

The Social Costs of Uber

Brishen Rogers†

INTRODUCTION

The “ride-sharing” company Uber has become remarkably polarizing over the last year. Venture capital firms still love Uber’s prospects, as reflected in a recent \$40 billion valuation.¹ Yet the company seems determined to alienate just about everyone else.² Taxi drivers have cast Uber as an unsafe and rapacious competitor, leading lawmakers to shut it out of various markets.³ Uber’s claim that its average New York City driver earns over \$90,000 a year was so hard to verify that a *Slate* writer entitled her article “In Search of Uber’s Unicorn.”⁴ And in what some have called “Ubergate,”⁵ a senior executive stated that the company might investigate the personal and family lives of its critics—in particular a female journalist who accused it of disregarding female passengers’ and drivers’ safety.⁶

† Associate Professor of Law, Temple University James E. Beasley School of Law.

I’d like to thank the staff of *The University of Chicago Law Review* for superb editorial assistance. Errors are of course mine alone.

¹ Mike Isaac and Michael J. De La Merced, *Uber Adds a Billion Dollars More to Its Coffers*, NY Times Dealbook Blog (NY Times Dec 4, 2014), online at <http://dealbook.nytimes.com/2014/12/04/uber-files-to-sell-1-8-billion-in-new-shares> (visited Feb 26, 2015).

² Indeed, one Silicon Valley venture capital chieftain has called the company “ethically challenged.” Hailey Lee, *Uber Is ‘Ethically Challenged’*; Peter Thiel (CNBC Sept 17, 2014), online at <http://www.cnbc.com/id/102008782> (visited Feb 26, 2015).

³ See, for example, Gregory Wallace, *Uber’s Global Ambitions Hit Roadblocks*, CNN Money (CNN Dec 9, 2014), online at <http://money.cnn.com/2014/12/09/technology/uber-ban-global-spain-india-portland> (visited Feb 26, 2015).

⁴ Alison Griswold, *In Search of Uber’s Unicorn*, Slate Moneybox Blog (Slate Oct 27, 2014), online at http://www.slate.com/articles/business/moneybox/2014/10/uber_driver_salary_the_ride_sharing_company_says_its_drivers_make_great.html (visited Feb 26, 2015).

⁵ See, for example, Liz Gannes, *Investors: Damn Ubergate and Full Speed Ahead with Megafunding*, Recode (CNBC Nov 24, 2014), online at <http://www.cnbc.com/id/102212709> (visited Feb 26, 2015).

⁶ See Ben Smith, *Uber Executive Suggests Digging Up Dirt on Journalists* (Buzzfeed Nov 17, 2014), online at <http://www.buzzfeed.com/bensmith/uber-executive-suggests-digging-up-dirt-on-journalists> (visited Feb 26, 2015); Sarah Lacy, *The Horrific Trickle-Down of Asshole Culture: Why I’ve Just Deleted Uber from My Phone* (PandoDaily Oct 22, 2014), online at <http://pando.com/2014/10/22/the-horrific-trickle-down-of-asshole-culture-at-a-company-like-uber> (visited Feb 26, 2015) (describing recent company acts as demonstrating “sexism and misogyny”).

Unfortunately, public debate surrounding Uber has so far generated more heat than light, revealing little about the company's net impact on important public goods and values.⁷ This Essay takes up that question. It first argues that Uber's success stems not (just) from regulatory arbitrage or other malfeasance, but from having created a far more efficient market for car-hire services. It then argues that Uber's rise is cause for both optimism and pessimism. In addition to its obvious positive effects on consumer welfare, Uber's partial consolidation of the car-hire sector and its compilation of data on passenger and driver behavior may enable Uber and regulators to ensure safety and root out discrimination against passengers with relative ease. In that regard, Uber may be an improvement over the existing taxi sector, which is quite difficult to regulate, though of course much depends on political will. Uber's longer-term impact on labor standards is quite unclear, however, and it may have dark implications for the future of low-wage work more generally.

Part I discusses how Uber is fundamentally altering the car-hire sector. Part II assesses Uber's effects on safety, privacy, discrimination, and labor standards and outlines how lawmakers might adapt existing laws to reach Uber and other ride-sharing companies. Part III closes with reflections on Uber and the future of low-wage work.

I. UBER'S EFFECT ON THE CAR-HIRE SECTOR

Uber is sparking two major transformations of the car-hire sector. First, it is eliminating various transaction costs that have plagued the sector, particularly search costs, thereby creating something akin to a free market for car-hire services. Second, it is encouraging vertical and horizontal integration of the sector, which is highly fragmented in many cities.

A. Creative Destruction at Work

Uber's business model is actually quite simple: its smartphone-based app connects drivers offering rides and passengers seeking them, passengers pay mileage-based fees through credit cards that the company keeps on file, and Uber

⁷ Hence my title, which references Ronald Coase, *The Problem of Social Cost*, 3 J L & Econ 1, 34 (1960) (arguing that, in assessing "alternative social arrangements, the proper procedure is to compare the total social product yielded by these different arrangements").

then takes a percentage of each fare and gives the rest to drivers. Uber describes this as “ride-sharing,” but that is a misnomer—nothing is shared. Rather, in Robert Nozick’s memorable phrase, the app enables “capitalist acts between consenting adults.”⁸

While Uber is extremely aggressive toward competitors and seems to disregard the law when convenient,⁹ its success is not based just on regulatory arbitrage. Nor is it simply toppling an ancien régime of taxi regulations that merely protect medallion holders’ monopoly rents. Rather, Uber’s key innovation lies in having reduced the transaction costs that otherwise plague the sector and provided the justification for its extensive regulation in the first place. A bit of history should help illustrate.

US cities began regulating cabs in the 1920s in response to a perceived free-for-all: markets were flooded with taxis, which led to declining fares, long hours for drivers, dangerous cars, and inadequate compensation for accident victims.¹⁰ Most (but not all) cities responded with regulations that are usefully understood as a bargain with operators. Market entry was restricted and fares were regulated, which helped to ensure that operators could make a living; in exchange, operators had to follow certain safety, insurance, and service requirements—and, later, nondiscrimination rules.¹¹ Granted, those regulations were far from perfect. In many cities, restrictions on entry eventually created monopoly rents for incumbents and medallion owners,¹² even as drivers struggled to make a decent living.¹³ Yet deregulation efforts

⁸ Robert Nozick, *Anarchy, State and Utopia* 163 (Basic Books 1974) (“The socialist society would have to forbid capitalist acts between consenting adults.”).

⁹ See Erica Fink, *Uber’s Dirty Tricks Quantified: Rival Counts 5,560 Canceled Rides*, Innovation Nation Blog (CNN Aug 12, 2014), online at <http://money.cnn.com/2014/08/11/technology/uber-fake-ride-requests-lyft> (visited Feb 26, 2015) (discussing Uber’s allegedly aggressive tactics); Paul Nussbaum, *Ride-Share Operations Prepare for Long Legal Battle in Pennsylvania* (Philadelphia Inquirer Oct 13, 2014), online at http://articles.philly.com/2014-10-13/business/54933610_1_uber-and-lyft-ride-sharing-uber-spokesman-taylor-bennett (visited Feb 26, 2015) (discussing Uber’s defiance of cease-and-desist orders in Pennsylvania).

¹⁰ See Paul Stephen Dempsey, *Taxi Industry Regulation, Deregulation & Reregulation: The Paradox of Market Failure*, 24 *Transportation L J* 73, 76–77 (1996).

¹¹ *Id.* at 75–76.

¹² In New York City, for example, medallions have sold for over \$1 million. See Matt Flegenheimer, *\$1 Million Medallions Stifling the Dreams of Cabdrivers* (NY Times Nov 14, 2013), online at <http://www.nytimes.com/2013/11/15/nyregion/1-million-medallions-stifling-the-dreams-of-cabdrivers.html> (visited Feb 26, 2015).

¹³ According to the US Bureau of Labor Statistics, the median annual salary for taxi drivers and chauffeurs was just \$22,280 in 2012. US Bureau of Labor Statistics, *Occupational Outlook Handbook: Taxi Drivers and Chauffeurs* *1 (Jan 8, 2014), online at

in the 1970s and 1980s failed: as in the 1920s, supply went up, but fares also went up and service declined.¹⁴

Why did this happen? Part of the explanation is that both regulated and deregulated taxi sectors suffer from high search costs. Riders have difficulty finding empty cabs when needed. Taxis therefore tend to congregate in spaces of high demand, such as airports and hotels.¹⁵ Deregulation arguably made this worse. Since supply went up, cab drivers had even greater incentives to stay in high-demand areas, and yet they had to raise fares to stay afloat.¹⁶

High search costs and low effective supply may also reduce demand for cabs in two ways. First, if consumers have difficulty finding cabs because cabs are scarce, they may tend not to search in the first place.¹⁷ Second, high search costs may create a vicious cycle for phone-dispatched cabs. Riders who get tired of waiting for a dispatched cab may simply hail another on the street; drivers en route to a rider may also decide to take another fare from the street, rationally estimating that the rider who called may have already found another car. In some cities, the result is that dispatched cabs may never arrive—full stop.¹⁸

Uber has basically eradicated search costs. Rather than calling a dispatcher and waiting, or standing on the street, users can hail a car from indoors and watch its progress toward their location. Drivers also cannot poach one another's pre-committed fares. This is a real boon for consumers who don't like long waits or uncertainty—which is to say everyone. Uber can also advise drivers on when to enter and exit the market—for example, by encouraging part-time drivers to work a few hours on weekend nights.

<http://www.bls.gov/ooh/transportation-and-material-moving/taxi-drivers-and-chauffeurs.htm> (visited Feb 26, 2015).

¹⁴ Dempsey, 24 *Transportation L J* at 102 (cited in note 10).

¹⁵ See, for example, Kristina Sadlak, *Taxicab Deregulation* (Connecticut General Assembly Office of Legislative Research Apr 19, 2004), online at <http://www.cga.ct.gov/2004/rpt/2004-R-0380.htm> (visited Feb 26, 2015).

¹⁶ See *id.*

¹⁷ See Daniel Flores-Guri, *An Economic Analysis of Regulated Taxicab Markets*, 23 *Rev Indust Org* 255, 256 (2003) (finding that demand “responds positively but inelastically to increases in the number of vacant taxis”).

¹⁸ See, for example, Q2 Research Group, *Taxi Availability Study *2* (Jan 2006), online at <http://archives.sfmta.com/cms/rtaxi/documents/2005TaxiAvailabilityStudy.pdf> (visited Feb 26, 2015) (finding that only 49 percent of dispatch attempts in San Francisco during the period studied resulted in a cab arriving).

The result is that Uber may be creating what once appeared impossible: a functioning market for car-hire services that is governed largely by supply and demand. Of course, this isn't entirely a *free* market: Uber is a critical price-setting intermediary, and it may be keeping fares artificially low by compensating drivers in part out of its capital reserves.¹⁹ Once the company takes on greater financial responsibilities for safety, as it surely will, costs will go up, forcing the question of where the market-clearing price really lies. But those points should not detract from the basic Schumpeterian transformation²⁰ that Uber has now begun.

B. Integrating the Sector

Uber is also extremely important for another reason that has received little attention: it is encouraging vertical and horizontal integration in the car-hire sector. As a *Washington Post* reporter explained in an excellent primer on the industry, the taxi system in many cities is highly fragmented along both dimensions.²¹ In Chicago, for example, medallion owners often lease their operating rights to management companies; management companies in turn purchase or lease cars and outfit them as required per local regulations; drivers then lease those cars from management companies on a weekly, daily, or even hourly basis.²² Other cities have different licensing systems, but any licensing system that does not mandate owner operation or direct employment of drivers will encourage similar vertical fragmentation.²³ Taxi companies will rationally (and lawfully) lease cars to drivers rather than employ drivers in order to avoid

¹⁹ See Ellen Huet, *Uber's Newest Tactic: Pay Drivers More Than They Earn* (Forbes July 2, 2014), online at <http://www.forbes.com/sites/ellenhuet/2014/07/02/ubers-newest-tactic-pay-drivers-more-than-they-earn> (visited Feb 26, 2015).

²⁰ See generally Joseph Schumpeter, *Capitalism, Socialism, and Democracy* (Harper 2d ed 1947) (introducing the term "creative destruction" to describe how innovation by entrepreneurs sustains long-term economic growth).

²¹ Emily Badger, *Taxi Medallions Have Been the Best Investment in America for Years. Now Uber May Be Changing That*, Wash Post Wonkblog (Wash Post June 20, 2014), online at <http://www.washingtonpost.com/blogs/wonkblog/wp/2014/06/20/taxi-medallions-have-been-the-best-investment-in-america-for-years-now-uber-may-be-changing-that> (visited Feb 26, 2015).

²² *Id.*

²³ Toronto recently took the step of mandating total owner operation in the taxi industry by 2024. See Jessica Smith Cross, *Getting a Fare Deal: The Economics of Toronto's Taxi Industry* (Metronews Canada Mar 13, 2014), online at <http://metronews.ca/news/toronto/969965/toronto-taxicab-economics-getting-a-fare-deal> (visited Feb 26, 2015).

the costs associated with employment, which include minimum wage laws, unemployment and workers' compensation taxes, and possible unionization.

Uber is now reducing such vertical fragmentation, since it has a direct contractual relationship with its drivers. It is also integrating the sector horizontally as it gains market share within cities. Meanwhile, the company is compiling a massive database of driver and rider behavior. Those data are essential to Uber's price-setting and market-making functions but would be all-but-impossible to compile in a fragmented industry.

These developments could make it relatively simple to ensure that Uber complies with the law and plays its part in advancing public goals. The reason is simple: as scholars have documented, large, sophisticated firms can detect and root out internal legal violations—and otherwise alter employees' and contractors' behavior—far more easily than public authorities or outside private attorneys. Lawmakers and regulators often leverage those self-regulatory processes for public purposes, for example by creating incentives for firms to beef up internal compliance and training efforts.²⁴ But that strategy doesn't work as well in fragmented sectors comprised of many small companies, such as the existing cab sector, since small companies generally have far less internal regulatory capacity. With its vast network of drivers and customers and its mountains of data on their behavior, Uber is a game changer.

II. SOCIAL COSTS AND BENEFITS OF UBER

Understanding Uber's business model and this transformation allows for a better assessment of the social costs and benefits of Uber's rise. Some such benefits are obvious. Like Airbnb and other sharing-economy firms, Uber may enable far more efficient use of capital and substantially enhance consumer welfare. For example, Uber reduces consumers' incentives to purchase automobiles, almost certainly saving them money and reducing environmental harms.²⁵ As consumers buy fewer cars, Uber also opens up the remarkable possibility of converting

²⁴ See generally Cynthia Estlund, *Rebuilding the Law of the Workplace in an Era of Self-Regulation*, 105 Colum L Rev 319 (2005); Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 Colum L Rev 458 (2001).

²⁵ Christian Fritz, *Mobility-As-a-Service: Turning Transportation into a Software Industry* (Venture Beat Dec 13, 2014), online at <http://venturebeat.com/2014/12/13/mobility-as-a-service-turning-transportation-into-a-software-industry> (visited Feb 26, 2015).

parking spaces to new and environmentally sound uses. Uber may also reduce drunk driving and other accidents. These are all important social goods.

At the same time, Uber has faced criticism along at least six dimensions: First, that it is unfairly competing with taxi drivers by entering their market without following regulations or fare schedules; second, that it aspires to become a monopoly; third, that its cars or drivers are unsafe or underinsured; fourth, that it may invade customers' privacy; fifth, that it enables discrimination by drivers and passengers; and sixth, that it is undermining working standards for taxi drivers and compensating its own drivers poorly.

The first two arguments can be addressed quickly, while the others are more complicated.

Regarding the first, it seems unquestionable that Uber aims to undermine traditional taxi service, and it seems manifestly unfair that taxi drivers and Uber drivers can operate in the same market subject to different rules. This is especially true insofar as Uber floods the market with part-time drivers during peak periods.²⁶ Uber may therefore cut off one classic path to the American Dream: that taxi drivers can work their way up the income ladder, from a driver to the owner of their own car, and then to an owner of multiple cars. At the same time, to ban Uber on that ground alone may just ratify a regulatory structure that often led to low supply, poor service, and bad pay. The issues discussed below therefore strike me as more important to assessing how Uber and taxis should be allowed to compete.

Regarding the second criticism, it also seems clear that Uber aspires to dominate the ride-sharing sector, and perhaps the car-hire sector more generally. It also wants to become a leading logistics company.²⁷ Excessive market power in any of these sectors could of course threaten consumer welfare.

Yet it would be a real mistake to regulate Uber out of existence on that basis alone. For one thing, as noted above and explored below, greater horizontal and vertical integration can

²⁶ *Pricing the Surge: The Microeconomics of Uber's Attempt to Revolutionise Taxi Markets* (The Economist Mar 29, 2014), online at <http://www.economist.com/news/finance-and-economics/21599766-microeconomics-ubers-attempt-revolutionise-taxi-markets-pricing-surge> (visited Feb 26, 2015).

²⁷ See Emily Badger, *Why Uber Is Joining the Race to Dominate Urban Logistics*, Wash Post Wonkblog (Wash Post Apr 8, 2014), online at <http://www.washingtonpost.com/blogs/wonkblog/wp/2014/04/08/why-uber-is-joining-the-race-to-dominate-urban-logistics> (visited Feb 26, 2015).

bring certain public benefits. Moreover, it is not clear that Uber's position at the top of the ride-sharing sector is stable. While Uber's app is revolutionary, it is also easy to replicate. Uber already faces intense competition from Lyft and other ride-sharing companies, competition that should only become more intense given Uber's repeated public relations disasters.²⁸ While Uber's success relies in part on network effects—more riders and drivers enable a more efficient market—the switching costs for riders and drivers appear to be fairly minimal. Uber may become the Myspace or Netscape of ride sharing—that is, a pioneer that could not maintain its market position. Concerns about monopoly therefore seem premature.²⁹

A. Safety

Other concerns are a bit more complicated. For example, courts in Germany and the United States have enjoined some of Uber's services on safety grounds,³⁰ and not without reason. An Uber driver in San Francisco struck and killed a young girl, possibly at a time when he was distracted by Uber's app. His insurance may not cover her family's losses, and Uber's commercial coverage was not in effect at the time since he was not carrying a fare.³¹ Uber drivers have also assaulted passengers and committed other crimes—most notably when a driver in Washington, DC, took several riders on a high-speed chase.³²

²⁸ See note 6.

²⁹ The related issue of Uber's "surge pricing," under which it raises rates at times of very high demand, is troubling but should also be self-correcting. If riders are sufficiently upset about that pricing, the bad press and loss of goodwill should drive riders toward other companies.

³⁰ See Karin Matussek, *Uber Must Stop Car Service in Germany's Two Largest Cities* (Bloomberg Sept 26, 2014), online at <http://www.bloomberg.com/news/2014-09-26/uber-faces-ban-in-berlin-after-overturning-german-wide-measure.html> (visited Feb 26, 2015) (quoting the spokesman for a Berlin court, who claimed that the injunction was "necessary to protect customers from dangers to life and limb"). See also Luz Lazo, *Virginia Reaches Deal with Uber, Lyft, to Allow Services to Operate in the State*, Wash Post Dr. Gridlock Blog (Wash Post Aug 6, 2014), online at <http://www.washingtonpost.com/blogs/dr-gridlock/wp/2014/08/06/virginia-reaches-deal-with-uber-lyft-to-allow-services-to-operate-in-the-state> (visited Feb 26, 2015) (noting that Virginia officials lifted a cease-and-desist order against Uber only once the company reached a settlement with the state that ensured consumer safety and a level playing field for transportation providers).

³¹ See Kale Williams and Kurtis Alexander, *Uber Sued over Girl's Death in S.F.*, SFGate (San Francisco Chronicle Jan 28, 2014), online at <http://www.sfgate.com/bayarea/article/Uber-sued-over-girl-s-death-in-S-F-5178921.php> (visited Feb 26, 2015).

³² See Julie Zauzmer and Lori Aratani, *Man Visiting D.C. Says Uber Driver Took Him on a Wild Ride*, Wash Post Dr. Gridlock Blog (Wash Post July 9, 2014), online at

Yet safety will probably not be a major issue in the long run. True, some Uber drivers will assault passengers, and Uber shares causal and moral responsibility for such assaults since it links up drivers and passengers in the first place. This may be an argument for more stringent background checks on drivers, though such checks are no panacea. As the Equal Employment Opportunity Commission (EEOC) has emphasized, background checks have limited predictive value and can have a disparate impact on minority drivers.³³ More generally, however, there is no indication that criminal law will not deter assaults just as well in Uber cars as it does in taxis. In fact, criminal law may work far better, since any passenger who suffers an assault by an Uber driver will actually be able to identify their driver. Not so in a street-hailed cab. Worries about unsafe Uber cars or unsafe driving are of course legitimate, but the experience of riding in a cab in many cities hardly invites confidence that cab drivers or cabs are much better.

Perhaps more importantly, is there any reason to think that problems of dangerous or underinsured Uber drivers will not be self-correcting? Any rash of accidents will lead quickly to public ire and calls for regulation or will create an opening for Uber's competitors. This may of course change if the company fades from public view, as its extremely high media profile is now ensuring that consumers learn of its every misstep. But in the medium term, the company has incentives to insure its drivers, at least while they are carrying Uber passengers. It also has incentives to embrace compromise legislation, such as that recently passed in Washington, DC, that legalizes the service while requiring certain

<http://www.washingtonpost.com/blogs/dr-gridlock/wp/2014/07/09/man-visiting-d-c-says-uber-driver-took-him-on-wild-ride> (visited Feb 26, 2015).

³³ See Equal Employment Opportunity Commission, *Consideration of Arrest and Conviction Records in Employment Decisions under Title VII of the Civil Rights Act of 1964* *11 (Guidance No 915-002, Apr 25, 2012), online at http://www.eeoc.gov/laws/guidance/upload/arrest_conviction.pdf (visited Feb 26, 2015) (suggesting that employers may avoid disparate impact liability upon a showing that a policy adequately accounted for “the nature and gravity of the offense or conduct,” “the time that has passed since the offense or conduct,” and “the nature of the job held or sought”). Under those policies, an absolute ban on contracting with drivers with criminal convictions would be discriminatory, though of course Uber is not subject to Title VII because it does not employ drivers. See *El v Southeastern Pennsylvania Transportation Authority*, 479 F3d 232, 248 (3d Cir 2007) (upholding summary judgment for the defendant, which terminated the plaintiff in accordance with a policy of screening for past criminal convictions, but noting the “reasonable inference that [the defendant] has no real basis for asserting that its policy accurately distinguishes between applicants that do and do not present an unacceptable level of risk”).

safety inspections, liability insurance levels, and background checks on drivers.³⁴

B. Privacy

Uber's use of rider data has also sparked concern, especially after widespread coverage of its possible plan to spy on journalists. *The New York Times* ran a story days after that plan was identified recounting that some users had ceased using the service as a result.³⁵ One angel investor told the *Times* why she stopped: "I don't want them to have my information, my credit card or my name."³⁶ Senator Al Franken, of Minnesota, sent a letter to the company requesting information about its privacy practices. "The reports suggest a troubling disregard for customers' privacy," Franken wrote, "including the need to protect their sensitive geolocation data."³⁷ The fear is obvious, and warranted: Uber's ride data on venture capitalists, journalists, elected officials, and others could be used for all sorts of improper purposes, including corporate espionage and manipulation of regulators. Given the company's take-no-prisoners approach to competitors and critics, this is not far-fetched.

While I am not a privacy expert, I suspect that privacy issues will largely self-correct as well. Unlike Facebook and Google, sale or exploitation of user data does not seem to be a major revenue source for Uber. The aggregate data are what enables Uber to make its market. As a result, if elites such as journalists and venture capitalists cease using Uber out of fear that it will use their data for untoward purposes, the company seems very likely to back down. Failing to do so would create a major opening for other ride-sharing apps with less baggage.

³⁴ See Martin Di Caro, *Ridesharing Legislation Passes D.C. Council over Protests of Cabbies, Teamsters* (WAMU Oct 29, 2014) online at http://wamu.org/news/14/10/28/uberx_lyft_win_key_battle_in_dc_council (visited Feb 26, 2015). But see Marc Lifsher, *Ride-Sharing Firms Shift into Overdrive to Kill Insurance Bill* (LA Times Aug 24, 2014), online at <http://www.latimes.com/business/la-fi-capitol-business-beat-20140825-story.html> (visited Feb 26, 2015) (noting Uber's strong opposition to California legislation backed by the insurance and taxi industries).

³⁵ Laura M. Holson, *To Delete or Not to Delete: That's the Uber Question* (NY Times Nov 21, 2014), online at <http://www.nytimes.com/2014/11/23/fashion/uber-delete-emil-michael-scandal.html> (visited Feb 26, 2015).

³⁶ *Id.*

³⁷ Mike Isaac, *Uber's Privacy Practices Questioned by Senator Franken*, NY Times Bits Blog (NY Times Nov 19, 2014), online at <http://bits.blogs.nytimes.com/2014/11/19/senator-questions-uber-on-privacy-practices> (visited Feb 26, 2015).

C. Discrimination

Discrimination seems to be a risk of Uber's rider-feedback model, which requires drivers to maintain a minimum score or be kicked off the service. Passengers may give bad reviews to racial-minority drivers, whether out of implicit or explicit bias. Drivers in turn may be less likely to pick up riders if they learn that they are racial minorities and may generally prefer to pick up or drop off clients in wealthier, whiter neighborhoods.

But of course Uber did not invent discrimination against riders. Taxi drivers' discrimination against black men in particular is notorious.³⁸ Taxis also regularly refuse to accept fares to poor neighborhoods, even when doing so is clearly illegal. In fact, Uber drivers may in some cases be *more* likely to drive to or pick up in poor neighborhoods.³⁹ Cabs' refusal to do so may reflect their difficulty in finding return fares. Uber's matching app could mitigate that problem.

More importantly, Uber's data collection could enable it to deter or prevent discrimination by drivers—which is quite difficult in a fractured taxi industry. Whether Uber ultimately takes that step will depend in part on the answers to two threshold legal questions. First, Uber's exact duties under federal and state civil rights laws are not yet clear.⁴⁰ Disability-rights organizations have argued that the company is a taxi service under the Americans with Disabilities Act of 1990,⁴¹ for example, and therefore must make reasonable accommodations for disabled

³⁸ See, for example, Russ Ptacek, *Hidden Camera DC Taxi Investigation Documents Blacks Waiting Longer and 25% Stranded in Favor of Whites* (WUSA May 22, 2013), online at <http://www.wusa9.com/news/article/241642/373/Undercover-Probe-25-Of-Taxis-Strand-Black-Riders> (visited Feb 26, 2015).

³⁹ See, for example, Latoya Peterson, *Cab Drivers, Uber, and the Costs of Racism* (Racialicious Nov 28, 2012), online at <http://www.racialicious.com/2012/11/28/cab-drivers-uber-and-the-costs-of-racism> (visited Feb 26, 2015); Johana Bhuiyan, *Uber and Lyft Position Themselves as Relief from Discrimination* (Buzzfeed Oct 7, 2014), online at <http://www.buzzfeed.com/johanabhuiyan/app-based-car-services-may-reduce-discrimination-issues-tk> (visited Feb 26, 2015) (noting that Uber's policy that drivers must accept 90 percent of all requests has the potential to reduce racial profiling and destination bias).

⁴⁰ Compare 42 USC § 2000a(b) (defining "place of public accommodation" to include, for example, hotels and motels, restaurants, and theaters, but not transportation companies), with 49 CFR § 37.29 ("Providers of taxi service are subject to the requirements of [the transportation and related provisions of Titles II and III of the ADA]."); DC Code § 2-1401.02(24) (defining "place of public accommodation" to include "all public conveyances").

⁴¹ Pub L No 101-336, 104 Stat 327, codified as amended at 42 USC § 12101 et seq.

passengers.⁴² Uber disagrees, but the Justice Department has sided with the plaintiffs in that case.⁴³ Second, if Uber drivers are not Uber employees, the company's vicarious liability for discrimination by drivers may be limited—though as the Justice Department noted, “while an entity may contract out its service, it may not contract away its ADA responsibilities.”⁴⁴

Even if courts side with the company, however, Congress or state legislatures could simply clarify that ride-sharing companies are public accommodations, thus holding them responsible if they fail to take reasonable steps to prevent discrimination by drivers.⁴⁵ Such steps might include hiding race, disability, and home-address data from drivers, implementing internal policies against such discrimination, and developing algorithms to determine which drivers regularly refuse fares from minority riders. The EEOC and state attorneys general could also encourage Uber down this path even if they cannot order it there, and given Uber's public visibility, antidiscrimination norms may have similar effects even absent law reforms. Traditional cab companies that lack Uber's data pool and public profile are both less susceptible to public pressure and less capable of implementing such compliance programs.

Uber's data pool could also help it to root out or correct for discrimination against drivers by passengers, which, to be fair, is *not* an obvious problem in the traditional cab sector. Federal law prohibits Uber from intentionally discriminating against drivers on the basis of race, even if they are contractors rather than employees.⁴⁶ Demonstrating intent is not easy, though, especially if

⁴² See Complaint for Violations of the Americans with Disabilities Act, 42 U.S.C. § 12101 et seq., the California Unruh Civil Rights Act, Cal. Civ. Code §§ 51 & 52, and the California Disabled Persons Act, Cal. Civ. Code §§ 54–54.3, *National Federation of the Blind of California v Uber Technologies, Inc.*, Case No 3:14-cv-4086, ¶¶ 52–75 at *14–20 (ND Cal filed Sept 9, 2014) (available on Westlaw at 2014 WL 4628579).

⁴³ Bob Egelko, *Obama Administration Takes Sides in Disability Suit against Uber* (SFGate.com Dec 23, 2014), at <http://www.sfgate.com/bayarea/article/Obama-administration-takes-sides-in-disability-5976148.php> (visited Feb 26, 2015).

⁴⁴ Statement of Interest of the United States of America, *National Federation of the Blind of California v Uber Technologies, Inc.*, Case No 3:14-cv-4086, *5 (ND Cal filed Dec 23, 2014).

⁴⁵ Just as employers are held liable when they fail to take reasonable steps to prevent and remedy hostile-work-environment harassment by employees. See *Farragher v City of Boca Raton*, 524 US 775, 805–06 (1998).

⁴⁶ While Title VII does not protect non-employees, racial discrimination against independent contractors is illegal. See 42 USC § 1981. See also generally *Runyon v McCrary*, 427 US 160 (1976). Moreover, systemic disparate treatment claims are available under

Uber takes action against drivers based on biased customer feedback.⁴⁷

But here again, a small tweak to federal or state law could do a great deal of work. Title VII⁴⁸ already prohibits discrimination by employment agencies, defined as persons or entities “regularly undertaking . . . to procure employees for an employer.”⁴⁹ This does not apply to Uber, since riders are not drivers’ employers. But since Uber performs a similar function in matching riders with drivers, Congress or state legislatures could revise employment discrimination statutes to classify ride-sharing services as employment agencies. Again, regulators could also press the company to ensure that its standards do not have such a disparate impact in the first place, and antidiscrimination norms may have a powerful disciplining effect.

There is another cost lurking here that deserves mention: Uber’s rating system may require drivers, and perhaps even passengers, to engage in what has been called “emotional labor,” or the work of establishing “micro-relationships that make customers feel good.”⁵⁰ To stay above a certain rating, drivers may need to be friendly, and perhaps a bit servile. Cab drivers, in comparison, can afford to be themselves—which may involve venting their frustration at long hours and low pay. Such emotional labor may impose a disparate burden on racial minorities.⁵¹ Minority drivers, to retain high ratings, may need to overcome white passengers’ preconceptions, which can involve “identity work,” or a conscious effort to track white, middle-class

§ 1981. See *Alexander v Fulton County, Ga*, 207 F3d 1303 (11th Cir 2000) (permitting the use of statistical evidence to prove discrimination).

⁴⁷ For example, since disparate impact theory is not available under § 1981, see *General Building Contractors Association v Pennsylvania*, 458 US 375, 383 n 8 (2002), a policy that simply banned drivers who received below a certain passenger rating would not be actionable even if it led to more minority drivers being penalized.

⁴⁸ Civil Rights Act of 1964, Pub L No 88-352, 78 Stat 241, codified in various sections of Title 42.

⁴⁹ 42 USC § 2000e(c).

⁵⁰ Jedediah Purdy, *Why Your Waiter Hates You* (The Daily Beast Oct 26, 2014), online at <http://www.thedailybeast.com/articles/2014/10/26/there-s-a-reason-your-waiter-hates-you.html> (visited Feb 26, 2015). See also Paul Myerscough, *Short Cuts* (London Review of Books Jan 3, 2013), online at <http://www.lrb.co.uk/v35/n01/paul-myerscough/short-cuts> (visited Feb 26, 2015) (describing requirements of “affective labour” at Pret a Manger cafe).

⁵¹ See Nancy Leong, *The Sharing Economy Has a Race Problem* (Salon Nov 2, 2014), online at http://www.salon.com/2014/11/02/the_sharing_economy_has_a_race_problem (visited Feb 26, 2015).

norms.⁵² As argued in Part III, this may be a harbinger of things to come in the low-wage labor market.

D. Labor Standards

Finally, what about labor standards? One writer recently spoke for many when he argued that “[s]haring economy’ companies like Uber shift risk from corporations to workers, weaken labor protections, and drive down wages.”⁵³ But this is not entirely accurate. As noted above, those standards are hardly ideal to begin with in the United States.⁵⁴ Rather than “shifting” risk onto workers, Uber may well be creating a new market, with a new allocation of risk and reward. How much risk drivers will bear, and what rewards they will enjoy, are very much open questions.

Granted, early signs are not encouraging for workers. For example, the company often acts unilaterally toward its drivers, changing terms and conditions at will, even when drivers have invested in cars in reliance on Uber’s policies.⁵⁵ It is also the subject of lawsuits alleging that it misled drivers and the public by stating that 20 percent tips were built into fares and arguing that Uber drivers are actually employees and therefore eligible for reimbursement for employment-related expenses such as gas and insurance. In one such suit, a federal judge in California denied Uber’s motion for summary judgment on the issue of employment status.⁵⁶

I’m skeptical, though, that many courts will find Uber drivers to be employees. The test under most federal and state employment statutes is whether the putative employer has the

⁵² See generally, for example, Devon Carbado, *Acting White? Rethinking Race in Post-racial America* (Oxford 2013).

⁵³ Avi Asher-Schapiro, *Against Sharing* (Jacobin Sept 19, 2014), online at <https://www.jacobinmag.com/2014/09/against-sharing> (visited Feb 26, 2015). See also Dave Jamieson, *Meet the Real Amazon Drones*, Huffington Post Business (Huffington Post Apr 24, 2014), online at http://www.huffingtonpost.com/2014/04/24/amazon-delivery-lasership_n_5193956.html (visited Feb 26, 2015) (noting that Amazon’s contractors “shift[] the costs associated with employment away from the company and onto the worker”).

⁵⁴ The story is of course different in Germany, France, and England, where cab drivers earn middle-class salaries. See Rick Noak, *Why Germany (and Europe) Fears Uber* (Wash Post Sept 4, 2014), online at <http://www.washingtonpost.com/blogs/worldviews/wp/2014/09/04/why-germany-and-europe-fears-uber> (visited Feb 26, 2015).

⁵⁵ See, for example, Odette Yousef, *Cabbies Threaten to Abandon Uber over Changes* (WBEZ Feb 3, 2014), online at <http://www.wbez.org/news/cabbies-threaten-abandon-uber-over-changes-109625> (visited Feb 26, 2015).

⁵⁶ *O’Connor v Uber Technologies, Inc.*, 2013 WL 6354534, *5–7 (ND Cal).

right to control the work in question.⁵⁷ The most analogous recent cases, in which courts have split, involve FedEx drivers. Those that found for the workers have noted, for example, that FedEx requires uniforms and other trade dress, that it requires drivers to show up at sorting facilities at designated times each day, and that it requires them to deliver packages every day.⁵⁸ Uber drivers are different in each respect. They use their own cars, need not wear uniforms, and most importantly they work whatever hours they please.⁵⁹

Such cases aside, Uber's consolidation of the sector may create opportunities for drivers to force better standards through collective action, and for regulators to ensure decent treatment of drivers. Associations of Uber drivers have already sprung up, calling attention to the long hours, low pay, and precariousness that they face.⁶⁰ In response to a work stoppage by the New York association, the company backed down from a plan to require drivers for its upscale UberBlack service to accept some lower-cost fares from its cheaper UberX service.⁶¹

A couple factors suggest that drivers may continue to win such fights. Uber drivers are naturally tech savvy, and they may be able to organize cheaply using social media and other online platforms. Ride-sharing companies also appear to be competing for drivers. Gett, for example, has begun guaranteeing higher salaries as a means of recruitment,⁶² indicating that drivers already enjoy a fair amount of bargaining power. Uber's consolidation of and leadership of the sector also make it a natural target

⁵⁷ See Mark A. Rothstein, *Employment Law* § 10.8 at 907–10 (West 4th ed 2010).

⁵⁸ Compare *In re FedEx Ground Package System, Inc., Employment Practices Litigation*, 758 F Supp 2d 638, 658–60 (ND Ind 2010) (finding that FedEx drivers are independent contractors, albeit with some state law exceptions), with *Wells v FedEx Ground Package System, Inc.*, 979 F Supp 2d 1006, 1024 (ED Mo 2013) (finding that FedEx drivers are employees).

⁵⁹ They may fare better under Massachusetts' liberalized test for employment status, which requires a putative employer to prove that a worker is an independent contractor and applies a more stringent test. See Mass Gen Laws Ann ch 149 § 148B.

⁶⁰ The most prominent is probably the California App-Based Driver's Association. See generally California App-Based Driver's Association, online at <http://www.cadateamsters.org/aboutus.php> (visited Feb 26, 2015).

⁶¹ Alison Griswold, *Uber Just Caved on a Big Policy Change after Its Drivers Threatened to Strike*, Slate Moneybox Blog (Slate Sept 12, 2014), online at http://www.slate.com/blogs/moneybox/2014/09/12/uber_drivers_strike_they_protested Cheap_uberx_fares_uber_backed_down.html (visited Feb 26, 2015).

⁶² See Griswold, *In Search of Uber's Unicorn* (cited in note 4). See also *We're Doubling Driver Pay. Permanently.* (The Gett Blog Oct 15, 2014), online at <http://gett.com/doublepay> (visited Feb 26, 2015).

for workers, since it can change their pay by fiat. Forcing change in the cab sector is arguably much harder, at least in cities with dispersed license ownership and multiple contractual intermediaries.

But some other factors suggest less cause for optimism. Uber drivers probably lack the sorts of communal ties that often enable worker organizing. They do not gather at a central dispatch location, and many work part-time and are unlikely to know other drivers. Drivers who speak out or strike also take enormous risks. Assuming that they are independent contractors, Uber could lawfully retaliate against drivers for striking under federal labor law.⁶³ While Uber has pledged not to do so, it is constrained at this point largely by public opinion, which is notoriously mercurial around labor issues.

Uber could also deploy sticks rather than carrots. It might, for example, insert a noncompete clause into its driver contracts, thus prohibiting drivers from working for other ride-sharing companies.⁶⁴ While such clauses are difficult to enforce in some states, including California, other states have enforced them even against independent contractors. That may deter drivers from leaving Uber regardless of enforceability.⁶⁵ Uber may also wield the possibility of shifting to driverless cars to prevent drivers from organizing,⁶⁶ and given its past behavior toward adversaries, there is little reason to think it will not do so when feasible.

⁶³ See Elizabeth Kennedy, Comment, *Freedom from Independence: Collective Bargaining Rights for "Dependent Contractors"*, 26 Berkeley J Empl & Labor L 143, 152–53 (2005) (noting that the protections afforded by the National Labor Relations Act do not extend to independent contractors). See also *id.* at 168–74 (discussing the interaction between independent contractor status and labor rights).

⁶⁴ The company may already have incorporated such a clause into its driver contracts, though I suspect not. Given the visibility and unpopularity of noncompetes today, Uber organizers would likely have flagged it for reporters.

⁶⁵ Ruth Simon and Angus Loten, *Litigation over Noncompete Clauses Is Rising* (Wall St J Aug 14, 2013), online at <http://online.wsj.com/articles/SB10001424127887323446404579011501388418552> (visited Feb 26, 2015) (“California, where startups are plentiful, makes it particularly difficult to enforce such agreements.”).

⁶⁶ This change could have enormous positive safety and environmental effects. See Radhika Sanghani, *Google's Driverless Cars Are 'Safer' Than Human Drivers* (The Telegraph Oct 29, 2013), online at <http://www.telegraph.co.uk/technology/google/10411238/Googles-driverless-cars-are-safer-than-human-drivers.html> (visited Feb 26, 2015); *Driverless Cars Could Be Good for Environment* (Poughkeepsie J June 8, 2014), online at <http://www.poughkeepsiejournal.com/story/tech/science/environment/2014/06/08/earth-talk-valley/10031843> (visited Feb 26, 2015). But see Bradley Berman, *Why Driverless Cars Won't Save the Environment*, Readwrite (Business Insider Dec 27, 2013), online at <http://www.businessinsider.com/driverless-cars-environment-2013-12> (visited Feb 26, 2015).

Uber's ultimate effect on labor standards is therefore unclear. If its market share and network continue to grow, and its app enables drivers to have passengers rather than empty cars most of the time, it may be able to pay drivers well while keeping costs down. Or it may cut driver pay, or even cut drivers entirely, especially if price competition from other ride-sharing services heats up. As with most labor questions, which scenario unfolds will be determined as much by politics as by economics.

III. UBER AND THE FUTURE OF LOW-WAGE WORK

This is where Uber's rise begins to have unsettling implications. After the ride-sharing drivers' jobs are eliminated, what happens to mail- and package-delivery drivers whom Uber also hopes to displace?⁶⁷ What happens to supermarket clerks and other retail clerks as more and more shopping goes online, with goods delivered by—yes—Uber? What happens to the fast-food workers displaced as Uber or some other “Internet of things” company delivers fast food on demand in driverless cars?

I do not know, of course, but I'll close with two observations. First, a society committed to freedom and equality might not actually want to save such jobs. Ideally, the stunning productivity gains promised by new technologies like Uber could reduce society's need for work that is deadening to the human spirit. But without far-reaching changes to our social safety net, doing so would render tens of millions destitute. I worry that such a crisis in the low-wage labor market is close on the horizon, and that society is unprepared to deal with it.

Second, I suspect that consumer demand rather than commitments to freedom and equality will ultimately determine which low-wage jobs *are* saved, with menial tasks performed by humans only when consumers prefer not to deal with machines. At that point, workers without many skills will find their access to work determined in part by their ability to smile and appear cheerful—to perform emotional labor. This has already occurred in retail, hospitality, and other customer-service sectors.⁶⁸ It

⁶⁷ For a discussion of Uber's attempts at entering the delivery market, see Doug Gross, *Uber Gets into Delivery Game with Rush* (CNN Apr 8, 2014), online at <http://www.cnn.com/2014/04/08/tech/mobile/uber-rush-delivery> (visited Feb 26, 2015).

⁶⁸ See generally, for example, Hyun Jeong Kim, *Hotel Service Providers' Emotional Labor: The Antecedents and Effects on Burnout*, 27 *Intl J Hospitality Mgmt* 151 (2008); Blake E. Ashforth and Ronald H. Humphrey, *Emotional Labor in Service Roles: The Influence of Identity*, 18 *Acad Mgmt Rev* 88 (1993).

may next occur in positions with less frequent customer contact, such as hotel and commercial-office cleaners, security guards, and hospital orderlies. Some workers will need to ape middle-class norms of sociability, others to defer to customers. Workers “hired” through Task Rabbit and other sharing-economy platforms may face similar incentives to engage in emotional labor, since those platforms—like Uber—require workers to maintain a certain feedback rating.⁶⁹ Metaphorically, more and more workers will be waiting tables.

Which brings us back to the public’s mistrust of Uber. The company’s name clearly evinces Nietzsche’s vision of a new morality and a new class dedicated to human excellence.⁷⁰ But in Uber executives’ hands, that ideal has become little more than a defense of privilege. The company’s leaders seem just fine with a future in which the many are supplicant to the few, and the few are licensed to disregard ordinary rules. Uber’s slogan—“Everyone’s private driver”—speaks volumes. Perhaps the public’s intuitive skepticism toward Uber reflects a widespread sense that our economy should reflect basic democratic values. Given Uber’s size, power, and ambitions, whether lawmakers ensure that it advances those values may shape the future of low-wage work.

⁶⁹ See, for example, *TaskRabbit Community Guidelines: Performance Standards Compliance* (TaskRabbit Aug 27, 2013) online at <https://taskrabbit.zendesk.com/entries/22295495-TaskRabbit-Community-Guidelines> (visited Feb 26, 2015).

⁷⁰ See *Nietzsche’s Moral and Political Philosophy* (Stanford Encyclopedia of Philosophy Apr 14, 2010), online at <http://plato.stanford.edu/entries/nietzsche-moral-political> (visited Feb 26, 2015).