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Collective Versus Individual Rights: The Able Worker and the Promotion of Precarious Work for Persons with Disabilities Under Conflicting International Law Regimes

PAUL HARPUR*

INTRODUCTION

Even though labour rights are now regarded as human rights,¹ substantial differences remain in how labour rights and human rights regimes each approach equality at work. This paper will critically analyse the significant differences in how the ILO conventions and the United Nations Convention on the Rights of Persons with Disabilities (“CRPD”)² protect people with disabilities employed in precarious work.

One of the measures advanced in Article 27 of the CRPD goes against traditional approaches to protecting vulnerable workers, i.e., the CRPD promotes precarious work.³ Judy Fudge observes that the term “precarious work” focuses on whether the form of regulating work decreases workers’ work security, legal rights, and union protection, while also placing workers in an economically vulnerable situation.⁴ CRPD Article 27(1)(f) provides that State parties will safeguard and promote the

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1. *See generally* ILO Declaration on Fundamental Principles and Rights at Work, adopted Jun. 30, 1998, 37 I.L.M. 1237. The ILO Declaration on Fundamental Principles and Rights Work, adopted June 1998 by the General Conference of the ILO during its eighty-sixth session in Geneva, concerns the four labour rights. For the general impact on labour rights see Phillip Alston & James Heenan, *Shrinking the International Labour Code: An Unintended Consequence of the 1998 ILO Declaration on Fundamental Principles and Rights Work?*, 36 N.Y.U. J. INT’L L. & POL. 221 (2004).

2. United Nations Convention on the Rights of Persons with Disabilities, *opened for signature* Mar. 30, 2007, 2515 U.N.T.S. 3.

3. *Id.*

4. *See generally* Judy Fudge, *Beyond Vulnerable Workers: Towards a New Standard Employment Relationship*, 12 CAN. L. & EMP. L.J. 151 (2005).

realization of the right to work by taking appropriate steps, including through promoting “opportunities for self-employment, entrepreneurship, the development of cooperatives and starting one’s own business.”⁵ The forms of work articulated in Article 27(1)(f) reduce labour protections, reduce access to union protections and can result in workers being more vulnerable than workers in standard employment relationships.⁶

Labour laws distinguish between employment and other forms of regulating work.⁷ Whereas employees are regarded as vulnerable and entitled to some protection,⁸ workers in other contractual arrangements are treated as commercial operators and more able to protect their own interests.⁹ For this reason, anti-discrimination law, dismissal protections, sick leave, annual leave and workers compensation either do not apply or have reduced application to workers who run their own businesses.¹⁰ Accordingly, laws assume contractors, bailees, and franchisees “to be in commercial arrangements and in less need of protection.”¹¹ It is therefore remarkable that the CRPD, the primary convention to protect the rights of

5. United Nations Convention on the Rights of Persons with Disabilities, *supra* note 2, art. 27(1)(f).

6. Stephanie Bernstein et al., *Precarious Employment and the Law’s Flaws: Identifying Regulatory Failure and Securing Effective Protection for Workers*, in *PRECARIOUS EMPLOYMENT: UNDERSTANDING LABOUR MARKET INSECURITY IN CANADA* 203 (Leah F. Vosko ed., 2005); Judy Fudge, *Self-employment, Women and Precarious Work: The Scope of Labour Protection*, in *PRECARIOUS WORK, WOMEN AND THE NEW ECONOMY: THE CHALLENGE TO LEGAL NORMS* 201 (Judy Fudge & Rosemary Owens eds., 2006); Amber M. Louie et al., *Empirical Study of Employment Arrangements and Precariousness in Australia*, 61 *RELATIONS INDUSTRIELLES* 465 (2006); Elsa Underhill & Michael Quinlan, *How Precarious Employment Affects Health and Safety at Work: The Case of Temporary Agency Workers*, 66 *RELATIONS INDUSTRIELLES* 397 (2011).

7. This issue has regularly reached the highest appellate courts. For cases see High Court of Australia judgments in *Hollis v. Vabu Pty. Ltd.* [2001] 207 C.L.R. 21 (Austl.) (on whether a bicycle courier was an employee or contractor); *Stevens v. Brodribb Sawmilling Co. Pty. Ltd.* [1986] 160 C.L.R. 13 (Austl.) (positing a multi-factor test to determine if a worker was an employee or contractor); *NLRB v. Hearst Publ’ns*, 322 U.S. 111 (1944) (determining whether newsboys are employees or independent contractors).

8. The level of protection differs substantially between countries that embrace the employment at will doctrine, such as the United States, and those that have dismissal protections based upon fairness: Thomas C. Kohler, *The Employment Relation and Its Ordering at Century’s End: Reflections on Emerging Trends in the United States*, 41 *B.C.L. REV.* 103 (1999).

9. *Id.*

10. Megan Carboni, *A New Class of Worker for the Sharing Economy*, 22 *Rich. J.L. & Tech.* 11 (2016); Michael Quinlan & Claire Mayhew, *Precarious Employment and Workers’ Compensation*, 22 *INT’L J. L. & PSYCHIATRY* 491 (1999).

11. Paul Harpur & Philip James, *The Shift in Regulatory Focus from Employment to Work Relationships: Critiquing Reforms to Australian and UK Occupational Safety and Health Laws*, 36 *COMP. LAB. L. & POL’Y J.* 111 (2014); JOELLEN RILEY, *EMPLOYEE PROTECTION AT COMMON LAW* 9-10 (2005).

persons with disabilities, including the right to work,¹² adopts non-standard employment vehicles as one option to promote workplace equality. It has been a cornerstone of the labour movement that permanent fulltime work is the most effective way of protecting workers' rights.¹³ The CRPD drafters arguably recognised that existing labour and human rights laws were failing persons with disabilities and embraced a different approach. Through promoting precarious work for persons with disabilities in Article 27, what message are the community of nations and drafters of the CRPD sending about the effectiveness of human rights and industrial relations laws to protect workers with disabilities workplace rights?

The comparative critical analysis in this paper is divided into two parts. Part I of this paper will compare and contrast how the ILO and CRPD construct workers with disabilities. This part will draw from theoretical models in labour theories and disability studies to explain how these different regimes determine when workers with disabilities should have their right to work protected. This paper will then analyse in Part II how ILO conventions and the CRPD adopt different approaches to regulating and promoting precarious work. Arguably, the definition of who is a "worker" under each regime, in combination with operational factors, has a significant influence on the contrasting approaches of these two regimes.

To understand the theoretical, regulatory and operational implications of how ILO conventions and the CRPD approach the rights of precarious workers with disabilities, this paper will use the "gig economy" as a case study. The CRPD was the first human rights United Nations convention in the 21st century and it therefore seems appropriate to analyse the implications of Article 27(1)(f) by using the most recent manifestation of structuring work: the gig worker.¹⁴ The gig economy is an incremental step that technological developments have made possible. Gig companies control where customers can request various services and products.¹⁵ Naturally, the gig company then distributes the work to workers who will provide the product or service.¹⁶ The customer pays the gig

12. United Nations Convention on the Rights of Persons with Disabilities, *supra* note 2, art. 27.

13. RICHARD JOHNSTONE ET AL., *BEYOND EMPLOYMENT: THE LEGAL REGULATION OF WORK RELATIONSHIPS* 18 (2012).

14. Arlene S. Kanter, *The United Nations Convention on the Rights of Persons with Disabilities and Its Implications for the Rights of Elderly People Under International Law*, 25 GA. ST. U. L. REV. 527 (2009).

15. Emilie Jackson, Adam Looney, & Shanthi Ramnath, *The Rise of Alternative Work Arrangements: Evidence and Implications for Tax Filing and Benefit Coverage* (The Dept. of the Treas. Off. of Tax Analysis, Working Paper No. 114, 2017).

16. *Id.*

company, who then in turn remunerates the worker.¹⁷ To protect brand image, gig companies exercise significant control over gig workers and retain the power to terminate gig workers without notice.¹⁸

Some of the most successful gig companies are the ride sharing services of Uber and Lyft.¹⁹ There are many other gig product and services offered, usually on a micro-contract basis, including clerical, freelance, information-technology, consultancy, copy editing, and research assistant work (which has arguably created a college cheating economy).²⁰ The gig economy is not stable, and it is likely to expand into every product and service which can be provided via a gig company.

PART I. IMPAIRMENT AS A PROBLEM OR ABILITY DIVERSITY: THE CONSTRUCTION OF THE DISABLED WORKER

A. ILO, Labour Laws and the Problematizing of Sorkers who have a Disability

International labour standards are a powerful tool for critiquing domestic laws.²¹ Understanding how ILO standards exacerbate workplace ability inequalities impacts how workers with disabilities are perceived by employers. ILO labour standards are aimed at protecting workers' rights.²² Are persons with disabilities regarded by ILO conventions as valuable workers or as discounted workers?

Arguably, ILO conventions provide people with disabilities limited protection and support. The ILO's primary focus around ability differences at work is enabling workers with abilities in the normal abilities range to operate. The ILO has historically not provided people with disabilities the same protection as those with other attributes. For example, ILO Convention No. 111 concerning Discrimination in Respect of Employment and Occupation regarded disability discrimination as a second-

17. *Id.*

18. *Id.*

19. Darren Newman, *Uber Drivers' Tribunal Decision Presents Challenge to "Gig Economy" Model*, XPERTHR (Nov. 15, 2016), <http://www.xperthr.co.uk/legal-guidance/uber-drivers-tribunal-decision-presents-challenge-to-gig-economy-model/161592/>.

20. Jackson et al., *supra* note 15; OTTO KÄSSI & VILI LEHDONVIRTA, ONLINE LABOUR INDEX: MEASURING THE ONLINE GIG ECONOMY FOR POLICY AND RESEARCH (2016); Martha W. King, *Protecting and Representing Workers in the New Gig Economy*, in NEW LABOR IN NEW YORK: PRECARIOUS WORKERS AND THE FUTURE OF THE LABOR MOVEMENT 150-70 (Ruth Milkman & Ed Ott eds., 2014).

21. See generally Lance Compa, *Migrant Workers in the United States: Connecting Domestic Law with International Labor Standards*, 92 CHI.-KENT L. REV. 211 (2017).

22. *Id.*

tier attribute.²³ Article 5(1) prohibits discrimination on the grounds of race, colour, sex, religion, political opinion, national extraction or social origin. Article 5(2) provides that special measures to assist, inter alia, persons with disabilities are permitted under Convention No. 111.^{24 25}

The line between an abled body and a disabled one is permeable, with accident, illness, and poor health caused by aging resulting in movement between these categories.²⁶ ILO conventions and jurisprudence are targeted at enabling people who are able to work to continue to work, and those who lose abilities and are thus excluded from work.²⁷ The ILO Convention (No. 155) concerning Occupational Safety and Health and the Working Environment seeks to, inter alia, protect workers' safety and health to enable them to maintain their current state of abilities.²⁸ Where workers are injured at work, the conventions promote the rehabilitation and return to work of workers, or where this is not possible, the compensation of workers as they leave the labour market.²⁹

Article 1 of the Vocational Rehabilitation and Employment (Disabled Persons) Convention implicitly accepts that persons with disabilities are largely excluded from work, defining the "disabled person" as "an individual whose prospects of securing, retaining and advancing in suitable employment are substantially reduced as a result of a duly recognised physical or mental impairment."³⁰ The way in which this convention problematizes the under-employment of people with disabilities is contrary to modern understandings of disablement. It ignores the wider causes of disablement and focuses the attention on helping the person with a disability learn to cope with barriers in society. Article 1(2) does not seek to achieve equality of work, but expects that persons with disabilities will only secure "suitable employment" and that the State should help persons with disabilities to integrate or reintegrate into society.³¹

23. ILO Convention concerning Discrimination in Respect of Employment and Occupation, adopted June 25, 1958, 362 U.N.T.S. 31.

24. Paul Harpur, *Old Age is Not Just Impairment: The Convention on the Rights of Persons with Disabilities and the Need for a Convention on Older Persons*, 37 U. PA. J. INT'L L. 3 (2015).

25. *Id.*

26. See generally Harpur, *supra* note 24; Kanter, *supra* note 14.

27. See generally Harpur, *supra* note 24.

28. *Id.*; ILO Convention concerning Occupational Safety and Health and the Working Environments, adopted Aug. 11, 1983, 1331 U.N.T.S. 270.

29. See generally ILO Convention concerning Workmen's Compensation in Agriculture, adopted Nov. 21, 1921, 165 U.N.T.S. 38; ILO Convention concerning Equality of Treatment (Accident Compensation), adopted June 5, 1925, U.N.T.S. 602; ILO Convention concerning Medical Care and Sickness Benefits, adopted June 25, 1969, 826 U.N.T.S. 3.

30. See ILO Convention concerning Vocational Rehabilitation and Employment (Disabled Persons) art. 1, adopted June 20, 1983, 1401 U.N.T.S. 235.

31. See generally *id.*

A significant difference between ILO conventions and the CRPD is in the area of altering work environments to render them accessible to persons with disabilities. The ILO conventions do not require employers to make any reasonable accommodations or adjustments to enable persons with different abilities to perform their duties. The duty to make reasonable accommodations and adjustments is a key aspect of the CRPD,³² and is an important aspect of the right to work in the CRPD.³³ The concept of what is reasonable is situational and differs between rights protected. The right to work in the CRPD speaks of environments that are “open, inclusive and accessible” to persons with disabilities.³⁴ This can be contrasted with the right to education where the CRPD guarantees people with disabilities access to education.³⁵

The ILO adopts a tripartite approach which balances the interests of capital, labour and the state.³⁶ Whereas UN human rights conventions focus on individual rights, the ILO focuses on protecting collective rights.³⁷ Within this paradigm the interests of workers are primarily advanced by organized labour. Unfortunately, organized labour has largely neglected the interests of persons with disabilities. Humphrey describes organized labour’s approach to persons with disabilities as “a political and cultural forgetfulness.”³⁸ With so many issues and battles on the agenda, it is arguable that ability equality has largely been left off the agenda of organized labour.

To help understand how organized labour has approached ability differences at work, Carrie Basas critically analysed a random sample of 100 United States public sector collective bargaining agreements.³⁹

32. Rebecca Brown & Janet Lord, *The Role of Reasonable Accommodation in Securing Substantive Equality for Persons with Disabilities: The UN Convention on the Rights of Persons with Disabilities* in CRITICAL PERSPECTIVES ON HUMAN RIGHTS AND DISABILITY LAW (Marcia H Rioux, Lee Ann Bassler & Melinda Jones eds., 2011).

33. United Nations Convention on the Rights of Persons with Disabilities, *supra* note 2, art. 27(1)(i).

34. DELIA FERRI & ANNA LAWSON, REASONABLE ACCOMMODATION FOR DISABLED PEOPLE IN EMPLOYMENT CONTEXTS: A LEGAL ANALYSIS OF EU MEMBER STATES, ICELAND, LIECHTENSTEIN AND NORWAY (2016).

35. United Nations Convention on the Rights of Persons with Disabilities, *supra* note 2, art. 24; Paul Harpur & Michael Ashley Stein, *Children with Disabilities, Human Rights, and Sustainable Development*, in CHILDREN’S RIGHTS AND SUSTAINABLE DEVELOPMENT: IMPLEMENTING THE UNCRC FOR FUTURE GENERATIONS (Claire Fenton-Glynn ed., 2017).

36. Harpur, *supra* note 24.

37. *Id.* at 1042.

38. J. C. Humphrey, *Self-organise and Survive: Disabled People in the British Trade Union Movement*, 13 DISABILITY & SOC’Y 587, 588 (1998) (internal quotation marks omitted).

39. Carrie Griffin Basas, *A Collective Good: Disability Diversity as a Value in Public Sector Collective Bargaining Agreements*, 87 ST. JOHN’S L. REV. 793-96 (2013).

Basas' study identified four overarching approaches to ability difference in the workplace: 1) the industrialist approach, which problematized impairment, ignored disabling barriers in the workplace and reflected a medical model construction of disability; 2) the community approach, which focused on the collective good of the community.⁴⁰ While this approach may appear to help persons with disabilities, in fact the majority good may be harmful for the good of minority groups. The focus of the community approach is to subjugate the interests of the minority for the benefit of the majority. As the community good is the focus, this reduces the capacity of individual workers to assert their individual needs; 3) The compliance approach, which provided that all parties would comply with their legal duties without taking additional steps to achieve the purposes of equality interventions; and 4) the idealistic approach, which focused on social causes and involved advocacy for the rights of groups including persons with disabilities. Out of the four approaches identified by Basas, only the collective bargaining agreements which reflected the idealistic approach notably advanced the rights of persons with disabilities.⁴¹

Work reassignment for disabled or injured workers is a good example of how ability equality and the interests of organized labour can conflict with one another.⁴² Anti-discrimination laws across the globe prevent employers from discriminating against employees with disabilities, and require employers to make reasonable adjustments to enable these employees to work.⁴³ There are circumstances where the best work adjustment is to reassign the disabled employee. Work reassignments are often coveted and accordingly regulated by collective bargaining agreements.⁴⁴ This places employers in a position where they need to either follow anti-discrimination laws or the collective agreement. The United States Supreme Court has considered how employers should act in such situations, and has authorised them to exclude workers with disabilities and follow collective agreements.⁴⁵ Of course, organized labour could avoid this problem by only signing collective agreements which permit disability related reassignments. Organized labour has arguably not agreed to grant

40. *Id.* at 815-27.

41. *See generally Id.* at 835.

42. Richard Bales, *Title I of the Americans-with Disabilities Act: Conflicts Between Reasonable Accommodation and Collective Bargaining*, 2 CORNELL J. L. & PUB. POL'Y 161 (1993).

43. FERRI & LAWSON, *supra* note 34; ANNA LAWSON, *DISABILITY AND EQUALITY LAW IN BRITAIN: THE ROLE OF REASONABLE ADJUSTMENT* (2008).

44. Bales, *supra* note 42, at 182.

45. *US Airways, Inc. v. Barnett*, 535 U.S. 391 (2002); Paul L. Nevin, "No Longer Caught in the Middle?": *Barnett Seniority System Ruling Eliminates Managements' Dilemma with ADA Reasonable Accommodation*, 41 BRANDEIS L.J. 199, 222 (2002).

capital greater managerial discretion around assignments from a fear that such discretion would be abused. Rather than limiting assignments to the genuinely injured or disabled, reassignments might be provided to promote capital's struggle against labour.⁴⁶

It is not that organized labour is not interested in equality; it is more that organized labour has very limited resources and operates within an increasingly difficult industrial relations landscape. Organized labour has promoted the equality of ability where this can be done, without impacting the wider struggle for fair work conditions.⁴⁷ Organized labour remains involved in fighting for workers that are injured at work, and this has the potential to expand into wider ability equality issues.⁴⁸ Organized labour has recognised that workers with disabilities are an untapped membership base and has taken efforts to bring disability issues into their agendas.⁴⁹ Some of these efforts involve attempts to alter how employers perceive workers with disabilities.⁵⁰ Other efforts are more direct. For example, organized labour has provided industrial relations advocacy for workers with disabilities and has developed trade union disability champions.⁵¹ While these small steps to promote ability equality are positive, ultimately organized labour focuses on the collective struggle against capital, and individual rights associated with workers with disabilities remain a peripheral issue.

B. The CRPD and the Problematizing of the Unemployed Worker with a Disability

The emergence of the social model of disability in the 1980s has had a transformational impact on how public policies problematize ability inequalities in society.⁵² The social model has been adopted and expanded

46. Matthew A. Shapiro, *Labor Goals and Antidiscrimination Norms: Employer Discretion, Reasonable Accommodation, and the Costs of Individualized Treatment*, 32 YALE L. & POL'Y REV. 1 (2013).

47. *Id.*

48. Don Shrey et al., *Disability Management Best Practices and Joint Labour-Management Collaboration*, 1 INT'L J. DISABILITY MGMT. RES. 52 (2006).

49. Basas, *supra* note 39, at 801.

50. Deborah Foster & Patricia Fosh, *Negotiating 'Difference': Representing Disabled Employees in the British Workplace*, 48 BRIT. J. INDUS. REL. 560, 578 (2010).

51. See generally Nick Bacon & Kim Hoque, *The Influence of Trade Union Disability Champions on Employer Disability Policy and Practice*, 25 HUM. RESOURCE MGMT. J. 233 (2015).

52. Paul Harpur, *Embracing the New Disability Rights Paradigm: The Importance of the Convention on the Rights of Persons with Disabilities*, 27 DISABILITY & SOC'Y 1, 3 (2012) [hereinafter *Embracing the New Disability Rights Paradigm*.]

by the CRPD.⁵³ The CRPD sets out a roadmap for transforming how ability differences are approached and regulated.⁵⁴ Because the ILO conventions mentioned above were drafted and adopted well before the adoption of the CRPD, it is not surprising that there are significant differences in how disability is constructed between the ILO conventions and the CRPD.

In contrast to ILO conventions, the human rights paradigm in the CRPD recognises that barriers in society limit the capacity of people with different abilities to exercise their right to work.⁵⁵ The CRPD includes a focus on how society can become more accommodating of ability differences. CRPD Article 27(1)(i) does not just place a duty on employers to make sure reasonable accommodations are made in the workplace, Article 27 requires the State to ensure that such accommodations are made.⁵⁶ This imposes upon the state a two-fold obligation. First, the CRPD requires States to legislate a requirement for employers to make reasonable accommodations and, second, they are required to take steps to promote a more inclusive society generally.⁵⁷ This might include research on, adoption and promotion of universal design.⁵⁸

The differences between how the ILO and CRPD problematize disability have substantial results for ability equality at work. The approach reflected in ILO conventions falls short of international and domestic norms around ability equality at work. The ILO conventions focus on helping an individual cope with barriers in the workplace without requiring employers to take steps to remove those barriers to ability equality. Anti-discrimination laws go further than the ILO and require employers

53. PAUL HARPUR, DISCRIMINATION, COPYRIGHT AND EQUALITY: OPENING THE E-BOOK FOR THE PRINT DISABLED Ch. 2 (2017) [hereinafter DISCRIMINATION, COPYRIGHT AND EQUALITY: OPENING THE E-BOOK FOR THE PRINT DISABLED]; Michael Waterstone, *The Significance of the United Nations Convention on the Rights of Persons with Disabilities* 33 LOY. L.A. INT'L & COMP. L. REV. 1. (2010)

54. Professor Gerard Quinn heralds the CRPD as the Declaration of Independence for persons with disabilities. See Gerard Quinn, *Closing: Next Steps-Towards a United Nations Treaty on the Rights of Persons with Disabilities* in DISABILITY RIGHTS 519, 541 (Peter Blanck ed., 2005).

55. See Paul Harpur, *Time to be Heard: How Advocates can use the Convention on the Rights of Persons with Disabilities to Drive Change*, 45 VAL. U.L. REV. 1271, 1273-75 (2011) [hereinafter *Time to be Heard: How Advocates can use the Convention on the Rights of Persons with Disabilities to Drive Change*].

56. United Nations Convention on the Rights of Persons with Disabilities, *supra* note 2, art. 27.

57. Paul Harpur, *From Universal Exclusion to Universal Equality: Regulating Ableism in a Digital Age*, 40 N. KY. L. REV. 529 (2013) [hereinafter *From Universal Exclusion to Universal Equality*].

58. DISCRIMINATION, COPYRIGHT AND EQUALITY: OPENING THE E-BOOK FOR THE PRINT DISABLED, *supra* note 53.

to take positive steps to promote ability equality by requiring them to make reasonable alterations to work environments.⁵⁹

This duty on parties to make alterations in Ireland, the United States and in the *CRPD* is described as “reasonable accommodation”,⁶⁰ and in Australia and the United Kingdom as “reasonable adjustments”.⁶¹ Anti-discrimination laws require reasonable accommodations and adjustments from employers. These duties involve making alterations to environments to enable persons with disabilities to operate.⁶²

The *CRPD* goes further than anti-discrimination laws and requires the state to promote universal design.⁶³ The *CRPD* defines universal design to include “the design of products, environments, programmes and services to be usable by all people, to the greatest extent possible, without the need for adaptation or specialized design”.⁶⁴ Universal design reduces the need for retrofitting and thus improves the employability of persons with disabilities.

Reasonable accommodations and universal design both have a significant impact upon gig workers with disabilities. All gig workers need to access the internet and digital gig companies. Digital gig companies can be created in ways that limit or enhance persons with disabilities capacity to access content.⁶⁵ If digital content is not placed in an accessible format, then a person with a disability will need to find a means of ac-

59. *Time to be Heard: How Advocates can use the Convention on the Rights of Persons with Disabilities to Drive Change*, *supra* note 55, at 1278-85.

60. Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (1990); 42 U.S.C. § 12112(b)(5) (2009). *See* United Nations Convention on the Rights of Persons with Disabilities, *supra* note 2, art. 27(1)(i) for the use of this term with respect to the right to work; Employment Equality Act 1998 (Act. No. 21/ 1998) (Ir.).

61. *Disability Discrimination Act 1992* (Cth) ss 4, 5(2), 6(2) and 21A(1) (Austl.); Equality Act 2010 c.1, § 39(5)(UK).

62. Carrie Griffin Basas, *Back Rooms, Board Rooms - Reasonable Accommodation and Resistance Under the ADA*, 28 BERKELEY J. EMP. & LAB. L. 59, 88 (2008) (arguing that reasonable accommodations under the ADA are at the center of the integration of people with disabilities into mainstream work environments) [hereinafter *Back Rooms, Board Rooms - Reasonable Accommodation and Resistance Under the ADA*]; Deborah Foster, *Legal Obligation or Personal Lottery? Employee Experiences of Disability and the Negotiation of Adjustments in the Public Sector Workplace*, 21 WORK, EMP. & SOC'Y 67 (2007); Anna Lawson, *Reasonable Accommodation and Accessibility Obligations: Towards a More Unified European Approach?*, 11 EUR. ANTI-DISCRIMINATION L. REV. 11 (2011).

63. United Nations Convention on the Rights of Persons with Disabilities, *supra* note 2, art. 2.

64. *Id.*

65. PETER BLANCK, E-QUALITY: THE STRUGGLE FOR WEB ACCESSIBILITY BY PERSONS WITH COGNITIVE DISABILITIES 27 (2014); DISCRIMINATION, COPYRIGHT AND EQUALITY: OPENING THE E-BOOK FOR THE PRINT DISABLED, *supra* note 53.

cessing that information, either by identifying a work around in the system (which may be unlawful and involve stripping of digital rights management securities),⁶⁶ or by using the assistance of a person without a disability.⁶⁷ The fact that ILO conventions ignore the role employers and work systems have in disabling people with impairments limits the capacity of the ILO to promote ability equality at work.

PART II. PRECARIOUS WORK AS PROMOTING OR DAMAGING WORKERS' RIGHTS

A. ILO, Labour Laws and Precarious Work

A result of self-employment, entrepreneurship, operating cooperatives and owning one's own business is the inability to exercise one of the core labour rights: the right to collectivise. The ILO's tripartite approach embraces collectivism as a means to promote workplace rights.⁶⁸ The notion of workers acting collectively for mutual protection is a core focus of labour law.⁶⁹ Competition and anti-cartel laws prohibit commercial operators from working together to influence the market.⁷⁰ While these prohibitions reduce the risk from anti-competitive conduct in the broader economy, the application of these restrictions can significantly disadvantage precarious workers. Workers that operate through corporate structures are regarded as companies and are prohibited from collectivising.⁷¹ This means, even if they can surmount the isolation caused by geographical separation from other workers and often multiple engagers and form alliances,⁷² competition laws prohibit such workers from acting collectively to influence working conditions.

66. See Paul Harpur & Nic Suzor, *Copyright Protections and Disability Rights: Turning the Page to a New International Paradigm*, 36 U. N. S. WALES L.J. 745, 751 (2013).

67. Paul Harpur & Rebecca Loudoun, *The Barrier of the Written Word: Analysing Universities' Policies to Include Students with Print Disabilities and Calls for Reforms*, 33 J. HIGHER EDUC. POL'Y MGMT. 153, 159-60 (2011).

68. Ronald C. McCallum, *Domestic Constitutions, International Law, and the International Labour Organization: An Australian and Canadian Case Study*, 20 QUEEN'S L.J. 301, 306 (1994).

69. See Jacoby M. Sanford, *Unnatural extinction: The rise and fall of the independent local union*, 40 INDUS. REL. 377, 392 (2001).

70. See Howard Dickman, *Exclusive representation and American industrial democracy: An historical reappraisal*, 5 J. LAB. RES. 325 (1984).

71. Shae McCrystal, *Collective Bargaining by Independent Contractors: Challenges from Labour Law*, 20 AUSTL. J. LAB. L. 1 (2007).

72. Adelle Blackett, *Introduction: Regulating decent work for domestic workers*, 23 CAN. J. WOMEN L. 1 (2011); Rohini Hensman, *Organizing Against the Odds: Women in India's Informal Sector*, 37 SOCIALIST REGISTER 37 (2009); Shae McCrystal, *Collective bargaining beyond the boundaries of employment: A comparative analysis*, 37 MELB. U. L. REV. 662, 667 (2013); N.

The inability to collectivize is one factor that has motivated the ILO to introduce conventions to protect workers who operate through their own commercial entities.⁷³ While there is currently no convention specifically protecting workers in the gig economy, some of these workers are covered by existing ILO conventions.⁷⁴ Arguably, gig workers are home workers. Home workers or outworkers, depending on the preferred nomenclature,⁷⁵ are an early form of gig work. Technology has enhanced the capacity of capital to create this incremental variation of structuring work. While there are differences between gig work and home work, arguably the ILO's Home Work Convention covers gig workers.⁷⁶

Article 1(a) of the Home Work Convention defines a home worker to include a person that is not an employee of the principal, who performs work:

(i) in his or her home or in other premises of his or her choice, other than the workplace of the employer; (ii) for remuneration; (iii) which results in a product or service as specified by the employer, irrespective of who provides the equipment, materials or other inputs used, unless this person has the degree of autonomy and of economic independence necessary to be considered an independent worker under national laws, regulations or court decisions.⁷⁷

Depending upon the type of gig work, gig workers operate in their own home, in their car or at a range of locations that are not controlled by the company who connects them with the gig work. They receive remuneration in most gigs from the company that controls the gig company for the provision of services or products.⁷⁸ Gig workers would accordingly be covered by the Home Work Convention unless they are held to be sufficiently autonomous. This would depend upon the facts of each case.

If the Home Work Convention was applied to gig workers then this could have significant results for working conditions under which such

Neetha & Rajni Ratriwala, *The Absence of State Law: Domestic Workers in India*, CAN. J. WOMEN & L., 119 (2011).

73. Dan Gallin, *The ILO Home Work Convention: Ten years later* (2007), http://www.global-labour.info/en/2008/02/the_ilo_home_work_convention_t_1.html; See generally Dan Gallin, *Propositions on trade unions and informal employment in times of globalisation*, 33 ANTIPODE 531 (2001).

74. Gallin, *supra* note 73.

75. Peter Williams, *Leveraging change in the working conditions of UK homeworkers*, 15 DEVELOPMENT IN PRACTICE 546 (2005).

76. ILO Home Work Convention concerning Home Work, *adopted* Jun. 20, 1996, 2108 U.N.T.S 161.

77. *Id.* art. 1(a).

78. See generally Williams, *supra* note 75.

work is performed. As they are subject to commercial contracts, most gig workers enjoy limited or no labour law protections. If they are held to come within the protection afforded by the Home Work Convention, then article 4 of that convention provides that these working relationships should be regulated and that equality of treatment shall be promoted; in particular, in relation to collectivising and equality of treatment between home workers and employees in the same industry, and in relation to discrimination protections. This would entitle gig workers to reasonable accommodations and adjustments and access to disparate impact and treatment protections. If article 4 was reflected in national laws, then the working conditions of Uber and Lift drivers would be compared with the conditions enjoyed by employees of regular taxis. Even though employees in the taxi industry do not enjoy fantastic working conditions,⁷⁹ it is arguable that employees of taxi companies are still treated better than gig workers.

While international norms might be extended to regard gig workers as home workers, it is less clear if laws that protect home workers and outworkers can be extended over gig workers. Home work and outworker laws almost exclusively focus upon the working conditions of textile and apparel workers.⁸⁰ For example, the Australian *Fair Work Act 2009* (Cth) defines an outworker to be either an employee who performs work for their employer at residential premises or, if the worker is not in an employment relationship, then the term is limited to workers in the “textile, clothing or footwear industry”.⁸¹ Because gig workers are almost never employees, only gig workers working in the textile and apparel industry can exercise rights as an outworker under the *Fair Work Act 2009* (Cth).

79. Jane Barrett, *Organizing in the informal economy: A case study of the minibus taxi industry in South Africa*. (Intn'l Labour Office, Working Paper No. 39, 2003).; Lalita Kumari & Amarjit Singh Sidhu, *Factors Affecting Quality of Work Life of Private Taxi Drivers*, 41 MGMT. & LAB. STUD. 331 (2017).

80. Paul Harpur, *Clothing Manufacturing Supply Chains, Contractual Layers and Hold Harmless Clauses: How OHS Duties can be Imposed Over Retailers*, 21 AUSTL. J. OF LAB. 316 (2008); Paul Harpur, *Occupational Health and Safety Duties to Protect Outworkers: The Failure of Regulatory Intervention and Calls for Reform*, 12 DEAKIN L. REV. 48 (2007); Phil James et al., *Regulating Supply Chains to Improve Health and Safety*, 36 INDUS. L. J. 163 (2007); Igor Nossar, Richard Johnstone & Michael Quinlan, *Regulating Supply Chains to Address the Occupational Health and Safety Problems Associated with Precarious Employment: the Case of Home-based Clothing Workers in Australia*, 17 AUSTL J. LAB. L. 137 (2004).

81. *Fair Work Act 2009* (Cth) Division 2, Section 12 (Austl.).

B. The CRPD and Precarious Work

1. The Drafting History of Precarious Work in the CRPD

No ILO convention or, prior to the CRPD, United Nations human rights convention has promoted precarious work as a means to enable vulnerable workers to exercise their right to work. While the CRPD's approach to precarious work is remarkable, the drafters of the CRPD seemed to accept that this form of structuring work would assist workers with disabilities to exercise their right to work. The CRPD drafting process heavily involved persons with disabilities and their representative groups.⁸² While the CRPD remains a negotiated document, the debates involved the voices of persons with disabilities. Why then would the drafters seek to promote a form of structuring work that places persons with disabilities outside traditional labour law protective structures?

The committee that negotiated and drafted the CRPD, the Ad Hoc Committee on a Comprehensive and Integral International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities, considered persons with disabilities' right to work in its third session.⁸³ There was wide support for promoting persons with disabilities' right to self-employment, with the outcome document noting that there "was general support for dividing sub-paragraph (c) into two sub-paragraphs, the first dealing with paid employment, and the second with self-employment."⁸⁴ The right to work in other human rights conventions only promotes traditional employment.⁸⁵ Why then would the CRPD drafters promote measures that take persons with disabilities beyond the protection of labour laws? Perhaps it is because labour law fails to provide many persons with disabilities any meaningful protection.

82. Harpur, *supra* note 24.

83. Ad Hoc Committee on a Comprehensive and Integral International Convention on Protection and Promotion of the Rights and Dignity of Persons with Disabilities, *Provisional Agenda*, U.N. Doc. A/60/266 (Aug. 17, 2005)

84. *Id.* at 100.

85. See generally International Covenant on Economic, Social and Cultural Rights art. 6, *opened for signature* Dec. 16, 1966, 993 U.N.T.S. 3; Convention on the Elimination of All Forms of Discrimination against Women art. 11, *opened for signature* Dec. 18, 1979, 1249 U.N.T.S. 13; Convention on the Rights of the Child art. 32, *opened for signature* Nov. 20, 1989, 1577 U.N.T.S. 3; International Convention on the Elimination of all Forms of Racial Discrimination art. 5(iii)(f), *opened for signature* Dec. 21, 1965, 660 U.N.T.S. 195; G.A. Res. 44/25, Convention on the Rights of the Child (Nov. 20, 1989).

2. Why Workers with Disabilities are Often not Protected by Labour and Employment Laws

Stating that many persons with disabilities do not benefit from the protection of labour and employment laws is controversial. Clearly, labour laws provide all employees protection, regardless of the employee's level of abilities. Furthermore, there have been significant efforts to include disability human rights protections within traditional labour laws.⁸⁶ How could its cohort be beyond the protection from organized labour and workplace institutions? Largely because workplace laws only work if you work.

Persons with certain impairments are not employed in significant numbers, and thus persons with disabilities are relegated to charity and human rights tracks. The acceptance of regulatory intervention's importance and the adoption of anti-discrimination regimes, have not resulted in a concomitant increase in employment rates of persons with disabilities.⁸⁷ In Australia, persons with disabilities who are attempting to compete in the labour market, have an unemployment rate of 8.6% compared to an unemployment rate of 5.0% for persons without disabilities.⁸⁸ The actual statistic of unemployed persons with disabilities is much higher; only 53% of persons with disabilities participate within the labour force, compared to 81% for those without disabilities. A more concerning issue is the 39% unemployment rate of persons who have a severe or profound core activity limitation. People in this category are therefore 7.8 times more likely to be unemployed than Australians without a disability. To fall into this category, a person must have a "severe or profound limitation" in one of their core activities, such as self-care, mobility, or communication⁸⁹ People fall into this category if they have an impairment that is more than a moderate difficulty with a core activity.⁹⁰ In other words,

86. See, e.g., Australia's Fair Work Act 2009 (Cth) Part 3-1, in particular 1; see generally Paul Harpur, Ben French & Richard Bales, *Australia's Fair Work Act and the Transformation of Workplace Disability Discrimination Law*, 30 WISC. INT'L L. J. 190 (2012); Paul Harpur, Ben French & Richard Bales, *Australia's Solution to Disability Discrimination Enforcement*, 11 CORNELL HR REVIEW (2011) <http://www.cornellhrreview.org/australias-solution-to-disability-discrimination-enforcement/>.

87. Samuel Bagenstos, *Has the Americans with Disabilities Act Reduced Employment for People with Disabilities? The Decline In Employment Of People With Disabilities: A Policy Puzzle*, 25 BERKELEY J. EMP. & LAB. L., 527, 541 (2004).

88. 1370.0 — *Measures of Australia's Progress, 2010*, AUSTL. BUREAU OF STATISTICS, [http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/by%20Subject/1370.0~2010~Chapter~People%20with%20a%20disability%20\(4.36.4\)](http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/by%20Subject/1370.0~2010~Chapter~People%20with%20a%20disability%20(4.36.4)).

89. *Id.*

90. *Id.*

the 39% figure includes many people who are very employable: i.e. people who are blind or on wheelchairs. The unemployment rates of persons with disabilities in Australia is similar to the position in Canada, where the rate is over five times higher than persons without disabilities,⁹¹ and in the United Kingdom, where persons with disabilities are more than three times more likely to be unemployed.⁹²

It could be argued that people with disabilities are unemployed as their impairment prevents them from working.⁹³ Even if the unemployment rates factor in those whose disabilities prevent them from working, the statistics demonstrate that non-ability differences are causing high unemployment rates. For example, 69% of persons with disabilities are unemployed.⁹⁴ Subject to intersecting impairments, persons in this group are able to work.⁹⁵ What is causing this denial of the right to work is a range of factors including direct discrimination (i.e. refusing to hire people due to their disability, because the employer incorrectly thinks they cannot do the job, or that the employer just does not want a person with disability to work for him), the operation of facially neutral policies, and structures in society that interact with ability differences to create disability.⁹⁶

Although many persons with disabilities have not been able to successfully participate in the labour market, other work alternatives have been and continue to be embraced.⁹⁷ Similar to other minority entrepreneurs, one popular alternative means of entering the workforce is to start a micro-business and become self-employed.⁹⁸ Professor Peter Blanck

91. INT'L DISABILITY RIGHTS MONITOR, REGIONAL REPORT OF THE AMERICAS 109 (2004).

92. DISABILITY RIGHTS COMM' N, DISABILITY, SKILLS AND WORK: RAISING OUR AMBITIONS 3 (2007).

93. For an analysis of the application of the neoclassical economic labor market model to disability anti-discrimination laws, see RICHARD A. EPSTEIN, FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS 480 (1992) (opposing equality interventions); Michael Stein, *The Law and Economics of Disability Accommodations*, 52 DUKE L.J. 79, 121 (2003) (promoting equality interventions).

94. ROBERT SPRIGGS, RESULTS AND OBSERVATIONS FROM RESEARCH INTO EMPLOYMENT LEVELS IN AUSTRALIA (2007).

95. See generally Paul Harpur, *Naming, Blaming and Claiming Ablism: The Lived Experiences of Lawyers and Advocates with Disabilities*, 29 DISABILITY & SOC'Y 1234 (2014); Ron McCallum, *In Search of Origins: Blindness in History and Law*, 33 AUSTL. B. REV. 25 (2010).

96. Elizabeth F. Emens, *Framing Disability*, 2012 U. ILL. L. REV. 1383, 1389.

97. See generally Dennis C. Rizzo, *With a Little Help From my Friends: Supported Self-Employment for People with Severe Disabilities*, 17 J. VOCATIONAL REHABILITATION 97 (2002); J. W. Conroy, C. S. Ferris, & R. Irvine, *Microenterprise Options for People with Intellectual and Developmental Disabilities: An Outcome Evaluation*, 7 J. POL'Y & PRAC. INTELL. DISABILITIES 269 (2010).

98. See generally Thomas Cooney, *Entrepreneurs with Disabilities: Profile of a Forgotten Minority*, 4 IRISH BUS. J. 119 (2008); see generally C. S. Ahrens, J. L. Frey & S. C. S. Burke, *An Individualized Job Engagement Approach for Persons with Severe Mental Illness*, 65 J. OF

and others have contended that, if managed correctly, self-employment can provide a space where people with disabilities can gain experience, training, and economic independence to move from unemployment, under-employment, or welfare-based income to meaningful work.⁹⁹ Law makers recognised the benefits of self-employment for persons with disabilities and so included self-employment as a legitimate work outcome for this group in domestic laws,¹⁰⁰ and now the value of this work option is currently reflected in CRPD Article 27(1)(f).¹⁰¹ Why then is precarious work, with all its reduced regulatory protections, regarded by disability scholars, disability advocates and law makers a viable work option for this group of vulnerable workers?

The right to work in the CRPD directs States to introduce measures to remove barriers that reduce the capacity of persons with disabilities to work.¹⁰² While the State needs to adopt measures to motivate employers and actors to avoid creating barriers to equality, or to remove existing barriers, often the self-employed person with a disability has the control to avoid the barrier to equality. For example, the right to work identifies barriers in relation to hiring,¹⁰³ career advancement,¹⁰⁴ and reasonable accommodations or adjustments where work systems are not accessible.¹⁰⁵ In many situations, individuals with disabilities who are running their own micro-business do not need to employ themselves, and provided they can afford it, can attend any career advancement training they desire.

The human rights paradigm embraces both social and impairment factors when constructing disablement.¹⁰⁶ There are impairment benefits for persons with disabilities who run their own businesses. For example, the fact that micro-businesses can be run from a home office means that

REHABILITATION 17 (1999); *see generally* ROSEANNE HERZOG, "UNLIKELY" ENTREPRENEURS: A COMPLETE GUIDE TO BUSINESS START-UPS FOR PEOPLE WITH DISABILITIES AND CHRONIC HEALTH CONDITIONS (1998).

99. *See generally* Peter D. Blanck et al., *The Emerging Workforce of Entrepreneurs with Disabilities: Preliminary Study of Entrepreneurship in Iowa*, 85 IOWA L. REV. 1583 (1999).

100. For an example of this recognition see the inclusion of self-employment in the 1998 Reauthorization of the Rehabilitation Act of 1973; Rehabilitation Act of 1973, 1 U.S.C. § 103(a) (amended 1998). *See* Nancy L. Arnold & Catherina Ipsen, *Self-Employment Policies: Changes through the Decade*, 16 J. DISABILITY POL'Y STUD. 115 (2005).

101. United Nations Convention on the Rights of Persons with Disabilities, *supra* note 2, art. 27(1)(f).

102. *Id.*

103. *Id.*

104. United Nations Convention on the Rights of Persons with Disabilities, *supra* note 2, art. 27(1)(d) and (e).

105. United Nations Convention on the Rights of Persons with Disabilities, *supra* note 2, art. 27(1)(i).

106. *Embracing the New Disability Rights Paradigm*, *supra* note 52, at 4.

persons with mobility impairments are not required to identify strategies to commute to their place of work.¹⁰⁷ The social model explains that people with impairments are often disabled by the way society is structured.¹⁰⁸ The greatest benefit of self-employment is the increased power that persons with disabilities have to create disability-accessible work systems.¹⁰⁹ Whereas anti-discrimination laws require employers to retrofit workspaces, persons with disabilities who run their own business have far greater control over how their work environment is designed and operated. This reduces the need for retrofitting, and increases the capacity of persons with disabilities to work.¹¹⁰

While self-employment provides persons with disabilities greater control, it can reduce the support that comes with employment at a large workplace. As mentioned earlier in this paper, one reasonable accommodation and adjustment measure taken by larger organizations is the reassignment of a worker with a disability to a different position or to alter the worker's duties. Performing these tasks are easier in larger organizations.¹¹¹ A self-employed person with a disability who encounters barriers to equality may need external support to manage the impact of such barriers.¹¹²

The capacity to control how work systems are designed and managed remains one of the primary benefits of self-employment for persons with disabilities.¹¹³ Do gig workers have control over the design and operation of their work systems? While gig workers may control their working hours, they do not control how their work systems are designed or

107. D. Buchen, M. Pulich & J. Wenkman, *Home-Based Business Ownership: Is it in the Best Interests of Persons with Disabilities?*, 6 THE REHABILITATION PROF. 33 (1998).

108. Michael Ashley Stein, Anita Silvers, Bradley Areheart, & Leslie Pickering Francis, *Accommodating Every Body*, 82 CHI. L. REV. 689 (2014) ; Michael Waterstone & Michael Stein, *Disabling Prejudice*, 102 NW. U. L. REV. 1351, 1357 (2008).

109. Beth Ribet, *Emergent Disability and the Limits of Equality: A Critical Reading of the UN Convention on the Rights of Persons with Disabilities*, 14 YALE HUM. RTS. & DEV. L. J. 155, 169 (2011); Sandra Fredman, *Disability Equality: A Challenge to the Existing Anti-Discrimination Paradigm?*, DISABILITY RTS. IN EUR.: FROM THEORY TO PRAC. 199, 204 (Anna Lawson & Caroline Gooding eds., 2005).

110. Scott Atkins, *A Study into the Lived Experiences of Deaf Entrepreneurs: Considerations for the Professional*, 47 J. AM. DEAFNESS & REHABILITATION ASS'N 222 (2013).

111. Nicole B. Porter, *Reasonable Burdens: Resolving the Conflict Between Disabled Employees and their 'Coworkers'*, 34 FLA. ST. U.L. REV. 313, 314 (2007); *Back Rooms, Board Rooms - Reasonable Accommodation and Resistance Under the ADA*, *supra* note 62 at 112.

112. Sarah Parker Harris et al., *Assessing Social Entrepreneurship Perspective of People with Disabilities and Key Stakeholders*, 38 J. OF VOCATIONAL REHABILITATION 35 (2013).

113. Fabricio E. Balcazar et al., *An Empowerment Model of Entrepreneurship for People with Disabilities in the United States*, 23 PSYCHOSOCIAL INTERVENTION 145, 148 (2014).

operated.¹¹⁴ The technological control, monitoring, supervision, and capacity to terminate mean that the level of control exerted by gig companies is equal or greater than that which employers exert over many employees.¹¹⁵

3. Workers with Disabilities and the Gig Economy

While gig workers may work remotely, the extent of control they have over or over the hardware or software that regulates their work activities will depend on how the business structures their operations.¹¹⁶ While gig companies may write some of their core software and have the legal right to alter it, many gig companies will purchase hardware and software from other companies. This limits their legal and practical capacity to alter such technology. With the exception of some legislation,¹¹⁷ most software providers do not have a duty to make hardware or software accessible for persons with disabilities when designing and manufacturing products. In the absence of legal compulsion, many gig companies may be reluctant to devote efforts to be inclusive. Interestingly, the development of personal relationships with internal champions is one way to motivate companies to make reasonable accommodations and adjustments.¹¹⁸ Personal contact can help combat stereotypes¹¹⁹ and the lack of human contact inherent in gig work may reduce the capacity to build such relationships.¹²⁰

CONCLUSION

Persons with disabilities and their advocates have not promoted self-employment because they are enthusiastic about precarious work structures. Many persons with disabilities embrace precarious work structures

114. *Id.*

115. Brishen Rogers, *Employment Rights in the Platform Economy: Getting Back to Basics*, 10 HARV. L. & POL'Y REV. 479, 484-85, 490-91 (2016).

116. Michael D. West & Jane Anderson, *Telework and Employees with Disabilities: Accommodation and Funding Options*, 23 J. VOCATIONAL REHABILITATION 115 (2005); Jim Stanford, *The Resurgence of Gig Work: Historical and Theoretical Perspectives*, 28 ECON. & LAB. REL. REV. 382-401 (2017).

117. *See, e.g.* Access to Advanced Communications Services and Equipment, 47 U.S.C. § 617(d) (Supp. V 2011); *From Universal Exclusion to Universal Equality*, *supra* note 57, at 543, 548.

118. Paul Harpur, *Combating Prejudice in the Workplace with Contact Theory: The Lived Experiences of Professionals with Disabilities*, 34 DISABILITY STUD. Q. 14 (2014).

119. Anita Silvers & Michael Stein, *Disability, Equal Protection, and the Supreme Court: Standing at the Crossroads of Progressive and Retrogressive Logic in Constitutional Classification*, 35 U. MICH. J. L. REFORM 81 (2002).

120. It is possible that social media may partially offset this lack of human contact.

because they have been excluded from work by capital and ignored by organized labour. Accordingly, persons with disabilities and their advocates are not necessarily embracing this model, but prefer it over standard employment since the standard employment market has rejected them. Even where persons with disabilities are employed, their work situation is precarious as they encounter significant discrimination. They are often the last hired, the first fired, and overlooked for promotions.¹²¹ In this situation it is understandable why persons with disabilities and their representatives have embraced an option that enables persons with disabilities to exercise a discounted right to work.

Precarious work exposes persons with disabilities to considerable and enhanced vulnerabilities. Unlike sheltered workshops or social enterprises, precarious work structures have not been developed to promote equality.¹²² Precarious work is arguably symptomatic of wider moves in the labour market, shifting risk to workers and redistributing wealth to capital.¹²³ What message does it send when the leading disability human rights convention promotes work arrangements which are outside most labour law protections? Persons with disabilities indicate that the precarious work structure is well-established within this highly vulnerable work population and should be widely adopted by law makers.

The increase of vulnerable work structures, such as gig work, should attract the interest of organized labour. Job insecurity and work vulnerability has been increasing at an alarming rate,¹²⁴ but the situation is arguably more significant for workers with disabilities. Organized labour should be concerned by the growth of precarious work generally and by the potential for their members to join the ranks of workers with disabilities. Beyond the social justice issues associated with ability equality at work, the fact that millions of workers are disabled by occupational health and safety incidents¹²⁵ means that the plight of workers with disabilities should be increasingly addressed by ILO conventions and by organized labour.

121. Basas, *supra* note 39, at 799.

122. Laura C. Hoffman, *An Employment Opportunity or a Discrimination Dilemma?: Sheltered Workshops and the Employment of the Disabled*, 16 U. PA. J. L. & SOC. CHANGE 151, 164 (2013); LISA SCHUR, DOUGLAS KRUSE, & PETER BLANCK, *PEOPLE WITH DISABILITIES: SIDELINED OR MAINSTREAMED?* (2013).

123. Fudge, *supra* note 4, at 154.

124. KERRY RITTICH, *VULNERABILITY AT WORK: LEGAL AND POLICY ISSUES IN THE NEW ECONOMY* 5-6, 9, 26 (2004).

125. See *ILO Estimates Over 1 Million Work-Related Fatalities Each Year*, INT'L LAB. ORG. (1999), http://www.ilo.org/global/about-the-ilo/newsroom/news/WCMS_007969/lang-en/index.htm.