

# Beclouded Work In Historical Perspective

Matthew W. Finkin\*

## I. Introduction

Modern information technology has become the midwife of the “shared economy,” the “gig economy,” the “on-demand economy.” This, it is said, presents us with “something new in employer-employee relations.”<sup>1</sup> The question addressed here is whether that is true. Do we face something new in employment? To the extent we do not, is anything to be learned from the past?

At the outset it is necessary to grasp what confronts us, what these “gig” or cloud-sourced systems are, how they work. The form that dominates the discussion thus far, that has generated the most media “buzz,” worker participation, litigation, and protest by those whose work is being displaced – taxi drivers<sup>2</sup> – is the computerized outsourcing of services via an “app” to be performed by contracting participants for third-party customers, most prominently Uber and Lyft. The thrust of the legal attention drawn to them in the United States concerns whether those contracting to provide that service are employees of the company or are independent contractors.<sup>3</sup> This is a question of considerable practical importance, but not the one addressed here.

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\* Professor of Law, the University of Illinois. The author would like to thank Valerio De Stefano for bringing some crucial portions of the literature to the author’s attention and to the workshop participants for their illuminating comments. Thanks also to Sanford Jacoby for critical comments on an earlier draft.

<sup>1</sup> Steven Solomon, *Uber Case Highlights Outdated Worker Protection Laws*, N.Y. Times, September 16, 2015 at B-4; see also, Sarah O’Connor, *The human cloud: A new world of work*, FT.com (Oct. 9, 2015); Killian Fox & Joanne O’Connor, *Five ways work will change in the future*, The Guardian (29 Nov. 2015) (“3. The human cloud.”); Seth Harris & Alan Krueger, *A Proposal for Modernizing Labor Laws for Twenty-First-Century Work: The “Independent Worker”* 5, The Hamilton Project Discussion Paper 2015-10 (Dec. 2015) (“New and emerging work relationships on the ‘online gig economy’ do not fit the legal definitions of ‘employee’ and ‘independent contractor’ status.”); Wolfgang Däubler & Thomas Klebe, *Crowdwork: Die Neue Form der Arbeit – Arbeitgeber auf der Flucht?*, NZA 1032 (2015).

<sup>2</sup> Laurent Gamet, *UberPop*(†), *Droit Social* 929 (Nov. 2015), commenting on the decision of the Constitutional Counsel sustaining a penal provision in the Code of Transportation regulating Uber-like services. Conseil constitutionnel Dec. No. 2015-484 QPC (Sept. 22, 2015).

<sup>3</sup> O’Connor v. Uber Technologies, Inc., 82 F.Supp.3d 1133 (N.D. Cal. 2015); Cotter v. Lyft, Inc., 60 F.Supp.3d 1067 (N.D. Cal. 2015). The City Council of Seattle has enacted an ordinance that would allow Uber and like drivers to

Casting a broader net, two other models emerge.<sup>4</sup> In one, a task to be performed for a sponsoring company, not for a third party, is posted electronically and a price is either set or put up for bid, payment to be made upon satisfactory completion within a fixed period of time. Those applying to perform it are vetted, by whom is not relevant for the moment, and from that pool of applicants one or more are chosen. Some tasks can involve rather low levels of cognition, *e.g.*, to look at business receipts and identify the business receipted, at 2 cents per receipt; or to transcribe up to 35 seconds of general content into text, at 5 cents per transcription.<sup>5</sup> (Note that on an hourly basis the rate of pay for this work may be less than the federal or state hourly minimum wage.) Tenders of such work can be far more complex, however, and can involve the assembling of groups of sophisticated professionals, potentially on a global scale. But, the model of pay based on satisfactory performance of assigned work remains constant.

The second is modeled on a competition akin to a bid for a government contract, an architectural commission, a prize, or the design of a public monument. The solicitor puts out a request for the solution to a specified problem. Interested parties prepare their proposals and bear the cost of time and effort in the preparation.<sup>6</sup> Those who are not selected lose their sunk costs.<sup>7</sup>

The latter builds on a well-established practice. Information technology facilitates the dissemination of the competition, but adds nothing to the model itself. The former more strongly

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bargain collectively if they are not employees within the meaning of the National Labor Relations Act. City of Seattle Ordinance No. 118499 (Dec. 2015). The Labor Act applies to “employees” and exempts independent contractors from its reach. 29 U.S.C. § 152(3).

<sup>4</sup> Because the author does not use a computer he has had to rely on the reference staff of the Albert E. Jenner Law Library of the University of Illinois College of Law, to whom thanks are owed. However, most of the “platforms” the staff located require that an account be opened before the actual tasks to be done can be accessed. That restriction has limited the author’s ability to grasp the full range at tasks contracted out.

<sup>5</sup> These taken from postings on Amazon Mechanical Turk, <https://www.mturk.com/mturk/findquals?earned=false&requestable=false> (Sept. 14, 2015).

<sup>6</sup> This is taken from <http://www.innocentive.com/for-solvers/why-solve> (Sept. 14, 2015).

<sup>7</sup> In a newsworthy example, an architectural firm incurred \$75,000 (in 1982 dollars) to prepare a proposal for the Jimmy Carter presidential library only to find that the firm selected had not bid on the project. Art Harris, *Design Competition for Carter Library Has Prominent Architects in a Suit*, The Washington Post, July 25, 1982 at p. A-12.

resonates against the claim of being an innovation in employment relations. That is the model addressed here.

## II. Industrial Homework and the “Putting Out” System

For most of history, manufacture, the making of things, took place in the home. Factories assembling thousands of workers were known as early as the Third Dynasty of Ur, about 3,200 years ago, but even then most production was home-based<sup>8</sup> – in the making of goods for family consumption or for consumption by others, including work on raw material provided by others. The latter came to be called the “putting out” system – in German, the *Verlagssystem*. It was long and widely followed.<sup>9</sup>

The oft told tale of economic history, starting in early modern Europe, is of how production, initially based in the home or in the home-based artisanal workshop, moved – with jarring social consequences, collective protest, even violence – to the factory. There the doing of work was often but not invariably accomplished by an ever refined division of labor that stripped artisans of their skills and independence and subjected workers to conditions of intense supervision and control.<sup>10</sup> According to the conventional account, the “putting out” system was, in hindsight, a transitional, proto-industrial institution. It

enabled mercantile capitalism from a quite early stage to take advantage of the surplus of cheap labour in the countryside. The rural artisan worked at home, helped by his family, while still keeping a field and a few animals. Raw materials – wool, flax, cotton – were provided by the merchant in town who ran the operation, received the finished or semi-finished product and paid the bill. The putting-out system thus combined town and country, craft and farming, industrial and family labour, and at the top, mercantile and industrial capitalism. To the artisan, it meant a life that was balanced if not exactly peaceful; to the entrepreneur, it meant the possibility of keeping fixed capital costs down

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<sup>8</sup> J.N. Postgate, *EARLY MESOPOTAMIA* 235 (1992). The putting out system was a feature of textile manufacture in Middle Kingdom Egypt as well at about the same time. Barry Kemp, *ANCIENT EGYPT: ANATOMY OF A CIVILIZATION* 330-331 (2d ed. 2006).

<sup>9</sup> Prabin Baishya, *The Putting Out System in Ancient India*, 25 *Soc. Scientist* 51 (1997).

<sup>10</sup> Some factories remained dependent on highly skilled labor. These workers were able to maintain a considerable degree of independence. Daniel Nelson, *The American System and the American Workers* in *YANKEE ENTERPRISE: THE RISE OF THE AMERICAN SYSTEM OF MANUFACTURES* 171 (Otto Mayr & Robert Post eds. 1981).

and more particularly of coping with the only too frequent gaps in demand: when sales fell off, he simply reduced his orders and employed fewer people – perhaps suspending operations entirely. In an economy where it was demand, not supply, which restricted industrial output, out-working provided industry with the necessary elasticity. It could be halted or re-started at a word of command.<sup>11</sup>

The urban-rural distinction in the putting out of work in this account has led to a historical reappraisal of the role of cities vis-à-vis the country in which the country has assumed a larger industrial role.<sup>12</sup> The country “ ‘offered more abundant and cheaper part-time agricultural labor, with a lower cost of living, virtually tax-free production, and an escape from specific guild and urban regulations.’ ”<sup>13</sup> Even so, the role of rural workers should not be over-emphasized. The putting-out system was also a feature of urban production in a variety of goods: paper and books, pencils, metal work of all sorts, and a good deal more.<sup>14</sup> And it endured not only into the 19th century – in the United States, most shoes were manufactured on the putting-out system until the 1850s, when steam-powered shoemaking machinery led to the factory<sup>15</sup> – it persists still.

The notion of proto-industrialization as a stage in the development of modern capitalism, of which the putting-out system has been a key part, has given rise to a rich debate surrounding that concept drawing close attention to such matters as change in rates and age of marriage, of child bearing, and much else.<sup>16</sup> None of this need detain us. The focus here is on the

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<sup>11</sup> 3 Fernand Braudel, *CIVILISATION & CAPITALISM 15TH-18TH CENTURY: PERSPECTIVE OF THE WORLD* 593 (Siân Reynolds trans. 1992) (reference omitted).

<sup>12</sup> See generally, *LABOUR AND LABOUR MARKETS BETWEEN TOWN AND COUNTRYSIDE (MIDDLE AGES-19<sup>TH</sup> CENTURY)* (Bruno Blondé, Eric Vanhaute & Michèle Galand eds. 2001).

<sup>13</sup> Eric Mielants, *The role of medieval cities and the origins of merchant capitalism* in *LABOUR MARKETS BETWEEN TOWN AND COUNTRYSIDE*, *id.*, 111, 125 (references omitted).

<sup>14</sup> Immanuel Wallerstein, *THE MODERN WORLD-SYSTEM II: MERCHANTILISM AND THE CONSOLIDATION OF THE EUROPEAN-WORLD ECONOMY 1600-1750*, 194 (1980); see also, James Farr, *ARTISANS IN EUROPE 1300-1914*, 51 (2000).

<sup>15</sup> Alfred D. Chandler, Jr., *THE VISIBLE HAND* 54 (1977). Ross Thomson, *THE PATH TO MECHANIZED SHOE PRODUCTION IN THE UNITED STATES* 61 (1989).

<sup>16</sup> The debate is captured by Sheilagh Ogilvie, *STATE CORPORATISM AND PROTO-INDUSTRY: THE WÜRTTENBURG BLACK FORREST 1580-1797*, Ch. 2 (1997) (“The Proto-industrialization debate”).

conventional assumption that the putting-out system was a transitional institution,<sup>17</sup> so conventional that it was recited as a matter of course in an introduction to Max Weber's account of the rise of capitalism.<sup>18</sup> But Weber did not make that claim. What he said is this:

As little as out of craft work did the factories develop out of the domestic system, rather they grew up alongside the latter. As between the domestic system and the factory the volume of fixed capital was decisive. Where fixed capital was not necessary the domestic system has endured down to the present....<sup>19</sup>

Weber supplied an account of the factors that would make one or the other – the centralized factory or the decentralized putting-out of work – more profitable. That analytical

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<sup>17</sup> Braudel assumes as much as the section quoted above is preceded by the caption: “*The division of labor: the end of the road for the putting-out system.*” Braudel, *supra* n. 11 (italics in original). It is made explicit elsewhere: Stephen Marglin, *What Do Bosses Do? The Origins and Functions of Hierarchy in Capitalist Production*, 6 Rev. Radical Pol. Econ. 60, 102 (1974) (italics added).

At the same time, *the putting-out system was necessarily transitional*. Once a free market in labor was brought into existence, it was only a matter of time until the employer took to the factory as a means of curbing those aspects of freedom that depressed profits. Legal arrangements carefully set up to buttress the employer against the worker's “laziness” and “dishonesty” were, as we have seen, never enforceable to the capitalist's satisfaction.

A claim has been made here to American exceptionalism: that, contrary to Europe, the putting-out system “was integral to the industrialization process, rather than a relic of an earlier stage of development”; that in the U.S., the putting-out system developed in a “symbiotic relationship to the factory system.” Eileen Boris, *HOME TO WORK: MOTHERHOOD AND THE POLITICS OF INDUSTRIAL HOMEWORK IN THE UNITED STATES* 10 (1994). It is clear that over the course of the 18<sup>th</sup> century domestic production in the U.S. grew independent of the putting-out system. *See e.g.* Laurel Thatcher Ulrich, *Martha Ballard and Her Girls: Women's Work in Eighteenth Century Maine* in *WORK AND LABOR IN EARLY AMERICA* 70, 90 (Stephanie Innes ed., 1988). It is true that in the U.S. domestic production co-existed and was integrated with factory production well into the mid-nineteenth century. Witt Bowden, *THE INDUSTRIAL HISTORY OF THE UNITED STATES* 218 (1930). But, so, too, was it in Europe. *See e.g.*, Christophe Charle, *A SOCIAL HISTORY OF FRANCE IN THE 19TH CENTURY* 83 (Miriam Kochan trans. 1994). And, as in Europe, advanced capitalism and the factory eventually did largely eclipse domestic production in the United States. *See generally*, Rolla Tryon, *HOUSEHOLD MANUFACTURES IN THE UNITED STATES, 1640-1860* (1917). However, this study excludes “manufacturing in the home where the material was furnished by the factory or shop, where the worker had nothing but his labor invested.” *Id.* at 2. One observer goes further along the line of transition:

The profit lure encouraged inventors to find new products and better ways of making them, and this industrial transformation ended household manufactures, as entrepreneurs with access to rich markets grasped new opportunities.

David Meyer, *THE ROOTS OF AMERICAN INDUSTRIALIZATION* 188 (2003). Whether “ended” is accurate will be taken up presently.

<sup>18</sup> Ira J. Cohen, *Introduction: Max Weber on Modern Western Capitalism* in Max Weber, *GENERAL ECONOMIC HISTORY* xv, lvii (Transaction ed. 1981) (“The domestic [‘putting-out’] system was an intermediate step toward the ultimate emergence of the modern capitalist industrial organization.”)

<sup>19</sup> Max Weber, *GENERAL ECONOMIC HISTORY*, *supra* n. 18 at 173.

approach has been followed by David Landes<sup>20</sup> and by Jill Rubery and Frank Wilkinson.<sup>21</sup>

Rubery and Wilkinson make the point quite clear that, under certain conditions there is nothing anachronistic in outsourcing to home workers. The dominance of the factory, and so the assumptions about the employment relationship attendant to it, make other forms of organization work seem strange only in consequence of a foreshortening of the historical horizon.<sup>22</sup>

In mid-twentieth century America many thousands of workers produced goods at home on a putting-out basis: predominantly in garment manufacture, but also in tobacco, carding (buttons, hooks, & eyes, safety pins), cheap jewelry fabrication, lampshades, powder puffs, artificial flowers, paper boxes and bags, toys, and a good deal more.<sup>23</sup> Whether such employment should be allowed at all, or should be regulated, was hotly contested. It became a focus of attention in fashioning federal wage and hour law, the Fair Labor Standards Act, in the late 30s, the upshot of which was to allow the Secretary of Labor to regulate, restrict, or prohibit industrial homework “to prevent the circumvention or erosion of and to safeguard the minimum wage.”<sup>24</sup> It resurfaced in intense public debate in the early 1980s when women knitting ski hats for manufacturers in Vermont objected to the federal prohibition of that work.<sup>25</sup>

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<sup>20</sup> David Landes, *THE WEALTH AND POVERTY OF NATIONS* 209 (1998); David Landes, *THE UNBOUND PROMETHEUS* 188-190 (2d ed. 2003) (with greater emphasis on national differences in “entrepreneurial response to factor costs”); David Landes, *What Do Bosses Really Do?* 46 *J. Econ. Hist.* 585 (1986).

<sup>21</sup> Jill Rubery & Frank Wilkinson, *Outwork and Segmented Labour Markets* in *THE DYNAMICS OF LABOUR MARKET SEGMENTATION* 115 (Frank Wilkinson ed. 1981).

<sup>22</sup> Simon Deakin & Frank Wilkinson, *THE LAW OF THE LABOR MARKET: INDUSTRIALIZATION, EMPLOYMENT, AND LEGAL EVOLUTION* 4 (2005):

[T]he problems which the employment model is currently encountering are the result, not simply of a changing labour market environment, but of the contingent and specific historical circumstances which accompanied its emergence. It also remains the case that forms of work which fall on the edges of, or completely outside, the scope of the employment contract—forms such as self-employment, outwork or homework, agency work, temporary work and (to some degree) part-time work—derive their seemingly marginal or excluded status by reference to the particular features of that model.

<sup>23</sup> Emily Brown, *Industrial Homework*, U.S. Dept. of Labor Women’s Bureau Bull. No. 79 (1930).

<sup>24</sup> 29 U.S.C. § 211(d).

<sup>25</sup> Philip Shabecoff, *Dispute Rises on Working at Home for Pay*, *N.Y. Times*, March 10, 1981, A-1; Felicity Barringer, *Home Knitting Is a Knotty Issue for Labor Department*, *Washington Post*, Sept. 14, 1981, A-13. A

Throughout, public concern was drawn to the role of women in the putting out system, as mothers and homemakers on one hand, and as labor market participants on the other. The public focus and argumentation shifted over time and with change in the work being put out – from manual work on things to the processing of data by computer,<sup>26</sup> but that singular focus eclipsed the role of male homeworkers to which scant attention has been paid. However, the fundamental point here is that there was nothing transitional in the deployment of home-based contract work in the twentieth century and beyond, and not only in the United States.<sup>27</sup> The cold calculus of capitalism has remained ever constant.

### A. The Economic Logic of the Putting-Out System

Rubery and Wilkinson lay out the economic considerations that conduce for or against the contemporary use of home-based outsourcing: (1) the role of investment and capital intensive technology; (2) the lack of need to supervise the work; (3) the avoidance of collective action; (4) the flexibility of the product market; and (5) the control of labor cost and the avoidance of legal regulation. When one examines each one finds continuity over a considerable span of time, for example, in comparison with woolen textile manufacture in Renaissance Florence.

#### 1. *Investment and Capital-Intense Technology*

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Congressional hearing was held on the matter. *Oversight Hearings on the Dept. of Labor's Proposal to Lift the Ban on Industrial Homework*, 99<sup>th</sup> Cong., 2d sess. (1986).

<sup>26</sup> See generally, Eileen Boris, HOME TO WORK, *supra* n. 17 and HOMEWORK: HISTORICAL AND CONTEMPORARY PERSPECTIVES ON PAID LABOR AT HOME (Eileen Boris & Cynthia Daniels eds. 1989).

<sup>27</sup> In the United Kingdom and the United States today there are numerous of workers who identify themselves as self-employed working at home. See e.g., Oxfam Briefing Paper, *Made at Home: British homeworkers in global supply chains* (May, 2004); K.D. Ewing, *Homeworking: A Framework for Reform*, 11 *Indus. L. Rev.* 94 (1982). Peter Mateyka, Melanie Rapino & Liana Landivar, *Home-Based Workers in the United States 2010*, U.S. Dept. of Commerce (Oct., 2012) (reporting that in 2010, over 9.3 million American workers reported themselves as working exclusively from home, over a third of whom reported themselves as unincorporated self-employed); but see Karl Brenke, *Heimarbeit: Immer weniger Menschen in Deutschland gehen ihren Beruf von zu Hause aus nach*, 81 *DIW-Wochenbericht* 131 (2014) (noting the decline in homeworkers in Germany). Unfortunately, the data do not break out those who do so on work provided by contractors.

Where the work can be fragmented, “so that individuals or small teams can work independently, often in different locations”<sup>28</sup> the doing of it can readily be outsourced, including to the home. The employer’s costs of real estate and equipment can be eliminated or reduced. Where, however, the work must be done on capital-intensive equipment beyond the reach of the individual, even on a rental basis, it cannot be outsourced.<sup>29</sup> Such was so in the case as well in the wool industry of Florence five hundred years ago.<sup>30</sup>

## 2. *Work Organization*

Supervisory and management costs can be avoided by outwork.<sup>31</sup> As with the putting-out of wool work five centuries ago, an employer concerned only with the price and quality of the product turned in need not expend time and money in the supervision of the work process.<sup>32</sup> As workers were paid by the piece, not by their time, the pace of work need not be monitored, so long as a product of acceptable quality is produced on time.

## 3. *Avoidance of Collective Action.*

Rubery and Wilkinson explain that,

The effect of worker organization is to create a differentiated wage structure and to establish property rights in jobs through agreements to increase job security and establish seniority systems, guaranteed wages and hours of work, sick pay, holiday pay and the like. Rights to guaranteed employment and income have been reinforced by the State through legislation and the fiscal system. These measures reduce flexibility in the use of labour, and capital seeks to evade them by resorting to the subcontract system.<sup>33</sup>

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<sup>28</sup> Rubery & Wilkinson, *supra* n. 21 at 120.

<sup>29</sup> *Id.* The availability of relatively inexpensive sewing machines, by purchase or lease, gave a significant boost to home-based outsourcing in American garment manufacture.

<sup>30</sup> Richard Goldthwaite, *THE ECONOMY OF RENAISSANCE FLORENCE 300* (2009):

A wool firm supplied its shop only with the inexpensive tools used in the initial stage of beating, combing, and carding the wool, but this required a miniscule outlay of capital. Almost all the equipment and tools needed for the subsequent stages of production of wool and virtually all those needed for silk were owned by the workers themselves.

<sup>31</sup> Rubery & Wilkinson, *supra* n. 21 at 124.

<sup>32</sup> Goldthwaite, *supra* n. 29 at 340, 366, 589.

<sup>33</sup> Rubery & Wilkinson, *supra* n. 21 at 123.

Outsourcing can forestall worker contact and the formation of sodalities by fragmenting the labor force and by increasing competition in the labor market.<sup>34</sup>

So, too, in Renaissance Florence. There was a danger, as an employer would see it, in having “a class of workers...too concentrated in [central] workplaces.”<sup>35</sup> Now, as then, dispersion of work creates an obstacle to group formation.<sup>36</sup> In 1979, for example, DialAmerica Marketing farmed out telephone research work to home workers who picked up their assigned work at a central location, but only by appointment. “Appointments were designed to prevent too many of the home researchers...from being present in the office at one time.”<sup>37</sup> In other words, proximity abets solidarity.<sup>38</sup>

#### 4. *Product Market Flexibility*

Where the demand for the work is discontinuous, where, for example, the sufficiency of the needed work varies due to “fluctuation in product demand,” outwork can be preferable because of the flexibility it affords.<sup>39</sup> “Outwork provides a means of reducing production costs directly with output.”<sup>40</sup> So, too, in the Florentine wool industry.<sup>41</sup>

#### 5. *Labor Cost and Legal Regulation*

This factor plays out in two ways. First, “[i]f labour supply is not homogeneous, and labour can be purchased at different prices, outwork may be a means of exploiting supplies of the

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<sup>34</sup> *Id.*

<sup>35</sup> Goldthwaite, *supra* n. 29 at 321.

<sup>36</sup> *Id.* at 366. Immanuel Wallerstein, *supra* n. 14 at 194-195 (“A rural location [for the putting out of work] also guaranteed the physical dispersal of the work force, minimizing the risk of worker organization while concentrating distribution in a few big merchant-entrepreneurs.”)

<sup>37</sup> *Donovan v. DialAmerica Marketing, Inc.*, 757 F.2d 1376, 1380 (3d. Cir. 1985).

<sup>38</sup> When in 1874, Circassian slaves near Istanbul rose up against their masters the Ottoman government manumitted and resettled them, but only one family to a village. The “authorities realized the potential for group action existed only where a sufficient number of enslaved persons lived together and could effectively organize for joint action.” Ehud Toledano, *AS IF SILENT AND ABSENT: BONDS OF ENSLAVEMENT IN THE ISLAMIC MIDDLE EAST* 202 (2007).

<sup>39</sup> Rubery & Wilkinson, *supra* n. 21 at 121.

<sup>40</sup> *Id.* at 122.

<sup>41</sup> Goldthwaite, *supra* n. 29 at 303. (“[A]ny slack in demand could be met by ceasing production.”)

cheapest labour.”<sup>42</sup> This connects as well to the short-term or project basis of payment. The payrolls for home-based Florentine wool workers “extended to no more than the several weeks...[the employers] had to pay advances to weavers while they had cloth on the loom.”<sup>43</sup>

Second, labor cost, as a cost of doing business, circles back to the matter of managerial flexibility discussed in connection with the avoidance of collective employee action; here, in the avoidance of legal regulation. Fernand Braudel’s discussion of the putting-out system in early modern Europe stressed the rural focus of such merchant effort not only to exploit a labor force with available time on its hands, but to avoid legal regulation which, in those days, meant the regulatory power of the guilds. As the guilds more often were town-based, they had reduced authority in the countryside.<sup>44</sup> Even so, the level of skills to be found in the countryside limited the capitalists’ capacity to contract out there. In fact, Florentine merchant-capitalists saw little need to avoid the city. Florentine guilds did not impose such onerous restrictions as to make work relocation plausible, even if it were possible; and, in any event, the needed skills were to be found in the city. Today, the modern out-putting contractor can avoid, or try to avoid, legal regulation not by relocating to the countryside but by characterizing the relationship as one of arms-length dealing with self-employed independent contractors, not employees.

A word on that. In response to the asperities of work in the factory system, industrializing countries spun webs of worker protective law. In the U.S., an employee is covered by: minimum wage law, compensation for overtime, antidiscrimination law, family and medical leave law, social security, unemployment compensation, workers’ compensation, protection for unionization and collective bargaining, and more. These laws draw a distinction between

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<sup>42</sup> Rubery & Wilkinson, *supra* n. 21 at 123 (reference omitted).

<sup>43</sup> Goldthwaite, *supra* n. 29 at 366.

<sup>44</sup> Immanuel Wallerstein, *supra* n. 14 at 194.

“employees,” who are subject to them, and independent contractors who are thought to be small businesses with no need for the law’s concern. All advanced economies have struggled with the issue of how to distinguish between the two.<sup>45</sup>

### B. Disadvantages in the Putting-Out of Work

Despite its advantages, the putting-out system did have its disadvantages for employers and workers. The dispersion of workers blunted the potential to generate new ideas as a result of workplace exchange and collective problem solving. Worker control of their time, their preference for leisure over income, could create bottlenecks for production; this more likely the case in rural out-putting, where the income was supplementary, than in urban out-putting where the workers were dependent on the work put out as their major or sole source of income.<sup>46</sup> Better control could be secured by placing outsourced homeworkers on short leashes for payment, by withholding payment or by making late payments. Advances made against future production could result in debt-bondage from which the worker could extricate herself only with great difficulty. In the late 19<sup>th</sup> century, French home-workers demanded the abolition of the Parisian practice whereby landlords required the payment of rent in advance (without interest) as these tenants were paid only on the delivery of their work.<sup>47</sup>

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<sup>45</sup> The amount of law and the volume of literature on this issue is daunting. The most recent exposition in comparative perspective is by Guy Davidov, Mark Freedland, & Nicola Kountouris, *The subjects of labor law: ‘Employees’ and other workers* in COMPARATIVE LABOR LAW Ch. 4 (Matthew Finkin & Guy Mundlak eds. 2015).

<sup>46</sup> Thomas Dublin, TRANSFORMING WOMEN’S WORK: NEW ENGLAND LIVES IN THE INDUSTRIAL REVOLUTION 36 (1994). A study of the *Verlagsstem* in textile manufacture from the early middle ages through the 18<sup>th</sup> century concludes that those contracted for put-out work stood between a waged craftsman (*Lohnhandwerker*) and a factory hand (*Fabrikarbeiter*). FRIDOLIN FÜRGER, ZUM VERLAGSSYSTEM ALS ORGANISATIONFORM DES FRÜHKAPITALISMUS IN TEXTILGEWERBE 149 (1927). The authors distinguishes those who could pick and choose their work, work for several merchants simultaneously as well as on their own account, who closely resembled independent contractors from those compelled to work for a single supplier and devoted all their efforts to those tasks; they provided performance, not products, closely resembling factory workers.

<sup>47</sup> Jeanne Gaillard, PARIS, LA VILLE 1852-1870, 129 (1977).

Workers, too, could engage in self-protective, or opportunistic, behavior. As a student of the putting out system in the Yorkshire woolen industry of the eighteenth century observed,

The domestic system lent itself easily to those practices which arise from lack of supervision. When raw materials were handed out to a workman, and work was done out of sight of the master, it was not difficult for the employee to practice any number of fraudulent tricks on his employer. Embezzlement of material, exchange of poor wool for good, the wetting of wool in order to make it weigh heavier, imperfect or inaccurate spinning, &c., all these things might be practiced with a fair chance of success, since the eye of the master or foreman was not ever on the workman.<sup>48</sup>

### III. Industrial Homework and the Law

The institution of home work became of legal concern in tandem with industrialization. England dealt legislatively with the sharp practices just mentioned, of both employers and employees, but the law fell far more heavily, was far more vigorously enforced against the workers.<sup>49</sup> In 1777, unlawful disposition of materials entrusted to workers and neglect to finish work was made subject to criminal sanction.<sup>50</sup> In 1843, this was added to by allowing the owner of the material put out to enter and inspect any “Place...where the Work should be carried on.”<sup>51</sup> France had similar laws, but these were applied with much greater leniency toward workers. The difference, according to Willibald Steinmetz, lay not only in the different sympathies of the tribunals – the industrial tribunals and justices of the peace in France, who were close to the workers, and the lower tribunals in England on which manufacturers often served – but in the difference as well in these countries’ attitude toward the poor.<sup>52</sup> David Landes treats this as well,

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<sup>48</sup> Herbert Heaton, *THE YORKSHIRE WOOLLEN AND WORSTED INDUSTRIES FROM THE EARLIEST TIMES UP TO THE INDUSTRIAL REVOLUTION* 418 (1920).

<sup>49</sup> Willibald Steinmetz, *Was there a De-juridification of Individual Employment Relations in Britain?*, in *PRIVATE LAW AND SOCIAL INEQUALITY IN THE INDUSTRIAL AGE* 265 (Willibald Steinmetz ed., 2000).

<sup>50</sup> 17 Geo. III c.56 (1777).

<sup>51</sup> 6&7 Vic. 40 (XIII) (1843).

<sup>52</sup> Steinmetz, *supra* n. 49.

but he emphasizes the assumption of social order in England and the fear of the political consequences of labor unrest in France as playing a role in their respective judicial responses.<sup>53</sup>

Laws protective of homeworkers started to be enacted in the late nineteenth century commencing in Australia and New Zealand.<sup>54</sup> Germany, which was a relatively late industrializer, faced collective protest and even fatal violence by home-based textile workers in 1844.<sup>55</sup> It enacted a homemaker protective law, largely concerned with occupational health, in 1911, which eventually grew into the more encompassing Homework Law (*Heimarbeitsgesetz*) of 1951. By 1925, a number of states had legislated protections for homeworkers. These were built upon later in the 20<sup>th</sup> century – for example, in Australia, Germany, and the United Kingdom – in which telework now figured.<sup>56</sup>

In the United States, the issue of industrial home work was initially one of public health: of work being done in tenements – overcrowded, unhealthy and unsafe, teeming with immigrant women and children. For that reason, as Eileen Boris has so carefully explained, the social question became feminized in the early 1900s.<sup>57</sup>

The legislative address to “industrial homework” in the United States moved along two axes of public concern. The first centered on the conflation of the home with a factory. Many states banned home work on certain materials, such as explosives, or the doing of certain work, such as the federal prohibition on the home manufacture of knitted goods that became a bone of contention in the 1980s. Where work was permitted, it was subject to regulation which included the licensing of the premises, requiring permits for the work to be done, providing for home

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<sup>53</sup> David Landes, *THE UNBOUND PROMETHEUS 190-191* (2d ed. 2003).

<sup>54</sup> Lucy Spinner, *DER GESETZLICHE HEIMARBEITERSCHUTZ 13-15* (1925).

<sup>55</sup> Hugo Karpf, *HEIMARBEIT UND GEWERKSCHAFT 13-16* (1980).

<sup>56</sup> Breen Creighton & Andrew Stewart, *LABOUR LAW* § 8.2 (5<sup>th</sup> ed. 2010) (“Outworkers”) [Australia]; Simon Deakin & Gillian Morris, *LABOR LAW* § 3.34 (6<sup>th</sup> ed. 2012) (“Homeworkers”) [U.K.]; Wolfgang Brandes & Friedrich Buttler, *Alte und neue Heimarbeit: Eine Arbeitsökonomische Interpretation*, 38 *Soziale Welt* 74 (1987).

<sup>57</sup> Eileen Boris, *supra* n. 17.

workplace inspection, labelling of goods made in the home, mandatory record keeping, and more.<sup>58</sup> However, none of this speaks to the cognitive work done in today's crowd-sourced world.

The second, set out in the Fair Labor Standards Act,<sup>59</sup> derived from a concern with the low wages and excessive hours of the home workers – in part as unfairly competitive with full-time, often unionized male workers,<sup>60</sup> in part as depriving mothers and children of time that should be devoted to child care and rearing, and in part resting on the principle that as work is work wherever performed those doing it should be treated alike. As an employer's work can be done in the employer's workplace by an independent contractor who receives none of the law's concern for employees, work can be outsourced to homeworkers who are not employees at common law. Consequently, industrial homeworkers who sought the law's protection as employees could face the prospect of a challenge to their eligibility.<sup>61</sup>

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<sup>58</sup> Regulations under the federal Fair Labor Standards Act are set out in 29 C.F.R. Part 530. This approach taken echoes that taken in many state laws.

<sup>59</sup> See 29 U.S.C. § 211(d).

<sup>60</sup> E.g. R.I. Gen. L. § 28-18-3(e), denying the licensing of home work “where it would unduly jeopardize the factory workers in the industry both as to wages and working conditions.” The Statement the Service Employees International Union made before the House committee conducting hearings on the Labor Department's role in regulating homework noted that,

...widespread homework activity drives down further the pay levels of unskilled factory labor. A 1936 survey by the state of Rhode Island confirmed that homework at subminimum wages had undercut factory wages to such a degree that upwards of 2/3 of the factory workers earned less than the minimum wage.

It took federal and state laws outlawing homework to break this vicious cycle. A 1956 re-survey in Rhode Island of these same jewelry manufacturers found factory earnings raised above the minimum wage.

*Hearings*, supra n. 25 at 245. So, too, see the regulations of the California Department of Industrial relations, 8 CCR § 13623:

(e) Limitation of Work. The maximum amount of work which may be given to any industrial homemaker in any week shall not exceed the average weekly amount produced by workers working legal hours on similar operations in the shop.

(f) Rates Paid to Homeworkers. On any operation, a female or minor homemaker shall be paid a piece-rate sufficient to yield to workers on similar operations in the factory the legally established minimum wage established by the Industrial Welfare Commission.

<sup>61</sup> Annot, *Industrial homeworkers as within social security, unemployment compensation, fair labor standards, or workmen's compensation act*, 143 ALR 418 (1943).

Given the economic condition of many industrial homeworkers, misclassification was an obstacle that could take more financial resources than they had to surmount. Some states adjusted their laws accordingly. Most industrial homework laws deal with persons identified not as “employees,” but as “industrial homeworkers.” New York’s law, for example, provides that, “All industrial homeworkers shall be presumed to be employees of their employer and not independent contractors.”<sup>62</sup> This creates only a rebuttable presumption; but, the fact that the worker does as much work as she chooses to do and does it without supervision would not render her an independent contractor even without that presumption.<sup>63</sup> Massachusetts and New Jersey speak directly to the wages paid to “industrial homeworkers” irrespective of whether they might not be employees at common law. In Massachusetts, the administrative regulations provide that industrial homeworkers must be paid at least the minimum wage and time and a half for overtime required of employees.<sup>64</sup> In New Jersey, “Industrial homework shall be performed...[o]nly in accordance with the wages, hours, or working conditions established for factories or businesses by persons of the same age as the homeworkers” by state or federal law.<sup>65</sup> In these states, it is the work these workers do, “industrial home production,” not the contractual terms and conditions that govern the doing of it, that determines their legal rights.

#### IV. Something Old, Something New

The cloud sourcing of cognitive work today retains the advantages the putting-out system holds for employers, but none of its historical drawbacks. Employers need not invest in a workplace for the work to be done, nor need they provide the tools. Unlike the loss of

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<sup>62</sup> N.Y. Lab. L. § 361-a.

<sup>63</sup> *In Re Bailey*, 517 N.Y.S. 2d 821 (Sup. Ct. 1987) (unemployment compensation) *following* *Andrews v. Commodore Knitting Mills, Inc.*, 13 N.Y.S. 2d 577 (Sup. Ct. 1939).

<sup>64</sup> 940 CMR § 17.02.

<sup>65</sup> N.J. Stat. Ann. § 34:6-136.12(3).

supervisory capacity putting-out entailed, today the workers can be rendered transparent, if need be, by requiring them to use software accessible to the employer and so be made subject to electronic oversight. Employers can track their experience with specific workers electronically; they can store, collate, and, if they see advantage to it, share that information, if they wish to do so, far more swiftly and efficiently than in a paper-governed world.<sup>66</sup>

Employees can generate new ideas by electronic collective interaction. As the work is cognitive, the potential for worker sharp practice of the earlier kind is not presented, though analogous questions of misappropriation or ownership of intellectual property could arise. The potential for collective action vis-à-vis their putative employer is attenuated by the lack of collective contact, the constant need for new work, and the kaleidoscopic array of potential purchasers of their services. The latter two features reduce the time available to devote to the formation of a sodality or their perceived need to do so – even were those doing the work to be held to be “employees” within the compass of the National Labor Relations Act – and lessens as well the likelihood of any one purchaser of their work becoming a target for collective effort.

Instead of avoiding guild regulation, by the location of work, the modern cloud putter-outer can avoid, or try to avoid, domestic legal regulation by constructing the relationship with that very end in mind, as one of arms-length dealing with self-employed independent contractors. If the worker is not an employee, the purchaser of her services need not withhold income taxes, pay into other publicly mandated benefits such as social security or unemployment compensation, nor be subject to any of these other employment-based restrictions. Where the work is put out to workers abroad, the out-sourcing company, like the merchant capitalist of

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<sup>66</sup> The questions this might raise under privacy law, and even under anti-blacklisting laws of an earlier period, are as yet uncharted.

centuries before who relocated to gain regulatory freedom, can get the benefit of the weak or non-existent labor regulation of the jurisdiction where the work is performed.

Omitted from the picture thus far is the configuration and role of the middlemen platforms through which these tasks are bid upon and accepted, who have been termed “brokers.”<sup>67</sup> Again, these are variants on an older theme. In medieval Europe, the putting-out system often involved an intricate web of contracts with middlemen.<sup>68</sup> Intermediaries were a common feature in industrial putting-out in antebellum America<sup>69</sup> as well as in modern times,

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<sup>67</sup> Rebecca Smith & Sarah Leberstein, *Rights on Demand: Ensuring Workplace Standards and Worker Security in the On-Demand Economy* (National Employment Law Project, Sept. 2015).

<sup>68</sup> Ulrich Pfister, *Craft Guilds, the Theory of the Firm, and Early Modern Proto-Industry* in *GUILDS, INNOVATION AND THE EUROPEAN ECONOMY, 1400-1800*, 25, 31-32 (S.R. Epstein & Maarten Prak eds. 2009) (reference omitted). As Pfister explains, these early modern merchant-manufacturers

coordinated great numbers of cottage workers at different stages in the production process, such as combers, spinners, weavers, bleachers, and dyers, and they frequently used middlemen to conclude and enforce contracts with individual workers (*Verlagssystem*, or putting-out system). The activities of merchant-manufacturers or master-manufacturers thus came fairly close to what Alchian and Demsetz have defined as the entrepreneur in a modern firm. They monitored the use of inputs in the team production of a complex good; they measured output performance; they acted as a central party at least for contracts relating to individual stages of production; they were able to alter the structure of their workforce at short notice; and they were residual claimants, that is, they earned a profit from their efforts at co-ordinating and supervising production processes.

<sup>69</sup> Thomas Dublin noted the role of storekeepers as middlemen for the putting out of hat braiding and weaving work in the 1830s. Thomas Dublin, *supra* n. 46 at 38-41, 51-53.

Outwork middlemen typically acted as agents for the textile firms with which they contracted for yarn to put out. They were held responsible for the quality of the woven cloth they returned to the firm and were paid according to the quantity of weaving done under their direction. They, in turn, paid weavers a piece wage for each yard woven, the price varying with the complexity of the fabric. They also enforced a system of fines and deductions intended to ensure uniformity and quality in the woven cloth.

*Id.* at 39 (reference omitted).

notably in garment manufacture.<sup>70</sup> How these intermediaries are to be treated is an important question<sup>71</sup>, but not a novel one.<sup>72</sup>

Neither are the arguments made for and against the extension of labor law to these workers. On the one hand, proponents of an unregulated market argue that these are people who chose willingly to do this work – at the low end of the wage scale, merely for extra money, at the high end of the scale, commonly involving professionals, for the flexibility it affords in balancing career and other life interests or for the stimulation of working ever afresh on challenging projects<sup>73</sup> – and that, in either case, society should be willing to accommodate them; *i.e.*, extending “outdated” labor protective law to them fosters inefficiency, dampens economic growth, and wrongly denies those who would take the work free choice.<sup>74</sup> On the other hand, proponents of labor law application argue that those at the low end of the scale have rather little free choice in the jobs society holds open for them and that the laws involved, providing for a minimum wage, overtime compensation, social security, unemployment compensation, and more, are scarcely outdated; the laws the new putting-out contractors seek to obviate are for the benefit of society as a whole even if some would willingly renounce them for short term gain.

These arguments, pitting the claims for a free market against claims of the public good, were strenuously and exhaustively debated a century ago. What is genuinely new are the

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<sup>70</sup> As a result, “jobbers” in garment manufacture were exempt from union secondary boycott prohibitions. 29 U.S.C. § 158(e).

<sup>71</sup> Note, for example, the National Labor Relations Board’s effort to expand “joint employer” relationships. *Browning-Ferris Indus.*, 362 NLRB No. 186 (2015). So, too, of the consequences of extensive networks of subcontracting discussed by David Weil, *THE FISSURED WORKPLACE* (2014). *See generally*, *Symposium: The Fissured Workplace*, 37 *Comp. Lab. L. & Pol’y J.* 3-222 (2015).

<sup>72</sup> *See e.g.* *Chawner v. Cummings*, 8 Q.B. 311 (1846) (suit by a worker against a “middle-man” concerning a set-off against his wages).

<sup>73</sup> *Cf.* Stephen Barley & Gideon Kunda, *GURUS, HIRED GUNS, AND WARM BODIES: ITINERANT EXPERTS IN A KNOWLEDGE ECONOMY* (2004).

<sup>74</sup> Steven Solomon, *supra* n. 1.

catalytic consequences of computerization.<sup>75</sup> First, the labor market for the putting out of cognitive work can be global. Unlike the putting out of textile work in the Middle Ages, where the skill levels of geographically available rural workers constrained what employers could do, the posting of cognitive work on a global scale can draw from pools of prospective workers that depend only on educational quality and language ability. To the extent the work is taken by workers in the developing world there would be obvious benefits to those workers, their families and communities. But, waging bidding wars for work on that scale places cloud participants from high wage, developed economies in direct competition with those accustomed to wage and benefit levels that are unacceptable in a domestic face-to-face employment relationship. The macroeconomic effects, should these systems come to compose a significant chunk of the labor market,<sup>76</sup> would abet existing trends of flattened or declining wages.<sup>77</sup>

Second, existing imbalances in bargaining power between the individual labor market participant and employers in the local geographic labor market would be exacerbated once the labor market becomes global. This poses a challenge to domestic labor law not only in its specific protections but, more importantly, in its ability to fashion collective means of redress absent a legal regime structured to accommodate transnational employee concert of action or collective bargaining.

The precise legislative responses to the perceived wrongs of industrial homework, fashioned in the early 20<sup>th</sup> century, have scant purchase here: “cognitive homework” is hard to shoehorn into statutory definitions of “industrial homework” that contemplate the making of

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<sup>75</sup> It has taken about three decades for these consequences to mature. See Alvin Toffler, *THE THIRD WAVE* Ch. 16 (1980) [“The Electronic Cottage”].

<sup>76</sup> But see Josh Zumbrun, *An Enduring Mystery of the ‘Gig Economy’: Why Are So Few People Self-Employed?* Wall St. J., Oct. 22, 2015 (reporting a decline in those who report themselves as self-employed).

<sup>77</sup> Labor cost reduction strategies pitting cheaper rural labor against costlier urban labor was a significant feature of pre-industrial capitalism as well. Eric Mielants, *supra* n. 13 at 124-126.

things; safety and health in the home workplace is not a problem with cognitive work; the assurance of a minimum wage and payment for overtime does have bite on the performance of routine tasks, but not on sophisticated professional work.<sup>78</sup>

What these industrial homework laws help us see is that *if* the existing legal system fails to achieve socially desired ends – by a too-constricted definition of an “employee” or in identifying “the employer,” were such to be so<sup>79</sup> – society is quite capable of tackling the problem directly and creatively. What would be called for is a sharpening of the focus on what has call for legal address – wage levels and wage payment, social security, protection against retaliation and discrimination, privacy, the precariousness of employment, the capacity for and efficacy of collective voice – how those needful of protection are to be identified, and how those protections can be made accessible.<sup>80</sup>

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<sup>78</sup> 20 U.S.C. § 213(a)(1) (exempting professional employees from wage and hour regulation.)

<sup>79</sup> The assertions that these laws are “outdated,” Solomon, *supra* n. 1, and that gig workers “do not fit the legal definition of ‘employee’,” Harris & Krueger, *supra* n. 1, are far from being obviously true.

<sup>80</sup> See *e.g.*, Smith & Leberstein, *supra* n. 67.