[w]hen a man agrees to sell his labor, he agrees by implication to surrender his political and social independence."[84] Godkin and his fellow labor republicans argued that the "dependence of permanent wage laborers" was "incompatible with republican freedom."[85] Labor republicans recognized that "work is a continuous, dynamic process, over which authoritative control is exercised regularly, not determined by a one-off contractual agreement."[86] Mid-nineteenth century reformer Langton Byelsby explained that "the very essence of slavery" is present in all systems whereby "men are compelled to labour, while the proceeds of that labor is [*sic*] taken and enjoyed by another."[87] Thus, labor republicans argued that workers are only free

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80. *See* Slater, *supra* note 74, at 97–98.

81. E-mail from Joseph E. Slater, Law Professor, Univ. of Toledo Coll. of L., to Rebecca E. Zietlow, Law Professor, Univ. of Toledo Coll. of L. (May 23, 2020, 11:15 AM EDT) (on file with author).

82. *See infra* Subpart III.B.

83. *See* CHRISTOPHER L. TOMLINS, LAW, LABOR AND IDEOLOGY IN THE EARLY AMERICAN REPUBLIC 289 (1993); Forbath, *supra* note 49, at 810–11.

84. Forbath, *supra* note 49, at 787 (citing Edwin Godkin, *The Labor Crisis*, 105 N. AM. REV. 177, 186 (1867)).

85. Gourevitch, *supra* note 48, at 594.

86. *Id.* at 608.

87. SEAN WILENTZ, CHANTS DEMOCRATIC: NEW YORK CITY & THE RISE OF THE AMERICAN WORKING CLASS, 1788-1850, at 160 (1984) (internal quotations omitted).

if they work for themselves or share ownership in the means of production.[88] Labor republicans argued that workers are entitled to the proceeds of their labor.[89] They idealize the autonomous and independent artisans and yeoman farmers from the days of Jeffersonian Republicanism.[90]

Some contemporary labor scholars have argued that labor republicanism provides an effective lens for theorizing work in the gig economy.[91] Gig economy workers who are "independent contractors" are arguably "[their] own boss, who can set [their] own schedule[s]."[92] Alex Gourevitch explains, "from a labor republican standpoint, the current desire for 'transformed work' is not just an abstract, utopian aspiration for new ways of organizing production, but a very concrete response to the actual modalities of domination of the contemporary workplace."[93] The labor republican promise of liberty and "the cultural and political veneration of the 'entrepreneur' as the ideal citizen-worker" has a strong ideological pull for gig economy workers.[94] Studies of Uber drivers report that many of them say that they prefer not to be classified as employees.[95] As Deepa Das Acevedo points out, control-based worker classifications are linked to "a particular vision of individual autonomy that is very compelling in America."[96]

But do these gig workers actually experience autonomy in the workplace? Labor scholars Deepa Das Acevedo and V.B. Dubal have conducted empirical studies of gig economy workers which draw this into question.[97] Das Acevedo and Dubal's work focuses on the structure of platform work and the question of whether platform

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88. *Id.* at 167.

89. *See* Forbath, *supra* note 49, at 769 ("A main tenet of republican ideology from [Thomas] Paine and Thomas Jefferson's time to Lincoln's time, was that freedom entailed ownership of productive property.").

90. *See* MONTGOMERY, *supra* note 11, at 26.

91. *See* Das Acevedo, *supra* note 6, at 829; Gourevitch, *supra* note 48, at 592; Rogers, *supra* note 30, at 500.

92. *See* Bill Gurley, *The Thing I Love Most About Uber*, ABOVE THE CROWD (April 19, 2018), http://abovethecrowd.com/2018/04/19/the-thing-i-love-most-about-uber/ (citing the response of 87 percent of Uber drivers to a survey conducted by Princeton professor Alan Krueger).

93. Gourevitch, *supra* note 48, at 608.

94. Dubal, *supra* note 8, at 81; *see also* Dubal, *supra* note 9, at 41 ("[I]ndependent contractor categories for taxi workers were meaningful not just for employment regulation, but also for worker identities").

95. Seventy-nine percent of respondents to an influential and widely publicized study responded that they preferred independent contractor status. Jonathan V. Hall & Alan B. Krueger, *An Analysis of the Labor Market for Uber's Driver-Partners in the United States*, 71 ILR REV. 705, 714 (2018). Others have critiqued these studies' methodology. *See, e.g.*, Dubal, *supra* note 9, at 43–44.

96. Das Acevedo, *supra* note 6, at 796–97.

97. *See, e.g.*, *id.* at 797–98.

workers should be legally categorized as "employees" entitled to legal protections.[98] This characterization requires them to show that they are under the control of the platforms for which they work.[99] Of course, if the platforms control the workers, then they are not actually experiencing republican liberty. Nonetheless, many platform workers are engaged in litigation and advocacy to establish themselves as employees who lack control over their working lives.[100] Das Acevedo explains this paradox by pointing out that "the common law control test captures one—but *only* one—of the two conflicting ways in which lay and legal actors think about freedom at work."[101] According to Das Acevedo, platform companies control platform workers by generating "uncertainty, conformity, and obsequiousness—all symptoms of domination—that are incompatible with freedom at work."[102] Moreover, Dubal found that many gig economy workers who opposed employee classification were not only motivated solely by a desire for autonomy but also by a concern that platform companies would be abusive employers.[103] Workers want the ability to choose from whom they get legal protections, enabling them to exercise their autonomy.[104] "Overwhelmingly, drivers both wanted employee benefits and feared how the companies might behave as an employer."[105]

It is important to note that the appeal of labor republicanism is limited to those gig economy workers who choose to work in part-time, gig work, or for platforms.[106] Millions of workers in today's gig economy lack that choice. US workers who lack legal documentation are consigned to low-wage work under dangerous conditions with few legal protections. Millions of other workers caught up in the gig economy may prefer stable, full-time jobs with benefits, but they are unable to find those jobs. Those workers may yearn for the autonomous status of the yeoman farmer, but that status is entirely unattainable for them.

C. The Thirteenth Amendment-Based Right to Be Free from Undue Coercion

Individual liberty of contract alone is insufficient for the vast majority of workers because rather than being isolated and autonomous, workers are interdependent and require more than

98. Dubal, *supra* note 3, at 758.
99. *See* Rogers, *supra* note 30, at 483.
100. *See id.* at 490–91.
101. Das Acevedo, *supra* note 6, at 806.
102. *Id.* at 816.
103. Dubal, *supra* note 9, at 37.
104. *Id.* at 52.
105. *Id.* at 37.
106. Gourevitch, *supra* note 48, at 594–96.

individual liberty to effectively assert their rights.[107] According to Martha Albertson Fineman, "[t]he illusion that independence is attainable for all leads to increased resistance to responding to the obvious dependency of others . . . ."[108] Current labor and employment law simply does not establish the preconditions necessary for worker autonomy. However, largely overlooked until now, the Thirteenth Amendment is an important source of workers' rights in the gig economy.

When the Thirteenth Amendment abolished slavery and involuntary servitude, it enabled formerly enslaved people to exercise their right to contract. While the freedom of contract includes the freedom to sell one's labor, it cannot be exercised by a worker who is unduly coerced, nor does it entail the freedom to voluntarily enter a condition of slavery.[109] Workers can only enter into contracts of their own free will if they are actually free.[110] The freedom to consent "enables people to modify the boundaries that make their equal freedom with others possible, in light of their particular purposes."[111] Thus, in order to exercise a meaningful right to contract, workers need legal protections to ensure that they are free to consent to, or refuse, unduly coercive contractual terms.

According to the late Justice Robert Jackson, "[w]hen the master can compel and the laborer cannot escape the obligation to go on, there is no power below to redress and no incentive above to relieve a harsh overlordship or unwholesome conditions of work."[112] This insightful ruling by Justice Jackson, striking down an Alabama debt peonage statute, establishes an effective framework for understanding the distinction between the right to contract and the right to free labor.[113] Without state intervention to relieve workers from this "harsh overlordship," workers exercising their right to contract are likely to be subjected to undue coercion in the

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107. FINEMAN, *supra* note 56, at 35 ("[A] state of dependency is a natural part of the human condition and is developmental in nature."); Martha Albertson Fineman, *The Vulnerable Subject: Anchoring Equality in the Human Condition*, 20 YALE J.L. & FEMINISM 1, 12 (2008) ("[H]uman reality encompasses a wide range of differing and independent abilities over the span of a lifetime.").

108. FINEMAN, *supra* note 56, at 32.

109. *See* RIPSTEIN, *supra* note 53, at 133 (stating that a person cannot consent to murder or slavery "because it lies beyond your normative power for uniting your will with that of another").

110. *See id.* at 134.

111. *Id.*

112. Pollock v. Williams, 322 U.S. 4, 18 (1944).

113. Pope, *supra* note 38, at 1478–79 (observing that Archibald Cox, noted scholar and Solicitor General under Presidents Kennedy and Johnson, argued that the *Pollock* standard should govern the scope of the Thirteenth Amendment's involuntary servitude clause); *see* Archibald Cox, *Strikes, Picketing and the Constitution*, 4 VAND. L. REV. 574, 576–77 (1951).

workplace.[114] Without such intervention, workers who enjoy nominal liberty of contract are in danger of being subjected to undue coercion reminiscent of peonage and involuntary servitude. In the gig economy, employers and platform owners structure work to avoid government regulation.[115] Thus, gig economy workers often lack the power to redress the harsh overlordship of their employers.[116]

The Thirteenth Amendment's prohibition against slavery and involuntary servitude protects workers from being subjected to undue coercion by their employers.[117] An act is coercive if it overcomes a person's will and forces them to act involuntarily.[118] For example, if P (the coercer) threatens Q (the coerced person) with a consequence, and Q believes that he will suffer the consequence unless Q does P's bidding, P has coerced Q.[119] The power dynamic between P and Q will affect P's perception of whether he has a choice to act otherwise. Thus, understanding the power relationship between P and Q is central to determining whether Q has been unduly coerced. Determining undue coercion is not a binary process but rather a matter of degree depending on the circumstances.

To determine whether a practice is unduly coercive, lawmakers must take into account the power imbalance between the worker and the purchaser of her labor. Too often, the assumption that individuals are free to choose their fate is often used as a justification for ignoring the inequities in existing social conditions.[120] For example, in *Lochner*, the Court ignored the New York state legislature's finding that the vast majority of bakers did not freely choose to work ten hours per day, but were obliged to do so in order to keep their jobs.[121] Yet freedom from undue coercion is only possible "when individuals have the basic resources that enable them to act in ways that are consistent with the tasks and expectations imposed upon them by the society in which they live."[122] Government intervention in labor

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114. *See* Pope, *supra* note 38, at 1507–08 (noting that after the Thirteenth Amendment was ratified, southern planters still attempted to subjugate former slaves through measures such as the rule of entireties, which forced workers to forfeit all earnings accrued if they chose to quit during the term of their contract, as well as tort actions for "enticing" employees away from their employers; subsequently, Congress had to outlaw certain practices to protect laborers).

115. *See* Rahman & Thelen, *supra* note 28, at 188.

116. Or, in the words of Anthony Rendon, Speaker of the California State Assembly, "this is fucking feudalism." Dubal, *supra* note 9, at 53 (reporting by Uber driver Mike Smith in an interview with Dubal).

117. *See* Zietlow, *supra* note 54, at 470.

118. John Lawrence Hill, *Moralized Theories of Coercion: A Critical Analysis*, 74 DENV. U. L. REV. 907, 908 (1997).

119. *See* Robert Nozick, *Coercion*, *in* PHILOSOPHY, POLITICS AND SOCIETY FOURTH SERIES 101, 102–03 (Peter Laslett et al. eds., 1972).

120. FINEMAN, *supra* note 56, at 42.

121. *See* Lochner v. New York, 198 U.S. 45, 59 (1905).

122. FINEMAN, *supra* note 56, at 29.

contracts is necessary to protect workers against undue coercion that often results from the imbalance of power in the workplace.

In order to better describe the lived experience of gig economy workers, some scholars have developed another framework for thinking about workers' freedom: the extent to which they are free from domination.[123] While workers do care about the freedom to make work decisions free from employer interference, they also have a more deep-rooted need for freedom from domination by their employer.[124] Domination is not the *actual* interference in worker choice; "it is that platforms and customers have the power to discipline (and thus the power to restrict choice) if and when they feel like it and in essentially unpredictable or unknowable ways."[125] Determining whether workers are subject to domination entails looking not only at the experience of individual workers but also at whether they are "subject to structural domination in the market."[126] The Thirteenth Amendment provides a source of protection against that structural domination.

Members of the Reconstruction Congress considered the power dynamic between employees and employers when they relied on the Thirteenth Amendment to prohibit debt peonage with the 1867 Anti-Peonage Act.[127] The Act was directed at the practice of debt peonage in New Mexico, under which a creditor had the right to the labor of a person who owed him a debt until the debtor repaid the debt.[128] Although the creditor did not own the debtor, the creditor owned the debtor's labor and could transfer it to another person, robbing the

123. Das Acevedo, *supra* note 6, at 816–17; Rogers, *supra* note 30, at 500 ("Neo-republican political thought and recent scholarship in law and in quality suggest a new approach: employment duties are fair when 'economic dependence' and 'unequal bargaining power' are sufficiently great that workers are at risk of *domination*.").

124. Rogers, *supra* note 30, at 483 ("Control and economic dependence are therefore important not in themselves, but as signals that workers are suffering domination.").

125. Das Acevedo, *supra* note 6, at 817.

126. Rogers, *supra* note 30, at 512.

127. Anti-Peonage Act, ch. 187, 14 Stat. 546, 546 (1867) (current version at 18 U.S.C. § 1581). ("[A]ll acts, law, resolutions, orders, regulations, or usages of the Territory of New Mexico, or of any other Territory or State of the United State, which have heretofore established, maintained, or enforced, or by virtue of which any attempt shall hereafter be made to establish, maintain, or enforce, directly or indirectly, the voluntary or involuntary service or labor of any persons as peons, in liquidation of any debt or obligation, or otherwise, be, and the same are hereby, declared null and void . . . .").

128. *See* CONG. GLOBE, 39th Cong., 2d Sess. 1571 (1867) (statement of Sen. Lane).

debtor of any contractual freedom.[129] As one lawmaker explained, "it was a kind of servitude for debt. . . . [A] system of serfdom worse than the Russian system ever was[;]" another called the practice of debt peonage "a system of slavery."[130] As Pennsylvania Senator Charles Buckalew pointed out, the terms of debt service were "always exceedingly unfavorable" to the laborer because "that debt is formed while he is subject to a master."[131] When the employer uses his power to impose exploitative practices on the employee, this amounts to undue coercion that violates the employee's liberty of contract.[132] The Thirteenth Amendment protects against this undue coercion.

The worker's right to be free of undue coercion conflicts with that workers' liberty of contract.[133] Arguably, a worker who has the liberty to choose to work for an employer has voluntarily accepted the conditions of employment and cannot complain of undue coercion.[134] However, the members of the Reconstruction Congress rejected that argument. Opposing the Anti-Peonage Act, Kentucky Senator Garrett Davis argued that the debtor had voluntarily entered into the debt and was no different from any other person who owed debts.[135] But the Act's proponents disagreed, and to clarify their position, they amended the Act to outlaw both "voluntary" and "involuntary" servitude.[136] The amended Act made it clear that an employee may suffer from undue coercion even if they voluntarily accepted the job.[137]

Less clear is the question of whether workers' ability to leave their jobs is a sufficient protection against condition of involuntary

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129. *See id.* (statement of Sen. Lane) ("I will say that the creditor cannot sell the peon, but he can transfer him just as he would a mule or a horse and give his services to anybody else.").

130. *Id.* (statements of Sen. Wilson and Sen. Lane).

131. *Id.* at 1572 (statement of Sen. Buckalew) ("[T]he almost invariable fact is that the peon continues accumulating debt, and as that debt is formed while he is subject to a master the terms of it are always exceedingly unfavorable to him, and for a very nominal consideration he is continued in this system of service during his whole lifetime.").

132. *See* Kathleen Kim, *The Coercion of Trafficked Workers*, 96 IOWA L. REV. 409, 416 (2011) (noting that trafficked workers are often the subject of coercion because their circumstances often "render them vulnerable to the exploitation"); Pope, *supra* note 38, at 1486 (arguing that the key to determining whether the job amounted to an illegal servitude was "whether the resulting condition was degrading to workers").

133. *See* Pope, *supra* note 38, at 1482.

134. *See id.* at 1481. ("[I]f a laborer *voluntarily* enters into a contract for indentured servitude or peonage, then it is hard to see how he or she could be in a condition of *involuntary* servitude.").

135. CONG. GLOBE, 39th Cong., 2d Sess. 1571 (1867) (statement of Sen. Davis) ("I have owed considerable debts and I have worked mightily hard to pay them . . . . I think this feature of a man's working to pay the debts that he owes to his creditors, in a modified form at least, ought to exist.").

136. *See id.*

137. *See* Soifer, *supra* note 38, at 1610.

servitude.[138] The right to quit can only render service voluntary if the worker has a viable alternative to her current job.[139] Most workers cannot afford to go without work, so the right to quit is only a remedy for undue coercion for workers who can find another job or are eligible for public benefits.[140] Moreover, workers who are threatened with unduly coercive practices "are likely to be relatively vulnerable, lacking the economic, social, cultural, and legal resources to resist."[141] Thus, the right to quit by itself is insufficient to protect many workers from undue coercion.[142]

The COVID-19 pandemic provides an important example of how workers' choice to leave their jobs can be illusory and how government can intervene to support that choice. As state governors issued stay-at-home orders, many businesses closed their doors and millions of workers filed for unemployment benefits.[143] With the CARES Act in March 2020, Congress provided enhanced unemployment benefits for those workers.[144] However, a short time afterwards, many states began reopening their economies, urging workers to return to their jobs.[145] Antigovernment protestors demanded the "liberty" to return to work and to shop for services as they pleased.[146] Yet those workers in "essential" jobs were forced to return whether they wanted to or not because unemployment benefits would no longer be available to

138. *See* Pope, *supra* note 38, at 1527.

139. *Id.*

140. *Id.* at 1528.

141. *Id.* at 1519.

142. *See id.* at 1539.

143. Sarah Chaney & Eric Morath, *Record 6.6 Million Americans Sought Unemployment Benefits Last Week*, WALL ST. J. (Apr. 2, 2020, 4:37 PM), https://www.wsj.com/articles/another-3-1-million-americans-likely-sought-unemployment-benefits-last-week-11585819800.

144. CARES Act, Pub. L. No. 116–136, § 2102, 134 Stat. 281, 313 (2020).

145. *See e.g.*, Jennifer Calfas et al., *States Move to Coordinate on Reopening Plans*, WALL ST. J. (Apr. 13, 2020, 11:26PM), https://www.wsj.com/articles/u-s-coronavirus-cases-rise-as-officials-weigh-when-to-restart-the-economy-11586774781; Jasmine C. Lee et al., *See How All 50 States Are Reopening (and Closing Again)*, N.Y. TIMES (Aug. 21, 2020), https://www.nytimes.com/interactive/2020/us/states-reopen-map-coronavirus.html.

146. *See, e.g.*, Marcie Bianco, Opinion, *Michigan Coronavirus Protesters Shout 'Liberty!' – As Right-Wing Rhetoric Weaponizes Freedom*, NBC (May 14, 2020, 3:31 AM), https://www.nbcnews.com/think/opinion/michigan-coronavirus-protesters-shout-liberty-right-wing-rhetoric-weaponizes-freedom-ncna1206596; Arianna MacNeill, *Photos: Large Crowd of Protesters Gathers in Front of Mass. State House Demanding Reopening of Economy*, BOSTON (May 4, 2020), https://www.boston.com/news/coronavirus/2020/05/04/protest-massachusetts-state-house-reopening-economy; Sam Stanton & Dale Kasler, *2,000 Join Rally Against Newsom's Stay-at-home Coronavirus Orders at California's Capital*, SACRAMENTO BEE (May 23, 2020, 9:27 AM), https://www.sacbee.com/news/politics-government/capitol-alert/.

them.[147] For example, thousands of workers at meat-packing plants returned to work in unsafe conditions, resulting in outbreaks of the virus at the plants.[148] These workers ostensibly had the freedom to quit their job, yet that freedom was illusory because they had no other option for financial survival.

III. LIBERTY OF CONTRACT FOR WORKERS—A BRIEF HISTORY

The structure of today's gig economy is the latest chapter in years of workers' struggles to enforce their liberty of contract and define its meaning. The tension between the ideology of liberty and the reality of unfree labor has been present throughout our country's history. From the very beginning of our nation, the ideology of liberty was undermined by the fact that that our nation's economy depended on indentured servitude and slave labor.[149] After the Civil War, a new paradigm of work emerged as "employees" replaced "servants."[150] However, for years after the Thirteenth Amendment became law, former slaves and their descendants were denied even its minimal guarantee of liberty of contract, trapped in a new system of unfree labor: debt peonage and convict leasing.[151] At the same time, industrial workers in the North learned that liberty of contract alone was insufficient to empower them to advocate for fair wages and safe working conditions.[152] These workers demanded government intervention in their labor contracts to protect them from undue coercion.[153] In the late twentieth century, employers adopted practices to avoid regulation, promoting the ideology of liberty to avoid the regulated contract.[154]

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147. *See* Jamelle Bouie, Opinion, *The Anti-Lockdown Protestors Have a Twisted Conception of Liberty*, N.Y. TIMES (May 8, 2020), https://www.nytimes.com/2020/05/08/opinion/sunday/anti-lockdown-protesters.html.

148. Eric Schlosser, *America's Slaughterhouses Aren't Just Killing Animals*, ATLANTIC (May 12, 2020), https://www.theatlantic.com/ideas/archive/2020/05/essentials-meatpeacking-coronavirus/611437/.

149. *See* ROBERT J. STEINFELD, THE INVENTION OF FREE LABOR: THE EMPLOYMENT RELATION IN ENGLISH & AMERICAN LAW AND CULTURE, 1350–1870 7 (The University of North Carolina Press eds., 1991).

150. *See* Deepa Das Acevedo, *Invisible Bosses for Invisible Workers, or Why the Sharing Economy is Actually Minimally Disruptive?*, 2017 U. CHI. LEGAL F. 35, 55 (2017).

151. *See* Baher Azmy, *Unshackling the Thirteenth Amendment: Modern Slavery and a Reconstructed Civil Rights Agenda*, 71 FORDHAM L. REV. 981, 1034 (2002).

152. *Id.* at 1041–42.

153. *See* FINEMAN, *supra* note 56, at 7 ("[The state] should assume a corresponding responsibility to see that these organizations operate in an equitable manner."); Pope, *supra* note 38, at 1539.

154. Das Acevedo, *supra* note 150, at 55.

Some abolitionists and antebellum labor activists believed that once workers obtained freedom of contract, they would be able to achieve economic independence and work for themselves.[155] Influenced by labor republicanism, they argued that working as an employee of another amounted to "wage slavery."[156] However, in the late nineteenth century's industrializing economy, "it seemed increasingly difficult to contend that wage labor was simply a temporary stopping point on the road to economic independence."[157] In the twentieth century, US workers largely resigned themselves to their role as employees and demanded legislation protecting them from a revised definition of wage slavery: undue coercion by their employers.[158] They now used the term "wage slavery" to mean working long hours in poor conditions for paltry wages.[159] Industrial workers sought workplace regulations to establish a minimum wage, maximum work hours, and safety in the workplace.[160] They argued that liberty of contract under the Thirteenth Amendment protected their right to organize into unions and bargain collectively to resist the undue coercion of their employer.[161] In the mid-twentieth century, workers' advocates achieved many of their goals. During the New Deal and the Civil Rights era of the 1960s, Congress enacted measures establishing workers' rights, prohibiting discrimination in employment, and creating a safety net to protect the most vulnerable workers.[162]

This history shows that US workers have never been satisfied with liberty of contract alone. They had to fight for protections that enabled them to exercise freedom in their workplaces. However, all of these protective measures enacted during the mid-twentieth century apply only to workers categorized as "employees" under the

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155. *See* ERIC FONER, FREE SOIL, FREE LABOR, FREE MEN: THE IDEOLOGY OF THE REPUBLICAN PARTY BEFORE THE CIVIL WAR 16–17 (1995); TOMLINS, *supra* note 83, at 289 ("To the antebellum labor movement, free labor ideally meant economic independence through the ownership of productive property, or proprietorship.").

156. FONER, *supra* note 155, at 17 ("A man who remained all his life dependent on wages for his livelihood appeared almost as un-free as the southern slave.").

157. ERIC FONER, POLITICS AND IDEOLOGY IN THE AGE OF THE CIVIL WAR 126 (1980).

158. *See infra* Subpart III.B.

159. *See* Rebecca E. Zietlow & James Gray Pope, *The Auto-Lite Strike and the Fight Against "Wage Slavery,"* 38 U. TOL. L. REV. 839, 840–41 (2007).

160. *See* REBECCA E. ZIETLOW, ENFORCING EQUALITY: CONGRESS, THE CONSTITUTION AND THE PROTECTION OF INDIVIDUAL RIGHTS 80 (2006).

161. *See* James Gray Pope, *Labor's Constitution of Freedom*, 106 YALE L.J. 941, 942–43 (1997); Zietlow, *supra* note 45, at 860 (arguing that the positive right to free labor under the Thirteenth Amendment includes the right to work for a living wage, free of undue coercion and discrimination based on immutable characteristics).

162. *See infra* note 204 and accompanying text.

applicable laws.[163] They also only apply to workers who are classified as employees and do not cover those classified as independent contractors.[164] Thus, these measures have limited value in today's gig economy.

At the same time, the legacy of peonage is reflected in our country's increased dependency on the labor of undocumented workers, a central component in our gig economy. Like the debt peons of the Jim Crow South, undocumented workers have virtually no legal rights, and they comprise a pool of exploitable labor that depresses the wages and conditions of workers throughout the gig economy.[165] While mid-century challenges to labor and employment law helped to remedy the plight of industrial workers, the deregulated gig economy workplace has made US workers increasingly vulnerable.[166]

A. Debt Peonage and Wage Slavery in the Early Twentieth Century

In 1901, John Davis, a black man in Alabama, was arrested on false pretenses and charged with owing a debt he had never incurred.[167] The sheriff who charged Davis sold him to John W. Pace, the owner of a large farm nearby, who forced Davis to work for years to pay off the "debt."[168] In 1934, workers at the Auto-Lite factory in Toledo had a different complaint about the coercive practices of their employer when they advocated for their right to join a union.[169] As Auto-Lite worker William Lockwood said, "[y]ou would go into work and the boss would make you wait around a while before telling you

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163. These include protections from discrimination, family and medical leave protections, equal pay guarantees, fiduciary standards regarding health and retirement benefits, workplace safety protections, and protections for workers engaging in union activity. Das Acevedo, *supra* note 6, at 799–800.

164. *See* Cherry, *supra* note 3, at 581; Das Acevedo, *supra* note 6, at 798–801.

165. *See* Maria Ontiveros, *Migrant Labour in the United States: Working Beneath the Floor for Free Labor?*, *in* MIGRANTS AT WORK: IMMIGRATION AND VULNERABILITY IN LABOUR LAW 180, 191–92 (Cathryn Costello & Mark Freeland eds., 2014).

166. For the purpose of this Article, I use the term "gig economy" workers to refer to all part-time and temporary workers, which includes, but is not limited to, workers who use internet platforms like Uber.

167. DOUGLAS A. BLACKMON, SLAVERY BY ANOTHER NAME: THE RE-ENSLAVEMENT OF BLACK AMERICANS FROM THE CIVIL WAR TO WORLD WAR II 123–27 (First Anchor Books ed. 2009).

168. *Id.* at 133 ("For all practical purposes, Pace owned John Davis."). Davis was one of thousands of black workers in the Jim Crow South subjected to the convict leasing system. *Id.* at 6–7 ("The total number of workers caught in this net had to have totaled more than a hundred thousand and perhaps more than twice that figure."). In the 1930s, many of them wrote letters to the federal government using terms like "slavery," "involuntary servitude," and "peonage" to describe their predicaments. RISA L. GOLUBOFF, THE LOST PROMISE OF CIVIL RIGHTS 51 (2007).

169. *See* Zietlow & Pope, *supra* note 159, at 840.

that you weren't needed . . . . So, you go home and you didn't get paid, even though you were on the premises."[170] These workers sought legal protections to enable them to effectively exercise their liberty of contract.[171] The system of debt peonage deprived workers like Davis of even the minimal liberty of contract. Industrial workers like those at the Auto-Lite plant argued that without government intervention, they lacked a meaningful right to contract.

After the abolition of slavery and involuntary servitude, it soon became apparent that the formal right to contract alone is insufficient to protect the free labor of workers. In the Jim Crow South, former slaves and their descendants were trapped as sharecroppers or in convict leasing systems, treated as little better than slaves.[172] John Davis's experience illustrates the fact that any black man or woman who walked alone on the highway was in danger of being arrested for vagrancy.[173] They would be brought before justices of the peace for brief show trials, convicted, and fined in a matter of minutes.[174] When those arrested could not afford to pay their fines, a local farmer or business owner would pay off the fines in exchange for their promise to work for an unlimited period of time.[175] Davis and others like him lacked even the most basic liberty of contract. Though Jim Crow era debt peonage violated the Thirteenth Amendment and the Reconstruction era Anti-Peonage Act, the workers' rights were largely unenforced.[176]

Unlike the black sharecroppers of the Jim Crow South, industrial workers enjoyed nominal liberty of contract. However, because of their comparative lack of bargaining power, industrial workers had little control over their wages and conditions of work. In order to keep their jobs, industrial workers had to work in dangerous, exploitative conditions for low wages.[177] The efficiency of industrial production

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170. *Id.* at 847 ("As Patrick O'Malley, an organizer of Cleveland automobile parts workers at the time of the Auto-Lite strike described the situation, 'Companies . . . pushed the workers more and more so that when the union came in and promised some freedom from this slavery, at that time people were just looking to get better conditions.'") (citing interview by Jack W. Skeels with Patrick J. O'Malley, (July 25, 1961) (on file with the Wayne State University Labor History Archives)).

171. *Id.* at 845–46, 852.

172. BLACKMON, *supra* note 167, at 7–8.

173. *Id.* at 127, 133–134.

174. *Id.* at 66 ("Swift, uncomplicated adjudication was the key to the system.").

175. *Id.* at 66–68 (explaining that with no hope of a fair judicial process, "black tenant farmers and sharecroppers often returned as uncompensated convict laborers . . . .").

176. *See id.* at 67–68; Ontiveros, *supra* note 165, at 181–82.

177. AHMED WHITE, THE LAST GREAT STRIKE: LITTLE STEEL, THE CIO, AND THE STRUGGLE FOR LABOR RIGHTS IN NEW DEAL AMERICA 37–39 (2016).

made it possible to exercise control over workers' every move.[178] Under the industrial philosophy of Taylorism, individual workers were assigned repetitive tasks that undermined their sense of identity.[179] Industrialists sought to use all possible economies, including longer hours, faster work, lower wages, and fiercer opposition to workers' attempts to organize into unions.[180] Workers complained of being driven to the limits of their endurance, and they often collapsed on the job.[181] Although these workers had nominal liberty to contract with their employers, they argued that they were being treated as little better than slaves.

In 1934, workers in Toledo, Ohio, invoked the image of "wage slavery" to explain their decision to strike for the right to organize into unions.[182] As Patrick O'Malley, an organizer of Cleveland automobile parts workers at the time of the Auto-Lite strike, described the situation, "[c]ompanies . . . pushed the workers more and more so that when the union came in and promised some freedom from this slavery, at that time people were just looking to get better conditions."[183] Charles Rigby, a charismatic leader within the plant, explained:

> The strikers were people fighting for their bread and butter, that's what they are—American men, good, honest men, fighting for their liberty, fighting for justice, fighting for just recognition . . . . And when you are recognized as a human being, no matter where you're at, and they say, "[w]e recognize you[,]" . . . you are a human being again.[184]

The Toledo Auto-Lite strikers served as a catalyst for the New Deal Congress to recognize a collective right to contract with the National

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178. *Id.* at 19.

179. *See* Michael C. Harper, *The Continuing Relevance of Section 8(a)(2) to the Contemporary Workplace*, 96 MICH. L. REV. 2322, 2341 (1998); *see also* WHITE, *supra* note 177, at 25 (arguing that the steel industry hired low skill workers and reduced jobs to functions so workers were easily replaced).

180. WHITE, *supra* note 177, at 16. For example, in the steel industry, workers were required to work twelve-hour shifts in extremely hazardous conditions, including excessive heat and the risk of being burned, crushed, or electrocuted; injured by fall; or caught in industrial explosions. *Id.* at 36–38. Thousands of industrial workers were killed or injured every year. *Id.* at 38.

181. *Id.* at 34, 36.

182. *See* Zietlow & Pope, *supra* note 159, at 846.

183. Interview by Jack W. Skeels with Patrick J. O'Malley, President, Am. Fed'n of Lab. & Cong. Of Indus. Orgs. (July 25, 1961) (on file with the Wayne State University Labor History Archives).

184. Zietlow & Pope, *supra* note 159, at 849 (citing PHILIP A. KORTH & MARGARET R. BEEGLE, I REMEMBER LIKE TODAY: THE AUTO-LITE STRIKE OF 1934 226 (1988) (quoting an interview with Charles Rigby)).

Labor Relations Act ("NLRA") and enact other statutes to protect workers' rights.[185]

Race discrimination and white supremacy played an integral role in the subordination of all workers in the early twentieth century, as employers throughout the country used race to divide workers and weaken worker solidarity. Southern owners of factories and farms preferred black workers' forced labor—"cheap, usually docile, unable to organize [into unions], and always available when free laborers refused to work."[186] Moreover, when free workers went on strike in the South, the companies often replaced them with convict laborers.[187] For example, in 1904, white miners launched a strike at the Pratt coal mines, seeking union recognition.[188] The company subsequently shut down the least efficient furnaces and transitioned two mines from free workers to forced labor.[189] The strike collapsed and the organizing effort failed.[190] This pattern repeated itself throughout the late nineteenth and early twentieth century.[191] Thus, white industrial workers were also adversely affected by the racial subordination of black workers.

B. Liberty of Contract and Freedom from Undue Coercion for "Employees"

In the mid-twentieth century, labor activists achieved significant success in regulating what had become the new paradigm of work: the employee/employer relationship. Central to their effort was the NLRA (also known as the Wagner Act), which established a federal right to organize and bargain collectively.[192] The NLRA's congressional supporters argued that the right to bargain collectively was necessary to protect workers from undue coercion and enable them to truly experience liberty of contract.[193] The New Deal Congress also enacted other protective legislation for workers,

185. *See id.* at 841.

186. BLACKMON, *supra* note 167, at 90.

187. *Id.*

188. *Id.* at 293.

189. *Id.*

190. *Id.*

191. *See* James Gray Pope, *Why Is There No Socialism in the United States? Law and the Racial Divide in the American Working Class, 1676-1964*, 94 TEX. L. REV. 1555, 1558 (2016).

192. *See generally* National Labor Relations Act, ch. 372, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. §§ 151–69) (establishing a federal right for workers to organize and collectively bargain for the purpose of negotiating the terms and conditions of their employment).

193. For example, Senator Richard Wagner, the Act's sponsor, argued that "[t]he fathers of our Nation did not regard freedom of contract as an abstract end. They valued it as a means of ensuring equal opportunities, which cannot be attained where contracts are dictated by a stronger party." 78 CONG. REC. 3679 (1934).

regulating the hours and wages of workers[194] and establishing a safety net for those who were unemployed or unable to work.[195]

However, the newfound prosperity for industrial workers was mostly limited to white male workers.[196] Unfortunately, the New Deal measures included few protections for workers of color. The NLRA and Fair Labor Standards Act ("FLSA") exempted domestic and agricultural workers, including millions of black workers who lived in southern states, as a compromise to win votes from southern Democrats.[197] Lawyers in the civil rights section of President Roosevelt's Department of Justice engaged in a litigation strategy to enforce the most basic right to contract for the black workers caught up in the exploitative Jim Crow system of labor.[198] However, a nationwide civil rights movement was necessary to protect the right to contract of black people and other workers of color. Responding to that movement in the 1960s, Congress began enacting legislation protecting workers from discrimination in employment based on race,[199] gender,[200] religion,[201] age,[202] and disability.[203]

New Deal and Civil Rights era measures regulated worker contracts to protect workers from undue coercion, restricting the employer's power to unilaterally impose terms of employment.[204] These laws "dramatically increased the number of workers whose jobs provided employment security along with living wages and benefits."[205] However, neither the New Deal measures nor the civil rights protections apply to all US workers. These protective statutes only apply to workers classified as "employees" under the applicable law.[206] They do not apply to independent contractors, and many also do not apply to part-time workers.[207]

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194. Fair Labor Standards Act of 1938, ch. 676, 52 Stat. 1060 (1938) (codified as amended at 29 U.S.C. §§ 201–19).

195. *See, e.g.*, Social Security Act, ch. 531, 49 Stat. 620 (1935) (codified as amended at 42 U.S.C. §§ 301–1397) (establishing retirement and disability benefits, unemployment insurance benefits, and welfare benefits with the Aid to Families with Dependent Children program).

196. HYMAN, *supra* note 1, at 50.

197. ZIETLOW, *supra* note 160, at 94–95.

198. GOLUBOFF, *supra* note 168, at 11.

199. Civil Rights Act (Title VII) of 1964, Pub. L. No. 88-352, § 703(a), 78 Stat. 241, 255 (codified as amended at 42 U.S.C. § 2000 et seq.).

200. Title IX of the Education Amendments (Title IX) of 1972, 20 U.S.C. § 1681(a); Title VII § 703(a).

201. Title VII § 703(a).

202. Age Discrimination Act of 1975, 42 U.S.C. § 6102.

203. Americans with Disabilities Act of 1990, Pub. L. No. 101-336, § 120, 104 Stat. 327, 331 (codified as amended at 42 U.S.C. § 12112(b)(5)(B)).

204. Kalleberg, *supra* note 10, at 4.

205. *Id.*

206. *See* Das Acevedo, *supra* note 6, at 799–800.

207. *See id.*

The New Deal Congress also created an economic safety net for workers who were unable to find employment and people who were unable to work. The Social Security Act established government benefits for retired and disabled workers.[208] It also created an entitlement to welfare benefits for people who could not work because they were caring for children.[209] The Unemployment Insurance Act provided benefits for able-bodied workers who could not find a job.[210] The Food Stamp Act provided subsidies for farmers and for low income people to purchase food.[211] All of these measures protected workers from economic destitution and empowered low-wage workers, providing them an alternative to the most exploitative employment practices.[212]

However, in the United States, many of the essential needs of workers are privatized, including pensions, health care, and other benefits. Instead of being universally available, those benefits are tied to employment and subject to bargaining between workers and their employers.[213] Access to those benefits is largely limited to full time employees, and benefits vary depending on the employer: higher wage employees—and those represented by unions—have better benefits.[214] Thus, the extent of a worker's freedom of contract in the United States is largely contingent on the traditional structure of employment and the ability of individual employees to bargain with their employers. In the gig economy, that structure is dismantled, depriving workers of the protections that they need against undue coercion.

C. The Rise of the Contingent Workplace and the Gig Economy

Since the New Deal and Civil Rights era the structure of work in the United States has changed. Elmer Winter's model of temporary work, a novelty in 1950, has become the new paradigm of work in our country.[215] Part-time and temporary gig work "has spread to all

208. *See* Social Security Act (Title II) of 1935, 42 U.S.C. § 402(a).

209. *See id.* § 607(e)(2).

210. *See id.* § 503(a)(2).

211. *See* Rachel Louise Moran, *Consuming Relief: Food Stamps and the New Welfare of the New Deal*, 97 J. AM. HIST. 1001, 1008 (2011).

212. *See* Rebecca E. Zietlow, *Rights of Belonging for Women*, 1 IND. J. L. & SOC. EQUALITY 64, 78 (2013).

213. *See* HYMAN, *supra* note 1, at 45 (arguing that the 1950 UAW-GM agreement (nicknamed the "Treaty of Detroit") defined a new world of work that included health insurance, cost of living increases, and pensions that ensured workers would not strike).

214. *Id.* at 88.

215. *See* DAVID WEIL, THE FISSURED WORKPLACE: WHY WORK BECAME SO BAD FOR SO MANY AND WHAT CAN BE DONE TO IMPROVE IT 55–57 (2014); Jennifer Middleton, *Contingent Workers in a Changing Economy: Endure, Adapt or Organize?*, 22 N.Y.U. REV. L. & SOC. CHANGE 557, 558 (1996). In 1995, a third of workers were "contingent" workers, and that number has increased dramatically

sectors of the economy and has become more pervasive and generalized," extending even to professional and managerial jobs.[216] Some gig economy workers, especially those with highly marketable skills, enjoy the flexibility that the work provides for them.[217] However, temporary work is no longer a choice for many workers;[218] rather, it is often the only work that they can find.[219]

As in the early twentieth century, the gig economy depends in large part on workers of color who lack any enforceable legal rights—undocumented immigrants. Illustrating the precarity of their situation, Delmer Joel Ramirez Palma, an undocumented construction worker, was deported to his home country of Honduras in 2019 after he told his employer about structural flaws that led to the collapse of a building.[220] Moreover, while platform companies trumpet the promise of liberty for gig economy workers, the workers themselves report a different story. Uber drivers interviewed by Deepa Das Acevedo reported that their best strategy for obtaining the high ratings necessary to retain their Uber status was to act like a servant.[221] The experience of these gig economy workers is far from the promise of liberty. Instead, these workers are experiencing a precarious existence.[222]

Platform workers such as Uber drivers are just one example of workers in the gig economy. At every level, work has become insecure and temporary as the structure of the workplace shifts the traditional employment relationship to the gig economy of short-term contracts for work.[223] This phenomenon affects workers of all races and classes, from undocumented workers to white-collar workers, but low-wage workers in particular have found themselves in an increasingly

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since the "great recession" of 2008. *See* Dubal, *supra* note 3, at 752; Dubal, *supra* note 9, at 34–36.

216. Kalleberg, *supra* note 10, at 6.

217. *See* Thelen, *supra* note 6, at 6.

218. *Id.* (citing a Pew Research study that found that 56 percent of platform workers report that they need the work to make ends meet).

219. HYMAN, *supra* note 1, at 267 ("Temp work of the [19]90s was largely involuntary.").

220. Adeel Hassan, *Witness In Hard Rock Hotel Collapse Is Deported*, N.Y. TIMES (Nov. 29, 2019), https://www.nytimes.com/2019/11/29/us/hard-rock-hotel-worker-immigration.html. Ramirez Palma noticed structural defects in the 18-story construction project on which he worked, and he complained to his supervisor numerous times. *Id.* Part of the building eventually collapsed, killing three workers. *Id.* Ramirez Palma spoke to a Spanish language radio reporter and was detained by Immigration and Customs Enforcement ("ICE") two days later. *Id.* Federal safety investigators interviewed Ramirez Palma three times while he was being held in ICE detention prior to his deportation. *Id.*

221. Das Acevedo, *supra* note 6, at 822.

222. *See* Kalleberg, *supra* note 10, at 3.

223. *See* HYMAN, *supra* note 1, at 1–2.

precarious situation.[224] The precarious nature of gig economy work is a result of deliberate decisions by employers to avoid legal protections for workers.

When Elmer Winter founded his temp business, temporary work was relatively uncommon. Most US union workers worked in full-time jobs with benefits such as health care and pensions.[225] Corporations valued stability, foregoing short-term opportunities for long-term gain.[226] In the early 1960s, however, "American capitalism was at a crossroads . . . ."[227] A new corporate strategy emerged that focused on leanness, nimbleness, and shareholder value.[228] This new approach would sacrifice stability for short-term profit, which became the primary driver of business decisions.[229] Workers paid a high price for this change.

The rise of the gig economy and the increasing precarity of work was accompanied by the rise of management consultants, many of whom advocated for the type of flexible workplace that melded naturally with the temp agency's business strategy.[230] In the mid-twentieth century, management consultants supported long-term corporate success, accompanied by long-term stable work conditions.[231] By the 1970s, the consultants' new ideal was a flexible, project-based workplace in which "quick, intense relationships" would replace long-term workplace relationships.[232] In the 1980s, employers no longer viewed temps as solely for emergency needs but instead used them for cyclical replacements.[233] The term "contingent worker," coined in 1985, described an increasing number of workers who were hired for temporary positions, or short-term contracts, and often worked part-time.[234] The 1991 recession led to layoffs of white-collar workers, and the economy was revealed to be insecure for all workers.[235] The temp world blossomed as laid off office workers, the new contingent workforce, looked for temp work.[236] Many of them never found permanent jobs. By the twenty-first century, "[u]biquitous gig work seemed to be the final nail in the coffin of

224. *See id.* at 2, 12.
225. *See id.* at 108.
226. *Id.* at 4.
227. *Id.* at 161.
228. *Id.*
229. *Id.* at 6.
230. *Id.* at 113.
231. *Id.* at 2, 6, 68.
232. *Id.* at 169.
233. *Id.* at 226.
234. Ann Bookman, *Flexibility at What Price? The Costs of Part-Time Work for Women Workers*, 52 WASH. & LEE L. REV. 799, 802–03 (1995); *see also* Anne E. Polivka & Thomas Nardone, *On the Definition of Contingent Work*, 112 MONTHLY LAB. REV. 9, 9–10 (1989).
235. HYMAN, *supra* note 1, at 256–57.
236. *Id.* at 256.

economic security."[237] Tech mediated work is "the latest iteration of a [fifty]-year-old pattern of 'labor fissuring'—the rise of 'nonstandard' or 'contingent' work that is subcontracted, franchised, temporary, on-demand, or freelance."[238]

Employers adopted the contingent worker structure in part to avoid regulations that applied to full-time workers, making the workforce more vulnerable to exploitation.[239] Some industries utilized temp workers to undermine unions, using temps to replace permanent workers during labor disputes.[240] Others limited hours of work to avoid having to pay benefits, retirement, sick leave, or holidays.[241] Temp leasing agencies also contracted out to government agencies, often replacing unionized workers.[242] This is particularly important since heavily unionized civil service jobs have long provided a pathway to the middle class for workers of color.[243]

The lowest paid and most vulnerable workers in the gig economy are undocumented migrant workers. In the early twentieth century, black workers caught in debt peonage provided essential agricultural labor in the South.[244] By mid-century, their labor was supplemented by other workers of color: migrant workers from Mexico.[245] In 1942, President Franklin D. Roosevelt created the Bracero guest worker program, which allowed Mexican workers to come to the United States to do farm work and other manual labor.[246] By the 1950s, thousands of Mexican workers harvested US crops without becoming citizens and with few options for citizenship.[247] The Bracero program also provided cover for undocumented immigrants who came to the United States without any legal qualifications to do the same kind of work as Braceros.[248] Neither the Braceros nor the undocumented workers had any legal path to become US citizens.[249]

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237. *Id.* at 299.
238. NAT'L EMP. L. PROJECT, *supra* note 26, at 1.
239. HYMAN, *supra* note 1, at 276.
240. *Id.* at 87.
241. *See id.* at 277.
242. *Id.* at 277.
243. Folayemi Agbede, *The Importance of Unions for Workers of Color*, CTR. FOR AMERICAN PROGRESS (Apr. 4, 2011, 9:00 AM), https://www.americanprogress.org/issues/economy/news/2011/04/04/9402/the-importance-of-unions-for-workers-of-color/.
244. Juan F. Perea, *The Echoes of Slavery: Recognizing the Racist Origins of the Agricultural and Domestic Worker Exclusion from the National Labor Relations Act*, 72 OHIO ST. L.J. 95, 100–01 (2011).
245. HYMAN, *supra* note 1, at 38; Perea, *supra* note 244, at 134.
246. HYMAN, *supra* note 1, at 38.
247. *Id.*
248. *Id.* at 40.
249. *Id.* at 38, 41.

Due in part to concerns about the unfairness of the Bracero program, Congress eliminated it in 1964.[250] However, when the Bracero program ended, 20 million Mexicans who had jobs found themselves out of work.[251] The sweeping immigration reforms of 1965 also restricted immigration from Latin America.[252] The result was a sharp increase in the number of undocumented immigrant workers who worked not only on farms but also in industry, construction, and the service economy.[253]

By the 1970s, the US economy had become dependent on the flexible, cheap labor of undocumented workers.[254] The entire economy of the West depended on undocumented labor, with 81 percent of Hispanic garment workers and 75 percent of Hispanic restaurant workers lacking the requisite documentation.[255] Silicon Valley pioneered the use of undocumented labor at an industrial scale. In 1984, the United States Immigration and Naturalization Service ("INS") estimated that as much of 25 percent of the Silicon Valley workforce was undocumented.[256] A 2014 Pew Research study estimated that the US labor force included as many as 8 million undocumented workers, which was 5 percent of the US labor force.[257] Undocumented immigrants work in many of the jobs that were once filled by slaves, including agricultural and other domestic work.[258] But they also work in construction jobs and other jobs. [259] According to a recent report, "the industrial produce and animal production and processing systems in the United States would collapse without the immigrant and migratory workforce."[260] During the course of the

250. *Id.* at 8.
251. *Id.*
252. *Id.* at 100–01.
253. *Id.* at 101.
254. *Id.* at 112.
255. *Id.* at 247–48.
256. *Id.* at 245 (stating that Silicon Valley firms outsourced toxic work to huts with little ventilation ran by subcontracted workers, thus avoiding US wage and safety laws).
257. *See* Jeffrey S. Passel & D'vera Cohn, *Size of U.S. Unauthorized Immigrant Workforce Stable After the Great Recession: Declines in Eight States and Increases in Seven Since 2009*, PEW RSCH. CTR. 4 (Nov. 3, 2016), https://www.pewresearch.org/hispanic/wp-content/uploads/sites/5/2016/11/LaborForce2016_FINAL_11.2.16-1.pdf.
258. *See* HYMAN, *supra* note 1, at 103; *see also id.* at 7–8 (stating that the 2014 Pew study estimated that 17 percent of workers in the agricultural industry were undocumented workers).
259. HYMAN, *supra* note 1, at 103, 105; Ontiveros, *supra* note 165, at 15–16.
260. *See* Claire Fitch et al., *Public Health, Immigration Reform and Food System Change*, JOHNS HOPKINS CTR. FOR LIVABLE FUTURE 2 (Jan. 1, 2017), https://clf.jhsph.edu/sites/default/files/2019-01/public-health-immigration-reform-and-food-system-change.pdf.

COVID-19 pandemic, those workers grew sick and died at an alarming rate.[261]

Meanwhile, economic inequality in the United States has been growing since the early 1980s.[262] The gap between rich and poor has widened substantially since the mid 1970s, with workers of color and women consistently earning less than their white male counterparts.[263] Workers' earnings have become more unstable and volatile, and the economic security of the middle class continues to decline.[264] Most contingent and gig economy workers do not receive health insurance, pensions, or other benefits from their employers.[265] "[T]he last few years have seen rising income inequality, a bimodal distribution of good jobs and income, and bad jobs and low pay, with no reduction in the average work week."[266] Subject to unregulated liberty of contract, gig economy workers are left vulnerable to exploitation by those who purchase their labor.

IV. THE NEW PEONAGE

In the gig economy, workers must shoulder all of the risk that is inherent in their "liberty" of contract, and workplace law has not evolved with the changing structure of the workplace. Rather than enacting measures to meet the needs of workers in the gig economy, lawmakers have sought to further deregulate the marketplace, repealing protections for workers.[267] As a result of the confluence of deregulatory "liberty" and the lack of job security for contingent and gig economy workers, employment practices reminiscent of slavery and involuntary servitude are on the rise, with little or no legal recourse for workers.[268]

The onset of the COVID-19 crisis has unmasked the precarity and vulnerability of low-wage workers in our economy. "Essential workers" include not only healthcare workers but also grocery, sanitation, and public transit workers. These workers must go to work or forego unemployment benefits, even though working means

261. *See* Jonathan W. Dyal et al., *COVID-19 Among Workers in Meat and Poultry Processing Facilities — 19 States, April 2020*, MORBIDITY AND MORTALITY WKLY. REP. 557 (May 8, 2020), https://www.cdc.gov/mmwr/volumes/69/wr/pdfs/mm6918e3-H.pdf.

262. Kalleberg, *supra* note 10, at 8.

263. *See* Robert Hardaway, *Race and Income Disparity: An Ideology-Neutral Approach to Reconciling Capitalism and Economic Justice*, 3 COLUM. J. RACE & L. 49, 50 (2013).

264. Kalleberg, *supra* note 10, at 8.

265. *See* STEVEN HILL, RAW DEAL: HOW THE "UBER ECONOMY" AND RUNAWAY CAPITALISM ARE SCREWING AMERICAN WORKERS 88 (2015); Dubal, *supra* note 3, at 742.

266. Cherry, *supra* note 3, at 602.

267. *See* Cherry, *supra* note 3, at 593–94.

268. *See id.* at 578–79, 581.

risking their lives and the lives of their family members.[269] COVID-19 has also exposed the fact that millions of workers have been living on the edge of financial breakdown even before the economy collapsed due to the crisis.[270] It further exposes the precarity of low-wage workers and greatly exacerbates their plight. Even before COVID-19, however, workers in the unregulated gig economy had little leverage to resist the coercion from above.

Employers created the gig economy to disempower workers and avoid regulations designed to protect them against undue coercion, and gig economy workers are paying the price. This Part begins with the most coercive practices: the exploitation of undocumented workers, the rise of debt peonage, and the use of prison labor. These practices disproportionately affect workers of color who have suffered the most from coercive labor practices throughout our nation's history.[271] This Part then considers other practices that are reminiscent of peonage, including on-demand scheduling, covenants not to compete, and work requirements for recipients of public benefits. Ironically, too much "liberty" of contract leaves the worker vulnerable to exploitation as employers adopt practices reminiscent of slavery and involuntary servitude.[272] In all of these examples, workers lack the "power below to redress and no incentive above to relieve a harsh overlordship or unwholesome conditions of work."[273]

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269. *See* Suresh Naidu, *"Essential" Workers are Just Forced Laborers*, WASH. POST (May 21, 2020, 2:22 PM), https://www.washingtonpost.com/outlook/2020/05/21/essential-workers-pay-wages-safety-unemployment/; Alina Selyukh & Shannon Bond, *More Essential Than Ever, Low-Wage Workers Demand More*, NPR (Apr. 28, 2020, 3:27 PM), https://www.npr.org/2020/04/27/843849435/hometown-heroes-or-whatever-low-wage-workers-want-more-than-praise; Vanessa Wong, *"I Am Only Earning $300 A Week": Here's What People Are Making For Essential Work*, BUZZFEED NEWS (May 22, 2020, 3:45 PM), https://www.buzzfeednews.com/article/venessawong/low-wages-cut-hours-few-benefits-essential-work.

270. *See, e.g.*, Sarah Mervosh, *An "Avalanche of Evictions" Could Be Bearing Down on America's Renters*, N.Y. TIMES (May 27, 2020), https://www.nytimes.com/2020/05/27/us/coronavirus-evictions-renters.html.

271. *See* Pope, *supra* note 38, at 1493 ("[I]t is no secret that the harshest forms of labor exploitation, for example, chattel slavery and peonage, are often reserved for members of the subordinate, racially defined groups.").

272. *See* Cherry, *supra* note 3, at 598 ("[T]he expansion of precarious labor . . . [which is] labor that is more than just part-time and temporary. . . . [with] no explicit promise of continuity. . . . [leads to] an increasing likelihood of unemployment, a growth of general job insecurity, expanding contingent and nonstandard work, and risk-shifting (that is, the transfer of labor expenses like health insurance and pensions from the employer to the employee)."); Dubal, *supra* note 3, at 749 (explaining that on-demand workers face issues such as "wage theft, over-work, and . . . psychological manipulation"); Kalleberg, *supra* note 10, at 12.

273. Pollock v. Williams, 322 U.S. 4, 18 (1944).

A. Undocumented Workers

Undocumented workers provide a cheap source of labor that is easily exploited because they lack any legal rights. Like the rise of the contingency workforce, the prevalence of undocumented workers has also undermined protections for other workers.[274] Although undocumented workers are not excluded from employment protections, the Supreme Court has held that undocumented workers who attempt to assert their rights cannot prevail because they are working illegally.[275] Undocumented workers are also often victims of trafficking and fraud.[276] These workers of color closely resemble the slaves of the nineteenth century and the indentured servants of the Jim Crow South. Maria Ontiveros has argued persuasively that many undocumented workers are subjected to involuntary servitude.[277] According to Louis Hyman, "[t]he undocumented, like the temps, enabled employers to imagine a workplace without obligations, without regulations, and without oversight."[278] Undocumented workers are thus an integral component of the gig economy, and their situation heightens the precarity of all low-wage workers.[279]

Arguably, involuntary servitude does not describe the plight of undocumented workers because they chose to come to this country voluntarily.[280] However, this argument oversimplifies the decisions that undocumented workers make about their lives. Though undocumented workers may have originally chosen to voluntarily enter this country in search of work, many lack the choice to return home. Today, a significant number of undocumented workers did not come to this country voluntarily but were the victims of trafficking.[281] Others did not themselves choose to enter this country but were brought by their parents or other family members when they were

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274. HYMAN, *supra* note 1, at 108 (citing as examples that in 1967, 80 percent of all commercial building in Houston were union projects, and by 1975, the number was down to 68 percent because construction firms had hired migrants from Mexico to replace many of their unionized workers).

275. *See* Hoffman Plastics v. NLRB, 535 U.S. 137, 146 (2002).

276. *See* Maria Ontiveros et al., *Women and Children First? New Strategies in Anti-Trafficking Initiatives,* 6 GEO. J. GENDER & L. 193, 207, 211–12 (2005).

277. *See* Ontiveros, *supra* note 35, at 670; *see also* HYMAN, *supra* note 1, at 247 ("[1980s] [b]usiness owners could selectively check green cards against an INS database or simply hand over 'troublemakers.'").

278. HYMAN, *supra* note 1, at 112.

279. *See id.* at 84; Ontiveros, *supra* note 165, at 189.

280. *See* Kim, *supra* note 132, at 445 ("The notion that some workers freely choose exploitation is compounded in the context of the undocumented-immigrant workplace, where it is believed that workers and employers engage in a collusive and mutually advantageous employment arrangement in deliberate violation of immigration laws.").

281. *See id.* at 411.

children.[282] Some initially acted voluntarily but, once they entered the country, became subject to what Kathleen Kim terms "situational coercion."[283] Kim points out that "[r]ather than experiencing direct threats of harm from their traffickers, many trafficked workers comply with abusive working conditions due to circumstances that render them vulnerable to the exploitation, such as lack of legal immigration status and poverty."[284] In 1867, members of the Reconstruction Congress recognized that employment relationships that were initially voluntarily could become compulsory.[285] The situation of many undocumented workers fits this same paradigm.

In determining whether undocumented workers are subject to situational coercion, Kim suggests "evaluating all the circumstances of the case, including power inequalities between the trafficker and trafficked worker and the trafficked worker's vulnerabilities."[286] Even workers who are not trafficked may find it impossible to return to the country that they came from.

When considering whether undocumented workers are involuntary servants, one key question is whether they have a realistic option to leave or alter their working conditions. As the experience of Delmer Joel Ramirez Palma illustrates, undocumented workers are always vulnerable to the threat of deportation and have little or no recourse when employers violate their rights.[287] Some employers threaten to report the immigration status of their workers' families to retaliate against workers who complain.[288] Moreover, antidiscrimination laws do not prohibit an employer from discriminating against or making employment decisions based on

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282. *See* Gustavo López & Jens Manuel Krogstad, *Key Facts About Unauthorized Immigrants Enrolled in DACA*, PEW RSCH. CTR. (Sept. 25, 2017), https://www.pewresearch.org/fact-tank/2017/09/25/key-facts-about-unauthorized-immigrants-enrolled-in-daca/.

283. Kim, *supra* note 132, at 416–17.

284. *Id.* at 416.

285. *See* 42 U.S.C. § 1994 (originally enacted as the Peonage Abolition Act of March 2, 1867, ch. 187, § 1, 14 Stat. 546).

286. Kim, *supra* note 132, at 416.

287. *See* SHANNON GLEESON, PRECARIOUS CLAIMS: THE PROMISE AND FAILURE OF WORKPLACE PROTECTIONS IN THE UNITED STATES 24–25, 29–30, 35, 37–38, 43–44 (2016); Brian W. Halpin, *Subject to Change Without Notice: Mock Schedules and Flexible Employment in the United States*, 62 SOC. PROBS. 419, 422 (2015) (discussing the reasons why undocumented workers' reluctance to activate workplace rights and protections in response to workplace violations and wage theft increases their vulnerability); Ontiveros, *supra* note 38, at 657–58, 670, 673, 680 ("Since workers fear disclosure of their documentation status and subsequent deportation, many will not file claims. Courts have recognized the chilling effect this can have on claims and have refused to order disclosure until the remedy phase of claims, but many workers are still intimidated.").

288. U.S. EQUAL EMP. OPPORTUNITY COMM'N, 915.004, EEOC ENFORCEMENT GUIDANCE ON RETALIATION AND RELATED ISSUES 39–40 n.134 (2016).

immigration status.[289] Therefore, undocumented workers are vulnerable to mistreatment by their employers.

There is ample evidence that employers are taking advantage of the vulnerability of undocumented workers. For example, 80 percent of female farmworkers interviewed by Human Rights Watch in California's Central Valley had personally experienced sexual harassment.[290] As has been dramatically and graphically revealed by the COVID-19 pandemic, animal and agricultural work ranks among the most dangerous US industries.[291] Meat packing workers, many of whom were undocumented workers of color, have paid the highest price for their lack of freedom.[292] In many states, other workers are caught in the same dilemma because under state laws, they will be ineligible for unemployment benefits if they fail to return to work out of concern for their health or the health of vulnerable family members.[293] The false choice, imposed on workers during a time of massive unemployment and justified by the rhetoric of "liberty," is unduly coercive.

In the Antebellum era, members of the Free Soil movement recognized that slavery had a negative impact on all workers by lowering the bar on wages and conditions of work.[294] Undocumented

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289. Ontiveros, *supra* note 165, at 184.

290. HUMAN RIGHTS WATCH, CULTIVATING FEAR: THE VULNERABILITY OF IMMIGRANT FARMWORKERS IN THE U.S. TO SEXUAL VIOLENCE AND SEXUAL HARASSMENT 23 (2012) (citing Irma Morales Waugh, *Examining the Sexual Harassment Experiences of Mexican Immigrant Farmworking Women*, 16 VIOLENCE AGAINST WOMEN 237, 241 (2010)).

291. *See* Shaakirrah R. Sanders, *AG-Gag Free Nation*, 54 WAKE FOREST L. REV. 491, 492 (2019) (citing *Agricultural Safety*, NAT'L INST. FOR OCCUPATIONAL SAFETY & HEALTH (NIOSH) (Apr. 12, 2018), https://www.cdc.gov/niosh/topics/aginjury/default.html).

292. *See id.* at 496–97, 502 ("Pew estimates that unauthorized persons were 17 percent of the total workforce in the agriculture industry (compared to 5 percent for all industries). In nineteen states, agriculture has the highest share of unauthorized workers when compared to all industries.") (citing JEFFREY S. PASSEL & D'VERA COHN, SIZE OF U.S. UNAUTHORIZED IMMIGRANT WORKFORCE STABLE AFTER THE GREAT RECESSION: DECLINES IN EIGHT STATES AND INCREASES IN SEVEN SINCE 2009 4, 8, 13 (2016), https://www.pewresearch.org/ hispanic/wp-content/uploads/sites/5/2016/11/LaborForce2016_FINAL_11.2.16-1.pdf); *see also* Sapna Jain, *Can We Keep Meatpacking Companies Accountable for Hiring Undocumented Immigrants?*, 3 EMORY CORP. GOVERNANCE & ACCOUNTABILITY REV. 157, 160–61 (2016).

293. *See* Megan Cassella & Brianna Ehley, *Unemployed Workers Face Choice Between Safety and Money as States Reopen*, POLITICO (Apr. 29, 2020, 7:09 PM), https://www.politico.com/news/2020/04/29/unemployment-coronavirus-safety-223216.

294. *See* REBECCA E. ZIETLOW, THE FORGOTTEN EMANCIPATOR: JAMES MITCHELL ASHLEY AND THE IDEOLOGICAL ORIGINS OF RECONSTRUCTION 45–46 (2017).

workers have a similar impact on the wages of US workers today.[295] The prevalence of an easily exploitable labor population has a negative impact on all workers and contributes to the precarity and uncertainty of the gig economy. Employers often prefer to hire undocumented workers over workers with legal status. As a kitchen manager in a large catering service explained:

> [Culinary school grads] want too much money and I'd have to reteach them everything. They don't work hard enough. I can hire a Mexican guy for seven bucks an hour and he'll do exactly what I tell him to do and he'll do it the same every time. White guys, they always want to try and change it.[296]

Moreover, the presence of undocumented workers can undermine workers' attempts to engage in collective action such as union organization because employers will call, or threaten to call, ICE to engage in a workplace raid.[297]

Arguably, another solution to the problem of undocumented workers would be to deport them. However, that solution is not only inhumane, but it is also unrealistic. There are an estimated 10.5 to 12 million undocumented immigrants in our country, which is approximately 3.5 percent of our population.[298] Our nation's economy depends on their labor.[299] Without legal protections for undocumented workers, they will continue to live in the shadows, fearing deportation, earning low wages, and depressing the wages and conditions of work for workers throughout this country. Undocumented workers are among those worst off in the gig economy, and they are still most likely to be subject to undue coercion.

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295. *See* Conor Trombetta, Note, *The Undocumented Workers' Dilemma: Improving Workplace Rights for Undocumented Workers Through Labor Arbitration and Collective Bargaining*, 34 GEO. IMMIGR. L.J. 127, 131, 134, 140–41 (2018).

296. Halpin, *supra* note 287, at 426.

297. Ontiveros, *supra* note 165, at 189. In a study of over one thousand union representation election campaigns, these threats appeared in 41 percent of campaigns in immigrant-dominated workforces and 50 percent of campaigns involving workplaces with a majority of undocumented workers. *Id.* (citing KATE BRONFENBRENNER, NO HOLDS BARRED: THE INTENSIFICATION OF EMPLOYER OPPOSITION TO ORGANIZING 12 (Econ. Pol'y Inst. Briefing Paper No. 235, 2009)).

298. Elaine Kamarck & Christine Stenglein, *How Many Undocumented Immigrants Are in the United States and Who Are They?*, BROOKINGS INST.: POL'Y 2020 (Nov. 12, 2019), https://www.brookings.edu/policy2020/votervital/how-many-undocumented-immigrants-are-in-the-united-states-and-who-are-they/.

299. *See 7 Ways Immigrants Enrich Our Economy and Society*, UNIDOSUS, https://www.unidosus.org/issues/immigration/resources/facts (last visited Dec. 18, 2020); León Krauze, *Undocumented Immigrants, Essential to the U.S. Economy, Deserve Federal Help Too*, GLOBAL OPINIONS (Apr. 13, 2020, 6:31 PM), https://www.washingtonpost.com/opinions/2020/04/13/undocumented-immigrants-essential-us-economy-deserve-federal-help-too/.

B. Debt Imprisonment and Convict Labor

After the death of Michael Brown in Ferguson, Missouri, rioters protested the treatment of black people by local police.[300] In 2020, a Minneapolis police officer killed George Floyd by kneeling on his neck for almost nine minutes, sparking nationwide protests and demands for police reform.[301] Any criminal justice reform must address the imprisonment of people who fail to pay bail that are disproportionately imposed on people of color. The imposition of fines and criminal penalties to welfare infractions since the early 1980s has entrapped many poor people into debt imprisonment, reminiscent of debt peonage in the post-Civil War South and Jim Crow era.[302]

Debt imprisonment is part of what Kaaryn Gustafson has called the criminalization of poverty, including criminal penalties for welfare infractions.[303] From the Civil War through the 1940s, black men have been imprisoned and sent to work camps solely because they were not working.[304] In the 1983 case of *Bearden v. Georgia*,[305] the US Supreme Court held that imprisoning a person for his failure to pay a debt violates due process unless that person could pay the debt yet willfully refused to do so.[306] The exception has come to swallow the rule because judges assume that nonpayment is willful and rarely hold hearings to determine otherwise.[307] Forcing people to

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300. *Timeline of Events in Shooting of Michael Brown in Ferguson*, ASSOCIATED PRESS (Aug. 8, 2019), https://apnews.com/article/9aa32033692547699a3b61da8fd1fc62.

301. Michael T. Heaney, *The George Floyd Protests Generated More Media Coverage Than Any Protest in 50 Years*, MONKEY CAGE (July 6, 2020, 6:00 AM), https://www.washingtonpost.com/politics/2020/07/06/george-floyd-protests-generated-more-media-coverage-than-any-protest-50-years/; Lara Putnam et al., *The Floyd Protests Are the Broadest in U.S. History – and Are Spreading to White, Small-Town America*, WASH. POST (June 6, 2020, 2:10 AM), https://www.washingtonpost.com/politics/2020/06/06/floyd-protests-are-broadest-us-history-are-spreading-white-small-town-america/.

302. *See* Tamar R. Birckhead, *The New Peonage*, 72 WASH. & LEE L. REV. 1595, 1595–97, 1655–58 (2015) ("Under the old [peonage], the statute conspired . . . to entrap former slaves in a cycle of coerced labor. . . . Under the new peonage, the punishment and incarceration of nonviolent offenders for criminal-justice debt . . . has . . . sustained the prison industrial complex.").

303. *See* Kaaryn Gustafson, *The Criminalization of Poverty*, 99 J. CRIM. L. & CRIMINOLOGY 643, 644, 646–48 (2009) ("Over the last several decades, criminal law enforcement goals, strategies, and perspectives have grown entangled with the welfare system . . . . Government welfare policies increasingly treat the poor as a criminal class, and the treatment of low-income women as criminals has occurred at all levels of government . . . .").

304. *See* BLACKMON, *supra* note 167, at 99, 339; GOLUBOFF, *supra* note 168, at 2–3, 6.

305. 461 U.S. 660 (1983).

306. *Id.* at 672.

307. *See* Cortney E. Lollar, *Criminalizing (Poor) Fatherhood*, 70 ALA. L. REV. 125, 147 (2018).

work to pay off debts is reminiscent of the system of debt peonage and convict leasing in the Jim Crow era.[308]

There are various contemporary contexts in which people are required to work for a private business or go to jail.[309] Many probationers are required to work as a condition of parole.[310] People in debt arising from assessing fees and fines are often required to work to pay off their debts.[311] In addition, poor fathers who owe child support are often required to work or be imprisoned for failure to pay.[312] These fathers are more likely to be jailed for failure to pay child support, and the practice has a disproportionate impact on black fathers.[313] Thus, Noah Zatz has argued that forcing labor under the threat of incarceration amounts to involuntary servitude in violation of the Thirteenth Amendment.[314]

The use of prison labor in private prisons is another example of involuntary servitude in our criminal justice system.[315] While many prisoners are obliged to work while they are incarcerated, they are often not paid or paid less than the minimum wage.[316] Some scholars have argued that prisoners are not protected by the Thirteenth Amendment because they are "duly convicted" and thus fall within the Amendment's Exceptions Clause.[317] James Gray Pope and Michele Goodwin have recently made persuasive arguments that those courts are wrong and that the Punishment Clause does not

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308. *See* Noah Zatz, *A New Peonage?: Pay, Work, or Go to Jail in Contemporary Child Support Enforcement and Beyond*, 39 SEATTLE U. L. REV. 927, 939 (2016).

309. *Id.* at 930.

310. *Id.* According to Zatz, of the nearly five million people on parole, primarily black and latino men fall into this category. *Id.* at 930–31.

311. *Id.* at 931–32.

312. Zatz, *supra* note 308, at 934; *see* Tonya L. Brito, *Fathers Behind Bars: Rethinking Child Support Policy Toward Low-Income Noncustodial Fathers and Their Families*, 15 J. GENDER, RACE & JUST. 617, 658–59 (2012); Lollar, *supra* note 307, at 170.

313. Brito, *supra* note 312, at 619; Lollar, *supra* note 307, at 167, 169–71; Zatz, *supra* note 308, at 933 ("[I]n larger U.S. cities, a shocking 15 percent of African-American fathers are at some point incarcerated for nonpayment of child support.").

314. Zatz, *supra* note 308, at 937–39 ("For the worker who has no ability to pay, it would be unconstitutional to jail her for nonpayment. Adding an independently unconstitutional option—pay or jail—cannot cure the infirmity of an otherwise unconstitutional choice between work and jail.").

315. *See* Katherine E. Leung, *Prison Labor as a Lawful Form of Race Discrimination*, 53 HARV. C.R.-C.L. L. REV. 681, 682 (2018).

316. *See id.* at 697–98.

317. *See, e.g.*, Dorothy E. Roberts, *Abolition Constitutionalism*, 133 HARV. L. REV. 1, 8, 66–67 (2019) (noting that prison abolitionists rarely invoke the constitution, and some see it as the problem).

allow prisons to require inmates to perform involuntary labor.[318] As Goodwin points out, the Exceptions Clause only applies to punishment, and modern day prison labor is not framed as a punishment for inmates.[319] Private prisons that rely on the labor of inmates closely resemble the convict leasing systems in the Jim Crow South and impose an involuntary servitude on those inmates.[320]

The Black Lives Matter movement and a series of nationwide protests have recently focused national attention on the racial bias in our criminal justice system. A new wave of scholarship examines this phenomenon, as well as the role that court-imposed fines and fees play in the carceral state.[321] Until now, however, lawmakers have done little to address the impact of the new debt peonage on workers, especially on workers of color.

C. Ability to Leave One's Employment and Covenants Not to Compete

If liberty of contract means anything for workers, it establishes the right to leave one's job.[322] One of the few effective bargaining chips for workers who wish to improve their wages and conditions of work is the ability to threaten to quit if their demands are not met. Another example of servitude-like practices in the gig economy, the rise of employer-imposed covenants not to compete on workers limits the ability of workers to leave their job for better employment. Such covenants are now commonplace among workers in high-tech industries and other high-skilled jobs.[323] They reduce workers' abilities to leave their current employers for higher wages, better conditions, or higher prestige jobs. While problematic for labor mobility, however, covenants not to compete for skilled workers are arguably justifiable because they protect trade secrets.[324]

Of far greater concern is the fact that industries employing low-wage workers—including the fast food industry—are increasingly also requiring low-wage workers to sign covenants not to compete as

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318. *See* Michele Goodwin, *The Thirteenth Amendment: Modern Slavery, Capitalism, and Mass Incarceration*, 104 CORNELL L. REV. 899, 977–78 (2019); James Gray Pope, *Mass Incarceration, Convict Leasing, and the Thirteenth Amendment: A Revisionist Account*, 94 N.Y.U. L. REV. 1465, 1468–69 (2019).

319. *See* Goodwin, *supra* note 318, at 978.

320. *See* Pope, *supra* note 318, at 1547.

321. *See, e.g.*, MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 155–56 (2010); Lollar, *supra* note 307, at 130; Zatz, *supra* note 308, at 931. *See generally* Gustafson, *supra* note 303 (discussing how the welfare system and the criminal justice system in the United States are becoming increasingly intertwined).

322. Roscoe Pound, *Liberty of Contract*, 18 YALE L.J. 454, 454 (1909).

323. *See* Rachel S. Arnow-Richman, *Bargaining for Loyalty in the Information Age: A Reconsideration of the Role of Substantive Fairness in Enforcing Employee Noncompetes*, 80 OR. L. REV. 1163, 1164–65 (2001).

324. *Id.* at 1177.

a condition of their at-will employment.[325] These covenants not to compete prevent low-wage workers from leaving their jobs to seek higher paid work with better conditions. They cannot be justified by protecting trade secrets because low-wage workers learn only the most rudimentary information from their employment.[326]

Members of the Reconstruction Congress understood that employee mobility was essential to liberty of contract.[327] Without mobility, freed slaves would have been forced to work for their former masters. In recent years, covenants not to compete have received attention from the media.[328] For example, in 2014, Jimmy John's made headlines with noncompete agreements that prohibited employees from working at companies that derived at least 10 percent of sales from selling sandwiches and operated within two miles of a Jimmy John's store for a period of two years.[329] Economists and antitrust experts have written about how noncompete agreements contribute to monopsony.[330] Noncompete agreements diminish a worker's power to change jobs and bargain for higher wages by stopping a worker from moving between jobs. They thus shift the bargaining power further in favor of employers and enable employers to outsize power over wages.[331]

Employees must be able to leave their jobs in order to seek better wages and conditions of work with other employers. Covenants not to compete restrict the employees' abilities to leave their employers and are reminiscent of "anti-enticement" laws that southern states enacted during the Jim Crow era, which were invalidated in *Pollock v. Williams*.[332] Limiting worker mobility enables employers to exploit their workers without the fear that they will leave for better jobs.[333] Thus, Ayesha Hardaway has argued persuasively that covenants not

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325. Ayesha Bell Hardaway, *The Paradox of the Right to Contract: Noncompete Agreements as Thirteenth Amendment Violations*, 39 SEATTLE U. L. REV. 957, 958 (2016); Najah A. Farley, *Regulating Non-Compete Agreements*, REGUL. REV. (Apr. 4, 2019), https:///www.theregreview.org/2019/04/04/farley-regulating-non-compete-agreements/.

326. Hardaway, *supra* note 325, at 963.

327. *See* Lea S. VanderVelde, *The Labor Vision of the Thirteenth Amendment*, 138 U. PA. L. REV. 437, 438–39 (1989).

328. *See* Farley, *supra* note 325.

329. *Id.*; *see* Hardaway, *supra* note 325, at 958.

330. Farley, *supra* note 325.

331. *Id.* A 2016 United States Department of the Treasury study showed a connection between noncompete enforcement, lower wage growth, and lower initial wages. *See* U.S. DEP'T OF THE TREASURY, OFFICE OF ECON. POL'Y, NON-COMPETE CONTRACTS: ECONOMIC EFFECTS AND POLICY IMPLICATIONS 19 (2016) https://www.treasury.gov/resource-center/economic-policy/Documents/UST%20Non-competes%20Report.pdf.

332. 322 U.S. 4 (1944). In that case, the Court struck down such a law as violating the Anti-Peonage Act. *Id.* at 25.

333. *See* Hardaway, *supra* note 325, at 978.

to compete impose involuntary servitude on low-wage workers.[334] However, lawmakers have so far failed to address it.

D. Schedule Uncertainty

For workers, the ability to control one's schedule is not only a matter of convenience but also about "empowerment and independence."[335] In 1934, Auto-Lite workers cited lack of control over their work schedule when they complained of being treated as wage slaves.[336] Said Auto-Lite worker William Lockwood: "You would go into work and the boss would make you wait around a while before telling you that you weren't needed . . . . So, you go home and you didn't get paid, even though you were on the premises."[337] Like the workers in the Eight Hour Movement of the nineteenth century, the Auto-Lite workers saw lack of control over their work schedules as an indicia of "wage slavery."[338] Yet in the twenty-first century, workers at all income levels are increasingly tied to the workplace without control over their working schedule. White-collar workers are expected to be available at all times, erasing the distinction between work and personal time.[339] In the retail and service sectors, which employ the majority of low-wage workers, businesses are increasingly using "just-in-time" scheduling, in which work schedules are made at the last minute and change constantly.[340] These scheduling practices deprive workers of autonomy in their lives, and abusive scheduling can amount to undue coercion.

Many low-wage workers are subject to "just-in-time" scheduling, which makes it difficult for them to plan day-to-day because they do not know their work schedules in advance.[341] According to a 2016 study by Kristen Harknett and Daniel Schneider, two-thirds of hourly workers reported that they received less than two weeks advance

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334. *See id.*

335. Das Acevedo, *supra* note 6, at 810.

336. Zietlow & Pope, *supra* note 159, at 843, 848.

337. *Id.* at 847.

338. *Compare* Alex Gorevitch, *Bernie Sanders Was Right to Talk About Wage Slavery. We Should Talk About It, Too*, JACOBIN MAG. (Jan. 24, 2020), https://www.jacobinmag.com/2020/01/wage-slavery-bernie-sanders-labor ("In 1873, Ira Steward . . . looked out over the United States's industrial sweatshops, its fourteen-hour days for poverty wages, and wrote '[s]omething of slavery still remains.'"), *with* Zietlow & Pope, *supra* note 159, at 847 ("[The foremen] had the power to assign work, and . . . you either had to do something for the foreman or you [weren't] working.").

339. *See* Paul M. Secunda, *The Employee Right to Disconnect*, 8 NOTRE DAME J. INT'L & COMP. L. 1, 7 (2018).

340. *See* Liz Watson et al., *Collateral Damage: Scheduling Challenges for Workers in Low-Wage Jobs and Their Consequences*, NAT'L WOMEN'S L. CTR. 1–2 (April 2017), https://nwlc.org/wp-content/uploads/2015/06/Collateral-Damage.pdf.

341. *Id.*; HYMAN, *supra* note 1, at 302–03.

notice of their schedule, and 70 percent reported last minute changes to the timing of their shifts.[342] Three-fourths of hourly workers reported that the amount of hours for which they were scheduled varied from week to week.[343] One-quarter were expected to work on-call shifts, and half worked back-to-back shifts.[344] Eighty percent of hourly workers reported that they had little or no say in the scheduling of their work.[345] Moreover, in retail jobs, workers were frequently sent home if business was slower than their manager expected it to be.[346] Thus, "just-in-time" scheduling can cause workers to be involuntarily reduced to a part-time schedule, exacerbating the economic insecurity inherent in a low-wage job.[347] It is also common for employers to cap schedules at twenty-nine hours to avoid federal regulations requiring them to provide benefits.[348]

Precarious work schedules disproportionately affect low-income and female workers, as well as people of color.[349] While the lack of control over schedule makes it hard for anyone to live a normal life, this practice is particularly harmful for parents, who must arrange for childcare in advance.[350] "Just-in-time" scheduling thus has a disproportionately harmful effect on women because they disproportionately shoulder the responsibility for arranging childcare.[351] Precarious work schedules can also impose a long-term negative impact on workers' health and well-beings.[352] Schedule uncertainty disrupts relationships and unsettles family routines.[353] Workers who experience schedule uncertainty suffer from anxiety, depression, and sleep disruption.[354] Schedule uncertainty is another example of undue coercion, as workers lack the power to redress the harsh overlordship of their masters.

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342. Kristen Harknett & Daniel Schneider, *Precarious Work Schedules and Population Health* 2 (February 2020), https://www.healthaffairs.org/do/10.1377/hpb20200206.806111/listitem/brief_workforce_health_Harknett.pdf. Respondents to a 2014 study reported that 41 percent received less than a week's notice of their schedule. *Id.*

343. *Id.*

344. *Id.*

345. *Id.*

346. *See* Watson et al., *supra* note 340, at 2.

347. *See* HYMAN, *supra* note 1, at 303 ("Managed by algorithms, workforces are kept lean but subject to uncertain week-to-week scheduling and a more volatile income.").

348. *Id.*

349. Harknett & Schneider, *supra* note 342, at 2.

350. *See* Watson et al., *supra* note 340, at 1, 3.

351. *See* HYMAN, *supra* note 1, at 303; Cherry, *supra* note 3, at 598.

352. *See* Harknett & Schneider, *supra* note 342, at 2–3.

353. *Id.* at 3.

354. *Id.*

E. Management by Algorithms

From the plantation overseer to the shop foreman, work supervisors often use coercion toward those working under them. One reason cited by gig economy workers as evidence of their liberty is the fact that they work without supervision.[355] Although gig economy workers can often choose when and where they want to work, they are subject to restrictions imposed on them by the platforms that govern their working lives.[356] Unlike the conventional workplace, platform workers often do not know what the rules are, nor do they know how to comply with them.[357] For example, the Uber and Lyft platforms utilize algorithms that automatically terminate access for drivers who fail to meet the standards, without revealing what those standards are.[358] The lack of clear work rules means that the platform is "an authority that is always there, waiting to be exercised, and waiting creates uncertainty."[359] Thus, workers in the sharing economy are plagued by uncertainty and lack job security.

Gig companies often "impose take-it-or-leave-it . . . contracts on their workers while setting fee rates, extracting penalties, and dictating when and how workers interact with customers."[360] For example, Handy.com, a platform which provides workers to perform house cleaning and other odd jobs, "[c]harges a per-transaction fee, [s]ets pay rates, [d]ictates when and how workers can contact consumers, [and f]ines workers for tardiness[, for] cancellation of appointments, and for arranging services off-platform."[361] Ride sharing platform Uber uses algorithms to manage its drivers based on consumer reviews; if a driver's customer satisfaction rating falls below a certain average, they can no longer sign into the app.[362] With management by algorithms, "[l]abor practices that used to be run through bureaucracy . . . are becoming imbedded within computer

355. Das Acevedo, *supra* note 6, at 810–11.

356. *See* NAT'L EMP. L. PROJECT, *supra* note 26, at 3 (reporting that tech companies want the new test for independent contractors to restate the elements of the current business model of gig companies without requiring that the workers be free from the control of the company); *id.* at 13 ("Far from being a neutral 'bulletin board,' Handy and other gig companies exert extensive control over their workforces and, in many ways, behave as employers.").

357. Das Acevedo, *supra* note 6, at 817 ("[P]latforms and customers have the power to discipline (and thus the power to restrict choice) if and when they feel like it and in essentially unpredictable or unknowable ways.").

358. Cherry, *supra* note 3, at 597; Das Acevedo, *supra* note 6, at 819.

359. Das Acevedo, *supra* note 6, at 820 (adding that the only thing platform workers can be sure of "is the platform and of the client to constrain their options in any circumstance").

360. NAT'L EMP. L. PROJECT, *supra* note 26, at 2.

361. *Id.* at 14.

362. Cherry, *supra* note 3, at 597.

programs."[363] This practice adds to the uncertainty and precarity of the working lives of gig economy workers.

Management by algorithm places another burden on the platform workers who must market themselves to attract customers. For example, domestic and homecare workers using platforms such as Care.com must create their own profiles to sell their services.[364] Customers worry about bringing the worker into their home, and the worker bears the burden of proving that they are trustworthy and safe.[365] This requires workers to give up much of their privacy, subjecting themselves to security checks and creating a biography to prove their legitimacy.[366] Platform companies are primarily focused on consumer satisfaction, often at the expense of platform workers.[367]

For example, care worker platform UrbanSitter advises customers to investigate workers' online identities and turn workers away if they have a bad feeling about them.[368] In 2018, a company called Predictim offered parents who used platforms to hire childcare workers a service that "analyze[s] a person's speech, facial expressions and online history with promises of revealing the hidden aspects of their private lives."[369] Consumer concerns about safety are natural, and some measures are needed to protect workers and the consumers who hire them. However, workers should not be required to give up all of their privacy to simply be able to find a job. Care workers using platforms are increasingly forced to subject themselves to surveillance that deprives them of liberty and human dignity, which arguably causes them to suffer undue coercion.

F. Work Requirements for Public Benefits

New Deal era safety net measures provided crucial support for low-income workers in our country. Food stamps, welfare benefits, and unemployment insurance help to stave off economic disaster for those who lose their jobs, are unable to work, or earn very little in their jobs. In the 1996 Personal Responsibility and Work Opportunity Reconciliation Act, however, Congress dismantled a significant portion of that safety net by abolishing the welfare benefits under the New Deal era Aid to Families with Dependent Children ("AFDC")

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363. *Id.*

364. Julia Ticona & Alexandra Mateescu, *Trusted Strangers: Carework Platform's Cultural Entrepreneurship in the On-Demand Economy*, 20 NEW MEDIA & SOC'Y 4384, 4389–90 (2018).

365. *Id.* at 4396.

366. *Id.* at 4395.

367. *See id.* at 4393; Rahman & Thelen, *supra* note 28, at 185.

368. Ticona & Mateescu, *supra* note 364, at 4396.

369. Drew Harwell, *Wanted: The 'Perfect Babysitter.' Must Pass AI Scan for Respect and Attitude*, WASH. POST (Nov. 23, 2018, 11:50 AM) https://www.washingtonpost.com/technology/2018/11/16/wanted-perfect-babysitter-must-pass-ai-scan-respect-attitude/.

program.[370] Congress replaced AFDC with the short-term Temporary Assistance for Needy Families Program ("TANF"), which had a five-year lifetime limit.[371] TANF required recipients to work or engage in work-like activities in order to receive those limited benefits.[372]

When Congress first considered passing TANF in 1994, Professor Julie Nice argued that requiring work as a condition of receiving public benefits would impose an involuntary servitude on those recipients.[373] As Nice pointed out, "welfare recipients are unable to physically subsist without financial assistance for food, clothing, shelter, and necessary medical care."[374] Thus, the threat of withdrawing welfare benefits makes welfare recipients particularly vulnerable to coercion.[375] Requiring welfare recipients to work for the paltry sums to which they are eligible thus imposes an involuntary servitude on those recipients.[376] Moreover, because people of color in the United States are disproportionately likely to be poor, work requirements for welfare have a disproportionate impact on racial minorities.[377]

Work requirements for public benefits raise additional concerns that impact all gig economy workers. By depriving low-wage workers of the alternative to public benefits, TANF undermines the right to quit. The lack of an adequate safety net makes low-wage workers immeasurably more vulnerable to coercive practices because they lack the alternative of public benefits and must find low-wage work to survive. As a result, public benefits serve indirectly as a government subsidy for low-wage employers.

Public benefits also directly subsidize low-wage employers, who use their availability to justify paying lower wages. A 2014 report estimated that Walmart workers cost US taxpayers $6.2 billion in public assistance, including food stamps, Medicaid, and public housing.[378] This is due in part to the fact that as of 2018, half of

370. *See* Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104–193, § 116, 110 Stat. 2105, 2183–85.

371. *See id.* § 408, 110 Stat. at 2137; *Policy Basics: Temporary Assistance for Needy Families*, CTR. ON BUDGET & POL'Y PRIORITIES, https://www.cbpp.org/research/family-income-support/temporary-assistance-for-needy-families (last visited Dec. 18, 2020).

372. Personal Responsibility and Work Opportunity Reconciliation Act § 407, 110 Stat. at 2133.

373. Julie A. Nice, *Welfare Servitude*, 1 GEO. J. ON FIGHTING POVERTY 340, 341 (1994).

374. *Id.* at 340.

375. *Id.* at 340–41.

376. *See id.* at 348 ("[T]he factors affecting the modern welfare recipient are startlingly similar to those affecting former slaves.").

377. *See id.* at 354.

378. Clare O'Connor, *Report: Walmart Workers Cost Taxpayers $6.2 Billion in Public Assistance*, FORBES (Apr. 15, 2014, 3:35 PM), https://www.forbes.com/sites/clareoconnor/2014/04/15/report-walmart-workers-cost-taxpayers-6-2-billion-in-

Walmart workers were part-time workers.[379] In 2018, the Washington Post reported that as many as one-third of Amazon workers in Arizona, and one-tenth of Amazon workers in Ohio and Pennsylvania, also received food stamps.[380] An Amazon spokeswoman protested that the report was "misleading because they include people who only worked for Amazon for a short period of time and/or who chose to work part-time," adding that, "[w]e have hundreds of full-time roles available, however, some prefer part-time for the flexibility or other personal reasons."[381] Here, the employer uses the rhetoric of liberty to justify paying low wages to workers. However, in the gig economy, part-time work is often the only choice for workers.

Despite the servitude imposed by work requirements on welfare benefits, lawmakers in some states have added work requirements to other public benefits necessary for survival, including food stamps and Medicaid.[382] Conditioning the receipt of public benefits on working for almost no pay in order to survive is unduly coercive and constitutes another form of peonage.

G. Lack of Workplace Safety

Finally, workplace safety is essential to the well-being of low-income workers in our country. In 1970, responding to reports that thirty-eight workers died on the job per day, Congress created the Occupational Safety and Health Administration ("OSHA") to regulate and monitor workplace safety.[383] Enforcement of OSHA regulations varies depending on the executive administration. Under President Barack Obama, OSHA stepped up its efforts with several enforcement

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public-assistance/#5b0965ae720b (citing *Walmart on Tax Day: How Taxpayers Subsidize America's Biggest Employer and Richest Family*, AMS. FOR TAX FAIRNESS 3–5 (2014), https://americansfortaxfairness.org/files/Walmart-on-Tax-Day-Americans-for-Tax-Fairness-1.pdf).

379. Nandita Bose, *Half of Walmart's Workforce Are Part-Time Workers: Labor Group*, REUTERS (May 25, 2018, 11:16 AM), https://www.reuters.com/article/us-walmart-workers/half-of-walmarts-workforce-are-part-time-workers-labor-group-idUSKCN1IQ295.

380. Abha Bhattarai, *Thousands of Amazon Workers Receive Food Stamps*, WASH. POST (Aug. 23, 2018, 11:23 PM), https://www.washingtonpost.com/business/2018/08/24/thousands-amazon-workers-receive-food-stamps-now-bernie-sanders-wants-amazon-pay-up/.

381. *Id.*

382. *See* Judith Solomon, *Medicaid Work Requirements Can't Be Fixed: Unintended Consequences Are Inevitable Result*, CTR. ON BUDGET & POL'Y PRIORITIES 2 (Jan. 10, 2019), https://www.cbpp.org/sites/default/files/atoms/files/1-10-19health-2.pdf.

383. 29 U.S.C. §§ 651–78; Deborah Harris, *Criminal Prosecutions Under the Occupational Safety and Health Act*, 68 DEP'T JUST. J. FED. L. & PRAC. 5, 5 (2020) (emphasizing the success of the legislation and that in 2018, that number had fallen to fourteen deaths per day).

initiatives.[384] However, under the Trump administration, OSHA has slowed its efforts and workplace fatalities have increased.[385] The Trump administration has removed information about OSHA citations from its website, reducing transparency and heightening danger for workers.[386] The COVID-19 pandemic has exacerbated this danger. Instead of increasing oversight, the Trump administration has halted enforcement of OSHA regulations at meatpacking plants—one of the largest sources of COVID-19 outbreaks.[387] The lack of safety enforcement heightens the vulnerability of low-wage workers. When workers are required to endanger their lives at work, that is a mark of undue coercion.

V. THE RIGHT TO BE FREE OF UNDUE COERCION

Gig economy workers have the right to true liberty of contract in the workplace, free of undue coercion. However, overshadowed by the ideology of liberty, their rights against undue coercion are not being enforced. Thus, workers in the gig economy are subjected to numerous practices reminiscent of involuntary servitude. Yet those workers are entitled to more under the Thirteenth Amendment: freedom from undue coercion and a recognition of their human dignity and autonomy. This Part briefly suggests three alternative approaches to regulating the gig economy and restoring liberty to US workers. The first approach is to address head-on the practices reminiscent of peonage through litigation and statutory measures. The second is to expand the definition of employee status so that all workers can benefit from existing regulations. The final approach is to take the republican promise of the gig economy seriously and

384. *See Worker Safety & Health in the Obama Years: The Importance of Enforcement*, NAT'L EMP. L. PROJECT 1–2 (Jan. 2017), https://s27147.pcdn.co/wp-content/uploads/NELP-Worker-Safey-Health-in-Obama-Years.pdf; Ben James, *Worker Safety Landscape to Shift Under Obama*, LAW360 (Mar. 12, 2009, 12:00 AM), https://www.law360.com/articles/91386/print?section=texas; Laura Walter, *OMB Watch: Obama Administration Stepping Up Enforcement of Labor Laws*, EHS TODAY (Dec. 14, 2010), https://www.ehstoday.com/standards/osha/article/21908461/omb-watch-obama-administration-stepping-up-enforcement-of-labor-laws.

385. *Workplace Safety Enforcement Continues to Decline in Trump Administration*, NAT'L EMP. L. PROJECT 1 (Mar. 2019), https://s27147.pcdn.co/wp-content/uploads/OSHA-Workplace-Safety-Enforcement-Continues-Decline-Trump-Administration-v2.pdf.

386. *See* Nathan Cortez, *Information Mischief Under the Trump Administration*, 94 CHI.–KENT L. REV. 315, 327–28 (2019).

387. Isaac Scher, *The Trump Administration Won't Enforce Coronavirus-Related Safety Rules for Meat Factories Making a "Good Faith" Effort to Keep Workers Safe*, BUS. INSIDER (Apr. 30, 2019, 9:20 AM), https://www.businessinsider.com/osha-stops-enforcement-for-meat-plants-good-faith-safety-efforts-2020-4.

provide a safety net that reduces the extent to which workers depend on their employers for essential needs.

A. Enforcing Anti-Peonage Measures

One approach to gig economy workers is to engage in a litigation strategy to combat those measures which so closely resemble peonage and involuntary servitude. The 2000 Trafficking Victims Protection Act ("TVPA") authorizes workers to sue their employers who hold them in involuntary servitude.[388] Federal civil rights laws also provide mechanisms for directly enforcing the Thirteenth Amendment against state officials and against private individuals who conspire to deprive individuals of their rights under the Thirteenth Amendment.[389] These measures provide important tools for workers to combat undue coercion.

The TVPA amended the Anti-Peonage Act to expand its scope, outlawing not only employers' use of physical coercion but also the use of psychological coercion to prevent employees from leaving their jobs.[390] The Act was intended to overturn the United States Supreme Court's narrow interpretation of involuntary servitude in *United States v. Kozminski*.[391] In *Kozminski*, mentally challenged farmworkers endured abusive conditions and mental abuse and were isolated and discouraged from speaking to any visitors.[392] The Court held that the TVPA prohibition of involuntary servitude was intended to cover only "forms of compulsory labor akin to African slavery," including direct or threatened physical force.[393] Congress disagreed, and the TVPA clarified that the type of psychological coercion in the *Kozminki* case could create an involuntary servitude.[394] The TVPA provides legally enforceable remedies for trafficked migrant workers, and those remedies should be enforced through an organized litigation campaign.[395] The statute's broad definition of coercion also extends to the numerous undocumented workers who lack any viable option for leaving coercive employers.[396]

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388. Trafficking Victims Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464 (codified as amended in scattered sections of 18 U.S.C., 22 U.S.C., and others); *see* 18 U.S.C. § 1589.

389. *See* 42 U.S.C. §§ 1983, 1985.

390. *See* Kim, *supra* note 132, at 414. The Act also creates "a private right of action [against] human-trafficking violations that involve 'force, fraud, or coercion.'" *Id.* (quoting 22 U.S.C. § 7102(11)).

391. 487 U.S. 931 (1988), *superseded by statute*, Trafficking Victims Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464.

392. *Id.* at 934–35.

393. *Id.* at 942 (internal quotation marks omitted) (quoting Butler v. Perry, 240 U.S. 328, 332 (1916)).

394. *See* Kim, *supra* note 132, at 414.

395. *Id.* at 468 (suggesting a strategy based on a broad reading of "undue coercion").

396. *Id.*

Covenants not to compete are reminiscent of Jim Crow era laws prohibiting workers from leaving their employers. In *Pollock*, the Supreme Court held that such laws violated both the Thirteenth Amendment and the federal Anti-Peonage Act,[397] finding that they deprived workers of "power below to redress and no incentive above to relieve a harsh overlordship or unwholesome conditions of work."[398] Ayesha Hardaway has called for a litigation campaign to enforce the Anti-Peonage Act against these covenants not to compete, which should be reinforced by political advocacy.[399] In 2016, the state of Illinois enacted a law prohibiting companies from requiring low-wage workers to sign covenants not to compete.[400] The states of Oregon, Nevada, New Mexico, and Massachusetts have also passed laws to address the problem.[401] So far, however, only the New York and Illinois state Attorneys General have undertaken enforcement measures.[402] These measures are needed to protect low-wage workers from this new form of involuntary servitude.

Debt peonage, imprisonment for nonpayment of fines, and the abuse of prison labor may also be targets of litigation campaigns. So far, courts have largely rejected prisoners' claims that prison labor violates the Thirteenth Amendment.[403] However, in the 2012 case of *McGarry v. Pallito*,[404] the Second Circuit Court of Appeals held that a pretrial detainee who was compelled to work in a prison laundry facility while he was detained had plausibly stated a claim under the Thirteenth Amendment.[405] The trial court had dismissed the complaint, noting that being compelled to work in the laundry facility was "nothing like the slavery that gave rise to the enactment of [the Thirteenth] Amendment,"[406] and that to recognize plaintiff's claim would "trivialize the pain and anguish that the Thirteenth Amendment sought to remedy."[407] The Appellate Court disagreed,

397. Pollock v. Williams, 322 U.S. 4, 25 (1944).

398. *Id.* at 18.

399. *See* Hardaway, *supra* note 325, at 978–79.

400. Illinois Freedom to Work Act, 820 ILL. COMP. STAT. 90/10 (2017); Farley, *supra* note 325.

401. Farley, *supra* note 325.

402. *Id.*

403. *See, e.g.*, Pischke v. Litscher, 178 F.3d 497, 500 (7th Cir. 1999); Hale v. Arizona, 993 F.3d 1387, 1394 (9th Cir. 1993) (citing Draper v. Rhay, 315 F.2d 193, 197 (9th Cir. 1963)); Ray v. Mabry, 556 F.2d 881, 882 (8th Cir. 1977) (first citing Draper, 315 F.2d at 197; then citing Howerton v. Mississippi County, 361 F. Supp. 356, 364 (E.D. Ark. 1973); and then citing Holt v. Sarver, 309 F. Supp. 362, 369–72 (E.D. Ark. 1970), *aff'd*, 442 F.2d 804 (8th Cir. 1971)).

404. 687 F.3d 505 (2d Cir. 2012).

405. *Id.* at 508–09.

406. McGarry v. Pallito, No. 1:09–CV–128, 2010 WL 679056, at *8 (D. Vt. Feb. 27, 2010), *rev'd and remanded*, 687 F.3d 505 (2d Cir. 2012).

407. *Pallito*, 2010 WL 679056, at *6 (quoting Ford v. Nassau Cty. Exec., 41 F. Supp. 2d 392, 401 (E.D.N.Y. 1999)).

noting that "[c]ontrary to the district court's conclusion, it is well-settled that the term 'involuntary servitude' is not limited to chattel slavery-like conditions. The Amendment was intended to prohibit all forms of involuntary labor . . . ."[408] The court concluded that McGarry's allegations that "his work in the prison laundry was compelled and maintained by the use and threatened use of physical and legal coercion" sufficiently stated a claim for a violation of the Thirteenth Amendment.[409]

McGarry is distinguishable from the plight of convicted criminals forced to work while in prison. McGarry was a pretrial detainee who was not yet convicted of any crime, so the Thirteenth Amendment's exception of punishment for those "duly convicted" of a crime did not apply to him.[410] Nonetheless, *McGarry* is an important precedent for those seeking to challenge state imposition of forced labor. Federal courts have also recently been open to challenges against excessive fees and fines. For example, in the 2019 case of *Timbs v. Indiana*,[411] the United States Supreme Court found for the first time that the Excessive Fines Clause of the Eight Amendment applied to the states.[412]

Heightened awareness of the racial inequity in our criminal justice system following the tragic death of George Floyd may create the political will to make significant reforms to that system. Any such reforms should address the racially discriminatory system of fines, fees, and prison labor that arguably violate the Thirteenth Amendment.

B. Classification and Employee Protections

Because so many workers' rights are linked to employee status, some gig economy workers have advocated for employee status protections. Many labor scholars have argued in favor of expanding the definition of employee to encompass platform workers.[413] In the fall of 2019, the state of California enacted AB5, redefining employee

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408. *Pallito*, 687 F.3d at 510. The court further noted that the Amendment's reach extends to "every race and every individual." *Id.* at 511 (quoting Hodges v. United States, 203 U.S. 1, 16 (1906), *overruled in part on other grounds*, Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968)).

409. *Id.* at 511. The court also held that McGarry's claim was not barred by qualified immunity. *Id.* at 514.

410. *See id.* at 511; *see also* U.S. CONST. amend. XIII ("Neither slavery nor involuntary servitude, except as punishment for crime whereof the party shall have been duly convicted, shall exist . . . ."). Scholars are currently debating the extent and meaning of the Exceptions Clause. *See, e.g.*, Goodwin, *supra* note 318, at 906–07; Pope, *supra* note 318, at 1467–70; Roberts, *supra* note 317, at 8.

411. 139 S. Ct. 682 (2019).

412. *Id.* at 686–87, 691.

413. *See, e.g.*, Cherry, *supra* note 3, at 578; Das Acevedo, *supra* note 6, at 794–98; Rogers, *supra* note 30, at 480–81.

status to include gig economy workers.[414] Workers have also filed suit seeking employee status under existing labor standards.[415] Coercion and control are central issues in these ongoing legal battles because courts traditionally apply a "control" test to determine whether the worker is independent or controlled by their employer.[416] Under the control test, if the employer exercises control over the worker, then the worker is an "employee" with rights under existing labor and employment laws.[417] AB5 codifies the broadest definition adopted by courts, the "ABC" test, to encompass most gig economy workers.[418] Applying AB5 to Lyft and Uber drivers, California regulators have now categorized them as employees.[419] Because these measures expand gig economy workers' access to legal protection and benefits, they significantly decrease the vulnerability of platform workers.

The United States has no law requiring regular work schedules.[420] The only relevant federal law is the FLSA, which requires workers to be paid overtime if they work more than forty hours a week.[421] However, that law does not cover independent contractors nor does it apply to most white-collar workers.[422] Recently, Senator Elizabeth Warren and Representative Rose DeLauro introduced the Schedules that Work Act "to empower [low-

414. An act to amend Section 3351 of, and to add Section 2750.3 to, the Labor Code, and to amend Sections 606.5 and 621 of the Unemployment Insurance Code, relating to employment, and making an appropriation therefor, ch. 296, § 5, 2019 Cal. Stat. 14 (to be codified at CAL. UNEMP. INS. CODE § 621).

415. *See* Maysa Zorob, *The Future of Work: Litigating Labour Relationships in the Gig Economy*, BUS. & HUM. RTS. RES. CTR., Mar. 2019, at 1, 12–14, https://media.business-humanrights.org/media/documents/files/documents/-CLA_Annual_Briefing-FINAL.pdf.

416. *See* Guy Davidov, *The Status of Uber Drivers: A Purposive Approach*, 6 SPANISH LAB. L. & EMP. REL. J. 6, 11–13 (2017), https://doi.org/10.20318/sllerj.2017.3921; Rogers, *supra* note 30, at 484–85; *see also* Cherry, *supra* note 3, at 579–94 (detailing ongoing classification litigation).

417. *See* Rogers, *supra* note 30, at 485 ("The control test accordingly instructs courts to consider multiple factors including the worker's skills, the duration of the parties' engagement, the method of payment, and the putative employer's ability to terminate the worker at will.").

418. Aaron N. Colby & Janet Grumer, *New California AB 5 Law Expands Independent Contractor ABC Test*, DAVIS WRIGHT TREMAINE (Sept. 19, 2019), https://www.dwt.com/blogs/employment-labor-and-benefits/2019/09/california-ab5-employment-law.

419. *See* Carolyn Said, *California Regulators Say Uber, Lyft Drivers Are Employees*, S.F. CHRONICLE (June 10, 2020, 7:05 PM), https://www.sfchronicle.com/business/article/California-regulators-say-Uber-Lyft-drivers-are-15330779.php?utm_campaign=CMS%20Sharing%20Tools%20(Premium)&utm_source=share-by-email&utm_medium=email.

420. *See* Secunda, *supra* note 339, at 4–5.

421. *See supra* note 194 and accompanying text.

422. The law exempts managerial workers and salaried employees. *See* Secunda, *supra* note 339, at 5, 22–23.

wage] workers to regain control over their work schedules and to build some economic security for themselves and their families."[423] While the chance of that bill's success are at best uncertain, at least one city (Seattle) has enacted an ordinance requiring employers to notify workers in advance about their schedule.[424] These measures empower workers to resist coercive scheduling practices.

Measures expanding protections for all workers would benefit gig economy workers. The most important initiative by far would be to raise the minimum wage and expand its applicability to all gig economy workers. According to the Economic Policy Institute, the real value of the federal minimum wage has declined 31 percent since 1968.[425] As a result, workers who earn the federal minimum wage take home $6,800 less in real dollars than they would have fifty years ago.[426] Congress last raised the minimum wage in 2009, and the real value of that increase has declined 17 percent since that date.[427] In the face of congressional inaction, and due to worker advocacy, numerous states and localities have raised the minimum wage in recent years.[428]

While these initiatives are significant, they mostly do not apply to the numerous gig economy workers who are classified as independent contractors. In 2018, New York City enacted an ordinance requiring all gig workers to be paid the prevailing minimum wage.[429] Raising the minimum wage for all workers would also decrease worker vulnerability and decrease the precarity of their lives.[430] Extending the wage increase to all gig economy workers would be a significant step toward fostering their autonomy.

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423. *Senator Warren and Representative DeLauro Announce Reintroduction of the Schedules That Work Act*, ELIZABETH WARREN (Oct. 17, 2019), https://www.warren.senate.gov/newsroom/press-releases/senator-warren-and-representative-delauro-announce-reintroduction-of-the-schedules-that-work-act; *see also* Schedules That Work Act, S. 3256, 116th Cong. (2020); Schedules That Work Act, H.R. 5004, 116th Cong. (2019).

424. SEATTLE, WASH., MUNICIPAL CODE ch. 14.22.040(A) (2016).

425. David Cooper et al., *Labor Day 2019: Low-wage Workers are Suffering from a Decline in the Real Value of the Federal Minimum Wage*, ECON. POL'Y INST. 1, 2–3 (Aug. 27, 2019), https://files.epi.org/pdf/172974.pdf.

426. *Id.* at 3.

427. *Id.* at 1–2.

428. *See Minimum Wage Tracker*, ECON. POL'Y INST. (July 3, 2020), https://www.epi.org/minimum-wage-tracker/.

429. *Peter Holley, New Rules Guarantee Minimum Wage for NYC Uber, Lyft Drivers*, WASH. POST (Dec. 4, 2018, 4:31 PM), https://www.washingtonpost.com/technology/2018/12/04/new-rules-guarantee-minimum-wage-nyc-uber-lyft-drivers/.

430. *See* Ann C. McGinley & David McClure, *We Are All Contingent: Fighting Vulnerability in the US Workforce*, *in* VULNERABILITY AND THE LEGAL ORGANIZATION OF WORK 259, 274 (Martha Albertson Fineman & Jonathan W. Fineman eds., 2018).

C. Strengthening the Safety Net to Foster Worker Autonomy

An alternative approach toward enhancing workers' liberty in the gig economy is to support workers who strive toward the Jeffersonian ideal of autonomy and self-ownership by strengthening the safety net to promote that autonomy. To enhance the autonomy of gig economy workers, labor republicans focus their efforts on reducing structural domination.[431] They advocate for government measures, such as a universal basic income, which enhance workers' socioeconomic independence.[432] While cuts to the safety net undermine workers, enhancing the safety net can give them the crucial support that they need to achieve more autonomy in their lives.

Gig economy workers lack the benefits that have been tied to employment since the New Deal era, including health care, pension, and other benefits. Measures to disaggregate those benefits from employment can provide important aid to gig economy workers. One such measure was the 2010 Affordable Care Act ("ACA"), popularly known as Obamacare, which provides affordable access to health insurance for individuals who do not receive it from employment.[433] Studies show that access to health care enabled the expansion of small businesses because workers could afford to leave their employers and start their own businesses.[434] After the passage of the ACA, the uninsured rate for small-business employees fell by almost ten percentage points, and health care costs stabilized for small businesses that provide health insurance for their employees.[435] Disaggregating health care from employment is thus an important step toward fostering real liberty for workers in today's economy. The ACA's disaggregation of work from benefits provides an effective model for thinking about how to empower workers to resist undue coercion. Workers who are not dependent on their employer for essential benefits have more leverage to bargain for higher wages and better conditions at work.

Similarly, proponents of a universal income argue that "[a]n unconditional basic income would enable workers to wait for a better job or negotiate better wages. They could improve their marketability by going back to school. They could even quit their job to care for a

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431. Das Acevedo, *supra* note 6, at 829; Gourevitch, *supra* note 48, at 592 ("The demand for [a] 'transform[ation of] work' or control over work activity is different from a call for a just distribution of income and wealth. It is an aspiration for a kind of freedom . . . .").

432. Gourevitch, *supra* note 48, at 598–99.

433. *See* Patient Protection and Affordable Care Act, 42 U.S.C. § 300gg–1(a).

434. *See* David Chase & John Arensmeyer, *The Affordable Care Act's Impact on Small Business*, COMMONWEALTH FUND 1, 1–3 (Oct. 1, 2018), https://www.commonwealthfund.org/sites/default/files/2018-10/Chase_ACA_impact_small_business_ib.pdf.

435. *Id.* at 1, 4–6.

relative."[436] Universal income proponents claim that their approach is more efficient and effective than welfare programs.[437] This claim is debatable, but it is a debate that is important to determine how to create the preconditions for workers to experience autonomy in our society.

VI. CONCLUSION: THE COVID-19 CRISIS AND BEYOND

This Article is being published at a time of crisis, transition, and opportunity for US workers. As a result of the COVID-19 pandemic, our country is now in the midst of a financial crisis that experts fear may rival that of the Great Depression in the 1930s.[438] As with all crises, it is likely that the current economic downturn will have the most harmful effect on the workers, who are the focus of this Article. The economic upheaval may be so severe that lawmakers will have the same kind of opportunity to reshape the workplace as they did during the Depression. If this happens, it is vital that lawmakers address the precarity of the lives of gig economy workers and protect them against undue coercion.

In March 2020, Congress moved a step in the right direction when it enacted the CARES Act, which (among other measures) expanded unemployment benefits to the many gig economy workers who had previously been ineligible because they were classified as "independent contractors."[439] Unfortunately, the bipartisan coalition behind the CARES Act has since fallen apart, revealing a drastically divergent approach to workers in our new economy.

On one side, Democratic lawmakers emphasize public health and safety for workers. They support expanding the safety net to protect workers, including the expansion of unemployment benefits and federal OSHA guidelines to protect workers from infection.[440] These

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436. Kimberly Amadeo, *What is Universal Basic Income? Pros and Cons of a Guaranteed Income*, BALANCE (citing Hilary W. Hoynes & Jesse Rothstein, *Universal Basic Income in the US and Advanced Countries* (Nat'l Bureau of Econ. Rsch., Working Paper No. 25538, 2019)), https://www.thebalance.com/universal-basic-income-4160668#citation-30 (Aug. 19, 2020).

437. *Id.*

438. Josh Zumbrun, *Coronavirus-Afflicted Global Economy is Almost Certainly in Recession*, WALL ST. J. (Apr. 14, 2020, 1:34 PM), https://www.wsj.com/articles/coronavirus-afflicted-global-economy-is-almost-certainly-in-recession-11586867402.

439. *See* Ally Schweitzer, *What Gig Workers Need to Know About Collecting Unemployment*, NPR (Apr. 27, 2020, 9:30 AM), https://www.npr.org/local/305/2020/04/13/833332449/what-gig-workers-need-to-know-about-collecting-unemployment.

440. *See* Siobhan Hughes, *Democrats Push for Coronavirus Workplace Safety Rules*, WALL ST. J., https://www.wsj.com/articles/democrats-push-for-coronavirus-workplace-safety-rules-11587478606 (Apr. 21, 2020, 7:46 PM); Erica Werner, *House Democrats Pass $3 Trillion Coronavirus Relief Bill Despite Trump's Veto*

measures would help to protect workers from undue coercion and decrease vulnerability. They could represent a step, however, small, toward strengthening workers' rights.

However, opponents of these measures are once again using the rhetoric of liberty to mask worker oppression. Republican lawmakers focus on opening the economy and champion the liberty of individuals who want to open up their businesses and return to normal.[441] Those who oppose the extension of heightened unemployment benefits argue that those benefits provide a disincentive for workers to return to their jobs.[442] Republicans also oppose safety regulations, arguing to the contrary that businesses should be protected from suit if their employees are exposed to COVID-19 on the job.[443] If this deregulatory vision prevails, US workers will be left even more vulnerable, some in danger of losing their lives.[444]

Liberty of contract is a fundamental human right and a prerequisite of free labor. However, formal liberty of contract alone is insufficient to guarantee the right against undue coercion embodied in the Thirteenth Amendment. Instead, the ideology of liberty of contract has often been successfully used to undermine workers' right to free labor. Far too often, the unregulated workplace is a place of domination and oppression of workers. The lack of regulation and the ideology of formal liberty enables employers to adopt practices that undermine the right to free labor and restrict the actual liberty of workers. As a result, at a time of what appears on its face to be maximum liberty, workers are increasingly in danger of falling into involuntary servitude. The Thirteenth Amendment offers a promise to these workers: a promise of freedom from undue coercion. Enforcing that promise should be central to reimagining workers' rights in the gig economy.

Threat, WASH. POST (May 15, 2020, 9:31 PM), https://www.washingtonpost.com/us-policy/2020/05/15/democrats-pelosi-congress-coronavirus-3-trillion-trump/.

441. *See* Steven Shepard, *Republican Voters Give Trump and GOP Governors Cover to Reopen*, POLITICO (May 13, 2020, 4:30 AM), https://www.politico.com/news/2020/05/13/poll-coronavirus-reopen-trump-republicans-252726.

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