

2019

Using the Anglo-American Respondeat Superior Principle to Assign Responsibility for Worker Statutory Benefits and Protections

Michael C. Harper
Boston University School of Law

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Recommended Citation

Michael C. Harper, *Using the Anglo-American Respondeat Superior Principle to Assign Responsibility for Worker Statutory Benefits and Protections*, 18 WASH. U. GLOBAL STUD. L. REV. 161 (2019), https://openscholarship.wustl.edu/law_globalstudies/vol18/iss1/7

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USING THE ANGLO-AMERICAN *RESPONDEAT SUPERIOR* PRINCIPLE TO ASSIGN RESPONSIBILITY FOR WORKER STATUTORY BENEFITS AND PROTECTIONS

MICHAEL C. HARPER*

ABSTRACT

When viewed flexibly, not to find doctrinal rules, but rather to find insight from judges' collective judgment on social values, the common law may have particular value for modern policy makers. For instance, a common law insight could set policy makers in both the United States (U.S.) and the United Kingdom (U.K.) on a promising path for defining when workers are to be protected and benefitted by employment statutes. That insight reflects the underlying rationale for the common law that made relevant the initial distinction between employees and independent contractors - the common law of vicarious liability through respondeat superior. This rationale is based on the appropriateness of cost internalization where there is an alignment of worker duties with employer interests. It presents a socially compelling reason for assigning responsibility for workers' benefits and protections to an employing entity, or entities, with aligned interests, rather than to the workers or to the general society.

While statutory protections and benefits should be based on worker need, the alignment of worker duties with employer interests provides a critical principle of economic fairness for assigning responsibility for the protections and benefits. Where workers do not have sufficient control over economic resources to work in their own independent interests, rather than in line with those of some employer or employers, they are in a position of greater need than those workers who do have such control. Furthermore, in the absence of such resource control, their duties will be

* Professor of Law and Barreca Labor Relations Scholar, Boston University School of Law (BUSL). I thank participants at seminars and workshops at the Institute for Advanced Legal Studies, University of London, Oxford University, and Boston University Law School for comments and suggestions.

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aligned with the interests of employers that presumptively should be responsible for the protections and benefits offered by modern employment statutes. This essay elaborates how the principle, which is expressed in the Restatement of Employment Law, applies to some difficult questions in the modern economy, including the treatment of workers employed by digital platforms and those with multiple potential employers.

INTRODUCTION.....	164
I. AMERICAN LAW.....	166
II. BRITISH LAW	171
III. THE PRINCIPLE OF <i>RESPONDEAT SUPERIOR</i>	177
IV. USING THE RESTATEMENT OF EMPLOYMENT LAW	184
V. APPLYING <i>RESPONDEAT SUPERIOR</i> AND § 1.01.....	187
VI. JOINTLY RESPONSIBLE EMPLOYERS	194
VII. DEPARTURE FROM THE DEFAULT RULES FOR MULTIPLE EMPLOYER RESPONSIBILITIES.....	208
CONCLUDING WORDS	212

INTRODUCTION

The common law remains an intellectual battle ground in Anglo-American legal systems, even in the current age of statutes. This is true in significant part because the common law provides legitimacy for arguments actually based on policy, ideology, and interest. It also is true because of the common law's malleability and related susceptibility to significantly varied interpretations.

Mere contention over the meaning of the common law to provide legitimacy for modern statutes is usually not productive of sensible policy, however. It generally produces no more than reified doctrine unsuited for problems the common law was not framed to solve. Yet, when viewed more flexibly, not to find doctrinal rules, but rather to find insight from judges' collective judgment on social values, examining the common law may have a different kind of value for modern policy makers.

Both the misuse and the value of the common law are illustrated by the attempts to define when workers are to be protected and benefitted by employment statutes in both the United States (U.S.) and the United Kingdom (U.K.), nations that proudly share a common law tradition.¹ The misuse is evident as the courts of each nation have looked to the common law to provide legitimacy for formulaic definitions that serve to set presumptive boundaries on those protected by their employment statutes. The courts of each have struggled both to make those boundaries clear and predictable, and also to provide a compelling and coherent rationale for the boundaries they have traced by common law formulas. American law has been burdened by multifactor tests that do not explicitly focus on some ultimate standard or principle, such as the need of workers for coverage by employment statutes.² U.K. law has compounded this burden by doctrine derived from the common law of contracts without explaining a rationale related to the purposes of its employment laws, including the needs of its workers.³

The result has been a halting and uncertain judicial response to the

1 I use the word worker rather than employee to avoid the current legal associations of the latter. The word worker refers to those providing economic labor, whether or not recognized by the law currently or historically as employees. For a probing history of the evolution in Britain of the variant relationships now arguably classified as ones of employment, see generally SIMON DEAKIN & FRANK WILKINSON, *THE LAW OF THE LABOUR MARKET: INDUSTRIALIZATION, EMPLOYMENT AND LEGAL EVOLUTION* (Paul Davies et al. eds., 2005) (especially ch. 2). See also Simon Deakin, *Does the Personal Employment Contract Provide a Basis for the Reunification of Employment Law?*, 36 *INDUS. L. J.* 68, 72-74 (2007).

2 See *infra* text accompanying notes 14-35.

3 See *infra* text accompanying notes 38-74.

challenge of defining the employment relationship in the shadow of two major developments in the modern workplace. The first is its vertical disintegration or fissuring, as the use of staffing agencies, subcontracting, and franchising, continues to proliferate. The second has been the emergence of a workforce who accepts work from digital platforms without a traditional contract of employment.

Yet, judicial and legislative policy makers in each nation could be set on a much more promising path by setting a default presumption of coverage based on an underlying rationale relevant to the initial distinction between employees and independent contractors - the common law of vicarious liability through *respondeat superior*.⁴ This rationale is based on the appropriateness of cost internalization where there is an alignment of worker duties with employer interests. It presents a socially compelling reason for assigning responsibility for workers' benefits and protections to an employing entity, or entities, with aligned interests, rather than to the workers or to the general society.⁵

While statutory protections and benefits should be based on worker need, the alignment of worker duties with employer interests provides a critical principle of economic fairness for assigning responsibility for the protections and benefits. Where workers do not have sufficient control over economic resources to work in their own independent interests, rather than in line with those of some employer or employers, they are in a position of greater need than those workers who do have such control. Furthermore, in the absence of such resource control, their duties will be aligned with the interests of employers that presumptively should be responsible for the protections and benefits offered by modern employment statutes.

This essay will explain how the common law of *respondeat superior* is based on a principle that also can determine the assignment of responsibility for benefits and protections set in modern employment statutes.⁶ In its first section, the essay briefly recounts the unfocused use of multifactor tests in the U.S. to set unclear and unconvincing default rules for the coverage of American employment statutes.⁷ In its second section, the essay also briefly describes how U.K. courts not only have failed to

4 See *infra* text accompanying notes 75-101.

5 See *infra* text accompanying notes 88-95.

6 The essay does not advocate for any particular benefits or protections; it instead assumes the choice of benefits and protections is a separable policy question that can be and has been rationally answered in variant ways in the U.S. and the U.K.

7 See *infra* text accompanying notes 14-35.

provide a more convincing default rule, but also have encumbered British law with unnecessary doctrine drawn from the common law of contracts.⁸

The essay, in its third section, then explains how the common law of *respondeat superior* offers a principled basis for deciding both when, and to which employing entities, responsibility for the protections and benefits of modern laws should be assigned.⁹ The fourth section then elaborates how the principled basis for employer responsibility derived from *respondeat superior* law can be embraced by American courts, and British policy makers,¹⁰ by adopting the distinction between employees and independent contractors articulated in the recently published Restatement of Employment Law.¹¹

The remainder of the essay then elaborates how the principle, as expressed in the Restatement of Employment Law, would apply to some difficult questions in the modern economy. The fifth section considers how the principle meets the challenges posed by employers shifting the risks of economic activity on to vulnerable workers, including those in the new digital “gig” economy, whose duties remain aligned with the interests of the employers and whose need of protection and benefits remains as great as those of more traditional workers.¹² The sixth section addresses assigning responsibility for certain workers’ statutory benefits and protections to multiple “fissured” employers whose interests are served by the workers.¹³ Finally, the seventh section considers several reasons that policy makers might wish to depart from the default rule derived from *respondeat superior*.¹⁴

I. AMERICAN LAW

Most federal American employment or labor statutes define coverage through a meaningless and typically circular definition of the employment relationship. For instance, many limit protection to those described as an “employee” and then define employee to be “any individual employed by

8 See *infra* text accompanying notes 38-74.

9 See *infra* text accompanying notes 75-101.

10 See *infra* text accompanying notes 102-107.

11 See RESTATEMENT OF EMP’T LAW (AM. LAW INST. 2015). I served as a Reporter with the primary responsibility for the drafting of the sections in this Restatement that define the employment relationship it covers. The positions expressed in this essay are my own and not to be associated with the ALI or any of its other members.

12 See *infra* text accompanying notes 108-141.

13 See *infra* text accompanying notes 142-204.

14 See *infra* text accompanying notes 205-216.

an employer.”¹⁵ As a result, the U.S. Supreme Court for at least the past forty years has invoked the common law to provide legitimacy for its opinions concerning the scope of federal employment statutes that offer protection to employees but not to independent contractors.¹⁶ Earlier it had tried to use a more flexible approach, taking into account the purpose of a particular law, such as the National Labor Relations Act (NLRA)¹⁷ governing collective bargaining,¹⁸ but had been chastised by Congress for departing from the common law as a default definition for covered employees.¹⁹

The Supreme Court’s more recent invocation of the common law may have provided some legitimacy, but it certainly has not provided clarity. The reason for this lack of clarity in the U.S. is not simply multiple state court jurisdictions with the authority to make their own common law, or a federal court system that since 1938 has been denied the authority to make general American federal common law not tied to the interpretation of statutes.²⁰ It also is because the state court systems have not been able to develop a clear consensus on a definition of the employee relationship, even with the assistance of the efforts of the American Law Institute (ALI) to restate the best common law formulated in American jurisdictions.²¹

It was not as if the ALI did not try to provide a meaningful definition, even before the recent Restatement of Employment Law. Agency law for purposes of setting the master’s vicarious or *respondeat superior* liability for the torts of servants required a definition of servant, and the

15 See, e.g., Civil Rights Act of 1964, 42 U.S.C. § 2000e (2018); Age Discrimination in Employment Act of 1967, 29 U.S.C. § 630 (2018); Americans with Disabilities Act of 1990, 42 U.S.C. § 12111 (2018); Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1002 (2018); Family and Medical Leave Act of 1993, 29 U.S.C. § 2611 (2018); Occupational Safety and Health Act of 1970, 29 U.S.C. § 652 (2018).

16 See, e.g., *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318 (1992); *Comty. for Creative Non-Violence v. Reid*, 490 U.S. 730 (1989).

17 29 U.S.C. §§ 151-169.

18 See *NLRB v. Hearst Publ’ns*, 322 U.S. 111, 126-128 (1944) (rejecting use of “common-law tests . . . without regard to the statute’s purposes”).

19 See H.R. REP. NO. 80-245, at 18 (1947), *reprinted in* 1 NAT’L LABOR RELATIONS BD., LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947 309 (1948). The Court subsequently followed the Congressional directive to use the common law in interpreting the NLRA. See *NLRB v. United Ins. Co.*, 390 U.S. 254 (1968).

20 See *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938).

21 The ALI was founded in 1923 to help clarify and simplify common law in America by the production of what are called Restatements of that law. The Restatements are to articulate in black letter with supporting illustrations and comments a wise synthesis of the sometimes variant positions taken by courts in the fifty state systems and in some cases by the federal system. See Herbert Wechsler, *The Course of the Restatements*, 55 AM. B. ASS’N J. 147, 149 (1969) (“In judging what was right, a preponderating balance of authority would normally be given weight, as it no doubt would generally weigh with courts, but it has not been thought to be conclusive.”).

Restatements of Agency have attempted to provide one, primarily through a right-to-control test.²² The mid-twentieth century Second Restatement of Agency, which remains the most influential, at least on this issue, defines servant as “a person employed to perform services in the affairs of another and who with respect to the physical conduct in the performance of the services is subject to the other’s control or right to control.”²³ The Second Restatement of Agency recognized, however, that the decisions could not be fully captured by so simple a formulation. A “full-time cook,” “ship captains,” “managers of great corporations,” a “traveling salesman,” and “skilled artisans ... with whose method of accomplishing results the so-called master has neither the knowledge nor the desire to interfere,” all could be servants regardless of the attenuation of the master’s control or even right to control physical conduct.²⁴

The Second Restatement of Agency thus supplemented the right-to-control test with a non-exclusive list of ten factors to determine “whether one acting for another is a servant or an independent contractor.”²⁵ It did not, however, specify whether these factors were to be used to expand the scope of employee status beyond that indicated by the right-to-control test or rather were to be used in service to this test. The former, however, seems suggested by inclusion, as the first of the ten listed factors, of “(a) the extent of control which, by the agreement, the master may exercise over the details of the work.”²⁶ The Restatement Second of Agency

22 RESTATEMENT (THIRD) OF AGENCY § 7.07(3) (AM. LAW INST. 2005); RESTATEMENT (SECOND) OF AGENCY § 220 (AM. LAW INST. 1958); RESTATEMENT (FIRST) OF AGENCY § 220 (AM. LAW INST. 1933).

23 RESTATEMENT (SECOND) OF AGENCY § 220(1) (AM. LAW INST. 1958). This language was almost identical to that of the Restatement (First). See RESTATEMENT (FIRST) OF AGENCY § 220(1) (AM. LAW INST. 1933).

24 RESTATEMENT (SECOND) OF AGENCY § 220 cmts. a, e, and i (AM. LAW INST. 1958).

25 *Id.* at § 220(2). This subsection states that

[In] determining whether one acting for another is a servant or an independent contractor, the following matters of fact, among other, are considered: (a) the extent of control which, by the agreement, the master may exercise over the details of the work; (b) whether or not the one employed is engaged in a distinct occupation or business; (c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision; (d) the skill required in the particular occupation; (e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work; (f) the length of time for which the person is employed; (g) the method of payment, whether by the time or by the job; (h) whether or not the work is a part of the regular business of the employer; (i) whether or not the parties believe they are creating the relation of master and servant; and (j) whether the principal is or is not in business.

Id. The Restatement (First) contained the same list, without the last factor. See RESTATEMENT (FIRST) OF AGENCY § 220.

26 RESTATEMENT (SECOND) OF AGENCY § 220.

thereby presented judges with great discretion and lawyers with great uncertainty.²⁷

The Supreme Court has not provided more clarity with its formulation of a default definitional line between employees who are protected by federal statutes and independent contractors who are not. That formulation, which the Supreme Court purports to be based on the common law,²⁸ includes consideration of “the hiring party’s right to control the manner and means by which the product is accomplished,” but also lists “[a]mong the other factors relevant to [the] inquiry” twelve other factors, including six that were at least similar to those in the Restatement Second list.²⁹ The Court has not explained why it provided additional factors or declined to include others in the Restatement list. It has offered no guidance on the relative weight that is to be given to the factors, and has even declined to confirm a primary role for the right-to-control factor. It has stated only, and unhelpfully, that “[n]o one of these factors is determinative.”³⁰

Furthermore, in a case interpreting the circular definition of employee in the Employment Retirement Income Security Act (ERISA) the Court cited not only the Restatement Second, but also an Internal Revenue Service ruling that sets forth “20 factors as guides in determining whether an individual qualifies as a common-law ‘employee’ in various tax law contexts[.]”³¹ The Court, however, did not explain its choice of listed factors or their relevance to any essential difference between employees and independent contractors that relates to the general purpose of federal statutes that use employment status to define the scope of their protections or benefit conferral. The Court, like the Restatement Second of Agency,

27 The Restatement (Third) provided no further clarification. It adopted the right-to-control test in § 7.07, but acknowledged that “[i]n some employment relationships, an employer’s right of control may be attenuated. For example, senior corporate officers, like captain of ships, may exercise great discretion in operating the enterprises entrusted to them[.]” RESTATEMENT (THIRD) OF AGENCY §7.07 cmt. f (AM. LAW INST. 2005).

28 See *supra* note 15 and accompanying text.

29 The six similar factors are (1) the skill required; (2) the source of the instrumentalities and tools; (3) the duration of the relationship between the parties; (4) the method of payment; (5) whether the work is part of the regular business of the hiring party; and (6) whether the hiring party is in business. The additional factors are (1) the location of the work; (2) whether the hiring party has the right to assign additional projects to the hired party; (3) the extent of the hiring party’s discretion over when and how long to work; (4) the hired party’s role in hiring and paying assistants; (5) the provision of employee benefit; and (6) the tax treatment of the hired party. See *Cnty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 751-52 (1989).

30 *Id.* at 752.

31 See *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 323-24 (1992) (citing Rev. Rul. 87-41, 1987-1 C.B. 296, 298-299).

thus offered only an unstructured multifactor test that confers great discretion on trial judges and presents great uncertainty for lawyers.

One important federal American employment statute, the Fair Labor Standards Act (FLSA), does supplement its circular definition of employee with an arguably more meaningful definition of “employ.”³² For purposes of the FLSA, to “[e]mploy” includes to suffer or permit to work.”³³ Soon after passage of the FLSA, the Court described this definition as the “broadest” in any statute,³⁴ and the lower courts since have purported to interpret the scope of the FLSA protections more broadly than those of other statutes with only the circular definition of employee.³⁵ They have done so, however, through consideration of multiple factors that mirror many of those included in both the § 220(2) list and the Court’s general common law list.³⁶ The claim of the lower courts that their interpretation of the FLSA definition of “employ” focuses on “economic realities” clarifies nothing, and as Judge Easterbrook noted, carries the curious implication that the common law definitions of employee are not based on reality.³⁷ In fact, the various FLSA multifactor tests, whether or not applied to sweep more broadly than are the common law multifactor tests, are not more structured, focused, or clear.

Multifactor tests can be helpful when a legal question turns on highly variant factual contexts. They cannot alone provide adequate rules of decision, however, without a structure provided by an ultimate question that the various factors are to answer. Without such a structure, these tests offer only minimally confined judicial discretion. Factors can be tallied without regard to relative weight, or alternatively ranked in importance and subordinated, without the judge revealing what considerations are actually driving a decision.³⁸

32 Fair Labor Standards Act of 1938, 29 U.S.C. § 203 (2018).

33 *Id.*

34 *United States v. Rosenwasser*, 323 U.S. 360, 364 n.3 (1945) (citing 81 CONG. REC. 7657 (statement of Sen. Black)).

35 *See, e.g., Baker v. Flint Eng’g & Constr. Corp.*, 137 F.3d 1436, 1440 (10th Cir. 1998); *Usery v. Pilgrim Equipment Co., Inc.*, 527 F.2d 1308 (5th Cir. 1976).

36 The factors used in FLSA cases vary between the courts of appeals. *See, e.g., Sec’y of Labor v. Lauritzen*, 835 F.2d 1529, 1535 (7th Cir. 1987) (factors include employer’s control over work, the degree of employee’s investment in equipment and materials, whether the work requires special skill, and the degree of permanency or duration of the work).

37 *See id.* at 1540 (Easterbrook, J., concurring) (“This implies that the definition of ‘independent contractor’ used in tort cases is inconsistent with ‘economic reality’ but that the seven factors applied in FLSA cases capture that ‘reality.’ In which way did ‘economic reality’ elude the American Law Institute and the courts of 50 states?”).

38 *Cf. RICHARD POSNER, REFLECTIONS ON JUDGING* 86-87 (Harvard Univ. Press 2013) (criticizing appellate judges for using multifactor tests to avoid policy analysis).

American multifactor tests not only have not offered a structure or ultimate standard, they also have not paid particular attention to the relative needs of the workers who could be covered by employment statutes or the ease with which they can be manipulated by employers wishing to escape the costs of incurring responsibility. Any compelling boundary for employment statutes must distinguish among sets of workers with significantly different needs of having other entities provide the minimum protections and benefits offered by the statutes. Although any distinction only offers a default standard that can be modified to serve the purposes of any particular statute, the definition must at least provide an economically relevant base line, particularly because the pull of the common law's legitimacy resists modification. Furthermore, given the incentives for employers to cut labor costs by avoiding liability and responsibility for protections and benefits promised by employment statutes, the definition has to be one that cannot be easily manipulated by employers through the structuring of their labor market and their formal contractual commitments.

II. BRITISH LAW

The United Kingdom's matrix of worker protection and benefit statutes,³⁹ like those of the U.S., limit their beneficiaries to workers in particular economic relationships. The economic relationship required by some of the statutes seems more encompassing than that required by others,⁴⁰ but all the statutes share three characteristics, two of which are

39 The most important current statutes include: Equality Act 2010 c. 15, <http://www.legislation.gov.uk/ukpga/2010/15/contents> (prohibiting employment discrimination); Employment Rights Act 1996 c. 18, <http://www.legislation.gov.uk/ukpga/1996/18/contents> (prohibiting unfair dismissal; requiring compensation for redundancy; requiring written statement of employment terms; requiring notice of dismissal); Trade Union and Labour Relations (Consolidation) Act 1992 c. 52, <http://www.legislation.gov.uk/ukpga/1992/52/contents> (providing labour union protections and benefits); National Minimum Wage Act 1998 c. 39, <http://www.legislation.gov.uk/ukpga/1998/39/contents>; Employment Relations Act 1999 c. 26, <http://www.legislation.gov.uk/ukpga/1999/26/contents> (leave for dependent care); Health and Safety at Work Act 1974 c. 37, <http://www.legislation.gov.uk/ukpga/1974/37/contents> (setting employer duties relating to worker health and safety). *See also* The Working Time Regulations 1998, SI 1998/1833 (working time limitations; paid annual leave).

40 The Employment Rights Act 1996 defines a "worker" as an individual who has entered into or works under (a) a contract of employment, or (b) any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business carried on by the individual. Employment Rights Act 1996 § 230(3). *See also* Trade Union and Labour Relations (Consolidation)

also shared with American statutes and one of which is not.

The two shared characteristics are (1) that the required economic relationships do not include those with independent businesses or contractors, and (2) that the line between protected and unprotected relationships is not adequately drawn by statutory language and thus requires judicial elaboration. The unshared characteristic is British law's conditioning of protection on the relationship being contractual,⁴¹ while American law requires only a status of employment.⁴²

The two shared characteristics have resulted in British courts struggling like American courts to distinguish protected workers from independent contractors without resort to unfocused multifactor tests. U.K. courts, like U.S. courts, and the ALI Restatements of Agency, have understood that a simple control test cannot make distinctions that accord with past precedents, including those that define *respondeat superior* liability.⁴³ British courts thus also have stressed additional factors, including whether the worker bears the risk of profit or loss,⁴⁴ and the degree to which a worker is integrated into the putative employer's organization, especially

Act 1992 § 296. Some important rights, however, including those to complain of unfair dismissal and to claim compensation for redundancy, are granted only to those covered by limb (a) of this definition, those with a "contract of employment." See §§ 94(1), 135. See also *infra* text accompanying notes and notes 64-70.

41 See the Employment Rights Act 1996 definition of "worker," *supra* note 39. Simon Deakin, in numerous writings, has traced the origins of the use of contract as a basis for U.K. employment protections to contingent choices made in twentieth century welfare legislation rather than to the dictates of common law jurisprudence. Deakin's work demonstrates that post-War British legislators wanted lower status manual workers, who had been treated as servants to a master in a contract of service, to be categorized with higher status workers in contracts of employment. See, e.g., Simon Deakin, *Does the Personal Employment Contract Provide a Basis for the Reunification of Employment Law?*, 36 *INDUS. L.J.* 68, 74-75 (2007); Simon Deakin, *The Many Futures of the Contract of Employment*, in *LABOR LAW IN AN ERA OF GLOBALIZATION 184-88* (Joanne Conaghan et al. eds., 2001). See also DEAKIN & WILKINSON, *supra* note 1, at ch. 2. Long term, relational work contracts of course were most common in the U.K. as in the U.S. during the mid-century, post-War decades. The elevation of contracts of service to contracts of employment, however, set up an unfortunate dichotomy with other forms of more casual work relationships that proliferated later in the century. See MARK R. FREEDLAND, *THE PERSONAL EMPLOYMENT CONTRACT 16-17* (Paul Davies et al., eds., 2003).

42 Some British commentators have argued that U.K. law should not base employment rights on the existence of a "contract of service." See Bob Hepple, *Restructuring Employment Rights*, 15 *INDUS. L.J.* 69, 74 (1986) ("the contract of service should be replaced by a broad definition of an 'employment relationship' between the worker and the undertaking to work in return for pay."). Others contend that British law is committed to contractual analysis, but that such analysis is sufficiently capacious to encompass any appropriately protected economic relationship. See FREEDLAND, *supra* note 41, at 6.

43 See, e.g., *White v. Troutbeck SA* [2013] EWCA (Civ) 1171 (appeal taken from EAT); [2013] IRLR 949; [2014] ICR D5 CA (Civ). See also Hepple, *supra* note 42.

44 See, e.g., *Mkt. Investigations Ltd. v. Minister of Soc. Sec.* [1969] 2 QB 173.

in cases where the worker is highly skilled.⁴⁵ Like American courts, however, the British courts have not settled on a particular set of factors or an ultimate organizing standard to distinguish independent contractors.⁴⁶

Significantly, the unshared characteristic, the British statutes' requirement that protected workers have a contractual relationship with a legally responsible entity, has resulted in other layers of confusion and unnecessary rigidity in U.K. law. The more important doctrinal rigidity has been the conditioning of a contract of employment on a mutuality of obligations between workers and a putative employer.⁴⁷ This doctrine, which does not derive directly from contract law,⁴⁸ has provided special difficulties for casual workers who are not given commitments of future work and who are not asked to commit to accepting any work that is offered. The British courts have held that such casual workers do not have a general or "umbrella" contract on which their continuing status as employees can be based.⁴⁹

This doctrine developed even though there is no compelling reason why employee protection or benefit statutes should treat differently workers who render service outside the coverage of a general "umbrella" or "global" contract in consideration for an employer's promise of remuneration.⁵⁰ Whether or not workers under or outside such an umbrella

45 See, e.g., *Stevenson Jordan & Harrison Ltd. v. MacDonald & Evans* [1952] 69 RPC 10 CA, 22 (Lord Denning) ("[U]nder a contract of service, a man is employed as part of the business and his work is done as an integral part of the business; whereas under a contract for services, his work, although done for the business, is not integrated into it but is only accessory to it.").

46 Compare, e.g., *Mkt. Investigations Ltd. v. Minister of Soc. Sec.* [1969] 2 QB 173 (applying multifactor test to determine whether worker is performing services "in business on his own account"), with, e.g., *Ready Mixed Concrete (South East) Ltd. v. Minister of Pensions & Nat'l Ins.* [1968] 2 QB 497 (applying unfocused multifactor test to find driver-owners of lorries to be independent contractors). See also, *Wickens v. Champion Emp't* [1984] ICR 365 (EAT) at 369-70 (applying a 'common sense' balancing test).

47 See, e.g., *Nethermere (St. Neots) Ltd. v. Gardiner* [1984] ICR 612 (Stephenson, LJ) ("There must ... be an irreducible minimum of obligations on each side to create a contract of service."); *O'Kelly v. Trusthouse Forte Plc* [1984] QB 90 (upholding tribunal finding that casual workers did not have a contract of employment without having an obligation to take work).

48 Contract law requires consideration and thus commitment, but it does not require that the consideration and commitment be of the same sort. See Hugh Collins, *Employment Rights of Casual Workers*, 29 *INDUS. L.J.* 73 (2000). See also Douglas Brodie, *Employees, Workers and the Self-Employed*, 34 *INDUS. L.J.* 253, 255 (2005).

49 See, e.g., *Carmichael v. National Power Plc* [1999] 1 WLR 2042, [1999] 4 All ER 897 (HL). See also Collins, *supra* note 48.

50 The mutuality of obligations doctrine and the notion of some overarching umbrella agreement seems particularly unsuitable for employment contracts without definite terms. See Julia Tomassetti, *The Contracting/Producing Ambiguity and the Collapse of the Means/Ends Distinction in Employment*, 66 *S.C. L. REV.* 315, 349-53 (2014) (criticizing the use of contract law to explain a continuing employment relationship, given the inequality of bargaining power and the general incompleteness of terms). "The only way to construe employment as a 'contract' is to think of it as a

contract labor for sufficient periods of time to be covered by a statute, they should have the same protection if their working hours were the same. The need of a worker for protections and benefits is surely not less if the worker has no commitment of future work from an employer.

British courts, after a period of uncertainty, thus were compelled to address the problem posed by the mutuality of obligations condition by recognizing that workers without a general umbrella contract with a particular employer may still qualify as employees based on a series of more specific employment contracts covering each separate period of work.⁵¹ The decisions now recognize that there is an obligation to perform and compensate service during each specific period. To achieve protection under statutes requiring continuity of employment,⁵² however, casual workers still must be able to establish that any break in service between the specific contracts qualifies as a “temporary cessation of work” under the relevant employment law.⁵³ Courts have been hesitant to do so where the break in work is long or where other workers have been substituted.⁵⁴

The other doctrinal impediment to employment status derived by British courts from the statutes’ requirement of contractual status is that the employee’s obligation be for personal service. Even an employee who has committed to future work performance may not have the actual performance of this work covered by British employment statutes if he or she did not commit to doing the work personally.⁵⁵

A commitment of personal service may be relevant to the demonstration that the service will be rendered as an employee rather than as an independent business; individuals running independent businesses in

contract that is continuously renewed at each moment the relationship endures and in which both employee and employer provide consideration through performance.” *Id.* at 354.

51 See, e.g., *Cornwall CC v. Prater* [2005] EAT; *sub nom. Prater v. Cornwall CC* [2006] EWCA (Civ) 102, [2006] 2 All ER 1013. See also A.C.L. Davies, *Casual Workers and Continuity of Employment*, 35 *INDUS. L.J.* 196 (2006).

52 See Employment Rights Act 1996 c. 18 §§ 210-13. Examples of regulations requiring continuity of work include The Maternity and Parental Leave etc. Regulations 1999, SI 1999/312, reg. 13(1); The Flexible Working Regulations 2014, SI 2014/1398, reg. 3.

53 See Employment Rights Act 1996 § 212(3). This is made easier by the law no longer requiring a minimum number hours of work in a week in which there is an employment contract for purposes of determining continuity. See *id.* at § 212(1). See also The Employment Protection (Part-time Employees) Regulations 1995, SI 1995/31.

54 See A.C.L. Davies, *The Contract for Intermittent Employment*, 36 *INDUS. L.J.* 102, 115 (2007), and cases cited therein.

55 See, e.g., *Express & Echo Publ’ns Ltd. v. Tanton* [1999] ICR 693, [1999] IRLR 367 CA (clause requiring driver to find a substitute at his own expense if he was sick or otherwise unable to work meant no requirement of personal service). This requirement does not apply to homeworkers, those who contract to do work in a place not under the employer’s control. See Employment Rights Act 1996 § 43K(1)(b); National Minimum Wage Act 1998 c. 39 § 35(2).

their own interest generally will have the discretion to satisfy contractual commitments through the allocation of workers as well as capital.⁵⁶ Moreover, the British courts have mitigated the impact of the personal service requirement by recognizing that contractual provisions that allow or require substitute workers may not reflect the reality of the economic relationship and contract, and thus can be set aside as shams.⁵⁷

However, in cases where there is not a true independent business being operated, a worker's actual discretion to share hours with or substitute another laborer to do the same work and collect the same pay is not relevant to whether performed work warrants protection or benefits. The actually performed work of a contractually bound worker or a substituted worker is in no less need of protections or benefits because the contractually obligated worker had the discretion to enlist the substitute. Drawing a distinction based solely on a personal service commitment, like drawing a distinction based on the existence of an overarching mutuality of obligations, constitutes doctrinal formalism with no nexus to the purpose of employee protection or benefit statutes. Both distinctions only serve to provide employers with possible loopholes to obtain cheaper labor by escaping the force of employment statutes.

Although British courts by formulating contract doctrine may have made even worse use of the common law than American courts when setting the bounds of employment statutes, Parliament, unlike Congress, has at least made some purposeful attempts to break these judicial bounds. Consider in particular the broader definition of "worker" applicable to protections provided by the new Labour Government, such as the National Minimum Wage Act 1998 (NMWA),⁵⁸ the Working Time Regulations 1998 (WTR),⁵⁹ and the Public Interest Disclosure Act 1998.⁶⁰ These provisions cover not only workers with "(a) contract of employment," but also those subject to "(b) any other contract ... whereby the individual

⁵⁶ Thus, the decision in *Mirror Newspaper Grp. Ltd. v. Gunning* [1986] 1WLR 546, [1986] 1 All ER 385 CA, seems to have correctly rejected employment status for a daughter who took over ownership of her deceased father's newspaper delivery business.

⁵⁷ See *Autoclenz Ltd. v. Belcher* [2011] UKSC 41, [2011] 4 All ER 745, [2011] ICR 1157. The recognition of sham written contracts also may be applicable to clauses that do not provide for mutual obligations. See Alan L. Bogg, *Sham Self-Employment in the Supreme Court*, 41 INDUS. L.J. 328 (2012).

⁵⁸ See National Minimum Wage Act 1998.

⁵⁹ See The Working Time Regulations 1998 SI 1998/1833. These regulations implemented the original European Council Directive 93/104/EC concerning certain aspects of the organization of working time. Council Directive 93/104, 1993 O.J. (L 307) 18 (EC), since superseded by Working Time Directive 2003/88/EC. Council Directive 2003/88, 2003 O.J. (L 299) 9 EC).

⁶⁰ This protection of whistle blowing is now embodied in the Employment Rights Act 1996 c. 18 §§ 43A-L.

undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business carried on by the individual.”⁶¹ Further, the Equality Act 2010 consolidated U.K. prohibitions of discrimination based on race, sex, age, disability, gender reassignment, marriage, pregnancy and childbirth, religion or belief, and sexual orientation for those who are employed under or apply to be employed under “a contract personally to do work.”⁶²

This legislation represents commendable attempts to break free of the controlled and subordinated servant model of employment.⁶³ The attempts fall short for several obvious reasons, however. First, the distinctions made by the definitions, especially in the second prong of the worker definition, are far from clear.⁶⁴ Ambiguity again may require judicial resort to unfocused common law tests.

Second, the lack of clarity is compounded by the absence of rationales for not expanding coverage in all employment protection and benefit statutes. Providing especially broad coverage for any prohibition of discrimination is easy to justify, but less obvious are rationales for not providing equally broad coverage for such topics as unfair dismissal,⁶⁵ redundancy pay,⁶⁶ dismissal notice,⁶⁷ and family-friendly leave.⁶⁸ Why are such topics distinct from those covered by the “worker” definition, such as minimum wages⁶⁹ and vacation pay?⁷⁰ Parliament seemed to recognize the inconsistency in 1999 by giving the Secretary of State power to extend all

61 See *id.* at § 230(3); National Minimum Wage Act 1998 § 54; The Working Time Regulations 1998 reg. 2. See also Trade Union and Labour Relations (Consolidation) Act 1992 c. 52 § 296(1).

62 Equality Act 2010 c. 15 § 83. *But cf.* *Jivraj v. Hashwani* [2011] UKSC 40, [2011] 1 WLR 1872, [2012] 1 All ER 629 (explaining that the definition covers only contracts of subordination). Recent cases indicate that the coverage of the Equality Act is commensurate with that of limb (b) in the definition of worker in the 1998 provisions, despite the absence of the business or profession qualification in the Equality Act definition. See *Pimlico Plumbers Ltd. v. Smith* [2017] EWCA (Civ) 51 [48], [92]; *Bates van Winkelhof v. Clyde & Coo LLP* [2014] UKSC 32 [67].

63 Furthermore, British tribunals recognized this purpose for the expanded definition of worker in the 1998 regulations. See, e.g., *Byrne Brothers (Formwork) Ltd. v. Baird & Others* [2002] ICR 667 (EAT) [17(4)] (“The reason why employees are thought to need such protection is that they are in a subordinate and dependent position vis-a-vis their employers; the purpose of the Regulations is to extend protection to workers who are, substantively and economically, in the same position.”).

64 This criticism is made forcefully by Professor Freedland. See FREEDLAND, *supra* note 41, at 25-26.

65 See Employment Rights Act 1996 Pt X.

66 See *id.* Pt XI.

67 See *id.* § 1(4)(e) (written statement required); § 86 (minimum periods).

68 See, e.g., *id.* §71 (maternity leave).

69 See National Minimum Wage Act 1998 c. 39 § 1.

70 See The Working Time Regulations 1998, SI 1998/1833 reg. 13 (annual leave).

employment protection rights generally to “workers,”⁷¹ but this power has never been invoked to issue regulations enabling workers to make claims for unfair dismissal or redundancy payments.

The most important deficiency in the expanded definitions of coverage in some U.K. statutes is their continued insistence that protection depends on there being a contractual relationship between a protected worker and a responsible entity. The more significant aspect of this deficiency may not be continued judicial application of the personal service and mutuality of obligations doctrines in decisions applying the expanded definitions of coverage. While there have been such decisions,⁷² it seems likely that the courts’ more recent recognition that workers may have a series of separate contracts of service, even without an umbrella contract imposing continuing commitments to provide and accept work,⁷³ will be most important in decisions under the expanded definition.⁷⁴ As will be explained below, however, the requirement, even in the expanded definitions, that a worker’s economic relationship with a responsible employer be contractual poses special difficulties for cases where a worker has cause to claim the responsibility of multiple or joint employers, but has a true contractual relationship only with one.⁷⁵

III. THE PRINCIPLE OF *RESPONDEAT SUPERIOR*

Ultimately, however, the cumbersome use of the common law to define the scope of employment statutes in the U.K., like the muddled use of it in the U.S., need not pose an insurmountable obstacle to the formulation of a default definitional standard that can be both clear and consistent with the usual purposes of such statutes. Indeed, if used not to delineate formalistic barriers based on inapplicable contractual or master-servant models, but rather to understand how modern societies might sensibly assign responsibility for the benefits and protections they wish to attach to work,

71 See Employment Relations Act 1999 c. 26 § 23.

72 See, e.g., *Mingeley v. Pennock* [2004] EWCA (Civ) 328 (race discrimination case); *Byrne Brothers (Formwork) Ltd. v. Baird*: [2002] ICR 667 (EAT) (working time regulations). See also *Davies*, *supra* note 51, at 104-05. A more recent controversial decision stumbling over the contractual requirement denied low paid food deliverer-bicyclists their statutory rights to bargain collectively because the bicyclists sometimes were able to substitute other bicyclists to perform their deliveries and thus did not undertake to perform work “personally.” *Indep. Workers Union of Gr. Brit. v. RoofFoods Ltd.* TUR1/985 (Cent. Arb. Comm. 2016).

73 See *supra* text accompanying note 50.

74 See, e.g., *Pimlico Plumbers Ltd. v. Smith* [2018] UKSC 29; *Aslam v. Uber B.V.* [2017] IRLR 4, [2016] EW (Misc) B68 (ET); see also *James v. Redcats (Brands) Ltd.* [2007] ICR 1006, [2007] IRLR 296 (EAT).

75 See *infra* text accompanying notes 142, 155-63.

the common law can contribute to a solution rather than aggravate the problem of defining coverage. Anglo-American common law can be used as a source of insight to define a compelling and clear default rule for coverage, consistent with what was proposed in the Restatement of Employment Law, and reachable through a liberal construction of British statutes as well.

The common law that should be used as a source of insight is not that of contracts, but rather that of torts and agency. It is the law of *respondeat superior*, the law of vicarious liability of “masters” for the torts of their “servants.” This use of the law of vicarious liability may seem not only superficially obvious, but also fundamentally misguided. It may seem superficially obvious because it was precisely for purposes of *respondeat superior* vicarious liability that the nineteenth century common law of both the U.S. and the U.K. both first used the right-to-control details of work as the central factor to distinguish servants from independent contractors.⁷⁶

The use of vicarious liability as a source of insight for defining the scope of employment protection and benefit statutes, on the other hand, may seem fundamentally misguided because the master-servant relationship and its central element of total subordination and control are not descriptive of labor relationships in modern economies.⁷⁷ Not surprisingly, some employment law commentators who accept that a master’s control over a servant may be part of the justification for imposing liability on the master for the servant’s torts reject the control test as a basis for a sufficiently expansive scope for employment statutes.⁷⁸

⁷⁶ Modern legal historians, however, have highlighted that a right-to-control test was not originally formulated as central to *respondeat superior* analysis. See MARC LINDER, THE EMPLOYMENT RELATIONSHIP IN ANGLO-AMERICAN LAW, A HISTORICAL PERSPECTIVE 133-50 (1989); DEAKIN & WILKINSON, *supra* note 1, at 142-46. Linder concludes that the test emerged in the U.S. only late in the nineteenth century with the encouragement of treatise drafters to restrict the scope of vicarious liability in the interest of developing capitalism. LINDER, *supra*, at 143-46. Deakin & Wilkinson conclude that “[t]he control test was only clearly asserted later [in the U.K.] in cases concerning, not the common law of vicarious liability, but the scope of social legislation.” DEAKIN & WILKINSON, *supra* note 1, at 91.

⁷⁷ See DEAKIN & WILKINSON, *supra* note 1, at 90; Otto Kahn-Freund, *Servants and Independent Contractors*, 14 MOD. L. REV. 504, 505-506 (1951).

⁷⁸ See, e.g., LINDER, *supra* note 76, at 43-46; Brishen Rogers, *Employment Rights in the Platform Economy: Getting Back to Basics*, 10 HARV. L. & POL’Y REV. 479, 482 (2016); 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. OF EMP. & LAB. L. 295, 311-14 (2001). Furthermore, modern writers have advocated expanding the service or work relationships that support vicarious liability. See, e.g., PAULA GILIKER, VICARIOUS LIABILITY IN TORT: A COMPARATIVE PERSPECTIVE 140-43 (Cambridge Univ. Press 2010); Ewan McKendrick, *Vicarious Liability and Independent Contractors – A Re-Examination*, 53 MOD. L. REV. 770, 784 (1990).

When considered from a somewhat different perspective, however, the law of *respondeat superior* and its distinction of independent contractors offer a very different and superior model for defining work that warrants the protection of modern employment statutes from that of a servant fully controlled by a master. That model is one of employer cost internalization where there is an alignment of employee duties and employer interests. It is the alignment of their duties with the interests of their employers, not their employers' control over their work, that best distinguishes employees from independent contractors for purposes of *respondeat superior* liability. Employer control over a worker is neither sufficient nor necessary for *respondeat superior* liability, while an alignment of an employee's duties with the interests of the employer is both necessary and sufficient.

That master-employer control, or even right to control, is not sufficient for *respondeat superior* liability is clear from the "scope of employment" condition on such liability.⁷⁹ Under the law of *respondeat superior*, an employer is liable for torts committed by its employees, even when those torts are committed through acts contrary to the employer's instructions,⁸⁰ as long as the employees are intending to act in accord with their duty to serve the interests of their employer within the scope of their employment.⁸¹ Whenever the employees, however, depart from their employer-aligned duties in pursuit of their own independent interests, "on a frolic of their own" as described in the memorable phrase,⁸² liability for

79 RESTATEMENT (THIRD) OF AGENCY § 7.07 (AM. LAW INST. 2006).

An employer is subject to vicarious liability for a tort committed by its employee acting within the scope of employment.

- (1) 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. An employee's act is not within the scope of employment when it occurs within an independent course of conduct not intended by the employee to serve any purpose of the employer.

See also RESTATEMENT (SECOND) OF AGENCY § 228 (AM. LAW INST. 1958); RESTATEMENT OF EMP'T LAW § 4.02 (AM. LAW INST. 2006).

80 See, e.g., *Limpus v. London Gen. Omnibus Co.* (1862) 158 Eng. Rep. 993, [1862] 1 Hurl. & C. 526 (bus driver's violation of employer's instructions not to obstruct passage by another bus); *Bayley v. Manchester, Sheffield & Lincolnshire Ry.* [1873] LR 8 CP 148 (liability for mistaken use of authority in course of employment); *McLachlan v. Bell*, 261 F.3d 908, 911 (9th Cir. 2001) (applying California law, even willful and malicious torts contrary to employer's instructions can be the basis of vicarious liability if in course of performance of employee's job.). See also P. S. ATIYAH, VICARIOUS LIABILITY IN THE LAW OF TORTS 198-99 (1967).

81 See, e.g., *Ellis v. Turner* (1800) 101 Eng. Rep. 1529, 1531, 8 TR 531, 533 ("The defendants are responsible for the acts of their servant in those things that respect his duty under them, though they are not answerable for his misconduct in those things that do not respect his duty to them."); *Laugher v. Pointer* (1826) 108 Eng. Rep. 204, 5 B & C 547.

82 See, e.g., *Joel v. Morison* (1834) 6 Car. & P. 501, 503 ("The master is only liable where the servant was acting in the course of his employment. If he was going out of his way, against his

any torts they commit is not imputed to their employer.⁸³ This qualification is not explained by the level of control over its employees the employer exercises, or has the right to exercise, because that level of control does not change when the employees take a detour from their duties to pursue their own interests. Rather what changes is the alignment of the employees' purposeful actions with their duties to serve the interests of their employer.⁸⁴

The misalignment of an independent contractor's duties with the interests of even an economically dominant contractor, rather than some variation on a control test, also explains why the dominant contractor is not responsible for an economically subordinate but independent contractor's torts. An economically dominant contractor could increase its control over an economically subordinate contractor, and presumably would do so with a sufficient incentive of potential liability. But potential control is not sufficient for vicarious liability when the subordinate contractor retains discretion over sufficient resources to pursue, at least to some extent, its own independent interests in its performance of work for the dominant contractor.⁸⁵

Thus, control or the potential for control is not a sufficient condition for the imposition of *respondeat superior* liability; the tortfeasor also must be exercising duties in alignment with the interests of the principal.⁸⁶ Furthermore, control or the potential for control also is not a necessary condition of *respondeat superior* liability. Courts impose such liability when employees are performing their duties in alignment with the interests of their employer, regardless of whether the employer is actually in a position to control this performance.⁸⁷ This explains, better than any

master's implied commands, when driving on his master's business, he will make his master liable; but if he was going on a frolic of his own, without being at all on his master's business, the master will not be liable.").

83 See, e.g., *Storey v. Ashton* [1869] 4 QB 476 (no vicarious liability because "they turned off in a different direction and proceeded to the clerk's house for purposes of their own").

84 An alignment principle was expressed in British law as early as 1800: "The defendants are responsible for the acts of their servant in those things that respect his duty under them, though they are not answerable for his misconduct in those things that do not respect his duty to them." *Ellis v. Turner*, (1800) 101 Eng. Rep. 1529, 1531, 8 TR 531, 533.

85 See, e.g., *Earle v. Hall*, 43 Mass. (2 Met.) 353, 361 (1841) (owner of land not liable for acts of builders' employees where builder "could in no sense be considered as building this house on account of Hall; but on his own account. He was building it on land of which Hall at the time held the fee, as security for the purchase money of the land; but he had a covenant for a conveyance, which might be specifically enforced; and when performed, the building would enure wholly to his benefit.").

86 Control of course has not been a sufficient condition for imposing vicarious liability on other superordinate parties, including supervisors of employees, as well as parents and teachers of children.

87 See, e.g., *Yates v. Brown*, 25 Mass. (8 Pick.) 23, 24 (1829) (owner of vessel is liable for injury to other vessel "notwithstanding there may be a pilot on board, who has the entire control and

unpredictable multifactor test, why corporate chief executives, airplane pilots, ship captains, orchestra maestros, gourmet cooks, traveling salespersons and long distance truck drivers all can impose liability on their employers through torts committed while loyally performing their discretionary duties in the scope of their employment, even though outside any practical ability of their employer to control.⁸⁸

The principle that justifies an alignment with employer-interests-standard for *respondeat superior* liability might be termed reciprocal cost internalization: an entity that causes and benefits from the service of workers should have to pay the reciprocal external social costs resulting from that work, at least whenever the workers cannot themselves pay.⁸⁹ This principle, of having to ensure payment for dangers created in service to your interests, has great social appeal⁹⁰ and explains the boundaries of *respondeat superior* liability.

The principle differs from and explains better these boundaries than does one based solely on providing incentive for an economically efficient

management of the vessel.”). Alignment of interests also explains better than control why the common law makes a partnership and each partner vicariously liable for the torts of co-partners within the scope of the partner’s service to the partnership, regardless of whether the co-partners are subject to the control of other partners. *See, e.g.*, Wallan v. Rankin, 173 F.2d 488, 491 (9th Cir. 1948) (applying Oregon law); Ashworth v. Stanwix [1860] 3 E. & E. 701.

88 *See supra* text accompanying note 23. From the seminal case of *Bush v. Steinman*, (1799) 126 Eng. Rep. 978, finding a home owner liable for the torts of contractors he could not control, the British courts have rested *respondeat superior* liability as much on the principal benefitting from service as on the principal’s control of service. The *Bush* decision emphasis on the principal’s benefitting was qualified to account for the unaligned discretion of an “independent business” contractor. *See, e.g.*, *Allen v. Hayward*, (1845) 115 Eng. Rep. 749, 7 QB 960, 975. But the British courts continued to focus on whether the defendant principal benefitted from the work of the tortious workers through an integrated business operation, or only indirectly through the workers’ service to an independent business. *See, e.g.*, *Reedie v. The London & North Western Ry.*, (1849) 4 Ex. 244, 154 Eng. Rep. 1201. A particularly direct judicial statement concerned a comedian found to be employed by theatrical producers in *Stagecraft, Ltd. v. Minister of Nat’l Ins.* (1952) SC 288:

His value as a servant lies in his individuality and he is frequently employed just because he can exercise specialized skill which the employer does not possess. The employer of such a servant can direct the objective to which the servant’s skill is to be addressed but he is powerless to control the manner in which the servant’s skill is exercised.

Id. at 297-298 (L.J. Clerk). *See also* LINDER, *supra* note 76, at 137-144.

89 *Cf.* Gregory C. Keating, *The Theory of Enterprise Liability and Common Law Strict Liability*, 54 VAND. L. REV. 1285, 1295-330 (2001) (explaining that *respondeat superior* liability, like workers’ compensation law and enterprise liability, is based on notions of the fairness of enterprises paying for costs of injuries their activities cause); Gregory C. Keating, *The Idea of Fairness in the Law of Enterprise Liability*, 95 MICH. L. REV. 1266 (1997) (developing the fairness argument through Kantian analysis).

90 *See, e.g.*, *Ira S. Bushey & Sons, Inc. v. United States*, 398 F.2d 167, 171 (2d Cir. 1968) (citing the “deeply rooted sentiment that a business enterprise cannot justly disclaim responsibility for accidents which may fairly be said to be characteristic of its activities”).

level of accident prevention.⁹¹ Imposing liability for an agent's torts on a principal with the ability to control the agent of course provides incentives for the principal to prevent the torts.⁹² Further, where the transaction costs of control are low, some economic analysis indicates that requiring a dominant business with economic control over an insolvent supplier or distributor to pay the costs of the negligence of the supplier's or distributor's insolvent employees can achieve an efficient level of prevention.⁹³ The law of *respondeat superior*, as it developed in the nineteenth century in both the U.K. and the U.S., however, does not impose vicarious liability on entities that benefit indirectly from the work of the tortfeasor employees of other independent employers who control the employees in their own independent interests.⁹⁴

Similarly, this principle of reciprocal internalization differs from and explains better the boundaries of *respondeat superior* liability than does the other most frequent principle of policy used to explain this form of vicarious liability, the principle of distributive justice.⁹⁵ If a wider distribution of risk could justify vicarious liability, any large business would be required to act as an insurer against the torts of employees of the most tenuously connected smaller employers, at least when the employees' torts were committed in the course of work that was somehow related to their employer's connection with the large employer. Needless to say, this is inconsistent with the law of *respondeat superior* not imposing liability on dominant, larger enterprises for the torts of the employees of independent business contractors.⁹⁶

Once the alignment of employee duties with employer interests based

91 See, e.g., GILIKER, *supra* note 78, at 241-243. For economic analysis, see George L. Priest, *The Invention of Enterprise Liability: A Critical History of the Intellectual Foundation of Modern Tort Law*, 14 J. LEGAL STUD. 461, 463 (1985) (forcing enterprises to internalize costs of accidents attributable to their operations provides incentives for cost-justified prevention).

92 An employer's formal legal right to control employees it cannot in practice control because of the employees' special expertise or distance, however, seems to not provide any rational justification for the *respondeat superior* doctrine based on incentives for prevention.

93 See Alan O. Sykes, *The Economics of Vicarious Liability*, 93 YALE L.J. 1231, 1232, 1264-1268 (1984) (explaining why franchisor vicarious liability would enhance social welfare). See also Alan O. Sykes, *The Boundaries of Vicarious Liability: An Economic Analysis of the Scope of Employment Rule and Related Legal Doctrines*, 101 HARV. L. REV. 563 (1988).

94 See, e.g., *Smith v. Cities Service Oil Co.*, 346 F.2d 349, 352 (7th Cir. 1965); *Pack v. Mayor of New York*, 8 N.Y. 222, 227 (1853); *Reedie v. London & North Western Ry.*, (1849) 4 Ex. 244, 154 Eng. Rep. 1201.

95 See ATIYAH, *supra* note 79, at 22-28. Or to put it more cynically, "we have to admit that vicarious liability owes its explanation, if not its justification, to the search for a solvent defendant." Glanville Williams, *Vicarious Liability and the Master's Indemnity*, 20 MOD. L. REV. 220, 232 (1957).

96 See, e.g., cases cited *supra* note 94.

on reciprocal cost internalization is recognized as central to the common law of *respondeat superior*, the relevance of this law to defining the bounds of modern employment statutes can be clarified. These statutes define the minimum protections and benefits that a modern polity has determined should be associated with a given level of work. Because these protections and benefits do not exist in the absence of a statutory command, no entity can be charged with directly injuring workers by an act of omission without an assignment of responsibility for their provision. Employment statutes assign this responsibility by imposing affirmative duties on employers. These duties include both negative tort-like duties to avoid injury and also positive duties to provide benefits. The assigning of affirmative duties to incur the costs of the provision of statutory protections and benefits is like assigning responsibility for the costs of the torts of insolvent tortfeasors; a business or other entity should have responsibility to pay these costs only when it may reap the benefit of work aligned with its interests. Where there is such alignment, there should be responsibility based on a principle of reciprocity: an enterprise with the opportunity to benefit fully from work should be responsible for all of its potential social costs. Where there is not the full opportunity for benefit because the work's vector is not fully aligned with the employer's interests, a worker denied statutory benefits and protections is like a third party victim of the tort of an insolvent independent contractor. Both the worker and the victim must provide for themselves or seek support from society more generally.

This alignment-reciprocal cost internalization analysis, though limiting, sets a very broad scope of work for which employers responsible for protections and benefits can be identified. The broad coverage is consistent and not burdened by the easily manipulated, formalistic categories that have plagued Anglo-American common law on both sides of the Atlantic. The coverage of work need not depend on an employer's control, as long as the work is to be done and is intended to be done in the interests of the employer.⁹⁷ Further, work covered under this analysis is not limited to work rendered under a contract of subordinate service rather than a contract for defined services.⁹⁸ The latter through specifications and

97 Cf. *supra* text accompanying notes 77-87.

98 The Roman distinction between *locatio operarum* (contract for service) and *locatio operis* (contract of service) indeed ultimately provides no more than different language to identify the categories of employees and independent contractors. See ATIYAH, *supra* note 79, at 35-36 (“[T]he use of such terms is just another way of stating the problem and does not provide a test for its solution.”).

conditions can be as fully aligned as the former with the interests of a responsible employer.⁹⁹ Even work not integrated into the core of an employer's business organization¹⁰⁰ may be performed in full alignment with the interests of an employer exercising control through contractual specifications.¹⁰¹ Finally, coverage need not depend on the existence of a contract for future work, whether or not with mutual obligations. The alignment-reciprocal cost internalization analysis of work can be applied *ex post* without consideration of *ex ante* obligations.¹⁰²

IV. USING THE RESTATEMENT OF EMPLOYMENT LAW

The importance of alignment analysis and a reciprocal cost internalization basis for *respondeat superior* vicarious liability under Anglo-American common law should influence both American and British policy makers to reconsider their formulations of a default standard for the economic relationships protected by their employment statutes. Even without statutory modifications, however, at least American courts could move toward alignment analysis by use of the recently adopted Restatement of Employment Law.

The final adopted draft, in the critical language of the Restatement of Employment Law's first section, 1.01, states that

an individual renders services as an employee of an employer if . . .
the employer controls the manner and means by which the
individual renders services, or the employer otherwise effectively
prevents the individual from render those services as an independent
businessperson. . . . An individual renders services as an

99 See Julia Tomassetti, *supra* note 50, at 368-389 (explaining how upfront contractual specifications can preclude worker independence as effectively as can general authority to control service).

100 The integration test was used by some British courts to supplement a control test, especially for highly skilled employees like doctors who could not be placed under the effective control of employers like hospitals. See *supra* text accompanying note 45. See also GILIKER, *supra* note 78, at 60-62, 69-70 (noting similar reasons for use of organization or integration test in vicarious liability cases).

101 The test thus seems broader than the test advanced by Professor Collins in his creative attempt to formulate a sophisticated new test. See Hugh Collins, *Independent Contractors and the Challenge of Vertical Disintegration to Employment Protection Laws*, 10 OXFORD J. OF LEGAL STUD. 353, 377-80 (1990). Collins states that task performance contracts, which transfer economic risk to workers, should not be treated as employment contracts if the organization has no techniques of control beyond checking the adequacy of service. See *id.* The alignment test may have a broader scope where workers do not have adequate traditional or human capital to pursue independent interests when performing their task contracts. See *infra* text accompanying note 103.

102 Cf. *supra* text accompanying note 49.

independent business person and not as an employee when the individual in his or her own interest exercises entrepreneurial control over important business decision, including whether to hire and where to assign assistants, whether to purchase and where to deploy equipment, and whether and when to provide service to other customers.¹⁰³

This formulation conveys the central idea that employees are those rendering service without actual control over the use of capital, including their own human capital, and the labor of others, to advance their own interests independently of the interests of any possible employers. Although the word “entrepreneurial” is used, the standard is better encapsulated as an independent business standard than as an entrepreneurial opportunity standard. The so-called common law standard of employer control over the manner and means of service is presented as a sufficient but not necessary way by which an employer prevents a controlled employee from operating an independent business through the allocation of capital and labor. As explained in the ALI-adopted comments to the formulation,¹⁰⁴ workers whose manner and means of work is controlled by another entity are not allowed to make capital and labor allocation decisions for any independent interests that are not fully aligned with those of the controlling entity. Furthermore, as also explained in the comments,¹⁰⁵ other workers, including the managerial, skilled, and off-site workers whose manner and means of work are not controlled, still may be prevented from rendering services in their independent interests by an alignment of their duties with the interests of an employer. Stated most succinctly, service is rendered as an employee rather than as an independent business person when the service renderer does not render the service with significant discretionary control over capital and labor. Retaining such control enables a business person to advance their own economic interests without also advancing proportionately the interests of another party that has denied such control.

The default definition of employee stated in § 1.01 of the Restatement thus turns on the difference between independent discretionary control over capital and labor, on the one hand, and the lack of such control and the consequent alignment of the worker’s service with the interests of a controlling entity, on the other. This definition distinguishes employees

103 RESTATEMENT OF EMP’T LAW § 1.01(a)(3); § 1.01(b) (AM. LAW INST. 2015).

104 § 1.01 cmt. d.

105 § 1.01 cmt. e.

due the protection and benefits of employment statutes primarily on the basis of relative need. Workers in a developed capitalist economy who can render service with control of capital and of labor are in a fundamentally stronger economic position to protect their own interests and provide for their own benefits than those who cannot.

Furthermore, the distinction between independent discretion and controlled alignment also provides a basis for assigning responsibility for the provision of benefits and protections by determining whether there is another entity, or entities, that can more appropriately be assigned responsibility for the protections and benefits than can the workers themselves. If the workers do not have discretion to serve their own independent interests, if their service is to be aligned with the interests of a controlling entity, then that entity, or entities, can appropriately be assigned responsibility for the protections and benefits that the polity has determined are warranted by their work. Where the legal or economic relationship empowers the party served to prevent the service renderer from making decisions in its own interest about how capital and labor are used in the course of the service, there is an alignment of interests that warrants both *respondeat superior* vicarious liability and a default assumption, reversible of course in particular legislation, that the party who benefits from the service should internalize the costs of ensuring statutory protections and benefits for the server.

The consistency of the alignment-reciprocal cost internalization analysis with § 1.01 does not of course establish that the analysis is mandated by common law decisions. As stated in the opening paragraphs of this essay,¹⁰⁶ the common law is malleable and open to variant interpretations to provide legitimacy. The common law, however, also provides insight into social values. The interpretation given by § 1.01 and applied through an analysis supported by the policy underlying *respondeat superior* liability not only draws from the insight of the common law, but also is well within the bounds of interpretive license.

In addition, this interpretation and analysis provides both a compelling and easily applied standard. On the one hand, it sharply distinguishes from employment status owners of independent businesses operating in a raw material or component supply or distribution chain. These independent businesses hire and assign employees and deploy equipment and other capital in order to maximize their own profits rather than those of other businesses that the independent business owners benefit through sales or

106 *See supra* Introduction.

purchases.

On the other hand, it highlights that individuals who provide personal service to private or public enterprises do so as employees unless they have control over substantial capital or significantly differentiated human capital. Without such control, no service provider while providing service to one enterprise can command the ability to deploy capital or assign assistants in its independent interests. A service provider without such control, like a plumber, a gardener or a delivery driver, may have discretion to provide service to others when it is not working for the enterprise, but unless such a provider has control over sufficient capital to increase its profits without also proportionately enhancing its service, the provider is serving the enterprise as an employee.

The definition of employment focuses on whether particular “service” or work is rendered as an employee, not on whether the service renderer is an employee in the abstract. Thus, any individual can render service to multiple employers in multiple employment relationships seriatim. The fact that the plumber or gardener or delivery driver without significant capital can serve other enterprises at different times is not relevant to the question of whether particular service is rendered within an employment relationship. The Restatement of Employment indeed expressly anticipates seriatim employment relationships, occurring within a “given day, week, or other time period” in § 1.04(a).¹⁰⁷ This also is in accord with how *respondeat superior* would be applied. We would expect any principal to be liable for the torts of an agent within the scope of their service, regardless of how many other principals the agent served within any given time period.¹⁰⁸

V. APPLYING *RESPONDEAT SUPERIOR* AND § 1.01

To illustrate further the clarity, coherence, and sense of the interest alignment analysis drawn from vicarious liability and supported by § 1.01 of the Employment Restatement, consider two overlapping kinds of

¹⁰⁷ § 1.04(a) states in full:

An individual is an employee of two or more separate employers if (i) the individual renders services to each of the employers on a separate basis during a given day, week, or other time period and (ii) during such time period is subject solely to that employer’s control or supervision as provided in § 1.01(a)(3).

RESTATEMENT OF EMP’T LAW § 1.04(a).

¹⁰⁸ See, e.g., *Brasseaux v. Town of Mamou*, 1999-1584, p. 8 (La. 1/19/00); 752 So. 2d 815, 821 (part-time police officer). Not surprisingly, employment laws generally do not exclude part-time workers.

relationships with workers that are covered by interest alignment analysis.¹⁰⁹ Classifying these relationships may be difficult for both American and British tribunals applying their current tools of analysis. The first set of relationships are ones in which an employer attempts to avoid employment laws by requiring contracts that transfer to the workers the risk of some limited control over marginal production costs.¹¹⁰ These contracts also may promise an opportunity for enhanced compensation through supervision of other employees. The transfer of risk may be accomplished through requiring the employees to lease or purchase, perhaps from the employer or through the employer's financing mechanism, and also to service, equipment like a truck or lorry that is necessary for the employees' work. The employer then requires the workers to use the equipment in service to the employer for periods and in a manner that make it very difficult, though perhaps not impossible, for the worker to reap profits from other use. Most importantly, the employer continues to set sufficient conditions on the worker's use of the capital equipment during the periods of service to the employer to ensure that the worker's obligations during these periods are fully aligned with the interests of the employer.

FedEx, for instance, used this kind of system to cast the delivery drivers performing its core service as independent contractors with entrepreneurial opportunities and without protections under American employment laws.¹¹¹ FedEx required the drivers to work long hours from Tuesday through Saturday, kept full control of the drivers' territories and their compensation, determined the packages they needed to deliver each day, and required the use of specified vehicles with FedEx logos.¹¹² Numerous drivers thus challenged their classification by FedEx as independent contractors.¹¹³ Some courts that resisted classifying the

109 RESTATEMENT OF EMP'T LAW § 1.01.

110 *See, e.g.,* Corp. Express Delivery Sys. v. NLRB, 292 F.3d 777, 780 (D.C. Cir. 2002) (owner-operators may be treated as employees under the NLRA); Ready Mixed Concrete (South East) Ltd. v Minister of Pensions & Nat'l Ins. [1968] 2 QB 497 (owner-operators of lorries did not have contracts of employment). *Compare also* Roadway Package Sys., Inc., 326 N.L.R.B. 842 (1998) (finding employee status), *with* Dial-A-Mattress Operating Corp., 326 N.L.R.B. 884 (1998) (finding independent contractor status).

111 For an excellent analysis of FedEx's business model, see Julia Tomassetti, *From Hierarchies to Markets: FedEx Drivers and the Work Contract as Institutional Marker*, 19 LEWIS & CLARK L. REV. 1083, 1085 (2015).

112 *See, e.g.,* FedEx Home Delivery v. NLRB, 563 F.3d 492, 510-511 (D.C. Cir. 2009) (Garland, J., dissenting) (discussing the factual findings of the NLRB Regional Director). *See also* Tomassetti, *supra* note 111, at 1111 and cites therein.

113 *See, e.g.,* Gray v. FedEx Ground Package Sys., Inc., 799 F.3d 995, 997 (8th Cir. 2015) (rejecting summary judgment of employee status); *In re* FedEx Ground Package Sys., 792 F.3d 818,

drivers as employees were influenced in part by FedEx's policy of allowing some drivers to be compensated for the hiring and supervision of other drivers on their routes or even in multiple routes.¹¹⁴ Some courts also were influenced by FedEx's claims that the drivers' capital investment in their trucks provided them with an entrepreneurial opportunity to adjust their returns, through their responsibility for truck maintenance or their formal freedom to use the trucks on off days or to sell their trucks along with the transfer of their routes.¹¹⁵

Whatever the extent of the FedEx drivers' limited control over their trucks, or over other drivers on other routes, and the even more limited extent to which this control was exercised, however, the drivers were not able to deploy their trucks to serve their independent interests during the periods in which they were obligated to deliver FedEx packages on their own routes. They did not have any discretion to enhance their returns for their delivery work during this period except by advancing FedEx's interests through delivering more packages.¹¹⁶ They had no discretion to use cheaper trucks or other equipment or to do other work during their mandated time of service to FedEx; their obligations during these hours were fully aligned with the interests of FedEx.¹¹⁷ Thus, just as FedEx, under this business model, should have been vicariously liable to any third party injured by a negligent FedEx driver during the delivery of FedEx

821 (7th Cir. 2015) (holding that drivers were employees as a matter of Kansas law, based on certified opinion of Kansas Supreme Court); *Carlson v. FedEx Ground Package Sys., Inc.*, 787 F.3d 1313, 1316, 1328 (11th Cir. 2015) (rejecting summary judgment of independent contractor status); *Slayman v. FedEx Ground Package Sys., Inc.*, 765 F.3d 1033 (9th Cir. 2014) (holding drivers were employees as a matter of California law); *FedEx Home Delivery v. NLRB*, 563 F.3d 492 (D.C. Cir. 2009) (holding that NLRB could not protect drivers as employees).

114 *See, e.g.*, *Gray v. FedEx*, 799 F.3d at 1000; *FedEx Home Delivery v. NLRB*, 563 F.3d at 499; *In re FedEx Ground Package Sys., Inc.*, 734 F. Supp. 2d 557, 562, 588-89 (N.D. Ind. 2010).

115 *See, e.g.*, *Gray v. FedEx*, 799 F.3d at 1001; *FedEx Home Delivery v. NLRB*, 563 F.3d at 500; *In re FedEx Ground Package Sys., Inc.*, 734 F. Supp. 2d at 596-97.

116 FedEx's claim that the opportunity to transfer routes along with trucks made the drivers entrepreneurs seems exaggerated because FedEx retained the discretion to reassign territory, and did so to maintain strict control over the volume of work in each area. *See Tomassetti, supra* note 111, at 1111. Thus, a driver could not enhance the value of a route for future sale by providing good service to attract additional customers.

117 Theoretically, drivers could marginally enhance or detract from their net returns for their hours of service to FedEx by lower-cost use of their trucks in anticipation of their ultimate sale when transferring their routes. However, FedEx provided support for truck maintenance, taxes, and insurance, and exercised control over route transfers. *See FedEx Home Delivery v. NLRB*, 563 F.3d at 510-511 (Garland, J., dissenting). Drivers who supervised other routes might have been able to enhance their independent returns if FedEx permitted them to control costs on these routes, including the wages of subordinate drivers, but even if they operated as independent businesses through such supervision, they still were employees on their own routes. *See Craig v. FedEx Ground Package Sys., Inc.*, 335 P.3d 66, 93 (2014) (holding under Kansas law that drivers were employees on the routes they service personally even if responsible for other routes).

packages, so should FedEx have been responsible for any employment benefits and protections, including for collective bargaining, associated with their drivers' work delivering packages for FedEx.

The second currently salient set of cases illuminated by interest alignment analysis involves the assignment of work through a digital platform that neither provides any guarantee of work nor requires any particular commitment to work.¹¹⁸ The absence of mutual commitments indicates why digital platforms could pose difficulty for the application of British statutes that condition coverage on the existence of a contract of employment that requires mutual obligations. However, as the example of Uber drivers demonstrates, digital platforms have presented classification controversies for American tribunals as well.¹¹⁹ Even liberal academics, like the economist Alan Krueger and the law professor Seth Harris, both Obama administration veterans,¹²⁰ have taken the position that the discretion of workers like Uber drivers to choose when to make themselves available to work probably removes them from the status of employee under American common law and requires the formulation of a new legal category of "independent worker," with some protections, not including the minimum wage guaranteed employees covered by the FLSA.¹²¹

Nevertheless, a decision of a British Employment Tribunal in *Aslam v. Uber*¹²² appropriately treated Uber drivers as workers under the second "(b) limb" of the definition in the NMWA, the WTR regulations, and the Employee Rights Act 1996,¹²³ based on a rich contextual multifactor analysis. Unlike the ex-Obama administration officials, the Tribunal recognized that the drivers were as much in need of the protection of the applicable employment laws as drivers of a traditional transportation

118 For various discussions, see Jeremias Prassl & Martin Risak, *Uber, Taskrabbit, & Co.: Platforms as Employers? Rethinking the Legal Analysis of Crowdwork*, 37 COMP. LAB. L. & POL'Y J. 619 (2016); Rogers, *supra* note 78; Nat'l Emp. L. Project, *Employers in the On-Demand Economy* (2016); Keith Cunningham-Parmeter, *From Amazon to Uber: Defining Employment in the Modern Economy*, 96 B.U. L. REV. 1673, 1684-1688 (2016); Wilma B. Liebman & Andrew Lyubarsky, *Crowdwork, the Law, and the Future of Work*, PERSPECTIVES ON WORK, 2016; Seth D. Harris & Alan B. Krueger, *A Proposal for Modernizing Labor Laws for Twenty-First-Century Work: The "Independent Worker"*, (The Hamilton Project, Washington, D.C., Dec. 2015).

119 See, e.g., Cunningham-Parmeter, *supra* note 118, at 1688, for cases filed against Uber's classification of its drivers as independent contractors rather than employees.

120 Harris served, inter alia, as Deputy Secretary of Labor, and Krueger was Chairman of the Council of Economic Advisors. See Harris & Krueger, *supra* note 118, at 34.

121 See Harris & Krueger, *supra* note 118, at 20.

122 *Aslam v. Uber B.V.* [2016] IRLR 4, aff'd [2017] RTR 14 (Eady, QC).

123 See *supra* text accompanying notes and notes 57-60.

company.¹²⁴

Assigning the drivers an appropriate full employee status would be much easier and more straightforward, however, under § 1.01 of the Restatement of Employment Law, through analysis that asked simply whether the drivers were able to utilize their capital and controlled labor in their own interest without directly benefiting aligned Uber interests in doing so. Working under the business relationships as described in *Aslam*,¹²⁵ the drivers could not. After logging on to make themselves available for Uber-solicited rides, the drivers had to accept most fares that Uber offered.¹²⁶ Uber set the price the riders paid, collected the fare, and paid the drivers a share.¹²⁷ Uber also prohibited the drivers from exchanging information to form future relationships with riders.¹²⁸ While in Uber's pool of available drivers, drivers had no discretion to use the limited capital invested in their cars in a way that could benefit them without proportionately benefitting Uber.¹²⁹ The drivers' duties were fully aligned with Uber's interests.

Thus, just as the Uber described in *Aslam* should be vicariously liable to riders or other third parties for injuries caused by the negligence of Uber drivers, so should Uber presumably be responsible for ensuring the protections and benefits defined in employment statutes. An Uber driver's ability to use a car at a different time for the riders of a competitor like Lyft is irrelevant. The alignment analysis is applied to particular work; as

124 See *Aslam*, [2016] IRLR 4 [86-97].

125 See *id.* [15-58]. For another consistent description of the Uber business model, see *O'Connor v. Uber Techs.*, 82 F. Supp. 3d 1133, 1135-1137 (N.D. Cal. 2015) (denying Uber's motion for summary judgment based on claims drivers were independent contractors for purposes of California Labor Code). For a description of a similar business model of Uber's prime competitor, see *Cotter v. Lyft, Inc.*, 69 F. Supp. 3d 1067, 1069-1073 (N.D. Cal. 2015) (denying cross motions for summary judgment on whether drivers are independent contractors or employees for purposes of California Labor Code). See also *Case C-434/15, Asociacion Profesional Elite Taxi v. Uber Sys. Spain*, 2017 (Uber connecting individuals with drivers constitutes the provision of transportation services and thus can be regulated as such by EU member states).

126 See *Aslam* [2016] IRLR 4 [48], [52-54].

127 See *id.* [18-21].

128 See *id.* [50].

129 The fact that drivers could use their vehicles at other times to serve other interests is irrelevant to the question of whether an employer has sufficient control of the use of the vehicles during particular periods to ensure that the vehicles' use is aligned with its interests. To be an independent business person, a service worker during the period of service must have control over the use of any relevant capital goods; ownership of the goods is not sufficient. Furthermore, modern computer technology enables firms with more significant capital to exercise periodic control of capital owned by service workers. See Julia Tomassetti, *Does Uber Redefine the Firm? The Postindustrial Corporation and Advanced Information Technology*, 34 HOFSTRA LAB. & EMP. L. J. 1, 63-65 (2016).

noted above,¹³⁰ a worker may have multiple employers seriatim.¹³¹

The work of service providers connected to clients or customers by a digital platform need not be aligned with the interests of the platform in all cases, however. If digital workers merely pay their platform a flat facilitation or finder's fee for each connection¹³² and also retain discretion to bargain for their own price with the threat of non-service, employee status is not appropriate because the workers' obligations are not aligned with the interests of the platform. Worker obligations and platform interests would not be aligned in that case because the platform benefits from further connection fees made possible by satisfied customers who feel they received a good bargain, while the workers are free to attempt to reap greater benefits only for themselves by deploying their labor and capital at a higher price without Uber garnering a higher commission. The ability to take a higher proportion of a higher price, perhaps through cost control discretion, as well as the discretion to set a price,¹³³ is necessary for independent business status, however. Even if a worker is delegated price setting discretion for a business, as long as the business reaps a percentage of the net returns for the worker's service, the worker's service obligations stay closely aligned with the interests of the business.¹³⁴

¹³⁰ See *supra* text accompanying note 107.

¹³¹ Some courts, however, have mistakenly treated the freedom of workers to work at different times for other employers or even for themselves as a critical factor in disproving their employment during particular work for one employer. See, e.g., *Saleem v. Corp. Transp. Grp., Ltd.*, 854 F.3d 131, 141-144 (2d Cir. 2017) (issuing summary judgment against black car drivers seeking employment status with dispatch company that negotiated fees with clients and received a portion of the drivers' fares). The *Aslam* tribunal, in contrast, appropriately, and in accord with the Restatement of Employment Law, treated the time when the Uber drivers had their Uber app turned on as separable from time when they might have worked for possible competitors.

¹³² In defending their treatment of drivers as independent businesses, Uber and Lyft have claimed to be mere facilitators of a product market between drivers and riders. See Tomassetti, *supra* note 129, at 13-16. This claim fails because the firms assign particular drivers and take a percentage of the fares they set rather than take a set fee and allow a free market to set fare levels. See *id.* at 23-28.

¹³³ Taxi drivers who must charge regulated fares, but pay a dispatching firm only a set fee to lease their cabs, rather than any portion of their fares, still may provide service in alignment with the interests of a dispatching firm exercising quality control to ensure well served and satisfied customers. The drivers can make more money only by working harder, rather than by any entrepreneurial allocation of capital or the labor of others. See, e.g., *Yellow Cab Coop., Inc. v. Workers' Comp. Appeals Bd.*, 277 Cal. Rptr. 434 (Cal. Ct. App. 1991) (lessor cab company exercised sufficient control over lessee drivers to be employer for purposes of workers' compensation law).

¹³⁴ The alignment is close but admittedly not perfect, however, in a case where workers have some control of costs through use of their own capital on jobs for which they have discretion to set prices. For instance, if Uber drivers could set prices for rides in vehicles they owned, the drivers rationally would prefer to set higher prices than would Uber sharing proportionately in the fares. This is because the drivers would have to pay for depreciation of their vehicle. Because there presumably is less depreciation if there are fewer rides at higher rates, drivers would benefit a little more from higher prices than would Uber. In addition, a rider's dissatisfaction from having to pay a high fee might be

In the real commercial world, most digital platforms, like Uber, charge a percentage commission to align their interests with the duties of workers to serve the platforms' clients or customers.¹³⁵ Most platforms also do not afford discretion to workers to pursue their independent interests by bargaining for special, higher returns from clients or customers identified by the platforms.¹³⁶ Thus, most work assigned or obtained through a platform should qualify as fully protected employment.¹³⁷

This protection of work secured through digital platforms should not be limited to certain statutes because the work is casual or part time, or because the work was not performed under a "global" or "umbrella" contract with a mutuality of obligations. First, contrary to the assertion of Harris and Krueger, the coverage of most platform workers, no more than the coverage of other causal or part time workers, poses no intractable problem for benefits or protections that "depend on the measurement of working hours."¹³⁸ Harris and Krueger contend that the inability to determine the hours of digital workers like Uber drivers with discretion to decide when and how long to work, and even whether to work for competitors, means that they cannot be assured a minimum wage under the FLSA. As the Tribunal in *Aslam* explained, however, the Uber drivers were at work for Uber whenever they logged on to the Uber app and made themselves available for an Uber assignment.¹³⁹ Similarly, under the FLSA, workers unable to attend to personal business during hours while waiting on-call from their employer must be compensated for those

directed to some extent at all Uber drivers, while the driver charging the high fee reaped all of the driver's proportion of that fee.

135 Mechanical Turk, Task Rabbit, and Upwork, for instance, all impose fees set as a percentage of the payment to workers. See Harris & Krueger, *supra* note 118, at 31-32; *Pricing*, AMAZON MECHANICAL TURK, www.mturk.com/pricing (last visited Oct. 30. 2018); UPWORK, www.upwork.com (last visited Oct. 30. 2018); TASKRABBIT, www.taskrabbit.com (last visited Oct. 30. 2018).

136 As long as it takes a commission, a platform can align its interests with individual workers' duties even if, like Upwork, *supra* note 135, it allows its clients or customers to set price levels for variant tasks. Employer status for a platform that commands a percentage commission only should be denied for a platform that connects clients with businesses that can perform a task with discretion to allocate capital and labor for their own profit. By cutting costs, such businesses have discretion to pursue independent higher profits at any commission level.

137 Indeed, in cases where workers do not exercise control over their own capital or have the ability to assign labor during performance of a task assigned through the platform, the workers may be jointly employed by the served client as well as by the platform. See *infra* text accompanying notes 166-172.

138 Harris & Krueger, *supra* note 118, at 20.

139 See *Aslam v. Uber B.V.* [2016] IRLR 4 [86], *aff'd* [2017] RTR 14 (Eady, QC). See also *Addison Lee Ltd. v. Gascoigne* [2018] EAT/0289/17/LA (UK) (finding couriers to be covered workers when they logged in to accept assignments with pay and routes set by company).

hours.¹⁴⁰ Indeed, computer-based records make the determination of on-call work hours easier in the modern economy. Such records also can be used to determine whether the worker has worked enough hours for enough weeks over a long enough period of time to meet other statutory minima for benefits such as family leave, sick pay, holiday pay, redundancy pay, or even protection from unfair dismissal in the United Kingdom. There may have to be adjustments from the default coverage rule advocated here for maximum hour or overtime rules for workers who unilaterally can set unlimited long hours, free from employer pressure, but such adjustments do not require adoption of a general intermediate category of workers no less in need of most employment protections and benefits.

Second, the explanation offered by the *Aslam* Tribunal of how the Uber drivers met the requirement of there being a “contract” under limb (b) of the definition of worker in the statutes applicable to the case also can be used to cover the drivers as employees under limb (a).¹⁴¹ If, as stated by the Tribunal, there is no need for an “overarching ‘umbrella’ contract” for there to be a “‘worker’ contract” covering periods during which a driver has the driver’s “App switched on” and is able and willing to accept assignments within an authorized territory,¹⁴² there also can be a contract of employment for even those short periods. Just as American law does not require an intermediate category for protected workers who are not employees, British law should not distinguish between employees and workers for purposes of some critical statutory protections.

VI. JOINTLY RESPONSIBLE EMPLOYERS

The kind of contracts treated in *Aslam v. Uber* as sufficient for worker status, using the “contract of employment” model as a condition of responsibility for employment protections, nonetheless poses even greater problems in the U.K. in cases where an employee’s duties are aligned with the interests of multiple parties, but the employee is in privity of contract with only one.¹⁴³ Joint responsibility for the torts of controlled workers has

140 See, e.g., *Halferty v. Pulse Drug Co.*, 864 F.2d 1185, 1189 (5th Cir. 1989) (“whether the employee can use the [on-call] time effectively for his or her own purposes” is critical issue). See generally Eric Phillips, *On-Call Time Under the Fair Labor Standards Act*, 95 MICH L. REV. 2633 (1997).

141 For the full definition, see *supra* note 40.

142 *Aslam* [2016] IRLR 4 [85-86].

143 British law of vicarious liability also has been hostile to the joint liability of two employers since dicta in *Laugher v. Pointer* (1826) 108 Eng. Rep. 204, 5 B & C 547, 558: “[t]he law does not

been recognized by American courts,¹⁴⁴ however, and can be supported by the controlling principle of reciprocal cost internalization that underlies *respondeat superior* liability. Under similar analysis, in some cases more than one employer can be assigned responsibility for ensuring to particular workers the protections and benefits promised by modern employment statutes.

Section 1.04(b) of the Restatement of Employment Law restated American law's recognition of the possible responsibility of multiple entities to internalize the same costs of employee protections and benefits. The section states that "an individual is an employee of two or more joint employers if (i) the individual renders services to at least one of the employers and (ii) that employer and other joint employers each control or supervise such rendering of services as provided" in the section defining the employment relationship discussed above.¹⁴⁵

This Restatement section reflects American judicial and administrative decisions recognizing "joint employer" responsibilities for the provision of protections and benefits secured by employment statutes.¹⁴⁶ Joint employers are distinct from single employers under American law. Single employers are under common ownership and control and thus do not have distinct ultimate interests.¹⁴⁷ Joint employers do have distinct interests.

recognize a several liability in two principals who are unconnected." *See also, e.g.,* Mersey Docks & Harbour Bd. v. Coggins & Griffith (Liverpool) Ltd., *sub nom.* McFarlane v. Coggins & Griffith (Liverpool) Ltd. [1947] AC 1, [1946] 2 All ER 345 (HL). In this century, however, some British courts have accepted the possibility of more than one employer being vicariously liable for the same torts of one employee serving the interests of both employers. *See, e.g.,* Viasystems (Tyneside) Ltd. v. Thermal Transfer (Northern) Ltd. [2005] EWCA (Civ) 1151, [2006] QB 510 (finding two employers liable for the negligence of one employee that served both). The American vicarious liability law recognized joint vicarious liability earlier. *See, e.g.,* Siidekum v. Animal Rescue League, 45 A.2d 59 (Pa. 1946).

144 *See, e.g.,* Morgan v. ABC Mfr., 97-0956 (La. 5/1/98); 710 So. 2d 1077, 1085; Vargo v. Sauer, 576 N.W. 2d 656, 665 (Mich. 1998). *See also* Kelley v. S. Pac. Co., 419 U.S. 318 (1974) (application under the Federal Employers' Liability Act, 45 U.S.C. §§ 51-60); RESTATEMENT (SECOND) OF AGENCY § 226 (AM. LAW INST. 1958) ("person may be the servant of two masters . . . at one time as to one act, if the service to one does not involve abandonment of the service to the other.").

145 RESTATEMENT OF EMP'T LAW § 1.04(b) (AM. LAW INST. 2015).

146 *See, e.g.,* Boire v. Greyhound Corp., 376 U.S. 473 (1964) (finding joint employment under the NLRA); Rutherford Food Corp. v. McComb, 331 U.S. 722 (1947) (finding joint employment under the FLSA); Grace v. USCAR, 521 F.3d 655, 667 (6th Cir. 2008) (finding joint employment under the Family Medical Leave Act); Antenor v. D. & S. Farms, 88 F.3d 925, 937 (11th Cir. 1996) (finding joint employment under the Migrant and Seasonal Agricultural Worker Protection Act); Amarnare v. Merrill Lynch, 611 F. Supp. 344, 349 (S.D.N.Y. 1984) (finding joint employment under Title VII of the 1964 Civil Rights Act).

147 Determination of single employer status, for instance, is critical for regulation of overtime under the FLSA. *See, e.g.,* Chao v. A-One Med. Servs., 346 F.3d 908, 917 ("Whether two companies constitute a single enterprise for FLSA coverage and whether they are liable as joint employers . . . are technically separate issues."). *See also* 29 C.F.R. § 779.203 (2018). American labor law also uses a

Nonetheless, particular work, and thus particular workers, can serve the interests of joint employers simultaneously if the interests of each do not conflict with respect to that particular work. This will be the case where the best rendering of particular efficient service to one employer serves the interests of a second employer.

As explained more fully below, the rendering of efficient service to one employer can serve the aligned interests of a second employer in at least four kinds of relationships between the two employers. First, it can do so where one employer is paid for administering personnel policy, including staffing and hiring, termination, compensation and benefits, for a second employer that directs the performance of work in its interests.¹⁴⁸ Second, it can do so where one employer both generally controls the work and compensation of the employees as a service to a set of customers who have some discretion to direct the service in their interest and also ultimately pay for the employees' compensation.¹⁴⁹ Third, it can do so where one employer is compensated by a second employer for ensuring that work serves the interests of the second employer.¹⁵⁰ And, fourth, it may do so where the second employer otherwise has sufficient control over the first employer to ensure that the work is aligned with interests of the first employer that do not conflict with interests of its own.¹⁵¹

Assigning joint and several responsibility to two employers for the provision of the same employment benefits of course does not mean that an employee can receive double benefits any more than vicarious liability can result in double recovery for an injured third party. One employer must be assigned primary liability, presumably the employer most directly involved in the denial of the benefit. The most direct involvement usually is not difficult to identify, whether the denial of a benefit or protection comes from a discriminatory or unfair discharge, a nonpayment of a wage, the allowance of discriminatory harassment, an unsafe work place, or a refusal to discharge a duty to bargain collectively.¹⁵² Any judicial determination of primary responsibility, in any event, can be obviated by

"single employer" doctrine for determining collective bargaining responsibilities. *See* *South Prairie Constr. Co. v. Local No. 627*, 425 U.S. 800 (1976).

148 *See infra* text accompanying note 166.

149 *See infra* text accompanying notes 167-175.

150 *See infra* text accompanying notes 173-192.

151 *See infra* text accompanying notes 193-204.

152 Some British commentators have suggested solving the problem posed by "triangular" or multilateral employment relationships by assigning responsibility for particular benefits or protections to one of the involved enterprises based on its functional relationship with the worker. *See, e.g.*, JEREMIAH PRASSL, *THE CONCEPT OF THE EMPLOYER* (2017); Deakin, *supra* note 41, 36 *INDUS. L. J.* at 80-81.

indemnification agreements between the employers, which always can be negotiated in contractual relationships. Assigning responsibility to both employers thus is most important in cases where the employer that seems to have the most direct involvement is insolvent.

Assigning responsibility for protections or benefits associated with particular work to a second, less directly involved enterprise whose interests are aligned with this work provides a more meaningful limit on expanded responsibility than does relying on the “dependence” of the first employer on the second. Assigning responsibility for one directly involved employer’s employment law violations to a second employer because of the first employer’s economic “dependence” on the second, as suggested by some American courts applying an “economic realities” test,¹⁵³ the Department of Labor in the Obama administration,¹⁵⁴ and some commentators,¹⁵⁵ could expand liability to totally independent businesses. Small businesses, such as restaurants, pharmacies, and barber shops, for instance, may be completely “dependent” on the continued proximate presence of a large manufacturing plant or office building. Clearly, the enterprise operating the plant or office building should not be responsible for the protection of one of the small business’s employees.

To be sure, in the case of proximate small businesses dependent on the presence of large independent employers, there is not a contractual relationship between the small business and the large business on which assignment of primary responsibility and cost internalization could be based. Even when there is a contractual relationship between two fully independent businesses with somewhat opposed interests, however, the mere dependence of one on the other does not make a strong case for the assignment of responsibility to the second for the protection of the

¹⁵³ See, e.g., *Hopkins v. Cornerstone Am.*, 545 F.3d 338, 343 (5th Cir. 2008); *Baker v. Flint Eng’g & Constr. Co.*, 137 F.3d 1436, 1440 (10th Cir. 1998).

¹⁵⁴ See U.S. DEP’T OF LABOR WAGE & HOUR DIV., ADMINISTRATOR’S INTERPRETATION NO. 2016-1, JOINT EMPLOYMENT UNDER THE FAIR LABOR STANDARDS ACT AND MIGRANT AND SEASON AGRICULTURAL WORKER PROTECTION ACT 5, 13 (2016).

¹⁵⁵ See e.g., GUY DAVIDOV, A PURPOSIVE APPROACH TO LABOUR LAW, 1345-1349 (2016); Guy Davidov, *Joint Employer Status in Triangular Employment Relationships*, 42 BRIT. J. INDUS. REL. 727, 739 (2004). Economic dependence is generally an unhelpful concept for defining employment relationships. Workers with substantial trust funds can be employees of employers on whom they are not dependent. So can workers with special skills that would enable them to work for many employers if they were discharged by one. Even a worker without independent wealth or special skills who garners a living wage from each of two employers is dependent on neither, but is still an employee of both. And a worker assigned to many clients by an agency or a digital platform can be an employee of both the clients and the agency or platform. See *infra* text accompanying notes 167-172. The opposite of “independent” as a modifier of “contractor” should be “aligned in interest” rather than “dependent.”

employees of the first.

Assume, for instance, that a manufacturer of specialized tubing sells a substantial majority of its tubing at a negotiated price to one pipeline manufacturer. Work at the tubing production plant benefits the pipeline manufacturer, and the pipeline's manufacturer's payments for the tubing influences the compensation of the tubing company's employees. Nonetheless, the tubing work is performed under the direction and control of the tubing company's managers aligned only with the tubing company's interests. The tubing company's management decides how much capital and what type is to be used in production. This management also decides how much and what quality of labor to employ and how that labor is to be motivated. These decisions are made in the ultimate interests of the tubing company, not in those of the pipeline manufacturer. The tubing company wants to satisfy the pipeline manufacturer at the lowest production costs possible. The manufacturer wants the best quality product possible at the price for which it has contracted. Even if the pipeline manufacturer limits the pay of the tubing company's employees by what it pays for tubing, an alignment-of-interests analysis explains why the tubing manufacturer's economic dependence on the pipeline manufacturer provides an insufficient basis for the pipeline manufacturer's responsibility for the tubing manufacturer's employees.¹⁵⁶

The alignment of interests test thus denies joint employer status based on mere economic dependence or dominance, but it also illuminates why such status is appropriate in the four situations noted above. The clearest case for joint employment is provided by the first of these situations, where one employer is paid for administering personnel policy for a second employer that directs the performance of work in its interests. However, this case has posed a difficult problem for U.K. law.

The problem for U.K. law derived in part from conditioning employment status on the existence of a "contract of employment." Workers supplied, compensated, and administered by an employment agency whose business is the provision of temporary workers do not have any actual contract with a client or user enterprise that directs their work in this client's interest.¹⁵⁷ The workers' only formal contractual relationship is with the employment agency, which in turn is in privity with the client

¹⁵⁶ See, e.g., *Martinez v. Combs*, 231 P.3d 259 (Cal. 2010) (produce merchant's ability to leverage payments to farm producer could influence farm worker pay, but did not make merchant employer of farm workers whose work it did not direct or directly compensate).

¹⁵⁷ See Davidov, *Joint Employer Status in Triangular Employment Relationships*, *supra* note 155, at 731-32.

or user enterprise. Thus, the suggestion in some British cases that temporary agency workers may have an implied contract of employment with the end user has not proven to be durable.¹⁵⁸

Some earlier decisions, moreover, had held an employment agency's contract with its workers not to be a contract of employment¹⁵⁹ because the agency had no obligation to provide, and the workers had no obligation to accept, further work.¹⁶⁰ Though decisions now recognize as adequate the temporary worker's contract with the agency during a single engagement with the user employer,¹⁶¹ these engagements are often too short to ensure coverage under statutes that require a qualifying period.¹⁶² Moreover, some decisions held that an employment agency in any event could not be an employer of workers who were not subject to its control at their work place.¹⁶³

The problem of having no responsible employer has been addressed under the Working Time Regulations and the National Minimum Wage Act by assigning a contractual obligation to the employer with the responsibility to compensate the workers in cases where a contract between the worker and one of the employers otherwise cannot be found.¹⁶⁴ Like the limb (b) definition of worker, however, this does not cover some of the employment benefits and protections offered by U.K. law.¹⁶⁵ Furthermore, no U.K. law or decisions seems to recognize

158 *Compare* *Dacas v. Brook St. Bureau (UK) Ltd.* [2004] ICR 1437, [2004] IRLR 358 (CA) (Mummery, LJ) (dicta suggesting that dismissed agency cleaning worker might have had a claim against end user through an implied contract of serve), *with* *Smith v. Carillion (JM) Ltd.* [2015] EWCA (Civ) 209, [2015] IRLR 467 (CA) (Civ), *and* *Alstom Transport v. Tilson* [2010] EWCA (Civ) 1308, [2011] IRLR 169 (CA) (Civ) (both rejecting a claim based on implied contract with end user of services).

159 Temporary workers were described as working under contracts *sui generis* rather than under a contract of employment with either the supplier or user firm. *See* *Constr. Indus. Training Bd. v. Labour Force Ltd.* [1970] 3 All ER 220 (QBD).

160 *See, e.g.,* *Wickens v. Champion Emp't* [1984] ICR 365 (EAT). *See also* *Pertemps Grp. Plc v. Nixon* [1993] EAT (UK), *discussed in* DEIRDRE MCCANN, *REGULATING FLEXIBLE WORK* 41 (2008).

161 *See, e.g.,* *McMeechan v. Sec'y of State for Emp't* [1997] IRLR 353, 357, 360.

162 Most importantly, protections against unfair dismissal and for redundancy payments now require qualifying periods of two years. *See* *Employment Rights Act 1996*, c.18, § 108(1).

163 *See, e.g.,* *Montgomery v. Johnson Underwood Ltd.* [2001] EWCA (Civ) 318, [2001] ICR 819, [2001] IRLR 269.

164 *See* *National Minimum Wage Act 1998* c. 39 § 34; *The Working Time Regulations 1998*, SI 1998/1883, reg. 36. Depending upon its interpretation, the *Agency Workers Regulations 2010* reg. 5, also may mitigate, but not solve, the problem. SI 2010/93. This regulation was issued to accord with the EU's *Temporary Agency Work Directive (2008/104/EC)*, to ensure agency workers the right to equal treatment with the permanent work-force of the end user. *See* GWYNETH PITT, *PITT'S EMPLOYMENT LAW* 117-18 (10th ed. 2016).

165 *See supra* text accompanying notes 64-70.

expressly that both an employment agency and an end user employer could be responsible for ensuring minimum benefits or protections.¹⁶⁶

In the United States, where an employment relationship can exist in the absence of a formal contractual relationship, there has been recognition that an end user can be a joint employer of employees supplied by a staffing agency that supplies and manages the benefits and compensation of employees in behalf of the end user.¹⁶⁷ Thus, § 1.04(b) of the Restatement of Employment requires only that a jointly employed worker provide service to at least one of the employers, and that both employers each control or supervise the rendering of services in order to ensure the alignment required for employment status by § 1.01.¹⁶⁸

The alignment of interests condition is regularly met for both employers in the case of workers supplied and administered by temporary staffing agencies because the staffing agency is best served when the temporary employees provide the best service to the user employer. Effective service of the user employer will more likely result in a continuation of the compensated commercial relationship between the two employers that is in the interest of the staffing agency. This is equally true for staffing agencies that place employees through digital platforms.

Note, however, that this confluence of interests between the staffing agency and the user employer may not exist if the staffing agency is paid only a fee for the provision of workers rather than for a continuing administration of their benefits or other personnel matters. While the goodwill of the staffing agency would be impaired by referring workers that provided ineffective service, a staffing agency that collects fees only for placement may not have the same investment in the continuing service of the employment of those it places. A staffing agency that collects only a placement fee, for instance, would gain no continuing benefit if a user employer extended a worker's service after finding the worker particularly productive.

A problematic British case illustrates the second type of joint employment alignment, where one employer generally controls both the work and compensation of the employees as a service to customers who

166 However, under the Equality Act 2010 § 41, a client firm as a "principal" may not discriminate against a temporary worker under contract with an agency in cases where an employer may not discriminate against an employee. Equality Act 2010 c. 15. *See, e.g.*, *Abbey Life Assurance v. Tansell* [2000] EWCA (Civ) 107, [2000] IRLR 387 (EAT). *See also* Health and Safety at Work Act 1974 c. 37, § 3 (requiring employers to ensure as far as reasonably practicable that non-employees are not exposed to risks to their health and safety).

167 *See, e.g.*, *Grace v. USCAR*, 521 F.3d 655, 667 (6th Cir. 2008).

168 RESTATEMENT OF EMP'T LAW §§ 1.01, 1.04(b) (AM. LAW INST. 2015).

ultimately pay the compensation and have discretion to direct the service in alignment with their interests. In *Cheng Yuen v. Royal Hong Kong Club*,¹⁶⁹ a golf club trained, disciplined, assigned, and compensated caddies who assisted the club's members during their golfing rounds. The club debited the members at a set fee for the caddies' services. The caddies' responsive services thus were aligned with the interests both of the club and of the members, although the Privy Council, denying an option of joint employment, viewed the members as the caddies' only employers.¹⁷⁰

In some cases the clients of digital platforms might be joint employers along with the platforms of workers assigned by the platforms. This is probably not the case for Uber's passengers. Because Uber controls its drivers' routes, vehicles, and fares,¹⁷¹ Uber passengers cannot ensure their drivers' direct service of their interests, as might the golfers in *Cheng Yuen*. However, clients of a platform that takes a percentage commission, but allows the clients some discretion to control the work and negotiate a fee, are similar to the golfers.

Neither the *Aslam* tribunal nor other tribunals have been asked to find a joint employment relationship in cases involving platforms because no one has claimed the clients to be employers. The lack of such claims is not surprising for several reasons, including the absence of continuing service to particular clients. That absence of continuity presents a legal hurdle for liability under employment laws in the U.K.¹⁷² and a logistical hurdle for employment laws in the U.S.¹⁷³

The third type of continuing joint employer relationship based on aligned interests, where one employer is compensated by a second employer for ensuring that work serves the interests of the second employer, has posed particular problems even for American legal doctrine that recognizes the possibility of joint employment. The problems have become more salient as what Hugh Collins almost three decades ago

169 *Yuen v. Royal Hong Kong Golf Club* [1998] ICR 131 (PC).

170 For a criticism of the decision and an argument that both the club and the members were employers, see Paul Davies & Mark Freedland, *Labour Markets, Welfare, and the Personal Scope of Employment Law*, 16 OXFORD REV. ECON. POL'Y 84, 92-93 (2000). For a more recent similar case, see *Stringfellow Restaurants Ltd. v. Quashie*, [2012] EWCA (Civ) 1735, [2013] IRLR 99 (CA) (lap dancers jointly employed by club as well as by club's clients).

171 See *supra* text accompanying notes 126-128.

172 See *supra* text accompanying notes 51-52.

173 Collective bargaining, for instance, cannot be practical or meaningful with a series of short term joint employers, nor is it feasible to enforce wage, overtime, or leave regulations against such employers. On the other hand, the enforcement of health and safety regulations or anti-discrimination prohibitions against a short term client-employer might be appropriate and feasible in some cases.

termed the “vertical disintegration” of modern capitalist economic production systems has proceeded apace.¹⁷⁴

The most important aspect of this disintegration, more recently and famously termed “fissuring” by David Weil,¹⁷⁵ the last Administrator of the Wage and Hour Division of the Department Secretary of Labor during the Obama administration, is not the formal conversion of individual employees into independent contractors, but rather the increased division of operational responsibilities through out-sourcing or subcontracting. Much of this increased fissuring has been driven by financial calculations that more specialized businesses concentrating on what are called “core competencies” can be more efficient.¹⁷⁶ Much of it also has resulted from labor cost savings that derive from subcontractors being able to use lower compensated workers from secondary labor markets not as available for central businesses that require a more permanent, skilled, and highly compensated internal labor market where workers are attuned to horizontal equity in wages.¹⁷⁷ Some of it, however, may derive from secondary labor market contractors being less concerned with the reputational costs of non-compliance with employment laws.¹⁷⁸

Applying an alignment of interests test does not impose joint employer business status on all central business operations benefitted by subcontracting. Even a subcontractor attractive to a central business because of lower labor costs partially based on reduced compliance with employment statutes may control its workers to advance interests not fully aligned with those of the central business. Consider, for instance, the usual subcontracting of cleaning services for hospitals, office buildings, commercial stores, and manufacturing plants. Cleaning subcontractors chosen because of their low labor costs, even if in part associated with noncompliance with employment laws, may be free to assign and direct their employees and allocate their limited capital in their own interest of doing satisfactory work at the lowest cost. The somewhat misaligned

174 See Collins, *supra* note 101, at 354.

175 See DAVID WEIL, *THE FISSURED WORKPLACE 7* (Harvard Univ. Press 2014).

176 See, e.g., *id.* at 49-52; Collins, *supra* note 101, at 356-58.

177 See, e.g., *id.* at 360; WEIL, *supra* note 175, at 85-88; Davidov, *Joint Employer Status in Triangular Employment Relationships*, *supra* note 155, at 730-31.

178 See Minwoong Ji & David Weil, *The Impact of Franchising on Labor Standards Compliance*, 68 *INDUS. & LAB. REL. REV.* 977 (2015) (finding far higher levels of noncompliance with minimum wage and overtime standards in franchised outlets than in comparable franchisor-owned outlets in fast food industries). The authors conclude that their data “suggests the importance of brand reputation as an explanation of the overall differences in compliance behavior” because franchisees are less concerned with the general impact of noncompliance on brand reputation. *Id.* at 1003.

interests of the office buildings are to receive the highest quality service possible, not just satisfactory service, at the contracted for price.

In some cases, however, a central business hires subcontractors to reduce labor costs without allowing the work they supply to deviate from alignment with the interests of the central business. These subcontracts produce a joint employer relationship. Consider the stated facts of the controversial 2015 *Browning-Ferris Industries of California, Inc.* (BFI) case, upon which a Labor Board appointed by President Obama based a finding of joint employment.¹⁷⁹ BFI operated a recycling facility for the sorting of materials into separate commodities to be sold to other businesses. BFI directly employed around the facility some managers, supervisors, and skilled specialists, including union-represented operators of heavy equipment.¹⁸⁰ The main operation inside the facility consisted of several conveyor belts, from which passing material was sorted by relatively unskilled workers standing on platforms.¹⁸¹ The sorters were supplied by a subcontractor, which processed their compensation and provided direct supervision of their work. The subcontractor also supplied, compensated, and directly supervised other relatively unskilled workers who cleared jams and cleaned the sorters and the rest of the facility.¹⁸² The recycling business reimbursed the subcontractor for the subcontractors' workers compensation, adding a percentage mark-up pursuant to what was essentially a cost plus contract.¹⁸³ The subcontractor could set compensation levels, as long as they were below the pay range set by the

179 *Browning-Ferris Indus. of Cal.*, 362 N.L.R.B. 186 (2015). The Board's decision in the case provoked an outcry in the business community, leading to the introduction of legislation to state a different standard for joint employment that would depart from the common law. Save Local Business Act, H.R. 3441, 115th Cong., (2017). The *BFI* decision unremarkably formulated a standard for joint employment that required each employer to satisfy the common law standard for employment, but the decision also rejected language in recent Board decisions that required a joint employer's control over employees to be exercised "directly" and "immediately" and not in a "limited and routine" manner. *Browning-Ferris Indus. of Cal.*, 362 N.L.R.B. at 15-16. Even though arguably not necessary to the decision in *BFI*, the Board, perhaps with insufficient elaboration, held that a user employer's control could be sufficient for joint employment even if only exercised indirectly through controlled supervisors of a subcontractor, as long as the control was sufficient "within the meaning of the common law" and if the employers "share or codetermine those matters governing the essential terms and conditions of employment." *Id.* at 15.

The *BFI* decision was overruled by a reconstituted Board appointed by President Trump. *See Hy-Brand Indus. Contractors Ltd.*, 365 N.L.R.B. No. 156 (Dec. 14, 2017). But the *Hy-Brand* decision and the overruling of *BFI* were vacated two months later because of a determination that one of the new Board members should have been disqualified to rule in the case. *See* 366 N.L.R.B. No. 26 (Feb. 26, 2018).

180 362 N.L.R.B. at 2.

181 *Id.*

182 *Id.* at 3-4.

183 *Id.* at 4.

recycler for its own directly employed workers.¹⁸⁴ The recycler, however, could terminate the subcontract, including for excessive cost, with thirty days of notice.¹⁸⁵ The recycling business's management retained and used authority to reject any of the workers supplied by the subcontractor and to initiate discipline of any of these workers.¹⁸⁶ The recycling management controlled the pace and hours of work by setting the operation, breaks, and speed of the conveyor belts.¹⁸⁷ It also determined where the sorters and other supplied workers were to work and monitored their work hours to ensure they were not overstated.¹⁸⁸ Furthermore, the recycler's supervisors determined daily operational plans and directed the subcontracting supervisors.¹⁸⁹ In addition to giving instructions to the subcontractor's employees indirectly through the subcontractor's supervisors, the recycler's supervisors retained and sometimes used authority to issue direct instructions to the subcontractor-supplied workers, even when those instructions countermanded directions from the subcontractor's supervisors.¹⁹⁰

This scenario presents an example of joint employment under interest alignment analysis. Through its discretion to terminate the cost-plus subcontract, the recycling company was able to ensure that the subcontractor's workers were paid as it wished. Furthermore, by overseeing the supervisors of the subcontractor's workers at the recycler's plant, as well as by directly controlling the pacing and timing of work, and of the subcontractor's workers, the recycler's management could ensure that the workers' service was directly aligned with the interests of the recycler.

The Board in *BFI* did not suggest that the relationship between the recycler and the subcontractor was that of a single integrated employer. The subcontractor was not under the general control of the recycler; it presumably operated its central administrative offices independently and serviced other clients as a provider and supervisor of work. The particular work at the recycler's plant, however, was under the ultimate control of the recycler. The recycler had sufficient control to ensure that these workers did not generate returns for the subcontractor at its expense rather than for its benefit. The workers efforts were fully aligned with the

184 *Id.*

185 *Id.* at 3.

186 *Id.* at 3-4.

187 *Id.* at 4-5.

188 *Id.*

189 *Id.* at 5.

190 *Id.*

interests of the recycler. Thus, the recycler was a joint employer and should be subject to both vicarious liability for the torts of the subcontractor's employees and responsibility to ensure that these employees receive the guarantees of employment protection and benefit statutes.

Given the mandate from Congress to use a common law test for defining the employment relationship,¹⁹¹ the Board in *BFI* understandably at least purported to apply a joint employer standard based on the common law.¹⁹² The common law provides the Board with a cloak of legitimacy, just as it has provided such a cloak for the Supreme Court.¹⁹³ But because the common law standard remains murky and undefined by an ultimate policy justification, the Board's standard is less clear and more vulnerable to criticism. Used as explanation and justification, the alignment analysis suggested by the common law insight provided by the law of *respondeat superior* could provide a firmer foundation for joint employer findings in cases like *BFI*.

Alignment analysis also would supply a firmer foundation for finding joint employment relationships in the fourth type of case where they may exist, where the second employer otherwise has sufficient control over the first employer to ensure that the work is aligned with interests of the first employer that do not conflict with interests of its own. This type of case is similar to the third type, but it differs because the second employer's control over the first employer may not be limited to authority secured by contract to issue directions to the first employer to provide and manage workers in the second employer's behalf. The control may derive from a more complicated economic relationship between the two employers.

The paradigm case is the relationship between some brand franchisors and some franchisee businesses. Treating individual workers as franchisees may be a sham to avoid employment status.¹⁹⁴ True franchisees, by contrast, contribute significant capital that they have some discretion to control in their own interests, independent of those of their franchisors. Indeed, franchising presumably has proliferated and been successful because it enlists franchises to raise capital quickly for expansion¹⁹⁵ while also providing incentives – probably greater than those

191 See *supra* text accompanying note 15.

192 See discussion, *supra* note 179.

193 See *supra* text accompanying notes 19-20.

194 See, e.g., *Awuah v. Coverall N. Am., Inc.*, 707 F. Supp. 2d 80 (D. Mass. 2010) (cleaning company denominated its cleaning workers as franchisees; misclassification under Massachusetts law).

195 See JEFFREY L. BRADACH, *FRANCHISE ORGANIZATIONS* 75 (1998); JOHN F. LOVE, *MCDONALD'S: BEHIND THE ARCHES* 202 (1986). Some studies indicate that businesses facing

for managers in a large business hierarchy – for the franchisees to sell the franchisor’s brand.¹⁹⁶

Franchisor control over the operations of franchisees varies across a broad spectrum. The grant of a franchise may be little more than the authorization of the use of a trademark for purposes of product distribution, without any restriction on the franchisee’s control of its methods of operation.¹⁹⁷ Even franchisors that demand franchisees adopt a particular business format and maintain specific brand quality may cede some discretion to their franchisees to make certain operational decisions, at least subject to a right of review. Such operational discretion may cover advertising, building maintenance and decoration, and some supply contracts.¹⁹⁸ The ceded discretion also may include control over the franchisees’ workers, including their hiring, firing, discipline, compensation, staffing assignments, and working hours.

Franchise agreements that allow franchisees to maintain control over the identity, compensation, and allocation of their workers do not establish joint employment, because such agreements do not fully align the duties of the franchisees’ employees with the interests of the franchisors as well as those of the franchisees. The franchisees’ interests may conflict in part with the interests of their franchisor because the typical franchise agreement requires the franchisee to pay royalties calculated as a percentage of revenues, in addition to an initial investment and the rental of any franchisor property used by the franchisee.¹⁹⁹ Higher profit margins that derive from cost-cutting labor allocation decisions thus benefit the franchisee, while somewhat different labor allocation decisions that might enhance service could result in increased sales that would provide benefit

capital constraints are more likely to rely on franchising. See James G. Combs & David J. Ketchen, Jr., *Can Capital Scarcity Help Agency Theory Explain Franchising? Revisiting the Capital Scarcity Hypothesis*, 42 *ACAD. OF MGMT. J.* 196 (1999); Paul H. Rubin, *The Theory of the Firm and The Structure of the Franchise Contract*, 21 *J. OF LAW & ECON.* 223, 232-33 (1978).

196 Franchising thus is a response to the “agency problem” confronted by firms. See James A. Brickley & Frederick H. Dark, *The Choice of Organizational Form: The Case of Franchising*, 18 *J. OF FIN. ECON.* 401 (1987); G. Frank Mathewson & Ralph A. Winter, *The Economics of Franchise Contracts*, 28 *J. OF LAW & ECON.* 503 (1985). See generally Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 *J. OF FIN. ECON.* 305 (1976).

197 This form of franchising may be termed “trademark franchising.” See, e.g., Gillian K. Hadfield, *Problematic Relations: Franchising and the Law of Incomplete Contracts*, 42 *STAN. L. REV.* 927, 933 (1990).

198 See, e.g., the wide variation in the franchisor-franchisee contracts reviewed in Hadfield, *supra* note 197, at 940-43.

199 See Mathewson & Winter, *supra* note 196; Hadfield, *supra* note 197, at 935-36. See generally ROGER D. BLAIR & FRANCINE LAFONTAINE, *THE ECONOMICS OF FRANCHISING* (Cambridge Univ. Press 2005).

to the franchisor.²⁰⁰ Furthermore, a franchisor can maintain control of its brand reputation by maintaining control over the content and presentation of its branded product without aligning a franchisee's capital and labor allocation decisions with its interests.²⁰¹

The hopes of franchisees to maintain, or expand, profitable franchisee operations, however, are dependent upon staying in the good graces of their franchisor.²⁰² The generally dominant economic and legal position of the franchisor thus provides the potential for the franchisor to control franchisee decisions relevant to the alignment of workers' duties and efforts. A franchisor could exercise its dominant economic position to induce a franchisee to control its employees to serve the franchisee in a manner that fully aligns with the interests of the franchisor. Though a franchisor's mere potential dominance over a franchisee should not suffice to establish joint employment, it does warrant consideration of whether the franchisor has been coordinating the franchisees' control over its employees to align with its interests. That coordination could be demonstrated, for instance, by evidence that a franchisor required its franchisees to accept overall employment policies set in software provided by the franchisor,²⁰³ -software that presumptively would not direct franchisees against the franchisor's own interest.²⁰⁴

200 There is some evidence that wages at franchisee outlets are lower than those at company-owned and managed outlets. See Alan B. Krueger, *Ownership, Agency and Wages: An Examination of Franchising in the Fast Foods Industry*, 106 Q. J. OF ECON. 75 (1991). See also Roger D. Blair & David L. Kaserman, *A Note on Incentive Incompatibility Under Franchising*, 9 REV. OF INDUS. ORG. 323 (1987); John M. Barron & John R. Umbeck, *The Effects of Different Contractual Arrangements: The Case of Retail Gasoline Markets*, 27 J. OF LAW & ECON. 313 (1984).

201 See NLRB Office of the Gen. Counsel Advice Memorandum on Nutritionality, Inc. Cases 13-CA-134294 et al. (Apr. 28, 2015) ("Freshii's requirements regarding food preparation, recipes, menu, uniforms, décor, store hours, and initial employee training prior to a franchise opening are not evidence of control over ... labor relations but rather establish Freshii's legitimate interest in protecting the quality of its product and brand.").

202 See, e.g., *Ochoa v. McDonald's Corp.*, 133 F. Supp. 3d 1228, 1236 (N.D. Cal. 2015) (citing declaration of John A. Gordon, restaurant advisor and consultant: "'McDonald's is able to exercise a greater degree of control over its franchisees' restaurants . . . through control over growth and rewrite, and the ability to terminate franchise agreements for deviation from its standards.'").

Franchisors typically make no future commitments concerning maintenance or expansion in their agreements with franchisees. See Hadfield, *supra* note 197, at 944.

203 Many franchisors now provide such software, though its use may be optional. See *Ochoa v. McDonald's*, 133 F. Supp. 3d at 1237 (McDonald's "In-Store Processor" has "optional functions, like timekeeping, crew scheduling, inventory, and positioning").

204 *Cf. Cano v. DPNY, Inc.*, 287 F.R.D. 251, 260 (S.D.N.Y. 2012) (the "Proposed Defendants [franchisor] promulgated compensation policies and implemented them through the Domino's PULSE system which was used at the defendants' store and included a system of tracking hours and wages and retaining payroll records which was submitted to the Proposed Defendant for ... review.").

In 2015 the General Counsel of the NLRB filed a series of complaints against McDonald's, charging the major fast food franchisor with responsibility as a joint employer for a number of unfair

Establishing a franchisor's control over a franchisee's workers, no more than establishing a contractor's control over the alignment of the work of a subcontractor's employees or a user employer's control over a temporary agency's employees, does not establish a single employer relationship. A franchisor is primarily interested in enhancing the reputation and aggregate sales of its branded products, while the franchisee cares about the profits of its owned outlets and less about the general reputation of the brand.²⁰⁵ Thus, to the extent a franchisee's ownership and management may make independent decisions about the deployment of their capital to enhance and market their particular franchise, they will not do so in full alignment with the interests of their franchisor. Nevertheless, with sufficient franchisor control over a franchisee's employees' work, a joint employment relationship can exist in a franchising relationship without the franchise being part of the franchisor's single operations.

VII. DEPARTURE FROM THE DEFAULT RULES FOR MULTIPLE EMPLOYER RESPONSIBILITIES

Accepting the trans-Atlantic applicability of interest alignment analysis as a default standard does not mean that it should never be qualified or modified for administrative convenience or to serve the purposes of a particular statute. For instance, it may be administratively difficult to protect some casual or part time work needful of employment protections and benefits. Difficulties may arise when work, whether or not located through an online intermediary, involves service rendered independently to individual customers or clients outside the control of an assigning employer. As effectively recognized in the limb (b) section in the

labor practices alleged against some of its franchisees. The General Counsel's case, as presented before an administrative law judge, was based in part on evidence that McDonald's encourages its franchisees to use McDonald's sophisticated software to reduce labor costs by determining the operational placement, compensation, and working times of the franchisees' employees. The General Counsel's evidence may have suggested that McDonald's encouragement of the use includes effective conditioning of franchise renewal and expansion on the franchisee's acceptance of directions given by the software. Whether or not the General Counsel's evidence was sufficient to make the case that McDonald's exerts effective control over franchisee employees to align their work closely with negotiated franchisor-franchisee interests, it is not difficult to imagine such effective control being imposed through modern technology. See Tomassetti, *supra* note 129, at 63-66. McDonald's responsibilities for at least some of the alleged unfair labor practices need not have turned on a finding of its joint employer status, however. See *infra* text accompanying note 210.

²⁰⁵ See Hadfield, *supra* note 197, at 949-50.

definition of worker in the U.K. statutes,²⁰⁶ the only responsible employers for such work could be the customers or clients served. In many instances, however, a casual worker, like a yard worker or house cleaner, without control of significant capital, may not have a sufficient relationship with such customers or clients to make enforcement of employment laws against them practical or even desirable. The work often is performed for a private customer's ultimate consumption rather than to further production of an enterprise, and it is often for periods too short to trigger statutory employee benefits or protections. In order to provide equal social protection, the state may have to provide supplementary benefits, such as unemployment or other supplementary compensation and vacation pay, for sporadic part time work for the consumption of householders or other customers, without attempting to assign responsibility to a series of employers with aligned interests.

Furthermore, if some other manageable boundaries can be set, a developed economy like those of the U.S. and U.K. may wish to provide supplementary benefits even for some work outside the boundaries set for employment by alignment analysis. For instance, to achieve egalitarian distributive goals we may wish to offer supplementary benefits to independent yard workers or house cleaners without capital to allocate, but who are not employees of the householders they serve because they can use other workers as assistants and can adjust the timing of their work. We also may wish to offer supplementary social benefits to workers with limited capital such as an automobile, which they are free to use in their own interests at their own fares and routes, and without any direction from any assignment platform.

There have been analogous recent expansions of *respondeat superior* vicarious liability in special circumstances based on strong policy rationales. For instance, courts have found employers to be vicariously liable for their agents' sexual misconduct outside the scope of employment where the agents have used special power afforded by their positions over the vulnerable injured third parties. Thus, employers have been found vicariously liable for the sexual misconduct of police officers, therapists, and nurses.²⁰⁷ Interpreting Title VII of the 1964 Civil Rights Act,²⁰⁸ the

206 See *supra* note 59 and accompanying text.

207 See, e.g., *Primeaux v. United States*, 102 F.3d 1458, 1462-63 (8th Cir. 1996) (police officer's sexual assault of stranded motorist); *Plummer v. Ctr. Psychiatrists, Ltd.* 476 S.E. 2d 172, 174-75 (Va. 1996) (therapist's sexual abuse of patient); *Samuels v. S. Baptist Hosp.*, 594 So. 2d 571, 573 (La. Ct. App. 1992) (nursing assistant's rape of patient). *But see, e.g., Graham v. McGrath*, 363 F. Supp. 2d 1030, 1033-34 (S.D. Ill. 2005) (priest's sexual abuse of young parishioner was not within scope of employment); *John R. v. Oakland Unified Sch. Dist.*, 769 P.2d 948, 956 (Cal. 1989) (school district

United States Supreme Court also has crafted vicarious liability doctrine, qualified by an affirmative defense, to impose liability on employers for supervisors' discriminatory harassment of subordinate employees, even though such harassment is outside the scope of employment.²⁰⁹ These expansions of vicarious liability doctrine can be supported by an argument that the employers benefited from the delegation of authority used by the tortfeasors, even if not from the course of conduct in which the torts were committed.

In some contexts we might expand responsibility beyond the boundaries set by the symmetrical cost internalization principle that underlies *respondeat superior* for four additional reasons. First, and most obviously, we may wish to apply anti-discrimination prohibitions to commercial relationships with independent contractors as well as to employment relationships with workers who do not have discretion to operate independent businesses. American law, for instance, prohibits race discrimination in all contracts.²¹⁰

More generally, any statutory provisions that do not merely require the provision of benefits, but also proscribe particular affirmative conduct, might be applied not only against joint employers with interests aligned with the work of the employee victims, but also against other entities that have some indirect culpability for the prohibited conduct. The culpability may derive from their encouragement or facilitation of the discriminatory or other prohibited conduct. This liability would be better characterized as analogous to direct rather than vicarious liability because it is based on the fault of the facilitating employer rather than on its responsibilities to protect its employees. For instance, a franchisor or a contractor that insisted or even advised that certain of its franchisee's or subcontractor's employees be discharged because of their union involvement should be guilty of an unfair labor practice under the NLRA regardless of whether or not it is a joint employer of the discharged workers.²¹¹

not liable for teacher's sexual assault of student). For an analysis of the same issue in British law, see Paula Giliker, *Rough Justice in an Unjust World*, 65 MOD. L. REV. 269 (2002).

208 42 U.S.C. §§ 2000e *et seq.* (2018).

209 See *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 765 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 777, 807-808 (1998).

210 42 U.S.C. § 1981 (2018). See, e.g., *Danco, Inc. v. Wal-Mart Stores, Inc.*, 178 F.3d 8 (1st Cir. 1999).

211 The Labor Board has held in a series of cases that without being deemed a joint employer for purposes of collective bargaining obligations, an employer covered by the Act can be held liable for unfair labor practices against employees of another employer if the employer "involved itself directly in the employment decision at issue by directing, instructing, or ordering another employer to take an unlawfully motivated action against its employees." *Comput. Assocs. Int'l, Inc.*, 324 N.L.R.B. 285,

Third, arguments based on efficiency and distributive justice that have supported *respondeat superior* liability,²¹² as qualified by considerations of reciprocal cost internalization, might be used with less qualification to expand the employers responsible for the denial of benefits promised by particular employment statutes. Thus, some concerned with the thin capitalization and potential insolvency of certain employers have argued that any entity in a distributional or supply chain should have secondary responsibility for ensuring wages required by the FLSA proportionate to its use of the inadequately compensated work.²¹³ Indemnification clauses could ensure the assignment of primary responsibility as there would always be contractual relationships up and down supply and distributional chains.²¹⁴ Even with the insulation of such clauses, however, large companies at the center of supply chains would have incentives to protect their brands through monitoring of smaller companies in the chain, and public authorities could use this monitoring for more efficient enforcement.²¹⁵

287 (1997). *See also* Dews Constr. Corp., 231 N.L.R.B. 182, 183 (1977); Georgia-Pacific Corp., 221 N.L.R.B. 982 (1975). For a proposal that the Board impose liability on employers covered by the NLRA for unfair labor practices committed by other employers with whom they are in a close contractual relationship whenever the first employers knew or should have known of the unlawful actions and facilitated or failed to resist their commission, see Caroline Galitsos, *Beyond Joint Employer Status: A New Analysis for Employers' Unfair Labor Practice Liability Under the NLRA*, 95 B.U. L. REV. 2083 (2015).

212 *See supra* text accompanying notes 91-96.

213 *See* Timothy P. Glynn, *Taking the Employer Out of Employment Law? Accountability for Wage and Hour Violations in an Age of Enterprise Disaggregation*, 15 EMP. RTS. & EMP. POL'Y J. 201, 205 (2011) ("commercial actors would be held strictly liable for wage and hour violations in the production of any goods and services they purchase, sell, or distribute, whether directly or through intermediaries"). *Cf. also* Brishen Rogers, *Toward Third-Party Liability for Wage Theft*, 31 BERKELEY J. EMP. & LAB. L. 1, 33 (2010) (asserting that end-user firms should have a legal duty to exercise reasonable care to prevent wage and hour violations in domestic supply chains regardless of contractual relationships); Jennifer Gordon, *Regulating the Human Supply Chain*, 102 IOWA L. REV. 445, 491 (2017) (advocating "full chain" strict liability for employment abuses of recruiters in human supply chains).

214 *See* Glynn, *supra* note 213, at 232.

215 A more moderate expansion of firm responsibility to encourage controlling employer monitoring of subcontractors is suggested by the Occupational Safety and Health Administration's policy for the assignment of responsibility for safety at multiemployer construction sites. The policy imposes duties on a controlling employer, "an employer who has general supervisory authority over the worksite, including the power to correct safety and health violations itself or require others to correct them. Control can be established by the contractor, in the absence of explicit contractual provisions, by the exercise of control in practice." *See* U.S. DEP'T OF LABOR, OSHA DIRECTIVE CPL 2-0.124, MULTI-EMP'R CITATION POL'Y §§ X.B-X.E (1999). *Cf. also* W. VA. CODE § 21-5-7 (2017) ("Whenever any person, firm or corporation shall contract with another for the performance of any work which the prime contracting person has undertaken to perform for another, the prime contractor shall become civilly liable to employees engaged in the performance of work under such contract for the payment of wages and fringe benefits ... to the extent that the employer of such employee fails to pay such wages and fringe benefits ...").

Fourth, I have argued elsewhere that the American law governing collective bargaining should provide workers who choose collective representation the right to bargain collectively with commercial entities that own and derive profit from the capital that the workers directly help make productive.²¹⁶ I argued that workers should be able to attempt to share in any rent that the owners of the capital have been able to extract. This principle would not expand collective bargaining rights to employees of businesses up and down supply and distributional chains,²¹⁷ but it would empower employees of certain subcontractors that work on the capital of other employers, even those beyond the default boundaries set by alignment analysis. The capital made productive might include intellectual property, including the brand name of franchisors. If this view were adopted, franchisees could become joint employers for purposes of collective bargaining, even if not for other employment law.

CONCLUDING WORDS

Arguments for expanding or contracting the range of enterprises that have potential legal responsibilities under various employment laws based on the purposes of the laws do not necessarily obviate the need for general default definitions of employers and employees and their consequent employment relationships. Such default definitions may provide beneficial clarity and coherence if they can be derived from a sufficiently compelling general principle or standard. This essay attempts to elaborate and apply such a principle based on an insight derived from the Anglo-American common law of vicarious liability.

Whether the elaborated principle is compelling should turn not on whether it reflects formal categories derived from the language of the common law. Rather, the principle's utility as a default standard should turn on whether it provides proper incentives and a "just" and administratively feasible assignment of responsibility for worker protection and benefits.

²¹⁶ See Michael C. Harper, *Defining the Economic Relationship Appropriate for Collective Bargaining*, 39 B.C. L. REV. 329 (1998).

²¹⁷ See *id.* at 350-51.