

## EMPLOYEES AS PRICE-TAKERS

by  
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*The question of who is an employee has challenged scholars, jurists, and practitioners since the dawn of labor law. Once some workers had certain protections, such as the right to a minimum wage, collective bargaining rights, and access to workers' compensation and unemployment insurance, debate about exactly which workers were employees entitled to those rights and benefits naturally arose. Recently, the idea of a third or intermediate category that would give workers some of the rights, protections, and benefits of employment, has gained traction, often in response to concerns about the rise in "gig economy" work. In this Article, I critically evaluate proposals for intermediate categories and conclude that the inquiry requires a re-examination of the employment category itself.*

*I argue that the current tests for employment call for a closer look at the triangular relationship between worker, employer, and customer in the context of drivers and other service industry workers. In so doing, I argue that workers who lack significant input into the prices charged for their services or the pay rates they receive ought to be considered employees under the current tests for employment. I demonstrate that prices and pay are more clear-cut indicators of whether the worker is actually a representative of the company for which she is providing services, and is thereby subject to the company's control—the essence of the most widely used test for employee status. Further, a worker's lack of input into prices and pay suggests the work performed is part of the employer's normal course of business. This Article theorizes the triangular relationship and its implications for determining who is an employee, and proposes a rebuttable presumption of employment status for workers who lack a meaningful role in negotiating the prices charged to customers for their services and their own pay.*

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## INTRODUCTION

The question of who is an employee has challenged scholars, jurists, and practitioners since the dawn of labor law. Once some workers had certain protections, such as the right to a minimum wage, collective bargaining rights, and access to workers' compensation and unemployment insurance, debate about exactly which workers were employees entitled to those rights and benefits, as opposed to independent contractors, naturally arose. The categories of employee and independent contractor are not *a priori* legal categories, but rather labels we have chosen to place on

certain relationships.<sup>1</sup> Recently, the idea of a third or intermediate category that would give workers some of the rights, protections, and benefits of employment has gained traction, often in response to concerns about the rise in gig economy work.<sup>2</sup> I critically examine proposals for intermediate categories and conclude that the inquiry requires a re-examination of the employment category itself. In conducting that examination, I determine that the triangular nature of drivers' and other gig economy workers' work relationships offers clues to the employment category.

Scholars have examined the shift in the American workplace from employer-employee relationships of long-term stability and loyalty to contingent, unstable relationships.<sup>3</sup> Scholars are beginning to discuss the extension of this trajectory into work being performed by workers who are purportedly no company's employees.<sup>4</sup> These workers are classified in law for tax, employment, and other purposes as independent contractors. This Article aims to contribute to this scholarship through consideration

<sup>1</sup> "Employment" is a legal category into which the law places certain work relationships, but it is also an economic and social concept that workers and companies use to describe their relationship without considering the legal rights and responsibilities the legal category of employment creates. Brishen Rogers, *Employment Rights in the Platform Economy: Getting Back to Basics*, 10 HARV. L. & POL'Y REV. 479, 497–98 (2016); see Katherine V.W. Stone, *The Decline of the Standard Contract of Employment in the United States: A Socio-Regulatory Perspective*, in RETHINKING WORKPLACE REGULATION: BEYOND THE STANDARD CONTRACT OF EMPLOYMENT 58, 58–59 (Katherine V.W. Stone & Harry Arthurs eds., 2013) (arguing that a standard contract developed in the United States "as a widespread social practice").

<sup>2</sup> See Lawrence F. Katz & Alan B. Krueger, *The Rise and Nature of Alternative Work Arrangements in the United States, 1995-2015* (Nat'l Bureau of Econ. Research, Working Paper No. 22667, 2016), <http://www.nber.org/papers/w22667.pdf>.

<sup>3</sup> See, e.g., CYNTHIA ESTLUND, *REGOVERNING THE WORKPLACE: FROM SELF-REGULATION TO CO-REGULATION* (2010); KATHERINE V. W. STONE, *FROM WIDGETS TO DIGITS: EMPLOYMENT REGULATION FOR THE CHANGING WORKPLACE* (2004); DAVID WEIL, *THE FISSURED WORKPLACE: WHY WORK BECAME SO BAD FOR SO MANY AND WHAT CAN BE DONE TO IMPROVE IT* (2014); Rachel S. Arnow-Richman, *Employment as Transaction*, 39 SETON HALL L. REV. 447 (2009) (offering explanation for shift in types of employment relationships in broader context); Kenneth G. Dau-Schmidt & Timothy A. Haley, *Governance of the Workplace: The Contemporary Regime of Individual Contract*, 28 COMP. LAB. L. & POL'Y J. 313 (2007) (discussing changing nature of employment relationships); Nantiya Ruan & Nancy Reichman, *Hours Equity Is the New Pay Equity*, 59 VILL. L. REV. 35, 41–49 (2014).

<sup>4</sup> Noah D. Zatz, *Working Beyond the Reach or Grasp of Employment Law*, in THE GLOVES-OFF ECONOMY: WORKPLACE STANDARDS AT THE BOTTOM OF AMERICA'S LABOR MARKET 31, 34 (Annette Bernhardt et al. eds., 2008) (noting that the move away from long-term employment with a single, large, vertically integrated employer has led to "work performed outside of any employment relationship"); see, e.g., Lisa J. Bernt, *Suppressing the Mischief: New Work, Old Problems*, 6 NE. U. L.J. 311 (2014); Matthew T. Bodie, *Participation as a Theory of Employment*, 89 NOTRE DAME L. REV. 661 (2013); Jeffrey M. Hirsch, *Employee or Entrepreneur?*, 68 WASH. & LEE L. REV. 353 (2011); James Reif, *'To Suffer or Permit to Work': Did Congress and State Legislatures Say What They Meant and Mean What They Said?*, 6 NE. U. L.J. 347 (2013).

of a possible third category of worker, while exploring the limitations of both traditional and new legal tests used to determine employee classification. It then proposes a pragmatic approach to the current employment tests that takes into account the underlying purposes of labor and employment law and takes serious account of the imbalance of power that inheres in many employment relationships.

Before delving into the employee and independent contractor categories, it is worth pausing to consider their purpose. That is, what problem does labeling a worker an employee seek to solve? Scholars have identified two main purposes of labor law—addressing the imbalance of power between labor and capital and the lack of worker voice or democratic deficit.<sup>5</sup> This Article takes the economic vulnerability that results from the imbalance of power between workers and employers as a starting point for examining the purposes of labor law, and argues that any test for employment should take this imbalance and vulnerability into account. In turn, regulation of the employment relationship should seek to ameliorate this imbalance.<sup>6</sup>

In the United States, two main sets of tests are used to determine who is an employee. One set of tests focuses on control, while the other focuses on the economic reality of the work relationship.<sup>7</sup> Both require

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<sup>5</sup> See, e.g., GUY DAVIDOV, A PURPOSIVE APPROACH TO LABOUR LAW 118–19 (2016); ESTLUND, *supra* note 3, at 74 (describing democratic deficit as “the lack of any mechanism . . . for collective employee participation in workplace governance”).

<sup>6</sup> The minimum wage and the right to collective bargaining are good examples of this attempt to address an imbalance of power. Regulation of the minimum wage is an acknowledgement that the process of agreeing on a price for a worker’s labor is shot through with the worker’s subordination and relative powerlessness—thus, government steps into the relationship to set a wage floor. See 29 U.S.C. § 202 (2012). Likewise, collective bargaining (that is, requiring employers to bargain with their workers’ representatives) is a way of ameliorating the imbalance of power between one worker and his/her employer by allowing workers to band together. Labor law protects workers’ collective bargaining rights and rights to engage in concerted activity. Allowing workers to join together and bargain collectively, as opposed to individually, with their employers (or with firms) is an attempt to ameliorate the imbalance of power in individual bargaining between worker and firm. See 29 U.S.C. § 151 (2012); see also Kate Andrias, *The New Labor Law*, 126 YALE L.J. 2, 5–10 (2016) (identifying labor law’s role in ameliorating economic and political inequality); Cynthia L. Estlund, *The Ossification of American Labor Law*, 102 COLUM. L. REV. 1527, 1529 (2002) (labor legislation sought “to rectify the failings of individual ‘liberty of contract’”); Judy Fudge, *Labour as a ‘Fictive Commodity’: Radically Reconceptualizing Labour Law*, in THE IDEA OF LABOUR LAW 120, 122 (Guy Davidov & Brian Langille eds., 2011) (noting that labor law’s primary purpose has been “conceived as addressing the power imbalance between employees and employers,” but that this purpose has been in tension with other goals).

<sup>7</sup> See 1 RESTATEMENT (SECOND) OF AGENCY § 220 (AM. LAW INST. 1958) (setting out control test); *Brock v. Superior Care, Inc.*, 840 F.2d 1054, 1058–59 (2d Cir. 1988) (describing FLSA economic realities test); *Sec’y of Labor v. Lauritzen*, 835 F.2d 1529, 1535 (7th Cir. 1987) (same).

consideration of a set of factors, with no one factor being determinative. Much has been written in the popular press about gig economy firms' increased use of independent contractors instead of employees.<sup>8</sup> State and local legislatures have enacted reforms in response to concerns about misclassification of workers as independent contractors rather than employees.<sup>9</sup> These new formulations are often variations on a three-factor test in which all three factors must be present.<sup>10</sup> Scholars have proposed that we focus on particular aspects of the work relationship to answer the vexing question of who is an employee.<sup>11</sup> Scholars and policymakers have proposed intermediate categories, sometimes in response to seemingly new kinds of work relationships.<sup>12</sup> However, intermediate categories are not new—Canadian scholar Harry Arthurs was one of the first to identify an intermediate category of workers, “dependent contractors,” fifty years ago, focusing on their need for collective bargaining.<sup>13</sup> More recently, the discussion around an intermediate category in the United States has

<sup>8</sup> See, e.g., Rachel Botsman, *Can the Sharing Economy Provide Good Jobs?*, WALL ST. J. (May 10, 2015), <http://www.wsj.com/articles/can-the-sharing-economy-provide-good-jobs-1431288393>; Lydia DePillis, *How Uber-Type Jobs Are Driving Inequality, and What to Do About It*, WASH. POST (May 21, 2015), <http://www.washingtonpost.com/blogs/wonkblog/wp/2015/05/21/how-uber-type-jobs-are-driving-inequality-and-what-to-do-about-it>; Dave Jamieson, *Meet the Real Amazon Drones*, HUFFINGTON POST (Apr. 24, 2014), [http://www.huffingtonpost.com/2014/04/24/amazon-delivery-lasership\\_n\\_5193956.html](http://www.huffingtonpost.com/2014/04/24/amazon-delivery-lasership_n_5193956.html); Farhad Manjoo, *Uber's Business Model Could Change Your Work*, N.Y. TIMES (Jan. 28, 2015), <https://nyti.ms/1v4XBqO>; James Surowiecki, *Gigs with Benefits*, NEW YORKER (July 6 & 13, 2015), <http://www.newyorker.com/magazine/2015/07/06/gigs-with-benefits>; Derek Thompson, *A World Without Work*, ATLANTIC (July 2015), <http://www.theatlantic.com/magazine/archive/2015/07/world-without-work/395294>.

<sup>9</sup> See, e.g., SEATTLE, WASH., MUN. CODE § 6.310.735 (2015); N.Y. LAB. LAW § 861-a (McKinney 2017); see also Anna Deknatel & Lauren Hoff-Downing, *ABC on the Books and in the Courts: An Analysis of Recent Independent Contractor and Misclassification Statutes*, 18 U. PA. J.L. & SOC. CHANGE 53, 55 (2015); CATHERINE K. RUCKELSHAUS & SARAH LEBERSTEIN, NAT'L EMP'T LAW PROJECT, NELP SUMMARY OF INDEPENDENT CONTRACTOR REFORMS: NEW STATE AND FEDERAL ACTIVITY (2011), <http://www.nelp.org/content/uploads/2015/03/2011IndependentContractorReformUpdate.pdf?nocdn=1>.

<sup>10</sup> See Deknatel & Hoff-Downing, *supra* note 9, at 65–71.

<sup>11</sup> See, e.g., Bodie, *supra* note 4, at 692–95; Benjamin Means & Joseph A. Seiner, *Navigating the Uber Economy*, 49 U.C. DAVIS L. REV. 1511, 1524 (2016).

<sup>12</sup> See, e.g., SETH D. HARRIS & ALAN B. KRUEGER, THE HAMILTON PROJECT, A PROPOSAL FOR MODERNIZING LABOR LAWS FOR TWENTY-FIRST-CENTURY WORK: THE “INDEPENDENT WORKER” 15 (2015); Mark R. Warner, Opinion, *Facing the Gig Economy*, WASH. POST, June 19, 2015, at A21; Lauren Weber, *What if There Were a New Type of Worker? Dependent Contractor*, WALL ST. J., Jan. 28, 2015, at B7; Elizabeth Kennedy, Comment, *Freedom from Independence: Collective Bargaining Rights for “Dependent Contractors,”* 26 BERKELEY J. EMP. & LAB. L. 143, 147–48 (2005).

<sup>13</sup> H. W. Arthurs, *The Dependent Contractor: A Study of the Legal Problems of Counter-vailing Power*, 16 U. TORONTO L.J. 89, 90 (1965).

grown more robust and is often coupled with concerns about the rise in gig economy work.<sup>14</sup> Meanwhile, outside the United States, some European countries, as well as Canada, have had intermediate categories, usually called “dependent contractors,” for some time.<sup>15</sup>

Through critical examination, I conclude that an intermediate category could potentially extend rights and benefits to workers who do not receive them today. But it also has the problematic potential of shunting workers who should be considered full-fledged employees into an intermediate category with fewer protections than they ought to enjoy.<sup>16</sup> Some calls for intermediate categories cite the increasing difficulty of figuring out whether a given worker is an employee or an independent contractor as a good reason to initiate a third category.<sup>17</sup> But, I argue, this is not a good reason to have an intermediate category and has the potential to further complicate, rather than simplify, the inquiry.

I conclude that intermediate categories might be useful in the U.S. context, for the purpose of extending some rights, benefits, and protections to workers who would not ordinarily be considered employees under U.S. law. But, intermediate categories should not be used to avoid the difficulty of parsing new labor relationships that defy easy categorization under traditional analyses. This is a possibly pragmatic, but unprincipled, compromise that risks reducing the rights and benefits some workers may be entitled to as employees. To deal with this grey area, we will need to reconsider the employment category itself.

Returning to that inquiry, I propose a new approach to applying the existing tests for employment status, based on the triangular relationship between worker, company, and customer that exists in many gig economy and service relationships. Taking account of this relationship recharacterizes the predominant tests used to determine employment status to look more clearly at the underlying purposes of the status. I argue for a rebuttable presumption of employment status for workers who lack significant input into the prices charged to customers and their own pay rates.

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<sup>14</sup> See Katz & Krueger, *supra* note 2, at 15–16 (measuring incidence of gig economy work).

<sup>15</sup> See generally Brian A. Langille & Guy Davidov, *Beyond Employees and Independent Contractors: A View from Canada*, 21 COMP. LAB. L. & POL’Y J. 7 (1999) (reviewing Canada’s attempt to define “employees”).

<sup>16</sup> See Miriam A. Cherry & Antonio Aloisi, “*Dependent Contractors*” in *The Gig Economy: A Comparative Approach*, 66 AM. U. L. REV. 635, 639 (2017) (noting the risk that companies will downgrade employees to intermediate status in the face of an intermediate category).

<sup>17</sup> See, e.g., HARRIS & KRUEGER, *supra* note 12, at 5, 8–9.

I examine these issues through the lens of drivers, the most common job category in the United States.<sup>18</sup> While the contested status of Uber and Lyft drivers is well-known, many traditional drivers, such as cab drivers and FedEx delivery drivers, have also been classified as independent contractors, and this status has been adjudicated in courts and administrative agencies with varying results.<sup>19</sup> Further, the triangular nature of many drivers' work relationships is similar in important ways to other work in the gig economy. Both drivers and gig economy workers conduct their work through a company from which customers seek a service—thus a triangle comprised of the company, the worker, and the customer.<sup>20</sup> This Article begins to theorize the triangular relationship and its implications for determining who is an employee.

For the most part, drivers' work forms one part of a three-pronged, or triangular, relationship, consisting of the driver, a customer who seeks a ride or delivery, and a company from which the customer seeks the service. In this way, drivers are similar to other workers in the “gig” or “platform” economy.<sup>21</sup> Work in the gig economy is also characterized by a triangular relationship. A company or platform links consumers seeking a product or service to a worker who can provide it. Put another way, the

<sup>18</sup> Quoc Trung Bui, *Map: The Most Common Job in Every State*, PLANET MONEY (Feb. 5, 2015), <http://www.npr.org/sections/money/2015/02/05/382664837/map-the-most-common-job-in-every-state>.

<sup>19</sup> See, e.g., *Slayman v. FedEx Ground Package Sys., Inc.*, 765 F.3d 1033, 1035 (9th Cir. 2014) (finding delivery drivers to be employees under Oregon law); *Saleem v. Corp. Transp. Grp., Ltd.*, 52 F. Supp. 3d 526, 528 (S.D.N.Y. 2014) (finding livery drivers to be independent contractors under federal and New York law). Katherine Stone notes trucking companies' widespread practice of converting their employee drivers into independent contractor owner-operators, while requiring them to follow detailed company regulations including exclusivity and uniform requirements. Katherine V.W. Stone, *Regulation of Employment and Labor*, in 7 INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL AND BEHAVIORAL SCIENCES 571, 573 (James D. Wright ed., 2d ed. 2015).

<sup>20</sup> See Yuval Feldman, *Ex-Ante vs. Ex-Post: Optimizing State Intervention in Exploitative Triangular Employment Relationships*, 30 COMP. LAB. L. & POL'Y J. 751, 752 (2009).

<sup>21</sup> The terms “gig economy” and “platform economy” can be confusing and overlapping. While the word “gig” connotes a temporary or part-time job, many use the term “gig economy” to refer to the proliferation of online apps whereby workers or service providers can connect with customers through the app, whether the work is full- or part-time, long- or short-term, and is a worker's main source of income or supplements other income. For instance, Hathaway & Muro define “gig economy” as “the matching of freelance workers or service providers to customers on a digital platform or marketplace.” Ian Hathaway & Mark Muro, *Tracking the Gig Economy: New Numbers*, BROOKINGS INST. (Oct. 13, 2016), <https://www.brookings.edu/research/tracking-the-gig-economy-new-numbers/#footref9>. Others prefer the term “platform economy” as more descriptive. See Rogers, *supra* note 1, at 480 (describing “platform economy” companies “which provide online platforms that match consumers with workers for short-term tasks”). However, I use the term “gig economy” here given its wider use.

platform engages workers to provide a service to its customers. Put yet a third way, customers seek a service from or through the company, and a worker provides that service.<sup>22</sup> Drivers, whether they work in the gig economy or not, also tend to work in triangular relationships. They provide a service—the transportation of persons or things from one place to another—in the context of a triangular relationship, where their contact with the company’s customers, and the work they do, is mediated through the company. In disputes over drivers’ employment status, the significance of the company’s role in mediating the driver-customer relationship is often contested.<sup>23</sup> So, drivers’ work relationships may shed light on others in the gig economy.

The triangular relationship I tease out here is distinct from the triangular relationship identified in the joint employer context. In a joint employer inquiry, courts analyze a worker’s relationship to two (or more) entities and consider whether one, the other, or both entities are that worker’s employer.<sup>24</sup> A joint employer inquiry considers “whether workers who are already employed by a primary employer are also employed by a second employer.”<sup>25</sup> In contrast, the employee/independent contractor inquiry is meant to “determine if particular workers are independent of *all* employers.”<sup>26</sup>

I focus on drivers for several additional reasons. First, looking at drivers across a variety of industries allows us to see the similarities between gig economy work and work in the broader service sector. Drivers span the gig economy—for some, driving may be a *gig*, that is, a short-term, part-time or supplemental source of income; for others, it may be their full-time, long-term job, and not a gig at all. Driving also spans the platform economy—including online app-based companies such as Uber and Lyft, as well as more traditional taxi services that are operated via a more old-fashioned dispatch service rather than an online app or platform.

Second, some of the earliest academic literature to address the question of who is an employee deals with the question of a firm’s responsibility for the torts of its independent contractors.<sup>27</sup> These inquiries have ob-

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<sup>22</sup> The framing of the nature of the triangular relationship matters greatly for legal determinations of employment status, thus my possibly repetitive, but slightly different, characterizations.

<sup>23</sup> See Rogers, *supra* note 1, at 480.

<sup>24</sup> See *Zheng v. Liberty Apparel Co.*, 355 F.3d 61, 67–68 (2d Cir. 2003).

<sup>25</sup> *Id.* at 68.

<sup>26</sup> *Id.*

<sup>27</sup> See, e.g., O. W. Holmes, *Agency*, 4 HARV. L. REV. 345 (1891); Clarence Morris, *The Torts of an Independent Contractor*, 29 ILL. L. REV. 339 (1934); Roscoe T. Steffen, *Independent Contractor and the Good Life*, 2 U. CHI. L. REV. 501 (1935); John H. Wigmore, *Responsibility for Tortious Acts: Its History*, 7 HARV. L. REV. 315 (1894).



vious implications for drivers, whose work subjects them, and others, to a relatively high likelihood of injury.<sup>28</sup>

Third, by the nature of their occupation, drivers work off of their companies' premises, and operate costly "tools" (in the form of vehicles) that they are often required to furnish themselves. As we will see when considering the legal test for employment, these two facts may suggest drivers are good candidates for classification as independent contractors.

Fourth, drivers' work demonstrates some of the many ways technology impacts work across industries. For instance, technology has changed the way consumers shop, leading to a vast increase in online purchases. Instead of an individual consumer getting in her car or riding public transportation to a store, she may be more likely to order a product online for delivery. Thus, the demand for delivery workers may have increased over the last decade. However, consumer convenience and overall efficiency,<sup>29</sup> in the form of online ordering, home delivery, and less consumer driving, may come at too high a cost to delivery workers.<sup>30</sup>

Further, new technologies play an important role in the work of, and the demand for, drivers. New technology makes gig economy companies (such as Uber, Lyft and other transportation network companies, as some regulators call them) possible.<sup>31</sup> Many gig economy companies are built using web-based applications that allow consumers to seek services via an app that they download on their phone or access via the web. The services these companies provide—in the case of Uber and Lyft, rides for hire—are not new, but the method by which they are sought and paid for would not be possible without new technologies.

Technology may also alter the analysis about whether a worker is an independent contractor or an employee. For instance, GPS technology allows firms to track drivers' locations, and cell phones allow firms to be in contact with drivers while they are driving. Thus, a company may have

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<sup>28</sup> See Joe Fitzgerald Rodriguez, *Uber Settles Wrongful Death Lawsuit of Sofia Liu*, S.F. EXAMINER (July 14, 2015), <http://www.sfexaminer.com/uber-tentatively-settles-wrongful-death-lawsuit-of-sofia-liu>. In fact, the Bureau of Labor Statistics reports that heavy and tractor-trailer truck drivers experienced the highest number of fatal injuries of any occupation, and that transportation incidents resulted in more workplace deaths than any other type of incident in 2015. News Release, Bureau of Labor Statistics, U.S. Dep't of Labor, National Census of Fatal Occupational Injuries in 2015, at 1–2 (Dec. 16, 2016), <https://www.bls.gov/news.release/pdf/foi.pdf>.

<sup>29</sup> See generally Brishen Rogers, *The Social Costs of Uber*, 82 U. CHI L. REV. DIALOGUE 85 (2015) (describing how Uber "created a far more efficient market for car-hire services").

<sup>30</sup> See Jamieson, *supra* note 8.

<sup>31</sup> See PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, RULEMAKING 12-12-011, DECISION ADOPTING RULES AND REGULATIONS TO PROTECT PUBLIC SAFETY WHILE ALLOWING NEW ENTRANTS TO THE TRANSPORTATION INDUSTRY (Dec. 20, 2012), <http://docs.cpuc.ca.gov/PublishedDocs/Published/G000/M077/K112/77112285.PDF>.

significant control over a driver even while she is driving off the company's premises, in a way that was not possible without new technologies. In fact, the level of control and surveillance Uber has over its drivers prompted one court to draw a comparison to Michel Foucault's *Discipline and Punish: The Birth of the Prison*.<sup>32</sup>

Finally, the specter of obsolescence hangs over these inquiries. Technology may soon make some drivers obsolete. The driverless car has been heralded as one of the more promising robotic innovations of recent years.<sup>33</sup> Indeed, scholars and regulators have begun to consider the legal and ethical ramifications of driverless cars.<sup>34</sup> For those who work as drivers, advances in driverless technology may mean the work becomes scarcer as firms begin to use driverless vehicles to transport passengers or deliver goods.<sup>35</sup> However, it is likely that driving work will remain important to the American economy and these questions will remain relevant for some time to come. Furthermore, because the nature of drivers' relationships with the companies for which they work and the customers seeking their services bears important similarities to other relationships in the gig economy, and the broader service economy, analyses of these relationships and their ramifications for employment can help us understand these relationships in those broader contexts.

This Article proceeds as follows. Part I surveys the various tests to determine who is an employee, through the lens of drivers, and includes scholarly critiques of the tests. It also uses these cases to illuminate the nature of the triangular relationship. Part II examines proposals for intermediate categories in the United States, and the intermediate category

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<sup>32</sup> O'Connor v. Uber Techs., Inc., 82 F. Supp. 3d 1133, 1151–52 (N.D. Cal. 2015).

<sup>33</sup> See Daniela Rus, *The Robots Are Coming: How Technological Breakthroughs Will Transform Everyday Life*, FOREIGN AFFAIRS, July–Aug. 2015, at 2, 3.

<sup>34</sup> See, e.g., Dorothy J. Glancy, *Autonomous and Automated and Connected Cars—Oh My! First Generation Autonomous Cars in the Legal Ecosystem*, 16 MINN. J.L., SCI. & TECH. 619 (2015); Bill Vlasic & Neal E. Boudette, *A Tesla Driver Using Autopilot Dies in a Crash*, N.Y. TIMES, June 30, 2016, at A1 (noting that the National Highway Traffic Safety Administration was set to release regulations regarding the testing of self-driving vehicles on public roads in July 2016).

<sup>35</sup> For instance, Wal-Mart, the largest retailer in the United States, recently sought permission from regulators to test drones for home delivery and pick-up. See Nathan Layne, *Exclusive: Wal-Mart Seeks to Test Drones for Home Delivery, Pickup*, REUTERS (Oct. 27, 2015), <http://www.reuters.com/article/us-wal-mart-stores-drones-exclusive-idUSKCN0SK2IQ20151027>. However, advances in technology may actually benefit workers. For instance, semi-autonomous trucks, which still require the presence of a driver, may improve conditions for truck drivers and attract more workers to an industry that has a hard time attracting enough workers. Jenny Che, *Self-Driving Trucks Will Actually Be Great for Truckers, for Now*, HUFFINGTON POST (Nov. 11, 2015), [http://www.huffingtonpost.com/entry/self-driving-trucks-will-be-great-for-truckers-for-now\\_5637984ce4b00aa54a4eded9?utm\\_hp\\_ref=business](http://www.huffingtonpost.com/entry/self-driving-trucks-will-be-great-for-truckers-for-now_5637984ce4b00aa54a4eded9?utm_hp_ref=business); Emily Nash, *Weekend News & Commentary, ON LABOR* (Nov. 15, 2015), <http://onlabor.org/2015/11/15/weekend-news-commentary-november-14-15-2015/>.

in operation in Canada. Part III critiques these proposals, addressing their promises and limitations. Part IV returns to the employee/independent contractor distinction and proposes a new test for employment for workers in triangular relationships. Part V concludes.

## I. THE LEGAL TESTS AND REFORM EFFORTS

This Part analyzes the current legal tests for employment status through the lens of drivers. Section I.A begins by exploring the significance of employment status and its regulation of the work relationship. Sections I.B and I.C discuss and critique the two main tests used to determine employment status in the United States—the common law control test and the economic realities test. Section I.D takes up a new gloss on the common law test focusing on entrepreneurialism. Finally, Section I.E addresses reform tests enacted at the state level that seek to provide workers with expanded rights and protections.

### A. *Why Does Employment Status Matter?*

Before addressing the legal tests used to determine employment status, it is important to consider why employment status matters. What protections, benefits, and obligations does employment status confer on employers and employees? The answer is a hodge-podge of benefits, and decision-makers were not necessarily considering background protections, benefits, and obligations when deciding whether to change or add a right or obligation to the employment landscape.<sup>36</sup>

First, employment status is of central importance for labor and employment law. Employment status determines whether a worker is entitled to the minimum wage and overtime under federal and state law.<sup>37</sup> Employment status also determines whether a worker is covered under federal labor legislation, such as the National Labor Relations Act (NLRA) and its attendant rights to collective bargaining and protection from retaliation for concerted action.<sup>38</sup> Only employees are protected by Title VII's antidiscrimination provisions.<sup>39</sup>

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<sup>36</sup> See Marc Linder, *Dependent and Independent Contractors in Recent U.S. Labor Law: An Ambiguous Dichotomy Rooted in Simulated Statutory Purposelessness*, 21 COMP. LAB. L. & POL'Y J. 187, 187 (1999) (noting that the application of hundreds of statutes and regulations hinges on employee status).

<sup>37</sup> See 29 U.S.C. §§ 206–207 (2012); N.Y. LAB. LAW §§ 652–665 (McKinney 2017); CAL. LAB. CODE § 2750.5 (West 2017).

<sup>38</sup> See 29 U.S.C. § 157.

<sup>39</sup> See *O'Connor v. Davis*, 126 F.3d 112, 113–14 (2d Cir. 1997) (student intern not covered under Title VII because she was not an employee); Nancy E. Dowd, *The Test of Employee Status: Economic Realities and Title VII*, 26 WM. & MARY L. REV. 75, 75–76 (1984), Danielle Tarantolo, Note, *From Employment to Contract: Section 1981 and Anti-*

In addition, only employees are entitled to unemployment, worker's compensation, or Social Security retirement benefits.<sup>40</sup> Although employers are generally not required to provide retirement benefits, if they do, these benefits are governed by the federal Employee Retirement and Insurance Security Act (ERISA), which applies only where an employer/employee relationship exists.<sup>41</sup> The Affordable Care Act's employer health insurance requirements apply only to employees.<sup>42</sup>

In addition to labor and employment law, employment status matters for myriad substantive areas, such as tax, intellectual property, torts, and criminal law.<sup>43</sup> For instance, intellectual property rights are governed in part by whether a worker is an employee or an independent contractor.<sup>44</sup> The work-for-hire doctrine in federal copyright law provides that an employer is the author of a work made by an employee, unless the parties expressly agree otherwise in writing.<sup>45</sup> Thus, in the intellectual property arena, workers may prefer not to be employees, as default rules allow independent contractors to retain ownership and control over their inventions.<sup>46</sup>

Courts and agencies may use different standards to determine employee classification, depending on the purpose for the classification. For instance, the New York State Worker's Compensation Board applies a common law test to determine if a worker is an employee, unless the worker is in the construction or trucking industries, in which case a statutory test applies.<sup>47</sup> A separate economic realities test applies under the Fair Labor Standards Act.<sup>48</sup> Thus, a worker can technically be an employee under one test, but not under another.<sup>49</sup> Over the last ten to fifteen

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*discrimination Law for the Independent Contractor Workforce*, 116 YALE L.J. 170, 173 (2006).

<sup>40</sup> See NYS DEP'T OF LABOR, ANNUAL REPORT OF THE JOINT ENFORCEMENT TASK FORCE ON EMPLOYEE MISCLASSIFICATION 2 (2014).

<sup>41</sup> See *Vizcaino v. Microsoft Corp.*, 120 F.3d 1006, 1008–09 (9th Cir. 1997).

<sup>42</sup> See I.R.C. § 4980H(c)(4) (addressing employers' responsibilities regarding health coverage).

<sup>43</sup> See *Bodie*, *supra* note 4, at 666–74.

<sup>44</sup> See *id.* at 671–73.

<sup>45</sup> See *Cnty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 737 (1989). Under the shop-right doctrine, an employer may use its employee's patent without compensating the employee. See Paul M. Rivard, *Protection of Business Investments in Human Capital: Shop Right and Related Doctrines*, 79 J. PAT. & TRADEMARK OFF. SOC'Y 753, 757 (1997).

<sup>46</sup> Rivard, *supra* note 45, at 753.

<sup>47</sup> N.Y. WORKERS' COMP. LAW § 2(4) (McKinney 2017); N.Y. LAB. LAW §§ 861-c, 862-b (McKinney 2017).

<sup>48</sup> See *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 730 (1947); *United States v. Silk*, 331 U.S. 704 (1947).

<sup>49</sup> Sanjukta M. Paul, *The Enduring Ambiguities of Antitrust Liability for Worker Collective Action*, 47 LOY. U. CHI. L.J. 969, 987 (2016) (noting that a worker might in theory

years, states have enacted worker-protective reforms, including legislating the distinction between an employee and an independent contractor.<sup>50</sup> The effects of these reforms are a subject of scholarly and advocate interest.<sup>51</sup>

### B. *The Common Law Control Test*

The predominant test for employment status is the common law control test.<sup>52</sup> The test has been used since well before the New Deal. It has its origins in English common law and was historically used to determine the liability of a master for the torts of his servant.<sup>53</sup> It has since been used by the IRS to determine tax liability,<sup>54</sup> is the test used under the NLRA,<sup>55</sup> the Americans with Disabilities Act,<sup>56</sup> ERISA,<sup>57</sup> and many state wage-and-hour and other laws for which employment status is relevant.<sup>58</sup> Scholars and jurists have roundly critiqued the importation of the common law test, with its purpose of determining liability to third parties, into statutory employment and labor law, which have other purposes.<sup>59</sup> Nonetheless, the Restatement (Second) of Agency is a widely-used source for the common law test,<sup>60</sup> and thus a helpful starting point.<sup>61</sup> Using the

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be classified as an employee for some purposes and an independent contractor for others).

<sup>50</sup> See Deknatel & Hoff-Downing, *supra* note 9, at 64.

<sup>51</sup> See, e.g., *id.*; RUCKELSHAUS & LEBERSTEIN, *supra* note 9, at 3.

<sup>52</sup> Bodie, *supra* note 4, at 675.

<sup>53</sup> See Steffen, *supra* note 27, at 502.

<sup>54</sup> I.R.C. § 3121(d)(2) (2012) (defining employee as “any individual who, under the usual common law rules applicable in determining the employer-employee relationship, has the status of an employee”); Treas. Reg. § 31.3121(d)-1(c)(2) (2012) (finding an employment relationship exists “when the person for whom services are performed has the right to control and direct the individual who performs the services, not only as to the result to be accomplished by the work but also as to the details and means by which that result is accomplished,” and listing other control factors).

<sup>55</sup> In response to a Supreme Court decision finding newspaper boys to be employees under a reading of the NLRA focusing on its history and purpose, Congress amended the statute to specifically exclude independent contractors. See *NLRB v. United Ins. Co. of Am.*, 390 U.S. 254, 256 (1968) (discussing *NLRB v. Hearst Publications, Inc.*, 322 U.S. 111 (1944)). The Supreme Court later held that Congress intended courts to apply agency principles to employee/independent contractor determinations under the NLRA. *Id.* The D.C. Circuit recently reframed the control test for purposes of the NLRA in *FedEx Home Delivery v. NLRB*, focusing on entrepreneurial opportunity. 563 F.3d 492, 497–99 (D.C. Cir. 2009).

<sup>56</sup> See *Clackamas Gastroenterology Assocs v. Wells*, 538 U.S. 440 (2003).

<sup>57</sup> See *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318 (1992); *Vizcaino v. Microsoft Corp.*, 120 F.3d 1006, 1009–10 (9th Cir. 1997).

<sup>58</sup> See *Linder*, *supra* note 36, at 195–96.

<sup>59</sup> *Id.*

<sup>60</sup> See, e.g., *Darden*, 503 U.S. at 324; *Cnty. for Creative Non-Violence v. Reid*, 490

traditional language of master/servant, it defines a servant as “a person employed to perform services” for another and “subject to the other’s control or right to control.”<sup>62</sup> It goes on to list ten, non-exhaustive factors to be used in determining whether someone performing work for another is an employee (“servant”) or independent contractor.<sup>63</sup>

In practice, the common law test takes slightly different formulations across jurisdictions and agencies. For instance, New York courts focus on how much control a putative employer exerts over “the results produced or the means used to achieve the results.”<sup>64</sup> In doing so, they look to “whether the worker (1) worked at his own convenience, (2) was free to engage in other employment, (3) received fringe benefits, (4) was on the employer’s payroll and (5) was on a fixed schedule.”<sup>65</sup> Two of these factors, whether the worker was on the employer’s payroll and whether she received fringe benefits, seem to beg the question and are easily manipulated by employers.<sup>66</sup> Unsurprisingly, drivers claiming they were misclassified as independent contractors have not fared well under New York law.<sup>67</sup> While recent statutory reforms have altered New York’s test for

U.S. 730, 751–52 (1989).

<sup>61</sup> See *Carlson v. FedEx Ground Package Sys., Inc.*, 787 F.3d 1313, 1318 (11th Cir. 2015) (citing *Keith v. News & Sun Sentinel Co.*, 667 So.2d 167, 171 (Fla. 1995)); *Bodie*, *supra* note 4, at 676.

<sup>62</sup> 1 RESTATEMENT (SECOND) OF AGENCY § 220(1) (AM. LAW INST. 1958).

<sup>63</sup> The following are the ten factors:

(a) the extent of control which, by the agreement, the master may exercise over the details of the work; (b) whether or not the one employed is engaged in a distinct occupation or business; (c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision; (d) the skill required in the particular occupation; (e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work; (f) the length of time for which the person is employed; (g) the method of payment, whether by the time or by the job; (h) whether or not the work is a part of the regular business of the employer; (i) whether or not the parties believe they are creating the relation of master and servant; and (j) whether the principal is or is not in business.

*Id.* § 220(2).

<sup>64</sup> *Bynog v. Cipriani Grp., Inc.*, 802 N.E.2d 1090, 1093 (N.Y. 2003).

<sup>65</sup> *Id.*

<sup>66</sup> That is, employers may prefer to use independent contractors in part to avoid paying payroll taxes and benefits. If we are concerned with independent contractor misclassification, baking circular factors into the test of employment status seems counterintuitive.

<sup>67</sup> See *Saleem v. Corp. Transp. Grp., Ltd.*, 52 F. Supp. 3d 526, 528 (S.D.N.Y. 2014) (finding limo drivers to be independent contractors under New York and federal law); *Browning v. CEVA Freight, LLC*, 885 F. Supp. 2d 590, 592 (E.D.N.Y. 2012) (delivery drivers); *Velu v. Velocity Express, Inc.*, 666 F. Supp. 2d 300, 302–03 (E.D.N.Y. 2009) (same).

truckers and delivery drivers, the impact of those reforms remains to be seen.<sup>68</sup>

However, New York is in accord with other jurisdictions in broadly focusing the inquiry on whether the purported employer controls the manner and means by which the work is achieved, or merely controls the result.<sup>69</sup> This inquiry itself is problematic on many levels. On the surface, it is problematic because the law itself gives little guidance about *what* degree of control is necessary for a worker to be an employee,<sup>70</sup> leading courts to resort not only to the usual interpretive tools of legislative intent and the like, but also to normative judgments about what work is or ought to be, and what independence and entrepreneurialism are and ought to be.<sup>71</sup> Of course, this critique can be, and has been, levied in many doctrinal areas.<sup>72</sup> But the employment question has especially vexed jurists and scholars.<sup>73</sup>

While it appears New York courts are concerned with *actual* control exerted by the purported employer,<sup>74</sup> in contrast, California courts consider the purported employer's *right* to control details of the work, and consider this the most important factor.<sup>75</sup> The employer's *right* to dis-

<sup>68</sup> See Naomi Sunshine, *New York Takes Steps to Protect Misclassified Workers*, N.Y. EMP. ADVOC., Oct. 2014, at 26, 26–28.

<sup>69</sup> See, e.g., *D & R Constr. v. Workers' Comp. Appeal Bd.*, 167 A.3d 837, 843 (Pa. Commw. Ct. 2017).

<sup>70</sup> See Noah D. Zatz, *Beyond Misclassification: Tackling the Independent Contractor Problem Without Redefining Employment*, 26 A.B.A.J. LAB. & EMP. L. 279, 281 (2011).

<sup>71</sup> See Rogers, *supra* note 1, at 493. For instance, Justice Souter has pointed out that in previous cases applying the agency test, “disparate results do not necessarily reflect wildly varying terms of the particular employment contracts involved, but represent different judgments about the desirability of holding an employer liable for his subordinates’ wayward behavior.” *Faragher v. City of Boca Raton*, 524 U.S. 775, 796 (1998); see also Zatz, *supra* note 70, at 283.

<sup>72</sup> See Brian A. Langille & Guy Davidov, *Beyond Employees and Independent Contractors: A View from Canada*, 21 COMP. LAB. L. & POL’Y J. 7, 40–41 (1999).

<sup>73</sup> See Rogers, *supra* note 1, at 483–87.

<sup>74</sup> But see *In re FedEx Ground Package Sys., Inc., Emp’t Practices Litig.*, 273 F.R.D. 424, 454 (N.D. Ind. 2008) (finding that the “right to control is ‘the critical inquiry’ under New York law” (quoting *Bynog v. Cipriani Grp., Inc.*, 802 N.E.2d 1090, 1092–93 (N.Y. 2003))).

<sup>75</sup> *S.G. Borello & Sons, Inc. v. Dep’t of Indus. Relations*, 769 P.2d 399, 404 (Cal. 1989). This difference is especially significant in the class action context, when parties dispute commonality. For instance, in the FedEx multi-district litigation regarding independent contractor classification, the district court found that class certification was appropriate in states where the test focused on the *right* to control but not in states where the focus was on *actual* control, stating that actual control requires an individualized inquiry into the relationship between FedEx and each driver. Right to control, the court found, could be determined based on standardized contracts and other company policies. See *In re FedEx Ground Package Sys., Inc.*, 273 F.R.D. at 434–35; see also EVE H. CERVANTEZ, CLASS AND COLLECTIVE ACTION CERTIFICATION OF INDE-

charge at will is considered a strong indication of an employment relationship.<sup>76</sup> California courts may consider the economic reality factors delineated under the FLSA (discussed *infra* Part I.C) as well.

California courts do balance the right to control test, derived in the common law context, with a purposive approach.<sup>77</sup> In the leading case on the issue, the California Supreme Court explicitly calls for applying the above factors in light of “the history and fundamental purposes of the statute” in question.<sup>78</sup>

Neither the agency test nor the New York or California lists of factors explicitly inquire into *how* a worker’s pay is set or the worker’s role in determining how much the company will charge a customer for her services. Some articulations of the control test do address whether a worker is paid based on time spent or by the job (or some other measure), the rationale being that a worker paid by the job has more opportunity for profit by, for instance, working quickly or using tools that can make the work go faster, and is thus more likely to be an independent contractor.<sup>79</sup> But none consider to what extent the worker can negotiate over her own pay, or over the amount the customer pays for her service.

Nonetheless, a focus on workers’ control over prices and pay addresses several articulated factors in the common law control test, including whether a worker is engaged in a distinct occupation or business (in which case she would be more likely to set her own prices and negotiate over her take rate); whether the work is part of the employer’s regular business (in which case it is more likely to set customer prices); and whether the parties believe they are creating a relationship of employment (although many employees negotiate over their own pay, few choose how much consumers will be charged for their services or for the company’s products).

### 1. *The Control Test in Action: FedEx Drivers*

We can see the control test in action and the disparate ways courts apply it through the example of FedEx drivers. Courts have applied the control test when considering the employment status of FedEx drivers in two major contexts—their coverage under the NLRA and under state and

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PENDENT CONTRACTOR MISCLASSIFICATION CASES 6 (2013) (unpublished manuscript) (on file with author).

<sup>76</sup> *S.G. Borello*, 769 P.2d at 404.

<sup>77</sup> At the federal level, the Supreme Court explicitly rejected a purposive approach in *Darden*, noting its abandonment of an approach that would construe the term “employ” “in the light of the mischief to be corrected and the end to be attained.” 503 U.S. at 325 (quoting *Silk*, *United States v. Silk*, 331 U.S. 704, 713 (1947)).

<sup>78</sup> *S.G. Borello*, 769 P.2d at 405 (quoting *Laeng v. Workmen’s Comp. App. Bd.*, 494 P.2d 1, 4 (Cal. 1972)).

<sup>79</sup> See, e.g., *NLRB v. Hearst Publ’ns, Inc.*, 322 U.S. 111, 117 (1944); *Carlson v. FedEx Ground Package Sys., Inc.*, 787 F.3d 1313, 1324 (11th Cir. 2015).



federal wage and hour laws. Many of the state law adjudications address the control test.

FedEx drivers in over 40 states brought suit alleging that they were employees, rather than independent contractors as FedEx had designated them.<sup>80</sup> The cases were centralized into a multi-district litigation, in part because FedEx's relationship with its drivers was governed by a standard contract and generally applicable policies and procedures set by FedEx.<sup>81</sup> Unsurprisingly, the agreement included language stating that drivers were independent contractors and had discretion as to the manner and means of their work.<sup>82</sup> FedEx set specific requirements for the type, configuration, and appearance of trucks used to deliver its packages, and required drivers to wear uniforms and maintain "proper" grooming.<sup>83</sup> The contract detailed procedures for delivering, picking up, and processing packages. Drivers were required to prepare daily logs and inspection reports, have customers sign FedEx documentation for packages, and follow specific instructions for unsuccessful delivery.<sup>84</sup> They had to be available to work (or make a FedEx-approved substitute driver available) five days a week.<sup>85</sup>

On the other hand, drivers could sell their routes and hire employees (who had to be approved by FedEx and were subject to FedEx's rules).<sup>86</sup> They could also make deliveries in any order they chose.<sup>87</sup> FedEx paid drivers based in part on the number of deliveries they made, did not pay payroll taxes for its drivers, and provided them with 1099s.<sup>88</sup>

Numerous courts have considered the control test under state law as applicable to FedEx drivers. For example, the Ninth and Eleventh Circuits decided separate appeals from the FedEx driver independent contractor misclassification multidistrict litigation.<sup>89</sup> Both courts found that there were questions of fact as to the drivers' employment status and reversed a lower court's finding of summary judgment for FedEx.<sup>90</sup> Interestingly, while California and Florida law require presumptions pointing in

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<sup>80</sup> See *In re Fedex Ground Package Sys., Inc., Emp't Practices Litig.*, Case No. 3:05-MD-527 RLM, 2017 WL 1750154 (N.D. Ind. May 1, 2017).

<sup>81</sup> *Carlson v. FedEx Ground Package Sys., Inc.*, 787 F.3d 1313, 1317 (11th Cir. 2015).

<sup>82</sup> *In re FedEx Ground Package Sys., Inc., Emp't Practices Litig.*, 734 F. Supp. 2d 557, 560 (N.D. Ind. 2010).

<sup>83</sup> *Carlson*, 787 F.3d at 1326.

<sup>84</sup> *Id.* at 1325.

<sup>85</sup> *FedEx Home Delivery v. NLRB*, 563 F.3d 492, 499 n.5 (D.C. Cir. 2009).

<sup>86</sup> *Carlson*, 787 F.3d at 1325.

<sup>87</sup> *Id.* at 1324.

<sup>88</sup> *Id.*

<sup>89</sup> *Id.* at 1316; *Alexander v. FedEx Ground Package Sys., Inc.*, 765 F.3d 981, 987 (9th Cir. 2014).

<sup>90</sup> *Carlson*, 787 F.3d at 1316; *Alexander*, 765 F.3d at 997.

opposite directions with regard to employment status, the courts reached the same conclusion.<sup>91</sup>

In *Carlson v. FedEx Ground Package Systems*, the Eleventh Circuit considered whether FedEx drivers were employees or independent contractors under Florida law.<sup>92</sup> The decision started from the perspective of the FedEx customer, and pointed out that (a) customers' concern is that their packages get delivered and received on time; and (b) they would likely assume FedEx drivers are employees of FedEx. "The law . . . sometimes has a funny way of making hard what would otherwise seem intuitively simple."<sup>93</sup> Thus, the court focused on the customers, the third prong in the triangular relationship between drivers and the companies for which they transport packages or people.

Following the Florida Supreme Court, the Eleventh Circuit took the Restatement (Second) of Agency as its starting point and focused on the extent of control over the details of the drivers' work.<sup>94</sup> The court honed in on the fact that any replacement drivers the FedEx drivers hired must be approved by FedEx, which required not only compliance with applicable government regulations, but also with its own, more stringent requirements.<sup>95</sup> The court also found it significant that FedEx set specific requirements for the type, configuration, and appearance of drivers' trucks, and the tools and instrumentalities used for delivery, including setting recordkeeping methods and requiring the use of a FedEx scanner.<sup>96</sup> In contrast to the D.C. Circuit (discussed *infra* Part I.D), the Eleventh Circuit did not discount the relevance of some aspects of FedEx's control merely because their purpose may have been about customer satisfaction and maintaining FedEx's reputation.

In *Alexander v. FedEx Ground Package Systems*,<sup>97</sup> the Ninth Circuit considered the employment status of FedEx drivers under California law. Importantly, the Ninth Circuit found that FedEx's negotiation of package delivery windows directly with its customers supported a finding of control and employee status.<sup>98</sup> The court began by pointing out that delivery drivers were central to FedEx's business.<sup>99</sup> The Ninth Circuit followed *Bo-*

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<sup>91</sup> California law calls for a presumption of employment when a worker provides services to another. *Narayan v. EGL, Inc.*, 616 F.3d 895, 900 (9th Cir. 2010); *see also* *Rogers*, *supra* note 1, at 487. Florida law calls for a presumption of independent contractor status when the contract between the parties so states. *See Carlson*, 787 F.3d at 1319 (citing *Keith v. News & Sun Sentinel Co.*, 667 So.2d 167, 171 (Fla. 1995)).

<sup>92</sup> *Carlson*, 787 F.3d at 1318.

<sup>93</sup> *Id.* at 1316.

<sup>94</sup> *Id.* at 1318–19.

<sup>95</sup> *Id.* at 1320–21.

<sup>96</sup> *Id.* at 1325.

<sup>97</sup> *Alexander v. FedEx Ground Package Sys., Inc.*, 765 F.3d 981 (9th Cir. 2014).

<sup>98</sup> *Id.* at 990.

<sup>99</sup> *Id.* at 984.

relo's pronouncement that "[t]he principal test of an employment relationship is whether the person to whom service is rendered has the right to control the manner and means of accomplishing the result desired."<sup>100</sup> While the court noted other factors, the right to control factor predominated. The court found that FedEx controlled drivers' and their trucks' appearance through uniform and truck insignia requirements, and exerted enough control over drivers' time to deny summary judgment.<sup>101</sup> Although it found that FedEx did not control all aspects of the work (for instance it did not require drivers to follow a particular route or make deliveries in a certain order), this did not sufficiently counteract the aspects it did control.<sup>102</sup>

## 2. Critiques of the Control Test

The control test is flawed for many reasons, and scholars have widely criticized it.<sup>103</sup> One set of criticisms focuses on the mismatch between the control test and the purposes of the labor and employment laws to which it is applied. For instance, Marc Linder shows that the Supreme Court's 1992 decision in *Nationwide Mutual Insurance Co. v. Darden*<sup>104</sup> set the scene for all laws except the FLSA to be interpreted without regard to their statutory purpose and to rely instead on agency principles looking to the control test.<sup>105</sup> That is, courts have moved away from any examination of statutory purpose and instead have imported a test from the law of agency that both ignores the purposes of the various labor laws and results in a narrower definition of employee than would a purposive approach.<sup>106</sup>

The control test has always been a poor match for the goals of labor and employment law.<sup>107</sup> Given that the control test was developed to ascertain when an employer was liable to a third party for an employee's torts, the test aims to ascertain which party was best able to deter and compensate for a worker's torts. But the answer to that question is often not the same as the answer to the question of when employment rights and duties are appropriate.<sup>108</sup>

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<sup>100</sup> *Id.* at 988 (quoting *S.G. Borello & Sons, Inc. v. Dep't of Indus. Relations*, 769 P.2d 399, 404 (Cal. 1989)).

<sup>101</sup> *Id.* at 995–97.

<sup>102</sup> *Id.* at 997.

<sup>103</sup> *E.g.*, Linder, *supra* note 36; Rogers, *supra* note 1; Julia Tomassetti, *From Hierarchies to Markets: FedEx Drivers and the Work Contract as Institutional Marker*, 19 LEWIS & CLARK L. REV. 1083 (2015); Zatz, *supra* note 70.

<sup>104</sup> 503 U.S. 318 (1992).

<sup>105</sup> *See* Linder, *supra* note 36, at 196.

<sup>106</sup> *Id.* at 230.

<sup>107</sup> *See* Rogers, *supra* note 1, at 486; Zatz, *supra* note 70, at 283.

<sup>108</sup> As Zatz points out, it is "just bizarre to look to agency law to determine when employers have obligations to their workers," given that agency law is concerned with when to hold employers liable to third parties for their workers' (or other agents')

Further, the focus on control misses “the dimension of labor law [that is] concerned with rectifying economic inequality.”<sup>109</sup> A worker may be at a firm’s mercy economically, but that does not mean the firm necessarily exerts day-to-day control or sets rigid unfavorable economic terms. For instance, the firm could shift the risk of loss to the worker by having a commission only set-up for a salesperson. A worker who purchases her own tools and equipment can be vulnerable because she has no guarantee that any company will use that equipment. A driver who is free to seek rides from both Uber and Lyft at the same time may get no work, and therefore no pay, from either company. That economic uncertainty can then be cast as entrepreneurial opportunity for the worker. Noah Zatz points out that “the very thing that labor law should counteract—an employer’s economic power—manifests itself as a contraindication to labor law protection.”<sup>110</sup> Similarly, Julia Tomassetti observes that courts have viewed the very vulnerabilities that would suggest that FedEx drivers might need the protections of labor law as evidence that they have entrepreneurial opportunities, and are thus not employees.<sup>111</sup>

Perhaps most importantly, Zatz points out that the focus on whether a given worker is an employee or an independent contractor overlooks the more important question of the firm’s *motivation* for classifying a worker as an independent contractor. That is, it overlooks both “the firm’s power to choose the methods by which they obtain labor” and the role that legal rules play in firms’ structuring of their relationships with their workers.<sup>112</sup> Instead of taking a static, frozen-in-time view of the relationship between a firm and its worker, he argues, we ought to consider the relationship taking into account the dynamics of employer power that led to the firm’s decision to classify the worker as an independent contractor in the first place.<sup>113</sup> Another test for employment status, the economic realities test, arguably more successfully gets at the underlying purpose of the laws for which it is used. I turn to that test now.

### C. *The FLSA Economic Realities Test*

The Fair Labor Standards Act (FLSA) is somewhat unique in that courts apply a broader “economic realities” test that is meant to bring more workers under the employment umbrella.<sup>114</sup> This is in part based on

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actions, not with employers’ obligations with their workers. Zatz, *supra* note 70, at 282.

<sup>109</sup> *Id.* at 282.

<sup>110</sup> *Id.* at 283.

<sup>111</sup> Tomassetti, *supra* note 103, at 1093–94.

<sup>112</sup> Zatz, *supra* note 70, at 288–89 (emphasis omitted).

<sup>113</sup> *Id.* at 288.

<sup>114</sup> See *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 728–29 (1947) (noting the breadth of FLSA and recognizing its application to “many persons and working

the FLSA's broader definition of "employ" as "to suffer or permit to work" and on the remedial nature and purposes of the statute.<sup>115</sup> The economic realities test focuses on economic dependence, thus it would seem to address some of the control test's shortcomings, as it more directly addresses at least one of the purposes of labor law—remedying inequality of bargaining power.<sup>116</sup> Like the control test, the economic realities test also looks at what has been described as a "nonexclusive and overlapping set of factors,"<sup>117</sup> and asks whether "as a matter of economic reality, the individual is dependent on the entity."<sup>118</sup> Federal courts of appeals have developed lists of five or six factors that are variations on the following: (1) The degree of control exercised by the purported employer over the workers; (2) the worker's opportunity for profit or loss; (3) the worker's investment in the business, in the form of tools, equipment or materials or the hiring of other workers; (4) the degree of skill and independent initiative required for the work; (5) the permanence and duration of the work relationship; and (6) the extent to which the work is an integral part of the purported employer's business.<sup>119</sup>

The economic realities test is an improvement over the control test in that it focuses on some aspects of worker economic vulnerability.<sup>120</sup> But, it still leaves much to be desired. Like the control test, it requires decisionmakers to balance a list of factors without much guidance as to how

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relationships, which prior to this Act, were not deemed to fall within an employer-employee category"). Courts are called on to apply the FLSA economic realities test in two distinct but overlapping situations—when workers claim they have been misclassified as independent contractors instead of employees, and when employees of a contractor claim that they are also employees of the firm that has engaged the contractor (commonly known as a joint employer scenario). See Brishen Rogers, *Toward Third-Party Liability for Wage Theft*, 31 BERKELEY J. EMP. & LAB. L. 1, 13 (2010).

<sup>115</sup> 29 U.S.C. § 203(g) (2012). Of course, many other labor and employment-related statutes, such as state wage and hour laws and Title VII, are also remedial in nature.

<sup>116</sup> For instance, the Supreme Court upheld the constitutionality of the National Labor Relations Act based in part on unions' role in equalizing bargaining power between workers and employers. *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 33–34 (1936); *accord.* *NLRB v. City Disposal Sys., Inc.*, 465 U.S. 822, 834–35 (1984) (recognizing Congress's purpose to equalize bargaining power between management and labor in passing labor legislation).

<sup>117</sup> *Barfield v. N.Y.C. Health & Hosps. Corp.*, 537 F.3d 132, 143 (2d Cir. 2008) (quoting *Zheng v. Liberty Apparel Co.*, 355 F.3d 61, 75 (2d Cir. 2003)).

<sup>118</sup> *Atenor v. D & S Farms*, 88 F.3d 925, 929 (11th Cir. 1996).

<sup>119</sup> *See, e.g., Brock v. Superior Care, Inc.*, 840 F.2d 1054, 1058–59 (2d Cir. 1988); *Sec'y of Labor v. Lauritzen*, 835 F.2d 1529, 1535 (7th Cir. 1987).

<sup>120</sup> DAVIDOV, *supra* note 5, at 115 (noting that a focus on economic realities can address the purposes of labor legislation and the employment category).

to weigh the factors or how much of each factor is enough.<sup>121</sup> Judge Frank Easterbrook addressed this in an important concurring opinion in *Secretary of Labor v. Lauritzen*, where he pointed out that “[a] legal approach calling on judges to examine all the facts, and balance them, avoids formulating a rule of decision.”<sup>122</sup> The approach begs the question of which aspects of economic reality matter, and why.<sup>123</sup> Scholars and jurists have advocated for abandoning the factors test in favor of interpreting the statute in light of its remedial nature and its history and functions.<sup>124</sup> Easterbrook is in the company of many scholars when he proposes a back-to-basics approach of looking at the general purposes of the FLSA.<sup>125</sup>

Further, economic dependence is both overinclusive and underinclusive of the employment category. The concept of dependence as the rule for making someone an employee is overinclusive.<sup>126</sup> Many workers dependent on the companies to whom they provide services otherwise look a lot like independent contractors.<sup>127</sup> For example, consider a heating and air conditioning (HVAC) installer and repair person, who has several large clients in a mid-sized town. Perhaps her large clients are (1) a company that owns and manages office buildings, (2) another company that manages several large condominium developments in the town, and (3) the town’s public school system. These companies may not know the first thing about heating and air conditioning systems; their focus is on

<sup>121</sup> See Katherine V.W. Stone, *Legal Protections for Atypical Employees: Employment Law for Workers Without Workplaces and Employees Without Employers*, 27 BERKELEY J. EMP. & LAB. L. 251, 260 (2006).

<sup>122</sup> *Lauritzen*, 835 F.2d at 1539 (Easterbrook, J., concurring).

<sup>123</sup> *Id.* at 1539–41 (Easterbrook, J., concurring).

<sup>124</sup> *Id.* at 1543 (Easterbrook, J., concurring).

<sup>125</sup> See, e.g., DAVIDOV, *supra* note 5; Rogers, *supra* note 1. One important purpose Easterbrook touches on is, as stated in the FLSA, to correct and eliminate conditions that are detrimental to a minimum standard of living necessary to workers’ “health, efficiency and general well-being.” *Lauritzen*, 835 F.2d at 1543 (Easterbrook, J., concurring) (citing 29 U.S.C. § 202 (1974)). He further discusses the purposes of the FLSA’s overtime provision: (1) to prevent a race to the bottom whereby workers willing to work abnormally long hours take jobs away from workers who prefer to work shorter hours; (2) “to spread work and thereby reduce unemployment, by requiring [an] employer to pay a penalty for using fewer workers” working longer hours; and (3) to protect workers from the health and safety problems associated with longer hours. *Id.* (Easterbrook, J., concurring). He then finds that these purposes strongly suggest that the FLSA applies to migrant farm workers, like those at issue in *Lauritzen*, because of their lack of human capital. *Id.* (Easterbrook, J., concurring).

<sup>126</sup> See Lewis L. Maltby & David C. Yamada, *Beyond “Economic Realities”: The Case for Amending Federal Employment Discrimination Laws to Include Independent Contractors*, 38 B.C. L. REV. 239, 260 (1997) (making a similar point with the example of an all-female construction company and the primary employer in a company town).

<sup>127</sup> Noah Zatz takes this point further with the example of farmers’ economic dependence on railroads (for which they do not provide any services, but on which they depend to get their products to market). See Zatz, *supra* note 70, at 286.

other matters. They may only know that it's too hot, too cold, or that water is dripping from the ceiling vents. So, they call our HVAC expert to come take a look. Perhaps she has a contract with these companies to do regular maintenance, install new systems when needed, and make all repairs. She negotiates the contracts, including how much companies will pay, directly with the companies. She may delegate the work to another repair person when she is on vacation. She decides what equipment to use guided by only general specifications, such as "we want to heat this place as cheaply as possible," or "we're demolishing this school and building a new one in five years so we don't want to spend more than we need to keep it running for that time," or "we want the most energy-efficient system," or "we want the quietest system." She uses her own expertise, training, and experience to devise and execute plans guided by her customers' priorities, such as price, energy efficiency, long vs. short-term cost, volume, and space. In fact, her customers would not know what equipment was appropriate, so they rely on her to decide. She makes her own hours, responding quickly to emergencies to keep her customers happy, but with no expectation that she will be available at particular times.

She is independent in the sense of expertise and lack of control. But she is dependent on each of these customers for her livelihood. If one were to back out it would cause great disruption, and be akin to a person who cobbles together several part-time jobs losing one of them. Is the HVAC technician an employee of each of the companies because she is economically dependent on them? Or is she an independent contractor because she holds the expertise, controls the work, and performs work that is not at the core of her clients' business?<sup>128</sup> Thus the concept of economic dependence may be overinclusive.

The concept of economic dependence as a measure of employment is also underinclusive. Consider day laborers, who are quite economically vulnerable but not dependent on any one employer for their income.<sup>129</sup>

#### *D. The D.C. Circuit/Restatement Entrepreneurial Opportunities Test*

Recently, scholars and jurists have developed a gloss on the control test that focuses on a subset of control test factors that consider a work-

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<sup>128</sup> Scholar Guy Davidov argues that "[p]eople who have their own small business—with a significant degree of independence concerning the running of this business—are not 'employees,' because they are not in a condition of subordination, but, if they are dependent for most of their income on a single client, they need the protection of some (indeed many) labour and employment laws." Guy Davidov, *Reform in Small Steps: The Case of the Dependent Contractor*, in *THE DAUNTING ENTERPRISE OF THE LAW: ESSAYS IN HONOUR OF HARRY W. ARTHURS* 244, 249 (Simon Archer et al. eds., 2017).

<sup>129</sup> See Zatz, *supra* note 70, at 286.

er's "entrepreneurial opportunities." The D.C. Circuit considered the employment status of FedEx drivers in the context of the NLRA in *FedEx Home Delivery v. NLRB*.<sup>130</sup> There, the issue was whether FedEx had committed an unfair labor practice under the NLRA in refusing to negotiate with the union elected by local FedEx drivers.<sup>131</sup> In a 2-1 majority decision, the court found the workers to be independent contractors.<sup>132</sup> Relying on a series of its own precedents regarding the employment status of drivers under the NLRA,<sup>133</sup> the court focused on the elements of the control test that address workers' entrepreneurial opportunities.<sup>134</sup>

In assessing entrepreneurial opportunity, the court focused on the language of the contract between drivers and FedEx.<sup>135</sup> The contract provided that drivers were independent contractors, could hire replacement drivers and helpers without FedEx's approval, could sell their routes, could use their trucks (which had to be affixed with FedEx insignia) for other purposes and could operate multiple routes (for which they would need to hire others).<sup>136</sup> The court found these factors, which illuminated "whether the position presents the opportunities and risks inherent in entrepreneurialism,"<sup>137</sup> outweighed other factors, such as the requirement that drivers wear a FedEx uniform and conform to certain grooming standards; that they drive trucks of a certain color and size range displaying FedEx's logo; that FedEx audited driver performance, required contractors to have a truck and driver available on particular days of the week, and could take away a driver's route if it found the service inadequate; and perhaps most importantly, that drivers performed work that was "a regular and essential part of FedEx Home's normal operations, the delivery of packages."<sup>138</sup> In dissent, Judge Merrick Garland criticized the majority's shift to a focus on one factor—entrepreneurial opportunity—to the exclusion of other factors in the traditional Restatement test.<sup>139</sup>

The court's most interesting move, however, was reading a *mens rea* requirement into the control test by focusing on the *reason* FedEx imposed certain rules, as opposed to the rules' existence.<sup>140</sup> Importantly, the dispute between the majority and dissent in *FedEx Home Delivery v. NLRB*

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<sup>130</sup> *FedEx Home Delivery v. NLRB*, 563 F.3d 492, 495 (D.C. Cir. 2009).

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> *E.g.*, *Corp. Express Delivery Sys. v. NLRB*, 292 F.3d 777, 780 (D.C. Cir. 2002); *C.C. E., Inc. v. NLRB*, 60 F.3d 855, 860–61 (D.C. Cir. 1995); *N. Am. Van Lines, Inc. v. NLRB*, 869 F.2d 596, 600 (D.C. Cir. 1989).

<sup>134</sup> *FedEx Home Delivery*, 563 F.3d at 497–98.

<sup>135</sup> *Id.* at 498; *see also* Tomassetti, *supra* note 103, at 1137–39.

<sup>136</sup> *FedEx Home Delivery*, 563 F.3d at 498–99.

<sup>137</sup> *Id.* at 497.

<sup>138</sup> *Id.* at 500–02.

<sup>139</sup> *Id.* at 507 (Garland, J., dissenting).

<sup>140</sup> *Id.* at 501.



focused on the triangular relationship between FedEx, its drivers, and its customers. How could the majority have ignored the many rules FedEx imposed on its drivers? The court found FedEx's control over the drivers, in the form of training, bi-annual quality control ride-alongs, requirements that drivers display FedEx insignia on their uniforms and trucks and be available to work (or make a truck and driver available) Tuesdays through Saturdays, insufficient for a finding of employee status.<sup>141</sup> Why? Because of FedEx's role as an "intermediary" between diffuse groups of senders and receivers of its packages.<sup>142</sup> Because of this role, the court found FedEx's reputation with its customers was vital to its business.<sup>143</sup> The court suggested that the above indicia of control were of limited importance because they were *intended to* "ensure customer security rather than to control the driver."<sup>144</sup> The court ignored these factors because their purpose was about preserving FedEx's good reputation with the public and responding to customer demands, rather than about FedEx's desire to control its drivers. That is, they were about the relationship of FedEx to its customers rather than about the relationship of FedEx to its drivers. However, the court did not explain why the *purpose* of a company's control over a worker, rather than the *fact* of the control itself, should matter. Indeed, it is reasonable to assume that many companies arrange their affairs as they do for business-related reasons such as customer satisfaction. But it is precisely for this reason that the FedEx drivers ought to have been considered employees. FedEx's relationship with its customers, and the customers' expectation of a consistent level of service, necessitated FedEx's day-to-day control over its drivers.

Following the D.C. Circuit's *FedEx* decision, the Restatement (Third) of Employment emphasizes entrepreneurial opportunity as the operative inquiry under the common law test of employment. It posits that a person who "acts, at least in part, to serve the interests of the employer" where "the employer consents to receive" the services is an employee if "the employer controls the manner and means by which the individual renders services, or the employer otherwise effectively prevents the individual from rendering those services as an independent businessperson."<sup>145</sup> It explains, in turn, that a worker is an independent businessperson "when the individual in his or her own interest exercises entrepreneurial control over important business decisions, including whether to hire and where to assign assistants, whether to purchase and

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<sup>141</sup> *Id.* at 511 (Garland, J., dissenting).

<sup>142</sup> *Id.* at 501.

<sup>143</sup> *Id.*

<sup>144</sup> *Id.* (citing INTERNAL REVENUE SERV., EMPLOYMENT TAX GUIDELINES: CLASSIFYING CERTAIN VAN OPERATORS IN THE MOVING INDUSTRY 23, <https://www.irs.gov/pub/irs-utl/van-ops.pdf>).

<sup>145</sup> RESTATEMENT (THIRD) OF EMPLOYMENT LAW § 1.01(a)(1)–(3) (AM. LAW. INST. 2015).

where to deploy equipment, and whether and when to provide service to other customers.”<sup>146</sup> The Restatement’s “entrepreneurial control” test interacts with the control test in that it comes into play only when a putative employer lacks control over the manner and means by which the worker conducts the work. The D.C. Circuit took a different approach in *FedEx*, privileging the control factors that go to “entrepreneurship” (ability to hire workers, make decisions about equipment, and decide when to work) and discounting others (such as those that show control while working—uniforms, requirements to follow specific procedures, and perhaps most importantly, pay rates).

The entrepreneurial opportunity test seems to focus on one aspect of the control test, and one that it has in common with the economic realities test—that is, the workers’ opportunity for profit or loss. In doing so, it ignores any inequality of bargaining power between worker and firm as well as workers’ economic vulnerability. It takes features that indicate economic vulnerability—such as exposure to increases in gas prices—as evidence that a worker is not an employee.<sup>147</sup> The flip side of entrepreneurial opportunity is economic uncertainty and vulnerability. Addressing inequality of bargaining power and worker vulnerability are normative goals of labor law. A test that instead sees these same features as evidence of independent contractor status is unmoored from these purposes.

### *E. Reform Tests*

In an attempt to address what they see as misuse of the independent contractor label, many states have enacted legislative reforms to clarify the employment category.<sup>148</sup> States have taken various approaches to this strategy, ranging from revising the definition of independent contracting for the purpose of a particular employment benefit, such as workers’ compensation, to industry-specific redefinitions, to setting a definition in statute that applies across all industries and employer obligations.<sup>149</sup>

One primary form these new legislative enactments take is what practitioners term the ABC test. This three-pronged test evaluates whether:

- (1) the individual is free from control and direction . . . both under his[/her] contract for the performance of service and in fact; and
- (2) the service is performed outside the usual course of business of the employer; and,

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<sup>146</sup> *Id.* at § 101(b).

<sup>147</sup> See Zatz, *supra* note 70, at 286; see also Tomassetti, *supra* note 103, at 1112.

<sup>148</sup> See Deknatel & Hoff-Downing, *supra* note 9, at 64.

<sup>149</sup> *Id.*; Sunshine, *supra* note 68, at 26.

(3) the individual is customarily engaged in an independently established trade, occupation, profession or business of the same nature as that involved in the service performed.<sup>150</sup>

The first factor in the ABC test looks at the putative employer's control over the worker, both under a contract and in fact. Unless a company both lacks the right to control and does not actually control the worker, the driver will be considered an employee. It of course overlaps significantly with the control test.

The second factor looks at the type of work performed in relationship to the business of the company. This factor considers whether the work performed is of a type that is a significant part of the company's business. Recent scholarship corresponds to this prong. In *Participation as a Theory of Employment*, Matthew Bodie proposes a participation test to determine employment status and the consequent application of labor and employment law. Under this formulation, decision-makers ought to consider whether the worker is a "participant[] in a common economic enterprise organized into a business entity."<sup>151</sup> This inquiry examines several factors, but in particular whether the work being performed is part of the employer's regular business.

The third ABC factor focuses on the worker and whether he or she has an "independently established trade, occupation, profession, or business" similar to the work she is performing. This factor is the vaguest of the three, and appears to allow for a range of interpretations.<sup>152</sup>

The reform tests have the pragmatic advantage that, in some iterations, all three prongs of the ABC test must be met in order for a worker to be considered an independent contractor. Thus, adjudicators need not engage in weighing the factors against each other. However, the ABC test has some of the same problems of definition and degree that the more traditional tests have. That is, we do not know how much of each factor suffices. For instance, what does it mean to be *customarily* engaged in an independently established trade? How is *customarily* measured, and how much is enough?

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<sup>150</sup> MASS. GEN. LAWS ANN. ch. 149, § 148B(a)(1)–(3) (West 2016).

<sup>151</sup> Bodie, *supra* note 4, at 665.

<sup>152</sup> Compare *Athol Daily News v. Bd. of Review*, 786 N.E.2d 365, 373 (Mass. 2003) (interpreting factor under Massachusetts law to require consideration of whether "the worker is capable of performing the service to anyone wishing to avail themselves of the services or, conversely, whether the nature of the business compels the worker to depend on a single employer for the continuation of the services"), with *AFM Messenger Serv., Inc. v. Dep't of Emp't Sec.*, 763 N.E.2d 272, 285 (Ill. 2001) (interpreting the factor under Illinois law to require that a worker's "entrepreneurial enterprise must enjoy a degree of economic independence such that the enterprise could survive any relationship with the particular person contracting for services." (internal quotation marks omitted)).

In the face of the definitional and pragmatic challenges that both the traditional and reform tests pose, some scholars and commentators have proposed an intermediate category of worker. It is to these proposals, and the problems they seek to address, that I now turn.

## II. A THIRD WAY

This Part further explores the sources of the interpretational difficulties discussed in Part I, and examines both proposed and lived solutions. Section II.A explores the source of definitional and interpretive challenges in identifying and differentiating employer/employee relationships from other kinds of relationships. Section II.B takes up scholarly and policy proposals for intermediate categories, while Section II.C examines the use of an intermediate category in Canada.

### A. *A Problem in Need of a Fix?*

Determining employment status is notoriously difficult. Scholars disagree about the source of interpretive difficulties in determining whether a given worker is an employee, and whether or not they ought to be remedied.<sup>153</sup> For instance, in *Beyond Employees and Independent Contractors: A View From Canada*, Brian Langille and Guy Davidov argue (in contrast to Easterbrook)<sup>154</sup> that the difficulties in interpreting legal terms such as employee and employer do not mean that there is something wrong with the definitions of those terms, but that these difficulties are inherent in the nature of law and legal interpretation.<sup>155</sup> They compare the interpretational project to Hart and Fuller's debate about the nature of law and legal interpretation, and point out that defining who is an employee is an iterative exercise that can be taken up only in the context of specific facts, which may not lend itself to clearer, simpler, or more predictable definitions.<sup>156</sup> They propose looking to the broader goals of labor law, which they see as "expanding capabilities for people to live longer, better, meaningful and productive lives" or, put more succinctly, "human freedom."<sup>157</sup> Their solution, then, is that the decision about whether a

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<sup>153</sup> See, e.g., Richard R. Carlson, *Why the Law Still Can't Tell an Employee When It Sees One and How It Ought to Stop Trying*, 22 BERKELEY J. EMP. & LAB. L. 295, 296–301 (2001); Henry H. Perritt, Jr., *Should Some Independent Contractors Be Redefined as "Employees" Under Labor Law?*, 33 VILL. L. REV. 989, 990–95 (1988); Rogers, *supra* note 1, at 486.

<sup>154</sup> See *Sec'y of Labor v. Lauritzen*, 835 F.2d 1529, 1539–45 (7th Cir. 1987) (Easterbrook, J., concurring).

<sup>155</sup> See Langille & Davidov, *supra* note 72, at 13.

<sup>156</sup> *Id.* at 12–15.

<sup>157</sup> *Id.* at 42. The language of the FLSA itself supports Langille and Davidov's conclusion; its purpose is stated in part as "to correct and as rapidly as practicable to eliminate . . . labor conditions detrimental to the maintenance of the minimum

given worker or class of worker is an employee should be made with these ends in mind.

One problem with this purposive approach is that not all decision-makers will agree about this underlying purpose of labor and employment law. For instance, some argue that the purpose of labor and employment regulation is to correct for market failures in the form of unequal bargaining power.<sup>158</sup> Davidov himself has opined in more recent work that while human freedom is a laudable and inspiring goal, it is less useful than some other articulated goals of labor law, such as addressing “inherent vulnerabilities,” in evaluating the application of labor law to any given worker, or in evaluating reform proposals.<sup>159</sup> This approach acknowledges that the default position in capitalist societies is to apply private law rules to contracts, including those contracts that involve the performance of work. So, the question is, why do we take some kinds of contracts, such as contracts for employment, and regulate them through employment and labor law? What makes employment relationships unique (and importantly, what distinguishes them from relationships involving independent contractors)? Davidov argues that employees are vulnerable along three axes—organizational (i.e., employment relationships are hierarchical, thus employment is characterized by subordination), economic, and social/psychological (employees are dependent on the employment relationship for income as well as the fulfillment of the needs for self-esteem, social relationships, social status, and other social/psychological needs).<sup>160</sup> When dependency and democratic deficits along these axes are significantly present in a work relationship, he argues, we call (or ought to call) that relationship one of employment.<sup>161</sup>

Relatedly, Julia Tomassetti argues that the instability in the employee/non-employee distinction in American law comes neither from the indeterminacy of the legal tests, nor from a poor fit between old tests and

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standard of living necessary for health, efficiency, and general well-being of workers.” 29 U.S.C. § 202 (a)–(b) (2012).

<sup>158</sup> Judge Easterbrook appeals to inequality of bargaining power in arguing that farmworkers’ lack of human capital renders them employees. See *Lauritzen*, 835 F.2d at 1544–45. Brishen Rogers notes the centrality of inequality of bargaining power in labor and employment law, but finds it of limited usefulness as a dividing line between employees and independent contractors, given the pervasiveness of unequal bargaining power in capitalist societies. Rogers, *supra* note 1, at 495; see also Zatz, *supra* note 67, at 282 (noting that labor law is concerned with rectifying economic inequality).

<sup>159</sup> Guy Davidov, *The Goals of Regulating Work: Between Universalism and Selectivity*, 64 U. TORONTO L.J. 1, 16–18 (2014) [hereinafter Davidov, *The Goals of Regulating Work*]; Guy Davidov, *The Three Axes of Employment Relationships: A Characterization of Workers in Need of Protection*, 52 U. TORONTO L.J. 357, 358–59 (2002) [hereinafter Davidov, *The Three Axes*].

<sup>160</sup> Davidov, *The Three Axes*, *supra* note 159, at 361.

<sup>161</sup> *Id.*

new forms of work arrangements. Rather, it stems from the employment contract itself, which contains an inherent contradiction between equality and servitude.<sup>162</sup> As discussed in Part I.B, judges and treatise writers incorporated agency law's master-servant concepts into their understanding of the employment contract.<sup>163</sup> This creates a tension—on the one hand, the traditional concept of contract imagines two parties with equal bargaining power coming to an agreement that benefits them both. On the other hand, in the employment context, the parties are bargaining (if they are bargaining at all) for the servitude of one to the other—that is, for the right of one party to tell the other what to do, for the power of one party over the time of the other. They are entering into an inherently unequal relationship.<sup>164</sup> This inherent ambiguity in the employment relationship explains the persistent disagreements regarding whether relationships are that of employer/employee or something else.<sup>165</sup> Davidov takes this up in his discussion of the goals of labor law—that inequality of bargaining power refers both to the making of the employment agreement and to the existence of subordination in the employment relationship itself.<sup>166</sup> In turn, I take inequality of bargaining power and economic vulnerability as the starting point for evaluations of employee status in Part IV.

## B. *Is an Intermediate Category the Solution?*

### 1. *Scholarly Discussion of Intermediate Categories*

If current tests are unmoored from their purpose and full of indeterminacy, leave some workers who ought to be covered unprotected, and new forms of work make the inquiry even more challenging, is an intermediate category the answer? Scholars and policymakers have considered intermediate categories to resolve these and other issues.

Canadian scholar Harry Arthurs first proposed an intermediate category in a 1965 article, *The Dependent Contractor: A Study of the Legal Problems of Countervailing Power*.<sup>167</sup> There, he posited that while public policy has encouraged collective bargaining to address problems of unequal bargaining power between employers and employees, collective bargaining

<sup>162</sup> See Julia Tomassetti, *The Contracting/Producing Ambiguity and the Collapse of the Means/Ends Distinction in Employment*, 66 S.C. L. REV. 315, 317 (2014).

<sup>163</sup> See also *id.* at 324. In using the term “the employment contract,” I am not referring to any particular agreement between an employer and an employee, but rather to the set of background assumptions that inhere in the employment relationship.

<sup>164</sup> See *id.* 345–46; see also James Gray Pope, *Contract, Race, and Freedom of Labor in the Constitutional Law of “Involuntary Servitude,”* 119 YALE L.J. 1474, 1555–56 (2010).

<sup>165</sup> See Tomassetti, *supra* note 162, at 399.

<sup>166</sup> Davidov, *The Goals of Regulating Work*, *supra* note 159, at 10–13.

<sup>167</sup> Arthurs, *supra* note 13.

is prohibited with respect to businesses through antitrust laws.<sup>168</sup> He identifies a group of workers who are economically dependent but legally contractors—“dependent contractors,” whose ranks include truck drivers and taxi operators.<sup>169</sup>

Arthurs queries whether the control test, adopted by the National Labor Relations Board after the Taft–Hartley Act, and by Canadian labor tribunals as well, is appropriate or relevant to determining collective bargaining rights given its origins in the distinct area of master-servant liability.<sup>170</sup> He canvasses the existing caselaw regarding collective bargaining for dependent contractors in Canada and the United States, pointing out the challenges dependent contractors face in seeking to bargain collectively and the overlapping, sometimes contradictory regimes covering the issue.<sup>171</sup> He advocates for abandoning the traditional legal distinction between employees and independent contractors because it bears no relation to economic reality.<sup>172</sup> He then proposes a few solutions, including broadening the definition of employee to focus on dependence, so that it encompasses dependent contractors, as well as other legislation that would allow dependent contractors to bargain collectively.<sup>173</sup>

Other scholars have taken up Arthurs’s exploration in the United States context and/or proposed intermediate categories to address more specific problems with the lack of protection for workers. For instance, Elizabeth Kennedy has recommended collective bargaining rights for United States workers she labels dependent contractors.<sup>174</sup> Noting that independent contractors have been explicitly excluded from the NLRA, she proposes a state-level entity she terms a “dependent contractor relations board.”<sup>175</sup> Lewis Maltby and David Yamada have argued that anti-discrimination laws should be extended to apply to independent contractors.<sup>176</sup> They propose amending federal anti-discrimination laws to expressly cover independent contractors, rather than creating an intermediate category. However, they recognize line-drawing problems between independent contractors to whom anti-discrimination laws should apply, and independent contractors to whom the laws should not apply (such as

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<sup>168</sup> *Id.* at 89.

<sup>169</sup> *Id.*

<sup>170</sup> *Id.* at 94.

<sup>171</sup> *Id.* at 109–10.

<sup>172</sup> *Id.* at 114.

<sup>173</sup> *Id.* at 114–15.

<sup>174</sup> Kennedy, *supra* note 12, at 148.

<sup>175</sup> *Id.* The City of Seattle has essentially done this with passenger drivers. See generally Naomi B. Sunshine, *Labor Rights for Platform Workers: A Response to Social Change’s 2016 Symposium*, 41 N.Y.U. REV. L. & SOC. CHANGE HARBINGER 241 (2016), [https://socialchangenyttest.files.wordpress.com/2016/12/sunshine\\_laborrightsplatformworkers\\_161212.pdf](https://socialchangenyttest.files.wordpress.com/2016/12/sunshine_laborrightsplatformworkers_161212.pdf).

<sup>176</sup> Maltby & Yamada, *supra* note 126, at 266.

very large firms).<sup>177</sup> Thus, in a sense, their proposal would create an intermediate category, that of independent contractors covered by anti-discrimination laws.

## 2. *Intermediate Categories in the Gig Economy—Proposals*

Scholars, advocates, and policymakers have proposed intermediate categories in the face of work relationships in the gig economy. These proposals tend to fall into three categories: portable benefits systems, collective bargaining rights, and explicit intermediate categories that would encompass some but not all current labor and employment rights.

Virginia Senator Mark Warner has proposed creating a social safety net for gig economy workers by de-linking healthcare, social security and other safety-net benefits from employment, but not from work.<sup>178</sup> He suggests creating an “hour bank” through which individual workers’ hours of work for different companies could be credited toward these benefits.<sup>179</sup> This would in a sense create an intermediate category of workers who can participate in such hour banks and other benefits. That is, a portable benefits system that covers workers who are not considered employees would necessarily include some discussion of what kinds of workers get to participate in portable benefits programs. Writing more broadly about the decline in internal labor markets within firms and the consequent decline in what she terms the standard employment contract, Katherine Stone has advocated that pensions and health benefits be universal and portable, rather than linked to a specific employer, given the decline in long-term employment by one employer.<sup>180</sup>

Others have taken a similar approach. A group of business and union leaders signed a letter calling for “a new social safety net for the workforce of today—and tomorrow.”<sup>181</sup> Citing the Affordable Care Act as an example of separating a benefit from a worker’s relationship with an employer, the letter called for additional ways of providing protections and benefits to workers.<sup>182</sup> While the letter did not provide specifics, it set out broad principles; for instance, that protections and benefits be portable,

<sup>177</sup> *Id.* at 271–73.

<sup>178</sup> See Jenna Portnoy, *Saving Capitalism: A Restless Senator’s New Obsession*, WASH. POST (Oct. 1, 2016), [https://www.washingtonpost.com/local/virginia-politics/saving-capitalism-a-restless-senators-new-obsession/2016/10/01/32515c14-8666-11e6-a3ef-f35afb41797f\\_story.html?utm\\_term=.5b4f6a551d9a](https://www.washingtonpost.com/local/virginia-politics/saving-capitalism-a-restless-senators-new-obsession/2016/10/01/32515c14-8666-11e6-a3ef-f35afb41797f_story.html?utm_term=.5b4f6a551d9a).

<sup>179</sup> See Warner, *supra* note 12; see also Surowiecki, *supra* note 8.

<sup>180</sup> Stone, *supra* note 1, at 74. Stone describes the standard employment contract as encompassing informal promises of “job security, predictable promotions, and wage growth opportunities,” as well as benefits such as “health insurance, pensions, vacation entitlements ,and other employment-based benefits.” *Id.* at 63.

<sup>181</sup> Portable Benefits, *Common Ground for Independent Workers*, WTF? (Nov. 9, 2015), <https://medium.com/the-wtf-economy/common-ground-for-independent-workers-83f3fbcf548f#a101aej81>.

<sup>182</sup> *Id.*



so that workers can “carry” them from one workplace to another; and universal, meaning workers should have access to basic benefits and protections regardless of their employment status.<sup>183</sup>

In addition, New York is considering legislation to create a portable benefits fund backed by gig economy company Handy and a corporate lobbying group called Tech NYC.<sup>184</sup> Under the plan, firms would contribute 2.5 percent of the money they make from their worker’s services to the fund.<sup>185</sup> Workers could access the fund to purchase retirement, health insurance, and other benefits.<sup>186</sup> The benefits would be portable in the sense that a worker could access money in the fund contributed by multiple employers.<sup>187</sup> The catch, however, is that as a condition of participation in the fund, state law would explicitly recognize these workers as independent contractors.<sup>188</sup> Although companies that would contribute to the fund already classify these workers as independent contractors, the law would essentially take away the workers’ right to contest the independent contractor designation. As Benjamin Sachs points out, the proposal would allow companies to buy their way out of New York labor and employment law (or risk of its application) for a small fee equal to 2.5 percent of each job their workers perform.<sup>189</sup> This plan would also effectively create an intermediate category of workers entitled to take money from the fund for benefits, though line drawing would be relatively simple. The category would consist of workers whose companies had contributed to the fund on their behalf.

Other reforms provide collective bargaining rights to workers not currently covered by the NLRA. The City of Seattle has enacted legislation allowing drivers for both traditional taxicab and driver-for-hire companies, as well as platform-based “transportation network compan[ies]” (i.e., ride-hailing apps like Uber and Lyft) to form unions and engage in collective bargaining.<sup>190</sup> Similar legislation that would apply to gig economy workers across industries (rather than just to passenger drivers) has

<sup>183</sup> *Id.*

<sup>184</sup> Cole Stangler, *Uber, But for Benefits: NY Tech Companies Propose a Gig Economy Solution*, VILLAGE VOICE (Jan. 3, 2017), <https://www.villagevoice.com/2017/01/03/uber-but-for-benefits-ny-tech-companies-propose-a-gig-economy-solution/>.

<sup>185</sup> *Id.*

<sup>186</sup> *Id.*

<sup>187</sup> *Id.*

<sup>188</sup> *Id.*

<sup>189</sup> Benjamin Sachs, *Regressive Federalism*, On Labor (Jan. 11, 2017), <https://onlabor.org/2017/01/11/regressive-federalism/>.

<sup>190</sup> SEATTLE, WASH., MUN. CODE § 6.310.735 (2015); Nick Wingfield & Mike Isaac, *Seattle Will Allow Uber and Lyft Drivers to Form Unions*, N.Y. TIMES (Dec. 14, 2015), <https://www.nytimes.com/2015/12/15/technology/seattle-clears-the-way-for-uber-drivers-to-form-a-union.html>.

been introduced in California.<sup>191</sup> These laws also effectively create an intermediate category of workers with collective bargaining rights but no rights to the minimum wage or other workplace protections.<sup>192</sup> These laws promote collective bargaining under more favorable rules than the NLRA.<sup>193</sup>

One more concrete set of proposals involves the more explicit recognition of an intermediate category. Seth Harris and Alan Krueger have recently proposed a new intermediate category of worker, the “independent worker.”<sup>194</sup> Harris and Krueger identify independent workers by the triangular nature of their work relationships, noting that they are characterized by their work with intermediaries who connect them to customers needing their services.<sup>195</sup> Independent workers, they posit, have some characteristics of employment—such as the intermediary controlling the fees to be charged to the customers and the intermediary’s ability to terminate the worker.<sup>196</sup> They also have some characteristics of independence, such as the ability to decide when and whether they work, to work for multiple intermediaries at the same time, and to do personal tasks while they are working with an intermediary.<sup>197</sup> Harris and Krueger propose that these workers receive some, but not all, of the benefits employees receive. Under their proposal, independent workers would have the right to organize and bargain collectively, would be covered by anti-discrimination laws that apply to employees, have taxes withheld from their paychecks and a share of payroll taxes paid by the intermediaries.<sup>198</sup> However, they would not be covered by wage and hour laws, such as the minimum wage and overtime, and would not qualify for unemployment.<sup>199</sup>

Under the proposal I advance in Part IV, the workers identified by Harris and Krueger would be considered employees because they have no role in setting prices customers pay for their services, and many cannot negotiate their own rates—that is, how much they keep from the

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<sup>191</sup> See Assemb. B. 1727, 2015–2016 Reg. Sess. (Cal.); see also Jennifer Van Grove, *California Bill Would Let Gig Workers Organize for Collective Bargaining*, L.A. TIMES (Mar. 11, 2016), <http://www.latimes.com/business/la-fi-gig-workers-bill-20160310-story.html>.

<sup>192</sup> I have written extensively about these laws elsewhere. See generally Sunshine, *supra* note 175. In extending collective bargaining, but not other workplace rights, to these workers, the Seattle and (proposed) California laws are similar to the dependent contractor category in Canada. See Davidov, *supra* note 128, at 249.

<sup>193</sup> See Sunshine, *supra* note 175, at 247–48.

<sup>194</sup> HARRIS & KRUEGER, *supra* note 12, at 9.

<sup>195</sup> *Id.*

<sup>196</sup> *Id.* at 2.

<sup>197</sup> *Id.* at 10.

<sup>198</sup> *Id.* at 15–19.

<sup>199</sup> *Id.* at 19.

amounts customers pay for their service.<sup>200</sup> Yet, Harris and Krueger's proposal is well thought out, and seeks to bring some rights and protections to workers who do not currently have them. In particular, it takes regulatory arbitrage—the risk that employers will structure their work relationships to avoid an employment relationship—seriously.<sup>201</sup>

Nonetheless, their proposal is flawed in a several respects. First, Harris and Krueger find that intermediate workers are not like employees because they do not have an indefinite relationship with any employer.<sup>202</sup> However, many Uber and Lyft drivers do have indefinite and long-term relationships with the companies.<sup>203</sup> Further, the proposal identifies workers who should fall into the independent worker category based, in part, on the immeasurability of their working hours for any particular company. They give the example of a driver who has the Uber and Lyft apps open at the same time, seeking a fare from either company.<sup>204</sup> But this example relies on an assumption that the driver is doing compensable work in this scenario. In contrast, it is unlikely that a court would find this work compensable, even under the broader FLSA.<sup>205</sup> Finally, the proposal mysteriously excludes wage and hour protections from the list of benefits and protections intermediate workers should get. Their explanation is the impossibility of measuring these workers' working hours for any one company, but again, this relies on an assumption that workers should be compensated for hours that would not currently be compensable even if the workers were employees.<sup>206</sup>

Some scholars, advocates, and policymakers have responded to the rise in gig economy work with proposals for intermediate categories. Some of these proposals, including portable benefits systems and expansion of collective bargaining to non-employees, have analogous proposals outside the gig economy. This makes sense given that gig economy work relationships are not by nature different from those in other types of work. Work relationships in the gig economy are in fact a continuation of

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<sup>200</sup> See Benjamin Sachs, *Do We Need an "Independent Worker" Category?*, ON LABOR (Dec. 8, 2015), <https://onlabor.org/2015/12/08/do-we-need-an-independent-worker-category/>.

<sup>201</sup> HARRIS & KRUEGER, *supra* note 12, at 5.

<sup>202</sup> *Id.* at 10.

<sup>203</sup> A study commissioned by Uber found that 38% of Uber drivers had no other job. Jonathan V. Hall & Alan B. Krueger, *An Analysis of the Labor Market for Uber's Driver-Partners in the United States* (Princeton Univ. Indus. Relations Section, Working Paper No. 587, 2015), <http://dataspace.princeton.edu/jspui/bitstream/88435/dsp010z708z67d/5/587.pdf>.

<sup>204</sup> HARRIS & KRUEGER, *supra* note 12, at 13.

<sup>205</sup> See Sachs, *supra* note 200.

<sup>206</sup> HARRIS & KRUEGER, *supra* note 12, at 20; Sachs, *supra* note 200.

employment trends of the past thirty-four years.<sup>207</sup> These trends include increased use of outsourcing, temporary work, just-in-time scheduling, subcontracting, classifying former employees as independent contractors, and the like.<sup>208</sup>

### C. *The Intermediate Category in Canada—Dependent Contractors*

This section will look at the use of an intermediate category in Canada in order to begin to understand the range of possibilities and problems intermediate categories may pose. It will scan the history of the Canadian dependent contractor category, more recent developments, and assessments of its effects.

#### 1. *History of the Dependent Contractor Category in Collective Bargaining*

Canada has recognized an intermediate category of worker, dependent contractors, for approximately forty years.<sup>209</sup> While intermediate category workers have long had collective bargaining rights and the right to notice upon termination,<sup>210</sup> courts and legislatures have not recognized or created an intermediate category for other purposes.<sup>211</sup>

In a 1965 article, Canadian scholar Harry Arthurs identified a category of workers who were legally contractors but economically dependent.<sup>212</sup> He recognized that these workers were in a relationship of unequal bargaining power vis-à-vis the companies they worked for, but might be prohibited from organizing and bargaining collectively due to antitrust law.<sup>213</sup> He used the term “dependent contractor” to denote these workers.<sup>214</sup> He included truck drivers and taxicab operators as examples of dependent contractors.<sup>215</sup> Arthurs stressed that these workers may not be

<sup>207</sup> See Stone, *supra* note 1, at 67–69 (describing the decline of internal labor markets within firms, long-term job security, regular promotions and pay increases, and employment benefits since the late 1970s).

<sup>208</sup> *Id.*

<sup>209</sup> Courts have recognized an intermediate status for even longer. In *Carter v. Bell & Sons*, [1936] 2 D.L.R. 438, 440 (Can. Ont. C.A.), the Ontario Court of Appeal held that there were cases of an “intermediate nature” where a master/servant (or employer/employee) relationship did not exist but where a notice requirement for dismissal might be implied. Judy Fudge et al., *Employee or Independent Contractor? Charting the Legal Significance of the Distinction in Canada*, 10 CANADIAN LAB. & EMP. L.J. 193, 199 (2003).

<sup>210</sup> See *id.* at 199, 206–07.

<sup>211</sup> See *id.* at 209–10 (noting that, in contrast to the collective bargaining context, the statutory definitions of employee in employment standards legislation have never specifically included dependent contractors, but that it is unclear to what extent this has limited the scope or application of employment standards laws).

<sup>212</sup> Arthurs, *supra* note 13, at 89.

<sup>213</sup> *Id.*

<sup>214</sup> *Id.*

<sup>215</sup> *Id.*

recognized as employees using the traditional control test.<sup>216</sup> He proposed that collective bargaining rights be extended to these workers in order to address the problem of unequal power they faced due to their economic dependence.<sup>217</sup>

Subsequently, seven Canadian jurisdictions modified their collective bargaining legislation to include dependent contractors.<sup>218</sup> Most jurisdictions defined dependent contractors by reference to their “economic dependence on, and . . . obligation to perform duties” in an arrangement “more closely resembling the relationship of an employee than that of an independent contractor.”<sup>219</sup> At the federal level, initially only truck owner-operators and fishermen were deemed dependent contractors, but the definition was later broadened to include the above language.<sup>220</sup> As I explore here, this statutory language itself may present some of the same challenges as the FLSA economic realities test.<sup>221</sup> However, through legislation and more liberal tests, Canada extended collective bargaining rights to workers legally considered independent contractors under a traditional control test, but practically and economically dependent.

#### *a. Economic Dependence*

Like their U.S. counterparts, Canadian courts have developed multi-factor tests to determine employee status. At the time of Arthurs’s article and the first wave of legislative enactments of an intermediate category, some Canadian courts used a fourfold test to determine employee status, which considered control, ownership of the tools, chance of profit, and

<sup>216</sup> *Id.* at 114.

<sup>217</sup> *Id.* at 114–15.

<sup>218</sup> Fudge et. al., *supra* note 207, at 209; Michael Bendel, *The Dependent Contractor: An Unnecessary and Flawed Development in Canadian Labour Law*, 32 U. TORONTO L.J. 374, 376 (1982).

<sup>219</sup> B.C. Labour Code, R.S.B.C. 1996, c 244, s 1(1) (Can.); *accord* Nfld. Labour Relations Act, R.S.N.L. 1990, c L-1, s 3(1)(c) (Can); Canada Labour Code, R.S.C. 1985, c L-2, s 3(1)(c).

<sup>220</sup> *See* Bendel, *supra* note 218, at 377. Manitoba’s dependent contractor definition was also initially limited to truck owner-operators. *Id.*

<sup>221</sup> Similarly, the German category of “employee-like person” (*arbeitnehmerähnliche Personen*) covers self-employed workers who are nonetheless considered dependent. *Tarifvertragsgesetz* (TVG) [Collective Agreements Act], 25 Aug. 1969, BGB I at 1323, § 12a (Ger.). The category is recognized by statute. Though its definition is more specific than U.S. definitions, it is just as apparently circular as those found in some American laws, and contains a very similar circularity as the Canadian dependent contractor definition. Employee-like persons are defined as “persons who are economically dependent and, like an employee, in need of social protection.” *Id.* So, the German and Canadian definitions themselves beg the question whether a particular worker is “like an employee,” and in which ways s/he needs to be “like an employee” to merit social protection. The German social protection inquiry seems to directly ask a purposive question—is this the kind of worker the social protections (such as paid leave, pension, and healthcare) are meant for?

risk of loss.<sup>222</sup> Other courts used an “organization” test focusing on the extent to which the work performed is an integral part of the employer’s business.<sup>223</sup> More recently, courts have used more expansive tests with longer lists of factors, and have tended to take a purposive approach, considering the purpose of the statute involved when deciding whether a given work relationship is subject to its rights and protections.<sup>224</sup> The expanded definitions under Canadian labor laws led to their own line-drawing challenges.<sup>225</sup>

*b. Narrowing to Require Near-Exclusivity*

The Canadian labor boards adjudicating dependent contractor status have limited its application to require that a worker derive at least 80 percent of his/her income from one source.<sup>226</sup> While the statutes themselves do not require this limiting construction, adjudicators have further defined economic dependence with reference to the percentage of income derived from one source, and have even found that percentage of income is the most important factor bearing on the question of whether a worker is economically dependent for purposes of dependent contractor classification.<sup>227</sup>

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<sup>222</sup> *Montreal v. Montreal Locomotive Works Ltd.*, [1947] 1 D.L.R. 161, 169 (P.C.).

<sup>223</sup> *Stevenson Jordan & Harrison, Ltd. v. MacDonald & Evans*, [1952] 1 T.L.R. 101, 111 (U.K. C.A.).

<sup>224</sup> *Fudge et al.*, *supra* note 207, at 209–10.

<sup>225</sup> “[W]here a labour tribunal will draw the line between employees, dependent contractors, and entrepreneurs in a particular case is hard to predict.” *Id.* at 208.

<sup>226</sup> *Kennedy*, *supra* note 12, at 154; *see also* *Cherry & Aloisi*, *supra* note 16, at 655. Likewise, the German economic dependence inquiry has been understood to focus not only on the relationship of the particular worker to the particular company, but also on the worker’s other sources of income. That is, courts look at what proportion of the worker’s income is derived from the particular company to determine whether the worker is an “employee-like person.” Courts have found that when a worker derives more than 50 percent of her income from one particular relationship, that is a strong indication that the relationship is characterized by economic dependence. *Bundesarbeitsgericht [BAG] [Federal Court of Labor Law]* Apr. 11, 1997, 5 AZB 33/96, AP ArbGG 1979 § 5 No. 30; *Neue Juristische Wochenschrift [NJW]* 1997, 2404 (Ger.); *Neue Zeitschrift fOr Arbeitsrecht [NZA]* 1998, 499-500 (Ger.). This “proportion of income” test is found in intermediate category determinations in Canada as well, *see Ridge Gravel & Paving Ltd. v. Teamsters Local Union No. 213*, [1988] 88 C.L.L.C. 16,040 (Can. B.C. I.R.C.), and poses an interesting quandary. It means that the classification is determined not by the relationship of the worker and the company (or the company’s customers) but by the worker’s income outside of that relationship.

<sup>227</sup> *See McKee v. Reid’s Heritage Homes Ltd.*, [2009] ONCA 916 para. 39 (Can. Ont. C.A.) (requiring consideration of “whether or not the agent was limited exclusively to the service of the principal”); *see also* *Aspen Planners, Ltd. v. Int’l Woodworkers of Am., Local No. 1-417*, [1983] L.R.B. Decision No. 250/83 (Can. B.C.).

*c. Expansion with Respect to Other Rights*

While Canada has not legislated an intermediate category outside the collective bargaining context, it is not clear that this has limited the coverage of workers for other purposes, such as minimum wage, overtime, parental leave, or anti-discrimination.<sup>228</sup> Canadian courts have moved away from the traditional common law and fourfold tests and toward a more purposive approach, considering the purpose of the legislation when determining whether a worker should be covered.<sup>229</sup>

*2. Has the Intermediate Category Benefitted Canadian Workers?*

In sum, Canadian law, by both legislation and common law development, has expanded collective bargaining rights (and termination notice rights)<sup>230</sup> to dependent contractors; or rather, to workers who derive the lion's share of their income from one employer, but who would not be considered to be under that employer's control based on a traditional common-law control test. This means that many Canadian truckers, delivery drivers, and taxi drivers may seek to improve their pay and working conditions through collective bargaining.

Scholars disagree about whether legislative change was necessary to expand collective bargaining rights to more Canadian workers. Judy Fudge and her colleagues argued it was necessary because the common law control test (and a modified version) Canadian labor tribunals used did not encompass dependent contractors.<sup>231</sup> Miriam Cherry and Antonio Aloisi posit that the Canadian experience with the dependent contractor category has in fact resulted in bringing workplace protections to workers who would not otherwise have had them under Canadian law, given previous narrow and rigid definitions of the employee category.<sup>232</sup> They argue the Canadian experience has been successful relative to intermediate categories in other countries, as it has focused on "expanding the coverage of laws aimed at 'employees' to encompass vulnerable small businesses and tradespeople."<sup>233</sup>

<sup>228</sup> Fudge et al., *supra* note 209, at 209.

<sup>229</sup> *Id.* at 224.

<sup>230</sup> In contrast to the United States, Canadian law recognizes a common-law right to notice of termination. *See McKee*, ONCA at para. 22; Fudge et al., *supra* note 207, at 199; *see also* Stone, *supra* note 1, at 58 (noting that most U.S. employees are at-will employees, meaning they can be terminated at any time and have "no claim to ongoing employment").

<sup>231</sup> *See* Fudge et al., *supra* note 209, at 205.

<sup>232</sup> *See* Cherry & Aloisi, *supra* note 16, at 655–56.

<sup>233</sup> *Id.* at 639. In contrast, the intermediate category in Spain has applied to very few workers, in part because it requires the worker to work predominantly for one business. *Id.* at 688. In Italy, companies used the existence of a third category to avoid obligations to their workers—that is, they down-graded workers who would otherwise have been considered employees into the intermediate category. *Id.*

But, it is not clear that a separate intermediate category was needed to do this. Michael Bendel has argued that the move to enact a dependent contractor category was unnecessary because, by the mid-1970s, courts and tribunals had started interpreting the term “employee” in a broader and more purposive fashion anyway.<sup>234</sup> Bendel argues that labor relations boards had been able to extend employee status to all or almost all of the dependent contractors who were previously thought to be beyond their reach.<sup>235</sup> They did this through a broader understanding of the traditional common law control test, and an understanding that they were not bound to use the control test.<sup>236</sup> In reality, the dependent contractor reforms and the move toward a more expansive application of labor and employment laws through a purposive approach happened in tandem. Thus, we will never know whether one would have happened without the other.

The Canadian dependent contractor analysis focuses on economic dependence.<sup>237</sup> In a sense, the FLSA economic realities test seeks to do the same thing.<sup>238</sup> Also, Canadian courts and tribunals have limited the scope of the dependent contractor category by adding a requirement of exclusivity or near-exclusivity, requiring that the worker receive the lion’s share of his/her income from one company.<sup>239</sup> This is not required by the dependent contractor legislation, and has limited its effectiveness in ameliorating the power imbalance between worker and employer. Further, in cases making the inquiry, courts decide whether a particular worker should be treated as an employee (by means of a dependent contractor designation) for purposes of the particular right at issue (collective bargaining, right to notice of termination, or other employment rights).

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<sup>234</sup> See Bendel, *supra* note 218, at 379.

<sup>235</sup> *Id.*

<sup>236</sup> *Id.* Recognizing the limited usefulness of a traditional control test under the “complex conditions of modern industry,” Canadian courts developed a fourfold test looking at “(1) control; (2) ownership of the tools; (3) chance of profit; (4) risk of loss,” with a recognition that the “crucial question [is] whose business is it.” *Montreal v. Montreal Locomotive Works Ltd.*, [1947] 1 D.L.R. 161, 169 (P.C.). Around the same time, courts increasingly began using an “organization” test, which asks whether a worker has a business of his/her own or whether the work constitutes an integral part of the alleged employer’s business. See Bendel, *supra* note 218, at 381–82.

<sup>237</sup> Some argue it goes beyond the focus on economic dependence to require additional employee-like characteristics in the form of subordination. See, e.g., Davidov, *supra* note 128, at 249.

<sup>238</sup> See Guy Davidov et al., *The Subjects of Labor Law: ‘Employees’ and Other Workers*, in *COMPARATIVE LABOR LAW* 115, 124 (Matthew W. Finkin & Guy Mundlak eds., 2015) (calling the United States Supreme Court a “pioneer when adopting a purposive approach . . . which led to the adoption of an ‘economic reality of dependence’ test”).

<sup>239</sup> See Cherry & Aloisi, *supra* note 16, at 655 (noting that a driver working for multiple online platforms such as Uber and Lyft might not be considered a dependent contractor under this approach).



Thus, while the dependent contractor category has increased worker protection, it is not clear it was necessary, and it creates its own definitional problems. I turn now to evaluating the potential advantages and disadvantages of an intermediate category in the U.S. context, with special attention to its implications for drivers.

### III. EVALUATING INTERMEDIATE CATEGORIES

Intermediate categories may make sense for the United States, but before answering whether they do, I will point out that they beg many questions. I will consider two of those questions—first, what is their purpose, and second, what is their effect? The first question can be rephrased as, what normative flaws might an intermediate category seek to fix? The second question considers what rights, benefits, or protections of employment an intermediate category would extend to workers in that category. I argue that the latter question, which is usually answered by focusing on collective bargaining, non-discrimination, and/or benefits such as workers' compensation and unemployment, is usually answered incompletely.

#### A. *Why Might We Need an Intermediate Category?*

There are many problems an intermediate category may seek to solve. It may be trying to make a new category for workers or work relationships that are in a grey area or “borderland”<sup>240</sup> between employee and independent contractor; that is, relationships that have some characteristics of both. That is, we may address the difficulty in characterizing some work relationships as either between an employer and employee or between independent contractors by interposing an intermediate category. Scholars have delved into the question of why it is so difficult to characterize work relationships. Some have argued that the difficulty lies in antiquated tests—that the tests to determine employee status are outdated in the current economy, and given changes in technology.<sup>241</sup> There is some truth to this. For instance, in some formulations of the employment test, whether or not someone works on the employer's premises is important to the determination.<sup>242</sup> With advances in technology, such as cell phones, email, instant messaging, video capabilities, and GPS, a worker not in the same physical location as a company may be much less inde-

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<sup>240</sup> See *NLRB v. Hearst Publ'ns, Inc.*, 322 U.S. 111, 121 (1944) (identifying this “borderland”).

<sup>241</sup> See, e.g., *Cotter v. Lyft, Inc.*, 60 F. Supp. 3d 1067, 1081 (N.D. Cal. 2015) (finding that “[t]he test the California courts have developed over the 20th Century for classifying workers isn't very helpful in addressing this 21st Century problem” of whether Lyft drivers were employees, and was akin to trying to fit a square peg into one of two round holes); HARRIS & KRUEGER, *supra* note 12, at 7.

<sup>242</sup> See, e.g., *Zheng v. Liberty Apparel Co.*, 355 F.3d 61, 68 (2d Cir. 2003).

pendent than she would have been 70 or 80 years ago when major U.S. labor legislation was enacted. But this account is incomplete. Indeed, courts have been meeting this quandary for decades.<sup>243</sup>

It could also be hard to figure out who is an employee because, as Langille and Davidov argue, indeterminacy has always been baked into the determination of employment status.<sup>244</sup> Or, as Tomassetti argues, because there is an inherent contradiction in the employment relationship itself—in the idea of bargaining or contracting (which we think of as happening between parties with equal power) for servitude (i.e., for the right of one party to tell the other what to do and control the other party's time).<sup>245</sup> But, no matter the cause of the difficulty, one purpose of an intermediate category under this formulation is to reduce legal uncertainty.<sup>246</sup> If this is the goal of an intermediate category, we might expect a simpler definition of what work relationships would fit into such a category.

Another problem intermediate categories may seek to solve is a lack of workplace protections for workers who are clearly not employees under any formulation of the employment test. In other words, an intermediate category might seek to bring workers who would not otherwise be employees into the fold, to extend employee-like protections to them. This is, in a sense, what proposals for portable benefits<sup>247</sup> seek to do. These proposals mostly do not concern themselves with categories, intermediate or otherwise, but of course would involve line-drawing—for instance, who gets portable benefits, and who doesn't? Why might we want to extend workplace protections to those who do not currently have them? The reasons are usually articulated as having to do with the changing nature of work, and the lack of fit between the old one-size-fits-all, employee or bust, model and today's economy. As work becomes more contingent, many workers cannot access the (albeit thin) social safety net that attaches to employment. As new forms of work relationships emerge, inequality of bargaining power exists in more and more “independent contractor” relationships—that is, the idea of equal bargaining power in

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<sup>243</sup> See *Hearst Publ'ns, Inc.*, 322 U.S. at 121 (stating, in 1944, that “[f]ew problems in the law have given greater variety of application and conflict in results than the cases arising in the borderland between what is clearly an employer-employee relationship and what is clearly one of independent, entrepreneurial dealing”).

<sup>244</sup> See Langille & Davidov, *supra* note 72, at 8–9.

<sup>245</sup> Tomassetti, *supra* note 162, at 399.

<sup>246</sup> See HARRIS & KRUEGER, *supra* note 12, at 6 (noting that “independent workers and the intermediaries with which they work are especially vexed by” the current legal regimes).

<sup>247</sup> See Portable Benefits, *supra* note 181; Nick Hanauer & David Rolf, *Shared Security, Shared Growth*, DEMOCRACY (2015), <https://democracyjournal.org/magazine/37/shared-security-shared-growth/>.

these relationships is revealed as a fiction. Of course, some have argued that this has always been so.<sup>248</sup>

Thus, proponents of intermediate categories have articulated at least two reasons for them. The first reason is to reduce legal uncertainty—to account for those relationships for which it is difficult to determine whether a worker is an employee or an independent contractor. The second reason is to expand employment protections and rights beyond employees. Having addressed the reasons for an intermediate category, I turn to its potential contours.

### *B. What Should Workers in an Intermediate Category Get?*

If an intermediate category is normatively desirable, which rights, benefits, and obligations of employment should workers in the intermediate category have? Some have proposed an “independent worker” category where workers would be protected from discrimination, have the right to unionize, would be included in some social benefit programs like Social Security and Medicare, and would get some benefits like “employer” contributions to health insurance.<sup>249</sup> The City of Seattle has enacted legislation granting collective bargaining rights to Uber and Lyft drivers.<sup>250</sup> Virginia Senator Mark Warner has proposed creating a social safety net for “gig economy” workers by de-linking healthcare, social security, and other safety-net benefits from employment.<sup>251</sup> He suggests creating an hour bank through which individual workers’ hours of work for different companies could be credited toward these benefits.<sup>252</sup> Notably, none of these proposals include wage and hour protections like the right to a minimum wage.<sup>253</sup>

Under Warner’s and Seattle’s approach, the move is not to question the employment classification but to extend some rights and protections to non-employees. Although the Seattle legislation is not explicit about it, it is in a sense creating an intermediate category of drivers for traditional taxi companies as well as platform-based transportation network companies (such as Uber and Lyft).<sup>254</sup> Under the Seattle ordinance, drivers have

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<sup>248</sup> See, e.g., Arthurs, *supra* note 13, at 89.

<sup>249</sup> See, e.g., HARRIS & KRUEGER, *supra* note 12, at 15–21.

<sup>250</sup> SEATTLE, WASH., MUN. CODE § 6.310.735 (2015); see also Wingfield & Isaac, *supra* note 190.

<sup>251</sup> See Warner, *supra* note 12.

<sup>252</sup> See *id.*

<sup>253</sup> In pointing this out, I do not mean to suggest that the minimum wage is adequate. Indeed, a full-time worker earning the federal minimum wage makes only \$15,080 annually. *What Are the Annual Earnings for a Full-Time Minimum Wage Worker?*, U.C. DAVIS CTR. FOR POVERTY RESEARCH, <http://poverty.ucdavis.edu/faq/what-are-annual-earnings-full-time-minimum-wage-worker> (last updated Jan. 12, 2018).

<sup>254</sup> See Sunshine, *supra* note 175, at 249.

collective bargaining rights that non-employees lack under the NLRA. One set of rights and protections that proposals for intermediate categories do not usually extend to workers in the category are rights to a minimum wage and overtime. This is curious given that these two protections are central features of federal as well as state employment legislation. One purpose of these protections is to avoid a race to the bottom whereby companies take advantage of workers with little bargaining power. Thus, it appears some proposals seek to address the reality of unequal bargaining power through encouraging or allowing collective bargaining, but not by limiting the terms of the bargain to a certain minimum wage and maximum hours.

The question why the right to a minimum wage and overtime should be limited to employees, and not to workers in the intermediate category, has not been sufficiently theorized.<sup>255</sup> Cynthia Estlund has pointed out that collective bargaining can be a “third way” between the harshness and inequality of free market bargaining between individual workers and firms on the one hand, and centralized “command and control” regulation decried in the deregulation era.<sup>256</sup> It may be that there is an overall preference for tweaking the power dynamic without specifically regulating the terms of the bargain. However, since Estlund’s article, many states and cities have enacted legislation to raise the minimum wage and provide new worker protections (such as paid sick and family leave).<sup>257</sup> In particular, the Fight for Fifteen campaign to raise the minimum wage has resulted in many local successes and galvanized many workers.<sup>258</sup> Thus, we are seeing a shift to re-regulation when it comes to employees. In turn, we are seeing a decline in union membership and an expansion of so-called right-to-work laws.<sup>259</sup> Excluding intermediate category workers from minimum wage protections is ironic in the face of widespread efforts to shore up the minimum wage.<sup>260</sup>

In sum, any proposal for an intermediate category should be grounded in what the current categories do—both what they do poorly and what they do well. Since adding an intermediate category may signal

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<sup>255</sup> See Cherry & Aloisi, *supra* note 16, at 679 (arguing that omitting minimum wage protections for intermediate category workers “would only exacerbate the problem of exploitation of workers in the gig economy”); Davidov, *supra* note 128, at 249–50.

<sup>256</sup> Estlund, *supra* note 6, at 1528–29.

<sup>257</sup> See, e.g., N.Y.C., N.Y., ADMIN. CODE § 20-913 (2017); New York Paid Family Leave Benefits Law, S.B. S6406C, 2015–2016 Reg. Sess. (N.Y.).

<sup>258</sup> See Cherry & Aloisi, *supra* note 16, at 678–79; Steven Greenhouse, *How the \$15 Minimum Wage Went from Laughable to Viable*, N.Y. TIMES (Apr. 3, 2016), <https://www.nytimes.com/2016/04/03/sunday-review/how-the-15-minimum-wage-went-from-laughable-to-viable.html>.

<sup>259</sup> Stone, *supra* note 1, at 69–73.

<sup>260</sup> See Cherry & Aloisi, *supra* note 16, at 678–79.

some giving up on the current categories, and would certainly involve line-drawing of its own, it is worth reconsidering the employee-independent contractor dichotomy before choosing to dispense with it. In assessing the normative value of an intermediate category, we should be clear about the shortcomings of the current categories. In a sense, adding an intermediate category would dispense with (or at least narrow) the current categories. If we are to add an intermediate category, we should be clear about its effects on current categories and the reasons for these effects. Thus, while intermediate categories may be necessary and important, before making that determination, it is important to consider the employee category and whether there are ways to approach it that may alleviate some of its problems. An intermediate category may be desirable for the reasons stated above, but it will not fix the employment category. I turn to that inquiry now.

#### IV. FRAMEWORK FOR ANALYZING WHETHER DRIVERS ARE EMPLOYEES

##### A. *Prices and Pay*

Turning back to the employment category, one feature of drivers' and gig economy workers' relationships stands out—the worker's role in negotiating prices charged to the customer and the amount the worker is paid. Looking at a worker's role in setting prices and pay provides significant information about the nature of the triangular relationship between the company, the worker, and the customer, indicating whether the company is more than a mere passive intermediary, but rather plays a significant role in defining work conditions. Ability to negotiate over prices and pay is also a site where the traditional control test and the economic realities test intersect.

In the triangular relationship that drivers, as well as many gig economy workers, inhabit, it is important to consider the relationship of the worker to the customer. If the company controls the prices vis-à-vis the customer (or even if the customer and the company negotiate prices but the worker is not involved), the worker is really just a representative of the company—the customer has sought a service from the company, and the worker is the one fulfilling that service.

In addition, ability to negotiate over prices and pay impacts the employee question under both the control and economic realities test. Doctrinally, ability to negotiate prices and pay also addresses a few of the traditional control factors—whether the worker is engaged in a distinct occupation or business, whether the work is usually done by a specialist without supervision or under the direction of an employer, the method of payment, and whether the work is part of the employer's regular busi-

ness.<sup>261</sup> Notably, these factors overlap significantly with the ABC test.<sup>262</sup> For instance, the traditional control test focuses on whether the employer has control over the manner and means by which a worker performs the work, in contrast to merely requiring a particular outcome. Looking at the economic and transactional reality within a triangular relationship from the consumer's perspective, a consumer who pays FedEx for a delivery expects a consistent level of service—that is the signal that consistent pricing sends to consumers. In order to give consumers consistent service, a company needs to control how the work is done, either by setting out detailed rules, or by weeding out all workers who do not provide this level of service. This is the essence of controlling the manner and means by which a worker performs the work. Furthermore, a company is more likely to set prices for services it offers to consumers when those services are integral to the company's business—an important factor in both the control and economic realities tests.

The economic realities test is designed to get at economic dependence. A worker who performs services for customers but lacks significant input into what customers are charged for the services is dependent on her employer for her income from that employer (or from the employer's customers). She is economically vulnerable in the sense that her income from that job is largely dependent on decisions the employer makes (and, perhaps, how many hours she works).

A work relationship in which the worker cannot negotiate prices or pay is presumptively an employment relationship. As Davidov has recently pointed out,<sup>263</sup> and as jurists have pointed out before, if a company sets a worker's pay per unit of service (for instance, per mile or per delivery), there are limited things the worker can do to increase her income. One of the elements of the economic realities test is opportunity for profit or loss.<sup>264</sup> When a company unilaterally sets pay rates, usually all the worker can do to make more money is to work more hours.<sup>265</sup> This gives her very little control over her profit or loss. If we consider that each hour worked has a cost to the worker—including her labor as well as wear and tear on tools and materials (in drivers' case, a vehicle and perhaps a smartphone), if she works more hours to make more money, her profits will still be the same. That is, her costs increase along with her income as her time increases.

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<sup>261</sup> RESTATEMENT (SECOND) OF AGENCY § 220 cmt.h (AM. LAW INST. 1958).

<sup>262</sup> See *supra* Part I.E.

<sup>263</sup> See Guy Davidov, *Guest Post: The Status of Uber Drivers – Part 3: Applying the Tests*, ON LABOR (May 24, 2016), <https://onlabor.org/guest-post-the-status-of-uber-drivers-part-3-applying-the-tests/>; Carlson, *supra* note 153, at 317.

<sup>264</sup> See *Sec'y of Labor v. Lauritzen*, 835 F.2d 1529, 1535 (7th Cir. 1987).

<sup>265</sup> See *Aslam v. Uber B.V.*, [2016] IRLR 4 (U.K. Empl. Trib.) (No. 2202550/2015) (ET) (Eng.) (finding Uber drivers are entitled to the minimum wage, sick pay, and paid holidays, in part because Uber unilaterally sets their pay).

This lack of control over profit and loss is apparent in the Uber context. When a company unilaterally sets prices and pay, its workers generally ought to be considered employees, even if workers can change their schedule to try to make more money, for instance by only driving during peak times where the company has decided to charge customers more per mile and the worker in turn gets more money per mile. This is because the companies generally do not control the supply of workers. For instance, Uber and Lyft do not control the number of drivers who sign up to work with the companies or who can work at any one time. In fact, the companies fought mightily to avoid an attempt to cap the number of their drivers in New York City.<sup>266</sup> Although there may be some barriers to entry, such as a background check, having the proper license, obtaining insurance, and the like,<sup>267</sup> the companies themselves do not limit the number of people who can be on the platform at any one time. So, presumably, at times when there is more money to be made, there would be more competition from other workers. This is Uber's surge pricing model at work. So, it is unclear that this would really give a worker control over profits, because there would be more competition for the work.

In sum, a worker's ability (or lack thereof) to negotiate prices and pay is where control and economic reality intersect. If the economic relationship is characterized by one party setting the price terms, and the other party's only option is to withhold her services—that is, to exit<sup>268</sup>—the relationship is indistinguishable from an employment relationship. Ability to exit, or quit, is always available to American workers—the Thirteenth Amendment protection against involuntary servitude guarantees that.<sup>269</sup> So, when a worker has no say in what the ultimate customers are charged or what she is paid, the economic reality of the relationship is not materially different than that between employer and employee, and that worker is presumptively an employee.

### B. *Potential Critiques*

Why do I propose a pragmatic solution such as this? Critiques of the employee/independent contractor divide and proposals for a better ap-

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<sup>266</sup> See Josh Dawsey & Andrew Tangel, *Uber Won't Face Limits on Surge Pricing Under NYC Council Legislation*, WALL ST. J. (Jan. 16, 2016), <https://www.wsj.com/articles/uber-wont-face-limits-on-surge-pricing-under-nyc-council-legislation-1452880443>.

<sup>267</sup> See *Get a TLC License: New York City*, UBER, <http://driveubernyc.com/tlc-overview/> (last visited Nov. 14, 2017).

<sup>268</sup> See ALBERT O. HIRSCHMAN, EXIT, VOICE, AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES 4 (1970).

<sup>269</sup> See *Bailey v. Alabama*, 219 U.S. 219, 245 (1911) (holding statute making it a crime to fail to perform a contract for labor unconstitutional under the Thirteenth Amendment); see also Pope, *supra* note 164, at 1481–92 (tracing the origins of the right to quit in Supreme Court doctrine and federal legislation, as well as the Thirteenth Amendment).

proach fall into two camps. On the one side are doctrinal fixes: for instance, worker advocates' such as the National Employment Law Project's (NELP) propose that the proper inquiry is whether the worker is truly in business for herself.<sup>270</sup> The entrepreneurial opportunity test is another example of a doctrinal fix,<sup>271</sup> as is Matthew Bodie's suggestion that we look to whether the worker is carrying out the work of the organization—that is, does the worker perform the kind of work the organization is set up to do (such as a driver's relationship to FedEx or Uber), or rather do something more adjunct, such as fixing the plumbing in an office building?<sup>272</sup> The ABC test used in much reform legislation is another example of a doctrinal fix. What all of these reforms have in common is that they pull out some of the factors from the common law and/or economic realities test for special emphasis. They usually ground their rationales on what they find as the underlying purpose of the employee/independent contractor distinction or purpose of the law(s) in question (though Bodie bases it on an understanding of the theory of the firm).<sup>273</sup> But they go on from there to consider how these underlying purposes might apply to the current order, and suggest a shift in current doctrine rather than a radical rethinking. They do not upend the order of things but rather propose a pragmatic solution that judges, legislators, and practitioners might use.

Other proposals are more foundational, suggesting fundamental changes rather than doctrinal reforms. These include Davidov's enduring focus on a purposive approach, and Tomassetti's insightful identification of the problem with the distinction in the merging of contract and subservience. Were these ideas to be implemented, they would be a more radical change. But it is also harder to see how they might be implemented and how they lead out of the current morass of determining who is an employee and who is an independent contractor.

While the prices and pay test I propose in this Article falls squarely into the pragmatic camp, I recognize that the more pragmatic solutions have their own problems. They may lead to employer arbitrage;<sup>274</sup> indeed there are many examples of this already.<sup>275</sup> For instance, some companies

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<sup>270</sup> See Brief *Amicus Curiae* by the Nat'l Emp't Law Project et al. in Support of Reversal at 7, *Saleem v. Corp. Transp. Grp., Ltd.*, 854 F.3d 131 (2d Cir. 2017).

<sup>271</sup> See *infra* Part I.D.

<sup>272</sup> See Bodie, *supra* note 4, 705–06. Bodie's proposal has some overlap with NELP's argument that the real issue is whether the worker is in business for herself.

<sup>273</sup> *Id.*

<sup>274</sup> See Zatz, *supra* note 70, at 288–89 (discussing the role that legal rules play in firms' structuring of their relationships with their workers).

<sup>275</sup> See, e.g., *Craig v. FedEx Ground Package Sys., Inc.*, 335 P.3d 66, 72–73 (Kan. 2014) (finding that FedEx had “carefully structured its drivers' operating agreements so that it could label the drivers as independent contractors in order to gain a competitive advantage, *i.e.*, to avoid the additional costs associated with employees”).



require drivers to set up business entities themselves so as to create the appearance that the company is contracting with small businesses, not individuals.<sup>276</sup> Companies have allowed drivers to negotiate their pay rate within a very narrow band in response to litigation contesting drivers' employment status. This regulatory arbitrage is probably the most problematic thing about doctrinal solutions, and it is one reason why some commentators have posited that the employment test must leave some room for interpretation and discretion and should be left to adjudicative bodies.<sup>277</sup> Legal rules surely play a role in firms' structuring of their relationships with their workers.<sup>278</sup> However, some pragmatic solutions are less susceptible to employer arbitrage than others. Reforms such as the prices and pay rule, that would not otherwise be attractive for employers to adopt, help reduce the risk of employer manipulation.

Employers may respond to a pragmatic solution such as the prices and pay rule with regulatory arbitrage—that is, they may manipulate the rule to avoid employer status. If a particular practice is beneficial to a company without regard to the independent contractor/employee question, that factor should not be given as much weight as other factors, because of the risk that a company will manipulate the factor for the purpose of making its workers seem like independent contractors.<sup>279</sup> In seeking ways to simplify the test for employment or answer the question of who is an employee more straightforwardly, we should look for factors that have some negative consequences for the company (apart from the employment question) or at least do not benefit the company (apart from the employment question). For example, another factor courts examine at in determining whether a worker is an employee or independent contractor is the worker's investment in tools and equipment.<sup>280</sup> Given that many drivers own or lease their own vehicles, this factor cuts in favor of independent contractor status. However, that factor should not be weighed too heavily because companies can easily manipulate it. A company benefits financially when it does not have to provide and pay for equipment but instead shifts that cost to its workers. Because a worker's ownership of tools also weighs in favor of employee status, companies are doubly incented to require their employees to provide their own tools. By contrast, allowing workers to negotiate prices directly with cus-

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<sup>276</sup> See *Ruiz v. Affinity Logistics Corp.*, 754 F.3d 1093, 1103–04 (9th Cir. 2014) (company's requirement that delivery drivers set up their own business outweighed fact that workers had done so).

<sup>277</sup> See Guy Davidov, *Guest Post: The Status of Uber Drivers – Part I: Some Preliminary Questions*, ON LABOR (May 17, 2016), <https://onlabor.org/2016/05/17/guest-post-the-status-of-uber-drivers-part-i-some-preliminary-questions/>.

<sup>278</sup> See *Zatz*, *supra* note 70, at 288–89.

<sup>279</sup> See *Davidov*, *supra* note 277.

<sup>280</sup> See *Sec'y of Labor v. Lauritzen*, 835 F.2d 1529, 1535 (7th Cir. 1987); *S.G. Borello & Sons, Inc. v. Dep't of Indus. Relations*, 769 P.2d 399, 404 (Cal. 1989).

tomers, or to negotiate their pay, generally does not benefit companies, and may add unwelcome complexity for companies. Thus, it is less easily manipulated, and the risk of employer arbitrage is diminished.

Having control over prices and pay generally benefits a company and also makes its workers seem more like employees. That is, doing the thing that would make the workers seem more like independent contractors—here, negotiating driver pay or allowing the drivers to set the prices for their services directly with the customers, is not otherwise beneficial to companies. All else being equal, a company would likely prefer to set its own prices with its customers and set the rate that it pays to workers. That is, the company would prefer to have a “take it or leave it” approach to both its customers and its drivers.<sup>281</sup>

Control over a worker’s time shares the characteristic of being beneficial to the company but is also more suggestive of employment status. That is, it might be advantageous for a company to set its workers’ schedules or require workers to be available to work at certain times. But this would make a worker seem more like an employee. Here too, it is not to the company’s benefit to allow workers to work when they want, but doing so makes those workers more like independent contractors. Benjamin Means and Joseph Seiner have argued that what is most important for employment status is whether a company controls *when* a worker works—that is, controls the worker’s time.<sup>282</sup> While control over a worker’s time is an important factor, control over pay and prices may be a more important factor, because it is more directly tied to the economic reality of the work relationship. A company that controls a worker’s time is always that worker’s employer. But, if the company does not control the worker’s time, it may still be the worker’s employer if it controls prices or pay.

In the gig economy, driving companies like Uber and Lyft set prices directly with customers. Other companies, like TaskRabbit, have a different model. TaskRabbit originally used a reverse-auction model in which a job went to the lowest bidder. TaskRabbit’s current model lets workers set their own rates.<sup>283</sup> However, TaskRabbit unilaterally decides the cut or percentage it will take from workers’ pay.<sup>284</sup> If workers who do not set

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<sup>281</sup> When customers are not individuals, companies may be more likely to negotiate prices with them. For instance, a delivery company may negotiate prices with a large corporate customer, rather than setting the prices unilaterally. Nonetheless, they are likely reluctant to have drivers involved in these negotiations.

<sup>282</sup> Means & Seiner, *supra* note 11, at 1535–45.

<sup>283</sup> See *Why TaskRabbit is One of the Most Innovative Companies of 2017*, FAST CO. (Feb. 13, 2017), <https://www.fastcompany.com/3067481/most-innovative-companies/why-taskrabbit-is-one-of-the-most-innovative-companies-in-business>.

<sup>284</sup> See Jay Cassano, *TaskRabbit Quietly Doubled the Cut It Takes from Many of Its Workers*, FAST CO. (Nov. 29, 2016), <https://www.fastcompany.com/3065993/taskrabbit-workers-fee-increase>.

their own prices with customers are employees, does this mean that workers who do set their prices are not employees? In some ways the TaskRabbit model, where workers set their own rates, suggests independence, but in other ways it suggests vulnerability and a race to the bottom (something employment and labor laws seek to prevent). The reverse-auction model is a direct example of that race to the bottom.

What about workers, like TaskRabbit workers, who do negotiate or set the prices charged for their services directly with customers? Aren't those workers still experiencing an imbalance of bargaining power? That is, because they negotiate prices individually instead of as part of a group of workers or under the umbrella of their company, aren't they even more subject to the vulnerabilities that Zatz and Tomassetti point out?<sup>285</sup> Don't these workers face just the vulnerabilities that labor law is meant to address?

My response is twofold. First, the proposed test is a one-way ratchet. Although most workers in triangular relationships who do not set prices directly with their customers are employees, many workers who do set their prices may also be employees—in these situations, it becomes important to look at other factors of control and economic dependence, and to look at their role in determining their pay.

Second, this may be where an intermediate category can be useful and effective. These workers should be able to join together in concerted action to demand that their company set certain labor standards (such as health and safety conditions, and perhaps wage rates). The minimum wage should apply to these workers as well.

A final problem with pragmatic solutions is that they may not account for every potential situation and work relationship. A more specific solution may not be tailored for all instances. This is true of my proposed solution. My proposed solution seeks to address triangular relationships where a worker, customer, and company play important roles, that is, relationships where a worker (such as a driver or gig economy worker) performs a service for, and usually interacts directly with, a customer. My solution looks to the nature of this triangular relationship, but it does not encompass other kinds of work relationships. For instance, wage theft and independent contractor misclassification are widespread among day laborers,<sup>286</sup> but day laborers do not usually provide a service directly to their employers' clients or customers. Thus, considering a worker's control over prices and pay may not shed light on employment status in all work relationships. However, given the rise of the gig economy and

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<sup>285</sup> See *supra* notes 109–111 and accompanying text.

<sup>286</sup> Catherine K. Ruckelshaus, *Labor's Wage War*, 35 *FORDHAM URB. L.J.* 373, 381, 384–89 (2008) (noting that 50% of day laborers suffer wage theft, many fear retaliation if they complain or report the theft to a government agency, and day laborers' employers frequently misclassify them as independent contractors).

broader service economy,<sup>287</sup> accounting for the relationship between worker, customer, and firm when evaluating employee status covers many work relationships.

### CONCLUSION

It can be difficult to determine whether a worker is an employee or an independent contractor. Jurists, scholars, and advocates have struggled to answer this old and vexing question. As one response to this problem, scholars, advocates, and policymakers have called for intermediate categories of workers in the United States. An intermediate category may hold promise in extending some rights, benefits, and protections of employment status to workers who would not be considered employees under current law. But we ought to be cautious about using it to parse work relationships that seem to defy easy categorization under traditional tests.

While work in the gig economy is more similar to pre-internet forms of work than Silicon Valley boosters would have us believe, one feature of that work offers clues to reevaluating the employee category. The triangular relationship between workers, companies, and customers, often found in the gig economy, is also present in many non-gig economy work relationships, such as those of delivery and taxi drivers. It offers important clues in reevaluating the employment category. While this Article merely begins a process of theorizing the triangular relationship, there is more to be learned in understanding and analyzing this relationship.

Workers who lack a meaningful say in the prices charged to customers or the percentage they are paid, ought in most instances to be considered employees. Thus, intermediate categories may be useful for some gig economy workers and others, but they are not needed for many drivers, because most drivers, including those who work for app-based companies, are employees.

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<sup>287</sup> A recent analysis reports a 69% increase in non-employee workers in the passenger ground transportation industry between 2010 (when Uber was founded) and 2014. Hathaway & Muro, *supra* note 21.