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### Essentializing Labor Before, During, and After the Coronavirus Pandemic

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# Essentializing Labor Before, During, and After the Coronavirus Pandemic

Deepa Das Acevedo\*

*In the era of COVID-19, the term “essential labor” has become part of our daily lexicon. Between March and May, 2020, essential labor was not simply the only kind of paid labor occurring across most of the United States, it was also, many argued, the only thing preventing utter economic and humanitarian collapse. As a result of this sudden significance, legal scholars, workers’ advocates, and politicians have scrambled to articulate exactly what makes essential labor “essential.” Some commentators have also argued that the rise of essential labor as a conceptual category disrupts—or should disrupt—longstanding patterns in the way the nation regulates work.*

*Contrary to this emerging narrative, this Article argues that essentiality is not at all new to the way we conceptualize and regulate labor in the United States. If anything, essential labor replicates and exacerbates an attitude that has always been central to American work law: the idea that work should be measured, classified, regulated, and remunerated according to how much it benefits someone other than the worker. The only thing that has changed as a result of the coronavirus pandemic is the referent in this analysis: essential to whom? Before the pandemic, the United States considered work to be essential when it was essential to the employer; during the pandemic, essential labor has come to mean tasks that are essential to society as a whole. In neither scenario is the relationship between the worker and their work at the center of legislation, adjudication, or business operations.*

*This Article therefore offers a novel proposal: a worker-centric analysis demonstrates that, in the United States, labor is always essential to the worker. This is both legally true, in the sense that this country ties physical and financial well-being to employment status more than any other highly developed nation, and it is morally true, in that social science scholarship and human rights discourse have established the critical relationship between work and human flourishing. In light of this, the Article contends that the longstanding and idiosyncratically American concept of “at-will” employment, whereby work relationships can be terminated upon no notice and for any reason, fails because it neglects to account for the extent to which labor is essential to workers. Relinquishing the concept of at-will employment will not by itself solve all the problems bedeviling American work law, but it is an important and necessary first step toward fixing those problems, and toward implementing the true labor and employment law lesson of COVID-19.*

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## INTRODUCTION

The United States regulates work using a multitude of binaries. There are employees and independent contractors; non-exempt employees and exempt employees; full-time and part-time workers; covered individuals and non-covered individuals, and so on, world without end. More often than not, legal battles in the employment context are, at heart, about which of these conceptual categories a worker properly belongs to, because that determination has weighty consequences for both the giver and recipient of work. Minimum wage and overtime guarantees,

protection against some forms of workplace discrimination, job security in the event of illness or caregiving responsibilities, and the right to engage in collective activity without penalty are just some of the benefits that are determined by which half of each of these binaries a particular worker is slotted into.<sup>1</sup>

Due to the pandemic caused by the novel coronavirus, this long list of binaries appears to have a new addition: essential versus non-essential labor. The single most important consequence of being deemed “essential” is that a worker enjoys the ability—or suffers the obligation—to continue working. Essential workers thus continue earning money at a time when a rapidly growing percentage of the American workforce is without income. At the same time, many essential workers operate in high-exposure environments or perform tasks that severely raise their chances of contracting COVID-19, the disease caused by the novel coronavirus. Other consequences associated with “essential” status do not apply evenly across all affected workers. The Occupational Safety and Health Administration (OSHA), which is responsible for ensuring a safe working environment, has increased efforts to protect healthcare workers, but has largely left other essential workers vulnerable to their employers’ determinations regarding adequate personal protective equipment and social distancing measures.<sup>2</sup> Legislative efforts to offer essential workers heightened protections or pay differ in their coverage and generosity.<sup>3</sup> Nevertheless, it remains the case that individuals undertaking essential labor are increasingly set apart from other workers.

Because of the expanding range of obligations and privileges attached to this designation, federal agencies, state and local governments, and businesses have all been at pains to define (and sometimes, *redefine*) the contours of “essential labor.”<sup>4</sup> Yet, and as with

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<sup>1</sup> For a more complete list of benefits allocated via just one of these binaries, the employee/independent contractor distinction, see Deepa Das Acevedo, *Unbundling Freedom in the Sharing Economy*, 91 S. CAL. L. REV. 793, 799-800 (2018).

<sup>2</sup> OSHA, INTERIM ENFORCEMENT RESPONSE PLAN FOR CORONAVIRUS DISEASE 2019 (COVID-19) (Apr. 13, 2020), <https://www.osha.gov/memos/2020-04-13/interim-enforcement-response-plan-coronavirus-disease-2019-covid-19>; Editorial, ‘You’re On Your Own,’ *Essential Workers Are Being Told*, N.Y. TIMES (Apr. 20, 2020), <https://www.nytimes.com/2020/04/20/opinion/osha-coronavirus.html>.

<sup>3</sup> Section I(D), *infra*.

<sup>4</sup> *Id.*

most concepts that acquire instant omnipresence, there is little certainty as to what makes essential labor *essential*. In California, the State Public Health Officer created a list of the thirteen industry sectors employing most essential workers and providing specific details of the tasks that are considered essential as well as guidelines for performing them.<sup>5</sup> In Pennsylvania, the Governor's office posted a table on the digital database Scribd that breaks down business activities by industry, sector, subsector, and industry group.<sup>6</sup> In Alabama, the State Health Officer listed both essential activities and essential businesses and operations, although the list of essential activities and businesses was over twice as long as its non-essential counterpart.<sup>7</sup> The various lists issued by governmental actors overlap enough to suggest coherence, and diverge enough to make coherence seem like wishful thinking. And, as if this were not confusing enough, most states allowed businesses themselves to decide whether or not they are essential, which is how workers at craft stores, pool supply stores, and videogame stores came to find themselves labelled "essential."<sup>8</sup>

What has been lost in the creation and interpretation of these lists and in the debates over managing essential workers during the pandemic is the fact that *essentiality* is not at all new to the way we conceptualize and regulate labor in the United States. COVID-19 may have created a new category of work that is called "essential," but it has not introduced a new way of thinking about work—far from it. We have *always* allocated protections and obligations based on the degree to which a specific job is considered essential. The only thing that has changed is the referent: essential *to whom?*<sup>9</sup>

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<sup>5</sup> Cal. Pub. Health, Essential Workforce (Apr. 28, 2020).

<sup>6</sup> Industry Operation Guidance (Gov. Tom Wolf May 28, 2020).

<sup>7</sup> Scott Harris, Order Of The State Health Officer Suspending Certain Public Gatherings Due To Risk Of Infection By Covid-19 (Apr. 3, 2020).

<sup>8</sup> Polly Mosendz & Anders Melin, *Bosses Stretch the Definition of Who Is 'Essential' — and Workers Take the Risk*, BLOOMBERG (April 9, 2020, 4:00 AM CDT), <https://www.bloomberg.com/news/features/2020-04-09/are-you-an-essential-worker-in-the-pandemic-that-depends>.

<sup>9</sup> Zachary Jagers, *We call workers 'essential' — but is that just referring to the work, not the people?*, THE CONVERSATION (May 4, 2020 8.11am EDT), <https://theconversation.com/we-call-workers-essential-but-is-that-just-referring-to-the-work-not-the-people-137460>.

This Article argues, first, that the rise of “essential labor” as a category of analysis does not fundamentally alter the landscape of work regulation in the United States.<sup>10</sup> It does not provide a meaningfully new analytic rubric for allocating benefits and protections, and it is not the harbinger of a wholesale reimagining of work law that has been called for by a growing number of scholars and activists.<sup>11</sup> If anything, essential labor replicates *and exacerbates* an attitude that has always been central to American work law: the idea that work should be measured, classified, regulated, and remunerated according to how much it benefits someone other than the worker.<sup>12</sup> Before the pandemic (and likely, after it), the United States considered work to be essential when it is essential to the *employer*; during the pandemic, essential labor has come to mean tasks that are essential *to society*.<sup>13</sup> In neither scenario is the relationship between the worker and their work at the center of legislation, adjudication, or business operations.

Second, the Article argues that unlike existing employer- or society-centric approaches to determining essentiality—both of which necessitate a highly variable and fact-based analysis—the question “is the work being performed essential to the worker?” necessarily invites a positive response. This is morally true, in the sense that longstanding social science scholarship and decades of international human rights discourse have established the critical relationship between work and individual dignity.<sup>14</sup> Just as importantly, it is also *legally* true in the particular circumstances of the United States, inasmuch as numerous aspects of a safe and healthful life are, in this country, predicated on the work relationship. In the United

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<sup>10</sup> *Contra* Molly Kinder, *Essential but Undervalued: Millions of Health Care Workers Aren't Getting the Pay or Respect They Deserve in the COVID-19 Pandemic*, BROOKINGS (May 28, 2020); Sarah Jones, *There's No Such Thing as Unskilled Labor*, NY MAG (Mar. 21, 2020), <https://www.brookings.edu/research/essential-but-undervalued-millions-of-health-care-workers-arent-getting-the-pay-or-respect-they-deserve-in-the-covid-19-pandemic/>.

<sup>11</sup> *See, e.g., About Clean Slate for Worker Power*, CLEANSLATEWORKERPOWER.ORG, <https://www.cleanslateworkerpower.org/about> (last visited Apr. 4, 2020).

<sup>12</sup> Part II(B), *infra*.

<sup>13</sup> *See* Parts I(D) and II, *infra*.

<sup>14</sup> Pablo Gilabert, *Labor Human Rights And Human Dignity*, 42 PHIL. & SOC. CRIT. 171, 183 (2016).

States more than in any other highly developed nation, one both works to live and works to have something to live for.

Finally, this Article suggests how we should respond to the realization that work is always essential to the American worker. Briefly put, the fact that labor is inescapably essential to the worker—as COVID-19 has made painfully clear—means that we can no longer abide by the longstanding and idiosyncratically American concept of “at-will” employment, according to which employment relationships may be terminated without notice or pay for any reason.<sup>15</sup> To be sure, eliminating at-will employment will not singlehandedly solve all the problems bedeviling American work law.<sup>16</sup> Nevertheless, it is an important and necessary first step toward fixing those problems and toward

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<sup>15</sup> Note that Montana alone does not follow the at-will rule. Montana Wrongful Discharge from Employment Act of 1987, Mont. Code Ann. §§ 39-2- 901 to 39-2-915 (2003). Other calls to revise or dispense with the at-will rule include Rachel Arnow-Richman, *Just Notice: Re-Reforming Employment At Will*, 58 UCLA L. REV. 1, 72 (2010); Lawrence E. Blades, *Employment At Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power*, 67 COLUM. L. REV. 1404 (1967); Cynthia L. Estlund, *How Wrong Are Employees About Their Rights, and Why Does It Matter?*, 77 N.Y.U. L. REV. 6 (2002); Jeffrey M. Hirsch, *The Law of Termination: Doing More with Less*, 68 MD. L. REV. 89 (2008); Venessa F. Kuhlmann-Macro, *Blowing the Whistle on the Employment at-will Doctrine*, 41 DRAKE L. REV. 339 (1992); Arthur S. Leonard, A New Common Law of Employment Termination, 66 N.C. L. REV. 631 (1988); Peter Linzer, *The Decline of Assent: At-Will Employment as a Case Study of the Breakdown of Private Law Theory*, 20 GA. L. REV. 323 (1986); Ann C. McGinley, *Rethinking Civil Rights and Employment At Will: Toward a Coherent National Discharge Policy*, 57 OHIO ST. L.J. 1443 (1996); Cornelius J. Peck, *Unjust Discharges From Employment: A Necessary Change in the Law*, 40 OHIO ST. L.J. 1 (1979); Henry H. Perritt, Jr., *Wrongful Dismissal Legislation*, 35 UCLA L. REV. 65 (1987); Nicole B. Porter, *The Perfect Compromise: Bridging the Gap Between At-Will Employment and Just Cause*, 87 NEB. L. REV. 62 (2008); Theodore J. St. Antoine, *A Seed Germinates: Unjust Discharge Reform Heads Toward Full Flower*, 67 NEB. L. REV. 56 (1988); Peter Stone Partee, *Reversing the Presumption of Employment At-Will*, 44 VAND. L. REV. 689 (1991); Clyde W. Summers, *Employment At Will in the United States: The Divine Right of Employers*, 3 U. PA. J. LAB. & EMP. L. 65 (2000); Cass R. Sunstein, *Switching the Default Rule*, 77 N.Y.U. L. REV. 106 (2002). This Article builds on those earlier efforts by offering a new and especially timely perspective based on essentiality analysis.

<sup>16</sup> A considerable literature argues that U.S. labor and employment law is damaged beyond resolution. For a recent and representative perspective, see *About*, CLEAN SLATE FOR WORKER POWER, *supra* note 11.

implementing the true labor and employment law lesson of the pandemic.<sup>17</sup>

Part I begins with a brief overview of the way COVID-19 has impacted the American labor force, as well as of legislative efforts to mitigate that impact that have been undertaken at federal, state, and local levels. This account will necessarily be incomplete, as all real-time commentaries are. My goal is simply to demonstrate that, even early on, the pandemic caused such devastation as to make it seem that new ways of doing and thinking about work would inevitably arise. The section goes on to show how “essential labor” emerged as that seemingly disruptive concept, and how, in the midst of the pandemic, popular discourse and relevant law came to define essential labor as labor that is essential *to society*.

Part II demonstrates that essentiality was a key metric in American work law even before the onset of the coronavirus pandemic, but that it previously referred to labor that was essential *to the employer*. I focus on labor and employment law’s most important binary, employee versus independent contractor, and show how its conceptualization and implementation has exemplified the attitude that work should be regulated according to how much the employer values it. This section will also highlight various criticisms of the employer-focused analysis that have characterized classification law and work law more generally, many of which underscore how existing approaches minimize or altogether ignore the worker’s relationship to the work.

Part III draws on theoretical and social science arguments—as well as international and foreign law—to support the growing view that work is essential to human *flourishing*. At the same time, it also revisits American work law in order to underscore how, in the United States, with its notoriously weak social welfare net, work is essential to *living*. It goes on

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<sup>17</sup> Others have made similar, but less broad, proposals in relation to COVID-19. See, e.g., Charlotte Garden, *Shelter from the Storm*, ONLABOR (May 4, 2020), <https://www.onlabor.org/shelter-from-the-storm/> (arguing for just cause termination for essential workers); Rachel Sandalow-Ash, *Protecting Whistleblowers under COVID-19: A Proposal for “Precognance” for Termination*, ONLABOR (May 5, 2020), <https://www.onlabor.org/protecting-whistleblowers-under-covid-19-a-proposal-for-precleanance-for-termination/>; Rachel Arnow-Richman, *Just Notice: Re-Reforming Employment at Will*, 58 UCLA L. REV. 1 (2010).



to argue that, in effect, working in this country outside certain forms of worker classifications reduces individuals to bodies for hire—and that working within those more protected classification statuses is not much better.

Part IV brings together the preceding sections by arguing for the elimination of the at-will rule as a way of acknowledging the essentiality of labor to the American worker. While the insupportability of at-will employment is not specific to the circumstances generated by COVID-19, it can and should be one of the pandemic's primary lessons.

### I. COVID-19 COMES TO AMERICA

A coronavirus is a type of virus that typically causes respiratory illnesses in human beings; the name *corona* (“crown”) is a Latin reference to the virus’ appearance.<sup>18</sup> The common cold is caused by a type of coronavirus.<sup>19</sup> The *novel* coronavirus currently circulating around the world first emerged in Wuhan, China, in late 2019.<sup>20</sup> The disease caused by this virus, called COVID-19,<sup>21</sup> is suspected to have some origin in an animal, but as of this writing it has consistently and devastatingly spread between human beings for over six months.<sup>22</sup> At present, over 16,000,000 people have been infected with the virus worldwide, and over 600,000 have died.<sup>23</sup> The first instance of coronavirus infection in the United States was identified in Washington state on January 20, 2020.<sup>24</sup> Since then, over 4,200,000 cases of infection have been identified and over 140,000 Americans have died.<sup>25</sup>

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<sup>18</sup> *Human Coronavirus Types*, CENTERS FOR DISEASE CONTROL AND PREVENTION, <https://www.cdc.gov/coronavirus/types.html> (last visited June 15, 2020).

<sup>19</sup> *Id.*

<sup>20</sup> *Frequently Asked Questions*, CENTERS FOR DISEASE CONTROL AND PREVENTION, <https://www.cdc.gov/coronavirus/2019-ncov/faq.html> (last visited June 15, 2020).

<sup>21</sup> *Id.* (noting that “‘CO’ stands for ‘corona,’ ‘VI’ for ‘virus,’ and ‘D’ for disease”).

<sup>22</sup> *Situation Summary*, CENTERS FOR DISEASE CONTROL AND PREVENTION, [https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/cases-in-us.html?CDC\\_AA\\_refVal=https%3A%2F%2Fwww.cdc.gov%2Fcoronavirus%2F2019-ncov%2Fcases-updates%2Fsummary.html](https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/cases-in-us.html?CDC_AA_refVal=https%3A%2F%2Fwww.cdc.gov%2Fcoronavirus%2F2019-ncov%2Fcases-updates%2Fsummary.html) (last visited July 29, 2020).

<sup>23</sup> *COVID-19 Coronavirus Pandemic*, WORLDOMETER, <https://www.worldometers.info/coronavirus/> (last visited July 29, 2020).

<sup>24</sup> Michelle L. Holshue et al., *First Case of 2019 Novel Coronavirus in the United States*, 382 N. ENGL. J. MED. 929, 929 (2020), DOI: 10.1056/NEJMoa2001191.

<sup>25</sup> *Situation Summary*, *supra* note 22.

The number of infections is likely grossly understated, both because of the extent to which the virus can spread asymptotically and because of the paucity of testing facilities. All 50 states, the District of Columbia, Puerto Rico, Guam, the U.S. Virgin Islands, and the Northern Mariana Islands have reported cases of COVID-19.<sup>26</sup>

The pace at which law and policy changed in response to the spread of COVID-19, although widely decried as monstrously slow, was also so dizzyingly rapid that it is difficult to capture on paper without risking hyperbole.<sup>27</sup> At first, government officials in the United States and in many parts of the world spoke of “containment.”<sup>28</sup> This language reflected a belief that it was possible to identify and quarantine individuals who had been exposed to the coronavirus and, moreover, that doing so was a plausible way of avoiding a thorough breakdown of medical facilities. However, beginning in late March, 2020, the conversation shifted to “mitigation,” which does not seek to *prevent* the transmission of the disease by isolating infected individuals so much as it seeks to *slow* the rate of transmission in order to avoid overburdening medical facilities.<sup>29</sup>

Mitigation, though widely accepted by the medical community as an effective tool and credited for reducing the total infection and death rates in the United States, has also undeniably brought with it many non-medical (or *indirectly* medical) ills.<sup>30</sup> Foremost among these non-medical costs of mitigation is a set of broad, deep, and often surprising impacts on the labor force.<sup>31</sup> People have been fired, furloughed, inadequately

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<sup>26</sup> *Id.*

<sup>27</sup> Matthew Desmond, *Can America’s Middle Class Be Saved from a New Depression?*, N.Y. Times (May 26, 2020), <https://www.nytimes.com/interactive/2020/05/26/magazine/coronavirus-milwaukee-unemployment-jobs.html>.

<sup>28</sup> Stephen M. Parodi & Vincent X. Liu, *Viewpoint: From Containment to Mitigation of COVID-19 in the US*, J. AM. MED. ASSOC. (March 13, 2020. doi:10.1001/jama.2020.3882) (arguing, as late as March 13, that “It is critically important that the strategy for slowing the spread of the COVID-19 pandemic change from containment to mitigation”).

<sup>29</sup> Daniel Flatley et al., *The U.S. Can’t Contain Coronavirus, It Just Hopes to Mitigate its Impact*, FORTUNE (Mar. 10, 2020, 12:53 PM CDT), <https://fortune.com/2020/03/10/us-coronavirus-cases-spread-white-house-trump-containment/>.

<sup>30</sup> *Opinion: We Need Smart Solutions to Mitigate the Coronavirus’s Impact. Here are 43.*, WASH. POST (Mar. 20, 2020).

<sup>31</sup> See Natalie Delgadillo, *Locals Struggle to Find Non-Coronavirus Health Care Amid Pandemic*, NPR (Apr. 28, 2020),

compensated, and inadequately protected from newly arising work-related hazards.

*A. The Impact of COVID-19 on the American Workforce*

In early April, the Bureau of Labor Statistics (BLS) issued its first jobs report after the coronavirus had spread significantly within the United States. The Bureau announced that “[t]otal nonfarm payroll employment fell by 701,000 in March, and the unemployment rate rose to 4.4 percent.”<sup>32</sup> That figure, frightening as it was to private individuals and government officials alike, proved to be miniscule in comparison to what lay ahead. As the *New York Times* rather chillingly noted upon the release of the March BLS report, this “data was mostly collected in the first half of the month, before stay-at-home orders began to cover much of the nation.”<sup>33</sup>

By early May, an analysis of BLS data suggested that at least eight states had reported unemployment claims that amounted to 25% of their pre-pandemic employment levels, while another six reported claims amounting to 20% of those levels.<sup>34</sup> States that rely heavily on manufacturing, retail, and tourism were more severely affected than states reporting the highest number of COVID-19 infections: the May 2020 analysis of BLS data stated, for instance, that New York had not yet breached 20% in unemployment claims despite being the epicenter of the outbreak in the continental United States.<sup>35</sup>

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<https://www.npr.org/local/305/2020/04/28/847316067/locals-struggle-to-find-non-coronavirus-health-care-amid-pandemic>; Suzi Hong, *Opinion: Pandemics Come and Go, But the Mental Harms Tend to Linger*, TIMES OF SAN DIEGO (Apr. 28, 2020), <https://timesofsandiego.com/opinion/2020/04/28/opinion-pandemics-come-and-go-but-the-mental-harms-tend-to-linger/>.

<sup>32</sup> *Employment Situation Summary*, BUREAU OF LABOR STATISTICS (Apr. 3, 2020).

<sup>33</sup> Nelson D. Schwartz & Patricia Cohen, *Decade of Job Growth Comes to an End, Undone by a Pandemic*, N.Y. TIMES (Apr. 3, 2020), <https://www.nytimes.com/2020/04/03/business/economy/coronavirus-jobs-report.html>.

<sup>34</sup> Dave Shideler & Jonas Crews, *Unemployment Continues to Rise, Recovery Seems Elusive*, HEARTLANDFORWARD (Apr. 30, 2020), <https://heartlandforward.org/unemployment-continues-to-rise-recovery-seems-elusive> (noting that, as of April 30, these states were GA, HI, KY, LA, MI, NV, PA, and RI).

<sup>35</sup> *Id.*

Indeed, variations in industry characteristics and constraints have resulted in distinctive patterns of job loss. Hospitality workers—and within that category, food service workers—have been especially hard hit, with over seven percent of restaurant, hotel, and bar workers filing for unemployment during the week of March 15–21 alone.<sup>36</sup> The highest “week-to-week” rise in unemployment claims for the second week of the pandemic, March 22–28, included manufacturing, retail, and construction; for week three (March 29–April 4) the damage began extending up the supply chain to affect wholesale and retail trade (including freight and transportation); by the first full week of April (April 5–11) the impact had extended to white collar workers like those in management, finance, insurance, and even the online review site Yelp, which laid off approximately one-third of its workforce on April 9.<sup>37</sup> As this article was being written, fruit and meat processing workers were beginning to suffer immense waves of disease.<sup>38</sup>

The pandemic’s impact has also varied according to worker demographics. Millennials (roughly, those born between 1980 and 1997) have been among the worst hit, in part because they had not yet amassed a “wealth cushion” like Generation X and Baby Boomers, and in part because Millennials disproportionately work in industries like hospitality, recreation, and retail that cannot easily adjust to quarantine orders or remote work practices.<sup>39</sup> The same industries are heavily occupied by minorities, who also tend to have smaller emergency savings, so that the labor market contraction caused by COVID-19 fallen more heavily on BIPOC (Black, Indigenous, People of Color) workers than other groups.<sup>40</sup>

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<sup>36</sup> Andrew Van Dam, *Crisis Begins To Hit Professional And Public-Sector Jobs Once Considered Safe*, WASH. POST: BUSINESS ANALYSIS (April 30, 2020 at 6:32 a.m. CDT), <https://www.washingtonpost.com/business/2020/04/30/jobless-claims-industry/>.

<sup>37</sup> *Id.*

<sup>38</sup> Jerald Brooks & Lakesha Bailey, *We’re Feeding America, but We’re Sacrificing Ourselves*, N.Y. TIMES (June 15, 2020, 5:00 a.m. ET), <https://www.nytimes.com/2020/06/15/opinion/coronavirus-tyson-poultry.html>.

<sup>39</sup> Sean Collins, *Why The Covid-19 Economy Is Particularly Devastating To Millennials*, In *14 Charts*, VOX.COM (May 5, 2020, 8:10am EDT), <https://www.vox.com/2020/5/5/21222759/covid-19-recession-millennials-coronavirus-economic-impact-charts>.

<sup>40</sup> Jonnelle Marte, *Coronavirus U.S. Job Losses Hitting Minorities The Hardest, Fed's Powell Says*, REUTERS (Apr. 29, 2020 / 5:49 PM), <https://www.reuters.com/article/us-usa->

Put together, this means that the youngest, poorest, and most marginalized Americans have suffered first and worst. Nevertheless, the fallout of the coronavirus pandemic extends well beyond these populations. To date, more than 47 million people have filed for unemployment; this is more than 1.2 times the number of claims filed during the Great Recession, which was around 37 million.<sup>41</sup> Likewise, in April, 2020, the unemployment rate reached 14.7%, whereas unemployment during the Great Depression peaked at approximately 25%.<sup>42</sup> Many observers have argued that job loss stemming from the pandemic is different from job loss during both of these earlier economic traumas because it is temporary rather than structural. However, others have countered that the impact on the labor market will not be fleeting because employers, workers, and most significantly consumers will be hesitant to resume past purchasing practices before the advent of a vaccine, and will be unable to afford doing so without a significant improvement in employment levels.<sup>43</sup>

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fed-labor/coronavirus-u-s-job-losses-hitting-minorities-the-hardest-feds-powell-says-idUSKBN22B3EO. See also Campbell Robertson & Robert Gebeloff, *How Millions of Women Became the Most Essential Workers in America*, N.Y. TIMES (Apr. 18, 2020), <https://www.nytimes.com/2020/04/18/us/coronavirus-women-essential-workers.html>.

<sup>41</sup> Eli Rosenberg & Abha Bhattarai, *Another 1.48 million workers are newly unemployed*, WASH. POST (June 25, 2020, 5:51 p.m. CDT), <https://www.washingtonpost.com/us-policy/2020/06/25/june-unemployment-insurance/>; Carmen Reinicke, *US Weekly Jobless Claims Hit 1.5 Million, Bringing The 13-Week Total To 46 Million*, BUS. INSIDER (June 18, 2020, 7:36 AM), <https://www.businessinsider.com/us-weekly-jobless-claims-unemployment-insurance-filings-economy-coronavirus-recession-2020-6> (stating that 37 million people filed for unemployment insurance during the Great Recession).

<sup>42</sup> Bureau of Lab. Stats., *The Employment Situation—April 2020* (May 8, 2020), [https://www.bls.gov/news.release/archives/empsit\\_05082020.pdf](https://www.bls.gov/news.release/archives/empsit_05082020.pdf) (last visited July 4, 2020); Greg Iacurci, *Unemployment is Nearing Great Depression Levels. Here's How the Eras are Similar—and Different*, CNBC (May 19, 2020, 8:00am EDT), <https://www.cnbc.com/2020/05/19/unemployment-today-vs-the-great-depression-how-do-the-eras-compare.html> (giving the unemployment rate during the Great Depression as 25.6%).

<sup>43</sup> Compare Jeff Cox, *An Unemployment Rate Of 23%? The Real Jobless Picture Is Coming Together*, CNBC (Thu. Apr. 23 2020, 3:31 PM EDT), <https://www.cnbc.com/2020/04/23/an-unemployment-rate-of-23percent-the-real-jobless-picture-is-coming-together.html> with Louise Sheiner & Kadija Yilla, *The ABCs Of The Post-COVID Economic Recovery*, BROOKINGS (May 4, 2020), <https://www.brookings.edu/blog/up-front/2020/05/04/the-abcs-of-the-post-covid->

The acidic shock of these developments is already evoking comparison to other devastating world-historical moments, including the “Spanish” Flu (1918-20), the Great Recession (2007-09), September 11, and even World War II.<sup>44</sup> To a lesser but growing extent, commentators have alluded to the Great Depression (1929-1930s) and the most famous instantiation of the Bubonic Plague, the Black Death, which reached its European peak between 1347-51.<sup>45</sup> In part, these analogies acknowledge the extent to which the pandemic is a world-historical moment that has come to define and alter reality for billions of people around the globe. Simultaneously, however, the analogies are meant to offer hope, since many of these earlier traumas spurred great social and legal development relating to work. World War II led to a burst of industrial and scientific development, to say nothing of social transformation brought on by women’s large-scale entry into the workforce.<sup>46</sup> The Great Depression arguably gave Americans their most significant labor reforms since the

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economic-recovery/. See also Alec Levenson, *A Long Time Until the Economic New Normal*, MIT SLOAN (Apr. 10, 2020), <https://sloanreview.mit.edu/article/a-long-time-until-the-economic-new-normal/>.

<sup>44</sup> Robert J. Barro et al., *The Coronavirus and the Great Influenza Pandemic: Lessons from the “Spanish Flu” for the Coronavirus’s Potential Effects on Mortality and Economic Activity* (Nat’l Bureau of Econ. Research, Working Paper No. 26866, 2020); Andy Kiersz & Carmen Reinicke, *5 Charts Show How the Coronavirus Crisis Has Dwarfed the Great Recession in Just Two Months*, BUSINESS INSIDER (May 24, 2020, 6:29 AM), <https://www.businessinsider.com/5-charts-how-coronavirus-economic-fallout-compares-to-great-recession-2020-5>; Carlie Porterfield, *Coronavirus Has Now Killed More New Yorkers Than 9/11*, FORBES (Apr. 7, 2020, 2:22 PM EDT), <https://www.forbes.com/sites/carlieporterfield/2020/04/07/coronavirus-has-now-killed-more-new-yorkers-than-911/#4008a328befc>; Gillian Brunet, *5 Lessons From World War II for the Coronavirus Response*, VOX (Apr. 10, 2020, 12:20 PM EDT), <https://www.vox.com/2020/4/10/21214980/coronavirus-economy-jobs-ppe>.

<sup>45</sup> Jon Meacham, *Pandemics of the Past*, N.Y. TIMES (May 7, 2020), <https://www.nytimes.com/2020/05/07/books/review/pandemics-of-the-past-coronavirus.html> (discussing the Black Death), and William Gumede, *The Impact of Coronavirus Could Compare to the Great Depression*, ALJAZEERA (May 3, 2020), <https://www.aljazeera.com/indepth/opinion/impact-coronavirus-compare-great-depression-200420070542882.html>.

<sup>46</sup> A.W. Purdue, *The Transformative Impact of World War II*, EGO (Apr. 18, 2016), <http://ieg-ego.eu/en/threads/alliances-and-wars/war-as-an-agent-of-transfer/a-w-purdue-the-transformative-impact-of-world-war-ii#citation>.

Emancipation Proclamation and the passing of the 13<sup>th</sup> Amendment.<sup>47</sup> And, to a certain extent, the Black Death showed European aristocrats the value of peasant labor.<sup>48</sup>

American legislators ranging from city councils to Congress have attempted to respond to COVID-19's massive impact on the labor market with legal initiatives that are in some respects as grand as the governmental interventions following these earlier disasters. Given the immense scale, multiple levels, and rapidly evolving nature of legislative responses to the pandemic, this Article cannot offer an in-depth analysis of these legal responses. Additionally, what matters more than the content of the response is its *scale*: the dimensions and tone of official response have contributed to the sense that "essential labor" *must* signal something new.

#### *B. Federal Legislative & Administrative Efforts to Minimize Workforce Damage*

At the federal level, legislative action consisted of four new statutes, amounting to 401 pages of text passed in 51 days: the Coronavirus Preparedness and Response Supplemental Appropriations Act (enacted March 6),<sup>49</sup> the Families First Coronavirus Response Act (enacted March 18),<sup>50</sup> the Coronavirus Aid, Relief, and Economic Security Act (enacted March 27),<sup>51</sup> and the Paycheck Protection Program and Health Care Enhancement Act (enacted April 24).<sup>52</sup>

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<sup>47</sup> See Fair Labor Standards Act of 1938, Pub. L. No. 75-718, 52 Stat. 1060 (1938); National Labor Relations Act of 1935, Pub. L. No. 74-198, 49 Stat. 449 (1935); Social Security Act of 1935, Pub. L. No. 74-271, 49 Stat. 620 (1935); Michael E. Parrish, *The Great Depression, The New Deal, and the American Legal Order*, 59 WASH. L. REV. 723 (1984).

<sup>48</sup> Harilaos Kitsikopoulos, *The Impact of the Black Death on Peasant Economy in England, 1350-1500*, 29 J. PEASANT STUD. 71 (2002).

<sup>49</sup> Pub. L. No. 116-123 (2020) (henceforth "Supplemental Appropriations Act").

<sup>50</sup> Pub. L. No. 116-127 (2020) (henceforth "FFCRA").

<sup>51</sup> Pub. L. No. 116-136 (2020) (henceforth "CARES Act").

<sup>52</sup> Pub. L. No. 116-139 (2020) (henceforth "PPP").

## 1. Supplemental Appropriations Act

The first of these new laws—the Supplemental Appropriations Act—had the least direct impact on American workers. It was largely concerned with providing extra funding to federal agencies that would have to marshal a response to the impending outbreak, in particular to the Department of Health and Human Services (which received \$6.2 of the total \$8.3 billion allocated by the Act) for the development of vaccines and other medical and therapeutic measures.<sup>53</sup> By contrast, of the three remaining federal efforts, each one in part or in whole addressed itself to the challenges faced by ordinary Americans.

## 2. Families First Coronavirus Response Act

The FFCRA, enacted less than two weeks after the Supplemental Appropriations Act, allocated approximately \$104 billion to dealing with the unemployment and caretaking obligations that were rapidly impinging on the workforce.<sup>54</sup> On the unemployment side, the FFCRA provided an additional \$1 billion to states in order to fund their unemployment compensation programs and incentivized looser requirements to access those programs.<sup>55</sup> On the caretaking side, the FFCRA provided two weeks (80 hours) of paid sick leave for full-time employees who themselves needed to self-quarantine or self-isolate, or who were obliged to care for an individual under quarantine or isolation orders, or who were obliged to care for a child whose school or daycare had closed due to the pandemic.<sup>56</sup> The FFCRA contained other important provisions as well, some of which—

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<sup>53</sup> Stephanie Oum, Adam Wexler, & Jennifer Kates, *The U.S. Response to Coronavirus: Summary of the Coronavirus Preparedness and Response Supplemental Appropriations Act, 2020*, KFF (Mar. 11, 2020), <https://www.kff.org/global-health-policy/issue-brief/the-u-s-response-to-coronavirus-summary-of-the-coronavirus-preparedness-and-response-supplemental-appropriations-act-2020/>.

<sup>54</sup> *Summary: H.R. 6074: Coronavirus Preparedness and Response Supplemental Appropriations Act, 2020*, GOVTRACK.US, (last visited June 5, 2020), <https://www.govtrack.us/congress/bills/116/hr6074/summary>.

<sup>55</sup> Kellie Moss, Lindsey Dawson, Michelle Long, Jennifer Kates, MaryBeth Musumeci, Juliette Cubanski, & Karen Pollitz, *The Families First Coronavirus Response Act: Summary of Key Provisions*, KFF (Mar. 23, 2020), <https://www.kff.org/global-health-policy/issue-brief/the-families-first-coronavirus-response-act-summary-of-key-provisions/>.

<sup>56</sup> *Id.*



like the requirement that private health insurers and Medicare cover COVID-19 testing—were indirectly associated with individuals' work statuses.<sup>57</sup>

### 3. Coronavirus Aid, Relief, and Economic Security Act

The CARES Act that was enacted three weeks after the Supplemental Appropriations Act, was—by a considerable margin—the single largest spending bill in American history.<sup>58</sup> Its provisions contained several key protections designed to acknowledge and mitigate COVID-19's unprecedented impact on the workforce, including:

- A \$1,200 stimulus check for most Americans, with more possible for married couples and parents, subject to an income ceiling;<sup>59</sup>
- An addition of \$600/week to existing state unemployment compensation payments, for a maximum of 13 weeks;<sup>60</sup>
- An expansion of eligibility for unemployment compensation to include workers who are not classified as employees—including gig workers as well as freelancers and independent contractors in the conventional economy;<sup>61</sup>
- Emergency grants, loan forgiveness, and—most notably—new and partially forgivable loans to small businesses through the Paycheck Protection Program;<sup>62</sup>
- A tax credit of up to \$5,000 per employee (for all of 2020) regardless of employer size.<sup>63</sup>

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<sup>57</sup> *Id.*

<sup>58</sup> *Summary, supra* note 54.

<sup>59</sup> CARES Act, § 2201.

<sup>60</sup> CARES Act, § 2104.

<sup>61</sup> CARES Act, § 2102.

<sup>62</sup> See, e.g., CARES Act, § 1102; § 1106.

<sup>63</sup> CARES Act, § 2301. This selection and explanation was compiled from a variety of sources: *COVID-19-Related Employee Retention Credits: Determining When an Employer is Considered to have a Significant Decline in Gross Receipts and Maximum Amount of an Eligible Employer's Employee Retention Credit FAQs*, IRS.GOV, [https://www.irs.gov/newsroom/covid-19-related-employee-retention-credits-determining-when-an-employer-is-considered-to-have-a-significant-decline-in-gross-receipts-and-maximum-amount-of-an-eligible-employers-employee-retention#max\\_amount](https://www.irs.gov/newsroom/covid-19-related-employee-retention-credits-determining-when-an-employer-is-considered-to-have-a-significant-decline-in-gross-receipts-and-maximum-amount-of-an-eligible-employers-employee-retention#max_amount) (last visited June 5, 2020); Kelsey Snell, *What's Inside The*

Like the FFCRA, the CARES Act contained several other provisions that were more indirectly—but, in the American context, very clearly—connected to an individual’s work status. Some of the most significant of these work-adjacent provisions pertain to healthcare (greater coverage for COVID-19 testing and treatment),<sup>64</sup> student loan payments (suspension of principal and interest payments until September 30),<sup>65</sup> and retirement plans (penalty-free withdrawals and temporary waiver of required minimum distributions).<sup>66</sup> All of these sought to acknowledge the immense and unexpected financial toll caused by the mitigation-inspired cessation of work activities.

#### 4. Paycheck Protection Program and Health Care Enhancement Act

Congress’ final measure during the first few months of the coronavirus pandemic established more funding for existing measures rather than new protections or obligations. Specifically, it provided a further \$320 billion for the Paycheck Protection Program created by the CARES Act, as well as \$160 billion for various other efforts including hospital assistance, disaster loans, and COVID-19 testing by states and municipalities.<sup>67</sup>

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*Senate’s \$2 Trillion Coronavirus Aid Package*, NPR (Mar. 23, 2020), <https://www.npr.org/2020/03/26/821457551/whats-inside-the-senate-s-2-trillion-coronavirus-aid-package>; *H.R. 748: Coronavirus Aid, Relief, and Economic Security Act*, GOVTRACK.US, <https://www.govtrack.us/congress/bills/116/hr748/summary> (last visited June 5, 2020).

<sup>64</sup> CARES Act, § 3201; several provisions of Title III, Subtitle D, especially § 3713.

<sup>65</sup> CARES Act, § 3513.

<sup>66</sup> CARES Act, §§ 2202–03.

<sup>67</sup> *Summary*, *supra* note 54; James J. Plunkett & Michael Oliver Eckard, *New Federal Stimulus Legislation Provides Funding for Small Businesses, Healthcare Providers, and Coronavirus Testing*, NAT’L L. REV. (Apr. 24, 2020), <https://www.natlawreview.com/article/new-federal-stimulus-legislation-provides-funding-small-businesses-healthcare>.

## 5. Federal Administrative Actions, Helpful and Hurtful

Although Congress undertook massive legislative efforts to respond to the coronavirus pandemic, federal administrative actors were admittedly sometimes more focused on facilitating economic recovery than on helping workers themselves. As the introduction to this Article observed, the Occupational Health and Safety Administration (OSHA) received widespread criticism for an April 10 guidance document in which it effectively disclaimed any intention to police workplace health practices for a majority of workers.<sup>68</sup> By mid-April, OSHA had received over 3,000 complaints from workers whose employers were failing to observe guidelines for social distancing, and who were not providing adequate protective equipment, hygiene materials, or sufficiently sanitized workplaces.<sup>69</sup> The AFL-CIO eventually sued OSHA for failing to issue emergency standards.<sup>70</sup> In response, on May 19, OSHA revised its guidance, stating that it would be “increasing in-person inspections at all types of workplaces,” and clarified that “coronavirus is a recordable illness, and employers are responsible for recording cases of the coronavirus” if the cases meet usual OSHA criteria.<sup>71</sup>

Similarly, in mid-May, the Department of Labor (DOL) announced changes in its wage and hours regulations that would allow businesses to

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<sup>68</sup> OSHA, INTERIM ENFORCEMENT RESPONSE PLAN FOR CORONAVIRUS DISEASE 2019 (COVID-19) (Apr. 10, 2020), <https://www.osha.gov/memos/2020-04-10/enforcement-guidance-recording-cases-coronavirus-disease-2019-covid-19>.

<sup>69</sup> Alexandra Butler, *Today's News & Commentary—April 17, 2020*, ONLABOR (Apr. 17, 2020), <https://onlabor.org/todays-news-commentary-april-17-2020/>

<sup>70</sup> Fatima Hussein, *AFL-CIO Sues OSHA to Force Temporary Worker-Safety Standard (2)*, BLOOMBERG (May 18, 2020, 9:26 AM) <https://news.bloomberglaw.com/daily-labor-report/afl-cio-sues-osha-to-force-temporary-worker-safety-standard>.

<sup>71</sup> OSHA, NEWS RELEASE: U.S. DEPARTMENT OF LABOR ADOPTS REVISED ENFORCEMENT POLICIES FOR CORONAVIRUS (May 19, 2020), <https://www.osha.gov/news/newsreleases/national/05192020-0>; *In re: American Federation of Labor and Congress of Industrial Organizations*, No. 19-1158 (D.C. Cir., May 18, 2020), <https://www.bloomberglaw.com/public/desktop/document/InreAmericanFederationofLaboraDocketNo2001158DCirMay182020CourtD?1589832712>.

exclude certain workers from eligibility for overtime pay.<sup>72</sup> Although the regulations had long been criticized by courts and employers and the changes were not made in response to COVID-19, employer-side attorneys exulted that “in light of the impact of COVID-19 on the greater business world... now is a great time for employers to take a fresh look at the exempt status of their sales people and other commissioned employees.”<sup>73</sup>

However, one day later, the DOL introduced yet another change that *improved* the ability of some workers to receive hazard pay and other forms of financial incentives. On May 20, the Department announced that salaried, nonexempt workers whose regular wages and overtime pay are calculated according to the “Fluctuating Workweek” method may receive additional compensation without being penalized.<sup>74</sup> Although the DOL had for some time been considering revisions to its Fluctuating Workweek rule, the final impetus came from the coronavirus pandemic.<sup>75</sup> As the announcement stated, the new “rule will make it easier for employers and employees to agree to unique scheduling arrangements while allowing employees to retain access to the bonuses and premiums they would otherwise earn.”<sup>76</sup>

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The purpose of this quick overview is neither to applaud nor critique the substance of federal actions during the early months of the COVID-19 pandemic, but to demonstrate that, even in its preliminary

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<sup>72</sup> News release No. 20-1008-NAT, *U.S. department of labor issues final rule to simplify retail or service establishment exemption*, U.S. DEP’T LAB. (May 18, 2020), <https://www.dol.gov/newsroom/releases/whd/whd20200518>.

<sup>73</sup> Anna L. Rothschild & Christopher M. Pardo, *The DOL’s New Rule Removes Presumption Against Overtime Exemption for Possible Retail and Service Establishments, Broadening Availability to Employers*, HUNTON EMP. & LAB. PERSPECTIVES (May 26, 2020), <https://www.huntonlaborblog.com/2020/05/articles/flsa-wage-hour/the-dols-new-rule-removes-presumption-against-overtime-exemption-for-possible-retail-and-service-establishments-broadening-availability-to-employers/>.

<sup>74</sup> The “fluctuating workweek” method of calculating overtime pay applies when an employee receives a fixed salary for fluctuating work hours. See 29 CFR 778.114(a).

<sup>75</sup> U.S. DEP’T OF LAB., Wage & Hour Div., *Fluctuating Workweek Method of Computing Overtime under 29 CFR 778.114*, <https://www.dol.gov/sites/dolgov/files/WHD/fww/FR-FWW.pdf>.

<sup>76</sup> *Id.*

phase, the pandemic elicited responses from federal actors that were unprecedented in their scale even if they were often deservedly viewed as insufficient. Federal legislative efforts, though widely derided for being inadequate in terms of dollar amount and slow to arrive (partly because of President Trump's insistence on having his signature appended to the checks received by Americans), were nonetheless also lauded as the largest stimulus effort in the history of the country.<sup>77</sup> Federal agencies, though somewhat uneven in their responses, have either changed course in the face of deserved criticism (OSHA) or sought to balance competing concerns for worker and employers (DOL). In this atmosphere, and particularly in light of the additional state efforts described below, it was entirely reasonable for Americans to feel that they were on the cusp of new ways of doing and thinking about work, and that a category like "essential labor" signaled a departure from the old order.

### *C. State Efforts to Minimize Workforce Damage*

Responses to the pandemic, and especially to its impact on the workforce, have been predictably varied below the federal level. By mid-June, only thirty-eight states had enacted or adopted legislation pertaining to COVID-19, and there were considerable differences even among those that had passed laws intended to mitigate workforce impact.<sup>78</sup> These differences derived in part from how the pandemic exacerbated pre-existing variations in how states approached various work-related issues (e.g., unemployment compensation). For instance, under regular circumstances, eight states provide less than 26 weeks of unemployment benefits; consequently, the 13 weeks and \$600/week added by the CARES

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<sup>77</sup> Nicole Lyn Pesce, *84% of Americans Say They Need Another Stimulus Check*, MARKETWATCH (Apr. 23, 2020, 9:40 AM ET), <https://www.marketwatch.com/story/1-in-3-americans-say-their-stimulus-checks-wont-sustain-them-for-even-a-month-2020-04-08>; Katelyn Burns, *Trump Wants His Name on Millions of Stimulus Checks, Even if it Delays Them*, VOX (Apr. 15, 2020 1:40 PM EDT), <https://www.vox.com/policy-and-politics/2020/4/15/21222046/trump-name-stimulus-checks-delays>; Jordan Fabian & Justin Sink, *Trump Signs \$2 Trillion Virus Bill, Largest Ever U.S. Stimulus*, BLOOMBERG (Mar. 27, 2020, 3:32 PM CDT), <https://www.bloomberg.com/news/articles/2020-03-27/trump-signs-2-trillion-virus-bill-largest-ever-u-s-stimulus>.

<sup>78</sup> COVID-19 Policy Tracker: State Legislation on COVID-19, MULTISTATE, <https://www.multistate.us/pages/covid-19-policy-tracker> (last visited June 15, 2020).

Act amounts to less for residents of those states.<sup>79</sup> Similarly, some states' unemployment compensation systems were particularly hard hit by the sudden glut of benefit seeker. By early April, New York's system had gained notoriety for its reliance on antiquated technology (including fax machines), while around the same time it became clear that Florida's system, which had been *designed* to reduce the number of viable unemployment claims, was succeeding too well.<sup>80</sup>

In part, though, the variation in states' legislative responses simply reflected their different priorities and capacities for dealing with the workforce impact of COVID-19. The following comparison between California, which was the first to order a statewide lockdown as part of a broader mitigation strategy, and Alabama, which was among the last states to do so (as well as one of the first to open up its economy), illustrates the range in these responses.<sup>81</sup> For the sake of brevity, I have focused on their differing approaches to one labor-related issue, namely, workers' compensation for injury or illness, and I have also focused on actions taken by each state within the same limited time period.

On May 7, the website of California's Labor and Workforce Development Agency featured a table titled, "Benefits for Workers

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<sup>79</sup> NAT'L EMP. L. PROJECT, FACT SHEET: UNEMPLOYMENT INSURANCE PROVISIONS IN THE CORONAVIRUS AID, RELIEF, AND ECONOMIC SECURITY (CARES) ACT 2 (Mar. 2020), <https://s27147.pcdn.co/wp-content/uploads/Fact-Sheet-Unemployment-Insurance-Provisions-CARES-Act.pdf>.

<sup>80</sup> Patrick McGeehan, *He Needs Jobless Benefits. He Was Told to Find a Fax Machine*, N. Y. TIMES (Apr. 4, 2020), <https://www.nytimes.com/2020/04/04/nyregion/coronavirus-ny-unemployment-benefits.html>; Gary Fineout & Mark Caputo, *'It's a sh—sandwich': Republicans rage as Florida becomes a nightmare for Trump*, POLITICO (Apr. 3, 2020), <https://www.politico.com/states/florida/story/2020/04/03/its-a-sh-sandwich-republicans-rage-as-florida-becomes-a-nightmare-for-trump-1271172>.

<sup>81</sup> CAL. EXEC. ORDER N-33-20 (Mar. 19, 2020), <https://covid19.ca.gov/img/Executive-Order-N-33-20.pdf>; Mike Cason, *Gov. Kay Ivey issues stay-at-home order effective Saturday*, AL.COM (Apr. 3, 2020), <https://www.al.com/news/2020/04/gov-kay-ivey-to-give-update-on-coronavirus-response.html>; Leada Gore, *Gov. Ivey reopening retail stores, beaches; restaurants still curbside only, hair salons closed*, AL.COM (Apr. 28, 2020), <https://www.al.com/news/2020/04/gov-kay-ivey-press-conference-on-plans-for-reopening-alabama-watch-live.html>; Patrick McGreevy, *Newsom sets new rules for reopening California restaurants, malls and offices amid coronavirus*, L.A. TIMES (May 12, 2020, 1:36 PM), <https://www.latimes.com/california/story/2020-05-12/gavin-newsom-restaurants-malls-offices-guidelines-reopening-california-coronavirus-rules> (allowing certain CA counties to reopen limited activities).

Impacted by COVID-19.”<sup>82</sup> Using non-technical language and categories like “Why,” “What,” “Benefits,” and “How to File,” along with embedded links leading visitors to additional information sources, the table explained how Californians could access various forms of financial support in the event of coronavirus-related job loss or income reduction. The last row in the chart specifies how Californians who reported to work after Governor Newsom declared a lockdown and were later diagnosed with COVID-19 or a related illness may access workers’ compensation benefits. Specifically, the chart refers to a May 6 executive order from the Governor’s Office (available on the Government of California website) that creates a temporary rebuttable presumption of eligibility for workers compensation so long as the individual meets certain minimal criteria.<sup>83</sup>

On May 8, the Governor of Alabama’s website featured an “Eighth Supplemental State of Emergency: Coronavirus (COVID-19)” proclamation.<sup>84</sup> The proclamation’s main purpose was to provide civil liability immunity for a “business, health care provider, or other covered entity” against claims of death or injury in connection with COVID-19.<sup>85</sup> A News Release published on May 14<sup>th</sup> by the Alabama Department of Labor made no mention of this proclamation or the fact that it did nothing to meaningfully alter workers’ obligations to pursue injury claims for COVID-19 related illnesses under the Alabama Workers Compensation Act.<sup>86</sup> The website of the Workers’ Compensation Division also provided no clarity on this point—in fact, as of mid-May, its home page did not even mention COVID-19 or the coronavirus.<sup>87</sup> An Alabamian who believed he or she contracted a coronavirus-related illness through their employment would have to make their way to Section 670-X-14-.03 of the Code of Alabama,

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<sup>82</sup> CAL. LAB. & WORKFORCE DEV. AGENCY, CORONAVIRUS 2019 (COVID-19) RESOURCES FOR EMPLOYERS AND WORKERS, <https://www.labor.ca.gov/coronavirus2019/#chart> (last visited June 15, 2020).

<sup>83</sup> CAL. EXEC. ORDER No. N-62-20 (May 6, 2020), <https://www.gov.ca.gov/wp-content/uploads/2020/05/5.6.20-EO-N-62-20-text.pdf>

<sup>84</sup> ALA. EIGHTH SUPPLEMENTAL STATE OF EMERGENCY: CORONAVIRUS (COVID-19) (May 8, 2020), <https://governor.alabama.gov/newsroom/2020/05/eighth-supplemental-state-of-emergency-coronavirus-covid-19/> (last visited June 15, 2020).

<sup>85</sup> ALA. EIGHTH SUPPLEMENTAL STATE OF EMERGENCY, *supra* note 84, at I(C)(1).

<sup>86</sup> ALA. CODE § 25-5-1 through 25-5-340 (2006).

<sup>87</sup> Ala. Dep’t of Lab., Worker’s Comp. Div., <https://labor.alabama.gov/wc/workers-compensation.aspx> (last visited June 15, 2020).

whose definition of occupational illness would, quite obviously, preclude COVID-19 claims from all but a subset of healthcare and emergency response personnel.<sup>88</sup>

It is now commonplace to observe that where one lives, especially (but not only) in the United States, matters a great deal—that, in fact, it matters down to the city block.<sup>89</sup> Alabama’s Governor said as much when, on March 24, she dismissed the idea of a statewide lockdown with the remark that “y’all, we are not California, we’re not New York, we aren’t even Louisiana.”<sup>90</sup> However, for the purposes of this Article what matters most is *not* the relative merits of being a resident of California or Alabama during the pandemic, much less of being a workers’ compensation claimant in one of these states versus the other. Regardless of the conclusions we might draw on either of these points, the responses by both California and Alabama underscore, in starkly different terms, how severely their governments expected the pandemic to impact the workforce. California, with its immense economy, progressive politics, and (by American standards) labor-protective policies, was generous with money, protections, and information. Alabama, with its conservative politics, much smaller economy (dominated by several large employers in a few industries), and labor-restrictive policies, was anxious to avoid complete economic collapse and had a weaker worker support infrastructure on which to build. Both states, however, saw the coronavirus pandemic as an unprecedented assault on their workforce and their economies, and acted accordingly.

Together with the federal responses described in Part I(B), these state actions underscore the degree to which the pandemic has forced

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<sup>88</sup> ALA. ADMIN. CODE 670-x-14-.03 (1975), <http://www.alabamaadministrativecode.state.al.us/docs/pers/14PERS.htm> (last visited June 15, 2020); Mike Fish, *Alabama Occupational Diseases and COVID-19*, ALABAMA WORKER’S COMP BLAWG (March 18, 2020), <http://www.alabamaworkerscompblawg.com/blawg-post/alabama-occupational-diseases-and-covid-19>.

<sup>89</sup> Joe Pinsker, *How Do Rich Neighborhoods Exist So Close to Poor Ones?*, THE ATLANTIC (June 26, 2019), <https://www.theatlantic.com/family/archive/2019/06/raj-chetty-and-study-hyperlocal-inequality/592612/>.

<sup>90</sup> Mike Cason, *Gov. Kay Ivey says no current plans for statewide ‘shelter-in-place’ order*, AL.COM (Mar. 24, 2020), <https://www.al.com/news/2020/03/gov-kay-ivey-says-no-current-plans-for-statewide-stay-at-home-order.html>.



governments—and consequently, has forced working Americans—to think and talk about work in previously unimaginable ways.<sup>91</sup> One of the most striking of these changes has been the rise of a seemingly new category of work, “essential labor,” that is the focus of this Article.

#### *D. The Rise of Essential Labor during COVID-19*

Conversations centered on essential labor have been characterized by two broad concerns: identifying types of essential labor and determining the range of appropriate protections and remuneration for workers who perform that labor. Although this Article focuses on the first of these concerns, the two are necessarily interconnected because of a widespread sense that something more than ordinary labor protections and employer-proffered incentives are called for when it comes to this special—and, importantly, *different*—type of work.

Between mid-March, 2020 (when many states began issuing limitations on movement and commerce) and early-May (when a few governors began easing restrictions) essential labor acquired a porous, but still readily identifiable core of meaning. Federal guidance from the Department of Homeland Security suggests that essential industries include but are not limited to medical and healthcare, telecommunications, information technology systems, defense, food and agriculture, transportation and logistics, energy, water and wastewater, law enforcement, and public works.<sup>92</sup> Many state and local laws replicate these categories.

This is not to say that there is complete legal coherence as to what constitutes “essential labor”—at the margins, the definition of essential labor has varied considerably. Pennsylvania, a liquor-control state, determined that liquor stores were *not* essential and closed its state-run

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<sup>91</sup> James Kuo, *On the Front Lines of a Pandemic, ‘I Love You’ Can Mean ‘Goodbye,’* N.Y. TIMES: Modern Love (Mar. 27, 2020), <https://www.nytimes.com/2020/03/27/style/modern-love-coronavirus-seattle-kirkland.html>.

<sup>92</sup> Christopher C. Krebs, Advisory Memorandum On Identification Of Essential Critical Infrastructure Workers During Covid-19 Response, U.S. DEP’T OF HOMELAND SECURITY, CYBERSECURITY & INFRASTRUCTURE SECURITY AGENCY (Apr. 17, 2020), [https://www.cisa.gov/sites/default/files/publications/Version\\_3.0\\_CISA\\_Guidance\\_on\\_Essential\\_Critical\\_Infrastructure\\_Workers\\_4.pdf](https://www.cisa.gov/sites/default/files/publications/Version_3.0_CISA_Guidance_on_Essential_Critical_Infrastructure_Workers_4.pdf).

Fine Wines and Good Spirits chain; neighboring Ohio, New Jersey, West Virginia, and Maryland felt differently and sustained a flood of thirsty Pennsylvanians as a result.<sup>93</sup> Arizona decided that golf courses were essential.<sup>94</sup> Connecticut did likewise with landscaping, Delaware with tobacco manufacturing, Indiana with pawnshops (perhaps one of the more understandable inclusions), and Illinois with marijuana sales for both “adult use” and “medical use.”<sup>95</sup> Workers in all of these industries became, with or without their knowledge and preference, providers of essential labor.

Despite this variation, there is a Justice Stewart-like sense that we all know essential labor when we see it.<sup>96</sup> Indeed, their violation of that intuition is why businesses like Hobby Lobby and Leslie’s Poolmart attracted widespread criticism when they decided, at least for a short period, to consider their own workers as being essential.<sup>97</sup> Essential labor, both legally and in popular consciousness, is taken to mean a set of work activities without which contemporary American life would not be possible.

Moreover, “essential labor” is conceptually compelling in large part because it is simultaneously a category of lay thought and legal thought and its meaning, insofar as it has one, is generally stable across these contexts. This uniformity distinguishes essential labor from even the most familiar categories, such as “employee,” into which U.S. law slots its workers. As legal scholarship has long been at pains to demonstrate, customers and even colleagues often assume that particular workers are

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<sup>93</sup> Kyle Mullins, *Ohio governor’s order ends ‘mind-boggling’ flood of Pa. customers at liquor stores*, PITTSBURGH POST-GAZETTE (Apr. 13, 2020, 6:36 PM EDT), <https://www.post-gazette.com/life/drinks/2020/04/13/Ohio-governor-liquor-store-order-identification-pennsylvania-sales-west-virginia-plcb-maryland/stories/202004130129>.

<sup>94</sup> Courtney Holmes, *Golf Courses, Players Adjust To Social Distancing*, ABC15.COM (Apr 07, 2020, 7:13 PM), <https://www.abc15.com/news/state/golf-courses-players-adjust-to-social-distancing>.

<sup>95</sup> Stephanie Pagonis, *Unexpected ‘Essential Businesses’ Identified Amid Coronavirus*, FOX BUSINESS (Mar. 25, 2020), <https://www.foxbusiness.com/lifestyle/unexpected-essential-businesses-identified-amid-coronavirus>.

<sup>96</sup> *Jacobellis v. Ohio*, 78 U.S. 184, at 197 (1964) (Stewart, J., concurring).

<sup>97</sup> See note 8, *supra*.

employees when they are in fact independent contractors<sup>98</sup>; indeed, even federal judges often struggle to make this distinction.<sup>99</sup> Consequently, the terms do not translate easily between popular and specialist usage. Likewise, lay conceptions of what is owed to or enjoyed by employees in terms of rights and protections often bear little resemblance to what they receive under various labor and employment law regimes.<sup>100</sup> In contrast to all this confusion over the category of “employee,” government actors and ordinary Americans are increasingly, if unevenly, converging on a shared sense that essential workers are an identifiable group, and that they require special protections if they are to continue performing the work that is so important to society.

Several types of essential worker would be considered critical to society under *any* circumstances and are merely more so during a health crisis: medical professionals, pharmacists, emergency and first-response services, grocers, and other food distributors (including food banks and other charitable actors).<sup>101</sup> Others—especially gig workers—are a less obvious but understandable and consistent inclusion in recent conversations about essential labor. To be sure, some urban transportation officials likely viewed Uber and Lyft to be indispensable elements of contemporary metropolitan life even before the onset of the pandemic.<sup>102</sup> Nevertheless, most governmental *and* non-governmental actors alike probably did not consider rideshare drivers—or Shipt workers, or Instacart shoppers—to be essential before COVID-19 changed the rules of everyday life.

Now, however, the value of a GrubHub delivery-person who is willing to brave restaurant pick-up lines in one’s place or a Lyft driver who

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<sup>98</sup> See Naomi B. Sunshine, *Employees as Price-Takers*, 22 LEWIS & CLARK L. REV. 105, 122 (2018).

<sup>99</sup> See generally Catherine Tucciarello, *The Square Peg Between Two Round Holes: Why California’s Traditional Right to Control Test is Not Relevant for On-Demand Workers*, 13 SETON HALL CIRCUIT REV. 351 (2017).

<sup>100</sup> Pauline T. Kim, *Bargaining with Imperfect Information: A Study of Worker Perceptions of Legal Protection in an At-Will World*, 83 CORNELL L. REV. 105 (1997-1998).

<sup>101</sup> Patricia Davidson, *Nurses as Essential Personnel*, JOHNS HOPKINS NURSING (May 6, 2015), <https://magazine.nursing.jhu.edu/2015/05/nurses-as-essential-personnel/>.

<sup>102</sup> Deepa Das Acevedo, *Data Deficits in Municipal Rideshare Collaborations*, 63 ST. LOUIS U. L. J. 69, 77–78 (2018) (discussing local officials’ sense of vulnerability respecting transportation platforms that threaten to leave their jurisdictions).

will transport an elderly grandmother living in another city to the hospital when she has suspicious sniffles has risen astronomically.<sup>103</sup> Perhaps even more strikingly, Amazon warehouse workers, who are not gig workers in conventional sense but who labor under markedly similar conditions, are now also considered “heroes.”<sup>104</sup> So too are the thousands of undocumented farmhands and processing plant workers who make it possible for Americans to continue consuming meat and fresh produce.<sup>105</sup>

Appreciation for these “newly essential” workers has manifested itself in ways that are themselves both predictable and surprising. Many shoppers and delivery drivers report receiving massive tips from grateful customers, sometimes going as high as \$22 or \$42 per order, or an additional \$15-20 in cash on top of 15% through the app.<sup>106</sup> Others, particularly personal shoppers, have received unusual gratuities, as when customers pay for a free ice cream, a lottery ticket, or a jar of pickles.<sup>107</sup> In late April, toy manufacturer Mattel announced a new set of collectible figures honoring “individuals leading the fight against COVID-19 as well as the everyday heroes who are working to keep communities up and

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<sup>103</sup> Times Editorial Board, *Editorial: Food and Grocery Workers are Essential. They Should Have ‘Essential’ Pay and Protection Too*, L.A. TIMES (May 1, 2020), <https://www.latimes.com/opinion/story/2020-05-01/essential-food-grocery-worker-protections>.

<sup>104</sup> Arielle Pardes, *This Pandemic Is a ‘Fork in the Road’ for Gig Worker Benefits*, WIRED (04.09.2020 03:36 PM), <https://www.wired.com/story/gig-worker-benefits-covid-19-pandemic/>.

<sup>105</sup> Jonathan Safran Foer, *The End of Meat is Here*, N.Y. TIMES (May 21, 2020), <https://www.nytimes.com/2020/05/21/opinion/coronavirus-meat-vegetarianism.html?searchResultPosition=1>; Miriam Jordan, *Farmworkers, Mostly Undocumented, Become ‘Essential’ During Pandemic*, N.Y. TIMES (Apr. 2, 2020), <https://www.nytimes.com/2020/04/02/us/coronavirus-undocumented-immigrant-farmworkers-agriculture.html>.

<sup>106</sup> Shirelle Moore, *Instacart shopper says some customers are promising big tips then giving nothing*, FOX42 (Apr. 10, 2020), <https://fox42kptm.com/news/local/instacart-shopper-says-some-customers-are-promising-big-tips-then-giving-nothing>; Nara Schoenberg, *Tippling in the era of the coronavirus: What do you give the grocery or restaurant delivery person? The mail carrier? The plumber?*, UNION DEMOCRAT (May 7, 2020), [https://www.uniondemocrat.com/lifestyle/article\\_9c3bd268-9075-11ea-8780-8f767b91b735.html](https://www.uniondemocrat.com/lifestyle/article_9c3bd268-9075-11ea-8780-8f767b91b735.html).

<sup>107</sup> u/neptune227, *IC shopper appreciation post*, REDDIT, [https://www.reddit.com/r/InstacartShoppers/comments/c8shz7/ic\\_shopper\\_appreciation\\_post/](https://www.reddit.com/r/InstacartShoppers/comments/c8shz7/ic_shopper_appreciation_post/) (last visited June 20, 2020).

running”; the figures include a doctor, nurse, EMT, delivery driver, and grocery store worker.<sup>108</sup> These individuals, although not conventionally essential workers, make it possible for many Americans to live the way they do, in the places they do. That is, COVID-19 appears to have caused two great shifts in perspective concerning the value of work: first, that there are types of labor without which society cannot function (a view that would have likely been accepted in one form or another by a majority of pre-pandemic Americans) and second, that these essential types of labor include several tasks that are irregular, low prestige, poorly paid, and require little in the way of specialized skills or training.<sup>109</sup>

These realizations have, in turn, spurred an understandable desire to acknowledge the ostensibly distinctive nature of essential labor via better protections and compensation. At the federal level, Senate Democrats and Senator Mitt Romney (R-UT) have each proposed a temporary “hazard pay” increase for essential workers.<sup>110</sup> The Democratic proposal, which calls for a “Heroes Fund,” states that the definition of essential worker “will be the subject of debate” but provides for an additional payment for “Essential Health and Home Care Workers and First Responders.”<sup>111</sup> Senator Romney’s proposal states that “Congress and the Department of Labor would designate critical industries including, but not limited to, hospitals, food distributors and processors, and health manufacturers”<sup>112</sup>

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<sup>108</sup> *Mattel Unveils Special Edition #ThankYouHeroes Collection From Fisher-Price® to Honor Today’s Heroes*, BUSINESS WIRE (April 29, 2020 06:30 AM EDT), <https://www.businesswire.com/news/home/20200429005245/en/Mattel-Unveils-Special-Edition-ThankYouHeroes-Collection-Fisher-Price®>. At the same time, it should be noted, proceeds from the sales of these figures were slated for donation to #FirstRespondersFirst, an initiative to support first responder *healthcare* workers. *Id.* See also u/neptune227, *IC shopper appreciation post*, REDDIT, [https://www.reddit.com/r/InstacartShoppers/comments/c8shz7/ic\\_shopper\\_appreciation\\_post/](https://www.reddit.com/r/InstacartShoppers/comments/c8shz7/ic_shopper_appreciation_post/) (last visited June 15, 2020).

<sup>109</sup> Jones, *supra* note 10.

<sup>110</sup> Mitt Romney, *Patriot Pay*, [https://www.romney.senate.gov/sites/default/files/2020-05/Patriot%20Pay\\_one%20pager\\_final.pdf](https://www.romney.senate.gov/sites/default/files/2020-05/Patriot%20Pay_one%20pager_final.pdf) (last visited June 15, 2020).

<sup>111</sup> The COVID-19 “Heroes Fund,” DEMOCRATS.SENATE.GOV, <https://www.democrats.senate.gov/imo/media/doc/Heroes%20Fund%20FINAL%204.7.20.pdf> (last visited June 15, 2020).

<sup>112</sup> Romney, *supra* note 110.

State and local officials have sought to reward essential workers, too. In late April, 2020, the New York City Council introduced an Essential Workers Bill of Rights that “would require premiums for non-salaried essential employees at large companies, prohibitions on the firing of essential workers without just cause, and paid sick leave for gig workers.”<sup>113</sup> Also in late April, Governor Gretchen Whitmer of Michigan announced free college or technical training benefits for essential workers without a college degree, including hospital and nursing home staff, grocery store stockers, manufacturers of personal protective equipment, and individuals providing childcare to other essential workers.<sup>114</sup>

What all of these proposals share in common is a sense that Americans have found a new way to think about work, according to whether or not it is considered essential, and that this new binary should be reflected in law.<sup>115</sup> A growing chorus of commentators is even arguing that the distinction between essential and non-essential labor should shape (or at least influence) work regulation beyond the duration of the pandemic and the provisional legislative measures described above.<sup>116</sup> Without speaking to the suitability of these temporary measures, which many contend do not go far enough, this Article argues that there is nothing new about allocating benefits and protections based on a determination of how essential the work being done actually is.<sup>117</sup> To the contrary, essentiality analysis has long been at the core of American work law; all that has changed is the answer to the question: “essential to *whom?*”

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<sup>113</sup> N.Y. City Council, *New York City Council Announces COVID-19 Legislative Relief Package To Be Introduced on Wednesday* (Apr. 21, 2020), <https://council.nyc.gov/press/2020/04/21/1940/>.

<sup>114</sup> Mich. Gov., Governor Whitmer Announces “Futures for Frontliners,” a G.I. Bill Program for Essential Workers (Apr. 29, 2020), [https://www.michigan.gov/whitmer/0,9309,7-387-90499\\_90640-527530--,00.html](https://www.michigan.gov/whitmer/0,9309,7-387-90499_90640-527530--,00.html). Precise eligibility requirements and coverage details have not yet been released.

<sup>115</sup> Jones, *supra* note 10; Emma Scott, *Protecting Essential Workers During COVID-19 and Beyond*, CHLPI BLOG (Apr. 7, 2020), <https://www.chlpi.org/protecting-essential-workers-during-covid-19-and-beyond/>. See also Mary Mazzoni, *Proposed Coronavirus Relief Package Includes Elements of ‘Essential Workers Bill of Rights,’ But Is It Enough?*, TRIPLE PUNDIT (May 15, 2020), [https://www.triplepundit.com/story/2020/coronavirus-essential-workers-bill-rights/89036\\_](https://www.triplepundit.com/story/2020/coronavirus-essential-workers-bill-rights/89036_)

<sup>116</sup> *Id.*

<sup>117</sup> Mazzoni, *supra* note 115.

## II. ESSENTIAL LABOR IN AMERICAN WORK LAW

Labor and employment regulation in the United States is characterized by a set of nested problems: we funnel many protections and benefits exclusively through work relationships, we identify one type of work relationship (“employee” status) as triggering entitlement to those benefits and protections, and—intentionally or not—we prioritize one concept, “control,” in the task of determining whether a given worker is an employee. This section demonstrates that the overarching concern of American worker classification doctrine, and by extension of American work law itself, has been to identify labor that is essential to the *employer*.

### *A. American Worker Classification Doctrine—Scope, Aims, and Tests*

Classification doctrine seeks to sort workers for the purposes of assigning legal obligations and protections. The options are usually binary, meaning that a given worker is either an employee *or* an independent contractor, exempt *or* nonexempt, full-time *or* part-time, covered *or* non-covered. While all of these pairings carry important implications for workers and employers, one of them stands head and shoulders above the rest—in fact, it determines whether any of the other pairings even need to be considered. Consequently that classification binary, according to which a worker is either an “employee” or an “independent contractor,” is widely considered to lie at the core of American work law.<sup>118</sup>

The legal consequences of being an employee are immense. Only employees receive anti-discrimination and harassment protections associated with specified factors like race, religion, sex, national origin, disability, and age (including the duty to accommodate, where that is applicable);<sup>119</sup> job security when they must take family or medical leave;<sup>120</sup>

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<sup>118</sup> Laurie Leader, *Whose Time is it Anyway?: Evolving Notions of Work in the 21<sup>st</sup> Century*, 6 BELMONT L. REV. 96, 99 (2019).

<sup>119</sup> Title VII, 42 U.S.C. § 2000e et seq. Note that the Civil Rights Act of 1866 does *not* limit its protection against racial discrimination in the formation of contracts to “employees.” 42 U.S.C. §1981(a).

<sup>120</sup> Family and Medical Leave Act (1993), 29 U.S.C.A. §2611(4). Note that the FMLA adopts the FLSA’s “suffer or permit” definition of “employ.”

a guarantee of equal pay as between men and women;<sup>121</sup> minimum wage guarantees as well as guarantees regarding when overtime rates of pay are applicable and how to calculate them;<sup>122</sup> eligibility for employer-sponsored health and retirement plans, where these are available (as well as advice and management regarding those plans that is subject to fiduciary standards);<sup>123</sup> workplace safety protections;<sup>124</sup> and, of course, protections for workers who engage in union activity or concerted activity.<sup>125</sup> Being the right kind of worker (that is, being an *employee*) for the right kind of employer—and, sometimes, even being in the right kind of industry—are what stands between working Americans and most of the legal, monetary, and systemic support structures required to pursue a decent life.<sup>126</sup>

Because of this centrality to everyday life, the task of sorting workers into “employee” and “independent contractor” categories has been both important and controversial, and multiple tests have been developed to aid lawmakers and judges, guide employers, and inform workers. Three of these tests, each having fairly circumscribed applications, are the Economic Realities test, the Entrepreneurial Opportunities test, and the “ABC” test.

Courts developed the Economic Realities test in the course of trying to implement the Fair Labor Standards Act’s broad definition of what it means to be an employer (to “suffer or permit to work”); this test is meant to expand the scope of judicial analysis by considering workers’ economic dependence on employers and employers’ functional authority over workers.<sup>127</sup> The Entrepreneurial Opportunities test was developed by the D.C. Circuit and focuses on the extent to which workers “have ‘significant entrepreneurial opportunity for gain or loss.’”<sup>128</sup> Since the D.C. Circuit is

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<sup>121</sup> Equal Pay Act of 1963, 29 U.S.C.A §206(d).

<sup>122</sup> Fair Labor Standards Act (1938), 29 USC §201, at §203(d) & (e), and §206; Portal to Portal Act (1947), 29 U.S.C. §§ 251 to 262.

<sup>123</sup> Employee Retirement Income Security Act (1974), 29 U.S.C.A. §1002.

<sup>124</sup> Occupational Safety and Health Act of 1970, 29 U.S.C.A §§ 651–52.

<sup>125</sup> National Labor Relations Act of 1935. 29 U.S.C. §157.

<sup>126</sup> Das Acevedo, *supra* note 1, at 800.

<sup>127</sup> See e.g., *West v. J.O. Stevenson, Inc.*, 164 F.Supp.3d 751, 763 & n.6 (2016). See also, *Zheng v. Liberty Apparel Co. Inc.*, 355 F.3d 61, 66 (2003).

<sup>128</sup> *Corporate Express Delivery Systems v. NLRB*, 292 F.3d 777, 780 (D.C. Cir. 2002); *FedEx Home Delivery, Inc. v. NLRB*, 563 F.3d 492, 497 (D.C. Cir. 2009).



“the preeminent court of appeals with respect to federal labor law”<sup>129</sup> and “widely respected among other circuits for its expertise in labor and other administrative law” the court’s development and use of a distinct classification test is more than ordinarily influential.<sup>130</sup> Lastly, and in contrast to the first two tests (which may have varying numbers of factors depending on the specific articulation), the ABC test considers just three things: whether the worker (a) “is free from the control and direction of the hirer”; (b) “performs work that is outside the usual course of the hiring entity’s business”; and (c) “is customarily engaged in” work “of the same nature as the work performed for the hiring entity.”<sup>131</sup>

Despite their applicability to important statutes, and their use by important courts or states, none of these tests approaches the influence of the Control test. The Control test is “the default for federal work law protections,” including, for instance, retirement benefits, workplace safety, and disability protections.<sup>132</sup> It “purports to distinguish employees from independent contractors on the grounds that employees enjoy less freedom in the ‘means and manner’ of their work and thus merit a host of work-related safeguards.”<sup>133</sup> The crux of control-based analysis is the extent to which hiring entities dictate how workers should perform their

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<sup>129</sup> Norman J. Fry, *The Decontextualization of Labor Relations in Successorship Cases: Williams Enterprises v. NLRB and Sullivan Industries v. NLRB*, 61 GEO. WASH. L. REV. 1616, 1662–63 (1993);

<sup>130</sup> Jeffrey M. Hirsch, *Employee or Entrepreneur?*, 68 WASH. & LEE L. REV. 353, 360 (2011).

<sup>131</sup> *Dynamex Operations West, Inc. v. Superior Court*, 4 Cal.5th 903, 917 (2018). The ABC test further differs from the Economic Realities and Entrepreneurial Opportunities tests in two ways: it is mostly used in state, not federal, law, and it establishes a rebuttable presumption of employee status, rendering it considerably more favorable to workers. Nick Cahill, *Study: Most Independent Contractors Will Benefit From New California Law*, COURTHOUSE NEWS (Nov. 12, 2019), <https://www.courthousenews.com/study-most-independent-contractors-will-benefit-from-new-california-law/>.

<sup>132</sup> The case that established the Control test as the default for federal statutes is *Nationwide Mutual Insurance v. Darden*, 503 U.S. 318 (1992). Other decisions extended *Darden*’s application. See e.g., *Frankel v. Bally, Inc.*, 987 F.2d 86, 89-90 (2d Cir. 1993) (applying *Darden* to the Age Discrimination in Employment Act of 1967); *Slingluff v. Occupational Safety & Health Review Com’n*, 425 F.3d 861, 867-868 (2005) (applying *Darden* to the Occupational Safety and Health Act of 1970); *Birchem v. Knights of Columbus*, 116 F.3d 310, 312-13 (8th Cir. 1997) (applying *Darden* to the American with Disabilities Act of 1990).

<sup>133</sup> Das Acevedo, *supra* note 1, at 795. See also *Id.* note 5.

work rather than simply specifying a predetermined level and type of output for them to meet—in other words, the Control test emphasizes the *how* of labor over the *what* or the *how much*.

However, the Control test has always been subject to extensive criticism. Labor and employment law scholars, as well as judges themselves, have argued that it is insufficiently responsive to changing work conditions,<sup>134</sup> too easily manipulated by employers,<sup>135</sup> too confusing for courts,<sup>136</sup> insufficiently concerned with the broader purposes of work regulation,<sup>137</sup> was explicitly developed for purposes *other* than those of work regulation,<sup>138</sup> and (even when applied carefully and fairly) is too narrow in its conception of authority and freedom.<sup>139</sup>

Despite all this criticism, the Control test and its way of parsing work relationships carry immense influence. Because control-based analysis derives from a Common Law tradition, it lies in the background, silent but potent, even when it is expressly inapplicable or unwanted.<sup>140</sup> American work law and work scholarship is replete with a sense that

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<sup>134</sup> Katherine V. W. Stone, *Legal Protections for Atypical Employees: Employment Law for Workers Without Workplaces and Employees Without Employers*, 27 BERKELEY J. EMP. & LAB. L. 251, 282 (2006); Cynthia L. Estlund, *The Ossification of American Labor Law*, 102 COLUM. L. REV. 1527, 1530–32 (2002); Orly Lobel, *The Gig Economy & the Future of Employment and Labor Law*, 51 U.S.F. L. REV. 51, 57–71 (2017).

<sup>135</sup> Keith Cunningham-Parmeter, *From Amazon to Uber: Defining Employment in the Modern Economy*, 96 B. U. L. REV. 1673, 1677 (2016); Julia Tomassetti, *The Contracting/Producing Ambiguity and the Collapse of the Means/Ends Distinction in Employment*, 66 S. C. L. REV. 315, 362–91 (2014–15).

<sup>136</sup> Opinions from the early twentieth century and the early twenty-first century demonstrate the challenges of applying the Control test. See, e.g., *Cotter v. Lyft*, 60 F. Supp. 3d 1067, 1081 (2015); *Kisner v. Jackson*, 159 Miss. 424, 427 (1931).

<sup>137</sup> Guy Davidov, *The Three Axes of Employment Relationships: A Characterization of Workers in Need of Protection*, 52 UNIV. OF TORONTO L.J. 357 (2002); Marc Linder, *What is an Employee—Why it Does, But Should Not, Matter*, 7 L. & INEQUALITY: J. OF THEORY & PRAC. 155, 173 (1989).

<sup>138</sup> Richard R. Carlson, *Why the Law Still Can't Tell an Employee When It Sees One and How It Ought to Stop Trying*, 22 BERKELEY J. EMP. & LAB. L. 295, 311 (2001).

<sup>139</sup> Das Acevedo, *supra* note 1 (arguing that the Control test only captures one of the two ways lay and legal actors think about freedom at work); Marion Crain, *Work, Free Will, and Law*, 24 EMP. RTS. EMP. POL'Y J. 279, 285 (2012).

<sup>140</sup> For instance, one of the primary criticisms of the Economic Realities test is that it is insufficiently distinct from the Control test. Das Acevedo, *supra* note 1, at 802.

control is inescapable as an analytic rubric.<sup>141</sup> (Indeed, given its Common Law origins, not *only* American law and legal scholarship bemoan the omnipresence of control-based analysis, but the consequences of control's analytic dominance is less severe elsewhere.<sup>142</sup>) Moreover, while the problems with control-based classification are many and well-known, the practicable solutions are few, if any. In this context, it is more than understandable that Americans living, working, and governing in 2020 would want to view the rise of "essential labor" as signaling a new way of thinking about work regulation in this country. However, "essentiality analysis" has *always* been integral to the Control test and to classification doctrine more broadly.

### *B. Essentiality Analysis in Worker Classification Doctrine*

In the second half of the nineteenth century, courts confronting more complicated work relationships produced by the Industrial Revolution sought to determine when masters (increasingly called "employers") should be held responsible for their servants' ("employees'") actions: "a master was liable for an act of the servant commanded by the master or committed in the course of the servant's service controlled by his master."<sup>143</sup> This, in turn, required courts to develop factors that would indicate when an employer had, in fact, controlled or commanded the type

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<sup>141</sup> See JEREMIAS PRASSL, *THE CONCEPT OF THE EMPLOYER* 1–7 (2015) (discussing, mostly with respect to British law, the problem with control-based analysis); Brian A. Langille & Guy Davidov, *Beyond Employees and Independent Contractors: A View From Canada*, 21 *COMP. LAB. L. & POL'Y J.* 7, 15–16 (1999) (noting the significance of control to Canadian worker classification doctrine).

<sup>142</sup> See Miriam A. Cherry & Antonio Aloisi, *"Dependent Contractors" in the Gig Economy*, 66 *AM. U. L.R.* 635, 651 (2017).

<sup>143</sup> Stephen Nayak-Young, *Revising the Roles of Master and Servant: A Theory of Work Law*, 17 *U. PA. J. BUS. L.* 1223 (2015). I do *not* mean to suggest that these developments were the rational responses of a legal system confronting changes in the social order. Contrast Robert W. Gordon, *Critical Legal Histories*, 36 *STAN. L. REV.* 57 (1984). As this Article, my own work elsewhere, and the work of many (if not most) labor and employment law scholars suggests, the classification doctrine that emerged out of the late nineteenth and early twentieth centuries was not inevitable nor is it self-evidently efficient or desirable. See, e.g. Tomassetti, *supra* note 135, at 346. Carlson, *supra* note 138, at 304.

of actions that produced the harm.<sup>144</sup> Where the employer *had* exerted this type of control, a worker was generally deemed to be an employee; when the employer had *not*, the worker was considered an independent contractor.<sup>145</sup>

Labor and employment law scholarship has extensively analyzed and critiqued the rationale, as well as the outcomes, of control-based analysis. This Article suggests that a small adjustment in the way we think about the Control test can shed considerable light on contemporary conversations about essential labor and the reform of work regulation. Most scholarship on the test asks whether specific factors accurately indicate control,<sup>146</sup> or whether control is an appropriate basis for allocating various protections.<sup>147</sup> If, instead, we focus on what courts assume in the course of applying the test, the animating impulse of the Control test (and consequently, of worker classification and, arguably, of work law itself) becomes inescapably clear.

Courts applying the Control test assume that control or its absence indicates employer valuation of a particular task. That is, how a hiring party structures its production process and its internal organization (in order to

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<sup>144</sup> Some factors include: whether the employer had provided any specific instructions regarding how the work was to be done, whether the work process occurred on his property or within his personal view, the longevity of the relationship, and “the relative size and sophistication of the parties’ respective businesses.” Carlson, *supra* note 138, at 305.

<sup>145</sup> Marion Crain, *Arm’s Length Intimacy: Employment as Relationship*, 35 WASH. U. J. L. & POL’Y 163, 180 (2011). *But see* V.B. Dubal, *Wage Slave or Entrepreneur?: Contesting the Dualism of Legal Worker Identities*, 105 CALIF. L. REV. 65 (2017) (arguing that the employee/independent contractor distinction is much more recent).

<sup>146</sup> Jennifer Pinsof, *A New Take on an Old Problem: Employee Misclassification in the Modern Gig-Economy*, 22 MICH. TELECOMM. & TECH. L. REV. 341, 351 (2016). *See also* Marc Linder, *Dependent and Independent Contractors in Recent U.S. Labor Law: An Ambiguous Dichotomy Rooted in Simulated Statutory Purposelessness*, 21 COMP. LAB. L. & POL’Y J. 187, 198 (1999).

<sup>147</sup> Robert Sprague, *Redefining ‘Employee’ to Provide Worker Protections Within a Flexible Workforce* (unfinished manuscript, 2016), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2801079](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2801079); Micah Prieb Stolfus Jost, *Independent Contractors, Employees, and Entrepreneurialism under the National Labor Relations Act: A Worker-by-Worker Approach*, 68 WASH. & LEE L. REV. 311, 347 (2011); Jonathan P. Hiatt, *Policy Issues Concerning the Contingent Work Force*, 52 WASH. & LEE L. REV. 739, 747 (1995).

grant itself more or less control over labor) accurately signals how much it values any given task. For instance, a court might conclude that a hiring party who seeks to heavily control a worker as he or she performs a task cares a lot about how that task is performed and has the ability to specify, *ex ante*, how it *should* be performed. The task is both essential and definable. Conversely, a court might conclude that a hiring party who seeks broad but amorphous powers of control over a worker cannot specify, *ex ante*, all the tasks that it wants the worker to complete nor how they should be completed, but wants the ability to potentially do both. The tasks are essential but undefinable. In either scenario, the court tries to determine how much the hiring party values the worker's labor on the basis of how much it seeks to control the "means and manner" in which work is performed.<sup>148</sup> And, in both scenarios, the hiring party's attempts to exercise control—whether exceedingly granular or exceedingly broad—constitute the basis for its obligations both to the worker (in the form of "employee" status and all the benefits and protections that come with it) as well as to third parties (in the form of vicarious liability for the employee's actions). The entirety of this phenomenon, whereby courts presume that organizational structure is an accurate signal of internal labor valuation, and use the resulting insights to classify the worker as an employee or an independent contractor, is what I call "essentiality analysis."

Courts are not the only ones interested in determining which tasks employers perceive to be essential to their business. Labor and employment scholarship has extensively documented the rise of the "fissured workplace," and how this development has entailed "shifting activities once considered central to operations to other organizations in order to convert employer-employee relationships into arm's length market transactions."<sup>149</sup> In other words, this scholarly literature seeks to understand changes in how employers identify essential labor—moreover,

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<sup>148</sup> Courts alternate between "means and manner" and "manner and means" to describe the crux of control-based analysis; in this Article I will use the first phrasing ("means and manner"). Compare, e.g., *Rahimi v. Weinstein*, 2020 U.S. Dist. LEXIS 66278, \*8 with *Darden*, 503 U.S. 318, 323 (1992) (citing *Reid*, 490 U.S. at 740).

<sup>149</sup> DAVID WEIL, *THE FISSURED WORKPLACE: WHY WORK BECAME SO BAD FOR SO MANY AND WHAT CAN BE DONE TO IMPROVE IT* 8 (2014). See also David Weil, *Enforcing Labour Standards in Fissured Workplaces: The U.S. Experience*, 22 *ECON. & LAB. REL. REV.* 33 (2011).

much of it is dedicated to reversing the trends that are identified and that have made the working lives of many Americans increasingly “precarious” and “contingent.”<sup>150</sup>

The news media has also explored employers’ gradually narrowing view of what is essential to their core missions. A widely read *New York Times* article from 2017 compared two women, each of whom had “cleaned offices for one of the most innovative, profitable, and all-around successful companies in the United States.”<sup>151</sup> Gail Evans worked at Kodak in the early 1980s, while Marta Ramos did so at Apple at the time the article was published. While the primary goal of the article was to demonstrate the way fissuring has severely disadvantaged workers like Ramos, it inadvertently reinforced the notion that business structure accurately signals labor valuation. As the author conveyed all too clearly, Apple does not control the means and manner in which its offices are cleaned—it simply specifies end results that the contractor employing Ramos must satisfy—because it does not consider building maintenance to be an essential task.

But what scholars and journalists (as well as workers’ advocates and policy analysts) have largely overlooked is that identifying essential labor is the *goal* of worker classification law, not its *accidental effect*. The United States’ work regulation infrastructure is predicated on the idea that work should be measured, classified, regulated, and remunerated according to how much it benefits someone—and that someone, until very recently, has always been the employer. This bias is most apparent in the essentiality analysis characterizing judicial application of the Control test, but it is compounded by the latent influence of control-based analysis even in contexts where the Control test is not formally applied, and in the way employee status is a threshold requirement to access several elements of the social safety net.<sup>152</sup>

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<sup>150</sup> Cherry & Aloisi, *supra* note 142, at 687 (discussing precarious work); Alan Hyde, *Employment Law After the Death of Employment*, 1 U. PA. J. LAB. & EMP. L. 99, 101 (1998) (discussing contingent work).

<sup>151</sup> Neil Irwin, *To Understand Rising Inequality, Consider the Janitors at Two Top Companies, Then and Now*, N.Y. TIMES: THE UPSHOT (Sept. 3, 2017), <https://www.nytimes.com/2017/09/03/upshot/to-understand-rising-inequality-consider-the-janitors-at-two-top-companies-then-and-now.html>.

<sup>152</sup> See notes 119–126, *supra*.

As a result, whether an individual American is entitled to, for example, anti-discrimination protections and a safe working environment is *directly* tied to how essential they are to the entity who hires them. This is because their access to these protections is based on their classification status, and their classification is determined using a test that links control and essentiality. That same American's entitlement to a minimum wage and family leave is *indirectly* (but clearly) tied to how essential they are to the hiring entity. This is because those safeguards are dependent on employee status as determined using tests that often boil down to control-based analysis. Essentiality is at the heart of working and living in the United States.

In saying this I am not arguing that essentiality analysis has *always* been central to the way the United States regulates work nor am I suggesting that this centrality is *desirable*. To the contrary, judicial preoccupation with identifying essential labor for the purposes of allocating employee status is both historically contingent (tied to the growing importance of worker classification) and severely misguided (because it only considers whether labor is essential for the hiring entity). Indeed, essentiality analysis is a decidedly naïve approach. It takes at face value hiring entities' explanations of why they structure their businesses as they do: *not* because a particular format will relieve them of administrative, financial, and legal burdens, but because that format reflects the importance of each task and each worker to the hiring entity's broader mission. Because essentiality analysis is so flawed, labor and employment law scholars have not taken seriously the proposition that this is what courts think they are doing when they classify workers. Not surprisingly, courts often engage in conceptual gymnastics in order to explain why, for instance, a contract that contains "detailed and extensive work rules" nonetheless does not control the "means and manner" of labor performance.<sup>153</sup>

Disputes over worker classification in the gig economy exemplify both this judicial failing and scholarly oversight. Transportation network companies (TNCs) like Uber and Lyft have been in several, long-running, multi-jurisdictional disputes with their drivers over whether the drivers are properly considered employees or independent contractors. One of the

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<sup>153</sup> Tomassetti, *supra* note 135, at 366 (discussing "upfront contractual specification").

TNCs' primary justifications for independent contractor status is that companies like them are not in the business of providing transportation, and hence drivers are not engaging in an activity that is essential to their business model.<sup>154</sup> Instead, TNCs argue, they are technology companies that allow drivers and passengers to connect with one another in a more efficient way, and because of their focus on technology over transportation, the companies exercise little to no control over the way drivers drive.<sup>155</sup>

Some courts, both within and outside the United States, have explicitly resisted this reasoning, saying that it is "obviously wrong" to say that "Lyft is an uninterested bystander of sorts, merely furnishing a platform that allows drivers and riders to connect,"<sup>156</sup> and that "it is... unreal to deny that Uber is in business as a supplier of transportation services."<sup>157</sup> They point to many operational requirements that TNCs impose on drivers as evidence of efforts to control the quality of labor that is essential to the TNC business model.<sup>158</sup> But others have accepted the argument that a TNC like Uber or Lyft is merely "a technology platform" and, unsurprisingly, that this sort of technology platform "does not directly evaluate or supervise its drivers."<sup>159</sup> Moreover, several jurisdictions have made this determination legislatively.<sup>160</sup>

To be sure, the connection between essential labor and worker classification far predates Uber and Lyft and the gig economy more generally. Before the rise of gig work, the same arguments over identifying essential labor—accompanied by the same judicial analysis—

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<sup>154</sup> See *Berwick v. Uber Techs. Inc.*, Case No. 11-46739 EK, Cal. Labor Comm'n (June 3, 2015) (quoting Uber's argument that it is "just a neutral technological platform").

<sup>155</sup> Defendant's Motion for Summary Judgment, *O'Connor v. Uber Techs. Inc.*, No. 13-03826-EMC, 2014 WL 10889983 (N.D. Cal. Dec. 4, 2015).

<sup>156</sup> *Cotter v. Lyft*, 60 F. Supp. 3d 1067, 1078 (2015)

<sup>157</sup> *Aslam Farrar v Uber*, [2018] EWCA Civ 2748, at 27 / ¶189.

<sup>158</sup> *O'Connor v. Uber Technologies, Inc.*, 82 F.Supp.3d 1133, 1142-43 (N.D.Cal. 2015) ("Uber exercises substantial control over the qualification and selection of its drivers...Uber stresses that these screening measures are important because 'Uber provides the best transportation service...').

<sup>159</sup> *McGillis v. Uber*, No. 3D15-2758 (Fla. Dist. Ct. App., Feb. 1, 2017), at 2, 5.

<sup>160</sup> National Employment Law Project, *The On-Demand Economy & State Labor Protections 2*, Policy Brief (Jan. 2017), <https://www.nelp.org/wp-content/uploads/On-Demand-Economy-State-Labor-Protections.pdf>.



characterized classification disputes involving giant franchise chains (like McDonald's),<sup>161</sup> large companies that are heavily reliant on independent contractors (like FedEx),<sup>162</sup> and even coal mining in the early twentieth century.<sup>163</sup> In *Lehigh Valley*, Judge Hand resisted a coal mining company's suggestions that "it was nothing more than a buyer and distributor of the miners' coal." Instead, Judge Hand undertook "a simple comparison of the nature of a miner's work and the essence of the employer's business" and observed that the company's business "was inconceivable without a miner."<sup>164</sup>

Notably, *Lehigh Valley* is considered to be the genesis of the Economic Realities test, and the focus of the Economic Realities test is ostensibly the worker's dependence on his or her job—or, put differently, how essential the job is to the worker.<sup>165</sup> Just as remarkably, the coal miners were awarded employee status.<sup>166</sup> As *Lehigh Valley* suggests, the impulse to classify labor and workers on the basis of how essential they are to someone other than the worker extends far beyond the Control test and is fundamental to American work regulation. Indeed, the ABC test, which is widely held to be worker-friendly, explicitly integrates essentiality analysis into its prong "B," which asks whether the worker "performs work that is outside the usual course of the hiring entity's business."<sup>167</sup> Moreover, it is *this* prong (together with the rebuttable presumption of employee status) that is said to make the ABC test more favorable to workers.<sup>168</sup> Even efforts to make classification doctrine more equitable have focused on identifying labor that is essential to the employer.

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<sup>161</sup> Deepa Das Acevedo, *Invisible Bosses for Invisible Workers, or Why the Sharing Economy is Actually Minimally Disruptive*, 2017 U. CHI. LEGAL FORUM 35 (2018); Andrew Elmore, *Franchise Regulation for the Fissured Economy*, 86 GEO. WASH. L. REV. 907 (2018).

<sup>162</sup> Julia Tomassetti, *From Hierarchies to Markets: Fedex Drivers and the Work Contract as Institutional Marker*, 19 LEWIS & CLARK L. REV. 1084 (2015).

<sup>163</sup> Carlson, *supra* note 138, at 311-313 (discussing *Lehigh Valley Coal Co. v. Yensavage*, 218 F. 547 (2d Cir. 1914)).

<sup>164</sup> *Id.* at 312 (internal citations omitted).

<sup>165</sup> Jooho Lee, *The Entrepreneurial Responsibilities Test*, 92 TUL. L. REV. 777, 791-92 (2018).

<sup>166</sup> *Lehigh Valley Coal Co. v. Yensavage*, 218 F. 547, 552-53 (2d Cir. 1914).

<sup>167</sup> Note 131, *supra*.

<sup>168</sup> Scott J. Witlin et al., 'ABC Test' for Independent Contractors Set to Take Effect in California Jan. 1, NAT. L. REV. (Dec. 2, 2019), <https://www.natlawreview.com/article/abc-test-independent-contractors-set-to-take-effect-california-jan-1>.

As these examples demonstrate, essentiality analysis extends far beyond the formal boundaries of the Control test and it is apparent both in cases where workers are found to be employees and in those where they are held to be independent contractors. Moreover, as an analytic approach, essentiality's importance to American work law long predates the rise of "essential labor" during the coronavirus pandemic. Before the spread of COVID-19, essential labor *always* referred to work that is integral to a hiring entity. Since the onset of the pandemic, essential labor has largely come to mean work that is critical to society and necessary to avoid catastrophic economic and humanitarian harm. (However, it should be noted that the employer-centric analysis still lingers even under these extraordinary circumstances—recall, for instance, that businesses were mostly allowed to determine whether their employees performed essential labor, and that some employers, like Hobby Lobby and Leslie's Poolmart, took advantage of this continued deference to employer perspectives.<sup>169</sup>) What "essential labor" has *never* really signified is labor that is essential to the worker who performs it. But, as we shall see, in the United States, work is *always* essential to workers.

### III. ALL LABOR IS ESSENTIAL LABOR

The United States recognizes no right to work, and yet work is arguably more important for human well-being here than virtually anywhere else. This section opens by considering scholarly arguments that have recognized the centrality of work to human flourishing and legal regimes that have been developed in support of this view. The section then outlines some of the benefits and protections that are only available to Americans who are classified as employees, and contrasts this approach to funneling social goods through work status with the approach taken by peer nations. As this comparative exercise makes clear, existing outside "employee" status in the United States constitutes the imposition of a degraded state of being in which a worker is little more than a body for hire.

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<sup>169</sup> Note 8, *supra*.

### A. Work as Central to Human Flourishing

The idea that work is central to human flourishing is now so embedded within our social fabric that it is easy to overlook. Some political philosophers like Locke and Marx made it central to their theories of government and social change, while others, like Nussbaum, recognize work as one of the things “a decent political order must secure to all citizens” at “at least a threshold level.”<sup>170</sup> Freud famously (although perhaps apocryphally) stated that all we need is “*lieben und arbeiten*”—work and love—but he was especially emphatic about the importance of work, which he thought gave individuals “a secure place in a portion of reality, in the human community.”<sup>171</sup> Anthropologists and sociologists have long argued that “work relates to and interpenetrates all aspects of the lives of individuals.”<sup>172</sup> Their empirical research has documented how work can actually change the way individuals experience the world around them, sometimes in positive ways (as when a single mother comes to see herself “as a worker, a provider” and gains pride from that) and sometimes in negative ways (for instance by “manufacturing consent” to circumstances workers would otherwise resist).<sup>173</sup>

What all of these approaches and perspectives share in common is the conviction that work—its availability, its conditions, its ability to meet our material and intellectual needs, and whether it is freely chosen—is a defining element of human existence as well as a key component of human well-being and happiness.<sup>174</sup> Indeed, even when social science and legal scholars have criticized the concept of “work” they have often done so

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<sup>170</sup> JOHN LOCKE, *SECOND TREATISE OF GOVERNMENT* 27-28 (C.B. Macpherson ed.1980 [1690]) (articulating the theory that man creates property through labor); KARL MARX, *ECONOMIC AND PHILOSOPHICAL MANUSCRIPTS OF 1844*, at 74-78 (Martin Milligan trans., 1988 [1844]) (articulating the theory that the objectification of labor by capital estranges the worker from his labor); MARTHA C. NUSSBAUM, *CREATING CAPABILITIES: THE HUMAN DEVELOPMENT APPROACH* 33–34 (2011).

<sup>171</sup> Alan C. Elms, *Apocryphal Freud: Sigmund Freud’s Most Famous “Quotations” and Their Actual Sources*, in 29 *THE ANN. OF PSYCHOANALYSIS: SIGMUND FREUD AND HIS IMPACT ON THE MODERN WORLD* 83, 91–100 (ed. Jerome A. Winer & James William Anderson, 2001).

<sup>172</sup> HERBERT APPLEBAUM, *CONSTRUCTION WORKERS, U.S.A.* 1 (1999);

<sup>173</sup> KATHRYN J. EDIN & H. LUKE SHAEFER, *\$2.00 A DAY: LIVING ON ALMOST NOTHING IN AMERICA* 33 (2016); MICHAEL BURAWOY, *MANUFACTURING CONSENT: CHANGES IN THE LABOR PROCESS UNDER MONOPOLY CAPITALISM* 81-83 (1979)

<sup>174</sup> Geoffrey Hinchliffe, *Work and Human Flourishing*, 36 *ED. PHI. & THEORY* 535 (2004).

because of the way it fails to recognize the importance of many activities. These scholars have argued that what we consider to be work creates arbitrary distinctions between paid and unpaid labor, difficult and easy labor, women's and men's labor, and pleasurable ("leisure") activities as opposed to unpleasurable ("work") activities; in each case, our preconceptions, and consequently our laws, determine that some of these acts are worthwhile and compensable while others are less so or not at all.<sup>175</sup> But even these critical approaches do not question the intrinsic significance of work, material or otherwise: they simply demonstrate that our line-drawing is sometimes capricious, always culturally-mediated, and often underinclusive.

Outside the United States, law regularly and prominently recognizes work's centrality to human flourishing. Several international organizations do this by guaranteeing something like a "right to work" to residents of signatory nations. (It is worth noting that although, in the United States, the phrase "right to work" is associated with efforts to destabilize and defund labor unions—in effect signifying "the right to work without protection for concerted activity"—this counterintuitive meaning is not common anywhere else.) The following partial list provides a sense of just how widely work is acknowledged to be a central element of human happiness, inasmuch as it is viewed as a basic positive right or entitlement. My goal is not to discuss the substantive merits of enshrining a formal "right to work," but rather to use the existence of such a right as a proxy for the recognition that work is essential in several ways to the people who perform it.

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<sup>175</sup> Miriam A. Cherry, *The Gamification of Work*, 40 HOFSTRA L. REV. 851 (2012) (discussing the blurring boundaries between work and play); Arlene Kaplan Daniels, *Invisible Work*, 34 SOC. PROBLEMS 403 (1987) (discussing the devaluation of women's work); ARLIE RUSSELL HOCHSCHILD, *THE MANAGED HEART: COMMERCIALIZATION OF HUMAN FEELING* 6–7 (1983) (describing uncompensated emotional labor); Noah D. Zatz, *The Impossibility of Work Law*, in *THE IDEA OF LABOUR LAW* 234 (Guy Davidov & Brian Langille, eds. 2011) (arguing that work law needs to take "nonmarket" work seriously).

INTERNATIONAL OR REGIONAL LEGAL RECOGNITION OF A “RIGHT TO WORK” OR RELATED GUARANTEE
Article 23 of the Universal Declaration of Human Rights <sup>176</sup>
Article 55 of the United Nations Charter <sup>177</sup>
Article 6 of the International Covenant on Economic, Social and Cultural Rights <sup>178</sup>
Article 15 of the European Union Charter of Fundamental Rights <sup>179</sup>
Article 15 of the African Charter on Human and People’s Rights <sup>180</sup>
Article 14 of the Organization of American States’ Declaration of the Rights and Duties of Man <sup>181</sup>

Additionally, several countries have recognized the importance of work via their constitutions. There is something like a right to work in Section 35 of the Spanish Constitution<sup>182</sup> as well as in Article 6 of the Brazilian Constitution.<sup>183</sup> The Preamble to France’s 1946 Constitution declared that

<sup>176</sup> UNIVERSAL DECLARATION OF HUMAN RIGHTS (1948), G.A. Res. 217A (III) 1948, Art. 23 (“Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment.”).

<sup>177</sup> CHARTER OF THE UNITED NATIONS (1945), Art. 55 (promoting “full employment”)

<sup>178</sup> INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS, G.A. Res. 2200A (XXI) (1966) (guaranteeing “...the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts...”), <https://www.un.org/esa/socdev/enable/comp203.htm#:~:text=Article%206%20of%20the%20ICESCR,freely%20chooses%20or%20accepts%E2%80%A6%22>.

<sup>179</sup> CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION (2012), Art. 15 (“Freedom to Choose an Occupation and Right to Engage in Work”).

<sup>180</sup> Note that this clause was pulled directly from an Organization of African Unity convention ratified in 1981. AFRICAN CHARTER ON HUMAN AND PEOPLES’ RIGHTS (1981) (“Every individual shall have the right to work under equitable and satisfactory conditions, and shall receive equal pay for equal work.”).

<sup>181</sup> AMERICAN DECLARATION OF THE RIGHTS AND DUTIES OF MAN (1948) (“Every person has the right to work, under proper conditions, and to follow his vocation freely, insofar as existing conditions of employment permit.”)

<sup>182</sup> SPAIN CONST., Division 2: Rights and Duties of Citizens, § 35 (“All Spaniards have the duty to work and the right to work...”).

<sup>183</sup> BRAZIL CONST. § 6 (recognizing “labor” as a “social right” under the Constitution).

“Each person has the duty to work and the right to employment.”<sup>184</sup> India’s Constitution provides that “The State shall, within the limits of its economic capacity and development, make effective provision for securing the right to work.”<sup>185</sup> China, perhaps unsurprisingly, stipulates that “Citizens... have the right as well as the duty to work.”<sup>186</sup> The right to work is also fairly common in the constitutions of African countries: Angola, Egypt, and Libya each have one.<sup>187</sup>

Once again, this Article is not primarily concerned with the substantive merits of a right to work, nor with advocating for any such right in the United States. A positive right to work is now so far outside the realm of the plausible in this country that it receives little discussion even within scholarship that is extremely supportive of labor.<sup>188</sup> This is not to say that a right to work has *never* gained traction in the United States.<sup>189</sup> During the coronavirus pandemic, commentators and protestors arguing for a reopening of the economy relied heavily on the idea of a right to work or to go to work. “It has to do with basic rights,” declared one protester in Maryland, adding “People have the right to stay home and people have the right to work.”<sup>190</sup> Some protestors have even unconsciously confused the

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<sup>184</sup> FRANCE CONST. PREAMBLE.

<sup>185</sup> INDIA Const. § 41. Note that Article 41 is contained in the non-justiciable but often litigated “Directive Principles” section of the Constitution.

<sup>186</sup> CHINA CONST. § 42.

<sup>187</sup> ANGL. CONST. § 76(1); EGYPT CONST. § 12; LIBYA CONST. § 8.

<sup>188</sup> *But see* Richard T. De George, *The Right to Work: Law and Ideology*, 19 VAL. U. L. REV. 15 (1984); R. George Wright, *Toward a Federal Constitutional Right to Employment*, 38 SEATTLE U. L. REV. 63 (2014).

<sup>189</sup> For instance, President Roosevelt spoke of the need for a right to employment as part of a “Second Bill of Rights.” Franklin Delano Roosevelt, State of the Union Address (Jan. 11, 1944), <https://fdrfoundation.org/a-second-bill-of-rights-video/>.

<sup>190</sup> Brooks Dubose, *Coronavirus Lockdown Protesters Hold Rally In Annapolis A Few Hours Before Maryland Set To Gradually Reopen*, CAPITAL GAZETTE (MAY 15, 2020 | 2:37 PM), <https://www.capitalgazette.com/coronavirus/ac-cn-annapolis-re-open-maryland-protest-20200515-20200515-s45k57vk45hcbjjsjg225lxmy4-story.html>. Similarly, a Michigan barber whose license was suspended because he defied a lockdown order described Governor Whitmer’s order as “arbitrarily and unilaterally say[ing], ‘I’m going to take your work right away.’” Michael Levenson, *Michigan Barber Has Licenses Suspended After Defying Shutdown Orders*, N.Y. TIMES (May 13, 2020), <https://www.nytimes.com/2020/05/13/us/michigan-barber-shop-virus.html>.

peculiar American interpretation of the term for its more common international understanding.<sup>191</sup>

For the purposes of this Article, however, the ubiquity of a right to work outside the United States as well as its infrequent (and usually garbled) presence within this country matter for their signaling value, not their substance. The enshrining of a right to work in a constitution or other founding charter is a way of acknowledging what a diverse array of scholars have argued: that work is central—psychologically, socially, and of course materially—to human well-being. To be sure, a formal “right to work” is not the only way to achieve this recognition, and some of the United States’ peer countries also lack a true right to work.<sup>192</sup> The irony is that even though the United States does not recognize the importance of work to human well-being via a formal measure like a “right to work,” it renders work—and specifically, employee classification—uniquely essential to a decent life.

#### *B. Work’s Centrality to a Decent Life Inside and Outside the U.S.*

As two countries with especially strong cultural and legal overlap with the United States, we might expect that the U.K. and Canada treat labor similarly. Indeed, neither country has a “right to work” and both countries, unsurprisingly, use the Common Law Control test as a way of distinguishing employees from other types of workers.<sup>193</sup> But in many respects, the similarities end there.

In both Canada and the U.K, workers who are not employees are still substantially covered by anti-discrimination protections, whereas in the United States non-employees are unprotected when it comes to anything except race discrimination (and even there, their protections are

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<sup>191</sup> *You need to open the state back up’: Protesters urge Northam to reopen Virginia’s economy*, NBC12 (April 22, 2020 at 11:31 AM EDT), <https://www.nbc12.com/2020/04/22/you-need-open-state-back-up-protesters-urge-northam-reopen-virginias-economy/> (quoting one Virginia protestor who stated that: “Virginia is a right to work state, you know? We own small businesses. We’ve got... poverty kills. The virus, they’re inflating the numbers.”)

<sup>192</sup> See Part III(B), *infra*.

<sup>193</sup> *Employment Rights Act 1996 s 230 (1)-(3)* (distinguishing between employees and other types of workers in the U.K.).

limited).<sup>194</sup> Canada has a single-payer, government-run national health insurance system (known, perhaps confusingly to a U.S. reader, as “Medicare”) that pays doctors and hospitals directly and requires few, if any, out-of-pocket costs for Canadians.<sup>195</sup> The U.K.’s National Health Service is one of the most expansive in the world, providing largely free-at-the-point-of-use treatment (not just coverage) to all U.K. citizens and heavily subsidized treatment to anyone residing in the U.K.<sup>196</sup> In contrast, 61% of health insurance coverage in the United States is a function of employment, and the Affordable Care Act leaves even “employees” unaccounted for if they work for small businesses.<sup>197</sup> Old age assistance is also more accessible in Canada, which does not tie its Old Age Security

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<sup>194</sup> 42 U.S.C. 1981(a) (“All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts... as is enjoyed by white citizens”). *Contrast* Equality Act, 2010 c. 15, § 83(2)(a) (protecting persons in “employment under a contract of employment, a contract of apprenticeship or a contract personally to do work”). The Canadian Human Rights Act does not limit federal protections against employment discrimination to “employees,” however, most employment discrimination is governed by provincial laws—many of which do not single out employees either. *Human Rights At Work: Who Is Protected At Work?*, ONTARIO HUM. RTS. COMM’N (2008), <http://www.ohrc.on.ca/en/iii-principles-and-concepts/5-who-protected-work> (last visited June 15, 2020).

<sup>195</sup> Goran Ridic, Suzanne Gleason, & Ognjen Ridic, *Comparisons of Health Care Systems in the United States, Germany and Canada*, 24 *MATER SOCIOMED* 112 (2012). As the authors note, the term “single-payer” may not be entirely accurate given that the program is administered at the provincial level, but most American commentators use it anyway.

<sup>196</sup> Nat’l Health Services, *How to access NHS services in England if you're visiting from abroad*, <https://www.nhs.uk/using-the-nhs/nhs-services/visiting-or-moving-to-england/how-to-access-nhs-services-in-england/> (last visited June 15, 2020) (noting, for instance, that “Hospital treatment is free to people who are ‘ordinarily resident’ in the UK.”).

<sup>197</sup> Ridic, Gleason, & Ridic, *supra* note 195, § 3.



payments to work history, let alone classification status.<sup>198</sup> (The U.K.'s system, like the United States', is employment-based.<sup>199</sup>)

Perhaps most strikingly, neither Canada nor the U.K. has an equivalent to at-will employment. At-will employment, which is also known as “Wood’s Rule” after the nineteenth century New York lawyer who popularized it, presumes that hiring for an indefinite period of time is presumed to be terminable at will for “good cause, bad cause, or no cause at all”—anything except an illegal cause.<sup>200</sup> It is hard to overstate how remarkable it is that the United States follows the at-will rule while Canada and the U.K. do not. Although the latter two do not tie as many benefits and protections to employment as does the United States, their labor and employment laws are highly mutually intelligible, both with each other and with the U.S., all three share a background in the Common Law, and all three are built on the concept of the “employee” as a special type of worker.<sup>201</sup> In other words, there is every reason to expect that, despite different orientations to the provision of welfare benefits and social goods, Canada and the U.K. would have a default principle like the at-will rule—but they do not.

Instead, Canada and the U.K. follow variations of a system that American work law scholars have long advocated for in the United States: “just cause” dismissal.<sup>202</sup> Generally speaking, “just cause” forces an

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<sup>198</sup> Gov’t of Canada, *Old Age Security – Eligibility*, <https://www.canada.ca/en/services/benefits/publicpensions/cpp/old-age-security/eligibility.html> (last visited June 15, 2020) (“Your employment history is not a factor in determining eligibility: you can receive the Old Age Security (OAS) pension even if you have never worked or are still working.”).

<sup>199</sup> *The basic State Pension*, <https://www.gov.uk/state-pension/eligibility> (individuals need “a total of 30 qualifying years of National Insurance contributions or credits” to be eligible for the Basic State Pension) (last visited June 19, 2020).

<sup>200</sup> Charles J. Muhl, *The Employment-at-Will Doctrine: Three Major Exceptions*, 124 MONTHLY LAB. REV. 3, 3 (2001); Jay M. Feinman, *The Development of the Employment-at-Will Rule Revisited*, 23 ARIZ. ST. L.J. 733, 733 (1991).

<sup>201</sup> PRASSL, *supra* note 141, at 1 (observing that in U.K. law, non-employees are “without recourse to the highest levels of protection”); Langille & Davidov, *supra* note 141, at 7 (noting that the employee/independent contractor distinction is “paradigmatically critical” in Canada).

<sup>202</sup> *McKinley v. BC Tel*, 2 S.C.R. 161 (2001) (establishing a test for determining, in Canada, whether an employer has “just cause” to terminate an employee); *Dismissal: Your Rights*,

employer to provide notice of termination, payment in lieu of notice, or an adequate rationale for dismissal in lieu of both notice and payment. In other words, it recognizes the essential nature of work *to the employee* by requiring employers to have a reason for terminating the employee (usually misconduct, poor performance, or some other cognizable inadequacy)—or, where they have no such reason, by requiring employers to give the employee time or money to adjust to their newly unemployed status. It is an admittedly thin protection since the employer may still, to use the language of the at-will rule, terminate the employee for “bad cause” or “no cause” so long as the employer notifies or pays appropriately. But it is, nonetheless, an *important* protection.

From a worker’s perspective, in countries like Canada and the U.K., fewer aspects of a decent life—protection from discriminatory treatment, access to medical care, support in old age—can be taken away as easily as the flip of a switch and with no acknowledgement as to the harm being imposed. This is admittedly because, in both Canada and the U.K., fewer benefits and protections are dependent on being classified as an employee in the first place. Yet it is also because the United States places a social and material premium on working under *any* classification and *regardless* of whether a job provides adequate monetary support. The very structure of support for this country’s most vulnerable populations creates and affirms the essentiality of labor by providing a government funded pay raise—sometimes as high as 36%—to the working poor, none of which is available to those not employed in a formal job.<sup>203</sup> When working matters this much, not working matters equivalently.

Moreover, in an all-too important sense, the difference between the United States and its peer countries stems from the vulnerability and precariousness that American workers are made to feel *even when they are employed*.<sup>204</sup> Work is no relief from financial and psychological instability in the United States because it can disappear so quickly, for so little reason—indeed, and to again use the language of the at-will rule, work

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<https://www.gov.uk/dismissal> (last visited June 19, 2020) (describing various requirements that employers in the U.K. must meet to legally terminate employees).

<sup>203</sup> EDIN & SHAEFER, *supra* note 173, at 9 (discussing the Earned Income Tax Credit and its application to the circumstances of a particular interlocutor)

<sup>204</sup> Blades, *supra* note 15, at 1435 and *passim* (discussing peoples’ “highly vulnerable status as employees”)

can disappear for *no* reason at all. During the pandemic, healthcare aides were simultaneously punished for *working* after a positive COVID-19 test and for *not* working after a client had tested positive; this kind of double-bind exists because of the fear and insecurity that even accompanies gainful, *essential*, labor.<sup>205</sup> As one longtime observer of the United States' retirement system observed, Americans take fewer vacation days than Canadians because they "can get fired more easily than people in other countries...in order to avoid being fired... employees are overworking themselves, exploiting themselves."<sup>206</sup> Tellingly, she added, "this will be worse during a recession."<sup>207</sup>

### C. Bodies for Hire

Work is essential to human flourishing everywhere, but it is uniquely essential to *living* in the United States. This is because, as Part II demonstrated, the United States funnels an extraordinary range of benefits and protections through the work relationship instead of granting them universally or on the basis of residency, citizenship, or another widely applicable factor. It is also because almost all those benefits and protections are only available to workers who are classified as employees. To live without employee status (let alone without work) in this country is, for most people, to live without many components of a decent life: access to medical care, protection against discrimination and harassment, a minimum wage for services rendered, freedom to care for oneself or a loved one without fear of termination, and the right to cooperate with one's colleagues in search of better working conditions.

Not only does the lack of these assurances leave non-employee workers significantly worse off materially, it also makes it nearly impossible for them to reap the non-material benefits of work (stability, creativity, self-actualization) that have long been identified by social

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<sup>205</sup> E. Tammy Kim, *The Invisible Essential Workers*, N.Y. TIMES (June 30, 2020), <https://www.nytimes.com/2020/06/30/opinion/coronavirus-nursing-homes.html?action=click&module=Opinion&pgtype=Homepage>.

<sup>206</sup> Dora Mekouar, *Why Americans Work More Than Their Foreign Peers*, VOA (Sept. 7, 2018), <https://blogs.voanews.com/all-about-america/2018/09/07/why-americans-work-more-than-their-foreign-peers/>.

<sup>207</sup> *Id.*

scientists and philosophers.<sup>208</sup> A rapidly increasing scholarly literature is documenting these losses as they apply to the gig economy, which is supposed to offer greater scope for independence and personal fulfillment than conventional employment but often simply imposes a new and differently-degrading form of subordination to “algorithmic management.”<sup>209</sup> Moreover, as scholars studying gig work are themselves quick to admit, the challenges and indignities associated with working outside employee status are hardly limited to app-based labor.<sup>210</sup>

However, even living *within* employee status is not, in the United States, terribly conducive to human well-being, to say nothing of human flourishing. Alone among its peers—and, indeed, alone in the world—the United States allows the benefits of employee status to be snatched away “for good cause, bad cause, or no cause at all.”<sup>211</sup> To be sure, workers also enjoy this “right.” But this kind of formal parity no more renders the at-will rule beneficial to individual workers than does the formal equivalence between parties to employment contracts. As scholars of both employment law and contract law have repeatedly shown, formal equality in contract has little to do with parity of position in action.<sup>212</sup> More to the point, the benefits of employee status—so essential to a decent life in the

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<sup>208</sup> See notes 170–173, *supra*.

<sup>209</sup> On the questionable extent to which gig work offers independence and personal fulfillment, see generally Das Acevedo, *supra* note 1, *passim*; JEREMIAS PRASSL, *HUMANS AS A SERVICE: THE PROMISE AND PERILS OF WORK IN THE GIG ECONOMY* (2018); Lilly Irani, *Difference and Dependence among Digital Workers: The Case of Amazon Mechanical Turk*, 114 S. ATL. Q. 225 (2015), *passim*; Alex Rosenblat & Luke Stark, *Algorithmic Labor and Information Asymmetries: A Case Study of Uber’s Drivers*, 10 INT’L J. COMM. 3758 (2016), *passim*.

<sup>210</sup> Das Acevedo, *supra* note 161 (comparing gig work, franchise work, and work in contexts where employers rely heavily on independent contractors); Valerio De Stefano, *The Rise Of The “Just-In-Time Workforce”: On-Demand Work, Crowdwork, And Labor Protection In The “Gig-Economy,”* 37 COMP. LAB. L. & POL’Y J. 471, 473 (2015-2016).

<sup>211</sup> See note 200, *supra*.

<sup>212</sup> Tomassetti, *supra* note 135, at 317 (the employment relationship constitutes “equality in contracting and servitude in production”); Franklin G. Snyder, *The Pernicious Effect of Employment Relationships on the Law of Contracts*, 10 TEX. WESLEYAN L. REV. 33, 34 (2003) (“employment is not really a contractual relationship at all; it is, and always has been, one of status”); Jay M. Feinman, *Relational Contract Theory in Context*, 94 NW. U. L. REV. 737, 738–39 (1999-2000); Robert W. Gordon, *Macaulay, Macneil, And The Discovery Of Solidarity And Power In Contract Law*, 1985 WIS. L. REV. 565 (1985) (describing the impact of Stewart Macaulay and Ian MacNeil in critiquing the “highly individualist ideological assumptions” underlying classical contract law scholarship).

United States—do not carry comparable value for the employer who suddenly terminates an employee and for the employee who could have, but did not want to, walk away.<sup>213</sup> In the United States, where labor is always essential to the worker who performs it, the perpetual threat of employee status revocation presented by the at-will doctrine transforms even workers who exist within this relatively protected category into little more than bodies for hire.<sup>214</sup>

#### IV. ELIMINATING THE AT-WILL RULE

Eliminating the at-will rule achieves three things. First, by making it impossible for employers to terminate employees upon no notice, with no pay, and for no reason, it signals comprehension that labor regulation is about determining when labor is essential to someone. It also signals comprehension that labor is always essential to workers, and that it is particularly essential to workers in the United States. Simply put, labor in general and employee status in particular are too important to individual Americans to be lost for “good cause, bad cause, or no cause at all.”

Second, by extension, eliminating the at-will rule partially shifts regulatory perspective from the employer to the worker. Admittedly, workers will still be classified as employees or independent contractors, and classification analysis will largely focus on the employer—or, as has been the case during COVID-19 and the rise of “essential labor,” it will focus on society at large. Yet by imposing limits on employers’ extraordinary ability to dispense with employees, a new system of “just cause” termination will at least prioritize worker perspectives on the back end of the relationship. As Canada and the U.K. demonstrate (among others), just cause termination is hardly unworkable in a liberal-democratic polity or a capitalist economy. Moreover, dozens of proposals specifically explain how to adapt just cause for the U.S. environment. General suggestions include a Model Employment Termination Act,<sup>215</sup> a

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<sup>213</sup> St. Antoine, *supra* note 15, at 67 (describing various mental, physical, and behavioral harms associated with termination).

<sup>214</sup> Jeremias Prassl also alludes to the objectification of working human beings using the phrase “humans as a service.” PRASSL, *supra* note 209, *passim*.

<sup>215</sup> Theodore J. St. Antoine, *The Making of the Model Employment Termination Act*, 69 WASH. L. REV. 361 (1994).

tort of “abusive discharge,”<sup>216</sup> a “pay-or-play” system,<sup>217</sup> and “a switch in the default rule.”<sup>218</sup> Other proposals adapt just cause to specific circumstances, like mid-term contract modification and employee whistleblowing.<sup>219</sup> Any one of these approaches would constitute an improvement for workers.

Finally, precisely because it achieves these small but significant shifts in perspective, eliminating the at-will rule may very well open the door for more comprehensive and worker-supportive labor reforms. The at-will rule is an idiosyncratically American phenomenon and does not exist in peer countries whose approaches to labor regulation otherwise share many similarities with the United States’. Putting the at-will rule to rest is, consequently, a disproportionately significant change that may sufficiently alter employee and employer mindsets as to make further improvements more feasible.

This Article is hardly the first to argue against the at-will rule, and there are by now a number of well-rehearsed objections to calls for its removal.<sup>220</sup> The first of these is that dispensing with the rule does not achieve much in the way of improving workers’ lives because the rule has already been circumscribed by statute or case law in many ways. While limitations to the at-will rule certainly exist at both state and federal levels, white-collar workers in private industry are still largely governed by the rule.<sup>221</sup> More importantly, the rule still operates as a background principle of U.S. work law and employer behavior: eliminating it is not an empty gesture.

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<sup>216</sup> Blades, *supra* note 15, at 1413.

<sup>217</sup> Arnow-Richman, *Just Notice*, *supra* note 15.

<sup>218</sup> Cass R. Sunstein, *Switching the Default Rule*, 77 N.Y.U. L. REV. 106, 121 (2002).

<sup>219</sup> Venessa F. Kuhlmann-Macro, *Blowing the Whistle on the Employment at-will Doctrine*, 41 DRAKE L. REV. 339 (1992); Rachel Arnow-Richman, *Modifying At-Will Employment Contracts*, 57 B. C. L. REV. 427 (2016).

<sup>220</sup> See the sources cited in note 15, *supra*.

<sup>221</sup> Linzer, *supra* note 15, at 336–37 (citing, among others, *rtr.*, 116 Cal. App. 3d 311, 320-21 (1981); *Brockmeyer v. Dun & Bradstreet*, 113 Wis. 2d 561, 567-68 (1983); Blades, *supra* note 15, at 1410-13). See also *St. Antoine*, *supra* note 215, at 362. At the federal level, employers must provide sixty days’ notice where a plant closing will impact fifty or more workers or where a “mass layoff” (as defined by statute) will occur. WARN Act, 29 U.S.C. §§2101-09, .§§2101(a)(2), 2101(a)(3), 2102 (2006).

A second objection is a variation on the first, inasmuch as it dismisses efforts to eliminate the at-will rule because doing so does not go far enough to improve the conditions of work. Work law scholars have long argued that the United States' approach to regulating labor is "ossified," that there is "little hope for reversing the trend," and that "only by writing on a statutory clean slate could [we] meet these challenges."<sup>222</sup> According to this line of thinking, a discrete change like eliminating the at-will rule is a game not worth the candle.

To be clear, eliminating the at-will rule will not change the fact that labor is always essential to workers. It will simply, *finally*, acknowledge that this is the case. Labor matters to anyone who performs it for reasons that are not easily attributable to law, including personal fulfillment and social status. Work is often "what keeps the problems of mental distress and family dysfunction at bay"; it has, mentally and physically, "a certain healing power."<sup>223</sup> Likewise, eliminating the at-will rule will not change the fact that labor, and specifically employee status, is particularly essential to American workers for reasons that *are* easily attributable to law. Workers in the United States, more than their peers elsewhere, depend on their jobs for access to basic benefits and protections, as well as for access to crucial safety net systems. Even in the wake of a global pandemic, it is difficult to imagine this changing.

Nevertheless, as the later stages of the pandemic are beginning to teach us, first steps are important steps. Beginning in late May, 2020, individuals all over the United States ignored social distancing imperatives in the service of another cause: the Black Lives Matter marches that erupted upon the killing of yet another unarmed black person, George Floyd, by the Minneapolis police.<sup>224</sup> One of the more common responses by city and state legislators has been to remove monuments honoring Confederate leaders from public property.<sup>225</sup> This step, in and of itself,

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<sup>222</sup> Estlund, *supra* note 134, 1611-12 (2002); Kate Andrias, *The New Labor Law*, 126 YALE L.J. 2, 6 (2016); Clean Slate, *supra* note 16.

<sup>223</sup> Edin & Shaefer, *supra* note 173, at 159.

<sup>224</sup> Evan Hill et al, *8 Minutes and 46 Seconds: How George Floyd Was Killed in Police Custody*, N.Y. TIMES (May 31, 2020), <https://www.nytimes.com/2020/05/31/us/george-floyd-investigation.html>.

<sup>225</sup> Alisha Ebrahimji, Artemis Moshtaghian, *Confederate statues are coming down following George Floyd's death. Here's what we know*, CNN (June 12, 2020, 2:37 PM ET),

does not constitute a reimagination of law enforcement, race relations, or public safety. And yet, with each monument that they dismantle, legislators convey that they “realize that this is a symbol that is sending the wrong message to U.S. citizens.”<sup>226</sup> The at-will rule is more than symbolic; like the chokeholds and no-knock warrants that are also being banned in response to the Black Lives Matter protests, it is a legal tool that works in predictable ways within specific contexts.<sup>227</sup> It is, moreover, a legal tool that disproportionately impacts the workers most severely hurt by pandemic-induced unemployment—the poor, the young, and the marginalized.<sup>228</sup> At a moment when workers are suffering because of unemployment and dangerous employment alike, the elimination of the at-will rule would constitute legislative recognition that, especially in the United States, labor is always essential to those who perform it.

#### CONCLUSION

This Article began with an observation about the emergence of a novel legal category during a pandemic, and concluded with recommendations respecting a standard legal principle that long predates that pandemic. As I have shown, essential labor, the ostensibly new type of work that has emerged out of COVID-19, is in fact not new at all: we have always classified, regulated, and remunerated work according to how essential it was. Before the pandemic, this essentiality analysis was conducted with reference to the employer, largely through the medium of the employee-independent contractor distinction and the Control test that is its linchpin,

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<https://www.cnn.com/2020/06/09/us/confederate-statues-removed-george-floyd-trnd/index.html>.

<sup>226</sup> Alfred L. Brophy, *Is the Confederate Flag Unconstitutional?*, NEW REPUBLIC (June 24, 2015), <https://newrepublic.com/article/122138/confederate-flag-unconstitutional>.

<sup>227</sup> Barbara Campbell & Suzanne Nuyen, *No-Knock Warrants Banned In Louisville In Law Named For Breonna Taylor*, NPR (June 11, 2020, 9:40 PM ET),

<https://www.npr.org/sections/live-updates-protests-for-racial-justice/2020/06/11/875466130/no-knock-warrants-banned-in-louisville-in-law-named-for-breonna-taylor>; Luis Ferré-Sadurní & Jesse McKinley, *N.Y. Bans Chokeholds and Approves Other Measures to Rein In Police*, N.Y. TIMES (June 12, 2020, 7:38 p.m. ET), <https://www.nytimes.com/2020/06/12/nyregion/50a-repeal-police-floyd.html?action=click&module=Top%20Stories&pgtype=Homepage>

<sup>228</sup> See notes 39–40, *supra*.



while during the pandemic essentiality analysis has focused on labor that is essential to society in general. If we are to take any work law lessons from the coronavirus pandemic, it should be that it is high time that our regulatory system centered workers above employers or third parties. A good first step towards effectuating this kind of result is recognizing that *all* labor is essential to those who perform it, and that the at-will rule, which ignores this fact, is incompatible with truly “essentializing” labor.