Introduction

Deepa Das Acevedo

This book, although it may appear to be a single book, is in fact two. On the one hand, this is a book about labor exchange in the gig economy masquerading as a book about the value of qualitative empirical data for law and policy development. On the other hand, this is also a book about the value of qualitative empirical data masquerading as a book about the buying, selling, and performance of labor via gig companies like Uber and Airbnb. Since a reader may find it difficult to tell which of these two she is reading at any given moment this introduction will sketch the contours and purpose of each book.

GIG WORK

As a book about labor exchange in the gig economy this volume dives deeply into what is, in many ways, *the* hot-button work law issue of the day. The gig economy has generated immense popular interest in labor conditions – no mean feat in an era of decreasing unionization and growing corporate power – as much as it has commanded attention from policymakers and scholars. In many ways this appeal is unsurprising given the aura of innovation and entrepreneurship that surrounds the gig economy, the way it reflects broader trends toward micro- and on-demand transactions, and its incorporation of widely accessible technology. Within weeks of the 2020 shutdowns triggered by the COVID-19 pandemic, it became clear that the simple acts of providing transportation or delivering meals had become "essential labor" in most countries, and that these tasks were largely undertaken by gig workers. At the same time, many commentators are arguing that key aspects of the gig business model simply replicate strategies used by a variety of employers well before Uber became a household name. The empirical insights contained in this volume speak to both this sense of newness and this sense of familiarity in the course of serving three broad purposes.

Most obviously – but perhaps also most importantly – this volume provides substantive empirical information about gig work across multiple industries. What

are the conditions under which gig workers work? How exactly does the tripartite relationship between consumer, provider, and company operate? While such foundational information is in far greater supply today than it was just a few years ago when many of the contributors to this volume first began studying gig work, the gig economy is still new enough, and *secretive* enough, that answers to these kinds of questions are still well worth gathering. This is all the more true given the rapid pace at which the companies themselves have evolved and the worries they generate have changed. In the "early" days of the gig economy, one of the most common concerns voiced with regard to transportation companies like Uber was that they compromised consumer safety, while one of Uber's most widely criticized practices was its refusal to facilitate a tipping mechanism within its smartphone app. Today, the overwhelming worry associated with transportation companies (as with the gig economy more broadly) is worker welfare. Similarly, tipping is no longer a dominant concern since Lyft has allowed it since 2012 and Uber has allowed it since 2017.[1] Gig worker concerns, as the coronavirus pandemic made clear, are worker concerns – even if the mechanisms and dynamics under which they operate are somewhat different.

Secondly, this volume provides insights as to how gig workers experience, engage with, or think about the regulatory infrastructures that apply to them. This type of insight matters inasmuch as labor and employment law is concerned with creating conduct rules for lay actors – yet, remarkably, there is little empirical information about how the realities of gig work intersect with the legal rules meant to govern it. The same type of insight also serves to bridge two immensely interesting and quickly expanding literatures that, as yet, have had unfortunately little crossover impact. Over the last few years, scholars in anthropology, sociology, communication studies, and information technology have conducted a wide range of qualitative empirical studies on gig labor that do not address law and policy concerns despite widespread interest and the relatively urgent need for regulatory action. Meanwhile, legal scholars interested in devising better oversight mechanisms for gig work have accessed comparatively little of the qualitative research that is currently available in these social science literatures and that could provide valuable insights for normative scholarship. The chapters that follow bridge these two literatures both directly, in that they bring the contributors' own qualitative research to bear on gig work regulation, and indirectly, by drawing on and combining the insights of the contributors' disciplines.

Finally, this volume offers decisionmakers who are interested in learning more about gig work a sense of what information to look for and where to look for it. The state legislators, municipal officials, judges, and labor board members who, in the absence of any federal legislation, must devise regulations for gig work are left to do

[1] Kari Paul, *Uber Allows Tipping in 121 Cities – Here's How Much You Should Tip Your Driver*, MarketWatch, July 8, 2017, www.marketwatch.com/story/this-is-exactly-how-much-you-should-tip-your-uber-driver-2017–04-18.

so without much empirical knowledge to draw on.[2] What information they do have largely comes from the experiences of peer regulators elsewhere (who are necessarily facing *other* circumstances), from journalistic accounts (operating under *other* incentives), from scholarship (frequently facing the *same* limitations), and from their own intuition about how things ought to be. Confusion and dissatisfaction have been the overwhelming result of this makeshift approach. In contrast, the kind of granular empirical information produced by the contributors to this volume can help regulators understand the mechanics and the dynamics of the relationships they are trying to govern.

This is perhaps the ideal time to empirically study the relationship between gig work and regulatory practices. Many jurisdictions now feature some legal infrastructure, whether judicial or administrative, that gig companies and workers must engage with. Influential states like California and New York are beginning to develop more substantive legislation to address labor exchange in the gig economy – legislation that is likely to inspire or simply be duplicated by regulations elsewhere.[3] The COVID-19 pandemic will arguably have accelerated this process, inasmuch as, for the first time, many categories of gig workers were included alongside conventional workers in legislation providing job-related benefits or defining "essential labor." Nevertheless, even in those jurisdictions that feature the thickest web of regulations, there is hardly anything amounting to consensus or stability regarding how gig work ought to be governed. In other words, we are now at that rare moment where it is both possible and useful to improve our understanding about how law and society – in this case, work law and gig workers – interact.

QUALITATIVE RESEARCH

As promised, this is also a book about highlighting the value of qualitative empirical data for law and policy development. Thanks in part to the rise of law and economics, interdisciplinary legal conversations have been largely dominated by quantitative research methods. Qualitative research – the kind of research that involves interviews, informal conversations, and participant observation, usually as part of a mixed-methods approach along with other techniques like archival research or content analysis – has been significantly less prominent. This book is not concerned with changing that. What it is concerned with, however, is showcasing the types of insights that are uniquely accessible to individuals using qualitative research techniques, as well as demonstrating why those insights, like the insights produced by quantitative studies, can be useful to legal scholars and decisionmakers.

[2] As Chapter 1 recounts, there have been some efforts to regulate gig work at the federal level, most notably separate bills developed by Senator John Thune and Senator Mark Warner, but these have not progressed beyond the committee level.

[3] *See* Chapter 1 (discussing AB5 in California and the Dependent Workers Act in New York).

To begin with, qualitative research can produce extremely granular information. Quantitative sources like data sets and mass surveys, on the other hand, give sky view insights. Put differently, the one more reliably offers depth over breadth while the other more reliably offers breadth over depth. While the generalizable conclusions usually enabled by quantitative research are both valuable and appealing in a law and policy context (since regulations are developed for the many rather than for the few), it would nonetheless be a mistake to conclude that granular qualitative insights are of no use to legal scholars and decisionmakers. One of the earliest studies of Uber and Lyft explained the mechanics of surge pricing from the drivers' perspective using largely qualitative methods and by reproducing individual smartphone screenshots showing the companies' efforts to shape driver behavior.[4] Neither of these types of information would surface in large-scale quantitative studies, yet both have been instrumental in shaping scholars' and decisionmakers' thinking about how much control these transportation companies exert over drivers and, consequently, whether they should be treated as the drivers' employers.

Second, qualitative research can more easily allow researchers to explore how people make sense of the world around them – and, which is more immediately relevant for law and policy folk – how they make sense of the legal infrastructures with which they are constantly interacting. This is perhaps best understood as the ability to answer the "why" question: *why* do people think as they do, *why* do they behave in ways that do not reflect what they consciously think, *why* do they seem to think and behave differently than we, as outsiders, might expect, and so on.[5] Quantitative research can sometimes capture parts of this puzzle because it can, in select instances, tell us whether there is a distinction between what people do or say and what they *say* they do or say; for instance, it can reveal whether Airbnb hosts discriminate against Black customers despite claiming to do otherwise.[6] But in circumstances where there is no alternate source against which peoples' statements can be measured – that is, where there is no data set to analyze and no website to mine – then even this cannot be done through purely quantitative methods. Municipal officials, for example, are unlikely to admit that their gig work policies are based more on journalistic accounts than on locally relevant data, but this is

[4] Alex Rosenblat & Luke Stark, *Algorithmic Labor and Information Asymmetries: A Case Study of Uber's Drivers*, 10 Int'l J. Comm. 3758 (2016).

[5] For examples of relevant ethnographically informed scholarship answering these kinds of questions, see Deepa Das Acevedo, *Unbundling Freedom in the Sharing Economy*, 91 S. Cal. L. Rev. 793 (2018) (exploring why the "control test" has proven both appealing and dissatisfying to scholars, decisionmakers, and even workers themselves) and V. B. Dubal, *Wage Slave or Entrepreneur? Contesting the Dualism of Legal Worker Identities*, 105 Cal. L. Rev. 65 (2017)(exploring why Bay Area taxi drivers disagreed on the value of employee classification).

[6] Benjamin Edelman, Michael Luca, Dan Svirsky, *Racial Discrimination in the Sharing Economy: Evidence from a Field Experiment*, 9 Am. Econ. J. Applied Econ. 1 (2017). There is also an earlier study suggesting that non-Black hosts charge a higher amount for equivalent rentals. Benjamin Edelman & Michael Luca, *Digital Discrimination: The Case of Airbnb.com* (Harv. Bus. Sch., Working Paper No. 14–054, 2014).

nonetheless true in many cases simply because data on gig work is notoriously difficult and expensive to come by.[7] Not only is it difficult to prove, quantitatively, that officials do not rely on data in formulating their policies, it is virtually impossible to explain *why* – or, for that matter, to understand how they *actually* go about creating policy – without the participant observation and repeated conversations that are the stock-in-trade of qualitative research.

All of this is to say that qualitative research can often reveal substantive insights about the everyday workings of the law that are *inherently invisible* to quantitative methods. Moreover, while these substantive insights are valuable in themselves, they can also give rise to theoretical and doctrinal advancements that would not otherwise be possible. It is no coincidence that "invisible work" and "emotional labor," qualitatively derived concepts that add nuance and accuracy to our understanding of the phenomena being regulated by law, were developed by sociologists.[8]

However, in addition to shedding light on practices and dynamics that are *inherently* invisible to quantitative forms of data collection, qualitative research can also help open up spaces that are *temporarily* beyond the reach of quantitative study. Again, the gig economy is an excellent example: corporate secrecy and isolating working conditions mean that large-scale, data-set driven information about gig work has been hard to gather. This is slowly starting to change as companies create measurable impacts on third parties (like banks),[9] as they become publicly traded (and make necessary disclosures), and as researchers become more adept at extracting information from platforms and websites. But for several years, individuals who wanted to study gig work were obliged to rely on company-packaged information, independently collected qualitative information (usually compiled by journalists), or little empirical information altogether.[10] Interest in and concern about the gig economy, though, waited for no one.

Now is an especially good time to reevaluate and reiterate the value of qualitative empirical research to law and policy conversations. The recent reemergence of sociological ethnography within interdisciplinary legal scholarship has meant that

[7] See Chapters 7 and 8 of this volume.

[8] Arlene Kaplan Daniels, *Invisible Work.*, 34 Soc. Problems 403 (1987); Arlie Russell Hochschild, The Managed Heart: Commercialization of Human Feeling (3rd ed. 2012) (developing the concept of "emotional labor").

[9] *See, e.g.*, J. P. Morgan Chase, Paychecks, Paydays, and the Online Platform Economy: Big Data on Income Volatility (Feb. 2016) (on file with author).

[10] Perhaps the most well-known example of gig work researchers using company-packaged information is a 2018 paper by Hall and Krueger. Jonathan V. Hall & Alan B. Krueger, *An Analysis of the Labor Market for Uber's Driver-Partners in the United States*, 71 Indus. Labor Relations Rev. 705 (2018) (describing the results of a study conducted by an employee of Uber and an academic economist who was employed as a consultant for Uber at the time of the study, using information obtained from Uber). *See also* Janine Berg and Hannah Johnston, *Too Good to Be True? A Comment on Hall and Kruger's Analysis of the Labor Market for Uber's Driver-Partners*, 72 Indus. Labor Relations Rev. 39 (2019) (critiquing the underlying data used by Hall and Krueger as well as their interpretation of that data).

there is both greater interest in and confusion about what good qualitative research is *and* what good qualitative research can do for law.[11] On the former point, contributors to this volume demonstrate that innovative and insightful qualitative research takes diverse methodological and theoretical forms. On the latter, this volume offers a range of examples, from critiques of how work law imagines worker subjectivities to proposals for regulatory reform, in the hope that legal scholars and decisionmakers can see for themselves how qualitatively grounded insights can contribute to the task of regulating gig work.

CROSSING THE ACADEMIC BRIDGE

This book has a third goal, one born of necessity as much as design, and that is linking academic experts who have used qualitative methods to learn about gig work regulation with nonacademic researchers who have done likewise. Much of the earliest empirical information about the gig economy came from journalists and policy analysts who did the difficult and time-consuming labor of conducting interviews and engaging in participant observation before qualitatively minded academics joined in the effort.[12] Consequently, many of the legal and policy positions that scholars and decisionmakers have developed over the last decade, as well as many of the arguments they continue to make, are built on these foundational studies by various nonacademic industry experts. Although every edited volume is only a partial reflection of its topic, to exclude industry experts altogether from a book about qualitative insights for gig work regulation would be to grossly misrepresent the range and origins of those insights.

This is not to say that there are *no* differences between the approaches taken by academic contributors and those taken by industry experts. Qualitative empirical research done within a university context is almost always preplanned, financially funded, and subject to highly formalized disciplinary practices as well as ethics constraints that are overseen by institutional review boards. By contrast, the information collected by this volume's nonacademic contributors is largely acquired in the course of performing other tasks – developing policy reports, advising gig workers, or

[11] For just one example of sociological research that has inspired both great interest and critical debate among legal scholars, *see* Alice Goffman, On the Run: Fugitive Life in an American City (2014) (based on the author's six year study of policing in an African-American neighborhood of Philadelphia). See also Steven Lubet, Interrogating Ethnography: Why Evidence Matters (2017) (critiquing certain practices in sociological ethnography).

[12] The following is a decidedly incomplete list of these early journalistic studies: Josh Dzieza, *The Rating Game: How Uber and Its Peers Turned Us into Horrible Bosses*, The Verge, Oct. 28, 2015, www.theverge.com/2015/10/28/9625968/rating-system-on-demand-economy-uber-olive-garden; Emily Guendelsberger, *I Was an Undercover Uber Driver*, CityPaper, May 7, 2015 (on file with author); Sarah Kessler, *Pixel and Dimed: On (Not) Getting By in the Gig Economy*, Fast Company, Mar. 18, 2014, www.fastcompany.com/3027355/pixel-and-dimed-on-not-getting-by-in-the-gig-economy.

reporting on the gig economy for the news media. As such, it is subject to different and more varied imperatives.

Likewise, nonacademic writers are rarely bound by the conventions that govern scholarly writing – the citations, literature reviews, methods sections, and prose styles that, although they vary considerably from discipline to discipline, are still commonly and recognizably "academic." As a result, nonacademic writing is often remarkable for its liveliness, brevity, and skill at translating unfamiliar concepts to lay readers. The industry experts who have contributed to this volume take an intermediate approach by retaining the style and concision of their usual writing but including some citations for facts not established by their own work as well as some methodological explanation as to how they arrived by their insights. In order to acknowledge these differences, their chapters appear together, as Part II of the volume, following the chapters written by academic contributors.

SCOPE AND TERMINOLOGY

Nearly ten years in, two boundary-drawing challenges underlie virtually all commentary on the gig economy: determining what exactly is meant by the "gig economy" and identifying the proper terminology with which to reference it. Some of the earliest scholarship in this area was specifically concerned with establishing the field of debate by developing taxonomies and terms, but these efforts appear to have been more successful at identifying gig work than at naming it.[13] Now, many participants in this conversation operate on a shared sense that, when it comes to gig work, they too "know it when [they] see it"[14] – and, for the most part, their approach has worked well enough. Like the contributors to this volume, who did not explicitly agree on a definition or a term, most commentators have focused their attention on companies that share two characteristics: they *participate* in the transactions they give rise to between third parties, and they (albeit to varying degrees) *substitute* themselves for governmental safeguards that would otherwise apply to those transactions.[15] (To be sure, gig companies contest both these descriptions of what they do.) Additionally, most gig companies use some forms of advanced technology – "algorithmic management"[16] mechanisms and smartphone applications are the most common – to facilitate the transactions they generate.

[13] *See, e.g.*, Deepa Das Acevedo, *Regulating Employment Relationships in the Sharing Economy*, 20 Emp. Rts & Emp. Pol'y J. 1 (2016); 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 471 (2015–16); Orly Lobel, *The Law of the Platform*, 101 Minn. L. Rev. 87 (2016–17).

[14] The original phrase – "I know it when I see it" – was written by Justice Potter Stewart with reference to pornography in 1964. Jacobellis v. Ohio, 378 U.S. 184, 197 (1964).

[15] This definition is taken from Das Acevedo, *supra* note 13, at 9–11.

[16] Min Kyung Lee et al., *Working with Machines: The Impact of Algorithmic and Data-Driven Management on Human Workers*, Proc. 33rd Ann. ACM Conf. Human Factors Comput. Sys. 1603–1612 (2015).

Not all companies that seem to use technology to change the means or ends of consumer behavior meet these criteria.[17] Some of the more well-known entities that might appear to belong in any discussion of gig work do not generate financial transactions at all; rather, the exchanges they give rise to are merely swapping exercises in which the company (often a nonprofit) acts as an online bulletin board. Couchsurfer, for instance, does not shape interactions between individuals wanting a place to stay during their travels and individuals wanting to host travelers. Similarly, not all companies that promote on-demand, micro-consumption actually generate "peer to peer" transactions between two third parties – many are business-to-consumer entities much like conventional brick-and-mortar stores. ZipCar, which rents cars in increments of thirty minutes or more (and is in fact owned by the legacy rental company, Avis), exemplifies this type.

In contrast, companies like Uber, Airbnb, Feastly, and Handy generate financial transactions between third parties – usually, an individual consumer and an individual service provider. The same companies participate in those transactions by means of ratings systems, vetting and termination standards, real-time tracking practices, and by enforcing brand management techniques, among other strategies.[18] And, in the process, these companies often substitute themselves for governmental safeguards that would otherwise apply to those transactions – either industry safeguards (like licensing or hygiene requirements) or labor safeguards (like unionization and minimum wage rights) or both. Industry safeguards and consumer protection concerns dominated earlier phases of the debate on gig work, but the conversation has overwhelmingly shifted to labor and employment safeguards and the extent to which gig companies ought to provide for them.[19] As Chapter 1 explains, that conversation is rooted in the American system of worker classification, which allocates most work-related benefits and protections to individuals classified as *employees* while excluding those classified as *independent contractors*. And, as many of the chapters in this volume demonstrate, any attempt to fairly and effectively classify gig workers has to be grounded in an empirically based awareness of their conditions of work and the way in which those conditions are impacted by regulations.

Even if there is tacit agreement as to which companies' practices present common regulatory challenges and should thus be grouped together, there is little consensus as to how to reference those companies and the workers whose services they sell. The most popular term in the earliest days of this conversation was the *sharing economy*. That phrase, which was quickly and easily lampooned for the aura of altruistic,

[17] For further discussion of these close-but-not-quite examples, *see* Das Acevedo, *supra* note 13, at 3–9.

[18] Deepa Das Acevedo, *Invisible Bosses for Invisible Workers, or Why the Sharing Economy Is Actually Minimally Disruptive*, 2017 U. Chi. Legal Forum 35 (2018).

[19] For examples of the earlier focus on consumer protection, see Christopher Koopman et al., *The Sharing Economy and Consumer Protection Regulation: The Case for Policy Change* 2 (Mercatus Working Paper, May 2015) (on file with author); Nancy Leong, *New Economy, Old Biases*, 100 Minn. L. Rev. 2153 (2016).

noncommercialized exchange it inaccurately bestowed upon the sale of goods or labor for money, proved to have considerable lasting power simply because it was widely recognizable. Indeed, critics and admirers alike continued to use *sharing economy* even as they agreed it was a less than ideal label.[20]

Today, the comparable term – both with regard to recognition and criticism – is the *gig economy*. As contributors to this very volume argue here and elsewhere, this new term is no more neutral than its predecessor: it advances the idea that the workers in question are entrepreneurs engaging in discrete (and consequently nonemployee-like) tasks that have little to do with the companies who market their services.[21] That said, and despite the periodic surfacing of other terms – economies variously described as peer-to-peer, on-demand, platform, and 1099 – the *gig economy* remains the most efficient way to reference the forms of labor exchange with which this volume is concerned. For this reason, and because there is as yet no preferable alternative in circulation, contributors to the volume have largely retained this terminology or used it alongside other terms.[22]

Just as the substantive scope of this volume is restricted to companies that engage in the kind of technologically mediated participation and substitution described above, the volume's geographic scope is limited to the United States. This is emphatically *not* because the gig economy or the regulations circumscribing it are at their thickest here, nor is it because scholarship on gig work – empirical or otherwise – is more developed in the United States than elsewhere. Rather, the volume's geographic focus is at once an attempt to foreground the value of qualitative insights for gig work regulation against a common legal landscape and an admission that no one volume can do justice to the topic on a global scale.

CHAPTER OVERVIEW

The two parts to this volume reflect different styles of empirical engagement with gig work that, together, underscore just how much there is to learn from qualitatively informed analysis. In Part I, six chapters by academic authors (or coauthored by academic authors working with policy analysts) draw on a range of methodological and analytical approaches to offer regulatory insights about gig work. The academic contributors include two sociologists, one of whom writes with a policy analyst trained as an anthropologist, two legal scholars, and three law professors who also hold doctorates in social science disciplines. Part II features slightly shorter chapters

[20] For a positive account that uses the term *sharing economy*, *see* Arun Sundararajan, The Sharing Economy: The End of Employment and the Rise of Crowd-based Capitalism (2016). For a negative account that also uses the term, *see* Tom Slee, What's Yours is Mine: Against the Sharing Economy (2015).

[21] *See, e.g.*, the criticism of "gig economy" and "gig work" in Chapters 4 and 5.

[22] For instance, Chapter 1 uses both "gig" and "platform," with the latter most often being used synonymously with "company" – as in, "Uber is a *transportation platform*" (it is also a *transportation company* but so is the long-haul trucking giant Schneider National).

by nonacademic industry experts – a reporter, a policy analyst, two staff members from the National Employment Law Project, and the founder of one of the oldest online resources for drivers in the gig economy. Like their co-contributors based at academic institutions, these authors also draw on information gained through qualitative empirical means – observations, conversations, firsthand participation – but in their case, the information may or may not have been acquired for the express purpose of informing regulatory strategy.

Part I

Chapter 1 lays the groundwork for the empirically informed contributions that follow by describing the current landscape of gig work regulation. Deepa Das Acevedo constructs a brief tour of legislative, judicial, and administrative developments ranging from municipal ordinances to federal appellate court opinions with the goal of offering "something of a refresher for readers who are familiar with the topic and provid[ing] some basic information for those who are not."[23] As the chapter demonstrates, regardless of who undertakes the regulatory action or at which level of government it occurs, the central concern remains determining whether gig workers are employees who receive a moderate range of benefits and protections or independent contractors who do not. This question of worker classification also surfaces repeatedly throughout the volume as contributors demonstrate the different and often surprising ways in which it impacts the incentives and conditions of work for individuals in the gig economy.

Following this opening chapter, V. B. Dubal draws on her ethnographic work among Uber drivers to argue that the question of worker classification is, for the drivers themselves, much more complicated than widespread scholarly, activist, and political opinion would have it. Although most survey research reports that Uber drivers prefer being independent contractors because of the autonomy it affords them, drivers in Dubal's research express ambivalence toward this outcome in direct conversation. Perhaps more relevantly, many drivers have pushed for legislation that would grant them employee status. At the same time, drivers do not act out of a conviction that being an employee is unequivocally superior to being an independent contractor. Rather, Dubal's interviews and long-term engagement with drivers reveal that they are less invested in classification per se and more in particular benefits associated with one worker status or the other. Commentators – and perhaps especially regulators – who interpret either survey results or a willingness to rally around concrete legislative goals as definitive proof of what drivers want (and what might achieve basic labor regulation goals) do so at their own risk.

In Chapter 3, Alexandra Mateescu and Julia Ticona use content analysis and interviews to explore the sociological concept of "invisibility" as it applies to

[23] Das Acevedo, Chapter 1.