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Comment

What's the Gig? Exploring the Scope of Employment Among Gig Economy Workers

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Work is a universal human experience, but the nature of work and the relationships between workers and employers have changed dramatically in recent years, thanks in large part to the rise of the "gig economy." Gig workers on platforms like Uber, Lyft, DoorDash, Grubhub, and many others enjoy a degree of flexibility and autonomy, but that same autonomy helps to shield their employers from legal liability when workers cause harm to others.

This Comment explores the doctrine of respondeat superior *and specifically the "control test" in the context of the gig economy. Because gig work is not bound by specific time and space requirements in the same way as traditional employment, and because gig workers often have multiple "gigs" simultaneously, it is often difficult to determine whether a tort is committed within the scope of employment. This Comment proposes using the "scope of the gig" as the key to unlock vicarious liability: if the worker's intent was, at least in part, to complete the gig, then the gig employer can be held legally responsible for the harm caused.*

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IAN A. RUSSELL*

[T]he laborer is worthy of his wages.†
– *Luke* 10:7

Fortune is powerless to help one who does not exert himself.††
– Leonardo da Vinci

Most people work just hard enough not to get fired and get paid just enough money not to quit.[b]
– George Carlin

INTRODUCTION

Work has been a near-universal human experience since ancient times, so it is perhaps unsurprising that much of the law is concerned with regulating workplaces and employment relationships. However, while work itself is a constant, the nature of employment relationships has changed significantly over time, and the law is sometimes slow to catch up with those developments.

In recent years, one such significant change has been the rise of the "gig economy," including app-based platforms such as Uber, Lyft, and DoorDash.[1] About one in six Americans have earned money through an online gig platform.[2] Gig workers perform tasks such as transporting passengers, shopping for groceries, cleaning homes, assembling furniture, running household errands, and delivering packages and take-out food, to

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† *Luke* 10:7 (New King James).

†† LEONARDO DA VINCI, THE NOTEBOOKS OF LEONARDO DA VINCI 91 (Edward MacCurdy ed. trans., 1938).

[b] GEORGE CARLIN, BRAIN DROPPINGS 206 (1st, ed. 1997).

[1] This Comment will refer to Uber, Lyft, DoorDash, Grubhub, and similar companies that hire workers to complete tasks through app-based platforms as "gig employers," and to the workers themselves as "gig workers." The word "gig" is used to refer generically to the individual tasks completed by gig workers (for example, transporting a passenger for Uber).

[2] Monica Anderson, Colleen McClain, Michelle Faverio & Risa Gelles-Watnick, *The State of Gig Work in 2021*, PEW RSCH. CTR. 3 (Dec. 8, 2021), https://www.pewresearch.org/internet/2021/12/08/the-state-of-gig-work-in-2021.

name a few.[3] Moreover, gig workers today are disproportionately young adults, suggesting that gig work may become an even larger share of the economy with generational change.[4]

This Comment will examine one implication of the rise of online gig work: its interaction with the doctrine of *respondeat superior*, the principle that an employer is legally responsible for torts committed by its employees within the scope of employment.[5] Since *respondeat superior* is dependent on the employer's control of the worker, gig employers have argued they should not be held responsible for torts committed by gig workers because they do not control the workers.[6]

This Comment argues that in the unique context of gig work, whether the employer controls the worker (the "control test") is simply the wrong question. A more tailored theory of vicarious liability is needed to address the challenges of the gig economy. Part I provides a brief overview of *respondeat superior* in general and its interactions with traditional employment relationships. Part II examines the challenges of defining the scope of employment specific to the gig work context. Finally, Part III presents the author's preferred solution to this challenge, a test based on the gig worker's intent, as well as briefly exploring an alternative, a theory of enterprise liability.

I. AN OVERVIEW OF *RESPONDEAT SUPERIOR*

Respondeat superior, Latin for "let the superior make answer," is a theory of vicarious liability that holds an employer or principal responsible for torts committed by an employee within the scope of the employment.[7] In other words, under *respondeat superior*, if an employee causes a legally actionable injury while on the job, then the employer can be held responsible, regardless of whether the employer as an entity did anything wrong.

In general, a *respondeat superior* analysis has two elements: first, the person committing the tort must be an employee,[8] and second, the tort must

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[3] *Id.*

[4] *Id.* at 4.

[5] See *infra* notes 8–11 and accompanying text for an overview of the concept of *respondeat superior*.

[6] *See, e.g.*, Keith Cunningham-Parmeter, *When Amazon Drivers Kill: Accidents, Agency Law, and the Contractor Economy*, 65 WM. & MARY L. REV. 581, 588 (2024) (stating Amazon's argument that it does not exert control over third-party delivery drivers); *see also infra* notes 25–28 and accompanying text (explaining why the control test is an obstacle to applying *respondeat superior*).

[7] *Respondeat Superior*, BLACK'S LAW DICTIONARY (12th ed. 2024).

[8] It should be noted that the *agency law* question of whether a gig worker is an employee for purposes of *respondeat superior* is distinct from the *employment law* question of whether a gig worker is an employee for the purposes of, e.g., taxation, anti-discrimination law, or employment benefits. Cunningham-Parmeter, *supra* note 6, at 587. For a discussion on whether gig workers are "employees" for other purposes, see, e.g., Rebecca Rainey, Maia Spoto & Chris Marr, *Uber, Lyft Are Winning the Gig Worker War in States, Courts (1)*, BLOOMBERG L. (Aug. 5, 2024, 5:30 AM), https://news.bloombergla w.com/daily-labor-report/uber-lyft-are-winning-the-gig-worker-war-in-states-and-courts.

be committed within the scope of employment.[9] Although there are variations by jurisdiction, the control test is central to the analysis: a worker is only an employee if the employer controls their work.[10] If the employer does not control the work, then the worker is considered an independent contractor, and *respondeat superior* does not apply.[11]

If, however, a worker is an employee, then the remaining question is whether the worker caused injury while acting within the scope of their employment.[12] In jurisdictions that follow the Restatement (Third) of Agency, the control test determines this element as well: "[a]n employee acts within the scope of employment when performing work assigned by the employer or engaging in a course of conduct subject to the employer's control."[13] However, an alternative approach focuses on the employee's *intent*: if an employee is motivated solely by his or her own purposes, then the conduct is outside the scope of employment; contrarily, if an employee is motivated at least in part by serving the employer, then their conduct may be within the scope of employment.[14] Note that the standard is not necessarily whether the employer authorized the specific conduct at issue. Indeed, *respondeat superior* has occasionally been found to apply to conduct that the employer almost certainly did not authorize or approve of, yet was related to the employee's job and, at least partially, motivated by a

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[9] RESTATEMENT (THIRD) OF AGENCY § 7.07 (AM. L. INST. 2006). *See also* RESTATEMENT (SECOND) OF AGENCY § 219 (AM. L. INST. 1958) ("A master is subject to liability for the torts of his servants committed while acting in the scope of their employment.").

[10] RESTATEMENT (THIRD) OF AGENCY § 7.07(3)(a) (AM. L. INST. 2006) ("[A]n employee is an agent whose principal *controls or has the right to control* the manner and means of the agent's performance of work . . . .") (emphasis added). The Restatement (Second) of Agency uses the term "servant" instead of "employee," but the definition of "servant" likewise is dependent on the employer's control. RESTATEMENT (SECOND) OF AGENCY § 220 (AM. L. INST. 1958).

[11] RESTATEMENT (SECOND) OF AGENCY § 220(2) (AM. L. INST. 1958).

[12] *Id.* § 219 ("A master is subject to liability for the torts of his servants committed while acting in the scope of their employment.").

[13] RESTATEMENT (THIRD) OF AGENCY § 7.07(2) (AM. L. INST. 2006). Note that while both elements are based on the employer's control, they are still distinct: the first element focuses on the level of control in the employer-employee relationship as a whole, while the second focuses on whether the employee's specific tortious act was within the employer's control. *Compare* RESTATEMENT (THIRD) OF AGENCY § 7.07(2) (AM. L. INST. 2006) (defining the scope of employment as a "*course of conduct* subject to the employer's control") (emphasis added), *with* RESTATEMENT (THIRD) OF AGENCY § 7.07(3)(a) (AM. L. INST. 2006) ("[A]n employee is an agent whose principal controls or has the right to control the manner and means of the *agent's performance of work* . . . .") (emphasis added).

[14] *See* RESTATEMENT (THIRD) OF AGENCY § 7.07 cmt. b (AM. L. INST. 2006) ("When an employee commits a tort with the sole intention of furthering the employee's own purposes, and not any purpose of the employer, it is neither fair nor true-to-life to characterize the employee's action as that of a representative of the employer. The employee's intention severs the basis for treating the employee's act as that of the employer in the employee's interaction with the third party."). Some jurisdictions, following the approach of the Restatement (Second) of Agency, expressly include the employee's intent or motivation as an element of their scope of employment analysis. *See, e.g.*, Harp v. King, 835 A.2d 953, 974 (Conn. 2003) (stating that conduct is within the scope of employment if it "(1) occurs primarily within the employer's authorized time and space limits; (2) is of the type that the employee is employed to perform; and (3) is motivated, at least in part, by a purpose to serve the employer.").

desire to serve the employer. In one such case, a *respondeat superior* claim was allowed to proceed after an off-duty employee at a YMCA brutally assaulted a player who committed a foul during a pickup basketball game on his employer's premises.[15] The court ruled that the employee may have been motivated at least in part by his duty to maintain order on the basketball court.[16]

Respondeat superior plays a vital role in the tort system because it serves both primary purposes of tort claims: (1) compensating victims for their injuries and (2) deterring harmful conduct.[17] *Respondeat superior* serves the compensatory purpose by partially solving the "judgment proof problem"—that is, the all-too-common situation where a tort claim, while *legally* viable, is not *practically* viable to pursue since the person who committed the tort has no assets to pay a judgment, making the litigation cost-prohibitive.[18] While individual employees are often judgment-proof, employers are more likely to have assets or insurance that will cover tort claims, increasing the likelihood that victims will actually be able to pursue and receive compensation.[19] Holding employers vicariously liable also serves a deterrent purpose because employers are in a position of power over their employees' behavior; the prospect of liability motivates employers to use that power to prevent harm and thus avoid being sued.[20] It follows, then, that with millions of gig workers at work every day, the legal system ought to be concerned with whether, and how, *respondeat superior* can apply to the torts that they inevitably commit.

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[15] Glucksman v. Walters, 659 A.2d 1217, 1219–20 (Conn. App. 1995), *cert. denied*, 665 A.2d 608 (Conn. 1995).

[16] *Id.* For more examples of violent and bizarre employee conduct held to fall at least arguably within the scope of employment, see, e.g., Drug Fair of Md., Inc. v. Smith, 283 A.2d 392, 397 (Md. 1971) (holding that an employee who engaged in an altercation with a shoplifter was acting within the scope of his employment for purposes of *respondeat superior*); Kirlin v. Halverson, 758 N.W.2d 436, 448 (S.D. 2008) (holding that an employee who assaulted an employee of a rival business may have been within the scope of his employment if he were "motivated by the intent to further [his employer's] business interests through discouraging the competition, albeit in a misguided and wholly unacceptable fashion"); Doe v. Flanigan, 243 A.3d 333, 344–45 (Conn. App. 2020), *cert. denied*, 242 A.3d 711 (Conn. 2020) (holding that a police officer who pushed a minor to the ground and handcuffed him may have been acting within the scope of his employment, even though his actions expressly violated his employer's policies).

[17] *Tort*, CORNELL LEGAL INFO. INST., https://www.law.cornell.edu/wex/tort (last visited Oct. 10, 2025).

[18] For a more thorough discussion of the judgment proof limitation in tort law, see generally S. Shavell, *The Judgment Proof Problem*, 6 INT'L REV. L. & ECON. 45 (1986). The judgment proof problem is particularly acute in the gig economy context because gig workers are often "under-monetized" and "unable to bear the brunt of liability when accidents occur." Agnieszka A. McPeak, *Regulating Ridesharing Platforms Through Tort Law*, 39 U. HAW. L. REV. 357, 392 (2017).

[19] *See* Shavell, *supra* note 18, at 55 (noting that one potential solution to the judgment proof problem is to impose vicarious liability on parties related to the tortfeasor with ample assets).

[20] McPeak, *supra* note 18, at 389 (arguing that "if ridesharing companies know that they may be liable for the acts of their drivers, they will conduct themselves in ways that limit their exposure to liability, and the public will be given some protection from harm.").

II. THE CHALLENGE OF APPLYING *RESPONDEAT SUPERIOR* TO GIG WORKERS

In the context of traditional employment relationships, *respondeat superior* is usually a relatively straightforward analysis. In the traditional workplace, employees are "on the clock" for certain hours and are usually expected to work at a single location.[21] Moreover, employees have traditionally been expected to give their jobs more or less exclusive attention while on the clock, and refrain from working for multiple employers.[22] When employees are visibly "at work" or "not at work," subject to well-defined time and space constraints and under the employer's supervision, determining whether they are employees acting within the scope of employment is typically straightforward, although there are exceptions.[23]

For gig workers, however, there are questions surrounding *respondeat superior*. There are few, if any, time and space constraints on gig work in general, although there certainly may be such constraints on a particular gig.[24] Gig workers can easily switch between multiple platforms depending

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[21] *Traditional vs Modern Workplace: A Comprehensive Guide*, AUXILION (Aug. 28, 2024), https://www.auxilion.com/insights/traditional-vs-modern-workplace#:~:text=Understanding%20Conventional%20Workspaces,structured%20and%20predictable%20work%20environment. Of course, there have always been exceptions to this rule—traveling salespeople, visiting nurses, in-home tutors, and the like—but the 21st century has seen a significant uptick in workers who have no fixed place of employment, thanks both to the gig economy and the prevalence of work-from-home-jobs. *See* Kim Parker, *About a Third of U.S. Workers Who Can Work from Home Now Do So All the Time*, PEW RSCH. CTR. (Mar. 30, 2023), https://www.pewresearch.org/short-reads/2023/03/30/about-a-third-of-us-workers-who-can-work-from-home-do-so-all-the-time (reporting that about fourteen percent of U.S. employees work from home all the time, with millions more in hybrid roles).

[22] This expectation was once far harsher than it is today; in the 19th century, the law of master and servant gave employers almost unrestricted control over their employees' work. *See generally* CHRISTOPHER L. TOMLINS, LAW, LABOR, AND IDEOLOGY IN THE EARLY AMERICAN REPUBLIC 259–92 (1993) (providing a historical and regional perspective on the relationship between employers and employees). Conversely, in the modern workplace, tolerance for divided loyalties during work hours has increased somewhat, but there remains an expectation of exclusivity among employers. *See* Alison Green, *What's Really So Wrong About Secretly Working Two Full-Time Jobs at Once?*, SLATE (Feb. 20, 2023, 5:55 AM), https://slate.com/human-interest/2023/02/remote-work-multiple-full-time-jobs-overmployed.html (discussing the trend of workers juggling multiple full-time jobs at once, but also noting that "employers tend to believe they've purchased their employees' full attention during work hours.").

[23] See *supra* note 16 and accompanying text for examples of the ambiguity associated with employees acting within the scope of employment.

[24] For instance, once a rideshare driver accepts a ride request, there are time and space constraints for the duration of the gig: the driver must immediately drive to a specific location, pick up a passenger, and drive to that passenger's destination to drop them off. *See* Rosie Bubb, *How Lyft Works: 6 Things to Know Before Your First Ride*, LYFT (June 8, 2016), https://www.lyft.com/blog/posts/how-does-lyft-work (explaining the process of utilizing the services of a driver for Lyft). Furthermore, timeliness is often an explicit requirement set by gig economy employers. DoorDash's independent contractor agreement, for example, specifies that workers must "retrieve the [i]tem(s) in a safe and *timely* fashion" and "complete delivery . . . in a safe and *timely* fashion," expressly establishing time constraints on the work—and implicitly establishing space constraints as well, since detours naturally impact timeliness. *Independent Contractor Agreement*, DOORDASH, https://help.doordash.com/legal/document?type=dx-ica&region=US&locale=en-US (last updated Feb. 14, 2025) (emphasis added).

on when and where work is available, and they can likewise seamlessly switch between work and personal tasks. Take, for example, a worker who drives for both Uber (transporting passengers) and DoorDash (transporting food). Seeking to maximize income, she intentionally accepts Uber passengers whose destinations are close to the popular restaurants in her city, so as to be well-positioned to pick up DoorDash orders, return to the residential areas, and continue the cycle. Clearly, she is in the scope of her employment with Uber when she has a (probably hungry) Uber rider in her car on the way to the restaurants. Likewise, she is clearly in the scope of her employment with DoorDash when she has a chicken burrito, veggie burger, or other hot meal in her vehicle on its way to a (certainly hungry) DoorDash customer.[25] But is she not at least arguably working for both employers during and between gigs as well? Is she not at least partially motivated by her desire to serve both employers more efficiently—and thus maximize her own income?

Furthermore, particularly in the context of food delivery apps, there is always the possibility that a given worker is engaged in gigs for multiple companies *at the same time*. The practice of "multi-apping," that is, running multiple delivery apps at the same time to maximize income, may result in a driver having multiple food deliveries in their car simultaneously.[26] If a driver causes a car crash while "multi-apping,"[27] which, if any, of the food delivery companies is responsible?

Setting aside those practical concerns for the moment, the greatest doctrinal obstacle to applying *respondeat superior* in the gig work context is the purported lack of control that gig employers have over their workers.[28] Again, since *respondeat superior* is dependent on the control test, courts have applied this test to conclude just that. For instance, in *Bongiovi v. Pulla*, a lawsuit involving a motor vehicle accident caused by an Uber driver, Uber contended that it could not be held vicariously liable because it did not direct and control the driver's work.[29] Uber's argument focused on the driver's freedom to work for other platforms and to accept as many or as few riders as they wish, both of which are in stark contrast to traditional, exclusive

[25] This author assures the reader that he has more on his mind than food.

[26] Kevin Ha, *The Ultimate Guide to Multi-Apping with DoorDash, Uber Eats, and Grubhub*, Fin. PANTHER (Jan. 7, 2025), https://financialpanther.com/the-ultimate-guide-to-multi-apping.

[27] A possibility that is, if anything, more likely when the driver is distracted by multiple apps.

[28] *See* RESTATEMENT (THIRD) OF AGENCY § 7.07(2) (AM. L. INST. 2006) ("An employee acts within the scope of employment when performing work assigned by the employer or engaging in a course of conduct subject to the employer's control.").

[29] Bongiovi v. Pulla, No. 150935/2023, 2024 WL 2823654, at *6 (N.Y. Sup. Ct., May 31, 2024).

employment.[30] The court in *Bongiovi* ultimately agreed with Uber and granted summary judgment on the issue of vicarious liability.[31]

But even if it is true that a company like Uber does not "control" its workers individually in the same manner as a traditional employer, it surely bears at least some responsibility for their actions collectively. After all, they wouldn't be on the road and engaging in potentially dangerous activity otherwise. Public policy demands that there should be at least some mechanism to hold these companies accountable.

III. TWO PROPOSED APPROACHES TO THE SCOPE OF EMPLOYMENT PROBLEM

Considering the policy importance of holding gig employers financially responsible for the actions of their workers under at least some circumstances,[32] courts and lawmakers should seriously consider adopting standards that would allow for vicarious liability for gig employers. This Section first establishes why courts should consider supplanting the control test in the context of gig work. This Section then discusses two alternatives: a test based on the gig worker's motivation (the "motive test"), and a theory of enterprise liability. This Comment then concludes by arguing that the motive test is the best fit for the challenges of the gig economy.

A. *Why Consider Moving on from the Control Test?*

As discussed above, the practical effect of the control test has largely insulated gig employers from vicarious liability.[33] There is, however, some question as to whether this is actually a problem. Since the rise of Uber, Lyft,

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[30] *Id.* at *6–*7. In support of this contention, Uber quoted its agreement with its drivers, called the Platform Access Agreement ("PAA"). The pertinent portion of the PAA reads:

> We [Uber] do not, and have no right to, direct or control you [the driver]. Subject to Platform availability, you decide when, where and whether (a) you want to offer For-hire Service facilitated by our Platform and (b) you want to accept, decline, ignore or cancel a Ride (defined below) request; provided, in each case, that you agree not to discriminate against any potential Rider in violation of the Requirements (defined below). Subject to your compliance with this Agreement, you are not required to accept any minimum number of Rides in order to access our Platform and it is entirely your choice whether to provide For-hire Service to Riders directly, using our Platform, or using any other method to connect with Riders, including, but not limited to other platforms and applications in addition to, or instead of, ours.

Id. at *7.

[31] *Id.* at *10. Specifically, the court concluded that because Uber had "only incidental control" over the driver, he was an independent contractor, not an employee, and thus the first element of *respondeat superior* was not present. *Id.* at *9.

[32] *See supra* notes 17–20 and accompanying text (explaining the policy purposes of holding employers responsible under *respondeat superior*).

[33] *See supra* notes 28–31 and accompanying text (providing an example of the control test being used to prevent a gig employer from being held vicariously liable for the tortious conduct of a gig worker).

DoorDash, and similar companies, states have enacted statutes requiring companies, like Uber, Lyft, and DoorDash (or their drivers) to carry liability insurance that covers car crashes caused by their workers in the course of a gig.[34] Thanks to these state insurance mandates, if a driver causes a car accident in the course of a gig for one of these companies, any injured party can sue the driver rather than the gig employer, but the gig employer's insurance policy may pay any settlement or judgment up to the policy limits. One could reasonably argue that it is *unnecessary* to hold gig employers legally responsible for torts committed by gig workers, because the insurance mandates have already, from a practical perspective, provided a meaningful legal remedy for victims.

However, these insurance mandates are an inadequate solution for several reasons. Most fundamentally, if a gig employer cannot be held vicariously liable for injuries caused by its workers, then the employer has no financial incentive, independent of the mandate, to carry insurance that will pay for those injuries. Lacking such an incentive, gig employers are actively lobbying state governments to reduce or eliminate their statutory coverage requirements.[35] Furthermore, car insurance policies often contain limitations and exclusions that may leave some injured parties without coverage.[36] Again, since the gig employer's own assets are not at risk without an applicable theory of vicarious liability, employers can and will prioritize lower insurance costs over more robust coverage. Finally, even robust insurance coverage may be inadequate to cover truly catastrophic injuries.[37] However, under a theory of liability that allows gig employers to be sued for torts committed by their workers, the employers would have a strong incentive to carry insurance to protect their assets, with or without state mandates. In short, rather than simply mandating that gig employers carry insurance, the legal system needs to give these companies an actual *incentive* to carry adequate insurance; i.e., potential exposure to their assets if insurance coverage is not available.[38]

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[34] *See, e.g.*, CONN. GEN. STAT. § 13b-120(c) (requiring that, when a driver's policy lapses, transportation network companies shall provide insurance coverage for claims arising out of the driver's transportation activities); TEX. INS. CODE § 1954.051 et seq. (requiring that either the transportation network company or the driver shall maintain insurance covering the driver during the course of the gig); HAW. REV. STAT. § 431:10C-703 (requiring that a transportation network company or driver maintain a policy that recognizes the driver as a transportation network driver and provides coverage for the gig activities).

[35] Matthew Sellers, *Uber Calls for Insurance Reforms as Fraud, Regulations Drive Up Costs*, INS. BUS. (Mar. 4, 2025), https://www.insurancebusinessmag.com/us/news/auto-motor/uber-calls-for-insurance-reforms-as-fraud-regulations-drive-up-costs-527174.aspx (noting that Uber argues that "high coverage requirements result in increased operating costs for Uber, which are ultimately passed on to riders").

[36] *See* Cunningham-Parmeter, *supra* note 6, at 639–40 (explaining the role policy limitations may play in accident coverage for Uber drivers).

[37] *See id.* (noting that Uber's insurance coverage is either $100,000 or $1 million depending on whether the driver has accepted a ride request and that even the higher amount may not be enough to cover catastrophic losses).

[38] In addition, vicarious liability would serve a deterrent purpose, motivating gig employers to minimize the harm their workers cause. *See id.* at 641–45 (discussing steps that Uber and Amazon could take to reduce threats of harm if they had the legal incentive to do so).

Furthermore, from an accountability perspective, even if individual claimants are able to get compensation from insurance policies carried by gig employers, there is an inherent value *to the public* in being able to sue gig employers for the harm their workers cause. Lawsuits are a matter of public record, and it is easy for journalists or citizens to look up cases in which Uber, Lyft, or another gig employer is actually named as a defendant.[39] In contrast, under the current model where gig employers carry insurance that pays for injuries caused by their workers, only the gig worker is typically named as a defendant, while the gig employer lurks in the shadows.[40] Even if the outcomes for individual plaintiffs are the same, there is a broader societal value in creating a public record of injuries for which gig employers are responsible.

Just because a theory of vicarious liability is needed to fully hold gig employers accountable does not necessarily mean the control test must be abandoned as inadequate for that purpose. Keith Cunningham-Parmeter has persuasively argued that the control test can be applied flexibly to cover many scenarios presented by the gig economy.[41] However, Professor Cunningham-Parmeter also acknowledges that courts have been inconsistent in their applications of control principles to emerging circumstances in changing workplace settings.[42] This Comment does not seek to definitively show that the control test ought to be abandoned in the context of the gig economy; however, given that this test has only shown limited success in holding rideshare employers accountable thus far, alternatives should be explored.

B. *An Intent-Based Approach: The "Scope of the Gig" Test*

The first alternative solution is based on the intent-based approach taken by the Restatement (Second) of Agency.[43] However, this author's approach would depart from the Restatement by entirely setting aside the question of

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[39] The public may access most federal court filings electronically on "PACER." *Accessing Court Documents - Journalist's Guide*, U.S. CTS., https://www.uscourts.gov/data-news/reports/handbooks-manuals/a-journalists-guide-federal-courts/accessing-court-documents-journalists-guide (last visited Oct. 15, 2025). The public also has access to most documents filed in state court. *E.g*, *Court Records: Frequently Asked Questions*, STATE OF CONN. JUD. BRANCH, https://www.jud.ct.gov/faq/courtrec.html (last visited Oct. 15, 2025) (stating that "[m]embers of the public have the right to see any document in any court file . . ." unless the file is sealed or otherwise rendered confidential).

[40] Even when gig employers are sued alongside their employees, the employee is often the named defendant. *See, e.g.*, Uy v. Hussein, 186 A.D.3d 1567 (N.Y. App. Div. 2020) (naming Uber driver as defendant); Hart v. Phung, 876 S.E.2d 1 (Ga. Ct. App. 2023), *cert. denied*, 887 S.E.2d 291 (Ga. 2023) (naming ride-share driver as defendant); Jones v. Ramos, 335 F.R.D 208 (N.D.Ind. 2020) (same).

[41] Cunningham-Parmeter, *supra* note 6, at 626 ("[C]ourts 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.").

[42] *Id.* at 625–26.

[43] RESTATEMENT (SECOND) OF AGENCY § 228(1)(C) (AM. L. INST. 1958).

whether the gig worker is an "employee" in any broader sense. Rather, the two prongs of the traditional *respondeat superior* inquiry would, in gig work cases, be collapsed into a single question: *was the tort committed within the scope of the gig?* This "scope of the gig" test would have three elements: whether the gig worker's conduct (1) is of the kind he or she is engaged to perform, (2) occurs substantially within the authorized time and space limits of the gig, and (3) is actuated, at least in part, by a purpose to complete the gig.[44]

With respect to the first element, the flexibility of gig work means that the "kind" of conduct should be interpreted somewhat more loosely than in a traditional employment context; after all, gig workers are generally free to use whatever means they see fit as long as the job is completed. Under this approach, any act that moves the worker at least somewhat closer to completion of the gig should satisfy the first element. Likewise, as previously discussed, the "time and space limits" of gig employment are not always well-defined.[45] However, within the context of a particular gig, it is often possible to identify time and space limits that would put at least some constraints on liability, such as the route from a pickup point to a destination.

Focusing on the third element, the gig worker's *intent*, is the key to establishing vicarious liability. If a gig worker's actions are motivated by the gig, then the gig employer can be held vicariously liable for those actions. Under this rule, problems arising when workers use multiple gig platforms simultaneously can likewise be resolved: the gig that motivates the conduct is where vicarious liability attaches. In instances where multiple gigs partially motivate the conduct, principles of apportionment or comparative negligence can be applied, according to the applicable state laws.[46]

One potential criticism of the intent-based approach is the inherent difficulty of determining a worker's subjective intent or motivation.[47] However, in the context of gig work, the worker's motivation to serve the employer is not as difficult to prove as it might seem, because it can be assessed in the context of the limited scope of a gig. For example, any act taken by an Uber or Lyft driver might be motivated by service to the

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[44] *Id.* § 228(1) (setting forth language that this author's alternative approach draws from). The Restatement's limitation on vicarious liability for intentional torts (namely, that they must not be "unexpectable by the master") can also be applied to gig workers. *Id.* §228(1)(d).

[45] *Supra* note 24 and accompanying text.

[46] There are numerous approaches to apportionment of liability that vary widely by jurisdiction. *See* DAN B. DOBBS, PAUL T. HAYDEN & ELLEN M. BUBLICK, THE LAW OF TORTS § 487 (2d ed. 2025) (noting that "apportionment of liability among multiple actors, once a fairly straightforward topic, has now become increasingly fragmented and complex"). For purposes of this Comment, however, it is sufficient that every state has *some* method of apportioning liability in circumstances where more than one actor is partially at fault, and those same principles can be extended to address situations where there is one primary actor but multiple vicariously liable entities.

[47] *See, e.g.*, Mark E. Roszkowski & Christie L. Roszkowski, *Making Sense of Respondeat Superior: An Integrated Approach for Both Negligent and Intentional Conduct*, 14 S. CAL. REV. L. & WOMEN'S STUD. 235, 245–46 (2005) (criticizing the Restatement's dependence on motivation and noting that "motive or intent, like any subjective test, is often difficult to prove . . . .").

rideshare company insofar as it allows the driver to pick up a passenger sooner or get them to their destination more efficiently (such as by taking a shortcut or removing or bypassing an obstacle). Furthermore, app data can be used to help answer this question by showing exactly when the gig was accepted and what the gig was, building a precise timeline of events in which it's relatively easy for a fact finder to understand the gig worker's objectives at any given moment. Indeed, the question of motivation may be easier to answer in the gig economy context than in traditional employment, where an employee's more generalized responsibilities may cast a shadow over a wider range of actions.[48]

C. An Alternative Approach: Enterprise Liability

A second, more radical solution, would be broader adoption of the rule used by California, at least for gig-economy cases. California courts have adopted a principle that "'the modern justification for vicarious liability is a rule of policy, a deliberate allocation of risk;'" under this principle, "'the losses caused by the torts of employees, which as a practical matter are sure to occur in the conduct of the employer's enterprise, are placed upon that enterprise itself, as a required cost of doing business."[49] Such a theory of enterprise liability—which largely avoids the scope of employment issue—would be conscious of the massive and growing economic significance of gig work as a whole and prevent gig employers from sidestepping liability by conducting their business through gig workers instead of traditional employees.[50] Furthermore, the more the law treats torts committed by gig workers as a "cost of doing business," the more employers will be motivated to put up guardrails to limit those torts and thus reduce their own costs. The California approach has significant appeal from a policy perspective, as it tends to incentivize employers to reduce the risk of accidents, assures compensation for accident victims, and reasonably assures that accident losses will be broadly and equitably distributed at the enterprise level.[51]

One potential criticism of the enterprise liability approach is that it is unnecessary in the gig economy context because insurance mandates already

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[48] *See supra* note 16 and accompanying text (noting circumstances in which a traditional employee's conduct could be viewed as being motivated by serving the employer's interests).

[49] In re Uber Techs., Inc., 745 F. Supp. 3d 869, 886–87 (N.D. Cal. 2024). Notably, in this multi-district litigation centered on sexual assaults committed by gig workers, the plaintiffs pursued a *respondeat superior* theory in California but not in Texas, which followed the traditional common-law rule. *Id. See also* Ira S. Bushey & Sons, Inc. v. United States, 398 F.2d 167, 171 (2d Cir. 1968) (Friendly, J.) ("[A] business enterprise cannot justly disclaim responsibility for accidents which may fairly be said to be characteristic of its activities.").

[50] For a much more detailed argument in favor of the "enterprise liability" approach to gig employers, see generally Jacob D. Walpert, Note, *Carpooling Liability?: Applying Tort Law Principles to the Joint Emergence of Self-Driving Automobiles and Transportation Network Companies*, 85 FORDHAM L. REV. 1863 (2017).

[51] 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, 575–76 (1994).

provide the compensation workers need. As discussed above, however, insurance mandates are inadequate to ensure full accountability for those injured by gig workers.[52] A second issue, from a practical perspective, is that courts in other jurisdictions have thus far largely declined to adopt the California approach.[53] In short, the enterprise liability theory is often seen as too radical and a fundamental rearrangement of "the responsibility of employers for the conduct of their employees."[54] While this concern is well taken, the gig economy is arguably a big enough rearrangement of the employment relationship itself to justify at least some reconsideration of the responsibility of employers for the conduct of their employees; moreover, applying the enterprise liability theory in gig economy cases would not necessarily demand its application in other scenarios.[55]

Nevertheless, adopting the "scope of the gig" test seems more achievable in most jurisdictions. This approach would preserve the case-by-case, fact-based analysis that is typical of traditional *respondeat superior* cases in all jurisdictions and closely aligns with the specific tests applied in many jurisdictions.[56] Moreover, focusing on intent ensures that causation is present in every case where vicarious liability is found: if the worker's actions were motivated by the gig, then presumably, the tort would not have happened but for the worker's acceptance of the gig in the first place. The rule also has an appealing symmetry and simplicity, tying the imposition of tort liability to the particular gig assigned by the employer.

CONCLUSION

The gig economy presents significant challenges for the legal system. As it stands, reliance on gig work threatens to leave injured parties with limited recourse because gig workers are usually considered independent contractors, putting their well-resourced employers out of the reach of tort lawsuits. Moreover, companies have a strong incentive to employ gig workers in order to avoid liability and thus avoid the time and expense needed to prioritize safety, leaving the public at risk. While states have attempted to solve this problem by mandating that gig employers carry

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[52] *Supra* notes 34–40 and accompanying text.

[53] *See, e.g.*, Hamilton v. Natrona Cnty. Educ. Ass'n, 901 P.2d 381, 387 (Wyo. 1995) ("We . . . reject the theory of enterprise liability."); Carter v. Reynolds, 815 A.2d 460, 470 (N.J. 2003) (declining to adopt the broader California rule and deciding the case on narrower grounds); Lessard v. Coronado Paint & Decorating Ctr., Inc., 168 P.3d 155, 164 (N.M. Ct. App. 2007) (same).

[54] *Hamilton*, 901 P.2d at 387.

[55] *Cf.* Franklin, *supra* note 51, at 585 (noting that South Dakota seems to have adopted the enterprise liability theory in non-automobile cases but has not addressed the enterprise liability theory in commuting scenarios).

[56] *See supra* notes 8–16 and accompanying test (explaining tests traditionally applied in respondeat superior cases).

insurance that covers their workers, these mandates are an inadequate solution without a theory of liability that exposes the gig employer's own assets in the event of a serious injury.

This Comment has examined the law of *respondeat superior* and identified a way in which this common-law principle can be adapted to serve the needs of the 21st century economy. By setting aside, in this limited context, the question of whether a gig worker is an "employee" in a broader sense and focusing on the "scope of the gig," courts can effectively tie liability to the individual gig and thus to the gig employer. While this approach does have drawbacks, as intent is never trivial to ascertain, in the limited context of a gig, assessing the employee's motivating factor is not too burdensome for a fact finder. Using this test, the legal system can ensure injured parties have access to compensation and, just as importantly, curb the ability of gig employers to dodge liability simply by not relying on traditional employees.