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

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This Essay considers antitrust and consumer protection liability for coercive practices vis-à-vis drivers that are prevalent in the rideshare industry. Resale price maintenance, nonlinear 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, which 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.

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.

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1 Marshall Steinbaum, *Establishing Market and Monopoly Power in Tech Platform Antitrust Cases*, 67 ANTITRUST BULL. 130, 137 (2022).

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 get set by the retailer 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 the seller advertises 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' 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]

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[2] *E.g.*, Richard VEDDER & WENDELL COX, THE WAL-MART REVOLUTION: HOW BIG-BOX STORES BENEFIT CONSUMERS, WORKERS, AND THE ECONOMY 5, 114–15 (2006); LEIGH PHILLIPS & MICHAL ROZWORSKI, THE PEOPLE'S REPUBLIC OF WALMART: HOW THE WORLD'S BIGGEST CORPORATIONS ARE LAYING THE FOUNDATION FOR SOCIALISM 30–46 (2019) (determining that "Walmart's suppliers cannot really be considered external entities"); *cf.* Jason Furman, *Wal-Mart: A Progressive Success Story*, MACKINAC CTR. FOR PUB. POL'Y 1–2 (Nov. 28, 2005), https://perma.cc/T9L8-8A4L (discussing how Wal-Mart fails to advocate for policies that would favor its workers); Emek Basker, *Selling a Cheaper Mousetrap: Wal-Mart's Effect on Retail Prices*, 58 J. OF URB. ECON. 203, 220 (2005) (finding that Wal-Mart lowers average retail prices for markets it enters); Ali Hortaçsu & Chad Syverson, *The Ongoing Evolution of US Retail: A Format Tug-of-War*, 29 J. ECON. PERSPS. 89, 100–03 (2015) (concluding that "warehouse club" or "supercenter" retailers have grown faster than e-commerce).

[3] DAVID WEIL, THE FISSURED WORKPLACE: WHY WORK BECAME SO BAD FOR SO MANY AND WHAT CAN BE DONE TO IMPROVE IT 8–10 (2014).

[4] *But see* Castellanos v. State, 2021 WL 3730951, at *2–5 (Cal. Super. Ct. Aug. 20, 2021) (holding that an act passed by public referendum to categorize app-based drivers as

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 federal 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 Essay. If gig workers are legally independent from the platform that controls and directs their work, we argue that that means routine aspects of the gig economy fall within the bounds of antitrust (specifically the antitrust jurisprudence of vertical restraints) and consumer protection law. 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 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 collective action by workers under antitrust law or the exemption for employment contracts under 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 employment-and-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 anticompetitive.[7] (Indeed, that dis-

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independent contractors is "an unconstitutional continuing limitation on the Legislature's . . . plenary power to determine what workers must be covered or not covered by the worker's compensation system), *appeal filed* A163655.

5 WASH. REV. CODE § 51.08.180 (2022); *see also* Kathryn P. Fletcher & Emma A. Healey, *Washington's New Law Presents Sweeping Changes to Gig Economy*, NAT'L. L. REV. (Apr. 15, 2022), https://perma.cc/X4YC-2MPL.

6 Worker Flexibility and Choice Act, H.R. 8442, 117th Cong. (2d Sess. 2022).

7 United States v. Richfield Oil Corp., 99 F. Supp. 280, 294 (S.D. Cal. 1951) (finding that vertical restraints restricted the dealings of independent businessmen).

tinction would probably not have appeared sensible because 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 trade-off between interbrand and intrabrand 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 that "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 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, intrabrand 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 Part I, we describe how the gig economy operates in practice, particularly as it pertains to rideshare. In Part II, we explain where antitrust liability is implicated. Part III does the same for consumer protection law.

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[8] Frank H. Easterbrook, *Vertical Arrangements and the Rule of Reason*, 53 ANTITRUST L.J. 135, 140 (1984) (emphasis added).

I. 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 that 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 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 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 end points matter a great deal for how much unengaged, "deadhead" time and distance the driver will have to swallow on any given trip. ("Deadhead" is transportation-industry jargon for uncompensated trips, in this case, the distance and time a driver must travel without a fare in order to obtain the next paying customer.[9])

The fare also matters a great deal for the trip's profitability. Yet the driver learns a trip's starting point only after accepting it, learns a trip's destination only after the passenger or food is in the car, and learns the fare only after the trip is complete. If the

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[9] *See* Gopindra S. Nair, Chandra R. Bhat, Irfan Batur, Ram M. Pendyala, & William H.K. Lam, *A Model of Deadheading Trips and Pick-Up Locations for Ride-Hailing Service Vehicles*, 135 TRANSP. RSCH PT. A: POL'Y AND PRACTICE 289, 290, 296 (2020).

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.[10]

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' utilization during times of peak demand, ensuring profitability at those times, thereby enabling cross subsidization across time and geography and defraying the consequences of deadheading. Rideshare and food-delivery platforms, on the other hand, promote driver nonneutrality: accept the wrong trip and an entire shift's profitability could be ruined, with no scope for cross subsidization because the supply of driver labor increases when demand is high, holding driver utilization rates approximately constant.[11] The implication is that drivers cannot expect to recoup losses on uneconomic trips. For that reason, drivers are incentivized to be very discerning about which trips they accept, while operating at an informational disadvantage vis-à-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.[12] Earlier in the platforms' life cycles, they employed "surge pricing" whereby the fare customers paid (and that drivers received, 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 platforms abandoned this system in favor of up-front pricing to customers,[13] 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

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[10] ALEX ROSENBLAT, UBERLAND: HOW ALGORITHMS ARE REWRITING THE RULES OF WORK 150 (2018).

[11] Jonathan V. Hall, John J. Horton & Daniel T. Knoepfle, Pricing in Designed Markets: The Case of Ride-Sharing, TOULOUSE SCH. OF ECON. 3–4 (Jan. 29, 2021) (unpublished manuscript) (available at https://perma.cc/3DW9-GBMY).

[12] Len Sherman, *Why Can't Uber Make Money?—Revisited*, MEDIUM (June 11, 2022), https://perma.cc/9B5C-W9PL.

[13] Alison Griswold, *Uber Has Quietly Started to End Surge Pricing as We Know It*, QUARTZ (May 26, 2016), https://perma.cc/5SYL-BD9F.

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 multihoming (i.e., comparing prices across rideshare platforms and opting to take the ride on the lowest-priced platform or traveling via some other mode) by minimizing wait times because competition would push 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 multihoming by both sets of counterparties, and the competition over platform take rates that would ensue if drivers and customers were able to freely set and compare prices and terms across platforms. In order to accomplish this, platforms set prices upfront as take-it-or-leave-it offers to both drivers and customers. That prevents both customers and drivers from steering one another to lower-price, lower-take-rate platforms.

A. Resale Price Maintenance

Unlike most other multisided 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—in the case of rideshare apps, the drivers—charge to consumers. In fact, as stated above, the price the platform decides to charge is told to drivers only after the trip is complete, an even more onerous variation on the usual RPM in which the dominant firm sets prices in advance.[14]

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[14] This is one of many reasons why the rideshare platforms' 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 driver agreement states, "[Y]ou [driver] agree to charge the Rider Payment to the Rider at the amount recommended by us." Complaint, Gill v. Uber Techs., Inc., CGC-22-600284, Dkt. No. BL-9, at 6 (Cal. Super. Ct. June 21, 2022).

The fact that the platform sets the price means workers have even less independence and flexibility than upstream sellers elsewhere in platform ecosystems. This fact is relevant to the question of employment classification because part of the test for independent contractor status has been whether the notional contractor suffers "profit and loss," i.e., whether the contractor can 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 anticompetitive effects because it functions as an antisteering 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.[15] 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 incumbents. Rival rideshare platforms have tried to execute a strategy to defeat incumbent platform oligopoly and have failed 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.[16]

Much scholarship considers the competitive consequences of platform most-favored nations (MFN) clauses, in which a given

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[15] Antisteering restraints were the subject of *Ohio v. Am. Express Co.*, 138 S.Ct. 2274 (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 (Apr. 4, 2022), https://perma.cc/9UV8-4XQS.

[16] Several empirical and theoretical treatments of similar conduct and institutional settings illustrate the consequences of blunting incentives to reduce price by curtailing any demand response. In price discrimination under oligopoly, 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). Jacques-Francois Thisse & Xavier Vives, *On The Strategic Choice of Spatial Price Policy*, 78 AM. ECON. REV. 122, 128–32 (1988). Algorithmic pricing under asymmetric conditions leads some sellers to respond faster to a price reduction by competitors than others. In that case, the slower competitors lose the incentive to reduce price because they will not reap increased demand, which raises prices for all sellers in a quasi-collusive equilibrium. Zach Y. Brown & Alexander MacKay, *Competition in Pricing Algorithms*, AM. ECON. J.: MICROECON. (forthcoming 2023).

platform mandates that sellers on that platform charge prices that are no higher than the prices charged on alternative distribution channels.[17] The basic reason why platform MFN clauses impair competition is no different than the reason why rideshare RPM hurts competition: the absence of price competition between platforms artificially raises prices on all platforms. The difference between rideshare RPM algorithms and MFN clauses on other platforms 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.[18]

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.[19] 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.[20] 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

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17 Jonathan B. Baker & Fiona Scott Morton, *Antitrust Enforcement Against Platform MFNs*, 127 YALE L.J. 2176, 2178 (2018); *see also* Jonathan B. Baker, *Cartel Ringmaster or Competition Creator? The Ebooks Case Against Apple* (2013), AM. UNIV. WASH. COLL. OF L. DIGIT. COMMONS 1 (Aug. 2017), https://perma.cc/MQL3-UQDE.

18 *Cf.* Diana Farrell, Fiona Greig & Amar Hamoudi, *The Online Platform Economy in 2018: Drivers, Workers, Sellers, and Lessors*, JP MORGAN CHASE & CO. INST. 23–24 (Sept. 2018), https://perma.cc/APY4-VPH5 (studying thirty-eight million payments directed through de-identified 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").

19 *See* Cyrus Farivar, *Uber Expands Driver-Led Pricing to All of California*, NBC NEWS (July 9, 2020), https://perma.cc/3RUT-7RPZ; *see also* Faiz Siddiqui, *To Fight New Employment Law, Uber Pits California Drivers Against Each Other*, WASH. POST (Jan. 27, 2020), https://www.washingtonpost.com/technology/2020/01/27/fight-new-employment-law-uber-pits-california-drivers-against-each-other/.

20 Gabrielle Canon, *Uber, Lyft Say Proposed California Ballot Measure is a Good Deal for Drivers. Economists Disagree*, USA TODAY (Nov. 11, 2019), https://www.usatoday.com/story/news/politics/2019/11/11/uber-lyft-fight-back-against-analysis-their-proposition-undepays-drivers/2532947001/.

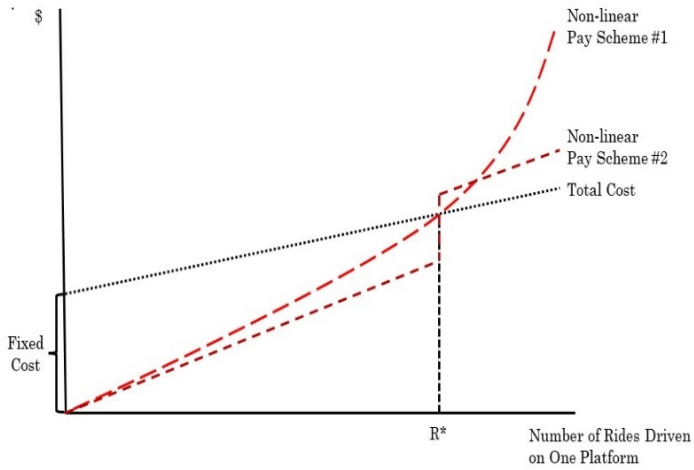
the platforms fear would happen in the absence of RPM, and so Uber abandoned that system immediately after the passage of Proposition 22, when the threat of misclassification liability had been removed.

B. Nonlinear 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.[21] This nonlinear pay takes various forms. One of them is that the platforms divide the week into two segments: Monday through Thursday and Friday through 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 twenty trips, another for forty, and another for sixty. 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. Figure 1 illustrates how nonlinear pay schemes operate on a single platform.

[21] *See How Much Can Drivers Make with Uber?*, UBER (2022), https://perma.cc/5ZAX-9EYK (explaining that drivers can "[e]arn extra money if [they] complete a set number of trips in a certain amount of time when the offer is available").

FIGURE 1: NONLINEAR PAY SCHEMES ON A SINGLE PLATFORM



This figure is a schematic depiction of nonlinear 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. For a driver, the fixed costs might include an auto loan; the driver's variable costs, which increase with the number of rides, might include gasoline, the opportunity cost of labor, and depreciation. Nonlinear Pay Scheme #1 is a smooth convex function of rides driven, and nonlinear Pay Scheme #2 gives a lump-sum bonus for completinga 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.

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 of trips. However, because the platform dispatches trips, if a driver rejects even one, the platform can prevent the driver from hitting the bonus by throttling subsequent offers. More commonly, they offer drivers who are near the bonus threshold only trips that are disadvantageous, knowing that drivers will only accept the trips to attain the bonus.[22] In this way, platforms can line up the labor

[22] An implication of the dispatching of disadvantageous offers to drivers near their bonus thresholds, who have low labor supply elasticity and are thus induced to accept them by the bonus, is that the platform is learning which rides are disadvantageous from their prior rejection by unencumbered drivers. Because drivers who don't accept rides

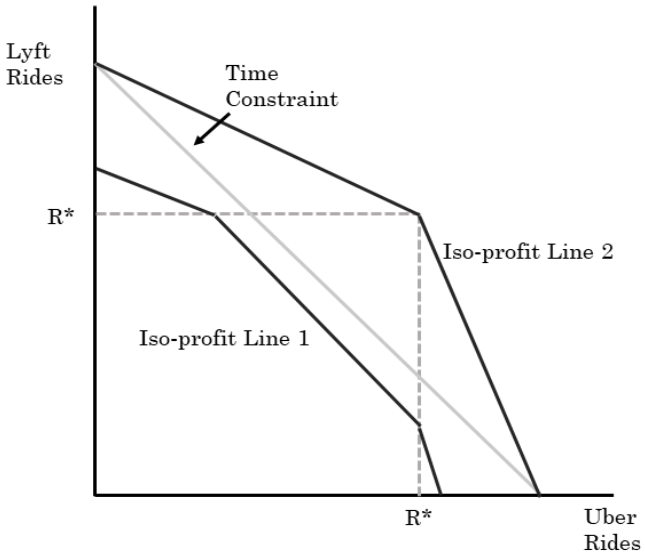
they need in advance given their forecasts of rider demand, without having to compete against one another for drivers in real time.[23] Figure 2 illustrates how loyalty pay can act to induce drivers to single home on one platform. Moreover, the terms of week-segment-style bonuses tend to worsen as drivers gain experience on the platform. Apparently, the platforms figure that drivers make costly investments, like taking out auto leases or loans, or quitting another job, which mean that they are willing to work for less pay once they are locked in. That fact also undermines any claim that the bonuses are themselves bargained over and arrived at under fully competitive conditions, because 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, which will then lower the wage that has to be paid to induce labor supply.[24]

aren't paid, that sorting of rides constitutes valuable, but uncompensated, labor on the part of drivers.

[23] Sergio Avedian, *How Uber and Lyft Keep Drivers from Switching Platforms*, THE RIDESHARE GUY (Dec. 20, 2021), https://perma.cc/YVA8-4V2P.

[24] Daron Acemoglu & Alexander Wolitzky, *The Economics of Labor Coercion*, 79 ECONOMETRICA 555, 555 (2011).

FIGURE 2: NONLINEAR PAY SCHEMES IN A DUOPOLY



This figure extends the logic of Figure 1's Nonlinear Pay Scheme #2, a lump-sum bonus for driving *R** rides on a single platform, to a platform duopoly consisting of Uber and Lyft. The time constraint signifies the driving time for 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 nonlinear 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 isoprofit curves were constrained to be lines.

The platforms use other forms of nonlinear 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.[25] They also offer bonuses for accepting multiple rides in close succession. As with the week-segment bonuses, bonuses for rides in close succession have the effect of locking drivers into very-short-term noncompete agreements that induce them to accept rides they would otherwise reject due to an undesirable fare, destination, or passenger.[26]

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[25] *See, e.g.*, *How Much Can Drivers Make with Uber?, supra* note 21 ("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.").

[26] Sergio Avedian, *Lyft Threatens Me with Deactivation for Following Company Policy*, THE RIDESHARE GUY (Apr. 4, 2022), https://perma.cc/8BNY-5ASD.

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 bonus. Moreover, the per-trip fare is often so low as to, in effect, require drivers to accept nonlinear pay in order to break even.[27] That structure serves to reduce drivers' residual labor supply elasticity vis-à-vis any one platform, and so enables the platform to which the driver is committed to reduce pay or worsen working conditions without causing the driver to switch platforms or to cease driving entirely.

Nonlinear pay falls in the category of "conditional pricing practices," which is to say, favorable pricing conditional on exclusivity or near exclusivity.[28] 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.[29] 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 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.

C. 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.[30]

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[27] Sergio Avedian, *Surge-Only Driving is Key for High Earning Drivers*, THE RIDESHARE GUY (Dec. 1, 2021), https://perma.cc/EY5Y-4YHW.

[28] Steven C. Salop, *The Raising Rivals' Cost Foreclosure Paradigm, Conditional Pricing Practices, and the Flawed Incremental Price-Cost Test*, 81 ANTITRUST L.J. 371, 372 (2017).

[29] John Asker & Heski Bar-Isaac, *Raising Retailers' Profits: On Vertical Practices and the Exclusion of Rivals*, 104 AM. ECON. REV. 672, 681 (2014).

[30] *See* Orley Ashenfelter, David Card, Henry Farber & Michael R. Ransom, *Monopsony in the Labor Market: New Empirical Results and New Public Policies*, 57 J. HUM. RES.

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, but having to maintain a minimum acceptance rate reduces it and thus undermines the value of sharing data.

II. ANTITRUST LIABILITY FOR VERTICAL PRICE AND NONPRICE RESTRAINTS

Given the business model and the use of vertical restraints described in Part I, 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 maintain the market power of the incumbent platforms by diminishing competition between them (walled garden or competitive bottleneck as opposed to multihoming and steering) 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 anticompetitive 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.[31] The fact that workers in the gig economy are required to accept or reject individual rides constitutes separate agreements

S1, S2–S3 (2022) (stating that "[m]arket power in wage-setting arises when the labor supply to a given firm (or group of coordinating firms) is less than perfectly elastic"); *see also* Alan B. Krueger & Orley Ashenfelter, *Theory and Evidence on Employer Collusion in the Franchise Sector*, 57 J. HUM. RES. S324, S333–34 (2022); David Card, *Who Set Your Wage?*, 112 AM. ECON. REV. 1075, 1085 (2022) (concluding that the "lack of information presumed in a typical posted wage search model is troubling"). *But see* ALAN MANNING, MONOPSONY IN MOTION: IMPERFECT COMPETITION IN LABOR MARKETS 117 (2003) (articulating that "wage variation is very low among workers who do the same job").

[31] United States v. Colgate & Co., 250 U.S. 300, 307 (1919) (holding that a private business did not violate the Sherman Act by announcing in advance the price at which its goods could be resold and terminating a contract with a vendor that had sold at a lower price).

to undertake each task. The fact that the price and other terms of each task are determined without the worker's knowledge is one of the ways the agreements are coercive. The platforms also give notice to 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 driver's agreement explicitly states that drivers are obligated to charge the rider the price "recommended" by Uber.[32]

Antitrust liability for platform Resale Price Maintenance would interpret it as reducing incumbent platforms' incentive to compete by reducing take rates, because 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.

Put another way, if a platform increases its take rate by reducing driver pay, the driver would like to respond by shifting to another platform where the pay is better. But the driver's labor supply elasticity in the face of such a wage reduction is limited by RPM. The driver can only switch if there are sufficient customers on that other platform. The way to ensure there would be sufficient customers is for drivers to set lower consumer prices on the platform with higher net pay, inducing customers to switch. Thanks to RPM, drivers cannot offer those discounts. The ability of platforms to impose RPM to deter platform competition rests on their control over access to consumers, and hence on their tight duopoly. RPM (and the other antisteering restraints) serve to maintain that control. This is an instance of indirect network effects on a two-sided platform creating platform market power.

Courts have recognized that vertical price restraints are threatening to competition where they are used by all the incumbents in an oligopolized industry,[33] and the Sherman Act[34] case

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[32] Complaint, Gill v. Uber Techs., Inc., CGC-22-600284, Dkt. No. BL-9, at 6 (Cal. Super. Ct. June 21, 2022).

[33] *See* Brian Callaci & Sandeep Vaheesan, *Antitrust Remedies for Fissured Work*, CORNELL L. REV. ONLINE (forthcoming 2022) ("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." (quoting Standard Oil Co. of Cal. v. United States, 337 U.S. 293, 314 (1949))).

[34] 15 U.S.C. §§ 1–7.

that shifted treatment for vertical price restraints from the per se rule to the rule of reason, *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*,[35] explicitly considers the scenario in which a dominant retailer imposes RPM on a dependent manufacturer in order to prevent innovation in distribution (and hence discounting to consumers) as a case in which it would be anticompetitive.[36] 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, Inc.*[37] (the Apple e-books case), 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 e-book distributor discounting.[38] The result was higher retail prices when Apple entered the e-book 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 Proposition 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 Apple e-books case, it was the combination of an MFN in Apple's contracts with publishers, plus the publishers' use of RPM vis-à-vis other e-book 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 that do not use RPM.

Antitrust liability for nonlinear 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.[39] An incumbent offers discounts in exchange for

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35 551 U.S. 877 (2007).

36 Id. at 893–94:

> Resale price maintenance, furthermore, can be abused by a powerful manufacturer or retailer. A dominant retailer, for example, might request resale price maintenance to forestall innovation in distribution that decreases costs. A manufacturer might consider it has little choice but to accommodate the retailer's demands for vertical price restraints if the manufacturer believes it needs access to the retailer's distribution network.

37 791 F.3d 290 (2d Cir. 2015).

38 *Id.* at 304–05.

39 ZF Meritor, LLC v. Eaton Corp., 696 F.3d 254, 270, 318 (3d Cir. 2012).

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 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 because 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 nonlinear 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 Part I, 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 nonlinear pricing schemes prevent that, they foreclose the market.

Minimum acceptance rates in exchange for sharing data are clearly anticompetitive 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 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, 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,[40] notwithstanding other case law that cannot be understood as anything else.[41] One recent study of the purported benefits to consumers from the exercise of labor market power concludes that "multimarket balancing that treats out-market benefits as cognizable justifications for the restraints on workers . . . should be rejected."[42]

Another problem 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 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 nondiscriminatory 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.

Finally, all of the vertical conduct described here supports a long-term strategy of predatory pricing followed by recoupment. Such cases filed during the initial predation phase failed due to the high burden for plaintiffs to show a reasonable probability of recoupment following *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*[43] But now there is arguably evidence of recoupment given that the platforms have increased their take rates substantially in recent years. The usual reason why predatory pricing is thought to be rare is that executing a recoupment strategy would invite entry and therefore be self-defeating. But all the conduct

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40 United States v. Phila. Nat'l Bank, 374 U.S. 321, 370–71 (1963).

41 Ted Tatos, *Deconstructing the NCAA's Procompetitive Justifications to Demonstrate Antitrust Injury and Calculate Loss Compensation: The Evidence Against NCAA Amateurism*, 62 ANTITRUST BULL. 184, 211–16 (2017).

42 Laura Alexander & Steven C. Salop, *Antitrust Worker Protections: The Rule of Reason Does Not Allow Counting of Out-of-Market Benefits*, 90 U. CHI. L. REV. 273, 273 (2023).

43 509 U.S. 209 (1993).

described above is what enables recoupment to be successful: Entry is deterred by locking drivers up to incumbent platforms and preventing steering to any would-be entrant by driver discounting. Those restraints act as an MFN clause would, radiating high take rates outward by preventing off-platform discounting. Through that means, unilateral (or bilateral) increases in take rates are tacitly collusive because they can't be undercut by would-be entrants, so entry is deterred.

III. 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."[44] 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.[45] Moreover, even if consumer protection law might characterize a professional driver as a merchant vis-à-vis her 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."[46] Many courts have held business-to-business contracts are outside the scope of their respective state UDAP laws.[47] And, most courts also hold that UDAP laws do not

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44 DEE PRIDGEN, RICHARD M. ALDERMAN & JOLINA C. CUARESMA, CONSUMER PROTECTION AND THE LAW § 4:2, Appendix 4A (2022-2023 ed.) [hereinafter PRIDGEN ET AL., CONSUMER PROTECTION].

45 Uber goes a step further characterizing workers as "Driver Partner[s]." *E.g.*, *California Uber Pro Terms and Conditions*, UBER (last modified Mar. 25, 2022), https://perma.cc/F9ME-QNPN.

46 *E.g.*, Truth in Lending Act, 15 U.S.C. § 1602(h); Fair Debt Collection Practices Act, 15 U.S.C. § 1692a(5); Magnuson Moss Warranty Act, 15 U.S.C. § 2301; U.C.C. §§ 2A-103(e), 9-102(a)(22)–(24) (AM. L. INST. & UNIF. L. COMM'N 2022).

47 *See, e.g.*, Perschau v. USF Ins. Co., 1999 WL 162969, at *4 (E.D. Pa. 1999) (finding that an insurer committing unfair practice in settling an insurance claim did not violate the state consumer law in which an insurance policy was for commercial property); *see*

cover traditional employment agreements even though most workers use their compensation for personal, family, or household purposes.[48] 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."[49] 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 a business or employment contract. In general, state UDAP laws have a broad sweep with "expansive remedial goals."[50] And they are to be given a liberal construction to effectuate the purpose of protecting the public.[51] UDAP laws are routinely applied to opportunities for financial prizes or sweepstakes—both consumer contracts formed with the expectation of renumeration.[52] A large and persuasive body of consumer law treats "business opportunities" as subject to UDAP statutes.[53] Some courts, in Massachusetts for example, have already squarely held that independent contractors are covered by that state's UDAP law.[54] Across the country many courts have held state UDAP laws are applicable to multilevel marketing businesses, work-from-home opportunities, and pyramid schemes.[55] Many UDAP statutes, for example, include

also PRIDGEN ET AL., CONSUMER PROTECTION, *supra* note 44, at § 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.").

48 *See* CAROLYN L. CARTER & JONATHAN SHELDON, UNFAIR AND DECEPTIVE ACTS AND PRACTICES § 2.2.9, n.1104 (9th ed. 2016) (collecting cases by state).

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

50 LaChance v. U.S. Smokeless Tobacco Co., 931 A.2d 571, 578–79 (N.H. 2007).

51 *See, e.g.*, Scott v. Ass'n for Childbirth at Home, Int'l, 430 N.E.2d 1012, 1015 (Ill. 1982); Lemelledo v. Beneficial Mgmt. Corp., 696 A.2d 546, 551 (N.J. 1997).

52 *See, e.g.*, FTC v. Gem Merch. Corp., 87 F.3d 466, 468–70 (11th Cir. 1996) (finding defendant liable under a UDAP law for misrepresenting chances of winning a contest).

53 *See, e.g.*, FTC v. Freecom Commc'ns, Inc., 401 F.3d 1192, 1203 (10th Cir. 2005) (holding that purchasers of home-business packages are "consumers" for the purpose of the Federal Trade Commission Act); *see also* CARTER & SHELDON, *supra* note 48 at § 2.2.8.4.

54 Speakman v. Allmerica Fin. Life Ins., 367 F. Supp. 2d 122, 139–40 (D. Mass. 2005); Bolen v. Paragon Plastics, Inc., 754 F. Supp. 221, 227–28 (D. Mass. 1990); Linkage Corp. v. Trs. of Bos. Univ., 679 N.E.2d 191, 207 (Mass. 1997).

55 State *ex rel.* Celebrezze v. Howard, 602 N.E.2d 665, 670–71 (Ohio Ct. App. 1991) (finding a pyramid scheme in violation of Ohio UDAP statutes); Sheehan v. Bowden, 572 So.2d 1211, 1211–12 (Ala. 1990) (finding a pyramid sales structure in violation of Alabama UDAP statutes); Connolly v. Wecare Distribs., Inc., 541 N.Y.S. 2d 163, 165 (N.Y. Sup. Ct.

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 "the statutory ban on pyramid schemes [ ] a dead letter."[56] 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.[57]

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.[58] 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 frames gig work as providing workers the

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1989) (finding a business involving the recruitment of individual distributors to be in violation of New York UDAP statutes).

56 Morrison v. YTB Int'l, Inc., 649 F.3d 533, 538 (7th Cir. 2011).

57 Stipulated Order for Permanent Injunction and Monetary Judgment by Plaintiff, FTC v. Uber Techs., Inc., 3:17-cv-00261, Dkt. No. 2, at 3–4 (N.D. Cal. Feb. 2, 2017). 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." *Uber Settles FTC Allegations That It Made Deceptive Privacy and Data Security Claims*, FTC (Aug. 15, 2017), https://perma.cc/WS4V-7A7A.

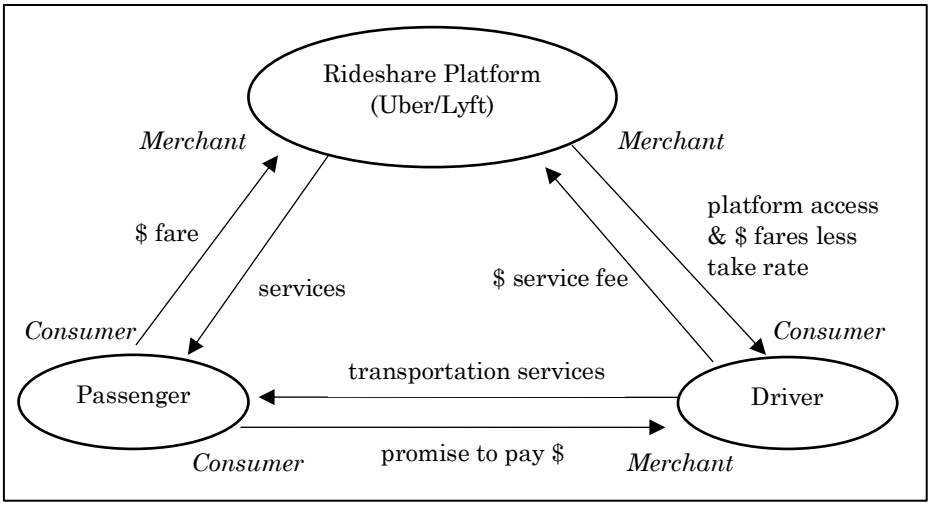
58 For example, rather than treating consumer riders as third-party beneficiaries of Uber's contract with drivers, the U.S. Terms of Use provisions characterize the platform's services to consumer riders as merely facilitating acquisition of services from drivers characterized as "Third-Party Providers." *E.g.*, *U.S. Terms of Use*, UBER § 5 (Aug. 16, 2022), https://perma.cc/NZU4-DS6Z:

> With respect to Third-Party Providers, Charges you incur will be owed directly to Third-Party Providers, and Uber will collect payment of those charges from you, on the Third-Party Provider's behalf as their limited payment collection agent, and payment of the Charges shall be considered the same as payment made directly by you to the Third-Party Provider.

Uber itself does not appear to explicitly promise to consumers that they will be driven to their destination—leaving this fundamental feature of the arrangement to the drivers and riders.

opportunity to "be your own boss," ethnographic interviews find that drivers do not view themselves as entrepreneurs.[59] Rideshare platforms' boilerplate contracts of adhesion with workers more closely resemble archetypal consumer transactions than business-to-business negotiations.

FIGURE 3: RIDESHARE-PLATFORM TRANSACTIONS



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 "[y]ou confirm the existence and nature of that contractual relationship each time you access our Platform."[60] Professor Ryan Calo and technology ethnographer Alex Rosenblat adroitly explained that this practice is "akin to signing a new employee

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[59] One such interview quoted an Uber driver as saying that:

> 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.

Alex Rosenblat & Luke Stark, *Algorithmic Labor and Information Asymmetries: A Case Study of Uber's Drivers*, 10 INT'L J. COMMC'N. 3758, 3762–63 (2016); *see also* Jim Hawkins, *Protecting Consumers as Sellers*, 94 IND. L.J. 1407, 1433—34 (2019) (analyzing the role of rideshare drivers as consumer sellers).

[60] Uber, *Platform Access Agreement*, UBERPEOPLE.NET § 1.1(a) (Jan. 1, 2022), https://perma.cc/Q536-QKMV.

manual every few days."[61] And, when litigating over drivers' obligation to pay a licensing fee, Uber itself characterized drivers as "consumers" of its software.[62] 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.[63] And there is also a plausible argument that certain platform practices are subject to antitrust law, consumer protection law, or both.[64] 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.

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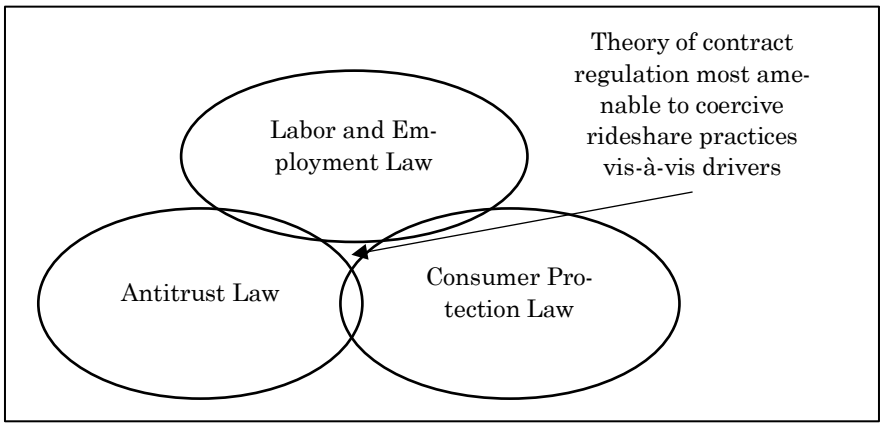
61 Ryan Calo & Alex Rosenblat, *The Taking Economy: Uber, Information, and Power*, 117 COLUM. L. REV. 1623, 1661 (2017).

62 *Id.* at 1647.

63 *See* Razak v. Uber Techs., 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).

64 Calo and Rosenblat have persuasively made this case, arguing that 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. Calo & Rosenblat, *supra* note 61, at 1647 n.120, 1686 n.340 (quoting Complaint for Permanent Injunction and Other Equitable Relief, FTC v. Uber Techs., Inc., 3:17-cv-00261, Dkt. No. 1, at 10–11 (N.D. Cal. Jan. 19, 2017)).

FIGURE 4: APPLICABILITY OF VARIOUS LAWS



A. Deceptive Practices

While there are a 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[65] (FTCA) prohibition of unfair and deceptive acts or practices (UDAP) as well as its progeny of state "little FTC Acts." Congress adopted the FTCA in 1914 in hopes of expanding and strengthening older antitrust provisions within Sherman Act and the common law.[66] Rather than provide a comprehensive list of prohibitions, Section 5 prohibited "unfair competition" generally.[67] And it also established the Federal Trade Commission (FTC) giving the new agency authority to issue orders prohibiting "unfair methods of competition."[68]

The FTC initially took a broad view of unfairness as including a prohibition of deceptive practices. But, in 1931, the Supreme Court held that the FTCA only prohibited practices that reduced competition and, accordingly, that the Act did not directly protect

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65 15 U.S.C. §§ 41–58.

66 Charles Grove 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, 1510 n.126 (2008); David A. Rice, *Consumer Unfairness at the FTC: Misadventures in Law and Economics*, 52 GEO. WASH. L. REV. 1, 14 (1983).

67 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).

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

consumers from merchant deception.[69] 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."[70]

The new federal statutory deception standard modified the 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."[71] In contrast to common law fraud, the FTCA statutory deception under the Wheeler-Lea Act's amendments to the FTCA established a deception where "[r]epresentations merely having a 'capacity to deceive' are unlawful."[72] This capacity to deceive standard was far easier for the FTC to prove than common law fraud because it did not require evidence of intent to deceive the public, was indifferent to defendant's good faith, and lacked a justifiable reliance element.[73]

While the deception standard was easier to prove for the FTC, 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 1970s state legislatures around the country followed Congress' lead by adopting state "little FTC Acts," which imported the FTCA's prohibition of unfair and deceptive practices into the state law in nearly every state.[74] Nearly all state UDAP laws include some form of a private cause of action, and many statutes include attorney-fee shifting for successful consumer plaintiffs.[75]

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69 FTC v. Raladam Co., 283 U.S. 643, 646–47 (1931) (holding that "the plain words of the act" give the Commission authority to prohibit only "methods of competition in commerce" (emphasis omitted)); *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 § 1.03(1) (2018 ed.).

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

71 37 AM. JUR. 2D *Fraud and Deceit* § 24 (2022).

72 Charles of the Ritz Distribs. Corp. v. FTC, 143 F.2d 676, 680 (2d Cir. 1944) (quoting FTC v. Algoma Lumber Co., 291 U.S. 67, 81 (1934)).

73 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).

74 CARTER & SHELDON, *supra* note 48, at §§ 1.1–1.2.

75 *Id.*

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 in the circumstances," and third, the "representation, omission, or practice must be [ ] material."[76] 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.[77]

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, under both standards, most UDAP laws generally do not require proof of intent to deceive.[78] 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.[79] 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 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

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[76] James C. Miller, *FTC Policy Statement on Deception*, FTC (Oct. 14, 1983), https://perma.cc/4RY9-TXHW. Unusually, the FTC issued revised policy in a letter to Congress appended to its decision in *In re* Cliffdale Assocs. Inc., 103 F.T.C. 110 (1984); *see also* JOHN A. SPANOGLE, RALPH J. ROHNER, DEE PRIDGEN, JEFF SOVERN & CHRISTOPHER L. PETERSON, CONSUMER LAW CASES AND MATERIALS 52–54 (4th ed. 2013).

[77] PRIDGEN ET AL., CONSUMER PROTECTION, *supra* note 44, at § 3: ("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.").

[78] *See* FTC v. Freecom Commc'ns, Inc., 401 F.3d 1192, 1202 (10th Cir. 2005) (citations omitted) (first citing FTC v. Amy Travel Serv., Inc., 875 F. 2d 564, 573 (7th Cir. 1989), *overruled by* FTC v. Credit Bureau Center, LLC, 937 F. 3d 764 (7th Cir. 2019); then citing United States v. Johnson, 541 F.2d 710, 712 (8th Cir. 1976); and then quoting FTC v. Sterling Drug, Inc., 317 F. 2d 669, 674 (2d Cir. 1963)):

> 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.

[79] Kraft, Inc. v. FTC, 970 F.2d 311, 318–20 (7th Cir. 1992).

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 "[t]o tell less than the whole truth is a well-known method of deception."[80] Of course, not every nondisclosure is illegal. But failure to disclose *material* facts generally gives rise to a triable allegation of deception sufficient to survive motions to dismiss and for summary judgment.[81] 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.[82]

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.[83] 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;[84] studies tending to show a health product was ineffective;[85] hidden defects in cars (even when sold

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80 P. Lorillard Co. v. FTC, 186 F.2d 52, 58 (4th Cir. 1950); *see also* Benrus Watch Co. v. FTC, 352 F.2d 313, 322–24 (8th Cir. 1965).

81 *See* Packard v. KC One, Inc., 727 S.W.2d 435, 436–37 (Mo. Ct. App. 1987); *see also* Fayne v. Vincent, 301 S.W.3d 162 (Tenn. 2009) (finding a triable allegation of deception based on incomplete information about the condition of a home's septic tank).

82 FTC v. Cyberspace.Com LLC, 453 F.3d 1196, 1199–1201 (9th Cir. 2006); *see also* CARTER & SHELDON, *supra* note 48, at § 4.2.15.2.

83 *See* CARTER & SHELDON, *supra* note 48, at § 4.2.15.3.8 (collecting cases); *see also* PRIDGEN ET AL., CONSUMER PROTECTION, *supra* note 40, at § 3:9 ("Most states will find liability for omission if the omitted facts are material.").

84 Herron v. Best Buy Co., 924 F. Supp. 2d 1161, 1166–67 (E.D. Cal. 2013) (evaluating claims of deception for nondisclosure of test results about a laptop's battery life).

85 Stephens v. Gen. Nutrition Cos., 2009 WL 1437843, at *3–4 (N.D. Ill., May 21, 2009) (evaluating claims of deception for studies about a product's ineffectiveness).

without a warranty);[86] known material defects in the value or condition of land;[87] lack of relevant sales-staff expertise;[88] financial difficulties that could prevent performance;[89] the recruit of a commission or kickback;[90] the gathering and subsequent sale of credit card usage data to direct-mail companies;[91] and interest rates or payment terms in credit.[92] Some courts have held that a failure to disclose in a consumer contract is deceptive only 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.[93]

Several tactics that rideshare platforms currently use appear to violate these antideception 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

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[86] Totz v. Cont'l Du Page Acura, 602 N.E.2d 1374, 1382 (Ill. Dist. Ct. 1992) (finding the nondisclosure of a prior accident to be a deceptive act); Thompson v. Main St. Auto Sales & Serv., Inc., 1999 Mass. App. Div. 260, 262 (Mass. App. Div. 1999) (finding the nondisclosure of rental car history to be a deceptive act). *But see* Kenney v. Healey Ford-Lincoln-Mercury, Inc., 730 A.2d 115, 117 (Conn. Ct. App. 1999) (finding no duty to disclose the rental or accident history of a used car).

[87] Stechschulte v. Jennings, 298 P.3d 1083, 1085 (Kan. 2013).

[88] State *ex rel.* Corbin v Goodrich, 726 P.2d 215, 221 (Az. Ct. App. 1986) (determining that a failure to disclose lack of expertise in staff proposing investment opportunity constituted a deceptive act).

[89] Speakman v. Allmerica Fin. Life Ins., 367 F. Supp. 2d 122, 141–42 (D. Mass. 2005) (deciding that the failure to disclose a risk to independent contractors of a possible downturn in stock market constituted a deceptive act); State *ex rel.* Steinberg v. Consumer's Choice Foods, Inc., 755 N.W.2d 583, 489 (Neb. 2008) (concluding that the failure to disclose the impending demise of business constituted a deceptive act).

[90] Green v. H & R Block, Inc., 735 A.2d 1039, 1058–59 (Md. Ct. App. 1999) (finding that the failure to disclose the receipt of a commission on a tax refund in anticipation loan referral constituted a deceptive act).

[91] Dwyer v. Am. Exp. Co., 652 N.E.2d 1351, 1356–57 (Ill. Ct. App. 1995).

[92] Chroniak v. Golden Inv. Corp. 983 F.2d 1140, 1146–47 (1st Cir. 1993) (evaluating a deception claim that a lender failed to disclose interest rates); Conseco Fin. Servicing Corp. v. Hill, 556 S.E.2d 468, 472–73 (Ga. Ct. App. 2001) (evaluating deception claims that a lender failed to disclose interest rate and advised on the legality of a purchase agreement).

[93] *See, e.g.*, Indus. Gen. Corp. v. Sequoia Pac. Sys. Corp., 44 F.3d 40, 43–44 (1st Cir. 1995) (limiting deceptive nondisclosure to situations in which common law would have imposed a duty to disclose); Forrest v. P & L Real Estate Inv. Co., 759 A.2d 1187, 1208–09 (Md. Ct. Spec. App. 2000) (concluding that a duty to disclose arose from the merchant's superior knowledge).

trip, drivers have only seconds to decide whether to accept. At this decision-making moment, platforms usually provide an estimated distance and time to the prospective passenger's pickup 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.[94] 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 "deadhead" 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 the late 2010s,

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94 *See* Levi Sumagaysay, *Uber Showed Drivers Lower Fares than Passengers, Blames California Law It Supported*, MKT. WATCH (July 23, 2021), https://www.marketwatch.com/story/uber-showed-drivers-lower-fares-than-passengers-blames-california-law-it-supported-11627087679.

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.[95] In 2019, the California legislature passed a law affirming that decision.[96] Under these rules, California courts would likely have determined that most gig workers were misclassified.[97] Gig platforms responded with a $185 million ballot campaign in favor of Proposition 22 which eventually overturned the 2019 legislation.[98] 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.[99] Once Proposition 22 passed and Uber had gotten what it wanted, Uber reverted to a system in which the platform shared fare and destination data only with drivers who had accepted five of the last ten offered rides.[100] Similarly, Lyft shares information on fares and drop-off locations only with drivers who accept nine out of ten offered rides.[101]

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[95] Dynamex Ops. West, Inc. v. Super. Ct., 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) [ ] the worker is free from the control and 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) [ ] the worker performs work that is outside the usual course of the hiring entity's business; and (C) [ ] 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.

[96] Assemb. B. No. 5, 2019–2020 Reg. Sess. (Cal. 2020) (codified at CAL. LABOR CODE §§ 2750.3, 3351 and CAL. UNEMPLOYMENT INS. CODE §§ 606.5, 621).

[97] 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://perma.cc/7J59-LAYP; 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://perma.cc/S592-WFAW.

[98] Sara Ashley O'Brien, *The $185 Million Campaign to Keep Uber and Lyft Drivers as Contractors in California*, CNN BUS. (Oct. 8, 2020), https://perma.cc/7UGH-JGHP.

[99] Faiz Siddiqui, *You May Be Paying More for Uber, but Drivers Aren't Getting Their Cut of the Fare Hike*, WASH. POST (June 10, 2021), https://perma.cc/VUN4-EMXD.

[100] *Id.*

[101] Jackie Davalos & Drake Bennett, *Gamification Took over the Gig Economy. Who's Really Winning?*, BLOOMBERG BUS. WK. (May 27, 2022), https://www.bloomberg.com/news/features/2022-05-27/how-uber-and-lyft-gamify-the-gig-economy#xj4y7vzkg.

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 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 unlawful.

Platforms' decisions 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 is 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 counterargument has generally been unsuccessful in deceptive nondisclosure cases under state UDAP laws. Courts generally hold that an initially misleading practice is deceptive "even if subsequently clarified."[102] Moreover, the fact that there are repeated instances of misleading nondisclosure ought not be allowed to somehow combine in a way that renders deceptive nondisclosure permissible. Sustained experience of deceptive nondisclosure is evidence of greater, not less, consumer harm.

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[102] CARTER & SHELDON, *supra* note 48, at § 4.2.16.1 (collecting cases).

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 frontline 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 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.

B. Unfair Acts or Practices

In addition to the federal deception standard, the Wheeler-Lea amendments to the FTCA 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.[103] In the 1972 Supreme Court case of *FTC v. Sperry & Hutchinson Co.*,[104] 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";
2. It is "immoral, unethical, oppressive, or unscrupulous"; or
3. It "causes substantial injury to consumers."[105]

As with deception, the FTC revised its unfairness test during the early 1980s.[106] Under the revised test, for a practice to be unfair, it must cause or be 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.[107] But many courts still apply the

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[103] *See, e.g.*, CARTER & SHELDON, supra note 48, at § 4.3.3.1.

[104] 405 U.S. 233, 244 n.5 (1972).

[105] PRIDGEN ET AL., CONSUMER PROTECTION, *supra* note 44, at § 3:16 (quoting *Sperry & Hutchinson Co.*, 405 U.S at 244 n.5.)

[106] *In re* Int'l Harvester Co., 104 F.T.C. 949, 1071–76 (1984) (appending the FTC Policy Statement on Unfairness dated December 17, 1980).

[107] *Id.* In 1994, Congress amended the FTCA by adding the 1980 policy statement standard to § 5 of the original act. Federal Trade Commission Act Amendments of 1994, Pub. L. No. 103-312, § 9, 108 Stat. 1691 (codified at 15 U.S.C. § 45(n)); *see also* Stephen Calkins, *FTC Unfairness: An Essay*, 46 WAYNE L. REV. 1935, 1949–50 (2000) (discussing the effects of the revised standard on FTC unfairness enforcement).

older *Sperry & Hutchinson* ("S&H") standard in interpreting state unfairness statutes.[108]

The flexibility of the unfairness standard was baked into the design 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 FTCA 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 at once necessary to begin over again. If Congress were to adopt the method of definition, it would undertake an endless task.[109]

More specific practices where courts have found triable claims of unfairness under the FTCA or state UDAP laws include a range of acts analogous to practices by rideshare platforms. For example, courts have found triable allegations of unfairness for failing to provide important information to a consumer;[110] systematically overcharging for a good or service;[111] attempting to circumvent an applicable law;[112] consistently maintaining a pattern of inefficiency in the conduct of a business;[113] and using the threat of termination against transaction-cost-committed consumers who attempt to insist on fair treatment.[114]

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

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[108] PRIDGEN ET AL., CONSUMER PROTECTION, *supra* note 44, at § 3:26.

[109] H.R. Conf. Rep. No. 1142, 63d Cong., at 19 (2d Sess. 1914).

[110] *E.g.*, Burnett v. Ala Moana Pawn Shop, 1991 WL 11986116, at *13–14 (D. Haw. Oct. 17, 1991) (failing to inform about a 240% interest rate), *aff'd*, 3 F.3d 1261 (9th Cir. 1993); *In re* Int'l Harvester Co., 104 F.T.C. 949, 949 (1984) (failing to inform about a tractor's fuel-geysering risk).

[111] Sampson-Bladen Oil Co. v. Walters, 356 S.E.2d 805, 808 (N.C. Ct. App. 1987).

[112] *In re* Simeon Mgmt. Corp. 87 F.T.C. 1184 (1976), *aff'd* 579 F.2d 1137 (9th Cir. 1978) (concluding that drug advertisements circumvented a Food and Drug Administration policy).

[113] Baaron, Inc. v. Davidson, 44 N.E.3d 1062, 1067–69 (Ohio Ct. App. 2015) (finding a home contractor liable for substandard work); Brown v. Lyons, 332 N.E.2d 380, 385–87 (Ohio Ct. Com. Pl. 1974) (imposing liability on a supplier who accepted payments for products delivered very slowly or not at all).

[114] Wade v. Jobe, 818 P.2d 1006, 1017 (Utah 1991) (determining that a landlord's refusal to repair premises led to "an overall imbalance in the obligations and rights imposed by the bargain").

between steady employment, struggling to pay for shelter, and on the razor's edge of insolvency.[115] Rideshare platforms use algorithms to strategically extract undisclosed 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, nonlinear pay, and minimum acceptance rates in exchange for data is inconsistent with language in Proposition 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 because they are likely to accept 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 that rideshare platforms are treating their consumer-drivers unfairly.

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 has rapidly displaced more traditional taxi services because of its 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

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[115] *See* UCLA Inst. for Rsch. on Lab. & Emp., UCLA Lab. & Workplace Stud. Minor & UCLA Labor Ctr., *More Than a Gig: A Survey of Ride-Hailing Drivers in Los Angeles*, UCLA 15 (May 18, 2018), https://perma.cc/8W8C-XDD6 (finding that nearly one in five drivers surveyed in the greater Los Angeles area receive some form of public assistance).

constrained the shared benefits society can expect from innovation. The focal point in the 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, nonlinear 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.