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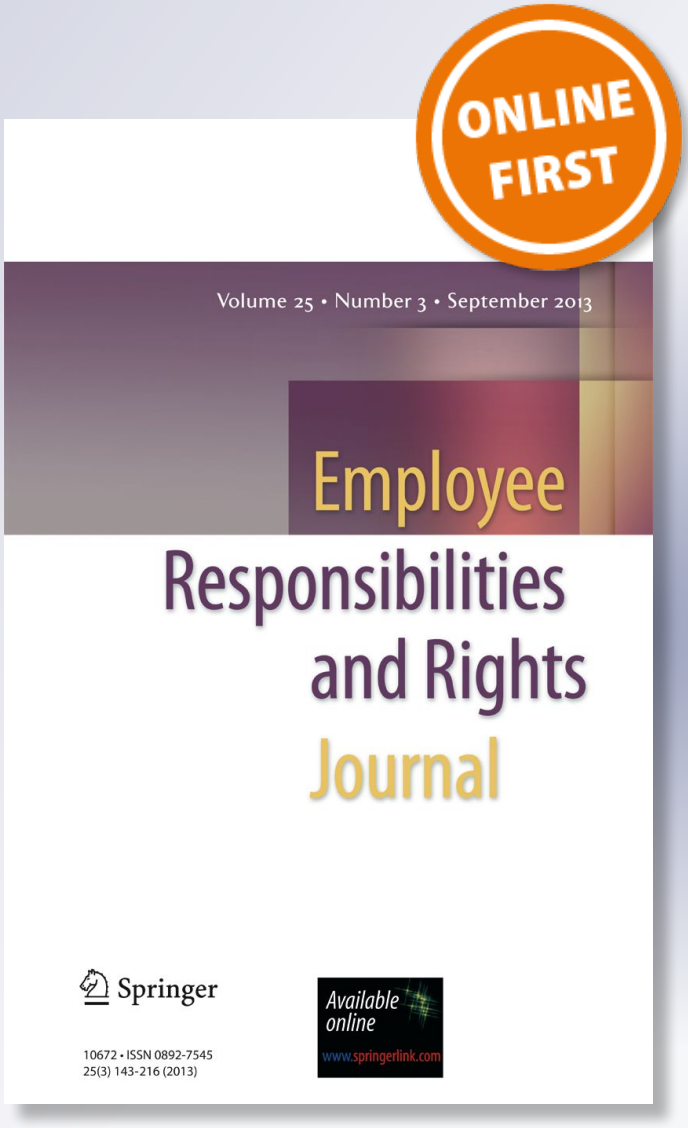


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# Uber Drivers and Employment Status in the Gig Economy: Should Corporate Social Responsibility Tip the Scales?

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**Abstract**
As the gig economy continues to grow, the legal status of its workers remains a source of confusion and controversy. Uber and other transportation network companies (TNCs) typically disclaim employee status, depriving drivers of social insurance among other benefits. Further, such companies typically deny liability to third party victims for damages due to auto accidents, sexual assaults, and other negative outcomes arising out of their business. Legal and regulatory systems in the U.S. and elsewhere continue to struggle with how to determine and apply a consistent standard as to employee classification. We argue that corporate social responsibility should figure prominently in the equation. Private companies already are required to cover social costs of doing business in a variety of contexts (e.g., workers compensation, family leave, public and workplace accommodations for disabled individuals), and it makes sense that they also should be required to underwrite other important implications associated with employee status as part of their responsibilities to society. This is especially so where, as with Uber and other TNCs, a company's core profit-making operations include activities that carry the direct potential for causing substantial harm both to individual clients and to the public at large.

**Keywords** Uber · Ride hailing · Worker classification · ABC test · Corporate social responsibility

Published reports of offenses including physical assault, kidnapping, sexual assault, and rape by Uber drivers in Australia, Canada, India, the Philippines, Singapore, the U.K., the U.S. and elsewhere continue to appear in the media with disturbing regularity (see, e.g., incidents reported at www.whosdrivingyou.org). Some of these offenses were perpetrated by known

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felons hired by Uber after only cursory background checks (www.cnn.com/2018/06/01/us/felons-driving-for-uber-invs/index.html).[1] Perhaps in response to media fallout from these events, Uber recently has ceased doing business in some countries (e.g., India) and has added a "panic button" to its application in the U.S., but otherwise continues to disclaim liability to third parties based on classification of its drivers as independent contractors rather than employees.[2] We argue that this position is misplaced both legally and ethically, and that employee status should be granted where a company's core business operations pose substantial risks to potential third-party victims. Such a requirement would motivate companies to more carefully screen and control their workers to maintain safe conduct of their business. It also would provide workers rights to receive better compensation and benefits, and to unionize if they so choose in order to protect those rights. Further, it would ease burdens on society that occur as cash-strapped state and local governments struggle to provide essential services when deprived of tax revenues that would otherwise be received were misclassified contractors properly treated as employees.

After an overview of developments and societal issues in the so-called "gig economy,[3]" we present a review of recent illustrative case law dealing with employee misclassification, de facto employees, and corresponding legal liability in the U.S. We then discuss research that addresses corporate social responsibility (CSR) concerns such as underemployment and compensation and benefit inequities that we believe support a mandate that businesses utilize employees rather than contractors for jobs in their core area of operations. We believe this is especially apt in the ride hailing and delivery driver industries where public safety concerns are directly implicated. We conclude by discussing implications for aligning the employment relationship with a company's brand, reputation, and overall competitive strategy.

## Background and Development of the Gig Economy

Recent growth of the "gig" economy and the prevalence of "side hustles," where employees are paid on short-term contracts or freelance work, has admittedly generated increased flexibility for workers. However, although hailed as offering solutions addressing the needs of an entrepreneurial generation that craves flexibility (Friedman 2014), some "gigs," particularly those inherent to transportation network companies (TNCs), are really just on-demand piecework (drivers are paid per completed trip; see Rauch and Schleicher 2015). These ill-defined employment arrangements reduce security for many workers due to the lack of legal protections and traditional benefits included in the employment contract (Friedman 2014). More specifically, workers misclassified as contractors rather than employees are improperly denied expense reimbursement, health and retirement benefits, unemployment compensation, workers compensation for work-related injuries, and the protections afforded by wage laws,

[1] A recent British court decision has resulted in Uber being granted only probationary licensing status due to the company's failure to run adequate background checks or report crimes involving its drivers as required by law (https://www.reuters.com, downloaded 6/25/18).

[2] Uber, originally called "UberCab," now asserts that it is only a provider of "mobile applications and related services" and is not a provider of "transportation, logistics, or delivery services" (https://www.uber.com/, downloaded 7/1/18).

[3] The gig economy also is known as the on-demand economy and the sharing economy; see generally, Andoyan 2017; Kennedy 2016-2017; Keeton 2016; Scott and Brown 2016-2017).

occupational health and safety requirements, anti-discrimination statutes, and labor relations laws (see generally, Bennett-Alexander and Hartman 2018; Friedman 2014).

Variability of income due to the nature of gigs and side hustles is one area of concern (Friedman 2014); the erosion of non-salary benefits and employer-sponsored obligations that correspond with employee status is another. The United States, in contrast to many industrialized nations, relies upon "occupational welfare" to ensure income security (O'Rand 1986; Titmuss 1969). Traditionally, most full-time working adults in the US enjoyed benefits funded by their employers, thus reducing the demand for such benefits to be provided by government sources (O'Rand, 1986). However, as workers adopt gig-based contract work, which entails few if any benefits, we will likely see greater reliance on public programs to help support such workers. Without access to employer-sponsored group health insurance (and given the uncertain status of the Affordable Care Act; Luthi 2018), drivers may see their premiums rise precipitously. Without workers' compensation coverage, already cash-strapped social programs such as the Social Security Disability Insurance (SSDI) program may become insolvent, leaving contract-based drivers in precarious financial positions should they be injured either on or off the job (Fichtner and Seligman 2016).

Moreover, as most TNC contract drivers do not carry commercial insurance and may even invalidate coverage under their personal liability policies by working as a driver-for-hire, Uber and other TNCs may be imposing greater risks on drivers, passengers, and the public at large (Feeney 2015). Although individuals gain some measure of autonomy when working as contractors or on variable shifts, they lose the stability of employee benefits that have been the bedrock of the employer-employee relationship for decades (Jerrell 1997). And, although TNCs such as Uber tout the efficiencies gained from on-demand sourcing, evidence suggests TNCs are pulling customers from public transportation, thereby putting more cars on the road and causing more congestion and air pollution (Clewlow and Mishra 2017; Gehrke et al. 2018; Schaller 2017). From the customer's perspective, it may be advantageous to have an on-demand mode of transportation that is not based on set times like buses, trains or subways and that does not require sharing space with anyone but the driver. However, while classifying workers as contractors rather than employees may save TNCs money in the near-term, these savings and lax regulatory oversight would seem to be increasing costs to society at large (Friedman 2014).

The previous rise of traditional employee benefits programs over the past century is starting to ebb (Jerrell 1997). At the dawn of the industrial revolution, compensation to the worker beyond a base salary evolved due to a number of different forces. For example, social movements generated care for the elderly, injured, and widowed, and fair labor standards and unemployment insurance were initiated through political changes after the Great Depression. More recently, innovative companies engaged in a war for talent have been a driving force behind paid maternity and paternity leave (Gault et al. 2014; Jerrell 1997; Ko and Hur 2014). However, contract-drivers are not subject to minimum wage standards that would otherwise apply, and a research finding from MIT (later withdrawn due to questions regarding its methodology) had suggested that Uber drivers might average as little as $8.55 per hour while driving in contrast to figures of more than twice that touted by Uber (see generally Hall and Krueger 2018; Meyer 2018; and Zoepf et al. 2018).

Furthermore, there are issues that may arise from the displacement of historically minority taxi drivers from their unskilled jobs, as well as outcomes of *underemployment*, where workers otherwise qualified for higher-level jobs are relegated to lower level positions as on-demand drivers or delivery personnel. Indeed, anecdotal evidence recently communicated verbally to

one of the authors confirms that at least one Uber driver, an out-of-work software engineer in Silicon Valley, had given up trying to regain employment in his chosen profession in favor of less desirable but more available part time work in the ride hailing business. We return to these issues later on after discussing the legal issues surrounding employee misclassification.

## Case Law Developments Regarding Employee Misclassification

The question of whether a worker is an employee or an independent contractor has generated a patchwork quilt of differing standards and tests in various jurisdictions. The most largely utilized are the "common law agency" test, based on control of the work under traditional master and servant classifications, versus an "economic realities" test based on the level of economic dependence of the worker on the business (Bennett-Alexander and Hartman 2018, pp. 12–16). This question is important for many reasons, among them the issues of whether workers receive benefits, whether they are protected from employment discrimination, and whether the entity for whom work is done has vicarious liability for harm caused to third parties in the course and scope of performing their work (id., pp. 7–12). In order to understand where Uber drivers and other workers in the gig economy fit into this landscape, it is instructive to briefly review select illustrative case law on worker classification and misclassification. We begin with some cases of historical significance, and then turn to those reflecting more recent developments specific to Uber, Lyft, and analogous delivery services.

Courts have struggled for decades with how to determine employee versus contractor status in contexts where no clear test is specified in the relevant statutory or common law subject area. For example, in *NLRB v. Hearst Publications* (1944), the U.S. Supreme Court noted the difficulty of determining employee status where no clear standard was found in the National Labor Relations Act. It thus turned to both historical context and the economic realities of the situation in upholding a decision by the National Labor Relations Board that found full time newsboys to be employees of Hearst. Similarly, in *Nationwide Mutual Insurance Co. v. Darden* (1992), the U.S. Supreme Court faced the issue of whether Darden, a sales agent for Nationwide, was entitled to retirement benefits. The trial court had held that Darden was an independent contractor, not an employee, under common law agency principles and thus not entitled to retirement benefits, but the 4th Circuit felt that Darden would probably be an employee under statutory protections offered by the Employee Retirement Income Security Act (ERISA). The Supreme Court, however, noted that ERISA did not incorporate traditional agency law, nor did it otherwise help to define the meaning of "employee" in its own context; ERISA merely states that an employee is "any individual employed by an employer." The case therefore was remanded to the trial court for a factual determination on the matter, thus leaving it unsettled at the appellate level.

Against this backdrop, the Ninth Circuit Court of Appeals addressed a similar issue—entitlement to retirement benefits—in a case brought on behalf of "temporary" contract workers, some of whom had worked for Microsoft for half a decade or more. In *Vizcaino v. Microsoft* (9th Cir. 1996), those workers, relying on a favorable Tax Court ruling that they were de facto employees and that Microsoft thus should have withheld taxes from their paychecks, claimed entitlement to retirement benefits even though they had signed agreements acknowledging that they would not receive them. Notwithstanding those agreements, these workers had worked alongside regular Microsoft employees doing the same type of work, and differed only in that they wore alternate colored ID badges and were paid out of accounts

payable rather than out of payroll. Despite their classification by Microsoft as independent contractors, the Court found these distinctions meaningless and held that the workers' status as "common law" employees did in fact entitle them to the same benefits as those bestowed by Microsoft on its regular employees. The case stands with many others which conclude that the label given to workers by a hiring entity, although worthy of consideration as one factor among many, is not alone determinative of workers' legal rights.

More recently, that same court addressed the issue of whether taxi drivers were employees, versus independent contractors, and thus entitled to unionize under the National Labor Relations Act. In *N.L.R.B v. Friendly Cab* (2008), the 9th Circuit upheld a decision by the National Labor Relations Board that the company exerted substantial control over the manner and means of how the drivers were to perform their jobs, and that the drivers were thus employees. As in the previous two cases, notwithstanding that the workers had signed documentation to the contrary, the court found the label assigned by the company not to be conclusive. Factors arguably suggesting contractor status were outweighed by evidence that Friendly enforced a dress code and strict rules regarding how their drivers actually were to drive their taxicabs. The company also restricted their ability to take on entrepreneurial activities for their own benefit while driving for Friendly.

In another case involving misclassification of drivers as independent contractors, the 9th Circuit in *Alexander v. Fedex* (2014) again considered the strict dress code and other rules of conduct enforced by Fedex to indicate control by the company over the manner and means of how its work was done. It thus found Fedex package delivery drivers to be employees of the company despite signed agreements to the contrary. Like *Friendly Cab*, this case also arose in California, but Fedex has faced similar litigation results in a variety of other jurisdictions in analogous legal contexts (see, e.g., *Fedex* vs. *NLRB*, D.C. Cir., 2009).

Lest it be concluded that the 9th Circuit always finds in favor of employee status, it is illustrative to compare and contrast *Murray v. Principal Financial Group* (2010), a case in which employee status would have been critical to Murray's right to bring a Title VII discrimination claim. In that case, the Court found that an insurance agent was properly classified as an independent contractor due to the specific product knowledge and particular skill applied by Murray in her sales work, and the fact that Murray was free to operate her business as she saw fit without day-to-day intrusions. She also decided when and where to work, and maintained her own office, where she paid rent. She scheduled her own time off, and was not entitled to vacation or sick days. Finally, Murray was paid on commission only, reported herself as self-employed to the IRS, and sold products other than those offered by Principal. The Court, citing *Nationwide v. Darden* (above), also took the opportunity to clarify apparent confusion in the trial court over whether to apply the common law agency test, the "economic realities" test applied by some courts, or a hybrid version of the two. It found "no functional difference" in application among them, and reiterated that the proper inquiry is to evaluate "the hiring party's right to control the manner and means by which the [work] product is accomplished."

Similarly, in *Varisco v. Gateway Science and Engineering* (2008), a California state Court of Appeals, based largely on the specialized skills, knowledge, and expertise of Varisco as a state-certified architectural inspector, upheld the trial court's finding that Varisco was an independent contractor and not an employee. Because Varisco was hired for his particular expertise and was expected to do his work under his own control, the existence of isolated "at-will" language in his contract documents did not alone operate to make him an employee.

Returning to the context of workers who drive for a living, it is worth examining a recent federal trial court case out of Northern California. In *Lawson v. Grubhub* (2018), the court ruled that Lawson, a driver for a meal delivery service, was properly classified as an independent contractor due to Grubhub's lack of control over how Lawson performed his job. Although noting that Lawson's work was indeed part of Grubhub's core business (thus pointing toward employee status), the Court heavily weighed the lack of training, lack of a regular work schedule, lack of a standard dress code, and lack of any particularized vehicle requirement to tip the scales in favor of lack of control over Lawson, and thus, contractor status.

However, as a trial court case, *Lawson* has little if any precedential value, and its result will likely be challenged based on a recent watershed appellate case, *Dynamex v. Superior Court,* et al. (2018). In *Dynamex*, the California Supreme Court adopted a three-part "ABC" test to simplify employee-versus-contractor determinations under California's wage orders, which deal with exemption from or entitlement to premium overtime pay among other issues.[4] The case now requires any hiring entity asserting independent contractor status to establish each of the following three factors: that the worker 1) is free from its control; 2) performs work outside the usual course of its business; and 3) customarily engages in independent work. This analysis appears to be consistent with and incorporate elements of both the common law agency test and the economic realities test described earlier, and may ultimately become critical in the ongoing debate over Uber drivers, at least in California.

In *Dynamex*, a group of drivers for a delivery service who worked only for that company was awarded class certification to pursue claims that they had been misclassified as independent contractors. The Court's opinion provides an extensive historical review of California cases dealing with the employee-contractor distinction, most notably *Borello & Sons v. Department of Industrial Relations* (1989), and recognizes "the difficulty that courts in all jurisdictions have experienced in devising an acceptable general test or standard" for doing so. Of particular relevance to our arguments concerning corporate social responsibility, discussed in greater detail below, is the Court's broad introductory language:

"Worker classification, under both California and federal law, has clear consequences for workers, businesses, and the public generally. Businesses bear the responsibility of paying federal Social Security and payroll taxes, unemployment insurance and state employment taxes, providing worker's compensation insurance, and complying with state and federal statutes and regulations governing wages, hours, and working conditions of those who are classified as employees. These protections are not available to independent contractors, and although in some circumstances classification as an independent contractor may be advantageous to workers as well as to businesses, *the risk that workers who should be treated as employees may be improperly misclassified as independent contractors is significant in light of the potentially substantial economic incentives that a business may have in mischaracterizing some workers as independent contractors. Such incentives include the unfair competitive advantage the business may obtain over competitors that properly classify similar workers as employees and that thereby assume the fiscal and other responsibilities and burdens that an employer owes to its employees. In recent years, the relevant regulatory agencies of both the federal and state governments have declared that the misclassification of workers as independent contractors rather than employees is a very serious problem, depriving federal and state*

[4] The ABC test had previously been utilized elsewhere, but largely in determining entitlement to unemployment insurance compensation. See the full text of the *Dynamex* decision for further detail.

*governments of billions of dollars in tax revenue and millions of workers of the labor law protections to which they are entitled* [emphasis added]."

In light of these comments, it is interesting to note that Uber, in its online recruitment message for potential drivers (https://www.uber.com/careers), touts the various benefits of contractor status that would be "advantageous to workers" but makes no mention of the many downsides recognized above by the California Supreme Court. When considering the numerous pending class action lawsuits against Uber and other TNCs in a variety of jurisdictions, it might behoove such companies to consider these factors more seriously when deciding whether to stick with the assertion that their drivers are properly classified as contractors.

## Case Law Developments Specific to Uber

Since October of 2012, there have been more than a hundred lawsuits filed against Uber in the U.S. alone (Bales and Woo 2016-2017).[5] Among the more noteworthy decisions are *O'Connor v. Uber Technologies* (N. D. Cal. 2015) and *Razak v. Uber Technologies* (E. D. Pa. 2018), which reached opposite results.[6] In *O'Connor*, a federal trial court in Northern California held that Uber drivers were presumptively employees, but that there were genuine issues of fact as to the level of control asserted by Uber such that summary judgment on the matter was not appropriate. Significantly, the Court's opinion concluded that current laws were not well equipped to deal with the "sharing economy," and that new legislation might be required to clarify California law on the matter.[7] On the other hand, a federal trial court in Philadelphia, Pennsylvania decided that drivers for UberBLACK, which provides limousine service, were properly classified as contractors because they set their own schedules, work when they want to, and are free to run errands without reporting to Uber. The distinction appears to rest heavily on the fact that these drivers essentially run their own businesses, which is virtually identical to the third part of the ABC test adopted by the California Supreme Court in *Dynamex*. Whether the same analysis will be extended to regular Uber drivers, many of whom drive for Uber as only one of several types of work they perform, remains to be seen.

## Underemployment: Another Negative Outcome

The story of the out of work software engineer driving for Uber mentioned earlier is not unusual. Lower entry barriers combined with the attraction of working with a technologically innovative platform has led to highly educated employees moving into jobs that had traditionally been done by individuals without college degrees. When individuals suffer a job loss or other career setback, they can easily shift to the gig economy—an ecosystem that allows

[5] As reviewed in detail elsewhere, there also have been rulings by various state labor relations agencies (see, e.g., Keeton 2016). These decisions have limited applicability beyond their specific jurisdictions and are not considered in our analysis.

[6] An analogous case against Uber's main competitor, Lyft, was settled by the parties and provides little useful guidance in the present inquiry. See *Cotter v. Lyft* (N. D. Cal. 2017).

[7] A proposed settlement of this litigation was rejected by the court, but the case was stayed pending appeal to the 9th Circuit on the issue of whether class action waivers in arbitration clauses signed by the drivers are enforceable.

immediate entry and participation in a labor market as a freelancer or independent contractor. Although access to this opportunity may appear to be beneficial, it also may deter individuals from seeking jobs that are more suitable to their education and skill level, thus pushing them into the category of underemployment (Leana and Feldman 1995; Wanberg 1995). Further, these "opportunities" can limit access to employer-sponsored social insurance programs such as unemployment insurance and continued health insurance coverage through COBRA, which are typically only available to those who have held traditional jobs for an extended period of time (Friedman 2014). In Australia by way of contrast, analogous "casual workers" (non-full time workers with irregular hours and schedules) are paid a "casual loading" premium to compensate for their lack of employer-provided benefits (https://www.fairwork.gov.au/, downloaded 10/3/18). However, contract or gig workers unable to work enough hours in lower paying jobs to earn a living wage in the U.S. may need to rely on social safety nets such as Medicaid and the Supplemental Nutrition Assistance Program (SNAP) that are at risk under threat of government budget cuts.

The rise of businesses with digital platforms has caused further shifts in the labor market where overqualified individuals are both underemployed and are displacing previously full-time unskilled workers from the driving profession (Berger et al. 2017). Schor (2017) found many Uber drivers in the U.S. to be white and native born rather than people of color and/or immigrants who "disproportionately do this manual work in the conventional economy" (p.272). The entry of the white collar or "gig worker" to traditionally low-wage jobs thus has a crowding-out effect, displacing low-wage workers. Furthermore, since the jobs (rides) are not predictable, it encourages individuals to find "gigs" in multiple organizations. In fact, it appears that over 60% of Uber drivers have at least one additional job, and many drive concurrently for Lyft. This suggests that their employment is unstable, and that income levels are precarious for these workers. As shown by the growing number of lawsuits seeking employee status and related benefits and legal protections, many of these individuals clearly would prefer more regular working hours and greater stability in employment. We believe they should at least be afforded that option. However, at least for now, they remain both underutilized and underemployed.

Underemployment occurs when individuals are in a lesser or inferior job compared to some standard. It is not new to gig workers, and has been a problem with other contingent workers for decades (Connelly et al. 2011). However, easy access to work through platform providers has exacerbated the issue and created an exploitative environment where individuals perform work only on an on-demand or as-needed basis and often need to piece together several jobs to earn a living wage. Although there is no clear consensus or universal definition of underemployment, most scholars agree that underemployed individuals experience a reduction in wages, work at lower hierarchical levels in organizations, and find their skills underutilized (Feldman 1996; Feldman et al. 2002). The main socioeconomic theme of the underemployed is clear: they simply are not operating at their full potential.

Theoretical frameworks including relative deprivation theory have been used to help explain the antecedents and consequences of underemployment. In the context of Uber, many highly educated drivers not only suffer from their work being unstable and uncertain, but also experience relative deprivation with respect to skill utilization. Whatever theoretical framework may be used, however, researchers agree that underemployment generates a host of unfavorable outcomes including decreased psychological well-being and decreased physical health (Feldman and Turnley 1995; Maynard et al. 2006; Milner et al. 2017). Some scholars consider this "post-capitalist hyper-exploitation" (Peticca-Harris et al. 2018). In particular, Trebor Scholz (2017) labels this "crowd fleecing"—the real time exploitation of millions of

workers by a small number of online companies—and finds that it drives "an intensification of exploitation with the lion's share of the wealth of networks being re-routed into the pockets of a handful of platform owners" (p. 114).

## Should Corporate Social Responsibility Require Employee Status?

Carroll's (1991, 2015) pyramid model of corporate social responsibility (CSR) serves as a starting point to understand and evaluate organizations like Uber. The framework encompasses four aspects of CSR: economic, legal, ethical and discretionary expectations. Businesses first and foremost have an economic responsibility to be profitable, and they do this by adding value and sustaining their operations. In doing so, businesses are required to comply with laws and regulations as a condition of operating. Compliance, however, is necessary but not sufficient, and society expects businesses to conduct themselves in an ethical manner. Carroll thus maintains that companies should perform in a manner consistent with expectations of societal mores, recognize evolving ethical/moral norms adopted by society, prevent those norms from being compromised in order to achieve business goals, and recognize that ethical behavior goes beyond mere compliance with laws and regulations (Carroll 1991, 2016). Carroll also points out that business goals and responsibilities most dramatically affect employees as well as other stakeholders because of the critical nature of basic financial viability once a firm occupies its place in the economy. This reasoning supports our argument that companies like Uber have a responsibility to their workers to help them maintain a living wage and decent levels of social welfare (see also Spence 2016, regarding a business firm's responsibilities to its employees).

In addition to these considerations, it is becoming increasingly common, indeed necessary, for businesses to assume social and political responsibilities that go far beyond legal requirements and to fill the "regulatory vacuum" now present in a growing number of areas of global governance (Scherer and Palazzo 2011). Where medical and retirement benefits may be increasingly difficult to obtain, as is the case in the U.S. today, emerging notions of CSR may require responsible businesses to step in and do so. Indeed, this very notion was recognized implicitly by the California Supreme Court in its *Dynamex* decision, quoted in part earlier in this paper. Requiring companies like Uber to offer at least the option to obtain employer-provided group benefits to those who spend substantial portions of their work lives helping to drive the profits of the company would recognize the realities of these ongoing developments.

To be sure, companies like Uber have gained attention from scholars and practitioners who are fascinated by the efficiency and optimization of digital markets as well as their arguable benefits to consumers. However, the needs and well-being of the people who perform the work, as well as other stakeholders and third parties, deserve serious consideration as well.

## Strategic Considerations and Concerns

Given the legal, societal, and ethical advantages of employee status discussed above, would requiring that status through legislative or regulatory mandate pose difficulties with innovation or other aspects of competition for companies like Uber and Lyft? To the contrary, we believe there are potential strategic advantages to be gained through branding as socially responsible companies who provide collective employee benefits and improved worker rights.

Management scholars have developed frameworks for mapping a firm's human resources practices onto its overall competitive strategy. Among the most well-known and widely used are those developed by Porter and by Miles and Snow (see Gomez-Mejia et al. 2016, pp. 28–30). Porter's typology of generic competitive strategies includes the distinction between cost leadership and product or service differentiation (uniqueness) to achieve a competitive advantage, whereas Miles and Snow analogously distinguish between the respective strategies of defender (cost control, efficiency and stability) versus prospector (innovation and new product development). As Gomez-Mejia et al. point out, low cost or defender firms tend to utilize HR strategies that emphasize control and discourage creativity and innovation, while differentiation or prospector firms utilize HR strategies that foster creativity and adaptability. In light of the innovative, hi-tech nature of Uber's ride sharing application, misclassifying on-demand drivers as contractors thus appears to be part of a misplaced low-cost or defender strategy given its corresponding attempt to save on expenditures related to health insurance, retirement benefits and the like. On the other hand, requiring companies like Uber and Lyft to properly classify their drivers as employees would incentivize them to raise the level of their hiring, compensation and benefit practices to support a more appropriate competitive strategy of differentiation (quality) or prospector (innovation).

Further, because Uber or Lyft would be responsible to third parties for the conduct of its drivers were they employees (Bennett-Alexander and Hartman 2018, p. 9), potential customers would likely be getting enhanced safety and reliability when they arrange transportation services through these companies. Mandating employee status also would motivate Uber and Lyft to maintain higher levels of commercial insurance coverage for the casualty losses that are inevitable in ride hailing and other driving operations, thus providing recourse for third party victims that is otherwise inadequate or lacking altogether from individual drivers working as independent contractors.

## Alternative Possible Approaches to the Employee/Contractor Dichotomy

In addition to the ABC test recently adopted by the California Supreme Court in *Dynamex*, which would still require a case by case determination of its three relevant factors (worker freedom from control, performing work outside the core business, and customarily engaging in independent work), legal commentators have proposed a variety of other approaches for determining worker status in the gig economy. These include a special "for-hire driver" classification such as that used in Seattle's rideshare ordinance (Keeton 2016); a "hybrid" approach that would provide workers with a basic level of protection while still maintaining flexibility (Andoyan 2017; Redfearn 2016); a "platform contractor" classification that would examine issues including the level of worker dependency on a particular platform owner such as Uber; and "taxonomy" (Scott and Brown 2016-2017) or "continuum" (Rathod and Skapski 2013) approaches whose application would depend, inter alia, on whether the business in question focuses on reducing consumption (e.g., Booksfree), facilitating on-demand services (e.g., Uber), or allocating shared housing and space (e.g., Airbnb).[8] Finally, there are the

[8] There is, of course, a question whether the first type of enterprise really exists to reduce consumption via sharing things like books (Booksfree), toys (ToysTrunk), or clothes (Le Tote) or is more concerned with "sharewashing"—emphasizing claims of having a social mission or social responsibility in order to soften what otherwise might appear to be a purely cutthroat profit motive.

"independent employee" approach and a "dependent contractor" classification, recognized in Canada,[9] New Zealand, and the UK, for workers who do 80% or more of their labor for one company. This approach would be problematic to apply to Uber drivers, however, given that many if not most of them also drive for Lyft and hold one or more additional jobs (Nadler 2018). In any event, we believe these approaches are simply unwieldy and more likely to perpetuate the current confusion and inconsistent results than they are to bring clarity to the classification issue.

## Conclusion

For all the reasons discussed above, workers in the gig economy should be entitled to be classified as employees, not independent contractors. Legal mandates requiring the availability of employee status for those workers who want it should be adopted and enforced. This approach offers the best and most understandable way to recognize and balance important worker rights, stakeholder interests, and corporate social responsibility. It would bring much-needed clarity to what has thus far been a murky and inconsistent area of both business practice and the law.

### Compliance with Ethical Standards

**Ethical Approval** This article does not involve any studies with human participants or animals performed by any of the authors.

**Conflict of Interest** All authors declare that they have no conflicts of interest.

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[9] See generally, Kaardal and Bjornson (2018).

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