

Michigan Journal of Race and Law

Volume 26

2021

Aligned: Sex Workers' Lessons for the Gig Economy

Yvette Butler

University of Mississippi School of Law

Follow this and additional works at: <https://repository.law.umich.edu/mjrl>



Part of the [Labor and Employment Law Commons](#), [Law and Economics Commons](#), [Law and Race Commons](#), and the [Sexuality and the Law Commons](#)

Recommended Citation

Yvette Butler, *Aligned: Sex Workers' Lessons for the Gig Economy*, 26 MICH. J. RACE & L. 337 (2021).
Available at: <https://repository.law.umich.edu/mjrl/vol26/iss2/3>

<https://doi.org/10.36643/mjrl.26.2.aligned>

This Article is brought to you for free and open access by the Journals at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Journal of Race and Law by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.

ALIGNED: SEX WORKERS' LESSONS FOR THE GIG
ECONOMY

Yvette Butler*

*If I wasn't rappin' I probably be wrastlin'
Hand to hand grapplin' on the corner of Madison
Or real-estating, trying to sell you a mansion
Or rollerblading doing three-sixty flat spins
Or I'd probably be flipping a burger
Attempting a murder, paralyzed sippin' on Gerber
I could be working at Jewels, chain snatching
Jerking your jewels, homeless working for food
I might be cleaning your pool, teaching your school, preaching to fools
Leeching, smoking weed to be cool
At DMV's holding lines up
Or wind up in line-ups, the time's up
Full of holes in a hole in a fine tux
Out on parole, out of control, holding your dime up
I could be lazy, sitting on your couch
Or I could be crazy, cussing pigeons out*

*I could be hustlin' bags
Strugglin' bad
If I wasn't up in the lab, shit
I just might be cuttin' your grass
Walkin' your dog, pumpin' your gas*

* Yvette Butler, Assistant Professor of Law, University of Mississippi School of Law.
A special thank you to Puneet Cheema and Elizabeth Nolan Brown for spending your afternoons as my panel discussants and Professor Megan Stevenson for moderating the panel. Your insights, comments, and facilitation were tremendous. Thank you to Kate D'Adamo for your helpful comments before the panel. You were certainly missed at the Symposium. Thank you to the George Mason University Journal of Law, Economics, and Policy staff for proposing the topic of 21st Century Employment and selecting my paper for presentation. I will always be grateful to this Symposium for lining up perfectly with my transition into academia from my work advocating for a less oppressive legal system alongside sex workers and survivors of trafficking. Thank you to the Michigan Journal of Race and Law for your hard work preparing this publication. Finally, thank you to Christopher Tolbert, my significant other, for being so patient while I typed away on nights and weekends. Through what can only be described as the purest love, you brought me water and listened to me talk endlessly about sex work and the gig economy.

*Or nothin' at all*¹

INTRODUCTION

What Lupe Fiasco describes in the lyrics above is more than the infinite possibilities that different life circumstances bring. He paints a picture where “we all got a job to do.”² Yet, some of those jobs are considered more legitimate than others.

Society’s perception of a type of work and the people who engage in money-generating activities has an impact on whether and how the law protects (or does not protect) the people who perform those activities.³ Work can be legitimized or delegitimized. Workers are protected or left out to dry depending upon their particular “hustle.” This Article argues that gig workers and sex workers⁴ face similar challenges within the legal system and that these groups can and should collaborate to their collective advantage when seeking reforms. Gig workers have been gaining legitimacy while sex workers still primarily operate in the shadow economy.⁵ This Article digs into the sometimes-conflicting desires of individuals working as sex workers and gig workers to inform how gig workers can achieve the power and economic independence necessary to prevent workplace exploitation.

Most people, when they think of the gig economy, imagine individuals who provide rideshares or deliver food or packages. Given our familiarity and comfort with rideshare services and in-home services like cleaners or babysitters, it may come as a surprise to consider criminalized workers and sex workers as a part of the gig economy. Colloquially, a “gig” is a short-term job, often relating specifically to an entertainer’s engagement.⁶ In 2009, Merriam-Webster added the term “gig economy” to the dictionary: “economic activity that involves the use of temporary or freelance workers to perform jobs typically in the service sector.”⁷ Similarly, the Congressional Research Service defined the gig economy as

1. LUPE FIASCO, *Coulda Been*, on COULDA BEEN (1st and 15th Productions, Inc. 2017).

2. *Id.*

3. See Parts I and II.

4. Sex work is defined in Part I.B.

5. The shadow economy is defined in Part I.A.

6. See *Gig*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/gig> [<https://perma.cc/HBA7-B5VC>] (last visited Mar. 8, 2021).

7. *Gig Economy*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/gig%20economy> [<https://perma.cc/XL4X-KBKH>] (last visited Mar. 8, 2021).

“the collection of markets that match providers to consumers on a gig (or job) basis in support of on-demand commerce.”⁸

As explained in Part I, sex workers have been providing temporary and freelance services long before the law was concerned with the increasing nature of gig employment. The sex workers' rights movement is instructive for resolving the current regulatory quandary of whether to classify gig workers as independent contractors or employees and reconciling seemingly opposing interests within the total pool of gig workers.⁹ In this Article, the sex workers' rights movement is used to illustrate and emphasize issues faced by all gig workers, such as concerns about vulnerability and exploitation and workers' need for economic freedom and security.

This Article begins by exploring the demographics of people who enter into the gig economy. Then, it will provide an explanation about what sex work is and who sex workers are. Next, it compares the gig economy to the unregulated shadow economy to demonstrate the overlapping demographics of individuals who survive on the income they generate through work done in the shadow economy. This demonstration highlights why sex workers, as devalued gig workers, make for such an apt comparison and why gig workers can learn from the struggles of sex workers.

The gig economy is not unique. It is a formalization of, or another medium to, organize and regulate jobs traditionally done by people on the margins of society. Alexandra Ravenelle, currently an Assistant Professor of Sociology at the University of North Carolina at Chapel Hill, divides gig economy workers into groups she refers to as “strugglers,” “strivers,” and “success stories.”¹⁰ “Strugglers” are people who are “down on their luck, unemployed, or undocumented immigrants.”¹¹ According to Ravenelle's findings, “strugglers” are often people of color, particularly

8. SARAH A. DONOVAN, JON O. SHIMABUKURO & DAVID H. BRADLEY, CONG. RSCH. SERV., R44365, WHAT DOES THE GIG ECONOMY MEAN FOR WORKERS? 1 (2017), <https://crsreports.congress.gov/product/pdf/R/R44365/5> [https://perma.cc/72ZC-AYA3].

9. See Part I.D for more on classifying workers as independent contractors or employees.

10. Fabiana Echeverria, Mengjiao Yu, Zicong Zhang & Josh Sullivan, *Faces of the Gig Economy: Who Is Really in the Gig Economy?*, MARGINS (2017), <https://web.northeastern.edu/themargins/gigeconomy/yl/> [https://perma.cc/8372-S232]; Professor Ravenelle explores this concept further in her book, *HUSTLE AND GIG: STRUGGLING AND SURVIVING IN THE SHARING ECONOMY* (2019).

11. *Id.* Strivers are “middle class and consider their work extra income. Success stories are those “for whom their gig economy job has turned into the dream everyone wants.” This Article focuses on strugglers because it is concerned with the devaluation of hustles pursued by people of color.

Black and Latinx people, who often hold transportation jobs in the gig economy.¹²

As for the shadow economy, empirical data is hard to come by because the economy, by definition, operates underground and off the record. As discussed in Part I, the shadow economy refers to a variety of survival strategies adopted by people living in poverty and by people of color, such as dealing drugs, sex work, braiding hair, or other assorted odd jobs. Those strategies can lead to arrest and prosecution, which then have collateral consequences and disparate impacts. For example, several studies indicate that while Black and white people use and sell drugs at similar rates,¹³ their motivations¹⁴ for doing so and rates of arrest differ.¹⁵ It is troubling that much of this off the record work is penalized when done by marginalized people making ends meet, but celebrated when it is formalized by large corporations like Uber and TaskRabbit or smaller companies like licensed marijuana dispensaries.¹⁶ Part I will give an overview of these issues, including how the gig and shadow economies are related.

12. *Id.*

13. German Lopez, *Black and White Americans Use Drugs at Similar Rates. One Group is Punished More for It.*, VOX (Oct. 1, 2015, 9:05 AM), <https://www.vox.com/2015/3/17/8227569/war-on-drugs-racism>.

14. Daniel Denvir, *Criminalizing the Hustle: Policing Poor People's Survival Strategies from Eric Garner to Alton Sterling*, SALON (July 8, 2016, 2:00 PM), https://www.salon.com/2016/07/08/criminalizing_the_hustle_policing_poor_peoples_survival_strategies_from_erin_garner_to_alton_sterling/ [<https://perma.cc/PME5-5ZQV>] (As sociologist Saskia Sassen notes, “I think the economy we have right now is generating expulsions—you are simply out. This generates desperation—you become an outcast.” Additionally, political science professor Lester Spense notes, “Over the past few decades cities have turned to policing to fulfill two functions: to surveil and discipline black populations hardest hit by economic shifts and to collect revenue in the form of fines The black men most likely to be left out of the formal economy — who have to engage in various illegal hustles to make ends meet — are far more likely to suffer from police violence than other black men.”).

15. *Id.*

16. James Surowiecki, *The Underground Recovery*, NEW YORKER (Apr. 22, 2013), <https://www.newyorker.com/magazine/2013/04/29/the-underground-recovery> [<https://perma.cc/NK98-QHPQ>] (“This unreported income is being earned, for the most part, not by drug dealers or Mob bosses but by tens of millions of people with run-of-the-mill jobs—nannies, barbers, Web-site designers, and construction workers—who are getting paid off the books.”); Naomi Ishisaka, *How Black Businesspeople Were Left Out of Washington's Green Gold Rush After Marijuana Was Legalized*, SEATTLE TIMES (Dec. 7, 2020, 11:14 AM), <https://www.seattletimes.com/seattle-news/how-black-businesspeople-were-left-out-of-washingtons-green-gold-rush-after-marijuana-was-legalized/> [<https://perma.cc/7ETT-ML9G>] (Moreover, in states that have legalized marijuana, black people who “were the very ones that were incarcerated” for selling marijuana have been effectively shut out of the regulated industry.); One of these reasons is because people with felony convictions are prohibited from participating in the regulated industry. Wilbert L. Cooper & Christie Thompson, *Will Drug Legalization Leave Black People Behind?*, MARSHALL PROJECT (Nov. 11, 2020, 1:40 PM), <https://www.themarshallproject.org>

This Article then explores the necessity of coalition building with individuals who may not always agree philosophically, but face similar struggles. The anti-sex trafficking¹⁷ movement is a helpful comparison here because it often fails to consider the ways in which a legal framework based on the interests of a few could hurt the whole. While the principles of the movement are noble, the way the movement has developed rejects the perspectives of similarly situated individuals—like sex workers or others in the sex trade—resulting in harmful consequences. For example, the anti-sex trafficking movement encourages carceral solutions that often have negative impacts on sex workers, as well as the victims of sex trafficking—the individuals being forced into involuntary sex work.¹⁸ Part II will give a brief history of anti-sex trafficking policy and how the anti-trafficking trajectory has stunted the growth of a more inclusive, racially just, labor rights approach to sex work. This explanation will extract key lessons that can be useful to workers in other forms of gig work and beyond.

Finally, this Article will present how workers on the margins are excluded from the law's protections and lack bargaining power with their employers. Part II.B will consider the ways in which sex workers have been operating in a gig economy in the absence of labor and employment protections; how they have been surviving without those protections; and how they have been impacted by contemporary laws that further criminalize sex work or limit opportunities for advocacy in partnerships with sex workers. Part II.C will also suggest ways in which gig economy workers can learn from and partner with sex workers and other groups with related interests in order to secure protections that are responsive to their overlapping needs. Gig economy workers are in a privileged enough position to advance the interests of other vulnerable populations by supporting a variety of advocacy approaches that would be useful to a multitude of non-traditional workers. By using principles of humility, love, and lending privilege, gig workers, unions, and other workers can use movement-building principles to support causes more vulnerable than their own. In doing so, they can win key victories for themselves.

This Article draws vital insights from the struggles of sex workers so that workers in other industries can learn from their efforts. As is credited to cultural anthropologist Margaret Mead, “Every time we liberate a

/2020/11/11/will-drug-legalization-leave-black-people-behind [https://perma.cc/4NBP-E5VU] (Nov. 11, 2020).

17. Sex trafficking and human trafficking are defined in Part I.B.

18. Dean Spade, *Intersectional Resistance and Law Reform*, 38 SIGNS 1031 (2013) (discussing how carceral feminism primarily advances the perceived importance of police, incarceration, mandatory arrests for domestic violence perpetrators, and “rescuing” sex workers).

woman, we liberate a man.”¹⁹ Our destinies are tied, and the focus should be on the most marginalized in order to guarantee rights for us all.

I. THE CROSSOVER

A. What “Counts” As Work?

*[I]mpoverished communities of color have for centuries been sharing, collaborating, hacking, and crowdsourcing in order to survive in environments devoid of formal employment opportunities, yet their improvisation and inventiveness have mostly been discarded if not actively sabotaged and criminalized.*²⁰

Not only are impoverished communities of color excluded from legal protection, but their survival tactics are undervalued and often actively deterred by society. The book *Knocking the Hustle* gives a historical account of the 1970s change in economic theory that placed a high value on productivity and entrepreneurship, but:

[N]ot just any type of entrepreneurial hustle. Even when a social safety net existed, poor and working-class populations have had to engage in a range of hustles to make ends meet, from providing day care to selling untaxed cigarettes to using their cars as unlicensed taxicabs to hawking bootleg CDs, DVDs, and designer clothing. But the state and civil society usually frowns upon this type of entrepreneurial behavior because it doesn’t generate tax revenue and doesn’t shunt people into acceptable forms of income-generating employment.²¹

There are concrete reasons that marginalized communities have been forced into these hustles. Black people and communities of color are excluded from the formal economy through a series of measures, including past criminal history, which often present barriers to employment.²² Survival tactics and criminalization form a vicious cycle. People

19. Michael H. LeRoy, *Bare Minimum: Stripping Pay for Independent Contractors in the Share Economy*, 23 WM. & MARY J. WOMEN & L. 249, 270 (2017).

20. Niels van Doorn, *Platform Labor: On the Gendered and Racialized Exploitation of Low-Income Service Work in the ‘On-Demand’ Economy*, 20 INFO. COMM. & SOC’Y 898, 909 (2017).

21. LESTER K. SPENCE, *KNOCKING THE HUSTLE: AGAINST THE NEOLIBERAL TURN IN BLACK POLITICS* 139 (2015).

22. MICHELLE ALEXANDER, *THE NEW JIM CROW* 6 (2012) (discussing the impact of criminal records resulting from the war on drugs on young, Black men by subjecting them to legalized discrimination); *id.* at 141 (“A criminal record today authorizes precisely

living in poverty can break the law and then be saddled with a criminal record that stifles their employment prospects, or they can become impoverished as a result of their criminalized status and then turn to unlawful survival tactics because of their exclusion from the formal economy. The consequences of participating in the shadow economy for these individuals can even be deadly. For example, Eric Garner sold loose cigarettes, Alton Sterling was suspected of selling bootleg CDs. Both were killed when they encountered law enforcement during their “street hustle[s]” and their deaths were justified by many because of the criminal nature of their activities.²³

The shadow economy²⁴ may be defined to include illegal activities and “unreported income from the production of legal goods and services from monetary or barter transactions.”²⁵ The shadow economy may include the sale of unregulated food²⁶ or illegal substances, “braiding hair or cleaning houses on the side,”²⁷ or—as is the focus of this Article—the exchange of sexual services for compensation.

This Article opts for a broad conceptualization of the shadow economy that includes work that is either criminalized, like prostitution, or work that is not criminal but is otherwise stigmatized, like stripping. This broad definition will serve as a basis for explaining how the gig economy is merely a formalization and de-stigmatization of labor that many (espe-

the forms of discrimination we supposedly left behind—discrimination in employment, housing, education, public benefits, and jury service. Those labeled criminals can even be denied the right to vote.”); Devah Pager, *The Mark of a Criminal Record*, 108 AM. J. SOCIO. 937 (2003) (Evidence shows that having a record reduces employer callback rates by 50 percent); E. ANN CARSON, BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, PRISONERS IN 2016, at 8 (2018), <https://www.bjs.gov/content/pub/pdf/p16.pdf> [<https://perma.cc/73Z5-PK2Y>] (Black adults are 5.9 times as likely to be incarcerated than whites and Hispanics are 3.1 times as likely); *Crime in the United States 2016: Table 21A*, FBI, <https://ucr.fbi.gov/crime-in-the-u.s/2016/crime-in-the-u.s.-2016> [<https://perma.cc/YV6V-4XH7>] (last visited Mar. 14, 2021) (In 2016, Black Americans comprised 27 percent of all individuals arrested in the United States—double their share of the total population.).

23. Denver, *supra* note 14.

24. Also referred to as the informal, underground, illicit, or parallel economy.

25. Friedrich Schneider & Dominik Enste, *Hiding in the Shadows: The Growth of the Underground Economy*, INT’L MONETARY FUND (Mar. 2002), <https://www.imf.org/external/pubs/ft/issues/issues30/> [<https://perma.cc/7272-SJQE>] (“Hence, the shadow economy comprises all economic activities that would generally be taxable were they reported to the tax authorities.”).

26. See Elizabeth Kregor, *How Do You Formalize a Tamale? How to Ease Street Vendors’ Transition Out of the Shadow Economy*, 7 U.C. IRVINE L. REV. 453 (2017). Legalizing an activity may not always be freeing it because the barriers of something like street vending (e.g., licensing fees) could be too high for people who are street vending without meeting the legal requirements. *Id.* at 454.

27. Denver, *supra* note 14.

cially racial and gender minorities) have been engaging in (perhaps quite literally) forever.

Individuals working in the shadow economy and certain types of legal employment have been excluded from legal protections for various reasons.²⁸ As a preliminary matter, engaging in criminalized economic activity generally prevents one from asserting certain rights that may otherwise be present under the law. For example, a contract for an illegal good or service is void and unenforceable by the courts. The law also will not step in if there is a so-called “falling out between thieves.”²⁹ In addition, speech “intended to induce or commence illegal activities is not protected by the First Amendment.”³⁰

However, a recent Tenth Circuit opinion from 2019 clarified that the illegal nature of an activity does not necessarily preclude protection from federal labor law.³¹ A marijuana distributor (legal in Colorado, but still criminal federally) intentionally misclassified a security guard as an independent contractor under the Federal Labor Standards Act (“FLSA”) to avoid overtime pay obligations.³² The court ruled that the FLSA is a “remedial scheme” for the benefit of all workers and is not rendered inapplicable to an employer just because that employer is violating other federal laws.³³ A similar line of reasoning could certainly be applied to the National Labor Relations Act (“NLRA”) and other labor protections where an otherwise lawful employee is being taken advantage of. These two important sources of labor protections will be discussed further.

B. *Is Sex Work, Work?*

This Article is not a debate about sex work versus sex trafficking or the endless arguments about the distinction between the two. Nor is it a debate over the appropriate legal framework to criminalize or regulate sex work. Nonetheless, the arguments warrant a brief discussion because vulnerability and exploitation are important aspects of the broader workers’ rights discourse. Sex work, as a general term, takes many forms, in-

28. Including those discussing the racist origins of the agricultural and domestic worker exclusions laid out in Part I.D.

29. RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 32 (AM. L. INST. 2010).

30. *Woodhull Freedom Found. v. United States*, 334 F. Supp. 3d 185, 201 (D.D.C. 2018) (citing *United States v. Williams*, 553 U.S. 285, 297 (2008)); *see also* *Pittsburgh Press Co. v. Pittsburgh Comm’n on Hum. Rels.*, 413 U.S. 376, 388–89 (1973) (“We have no doubt that a newspaper constitutionally could be forbidden to publish a want ad proposing a sale of narcotics or soliciting prostitutes.”).

31. *Kenney v. Helix TCS, Inc.*, 939 F.3d 1106 (10th Cir. 2019).

32. *Id.* at 1108.

33. *Id.* at 1111.

cluding the exchange of physical, sexual activity (prostitution); companionship (sometimes referred to as “sugaring” or “escorting”); digital images or videos (pornography or “camming”³⁴); or nude dancing (“stripping”) for money or other forms of compensation (such as food or shelter).³⁵ For ease of terminology, this Article primarily focuses on and refers to prostitution as “sex work” and refers to stripping separately.

Sex work and sex trafficking are often presented as binary: either someone engages in sex work by choice or they were forced and, as a result, they are a victim of coercion. The reality is much more complicated. The term “sex workers” is used here to include individuals who engage in commercial sexual exchange (in any number of ways), regardless of whether they do so because of choice, circumstance, or coercion.

Consensual sex work (or sex work by choice) differs from sex trafficking. Sex trafficking, is defined in both federal and state laws.³⁶ The federal definition is “the recruitment, harboring, transportation, provision, obtaining, patronizing, or soliciting of a person for the purpose of a commercial sex act” which is induced “by force, fraud, or coercion, or in which the person induced to perform such act has not attained 18 years of age.”³⁷ A commercial sex act “means any sex act on account of which anything of value is given to or received by any person.”³⁸ The law assumes that minors cannot consent.³⁹

Whereas trafficking is forced, choice recognizes the agency of individuals who decide to participate in the sex industry while acknowledging the “limited and oppressive power structures of race, class, gender, and sexuality” within it.⁴⁰ “Circumstance”⁴¹ is more amorphous. In the

34. Camming is a “kind of digital-era peep show.” Matt Richtel, *Intimacy on the Web, With a Crowd*, N.Y. TIMES (Sept. 22, 2013). <https://www.nytimes.com/2013/09/22/technology/intimacy-on-the-web-with-a-crowd.html>.

35. For more terms and definitions, see *Why Decriminalize Sex Work?*, DECRIMNOW, <https://www.decrimnow.org/resources-1#/why-decriminalize-sex-work> [<https://perma.cc/JU3R-A35V>] (last visited Mar. 14, 2021).

36. See, e.g., 22 U.S.C.A. § 7102(12) (Westlaw through Pub. L. No. 116-259); VA. CODE ANN. § 18.2-357.1 (West 2019); D.C. CODE ANN. § 22-1833 (West 2010).

37. 22 U.S.C.A. § 7102(11)-(12) (Westlaw through Pub. L. No. 116-259).

38. 22 U.S.C.A. § 7102(4) (Westlaw through Pub. L. No. 116-259).

39. 22 U.S.C.A. § 7102(11) (Westlaw through Pub. L. No. 116-259).

40. Meg Panichelli, Moshoula Capous-Desyllas & Yvette Butler, *From Fallen Women to the Tumblr Ban: Representing the Landscape of Sex Work From a Historical and Legal Perspective*, in THE ROUTLEDGE INTERNATIONAL HANDBOOK OF SOCIAL WORK AND SEXUALITIES (SJ Dodd ed., forthcoming 2021) (“This perspective recognizes that sex workers, like most individuals, are making choices within limited and oppressive power structures of race, class, gender, and sexuality.”).

41. Circumstance is not defined in local, state, or federal U.S. law. It is a delineation that has been made by impacted individuals and professionals working with those in the sex industry to acknowledge the lack of clear binaries between choice and coercion. See,

case of lesbian, gay, bisexual, transgender, or queer (“LGBTQ+”) individuals (especially those who are transgender or gender nonconforming), sex work may be one of only a few options to make money after facing discrimination in mainstream employment.⁴² Race compounds the issue, as Black and Brown transgender individuals have higher rates of participation in sex work than white transgender individuals.⁴³ Those who are thrust into commercial sex work due to their circumstances are often referred to as engaging in “survival sex work,” where sexual activity is exchanged for food, a place to sleep, or money to secure these basic needs.⁴⁴

Individuals may begin engaging in sex work by choice or by circumstance, encounter an abusive person who traffics them, and then resume sex work for their original reasons. Or perhaps an individual was the victim of trafficking and, due to being prosecuted while a victim of trafficking, now has a criminal record that makes it difficult to secure mainstream employment.⁴⁵ Consequently, they return to sex work as a matter of circumstance.

As a practical matter, many sex workers’ rights activists are seeking labor protections in much the same way as other workers.⁴⁶ Sex workers’ rights activists argue that sex work is work, and they should be granted

e.g., SEX WORKERS & ALLIES NETWORK & GLOB. HEALTH JUST. P’SHP, SEX WORK VS TRAFFICKING: HOW THEY ARE DIFFERENT AND WHY IT MATTERS 2 (2020), https://law.yale.edu/sites/default/files/area/center/ghjp/documents/issue_brief_sex_work_vs_trafficking_v2.pdf [<https://perma.cc/CY9W-UJNY>].

42. See ERIN FITZGERALD, SARAH ELSPETH PATTERSON, DARBY HICKEY & CHERNO BIKE, MEANINGFUL WORK: TRANSGENDER EXPERIENCES IN THE SEX TRADE 5 (2015), https://www.transequality.org/sites/default/files/Meaningful%20Work-Full%20Report_FINAL_3.pdf [<https://perma.cc/DN6B-E5MU>] (“Those who lost a job due to anti-transgender bias were almost three times as likely to engage in the sex trade (19.9% vs. 7.7%).”).

43. *Id.* at 4 (noting that according to the National Transgender Discrimination Survey (NTDS), “Black and Black Multiracial NTDS respondents had the highest rate of sex trade participation overall (39.9%), followed by those who identified as Hispanic or Latino/a (33.2%). Those who identified as “White only” had the lowest rate of participation at 6.3%.”).

44. See *id.* at 8.

45. THE SURVIVOR REENTRY PROJECT, AM. BAR ASS’N COMM’N ON DOMESTIC & SEXUAL VIOLENCE, POST-CONVICTION ADVOCACY FOR SURVIVORS OF HUMAN TRAFFICKING: A GUIDE FOR ATTORNEYS 6 (2016) [hereinafter THE SURVIVOR REENTRY PROJECT], https://www.americanbar.org/content/dam/aba/administrative/domestic_violence1/SRP/practice-guide.authcheckdam.pdf [<https://perma.cc/HZ9W-B3V6>].

46. See Adrienne D. Davis, *Regulating Sex Work: Erotic Assimilationism, Erotic Exceptionalism, and the Challenge of Intimate Labor*, 103 CALIF. L. REV. 1195, 1197-202 (2015) (asserting that the sex worker rights movement has stalled and thoroughly engaging with issues of employment and labor law in the context of regulating sex work).

the same rights and protections granted to any other worker.⁴⁷ They argue that many who engage in sex work make a conscious decision to do so⁴⁸ and are doing it because it pays the bills, just like anyone else. Some activists believe it is a violation of their civil rights to be denied the opportunity to engage in sex work.⁴⁹ Additionally, the fact that those selling sex disproportionately come from multiple marginalized statuses (sex, race, gender identity)⁵⁰ means that attempts to address sex work must come from, and be cognizant of, a racial justice perspective. Such a perspective requires, among other things: addressing root causes of vulnerability, acknowledging how police are often dangerous to Black and Brown people, and respecting the agency of sex workers.⁵¹ Regardless of why anyone engages in sex work, the argument goes: neither they—nor their work—should be criminalized.

Many anti-sex trafficking activists believe that one cannot choose to engage in sex work because it is inherently violent and exploitative.⁵²

47. Lacey Sloan, *Who Owns Prostitution—and Why?: Why Decriminalizing Prostitution Is the Right Thing to Do*, FREE INQUIRY, Fall 1997, at 18.

48. *Id.* at 19.

49. *Id.*

50. See FITZGERALD ET AL., *infra* note 454; MEREDITH DANK, BILAL KHAN, P. MITCHELL DOWNEY, CYBELE KOTONIAS, DEBORAH MAYER, COLLEEN OWENS, LAURA PACIFICI & LILY YU, ESTIMATING THE SIZE AND STRUCTURE OF THE UNDERGROUND COMMERCIAL SEX ECONOMY IN EIGHT MAJOR US CITIES 219 (2014), https://www.urban.org/sites/default/files/publication/22376/413047-estimating-the-size-and-structure-of-the-underground-commercial-sex-economy-in-eight-major-us-cities_0.pdf [<https://perma.cc/6HPH-4U7F>] (“The 36 sex workers interviewed for this study represent a diverse set of racial and ethnic backgrounds and gender identities. . . . [T]welve participants identified as African American or black (33 percent), six identified as white (17 percent), four identified as Latino/a (11 percent), and three identified as multiracial (8 percent). Eleven (30 percent) did not identify a race or ethnicity. Twenty-eight individuals (78 percent) identified as women, one (3 percent) identified as a man, and seven (19 percent) identified as transgender women.”). See also, Press Release, Bureau of Justice Statistics, Most Suspected Incidents of Human Trafficking Involved Allegations of Prostitution of An Adult or Child (April 28, 2011), <https://www.bjs.gov/content/pub/press/cshti0810pr.cfm> [<https://perma.cc/WRG5-BL9N>] (In a 2008–2010 study, the Bureau of Justice Statistics estimated that, of sex trafficking victims identified, 40 percent were black. While this study measured sex trafficking victims, sex trade demographics are hard to measure. Because it is not immediately obvious whether someone is a victim or not, these statistics help estimate the number and demographics of people in the sex trade generally.).

51. See Jasmine Sankofa, *From Margin to Center: Sex Work Decriminalization is a Racial Justice Issue*, AMNESTY INT’L USA (Dec. 12, 2016), <https://www.amnestyusa.org/from-margin-to-center-sex-work-decriminalization-is-a-racial-justice-issue/> [<https://perma.cc/XT6C-LCB8>].

52. These arguments were generally inspired by feminist legal theorists like Catherine MacKinnon who popularized “dominance feminism.” See generally CATHARINE A.

Consequently, they do not believe in legitimizing sex work by calling it “work” or otherwise changing its legal status.

This article adopts the perspective that sex work is a form of work. Not only that, but it is devalued labor that is undertaken particularly by women of color in the shadow economy. Sex workers, like the mainstream gig workers discussed below, enter into their working arrangements to make ends meet.

C. Defining the Gig Economy

As defined above, a “gig” is a short-term job or an “economic activity that involves the use of temporary or freelance workers to perform jobs typically in the service sector.”⁵³ The gig economy is also known as “the collection of markets that match providers to consumers on a gig (or job) basis in support of on-demand commerce.”⁵⁴

While the particular business models vary, many people imagine a “basic model” where “gig workers enter into formal agreements with on-demand companies (e.g., Uber, TaskRabbit) to provide services to the company’s clients.”⁵⁵ In this kind of system, “[p]rospective clients request services through an Internet-based technological platform or smartphone application that allows them to search for providers or to specify jobs.”⁵⁶ The individual who completes the service is then compensated through the application. Work is “on-demand”⁵⁷ for both the customer and the worker.

This Article includes in the gig economy the “contingent workforce,” which encompasses individuals who work in areas outside of the standard, full-time employment relationship.⁵⁸ These might be temporary workers, freelancers, contractors, consultants, leased workers, workers on call, part-time workers, and the self-employed,⁵⁹ including anyone who makes a living by cobbling together different jobs or who takes on a side job to make ends meet. These definitions of gig work suggest legal, formal, mainstream, or otherwise “socially acceptable” forms of work.

MACKINNON, FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW (1987); CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE (1989).

53. *Gig*, *supra* note 6.

54. DONOVAN ET AL., *supra* note 8, at 1.

55. *Id.*

56. *Id.*

57. Orly Lobel, *The Gig Economy and the Future of Employment and Labor Law*, 51 U.S.F. L. REV. 51 (2017).

58. *Id.* at 56.

59. *Id.*

There are many reasons people work in the gig economy. Some gig jobs pay better than more traditional jobs and the hours and work are often more flexible, allowing workers a lot of freedom in choosing the type of work they perform and the hours in which they perform it.⁶⁰ Additionally, the gig economy is accessible to many individuals who may be excluded from the mainstream economy for one reason or another, including women with children, racial minorities, people who face discrimination based on sexual orientation or gender identity, and people with criminal records.⁶¹ Despite these advantages, the work can be precarious in many ways: inconsistent jobs, non-negotiable pay, and no benefits such as insurance, personal leave, or overtime pay.⁶²

Studies show that the contingent workforce is racially diverse,⁶³ but the division of labor within the contingent workforce continues to reflect societal inequities. For example, many individuals with more societal advantage (white, men) work a gig job to supplement their primary source of income and are likely to receive higher wages and higher levels of flexibility and control.⁶⁴ On the other hand, groups that are already disad-

60. Michael L. Nadler, *Independent Employees: A New Category of Workers for the Gig Economy*, 19 N.C. J.L. & TECH. 443, 457-58 (2018); Holly Wilmet, *Naked Feminism: The Unionization of the Adult Entertainment Industry*, 7 AM. U.J. GENDER SOC. POL'Y & L. 465, 491 (1999) (noting that in the case of stripping: "The flexible schedules accommodate women who are mothers, students, actors, or employees in need of additional income. In many cases, the income a woman makes from dancing is the difference between work and welfare.").

61. MARKETPLACE-EDISON RESEARCH, *THE GIG ECONOMY* (2018) <http://www.edisonresearch.com/wp-content/uploads/2019/01/Gig-Economy-2018-Marketplace-Edison-Research-Poll-FINAL.pdf> [<https://perma.cc/JA8P-Y359>] (The study indicated that women are slightly more likely to have a gig job as secondary income than men. For over half of Black gig workers, their gig job served as their primary source of income. Almost half of Hispanic gig workers said their gig job was their primary source of income. White gig workers were the least likely to have gig work as their primary source of income.).

62. See Nadler, *supra* note 60, at 458-59 (explaining that independent contractors are not able to take advantage of the protections in the Fair Labor Standards Act, National Labor Relations Act, Civil Rights anti-discrimination provisions, Family Medical Leave Act, or Occupational Safety and Health Act).

63. See *e.g.*, MARKETPLACE-EDISON RESEARCH, *supra* note 61. ("Gig workers are more highly concentrated among Hispanic or African-American adults than White adults. Almost one-third (31%) of Hispanic adults 18+ earn money through the gig economy, compared to 27% of African-Americans. White adults are the least likely to earn money through the gig economy at 21%.")

64. *Who Participates in the Gig Economy*, GIG ECON. DATA HUB, <https://www.gigeconomydata.org/basics/who-participates-gig-economy> [<https://perma.cc/DQ3N-ULZK>] (last visited Mar. 14, 2021) ("Taken together, these demographic data suggest that the non-traditional workforce is deeply segmented. Some work pays particularly well, offers high levels of flexibility and control, and tends to be held by advantaged groups, often on a supplemental basis. Other non-traditional work provides low wages,

vantaged (by sex or race) more frequently rely on non-traditional or contingent employment as their primary source of income.⁶⁵

D. “Class” Warfare and Exclusion from Legal Protection

Gig workers and shadow workers represent complicated applications of the regulatory framework that governs labor relations in the United States. The key piece of legislation at issue in this Article is the NLRA.⁶⁶ The NLRA, enacted to help facilitate the flow of commerce,⁶⁷ gives employees the right to organize, to form labor organizations, to engage in collective bargaining through self-selected representatives, and to “engage in other concerted activities for the purposes of collective bargaining or mutual aid or protection.”⁶⁸ Employees are covered by the NLRA, but independent contractors, agricultural laborers, and domestic servants are not.⁶⁹ While the focus here is on the NLRA, it is worth noting that the FLSA exempts similar groups from wage and hour protections.⁷⁰

Concerns about exploitation of non-employees have deep historical roots in the United States. For instance, many scholars have connected the exclusion of domestic and agricultural workers from federal labor protections in the 1930s to America’s history of racism and anti-immigrant sentiment.⁷¹ Domestic and agricultural workers were primarily Black, meaning that the era of labor and employment protections left out many Black workers by proxy.⁷² Though slavery had been abolished, white southerners used strategies like the “tenancy system” to keep Black

and tends to be held disproportionately by disadvantaged groups, who often rely on it for their primary livelihood.”).

65. *Id.*

66. While there are more statutes, such as the Fair Labor Standards Act, governing wage and hour laws, my focus here is on workers’ rights to organize and bargain.

67. 29 U.S.C.A. § 151 (Westlaw through Pub. L. No. 116-259) (“The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate current business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.”).

68. 29 U.S.C.A. § 157 (Westlaw through Pub. L. No. 116-259).

69. 29 U.S.C.A. § 152 (Westlaw through Pub. L. No. 116-259).

70. 29 U.S.C.A. § 213 (Westlaw through Pub. L. No. 116-259).

71. See, e.g., Juan F. Perea, *The Echoes of Slavery: Recognizing the Racist Origins of the Agricultural and Domestic Worker Exclusion from the National Labor Relations Act*, 72 OHIO ST. L.J. 95 (2011); William E. Spriggs, *A Look at Inequality, Worker’s Rights, and Race*, 36 LAW & INEQ. 231, 238-40 (2018).

72. Perea, *supra* note 71, at 96.

workers in a perpetual state of debt to the white farm owners.⁷³ Economic dependence was a crucial part of their exploitation.

While the practice of tenant farming was declared unconstitutional,⁷⁴ the laws that would actually benefit these individuals were the ones that would buttress their economic independence: social security benefits, unemployment insurance, equal or minimum wages, and equalized bargaining power.⁷⁵ Moreover, white southerners fought against equal wages for Black workers as they would have signified equal worth and dignity.⁷⁶ Today, these same statutory exclusions continue to harm majority-Latinx farm workers.⁷⁷ This demonstrates the persistence of the desire to “preserve an exploited, economically deprived non-white agricultural labor force.”⁷⁸ This economically deprived labor force goes beyond agriculture. Legal classifications continue to reinforce racial hierarchies among economically deprived and legally vulnerable labor forces.

Unfortunately for gig workers, courts have struggled to decide whether to classify them as employees or as independent contractors under the NLRA and FLSA.⁷⁹ This classification is incredibly important because whether one is an employee or independent contractor determines which benefits and protections one receives, and to what degree.⁸⁰ Contractors are eligible for fewer benefits and protections than those workers classified as employees. Rather than analyzing the classification debate in

73. *Id.* at 101.

74. *Id.* (“Such debt peonage continued despite repeated Supreme Court decisions declaring the practice unconstitutional.”).

75. *Id.* at 102.

76. *Id.* at 116.

77. *See, e.g.,* Anastasia Christman, *Ending Injustice in Our Fields and Dairies: New York State Should Extend Basic Labor Protections to Farmworkers*, NAT’L EMP. L. PROJECT (May 6, 2019), <https://www.nelp.org/publication/ending-injustice-fields-dairies-new-york-state-extend-basic-labor-protections-farmworkers/> [<https://perma.cc/RT8V-WTX8>] (One survey of dairy farmworkers in New York found “nearly two-thirds of workers reporting that Latino immigrant workers were given worse assignments and earned less pay than other workers. Farmworkers who experience abusive conditions, wage theft, or unsafe practices that threaten worker and consumer safety may be fearful of speaking up, while those on H-2A visas are tied to just one employer and cannot leave to work in less abusive conditions.”).

78. Perea, *supra* note 71, at 127.

79. Some argue that independent contractor status is a form of exploitation because businesses are not providing workers with the benefits they would be entitled to receive if they were classified as employees. This Article will not spend time on that struggle because several articles already cover those discussions in great depth. In essence, some scholars argue that the gig economy is not unique enough to require new tests to classify workers. Other scholars argue that the traditional rules are unworkable when applied to the gig economy.

80. *See supra* note 79.

depth, which is well explored elsewhere,⁸¹ this Article attempts to call attention to the ways that gig workers can learn from past advocacy efforts by individuals at similar or greater levels of socio-legal vulnerability.

Given that there is no consensus among workers about how to regulate—or not regulate—the gig economy, how should policymakers figure out how to move forward? How can policymakers protect workers without unintentionally harming them by tampering with the flexible nature of gig work?

This Article argues that these questions could be answered more effectively if policymakers considered individuals, like sex workers, who often make ends meet by engaging in the shadow economy. Including shadow workers in the gig economy would provide policymakers with a helpful historical context of successes and failures in regulatory efforts in a closely analogous context, providing them with guidance to more effectively regulate this ever-growing employment sector.

E. *You Must Be New Here: Sex Workers in The Gig Economy*

Modern gig work platforms were not the first to capitalize on the internet's ability to match short-term workers with jobs. In the early 1990s, sex workers were the “economic engine” for print magazines and newspapers because of their advertisements in the classifieds section.⁸² As described by Maxine Doogan, founder of the Erotic Providers Union,⁸³ sex workers were pioneers of the early internet.⁸⁴ They transitioned from print to online marketing in the 1990s. Kristen Diangelo, Founder of the Sacramento chapter of the Sex Worker Outreach Project described the move online.⁸⁵ Chat rooms and message boards allowed clients to rate and review sex workers and their services.⁸⁶ Sex workers later did the same with “bad date” websites, developed to keep one another safe from abusive clients.⁸⁷ The online sex industry even worked with cryptocurrencies⁸⁸ and online payment before other industries.⁸⁹

81. See, e.g., Lobel, *supra* note 57; Nadler, *supra*, note 60; Jeffrey M. Hirsch & Joseph A. Seiner, *A Modern Union for the Modern Economy*, 86 *FORDHAM L. REV.* 1727 (2018).

82. *Id.*

83. More on the Erotic Service Providers Union can be found at *EROTIC SERV. PROVIDERS UNION*, <https://www.espu-usa.com/> [<https://perma.cc/U8HD-BM8Y>] (last visited Mar. 12, 2021).

84. Sofia Barrett-Ibarria, *Sex Workers Pioneered the Early Internet—and It Screwed Them Over*, *VICE* (Oct. 3, 2018, 8:00 AM), https://www.vice.com/en_us/article/qvazy7/sex-workers-pioneered-the-early-internet [<https://perma.cc/8WX7-EJW8>].

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.*

Crucially, using the internet allowed sex workers to build community and secure more autonomy over their labor. Websites like Backpage and Craigslist were popular, as was social media. As Molly Smith, a sex worker and author of *Revolting Prostitutes*, put it: “Using platforms like Backpage, you could organize your work for yourself. Even 15 years ago, sex workers would have to do most of their work on the street, or work for a manager—which opens you up to all sorts of harms.”⁹⁰ Technological advances reduce the need for intermediaries and have “the potential to create a more efficient and transparent labor market, which enables independence, choice, autonomy, and freedom for people to work according to their own terms, time, and desired lifestyle.”⁹¹

Recall the relationship between independence and worker power. Sex workers demonstrated early on how use of the internet could improve their working conditions. Gig workers have found this to be true as well. Despite the concerns about the precarious nature of the work, gig work can be more accessible⁹² than traditional employment. Moreover, the hours and the work itself are often more flexible, which translates into greater autonomy for workers.⁹³

II. LESSONS FROM A FRACTURED GROUP: SEX WORK AND SEX TRAFFICKING

The following discussion provides two lessons for gig workers to take from the sex workers' rights movement. First, Part II.A will describe the current regulatory framework of prostitution in the United States. Part II.B will describe two major pieces of anti-trafficking legislation and the consequences sex workers suffered as a result. Next, it will describe the ways in which sex workers have attempted to work with unions. Gig workers and their allies will benefit from this history, as legislation and unionization are issues that gig workers are grappling with right now. That history illustrates the importance of properly including similarly situated individuals to avoid changes in the law that would be harmful to those in similar circumstances.

89. Nick Saint, *How Pornographers Invented E-Commerce*, BUS. INSIDER (Aug. 6, 2010, 7:30 PM), <https://www.businessinsider.com/the-producer-of-middle-men-talks-to-us-about-how-pornographers-invented-e-commerce-2010-8> [<https://perma.cc/D7QQ-ZUVZ>].

90. Tom Whyman, *Your Job Has More in Common with Sex Work Than You Think*, VICE (Nov. 20, 2018, 7:34 AM), https://www.vice.com/en_us/article/xwjzxw/your-job-has-more-in-common-with-sex-work-than-you-think [<https://perma.cc/D5FQ-KDV7>].

91. Lobel, *supra* note 57, at 2.

92. MARKETPLACE-EDISON RESEARCH, *supra* note 61.

93. See sources cited *supra* note 60.

Finally, Part II.C is a lesson in movement-building by illustrating what *not* to do when joining forces for a similar cause. It will provide a cautionary tale on movement-building based on the divide between the fight for sex workers' rights and anti-sex trafficking policy. As explained previously in Part I, the unfortunate result of this divide is that anti-sex trafficking policy is extremely carceral and does not provide sex workers with added labor protections due to an underlying belief that sex work cannot be legitimate work and is inherently exploitative. A similar divide exists in the discussions surrounding how best to legislate gig work and what regulatory schemes would cure instances of worker exploitation within the gig economy.

A. Regulatory Framework

Prostitution is subject to a variety of criminalization schemes and regulations.⁹⁴ For example, in the United States, prostitution, solicitation, pandering, brothel keeping, and related activities are illegal—except for in certain counties in Nevada.⁹⁵ Other types of work, such as stripping, “camming,” and acting in sexually explicit videos are not illegal, but remain stigmatized. In Sweden, Norway, and Iceland, the approach used criminalizes the purchase of sexual services, instead of the sale.⁹⁶ This is referred to as the “end-demand” or “Nordic model.”

Sex industry workers of all kinds have been participating in the gig and shadow economies for ages, fighting to secure rights for themselves all the while.⁹⁷ Sex workers engaging in prostitution struggle to organize and advocate for safer working conditions while being criminalized. In the fight against human trafficking, sex workers complain that their work has been made less safe because of the focus on carceral solutions. Sex workers argue that criminalizing their work makes them easy targets for violence because they're unlikely to receive help from the police—and may be arrested if they do seek help.⁹⁸ Additionally, sex workers also have

94. Anna North, *The Movement to Decriminalize Sex Work, Explained*, VOX (Aug. 2, 2019, 7:30 AM) <https://www.vox.com/2019/8/2/20692327/sex-work-decriminalization-prostitution-new-york-dc> [<https://perma.cc/2PN2-FR6X>].

95. *Id.*

96. See Noy Thrupkaew, Opinion, *A Misguided Moral Crusade*, N.Y. TIMES (Sept. 22, 2012), <https://www.nytimes.com/2012/09/23/opinion/sunday/ending-demand-wont-stop-prostitution.html> (discussing other countries' legal frameworks, such as Sweden's, where the sale of sex is decriminalized, while buying sex is a criminal offense).

96. Sloan, *supra* note 47, at 18 (1997).

97. Some of this struggle for rights is discussed in Part II.C.

98. See MEGAN MCLEMORE, SEX WORKERS AT RISK: CONDOMS AS EVIDENCE OF PROSTITUTION IN FOUR US CITIES, HUM. RTS. WATCH (2012), https://www.hrw.org/sites/default/files/reports/us0712ForUpload_1.pdf [<https://perma.cc/TU2F-UEET>].

to worry about keeping themselves safe from state violence. As stated earlier, sex workers are often racial, sexual, and gender minorities. Increased policing in communities of color, mandatory arrests, escalation of violence and excessive force by police officers are a real threat.⁹⁹ Between 2005 and 2013, police were arrested for over 600 cases of forcible fondling, over 400 cases of rape, and over 200 cases of sodomy.¹⁰⁰ Those numbers include the people the police are supposed to protect. “A predominance of the victims fall into at least one of several categories: *They have criminal records, are homeless, are sex workers, or have issues with drug or alcohol abuse.* Essentially, predatory cops are ‘picking on people who juries won’t believe or who don’t trust police.’”¹⁰¹

Prostitution abolitionists, now more commonly referred to as “end-demand” activists because of their desire to dismantle the sex trade by criminalizing the purchase of sexual services, argue that only the *sale* of sexual services by sex workers should be decriminalized, legalized, or regulated.¹⁰² Indeed, “[a]lmost all feminists and sex workers who have written on the subject advocate that sex workers not be criminally liable for engaging in sex work.”¹⁰³ In other words, despite the philosophical rifts among feminists, almost all now agree that sex workers themselves should no longer be criminalized. However, end-demand activists believe that pandering, soliciting (buying sexual services), and profiting from the wages of sex workers should remain criminalized.¹⁰⁴

B. *Nothing About Us Without Us*

Industries just want to look at us and use us for whatever means serves their purpose, but they don't do anything for us. They're tak-

99. Alicia Gill, *Survivor-Centered Research: Towards an Intersectional Gender-Based Violence Movement*, 33 J. FAMILY VIOLENCE 559, 560 (2018) (“Survivors of color and Native survivors, LGBTQIA survivors, survivors with disabilities, and survivors who live at the intersections of all of these identities” experience more violence because of their identities. . . . [I]ncreased policing in communities of color, mandatory arrests, escalation of violence and excessive force by police officers” are all the result of unintended consequences of past domestic violence and sexual assault laws that have a disproportionate effect on marginalized communities.).

100. Elliott C. McLaughlin, *Police Officers in the US Were Charged With More Than 400 Rapes Over a 9-year Period*, CNN (Oct. 19, 2018, 10:46 AM), <https://www.cnn.com/2018/10/19/us/police-sexual-assaults-maryland-scope/index.html> [<https://perma.cc/3S3D-595W>].

101. *Id.*

102. See Thrupkaew, *supra* note 96.

103. Sloan, *supra* note 47, at 18 (1997).

104. See *id.*

*ing money off of our community, but they never stand in solidarity with our community.*¹⁰⁵

The slogan “nothing about us without us” is borrowed from the disability rights movement, but it applies similarly to policymaking for workers in the sex trade and the gig economy. The book *Revolted Prostitutes*, written by sex workers and sex workers’ rights activists, “compellingly argues that true supporters of sex workers’ rights must put the voices, experiences, and welfare of sex workers first. In other words: Nothing about them without them.”¹⁰⁶ This is advice that should be heeded for all legislation: those who will be directly impacted by policies will also have the best idea of how it affects their lived experience. A failure to take their lived experiences into account can lead to unintended consequences that cause more harm than good.

In considering how inclusive to be when selecting potential allies, one might wonder why sex workers should have any say in anti-trafficking policy at all. For one thing, it is important to include these perspectives because the ways that individuals enter the sex industry, and the degree of coercion involved (as explained in Part I), is not binary or static. Secondly, sex workers have a personal stake in anti-trafficking policy, as it often affects their lives and livelihoods so directly. As was just discussed, for example, many sex workers’ lives became more dangerous and their work more precarious post-FOSTA-SESTA.¹⁰⁷ Sex workers also face problems similar to those of trafficking victims: their arrest records make it more difficult to find stable, mainstream employment, safe housing, and more.¹⁰⁸

Recall from earlier, that carceral solutions may mean deadly interactions with law enforcement. Many sex workers argue that good anti-trafficking policy requires a racial justice perspective and that sex workers’

105. Barrett-Ibarria, *supra* note 84 (quoting Maxine Doogan, founder of the Erotic Service Providers Union).

106. Arvind Dilawar, *How the Fight for Sex Workers’ Rights Can Put Sex Workers First*, PAC. STANDARD (updated Nov. 5, 2018), <https://psmag.com/news/how-the-fight-for-sex-workers-rights-can-put-sex-workers-first> [<https://perma.cc/NG2M-E4KE>]. After acknowledging the relative privilege the authors hold as cis-gender, white, sex workers in the global North, they go on to discuss how meaningful a book “about prostitution written by prostitutes” is. They are able to bring their lived experience to this book. “Sex workers – not journalists, politicians, or the police – are experts on sex work.” JUNO MAC & MOLLY SMITH, *REVOLTING PROSTITUTES: THE FIGHT FOR SEX WORKERS’ RIGHTS* 21 (2018).

107. Siouxsie Q, *Anti-Sex-Trafficking Advocates Say New Law Cripples Efforts to Save Victims*, ROLLING STONE (May 25, 2018, 7:01 PM), <https://www.rollingstone.com/culture/culture-features/anti-sex-trafficking-advocates-say-new-law-cripples-efforts-to-save-victims-629081/> [<https://perma.cc/AMG8-2NQ3>].

108. THE SURVIVOR REENTRY PROJECT, *supra* note 45, at 6.

rights is a racial justice issue. A racial justice perspective requires addressing root causes of vulnerability and an acknowledgement that police are often dangerous for Black and Brown bodies. “Women of color, especially Black cisgender and transgender women, girls, and femmes, are particularly vulnerable. Because sex work and sex trafficking are conflated, interventions are focused on abolishing the sex industry instead of eliminating structural issues that drive exploitation.”¹⁰⁹ As explained previously, some of the root causes of the vulnerability that pushes individuals into societally-disfavored labor arrangements are economic. Had they been included earlier (or taken seriously when lodging their complaints), this would not be a new development.

Finally, from the “end-demand” perspective, if all sex workers are victims who cannot consent to engage in the sex trade, then why wouldn’t they be included in discussions on anti-trafficking policy along with other victims?

One example of legislation created without input from sex workers is the Mann Act of 1910, also known as the “White-Slave Traffic Act.”¹¹⁰ The law criminalizes the knowing transportation of any individual in interstate commerce for the purposes of prostitution.¹¹¹ While the law was adopted to help victims of trafficking, in effect it actually ended up harming many of them.¹¹² “[T]he reality for some of these women and girls, once the Mann Act was implemented, was much different [from the supposed guarantee of their protection]. Rather than being protected, they were prosecuted, or at least threatened with prosecution, so that they would cooperate with law enforcement officials.”¹¹³

While the Mann Act was passed over 100 years ago, this dynamic between trafficking survivors and the State has not changed dramatically. Despite some recent advancements in trauma-informed practice,¹¹⁴ police

109. Sankofa, *supra* note 51.

110. 18 U.S.C.A. § 2421 (Westlaw through Pub. L. No. 116-259); 45 CONG. REC. 545 (1910). Of note, the Mann Act has an incredibly interesting origin story. The Congressional Record demonstrates the racial anxiety of the time and the desire to protect white women. For example, Representative Cox, during the debate on whether to adopt the Mann Act stated, “It is indeed appalling to know that, in this day of enlightenment, we have had for several years a species of slavery a thousand times worse and more degrading in its consequences and effects upon humanity than any species of human slavery that ever existed in this country.” 45 CONG. REC. 547 (1910). I will explore this severely tone-deaf issue deeper in a future paper.

111. 18 U.S.C.A. § 2421(a) (Westlaw through Pub. L. No. 116-259).

112. See BRIDGETTE CARR, ANNE MILGRAM, KATHLEEN KIM & STEPHEN WARNATH, HUMAN TRAFFICKING LAW AND POLICY 107 (2014).

113. *Id.*

114. For information on trauma-informed practice, see *Victims and Trauma*, NAT’L. PREVENTION TOOLKIT ON OFFICER-INVOLVED DOMESTIC VIOLENCE AND HUM.

and prosecutors may still hold prostitution charges (or related offenses) over the heads of trafficking victims in order to get them to testify against their traffickers.¹¹⁵

Two much more recent anti-trafficking laws, the Allow States and Victims to Fight Online Sex Trafficking Act (“FOSTA”), and the Stop Enabling Sex Traffickers Act (“SESTA”) were passed by Congress and signed into law by President Trump in April 2018. SESTA was incorporated into FOSTA.¹¹⁶ Together, these pieces of legislation are known as FOSTA-SESTA. FOSTA-SESTA was criticized by sex workers and their allies for dismantling sex workers’ power and making it increasingly difficult to find and negotiate their own work.

FOSTA-SESTA clarifies¹¹⁷ that Section 230 of the Communications Decency Act¹¹⁸ was never meant to protect websites that facilitate sex trafficking, and it imposes criminal penalties for operating an interactive computer service “with the intent to promote or facilitate the prostitution of another person.”¹¹⁹ Thus, the law limits not only sex trafficking,

TRAFFICKING, <https://nationaltoolkit.csw.fsu.edu/leo/part-3/victims-and-trauma/> [<https://perma.cc/H36Y-V79F>] (last visited Apr. 15, 2021).

115. Yvette Butler, *Harmful Investigation Tactics: How Law Enforcement Uses Criminalization to Control and Retraumatize Survivors of Sex Trafficking*, AMARA LEGAL CTR. (Dec. 13, 2016), <https://www.amaralegal.org/harmful-investigation-tactics-how-law-enforcement-uses-criminalization-to-control-and-retraumatize-survivors-of-sex-trafficking/> [<https://perma.cc/E6Y3-4ABD>].

116. Tom Jackman, *House Passes Anti-Online Sex Trafficking Bill, Allows Targeting of Websites Like Backpage.com*, WASH. POST (Feb. 27, 2018, 6:15 PM), <https://www.washingtonpost.com/news/true-crime/wp/2018/02/27/house-passes-anti-online-sex-trafficking-bill-allows-targeting-of-websites-like-backpage-com/> (“some writers called it a ‘Frankenstein bill,’ merging parts of the Senate’s SESTA with the House’s FOSTA”).

117. Allow States and Victims to Fight Online Sex Trafficking Act of 2017, Pub. L. No. 115-164, 132 Stat. 1253 (2018) (codified as amended at 18 U.S.C. §§ 1591, 1595, 2421A and 47 U.S.C. § 230) (Section 230 of the Communications Decency Act was “never intended to provide legal protection to websites that unlawfully promote and facilitate prostitution and websites that facilitate traffickers in advertising the sale of unlawful sex acts with sex trafficking victims”).

118. Section 230 of the Communications Decency Act gives immunity to providers of “interactive computer services” when a third party publishes (i.e., uploads) content that may violate the law. See 47 U.S.C.A. § 230(c)(1)-(2) (Westlaw through Pub. L. No. 116-259). Examples of interactive computer services include websites like Reddit, Craigslist, Instagram, Facebook, Tumblr, and Twitter that provide space for users to create and share content. Some of the content could be either legal (original artwork, comments related to meal prepping) or illegal (child pornography). Section 230 provided immunity to such websites as long as the websites were not also creating objectionable content.

119. Interestingly enough, Section 230 likely never protected websites that facilitate sex trafficking. This means that FOSTA-SESTA is superfluous in providing an avenue for prosecuting trafficking, as well as harmful. See VALERIE C. BRANNON, CONG. RSCH. SERV., LSB10306, LIABILITY FOR CONTENT HOSTS: AN OVERVIEW OF THE

but also any promotion or facilitation of sex work either by choice or circumstance.

Sex workers' rights and tech freedom advocates were FOSTA-SESTA's main opponents. Section 230's benefits pre-FOSTA-SESTA were summed up nicely by the Electronic Frontier Foundation (a leading national non-profit focused on technology and civil liberties):

This legal and policy framework has allowed for YouTube and Vimeo users to upload their own videos, Amazon and Yelp to offer countless user reviews, craigslist to host classified ads, and Facebook and Twitter to offer social networking to hundreds of millions of Internet users. Given the sheer size of user-generated websites (for example, Facebook alone has more than 1 billion users, and YouTube users upload 100 hours of video every minute), it would be infeasible for online intermediaries to prevent objectionable content from cropping up on their site. *Rather than face potential liability for their users' actions, most would likely not host any user content at all or would need to protect themselves by being actively engaged in censoring what we say, what we see, and what we do online.* In short, CDA 230 is perhaps the most influential law to protect the kind of innovation that has allowed the Internet to thrive since 1996.¹²⁰

As predicted, even before FOSTA-SESTA was formally signed into law, Craigslist and other websites shut down portions (or even entire sites) used primarily by sex workers for exactly the reason that the Electronic Frontier Foundation anticipated: "Rather than face potential liability for their users' actions, most would likely not host any user content at all."¹²¹ One of the first things to go was the Craigslist personals section. Craigslist published the following statement explaining its decision: "Congress just passed HR 1865, 'FOSTA', seeking to subject websites to criminal and civil liability when third parties (users) misuse online personals unlawfully. Any tool or service can be misused. We can't take such risk without jeopardizing all our other services, so we are regretfully taking Craigslist personals offline."¹²² The impact was immediately felt by sex workers. It "was swift and, honestly, terrifying. We watched people literally walk

COMMUNICATIONS DECENCY ACT'S SECTION 230, at 3_(2019); 47 U.S.C.A. § 230(e)(1) (Westlaw through Pub. L. No. 116-259) ("Nothing in this section shall be construed to impair the enforcement of . . . any other Federal criminal statute.").

120. *Section 230 of the Communications Decency Act*, ELEC. FRONTIER FOUND. (emphasis added), <https://www.eff.org/issues/cda230> [<https://perma.cc/5A7B-ZK74>].

121. *Id.*

122. *FOSTA*, CRAIGSLIST, <https://www.craigslist.org/about/FOSTA> [<https://perma.cc/G94F-SY7X>] (last visited Mar. 7, 2021).

back to their pimps knowing they had lost any bit of autonomy they had. We watched people wind up homeless overnight. We watched members of our community disappear.”¹²³ FOSTA-SESTA is thus problematic because its scope is too broad. It limits how sex workers are able to find and negotiate their *own* work. It limits their independence—a key factor in worker power.

The lesson here is simple: sex workers were left out of key conversations when developing policy geared toward helping victims.¹²⁴ Had they been included earlier (or taken seriously when lodging their complaints), it would not be a new development that sex workers’ rights is a racial justice issue, nor would it be recent news that cutting off their access to the internet would put them in more danger.¹²⁵

The problem of inclusion is reflected in the gig economy as well. For example, as domestic work moved to the online platform economy, an innovative form of corporate self-regulation¹²⁶ emerged in the form of Good Work Code, a non-profit designed by the National Domestic Workers Alliance as a way of achieving “social justice in the workplace.” One scholar described what made the initiative so important:

[W]hat I find incredibly important about this initiative is the fact that it actually involves domestic workers in the act of drawing up alternative ‘future of work’ scenarios. One of the key problems with current debates about how technology is reshaping the future of work has generally been *their lack of engagement with the gig workers whose lives and livelihoods are directly affected by changes underway*. Most of these debates happen at conferences hosted by universities and other public and private institutions, which frequently charge hefty registration fees and feature academics, policy experts, and/or business consultants speaking on topics intimately familiar to gig workers who nevertheless lack meaningful representation and voice.¹²⁷

123. Siouxsie Q, *supra* note 107.

124. See, e.g., Meaghan Beatley, *Who’s Afraid of a Sex Workers’ Union?*, NATION (Dec. 13, 2018), <https://www.thenation.com/article/otras-sex-workers-union-spain-feminism-prostitution/> [<https://perma.cc/97HK-E4QH>]. OTRAS is a Spanish sex worker union. They call the prostitution abolitionist activists “the industry.” One advocate [Necro] says those advocates “live really well off of their discussions, books, workshops, conferences, without ever including sex workers We’re not allowed to attend the feminist conventions.” This sentiment is not unique to Spain and is also felt in the United States. *Id.*

125. Siouxsie Q, *supra* note 107.

126. Van Doorn, *supra* note 20, at 908 (“Good Work Code, established by the National Domestic Workers Alliance in response to seeing domestic work move to on-demand platforms.”).

127. *Id.* (emphasis added).

In essence, when discussing labor law issues (whether platform-mediated or otherwise), shouldn't we start by asking how these issues impact the everyday lives of people who are actually impacted by these issues? As will be explored more in the next section, sex workers and strippers have formed their own coalitions to argue for greater inclusion in policy making.

Many scholars have noted the difficulty surrounding the employee/independent contractor debate.¹²⁸ The exact things that make gig economy work attractive—flexibility and worker control—are the same things that may disappear if a traditional employee classification is given to gig workers. There is reason to believe that neither workers nor platforms want that. For instance, “[s]everal Gig Economy companies have expressed a desire to provide various benefits and training to workers they have classified as independent contractors, but fear that doing so might provide further ammunition for plaintiffs bringing misclassification suits.”¹²⁹ The result is that “laws and regulations intended to help workers are instead actively harming them by preventing companies from extending benefits to independent contractors that both the contractor and company would prefer they be given.”¹³⁰

When making any sort of policy change, it is best practice to involve the individuals who would be most impacted by it. Workers may want benefits and increased health and safety protections without making their jobs inflexible. They know the ins and outs of the industry and are best suited to suggest ways to navigate it.

C. *Building Movements*

*Divide and conquer is the basic operating principle of any empire. The success of struggles for justice—against poverty, colonialism, racism, sexism, and so on—depend heavily on our ability to overcome this very old strategy.*¹³¹

What follows is a cautionary tale on movement-building based on the divide between the fight for sex workers' rights and anti-sex trafficking policy. As explained previously, gig workers have their own disagreements around the best legislation to adopt to enhance worker power while limiting the potential for exploitation. Gig workers should learn

128. See *supra* note 81.

129. See Nadler, *supra* note 60, at 463.

130. *Id.* at 464.

131. ARIC MCBAY, FULL SPECTRUM RESISTANCE: BUILDING MOVEMENTS AND FIGHTING TO WIN 113 (2019).

from the divisions between people in the sex trade to build better and more inclusive alliances moving forward.

Just as sex workers' rights advocates feel animosity toward anti-trafficking advocates for leaving them out of vital discussions, prostitution abolitionists have their own curious concerns about a white "pimp lobby," the source of sex workers' rights funding, and question the sincerity of sex worker activists' desire to help people harmed in the sex trade. Essentially, prostitution abolitionists question the legitimacy of those holding themselves out to be feminists who simultaneously support a view of sex work as work. The following is an example of an argument heard much too often in an attempt to silence sex workers and their allies:

'Sex work' is a clever euphemism preferred by the pimp lobby to whitewash and sanitize the brutalities inherent to prostitution. It's not a 'job' but a system of gender inequality: An estimated 98 percent of the 42 million people in prostitution worldwide are women, while 99 percent of those who buy them are men.¹³²

Hopefully, the following analysis can help to disrupt lines of thinking that demonize entire groups who merely hold a different philosophy on the best strategy to pursue meaningful protection. Seeking collective liberation requires building strong alliances and the pursuit of common ground with similarly situated individuals.

Unlike prostitution, stripping is legal and regulated.¹³³ However, strippers occupy a gray area of legitimized work that is still disfavored by society. Like gig workers, strippers have fought court battles to determine whether they are employees or independent contractors.¹³⁴ This distinction is vital for individuals working in the sex industry, because worker power¹³⁵ combats exploitation. Some of the exploitative practices strip-

132. Laila Mickelwait, *Don't Pass This 'Pimp Protection Act'*, N.Y. POST (Mar. 4, 2019, 7:55 PM), <https://nypost.com/2019/03/04/dont-pass-this-pimp-protection-act/> [https://perma.cc/KD3V-DVXD].

133. Regulation varies by jurisdiction. For some discussion of these regulations, see Scott D. Bergthold, *The ABCs of SOBs: Drafting and Defending Constitutionally Sound Sexually Oriented Business Regulations*, MDLA QUARTERLY, Winter 2017, <https://www.adultbusinesslaw.com/downloads/MDLAQuarterlyWinter2007ABCsofSOBs.pdf> [https://perma.cc/L22N-HCEX].

134. For an excellent analysis of the classification of strippers and other adult entertainers, see Wilmet, *supra* note 60. For a more recent article that analyzed seventy-five federal and state court decisions and found that the majority of strippers won their cases and were classified as employees, see LeRoy, *supra* note 19.

135. Worker power is especially important when discussing sex work. If the main criticism from anti-trafficking advocates is that sex work is full of violence and exploitation, it doesn't necessarily follow that the only way to rid the profession of that violence and ex-

pers have fought (and are still fighting) against include: sexual harassment or assault by management and customers (words, unwanted physical contact, and unsanctioned photography); docked pay; mandatory stage fees; and refusal to allow workers to take their contracts home with them.¹³⁶ When club owners and management try to classify strippers as independent contractors, they are attempting to take advantage of strippers' lack of access to legal protection and societal favor, thus keeping them economically dependent and easy to exploit.

There is a long history of collective organizing to challenge worker misclassification and abusive practices within the sex industry. Strippers attempted to unionize as early as the 1940s.¹³⁷ The "American Guild of Variety Artists (AGVA) individually represented a large number of dancers through recognition agreements, casual engagement contracts, and standard contracts for minimum wages on a dancer-by-dancer, club-by-club basis." However, "[t]he relationship between AGVA and dancers ended abruptly in 1973 when a federal court first declared nightclub performers to be independent contractors."¹³⁸ Strippers all over the country have continually attempted to unionize and collectively bargain over the years, with mixed results.¹³⁹

In the early 1990s, strippers at Pacers, a San Diego strip club, briefly unionized, but "due largely to management's misinformation, threats, and the hiring of dancers who would not join the union," the dancers voted to decertify in 1993.¹⁴⁰ Their efforts to join other unions, such as the Service Employees International Union, were met with pushback.¹⁴¹ Meanwhile, some unions, such as the International Brotherhood of Teamsters, AFL-CIO, initially agreed to represent the dancers, but then "inexplicably abandoned the effort and the dancers, in mid-campaign."¹⁴² As a result, the dancers failed to get enough votes to certify the union.¹⁴³ Overall, the unions' reactions to including strippers have been similar to the

exploitation is to just scrap it. Any effort to support sex workers in building their own power to advocate for their own interests should take top priority.

136. Wilmet, *supra* note 60, at 477-83.

137. *See id.* at 466 n.5.

138. *Id.*

139. Valeriya Safronova, *Strippers Are Doing It for Themselves: An Industry Organizes Against Decades of Exploitation*, N.Y. TIMES (July 24, 2019), <https://www.nytimes.com/2019/07/24/style/strip-clubs.html> (In 1998, a group of San Francisco dancers sued a club for back wages and won \$2.85 million in a settlement.); LeRoy, *supra* note 19 (analyzing seventy-five federal and state court decisions and finding that the majority of (but not all) strippers won their cases and were classified as employees).

140. Wilmet, *supra* note 60, at 466.

141. *See id.* at 467 n.8.

142. *Id.*

143. *Id.*

general public's opinion of their work—they assume “that exotic dancing /entertaining is ‘not an honest day's work’” and have not taken the workers seriously.¹⁴⁴

Adding to the struggle for workers' rights is the power imbalance between strippers and club management. In a strip club environment, a high number of dancers is good for the club and for customers, but not for the workers. A club's ability to earn “is inversely proportionate to the number of dancers working at a given time.”¹⁴⁵ Hiring more dancers creates competition among the dancers for a limited number of customers. The fewer customers per dancer generally means less money per dancer. The resulting economic dependency “makes adult entertainers more susceptible to the illegal demands of their employers, while simultaneously ensuring their silence about their mistreatment.”¹⁴⁶ Quitting is not a realistic option for many, who may otherwise have no avenue for financial independence and would “remain dependent on the largess of men or society.”¹⁴⁷

Two things in particular contribute to the power imbalance between workers and management: (1) the fact that strippers must attempt to collectively bargain without the protection of labor laws, and (2) the societal view that the work is illegitimate and unworthy of respect and protection.¹⁴⁸ Historically, when club managers are faced with potential unionization, they threaten workers with blacklisting and physical violence.¹⁴⁹ Without protections against such retaliatory action, the co-founder of the Exotic Dancers' Alliance, Johanna Breyer, “was blacklisted from all San Francisco strip clubs after she began organizing other dancers.”¹⁵⁰ She and other organizers were verbally and physically threatened, subjected to arbitrary firings, lockouts, and more.¹⁵¹

To break either of these barriers, dancers must view one another as allies in a broader effort, and not merely as competitors. Moreover, by keeping the industry underground and failing to provide labor protections or adequate sanctions for abusive employers,¹⁵² the current legislative framework allows exploitative practices to flourish.¹⁵³

144. *Id.* at 468 n.10.

145. *Id.* at 489.

146. *Id.* at 491.

147. *Id.*

148. *Id.* at 469, 484.

149. *Id.* at 496 n.196.

150. *Id.*

151. *Id.* at 496 n.196. A “pimp lobby” that benefits from recognizing sex work as labor would have welcomed these protections. Pushback demonstrates a successful attempt to wrest power.

152. *See, e.g.*, Lici Beveridge, *Mississippi ICE Raids: Employers Can Face Civil, Criminal Charges*, MISS. CLARION LEDGER (Aug. 8, 2019), <https://www.clarionledger.com/story>

Litigation is not the only avenue for redress, which is a relief given that strippers have received mixed results in court.¹⁵⁴ Instead, they have successfully focused on efforts to change the very laws that regulate their work. In 2018, the first National Sex Worker Lobby Day took place in Washington, D.C., where sex workers and allies protested the passage of FOSTA-SESTA.¹⁵⁵ In 2019, a successful lobbying effort in Washington State led to the passage of a bill to improve safety measures in strip clubs by installing “panic buttons in spaces where dancers could be alone with customers[,] maintain[ing] blacklists of customers who have been violent,”¹⁵⁶ mandating Know-Your-Rights training for dancers, and establishing an advisory committee whose membership is at least 50 percent current or former dancers.¹⁵⁷

On the international stage, sex workers, and other workers in the shadow economy or otherwise overlooked by labor laws, have also been organizing for quite some time. “StreetNet reimagined collective bargaining for a cross-sectional group of primarily own-account workers, including sex workers and street vendors.”¹⁵⁸ Since the work was decentralized, meaning there was no specific management with which to bargain, “the coalition demanded bargaining forums from national and municipal governments.”¹⁵⁹ The group “focused on public policies and social protection programs.”¹⁶⁰

Thus, sex workers and strippers have for decades participated in efforts to collectively bargain, form unions, and advocate for policy change at every level.¹⁶¹ Their interests in legal protection and economic independence are closely aligned with agricultural workers and domestic workers, types of work that are often done by immigrants and racial minorities. Furthermore, as gig workers themselves, sex workers face the

/news/local/2019/08/08/mississippi-ice-raids-what-penalties-hiring-unauthorized-workers-businesses-criminal-civil/1956401001/ [https://perma.cc/KV86-DU52] (Employers can face sanctions, but rarely do. Here, even after ICE raids arrested over 600 workers, it is uncertain whether the employers will face sanctions.).

153. Wilmet, *supra* note 60, at 491.

154. LeRoy, *supra* note 19 (analyzing seventy-five federal and state court decisions and finding that the majority of (but not all) strippers won their cases and were classified as employees).

155. Shira Tarlo, *Sex Workers Converge on Capitol Hill: “We’re Human Beings”*, SALON (June 2, 2018, 6:14 PM), <https://www.salon.com/2018/06/02/sex-workers-converge-on-capitol-hill-to-be-recognized-were-human-beings/> [https://perma.cc/6W2M-P6JX].

156. Safronova, *supra* note 139.

157. *Id.*

158. Kate D’Adamo, *Beyond Sex Work as Work*, 14 RSCH. FOR SEX WORK, 1 (2015).

159. *Id.*

160. *Id.*

161. See Safronova, *supra* note 139; Tarlo, *supra* note 155; D’Adamo, *supra* note 158, at 1.

same tension between potential exploitation and desire for greater control over their work.

Gig workers and their allies can adopt strategies and principles utilized by sex workers in order to secure further protections. Gig workers in the mainstream have an opportunity to use their privilege as a socially-acceptable group to be mindful of how changing laws and regulations could harm more marginalized individuals.

Groups do not have to have identical interests in order to build power together. It is perfectly acceptable to seek sites of overlap and compromise. When describing the history of work and its relationship to women's liberation, bell hooks explained that "the emphasis on work . . . led many white feminist activists to suggest women who worked were 'already liberated.' They were in effect saying to the majority of working women, [the] 'feminist movement is not for you.'"¹⁶² This meant that many Black women, who were already working outside of the home and found that it did not, in fact, "liberate" them, were disconnected and were not served by the feminist movement. However, "if improving conditions in the workplace for women had been a central agenda for [the] feminist movement in conjunction with efforts to obtain better paying jobs for women and finding jobs for unemployed women of all classes," the movement could have been a much more inclusive one that encompassed the needs of all women regardless of race or class.

Interests need not be identical. But for a movement to be most effective, it should consider the needs of other potential beneficiaries and center their "marginalized" status. The results will be more inclusive. What follows are suggestions for meaningful inclusion and movement building to build worker power as a whole.

The issues affecting gig workers are interrelated with those affecting sex workers because, as explained earlier, sex workers *are* gig workers. Both gig workers and sex workers operate in a precarious economy where they navigate marginalized status, power imbalances, and a need for economic independence and flexibility. Movements are built by creating common ground and showing up for one another. This idea is explored below.

The idea that formal and informal unions, community members, advocates, and individuals with lived experience should form coalitions and engage in advocacy together is not new. The practice of "common good unionism" emerged as "a form of union organizing that addresses social conditions whether or not they are directly related to traditional

162. BELL HOOKS, *FEMINIST THEORY: FROM MARGIN TO CENTER* 99 (Routledge 3rd ed. 2015) (1984).

terms and conditions of employment.”¹⁶³ “Like the fight for an eight-hour day and the weekend before it, common-good unionism is bringing about positive change not just for the benefit of union members but for all people who are similarly situated.”¹⁶⁴

Earlier, this Article discussed the gig work that people have been engaging in outside the protection or permission of the law. Workers living in poverty, workers engaging in entrepreneurship that is disfavored by society, and mainstream workers all face issues related to their overlapping identities of race, gender, nationality, and more, “with a corresponding variety of experiences of poverty that require more than traditional labor law to address.”¹⁶⁵

For example, the link between racial justice and living wages becomes clear when you consider the words of Rasheen Aldridge, a Black Lives Matter activist and leader in the fight to increase wages:

There’s a system in place that continues to hold people back—and that’s the case in the workplace as well One key thing that connects both movements is poverty. If we had jobs in our communities that actually paid people a livable wage, not a minimum wage that isn’t even survival, we would get rid of crime and violence in our communities. People wouldn’t have to worry about the lights going off or about getting childcare.¹⁶⁶

Of course, unions and advocates cannot merely come into a community and impose their will. For common good unionism to be effective, unions must “bring their demands in line with the needs of the community”¹⁶⁷ and support the work of community leaders.

Moreover, when advocates come together, they should practice humility, act from a place of love, and be willing to relinquish privileges to support the work of pursuing justice.¹⁶⁸ Humility acknowledges that certain actors should take a supporting role to directly impacted individuals who conceive, strategize, and plan efforts.¹⁶⁹ Engaging with move-

163. Kimberly M. Sánchez Ocasio & Leo Gertner, *Fighting for the Common Good: How Low-Wage Workers' Identities Are Shaping Labor Law*, 126 YALE L.J. F. 503, 505-06 (2017).

164. *Id.*

165. *Id.* at 511.

166. Gabriel T. Rubin, *Ferguson and the Fight for 15*, WASH. U. POL. REV. (Apr. 14, 2015) (quoting Rasheen Aldridge), <http://www.wupr.org/2015/04/14/ferguson-and-the-fight-for-15/> [<https://perma.cc/HVC9-BBP8>].

167. See Sánchez Ocasio & Gertner, *supra* note 163, at 519.

168. Betty Hung, *Movement Lawyering as Rebellious Lawyering: Advocating with Humility, Love and Courage*, 23 CLINICAL L. REV. 663, 664 (2017).

169. See *id.* at 665.

ments from a place of love “affirms the intersectional humanity of individuals and communities” who are often the “targets of hate and harassment on the basis of aspects of their identity.”¹⁷⁰ This approach means that “larger, more diverse, and more powerful” coalitions can be built rather than if advocates focused on just one or two communities.¹⁷¹ Such an approach truly embraces “margins to center” activism by recognizing a movement focused on issues impacting the most vulnerable can also address the issues faced by related, less vulnerable individuals.

Advocating from a place of courage means being “willing to take risks and relinquish” privileges.¹⁷² Leaders in workers’ rights movements routinely take personal risks. They may be retaliated against through harassment, “having their hours cut, or being fired.”¹⁷³ Individuals who do not face these same risks – or do not face them to the same extent – should use their privilege to speak up on behalf of those who do.

Gig workers lose nothing by including sex workers in their advocacy and joining other anti-poverty movements. Their interests are quite aligned as, even in the mainstream, the focus is on earning enough money to make ends meet and on avoiding exploitation. While there may be pushback from the end-demand anti-sex trafficking community, gig workers can rest easy knowing that increasing individual worker power is a strong antidote to exploitation. The “pimp lobby” would not try to silence the efforts of increasing worker power if it did not threaten their control over sex workers’ earnings. “[B]eing effective brings down repression—you can judge how much those in power are afraid of real coalitions by how violently they repress them.”¹⁷⁴

CONCLUSION

There are many reasons to work in the gig economy: low barriers to entry, good pay, flexible work, and more freedom than in full-time employment. It is accessible to individuals who may be excluded from the formal economy and may otherwise find it difficult to make ends meet. At the same time, the work may be precarious in many ways: inconsistent jobs, non-negotiable pay, and no benefits.

Resolving these issues by looking through the lens of the sex workers’ rights movement is illustrative because of the similar demographics of the workers, the often-emphasized concerns around vulnerability and exploitation, and the goals of economic freedom and security. Mainstream

170. *Id.* at 666.

171. *See id.* at 667.

172. *Id.* at 668.

173. *Id.*

174. MCBAY, *supra* note 131, at 122 (emphasis omitted).

gig workers can learn from the trials of the sex workers' rights movement.

While gig workers may not all agree on the best way to regulate their own work, they have so much in common with other social causes around worker power, racial and economic justice, and justice for victims of exploitation. An example of this proposed beneficial overlap can be found in increased legal protections for sex workers that also benefit victims of sex trafficking. Especially in the case of survivors of trafficking, sex workers suffering from abuse, and other gig workers who may face levels of violence that are higher than others, coalitions should consider whether there are special services, policies, or other necessities that these groups may need to help participate in collective action or must otherwise receive from their coalition partners. For example, “[s]ex trafficking victims who escape abusive situations often need an array of financial and other supports to begin building stable lives” such as “housing assistance, legal assistance, physical and mental health services, counseling for psychological trauma, substance abuse treatment, education, and job training.”¹⁷⁵ Keep in mind that many of the issues discussed herein have to do with poverty, racism, and other forms of discrimination and exploitation, so these services are things that may be needed by a variety of gig workers.

Gig workers and their allies have an opportunity to use their current platform to be mindful of how changing labor laws and regulations could help or harm those more marginalized than they are. This Article demonstrates how gig workers can build alliances with other groups facing similar challenges for their collective advantage.

In the words of Lupe Fiasco, it shouldn't matter if you're real-estating, trying to sell a mansion, flipping a burger, homeless working for food, cleaning a pool, hustlin' bags, strugglin' bad, cuttin' grass, walkin' dogs, or pumpin' gas.¹⁷⁶ We've all got a job to do. There's a place at the table for your hustle.

175. SARAH GONZALEZ BOCINSKI, INST. FOR WOMEN'S POL'Y RSCH., *THE ECONOMIC DRIVERS AND CONSEQUENCES OF SEX TRAFFICKING IN THE UNITED STATES* 6 (2017).

176. LUPE FIASCO, *Coulda Been*, on *COULDA BEEN* (1st and 15th Productions, Inc. 2017).

