WHEN AMAZON DRIVERS KILL: ACCIDENTS, AGENCY LAW, AND THE CONTRACTOR ECONOMY

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ABSTRACT

Amazon vans and Uber drivers frequently crash into other cars. Despite the many injuries and deaths that result from these accidents, Amazon and Uber deny responsibility for such claims because they categorize their drivers as "independent contractors." But this contractor defense distorts the basic rules of agency law. Over a century ago, courts crafted agency standards that forced businesses to pay for the harms that their workers caused. Since that time, American firms have attempted to skirt this rule by labeling their workers as "contractors" rather than as "employees." Aware of this age-old tactic to avoid liability, courts historically built sufficient flexibility into agency standards to hold companies responsible for injuries to others, even when ostensible "contractors" committed those torts.

In the years to come, a growing number of drivers for Amazon, Uber, and other on-demand firms will hit the road, make mistakes, and harm members of the public. Applying agency standards to this emerging problem, this Article develops a legal framework for determining when to hold on-demand firms accountable for the accidents that their contractors cause.

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INTRODUCTION

Sometimes Amazon vans crash. Crunched for time and constantly supervised by electronic trackers, Amazon drivers speed, miss turns, and fail to stop when they should.[1] When these errors occur, the ubiquitous blue-gray Sprinter van that carries everyone's favorite packages can quickly morph into a dangerous force.[2] Often giving drivers less than two minutes to deliver each package, Amazon constantly pushes its delivery people to drive faster.[3] Predictably, Amazon vehicles have been involved in hundreds of accidents over the last several years, causing numerous fatalities and serious injuries along the way.[4] From motorists to pedestrians to pets, everyone runs the risk of encountering an overworked, behind-schedule Amazon driver on the road.[5]

Transporting people instead of packages, Uber drivers face many of the same pressures.[6] Uber requires drivers to respond to trip requests within fifteen seconds, monitors drivers who take ineffi-cient routes, and sends notifications about new jobs to drivers while they are still driving.[7] In light of these distractions, Uber drivers unsurprisingly have caused a rash of auto wrecks. Uber's latest

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1. *See* Patricia Callahan, *Amazon Pushes Fast Shipping but Avoids Responsibility for the Human Cost*, N.Y. TIMES (Sept. 6, 2019), https://www.nytimes.com/2019/09/05/us/amazon-delivery-drivers-accidents.html [https://perma.cc/3RXR-JSPK] (describing a rash of auto accidents by Amazon drivers and explaining how Amazon monitors drivers' routes).

2. *See* Caroline O'Donovan & Ken Bensinger, *Amazon's Next-Day Delivery Has Brought Chaos and Carnage to America's Streets—But the World's Biggest Retailer Has a System to Escape the Blame*, BUZZFEED NEWS (Sept. 6, 2019, 5:14 PM), https://www.buzzfeednews.com/article/carolineodonovan/amazon-next-day-delivery-deaths [https://perma.cc/XX75-TNSC] (describing the time pressures that Amazon puts on drivers).

3. *Id.*

4. *Id.* (summarizing the results of a yearlong investigation into accidents involving Amazon's delivery vehicles).

5. *See id.* (describing time demands that Amazon drivers face).

6. *See* Ryan Calo & Alex Rosenblat, *The Taking Economy: Uber, Information, and Power*, 117 COLUM. L. REV. 1623, 1664-65 (2017) (explaining how Uber subjects its drivers to various control mechanisms).

7. *Id.* at 1669 (discussing different ways that Uber monitors drivers); *Getting a Trip Request*, UBER, https://help.uber.com/driving-and-delivering/article/getting-a-trip-request?nodeId=e7228ac8-7c7f-4ad6-b120-086d39f2c94c [https://perma.cc/RC59-UAZ9] (stating that drivers have fifteen seconds to respond to trip requests); Complaint at 14-15, Walker v. Uber Techs., Inc., No. 21-CA-008663 (Fla. Cir. Ct. Oct. 29, 2021) (alleging that Uber's systems con-tribute to distracted driving).

safety report indicated that 101 people died in Uber-involved crashes during a two-year period.[8]

When these accidents happen, Amazon and Uber consistently deny responsibility for the harm that their drivers cause. In dozens of court filings, both companies have repeatedly claimed that the "independent contractors" whom they hired should alone answer for these accidents.[9] For example, after an Uber driver killed six-year-old Sofia Liu in a San Francisco crosswalk, Sofia's family sued Uber for the driver's negligence.[10] Denying responsibility, Uber responded that it "sympathize[d] with the Liu family" but that Uber should not have to pay for Sofia's death because it was a "technology company" that did not "employ drivers."[11] Similarly, when an Amazon cargo van struck and killed Telesfora Escamilla in a Chicago crosswalk,[12] Amazon relied on the contractor defense to claim that the accident was caused "by third parties not under the direction or control of Amazon."[13]

Amazon and Uber are not alone in affixing the "contractor" label to drivers. Recent shifts in technologies and corporate structures have caused numerous businesses to hire a growing number of independent contractors to complete tasks that were once performed by

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8. UBER, 2019-2020 U.S. SAFETY REPORT 17 (2022), https://uber.app.box.com/s/vkx4 zgwy6sxx2t2618520xt35rix022h?uclick_id=d07ec9d4-4f4a-41d5-a8ef-2723120ebcc1 [https://perma.cc/WMQ4-QTPM]; *see also* Kellen Browning, *Uber Says Sexual Assaults Are Down But Rate of Traffic Deaths Is Up*, N.Y. TIMES (June 30, 2022), https://www.nytimes. com/2022/06/30/business/uber-safety-report.html [https://perma.cc/UFT9-H34A] (noting that Uber's most recent safety report showed an increase in traffic fatalities, as compared to the previous report).

9. *See* Kevin Alden, *Strict Liability for the Information Age*, 46 BYU L. REV. 1619, 1620-21 (2021) (explaining how Amazon attempts to separate itself from "delivery-driver-tortfeasors"); Agnieszka A. McPeak, *Regulating Ridesharing Platforms Through Tort Law*, 39 U. HAW. L. REV. 357, 364-66 (2017) (discussing how Uber denies vicarious responsibility for its drivers' accidents).

10. Complaint for Damages & Demand for Trial by Jury at 2-10, Liu v. Uber Techs., Inc., No. CGC-14-536979 (Cal. Super. Ct. Jan. 27, 2014) (asserting that Sofia Liu and her family were crossing the street on a green light when they were struck by an Uber driver).

11. Answer & Affirmative Defenses of Defendants Uber Technologies, Inc., Rasier LLC, and Rasier-CA LLC to Plaintiffs' Complaint at 2-3, Liu v. Uber Techs., Inc., No. CGC-14-536979 (Cal. Super. Ct. May 1, 2014) (characterizing the driver who caused the accident as an "independent, third-party transportation provider[ ]").

12. Complaint at 2, Escamilla v. Amazon.com, LLC, No. 2017-L-000060 (Ill. Cir. Ct. Jan. 4, 2017).

13. Amazon.com's Answer & Affirmative Defenses to Plaintiff's Complaint at Law at 6, Escamilla v. Amazon.com, LLC, No. 2017-L-000060 (Ill. Cir. Ct. Mar. 24, 2017).

employees.[14] This rapid expansion of independent contracting is most pronounced in the platform or "gig" economy, which is staffed almost entirely by independent contractors.[15] From DoorDash dashers to TaskRabbit taskers to Amazon Flex drivers, over one-third of U.S. laborers performed some form of "gig" or freelance work in 2021.[16] In the years to come, a growing number of drivers for on-demand firms will hit the road, make mistakes, and injure members of the public.[17] Left unchallenged, this massive movement toward on-demand transportation and independent contracting threatens to leave large segments of the population injured and uncompensated when these accidents occur.[18]

Acknowledging the significance of these changes, judges and scholars have devoted considerable attention to the question of whether platform workers are "employees" who should enjoy full employment protections such as overtime and the minimum wage.[19]

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14. *See* Rory Van Loo, *The Revival of Respondeat Superior and Evolution of Gatekeeper Liability*, 109 GEO. L.J. 141, 143-44 (2020) (analyzing the law's response to growing instances of corporate restructuring).

15. *See* Alden, *supra* note 9, at 1627 (explaining how nearly all platform employers designate workers as "independent contractors").

16. *See* Daniel Wiessner, Nandita Bose & David Shepardson, *Biden Labor Proposal Shakes Up Gig Economy that Relies on Contractors*, REUTERS (Oct. 11, 2022, 7:49 PM), https://www.reuters.com/world/us/new-biden-labor-rule-would-make-contractors-into-employees-2022-10-11/ [https://perma.cc/5FB7-ZYCN] (discussing the rise of non-traditional, freelance work); *see also* Mihailis E. Diamantis, *Employed Algorithms: A Labor Model of Corporate Liability for AI*, 72 DUKE L.J. 797, 835-36 (2023) (examining the growth of the platform economy); *How Many Gig Workers Are There?*, GIG ECON. DATA HUB, https://www.gigeconomydata.org/basics/how-many-gig-workers-are-there [https://perma.cc/A9ZQ-7LW7] (listing several studies of gig-worker density).

17. *See* O'Donovan & Bensinger, *supra* note 2 (discussing the numerous accidents caused by Amazon delivery people); UBER, *supra* note 8, at 17 (noting that more than 100 people have died in crashes involving Uber drivers).

18. *See generally* Van Loo, *supra* note 14, at 143-45 (discussing scholarly commentaries on the law's apparent inability to keep pace with outsourcing).

19. *See* Keith Cunningham-Parmeter, *Gig-Dependence: Finding the Real Independent Contractors of Platform Work*, 39 N. ILL. L. REV. 379, 393-98 (2019) (explaining how courts have reached different conclusions on the question of whether platform workers are employees); *see also* Miriam A. Cherry, *Beyond Misclassification: The Digital Transformation of Work*, 37 COMPAR. LAB. L. & POL'Y J. 577, 584-85 (2016); Valerio De Stefano, *The Rise of the "Just-in-Time Workforce": On-Demand Work, Crowdwork, and Labor Protection in the "Gig-Economy,"* 37 COMPAR. LAB. L. & POL'Y J. 471, 489-94 (2016); Brishen Rogers, *Employment Rights in the Platform Economy: Getting Back to Basics*, 10 HARV. L. & POL'Y REV. 479, 480-82 (2016); Benjamin Means & Joseph A. Seiner, *Navigating the Uber Economy*, 49 U.C. DAVIS L. REV. 1511, 1514-15 (2016); Elizabeth C. Tippett & Bridget Schaaff, *How* Concepcion *and*

Distinct from this *employment* law question of workers' rights, an equally vital (though less discussed) *agency* law question looms over the work of Amazon, Uber, and other on-demand drivers: when should the law hold these firms accountable for the injuries that their drivers cause? Agency law generally requires employers to answer for the mistakes of their employees, but not for the mistakes of their independent contractors.[20] Both agency law and employment law typically use the same "right to control" test to determine whether or not workers are employees.[21] According to both employment law and agency law, if firms retain sufficient control over working conditions, then their workers are employees.[22]

Even though both employment law and agency law ask courts to assess the level of control that companies retain over workers, judges have largely failed to examine the unique reasons why control matters in the agency context, as opposed to the employment context.[23] Whereas employment law seeks to identify individuals who should enjoy workplace rights,[24] agency law seeks to compensate members of the public when workers cause them harm.[25] In other words, even though both bodies of law require an evaluation

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Italian Colors *Affected Terms of Service Contracts in the Gig Economy*, 70 RUTGERS U. L. REV. 459, 476-77 (2018) (summarizing the scholarly debate over the employment status of platform workers).

20. *See* Van Loo, *supra* note 14, at 144 (considering the effect that independent contracting has on questions of corporate liability).

21. RESTATEMENT (SECOND) OF AGENCY § 220 (AM. L. INST. 1958); *see also* Note, *Borrowed Servants and the Theory of Enterprise Liability*, 76 YALE L.J. 807, 807-09 (1967) [hereinafter *Borrowed Servants*] (discussing how agency law and employment law share a common definition of "employee"); Michael J. Zimmer, Charles A. Sullivan & Rebecca Hanner White, *Taking on an Industry: Women and Directing in Hollywood*, 20 EMP. RTS. & EMP. POL'Y J. 229, 240-41 (2016) (discussing the role that the control test plays in defining "employees" for purposes of employment law and agency law).

22. *See* Michael C. Harper, *Using the Anglo-American* Respondeat Superior *Principle to Assign Responsibility for Worker Statutory Benefits and Protections*, 18 WASH. U. GLOB. STUD. L. REV. 161, 177-78 (2019) (summarizing the early judicial application of the right-to-control test).

23. *See* Deanna N. Conn, *When Contract Should Preempt Tort Remedies: Limits on Vicarious Liability for Acts of Independent Contractors*, 15 FORDHAM J. CORP. & FIN. L. 179, 188-89, 194-96 (2009) (discussing the distinct nature of agency law questions, as compared to employment law questions).

24. *See* Harper, *supra* note 22, at 178-79 (outlining the core objectives of employment protections).

25. El Koussa v. Att'y Gen., 188 N.E.3d 510, 517 (Mass. 2022) (distinguishing between the different objectives of agency law and employment law).

of workplace control, they do so for entirely distinct reasons: protecting workers (employment law) and compensating third parties (agency law).

Judges who fail to consider a rule's underlying rationales are more likely to engage in mechanical, uncritical applications of that rule.[26] Unfortunately, when courts make vicarious liability determinations in the on-demand economy, they tend to talk about "control" without considering the unique agency rationales for making that assessment.[27] For example, when victims sue Amazon for car wrecks, Amazon argues that it does not control drivers or the third-party logistics companies that hire drivers on Amazon's behalf.[28] Amazon's enormous delivery network is comprised of hundreds of different logistics firms that range in size from large, publicly-traded companies to tiny firms that own just a few vans.[29] The drivers technically work for the logistics companies, which Amazon calls "Independent Contractor Service Providers."[30] A cursory glance at this complicated web of contractual relationships might lead some courts to conclude that Amazon has very little control over the drivers who deliver its packages every day. Despite this appearance, Amazon exerts influence over drivers in several less-obvious ways. For instance, by issuing orders to its logistics companies, Amazon dictates the wages that drivers earn, the vans that they drive, the scanners that they carry, and the vests that they wear.[31] When evaluating Amazon's responsibility for crashes, judges frequently

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26. Young B. Smith, *Frolic and Detour*, 23 COLUM. L. REV. 444, 463 (1923) (discussing the importance of contextualizing the justifications for various rules); *see also* Gregory C. Keating, *The Theory of Enterprise Liability and Common Law Strict Liability*, 54 VAND. L. REV. 1285, 1305-06 (2001) (evaluating various scholarly rationales for the rule of vicarious employer liability).

27. *See generally* Harper, *supra* note 22, at 164-65 (calling on courts to evaluate the animating principles of agency law when defining the boundaries of employment relationships).

28. *See, e.g.*, Defendant Amazon.com, Inc.'s Memorandum of Law in Support of its Motion to Dismiss Plaintiffs' Amended Complaint at 2-3, 7-11, 13, Hoffee v. AAC Transp., No. 1:18-CV-01908-SHR (M.D. Pa. Dec. 18, 2018) (asserting that an "independent contractor" logistics company should pay damages for a crash involving an Amazon delivery truck).

29. O'Donovan & Bensinger, *supra* note 2 (discussing trends in litigation against Amazon and its delivery companies).

30. WHISARD Compliance Action Report, Amazon Logistics, Inc., No. 1785930, at 2-17 (Dep't of Labor Mar. 8, 2016).

31. *Id.* at 7-9.

review the foregoing facts and engage in basic evaluations of control without considering the core agency objectives, such as third-party compensation, that the control test was designed to further.[32] In other words, courts focus exclusively on the question of *if* control exists rather than on the question of *why* control matters. But given that the control analysis is notoriously indeterminate,[33] a myopic application of control—divorced from agency law's underlying rationales—leads to unpredictable results, with some plaintiffs winning their personal injury claims against Amazon, and others losing.[34]

This Article provides a legal framework for evaluating agency questions in the contractor economy. When deciding whether to hold Amazon, Uber, or other on-demand companies responsible for injuries that their drivers cause, courts should not only consider whether these firms control working conditions, but also the goals that the control test should advance. Identifying three such goals—compensation, deterrence, and a concept described here as "fair loss-attribution"—this Article explains how courts in other agency contexts have historically advanced these objectives while adapting to technological and societal changes along the way.[35]

Legal scholars have repeatedly identified compensation and deterrence as central justifications for both tort law and agency law.[36]

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32. *See* Rhett B. Franklin, *Pouring New Wine into an Old Bottle: A Recommendation for Determining Liability of an Employer Under Respondeat Superior*, 39 S.D. L. REV. 570, 576-77 (1994) (criticizing courts for applying agency tests without evaluating the reasons for applying those tests).

33. *See* Deepa Das Acevedo, *Unbundling Freedom in the Sharing Economy*, 91 S. CAL. L. REV. 793, 801-06 (2018) (discussing the imprecision of employment-classification tests).

34. *See* Hoffee v. AAC Trans. LLC, No. 1:18-CV-01908, 2019 WL 2642840, at *1-3 (M.D. Pa. June 27, 2019) (dismissing injured plaintiff's claims against Amazon); Young v. NEA Deliver, LLC, No. BC621762, at 3 (L.A. Cnty. Super. Ct. Apr. 27, 2018) (ruling against Amazon's motion to dismiss plaintiff's personal injury claim); *see generally* Cecilia G. Vazquez, Comment, *The Sharing Revolution: Changing Times Call for Clarifying Tort Liability*, 80 LA. L. REV. 623, 640-41 (2020) (discussing the challenges of delineating the boundaries of tort liability in the platform economy).

35. *See* Agnieszka A. McPeak, *Sharing Tort Liability in the New Sharing Economy*, 49 CONN. L. REV. 171, 188 (2016) (arguing that tort theories have evolved in response to changing economic realities); Justin Sevier, *Vicarious Windfalls*, 102 IOWA L. REV. 651, 658 (2017) (examining how the law of vicarious liability originally developed in response to industrial changes).

36. *See generally* DAN B. DOBBS, PAUL T. HAYDEN & ELLEN M. BUBLICK, THE LAW OF TORTS § 10 (2d ed. 2023) (evaluating tort law's central goals); 5 FOWLER V. HARPER, FLEMING JAMES

According to these descriptions, holding firms responsible for their employees' torts promotes victim compensation while creating incentives for firms to prevent future injuries.[37] Whereas compensation and deterrence are well-accepted principles of agency law,[38] this Article introduces the term "fair loss-attribution" to help explain the role that a hiring entity's blameworthiness should also play in making agency determinations in the contractor economy.[39] Technically, the doctrine of vicarious liability—a branch of agency law—is a no-fault doctrine.[40] But despite this common assertion that employer fault plays no role in assessments of vicarious liability, the theory of fair loss-attribution explains how aspects of employer blame nevertheless often lie just beneath the surface of these determinations. For example, when deciding whether to hold firms liable for their workers' mistakes, agency law asks whether an employer could *foresee* certain harms and whether those harms arose out of business activities that the employer *controlled*.[41] Stated this way, the standards embedded in this no-fault agency test help define circumstances in which employers play somewhat culpable roles in facilitating injury-causing activities. Applying these principles to the current problem, the theory of fair loss-attribution can

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JR. & OSCAR S. GRAY, HARPER, JAMES AND GRAY ON TORTS § 26.2 (3d ed. 2008) (listing contemporary rationales for vicarious liability).

37. *See* Gary T. Schwartz, *The Hidden and Fundamental Issue of Employer Vicarious Liability*, 69 S. CAL. L. REV. 1739, 1749-64 (1996) (examining scholarly debates over the deterrence justification for vicarious liability); John Fabian Witt, *Speedy Fred Taylor and the Ironies of Enterprise Liability*, 103 COLUM. L. REV. 1, 42-43 (2003) (discussing debates among torts scholars over the rationales for extending liability to employers).

38. *See infra* Part III.A (examining various justifications for vicarious employer liability).

39. *See generally* Daniel Harris, *The Case Against Vicarious Gatekeeper Liability*, 21 FLA. ST. U. BUS. REV. 43, 52-53 (2022) (discussing the scholarly debate over the role that a defendant's fault plays in vicarious liability determinations); Keating, *supra* note 26, at 1303-04 (examining the dialogue among legal scholars over conflicts between tort law and agency law).

40. *See* Keith Cunningham-Parmeter, *The Sexual Harassment Loophole*, 78 WASH. & LEE L. REV. 155, 159 (2021) (discussing the role that fault plays in vicarious liability determinations); Sevier, *supra* note 35, at 660 (examining scholarly critiques of vicarious liability based on the doctrine's apparent conflict with "popular notions of moral responsibility").

41. W. PAGE KEETON, DAN B. DOBBS, ROBERT E. KEETON & DAVID G. OWEN, PROSSER AND KEETON ON THE LAW OF TORTS 500 (5th ed. 1984) (discussing the modern justifications for vicarious employer liability).

help courts determine when it is fair to require firms to pay for certain business-generated risks that predictably harm the public.

After outlining the agency principles of compensation, deterrence and fair loss-attribution, this Article offers three fairly recent historical examples that serve as rough analogues to the contemporary problem of injuries caused in the on-demand economy: taxi driving, pizza delivery, and telemarketing.[42] In these cases, firms attempted to avoid liability by embracing the contractor defense.[43] Although judges were far from uniform in their evaluation of this defense, many courts that assessed firmwide liability in each industry looked beyond formalistic "contractor" labels to identify the circumstances under which businesses ought to compensate members of the public for worker-caused injuries.[44] Demonstrating agency law's adaptability, these examples provide a roadmap for making liability determinations in the on-demand economy by highlighting the role that compensation, deterrence, and fair loss-attribution have historically played in assessing employer responsibilities for third-party harms.[45]

This Article proceeds in four parts. Part I summarizes the wave of accidents that Amazon and Uber drivers have caused in recent years. By using the contractor defense to claim tort immunity, on-demand firms increase the risk that members of the public will experience uncompensated losses when drivers make mistakes. Part II evaluates several recent decisions involving Amazon and Uber drivers in which courts have failed to consider the agency rationales that originally motivated courts to create the contractor defense. Turning to agency law's history and adaptability, Part III examines three different examples—taxi driving, pizza delivery, and telemarketing—in which employers attempted to immunize themselves from liability by raising the contractor defense. Examining how many judges in these cases flexibly applied the concept of control to account for technological and societal changes, Part III explains how these decisions advanced larger agency objectives.

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42. *See infra* Part III.B. (analyzing various historical analogues to misconduct by on-demand drivers).

43. *See infra* Part III.B.

44. *See infra* Part III.B.

45. *See generally* Van Loo, *supra* note 14, at 146-47 (discussing the need for theories of third-party liability to adapt to increased levels of specialization and outsourcing).

Mapping the foregoing framework onto the problem at hand, Part IV examines how courts can embrace these principles when making liability determinations in the contractor economy. For example, as to the issue of deterrence, there are several basic safety measures that Uber and Amazon could adopt to reduce the likelihood of future accidents.[46] Uber, for instance, could require drivers to take safety trainings or deactivate drivers who speed excessively.[47] Likewise, Amazon could remove dangerous left-hand turns from the driving directions that it provides to delivery people—a known safety measure that UPS has adopted for all drivers, but Amazon has not.[48] As to the issue of compensation, in light of the fact that many plaintiffs would otherwise have to obtain relief from low-wage Uber drivers or under-capitalized logistics companies that hire drivers on Amazon's behalf, the chances of receiving compensation would increase dramatically if plaintiffs could sue Uber and Amazon directly.[49] Finally, on the issue of fair loss-attribution, millions of Americans are injured in auto accidents every year.[50] Under these circumstances, the injuries that arise from collisions could easily be categorized as predictable costs of transporting people and delivering packages, especially when companies subject drivers to extreme time pressures. In light of the foreseeable nature of these harms, courts could fairly attribute such losses to firms that play meaningful roles in generating those losses.

American society is currently experiencing a technological revolution that has facilitated tremendous advances in transportation

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46. *See infra* Part IV.B. (examining various deterrence measures that on-demand firms could enact to reduce the incidence of delivery-related accidents).

47. *See* Alden, *supra* note 9, at 1643 (explaining how platforms retain the ability to impose speed restrictions on drivers).

48. *See* O'Donovan & Bensinger, *supra* note 2 (listing safety measures that Amazon could implement).

49. *See* Callahan, *supra* note 1 (explaining how Amazon's delivery network is composed of large logistics businesses and "tiny companies [with] just a handful of drivers"); *see also* BEN ZIPPERER, CELINE MCNICHOLAS, MARGARET POYDOCK, DANIEL SCHNEIDER & KRISTEN HARKNETT, NATIONAL SURVEY OF GIG WORKERS PAINTS A PICTURE OF POOR WORKING CONDITIONS, LOW PAY, ECON. POL'Y INST. 5 (2022) (reporting on the large number of gig workers who earn between $10 and $14.99 per hour).

50. *See* Car Crash Deaths and Rates, NAT'L SAFETY COUNCIL, https://injuryfacts.nsc.org/motor-vehicle/historical-fatality-trends/deaths-and-rates/ [https://perma.cc/M49Y-RNYE] (listing traffic fatality trends through 2020).

and delivery.[51] But the same developments that allow consumers to quickly order packages and trips can also cause harm when drivers make mistakes. Historically, judges have expanded the scope of employer liability in response to technological and societal changes that generated new public risks.[52] Likewise, courts today should embrace agency law's adaptability when deciding whether to hold on-demand companies responsible for the injuries that their contractors cause.

I. AMAZON ACCIDENTS, UBER CRASHES, AND THE RISE OF CONTRACTING

The next time that you cross the street, be sure to watch out for Amazon vans and Uber drivers. In light of rapid developments in logistics and technology, Americans are increasingly sharing the road with on-demand drivers.[53] As they rush to deliver packages and passengers, some drivers injure members of the public. This Part surveys the rise of on-demand delivery, independent contracting, and auto accidents that have resulted from the confluence of these forces. It explains how, despite the many auto wrecks caused by Amazon-branded vans and Uber-hired drivers, on-demand companies deny responsibility for such incidents. By describing the explosive growth of on-demand delivery and accidents, this Part sets the stage for assessing the legal framework that courts currently use to evaluate the contractor defense.

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51. *See* Lauren Geisser, Note, *Risk, Reward, and Responsibility: A Call to Hold UberX, Lyft, and Other Transportation Network Companies Vicariously Liable for the Acts of Their Drivers*, 89 S. CAL. L. REV. 317, 355 (2016) (listing various societal costs associated with platform work).

52. *See* Catherine Fisk & Erwin Chemerinsky, *Civil Rights Without Remedies: Vicarious Liability Under Title VII, Section 1983, and Title IX*, 7 WM. & MARY BILL RTS. J. 755, 760-61 (1999) (explaining how the law of vicarious liability has adjusted to societal shifts).

53. *See* Alden, *supra* note 9, at 1621-22 (discussing the growth of on-demand delivery and transportation).

A. *The Expansion of On-Demand Work and Independent Contracting*

Independent contractors are all around us. Whereas companies used to reserve the "independent contractor" label for highly paid professionals and freelancers, firms now designate all types of workers as independent contractors, even if those workers perform low-paid or low-skilled jobs.[54] From healthcare to building maintenance to service work, employers in a wide array of sectors use independent contractors to complete essential business tasks.[55]

The Department of Labor estimates that 22.1 million Americans work as independent contractors, and studies show rapid growth in this job category.[56] No industry better reflects the unprecedented expansion of independent contracting than the platform or "gig" economy. Providing delivery, chore, and transportation services, nearly all on-demand platforms designate their workers as independent contractors.[57] And the number of individuals who work in this sector is growing. Surveys estimate that between 25 to 35 percent of workers have performed non-standard or gig work in the preceding month.[58] When estimates broaden the inquiry to ask whether individuals have performed *any* type of freelance work in the past twelve months, these numbers skyrocket to sixty million people, or one-third of the workforce.[59] But despite the increasing number of independent contractors at American workplaces, firms

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54. *See* Cunningham-Parmeter, *supra* note 19, at 407 (examining early characteristics of independent contractors).

55. *Id.*

56. Employee or Independent Contractor Classification Under the Fair Labor Standards Act, 87 Fed. Reg. 62218 (proposed Oct. 13, 2022) (to be codified at 40 C.F.R. pts. 780, 788, 795) (reporting on several studies of independent contracting); *see also Freelancing in America*, GIG ECON. DATA HUB, https://www.gigeconomy data.org/research/data-sources/freelancing-america [https://perma.cc/UK9B-TPG2] (estimating the number of workers who performed some form of platform work).

57. *See* Alden, *supra* note 9, at 1627 (examining the growth of independent contracting in the platform economy).

58. *How Many Gig Workers Are There?*, GIG ECON. DATA HUB, https://www.gigeconomy data.org/basics/how-many-gig-workers-are-there [https://perma.cc/EVQ7-3DQ2].

59. *See* Wiessner et al., *supra* note 16 (discussing the rise of non-traditional, freelance work); *see also* Diamantis, *supra* note 16, at 835-36 (examining the growth of the platform economy); *How Many Gig Workers Are There?*, *supra* note 58 (listing several studies on gig-worker density).

differ on how they structure their legal relationships with this class of workers.

1. Uber Growth and the "Direct-Contractor" Problem

Since its founding in 2009, the company originally known as "UberCab" hired only independent contractors as drivers.[60] Like many of the labor-dependent technology unicorns of its time, Uber immediately sought to grow at unprecedented rates while keeping labor costs down.[61] Investors rewarded Uber's business model by providing the company with a series of cash infusions, which eventually led to skyrocketing valuations.[62] Today, Uber operates in 900 cities globally, while its competitor, Lyft, operates in 644 cities and holds 31 percent of the ride-hailing market.[63] In their contracts with workers, both Uber and Lyft explicitly state that drivers are independent contractors.[64] Lyft refers to its drivers as "Users" and specifies that no "agency relationship is intended or created by this [a]greement."[65] Similarly, Uber's terms of service refer to drivers as "independent drivers" and state that they "ARE NOT ACTUAL AGENTS ... OR EMPLOYEES OF UBER IN ANY WAY."[66]

But Uber and Lyft are not alone in labeling workers as "independent contractors." For instance, app-based food delivery services such as Grubhub, Uber Eats, and DoorDash also hire drivers as

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60. *See* Agnieszka McPeak, *Platform Immunity Redefined*, 62 WM. & MARY L. REV. 1557, 1561-62, 1595 (2021); Elizabeth A. Mapelli, *Inadequate Accessibility: Why Uber Should Be a Public Accommodation Under the Americans with Disabilities Act*, 67 AM. U. L. REV. 1947, 1955-56 n.55 (2018) (discussing Uber's early history).

61. *See* Alden, *supra* note 9, at 1621-22 (outlining marketplace pressures that on-demand firms face).

62. *See* Mapelli, *supra* note 60, at 1955 n.48 (discussing various funding sources that Uber received during its early years).

63. Faizan Farooque, *Lyft Continues to Gain on Uber in Crucial Areas*, NASDAQ (June 26, 2022, 9:08 AM), https://www.nasdaq.com/articles/lyft-continues-to-gain-on-uber-in-crucial-areas [https://perma.cc/36ME-J7L7]; *see* Hillary A. Sale, *The Corporate Purpose of Social License*, 94 S. CAL. L. REV. 785, 816 n.220 (2021) (examining growth trends in ride-hailing).

64. *See* Rogers, *supra* note 19, at 490-91 (discussing the legal relationship between on-demand platforms and workers).

65. *Lyft Terms of Service*, LYFT (Dec. 12, 2022), https://www.lyft.com/terms [https://perma.cc/F3NT-HU8W].

66. *U.S. Terms of Use*, UBER (June 14, 2023), https://www.uber.com/legal/en/document/?name=general-terms-of-use&country=united-states&lang=en [https://perma.cc/ZU2K-8DVB].

non-employees. Grubhub calls its drivers "Delivery Partner[s],"[67] and DoorDash calls its drivers "Dasher[s]."[68] As with Uber and Lyft, the rapid expansion of online food delivery has caused a growing number of drivers to hit the road. Between 2018 and 2021, the industry experienced a four-fold increase in sales.[69] And when these drivers inevitably make mistakes and cause accidents, the legal question facing courts will be the same: whether Uber Eats "Part-ners" and DoorDash "Dashers" are bona fide independent contrac-tors or simply employees of the firms that hired them.

Cases involving Uber and other "gig" workers present courts with what might be called a "direct-contractor" problem. As defined here, the term "direct-contractor" involves a rather straightforward rela-tionship between one company and its workers. In other words, there are no intermediaries that formally hire workers on the platform's behalf. Rather, the on-demand company directly hires workers, and workers perform labor directly through the platform.[70] As such, the direct-contractor relationship creates a binary choice for judges: either the platform correctly designated the worker as an "independent contractor" or the platform misclassified the employee and should be held accountable for the employee's accidents.[71]

But not all relationships in the on-demand economy involve this rather straightforward contractual arrangement. Whereas Uber and Lyft present courts with direct-contractor problems, Amazon adds one layer of contractual complexity to its relationships with workers by hiring intermediaries who, in turn, hire drivers.[72] The following

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67. *Grubhub Delivery Partner Terms of Use*, GRUBHUB (Dec. 8, 2023), https://driver. grubhub.com/terms-of-use/ [https://perma.cc/QPX9-DPPP].

68. *Independent Contractor Agreement*, DOORDASH (Apr. 14, 2023), https://help.doordash. com/dashers/s/ica-us?language=en_US [https://perma.cc/8PBG-5SYC].

69. *See* Kabir Ahuja, Vishwa Chandra, Victoria Lord & Curtis Peens, *Ordering In: The Rapid Evolution of Food Delivery*, MCKINSEY (Sept. 22, 2021), https://www.mckinsey.com/ industries/technology-media-and-telecommunications/our-insights/ordering-in-the-rapid-evolution-of-food-delivery#/ [https://perma.cc/JZD6-RV6M]; Jeff Wells, *Grocery Delivery Is Off to a Strong Start in 2022*, GROCERYDIVE (Apr. 11, 2022), https://www.grocerydive.com/news/ grocery-delivery-sales-have-strong-start-in-2022/621890/ [https://perma.cc/A73M-JWVP] (ex-amining growth trends in grocery delivery).

70. *See* Alden, *supra* note 9, at 1627-28.

71. *See* Das Acevedo, *supra* note 33, at 801 (discussing the challenge of determining whether workers are employees or independent contractors).

72. *See* Alden, *supra* note 9, at 1620-21.

Subpart considers the unique liability questions posed by this intermediary-contractor arrangement.

2. Amazon Expansion and the "Intermediary-Contractor" Problem

Amazon's explosive growth in the retail sector is the stuff of legends. Originally founded as an online bookstore in 1995 with the motto "get big fast," Amazon has matured into an e-commerce behemoth.[73] Today, the retailer ships an estimated 7.7 billion packages each year and generates $470 billion in annual sales.[74] But Amazon's expansion famously hit a speedbump in the run up to Christmas 2013.[75] At the time, Amazon was relying almost exclusively on legacy carriers, such as UPS, FedEx, and the postal service, to deliver its packages.[76] Due to a surge in demand for two-day delivery through Amazon Prime (the loyalty program signed up more than one million customers in a single week in December 2013), the legacy carriers could not deliver packages fast enough.[77] Irate customers whose Christmas gifts did not arrive on time wanted answers from Amazon.[78] The so-called "Christmas Fiasco" of 2013 caused furious Amazon executives to quickly develop a strategy that would free the company from its overdependence on UPS and other delivery companies.[79] Knowing that the legacy carriers would never keep up with Amazon's growth, the online retailer hatched a plan to develop a logistics network of its own.[80]

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73. *Amazon Opens for Business*, HISTORY (July 16, 1995), https://www.history.com/this-day-in-history/amazon-opens-for-business [https://perma.cc/68JT-U4GA] (summarizing the events surrounding Amazon's founding).

74. Anne Goodchild & Rishi Verma, *How Many Amazon Packages Get Delivered Each Year?*, UNIV. WASH. SUPPLY CHAIN TRANS. & LOGISTICS CTR. (Oct. 17, 2022), https://depts.washington.edu/sctlctr/news-events/in-the-news/how-many-amazon-packages-get-delivered-each-year# [https://perma.cc/NV5B-D8W2].

75. *See* Callahan, *supra* note 1.

76. *See id.*

77. *See id.* (examining the early development of Amazon's logistics network).

78. *See id.*

79. *See* O'Donovan & Bensinger, *supra* note 2 (stating that Amazon gave affected customers $20 gift cards to make up for later deliveries in December 2013).

80. Spencer Soper, *Amazon Sued Over Crashes by Drivers Rushing to Make Deliveries*, BLOOMBERG (Nov. 12, 2021, 5:00 AM), https://www.bloomberg.com/news/features/2021-11-12/amazon-com-algorithms-blamed-in-crash-that-paralyzed-aspiring-doctor

Unlike most delivery companies, however, Amazon's new strategy did not involve hiring drivers to work directly for Amazon. Rather, the company planned to create a decentralized network of thousands of vans that would be operated by independently owned logistics firms.[81] These smaller logistics companies would then hire Amazon-clad drivers to make deliveries.[82]

Over the past decade, Amazon has swiftly shifted away from legacy carriers to its own contractor network. Whereas the older shippers, such as UPS and FedEx, delivered 91 percent of Amazon's packages in 2015, some experts estimate that Amazon now completes nearly half of its deliveries with its own expansive network of delivery contractors.[83] And Amazon's reliance on contractors will only increase in the years to come. The World Economic Forum projects that last-mile transit (that is, the final delivery stage of Amazon deliveries) will grow by 78 percent by the end of the decade.[84]

In contrast to Uber's single-contractor arrangement with drivers, Amazon's delivery system presents an "intermediary-contractor" problem because intermediary logistics firms stand between Amazon and its drivers. Amazon calls the logistics companies "Delivery Service Partners" (DSPs).[85] After signing contracts with Amazon, DSPs then hire their own drivers, whom Amazon labels "Delivery Associates."[86] Amazon's website touts the benefits of this arrangement saying, "As a DSP, the success of your business is in your hands. You'll be responsible for managing the day-to-day delivery operations and supporting your delivery associates as they encounter challenges throughout their shifts."[87] Today, Amazon contracts

[https://perma.cc/7YBG-YUSQ] (describing the evolution of Amazon's delivery system).

81. *See* O'Donovan & Bensinger, *supra* note 2 (outlining the growing role that logistics companies play in Amazon's delivery system).

82. *Id.*

83. Callahan, *supra* note 1 (examining the expansion of Amazon's delivery network).

84. *The Future of the Last-Mile Ecosystem*, WORLD ECON. F. 6 (2020), https://www.weforum.org/publications/the-future-of-the-last-mile-ecosystem/ [https://perma.cc/T9NJ-Q8N6]; *see* Dan Berthiaume, *U.S. Parcel Volume Grows in 2021*, CHAIN STORE AGE (May 22, 2022), https://chainstoreage.com/us-parcel-volume-grows-2021 [https://perma.cc/94EP-Z34A] (reporting growth trends in last-mile delivery).

85. *Build the Future of Delivery*, AMAZON, https://logistics.amazon.com [https://perma.cc/SLD2-XA4Q].

86. *Id.*

87. *Your Opportunity*, AMAZON, https://logistics.amazon.com/marketing/opportunity [ht

with 2,500 companies as DSPs that employ 260,000 drivers.[88] Just as the direct-contractor defense potentially immunizes Uber from liability, the intermediary-contractor defense potentially protects Amazon because agency law generally does not impose liability on firms that hire contracting companies that in turn hire their own workers.[89]

But even though Amazon's relationships with drivers typically raise intermediary-contractor problems, and even though Uber's relationships with drivers typically raise direct-contractor problems, sometimes each company borrows from the other's playbook. For example, Uber requires some limousine drivers to form their own "independent transportation companies" (ITCs).[90] The drivers technically work for the ITCs, not for Uber. As such, the ITCs act as intermediary contractors and potentially immunize Uber from liability.[91] Conversely, Amazon does not always place logistics companies between itself and its drivers. In addition to hiring intermediary logistics companies, Amazon also engages in direct-contractor arrangements with drivers through its Amazon Flex program.[92] These drivers apply to work directly through the Amazon Flex app and make deliveries using their own vehicles, much like Uber drivers use their own cars to transport passengers.[93] But regardless of whether the relationship involves direct contracting or intermediary contracting, both Amazon and Uber subject drivers to demanding time pressures and constant app-based alerts.[94] For those who share the road with Amazon and Uber drivers, the distractions that come from such pressures can yield deadly results.

tps://perma.cc/ETC5-PPWE].

88. *See* Soper, *supra* note 80 (discussing how Amazon defends against litigation claims related to delivery accidents).

89. *See* Harper, *supra* note 22, at 181-82 (explaining how intermediary contractors immunize businesses from liability).

90. Razak v. Uber Techs., Inc., 951 F.3d 137, 139 (3d Cir. 2020) (discussing the relationship between for-hire drivers and UberBLACK).

91. Defendants' Revised Reply to Plaintiffs' Statement of Facts Opposing Defendants' Motion for Summary Judgment at 13-14, 52, 61, Razak v. Uber Techs., Inc., No. 16-573 (Apr. 4, 2018) (noting that one plaintiff was both the owner and sole employee of the ITC).

92. *See* Callahan, *supra* note 1 (describing the "tiers of contractors" that Amazon uses to make deliveries).

93. *Id.*

94. *See infra* Part I.B. (discussing various time pressures that Uber and Amazon place on drivers).

B. Increase in Contractor-Caused Accidents

As the number of contractors increases, so too does the number of accidents that these workers cause. Like all drivers, Amazon and Uber drivers can fall prey to dangerous or distracted driving. Unfortunately, the platforms that hire these workers create rules and incentives that contribute to unsafe behavior on the road. For example, Amazon has established a "no package left behind" policy and sets demanding targets for drivers who are prone to cause auto accidents as they rush between locations.[95] With daily delivery routes consisting of 250 packages on average, a single driver on an eight-hour shift has an average of just two minutes to complete each delivery.[96] Given that next-day and same-day deliveries have become a centerpiece of Amazon's market dominance, it is no surprise that media stories are filled with reports of Amazon drivers who attempt to save time by skipping meals, urinating in bottles, and not wearing seatbelts.[97]

Like Amazon delivery people, Uber drivers are greeted with a cacophony of alerts when they are behind the wheel. Uber requires drivers to use their devices to obtain new rides.[98] To save time and increase their chances of landing new assignments, drivers frequently look for rides while driving.[99] When Uber sends a potential ride request, the platform's algorithm gives drivers exactly fifteen seconds to respond.[100] The ride-hailing firm punishes drivers if their ride-acceptance rate drops below an undefined level.[101] As such, the sanction for not accepting rides and the requirement that drivers accept requests within fifteen seconds create strong incentives for drivers to constantly monitor their phones or risk losing income.

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95. *See* O'Donovan & Bensinger, *supra* note 2 (explaining how Amazon subjects drivers to high-pressure delivery expectations).

96. *Id.*

97. *Id.*; *see, e.g.*, Callahan, *supra* note 1 (examining various delivery-related performance expectations).

98. *See* Geisser, *supra* note 51, at 352-53 (discussing distracted driving and Uber drivers).

99. *Id.*

100. Razak v. Uber Techs., Inc., 951 F.3d 137, 140 (3d Cir. 2020).

101. *See* Calo & Rosenblat, *supra* note 6, at 1661 (explaining that a low ride-acceptance rate, combined with other factors, can lead to "temporary suspension or permanent firing").

Adding to these time pressures, Uber encourages drivers to rush to high-demand areas by publishing "heat maps" that show "surge prices" (that is, pick-up locations that provide higher compensation rates).[102] These heat maps act as behavioral engagement tools as drivers "chase surges" across town to earn more.[103] Not only does this encourage drivers to speed, but surge zones also funnel more traffic into concentrated areas, thus increasing the risk of accidents in these crowded sectors. Some drivers characterize surge pricing as a bait-and-switch technique because Uber retains the right to re-move the higher-priced rates at a moment's notice.[104] This opaque system of variable pricing naturally incentivizes drivers to rush to surge zones to increase their chances of starting a surge-priced ride before the surge disappears.

Under these conditions, it is not surprising that Amazon and Uber drivers are involved in many crashes. Although not all such accidents occur due to driver negligence, the time pressures placed on drivers have coincided with a number of fatal wrecks. In its most recent safety statement, which covered trips in 2019 and 2020, Uber reported 101 individual fatalities, with 29.7 percent of those involving "non-occupants," such as pedestrians and cyclists.[105] Driv-ers for Lyft have been involved in a high number of fatal crashes as well. Lyft's most recent safety data show that 105 deaths occurred over a three-year period, although Lyft asserts that its fatality rate falls below the national average when measuring fatalities per mile driven.[106]

Just as car accidents occur at the hands of Uber and Lyft drivers, food-delivery drivers hit pedestrians and other autos. For example, in 2021, a DoorDash driver in California struck and killed a pedes-trian, Latitia Austin Ahmad, in front of Ahmad's two adult child-ren.[107] The DoorDash driver allegedly fled the scene, striking Ahmad

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102. *Id.* at 1661-62.

103. *Id.*

104. *Id.*

105. U.S. SAFETY REPORT, *supra* note 8, at 50.

106. COMMUNITY SAFETY REPORT, LYFT (2021), https://www.lyft.com/blog/posts/lyfts-com munity-safety-report [https://perma.cc/NA3D-CMXJ].

107. *See* Emilie Raguso, *Motorist Who Killed Pedestrian Was Driving for DoorDash, Lawsuit Says*, BERKELEYSIDE (Aug. 31, 2021, 4:29 PM), https://www.berkeleyside.org/2021/08/31/motorist-killed-pedestrian-berkeley-doordash-lawsuit [https://perma.cc/MK5P-Q3JC].

again.[108] In the litigation that followed, Ahmad's lawyer argued that DoorDash put the public at risk by "flooding certain areas with cars and encouraging its 'Dashers' to make speedy deliveries."[109]

Given their sheer size and weight, Amazon vans can cause tremendous damage when they collide with other vehicles. For example, twenty-four-year-old Ans Rana was driving with his brother on a busy Georgia freeway when his car had to brake for a disabled vehicle.[110] Unfortunately, at the time that Rana's car stopped, an Amazon van was barreling down the road at sixty-seven miles per hour.[111] The rear-end collision caused Rana's car to crumple.[112] Denying responsibility for the paralysis and other injuries that Rana suffered as a result of the crash, Amazon blamed the accident on a company called "Harper Logistics LLC," which operated the blue Amazon van that struck Rana's car.[113]

Indeed, Amazon has repeatedly relied on the contractor defense to disclaim liability when Amazon drivers harm members of the public. Consider, for example, twenty-two-year-old Samuel Cabelus, who was riding on his motorcycle through a Philadelphia suburb when an Amazon van crushed and killed him.[114] The driver of the van worked for a company called "Last Mile Delivered," and Amazon pointed to its agreement with the logistics company to deny responsibility.[115] In another instance, nine-month-old Gabrielle Kennedy was killed when a twenty-six-foot box truck delivering Amazon packages crashed into the back of her mother's jeep.[116] The truck was operated by a firm called "DSD Vanomos"—a business that owned just two delivery vehicles.[117] The driver involved in the accident said he was running late the morning that he struck

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108. *See* Greg Liggins, *Children Want Justice After Driver Kills Mother in Berkeley*, Fᴏx 2 (Aug. 11, 2021), https://www.ktvu.com/news/children-want-justice-after-driver-kills-mother-in-berkeley [https://perma.cc/FX8V-UGEP].

109. Raguso, *supra* note 107.

110. *See* Soper, *supra* note 80.

111. *Id.*

112. *Id.*

113. *Id.*

114. O'Donovan & Bensinger, *supra* note 2.

115. *Id.*

116. Callahan, *supra* note 1 (outlining various injuries and deaths involving Amazon deliveries).

117. *Id.*

Gabrielle's car.[118] DSD Vanomos went out of business after the accident.[119] The examples go on and on, including an eighty-nine-year-old woman who was struck and killed as she crossed a New Jersey street and another eighty-nine-year-old woman who was killed in front of an Outback Steakhouse.[120] In the wake of these accidents, Amazon has said again and again that it is not responsible.[121]

In 2021 alone, Amazon Logistics was named as a defendant in at least 119 lawsuits involving motor-vehicle injuries in thirty-five states—a fourfold increase from the previous year.[122] But this figure does not come close to representing the actual number of accidents involving Amazon vans, given that Amazon does not publicly report vehicle collisions.[123] Most of these accidents are not subject to the Department of Transportation's (DOT) reporting requirements because Amazon vans generally weigh less than 10,000 pounds—the DOT's minimum reporting threshold.[124] Just as federal law does not require Amazon to report accidents, the DOT also does not subject most Amazon vans to federally mandated safety inspections.[125]

As the foregoing stories make clear, new developments in communications and technology now allow people and packages to get to their destinations at record speeds.[126] But as the deaths and injuries from on-demand driving grow, so too does the need to fairly allocate responsibility for such accidents. Unfortunately, many firms raise the contractor defense in court to avoid this accountability. Evaluating these claims, the following Part explains how judges have assessed liability in the on-demand economy thus far.

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118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.*

122. Soper, *supra* note 80 (discussing lawsuits against Amazon for delivery accidents).

123. *See id.*

124. *Id.*

125. *See* O'Donovan & Bensinger, *supra* note 2 (explaining how Amazon vans are subject to less federal oversight than larger delivery vehicles).

126. *See* Geisser, *supra* note 51, at 318 (examining how technological shifts have transformed transportation markets).

II. THE CONTRACTOR DEFENSE IN COURT: ON-DEMAND DRIVERS AND CONTROL

The ascension of independent contracting and on-demand transportation has given rise to a pressing legal question: who should pay for the injuries and deaths that on-demand drivers cause? Currently, Amazon and Uber claim broad, sweeping immunity from these claims. This Part evaluates the operation of the contractor defense in court.

To date, the majority of litigation over the contractor defense has centered on the *employment* law question of whether firms must extend workplace rights to drivers as employees.[127] But in contrast to this relatively robust judicial evaluation of certain employment issues, such as overtime and the minimum wage, courts have spent far less time considering the *agency* question of whether companies must pay for their drivers' negligence.[128] At a doctrinal level, this focus on employment law over agency law is understandable given that both branches of law ask the *same* threshold question: do these companies employ drivers by retaining the right to control working conditions?[129] If the answer to this question is "yes," then employment law requires firms to extend workplace rights to employees, and agency law requires firms to compensate victims for employee mistakes.[130] But despite this doctrinal overlap between employment law and agency law, each inquiry entails entirely distinct legal objectives. Whereas employment law seeks to further the workplace protections of employees, agency law seeks to compensate third parties for worker mistakes.[131] In other words, while the *tests* for

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127. *See generally* McPeak, *supra* note 9, at 365-66 (discussing the judicial evaluation of employment and agency questions in the platform economy).

128. *See* Vazquez, *supra* note 34, at 639-41 (explaining how very few courts have ruled on agency questions in the platform economy).

129. *See Borrowed Servants*, *supra* note 21, at 808 (discussing the overlap between employment and agency tests).

130. *See* Matthew T. Bodie, *Lessons from the Dramatists Guild for the Platform Economy*, 2017 U. CHI. LEGAL F. 17, 17-18 (outlining the relationship between a worker's employment status and the applicability of workplace protections); Fisk & Chemerinsky, *supra* note 52, at 759-60 (distinguishing between direct liability and vicarious liability in the employment context).

131. *See* El Koussa v. Att'y Gen., 188 N.E.3d 510, 516-17 (Mass. 2022) (rejecting ballot

employment law and agency law are the same (that is, "control"), the *objectives* of those tests are entirely unique.

This Part examines the judicial failure to distinguish between the goals of employment law and agency law in the contractor economy. Whereas courts have considered whether on-demand firms "control" working conditions for the purpose of employment law, they have provided virtually no analysis of the reasons why control matters in the context of driver-caused accidents.[132] This failure to consider agency law's animating principles has led to unpredictable and inconsistent decisions about the responsibility, if any, that on-demand firms owe to accident victims.

A. The Malleable Nature of Control

A branch of agency law, "vicarious liability" requires defendants to pay for the tortious acts of others."[133] In the workplace context, the most common form of vicarious liability is known as "*respondeat superior*," which requires employers to pay for torts that employees commit in the scope of their employment.[134] As such, the hornbook definition of *respondeat superior* involves two distinct inquiries: (1) whether parties share an employer-employee (originally dubbed "master-servant")[135] relationship; and (2) whether a tortious act was committed within the scope of employment.[136] As to the second question, courts will usually conclude that most accidents by for-hire drivers fall within the "scope of employment" because the act of driving is a driver's primary task.[137] But the first question presents a much trickier legal issue.

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initiative that failed to distinguish between the employment rights of platform workers and agency questions related to platform workers' accidents).

132. *See generally* Cunningham-Parmeter, *supra* note 19, at 407-08 (discussing the inconsistent application of the control test to employment questions in the platform economy).

133. Cunningham-Parmeter, *supra* note 40, at 199.

134. *Id.*; RESTATEMENT (THIRD) OF AGENCY § 2.04 (AM. L. INST. 2006); *see also* Martha Chamallas, Lecture, *Vicarious Liability in Torts: The Sex Exception*, 48 VAL. U. L. REV. 133, 136-37 (2013) (analyzing the contours of *respondeat superior* liability).

135. *See* O.W. Holmes Jr., *Agency*, 4 HARV. L. REV. 345, 354-57 (1891) (examining various rationales for vicarious liability under master-servant law).

136. Search v. Uber Techs., Inc., 128 F. Supp. 3d 222, 231 (D.D.C. 2015).

137. *See* James A. Henderson, Jr., *Why Negligence Dominates Tort*, 50 UCLA L. REV. 377, 401 n.158 (2002) (explaining why vehicular accidents normally fall within the scope of a driver's employment).

To detect the existence of an employment relationship, agency law asks whether companies retain sufficient control over working conditions.[138] Although this standard contains several subfactors, the question of control usually represents the most important factor.[139] By its very definition, the nature of control requires courts to grapple with inherently malleable concepts.[140] Given this ambiguity, judicial evaluations of workplace control can yield varying results, especially when those evaluations fail to consider the distinct reasons why control matters for agency purposes, as compared to employment purposes.

B. Analyzing Control in Employment Cases

Like agency law, employment law uses the right-to-control test to distinguish between employees and independent contractors.[141] Because companies can save up to 30 percent in labor costs by hiring independent contractors, firms have embraced this business model in recent years.[142] Therefore, as with agency law, employment law creates tremendous incentives for firms to deny that they control work activities. Indeed, many employers try to attain the best of both worlds by subjecting workers to strict workplace guidelines while delegating just enough freedom to create the impression that the parties share an independent-contracting relationship.[143] The on-demand economy frequently exhibits this tension between worker freedom and firm-enumerated control.

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138. *See* Franklin, *supra* note 32, at 580 (examining different definitions of "control").

139. RESTATEMENT (THIRD) OF AGENCY § 2.04 (AM. L. INST. 2006); *Search*, 128 F. Supp. 3d at 231 (referring to control as "the determinative factor").

140. *See generally* Roscoe T. Steffen, *Independent Contractor and the Good Life*, 2 U. CHI. L. REV. 501, 502-03 (1935) (discussing the indeterminate nature of the control test).

141. *See Borrowed Servants*, *supra* note 21, at 808-09 (explaining how employment law and agency law share a common definition of "employee").

142. *See* Keith Cunningham-Parmeter, *From Amazon to Uber: Defining Employment in the Modern Economy*, 96 B.U. L. REV. 1673, 1686 (2016) (discussing the expansion of independent contracting).

143. *See* Richard R. Carlson, *Why the Law Still Can't Tell An Employee When It Sees One and How It Ought to Stop Trying*, 22 BERKELEY J. EMP. & LAB. L. 295, 336-37 (2001) (examining employer incentives to place "workers in the independent contractor zone").

1. Uber, Worker Autonomy, and Employment Rights

When sued by drivers for employment claims, Uber has failed to convince most courts that drivers are independent contractors as a matter of law.[144] For example, in *O'Connor v. Uber Technologies, Inc.*, a federal district court in California evaluated wage claims brought by Uber drivers.[145] Denying its obligation to abide by state wage requirements, Uber asserted that it was not an employer but instead a "technology company" that generated "leads" for its "partners."[146] Characterizing this assertion as "semantic framing," the *O'Connor* court highlighted several tools that Uber used to control its relationship with drivers.[147] For instance, although drivers retained discretion to decide when to turn on the Uber app, the *O'Connor* court found that Uber: prohibited drivers from soliciting clients outside of the app; threatened to discharge "partners" based on their customer ratings; and retained decisive authority over drivers' compensation.[148] Balancing the limited freedoms that drivers enjoyed against the many ways that Uber influenced working conditions, the *O'Connor* court ultimately concluded that Uber retained "a tremendous amount of control over the 'manner and means' of its drivers' performance."[149]

Four years after *O'Connor*, the New York Supreme Court, Appellate Division, concluded that Uber drivers were employees for the purposes of state unemployment determinations.[150] Colin Lowry applied for unemployment insurance benefits once he stopped driving for Uber.[151] After the New York Unemployment Insurance Appeal Board ruled that Uber drivers were employees and ordered Uber to make unemployment insurance contributions, Uber

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144. *See* Mark J. Loewenstein, *Agency Law and the New Economy*, 72 BUS. LAW. 1009, 1022 (2017) ("On balance, the courts have not been receptive to Uber's argument that its drivers are independent contractors.").

145. 82 F. Supp. 3d 1133, 1135 (N.D. Cal. 2015).

146. *Id.* at 1137-38, 1140; *see also* Cunningham-Parmeter, *supra* note 142, at 1718 (analyzing the case).

147. *O'Connor*, 82 F. Supp. 3d at 1141-42.

148. *Id.* at 1142-45, 1149-50.

149. *Id.* at 1151-52.

150. *In re* Lowry, 138 N.Y.S.3d 238, 241 (N.Y. App. Div. 2020).

151. *Id.* at 239-40.

appealed.[152] Stating that control was the most important factor to consider, the *Lowry* court explained how Uber retained ultimate authority over numerous working conditions.[153] Specifically, the court found that Uber determined drivers' compensation rates, threatened drivers with deactivation, and controlled drivers' interactions with customers.[154] Based on these and other factors, the *Lowry* court concluded that Uber controlled drivers as employees such that they were entitled to unemployment benefits.[155]

In the most significant federal appellate decision to address the wage rights of Uber drivers, the United States Court of Appeals for the Third Circuit again ruled against Uber.[156] The plaintiffs in *Razak v. Uber Technologies, Inc.* worked as limousine drivers in Pennsylvania for UberBLACK.[157] Searching the record for evidence of Uber's control over working conditions, the Third Circuit observed that although Uber could not require drivers to accept trips, the platform gave drivers only fifteen seconds to respond to ride requests and moved drivers offline if they failed to accept a certain number of requests.[158] The *Razak* court also noted that Uber prevented drivers from knowing their potential earnings or destinations until *after* they had accepted an assignment.[159] Although the foregoing facts suggested the Uber retained significant control over the limousine drivers' work, the Third Circuit also identified various freedoms that Uber drivers seemed to enjoy, including the ability to pursue personal matters while online, to control how much work they performed, and to work for competitors such as Lyft.[160] Given the conflicting evidence over Uber's workplace authority, the *Razak* court rejected the defendant's assertion that its drivers were non-employees as a matter of law.[161] Although not all courts have ruled

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152. *Id.* at 240.

153. *Id.* at 240-42 ("[T]he relevant inquiry is whether the purported employer exercised control over the results produced or the means used to achieve those results.") (citations omitted).

154. *Id.* at 240-41.

155. *Id.* at 241.

156. Razak v. Uber Techs., Inc., 951 F.3d 137, 139 (3d Cir. 2020).

157. *Id.* at 139.

158. *Id.* at 140 (discussing the ride-acceptance process that Uber establishes for drivers).

159. *Id.* at 140-41.

160. *Id.* at 141.

161. *Id.* at 139, 141.

against Uber on employment questions, the majority of reported judicial decisions that have evaluated wage claims against Uber have refused to classify drivers as independent contractors.[162]

2. Amazon, Wages, and Control

In contrast to the extensive litigation over Uber's alleged misclassification of on-demand workers, far fewer cases have addressed the employment status of Amazon drivers. However, a series of recent media reports and investigations by the Department of Labor (DOL) have illuminated various ways in which Amazon retains a tight grip over drivers through the logistics companies that Amazon hires.[163] For example, Amazon requires its logistics companies to ensure that drivers are on time for 999 out of 1,000 deliveries.[164] Monitoring the speed and accuracy of each logistics firm, Amazon routinely ranks these companies and rewards the best performers with more profitable routes.[165] Given that many logistics firms depend entirely on Amazon for continued business, a canceled contract can quickly cause owners of these businesses to file for bankruptcy.[166]

Beyond measuring on-time performance, Amazon retains authority over drivers by prescribing workplace standards that logistics companies must enforce. For example, Amazon dictates what drivers can wear, what type of vans they can use, and how

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162. *See id.* at 139; O'Connor v. Uber Techs, Inc., 82 F. Supp. 3d 1133, 1135 (2015); People v. Uber Techs., Inc., 270 Cal. Rptr. 3d 290, 302 (Cal. Ct. App. 2020) (finding a "reasonable probability" that Uber misclassified drivers as independent contractors); *see also In re* Lowry, 138 N.Y.S.3d 238, 240 (2020) (ruling that Uber drivers were employees for unemployment purposes in New York). *But see* Tyler v. Uber Techs., Inc., 487 F. Supp. 3d 27, 35 (D.D.C. 2020) (dismissing without prejudice pro se plaintiff's antidiscrimination claim for failing to sufficiently allege facts that would support the inference of an employment relationship); McGillis v. Dep't Econ. Opportunity, 210 So. 3d 220, 220-22 (Fla. Dist. Ct. App. 2017) (holding that Uber drivers were not employees for unemployment purposes under Florida law).

163. *See* Callahan, *supra* note 1 (examining various ways that Amazon controls drivers and the intermediary logistics companies that it hires).

164. *See id.* (discussing cases in which Amazon sued delivery companies for breach of contract).

165. *See* O'Donovan & Bensinger, *supra* note 2 (examining the relationship between Amazon and its various delivery subcontractors).

166. *See id.* (discussing how Amazon's "overstretched delivery companies fall into bankruptcy").

many packages they must deliver.[167] In addition, Amazon often tells drivers the specific order in which they should make deliveries and the route that drivers should take.[168] When things go awry, Amazon's dispatchers place phone calls directly to drivers and tell them when they are falling behind schedule.[169] Demonstrating its power to fire workers, Amazon has reportedly ordered its logistics companies to remove certain drivers, suggesting that Amazon retains significant directive power, even if drivers formally work for the logistics companies that technically hire them.[170]

Reflecting these dynamics, a 2016 wage-related investigation by the DOL provided a detailed account of the control that Amazon retained over a Florida logistics company called "VHU Express."[171] According to the DOL, Amazon hired VHU to provide last-mile delivery services throughout several regions of the United States.[172] After a lengthy investigation of Amazon and VHU, the DOL identified a number of ways in which Amazon controlled drivers through VHU. For instance, Amazon told VHU that drivers must wear Amazon shirts, hats, and safety vests.[173] In addition, Amazon set the drivers' wages and fuel allowances.[174] Although the drivers' contracts indicated that they worked for VHU, Amazon nevertheless required the drivers to report to Amazon's warehouse each day, clock in and out, and meet with a dispatcher to obtain their daily routes.[175] At the end of each day, VHU drivers had to return to Amazon's warehouse, upload the data from their scanners to Amazon's servers, and return equipment to Amazon.[176] Although Amazon claimed that VHU was an "Independent Contractor Service

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167. *See id.* (countering Amazon's assertion that it does not control its logistics companies or delivery drivers).

168. *See* Callahan, *supra* note 1 (explaining how Amazon requires its contractors to indemnify Amazon for any damages that the contractors cause).

169. *Id.*

170. *See id.* (questioning Amazon's claim that only contractors can hire and fire drivers).

171. WHISARD Compliance Action Report, VHU Express Inc., No. 1783381, at 1-19 (Dep't of Labor Feb. 16, 2016); WHISARD Compliance Action Report, Amazon Logistics, Inc., No. 1785930, at 1-19 (Dep't of Labor Mar. 8, 2016).

172. WHISARD Compliance Action Report, VHU Express Inc., No. 1783381, at 4 (Dep't of Labor Feb. 16, 2016).

173. *Id.* at 7.

174. *Id.*

175. *Id.* at 8.

176. *Id.* at 9.

Provider," the DOL rejected this assertion and found that the drivers were Amazon's employees who were entitled to unpaid wages.[177] Shortly after the DOL ruled against Amazon, the retail giant sued VHU and won a judgment for $300,000.[178] These actions eventually caused VHU to file for bankruptcy and lay off about 300 employees.[179]

C. Control, Negligent Driving, and the Absence of Agency Rationales

In contrast to the numerous decisions involving wage claims and other employment rights of on-demand drivers, only a few courts have directly addressed the question of whether Uber and Amazon are responsible for their workers' negligent driving. Bucking this trend, however, a federal court in Rhode Island recently issued one of the most detailed analyses of Uber's responsibility for its driver's mistakes.[180] The case of *Narayanasamy v. Issa* involved an Uber passenger who sued the ride-hailing company for injuries that he sustained when his Uber driver collided with another car.[181] Applying the state's right-to-control test, the *Narayanasamy* court noted that liability depended on Uber's "power to exercise control," as opposed to whether Uber "exercised actual control" over the driver in question.[182] In other words, the court's control analysis focused on Uber's ability to influence working conditions, rather than on Uber's actual use of that authority. Applying this standard, the *Narayanasamy* court identified several freedoms that Uber drivers seemed to enjoy, such as scheduling, route selection, and the ability to work for competitors.[183]

Contrasting Uber's arguments against control with the plaintiff's claims, however, the *Narayanasamy* court questioned whether Uber

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177. WHISARD Compliance Action Report, Amazon Logistics, Inc., No. 1785930, at 2-17 (Dep't of Labor Mar. 8, 2016).

178. *See* O'Donovan & Bensinger, *supra* note 2 (noting that the owner of VHU faced lawsuits from unpaid lenders, workers, and van-leasing companies).

179. *Id.*

180. Narayanasamy v. Issa, 435 F. Supp. 3d 388, 389-93 (D.R.I. 2020).

181. *Id.* at 389.

182. *Id.* at 390-91 (noting that the court's sole task at summary judgment was to assess whether "a jury could determine that the driver ... was an employee of Uber").

183. *Id.* at 391.

shared a genuine independent contracting relationship with drivers.[184] Namely, the plaintiffs claimed that Uber unilaterally set fares, barred drivers from soliciting rides outside the Uber app, and reserved the right to deactivate drivers for poor performance.[185] Concluding that these facts raised genuine questions about whether Uber controlled and employed the negligent driver in the case, the *Narayanasamy* court rejected Uber's attempt to immunize itself from the driver's tortious behavior.[186] Although this case remains one of the only federal decisions to address the scope of Uber's liability for a driver's mistakes, the *Narayanasamy* decision said nothing about the reasons why control mattered. Instead, the decision simply stated that "reasonable people could differ on whether a worker is an employee or an independent contractor."[187]

Whereas the *Narayanasamy* court determined that passengers could sue ride-hailing firms for their drivers' negligence, the case of *Freyer v. Lyft* reached the opposite conclusion.[188] According to the complaint, soon after leaving the Dallas-Fort Worth Airport with a Lyft driver, Molly Freyer noticed that her driver was behaving erratically.[189] After the driver appeared to pass out and the vehicle stopped unexpectedly, Freyer attempted to exit the car.[190] However, just as Freyer was leaving the vehicle, her driver suddenly regained consciousness and drove the car for approximately 150 feet with the door open, pinning Freyer's leg between the vehicle and a concrete barrier.[191] Injuries from the accident required medical personnel to amputate Freyer's toe and part of her right foot.[192] The record before the court in *Freyer v. Lyft* showed that the driver was uninsured at the time of the accident and had already driven six times with lapsed insurance *prior* to working for Lyft.[193] Ruling against Freyer's attempt to attach *respondeat superior* liability to the ride-hailing company, the Texas Court of Appeals noted that the "most

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184. *Id.* at 392.

185. *Id.* (discussing various ways that Uber controls drivers).

186. *Id.*

187. *Id.* at 392-93 (internal citations omitted) (denying Uber's summary judgment motion).

188. *Id.* at 393; Freyer v. Lyft, Inc., 639 S.W.3d 772, 791 (Tex. Ct. App. 2021).

189. *Freyer*, 639 S.W.3d at 778.

190. *Id.*

191. *Id.*

192. *Id.*

193. *Id.* at 785 (discussing the Lyft driver's safety background).

frequently proffered justification for imposing such liability is that
the employer has the right to control the means and methods of the
agent or employee's work."[194] Despite this reference to the control
test, however, the *Freyer* court dismissed the plaintiff's complaint
based on the conclusion that Lyft drivers were independent contrac-
tors under Texas's Transportation Network Companies statute.[195]

　　As with ride-hailing drivers, courts have barely addressed the
question of whether Amazon must pay for injuries that their drivers
cause. In the few instances that judges have broached this subject,
they have generally engaged in cursory control analyses. For
example, when Joshua Hoffee's car was struck head-on by an
Amazon box truck, Hoffee sued Amazon for his broken arm and
other serious injuries.[196] In response, Amazon denied responsibility
by claiming that the driver who caused the crash worked for an
"independent contractor" logistics company that Amazon hired to
make deliveries.[197] Reviewing Hoffee's claims, a Pennsylvania trial
court agreed with Amazon.[198] Absolving the retail giant of any
responsibility for the accident, the court held that Amazon did not
retain the "requisite control over the individual truck driver" to
hold Amazon accountable for the plaintiff's injuries.[199]

　　The case of *Young v. NEA Delivery* represents one of the few
judicial decisions to address the scope of Amazon's liability for a
delivery driver's negligence in any detail.[200] According to the com-
plaint, plaintiff Aaron Young was bicycling down the streets of
Santa Monica, California, when the door of an Amazon van opened
into his bike lane, causing Young to fall and suffer serious

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194. *Id.* at 780 (citations omitted).

195. *Id.* (citing TEX. OCC. CODE ANN. § 2402.114).

196. Complaint at 1-51, Hoffee v. AAC Transp. LLC, No. 1:18-CV-01908, 2019 WL 2642840
(M.D. Pa. Sept. 28, 2018) (alleging that the Amazon driver was at fault and asserting that the
driver received twenty-two citations for the accident).

197. Defendant Amazon.com, Inc.'s Memorandum of Law in Support of Its Motion to
Dismiss Plaintiff's Amended Complaint at 7-9, Hoffee v. AAC Transp. LLC, No. 1:18-CV-
01908, (M.D. Pa. Dec. 18, 2018) (summarizing Amazon's assertion that an independent, third-
party logistics company should answer for the accident).

198. Hoffee v. AAC Transp. LLC, No. 1:18-CV-01908, 2019 WL 2642840, at *1-4 (M.D. Pa.
June 27, 2019).

199. *Id.* at *1-4 (discussing various contractual relationships that separated Amazon from
the truck driver involved in the accident).

200. Young v. NEA Delivery, LLC., No. BC621762, at 2 (L.A. Cnty. Super. Ct. Apr. 27,
2018).

injuries.[201] Defending against Young's assertion of *respondeat superior* liability, Amazon argued that NEA Delivery was solely responsible for the accident.[202] In reviewing Amazon's motion for summary judgment, the *Young* court observed that the "most significant factor in determining the existence of an employer-independent contractor relationship is the right to control the manner and means by which the work is to be performed."[203] Drawing particular attention to Amazon's ability to terminate its contract with NEA Delivery, the *Young* court stated that such a right to discharge was "incompatible with the full control of ... work usually enjoyed by an independent contractor."[204] Highlighting instances of workplace control, the plaintiff alleged that Amazon dictated the driver's route, set the order of deliveries, and provided the driver with a handheld device to complete deliveries.[205] In addition, the driver communicated directly with Amazon's dispatcher.[206] As to Amazon's relationship with the logistics company, the *Young* court found that NEA Delivery had no customers other than Amazon and that Amazon retained the power to order NEA to terminate drivers.[207] Finally, the court noted that the driver wore an Amazon uniform, even though the driver technically worked for NEA.[208] Based on these facts, the *Young* court concluded that a jury could reasonably hold Amazon vicariously liable for the plaintiff's injuries.[209]

Several trends emerge from these cases. First, parties have vigorously debated the issue of control when it comes to the employment rights of on-demand drivers. Second, courts have engaged in a very

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201. O'Donovan & Bensinger, *supra* note 2 (outlining the facts of *Young*); *Young*, No. BC621762, at 3 (noting that a witness to the accident testified that the van had "Amazon" written on it); Complaint at 4, Young v. NEA Delivery, LLC., No. BC621762, at 2 (L.A. Cnty. Super. Ct. May 26, 2016) (alleging that the driver's negligent operation of Amazon's van left the plaintiff with serious injuries).

202. Reply to Plaintiff's Opposition to Motion for Summary Judgment at 4, Young v. NEA Deliver, LLC., No. BC621762, at 2 (L.A. Cnty. Super. Ct. Apr. 20, 2018).

203. *Young*, 2018 No. BC621762, at 2.

204. *Id.* (citations omitted).

205. *Id.* at 3.

206. *Id.*

207. *Id.*

208. *Id.* at 4.

209. *Id.* at 2 (examining various forms of control that Amazon retained over NEA and the driver who caused the accident).

similar control analysis when making agency determinations about the vicarious liability of on-demand firms. Finally, although courts have given parallel treatment to control questions in both the employment context and the agency context, they have largely failed to analyze the unique reasons why control matters in agency cases. Acknowledging this gap, the following Part outlines the role that agency law's animating principles should play in deciding when to hold on-demand companies responsible for their drivers' mistakes.

III. AGENCY AND ADAPTATION: ASSESSING THE CONTRACTOR DEFENSE IN OTHER CONTEXTS

Uber and Amazon are not alone in denying responsibility for their workers' wrongdoings. Indeed, the annals of modern tort law are littered with cases in which firms attempted to direct blame at nominal contractors.[210] This Part traces that history by analyzing modern-day examples of companies that attempted to embrace the contractor defense. In each of three scenarios—pizza delivery, taxi driving, and telemarketing—employers claimed that their workers were contractors who should solely bear the costs of their own wrongdoing. And in many instances, courts looked beyond the contractor defense to determine whether firms retained sufficient control over the conditions of work such that they should pay for third-party harms. By analyzing these cases and the agency principles that they advanced, judges today can more effectively assess issues of control and accountability in the on-demand economy.

A. Respondeat Superior *as Legal Response to Industrialization*

The doctrine of *respondeat superior* was a product of its time. Developed by courts at the dawn of industrialization, *respondeat superior* attempted to address a vexing legal question: when should firms compensate third parties for worker-caused harms that arose out of a rapidly changing industrial landscape?[211] In their

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210. *See* Diamantis, *supra* note 16, at 830-31 (discussing the advantages that companies enjoy by categorizing their workers as "independent contractors").

211. *See, e.g.*, David Jacks Achtenberg, *Taking History Seriously: Municipal Liability Under 42 U.S.C. § 1983 and the Debate over Respondeat Superior*, 73 FORDHAM L. REV. 2183,

preindustrial answer to this question, English courts had limited a master's legal responsibility to injuries that masters commanded servants to cause, either directly or impliedly.[212] But as work gradually shifted away from the mostly private transactions of the preindustrial age to those involving larger commercial enterprises, the limited idea of masters ordering their servants to do wrongs became less applicable to these new workplace settings.[213]

Responding to the increased separation of masters from servants, courts began to hold masters liable not only for the misconduct that they *ordered*, but also for accidents that arose out of tasks that they *controlled*.[214] In this way, the concept of control provided a practical standard for courts to allocate the costs of doing business in an industrial age, while limiting employer liability to activities over which employers retained sufficient influence.[215] At its core, then, the concept of control that defined *respondeat superior* represented a judicial attempt to adjust to workplace shifts while allocating responsibility for accidents that tended to arise from a master's normal business activities.[216]

As explained below, three goals can be distilled from this history. When courts first applied the control test to hold employers vicariously liable for their servants' torts (but not for those committed by independent contractors), they: (1) helped ensure recovery for accident victims (compensation); (2) spurred employers to prevent future accidents (deterrence); and (3) equitably assigned costs to firms that generated predictable losses from their business activities (fair loss-attribution).[217]

2196-2248 (2005) (discussing the adaptability of the *respondeat superior* test).

    212. *See* Cunningham-Parmeter, *supra* note 19, at 401 (examining the judicial development of *respondeat superior*).

    213. *See* Richard A. Epstein, *Vicarious Liability of Health Plans for Medical Injuries*, 34 VAL. U. L. REV. 581, 583-84 (2000) (discussing the historical evolution of vicarious liability concepts).

    214. *Id.* at 584 (explaining how the scope-of-employment test helps courts assess vicarious workplace liability).

    215. *See* Cunningham-Parmeter, *supra* note 19, at 403 (examining the relationship between control and employer culpability).

    216. *Id.* at 401 (surveying the historical development of *respondeat superior*).

    217. *See, e.g.*, Perez v. Van Groningen & Sons, Inc., 719 P.2d 676, 678 (Cal. 1986) (citations omitted) (listing several policy rationales for vicarious liability).

1. Compensation: Identifying Financially Secure Contractors

Throughout the industrial era, many work-related torts were committed by low-wage workers who lacked the assets to satisfy judgments against them.[218] Given that servants were far more likely than independent contractors to be judgement-proof, the law of vicarious liability helped courts identify certain parties who possessed the financial ability to reimburse the public for work-generated injuries.[219] Judges used the concept of control to make this crucial distinction between dependent servants and financially independent contractors.[220]

Courts took decades to outline the rough contours of the "independent contractor" designation.[221] But as judges began to define this job category, a worker's financial self-determination became one crucial criterion for differentiating servants from bona fide independent contractors.[222] Unlike servants who worked under the master's direction, independent contractors constituted a class of laborers whose work was not subject to the master's control and who generally possessed a superior ability (relative to servants) to compensate third parties for harms that they caused.[223] Beyond control, other aspects of *respondeat superior* also spoke to the contractor's financial self-determination.[224] For example, a worker was more likely to be his "own master" if he served multiple clients, as compared to servants who served only one master.[225] Indeed, in

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218. *See* Schwartz, *supra* note 37, at 1756 (arguing that "employee insolvency (or limited insolvency) ... drives the entire line of analysis").

219. *See generally* Clarence Morris, *The Torts of an Independent Contractor*, 29 ILL. L. REV. 339, 340-41 (1934) (discussing the relationship between vicarious liability and the compensation objective).

220. *See* Nancy E. Dowd, *The Test of Employee Status: Economic Realities and Title VII*, 26 WM. & MARY L. REV. 75, 98-101 (1984) (examining the connection between control and a master's liability).

221. Fowler V. Harper, *The Basis of the Immunity of an Employer of an Independent Contractor*, 10 IND. L.J. 494, 497 (1935) (summarizing the historical development of *respondeat superior*).

222. *See* Cunningham-Parmeter, *supra* note 19, at 404 (considering early iterations of the contractor defense).

223. *See* McPeak, *supra* note 9, at 375 (discussing different rationales for establishing vicarious employer liability).

224. *See* Carlson, *supra* note 143, at 303.

225. *Id.* (outlining various historical justifications for the contractor defense).

many cases, independent contractors who operated their own businesses were wealthier than the individuals who retained their services.[226]

Today, courts and scholars agree that victim compensation plays a central role in contemporary applications of *respondeat superior* liability.[227] Whereas insolvent employees might leave tort victims undercompensated, the "deep pockets" of employers help ensure that plaintiffs will be made whole.[228] Placing the loss of worker-generated torts on employers not only increases the chances of third-party relief, but it also removes the financial pressure that such losses would otherwise place on individual employees who might be financially crushed by a civil judgment.[229]

But despite the acknowledged role that compensation plays in both historical and contemporary understandings of *respondeat superior*, the goal of compensation cannot justify vicarious liability by itself. After all, taken to its logical conclusion, advancing a compensation objective could theoretically require courts to hold any large firm accountable for work-generated harms, even firms that retain only tangential connections to tort-generating transactions.[230] Given that it lacks a limiting principle, the compensation goal cannot solely justify the imposition of vicarious liability in most cases. Fortunately, the rationales of deterrence and fair loss-attribution interrelate with the compensation objective to help establish the boundaries of vicarious liability.[231]

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226. *See* Steffen, *supra* note 140, at 501-14 (discussing the self-sufficiency of independent contractors); Nadeem A. Bezar, *The Road to Redemption: Holding Rideshare Companies Responsible for Their Role in Trafficking*, 60 JUDGES' J. 30, 32-33 (2021) (outlining early scholarly debates about the justifications for vicarious employer liability).

227. *See generally* Diamantis, *supra* note 16, at 827-28 (examining compensation and deterrence rationales for vicarious liability).

228. *See* Sevier, *supra* note 35, at 702-03 (discussing how courts developed *respondeat superior* in part to avoid the problem of undercompensating victims).

229. *See* Mark Bartholomew & John Tehranian, *The Secret Life of Legal Doctrine: The Divergent Evolution of Secondary Liability in Trademark and Copyright Law*, 21 BERKELEY TECH. L.J. 1363, 1366-67 (2006) (explaining how holding employers vicariously liable for their workers' misconduct can help advance compensation goals).

230. *See* Harper, *supra* note 22, at 182 (discussing the underlying rationales for establishing *respondeat superior* liability).

231. Fisk & Chemerinsky, *supra* note 52, at 760-61.

2. Deterrence: Modifying Organizational Rules to Reduce Risk

In addition to highlighting *respondeat superior*'s compensation goal, scholars and judges have also justified the doctrine on deterrence grounds.[232] As courts continued to develop the rules for *respondeat superior* in the late nineteenth century and early twentieth century, torts scholars explained how the doctrine helped reduce work-related risks.[233] Many of these arguments drew from debates over workers' compensation statutes at the time.[234] When state legislatures enacted workers' compensation legislation during the first half of the twentieth century, they operated under the assumption that employers were the superior cost-bearers of work-related injuries because they could prevent injuries by enacting workplace safety measures.[235] Analogizing this rationale for workers' compensation to vicarious liability, scholars at the time argued that if employers were in the best position to prevent injuries *inside* the workplace through workers' compensation, then employers were also in the better position to prevent third-party harms *outside* the workplace.[236]

This deterrence objective related to *respondeat superior*'s compensation goal as well. For example, when courts first defined the contours of *respondeat superior*, they assigned liability to defendants (masters and independent contractors) who faced meaningful monetary pressures to avoid losses.[237] As compared to masters and independent contractors, servants possessed fewer financial motivations to prevent injuries to third parties because many servants were judgement-proof.[238]

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232. *See* Diamantis, *supra* note 16, at 827-28 (considering the deterrence justification for vicarious liability); Fisk & Chemerinsky, *supra* note 52, at 757 (examining various policy-based reasons for imposing vicarious liability on employers).

233. *See* Witt, *supra* note 37, at 41-42 (discussing legal justifications for placing prevention costs on employers).

234. *Id.* at 40.

235. *Id.* at 41-42.

236. *Id.* (identifying a "sea change" in torts scholarship during the twentieth century that reallocated accident costs from individuals to firms).

237. *See* Cunningham-Parmeter, *supra* note 19, at 405; Morris, *supra* note 219, at 340 (examining the historical justifications for *respondeat superior*).

238. Jeffrey H. Wolf & Aaron C. Schepler, *Caught Between Scylla and Charybdis: Are Franchisors Still Stuck Between the Rock of Non-Uniformity and the Hard Place of Vicarious Liability?*, 33 FRANCHISE L.J. 195, 197 (2013) (explaining how the threat of vicarious liability

As with most deterrence debates, the risk of moral hazard could theoretically diminish *respondeat superior*'s deterrent effects. According to this concern, because *respondeat superior* requires employers to pay for worker-caused injuries—as opposed to leaving employees solely responsible for their own misconduct—vicarious liability might reduce workers' incentives to safely perform their jobs.[239] In other words, a liability rule that shifts the costs of mistakes from employees to employers could cause some employees to take additional risks, thereby undermining the deterrence objective of *respondeat superior*. But there are a few reasons why the fear of moral hazard is overstated in the current context. As an initial matter, the average on-demand driver is unlikely to be aware of *respondeat superior* and its nuances.[240] Drivers will not engage in additional risk-taking behaviors based on the theoretical chance that on-demand firms might someday pay passengers and third parties for their mistakes.[241] In addition, given that a driver's own personal safety is at risk when the driver is providing on-demand transportation, it is hard to imagine a scenario in which drivers would consciously take more risks simply because they know that Amazon or Uber might end up paying for their accidents.[242] In contrast to these theoretical risks of moral hazard, extending vicarious liability to Amazon and Uber would provide these firms with genuine incentives to enact meaningful safety measures that could reduce their legal exposure to such claims.[243]

As with the compensation justification, the concept of control helps explain the role that deterrence plays in *respondeat superior* determinations.[244] According to a control-framed deterrence

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created additional incentives for masters to ensure that their servants exercised due care).

239. *See* Henderson, *supra* note 137, at 402-03 (raising and dismissing concerns about moral hazard with regard to certain worker-generated harms).

240. *See* Alan O. Sykes, *The Economics of Vicarious Liability*, 93 YALE L.J. 1231, 1262-63 (1984) (considering whether a potential tortfeasor's awareness of the existence of vicarious liability will affect "loss-avoidance" decisions).

241. *Id.* at 1269.

242. *Id.* at 1268-69 (discussing the concept of moral hazard in the context of vehicle accidents).

243. *See* Geisser, *supra* note 51, at 353-54 (considering deterrence incentives that arise from expanded liability).

244. *See* Fisk & Chemerinsky, *supra* note 52, at 757 (characterizing deterrence as the "standard rationale for vicarious liability").

analysis, employers are best positioned to prevent work-related harms precisely because they control working conditions.[245] Although the efficacy of different prophylactic measures will depend on workplace variables, employers can take a number of steps to prevent third-party injuries in the on-demand economy. For example, they can select employees more carefully, discipline employees who commit wrongdoing, and alter workplace rules to reduce incentives to engage in risk-taking behaviors.[246] From the perspective of risk-prevention, then, employers are better situated to modify organizational rules that would otherwise encourage dangerous acts by employees.[247] Therefore, by placing the costs of employee-generated harms on firms, *respondeat superior* can prompt businesses to investigate and implement meaningful risk-reducing steps.

3. Fair Loss-Attribution: Assessing Blame for Foreseeable Accidents

Standing alone, the principles of compensation and deterrence do not always provide clear guidance as to why certain firms and not others should pay for employee mistakes. For example, to say that exposure to vicarious liability can prompt companies to pursue deterrence measures does not necessarily explain why Amazon is better positioned to prevent public harms, as compared to the thousands of logistics companies that it hires to make deliveries on its behalf.[248]

To assist courts with making distinctions among potential defendants, then, this Subpart introduces the term "fair loss-attribution." As described here, fair loss-attribution explains the subtle role that employer blame plays in vicarious liability determinations. A long-running critique of *respondeat superior* asserts that the doctrine violates the central "fault principle" of tort law, which seeks to limit liability only to tortfeasors who have engaged in blameworthy

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245. *See* Witt, *supra* note 37, at 41-42 (outlining employers' incentives to prevent harm).

246. *See* Schwartz, *supra* note 37, at 1757-58 (listing various ways that employers can reduce their exposure to vicarious liability).

247. *See* Diamantis, *supra* note 16, at 827-28 (examining deterrence objectives in the workplace).

248. *See* Callahan, *supra* note 1 (describing numerous components of Amazon's complicated delivery network).

conduct themselves.[249] In direct contrast to tort law's fault principle, scholars describe *respondeat superior* as a "no-fault" concept.[250] Formally, this assertion is true. *Respondeat superior* requires companies to pay for employee wrongdoing even when employers properly supervise workers, issue warnings, and enact rules against misbehavior.[251] Reflecting *respondeat superior*'s no-fault nature, employers must assume responsibility for employee mistakes despite the fact that employers have not necessarily committed any wrongful acts themselves.[252]

Complicating the foregoing doctrinal narrative, however, the concept of fair loss-attribution challenges the characterization of *respondeat superior* as entailing a purely no-fault inquiry. As the concept of fair loss-attribution explains, the proof requirements of *respondeat superior* actually illuminate employer culpability in important ways. Specifically, *respondeat superior* attaches liability only to torts that employers could *foresee* and that arose out of work that employers could *control*.[253] As such, *respondeat superior*'s core elements of foreseeability and control allude to aspects of employer blame that the "no-fault" description of the doctrine obscures. Although plaintiffs do not have to offer proof of a firm's direct fault (for example, by establishing that the employer should have prevented the accident), they must prove that the firm controlled working conditions and could foresee certain predictable work-

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249. *See generally* Harris, *supra* note 39, at 52-53 (discussing scholarly debates over the role that a defendant's fault plays in vicarious liability determinations); Keating, *supra* note 26, at 1303-04 (summarizing debate among scholars over the inherent conflict between tort law and agency law); Joseph H. King, Jr*., Limiting the Vicarious Liability of Franchisors for the Torts of Their Franchisees*, 62 WASH. & LEE L. REV. 417, 427-28 (2005) (describing vicarious liability as "an important exception" to the fault principle).

250. *See* Cunningham-Parmeter, *supra* note 40, at 199 (examining the "no-fault" nature of vicarious liability); Keating, *supra* note 26, at 1334-35 (explaining how tort law oscillated between concepts of fault and no fault throughout the twentieth century).

251. *See* Keating, *supra* note 26, at 1334-35; *see also* David B. Oppenheimer, *Employer Liability for Sexual Harassment by Supervisors*, *in* DIRECTIONS IN SEXUAL HARASSMENT LAW 272, 274 (Catharine A. MacKinnon & Reva B. Siegel eds., 2004) (outlining different justifications for holding employers vicariously responsible for employee misconduct).

252. *See* McPeak, *supra* note 9, at 375 (examining various rationales for vicarious employer liability).

253. *See* Doe v. Uber Techs., Inc., 184 F. Supp. 3d 774, 781-84 (N.D. Cal. 2016) (explaining how determinations of *respondeat superior* consider proof of an employer's control and whether harms were predictable).

generated injuries.[254] In other words, by controlling operations that led to foreseeable tortious behavior, the employer exhibits patterns of secondary fault.

Here, it is important to distinguish fair loss-attribution from "enterprise liability," which rose to prominence among American legal theorists in the latter half of the twentieth century.[255] During that time, proponents of enterprise liability argued that businesses should pay for certain firm-generated harms because they were better positioned to prevent injuries and spread losses among consumers and others.[256] In other words, proponents of enterprise liability explained why companies ought to pay for accidental physical injuries that naturally arose from their business activities.[257] Although scholars today debate enterprise liability's practical impact, all agree that the doctrine of strict products liability represents one of the most prominent examples of enterprise liability in modern tort law.[258]

The theories of fair loss-attribution and enterprise liability share some characteristics, but not others. For example, both theories depend on the deterrence rationale to explain why extending liability to firms will create incentives for companies to embrace new safety measures.[259] Likewise, both theories rely on fairness concerns to explain why it is reasonable to expect firms to pay for business activities that injure the public.[260] Despite these similarities, however,

254. *See* Jennifer A. Brobst, *Vicarious Liability for Systemic Risks of Sexual Violence in the United States: Not a Modest Proposal*, 99 U. DET. MERCY L. REV. 261, 278-79 (2022) (distinguishing between the proof requirements of direct and vicarious liability).

255. *See* Henderson, *supra* note 137, at 380-82 (discussing early scholarly discussions of enterprise liability).

256. *See* Witt, *supra* note 37, at 2-3 (surveying the rapid expansion of enterprise liability during the 1960s in the areas of products liability, landowner liability, and medical malpractice).

257. *See* Keating, *supra* note 26, at 1286-87 (discussing the basic principles of enterprise liability).

258. *See* James A. Henderson, Jr., *Echoes of Enterprise Liability in Product Design and Marketing Litigation*, 87 CORNELL L. REV. 958, 962 (2002) (explaining how rights-based theorists and efficiency-oriented scholars have justified enterprise liability); Henderson, *supra* note 137, at 382-83 (asserting that proponents of enterprise liability have exaggerated its practical impact on tort law); Witt, *supra* note 37, at 2-3 (summarizing the expansion of enterprise liability throughout the end of the twentieth century).

259. *See* Alden, *supra* note 9, at 1634-35 (discussing the deterrence rationale for strict products liability).

260. *See* Far West Fin. Corp. v. D & S Co., 760 P.2d 399, 410-11 n.13 (Cal. 1988)

enterprise liability and fair loss-attribution differ in the role that a firm's blameworthy conduct plays in assigning losses to employers. Enterprise liability extends to firms even when there is no evidence of fault at any stage in the chain of production.[261] In contrast, the theory of fair loss-attribution depends on the existence of employee fault from the outset of a transaction and then defines when to fairly attribute that fault to employers that have culpably facilitated the employee's tortious act.[262] Although the firm is not directly at fault for the accident, the firm controls workers who engage in negligent behavior themselves.

Of course, any explanation of *respondeat superior* that turns entirely on employer blame ignores the *vicarious* nature of vicarious liability.[263] After all, *respondeat superior* holds employers liable for their employees' torts, even when employers have exercised due care.[264] In other words, this form of vicarious liability does not require any direct proof of an employer's wrongful acts, as long as employees commit tortious behavior in the scope of their employment.[265] The theory of fair loss-attribution does not challenge these principles. Instead, the theory asserts that, notwithstanding the secondary nature of vicarious liability, *respondeat superior*'s test for control and foreseeability still implicates employer blame in important ways.

Consider, for example, the foreseeability component of *respondeat superior*. Courts have consistently concluded that to hold an employer vicariously liable for worker misconduct, the tort must have occurred within the scope of the worker's employment, meaning that the employer could have reasonably predicted that this type of

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(comparing various justifications for vicarious liability and products liability).

261. *See* Henderson, *supra* note 258, at 961 (explaining how enterprise liability constitutes a form of strict liability in which firms must pay for the harms they cause, "irrespective of the care they take").

262. *See* Harris, *supra* note 39, at 51-52 (critiquing the expansive reach of enterprise liability).

263. *See* Cunningham-Parmeter, *supra* note 19, at 402 (explaining the derivative nature of vicarious liability).

264. *See* Cunningham-Parmeter, *supra* note 40, at 199 (discussing the role that fault plays in vicarious liability determinations); Keating, *supra* note 26, at 1334-35 (examining the evolution of fault and no-fault concepts in tort law).

265. *See* Cunningham-Parmeter, *supra* note 19, at 403 (explaining how vicarious liability applies even when employers are not directly to blame for an employee's misconduct).

injury would occur.[266] The more that an employee's risk-producing conduct can fairly be regarded as typical of the employer's enterprise, the more likely that the employer should pay for injuries that arose from that conduct.[267] Given these parameters, the theory of fair loss-attribution describes the circumstances under which it is equitable to require firms to compensate victims for ordinary losses that firms could reasonably foresee.[268] This inquiry into foreseeability works in tandem with the control requirement. *Respondeat superior* exposes firms to liability when they retain sufficient control over workers who themselves engage in culpable conduct.[269] Although employers may not be directly at fault, they nevertheless control business activities that produce foreseeable injuries. As such, the theory of fair loss-attribution highlights the culpable role that firms play in facilitating transactions that generate predictable public harms.

B. Adjusting Control Analyses to Technological and Societal Shifts

The principles of compensation, deterrence, and fair loss-attribution can assist courts with defining the boundaries of vicarious liability in contemporary workplace settings. As explained below, in a number of modern employment scenarios—taxi driving, pizza delivery, and telemarketing—employers have attempted to evade responsibility for worker-generated harm by raising the contractor defense. Reacting to these attempts, many courts have nevertheless held firms responsible for third-party injuries that arose from work. This is not to say that plaintiffs have always won these cases or that courts have consistently enumerated agency rationales in their

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266. *E.g.*, Doe v. Uber Techs., Inc., 184 F. Supp. 3d 774, 784 (N.D. Cal. 2016) (discussing the relationship between foreseeability and the "scope of employment" standard).

267. *See* Rodgers v. Kemper Constr. Co., 124 Cal. Rptr. 143, 149 (Ct. App. 1975) (citations omitted) (outlining the circumstances in which an employee's tortious conduct can fairly be attributed to a firm).

268. *See* Kephart v. Genuity, Inc., 38 Cal. Rptr. 3d 845, 857 (Ct. App. 2006) (citations omitted) (discussing vicarious liability and the predictability of employee misconduct).

269. *See* Bartholomew & Tehranian, *supra* note 229, at 1366-67 (explaining how *respondeat superior* determinations can help illuminate an employer's "relationship with the direct tortfeasor").

decisions.[270] Rather, the following cases make the more modest point that in flexibly evaluating various levels of workplace control, many judges furthered the agency principles discussed above. Applying this framework to the problem at hand, courts today should also embrace the control test's adaptability to determine when to hold firms accountable for the deaths and injuries that their on-demand drivers cause.

1. Taxi Driving

Accidents involving taxi drivers provide analogies to the modern-day problem of injuries that arise from on-demand delivery and transportation. Just as Amazon and Uber argue that advancements in algorithms and logistics create technological distance between workers and firms, taxi companies have historically characterized their relationship with drivers in similar ways.[271] Although for-hire drivers have been around since the era of the horse and buggy, taxis brought this service to scale throughout American cities in the twentieth century.[272] But as taxis began to proliferate throughout the United States, accidents followed.[273] As litigation from these incidents ensued, defendants raised the contractor defense to avoid legal responsibility for injuries that taxi drivers caused.[274] Mirroring arguments that ride-hailing firms make today, cab companies

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270. *See* William D. Bremer, *Liability of Taxicab Company for Cabdriver's Negligence*, 41 AM. JUR. PROOF FACTS 2d 239 § 5 (2022) (examining different judicial categorizations of taxi companies); Harvey Gelb, *A Rush to (Summary) Judgment in Franchisor Liability Cases?*, 13 WYO. L. REV. 215, 228 (2013) (discussing unsuccessful attempts to assert vicarious liability claims against franchisors like Domino's); Van Loo, *supra* note 14, at 160 (stating that "courts have come to widely varying conclusions about how to classify taxi drivers").

271. *See* McPeak, *supra* note 35, at 176 (comparing ride-hailing firms to taxi companies).

272. *See generally* 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, 82 (2017) (noting that taxis first appeared in San Francisco in 1906, replacing horse-drawn carriages for hire); Richard C. Schragger, *Cities, Economic Development, and the Free Trade Constitution*, 94 VA. L. REV. 1091, 1104-05 (2008) (discussing urban migration patterns during the early twentieth century).

273. *See* SCHALLER CONSULTING, TAXI AND LIVERY CRASHES IN NEW YORK CITY, 1990-99, at 3 (Feb. 28, 2001), http://www.schallerconsult.com/taxi/crash.pdf [https://perma.cc/6TF9-PHM7] (discussing the rise in taxi accidents in New York during the 1930s).

274. *See* Bremer, *supra* note 270, at § 1 (explaining how a taxi defendant might claim to be an "association of independent taxicab operators, a taxicab-leasing company, or a dispatching service").

characterized themselves as referral agencies who used radios and telephones to connect riders to independent drivers.[275] Rejecting these assertions, however, many courts did not allow the "new technology" of taxis to prevent them from holding cab companies liable for their drivers' mistakes.[276]

Consider, for example, the case of *Callas v. Independent Taxi Owners' Association*.[277] There, the U.S. Court of Appeals for the D.C. Circuit reviewed the complaint of a fruit vendor who was hit by a taxi driver while the vendor was pushing his food cart.[278] The plaintiff sued Diamond Cab for his injuries, asserting that the taxi company employed the driver and that the accident occurred "in furtherance of its business."[279] To defend against this claim, the president of Diamond Cab raised arguments that resemble claims made by Uber today.[280] Specifically, the president asserted that Diamond Cab "did not own a cab" and that "it was not in the cab business."[281] Similarly, Uber claims that it "owns no vehicles" and "employs no drivers."[282]

Responding to the cab company's claim that it was not legally responsible for its driver's negligence, the D.C. Circuit underscored the need to advance the goals of deterrence and fair loss-attribution:

> If a corporation chartered as a cab company may bring under its general control a fleet of a thousand taxicabs and hold itself out as a public service corporation engaged in their operation, and at the same time evade responsibility by showing that it is merely a beneficial association providing a centralized administrative bureau through co-operative effort, it is apparent that public authority should insure to the public some other protection against this growing menace.[283]

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275. *Id.*

276. *See* McPeak, *supra* note 35, at 204-15 (surveying various liability theories that plaintiffs have asserted against taxi companies).

277. 66 F.2d 192, 192 (D.C. Cir. 1933).

278. *Id.*

279. *Id.*

280. *See id.* at 194.

281. *Id.*

282. O'Connor v. Uber Techs., Inc., 82 F. Supp. 3d 1133, 1137 (N.D. Cal. 2015) (summarizing Uber's characterization of its business).

283. *Callas*, 66 F.2d at 195.

Given that no public authority was insuring against the "growing menace" of taxi accidents, and given that Diamond Cab was in charge of the driver who injured the food-cart vendor, the *Callas* court refused to dismiss the plaintiff's lawsuit.[284]

The same day that it handed down the *Callas* decision, the D.C. Circuit elaborated on the concept of fair loss-attribution in *Rhone v. Try Me Cab Co.*[285] Rejecting the defendant cab company's assertion that the driver involved in the accident at issue "was an independent contractor with the [injured] passenger, and in sole control of the cab," the *Rhone* court noted that the taxi company was "holding out to the public an illusion of incorporated responsibility" but then disclaiming that responsibility when accidents occurred.[286] Citing agency law's deterrence and compensation goals, the *Rhone* court explained how "each cab constitut[ed] a potential danger both to its passengers and to the public," even though the defendant claimed that it had "no financial responsibility to either."[287] Under these circumstances, the *Rhone* court refused to absolve the defendant taxi company of liability for the plaintiff's injuries.[288] Remarking on the *Rhone* decision many years later, the D.C. Circuit commented that *Rhone* was "[i]nformed by public policy considerations including concerns about taxicab companies' lack of financial accountability."[289]

Four years after the decisions in *Callas* and *Rhone*, the Florida Supreme Court also ruled against a taxi company that had attempted to use the contractor defense to avoid liability.[290] In *Economy Cabs v. Kirkland*, a taxi driver drove recklessly and injured his passenger.[291] Assessing the taxi company's claim that the driver was "an independent contractor on his own account," the Florida Supreme Court ruled against the defendant and asserted that it "should not be permitted to parade under a flag of truce to

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284. *Id.*

285. *See* 65 F.2d 834, 836 (D.C. Cir. 1933).

286. *Id.* at 834, 836.

287. *Id.* at 836.

288. *Id.*

289. Floyd-Mayers v. Am. Cab Co., 732 F. Supp. 243, 246 (D.D.C. 1990).

290. *See* Econ. Cabs v. Kirkland, 174 So. 222, 224 (Fla. 1937).

291. *Id.* at 223.

garner a profit and then raise the black flag when called on to make restitution for damage perpetrated."[292]

Whereas the foregoing decisions focused a great deal on fairness concerns, the Michigan Court of Appeals explained how extending liability to taxi operators helped advance agency law's compensation objective as well.[293] In *Thomas v. Checker Cab Co.*, the court evaluated the liability of a cab company for its driver's negligence.[294] Much as Amazon requires drivers to wear Amazon vests and mandates that logistics companies paint their vans blue,[295] the taxi company in *Thomas* required all of its cars to have a "common color scheme" and to show the "Checker Cab insignia."[296] Like Uber's use of an app to connect riders and drivers, Checker Cab maintained a switchboard that relayed dispatches to radio-equipped cabs.[297] And just as Uber allows riders to complain about drivers through the Uber app, Checker maintained a system to resolve complaints against drivers.[298] Finally, just as Amazon and Uber give detailed instructions to their drivers, Checker distributed a "book of rules and regulations" to theirs.[299] Analyzing these various permutations of control, the *Thomas* court spoke to the difficulty that "injured individuals encounter in unraveling the complex organization structures set up between taxicab companies and their drivers."[300] Relying specifically on "policy considerations," the court stated that the "firm to be called to answer for the mishap should be the person or firm whose name decorates the offending vehicle."[301] According to the *Thomas* court, extending liability under these circumstances would advance the goals of "correlative social responsibility" and

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292. *Id.* at 223-24.

293. *See* Thomas v. Checker Cab Co., 238 N.W.2d 558, 561 (Mich. Ct. App. 1975).

294. *Id.* at 560.

295. WHISARD Compliance Action Report, VHU Express Inc., No. 1783381, at 7 (Dep't of Labor Apr. 1, 2016).

296. *Thomas*, 238 N.W.2d at 560.

297. *Id.*

298. *Id.* at 563.

299. *Id.*

300. *Id.* at 561 (concluding that the presence of signage on the outside of a cab gives rise to a presumption that the taxi company "had custody and control of that cab, whether the company owned it or not").

301. *Id.* at 562 (quoting Fullerton v. Motor Express, Inc., 100 A.2d 73, 74 (Pa. 1953)).

"simple justice," while still allowing the defendant to escape liability by proving "nonagency."[302]

Although many of the factors discussed in these cases resemble the relationship that on-demand firms and drivers share today, some other factors do not necessarily apply. For example, whereas the *Thomas* court referred to the "common color scheme" and shared insignia of taxis,[303] some Uber and Amazon vehicles display the companies' logos, while others do not.[304] Beyond vehicle branding, many considerations addressed in these earlier cab cases apply directly to on-demand driving. For example, as with Checker Cab, Amazon and Uber use customer-referral technologies, rulebooks, and "complex organization structures" to control how workers do their jobs.[305] Just as courts in the cab cases referred to "correlative social responsibility" and the need to "make restitution for damage perpetrated,"[306] courts today should similarly seek to advance the goals of compensation, deterrence, and fair loss-attribution when assessing control in the on-demand economy.

2. Pizza Delivery

The question of whether franchisors should be held vicariously liable for their franchisees' mistakes has vexed courts for decades.[307] In the context of food delivery, no set of cases has illustrated this point more than those involving Domino's Pizza. In the 1980s, shifts in markets and customer demand gave rise to a flux of increasingly novel advertisements and promotions.[308] Reflecting this trend, in

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302. *Id.* (quoting Webb. v. Dixie-Ohio Express Co., 165 S.W.2d 534, 540 (Ky. 1942)).

303. *Id.* at 560.

304. *See* Callahan, *supra* note 1 (noting that there is "no hint of Amazon's corporate logo" on many vehicles that deliver Amazon packages). *But see Driver Requirements*, UBER (2023), https://www.uber.com/us/en/drive/requirements/regulatory/ [https://perma.cc/SQQ7-L8NH] (discussing situations in which Uber drivers must place Uber signage on their cars).

305. *Thomas*, 238 N.W.2d at 561; *see Driver Requirements*, *supra* note 304; Callahan, *supra* note 1 (outlining different mandates that Amazon imposes on drivers).

306. *Thomas*, 238 N.W.2d at 562; Callas v. Indep. Taxi Owner's Ass'n, 66 F.2d 192, 195 (D.C. Cir. 1933); Econ. Cabs v. Kirkland, 174 So. 222, 224 (Fla. 1937).

307. *See* Gelb, *supra* note 270, at 228-29 (discussing various approaches that judges have taken to evaluate control in the franchise context).

308. *See, e.g.*, Susanna Kim, *Pepsi Challenge Returns with a Bubbly Twist*, ABC NEWS (Mar. 11, 2015, 11:23 AM), https://abcnews.go.com/Business/pepsi-challenge-returns-bubbly twist/story?id=29552172 [https://perma.cc/49H4-NSS9] (discussing the history of the "Pepsi

1984, the pizza chain Domino's pledged that it would deliver food to customers in thirty minutes or less.[309] At that time, the franchise business model was in bloom throughout the United States, with national chains increasingly selling the right to own and operate local franchises to business owners in a range of industries.[310] Domino's fully embraced this business model. By the early 1990s, Domino's had grown to 5,300 stores worldwide.[311] The nature of the pizza chain's thirty-minute guarantee spoke for itself: if a customer did not receive an order within thirty minutes, then the pizza was free.[312] Unsurprisingly, behind-schedule drivers caused a rash of auto accidents as they tried to meet this nationally imposed deadline.[313] By the end of Domino's campaign in 1994, at least one hundred people had sued the pizza chain, alleging that the promotion had led to reckless driving and accidents.[314]

Perhaps the most famous example of this problem occurred in Missouri when a Domino's driver allegedly ran a red light and severely injured a St. Louis woman in 1989.[315] Just as Amazon claims that it cannot be held responsible for the acts of drivers who

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Challenge"); Elaine Woo, *Donald Keough Dies at 88, Helped Coke Stay Dominant During "Soda Wars,"* L.A. TIMES (Feb. 24, 2015, 7:21 PM), https://www.latimes.com/local/obituaries/la-me-donaldkeough-20150225-story [https://perma.cc/KXQ6-DN8G] (recounting the "soda wars" of the 1980s).

309. *Domino's Drops 30-Minute Delivery Pledge*, CHI. TRIB. (Dec. 22, 1993, 12:00 AM), https://chicagotribune.com/news/ct-xpm-1993-12-22-9312220035-story.html [https://perma.cc/C3S5-NXXL]; Associated Press, *Domino's Puts the Brakes on 30-Minute Deliveries*, DESERET NEWS (Dec. 22, 1993, 2:00 AM), https://www.deseret.com/1993/12/22/19083018/domino-s-puts-the-brakes-on-30-minute-deliveries [https://perma.cc/L9FK-TAA4]; Michael Janofsky, *Domino's Ends Fast-Pizza Pledge After Big Award to Crash Victim*, N.Y. TIMES (Dec. 22, 1993), https://www.nytimes.com/1993/12/22/business/domino-s-ends-fast-pizza-pledge-after-big-award-to-crash-victim.html [https://perma.cc/VBK4-NLW6] (summarizing the history of the Domino's promotion).

310. *See* Tyler Jones, *Keeping the Entire Pie and the Dog Fed: Why the Modern Instrumentality Test Fails to Reflect the Realities of the Franchisor-Franchisee Relationship*, 36 FRANCHISE L.J. 341, 341-44 (2016) (examining the historical development of the franchising business model); King, *supra* note 249, at 421-22.

311. *See* Janofsky, *supra* note 309 (discussing Domino's growth).

312. *Id.*

313. *See* Randall K. Hanson, *The Franchising Dilemma Continues: Update on Franchisor Liability for Wrongful Acts by Local Franchisees*, 20 CAMPBELL L. REV. 91, 95-96 (1997) (describing Domino's ad campaign).

314. *Id.* at 95; Janofsky, *supra* note 309 (examining the Domino's litigation).

315. Kinder v. Hively Corp., No. 136751, 1993 WL 743833 (Mo. Dec. 1, 1993); Associated Press, *supra* note 309 (discussing events that led to the termination of the Domino's free-pizza promotion).

are hired by logistics companies, Domino's Pizza, Inc., claimed that it could not be held responsible for the acts of the St. Louis driver, who was formally hired by Hively Corp.—an independently owned Domino's franchisee.[316] But this contractor defense did not hold up in court. Reviewing the facts of the case in *Kinder v. Hively*, a jury rejected the contractor defense and required Domino's to pay $78 million for the plaintiff's head and spinal injuries.[317] Just four days after the verdict, Domino's ended its thirty-minute guarantee.[318]

Although the *Hively* court did not produce a detailed written opinion about Domino's agency relationship with franchisees, the case of *Parker v. Domino's Pizza, Inc.* did.[319] Jeffrey Hoppock was making a delivery for Domino's in Florida when his car collided head-on with another vehicle.[320] At the time of the accident, Hoppock was formally employed by J & P Enterprises, which was the separately owned franchisee of Domino's Pizza, Inc.[321] Just as Amazon today hires logistics companies that hire drivers, Domino's hired J & P, which in turn hired the pizza-delivery driver.[322] Like Amazon, which calls its logistics companies "Independent Contractor Service Providers," Domino's categorized J & P as an independent contractor.[323]

But the Florida Court of Appeals declined to apply the contractor defense to these circumstances. Reviewing the record, the *Parker* court explained how Domino's retained significant control over franchisees like J & P.[324] For example, the company's operations manual dictated to franchisees that "a Domino's pizza is delivered

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316. *See* Callahan, *supra* note 1; Kinder, 1993 WL 743833; Hanson, *supra* note 313, at 95 (explaining how Domino's raised the contractor defense to defend against accident claims).

317. *See* Associated Press, *supra* note 309 (outlining the allegations in *Kinder v. Hively Corp.*).

318. *Domino's OKs Settlements with Woman*, DESERET NEWS (Apr. 6, 1994, 2:00 AM), https://www.deseret.com/1994/4/6/19101396/domino-s-oks-settlement-with-woman [https://perma.cc/TA4Q-5BT9] (discussing fallout from the *Kinder* verdict).

319. 629 So. 2d 1026, 1027-28 (Fla. Dist. Ct. App. 1993).

320. *Id.* at 1026-27.

321. Parker v. Hoppock, 695 So. 2d 424, 426 (Fla. Dist. Ct. App. 1997) (discussing the underlying facts of *Parker*); Callahan, *supra* note 1.

322. *See Hoppock*, 695 So. 2d at 426; Callahan, *supra* note 1.

323. WHISARD Compliance Action Report, Amazon Logistics, Inc., No. 1785930, at 2-17 (Dep't of Labor Mar. 8, 2016); *Parker*, 629 So. 2d at 1027 (reviewing the franchise agreement between Domino's and J & P Enterprises).

324. *Parker*, 629 So. 2d at 1029.

within 30 minutes" and that "[p]ick-up pizzas are ready in 10 minutes."[325] Resembling those same mandates today, Amazon requires its logistics contractors to deliver 99 percent of their packages on time.[326] Just as the Domino's contract with J & P stated that "[f]ranchise renewal [was] dependent upon compliance with Domino's specific prescriptions," logistics companies today risk losing Amazon routes if they fail to adhere to Amazon's mandates.[327]

The *Parker* court also noted how the franchise agreement between Domino's and J & P required the franchisee to follow Domino's signage requirements and to enforce Domino's dress code.[328] Mirroring this mandate, Amazon dictates to logistics companies the types of vans that they can use and the type of clothes that drivers can wear.[329] Calling the operations manual "a veritable bible for overseeing a Domino's operation," the *Parker* court also noted how the franchise agreement set sales quotas, mandated certain trainings, defined the franchisee's delivery zone, enumerated certain royalty contributions, and allowed Domino's to conduct random inspections of J & P.[330] Because these directives from Domino's "literally le[ft] nothing to chance," the Florida Court of Appeals rejected Domino's attempt to dismiss the plaintiff's personal injury claims.[331]

Although plaintiffs in other jurisdictions did not always prevail in their cases against Domino's,[332] the conclusions in *Parker* and *Kinder* can assist courts today with defining the contours of liability in the on-demand economy. Faced with the rapid development of franchise agreements at the time and Domino's attempt to immunize itself from drivers' torts, these courts looked beyond the contractor defense to assess Domino's control over franchisees. But

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325. *Id.*

326. *See* O'Donovan & Bensinger, *supra* note 2 (describing various mandates that Amazon imposes on logistics firms).

327. *Parker*, 629 So. 2d at 1028.

328. *Id.*

329. *See* WHISARD Compliance Action Report, Amazon Logistics, Inc., No. 1785930 at 7-8 (Dep't of Labor Mar. 8, 2016) (listing the DOL's conclusions about Amazon's control over its logistics company).

330. *Parker*, 629 So. 2d at 1028-29.

331. *Id.* at 1029.

332. *See, e.g.*, Rainey v. Langen, 998 A.2d 342, 345, 350-51 (Me. 2010) (concluding that Domino's did not retain sufficient control over franchisee's day-to-day operations); Viado v. Domino's Pizza, LLC, 217 P.3d 199, 210 (Or. Ct. App. 2009) (declining to hold Domino's vicariously liable for injuries caused by a delivery driver).

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pizza delivery is not the only instance in which courts have evaluated the contractor defense in light of business innovations or societal changes. As in the franchise-delivery context, the tele-marketing industry provides another example of how courts have flexibly applied the control test to advance agency objectives.

3. Telemarketing

Just as advances in logistics and technology have recently transformed the world of on-demand delivery, developments in telephone technology changed the business of telemarketing several decades ago. Although telemarketers have been around since World War II, the industry expanded dramatically during the 1970s when the skyrocketing price of oil made door-to-door sales costlier.[333] Adding to this trend, by the early 1980s, automated telephonic technology had significantly reduced the costs of calling cus-tomers.[334]

But as technological advances lowered the price of reaching cus-tomers, an onslaught of calls from telemarketers raised the need for regulation in this area.[335] As such, Congress passed the Telephone Consumer Protection Act (TCPA) of 1991, which barred telemar-keters from making unsolicited calls with prerecorded voices.[336] Of course, anyone today with a cell phone knows that violations of the TCPA are commonplace. Given the reality of widespread illegal telemarketing, recent litigation in this area has focused on the question of whether firms must pay for TCPA violations that contractors commit.[337] Applying agency standards to this question, courts in these cases have focused on the level of control that firms

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333. Augusta Meacham, *To Call or Not to Call? An Analysis of Current Charitable Telemarketing Regulations*, 12 J. COMMC'NS L. & POL'Y 61, 62 (2004) (outlining growth trends in telemarking).

334. Niall T. Martin, Comment, *Stop Telephonin' Me: The Problematically Narrow Conception of Telemarketing Abuse Under the TCPA*, 2022 WIS. L. REV. 997, 1001-02 (2022) (discussing the streamlining of telemarketing processes).

335. *Id.* at 1002 (stating that by the early 1990s, over forty states had enacted consumer protection laws related to telemarketing).

336. *See* 47 U.S.C. § 227(b)(1)(A); Mey v. Venture Data, LLC, 245 F. Supp. 3d 771, 774-75 (N.D. W. Va. 2017).

337. *See, e.g.*, Brown v. DirecTV, LLC, 562 F. Supp. 3d 590, 607 (C.D. Cal. 2021) (explaining how agency principles relate to vicarious liability determinations under the TCPA).

retain over their "independent" telemarketers that make calls on behalf of the companies.[338]

In the most authoritative ruling on the topic, the Federal Communications Commission (FCC) evaluated several consolidated cases involving telemarketers for DISH Network.[339] The plaintiffs in these cases alleged that DISH had hired retail sellers who violated the TCPA by making illegal calls.[340] The U.S. Court of Appeals for the Sixth Circuit framed the question presented to the FCC as follows: "whether the [TCPA] and its accompanying regulations permit [plaintiff] to recover damages from [DISH], an entity that did not place any illegal calls ... but whose independent contractors did."[341] After the Sixth Circuit referred the case to the FCC, the agency explained how extending liability to DISH for its telemarketers' illegal activities would advance agency objectives. For instance, on the issue of deterrence, the FCC concluded that imposing vicarious liability on sellers would create incentives to "carefully choose their telemarketers to ensure compliance."[342] Placing the costs of careful selection on sellers made sense, according to the FCC, because sellers were "in the best position to monitor and police TCPA compliance by third-party telemarketers."[343]

The FCC also addressed the compensation-related harms that would occur if DISH were immunized from liability: "[A]llowing the seller to avoid potential liability by outsourcing its telemarketing activities to unsupervised third parties would leave consumers in many cases without an effective remedy.... This would particularly be so if the telemarketers were judgment proof, unidentifiable, or located outside the United States, as is often the case."[344] Based on these policy-based considerations, the FCC concluded that imposing liability on DISH for its contractors' violations would help ensure that victims of illegal telemarketing would be made whole.[345]

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338. *Mey*, 245 F. Supp. 3d at 786-87 (considering whether a principal controls "'the manner and means' of the agent's calling activities") (quoting Lushe v. Verengo Inc., 2014 WL 5794627, at *4 (C.D. Cal. Oct. 22, 2014)).

339. *In re* DISH Network, LLC, 28 FCC Rcd. 6574, 6574 (2013).

340. *Id.* at 6576.

341. Charvat v. Echostar Satellite, LLC, 630 F.3d 459, 465 (6th Cir. 2010).

342. *In re* DISH Network, 28 FCC Rcd. at 6591-92.

343. *Id.* at 6588.

344. *Id.*

345. *Id.* at 6590 n.124 (explaining that liability under the TCPA could apply to sellers

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Since the FCC's ruling against DISH, a number of courts have analyzed the role that agency principles play in assessing a company's liability for TCPA violations that its contractors commit. For example, in *Brown v. DirecTV, LLC*, a federal court in California assessed DirecTV's vicarious liability for TCPA violations when the satellite carrier retained the authority to discharge workers who made solicitation calls for DirecTV.[346] Much as Amazon can prohibit certain drivers from working for its logistics companies, DirecTV could prohibit certain subcontractors from working for the telemarketing firms that it hired.[347] Thus, even though the telemarketing firms retained authority over various workplace issues, the *Brown* court concluded that "DirecTV's ability to give significant interim instructions" and to ultimately fire callers gave rise to an agency relationship between DirecTV and its vendors.[348]

Similarly, in *Bakov v. Consolidated World Travel, Inc.*, a federal court in Illinois held a travel agency vicariously liable for illegal telemarketing when it retained sufficient control over contractor-callers.[349] The defendant, Consolidated World Travel (CWT), had hired a telemarketing company to call millions of potential customers and market "free" cruises.[350] Reviewing the level of control that CWT retained over its contractors, the district court stated:

> [A]ll of the requirements that denote an agency relationship with actual authority exist here. Defendant had sole control over the script and could provide interim instructions in the form of a script update, provided [the telemarketer] weekly performance updates, and could terminate the agency relationship and revoke [the telemarketer's] authority to make calls on its behalf.[351]

Building on these themes, other courts have evaluated control concepts in a number of other telemarketing contexts.[352] For

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under theories of "classical agency ... apparent authority and ratification").

346. 562 F. Supp. 3d 590 (C.D. Cal. 2021).

347. *Id.* at 608-09.

348. *Id.* at 609.

349. No. 15 C 2980, 2019 WL 6699188, at *2, *10 (N.D. Ill. Dec. 9, 2019).

350. *Id.* at *1-3.

351. *Id.* at *5.

352. *See, e.g.*, Mestas v. CHW Grp. Inc., 508 F. Supp. 3d 1011, 1011 (D.N.M. 2020) (rejecting motion to dismiss plaintiff's claim for vicarious liability against seller of home warranties); Mohon v. Agentra LLC, 400 F. Supp. 3d 1189, 1201 (D.N.M. 2019) (discussing

example, judges have concluded that a company's control over the script that telemarketers read, texts that they send, and wages that they earn are strong indicia of control.[353] Indeed, courts have extended vicarious liability for illegal telemarketing to sellers of auto warranties, roof repairs, solar panels, stock research tools, and insurance.[354]

Just as Amazon and Uber argue that courts should not hold them liable for the wrongdoing of their contractor drivers, sellers have attempted to disclaim responsibility for the illegal telemarketing of their contractor callers. But even though technological innovations in communications have enabled third-party firms to conduct telemarketing for clients at scale, courts have looked beyond the contractor defense to assess whether sellers sufficiently controlled working conditions.[355] In demonstrating the flexible nature of control, these decisions have advanced the goals of deterrence and compensation while delineating the circumstances under which it is fair to attribute losses to companies that hire telemarketing contractors. Courts today should seek to advance these same objectives when evaluating the levels of control that Uber and Amazon retain over drivers.

IV. APPLYING AGENCY OBJECTIVES TO ON-DEMAND DRIVING

When deciding whether to hold Amazon and Uber responsible for their drivers' accidents, courts should consider the underlying agency goals that the control test was designed to serve.[356] To assist

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agency relationship between telemarketer and health insurance company).

353. *Mestas*, 508 F. Supp. 3d at 1023; Hand v. Beach Ent. KC, LLC, 456 F. Supp. 3d 1099, 1130 (W.D. Mo. 2020) ("[Defendant] ... developed district-wide policies for how, when, and with what phrasing text messages were permitted to be sent by [the telemarketer].").

354. Hossfeld v. Am. Fin. Sec. Life Ins. Co., 544 F. Supp. 3d 1323, 1327 (S.D. Fla. 2021) (health insurance); Starling v. J Wales Home Sols. LLC, No. 4:21-CV-01261-O, 2022 WL 1156021, at *1 (N.D. Tex. Apr. 19, 2022) (roof repairs); Horton v. Palmer Admin. Servs. Inc., No. 3:20-CV-3526, 2021 WL 8014654, at *1 (N.D. Tex. June 8, 2021) (auto warranties); Cooley v. Freedom Forever LLC, No. 2:19-CV-562, 2020 WL 1027149, at *3 (D. Nev. Feb. 13, 2020) (solar panels); Armstrong v. Inv.'s Bus. Daily, Inc., No. CV 18-2134, 2019 WL 2895621, at *1 (C.D. Cal. Mar. 12, 2019) (stock research tools).

355. *See, e.g.*, *Mestas*, 508 F. Supp. 3d at 1023 (examining the scope of a principal's vicarious liability for an agent-telemarketer's misconduct).

356. *See* Das Acevedo, *supra* note 33, at 801-02 (discussing the definition of "employee" and its indeterminacy).

with that inquiry, the following Part explains how the agency objectives of compensation, deterrence, and fair loss-attribution can inform liability determinations in the on-demand economy.

A. Compensating Victims for Contractor-Caused Accidents

When courts first created the contractor defense over a century ago, they identified a class of workers (that is, "independent contractors") who ran their own businesses and, accordingly, could afford to compensate accident victims without the financial assistance of employers.[357] Unlike servants of the day who were more likely to be judgment-proof, independent contractors possessed the financial wherewithal to pay for third-party injuries.[358] Applying these concepts to on-demand transportation, most drivers for Amazon and Uber lack the economic ability to pay for catastrophic accidents. App-based workers tend to earn low wages.[359] For instance, a recent survey of gig labor showed that a large number of workers in this sector—38 percent—earned between ten dollars and fifteen dollars per hour, while 29 percent of the group earned less than their state's minimum wage.[360] The financial precarity of platform workers is also exemplified by their high use of public benefits. For example, in major metropolitan areas such as New York, San Francisco, and Seattle, 30-40 percent of app-based workers receive Medicaid.[361] Mirroring the earnings of gig workers, Amazon drivers, who the firm calls "Delivery Service Partners," earn an average of eighteen dollars per hour.[362]

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357. *See* discussion *supra* Part III.A.1 (outlining *respondeat superior*'s compensation objective).

358. *See* Bezar, *supra* note 226, at 32-33 (comparing the financial strength of independent contractors to ordinary workers).

359. *See* NAT'L EMP. L. PROJECT, APP-BASED WORKERS SPEAK: STUDIES REVEAL ANXIETY, FRUSTRATION, AND A DESIRE FOR GOOD JOBS 4 (2021), https://www.nelp.org/wp-content/uploads/App-Based-Workers-Speak-Oct-2021-1.pdf [https://perma.cc/KVD4-A9Y5]; Frank Gogol, *How Much Does Uber Pay?*, STILT (July 13, 2023), https://www.stilt.com/blog/2020/02/how-much-does-uber-pay/ [https://perma.cc/767R-ZEPN] (discussing earnings in the platform economy).

360. *See* ZIPPERER ET AL., *supra* note 49, at 5-6 (reporting survey results on pay and platform work).

361. *See* NAT'L EMP. L. PROJECT, *supra* note 359, at 11 (discussing platform workers' use of public benefits).

362. *See* Spencer Soper, *Amazon Delivery Partners Rage Against the Machines: We Were

Although the relative inability of drivers to satisfy large judgments suggests that immunizing on-demand firms from tort liability would undermine agency law's compensation objective, the availability of insurance might mitigate some (but not all) of this harm. For example, if drivers or logistics companies carry their own insurance, then victims can theoretically receive compensation without having to extend vicarious liability to companies such as Amazon or Uber. But insurance coverage in this sector varies widely by company. Uber and Lyft, for example, provide drivers with $1 million in liability insurance coverage, but only *after* drivers have accepted ride requests.[363] Foisting the responsibility to purchase insurance on intermediaries, Amazon requires its logistics companies to purchase auto liability insurance.[364] Other on-demand firms such as Grubhub and Instacart do not purchase liability insurance for their drivers at all, thereby increasing the chances that third parties will experience uncompensated losses when accidents occur.[365]

Even when firms provide insurance coverage, however, there are several reasons why existing insurance schemes will frequently fail to fully advance agency law's compensation goal. First, Uber's $1 million coverage applies only to situations where drivers have already accepted ride requests.[366] If an accident occurs prior to a ride being accepted, the platform provides only $100,000 of coverage per accident.[367] In light of this low ceiling, if a driver hits another car or a pedestrian while the driver is scanning the Uber app, for instance, insurance coverage will not necessarily make victims

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Treated Like Robots, BLOOMBERG (Oct. 7, 2021, 10:00 AM), https://www.bloomberg.com/news/features/2021-10-07/amazon-delivery-partners-claim-treated-like-robots-by-algorithms [https://perma.cc/XMB6-BHNA].

363. *See All Things Insurance, All in One Place*, LYFT, www.lyft.com/driver/insurance [https://perma.cc/GKW8-VFYF]; *Auto Insurance to Help Protect You*, UBER, https://www.uber.com/us/en/drive/insurance/ [https://perma.cc/VF3Z-TH7T] (outlining various levels of insurance coverage for ride-hailing drivers).

364. *See* Callahan, *supra* note 1 (considering the role that insurance plays in accidents involving Amazon's logistics companies).

365. *See* Jason Metz, *Navigating Auto Insurance for Delivery Drivers*, FORBES (Jan. 4, 2023, 1:06 PM), https://www.forbes.com/advisor/car-insurance/delivery-drivers/ [https://perma.cc/7GPJ-56DE] (discussing different insurance considerations for on-demand drivers).

366. *See Auto Insurance to Help Protect You*, *supra* note 363 (examining ride-hailing and insurance coverage).

367. *Id.*

whole. Second, even if the $1 million policy kicks in, this amount will not cover certain catastrophic losses. Given that damages from fatal car accidents can often exceed this amount,[368] a $1 million policy limitation will fail to fully compensate victims in many catastrophic cases.

As to deliveries that Amazon's logistics companies make, the online retailer claims that "there is coverage for all involved" because its logistics companies must purchase insurance to do business with Amazon.[369] But this requirement does not necessarily ensure that victims will be made whole when Amazon vans injure them. Even with intermediary insurance in place, Amazon is still free to raise the contractor defense—as it frequently does—and argue that it should not be held responsible for such accidents.[370] Although Amazon's logistics companies would still remain theoretically insured under these scenarios, Amazon has reportedly retained under-capitalized firms that have either filed for bankruptcy, missed insurance payments, or both.[371] These scenarios make it more difficult for plaintiffs to obtain relief from smaller intermediaries, many of whom may be hired for the specific purpose of avoiding liability.[372]

Even when insurance is in place, insurance caps may not fully cover victims' losses. For example, when a collision with an Amazon van left twenty-four-year-old Ans Rana paralyzed with lifelong injuries, Rana tried to recoup $2 million in medical bills from Amazon.[373] Denying liability, Amazon directed Rana to obtain relief from Harper Logistics, the company that operated the Amazon-marked van that hit him.[374] Unfortunately, Harper Logistics's

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368. *See Costs of Motor-Vehicle Injuries*, NAT'L SAFETY COUNCIL, https://injuryfacts.nsc.org/all-injuries/costs/guide-to-calculating-costs/data-details/ [https://perma.cc/FQ7F-TZZX] (estimating that the average fatal motor vehicle accident generates $1.75 million in "calculable costs," although not all such costs are recoverable through tort claims).

369. *See* Callahan, *supra* note 1 (summarizing Amazon's response to reports of accidents involving Amazon vans).

370. *See* discussion *supra* Part II.C (examining cases in which Amazon denied responsibility for accidents involving its delivery vehicles).

371. *See* O'Donovan & Bensinger, *supra* note 2 (discussing the financial stability of Amazon's delivery contractors).

372. *See* Van Loo, *supra* note 14, at 181-82 (examining the challenges of suing intermediaries that are entangled in complex corporate structures).

373. *See* Soper, *supra* note 80 (reporting on the crash).

374. *Id.*

insurance coverage was capped at $1 million.[375] As such, even if Rana were able to obtain relief from the insurer, Amazon's scheme would leave Rana severely undercompensated, given that his medical bills alone were reportedly double that amount. Under these circumstances, holding Amazon liable for all of Rana's damages would be much more likely to advance agency law's compensation objective.

In short, even when it is available, insurance coverage will frequently fail to fully compensate victims. Given gaps in coverage, the presence of insurance does not resolve the need to determine whether Amazon, Uber, or other on-demand firms should pay for injuries that their drivers cause.[376]

B. Deterring Dangerous Driving

In addition to citing to the compensation objective, judges and scholars have justified *respondeat superior* on deterrence grounds.[377] They have explained how holding principals liable creates incentives to prevent future accidents by enacting firmwide safety measures. Applying this objective to on-demand driving, extending vicarious liability to Amazon and Uber would create additional incentives for these companies to enact meaningful safety measures.[378]

If faced with a genuine threat of liability for the injuries that their drivers cause, on-demand businesses could take several tangible steps to reduce the likelihood of these accidents. For example, companies could monitor unsafe driving more carefully and punish those who operate their vehicles dangerously.[379] Indeed, Uber already tracks drivers' geolocations and has experimented with monitoring drivers' behavior for evidence of excessive acceleration

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375. *Id.*

376. *See* McPeak, *supra* note 35, at 202 (identifying insurance gaps in the platform economy).

377. *See* discussion *supra* Part III.A.2 (analyzing scholarly debates over the deterrence justification for *respondeat superior*).

378. *See* Geisser, *supra* note 51, at 353-54 (explaining how expanding liability can incentivize the adoption of certain deterrence measures).

379. *See Drive with Confidence*, UBER, https://www.uber.com/us/en/drive/safety/ [https://perma.cc/J23F-9H59] (stating that Uber uses GPS data and sensors to detect if a trip has gone off course or if an accident has occurred).

or braking.[380] But despite this available data, the platform has yet to announce clear rules that specify which dangerous driving behaviors will lead to deactivation. In its publicly available report on traffic fatalities, Uber states that poor drivers might be "flagged by Uber's system" and "deactivated for unsafe driving."[381] Yet in the company's warning to drivers themselves, Uber lists only three driving-related bases for deactivation: "crash," "traffic citation," and "repeated reports of ... unsafe ... driving."[382] Platform drivers cannot conform their behavior to a company's driving norms unless they are informed of the consequences for violating those norms. Therefore, Uber should clearly announce to drivers how it will monitor dangerous driving and what types of driving behaviors will lead to deactivation.

If Amazon faced heightened liability for its drivers' accidents, the online retailer could take many additional steps to encourage safe-driving practices. Amazon asserts publicly that it cares about safe driving.[383] To promote this goal, Amazon has fitted half of its U.S. fleet with video cameras and other technologies to flag instances of distracted driving and stop sign violations.[384] In light of this available technology, Amazon could better deter dangerous driving by fitting its entire fleet with this monitoring equipment and by imposing consistent sanctions on drivers for violations.

Beyond punishing individuals for dangerous driving, Amazon and Uber could reduce drivers' incentives to engage in risky behavior in the first place. As noted above, both companies have implemented performance targets that give rise to inattentive and rushed

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380. *See* Danny Yadron & Nellie Bowles, *Uber Monitoring Drivers in U.S. in Attempt to Flag Dangerous Drivers*, THE GUARDIAN (Jan. 26, 2016, 3:01 AM), https://www.theguardian.com/technology/2016/jan/26/uber-monitoring-drivers-us-passenger-safety-houston [https://perma.cc/C293-5QLX] (discussing an Uber safety program that monitored some Texas drivers for evidence of erratic driving).

381. U.S. SAFETY REPORT, *supra* note 8, at 30 n.56 (outlining various grounds for deactivating users based on unsafe driving).

382. *Understanding Why Drivers and Delivery People Lose Account Access*, UBER, https://www.uber.com/us/en/drive/safety/deactivations/ [https://perma.cc/DL7U-2AEV] (discussing various safety issues that can lead to deactivation).

383. *A Commitment to Safety*, AMAZON, https://logistics.amazon.com/marketing/opportunity [https://perma.cc/4XR5-NLLW] ("Safety is integral to everything that we do at Amazon.").

384. *See* Soper, *supra* note 80 (listing several safety measures that Amazon has implemented to curb traffic accidents).

driving.[385] Requiring drivers to ensure that 99 percent of packages arrive on time, Amazon gives drivers just a few minutes to deliver each package. Media accounts are filled with stories of drivers who do not have time to buckle their seatbelts or go to the bathroom.[386] Uber also places its drivers under tremendous time pressures. Uber gives drivers only fifteen seconds to accept ride requests and punishes drivers who do not respond quickly.[387] The platform temporarily flashes higher-paid "surge pricing" in certain regions of cities, thereby causing drivers to rush to those areas.[388] Under these circumstances, holding Amazon and Uber liable for accidents would encourage these firms to modify their systems so that drivers would take greater care to safely reach their destinations.

In addition to strictly enforcing safe-driving rules, platforms could curb traffic fatalities by discouraging drowsy driving.[389] Researchers estimate that over 20 percent of fatal car crashes involve a person driving while tired.[390] Uber and Lyft are not doing enough to combat this problem. Both platforms allow individuals to drive for over twelve hours before taking a six-hour break.[391] But twelve hours of driving is too long for individuals to drive safely. For example, the Federal Motor Carrier Safety Administration (FMCSA) limits passenger-carrying drivers to ten hours of driving and requires those drivers to then have eight hours off.[392] Although Uber and Lyft

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385. *See* discussion *supra* Part I.B (examining risk-taking and driver incentives).

386. *See* O'Donovan & Bensinger, *supra* note 2 (discussing different performance expectations that Amazon sets for drivers).

387. Razak v. Uber Techs., Inc., 951 F.3d 137, 140 (3d Cir. 2020) (outlining various methods of control that Uber retains over drivers).

388. *See* Calo & Rosenblat, *supra* note 6, at 1661-62 (explaining how Uber influences driver behaviors).

389. *See generally*, *Drowsy Driving: Asleep at the Wheel*, CTR. DISEASE CONTROL & PREVENTION (Nov. 21, 2022), https://www.cdc.gov/sleep/features/drowsy-driving.html [https://perma.cc/7PVK-CER5] (listing the risks associated with driving while sleep-deprived).

390. *See* Eric Suni & Anis Rehman, *Drowsy Driving*, SLEEP FOUND. (June 1, 2023), https://www.sleepfoundation.org/drowsy-driving [https://perma.cc/BH7D-3R2W] (outlining rates of tired driving).

391. *See Driving Time*, UBER HELP, https://help.uber.com/driving-and-delivering/article/driving-time?nodeId=c8785b5d-e2eb-42be-8c99-000d111e06d0 [https://perma.cc/DXM3-7KXF] (explaining how Uber sets a thirteen-hour limit with drivers); *Taking Breaks and Time Limits in Driver Mode*, LYFT HELP, https://help.lyft.com/hc/en-us/all/articles/115012926787-Taking-breaks-and-time-limits-in-driver-mode [https://perma.cc/J39G-K89R] (listing time limits for Lyft drivers).

392. *Summary of Hours of Service Regulations*, FED. MOTOR CARRIER SAFETY ADMIN. (Mar. 28, 2022), https://www.fmcsa.dot.gov/regulations/hours-service/summary-hours-service-reg

are not regulated by the FMCSA, they could still voluntarily conform to this safety limit.

Finally, on-demand companies could do more to ensure that drivers receive proper training before they hit the road. Today, Uber does not require its users to take driver-safety classes.[393] Instead, the platform simply asks new drivers to follow instructions on "how to use the app and navigation with a GPS system."[394] Obviously, this mandate is a far cry from teaching drivers basic safety techniques. Amazon Flex drivers do not receive much training either. According to a recent review of the company's onboarding process, Amazon provides Flex drivers with less than a half-page of instructions on defensive-driving tactics.[395]

The lack of driver training is especially stark in the case of Amazon drivers. In contrast to UPS, Amazon builds far fewer safety protections into its driver-training programs. For instance, UPS trains its drivers for weeks in multimillion-dollar facilities, requires them to complete challenging entrance exams, subjects them to virtual-reality training, prohibits them from taking unnecessary left-hand turns, and places many drivers in familiar daily routes.[396] In contrast, Amazon allows some drivers to take left-hand turns (a statistically proven dangerous maneuver), expects drivers to navigate unfamiliar neighborhoods, and provides drivers with limited in-office training that can take only two days to complete.[397]

As the foregoing examples illustrate, there are a number of steps that both Amazon and Uber could take to reduce the likelihood of crashes. In general, extending liability to firms creates incentives for those firms to alter organizational features that increase liability risks.[398] As the party that sits between drivers and members of the

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ulations [https://perma.cc/PD78-VJU7] (listing hour restrictions on passenger-carrying drivers).

393. *For Your Safety*, UBER BLOG (Nov. 27, 2018), https://www.uber.com/en-EG/blog/for-your-safety/# [https://perma.cc/VU5X-K86R].

394. *Id.*

395. *See* Callahan, *supra* note 1 (examining training materials that Amazon provides to Flex drivers).

396. *Id.*; O'Donovan & Bensinger, *supra* note 2 (comparing various forms of training that different carriers provide to drivers).

397. *See* Callahan, *supra* note 1; O'Donovan & Bensinger, *supra* note 2 (discussing the "little training" that Amazon drivers receive before hitting the roads).

398. *See* Diamantis, *supra* note 16, at 827-28 (explaining how organizational rules can encourage employees to take risks).

public, on-demand firms retain the ultimate ability to reduce threats of harm by enforcing meaningful safety rules.[399] But because the contractor defense encourages companies to cast blame on drivers and logistics companies, Amazon and Uber do not yet possess the legal incentives to effectively curb the risks that their workplace practices create.[400] In contrast to the status quo, holding on-demand firms responsible for their drivers' accidents would advance agency law's deterrence objective.

C. Fairly Allocating Losses Caused by Amazon and Uber Drivers

When considered in tandem with the goals of deterrence and compensation, the theory of fair loss-attribution helps identify the circumstances under which it is equitable to attribute the costs of accidents to firms that benefit from risk-creating activities. As outlined above, courts are more likely to hold employers vicariously liable when accidents are reasonably predictable outcomes of normal business activities.[401] Although a company might not have engaged in any formal wrongdoing, the firm will face vicarious liability if it retains sufficient control over workers who themselves engage in predictable, culpable conduct.[402] As such, the theory of fair loss-attribution highlights the relationship between employee careless-ness, foreseeable harms, and employer responsibility.

Applying the foregoing principles to the problem at hand, many injuries that arise from on-demand transportation can fairly be attributed to firms that facilitate these transactions. Consider, for example, the accident involving Ans Rana, discussed above.[403] After Rana's stationary vehicle was rear-ended by an Amazon van at high speeds, Rana suffered lifelong injuries and could not walk.[404]

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399. *See* Alden, *supra* note 9, at 1639-40 (examining how platforms influence driver conduct).

400. *See* Cunningham-Parmeter, *supra* note 40, at 219-20 (discussing the effect that liability regimes have on employer incentives).

401. Doe v. Uber Techs., Inc., 184 F. Supp. 3d 774, 784 (N.D. Cal. 2016) (evaluating the relationship between foreseeability and vicarious employer liability).

402. *See* Bartholomew & Tehranian, *supra* note 229, at 1366-67 (explaining how the reach of *respondeat superior* liability depends on an employer's "relationship with the direct tortfeasor").

403. *See* discussion *supra* Part I.B (examining accidents involving Amazon drivers).

404. *See* Soper, *supra* note 80 (discussing Amazon delivery vehicles and crashes).

Disclaiming responsibility, Amazon blamed its logistics company for the accident.[405] In the wake of the accident, Rana alleged that the insurer of the Amazon van that hit him failed to cover at least $1 million of his medical bills.[406] In addition to this insurance shortfall, Rana also faced the costs of ongoing medical care, pain, and suffering.[407] As such, Rana's case raises the central question about which party should pay for this vast financial shortfall: Rana or Amazon?

Likewise, the case of Sofia Liu similarly illustrates the problem of fair loss-attribution as it relates to Uber. Recall that an Uber driver struck and killed six-year-old Sofia in a San Francisco crosswalk, injuring her mother and brother.[408] Uber denied responsibility for the accident, claiming that it was a "technology company" that did not "employ drivers."[409] Because the driver was allegedly scanning his phone for rides at the time (but had not yet accepted any ride requests), Uber's current insurance scheme would have provided Sofia's family with a maximum of $100,000 in compensation, far less than the family's initial medical bills of $185,000, let alone the exponentially higher damages arising from Sofia's wrongful death.[410] Under these circumstances, the theory of fair loss-attribution asks whether it is fairer for Sofia's family or Uber to bear these enormous uncompensated losses.

By drawing critical attention to the concepts of control, foreseeability, and firmwide responsibility, the theory of fair loss-attribution provides guidance on these questions. As to the issue of firmwide responsibility, the theory of fair loss-attribution explains why firms should bear losses that arise from their profit-generating conduct when such injuries predictably arise from normal business operations.[411] Amazon generated $472 billion in sales last year.[412]

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405. *Id.*

406. *Id.*

407. *Id.*

408. *See supra* Introduction (analyzing evidence of Uber-involved auto wrecks).

409. Answer at 2-3, Liu v. Uber Techs., Inc., No. CGC-14-536979 (Cal. App. Dep't Super. Ct. May 1, 2014) (characterizing the driver who caused the accident as an "independent, third-party transportation provider[]").

410. *See* Martha Alejandra Salas, Comment, *Holding Rideshare Companies Accountable in Texas*, 49 ST. MARY'S L.J. 879, 911-12 (2018) (examining on-demand transportation and gaps in insurance coverage).

411. *See* Far W. Fin. Corp. v. D & S Co., 760 P.2d 399, 410 n.13 (Cal. 1998) (discussing various justifications for imposing vicarious liability on principals).

412. *See* Soper, *supra* note 80 (reporting Amazon's earnings).

Uber's most recent earning report showed gross annual bookings of $25.9 billion, with year-over-year growth of at least 50 percent.[413] Under these circumstances, basic notions of fairness ought to put the costs of accidents on entities that facilitate harm-creating transactions when those entities sufficiently control transactions that lead to harm. This is especially true when doing otherwise would leave victims with the suboptimal recovery options of pursuing claims against low-wage drivers or under-capitalized intermediaries.[414]

But increasing a victim's chance of recovery, standing alone, does not provide the sole rationale for fairly attributing losses to on-demand firms. In addition to advancing compensation objectives, the theory of fair loss-attribution explains why firms should be held responsible for the foreseeable costs of business activities. Of course, driving in general is widely regarded as a dangerous pursuit. Traffic deaths have steadily risen throughout the United States over the past decade.[415] Given these ongoing dynamics, it is no surprise that over two million people are injured in auto accidents every year.[416] In light of the sheer scale of this problem, companies operating in the transportation and delivery sector can easily foresee that their drivers will accidentally harm members of the public in the course of doing their jobs.[417]

Finally, the theory of fair loss-attribution posits that companies ought to pay for the foreseeable costs of injury-causing activities

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413. *See Uber Announces Results for Fourth Quarter and Full Year 2021*, UBER INVESTOR (Feb. 9, 2022), https://investor.uber.com/news-events/news/press-release-details/2022/Uber-Announces-Results-for-Fourth-Quarter-and-Full-Year-2021/default.aspx [https://perma.cc/UA4T-9H2X] (listing Uber's earnings).

414. *See* Morris, *supra* note 219, at 340 (examining compensation-related rationales for *respondeat superior*).

415. *See Car Crash Deaths and Rates*, NAT'L SAFETY COUNCIL, https://injuryfacts.nsc.org/motor-vehicle/historical-fatality-trends/deaths-and-rates/ [https://perma.cc/M49Y-RNYE] (showing an increase in traffic fatalities through 2020).

416. *See* TIMOTHY STEWART, NAT'L HIGHWAY TRAFFIC SAFETY ADMIN, OVERVIEW OF MOTOR VEHICLE CRASHES IN 2020 (2022), https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&ved=2ahUKEwi38sTE-euAAxVSFVkFHZceA14QFnoECA0QAw&url=https%3A%2F%2Fcrashstats.nhtsa.dot.gov%2FApi%2FPublic%2FPublication%2F813266&usg=AOvVaw2FdRxdRYf7Ht7KQKOo4W3h&opi=89978449 [https://perma.cc/JP6H-ZXGQ] (reporting on the number of traffic accidents and fatalities on U.S. roadways).

417. *See* Doe v. Uber Techs., Inc., 184 F. Supp. 3d 774, 784 (N.D. Cal. 2016) (discussing Uber drivers and the scope-of-employment test).

that they control.[418] Applied to on-demand transit, Amazon and Uber retain significant control over how drivers do their jobs. For example, Amazon exerts control over drivers' wages, delivery routes, and uniforms.[419] Perhaps even more critically, the company sets on-time delivery expectations that encourage drivers to take risks.[420] Likewise, Uber exercises significant influence over working conditions by setting pay rates, deactivating certain drivers, and punishing those who take inefficient routes.[421] Like Amazon, Uber also places time constraints on drivers, thereby increasing the odds that drivers will rush and make mistakes. Under these circumstances, the more control that firms retain over risk-generating working conditions, the fairer it becomes to attribute consequent injuries to those firms.

CONCLUSION

Whether they are transporting packages or people, on-demand drivers will inevitably make mistakes and harm others. Seeking to avoid the costs of these errors, firms increasingly rely on the contractor defense to dissociate themselves from drivers.[422] Before the dawn of algorithms and rapid logistics, employers frequently attempted to sidestep liability for their workers' torts by relying on the contractor defense.[423] Assessing this claim in offline markets, judges have historically adapted their agency analyses of control to account for a number of societal and technological shifts.[424] Courts today should likewise build flexibility into their liability assessments of on-demand companies. Uber can still control drivers, even if it uses an app to communicate mandates. Amazon can still control drivers, even if it conveys directives through intermediaries. By

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418. *See* Brobst, *supra* note 254, at 278-79 (exploring how plaintiffs can establish direct liability and vicarious employer liability in court).

419. *See* Callahan, *supra* note 1.

420. *See* O'Donovan & Bensinger, *supra* note 2.

421. *See* Narayanasamy v. Issa, 435 F. Supp. 3d 388, 392 (D.R.I. 2020) (discussing various methods that Uber uses to influence driver behavior).

422. *See* Lynn M. LoPucki, *The Death of Liability*, 106 YALE L.J. 1, 65-66 (1996) (considering the risk that expanded contracting relationships pose to existing liability regimes).

423. *See* Fisk & Chemerinsky, *supra* note 52, at 760-61 (examining the general trend in tort law to broaden interpretations of vicarious employer liability).

424. *See* Van Loo, *supra* note 14, at 182 (discussing the evolution of *respondeat superior* liability).

recognizing these modern iterations of control, courts can more effectively advance agency objectives and hold firms accountable for the injuries that their drivers cause.