Updating Legal Norms for a Precarious Workforce

by

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I. INTRODUCTION

Jobs that provide a decent wage, adequate benefits, and some semblance of stability have been the bedrock of American-household economic security since the mid-twentieth century.[1] But something has gone awry.[2] With the arrival of global capitalism, American income insecurity has grown.[3] The nature of work has also changed. More and more, the role of many workers in the modern U.S. economy is not that of a true employee, yet also not that of a true independent businessperson who has the freedom to negotiate his or her compensation or terms of service.[4] But the legal tests used to determine whether a worker is an employee—subject to various workplace protections—or an independent contractor with no such protections, have generally not kept pace with the modern economy. We are left with a large number of workers who are in between, and unprotected.

This paper provides an overview of these issues. Part II reveals the changing nature of work in the modern economy. It demonstrates that work, for many, has become contingent and precarious. Part III provides an overview of how the current tests used to determine whether an employee has been misclassified as an independent contractor, and therefore wrongly deprived of workplace protections, is woefully out of date. Part IV then notes that if the common law will not change, perhaps the change should come through legislation—primarily, as noted in Part V, by extending workplace protections to all workers subject to a very limited "independence" test. And, as detailed in Part V.A., the California Supreme Court, just as this paper was being submitted, adopted a simplified classification test that has the potential to substantially change the way courts classify workers as employees or independent contractors.

II. THE NATURE OF WORK IN THE MODERN ECONOMY

The so-called "standard work arrangement," involving stable, full-time employment with benefits and a living wage, is under attack in the United States and many western economies.[5]

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[1] Mark R. Rank & Thomas A. Hirschl, *Economic Security and the American Dream, in* WORKING AND LIVING IN THE SHADOW OF ECONOMIC FRAGILITY 140, 143 (Marion G. Crain & Michael Sherraden eds., 2014).

[2] In 2011, McDonalds hired 62,000 workers in its first-ever national hiring day—more jobs created on that one day than the net job creation of the entire U.S. economy in 2009. Over 900,000 applicants were rejected. Andy Kroll, *The US Job Market Is Increasingly Unfavorable for the Middle Class, in* WHAT IS THE FUTURE OF THE US ECONOMY? 61, 61–62 (Ronald D. Lankford, Jr. ed., 2013).

[3] Rank & Hirschl, *supra* note 1, at 144; Celinda Lake, Lake Research Partners, Presentation at the Brookings Institute: Economic Anxiety and the American Dream: Is the Dream at Risk in the 21st Century? 4, 7 (July 13, 2007), https://www.brookings.edu/wp-content/uploads/2012/04/20070713.pdf (reporting that seventy-four percent of respondents believe it is harder today to achieve the "American Dream": wages that support a family, affordable quality health care, opportunities for one's children, respect for the work one does, and retirement security).

[4] *See* SETH D. HARRIS & ALAN B. KRUEGER, A PROPOSAL FOR MODERNIZING LABOR LAWS FOR TWENTY-FIRST-CENTURY WORK: THE "INDEPENDENT WORKER" 8 (2015), http://www.hamiltonproject.org/assets/files/modernizing_labor_laws_for_twenty_first_century_work_krueger_harris.pdf ("The heart of the challenge for independent workers is that they do not resemble independent contractors or employees with respect to their most fundamental characteristics.").

[5] *See* Steven Vallas, *Accounting for Precarity: Recent Studies of Labor Market Uncertainty*, 44 CONTEMP. SOC. 463, 463 (2015) (noting that fears of "precarity"—"an enduring condition of economic liminality"—are no longer confined to the United States and "have gripped many member states in the European Union, growing more

Organizations, it is argued, must be more flexible to compete, which requires workers to also become more flexible.[6] In this "fissured workplace,"[7] "[p]athways to employment are increasingly obscure in the United States."[8]

Modern "asset-light" companies[9] and "liquid organizations"[10] are creating a precarious workforce.[11] It is a complex dynamic that has been brewing over the past seven decades driven by, it is argued, neoliberal globalization,[12] technological advances,[13] union decline and

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pronounced since the onset of the economic crisis in 2007"); *see also* Rowena Mason, *Theresa May Hires Former Blair Policy Boss to Review Workers' Rights*, GUARDIAN (Oct. 1, 2016, 9:58 AM), https://www.theguardian.com/money/2016/oct/01/theresa-may-hires-former-tony-blair-policy-boss-to-review-workers-rights (reporting on a UK government review of workers' rights and practices that will try to address concerns that millions are stuck in insecure and stressful work).

[6] *See* Stewart Clegg & Carmen Baumeler, *Essai: From Iron Cages to Liquid Modernity in Organization Analysis*, 31 ORG. STUD. 1713, 1720 (2010) ("Rather than internalize all organizational needs within the envelope of bureaucracy, projects are bid for, worked on, negotiated and shared with other similarly mobile and flexible people working on temporary assignments with high levels of self-responsibility, unclear boundaries and insecure incomes. Time-bound and specific disaggregated projects require individuals to be flexible and adaptable—to be constantly ready and willing to change tactics at short notice, to abandon commitments and loyalties without regret and to pursue opportunities according to their current availability.").

[7] *See* David Weil, *Fissured Employment: Implications for Achieving Decent Work, in* CREATIVE LABOUR REGULATION: INDETERMINACY AND PROTECTION IN AN UNCERTAIN WORLD 35, 37 (Deirdre McCann et al. eds., 2014) (describing the fissured employment strategy as one in which large corporations in major economic sectors no longer directly employ a majority of their workforce, but rather contract with multiple employment purveyors who, in turn, compete with each other to obtain the large firms' business).

[8] Gerald F. Davis, *After the Corporation*, 41 POL. & SOC'Y 283, 294 (2013). Davis concludes: "To oversimplify only slightly, big firms prefer investing in machines to people, and small firms rely on outside vendors for much of the heavy lifting of production and distribution." *Id.* at 295.

[9] *See* ARUN SUNDARARAJAN, THE SHARING ECONOMY: THE END OF EMPLOYMENT AND THE RISE OF CROWD-BASED CAPITALISM 1–2 (2016) (arguing that salaried, permanent jobs in "asset-heavy" businesses are on their way out while flexible on-demand labor in "asset-light" businesses is in).

[10] *See* Clegg & Baumeler, *supra* note 6, at 1718 (discussing liquid organizations that have few long-term investments that are difficult to disinvest, including those in which investments in people are very largely liquid, are easily liquidated, and carry no long-term investment implications).

[11] *See* GUY STANDING, THE PRECARIAT: THE NEW DANGEROUS CLASS 1 (2014) (describing the "precariat" as millions of workers around the world without an anchor of stability). Sociologist Arne Kalleberg defines precarious work as "employment that is uncertain, unpredictable, and risky from the point of view of the worker." Arne L. Kalleberg, *Precarious Work, Insecure Workers: Employment Relations in Transition*, 74 AM. SOC. REV. 1, 2 (2009).

[12] *See* DANIEL STEDMAN JONES, MASTERS OF THE UNIVERSE: HAYEK, FRIEDMAN, AND THE BIRTH OF NEOLIBERAL POLITICS 2 (2012) (defining neoliberalism as "the free market ideology based on individual liberty and limited government that connect[s] human freedom to the actions of the rational, self-interested actor in the competitive marketplace"); *see also* Louis Uchitelle, MAKING IT: WHY MANUFACTURING STILL MATTERS 27 (2017) ("Multinational corporations have . . . mov[ed] production abroad to supply overseas markets rather than exporting from the United States, and to lower the cost of manufacturing merchandise for American consumers. As the exodus continued and work disappeared, the bargaining power of American factory workers plummeted. . . . By the late 1990s the truly multinational manufacturer—headquartered in the United States and running sophisticated factories spread across the globe—had come fully to life.").

[13] *See, e.g.*, NIGEL M. DE S. CAMERON, WILL ROBOTS TAKE YOUR JOB? 68 (2017) ("In the case of the Machine Intelligence revolution, what we face is a disruption that mirrors previous disruptions but on a far wider scale. Its impact will not be localized geographically, nor as to industry. . . . Partly because jobs passed directly from humans to machines will be lost in many different areas of the economy . . . ."); Guido Matias Cortes et al., *Disappearing Routine Jobs: Who, How, and Why?* 3 (Nat'l Bureau of Econ. Research, Working Paper No. 22918, 2016), http://www.nber.org/papers/w22918 (demonstrating analytically that advances in automation cause workers to leave routine occupations and sort into nonemployment and nonroutine, low-wage, manual jobs); Melanie Arntz et al., *The Risk of Automation for Jobs in OECD Countries: A Comparative Analysis* 4 (OECD Social, Employment and

deregulation, the accelerated ascendancy of business, and the rise in service industries coupled with the decline in manufacturing jobs.[14] The "neoliberal" model sought increased labor flexibility by transferring risks and insecurity onto workers,[15] leading to an erosion of full-time work for a particular employer at its place of work.[16] In short, there has been a substantial decline in long-term employment opportunities and a concomitant reduction in job security in the private sector.[17] Commentators suggest that a principal motivation for shifting to temporary, part-time, and contingent workforces, besides lowering labor costs, is to insulate core employees from economic fluctuations by using peripheral workers to buffer or absorb economic

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Migration, Working Paper No. 189, 2016), http://www.oecd-ilibrary.org/the-risk-of-automation-for-jobs-in-oecd-countries_5jlz9h56dvq7.pdf (concluding that while, on average, nine percent of jobs are automatable across the twenty-one OECD countries, "low qualified workers are likely to bear the brunt of the adjustment costs as the automatibility of their jobs is higher compared to highly qualified workers. Therefore, the likely challenge for the future lies in coping with rising inequality . . . .").

[14] Kalleberg, *supra* note 11, at 2–3; *see also* ARNE L. KALLEBERG, GOOD JOBS, BAD JOBS: THE RISE OF POLARIZED PRECARIOUS EMPLOYMENT SYSTEMS IN THE UNITED STATES, 1970S TO 2000S 21 (2011) ("Forces such as the globalization of production, technological change, and the continued rise in the service sector—combined with political decisions to deregulate markets and to reduce enforcement of market standards—weakened unions and the collective power of workers while strengthening the control of employers, who consequently had relatively free rein to restructure employment relations.").

[15] STANDING, *supra* note 11, at 1; *see also* DAVID WEIL, THE FISSURED WORKPLACE: WHY WORK BECAME SO BAD FOR SO MANY AND WHAT CAN BE DONE TO IMPROVE IT 49–50 (2014) (discussing the notion, emanating from the public capital markets and private equity companies in the 1980s and 1990s, that firms should focus on their core competencies and shed everything else—including a significant portion of their long-term employee base—that was not contributing directly to the bottom line).

[16] Kalleberg, *supra* note 11, at 3; *see also* ERIN HATTON, THE TEMP ECONOMY: FROM KELLY GIRLS TO PERMATEMPS IN POSTWAR AMERICA 2 (2011) ("By the turn of the twenty-first century, . . . it became acceptable to talk about workers—*all* workers, from the highly skilled to the day laborer—as costly sources of rigidity in an economy that required flexibility."); Brad DeLong, *The Jobless Recovery Has Begun*, THE WEEK (July 20, 2009), http://www.theweek.com/articles/503493/jobless-recovery-begun (suggesting that the recovery from the 2009 recession would be "jobless" because firms think that their workers are much more disposable).

[17] Henry S. Farber, *Short(er) Shrift: The Decline in Worker-Firm Attachment in the United States, in* LAID OFF, LAID LOW: POLITICAL AND ECONOMIC CONSEQUENCES OF EMPLOYMENT INSECURITY 10, 30 (Katherine S. Newman ed., 2008) (analyzing mean job tenure data from 1975–2005); *see also* CARRIE M. LANE, A COMPANY OF ONE: INSECURITY, INDEPENDENCE, AND THE NEW WORLD OF WHITE-COLLAR UNEMPLOYMENT 37 (2011) (noting that in the 1970s and 1980s layoffs in the United States became more frequent, more permanent, and more likely to occur in prosperous companies following a new "lean and mean" management ethos, as well as automation, deindustrialization, business cycles and cost cutting, often achieved by sending jobs overseas); Kalleberg, *supra* note 11, at 6–8 (noting that since the 1970s there has been a general decline in the average length of time people remain employed with a particular employer, an increase in long-term unemployment, growth in perceived job insecurity, growth of nonstandard work arrangements and contingent work, and an increase in risk-shifting from employer to employee). Labor force participation has continued to remain essentially flat since 1978, measured at 62.7% in mid-2016. Steven F. Hipple, *Labor Force Participation: What Has Happened Since the Peak?* BLS MONTHLY LAB. REV. (Sept. 2016), http://www.bls.gov/opub/mlr/2016/article/labor-force-participation-what-has-happened-since-the-peak.htm (noting the labor force participation rate peaked at 67.3% in early 2000).

fluctuations.[18] Ultimately though, it is argued, firms cannot resist the substantial cost savings associated with a peripheral workforce.[19]

David Weil has identified three trends that have contributed to a fissured workplace: subcontracting,[20] franchising,[21] and supply chain management.[22] Other commentators have placed more emphasis on recent operational trends colloquially referred to as the "sharing" or "gig" economy. In general, commentators cannot agree on a precise definition of the "sharing economy."[23] Today it stands in for technology-based intermediaries that connect providers with

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[18] *See* BENNETT HARRISON & BARRY BLUESTONE, THE GREAT U-TURN: CORPORATE RESTRUCTURING AND THE POLARIZING OF AMERICA 45 (1988); *see also* RANA FOROOHAR, MAKERS AND TAKERS: THE RISE OF FINANCE AND THE FALL OF AMERICAN BUSINESS 2–3 (2016) (arguing that American businesses spend more time and effort on financial engineering rather than traditional (i.e., product) engineering). "[W]orkforce participation is as low as it's been since the late 1970s. It used to be that as the fortunes of American companies improved, the fortunes of the average American rose, too." *Id.* at 3.

[19] *Cf.* HARRISON & BLUESTONE, *supra* note 18, at 45–46; *see also* James H. Wolfe, *Determination of Employer-Employee Relationships in Social Legislation*, 41 COLUM. L. REV. 1015, 1015 (1941) ("As the financial burdens imposed on the employer grow heavier, there is a temptation to avoid them by fashioning contracts transforming employer-employee relationships by legal guises into those of vendor-vendee, lessor-lessee, or independent contractor.") (footnotes omitted). This can be true for small startup businesses as well. *See, e.g.* Jeffrey Sparshott, *Tiny Firms Stay That Way—Number of One-Person Companies Soars, but It Won't Do Much to Expand Overall Jobs*, WALL ST. J., Dec. 29, 2016, at A3 (quoting one owner of a nonemployee business, "It's so expensive to hire the first worker—it's grim, all the paperwork, unemployment taxes.") (internal quotation marks omitted).

[20] WEIL, *supra* note 15, at 99–121. Weil notes that subcontracting has been common in many industries, such as construction, throughout U.S. history. *Id.* at 99. Recently, however, subcontracting has spread into new sectors and deepened within those in which it traditionally occurred. *Id.* at 100. The result for workers is conditions that are competitive, price sensitive, and subject to fluctuating demand. *Id.* For example, an airline passenger may incorrectly assume that workers loading baggage onto a plane are employees of that airline. *See, e.g.*, Christine Hauser, *A United Baggage Handler Took an Unexpected Flight in a Cargo Hold*, N.Y. TIMES (Jan. 3, 2017), www.nytimes.com/2017/01/03/us/baggage-handler-cargo-united-airlines.html (revealing, while reporting on a baggage handler who somehow was locked in the cargo hold of a plane during a flight, that the worker was actually employed by a company different from the airline he serviced); *see also* Gerald F. Davis, *What Might Replace the Modern Corporation? Uberization and the Web Page Enterprise*, 39 SEATTLE U. L. REV. 501, 502 (2016) ("Nikefication turned the corporation into a nexus-of-contracts, organizationally separating design from production and distribution. Entrepreneurs grew skilled at assembling contractors into a virtual enterprise.") (footnote omitted). Davis describes "Nikefication" as the widespread adoption of Nike's model of designing and marketing athletic shoes by contracting out production to suppliers in East Asia." *Id.* at 502 n.2.

[21] WEIL, *supra* note 15, at 122–158. Rather than simply leveraging the entrepreneurial drive of individuals seeking to expand an existing product or service (*see id.* at 122), Weil argues that some franchise arrangements are problematic, particularly for janitorial services, by directly collecting customer fees and then paying the franchisee a percentage less royalty fees and principal and interest on the loan used to acquire the franchise. *See id.* at 197; *see also* Awuah v. Coverall N. Am., 707 F. Supp. 2d 80 (D. Mass. 2010) (holding that plaintiffs/franchisees were employees of defendant/franchisor because, in part, the franchisor contracted with and billed customers for the cleaning services performed, and collected a percentage of the revenue earned for every cleaning service performed).

[22] WEIL, *supra* note 15, at 159–177. As Weil notes, this is fundamentally outsourcing (moving jobs to domestic sources outside the company) and offshoring (moving jobs to foreign sources outside the company). *Id.* at 159. Ultimately, Weil argues, outsourcing and offshoring entail a lead company focusing on core competencies while shedding activities, such as manufacturing and assembly, to other businesses. *Id.* at 168.

[23] *See, e.g.*, SUNDARARAJAN, *supra* note 9, at 27 (stating that he is unaware of any consensus on a definition of the sharing economy). Sundararajan views the phenomenon more as "crowd-based capitalism," arguing the "crowd" (represented by peer-to-peer networks) will replace the corporation at the center of capitalism. *Id.* at 2, 27. Other commentators envision an environment more closely akin to social enterprises and cooperatives. *See, e.g.*, Jenny Kassan & Janelle Orsi, *The Legal Landscape of the Sharing Economy*, 27 J. ENVTL. L. & LITIG. 1, 3 (2012)

those in need of products or services.[24] Ultimately, contrary to Sundararajan's vision of peer-to-peer networks replacing the corporation at the center of capitalism,[25] the "sharing economy" is a business model that operates less like sharing and more like traditional corporate profit-making that happens to use an app.[26] Sharing economy businesses are currently epitomized by Airbnb (matching people who have a house, apartment, or room available for short-term rent with travelers looking for an alternative place to stay), Uber and Lyft (matching people who are willing to give rides in their cars to people looking for a ride), TaskRabbit, matching people who need a chore performed with workers who are willing to perform the chore), and Grubhub (an internet food ordering service that connects diners to local restaurants).[27]

The "gig economy" refers more broadly to the evolving nature of on-demand work. As one report explains, "This is a new age of *non-employee* workforce management, one that is founded on the progression of social and business networks, enterprise technology, and an overall shift in how today's enterprises approach their talent engagement strategies."[28] One commentator suggests that anyone working in a nontraditional job could be considered a contingent, temporary, or "gig" worker.[29] One perspective of the gig economy is that it allows

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(describing the sharing economy as facilitating "community ownership, localized production, sharing, cooperation, small scale enterprise, and the regeneration of economic and natural abundance").

[24] *See, e.g.*, Steven Greenhouse, *The Whatchamacallit Economy*, N.Y. TIMES (Dec. 16, 2016), http://www.nytimes.com/2016/12/16/opinion/the-whatchamacallit-economy.html (noting there often isn't much actual sharing going on and that the "sharing economy" is also referred to as the on-demand economy, peer-to-peer economy, crowd-based economy, gig economy, and collaborative economy); *see also* SUNDARARAJAN, *supra* note 9, at 27 (summarizing the characteristics of whatever one may call this "economy" as "[b]lurring the lines between fully employed and casual labor, between independent and dependent employment, between work and leisure: many traditionally full-time jobs are supplanted by contract work that features a continuum of levels of time commitment, granularity, economic dependence, and entrepreneurship"); DIANA FARRELL & FIONA GREIG, PAYCHECKS, PAYDAYS, AND THE ONLINE PLATFORM ECONOMY: BIG DATA ON INCOME VOLATILITY 5 (2016), https://www.jpmorganchase.com/corporate/institute/document/jpmc-institute-volatility-2-report.pdf (defining "the Online Platform Economy as economic activities involving an online intermediary that provides a platform by which independent workers or sellers can sell a discrete service or good to customers. Labor platforms, such as Uber or TaskRabbit, connect customers with freelance or contingent workers who perform discrete projects or assignments. Capital platforms, such as eBay or Airbnb, connect customers with individuals who rent assets or sell goods peer-to-peer.").

[25] SUNDARARAJAN, *supra* note 9, at 27.

[26] Greenhouse, *supra* note 24; *see also* Rachel Botsman, *Defining the Sharing Economy: What Is Collaborative Consumption—and What Isn't?*, FAST CO. (May 27, 2015, 6:15 AM), https://www.fastcoexist.com/3046119/defining-the-sharing-economy-what-is-collaborative-consumption-and-what-isnt ("The 'sharing economy' is a term frequently incorrectly applied to ideas where there is an efficient model of matching supply with demand, but zero sharing and collaboration involved.").

[27] *See* Lawson v. Grubhub, No.15-cv-05128-JSC, 2018 WL 776354, at *2 (N.D. Cal. Feb. 8, 2018); *see also* HARRIS & KRUEGER, *supra* note 4, at Appendix, 28–33 (listing and describing twenty-six "prominent" online intermediary companies).

[28] CHRISTOPHER J. DWYER, THE STATE OF CONTINGENT WORKFORCE MANAGEMENT 2016–2017: ADAPTING TO A NEW WORLD OF WORK 5 (2016), https://www.fieldglass.com/sites/default/files/2017-11/state-of-contingent-workforce-management-2016-2017-Ardent-SAP-Fieldglass.pdf (emphasis added).

[29] Michelle Capezza, *The Independent Worker: An Interview with Gene Zaino, CEO of MBO Partners*, TECH. EMP. L. (Nov. 3, 2016), http://www.technologyemploymentlaw.com/benefits-compensation/the-independent-worker-an-interview-with-gene-zaino-ceo-of-mbo-partners/; *see also* FARRELL & GREIG, *supra* note 24, at 20 (noting that labor platforms, such as Uber or TaskRabbit, are often referred to as the "Gig Economy"). *But see* HARRIS & KRUEGAR, supra note 4, at 10 Box 2 (defining the online gig economy as involving "the use of an Internet-based app to match customers to workers who perform discrete *personal tasks*, such as driving a passenger from point A to point B, or delivering a meal to a customer's house[;]" excluding intermediaries that facilitate the sale of goods and impersonal

skilled and entrepreneurial workers to leverage their talents to move from good to great jobs.[30] In a 2015 study, the Institute for the Future found a number of worker advantages in the gig economy: part-time workers supplementing "traditional" low-paying jobs; highly-skilled educated workers finding numerous consulting opportunities; freelancers who can work when they want to; full-time "gig" workers who, for whatever reason (recent move; laid-off), are unable to find or hold a "traditional" full-time job; workers who are attempting to re-enter the workforce; workers who leverage entrepreneurial skills to maximize gig opportunities; and workers who thrive at working multiple gig opportunities.[31] Similarly, a 2016 Intuit-sponsored survey of on-demand workers broke them into five categories: "career freelancers" (twenty percent of respondents) who are building a career through freelancing; "business builders" (twenty-two percent of respondents) who want to work for themselves and not hold a traditional job; "side giggers" (twenty-six percent of respondents) who are seeking financial stability by moonlighting; "passionistas" (fourteen percent of respondents) who are well-educated workers that are more interested in flexibility and the nature of the work rather than the money; and "substituters" (eighteen percent of respondents) who are replacing a traditional job they lost or they cannot find one.[32]

Does the gig economy represent a new wave of entrepreneurship and innovation or a race to the bottom by exploited workers?[33] Overall, gig workers report being generally satisfied with their on-demand work. The Intuit survey found, for example, that over eight percent of "career freelancers" and "business builders" were each satisfied with their on-demand platforms, while "substituters" were least satisfied (forty-seven percent).[34] A 2015 Uber-sponsored survey found that eighty-one percent of its drivers were satisfied with their experience.[35] In contrast, another

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services to customers, such as Etsy.com (a Web site where individuals sell handmade or vintage goods) and Airbnb (alteration in original)).

[30] *See* Diane Mulcahy, *Who Wins in the Gig Economy, and Who Loses*, HARV. BUS. REV. (Oct. 27, 2016), https://hbr.org/2016/10/who-wins-in-the-gig-economy-and-who-loses (noting also that the gig economy allows low-skill workers to move from bad jobs to better work).

[31] *See* MIRIAM LUECK AVERY ET AL., VOICES OF WORKABLE FUTURES: PEOPLE TRANSFORMING WORK IN THE PLATFORM ECONOMY 7–30 (2015), http://www.iftf.org/fileadmin/user_upload/downloads/wfi/IFTF_WFI_Voices_of_Workable_Futures_2016.pdf.

[32] Elaine Pofeldt, *How Happy Is Your Uber Driver? Survey Offers Candid Glimpse Of Gig-Economy Workers*, FORBES (Feb. 7, 2016, 6:26 PM), http://www.forbes.com/sites/elainepofeldt/2016/02/07/how-happy-is-your-uber-driver-survey-offers-candid-glimpse-of-gig-economy-workers.

[33] *See, e.g.*, Arne L. Kalleberg & Michael Dunn, *Good Jobs, Bad Jobs in the Gig Economy*, 20 PERSP. ON WORK 10, 10 (2016) ("Some see the gig economy as promoting entrepreneurship and limitless innovation coupled with jobs that offer considerable flexibility, autonomy, and work/life balance, as well as opportunities for individuals to supplement their incomes by monetizing their resources."); *id.* (noting that "skeptics argue that gig jobs leave workers open to exploitation and low wages as employers compete in a race to the bottom"); Guy Standing, *Taskers: The Precariat in the On-Demand Economy (Part One)*, WORKING-CLASS PERSP. (Feb. 16, 2015), https://workingclassstudies.wordpress.com/2015/02/16/taskers-the-precariat-in-the-on-demand-economy-part-one/ ("All these [workers] face insecurity, low and fluctuating incomes, chronic uncertainty, and lack of control over time. They have no fixed hours or workplaces. . . . [T]hey live in a tertiary time regime, in which labor and work blur into each other, without payment for downtime, waiting, retraining, networking, and so on. They have illusion of freedom while also feeling that they are under incessant control."); Arun Sundararajan, *The "Gig Economy" Is Coming. What Will It Mean for Work?* GUARDIAN (July 25, 2015, 7:05 PM), https://www.theguardian.com/commentisfree/2015/jul/26/will-we-get-by-gig-economy (questioning whether the gig economy "portends a dystopian future of disenfranchised workers hunting for their next wedge of piecework").

[34] Pofeldt, *supra* note 32.

[35] *New Survey: Drivers Choose Uber for Its Flexibility and Convenience*, UBER NEWSROOM (Dec. 7, 2015), https://newsroom.uber.com/driver-partner-survey/.

survey found that sixty-seven percent of respondents who have worked as an independent contractor would choose not to do so again in the future.[36]

The Institute for the Future notes downsides to working in the gig economy: income and job insecurity; lack of benefits, particularly health insurance; and dead-end work with no possibility of advancement.[37] Similarly, the Intuit survey reveals that most on-demand work is part time, with thirty percent of workers still holding down a traditional full-time or part-time job, while another thirty-three percent are simultaneously engaged in contracting, consulting, or running a business.[38]

Regardless of the moniker or the exact methodology, there is a definite and growing trend of reduced long-term employment and increasing contingent work arrangements.[39] David Weil and Tanya Goldman assert that "[a] myopic focus on the on-demand world obfuscates more fundamental changes that have become pervasive across a wider spectrum of industries."[40] They argue that "[m]any business models in the on-demand sector represent a deepening fissuring of the workplace, as technology and software algorithms enable companies to further outsource significant proportions of the work."[41]

Unfortunately, there are no hard numbers available to accurately "count" the number of independent contractors and contingent, freelance, moonlighting, on-demand, or gig workers in the United States.[42] Estimates range from eight percent to nearly forty percent of workers,

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[36] Press Release, Deloitte, Deloitte Survey Finds 67 Percent of Americans Who Have Worked as Independent Contractors Would Choose Not to Do So in the Future (Aug. 25, 2016), https://www2.deloitte.com/us/en/pages/about-deloitte/articles/press-releases/deloitte-survey-workplace-culture-important-to-independent-contractors.html.

[37] AVERY ET AL., *supra* note 31, at 46–47; *see also* Mark Frauenfelder, *Making the Gig Economy Work for Everyone*, IFTF BLOG (Dec. 16, 2016), http://www.iftf.org/future-now/article-detail/making-the-gig-economy-work-for-everyone/ ("[I]f you take a higher altitude look at the growing landscape of algorithmic matchmaking services, you'll see some troubling aspects. For example, traditional workers can usually converse with human bosses, but on a platform, workers are told what to do by algorithmic 'managers' that consider humans to simply be part of a pool of inputs to be allocated in response to changes in network conditions. To make things worse, workers in the gig economy are isolated from one another, making it extremely difficult for them to develop a collective voice to negotiate with platform owners and designers about issues that affect their livelihood.").

[38] Pofeldt, *supra* note 32 (concluding that "many workers' salaries aren't paying the bills, unless they do extra on-demand work"); *see also* Annette Bernhardt, *It's Not All About Uber*, 20 PERSP. ON WORK 14, 15 (2016) (noting surveys "consistently" finding that a majority of the workers who use platforms are working on them only part-time and part-year to smooth over periods of unemployment or to supplement income).

[39] *See, e.g.,* LANE, *supra* note 17, at 38 (noting that white-collar workers have accounted for a steadily increasing proportion of total U.S. job losses since the 1980s as their jobs became "increasingly insecure due to the rising emphasis on 'flexible'—easily hirable and fire-able—labor . . ., the availability of inexpensive white-collar laborers abroad, and the financial pressures of quarterly reporting"); Capezza, *supra* note 29 ("By [2021], nearly one in two people will work independently, or will have done independent work at some point in their careers."); Mulcahy, *supra* note 30 ("Work is being disaggregated from jobs and reorganized into a variety of alternative arrangements, such as consulting projects, freelance assignments, and contract opportunities."); DWYER, *supra* note 28, at 8–9 ("Nearly 38% of the world's workforce is now considered 'non-employee,' which includes contingent/contract workers, temporary staff, gig workers, freelancers, professional services, and independent contractors.").

[40] David Weil & Tanya Goldman, *Labor Standards, the Fissured Workplace, and the On-Demand Economy*, 20 PERSP. ON WORK 26, 26 (2016); *see also* Bernhardt, *supra* note 38, at 15 (questioning whether the gig economy is new activity or merely moonlighting supplanted on platforms). *But see* Standing, *supra* note 33 ("Informed observers predict that within the next decade, one in every three labor transactions will be done online as part of the 'on-demand,' 'sharing,' 'gig,' or 'crowd labor' economy.").

[41] Weil & Goldman, *supra* note 40, at 27.

[42] *See, e.g.*, Jonathan V. Hall & Alan B. Krueger, *An Analysis of the Labor Market for Uber's Driver-Partners in the United States* 6 (Princeton Univ. Indus. Relations Section, Working Paper No. 587, 2015),

depending on how "nontraditional" workers are classified.[43] The Bureau of Labor Statistics (BLS) has not updated its data on contingent workers—those who do not have an implicit or explicit contract for long-term employment—and workers with alternative employment arrangements—including independent contractors (also called freelancers or independent consultants), on-call workers, and workers provided by temporary help agencies or contract firms—since 2005.[44] In 2005, BLS data found that contingent workers accounted for roughly two to four percent of all workers, and approximately seven percent of workers were independent contractors, the most common alternative employment arrangement.[45] The BLS suggests that "nonemployers"—very small, unincorporated businesses with no paid employees—fit the description of gig workers.[46] According to the Census Bureau, the "other services" business sector—which includes many of the occupations involving on-demand services well suited to gig employment—gained nearly one million nonemployer businesses between 2003–2013.[47]

However, Lawrence Katz and Alan Krueger conducted an alternative contingent work survey that revealed a substantial rise in the incidence of alternative work arrangements for U.S. workers from 2005 to 2015.[48] Using the same broad definition of alternative work arrangements—temporary help agency workers, on-call workers, contract company workers, and independent contractors or freelancers—Katz and Krueger found the percentage of workers engaged in such arrangements increased from 10.1% in 2005 to 15.8% in 2015, after the BLS contingent worker survey found minimal changes in the percent of workers engaged in such arrangements between 1995–2005.[49] Importantly, though, Katz and Krueger conclude that "*all of*

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http://dataspace.princeton.edu/jspui/bitstream/88435/dsp010z708z67d/5/587.pdf ("The size of the sharing economy, which is undoubtedly growing as a result of technological advances, is too new to be precisely measured. But workers in the sharing economy are largely a subset of those who are independent contractors and the self-employed.").

[43] *See, e.g.*, Shayna Strom & Mark Schmitt, *Protecting Workers in a Patchwork Economy*, CENTURY FOUND. (Apr. 7, 2016), https://tcf.org/content/report/protecting-workers-patchwork-economy/ (referencing estimates of nontraditional work as low as eight percent of the workforce (four percent as self-employed independent contractors, and another four percent as temporary workers), with other estimates putting the percentage of people doing at least some freelance work as high as thirty-four percent of the workforce, and citing a range of sources with various classifications of workers); FARRELL & GREIG, *supra* note 24, at 21 (finding that one percent of adults earned income from online platforms in a given month during 2015, and four percent participated over the three-year period 2012–2015).

[44] Elka Torpey & Andrew Hogan, *Working in a Gig Economy*, BUREAU OF LAB. STAT. (May 2016), https://www.bls.gov/careeroutlook/2016/article/what-is-the-gig-economy.htm. The BLS did conduct a special supplemental survey on contingent and alternative employment arrangements in May 2017, but has yet to set a release date for the findings. *See* BLS, Labor Force Statistics from the Current Population Survey, https://www.bls.gov/cps/lfcharacteristics.htm (last modified Mar. 26, 2018).

[45] Torpey & Hogan, *supra* note 44.

[46] *Id.* However, not all "nonemployers" fit the gig economy description. *See, e.g.* Sparshott, *supra* note 19 (reporting that manufacturing establishments with no employee other than the owner increased by nearly seventeen percent from 2004 to 2014; describing tiny operations making food, craft beer, toiletries, or other niche products).

[47] Torpey & Hogan, *supra* note 44.

[48] Lawrence F. Katz & Alan B. Krueger, The Rise and Nature of Alternative Work Arrangements in the United States, 1995–2015, at 2 (Mar. 29, 2016), https://krueger.princeton.edu/sites/default/files/akrueger/files/katz_krueger_cws_-_march_29_20165.pdf.

[49] *Id.* at 2–3. *But see* Hall & Krueger, *supra* note 42, at 6 (concluding that after considering losses in some sectors of the economy and gains in other sectors, the net share of self-employment work was slightly lower in 2014 than it was in 2004).

the net employment growth in the U.S. economy from 2005 to 2015 appears to have occurred in alternative work arrangements."[50]

III. APPLYING OLD LAW TO NEW WORK ARRANGEMENTS

In re *Mitchell*[51] exemplifies the accelerating transformation of the U.S. (and, to some extent, global) workforce to a contingent, on-demand labor pool primarily populated by (sometimes partially) self-employed workers classified as independent contractors. In 2010, Gregory Mitchell entered into a contract to become a media blogger for the print and online magazine, The Nation. Mitchell was paid a "freelance payment" of $46,800 per year, paid in monthly installments.[52] During the approximately four and one-half years Mitchell worked for The Nation, he was free to pursue other work, which he did—publishing approximately eight books and blogging for other entities.[53] When Mitchell's contract was not renewed in 2014, he applied for unemployment insurance benefits. Both the New York Department of Labor and the New York Unemployment Insurance Appeal Board ruled that Mitchell, as well as similarly situated workers, was an employee entitled to unemployment insurance benefits.[54]

In many respects, one could consider Mitchell's working relationship with The Nation as that of a "traditional" employee—he was paid an annual salary in monthly installments and was reimbursed for certain business-related expenses; his contract required that he identify himself as a writer for The Nation; he was assigned an intern for assistance; he was restricted from publishing the same content with competitors (at least within forty-eight hours of the content's publication), he was required to use The Nation's software system to post his blog entries; and on at least one occasion, he was directed to continue to write on a particular topic after he expressed a desire to go in another direction.[55]

However, the New York Supreme Court Appellate Division reversed, concluding that Mitchell was an independent contractor—he was not formally interviewed for his position; he worked from home (indeed, he was not permitted to work from The Nation's offices) using his own laptop; he had no supervisor; he did not suffer any adverse consequences if he did not post a story; he generally was not assigned to write on a particular topic; and could post a story to his

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[50] Katz & Krueger, *supra* note 48. at 7 (alteration in original); *see also* ELI DOURADO & CHRISTOPHER KOOPMAN, EVALUATING THE GROWTH OF THE 1099 WORKFORCE 1 (Dec. 2015), http://mercatus.org/sites/default/files/Evaluating-Growth-1099-Dourado-MOP.pdf (concluding that a recent increase in nontraditional employment was not caused by sharing-economy firms; rather, the rise of sharing-economy firms is a response to a stagnant traditional labor sector and a product of the growing independent workforce; based on analysis of IRS data). Katz and Krueger also found that only about 0.5% of workers indicated they are working through an online intermediary, such as Uber or TaskRabbit. Katz & Krueger, *supra* note 48, at 3 (noting that while this is a relative small percentage compared to other alternative work arrangements, it is growing very rapidly); *see also* HARRIS & KREUGER, *supra* note 4, at 12 Box 2 (estimating the online gig economy represents 0.4% of total U.S. employment); Josh Zumbrun, *The Entire Online Gig Economy Might Be Mostly Uber*, WALL ST. J. (Mar. 28, 2016, 1:52 PM), http://blogs.wsj.com/economics/2016/03/28/the-entire-online-gig-economy-might-be-mostly-uber/ (noting that "about 1% of U.S. adults were earning income from online platforms, but the majority were earning money with sites like Airbnb and Etsy, where the primary activity is renting housing or selling products, rather than directly selling their own labor").

[51] 44 N.Y.S.3d 567 (N.Y. App. Div. 2016).

[52] *Id.* at 568.

[53] *Id.*

[54] *Id.*

[55] *Id.* at 570.

blog prior to it being edited by The Nation's staff.[56] Ultimately, the Appellate Division concluded, while The Nation exercised incidental control over the results produced by Mitchell, it did not exercise sufficient *control over the means* employed by him to achieve the results.[57]

In the past few years, there has been a spate of "gig"–related misclassification[58] disputes, including well-known companies such as Uber, Lyft, and Grubhub.[59] What these cases have in common is that because the workers exhibit attributes associated with both independent contractors and employees, the question of classification must rest with a jury. In *O'Connor v. Uber Technologies, Inc*., the District Court for the Northern District of California concluded whether Uber drivers were employees or misclassified independent contractors was a mixed question of law and fact suitable for a jury, after contrasting that the drivers provided a service to Uber and were closely monitored, while also providing their own vehicles and having the freedom to essentially work when the wanted for as long as they wanted.[60] Within just a few days, another judge in the District Court for the Northern District of California noted that Lyft drivers didn't seem much like employees while simultaneously not looking much like independent contractors either, and therefore concluded the case must go to a jury because reasonable people could differ on whether the drivers were employees or independent contractors.[61] More recently, in *Lawson v. Grubhub*, Magistrate Judge Corley in the District Court for the Northern District of California concluded that a grocery delivery worker was an independent contractor and not an employee.[62]

Labor and employment laws—such as antidiscrimination, fair labor standards and labor relations, family and medical leave, and state workers' and unemployment compensation—focus on protecting employees.[63] No parallel laws protect workers who are not classified as employees,

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[56] *Id.* at 571.

[57] *See id.* at 569. *Contrast with In re* Barrier Window Sys., Inc., 53 N.Y.S.3d 222 (N.Y. App. Div. 2017) (concluding that Barrier Window installers were employees rather than independent contractors because, for example, Barrier determined the installation price and selected an installer from a list that it maintained, with no negotiation of the installation price with the installer).

[58] The argument is that someone classified as an independent contractor when, in fact, that person is an employee, is considered a misclassification.

[59] There are certainly misclassification disputes in other types of work. *See, e.g.*, McFeeley v. Jackson St. Entm't, LLC, 825 F.3d 235 (4th Cir. 2016) (exotic dancers); Meyer v. U.S. Tennis Ass'n, 607 Fed. App'x 121 (2nd Cir. 2015) (tennis umpires); Schultz v. Capital Int'l Sec., Inc., 466 F.3d 298 (4th Cir. 2006) (personal protection service agents); Safarian v. Am. DG Energy, Inc., No. 10-6082, 2015 WL 12698441 (D.N.J. Nov. 24, 2015) (field service engineer); *In re* Yoga Vida NYC, Inc., 64 N.E.3d 276 (N.Y. 2016) (yoga instructors); *see also generally Exploiting Workers by Misclassifying Them as Independent Contractors: Before the Emp't & Hous. Subcomm. of the Comm. on Gov't Operations*, 102d Cong. (1991) [hereinafter *Exploiting Workers*] (focusing primarily on employment classification in the construction industry); David Cowley, *Employees vs. Independent Contractors and Professional Wrestling: How the WWE Is Taking a Folding-Chair to the Basic Tenets of Employment Law*, 53 U. LOUISVILLE L. REV. 143 (2014) (discussing employment classification of professional wrestlers); Robert Sprague, *Worker (Mis)Classification in the Sharing Economy: Trying to Fit Square Pegs into Round Holes*, 31 A.B.A. J. LAB. & EMP. L. 53, 62–67 (2015) (discussing employment classification cases involving FedEx drivers).

[60] 82 F. Supp. 3d 1133 (N.D. Cal. 2015).

[61] Cotter v. Lyft, Inc., 60 F. Supp. 3d 1067, 1069, 1080–81 (N.D. Cal. 2015).

[62] Lawson v. Grubhub, No.15-cv-05128-JSC, 2018 WL 776354, at *18 (N.D. Cal. Feb. 8, 2018) ("Grubhub did not control the manner or means of Mr. Lawson's work, including whether he worked at all or for how long or how often, or even whether he performed deliveries for Grubhub's competitors at the same time he had agreed to deliver for Grubhub.").

[63] *See, e.g.*, 42 U.S.C. §§ 2000e(b), 2000e-2(a) (2016) (Title VII of the Civil Rights Act of 1964); *id.* § 12111(5)(A) (2016) (Americans with Disabilities Act); 29 U.S.C. § 206(a) (2016) (Fair Labor Standards Act); *id.* §§ 152(3), 157 (2016) (National Labor Relations Act); *id*. § 2611(2)(A) (2016) (Family and Medical Leave Act); CAL. LAB. CODE §

namely independent contractors.[64] Arguably, most workers would prefer to receive legal workplace protections and most employers would prefer to avoid their associated costs.[65] As such, we find ourselves in a continuous struggle to determine just which workers are independent contractors and which, in fact, are actually employees subject to labor law protections.[66] This has been a long-running struggle with no easy solution.[67] Courts have long recognized "simplicity and uniformity, resulting from application of 'common-law standards,' does not exist."[68]

The degree of control the employer exercises over the means of the work performed is the first, and often most important factor considered in determining whether a worker is an

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3357 (2011) (regarding workers' compensation coverage: "Any person rendering service for another, other than as an independent contractor, or unless expressly excluded herein, is presumed to be an employee."); *see also* Dynamex Operations W., Inc. v. Sup. Ct., No. S222732, 2018 WL 1999120, at *1 (Cal. Apr. 30, 2018) ("If a worker should properly be classified as an employee, the hiring business bears the responsibility of paying federal Social Security and payroll taxes, unemployment insurance taxes and state employment taxes, providing worker's compensation insurance, and. . . complying with numerous state and federal statutes and regulations governing the wages, hours, and working conditions of employees. The worker then obtains the protection of the applicable labor laws and regulations.").

[64] *See, e.g.*, *Dynamex*, 2018 WL 1999120, at *1 (noting independent contractors are entitled to "none of the numerous labor law benefits"); Global Hawk Ins. Co. v. Le, 170 Cal. Rptr. 3d 403, 410 (Cal. Ct. App. 2014) ("An independent contractor is not eligible for workers' compensation."); Hubbard v. Henry, 231 S.W.3d 124, 128–29 (Ky. 2007) (holding employees, but not independent contractors, are eligible for unemployment compensation); Subcontracting Concepts, Inc. v. Comm'r of the Div. of Unemployment Assistance, 19 N.E.3d 464, 467 (Mass. App. Ct. 2014) (holding same); Peidong Jia v. Unemployment Comp. Bd. of Review, 55 A.3d 545, 548 (Pa. Commw. Ct. 2012) (holding same); *see also Exploiting Workers, supra* note 59, at 2 (statement of Rep. Tom Lantos, Chairman, H.R. Subcomm. on Emp't & Hous.) (noting that independent contractors are not protected by Occupational Safety and Health, minimum wage and hour, antidiscrimination, and collective bargain laws; "When an employer switches a worker from employee to contractor status, he is in effect cutting him or her adrift, depriving the worker of essential, congressionally-mandated support.").

[65] *Cf. Dynamex*, 2018 WL 1999120, at *1 (noting the "substantial economic incentives that a business may have in mischaracterizing some workers as independent contractors").

[66] In fact, one scholar asserts "the legal bifurcation of workers into 'employees' and 'independent contractors' has contributed significantly to the growth of precarious work in the United States." V.B. Dubal, *Wage Slave or Entrepreneur?: Contesting the Dualism of Legal Worker Identities*, 105 CAL. L. REV. 65, 67 (2017).

[67] For example, with respect to determining just who is an employee under various labor and worker welfare laws, see Edwin R. Teple, *The Employer-Employee Relationship*, 10 OHIO ST. L.J. 153, 153 (1949) ("Unfortunately, the significance of the problem is matched by the difficulty of its solution. There is a growing field of borderline cases in which the accepted tests simply do not offer a clear-cut answer. Many relationships are like the swoose, which had unmistakable characteristics of both the swan and the goose. Neither the courts nor the legislatures have yet devised a yardstick equal to the task of unerringly separating the swans from the geese and at the same time cataloguing their hybrid offspring with any degree of uniformity."); *see also* NLRB v. Hearst Publ'ns, 322 U.S. 111, 121 (1944) ("Few 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. This is true within the limited field of determining vicarious liability in tort. It becomes more so when the field is expanded to include all of the possible applications of the distinction.") (footnote omitted). This remains just as true today. *See* Jennifer Pinsof, Note, *A New Take on an Old Problem: Employee Misclassification in the Modern Gig-Economy*, 22 MICH. TELECOMM. & TECH. L. REV. 341, 343 (2016) ("For over 100 years, America has classified workers into these two categories [independent contractor or employee], yet the law continuously fails to do so in a uniform, predictable, and purposeful way.").

[68] *Hearst Publ'ns*, 322 U.S. at 122 (noting that within a single jurisdiction a person who is held to be an independent contractor for the purpose of imposing vicarious liability in tort may be an employee for the purposes of particular legislation, such as unemployment compensation). For example, many "gig" workers like the flexibility of "dipping" into the platform economy and stepping back out as the situation warrants. *See* AVERY ET AL., *supra* note 31, at 8.

employee or independent contractor.[69] This "right to control" originated in agency law to determine whether an employer should be liable to third parties injured by a worker—no control, no liability.[70] But as courts have noted, particularly in the Northern District of California, this test for determining worker classification has not kept pace with changes in work. It is "outmoded" and leaves juries being "handed a square peg and asked to choose between two round holes."[71] As a general rule, this common law control test is applied when an applicable workplace statute does not define employment.[72]

There are (sometimes overlapping) variations on factors to be considered, though all start with right to control; the additional factors are: the alleged employee's opportunity for profit or

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[69] O'Connor v. Uber Techs., Inc., 82 F. Supp. 3d 133, 1148–49 (N.D. Cal. 2015) ([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.") (internal quotation marks omitted); Cotter v. Lyft, Inc., 60 F. Supp. 3d 1067, 1075 (2015) ("[T]he 'principal' question is whether the person or company to whom service is rendered has the right to control the manner and means of accomplishing the result desired.") (internal quotation marks omitted) (alterations omitted); Lawson v. Grubhub, No.15-cv-05128-JSC, 2018 WL 776354, at *11 (N.D. Cal. Feb. 8, 2018) ("Grubhub's right to control work details is the *most important or most significant* consideration. That is, its right to control the manner and means of accomplishing the result desired.") (internal quotation marks omitted) (citations omitted); *see also* Cmty. for Creative Non-Violence v. Reid, 490 U.S. 730, 751 (1989) ("In determining whether a hired party is an employee under the general common law of agency, we consider the hiring party's right to control the manner and means by which the product is accomplished."). There are additional factors that are considered, namely: skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party. *Id.* at 751–52; *see also* RESTATEMENT (SECOND) OF AGENCY § 220(2) (1958); Lisa J. Bernt, *Suppressing the Mischief: New Work, Old Problems*, 6 N.E. U. L.J. 311, 319 (2014) ("[W]hile other factors. . . might be considered in some tests, the hiring party's control over the manner of work is still typically a significant, perhaps the most important, factor.").

[70] *See, e.g.*, Standard Oil Co. v. Anderson, 212 U.S. 215, 222 (1909) ("[W]e must inquire whose is the work being performed, a question which is usually answered by ascertaining who has the power to control and direct the servants in the performance of their work."); Singer Mfg. Co. v. Rahn, 132 U.S. 518, 523 (1889) ("[T]he relation of master and servant exists whenever the employer retains the right to direct the manner in which the business shall be done, as well as the result to be accomplished, or, in other words, not only what shall be done, but how it shall be done.") (internal quotation marks omitted).

[71] *See Cotter*, 60 F. Supp. 3d at 1081–82; *cf. Grubhub*, 2018 WL 776354, at *20 ("Under California law whether an individual performing services for another is an employee or an independent contractor is an all-or-nothing proposition. If Mr. Lawson is an employee, he has rights to minimum wage, overtime, expense reimbursement and workers compensation benefits. If he is not, he gets none. With the advent of the gig economy, and the creation of a low wage workforce performing low skill but highly flexible episodic jobs, the legislature may want to address this stark dichotomy."); *see also* Razak v. Uber Techs., Inc., No. 16-573, 2018 WL 1744467, at *13 & n.17 (E.D. Pa. Apr. 11, 2018) ("Transportation network companies ('TNCs'), such as Uber and its most frequent U.S. competitor, Lyft, present a novel form of business that did not exist at all ten years ago, available through the use of 'apps' installed on smart phones. With time, these businesses may give rise to new conceptions of employment status."; noting also that Uber's business model shares some characteristics in common with a joint venture); Blake E. Stafford, *Riding the Line between Employee and Independent Contractor in the Modern Sharing Economy*, 51 WAKE FOREST L. REV. 1223, 1232 (2016) (noting that given the number of factors that can be examined, courts have reached conflicting results while purporting to use the same test).

[72] *See* Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 326–27 (1992) ("Agency law principles comport, moreover, with our recent precedents and with the common understanding, reflected in those precedents, of the difference between an employee and an independent contractor."; determining classification with respect to ERISA, which does not define employment).

loss depending on his managerial skill; the alleged employee's investment in equipment or materials required for his task, or his employment of helpers; whether the service rendered requires a special skill; the degree of permanence of the working relationship; and whether the service rendered is an integral part of the alleged employer's business.[73] This "economics realities" test derives from worker allegations of violation of the Fair Labor Standards Act,[74] and springs from U.S. Supreme Court decisions in the 1940s.[75] But right to control remains the paramount factor.[76]

IV. CHANGE THE LAW, NOT PRECEDENT

As noted above, rather than veering from long-established precedent to adapt to changing circumstances, judges instead have merely lamented that the common test for determining worker classification is no longer viable.[77] Legislative action would therefore be the next logical step. Legislative efforts have been made, most notably through codification of an "ABC" test. In 2004, Massachusetts enacted a simplified version of the common law "right to control" factors with a presumption of employment surmountable only by satisfying a three-prong assessment: (A) the individual is free from direction and control, both under the contract for the performance of service and in fact; (B) the service is performed outside the usual course of business of the employer; and (C) 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.[78] The strength of the ABC test is its presumption of employee classification.[79]

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[73] *See, e.g.*, S.G. Borello & Sons, Inc. v. Dep't of Indus. Relations, 769 P.2d 399, 407 (1989) (noting other jurisdictions consider factors in addition to "right to control," such as "(1) the alleged employee's opportunity for profit or loss depending on his managerial skill; (2) the alleged employee's investment in equipment or materials required for his task, or his employment of helpers; (3) whether the service rendered requires a special skill; (4) the degree of permanence of the working relationship; and (5) whether the service rendered is an integral part of the alleged employer's business."); *see also* Razak v. Uber Techs., Inc., No. 16-573, 2018 WL 1744467, at *8 (E.D. Pa. Apr. 11, 2018) (noting the Third Circuit follows the same factors as enunciated in *Borello* with respect to Fair Labor Standards Act classification) (citing Donovan v. DialAmerica Mktg., Inc., 757 F.2d 1376, 1382 (3rd Cir. 1985)).

[74] Pub. L. No. 75–718, ch. 676, 52 Stat. 1060 (1938) (codified as amended at 29 U.S.C. §§ 201 – 219 (2016)).

[75] *See* NLRB v. Hearst Publ'ns, Inc., 322 U.S. 111 (1944) (superseded by statute as stated in NLRB v. United Ins. Co. of Am., 390 U.S. 254 (1968)); Rutherford Food Corp. v. McComb, 331 U.S. 722 (1947); *see also Darden*, 503 U.S. at 325–26 (discussion origins of FLSA's definition of employment); Keith Cunningham-Parmeter, *From Amazon to Uber: Defining Employment in the Modern Economy*, 96 B.U. L. REV. 1673, 1691–95 (2016) (discussing the economic realities test).

[76] *See* Stephen F. Befort, *Revisiting the Black Hole of Workplace Regulation: A Historical and Comparative Perspective of Contingent Work*, 24 BERKELEY J. EMP. & LAB. L. 153, 172–73 (2003) ("The economic realities test, like the common law standard, consists of a multi-factor formula in which the right to control the manner of work is a significant factor."); 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, 344 (2001) ("[C]ourts have frequently looked to other factors beyond control to expand their search for evidence of employee status. Unfortunately, any of the additional factors courts have listed as evidence of employee status are, in reality, additional aspects of control, or they present the same problems as the control factor.").

[77] *Supra* note 71 and accompanying text.

[78] MASS. GEN. LAWS ANN. ch. 149, § 148B(a)(1)-(3) (West 2014). *But see*, Carey v. Gatehouse Media Mass. I, Inc., 92 Mass. App. Ct. 801, 2018 WL 1058352, at *4 (2018) ("[A] service need not be the sole, principal, or core product that a business offers its customers, or inherently essential to the economic survival of that type of business, in order to be furnished in the usual course of that business."); Schwann v. FedEx Ground Package Sys., Inc., 813 F.3d 429, 440 (1st Cir. 2016) (holding that the Federal Aviation Administration Authorization Act of 1994 preempts the second factor (B) of Massachusetts's statute with respect to motor carriers).

Although the test includes, as its first condition for exception to employee classification that the worker is free from control of the employer,[80] the test then includes important additional factors: the second factor (B)[81] codifies a situation when a employer hires occasional services outside the employer's scope of business versus merely attempting to skirt employment laws for its regular course of business; while the third factor (C)[82] indicates true independence by the worker.[83] While the ABC test has come to dominate the independent contractor definition statutes that have been enacted,[84] only fourteen states appear to have adopted the ABC test, and not consistently.[85]

Another approach would be to include independent contractors in various employment statutes.[86] Seth Harris and Alan Krueger have provided one of the more comprehensive examinations of the challenges to revising employment laws to incorporate a growing type of worker, the "independent worker"—who "chooses when and whether to work at all. The [employment] relationship can be fleeting, occasional, or constant, at the discretion of the *independent worker*."[87] One significant restraint addressed by Harris and Krueger is that because independent workers often wait for work simultaneously for multiple employers, it is often difficult measure work hours; as such, they recommend that employers not be required to provide hours-based benefits, such as overtime and minimum wage.[88] They do recommend, however, that independent workers be afforded other, standard, employment-related protections, including freedom to organize and collectively bargain, civil rights, tax withholding, workers' compensation insurance, affordable health insurance, and risk pooling (for protections that might not be provided through an employer).[89]

Harris's and Krueger's analysis is limited to "gig economy" workers who provide services through intermediaries. U.S. Senator Sherrod Brown (D-OH) has developed proposals more broadly aimed at employment insecurity and inequality.[90] He proposes, for example, raising the minimum wage, increasing the overtime salary threshold, requiring paid sick days and

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[79] MASS. GEN. LAWS ANN. ch. 149, § 148B(a) ("[A]n individual performing any service, except as authorized under this chapter, shall be considered to be an employee . . . .").
[80] *See, e.g.*, *id.* § 148B(a)(1).
[81] *See, e.g.*, *id.* § 148B(a)(2).
[82] *See, e.g.*, *id.* § 148B(a)(3).
[83] The common law test includes whether the parties have indicated they have entered into an employee-employer relationship. RESTATEMENT (SECOND) OF AGENCY § 220(2)(i) (1958) (considering "whether or not the parties believe they are creating the relation of master and servant"). Massachusetts's ABC test counterbalances that consideration by explicitly providing that some indications of an independent contractor relationship are not considered, namely failing to withhold taxes or provide workers' compensation insurance (MASS. GEN. LAWS ANN. ch. 149, § 148B(b)), as well as the worker's election to secure workers' compensation insurance (MASS. GEN. LAWS ANN. ch. 149, § 148B(c)).
[84] 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, 65 (2015).
[85] *See id*. at 66–67; Dynamex Operations W., Inc. v. Sup. Ct., No. S222732, 2018 WL 1999120, at *29 n.23 (Cal. Apr. 30, 2018) ("Many jurisdictions that have adopted the ABC test use the standard only in the unemployment insurance context, but other jurisdictions use the ABC test more generally in determining the employee or independent contractor question with respect to a variety of employee-protective labor statutes.").
[86] Ignoring the political realities of whether this is achievable.
[87] HARRIS & KRUEGER, *supra* note 4, at 9.
[88] *Id.* at 13.
[89] *See id*. at 15–21.
[90] *See* U.S. Senator Sherrod Brown, Working Too Hard for Too Little: A Plan for Restoring the Value of Work in America (2017), http://www.brown.senate.gov/download/plan-to-restore-value-of-work.

family medical leave, and strengthening collective bargaining rights.[91] Senator Brown also addresses misclassification.

First, Senator Brown supports the Fair Playing Field Act.[92] This proposed legislation does not, however, change the legal test for determining whether a worker is an employee or independent contractor, but merely gives the IRS authority to take action against employers who misclassify their workers.[93] More substantively, Senator Brown proposes that employers with more than $7.5 million in annual receipts and 500 independent contractors be required to pay half of payroll taxes for those workers.[94] Senator Brown is targeting large companies relying on a business model that classifies their entire, large workforces as independent contractors.[95] He believes this approach "will increase the cost of classifying workers as independent contractors and, ideally, lead large companies to rethink choosing a business model that relies on a workforce of independent contractors in lieu of employees."[96]

Senator Elizabeth Warren (D-MA) takes a more holistic approach: "all workers—no matter when they work, where they work, who they work for. . .—. . . should have some basic protections and be able to build some economic security for themselves and their families."[97] While Senator Brown would require large employers to deduct payroll taxes, Senator Warren proposes "electronic, automatic, and mandatory withholding of payroll taxes must apply to everyone[,]" including independent contractors.[98] Senator Warren also advocates for the availability of (pooled) catastrophic insurance for workers who are not covered by workers' compensation, as well as paid leave.[99]

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[91] *See id.* at 3.

[92] S. 2252, 114th Cong. (2015).

[93] *See* BROWN, *supra* note 90, at 37. The proposed legislation would also require employers to inform workers of their status so they can better determine whether they are misclassified and take action accordingly. *See id*. The Internal Revenue Service also uses its own test to determine whether a worker is an employee or independent contractor that focuses on right to control and the working relationship, including its financial aspects. *See* INTERNAL REVENUE SERV., PUB. 15-A, EMPLOYER'S SUPPLEMENTAL TAX GUIDE 7–10 (2018); *Independent Contractor (Self-Employed) or Employee?*, IRS, http://www.irs.gov/Businesses/Small-Businesses-&-Self-Employed/Independent-Contractor-Self-Employed-or-Employee (last updated Dec. 28, 2017).

[94] *See* BROWN, *supra* note 90, at 37.

[95] *Id.* (noting the independent contractor status was not created to be used by companies as a way of avoiding taxes, labor standards, and workers' rights; rather "Congress intended for the category to distinguish between those who work under supervision and those who decide how the work will be done and usually hire others to do the work.") (internal quotation marks omitted) (alterations omitted).

[96] *Id.* ("Creating this safeguard against abuse will redefine the independent contractor status as a classification for workers who are truly independent and truly contractors."). Senator Brown also recognizes that "[c]ompanies that classify workers as independent contractors will not sponsor a retirement plan because it is an important indicator to the IRS and the Courts of an employer-employee relationship." *Id.* at 40. He therefore proposes "increasing access to a tax-preferenced savings program for workers who file 1099 tax forms [to] help . . . address the economic insecurity that often accompanies the independent contractor status." *Id.*

[97] Elizabeth Warren, U.S. Senator, Remarks at the New America Annual Conference, "Strengthening the Basic Bargain for Workers in the Modern Economy" 4 (May 19, 2016), https://www.warren.senate.gov/files/documents/2016-5-19_Warren_New_America_Remarks.pdf.

[98] *Id.*

[99] *See id.*

V. CONCLUDING ANALYSIS

This paper has shown that the nature of work in the United States is changing, particularly with respect to an increase in contingent and precarious employment arrangements, often by classifying workers as independent contractors. Concurrently, though, the law has generally not kept pace and respect for precedent has left courts lamenting old and outdated rules for new circumstances, but declining to change those rules.[100] One viable alternative, therefore, is legislation. While some states have adopted independent contactor statutes, they essentially just codify portions of the common law tests currently in place. As discussed above, the ABC test is a good start, but it has been enacted in only a minority of states and it still retains the "right to control" factor.

Another approach would be to expand statutory application of employment laws to include independent contractors. As discussed, this approach also has its challenges (beyond congressional inertia). In particular, it may be nearly impossible to identify a responsible employer when someone works simultaneously for multiple employers. And while proposals for payroll deduction of taxes and insurance pooling can alleviate some of the drawbacks of being misclassified as an independent contractor, they still fall far short of providing workplace protections equivalent to those provided most workers classified as employees.

Incorporating Senator Warren's approach of providing workplace protections for *every* worker, coupled with the second and third ABC test factors (the service is performed outside the usual course of business of the employer, and the worker is customarily engaged in an independently established trade, occupation, profession, or business of the same nature as that involved in the service performed[101]) could not only preserve true *independent* contractor status, but also eliminate the most difficult aspect of worker classification—control, in an era of less control over workers—while still providing workplace protections for those who need them just as much as "traditional" employees.

To a large extent, this is the approach the California Supreme Court adopted April 30, 2018.

A. Dynamex Operations West, Inc. v. Superior Court

Just as this paper was "going to press" (i.e., being submitted for the conference), the California Supreme Court adopted, for certain circumstances, the ABC test in *Dynamex Operations West, Inc. v. Superior Court*.[102] *Dynamex* involved delivery drivers who believed they were employees misclassified as independent contractors, and therefore denied legal protections under California's "wage orders," which impose obligations such a minimum wages, maximum hours, and basic working conditions on California employers.[103] At the heart of *Dynamex* was how to define "employ" under the wage orders with respect to determining whether a worker is an employee or independent contractor. The California Supreme Court concluded "suffer or permit to work" is the proper definition.[104] And, according to the California

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[100] *See supra* note 71 and accompanying text. *But see infra* Part V.A.
[101] MASS. GEN. LAWS ANN. ch. 149, § 148B(a)(1) & (3) (West 2014).
[102] No. S222732, 2018 WL 1999120 (Cal. Apr. 30, 2018).
[103] *See id*. at *2 & n.3. Procedurally, the California Supreme Court was addressing the trial court's certification of class status of drivers with respect to whether they were properly classified as independent contractors. *See id.*
[104] *Id.* at *4 ("[W]e agree with the Court of Appeal that the trial court did not err in concluding that the 'suffer or permit to work' definition of 'employ' contained in the wage order may be relied upon in evaluating whether a

Supreme Court, "[t]he adoption of the exceptionally broad suffer or permit to work standard in California wage orders finds its justification in the fundamental purposes and necessity of the minimum wage and maximum hour legislation in which the standard has traditionally been embodied."[105] Further, "the suffer or permit to work standard must be interpreted and applied broadly to include within the covered 'employee' category all individual workers who can reasonably be viewed as '*working in the [hiring entity's] business*.'"[106] Conversely,

> Under the suffer or permit to work standard, an individual worker who has been hired by a company can properly be viewed as the type of independent contractor to which the wage order was not intended to apply only if the worker is the type of traditional independent contractor—such as an independent plumber or electrician—who would *not* reasonably have been viewed as working *in the hiring business*.[107]

The Court, with respect to wage orders, and particularly wage and hour matters, then formally adopted the ABC test, addressing each of the three factors within the test.[108] Under Part A, the hiring entity must establish that the worker is free of control in order to not be classified as an employee.[109] Importantly, though, the California Supreme Court recognizes that because the suffer and permit to work definition is broader and more inclusive than the common law test, employee classification does not rest on control of the precise manner or details of the work (as required under the common law test).[110] Under Part B, addressing whether the worker is "in the hiring entity's business," the focus is on whether workers "are reasonably viewed as providing services to the business in a role comparable to that of an employee, rather than in a role comparable to that of a traditional independent contractor"[111]—and "[w]orkers whose roles are most clearly comparable to those of employees include individuals whose services are provided within the usual course of the business of the entity for which the work is performed . . . ."[112] Under Part C, the focus is on whether the worker *independently* made the decision to go into business for him or herself.[113] The Court concluded,

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worker is an employee or, instead, an independent contractor for purposes of the obligations imposed by the wage order."); *see also id*. at *22 ("[T]he suffer or permit to work standard has a long and well-established history, and in other jurisdictions has regularly been held applicable to the question whether a worker should be considered an employee or an independent contractor for the purposes of social welfare legislation embodying that standard.").

[105] *Id.* at *27. Under the Fair Labor Standards Act (FLSA) (Pub. L. No. 75–718, ch. 676, 52 Stat. 1060 (1938) (codified as amended at 29 U.S.C. §§ 201 – 219 (2016))) the term "employee" means any individual employed by an employer" (29 U.S.C. § 20(e)(1)) and "employ" "includes to suffer or permit to work." *Id.* § 203(g). The Congressional intention was to include all employees within the scope of the FLSA unless specifically excluded. U.S. v. Rosenwasser, 323 U.S. 360, 363 (1945).

[106] *Dynamex,* 2018 WL 1999120, at *27 (quoting Martinez v. Combs, 231 P.3d 259 (Cal. 2010)) (emphasis added by *Dynamex* Court).

[107] *Id.* (emphasis in original) ("Such an individual would have been realistically understood, instead, as *working only in his or her own independent business*.") (emphasis in original).

[108] *See id*. at *29; *see also id*. n.23 (expressly adopting Massachusetts' version of the ABC test). The New Jersey Supreme Court has also adopted the ABC test with respect to the state's Wage Payment and Wage and Hour laws. *See* Hargrove v. Sleepy's, LLC, 106 A.3d 449, 463 (N.J. 2015).

[109] *Dynamex,* 2018 WL 1999120, at *30.

[110] *See id.*

[111] *Id.* at *31.

[112] *Id.*

[113] *See id.* at *33. In contrast, the law has never recognized that the employer could alone make that decision by labeling the worker an independent contractor. *See id*. at *32; *see also id.* at *33 ("When a worker has not independently decided to engage in an independently established business but instead is simply designated an

> A company that labels as independent contractors a class of workers who are not engaged in an independently established business in order to enable the company to obtain the economic advantages that flow from avoiding the financial obligations that a wage order imposes on employers unquestionably violates the fundamental purposes of the wage order.[114]

As noted previously in this paper, regardless of the misclassification test used, invariably, control over the means of work is the paramount factor.[115] This paper has also argued that less emphasis should be placed on control, while also considering the second (B) and third (C) factors of the ABC test.[116] The California Supreme Court also adopted this approach in *Dynamex*:

> Because in many cases it may be easier and clearer for a court to determine whether or not part B or part C of the ABC standard has been satisfied than for the court to resolve questions regarding the nature or degree of a worker's freedom from the hiring entity's control for purposes of part A of the standard, the significant advantages of the ABC standard—in terms of increased clarity and consistency—will often be best served by first considering one or both of the latter two parts of the standard in resolving the employee or independent contractor question.[117]

In sum, in California with respect to wage orders, it is now the employer's burden to show that: (A) the worker is free from control and direction in the performance of the work (both in terms of the contract as well as the performance of the work in fact); (B) the worker performs work outside the usual course of the employer's business; and (C) the worker is customarily engaged in an independently established trade, occupation, or business.[118] If the employer fails to prove *any one* of these three elements, the worker will be considered an employee—at least for purposes of California wage orders.[119] The California Supreme Court concluded the workers at issue in *Dynamex* could proceed with the class action, with respect to their worker classification, based on sufficient commonality with respect to factors B and C of the newly adopted ABC test.[120]

Although limited to particular types of wage-related actions, *Dynamex* is critically important in two respects. First, it broadens the control factor used to determine whether a worker is an employee by eliminating the requirement that the employer control the precise manner and details in which the work is performed. Second, the California Supreme Court recommends that courts, instead of focusing on control, first examine the second two "independence"-related factors; if either is not met, then the worker cannot be classified as an employee, regardless of the amount of control (not) exercised by the employer.

It remains to be seen how California's lower courts will apply *Dynamex* and the extent to which other jurisdictions will follow its lead. This could be a seismic shift in worker

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independent contractor by the unilateral action of a hiring entity, there is a substantial risk that the hiring business is attempting to evade the demands of an applicable wage order through misclassification.").

[114] *Id.* at *33. ("The fact that a company has not prohibited or prevented a worker from engaging in such a business is not sufficient to establish that the worker has independently made the decision to go into business for himself or herself.").

[115] *See supra* note 69 and accompanying text.

[116] *See supra* Part V.

[117] *Dynamex,* 2018 WL 1999120, at *34.

[118] *See id.*

[119] *See id.*

[120] *See id*. at *35–36.

classification that may directly lead to the alleviation of many of the economic challenges facing modern workers.