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## Strict Liability for the Information Age

Kevin Alden

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# Strict Liability for the Information Age

*Kevin Alden*

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Stacey Curry was killed while walking through a parking lot to her office.<sup>1</sup> She was struck and run over by a delivery truck.<sup>2</sup> The driver said he thought he had gone over a speed bump. The police officer on the scene could not explain how the driver did not see her: there were no parked cars limiting visibility, it was a sunny day, and the posted speed limit was low.<sup>3</sup> Telesfora Escamilla was

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1. Patricia Callahan, *Amazon Pushes Fast Shipping but Avoids Responsibility for the Human Cost*, N.Y. TIMES (Sept. 6, 2019), <https://www.nytimes.com/2019/09/05/us/amazon-delivery-drivers-accidents.html>.

2. Patricia Callahan, *His Mother Was Killed by a Van Making Amazon Deliveries. Here's the Letter He Wrote to Jeff Bezos*, PROPUBLICA (Sept. 5, 2019, 1:59 AM), <https://www.propublica.org/article/his-mother-was-killed-by-a-van-making-amazon-deliveries-heres-the-letter-he-wrote-to-jeff-bezos>.

3. *See id.*

also killed by a delivery truck in a hurry.<sup>4</sup> It was sunny when she crossed the street in a marked crosswalk, three blocks from her home, three days before Christmas.<sup>5</sup> A twenty-two-year-old man was killed when another delivery vehicle turned left into his motorcycle.<sup>6</sup> The driver was apparently distracted, or else not even paying attention.<sup>7</sup> These three and at least seven others were killed by collisions with Amazon delivery trucks.<sup>8</sup>

Amazon exercises extraordinary control over its delivery providers, determining the routes of vehicles, tracking movements, and keeping time.<sup>9</sup> Amazon also exercises control over hiring and firing drivers,<sup>10</sup> but it has been able to avoid liability for the ten deaths and sixty other “serious injuries” caused by their vehicles by placing a legal firewall between itself and the drivers—many of whom drive Amazon-branded vans.<sup>11</sup> Amazon separates itself from the delivery-driver-tortfeasors by contracting with separate companies, often limited liability corporations (LLC) financed by Amazon, who drive the vehicles that provide the “final mile” delivery services. These separate companies then employ or contract drivers to perform the labor, insulating Amazon from liability when a tort occurs. This allows Amazon to set stricter and quicker delivery goals without being confronted by the liability for the resulting torts, including the taking of human life.<sup>12</sup>

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4. Caroline O'Donovan & Ken Bensinger, *Amazon's Next-Day Delivery Has Brought Chaos and Carnage to America's Streets – But the World's Biggest Retailer Has a System to Escape the Blame*, BUZZFEED NEWS (Sept. 6, 2019, 5:14 PM), <https://www.buzzfeednews.com/article/carolineodonovan/amazon-next-day-delivery-deaths>.

5. *Id.*; Christian Farr, *Former Amazon Driver Acquitted in Death of 84-Year-Old Woman*, NBC5 CHICAGO (Aug. 1, 2019, 7:55 PM), <https://www.nbcchicago.com/news/local/former-amazon-driver-acquitted-in-death-of-84-year-old-pedestrian/127151/>.

6. Callahan, *supra* note 1.

7. O'Donovan & Bensinger, *supra* note 4. The driver thought he had hit a pole, when in fact he had cut off the motorcyclist and braked, causing the motorcycle to lose control and slide. *Id.*

8. *See id.*

9. Hayley Peterson, “Amazon Has All the Power”: How Amazon Controls Legions of Delivery Drivers Without Paying Their Wages and Benefits, BUS. INSIDER (Oct. 4, 2018, 9:54 AM), <https://www.businessinsider.com/amazon-controls-delivery-drivers-without-paying-wages-2018-9>.

10. David Ingram & Jo Ling Kent, *Inside Amazon's Delivery Push: Employees and Drivers Say an Overworked System Is Lax on Safety as Packages Pile Up*, NBC NEWS (Nov. 27, 2019, 2:30 AM), <https://www.nbcnews.com/tech/tech-news/inside-amazon-s-delivery-push-employees-drivers-say-overworked-system-n1087661>.

11. Callahan, *supra* note 1.

12. *See* Peterson, *supra* note 9.

Amazon is not the only company that uses subcontracted services to shield itself from liability. It has been a long-standing way for a company to reduce its own risk of liability by passing the burden to a contractor or even a properly capitalized subsidiary. Amazon is not alone in the field of companies relying on unskilled, untrained labor to fulfill what, at times, can be extremely dangerous work.

Similar liability maneuvers have empowered an entire economy of so-called “gig companies.”<sup>13</sup> Gig companies disrupt established, often regulated industries, by connecting service customers with “able” providers. Among the biggest names in the gig economy, a common strategy has emerged which seems to propel their success: identify a regulated industry, find loopholes to reduce or eliminate the regulatory hurdles, and most importantly, call yourself a tech company and distance yourself from the end-provider.<sup>14</sup> Though many gig workers perform risky tasks, like driving, on strict deadlines, the employers mostly avoid the cost of providing training or supervision. Even those who require some level of training, supervision, or competency checks must face the reality of a marketplace that incentivizes the companies to grow their workforce at unprecedented rates,<sup>15</sup> while minimizing labor costs.<sup>16</sup> Part of that minimization is

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13. Gig company refers to those entities that produce revenue by engaging in the gig economy. The gig economy was recognized in Merriam-Webster’s “Words We’re Watching” and added to the dictionary in 2019. *Words We’re Watching: “Gig Economy”*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/words-at-play/gig-economy-use-origin-phrase> (last visited May 1, 2021). First used in 2009, gig economy refers to “economic activity that involves the use of temporary or freelance workers to perform jobs typically in the service sector.” *Gig Economy*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/gig%20economy> (last visited May 1, 2021).

14. See, e.g., *O’Connor v. Uber Techs., Inc.*, 82 F. Supp. 3d 1133, 1137 (N.D. Cal. 2015) (in suit brought by Uber drivers, the court dissects Uber’s arguments that it should not be treated like a taxi company because it is a “‘technology company,’ not a ‘transportation company’”).

15. SETH D. HARRIS & ALAN B. KRUEGER, BROOKINGS INST., A PROPOSAL FOR MODERNIZING LABOR LAWS FOR TWENTY-FIRST-CENTURY WORK: THE “INDEPENDENT WORKER” 6 (Brookings Inst., 2015), [https://www.hamiltonproject.org/assets/files/gig\\_economy\\_slides.pdf](https://www.hamiltonproject.org/assets/files/gig_economy_slides.pdf) (presenting a chart of Uber driver growth).

16. Noam Scheiber, *How Uber Uses Psychological Tricks to Push Its Drivers’ Buttons*, N.Y. TIMES (Apr. 2, 2017), <https://www.nytimes.com/interactive/2017/04/02/technology/uber-drivers-psychological-tricks.html> (describing how Uber manipulates drivers in “a quest for a perfectly efficient system: a balance between rider demand and driver supply at the lowest cost to passengers and the company”).

reducing or altogether eliminating the company's liability for its untrained workers.

In the "gig economy," companies rely on various legal maneuvers to prevent the negative impacts of their service-products from costing the companies big. While Amazon and others are able to use separate corporate entity arguments to avoid the legal liability, the same technique would prevent gig companies from expanding at the rate needed to capture investment dollars.<sup>17</sup> If every individual driving for the ostensible "rideshare" company was required to jump through the hoops of forming a separate company there would not be enough drivers to service the user base needed to make the company successful. Most gig companies rely on other common law techniques to shield the companies from liability. Uber has argued that all of its drivers are independent contractors, precluding almost all company liability for acts of their drivers under principles of respondeat superior.<sup>18</sup> But as the companies grow and deepen their pockets, the plaintiffs' bar will continue to challenge the assertion, sometimes with at least a modicum of success.<sup>19</sup> However, even when plaintiffs overcome the independent contractor status, respondeat superior limits liability to acts taken in pursuit of the employer's business, leaving some passengers no recourse against the companies for torts perpetrated by drivers who were both vetted by the company and assigned by the company to pick up the passenger.

Some jurisdictions have attempted to address the matter of gig-worker independent contractor status legislatively, either restricting the activities of gig companies or altogether preventing the companies from operating due to the health and safety risks.<sup>20</sup>

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17. See, e.g., Nathan Heller, *Is Venture Capital Worth the Risk?*, NEW YORKER (Jan. 20, 2020), <https://www.newyorker.com/magazine/2020/01/27/is-venture-capital-worth-the-risk> (lamenting venture capital's effect on startups, specifically the push to quickly scale).

18. See, e.g., *Search v. Uber Techs., Inc.*, 128 F. Supp. 3d 222 (D.D.C. 2015) (passenger attacked by driver); *Yi v. Uber Techs., Inc.*, No. 18-C-355, 2018 WL 5013568 (N.D. Ill. Oct. 15, 2018) (passenger paralyzed after crash caused by driver); *Doe v. Uber Techs., Inc.*, 184 F. Supp. 3d 774 (N.D. Cal. 2016) (passenger raped by driver).

19. See, e.g., *Razak v. Uber Techs., Inc.*, 951 F.3d 137 (3d Cir. 2020) (citing *Donovan v. DialAmerica Mktg., Inc.*, 757 F.2d 1376 (3d Cir. 1985)) (reversing summary judgement on the question of whether plaintiff Uber drivers are in fact independent contractors, explaining that because factual issues existed for questions under the *Donovan* test the district court's finding was not a matter of law and therefore a jury was needed to resolve the factual disputes).

20. See, e.g., Adam Satariano & Amie Tsang, *Uber Is Fighting to Survive in London After Losing Its License*, N.Y. TIMES (Nov. 25, 2019), <https://www.nytimes.com/2019/11/25/business/uber-london.html>.

But those efforts have struggled to gain traction, been temporary in nature, or been reversed by ballot initiatives.<sup>21</sup> In California, legislation classifying gig workers as employees was overturned by a referendum backed by the gig companies, who leveraged the threat of unemployment and higher fares to turn out gig-worker, and rider, votes.<sup>22</sup> The result in California is legislation that classifies gig drivers as independent contractors. The legislation excludes any application in tort-related claims, but the scenario illustrates a potential path forward for the gig companies.

A final method that gig companies are pursuing to remove the liability for employees' and contractors' torts is removal of the human labor altogether—for example, by offering automated drone delivery<sup>23</sup> and driverless cars.<sup>24</sup> This raises other questions of liability which, although not addressed in this Note, may be resolved in the same manner as those involving the torts of gig-workers.

This Note addresses a new imbalance in the tort system caused by the proliferation of gig companies in recent years. It starts by looking at how the law is currently failing. It then addresses approaches others have considered for dealing with the new

21. See Chris Marr, *New Jersey Gig Worker Bills Go to Governor, But Not "Big One"*, BLOOMBERG L. (Jan. 13, 2020, 6:49 PM), <https://news.bloomberglaw.com/daily-labor-report/new-jersey-gig-worker-bills-go-to-governor-but-not-big-one> (“[E]fforts to pass a California-style worker classification law will start over immediately” after state congress fails to meet the mark.); *Uber Spared From London Ban Despite “Historical Failings”*, BBC (Sept. 28, 2020), <https://www.bbc.com/news/business-54322579> (London court overturns Uber’s ban on service within the city); Faiz Siddiqui, *Uber, Other Gig Companies Spend Nearly \$200 Million to Knock Down an Employment Law They Don’t Like – and It Might Work*, WASH. POST (Oct. 26, 2020, 12:19 PM), <https://www.washingtonpost.com/technology/2020/10/09/prop22-uber-doordash/> (Uber and others lobby and advertise the ultimately-successful Proposition 22 in California, overturning a prior bill that challenged the independent contractor status for gig workers).

22. Suhauna Hussain, *Uber, Lyft Push Prop. 22 Message Where You Can’t Escape It: Your Phone*, L.A. TIMES (Oct. 8, 2020, 5:00 AM), <https://www.latimes.com/business/technology/story/2020-10-08/uber-lyft-novel-tactics-huge-spending-prop-22> (“Last week the ride-hailing app served users with a pop-up threatening that if voters failed to pass Proposition 22 on the Nov. 3 ballot, wait times and prices would ratchet up, and drivers would lose their livelihoods. To move forward with ordering a ride, users had to tap the ‘confirm’ button on the message.”).

23. *Amazon Prime Air*, AMAZON.COM, <https://www.amazon.com/Amazon-Prime-Air/b?node=8037720011> (last visited Mar. 11, 2021).

24. Paul A. Eisenstein, *Driverless Taxi Rides Are Headed Your Way this Year*, NBC NEWS (Feb. 19, 2018, 11:40 AM), <https://www.nbcnews.com/business/autos/driverless-taxi-rides-are-headed-your-way-year-n849371>; Alison Griswold, *Alphabet Is Coming for Uber*, QUARTZ (Dec. 6, 2018), <https://qz.com/1486469/waymo-googl-is-coming-for-uber-with-a-driverless-taxi-service/> (“The driverless taxi race is on.”).

dilemma in assigning liability. These approaches are insufficient due to their disparate effects and the inefficiency of the judicial process – they merely incentivize a perpetual game of creative legal maneuvers for those who can afford the legal cost, without addressing the issue. Because so much of the gig economy is driven by transportation providers, a comparison to the evolution of taxi regulation and liability will be briefly addressed; however, the shortcomings of applying an industry-specific regulation to an entire economy of gig companies proves too limiting. By comparing the problem of gig-economy tort liability to the nineteenth- and twentieth-century evolution of products liability, this Note ultimately proposes assigning strict liability to the company advertising its services. Finally, the Note concludes by briefly hypothesizing how the changes might impact the gig companies.

### I. GIG COMPANIES AND THE LAW CURRENTLY

Tort law is not currently equipped to handle industries that are (1) wholly reliant on gig labor and (2) shielded from the gig laborers' tortious actions. In this world, a "technology company" that derives most, if not all, of its revenue from a thirty percent cut of every payment on its ride hailing app is able to tell a court that it isn't a taxi company, it's a technology company.<sup>25</sup> And a trillion-dollar company can expend a monumental effort and sum of money to make fast, cost-effective delivery a reality, yet still insist that they have no control over its delivery drivers.<sup>26</sup> If finding

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25. See *Ill. Transp. Trade Ass'n v. City of Chicago*, 839 F.3d 594, 597 (7th Cir. 2016) (Judge Posner opining that the City of Chicago can treat gig transportation companies differently from taxi companies—effectively saying that they are different from taxi companies—by comparing the two to cats and dogs, "Most cities and towns require dogs but not cats to be licensed. There are differences between the animals. Dogs on average are bigger, stronger, and more aggressive than cats, are feared by more people, can give people serious bites, and make a lot of noise outdoors, barking and howling. Feral cats generally are innocuous, and many pet cats are confined indoors. Dog owners, other than those who own cats as well, would like cats to have to be licensed, but do not argue that the failure of government to require that the 'competing' animal be licensed deprives the dog owners of a constitutionally protected property right, or alternatively that it subjects them to unconstitutional discrimination."). *But see* Jennings Brown, *Uber's Big Claim that It's Not Really a Cab Company Is Bogus, EU Court Rules*, GIZMODO (Dec. 20, 2017, 9:55 AM), <https://gizmodo.com/uber-s-big-claim-that-it-s-not-really-a-cab-company-is-1821461427> (reporting on the European Court of Justice declaring that Uber is a taxi company in the European Union).

26. See generally, Callahan, *supra* note 1 (discussing the significant efforts by Amazon to make fast delivery a reality while taking calculated steps to preserve a liability shield).

creative ways to dodge liability and regulation are cornerstones of the company's ability to "innovate," utilizing legal principles to hold the actor accountable might require upending the status quo.

#### A. *Respondeat Superior*

The principle of respondeat superior holds that a party is responsible for the acts of its employees "acting within the scope of their employment."<sup>27</sup> Respondeat superior is a form of vicarious liability for employers, holding the employer or company liable for torts which come about as a consequence of their business actions.<sup>28</sup> The intended result is that the social cost of doing business is partly placed on the party that stands to benefit. In this case, that party also happens to be best positioned to spread the cost of the risk in the form of higher prices for customers.<sup>29</sup> If customers benefit enough to cover the social cost—passed on in the form of tort litigation—perhaps the market can justify perpetuating the risk. This satisfies the desire to make tort victims whole and the desire to hold the businesses accountable for accidents "which may fairly be said to be characteristic of its activities[,]"<sup>30</sup> while also allowing society—in the form of the market—to arbitrate whether the cost is justified.

#### B. *In the Service of the Employer*

The subject of respondeat superior has been covered at length by others, but it serves to expound its basic principles in assigning liability, because respondeat superior is the current status quo for service-related torts. An employer is liable for the acts of employees who are engaged in actions in the furtherance of the business.<sup>31</sup> Acts beyond this purpose are not covered by the doctrine.<sup>32</sup> Acts directly linked to the business may be obvious, but in defining whether a non-business action can be tied to the employer, courts will generally look at whether the act fits the meaning of a "detour" or

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27. Christensen v. Swenson, 874 P.2d 125, 127 (Utah 1994).

28. See Perez v. Van Groningen & Sons, Inc., 719 P.2d 676, 678–79 (Cal. 1986).

29. Young B. Smith, *Frolic and Detour*, 23 COLUM. L. REV. 444, 456–57 (1923) (noting the underlying principle of spreading the risk of inevitable torts across a larger group of people by holding the employer liable, allowing the cost of torts to be incorporated in the business costs).

30. Ira S. Bushey & Sons, Inc. v. United States, 398 F.2d 167, 171 (2d Cir. 1968).

31. Depew v. Crocodile Enters., Inc., 63 Cal. Rptr. 2d 673, 676 (Ct. App. 1998).

32. *Id.*

a “frolic.”<sup>33</sup> A detour is a minor departure from the employer’s charge, and torts during a detour may still create liability for the employer. A frolic is a major departure from the order of the employer, generally for the employee’s exclusive benefit.<sup>34</sup> To balance the classification of an act, a court might look at the time, place, authorization, foreseeability and normalcy of the departure, purpose, and common sense, among other factors.<sup>35</sup> Thus, a delivery driver who travels hundreds of miles into another state to visit a friend instead of performing deliveries has likely gone off on a frolic for which the employer will not be held accountable. But another driver who stops mid-delivery for lunch might only be considered to have detoured, resulting in liability for the employer if the driver causes a vehicular accident on the way to the diner or on the return to the delivery route.

Concepts of detour and frolic can get even more tangled in the gig-economy context. Because the gig workers are frequently permitted to set their own schedule and usually have the power of election to choose or deny service requests, questions arise: At what point is the gig worker going about the business of the employer, and at what point are the actions truly a frolic? There may be an obvious delineation between an Uber driver who is on a road trip with her family and the same driver completing a ride with an Uber passenger in tow, but what about the times between providing rides to paying passengers?<sup>36</sup> What about the time and space between dropping off a customer and returning to a high-demand area for the next pickup?<sup>37</sup> Or the space between accepting a ride request and picking up the customer?<sup>38</sup> Each of these questions

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33. *Id.* at 676–77; *see also* *Karangelen v. Snyder*, 391 A.2d 474 (Md. 1978) (evaluating whether the actions of a police officer were adequately classified as a detour, rather than a frolic, by the lower court).

34. *Pyne v. Witmer*, 543 N.E.2d 1304, 1309 (Ill. 1989).

35. *Karangelen*, 391 A.2d at 476.

36. Uber maintains \$1,000,000 insurance policy for accidents caused when en route to pick up a rider, but significantly less for accidents caused while waiting for the next ride request. *Auto Insurance to Help Protect You*, UBER, <https://www.uber.com/us/en/drive/insurance/> (last visited Feb. 8, 2021).

37. *E.g.*, Dan Levine, *Uber Settles Wrongful Death Lawsuit in San Francisco*, REUTERS (July 14, 2015), <https://www.reuters.com/article/us-uber-tech-crash-settlement/uber-settles-wrongful-death-lawsuit-in-san-francisco-idUSKCN0PO2OW20150715> (describing Uber’s settlement with family of 6-year-old who was killed when an Uber driver struck her between accepting Uber assignments).

38. Uber addresses this directly in its insurance policy for drivers, but without the policy the line is not so clear. *See id.*

raises more doubts about the efficiency of such a framework in meting out liability to gig companies.

### *C. Independent Contractors*

Beyond the question of whether the worker is going about the master's service, and significantly more important to the calculus of liability, is the worker's employment status. Almost exclusively, gig workers are classified as independent contractors. For respondeat superior claims, this is often a fatal distinction.

The majority rule for respondeat superior in cases involving independent contractors says that if one hires an independent contractor and "retain[s] no control over the manner of its performance, he is not liable on account of negligence of the contractor or his servants."<sup>39</sup> Thus, for the vast majority of gig companies, the independent contractor status of gig workers precludes liability from being attached to the gig company for the tortious acts of the gig worker. The exceptions to this barrier for respondeat superior liability include when the tortious act was committed at the explicit behest of the employer<sup>40</sup> or when the employer fails to exercise a reasonable amount of care in the hiring and retention of the independent contractor.<sup>41</sup>

The typical gig company hires independent contractors to perform their services. The companies promote this arrangement as a special benefit for the gig workers—the ability to set your own hours and be your own boss—but the benefits are far more valuable for the gig companies who save time and money by reducing oversight, training, and management, not to mention by avoiding otherwise mandatory unemployment, social security, and Medicare taxes.

The typical gig company will also require its contractors to accept and sign work contracts that stipulate the terms of the relationship,<sup>42</sup> including any ongoing obligations. For example, a rideshare company uses these agreements and other verification methods to qualify drivers who have demonstrably good driving

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39. *Zirkle v. Winkler*, 585 S.E.2d 19, 20 (W. Va. 2003).

40. RESTATEMENT (SECOND) OF TORTS § 410 (AM. L. INST. 1965).

41. *Id.* § 411.

42. Frequently, these agreements explicitly state that the gig worker is an independent contractor.

records, proof of private licensure,<sup>43</sup> and liability insurance.<sup>44</sup> In this way, the companies can argue that they satisfy the requirement to exercise reasonable care in the retention of competent contractors. If a gig worker commits a tort that implicates the gig company, the company can simply claim that the work contract has been violated—placing a barrier between the company and subsequent litigation while the termination also provides evidence that the company has acted in a reasonable manner in the retention of contractors. Testing the inapplicability of respondeat superior for independent contractors is a two-edged sword that cuts both ways in favor of the gig companies.

#### *D. Recent Developments in Independent Contractor Tests*

There have been recent developments in California, Massachusetts, and Connecticut regarding the classification of gig workers as independent contractors.<sup>45</sup> Given the enormous growth of gig economies, especially in densely populated areas, these states are at the forefront of handling gig-worker rights. One example of this classification change was in California, known as Assembly Bill 5 (AB5), which codified a three-part test previously expounded by the California Supreme Court in *Dynamex Operations West, Inc. v. Superior Court*.<sup>46</sup>

In addition to the traditional independent contractor requirement that (A) the work be free from the control and direction of the employer, the *Dynamex* test also requires that (B) the worker performs similar work outside the usual course of hiring for the employer's business, and that (C) the worker be customarily and independently engaged in the established trade or occupation for which nature the contracted work is being

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43. Private, not commercial licenses are the norm for ridesharing companies.

44. For example, the requirements to drive for Uber in the United States include at least one year of driving experience, valid U.S. driver's license, an "eligible" four-door vehicle, proof of residency, proof of insurance, and a personal photo. Uber separately obtains the individual's driving record and criminal history. *Driver Requirements*, UBER, <https://www.uber.com/us/en/drive/requirements/> (last visited May 1, 2021).

45. Assemb. 5, 2019–2020 Leg., Reg. Sess. (Cal. 2019); MASS. GEN. LAWS ch. 149, § 148B (2004); CONN. GEN. STAT. § 31-222(a)(1)(B)(ii) (2017); see also Assemb. 5936, 218th Leg. (N.J. 2019). Other states have gone the other direction, passing laws that classify some gig workers as "marketplace contractors." See, e.g., H.R. 7087, 2018 Leg. (Fla. 2018); H.R. 1286, 120th Gen. Assemb., 2nd Reg. Sess. (Ind. 2018); H.R. 220, 2019 Gen. Assemb., Reg. Sess. (Ky. 2019); S. 1967, 1978 Gen. Assemb. (Tenn. 1978).

46. Cal. Assemb. 5; *Dynamex Operations W. v. Superior Ct.*, 416 P.3d 1 (Cal. 2018).

performed.<sup>47</sup> This test is creatively known as the ABC test for independent contractors.<sup>48</sup> The purpose of California's bill—and those of the other states—was disappointingly limited. The bill was created and passed to provide employee benefits for the gig workers, not to extend tort liability to the gig companies. Accordingly, even though these laws highlight the reclassification of many gig workers as employees, the benefits extend only as far as the drivers, not to the potential tort victims.

The reticence of these state legislatures to tackle the inherent problem of tort liability in our gig economy is not entirely baffling. The companies provide labor opportunities and tax revenue. They are also popular. After AB5 was signed into law, Uber, Lyft, and others were able to get a referendum on the ballot which created an exemption in the ABC rule for gig drivers.<sup>49</sup> The companies threatened to raise fees or stop services if the proposition did not pass, and the referendum passed with 59% of the vote.<sup>50</sup> The companies still raised their fees.<sup>51</sup> The revision of the terms for independent contractor status under bills like AB5 provides a clear opportunity to extend the independent contractor test to tort claims brought against those independent contractors. But instead, the California bill only codified the ABC test “for purposes of claims for wages and benefits arising under wage orders issued by the Industrial Welfare Commission,” excluding tort claims.<sup>52</sup> There may be any number of justifications, but the simplest one makes the most sense: there are more workers than tort victims.

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47. Cal. Assemb. 5.

48. John Myers, *A Flood of Proposed Changes to California's AB 5 Awaits State Lawmakers*, L.A. TIMES (Feb. 28, 2020), <https://www.latimes.com/california/story/2020-02-28/proposals-change-ab5-independent-contractors-labor-law-california>; Allison Yano, *The Devastating Ripple Effect of California's New Gig Worker Laws*, AM. GENIUS (Jan. 7, 2020), <https://theamericangenius.com/business-news/california-gives-part-time-workers-full-time-benefits-with-ab5/>.

49. Carolyn Said, *Proposition 22, California Gig-Work Ballot Measure Backed by Uber and Lyft, Passes*, S.F. CHRON. (Nov. 6, 2020, 4:39 PM), <https://www.sfchronicle.com/politics/article/Proposition-22-California-gig-work-ballot-15699651.php>.

50. *Id.*

51. Carolyn Said, *Here's What You're Paying for Proposition 22*, S.F. CHRON. (Jan. 19, 2021, 11:00 AM), <https://www.sfchronicle.com/business/article/Here-s-what-you-re-paying-for-Prop-22-15870617.php>.

52. Assemb. 5, 2019–2020 Leg., Reg. Sess. (Cal. 2019).

## II. OLD APPROACHES TO ADDRESSING GIG LIABILITY

Some scholars have suggested that addressing tort liabilities in a gig economy can be accomplished by relying on common law doctrines of respondeat superior and other forms of vicarious liability.<sup>53</sup> However, years of data suggest that the gig companies have routinely avoided liability by chiefly relying on those same principles, gaining precedent in the process. This includes suits claiming everything from wrongful death<sup>54</sup> and property damage,<sup>55</sup> to scooters causing trespass<sup>56</sup> and private nuisance,<sup>57</sup> to drivers assaulting<sup>58</sup> and raping<sup>59</sup> passengers. At this point, the weight of precedence far outweighs the notion of returning to the foundation of these tort principles.

Reliance on common law forms of vicarious liability will only result in long-term maneuvering by the companies to further escape liability, perpetuating the problem and putting unnecessary and inappropriate reliance on the judiciary to adapt our laws. It would not be inconceivable, for instance, for Uber and other gig companies to follow the example of Amazon, using principles of corporation law and separate entities to create stronger barriers to responsibility. What then of the common law?

## III. HAVEN'T WE BEEN HERE BEFORE? TAXIS AND THE GIG

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53. E.g., Agnieszka McPeak, *Sharing Tort Liability in the New Sharing Economy*, 49 CONN. L. REV. 171 (2016).

54. E.g., Annie McCormick, *Woman Dies After Being Struck by Uber Driver in North Philadelphia*, ABC6 PHILA. (June 1, 2016), <https://6abc.com/traffic/woman-dies-after-being-struck-by-uber-in-north-philadelphia/1365836/>.

55. E.g., Checkey Beckford, *4 Hurt After Uber Driver Jumps Curb, Plows into Phone Store, Busy Restaurant in Chelsea: Police*, NBC4 N.Y. (July 31, 2018), <https://www.nbcnewyork.com/news/local/car-hits-building-chelsea-uber-driver-nypd/524492/>.

56. *Lautemann v. Bird Rides, Inc.*, No. CV 18-10049 PA (RAOx), 2019 U.S. Dist. LEXIS 123864 (C.D. Cal. May 31, 2019).

57. *Labowitz v. Bird Rides, Inc.*, No. CV 18-9329-MWF (SK), 2019 U.S. Dist. LEXIS 195982 (C.D. Cal. Oct. 29, 2019) (class action brought against scooter companies by mobility and visually impaired plaintiffs whose access to and use of public sidewalks has been impaired).

58. E.g., Sage Lazzaro, *An Uber Driver has been Charged with Strangling a Student in a Dorm Parking Lot*, OBSERVER (May 23, 2016), <https://observer.com/2016/05/an-uber-driver-has-been-charged-with-strangling-a-student-in-a-dorm-parking-lot/>.

59. E.g., Tracey Lien, *WeHo Woman Sues Uber for Negligence after being Raped by Driver*, L.A. TIMES (July 21, 2016), <https://www.latimes.com/business/technology/la-fi-tn-uber-la-assault-20160721-snap-story.html>.

## ECONOMY

Many plaintiffs have attempted to classify Uber, Lyft, and others as nothing more than taxi services, subject to the same heightened standard of care for passengers as other common carriers. Thinking about gig companies as taxis is an attractive model for handling torts in the gig economy.<sup>60</sup> Unfortunately, although the evolution of taxi company liability provides an optimistic model of developing similar liability for gig companies, the regulations and precedent establishing the liability for taxi companies is uniquely tailored to transportation-focused gig companies. Applying the same rules to all gig companies will only produce gaps and loopholes in the same way applying traditional principles likely will.

Several of the most prominent gig companies are based on the idea of ridesharing, an alternative to the traditional taxicab. In this ridesharing economy, almost anyone with an insured vehicle and a license to drive can participate as a service provider. Anyone with the app can hail a ride. This business model skirts the expensive regulations that bind regulated taxis.<sup>61</sup> Existing taxi regulations have arguably raised the cost of taxi fares, but they also provide certain social benefits for the public and the workers engaged in the industry, including public safety by requiring minimum training, equality by requiring the taxis to provide a certain level of service to every passenger, and competitive wages for drivers in some areas by limiting the number of licensed cabs to prevent dilution of the market, while capping fares to protect customers.<sup>62</sup> Some cities even collect special fees from taxi companies to help cover other social costs associated with the industry.<sup>63</sup>

But the gig economy is not limited to rideshare services. Airbnb links would-be hoteliers with people seeking a spare room or house.<sup>64</sup> Other companies provide cleaning, handyman, moving,

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60. Consider a comparison of the argument (rejected by the court) in *Association of Independent Taxi Operators, Inc. v. Kern*, 13 A.2d 374 (Md. 1940), to that used by gig companies today: "The defendant contends that it has no liability because the management, direction, control, and supervision of drivers is in the owners of the cabs . . ." *Id.* at 376.

61. TRANSP. RSCH. BD., BETWEEN PUBLIC AND PRIVATE MOBILITY: EXAMINING THE RISE OF TECHNOLOGY-ENABLED TRANSPORTATION SERVICES 38-51 (2016), <https://www.nap.edu/read/21875/chapter/5>.

62. *Id.*

63. *Id.*

64. *About Us*, AIRBNB, <https://news.airbnb.com/about-us/> (last visited Mar. 8, 2021).

trucking, lawn care, and shopping services at the click of a button – services provided not by employees, but by gig workers. Nevertheless, the development of liability for taxi services is a model for establishing liability for gig companies – with some limitations.

Traditional taxi companies are viewed as an appropriate parallel because the structure is similar to many gig worker relationships. While some taxi companies own the vehicles and taxi licenses and employ drivers, often the company is nothing more than an association of independent drivers. These independent drivers own their own taxi-licensed vehicles and participate in an association of taxi drivers who rely on the association's dispatch, training, regulatory, and other services.<sup>65</sup> This relationship between an independent taxi driver and her taxi association has many parallels to the relationship between a gig worker and the gig company. For one, the association does not employ the driver; rather, the driver subscribes to the association's service as a matter of efficiency. In some situations, the association has no involvement in the actual transportation service, but merely acts as a support organization for the drivers.<sup>66</sup>

Despite this separation between taxi associations and drivers, and the apparent legal divide created by the separate entity and independent contractor status, decades of case law have resulted in a system of liability for cab companies, which, coupled with now-established regulatory requirements in many jurisdictions, places liability on the cab companies for the acts of their drivers.<sup>67</sup>

An obstacle with applying similar principles to gig companies is that the companies do not all take on the same form, and the specifically tailored regulation of taxi services does not provide a flexible framework for dealing with a range of industries and working arrangements under the gig umbrella. It does, however,

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65. *E.g.*, *Ill. Transp. Trade Ass'n v. City of Chicago*, 134 F. Supp 3d 1108, 1110 (N.D. Ill. 2015) (in the precursor to Judge Posner's cats-and-dogs comparison, *supra* note 25, court notes plaintiff's complaint that taxi associations responsible for training, safety courses, continuing education, and ensuring that drivers and vehicles have been properly qualified and inspected, while Uber and others have a lower standard).

66. *See generally* CITY OF BOS., TAXI CONSULTANT REPORT, DRAFT ES.4 (2013), [https://www.cityofboston.gov/news/uploads/6033\\_4\\_24\\_27.pdf](https://www.cityofboston.gov/news/uploads/6033_4_24_27.pdf); *see also* *Ass'n of Indep. Taxi Operators, Inc. v. Kern*, 13 A.2d 374 (Md. 1940) (weighing taxi association's defense which was based in part on an explanation of its role in the taxi industry as a facilitator, not supervisor).

67. *See, e.g.*, *Jacobs v. Yellow Cab Affiliation, Inc.*, 73 N.E.3d 1220 (Ill. App. Ct. 2017) (allowing claim against taxi association to continue because the association controlled the appearance of the taxi and the logo on its side).

demonstrate how changing perceptions of the public and the judiciary, coupled with increasing rates of litigation, may be a signal to the courts, regulators, and legislators that the opportunity to make changes to the law is ripe.

#### IV. IS IT TIME TO EXPAND STRICT LIABILITY TO SERVICES?

##### A. *The Purposes of Tort Law*

There is no perfectly unified theory of tort law that adequately addresses all of its purposes. While this Note relies on surface-level abstractions of the underlying motivations for liability, compensation, and other damages, other articles suggest that this isn't enough to understand the true purposes underlying tort law.<sup>68</sup> It does, however, suffice the purposes of *this* Note to claim that fulfillment of the surface-level purposes of tort law is enough to justify a closer look. The purposes of tort law are fourfold: (1) compensation, indemnity, or restitution to the harmed party in an effort to make them whole; (2) determination of rights; (3) punishment of wrongdoers and appropriate deterrence of the wrongful conduct; and (4) vindication of the parties to deter retaliation and unlawful self-help.<sup>69</sup> Chief among the considerations for liability in the gig economy are restitution and appropriate deterrence. And the most appropriate model of tort liability to fulfill these purposes in this context is strict liability for services.

##### B. *Origins of and Justifications for Strict Products Liability*

Products liability largely developed due to the increasing limitations of the doctrine of privity on would-be tort plaintiffs.<sup>70</sup> Under the doctrine of privity, a person injured by a product could only sue someone who was party to the contracted sale of the product.<sup>71</sup> With this limitation, retailers shielded the manufacturer or producer from liability for torts caused by the product, because the consumer was not in privity with the manufacturer—the consumer was only in privity with the retailer. Over the years,

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68. See, e.g., Cristina Carmody Tilley, *Tort Law Inside Out*, 126 YALE L.J. 1320 (2017) (suggesting that the under purpose of tort law is to create community).

69. RESTATEMENT (SECOND) OF TORTS § 901 (1979).

70. See generally Morton R. Covitz, Comment, *Products Liability: The Rise and Fall of Privity*, 3 B.C. INDUS. & COM. L. REV. 259 (1962).

71. *Id.* at 259.

courts identified the imbalance of incentives the privity requirement created, and the requirements were loosened. First, courts removed the requirement in situations where the defect or inherently dangerous product was fraudulently concealed.<sup>72</sup> In 1916, a New York case completely removed the privity requirement for any product that is likely to cause injury if negligently made.<sup>73</sup> Courts would later remove the fraud requirement altogether—a concealed defect coupled with putting the product into the marketplace was enough.<sup>74</sup> From there, the expansion of products liability has developed to include liability for express warranties,<sup>75</sup> implied warranties,<sup>76</sup> invalidation of disclaimers of implied warranty liability,<sup>77</sup> and ultimately strict liability in tort for defective products.<sup>78</sup>

The justifications for strict liability for defective products do not provide the full picture regarding its development, but they are informative when considering the evolution of a body of tort law to address a specific inadequacy in the law. One justification for strict products liability is that negligence is often too difficult for the injured party to prove. The burden of proof is especially heavy in an economy where the producer is often several degrees separated from the consumer—both by middlemen facilitators and geography. A second justification is that strict liability incentivizes safety. The safety argument has two parts. First, manufacturers are on notice of the strict liability nature of an offense, incentivizing the creation of products that will not cause litigation. Second, by

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72. *Mazetti v. Armour & Co.*, 135 P. 633, 634 (Wash. 1913) (“It has been accepted as a general rule that a manufacturer is not liable to any person other than his immediate vendee . . . without privity of contract no suit can be maintained; [but] . . . certain exceptions have been recognized: (1) [w]here the thing causing the injury is of a noxious or dangerous kind[;] (2) [w]here the defendant has been guilty of *fraud* or deceit in passing off the article[;] (3) [w]here the defendant has been negligent in some respect with reference to the sale or construction of a thing not imminently dangerous.” (emphasis added)).

73. *MacPherson v. Buick Motor Co.*, 111 N.E. 1050 (N.Y. 1916).

74. *Jack Roach-Bissonnet, Inc. v. Puskar*, 417 S.W.2d 262, 275 (Tex. 1967) (“Under Section 402B it is unnecessary that the ‘misrepresentation’ be made fraudulently or negligently.”); *Fisher v. Johnson Milk Co.*, 174 N.W.2d 752, 753 (Mich. 1970) (affirming summary judgment where there was no “hidden or concealed defect” in the product).

75. *Baxter v. Ford Motor Co.*, 12 P.2d 409 (Wash. 1932).

76. *Henningesen v. Bloomfield Motors, Inc.*, 161 A.2d 69 (N.J. 1960).

77. *Id.*

78. *Greenman v. Yuba Power Prods., Inc.*, 377 P.2d 897 (Cal. 1963); *see also Escola v. Coca Cola Bottling Co.*, 150 P.2d 436, 440–44 (Cal. 1944) (Traynor, J., concurring) (discussing the merits of a strict liability schema for defective products).

reducing the burden on the plaintiff, it incentivizes potential plaintiffs to bring the claims. Putting the burden on the manufacturer is appropriate because the manufacturer is in the best position to prevent or mitigate the harm by designing and producing safe products free from defects. Additionally, the manufacturer is able to spread the cost of each claim across a larger swath of people, by incorporating the cost of damages into the pricing of the product. Finally, manufacturers induce consumer reliance on the expectation of safety when they put the product in the marketplace and therefore have a moral duty to stand behind their products.<sup>79</sup>

The development of strict liability for defective products did not necessarily come about simply from judges weighing the positives and negatives of these justifications. The requirement of privity enjoyed a long-lasting tenure, bolstered by *stare decisis*, with judges reticent to go against the grain and complicate a large body of not only tort, but the many other commercial laws depending on the principle and protection of privity.<sup>80</sup> What the anti-privity movement needed was a boost.

### C. *The Industrial Age's Role in Products Liability*

The evolution of products liability was catalyzed by the Industrial Revolution.<sup>81</sup> During and after the Industrial Revolution, consumers were newly and increasingly separated from producers due to the development of industrial age factories and the advent of the steam engine, which more readily provided overland transport of the goods produced in the industrial cities to consumers across the country and world.<sup>82</sup> Before this time, privity between the producer and the consumer was commonplace; however, this trend of separation continued to accelerate, and by the end of World War II, consumers were largely separated from

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79. *Escola*, 150 P.2d at 440-41.

80. Consider here the comparative dilemma currently faced by judges and legislatures dealing with the classification of gig workers.

81. Covitz, *supra* note 70, at 259.

82. University of Wisconsin-Green Bay, *The Ways that Industrialization Altered Patterns of Consumption*, FOUNDS. OF W. CULTURE: THE INDUS. REVOLUTION (2016), <http://foundations.uwgb.org/group-11/>.

producers, maintaining privity with middlemen retailers instead.<sup>83</sup> The departure from the privity requirement was a recognition “that a sale of goods in 1961 differs from a corresponding sale in 1861.”<sup>84</sup>

Instead of privity of contract between one consumer and one producer as before, industrialized America was increasingly condensed among fewer and fewer producers who relied on middlemen to complete the sale to consumers<sup>85</sup>—separating the producer from consumer effectively eliminated privity between the two parties, and by extension, the liability of the producer for claims of the consumer.<sup>86</sup> One argument used in the rebuttal of the privity requirement was that advertisements and labels were enough inducement to the consumer to justify holding the manufacturer accountable for later injury to a “consumer who buys the product in reliance on such representations and later suffers injury because the product proves to be defective or deleterious.”<sup>87</sup> But the altogether elimination of the privity requirement took time and developed over decades.

#### *D. The Information Age’s Role in Service Liability*

Many of the same problems created by producer-consumer segregation in the Industrial Age have been resurrected in this latest phase of the Information Age. Where products and producers previously reigned, services and providers now dominate. And where the relationship between producer and consumer was previously disrupted during the Industrial Revolution, creating greater separation as producers consolidated separate from retail, today the relationship between the purveyor of services and the recipient has also evolved. The effect is analogous to the

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83. Emanuel Emroch, *Caveat Emptor to Strict Liability: One Hundred Years of Products Liability Law*, 4 U. RICH. L. REV. 155, 155 (1970) (noting the scientific and economic explosion following World War II that propelled the transformation “from the ancient mercantile society, where the seller and buyer usually met and bargained, to an impersonal market characterized by corporate organization, industrial and technological advancement and complexity, and sophisticated marketing and finance”).

84. Covitz, *supra* note 70, at 265.

85. *The Development of Industrial United States 1870–1900*, NAT’L MUSEUM OF AM. HIST., [https://americanhistory.si.edu/presidency/timeline/pres\\_era/3\\_657.html](https://americanhistory.si.edu/presidency/timeline/pres_era/3_657.html) (last visited Feb. 8, 2021).

86. The first producer to adopt this model set the stage for Uber and others some 100 years later in their efforts to remove the burden of liability to consumers of its services and the general public.

87. *Rogers v. Toni Home Permanent Co.*, 147 N.E.2d 612, 615–16 (Ohio 1958).

breakdown of privity in products liability. Today, the separation of gig companies from the gig consumers has created a legal barrier that often prevents anyone from holding the companies accountable for its services.

This isn't the first time strict liability for services has been discussed. In the years during and after the period of strict products liability development, the question of differentiating between services and products was frequently addressed by courts.<sup>88</sup> Ultimately, the majority concluded that it was not time to extend the protection of strict liability to services. The justifications for not extending strict liability to services are threefold. First, the Second Restatement of Torts did not intend to include services within the umbrella of strict liability. Second, the idea of "defectiveness" is a meaningless standard for services. And finally, the application of strict liability for specific kinds of services is not warranted, either due to the nature of the service or because portions of the strict liability standard do not analogize as well as other bodies of law which may be applied in the circumstance.<sup>89</sup>

The major flaws of the first and third justifications stand on their own regardless of how strict liability is being applied.<sup>90</sup> Whether or not the Restatement intended to include services within strict liability has no bearing on its application now. As for the application of strict liability for specific services, this can be carved out where appropriate. In areas where other regulations and existing tort schemes already provide a level of protection for the consumer, it may not be prudent to upend the status quo. However, the second, questioning the rationale of applying strict liability to service providers, has greater relevance now than ever. The argument then furthered by those opposed was that "[t]he salient feature of defectiveness is that (unlike negligence) it purports to evaluate the product rather than the manufacturer's conduct."<sup>91</sup> In this way, opponents comment that by extending strict liability to

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88. *E.g.*, *Shepard v. Alexian Bros. Hosp.*, 109 Cal. Rptr. 132 (Ct. App. 1973) (blood transfusion was a service, not a product, so no strict liability for plaintiff who contracted hepatitis from the transfusion); *Kissel v. Aetna Cas. & Sur. Co.*, 380 S.W.2d 497 (Mo. Ct. App. 1964) (excavation was a service, not a product, so no strict liability for damages caused by faulty excavation); *Pierson v. Sharp Mem'l Hosp.*, 264 Cal. Rptr. 673 (Ct. App. 1989) (strict liability not warranted for services rendered at hospital).

89. William C. Powers, Jr., *Distinguishing Between Products and Services in Strict Liability*, 62 N.C. L. REV. 415, 421-23 (1984).

90. *See, e.g., id.* at 419-20.

91. *Id.* at 420 (citing *Phillips v. Kinwood Mach. Co.*, 525 P.2d 1033, 1036 (Or. 1974)).

services, the court would have to evaluate conduct. This misses the point. The purpose is to evaluate results of the service, not the provider's conduct.<sup>92</sup> The alternative is no different than a negligence standard.

Extending strict liability to services seeks to promote a number of positive externalities—just as it does in the scope of products liability: (1) promote safety, (2) spread the cost of risk, (3) reduce the burden created by information asymmetry, (4) fulfill consumer expectations of service safety, (5) put the burden on the party best able to prevent injury, and (6) encourage fairness by holding the party who benefits most from the risk accountable.<sup>93</sup> Before the rise of gig companies, purposes three and four were seen as “distinctions” between products and services—two arguments that at the time were applied to products but did not have a clear rationale for services.<sup>94</sup> This discrepancy no longer exists. Companies are now distanced from their clients and their workers by technology, creating information gaps, while the company nevertheless advertises quality, reliability, and safety in their services—creating implied warranties that shape client expectations.<sup>95</sup>

One of the issues earlier courts had with applying strict liability to services was that the “problem of proof” was not as acute in non-product cases as it was in products liability cases where the defendant was many steps removed from the plaintiff.<sup>96</sup> Today, the purveyors of services, the gig companies, are further removed from the consumer than ever before. Consumers can hire and accept services from a gig worker without knowing their name, phone number, qualifications, or any other material information. The gig company, through its process of onboarding workers, has access to all of this information and more—though the particular practices of how the company determines who is and isn't qualified to deliver the services is information unavailable to the consumer.

The application of strict liability for services would put the companies on notice to *optimize* the risks created by their services. The optimization would be based not on the recommendations of

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92. *Id.*

93. *Id.* at 423–28.

94. *Id.* at 428.

95. Marketing Campaign E-mail from Uber Techs., Inc. (Feb. 10, 2021, 10:57 PM CST) (on file with author) (touting Uber's commitment to and investment in rider safety).

96. Powers, *supra* note 89, at 422–23.

company ethics advisors, but by the costs of managing a relationship with society that includes plaintiffs and courts. Gig companies are the gatekeepers and managers of this system of incentives for gig workers, and they are therefore the entities best positioned to mitigate the risks of peer-to-peer services. Because they sit between the consumer and the providers of services, they are able to “monitor and channel” the behavior of all users<sup>97</sup>—a function which would also permit the companies to protect the welfare of consumers and the public. With GPS data, user reviews, and time logging, transportation-focused gig service companies could effectively enforce speed limits, traffic sign compliance, pedestrian and cyclist awareness, appropriate rest for drivers, and other similar tort-mitigating measures. All gig service companies could mitigate criminal and tortious acts by gig workers by conducting thorough background checks and providing appropriate training and other support resources. Still other issues might be mitigated by appropriate monitoring of workers. The emphasis in this context is on mitigation, rather than prevention. Even the best efforts will fall short of complete resolution of liability, but such efforts could at least bring gig companies in line with the societal expectations for other companies engaged in the same industries.

*E. One of Many Possible Exclusions for Strict Liability for Services*

In cases that have dealt with product-service combinations, courts have largely avoided the question of strict liability, leaving commentators to question whether the exemption was for all product-service combinations or simply an exemption for professional services.<sup>98</sup> While this Note does not explore all of the justifications and consequences of exempting professional service providers from strict liability, it merits mention as an adaptation to the recommended strict liability for services. The problem with relying on regulation as the impetus, rather than shifting to strict

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97. Ryan Calo & Alex Rosenblat, *The Taking Economy: Uber, Information, and Power*, 117 COLUM. L. REV. 1623, 1628 (2017) (arguing that Uber and other gig-economy companies use their power and information to manipulate participants for their own gain).

98. Powers, *supra* note 89, at 416–18 (citing *Hoven v. Kelble*, 256 N.W.2d 379, 388–89 (Wis. 1977) (“Where ‘professional’ services are in issue the cases uniformly require that negligence be shown. We have found no decision of any court applying strict liability to the rendition of professional medical services.”)).

liability, was previously discussed in reference to taxi drivers.<sup>99</sup> It is that the gig economy will continue to develop and morph at a rate faster than regulators are able to meaningfully control. And while the control may be desired, can the regulators do it in a way that does not stifle real and desirable innovation? The approach that encourages the most creativity is to draw the lines of liability and allow the gig companies to optimize their services to reduce the potential risk and costs associated with those liabilities. This approach is not foolproof and may need regulatory adjustments from time to time.

The primary purposes of extending strict liability to services may still be largely fulfilled by state licensing and training for certain skilled services. For many of those gig services, existing frameworks for licensure already exist.<sup>100</sup> For others, there is an obvious path forward, given existing frameworks in other jurisdictions or an obvious path to licensure. In fulfilling the purpose of tort law, such licensure might require training and other programs to promote safety by the service workers. The licensure would put the costs on the preventative rather than compensatory side of the equation, but it would still effectively spread the costs across all those who benefit from the services in order to achieve the desired mitigation. The asymmetry of information would be partially reduced because the requirements for licensure would be public record and the licensure could require renewals, audits, or some other form of periodic review – all of this would facilitate the exchange of information. There would also still exist a framework for strict liability for services which would apply in situations where the company failed to meet the requirements of the professional exception. The last three points of fulfilling expectations, putting the onus on the party best able to mitigate, and questions of fairness could all be handled in some degree by such regulations as well.

This isn't to suggest that outright exemptions for professionally licensed providers is equivalent to strict liability nor that other exceptions are less meritorious. The possibility of adapting the strict liability for services rule to fit other scenarios is available and should be evaluated further.

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99. *Supra* Part III.

100. For example, several companies connect skilled trades with homeowners. State licensing for plumbers, electricians, general contractors, and others should largely fill the need.

### F. The Economics of Strict Liability

The general purpose of extending strict liability to services is the same as the rationale articulated by the courts that developed strict liability for products. As Justice Traynor wrote in an early products liability decision,

Even if there is no negligence, however, public policy demands that responsibility be fixed wherever it will most effectively reduce the hazards to life and health inherent in defective products that reach the market. It is evident that the manufacturer can anticipate some hazards and guard against the recurrence of others, as the public cannot.<sup>101</sup>

The net social impact of this ideal may not be quantified immediately, but scholars have looked at the cost of strict liability in other settings—including the extension of strict liability to *all* forms of tort, thus eliminating the concept of negligence altogether.<sup>102</sup> In their study of the subject, Richard Posner and William Landes concluded,

If a change in the plaintiff's activity is unlikely to be an efficient method of accident avoidance, but a change in the defendant's activity is likely to be an efficient method, strict liability is an attractive rule. It will deter many accidents, and what we have called the claim cost of strict liability will be reduced.<sup>103</sup>

Strict liability is attractive and efficient because there is not a clear path forward for changing the behaviors of potential gig-company tort plaintiffs, but there *is* a clear and simple path for changing the behaviors of the gig companies. This conclusion by Posner and Landes also brings to light a final point and a return to the beginning of the Note. Regardless of the type of service being offered, the strict liability for services must include not just consumers of the service, but bystanders.

### G. Claims by Innocent Bystanders

The adoption of strict liability for service providers answers the question of liability when the consumer is harmed by a defect in the

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101. *Escola v. Coca Cola Bottling Co.*, 150 P.2d 436, 440–41 (Cal. 1944) (Traynor, J., concurring).

102. See, e.g., William M. Landes & Richard A. Posner, *The Positive Economic Theory of Tort Law*, 15 GA. L. REV. 851, 877 (1981).

103. *Id.*

service, but it does not settle the problem of appropriate liability when the public at large, or bystanders, are harmed by the act. For this dilemma, the evolution of products liability is again informative. It wasn't long after the concept of strict liability for product defects became widespread that courts began extending this protection to non-user and non-consumer third parties.<sup>104</sup> The purpose: public policy considerations.<sup>105</sup> The lack of a consumer-producer relationship has no bearing on the analysis in a strict liability claim. While not all jurisdictions provide equivalent protection for users as for non-users, those extending the protection have recognized that "[t]here is no adequate rationale or theoretical explanation why non-users and non-consumers should be denied recovery against the manufacturer of a defective product. The reason for extending the strict liability doctrine to innocent bystanders is the desire to minimize risks of personal injury and/or property damage."<sup>106</sup> While the Restatement is written to protect "the user or consumer or . . . his property," the notes in the Restatement make clear that it takes no position on the matter of bystanders.<sup>107</sup> And despite the text of the Restatement, there is widespread agreement in tort law that bystanders are able to recover for injuries despite a lack of privity or relationship with the manufacturer.<sup>108</sup> This is in line with the public policy objectives of not only strict products liability, but also tort law generally.

#### V. SOME ISSUES WITH STRICT SERVICE LIABILITY

Will strict liability for services end innovation? Many have wondered if *any* regulation will destroy innovation. And though innovation is a common argument against interference in the marketplace, the gig economy may be, itself, a product of regulation.<sup>109</sup> Existing regulations created sizable room to reduce costs and improve services. Undoubtedly a shift to strict liability

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104. See Frederic N. Schneider, *Tort: Recovery by a Bystander in Strict Liability*, 8 TULSA L.J. 216 (1972) (noting at the time, a "contemporary trend toward consumer protection . . . [extending] strict tort liability to manufacturers and retailers for injuries caused by their defective products to non-user and non-consumer third parties").

105. *Id.*

106. *Darryl v. Ford Motor Co.*, 440 S.W.2d 630, 633 (Tex. 1969).

107. RESTATEMENT (SECOND) OF TORTS § 402A cmt. (1) (AM. L. INST. 1965).

108. Michael J. Toke, *Restatement (Third) of Torts and Design Defectiveness in American Products Liability Law*, 5 CORNELL J.L. & PUB. POL'Y 239, 256 (1996).

109. *Supra* Part I. Admittedly the claim is made that such innovation to avoid regulation is less innovation and more creative maneuvering.

will encourage more maneuvering by gig companies to shield themselves from liability; however, unlike independent contractor status – the two-edged sword that doubly benefits gig companies – maneuvering around strict liability would require risk prevention measures that advance general social welfare. Rather than innovating ways around existing regulations, that creativity could be utilized to produce safety solutions and improved risk mitigation. Cost cutting and optimization could still motivate innovation, but towards greater efficiency rather than reduced fees, fines, and judgements.

There are also lingering questions remaining about applicability. What about companies such as Expedia and other middlemen which merely connect consumers to producers, but not under the guise of offering a service? On the surface, this appears no different than the producer-retailer-consumer relationship that has developed over the past century. The point of strict liability is not to create new causes of action against providers or retailers, but to bring forward the entity that is best situated to address the risks of its products. In the service space, a cab company that advertises its service, brands its vehicles, and registers its drivers has taken the affirmative steps of qualifying a service to the market. These actions function as consent to be subject to the rules of the marketplace. A company like Uber might suggest that it is merely the “retailer” of ridesharing service providers.

But the independent drivers have not assented to the marketplace – they have assented to Uber. They do not acquiesce to any terms of market complicity by contracting with Uber – Uber is the entity engaging with the market. Uber manages the drivers. Gig services exist for handyman services. They advertise their offerings, require agreement of terms of service for engaging as a contractor, and manage the client relationship. These companies have assented to the marketplace. This can be differentiated from other services, such as Angie’s List, which provides recommendations, but neither facilitates client maintenance nor directs the actions of the service provider, or from services like Expedia, which intermediate the sale of service-products for known providers.

#### *A. The Problem with Differentiating Service Providers*

There is another class of companies within the gig economy which does not follow the clean groupings presented above.

Uber arguably controls the driver both with terms of service and also by directing the driver to passengers and to passengers' destinations – managed by Uber. But there are also true ridesharing companies – companies that setup carpools of strangers who desire to *share* a ride, not *provide* a ride. These services seek to pair two or more people who are heading in the same direction, say commuting to work, for greater efficiency. What then of the liability for these companies? To some extent, the companies direct the drivers and may even advertise and perform other activities which suggest they have assented to the requirements of the marketplace. Many of these types of services even receive kickbacks in the form of tip-sharing or user fees. Weighing heavily on the liability analysis are user perception, how the service is advertised, and how the service is managed. Where Uber markets a cheaper taxi, these ridesharing services advertise catching a ride with a stranger.<sup>110</sup> Control of the provider would also factor into the discussion. While Uber requires vehicles of certain model years and certain levels of cleanliness, among other terms for its drivers,<sup>111</sup> the average ridesharing apps do not.<sup>112</sup>

Like these carpools, other services connect strangers who are willing to volunteer, or sell, a service or offering, with those interested in the offer. Many times, these services operate as tailored forums and provide little in the way of planning, logistics, or actual pairing of the offeror with the recipient. Popular services of this type have varied widely in purpose, from services that connect empty sofas to shoestring budget travelers, to those that connect gardeners in order to share surplus or unique plant seeds. The principles of strict service liability need not extend to every service that brings people together. By focusing on companies that market services with implied warranties, the test for liability may evolve but need not interfere with these other ventures.

Finally, it was previously argued that extending existing principles of vicarious liability would simply push gig companies closer to the Amazon delivery model of moving the gig workers further away from the gig company, sheltering liability in independent LLCs. Wouldn't strict liability do the same? Rather than relying on existing principles of vicarious liability which

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110. *Carpool*, WAZE, <https://www.waze.com/carpool> (last visited Mar. 8, 2021).

111. *Driver Requirements*, *supra* note 44.

112. *Carpool*, *supra* note 110.

would require adapting long-established precedent of not just vicarious liability but also corporate liability, the standard for strict liability would look past the end-provider to the purveyor of the services and attach liability on the entity that *offered* the service to the marketplace, regardless of who provided it. This approach provides an adequate avenue for bringing claims against gig companies, regardless of the number of corporations between the company and the tort victim.

#### VI. CONCLUSION

Service providers are the new producers. In this information age, we no longer must engage with the companies we contract with for services. Instead, we engage with the worker sent to do the task. This change in the privity structure of the service economy has necessitated a continuation of the liability evolution that started when retailers first started disconnecting consumers from manufacturers. Extending strict liability to include those who market services provides a reasonable recourse to address the escalating harms that are caused by those service providers and creates a system that incentivizes desired behaviors.