ESSAY

Navigating the Uber Economy

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In litigation against ride-sharing companies Uber and Lyft, former drivers have alleged that they were misclassified as independent contractors and denied employment benefits. The companies have countered that they do not employ drivers but merely license access to a platform that matches those who need rides with nearby, available drivers. At stake are the prospects, not only for Uber and Lyft, but for a nascent, multi-billion dollar, "on-demand" economy.

Unfortunately, existing laws fail to provide adequate guidance regarding the distinction between independent contractors and employees, especially when applied to the hybrid working arrangements common in a modern economy. Under the Fair Labor Standards Act and analogous state laws, courts consider several factors to assess the "economic reality" of a worker's alleged employment status; yet, there is no objective basis for prioritizing those factors.

This Essay argues that the classification of workers as independent contractors or employees should be shaped by an overarching inquiry: How much flexibility do individuals have in determining the time, place, price, manner, and frequency of the work they perform? Those who select these variables are more independent than those who must accommodate themselves to a business owner's schedule. Our approach is novel and would provide an objective basis for adjudicating classification disputes, especially those that arise in the context of the on-demand economy. By reducing legal uncertainty, this focus on worker flexibility would ensure

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both that workers receive appropriate protections under existing law and that businesses are able to innovate without fear of unknown liabilities.

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INTRODUCTION

One of the most controversial issues in labor and employment law concerns how workers should be categorized in "on-demand" businesses that rely more on smartphone applications and internet connections than hierarchical supervision within traditional brick-and-mortar workplaces.[1] For example, (former) drivers for ride-sharing companies Uber and Lyft have brought lawsuits alleging that they were improperly classified as independent contractors and denied employment benefits.[2] The companies have countered that they do not employ drivers but instead license access to a platform that matches those who need rides with nearby available drivers.[3]

At stake are the prospects, not only for Uber and Lyft, but for a nascent, multi-billion dollar, "on-demand" economy that relies upon independent contractors to offer goods and services as varied as home cleaning, software development, household errands, personal training, and apartment or home rentals.[4] Employees cost more than

[1] *See, e.g.*, Editorial Bd., *Defining 'Employee' in the Gig Economy*, N.Y. TIMES (July 18, 2015), http://www.nytimes.com/2015/07/19/opinion/sunday/defining-employee-in-the-gig-economy.html; Kathleen Hennessey, *The 'Gig Economy' Gets the Campaign Treatment*, L.A. TIMES (July 13, 2015, 3:39 PM), http://www.latimes.com/nation/politics/la-na-gig-economy-20150713-story.html; Gabe Miano, *How Freelancers Can Thrive in 2015's Gig Economy*, FORBES (Nov. 18, 2014, 10:12 AM), http://www.forbes.com/sites/groupthink/2014/11/18/how-freelancers-can-thrive-in-2015s-gig-economy/2/; Sara Ashley O'Brien, *The Uber Effect: Instacart Shifts Away from Contract Workers*, CNN MONEY (June 22, 2015, 9:17 PM ET), http://money.cnn.com/2015/06/22/technology/instacart-employee-option/; Luke O'Neil, *Surviving the Gig Economy*, BOS. GLOBE (Aug. 31, 2014), https://www.bostonglobe.com/opinion/2014/08/30/surviving-gig-economy/kNnzDGxgu7nvju8JhdAKVN/story.html; Aimee Picchi, *One Startup Reconsiders the Merits of the "Gig Economy,"* CBS MONEYWATCH (June 23, 2015, 4:54 PM), http://www.cbsnews.com/news/one-startup-reconsiders-the-merits-of-the-gig-economy/; Tom Risen, *Hillary Clinton Boosts Workers, Blasts Uber*, U.S. NEWS & WORLD REP. (July 13, 2015, 5:32 PM), http://www.usnews.com/news/articles/2015/07/13/hillary-clinton-boosts-workers-blasts-uber; Erik Sherman, *How the U.S. Just Knee-Capped the 'Gig Economy,'* INC. (July 17, 2015), http://www.inc.com/erik-sherman/did-the-feds-just-knee-cap-the-gig-economy.html; James Surowiecki, *Gigs with Benefits*, NEW YORKER (July 6, 2015), http://www.newyorker.com/magazine/2015/07/06/gigs-with-benefits; Mark R. Warner, *Asking Tough Questions About the Gig Economy*, WASH. POST (June 18, 2015), https://www.washingtonpost.com/opinions/asking-tough-questions-about-the-gig-economy/2015/06/18/b43f2d0a-1461-11e5-9ddc-e3353542100c_story.html.

[2] Cotter v. Lyft, Inc., 60 F. Supp. 3d 1067, 1070 (N.D. Cal. 2015) (order denying summary judgment); O'Connor v. Uber Techs., Inc., 82 F. Supp. 3d 1133, 1135-38 (N.D. Cal. 2015) (order denying summary judgment).

[3] *See, e.g.*, *O'Connor*, 82 F. Supp. 3d at 1137-38 (stating that "Uber bills itself as a 'technology company,' not a 'transportation company'").

[4] *See, e.g.*, Richard Epstein, *Uber and Lyft in California: How to Use Employment Law to Wreck an Industry*, FORBES (Mar. 16, 2015, 10:57 AM), http://www.forbes.com/

independent contractors because businesses are responsible for, among other things, payroll taxes, workers' compensation insurance, health care, minimum wage, overtime, and the reimbursement of business-related expenses.[5] If saddled with those costs, the on-demand business model might not survive, at least not in its current form.[6] At the same time, the importance of adequate protections for workers does not diminish simply because workers' tasks are coordinated through a high-technology platform.[7]

The current context may be new, but the difficulty of classifying workers long predates the on-demand economy. More than seventy years ago, the Supreme Court concluded 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."[8] As traditional employment has

sites/richardepstein/2015/03/16/uber-and-lyft-in-california-how-to-use-employment-law-to-wreck-an-industry/ ("Putting drivers into this employment relationship can only shrink the size of the pie. It will be yet another instance of killing through regulation the goose that lays the golden egg."). Class action litigation has even impacted the on-demand food industry. *See* Tracey Lien, *GrubHub, DoorDash and Caviar Face Lawsuits over Worker Misclassification*, L.A. TIMES (Sept. 23, 2015, 4:38 PM), http://www.latimes.com/business/technology/la-fi-tn-grubhub-caviar-lawsuit-20150923-story.html.

[5] The Department of Labor reports that employee benefits amount to approximately 30% of total employee compensation. *See* Press Release, U.S. Dep't of Labor, Bureau of Labor Statistics, Employer Costs for Employee Compensation — September 2015 (Dec. 9, 2015), *available at* http://www.bls.gov/news.release/ecec.htm.

[6] *See generally* Myra H. Barron, *Who's an Independent Contractor? Who's an Employee?*, 14 LAB. LAW. 457, 457 (1999) ("There is often less cost to and regulation of enterprises whose personnel are independent contractors rather than employees."). As Barron points out, "Liability for misclassifying an employee as an independent contractor can be severe — including significant monetary costs and other civil and criminal sanctions." *Id.*

[7] Indeed, if companies like Uber gain a competitive advantage in the marketplace by shirking their obligations to workers, then their perceived luster might owe something to regulatory arbitrage rather than useful innovation. *Cf.* Timothy P. Glynn, *Taking the Employer out of Employment Law? Accountability for Wage and Hour Violations in an Age of Enterprise Disaggregation*, 15 EMP. RTS. & EMP. POL'Y J. 201, 203 (2011), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1853568&download=yes (arguing that the "disaggregation of business enterprises into smaller, independent parts" contributes to noncompliance with wage and hour requirements).

[8] NLRB v. Hearst Publ'ns, Inc., 322 U.S. 111, 121 (1944), *superseded by statute*, Social Security Act of 1948, ch. 468, § 2(a), 62 Stat. 438, 438 (1948), *as recognized in* Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318 (1992).

waned, borderline cases have proliferated; gone are the days when a typical worker spent a working lifetime in the employ of a single firm.[9]

Unfortunately, existing laws fail to provide adequate guidance regarding the distinction between independent contractors and employees, especially when applied to the hybrid working arrangements common in a modern economy. Under the Fair Labor Standards Act ("FLSA") and analogous state laws, courts consider several factors to assess the "economic reality" of a worker's alleged employment status;[10] yet, there is no objective basis for prioritizing those factors. As one court observed recently, deciding whether an on-demand driver is an independent contractor or an employee under current law is like being "handed a square peg and asked to choose between two round holes."[11]

This Essay argues that the classification of workers as independent contractors or employees should be shaped by an overarching inquiry: How much flexibility do individuals have in determining the time, place, price, manner, and frequency of the work they perform? Those who select these variables are more independent than those who must accommodate themselves to a business owner's schedule. Our approach is novel and would provide an objective basis for adjudicating classification disputes, especially those that arise in the context of the on-demand economy. By reducing legal uncertainty, a focus on worker flexibility would ensure both that workers receive appropriate protections under existing law and that businesses are able to innovate without fear of unknown liabilities.[12]

Other scholars have recommended more far-reaching changes to the classification of workers.[13] However, in light of the politically

[9] *See* Matthew T. Bodie, *Participation as a Theory of Employment*, 89 NOTRE DAME L. REV. 661, 724 (2013) (arguing that work that once would have been done inside a firm is now often outsourced: "Increasingly, labor is hired through short-term, market-mediated arrangements that may not be 'employment' relations in any legal or technical sense of that word." (quoting Alan Hyde, *Employment Law After the Death of Employment*, 1 U. PA. J. LAB. & EMP. L. 99, 99 (1998) (some internal quotation marks omitted))).

[10] *See infra* Part II.A (discussing a multi-factor approach to worker classification).

[11] Cotter v. Lyft, Inc., 60 F. Supp. 3d 1067, 1081 (N.D. Cal. 2015) (order denying summary judgment).

[12] As one scholar summarizes Uber's innovations: "Uber is sparking two major transformations of the car-hire sector. First, it is eliminating various transaction costs that have plagued the sector, particularly search costs, thereby creating something akin to a free market for car-hire services. Second, it is encouraging vertical and horizontal integration of the sector, which is highly fragmented in many cities." Brishen Rogers, *The Social Costs of Uber*, 82 U. CHI. L. REV. DIALOGUE 85, 86 (2015).

[13] *E.g.*, Bodie, *supra* note 9, at 665-66, 704-07 (recommending a participation-

polarized debate surrounding employment and labor law issues in general,[14] and Uber in particular,[15] a significant advantage of the approach we recommend is that its implementation would not require new legislation. Indeed, because worker flexibility clarifies the economic reality of labor arrangements in the on-demand economy, courts should already be obligated to consider it.

Our goal in this Essay is practical: we seek to clarify the framework for resolving worker classification disputes, thereby conserving judicial and litigant resources. We do not indulge in generalizations regarding the overall status of workers in the on-demand economy, both because we believe the inquiry is premature and because the law requires that each case be decided on its own merits. In this regard, we recognize that detailed factual analysis is important and that classification disputes cannot be reduced to a simple formula.[16] Thus, on the one hand, we reject the argument that workers in on-demand businesses are necessarily independent contractors because the businesses are merely technology platforms that take a cut of the transactions they facilitate. Uber and Lyft depend on their drivers to generate revenue, and it seems disingenuous to pretend otherwise.[17]

based analysis); Jeffrey M. Hirsch, *Employee or Entrepreneur?*, 68 WASH. & LEE L. REV. 353, 363-64 (2011) (advocating a "fundamental change in the definition of employee" under the National Labor Relations Act while admitting that this amounts to "wishful thinking"); 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, 242 (1997) (arguing that anti-discrimination law should include independent contractors); Elizabeth Kennedy, Comment, *Freedom from Independence: Collective Bargaining Rights for "Dependent Contractors,"* 26 BERKELEY J. EMP. & LAB. L. 143, 148 (2005) (recommending the creation of a dependent contractor relations board).

[14] *See* Cynthia L. Estlund, *The Ossification of American Labor Law*, 102 COLUM. L. REV. 1527, 1530 (2002) (observing, with respect to labor law, that "a longstanding political impasse at the national level has blocked any major congressional revision").

[15] The classification of workers has been characterized, perhaps caricatured, as a clash of free-market principles and worker protections. The issue has even become part of the presidential race. *See, e.g.*, Michael Barbaro & Ashley Parker, *Candidates Will Hail a Ride, but Not Necessarily the Uber Labor Model*, N.Y. TIMES (July 16, 2015), http://www.nytimes.com/2015/07/17/us/politics/presidential-candidates-hail-uber-rides-doubts-on-model.html.

[16] *See* Hirsch, *supra* note 13, at 364. However, we resist the notion that the alternative is embracing the "necessary evil" of a multi-factor test that "often fails to provide clarity to parties." *Id.* By providing an organizing framework for evaluating existing factors, our approach would give the parties guidance that is sorely lacking without denying the complexity of the classification problem.

[17] Of course, without vendors willing to access its platform, eBay would not exist either, and no one would suggest that eBay vendors are employees. The more nuanced point, which we do not fully develop here, is that Uber drivers are integral to the

On the other hand, we criticize the Department of Labor's recently promulgated guidance. Perhaps out of concern that companies like Uber and Lyft will avoid responsibility for workers who are effectively under their control, despite the absence of a formal work schedule, the Department misreads existing law and asserts that "workers' control over the hours when they work is not indicative of independent contractor status."[18] This approach is erroneous and, if accepted by the courts, would make it nearly impossible for on-demand businesses to argue that their workers are independent contractors.

To be clear, a focus on worker flexibility does not guarantee that workers in on-demand businesses will be considered independent contractors. Although greater worker flexibility may be a signature feature of the on-demand economy, taken as a whole, businesses should not be able to classify their workers as independent contractors unless those workers, in fact, enjoy meaningful flexibility. For example, if a company such as Uber licenses vehicles to certain of its drivers, and if those drivers must work several hours a day to break even on the lease obligation, there is a strong argument that the drivers' flexibility in scheduling work is actually quite limited.[19] In sum, when businesses like Uber say "[b]e your own boss and get paid in fares for driving on your own schedule," we argue they should be held to their word.

The Essay proceeds as follows. In Part I, we argue that the labor and employment laws of the twentieth century were premised upon a fundamental insight: that the flexibility of at-will employment tends to benefit employers, who have the economic power to set terms their employees have little choice but to accept. From the beginning, then, it has been important to ask whether, as a matter of economic reality, regulation is needed to protect the health, safety, and financial well-being of the American workforce.

Part II focuses on the threshold issue for application of most labor and employment laws: the existence of an employment relationship.

provision of the ride-sharing service for which Uber is known. The value of its brand depends upon the availability and quality of the drivers who provide a service that customers can access through the Uber application. To protect its brand, by contrast, eBay need only ensure reliable channels for communication and an absence of fraud or criminal conduct in sales it facilitates.

[18] DAVID WEIL, U.S. DEP'T OF LABOR, ADMINISTRATOR'S INTERPRETATION NO. 2015-1, at 13 (2015) [hereinafter ADMINISTRATOR'S INTERPRETATION NO. 2015-1], *available at* http://www.dol.gov/whd/workers/Misclassification/AI-2015_1.pdf.

[19] *Cf.* Katrina Miriam Wyman, *Problematic Private Property: The Case of New York Taxicab Medallions*, 30 YALE J. ON REG. 125 (2013) (providing overview of taxicab business structure).

Using the FLSA and its broad and influential definition of "employment" as an exemplar, Part II argues that the factors used to distinguish employees from independent contractors no longer fit the facts of a marketplace in which hybrid working arrangements are increasingly common. Consequently, decisions in cases involving on-demand businesses such as Uber and Lyft will appear arbitrary because the relevant factors conflict and could conceivably support any result.

Part III argues that a crucial, overlooked factor for deciding whether a worker is an independent contractor is the flexibility the worker has in the employment relationship. Employees are beholden to their employers; independent contractors are not. By using the concept of worker flexibility to order an otherwise unruly balancing of factors, our approach would not only facilitate the adjudication of classification disputes, it would further the broader purposes of labor and employment law. In particular, worker flexibility offers a normatively attractive framework for identifying who counts as an employee in the on-demand economy because it forces us to consider who really benefits from the increased flexibility made possible by technological advances.

I. THE FLEXIBILITY (AND INFLEXIBILITY) OF AT-WILL EMPLOYMENT

In theory, the common law principle of at-will employment offers flexibility that benefits both businesses and workers. The employment relationship is voluntary and either side can terminate without cause.[20] Accordingly, salaries and benefits are generally set according to the structure of the labor market rather than by fiat.

This promise of mutually beneficial flexibility should be immediately familiar to anyone who has followed the development of the on-demand economy. Advocates extol the potential of technological innovation to unshackle workers from the constraints of more traditional employment while, at the same time, unleashing the engines of capitalism to promote economic growth.[21]

However, a theory is only as strong as its assumptions. As this Part explains, it has long been recognized that an unregulated system of

[20] *See, e.g.*, Payne v. W. & Atl. R.R. Co., 81 Tenn. 507, 518-20 (1884) ("It is a right which an employe[e] may exercise in the same way, to the same extent, for the same cause or want of cause as the employer."), *overruled in part by* Hutton v. Watters, 179 S.W. 134 (Tenn. 1915).

[21] *See generally* Lewis D. Solomon, *The Microelectronics Revolution, Job Displacement, and the Future of Work: A Policy Commentary*, 63 CHI.-KENT L. REV. 65, 71 (1987) ("[T]he topic of whether technology creates more jobs than it destroys divides analysts into two camps — the optimists and the pessimists.").

private ordering did not produce mutually beneficial arrangements; in reality, most workers were forced to accept the terms handed to them by their employers.[22] Thus, this Part contends that the labor and employment laws enacted in the mid-twentieth century are best understood as responses to the problem of worker inflexibility. The background is important because laws from that period, including the FLSA, now figure prominently in present-day disputes between workers and businesses such as Uber and Lyft.[23]

A. The Risk of Economic Coercion in At-Will Employment

Employment at-will is the governing principle of the United States labor markets, and it is equally intolerant of indentured servitude and entrenched employment rights. Because employment is a wholly voluntary status, either party can terminate the employment relationship at any time, for any reason. At-will employment is, in principle, perfectly symmetrical; the right to fire is equivalent to the right to quit.[24]

In theory, this symmetrical flexibility benefits both capital and labor.[25] For workers, at-will employment guarantees their ownership of their own labor and ensures their ability to sell that labor on the market for its highest value.[26] Employers benefit as well because at-

[22] Some commentators argue that at-will employment continues to privilege the interests of employers over employees. *See, e.g.*, Rachel Arnow-Richman, *Just Notice: Re-Reforming Employment at Will*, 58 UCLA L. REV. 1, 1-16 (2010) (describing common critiques of employment at-will). Notwithstanding a vigorous argument to the contrary, the American Law Institute's recently completed Restatement of Employment Law adopted the rule of employment at-will. *See* Robert A. Hillman, *Drafting Chapter 2 of the ALI's Employment Law Restatement in the Shadow of Contract Law: An Assessment of the Challenges and Results*, 100 CORNELL L. REV. 1341, 1344-46 (2015).

[23] *See infra* Part II.B.

[24] *See, e.g.*, Timothy J. Coley, *Getting Noticed: Direct and Indirect Power-Allocation in the Contemporary American Labor Market*, 59 CATH. U. L. REV. 965, 974 (2010) ("Ironically, the primary rationale for the implementation of the employment-at-will system in the first place was that it would put the employer and employee on equal footing in terms of bargaining power." (internal quotation marks and citation omitted)).

[25] *See* Pauline T. Kim, *Bargaining with Imperfect Information: A Study of Worker Perceptions of Legal Protection in an At-Will World*, 83 CORNELL L. REV. 105, 111 (1997) ("Richard Epstein offered his classic defense of employment at will, arguing that the common-law rule is justified on grounds of both fairness and utility." (citing Richard A. Epstein, *In Defense of the Contract at Will*, 51 U. CHI. L. REV. 947, 955 (1984))).

[26] By contrast, during feudal times in Europe, workers were often bound to their employers with the possibility of criminal consequences. *See* Philip Harvey, *Joblessness*

will employment allows them to hire and fire as the economy waxes and wanes, maximizing the economic efficiency of their operations.[27]

Although at-will employment has a formal symmetry, substantial inequality of economic power distorts the actual structure of labor markets.[28] In many industries and occupations, workers lack the leverage to demand better terms:

> Typically, the worker as an individual has to accept the conditions which the employer offers. [T]he relation between an employer and an isolated employee or worker is typically a relation between a bearer of power and one who is not a bearer of power. In its inception it is an act of submission, in its operation it is a condition of subordination, however much the submission and the subordination may be concealed by that indispensable figment of the legal mind known as the "contract of employment."[29]

In an at-will employment regime, employees have no guaranteed job stability, and entire communities can be affected if mass layoffs occur.[30] Just by virtue of their power to hire and fire, businesses have

and the Law Before the New Deal, 6 GEO. J. ON POVERTY L. & POL'Y 1, 4 (1999) (discussing Statute of Labourers, which required individuals "to accept employment with any person who required their services (with preference given to lords) at wages no greater than those prevailing before the Black Death"). As late as the nineteenth century, English law still included "statutory schemes . . . that . . . compelled entry into and punished unauthorized departures from labor service." MARC LINDER, THE EMPLOYMENT RELATIONSHIP IN ANGLO-AMERICAN LAW 45 (1989) (citing, as well, laws that "fixed wages and hours," "discouraged pauperism," and "prohibited combinations by workers").

[27] Other countries, particularly in Western Europe, use a model that typically requires a showing of cause for a worker's removal. This system protects workers who are already employed but can cause higher aggregate unemployment because rational employers will be extremely cautious about hiring additional workers. *See* Stewart J. Schwab, *Life-Cycle Justice: Accommodating Just Cause and Employment at Will*, 92 MICH. L. REV. 8, 24 & n.58 (1993) (noting the European approach to employment and the problem of high unemployment).

[28] *See, e.g.*, Coley, *supra* note 24, at 967 ("The vast majority of workers in the United States retains only marginal security in their employment due to the American 'at-will' employment . . . scheme, which places them in a greatly disadvantaged position relative to their employers.").

[29] LINDER, *supra* note 26, at 18 (quoting OTTO KAHN-FREUND, LABOUR AND THE LAW 6 (2d ed. 1977)).

[30] *See* Arnow-Richman, *supra* note 22, at 37-38; *see also* Coley, *supra* note 24, at 974 ("Opponents of the at-will scheme have concluded that its impact upon workers 'has become incongruous with our social norms, with our views of who we are as a polity, and with the kind of society in which we want to live.'" (quoting Joseph Grodin, *Toward a Wrongful Termination Statute for California*, 42 HASTINGS L.J. 135,

tremendous power over their workers. Although the flexibility afforded by at-will employment might be envisioned as a two-way street, it seems not to work that way. The flexibility runs mostly in one direction and, unless constrained by external factors, produces employment agreements with one-sided terms.[31]

B. Regulating At-Will Employment

At first, courts refused to recognize a gap between workers' formal rights and the practical conditions affecting the exercise of those rights. Indeed, an early and well-known attempt to limit the number of hours that bakers could work in the state of New York found its way to the Supreme Court in 1905.[32] In *Lochner v. New York*, the Court held that the maximum-hours limitation at issue was unconstitutional as it impaired the contractual liberty interests of employers and employees.[33] The Court's judgment regarding the constitutionality of the regulation was clearly influenced by its policy view that paternalism was inferior to contractual bargaining as a method for protecting workers; after all, who better than the workers to decide what working conditions were desirable? In subsequent years, the Court struck down many attempts at the state and federal level to provide workers with mandatory wage and hour protections.[34]

The so-called *Lochner* era is widely considered to have been a historic low point for American workers.[35] By 1937, however, the Court had backed down in the face of pressure from President

138 (1990))).

[31] The relationship between capital and labor is contractual, in an economic sense, regardless of whether the terms are actually negotiated and reduced to writing. *See* STEPHEN M. BAINBRIDGE, CORPORATION LAW AND ECONOMICS 28 (2002) (distinguishing the broader, economic understanding of contract from the legal formalities of contract law). Unless modified, a central fact of the employment contract is its impermanence — the worker can be fired without cause for any reason. Richard A. Epstein, *In Defense of the Contract at Will*, 51 U. CHI. L. REV. 947, 955 (1984).

[32] Lochner v. New York, 198 U.S. 45, 46 (1905), *abrogation recognized in* Ferguson v. Skrupa, 372 U.S. 726 (1963).

[33] *See id.* at 52-53, 64.

[34] *See, e.g.*, A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935) (invalidating several provisions of the National Industrial Recovery Act); Michal R. Belknap, *The New Deal and the Emergency Powers Doctrine*, 62 TEX. L. REV. 67, 96-98 (1983) (discussing Supreme Court's invalidation of NIRA). Indeed, the Court invalidated many other regulations. *See, e.g.*, United States v. Butler, 297 U.S. 1 (1936) (invalidating the AAA); Panama Refining Corp. v. Ryan, 293 U.S. 388 (1935) (striking down additional parts of the NIRA).

[35] *See, e.g.*, Seymour Moskowitz, *Save the Children: The Legal Abandonment of American Youth in the Workplace*, 43 AKRON L. REV. 107, 132-42 (2010).

Franklin Roosevelt, including a threat to "pack" the Supreme Court with enough extra Justices to uphold his New Deal legislation.[36] With the judicial impediment removed, post-*Lochner* legislation preserved the common law principle of at-will employment but sought to protect workers from the vulnerability of their economic circumstances.[37] Such legislation proceeded from the insight that when one party to a contract has far more power than the other, unlimited flexibility to strike any bargain can lead to exploitation and oppression.[38]

Federal law now provides mandatory protections for employees, including anti-discrimination law[39] and wage and benefit guarantees.[40]

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[36] *See* 2 BRUCE ACKERMAN, WE THE PEOPLE: TRANSFORMATIONS 360-61 (1998); *see also* Belknap, *supra* note 34, at 91 n.161.

[37] *See* National Labor Relations Act, ch. 372, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. §§ 151–169 (2012)) (establishing the National Labor Relations Board); Fair Labor Standards Act of 1938, ch. 676, 52 Stat. 1060 (codified as amended at 29 U.S.C. §§ 201–219 (2012)) (setting minimum wage, maximum hours, and minimum ages); William R. Corbett, *Waiting for the Labor Law of the Twenty-First Century: Everything Old Is New Again*, 23 BERKELEY J. EMP. & LAB. L. 259, 269-70 (2002).

[38] Of course, the extent to which regulation is desirable remains controversial and depends upon the perceived efficacy of private ordering for achieving economically efficient results that are also consistent with the requirements of distributive justice. *See* Daniel J. Chepaitis, *The National Labor Relations Act, Non-Paralleled Competition, and Market Power*, 85 CAL. L. REV. 769, 784-85 (1997) (discussing market approaches to labor law and concluding "one cannot assume that the external labor market is competitive — that wages, benefits, and work conditions are competitively set in the external market — simply because some employees will find other jobs if employers make greater demands on them or decrease benefits"); Samuel Issacharoff & Erica Worth Harris, *Is Age Discrimination Really Age Discrimination?: The ADEA's Unnatural Solution*, 72 N.Y.U. L. REV. 780, 794 n.49 (1997) (arguing that Judge Richard Posner incorrectly dismisses arguments for federal age discrimination law when he maintains that "employers have their own incentives, unrelated to law, to avoid firing competent employees of any age, even if replacements are available" (internal quotation marks and citation omitted)). Some commentators even defend the *Lochner* era jurisprudence. *See generally* Stephen A. Siegel, Lochner *Era Jurisprudence and the American Constitutional Tradition*, 70 N.C. L. REV. 1 (1991) (discussing the different "narratives" of the *Lochner* era and jurisprudence).

[39] *See generally* Joseph A. Seiner, *Weathering* Wal-Mart, 89 NOTRE DAME L. REV. 1343 (2014) (discussing intersection of employment discrimination and procedural law); Joseph A. Seiner, *Punitive Damages, Due Process, and Employment Discrimination*, 97 IOWA L. REV. 473 (2012) (same).

Under Title VII of the Civil Rights Act of 1964, an employer cannot terminate a worker on the basis of race, color, sex, national origin or religion. Civil Rights Act of 1964, Pub. L. No. 88-352, § 703(a)(1), 78 Stat. 241, 255 (1964). Other exceptions have been carved out for disability and age discrimination as well as certain restrictions that ring in tort (e.g., negligent infliction of emotional distress) and contract (e.g., breaching the covenant of good faith and fair dealing). And of course, whistleblowing exceptions have been created where a worker notifies governmental

Additional worker protections have also been adopted at state and local levels. Thus, society has determined that in certain circumstances, there should be limitations on an employer's ability to completely structure the employment relationship.[41]

Enacted in 1938, and amended over the years, the FLSA exemplifies the progressive determination to regulate at-will employment and continues to define many of the wage and hour protections that employees are entitled to receive.[42] The FLSA has three major components: it provides for a guaranteed minimum wage,[43] mandates premium pay (overtime) for non-exempt employees working over forty hours per week,[44] and restricts the use of child labor. The content of these protections remains controversial, and battles are being waged now over the appropriate amount of the minimum wage, with many states and cities greatly diverging from the federal standard.[45]

officials of certain wrongdoing that has occurred. *See generally* STEVEN L. WILLBORN ET AL., EMPLOYMENT LAW: CASES AND MATERIALS (5th ed. 2012).

[40] *E.g.*, Fair Labor Standards Act of 1938, 29 U.S.C. § 206(a)(1)(C) (2012) (setting the federal minimum wage); Employee Retirement Income Security Act of 1974 (ERISA), Pub. L. No. 93-406, 88 Stat. 829 (1974) (regulating employers offering pensions). *See generally* Miriam A. Cherry, *Working for (Virtually) Minimum Wage: Applying the Fair Labor Standards Act in Cyberspace*, 60 ALA. L. REV. 1077 (2009).

[41] *See* Coley, *supra* note 24, at 974-75 ("[S]everal exceptions exist to the default employment-at-will scheme, arising under both statutory and common law, and they serve to limit an employer's ability to legally terminate employees.").

[42] *See generally* 29 U.S.C. § 202 (2012) (FLSA declaration of policy); WILLBORN ET AL., *supra* note 39 (discussing the *Lochner* Era, the Roosevelt administration, and the political issues that led to passage of the FLSA).

[43] *See* Kevin J. Miller, Comment, *Welfare and the Minimum Wage: Are Workfare Participants "Employees" Under the Fair Labor Standards Act?*, 66 U. CHI. L. REV. 183, 192-94 (1999) (discussing scope of minimum wage provisions under FLSA). This amount has changed over time and with inflation, and currently sits at $7.25 per hour. 29 U.S.C. § 206(a)(1)(C).

[44] 29 U.S.C. § 207(a)(1) (2012). The premium pay provision allows employees working over forty hours per week to receive time and a half. *Id.* This provision was designed to spread out the work performed by employees and to encourage employers to hire additional workers rather than to demand too much of specified individuals.

[45] *Minimum Wage Laws in the States — January 1, 2016*, U.S. DEP'T LAB. (Jan. 1, 2016), http://www.dol.gov/whd/minwage/america.htm; Yuki Noguchi, *More States Raise Minimum Wage, but Debate Continues*, NPR (Jan. 1, 2015, 10:34 PM ET), http://www.npr.org/2015/01/01/374406071/more-states-raise-minimum-wage-but-debate-continues (noting that 29 states, as well as the District of Columbia, have wage rates higher than the $7.25 hourly minimum under federal law). *See generally State Minimum Wages: 2016 Minimum Wage by State*, NAT'L CONF. ST. LEGISLATURES (Jan. 1, 2016), http://www.ncsl.org/research/labor-and-employment/state-minimum-wage-chart.aspx (noting that Delaware's statewide minimum wage is $8.25, effective June 1, 2015; Rhode Island's is

This Part's objective is not to defend any particular set of worker protections but to show that such protections were motivated by a perception that employers had total control over the lives of their workers and that workers had little or no flexibility, notwithstanding the formal autonomy guaranteed by at-will employment. It is important to appreciate the underlying purpose of labor and employment laws because, as we discuss in the next Part, the applicability of such laws usually depends upon whether a worker should be classified as an independent contractor or an employee.

II. WHO IS AN EMPLOYEE?

Most labor and employment laws apply only to those who are classified as employees.[46] Often, the laws define the concept of employment broadly. However, courts must still interpret statutory language in light of the preexisting common law divide between independent contractors and employees. The factors relevant to the common-law analysis generally concerned the principal's vicarious liability for the conduct of agents, rather than the principal's obligations to those agents.[47]

In a pre-modern economy, the meaning of employment would have been obvious in most circumstances:

> In 1848 one simply knew who were the proletarians. One knew because all the criteria — the relation to the means of production, manual character of labor, productive employment, poverty, and degradation — all coincided to provide a consistent image.[48]

$9.60, effective Jan. 1, 2016; D.C.'s is $10.50 and Maryland's is $8.25, effective July 1, 2015); *This Map Shows Which Cities Have the Highest Minimum Wages*, TIME (May 21, 2015), http://time.com/3890984/cities-highest-minimum-wage-map/ (mapping city minimum wages, noting that Seattle, San Francisco, and Los Angeles (effective 2020) set their minimum wage at $15, Santa Fe at $10.84, and Louisville at $9).

[46] *See* WILLBORN ET AL., *supra* note 39, § 2[A] (discussing differences in treatment of independent contractors and employees).

[47] *See* Barron, *supra* note 6, at 458-59 (stating the right to control test, also known as the master-servant or common law agency test, came "from a body of case law (hence the label *common law*) in which courts analyzed employment relationships to decide when an enterprise should be held liable to others for the wrongs of its workers"). Two other tests — the economic reality test and hybrid test — both implement features of the control test. *Id.* at 460.

[48] LINDER, *supra* note 26, at 19 (quoting ADAM PRZEWORSKI, CAPITALISM AND SOCIAL DEMOCRACY 56-57 (1987)).

The distinction between independent contractors and employees may still have been reasonably clear in the mid-twentieth century when many of today's labor and employment laws were first enacted. However, in a more modern context characterized by multiple classes of skilled labor, unclear boundaries between capital and labor, and a reduction in the importance of the physical workplace, classifying workers has become markedly more difficult.[49] The on-demand economy exemplifies the problem because the workers may never meet their putative employers and often deploy their own capital; for example, the car used to provide rides for Uber or Lyft, or the apartment rented through Airbnb, FlipKey, or VRBO.[50]

This Part focuses on the FLSA because its definition of "employee" applies to the vast majority of the American workforce.[51] Part II.A explains that the factors used by courts to implement the FLSA's definition of employment are intended to ascertain whether a worker has economic independence or is beholden to a particular business. Part II.B argues, however, that those factors do not provide a reliable guide to classification disputes in on-demand businesses. Part II.C further contends that the Department of Labor's recent effort to provide exhaustive, updated guidance only highlights the arbitrariness of an outmoded approach to worker classification.

A. A Multi-Factor Approach to Worker Classification

According to the FLSA's somewhat circular definition, an employee is "any individual employed by an employer."[52] The employment relationship covered by the statute is broad — to "[e]mploy includes

[49] This same problem has arisen, not just in the context of labor and employment law but with respect to issues of vicarious liability that turn on the common-law characterization of workers as independent contractors or employees. *See, e.g.*, Joseph H. King, Jr., *Limiting the Vicarious Liability of Franchisors for the Torts of their Franchisees*, 62 WASH. & LEE L. REV. 417 (2005) (discussing vicarious liability in the context of franchises).

[50] *See, e.g.*, Tim Worstall, *Uber Reduces Capital Concentration and Increases the Number of Capitalists*, FORBES (Aug. 2, 2015, 6:09 AM), http://www.forbes.com/sites/timworstall/2015/08/02/uber-reduces-capital-concentration-and-increases-the-number-of-capitalists/ (arguing that the on-demand economy benefits ordinary workers by helping them to turn consumption goods into capital goods).

[51] *See* Miller, *supra* note 43, at 193-94 (noting Supreme Court jurisprudence "narrowly construe[s]" exemptions to the FLSA). "[T]he term 'employee' had been given 'the broadest definition that has ever been included in any one act.'" United States v. Rosenwasser, 323 U.S. 360, 363 n.3 (1945) (quoting Sen. Black) (citing 81 CONG. REC. 7657 (1937)).

[52] 29 U.S.C. § 203(e)(1) (2012).

to suffer or permit to work."[53] That language was drawn from existing state laws and was designed to "reach businesses that used middlemen to illegally hire and supervise children."[54] Thus, the FLSA's broad language suggests that Congress intended to prevent employers from manipulating the form of the working relationship in order to circumvent their responsibilities.[55]

Over time, the courts have developed a substantial body of law interpreting the FLSA's definition of employment in order to distinguish work done by independent contractors from work done by employees. In *Goldberg v. Whitaker House Cooperative*, the Supreme Court stated that the ultimate basis for classifying workers under the FLSA should be "economic reality" rather than a focus on "technical concepts."[56] The *Goldberg* Court concluded that where workers "are regimented under one organization, [doing] what the organization desires and receiving the compensation the organization dictates,"[57] they are employees under the FLSA. The *Goldberg* Court's characterization of economic reality needs updating; the worker-flexibility approach we advocate in this Essay does just that. The more regimented the workplace, the more an individual is likely to be characterized as an employee. The more a worker retains flexibility as to the working relationship itself, the more that worker is likely to be characterized as an independent contractor.

Subsequently, courts have elaborated several factors to assist in determining the economic reality of disputed working relationships. Specifically, the courts look to: 1) the level of control the employer maintains over the worker; 2) the opportunity for profit or loss maintained by the worker in the business; 3) the amount of capital investment the worker puts into the process; 4) the degree of skill necessary to perform the job; 5) whether performance of the job is integral to the operation of the business; and 6) the permanency of the relationship between the worker and the employer.[58] Under this multi-

[53] *Id.* § 203(g) (internal quotation marks omitted).

[54] Antenor v. D & S Farms, 88 F.3d 925, 929 n.5 (11th Cir. 1996).

[55] *See* ADMINISTRATOR'S INTERPRETATION NO. 2015-1, *supra* note 18, at 3-4.

[56] Goldberg v. Whitaker House Coop., 366 U.S. 28, 33 (1961) (internal quotation marks omitted).

[57] *Id.* at 32-33.

[58] *See* Sec'y of Labor v. Lauritzen, 835 F.2d 1529, 1534-35 (7th Cir. 1987); *see also* Rutherford Food Corp. v. McComb, 331 U.S. 722, 730 (1947) (approving a factors-based approach). Other jurisdictions have developed alternate formulations. *See, e.g.*, Irizarry v. Catsimatidis, 722 F.3d 99, 104-05 (2d Cir. 2013) ("Instead, we established four factors to determine the 'economic reality' of an employment relationship: 'whether the alleged employer (1) had the power to hire and fire the employees, (2)

factor, evaluative approach, "employees are those who as a matter of economic reality are dependent upon the business to which they render service."[59] Yet, when the factors conflict, courts need guidelines for deciding which factors best illuminate the economic reality of the situation. As discussed in the next section, no such guidelines exist — to advert to economic reality, as if it could supply the missing guidance, is to mistake a label for the analysis necessary to support it.

B. Classifying Workers in the On-Demand Economy

In typical cases involving on-demand businesses, the traditional factors for assessing economic reality can be marshaled to establish that a worker is an independent contractor or, equally plausibly, that the worker is an employee. On the one hand, a worker may access work assignments via a smartphone app (an instrumentality of the business) and will, as a condition of access, agree to abide by guidelines for how the work should be performed. The work may well be integral to the operation of the business. On the other hand, the working relationship may also be impermanent, involve no in-person interactions, and permit the worker to work whenever she wishes. Often the worker will bring her own equipment to the job: a computer for software development, a car for ride-sharing, or an apartment for vacation rental.

As evidenced by two recent class-action cases involving Uber and Lyft, respectively, the traditional factors alone cannot resolve classification disputes in the on-demand economy because the factors merely illuminate what is already evident — that neither category neatly fits hybrid circumstances. The factors that courts have previously identified are potentially useful, but they lack an organizing framework. What is missing, then, is a higher-level conceptual analysis that would enable courts to adapt existing categories in a manner consistent with the economic reality of an on-demand economy.

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supervised and controlled employee work schedules or conditions of employment, (3) determined the rate and method of payment, and (4) maintained employment records.'" (quoting Barfield v. N.Y.C. Health & Hosps. Corp., 537 F.3d 132 (2d Cir. 2008)).

[59] Bartels v. Birmingham, 332 U.S. 126, 130 (1947), *superseded by statute*, Act of June 14, 1948, ch. 468, § 2(a), 62 Stat. 438, 438. *See generally* Bodie, *supra* note 9, at 684-88 (discussing economic realities test). The economic reality test was applied both to the Social Security Act ("SSA") and FLSA — an "eyeball standard." *Id.* at 684-85. But, Congress overturned its application to the SSA, while it still applies to the FLSA. *Id.* at 685.

In *O'Connor v. Uber Technologies, Inc.*,[60] the court rejected Uber's motion for summary judgment and concluded that whether Uber's drivers are employees or independent contractors under California's Labor Code is a mixed question of law and fact that would have to be decided at trial.[61] Although Uber characterized itself as a "technology company" rather than a "transportation company,"[62] a point hotly contested by the plaintiffs, many of the basic facts were not in dispute. Essentially, Uber matches those who need rides with available drivers through a smartphone application.[63] The company sets the fare for each ride and processes payments from passengers, reserving a percentage for itself.[64] To become an Uber driver, applicants must pass a screening process and background check, as well as a "city knowledge test."[65] There is also an interview process, after which successful applicants must sign a contract with Uber (or a subsidiary) indicating that they are purely independent contractors — there is no employment relationship.

The parties disagreed principally regarding the amount of control Uber has over its drivers. Uber argued that it lacks control because it simply provides a software platform for independent contractors who use their own vehicles, set their own schedules, and operate with very little supervision.[66] The plaintiffs disputed those characterizations and maintained that Uber markets itself as a transportation company, selects its drivers, monitors their performance (largely through customer ratings), and disciplines individuals who fail to meet company standards.[67]

Under California law, which closely resembles the FLSA, the classification of workers as employees or independent contractors requires consideration of several factors.[68] The *O'Connor* court noted

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

[61] *Id.* at 1135.

[62] *Id.* at 1137 (internal quotation marks omitted).

[63] *Id.* at 1137, 1141.

[64] *Id.* at 1136-37, 1144.

[65] *Id.* at 1136 (internal quotation marks omitted).

[66] *Id.* at 1137-38.

[67] *Id.* at 1137, 1150-51.

[68] *See, e.g.*, CAL. LAB. CODE § 2750.5 (2016) ("Proof of independent contractor status includes satisfactory proof of these factors: (a) That the individual has the right to control and discretion as to the manner of performance of the contract for services in that the result of the work and not the means by which it is accomplished is the primary factor bargained for. (b) That the individual is customarily engaged in an independently established business. (c) That the individual's independent contractor status is bona fide and not a subterfuge to avoid employee status.").

the importance of control, but also a number of other factors quite similar to the FLSA test: the types of services performed, whether the work is done at the direction and supervision of the company, the amount of skill required to perform the job, who supplies the instrumentalities of the job, the length of time that the services are rendered, the method of payment, whether the work is a "regular" part of what the company does, and whether the parties intended to create an employment relationship.[69]

While the court was skeptical as to whether those factors ought to control the classification of workers in a modern "sharing economy," it was nevertheless bound to apply existing law and concluded that there was a mixed question of law and fact that could not be resolved before trial.[70] The court rejected Uber's argument that it was merely a "technology company" and held that it was "most certainly a transportation company, albeit a technologically sophisticated one."[71] Thus, the work performed by the drivers was for Uber, and the question of classification could not be avoided.

If the case does not settle before trial, a jury will decide whether Uber's drivers are employees or independent contractors. However, it is notable that the judge has already expressed significant doubts about whether that answer can possibly be satisfactory when premised upon an "outmoded" analysis:

> The application of the traditional test of employment — a test which evolved under an economic model very different from the new "sharing economy" — to Uber's business model creates significant challenges. Arguably, many of the factors in that test appear outmoded in this context. Other factors, which might arguably be reflective of the current economic

[69] *O'Connor*, 82 F. Supp. 3d at 1139 (citing S.G. Borello & Sons, Inc. v. Dep't of Indus. Relations (*Borello*), 769 P.2d 399, 404 (Cal. 1989) (en banc)). *Borello* said, "The standards set forth for contractor's licensees in section 2750.5 are also a helpful means of identifying the employee/contractor distinction. The relevant considerations may often overlap those pertinent under the common law." S.G. Borello & Sons, Inc. v. Dep't of Indus. Relations (*Borello*), 769 P.2d 399, 407 (Cal. 1989) (en banc) (citations omitted). *O'Connor* summarized, "Indeed, this Court's extensive survey of the caselaw confirms that no one *Borello* factor is dispositive when analyzing employee/independent contractor status." *O'Connor*, 82 F. Supp. 3d at 1140.

[70] *O'Connor*, 82 F. Supp. 3d at 1153 (internal quotation marks omitted).

[71] *Id.* at 1140-45 (internal quotation marks omitted). The holding, correct in our view, was significant because California law creates a presumption of employment once an individual establishes that she has performed work for the principal. *Id.* at 1138. Thus, the court required Uber to rebut the presumption that its drivers were employees. *Id.* at 1145.

> realities (such as the proportion of revenues generated and shared by the respective parties, their relative bargaining power, and the range of alternatives available to each), are not expressly encompassed by the *Borello* test. It may be that the legislature or appellate courts may eventually refine or revise that test in the context of the new economy. It is conceivable that the legislature would enact rules particular to the new so-called "sharing economy." Until then, this Court is tasked with applying the traditional multifactor test of *Borello* . . . .[72]

In *Cotter v. Lyft, Inc.*,[73] issued on the same day as the *O'Connor* decision involving Uber, the court rejected Lyft's motion for summary judgment regarding the classification of its drivers under California law. Like Uber, Lyft uses a smartphone application that matches drivers with individuals in need of transport.[74] The company initially provided a guide for drivers to follow when addressing passengers, which was subsequently replaced by a "frequently asked questions" section placed on its website.[75] The company further reserves the right to investigate workers and ultimately terminate them "at any time, for any or no reason, without explanation."[76] Drivers typically select their work schedule by either submitting requests in advance with the company or logging onto a website to reserve available hours.[77]

Given these facts, drivers might plausibly be placed in either category. The court observed that "[a]t first glance, Lyft drivers don't seem much like employees," then added, "[b]ut Lyft drivers don't seem much like independent contractors either."[78] The court noted the amount of control exerted by the company over the drivers, including its detailed guidelines concerning how drivers are to perform their job.[79] Also, the company reserved "a broad right to terminate drivers for cause" or for no reason at all.[80] Thus, in some respects, the Lyft drivers appear to be employees.

Yet, in other respects, the drivers look like independent contractors. As in *O'Connor*, the drivers provide their own vehicles and choose

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[72] *Id.* at 1153.

[73] 60 F. Supp. 3d 1067 (N.D. Cal. 2015) (order denying summary judgment).

[74] *Id.* at 1070.

[75] *Id.* at 1072-73.

[76] *Id.* at 1072 (internal quotation marks omitted).

[77] *Id.* at 1071.

[78] *Id.* at 1069.

[79] *Id.* at 1078-79.

[80] *Id.* at 1079.

their own work schedules. Ultimately, although most of the relevant facts were not in serious dispute, the court could not decide as a matter of law which classification was appropriate.[81] Accordingly, just like the court in *O'Connor*, the *Cotter* court decided that the case should proceed to a jury on the question of whether Lyft drivers were employees or independent contractors.[82] However, as the court understood, committing the question for jury determination was simply an admission that the law provides no clear answer:

> As should now be clear, the jury in this case will be handed a square peg and asked to choose between two round holes. The test the California courts have developed over the 20th Century for classifying workers isn't very helpful in addressing this 21st Century problem . . . . But absent legislative intervention, California's outmoded test for classifying workers will apply in cases like this.[83]

These two cases demonstrate the need to clarify the basis for distinguishing independent contractors and employees under state and federal law.[84]

Nor are problems of worker classification limited to the most cutting edge, high-technology businesses. In a case involving the classification of migrant workers who picked cucumbers, Judge Easterbrook authored a separate opinion arguing that it is absurd to decide the economic reality of a worker's situation through a multi-factor balancing test: "My colleagues' balancing approach is the prevailing method, which they apply carefully. But it is unsatisfactory both because it offers little guidance for future cases and because any balancing test begs questions about which aspects of 'economic reality' matter, and why."[85]

If the multi-factor approach to worker classification is unpredictable, even when applied to migrant farm workers, it is still

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[81] *See id.* at 1070.

[82] *Id.*

[83] *Id.* at 1081-82.

[84] *See, e.g.*, Benjamin D. Johnson, Comment, *There's No Place like Work: How Modern Technology Is Changing the Judiciary's Approach to Work-at-Home Arrangements as an ADA Accommodation*, 49 U. RICH. L. REV. 1229, 1230 (2015) ("Telepresence is only one example of the endless ways in which technology is constantly evolving to reduce the need for employees to be physically present in their employers' offices. This phenomenon has forced the courts to reconsider the definition of the workplace in the employment law context." (footnote omitted)).

[85] Sec'y of Labor v. Lauritzen, 835 F.2d 1529, 1539 (7th Cir. 1987) (Easterbrook, J., concurring).

more difficult to apply in cases involving on-demand businesses. But the basic problem in any context in which the classification issue arises is that the concept of economic reality has no clear meaning.[86] Assuming that all the factors previously identified by courts are potentially relevant, they do not all point in the same direction.[87] The lack of guidance creates uncertainty and wastes judicial resources, encouraging an expensive litigation process. By leaving open the specter of punitive damages for misclassifications, pursued through class-action litigation as in the *O'Connor* and *Cotter* cases, the current climate of legal uncertainty threatens to diminish what has become a vibrant and promising section of the economy.

C. The Department of Labor's Guidance

In July 2015, the Department of Labor ("DOL") issued guidance seemingly in direct response to the current controversy regarding the classification of workers in on-demand businesses.[88] This guidance, an Administrator's Interpretation, surveys the field and attempts to redefine the meaning of "suffer or permit to work" in the FLSA[89] However, it appears that the DOL's overall intent is to stack the deck against on-demand businesses, thereby supporting a pre-determined result rather than facilitating an honest inquiry.[90]

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[86] *See, e.g.*, Goldberg v. Whitaker House Coop., 366 U.S. 28, 32-33 (1961) (assessing the economic reality of a cooperative).

[87] O'Connor v. Uber Techs., Inc., 82 F. Supp. 3d 1133, 1140-41 (N.D. Cal. 2015). *Compare* Sandrock v. Taylor, 174 N.W.2d 186, 192-91 (Neb. 1970) (affirming that a material question of fact existed as to whether a milk delivery driver was under the "control" of a company that could terminate the contract at any time by thirty days' written notice), *and* Eden v. Spaulding, 359 N.W.2d 758, 762 (Neb. 1984) (stating that contractual right of termination is not a determinative factor of control where the purported employee works for more than one person), *with* RESTATEMENT (SECOND) OF AGENCY § 220 (1958) (listing several factors to consider in classifying a worker but omitting right of termination).

[88] ADMINISTRATOR'S INTERPRETATION NO. 2015-1, *supra* note 18, at 1.

[89] *Id.* at 1-2 (internal quotation marks omitted).

[90] If so, this would not be the first time in recent memory that the DOL has offered result-oriented guidance. In 2012, the Supreme Court rejected the agency's interpretation of whether particular pharmaceutical representatives were exempt under the terms of the FLSA. In declining to give the agency's interpretation any deference, the Court held that it was "quite unpersuasive" and "plainly lacks the hallmarks of thorough consideration." Christopher v. SmithKline Beecham Corp., 132 S. Ct. 2156, 2160 (2012). Although four Justices dissented on the merits, it is striking that they agreed with the majority that the DOL's interpretation should not be accorded any special deference. *Id.* at 2175 (Breyer, J., dissenting).

The DOL takes the position that businesses frequently misclassify their workers as independent contractors.[91] The DOL argues that any ambiguities should be resolved in favor of employment status as the statutory language "was specifically designed to ensure as broad of a scope . . . as possible."[92] The agency emphasizes that when interpreting the FLSA, "[t]he Supreme Court has consistently construed the Act liberally to apply to the furthest reaches consistent with congressional direction."[93] Such "broad coverage is essential to accomplish" the primary purpose of the statute.[94]

The DOL examines the factors that courts use to resolve classification disputes, noting that there is no single determinative factor.[95] The DOL contends that the "ultimate inquiry" should focus on economic dependence: "If the worker is economically dependent on the employer, then the worker is an employee. If the worker is in business for him or herself . . . then the worker is an independent contractor."[96]

Of course, the difficulty is in determining how the factors relate to the ultimate question of economic dependence. In its guidance, the DOL outlines each of the factors of the economic realities test, explaining in detail their application.[97] With each factor, the agency takes as broad a view as possible on the coverage question. The DOL concludes that "most workers are employees under the FLSA's broad definitions,"[98] and it encourages those interpreting the statute to consider the "intended expansive coverage" of the Act.[99]

The DOL provides numerous examples in support of its expansive interpretation. But while many of its examples are highly sympathetic, the DOL draws substantive conclusions that go beyond the circumstances described. Consider the following:

> A worker provides cleaning services for corporate clients. The worker performs assignments only as determined by a cleaning company; he does not independently schedule assignments, solicit additional work from other clients, advertise his

91 ADMINISTRATOR'S INTERPRETATION NO. 2015-1, *supra* note 18, at 1.

92 *See id.* at 3.

93 *Id.* at 3 (internal quotation marks and citations omitted).

94 *Id.* (internal quotation marks and citations omitted).

95 *Id.* at 4.

96 *Id.* at 5.

97 *Id.* at 5-15.

98 *Id.* at 15.

99 *Id.*

> services, or endeavor to reduce costs. The worker regularly agrees to work additional hours at any time in order to earn more. In this scenario, the worker *does not exercise managerial skill* that affects his profit or loss. Rather, his earnings may fluctuate based on the work available and his willingness to work more. This lack of managerial skill is indicative of an employment relationship between the worker and the cleaning company.[100]

Although plausible as a characterization of the status of a worker who provides cleaning services when, where, and as directed by a cleaning company, this hypothetical appears calculated to cover Uber, Lyft, and other on-demand businesses. For instance, the DOL asserts that a worker who does not independently control assignments, receives additional work on occasion to earn higher wages, and generally receives fluctuating earnings based on the amount of work is an employee rather than an independent contractor. As the DOL is surely well aware, the workers whose classification is now at issue in the *O'Connor* and *Cotter* cases received fluctuating work schedules subject to availability and demand and did not "exercise managerial skill" in the endeavor.[101] Pursuant to the guidance here, there can be little doubt that these individuals would count as employees under the FLSA.[102]

However, the DOL's analysis fails to consider arguments that would support a finding that on-demand workers are independent contractors. Most glaring, the DOL asserts that "workers' control over the hours when they work is not indicative of independent contractor status."[103] The cases cited by the DOL do not support this proposition.[104] For example, the Tenth Circuit in a case involving the classification of wait

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[100] *Id.* at 8-9.

[101] *Compare id.* (emphasizing exercise of managerial skill under profit/loss factor), *with* O'Connor v. Uber Techs., Inc., 82 F. Supp. 3d 1133, 1137-38, 1152 (N.D. Cal. 2015) (noting flexible scheduling), *and* Cotter v. Lyft, 60 F. Supp. 3d 1067, 1069, 1081 (N.D. Cal. 2015) (same).

[102] "Technological advances and enhanced monitoring mechanisms may encourage companies to engage workers not as employees yet maintain stringent control over aspects of the workers' jobs, from their schedules, to the way that they dress, to the tasks that they carry out." ADMINISTRATOR'S INTERPRETATION NO. 2015-1, *supra* note 18, at 13.

[103] *Id.* at 13 (citing Dole v. Snell, 875 F.2d 802, 806 (10th Cir. 1989); Doty v. Elias, 733 F.2d 720, 723 (10th Cir. 1984)).

[104] Dole v. Snell, 875 F.2d 802, 806 (10th Cir. 1989) ("Of course, flexibility in work schedules is common to many businesses and is not significant in and of itself."); Doty v. Elias, 733 F.2d 720, 723 (10th Cir. 1984) ("A relatively flexible work schedule alone, however, does not make an individual an independent contractor rather than an employee.").

staff at a restaurant said that because "plaintiffs could wait tables only during the restaurant's business hours, [defendant] essentially established plaintiffs' work schedules."[105] Thus, the court concluded that the workers did not, in fact, control their hours. By contrast, drivers for Uber or Lyft can usually log onto the company's smartphone application whenever they wish to provide rides; there are no agreed-upon hours, though drivers may add themselves to the schedule further in advance at their discretion to guarantee availability.[106] The striking contrast between the two types of situations underscores the need to examine more carefully worker flexibility in analyzing working relationships in the on-demand economy.

In the next Part, we argue that worker flexibility — the factor rejected by the DOL — will often be the key to understanding the economic reality of a worker's situation and, therefore, the worker's appropriate classification as an independent contractor or an employee. In many cases, it may be that on-demand workers should be classified as employees in order to achieve the remedial purposes of existing labor and employment laws. However, any such conclusion should be based on the specific facts involved.

III. THE OVERLOOKED IMPORTANCE OF WORKER FLEXIBILITY

This Part argues that, particularly in the context of the on-demand economy, the current approach to evaluating whether a worker is an independent contractor or an employee has missed a crucial, often dispositive question: how much flexibility does the individual have in the working relationship? The more flexible a worker's schedule is — and the more control a worker has over her daily routine — the more likely that individual is an independent contractor. By contrast, if an employer dictates the worker's schedule, the inflexibility of the worker's schedule would indicate an employment relationship.

Unlike other proposals for reform, our approach would not require legislative intervention, let alone a whole-scale revision of existing practice. The FLSA's definition of employment turns on the economic reality of each working relationship.[107] The factors courts have

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[105] *Doty*, 733 F.2d at 723. In *Snell*, cake decorators were deemed employees in part because "[t]he demands of the business controlled [them]" and operations "were not subject to the whims or choices of the decorators." *Snell*, 875 F.2d at 806.

[106] If the market is oversaturated with drivers at a particular moment, a driver logging on at the last minute may not be able to offer rides until the oversupply has been corrected. *See Cotter*, 60 F. Supp. 3d at 1071.

[107] Goldberg v. Whitaker House Coop., 366 U.S. 28, 33 (1961).

developed to help answer that question "should not be applied in a mechanical fashion, but with an understanding that the factors are indicators of the broader concept of economic dependence."[108] Accordingly, if the concept of worker flexibility clarifies the economic independence of working relationships in the on-demand economy, courts are already obligated to consider it.

A. Why Worker Flexibility Matters

Any assessment of the economic reality of particular working relationships ought to recognize the massive shift that has taken place from traditional, full-time employment to alternative, contingent work arrangements. According to the U.S. Government Accountability Office, the contingent workforce (which includes part-time employees, self-employed workers, and others who fall outside the category of traditional full-time employment) is increasing and (as of 2010) amounts to over 40% of workers.[109] The higher percentage of contingent workers can be explained, in large part, by flexibility sought both by businesses and by workers. "Among the trends weakening the traditional model of steady, full-time employment are on-demand work platforms like Lyft and Instacart; software to help companies schedule employees' shifts almost in real time; and a desire among many workers for greater flexibility."[110]

However, as was true of the flexibility offered by at-will employment rules, there is no guarantee that the flexibility created through technological advances will be enjoyed equally by capital and labor. Workers made vulnerable and less secure in their income do not, for that reason, become more economically independent. If anything, they have greater need of the protection of employment laws. Just as businesses have always used their right to fire workers to set advantageous terms, businesses may use their ability to access labor

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[108] ADMINISTRATOR'S INTERPRETATION NO. 2015-1, *supra* note 18, at 2.

[109] U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-15-168R, CONTINGENT WORKFORCE: SIZE, CHARACTERISTICS, EARNINGS, AND BENEFITS 1, 4 (Apr. 20, 2015), *available at* http://www.gao.gov/assets/670/669899.pdf ("Millions of workers do not have standard work arrangements — permanent jobs with a traditional employer-employee relationship. Rather, they are in temporary, contract, or other forms of nonstandard employment arrangements in which they may not receive employer-provided retirement and health benefits, or have safeguards such as job-protected leave under the Family Medical Leave Act . . . ."); Lauren Weber, *New Data Spotlights Changes in the U.S. Workforce*, WALL ST. J. (May 28, 2015, 10:56 AM ET), http://blogs.wsj.com/atwork/2015/05/28/new-data-spotlights-changes-in-the-u-s-workforce/.

[110] Weber, *supra* note 109.

online, and to substitute workers at very low cost, to insist upon more onerous working conditions and to reduce the flexibility that workers have to arrange their own lives.

In order to appreciate how flexibility affects the economic reality of a working relationship, it may be instructive to consider the negative impact technology can have. When a business exerts total, despotic control over its workers' schedules and uses just-in-time staffing software to deploy workers whenever algorithms suggest demand is likely to be highest, the loss of control workers experience in their own lives should counsel strongly in favor of classifying those workers as employees eligible for whatever job, wage, and hour protections the law may provide. Workers who must make last-minute adjustments to meet a business's scheduling demands have little or no opportunity to pursue other economic opportunities and may not even be able to manage basic requirements of their personal lives.

A recent *New York Times* article described the burden placed upon one Starbucks employee, a single parent, who "rarely learned her schedule more than three days before the start of a workweek, plunging her into urgent logistical puzzles."[111] The lack of stability stymied her efforts to pursue a college degree part time and to thereby achieve greater financial independence.[112] The employee described her predicament as a loss of control: "'You're waiting on your job to control your life,' she said, with the scheduling software used by her employer dictating everything from 'how much sleep [my son] will get to what groceries I'll be able to buy this month.'"[113] Starbucks does not contest that its baristas are employees, but the example illustrates the importance of flexibility, or its absence. Not only does Starbucks train and supervise its baristas, its one-sided ability to dictate the working schedule is part and parcel of an employment relationship.

Accordingly, we contend that worker flexibility is crucial to understanding the nature and degree of the employer's control, a key factor under the existing FLSA standard and a dominant factor in many other tests for employment status. Worker flexibility, properly understood, is a way of evaluating existing factors; it is not a separate

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[111] *See* Jodi Kantor, *Working Anything but 9 to 5*, N.Y. TIMES (Aug. 13, 2014), http://www.nytimes.com/interactive/2014/08/13/us/starbucks-workers-scheduling-hours.html.

[112] *Id.* (noting that the barista's "degree was on indefinite pause because her shifting hours left her unable to commit to classes").

[113] *Id.*

standard. For example, to the extent control is the measure of independence, flexibility is often the best evidence of control.[114]

To be clear, we do not dispute that someone may be employed regardless of whether she works at an office or from home.[115] Minor flexibility in terms of when and where assigned tasks must be performed may be helpful for workers, but it is not the type of flexibility that we contend ought to govern the classification analysis of workers in the on-demand economy. Rather, our argument is that when the worker has significant discretion to decide when to work, the worker has, as a matter of economic reality, a greater degree of independence than a worker who must abide by a schedule set by the employer. Whether that flexibility exists in any particular situation will require detailed analysis of the conditions governing the relationship, its duration, exclusivity, and the total number of hours worked.

Aside from its congruence with existing law, the flexibility test we propose has three significant policy advantages. First, and appropriate for a standard designed for the benefit of workers, it tracks the expressed preferences of workers themselves. "Studies suggest that flexibility — no supervisors to answer to, working when you want rather than when the boss wants — is an important part of what attracts workers to companies like Uber."[116] Many employees are now demanding "[f]lexible schedules," a "[s]upportive environment," and "[t]ransparency" on the part of their employers.[117] This new workplace looks nothing like the employment model of previous generations.[118] Often, on-demand companies advertise flexibility as a benefit for their workers.[119]

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[114] As long as courts continue to overlook worker flexibility, their judgment regarding an alleged employer's control may concentrate on aspects of control that are, from the standpoint of economic independence, not particularly important. A principal's right to control the manner in which a task is performed should impact the principal's vicarious liability for torts committed by an agent — but that is a separate issue. Whether or not a business is responsible for torts committed by workers — say, drivers for Uber or Lyft — does not answer the question whether the business should be obligated to pay workers a minimum wage, overtime, and for business-related expenses.

[115] *See* Goldberg v. Whitaker House Coop., 366 U.S. 28, 33 (1961) (holding that individuals who sewed goods in their own homes as part of a cooperative that paid for the goods on a piece-rate basis were employees under the FLSA).

[116] Surowiecki, *supra* note 1.

[117] *See* Jeanne Sahadi, *How Companies Are Changing Old Ways to Attract Young Workers*, CNN MONEY (July 23, 2015, 3:45 PM ET), http://money.cnn.com/2015/07/23/pf/companies-millennial-workers/.

[118] *See id.*

[119] *See, e.g.*, *Become a Dasher*, DOORDASH, https://www.doordash.com/dasher/apply/

Second, a focus on flexibility comports with intuitive judgments about fairness. On the one hand, is a worker who performs tasks on an occasional basis, when and if the worker chooses to do so, really an employee and entitled to the full panoply of benefits under federal, state, and local law? On the other hand, is a worker who provides full-time services an independent contractor simply because the company formally acts as an intermediary between the worker and a client while taking care not to exercise too much control over the work provided? In both cases, we submit that the answer should almost certainly be "no."[120]

Third, as discussed in the next section, because flexibility may vary greatly from company to company and even for workers who operate within a single company, it offers a nuanced basis for analysis and avoids sweeping all workers in the on-demand economy into one category or the other.[121]

B. Assessing Worker Flexibility in the On-Demand Economy

Although flexibility is the hallmark of the on-demand economy, it is important to analyze who benefits from the flexibility. Those who work in the on-demand economy, and who may be characterized as

(last visited Dec. 28, 2015) (on-demand food delivery services offering the ability to "[w]ork in the morning, at night, or any time in between"); *Become a Soothe Therapist*, SOOTHE, https://www.soothe.com/apply (last visited Jan. 22, 2016) ("Work When You Want . . . . Soothe's app allows you to change your schedule and coverage based on your needs and commitments."); *Become a Zeel Massage Therapist*, ZEEL, https://www.zeel.com/zmt (last visited Dec. 28, 2015) (on-demand personal massage services offering the ability to "[w]ork [w]hen [y]ou [w]ant" and to "make your own schedule"); *Build Your Own City: Spend Time Making Money*, ZIRX, http://zirx.com/agents/ (last visited Dec. 28, 2015) (on-demand car services offering "flexibility in your schedule" and the ability to "set your own hours"); *Join the Saucey Family*, SAUCEY, https://sauceyapp.com/apply/ (last visited Dec. 28, 2015) (on-demand alcohol delivery services offering the ability to "[w]ork when you want" and "[s]et your own schedule"); *Join the Valet Team*, LUXE, http://luxe.com/valet (last visited Dec. 28, 2015) (on-demand valet car service offering "flexible hours"); *Packing Expert*, SHYP, https://jobs.lever.co/shyp/ea0c0a39-7a0e-4b79-9540-6920c89d8cd2 (last visited Feb. 16, 2016) (on-demand shipping services requiring a willingness to work a "flexible schedule"); *Positions at Instacart*, INSTACART, https://www.instacart.com/shoppers (last visited Dec. 28, 2015) ("Fit work around your own life. Set your availability each week."); VINT, https://www.joinvint.com/ (last visited Dec. 28, 2015) (on-demand personal training services offering the ability to "[a]ccess gyms whenever and wherever you need it").

120 However, the analysis involves other factors and proceeds case by case, so we do not rule out the possibility of exceptional cases in either situation.

121 The flexibility test is, itself, flexible. Obviously, a one-size-fits-all answer would provide greater certainty, but it would do so at the expense of careful assessment of the nature of each working relationship.

independent contractors, may nevertheless function as employees if they lack the flexibility to set their own schedules. Workers who must show up for work when the employer directs them to do so are not, in an important sense, independent. In most cases, on-demand businesses will allege that their workers do have significant flexibility, but courts can and should go beyond broad-brush generalizations to ensure that actual practice matches aspirational goals.

In this regard, consider Amazon's Mechanical Turk platform ("AMT"), which matches businesses with "an on-demand, scalable workforce."[122] According to AMT, "[w]orkers select from thousands of tasks and work whenever it's convenient."[123] To the extent this broad mission statement is accurate, AMT workers would appear to be independent and not properly classified as employees of AMT. However, despite the apparent flexibility in schedule, one worker has alleged that the reality was otherwise. Once an initial match had been made, no further flexibility was permissible:

> "These weren't just people working for five minutes, they were putting in hours and effort," Otey says of his time working for one Amazon Turk user, a company called CrowdFlower. "I didn't have control over the work I did. It was all done on their platform. I couldn't choose my own hours. I had to work when they provided the work. They pretty much controlled all the aspects of the work that was being offered."[124]

AMT might object that it merely made the match and was not responsible for the hours assigned by the client for whom Otey had agreed to provide services. On the other hand, the FLSA's definition of employment is broad and includes situations where the employer "suffer[s]" or "permit[s]" the employee to work.[125] Given that the original purpose of that language was to capture child labor provided by an intermediary,[126] it seems potentially applicable to labor arrangements established through a smartphone application. Even if

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[122] *Mechanical Turk Is a Marketplace for Work*, AMAZON MECHANICAL TURK, https://www.mturk.com/mturk/welcome (last visited Aug. 11, 2015).

[123] *Id.*

[124] Sarah Kessler, *The Gig Economy Won't Last Because It's Being Sued to Death*, FAST COMPANY (Feb. 17, 2015, 6:00 AM), http://www.fastcompany.com/3042248/the-gig-economy-wont-last-because-its-being-sued-to-death.

[125] Fair Labor Standards Act, 29 U.S.C. § 203(g) (2012) ("'Employ' includes to suffer or permit to work."); *see also* ADMINISTRATOR'S INTERPRETATION NO. 2015-1, *supra* note 18, at 1-2.

[126] *See* Antenor v. D & S Farms, 88 F.3d 925, 929 n.5 (11th Cir. 1996).

many other people who signed up to provide services using the AMT site had more control over their own time, consistent with AMT's own stated emphasis on convenience, and might properly be classified as independent contractors, a fact finder might conclude that Otey was an employee. Thus, a focus on flexibility helps to guide the analysis, enabling fact finders to make reasoned judgments in individual cases.

Other on-demand companies, such as Upwork and TaskRabbit, follow a similar model. Potential clients post a job request to the website and are matched with workers (whether described as "freelancers" or "taskrabbits") who can handle the job. Upwork, for instance, focuses on computer-based projects, including ongoing "mobile programming" and "graphic design."[127] Upwork's payment system contemplates the processing of hourly fees on a weekly basis or else payments when agreed-upon milestones have been reached.[128] The company sets no maximum number of hours or any other constraints that would prevent a client from establishing a permanent working relationship, either with an Upwork freelancer or team of freelancers, in which the client assigns tasks and specifies when and how they must be completed. Again, the freelance model Upwork has established does not preclude a conclusion in an individual case that a freelancer should be classified as an employee. Rather, that determination will depend on the particular agreement of the client and the freelancer.

The overall flexibility of the workforce supports the conclusion that many workers in the on-demand economy are independent contractors.[129] For example, someone signed up as a driver on the Uber or Lyft platforms may have other full-time employment and drive only occasional hours when the opportunity arises. To the extent Uber and Lyft accommodate drivers' schedules, the flexibility of the relationship should weigh heavily in favor of a finding that the drivers

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[127] *Get the Job Done Right*, UPWORK, https://www.upwork.com/i/howitworks/client/ (last visited Aug. 11, 2015). TaskRabbit has a similar scheme. *See Become a Tasker*, TASKRABBIT, https://www.taskrabbit.com/become-a-tasker (last visited Jan. 5, 2016).

[128] *Get the Job Done Right*, *supra* note 127.

[129] For several financial reasons already discussed, most workers desire to be categorized as employees. It is interesting to note, however, that from a demographic standpoint, independent contractors do not appear to be an exploited group. Indeed, approximately four-fifths of independent contractors are white, over half are male, and over a third have a college degree. *See* WILLBORN ET AL., *supra* note 39, at 30. In some instances, workers may not want to be categorized as employees. This is particularly true where workers are interested in maintaining copyright or a patent in their work. *See, e.g.*, 17 U.S.C. § 201(b) (2012) (giving ownership over works produced in the course of employment to employers).

are independent contractors. Indeed, many if not most Uber and Lyft drivers may fall in this category. By contrast, FedEx drivers who work regular schedules seem to fall within the employment category, regardless of whether FedEx attempts to structure an independent contractor relationship.[130]

Nevertheless, the facts of each case must be considered and formal freedom may mask hidden constraints. As one former Uber driver described his experience, Uber set the price for rides and therefore exerted indirect control over scheduling issues:

> My choice of hours was heavily influenced by Uber. I determined when and where I would drive early in the week based on emails from the district managers. They supplied a schedule of concerts, baseball games, conferences, and other events expected to generate high demand. Additionally, maps of San Diego with highlighted high demand zones accompanied the schedule. On Friday and Saturday nights, the Uber iPhone would receive text messages from the district headquarters informing drivers of areas entering "peak hours." Selecting the map application revealed a shaded portion that guaranteed a normal fare was multiplied two or three times.
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> The initial draw to Uber was the flexibility to create my own schedule. However, earnings are slim outside the suggested time frame so I always drove within hours proposed by Uber. I couldn't earn money if I freely organized a schedule. In addition, incentives were awarded to drivers that worked the most hours, generated the most income, accepted the most requests, and maintained high customer ratings. Competing for the bonuses was impossible without adhering to Uber recommendations.[131]

Whether Uber's control over its pricing and its communications with drivers encroached upon the drivers' flexibility in the working relationship is a question of fact. Although some drivers may have felt pressure to comply with Uber's requests, Uber would likely respond

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[130] Although FedEx continues to maintain that its drivers are independent contractors, it recently agreed to pay $228 million to settle a class action complaint brought by over 2,000 California pickup and delivery drivers. Robert W. Wood, *FedEx Settles Independent Contractor Mislabeling Case for $228 Million*, FORBES (June 16, 2015, 8:39 AM), http://www.forbes.com/sites/robertwood/2015/06/16/fedex-settles-driver-mislabeling-case-for-228-million/.

[131] Memorandum from Colton Tully-Doyle to authors (July 30, 2015) (on file with authors).

that its communications simply reflected market demand and that drivers remained free to set their own schedule.

Even without a set schedule or other direct indicia of control, the economic context may support a finding that a worker lacks flexibility in the relationship. For example, drivers who lease vehicles through Uber or one of its partners may need to work steadily just to break even. Although Uber might respond that a voluntarily-assumed economic obligation is not coercive, the issue is not whether the worker entered the working relationship voluntarily but whether, having done so, the worker retains meaningful flexibility. In this regard, a finder of fact might consider total hours worked as a factor in evaluating whether a particular worker was, as a matter of economic reality, an employee of a company. The more a worker depends on a single employer for her livelihood, the more likely it is that the employer will have the power to exert significant control over the time, place, price, frequency, and manner of the work.

Without the ability to undertake granular analysis of work relationships in the on-demand economy, there is a danger that courts will make arbitrary decisions based on factors that could easily support any conclusion.[132] Or, even worse, that decisions will flow from preconceived notions regarding the on-demand economy as a whole rather than the facts of specific cases. In an apparent example of the latter danger, the California Department of Labor recently ruled against Uber in a case involving the classification of a driver who alleged she was an employee, not an independent contractor.[133] The Department's decision dutifully noted Uber's position that it exerts no control over the hours worked or geographical location of its "Transportation Providers" and that it does not require a minimum number of rides.[134] However, the Department's subsequent legal analysis ignored Uber's argument.

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[132] Judge Frank Easterbrook argues that the economic reality test is inherently arbitrary. *See* Sec'y of Labor v. Lauritzen, 835 F.2d 1529, 1539 (7th Cir. 1987) (Easterbrook, J., concurring). The Judge states that:

> It is comforting to know that "economic reality" is the touchstone. One cringes to think that courts might decide these cases on the basis of economic fantasy. But "reality" encompasses millions of facts, and unless we have a legal rule with which to sift the material from the immaterial, we might as well examine the facts through a kaleidoscope. *Id.*

[133] Berwick v. Uber Techs., Inc., No. 11-46739 EK, 2015 WL 4153765, at *6 (Cal. Dep't Labor June 3, 2015).

[134] *Id.* at *3.

Instead, the Department primarily relied on a factor set forth by the California Supreme Court for distinguishing independent contractors and employees: "Whether the person performing services is engaged in an occupation or business distinct from that of the principal."[135] When the worker's business is not distinct, the worker is more likely to be an employee.[136] (The same is true under the FLSA).[137] Further, the Department found that "Plaintiff's work was integral to Defendants' business. Defendants are in business to provide transportation services to passengers. Plaintiff did the actual transporting of those passengers. Without drivers such as Plaintiff, Defendants' business would not exist."[138] To reinforce its conclusion, the Department noted that Uber also exercises control over the relationship by vetting its drivers, setting standards for drivers to follow, and reserving sole power to set the amount of payment for rides.[139]

Whether or not the plaintiff should have been classified as an employee, based upon the particular facts of her dispute with Uber, the Department's analysis was overbroad and, taken to its logical conclusion, would effectively obliterate independent contractor status in the context of on-demand businesses. A business that uses technology to match supply and demand, whether for car rides, cleaning services, or computer programming, could not exist without people to provide those services. This context should be the starting point for analysis not the end of the analysis. The general nature of a given platform does not determine whether particular persons who contribute services are independent contractors or employees.

On the other hand, while it might be possible to argue that an on-demand business is nothing more than the creation and implementation of intermediating technology, we agree with the DOL that such a distinction seems specious. Without the contemplated

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[135] *Id.* at *4-6 (citing S.G. Borello & Sons, Inc. v. Dep't of Indus. Relations (*Borello*), 769 P.2d 399 (Cal. 1989) (en banc)).

[136] *Id.* at *5 (citing Yellow Cab Coop. v. Workers' Comp. Appeals Bd., 277 Cal. Rptr. 434 (1991) (holding that independent contractor classification was inaccurate for a taxi business because "the overriding factor is that the persons performing the work are not engaged in occupations or businesses distinct from that of [Defendants]")).

[137] *See, e.g.*, *Lauritzen*, 835 F.2d at 1537-38 ("It does not take much of a record to demonstrate that picking the pickles is a necessary and integral part of the pickle business . . . ."); Donovan v. DialAmerica Mktg., Inc. 757 F.2d 1376, 1385 (3d Cir. 1985) (stating that "workers are more likely to be 'employees' under the FLSA if they perform the primary work of the alleged employer").

[138] *Berwick*, 2015 WL 4153765, at *6.

[139] *Id.*

services, whatever they might be, the technology would have no purpose. Moreover, the on-demand business may intervene heavily to structure the supposedly neutral market it facilitates.[140] In order to grapple with the classification of workers in the on-demand economy, we should seek to understand how the market actually functions and what role the workers play.

CONCLUSION

This Essay has argued that it would dispel considerable confusion regarding the classification of workers in the on-demand economy to recognize that the central inquiry, at bottom, is quite simple: Were the workers truly free to choose the time, place, price, frequency, and manner of the work? This is an inquiry that can only be answered case by case, but worker flexibility provides an objective basis for adjudicating classification disputes consistent with the goals that have always animated employment law.

Ultimately, though, it may be that clarifying existing law is not sufficient to protect workers in a changing economy in which the distance-bridging possibilities of technology are reducing the role of the firm and of traditional employment.[141] Perhaps laws that regulate at-will employment will need to be rethought in light of technological innovations that provide greater flexibility for those who are able to capture technology's economic potential but threaten to leave vulnerable workers with even less control over their own schedules and lives.

Some believe that such worries are overdrawn or at least premature.[142] Other commentators see evidence that a shift has already occurred, contending that the issue of worker classification is "the most fundamental labor issue of the digital economy: whether those who work for massive digital platforms deserve the protection of employment, or can be treated as mere 'independent contractors'

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[140] *See* Tim Hwang & Madeleine Clare Elish, *The Mirage of the Marketplace*, SLATE (July 27, 2015, 6:00 AM), http://www.slate.com/articles/technology/future_tense/2015/07/uber_s_algorithm_and_the_mirage_of_the_marketplace.html.

[141] *See generally* Bodie, *supra* note 9, at 665-66 (suggesting participation-based approach to employment test).

[142] According to one line of argument, the on-demand economy promises to reduce wealth inequality by allowing more people to turn their consumption goods into capital goods — a car can be turned profitable by giving rides; an apartment can be rented. *See* Worstall, *supra* note 50. Others deny that the technology makes any substantial difference. *See, e.g.*, Susie Cagle, *There's No Such Thing as 'The Gig Economy*,' PAC. STANDARD (July 28, 2015), http://www.psmag.com/business-economics/your-gig-economy-is-some-kind-of-marketing-wizardry.

bereft of traditional labor protections."[143] While these issues are beyond the scope of the present Essay, the worker-flexibility framework we defend can be used to evaluate the implications of changes in the structure of the labor market and to design new protections to meet new challenges.

[143] Trebor Scholz & Frank Pasquale, *Serfing the Web: On-Demand Workers Deserve a Place at the Table*, NATION (July 16, 2015), http://www.thenation.com/article/serfing-the-web-on-demand-workers-deserve-a-place-at-the-table/.