

# Wage Slave or Entrepreneur?: Contesting the Dualism of Legal Worker Identities

V.B. Dubal\*

*Today, whether a worker is legally classified as an “employee” or an “independent contractor” determines whether he or she is entitled to employment and labor law protections. With the proliferation of the on-demand economy, the doctrinal definitions and legal analyses of these categories are fiercely contested. While businesses have attempted to confine the definition of employee to limit their financial and legal liabilities and risks, public interest lawyers have worked to broaden the definition, ensuring that more workers are covered and protected by the law. How did U.S. law come to divide workers into these two categories, how have the definitions evolved historically, and how do workers today make sense of them? This Article challenges the duality of worker classification in employment regulation by positioning the employee and the independent contractor in U.S. legal history and in the lives of contemporary workers. Part I situates the debate in work law scholarship. Part II uses historical and legal archives to challenge the prevailing assumptions about the employee and independent contractor classifications in employment and labor law. I argue that the existence of the dualism of worker categories is more recent than*

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\* Associate Professor of Law, University of California, Hastings College of the Law (UC Hastings). Postdoctoral Fellow, Stanford University; Ph.D., Jurisprudence and Social Policy Program, University of California, Berkeley; J.D., University of California, Berkeley, School of Law; B.A., Stanford University. I have many people to thank for reviewing early drafts of this Article and providing critical, productive feedback. My sincerest appreciation goes to my colleagues at UC Hastings, as well as to Catherine Albiston, Jennifer Carlson, Fidan Elcioglu, Ryan Gilfoil, Akhil Gupta, Mimi Kim, Roi Livne, Kristin Luker, Deborah Lustig, Purnima Mankekar, David Minkus, Calvin Morrill, Nantiya Ruan, Jonathan Simon, Christine Trost, Kim Voss, and Noah Zatz. I am grateful to both the Center for Research on Social Change Graduate Fellowship Program at the University of California, Berkeley, and the Berkeley Empirical Legal Studies Fellowship for giving me critical funding and wonderful communities of people to learn from. I also thank the hundreds of San Francisco taxi workers who shared their time and accepted me into their lives and communities. I am grateful to my parents, Bharat and Saroj Dubal, for their unconditional love and support. I dedicate this Article to James and Jaya: May you grow up in a world where you do not have to work so hard and so long for so little.

*previously understood and that contemporary doctrinal tests reflect not bright line legal rules, but evolving political and cultural philosophies about work. Part III investigates the impact of these legal classifications on the ground. Through ethnographic research and analysis, I find that these categories of work have taken on social meaning for workers, often disrupting worker collectivities. The Article concludes that both the doctrinal analyses of the employee category and the lawyering methodologies used to advance the interests of workers must be more attendant to workers' realities.*

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## INTRODUCTION

With the decline of the welfare state in the United States, a tremendous amount of weight has been placed on employment regulation to remedy economic inequality. And yet, paradoxically, employment aid and employment benefits elude many U.S. workers. A growing number of workers are not considered “employees” under the law but “independent contractors,” working-class entrepreneurs who are ineligible for basic employment safeguards such as the right to collectively bargain, the right to a minimum wage, and the right to protections against employment discrimination, among others. With the innovation and proliferation of business models intended to lower corporate costs by relying on non-legally cognizable employee labor, especially in the “on-demand” or “gig” economy, more workers are working “casually.”<sup>1</sup> Such nonemployee workers include contractors, lessees, temporary laborers, freelancers, and consultants, all likely classified as “independent contractors.” Social scientists refer to the growth of the casual workforce as the rise in the *precariat*—a class of workers whose relationship to employment is precarious or risky because it lacks stability and the benefits of regulation.<sup>2</sup>

This Article maintains that the legal bifurcation of workers into “employees” and “independent contractors” has contributed significantly to the growth of precarious work in the United States. It investigates the legal, historical, and cultural origins of these dual legal categories and their impact on contemporary workers. Based on empirical research, I argue that the two-category division of workers in U.S. employment and labor laws is much more recent than commonly understood. This division has resulted not just in widespread contingent labor but also in fractured worker collectivities, thereby exacerbating the potential for precarity. These findings highlight the need for more scholarly attention to the politics of employee rights advocacy. Simultaneously, they hold key implications for doctrinal analysis and for lawyering methodologies intended to address the rise of insecure work, poverty, and inequality in the United States.<sup>3</sup>

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1. The “on-demand” or “gig” economy consists of firms that employ independent contractor labor for mostly short-term work engagements. These workers labor “casually” without a long-term employment relationship to a single employer. Another term for casual labor is contingent work. Casual or contingent workers are considered disposable and frequently work part-time. According to Jennifer Middleton, “Perhaps the largest segment of the contingent workforce is the part-time working poor.” Jennifer Middleton, *Contingent Workers in a Changing Economy: Endure, Adapt, or Organize?*, 22 N.Y.U. REV. L. & SOC. CHANGE 557, 558 (1996).

2. See, e.g., Arne L. Kalleberg, *Precarious Work, Insecure Workers: Employment Relations in Transition*, 74 AM. SOC. REV. 1, 2 (2009); GUY STANDING, *THE PRECARIAT: THE NEW DANGEROUS CLASS* 7–13 (2011); ANDREW ROSS, *NICE WORK IF YOU CAN GET IT: LIFE AND LABOR IN PRECARIOUS TIMES* (2009).

3. The official poverty rate increased from 12.5 percent in 2007 to 15.0 percent in 2012. STANFORD CTR. ON POVERTY & INEQUALITY, NATIONAL REPORT CARD 1, 4 (2014). According to researchers at Stanford University:

After the Great Recession ended in mid-2009, income and consumption inequality increased, thus resuming what has been a nearly relentless growth in inequality over the last

This Article is informed by legal and historical research spanning 1910 to 2013 and by ethnographic data collected in the San Francisco taxi-worker community between 2010 and 2013.<sup>4</sup> The legal and historical research includes a comprehensive review of a century of federal court decisions, federal legislative history, law review articles examining the employee and independent contractor dualism, and over one hundred years of newspaper archives relating to the taxi industry collected by United Taxicab Workers of San Francisco, the San Francisco Public Library, and the San Francisco State University Labor Archives.<sup>5</sup> The ethnographic data, collected over a span of more than two years, incorporates over one thousand hours of participant observation at regulatory meetings, taxi worker advocacy meetings, and other places where taxi workers frequently convene, like the San Francisco International Airport holding lot. This research also comprises data from forty-five in-depth interviews of taxi workers.

Taxi work is an especially telling site for this investigation into the historic origins and contemporary legal and social meanings of the dual worker categories of employee and independent contractor. Today, “ride-sharing” (as the next-generation of taxi work) leads the technologically driven “platform” or gig economy with its legally contested use of independent contractor drivers.<sup>6</sup> Ironically, over forty years ago, in the late 1960s and 1970s, taxi companies were among the first businesses nationwide to alter their business models by changing the legal identities of their workers from employees to independent contractors. While the nature of taxi work remained the same, taxi companies restructured their relationship to workers, demanding that the workers “lease” the taxis from companies, as opposed to split their fares with the taxi companies. This change to leasing, the companies maintained, gave the

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thirty years. The lowest income quintile secured only 3.4 percent of total income in 2012. In the 1990s, it appeared as if the long-standing decline in the lowest quintile’s share had been stanchied, but that downward march has now resumed.

*Id.* at 6.

4. Newspaper reports confirm the first taxi worker strike in San Francisco in 1910. *Taxicab Drivers Are out on Strike*, S.F. CALL, Nov. 1910 (on file with author). Exactly one hundred years later, in 2010, I began two years of ethnographic research on taxi workers and the taxi worker collectivities in San Francisco.

5. The United Taxicab Workers, which was the longest running post-union taxi-worker advocacy group in San Francisco, maintained an archive of newsletters and other ephemera affiliated with their advocacy and the advocacy of their predecessor, the Alliance of Taxicab Workers. They kindly shared it with me. The Daniel E. Koshland San Francisco History Center (Center) located in the San Francisco Public Library contains a research collection of books, newspapers and magazines, photographs, maps, posters, archives and manuscript collections, and ephemera documenting all aspects of San Francisco life and history. The Center also houses the archives for the City and County of San Francisco. Finally, the San Francisco State Labor Archives has a small collection of taxi-worker-related material, mostly donated by the family of S.T. Dixon, an early twentieth century chauffeur organizer.

6. At the time of publication, active misclassification lawsuits against Uber and Lyft abound. In the state of California, seventeen such cases had been filed, at least one of which was a class action lawsuit.

workers more control over their work and thus made them legally cognizable independent contractors. As a result of this industry-wide shift, many of the earliest legal decisions adjudicating the dual worker categories for the purposes of employment protections involved an investigation into the work of the taxi industry.<sup>7</sup>

The San Francisco taxi industry, in particular, serves as a revealing case study and window into the implications of the dual worker categories on the ground. First, the history of the city poses an interesting puzzle: from 2002 to 2009, by municipal regulation, San Francisco taxi workers could have been converted to employee status if a simple majority of the workforce wanted the shift.<sup>8</sup> Despite the instability and risks associated with independent contractor labor, this change never happened. Second, the San Francisco taxi workforce is more diverse than the taxi workforce in other major metropolitan areas. While the industry is largely immigrant, the drivers have comparably diverse national origins, and the city still maintains a large contingent of white, nonmigrant taxi workers. My ethnographic research reflects a multiplicity of viewpoints that, I maintain, are associated with this diversity of the worker population. Finally, San Francisco is home to the latest in taxi business re-orderings through the recent advent of ride-sharing. Since 2012, the ride-sharing or “transportation network” industry has converted many independent contractor taxi workers to independent contractor “micro-entrepreneurs” with even fewer employment protections than traditional San Francisco taxi drivers.<sup>9</sup> Indeed, the most recent and highly publicized misclassification battles take place in this industry and are being litigated on behalf of San Francisco drivers (as well as other Uber drivers throughout the state of California).<sup>10</sup>

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7. See, e.g., *Party Cab Co. v. United States*, 172 F.2d 87 (7th Cir. 1949).

8. This option was eliminated when the San Francisco Board of Supervisors dissolved the Taxi Commission and the San Francisco Municipal Transportation Agency (SFMTA) took over regulation of the taxi industry and rewrote the industry’s governing regulations.

9. Some scholars use the term “micro-entrepreneur” to reference workers in the so-called “sharing economy.” See, e.g., *The New Sharing Economy Can Enrich Micro-entrepreneurs But At What Cost?*, PBS NEWS HOUR (Oct. 10, 2014), <http://www.pbs.org/newshour/bb/sharing-economy-enrich-micro-entrepreneurs-promote-unregulated-big-business> [https://perma.cc/7JU2-KVDF] (interview comment by Arun Sundarajan). Unlike ride-share drivers working for companies like Uber and Lyft, San Francisco taxi workers are covered by workers’ compensation and unemployment insurance laws as a result of misclassification litigation. *Tracy v. Yellow Cab Cooperative*, No. 938786 (Cal. Super. Ct. Oct. 22, 1996) (order granting summary judgment).

10. See, e.g., *O’Connor v. Uber Techs., Inc.*, No. 13-03826 (N.D. Cal. Aug. 18, 2016). *O’Connor*, a certified class action, has received a tremendous amount of attention for its potential to make Uber’s drivers employees and to upend Uber’s business model and, by extension, the business model for many companies in the on-demand economy. See, e.g., Lauren Weber & Rachel Silverman, *Meet the Boston Lawyer Who’s Putting Uber on Trial*, WALL ST. J. (Nov. 4, 2015), <http://www.wsj.com/articles/meet-the-boston-lawyer-whos-putting-uber-on-trial-1446596980> [https://perma.cc/9LEY-NTS7]; Therese Poletti, *The Lawyer Looking to Kill the “Gig Economy,”* MARKETWATCH (Dec. 8, 2015), <http://www.marketwatch.com/story/the-lawyer-looking-to-kill-the-gig-economy-2015-12-07> [https://perma.cc/VPR8-KJ7M]; Julia Carrie Wong, *Original Uber Plaintiff Says He Agreed to ‘Disastrous’ \$100m Deal ‘Under Duress,’* GUARDIAN (May 16, 2016),

This Article proceeds in three parts. Part I briefly reviews the contemporary legal literature on the employee and independent contractor categories and the doctrinal debates within that body of scholarship. With this as background, Part II utilizes original legal and historical research to answer the following question: *When and how did workers become categorized into employees and independent contractors for the purposes of employment regulation, specifically the right to collectively bargain?* In sharp contrast to the assumptions made in existing scholarship on worker categories, my research shows that the bifurcation of worker identity is a relatively new phenomenon in employment and labor laws, one that reflects cultural shifts in work and state governance. Far from being a natural or necessary way to categorize workers, the employee and independent contractor classifications in work law<sup>11</sup> arose in the post–World War II era through the application of the doctrine of respondeat superior to laws regulating employment and labor.

Because of the capacious and subjective nature of the doctrine of respondeat superior—which courts had most commonly used to determine vicarious liability in the tort context—the evolving legal analysis for employment classification reflects not clear legal rules, but rather prevailing political and cultural philosophies. With the growth of free-market cultural ethos, broadly termed “neoliberalism,” in the 1970s and 1980s, the doctrinal analysis that defined the protected worker—the employee—greatly narrowed, undermining basic worker protections. Indeed, one of the latest embodiments of the doctrinal test for employment, as articulated by the D.C. Circuit in 2009,<sup>12</sup> reflects a particular idealization of the “entrepreneur” and the cultural and political philosophies of neoliberalism, typified by the idea that workers should be liberated by the free market and unencumbered by the state’s protections.<sup>13</sup>

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<https://www.theguardian.com/technology/2016/may/16/uber-plaintiff-speaks-out-settlement-lawsuit> [https://perma.cc/UQF6-SPRM]. In *O’Connor*, plaintiffs, a class of Uber drivers, argue that Uber misclassifies them as independent contractors and that they should be considered employees under California law. Much to the dismay of workers’ rights advocates and many objecting Uber drivers, the plaintiffs’ attorney, Shannon Liss-Riordan, and Uber agreed to settle the case. The court has rejected the terms of this contentious settlement. I represented a group of objecting drivers from a workers’ organization called the San Francisco Bay Area Drivers Association and filed a declaration detailing why the case should not be settled under the proposed terms. The declaration can be accessed here: <http://www.uchastings.edu/news/articles/2016/05/Dubal%20Declaration%20-%20Uber.pdf> [https://perma.cc/E69V-87TG].

11. I use the term work law throughout this Article to refer to laws regulating work, including employment and labor laws. This is a common terminological trend in the study of employment and labor laws. See, e.g., MARION CRAIN ET AL., *WORK LAW: CASES AND MATERIALS* (2015) (the seminal casebook being used to teach law students employment and labor relations).

12. *FedEx Home Delivery v. NLRB*, 563 F.3d 492, 504 (D.C. Cir. 2009).

13. Professor Reuel Schiller documents the post–World War II shift made by courts to protect “individual liberties” over group rights. He describes the changes that ensued as being the byproduct of a broader shift in intellectual thought and argues, as I do here, that this move weakened the U.S. labor movement. Reuel E. Schiller, *From Group Rights to Individual Liberties: Post-War Labor Law, Liberalism, and the Waning of Union Strength*, 20 *BERKELEY J. EMP. & LAB. L.* 1, 1–2 (1999).

Finally, Part III draws on findings from over two years of ethnographic fieldwork in the taxi worker community of San Francisco. Based on this data, I argue that the two legal worker categories have become meaningful not just for employment regulation but also for worker identities and collectivities on the ground. Many workers in my ethnographic study, particularly immigrant taxi workers, embraced their precarious independent contractor status for surprising reasons. White, nonmigrant taxi workers, on the other hand, longed for employee status, believing that the identity would not only bring security and stability but also professionalism and dignity back to their work.<sup>14</sup> This difference in the social and cultural perceptions and realities of the diverse taxi workforce has greatly fractured worker collectivities within the San Francisco taxi industry.

The Conclusion considers implications of these empirical findings for both doctrinal analysis and lawyering methodologies. In addition to proposing an alternative doctrinal test that may lead to more consistent employment classification decisions (reflecting both legislative intent and working realities), I argue that lawyers representing the interests of workers must be more attentive to the diverse goals of the workers themselves.

## I.

### WORKER IDENTITIES IN LEGAL PERSPECTIVE

A central vehicle for the decline of worker protections is the shifting definition of who is an employee for the purposes of employment and labor regulation. While business representatives have worked to decrease legal and financial risks and liabilities by narrowing the scope of the definition of employee, plaintiff-side and public interest attorneys have sought to broaden the definition to ensure that the protections extend to more workers. Amidst this push and pull, the laws and tests defining who is an employee have perplexed both the courts and legal scholars. This Section provides a brief review of the contemporary doctrinal tests defining the protected employee and the current legal debates pertaining to the categorization of workers as either “employees” or “independent contractors.”<sup>15</sup>

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14. For the purposes of this Article, I use “nonmigrant” to describe workers who have not crossed national boundaries to live and work. Many of the white, nonmigrant workers in my study were indeed internal migrants, having moved from another part of the United States to San Francisco.

15. An enormous amount of scholarship has been devoted to this area of the law, and I do not do justice to it all in this Section. For other seminal pieces that opine on the independent contractor (often referred to as a “contingent worker”) and employee distinction both domestically and internationally, see KATHERINE V. W. STONE, *FROM WIDGETS TO DIGITS: EMPLOYMENT REGULATION FOR THE CHANGING WORKPLACE* (2004); Katherine V. W. Stone, *Rethinking Labour Law: Employment Protection for Boundaryless Workers*, in *BOUNDARIES AND FRONTIERS OF LABOUR LAW: GOALS AND MEANS IN THE REGULATION OF WORK* 155 (Guy Davidov & Brian Langille eds., 2006); Stephen F. Befort, *Revisiting the Black Hole of Workplace Regulation: A Historical and Comparative Perspective of Contingent Work*, 24 *BERKELEY J. EMP. & LAB. L.* 153 (2003); Guy Davidov, *Who Is a Worker?*, 34 *INDUS. L.J.* 57 (2005) (analyzing use of economic

### A. Main Doctrinal Tests

Contemporary commentators on both sides of the debate agree on one thing: despite the fact that employment status matters enormously for both businesses and workers, the legal definitions and doctrinal tests demarcating the protected employee in federal, state, and municipal work laws are indeterminate. Three main doctrinal tests summarized below in Figure 1—or variations thereof—determine whether workers are employees or independent contractors for the purposes of different rights and protections.

The first test, the Common Law of Agency Test, of which there are many variations, is the core of almost all other tests. Broadly, it examines the alleged employer's "control" over the means and manner of a worker's job performance to determine his status as an employee. The more control exerted by the alleged employer, the more likely the worker is an employee. However, due to the subjective nature of the analysis and the difficulty in applying the test across the field of work, the test's requirements are unevenly applied and the concept of "control" is itself contested.

The second test, the Economic Realities Test, is used to determine eligibility for wage and hour and family leave protections. This test considers both control and additional factors that discern the worker's economic dependence on the alleged employer. In theory, under this test, the more economically dependent a worker is on his or her alleged employer, the more likely it is that the worker is an employee. For example, one factor of the Economic Realities Test investigates the relative financial investments of an alleged employee. If he does not own his own instruments of work but rather borrows them from the alleged employer, then that factor weighs in favor of employee status.

The third test, the ABC Test, is used primarily by state administrative bodies to determine eligibility for unemployment insurance. This test attempts to simplify the analysis of control by looking at three factors: (1) whether the worker is free from direction or control, (2) whether the worker performs the work off the premises of the business, and (3) whether the worker is engaged in a "customarily" independent trade.<sup>16</sup> Even under this simplified test, states vary as to how they weigh the factors in making their determination.<sup>17</sup>

As a result of the various tests and the myriad factors used to determine employee status, the current regime of employee status and rights is piecemeal and inconsistent. A worker may be legally classified as an employee for workers' compensation but as an independent contractor for protected

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dependence in U.K. wage and hour law to define a category of worker broader than employee); Jeffrey E. Dilger, *Pay No Attention to the Man Behind the Curtain: Control as a Nonfactor in Employee Status Determinations Under FedEx Home Delivery v. NLRB*, 26 ABA J. LAB. & EMP. L. 123 (2010).

16. U.S. DEP'T OF LABOR, COVERAGE 1-4 (2014), <http://www.ows.doleta.gov/unemploy/pdf/uilawcompar/2014/coverage.pdf> [<https://perma.cc/6UEH-29SU>].

17. *Id.*



collective bargaining.<sup>18</sup> As Richard Carlson has argued, because of the nature of these tests, “[t]he real work of identifying ‘employees’ and their employment relationships has always been in courts . . . [b]ut the courts have scarcely been any more clear . . . in developing definitions or rules for this purpose.”<sup>19</sup>

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18. For example, the National Labor Relations Board (NLRB) twice rejected the petition by a group of San Francisco taxi workers to be considered a protected bargaining unit under the National Labor Relations Act (NLRA). The NLRB determined that under the NLRA analysis, the taxi workers were independent contractors. *Luxor Cab Co. v. United Taxicab Workers*, 20-RC-16314 (June 15, 1989) (on file with author); *Yellow Cab Cooperative, Inc. v. Chauffeurs Union Local No. 265*, 20-RC-14735 (Mar. 28, 1979) (on file with author). However, the California Superior Court later found that San Francisco taxi workers were employees for purposes of workers’ compensation and unemployment insurance. *Tracy v. Yellow Cab Cooperative*, No. 938786 (Cal. Super. Ct. Oct. 22, 1996).

19. Richard R. Carlson, *Why the Law Still Can’t Tell an Employee When It Sees One and How It Ought to Stop Trying*, 22 *BERKELEY J. EMP. & LAB. L.* 295, 298–99 (2001).

**Figure 1: Defining “Employees” Under Federal & State Laws: An Approximate Summary**

Legal Test	Dispositive Factor(s)	Employment Protections/Benefits
Common Law of Agency Test <sup>20</sup>	[Alleged] Employer’s Control over “Means and Manner” of Worker’s Work <sup>21</sup>	<ul style="list-style-type: none"> <li>• Collective Bargaining Protection under the National Labor Relations Act (NLRA)</li> <li>• Protection from Discrimination under Title VII of the Civil Rights Act</li> <li>• Protection under the Age Discrimination in Employment Act (ADEA)</li> <li>• Protection under the Employee Retirement Income Security Act (ERISA)</li> <li>• Protection under State Workers’ Compensation Laws</li> </ul>

20. The *Restatement (Third) of Agency* defines the employee as follows: “[A]n employee is an agent whose principal controls or has the right to control the manner and means of the agent’s performance of work.” RESTATEMENT (THIRD) OF AGENCY § 7.07(3)(a) (2006).

21. The emphasis of the “control” analysis varies and is the subject of much debate. The Supreme Court in *Community for Creative Non-Violence* set forth thirteen factors that should be considered under the common law control analysis: (1) the hiring party’s right to control the manner and means by which the product is accomplished; (2) the skill required; (3) the source of the instrumentalities/tools; (4) the location of the work; (5) the duration of the relationship; (6) whether the hiring party can assign additional projects to the hired party; (7) the extent of the hired party’s discretion over when/how long to work; (8) the method of payment; (9) the hired party’s ability to hire/pay assistants; (10) whether the work is part of the regular business of the hiring party; (11) whether the hiring party is in business; (12) the provision of employee benefits; and (13) the tax treatment of the hired party. *Cnty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 751–52 (1989). While no single factor is dispositive, the primary emphasis is put on the first factor—the extent to which the hiring party controls the manner and means by which the worker completes her task. *See id.* at 752.

Economic Realities Test <sup>22</sup>	<ul style="list-style-type: none"> <li>• Degree of control exercised by the [alleged] employer;</li> <li>• Extent of the relative investments of the [alleged] employee/employer;</li> <li>• Degree to which the [alleged] employee's opportunity for profit and loss is determined by the [alleged] employer;</li> <li>• Skill and initiative required in performing the job; and</li> <li>• Permanency of the relationship.</li> </ul>	<ul style="list-style-type: none"> <li>• Wage and Hour Protections under the Fair Labor Standards Act (FLSA)<sup>23</sup></li> <li>• Protections under the Family Medical Leave Act (FMLA)</li> <li>• Benefits under the Social Security Act (SSA)</li> </ul>
ABC Test	<ul style="list-style-type: none"> <li>• The worker is free from control or direction in the performance of the work.</li> <li>• The work is done outside the usual course of the company's business and off business premises.</li> <li>• The worker is customarily engaged in an independent trade, occupation, profession, or business.</li> </ul>	<ul style="list-style-type: none"> <li>• Protection under State Unemployment Insurance Laws<sup>24</sup></li> </ul>

22. The Supreme Court in *United States v. Silk*, a case adjudicating employment status under the Social Security Act, set forth five derived factors constituting the Economic Realities Test: (1) the degree of control exercised by the alleged employer; (2) the extent of the relative investments of the alleged employer and the alleged employee; (3) the degree to which the alleged employee's opportunity for profit and loss is determined by the alleged employer; (4) the skill and initiative required in performing the job; and (5) the permanency of the relationship. *United States v. Silk*, 331 U.S. 704, 716 (1947). Several jurisdictions add a sixth factor to the inquiry: whether the service rendered by the individual is an integral part of the alleged employer's business. *See, e.g.*, *Dole v. Snell*, 875 F.2d 802, 803 (10th Cir. 1989); *Brock v. Superior Care*, 840 F.2d 1054, 1059 (2d Cir. 1988); *Sec'y of Labor v. Lauritzen*, 835 F.2d 1529, 1535 (7th Cir. 1987); *Donovan v. DialAmerica Mktg., Inc.*, 757 F.2d 1376, 1381 (3d Cir. 1985), *cert. denied*, 474 U.S. 919 (1985); *Donovan v. Sureway Cleaners*, 656 F.2d 1368, 1370 (9th Cir. 1981).

23. Most circuits use a hybrid version of the control test and the economic realities test to make determinations under the ADEA, Title VII, and ERISA. *See, e.g.*, *Wilde v. Cty. of Kandiyohi*, 15 F.3d 103, 105 (8th Cir. 1994); *Oestman v. Nat'l Farmers Union Ins. Co.*, 958 F.2d 303, 305 (10th Cir. 1992); *Mares v. Marsh*, 777 F.2d 1066, 1067-68 & n.2 (5th Cir. 1985); *Garrett v. Phillips Mills, Inc.*, 721 F.2d 979, 981-82 (4th Cir. 1983); *EEOC v. Zippo Mfg. Co.*, 713 F.2d 32, 37-38 (3d Cir. 1983); *Unger v. Consol. Foods Corp.*, 657 F.2d 909, 915 n.8 (7th Cir. 1981), *cert. denied*, 460 U.S. 1102 (1983), *and cert. denied*, 464 U.S. 1017 (1983); *Cobb v. Sun Papers, Inc.*, 673 F.2d 337, 340-41 (11th Cir. 1982), *cert. denied*, 459 U.S. 874 (1982); *Lutcher v. Musicians Union Local 47*, 633 F.2d 880, 883 n.5 (9th Cir. 1980); *Spirides v. Reinhardt*, 613 F.2d 826, 831-32 (6th Cir. 1979). At least one appellate court, the Ninth Circuit, has said that the Control Test, the Economic Realities Test, and any combination therein are functionally equivalent. *See Murray v. Principal Fin. Grp., Inc.*, 613 F.3d 943, 945 (9th Cir. 2010).

24. About two-thirds of states use the ABC Test to determine eligibility for unemployment insurance. *See U.S. DEP'T OF LABOR, supra note 16*, at 15-6.

### B. Views in the Debate

A major fissure in the scholarly debate on the regulation of employment is whether it is *even possible* to capture, or at least closely ascertain, who is an employee on a consistent basis. At least one federal circuit has opined that “there is no functional difference between the three formulations” of tests for employment.<sup>25</sup> And courts and administrative bodies have come to divergent conclusions, even when looking at the same set of facts. For example, in 2009, the D.C. Circuit, using a refined version of the common law control test, ruled that FedEx Home Delivery drivers were independent contractors under the National Labor Relations Act.<sup>26</sup> Five years later, however, the Ninth Circuit, also using a variation of the common law control test, found that similarly situated FedEx Home Delivery drivers were employees for the purposes of wage protections under California law.<sup>27</sup>

Some scholars and legal commentators look at these conflicting outcomes and contend that the doctrinal inquiry into employment classification needs to be more clearly defined, with a one-size-fits-all test for every context.<sup>28</sup> Others maintain that searching for a single test in such a complexly formulated economy where subcontracting and multiple employers abound is a fool’s errand.

Proponents who push for clearer doctrine advocate for a refined version of one of the three tests detailed in Figure 1. In this context, workers’ rights champions have generally supported a test of economic dependency, which, they maintain, would also mean a return to the statutory purpose of employment protection laws.<sup>29</sup> Because such a test would base employment status entirely on a worker’s economic dependence on his or her employer, supporters have argued that this analysis would get to the heart of the classification issue: workers who need state protection or state regulation would get it. Sympathetic critics counter that such a test would leave too much

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25. The Ninth Circuit wrote, “We take this opportunity to clarify what the district court ultimately recognized: there is no functional difference between the three formulations.” *Murray*, 613 F.3d at 945. Eight years prior, however, the Supreme Court, in a case adjudicating the applicability of ERISA, maintained that the Economic Realities Test used for FLSA purposes “stretches the meaning of ‘employee’ to cover some parties who might not qualify as such under a strict application of traditional agency law principles.” *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 326 (1992).

26. “We have considered all the common law factors, and, on balance, are compelled to conclude they favor independent contractor status.” *FedEx Home Delivery v. NLRB*, 563 F.3d 492, 504 (D.C. Cir. 2009).

27. “We hold that plaintiffs are employees as a matter of law under California’s right-to-control test.” *Alexander v. FedEx Ground Package Sys., Inc.*, 765 F.3d 981, 997 (9th Cir. 2014). Notably, the class action challenging the status of Uber drivers is also being litigated under California law.

28. See, e.g., Karen R. Hamed et al., *Creating A Workable Legal Standard for Defining an Independent Contractor*, 4 J. BUS. ENTREPRENEURSHIP & L. 93, 113 (2010); Jennifer Pinosof, *A New Take on an Old Problem: Employee Misclassification in the Modern Gig-Economy*, 22 MICH. TELECOMM. & TECH. L. REV. 341, 369 (2016).

29. See Carlson, *supra* note 19, at 344–45.

judicial discretion to determine how much economic dependence is needed to trigger protection. This, critics maintain, would result in inconsistent and unpredictable results, similar to decisions made using the economic realities test.<sup>30</sup> At least one scholar reasons that under an economic dependency test, both quintessential small business people and workers suffering from extreme economic vulnerability but without a single boss (e.g., day laborers) would continue to be left out of the regime of protections despite facing extraordinary economic hardship.<sup>31</sup>

Employers' representatives have also endorsed their own version of a single standard test to offer more guidance to businesses seeking to streamline their structures and to avoid unnecessary liabilities—an amended version of the Internal Revenue Service Factors Test<sup>32</sup> (itself an interpretation of the Common

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30. See, e.g., Noah D. Zatz, *Beyond Misclassification: Tackling the Independent Contractor Problem Without Redefining Employment*, 26 ABA J. LAB. & EMP. L. 279, 286 (2011).

31. *Id.*

32. The Internal Revenue Service has identified twenty factors to aid in determining whether a worker falls into the employee status under the revenue codes. These factors are as follows:

1. INSTRUCTIONS. A worker who is required to comply with other persons' instructions about when, where, and how he or she is to work is ordinarily an employee . . . ;
2. TRAINING. Training a worker by requiring an experienced employee to work with the worker, by corresponding with the worker, by requiring the worker to attend meetings, or by using other methods, indicates that the person or persons for whom the services are performed want the services performed in a particular method or manner;
3. INTEGRATION. Integration of the worker's services into the business operations generally shows that the worker is subject to direction and control . . . ;
4. SERVICES RENDERED PERSONALLY. If the Services must be rendered personally, presumably the person or persons for whom the services are performed are interested in the methods used to accomplish the work as well as in the results;
5. HIRING, SUPERVISING, AND PAYING ASSISTANTS. If the person or persons for whom the services are performed hire, supervise, and pay assistants, that factor generally shows control over the workers on the job . . . ;
6. CONTINUING RELATIONSHIP. A continuing relationship between the worker and the person or persons for whom the services are performed indicates that an employer-employee relationship exists. A continuing relationship may exist where work is performed at frequently recurring although irregular intervals;
7. SET HOURS OF WORK. The establishment of set hours of work by the person or persons for whom the services are performed is a factor indicating control;
8. FULL TIME REQUIRED. If the worker must devote substantially full time to the business of the person or persons for whom the services are performed, such person or persons have control over the amount of time the worker spends working and impliedly restrict the worker from doing other gainful work . . . ;
9. DOING WORK ON EMPLOYER'S PREMISES. If the work is performed on the premises of the person or persons for whom the services are performed, that factor suggests control over the worker, especially if the work could be done elsewhere. Work done off the premises of the person or persons receiving the services, such as at the office of the worker, indicates some freedom from control . . . Control over the place of work is indicated when the person or persons for whom the services are performed have the right to compel the worker to travel a designated route, to canvass a territory within a certain time, or to work at specific places as required;
10. ORDER OR SEQUENCE SET. If a worker must perform services in the order or sequence set by the person or persons for whom the services are performed, that factor

Law of Agency Test). However, workers' advocates have countered that the proposed amendments include highly malleable criteria that employers could use to even further limit the coverage of employment protections. For example, one recommended amendment includes a condition that would favor independent contractor status if the worker has "performed a significant amount of service for others."<sup>33</sup> While such a standard would decrease the

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shows that the worker is not free to follow the worker's own pattern of work but must follow the established routines and schedules of the person or persons for whom the services are performed . . . ;

11. ORAL OR WRITTEN REPORTS. A requirement that the worker submit regular or written reports to the person or persons for whom the services are performed indicates a degree of control;

12. PAYMENT BY HOUR, WEEK, MONTH. Payment by the hour, week, or month generally points to an employer-employee relationship, provided that this method of payment is not just a convenient way of paying a lump sum agreed upon as the cost of a job . . . ;

13. PAYMENT OF BUSINESS AND/OR TRAVELING EXPENSES. If the person or persons for whom the services are performed ordinarily pay the worker's business and/or traveling expenses, the worker is ordinarily an employee . . . ;

14. FURNISHING OF TOOLS AND MATERIALS. The fact that the person or persons for whom the services are performed furnish significant tools, materials, and other equipment tends to show the existence of an employer-employee relationship;

15. SIGNIFICANT INVESTMENT. If the worker invests in facilities that are used by the worker in performing services and are not typically maintained by employees (such as the maintenance of an office rented at fair value from an unrelated party), that factor tends to indicate that the worker is an independent contractor . . . Special scrutiny is required with respect to certain types of facilities, such as home offices;

16. REALIZATION OF PROFIT OR LOSS. A worker who can realize a profit or suffer a loss as a result of the worker's services (in addition to the profit or loss ordinarily realized by employees) is generally an independent contractor, but the worker who cannot is an employee . . . ;

17. WORKING FOR MORE THAN ONE FIRM AT A TIME. If a worker performs more than de minimis services for a multiple of unrelated persons or firms at the same time, that factor generally indicates that the worker is an independent contractor . . . ;

18. MAKING SERVICE AVAILABLE TO GENERAL PUBLIC. The fact that a worker makes his or her services available to the general public on a regular and consistent basis indicates an independent contractor relationship;

19. RIGHT TO DISCHARGE. The right to discharge a worker is a factor indicating that the worker is an employee and the person possessing the right is an employer. An employer exercises control through the threat of dismissal, which causes the worker to obey the employer's instructions . . . ; [and]

20. RIGHT TO TERMINATE. If the worker has the right to end his or her relationship with the person for whom the services are performed at any time he or she wishes without incurring liability, that factor indicates an employer-employee relationship.

Rev. Rul. 87-41, 1987-1 C.B. 296 (1987).

33. Marc Linder, *Dependent and Independent Contractors in Recent U.S. Labor Law: An Ambiguous Dichotomy Rooted in Simulated Statutory Purposelessness*, 21 COMP. LAB. L. & POL'Y J. 187, 220 (1999). Linder writes:

In 1995, more than a hundred members of the House of Representatives supported the introduction of . . . a bill in response to demands during that year's White House Conference on Small Business, whose delegates named a new definition of independent contractors "their number one concern." The resulting initiative, H.R. 1972, . . . "would enable employers to label workers as independent contractors" if the workers met the

liabilities of businesses, it would also constrict the reach of employment protections that are vital in addressing poverty and inequality among the nation's most vulnerable workers.

For those who promote the “no good answer” approach, enforcing employment and labor law means focusing solely on the actions of the alleged employer, rather than focusing on the interactions between the alleged employer and the alleged employee. Following in the scholarship of Marc Linder, who famously calls the dichotomy between employees and independent contractors “intellectually bankrupt,”<sup>34</sup> Noah Zatz proposes that efforts to parse out workers' legal identities be diverted to instead determine when a business is avoiding liability.<sup>35</sup> Like many scholars, Zatz agrees that the vagueness of worker categorization tests incentivizes employers to drive a greater number of their workers into a zone of ambiguity, thereby lowering employers' financial and legal risks. He argues convincingly, “legal reform should focus [not on refining the definitions of the employee but rather] on the process of structuring work relationships.”<sup>36</sup> For example, under this framework, an employer would be held liable for committing unfair labor practices by shifting work to individual contractors when it does so to prevent liabilities like unionization.<sup>37</sup> This promising focus may indeed prevent worker misclassification, but it remains unclear how to formulate a test or judicial inquiry into the intentionality of business structures. Calling for such legal reform also sidesteps the fundamental classification question for contemporary workers and putative employers in a grey zone.

This concise background on the doctrinal tests defining worker identities and the debates surrounding the doctrine contextualizes how work and workers are viewed through today's muddled legal lens. Employment, as it turns out, is

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following criteria: (1) they “agree to perform the service for a particular amount of time or to complete a specific result and be liable for damages for early termination without cause”; (2) they are “not required to perform services exclusively for the service recipient,” and in the preceding or following year, either “performed a significant amount of service for others” or “offered to perform services for others through... individual... oral solicitations”; and (3) that “[t]he services must be performed pursuant to a written contract, and the contract must state that the service provider will not be treated as an employee with respect to such services.” Pursuant to these criteria, a firm would be entitled to label an unskilled migrant farmworker an independent contractor under all federal employment-related laws merely because she: (1) agreed to work for a week or to harvest a specified acreage and was required by the firm to agree to pay the firm damages for leaving early without cause; (2) was not required to harvest exclusively for this firm and either harvested for other farmers or knocked on their doors and offered to do so; and, (3) signed an adhesion contract stating that she was not an employee. Under such radically manipulable criteria, the universe of covered employees would be rapidly depleted.

*Id.* at 219–20.

34. *Id.* at 230.

35. *Id.*

36. Zatz, *supra* note 30, at 280.

37. *Id.*

not a natural social fact that is easily and clearly identifiable.<sup>38</sup> Throughout the remainder of this Article, I maintain that rather than merely recognizing and regulating social facts, the legal adjudication of employment is both influenced by and influences social realities of work. Parts II and III depart from existing scholarship by considering how the law envisions and constitutes the social realities of work. In the next Section, for example, I contend that the various tests and arguments over factors in the doctrinal tests reflect not mere arguments about the law but rather reflect contesting ideologies about work and work politics. Because employee status tests provide a road map for future business models, the evolution of this case law tells a story about how courts and businesses have historically constituted work as a coherent social sphere. When and why did legally defining a worker become so tricky?

## II.

### THE PRODUCTION OF PRECARIETY: A LEGAL HISTORY OF THE ENTREPRENEURIAL TAXI DRIVER

This Section uses historical and legal analysis to examine the production of precarity—the conditions under which employment laws originally written to protect workers have come to engender their risky and uncertain working conditions. Because, as discussed in Part I, the adjudication of employment regulation is piecemeal, with different tests used for different employment rights, I focus primarily on the legal history of work law as it relates to the right to collectively bargain. Protected collective bargaining is the only employment right that is concerned with rectifying the inequalities between workers and businesses *prior* to the formation of the employment contract.<sup>39</sup>

The legal determination of *who* is an employee granted the right to collectively bargain and of *who* is an independent contractor completely uncovered by labor protections is not a natural categorization. Rather, this bifurcation of worker identity is the result of recent legal history influenced by U.S. work politics, the rise of neoliberalism, and shifting ideas about the individual's relationship to the state.<sup>40</sup> For a growing number of workers,

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38. For more information on work as a social institution, see generally CATHERINE R. ALBISTON, *RIGHTS ON LEAVE: INSTITUTIONAL INEQUALITY AND THE MOBILIZATION OF THE FAMILY AND MEDICAL LEAVE ACT* (2010).

39. See Zatz, *supra* note 30, at 293. My research and practice experience also reveals that without collective bargaining, many other employment rights may become more difficult to enforce. For example, in San Francisco, because of misclassification litigation in the 1990s, taxi workers are supposed to have workers' compensation and unemployment insurance. See, e.g., *supra* note 9. However, my research revealed that over the past twenty-five years, workers have rarely availed themselves of these rights out of fear of being blacklisted in the industry. Without collective power, workers are, or at least feel, fearful of retaliation for enforcing their individual employment rights.

40. Much scholarly ink has been spilled on neoliberalism. I use the term to describe two intersecting phenomena: (1) policies that reflect an economic practice aimed at "liberating individual entrepreneurial freedoms and skills within an institutional framework characterized by strong private property rights, free markets, and free trade," and (2) hegemonic discourse in which the ideals of



including taxi drivers, truck drivers, delivery drivers, janitors, and nail salon workers, the adjudication of who receives the protections of the state is a legal determination reflecting not only shifting doctrine but also the growth of a free market cultural ethos.<sup>41</sup>

I maintain throughout this Section that the cultural and political veneration of the “entrepreneur” as the ideal citizen-worker has greatly influenced doctrinal analysis of who constitutes a worker for the purposes of employment protections. The entrepreneurial actor’s emergence as the remedy for economic inequality alongside the decline of both employment protections and the welfare state is not accidental.<sup>42</sup> Instead, it represents shifting perceptions about the role of the individual in relation to both work and the state. In the legal analysis of the D.C. Circuit, for example, the working-class entrepreneur has become the opposite, not of the unemployed, but of the wage-worker, reflecting not the way businesses structure themselves to avoid liability, but the way that workers *should* behave.<sup>43</sup> Rather than the state providing a “safety net” for the down and out, the worker is a “partner that sustains the re-orientation of the government” through his labor.<sup>44</sup> He endures a low wage or income and must “pull himself up by his bootstraps” to replace the state’s responsibility for individual social security and employment. Rather than leaching off “entitlements” (including employment benefits), he must *entrepreneurialize* himself by becoming a small businessman.

The precarious nature of work today, exemplified by the risks of working-class entrepreneurialism and the independent contractor identity, finds its legal roots in the taxi industry. In the 1970s, taxi companies were among the first to

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individual freedom and the free market are sacrosanct. DAVID HARVEY, A BRIEF HISTORY OF NEOLIBERALISM 2 (2005). I do not intend to describe neoliberalism in merely causal terms, as either “bottom-up” or “top-down,” but rather as a “circuitous process of socio-spatial transformation.” Simon Springer, *Neoliberalism as Discourse: Between Foucauldian Political Economy and Marxian Poststructuralism*, 9 CRITICAL DISCOURSE STUD. 133 (2012). In other words, neoliberal policies are not *just* pushed upon and resisted by subjugated workers, but rather, neoliberal discourse infuses worker understandings of their experiences and desires in relation to these policies, thereby shaping the possibilities of worker politics.

41. Throughout this Article, I focus on the taxi industry and efforts to restructure businesses *internally* to avoid the liabilities associated with employment regulation. However, many businesses, such as the garment and janitorial industries, evade liabilities by restructuring themselves *externally*, using complicated arrangements with judgment-proof middlemen to “employ” workers. A burgeoning body of literature covers this “joint employer phenomenon,” and in 2014, the NLRB General Counsel announced the decision to expand the standard of “joint employer” for bargaining and unionization purposes. This will likely affect the ability of franchisee workers to engage in protected bargaining. *NLRB Office of the General Counsel Authorizes Complaints Against McDonald’s Franchisees and Determines McDonald’s, USA, LLC Is a Joint Employer*, NLRB (July 29, 2014), <https://www.nlr.gov/news-outreach/news-story/nlr-office-general-counsel-authorizes-complaints-against-mcdonalds> [https://perma.cc/37K7-TD9T].

42. See TOMAS MARTTILA, THE CULTURE OF ENTERPRISE IN NEOLIBERALISM: SPECTERS OF ENTREPRENEURSHIP 1–7 (2013).

43. See *Fedex Home Delivery v. NLRB*, 563 F.3d 492 (D.C. Cir. 2009).

44. MARTTILA, *supra* note 42, at 1.

reorder their business models and convert their workers from employees that had the right to collectively bargain to independent contractors that were uncovered by the National Labor Relations Act (NLRA) and the litany of New Deal and post–New Deal employment protections.<sup>45</sup> The response of courts to the de-unionization of taxi workers endorsed the business decisions of companies by shifting risk onto workers and fueling the production of a new identity for low-income workers—that of the working-class entrepreneur.<sup>46</sup>

Part II.A explains the broad legal, historical, and cultural contexts for the fall of the protected wage-earning employee and the rise of the unprotected independent contractor entrepreneur in work law, arguing that both legislation and legal decisions facilitated the formation of this precarious work. Part II.B then examines the impacts of these broad legal shifts on the history of the San Francisco taxi industry and the regulations governing both San Francisco taxi companies and taxi workers. Asserting that they were facilitating “entrepreneurialism,” courts, local regulators, and businesses enabled the shifting of corporate risk and responsibility onto workers who did not receive commensurate remuneration.

#### A. *From Employee to Entrepreneur Under the Law*

Not surprisingly, alongside the growth of the independent contractor identity, the United States has witnessed a massive reduction in union membership.<sup>47</sup> The percentage of U.S. workers with the “right to collectively bargain” who are organized by unions and protected by the NLRA has decreased dramatically since the post–World War II years, from over 35 percent in 1954 to just over 11 percent in 2013.<sup>48</sup> In today’s deregulated, globalized economy, indirect employment is growing.<sup>49</sup> Businesses rely heavily on the labor of subcontractors, independent contractors, and temporary workers, all of whom are considered ineligible for the collective bargaining protections of the NLRA.<sup>50</sup> How did the majority of work in the United States become constructed so as to undermine work law protections?

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45. As a result, in the post–Taft Hartley era, taxi companies also faced the first classification challenges. *See, e.g., Party Cab Co. v. United States*, 172 F.2d 87, 92 (7th Cir. 1949).

46. *See, e.g., id.*; *Local 777 v. NLRB*, 603 F.2d 862, 886 (D.C. Cir. 1979), discussed *infra*.

47. Scholars explain the decline in private sector union membership by blaming a variety of factors including the outsourcing of manufacturing jobs, intense hostility from businesses, the failures of unions to organize the service sector industry, and decisions by courts to grow individual rights while limiting group rights. *See, e.g., Henry S. Farber, The Decline of Unionization in the United States: What Can Be Learned from Recent Experience?*, 8 J. LAB. ECON. (1990).

48. Drew Desilver, *American Unions Membership Declines as Support Fluctuates*, PEW RES. CTR. (Feb. 20, 2014), <http://www.pewresearch.org/fact-tank/2014/02/20/for-american-unions-membership-trails-far-behind-public-support> [https://perma.cc/NM2E-P6MY].

49. *Contingent and Alternative Employment Arrangements*, BUREAU LAB. STAT. (July 27, 2005), <http://www.bls.gov/news.release/conemp.toc.htm> [https://perma.cc/9VSZ-XZ8D].

50. Temporary workers, although independent contractors of the companies for whom they provide services, are sometimes “employees” of the Temporary Service Agency that connects them to their temporary work. For a fascinating ethnography of a Temporary Service Agency, see Emine

1. *National Labor Relations Act and the “Employee”*

New Deal legislation, including the NLRA, protects “employees,” and not “independent contractors.” These identities, however, are not inherent to the organization of work in the United States. Rather, they are legally constructed definitions and the boundary between them is contested.<sup>51</sup> Both Congress and the courts have fiercely debated those definitions and have changed them in relationship to shifting ideas and perceptions of work. Now, almost eighty years after the passage of the NLRA, the legal boundaries of the protected worker—the employee—exclude an increasing number of workers. With more workers laboring outside the boundaries of work law, the law’s ability to regulate employment is increasingly curtailed.

How and when did workers become divided into independent contractors and employees for the purposes of employment and labor protections? The legislative history of the NLRA reflects no intention to divide workers into employees, who are eligible for collective bargaining, and independent contractors, who are cut out of its protections. To the contrary, the NLRA’s promulgators clearly contemplated taxi workers and other similar workers who would today be classified as independent contractors as intended beneficiaries of the NLRA. In the House Debates preceding the passage of the NLRA, Congressman Connery, the bill’s sponsor, stated, “We are talking about *all* the working people of the country. We say that *we want all workers* to have the right to bargain collectively.”<sup>52</sup> To underscore the need for all workers to have bargaining power—even those with numerous employers or with under ten fellow employees—the report comparing different versions of the bill stated, “[i]n some industries, such as motion pictures and trucking, employee units of 3, 2, and even 1 are not at all uncommon.”<sup>53</sup> Understanding that the modern industrial organization was much more complexly constituted than a simple employer-employee formula, the NLRA’s architects intended a consistently-applied, flexible working definition of employment.<sup>54</sup>

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Fidan Elcioglu, *Producing Precarity: The Temporary Staffing Agency in the Labor Market*, 33 QUALITATIVE SOC. 117 (2010).

51. Legal scholars have long argued that the “Law”—the New Deal legislation and its administration by courts—is more than partly responsible for the decline of organized labor. See, e.g., Karl Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937-1941*, 62 MINN. L. REV. 265 (1978) (discussing the co-optation and disciplining of the workers’ movement by New Deal reforms).

52. Proceedings in H. on June 19, 1935, on Agreeing to H. Res. 263 (79 Cong. Rec. 9683)/Debates in H. on June 19, 1935, on S. 1958 (79 Cong. Rec. 9683-9711, 9713-9730), reprinted in 2 LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT 3119 (1949) (emphasis added).

53. Mem. of Mar. 11, 1935, Prepared for S. Comm. on Educ. and Lab. Comparing S. 1958 (74th Cong., 1st Sess.), with S. 2926 (73d Cong., 2d Sess.), as Reported with Amendments, reprinted in 1 LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT 1342 (1948).

54. See *NLRB v. Hearst Publ’ns*, 322 U.S. 111, 122–24 (1944).

Even opponents of what became the NLRA did not contest the meaning of employee in their otherwise vociferous arguments against and suggested amendments to the bill. During hearings in the Senate, James Emery, the General Counsel of the National Association of Manufacturers, spoke vehemently *against* the bill. In particular, he objected to the provision that would allow striking workers to maintain their protected status as “employees” under the NLRA. Emery’s testimony gives the modern reader historical context as to who was considered an employee at the time of the NLRA’s passage. He protested:

The fact [is] that at the present time . . . the city of New York has been thrown into civil disorder by a strike between taxicab drivers and their employers in which the streets of the city have been the scene of public disorder . . . I shall show you presently, if this bill were in effect, those very strikers, guilty of those very acts, would still be, within the contemplation of the law, “employees” of their employers . . .<sup>55</sup>

By using the taxi workers in his example, he situates them as workers historically understood as “employees” intended to benefit from the NLRA.

Like the NLRA, most New Deal legislation providing worker protections used the term employee to describe the intended beneficiaries, but did not define the term, or only did so loosely. Businesses tried to utilize this definitional ambiguity to limit their liabilities and burdens under the new laws.<sup>56</sup> By drawing on the unclear boundaries between independent contractors and employees in tort law, businesses argued that the common law of agency should be applied to determine who was an employee under the NLRA.<sup>57</sup> Notably, however, Congress did not discuss this tort law issue during the legislative sessions preceding the passage of the NLRA because it did not conceive of the dichotomy between “independent contractors” and “employees” in agency law as extending to employment law protections. Agency law originated in concerns about negligence—when to hold employers liable for the acts of their workers—while employment and labor laws focus on

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55. Hearings before Sen. Comm. on Educ. and Lab., 73d Congress, Sec. Session, on S. 2926: Part II (Mar. 26–Apr. 3, 1934), *reprinted in* 1 LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT, *supra* note 53.

56. *See, e.g.*, *Indus. Comm’n v. Nw. Mut. Life Ins. Co.*, 103 Colo. 550, 553–54 (1939); *Unemployment Comp. Comm’n of N.C. v. Jefferson Standard Life Ins. Co.*, 215 N.C. 479, 483–87 (1939); *Nw. Mut. Life Ins. Co. v. Tone*, 4 A.2d 640 (Conn. 1939).

57. *See, e.g.*, *Nw. Mut. Life Ins. Co.*, 103 Colo. at 562 (“The issues made herein primarily center on what shall be considered ‘employment’ within the meaning of that word as used in the Colorado Unemployment Compensation Act. . . . The company contends that the persons involved herein are independent contractors; that ‘employment,’ as used in the act, relates primarily to the relationship of master and servant, and it is, therefore, to that extent exempt from the provisions of the law.”).

the welfare of workers.<sup>58</sup> Extending the reasoning of the common law of agency to the employment regulation context was neither natural nor necessary.

In the midst of business' efforts to evade the burdens of a unionized workforce, the Supreme Court examined the case of newsboys seeking to unionize and collectively bargain as proscribed by the NLRA in *National Labor Relations Board v. Hearst*. There, the Court rejected the argument that the employee definition should be determined using the common law of agency.<sup>59</sup> The Court instead found that Congress intended the NLRA to address labor strife broadly. Consequently, the definition of employee for purposes of the NLRA encompassed "a wider field than the narrow technical legal relation of 'master and servant,' as [in agency law] . . . ."<sup>60</sup> Further, Justice Rutledge underscored the ambiguities between the employee and the independent contractor and argued that the identity of employee is not a simple truth under the law:

The [employer's] argument assumes that there is some simple, uniform and easily applicable test which the courts have used, in dealing with such problems, to determine whether persons doing work for others fall in one class or the other. Unfortunately this is not true. . . . *Few problems in the law have given greater variety of application and conflict in results than the cases arising in the borderland between what is clearly an employer-employee relationship and what is clearly one of independent entrepreneurial dealing.*<sup>61</sup>

Presciently, Justice Rutledge acknowledged both the need to look beyond the industrial factory setting and the difficulties of employing a single test to determine "employment" under the common law test given the emergence of new business structures. While the Fordist factory model of production was still dominant at the time of this decision, other business models that relied on long-term contractors, particularly in service and entertainment centers, were growing.<sup>62</sup> Justice Rutledge wrote:

*Wide variations in the forms of employee self-organization and the complexities of modern industrial organization make difficult the use of inflexible rules as the test of an appropriate [bargaining] unit. Congress was informed of the need for flexibility in shaping the [bargaining] unit to the particular case and accordingly gave the Board wide discretion in the matter.*<sup>63</sup>

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58. For evidence of the origins of agency law and the doctrine of respondeat superior in negligence principles, see *The Doctrine of Respondeat Superior*, 17 HARV. L. REV. 51 (1903).

59. *Hearst*, 322 U.S. at 124.

60. *Id.* at 125.

61. *Id.* at 120–21 (emphasis added).

62. Joachim Singelmann, *The Sectoral Transformation of the Labor Force in Seven Industrialized Countries, 1920–1970*, 83 AM. J. SOC. 1224, 1229 (1978).

63. *Hearst*, 322 U.S. at 134 (emphasis added).

After the passage of the NLRA and the Supreme Court's decision in *Hearst*, the enormous consequences of the definitional boundary dividing workers into two categories—employees and independent contractors—became clear. For workers, *Hearst* meant that no matter the complexity of their employer's business model or whether they had more than one employer, they could engage in protected bargaining, get social security benefits, and be entitled to a guaranteed minimum wage. For businesses, *Hearst* signaled increased costs and the burden of dealing with workers whose power to bargain augmented them from being “servants,” as the common law of agency had it, to being on more equal footing with their employers. Circuit courts and administrative bodies cited to *Hearst* dozens of times between 1944 and 1947, reflecting the great impact the decision had on workers' rights under New Deal legislation.<sup>64</sup>

Only three years after the *Hearst* decision, the Eightieth Congress (1947 to 1949) unraveled many New Deal labor and employment protections. Known for its opposition to New Deal and Fair Deal laws, the Eightieth Congress aggressively passed pro-business legislation, precipitating a legal journey back toward precarious work. Most (in)famously, Congress passed the Labor Management Relations Act (LMRA), also known as the Taft-Hartley Act and called the “Slave Labor Law” by its opponents.<sup>65</sup> Rooted not only in business interests but also in the protection of the individual against the collective (and in particular, Cold War fears of the Sovietization of the American workforce), the LMRA broadly restricted activities of labor unions.<sup>66</sup>

One way the LMRA addressed businesses' concerns about the NLRA was through new restrictions on the NLRA's definition of “employee.” The revised definition of employee did not include supervisors or independent contractors.<sup>67</sup> At the time, the more controversial of these two changes was the

64. See, e.g., *Duquesne Warehouse Co. v. R.R. Ret. Bd.*, 148 F.2d 473 (2d Cir. 1945), *rev'd*, 326 U.S. 446 (1946); *NLRB v. Norfolk S. Bus. Corp.*, 159 F.2d 516, 517 (4th Cir. 1946); *NLRB v. Packard Motor Car Co.*, 157 F.2d 80, 85 (6th Cir. 1946), *aff'd*, 330 U.S. 485 (1947).

65. Nelson Lichtenstein, *Taft-Hartley: A Slave-Labor Law?*, 47 CATH. U. L. REV. 763, 766 (1998).

66. Professor of industrial and labor relations Rick Hurd details the limits that the LMRA put on union activity:

The LMRA outlawed closed shops, required sixty days' notice before a strike, required a non-Communist oath from all union officials, allowed states to outlaw union shops, and made collective bargaining contracts enforceable in the courts. The LMRA also added a list of unfair labor practices for labor unions, including: 1. organizing strikes, 2. jurisdictional strikes, 3. secondary boycotts, 4. featherbedding, 5. refusal to bargain with management. Finally, the LMRA set up a complex procedure to deal with ‘national emergency’ strikes; under this procedure, whenever the President decides that a strike endangers national health or safety, the strike can be enjoined by federal courts for 80 days.

Richard W. Hurd, *New Deal Labor Policy and the Containment of Radical Union Activity*, 8 REV. RADICAL POL. ECON. 32, 29 (1976).

67. The LMRA's definition of employee reads as follows:

The term “employee” shall include any employee, and shall not be limited to the employees of a particular employer, unless this subchapter explicitly states otherwise, and shall include

exclusion of supervisors from the definition of employee.<sup>68</sup> The single mention of the independent contractor carve out in the legislative history is in the House Report on the modifications, which states, in part:

In the law, there always has been a difference, and a big difference, between “employees” and “independent contractors.” “Employees” work for wages or salaries under direct supervision. “Independent contractors” undertake to do a job for a price, decide how the work will be done, usually hire others to do the work, and depend for their income not upon wages, but upon the difference between what they paid for the goods, materials, and labor and what they receive for the end result, that is, upon profits.<sup>69</sup>

The House Report rested its opposition to the *Hearst* decision in the Supreme Court’s reliance and deference to the NLRB, stating that the NLRB had aggressively expanded the definition beyond its common usage and that Congress did not intend for such an expansion.<sup>70</sup> The legislative history of the

any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act [45 U.S.C.A. 151 et seq.], as amended from time to time, or by any other person who is not an employer as herein defined.

29 U.S.C. § 152(3) (2012). The Taft-Hartley amendments’ exclusion of supervisors from the NLRA has received a great deal of scholarly attention and criticism for its role in undermining labor. *See, e.g.*, Kenneth R. Dolin, *The Supreme Court’s Rejection of Excluding “Ordinary Professional or Technical Judgment” as Independent Judgment When Directing Employees: Does Kentucky River Mean Lights out for “Mississippi Power?”*, 18 LAB. LAW. 365 (2003); Ben M. Germana, *Protecting Managerial Employees Under the National Labor Relations Act*, 91 COLUM. L. REV. 405 (1991); Robert D. Leiter, *Supervisory Employees and the Taft-Hartley Law*, 15 S. ECON. J. 311 (1949).

68. 29 U.S.C § 152(3).

69. H.R. Rep. on H.R. 3020 (1947), *reprinted in* 1 LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT, *supra* note 53, at 309.

70. The House Report states:

An “employee”, according to all standard dictionaries, according to the law as the courts have stated it, and according to the understanding of almost everyone, with the exception of members of the National Labor Relations Board, means someone who works for another for hire. But in the case of *National Labor Relations Board v. Hearst Publications, Inc.* (322 U.S. 111 (1944)), the Board expanded the definition of the term “employee” beyond anything that it ever had included before, and the Supreme Court, relying upon the theoretic “expertness” of the Board, upheld the Board. In this case the Board held independent merchants who bought newspapers from the publisher and hired people to sell them to be “employees.” The people the merchants hired to sell the papers were “employees” of the merchants, but holding the merchants to be “employees” of the publisher of the papers was most far-reaching. It must be presumed that when Congress passed the Labor Act, it intended the words it used to have the meanings that they had when Congress passed the act, not new meanings that, 9 years later, the Labor Board might think up.

*Id.*

NLRA and Justice Rutledge's opinion in *Hearst*, as discussed above, render these assertions questionable at best.

The independent contractor exclusion was perhaps less controversial than the supervisor exclusion because much of the workforce was configured under an industrial model of employment. Most workers were still included within the abridged definition of employee, so the impact of the independent contractor exception was considered minor.<sup>71</sup> Nevertheless, astute business lawyers noticed the potential implications of the withdrawal of independent contractors from the definition of employees who could collectively bargain and receive other employment protections. Willett H. Parr, for example, a business law attorney and senior partner at an Indiana law firm, summarized the LMRA's importance for the Indiana Bar. He stated:

While most people regard this section of the [LMRA] as of importance because of its exclusion of supervisors from the definition of employees, and it was important that the question be decided that way, I hail the independent contractor provision not only for its innate worth but as an indication of a return to principles of law evolved by experience and understood without specious reasoning.<sup>72</sup>

Mr. Parr's observation of the exclusion's importance proved accurate as businesses, including taxi companies, restructured to limit liabilities to their workers and undermine their ability to collectively bargain.

Amidst broader neoliberal economic shifts in the coming decades, including the outsourcing of manufacturing work and the rise of the service economy, businesses found ways to utilize the ambiguities of the common law definition of employee. In doing so, they relieved themselves of obligations to their workers under New Deal legislation. The importance of employer "control" over the means and manner of work in the common law of agency test to determine whether a worker was an employee gave non-factory-based industries incentive to streamline their business models. Taxi companies, for example, escaped union contracts through a practice called "leasing," in which they used the common law definition of employee as a guide to convert their workers to independent contractors. While the nature of taxi work remained the same, the new business model of the taxi companies not only undermined worker protections but also shifted the bearing of financial risk from the business to the worker.

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71. However, another notable type of work where workers did not fit the industrial factory model was homework, occupied mostly by women. According to historian Eileen Boris, homework, including piece-rate work in which women brought the factory or office home, blurred the division between public and private spheres and therefore challenged how government administrators thought about work and regulated it. See EILEEN BORIS, *HOME TO WORK: MOTHERHOOD AND THE POLITICS OF INDUSTRIAL HOMEWORK IN THE UNITED STATES* (1994).

72. Willett H. Parr, *The Taft-Hartley Law*, 23 *IND. L.J.* 12, 14–15 (1947).



2. *Entrepreneur by Law: The Rise of Neoliberalism's Quintessential Actor in Legal Reasoning*

This Section examines how and why post-LMRA court decisions contributed to the fall of employment and labor law protections and the rise of precarious work. Using the unwieldy “control test” to determine employment, courts struggled with analyzing nonindustrial service work, like that performed in the taxi industry. Beginning in the 1970s, courts further whittled down the definition of employee, gradually deregulating employment and idealizing the “entrepreneur” as a worker identity. Appellate court decisions overturned NLRB findings and found transportation workers seeking to unionize to be independent contractors, thus undermining the rights of workers to collectively bargain by further restricting the definitional boundary of the employee. These court decisions coincided with the growth of structural neoliberalism more broadly.<sup>73</sup>

In contrast to prior decades when corporate activities were surrounded by a web of social and political constraints, the 1970s saw the growth of legal reasoning reflecting the neoliberal ideation. Most centrally in the realm of work law, courts undermined collective bargaining rights by finding that the decision to structure a business—such that workers became independent contractors—was not subject to collective bargaining. Courts established that workers laboring under particular business orderings should behave like small businessmen, without the protections of the state for their economic and social welfare. Today, this reasoning has evolved under the D.C. Circuit, which has potential jurisdiction over any NLRB appeal.<sup>74</sup> According to *FedEx Home Delivery, Inc. v. NLRB*, leasing transportation workers are not just “independent contractors” but working-class “entrepreneurs”—even in the absence of entrepreneurial activity.<sup>75</sup> This Section concludes with analysis of this contemporary case, examining how neoliberalism infused the court’s imagination about work and how workers can and *should* behave when they are “liberated” by the free market and unencumbered by the state.

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73. In describing the origins of structural neoliberal practices, Boltanski and Chiapello explain: [I]nterpretation of the crisis of capitalism as a crisis of Taylorism had, since the beginning of the 1970s, prompted a number of initiatives by employers to change the organization of work. . . . As early as 1980, Gerard Lyon-Caen demonstrated that the proliferation of casual workers was the result of new strategies on the part of firms. These strategies were structured around two points: a new employment policy, making it possible for the employer to “maintain a free hand”, and a new “policy of enterprise structures”, such that employers—by outsourcing manpower, for example—could “shield themselves as employer.”

LUC BOLTANSKI & EVE CHIAPELLO, *THE NEW SPIRIT OF CAPITALISM* 218–26 (2005). These precise shifts occurred in the taxi industry through the practice of leasing. See Chapters 2 and 3 of BIJU MATHEW, *TAXI!: CABS AND CAPITALISM IN NEW YORK CITY* (2005).

74. The D.C. Circuit has potential jurisdiction over any NLRB appeal because the NLRB is a federal board.

75. *Supra* note 23.

In the years following the LMRA, businesses experimented with the ambiguities of the employee identity. The transportation sector was an ideal place to push the legal boundaries because workers were not “controlled” in the traditional industrial sense. When the independent contractor identity of transportation workers was challenged, appellate courts almost invariably decided in favor of the companies, against both the arguments of the NLRB and plaintiffs’ attorneys. Control over the means and manner of production as required under the common law definition of the employee was, arguably, limited in transportation work.<sup>76</sup> Due to the nature of driving, employers easily argued that they did not exert spatial or temporal influence over their workers. Over and over again, courts found that taxi drivers who leased their cabs were “independent contractors” under the common law.<sup>77</sup>

The most cited and influential appellate decision prohibiting these lease cab drivers from collective bargaining is a 1979 D.C. Circuit case, *Local 777, Democratic Union Organizing Committee, Seafarers International Union of North American, AFL-CIO v. NLRB* (“*Local 777*”), which subverted workers’ employment protections to the decision-making prerogatives of business by finding lease cab drivers to be independent contractors under the common law analysis of control.<sup>78</sup> *Local 777* became central to the adjudication of the legal worker identities of lessee workers because it dealt not just with the common law analysis of workers in a non-industrial setting but also with the technicalities of the business shift to leasing. Namely, it facilitated the abolition of state protections in taxi employment by withdrawing the law from negotiated union agreements, eliminating collective worker rights.<sup>79</sup>

*Local 777* enabled leasing and shifted risk onto workers by deciding that the companies’ change in business model—from profiting by taking commissions from drivers’ earnings to profiting by leasing taxis to workers—was not a mandatory subject of bargaining. Leasing shifted the source of the companies’ income from the riding public to the drivers themselves. The companies charged workers for use of the cab, and workers, in turn, kept their

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76. See, e.g., *NLRB v. Associated Diamond Cabs, Inc.*, 702 F.2d 912, 925 (11th Cir. 1983); *Yellow Taxi Co. of Minneapolis v. NLRB*, 721 F.2d 366 (D.C. Cir. 1983); *City Cab Co. of Orlando*, 285 N.L.R.B. 1191, 1192 (1987).

77. See *Associated Diamond Cabs, Inc.*, 702 F.2d at 925; *Yellow Taxi Co. of Minneapolis*, 721 F.2d at 366; *City Cab Co. of Orlando*, 285 N.L.R.B. at 1192.

78. Despite an elaborate analysis of why the decision of the cab companies to lease cabs to their drivers was not a mandatory subject of bargaining, the court states:

[W]e prefer to rest our decision on the grounds that even if the decision to institute leasing was a mandatory subject of bargaining, the companies’ unilateral action [to turn to leasing] was not an unfair labor practice because the union itself made any negotiation impossible by imposing an improper condition as a prerequisite to bargaining.

*Local 777, Democratic Union Org. Comm. v. NLRB*, 603 F.2d 862, 886 (D.C. Cir. 1979). The “improper condition” that the court refers to was the union’s condition that it continue to be recognized as the representative of the drivers. *Id.*

79. See *supra* note 78 and accompanying text.

fares. Drivers' take-home income became the difference between their lease payment and the fares they collected. The court's decision allowed the companies to evade union contracts and to unilaterally turn their drivers into independent contractors. The D.C. Circuit agreed that the practice of leasing violated the terms of the union contract, but held that the companies' decision to change their source of income was not subject to collective bargaining. The court wrote,

The fact that an employer's decision affects conditions of employment does not necessarily imply . . . that it is a mandatory subject of bargaining. . . . [T]he decision to lease did not merely change the identity of the persons employed, but rather the entire basis of the companies' income.<sup>80</sup>

Thus, even though the taxi companies in question had premeditatedly advanced plans to make their workers independent contractors, going so far as to request an Internal Revenue Service (IRS) ruling on the matter prior to the change,<sup>81</sup> the court found that the switch of worker identity was within the realm of the business prerogative and not an unfair labor practice.<sup>82</sup>

The D.C. Circuit panel in *Local 777* also determined that under the "all of the circumstances" of control test—a derivative of the common law test of control—the drivers in question were independent contractors.<sup>83</sup> Centrally, the court held that:

[T]he extent of the actual *supervision* exercised by a putative employer over the "*means and manner of the workers' performance is the most important element to be considered* in determining whether or not one is dealing with independent contractors or employees.<sup>84</sup>

Drawing on the realities of factory-based industrial work—not service or piece-rate work—the court determined that the "right to control the *physical* movements of the employee is the most important single element" in assessing the "means and manner" of employer control.<sup>85</sup> The court discounted the companies' control over workers before and after their shifts and found that on the road the drivers did not suffer the control of a boss in their workspace.<sup>86</sup>

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80. *Local 777*, 603 F.2d at 883–84.

81. *Id.* at 867.

82. *Id.*; see *supra* note 32 for the IRS test factors.

83. *Local 777*, 603 F.2d at 868. The "all of the circumstances test" finds its origins in the Supreme Court's decision in *NLRB v. United Ins. Co.*, 390 U.S. 254 (1968).

84. *Local 777*, 603 F.2d at 873 (emphasis added).

85. *Id.* at 875 (emphasis added).

86. In deciding that the "control" analysis was limited to the period of time during which the drivers were in possession of their cabs, the court cited to a 1949 case dealing with back taxes, *Party Cab Co. v. United States*, 172 F.2d 87, 92 (7th Cir. 1949). The Seventh Circuit in *Party Cab*, however, found that lessee cab drivers were neither employees nor independent contractors. The *Party Cab* decision stated that "the relation between the plaintiff and the drivers appears more like some kind of a joint venture . . ." *Id.* at 93.

The *Local 777* decision acknowledged that even in the physical absence of a boss, taxi workers confronted a litany of controls over their work while driving, but blamed these controls on government rules, not on business interests. Because the taxi industry is subject to municipal regulations and driving is subject to motor laws, the D.C. Circuit found that the “controls” faced by drivers stemmed from the law, not from the companies themselves.<sup>87</sup> Dismissing the union’s insistence that the “companies discipline lessee drivers through threat of city action,” the court harkened back to the NLRB’s own findings that agency regulations are evidence of government—not employer—control.<sup>88</sup> The court wrote, “It is the law that controls the driver. . . . The effect of state regulation is a far cry from such restrictions as cause ‘the actor’s physical activities and his time (to be) surrendered to the control of the Master.’”<sup>89</sup> Finally, the *Local 777* court reasoned that the taxi drivers in question could not be employees because the lease system removed financial incentives for companies to control drivers:

When a driver pays a fixed rental, regardless of his earnings on a particular day, and when he retains all the fares he collects without having to account to the company in any way, there is a strong inference that the cab company . . . does not exert control over “the means and manner” of his performance . . . [because] the company simply would have no financial incentive to exert control over its drivers.<sup>90</sup>

In making this determination, the court ignored both nonmonetary and monetary incentives for control. Cab companies, for example, did have incentive to influence a driver’s behavior towards riders because it reflected on the companies’ brands. Further, the companies had a monetary incentive to exert control over how many fares a driver picked up during a shift because it determined how much the companies could charge for a lease. Municipal regulations required drivers to keep “trip sheets” detailing all their rides and the fares collected.<sup>91</sup> The court speciously reasoned that these trip sheets “serve[d] no purpose” to companies under the leasing practice.<sup>92</sup> To the contrary, the trip sheets were a way for the companies to gauge driver income and to hold drivers indirectly accountable for their revenue. Without government regulation, the amount of the lease was at the whim of the taxi companies. The more money a driver made, the higher the taxicab companies could raise the lease charge, and the greater the companies could profit.

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87. *Local 777*, 603 F.2d. at 874.

88. *Id.* at 901.

89. *Id.* at 875.

90. *Id.* at 879.

91. *Id.* at 874.

92. *Id.* at 876.

*Local 777* and the litany of misclassification decisions<sup>93</sup> that followed its reasoning underscored the difficulty that courts had with analyzing “control”—the key test of analysis in the common law definition of employment—when workers were not confined to the same space as their employer or not paid an hourly wage, as they were in the industrial or factory setting. The *Local 777* decision found many elements of control over the “means and manner” of the lease cab drivers’ work, such as the required maintenance of trip sheets, but blamed that control on municipal regulation and discounted benefits those regulations provided the cab companies.<sup>94</sup> Further, the court’s analysis of other forms of control was circumscribed by the assertion that under the leasing system, cab companies had no financial incentive to control workers. The inability of the D.C. Circuit to draw forth a well-defined test on whether or not leasing drivers were independent contractors for collective bargaining purposes resulted in muddled legal analysis and inconsistent decisions for many decades of cases to come.<sup>95</sup>

In 2009, exactly thirty years after deciding *Local 777*, the D.C. Circuit decided another case in which the right of transportation workers to collectively bargain was at issue. In *FedEx Home Delivery v. NLRB*, the court effectively discarded the “means and manner” of control test in favor of an “entrepreneurial potential” test for determining the employment identity of transportation workers. The court explained that the new test shifted the classification analysis “in favor of a more accurate proxy: *whether the putative independent contractors have significant entrepreneurial opportunity for gain or loss*” under the company’s business model.<sup>96</sup> Articulating the “entrepreneurial potential” test as a better formulation of the common law test, Judge Brown opined:

[I]t is not “the degree of supervision under which [one] labors but . . . the degree to which [one] functions as an entrepreneur—that is, takes economic risk and has the corresponding opportunity to profit from *working smarter, not just harder*,” that better illuminates one’s status.<sup>97</sup>

In reformulating the common law test, the court drew on neoliberal ideas about work and further narrowed the boundaries of the definition of “employee.” Single-route drivers for FedEx Home Delivery, the court held, could not

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93. See generally *Air Transit, Inc. v. NLRB*, 679 F.2d 1095 (4th Cir. 1982); *NLRB v. Associated Diamond Cabs, Inc.*, 702 F.2d 912 (11th Cir. 1983); *Yellow Taxi Co. of Minneapolis v. NLRB*, 721 F.2d 366 (D.C. Cir. 1983).

94. *Local 777*, 603 F.2d at 876.

95. See *supra* note 93; *City Cab Co. of Orlando, Inc. v. NLRB*, 628 F.2d 261, 265–66 (D.C. Cir. 1980) (finding taxi drivers to be employees); *C.C.E., Inc. v. NLRB*, 60 F.3d 855, 860–61 (D.C. Cir. 1995) (finding freight drivers were independent contractors).

96. *FedEx Home Delivery v. NLRB*, 563 F.3d 492, 497 (internal quotes omitted) (citing *Corporate Express Delivery Sys. v. NLRB*, 292 F.3d 777, 780 (D.C. Cir. 2002)) (emphasis added).

97. *Id.* at 503 (emphasis added).

unionize under the law because the company's business model afforded workers "entrepreneurial *potential*."<sup>98</sup> Specifically, FedEx outsourced hiring responsibilities to drivers who could hire their own employees or "sell" their truck and route to another worker. Instead of interpreting this as the employer's abdication of duties and outsourcing of management work to workers, the court found that these features of the business ordering gave workers the opportunity to make more money. The workers' supposed entrepreneurial opportunity, then, precluded the legal identity of employee and the right to collective bargaining. In deciding that the truck drivers were not just independent contractors, but also working-class "entrepreneurs," the court went one step further than previous decisions.

Notably, the court focused its analysis on *potential* entrepreneurial opportunity, not on realized entrepreneurial opportunity or practice. Here, the *FedEx Home Delivery* decision determined who is an independent contractor by finding inherent in the legal definition one who has the opportunity to profit from not just working hard, but from working "smart"—in other words, one who can (but may not) maximize profits during the course of one's work—thus ignoring actual conditions of work and remuneration.<sup>99</sup> By this measure, risk and uncertainty are interpreted as the workers' entrepreneurial opportunity and potential. The court was not interested in workers' "regular exercise of [the right to engage in entrepreneurial activity]" but in the "worker's retention of [that] right."<sup>100</sup> With this emphasis, the court implicitly placed value on the "freedom" of the worker to entrepreneurialize himself while subverting his right to act collectively. The majority was not persuaded by the NLRB's factual findings that the occasion for actual profit was miniscule and that the FedEx drivers did not actually organize their work in the form of small, independent businesses.<sup>101</sup> Nor did the court find it relevant that FedEx Home Delivery exerted significant control over the workers' performance—assigning routes requiring audits, forcing drivers to wear uniforms, requiring drivers to conform to grooming standards, requiring drivers to drive certain vehicles, and forcing

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98. *Id.* at 498 (emphasis added).

99. Fascinatingly, in the mid-1990s, the Service Employees International Union actually argued for a similar definition of independent contractor that "appropriately recognizes the voluntary and entrepreneurial nature of a true independent contractor"—the analysis focused on a calculation of risk, control, and established business practices. Jonathan P. Hiatt, *Policy Issues Concerning the Contingent Workforce*, 52 WASH. & LEE L. REV. 739, 750 (1995). Mr. Hiatt was an attorney for Service Employees International Union and later the general counsel for AFL-CIO. *See also* Ruth Burdick, *Principles of Agency Permit the NLRB to Consider Additional Factors of Entrepreneurial Independence and the Relative Dependence of Employees When Determining Independent Contractor Status Under Section 2(3)*, 15 HOFSTRA LAB. & EMPL. L.J. 75 (1997). Pro-business interests, meanwhile, have fought back against such definitions, calling the "entrepreneurial opportunity" test used in *FedEx Home Delivery* "inherently vague." Richard A. Samp & Kevin L. Kearns, *Court Should Establish Clear Rules on Categorizing 'Independent Contractors'*, WASH. LEGAL FOUND., <http://www.wlf.org/upload/10-24-08samp.pdf> [<https://perma.cc/62SH-LJYB>].

100. *FedEx*, 563 F.3d at 502 (internal quotes omitted).

101. *Id.* at 500.

drivers to display the FedEx logo on those vehicles (amid other things).<sup>102</sup> Instead, the decision discounted the controlling behaviors of FedEx and blamed the fact that no drivers reaped financial benefits from FedEx’s business model on a “fail[ure by drivers] . . . to make the extra effort.”<sup>103</sup>

Rather than reflecting an objective reality about work, this doctrinal test of entrepreneurial potential reflects powerful (and shifting) cultural meanings about work and capitalism. Self-determination, individuality, and flexibility are valorized in the potentials of the working-class entrepreneur, while stability and security are, at best, under-considered. As neoliberalism’s “quintessential actor,”<sup>104</sup> the entrepreneur and the supposed freedom, flexibility, independence, and creativity of their work reflect the sacrosanct ideals of deregulated, free-enterprise governance.

### B. Driven to Precarity

This Section builds off of the legal and regulatory shifts discussed in Part II.A to examine the following question: How did the application of the independent contractor and employee bifurcation in employment and labor laws affect the San Francisco taxi industry? After the passage of the LMRA and federal court decisions such as *Local 777* relating the leasing system to independent contractor status, taxi companies in San Francisco restructured themselves to avoid the liabilities associated with collectivized employee workers. Both the companies and city and state regulators of the taxi industry in San Francisco drew on the notion and potentials of “working-class entrepreneurialism” to justify converting taxi workers into independent contractors with unstable and risk-laden work lives.

#### 1. From Hack to Small Businessman: The Growth of Leasing as a Business Model in the San Francisco Taxi Industry

Until the 1970s, taxi drivers in the United States were largely unionized workers. Even prior to the passage of legalized collective bargaining under the NLRA, taxi drivers in San Francisco, for example, were highly organized and went on strike for better working conditions with some frequency.<sup>105</sup> After the

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102. Notably, these factors were important to the Ninth Circuit in determining that similarly situated FedEx drivers were, in fact, employees. See *Alexander v. FedEx Ground Package Sys., Inc.*, 765 F.3d 981, 989–94 (9th Cir. 2014).

103. *FedEx*, 563 F.3d at 498 (emphasis added).

104. For more on the entrepreneur as neoliberalism’s quintessential actor, see Carla Freeman, *The “Reputation” of Neoliberalism*, 34 AM. ETHNOLOGIST 252 (2007).

105. When taxis first arrived in San Francisco in the early twentieth century, replacing horse-drawn carriages, the Chauffeurs’ Union Local 265, under the direction of S.T. Dixon, rapidly organized drivers, using collective action to improve taxi work life. Newspaper archives reveal the tremendous success of the Chauffeurs’ Union in securing wages and working conditions for drivers through strikes, protests, and local advocacy. The first documented strike of taxi workers in San Francisco occurred as early as 1910 and lasted three weeks. OCCIDENT, Dec. 13, 1910, at 448 (on file with author). The work stoppage resulted in many concessions by taxi companies, including free

passage of New Deal legislation, collective organizing and bargaining continued unabated in the San Francisco taxi and transportation industries until the passage of the LMRA and the advent of the “leasing system.” As discussed in Part II.A, leasing as a business model restructured the industry, making workers “independent contractors,” or working-class entrepreneurs who bore the risk and responsibility of the business, without the potentials of corresponding earnings.

Following the passage of the NLRA in 1935, the San Francisco Chauffeurs’ Union, which had organized 100 percent of the San Francisco taxi workforce by as early as 1910, continued successfully organizing drivers and staging strikes for better working conditions.<sup>106</sup> Like taxi workers across the country, San Francisco drivers’ daily wage depended upon a commission-based system. By 1972, drivers working for the largest San Francisco taxi company, Yellow Cab, labored under a union contract that ensured an eight-hour workday, a forty-hour week, \$16 per day or 50 percent commission (whichever was greater), roughly \$54.50 in health and welfare benefits per month, four weeks of paid vacation, and a pension fund.<sup>107</sup>

After the passage of the LMRA, however, the independent contractor exclusion to the definition of employee in the NLRA encouraged the strategic reordering of taxi business profit models from commission-based to leasing.<sup>108</sup> In the 1950s, a few taxi companies nationwide began to lease cabs to drivers.<sup>109</sup> However, in San Francisco in 1950, municipal regulators quickly suppressed leasing and declared the practice illegal and exploitative, as it violated regulatory rules and abandoned workers to unguaranteed wages.<sup>110</sup> The Chauffeurs’ Union fined three of its members for leasing their permits and effectively working as employers, rather than driving the cabs themselves.<sup>111</sup>

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gasoline for drivers. *Taxicab Drivers Are out on Strike*, S.F. CALL, Nov. 1910 (on file with author). The years that followed the 1910 strike brought more advocacy and protests, ushering additional workers into the fold of the union and bettering working conditions overall. By 1919, the San Francisco taxi workforce was 100 percent unionized, and driver wages increased to \$5 per day after a three-day strike. *Taxi Drivers Win Battle for \$5 Wage: Demand for Eight-Hour Day Also Unconditionally Granted by the Auto Owners’ Association*, S.F. EXAMINER, Oct. 2, 1919 (on file with author); see also S.T. Dixon of *Chauffeurs’ Union*, CHAUFFEURS’ MAG., 1919 (on file with author). The U.S. Bureau of Labor Statistics calculates that, considering inflation, \$5 in 1919 was roughly the equivalent of \$69.66 in 2016. See U.S. Bureau of Labor Statistics, *CPI Inflation Calculator*, <http://data.bls.gov/cgi-bin/cpicalc.pl?cost1=5&year1=1919&year2=2014> [https://perma.cc/2LFU-T5BY].

106. *Labor News*, BULL.: S.F. (1911) (on file with author).

107. *Cab Strike Headed Off—Vote Set*, S.F. EXAMINER (July, 26, 1968) (on file with author). My interviewees informed me that in New York City during the same time, the percentage commission to drivers was between 40 and 42 percent.

108. See discussion of *Local 777*, *supra* Part II.A.

109. See, e.g., *Party Cab Co. v. United States*, 172 F.2d 87, 91 (7th Cir. 1949).

110. *Cab Firms Deny Violations of Permit Rules: Holders at Police Commission Hearing Reject Change*, S.F. EXAMINER (Mar. 25, 1950) (on file with author).

111. *Id.*



Over the next twelve years, the union successfully challenged the practice of leasing three more times at the municipal level (1959, 1962, and 1963).<sup>112</sup>

By the late 1970s, the leasing of medallions with monetary value by non-workers to drivers—a once vehemently contested practice—became the mainstream practice of the taxi industries in many cities across the country, including San Francisco. This practice played a central role in the image of the “entrepreneurial” taxi driver.<sup>113</sup> How did this dramatic shift in municipal governance occur in less than ten years?

Yellow Cab of San Francisco, the city’s largest taxi service provider, went bankrupt in 1976 due to corrupt practices of its parent corporation.<sup>114</sup> When Yellow Cab reopened one year later, the company surprised desperate workers by providing nonunion lease contracts without benefits, stating that taxi drivers were independent contractors, not employees.<sup>115</sup> Other companies followed suit, and by 1979, the independent contractor leasing identity was ubiquitous in the San Francisco taxi industry.<sup>116</sup> The pervasiveness of leasing nationally, propelled by appellate court decisions sanctioning the practice, and the desperation of a city lacking taxi service, constrained San Francisco regulators from intervening.

The nationwide shift to leasing led to the eventual dissolution of union representation for taxi workers and the unraveling of their working conditions. Through the practice of leasing, taxi companies passed the risk and uncertainty of business to workers while avoiding the liabilities associated with having “employees.” In discussing the shift to taxi leasing in New York City, which occurred at a similar time, management professor Biju Mathew writes, “Leasing signific[ed], in many ways, the core neoliberal economic practice and its logic of shifting risk downward to those who have the least power within the system.”<sup>117</sup>

Despite the precarious work engendered by the practice of leasing and the drivers’ subsequent legal status as “independent contractors,” taxi companies claimed that leasing made drivers bona fide small businessmen. Companies, including Yellow Cab in San Francisco, boasted that, as independent contractors, workers had both a new physical freedom and the potential to make more money than ever before.<sup>118</sup> Though the reality of workers’ lives was

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112. Charles Rathborne, *Taxis and San Francisco Labor History*, TAXI-LIBRARY, <http://www.taxi-library.org/history.htm> [<https://perma.cc/5RVZ-875Z>].

113. See generally BIJU MATHEW, TAXI!: CABS AND CAPITALISM IN NEW YORK CITY (2005) for an in-depth discussion of the practice of leasing and its implications in the taxi industry.

114. See *S.F. Struggles to Get Around in Cab Shortage*, S.F. EXAMINER (Dec. 2, 1976) (on file with author).

115. Interview by V.B. Dubal with Joseph Tracy, Taxi Worker and Lead Plaintiff in *Tracy v. Yellow Cab* in S.F., Cal. (Aug. 17, 2013).

116. Complaint for Injunctive, Declaratory, & Restitutionary Relief at 11, *Tracy v. Yellow Cab Cooperative* (Cal. Super. Ct. Nov. 25, 1991) (No. 938786).

117. MATHEW, *supra* note 113, at 81.

118. Interview with Joseph Tracy, *supra* note 115.

much more complicated, with every day a gamble, no benefits, and no protections, the political and legal trope of “entrepreneurialism” for workers became even more salient in coming decades.

By the second decade of the twenty-first century, city and state transportation administrators increasingly drew on the promise of working-class entrepreneurialism and overlooked the exploitative potentials of deregulation. In privatizing medallions and legalizing “Transportation Network Companies” (TNC) in San Francisco, for example, regulatory bodies argued that their decisions freed the market and liberated the “entrepreneurial potential” of workers. However, like the shift to leasing and independent contracting, both phenomena exacerbated the precarities of taxi work, pushing drivers further from the protections of employment status and increasing income instability.

2. *The Making of Working-Class Entrepreneurs: Medallion Privatization and the Legalization of “Transportation Network Companies”*

This Section discusses the commodification of taxi medallions in San Francisco and the legalization of the TNCs or “ride-sharing companies” in California. Both regulatory decisions produced casual, insecure work, were validated through the pretense of working-class entrepreneurship, and were devised through new business models that transferred corporate risk onto workers.

Concurrent to the D.C. Circuit’s 2009 decision in *FedEx Home Delivery*<sup>119</sup> and amidst a staggering budget deficit, regulators in San Francisco privatized medallions—that is, conferred monetary value upon government-issued permits to operate a taxicab and made them transferable between private parties. Similar to the reasoning in *FedEx Home Delivery v. NLRB*, the city’s validation of medallion privatization reflected the logic of neoliberalism manifested through the ethic of working-class entrepreneurialism. The mayor of San Francisco, renegeing on previous promises, declared that selling medallions would generate much-needed revenue for the city and give drivers the entrepreneurial opportunity to own the cabs, again ignoring the realities of potential compensation.<sup>120</sup> Many working drivers incurred hundreds of thousands of dollars of debt to become such “entrepreneurs”—small businessmen who did not just drive cabs, but “owned” them.

Three years later, however, the value of the medallion was seriously threatened by the same regulators’ refusal to curtail new competition in the

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119. See discussion *supra* Part II.A.2.

120. See, e.g., Veena Dubal, *Sweatshop on Wheels: Mayor Gavin Newsom’s Attempt to Pillage the Taxi Industry*, FOG CITY J. (2009), <http://www.fogcityjournal.com/wordpress/1166/sweatshops-on-wheels-mayor-gavin-newsoms-attempt-to-pillage-the-taxi-industry> [<https://perma.cc/V6GB-RB3S>].

form of ride-sharing or TNCs.<sup>121</sup> In 2012, Uber, a technology startup, created a mobile application that connected passengers with private drivers. The number of unlicensed vehicles providing taxi services in San Francisco soon proliferated, severely undercutting the demand for and income of lessee taxi workers.<sup>122</sup> Eventually passing special rules allowing the TNCs to operate with minimal oversight, state regulators pointed to the possibilities of “micro-entrepreneurship”: without startup costs, anyone could monetize his or her own assets through the TNCs.<sup>123</sup> Suddenly, the promise of “micro-entrepreneurship” subverted the “entrepreneurial potential” of medallion-owning taxi workers and the earning potential of all drivers.

The legal and political history of the San Francisco taxi medallion and its “ownership,” steeped in broader shifts in the organization of labor and local politics, reflects the historical origins and tensions of contemporary privatization. The roots of the taxi medallion in San Francisco date back to the Great Depression, when the San Francisco Board of Supervisors (Supervisors) first began regulating the taxi industry with the stated purpose of protecting the riding public and the livelihood of workers.<sup>124</sup> In December 1929, six years prior to the passage of the NLRA, the Supervisors passed an ordinance limiting the number of cabs and cab companies, requiring insurance for drivers, and protecting union labor in the case of corporate merger.<sup>125</sup> Over time, medallions became the physical manifestation of government regulation. The government issued them based on traffic demand, and both individual owner-drivers and cab companies held a finite number of medallions.

Historically, scholars and labor activists have asserted that conferring monetary value upon medallions and allowing their sale encourages deregulation of the industry and artificially inflates the lease fee for taxi workers.<sup>126</sup> This, they argue, makes it harder for workers to earn a living, introduces debt into the industry, and opens the door for corruption.<sup>127</sup> Explaining how the commodification of medallions has led to the exploitation of New York City taxi drivers, Biju Mathew writes:

Because the medallion is also a permit that the city issues . . . it is a commodity whose supply is artificially curtailed. As a result, there is significant upward pressure on its value. As the cost of the medallion rises, so too does the cost of the lease, as the medallion owner pushes

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121. The California Public Utilities Commission decided that Uber, Lyft, and Sidecar were not “ride-shares” as per the regulatory definition and created a new term of art for the companies. *See* Pub. Util. Comm’n, Decision Adopting Rules and Regulations to Protect Public Safety While Allowing New Entrants to the Transportation Industry, 12-12-011 (Sept. 19, 2013).

122. By February 2014, the San Francisco Taxi Drivers’ Association reported over three thousand TNC vehicles in San Francisco.

123. *See* Pub. Util. Comm’n, *supra* note 121.

124. *Taxi Barons Endorsed by Supervisors* (Dec. 1929) (on file with author).

125. *Id.*

126. MATHEW, *supra* note 113, at 55.

127. *See, e.g., id.*

to ensure a minimum rate of return on the medallion investment. The fact that this permit has been converted into private property, then, largely explains why the leasing structure of the New York City taxi industry is so exploitative . . .<sup>128</sup>

In San Francisco, the debate over whether medallions should be privatized (sold by the city to individuals and companies) and transferable (able to be resold and bought by private actors) has been a central topic of debate in the industry for the past sixty years.<sup>129</sup> In 1978, illegal medallion sales and allegations of political corruption prompted the Supervisors to pass a measure barring the transfer of medallions.<sup>130</sup> Following a veto by the mayor, the matter was taken up by Supervisor Quentin Kopp, submitted to the voters, and passed as Proposition K in 1978.<sup>131</sup>

Proposition K grandfathered existing medallions and established that all taxicab medallions were not transferable, did not have monetary value, and could only be issued to drivers.<sup>132</sup> The proposition also imposed a driving requirement for medallion holders to ensure that only working cab drivers could hold medallions. Supervisor Kopp, six other Supervisors (including now Senator Diane Feinstein and former Supervisor Harvey Milk), and the Chauffeurs' Union supported Proposition K and called it "consumer legislation."<sup>133</sup> Urging voters to vote for Proposition K, they wrote, "[i]t gives you, the voter, a chance to say whether the cab business should be opened up to stop favored taxicab companies and individuals from buying and selling cab permits for profit and practicing unfair competition."<sup>134</sup>

After 1978, cab company representatives introduced eight different propositions attempting to repeal or amend Proposition K to make medallions privatized and transferable.<sup>135</sup> All of these propositions were voted down by overwhelming margins by the citizens of San Francisco.<sup>136</sup> Then, in November 2007, San Francisco voters passed Proposition A. This proposition concerned bus regulation, but included a brief provision on page thirty-six of the text expanding the role of the San Francisco Municipal Transportation Agency

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128. *Id.*

129. All over the country, taxi medallions are at the center stage of taxi worker advocacy because how they are regulated and structured affects how drivers are regulated and structured within the industry, how much money they earn, how much debt they incur, and to whom they are beholden. *See, e.g., id.*

130. Veena Dubal, *Protecting Taxi Workers & San Francisco Consumers: Medallion Transferability and Proposition K*, ASIAN L. CAUCUS 3 (2009) (on file with author).

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.*

136. *Id.*

(SFMTA) in making “taxi-related regulations” in the event that the taxi regulatory body, the Taxi Commission, was merged with the SFMTA.<sup>137</sup>

Less than two years later, in March 2009, the SFMTA, by authority of a new ordinance, took over taxi regulation. The mayor of San Francisco held a press conference and announced his intention to generate millions of dollars for the city by privatizing medallions.<sup>138</sup> The mayor and local regulators emphasized that this move was good for drivers because it gave them the opportunity to be small business owners, real entrepreneurs.<sup>139</sup> Despite a long and arduous fight by labor activists, the SFMTA Board of Directors, amidst fiscal emergency, voted in favor of medallion transferability and privatization.<sup>140</sup> A number of drivers scrounged up money from family, acquaintances, and creditors to purchase medallions, hoping, against the economic reality of the taxi industry, to become small business owners. An even greater number put their names on the long waiting list of potential buyers.

In 2012, three years after dozens of taxi workers incurred over \$230,000 of debt to “own” a medallion, an investment that the regulators assured them was sound, new competition arrived in the form of TNCs. A global transportation phenomenon, TNCs like Uber, Lyft, and Sidecar began as venture-funded startups that connected passengers with vehicles for hire via mobile applications. The drivers of these vehicles, who most commonly use their own private vehicles, are “independent contractors” who receive a certain percentage of profit from each fare.<sup>141</sup> Due to the low startup costs for TNC drivers, who are not subject to regulatory fees and do not pay for training, as taxi workers do, workers flocked to become independent contractors for the TNCs. Both the TNCs and their supporters claimed that their services benefited not just the riding public but also the drivers who had entrepreneurial potential, flexibility in setting their hours, and no boss.

The TNCs passed not just the financial risks, but also the legal risks onto worker drivers by operating without the regulatory permission of the California Public Utilities Commission (CPUC), which oversees limousines, or the SFMTA, which then regulated taxis. Though the SFMTA and the CPUC

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137. *Id.*

138. *Id.*

139. *See, e.g.,* Dubal, *supra* note 120.

140. *See, e.g.,* Michelle A. Samaad, *San Francisco Taxi Medallion Program Expands Niche for CUs*, CREDIT UNION TIMES (2010), <http://www.cutimes.com/2010/09/08/san-francisco-taxi-medallion-program-expands-niche-for-cus?slreturn=1461288668> [<https://perma.cc/CE3W-XGZF>].

141. This amount varies but as of the time of publication, it is about eighty percent. *See* David Shimakura, *How Much Commission Are Uber and Lyft Taking from Drivers?*, QUORA (Oct. 12, 2015), <https://www.quora.com/How-much-commission-are-Uber-and-Lyft-taking-from-drivers> [<https://perma.cc/7DQH-P2CQ>]. Also, the independent contractor identity of California drivers for purposes of wage laws is now being challenged under California law by a class action of Uber drivers. *See* Second Amended Class Action Complaint and Jury Demand, *O'Connor v. Uber Techs., Inc.* (N.D. Cal. Nov. 12, 2014) (No. 13-3826-EMC), 2014 WL 10805308.

initially issued cease and desist orders to the companies, arguing that they were not properly licensed, the orders were never enforced, and the TNCs continued operations unabated.<sup>142</sup> At the outset, companies maintained that they were not technically transportation companies, since they were not providing vehicles to the independent contractor drivers. Instead, they argued that they were software companies and therefore not regulated by the CPUC or the SFMTA. The companies asserted that while the drivers may have been operating illegally, they, as software companies, were not in violation of the law.<sup>143</sup>

Despite great protest by taxi companies, who could no longer fill their shifts, and taxi workers, who could not earn a living with the unbridled competition, the CPUC legalized TNCs in 2013.<sup>144</sup> Because these startups began in San Francisco, the CPUC was the first state regulatory body nationwide to respond.<sup>145</sup> The rules passed by the CPUC allowed drivers to remain unlicensed and to outsource their regulatory responsibilities to the TNCs. The CPUC decision to allow the TNCs to operate without interruption and to create new, lax rules just for them has affected other states' and cities' responses as well.

TNCs and their supporters, including government regulators, have claimed that this casual work helps people in a difficult economy become “micro-entrepreneurs”—“self-employed” drivers with a flexible schedule (Images 1 and 2). Media commentators, too, have noted that unlike taxi drivers, Lyft and Uber drivers using their own vehicles can act as “micro-entrepreneurs.”<sup>146</sup>

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142. See Ryan Lawler, *While the California PUC Cracks Down on Ride-Sharing, Sidecar and Lyft Commit to Staying on the Road*, TECHCRUNCH.COM (Oct. 8, 2012), <https://techcrunch.com/2012/10/08/cpuc-ride-sharing-c-and-d> [<https://perma.cc/5RQN-CH37>]; Liane Yvkoff, *Uber Lives on Despite SFMTA Cease-and-Desist*, CNET.COM (Dec. 14, 2010), <https://www.cnet.com/roadshow/news/uber-lives-on-despite-sfmta-cease-and-desist> [<https://perma.cc/ZC52-FCUE>].

143. See Reply Comments of the Taxicab Paratransit Association of California, 12-12-011, [http://sfcdca.org/CPUC/TPAC\\_reply\\_PD.pdf](http://sfcdca.org/CPUC/TPAC_reply_PD.pdf) [<https://perma.cc/B5G5-P268>].

144. See *supra* note 121.

145. Tomio Geron, *California Becomes the First State to Regulate Ridesharing Services Lyft, Sidecar, UberX*, FORBES.COM (Sept. 19, 2013), <http://www.forbes.com/sites/tomiogeron/2013/09/19/california-becomes-first-state-to-regulate-ridesharing-services-lyft-sidecar-uberx/#517162f667fe> [<https://perma.cc/4G8H-F7RU>].

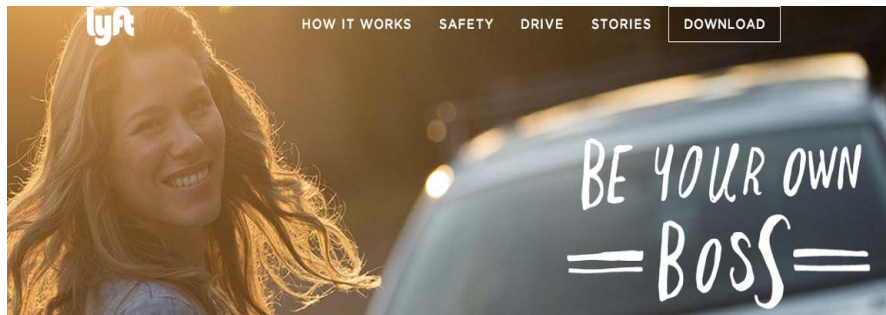
146. See, e.g., Jamie Wong, *The Rise of the Micro-Entrepreneurship Economy*, FASTCOEXIST.COM (May 29, 2012), <https://www.fastcoexist.com/1679903/the-rise-of-the-micro-entrepreneurship-economy> [<https://perma.cc/5DTP-N9D6>].

**Image 1: On a billboard in San Francisco, Lyft advertises the potentials of flexible work: “~~Nine to Five.~~”**



The ten-hour workday for taxi workers in San Francisco was accomplished through union representation. With unbridled competition, in order for a TNC driver or taxi worker in San Francisco to make a living wage in the post-union economy, he or she must work for longer.

**Image 2<sup>147</sup>: In attracting drivers, Lyft advertises that workers can be their own boss, appealing to the social capital of entrepreneurship and the desires for freedom and flexibility.**



What these claims to working-class entrepreneurship do not consider, however, is the precarious nature of the work created through a combination of the TNCs' business models and the CPUC's decision to only minimally regulate TNCs. Though the number of cabs is directly curtailed by the sum total of medallions issued by the SFMTA, the number of TNC vehicles operating simultaneously has no limit. With thousands of TNC vehicles flooding the streets, the ratio of workers to rides has increased exponentially. As a result, the ability of both TNC workers and taxi workers to earn a living

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147. This image is available at LYFT, <https://www.lyft.com/drivers> [<https://perma.cc/8Y6D-BJ8H>] (last visited July 1, 2014).

by driving is undermined. The impact on taxi workers has been drastic; in 2014, taxi drivers reported a 65 percent decrease in their already low ridership.<sup>148</sup> The ability of TNC drivers to earn a living is also limited, especially with rate cuts. As independent contractors, TNC drivers remain unprotected and uncovered by employment protections, including the minimum wage and recourse for unlawful termination. Uber drivers can even be “fired” or “suspended” by Uber when disconcerted riders give them a low rating or lodge complaints.<sup>149</sup>

Meanwhile, the value of the taxi medallions purchased in 2009 has diminished, as has the “entrepreneurial potential” of thousands of San Francisco cab drivers, including the many who invested hundreds of thousands of dollars in a medallion.<sup>150</sup>

### III.

#### RESPONDING TO AND EXPERIENCING PRECARITY: AN ETHNOGRAPHIC ANALYSIS OF LEGAL WORKER IDENTITIES

In Parts I and II, I examined the historical origins of the bifurcation between employee and independent contractor in U.S. work law and argued that the doctrinal analysis determining employee status has come to reflect contemporary cultural and political philosophies, not on-the-ground work realities. Using the San Francisco taxi industry as my case study, I also showed how legal and regulatory trends toward growing the independent contractor category and narrowing the employee category have contributed to the rise of casual, unstable, and precarious work in the United States. With these backgrounds in mind, Part III turns to an ethnographic examination of San Francisco taxi workers’ experiences and understandings of their legal worker identity. *While being an independent contractor puts more legal and financial risks on taxi workers, how do the workers themselves make sense of their independent contractor label, and how do these meanings affect potential collective action and lawyering on their behalf?*

Plaintiffs’ lawyers and public interest lawyers have long assumed that workers would rather be employees than independent contractors, particularly in low-income sectors of work. However, from 2002 to 2009, San Francisco taxi drivers had the opportunity to become employees if only a simple majority

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148. Megan Garber, *After Uber San Francisco Has Seen a 65% Decrease in Cab Use*, ATLANTIC (Sept. 17, 2014), <http://www.theatlantic.com/technology/archive/2014/09/what-uber-is-doing-to-cabs-in-san-francisco-in-1-crazy-chart/380378> [<https://perma.cc/2BES-9X2Q>].

149. Indeed, TNC drivers across the nation, including San Francisco, have organized to protest the lax regulatory rules and capricious company policies that govern their work and impede on their ability to make a living.

150. As of May 2016, the city of San Francisco had a list of 766 medallion-holders seeking to sell their medallions. That list grew from 500 in December 2015. Peter Kirby, *San Francisco’s Medallion Program and the Damage Done*, S.F. EXAMINER (May 1, 2016), <http://www.sfoxaminer.com/san-franciscos-medallion-program-damage-done> [<https://perma.cc/778M-XN8Q>].



of drivers voted to be considered employees under the law.<sup>151</sup> And yet, despite workers' rights advocacy and campaigns, this did not happen. This Section is aimed at understanding why this change did not occur through an examination of the employee and independent contractor legal categories in the lives of the diverse contemporary taxi workforce in San Francisco.

In my two years of ethnographic research on San Francisco taxi workers, I found that the legal worker categories of independent contractor and employee are a prevailing feature of social and political relations between and among taxi drivers. For the white, nonmigrant drivers in my study, discussed in Part III.A, the employee identity is key to better working conditions and symbolizes a glorious labor history that immigrant taxi drivers cannot comprehend.<sup>152</sup> However, Part III.B describes how, in sharp contrast, for most immigrant and racial-minority drivers, the stigma and difficulties of taxi work are reinforced by legal and cultural discourses about the "employee." Surprisingly, immigrant taxi workers value their independent contractor status because of the structural control it enables, physical freedom it allows, and the promises of social mobility engendered by the "entrepreneur" identity. I conclude that the multiple and sometimes contradictory nature of the law's meanings in the lives of the taxi workers in my study inhibits the creation of a collective worker consciousness and sustained collectivities in the diverse San Francisco taxi workforce.

#### A. *Views from the Stage: Driver-Advocates & the "Return" Narrative*

The United Taxicab Workers (UTW), run by volunteer taxi drivers, was the longest-running post-union labor organization representing the interests of rank-and-file taxi workers in San Francisco.<sup>153</sup> UTW was formed in 1986 following the dissolution of the Chauffeurs' Union; almost thirty years later, in late 2014, the UTW was subsumed by the San Francisco Taxi Worker Alliance.<sup>154</sup> During its long tenure, the organization earned its reputation as the

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151. See S.F. POLICE CODE § 1124.5 (2016). It is unclear how the city intended to force companies to reorganize themselves and, in fact, whether such an act would be legal, but nevertheless this is what the regulation said.

152. I conducted ten in-depth interviews with white, nonmigrant drivers and thirty-five in-depth interviews with immigrant and racial minority drivers. This roughly represents the breakdown in the industry. Of my ten white, nonmigrant interviewees, all of them lamented the loss of their employee status. This was in stark contrast to the thirty-five immigrant and racial-minority drivers who I interviewed. Of these drivers, only two wanted to be considered employees. The rest embraced their independent contractor identity. In the course of my ethnographic research, I interacted with hundreds of drivers of all backgrounds. The findings from my in-depth interviews reflected and were reinforced by the realities I observed through participant observation and everyday conversations with workers.

153. The UTW represented all taxi drivers but, by design, only non-medallion holding taxi drivers could hold positions in the organization. Medallion holding drivers, according to the UTW advocates, often have different interests than non-medallion holding drivers. In fact, medallion holders have their own representative organization, the Medallion Holders' Association.

154. In November 2014, in response to the industry threat posed by the TNCs, taxi workers from a number of different groups (most of which had splintered from UTW) agreed to put their

voice of taxi workers through sustained policy advocacy and the quarterly publication of *United to Win*, an award-winning worker-centered newsletter. San Francisco Supervisors, taxi regulators, and the local media turned to UTW for the “worker perspective.”<sup>155</sup> The composition of UTW membership was confidential, but those driver-advocates who were most active during my study were older, white, nonmigrant taxi workers, some of whom drove in the 1970s, prior to the conversion of drivers from employees to independent contractors. UTW had many victories, but its most weighty failure was its inability to organize workers around the employee issue. The NLRB rejected UTW’s petition to be considered the collective bargaining unit for taxi workers in both 1989 and 1991, concluding that taxi workers in San Francisco were independent contractors under the NLRA.<sup>156</sup> However, as a result of UTW advocacy, San Francisco municipal code for many years mandated that taxi workers be considered employees if a simple majority of drivers voted for the status. Notwithstanding campaigns and petitions to that end, UTW never achieved employee status for San Francisco taxi workers.

Despite these repeated failures, many UTW driver-advocates continued to organize their understanding of the difficult working conditions in the taxi industry around the *loss* of employee status. The primarily white, nonmigrant UTW driver-advocates had a sophisticated understanding of the legal, historical, and political underpinnings of their worker identities. They blamed both the oppressive working conditions and the perceived marginality of taxi work on their independent contractor identities, and they deployed a “return” narrative in their advocacy. For these drivers, a “return” to employee status would have reinstilled taxi work with the dignity and professionalism that it lost when it descended from being middle-class work to becoming an “immigrant job” (in the words of more than one of my interviewees). However, their fixation on returning to an earlier moment in labor and taxi history became an impediment to collective action. UTW driver-advocates conceived of immigrant workers as nonorganizable because of their “misperceptions” and “illusions” about the independent contractor identity. This perception intensified divisions in the diverse taxi worker community.

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differences aside and come together under the name San Francisco Taxi Workers Alliance (SFTWA). The formation of the SFTWA was facilitated through and by an organizer from the National Taxi Workers Alliance (NTWA). The NTWA became affiliated with the AFL-CIO in 2011. *National Taxi Workers Alliance Affiliates with the AFL-CIO*, AFLCIO (Oct. 20, 2011), <http://www.aflcio.org/Press-Room/Press-Releases/National-Taxi-Workers-Alliance-Affiliates-with-the> [https://perma.cc/F5Q5-ZFC6]. At the time of publishing, the most active UTW advocates remain active in the SFTWA.

155. During my fieldwork, most newspaper articles covering issues affecting San Francisco taxi drivers included commentary from UTW.

156. See *supra* note 18.

1. *UTW Driver-Advocates on the Loss of Employee Status*

My research findings show that the views of white, nonmigrant taxi worker advocates affiliated with or formerly affiliated with the UTW on the “employee” status issue impacted the social relations among drivers and the political possibilities of collective action. For UTW advocates, the employee status held the resolution to the dilemmas and difficulties of taxi work. They harbored a frustration that more drivers did not want to “return” to the employee status, signifying, for them, an era of relative labor stability.

Every white, nonmigrant taxi worker in my interview study attributed their poor working conditions to their *loss* of employee status. For example, Robin Goodings,<sup>157</sup> a female taxi worker who has been driving in San Francisco since 1973, reflected on her four years as a member of the Chauffeurs’ Union Local 265:

When I started driving, we were considered employees. . . . Everybody had health care, everybody had optical, everybody had dental, everybody had paid sick and vacation days. [Laughs] *You remember them?* Everybody had retirement.<sup>158</sup>

Goodings complained that, because they are independent contractors, “[n]o one cares about taxi workers.”<sup>159</sup> She pointed out that working conditions were better for bus drivers, who were city employees with union representation. When a riled San Francisco Supervisor once told Goodings that taxi workers were “the problem that will not go away,” she highlighted her frustration with the independent contractor status, urging him to return taxi workers to the employee status. She told him:

You *can* make us go away—make us employees—what you see are contract negotiations happening in public. We have to negotiate every f\*cking thing in our universe in public with the politicians and in the ballot box because we can’t have a union because we can’t have a contract because we are so-called “independent contractors.”<sup>160</sup>

Tom Morrison, a former president of UTW from 2008 to 2010, who drove a taxi in San Francisco for nearly a decade, also had a keen awareness of the structural changes that plagued contemporary workers in the United States. He explained:

The taxi drivers are really very representative of the modern situation with workers. Whereas in the twentieth century workers were able to win the point that we had skills that we brought to the marketplace that were worth money, that has been reversed. Now as independent

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157. All names of interview subjects have been changed to protect their identities.

158. Interview by V.B. Dubal with Robin Goodings, Taxi Worker and UTW Advocate, in S.F., Cal. (Aug. 7, 2013) (emphasis added).

159. *Id.*

160. Interview by V.B. Dubal with Robin Goodings, Taxi Worker and UTW Advocate, in S.F., Cal. (Aug. 14, 2013).

contractors, you have to bid—you know, it’s the companies that have the jobs and you have to bid for these jobs and *even pay* for these jobs. Cab drivers have to pay to get into this job, and you have to pay every day to keep it!<sup>161</sup>

In addition to the financial difficulties engendered by the independent contractor identity, white, nonmigrant drivers explained that their status as drivers “who have to pay” to keep their jobs also precluded other aspects of life. They argued that being independent contractors forced them and other taxi drivers to work so hard and so long that they struggled to find partners and to have families. Even driving full time, these drivers complained, they had to find other ways to supplement their income. They believed strongly that deregulation of the industry made taxi work a “marginal” job and that a return to the employee identity would reinstall taxi work with dignity and professionalism. Morrison, for example, stated:

So many drivers don’t have families. They don’t even have any women, you know. It consumes everything. . . . Your day consists of racing through the day trying to make money, looking for people, constantly “where’s the money” and then you have to hurry up and recreate, to unwind, which means drinking. And then you have to hurry up and go to sleep so you can get up in the morning.<sup>162</sup>

To make ends meet, many white, nonmigrant drivers told me that they were forced to behave as working-class entrepreneurs, acting creatively to supplement their full-time taxi work. Rather than embracing this “entrepreneur” identity, they resented it. Tom Morrison said, “You have to bleed this turnip dry.”<sup>163</sup> So, not only did he make money driving his cab but he also thought up several other moneymaking schemes. He acted as a “roving” notary public, created laminated taxi licenses for other taxi drivers, and married people in his cab, advertising it as a quirky San Francisco experience (Image 3). George Lawson, another former UTW President, felt forced to become a small-time entrepreneur in order to make ends meet as a taxi driver.<sup>164</sup> He started making and selling tomato sauce and created a cab application for smartphones.<sup>165</sup> Robin Goodings also “entrepreneurialized” herself to make ends meet. Goodings’ health problems made it increasingly difficult to be mobile and to drive fulltime. To supplement her driving income and to help pay her hefty out-of-pocket health insurance, Goodings opened a taxi driver institute in the UTW office as an alternative to the taxi class offered by the

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161. Interview by V.B. Dubal with Tom Morrison, Taxi Worker and UTW Chairman, in Berkeley, Cal. (Jan. 15, 2012).

162. *Id.*

163. Interview by V.B. Dubal with Tom Morrison, Taxi Worker and UTW Chairman, in S.F., Cal. (Sept. 9, 2011).

164. Interview by V.B. Dubal with George Lawson, Taxi Worker and UTW Chairman, in S.F., Cal. (Sept. 2, 2011).

165. *Id.*

police department. UTW driver-advocates begrudged the stress and the pressure to supplement their income after working more than fifty-hour weeks as cab drivers.

**Image 3: Tom Morrison supplemented his income from taxi driving with his work as a “roving notary public” and a minister who would marry couples in his cab. Morrison’s online advertisement for “marry me in a cab” said: “Universal Life Church minister offers quintessential SF wedding . . . by cab! As fun as it is, it’s not a joke. Possibilities are wide open . . . Let’s talk. P.S. Also available for absolution. Sliding scale.”**



## 2. *UTW Driver-Advocates on Organizing Diverse Taxi Workers*

The law, in the form of the dual worker identities of employee and independent contractor, reinscribes assumptions and “common sense” knowledge about immigrant workers. For UTW driver-advocates, the fact that most immigrant taxi workers embraced their independent contractor identity buttressed stereotypes about the difficulties of organizing immigrants.<sup>166</sup> In turn, these white, nonmigrant drivers spurned the possibility of organizing taxi workers collectively and focused their energies on policy advocacy that did not require forming collective power or consensus among the diverse workforce.

Though UTW driver-advocates felt strongly about returning to the employee status, they struggled with organizing the broader taxi worker community around the idea. In the early 2000s, the UTW led a major campaign to gather signatures from a simple majority of taxi workers expressing the desire to be “employees” in order to convert worker status under municipal law. Despite the failure of this campaign, new UTW leadership returned again and again to the idea of organizing workers to “return” to employee status.

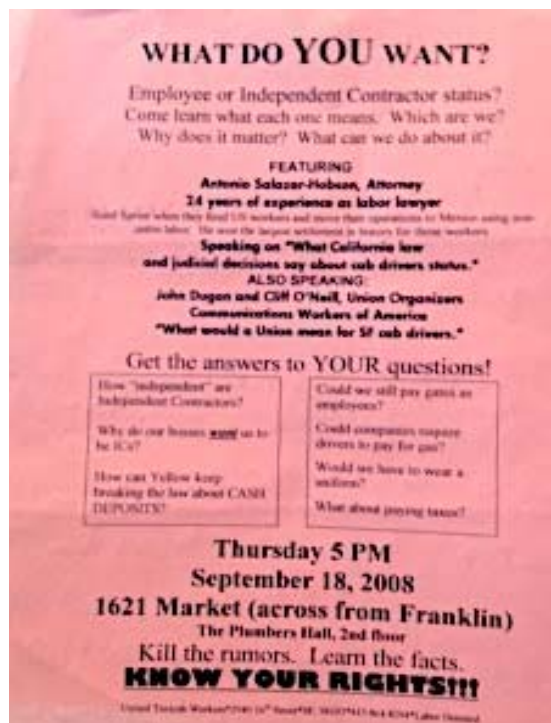
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166. Notably, other taxi worker “unions” with diverse taxi worker populations have successfully organized drivers. These include the New York Taxi Workers Alliance and the Philadelphia Taxi Workers Alliance.

When a renewed attempt failed, UTW driver-advocates would blame it on immigrant drivers' faith in the "illusion" of the independent contractor status.

In 2008, for example, when Tom Morrison became president of UTW, his first major campaign was to convince workers that they should be employees. To this end, he put together a conference to educate taxi workers on the independent contractor status (Image 4). Despite days of outreach and flyer-ing about the event, only fourteen drivers attended the conference, most of whom—all except one woman and one immigrant man—were older, white, nonmigrant men already in favor of the switch to employee status. Those who came genuinely curious expressed fear that being an employee meant that they would have to wear a uniform and could not stop to take a break when they wanted.

**Image 4: The UTW flier advertising the educational event on the difference between independent contractors and employees advises potential attendees, "Kill the rumors [about being an employee]. Learn the facts. Know Your Rights." The intimation is that drivers misconceive what it means to be an independent contractor versus an employee.**



Despite the failure of the conference, Morrison soldiered on, firmly believing that the solution to the contemporary problems of labor was to turn

back the clock to an earlier decade of U.S. labor history. He felt that a return to the employee status was the solution to the taxi labor problem generally and to his problems specifically. Although Morrison never successfully organized workers en masse around the idea, he employed a number of attorneys to research the possibility and even reached out to Teamsters to see if they were interested in an organizing drive.<sup>167</sup>

Throughout his tenure as UTW president, Morrison, like others, remained flummoxed by the nonrecognition of other taxi drivers that they should be employees. In an interview two years after he left UTW, frustrated by his inability to make change, Morrison reflected on the fact that those active in UTW were largely white activists and on the difficulties in organizing:

I don't know that we tried to go out and organize with [the immigrant drivers] . . . [T]hat was a real failing, that we never bridged that gap across the different nationalities. . . . But, you know, when it comes down to it, to actually get people to come to any kind of meeting or to do anything, you just are really beating your head against a brick wall.<sup>168</sup>

Morrison wasn't the only former President of UTW who felt organizing taxi drivers was impossible. When I asked George Lawson, who was President of UTW from 2007 to 2008, why UTW had never been able to organize drivers in a sustained way, he said:

It's like herding cats. It's a culture of cab drivers is everybody is against everybody . . . we have drivers who really believe that they are actually entrepreneurs, businessmen, which is B.S., but they believe it. *It's an illusion.* If you're an independent contractor, you could make yourself believe you're a businessperson, but you're not. There's no option for growing. There's no option to make your own business decisions. There's nothing like that . . . I thought it would be possible to organize them, but under the current structure, I don't think it's possible.<sup>169</sup>

George Lawson, like Tom Morrison, had a clear legal understanding of what it meant to be an independent contractor. He attributed the fact that drivers remained contractors to their false beliefs and hopes about the independent contractor status. He called it "an illusion."

Robin Goodings, too, like many UTW leaders, reflected on the difficulties in organizing the influx of immigrant workers in the industry. In an opinion piece, Goodings wrote:

[I]t is generally hard to organize first generation immigrants. Part of

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167. Although this never came to fruition, had the Teamsters decided to organize taxi workers, a "turf" issue between unions may have ensued since the Communication Workers of America is formally affiliated with the UTW.

168. Interview with Tom Morrison, *supra* note 163.

169. Interview by V.B. Dubal with George Lawson, S.F. Taxi Worker, in Oakland, Cal. (Jan. 13, 2011) (emphasis added).

the problem stems from the fact that immigrants are generally coming from a less industrialized culture to more industrialized cultures. These less industrialized culture[s] tend to have very different social structures. . . . It is hard for new immigrants to perceive what the change is and means. . . . Most third world drivers come from areas where there either was no union, or else the union was just another part of a corrupt, repressive hierarchy.<sup>170</sup>

To the contrary, however, my ethnographic research at regulatory hearings revealed that immigrant drivers did some of the most robust organizing of workers in the industry.<sup>171</sup> Nevertheless, white, nonmigrant taxi worker advocates were unable to garner their collective power, because, as I argue in the next Section, they discounted the views and desires of the majority of the immigrant workforce.

*B. Views from the Street: Immigrant and Racial-Minority Taxi Workers on Freedom, Marginality, and the Independent Contractor Identity*

Unlike white, nonmigrant workers, immigrant and racial-minority drivers in my research perceived a gap between the promises of employee status and its realities. They shared the views of the UTW drivers discussed in Part III.A that driving was an oppressive and precarious job. But, the immigrant and racial-minority drivers did not blame that oppression and precarity on their legal identities as independent contractors. Rather, they blamed corruption, racism, poor regulation, and the public perception of cab drivers. The immigrant drivers in my research explained that the employee status would exacerbate, rather than disrupt, the difficulties of their work. Namely, though many drivers recognized the potential stability of being an employee, the status made them feel more out of control of their everyday lives. In addition, the employee status concretized the power dynamics that they worked so hard to escape. More than a mere “illusion,” immigrant and racial-minority drivers’ approval of their independent contractor status enabled them to exert control over their bodies, to manage their time and transnational lives, and to affirm their sense of dignity as working-class men.<sup>172</sup>

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170. Robin Goodings, *Organizing Taxi Workers* (1986) (unpublished paper, San Francisco State University) (on file with author and the San Francisco State Labor Archives).

171. I would frequently hear about important regulatory hearings from UTW organizers. Attending the meetings, I would find immigrant workers unaffiliated with UTW on the steps of City Hall with signs, protesting proposed regulatory decisions. The immigrant workers would stand in line to have their voices heard during public comment. I would see them pouring out of the offices of San Francisco Supervisors where they were making their voices heard. While UTW advocates engaged robustly in all of these capacities, they rarely, if ever, had the number of workers behind them as the unaffiliated, loosely-organized immigrant workers did.

172. Although three of the white, nonmigrant drivers I interviewed were women, I did not interview any immigrant women. I approached two immigrant women for an interview, but both were hesitant to share their views.



1. *Immigrant & Racial-Minority Drivers on the Marginality of Taxi Work*

Arjun Malhi, an undocumented Indian driver who has been driving a taxi in San Francisco since 2007, eloquently articulated the trials and travails of being an immigrant taxi worker, sharing the racism, corruption, and humiliation he faces on a daily basis. He also expressed his skepticism about legal recourse broadly:

Taxi drivers aren't respected like other drivers—like garbage truck drivers or MUNI [bus] drivers. If a bus driver needs anything, a PCO [parking control officer] will help. If a taxi driver needs help, the PCO will threaten the driver with a ticket. I have had this experience myself. I wrote a complaint. But nothing came of it. . . . And the companies—they are corrupt and rip off drivers. . . . Taxi driving is a low level job. You don't have a voice. You're no one—especially immigrant drivers. All cab drivers agree that we're looked down upon among all the driving jobs. We are the least respected. No one flips a finger at a garbage truck driver. . . . I call 9-11 a lot—whenever I see an accident, an emergency on the road, debris on the highway. But once, when I called because I was in trouble, they wouldn't help me. I called because a customer was screaming at me and being abusive. The policeman took the customer's word for it. It was useless. Even when I took the taxi class [run by the police department], the officer who taught it was very disrespectful to everyone. Once he showed us some deodorant, and he said, "They don't even sell this in your country."<sup>173</sup>

Malhi's narrative closely reflects the experiences and sentiments of other immigrant drivers in my research. In addition to enduring the economic instability articulated by the white, nonmigrant drivers in my study, all of the immigrant and racial-minority drivers encountered the indignities of racism at the hands of customers, management, and police. Complaints about management were particularly pronounced. Immigrant drivers complained that taxi management commented on their accents, their bodily smells, their religious identities, and their perceived countries of origin. One day-lease driver named Farouk said that he had such a bad experience at the first taxi company where he worked that when he left to go to another, he changed his name to "Frank" to avoid being identified as Muslim.<sup>174</sup> Another driver, a Pakistani immigrant, explained that when taxi management asked him where he was from, he answered "India" because he was told by other drivers that discrimination against Pakistani immigrants would result in getting bad shifts or no shift at all.<sup>175</sup> Other immigrant taxi workers sensed that taxi management forced them to wait hours for their car, take poor shifts, or drive broken-down

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173. Interview by V.B. Dubal with Arjun Malhi, Taxi Worker, in S.F., Cal. (Jan. 24, 2012).

174. Interview by V.B. Dubal with Farouk Ali, S.F. Taxi Worker, in San Mateo, Cal. (Feb. 22, 2012).

175. Interview by V.B. Dubal with Ahmed Sayed, Taxi Worker, in S.F., Cal. (Mar. 12, 2012).

taxis because of prejudices against them as a result of their national origin, race, or religion.

These humiliating encounters, according to the immigrant taxi workers, could not be fixed by the employee status, but only further exacerbated by it. They feared that being legally considered employees would put them even further under the thumb of the cab company management who would then have the power to determine the condition of the taxis they drove, to force them to wear uniforms, to cut their hair a certain way (a concern articulated by observant Muslim and Sikh drivers), and to prevent them from taking breaks at will. As one immigrant driver rationalized, “We are already like the slaves of the city. If we became employees, it would be worse. [The companies] would tell us what to wear and where to be.”<sup>176</sup> Given the difficulties of proving discrimination in the employment context, their attitudes were not illogical.

The immigrant workers’ concerns about company control over driver dress and appearance were ubiquitous, but many white, nonmigrant taxi workers were skeptical of these anxieties, given the economic issues at stake. One UTW advocate, for example, had an indignant response; he told me, “What are they afraid of? The company is going to make them wear dresses?” Historical research, however, revealed that worker appearance had long been a meaningful issue among drivers, especially minority drivers, and one that even pitted them against the union in the 1970s.<sup>177</sup>

In contrast to the nostalgia of white, nonmigrant drivers who labored with union representation in the 1970s, the few immigrant drivers in my study who drove as employees under the Chauffeurs’ Union contract remember the union with scorn. Samuel Tesfaye, for example, who has been driving a taxi in San Francisco since 1969 and claims that he was the first African immigrant driver in the industry, said about his time as an employee driver:

ST: They collected our money and that was it. They could care less about us. Nobody cares about taxi drivers anyway.

VD: Were things better then when the union was in place than they are now?

ST: No. We didn’t know anything better back then. . . . It was tough and nobody really cared to begin with. We were and are looked upon like we’re cheap, dirt. It’s like we are the lowest. People really don’t

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176. Interview by V.B. Dubal with Ashok Agarwal, Taxi Worker, in S.F., Cal. (Mar. 1, 2012).

177. In 1970, Yellow Cab disciplined twenty-seven drivers for “failing to meet a company requirement that beards be neatly trimmed and that hair not fall below collar length.” *Taxi-Hair Issue Put in Kagel Hands*, S.F. EXAMINER (Apr. 17, 1970) (on file with author). The Local 265 Union president supported Yellow Cab stating that the company “being a private firm, has the right under the contract to demand a neat and clean appearance.” *Id.* In response, about one hundred long-haired drivers, among them racial minorities, formed a “Dissident Drivers” committee and converged upon the Union claiming that it was conspiring with Yellow Cab. *Long-Hairs Assail Cabbies’ Union*, S.F. EXAMINER (Apr. 13, 1970) (on file with author).

give a heck about cab drivers today or back then.<sup>178</sup>

Unlike Tesfaye, most immigrant drivers were excited about the prospect of an independent contractor union, but did not believe that achieving union status under the law was worth losing their independent contractor identity and the benefits that they perceived came with it.<sup>179</sup>

## 2. *Immigrant & Racial-Minority Drivers on Dignity, Control, and Independent Contracting*

Rather than being a result of an “illusion” about independence, immigrant and racial-minority drivers’ affinity for their independent contractor identity derives, in part, from valid concerns about control over their lives and dignity at work.

One prominent way in which the immigrant drivers in my study asserted their allegiance to the independent contractor identity was their preference for the practice of long-term leasing. Many immigrant drivers attributed the insecurities and indignities of taxi work to the practice of day-leasing, an outgrowth of taxi workers’ former status as employees. As employee drivers, taxi workers would come into the company garage on the day of their allocated shifts, be given cars to drive, and then return the cars to the company garages, with commission earnings, at the end of their shifts. When companies converted drivers to independent contractors, the shift practice continued in the form of day-leasing. Today, day-lease drivers come into the garage on the day of their shift, pay the cab company to lease the car, and return the car at the end of their shift, keeping all earnings from the day’s work. Long-term leaseholders, on the other hand, only have to go to the company garage once every few months, if that. They escape the everyday indignities associated with going into the garage and encountering “the boss,” while also having more control over their work schedule.

Eyasu Bekele, a fifty-two-year-old father of two who arrived in the San Francisco Bay Area in the early 1980s as an asylum-seeker from Ethiopia and who is now a long-term lease driver, repeatedly told me that when he was a day-lease driver, he “had no liberty” and “felt out of control”:

The hardest part used to be like just going to work and not being able to go out immediately. Because once you’re on the street, everything is in your control. But it used to be like you go out [to the company garage], you stand in line, you wait. You have to bribe the guy. All

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178. Interview by V.B. Dubal with Samuel Tesfaye, Taxi Worker, in Oakland, Cal. (May 23, 2012).

179. While the U.S. labor force is increasingly forming independent contractor unions, these collective groups are not protected collective bargaining units under the law. Indeed, they risk antitrust liabilities in organizing as independent contractors. For more about the “worker centers” that have formed from this organizing, see JANICE FINE, *WORKER CENTERS: ORGANIZING COMMUNITIES AT THE EDGE OF THE DREAM* (2006).

sorts of things happening. *You feel like the old defeated self kind of thing.* You are waiting out there, and they're [the company men] in full control. We have no liberty. So even the money doesn't matter [if you bribe them]. They don't like you, forget it.<sup>180</sup>

Govind Kalra, an Indian immigrant driver who has been driving in San Francisco for over thirty years, echoed Bekele:

I changed it to long-term lease because I could work for longer, and I had more freedom. I'm ready when I'm ready. I didn't have to go to company, pay kick back. There is much more freedom as a long-term lease driver. If you are a gas and gates driver, you go to the cab company for your shift, you wait three hours to get a car. You are scheduled to drive for ten hours a day, but the cab is not ready when it's supposed to be—not until 9:30am when it's supposed to be ready at 6:30am. You lose those three hours to make money. Then, you tip the guy \$5, you get an old car. You tip him \$10, you get a better car. You tip him \$20, you get a new car. You have to tip the gas-man, the dispatcher, it goes on. The long-term lease avoids all of this. . . . Long-term lease is better. It's like that.<sup>181</sup>

Mohamed Iqbal, a Pakistani immigrant driver and prominent worker activist, said he spoke on behalf of all immigrant drivers on the long-term lease issue: "These people [who choose to drive under a long-term lease] don't want to come in and wait in that kind of line [where you have to bribe people] and be insulted. *People have been insulted to the limit.*"<sup>182</sup>

Past UTW leaders and other labor advocates see the employee status as a fix to the uncertainties faced by day-lease drivers (who may or may not actually get a car during their allocated shift). These advocates have fought against long-term leasing because of its exploitative potential.<sup>183</sup> UTW leaders argued that long-term leasing places more risk on the backs of workers who

180. Interview by V.B. Dubal with Eyasu Bekele, Taxi Worker, in San Ramon, Cal. (Mar. 10, 2012) (emphasis added).

181. Interview by V.B. Dubal with Govind Kalra, Taxi Worker, in S.F., Cal. (Mar. 6, 2012).

182. Interview by V.B. Dubal with Mohamed Iqbal, Taxi Worker, S.F., Cal. (Mar. 3, 2012) (emphasis added).

183. In the December 1986/1987 issue of *The Hack Sheet*, a precursor to the United Taxicab Workers' quarterly newsletter, the beginnings of the use of the long-term lease is documented. The newsletter states:

Rumor has it that the "independent contractor" monster has given birth to a mutant offspring. Pacific Cab is releasing its longtime weekly lease drivers. In order to maintain a working relationship with this outfit, one has to sign a lease on a monthly basis. The lease stipulates that only one driver may use the cab. The price—a large down payment and \$2500 per month. Oh yes, the driver must buy the vehicle and pay for repairs. More to come on this latest outrage.

HACK SHEET, Dec. 1986–Jan. 1987, at 3 (on file with author). *United to Win*, the United Taxicab Workers' quarterly newsletter, explained in its Winter 1996–1997 newsletter that long-term leasing "is a disaster for drivers and the public for several reasons . . ." The newsletter goes on to cite loss of driver protections, loss of cab-driver jobs, and safety issues arising from drivers working fourteen to sixteen hour shifts. UNITED TO WIN, Winter 1996–1997, at 3, 8 (on file with author).

have to maintain the vehicles. They asserted that long-term leasing exacerbates the possibility of unjust working conditions for subleasing drivers who drive (sometimes illegally) for the long-term leaseholders. Labor advocates have also pointed out, correctly, that long-term leasing as a practice pushes drivers further from employee status. If the cab company is leasing to taxi workers who only come into the garage once every few months or not at all, then analysis of the workers' legal classification under common law control test—the test most commonly used to determine employment status—weighs toward independent contractor status.<sup>184</sup>

However, the immigrant workers I interviewed overwhelmingly favored the long-term leasing practice because it helped them to take charge of their own bodies and lives while avoiding the anxieties that accompany the difficult and often racist encounters with managers in the taxi company garages. Bekele, for example, admitted to me that now, as a long-term lease driver, when he goes out onto the street, he might not make any money, but he still *feels* like he is in control.<sup>185</sup>

In addition, some immigrant drivers argued that long-term leasing gave them the flexibility to deal with their family lives. As one non-medallion holding driver, an immigrant from China who has been driving a taxi in San Francisco for over twenty years, told me:

Long-term lease always better because you always get the same cab, same location, no later than the fixed time. In cab company . . . you have to wait for a long time. . . . [With] long-term lease you can manage better with the private stuff. I can take my daughter to school. I help with my brother's family. It make hard life easier. When my mother died, I [was] able to lease cab to my friend so I could attend funeral [in China].<sup>186</sup>

Thus, while long-term leasing as a business practice pushed workers further from employee status and arguably exacerbated potential exploitation of sublessees, immigrant drivers in my study preferred it. They valued the flexibility it gave them to deal with their transnational lives and the fact that it allowed them to avoid the painful everyday encounters with management that made them feel like, in Bekele's words, "the old defeated self kind of thing."<sup>187</sup>

### 3. *Immigrant and Racial-Minority Drivers on Freedom, Entrepreneurship, and Independent Contracting*

When drivers stated how difficult and precarious their work was, and how they used to be an accountant or an engineer or a lawyer, I asked, "Why stay a driver, then?"

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184. See *supra* Part I.A and accompanying discussion.

185. See Interview with Eyasu Bekele, *supra* note 180.

186. Interview by V.B. Dubal with Lin Wong, Taxi Worker, in S.F., Cal. (Mar. 16, 2012).

187. See Interview with Eyasu Bekele, *supra* note 180.

Strikingly, every driver gave the same answer, “I like the freedom.” In addition to embracing the structural control and flexibility enabled by independent contracting, many immigrant and racial-minority drivers experienced the independent contractor identity as a freeing identity. They corresponded the independent contractor identity to a freedom of the body and simultaneously recognized that it authorized their status as “entrepreneurs.” In contrast to the white, nonmigrant drivers, immigrant and racial-minority drivers embraced their status as working-class entrepreneurs and used it to recapture their dignity and reframe themselves as something more than “just a worker.”

Though the freedom that the immigrant drivers described was emotional and physical—expressly *not* neoliberal—it was enabled by their subjective construction of the identity of independent contractor. Jitendra Saini, a long-time taxi driver and immigrant from India, told me that prior to becoming a taxi driver, he had worked in a gas station, and prior to that, as a busboy in a restaurant. He explained why, though his income was less stable, he chose to stay a taxi driver:

I just took the [taxi] job because it gave me more freedom . . . than the gas station. In India, it’s very different. There are no 9-5 jobs. People have their own businesses. People are not working for big corporations where someone else is telling them this and that and how to do work. For me, working like that was unnatural. . . . So, I figured taxi driving would be good. Whether I worked five hours, six hours, or ten hours, the company did not care. . . . Now, I tell my family I drive my own taxi, they are proud. *No shame in it.*<sup>188</sup>

More than a mere “illusion,” Saini’s independent contractor status enabled him to exert control over his body, manage his own time, and affirm his dignity. Although his observation that people do not participate in wage work in India is empirically false,<sup>189</sup> Saini’s own middle-class origins and immigrant status made wage work feel shameful. Driving his own taxi, he could claim the cultural status of a businessman and shrug off the potential shame of being a low-wage worker. Saini could proudly tell his father that, like his brothers in India, he was an entrepreneur.

Ashfaq Swapan, another immigrant driver, underscored the complicity between the physical “freedom” of taxi driving (alluded to by Saini and other drivers) and the independent contractor identity:

AS: As a driver, nobody tells you what to do. You can take a break any time. It’s tough, but good—even fun at times. Driving a taxi, no one is sitting on my back. It’s also more responsibility in comparison to other

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188. Interview by V.B. Dubal with Jitendra Saini, Taxi Worker, in S.F., Cal. (Aug. 3, 2011) (emphasis added).

189. For a discussion of wage labor and minimum wage laws in India as compared to other countries in the Global South, see, for example, Uma Rani, et al., *Minimum Wage Coverage and Compliance in Developing Countries*, 152 INT’L LAB. REV. 381 (2013).

jobs. When I was a waiter, I served people food. As a taxi driver, I'm navigating San Francisco streets. My customer's lives are in my hands as I take them from place to place. I am handling a weapon.

VD: [Laughing] That must feel powerful!

AS: Yes, I have a lot of power. I have to speed from stop to stop to get customers to even make my gate [daily lease fee]. That's stressful, but it can be thrilling. This city has an energy—when I came here, after traveling all over the U.S.—I knew I wanted to stay. And driving, you feel that. You speed through it.<sup>190</sup>

Swapan draws on power-laden imagery to describe the affective thrill of taxi driving, calling his cab a “weapon.” He describes his job in terms of its “responsibility” and “power” and closely aligns these tropes with his status as an independent contractor. When I asked him if he would ever want drivers to be employees, he answered:

I like the small business, entrepreneurial spirit. I don't mean to brag, but mostly customers say that I am the best driver they've had. Being an immigrant, I've made an effort to learn the language. American is different from Indian English. The customers say I'm very nice, kind, and helpful. I offer good customer service. This is my business practice. *I run my own business.* We are already like the slaves of the city. If we became employees, it would be worse. [The taxi companies] would tell us what to wear and where to be. We couldn't stop and get coffee, like I am doing right now with you. We would lose our freedom. Drivers don't want to lose that. *It's all we have.*<sup>191</sup>

Here, Swapan again evokes the word “freedom” to describe being free from the oppression of being an employee—of having one's body submitted to the control of bosses, of having to wear a uniform, of being told what to do. Drivers, according to Swapan, are already “slaves of the city,” but they have the freedom of imagining and aspiring towards something else—towards an identity that carries them beyond that of wage-slaves towards the symbolic capital of “entrepreneurship.”

Unlike the white, nonmigrant drivers I interviewed, Saini and Swapan (and almost all the immigrant and racial-minority drivers in my research), did not see their status as small businessmen as mythical or as an illusion. Rather, considering all the difficulties of their work, being small businessmen was *all they had*. It gave them a respectful identity in a job where they were largely disrespected. In a world where being a “worker”—particularly a waged worker—is no longer respectable, being an entrepreneur, however materially meaningless, enables a sense of agency, a symbolic hook from which to hang one's dignity.

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190. Interview by V.B. Dubal with Ashfaq Swapan, Taxi Worker, in S.F., Cal. (Mar. 14, 2012).

191. *Id.* (emphasis added).

Immigrant drivers in my research wanted to be independent contractors not because they espoused a false sense of what it would mean to be an employee, but rather because they labor in a world where being an employee is immobilizing. Being “free” and “flexible” are not false tropes; they are the only available feelings of liberation in an industry where the screws are so tight that being in “control” of one’s own destiny on a day-to-day basis is beyond a worker’s grasp. Stopping to get coffee, as Swapan pointed out,<sup>192</sup> or “not working” as another driver explained, are small acts of escape from the oppression of everyday life. This means that even though they might not make money in the end of the day, they are in control of their own bodies—or as Swapan puts it, of their own movement<sup>193</sup> and the movement of their customers.

Taxi worker advocates affiliated with UTW worked long and hard to bring stability, security, and the living wage back to the taxi profession by advocating for the employee legal identity. However, for immigrant and racial-minority taxi workers, being an independent contractor reaffirmed their otherwise lost senses of control, freedom, and power, *legally* enabling an aspirational identity as an “entrepreneur.”<sup>194</sup>

My interlocutors’ accounts of their driving experiences expose how the volitional mobility of the free, cab-driving entrepreneur relieves the coerced immobility of the working-class immigrant. Their desire for upward social mobility, while stifled by lack of real capital, is emancipated, in part, through the legal validation of their identities as independent contractor “entrepreneurs,” as opposed to employee “wage-slaves.”

#### CONCLUSION

*A worker is a worker.*

—Bhairavi Desai, Executive Director of the New York Taxi Workers’ Alliance (which represents taxi and TNC workers) & First Member of the Executive Council of the AFL-CIO representing Independent Contractor Workers

As inequality rises,<sup>195</sup> scholars across disciplines are interested in the insecurity of work facilitated by what Jacob Hacker calls “the Great Risk Shift.”<sup>196</sup> How and why are workers in the new economy bearing the legal and

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192. *Id.*

193. *Id.*

194. In my Ph.D. dissertation, I argued that taxi drivers “manage” not only their own bodies but also the bodies of their customers—often businessmen, entrepreneurs, and executives who sit at the center of global economic power.

195. For an economic analysis of income inequality in the United States, see Thomas Piketty & Emmanuel Saez, *Income Inequality in the United States, 1913–1998*, 118 Q. J. ECON. 1 (2003).

196. JACOB S. HACKER, *THE GREAT RISK SHIFT: THE NEW ECONOMIC INSECURITY AND THE DECLINE OF THE AMERICAN DREAM* (2008).



financial risks once shouldered by corporations?<sup>197</sup> This Article answers a central part of this question by tracing the origins of the worker categories of employee and independent contractor in work law, their role in the production of worker precarity, and their part in fracturing a contemporary labor movement.<sup>198</sup> I show how in the mid-to late-twentieth century, taxi companies used the independent contractor category to shift the legal and economic risks of business from government and employers to individual drivers. These changes have profoundly shaped the lives and opportunities of vulnerable workers today by rendering precarious their work. Corporate transformations in the taxi industry, I maintain, typify the restructuring of work in the new economy. This is perhaps most salient for independent contractor labor in the growing “gig” or “platform” economy, which use technology to proliferate contingent work.<sup>199</sup>

Although the employee and independent contractor are now commonsense worker categories, my findings reveal that their entrée into the legal lexicon of employment regulations is relatively recent. Rather than being a necessary or natural classification, the legal binary reflects neoliberal cultural and political trends and ideologies—particularly, the veneration of the working-class entrepreneur. The response of legal advocates has been to work within the dualism by growing the employee category. My ethnographic investigation, however, exposes how many workers—particularly immigrant and racial-minority men—have compelling reasons to feel affection for their independent contractor identities.

By revealing the contested meanings of these categories, this Article challenges conventional knowledge about the dualism of legal worker categories in political mobilization and worker movements. I show how the employee and the independent contractor have emerged as factious identities and highlight the difficult tensions between how the law understands workers

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197. The “new economy” is a result of the growth of service work and the decline of manufacturing work in the United States and Western Europe. Accompanying this shift has been “downsizing, restructuring, the increased use of contingent labor.” VICKI SMITH, *CROSSING THE GREAT DIVIDE: WORKER RISK AND OPPORTUNITY IN THE NEW ECONOMY* (2002). In the literature on the “new economy,” an important and burgeoning literature is growing around the concept of the “fissured workplace,” which David Weil coined to describe the transformation of modern work. Specifically, Weil argues that in the previous century, “the critical employment relationship was between large businesses and workers.” DAVID WEIL, *THE FISSURED WORKPLACE* 28 (2014). In the twenty-first century, these relationships have “fissured.” Weil writes that in the new economy, “Employment has been actively shed by . . . market leaders and transferred to a complicated network of smaller business units.” *Id.* at 8; *see also* STEVEN HILL, *RAW DEAL: HOW THE “UBER ECONOMY” AND RUNAWAY CAPITALISM ARE SCREWING AMERICAN WORKERS* (2015).

198. In doing this, I have tried to answer Vicki Smith’s call to social scientists to “systematically describe the array of strategies and innovations that are transfiguring workplaces and hiring practices in a postindustrial and shifting economy.” SMITH, *supra* note 197, at 4.

199. Legal scholars are just beginning to grapple with the “gig” or “platform” economy. The bulk of this Article shows how much of what is happening in the “gig” economy is not new, but a continuation and proliferation (via technology) of earlier business models.

and how workers understand themselves.<sup>200</sup> While San Francisco taxi workers fought for better working conditions before the advent of Uber and Lyft, the powerful social and political meanings of employee and independent contractor splintered worker mobilization. Centrally, I reveal how and why many immigrant and racial-minority drivers eschewed the employee identity—in spite of all its apparent promise.<sup>201</sup>

Taking seriously the call to do more than “emphasize . . . the limits of past legal strategies” like misclassification litigation,<sup>202</sup> I maintain that my findings have real implications both for doctrinal analysis and for the strategies of workers’ advocates. Most centrally, the tension between the employee and independent contractor categories is a calling to work outside traditional boundaries of employment and labor regulations and to overcome the recently established constraints and limitations of the law. Doctrinally, one possibility for advocating on behalf of workers who desire employee status is to develop the “entrepreneurial” idealization of courts and to force it to live up to its claims. This means transforming the “entrepreneurial potential” test of the D.C. Circuit into a test of “entrepreneurial realization” rooted in the traditional common law of agency analysis. Under such analysis, only real financial remuneration from the theoretical entrepreneurial opportunity of business models would carve workers out of the protections of the law.

But how do public interest lawyers and other rights advocates serve workers, like those taxi drivers in this Article, who reject the employee identity altogether? The friction between the available legal tools and the desires of a diverse workforce demands that advocates revolutionize their approaches. Collaborations between workers, their organizers, and their attorneys should serve the needs as the workers themselves define them. In this context, work law attorneys may be forced to lawyer in arenas otherwise unfamiliar to

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200. Although I do not explicitly reference “legal consciousness,” my conceptual analysis owes a great debt to the works of Sally Engle Merry, Patricia Ewick, Susan Silbey, and Austin Sarat, who influenced my thinking about subjectivity and legality. Merry defines “legal consciousness” as “the ways people understand and use the law.” SALLY ENGLE MERRY, *GETTING JUSTICE AND GETTING EVEN: LEGAL CONSCIOUSNESS AMONG WORKING-CLASS AMERICANS* (1990); see also Patricia Ewick & Susan S Silbey, *Conformity, Contestation, and Resistance: An Account of Legal Consciousness*, 26 *NEW ENG. L. REV.* 731 (1991); Austin Sarat, “. . . *The Law Is All Over*”: *Power, Resistance and the Legal Consciousness of the Welfare Poor*, 2 *YALE J.L. & HUMAN.* 343 (1990).

201. My research on this meaning-making draws on and owes a great deal to the seminal sociolegal literature on the role of rights and legal mobilization in political struggle. In thinking about these issues, I was particularly influenced by the works of Michael McCann, Gerald Rosenberg, and Stuart Scheingold, who pioneered research on the role of rights lawyering in social movements. See MICHAEL W MCCANN, *RIGHTS AT WORK: PAY EQUITY REFORM AND THE POLITICS OF LEGAL MOBILIZATION* (1994); GERALD N ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* (2d ed. 2008); STUART A. SCHEINGOLD, *THE POLITICS OF RIGHTS: LAWYERS, PUBLIC POLICY, AND POLITICAL CHANGE* (2d ed. 2004).

202. MCCANN, *supra* note 201, at 310.

them.<sup>203</sup> Advocacy on behalf of taxi workers, for example, may involve engaging antitrust laws, regulatory laws, unfair competition laws, and even corporate laws. While perhaps a daunting task for lawyers trained in the traditional arts of employment and labor law, confronting and creatively targeting both private and public entities requires taking seriously the legal and social claim that such workers are “small business” people.

Innovative lawyering outside the employee paradigm does not necessarily mean a retreat from the hard fought wins of the New Deal and labor movements. To the contrary, lawyering methodologies to upset the entrenched legal, political, and social assumptions of the employee and independent contractor dualism may unearth the original visions of early twentieth century labor struggles by acknowledging that a “worker is a worker.” Public interest lawyers can make this recognition in their advocacy and meet the immediate needs of workers while reshaping the legal possibilities of workers’ rights efforts. By undermining the schismatic impact of binary worker identities, advocates may augment the potential of worker collectivities and help to achieve some economic justice amidst otherwise growing economic inequality.

My hope is that the legal, historical, and ethnographic research and findings rendered herein destabilize, however slightly, the dualism of legal worker identities and compel new visions and approaches to achieving fairness and equality for workers in the modern labor movement.

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203. Indeed, we see glimmers of this type of lawyering in some nontraditional, diverse workforces such as the restaurant industry, and, at least in New York City, in the taxi industry. For more on public interest lawyering, law, and organizing, see Sameer M. Ashar, *Public Interest Lawyers and Resistance Movements*, 95 CALIF. L. REV. 1879 (2007); Scott L. Cummings & Ingrid V. Eagly, *A Critical Reflection on Law and Organizing*, 48 UCLA L. REV. 443 (2001).

