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**Labor Platforms and Gig Work:  
The Failure to Regulate\***

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## LABOR PLATFORMS AND GIG WORK: THE FAILURE TO REGULATE

Since 2012, the platform economy has received much academic, popular, and regulatory attention, reflecting its extraordinary rate of growth. This paper provides a conceptual and theoretical overview of rapidly growing labor platforms, focusing on how they represent both continuity and change in the world of work and its regulation. We first lay out the logic of different types of labor platforms and situate them within the decline of labor protections and the rise of intermediated employment relations since the 1970s. We then focus on one type of labor platform—the on-demand platform—and analyze the new questions and problems for workers and the political problem of labor regulation. To examine the politics of regulating labor on these platforms, we turn to Uber, which is the easiest case for labor regulation due to its high degree of control over work conditions. Because Uber drivers are atomized and ineffective at organizing collectively, their issues are most often represented by surrogate actors—including plaintiffs’ attorneys, alt labor groups, unions, and even Uber itself—whose own interests shape the nature of their advocacy for drivers. The result of this type of politics, dominated by concentrated interests and surrogate actors, has been a permissive approach by regulators in both legislative and judicial venues. If labor regulation has not occurred in this “easy” case, it is unlikely to occur for gig work on other labor platforms.

Since 2012, the platform economy has received much academic, popular, and regulatory attention reflecting its extraordinary rate of growth. While this growth is typically presented in terms of the capitalization of platform companies, equally impressive is the growth in individuals who earn money on the platform. Analysts estimate that monthly participation grew ten-fold from October 2012 to September 2015. While this constitutes only 1 percent of adults in the United States, the cumulative participation rate reached 4.2 percent by the end of that period. In this paper, we analyze the nature of platform work and the politics of regulating it, focusing our study on a subset of these platforms, specifically *labor* platforms, which connect workers with “requesters” for specific tasks of varying lengths of time.<sup>1</sup> In 2013 and 2014 the annual growth rates of labor platforms ranged between 300 and 400 percent. While the growth rate has since slowed, it continues to be robust.<sup>2</sup>

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<sup>1</sup> The other kind of platform included in this growth analysis is capital platforms in which people sell goods or rent assets. The Online Platform Economy. (JPMorgan Chase Institute 2016: 3).

<sup>2</sup> “The Online Platform Economy: What is the Growth Trajectory?” (JPMorgan Chase Institute 2016).

Along with rapid growth have come a number of regulatory issues concerning the world of work these platforms generate. While labor platforms are often seen as disruptive, in many ways they represent a continuation of earlier trends: the restructuring of capital to achieve new employment relations, including new forms of “intermediated” employment relations, and a shift to alternative or contingent forms of employment, unprotected by employment and labor laws.

Labor platforms not only accelerate this trend, but also compensate for it, by providing supplemental work to jobs that yield inadequate income or irregular hours. They also relate both to other pathologies and to new forms of dynamism in the economy by, for instance, compensating for inadequate pensions and retirement savings and providing income for start-up entrepreneurs.

This paper provides a conceptual and theoretical overview of these rapidly growing platforms, focusing on how they represent both continuity and change in the transformation of the world of work and its regulation. We first lay out the logic of different types of labor platforms and situate them within the decline of employment relations and labor protections since the 1970s. We then focus our analysis on one type of labor platform—the on-demand platform—which poses new questions and problems for workers and the political problem of regulating labor. Finally, we examine the case of Uber, which in many ways is the easiest case for labor regulation.

Ultimately, as we show, little has been done to regulate Uber in a way that advances drivers’ rights and benefits. As a dispersed, atomized interest group, drivers have been mostly unable to mobilize collectively and to make effective claims in legislative arenas, where concentrated interests are the predominant voices. Instead, drivers have, at times, been mobilized in legislative arenas by surrogates, such as unions and alt-labor organizations. Uber has also mobilized drivers but not on labor issues. While workers’ issues are largely ignored in legislative arenas, they have been taken up in courts, but again primarily by surrogates—plaintiffs’ attorneys, who take the initiative in bringing suits. All of these surrogates bring their own interests that shape their advocacy and skew the representation of drivers’ interests. The result of a politics dominated by concentrated interests and surrogate actors has been a permissive approach by regulators that aims to encourage technological innovation and growth not only of the hi-tech sector, but also of the “gig economy” in which workers engage in flexible, but unprotected labor.<sup>3</sup>

## **PERSPECTIVES ON LABOR PLATFORMS: CONTINUITY VS. DISRUPTION**

Labor, or labor-brokerage, platforms are those that cybercoordinate the market of a service worker and a requester of work for a defined task or project. The task or project may last anywhere from a few minutes to several weeks. Workers are generally considered to be independent contractors, rather than employees, and as such, are not

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<sup>3</sup> We define a gig worker as an independent contractor unprotected by employment and labor laws, who is contracted by the task or project. Some definitions refer specifically to those who offer their labor “through a digital marketplace” (Torpey and Hogan 2016).

covered by existing employment and labor laws.<sup>4</sup> In this section, we examine both the ways in which platform-coordinated work builds upon existing trends in the move to contingent labor and the ways in which it is new. We also look at the nature of gig work and the problems posed by “mediated” employment relations. Rather than the older bilateral relations between worker and employer, these are trilateral relations, in which the platform mediates the relationship between the worker and the user of that work. Labor platforms are a type of “multi-sided platform,” which have been analyzed as firms that create value by facilitating the interaction between two groups with network benefits (Evans and Noel 2007; Evans 2003). However, for the present purpose of analyzing labor platforms, we find it useful to think of them within the larger context of restructuring work relations and the trend toward mediated employment relations—a move often undertaken by firms precisely to avoid the regulations and responsibilities that employee relations entail.

### *Platform Labor as Contingent Work*

“Disruption” and “creative destruction” have become omnipresent terms that arise in discussions of the platform economy. These descriptors are often used to approve of and justify the new developments. Yet one should be clear about what is—and is not—being disrupted. Labor platforms provide more opportunities for gig work and make it more efficient; however, they neither create a new world of work nor fundamentally disrupt an existing pattern of employment relations.

Rather, labor platforms should be viewed as a step in a longer pattern of sectoral or firm restructuring and a continuing dualization of the labor market: the growth of various forms of “alternate,” contingent, or contract workers, who do not have the rights or social protections of “employees,” as per employment and labor laws. Within that history of restructuring, which began with economic globalization and the technological innovations of the 1970s and 1980s, the platform economy takes two further steps. First, big data and the algorithmic revolution have enabled a cyber-coordinated labor market, giving the employer tools to intensify, accelerate, and expand the market for contract labor.<sup>5</sup> Second, the spread of smartphone technology has enabled the possibility of labor platforms, particularly on-demand platforms (see below), which are the focus of the current study.

An interesting analysis of this recent but longer term history of capital and labor restructuring is that by David Weil (2014), who analyzes what he calls the fissured workplace, resulting from strategies of firms to shed in-house workers. Weil’s analysis points to two important effects of this restructuring. First, it changes how gains are shared, with fewer gains going to workers (76). Whereas wages were set with some regard for notions of fairness in the old system of an “internal labor market,” the restructured firm is concerned only with minimizing costs (83f). Responsibility for worker

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<sup>4</sup> Workers on a few platforms are considered employees.

<sup>5</sup> These tools are not limited to contract labor or the platform economy. Employers use dynamic just-in-time scheduling of workers to coincide with the ebb and flow of demand on very short notice (and often insist that they be available in order to stay on the roll). Big data analytics have also expanded the tools for analyzing and monitoring work. See Gleason and Lambert 2014, Kaplan et al. 2015, Benn 2016.

protection and social costs are shifted out of the firm. Second, with fissured restructuring a firm maintains an arms-length or mediated relationship with workers.

Beyond the specific types of fissuring analyzed by Weil, a larger trend in the US has been a shift from full-time, regulated, and protected employment to a casualization and informalization of work and a demutualization of risk. A number of studies have pointed to the increase in contingent or “non-standard” work, such as temp-agency workers, direct-hire temps, and independent contractors.<sup>6</sup> This sector of the workforce grew 75 percent faster than the overall workforce from 1980 to 1993 (Belous 1995: 863, 867; Middleton 1996: 557, 564), and by 1995, contingent workers constituted about 32 percent (Weil 2014: 272).

Explanations of this change in the nature of work are rooted in both the demand and supply side of the labor market. Employers have turned to contingent work as firms have altered their strategies in response not only to globalization and technology, but also to legal and regulatory incentives (Befort 2002). At the same time, there has been some increase in demand for this work, particularly for the purposes of achieving work-family balance, supplementing stagnant wages, compensating for unemployment, and coping with “just-in-time” work.

With respect to employment trends, then, the labor platform economy is not so “disruptive.” Rather, the work “flexibility” and, in most cases, the independent contractor model of most labor platforms in the gig economy are a continuation and an acceleration of more general developments in the nature of work. Little data is available to assess the size contribution of the platform economy to the more general trends (Bernhardt 2014). After robust growth in the period from 1980 to 1993, the relative size of the larger category of alternative work showed little change in the following decade, 1995-2005 (Weil 2014: 272; Katz and Krueger 2016: 3). However, growth subsequently took off. Katz and Krueger calculate a 50 percent increase from 2005-2015 in the number of individuals using alternative work as their *primary* work, accounting for “all of the net employment growth in the US economy” (7). The timing of this growth corresponds to the Great Recession and the subsequent recovery. Using this same data, we calculate that platform work constitutes about one fourth of this recent growth of contingent work. This figure, however, underestimates the total growth in platform workers because most participants do not use the platform as their primary source of income (JPMorgan Chase Institute 2016: 24).

The growth in platform gig work not only contributes to the trend toward part-time, short-duration, and low-wage jobs in the US economy, but also importantly supplements and compensates for these developments in the off-line labor market. Platform gig work is a form of flexible employment that is available to a worker between, “around,” or in addition to other jobs that have disappeared, are themselves irregular or “flexible,” or are inadequate sources of income. As offline work becomes more unstable and precarious, the platform economy, with its tremendous increase in search efficiency and lower transaction costs in the labor market, is a compensatory mechanism for the changing nature of offline work. Empirical evidence suggests that income from labor platforms is

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<sup>6</sup> See, for example, De Stefano 2015; Aloisi 2016; Hill 2015; Standing 2011; and Lambert, et al. 2014.

used in this compensatory way to cope with volatility in offline income (in contrast to income from so-called capital platforms, which are those on which individuals rent assets or sell goods).<sup>7</sup> Platform income “fits” into recent traits of the larger labor market in other ways as well. It can compensate for insufficient retirement pensions or “early” unemployment occasioned by the difficulty middle-aged workers face finding jobs after being laid off; it can be a way to limit or cope with student debt; and it can be an opportunity for flexible income while launching a start-up.

### *Decommodification of Contingent Work*

From the perspective of the worker, the shift to gig work can also be seen in terms of a shifting boundary between socialized—or monetized—and unsocialized labor, that is, between paid and unpaid labor (Huws 2003: 68). The labor platform, as well as the offline shift from employee to independent contractor status, represents this shifting boundary between paid and unpaid work, or the decommodification of work, in at least two senses.

First, it is a form of piecework remuneration, so that downtime, such as paid breaks, lunch time, vacation, and sick-leave, that was considered part of the work in the “good job,” full-time employee model is now unpaid, or decommodified. Second, what we will refer to as risk work, which is an in-kind payment in the employee model, is now a form of unpaid labor foisted on the worker. Grossman and Woyke discuss the “unbundling” of work, so that primary benefits that traditionally accompany employment are excluded from the contractor model (2015: 6-7). However, it is not only that a set of benefits, like health insurance and retirement savings are no longer available or that risk has shifted from the employer to the worker (Hacker 2006). Although these changes are extremely important and much discussed, the further point is that the work that is involved in acquiring the benefit is not that of an HR department. It is unpaid, “outsourced,” self-help work. It is often an extremely complicated and on-going process to figure out how to choose the best health care insurance or IRA, how to manage money or comply with required quarterly IRS payments, and how to continue training and advance a career path. Along with the changing distribution of risk are the issues of a steep learning curve and the unpaid task of managing these complex information-intensive tasks. For many people, including the highly educated, these tasks may even incur the cost of hiring a specialist to take them over. On the other hand, some of this unpaid work may also become automated. For example, Uber recently announced that it was making a robo-financial advisor available to some of its drivers (Kokalitcheva 2016).<sup>8</sup>

Another example of this decommodified risk work is labor spent ensuring payment for completed work. For example, our surveys and interviews as well as a review of online driver forums reveal that Uber drivers engage in a substantial amount of unpaid work, to

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<sup>7</sup> In line with this compensatory use of labor platforms, a more recent update to that study indicates that the recent job recovery has coincided with a slowing of the rate of growth in participation on labor platforms since August 2014—although it continues to double annually (JPMorgan Chase Institute 2016).

<sup>8</sup> It may be noted that while from the point of view of the worker, the gig economy may be seen as a shift from decommodification to self-help work, the discussion below indicates that from the point of view of the consumer the gig economy is part of a shift in the other direction: from self-help to commodified work.

ensure that Uber has calculated their pay correctly, a particularly onerous task given the opaqueness of algorithms involved in a “flexible” or dynamic price structure (see below), and then, if necessary, to try to contact Uber to correct errors in their earning statements.<sup>9</sup>

### *Mediated Employment Models and the Issue of Control*

The labor platform economy is also a continuation of the trend in firm restructuring and the move to more “distant” and mediated models of employment relations. Weil analyzes these offline models in terms of the mediated relationship between the worker and those setting certain specifications for the work, or the “lead firm.” This relationship is intermediated in various ways by, for instance, a staffing agency or subcontracting/supply-chains. The labor platform is a different kind of mediated or trilateral relationship between a worker, a “user/requester” of that labor, and the platform. The key questions become if the platform can be considered the “lead firm” and how much control and responsibility it has (or should have).

The issue of control is deeply rooted in the regulation of the kind of work that expanded in the 20<sup>th</sup> century, rather than the type that has been growing in the 21<sup>st</sup> century. The worlds of work in these two historic eras are quite different. Marx famously predicted that the proletarian employment relation, whereby workers sold their labor to an employer who controlled conditions of work, would become more and more generalized. Work laws were developed in the 20<sup>th</sup> century to regulate this proletarian relationship, defining it as an “employee” relationship and granting certain protections to the employee.<sup>10</sup> Not only did the employee relationship fail to encompass “all” of the working class, but toward the end of the 20<sup>th</sup> century, as just discussed, it was in retreat. This retreat raises two basic regulatory issues regarding platform gig work. First, where do labor platforms fit into the existing regulatory regime regarding employees? Second, if labor platforms do not fit the old employee category, should the definition be expanded, should new categories be devised, or should new forms of social protection independent of employment be adopted?

The degree of control exerted by the labor platform varies considerably. At one end, some platforms operate as a more efficient, electronic version of the employment agency model. Others, however, are more interventionist in the relation between the worker and requester and, crucially, exert more control over conditions of work. In those cases, most notably platforms like Uber, the question arises of where responsibility lies for work conditions. This question mirrors a similar dilemma in more complex, non-platform models, such as outsourcing and supply chains. Is, for instance, a U.S. brand designer responsible for work conditions down the supply chain? Along similar lines, a major regulatory dispute that has arisen with interventionist labor platforms is the issue of worker classification. Are the workers independent contractors—a type of

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<sup>9</sup> Uber recently admitted to systematically underpaying drivers in both New York City and Philadelphia (Bhuiyan 2017). In response, in May 2017, Uber implemented an upfront pricing scheme that at least nominally increased the transparency of driver pay (Perea 2017).

<sup>10</sup> When passed in the early part of the 20<sup>th</sup> century, U.S. employment and labor laws granting workers protections did not exclude independent contractors from their coverage. Rather, contractors were excluded from these protections after much litigation and post-war legislation (see Dubal 2017a).



microentrepreneur—or are they employees protected by labor and employment laws and regulations? The issue is an old one, and such classification disputes have arisen across the service industry since the 1970s. What is new here is that labor platforms claim to be tech companies that only supply software.

Thus, the move to a contingent and “distant” workforce has a long history, and the questions of control and responsibility of work conditions have also arisen in offline work. However, the claims of the platform around this question are new and arise in a more dramatic context around the issue of innovation, technology, and a supposedly “new” economy.

## TYPES AND LOGICS OF LABOR PLATFORMS

As noted above, we focus our analysis on one of the many kinds of platforms that seem to proliferate daily: the labor platform. These are platforms that facilitate the selling of labor to perform a task or service for monetary compensation. They are distinct from a number of other types of platforms on which individuals rent assets or sell goods “peer-to-peer,” such as Airbnb and Etsy, or engage in “consignment” work, such as YouTube (Kenney and Zysman 2016). They also differ from those such as Craigslist, Monster, or Career Builder, which are electronic bulletin boards or classified ads. The labor platforms that are of current interest are those that specialize in temporary contract labor and coordinate the exchange between the worker and the requester of that work.

### *Types of Labor Platforms*

A basic distinction can be made between what is increasingly referred to as crowdsourcing vs. on-demand platforms, or crowdwork vs. on-demand or in-person work (De Stefano 2015; Aloisi 2016). Crowdwork is arranged for and fulfilled remotely and online, whereas on-demand work is fulfilled in person, “in the physical world” (De Stefano 2015: 478). Crowdwork platforms therefore construct a potentially global labor market that integrates high- and low-wage economies, whereas on-demand platforms construct a local market (although such a platform can expand to many localities, it organizes separate, local markets).

Labor platforms may also be distinguished by the skill of the work. Skill is a crosscutting dimension, as both crowdwork and on-demand work may be relatively skilled or relatively unskilled. (See Figure 1).

Figure 1. Types of Labor Platforms

	<b>Low Skill</b>	<b>High Skill</b>
<b>Crowdsourcing</b>	AMT	UpWork (coders, editors, lawyers, accountants)
<b>On-Demand</b>	Uber, Postmates, Handy, Rover, TaskRabbit (mostly unskilled; some are blue-collar skilled)	UrbanSitter, Medicast (MD house calls), Angie’s list (blue-collar skilled), GlamSquad

Perhaps the best-known example of low-skilled crowdwork is that on Amazon Mechanical Turk (AMT) in which workers carry out microtasks of “extremely parceled activities [which are] often menial [and] monotonous.”<sup>11</sup> Other tasks demand high-skilled workers, such as coders, designers, and a variety of professional services. On-demand work also spans skill levels. At the low-skill end are a large variety of delivery tasks of many types (food from restaurants or chefs, goods from retail stores, or, in the case of Uber, oneself) or services such as housecleaning and dog walking. At higher skill levels are electricians, care takers, doctors, and lawyers.

Uber is a special case in a number of ways. Per the distinctions above, it is an exemplar of the low-skilled, on-demand or in-person platform. Further, it is in some respects a hybrid platform in that it has been seen also as a platform for monetizing an asset (similar to Airbnb), since the original idea was to monetize the otherwise “unused” time of car ownership. However, unlike a car-sharing/renting platform (e.g., turo.com), Uber most fundamentally is a labor platform on which the driver works. Indeed, Uber has encouraged and facilitated the leasing of cars in order for drivers to be able to work on the platform.

### *Efficiency on Labor Platforms*

The application of technology on labor platforms increases efficiency but in a way quite distinct from conventional applications of technology. The Fordist model of full-time employment, for instance, increased productivity by applying technology to the production process—to the labor process itself. It thereby enabled higher wages, along with increases in worker productivity. The use of robotics follows this same conventional model of increasing labor productivity through the introduction of capital goods. The logic of labor platforms is different. The technology of the platform can be thought of not as making the worker more productive in the actual production process but rather as making the market more efficient by lowering transaction costs. Gig work, which is a central part of the business model of most labor platforms, takes advantage of this efficiency. The technology of labor platforms achieves efficiency by, in effect, shifting the balance between the gig and the search.

Put another way, the work of a freelancer or independent contractor can be thought of in two parts: 1) the unpaid work of looking for a gig and making a contract, and 2) the paid work of fulfilling the contract. The remuneration from the paid production component must cover the unpaid search component. The technology of the platform makes the first of these more efficient, but does not affect the productivity of the worker during the second. Thus, wages rise by working more gigs per time period, assuming the same rate of remuneration for the paid gig/contract work.

Maintaining this wage rate may be a particular challenge on crowdwork platforms, which put pressure on wage rates by globally integrating high- and low-wage labor markets. To some extent, by shifting the balance between the unpaid search and the paid gig, total remuneration can be maintained even with a lower price per gig, because more gigs can be fit into the freed up, formerly unpaid search time. However, the degree to

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<sup>11</sup> De Stefano 2015: 474. See also Irani 2015. There also exist high-skill tasks on AMT.

which the requester will enjoy the greater efficiency through lower prices or the worker will enjoy higher compensation through more gigs in a given time period will vary by the type of work and the particular platform, as well as by the regulatory framework.

This last point, the possibility of lowering the price per gig, may be important for the business model of certain kinds of platforms. On-demand platforms, such as Uber, may have an interest in a low price for the paid component, putting the burden for maintaining or even increasing income on the technology-driven speed-up efficiency of the unpaid search. As we discuss below, Uber uses this logic of efficient service provision through its software to argue that intensifying the rate of paid work (more gigs per unit time) allows income to be maintained even at lower wage-rates per gig. Drivers, however, refute the claim that income is maintained.

### *Platform Growth*

Growth on the platform typically occurs through two routes: diversification of services available on the platform and expanding the market for a given service. Many crowdwork platforms are quite unspecialized, covering a wide diversity of tasks, skills, and prices. In-person, on-demand platforms vary in their degree of specialization, many beginning as single-service platforms (rides, restaurant delivery, meal preparation and delivery, laundry tasks, dog walking, etc.). Uber is a prime example of a diversification strategy in terms of the types of cars available for ride hailing, the riding services offered (e.g., individual or pooled), delivery of other products, and perhaps ultimately a much greater set of logistics services. The diversification strategy is reflected in Uber's recent change of its motto from "Everyone's Private Driver" to "Where Lifestyle meets Logistics" (Lobel 2016: 102).

Most on-demand platforms initially attempt to grow by expanding the number of workers and requesters for a given service. Crowdsourcing platforms tend to be W2B (worker to business) coordinators, which match "workers" or taskers with a variety of skills and expertise to requesters (or taskmasters), who are in business, or are "producers" in that the tasks are generally inputs that the requesters use in some production process. By contrast, on-demand platforms are W2C (worker to consumer) coordinators, which match workers or taskers to final consumers—primarily making personal services available to consumers. The low-skill services are those that most people are used to carrying out themselves, and the idea is to commodify these generally domestic "self-help" tasks by purchasing the services of household help, such as cooks, washers, cleaners, drivers, gardeners, babysitters, and those who would do other chores for the household, like walking the dog or picking up and delivering packages, dry cleaning, or purchases. In another sense, the provision of these tasks or chores constitutes a massification of "servant" tasks through their decomposition: instead of hiring a whole servant, one hires these household or personal consumption services (or "personalistics"<sup>12</sup>) by the chore or task. With this decomposition, individual chores become affordable for those who cannot hire a servant, and the market for household help ultimately expands by going down the stratification hierarchy. Such market expansion for these chores depends on their provision at a lower cost.

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<sup>12</sup> This term was suggested by William Stafford.

The market for ride-hailing is particularly interesting in this respect. Studies have shown a bifurcation in the use of taxis, which is greatest among both high and low income groups (Schaller 2016: 10). Thus, expansion might depend on not only an offer that is attractive or affordable down the income hierarchy to create a mass market, but also intensification of use at the low end. Both of these strategies have a low-cost logic.<sup>13</sup>

For the worker, this on-demand or in-person economy thereby represents a low-wage strategy. The low-wage strategy has both a micro and a macro contradiction. At the micro level, wages must be high enough to recruit workers. At a macro level it meets a constraint on aggregate demand to the extent that the model becomes generalized: the potential for expansion depends on the income distribution and the size of the middle—or even the upper-middle class. However, unlike Fordism, as a low-wage model it may generate a class of workers unable to afford what is produced.

### *Tripartite Relations and Worker Autonomy on the Platform*

The online gig economy embodies a tripartite relationship between the platform, the worker, and the requester of the work or service. All labor platforms that are not simply electronic bulletin boards provide some services. Examples are payment processing, ratings or reviews, background checks, and information about worker credentials. A basic issue is whether the platform exercises some degree of control over the exchange between the worker and the requester. The platform can exercise control over various conditions of work, but perhaps the most important form of control concerns the process of price or wage setting.

On some platforms, workers can set their own rate and offer their labor at a stated price. The requester then chooses among workers on the basis of this offer, combined with other information about worker experience, qualifications, and ratings by past requesters on the platform. On other platforms, the requester lists a task or project at a set price, and workers decide if they want to apply. In these cases, the platform does not control wage rates, though it might indirectly affect them by constructing a larger market of workers and requesters. Platforms like Angie's List can more directly affect the wage rate by delineating a "fair price" range that must be met. Still others, particularly low-skilled on-demand platforms like Uber, many delivery platforms such as Postmates, and other services, such as Swifto dogwalking and Handy housecleaning, set the price of work.

In addition to price, the platform may control other aspects of the work as well. In general, the platforms that exert greater control are on-demand platforms, which tend to be worker-to-consumer (W2C) platforms. These more controlling W2C platforms coordinate the same, relatively unskilled tasks repeatedly whereas on W2B (worker-to-

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<sup>13</sup> While Schaller finds that taxi use is highest among lower and upper income groups, we do not have data that suggests the same is true for users of Transportation Network Companies, or TNCs, like Uber. While we lack data on the frequency of use, a 2015 Pew survey found that 26 percent of high-income individuals (those making above \$75,000 a year) have used a ride-hailing service like Uber and Lyft compared to 10 percent of low-income individuals (those making less than \$30,000 a year). Since public transit is the cheaper option, one might hypothesize that low-income use is more occasional, more restricted to necessary situations, and thus a harder market to expand.

business) crowd-sourced platforms, work is more “customized.” Matching worker and requester thus becomes a logistically easier task for on-demand platforms, and control over matching allows these platforms to also control pricing and thereby workers’ wages.

Platform control is important because it has been raised as a central issue on many platforms, particularly Uber. For drivers, it is a source of worker dissatisfaction. It is also the most salient legal criterion for employee status. Most platforms maintain that workers are not employees but rather independent contractors who maintain autonomy in their work, particularly over hours and the decision to accept a gig. Thus, the nature of platform control over conditions of work is a central issue for labor regulation in the gig economy.

### **THE UBER MODEL**

In examining the regulation of worker issues on on-demand labor platforms, Uber is a particularly good case for analysis. It has the longest record of regulation and thus provides an empirical base for examining the politics of regulation. Also, because of the unusual amount of control Uber exercises over work, its regulation brings the labor issue into sharpest relief. Uber presents perhaps the “easiest” case of regulation of employee rights, both because of the high degree of control exerted by the platform and because it presents more favorable conditions for collective action by platform workers. If regulating these issues is difficult in the case of Uber, regulation should be particularly unlikely in other cases.

Uber is also an interesting case for analysis because it has become so emblematic of the labor platform economy. Its paradigmatic position can be seen in, for instance, Hill’s use of “Uber Economy” in the subtitle of his book and the numerous hits (almost 50,000) that “uberization” turns up in a Google search.<sup>14</sup> As such, a study of Uber may uncover issues that are important in regulating the gig economy and labor platforms more generally.

Uber was launched in San Francisco in 2010 as UberCab—an app for livery services, which connected passengers to existing licensed black car and limousine drivers. In June 2012, Lyft and Sidecar launched apps with a different model, which altered both the ride-hailing industry and its century-old regulatory framework. Two traits were integral to these new apps: non-professional private drivers using their own cars and a suggested, non-mandatory price for the ride. The model was thus closer to a peer-to-peer or “sharing economy” model, on which in fact it was based. A month later, Uber launched UberX—as a similar model but with a key difference. Instead of a non-mandatory price (as with Lyft), Uber set the fare, a trait that also distinguished it from taxis, whose rates are set by municipal governments. The following year UberX expanded to many more cities in the U.S. With the use of private drivers in their own cars, Uber, Lyft, and Sidecar distinguished themselves from and maintained that they were software companies and as such should not be subject to the same regulations as traditional transportation companies.

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<sup>14</sup> It turned up an additional 285 on Google Scholar. “Uberize” turned up over 27,000 hits on Google and 50 on Google Scholar (August 11, 2017).

With this new model, Uber presented a particular challenge to an existing and highly regulated sector. Many other on-demand platforms construct new markets in personal services where virtually none previously existed (e.g., pick-up and delivery of many types and meal preparation). Uber, however, enters, expands, and improves an existing market. It presents competition for an existing sector that is already highly regulated and that has used that regulation to defend itself by limiting entry. Uber not only “breaks” those barriers to entry, but also provides what is widely regarded as a significant improvement in service: greater availability, faster matching of customers to drivers, and cheaper prices, as well as safety and consumer protection measures like price estimates and route monitoring. This challenge to taxis has resulted in a sharp decline in both medallion values and the number of taxi drivers in US cities (Barro 2015). In New York City, for instance, ride-hailing companies outnumber taxicabs by four to one, and the value of medallions has declined to one-fifth of their 2013 worth (Walker 2017).

The entry of Uber left unsettled a number of issues concerning proper licensing, public safety, and consumer protection that were regulated for taxis and limos. Taxi interests saw regulating Uber on these issues in terms of competition and sought to ban Uber or at least to impose similar regulations to level the playing field. Uber recognized that rider trust was central to the success of its model, and the company adopted a set of driver checks and car requirements and argued that it had sufficiently addressed issues of consumer protection and safety. Regulators, however, generally considered these “self-regulatory” measures inadequate. Thus, regulation around these issues became contested, pitting taxi interests against Uber and arousing the interest of public officials responsible for ride-hailing regulation.

The result has been widespread regulation of Uber and similar companies by both cities and states. Municipal governments have traditionally regulated taxis, and they have generally moved to regulate Uber upon its arrival. State legislatures, which have historically played a limited role in regulating the taxi sector, have also often intervened to regulate Uber. As of August 2016, 34 states passed such legislation (see Collier, Dubal, and Carter 2017). However, conspicuously absent in this list of regulations are those related to labor. This absence is particularly notable given the prominence of public conversations over the work conditions and employment status of Uber drivers.<sup>15</sup>

The nature of Uber’s control over the labor performed by its drivers is central to these debates about employment status and working conditions more generally. As putative independent contractors, Uber drivers are able to set their own schedules and accept or reject “gigs.” However, Uber exercises a great degree of control over many aspects of the gig, particularly over issues of the pace of work (e.g., who gets a request and how long one has to respond) and the operation of the rating system, an often opaque system that can lead to driver “deactivation,” or suspension, as several analyses have detailed (Lee et al. 2015; Rosenblat and Stark 2016). The issues of price setting and control of hours merit further discussion, as Uber uses incentives to influence driver

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<sup>15</sup> Taxi interests have not made demands for labor regulation. Taxi drivers (whether or not they are medallion holders) are not employees (with the exception of those in Las Vegas) but rather, they have been independent contractors since the taxi sector was restructured in the 1970s (Dubal 2017a).

behavior, including when and where drivers work.

As mentioned above, Uber, like many delivery platforms, unilaterally sets prices, unlike crowdwork platforms and many other on-demand platforms. It sets prices to achieve its goals of increasing market-share vis-à-vis competition or of breaking into a new market. Central to its business model is an on-going change in prices to achieve market efficiency by equilibrating supply and demand. It sets prices—and hence wages—in four distinct ways. First, surge pricing consists of constant, algorithmically controlled price changes, which are implemented without advanced warning and in a “disaggregated” way. That is, price changes can be for a larger or smaller geographic area and for an unknown amount of time, which may be very short. The goal is to induce drivers to high-demand areas.<sup>16</sup> Second, peak pricing operates in the same way, but at set times, such as rush hour. Third, fare cuts have been implemented in most markets from time to time to generate long-term growth, create demand when entering new markets or massifying the market in existing localities to make it more affordable. Finally, driver bonuses, to maintain or expand supply can be quite frequent, with a changing and often bewildering array of conditions. Thus, Uber sets prices/wages in a fluid and dynamic way that often cannot be anticipated by the driver. Drivers confront uncertainty not only from unknown fluctuations in demand, but also from the changing price of a trip. Not only is price-setting beyond the control of drivers, but drivers must learn how to optimize these complex incentives. Driver forums are filled with discussions about the advantages or disadvantages of following a surge and of pursuing constantly changing bonus opportunities.

Uber—and many drivers—emphasizes the benefits arising from drivers’ flexibility in controlling their schedules (Hall and Krueger 2017). The idea of flexible hours lies at the heart of the argument for independent contractor status. As noted above, driving for Uber is particularly attractive to those for whom Uber driving is a compensatory mechanism and who must accommodate driving hours to other income-earning activities or responsibilities, or who are driving casually for extra income. It affords little to those for whom for-hire driving is a full-time activity, many of whom drive well over forty hours a week. Even for many “casual” drivers, however, flexibility is diminished by the fact that the choice of hours is highly incentivized by Uber’s dynamic surge pricing (Goncharova 2017). Controlled dynamic pricing may mean “flexibility” in the sense of the irregularity of profitable hours and the strategic choice to work only at profitable times of higher hourly rates.

Uber thus exerts a great deal of control over work conditions, including prices and the ratings system—and thus continuation on the platform. It also exerts control by fluctuating incentives in order to meet changing demand. To the extent this practice works, it conditions and thereby reduces the autonomous flexibility of drivers and allows Uber to capture the benefits of flexible scheduling. Uber also controls “self-regulatory,” or self-imposed, requirements that affect safety and consumer protection. Drivers are often

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<sup>16</sup> Our interviews with drivers, however, suggest that this incentive does not always work. Many drivers avoid surge areas because they are short-lived, and there is no guarantee of getting a surge passenger. Computer scientists at Northeastern have confirmed this through modeling (Chen et al. 2015). More recently, driver commentators have noticed a significant decrease in surge requests from the platform (Campbell 2017c).

responsible for ensuring compliance with these regulations, such as maintaining their car in a way that conforms to company rules. This level of control highlights the issue of employment status, which, as discussed above, is primarily determined by the degree of control exercised over workers. The issue is complicated by the tripartite relationship in which the platform intermediates between the worker and the “user” or “requester” of work. Such a high level of control is not indicative of independent contractor status, and the employment status of the driver has become a major issue of contention.

Uber has typically resisted most regulations, but within this general pattern, it has most forcefully opposed those regulations that 1) give drivers the rights and benefits traditionally associated with employment, and 2) constrain the supply of drivers. With respect to the first, while those advocating employee status point to Uber’s significant control over conditions of work, Uber argues that it is not an employer but simply offers the software that matches riders with drivers. If workers were classified as employees of the platform, they would have the right to form a labor union and potentially negotiate their conditions of employment. They would also be covered under preexisting laws that establish minimum wages, Social Security contributions, overtime compensation, and other employment safety nets. Provision of these social protections would undoubtedly result in a dramatic increase in the cost of operation. Uber has thus fought reclassification attempts and laws that extend employee rights.

Uber also opposes regulations that are seen as restricting the ease of entry for drivers, which allows for a flexible workforce that can be continually expanded and replaced. The platform relies on easy entry for many reasons: because many of its drivers are temporary, part-time, or even casual drivers, and because many, including those who intend to drive full time, do not remain long on the platform. As former Uber Vice President, David Plouffe, said, “For most people, driving on Uber is not even a part-time job...it’s just driving an hour or two a day, here or there, to help pay the bills” (Uber Newsroom 2015). The business model requires two types of flexibility: 1) hourly flexibility to meet demand peaks, and 2) ease of entry, not only to accommodate seasonal fluctuation and expansion, but also to compensate for an extremely high rate of worker attrition, which persists both because many drivers consider Uber as short-term or stop-gap work and because of dissatisfaction. Analysis based on Uber data indicates that nearly half of Uber drivers will remain active for less than one year (Hall and Krueger 2015). Because of the desire to expand and massify the ride-hailing sector combined with this drop-off rate and the short-term flexibility of supply inherent in the model, Uber considers it crucial to minimize hurdles to driver entry.

For both casual and especially fulltime Uber drivers, the high degree of control over work has led to widespread driver grievances, as is evident in several analyses as well as many online driver forums.<sup>17</sup> Grievances have to do with selection and management of the workforce, prices, and quality standards, including car requirements or specifications, driver ratings, and deactivation, and the difficulty of calculating driver earnings and of contesting mistakes or unfair ratings (see for example, Rosenblat and Stark 2016, De Stefano; Campbell 2017a; Campbell 2017b). Some of these, like driver ratings, involve algorithmic control of work conditions, which also raises issues of transparency.

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<sup>17</sup> E.g., UberPeople.net, Uber Forum, Uber Chariot, The Uber Driver’s Subreddit



## **UBER DRIVERS & THEIR SURROGATES**

Uber drivers have had little capacity to make effective claims for addressing these grievances. Gig work generates difficult conditions for collective action because of the dispersion and atomization of workers. In fact, Uber drivers are better positioned than most gig workers to mobilize collectively. First, and perhaps most importantly, the high level of control Uber exercises over work conditions generates many shared complaints. Second, and relatedly, drivers share a single common target of grievance—Uber. Third, spaces exist where drivers congregate and where they have the potential to get to know one another—most prominently at pick-up locations such as airports.<sup>18</sup> Fourth, drivers have generated several active online forums and blogs that are available for exchange of information and coordination. Nevertheless, even with these relative advantages, Uber drivers face a number of collective action problems.

One challenge to collective mobilization is that drivers comprise a diverse, segmented workforce with potentially diverging demands. Some workers participate full-time and depend wholly on Uber for income—and may have incurred expenses by buying or renting appropriate cars for the purpose. Others work part-time to supplement other work, and still others work quite casually. As a result, driver interests are not always aligned on priorities such as flexibility and certain rights and benefits. Also, while Uber itself is an identifiable target, given the nature of the app, no immediate boss or supervisor is known or visible to workers to bring demands and grievances. Despite available spaces for drivers to interact with each other, workers who wish to mobilize may not have repeated interactions with the same Uber drivers, even in gathering hubs. Our interviews indicate that few drivers visit online forums and blogs.

Thus, despite some advantages, Uber drivers have not overcome collective action problems. Drivers' interests and claims have been instead most often initiated and pursued in regulatory venues (both in courts and legislatures) by non-driver actors—or *surrogates* as we refer to them. The three most important are labor surrogates—unions and alt-labor groups—private plaintiffs' attorneys, and Uber itself.<sup>19</sup> These surrogates both articulate drivers' interests and bias their representation, which is colored by their own "outsider" perspectives. Below we briefly review attempts at driver collective action and then analyze the strategies, activities, and conflicts of interest of these three types of surrogates.

### *Collective Action by Drivers*

The challenges to drivers' collective action are reflected in the low turnout and limited success of the few driver-led protests that have occurred since 2014. Most protests against Uber are small, often attracting fewer than 30 participants. Moreover, these protests are sporadic and have generally not led to sustained pressure necessary to elicit a response to drivers' demands.

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<sup>18</sup> Recently, Uber, like Lyft, has begun to offer "greenlight spots," where drivers can get assistance from an Uber representative. These spaces may serve as a location for drivers to congregate and discuss demands.

<sup>19</sup> Other surrogate actors for workers include NGOs, foundations, and academic analysts.

The majority of the driver protests against Uber have been in response to fare cuts, which translate into lower driver earnings per ride (Campbell 2016a).<sup>20</sup> In Fall 2014, for example, drivers in cities across the United States protested an indefinite rate cut of 20 percent (Kosoff 2014). In some cities, such as New York, Seattle, Santa Monica, and San Francisco, these protests attracted over one hundred drivers (Hill 2015: 90). In the next two years, Uber again slashed prices. When Uber cut rates by as much as twenty percent in 2016, San Francisco Bay area drivers took to the streets in protest (Said 2016). Yet, collective action has failed to reverse the cuts and has thus far not prevented additional cuts (Krisher and Sell 2017; Campbell 2016a).<sup>21</sup>

In a second form of protest, drivers have tried to coordinate by collectively turning off their Uber apps, often during periods of peak ridership (Hill 2015: 90; Burns 2014). The San Francisco Uber driver boycott during the 2016 Super Bowl took this form in an attempt to demand higher rates and better pay structure more generally (Alba 2016). Yet significant barriers prevent the widespread success of this method of collective action. First, despite all the publicity around this event, drivers seemed unaware of the call for a boycott (Campbell 2016a). Second, though strikes around events such as the Super Bowl attract maximum potential disruption and publicity, they are also moments of predictable surge pricing, which are particularly attractive to drivers and provide incentives for them to ignore the boycott. Similarly, these boycotts contain their own contradictions, as they themselves create a driver shortage, to which the algorithm responds with higher prices to entice other drivers onto the road with the promise of higher earnings. These incentives may be higher among drivers for whom Uber is not their primary source of income and whose strategy is to take advantage of the flexibility and drive only when the prices and demand are high. Indeed, despite the publicity leading up to the Super Bowl boycott, few drivers participated. (Hook 2016).

Even the largest driver-led protests have achieved only modest success at best. In New York, demonstrations have periodically drawn the support of hundreds of drivers. The largest to date occurred in fall 2014, when over one thousand drivers went to the streets and turned off their apps to protest recent rate cuts and increases in the commission the company retains on each ride (Griswold 2014). Many were also protesting a new policy requiring drivers of Uber's premium services to accept requests for cheaper services or risk the deactivation of their accounts (Bhuiyan 2014b). Shortly after the protest, Uber reversed this decision, but did not yield to the other demands. Nor, two years later, did Uber respond to a second wave of New York protests against rate cuts, which once again attracted hundreds of drivers (Feuer 2016).

Thus, drivers have largely been unable to mount successful collective action. The only successes, and even then very limited, have occurred in New York, which represents a particularly lucrative market, where the costs of ignoring driver protests may be unusually high. Similarly, many drivers in New York view Uber as a long-term career and depend on ridesharing companies for the bulk of their income (Bhuiyan 2014a). The high

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<sup>20</sup> Although Uber argues that lower rates increase demand and thus preserve total earnings, drivers report a decline in earnings (Campbell 2016b).

<sup>21</sup> Uber reduced rates in January of 2014, 2015, and 2016 in response to the "winter slump" (Campbell 2016b). It also periodically reduced rates in select cities to increase ridership and undercut the prices of other rideshare companies (Lawler 2016).

stakes for New York drivers—and for Uber—facilitate mobilizing in response to demands. But drivers' limited success reflects the problems drivers face in acting collectively.

### *Labor Organizations as Surrogates*

Because of collective action problems, drivers are primarily represented by surrogates. These include both traditional unions and alt-labor organizations, which have been divided in their approach to the issue of employment status: they either fight drivers' putative independent contractor status or accept it and try to achieve improvements within that status.<sup>22</sup> The different approaches taken by these labor surrogates reflect variation in their own interests.

Some unions, like the national AFL-CIO, take the position that Uber drivers are employees under the law and that they must fight for that legal recognition. This position extends the conventional strategy and organizing model that unions have historically pursued. It is a direct challenge to Uber's business model and, for the union, avoids the financial liabilities associated with organizing independent contractors. Union representatives have met with drivers, strategized around potential litigation and legislative proposals, filed court cases against Uber, and officially objected to court settlements that do not recognize employee status. Yet, this traditional union model, which centers on employment status, may not be the most salient interest of many drivers, who may prefer or prioritize a more selective allocation of rights and benefits to accompany the flexibility of independent contractor status.

Other union surrogates, including the Teamsters Local 117 in Seattle, have accepted the independent contractor status of Uber drivers, but insisted on their right to bargain collectively. These efforts to extend bargaining rights to independent contractors have been pursued in legislative venues and have been supported by union attorneys, who have been frustrated by years of ineffective misclassification suits in the courts. The union thus attempts to increase its constituency by representing a new group of workers in collective bargaining, albeit a group that does not have employee status.

Still other unions have likewise largely accepted the independent contractor status of drivers but have foregone the traditional struggle not only for employee status, but also for the right to collective bargaining and the relative job security associated with it. Instead they seek to increase their membership by representing *non*-unionized members in discussions with Uber over work conditions. The International Association of the Machinists and Aerospace Workers (an AFL-CIO member), for example, has pursued direct negotiations with Uber in its efforts to represent Uber drivers. Rather than advocating legislation that would confer new rights for independent contractors, they created an "Independent Drivers Guild" (IDG), which struck a private agreement: Uber agreed to establish grievance procedures and discuss market-based portable benefits for drivers in New York City in exchange for the IDG's commitment not to challenge the independent contractor status of drivers.<sup>23</sup> The Teamsters Joint Council 7 in Northern

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<sup>22</sup> (Dubal 2017a). Unions are acutely aware that collectively organizing putative independent contractors puts them at risk for anti-trust or price-fixing allegations.

<sup>23</sup> In effect, the IDG made an agreement to not organize work stoppages against Uber. As long

California attempted to create a similar California-based workers' association when Uber agreed to fund such an association as part of a class action settlement. The Teamsters effort, however, was thwarted when the settlement was thrown out by a judge.<sup>24</sup>

In addition to unions, alt-labor groups have also acted as surrogates to represent drivers. Again, these actors have their own set of interests. One notable case is the Freelancers' Union, which has for the past twenty years been a voice for highly skilled independent contractors. Unlike most unions, this alt-labor group has its origin in representing a category of workers for whom employment status is not an issue. It thus celebrates the "contractor" category and the flexibility and freedom that comes with it but believes that more needs to be done to protect freelancing workers. Their embrace of independent contractor status has made them an attractive partner for Uber. Indeed, the Freelancers' Union became a paid consultant for Uber and was charged in 2016 with creating a plan to provide portable benefits for drivers, which would be transferable from one platform employer to another (Horowitz 2016).

Another important alt-labor group is the New York Taxi Workers Alliance (NYTWA), formed in 1998 to represent taxi workers, a group that has not had employee status since the mid-1970s (Dubal 2017b). It since has expanded its membership base to include some Uber drivers in New York City, where regulations imposed greater parity with the taxi sector. Nevertheless, its primary defense of taxi rather than Uber drivers is reflected in its strong advocacy for employee status for Uber drivers, which the NYTWA never advocated for taxi drivers. The NYTWA adopts this strategy as a way to undermine Uber's business model and thereby limit the competition Uber represents for taxi drivers. Its representation of Uber drivers is thus shaped by potential conflicts between taxi and Uber drivers.

Thus, labor groups—both unions and alt-labor groups—have primarily taken three approaches: fighting for reclassification of drivers as employees, accepting independent contractor status but fighting for collective bargaining rights, and accepting independent contractor status but attempting to form workers' associations. As we discuss in more detail below, these approaches correspond to three venues—courts, legislatures, and private settings. Those who fight for employee status do so in courts alongside surrogate plaintiffs' attorneys. Those who organize drivers for collective bargaining without contesting the classification of drivers do so in the legislative arena. And those unions that form worker associations do so in private, non-governmental venues in negotiation with Uber.

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as drivers are considered "independent contractors," a labor organization that facilitates a strike by Uber drivers would risk anti-trust liability.

<sup>24</sup> *O'Connor v. Uber*, CV 13-03826-EMC, which remains an active case, was almost settled during the summer of 2016. However, the federal judge overseeing the case threw out the proposed settlement as unfair to the class of drivers. In addition to the monetary terms of the proposed settlement, the non-monetary terms included the creation, funding, and Uber-recognition of a drivers' association (similar to the IDG). Before the settlement was thrown out, Teamsters Joint Council 7 announced their intention to become the drivers' association for California-based Uber drivers. They held two organizing meetings with Uber and Lyft drivers in the San Francisco Bay Area in the summer of 2016. However, since the settlement was judicially discarded in August 2016, Uber drivers who had been in contact with Teamsters JC7 have not heard from the union.

**FIGURE 2: LABOR GROUP SURROGATES & THEIR APPROACHES TO UBER**

<b>Strategy</b>	Contest Contractor Status	Accept Contractor Status and Organize Workers for Collective Bargaining	Accept Contractor Status and Organize Workers for Workplace Voice & Market-based Benefits
<b>Venue</b>	Courts	Legislatures (Cities and State)	Private Consultation with Uber
<b>Labor Groups</b>	AFL-CIO (National) NYTWA (AFL-CIO)	Teamsters Local 117 (Seattle)	Teamsters Joint Council 7 (Northern California); Machinists NY (AFL-CIO); Freelancers Union

*Private Plaintiffs’ Attorneys*

Private plaintiffs’ attorneys have also acted on behalf of drivers. They have primarily pursued misclassification class action lawsuits to certify Uber drivers as employees for wage purposes. Their focus on suits regarding wages—and not, for instance, misclassification suits regarding safety net protections like unemployment insurance or workers’ compensation—corresponds to their own private interests, as wage settlements can yield a financial windfall for these plaintiffs’ attorneys. Market mechanisms thus play an important role in incentivizing private enforcement regulation (Farhang 2011: 5). Further, these same financial payoffs have incentivized them to settle court cases without a resolution to the underlying issue of employee status. To date, despite dozens of class actions of Uber drivers filed in states across the country, not one has made it to trial. While employment status has been decided by some courts in Europe and Africa,<sup>25</sup> the issue remains unresolved in the US, despite the fact that it was raised here first.

*Uber “Surrogate” Action*

Uber itself has also acted as a surrogate on behalf of workers’ interests. It defends workers by presenting itself as a source of work. It mobilizes drivers to fight against regulations, while posing the threat of disinvestment, or leaving the market. It thus makes an argument that equates drivers’ interests with those of the viability of the company. The Uber app provides the company with a means of communication that enables Uber to coordinate drivers in these anti-regulatory campaigns and “solves” their collective action problem by providing a mechanism (an easy way on the app to “click” on a message and add their “signature”) for petitioning regulators. In this way, Uber frames the terms of grassroots mobilization and leverages its power to skew and limit the representation and demands of workers. Walker (2014) has referred to this kind of

<sup>25</sup> See Mukherjee 2017 and Lomas 2016.

mobilization, mostly by businesses, as a “subsidized public” (22). He notes that the “subsidized public may be one in which elites have become more dominant players, but this need not entail the assumption that incentivized activists are disingenuous” (36). That is, drivers generally want Uber to continue to provide flexible jobs. Nevertheless, the terms and forms of their participation in the regulatory process are determined by Uber. The result is a biased representation of drivers’ interests.

The collective action problems of Uber drivers are not unique to them but rather are part of a more general challenge to worker mobilization posed by the very nature of gig work. More unusual, however, is the fact that Uber drivers work on a platform that exercises a very high degree of control over their conditions of work. With limited capacity to organize and no clearly defined way of making demands of the platform, drivers are left to rely on surrogates, who organize the representation of drivers’ interests but in the process may bias these interests as they work to achieve policy outcomes that reflect their own preferences. The following section details how surrogates have represented drivers in legislative and judicial venues.

## **LABOR REGULATION IN LEGISLATIVE AND JUDICIAL ARENAS**

The regulatory issues affecting Uber arise in multiple venues: legislative processes in city councils and state assemblies, administrative processes in city and state regulatory bodies, and judicial processes in courts. Issues related to labor have only rarely been addressed in legislative arenas, where regulation of issues related to safety, consumer protection, and competition has been more predominant (Collier, Dubal, Carter 2017). By far, most regulatory action on labor issues has occurred in courts through private enforcement litigation brought by plaintiffs’ attorneys presenting class action suits. While scholars, journalists, and politicians have debated the need to resolve the larger question of whether gig workers, like Uber drivers, are entitled to certain basic rights and benefits traditionally associated with employment, little to nothing has been accomplished in either legislative or judicial arenas to this end.

### *Legislative Venues*

At the state level, labor issues have attracted very little attention, and no action has actually changed the status quo for drivers. Only two states have attempted to address issues faced by workers. The first was California in 2016, when Assemblywoman Lorena Gonzalez’s office, in conjunction with long-time labor attorney Richard McCracken, authored legislation to give California’s independent contractors the right to bargain collectively. However, due to fractious positions within California’s labor community over regulatory approaches to Uber, the bill was preemptively pulled before it was even introduced. The second bill addressing labor is projected to be introduced in New York State in late 2017. It is a highly contested bill to create a portable benefits fund for independent contractor workers. That bill, which is sponsored by State Senator Diane Savino and crafted in conjunction with Tech:NYC, a trade group, would codify the independent contractor status of workers like Uber drivers and, in exchange, provide that companies devote 2.5 percent of each transaction to a fund for portable benefits (Eidelson 2017). In a contrary move, Uber has successfully lobbied several other states to pass legislation to codify independent contractor status but without any such driver

benefits: Mississippi, North Carolina, Ohio, Arkansas, Florida, and West Virginia have declared this status for drivers on ride-hailing platforms, like Uber. In Alaska, the state legislature also intervened under pressure from Uber, overriding a state regulatory board decision and exempting Uber from requirements to comply with workers' compensation requirements.

At the city level, labor issues have also been nearly absent. The lone exception is Seattle, where in 2015 drivers gained the right to unionize as independent contractors.<sup>26</sup> The initiative for this ordinance was taken by Teamster attorney, Dmitri Igzitin, who worked alongside two Seattle city councilmembers to introduce legislation that allowed Uber drivers in the city to organize despite their independent contractor status. Igzitin, like McCracken in California, observed that large companies evade enforcement of employee status for their workers, even when a court decides in favor of employee status.<sup>27</sup> Rather than suing Uber for misclassification and converting drivers to employee status to organize them, he worked to craft a law to provide drivers the right to bargain collectively regardless of their independent contractor status. The ordinance unanimously passed, allaying unions' fears that they would suffer from anti-trust liability for organizing Uber drivers. Uber, leveraged its structural and instrumental power (Collier, Dubal, Carter 2017) to mobilize against this regulation, arguing that it would make it impossible to maintain the fluid and large labor supply the company requires. While these efforts did not convince the Seattle city council to abandon its efforts, Uber mounted a strong legal challenge to the new labor regulation. Following enactment of the ordinance, Uber and Lyft, alongside the Right to Work Foundation, mobilized drivers to challenge the ordinance. The district court found for the city of Seattle, pronouncing the challenge "too early" and "speculative," but the ordinance remains blocked due to a temporary injunction requested by the National Chamber of Commerce.<sup>28</sup> The outcome of this effort on labor issues, however, remains far from clear.

### *Judicial Venues*

Issues of workers' rights have more often been addressed in courts. These cases have primarily been brought by private plaintiff's attorneys. Yet, because of procedural problems with certifying a class and the financial temptation for attorneys to settle before trial, collective workers' rights have *not* yet been successfully defended in the judicial

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<sup>26</sup> A bill more broadly targeting freelance workers was passed in New York but had little impact on Uber drivers. The "Freelance Isn't Free Act" requires that anyone in New York City who hires a freelancer "must agree in writing to a timeline and procedure for payment." While non-payment for agreed upon services is already illegal, the ordinance sets up a system of recourse for those who are not paid, including a fine for repeat offenders. See Bahler 2016.

<sup>27</sup> These companies instead shift their business model to make their workers look more like independent contractors, as FedEx did in response to successful misclassification litigation almost a decade earlier (Dubal forthcoming).

<sup>28</sup> The district court's decision on the lawsuit sponsored by Uber (*Clark v. City of Seattle*, 2017 BL 298107, W.D. Wash., No. 2:17-cv-00382, 8/24/17) will likely be appealed. The 9<sup>th</sup> circuit is scheduled to hear oral argument on a separate lawsuit appeal filed by the National Chamber of Commerce's lawsuit against the city of Seattle regarding the legality of this ordinance in December 2017. The 9<sup>th</sup> circuit has temporarily blocked implementation of the ordinance at the behest of the Chamber. *Chamber of Commerce of the U.S. v. City of Seattle*, 9th Cir., No. 17-35640, 8/29/17.

arena. While an undisclosed number of individual Uber drivers have won employee status in administrative hearings for purposes of their wages, workers compensation, and/or unemployment insurance, these cases are not binding for other drivers. In both the collective and individual contexts, Uber has settled or attempted to settle many cases as a strategy to avoid an adverse ruling; in some cases they have actually settled for *more* than a plaintiff would have made at trial just to make the case disappear.

To date, two important private enforcement class actions against Uber remain unsettled: *O'Connor v. Uber* and *NYTWA v. Uber*. *O'Connor*, filed in 2013, was the first class action filed against Uber. *O'Connor* alleged that Uber misclassified drivers under California wage laws. Brought by a Boston-based plaintiff's attorney and filed in the Northern District of California, the case attracted attention when a large class of plaintiffs was certified by the judge.<sup>29</sup> A ruling in favor of the plaintiffs would have constituted a major challenge to Uber. While the district court's decision to certify a large class was eventually overturned by the 9<sup>th</sup> circuit, dozens of copycat lawsuits followed all over the country.

After the plaintiffs' attorney in *O'Connor* attempted to settle the lawsuit, the NYTWA mobilized California drivers to object to the settlement. On behalf of New York Uber drivers, they also filed a state wage and Fair Labor Standards Act lawsuit in federal district court in New York in July 2016. Although the court decided that the NYTWA could not be party to the suit, despite the fact that it represents a large percentage of Uber drivers, the case remains active.

While private plaintiffs' attorneys have brought a number of cases, the government has brought few. Only two administrative agencies have publicly initiated investigations against Uber. In February 2016, the National Labor Relations Board Region 20 (San Francisco) filed a suit against Uber in federal court for failing to comply with the NLRB's investigation of the company's alleged violations of the National Labor Relations Act (NLRA). The NLRB Region 20 is conducting a coordinated investigation on behalf of NLRB regions across the country on whether or not Uber is an employer. In another case, the chief investigator for the Alaska Workers' Compensation Board initiated an investigation against Uber in 2015, when Uber first entered Alaska. The Board fined Uber \$71,000 for misclassifying their workers as independent contractors under Alaska's workers' compensation laws. Uber subsequently left Alaska. Two years later, however, the Alaska legislature passed a bill essentially overriding the Board's finding and specifically exempted Uber from workers' compensation laws (Asher-Schapiro 2017). Uber returned.

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<sup>29</sup> Due to the proliferation of arbitration agreements in contracts, membership in consumer and worker class actions have been limited to those few who "opt out" of the arbitration agreement. In the *O'Connor* case, Judge Edward Chen initially found Uber's arbitration clause—hidden in its drivers' contract—to be unenforceable because it was accompanied by another unenforceable waiver of rights. Thus, a large number of drivers—even those who had not opted out of the arbitration agreement—were certified in the class. The 9<sup>th</sup> Circuit, however, eventually reversed Judge Chen's decision, enforcing the arbitration agreement and diminishing the size of the class and the potential impact of a decision in *O'Connor*. The plaintiffs' attorney has since attempted to arbitrate the individual claims of those drivers who were excluded from the class.



## Conclusion

The recent and rapid growth of the platform economy raises a number of questions regarding if and how to regulate a work relationship that is intermediated by an online platform. This expanding world of work represents both a continuation of a longer-term move toward contingent work and a “fissured” workplace, in which the relation between the supplier and demander of labor is more distant and intermediated. Labor platforms are quite varied in the way in which they are situated regarding this intermediating role, raising a number of regulatory issues regarding the rights and benefits to which workers are entitled.

Uber is a crucial case in the analysis of labor regulation: compared to most labor platforms and independent contractor work relations, it comes closest to the kind of control over work conditions envisioned in legal definitions of employee status. Yet drivers, as atomized actors, have found it difficult to mobilize for pro-labor outcomes. While some driver protests have been mounted, they are generally small, infrequent, and not immediately successful. Instead, drivers are most often represented by surrogates, who act in their own interests and thereby shape the representation of drivers. Although city councils and legislatures have enacted regulations on safety, consumer protection, and competition issues, regulations addressing drivers’ rights and benefits have been almost entirely absent in these elected venues. Despite the relative frequency with which they are brought to court, labor issues have gone largely unregulated in that venue as well. Consonant with the interests of plaintiffs’ attorneys who bring these cases, class actions related to workers’ rights have been settled, dismissed, or stalled without resolution of whether drivers are owed traditional employment protections.

Legislative and court venues each have potential advantages and disadvantages. The fact that labor issues have been introduced more frequently in courts reflects their “low barriers to entry,” as cases can be brought by attorneys representing one or a relatively small group of drivers. Legislative venues, on the other hand, have higher barriers to entry, as drivers must mobilize collectively in relatively large numbers to influence the regulatory process. We have found little evidence to suggest that drivers are capable of effectively coordinating such action without the assistance of surrogates, who, apart from Uber, are also relatively politically weak in legislative arenas. Another contrast lies in the potential for policy innovation. In courts, labor regulation appears as a “backwards-looking” matter, with courts attempting to “fit” drivers into existing categories (e.g., employee) that may be outmoded or too narrowly focused for the realities of work in the gig economy. In contrast, legislative venues can innovate, devising new categories and regulations and updating long-standing forms of worker classification.

To date, across the U.S., regulations that address labor issues have only rarely been adopted. To the extent that Uber is an “easy” case for regulation, this finding suggests that regulations advancing labor issues for gig work on other platforms are unlikely.

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