

WINNING THE BATTLE, LOSING THE WAR?: ASSESSING THE IMPACT OF MISCLASSIFICATION LITIGATION ON WORKERS IN THE GIG ECONOMY

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As on-demand labor platforms proliferate the independent contractor business model, plaintiffs' attorneys in the United States have filed dozens of misclassification lawsuits to secure rights and protections for workers. The conventional wisdom is that if these lawsuits are won, then they will reverse the growth of insecure work. This Article challenges this widely-held assumption. Using empirical research, I examine the trajectories and legacies of three celebrated misclassification lawsuits from earlier moments of transportation "gig work" in California: *Tracy v. Yellow Cab Cooperative*, *Friendly Cab v. NLRB*, and *Alexander v. FedEx*. Against many odds, plaintiff workers secured judicial recognition of employee status in each of these cases. The untold, post-litigation stories, however, were surprisingly grim: workers' economic lives were no more secure—and in some cases more precarious—then before the lawsuits. While I maintain that such litigation plays an important deterrence role, this Article highlights the significant limitations of misclassification litigation victories in effecting and enforcing the rights of gig workers. Based on this data, I critique the (over) reliance on the private enforcement of employee-status to fight precarity in the on-demand gig economy and suggest lessons for future advocacy.

INTRODUCTION

For the past half-decade, how to address the economic insecurities of on-demand workers in the "gig economy"¹ has been a subject of intense political, academic, and popular discussion.² Largely in reaction

1. I define the "gig economy" as the labor market characterized by workers who are considered independent contractors and thus carved out of employment and labor law protections. The focus of this article is on the low-skilled and low-paid end of the gig economy, mostly constituted by workers engaged in on-demand service work such as chauffeur driving, food and goods delivery, home cleaning, gardening, and errand-running.

2. Collective anxiety about "gig workers" has set in across government, academic, and labor sectors. For example, in late 2015, the White House organized a conference around worker precarity in the gig economy. The conference was attended by President Barack Obama, who in his comments at the White House Summit on Worker Voice, articulated a concern that in the "on-demand" economy hard work and economic security are decoupled. He stated:

We've got folks who are getting a paycheck driving for Uber or Lyft; people who are cleaning other people's houses through Handy; offering their skills on TaskRabbit. And so there's flexibility and autonomy and

to the phenomenal growth of Uber,³ billions of dollars of venture capital have funneled into platform startups with independent contractor

opportunity for workers. . . . And all this is promising. But if the combination of globalization and automation undermines the capacity of the ordinary worker and the ordinary family to be able to support themselves, if employers are able to use these factors to weaken workers' voices and give them a take-it-or-leave-it deal in which they don't have a chance to ever save for the kind of retirement they're looking for, if we don't refashion the social contract so that workers are able to be rewarded properly for the labor that they put in . . . then we're going to have problems. . . . So we've got to make sure that as we continue to move forward, both in this new "on demand" economy and in the traditional economy as a whole, hard work guarantees some security.

President Barack Obama, Remarks by the President at the White House Summit on Worker Voice (Oct. 7, 2015), in Administration of Barack Obama, *2015 Remarks at the White House Summit on Worker Voice*, DAILY COMP. PRES. DOCS. 1, 7 (Oct. 7, 2015). Two months later, the Department of Labor held a symposium on the "Future of Work" that focused on "the broad migration of longer-term employment relations to more attenuated, shorter-term work arrangements." *The Future of Work: Diving into the Data*, U.S. DEP'T OF LAB. BLOG, FUTURE OF WORK (June 17, 2016), <https://blog.dol.gov/2016/06/17/the-future-of-work-diving-into-the-data> [https://perma.cc/4KJ7-BFRH]. While the Trump administration has since deleted the internet footprint of findings from that symposium (perhaps signaling a less critical stance toward the gig economy), a press release still remains on the Department of Labor's website that as of September 2016, the Department was issuing grants to non-profits to "expand portable retirement benefits for low-wage workers." *US Labor Department Announces More than \$150K in Research Grants to Expand Portable Retirement Savings Plans for Low-Wage Workers*, U.S. DEP'T OF LABOR, NEWS RELEASE (Sept. 22, 2016), <https://www.dol.gov/newsroom/releases/wb/wb20160922> [https://perma.cc/TJ6A-UHW3]. The Equal Employment Opportunity Commission's 2017–2021 Strategic Enforcement Plan, too, takes aim at the gig economy. *U.S. Equal Employment Opportunity Commission Strategic Enforcement Plan Fiscal Year 2017–2021*. See EQUAL EMP'T OPPORTUNITY COMM'N, BUDGET AND PERFORMANCE 1, 7–8, <https://www.eeoc.gov/eeoc/plan/upload/sep-2017.pdf> [https://perma.cc/PK4S-PGXQ]. Of course, academic papers on the subject abound. A search of "employee status" and "gig economy" on Google Scholar in September 2017 yielded no less than 149 hits. GOOGLE SCHOLAR: SEARCH RESULTS https://scholar.google.com/scholar?hl=en&q=%22employee+status%22+%26+%22gig+economy%22&btnG=&as_sdt=1%2C50&as_sdtp [https://perma.cc/3LCW-HYEM]. I have contributed two articles to this growing body of scholarship: V.B. Dubal, *Wage Slave or Entrepreneur?: Contesting the Dualism of Legal Worker Identities*, 105 CALIF. L. REV. 65, 120–22 (2017) [hereinafter Dubal, *Wage Slave or Entrepreneur?*]; 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, 75–77 (2017) [hereinafter Dubal, *The Drive to Precarity*]. The collective anxiety about the growth of the gig economy is not only national but global; at a 2017 international labor law conference I attended, roughly twenty-five paper presentations and one book talk were on worker precarity brought on by the independent contractor status of workers in the gig economy.

3. There are a number of ways to measure this growth. The most common way is through the capitalization of Uber. As of February 2017, the company had taken

business models conceived to disrupt, extend, or produce new service economies.⁴ In 2013 and 2014, the annual growth rates of such labor platforms ranged between 300 and 400 percent.⁵ Corresponding to this growth is an increasing number of workers who have been “gigging”—performing services or delivering goods on-demand and at the direction of technology platforms, but without the safety and security of employment benefits.⁶ These on-demand workers join existing service workers not considered employees and thus ineligible for basic safeguards like minimum wage, overtime, workers’ compensation, unemployment insurance, freedom from discrimination at work, and the right to collectively bargain.⁷ While much attention is given to the insecurities faced by these tech-enabled gig workers,⁸ to date, almost no legislation at the city, state, or federal level has passed to address their

over 12 billion dollars over fifteen rounds of investments. Jim Edwards, *Uber’s Leaked Finances Show the Company Might—Just Might—Be Able to Turn a Profit*, BUS. INSIDER (Feb. 27, 2017, 12:53 PM), <http://www.businessinsider.com/uber-leaked-finances-accounts-revenues-profits-2017-2> [https://perma.cc/8PF4-6GSW]. Equally impressive, however, is the participation rate of workers on the app. According to Forbes in May, 2015, “Uber’s active driver base has grown from basically zero in mid-2012 to over 160,000 at the end of 2014. The number of new drivers has more than doubled every six months for the last two years.” Brian Solomon, *The Numbers Behind Uber’s Exploding Driving Force*, FORBES (May 1, 2015, 12:27 PM) <https://www.forbes.com/sites/briansolomon/2015/05/01/the-numbers-behind-ubers-exploding-driver-force/#1523e9475750> [https://perma.cc/8V8Y-P8X2].

4. According to a 2017 estimate, more than 25 billion dollars in venture capital has been invested in on-demand platforms. Sunil Rajaraman, *The On-Demand Economy is a Bubble—and it’s About to Burst*, QUARTZ (Apr. 28, 2017) [https://perma.cc/532Y-FUBL]. Of this, 16.56 billion dollars has been invested in transportation and logistics platforms alone. *Id.* Most of these platforms use putative independent contractor labor. *Id.*

5. Ruth Berrins Collier, V.B. Dubal, & Christopher Carter, *Labor Platforms and Gig Work: The Failure to Regulate* 2 (Inst. for Research on Labor and Emp’t, Working Paper No. 106-17, 2017), <http://irle.berkeley.edu/files/2017/Labor-Platforms-and-Gig-Work.pdf> [https://perma.cc/8U2C-SFNF] [hereinafter *Labor Platforms and Gig Work*] (quoting *Paychecks, Paydays, and the Online Platform Economy: Big Data on Income Volatility*, JP MORGAN CHASE INST. 1 (2016) <https://www.jpmorganchase.com/corporate/institute/document/jpmc-institute-volatility-2-report.pdf>) [https://perma.cc/7UZG-C78U]).

6. See, e.g., STEVEN HILL, *RAW DEAL: HOW THE “UBER ECONOMY” AND RUNAWAY CAPITALISM ARE SCREWING AMERICAN WORKERS* 84–88, 108–09 (2015).

7. Valerio De Stefano, *The Rise of the “Just-In-Time Workforce”: On-Demand Work, Crowdwork, and Labor Protection in the “Gig-Economy”*, 37 COMP. LAB. L. & POL’Y J. 471, 471–72, 479–80 (2016).

8. Workers in my own research have complained most significantly of their low, unpredictable wages. Other complaints include lack of benefits, unpaid wages, ratings system, threat of termination, stringent rules and regulations, and an inability to contact Uber service representatives. See, e.g., HILL *supra* note 6, at 88–89; De Stefano, *supra* note 7, at 483.

unprotected status as putative independent contractors.⁹ Instead, nearly all efforts to address the unstable work lives of gig workers have been through misclassification lawsuits filed to bring them under the employee umbrella.¹⁰

One of the most important and internationally scrutinized examples of such attempts is *O'Connor v. Uber*,¹¹ a misclassification class action filed against Uber in 2013. In addition to being the first lawsuit against the tech giant to have a (large) class of drivers certified, *O'Connor* was filed in northern California—a jurisdiction with both an expansive legal definition of employee¹² and potentially sympathetic judges and jurors.¹³ Conventional wisdom among analysts was that if *O'Connor* went to trial and the class won, then Uber would be forced to—at the very least—begin paying their California drivers like employees.¹⁴ This, many predicted, would pressure Uber to re-think their contractor business model, deter others from copying it, and impede the flow of investment into the sector. Some commentators went so far as to suggest the case might “kill the gig economy.”¹⁵

9. Ruth Collier, V.B. Dubal, & Christopher Carter, *Disrupting Regulation and Regulating Disruption: The Politics of Uber in the United States* 17 (May 23, 2017) [hereinafter *Disrupting Regulation*] (unpublished manuscript) (on file with author).

10. *See id.* at 15.

11. *O'Connor v. Uber Techs., Inc.*, No. 13-03826-KAW, 2013 U.S. Dist. LEXIS 120406, at *1 (N.D. Cal. Aug. 23, 2013).

12. The test for employee status under California state law is delineated in *S.G. Borrello & Sons, Inc. v. Dep't of Indus. Relations*, 769 P.2d 399, 406–07 (Cal. 1989).

13. Although a large class of drivers was initially certified by the court, a portion was de-certified after a Ninth Circuit decision overruling the district court decision on the issue of arbitration. *See Mohamed v. Uber Techs., Inc.*, 848 F.3d 1201, 1206 (9th Cir. 2016). According to a motion for sanctions against the plaintiffs' attorney filed by Uber in August 2017, the plaintiffs' attorney has solicited drivers from the de-certified class to bring as many individual claims as possible to arbitration. Defendant Uber Technologies, Inc.'s Notice of Motion and Motion for Sanctions at 4, *O'Connor v. Uber Techs., Inc.*, 848 F.3d 1201 (9th Cir. 2016)(Doc. 811).

14. *See, e.g.*, Dianna Kapp, *Uber's Worst Nightmare*, S. F. MAG., May 18, 2016, <http://www.llrllaw.com/wp-content/uploads/2014/12/Uber%E2%80%99s-Worst-Nightmare.pdf> [<https://perma.cc/MCR5-A7TT>].

15. Therese Poletti, *The Lawyer Looking to Kill the “Gig Economy”*, MARKETWATCH (Dec. 8, 2015, 9:04 AM), <http://www.marketwatch.com/story/the-lawyer-looking-to-kill-the-gig-economy-2015-12-07> [<https://perma.cc/VPR8-KJ7M>].



Illustration 1: Two of my clients—Gladys Quinones (far left) and Edward Escobar (far right)—joined fellow Uber drivers to object to the proposed settlement *O'Connor*. Many of these drivers had been relying on the misclassification class action to change their status to employees for wage purposes. Here, plaintiff objectors are outside the courthouse holding signs reading “Reject the Settlement” and “I am an Employee.”¹⁶

In the course of my engaged research¹⁷ on regulatory responses to the on-demand platform economy, I found that after a class was certified in *O'Connor*, drivers,¹⁸ workers’ rights advocates, labor leaders, and sympathetic policy makers across the nation put on pause

16. Photo by Laura Waxmann, in Laura Waxmann, *Uber Drivers Push Back Against Proposed Settlement in Suit*, MISSION LOCAL (June 3, 2016, 12:41 PM), <https://missionlocal.org/2016/06/uber-drivers-push-back-against-proposed-settlement-in-suit/> [https://perma.cc/H5WJ-2JVS].

17. The impetus for this Article arose as I conducted engaged research for a larger project on workers, worker organizing, and regulation in the tech-enabled gig economy. This research included an ethnography of a group of Uber drivers working to improve their conditions, surveys of Uber drivers, and interviews with worker advocates, labor leaders, non-profit advocates, plaintiffs’ attorneys, and city and state regulators. As I describe in the body of the Article, I was struck by how hopeful my interlocutors were about the effectiveness of employee-status litigation to challenge exploitative working conditions in the Uberized gig-economy.

18. Hundreds of drivers officially objected to the proposed settlement in *O'Connor v. Uber*. See Tracy Lien, *Late Arrivals: Uber Drivers who Missed Filing Deadline Are Still Bashing Proposed Lawsuit Settlement*, L.A. TIMES (May 27, 2016, 1:37 PM), <http://www.latimes.com/business/technology/la-fi-tn-uber-objections-20160527-snap-story.html> [https://perma.cc/PC85-P46A].

attempts (through policy advocacy and organizing) to address the many grievances of platform gig workers.¹⁹ Although I represented Uber drivers in an official objection²⁰ to the proposed *O'Connor* settlement, urging the plaintiffs' attorney to take the case to trial, I was—and remain—skeptical as to whether a decision in this case would have a long-term impact on worker security.

With these responses to *O'Connor* as a prompt, this Article probes the impact of misclassification litigation on the fight against precarious work.²¹ To assess the efficacy of these lawsuits, I examine three successful cases from the antecedent gig economy: *Tracy v. Yellow Cab Coop.*,²² *Friendly Cab Co. v. NLRB*,²³ and *Alexander v. FedEx Ground Package System, Inc.*²⁴ These cases challenged the independent contractor status of taxi drivers (*Tracy*, *Friendly Cab*) and truck drivers (*Alexander*). Against many odds, the plaintiffs in each case won, establishing safety-net benefits (*Tracy*), secure wages (*Alexander*), and collective bargaining rights (*Friendly Cab*) for gig workers.

These lawsuits share similarities with and bear lessons for today's on-demand platform workers. Like today's gig workers, plaintiffs in these cases labored in a grey zone with regard to their status as workers. They exhibited the legal characteristics of traditional employees: their work was a core part of the employer's business; they were forced to abide by stringent rules and regulations; and they had limited entrepreneurial opportunity.²⁵ But they also shared common experiences with independent contractors, namely, they labored on relatively flexible schedules and performed without the oversight of an on-site supervisor. Though these workers operated in a grey legal zone,

19. Gonzalez's legislative aides told me that the reason they did not move forward with the gig worker bill is because the labor community asked them to hold off until *O'Connor* went to trial. The drivers who I study similarly were holding off on their organization and affiliation with a union until the case was decided. Declaration of Veena Dubal in Support of Objections to Class Settlement at 7–10, 17, *O'Connor v. Uber Tech. Inc.*, 201 F. Supp. 3d 1110 (N.D. Cal. 2016) (Nos. 3:13-cv-03826-EMC).

20. *Id.*

21. For purposes here, I define precarious work as work that lacks stability and the benefits of regulation. For a sample from the growing body of sociological work on the *precariat* see Arne L. Kalleberg, *Precarious Work, Insecure Workers: Employment Relations in Transition*, 74 AM. SOC. REV. 1, 2 (2009); GUY STANDING, *THE PRECARIAT: THE NEW DANGEROUS CLASS* 7–13 (2011); ANDREW ROSS, *NICE WORK IF YOU CAN GET IT: LIFE AND LABOR IN PRECARIOUS TIMES* 34–35 (2009).

22. No. 938786, slip op. at 2 (Super. Ct. Cal. Feb. 10, 1997).

23. 512 F.3d 1090 (9th Cir. 2008).

24. 765 F.3d 981 (9th Cir. 2014).

25. For an in-depth examination of the doctrinal test for employee status see my article Dubal, *Wage Slave or Entrepreneur?*, *supra* note 2, at 72.

a fact-intensive legal inquiry in each case led to an unlikely but positive outcome for the plaintiffs: employee status.

In analyzing these lawsuits and their post-litigation effects, this Article draws on a long history of critical legal scholarship examining the role of litigation on social change.²⁶ Taking on Michael McCann's call to "assess how . . . [legal] struggles affect . . . constituents and their relations with the dominant groups over the long haul[.]"²⁷ I investigate the enduring impacts of these misclassification lawsuit successes on the plaintiff workers.²⁸ How have these legal victories affected their lives? To answer this question, I employ qualitative empirical methodologies including semi-structured interviews, ethnography (in the taxi context), and archival research. I then draw upon this data to make sense of the pre- and post-litigation realities of worker plaintiffs in *Tracy*, *Friendly Cab*, and *Alexander*.²⁹ In each case study, the findings were counterintuitively grim: the evasion of workers' rights persisted and workers continued to labor without protections. These misclassification lawsuits undoubtedly played and

26. See, e.g., JOEL F. HANDLER, *SOCIAL MOVEMENTS AND THE LEGAL SYSTEM* 23–24 (1978); GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* 9–10 (2d ed. 2008); STUART A. SCHEINGOLD, *THE POLITICS OF RIGHTS: LAWYERS, PUBLIC POLICY, AND POLITICAL CHANGE* 49–53 (2d ed. 2004); Catherine Albiston, *The Dark Side of Litigation as a Social Movement Strategy*, 96 IOWA L. REV. 61 (2011); Scott L. Cummings & Ingrid V. Eagly, *A Critical Reflection on Law and Organizing*, 48 UCLA L. REV. (2001); Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95, 137–39 (1974); Michael McCann & Helena Silverstein, *Rethinking Law's "Allurements": A Relational Analysis of Social Movement Lawyers in the United States*, in *CAUSE LAWYERING: POLITICAL COMMITMENTS AND PROFESSIONAL RESPONSIBILITIES* 261, 261–92 (Austin Sarat & Stuart Scheingold eds., 1998).

27. Michael W. McCann, *How Does Law Matter for Social Movements?*, in *HOW DOES LAW MATTER?* (Bryant G. Garth & Austin Sarat eds., 1998).

28. *Id.* at 97.

29. In addition to the interviews and examination of municipal and legal records, both the taxi worker cases studied in this paper are informed by both my practice as a public interest lawyer representing taxi workers (between 2008–2010) and by over two years of ethnographic research in the San Francisco taxi industry (between 2010–2013). My observations on the contemporary on-demand platform gig economy includes one year of ethnographic and interview-based research amongst San Francisco Bay Area Uber drivers. This ethnographic and qualitative research of Uber drivers in the Bay Area is ongoing but began substantively in 2015. This research includes hundreds of hours of observation of Uber drivers in organizing meetings, fifteen in-depth interviews of Uber drivers, over 250 Uber driver surveys, and extensive review of legal complaints against Uber and regulatory debates and decisions regarding Uber and Transportation Network Companies (TNCs) across U.S. cities and states. Much of the regulatory research was conducted as part of a larger project investigating the politics of Uber regulation; this project is being conducted with Professor Ruth Berins Collier and Christopher Carter, Department of Political Science, University of California, Berkeley.

continue to play an important deterrence role,³⁰ both drawing public attention to these practices and dissuading some firms from embracing the independent contractor business model. But this research highlights the significant limitations of such litigation in effecting and enforcing stability and security for gig workers.

Two important lessons arise from these findings. The first lesson is that the relative structural and political power of firms makes enforcing employee status in the gig economy a difficult, if not impossible, feat. In each of these case studies, employers escaped compliance without additional legal penalty. In *Tracy*, San Francisco taxi companies successfully deterred workers from enforcing their rights through threatened worker blacklists. In *Friendly Cab*, despite six years of litigation and a federal appellate court ruling, the Oakland taxicab company leveraged their substantial political clout and access to a fungible workforce to undermine the advocacy of worker leaders and to refuse to bargain with the union. Perhaps most ominously, in *Alexander*, FedEx used the Ninth Circuit's decision as a roadmap, drawing on their legal and business acumen to alter their business model so that workers looked even less like employees under the established case law. These lessons on the structural and political power of capital to evade enforcement of employee status also illustrate how dependence on misclassification litigation in the gig economy may exacerbate worker precarity. In the aftermath of *Friendly Cab*, for example, immigrant taxi workers were pushed out of the industry and struggled without other employment options. FedEx truck drivers, too, suffered as the company re-wrote their contracts, resulting in job loss for some and increased risk and responsibility for others.

The second lesson that I draw from these case studies is that litigating for employee status may obscure worker plaintiffs' broader goals—especially in the gig economy. Surprisingly, plaintiff workers who whole-heartedly endorsed and participated in these lawsuits did not necessarily want to be employees. In *Friendly Cab*, the pursuit of employment status for unionizing purposes led workers astray from their original goal: self-ownership. And in *Alexander*, what plaintiff workers wanted from the beginning was to be treated like true

30. The deterrence role should not be diminished. For example, the Munchery CEO admitted that he chose to use employee drivers because he did not want to face misclassification litigation. See Caroline O'Donovan, *What Happens When a Delivery Startup Tries to Pay Its Workers Well?*, BUZZFEED (Apr. 14, 2015, 5:00 PM), https://www.buzzfeed.com/carolineodonovan/can-mun?utm_term=.xjil0vroZ#.dhq3oKBEp [<https://perma.cc/CB72-ZA4Y>]. "Prime Now" drivers, who drive for a company Amazon contracts in the Bay Area, were converted from independent contractors to employees overnight by the threat of a misclassification lawsuit. Interview with Beth Ross, Partner, Leonard Carder, LLP, in Berkeley, Cal. (Feb. 26, 2016).

independent contractors, with the independence and entrepreneurial opportunity of small businesses.

Though these lessons challenge the efficacy of employee rights enforcement in the gig economy, the findings in this Article are not intended to be a critique of rights more broadly.³¹ In many cases and contexts, the enforcement of employee rights has been effective and important. But for reasons elaborated in Part III, misclassification litigation—even under the best of circumstances—is not well-suited as a solo strategy for workers in the gig economy. In making this argument, I draw on the seminal work of Scott Cummings and Deborah Rhodes who observed, “that litigation, although a necessary strategy of social change, is never sufficient; it cannot effectively work in isolation from other mobilization efforts.”³² I emphasize that standalone litigation wins are ineffective for gig workers not just because of a lack of effective judicial enforcement power.³³ They are also ineffective because employee status for workers in a “grey zone” cannot address their vast structural and political inequality with firms. To fight precarity enacted by the gig economy, misclassification litigation must be leveraged alongside other forms of political and legal activism that are attendant to worker self-vision and that build and nurture collective worker power.

Before analyzing the case studies and deducing these lessons, the next section, Part I, situates contemporary gig work in the recent history of precarious work, connecting current patterns in the on-demand labor platform economy with older models of contingent labor and making a case for why lessons from these antecedent lawsuits are important today. In this section, I also describe the existing responses to the production of precarious work by on-demand labor platforms—noting the absence of organizing and legislative attempts and stressing an over-reliance on the enforcement of employee status through litigation. Part II uses empirical research to understand the trajectory of each case study, *Tracy*, *Friendly Cab*, and *Alexander*, and to assess their long-term impacts on worker plaintiffs. In Part III, I expand upon the lessons discussed above. I argue that the structural and political power of firms to evade enforcement and worker ambivalence towards employee status constrained the impacts of detached misclassification. Finally, in the Conclusion, I suggest possible advocacy paths forward.

31. Stuart Scheingold famously coined the term “the Myth of Rights” to describe how litigation diverts attention from the political roots of inequality. SCHEINGOLD, *supra* note 26, at 1–10.

32. Scott L. Cummings & Deborah L. Rhode, *Public Interest Litigation: Insights from Theory and Practice*, 36 FORDHAM URB. L.J. 603, 605 (2009).

33. *Id.* at 607–08.

I. CONTEXTUALIZING CONTEMPORARY GIG WORK

A central contention of this paper is that older patterns of gig work hold lessons for and are connected to the newer patterns much discussed today. Accordingly, this section situates the current model of platform-enabled independent contracting within the longer history of the “fissured workplace.”³⁴ I discuss how and why independent contractor business models which were once localized in certain industries—like transportation—are now proliferating in the service industry via technology platforms. I then examine existing political and legal responses to the proliferation of platform-enabled independent contracting. Half a decade has passed since Uber—literally—hit the streets in San Francisco. Though celebrated by some scholars³⁵ and commentators for the freedom and flexibility the work offers, one does not have to scratch far beneath the surface to discover the brutality of much of the platform-enabled work that followed. Since roughly 2013, increasing attention has been paid to the exploitation of on-demand platform workers who face such issues of wage theft, over-work, and even psychological manipulation.³⁶ Below, I review the recent responses to this much-discussed precarity.

A. *New Industry Disruption or Old Worker Exploitation?*

Despite excitement about the rise of on-demand labor platforms as new and disruptive, many companies in the platform-enabled gig economy (popularly referred to as the “sharing economy”) build upon and intensify older patterns of capital shifts and re-organization. These patterns of change—beginning almost forty years ago—were enacted in large part to minimize corporate costs and change how capital gains were shared.³⁷ Scholars have argued that these changes contributed to

34. See DAVID WEIL, *THE FISSURED WORKPLACE* (2014).

35. See, e.g., ARUN SUNDARARAJAN, *THE SHARING ECONOMY: THE END OF EMPLOYMENT AND THE RISE OF CROWD-BASED CAPITALISM* (2016).

36. See, e.g., *Labor Platforms and Gig Work*, *supra* note 5, at 14–15. See also Noam Scheiber, *How Uber Uses Psychological Tricks to Push Its Drivers’ Buttons*, N.Y. TIMES (Apr. 2, 2017) <https://www.nytimes.com/interactive/2017/04/02/technology/uber-drivers-psychological-tricks.html> [https://perma.cc/5KRY-YTFD] (discussing Uber’s use of behavioral science techniques to make their drivers behave in a way that increases the company’s profits); Noam Scheiber, *Uber to Repay Millions to Drivers, Who Could be Owed Far More*, N.Y. TIMES (May 23, 2017) <https://www.nytimes.com/2017/05/23/business/economy/uber-drivers-tax.html> [https://perma.cc/4TFF-4A2Q] (discussing tens of millions of dollars that Uber owes its drivers due to a “mistake” in the way the company calculated commissions).

37. WEIL, *supra* note 34, at 11.

the contemporary and growing dualization of the labor market—with low wages at the bottom and high gains at the top.³⁸ In this section, I do not do justice to the full economic and sociologic literature explaining these patterns, but attempt to highlight some key and relevant observations. How did we get here?

In the mid-1970s, alongside globalization and the rise of finance,³⁹ U.S. firms commenced both internal and external restructurings that continue today. Some corporations developed practices of “internal flexibility” and forms of organization founded on employee initiative.⁴⁰ This cultural and ideological shift pushed the individual responsabilization of work for both individual and collective security.⁴¹ Many companies also initiated the process of externalizing risks and responsibilities not related to their core competencies.⁴² This latter change, motivated in part to “disembed capital”⁴³ from the redistributive responsibilities cast upon business by the New Deal and post-New Deal order, is what economist David Weil calls the “fissuring of work.” Both practices are evident in the extreme in today’s platform-enabled gig economy. On the one hand, workers are encouraged to act entrepreneurially and through self-initiative to make money for themselves and the firm. On the other hand, many of these firms claim that software is their core competency, and thus workers performing

38. Ruth Berins Collier, V.B. Dubal, & Christopher Carter, *The Regulations of Labor Platforms: The Politics of the Uber Economy*, BERKELEY ROUNDTABLE INT’L ECON. 1, 3 (2017) [hereinafter *The Regulations of Labor Platforms*].

39. SASKIA SASSEN, *GLOBALIZATION AND ITS DISCONTENTS: ESSAYS ON THE NEW MOBILITY OF PEOPLE AND MONEY* 140 (1999).

40. LUC BOLTANSKI & EVE CHIAPELLO, *THE NEW SPIRIT OF CAPITALISM* 80–81 (Gregory Elliott trans., 2005).

41. Between the 1930s and 1960s, the culture of large, industrial firms was on the “socialization of production, distribution and consumption, and collaboration between large firms and the state in pursuit of social justice.” *Id.* at 18. Firms employed Taylor-ist techniques of organization, and largely in response to pressure from the labor movement, they accepted their social and economic responsibility to workers, whose lives, because workers were understood also as consumers, were inextricably tied to that of the firm. *Id.* at 80–81. By the 1970s, this integration of workers into the social order began to wane. Instead of a firm culture that “yoked economic and technological progress to the aim of social justice,” firm culture shifted to “a project of [worker] self-realization, linking the cult of individual performance and extolment of mobility to the reticular conceptions of the social bond.” *Id.* at 217. This change is reflected by shifts in techniques of work, including the rise of expectations of multitasking and emphasis placed on “self-control and the development of autonomy.” *Id.* at 218. For an examination of how the entrepreneur became legally exalted in this process see Dubal, *Wage Slave or Entrepreneur?*, *supra* note 2, at 101, 116–131.

42. See WEIL, *supra* note 34, at 8.

43. DAVID HARVEY, *A BRIEF HISTORY OF NEOLIBERALISM* 11 (2005).

tasks and services through the software have been “externalized” as independent contractors.

Weil describes the fissuring of work as a “seismic shift” from earlier parts of the twentieth century.⁴⁴ Most large tech firms today operating at the top of their industries—from Apple to Uber—“no longer directly employ legions of workers to make products or deliver services.”⁴⁵ Instead, employment—and the relationship between employers and their employees—has been casualized. While many companies focus on their core competencies, they shed in-house service workers, placing responsibilities for gardening, janitorial services, accounting, and other provisions of service to other employers.⁴⁶ This makes social and legal accountability for worker safety and security murky and difficult to enforce.

In addition to these outsourced relationships, a number of studies, including my own, have shown a rise in the vulnerability of “contingent” workers. Some contingent workers labor as precarious employees—as members of the “disposable, part-time and temporary”⁴⁷ labor force. These include just-in-time workers and temporary workers, who, while considered employees, do not benefit from many of the securities associated with full-time employment. Other contingent workers—including taxi drivers, truck drivers, nail salon workers, home care workers, and construction workers—labor as putative independent contractors. This casual or contingent sector of the work force has grown dramatically since the late 1970s. Contingent work grew seventy-five percent faster than the overall workforce from 1980 to 1993, and by 1995, these “casual” workers constituted about one-third of the workforce.⁴⁸

Most important to the analysis here is not just the reflection of these larger trends, but also that independent contracting is not new and did not originate with the platform-enabled gig economy. Independent contracting in the taxi industry, for example, began as early as the

44. WEIL, *supra* note 34, at 8.

45. *Id.*

46. These lead businesses in turn create “downward pressure on the marginal price” for the outsourced services. *Id.* at 15. Businesses competing for contracts for the outsourced service work face significant pressures to lower their own prices, which in turn impacts the more fungible workers that they employ. This pressure and subcontracting to a complicated network of smaller business units has itself contributed to a larger trend away from full-time regulated employment to “casual” employment. *Id.* This is true even on the higher end of the service industry.

47. Jennifer Middleton, *Contingent Workers in a Changing Economy: Endure, Adapt, or Organize?*, 22 N.Y.U. REV. L. & SOC. CHANGE 557, 558 (1996).

48. WEIL, *supra* note 34, at 272.

1950s and took off in the 1970s.⁴⁹ Taxi companies went from paying their drivers a wage to leasing their vehicles to workers—demanding that drivers pay to work. Due to municipal regulations in the taxi industry, while this form of work was necessarily precarious, some semblance of security over wages and hours remained.⁵⁰ In other industries, like truck driving and delivery services, companies like FedEx not only leveraged independent contractor labor as early as the 1990s, but also effectively pushed for the deregulation of competition, making it easier to grow their companies but harder to regulate worker security. Thus, as I and my colleagues have discussed elsewhere, “with respect to employment trends, the [labor] platform economy is not so ‘disruptive.’”⁵¹ Rather, on-demand platform companies build upon and exacerbate the prevalence of the fissured workplace: using independent contractor labor and pushing for (and frequently achieving) broader industry deregulation.

What is disruptive about the platform economy is the rate at which technology and venture capital together have spurred the growth of precarious unregulated independent contractor work. While the number of contingent workers remained steady for much of the early 2000s, it has since taken off, corresponding both to the timing of the Great Recession (and the loss of full-time jobs) and the rise of the on-demand labor platforms.⁵²

In some ways, the new on-demand labor platforms reflect the business models and strategies of taxi companies and FedEx put together, making the case studies in this Article even more relevant. These new gig firms combine the on-demand service models of taxi companies whose workers are paid in piece-rate with FedEx’s strategy of forced deregulation and requirement of worker capital investment. This latter point is key. While taxi companies continued to bear financial responsibility for the upkeep of vehicles, the dispatch technology, and the commercial insurance to cover potentially injured parties, many on-demand labor platform companies claim they are merely technology businesses that cyber coordinate service transactions. They thus push all associated costs and risks of business onto workers—including those liabilities related to the companies’ core competencies.⁵³

49. Dubal, *Wage Slave or Entrepreneur?*, *supra* note 2, at 96–97.

50. See Dubal, *The Drive to Precarity*, *supra* note 2, at 116–18.

51. *The Regulations of Labor Platforms*, *supra* note 38, at 4.

52. *Labor Platforms and Gig Work*, *supra* note 5, at 4.

53. Uber and Lyft, for example, require their drivers to purchase (or lease) vehicles, pay for commercial or hybrid personal-commercial insurance, pay for their phones, pay for all the associated car upkeep costs, and pay for gas. See, e.g., Jennie

B. Existing Responses to Tech-Enabled Gig Work

The fact that contemporary on-demand platform labor continues and intensifies older models of precarious work makes the case studies herein particularly important. But the additional impetus and perceived need for this Article arises from my and my colleagues' research on the regulatory responses in both political and legal spheres to the labor conditions proliferated by such companies.⁵⁴

Over the last half-decade, Uber and similar tech-enabled gig companies have taken center stage in public debates about the growth of precarious work. As mentioned above, journalists, academics, and policy makers across the political spectrum have spent immense amounts of time discussing and strategizing about what some have called a "new world of work" in which companies claim they are not employers and workers are excluded from the protections accorded most employees over the last century. Global conferences proliferate on the matter, with hundreds of thousands of dollars of foundation and university money being spent on "thinking" about what to do in response. And yet, almost no state action has been taken on the matter—either by legislatures or agencies assigned to address labor issues.⁵⁵ Instead, almost all efforts to protect gig workers have been

Davis, *Drive at Your Own Risk: Uber Violates Unfair Competition Laws by Misleading UberX Drivers About Their Insurance Coverage*, 56 B.C. L. REV. 1097, 1101–02 (2015) ("Ride-sharing is a transportation service whereby people without commercial licenses use their own personal vehicles to provide rides to strangers for a fee."); Avi Asher-Schapiro, *Is Uber's Business Model Screwing Its Workers?*, MOYERS & CO. (Oct. 1, 2014), <http://billmoyers.com/2014/10/01/ubers-business-model-screwing-workers/> [<http://perma.cc/NC8W-M7U8>] ("Uber drivers have no say in the pricing, yet they must carry their own insurance and foot the bill for gas and repairs—a cost of 56¢ per mile, according to IRS estimates."). In addition, drivers must also do managerial tasks and the unpaid work of making sure they are paid correctly, calculating and paying their taxes, and figuring out how best to work to optimize earnings. See, e.g., Alison Griswold, *Uber Drivers are Comparing Fares with Riders to Check Their Pay From the Company*, QUARTZ (Apr. 13, 2017) <https://qz.com/956139/uber-drivers-are-comparing-fares-with-riders-to-check-their-pay-from-the-company/> [<https://perma.cc/8JDB-Z9B5>] ("Independent Drivers Guild . . . encouraged drivers to compare their fare with their passenger's in Uber and other ride-hailing services."); *Tax Tips for Uber, Lyft, Sidecar, and other Car Sharing Drivers*, TURBOTAX (2016) <https://turbotax.intuit.com/tax-tools/tax-tips/Self-Employment-Taxes/Tax-Tips-for-Uber--Lyft--Sidecar-and-other-Car-Sharing-Drivers/INF28820.html> [<https://perma.cc/ZYQ6-SW3J>] (Explaining, "So when you receive a payment, understand that it's not a traditional 'paycheck,' and likely no taxes have been taken out. It's up to you to take care of federal and state income taxes, as well as Social Security and Medicare.").

54. For some of these findings see *Labor Platforms and Gig Work*, *supra* note 5, at 19–20.

55. *The Regulation of Labor Platforms*, *supra* note 38, at 2.

made via private enforcement mechanisms, either by individuals in administrative contexts or—most commonly—by plaintiffs’ attorneys in class actions.⁵⁶

Counterintuitively, most legislative efforts on matters of gig work since 2012 have enforced the status of gig workers as independent contractors carved out of employment and labor laws.⁵⁷ For example, despite widespread allegations of inadequate income and dangerous conditions for workers in the on-demand platform economy, the Florida,⁵⁸ North Carolina,⁵⁹ Arkansas,⁶⁰ and Indiana⁶¹ state legislatures have all passed laws codifying the position of on-demand transportation platform companies that their drivers are independent contractors.⁶²

In contrast, no state legislatures have passed laws to either enforce existing employee rights for gig workers or to create new rights for them.⁶³ An attempt was made in 2016, by California Assemblywoman Lorena Gonzalez, who almost introduced a bill that would have given all independent contractors in the state the right to collectively

56. *Id.* at 30–35.

57. *Id.* at 21.

58. *Gig Economy Game-Changer? New Florida Law Ensures Contractor Status for Drivers*, FISHER PHILLIPS; LEGAL ALERTS (Apr. 25, 2017), <https://www.fisherphillips.com/pp/alert-new-florida-law-ensures-contractor-status-for-drivers.pdf> [https://perma.cc/L7HJ-5A35].

59. Heather Sommerville & Dan Levine, *Exclusive: U.S. States Pass Laws Backing Uber’s View of Drivers as Contractors*, REUTERS, (Dec. 10, 2015, 1:23 PM), <http://www.reuters.com/article/us-uber-statelaws/exclusive-u-s-states-pass-laws-backing-ubers-view-of-drivers-as-contractors-idUSKBN0TT2MZ20151210> [https://perma.cc/3Y2Q-MX8P]. North Carolina is particularly interesting because of their simultaneous work to fight independent contracting in the construction industry. Andrew M. Ballard, *North Carolina Tackles Employee Misclassification*, 31 LABOR RELATIONS WEEK 950 http://news.bna.com/IRln/LRLNWB/split_display.adp?fedfid=119003899&vname=lrw_notallissues&jd=0000015de173d5b8a7dff97fecaa0002&split=0 [https://perma.cc/86YD-4RDE].

60. Sommerville & Levine, *supra* note 59.

61. *Id.*

62. After the Alaska labor commissioner fined Uber in 2015 for violation of workers’ compensation laws, the company left the state, only to return two years later when the legislature specifically codified a workers’ compensation exemption for the companies. Annie Zak, *Uber Plans to Resume Ride-Hailing Operations in Alaska in June*, ALASKA DISPATCH NEWS (May 25, 2017), <https://www.adn.com/business-economy/2017/05/25/uber-plans-to-return-to-alaska-in-june/> [https://perma.cc/5D3H-68SW]; see also ALASKA STAT. § 21.96.018 (2016). While these policy makers may have been heavily lobbied by platform companies, my discussions with such decision-makers suggest that they are also motivated by an anxiety about driving away innovation and jobs. The sense is that the friendlier legislatures are to tech companies, the more likely those companies will invest in the state’s economy—spurring what many imagine as the next generation of tech-fueled “industrial growth.”

63. *The Regulation of Labor Platforms*, *supra* note 38, at 35.

organize. The bill, however, was stymied both by the proposed settlement in *O'Connor*, which was to produce an Uber-funded “worker association,” and by the state’s labor community which was divided over the strategy.⁶⁴ Many believed that the bill “gave-in” to the independent contractor business model and that energy should instead be spent forcing companies to comply with existing collective bargaining laws.⁶⁵ As Gonzalez’s legislative aide told me after the bill was pulled (perhaps not coincidentally on the same day that the proposed settlement in *O'Connor* was announced), “Everyone in [the] labor [community] kept saying, ‘Let’s see what happens with this misclassification case [*O'Connor*], maybe they will [be found to] be employees’ . . . that was their push back before. What are they going to say now?”⁶⁶

The Teamsters Joint Council 7 Political Director, Doug Bloch, said the same, “When [Gonzalez’s] bill was drafted, we thought maybe it wasn’t needed because of the [*O'Connor*] class action.”⁶⁷ While Assemblywoman Gonzalez vowed to propose a similar bill the following year in 2017, what she introduced was instead much weaker: a measure mandating an in-app tipping option for on-demand platform companies.⁶⁸ This bill, too, was later pulled.

Even elected bodies in progressive cities, which are often places of innovative political regulation in support of workers’ rights, have been largely silent on issues faced by gig workers. Only two cities across the nation (Seattle and New York City) have passed ordinances to address the precarities posed by completely unregulated, low-income work. Seattle—which is much discussed—is the lone municipality that passed legislation specifically targeting the insecurities of on-demand transportation workers (namely Uber, Lyft, and taxi drivers), granting

64. Kate Conger, *California Bill to Give Gig Workers Organizing Rights Stalls over Antitrust Concerns*, TECHCRUNCH (Apr. 21, 2016), <https://techcrunch.com/2016/04/21/california-bill-to-give-gig-workers-organizing-rights-stalls-over-antitrust-concerns/> [https://perma.cc/V4XV-XQK2].

65. See *supra* note 29.

66. Telephone Interview with Laurel Brodzinsky, Legislative Aid, Office of Assemblywoman Lorena Gonzalez (Apr. 22, 2016).

67. Interview with Douglas Bloch, Political Dir., Teamsters Joint Council 7, in Oakland, Cal. (May 3, 2016).

68. Liam Dillon, *Uber Would Have to Allow Drivers to Collect Tips from Credit Cards Under a New California Bill*, L.A. TIMES (Feb. 17, 2017, 5:07 PM), <http://www.latimes.com/politics/essential/la-pol-ca-essential-politics-updates-uber-will-have-to-accept-tips-from-1487379477.htmlstory.html> [https://perma.cc/48TR-633Q]. This was later pulled when Uber voluntarily included this function in their app. See *Assemblywoman Applauds Uber Move to Allow In-App Tipping for Drivers*, EAST COUNTY TODAY (June 21, 2017), <http://eastcountytoday.net/assemblywoman-applauds-uber-move-to-allow-in-app-tipping-for-drivers/> [https://perma.cc/E9RW-W77F].

them the right to collectively bargain.⁶⁹ New York City also passed a bill focused on addressing wage theft experienced by freelancing workers. The city council codified existing contract laws and gave freelancers a more accessible form of recourse.⁷⁰ This measure, however, likely has little impact on-demand platform workers whose payment is largely electronic and automated. Elected venues in cities like San Francisco, Los Angeles, and Austin, which are known for worker-friendly initiatives including minimum wage ordinances and locally-funded health insurance for workers, have been surprisingly silent on gig worker issues. Thus, despite collective anxiety about the impact of technology on the future of work, almost nothing has passed to address the grievances of workers.

State agencies tasked with addressing labor issues have also been reticent to publicly respond to the issues raised by tech-enabled gig work. The federal Department of Labor initiated a grant-giving process to encourage non-governmental organizations to “think” about portable benefits for such workers.⁷¹ Though the Alaska Workers’ Compensation Board found Uber to be in violation of the state’s laws and fined them accordingly, the state legislature went on to specifically exempt on-demand transportation companies from these laws in order to lure the companies back to the state.⁷² The National Labor Relations Board (NLRB) has been relatively more active than other agencies, but even their efforts have been stymied by the legal objections and the foot-dragging of tech firms. The NLRB Regional Office in San Francisco initiated an investigation in early 2016 as to whether Uber drivers have been misclassified as independent contractors under the National Labor Relations Act.⁷³ But this process has been slowed by Uber’s tenacious

69. *The Regulation of Labor Platforms*, *supra* note 38, at 23–24

70. *Freelancers Aren’t Free: Mayor Announces First in Nation Protections for Freelance Workers*, CITY OF NEW YORK: OFFICE OF THE MAYOR (May 15, 2017), <http://www1.nyc.gov/office-of-the-mayor/news/307-17/freelancers-aren-t-free-mayor-first-nation-protections-freelance-workers> [<https://perma.cc/7DYZ-RVHK>].

71. *US Labor Department Announces More Than \$150K in Research Grants to Expand Portable Retirement Savings Plans for Low-Wage Workers*, U.S. DEP’T OF LAB., NEWS RELEASE (Sept. 22, 2016), <https://www.dol.gov/newsroom/releases/wb/wb20160922> [<https://perma.cc/9WY8-BFFV>].

72. Elwood Brehmer, *Uber Gets a Lift from Senate Authorization*, ALASKA J. COM. (Mar. 29, 2017, 12:00PM), <http://www.alaskajournal.com/2017-03-29/uber-gets-lift-senate-authorization> [<https://perma.cc/HGX3-FS89>]; *See also Uber Settles with Alaska over Unpaid Workers’ Comp*, INSURANCE J. (Sept. 8, 2015) <http://www.insurancejournal.com/news/west/2015/09/08/380976.htm> [<https://perma.cc/3AL2-YDES>].

73. *The Regulations of Labor Platforms*, *supra* note 38, at 33–34.

legal opposition.⁷⁴ More recently, the NLRB Boston office filed a misclassification complaint against Handy Technologies, Inc. which cyber coordinates home-cleaners and home-cleaning tasks.⁷⁵ Analysts predict the outcome of this case—which may take many years—will be dependent on the political composition of the NLRB.⁷⁶

Thus, in the “new” gig economy, political regulation addressing worker grievances has been scant and regulation codifying worker precarity has been the norm. This inaction to address workers’ issues has put a tremendous amount of pressure on misclassification cases to solve the problems posed by the gig economy.

In sharp contrast to state-initiated actions (or lack thereof) to address the precarity of on-demand gig workers, private actors have mobilized to regulate Uber on employment issues. Plaintiffs’ class action attorneys have filed dozens of misclassification cases against on-demand platform companies. For example, between 2012 and 2016, misclassification cases constituted approximately one-third of litigation against Uber.⁷⁷ Almost all pressure to regulate the gig work produced by on-demand platform companies has thus arisen in the judicial context.⁷⁸ And despite extraordinary legal hurdles posed by expensive discovery, financial incentives to settle, and uncertain arbitration laws, the majority of commentators agree that, “[t]he most effective way for [gig] workers to resolve the question of whether they are employees or independent contractors is a class-action lawsuit.”⁷⁹ But none of these lawsuits have yet achieved anything but settlements—which, while potentially important for temporary wealth-distribution and deterrence—leave the issue of worker identity unresolved.⁸⁰ The question remains, however, if one of these cases overcame the arbitration hurdle,⁸¹ certified a large class, and won employee status,

74. See *supra* note 29; *Uber Technologies, Inc.*, NAT’L LAB. REL. BOARD: CASES & DECISIONS (Sep. 24, 2015), <https://www.nlr.gov/case/20-CA-160720> [<https://perma.cc/92XW-2CS2>].

75. Josh Eidelson, *U.S. Labor Board Complaint Says On-Demand Cleaners Are Employees*, BLOOMBERG, POLITICS (Aug. 30, 2017, 11:07AM) <https://www.bloomberg.com/news/articles/2017-08-31/u-s-labor-board-complaint-says-on-demand-cleaners-are-employees> [<https://perma.cc/6AB3-Y4BN>].

76. *Id.*

77. Regulating Disruption, *supra* note 9, at 15.

78. *Labor Platforms and Gig Work*, *supra* note 5, at 21–22.

79. Charlotte Garden, *What Would a Merrick Garland Confirmation Mean for the Future of Gig Work?*, ATLANTIC (May 11, 2016) <https://www.theatlantic.com/business/archive/2016/05/supreme-court-gig-work/482115/> [<https://perma.cc/EP3C-SKJK>].

80. *The Regulations of Labor Platforms*, *supra* note 38, at 31–32.

81. For an insightful analysis of how arbitration agreements hinder misclassification class actions in the gig economy see Garden, *supra* note 79.

might it produce much-needed security and stability for workers? The answer, as I discuss below, is likely no.

II. THE ANTECEDENT GIG ECONOMY & THE PRIVATE ENFORCEMENT OF EMPLOYEE RIGHTS

In Part II, I examine three best-outcome case studies of similarly-situated gig workers in the antecedent gig economy who, absent the technology of labor platforms, performed transportation services as independent contractors at the behest of companies. In each case study, firms structured themselves to avoid the risks and costs associated with employment. In *Tracy v. Yellow Cab*, a legal-aid non-profit organization sued San Francisco's largest taxi companies, alleging that their taxi workers were employees for purposes of safety-net benefits—unemployment insurance and workers' compensation.⁸² In *Friendly Cab v. NLRB*, attorneys for the Teamsters challenged the classification of Oakland taxi drivers as independent contractors under the National Labor Relations Act and prevailed, securing for drivers the right to collectively bargain. And in *Alexander*, plaintiffs' attorneys sued FedEx, contesting the independent contractor status of drivers for wage and income purposes under California's labor code.⁸³ Judges examined the facts of each case in relation to the applicable legal definition of employee and found the workers to have been misclassified by the firms.⁸⁴ And yet, in all three cases, employee rights were either unsustainable or never realized. Based on interviews with workers, their attorneys, and labor advocates, I describe and make sense of these outcomes.

A. *Tracy v. Yellow Cab Cooperative*

In 1996, taxi workers in San Francisco won employee rights on summary judgment—an unlikely outcome in a misclassification case, especially one that had dragged on for so long. This was one of very few misclassification legal victories achieved on behalf of workers in the taxi industry nationally. Four years after the Legal Aid Society-Employment Law Center filed a class action on behalf of taxi workers against San Francisco's largest cab companies, Superior Court Judge William Cahill extended workers' compensation and unemployment

82. *Tracy v. Yellow Cab Coop.*, No. 938786 at 10–11 (Super. Ct. Cal. Oct. 22, 1996) (order granting motion for summary judgment).

83. *Alexander v. FedEx Ground Package Sys., Inc.*, 765 F.3d 981 (9th Cir. 2014).

84. *See id.* at 997; *Tracy*, No. 938786 at 10–11.

rights to five thousand San Francisco taxi drivers,⁸⁵ those who labored for Yellow Cab, DeSoto, and Luxor.⁸⁶ In the same decision, Judge Cahill banned these companies from charging taxi workers any cash bond or “security deposit” as a condition of employment.⁸⁷ One of the lead attorneys for the taxi workers—Christopher Ho—told reporters that the decision came at a time when “the big trend [wa]s for employers to try to characterize people as independent contractors.”⁸⁸ Plaintiff taxi workers were thrilled with the outcome.⁸⁹

Many in the California labor advocacy community understood the decision in *Tracy* as a “turning of the tide”—an example of how California courts could and would deliver a judicial check on businesses that misused the independent contractor business model to evade responsibility for their workers.⁹⁰ Though attorneys did not secure an appellate decision to generate precedent on the matter, they hoped that the outcome would help San Francisco workers and simultaneously deter other taxi companies from utilizing the “leasing” model.

But by the time I began working with San Francisco taxi drivers in 2008—twelve years after the *Tracy* decision—leasing was the ubiquitous practice of taxi companies nationally and the rights established in *Tracy* had mostly been lost to time.⁹¹ Few workers in the industry knew that these safety-net benefits were available to them.⁹² Taxi companies by and large did not comply with California laws regarding unemployment insurance, and they either threatened drivers who needed to file for

85. Christopher Cook, *Protecting the Cabbies: Despite Landmark Lawsuit, S.F. Drivers' Working Conditions Remain Grim*, S.F. BAY GUARDIAN, Nov. 20, 1996 at 25.

86. *Tracy v. Yellow Cab Coop.*, No. 938786, slip op. at 1 (Super. Ct. Cal. Feb. 10, 1997).

87. *Id.* at 2.

88. Dolores Ziegler, *Cabbie is Employee, Not for-Hire Worker*, S.F. DAILY J., Oct. 24, 1996.

89. John True, the plaintiffs' attorney who initially filed *Tracy v. Yellow Cab* in 1992, told me of the workers' responses:

I remember the day we got the decision. We had a meeting. Drivers were extremely happy and pleased with the representative because we had won. There was some discontent that we didn't get them back wages. But they were happy to have gotten up over management and beaten the companies' lawyers. They also felt good that they didn't have to pay the security deposit. It reaffirmed the fact that they saw the lease correctly and knew it was a sham.

Interview with John True, former Workers' Rights Attorney, Emp't Law Center-Legal Aid Society, in Berkeley, Cal. (Feb. 29, 2012).

90. See *supra* note 29 and accompanying text.

91. *Id.*

92. *Id.*

workers' compensation or fought them tooth and nail. Only one relic of the *Tracy* victory remained: twice between 2008 and 2010, worker-advocates successfully evoked the decision to rein in companies that demanded security deposits.

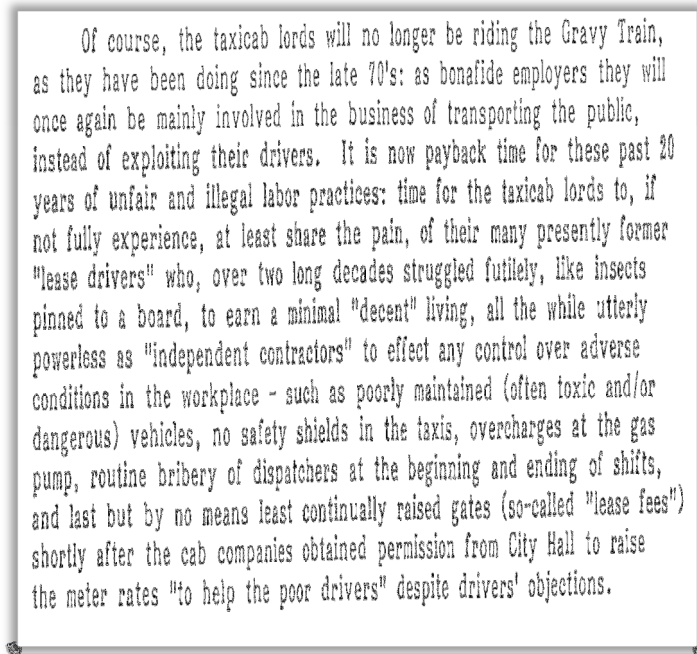


Illustration 2: Excerpt from a letter written by a taxi worker plaintiff to attorneys at the Employment Law Center praising Judge Cahill's decision. He emphasizes, "[i]t is now payback time for these past 20 years of unfair and illegal labor practices . . ."

In this case study, I analyze both the pre- and post-litigation stories of taxi worker plaintiffs who participated in this misclassification litigation. I explain how taxi workers in San Francisco became independent contractors, and how *Tracy* was conceived as a proxy battle to challenge the misclassification trend. I also tell the story of how the lawsuit impacted workers after the case was won. Unlike many class actions, *Tracy* was litigated by public interest attorneys for whom worker agency was vital, and workers informed every stage of litigation. But in spite of the legal victory, the enduring impact of *Tracy* on even the most active worker-plaintiffs neither sustained long-term mobilization, nor the mobilization of their employee rights.

1. WORKERS FIRST: LITIGATION, AGENCY, AND THE SOCIAL CHANGE

Public interest attorney John True filed *Tracy v. Yellow Cab* in 1991, just two years after the California Supreme Court decided *S.G. Borello & Sons, Inc. v. Department of Industrial Relations*.⁹³ In *Borello*, the court laid out a broad definition of who constituted an employee under California law. The decision held that for California state employee rights protections (including wage-related rights, unemployment insurance, and workers' compensation), the most significant consideration of whether a worker was an employee was if the putative employer retained the "right to control work details."⁹⁴ But the court also gave weight to other factors, including whether the worker who performed the "services [wa]s engaged in a distinct occupation or business" from the putative employer.⁹⁵ The addition of this and other factors to the traditional "right to control" test for employee status made it more likely that putative independent contractors would be found misclassified.

Soon after the *Borello* decision, John True, who founded Employment Law Center's Workers' Rights Clinic—a workers' rights clinic for low-income workers in San Francisco, began to win cases for taxi drivers who came to the clinic. True explained the genesis of the *Tracy* litigation:

Early on, we started seeing taxicab drivers come to the clinic. One guy, Garth Chojnowski, comes to mind. He was living in his car and got fired. He was a driver for Yellow, and applied

93. 769 P.2d 399 (Cal. 1989).

94. *Id.* at 403–04.

95. *Id.* at 404. The court emphasized that in addition to whether or not a putative employer has the right to control the means and manner in which the work is done, additional factors should be considered to determine whether the worker is an employee. *Id.* Those factors include: 1) Whether the person performing services is engaged in an occupation or business distinct from that of the principal; 2) Whether or not the work is a part of the regular business of the principal or alleged employer; 3) Whether the principal or the worker supplies the instrumentalities, tools, and the place for the person doing the work; 4) The alleged employee's investment in the equipment or materials required by his or her task or his or her employment of helpers; 5) Whether the service rendered requires a special skill; 6) The kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the principal or by a specialist without supervision; 7) The alleged employee's opportunity for profit or loss depending on his or her managerial skill; 8) The length of time for which the services are to be performed; 9) The degree of permanence of the working relationship; 10) The method of payment, whether by time or by the job; and 11) Whether or not the parties believe they are creating an employer-employee relationship may have some bearing on the question. *Id.*

for unemployment insurance through the clinic. We won. That replicated itself a number of times over—with workers' compensation claims being the most common. The most notorious workers' compensation case that I remember was of a driver who got assaulted by a customer and suffered permanent physical and mental injuries. He was one of the named plaintiffs in *Tracy*.⁹⁶

A number of the taxi drivers who came to the Employment Law Center's Workers' Rights Clinic assumed that they were owed safety-net protections because they had worked as taxi drivers before companies began utilizing the "leasing" practice.

In the late 1970s, San Francisco taxi drivers—like many drivers across the country—lost their access to employee protections when taxi companies re-ordered themselves through the practice of leasing.⁹⁷ Rather than paying taxi workers a guaranteed wage, companies began to ask drivers to pay to work. Drivers paid a rental fee and gasoline expenses for each shift, and in turn, they kept all earnings from fares collected. Because of the alleged lack of employer control inherent in the practice of leasing, taxi workers were subsequently considered to be "independent contractors."⁹⁸ The Teamsters, which had represented San Francisco taxi workers before the ascent of the leasing practice, challenged the status of leasing taxi workers as independent contractors for purposes of collective bargaining, but the courts found for the taxi companies under the National Labor Relations Act (NLRA).⁹⁹ By 1979, taxi drivers were left without either a union or basic on-the-job protections.¹⁰⁰

Based on the broad California definition of "employee" laid out in *Borello* and many individual administrative victories, True convened a group of taxi workers with the intention of trying to standardize safety-net benefits in the industry. In a case that could have been brought without workers under California's consumer protections laws, True chose to formulate this misclassification class action through and with taxi worker plaintiffs.¹⁰¹ In many class action contexts, the named

96. Interview with John True, *supra* note 89.

97. See Dubal, *Wage Slave or Entrepreneur?*, *supra* note 2, at 90, 97.

98. *Id.*

99. *Yellow Cab Cooperative, Inc.*, Nos. 20-RC-14735; 20-RC-14736 (NLRB Mar. 27, 1979).

100. *Id.*

101. In administrative hearings, the outcome does not affect similarly situated workers, just the individual who filed the complaint. See Charles C. Ames & Steven C. McCracken, *Framing Regulatory Standards to Avoid Formal Adjudication: The FDA as a Case Study*, 64 CAL. L. REV. 14, 46 (1976). However, when a class action is filed in

plaintiffs figure in only in a symbolic capacity, with the effective control almost always in the hands of the attorneys.¹⁰² But as a public interest attorney, True—and later Christopher Ho who served as co-counsel on the case—perceived of this litigation, from start to finish, not just as advancing taxi workers’ interests, but also as empowering taxi workers to mobilize and enact control over their work lives. True told me, “[W]e wanted them as a group to stand up and confront—face to face—management. Giving those drivers a voice was a huge thing for me.”¹⁰³

The problem, as True and Ho encountered it during the course of four years of complex litigation, was that no single “worker perspective” existed. In fact, divisive worker politics almost fractured the case. The reality was that not all workers wanted to be employees. And even amongst those who did, the decision to sue for safety-net benefits alone was met with contention. John True explained:

We made the political decision to sue only for safety-net type benefits . . . not [for the drivers] to be considered employees generally. For example, we didn’t sue for minimum wage or overtime because by and large drivers did not pay taxes, and we didn’t want to make them vulnerable during discovery. Some of the drivers were mad about this.¹⁰⁴

Ho echoed this, “I remember the tensions between the main drivers. We had to decertify part of the class action because of the divisiveness among the class. . . . It was very painful.”¹⁰⁵

Despite these difficulties, even during the throes of the case, True and Ho met regularly with driver-plaintiffs, and together, the drivers

court, the doctrine of *res judicata* applies. See *Res Judicata*, BLACK’S LAW DICTIONARY (10th ed. 2014). Therefore, the outcome of the case has an impact on all similarly situated workers. A win in a class action is thus much more powerful for workers than an individual administrative win.

102. See Geoffrey P. Miller, *Some Agency Problems in Settlement*, 16 J. LEGAL STUD. 189, 213 (1987).

103. Interview with John True, *supra* note 89.

104. Interview with John True, *supra* note 89. A central critique in the literature on public interest lawyering and social change has been the all too common dominating and domineering role of lawyers. See Sameer M. Ashar, *Public Interest Lawyers and Resistance Movements*, 95 CALIF. L. REV. 1879, 1916–25 (2007). In the *Tracy* case, however, the lead attorneys were acutely aware of these power dynamics and went to great lengths to make sure that workers were at the center of every decision.

105. Interview with Christopher Ho, Senior Staff Attorney, Law at Work (formerly the Employment Law Center-Legal Aid Society), in S.F., Cal. (Feb. 15, 2012).

voted on all litigation decisions. Both attorneys described combative meetings in which they went out of their way to build consensus among the class. True said:

We had so many meetings with drivers to decide what to do [throughout the litigation] . . . We would meet before and after court and settlement hearings. We met with a core group of thirty to forty drivers each time. These were long, contentious meetings where we tried to articulate the goals of the lawsuit and what we could accomplish. . . . Then we'd have more meetings with individual drivers around their cases. I remember thinking, 'Why don't we just litigate the way we want and stop all of these meetings?' It occurred to me that it would have been easier without the drivers. But . . . it would have been a terrible mistake [to exclude them from the decision-making process] . . . I can remember half a dozen times when we were in court where drivers got to be heard and companies had to listen. They heard the B.S. the management said in court, and they could actually respond to it. . . . Giving drivers a voice was a huge thing for me, and part of the case that I am really proud of.¹⁰⁶

True's memories underscore the remarkable lengths to which his team went to build consensus and maintain agency for the workers amidst litigation decisions. Joe Tracy, the lead plaintiff, remembered these meetings as well. Tracy was passionate about drivers' rights and had witnessed the reality of taxi work both before and after the switch to leasing and independent contracting.¹⁰⁷

Despite the eventual victory on summary judgment, Joe Tracy was so exhausted by the case that he was not motivated to fight for workers' rights after it ended.¹⁰⁸ Prior to the case, Tracy had been politicized through his own experiences with injustice and indignity at work.¹⁰⁹

106. Interview with John True, *supra* note 89.

107. Interview with Joe Tracy, Cab Driver, in S.F., Cal. (Aug. 13, 2013).

108. *Id.*

109. Joe Tracy recounted his moment of politicization around workers' rights issues:

I'm very regular so I don't really need to use the bathroom [at work], except one day for some reason, I was just off schedule. The bathroom at Luxor on that day was about six inches deep in sewage, I couldn't go in there. And I needed to use the bathroom. So I just walked into the administrative building at Luxor, went in and used the bathroom. [I] [c]ame out, and Mary Warner, who eventually became the president – she was standing right there at the door waiting for me to come out and when I came

These experiences had made him a leader amongst taxi-worker advocates, and, throughout the case, he had persisted. But afterward, he, like True and Ho, and the other drivers, was drained by the tensions among the class and the vicious lawyering of the cab companies. Tracy said that he felt he had done his part, “[E]ver since the end of this exhaustive case, I have kept my head down pretty much.”¹¹⁰ Years after the win, the new president of Luxor Cab, Tracy’s employer, asked Joe Tracy whether he was going to be a troublemaker. Tracy answered, I did my bit for my rights and the rights of my fellow cab drivers . . . I’m done. I’m exhausted. I’m not going to be advocating anymore for anybody unless somebody messes with me in particular, so don’t mess with me. Leave me alone.¹¹¹

Tracy was no doubt an extraordinary win for taxi workers. But despite the best efforts of the public interest attorneys to maintain worker agency through the process, the case complicated both the possibilities of misclassification litigation and the aspiration to leverage litigation victories to empower workers towards mobilization. The length of the litigation, due in large part to the vigorous and well-financed lawyering of the taxi companies, exhausted workers like Tracy who missed work and forfeited pay to participate.¹¹² Rather than mobilizing the collective power of workers, the difficulties of the case diverted the energies of potential leaders. As True aptly reflected over

out, she started waving her finger right in my face and yelling at me about how ‘you drivers, [this and that],’ you know, I was just saying the bathroom out there is just too bad, I couldn’t use it. And she kept yelling at me and sort of blaming me for all of this. And I just kind of ducked my head and crawled out of there as she was, you know, yelling at me all the way out of the building. And over the next three days, I went from a slow simmer about that to a rolling boil. I was completely pissed, and I would always think back to how my mother taught us three kids to always be nice to everybody, but don’t take any crap from anybody. That was in my genes.

Interview with Joe Tracy, Cab Driver, in S.F., Cal. (Aug. 8, 2013).

110. *Id.*

111. *Id.*

112. Joe Tracy said:

[T]here were so many meetings where I would miss work and lose pay and such. And there was—you know, anxiety about are we winning this case or losing this case, what’s going to happen? And then, there was anxiety about people at the Employment Law Center, what is going on here? Are you trying to squeeze us out of a deal, you know, after all these years and all this effort? So there was much anxiety and pressure and worry about whether it was going to be a win or a loss, you know, so that just thoroughly exhausted me after—even after we won, it was like that’s it, you know, now I’m going to go live my happy life. Unless somebody messes with me, because I still go the Irish-German in me, you know.

Id.

two decades later, “I’m not sure if the lawsuit prevented further mobilizing . . . that’s an issue that pervades employment law.”¹¹³



Image 3: Joe Tracy in his home in San Francisco in 2010. In recounting his role in the misclassification litigation, he told me, “[T]here was so much anxiety and pressure and worry about whether it was going to be a win or a loss, you know, so that just thoroughly exhausted me after—even after we won, it was like that’s it, you know, now I’m going to go live my happy life.”¹¹⁴

2. LONG TERM IMPACTS OF *TRACY*: RIGHTS WITHOUT POWER

Despite the unintentional consequences of *Tracy* on long term taxi worker organizing and mobilization, the decision undeniably aided vulnerable workers in the immediate aftermath of the decision. As

113. Interview with John True, *supra* note 89.

114. Interview with Joe Tracy, *supra* note 109.

Christopher Ho explained to the media after the win, “You have these horror stories of [drivers] getting clubbed over the head, pinned between cabs, and going to S.F. General [Hospital] . . . The gross injustice of this is that cabbies [would] get injured on the job and the company [would] fight them tooth and nail [in workers’ compensation claims].”¹¹⁵ *Tracy* legally ensured that taxi workers were “employees” for purposes of unemployment insurance and workers’ compensation.¹¹⁶ In what OSHA considers one of the most dangerous industries in the nation, workers finally had a safety-net to fall back upon if they were injured and lost their job. In my research, however, conducted many years after the *Tracy* decision, few drivers knew of the right to workers’ compensation, and those who did know were afraid to use the right. No one but older worker advocates who had labored in the industry when *Tracy* was decided knew about their right to unemployment insurance. And Yellow Cab had attempted to reinstate their security deposit requirement at least twice.

Many taxi workers in my research who were aware of their right to workers’ compensation stated that in the case of an injury, they would not file a claim. One worker leaned in and whispered to me during our interview, “They [the taxi cab companies] blacklist you. I had a friend who filed. I know. He never worked in the industry again.”¹¹⁷ Another driver said, “I was giving a driver a ride to work, and he said he got rear ended and he said the cab company told him if you get an attorney and apply for workers’ comp, you’re going to lose your shifts and he didn’t, so he just lived with his injury.”¹¹⁸ Whether or not the rumors of “black-listing” taxi workers and discouraging them from filing workers’ compensation were true, they speak to the relative powerlessness of the taxi worker in enforcing what, through the strenuous litigation in *Tracy v. Yellow Cab*, became his “right.” The workers feared that if they did file for workers’ compensation, after their recovery, they would never find work in the industry again.

Unlike with workers’ compensation, only two workers in my research (both of whom were tangentially involved in *Tracy*) knew about the right to unemployment insurance. Even Paul Gillespie, a longtime taxi driver who served for many years on San Francisco’s Taxi Commission, had never heard that workers had won the right to

115. Cook, *supra* note 85, at 25.

116. *Tracy v. Yellow Cab Coop.*, No. 938786, slip op. at 2 (Super. Ct. Cal. Feb. 10, 1997).

117. *See supra* note 29.

118. *Id.*

file for unemployment.¹¹⁹ It was unclear whether this was because cab companies had effectively stamped out the knowledge by discouraging such claims or whether the information had been lost to time. My research also uncovered that at Luxor Cab in 2012, the one unemployment insurance claim that had been filed had been rejected by the EDD (Employment Development Department), despite the *Tracy* decision. While this decision was not published and neither Luxor's attorneys nor management would share why the claim was rejected, my conjecture is that the more recent restructuring of taxi firms—through the rise of long-term leasing and the decline of day-leasing—led the administrative body to determine that Luxor taxi workers were now “independent contractors” and no longer “employees,” as they had been at the time of the *Tracy* litigation.

Though both unemployment insurance and workers' compensation have dwindled as enforced rights for cab drivers, San Francisco taxi workers did use collective power to mobilize the one remaining “win” in *Tracy*: the prohibition against cash bonds or security deposits.¹²⁰ Twice, in both 2008 and 2010, Yellow Cab issued notices to drivers to “pre-pay” monthly for their shifts.¹²¹ Yellow Cab drivers were told that management had changed the terms of the contract, illustrating the one-sided nature of these contracts, and warned that if drivers did not prepay for the entire month, they would lose their assigned shifts. The United Taxicab Workers (UTW)—a driver-led workers' rights organization—mobilized workers, informing them that this was illegal under *Tracy*.¹²² Bud Hazelkorn, then president of UTW, threatened a lawsuit seeking injunctive relief.¹²³ Quietly, weeks later, Yellow Cab notices about the pre-payment were taken down, and drivers informed that the change had been “postponed.”¹²⁴

The conundrum of *Tracy* reflects the larger problem with effecting individual employee rights for workers in a “grey zone.” Unlike the right to collectively bargain under the NLRA, individual employee rights and litigation attempting to enforce those rights do not address the inequalities integral to the contractual theory of employment. In the case of *Tracy*, policing individual employee rights through litigation after the formation of the contract between worker and employer did

119. Interview with Paul Gillespie, Taxi Driver and former Commissioner, S.F. Taxi Comm'n, in S.F., Cal. (Aug. 23, 2011).

120. See *supra* note 29.

121. *Tracy v. Yellow Cab Coop.*, No. 938786, ¶ 3 (1997).

122. See *infra* Ill. 4. For more on the history and work of the UTW see Dubal, *The Drive to Precarity*, *supra* note 2, at 111–20.

123. See *supra* note 29.

124. *Id.*

not destabilize the employer's dominant position. While taxi workers were granted individual protections, the asymmetry of power between them and the cab companies was left untouched. The structural power of capital won over a hard-fought for legal decision. And perhaps worse, the outrage and energy of the lead plaintiff waned.

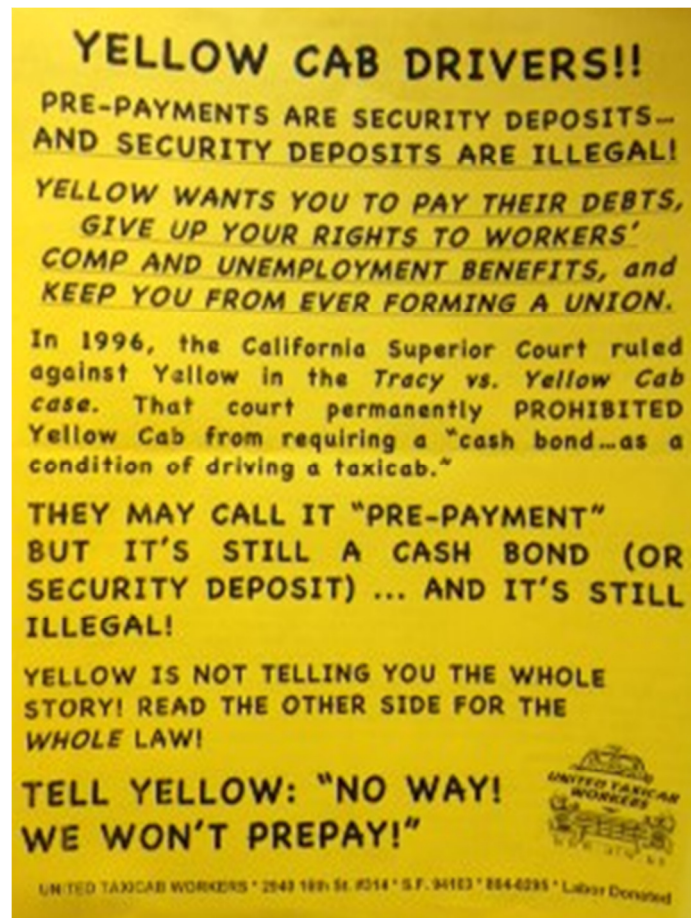


Illustration 4: United Taxicab Workers flier from 2010, urging drivers not to prepay for their shifts and informing them of the ruling in *Tracy v. Yellow Cab*.

A. *Friendly Cab v. NLRB*

Analytically, the next case study leaves off where *Tracy* ended. The key reason that *Tracy* did not have a long-term impact on the lives of taxi workers was drivers' limited power to leverage the hard-won safety-net protections. But what might have happened if the taxi workers had been employees not just for one-off rights but under National Labor Relations Act—that is, if they had the legally-enforced

power to collectively bargain with their employers? Would misclassification litigation in the NLRA context have been more effective?

In analyzing *Friendly Cab v. NLRB*, I examine the pre- and post-litigation realities of a taxi worker mobilization across the bay from San Francisco—in Oakland. After years of organizing, protesting, and holding improbable work stoppages, these taxi workers petitioned for employee recognition for unionizing purposes. As in San Francisco, the taxicab company employers structured their work through the practice of leasing to avoid liabilities associated with employment; but at each level of appeal, the courts found that the drivers were indeed employees. The Ninth Circuit opined that despite the leasing practice, the employers exerted unusual control over the means and manner of the work and that the taxi drivers had limited entrepreneurial opportunities.¹²⁵

And yet, despite the fact that the appellate court found that these taxi workers had the right to collectively bargain and recognized them as a bargaining unit, no union contract was ever established. In fact, workers never even made it to the bargaining table to hash out the terms of their work contracts. The real-life hindrances faced by workers in *Friendly Cab* were two-fold. First, despite years of worker organizing and the legal recognition of their bargaining unit, the taxi drivers still languished under the incredible structural and political power of their employers. Second, surprisingly, the taxi workers never really wanted to be employees. Their primary goal was cooperative self-ownership, but this objective was never embraced either by city regulators or by the union that supported them through the litigation.

1. BEFORE THE LITIGATION: ORGANIZING FOR SELF-OWNERSHIP

A battle that began with worker protests in 1996 and culminated in a Ninth Circuit decision finding workers to have been misclassified under the NLRA appeared to be a perfect success story of collective bargaining laws in the United States. The story leading up to the Ninth Circuit's decision in *Friendly Cab* is remarkable—involving almost a decade of resistance by low-income immigrant workers, including refugees from Afghanistan and immigrants from Nigeria and India. Many of the taxi workers in Oakland, California who worked for the multiple taxi companies operated by a single family entered the business because of both the relative freedom allotted to them by the leasing practice and because, despite their professional status in their

125. *NLRB v. Friendly Cab Co.*, 512 F.3d 1090, 1097 (9th Cir. 2008).

home country, they were carved out of similar work here. Their work lives as Oakland-based taxi drivers, however, were both precarious and oppressive. In addition to their low earnings, drivers complained of the frequent and unpredictable disciplinary actions taken by their employers (mostly in the form of fines) and the degree of capricious control exerted upon them while at work.

Responding to these conditions in 1996, almost one hundred drivers held days-long protests, seeking municipal recognition of their enumerated grievances.¹²⁶ Conceiving of themselves as a “union,” they complained to Oakland’s public safety committee that their cab companies refused to take basic measures to keep them safe, despite legal regulations mandating certain protections. For example, some of the companies would not install protective shields in their taxis, as required by law. Drivers also raised serious concerns about “faulty brakes, shoddy repairs, and lack of insurance for drivers.”¹²⁷ Their concerns—about both worker and consumer safety—fell on mostly deaf ears. The Singh family—who owned several taxi cab companies in Oakland, including the three largest—were powerful lobbyists who, drivers told me, had many friends in city government.¹²⁸

By late 2001, during the national drop in tourism following the September 11th attacks, these Oakland-based taxi drivers were earning—on average—\$25,000 a year, hardly enough to support their families in one of the most expensive areas in the world.¹²⁹ Their dire economic situation led to a new round of mobilizing. Anwar Zadrán, a refugee from Afghanistan who had worked for Friendly Cab since the early 1990s, emerged as a worker leader. Leveraging his charismatic personality, reputation for honesty, and boundless energy, Zadrán organized over one hundred taxi workers into an association called the East Bay Drivers’ Association (EBDA). Reflecting on this feat years later, Zadrán said:

126. Rick DelVecchio, *Cabbies Break for Union OK*, S.F. CHRON., Sept. 25, 1996, at A14.

127. Anwar Zadrán, *Blurring the Line: Workers in the New Tech Economy at the Berkeley Journal of Employment and Labor Law Symposium: On the Precipice, Workers in the New Tech Economy* (Feb. 24, 2016).

128. While most of this was anecdotal, there was some documented evidence of the relationship between the Singh family and government officials in Oakland. See, e.g., Zusha Elinson, *Dhar Mann, Indicted Oakland Pot Entrepreneur, Leaned On Political Relationships*, HUFFINGTON POST (Sept. 14, 2012, 6:17 PM), http://www.huffingtonpost.com/2012/09/14/dhar-mann_n_1885701.html [<https://perma.cc/J8WE-H7SC>].

129. See *supra* note 29 (describing underlying interviews). See also, Helene Blatter, *All’s Fare in Cabbies’ Union Fight*, EAST BAY EXPRESS (Oct. 9, 2002), <https://www.eastbayexpress.com/oakland/alls-fare-in-cabbies-union-fight/Content?oid=1068543> [<https://perma.cc/5NRJ-F6KD>].

We were mostly from our different countries. They [the cab companies] were trying to take advantage of us because we didn't know the law. They charged us fines when we say anything [in opposition] to them. We also needed vacation time and sick time [to deal] with the rest of our problems. That was one of the reasons that I gathered the drivers together to be unionized.¹³⁰

Like Zadran, members of the EBDA were frustrated by the degree of control exerted over their work lives by both the cab companies and the city regulators. The drivers' complaints against the city were two-fold. First, they alleged that the city did not provide them with an adequate number of taxi stands to pick up fares. The existing stands were always busy, and drivers who tried to hustle in other parts of the city—in parking places or at the curb—were slapped with tickets by the police department. These tickets often cost them more than half a day's income.¹³¹ Second, the drivers wanted the city to issue taxi medallions to working drivers—instead of to owners of existing taxi companies. The drivers wanted more control over their personal and professional lives. This supposed freedom and flexibility of taxi work had been a primary reason many of them had become drivers in the first place.

The drivers' complaints against the companies they worked for were many, but most stemmed from exploitation and unusually high degree of control exerted by the cab companies. The Singhs owned nearly sixty percent of Oakland's medallions or taxi permits. Among other things, drivers complained that the companies operated by this family compelled them to sign blank contracts that were later filled out by the company, that they charged higher leases to drivers who complained, and that they gave the best taxis and lower rates to Indian immigrant drivers (the Singhs are originally from India).¹³² They also alleged that the family "force[d] drivers to pay exorbitant repair bills in violation of their contracts, skim[med] off percentages of voucher reimbursements that belong to [the] drivers, fail[ed] to insure cabs and force[d] drivers to use cabs that [were] 'battered and non-roadworthy,

130. Interview with Anwar Zadran, Former EBDA Leader, S.F., Cal. (Aug. 2015).

131. DEBORAH EDGERLY, CITY OF OAKLAND OFFICE OF THE CITY ADM'R, AGENDA REPORT (Feb. 27, 2007), <http://clerkwebsvr1.oaklandnet.com/attachments/15631.pdf> [https://perma.cc/PML3-7TYU].

132. Charles Burrell, *Oakland Cabbies File Bias, Fraud Suit Against 5 Firms / 'Fed Up' Immigrant Drivers Claim Exploitation*, SFGATE (Aug. 13, 2002, 4:00 AM), <http://www.sfgate.com/bayarea/article/Oakland-cabbies-file-bias-fraud-suit-against-5-2783304.php> [https://perma.cc/EU4X-CL7V].

lack heating and air-conditioning, or belch smog.’’¹³³ Drivers who complained, they said, were either disciplined or terminated.¹³⁴

Since their drivers’ complaints were directed both at Oakland city officials and the cab company owners, the EBDA’s organizing occurred along two tracks simultaneously. Workers both pushed the city to give them more control over their lives and pressured the cab companies to do the same. The drivers, represented by Berkeley attorney Donald Jelinek, sued the five affiliated taxi companies then operated by the Singhs for extortion, fraud, race discrimination, and retaliation.¹³⁵ For confidential reasons, the drivers eventually took on the case *pro per* and the litigation was later dismissed.¹³⁶

However, in the process, Jelinek referred the EBDA to the Teamsters Local 7 for representation. The Teamsters, excited to have found a group of organized drivers to represent, closely examined the work realities imposed by the cab companies. Though the Teamsters had failed to establish employee status in other independent contracting contexts (mainly trucking) given the high degree of control exerted by the Singhs, they were hopeful for a better outcome with the EBDA.¹³⁷

As the Teamsters advanced their asks of the taxicab companies, the EBDA also heavily lobbied city officials to give them medallions or permits to operate their own taxi business. Zadran and other drivers explained to me that their dream had been to establish a worker-run taxi company. The taxi company they envisioned was a worker-cooperative in which the members of the EBDA shared both revenue and power. They believed that through self-ownership, they could better realize the demands of their non-work lives while also having a say in how they conducted themselves at work. Many of the immigrant men in the EBDA shared close friendships and bonds that they hoped would serve them well in a cooperative context. The most pressing question for them was how to get the medallions. The drivers believed that the Singhs were in violation of the terms of use for some of their medallions, and they lobbied the city to take those permits back and re-issue them to workers. Despite much advocacy by EBDA leaders—some of which I participated in—the city never relinquished. Behind

133. *Id.*

134. *Id.*

135. This case was later dismissed. Attorneys for the drivers say the reasons the case was dismissed are confidential. The docket record indicates that soon after the initial complaint was filed, the drivers represented themselves *pro per*. They did not respond to discovery requests, and the judge dismissed the case some 4 years later.

136. One of the attorneys who assisted Jelinek on this case recalled, “These were nice guys. But not always the easiest to deal with.” Telephone Interview with Myron Moskowitz, Legal Dir., Moskowitz Appellate Team (Aug. 10, 2017).

137. Interview with Anwar Zadran, *supra* note 130.

closed doors, sympathetic city officials explained to the drivers that the political capital of the Singh family tied their hands.

2. LITIGATION FOR EMPLOYEE STATUS: GETTING *FRIENDLY CAB* TO THE BARGAINING TABLE

In 2002, at the same time that the EBDA sued Friendly Cab in state court for various civil wrongs, they also—with the assistance of the Teamsters Local 70—petitioned the NLRB to be certified as a bargaining unit.¹³⁸ While the drivers continued to seek their own medallions, both the city and the Teamsters urged the drivers down the path of “employee status” to get the Singhs to bargain with them. When asked whether he knew that the drivers’ original goal had been to get medallions to start their own business, Bob Aiello, the Teamster’s Business Agent who worked with the EBDA over many years, admitted:

Yes, oh yeah, they saw the value of the medallions and they wanted their own. But then they would really become independent contractors and that wasn’t our objective. My objective was that they were not independent contractors, but [that] they were employees of Friendly Cab. They [the company owners] were blackmailing them and abusing them. My position, well, Local 70’s position, was that we wanted to stop the abuse and negotiate a fair collective bargaining agreement that would give them rights and security and retirement benefits.¹³⁹

The Teamsters’ objectives reflected the traditional path to address worker grievances: get workers under the employee umbrella, help them achieve bargaining rights, negotiate a fair contract, and increase collective worker power through union membership. Local 70 wanted to give the taxi workers in Oakland the kind of employee life that union officials knew was safe and secure. City regulators felt similarly. Once the EBDA was legally considered a union, the city could continue to work with known actors—the existing cab company owners—but their regulatory load would be significantly lightened. The welfare of the taxi workers would be addressed through private negotiations with the collective bargaining unit, rather than in and through public hearings.

138. *Id.*

139. Interview with Bob Aiello, Former Bus. Agent, Teamsters Local 70 (Aug. 11, 2017).

Both city regulators and the Teamsters were encouraged by the fact that on the face of things, the Singh family treated the drivers like employees. According to both the workers and their attorneys, the Singhs—unlike many taxicab companies whose business model relied on the practice of long-term leasing—exerted an unusual amount of control over the daily work lives of the taxi drivers. In the course of my research, I found that in San Francisco, many drivers opted into the long-term leasing practice because they typically only had to go into the taxi company garages upon occasion to pay a fixed rate to the cab company. All fares were then typically collected without accounting to the employer. The workers were otherwise free to work as they pleased—picking up fares on their own terms and in their own time. If they needed to stop driving to pick their child up from school, or to get coffee, then that was their prerogative. Since the 1970s, when the leasing and long-term leasing practices began to proliferate in taxi companies across the country, courts repeatedly found that the practice created a “strong inference” that taxi companies were not exerting control over the “means and manner” of the workers’ performance, and that consequently, the drivers were independent contractors, unprotected by labor and employment laws.¹⁴⁰

However, the long-term leasing practice at the Singhs’ establishments did not work in this way. Taxi driver plaintiffs relayed that the Singhs’ “flat rate” was not flat at all—but differed amongst workers. If the owners liked the driver, he got a lower rate. Drivers were not allowed to develop their own clientele and could only take fares from the company dispatcher. The owners also exerted a significant degree of control in regulating the manner in which the drivers drove—requiring drivers to adhere to a dress code, mandating that they accept “vouchers,” charging them “processing fees,” and requiring that they carry advertisements on their vehicles from which they earned no revenue. The owners even deployed a “road manager” who monitored drivers while they were working. The drivers also had to pay for accidents and maintenance and adhere to a training manual that outlined requirements above and beyond those outlined in city regulations. In the NLRB hearings, drivers testified that any verbal disagreements with the cab company owners or managers would lead to additional fines.

Based on these facts, and more, in 2002, the NLRB regional director found the drivers to be statutory employees and directed a

140. See, e.g., *NLRB v. Associated Diamond Cabs, Inc.*, 702 F.2d 912, 925 (11th Cir. 1983); *City Cab Co. of Orlando v. NLRB*, 628 F.2d 261, 264 (D.C. Cir. 1980); *Local 777, Democratic Union Organizing Committee v. NLRB*, 603 F.2d 862, 878 (D.C. Cir. 1978).

union election.¹⁴¹ But the owners of the cab companies were immediately recalcitrant, claiming that the drivers were independent contractors by law.¹⁴² They appealed to a three-member NLRB panel. On review, the drivers won, and once again, the cab companies appealed.¹⁴³ As the case went through the lengthy appeals process, the drivers continued their mobilization towards self-ownership. In 2006, amidst worker advocacy and lobbying of city regulators to issue medallions to them, the city council affirmed their support for the collective bargaining path. The Oakland City Council passed a resolution “[e]ncouraging [f]air [b]argaining and [e]mployee [r]ecognition for Oakland’s [t]axi [d]rivers,”¹⁴⁴ while continuing their refusal to issue even a single medallion to EBDA advocates.¹⁴⁵

The Singhs appealed *Friendly Cab* until it reached the Ninth Circuit.¹⁴⁶ Finally, in 2008, the appellate court found that the workers at these cab companies organized under the East Bay Drivers’ Association were, in fact, employees.¹⁴⁷ In a strongly-worded opinion, the court affirmed that:

[A] number of factors . . . in their totality compel a finding of employee status, the most significant of these being Friendly’s prohibition on its drivers’ operating an independent business and developing entrepreneurial opportunities with customers. Additional salient indicia of control by Friendly over the means and manner of its drivers’ performance include: (1) regulating the details of how drivers must operate their taxicabs; (2) imposing discipline for refusing or delays in responding to dispatches; (3) requiring drivers to carry advertisements without receiving revenue; (4) requiring drivers to accept vouchers subject to graduated “processing fees;” (5) prohibiting subleases; (6) imposing a strict dress

141. *NLRB v. Friendly Cab Co.*, 512 F.3d 1090, 1102 (9th Cir. 2008).

142. *Id.* at 1093.

143. *Id.* at 1102.

144. Oakland, Cal., Res. 79772 C.M.S., A Resolution Encouraging Fair Bargaining and Employee Recognition for Oakland’s Taxi Drivers (Mar. 7, 2006).

145. A 2007 report to the City Administrator to reform the taxi industry stated that many of the problems faced by taxi drivers stem from the “excessive power wielded by the companies,” and relayed that the drivers “have attempted to improve their bargaining power by unionizing . . . [but] the large companies do not recognize the union, contending that the drivers are independent contractors, not employees.” EDGERLY, *supra* note 131, at 9–10.

146. *Friendly Cab Co.*, 512 F.3d at 1103.

147. *Id.*

code; and (7) requiring training in excess of government regulations.¹⁴⁸

After twelve years of organizing and six years of litigation, the EBDA drivers finally had the right to collectively bargain.



Illustration 7: East Bay Drivers' Association members after the NLRB found in 2004 that drivers were employees of a syndicate of taxi cab companies in Oakland. Anwar Zadran, voted by the EBDA drivers as their leader and representative, is in front.¹⁴⁹

3. *FRIENDLY CAB'S* EXTRALEGAL VICTORIES

The day that the Ninth Circuit decision came down, in January 2008, the Teamsters press release quoted the EBDA leader, Anwar Zadran, as saying, "We now have the voice and the power with the company to receive better benefits and working conditions. This has been a long time coming."¹⁵⁰ In the same press release, James P. Hoffa, the Teamsters General President, reflected on the ramifications of this case on the broader fight against misclassification:

148. *Id.*

149. Picture by Katy Raddatz in Patrick Hoge, *East Bay/ Cabbies Join Union After Labor Board Rules They're Employees/ But Owners of the Taxi Companies Refuse to Negotiate*, SFGATE, (July 28, 2004, 4:00 AM) <http://www.sfgate.com/bayarea/article/EAST-BAY-Cabbies-join-union-after-labor-board-2738125.php> [<https://perma.cc/FBQ6-8QVA>].

150. *Local 70: Contract Bargaining On for East Bay Taxi Drivers*, N.CAL. TEAMSTER, Feb./Mar. 2008, at 4 (Teamsters Joint Council No. 7, S.F., Cal.).

Companies are now on notice that they cannot skirt the law by misclassifying their employees as independent contractors, a system that penalizes workers. From big companies like FedEx to smaller ones like *Friendly Cab*, the Teamsters are working nationwide to make sure this illegal business practice is erased.¹⁵¹

It seemed like a dream success story—after many, many years of organizing, appeal after appeal, the underdog workers had won. They could finally engage in negotiations with the employer.

But that negotiation never happened. Pushing back against the decision, the company used their significant structural and political power to resist compliance. As Bob Aiello from Local 70 told me, “In 2008 [after the decision], we tried to get the employers to the bargaining table, and they kept stonewalling us. They did everything in their power to not bargain in good faith. This went on and on and on.”¹⁵² Zadran echoed this, “It took a long time, and it didn’t help. The company has the money.”¹⁵³

Friendly Cab’s defiance of the Ninth Circuit decision, however, was only one problem. Both union representatives and drivers attested to the gradual atrophy of organizing energy among EBDA members through the many years of litigation. Many EBDA members had lost faith in the efficacy of the union after more than half a decade of waiting for enforcement with no result. For those drivers, the Ninth Circuit’s decision did not appear any different than the previous ones, which had been ineffective. Aiello reflected on that time and the struggles he faced with keeping drivers engaged:

After working with the *Friendly Cab* drivers for some time, I set up a council [of workers], and we had an election. The council consisted of four members who were the leaders of the group. If there were issues, they would be brought to the council, and if it wasn’t rectified through the council, then, the council would bring it to me, and I would get involved. . . . This went on for a period of time; the folks were paying us \$25 per month individually. *By the time the decision came down, most of them had stopped paying. Because it was a slow process. They thought I would have it wrapped up in a nice package in a short period of time.* I tried to maintain the

151. *Teamsters Applaud Court Ruling Allowing Cab Drivers to Unionize*, REUTERS, Jan. 11, 2008, PR NEWswire, Doc. No. 21:48:00.

152. Interview with Bob Aiello, *supra* note 139.

153. Interview with Anwar Zadran, *supra* note 130.

council and hold things together even though they stopped paying [the \$25 monthly fees]. But it was impossible. I had so much other work to do. (emphasis added).¹⁵⁴

Finally, in 2009, without union dues coming in and facing an intransigent employer, Teamsters Local 70 let go of their representation. Bob Aiello described a meeting he had with the President of Teamsters Joint Council 7, Chuck Mack, in which the decision was made:

Because of the expense and all the attorneys' fees, my wages, and everything, Chuck decided to withdraw our representation. *We won the battle, but not the war* because we didn't achieve the collective bargaining. Chuck thought it was a good fight, and that case set precedent. But in our situation here, we could no longer afford to represent them.¹⁵⁵ (emphasis added)

Though the union gave up on them, the EBDA drivers did not give up on their hopes for self-ownership. In April 2009, after thirteen long years of organizing, the taxi drivers took to the streets again—this time without union support. They gathered outside City Hall and held a two-day work stoppage, protesting the Singh's noncompliance with the *Friendly Cab* decision and the city's refusal to issue them medallions.

During this strike, the Singhs finally took extra-legal action. They towed the leased taxis from in front of the homes of the EBDA leaders. The drivers sued for retaliation and eventually settled with the Singhs, but the workers' leaders did not get their jobs back.

In 2014, I ran into Zadran at a protest in front of Uber's headquarters. After losing his job as a taxi driver in Oakland and failing to get a medallion to start his own company, he was driving for Uber. I asked Zadran if he was going to start unionizing Uber drivers, and he laughed with the same optimism I remembered from years before. But when I reached out to him again two years later, in 2016, he was downtrodden. Uber had dropped their rates dramatically, and Zadran's ability to support his family was diminished. He had been working tirelessly, sixteen hours a day, seven days a week. I asked if he was still going to protests or involved in any organizing efforts of Uber

154. Interview with Bob Aiello, *supra* note 139.

155. *Id.* The EBDA could not just go to another union because of a provision in the Teamsters' governing Articles forbids the practice of "raiding." *Id.* The EBDA would have had to wait a full year before affiliating with another union. *Id.*

drivers. He let out a resigned sigh, and with frustration in his voice, said:

It takes a long time. And it doesn't help. They have the money. Plus it's not worth it. What am I going to get for it? The union, they are supposed to win the case and get the company to bargain. Local 70 said they would form the union, but they give up. It's very hard to become unionized. I failed in doing it for just 100 drivers. How can I do it with these thousands of Uber drivers? And what for?¹⁵⁶

Although the Teamsters representative did not regret the time and energy they put into the case, Zadran did. Economically, physically, and emotionally, he was worse off than he had been prior to the NLRB mobilization. And like Joe Tracy, his optimism about law and organizing had waned.

B. *Alexander v. FedEx*

The last case study in this Article is perhaps the most important when examining the labor implications of platform-enabled gig companies and devising ways to address worker insecurity. Fed-Ex is the “largest and most successful global transportation company in the world,” and like today’s biggest on-demand platforms, including Uber, Fed-Ex was built on a strategy of deregulation, industry disruption, and risk-shift.¹⁵⁷ As Beth Ross, the lead plaintiffs’ attorney in multi-state misclassification litigation against FedEx noted in reference to the growth of the gig economy, “In many ways, FedEx legitimized this conversation about how everyone has a right to be an independent contractor.”¹⁵⁸

In this section, I tell the remarkable story of FedEx, its use of political influence to facilitate deregulation, and the fierce multi-district litigation that challenged their use of independent contractors. Based on interviews with both plaintiffs’ attorneys and plaintiff-workers involved in two related cases—*Estrada v. FedEx*¹⁵⁹ and *Alexander v. FedEx*—I describe how the misclassification litigation victories impacted workers’ lives.

156. Interview with Anwar Zadran, *supra* note 130.

157. Jill E. Fisch, *How Do Corporations Play Politics?: The FedEx Story*, 58 VAND. L. REV. 1495, 1503 (2005).

158. Interview with Beth Ross, *supra* note 30.

159. *Estrada v. FedEx Ground Package Sys., Inc.*, 64 Cal. Rptr. 3d 327 (Cal. Ct. App. 2007).

1. FEDEX'S INDUSTRY DISRUPTION: DEREGULATION AND INDEPENDENT CONTRACTING

As scholars have shown, FedEx is a “well-known corporate success story,”¹⁶⁰ netting billions of dollars within a few years of its founding. FedEx first became a leading player in the air-cargo delivery business, which, prior to FedEx's work to deregulate the industry, had been highly regulated and unprofitable. In pushing for and establishing a favorable regulatory environment, within ten years, FedEx became more profitable than its larger and older competitor: UPS.¹⁶¹ In 2000, when FedEx entered the market for ground delivery, the company once again took its competitors by storm, employing an independent contractor business model, growing rapidly, and usurping nearly fifty percent of the market within a decade.¹⁶²

FedEx's success has largely been attributed to its political participation in a series of major regulatory reforms.¹⁶³ Over many decades, FedEx leveraged its significant power in the form of both political and structural capital to achieve a regulatory environment favorable to the company's visions. For example, the federal act liberalizing the air cargo industry—passed in 1977—was commonly referred to in Congress as “The Federal Express Act” and principally designed to benefit FedEx.¹⁶⁴ The deregulation of inter- and intrastate trucking in the 1980s and 1990s, via the Motor Carrier Act of 1980¹⁶⁵ and the Federal Aviation Administration Authorization Act in 1995,¹⁶⁶

160. Fisch, *supra* note 157, at 1503.

161. *Id.*

162. Interview with Beth Ross, *supra* note 30.

163. Fisch, *supra* note 157, at 1503.

164. *Id.* at 1514–15

165. The Motor Carrier Act of 1980:

[F]ormally beg[an] the era of [trucking] economic deregulation. The new rules allowed free entry into the market, eliminated indirect routings designed to protect carriers from competition, sharply limited collective rate-making[,] . . . and allowed carriers to discharge discriminatory prices (discount pricing to high-volume customers). For the first time, compensatory rates—rather than would cover the cost of service—were not required; rates could be lower than the fully distributed cost of hauling the freight.

MICHAEL H. BELZER, SWEATSHOPS ON WHEELS: WINNERS AND LOSERS IN TRUCKING DEREGULATION 29 (2000).

166. Fisch, *supra* note 157, at 1518–22. After the deregulation of the trucking industry, between 1977 and 1995, real wages dropped by thirty percent for the average truck driver. BELZER, *supra* note 165, at 21. Notably, Congress mandated intrastate economic deregulation as a rider to the FAA [Federal Aviation Administration] Bill of 1995. *Id.* “This . . . developed out of dispute between competitors UPS and Federal

was also in large part the result of FedEx's industry disruption and political mobilization efforts, well detailed in Jill Fisch's 2005 study of the company.¹⁶⁷

For this case study, I look at FedEx's expansion into ground transportation and its practice of using independent contractor truck drivers. In 2000, FedEx purchased and grew a company—Roadway Package Systems (RPS)—that had, since 1985, also utilized a business model built on deregulation.¹⁶⁸ For fifteen years, RPS had ground-shipped packages with a workforce of independent contractor drivers.¹⁶⁹ Although RPS has faced years of costly misclassification litigation, upon purchase, FedEx chose to adopt an independent contractor model and expand it.

In RPS, FedEx found a kindred business spirit. Several RPS founders were former UPS managers “who were confident they could successfully compete with UPS with innovative business methods and an entirely different business model.”¹⁷⁰ To compete against UPS—whose workers are represented by Teamsters—RPS cut their labor costs, thus enabling them to lower their shipping prices. Instead of investing in a workforce—purchasing a fleet of delivery trucks, hiring mechanics to maintain those trucks, and employing truck drivers—RPS foisted all of those responsibilities onto independent contractors.¹⁷¹ Meanwhile, these “small business owners” were promised the freedom and flexibility of operating their “own businesses.”¹⁷² Just as today's on-demand labor platform companies claim to merely be “tech companies” that cyber coordinate workers and consumers, RPS—and

Express that came to a head in California.” *Id.* at 65. FedEx, which again was originally an air taxi carrier, transformed itself into a general freight carrier to avoid being covered by the Motor Carrier Act. UPS, by contrast, was classified as a motor carrier. Thus, FedEx and UPS—though doing the same thing—were operating under very different rules in California. FedEx was free to change intrastate rates while UPUS was regulated by the state public utilities commission and had to apply for rate changes. The dispute was litigated, and FedEx won. To address the inequities in regulation, Congress chose deregulation over re-regulation. *Id.* at 65–66.

167. Fisch, *supra* note 157, at 1519–20.

168. *FedEx Ground*, FEDEX, HISTORY AND TIMELINE, <http://about.van.fedex.com/our-story/history-timeline/history/opco-ground/> [https://perma.cc/V2BY-5YPY].

169. *Id.*

170. Beth Ross & Estelle Pae, *A Brief History*: In re FedEx Ground Package Systems, Inc. Employment Practices Litigation, *MDL No. 1700, Case No. 3:05-md-527 RM*, ABA LABOR AND EMPLOYMENT SECTION 585, 586 (2011), <https://www.americanbar.org/content/dam/aba/administrative/laborlaw/meetings/2011/eo/030.authcheckdam.pdf> [https://perma.cc/R23L-UUXG].

171. *Id.*

172. *Id.*

later FedEx—claimed to not be an employer, but a conduit between those who wanted to ship and those who could make the delivery.

RPS did eventually gain a competitive advantage over UPS by eliminating from its operating budget employment taxes, workers' compensation liability, and the costs and liabilities associated with owning and operating a fleet.¹⁷³ Still, to build their brand, the company needed to exert some control over their workers—especially with regard to the appearance of both their trucks and their drivers. The RPS drivers were required to sign Operating Agreements which obligated them to purchase or lease trucks through a specific company—Bush Leasing—and “to pay all expenses associated with operating that equipment and performing their assigned work duties.”¹⁷⁴ RPS assigned to each driver a geographically defined service route “to which, according to [the] Operating Agreement, they had a proprietary interest.”¹⁷⁵ RPS, however, exerted substantial control over how that proprietary right could be exercised.^{176 177}

The artful crafting of their truck drivers as independent contractors led to many legal challenges. RPS's independent contractor business model was first challenged by the Teamsters in the late 1980s.¹⁷⁸ In 1988, the NLRB decided that since RPS required their drivers to lease their trucks from a particular vendor (Bush Leasing), the company exerted enough control over their workers to consider them employees for purposes of collective bargaining.¹⁷⁹ The IRS went after the company after realizing they could get back-taxes for misclassification.¹⁸⁰ In 1994, RPS re-wrote their contract, allowing Bush Leasing to fall out of the contract, and including language to the effect of “no one can tell you when to take your break or how to conduct your business.”¹⁸¹ RPS paid 25 million dollars for a letter of

173. *Id.*

174. *Id.* at 586.

175. *Id.*

176. *Id.* For example, the contract specified that RPS could, among other things, “reconfigure the geographic boundaries of any route . . . reassign stops and accounts . . . grant or deny approval to a proposed transfer or sale of the route . . . [and mandate] pick-up and delivery [of] any work assignments.” *Id.* at 587.

177. Interview with Beth Ross, *supra* note 30; Dubal, *Wage Slave or Entrepreneur?*, *supra* note 2, at 77 n.32 (quoting Rev. Rul. 87-41, 1987-1 C.B. 296 (1987)).

178. *Roadway Package Sys. Inc.*, 288 N.L.R.B. 196, 196 (1988).

179. *Id.* at 199.

180. Ross & Pae, *supra* note 170, at 588.

181. Interview with Beth Ross, *supra* note 30.

assurance from the IRS saying that under the 1994 contract, RPS truck drivers were independent contractors under tax laws.¹⁸²

After FedEx purchased RPS in 1998, it launched FedEx Home Delivery, a business-to-consumer service.¹⁸³ In operating the company as a turnkey operation, FedEx inherited both the business model and the company's legal troubles.¹⁸⁴ Over the next two decades, FedEx "steadfastly stood by and defended the independent contractor model in every conceivable state and federal legal forum, including a group of class action cases filed between 2004 and 2009, asserting various statutory and common law claims under the laws of over 40 states as well as federal claims arising under the FLSA [Fair Labor Standards Act], ERISA [Employee Retirement Income Security Act], and the FMLA [Family and Medical Leave Act]."¹⁸⁵ This litigation and FedEx's commitment to operating in a deregulated and de-unionized

182. *Id.*

183. *FedEx Ground*, *supra* note 168.

184. Ross & Pae, *supra* note 170, at 587–88. Because FedEx entered the cargo transportation industry in the 1970s as an air carrier and not a ground carrier, "it took advantage of its status as an air carrier for purposes of labor regulations." Fisch, *supra* note 157, at 1538. In the mid-1970s, FedEx established through a series of judicial and administrative agency decisions that it was subject to the Railway Labor Act (RLA) and not the National Labor Relations Act (NLRA), which governed the labor activities of workers at other cargo companies, including FedEx's main competitor, UPS. *Id.* at 1539. The RLA is much less labor-friendly than the NLRA. Centrally, under the RLA, unions must organize employees of a company on a national level, not on a local level. Understandably, this greatly hindered attempts to unionize FedEx workers. They wanted to make sure that their ground business would not mix with FedEx Express because the presence of ground operations would have unprotected the company from the RLA. Thus, they bought RPS and operated it as a turnkey operation. Unlike other Fed-Ex couriers, then, Fed-Ex ground workers operate as independent contractors that spell out a type of piece-rate compensation from the company.

185. Ross & Pae, *supra* note 170, at 588. According to lead attorneys Beth Ross and Ellen Pae:

There are dozens and dozens of summary administrative decisions from all over the country passing on the employment status of individual workers. In addition, there have been a significant number of State Attorney General actions filed challenging the FedEx system The IRS opened a new investigation into the . . . FedEx system in which the IRS issued Notices of Proposed Assessment in 2007 and 2009 premised on the view that the FedEx drivers were employees under the common law agency test. Administrative actions have also been initiated against FedEx for various tax years by a number of state tax agencies including but not limited to California resulting in administrative decisions adverse to FedEx that are believed to have been settled as well.

Id. at 588 n.2.

workplace led them to pay over one billion dollars of litigation costs (including settlements) by 2016.¹⁸⁶

2. IN THE DRIVER'S SEAT: BEING A FEDEX INDEPENDENT CONTRACTOR

The independent contractor business no doubt enabled FedEx's successful and growing share in the ground delivery service market. But the implications for workers were less positive. Many drivers who began working for FedEx during this time did not understand what it meant to be an independent contractor when they purchased and worked a FedEx route. As Dale Rose, a named plaintiff in two important misclassification cases against FedEx, told me:

I didn't have a firm grasp of the difference between an independent contractor and an employee. I bought what they [FedEx] sold. They said, "This is your potential income." They sold that to me really hard. They sold it as "You have control over your life; it's your truck; it's your business, and you'll have a lot of control." Which obviously I didn't want to turn away.¹⁸⁷

Like the taxi worker plaintiffs in *Tracy* and *Friendly Cab*, control over their work lives was enticing to many FedEx drivers. The idea that they could be small business people—growing their own company, not having a boss on their back, and having the freedom to take time off to care for family—these were reasons that many workers, including Rose, were attracted to FedEx.

But soon after investing tens of thousands of dollars in a truck and a route, many drivers discovered that this "control" was illusory. Plaintiff-worker Marjorie Pontarolo, for example, bought a truck and a route from FedEx in 1999, just a year after the company was purchased from RPS. Reflecting on those early years driving and delivering for FedEx, Pontarolo said:

They called us independent contractors, but basically, they controlled us. They told us what uniforms to wear, what times

186. Daniel Weissner, *FedEx to Settle Driver Lawsuit in 20 States for \$240 Million*, REUTERS (June 16, 2016, 12:50PM), <https://www.reuters.com/article/us-fedex-settlement/fedex-to-settle-driver-lawsuits-in-20-states-for-240-million-idUSKCN0Z229Q> [<https://perma.cc/D4Q5-G2A7>].

187. Telephone Interview with Dale Rose, Former FedEx Truck Driver (May 9, 2017).

we could be at certain places. . . . As the years progressed, they really started tightening down, “You can’t wear black socks, you have to wear white socks, you can’t do this and you can do this.” And they really started tightening down on different parts of the job: what to do, where to be, how to do it, how to dress, when you could leave, when you could come back. . . . If you made mistakes, for example, or had an accident or if you missed your pick up, what they started doing was charging you.¹⁸⁸

Drivers like Rose and Pontarolo were disgruntled—and looking for solutions to their grievances against FedEx. Rose formed an informal group among contractors in his terminal in Southern California. Drivers met at each other’s homes, and for months, discussed their on-the-job complaints. Rose recalled:

We talked about what’s frustrating and about what FedEx really needed to address and we put it down on paper and presented it to higher management. . . . He pretended to take us serious, but no actions were taken over those several months. And I think the people in our group were frustrated. Or they were afraid they were going to be retaliated against, and some kind of were. We tried, but we disbanded.¹⁸⁹

His problems unsolved, Rose went online, and like many atomized workers with collective action problems do, he looked to lawyers. Rose happened upon a website of a law firm looking for plaintiffs to sue FedEx for misclassification, and he signed up.

However, the goals of the litigation that Rose and other FedEx drivers joined as plaintiffs did not reflect their desires. Rose did not want employee status. His goal was to remain an independent contractor but with “better pay and less control.”¹⁹⁰ Rose told me, “I wanted to be a contractor who was able to provide his employees a decent living wage, especially for the state of California.”¹⁹¹ Pontarolo, too, articulated how she had hoped that the litigation would bring her the dignity and freedom that she lacked at work. But she wanted to maintain her status as an independent contractor and force FedEx to treat her like a real businessperson. Pontarolo said:

188. Telephone Interview with Marjorie Pontarolo, Former FedEx Truck Driver (May 8, 2017).

189. Interview with Dale Rose, *supra* note 187.

190. *Id.*

191. *Id.*

I was hoping that FedEx would treat us like real independent contractors as opposed to treating us like employees because everything fell on us. Anytime there was a mistake or if a package wasn't delivered, they would bring us in for what they called a business meeting and write us up . . . and then they'd charge for the accident. It got to the point where it was \$500 a month for three months for one accident. I wanted them to back off and let us be real contractors. . . . The people that went out there and delivered the packages and did all the hard work and serviced their vehicles—dependable people out there doing a good job made FedEx what they are today. FedEx Ground didn't make themselves. We did it, and it was upsetting to see them treating everyone like they did. I think if you're going to have somebody as an independent contractor, then treat them like an independent contractor and let them do their job.¹⁹²

Though many drivers stayed in the shadows, fearful of retaliation, driver plaintiffs like Pontarolo and Rose stepped forward, and with the help and dedication of skilled plaintiffs' attorneys, used misclassification litigation to challenge the degree of control exerted over their work lives. Importantly, however, because of the constraints of work law and the independent contractor-employee dichotomy, the misclassification litigation did not accurately capture their self-visions. They did not want a court to find them to be misclassified employees, rather, they wanted legal recognition of their status as mistreated independent contractors.

3. *ESTRADA & ALEXANDER: WHEN WORKERS WIN IN COURT*

By the early 2000s, plaintiffs' attorneys across the United States were considering misclassification litigation against FedEx under wage-related state laws. The test for employee status varies from statute to statute with some state laws offering more expansive definitions of employment. This multi-state litigation, attorneys postulated, would force FedEx to change their business model nationwide and assume some of the traditional risk associated with employing so many workers.

The first of the court cases to go to trial was *Estrada v. FedEx Ground Package Systems, Inc.*,¹⁹³ which had been filed in 2000, just

192. Interview with Marjorie Pontarolo, *supra* note 188.

193. *Estrada v. FedEx Ground Package Sys., Inc.*, 64 Cal. Rptr. 3d 327 (Cal. Ct. App. 2007).

two years after FedEx purchased RPS.¹⁹⁴ The plaintiffs' primary claim in *Estrada* was for reimbursement of employment-related expenses under California Labor Code § 2802.¹⁹⁵ Over the course of nine years of complex litigation, a large class of workers was certified, and the drivers were held to be employees under the California *Borello* standard—the same test for employee status used in the *Tracy*, decision.¹⁹⁶ Substantial damages were awarded to each class member.¹⁹⁷

Though FedEx appealed the decision, the Ninth Circuit affirmed the trial court's finding, pointing to the Operating Agreement which the drivers had to sign, the FedEx "Ground Manual," and the "Operations Management Handbook."¹⁹⁸ The appellate decision delineated the many ways in which the drivers are "totally integrated into the [FedEx] operation," including "that they perform work essential to FedEx's core business, that they are required to work exclusively and full-time for FedEx, that their customers are those assigned to them by FedEx, that no specialized skills are required, that they must wear uniforms and conform absolutely to FedEx's standards and that, in the end, each driver has a 'job' with 'little or no entrepreneurial opportunities.'"¹⁹⁹ The court took special note of the fact that FedEx controlled "every exquisite detail of the drivers' performance, including the color of their socks and the style of their hair."²⁰⁰ In finding the single work area drivers to be employees for reimbursement purposes (excluding the cost of their vehicles), the trial court wrote, "[I]f it looks like a duck, walks like a duck, swims like a duck, and quacks like a duck, it is a duck."²⁰¹

While *Estrada* was still winding its way through the court system, over forty more misclassification class actions cases were filed by plaintiffs' attorneys on behalf of FedEx drivers under state laws all over the country.²⁰² All the class action lawsuits posed the identical legal question: are FedEx ground drivers employees, or are they independent contractors? Although virtually all the cases plead state law violations, at FedEx's behest, these cases were consolidated into a multi-district

194. Ross & Pae, *supra* note 170, at 588.

195. California Labor Code Section 2802 delineates the obligations of employers in indemnifying employees for expenses related to employment and calls for penalties and citations for those who violate the terms of the statute. Cal. Lab. Code § 2802.

196. For a discussion of the *Borello* standard see *supra* note 95.

197. Ross & Pae, *supra* note 170, at 589; *Estrada*, 64 Cal. Rptr. 3d at 335–36.

198. *Estrada*, 64 Cal. Rptr. 3d at 331–33.

199. *Id.* at 334.

200. *Id.* at 336.

201. *Id.* at 335, 347.

202. Ross & Pae, *supra* note 170, at 589.

litigation docket and all pretrial proceedings were put before a judge in the Northern District of Indiana.²⁰³

When *Estrada* was decided, many commentators understood it as having a potentially far-reaching consequence for FedEx drivers, but instead of abiding by the spirit of the decision and paying their drivers as employees, FedEx responded to *Estrada* by eliminating their single-route contracts.²⁰⁴ In late 2007, the company shifted all their California work to the “multi-work area” business model.²⁰⁵ Many single-route drivers were forced to purchase other routes and more than 1,000 single route drivers were not renewed.²⁰⁶ FedEx acknowledged that this action was taken in response to the *Estrada* decision.²⁰⁷

How did this change impact the plaintiffs? As one of the attorneys for the plaintiffs said, “a lot [of drivers] lost their jobs, which I feel extremely guilty about.”²⁰⁸ Pontarolo reflected:

After *Estrada*, you had to have multiple work areas . . . the stress factor went up and it made it harder. Over a period of time, it just kept getting worse and worse. . . . Everything that FedEx was doing to cover themselves against any of us being employees made our lives very hard. Everything was at our expense. They didn’t care. It was like, ‘You need to go out and service your area, and we don’t care if you take lunch breaks, we don’t care what you have to do to do it.’²⁰⁹

Thus, while FedEx did treat their workers more like independent contractors, as many drivers had hoped, how they made this change was surprising and challenging for both workers and their attorneys. In addition to many drivers losing their jobs, the ones who remained on the job suffered from a new host of problems.

Frustrated by the outcome, once FedEx shifted to the “multi-work area” business model in California, the *Estrada* attorneys sued again under California law. *Alexander v. FedEx* was filed and integrated into the multi-district litigation.²¹⁰ The plaintiffs’ attorneys, led by Beth Ross, represented 2,300 individuals who were full-time delivery drivers

203. *Id.*

204. Todd D. Saveland, *FedEx’s New “Employees”: Their Disgruntled Independent Contractors*, 36 TRANSP. L. J. 95, 113 (2009).

205. *Id.*

206. *Id.*

207. *Id.*

208. Interview with Beth Ross, *supra* note 30.

209. Interview with Marjorie Pontarolo, *supra* note 188.

210. *Alexander v. FedEx Ground Package Sys., Inc.*, 765 F.3d 981, 987 (9th Cir. 2014).

in California between 2000 and 2007.²¹¹ These drivers worked for both FedEx Ground and FedEx Home Delivery.²¹² While the multi-district litigation court in Indiana granted summary judgment to FedEx, on review, the Ninth Circuit reversed and granted summary judgment to the plaintiffs, finding all the necessary indicia of employee status.²¹³

4. EVADING *ALEXANDER*: THE RESTRUCTURING OF FEDEX AND THE INDEPENDENT SERVICE PROVIDERS AGREEMENT

Despite the tremendous class action wins in *Alexander* and *Estrada*, FedEx ultimately evaded treating their ground drivers as employees. In response to *Alexander* and in recognition of the twelve states around the country that use a modified test to determine employee status in which the question of employee status turns on whether workers perform work that is a core component of the principal's business, FedEx changed to an independent service provider (ISP) model.²¹⁴ Under the ISP model, drivers are required to cover five service areas.²¹⁵ According to Beth Ross, the plaintiffs' lead attorney in *Alexander*, many of the ISP contractors do not drive and instead spend all of their time managing these routes. In addition to foisting the risk and responsibilities of business onto these "small businesses," the ISP model also gives FedEx an additional level of protection against unionization.²¹⁶

Strikingly, the financial conditions of the ISP drivers are more precarious than they were before the *Alexander* litigation. As small business people, they are not properly remunerated for their work, nor are they able to provide secure employment for those who they hire. After spending a substantial portion of her career working on *Alexander*

211. *Id.* at 984.

212. *Id.*

213. *Id.*

214. *The Seventh Circuit Holds That FedEx Delivery Drivers Are Employees, and Not Independent Contractors, of FedEx*, SWARTZ SWIDLER, LLC (July 10, 2015), <http://swartz-legal.com/the-seventh-circuit-holds-that-fedex-delivery-drivers-are-employees-and-not-independent-contractors-of-fedex> [https://perma.cc/JW53-QVL7].

215. *FedEx Ground Announces ISP Transition by 2020*, CAPITAL ROUTE SALES (Jan. 29, 2016), <https://capitalroutesales.com/fedex-ground-announces-isp-transition-by-2020> [https://perma.cc/87MX-4XUS].

216. Lydia DePillis, *How FedEx is Trying to Save the Business Model That Saved It Millions*, WASH. POST (Oct. 23, 2014), <https://www.washingtonpost.com/news/storyline/wp/2014/10/23/how-fedex-is-trying-to-save-the-business-model-that-saved-it-millions> [https://perma.cc/M46U-R3AX]. Some drivers are considering suing FedEx under a joint-employer theory, but that will implicate many of the plaintiffs in *Alexander Torres v. Air to Ground Services, Inc.*, 300 F.R.D. 386, 391–393 (C.D. Cal. 2014).

and the multi-state misclassification litigation against FedEx, Ross reflected on the outcome:

Drivers [post-*Alexander*] have little control over how they order their affairs. FedEx leaves them alone more than they used to, but they have a terrible financial problem. FedEx doesn't pay them enough to really compensate the people who drive for them. A lot of them do not provide workers' compensation or provide overtime. One plaintiff from *Alexander*, for example, has nine drivers and four of them are on public benefits. And not because he doesn't pay them every penny he can. He does not even have health insurance for himself and his family.²¹⁷

Both Pontarolo and Rose confirmed Ross's observations and explained that drivers' work lives became more precarious after the decision in *Alexander* and FedEx's subsequent business model changes. Pontarolo decided to sell her route and trucks. She told me about the ISP model:

Things got worse when they brought in the ISP program. Basically, they thought, "how are we going to cover our behinds" and they made everyone have a huge work area. . . . And [so] you had to buy more service areas. They didn't want people partnering up with other people. Basically, you had to sell out or you had to sell to somebody that would keep you as an employee under them. . . . I ended up selling out in March. I wasn't going to deal with five trucks, five drivers, five times the insurance, five times the liability. But I lost money on both my routes. We lost \$50,000 per route. And they promised all the guys [who participated in the ISP], "Oh you'll make a million plus dollars a year with this new [ISP] contract." But the people that I know who stayed say that it's just horrible. Horrible. I see the trucks on the road and I just shake my head and think, "you guys are getting so screwed."²¹⁸

Unlike Pontarolo, Rose attempted to continue working with FedEx after the ISP model was implemented. He signed an ISP contract and experienced what it was like to manage and pay a team of nine drivers. When I asked how he managed and whether he had been able to pay the drivers who worked for him, he lamented:

217. Interview with Beth Ross, *supra* note 30.

218. Interview with Marjorie Pontarolo, *supra* note 188.

I gave them all that I could, but it wasn't enough. I had no profit at the end of the year, let's put it that way. I was actually losing a little bit of money each year. I couldn't offer them decent benefits . . . FedEx just doesn't pay enough. And I worked six days a week—all the time. My phone was never off; I did so much management work. It was a lot of stress, and I never made more than \$54,000 a year. That was the most I ever made.²¹⁹

Overwhelmed, underpaid, and stressed, Rose, too, decided to sell his routes and his trucks.

Worker plaintiffs were not the only ones disappointed by the outcome. I spoke with another prominent plaintiff's attorney who worked on the FedEx cases. Dmitri Igiztlan, who helped to craft a Seattle ordinance to give independent contractor gig workers the right to collectively bargain, told me that in drafting the legislation, he was drawing on the real-life failures and unexpected impacts of the misclassification litigation against FedEx. Igiztlan lamented, "I worked on FedEx for nine long years of my life, but I am not seeing the kinds of results that I had hoped. So, I am moving in another direction."²²⁰

III. LESSONS ON THE ROLE OF MISCLASSIFICATION LITIGATION ON WORKERS IN THE GIG ECONOMY

In 1974, largely responding to the failure of *Brown v. Board* to desegregate public schools, Stuart Scheingold famously argued:

[T]he . . . direct deployment of legal rights in the implementation of public policy will not work very well, given any significant opposition. Litigation may be helpful to individuals who have the resources and determination to pursue remedies through the court system. But courts cannot be relied upon to secure rights more generally . . .²²¹

Following Scheingold's excoriation of rights as "myths," law and society scholars engaged in a dynamic debate about the relative constraints of courts in enacting social change. For some, most famously Gerald Rosenberg, litigation was a "hollow hope," while for

219. Interview with Dale Rose, *supra* note 187.

220. Dmitri Iglitzin, Partner, Schwerin, Campbell, Barnard, Iglitzin & Lavitt, LLP, Panel at the Berkley Journal of Employment and Labor Law Symposium: Organizing Workers (Feb. 26, 2016).

221. SCHEINGOLD, *supra* note 26, at 117.

others, including Michael McCann, litigation had the potential—in symbolic and strategic ways—to enact social change.²²² In more recent years, social movement scholars in both political science and sociology have built on these arguments to examine—often through specific case studies—the internal and external effects of litigation. My examination of *Tracy*, *Friendly Cab*, and *Alexander* contributes to this conversation, utilizing both positivist and interpretivist understandings of the role of litigation in effecting social. Like Scheingold and Rosenberg, I identify reasons why litigation victories have not been successful in securing employee rights for workers. But following in the footsteps of Michael McCann, I am also interested in what symbolic and strategic impacts the litigation had, particularly on plaintiff-workers. How did the drivers in each case study make sense of the role of the litigation in their lives?

Workers won the litigation battle, but lost the larger war for economic justice. In all three of the case studies, employee rights laws remained unenforced. These stories are important to be read and understood together: not only because they litigated different types of employment rights (safety-net rights, collective bargaining rights, and rights to wage security), but also because the long-term, on-the-ground outcome of each case study reflected a different type of risk in relying upon litigation to enforce change for workers in the gig economy.

Scholars have long opined on the weak enforcement power of the judiciary to enforce social change. But in this section, I extrapolate two further lessons from the real-life failures of these litigation victories that are specific to the gig economy. First, the structural and political capital of many gig firms renders impotent the private enforcement of individual employee rights. And second, employee status may not be well-suited to the desires and goals of gig workers.

A. *The Structural and Political Capital of Firms*

As Scheingold first noted six decades ago, the “practical impact [of a litigation victory] . . . is restricted by post-judgment power

222. See generally, GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* (2d ed. 2008); MICHAEL W. McCANN, *RIGHTS AT WORK: PAY EQUITY REFORM AND THE POLITICS OF LEGAL MOBILIZATION* (1994). For an interesting conversation on the role of litigation in social change between Gerald Rosenberg, Malcolm Feeley, and Michael McCann see the symposium issue of *LAW AND SOCIAL INQUIRY* from 1992. Malcom M. Feeley, *Hollow Hopes, Flypaper, and Metaphors*, 17 L. & SOC. INQUIRY 745 (1992); Michael W. McCann, *Reform Litigation on Trial*, 17 L. & SOC. INQUIRY 715 (1992); Gerald N. Rosenberg, *Hollow Hopes and Other Aspirations: A Reply to Feeley and McCann*, 17 L. & SOC. INQUIRY 761 (1992).

relationships.”²²³ In the employee rights context, this is not only because of the fragmented nature of judicial enforcement,²²⁴ as has been much noted, but also because of the relative structural and political imbalances outside the courtroom. The first lesson from these case studies, then, is not surprising: the legal recognition of employee rights does not have a redistributive effect on power between the worker-plaintiffs and the firm-defendants.

Outside the courtroom, plaintiffs in each case study continued to lack the structural capital of the companies that they were challenging. In *Tracy*, the implication of this was quite clear: workers were afraid of galvanizing their individual rights. In *Friendly Cab*, too, the fact that the companies could leverage expensive, aggressive lawyering to slow down the litigation discouraged worker-plaintiffs and enervated long-term mobilization. The taxi company’s successful refusal to come to the bargaining table was itself a clear demonstration of their relative structural power.

Beyond the obvious resource imbalance and the fact that it was not remedied by litigation, legally-imposed inequalities also contributed to the relative structural power of these firms to impede employee rights from being realized. For example, in *Alexander*, enforcement of rights was circumvented by a business restructuring endorsed by legal decisions. Corporate evasion of employment and labor laws through reorganization has long been sanctioned by courts. When companies began to use independent contractor labor in the 1970s to de-unionize their workforce, federal appellate courts found that such re-organization was the prerogative of capital and not subjective to collective bargaining.²²⁵ The legal entitlement of firms to restructure their business model undermines any redistributive power enabled by a judicial finding of employee status. Perhaps *Alexander* best exemplifies

223. *Id.*

224. *Id.* at 118–20.

225. *Local 777, Democratic Union Org. Comm. v. Nat’l Labor Relations Bd.*, 603 F.2d 862, 886 (D.C. Cir. 1978). In *Local 777, Democratic Union Organizing Committee v. NLRB*, the D.C. Circuit famously held that the taxi companies’ decision to use the leasing practice to convert their workers to independent contractors was not an unfair labor practice. The court wrote:

The fact that an employer’s decision affects conditions of employment does not necessarily imply . . . that it is a mandatory subject of bargaining . . . the decision to lease did not merely change the identity of the persons employed, but rather the entire basis of the companies’ income.

Id. at 883–84. Thus, as I explain in detail elsewhere, even though the companies had pre-meditatively advanced plans to make their workers independent contractors in order to evade work laws, “the court found that the switch of worker identity was within the realm of the business prerogative” Dubal, *Wage Slave or Entrepreneur?*, *supra* note 2, at 91.

the power of contemporary gig firms to reconstitute themselves in the face of misclassification victories.

This lesson about the relative structural power of firms is also important to consider when assessing legislative approaches to address the grievances gig workers. For example, many contemporary academic and advocacy discussions on legislative solutions to worker precarity in the platform-enabled gig economy revolve around either expanding the definition of employee,²²⁶ or creating a new category of worker status²²⁷ (e.g. dependent contractor). But the outcome of the *Alexander* case study suggests that such popular policy strategies may be ineffective. Legally redefining who benefits from state protections does not address the power of firms to choose how to structure their workforce. As Noah Zatz aptly argues, “[T]weaking the line between [who is a protected worker and who is not] . . . seems doomed to intervene too late in a process that employers control from the outset, one that they control with at least one eye on the labor [and employment law] consequences.”²²⁸

In addition to their structural power, the firms in these case studies were emboldened by their significant political capital. Though city regulators had the power to sanction taxicab companies for non-compliance in *Tracy*, they never did, despite worker advocacy to this end. My interviews with both drivers and former city officials suggest that the owners of *Friendly Cab* wielded the power of their political relationships to maintain their hold of medallions—even those that were unused—essentially forcing the EBDA to choose misclassification litigation over regulatory advocacy to achieve self-ownership. As Jill Fisch has shown with her comprehensive study of FedEx’s political activities, FedEx’s corporate success is in large part a result of their political strategies, leveraging political participation to create a regulatory environment suitable to their ambitions and visions.²²⁹ Fisch’s study underscores that when court decisions or a regulatory regime does not favor them, well-financed firms like FedEx turn to elected bodies—not just to evade laws but also to re-shape them to their liking. In the more recent gig economy, both Uber and Lyft have had great success at quietly but proactively using their political power to get

226. Noah D. Zatz, *Beyond Misclassification: Tackling the Independent Contractor Problem Without Redefining Employment*, 26 ABA J. LAB. & EMP. L. 279, 280–82 (2011).

227. *Id.* at 284. For an excellent comparative analysis of the problems posed by such hybrid categories across national settings see Miram A. Cherry & Antonio Aliosi, “*Dependent Contractors*” in *the Gig Economy: A Comparative Approach*, 66 AM. UNIV. L. REV. 635, 637 (2017).

228. Zatz, *supra* note 226, at 289.

229. Fisch, *supra* note 157, at 1511.

state legislation passed which codifies the status of their drivers as independent contractors.

B. Worker Ambivalence Towards Employee Status

The second, less obvious lesson from these case studies is an interpretive one, gleaned from the narratives of plaintiff workers in each case. In other work, I have shown how the duality of legal worker status has had a fractitious impact on worker organizing. In an ethnography of taxi workers in San Francisco, I found that some drivers wanted to be employees, while others valued their independent contractor status. This, I illustrated, became a point of contention and division during efforts towards collective mobilization. But in the case studies here—specifically in *Friendly Cab* and *Alexander*—the issue of employee status did not necessarily divide workers. Rather, worker-plaintiffs who were fighting for employee status were themselves—from the very beginning—surprisingly ambivalent toward it. This finding highlights the degree to which misclassification litigation may be ill-suited to the desires and visions of some workers operating in a “grey zone.”

What did worker-plaintiffs want in these misclassification case studies, if not employee status? Both the *Friendly Cab* and the *FedEx* driver plaintiffs said they were attracted to the relative structural control enabled by independent contracting. Dale Rose, for example, explained that he joined FedEx because he wanted the flexibility enabled by self-management:

I wanted to be an entrepreneur, and I wanted to be self-employed. I wanted to manage my own schedule and to have some flexibility so that when things come up with the kids I c[ould] stop what I was doing to take care of that issue. I wanted the control, but that didn't happen with FedEx. And it didn't happen after *Alexander*.²³⁰

Anwar Zadran and Marjorie Pontarolo pointed to similar reasons for joining the taxi and trucking industries, respectively. In each case, these workers were motivated to participate as plaintiffs in misclassification litigation not because they pined for employee status, but because they resented the degree to which the companies exerted control and interfered in their everyday work lives. In each case, workers complained about arbitrary discipline and stringent rules on behavior, dress, and deliverables. For them, participating in the

230. Interview with Dale Rose, *supra* note 187.

lawsuits was valuable as an act of resistance, not necessarily as a means to gain certain employee protections.

In the case of *FedEx*, worker plaintiffs explained that they participated in the litigation to force the company to exert less control and to treat them more like they envisioned contractors should be treated. In the aftermath of *Estrada* and *Alexander*, workers got some independence, but only in exchange for an undesirable increase in risk. After FedEx moved to a multi-route business model following *Estrada*, Pontarolo reflected on how the changes she experienced negatively impacted her work life. She had wanted FedEx to stop interfering in her day-to-day work life—to stop telling her what to wear and disciplining her for not doing her work exactly as they wanted. But the way in which FedEx responded exacerbated her troubles. She told me:

I mean, after *Estrada*, I actually injured myself one time taking a hundred-fifty-pound package upstairs. I pulled my arm out of my socket, and I told my manager, “What do I do in a situation like that?” His comment back to me was, “You need to service the customer, and if means getting that package up to their front door, then you have to do it.” They didn’t care if you hurt yourself. And they would still fine you if you complained!²³¹

In other words, while Pontarolo wanted to be treated more independently, the ways in which she and FedEx envisioned that independence were dramatically different. Pontarolo continued to want the support that came from working at a large corporation. After being injured, she saw an easy solution: FedEx could temporarily give her work to someone else. But to FedEx, such a reassignment was emblematic of employee status. She was told to deal with her problems independently, perhaps so that she would look more like a contractor, bearing the risk and losses associated with injury. To make things worse, in addition to having to bear this responsibility, Pontarolo remained subject to the whimsical disciplinary regime of managers, neither free to complain nor to ask for support.

Rose acknowledged that FedEx’s post-*Alexander* restructuring did leave workers with more freedom from the everyday control exerted by the company than he had experienced after *Estrada*, but he bemoaned the remunerative realities of that independence. Rose said:

I feel bad for the drivers now. A lot of the drivers like the work. It gives them freedom; they don’t have a supervisor

231. Interview with Marjorie Pontarolo, *supra* note 188.

looking over their shoulder every hour of the day. But it's the compensation. They're driving, and they see an experienced UPS driver who is probably receiving \$120,000 overall compensation a year, including benefits and retirement. Versus an average driver at FedEx right now is probably making \$40,000 a year with very few benefits.²³²

Thus, to some extent, the litigation left Rose and his colleagues with the physical freedom they wanted, but the structure of the company severely limited the pecuniary possibilities of their work. Not only were their earnings one-third that of unionized truck drivers, but they also bore the additional stresses of managing and not being able to adequately pay their own employees. This latter impact drove Rose from the business altogether.

In the case of *Friendly Cab*, worker ambivalence towards potential employee status worked slightly differently. In *Friendly Cab*, the misclassification litigation derailed the workers' primary goal of cooperative self-ownership. When the Teamsters took up their cause, they made the understandable decision to discourage workers from becoming small business owners. "That wasn't our goal," said the Teamsters' business manager.²³³ The union, their attorneys, and even the city regulators instead endorsed the path most familiar to them: employee status. In theory, achieving collective bargaining rights for the drivers would give the union new members, give their attorneys the opportunity to advance good "worker-friendly" law, and make the job of city regulators in dealing with the taxi company much easier. But the many years of intense intransigence and hard-fought litigation on the part of the taxi companies enervated worker desires to mobilize through collective power. In reflecting on the case, Caren Sencer, the attorney who argued *Friendly Cab* on behalf of the East Bay Drivers' Association before the Ninth Circuit, lamented, "[T]he biggest problem, I think, was that the drivers did not want to be employees."²³⁴ Workers pushed for employee status as a way to hold the company accountable and to potentially improve their work lives. But it was a second-best goal for them. What they wanted was shared self-ownership—a progressive vision that no one helped them to achieve.

Nevertheless, across the three case studies, how workers conceptualized the role of the litigation in their lives varied. The plaintiff-workers from *Alexander* found the litigation process

232. Interview with Dale Rose, *supra* note 187.

233. Interview with Bob Aiello, *supra* note 139.

234. Interview with Caren Sencer, Attorney and Shareholder, Weinberg, Roger, and Rosenfeld, Alameda, Cal. (June 23, 2017).

empowering because it gave them the opportunity to air their grievances and to hold the company financially accountable in a limited sense. Pontarolo said:

I would do it all over again just to show FedEx that they can't do that to us little guys that make them what they are, that was the thing that I was so—excuse my French—but so pissed off about at the time was we made them what they were and are today.²³⁵

Rose, too, called the attorneys who litigated the cases his “heroes” and marveled at the litigation win, “I mean it was the biggest settlement in history with a case like this and that was satisfaction.”²³⁶

In contrast, the EBDA drivers from *Friendly Cab* were resentful at having spent years trying to get the right to collectively bargain. Having lost their jobs in the litigation process, many of these drivers were left with no other options to support themselves or their families. The financial desperation they found themselves in made them wonder what would have happened if they could have just gotten a hold of a few medallions instead of nearly a decade resisting their employer. Some looked back at the hard work of the Teamsters and believed that the union had deradicalized the objectives of their grassroots movement, only to abandon them later. Zadrán lamented, “We did all of that . . . for what?”²³⁷

Joe Tracy fell somewhere in between these two extremes. He had a great deal of respect for the attorneys who represented him and the class he represented. But he was exhausted and left worker organizing more generally. He said, “I did my part.”²³⁸

235. Interview with Marjorie Pontarolo, *supra* note 188.

236. Interview with Dale Rose, *supra* note 187.

237. Interview with Anwar Zadrán, *supra* note 130.

238. Interview with Joe Tracy, *supra* note 109.

Figure 1. SUMMARY OF FINDINGS FROM MISCLASSIFICATION
LITIGATION CASE STUDIES

	EMPLOYEE RIGHT WON VIA LITIGATION	EMPLOYEE STATUS EVADED POST- LITIGATION?
<i>Tracy v. Yellow Cab</i>	Workers' Compensation Unemployment Insurance	Yes: Companies discouraged workers from filing.
<i>Friendly v. NLRB</i>	Collective Bargaining	Yes: Company never sat at the bargaining table with workers; union dropped representation.
<i>Alexander v. FedEx</i>	Wage Security	Yes: Company restructured itself to avoid employee classification of workers.

CONCLUSION

Taken together, these three case studies from the antecedent gig economy provide empirical data for both sides of the debate on the role of litigation in social change. On the one hand, although rights were too easily dismantled after *Tracy*, the decision ensured that taxi workers were not forced to pay cash bonds to the cab companies in San Francisco for many decades to come. The Ninth Circuit decision in *Friendly Cab* created good precedent that undoubtedly influenced how companies considering use of independent contractor labor structuring their work. And though FedEx got themselves out from underneath the holdings of *Estrada* and *Alexander* through business restructuring, the millions of dollars they were forced to pay to drivers constituted some transfer of wealth. And the publicity around these cases raised public awareness by revealing the vulnerabilities of these workers.²³⁹

On the other hand, these judicial victories were followed by real-life losses for workers. By and large, these cases did not effect what they set out to accomplish, nor did they spur or support worker movements more broadly. Because it took time for the outcomes to unfold, the public was left with the impression that justice had been

239 McCann, *supra* note 27, at 83–84.

served, that the system had worked, and that people being cheated out of livelihoods were righted. It took a few years for FedEx to roll out their ISP model, and it took a few months for workers to determine that this ISP structure itself was exploitative. After the Ninth Circuit affirmed the rights of the EBDA to collectively bargain with Friendly Cab, months passed before the Teamsters announced that they could not support the drivers. And of course, *Tracy* took many years to become ineffectual.

For social movement scholars, my findings across these case studies may be intuitive: relying on litigation alone will not affect security for workers. For advocates fighting for workers' rights in the gig economy, however, employee status is understood as the umbrella under which workers must stand to achieve security. As a result, litigation to achieve employee status seems like the logical place to pour resources and energy. What the post-litigation stories of *Tracy*, *Friendly Cab*, and *Alexander* underscore that for political and structural reasons, firms can too easily push workers out from under these hard-won protections or deter them from seeking protection at all. Further, the self-visions and desires of workers do not necessarily align with the goals of the misclassification litigation. Litigation victories for employee rights in the gig economy are, thus, by themselves, ineffective.

Scott Cummings and others have convincingly argued that with low-wage workers, in order to be successful, litigation must be a “part of a comprehensive campaign that deploys multiple strategies” to advance economic justice.²⁴⁰ In all three of these case studies, while workers' may have been centered—the litigation was not “politically integrated,” as Cummings defines it.²⁴¹ Accordingly, I maintain that for social change actors—workers, lawyers, organizations, and labor leaders—considering how to achieve economic justice in the gig economy, the “opportunities and constraints”²⁴² of misclassification litigation must be constantly considered. What will the challenges be to enforcing the litigation outcome, even if the plaintiffs win? What will be the firm's structural and political responses to that litigation? How can worker advocates preempt such responses?

Politically-integrated litigation means ensuring that lawsuits are not filed without exploring and employing multiple strategies for change from the outset—including policy, organizing, and media initiatives. Doug NeJaime, in examining the positive impacts of litigation loss on

240. Cummings & Rhode, *supra* note 32, at 611.

241. *Id.* at 616.

242. Scott Cummings and Deborah Rhode make this point in their vanguard piece on the role of public interest litigation in enacting social change. *Id.* at 613–15.

social change (the opposite of what I have done with these case studies), makes the important point that much of the research and literature in this debate actually fails to understand legislation and litigation as integrated parts of a strategy for change.²⁴³ However, with respect to the gig economy—both old and new—litigation has been, by and large, the *only* strategy, to the detriment of utilizing other avenues for social change. In short, these wins in court have precluded both the building and maintenance of both collective worker power and legislative action.

Politically-integrated misclassification litigation is much easier discussed than enacted, especially by dispersed, atomized workers and decentralized advocates operating across both public and private arenas. However, as I discussed in this Article, on-demand gig economy firms have carried out their own form of politically-integrated advocacy—defending lawsuits, lobbying for new laws to protect their independent contractor model, and deploying savvy public relations campaigns that include the mobilization of consumers. Labor, by contrast, has almost solely relied on lawsuits.

While litigation has taken the center stage in the fight against the contemporary gig economy, the case studies from the antecedent gig economy are clear: even if successful, these lawsuits will not make insecure work secure. After spending twenty years litigating misclassification cases, Beth Ross, who valiantly led FedEx drivers through multi-state litigation, through a win in *Estrada* and *Alexander* emphasized, “Litigation is not the answer. It is part of the strategy, but not the answer.”²⁴⁴

243. Douglas NeJaime, *Constitutional Change, Courts, and Social Movements*, 111 MICH. L. REV. 877, 889-90 (2012).

244. Interview with Beth Ross, *supra* note 30.