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The Gig Is Rigged: How Gig Companies Exploit Private Law to Entrench Power

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The modern gig economy is built on a platform of exploitation — of regulatory gaps, liability shields, and, fundamentally, people. Most obviously, gig companies have dismantled traditional worker classifications, which disproportionately impacts vulnerable populations and has ripple effects in several areas of law. And, as the gig economy embraces artificial intelligence and automation, its negative social and economic impacts become even more pronounced.

But gig companies do not confine their strategies to one doctrinal area of law; they instead harness myriad liability-limiting tactics that reallocate risk

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and shirk liability across the board. Because of this, the gig economy is best viewed through the lens of law-and-political-economy scholarship, which strives to unearth the ways siloed legal systems, regulations, and policies work together to perpetuate power imbalance and structural inequality.

This Article synthesizes the approaches gig companies take to reallocate risk and limit liability in multiple private-law arenas — including employment, corporate, and tort law — while also identifying new risks of harms and highlighting structural inequality. As a primary example, it analyzes Amazon Flex and Amazon Delivery Service Partners, two programs that rely on a web of small businesses and gig drivers for making deliveries. More broadly, this Article considers how gig companies employ technology and digital surveillance to control workers and entrench power. Finally, through a law-and-political-economy framework, this Article argues that proposed solutions must look broadly at the totality of liability-limiting tools deployed across private law so that we can achieve greater fairness and break down structural inequality.

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INTRODUCTION

Analysis of the modern gig economy often focuses on platforms like Uber and Lyft and the ways they evade government regulation.¹ But other companies, like Amazon, are now adopting a gig-based model for some of their operations, broadly exploiting legal and regulatory structures to externalize costs and increase profits.² As the gig economy

¹ E.g., Andrea Bolton, *Regulating Ride-Share Apps: A Study on Tailored Reregulation Regarding Transportation Network Companies, Benefitting Both Consumers and Drivers*, 46 CUMB. L. REV. 101, 101 (2015); Deepa Das Acevedo, *Regulating Employment Relationships in the Sharing Economy*, 20 EMP. RTS. & EMP. POL’Y J. 1, 16 (2016); Rashmi Dyal-Chand, *Regulating Sharing: The Sharing Economy as an Alternative Capitalist System*, 90 TUL. L. REV. 241, 249 (2015); Sarah E. Light, *The Role of the Federal Government in Regulating the Sharing Economy*, in THE CAMBRIDGE HANDBOOK OF THE LAW OF THE SHARING ECONOMY 220, 223 (Nestor M. Davidson, Michèle Finck & John J. Infranca eds., 2018); Orly Lobel, *Coase and the Platform Economy*, in THE CAMBRIDGE HANDBOOK OF THE LAW OF THE SHARING ECONOMY, *supra*, at 67, 68-69 (recognizing the ways platforms innovate and improve upon traditional markets, while posing regulatory challenges); Agnieszka A. McPeak, *Sharing Tort Liability in the New Sharing Economy*, 49 CONN. L. REV. 171, 184 (2016) [hereinafter *Sharing Tort Liability*] (noting how Uber and Lyft skirt existing regulations, upend worker classification rules, and avoid tort and other liability through private law); Stephen R. Miller, *First Principles for Regulating the Sharing Economy*, 53 HARV. J. ON LEGIS. 147, 150-51 (2016) (articulating 10 principles to guide regulation of the sharing economy); Abbey Stemler, *The Myth of the Sharing Economy and Its Implications for Regulating Innovation*, 67 EMORY L.J. 197, 204 (2017).

² See Barak Atiram, *Market Dynamics in Corporate Tort Externalization: The Hidden Assumption of Corporate Social Efficiency*, 86 U. DET. MERCY L. REV. 347, 383 (2009) (“Facing the advantage of small-sized corporations in reducing production costs, large corporations will opt for outsourcing the bulk of activities embodying risks of tort

grows, a broader range of “gig companies”³ are prioritizing wealth maximization above all else at the expense of workers, third parties, and society as a whole.⁴

While the law permits companies to limit their costs and liability, gig companies use private law in new and expansive ways — to a degree that undermines the public good.⁵ New technology further allows many gig companies to surveille workers,⁶ externalize more costs,⁷ and automate some aspects of human labor.⁸ Amazon, for example, now uses gig

damages to small-sized corporations through contractual relations or through incorporating small-sized subsidiaries. In both cases, large corporations can enjoy tort externality advantages through their control over small-sized corporations, contractually or by their power as a parent company.”); *see, e.g.*, Pegah Moradi & Karen Levy, *The Future of Work in the Age of AI: Displacement or Risk-Shifting?*, in *THE OXFORD HANDBOOK OF ETHICS OF AI* 270, 278-81 (Markus D. Dubber, Frank Pasquale & Sunit Das eds., 2020) (technology enables companies to shift the risk and cost of excess labor or lost productivity to workers).

³ This Article uses the term “gig company” to refer to a firm or enterprise that relies on gig workers for furnishing some of the goods or services that make up a core part of its business. *See generally* *Dynamex Operations W., Inc. v. Superior Ct.*, 416 P.3d 1 (Cal. 2018) (establishing a three-part test for determining employment status, including whether “the worker [is] customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed for the hiring entity”). Platforms, which are technology-based companies that rely heavily on gig workers, are one form of gig company. *See* Orly Lobel, *The Law of the Platform*, 101 *MINN. L. REV.* 87, 99-101 (2016) (defining platforms). While many scholars focus exclusively on platforms or the “platform economy,” the terms “gig economy” and “gig companies” are used throughout in order to capture a broader range of commercial activity. *See id.* (discussing definitional challenges with platforms and listing regulatory corollaries for several platform-based startups).

⁴ Martha T. McCluskey, *Defining the Economic Pie, Not Dividing or Maximizing It*, 5 *CRITICAL ANALYSIS L.* 77, 91 (2018).

⁵ *See id.* at 85 (noting how some private markets need public regulation for fairness in order to prevent market asymmetry and promote the public good).

⁶ *E.g.*, Boone Ashworth, *Amazon Watches Its Workers and Waits for Them to Fail*, *WIRED* (June 4, 2022, 9:00 AM), <https://www.wired.com/story/amazon-worker-tracking-details-revealed/>.

⁷ *See* Moradi & Levy, *supra* note 2, at 277.

⁸ An influential study in 2013 predicted that artificial intelligence had displaced 700,000 jobs by 2007, and that close to 50% of other jobs were at high risk of automation in the decades to follow. Carl Benedikt Frey & Michael A. Osborne, *The Future of Employment: How Susceptible Are Jobs to Computerisation?*, 114 *TECH. FORECASTING & SOC. CHANGE* 254, 292 (2017). The study noted that some non-routine cognitive tasks are

workers to deliver packages through its “Amazon Flex” app⁹ and has created a network of small businesses it calls “Amazon Delivery Service Partners” to handle last-mile deliveries.¹⁰ Workers in these gig-based programs — who are more likely to be members of low-income and under-represented groups¹¹ — are treated as independent contractors who stand to bear increased liability as a result,¹² even though Amazon

subject to automation, including fraud detection, medical diagnosis, legal and financial services, and some roles within the finance sector. *Id.* at 258. Additionally, routine manual tasks are also being automated, such as manufacturing work and transportation. *Id.* Nonetheless, some tasks are not easily susceptible to automation because of the physical constraints of robotics, such as tasks requiring manual dexterity or navigation of tight or awkward physical spaces. *Id.* Other tasks not as easily susceptible to automation include creative intelligence, like originality and the fine arts, and social intelligence, like social perceptiveness, negotiation, persuasion, and caring for others. *Id.* at 258. For the purposes of risk allocation and tort liability, the shift to automation further complicates the legal and policy landscape for addressing risk in the gig economy.

⁹ *Why Flex*, AMAZON FLEX, <https://flex.amazon.com/why-flex> (last visited Dec. 21, 2023) [<https://perma.cc/L258-WYXA>].

¹⁰ *Delivery Service Partner and Logistics FAQ*, AMAZON LOGISTICS, <https://logistics.amazon.com/marketing/faq> (last visited Dec. 21, 2023) [<https://perma.cc/8YVC-DV4N>]. Last-mile delivery refers to the final stage of the supply chain, taking goods from a destination hub to the consumer. Steve Banker, *Last Mile Delivery, Visibility, and Vehicle Capacity*, FORBES (Feb. 26, 2023, 12:28 PM EST), <https://www.forbes.com/sites/stevebanker/2023/02/26/last-mile-delivery-visibility-and-vehicle-capacity/?sh=4dcc10577f3c> [<https://perma.cc/M38D-UY7A>].

¹¹ Monica Anderson, Colleen McClain, Michelle Faverio & Risa Gelles-Watnick, *The State of Gig Work in 2021*, PEW RSCH. CTR. (Dec. 8, 2021), <https://www.pewresearch.org/internet/2021/12/08/the-state-of-gig-work-in-2021/> [<https://perma.cc/PX2Q-QYX7>]. According to the Pew Research Center, 18-to-29-year-olds were the most likely demographic to have earned some money through a gig platform. *Id.* Only 12% of White adults have been gig workers, compared to 30% of Hispanic adults, 20% of Black adults, and 19% of Asian adults. *Id.* Further, the Amazon Delivery Service Partners Program, for example, expressly markets to veterans. *Amazon Is Helping Veterans Start Their Own Delivery Business*, VA NEWS (Apr. 27, 2020), <https://news.va.gov/74165/amazon-helping-veterans-start-delivery-businesses/> [<https://perma.cc/7BDW-EQ32>]; see also Isobel Asher Hamilton, *A Veteran Who Set Up Business Delivering Amazon Packages Says He Feels Trapped and Can't Shut Down Because of Potentially High Exit Fees for Returning Amazon's Branded Vans*, BUS. INSIDER (Mar. 8, 2022, 7:57 AM PST), <https://www.businessinsider.com/amazon-veteran-dsp-contractor-van-exit-fees-worries-report-2022-3> [<https://perma.cc/63RL-VQXN>].

¹² See Patricia Callahan, *Amazon Pushes for 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> [<https://perma.cc/ZZ3T-AMZP>]. An operations

exerts considerable control over the minutiae of their operations.¹³ At the same time, Amazon is developing drone and autonomous vehicle technology to automate deliveries, further challenging existing law and regulations.¹⁴ Risks of harm — from economic losses by small businesses¹⁵ to physical injury to workers and third parties¹⁶ — may be exacerbated by these increasingly pervasive uses of gig-based labor models.

manager for Amazon testified about the agreements delivery service partners have to sign, which include a shift of liability away from Amazon for “all loss or damage to personal property or bodily harm including death.” *Id.* These agreements include shifting attorneys’ fees, so that the delivery partner pays Amazon’s legal fees in lawsuits arising out of accidents. *Id.*

¹³ See *Delivery Service Partner and Logistics FAQ*, *supra* note 10 (describing the parameters of the program).

¹⁴ See Julien Chaisse & Nilanjan Banik, *The Gig Workers Facing the Regulator: The Good, the Bad, and the Future*, 31 *TRANSNAT’L L. & CONTEMP. PROBS.* 1, 30-31 (2021) (discussing how regulations will need to address the displacement of labor by technology); Jordan M. Cash, *Droning On and On: A Tort Approach to Regulating Hobbyist Drones*, 46 *U. MEM. L. REV.* 695, 712 (2016) (explaining the FAA’s policy statements about model airplanes and recreational drones); Alan Boyle, *Self-Driving Delivery Vehicles Plus Self-Flying Drones? Now There’s an Amazon Patent for That*, *GEEKWIRE* (Dec. 24, 2019, 12:10 PM), <https://www.geekwire.com/2019/self-driving-delivery-vehicles-plus-self-flying-drones-now-theres-amazon-patent/> [<https://perma.cc/XSF4-UQ6F>] (describing Amazon’s autonomous delivery innovations).

¹⁵ *E.g.*, Lauren Kaori Gurley, “I Had Nothing to My Name”: Amazon Delivery Companies Are Being Crushed by Debt, *VICE* (Mar. 7, 2022, 7:26 AM), <https://www.vice.com/en/article/wxdbnw/i-had-nothing-to-my-name-amazon-delivery-companies-are-being-crushed-by-debt> [<https://perma.cc/BA3P-R5B6>].

¹⁶ Spencer Soper, *Amazon Sued over Crashes by Drivers Rushing to Make Deliveries*, *BLOOMBERG NEWS* (Nov. 12, 2021, 2:00 AM PST), <https://www.bloomberg.com/news/features/2021-11-12/amazon-com-algorithms-blamed-in-crash-that-paralyzed-aspiring-doctor> [<https://perma.cc/QJK2-XJ24>]. In 2019, a *New Times* and *ProPublica* report found that, from 2015 to 2019, more than 60 accidents with serious injuries involved Amazon delivery contractors. *Id.* Ten of them resulted in death. *Id.* The report also noted that many accidents go unreported, as people never sue and public records don’t easily reflect the link to Amazon. Callahan, *supra* note 12; see also Gabriella Nunez, *Two Amazon Flex Drivers Sent to Same Home Shot While Making Delivery. Now They’re Suing the Company*, *ALIVE* (Mar. 24, 2022, 8:08 PM EDT), <https://www.11alive.com/article/news/local/georgia-men-sue-amazon-for-nearly-half-billion-dollars/85-cfoofe2c-e4c6-4915-8fb3-6778240b7664> [<https://perma.cc/EB43-QXUQ>] (describing physical injuries suffered by Amazon Flex drivers making deliveries).

In light of these developments, the impact of the gig economy is best understood through a law-and-political-economy lens. The scholarship on law and political economy posits that over-reliance on law-and-economics theory has caused greater inequality in the United States,¹⁷ and many of our legal institutions facilitate power imbalances that perpetuate social harm.¹⁸ Even purportedly neutral laws entrench economic power and promote principles of market supremacy, without effective counter-mechanisms to equalize the resultant ill effects on society.¹⁹ Law-and-political-economy scholarship thus provides a framework for achieving broader social good and breaking down structural inequality.²⁰ It is through this lens that the gig economy is best critiqued.²¹

This Article sheds light on the multi-tiered approach gig companies are employing to exploit laws, regulations, and, fundamentally, people. In particular, it examines how gig companies create new risks of harm, dodge regulations, circumvent traditional worker classifications, and exploit corporate, agency, and tort law. It presents a framework grounded in the law-and-political-economy literature for solving some of the problems created by the gig economy. Rather than seek a narrow solution within one specific area of law, this Article offers a holistic look at the myriad ways liability-limiting tools are being used and analyzes several proposals that support a more fair and equitable approach to gig-

¹⁷ Jedediah Britton-Purdy, David Singh Grewal, Amy Kapczynski & K. Sabeel Rahman, *Building A Law-and-Political-Economy Framework: Beyond the Twentieth-Century Synthesis*, 129 YALE L.J. 1784, 1790 (2020); see Frank Pasquale, *New Economic Analysis of Law: Beyond Technocracy and Market Design*, 5 CRITICAL ANALYSIS L. 1, 8-9 (2018) [hereinafter *New Economic Analysis of Law*] (noting the shortcomings of law and economics analysis in the context of the new, tech-enabled economy).

¹⁸ Britton-Purdy et al., *supra* note 17, at 1794. The authors note that, “[I]n fields denoted as about ‘the economy,’ the rise of law and economics centered efficiency and sidelined questions of distribution, power, and democracy.” In this way, law and economics took a “market supremacy” approach, which elevates efficiency and wealth maximization. *Id.* at 1796.

¹⁹ *Id.* at 1806-11.

²⁰ See *id.* at 1794.

²¹ See K. Sabeel Rahman, *The Shape of Things to Come: The On-Demand Economy and the Normative Stakes of Regulating 21st-Century Capitalism*, 7 EUR. J. RISK REGUL. 652, 652 (2016) [hereinafter *The Shape of Things to Come*] (noting structural inequality in the gig economy).

company liability. Through its holistic approach, this Article provides a framework for rebalancing risk and liability in a way that better promotes the public good and realigns the purpose, policy, and principles of fairness that underlie many areas of law, with a framework for planning for automation and the future of work in a technology-driven landscape.²²

With this goal in mind, this Article proceeds in five parts. In Part I, it situates the gig economy in a law-and-political-economy framework,²³ highlighting the ways in which legal and regulatory systems create structural inequality that permits gig companies to entrench power. Part II contains a case study: Amazon logistics.²⁴ In particular, Part II chronicles the evolution of global logistics to fast-and-free shipping models, with analysis of Amazon Flex²⁵ and the Amazon Delivery Service Partners program.²⁶ In Part III, it defines gig-economy harms, with a focus on worker professional identity and power,²⁷ risks of physical harm,²⁸ and the new dimensions of harm that emerge with technological innovation.²⁹

²² See Orly Lobel, *The Law of AI for Good*, 75 FLA. L. REV. 1073, 1073-74 (2023) (regulation of AI should not merely address risk but promote the positive aspects of AI).

²³ Britton-Purdy et al., *supra* note 17, at 1794; Rahman, *The Shape of Things to Come*, *supra* note 21, at 652 (noting structural inequality in the gig economy).

²⁴ See Dana M. Williams, *Power Accrues to the Powerful: Amazon's Market Share, Customer Surveillance, and Internet Dominance*, in *THE COST OF FREE SHIPPING: AMAZON IN THE GLOBAL ECONOMY* 35, 35-36 (Jake Alimahomed-Wilson & Ellen Reese eds., 2020).

²⁵ *Why Flex*, *supra* note 9.

²⁶ See *Delivery Service Partner and Logistics FAQ*, *supra* note 10 (describing the parameters of the program).

²⁷ See Gianpiero Petriglieri, Susan J. Ashford & Amy Wrzesniewski, *Agony and Ecstasy in the Gig Economy: Cultivating Holding Environments for Precarious and Personalized Work Identities*, 64 ADMIN. SCI. Q. 124, 133-35 (2019) (describing qualitative study of independent workers).

²⁸ See Callahan, *supra* note 12; Nunez, *supra* note 16 (describing physical injuries suffered by Amazon Flex drivers making deliveries); Soper, *supra* note 16.

²⁹ See Moradi & Levy, *supra* note 2, at 271-87; Frank Pasquale, *Tech Platforms and the Knowledge Problem*, 2 AM. AFFS., no. 2, Summer 2018, at 3, 3-4 [hereinafter *Tech Platforms*] (describing how technology has allowed firms to concentrate broad swaths of data and, in turn, market dominance); Gali Racabi, *Tech Drift & Powerlessness*, 24 YALE J.L. & TECH. 554, 607 (2022) (noting how tech drift — the idea that technology alters policy outcomes — “is used to create and herd politically vulnerable populations”); Brishen Rogers, *The*

In Part IV, this Article proposes ways of rethinking specific legal and regulatory structures to curtail the extremes of gig-company risk reallocation and liability avoidance. It describes five areas of private law gig companies exploit. First, it examines traditional employment, labor law, and worker classification principles, with analysis of two proposed reforms: recognition of hybrid worker classifications³⁰ and the unbundling of benefits.³¹ Second, it discusses agency law and the notion that a new “gig agency” category should be considered to better capture gig-economy relationships.³² Third, it critiques liability-limiting doctrines in corporate and business law and suggests the adoption of *liability-expanding* principles like corporate family liability,³³ generous

Law and Political Economy of Workplace Technological Change, 55 HARV. C.R.-C.L. L. REV. 531, 562 (2020) [hereinafter *The Law and Political Economy*].

³⁰ See Miriam A. Cherry & Antonio Aloisi, “Dependent Contractors” in the Gig Economy: A Comparative Approach, 66 AM. U. L. REV. 635, 647 (2017); Guy Davidov, *Who Is a Worker?*, 34 INDUS. L.J. 57, 61 (2005) [hereinafter *Who Is a Worker?*] (noting how “worker” is emerging as a third category in which control exists, but without the same degree of subordination that is present for employees); SETH D. HARRIS & ALAN B. KRUEGER, A PROPOSAL FOR MODERNIZING LABOR LAW FOR TWENTY-FIRST-CENTURY WORK: THE “INDEPENDENT WORKER” 2 (The Hamilton Project, Discussion Paper No. 2015-10, 2015), https://www.hamiltonproject.org/assets/files/modernizing_labor_laws_for_twenty_first_century_work_krueger_harris.pdf [<https://perma.cc/DS7C-66TK>]; see also Guy Davidov, *Reform in Small Steps: The Case of the Dependent Contractor*, in THE DAUNTING ENTERPRISE OF THE LAW: ESSAYS IN HONOUR OF HARRY W. ARTHURS 244, 246 (Simon Archer, Daniel Drache & Peer Zumbansen eds., 2017) [hereinafter *Reform in Small Steps*] (noting how Harry Arthurs proposed an intermediary category for worker classification as early as 1965); Jeremias Prassl & Martin Risak, *Uber, TaskRabbit, and Co.: Platforms as Employers? Rethinking the Legal Analysis of Crowdwork*, 37 COMP. LAB. L. & POL’Y J. 619, 620, 621 (2016) (proposing a more flexible analysis for defining “employees”).

³¹ See, e.g., Seth C. Oranburg, *Unbundling Employment: Flexible Benefits for the Gig Economy*, 11 DREXEL L. REV. 1, 50 (2018); Anthony Beilin, *Why We Need a Gig Economy that Works for Everyone*, WORLD ECON. F. (Nov. 21, 2022), <https://www.weforum.org/agenda/2022/11/gig-economy-that-works-for-everyone/> [<https://perma.cc/RJC8-KBKX>].

³² See McPeak, *Sharing Tort Liability*, *supra* note 1, at 202.

³³ See Carliss N. Chatman, *Corporate Family Matters*, 12 U.C. IRVINE L. REV. 1, 7 (2021); Robert B. Thompson, *Unpacking Limited Liability: Direct and Vicarious Liability of Corporate Participants for Torts of the Enterprise*, 47 VAND. L. REV. 1, 39 (1994) (discussing ways to impose corporate liability beyond veil-piercing).

use of veil-piercing,³⁴ and recognition of de facto franchises.³⁵ Fourth, it examines tort law and platform immunity and suggests “gig enterprise” liability as an appropriate approach to promote cost allocation and greater fairness in tort law.³⁶ It also suggests that platform immunity arguments should fail in typical gig-company tort cases.³⁷ Fifth, it notes how regulatory arbitrage³⁸ rounds out the arsenal of tools gig companies exploit to insulate themselves from accountability, with a proposal to adopt new theories of the corporation that promote better corporate cooperation with regulators.³⁹

Lastly, in Part V, this Article returns to a law-and-political economy framework to offer a holistic approach to dismantling structural inequality in the gig economy. Ultimately, it suggests that legal and regulatory solutions to gig-economy problems cannot focus on narrow silos of private law. Instead, reforms must address, holistically, the

³⁴ See Kiarie Mwaura, *Internalization of Costs to Corporate Groups: Part-Whole Relationships, Human Rights Norms and the Futility of the Corporate Veil*, 11 J. INT'L BUS. & L. 85, 104 (2014) (discussing instances in which corporate groups should be held liable).

³⁵ See Andrew Elmore, *Regulating Mobility Limitations in the Franchise Relationship as Dependency in the Joint Employment Doctrine*, 55 UC DAVIS L. REV. 1227, 1229 (2021); Robert W. Emerson, *Assessing Awuah v. Coverall North America, Inc.: The Franchisee as a Dependent Contractor*, 19 STAN. J.L., BUS. & FIN. 203, 210-12 (2014); Paul H. Rubin, *The Theory of the Firm and the Structure of the Franchise Contract*, 21 J.L. & ECON. 223, 224-25 (1978).

³⁶ See Gregory C. Keating, *Enterprise Liability*, in RESEARCH HANDBOOK ON CORPORATE LIABILITY 330, 331 (Martin Petrin & Christian A. Witting eds., 2023) [hereinafter *Enterprise Liability*]; Gregory C. Keating, *The Idea of Fairness in the Law of Enterprise Liability*, 95 MICH. L. REV. 1266, 1267-70 (1997) [hereinafter *The Idea of Fairness*]; Lewis A. Kornhauser, *An Economic Analysis of the Choice Between Enterprise and Personal Liability for Accidents*, 70 CALIF. L. REV. 1345, 1350 (1982).

³⁷ See Christopher Boyd, *One Click Liability: Section 230 and the Online Marketplace*, 70 DEPAUL L. REV. 597, 602-06 (2021) (discussing ways to allow some Section 230 immunity in the online marketplace context); Gregory M. Dickinson, *Rebooting Internet Immunity*, 89 GEO. WASH. L. REV. 347, 396 (2021); Benjamin Edelman & Abbey Stemler, *From the Digital to the Physical: Federal Limitations on Regulating Online Marketplaces*, 56 HARV. J. ON LEGIS. 141, 174 (2019); Agnieszka McPeak, *Platform Immunity Redefined*, 62 WM. & MARY L. REV. 1557, 1560 (2021) [hereinafter *Platform Immunity*].

³⁸ See Victor Fleischer, *Regulatory Arbitrage*, 89 TEX. L. REV. 227, 229 (2010) (defining regulatory arbitrage).

³⁹ See Eric C. Chaffee, *Collaboration Theory and Corporate Tax Avoidance*, 76 WASH. & LEE L. REV. 93, 147 (2019) (explaining his essentialist theory of the corporation as “collaboration theory”).

entire scope of gig-company tactics under private law in order to dismantle exploitative systems and promote greater fairness.

I. SITUATING THE GIG ECONOMY IN A LAW-AND-POLITICAL-ECONOMY FRAMEWORK

Before delving into the ways gig companies exploit private law to entrench power, it is important to first address how the gig economy marks an important shift in the nature of work — and to view this shift through a broader law-and-political-economy (“LPE”) lens.

As a preliminary matter, any scholarly work about the gig economy must grapple with some definitional challenges. The term “gig economy” can simply mean a labor market relying on short-term and freelance work, rather than one characterized by more permanent employment relationships.⁴⁰ In some instances, the gig economy is equated with the “sharing economy,” which involves peer-to-peer bartering in ways that historically were not monetized.⁴¹ But the modern gig economy marks a much larger paradigm shift, both in the ways people work but also in the ways consumers receive goods and services.⁴² Quite simply, employees — and the security that formal employment affords — are being replaced by independent workers who accumulate more risk and precarity as a result of their status. These independent workers, in exchange, purportedly enjoy autonomy and control, but modern gig companies have found ways to maintain control without the reciprocal risk and liability. This phenomenon has been made possible by technological advancements and the emergence of platforms, or web-based intermediaries, that facilitate large-scale, gig-

⁴⁰ See *Gig Economy*, OXFORD ENGLISH DICTIONARY, https://www.oed.com/dictionary/gig-economy_n?tl=true (last visited Jan. 5, 2024) [<https://perma.cc/UZ32-PSQB>] (defining gig economy as a noun for “[a] labour market characterized by a prevalence of short-term contracts and freelance work, as distinct from permanent, full-time employment”).

⁴¹ DAVID E. HARDESTY, *ELECTRONIC COMMERCE: TAXATION & PLANNING* ¶ 18.02, Westlaw (database updated Sept. 2023). While bartering and ad hoc labor have seemingly always existed, the gig economy, as a modern phenomenon, has exploded due to technology platforms. See Juan Diaz-Granados & Benedict Sheehy, *The Sharing Economy & the Platform Operator-User-Provider “Pup Model”: Analytical Legal Frameworks*, 31 *FORDHAM INTELL. PROP., MEDIA & ENT. L.J.* 997, 1014-15 (2021); Lobel, *supra* note 3, at 89.

⁴² See Lobel, *supra* note 3, at 90.

based transactions. These intermediaries are significant in their market power, their control over the transactions they facilitate, and the ways in which they have shifted norms towards greater reliance on gig workers.⁴³

Gig companies do more than just “disrupt” traditional worker classifications. Rather, a core feature of the gig economy is how gig companies exploit regulatory loopholes and use the full scope of the law to limit liability and reallocate risk.⁴⁴ From a law-and-economics standpoint, gig companies are masters at externalizing costs, and their positive attributes can be characterized as a product of market efficiencies.⁴⁵ In this way, many of their tactics are, in essence, fully “legal.” But gig companies are also evading countervailing principles that function as stopgaps or accountability mechanisms to protect workers and third parties.

In essence, the rise of the gig economy has allowed companies to exploit multiple facets of liability-limiting principles, without effective counter measures. And countervailing law and policy are needed to prevent economic asymmetry. Economists have noted that “without extensive public regulation for qualities of fairness, private markets are likely to induce private firms to ‘win’ by concentrating on one-sided gains that in the aggregate reduce overall well-being.”⁴⁶ This lopsided

⁴³ See Kenneth A. Bamberger & Orly Lobel, *Platform Market Power*, 32 BERKELEY TECH. L.J. 1051, 1053 (2017); V.B. Dubal, *The Drive to Precarity: A Political History of Work, Regulation, & Labor Advocacy in San Francisco’s Taxi & Uber Economies*, 38 BERKELEY J. EMP. & LAB. L. 73, 75-76 (2017) [hereinafter *The Drive to Precarity*]; Shelly Kreiczler-Levy, *The Duties of Online Marketplaces*, 58 SAN DIEGO L. REV. 269, 283-84 (2021). Uber and Lyft, two prominent ridesharing platforms, have emerged as primary exemplars of gig companies. See Dubal, *The Drive to Precarity*, *supra*, at 120. They have embraced a model that relies on gig workers to give rides to customers, all via their app that matches drivers to passengers. See *id.* The platforms control virtually all aspects of the transaction – from price to route driven – without a true employment relationship with the gig drivers. See McPeak, *Sharing Tort Liability*, *supra* note 1, at 182. Uber and Lyft are also notable for how they skirted existing regulations, upended worker classification rules, and avoided tort and other liability through private law. *Id.* at 174-75.

⁴⁴ See McPeak, *Sharing Tort Liability*, *supra* note 1, at 174-75.

⁴⁵ See Atiram, *supra* note 2.

⁴⁶ McCluskey, *supra* note 4, at 85 (referencing two Nobel Prize in Economics winners, Robert J. Shiller and George Akerlof).

legal and regulatory landscape, when aggregated, has reached a crescendo of unfairness to gig workers and third parties.

Many of the specific legal tools gig companies exploit fall within narrow siloes of private law. For example, gig companies carve themselves out of existing transportation regulations; they avoid vicarious liability in tort law through their worker classifications; they circumvent agency or franchisor/franchisee relationships; they use corporate law to avoid myriad forms of costs and liabilities.⁴⁷ It is thus tempting to analyze problems in the gig economy as wholly ones sounding in regulations, or in employment law, or in tort, or in corporate law. But a narrow view of gig harms misses the big picture: it is the totality of liability-limiting and risk-shifting tools, working in tandem, that allow the gig economy to evade accountability — to the detriment of society as a whole. And advances in technology, particularly artificial intelligence (“AI”) and private surveillance,⁴⁸ will only further the gap between gig companies, gig workers, and the public.

Rather than constraining critiques of the gig economy to private law siloes, the gig economy instead should be analyzed holistically, to unearth the ways it promotes inequality and invites more comprehensive legal and regulatory reform. To further this analysis, an LPE framework is most instructive. According to LPE scholars, decades of neoliberal policy and reliance on law-and-economics theory have created a backdrop of inequality in the United States.⁴⁹ This inequality permeates all areas of law, regulation, and politics — in an insidious but invisible way.⁵⁰ The ideals of market efficiency and wealth maximization have obfuscated the social harm and power imbalance that now defines many of our legal institutions.⁵¹ In other words, deference to the market

⁴⁷ See generally *infra* Part IV (discussing the denoted legal tools that gig companies exploit).

⁴⁸ See *infra* Part III.C.

⁴⁹ See Britton-Purdy et al., *supra* note 17, at 1790; see Pasquale, *New Economic Analysis of Law*, *supra* note 17, at 14 (noting the shortcomings of law and economics analysis in the context of the new, tech-enabled economy).

⁵⁰ See Britton-Purdy et al., *supra* note 17, at 1791 (noting how the Twentieth-Century Synthesis “makes up the air we breathe”).

⁵¹ *Id.* at 1794. The authors note that, “[I]n fields denoted as about ‘the economy,’ the rise of law and economics centered efficiency and sidelined questions of distribution,

has allowed a system of inequality to persist, and some legal scholarship has failed to fully address this backdrop and its influence, particularly in private law spheres like employment law, corporate law, and torts.⁵²

Even where law and policy purport to be neutral, they entrench economic power and promote the elevation of wealth as an ideal.⁵³ And, according to LPE scholars, private, economic power “is readily translated into influence over public decisions.”⁵⁴ Despite claims that the market is neutral, the ideals of market supremacy and wealth maximization are moralistic and, ultimately, outcome-determinative: they dictate social order, distributive justice, and free choice.⁵⁵ This market-supremacy approach has resulted in an ever-widening wealth gap, environmental crises, and economic, racial, and gender inequality.⁵⁶ And countervailing mechanisms to protect those left behind in this system have been rendered inadequate. The tax code is failing to redistribute wealth and effect social protection programs;⁵⁷ constitutional law lacks the reach to equalize private law imbalance;⁵⁸ and unions have lost their central role in protecting private-sector workers and influencing policy.⁵⁹ Taken together, it becomes clear that a new framework is needed to rebalance market concerns against the need for safeguards that promote a broader social good.

A new LPE framework brings to light the ways law and policy allocate wealth, power, and resources.⁶⁰ It shifts the predominant analytical approach away from a narrow view of market ideals, and instead studies the interplay of various systems to unearth the ways society — and

power, and democracy.” *Id.* In this way, law and economics took a “market supremacy” approach, which elevates efficiency and wealth maximization. *Id.* at 1796.

⁵² See *id.* at 1805.

⁵³ *Id.* at 1793, 1806.

⁵⁴ *Id.* at 1810-11.

⁵⁵ *Id.* at 1813-14.

⁵⁶ See *id.* at 1806-11.

⁵⁷ See *id.* at 1816.

⁵⁸ See *id.* at 1817.

⁵⁹ See *id.* at 1816; see also Rahman, *The Shape of Things to Come*, *supra* note 21, at 654 (noting how the sharing economy will require regulatory innovation, including by expanding worker power).

⁶⁰ Britton-Purdy et al., *supra* note 17, at 1818-20.

social harm — is constructed by our legal system.⁶¹ As such, the LPE framework examines how private power in markets has a huge influence on people and society — and how this influence currently inures to the detriment of most Americans. By using this LPE framework to analyze “private” law subjects, proposals for law reform can better address the full scope in which systems work together to facilitate and perpetuate social harm. It is only within this framework that the true impact of the gig economy can be seen and remedied.

Before applying an LPE framework to the gig economy, this Article presents an instructive case study: Amazon’s new gig-based logistics systems. Because Amazon is one of the largest companies in the world, its evolution into a global logistics giant is socially and economically significant — and only possible through Amazon’s strategic reliance on gig workers and its exploitation of legal and regulatory systems to minimize its costs and liabilities. In this next Part, Amazon’s expansion into shipping and delivery logistics — and the growth of Prime shipping in particular — is explained, with emphasis on the gig-based structures it is using to make its economic growth possible.

II. CASE STUDY: AMAZON SHIPPING AND LOGISTICS

This Part will present a case study about Amazon’s new reliance on third-party drivers and delivery partners for its logistics operations. As this case study shows, Amazon has shifted to a gig-based model, providing a useful example of how gig companies exploit liability shields, often to the detriment of workers, customers, and the public. First, this Part examines global logistics in the last few decades, leading up to Amazon’s dominance with its fast-and-free delivery model. Second, it discusses Amazon’s newest gig-based system for shipping and logistics: Amazon Flex and Amazon Delivery Service Partners. Lastly, it discusses Amazon’s future of automation and artificial intelligence.

⁶¹ *Id.* at 1821.

A. *Fast and Free Shipping*

Amazon originated as an internet bookstore in the late 1990s, with Jeff Bezos as its founder.⁶² Its online marketplace expanded to include other products, and Amazon not only sells name-brand products in virtually all categories of goods, but it also allows third-party sellers to post and sell content and creates its own line of products under monikers like Amazon Basics.⁶³ As an e-commerce giant, Amazon relies on sophisticated technology to develop and evolve, but remains tied to physical shipping and logistics needs. It is Amazon's new logistics model that serves as an important example of the modern gig economy trend.

In 2014, Amazon sought to create a network of its own delivery drivers, in an effort to rely less on the United States Postal Service or private companies like UPS. This initiative grew out of the 2013 holiday season, during which UPS, in particular, became overwhelmed by the number of Amazon packages it needed to deliver in the holiday rush.⁶⁴ It became clear that Amazon's growth and success was being hindered by a large-scale logistics puzzle and the real-world challenges of shipping. Recognizing how fundamental solving this logistics puzzle is for its enterprise, Amazon is evolving its business model to ensure fast-and-free shipping as the industry norm. But Amazon's logistics innovations build on (1) several decades of major shifts in shipping logistics and infrastructure and (2) the rise of Amazon Prime.

First, global logistics saw explosive growth in the 1980's as international trade created an uptick of goods moving from abroad, particularly Asia, to the United States.⁶⁵ At this time, the ocean shipping industry was shifting to a system of containerization, under which

⁶² BRAD STONE, *AMAZON UNBOUND: JEFF BEZOS AND THE INVENTION OF A GLOBAL EMPIRE* 5 (2021).

⁶³ *Amazon Basics, About Us*, AMAZON, https://www.amazon.com/stores/page/4Co8B645-DBA7-4457-AoCo-C75715BDACC5?ingress=0&visitId=a3dffed1-131e-441a-95db-364949doae-f7&ref_=pd_sl_9o18pbuwg8_b (last visited Dec. 19, 2023) [<https://perma.cc/D2UY-WWBE>].

⁶⁴ Mary Hanbury, *New Investigation Finds That 10 People Were Killed in Amazon-Related Delivery Accidents Since 2015, and The Retail Giant Is Able to Dodge Legal Responsibility Since the Drivers Aren't Considered Employees*, BUS. INSIDER (Sept. 6, 2019, 6:19 AM PDT), <https://www.businessinsider.com/amazon-not-legally-responsible-for-delivery-related-deaths-contract-drivers-2019-9> [<https://perma.cc/4UBW-KT4U>].

⁶⁵ Kim Moody, *Amazon: Context, Structure and Vulnerability*, in *THE COST OF FREE SHIPPING*, *supra* note 24, at 21, 24.

standard-sized containers were being used for sea shipments.⁶⁶ This shift, coupled with new laws in the United States,⁶⁷ triggered massive growth in international shipping.⁶⁸ In the United States, companies like Walmart also led the way with innovative logistics systems that more easily moved goods around the country.⁶⁹ Walmart built a massive logistics network that relied on consumer data, distribution centers, and other tools that created new ways to stock and move goods.⁷⁰ Digital scanning codes on all products helped make it easier to track goods.⁷¹ Supply chain innovations like lean manufacturing and just-in-time delivery — two concepts that hinge on producing goods quickly in response to consumer demand, rather than storing vast inventories⁷² — became more common.⁷³ In addition to opening retail stores across the country, Walmart also opened Supercenters, which combine its retail store of general merchandise with other goods, like groceries and

⁶⁶ Amir Khafagy, *The Hidden Costs of Containerization*, THE AM. PROSPECT, (Feb. 2, 2022), <https://prospect.org/economy/hidden-costs-of-containerization/> [<https://perma.cc/4CL3-WPUF>]. The process of moving to containerization required major upgrades to infrastructure, such as expanding ports, building trucking facilities, and reconfiguring other spaces and machinery to meet the new container system. *Id.* These changes not only required physical and infrastructure shifts but also impacted the environment, port communities, and labor markets. *Id.*

⁶⁷ Martha L. Cecil, *The Shipping Act of 1984: Bringing the United States in Harmony with International Shipping Practices*, 3 DICK. J. INT'L L. 197, 197 (1985). The Shipping Act of 1984, for example, sought to bring the United States in line with international standards for shipping and paved the way for the standardization and consolidation of the global shipping industry. *Id.*

⁶⁸ Khafagy, *supra* note 66.

⁶⁹ Moody, *supra* note 65, at 24.

⁷⁰ *Id.*

⁷¹ Alan Dranow, *6 Ways Walmart Made Its Mark in Retail History*, WALMART CORP. (Nov. 5, 2014), <https://corporate.walmart.com/news/2014/11/05/6-ways-walmart-made-its-mark-in-retail-history> [<https://perma.cc/N78V-AG7B>]. According to Walmart, the company made universal product codes standards in 1983 as a new way to better manage inventory. *Id.*

⁷² Scott Thompson, *Differences Between JIT & Lean Manufacturing*, CHRON (Jan. 25, 2019), <https://smallbusiness.chron.com/differences-between-jit-lean-manufacturing-75614.html> [<https://perma.cc/SXL4-H5A9>].

⁷³ Moody, *supra* note 65, at 24.

pharmacies.⁷⁴ In sum, the 1980s saw profound shifts in international shipping that, when coupled with Walmart's domestic logistics innovations, changed the face of retail.

Second, it is important to analyze the significance of Amazon Prime. When Amazon started as an online bookstore in 1995, it immediately coined itself "Earth's biggest bookstore."⁷⁵ Although founder Jeff Bezos drove some packages to the post office himself in the early days of its founding, by the end of the 1990s, Amazon shipped over 20 million items.⁷⁶ By 2000, it had expanded its inventory to include music CDs, toys, tools, electronics, and other goods.⁷⁷ In 2005, Amazon launched Amazon Prime, a subscription-based service that includes fast and free delivery.⁷⁸ While Prime has morphed over time to add services like video and music streaming, its core purpose is giving customers free and easy access to two-day, overnight, or even same day delivery.⁷⁹

With Prime shipping, Amazon continues to shift consumer expectation towards faster delivery of online purchases for little or no cost. According to one 2022 study, fifty-five percent of online shoppers subscribe to Amazon Prime, nearly double that of other major online

⁷⁴ *From Humble Beginnings. To Redefining Retail*, WALMART CORP., <https://corporate.walmart.com/about/history> (last visited Dec. 19, 2023) [<https://perma.cc/WYF3-BSM3>].

⁷⁵ *Amazon Opens for Business*, HISTORY, <https://www.history.com/this-day-in-history/amazon-opens-for-business#:~:text=On%20July%2016%2C%201995%2C%20Amazon,states%20and%20to%2045%20countries> (last updated July 14, 2021) [<https://perma.cc/8K2W-P6XW>].

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *When Did Amazon Prime Start?*, ENVISION HORIZONS (June 27, 2022), <https://www.envisionhorizons.com/when-did-amazon-prime-start#:~:text=Amazon%20Prime%20was%20introduced%20in,policies%2C%20customer%20service%2C%20etc> [<https://perma.cc/B6RZ-SUS2>].

⁷⁹ *See Prime Membership Benefits*, AMAZON, <https://www.amazon.com/b/?node=23945845011> (last visited Dec. 19, 2023) [<https://perma.cc/UZ37-24SC>]. Amazon Prime delivery benefits include Free two-day, one-day, or same-day shipping on millions of items. For items not available for the fastest delivery options, free shipping nonetheless remains the norm. *See id.*; *see also When Did Amazon Prime Start?*, *supra* note 78 (listing Prime benefits over time).

retailers' subscription shipping services.⁸⁰ While many online retailers take five or more business days to provide free delivery,⁸¹ Amazon's shipping ethos is "faster is almost always better."⁸² In this vein, Amazon provides zip-code based delivery dates rather than vague estimates of business days until arrival, detailed tracking features throughout the package's journey, and — most significantly — two-day delivery as the norm.⁸³ Consumers, in turn, are becoming less tolerant of "free and slow" shipping from online retailers, and instead are expecting Amazon-esque speed for their purchases.⁸⁴ The result in the marketplace is that other retailers feel pressure to either subsidize expedited shipping costs, sell or ship their goods through Amazon, or build an Amazon-style network of their own to compete.⁸⁵ Indeed, competitors like Target, Walmart, Overstock.com, and Google Express are shifting to two-day delivery models.⁸⁶ Smaller retailers, who lack the infrastructure to build competing shipping networks or the capital to subsidize shipping costs, are turning to tech startups that vow to aggregate small-business transactions to meet fixed-rate nationwide fast shipping thresholds.⁸⁷

⁸⁰ X DELIVERY, THE STATE OF SHIPPING REPORT 5 (2022), <https://www.scu.edu/media/leavy-school-of-business/rmi/2022-Shipping-Report-Compressed2.pdf> [<https://perma.cc/RRH2-PUT2>].

⁸¹ *Id.* at 8.

⁸² Letter from Andy Jassy, President & CEO, Amazon.com, Inc., to Shareholders, Amazon.com, Inc. (Apr. 14, 2022), <https://www.aboutamazon.com/news/company-news/2021-letter-to-shareholders> [<https://perma.cc/BJV7-PZ29>].

⁸³ See Moody, *supra* note 65, at 26.

⁸⁴ See X DELIVERY, *supra* note 80, at 8.

⁸⁵ See *id.* at 16 (noting how other companies who continue to operate under a "free & slow" shipping model will require brands to "become submissive to Amazon" or develop their own "roadmap to provide faster, economical shipping to their customers"). Amazon has long provided ways for brands and sellers to use "Fulfillment by Amazon" as a way to tap into Amazon's distribution and shipping networks. Brad Stone, *Sold on eBay, Shipped by Amazon.com*, N.Y. TIMES (Apr. 27, 2007), <https://www.nytimes.com/2007/04/27/technology/27amazon.html> [<https://perma.cc/8RJX-25MZ>].

⁸⁶ Christopher Mims, *The Prime Effect: How Amazon's Two-Day Shipping Is Disrupting Retail*, WALL ST. J. (Sept. 20, 2018, 9:00 AM EST), <https://www.wsj.com/articles/the-prime-effect-how-amazons-2-day-shipping-is-disrupting-retail-1537448425> [<https://perma.cc/G58A-4TMT>].

⁸⁷ *Id.*

The result is that all retailers, large and small, are heavily impacted by Amazon Prime's effect on the marketplace.

The cost and impact of Amazon's quick delivery is profound, however. To achieve a nationwide fast delivery system, Amazon has had to invest in a network of fulfillment and sortation centers.⁸⁸ This network relies on massive brick-and-mortar facilities scattered across the country, algorithmic logistics management, a large workforce, and — most importantly — a shipping network that reaches the end consumer quickly.⁸⁹ It is this vast shipping network that spawned Amazon's reliance on new delivery methods and gig-based business models.

B. Amazon's New Delivery Models

Amazon's market dominance in e-commerce hinges on its network of logistics and delivery systems, a network that relies both on technological innovations and traditional transportation and logistics infrastructure. One of the hardest aspects of shipping packages quickly is the final stage of the shipping process, or the "last mile."⁹⁰ Traditionally, the most complicated and expensive aspect of logistics services is the final segment of delivery, which typically includes transport from a local facility to a home or business location.⁹¹ It is the last-mile problem that led Amazon to develop two gig-based structures for its shipping needs: (1) Amazon Flex and (2) Amazon Delivery Service Partners ("DSP"). Both systems depart from traditional logistics arrangements between companies and drivers and instead rely on gig workers.

First, Amazon Flex is a ridesharing-type model that allows ordinary people to perform ad hoc deliveries. Drivers download an app, register as a driver, and request a delivery block.⁹² The Flex system touts driver flexibility: "Do it your way. Set your own hours, listen to your own tunes,

⁸⁸ *See id.*

⁸⁹ *Id.*

⁹⁰ Last-mile delivery refers to the final stage of the supply chain, taking goods from a destination hub to the consumer. Banker, *supra* note 10. According to some studies, only two percent of companies use gig-based services for last-mile logistics due to the need to maintain control in this important, final step of the delivery process. *Id.*

⁹¹ *Id.*

⁹² *Why Flex*, *supra* note 9.

and get paid.”⁹³ While earnings vary, Amazon’s website claims most drivers earn eighteen to twenty-five dollars an hour, and additional rewards can be earned like cash back, preferred scheduling, and discounts.⁹⁴ Amazon Flex tries to claim it is better than apps like Uber and Lyft because it saves drivers from having a passenger in their car and allows them to stay active by hopping out of the car to deliver packages (“It’s a driving gig that keeps you on your feet.”).⁹⁵ Amazon Flex drivers do not need a commercial driver’s license. Instead, drivers need to have a valid U.S. driver’s license, a mid- or large-sized vehicle,⁹⁶ a smartphone, and personal auto insurance.⁹⁷

Flex drivers are also not trained by Amazon, but the app includes some safety features. Amazon offers a learning portal with safety videos and articles, an Amazon Emergency Helpline, and a help button in the app that can connect to 911 for other emergency services.⁹⁸ The app also has a pet alert feature, to help alert drivers when a delivery destination has a dog, and optimized maps, which provide speed limit, road closure, and traffic data.⁹⁹ A customer chat function allows for communicating directly with package recipients.¹⁰⁰ Amazon has an anti-harassment policy and a Support feature allows for reporting safety concerns.¹⁰¹ Additionally, Amazon has a zero-tolerance policy for drivers being under

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *See id.*

⁹⁶ *FAQ, AMAZON FLEX*, <https://flex.amazon.com/faq> (last visited Dec. 20, 2023) [<https://perma.cc/HY5W-XHD6>] (“In order to deliver with Amazon Flex, you’ll need to use a 4-door, mid-sized sedan or larger vehicle, such as a truck with a covered bed, SUV, or a van that can safely and reliably transport Amazon orders to customers. Smaller cars and trucks with open beds do not qualify.”).

⁹⁷ *Id.* The insurance only applies to active deliveries in the delivery block and does not apply when a passenger is in the car or someone other than the delivery partner is driving. *Id.* Amazon provides an additional Amazon Commercial Auto Insurance Policy to Flex drivers at no cost in most states, which includes auto liability coverage, uninsured/under-insured motorist coverage, and contingent comprehensive and collision coverage. *Id.*

⁹⁸ *Safety, AMAZON FLEX*, <https://flex.amazon.com/safety> (last visited Dec. 20, 2023) [<https://perma.cc/S2JU-7UB5>].

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

the influence of drugs or alcohol.¹⁰² Penalties include suspension from the Amazon Flex app and, if impairment is confirmed, immediate termination of the Flex contract.¹⁰³ Otherwise, Amazon touts driver flexibility, control, and freedom as key perks of its Flex program.¹⁰⁴ While the Amazon Flex program may shrink over time,¹⁰⁵ the current Flex model demonstrates the gig-based approach Amazon is embracing in its last-mile delivery system.

Second, Amazon has created a network of franchise-esque shipping partners to handle its last-mile deliveries on a larger scale. This new gig-based structure is the DSP Program.¹⁰⁶ A DSP is a full-time package-delivery business with forty to one hundred employees and a fleet of twenty to forty vans.¹⁰⁷ Anyone can apply to own and manage a DSP, but Amazon makes clear this is a fulltime position, not merely passive investment or part-time employment.¹⁰⁸ Rather, the program is marketed to “strong leaders who are passionate about starting their own business and developing high-performing, safety-focused teams” and “customer-obsessed, hands-on leader[s] who thrive[] in a high-speed, ever-changing environment.”¹⁰⁹ DSPs are expected to work almost year-

¹⁰² *Amazon Flex Zero Tolerance Policy*, AMAZON FLEX, https://m.media-amazon.com/images/G/01/FlexComm/Web/AmazonFlexZeroTolerancePolicy_CB1198675309_.pdf (last visited Dec. 20, 2023) [<https://perma.cc/K2HF-4N4W>].

¹⁰³ *Id.*

¹⁰⁴ See *Why Flex*, *supra* note 9.

¹⁰⁵ It is hard to say whether Amazon will continue to invest in and heavily rely on Flex drivers, as some reports note that Flex opportunities have been dwindling in some markets, with speculation that Amazon is instead relying more on its Delivery Service Partners. Hayley Peterson, “*Flex is Dead*”: Drivers Claim Amazon Flex Delivery Jobs Are Disappearing, BUS. INSIDER (Jan. 25, 2019, 10:16 AM PST), <https://www.businessinsider.com/amazon-drivers-say-flex-delivery-jobs-are-disappearing-2019-1> [<https://perma.cc/MH4Q-KGVW>].

¹⁰⁶ *Delivery Service Partner and Logistics FAQ*, *supra* note 10; see Hanbury, *supra* note 64.

¹⁰⁷ *Delivery Service Partner and Logistics FAQ*, *supra* note 10.

¹⁰⁸ *Your Opportunity*, AMAZON LOGISTICS, <https://logistics.amazon.com/marketing/opportunity> (last visited Dec. 19, 2023) [<https://perma.cc/A4DQ-TX8V>].

¹⁰⁹ AMAZON, DELIVERY SERVICE PARTNER BROCHURE 2 (2022), https://m.media-amazon.com/images/G/01/DSP2022/assets/desktop/DSP_Brochure_English_V4.pdf [<https://perma.cc/E33U-7JZA>] [hereinafter DELIVERY SERVICE PARTNER BROCHURE].

round delivering packages exclusively for Amazon, in Amazon-branded vans.¹¹⁰

DSPs are given extensive support from Amazon, both in the formation and operation of the DSP. Amazon provides free or discounted business services, such as two weeks of startup training,¹¹¹ which includes a week of virtual classroom instruction and a week of hands-on practice in a delivery station working with an existing owner.¹¹² Amazon also supplies the technology the DSP will need and provides other services like roadside assistance to drivers, an operations manual, and even a business coach.¹¹³ The degree of Amazon's control over the DSP, however, is significant. The program gives Amazon powers to audit DSPs,¹¹⁴ designate routes, assign deliveries, and inspect equipment, to name a few — with rules that Amazon unilaterally sets in its exclusive contracts.¹¹⁵ As part of the suite of services Amazon touts for its DSPs, Amazon offers DSPs “exclusive deals” on some of these startup costs when using Amazon's programs for fuel, vehicle maintenance, insurance, uniforms, hardware, and even employee benefits.¹¹⁶ In this way, Amazon has a comprehensive bundle of startup tools and deals to launch small businesses — businesses that sport Amazon logos and

¹¹⁰ *Id.*

¹¹¹ Training focuses on both the details of running a business and the specific aspects of Amazon's culture and practices. *See id.* at 6. In particular, owners are trained on best practices in hiring and training and advice on running a delivery business, but also learn about “Amazon's customer-obsessed culture.” *Id.*

¹¹² *Id.*

¹¹³ *Id.* at 3.

¹¹⁴ *See* Gurley, *supra* note 15 (describing Amazon's annual audits, which look at payroll, insurance claims, drug testing, van inspections, and other data).

¹¹⁵ *Id.* (describing Amazon's control of DSPs according to owners who suffered financial losses from the program); *see also* Avery Hartmans & Kate Taylor, *Amazon Drivers Describe the Paranoia of Working Under the Watchful Eyes of New Truck Cameras That Monitor Them Constantly and Fire Off “Rage-Inducing” Alerts if They Make a Wrong Move*, BUS. INSIDER (Apr. 12, 2021 11:50 AM PDT), <https://www.businessinsider.com/amazon-delivery-cameras-tech-track-drivers-bezos-2021-4> [<https://perma.cc/A26D-2L3G>] (describing the Driveri system that creates comprehensive records and recordings of driver activity).

¹¹⁶ DELIVERY SERVICE PARTNER BROCHURE, *supra* note 109, at 8.

work exclusively for Amazon under precise terms, instructions, and protocols.¹¹⁷

It is the DSP, not Amazon, that is responsible for setting up the business, hiring drivers and helpers, and, ultimately, delivering packages year-round.¹¹⁸ The costs DSP owners incur include startup costs, like business formation, recruiting costs, like advertising positions and screening candidates, and professional services costs, like legal and accounting fees.¹¹⁹ The DSP also incurs ongoing operation costs, such as wages, insurance, vehicle leases, maintenance, and insurance.¹²⁰ For revenue, Amazon pays a fixed monthly amount to the DSP based on the number of vans it is operating, a route rate based on the length of the route, and a per-package rate based on successful deliveries.¹²¹ Net revenue potential is estimated at \$75,000 to \$300,000 annually.¹²² But some reports have emerged about the crippling debt and losses entrepreneurs faced after joining the Amazon DSP program.¹²³ At least two delivery partners have filed suit, with a separate class action lawsuit being filed in April 2022 on behalf of all 2,500 DSPs in the United States.¹²⁴ These lawsuits assert claims sounding in fraud,

¹¹⁷ See *id.* at 3-4.

¹¹⁸ *Id.* at 3-5. DSP program materials detail the life of a DSP owner, which includes setting up routes, holding a morning kickoff meeting with drivers and helpers, checking equipment, working with Amazon support, managing business performance, troubleshooting issues with undelivered packages, and arranging for vehicle maintenance. *Id.* at 5.

¹¹⁹ *Id.* at 7.

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.* at 2.

¹²³ See Gurley, *supra* note 15. An owner of a Boston-area DSP recounts receiving a call from Amazon informing him his DSP contract was being terminated. *Id.* The owner, whose company delivered three million packages the prior year, effectively had two weeks to wind down his business and lay off over 80 employees. *Id.* Other DSP owners incurred crippling debt to start their businesses, were left with costly expenses like van repairs, and faced precarious financial positions due to their heavy reliance on Amazon. *Id.* For many, the enterprise yielded far less profit than Amazon represented in its marketing materials. *Id.*

¹²⁴ Lauren Rosenblatt, *Delivery Company Files Class Action on Behalf of 2,500 Amazon-Branded Partners*, SEATTLE TIMES (Apr. 8, 2022, 5:35 PM), <https://www.seattletimes.com/business/amazon/delivery-company-files-class-action-on-behalf-of-2500-amazon-branded-partners/> [https://perma.cc/6MR5-9KB4]. The class action lawsuit includes claims based

misrepresentation, good faith and fair dealing breaches, and violation of consumer protection and franchise law.¹²⁵

The Amazon DSP program has enabled Amazon to reap the double benefit of exerting almost exclusive control over the last-mile delivery process, while labeling drivers as independent contractors — not subsidiaries, franchisees, or employees. Even though DSPs are deemed to be ad hoc operators who act as delivery companies for Amazon packages, these DSPs are nonetheless beholden to Amazon for virtually all of their business.¹²⁶ At the same time, allegations of unrealistic expectations and impossible standards are emerging, often at the risk of safety.¹²⁷ Quite simply, owners, drivers, and third parties face harm while Amazon insulates itself from the costs.¹²⁸

With the rise of Amazon Flex and DSPs, Amazon has built a new gig-based logistics system that goes to great lengths to externalize costs and limit liability. In the future, however, Amazon seeks to reduce its reliance on human drivers altogether with the rise of automation and AI.

on fraud, fraudulent inducement, breach of implied covenant of good faith and fair dealing, and violations of state law including Washington State's Consumer Protection and Franchise Investment Protection Acts. Complaint at 3, *Fli-Lo Falcon, LLC v. Amazon.com, Inc.*, No. 22-cv-00441, 2022 WL 1026980 (W.D. Wash. Apr. 5, 2022).

¹²⁵ In the Oregon lawsuit, the plaintiffs noted how Amazon controlled the routes, number of packages, and ins and outs of deliveries. See Lauren Kaori Gurley, *Amazon "Delivery Partners" Hit Amazon with \$15 Million Lawsuit*, VICE, (Oct. 27, 2021, 5:00 AM), <https://www.vice.com/en/article/k7wemv/amazon-delivery-partners-hit-amazon-with-dollar150-million-lawsuit> [<https://perma.cc/UU4F-3F9J>]. But the allegations showed Amazon's hand on even the minutiae of the DSP's operations, such as "control over the hiring and firing [sic] drivers, drivers' appearances, including fingernails, clothing, body odor, and hair." *Id.*

¹²⁶ See Callahan, *supra* note 12.

¹²⁷ See *id.*

¹²⁸ See *id.* An operations manager for Amazon testified about the agreements delivery service partners have to sign, which include a shift of liability away from Amazon for "all loss or damage to personal property or bodily harm including death." *Id.* These agreements include shifting attorneys' fees, so that the delivery partner pays Amazon's legal fees in lawsuits arising out of accidents. *Id.* ("In New Jersey, when a contractor's insurer failed to pay Amazon's legal bills in a suit brought by a physician injured in a crash, Amazon sued to force the insurer to pick up the tab. In California, the company sued contractors, telling courts that any damages arising from crashes there should be billed to the delivery companies.").

C. *A Future of Automation and Artificial Intelligence*

Shifts in Amazon's delivery models are a sign of a greater trend away from traditional approaches to logistics operations. For now, the Amazon Flex and DSP programs still rely on humans, but long-term goals encompass technology-enabled deliveries that bypass most human involvement. Two facets are worth noting: drones and driverless vehicles.

First, a drone is an autonomous, unmanned aircraft, capable of flying without an on-board pilot or remote human control.¹²⁹ While model airplanes, remote-controlled planes, and military aircraft may fit this basic definition,¹³⁰ a delivery drone generally is a small aircraft, with four to eight propellers, rechargeable batteries, and the ability to use AI technology for autonomous flight.¹³¹ Several companies are competing to develop delivery drone technology. UPS is exploring its own drone delivery development arm.¹³² Similarly, Alphabet, the parent company of Google, has started a drone company called "Wing,"¹³³ and even Walmart, as a major retailer, is exploring its own drone delivery technology.¹³⁴ Some early applications of drone delivery have included delivering time-sensitive, lightweight materials like medicine or food.¹³⁵

¹²⁹ John Villasenor, *What Is a Drone, Anyway?*, SCI. AM. BLOG, (Apr. 12, 2012), <https://blogs.scientificamerican.com/guest-blog/what-is-a-drone-anyway/> [<https://perma.cc/U4S7-7KDJ>].

¹³⁰ *Id.*

¹³¹ See Sarah Lewis, *Delivery Drone*, TECHTARGET, <https://www.techtargget.com/whatis/definition/delivery-drone> (last visited Dec. 20, 2023) [<https://perma.cc/9QXY-FLH9>].

¹³² Juan Plaza, *UPS Flight Forward Receives Part 135 Certification to Operate Drone Delivery Airline*, COMMERCIAL UAV NEWS (Oct. 2, 2019), <https://www.commercialuavnews.com/infrastructure/ups-flight-forward-receives-part-135-certification-to-operate-a-drone-airline> [<https://perma.cc/CU6U-EAWY>].

¹³³ See *id.*

¹³⁴ Press Release by David Guggina, Walmart U.S., *We're Bringing the Convenience of Drone Delivery to 4 Million U.S. Households in Partnership with DroneUp* (May 24, 2022), <https://corporate.walmart.com/newsroom/2022/05/24/were-bringing-the-convenience-of-drone-delivery-to-4-million-u-s-households-in-partnership-with-droneup> [<https://perma.cc/L9PB-MD9R>].

¹³⁵ Lewis, *supra* note 131.

Second, the ultimate vision for delivery logistics is to achieve automation in all or part of the supply chain. Autonomous vehicles promise increased safety, efficiency, and mobility.¹³⁶ While human drivers will continue to be part of logistics work for some time, a future of automation looms, and legal and regulatory structures that fail to address autonomous vehicles will further complicate the structural inequality of the gig economy.¹³⁷

Amazon's shift into gig-based logistics models, and its future of AI and automation, serves as an important case study for the "gigification" of work with widespread implications for society. These implications, collectively, will be analyzed as new gig economy harms.

III. DEFINING GIG ECONOMY HARMS

As large companies like Amazon continue to shift to gig-based models, new risks of harm emerge. First, gig workers may suffer a loss of professional identity and stability, even though they should gain control and autonomy due to their independent status. Second, new risks of physical harm arise from the gig economy, including harm to the public and to workers. Lastly, technology is making it even easier for gig companies to monitor workers — and shift costs, risk, and liability away from the company in new and extreme ways. This final example deteriorates privacy and further entrenches power in gig companies.

A. *Professional Identity and Stability*

The gig economy maximizes wealth for gig companies while shifting more risk to workers who lack countervailing protection and

¹³⁶ Dr. Sven A. Beiker, *Legal Aspects of Autonomous Driving*, 52 SANTA CLARA L. REV. 1145, 1149 (2012).

¹³⁷ See *id.* at 1152 (discussing the legal challenges with autonomous vehicles); Jamie Busby, *Drone Delivery: The Danger of Opening the Air as a Commercial Highway*, 18 LOY. MAR. L.J. 287, 288-89 (2019); Cash, *supra* note 14, at 709; Hyewon Hannah Choi, *Delivery Drones: Inapt for Application of Current Negligence Theory*, 86 J. AIR L. & COM. 435, 455 (2021); Jacob B. Jensen, Note, *Self-Driving but Not Self-Regulating: The Development of a Legal Framework to Promote the Safety of Autonomous Vehicles*, 57 WASHBURN L.J. 579, 580 (2018) (suggesting a negligence per se approach and federal legislation to address autonomous vehicle liability).

resources.¹³⁸ Indeed, while wealth concentrates in the upper echelons of society, risk accumulates at the bottom, with the greatest impact on vulnerable populations.¹³⁹ This impact on the human condition — particularly as to work and financial security — is especially felt in the gig economy.¹⁴⁰ Independent worker status affects professional identity formation, one’s self-worth, and financial stability. While it should, in exchange, provide flexibility and autonomy, gig companies cling to control and instead exacerbate the precariousness that gig work can bring.¹⁴¹

First, independent work has several downsides. Independent workers who are not steadily employed by one organization have noted the isolation and lack of community that comes with working independently.¹⁴² Their professional worth is often judged heavily by productivity, which gives rise to conflicting emotions and makes professional identity formation more challenging.¹⁴³ Because these independent workers lack an organizational environment to build connections with people and places, many of them need to seek that structure and emotional support elsewhere.¹⁴⁴ Independent workers also face a lack of training opportunities, support from supervisors or peers, and other guidance that they could receive from an institutional employer.¹⁴⁵ Additionally, independent workers recognize their employment is precarious, and with that comes socio-economic concerns.¹⁴⁶ Their jobs may feel temporary, unstable, and insecure.¹⁴⁷

¹³⁸ See ULRICH BECK, *RISK SOCIETY: TOWARDS A NEW MODERNITY* 56 (Mark Ritter trans., 1992) (1986).

¹³⁹ *Id.* at 35 (discussing class-specific risks and how stress, unemployment, physical injury, environmental hazards, and social risks are higher for unskilled workers and low-income groups).

¹⁴⁰ See V.B. Dubal, *Wage Slave or Entrepreneur?: Contesting the Dualism of Legal Worker Identities*, 105 CALIF. L. REV. 65, 97-98 (2017).

¹⁴¹ See Petriglieri et al., *supra* note 27, at 132.

¹⁴² *Id.* at 134.

¹⁴³ *Id.* at 132.

¹⁴⁴ *Id.* (describing the effects “holding environments” have on cultivating work identities and maintaining work productivity).

¹⁴⁵ *Id.* at 134.

¹⁴⁶ *Id.* at 135.

¹⁴⁷ *See id.*

Their ability to financially sustain themselves is never certain, which also impacts professional identity and self-worth.¹⁴⁸

Second, independent work also brings about the potential for autonomy and flexibility, which draws some workers to stay in an independent work model.¹⁴⁹ Without structure, predictability, and mandates from an organizational employer, some independent workers feel more free, creative, and satisfied.¹⁵⁰ Their professional identities can be more personalized, which for some promotes self-expression and a sense of purpose.¹⁵¹

Third, it is important to analyze these pros and cons in the context of the modern (often platform-based) gig economy. Gig work is often relegated to lower income, minority populations and younger adults. In the United States, most gig workers are under thirty years old, non-white, and from low-income populations.¹⁵² Even though gig work is a side job for most gig workers, thirty-one percent of gig workers nonetheless have reported that gig work is their main job.¹⁵³ And, most significantly, fifty-eight percent of gig workers — regardless of whether they relied solely on gig work for their income — said their gig earnings were essential or important for meeting their basic needs.¹⁵⁴ While most gig workers reported being generally satisfied with their pay, availability of jobs, and how jobs are assigned, almost half reported being dissatisfied with their benefits.¹⁵⁵ Notably, these gig workers often do not fit the mold of independent workers who are entrepreneurs with some bargaining power and autonomy.¹⁵⁶ Instead, gig workers mostly

¹⁴⁸ *Id.* at 136.

¹⁴⁹ *See id.* at 134 (summarizing qualitative study results in which some participants appreciated independence over feeling like a “cog at a huge organization”).

¹⁵⁰ *See id.* at 134-35.

¹⁵¹ *Id.* at 137.

¹⁵² ANDERSON ET AL., *supra* note 11, at 4 fig.1. According to the Pew Research Center, 18-to-29-year-olds were the most likely demographic to have earned some money through a gig platform. *Id.* Only 12% of White adults have been gig workers, compared to 30% of Hispanic adults, 20% of Black adults, and 19% of Asian adults. *Id.*

¹⁵³ *Id.* at 6 fig.2.

¹⁵⁴ *Id.* at 31.

¹⁵⁵ *Id.* at 10.

¹⁵⁶ Samantha J. Prince, *The AB5 Experiment - Should States Adopt California's Worker Classification Law?*, 11 AM. U. BUS. L. REV. 43, 53 (2022) [hereinafter *The AB5 Experiment*]

engage in lower-wage work, like driving, shopping, or performing household tasks.¹⁵⁷ By being classified as independent contractors, gig workers face lower standards and lower earnings, without individual or collective bargaining power.¹⁵⁸ While some gravitate to gig work to earn extra money on the side, the changing nature of work means that this shift away from employment to primarily relying on gig work will be even more pronounced. Taken together, the impact on gig workers amounts to “existential instability” because of the ways gig work limits one’s ability to support a family and live a fully realized adult life.¹⁵⁹

These downsides of independent work are exacerbated by the platforms themselves. For Uber and Lyft drivers, quality review is crowdsourced through reliance on customer ratings with an app, which has been criticized as reflecting bias and unfairly penalizing drivers.¹⁶⁰ Their exact movements, time spent on a task, and other details of their work are closely monitored.¹⁶¹ Overall, the positive aspects of the gig

(citing DAVID WEIL, *THE FISSURED WORKPLACE: WHY WORK BECAME SO BAD FOR SO MANY AND WHAT CAN BE DONE TO IMPROVE IT* 7 (2014)).

¹⁵⁷ ANDERSON ET AL., *supra* note 11, at 3.

¹⁵⁸ Eugene K. Kim, *Labor’s Antitrust Problem: A Case for Worker Welfare*, 130 *YALE L.J.* 428, 430-31 (2020) (noting how gig workers, like Uber drivers, face antitrust liability if they organize because they lack employee status); see Prince, *The AB5 Experiment*, *supra* note 156, at 53-54.

¹⁵⁹ Samantha J. Prince, *The Shoe Is About to Drop for the Platform Economy: Understanding the Current Worker Classification Landscape in Preparation for a Changed World*, 52 *U. MEM. L. REV.* 627, 642 (2022) [hereinafter *The Shoe Is About to Drop*] (citing Anna Freni-Sterrantino & Vincenzo Salerno, *A Plea for the Need to Investigate the Health Effects of Gig-Economy*, 9 *FRONTIERS IN PUB. HEALTH*, Feb. 9, 2021, at 2).

¹⁶⁰ Naomi Cahn, June Carbone & Nancy Levit, *Discrimination by Design?*, 51 *ARIZ. ST. L.J.* 1, 28-30 (2019) (noting how gender bias is reflected in platform review systems); Miriam A. Cherry, *Beyond Misclassification: The Digital Transformation of Work*, 37 *COMP. LAB. L. & POL’Y J.* 577, 597 (2016).

¹⁶¹ Amazon is also employing technology to monitor and regulate workers in other sectors of its operations, including inside its fulfillment centers. For example, Amazon tallies every minute workers spend “off task.” Ashworth, *supra* note 6. Trips to the bathroom, time spent talking to others, and activities like moving around may be counted as off-task and result in discipline or dismissal. *Id.* Software and other technology is used to accomplish this detailed surveillance, and Amazon has faced criticism and even unionization efforts in response. *Id.*; see also MARINA JABSKY & CHARLENE OBERNAUER, *TIME OFF TASK: PRESSURE, PAIN, AND PRODUCTIVITY AT AMAZON* 3

economy — such as worker independence, flexibility, and control — are coming at an ever-increasing cost *to workers* as gig companies set prices and exert control over more details of the work. And job safety, particularly with shipping and deliveries, can suffer without the same level of institutional training, supervision, and support.

Our Amazon case study exemplifies these very issues. Flex drivers are minimally trained and expected to use their own equipment, yet they are held to strict standards as to routes, time for deliveries, and modes of delivery.¹⁶² In the DSP program, small businesses are formed to work exclusively for Amazon, adhering to Amazon directives on which routes to take, subjecting drivers to invasive tracking, and facing often unrealistic productivity expectations.¹⁶³ Through its gig-based logistics approach, Amazon gets the best of both worlds by exerting considerable control while shirking responsibility for risks and liabilities. The result is increased costs to workers — for the risk of harm from accidents, for lost time or productivity, or for slow business — and, fundamentally, exploitation of gig workers and small business owners.

B. *Physical Harm*

In addition to the effects on professional identity and stability, the very structure of gig work may create new risks of physical harm to workers and the public. Amazon Flex drivers, like others using ridesharing apps, are not professional drivers in company-maintained vehicles. Instead, drivers for these platform-based operations require no particular training and are held to only basic safety standards for vehicles. The use of non-professional drivers, or of small-business contractors, may be increasing the risks of physical harm to the public.¹⁶⁴ In both the Amazon Flex and DSP programs, Amazon has shifted responsibility for safe driving to individuals or contractors who are not Amazon employees. In 2019, a New York Times and ProPublica report

(Lara Maldjian ed., 2019) (reporting on the detrimental effects of “time off task” monitoring on worker health and well-being at Amazon).

¹⁶² Ashworth, *supra* note 6; JABSKY & OBERNAUER, *supra* note 160, at 3.

¹⁶³ JABSKY & OBERNAUER, *supra* note 160, at 3; *see also* Hanbury, *supra* note 64.

¹⁶⁴ Brishen Rogers, *The Social Costs of Uber*, 82 U. CHI. L. REV. DIALOGUE 85, 92-93 (2015) (discussing some of the safety concerns with Uber, but noting that similar concerns exist for the taxi industry in general); Soper, *supra* note 16.

found that, from 2015 to 2019, more than sixty accidents with serious injuries involved Amazon delivery contractors.¹⁶⁵ Ten of them resulted in death.¹⁶⁶ The report also noted that many accidents go unreported, as people never sue and public records do not easily reflect the link to Amazon.¹⁶⁷ In January 2019, a ten-month-old baby girl died when an Amazon sub-contractor crashed his van into the girl's family SUV in Maine.¹⁶⁸ In Georgia in 2021, Ans Rana, a twenty-four-year old aspiring doctor, was nearly killed when an Amazon delivery van slammed into the vehicle he was riding in, causing him devastating paralysis and lifelong injury.¹⁶⁹ The van's driver worked for Harper Logistics, LLC, an Amazon DSP.¹⁷⁰

This risk of physical harm also extends to gig workers. Researchers are studying the correlation between gig work and negative health effects, including the physical health effects of sedentary work and even psychological distress.¹⁷¹ Two Georgia men delivering packages as "Flex" drivers for Amazon were shot and injured by a homeowner who mistook them for burglars, leaving one of the men a paraplegic.¹⁷² The homeowner noted that he had been burglarized a couple weeks earlier, and believed he had already received his packages earlier that day.¹⁷³ The Amazon drivers wore no uniforms or protective gear like safety visibility vests, a specific fact that was raised in their \$350 million lawsuit against Amazon.¹⁷⁴

¹⁶⁵ Callahan, *supra* note 12.

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ *Driver in Deadly Waterboro Crash Was Working as Sub-Contractor for Amazon*, WGME (Jan. 14, 2019, 2:01 PM PST), <https://wgme.com/news/local/driver-in-deadly-waterboro-crash-was-working-as-sub-contractor-for-amazon> [<https://perma.cc/55XL-HKAS>].

¹⁶⁹ Callahan, *supra* note 12; Soper, *supra* note 16.

¹⁷⁰ Soper, *supra* note 16.

¹⁷¹ See Prince, *The Shoe Is About to Drop*, *supra* note 159, at 640-46.

¹⁷² See Nunez, *supra* note 16.

¹⁷³ Jamie Kennedy, *Amazon Facing \$350M Lawsuit for Not Providing Safety Gear to 2 Drivers*, ATLANTA NEWS FIRST (Mar. 23, 2022, 3:18 PM PDT), <https://www.atlantaneWSfirst.com/2022/03/23/amazon-is-facing-350m-lawsuit-not-providing-safety-gear-two-drivers/> [<https://perma.cc/Z5HT-8N9F>].

¹⁷⁴ See *id.*

To address safety concerns, Amazon engages in a system of surveillance and control over drivers, which some argue is degrading and infringes on the autonomy that should be afforded independent workers.¹⁷⁵ Worker surveillance is another facet of harm in the gig economy — and a mode of risk reallocation, liability avoidance, and, fundamentally, a mechanism for maintaining power and control.

C. New Technology and Worker Surveillance

The shift to a gig economy model can be understood within the broader framework of risk allocation by employers. Advancements in technology, particularly with AI, are shaping and transforming the future of work.¹⁷⁶

While displacement of human labor through automation captures the public imagination and dominates the AI-in-the-workplace narrative, the role AI plays in centralized power and risk allocation is perhaps even more important from a law and policy perspective.¹⁷⁷

¹⁷⁵ See, e.g., Hayley Hofmann, *Roads Closed: Rideshare Drivers' Privacy Interests Create a Roadblock to Addressing Increasing Public Safety Concerns Associated with Ridesharing*, 2 UCLA J.L. & TECH. DIGEST, Spring 2020, at 1, 10-11 (discussing the tension between worker privacy and platform safety measures).

¹⁷⁶ See generally Frey & Osborne, *supra* note 8 (discussing a study of the displacement of human labor by AI).

¹⁷⁷ See generally Moradi & Levy, *supra* note 2, at 278-87 (noting the role AI plays in shifting risks away from companies and onto workers); Pasquale, *Tech Platforms*, *supra* note 29, at 14-15 (describing how technology has allowed firms to concentrate broad swaths of data and, in turn, market dominance); Racabi, *supra* note 29, at 598-600 (noting how tech drift — the idea that technology alters policy outcomes — “is used to create and herd politically vulnerable populations”); Rogers, *The Law and Political Economy*, *supra* note 29, at 534 (noting that “a wealth of historical and contemporary evidence suggests that social and political factors influence the course of technological development, sometimes in profound ways.”). In addition to using technology to control workers, companies also use AI-driven tools to impact customers and society as a whole. See also Mihailis E. Diamantis, *Employed Algorithms: A Labor Model of Corporate Liability for AI*, 72 DUKE L.J. 797, 811-12 (2023). The law will also need to address mechanisms for holding companies accountable for harm they cause to third parties through their adoption and use of predictive algorithms and other technology. *Id.* at 816-21 (proposing six criteria to determine when the law should impose corporate accountability for algorithmic harm); Mihailis E. Diamantis, *The Extended Corporate Mind: When Corporations Use AI to Break the Law*, 98 N.C. L. REV. 893, 899-901 (2020) (proposing a framework for addressing algorithmic corporate misconduct).

Labor laws emerged in the early twentieth century to secure workers' rights, particularly as to limits on working hours, improvement of health and safety in the workplace, and delineation of workdays and hours.¹⁷⁸ Now, with the explosive growth of artificial intelligence, the form and structure of work is experiencing radical transformation. AI for risk allocation is taking multiple forms in the private sector, including staffing and scheduling innovations, redefinition of compensable work, better fraud and loss prevention, and more sophisticated analysis and incentivizing of productivity.¹⁷⁹ Taken together, these tools give employers the ability to shift risks and costs to employees in new ways that often work to the detriment of workers.

First, as to staffing and scheduling, employers can now externalize the risk and cost of excess labor and miscalculation of demand.¹⁸⁰ In other words, employers can alter the workday through split-shifts, on-call shifts, or other modifications to the workday to meet the granular demands of customers.¹⁸¹ AI tools that track exact activity among customers and workers save the employer the cost of paying a worker during a slump in demand or need.¹⁸² Traditionally, employers were forced to pay for this excess in labor, but now employers shift the cost of down-time to employees who can be off-the-clock for those precise periods of time.¹⁸³ The end result is that workers' conditions deteriorate — with a lack of predictability, continuity, and consistency in work schedules — while employers save on paying wages at non-optimal times.

¹⁷⁸ Examples include the Fair Labor Standards Act, first enacted in 1938, which established federal standards for minimum wages, work hour parameters, and limits on child labor for certain employers. *See, e.g.*, Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201-19.

¹⁷⁹ *See, e.g.*, Moradi & Levy, *supra* note 2 (discussing AI risk and harm allocation in the workplace).

¹⁸⁰ *Id.* at 279.

¹⁸¹ *Id.*

¹⁸² *See id.* Sophisticated staffing algorithms can integrate granular data sources to better predict demand and labor needs. *Id.* Examples of data used in such systems include internal data like real-time customer traffic information derived from in-store sensor networks and external data like weather predictions that can indicate fewer customers anticipated at a given time. *Id.*

¹⁸³ *Id.*

The second example of risk allocation in the age of AI is how employers define compensable work. In an effort to save costs, employers may attempt to carve out some ancillary tasks from work that requires compensation.¹⁸⁴ Compensable work is often defined as work that is “integral and indispensable” to the principal job tasks, while tasks like commuting and dressing in protective gear are excluded from compensable work.¹⁸⁵ Now, AI tools can closely track employees in order to carve out more tasks as non-compensable, down to a granular level. Thus, as AI tools transform the workplace, employers can use algorithmic technology to redefine and further limit what counts as compensable work.¹⁸⁶

Third, detecting and preventing loss and fraud is another facet of AI and risk allocation in the modern workplace. Employees pose the risk of theft, mismanagement, breaches of data, mishandling of confidential information, and other potential losses and liabilities for the employer.¹⁸⁷ AI tools to monitor all employee activity — from broad surveillance of their online activity to video tracking in physical spaces — are designed to identify and prevent fraud and abuse by employees.¹⁸⁸ But such programs again shift the risk and cost from the employer to the employee, and employees may suffer privacy invasion, lack of autonomy, and degradation as a result.

Lastly, incentivizing and monitoring productivity is the final example of AI-enabled risk allocation among employers. Through technology, employers now have a greater ability to control the minutiae of worker conduct. Productivity monitoring in physical spaces can include CCTV cameras watching worker conduct and motion detectors to discern when workers are no longer moving around and, presumably,

¹⁸⁴ *Id.* at 285.

¹⁸⁵ *Id.* at 280.

¹⁸⁶ *Id.*

¹⁸⁷ *Id.* at 282.

¹⁸⁸ Several AI-based software tools are available on the market to facilitate employer surveillance of workers. One software, Teramind, boasts that its employee monitoring tools “[g]o beyond basic employee monitoring with data-backed behavior analytics that provide actionable insights for productivity, data security and compliance” See *Employee Monitoring for Productivity, Security, and Compliance*, TERAMIND, <https://www.teramind.co/solutions/employee-monitoring-software> (last visited Dec. 21, 2023) [<https://perma.cc/5A7F-ANRR>].

working.¹⁸⁹ Third-party contractors driving Amazon vans have been required to submit to four-part cameras with biometric feedback indicators to monitor driver movements, including looking away from the road, yawning, and driving too fast.¹⁹⁰ These tools are couched as safety improvement mechanisms, but a dual purpose of incentivizing productivity may be at play, especially in light of Amazon's productivity-driven surveillance of warehouse workers.

At the same time, these examples of tech-enabled workplace monitoring are a double-edged sword for employers, who are increasingly controlling and surveilling workers in ways not previously possible without sophisticated software and hardware. Control is a key factor for legal definitions of agency and employment relationships.¹⁹¹ The result is that companies that rely on technology to shift some risks to employees are also increasing the likelihood that they exert sufficient *control* over the worker, thereby increasing the risk of being found to have an employment or agency relationship.¹⁹²

Amazon, through its Flex and DSP programs, is a key example of a major company harnessing technology to reallocate risk.¹⁹³ Amazon

¹⁸⁹ Amazon is a notable example of corporate surveillance to monitor worker productivity. Workers at its warehouses are monitored for their “time off task,” or time spent at work doing something other than the assigned narrow task. Ashworth, *supra* note 6. This can include chatting with others or wandering away from a workstation. *Id.* Time off task is tracked throughout the day, and workers are disciplined if more than 30 minutes are logged. *Id.* To facilitate its tech-enabled surveillance, wrist devices can be used to track movements. *See id.*

¹⁹⁰ Annabelle Williams, *5 Ways Amazon Monitors Its Employees, from AI Cameras to Hiring a Spy Agency*, BUS. INSIDER (Apr. 5, 2021, 1:54 PM PDT), <https://www.businessinsider.com/how-amazon-monitors-employees-ai-cameras-union-surveillance-spy-agency-2021-4> [<https://perma.cc/7Z6W-HZ2K>].

¹⁹¹ *See* RESTATEMENT (THIRD) OF AGENCY § 1.01 (AM. L. INST. 2006).

¹⁹² *See* Alex Kirven, *Whose Gig Is It Anyway? Technological Change, Workplace Control and Supervision, and Workers' Rights in the Gig Economy*, 89 U. COLO. L. REV. 249, 284 (2018). Compliance and control can be achieved through constant surveillance — or the perception that one could be constantly surveilled, see generally *id.* In addition to a specter of tech-enabled supervision, control can be achieved through the internal discipline that occurs when one knows they are constantly observed. *Id.*

¹⁹³ Amazon is also employing technology to monitor and regulate workers in other sectors of its operations, including inside its fulfillment centers. For example, Amazon tallies every minute workers spend “off task.” *See* Ashworth, *supra* note 6. Trips to the bathroom, time spent talking to others, and moving around may be counted as off-task

monitors drivers in its DSP program to gauge braking frequency, driving speed, and other metrics.¹⁹⁴ Algorithms determine the routes DSPs are given, often with precise and inflexible expectations for completion.¹⁹⁵ Little leeway is given for things like traffic, poor cell reception, or human error.¹⁹⁶ And all of these data points are used by Amazon to determine future work for the DSP — or whether a vital contract will be renewed or not (and a non-renewal is essentially a mandate for the DSP to cease operations and completely shut down).¹⁹⁷ These examples of technology-based workplace shifts illustrate how risk allocation is an ever-changing focus of many companies. The ability to save money, reduce risk, and externalize costs is a key consideration for the structure and conduct of companies.

IV. RETHINKING EXISTING LEGAL AND REGULATORY SYSTEMS

The gigification of so many aspects of the economy has had a profound impact on many areas of law. One of the key challenges gig companies pose on existing legal structures is the bounds of liability — whether it be under employment law, agency, corporate law, or tort. At the same

and result in discipline or dismissal. *Id.* Software and other technology is used to accomplish this detailed surveillance, and Amazon has faced criticism and even unionization efforts in response. *Id.*; see also JABSKY & OBERNAUER, *supra* note 161, at 4-5 (reporting on the detrimental effects of “time off task” monitoring on worker health and well-being at Amazon).

¹⁹⁴ Amazon uses apps and a camera system called Driveri to monitor drivers. See Hartmans & Taylor, *supra* note 115. The system has four cameras that provide a 270-degree view of drivers, the road, and surroundings. *Id.* They constantly record when the ignition is on, looking for one of 16 cues, including speed, following distance, hard braking, rate of acceleration, driver drowsiness, and distracted driving. *Id.* A dozen other signals also trigger the Driveri system without audio alerts. *Id.* These include hard braking, hard acceleration, high g-forces, hard cornering, low impacts, seatbelt compliance, U-turns, driver drowsiness, and obstructed cameras. *Id.* Drivers complain that the cameras obstruct views, invade their privacy, and punish them for harmless activities like adjusting their hair or drinking water. *Id.*

¹⁹⁵ See Hartmans & Taylor, *supra* note 115.

¹⁹⁶ See *id.*

¹⁹⁷ See Todd Bishop, *A Franchise in Disguise? Amazon’s Delivery Service Partners Program Will Face a Key Legal Test*, GEEKWIRE (Apr. 7, 2022, 10:44 AM PST), <https://www.geekwire.com/2022/a-franchise-in-disguise-amazons-delivery-service-partners-program-will-face-a-key-legal-test/> [<https://perma.cc/XCS3-E8XD>].

time, gigification of existing professions creates new risks of harm that go unaddressed under existing law, particularly considering how far gig companies go to insulate themselves from liability. In this Part, this Article will address the ways gig companies exploit legal and regulatory structures to shift liability and risk to others, particularly to workers. Specifically, it will examine worker classifications, agency principles, corporate and business law, including de facto franchises, tort law, and regulation. Woven throughout are explanations and analyses of some proposed solutions to these separate legal and regulatory challenges.

A. *Employment, Labor, and Worker Classification*

One of the fundamental ways gig companies minimize liability is by worker classification: avoiding traditional employment relationships with workers. When a company hires a worker as an employee, the company's costs increase.¹⁹⁸ Some of these costs accrue because employees typically work set hours, earn benefits, are protected by minimum wage and other labor law, and are covered by workers' compensation and other insurance.¹⁹⁹ Employers have to pay myriad additional taxes associated with hiring employees.²⁰⁰ The benefit for the company, however, is stability and control over employees: the company knows that it has the human capital it needs to do its business, the commitment from a worker to primarily stay with one company for a longer time, and the tools to dictate exactly how and when employees

¹⁹⁸ Veena Dubal, *A Brief History of the Gig*, LOGIC, May 4, 2020, at 6 [hereinafter *The History of the Gig*] (employees cost about one-third more to companies than hiring workers); see also Oranburg, *supra* note 31, at 48 (explaining how benefits increase company costs by over 30% because of the requirement of offering benefits).

¹⁹⁹ Prince, *The AB5 Experiment*, *supra* note 156, at 50-51; Cherry & Aloisi, *supra* note 30, at 642. See generally Minna J. Kotkin, *Uberizing Discrimination: Equal Employment and Gig Workers*, 87 TENN. L. REV. 73, 83-86 (2019) (noting how worker classification impacts anti-discrimination rights under Title VII); David B. Torrey, *Workers' Compensation, Nonstandard Work, and Workers Laboring in the Gig*, BRIEF, Spring 2020, at 12, 13 (explaining the difference between employees and independent contractors, including the costs associated with hiring employees).

²⁰⁰ See *Dynamex Operations W., Inc. v. Superior Ct.*, 416 P.3d 1, 5 (Cal. 2018).

work.²⁰¹ Other benefits inure to the employer, like intellectual property ownership and the employee owing fiduciary duties to the employer.²⁰²

In the modern gig economy, companies are seeking out new ways to limit the costs and obligations that flow from employment, while also minimizing the negative aspects of relying heavily on independent contractors.²⁰³ The desire to classify workers as independent contractors is not new; in the transportation context, taxi companies used this tactic for decades.²⁰⁴ But courts and legal scholars are now forced to examine the ways the traditional doctrine of worker classification have been upended by the gig economy, and many either highlight and aim to correct misclassifications or urge for new hybrid classifications to emerge.

While the distinction between employee and independent contractor is a vital one for determining rights and obligations, the analysis for determining worker classification is complex.²⁰⁵ And, as the nature of work evolved over time, some of the tests used are becoming obsolete or harder to apply.²⁰⁶ One test is the “ABC Test,” which was used in the

²⁰¹ See, e.g., Prince, *The AB5 Experiment*, *supra* note 156, at 53-54.

²⁰² See RESTATEMENT (SECOND) OF AGENCY § 387 (AM. L. INST. 1958).

²⁰³ See generally Robert N. Eberhart, Stephen R. Barley & Andrew J. Nelson, *Freedom Is Just Another Word for Nothing Left to Lose: Entrepreneurialism and the Changing Nature of Employment Relations*, in ENTREPRENEURIALISM AND SOCIETY: NEW THEORETICAL PERSPECTIVES (Robert N. Eberhart, Michael Lounsbury & Howard E. Aldrich eds., 2022) (discussing the evolution of work to moving away from reliance on employees, and how this trend reflects a new entrepreneurial shift in the economy).

²⁰⁴ Dubal, *The History of the Gig*, *supra* note 198, at 6.

²⁰⁵ See Prince, *The AB5 Experiment*, *supra* note 156, at 53-54.

²⁰⁶ Cherry & Aloisi, *supra* note 30, at 642 n.27, 643 n.32 (describing some of the tests or factors courts have used in determining worker status). The authors also note that “the tests are notoriously malleable, difficult, and fact-dependent, even when dealing with what should be a fairly straightforward analysis.” *Id.* at 643; see also Richard R. Carlson, *Why the Law Still Can’t Tell an Employee When It Sees One and How It Ought to Stop Trying*, 22 BERKELEY J. EMP. & LAB. L. 295, 298-99 (2001) (noting how employers exploit ambiguity in worker status to exert control while avoiding some of the duties that would flow from workers being designated employees); Miriam A. Cherry, *Employee Status for “Essential Workers”: The Case for Gig Worker Parity*, 55 LOY. L.A. L. REV. 683, 705 (2022); Kirven, *supra* note 192, at 288; Orly Lobel, *We Are All Gig Workers Now: Online Platforms, Freelancers & the Battles over Employment Status & Rights During the Covid-19 Pandemic*, 57 SAN DIEGO L. REV. 919, 942-43 (2020).

California Supreme Court's decision in *Dynamex*.²⁰⁷ This test is used in some form by over twenty states.²⁰⁸ The ABC test is a three-part test that begins with the presumption that a worker is an employee.²⁰⁹ To rebut the presumption, the employer must show (A) that "the worker is free from the control and direction of the hirer in connection with the performance of the work, both under the contract for the performance of such work and in fact; and (B) that the worker performs work that is outside the usual course of the hiring entity's business."²¹⁰ This inquiry is separate from the control test and focuses on how the work being done fits into the usual course of the employer's business.²¹¹ Lastly, the test looks at (C) whether "the worker [is] customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed for the hiring entity."²¹² In other words, the inquiry examines whether the worker took independent steps to establish their business or trade, or whether they are simply designated as an independent contractor by the company.²¹³

California also attempted to codify worker classifications in Assembly Bill 5 ("AB5"), an initiative that widened the net of who is deemed an employee, to the opposition of some independent workers in various sectors of the economy.²¹⁴ Even though AB5 was touted as protecting workers, some of the workers with independent arrangements lost bargaining power and flexibility, and women in particular suffered when flexible work arrangements were at risk.²¹⁵ And, somewhat ironically, gig companies like Uber and Lyft were able to pass Proposition 22, which classified app-based ridesharing and delivery drivers as independent

²⁰⁷ See *Dynamex Operations W., Inc. v. Superior Ct.*, 416 P.3d 1, 34 (Cal. 2018).

²⁰⁸ Griffin Toronjo Pivateau & Gina Nerger, *The Worker Classification Dilemma: The IRS Test and the Platform Economy*, 53 TEX. TECH L. REV. 535, 553 n.209 (2021) (listing jurisdictions that have adopted some form of the ABC test).

²⁰⁹ See *Dynamex*, 416 P.3d at 34.

²¹⁰ *Id.* at 41.

²¹¹ See *id.*

²¹² *Id.* at 7.

²¹³ See *id.*

²¹⁴ Prince, *The AB5 Experiment*, *supra* note 156, at 61-62 (citing worker testimonials critical of AB5).

²¹⁵ See *id.* at 63.

contractors with limited protection.²¹⁶ To date, reform proposals and challenges continue in California in an effort to define employee status in response to the new gig economy. Moreover, workers continue to pursue recognition as employees.²¹⁷ Amazon Flex drivers have sued for reclassification as employees instead of independent contractors. In Seattle, three drivers sued, claiming that Amazon violates federal labor law, fails to pay overtime, and pays less than minimum wage when you factor in gas and maintenance.²¹⁸

In essence, control is a key facet of worker classification, but the changing nature of work makes clean distinctions even more elusive. Nonetheless, the impact of defining a worker as an independent contractor has broad implications as to rights and costs. And reclassifying workers as independent contractors has become a key facet of liability-limiting strategies in the gig economy. Of course, the strategy of classifying workers as independent contractors instead of employees is not new. Many have noted the incentives companies have to misclassify workers to avoid these additional costs.²¹⁹ Notably, it is the public that ultimately bears the cost of using independent contractors instead of employees.²²⁰ In other words, gig companies who misclassify workers profit while society as a whole pays. Further, the upheaval of traditional worker classifications has widespread effects in multiple

²¹⁶ See *id* at 66.

²¹⁷ See V.B. Dubal, *Winning the Battle, Losing the War?: Assessing the Impact of Misclassification Litigation on Workers in the Gig Economy*, 2017 WIS. L. REV. 739, 742.

²¹⁸ Ángel González, *Amazon Delivery Drivers Sue Company over Job Status*, SEATTLE TIMES (Oct. 5, 2016, 7:36 PM PST), <https://www.seattletimes.com/business/amazon/amazon-delivery-drivers-sue-company-over-job-status/> [<https://perma.cc/4HVB-FQE8>]. Another test is the IRS test, developed in the late 1980s to deal with the lost revenue caused by worker misclassification. See David Bauer, *The Misclassification of Independent Contractors: The Fifty-Four Billion Dollar Problem*, 12 RUTGERS J.L. & PUB. POL'Y 138, 140 (2015). It is used in some form in at least nine states and focuses on specific indicia of control. See *id* at 141; I.R.S. Rev. Rul. 87-41, 1987-1 C.B. 296 (1987).

²¹⁹ See *Dynamex Operations W., Inc. v. Superior Ct.*, 416 P.3d 1, 6 (Cal. 2018) (noting how state and federal regulatory bodies identified worker misclassification as a serious problem because of tax avoidance and the circumvention of labor law protections for workers); Carlson, *supra* note 206, at 298.

²²⁰ See *Dynamex*, 416 P.3d at 5.

areas of law — particularly as to the rights and liabilities — that usually flow from these traditional categories.²²¹

Gig-economy scholarship often focuses on the worker classification and employment law dimensions of the gig economy.²²² Two notable proposed solutions to worker classification-related issues include creating new, hybrid categories of workers, like the “dependent contractor,” and decoupling benefits from worker status.

1. Hybrid Categories

Scholars have noted that the binary employee/independent contractor classification is insufficient to deal with the ever-changing nature of work and labor, particularly in the gig economy.²²³ They have

²²¹ See Brishen Rogers, *Employment Rights in the Platform Economy: Getting Back to Basics*, 10 HARV. L. & POL’Y REV. 479, 501 (2016) [hereinafter *Employment Rights*] (noting how labor and employment laws encourage social equality and employee rights in many areas).

²²² Megan Carboni, *A New Class of Worker for the Sharing Economy*, 22 RICH. J.L. & TECH. 1, 54-55 (2016); Keith Cunningham-Parmeter, *Gig-Dependence: Finding the Real Independent Contractors of Platform Work*, 39 N. ILL. U. L. REV. 379, 382 (2019); Laurie E. Leader, *Whose Time Is It Anyway?: Evolving Notions of Work in the 21st Century*, 6 BELMONT L. REV. 96, 116 (2019); Pivateau & Nerger, *supra* note 208, at 536; Alaina Billingham, Note, *Driving the Industry Crazy: Classifying Ride-Share Drivers Following Dynamex*, 72 RUTGERS U. L. REV. 189, 190 (2019); Rachel Childers, Note, *Arbitration Class Waivers, Independent Contractor Classification, and the Blockade of Workers’ Rights in the Gig Economy*, 69 ALA. L. REV. 533, 551 (2017) (concluding that most gig workers are employees who should be afforded more contractual rights); Mary Martin, Note, *When Flexibility Sacrifices Security: An Analysis of Amazon’s Flex Program*, 54 NEW ENG. L. REV. 131, 149-53 (2019) (noting how Flex drivers may be employees under the ABC test); see Prince, *The Shoe Is About to Drop*, *supra* note 159, at 662-99 (cataloguing legal and regulatory developments on worker classifications and the gig economy).

²²³ See, e.g., Chaisse & Banik, *supra* note 14 (noting that new regulations will be needed to address technology’s impact on labor); Cherry & Aloisi, *supra* note 30 (analyzing some countries’ use of a third category of workers beyond employee and independent contractor); Guy Davidov, *The Three Axes of Employment Relationships: A Characterization of Workers in Need of Protection*, 52 U. TORONTO L.J. 357, 364 (2002) (proposing new tests or categories for defining employment relationships); Christina Hiessl, *The Classification of Platform Workers in Case Law: A Cross-European Comparative Analysis*, 42 COMP. LAB. L. & POL’Y J. 465, 472 (2021) (examining trends in case law and suggests adapted tests for platform economy workers); Liya Palagashvili, *Disrupting the Employee and Contractor Laws*, 2017 U. CHI. LEGAL F. 379, 379-82 (urging for alternative categories to better capture the realities of the on-demand economy).

thus proposed a third, hybrid category, such as “dependent contractors” or “independent workers.”²²⁴ This third category can provide more protections to the worker than those afforded mere independent contractors, while preserving some of the independence and autonomy independent contractors enjoy.²²⁵ Critics have pointed out that hybrid categories can be misused if they provide companies an avenue to downgrade employees to hybrid status, may be too narrowly used for just platform economy companies, or will become outdated as the nature of work continues to evolve.²²⁶

2. Unbundling Benefits

One of the biggest disadvantages workers face when denied “employee” status is the loss of benefits, like healthcare, retirement, and access to leave, to name a few. Some scholars have suggested that laws that mandate benefits for employees should be less rigid so that companies can offer subsets of benefits to workers. Under this approach, benefits like insurance and retirement can be prioritized, while foregoing others like paid leave.²²⁷ By unbundling benefits in this way, the law can rely less on worker classification and can instead facilitate flexibility in employee-type benefit offerings for non-employees.²²⁸ More broadly, others have advocated for better social protection programs, including benefits and social support, to make the gig economy more fair for workers who are not deemed employees.²²⁹

²²⁴ Cherry & Aloisi, *supra* note 30, at 646; Davidov, *Who Is a Worker?*, *supra* note 30, at 59 (noting how “worker” is emerging as a third category in which control exists, but without the same degree of subordination that is present for employees); Harris & Krueger, *supra* note 30, at 5; *see* Davidov, *Reform in Small Steps*, *supra* note 30, at 245 (noting how Harry Arthurs proposed an intermediary category for worker classification as early as 1965); Prassl & Risak, *supra* note 30, at 620 (proposing a more flexible analysis for defining “employees”).

²²⁵ Cherry & Aloisi, *supra* note 30, at 648.

²²⁶ *Id.* at 677, 687-89; Oranburg, *supra* note 31, at 5-6; *see* Rogers, *Employment Rights*, *supra* note 221, at 505-07 (noting how Uber should be required to treat drivers as employees).

²²⁷ *See* Oranburg, *supra* note 31, at 48.

²²⁸ *Id.* at 50.

²²⁹ Beilin, *supra* note 31.

B. Agency Law

While worker classification remains a crucial issue in the gig economy — and an underpinning of structural inequality — agency law is another existing legal system that should be deployed, and possibly expanded, in light of the changing nature of work.

An agency relationship is fiduciary in nature. Agency exists when a principal manifests assent for another person to act on the principal's behalf.²³⁰ That other person becomes the agent if they manifest assent or otherwise consent to acting as the agent.²³¹ The agent then acts with actual²³² or implied authority²³³ on behalf of the principal. But when acting on the principal's behalf, the agent is subject to control by the principal.²³⁴ Formal, written agreements between the agent and principal are not required to establish the scope of actual or implied authority.²³⁵

Additionally, under apparent authority or ostensible agency, principals may be on the hook for the conduct of agents even when no actual authority exists.²³⁶ It is the principal's manifestations as to the agent's authority that give rise to liability for the principal when the victim reasonably relies on those manifestations.²³⁷ Lastly, principals

²³⁰ RESTATEMENT (THIRD) OF AGENCY § 1.01 (AM. L. INST. 2006); see Eric W. Orts, *Shirking and Sharking: A Legal Theory of the Firm*, 16 YALE L. & POL'Y REV. 265, 273-74 (1998) (discussing how agency law is broader than contractual theories of the firm).

²³¹ RESTATEMENT (THIRD) OF AGENCY § 1.01.

²³² Under the Restatement approach, actual authority “is created by a principal's manifestation to an agent that, as reasonably understood by the agent, expresses the principal's assent that the agent take action on the principal's behalf.” *Id.* § 3.01.

²³³ Within actual authority is also the concept of implied authority, which denotes “actual authority either (1) to do what is necessary, usual, and proper to accomplish or perform an agent's express responsibilities or (2) to act in a manner in which an agent believes the principal wishes the agent to act based on the agent's reasonable interpretation of the principal's manifestation in light of the principal's objectives and other facts known to the agent.” *Id.* § 2.01 cmt. b. Under the Restatement, both fall under actual authority. *Id.*

²³⁴ See *id.*

²³⁵ *Id.* § 3.02 cmt. b, e (explaining the general rule that a writing is not required between the agent and the principal, although some specific state laws may impose a writing requirement on some contracts).

²³⁶ *Id.* § 3.03.

²³⁷ *Id.*

can ratify acts of the agent by either manifesting assent or engaging in conduct that justifies a reasonable assumption that the principal consents.²³⁸

Notably, the agency relationship does not hinge entirely on worker classifications. Rather, *respondeat superior* is one type of agency that arises out of an employer-employee relationship and requires that the agent be an employee of the principal who is acting within the scope of employment at the time of the tort.²³⁹ Otherwise, agency law is broader and separate from the employment relationship itself.

When an agency relationship exists, legal consequences, such as tort liability, can flow from the agent's actions, resulting in liability falling on the principal for whom the agent acted. When the agent's conduct is tortious and causes harm to a third party, the principal can be directly liable as long as the agent acted within the scope of actual authority, or the principal ratified the conduct.²⁴⁰ The principal may also be directly liable if it was "negligent in selecting, supervising, or otherwise controlling the agent" or delegated certain non-delegable duties, like "a duty to use care to protect other persons or their property."²⁴¹ Additionally, vicarious liability may arise when the agent is an employee acting within the scope of employment.²⁴² And the principal can be vicariously liable to third parties when the agent is acting with apparent authority.²⁴³

²³⁸ *Id.* § 4.01. Additional requirements exist, such as the act being one subject to ratification, the person ratifying has the power to do so, and the timeliness of the ratification. *Id.*; see also *id.* § 4.03 (explaining what acts may be ratified); *id.* § 4.04 (explaining the capacity to ratify). The timing of ratification primarily takes into consideration the inequitable effects on third parties. See *id.* § 4.05 (explaining the timing of ratification).

²³⁹ *Id.* § 2.04.

²⁴⁰ *Id.* § 7.04; see also Paula J. Dalley, *A Theory of Agency Law*, 72 U. PITT. L. REV. 495, 504-05, 547 (2011) (discussing the cost-benefit internalization theory to support use of agency law).

²⁴¹ RESTATEMENT (THIRD) OF AGENCY § 7.03(1); see also *id.* § 7.05 (further explaining principal's negligent conduct in conducting activity through agent). Additionally, liability may arise when the principal has a special relationship with the other person and thus owes "a duty of reasonable care with regard to risks arising out of the relationship." *Id.*

²⁴² *Id.* § 7.03.

²⁴³ *Id.*

Because agency law is a separate tool from employment and labor law, it is important to consider how agency law can adjust to meet the needs of the new gig economy. One approach is to think expansively about agency relationships in the gig context, so that more gig transactions trigger agency relationships. A new doctrine of “gig agency” may be necessary.

1. Gig Agency

Some of my other work has included discussion of agency law’s potential to address gig economy relationships.²⁴⁴ Expanding on that premise, a concept of “gig agency” can draw on agency relationships generally to better define the relationships at play in this new gig-based system. Using established agency law definitions, a “gig agent” can be one who has actual, implied, or apparent authority for the purpose of a single transaction or service, based on the company’s control of the terms of the gig activity, even if that control is manifested through a platform. Through a clearer “gig agent” definition, established principles in agency law can provide a new avenue for holding companies accountable even when other traditional legal tools are used to limit liability. In this way, gig agency moves the discussion away from reliance on worker classifications or narrow common law elements and instead frames the solution more in terms of equity and individual gig activities and transactions.

C. Corporate and Business Law

Abuse of the corporate form is an ongoing issue that the law tries to address, but that is brought into even sharper focus with the rise of the gig economy. In essence, corporate law bestows separate entity status on an organization by operation of state enabling laws — and with that status comes certain rights such as to own property, to transact business, and to insulate owners, officers, and directors from the debts and liabilities of the company.²⁴⁵ Corporations, as legal entities, are also

²⁴⁴ McPeak, *Sharing Tort Liability*, *supra* note 1, at 215-20.

²⁴⁵ See DEL. CODE ANN. tit. 8, §§ 121-22 (2024) (defining the powers of the corporation); Michael J. Meurer, *Law, Economics, and the Theory of the Firm*, 52 BUFF. L. REV. 727, 728 (2004).

allowed to own other companies, like subsidiaries, and enter into contracts with individuals or entities.²⁴⁶ But sometimes, through these rights of ownership and of contract, companies fragment themselves to create a web of limited liability. Corporate fragmentation occurs when a parent company siloes its commercial activities into separate entities to avoid liability.²⁴⁷ These silos can also harm third parties who cannot discern the true identity of the company, may not realize that a corporation is under-capitalized, and cannot use existing doctrine to seek recovery from a corporate parent or related entity.²⁴⁸

In our Amazon example, Amazon.com, Inc. is a parent company that has multiple subsidiaries and related entities. Additionally, Amazon has structured its DSPs as wholly separate entities, not even within the same corporate family as Amazon. Rather, Amazon fashioned an incubator-type system that bundles all the tools an entrepreneur needs to start and operate a small business — a business founded under the express parameters established by Amazon to exclusively partner with Amazon. In this way, Amazon controls many aspects of the delivery partner's structure, process, and work, without the risk of being a corporate parent. But the degree of control exerted by Amazon is significant, and Amazon is exploiting DSPs to insulate itself from paying for the harms that flow from DSP operations in favor of Amazon's business. In other words, Amazon is seeking to insulate itself from financial risk and liability without the reciprocal separateness and public accountability.

When corporate forms are used to perpetuate a fraud, permit undercapitalization, or manipulate the market, it may be proper for courts to disregard separate entity status.²⁴⁹ In this vein, a theory of corporate family liability, expansive veil-piercing remedies, or other equitable relief should be considered.²⁵⁰ Additionally, when entities are

²⁴⁶ See tit. 8, § 123 (2024).

²⁴⁷ See 18 C.J.S. *Corporations* § 14, Westlaw (database updated 2023) (disregarding corporate entity or piercing corporate veil, generally); Peter B. Oh, *Veil-Piercing Unbound*, 93 B.U. L. REV. 89, 90, 131 (2013).

²⁴⁸ See Oh, *supra* note 247, at 128.

²⁴⁹ See 18 C.J.S. *Corporations* § 14 (disregarding corporate entity or piercing corporate veil, generally); Oh, *supra* note 247, at 90.

²⁵⁰ See Samuel L. Bray, *The Supreme Court and the New Equity*, 68 VAND. L. REV. 997, 1023-36 (2015); Chatman, *supra* note 33, at 10-23; Caprice L. Roberts, *The Restitution Revival and the Ghosts of Equity*, 68 WASH. & LEE L. REV. 1027, 1029 (2011).

structured like franchises — but without complying with franchise law — they should be treated as de facto franchises.

1. The Corporate Family

Professor Carliss Chatman has developed a theory of the corporate family that seeks to uncover the grouping of business entities that are “acting together for the benefit of a parent corporation or for the personal gain of one or more leaders of the enterprise.”²⁵¹ Under the corporate family theory, separate entities should be treated as a single group “when (1) there is more than one entity with shared ownership or management, or when an entity is wholly owned by another entity, and (2) that entity operates for the promotion of the parent’s business purposes or the manager or owner’s business interests.”²⁵² For the first item, influence is a key inquiry, which can be synonymous to sufficient control — such as the degree of control often exerted by gig companies over the people and entities they work with.²⁵³

2. Veil-piercing

Veil-piercing is an equitable doctrine that permits a court to disregard the corporate form and hold a director, officer, or shareholder personally liable for the acts of the corporation.²⁵⁴ It can also be applied to hold a parent company liable for a subsidiary’s acts.²⁵⁵ While separateness is a key feature of business forms, veil-piercing recognizes that the privilege of the corporate form — and the liability limits it affords — cannot be used to perpetuate a fraud or inequity.²⁵⁶ It is a principle founded in agency law and marks a form of equitable relief, not dependent on the basis of the underlying claim.²⁵⁷ General veil-piercing

²⁵¹ Chatman, *supra* note 33, at 7.

²⁵² *Id.*

²⁵³ *See id.*; *see also* Mwaura, *supra* note 34, at 104 (discussing instances in which corporate groups should be held liable).

²⁵⁴ 18 C.J.S. *Corporations* § 14; Oh, *supra* note 247, at 90.

²⁵⁵ *See* Oh, *supra* note 247, at 127-28.

²⁵⁶ *Walkovszky v. Carlton*, 223 N.E.2d 6, 7 (N.Y. 1966) (citing *Int’l Aircraft Trading Co. v. Mfrs. Tr. Co.*, 79 N.E.2d 249, 252 (N.Y. 1948)).

²⁵⁷ 18 C.J.S. *Corporations* § 14.

may be justified when “the corporate principal exercises (1) some form of pervasive control over the activities of the corporation, and (2) there is some fraudulent or injurious consequence as a result.”²⁵⁸ Fragmentation of companies is not a new phenomenon.²⁵⁹ But, at its core, veil-piercing is an equitable principle, grounded in fairness to prevent fraud or injustice through inappropriate use of the corporate form. Even though particular factual circumstances may not justify veil-piercing in a specific case, the broader principle still stands for the proposition that corporate law cannot be abused to unjustly insulate actors from liability. As such, veil-piercing may be broadly justified as an equitable tool for dealing with gig companies.

3. De Facto Franchises

The concept of a franchise is rooted in agency and contract law, and in its basic form begins with a parent company establishing a market and brand for a product or service.²⁶⁰ That company becomes a franchisor by licensing the brand, business structure, and other aspects of the business to another entity (the franchisee).²⁶¹ The franchisor then maintains an ongoing relationship with the franchisee to ensure quality and ongoing payments in the form of royalties or other remuneration.²⁶²

²⁵⁸ *Id.*; see 1 FLETCHER CYCLOPEDIA OF THE LAW OF CORPORATIONS § 41 (perm. ed., rev. vol. 2023); see, e.g., *Celgene Corp. v. Mylan Pharm. Inc.*, 17 F.4th 1111, 1125-26 (Fed. Cir. 2021) (refusing to impute venue to a corporate defendant in a patent infringement case under an alter-ego theory); see also Thompson, *supra* note 33, at 39 (suggesting ways to impose liability beyond veil-piercing).

²⁵⁹ See *Carlton*, 223 N.E.2d at 8. In the *Carlton* case, the court declined to pierce the corporate veil of a taxicab company whose sole owner structured his fleet of 20 taxis so that 10 separate corporations owned only two cabs each. *Id.* at 7. The court noted that the law permits use of the corporate form to insulate companies and people from liability, but not without limits. *Id.* Once the corporate form is used to perpetuate fraud, or a company is used as a mere instrumentality of the other, the privilege of limited liability is lost. *Id.* Nonetheless, under the facts of the case, the plaintiff failed to establish that veil-piercing was warranted. *Id.* at 10. Notably, the *Carlton* case focused on piercing the veil to impose personal liability on the sole owner of the family of businesses. *Id.* The case did not consider whether the veil should be pierced to impose liability on related companies. *Id.*

²⁶⁰ See Elmore, *supra* note 35, at 1229; Emerson, *supra* note 35, at 210.

²⁶¹ See Rubin, *supra* note 35, at 224.

²⁶² *Id.*

Notably, the franchisor retains considerable right of control over the franchisee, which some have noted is more akin to an employment relationship.²⁶³ However, the franchisee is not a subsidiary or an employee of the franchisor; rather, the contractual and agency relationship of the franchise is a unique model of licensure in an ongoing business arrangement between two separate companies.²⁶⁴ And employees of the franchisee are usually classified as independent contractors and not employees of the franchisor.²⁶⁵

In a franchise arrangement, the franchisor typically enjoys a superior bargaining position and considerable rights of control.²⁶⁶ As a result, franchises are regulated on the state and federal levels. These regulations often focus on disclosure requirements so that franchisees can make fair and informed decisions. For example, the Federal Trade Commission promulgates and enforces strict disclosure rules designed to give prospective franchisees access to information and some protection from fraud.²⁶⁷ States have their own regulations governing franchises and may go even further by requiring registration and, in some jurisdictions, permitting private rights of action when a franchisor fails to comply with state franchise requirements.²⁶⁸

In the context of gig companies, some of the relationships between platforms and providers can be categorized as that of a franchisor/franchisee structure.²⁶⁹ Because control is again the hallmark of the franchise relationship, some have even noted how franchise law

²⁶³ *Id.* at 225.

²⁶⁴ *See id.*

²⁶⁵ Emerson, *supra* note 35, at 205.

²⁶⁶ *Id.* at 208 n.22 (noting experts who have observed the disproportionate bargaining power of franchisors but also summarizing arguments of experts who disagree with the assumption that franchisees are naïve or susceptible to opportunistic franchisors).

²⁶⁷ *Id.* at 211-12.

²⁶⁸ *Id.* at 212 n.43.

²⁶⁹ Juan Diaz-Granados, *Potential Legal Categories in the Sharing Economy's Platform Operator-User-Provider Model: A Taxonomic and Positive Approach — Part 1*, 62 JURIMETRICS 197, 218 (2022); Juan Diaz-Granados, *Potential Legal Categories in the Sharing Economy's Platform Operator-User-Provider Model: A Taxonomic and Positive Approach — Part 2*, 62 JURIMETRICS 241, 257 (2022).

paved the way for the current gig economy, as courts recognized franchises as a valid alternative to enable smaller companies to grow.²⁷⁰

In the Amazon DSP example, a class action of DSPs has sued Amazon Logistics, Inc., in part relying on state franchise law as a basis for recovery.²⁷¹ Specifically, plaintiffs cite Amazon's termination of their contracts without good cause as violating Washington State franchise law, which would have given some protection to the drivers against sudden termination.²⁷² In particular, plaintiffs argue that Amazon DSPs fall under the Franchise Investment Protection Act²⁷³ and, as a result, have obligations to act in good faith and refrain from unfairly changing terms or terminating the franchise.²⁷⁴ While it is too soon to predict whether theories of recovery based in franchise law will succeed, the very structure of the Amazon DSP program serves as another example of a gig company trying to harness as much control and influence over another person or entity — without being subject to countervailing legal obligations that would protect against exploitation. A de facto franchise approach may be necessary to promote fairness.

²⁷⁰ See *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 56 (1977); Sam Harnett, *How Franchising Paved the Way for the Gig Economy*, KQED (Mar. 18, 2021), <https://www.kqed.org/news/11862641/how-franchising-paved-the-way-for-the-gig-economy> [<https://perma.cc/5ZR7-4MKP>].

²⁷¹ Complaint at 2-3, *Fli-Lo Falcon, LLC v. Amazon.com, Inc.*, No. 22-cv-00441, 2022 WL 1026980 (W.D. Wash. Apr. 5, 2022); Bishop, *supra* note 197.

²⁷² Bishop, *supra* note 197.

²⁷³ Under the Act, “(6) ‘Franchise’ means:

(a) An agreement, express or implied, oral or written, by which:

(i) A person is granted the right to engage in the business of offering, selling, or distributing goods or services under a marketing plan prescribed or suggested in substantial part by the grantor or its affiliate;

(ii) The operation of the business is substantially associated with a trademark, service mark, trade name, advertising, or other commercial symbol designating, owned by, or licensed by the grantor or its affiliate; and

(iii) The person pays, agrees to pay, or is required to pay, directly or indirectly, a franchise fee.” WASH. REV. CODE § 19.100.010 (2023).

²⁷⁴ *Id.* § 19.100.180 (2023).

D. *Tort Law and Platform Immunity*

One of the key consequences of worker misclassification, corporate fragmentation, and other tactics is to reduce or avoid liability in tort. Tort law is a common law system of righting private wrongs. Often grounded in concepts of fault, it is supported by theories of cost allocation²⁷⁵ and efficiency.²⁷⁶ Additionally, tort law plays an important deterrence role and works in tandem with regulation and insurance to deter and remedy harms.²⁷⁷

Under basic tort law principles, the existence of a duty in negligence theory is often based on balancing important considerations, such as the burden of taking precautions against the severity and probability of harm.²⁷⁸ In this way, tort law accepts that some risky activity will be tolerated because of the activity's social utility, even if some risk of harm exists. But when harms outweigh burden, imposing a duty may be proper.²⁷⁹ For strict liability, the law recognizes that some activity is so abnormally dangerous, the actor is liable regardless of fault.²⁸⁰ Strict

²⁷⁵ See Richard A. Epstein, *Imperfect Liability Regimes: Individual and Corporate Issues*, 53 S.C. L. REV. 1153, 1156-59 (2002). Epstein discusses four factors that help dictate conduct. *Id.* First, he discusses “self-bonding,” wherein a defendant who also faces harm when endangering others will do more to avoid the harm. *Id.* at 1156. Additionally, regulations like fines and licensure requirements provided added layers of incentives to avoid certain risky conduct. *Id.* at 1157. Third, insurance functions as a system of social control and of cost allocation and, lastly, vicarious liability principles provide more expansive ways to allocate costs, although limited liability corporate forms undermine some of the benefits of vicarious liability. *Id.* at 1158-59.

²⁷⁶ John A. Siliciano, *Corporate Behavior and the Social Efficiency of Tort Law*, 85 MICH. L. REV. 1820, 1833-34 (1987). Enterprises may have liability-limiting tools available to them, but there is an assumption that “most businesses, most of the time, strive to anticipate and pay off their obligations. . . . [T]he economic merits of liability avoidance will depend on whether it is more profitable for the enterprise to ‘live fast and die young’ or to strive for permanence by playing within the rules.” *Id.* at 1838-39.

²⁷⁷ For a more thorough discussion of the interplay of tort law and regulation in the sharing economy, see Agnieszka A. McPeak, *Regulating Ridesharing Platforms Through Tort Law*, 39 U. HAW. L. REV. 357, 358 (2017) [hereinafter *Regulating Ridesharing Platforms*]; Stemler, *supra* note 1, at 199-200.

²⁷⁸ See *United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947).

²⁷⁹ See *id.*

²⁸⁰ Gregory C. Keating, *The Theory of Enterprise Liability and Common Law Strict Liability*, 54 VAND. L. REV. 1285, 1318 (2001).

liability, in particular, is rooted in an economic rationale of who should bear the cost of accidents when partaking in certain risky activities.²⁸¹

Additional tort concepts relevant here include vicarious liability and enterprise liability. Vicarious liability recognizes that an entity may bear liability for the acts of an individual based solely on the relationship between the entity and individual.²⁸² In other words, the law will impose liability on someone other than the tortfeasor — even though that someone may be completely without fault — just by virtue of their relationship with the tortfeasor. Similarly, enterprise liability is the idea that the enterprise that created a risk of harm should bear the costs of those harms.²⁸³ Enterprise liability fundamentally recognizes that victims may be unfairly left undercompensated while an enterprise reaps the profit from the harmful conduct. Tort theory thus recognizes that the enterprise that stands to profit from the individual's activity should bear the losses of harms that flow from the activity.

In the gig economy context, large, centralized actors are profiting from economic activity that risks harm to workers and third parties. But the liability-limiting tactics gig companies use may prevent victims from recovering from the company, and may leave insurance companies — society — to bear the cost of gig-economy accidents, even though the very nature of gig company operations may be increasing risks of harm.²⁸⁴ Returning to our Amazon example, it is individual Flex drivers or the small businesses that make up Amazon's DSPs that face liability in tort, without recovery from Amazon. Yet, in both scenarios, Amazon is creating market demand for fast and free delivery in ways that increase the risk of harm. In this way, Amazon's tactics are undermining the core function of tort law and, by extension, causing broader social harm.

²⁸¹ *See id.*

²⁸² *See* RESTATEMENT (THIRD) OF TORTS: APPOINTMENT LIAB. § 13 (AM. L. INST. 2000).

²⁸³ *See generally* Keating, *Enterprise Liability*, *supra* note 36 (explaining how enterprise liability serves as an alternative to fault-based distribution of losses in American tort law); Keating, *The Idea of Fairness*, *supra* note 36, at 1267 (arguing that enterprise liability, and the distribution of costs among all who benefit from the risks, is more fair than negligence liability).

²⁸⁴ *See* Cecilia G. Vazquez, *The Sharing Revolution: Changing Times Call for Clarifying Tort Liability*, 80 LA. L. REV. 623, 639 (2020).

Further, as technology advances, gig companies will further strain existing tort law principles. For example, drones will require some rethinking of ordinary negligence principles, as the standard of ordinary care for professionals becomes difficult to apply to autonomous aircraft.²⁸⁵ Autonomous vehicles in general pose new challenges for defining who can be liable in tort.²⁸⁶ The reliance on hardware and software — instead of human operators — raises issues of products liability and software liability in particular.²⁸⁷ And platform-based gig companies benefit from statutory platform immunity when liability arises from third-party content on the platform. Expansive interpretations of the scope of platform immunity further undermine tort law’s important role in society.

To counter some of these ill effects in tort law, “gig enterprise liability” may be a proper approach. Additionally, platform immunity should be redefined to prevent overbreadth and misuse by platform-based gig companies.

1. “Gig Enterprise” Liability

The concept of enterprise liability hinges on a company’s ability to bear losses that flow from its commercial activity to prevent market failure, more so than requiring the company’s own negligent conduct to contribute to the harm.²⁸⁸ It is premised on the notion that enterprises gain an unfair market advantage when they are able to externalize too many of their costs, particularly in ways that facilitate unsafe or cheap products and drain society’s resources.²⁸⁹ In this same vein, enterprise

²⁸⁵ Choi, *supra* note 137, at 438.

²⁸⁶ Gary E. Marchant & Rachel A. Lindor, *The Coming Collision Between Autonomous Vehicles and the Liability System*, 52 SANTA CLARA L. REV. 1321, 1326 (2012); see Jensen, *supra* note 137, at 590.

²⁸⁷ See Frances E. Zollers, Andrew McMullin, Sandra N. Hurd & Peter Shears, *No More Soft Landings for Software: Liability for Defects in an Industry that Has Come of Age*, 21 SANTA CLARA HIGH TECH. L.J. 745, 749-50 (2004).

²⁸⁸ Richard A. Booth, *Limited Liability and the Efficient Allocation of Resources*, 89 NW. U. L. REV. 140, 141 (1994) (“Enterprise liability is based on the idea that a business should internalize its externalities and that the free market should control the allocation of resources.”).

²⁸⁹ *Id.*

liability theory should be used to address the gig enterprise: when platforms concentrate power in a centralized company that engages in accident-causing activity, it is the gig company that should bear that cost.

2. Platform Immunity

Section 230 of the Communications Decency Act of 1996 immunizes computer services from most liability arising out of a content provider's content on the service.²⁹⁰ The statute essentially permits platforms to moderate content, without fear of liability when illegal content appears on the platform, by preventing the platform from being treated as the speaker, publisher, or distributor of third-party content.²⁹¹ Section 230 immunity is broad, and some platform-based gig companies have invoked it in litigation.²⁹² Amazon, for example, has asserted Section 230 immunity in products liability cases arising out of third-party seller goods sold on its site.²⁹³ While courts have not broadly applied Section 230 to gig-economy transactions, gig companies will likely continue to argue for expansive application of Section 230 immunity as part of their tactics to minimize tort liability.²⁹⁴ But such attempts should be closely

²⁹⁰ See 47 U.S.C. § 230(c).

²⁹¹ See 47 U.S.C. § 230(b)(3) (stating that Section 230 is meant to “encourage the development of technologies which maximize user control over what information is received” by those who use the internet).

²⁹² See, e.g., *HomeAway.com v. City of Santa Monica*, 918 F.3d 676, 681-82 (9th Cir. 2019) (noting the platforms' attempts to invoke Section 230); *Airbnb, Inc. v. City of Boston*, 386 F. Supp. 3d 113, 118 (D. Mass. 2019) (noting AirBnB's attempt to invoke Section 230 immunity); *Bay Parc Plaza Apartments, LP v. Airbnb, Inc.*, No. 2017-003624-CA, 2018 Fla. Cir. LEXIS 348, at *6 (Fla. Cir. Ct. July 11, 2018) (noting AirBnB's attempt to invoke Section 230 immunity).

²⁹³ See, e.g., *Oberdorf v. Amazon.com Inc.*, 930 F.3d 136, 151 (3d Cir. 2019), *vacated, reh'g en banc granted*, 936 F.3d 182 (3d Cir. 2019) (noting that Amazon used Section 230 to bar some of the plaintiff's claims); *Fox v. Amazon.com, Inc.*, 930 F.3d 415, 428 n.8 (6th Cir. 2019) (noting that Amazon conceded that Section 230 does not grant it immunity for one of the claims).

²⁹⁴ Boyd, *supra* note 37, at 598-99, 621 (discussing ways to allow some Section 230 immunity in the online marketplace context); see also Dickinson, *supra* note 37, at 396; Edelman & Stemler, *supra* note 37, at 143; McPeak, *Platform Immunity*, *supra* note 37, at 1560.

scrutinized, particularly in light of the many other ways gig companies are already avoiding liability.

E. Regulatory Arbitrage

In addition to the legal systems discussed above, regulatory structures are also being undermined by the liability-limiting tactics of gig companies. Regulation provides another means to incentivize desired behavior where other law, like tort law, falls short.²⁹⁵ Regulatory policy can have a huge impact on economic inequality, and the rise of the modern gig economy demonstrates how regulations may fall short in mitigating economic and other power disparities.²⁹⁶ Regulatory arbitrage is the notion that innovation quickly evolves to skirt existing regulations.²⁹⁷ Gig economy pioneers in the ridesharing space, Uber and Lyft, exemplify this regulatory arbitrage in their initial entrance into the market and their self-proclaimed “disruption” of outmoded taxi regulations.²⁹⁸

Returning once more to our Amazon example, the DSP program is expressly designed to exist on the outer edge of existing regulations. The vans that DSPs use are the maximum size allowed before being subject to Department of Transportation regulation.²⁹⁹ The DSP relationship with the Amazon subsidiary is defined in such a way as to avoid consumer protection laws, like Federal Trade Commission regulations

²⁹⁵ See Epstein, *supra* note 275, at 1157 (“[T]he legal system responds to the gaps in incentives under the system of tort liability by going outside its boundaries, namely, by using direct regulatory mechanisms that might otherwise prove to be redundant or unimportant . . .”).

²⁹⁶ See K. Sabeel Rahman, *Policymaking as Power-Building*, 27 S. CAL. INTERDISC. L.J. 315, 318 (2018); K. Sabeel Rahman, *Reconstructing the Administrative State in an Era of Economic and Democratic Crisis*, 131 HARV. L. REV. 1671, 1704 (2018) (book review).

²⁹⁷ See Fleischer, *supra* note 38, at 229 (defining regulatory arbitrage).

²⁹⁸ See Ruth Berins Collier, V.B. Dubal & Christopher L. Carter, *Disrupting Regulation, Regulating Disruption: The Politics of Uber in the United States*, 16 PERSPS. ON POL. 919, 919-20 (2018).

²⁹⁹ Kate Cox, *Amazon Delivery Contractors Operate with Little Oversight, Report Finds*, ARS TECHNICA (Sept. 3, 2019, 1:30 PM), <https://arstechnica.com/tech-policy/2019/09/amazon-delivery-contractors-operates-with-little-oversight-report-finds/> [<https://perma.cc/BH4V-QYS5>] (describing the “sprinter” style vans used by DSPs to fall just outside of federal regulatory oversight).

of franchises.³⁰⁰ Commenters have noted the failure of antitrust law and regulation to address big tech.³⁰¹ Unprecedented tax avoidance measures by Amazon have been exposed, stirring public outrage and scrutiny by the Internal Revenue Service.³⁰² And the future of automation further eludes existing regulation.³⁰³

³⁰⁰ See Bishop, *supra* note 197; see also Emerson, *supra* note 35, at 211 (discussion of federal and state franchise regulations). More generally, Amazon's DSP program is drawing attention from legislatures as being virtually unregulated despite risks. Monica Nickelsburg, *Senators Scrutinize Amazon Delivery Service Partners Program After Reports of Accidents and Labor Law Violations*, GEEKWIRE (Sept. 13, 2019, 9:49 AM), <https://www.geekwire.com/2019/senators-scrutinize-amazon-delivery-service-partners-program-reports-accidents-labor-law-violations/> [<https://perma.cc/J38H-Q5G4>]; David Kaplan, Comment, *Consumer Rights Are Gig Workers' Rights? Regulating the Gig Economy at the Intersection of Consumer Protection Law and Employment Law*, 53 SETON HALL L. REV. 281, 283 (2022) (arguing consumer protection laws should be used to regulate the gig economy where employment law fails).

³⁰¹ See Laura Kayali, Melissa Heikkilä & Elisa Braun, *Amazon Heads into Regulatory Whirlwind*, POLITICO (May 8, 2020, 7:20 AM EDT), <https://www.politico.com/news/2020/05/08/amazon-heads-into-regulatory-whirlwind-244168> [<https://perma.cc/U9R4-A9Q6>] (noting how anti-competitive tactics by Amazon are igniting greater regulatory scrutiny and proposals to regulate big tech firms as utilities); Henry H. Perritt, Jr., *Don't Burn the Looms — Regulation of Uber and Other Gig Labor Markets*, 22 SMU SCI. & TECH. L. REV. 51, 77 (2020) (noting how regulation may be necessary to remedy gig-economy market failures); Tim Wu, *How Google and Amazon Got Away with Not Being Regulated*, WIRED (Nov. 13, 2018, 6:00 AM), <https://www.wired.com/story/book-excerpt-curse-of-bigness/> (noting how Facebook acquired other social media platforms, like Instagram and WhatsApp, concentrating its market dominance and evading laws meant to curtail monopoly power).

³⁰² Tom Bergin, *Special Report: Amazon's Billion-Dollar Tax Shield*, REUTERS (Dec. 6, 2012, 8:11 AM PST), <https://www.reuters.com/article/idUSBRE8B50AU/>; Matthew Gardner, *Amazon Avoids More than \$5 Billion in Corporate Income Taxes, Reports 6 Percent Tax Rate on \$35 Billion of US Income*, INST. ON TAX'N & ECON. POL'Y (Feb. 7, 2022), <https://itep.org/amazon-avoids-more-than-5-billion-in-corporate-income-taxes-reports-6-percent-tax-rate-on-35-billion-of-us-income/> [<https://perma.cc/95AA-AHK6>].

³⁰³ See Chaisse & Banik, *supra* note 14, at 31 (discussing how regulations will need to address the displacement of labor by technology). Drones, for example, are regulated by the Federal Aviation Administration ("FAA"). Under the FAA Modernization and Reform Act of 2012, drones and other uncrewed aircraft are defined as aircraft that operate "without the possibility of direct human intervention from within or on the aircraft." FAA Modernization and Reform Act of 2012, 49 U.S.C. § 44801(11). The FAA also regulates some hobbyist drones under its legacy rules covering model airplanes. See Cash, *supra* note 14, at 712 (explaining the FAA's policy statements about model airplanes and recreational drones). The majority of states have also imposed their own

The regulatory state is meant to be a tool in protecting social good and has the potential to serve as a crucial counterbalance to the centralized power of gig companies. By engaging in regulatory arbitrage, gig companies render the administrative state toothless.³⁰⁴ Thus, any solution to address inequality in the gig economy must also consider the ill effects of regulatory arbitrage.

1. Collaboration Theory of the Corporation

Regulatory arbitrage raises questions about the very purpose of a corporation.³⁰⁵ While several theories of the corporation have been posed, Collaboration Theory in particular is instructive in envisioning a cooperative relationship among corporate actors, the government, and society.³⁰⁶ Collaboration Theory posits that “the corporation is a collaboration among the government and the individuals organizing, operating, and owning the corporation.”³⁰⁷ This theory contemplates a common effort with the government, such as economic development, and allows corporations to achieve more than their individual constituents could without separate entity status.³⁰⁸ Importantly, because the government is a collaborator, the bounds of corporate behavior are rightfully steered through law and regulation.³⁰⁹ And, when a corporation engages in activities like tax avoidance, the collaboration

regulations on the commercial use of drones. As drones evolve and potentially become ubiquitous, some have advocated for limiting aerial trespass or other doctrines to promote development of commercial drone use. See Tyler Watson, *Maximizing the Value of America’s Newest Resource, Low-Altitude Airspace: An Economic Analysis of Aerial Trespass and Drones*, 95 IND. L.J. 1399, 1401 (2020) (using economic rationales to caution against adopting the Uniform Law Commission’s proposals to expand aerial trespass rules). Meanwhile, others argue that commercial drone delivery should be banned for national security, safety, and privacy concerns. Busby, *supra* note 137, at 310.

³⁰⁴ See McPeak, *Regulating Ridesharing Platforms*, *supra* note 277, at 359; Stemler, *supra* note 1, at 199.

³⁰⁵ See Jill E. Fisch & Steven Davidoff Solomon, *Should Corporations Have a Purpose?*, 99 TEX. L. REV. 1309, 1340-41 (2021) (discussing corporate purposes as a coordinating device).

³⁰⁶ Chaffee, *supra* note 39, at 149-51 (explaining his essentialist theory of the corporation as “collaboration theory”).

³⁰⁷ *Id.* at 149.

³⁰⁸ *Id.* at 149-50.

³⁰⁹ *Id.* at 150-51.

theory would indicate that tax avoidance is improper because it undermines the government's goals of societal economic benefit through tax revenue.³¹⁰ Because the corporation is a collaborator with the government, some corporate conduct should prioritize government goals over mere corporate profit maximization principles.³¹¹ Ultimately, new theories of the corporation, like Collaboration Theory, can help guide companies away from myopic profit-centric goals and towards greater social good.

In sum, gig companies use existing legal and regulatory systems to reallocate risk and shirk liability. While each area of law is ripe for specific reform, it is crucial to look broadly at the totality of liability-limiting tools gig companies exploit — and to find solutions that tackle the full scope of inequality being perpetuated by the gig economy.

V. DISMANTLING STRUCTURAL INEQUALITY IN THE GIG ECONOMY

The new gig economy is testing the very foundation of social and political life in the United States because it centralizes power and uproots longstanding legal and regulatory structures.³¹² Gig companies often elevate shareholder primacy and wealth maximization above other considerations, thereby prioritizing profits and shifting power away from workers.³¹³ Power then becomes centralized in gig companies that can control transactions and workers through platforms and algorithms that distribute tasks across a network of gig workers.³¹⁴

More broadly, the gig economy is becoming a form of structural inequality that “operates in large part by concentrating economic, social, and political power through softened legal constraints on the one hand, and imbalanced background legal rules on the other.”³¹⁵ This structural inequality is buttressed by a lack of power, whether political

³¹⁰ *Id.* at 153.

³¹¹ *Id.* at 156-57.

³¹² Rahman, *The Shape of Things to Come*, *supra* note 21, at 655-56.

³¹³ *Id.* (noting how pressure from shareholders leads to cost-cutting and profit-seeking, while institutional investors further steer companies to elevate profits above social good).

³¹⁴ *Id.* at 656.

³¹⁵ K. Sabeel Rahman, *Constructing and Contesting Structural Inequality*, 5 *CRITICAL ANALYSIS* L. 99, 101 (2018) [hereinafter *Constructing and Contesting*].

or economic, by workers and other groups affected by this imbalance.³¹⁶ Ultimately, the law has facilitated this power imbalance and, without major legal and regulatory response, this imbalance will widen the gap between gig companies and vulnerable populations.³¹⁷

It is the very structure of the gig economy, particularly platform-based work, that disenfranchises workers who lose status and protection, and in turn shoulder more risk and cost.³¹⁸ Regulations fall short to address the broad-sweeping and fast-paced disruption the gig economy is causing.³¹⁹ Countervailing rights that would give workers power have been gutted, like social programs, access to unionization, and basic protections of fair wages and safe working conditions.³²⁰ And AI-based technology is further shifting risks and costs to workers by dictating the minutiae of staffing and scheduling, redefining compensable work, and incentivizing productivity in new (and invasive) ways.³²¹

Returning to our LPE framework, it is crucial to view the totality of gig-company liability-limiting tactics together to unearth their broader impact. By viewing these tactics together, reforms in law, regulation, and policy can work in tandem to provide a more comprehensive approach to dealing with the negative effects of the gig economy. The law often grants a privilege while imposing a reciprocal duty, and rights are often counterbalanced by responsibilities. A totality approach —

³¹⁶ *Id.*; see Frank Pasquale, *Two Narratives of Platform Capitalism*, 35 *YALE L. & POL'Y REV.* 309, 311 (2016) (“Platforms entrench existing inequalities and promote precarity by reducing the bargaining power of workers and the stability of employment.”).

³¹⁷ By contrast, law can be affirmatively used to alleviate inequality and advance important social goals, and those economic welfare goals can improve human well-being. Mark Glick, Gabriel A. Lozada & Darren Bush, *Why Economists Should Support Populist Antitrust Goals* 4 (Inst. for New Econ. Thinking, Working Paper No. 195, 2022).

³¹⁸ Rahman, *The Shape of Things to Come*, *supra* note 21, at 655.

³¹⁹ *Id.* at 657.

³²⁰ See Tamara Kneese, Alex Rosenblat & danah boyd, *Understanding Fair Labor Practices in a Networked Age* 12 (Data & Soc’y Rsch. Inst., Working Paper, 2014) (observing structural inequality in the gig economy and noting how its market power concentration, not technology, that is most notable about Uber’s rise).

³²¹ See Ryan Calo & Alex Rosenblat, *The Taking Economy: Uber, Information, and Power*, 117 *COLUM. L. REV.* 1623, 1650 (2017) (noting how technology creates information and power asymmetry in the sharing economy).

with an LPE lens — is the best way to inject some balance and fairness in regulating the gig economy.

Take, for example, our rethinking of the legal and regulatory systems of employment law, corporate law, and tort law. In employment law, companies can use independent contractors to avoid the costs associated with employment, but in return they should sacrifice a good deal of control. Yet gig companies are not only finding ways to entrench control over gig workers, but they are also centralizing their power even more with technology. For independent contractors, autonomy and control is the main benefit, often cited by freelancers and independent workers as the positive aspects of non-employee worker status. In the gig economy, technology is undermining this benefit. Rather, technology adds an automated level of surveillance and control that disenfranchises gig workers and further distributes power away from them. Some narrow solutions may help shift risk and liability away from workers and back to the gig company, such as hybrid worker categories, unbundling of benefits, and a new “gig agent” relationship in agency law. But these solutions, standing alone, are insufficient to tackle the magnitude of this power shift. Rather, a broader reimagining of private law — and the interplay of seemingly siloed legal and regulatory regimes — is necessary.

In Corporate law, gig companies are concentrating wealth and power in new ways, using corporate form to further minimize risk and costs. While corporate fragmentation can be legitimate, when viewed in relation to the gigification of work, the new risks of harm being created, and the exploitation of small businesses, it goes too far. Veil-piercing, imposing liability on corporate families, and recognizing de facto franchises all provide some legal avenues for more fairness within the broader umbrella of corporate and business law. Because remedies like veil-piercing sound in equity, principles underlying recovery in equity also support new frameworks for determining liability in gig-based logistics services.³²² More fundamentally, a shift away from wealth maximization and shareholder primacy will allow corporations to collaborate more with the government — and perhaps work towards a

³²² See Bray, *supra* note 250, at 998; Roberts, *supra* note 250, at 1029.

greater social good rather than elevating profit above other considerations.

The effects of worker misclassification and corporate fragmentation are perhaps most pronounced in tort law. Gig companies create new risks of physical and economic harm, which endangers innocent third parties and disproportionately impacts those from a lower socio-economic status or who are otherwise disenfranchised. When the cost of accidents is not borne by the company profiting from the economic activity, it is often society that is left to pay. Solutions like expanding vicarious liability, piercing the corporate veil, and imposing enterprise liability help solve the torts piece of the puzzle. But, again, without a holistic approach that considers gig-company liability shields across the board, the seismic shift caused by the gig economy will largely go unremedied.

Further, the future of work involves even greater reliance on technology, which stands to disenfranchise workers even more. Any solution must consider the political economy of work in the face of technological advancements. In other words, gig company reliance on technology to automate some aspects of work — and to monitor human workers — guts labor’s political power.³²³

Individual legal and regulatory solutions alone may fail to dismantle the system of risk-shifting that permeates the gig economy, and greater fairness can be achieved instead through a holistic, broad-brush look at the interplay of liability-limiting principles across multiple areas of law. With an LPE lens, we can better identify the normative shift the gig economy is causing and find multi-tiered approaches to dismantle an exploitative system.³²⁴ This approach requires examination of the totality of the circumstances, looking at the spectrum of liability-limiting and risk-shifting tools gig companies use across myriad areas of law. In this way, reforms can tackle the entire scope of the problem, with an eye towards more fairness.

³²³ See Rogers, *The Law and Political Economy*, *supra* note 29, at 32-33.

³²⁴ Rahman, *Constructing and Contesting*, *supra* note 315, at 100-01.

CONCLUSION

The gigification of work involves a multi-front misuse of liability-limiting tools that, on the whole, creates a market imbalance and a social ill. By externalizing so many costs, gig-economy companies gain unfair competitive advantage in the marketplace — often by exploiting individuals who lack political economy and stability. Amazon’s DSP program, for example, disproportionately impacts members of under-represented groups and other individuals seeking to break into economic prosperity. And, in the process, gig companies render regulations obsolete, which leaves a consumer protection gap and increases risks of harm. And individual workers lose the benefits of long-term employment, with all the impacts that has on their ability to maintain financial stability, build new skills, and form a professional identity.

The ways these gig companies exploit liability shields is myriad. They engage in corporate fragmentation; they expressly operate at the outside margin of existing regulations, particularly regulations that aim to protect consumers, workers, and the public; they fashion new worker classifications to circumvent traditional employment relationships; they create franchise-like businesses while shirking franchise law; they hide behind Section 230 to claim platform immunity simply because they engage in e-commerce; and they are engaging in AI-driven risk reallocation to workers on minute levels throughout their operations.

While each area of law challenged by gig companies has tried to evolve to address these issues, what is needed is a holistic approach that looks at the totality of tools used by gig companies to shirk liability. Taken together, the use of liability shields in a multi-faceted way should shift the balance towards imposing liability on gig companies.