

# Getting Fired by an App: The Shifting Legal Landscape of Criminal-Records- Based Exclusions from “Transportation-Network Companies” in Washington, D.C.

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## I. INTRODUCTION

The impact of mass incarceration, particularly in black and brown communities in the U.S., includes restricted access to “gig economy” employment for people with old criminal records. “Gig economy” work has been defined as “paid work allocated and delivered by way of internet platforms without an explicit

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or implicit contract for long-term employment.”<sup>1</sup> This work carries with it a reputation of accessibility and flexibility (usually as a trade-off for worker protections afforded to traditional employees), and is often attractive to workers who are on the margins of the economy. Access to gig economy work therefore takes on an important significance in communities struggling with barriers to traditional wage labor.

The interaction between the over-criminalization of communities of color and unemployment rates is well-documented.<sup>2</sup> In Washington, D.C., as in many cities in the United States, rates of unemployment are much higher in predominantly black communities.<sup>3</sup> Out of D.C.’s eight wards, the highest levels of unemployment are concentrated in wards five, seven, and eight, whose populations are 58.86% black, 92.64% black, and 92.18% black, respectively.<sup>4</sup> Criminalization, arrests, convictions, and jail time also disproportionately impact these communities; this over-criminalization has a direct relationship to unemployment rates.<sup>5</sup> Given the widespread use of rigorous background checks by employers in recent decades, people with criminal records find themselves foreclosed from employment opportunities based on convictions (and the completion of criminal sentences) from decades prior.<sup>6</sup> Additionally, state and federal laws prevent people with certain convictions from working in a number of specialized professions or from obtaining occupational or professional licenses.<sup>7</sup> It follows that black D.C. residents living in heavily policed communities “face unique challenges when seeking jobs” due in part to the prevalence of background checks.<sup>8</sup>

Screening job applicants based on criminal conviction history (regardless of how old the records are) not only has a negative impact on black communities, but also appears ineffective as a predictor of job performance when considering the research regarding desistance and recidivism. This research demonstrates that the older the conviction records are, the less they say about an individual’s future likelihood to commit crime. The recidivism risk for people with criminal records actually dips below the risk of arrest for people *without* records after

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1. MARK GRAHAM ET AL., OXFORD INTERNET INST., THE RISKS AND REWARDS OF GIG WORK AT THE GLOBAL MARGINS 2 (2017), <https://www.oii.ox.ac.uk/publications/gigwork.pdf>.

2. MICHELLE ALEXANDER, THE NEW JIM CROW 224 (2010).

3. D.C. DEP’T OF EMP’T SERVS., DISTRICT OF COLUMBIA LABOR FORCE, EMPLOYMENT, UNEMPLOYMENT AND UNEMPLOYMENT RATE BY WARD 2017 (2017), [https://does.dc.gov/sites/default/files/dc/sites/does/page\\_content/attachments/2017%20Unemployment%20Rate%20by%20Ward\\_5.pdf](https://does.dc.gov/sites/default/files/dc/sites/does/page_content/attachments/2017%20Unemployment%20Rate%20by%20Ward_5.pdf).

4. 2018 *Demographics: Summary Data for Ward 5*, DC HEALTH MATTERS (Jan. 2018), <http://www.dchealthmatters.org/?module=demographicdata&id=131492>; 2018 *Demographics: Summary Data for Ward 7*, DC HEALTH MATTERS (Jan. 2018), <http://www.dchealthmatters.org/?module=demographicdata&id=131494>; 2018 *Demographics: Summary Data for Ward 8*, DC HEALTH MATTERS (Jan. 2018), <http://www.pretrial.org/download/pji-reports/Race%20&%20Pretrial%20Risk%20Assessment.pdf>.

5. MARINA DUANE, EMILY REIMAL & MATHEW LYNCH, URBAN INST., CRIMINAL BACKGROUND CHECKS AND ACCESS TO JOBS: A CASE STUDY OF WASHINGTON, D.C. 12 (2017), [https://www.urban.org/sites/default/files/publication/91456/2001377-criminal-background-checks-and-access-to-jobs\\_2.pdf](https://www.urban.org/sites/default/files/publication/91456/2001377-criminal-background-checks-and-access-to-jobs_2.pdf).

6. MICHELLE N. RODRIGUEZ & MAURICE Emsellem, NAT’L EMP’T LAW PROJECT, 65 MILLION NEED NOT APPLY: THE CASE FOR REFORMING CRIMINAL BACKGROUND CHECKS FOR EMPLOYMENT 17 (2011), [http://www.nelp.org/content/uploads/2015/03/65\\_Million\\_Need\\_Not\\_Apply.pdf](http://www.nelp.org/content/uploads/2015/03/65_Million_Need_Not_Apply.pdf).

7. MICHELLE N. RODRIGUEZ & BETH AVERY, NAT’L EMP’T LAW PROJECT, UNLICENSED AND UNTAPPED: REMOVING BARRIERS TO STATE OCCUPATIONAL LICENSES FOR PEOPLE WITH RECORDS 1 (2016), <http://www.nelp.org/content/uploads/Unlicensed-Untapped-Removing-Barriers-State-Occupational-Licenses.pdf>.

8. DUANE, REIMAL & LYNCH, *supra* note 5, at 13.

“approximately four to seven years of desisting from crime for violent offenders, four years for drug offenders, and three to four years for property offenders.”<sup>9</sup> Various longitudinal studies of people with criminal records describe consistent results. A study analyzing police contact data over the course of multiple decades from 670 males born in Racine, Wisconsin and Philadelphia, Pennsylvania in 1942 found that after seven years without subsequent arrest “there is little to no distinguishable difference in risk of future offending between those with a criminal record and those without a criminal record.”<sup>10</sup> In New York State, a different study tracked criminal history data for people who were arrested for the first time as adults in 1980, and created an algorithm that described “redemption time” (i.e. period of time prior to consistent desistance from crime) as between four to seven years depending on the type of offense.<sup>11</sup> Despite the increasing body of research on desistance, discrimination against job applicants due to criminal history more than seven years old continues to have a profound impact on communities of color targeted by the criminal justice system.

Examining the exclusion of a class of D.C. workers from two of the most well-known players in the gig economy—Uber and Lyft—reveals the role of local politics in the inability of marginalized workers to access gig work as well as the gaps within current discrimination law. In this Article, I will examine some specific problems for D.C.-based workers with a criminal history attempting to drive for these “Transportation Network Companies” (TNCs). I will tell the story of the “deactivation” of one D.C.-based African-American driver with a ten-year-old criminal history from Uber’s platform and, through this story, I will explore the challenges of seeking redress from TNCs through discrimination law, and the need for policies rooted in an understanding of research regarding desistance from crime as well as the racially disparate impact of the criminal justice system..

## II. UBER, LYFT, AND CRIMINAL RECORDS EXCLUSION POLICIES

### *A. Alicia Was Fired by an App*

“Alicia” is a black woman in her mid-fifties who lives and works in D.C.<sup>12</sup> Her story of being terminated as an Uber driver began in 2004, when she was in an abusive relationship. Alicia’s then-boyfriend frequently physically assaulted her. One evening, fearing he would kill her, she fought back, injuring him. The incident resulted in a felony assault charge on her record. Afraid of what would happen if she went to court and had to face her attacker and potential prison time, Alicia missed court dates and accrued new charges for failure to appear. She was ultimately convicted of felony assault and failure to appear in 2008. These are the only criminal charges on Alicia’s record. However, when she tried to get back to

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9. Sharon M. Dietrich, *From Expungement to Sealing of Criminal Records in Pennsylvania*, 87 PA. B. ASS’N. Q. 163, 165 (2016).

10. Megan C. Kurlychek et al., *Enduring Risk? Old Criminal Records and Predictions of Criminal Involvement*, 53 CRIME & DELINQUENCY 64, 64 (2007).

11. Alfred Blumstein & Kiminori Nakamura, *Redemption in an Era of Widespread Criminal Background Checks*, 263 NAT’L INST. JUST. J. 10, 13 (2009).

12. Alicia’s name was changed for the purpose of this article to preserve confidentiality. The author met Alicia while working on her case in 2016.

work after serving her sentence, she found it very difficult to secure employment. This issue was compounded by a struggle with a rare health condition. Though she was discouraged by her financial and health situation, she always found ways to stay engaged in her community. She participated in multiple church programs, helped community members recover from drug addiction, and hosted veterans with PTSD in her Southeast D.C. home while they transitioned out of homelessness.

When Uber and Lyft first arrived on the transportation scene in D.C. in 2014, Alicia was enticed by their promise and joined the ranks of the first Uber drivers in the city. She felt like she was a part of something novel and important. The job provided her with the flexibility she desired given that she was still recovering from her illness and could not work full-time. She was also relieved to finally have reliable employment after years of difficulty. As an Uber driver, Alicia took pride in the high ratings she received from her passengers. She was also dedicated to the company's mission. She wore an Uber shirt when she drove (as well as when she was not driving), and she spread the word to her friends and family about the company. When Uber put out a call to drivers to help support their legalization in the District, Alicia went to the Council hearings for the new law.<sup>13</sup> On her way to the hearing, wearing her Uber t-shirt, she crossed through a picket line of taxi drivers protesting the legalization of TNCs.

Alicia drove for Uber for two years. Then, in the fall of 2016, she found herself locked out of the app and could not figure out how to fix the problem. She tried calling Uber, but could not get through to a live person who could help her. So she eventually went to Uber's new regional office in Forestville, Maryland. When she asked in person why she was locked out, Uber told her that her account was deactivated because she failed the background check. Alicia was confused. Uber already knew about her record because she passed a background check when she signed up to drive for them in 2014. The background check in 2014 was identical to the background check from 2016. More importantly, Alicia had driven for them for two years already. Now she was losing her job for that same record, which was more than seven years old at that point.

The alienating process of "deactivation" from an app as a form of termination is now a familiar phenomenon for gig workers. In June of 2017, National Public Radio ran a story called "Uber Drivers Criticize Company for Shady Firing Practices."<sup>14</sup> "If you've ever been fired," says host Robert Siegel, "you know how bad that can feel. Well, now imagine that instead of your boss or HR telling you that face to face, you get the news as a pop-up alert on your smartphone."<sup>15</sup> Reporter Aarti Shahani interviewed Eric Heustis, who began driving for Uber because he was able to work despite a disability from a motorcycle accident ("Uber is great for me because I don't need anybody. I can get in my car and go").<sup>16</sup> Heustis was deactivated from Uber after undergoing a renewed background check conducted by Checkr, a consumer reporting agency, which wrongfully reported

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13. D.C. CODE § 50-301.03(16A-C) (2018) (defining a "private vehicle-for-hire," and "private vehicle-for-hire company," and a "private vehicle-for-hire-operator").

14. Aarti Shahani, *Uber Drivers Criticize Company for Shady Firing Practices*, NAT'L PUB. RADIO (June 8, 2017), <https://www.npr.org/2017/06/08/532120218/uber-drivers-criticize-company-for-shady-firing-practices>.

15. *Id.*

16. *Id.*

misdeemeanor marijuana convictions for which he had received a pardon from the governor of Vermont. Shahani reports about Heustis' reaction: "Heustis was sweating bullets. He'd recently bought a used car just to drive for Uber. While he was invested in them, he says, they're not invested in him."<sup>17</sup> The whiplash of deactivation is particularly upsetting for drivers who rely on Uber as their sole source of income.

Uber's change in policy, leading to the trend of deactivation of long-term drivers for records they already disclosed (years prior, in some cases) reflects a combination of local regulations creating exclusions of drivers based on certain criminal convictions, and apparent shifts internal to the company. In Alicia's case, the three local regulations in D.C., Maryland and Virginia that legalized TNCs also tightened requirements regarding background checks. In Virginia, the law states that a TNC "shall not authorize an individual to act as a TNC partner if the criminal history records check . . . reveals that the individual . . . has ever been convicted or has ever pled guilty or nolo contendere to a violent felony offense . . ." or "within the preceding seven years has been convicted of a felony."<sup>18</sup> In Maryland, the law is much broader, and allows the disqualification of drivers who have "been convicted of a crime that bears a direct relationship to the applicant's or licensee's fitness to serve the public as a for-hire driver."<sup>19</sup> The law legalizing Uber's activities in the District following the hearing Alicia attended, the Vehicle for Hire Innovation Amendment Act of 2014, requires that TNCs run background checks on potential drivers and disqualifies applicants who were convicted within the past seven years of a list of serious felony offenses or "crimes of violence" defined by D.C. Code Ann. § 23-1331(4).<sup>20</sup> While Alicia's conviction may have disqualified her to work in Virginia and Maryland, it would not disqualify her to drive in D.C. under the D.C. regulation. Uber's criminal records exclusion policy, therefore, seems to reflect a lowest common denominator of the most restrictive regulations regarding criminal background checks for TNC drivers.

### *B. Drivers on the Front Lines of "Disruption"*

Alicia's role in pioneering Uber's presence in the District, lobbying for its legalization, and being excluded from its platform following legalization follows a pattern familiar to those closely observing the methods of TNCs.<sup>21</sup> Uber and Lyft both have become known for their "disruptive" approach to doing business.<sup>22</sup> This approach involves breaking local laws until local governments accommodate them with changes to regulations. Rebecca Smith of the National Employment Law

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17. *Id.*

18. VA. CODE § 46.2-2099.49 (2017).

19. MD. CODE § 10-104(e) (2013).

20. D.C. CODE § 50-303(26(c)) (2018).

21. JOY BORKHOLDER ET AL., NAT'L EMP'T LAW PROJECT, UBER STATE INTERFERENCE: HOW TNCs BUY, BULLY, AND BAMBOOZLE THEIR WAY TO DEREGULATION (2018), <http://www.nelp.org/content/uploads/Uber-State-Interference-How-Transportation-Network-Companies-Buy-Bully-Bamboozle-Their-Way-to-Deregulation.pdf>.

22. Michael Horn, *Uber, Disruptive Innovation and Regulated Markets*, FORBES (June 20, 2016), <https://www.forbes.com/sites/michaelhorn/2016/06/20/uber-disruptive-innovation-and-regulated-markets>.

Project labels TNC lobbying tactics “Barge in, Buy, Bully, and Bamboozle.”<sup>23</sup> First, the TNC will “barge into a market, sometimes illegally, and spend large amounts of money to quickly develop a customer and driver base.”<sup>24</sup> Next, the companies “buy access by deploying an overwhelming number of well-connected lobbyists to make contact with elected officials and their staff.”<sup>25</sup> They then “bully elected leaders by individually targeting them and issuing ultimatums.”<sup>26</sup> And last, they “bamboozle customers to take political action, frequently misrepresenting the facts, and often via the app itself.”<sup>27</sup>

The exclusion of drivers with old criminal history contains a bitter irony given that the companies’ tactics themselves involve illegality. During the process of establishing themselves in new cities, Uber and Lyft have regularly received criminal citations throughout the country for illegal operation.<sup>28</sup> Uber has invested considerable resources into collecting information that would help them evade local push-back and enforcement from city governments.<sup>29</sup> A New York Times article from March 3, 2017 described Uber’s sophisticated tool called “Greyball” which “uses data collected from the Uber app and other techniques to identify and circumvent officials who were trying to clamp down on the ride-hailing service.”<sup>30</sup> While the companies were taking large-scale legal risks, drivers were on the front lines of legal battles with local governments, as well as battles with taxi drivers regarding the impact of Uber and Lyft on their employment and wages. In their effort to win over city government, the companies galvanized support from their “driver-partners” for testimony in front of city councils when cities considered new regulations related to TNCs.<sup>31</sup> An article from DNA Info Chicago described a face-off between cab drivers and Uber and Lyft drivers at a 2016 city council hearing regarding new regulations for TNCs requiring drivers to have chauffeur’s licenses and requiring TNCs to pay an estimated “\$15 million in fines and fees owed the city.”<sup>32</sup> The gallery at the hearing was full, “for the most part, with Uber and Lyft drivers wearing blue and pink T-shirts.”<sup>33</sup> The scene during the 2014 D.C. Council hearing regarding the “Vehicle for Hire Innovation Amendment Act of 2014” was remarkably similar to that in Chicago.<sup>34</sup> Like in Chicago, Uber and Lyft drivers came to the hearings (Uber drivers wore black Uber shirts and Lyft drivers wore hot pink Lyft shirts) to outnumber taxi-cab drivers who attended to protest the

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23. BORKHOLDER, *supra* note 21.

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.*

28. V.B. Dubal, *The Drive to Precarity: A Political History of Work, Regulation, & Labor Advocacy in San Francisco’s Taxi & Uber Economics*, 38 BERKELEY J. EMP. & LAB. L. 73, 125 (2017).

29. Mike Isaac, *How Uber Deceives the Authorities Worldwide*, N.Y. TIMES (Mar. 3, 2017), <https://nyti.ms/2lng2Y8>.

30. *Id.*

31. Ted Cox, *Uber, Lyft Drivers Clash With Cabbies at Council Hearing*, DNAINFO CHI. (May 25, 2016), <https://www.dnainfo.com/chicago/20160525/downtown/uber-lyft-drivers-clash-with-cabbies-at-council-hearing>.

32. *Id.*

33. *Id.*

34. Katie Wells et al., *Uber, the “Metropolypse,” and Economic Inequality in D.C.*, WORKING CLASS PERSP. (Feb. 5, 2018), <https://workingclassstudies.wordpress.com/2018/02/05/uber-the-metropolypse-and-economic-inequality-in-d-c/>.

unfair advantage these companies were getting due to fewer restrictions placed on their work.<sup>35</sup> Uber spent approximately \$300,000 lobbying the D.C. Council, and called the resulting law “one of the best models for us.”<sup>36</sup> At this hearing, Lyft painted itself as a type of collective service where neighbors with cars helped those who were without.<sup>37</sup> Jim Black, Executive Vice President of Lyft, stated: “Some of the great benefits of peer-to-peer transportation networks come from the casual drivers who live throughout the region and provide rides in their own neighborhoods. A casual driver, however, is the most likely to forego applying if . . . needless barriers are in place.”<sup>38</sup> While Uber and Lyft seemed like exciting developments for unemployed and under-employed D.C. residents, particularly people with barriers to employment such as criminal records, shifts in policy which coincided with the legalization of the companies changed that. Alicia, along with other drivers who took the heat for the companies when they first arrived in the District and helped the companies lobby for legalization, were kicked off the platforms without warning when company policy regarding criminal records exclusions changed.

### III. IN BETWEEN THE LAWS: IN SEARCH OF LEGAL REMEDIES FOR ALICIA

Finding a legal remedy for Alicia and others like her is a challenge. In order to fight back against the sudden deactivation from her full-time employment, Alicia must overcome: (1) mandatory arbitration agreements limiting her litigation options; (2) classification as an “independent contractor” rather than an employee, depriving her of access to federal discrimination protections; (3) exemption from D.C.’s Fair Criminal Records Screening Amendment Act; (4) lack of access to disparate impact claims under local human rights law despite the apparent availability of these claims; and (5) limitations due to local regulations requiring more rigorous background checks.

#### *A. Barrier One: Arbitration Agreements*

Uber drivers sign a lengthy mandatory arbitration agreement at the time of application, agreeing to individual mandatory arbitration for all claims “arising out of” the agreement.<sup>39</sup> Arbitration deprives drivers of access to the courts for collective and class actions, and prevents them from joining together to address company-wide policies. Mandatory arbitration agreements are governed by the Federal Arbitration Act, which provides that “a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract . . . shall be valid, irrevocable, and enforceable, save upon such

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35. Cox, *supra* note 31.

36. Wells et al., *supra* note 34.

37. See *Transportation Network Services Innovation Act of 2014: Hearing on Bill 20-753 Before the Council of the D.C. Comm. on Transp. and the Env’t* 35 (Sept. 30, 2014) (statement of Jim Black, Executive Vice-President, Lyft), <http://lims.dccouncil.us/Download/31519/B20-0753-HearingRecord2.pdf> (implying that Lyft is a company that allows casual drivers to drive their “neighbors” around).

38. *Id.*

39. *Terms*, UBER, <https://www.uber.com/legal/terms/us/> (last visited Apr. 22, 2018).

grounds as exist at law or in equity for the revocation of any contract.”<sup>40</sup> The Ninth Circuit’s 2016 case of *Mohamed v. Uber Technologies* took up the issue of the enforceability of these agreements in the instance of drivers who are foreclosed from a day in court when de-activated due to a background check (specifically, a violation of the Fair Credit Reporting Act).<sup>41</sup> Following a successful challenge to the enforce-ability of the arbitration clause at the district court level, the Ninth Circuit reversed and held that the agreements were not unconscionable.<sup>42</sup>

Despite mandatory arbitration agreements, companies cannot require employees or contractors to surrender the right to submit an individual discrimination complaint to agencies enforcing federal and local discrimination law where those agencies become parties to the complaint.<sup>43</sup> In *EEOC v. Waffle House*, the Supreme Court held that because the Equal Employment Opportunity Commission (EEOC) was not a party to the arbitration agreement of a claimant who filed a charge of disability discrimination, the EEOC was not bound by the arbitration agreement.<sup>44</sup> Even while agencies enforcing discrimination law, such as the EEOC or the D.C. Office of Human Rights (OHR), have independent authority to investigate discrimination claims despite arbitration agreements, the discrimination protections afforded by these agencies have limitations and barriers when it comes to TNCs.

### *B. Barrier Two: Independent Contractor Classification and Deprivation of Federal Discrimination Remedies*

Classification of Uber and Lyft drivers as independent contractors rather than employees prevents these drivers from accessing several legal protections, including discrimination claims under Title VII of the Civil Rights Act.<sup>45</sup> Independent contractors also do not have access to minimum wage thresholds, unemployment insurance, worker’s compensation, paid sick leave, payroll tax contributions for Social Security and Medicare, the right to collectively bargain under the National Labor Relations Act, and other protections such as retirement savings plans.<sup>46</sup> While the Supreme Court has not defined a single rule or test for classification as an independent contractor or employee, “the general rule is that an individual is an independent contractor if the payer has the right to control or direct only the result of the work and, not what will be done and how it will be done.”<sup>47</sup>

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40. 9 U.S.C. § 2 (2012); *see also* EEOC v. Waffle House, Inc., 534 U.S. 279, 289 (2002).

41. *Mohamed v. Uber Techs., Inc.*, 848 F.3d 1201, 1206–07 (9th Cir. 2016).

42. *Id.* at 1210–11.

43. *Waffle House*, 534 U.S. at 294.

44. *Id.*

45. Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* (2012); *see also* U.S. EQUAL EMP. OPPORTUNITY COMM’N, NO. 915.002, ENFORCEMENT GUIDANCE ON THE CONSIDERATION OF ARREST AND CONVICTION RECORDS IN EMPLOYMENT DECISIONS UNDER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964 (2012), [https://www.eeoc.gov/laws/guidance/arrest\\_conviction.cfm](https://www.eeoc.gov/laws/guidance/arrest_conviction.cfm).

46. KARLA WALTER & KATE BAHN, CTR. AM. PROGRESS, RAISING PAY AND PROVIDING BENEFITS FOR WORKERS IN A DISRUPTIVE ECONOMY (2017), <https://www.americanprogress.org/issues/economy/reports/2017/10/13/440483/raising-pay-providing-benefits-workers-disruptive-economy/>.

47. *Independent Contractor Defined*, INTERNAL REVENUE SERV. (Oct. 31, 2017), <https://www.irs.gov/businesses/small-businesses-self-employed/independent-contractor-defined>.



Recent litigation regarding this issue in California has raised, but not yet settled, questions regarding whether Uber and/or Lyft drivers should be classified as employees, and has highlighted the challenges to applying traditional classification tests to the gig economy. In *Cotter v. Lyft*, Judge Vince Chhabria of the Northern District of California said during a motion hearing that when asked to decide the classification issue, “the jury . . . will be handed a square peg and asked to choose between two round holes. The test the California courts have developed over the 20<sup>th</sup> century for classifying workers isn’t very helpful in addressing this 21<sup>st</sup> century problem.”<sup>48</sup> His reasoning regarding the ways in which Lyft drivers might be employees tracks the circumstances of Lyft drivers who do the work full-time:

Lyft might not control when the drivers work, but it has a great deal of power over how they actually do their work, including the power to fire them if they don’t meet Lyft’s specifications about how to give rides. And some Lyft drivers no doubt treat their work as a full-time job—their livelihood may depend solely or primarily on weekly payments from Lyft, even while they lack any power to negotiate their rate of pay. Indeed, this type of Lyft driver—the driver who gives “Lyfts” 50 hours a week and relies on the income to feed his family—looks very much like the kind of worker the California Legislature has always intended to protect as an “employee.”<sup>49</sup>

The EEOC is also taking note of the need for a shift in the definition of employee when it comes to the gig economy. In the EEOC’s Strategic Enforcement Plan for 2017–2021, the agency describes the following substantive change in its “Emerging and Developing Issues priority”: “The Commission adds a new priority to address issues related to complex employment relationships and structures in the 21<sup>st</sup> century workplace, focusing specifically on temporary workers, staffing agencies, independent contractor relationships, and the on-demand economy.”<sup>50</sup> Meanwhile, however, claims against Uber and Lyft submitted to the EEOC by Alicia (and potentially other drivers like her) are rejected because of a lack of jurisdiction due to their status as independent contractors rather than employees.<sup>51</sup>

This lack of federal jurisdiction means that Alicia, and other black Uber or Lyft drivers who were deactivated due to a broadened criminal records exclusion policy, do not currently have access to a federal claim addressing the racially disparate impact of these policies. Where an employer has an overly-broad criminal records exclusion, an employee or applicant may have a claim of disparate impact race discrimination under Title VII.<sup>52</sup> According to the EEOC:

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48. *Cotter v. Lyft, Inc.*, 60 F. Supp. 3d 1067, 1081 (N.D. Cal. 2015).

49. *Id.* at 1069.

50. U.S. EQUAL EMP. OPPORTUNITY COMM’N, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION STRATEGIC ENFORCEMENT PLAN FISCAL YEARS 2017–2021 (2017), <https://www.eeoc.gov/eeoc/plan/sep-2017.cfm>.

51. See Hannah Levintova, *Uber Just Got Hit with Another Legal Fight*, MOTHER JONES (Oct. 7, 2016), <https://www.motherjones.com/media/2016/10/uber-racial-bias-lawsuit-liss-riordan/>.

52. See 42 U.S.C. § 2000e-2 (2012).

A covered employer is liable for violating Title VII when the plaintiff demonstrates that the employer's neutral policy or practice has the effect of disproportionately screening out a Title VII-protected group and the employer fails to demonstrate that the policy or practice is job related for the position in question and consistent with business necessity.<sup>53</sup>

The claims can therefore be broken down into two prongs: (1) the employer has an overly broad criminal records exclusion policy with a disparate impact on a protected group, and (2) the employer cannot show that the exclusion is job-related and consistent with business necessity.

To ensure compliance with Title VII and the consideration of relevant information during the job application process, the EEOC recommends an individualized assessment of applicants with criminal history.<sup>54</sup> This assessment should provide each applicant with an opportunity to “demonstrate that the [criminal records] exclusion does not properly apply to him; and considers whether the individual's additional information shows that the policy as applied is not job related and consistent with business necessity.”<sup>55</sup> Relevant factors include:

The facts or circumstances surrounding the offense or conduct; the number of offenses for which the individual was convicted; older age at the time of conviction, or release from prison; evidence that the individual performed the same type of work, post conviction, with the same or a different employer, with no known incidents of criminal conduct; the length and consistency of employment history before and after the offense or conduct; rehabilitation efforts, e.g., education/training; employment or character references and any other information regarding fitness for the particular position; and whether the individual is bonded under a federal, state, or local bonding program.<sup>56</sup>

Uber's policy does not include an opportunity for an individualized assessment of applicants with criminal history. At the time of Alicia's deactivation, the policy was the following:

[A] minimum of 1 year U.S. licensing history; a clean Motor Vehicle Record; no major moving violations, such as DUIs or reckless driving; no more than 3 minor moving violations in the past 3 years, such as speeding tickets or failure to obey traffic laws, unless local law establishes different screening standards; a clean criminal record that does not include convictions for prior offenses specified by local law.<sup>57</sup>

While local regulations applicable to TNCs mandate criminal background checks and the disqualification of drivers based on certain criminal records, Alicia

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53. U.S. EQUAL EMP. OPPORTUNITY COMM'N, *supra* note 44.

54. *Id.*

55. *Id.*

56. *Id.*

57. *What Does the Background Check Include?*, UBER, <https://help.uber.com/h/6970e704-95ac-4ed3-9355-e779a86db366> (last visited Apr. 15, 2018).

is an example of a driver who was deactivated even when her offense would not disqualify her under D.C. law.

Both Uber and Lyft have made public statements regarding the racially disparate impact of background checks. Former Uber CEO and co-founder Travis Kalanick has written publicly about the issue. Kalanick wrote an article published in Medium on October 5, 2016, titled “Record Shouldn’t Bar Ex-Offenders From Work.”<sup>58</sup> He writes: “[I]t’s amazingly hard to find work if you are one of the 70 million-plus Americans with a criminal record because many companies ask about your history up front . . . That is why Uber supports ‘Ban the Box’ and has removed this step from our hiring process.”<sup>59</sup> Some of the most relevant research regarding the disparate impact of background checks on black communities in D.C. was funded by Uber itself.<sup>60</sup> For example, a research report funded by Uber establishes the disproportionate impact of criminal records exclusions on black workers in D.C.<sup>61</sup> Specifically, the report finds that “[f]ollowing the national trend, Black or ethnic minority residents are disproportionately represented across every part of the criminal justice system in Washington, DC—from arrests to jail to prison.”<sup>62</sup> At the hearing in Chicago described above, a Lyft VP pointed to the fact that fifty-eight percent of Lyft drivers are minorities, and argued that a requirement for fingerprinting would have a disproportional impact on those drivers.<sup>63</sup> Rather than allowing for automatic deactivation based on a background check, thereby disproportionately deactivating more black drivers, Uber and Lyft could both incorporate the readily available guidance from the EEOC to shape their policies in a way that allows for individual assessments of drivers while still complying with local regulations. Federal discrimination law, however, is not currently positioned to hold them accountable if they continue to use broad criminal records exclusion policies.

### C. Barrier Three: Exemption from Local “Ban the Box” Law

Uber benefits from an exemption to D.C.’s Fair Criminal Record Screening Amendment Act, despite public statements of support for such laws. The District’s “Ban the Box” hiring law, the Fair Criminal Record Screening Amendment Act of 2014 (FCRSAA), prevents employers from inquiring about criminal records during the application process, and also prevents employers from revoking conditional offers of employment due to criminal history without a “legitimate business reason.”<sup>64</sup> This law protects workers classified as independent contractors, given that the definition of “employment” within the statute extends to “temporary or seasonal work, contracted work, contingent work, and work through the services of a temporary or other employment agency or any form of vocational or educational training with or without pay, where the physical location

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58. Travis Kalanick, *Record Shouldn’t Bar Ex-Offenders From Work*, MEDIUM (Oct. 5, 2016), <https://medium.com/@UberPubPolicy/record-shouldnt-bar-ex-offenders-from-work-a42732d2861b>.

59. *Id.*

60. See DUANE, REIMAL & LYNCH, *supra* note 5, at 11.

61. *Id.*

62. *Id.*

63. See Cox, *supra* note 31.

64. D.C. CODE § 32-1342 (2018).

of the employment is in whole or substantial part within the District of Columbia.”<sup>65</sup> While the law is in place to prevent people like Alicia from losing employment opportunities due to stale criminal history, there is an exception in the law for employers who are required by federal or District law to consider an applicant’s criminal record for the purposes of employment.<sup>66</sup> Because of the Vehicle for Hire Innovation Amendment Act of 2014, whose supporters included drivers excluded from the platform following the law’s passage, OHR has found Uber to be exempt from the FCRSAA.

*D. Barrier Four: Unavailability of Disparate Impact Claims at OHR*

While claims of disparate impact are unavailable at the EEOC due to the independent contractor classification, OHR could theoretically be an alternative venue for similar claims. The D.C. Human Rights Act (“the Act”) designates a cause of action for discrimination based on disparate impact, but OHR declined to pursue a disparate impact claim in Alicia’s case. The Act makes it unlawful for an employer “[t]o fail or refuse to hire, or to discharge[] any individual” either “wholly or partially for a discriminatory reason based upon the actual or perceived[] race” of the individual.<sup>67</sup> Under the Act, “[a]ny practice which has the effect or consequence of violating any of the provisions of this chapter shall be deemed to be an unlawful discriminatory practice.” Courts have therefore held that the Act authorizes discrimination claims based on a disparate impact theory.<sup>68</sup> Like the FCRSAA, the Human Rights Act also has a definition of “employee” which includes independent contractors. The Act defines “employer” as “any person who, for compensation, employs an individual, except for the employer’s parent, spouse, children or domestic servants, engaged in work in and about the employer’s household; any person acting in the interest of such employer, directly or indirectly; and any professional association.”<sup>69</sup> An employee is “any individual employed by or seeking employment from an employer; provided, that the term ‘employee’ shall include a paid intern.”<sup>70</sup>

While complainants still have a right to file in court when OHR dismisses a discrimination complaint, Uber’s arbitration agreement prevents claimants from pursuing the same case in court.<sup>71</sup> Therefore, without the option of bringing a disparate impact complaint at OHR, Uber drivers like Alicia are left without a remedy regarding race discrimination based on disparate impact.

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65. D.C. CODE § 32-1341(7) (2018).

66. D.C. CODE § 32-1342(c)(1) (2018).

67. D.C. CODE § 2-1402.11(a)(1) (2018).

68. D.C. CODE § 2-1402.68 (2018); *see also* Davis v. District of Columbia, 949 F. Supp. 2d 1, 11 (D.D.C. 2013); Gay Rights Coal. of Georgetown Univ. Law Ctr. v. Georgetown Univ., 536 A.2d 1, 29 (D.C. 1987) (en banc) (“As the legislative history demonstrates, the Council imported into the Human Rights Act, by way of the effects clause, the concept of disparate impact discrimination developed by the Supreme Court in Griggs v. Duke Power Co., 401 U.S. 424 (1971).”).

69. D.C. CODE § 2-1401.02(10) (2018).

70. D.C. CODE § 2-1401.02(9) (2018).

71. *U.S. Terms of Use*, UBER (Dec. 13, 2017), <https://www.uber.com/legal/terms/us/> (Users agree “to resolve any claim that you may have against Uber on an individual basis in arbitration”).

### *E. Barrier Five: Local Regulations Regarding Background Checks*

The local regulations that took effect over the past five years in D.C., Maryland, and Virginia regarding TNCs create problems for drivers with stale criminal history who were previously eligible to drive for the companies. As noted above, even if a driver is not excluded by D.C.'s regulation of vehicle-for-hire drivers, the laws in the neighboring jurisdictions of Virginia and Maryland (both of which are more broad and vague) might cause a criminal records exclusion. The close proximity of D.C. to Maryland and Virginia potentially leads to exclusion of drivers like Alicia, because TNC drivers in D.C. often cross over into these other jurisdictions when transporting passengers. Regulations like these, which do not allow for individualized assessments of applicants with criminal history but instead create more generalized exclusions, produce the risk of disproportionately screening out more black applicants.

## IV. LOCAL POLICY APPLICATIONS

The racialized patterns of exclusion within the gig economy illustrate the need for policies that more deeply acknowledge the interaction between race and exclusions based on criminal history. While the private sector could, on its own, implement internal policies to provide a more individualized assessment of drivers with criminal records and work actively to eradicate racial bias within their hiring and firing policies, local governments also wield significant influence over the ways in which gig economy employers enter into and shape their communities.

Below is a discussion of three approaches that local governments could use when seeking a remedy for the issues faced by gig workers like Alicia: (1) incorporating research regarding desistance from crime as well as “individualized assessments” of applicants with criminal history into local regulations involving criminal records exclusions; (2) allowing for disparate impact race discrimination claims at local discrimination agencies; and (3) expanding the reach of local criminal record sealing and/or expungement statutes.

### *A. Incorporating Desistance Research and “Individualized Assessments”*

Currently, local regulations of TNCs reflect a variety of approaches to the criminal records exclusion. Focusing on the D.C./Maryland/Virginia region highlights the confusion that these differences can cause in application. If jurisdictions took into account the desistance time periods repeatedly indicated by this research, exclusions based on criminal convictions would be no more than three years for a misdemeanor conviction and seven years for a felony conviction.<sup>72</sup> However, a blanket exclusion based on the amount of time that has passed since the time of the conviction still leaves a broad criminal records exclusion policy likely to disproportionately impact black communities. The guidance produced by the EEOC regarding an individualized assessment of criminal history can therefore be instructive in the context of these regulations as well.<sup>73</sup> While D.C.'s FCRSAA

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72. See Dietrich, *supra* note 9, at 164.

73. See U.S. EQUAL EMP. OPPORTUNITY COMM'N, *supra* note 44.

exists to encourage this type of individualized assessment into an employer's consideration of factors that comprise a "legitimate business reason" for a criminal records exclusion, the Act is undermined by the existence of regulations such as those governing TNCs, which do not incorporate the same individualized assessment and which exempt TNCs from the FCRSAA.<sup>74</sup>

### *B. Allowing Disparate Impact Discrimination Claims at Local Agencies*

The ability to bring claims based on a disparate impact theory of race discrimination is critical to the enforcement of local human rights laws. Given its expansive definition of "employee," the D.C. Human Rights Act is well situated to enforce human rights within D.C. even where workers are classified as "independent contractors" and employers use mandatory arbitration agreements. In this way, OHR could potentially fill the gap in discrimination law (experienced by Alicia) which exists due to the EEOC's current lack of clarity regarding the classification of workers in the gig economy. When local agencies charged with investigating discrimination complaints decline to investigate disparate impact claims despite having statutory authority to do so, gig workers like Alicia are left without a remedy for overly broad criminal records exclusions both at the federal level and the local level.

### *C. Expanding Criminal Record Sealing and Expungement*

While record sealing or expungement cannot, acting alone, end the disparate impact of criminal records exclusions on black and brown communities, it can remove an employer's access to records on the front end of the application process (rather than relying on "ban the box" or discrimination law as protections after job offers are revoked). In Washington D.C., legislators have cited to the history of mass incarceration in black communities when introducing the expansion of record sealing laws.<sup>75</sup> Current law in the District limits the availability of record sealing to a list of misdemeanor convictions, one felony conviction (Felony Bail Reform Act Violation), and both misdemeanor and felony non-convictions depending on the amount of time that has passed as well as other factors.<sup>76</sup> This means that, regardless of the amount of time that has passed, District residents with old (even decades old) felony convictions are unable to seal their records. However, the following bills—which would amend the record sealing statute—are currently under review by the D.C. Council: (1) the Criminal Record Expungement Amendment Act (B22-045); the Record Sealing Modernization Act (B22-447); and the Second Chance Amendment Act (B22-560).<sup>77</sup> These bills all seek to expand the

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74. See D.C. CODE § 32-1342(d) (2018).

75. *Record Sealing Modernization Amendment Act of 2017: Hearing on Bill 22-0447 Before the Council of the D.C. Comm. on Judiciary and Pub. Safety* 49:40–49:51 (Sept. 19, 2017), [http://dc.granicus.com/MediaPlayer.php?view\\_id=2&clip\\_id=4279](http://dc.granicus.com/MediaPlayer.php?view_id=2&clip_id=4279).

76. D.C. CODE § 16-801(7)-(9) (2018).

77. Criminal Record Expungement Amendment Act, B22-045 (D.C. 2017), <http://lims.dccouncil.us/Legislation/B22-0045>; Record Sealing Modernization Act, B22-447 (D.C. 2017), <http://lims.dccouncil.us/Legislation/B22-0447>; Second Chance Amendment Act, B22-560 (D.C. 2017), <http://lims.dccouncil.us/Legislation/B22-0560>.

number of offenses eligible for sealing and/or expungement in D.C. to include certain felonies and would make the sealing of certain non-conviction records automatic.

Unlike discrimination law, record sealing or expungement laws can address the root issue of a criminal record existing (rather than a criminal record being the basis for discrimination), by proactively limiting the collateral consequences of a conviction “to the period before the person has established a track record of rehabilitation.”<sup>78</sup>

## V. CONCLUSION

Alicia’s story illustrates the alienating experience of being fired due to stale and irrelevant criminal history after investing time, money, personal commitment, unpaid lobbying, and community outreach into her work. It also illustrates the secondary alienation of experiencing the lack of legal remedies for this initial injustice, and the necessity for a racially conscious approach to legal protections regarding barriers to employment resultant from criminal records in the context of the gig economy. Local governments play a critical role in enabling the gig economy as well as addressing barriers to work faced by city residents. Incorporating research regarding desistance and individualized assessments into local regulations excluding workers from employment based on criminal history is one way to reduce barriers to gig economy employment for vast numbers of workers, particularly black and brown workers. Additionally, enabling race discrimination claims based on a theory of disparate impact at local discrimination enforcement agencies would provide a means for residents classified as “independent contractors” asked to sign mandatory arbitration agreements to seek a remedy for systemic discrimination issues within companies otherwise beyond the reach of discrimination enforcement. Lastly, local governments seeking to redress the over-criminalization of communities of color can incorporate the same desistance research into criminal record sealing or expungement laws and expand those laws to include more types of convictions.

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78. Dietrich, *supra* note 9, at 164.