

**Coercive Rideshare Practices:
At the Intersection of Antitrust and Consumer Protection
Law in the Gig Economy**

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Abstract

This article considers antitrust and consumer protection liability for coercive practices vis-à-vis drivers that are prevalent in the rideshare industry. Resale price maintenance, non-linear pay practices, withholding data, and conditioning data access on maintaining a minimum acceptance rate all curtail platform competition, sustaining a high-price, tacitly collusive equilibrium among the few incumbents. Moreover, concealing relevant trip data from drivers is both deceptive and unfair when the platforms are in full possession of the relevant facts. In the absence of these coercive practices, customers too would be better-off due to platform competition that would lower average prices by sharpening competition between incumbents, enable entry by rivals charging lower take rates, and unravel pervasive price discrimination. Coercive practices in the rideshare industry and elsewhere, and the business models they enable, result from the preference for hierarchy and domination inherent in the contraction of liability for vertical restraints since the 1970s.

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I. INTRODUCTION

The premise of the tech platform business model is to intermediate the flow of goods or services between upstream suppliers and downstream customers.¹ What distinguishes the dominant tech platforms from dominant retailers in general is that suppliers to the platforms operate with greater apparent autonomy from the retailer. Contrast merchants on an online marketplace, for example, with suppliers to a dominant brick-and-mortar retailer: the former have notional autonomy over pricing as well as marketing, by purchasing advertising on or off the platform. Through that means, they may build consumer brand loyalty notwithstanding the platform's intermediation. By contrast, the dominant brick-and-mortar retailers got that way by disappearing their suppliers behind mandated low consumer prices and rigidly-controlled, largely captive supply chains.²

Under conditions of platform dominance, seller autonomy is illusory. Retail prices may be set by a seller, but the rules of the game are rigged so that the prices that actually do get set are to the platform's liking. Advertising that appears to build consumer loyalty functions in reality as a means to further cut the platform in on the seller's revenues, with the threat of biased search results demoting the seller's products unless sellers advertise sufficiently to prevent that fate.

Nowhere is the contrast between notional seller autonomy and actual platform control greater than in the gig economy. We are now more than ten years into the legal battle over whether rideshare drivers are properly classified as employees or independent contractors. The latter category enables the platforms to escape liability for the rights and benefits employers owe their employees under traditional labor and employment law. Indeed, the battle over employment classification in the gig economy is itself only the most recent site of conflict in employers'

¹ Marshall Steinbaum, *Establishing Market and Monopoly Power in Tech Platform Antitrust Cases*, 67 THE ANTITRUST BULLETIN 130–145 (2022).

² RICHARD VEDDER & WENDELL COX, *THE WAL-MART REVOLUTION: HOW BIG-BOX STORES BENEFIT CONSUMERS, WORKERS, AND THE ECONOMY* (2006); Jason Furman, *Wal-Mart: A Progressive Success Story*, (2005); Emek Basker, *Selling a cheaper mousetrap: Wal-Mart's effect on retail prices*, 58 JOURNAL OF URBAN ECONOMICS 203–229 (2005); Ali Hortacsu & Chad Syverson, *The Ongoing Evolution of US Retail: A Format Tug-of-War*, 29 JOURNAL OF ECONOMIC PERSPECTIVES 89–112 (2015); LEIGH PHILLIPS & MICHAL ROZWORSKI, *THE PEOPLE'S REPUBLIC OF WALMART: HOW THE WORLD'S BIGGEST CORPORATIONS ARE LAYING THE FOUNDATION FOR SOCIALISM* 256 (2019).

ongoing effort to evade responsibility while continuing to exercise control, through staffing agencies, franchisees, and the like.³ Thus far, that fight has gone well for the gig platforms: many states accorded them independent contractor status right off the bat, and those, like California, that sought to enforce a more expansive definition of employment were thwarted by public referendum.⁴ Most recently, the state of Washington passed a law that enshrines independent contractor status for gig workers.⁵ And at least one bill has been introduced in Congress that would vitiate minimum wage and overtime protections if workers agree to a ‘worker flexibility agreement.’⁶

The implications of the platforms’ apparent victory, however, have yet to be fully explored. Doing so is the basic theme of this symposium essay. If gig workers are legally independent from the platform that controls and direct their work, we argue that means routine aspects of the gig economy fall within the bounds of antitrust (specifically the antitrust jurisprudence of vertical restraints) and consumer protection laws. As we show, gig work centrally concerns an imbalanced informational playing field whereby independent workers are induced to accept gigs without possessing the data necessary to determine whether those gigs are profitable. This entire architecture of coercion is designed to

³ DAVID WEIL, *THE FISSURED WORKPLACE: WHY WORK BECAME SO BAD FOR SO MANY AND WHAT CAN BE DONE TO IMPROVE IT* (2014).

⁴ A California trial court judge in Alameda County has held that Prop 22 violates the California state Constitution. *Hector Castellanos, et al. v. State of California, et al.*, No. RG21088725, 2021 WL 3730951, at *2, 86 Cal. Comp. Cases 826 (Cal.Super. Aug. 20, 2021) (Trial Order) (Alameda County Superior Court) (holding Prop. 22 is “an unconstitutional continuing limitation on the Legislature’s power to exercise its plenary power to determine what workers must be covered or not covered by the worker’s compensation system.”). As of this writing, an appeal is pending in the First Appellate District of the California Court of Appeals. See *Hector Castellanos, et al., v. California, et al.*, Opening Brief of Defendants-Appellants State of California and Director Hagen, 2022 WL 742883 (Cal.App. 1 Dist. Feb. 24, 2022).

⁵ 2022 WASH. SESS. LAWS 281 (2022); 2022 WASH. LEGIS. SERV. Ch. 281 (S.H.B. 2076) (West). The Washington legislation includes new driver protections including minimum driver compensation per dispatched trip, accrued paid sick leave, and a driver resource center, though it rolls back municipal minimum fare regulation previously adopted in the city of Seattle. See Kathryn P. Fletcher & Emma A. Healey, *Washington’s New Law Presents Sweeping Changes to Gig Economy*, 12 NAT. L. REV. April 15, 2022, <https://www.natlawreview.com/article/washington-s-new-law-presents-sweeping-changes-to-gig-economy>.

⁶ HENRY CUELLAR, MICHELLE STEEL & ELISE STEFANIK, *To provide workers with schedule flexibility and choice, and for other purposes*, (2022), <https://www.congress.gov/bill/117th-congress/house-bill/8442>.

thwart the substance of economic independence and autonomy while still purporting to excuse dominant platforms from either their responsibilities under labor law or the possibility of horizontal coordination on the part of gig workers that would otherwise be shielded by the exemption for employment contracts under antitrust and consumer protection laws. Thus far, in other words, the platforms have had it both ways: economic control but legal independence without antitrust, consumer protection, or labor-based liability.

The autonomy of independent economic actors is one of several lost aims of antitrust. An older jurisprudence explicitly distinguished employees from “independent business men,” holding that the ability of the latter to conduct business outside the domination of powerful firms using vertical restraints to control them was a value the law protected, separate from any notion of whether doing so was pro- or anti-competitive.⁷ (Indeed, that distinction would probably not have appeared sensible, since requiring a retailer to buy only from a dominant supplier and not its rival would be deemed to impede competition on its face, for example, by foreclosing the rival from part of his market.)

In place of the autonomy of independent actors, the law has evolved based on the assumption that the power of a dominant employer or national chain to control a network of affiliates or subsidiaries is the economically efficient arrangement, to be preferred to the diffusion of independent business judgment to smaller actors. That is variously based on the assumption of a tradeoff between inter-brand and intra-brand competition, that dominant national chains are inherently more economically productive than smaller autonomous actors (and are more productive the more control they have over their affiliates), or that the alternative horizontal coordination on the part of smaller actors ‘distorts’ the competitive process, whereas unitary decisions by dominant players in control of a hierarchical vertical production chain are necessarily profit-maximizing and therefore productively efficient. For example, Judge Frank Easterbrook has written

“Restricted dealing is a form of cooperation. One firm (the retailer) agrees to do things the way a manufacturer specifies, *just as an employee does things within an*

⁷ United States v. Richfield Oil Corp., 99 F. Supp. 280, 294 (1951).

integrated firm. The agreement is not a displacement of the market. Such contracts are the market at work.”⁸

To summarize, antitrust now prefers vertical control as presumptively productively efficient based on a Coasian theory of the firm (construed broadly to include a network of affiliates), and eschews horizontal coordination across firm boundaries as allocatively inefficient against a benchmark of perfect competition. Meanwhile, intra-brand horizontal coordination is presumed to impede the exact productive efficiency that vertical control enables. Within this overall schema, it isn’t hard to discern how the gig economy platforms have enjoyed hands-off treatment.

This essay proceeds as follows: in Section II, we describe how the gig economy operates in practice, particularly as it pertains to rideshare. In Section III, we explain where antitrust liability is implicated. Section IV does the same for Consumer Protection law. Section V concludes.

II. HOW THE GIG ECONOMY WORKS

In order to aid the discussion of antitrust and consumer protection liability, it will help to have a clear picture of the actual practice of gig work. Here we focus on rideshare, and relatedly, on food delivery, both of which are platform-dominated businesses all of which classify drivers as independent contractors (whether or not that classification is lawful).

Drivers ‘activate’ on the platform when and where they wish to receive dispatched rides. Thereupon they may or may not receive offers to undertake certain gigs, which they notionally have the autonomy to accept or reject. Drivers are not paid for the time they are activated-but-undispatched. Nor are they paid for the time or distance between accepting an offered gig and commencing it, when the passenger gets in the car, or alternatively when picking up food for delivery. They are paid solely for the so-called ‘engaged time,’ when the passenger or the food is actually in the car.

Because of this, it is incumbent upon workers to ensure that their engaged time fully compensates operating costs, including the opportunity cost of unengaged time. That militates in favor of accepting as many offered gigs as possible. On the other hand, picking and choosing which gigs to accept (which drivers must do

⁸ Frank H. Easterbrook, *Vertical Arrangements and the Rule of Reason*, 53 ANTITRUST LAW JOURNAL 135, 140 (1984). (emphasis added).

in a matter of seconds) also matters a great deal for workers' livelihood. The driver doesn't know the origin or the destination of a ride when deciding whether to accept or reject. (In the basic setup, the driver is told the approximate time and/or distance from his or her present location to the location of the start of the trip.) Neither does the driver know what fare will be paid for the trip. The trip's start and endpoints matter a great deal for how much unengaged, 'deadhead' time and distance the driver will have to swallow on any given trip. The fare also matters a great deal for the trip's profitability. Yet the driver only learns a trip's starting point after accepting it, only learns a trip's destination after the passenger or food is in the car, and only learns the fare once the trip is complete. If the driver cancels the trip after accepting it, having learned at any of these points that the trip will be unprofitable to undertake, the driver risks platform deactivation.⁹

Municipal regulations governing taxi markets use two primary mechanisms to ensure driver neutrality as to which passengers they service: fare regulations guarantee a minimum per-trip pay, and entry restrictions protect incumbents' profitability during times of peak demand, enabling cross-subsidization across time and geography and defraying the dire consequences of deadheading. Rideshare and food delivery platforms, on the other hand, promote driver non-neutrality: accept the wrong trip and an entire shift's profitability could be ruined, with no scope for cross-subsidization. For that reason, workers are incentivized to be very discerning about which trips they accept, while operating at an informational disadvantage vis a vis the platform.

Meanwhile, the platform's motive is to service all customers at minimum cost and to charge as high a fare to customers as they are willing to pay.¹⁰ Earlier in the platforms' life cycle, they employed 'surge pricing' whereby the fare customers pay (and that drivers receive, less a fulfillment fee) would adjust in response to excess supply or demand. A higher surge would induce more drivers to activate and deter customers, and a lower one would attract customers and deter drivers. The platform would get a percentage fee of the price, surge or no surge. That system was not sufficiently profitable. Starting in 2016, the

⁹ ALEX ROSENBLAT, *UBERLAND: HOW ALGORITHMS ARE REWRITING THE RULES OF WORK* 150 (2018).

¹⁰ Len Sherman, *Why Can't Uber Make Money? — Revisited*, MEDIUM (2022), <https://len-sherman.medium.com/why-cant-uber-make-money-revisited-bf9a83b5cddf> (last visited Jul 12, 2022).

platforms abandoned this system in favor of ‘upfront’ pricing to customers,¹¹ which in practice is tailored to the platform’s perception of customer willingness-and-ability-to-pay, which they know to the level of the individual customer thanks to past actual-and experimental evidence with fare variation. Meanwhile, the driver gets a fare that is notionally tied to the trip’s time and distance, though this rate is opaque in most jurisdictions. The obvious motive is for the platform to price-discriminate among customers while pushing driver pay down as far as possible to maximize the difference.

Part of implementing discriminatory pricing is deterring customer multi-homing by minimizing wait times, because competition would compete down high prices charged to select customers. Thus, the platform seeks to service all customers at the discriminatory prices it sets, regardless of whether those trips are worthwhile for drivers. This type of pricing relies on driver single-homing as well, lest the same or similar rides be offered to drivers on a rival platform along with higher pay. The pattern of conduct described in the rest of this article is designed to prevent multi-homing by both sets of counterparties.

Resale Price Maintenance

Unlike most other multi-sided platform businesses, gig economy platforms make widespread and default use of Resale Price Maintenance (“RPM”). That is to say, the platform decides what price the notionally-independent upstream businesses charge to consumers. In fact, as stated above, the price the platform decides to charge is only told to workers after the trip is complete, an even-more-onerous variation on the usual RPM in which the dominant firm sets prices in advance.¹²

The fact that the platform sets the price means workers have even less independence and flexibility than upstream sellers

¹¹ Alison Griswold, *Uber has quietly started to end surge pricing as we know it*, QUARTZ, 2016, <https://qz.com/676502/uber-has-quietly-started-to-end-surge-pricing-as-we-know-it/> (last visited Jul 19, 2021).

¹² This is one of many reasons why the rideshare platform claim that this is only a ‘suggested price’ that drivers are permitted to discount is without merit. Another is that there’s no way by which a discount could be offered to customers in advance of the ride (either technologically, or because the driver doesn’t know what the full fare actually is). In order to effectuate steering, drivers would have to be able to affirmatively post lower prices on platforms charging lower take rates. As a matter of fact, at the time of writing Uber’s standard drivers agreement states “you agree to charge the Rider Payment to the Rider at the amount recommended by us.”

elsewhere in platform ecosystems. This fact is relevant to the question of employment classification, since part of the test for independent contractor status has been whether the notional contractor suffers ‘profit and loss,’ i.e. can the contractor choose where on a downward-sloping residual demand curve to operate? RPM means the answer to that question is ‘no.’

But beyond the question of control versus independence, RPM also has anti-competitive effects, since it functions as an anti-steering restraint akin to those that are prevalent in the credit card industry: drivers cannot set differential prices across platforms so as to steer consumers to a platform that charges a lower take rate.¹³ That, in turn, softens competition between platforms by blunting any incentive to try to attract business by charging a lower take rate. Doing so will not gain much business because drivers will have no means by which to induce customers to switch, and without customers, workers will not be able to afford abandoning the incumbent(s). Rival rideshare platforms have tried and failed to execute a strategy to defeat incumbent platform oligopoly exactly due to the incumbents’ price restraints. In that sense, they facilitate a tacit oligopoly of high prices and low pay, one with less legal risk than outright price-fixing or market division.¹⁴

Much scholarship considers the competitive consequences of Platform Most-Favored Nations (MFN) Clauses, in which a given

¹³ Anti-steering restraints were the subject of *Ohio vs. American Express*, 838 F. 3d 179 (2018). They are prevalent in tech as well, including among food delivery platform contracts with restaurants, which include “no price competition” clauses that are themselves the subject of antitrust litigation. Marisa Sarnoff, *Grubhub, UberEats Must Face Antitrust Lawsuit Accusing Them of “Cannibalizing” Dine-In Market, Judge Rules*, LAW & CRIME (2022), <https://lawandcrime.com/high-profile/grubhub-doordash-ubereats-must-face-antitrust-lawsuit-accusing-them-of-cannibalizing-dine-in-market-judge-rules/> (last visited Apr 14, 2022).

¹⁴ Several empirical and theoretical treatments of similar conduct and/or institutional settings illustrate the consequences of blunting incentives to reduce price by curtailing any demand response. Jacques-Francois Thisse & Xavier Vives, *On The Strategic Choice of Spatial Price Policy*, 78 AMERICAN ECONOMIC REVIEW 122–137 (1988) study price discrimination under oligopoly, in which the ability to charge different prices to different consumers means that oligopolists may compete over the whole range of customers, rather than just those at the margin. The threat of widening competition reduces prices for nearly all customers (and thus, prohibiting differential pricing would weaken competition). Zach Y. Brown & Alexander MacKay, *Competition in Pricing Algorithms*, AMERICAN ECONOMIC JOURNAL: MICROECONOMICS (2021) study the effect of algorithmic pricing under asymmetric conditions, in which some sellers are faster to respond to a price reduction by competitors than others. In that case, the slower competitors lose the incentive to reduce price since they will not reap increased demand, which raises prices for all sellers in a quasi-collusive equilibrium.

platform mandates that sellers on that platform charge prices that are no lower via alternative distribution channels.¹⁵ The basic reason why platform MFNs impair competition is no different than the effect of RPM in rideshare: the absence of price competition between platforms artificially raises prices on all platforms. The difference between rideshare RPM and other platform MFNs is that rideshare platforms do not explicitly limit pricing autonomy on other platforms, only on their own. But duopoly solves that problem for rideshare platforms: both incumbents use RPM, which means that either one of them need not worry about drivers charging lower prices elsewhere to undercut the collusive duopoly. A limited number of competitors plus the use of RPM by all of them brings about a high-price, low-pay equilibrium.¹⁶

Some commentators have claimed that driver autonomy over price-setting would be unworkable in rideshare, or that it would harm the drivers themselves by inducing a race to the bottom for fares, reducing labor standards even further. It should be noted that Uber tried a version of pricing autonomy in California in 2020, when it faced employment misclassification liability under Assembly Bill 5. In some markets, drivers were able to charge a multiple above or below the base fare, with drivers who set relatively-lower multiples ostensibly receiving priority in dispatching. While that system was in place, pay for drivers increased substantially while prices charged to customers did not change, resulting in much lower take rates for the platform. This is what the platforms fear would happen in the absence of RPM, and so Uber abandoned that system immediately after the passage of Prop 22, when the threat of misclassification liability had been removed.

¹⁵ Jonathan Baker & Fiona Scott Morton, *Antitrust Enforcement Against Platform MFNs*, 127 YALE LAW JOURNAL 2176–2202 (2018); Jonathan Baker, *Cartel Ringmaster or Competition Creator? The Ebooks Case Against Apple (2013)*, in THE ANTITRUST REVOLUTION: ECONOMICS, COMPETITION, AND POLICY 471–488 (Seventh Edition ed. 2019).

¹⁶ Cf. Diana Farrell, Greig Fiona, & Amar Hamoudi. *The Online Platform Economy in 2018: Drivers, Workers, Sellers and Lessors* at 24, JPMorgan Chase Institute, (September 2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3252994 (study of 38 million payments directed through deidentified Chase checking account data showing “[f]reelance transportation work is not a promising prospect for those looking to generate enough income to free them from traditional employment.”).

Non-linear Pay

In addition to the per-trip fares the rideshare platforms set, which drivers learn only after completing a ride, the platforms also make use of bonus systems that reward drivers for single-homing on one platform.¹⁷ This non-linear pay takes various forms. One of them is that the platforms divide the week into two segments: Monday-Thursday and Friday-Sunday. In advance of each segment, they offer drivers a personalized lump sum bonus if the driver agrees in advance to accept a set number of trips within that segment. For example, a driver may be offered one lump sum payment for accepting 20 trips, another for 40, and another for 60. Once agreed to, the driver earns the bonus if and only if he completes that number of trips before the end of the week segment.

Drivers who accept a given bonus offer still notionally have the ability to reject offered trips without foregoing the bonus, so long as they eventually accept the agreed-upon number. However, since the platform dispatches trips, if drivers reject even one, the

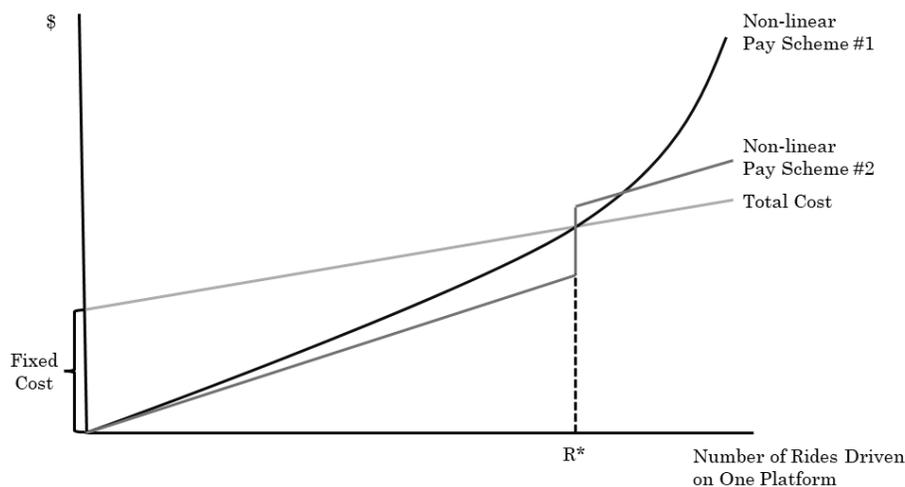


Figure 1. This figure is a schematic depiction of non-linear pay policies on a single rideshare platform. The horizontal axis plots the number of rides a driver would undertake on that platform. There are fixed and variable components of total cost, corresponding to an auto loan and gasoline (plus the opportunity cost of labor, and depreciation) respectively. Non-linear pay scheme #1 is a smooth convex function of rides driven, and non-linear pay scheme #2 gives a lump-sum bonus for driving a certain number of rides, R^* . Both pay schemes are engineered to make R^* the number of rides that would need to be driven for the driver to break even.

¹⁷ Uber’s website explains “Earn extra money if you complete a set number of trips in a certain amount of time when the offer is available.”

platform can prevent the driver from hitting the bonus by refusing to offer any more. More commonly, they offer drivers near the bonus threshold only trips that are disadvantageous, knowing they will only be accepted due to the bonus. In this way, platforms can line up the labor they need in advance given their forecasts of rider demand, without having to compete against one another for drivers in real time.¹⁸ Moreover, the terms of week segment bonuses tend to worsen as drivers gain experience on the platform. Apparently the platforms figure that drivers make costly investments, like auto leases or loans, or quitting another job, that mean they don't need to be paid as much to be induced to work. That fact also undermines any claim that the bonuses are themselves bargained over and arrived at under fully competitive conditions, since their terms worsen the more dependent a driver becomes on ridesharing in general and on a single rideshare platform in particular. In that sense, they are akin to coercive labor market contracts in which the employer has some ability to worsen the worker's outside option and thereby reduce his or her threat point, and thus the wage that has to be paid to induce labor supply.¹⁹

The platforms use other forms of non-linear pay as well: They offer fare multiples for working in particular places and at particular times, a means of assigning specific work to specific workers without incurring misclassification liability.²⁰ They also offer bonuses for accepting multiple rides in close succession. As with the week-segment bonuses, those have the effect of locking drivers into very-short-term noncompete agreements that induce them to accept rides they would otherwise decline due to an undesirable fare, destination, or passenger.²¹ Drivers cannot risk accepting a ride from a rival platform while seeking to meet such a bonus threshold for consecutive rides, else they must reject an offered ride from the platform offering the bonus and so forego the

¹⁸ Sergio Avedian, *How Uber and Lyft Keep Drivers From Switching Platforms*, THE RIDESHARE GUY (2021), <https://therideshareguy.com/how-uber-and-lyft-keep-drivers-from-switching-platforms/> (last visited Apr 17, 2022).

¹⁹ Daron Acemoglu & Alexander Wolitzky, *The Economics of Labor Coercion*, 79 *ECONOMETRICA* 555–600 (2011).

²⁰ See, e.g., How Much can drivers make with Uber?

<https://www.uber.com/us/en/drive/how-much-drivers-make/> (April 25, 2022)

(“Get paid extra for trips in certain areas at busy times. Example: earn an extra \$6 for completing 3 trips in a row with the first trip starting downtown between 4pm and 6pm.”).

²¹ Sergio Avedian, *Lyft Threatens Me with Deactivation for Following Company Policy*, THE RIDESHARE GUY (2022), <https://therideshareguy.com/lyft-threatens-me-with-deactivation-for-following-company-policy/> (last visited Apr 10, 2022).

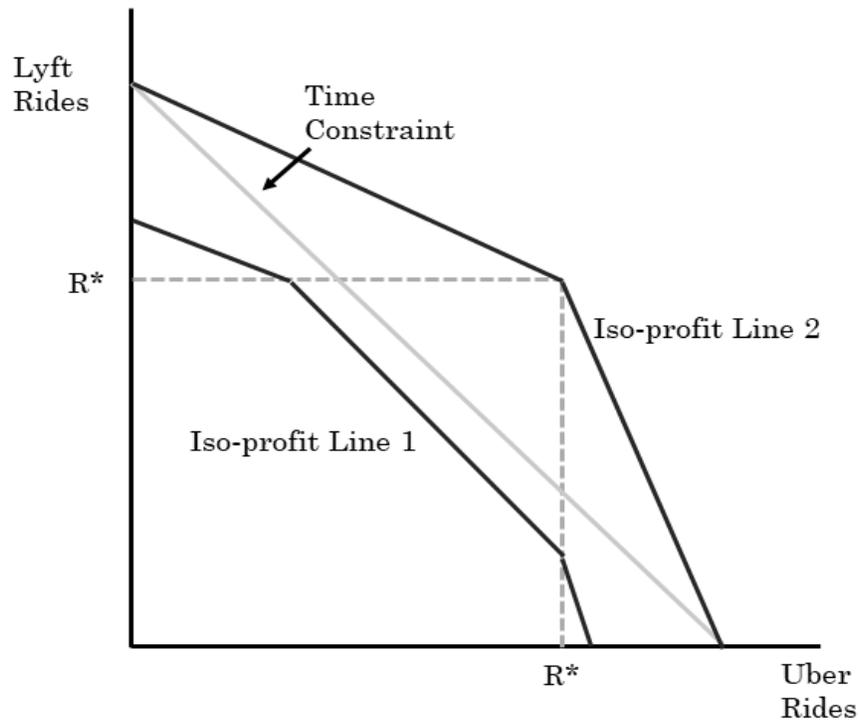


Figure 2. This figure extends the logic of non-linear pay scheme 2 from the previous figure to a platform duopoly consisting of Uber and Lyft. The time constraint signifies driving time of a given length, and the driver must choose how to allocate that time to each platform. For simplification, R^* , the bonus threshold, is the same for both platforms. The driver maximizes profit subject to the time constraint by single-homing on one platform or the other. The competitive significance of non-linear pay is that the availability of the 'kinked' profit schedule means platforms can secure single-homing with lower per-trip pay than it would cost to do so without bonuses, i.e. if the iso-profit curves were constrained to be lines.

bonus. Moreover, the per-trip fare is often so low as to, in effect, require drivers to accept non-linear pay in order to break even.²² That structure serves to reduce drivers' residual labor supply elasticity vis a vis any one platform, and so enable the platform to which the driver is pre-committed to reduce pay or worsen working conditions without causing the driver to switch or to cease driving entirely.

Non-linear pay falls in the category of "conditional pricing practices," which is to say, favorable pricing for customers

²² Sergio Avedian, *Surge-Only Driving is Key for High Earning Drivers*, RIDESHARE GUY (2021), https://therideshareguy.com/surge-only-driving-is-key-for-high-earning-drivers/?ck_subscriber_id=577251576 (last visited Dec 31, 2021).

conditional on exclusivity or near-exclusivity.²³ The idea is to prevent entry and thus competition at the level of the dominant firm—the platform, in this case—by rewarding subordinate entities conditional on cooperating to deter entry.²⁴ It thus acts to “raise rivals’ costs,” i.e. to withhold drivers from would-be entrants that makes entry uneconomic and therefore unsuccessful. It has succeeded in that in rideshare would-be entrants that tried to attract drivers with better terms were prevented from doing so by conduct that tied those drivers to the incumbents.

Withholding Data

In the basic setup, rideshare drivers must accept or decline rides without knowing the fare, origin, or destination of the ride in advance. This acts to reduce drivers’ labor supply elasticity: platforms can pay less than a competitive rate because the drivers don’t know the terms of what they’re agreeing to. Put differently, if the drivers knew the origin and destination in advance, they would decline gigs for which the fare is set too low. Withholding that information is a means of inducing them to accept dispatches they would otherwise reject. In the context of a dynamic labor monopsony model, such provisions enable the employer to reduce turnover without paying higher wages.²⁵

In some jurisdictions, the platforms have adopted variations on conditional data-sharing: drivers get to see the data in advance if they maintain a minimum acceptance rate for the rides they are shown. This modification to the standard arrangement gives with one hand and takes away with the other: having the data would increase drivers’ supply elasticity; having to maintain a minimum acceptance rate reduces it and thus undermines the value of sharing data.

²³ Steven C. Salop, *The Raising Rivals’ Cost Foreclosure Paradigm, Conditional Pricing Practices and the Flawed Incremental Price-Cost Test*, 81 ANTITRUST LAW JOURNAL 371–421 (2017).

²⁴ John Asker & Heski Bar-Isaac, *Raising Retailers’ Profits: On Vertical Practices and the Exclusion of Rivals*, 104 AMERICAN ECONOMIC REVIEW 672–686 (2014).

²⁵ ALAN MANNING, *MONOPSONY IN MOTION: IMPERFECT COMPETITION IN LABOR MARKETS* (2003); Orley C. Ashenfelter et al., *Monopsony in the Labor Market: New Empirical Results and New Public Policies*, 57 JOURNAL OF HUMAN RESOURCES S1–S10 (2022); Alan B Krueger & Orley Ashenfelter, *Theory and Evidence on Employer Collusion in the Franchise Sector*, 57 JOURNAL OF HUMAN RESOURCES (2022); David Card, *Who Set Your Wage?*, 112 AMERICAN ECONOMIC REVIEW 1075–1090 (2022).

III. ANTITRUST LIABILITY FOR VERTICAL PRICE AND NON-PRICE RESTRAINTS

Given the business model and the use of vertical restraints described in Section II, the next question is whether any of this incurs antitrust liability. The substance of that liability would be that the restrictions that platforms place on drivers maintains the market power of the incumbent platforms by diminishing competition between them (walled garden as opposed to multi-homing) and excludes rival platforms that would otherwise compete by charging lower take rates, attracting both customers and drivers and resulting in lower prices and higher pay. The latter possibility implicates the “raising rivals’ costs” paradigm for exclusion and anti-competitive harm: if drivers are tied to existing platforms by restraints, then would-be rival platforms would have to recruit a whole different set of drivers rather than compete for existing ones, which would presumably be much more costly.

One consideration to dispatch off the top is that the vertical restraints in question are not ‘coercive,’ because they are not agreements, but rather unilateral announcements of platform policy.²⁶ The fact that workers in the gig economy are required to accept or reject individual rides constitutes separate agreements to undertake each task. The fact that the price and other terms of each task is determined without the worker’s knowledge is one of the ways the agreements are coercive. The platforms also notice drivers for rejecting too many rides, for cancelling accepted rides, and for other conduct, which is affirmative action to enforce each coercive agreement. Finally, as of this writing, Uber’s standard drivers agreement explicitly states that drivers are obligated to charge the rider the price “suggested” by Uber.

Antitrust liability for platform Resale Price Maintenance would interpret it as reducing incumbent platforms’ incentive to compete by reducing take rates, since drivers would not be able to respond by reducing prices to steer customers. RPM softens platform competition in part because platform competition is already restrained by an oligopolistic market structure. The fact that every platform uses RPM means that drivers have no ability to steer customers to platforms that offer better terms to drivers by charging lower prices on those platforms. Courts have recognized that vertical price restraints are threatening to

²⁶ *United States v. Colgate & Co.*, 250 U.S. 300 (1919), <https://supreme.justia.com/cases/federal/us/250/300/> (last visited Apr 17, 2022).

competition where they are used by all the incumbents in an oligopolized industry.²⁷ The fact of platform duopoly or oligopoly also satisfies the requirement to show market power as part of antitrust liability for vertical price restraints in federal jurisprudence post-*Leegin*.

In *United States v. Apple* (“Apple ebooks”), the court recognized that Apple’s use of a platform MFN in its contracts with book publishers had the effect of excluding competition in the form of rival ebook distributor discounting.²⁸ The result was higher retail prices when Apple entered the ebook retailing market, because the publishers with whom it conspired switched to agency pricing (i.e., RPM) and raised their retail prices off Apple to match the higher prices on Apple’s platform. The same thing happened when Uber eliminated autonomous fare-setting on its platform after Prop 22 passed.

The potential for antitrust liability (at least under federal law) hinges on whether price competition between platform rivals is eliminated or curtailed by the price restraints. In the ebooks case, it was the combination of an MFN in Apple’s contracts with publishers, plus the publishers’ use of RPM vis a vis other ebook retailers, that effectuated the exclusion. The analog in rideshare is the RPM imposed on drivers separately by each platform, plus the fact that there are few competitors and none who do not use RPM.

Antitrust liability for non-linear loyalty-based pay (more generally referred to as “conditional pricing practices”) follows from cases that link its use to monopoly maintenance in the face of the threat of entry.²⁹ An incumbent offers discounts in exchange for exclusivity or near-exclusivity from its direct purchasers, which serves to foreclose the market from would-be rivals. As such, competitive effects hinge on the share of the market foreclosed: if, notwithstanding the conditional discounts, a rival can still gain sufficient customers to enter (because there are enough of them remaining uncovered by the conditional pricing), then the effect is not exclusionary. By contrast, if a substantial (or complete) share of the market is tied up by

²⁷ See BRIAN CALLACI & SANDEEP VAHEESAN, *Antitrust Remedies for Fissured Work*, (2021) (quoting *United States v. Standard Oil Company of California*, 337 U.S. 293, 314 (1949) (“In view of the widespread adoption of such contracts by Standard’s competitors and the availability of alternative ways of obtaining an assured market, evidence that competitive activity has not actually declined is inconclusive.”)).

²⁸ *US v. Apple, Inc.*, 791 F.3d 290 (2015).

²⁹ *ZF Meritor v. Eaton*, 696 F.3d 254 (2012).

conditional pricing agreements, then their effect is likely to be exclusionary.

There is a documented record of exclusion in the rideshare industry. Specifically, the defunct operator Sidecar attempted to enter the market with a model that would have undercut the incumbents' high take rates by offering drivers better terms and, having done that, enticing customers with shorter wait times since drivers would prefer to accept offered rides from the maverick platform Sidecar as against the low-pay incumbents Uber and Lyft.

Thus, the competitive effects of non-linear pricing would hinge on the share of the driver market that is subject to such agreements at any given time, and in particular at 'peak' times when rider demand is strong, in addition to other factors such as consumers' price elasticity of demand. As stated in section II, the economic purpose of this compensation structure to the platforms is to line up their workforce in advance without having to compete for it. If so, then there's likely little scope for competition from new entrants or maverick platforms. Even if, in principle, drivers have accounts with multiple platforms and may drive for both in general, the question is whether they are sufficiently autonomous to entertain bids from multiple platforms at any given point in time. To the degree the non-linear pricing schemes prevent that, they foreclose the market.

Finally, minimum acceptance rates in exchange for sharing data are clearly anti-competitive on their face, relative to full, unconditional data-sharing. It's hard to imagine a competitive justification for imposing them, but one justification the platforms could conceivably offer that has nothing to do with competition is that if drivers have "too much" data in hand when deciding whether to accept or reject rides, they might discriminate against passengers going to undesirable destinations, on the basis of race or some other protected category. Thus, so the argument would go, a minimum acceptance rate is an ancillary restraint to protect customers against discrimination on the part of drivers.

There are several problems with this argument. First, it offsets harm to competition on one side of a platform with ostensible benefits on the other side, and there are longstanding antitrust prohibitions against that idea,³⁰ notwithstanding other

³⁰ *United States v. Philadelphia National Bank*, 374 U.S. 321 (1963).

caselaw that cannot be understood as anything else.³¹ One recent study of the purported benefits to consumers from the exercise of labor market power concludes “Multi-market balancing that treats out-of-market benefits as cognizable justifications for the restraints on workers should be rejected.”³²

Another reason is that the reason drivers have an incentive to discriminate against customers is that the penalty for accepting the “wrong” customers is dire: operating at a loss, thanks to a large amount of uncompensated time and/or distance. With full data-sharing, that risk would be significantly mitigated, because drivers would have the ability to reject those rides. Thus, the minimum acceptance rate isn’t necessary to achieve that non-discriminatory result—the data-sharing would do that, or come close to doing that, by itself. If the platform wishes to serve customers going to undesirable locations, it can pay the drivers sufficiently to make it worth their while to accept those rides based on full information. Declining to do that amounts to discrimination on the part of the platforms, not the drivers. It also fulfills the platforms’ notional commitment to provide universal service by deceiving drivers into accepting uneconomic rides, which is the subject of the following section.

IV. LIABILITY FOR DECEPTION AND UNFAIRNESS

At the outset, some discussion of the scope and applicability of consumer protection statutes with respect to rideshare platforms is helpful. Most state consumer protection laws prohibiting unfair or deceptive acts or practices (UDAP laws) are limited in scope to “consumer transactions.”³³ Although rideshare platform user agreements characterize gig workers as independent contractors, it does not follow that this characterization predetermines the applicability of consumer protection law.³⁴ Moreover, even if consumer protection law might characterize a professional driver as a merchant vis-à-vis her

³¹ Ted Tatos, *Deconstructing the NCAA’s Procompetitive Justifications to Demonstrate Antitrust Injury and Calculate Loss Compensation: The Evidence Against NCAA Amateurism*, 62 ANTITRUST BULLETIN 184–236 (2017).

³² Laura Alexander & Steven C. Salop, *Antitrust Worker Protections: Rejecting Multi-Market Balancing as a Justification for Anticompetitive Harms to Workers*, (2022), <https://papers.ssrn.com/abstract=4094046> (last visited Jul 22, 2022).

³³ DEE PRIDGEN, RICHARD ALDERMAN & JOLINA C CUARESMA, CONSUMER PROTECTION AND THE LAW § 4:2, Appendix 4A. Statutory Limitations and Exemptions, Consumer Protection and the Law (2021).

³⁴ Uber goes a step further characterizing workers as “Uber driver-partners”

passengers, it does not follow the driver is beyond the scope of consumer protection laws in her contract with a gig platform.

It is true that at times, courts have struggled to decide which “hat” a person wears when consenting to a contract with the expectation of earning money. In some instances, particular language within a statute expressly clarifies whether the law applies. But, in most consumer protection laws, the touchstone is whether a person enters into the agreement for “personal, family or household purposes.”³⁵ Many courts have held business-to-business contracts are outside the scope of their respective state UDAP laws.³⁶ And, most courts also hold that UDAP laws do not cover traditional employment agreements even though most workers use their compensation for personal, family or household purposes.³⁷ The distinction is that when an employee attempts to sue under a UDAP statute, the employee “invokes the statute not to protect itself as a consumer, but to protect its business relationship.”³⁸ Courts in effect place a “worker” hat on consumers in employment contracts because an array of labor and employment laws are expected to provide a legal framework deterring employer overreach.

Nevertheless, consumer law is also clear that not every contract formed with the expectation of earning money is treated as business or employment contract. In general, state UDAP laws have a broad sweep with “expansive remedial goals”.³⁹ And they are to be given a liberal construction to effectuate the purpose of

³⁵ See, e.g., 15 U.S.C. §1602(i) (Truth in Lending Act); 15 U.S.C. § 1692a(5) (Fair Debt Collection Practices Act); 15 U.S.C. § 2301 (Magnuson Moss Warranty Act). Articles 2A and 9 of the Uniform Commercial Code, adopted by all fifty states, also define consumer transactions with this test. See U.C.C. § 9-102(a)(22)-(24) (in secured consumer finance); § 2A-103(e) (in consumer leases).

³⁶ See, e.g., *Perschau v. USF Ins. Co.*, 1999 WL 162969 (E.D. Pa. 1999) (unfair practice in settling insurance claim was not covered by the state consumer law where insurance policy was for commercial property). See also DEE PRIDGEN, RICHARD ALDERMAN & JOLINA C CUARESMA, CONSUMER PROTECTION AND THE LAW § 4:4 (“Courts in several states have held that the term ‘consumer’ simply does not include corporations, which eliminates most business purchasers from the scope of the statute’s coverage.”).

³⁷ See NATIONAL CONSUMER LAW CENTER, UNFAIR AND DECEPTIVE ACTS AND PRACTICES § 2.2.9, n. 1104 (9th ed. 2016) (collecting cases by state).

³⁸ *Cooperman v. R.G. Barry Corp.*, 775 F. Supp. 1211, 1214 (D. Minn. 1991).

³⁹ *LaChance v. U.S. Smokeless Tobacco Co.*, 931 A.2d 571, 578, 579 (N.H. 2007).

protecting the public.⁴⁰ UDAP laws are routinely applied to opportunities for financial prizes or sweepstakes—both consumer contracts formed with the expectation of remuneration.⁴¹ A large and persuasive body of consumer law treats “business opportunities” as subject to UDAP statutes.⁴² Some courts, in Massachusetts for example, have already squarely held that independent contractors are covered by that state’s UDAP law.⁴³ Across the country many courts have held state UDAP laws are applicable to multilevel marketing businesses, “work from home” opportunities, and pyramid schemes.⁴⁴ Many UDAP statutes, for example, include specific provisions explicitly prohibiting pyramid schemes. Reading the scope of consumer protection law to exclude any transaction where a party seeks a financial gain “would render statutory bans on pyramid schemes a dead letter.”⁴⁵ And specifically, the FTC has already brought a successful federal UDAP case against Uber for deceptively exaggerating the yearly and hourly income that drivers—explicitly characterized as consumers—could make in certain cities, and misleading prospective drivers about the terms of its vehicle financing options.⁴⁶

⁴⁰ See, e.g., *Scott v. Ass’n for Childbirth at Home Int’l* 430 N.E.2d 1012 (Ill. 1982); *Lemelledo v. Beneficial Mgmt. Corp.*, 696 A.2d. 546 (N.J. 1997);

⁴¹ See, e.g., *Fed. Trade Comm’n v. Gem Merchandising Corp.*, 87 F.3d 466 (11th Cir. 1996) (FTC enforcement action for misrepresenting chances of winning a contest).

⁴² See, e.g., *FTC v. Freecom Communications, Inc.*, 401 F.3d 1192 (10th Cir.2005) (held purchasers of home-business packages are “consumers” for the purpose of the Federal Trade Commission Act). See also NATIONAL CONSUMER LAW CENTER, UNFAIR AND DECEPTIVE ACTS AND PRACTICES § 2.2.8.4 (9th ed. 2016).

⁴³ *Speakman v Allmerica Fin. Life Ins.*, 367 F.Supp.2d 122 (D.Mass. 2005); *Bolen v. Paragon Plastics, Inc.*, 754 F.Supp. 221 (D. Mass. 1990); *Linkage Corp. v. Trustees of Boston Univ.*, 679 N.E.2d 191, 207 (Mass. 1997).

⁴⁴ *State ex rel. Celevreszze v. Howard*, 602 N.E.2d 665 (Ohio Ct. App. 1991); *Sheehan v. Bowden*, 572 So.3d 1211 (Ala. 1990); *Connolly v. Wecare Distributions, Inc.*, 541 N.Y.S.2d 163 (N.Y.Sup. Ct. 1989).

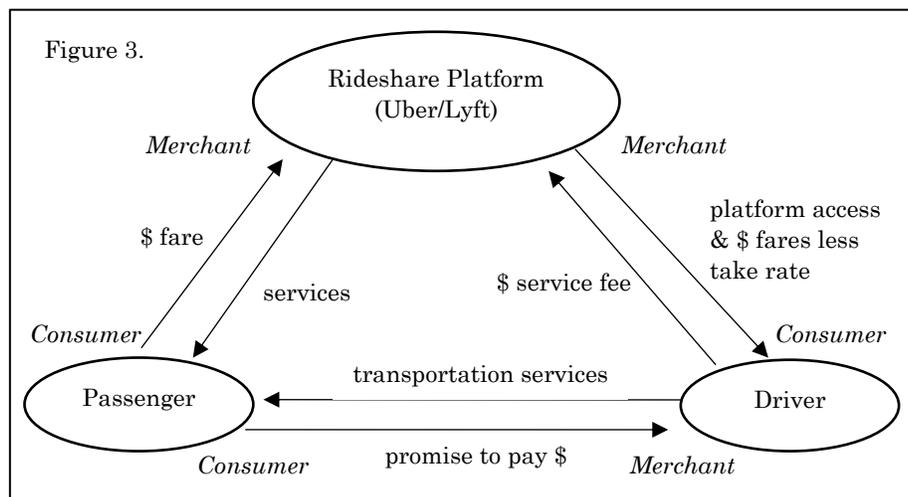
⁴⁵ *Morrison v. YTB Int’l, Inc.*, 649 F.3d 533, 538 (7th Cir. 2011) (J. Easterbrook) (Ill. Law).

⁴⁶ *Fed. Trade Comm’n v. Uber Technologies, Inc.*, Stipulated Order for Permanent Injunction and Monetary Judgment, Case 3:17-cv-00261 (N.D. Cal. Jan. 19, 2017),

<https://www.ftc.gov/system/files/documents/cases/1523082uberproposedorder.pdf>

. Following a large data breach, the FTC also brought a second successful case against Uber less than a year later for “misrepresenting the extent to which it monitored its employees’ access to personal information about users and drivers, and . . . misrepresenting that it took reasonable steps to secure that data.” Fed. Trade Comm’n, Press Release, *Uber Settles FTC Allegations that it Made*

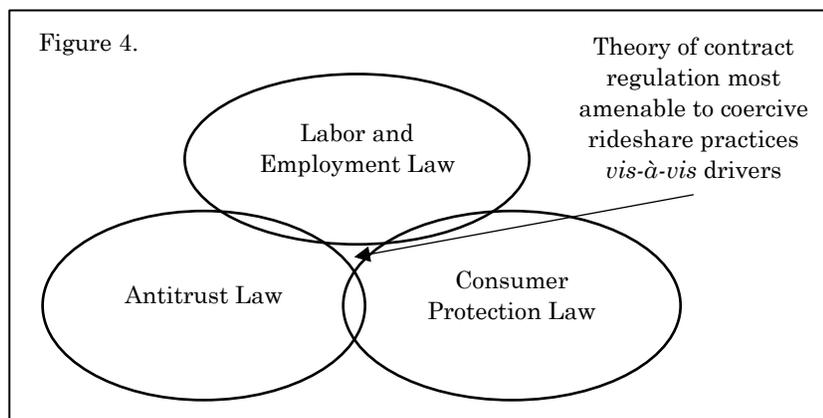
Natural persons can and do wear different doctrinal “hats” for different contracts. The CEO of a large multinational corporation is a merchant in her professional capacity. But, like the rest of us, she is a consumer, when she applies for a checking account or purchases groceries. Rideshare passengers seeking personal transportation are consumers both in their contract with the platform as well as their contract with the driver. In contrast, courts and regulators should generally view drivers and other gig workers as consumers in their contracts vis-à-vis platforms—presuming, *arguendo*, that they are not employees. As depicted in Figure 3, Gig workers purchase access to platform services for the purpose of providing personal, family and household income. While platform rhetoric frame gig work as providing workers the opportunity to “be your own boss,” ethnographic interviews find that drivers do not view themselves as entrepreneurs.⁴⁷ Rideshare platforms’ boilerplate contracts of adhesion with workers more closely resemble archetypal consumer transactions than business-to-business negotiations.



Deceptive Privacy and Data Security Claims, August 15, 2017,
<https://www.ftc.gov/news-events/news/press-releases/2017/08/uber-settles-ftc-allegations-it-made-deceptive-privacy-data-security-claims>.

⁴⁷ Alex Rosenblat & Luke Stark, *Algorithmic Labor and Information Asymmetries: A Case Study of Uber’s Drivers*, 10 INT’L J. COMM. 3758, 3762-63 (2016) (quoting a driver: “Entrepreneur is, I feel like a bit of a stretch. I mean, I feel like the definition of an entrepreneur is, you know, having your own idea and taking off with that. I feel like Uber is just like a side gig, not any kind of entrepreneur endeavor. . . . I don’t feel like entrepreneur is a great classification for drivers, unless you’re running a business out of your Uber car, I guess that’s something an entrepreneur could do.”).

Moreover, unlike traditional business contracts, gig platforms typically use each worker login as a new contract formation moment harvesting putative consent to whatever contractual amendments the platform prefers. For example, Uber stylizes its contract with drivers as a “platform access agreement” where as a driver “you confirm the existence and nature of that contractual relationship each time you access our Platform.”⁴⁸ Calo and Rosenblatt adroitly explained that this practice is “akin to signing a new employee manual every few days.”⁴⁹ And, when litigating over drivers’ obligation to pay a licensing fee, Uber itself characterized drivers as “consumers” of its software.⁵⁰ While this framing may or may not assist Uber in its defensive posture with respect to employment and labor law, it strongly suggests that drivers are consumers under state UDAP laws.



Fundamentally though, whether consumer protection law should apply to gig worker contracts must be answered in context with the application of labor law and antitrust law. As illustrated in Figure 4, the regulatory sweet spot for gig economy platforms would place their coercive practices within a soft point just beyond the simultaneous reach of labor, antitrust, and consumer protection laws. There is a plausible argument that driver-platform contracts should be governed by labor and employment law.⁵¹ And there is also a plausible argument that certain platform practices are subject to antitrust and/or consumer

⁴⁸ Uber, Platform Access Agreement, § 1.1(a) (January 1, 2022),

<https://www.uberpeople.net/attachments/uber-agreement-pdf.635879/>

⁴⁹ Calo & Rosenblatt, *supra*, at n. 196.

⁵⁰ Calo & Rosenblatt, *supra*, at n. 193.

⁵¹ See *Rzak v. Uber Technologies, Inc.*, 951 F.3d 137, 145 (3d Cir. 2020) (finding genuine issues of material fact in drivers claim of employee status under the Fair Labor Standards Act).

protection law.⁵² But what is entirely unreasonable is the argument that gig worker contracts should be subject to none of these restraints against oppressive contracts. Under a fair-minded theory of the gig economy's place in the topography of American contract law, Uber, Lyft, and other similar platforms cannot have it both ways: either they must face responsibility to workers under labor and employment law, or they must run the gauntlet of the antitrust and consumer protection laws that prohibit price fixing, deception, and unfair acts or practices.

Deceptive Practices

While there are broad variety of federal, state, and local consumer protection statutes and common law doctrines, in this essay we focus in particular on the Federal Trade Commission Act's prohibition of unfair and deceptive acts or practices (UDAP) as well as its progeny of state "little FTC Acts." Congress adopted the Federal Trade Commission Act in 1914 in hopes of expanding and strengthening older antitrust provisions within Sherman Act and the common law.⁵³ Rather than provide a comprehensive list of prohibitions Section 5 prohibited "unfair competition" generally.⁵⁴ And it also established the Federal Trade Commission giving the new agency authority to issue orders prohibiting "unfair methods of competition."⁵⁵

The FTC initially took a broad view of unfairness as including a prohibition of deceptive practices. But, in 1931, the Supreme

⁵² Ryan Calo and Alex Rosenblat have persuasively made this case arguing consumer protection law should apply to contractual relationships between gig economy platforms and workers as "entrepreneurial consumers"—a term coined in the FTC's enforcement action against Uber for deceptively exaggerating driver earnings. See Ryan Calo & Alex Rosenblat, *The Taking Economy: Uber, Information, and Power*, 117 COLUMBIA L. REV. 1623, n. 194 (2017) (quoting Complaint for Permanent Injunction and Other Equitable Relief at 10–11, *FTC v. Uber Techs., Inc.*, No. 17-261 (N.D. Cal. Jan. 19, 2017), <http://www.ftc.gov/system/files/documents/cases/1523082ubercmpl.pdf>.

⁵³ Charles G. Haines, *Efforts to Define Unfair Competition*, 29 YALE L.J. 1, 3, 68 (1919); Andy J. Miller, *A Procedural Approach To "Unfair Methods of Competition"*, 93 IOWA L. REV. 1485, 1517 n.126 (2008); David A. Rice, *Consumer Unfairness at the FTC: Misadventures in Law and Economics*, 52 GEO. WASH. L. REV. 1, 14 (1983).

⁵⁴ Gilbert Holland Montague, "Unfair Methods of Competition", 25 Yale L. J. 20, 20–21 (1915); Marc Winerman, *The Origins of the FTC: Concentration, Cooperation, Control, and Competition*, 71 ANTITRUST L.J. 1, 67–68 (2003).

⁵⁵ William Kolasky, *George Rublee and the Origins of the Federal Trade Commission*, 26 ANTITRUST 106, 107 (2011).

Court held that the FTCA only prohibited practices that reduced competition and, accordingly, that the Act did not directly protect consumers from merchant deception.⁵⁶ In 1938 Congress responded with the Wheeler-Lea Amendments to the FTCA which revised section 5 to also prohibit “unfair or deceptive acts or practices in or affecting commerce.”⁵⁷

The new federal statutory deception standard modified older, traditional common law prohibition of criminal and tortious fraud. While the elements vary from state to state, the traditional five elements of fraud include: “(1) a false representation; (2) in reference to a material fact; (3) made with knowledge of its falsity; (4) with the intent to deceive; and (5) on which an action is taken in justifiable reliance upon the representation.”⁵⁸ In contrast to common law fraud, the FTC statutory deception under the Wheeler-Lea Act’s amendments to the FTC the FTC established a deception where “[r]epresentations merely having a ‘capacity to deceive’ are unlawful.”⁵⁹ This capacity to deceive standard was far easier for the FTC to prove than common law fraud because it did not require evidence intent to deceive the public, was indifferent to defendant’s good faith, and lacked a justifiable reliance element.⁶⁰

While the deception standard was easier to for the FTC to prove, the FTCA did and still does not include a private right of action allowing consumers to defend themselves from deception. But during the 1960s and 70s state legislatures around the country followed Congress’ lead by adopting state “little FTC Acts” importing the FTCA’s prohibition of unfair and deceptive practices into the state law in nearly every state in union.⁶¹

⁵⁶ Federal Trade Commission v. Raladam Co., 283 U.S. 643, 646–47 (1931) (holding that the “the plain words of the act” give the Commission authority to prohibit only “methods of competition in commerce”). See also Paul Barron & Dan Rosin, *Federal Regulation of Real Estate And Mortgage Lending* § 5:1 (4th ed.) (2018); Peter C. Ward, *Federal Trade Commission: Law, Practice And Procedure*, §1:12 (2018).

⁵⁷ Wheeler-Lea Act, 75 Pub. L. No. 75-447, 52 Stat. 111 (1938) (codified at 15 U.S.C. § 45).

⁵⁸ 37 Am. Jur. 2d Fraud and Deceit § 24.

⁵⁹ Charles of the Ritz Distributors Corp. v. Fed. Trade Comm’n, 143 F.2d 676, 680 (2d Cir. 1944) (quoting Federal Trade Commission v. Algoma Lumber Co., 291 U.S. 67, 81, (1934)).

⁶⁰ Jack E. Karns & Alan C. Roline, *The Federal Trade Commission's Deception Policy in the Next Millennium: Evaluating the Subjective Impact of Cliffdale Associates*, 74 N.D. L. REV. 441, 445 (1998).

⁶¹ NATIONAL CONSUMER LAW CENTER, UNFAIR AND DECEPTIVE ACTS AND PRACTICES § 1.1-1.2 (9th ed. 2016).

Nearly all of state UDAP laws include some form of a private cause of action and many statutes include attorney fee shifting for successful consumer plaintiffs.⁶²

During the Reagan administration the pendulum of consumer reform swung back towards deregulation. In 1981 the FTC issued a statement on deception revising deception to prohibit an act or practice only “if, first, there is a representation, omission or practice that, second, is likely to mislead consumers acting reasonably under the circumstances, and third, the representation omission or practice is material.”⁶³ Some states followed the FTC’s revised standard and other state UDAP statutes continue to frame deceptive trade practices claims based on the older capacity to deceive rule.⁶⁴

Yet, under either standard, the statutory prohibition of deceptive practices in both state UDAP and under the FTCA remains considerably easier to prove than common law fraud for several reasons. First, the under both standards most UDAP laws generally do not require proof of intent to deceive.⁶⁵ Indeed, even literally true statements which through presentation effect or omitted context convey an implied false impression to consumers can constitute illegal deception under federal and state UDAP laws.⁶⁶ Second, UDAP statutes generally do not require proof of actual consumer deception. Either a capacity to deceive (under the old FTC standard) or a likelihood of deception of consumers acting reasonably under the circumstances (under the post 1981

⁶² *Id.*

⁶³ Commission letter on deception to Hon. John D. Dingell, Chairman, Subcommittee on Oversight and Investigations, Committee on Energy and Commerce, October 14, 1983, https://www.ftc.gov/system/files/documents/public_statements/410531/831014deceptionstmt.pdf. Unusually, the FTC issued revised policy in a letter to Congress appended to its decision in *In re Cliffdale Assocs.*, 103 F.T.C. 110 (1984). See DEE PRIDGEN, JEFF SOVERN & CHRISTOPHER L. PETERSON, CONSUMER LAW CASES AND MATERIALS 60 (5th Ed. 2020)

⁶⁴ CONSUMER PROTECTION AND THE LAW, *supra*, at § 3:25 (“Many state courts, without discussion, simply continue to apply the old FTC criteria for deception or unfairness well after the FTC announced its own policy changes in the early 1980s.”).

⁶⁵ See *F.T.C. v. Freecom Commc'ns, Inc.*, 401 F.3d 1192, 1202 (10th Cir. 2005) (“Because the primary purpose of § 5 is to protect the consumer public rather than to punish the wrongdoer, the intent to deceive the consumer is not an element of a § 5 violation. Instead, the ‘cardinal factor’ in determining whether an act or practice is deceptive under § 5 is the likely effect the promoter's handiwork will have on the mind of the ordinary consumer.”) (citations omitted).

⁶⁶ *Kraft, Inc. v. Fed. Trade Comm'n*, 970 F.2d 311 (7th Cir. 1992).

FTC standard) is sufficient. Third, unlike various formulations of common law fraud, UDAP laws generally do not require proof of justifiable or detrimental reliance on the misrepresentation. The remedial purpose of protecting the public in consumer transactions justifies liability even when state attorneys general or private counsel do not present evidence of reliance. The mere fact of the deceptive misrepresentation is sufficient.

And finally, most courts hold that deceptive trade practices statutes prohibit misleading omissions of information that would be material to consumers acting reasonably under the circumstances. The longstanding rationale for this policy is that “to tell less than the whole truth is a well-known method of deception.”⁶⁷ Of course, not every non-disclosure is illegal. But failure to disclose *material* facts generally give rise to a triable allegation of deception sufficient to survive motions to dismiss and for summary judgment.⁶⁸ Even if shared information leading up to contract formation is technically accurate, withholding material information can, in effect, obscure the meaning of otherwise accurate information rendering the overall contract formation process deceptive.⁶⁹

While there is some variation in state law as legislatures and appellate courts have fine-tuned their approach to deceptive nondisclosure, the great majority of courts across the country hold that misleading nondisclosure of material facts is unlawful in a range of consumer contexts.⁷⁰ Taking only a few examples, appellate courts have found triable allegations of deception for nondisclosure of: test results tending to discredit performance claims in electronic product battery life;⁷¹ studies tending to show a health product was ineffective;⁷² hidden defects in cars (even

⁶⁷ *P. Lorillard Co. v. Fed. Trade Comm’n*, 186 F.2d 52, 58 (4th Cir. 1950). *See also Benrus Watch Co. v. Fed. Trade Comm’n*, 352 F.2d 313 (8th Cir. 1965).

⁶⁸ *See Packard v. KC One, Inc.*, 727 S.W.2d 435 (Mo. Ct. App. 1987); *Fayne v. Vincent*, 301 S.W.3d 162 (Tenn. 2009) (finding triable allegation of deception based on incomplete information about the condition of a home’s septic tank).

⁶⁹ *Fed. Trade Comm’n v. Cyberspace.com*, 453 F.3d 1196 (9th Cir. 2006). *See also* National Consumer Law Center, UNFAIR AND DECEPTIVE ACTS AND PRACTICES § 4.2.15.2 (9th ed. 2016)

⁷⁰ *See* National Consumer Law Center, UNFAIR AND DECEPTIVE ACTS AND PRACTICES § 4.2.15.3.8 (9th ed. 2016) (collecting cases); DEE PRIDGEN, RICHARD ALDERMAN & JOLINA C. CUARESMA, CONSUMER PROTECTION AND THE LAW § 3:8 (“Most states will find liability for omission if the omitted facts are material.”).

⁷¹ *Herron v. Best Buy Co.*, 924 F.Supp.2d 1161 (E.D. Cal. 2013).

⁷² *Stephens v. Gen. Nutrition Cos., Inc.* 2009 WL 1437843 (N.D. Ill., May 29 2009).

when sold without a warranty);⁷³ known material defects in the value or condition of land;⁷⁴ lack of relevant sales staff expertise;⁷⁵ financial difficulties that could prevent performance;⁷⁶ the recruit of a commission or kickback;⁷⁷ the gathering and subsequent sale of credit card usage data to direct mail companies;⁷⁸ and, interest rates or payment terms in credit.⁷⁹ Some courts have held that a failure to disclose in a consumer contract is only deceptive where there is an independent duty to share the information, such as fiduciary duty or knowledge that the buyer is relying on the seller's superior skill or judgment.⁸⁰

Several tactics rideshare platform currently use appear to violate these anti-deception principles in UDAP law. First, both Uber and Lyft withhold information on the projected compensation a drivers will receive when offering a trip to the driver. When passengers hail a ride, they usually enter their planned destination. Platforms use this to identify potential drivers, plot directions to the destination, and set the fare for the trip. In turn this produces the driver's projected compensation based on the fare less the platform's take rate. When the platforms offer a driver a trip, drivers have only seconds to decide whether or not to accept. At this decision-making moment, platforms usually provide an estimated distance and time to the

⁷³ *Totz v. Continental Du Page Acura*, 602 N.E.2d 1374, 1382 (2d Dist. 1992) (deceptive nondisclosure of prior accident); *Thompson v. Main Street Auto Sales & Service, Inc.*, 1999 Mass. App. Div. 260, 1999 WL 1034759 (1999) (deceptive nondisclosure of rental car history). *But see Kenney v. Healey Ford-Lincoln-Mercury, Inc.*, 730 A.2d 115 (1999) (finding no duty to disclose rental or accident history of used car).

⁷⁴ *Stechschulte v. Jennings*, 298 P.3d 1083, 1011 (Kan. 2013)

⁷⁵ *State ex rel Corbin v Goodrich*, 726 P.2d 215 (Az. Ct. App. 1986) (deceptive failure to disclose lack of expertise in staff proposing investment opportunity).

⁷⁶ *Speakman v. Allmerica Fin. Life Ins.*, 367 F.Supp.2d 122, 141-42 (D. Mass 2005) (deceptive failure to disclose risk to independent contractors from possible downturn in stock market); *State ex rel. Steinberg v. Consumer's Choice Foods, Inc.*, 755 N.W.2d 583 (Neb. 2008) (deceptive failure to disclose impending demise of business).

⁷⁷ *Green v. H & R Block, Inc.*, 735 A.2d 1039 (1999) (deceptive failure to disclose receipt of a commission on a tax refund anticipation loan referral).

⁷⁸ *Dwyer v. American Exp. Co.*, N.E.2d 1351 (Ill. App. 1st Dist. 1995) (dismissed on other grounds).

⁷⁹ *Chroniak v. Golden Inv. Corp.* 983 F.2d 1140 (1st Cir. 1993); *Conseco Fin. Serv. Corp. v. Hill*, 556 S.E.2d 468 (Ga. Ct. App. 2001).

⁸⁰ *See, e.g., Indus. Gen. Corp. v. Sequoia Pac. Sys.*, 44 F.3d 40 (1st Cir. 1995) (limiting deceptive nondisclosure to situations where common law would have imposed duty to disclose); *Forrest v. P& L Real Estate Inv. Co.*, 759 A.2d 1187 (Md. Ct. Spec. App. 2000) (duty to disclose arising from merchant's superior knowledge).

prospective passenger's pick-up location. At this moment, Uber and Lyft could also disclose the driver's estimated compensation for the offered trip. Instead, both platforms conceal this critical information until it is too late for drivers to back out of the trip without inconveniencing the passenger and violating platform rules on trip cancellation.

Even after trips are complete and the driver learns the amount of her compensation, platforms still withhold and sometimes understate both the platform's take rate and the price that passengers paid for the ride. This practice frustrates the ability of consumer drivers to adapt their driving strategy to their own particular set of opportunity costs. If drivers learned the price passengers paid and the platform's take rate, they would have more information to guide a longer term strategy of competing down the platform take rate by withholding their consent to purchase access to the platform and drive passengers. This information might also be useful in identifying favorable and unfavorable compensation patterns in algorithmic pricing and offered rides. Armed with take rate information, drivers could simply refuse to accept rides when the platform's service fee exceeds drivers' preferred price points.

Moreover, rideshare platforms also withhold the passenger drop off locations from many drivers until after the driver accepts the offered trip and picks up the passenger. Because drivers are only paid for engaged time, passenger drop off location can significantly affect actual driver compensation over time. For example, if a trip takes a driver to a remote location, the driver may not be able to find another passenger without incurring costly delay or an uncompensated drive back to now distant passengers. Instead of paying an equilibrium rate sufficient to attract drivers to these "dead head" trips, the platforms conceal from drivers the information that would identify these unfavorable offers. In withholding this information, the platforms force drivers to bear these hidden and unwanted costs.

The proposition 22 battle in California illustrates the nature of this practice and its consequences for drivers. In late 2010s political momentum was building in the Golden State for reform that would classify rideshare drivers as platform employees. In 2018, the California Supreme Court ruled that the state's employment statute required the so-called 'ABC test' for employment status.⁸¹ In 2019, the California legislature passed a

⁸¹ *Dynamex Operations W. v. Superior Court*, 416 P.3d 1, 40 (Cal. 2018). Under this test, the California Supreme Court held that workers could be classified as independent contractors only if "(A) that the worker is free from the control and

law affirming that decision.⁸² Under these rules California courts would likely have determined that most gig workers were misclassified.⁸³ Gig platforms responded with a \$185 million ballot campaign in favor of Proposition 22 which eventually overturned the 2019 legislation.⁸⁴ While the California political campaign for Proposition 22 was underway, Uber modified its driver software to share destination and fare data with all drivers in advance of their decision to accept offered rides.⁸⁵ Once Proposition 22 passed and Uber had gotten what it wanted, Uber reverted to a system where the platform only shared fare and destination data with drivers who have accepted five of the last ten offered rides.⁸⁶ Similarly, Lyft only shares information on fares and drop-off locations with drivers who accept nine out of ten offered rides.⁸⁷

These shifting policies on compensation and drop off location disclosure should create a natural experiment. One would hypothesize that disclosure of fare and drop off locations would create a functional market pricing mechanism by allowing more rational and informed driver choices. Uber surely has data that

direction of the hirer in connection with the performance of the work, both under the contract for the performance of such work and in fact; (B) that the worker performs work that is outside the usual course of the hiring entity's business; and (C) that the worker is customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed for the hiring entity." *Id.* at 7.

⁸² Assembly Bill No. 52019 California Assembly Bill No. 5, California 2019-2020 Regular Session.

⁸³ John Myers, Johana Bhuiyan, Margot Roosevelt, *Newsom signs bill rewriting California employment law, limiting use of independent contractors*, L.A. TIMES, Sept. 18, 2019, <https://www.latimes.com/california/story/2019-09-18/gavin-newsom-signs-ab5-employees-independent-contractors-california>; Faiz Siddiqui, *California Senate passes ride-hail bill that has divided Democrats over the future of Uber and Lyft drivers*, WASH. POST, Sept. 11, 2019, <https://www.washingtonpost.com/technology/2019/09/11/how-california-rideshare-bill-has-divided-democrats-over-future-uber-lyft-drivers/>.

⁸⁴ Sara Ashtley O'Brien, *The \$185 million campaign to keep Uber and Lyft drivers as contractors in California*, CNN Business, October 8, 2020, <https://edition.cnn.com/2020/10/08/tech/proposition-22-california/index.html>

⁸⁵ Faiz Siddiqui, *You may be paying more for Uber, but drivers aren't getting their cut of the fare hike*, WASHINGTON POST, June 10, 2021, <https://www.washingtonpost.com/technology/2021/06/09/uber-lyft-drivers-price-hike/>.

⁸⁶ *Id.*

⁸⁷ Jackie Dvalos & Drake Bennett, *Gamification Took Over the Gig Economy. Who's Really Winning*, BLOOMBERG BUSINESS WEEK, May 27, 2022, <https://www.bloomberg.com/news/features/2022-05-27/how-uber-and-lyft-gamify-the-gig-economy#xj4y7vzkg>.

would reveal whether providing all drivers with this information led to higher driver pay and lower take rates. And these data might reveal whether Uber recaptured profits when the platform reverted back to pricing and destination opacity following their political victory on Proposition 22. Interestingly, such a natural experiment would also establish a model for measuring damages both in California and elsewhere for harm suffered by drivers if a court found the platforms' deceptive omission of material information is unlawful.

Platforms' decision to withhold information including driver compensation, drop off locations, fares, and take rates are material omissions that are likely to mislead consumer drivers. For example, by withholding driver compensation and passenger drop off locations until the driver has unrecoverable sunk costs and are subjected to the threat of platform deactivation for cancelling accepted trips, platforms prevent drivers from engaging in a rational, welfare maximizing decision through a fully informed comparison of expected utility to opportunity cost. These omissions are designed to mislead drivers into accepting trips that are against the drivers' best interests. Platforms are using nondisclosure of material information to create a bargaining posture with asymmetrical information that increases platform profits at the expense of drivers.

Rideshare platforms might respond that even without disclosure of key information for any one given trip, overall drivers are able to ascertain sufficient information through experience to make informed decisions. However, this type of counter argument has generally been unsuccessful in deceptive non-disclosure cases under state UDAP laws. Courts generally hold that an initially misleading practice is deceptive "even if subsequently clarified."⁸⁸ Moreover, the fact that there are repeated instances of misleading nondisclosure ought not be allowed to somehow combine in a way that renders deceptive non-disclosure permissible. Sustained experience of deceptive non-disclosure is evidence of greater not less consumer harm.

Of course, if drivers were traditional employees, withholding per-trip compensation information, passenger drop off locations, and similar information would be legal because employers are generally under no duty to disclose a firm's internal accounting to its front-line employees. The worker would simply be tasked with completing the firm's business, and, for example, deadhead trips would be compensable. But if drivers are truly independent

⁸⁸ NATIONAL CONSUMER LAW CENTER, UNFAIR AND DECEPTIVE ACTS AND PRACTICES § 4.2.16.1 (9th ed. 2016) (collecting cases).

consumer contractors who are purchasing access to the software platform's services by paying a service fee, then the failure to disclose the compensation drivers will receive has the capacity to mislead reasonable drivers about a material aspect of the offered contract—namely whether it is worth the drivers' time and effort.

Unfair Acts or Practices

In addition to the federal deception standard, the Wheeler-Lea amendments to the Federal Trade Commission Act established a new category of unfair acts distinct from antitrust law. Unfairness is sometimes described as a broader but overlapping category of consumer protection that includes but is not limited to deception.⁸⁹ In the 1972 Supreme Court case of *F.T.C. v. Sperry & Hutchinson*⁹⁰ the Court held that a practice is “unfair” under the FTCA if:

- (1) it offends “public policy” as “established by statutes, the common law or otherwise”; or
- (2) it is “immoral, unethical, oppressive, or unscrupulous”; or
- (3) it “causes substantial injury to consumers.”⁹¹

As with deception, the FTC revised its unfairness test during the early 1980s.⁹² Under the revised test unfair practices it must cause or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition.⁹³ But many courts still apply the older *Sperry & Hutchinson*, or “S&H” standard in interpreting state unfairness statutes.⁹⁴

⁸⁹ See, e.g., NATIONAL CONSUMER LAW CENTER, UNFAIR AND DECEPTIVE ACTS AND PRACTICES § 4.3.3.1 (9th ed. 2016)

⁹⁰ *F.T.C. v. Sperry & Hutchinson Co.*, 405 U.S. 233 (1972).

⁹¹ CONSUMER PROTECTION AND THE LAW § 3:15 (quoting *Sperry & Hutchinson Co.*, 405 U.S. at n.5.)

⁹² FTC Policy Statement on Unfairness, Dec. 17, 1980, *appended to International Harvester Co.*, 104 F.T.C. 949, 1070 (1984).

⁹³ *Id.* In 1994 Congress amended the FTCA by adding 1980 policy statement standard into a new paragraph within section 5 of the original Act. Federal Trade Commission Act Amendments of 1994, Pub. L. No. 103-312 § 9 (Aug. 26, 1994), *codified at* 15 U.S.C. § 45(n). For a discussion of the effects of the revised standard on FTC unfairness enforcement, see Stephen Calkins, *FTC Unfairness: An Essay*, 46 WAYNE L. REV. 1935, 1949-50 (2000).

⁹⁴ CONSUMER PROTECTION AND THE LAW § 3:25.

The flexibility of the unfairness standard was baked into the design of the of the original federal law in order to allow the FTC and courts to respond to changing practices and technology. In the gig economy era, the original 1914 Conference Report for the Federal Trade Commission Act still sounds prescient:

It is impossible to frame definitions which embrace all unfair practices. There is no limit to human inventiveness in this field. Even if all known practices were specifically defined and prohibited it would be necessary to begin over again. If congress were to adopt the method of definition, it would undertake an endless task.⁹⁵

More specific practices where courts have found triable claims of unfairness under the FTCA or state UDAP laws include a range of acts that with analogous practices in rideshare platforms. For example, courts have found triable allegations of unfairness for: failing to provide important information to a consumer;⁹⁶ systematically overcharging for a good or service;⁹⁷ attempting to circumvent an applicable law;⁹⁸ consistently maintaining a pattern of inefficiency in the conduct of a business;⁹⁹ and using the threat of termination against transaction cost-committed consumers who attempt to insist on fair treatment.¹⁰⁰

Analogously, from the perspective of drivers, rideshare platforms withhold critical information or release it only to those drivers who will be unable to use it strategically. Rideshare drivers as a group are disproportionately vulnerable people likely to be in-between steady employment, struggling to pay for shelter, and on the razor's edge of insolvency. Rideshare platforms use algorithms to strategically extract undisclosed

⁹⁵ H.R. Conf. Rep. 1142, 63 Cong., 2d Sess. At 19 (1914).

⁹⁶ *Burnett v. Ala Moana Pawn Shop* (D. Haw. 1991), *aff'd*, 3 F.3d 1261 (9th Cir. 1993) (nondisclosure of 240% interest rate); *International Harvester Co.*, 104 F.T.C. 949 (1984) (non-disclosure of tractor's dangerous fuel geysering problem).

⁹⁷ *Sampson-Balden Oil Co. V. Walters*, 356 S.E.2d 805 (N.C. Ct. App. 1987).

⁹⁸ *Simeon Mgmt. Corp.* 87 F.T.C. 1184 (1076), *aff'd* 579 F.2d 1137 (9th Cir. 1978) (drug advertising that circumvented a Food and Drug Administration policy).

⁹⁹ *Baaron, Inc. v. Davidson*, 44 N.E.3d 1062 (Ohio Ct. App. 2015); *Brown v. Lyons*, 332 N.E.2d 380 Ohio C.P Hamilton Cnty. 1974)

¹⁰⁰ *Wade v. Jobe*, 818 P.2d 1006, 1017 (Utah 1991) (landlord refusing to repair premises led to "an overall imbalance in the obligations and rights imposed by the bargain").

service fees without revealing their take rate from paid fares. The classification of drivers as independent contractors circumvents labor and employment laws including minimum wage requirements—even though the labor involved in driving passengers is at the heart of rideshare business model. Conversely, the use of RPM, non-linear pay, and minimum acceptance rates in exchange for data is inconsistent with language in Prop 22 purporting to protect drivers' flexibility and autonomy. The lack of transparency in consumer-driver contracts builds chronic inefficiency into drivers' decisions to accept or reject offered trips, since they are likely to accept a good many trips they end up regretting. And rideshare companies use the threat of platform deactivation with little or no due process to deter drivers from asserting market power to extract better compensation and lower take rates. Together, these factors could lead a court to conclude that a reasonable jury might find rideshare platforms are treating their consumer-drivers unfairly.

V. Conclusion

Technological advances from the gig economy have provided meaningful benefits and value to both suppliers and purchasers. In the rideshare industry many drivers and consumers alike choose to purchase platform services from Uber and Lyft's platform technology. It is also true that drivers have flexible opportunities to earn money by driving for the platform companies. And passengers have a new form of transportation that rapidly displaced more traditional taxi services because of their convenience, cost, and facility in competing for profitable business while strategically avoiding the public obligations attached to traditional taxis.

Nevertheless, the issue is not whether society will continue to use rideshare platforms, but what form those platforms will take. Rideshare platforms enjoy structural advantages in information, pricing, and algorithmically driven strategy that have constrained the shared benefits society can expect from innovation. The focal point in legal and political conflict of gig economy work has been whether gig workers will be classified as employees who enjoy the benefits and protections labor and employment law. Even if platforms succeed in their efforts to treat gig workers as independent contractors, antitrust and consumer protection law should be applied to constrain coercive rideshare platform practices. In particular, we have argued that platforms' use of resale price maintenance, of non-linear pay structures, and nondisclosure of critical information to drivers

raise grave questions on whether platforms currently comply with antitrust and unfair and deceptive trade practices law.