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Employment Law:
The Employee vs. Independent Contractor Dichotomy

Veena Dubal[1]

Today, whether a worker is legally classified as an "employee" or an "independent contractor" defines whether he or she is entitled to any employment-law and labor-law protections. With the proliferation of the on-demand economy, the doctrinal definitions and legal analyses of these categories are fiercely contested. While businesses have attempted to confine the definition of employee to limit their financial and legal liabilities and risks, public-interest lawyers have worked to broaden the definition, ensuring that more workers are covered and protected by the law. How did U.S. law come to divide workers into these two categories, how have the definitions evolved historically, and how do workers today make sense of them?

I challenge the duality of worker classification in employment regulation by positioning the "employee" and the "independent contractor" in U.S. legal history and in the lives of contemporary taxi workers. The legal bifurcation of workers into "employees" and "independent contractors" has contributed significantly to the growth of precarious work in the U.S. I investigate the legal, historical, and cultural origins of these legal categories and their impact on contemporary workers. Based on findings from empirical research, I argue that the two-category division of workers in U.S. employment and labor laws is much more recent than commonly understood and that this division has caused not just widespread contingent labor but also fractured worker collectivities, thereby exacerbating the potential for precarity. The implications of my findings for doctrinal analysis are key to reversing alarming trends in the growth of precarious work.

Taxi work is an especially telling site for this investigation. Taxi companies were among the first businesses nationwide to alter their business models by changing the legal identities of their workers from employees to independent contractors. As a result of this industry-wide shift, many of the earliest legal decisions adjudicating the worker categories for the purposes of employment protections involved an investigation into the work of the taxi industry. Today, "transportation-network companies" (as the next generation of taxi work) lead the

1. Summarized and excerpted from Veena B. Dubal, *Wage Slave or Entrepreneur: Contesting the Dualism of Legal Worker Identities*, 105 CALIF. L. REV. 65 (2017).

technologically driven on-demand economy with its legally contested use of independent-contractor drivers.

Part I briefly reviews the contemporary legal literature and the doctrinal debates on the employee and independent contractor categories. With this as background, Part II utilizes original legal and historical research to show that the bifurcation of worker identity is a relatively new, post-World War II phenomenon in the laws of employment and labor regulation, one that reflects cultural shifts in work and state governance. Part III draws on findings from over two years of ethnographic fieldwork in the taxi-worker community of San Francisco and argue that the two worker categories have become meaningful not just for employment regulation but also for worker identities and collectivities on the ground. The differences in the social and cultural perceptions and realities of the diverse taxi workforce has greatly fractured worker collectivities within the San Francisco taxi industry.

I. Worker Identities in Legal Perspective

Contemporary commentators agree on one thing: although employment status matters enormously to both businesses and workers, the legal definitions and doctrinal tests demarcating the protected "employee" are confusing, creating more fog than clarity. Three different doctrinal tests determine whether workers are employees or independent contractors for the purposes of different rights and protections. The requirements set forth are unevenly applied and contested, in large put due to the subjective nature of the required analysis. Under the current regime of piecemeal analysis, a worker may be legally considered an employee for workers' compensation but an independent contractor for protected collective bargaining.

A major fissure in the scholarly debate on the regulation of employment is whether it is *even possible* to capture, or at least closely capture, who is an employee. At least one federal circuit has opined that "there is no functional difference between the three formulations" of tests for employment.[2] But courts and administrative bodies have come to divergent conclusions, even when looking at the same set of facts. For example, the D.C. Circuit, using a refined version of the common-law

2. Murray v. Principal Fin. Grp., Inc. 613 F.3d 943, 945 (9th Cir. 2010). *But see* Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 326 (1992) (maintaining that the economic-realities test used for Fair Labor Standards Act (FLSA) purposes "stretches the meaning of 'employee' to cover some parties who might not qualify as such under a strict application of traditional agency law principles").

test, has held that FedEx Home Delivery drivers are independent contractors under the National Labor Relations Act (NLRA),[3] while the Ninth Circuit, also using a version of the common-law test, has held that similarly situated FedEx Home Delivery drivers are employees for the purposes of wage protections under California law.[4] Some scholars and legal commentators look at these conflicting outcomes and contend that the doctrinal inquiry needs to be more clearly defined, with a one-size-fits-all test for every context. Others maintain that searching for a single test in such a complexly formulated economy where subcontracting and multiple employers abound is a fool's errand. For those who promote the "no good answer" approach, enforcing employment and labor law means focusing on the character of the transactions between the business and the worker, as opposed to the character of their relationship.

II. The Production of Precarity: A Legal History of the Entrepreneurial Taxi Driver

The legal determination of *who* is an employee (with the right to collectively bargain) and *who* is an independent contractor (completely uncovered by labor protections) is not a natural categorization. Rather, this bifurcation of worker identity is the result of recent legal history and legal decisions influenced by work politics, the rise of neoliberalism, and shifting ideas about the individual in relationship to the state. For a growing number of workers, including taxi drivers, janitors, nail-salon workers, and others, the adjudication of who receives the protections of the state is a legal determination reflecting not only shifting doctrine but also the growth of a free-market cultural ethos.

The cultural and political veneration of the "entrepreneur" as the ideal citizen-worker has greatly influenced doctrinal analysis of who constitutes a worker for the purposes of employment protections. The well-documented emergence of the entrepreneurial actor as the remedy for economic inequality *alongside* the decline of both employment protections and the welfare state is not accidental. Rather, it represents shifting perceptions about the role of the individual in relation to both work and the state. In the legal analysis of the D.C. Circuit, for example, working-class entrepreneurship has become a wage-worker narrative, reflecting not the way businesses structure themselves to avoid liability, but the way that workers *should* behave. Rather than the state providing a

3. FedEx Home Delivery v. N.L.R.B., 563 F.3d 492, 504 (D.C. Cir. 2009).

4. Alexander v. FedEx Ground Package Sys., Inc., 765 F.3d 981, 997 (9th Cir. 2014).

"safety net" for the down and out, the worker, through his labor, sustains the reorientation of neoliberal governance. He endures a low wage or income and must "pull himself up by his bootstraps" to replace the state's responsibility for individual social security and employment. Rather than leaching off of "entitlements" (including employment benefits) he must *entrepreneurialize* himself—become a small businessman.

The precarious nature of work today, exemplified by the risks of working-class entrepreneurialism and the independent-contractor identity, finds its legal roots in the taxi industry. In the 1970s, taxi companies were among the first to reorder their business models and convert their workers from employees, with the right to collectively bargain, to independent contractors, uncovered by the National Labor Relations Act and the litany of New Deal and post New Deal employment protections. The response of courts to the resulting de-unionization of taxi workers privileged the business decisions of companies by shifting risk onto workers and enabled the production of a new identity for low-income workers—that of the working-class entrepreneur.

How and when did workers become divided into independent contractors and employees for the purposes of employment and labor protections? The legislative history of the NLRA reflects no intention to divide workers into categories of employees eligible for collective bargaining and independent contractors cut out of its protections. To the contrary, the NLRA's promulgators clearly contemplated taxi workers, and others today likely classified as independent contractors, as the intended beneficiaries of the Act. In the House Debates preceding the passage of the NLRA, Congressman Connery, the bill's sponsor, stated, "We are talking about *all* the working people of the country. We say that *we want all workers* to have the right to bargain collectively."[5]

After the NLRA was passed, businesses drew on the opacity between independent contractors and employees in tort law, arguing that the common law of agency should be applied to determine who is an "employee" under the NLRA, which would limit which workers were entitled to union protections. The Supreme Court, however, rejected that argument, holding that Congress intended the NLRA to address labor strife broadly by defining "employee" to encompass "a wider field than the narrow technical legal relation of 'master and servant [in agency law].'"[6]

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5. 79 Cong. Rec. 9683, 9683-711, 9713-30 (June 19, 1935) (emphases added).
6. N.L.R.B. v. Hearst Publications, 322 U.S. 111, 125 (1944).

But three years later, Congress unraveled many New Deal labor and employment protections, precipitating a legal journey toward precarious work. Most (in)famously, Congress passed the Labor Management Relations Act (LMRA). One way the LMRA addressed businesses' concerns about the NLRA was through new restrictions on the Act's definition of "employee." The revised employee definition did not include supervisors or independent contractors. In the years following the LMRA, businesses experimented with the ambiguities of the employee identity. The transportation sector was an ideal place to push the legal boundaries because workers were not "controlled" in the traditional industrial sense. When the independent-contractor identity of transportation workers was challenged, appellate courts almost invariably decided in favor of the companies, against both the arguments of the NLRB and plaintiffs' attorneys. Control over "the means and manner of production," as required under the common-law definition of the "employee" was, arguably, limited in transportation work.

The most cited and influential appellate decision prohibiting leasing cab drivers from collective bargaining is the D.C. Circuit's *Local 777* decision,[7] which subverted workers' employment protections to the decision-making prerogatives of business and found drivers to be independent contractors under the common-law analysis of control. *Local 777* became central to the adjudication of the categorization of lessee workers because it dealt not just with the common-law analysis of workers in a nonindustrial setting but also with the technicalities of the business shift to leasing. Namely, it facilitated the abolishment of state protections in taxi employment by withdrawing the law from negotiated union agreements, eliminating collective worker rights.

The court acknowledged that even in the physical absence of a boss, taxi workers confronted a litany of controls over their work while driving, but it attributed these controls to government rules, not employers. Dismissing the union's insistence that the "companies discipline lessee drivers through threat of city action," the court harkened back to the NLRB's own findings that agency regulations are evidence of government—not employer—control.[8]

Exactly thirty years later, the D.C. Circuit decided *FedEx Home Delivery v. NLRB*, another case examining the right of transportation workers to collectively bargain.[9] The court effectively discarded the

7. Local 777, Democratic Union Organizing Committee, Seafarers International Union of North American, AFL-CIO v. NLRB, 602 F.2d 862 (D.C. Cir. 1979).

8. *Id.* at 901.

9. 563 F.3d 492 (D.C. Cir. 2009).

"means and manner" of control test in favor of an "entrepreneurial potential" test to determine employment. Again evaluating the employment identity of lessee transportation workers, the court rejected the primacy of "control" as the factor for determining employment. Instead, the court held that it would shift analysis "in favor of a more accurate proxy: *whether the putative independent contractors have significant entrepreneurial opportunity for gain or loss*."[10] The decision determined who is an independent contractor by finding inherent in the legal definition one who has the opportunity to profit not from working hard, but from working "smart"—in other words, one who can (but may not) maximize profits during the course of one's work—thus ignoring actual conditions of work and remuneration. By this measure, risk and uncertainty are interpreted as the workers' entrepreneurial opportunity and potential.

Notably, the court focused its analysis on *potential* entrepreneurial opportunity, not on realized entrepreneurial opportunity or practice. The court was not interested in workers' "'regular exercise of [the right to engage in entrepreneurial activity]'" but in the "'worker's retention of [that] right.'"[11] Under this analysis, the court implicitly placed value on the "freedom" of the worker to entrepreneuralize himself while subverting his right to act collectively. The decision discounted the controlling behaviors of FedEx and blamed the fact that no drivers reaped financial benefits from FedEx's business model on a "fail[ure by drivers] . . . *to make the extra effort*."[12] Rather than reflecting an objective reality about work, this doctrinal test of entrepreneurial potential reflects powerful (and shifting) cultural meanings about work and capitalism. Self-determination, individuality, and flexibility are valorized in the potentials of the working-class entrepreneur, while stability and security are, at best, undervalued. As neoliberalism's "quintessential actor," the entrepreneur and the entrepreneur's supposed freedom, flexibility, independence, and creativity of his work reflect the sacrosanct ideals of deregulated, free-enterprise governance.

III. Responding to and Experiencing Precarity: An Ethnographic Analysis of Worker Identities

With the historical origins and doctrinal development of the employee and independent-contractor bifurcation in work law in mind, I

10. *Id.* at 497 (internal quotes omitted and emphasis added).
11. *Id.* at 502.
12. *Id.* at 498 (emphasis added).

turn to an ethnographic examination of San Francisco taxi workers' experiences and understandings of their worker identity. How do workers themselves make sense of their independent contractor label, and how do these meanings impact potential collective action and lawyering on their behalf?

Plaintiffs' lawyers and public interest lawyers have long assumed that workers would rather be employees than independent contractors, particularly in low-income sectors of work. However, from 2002-2009 in the San Francisco taxi industry, workers had the opportunity to become employees, if only a simple majority of workers wanted to be considered employees under the law. And yet, despite workers' rights advocacy and campaigns, this did not happen.

In my two years of ethnographic research on San Francisco taxi workers, I found that the categories of independent contractor and employee are a prevailing feature of social and political relations between and among taxi drivers. For white, nonmigrant drivers, the employee identity is key to better working conditions and symbolizes a glorious labor history that immigrant taxi drivers cannot comprehend. In sharp contrast, most immigrant and racial-minority drivers perceive a stigma of taxi work in legal and cultural discourses about the "employee." Surprisingly, immigrant taxi workers valued their independent-contractor status because of the structural control it permits, physical freedom it licenses, and the promises of social mobility engendered by the "entrepreneur" identity. The multiple and sometimes contradictory nature of the law's meanings in the lives of the taxi workers inhibit the creation of a collective worker consciousness and sustained collectivities in a diverse workforce.

CONCLUSION

The definition of who is a worker under employment and labor laws is increasingly contentious and important as more workers are carved out of the laws' protections. By challenging conventional knowledge about the dualism of worker categories and by showing how these categories have emerged as factious social and political identities, this research highlights the difficult tensions between how the law understands workers and how workers understand themselves. Although the employee and independent-contractor identities are now commonsense categories, my findings reveal that their incorporation into the legal lexicon of employment regulations is relatively recent. Indeed, rather than being a necessary or natural classification, the categories reflect

neoliberal cultural and political trends and ideologies. The impulse of workers' rights advocates has been to work within the dualism by growing the employee category. My ethnographic investigation, however, exposes how many workers, for compelling reasons, feel affection for their independent-contractor identities. In this context, the identity divide in work law extends to fracture already fragile, legally unprotected worker collectivities.