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HOW UBER'S REGULATORY SUCCESS IN THE UNITED STATES SLOWED ITS INTERNATIONAL EXPANSION

Grace A. Canfield

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**HOW UBER’S REGULATORY SUCCESS IN
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INTERNATIONAL EXPANSION**

*By Grace A. Canfield**

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I. INTRODUCTION

On September 1, 2020, a Hong Kong court dismissed the last appeal effort of twenty-eight Uber drivers who had been convicted of operating in the city without a taxi license.¹ For those familiar with the company's rise to national prominence in the United States, Uber's response to the ruling would seem rather perplexing: the company responded with a public call seeking to meet with local legislators and develop a regulatory scheme.² Even more, Uber's request for fitting regulation of their activities came after a failed attempt to partner with taxi drivers in Hong Kong to circumvent regulatory licensing requirements.³ This is a far cry from its position in 2015, when Uber's regulatory strategy—operating in defiance of local regulation until it could build a large enough consumer base to engage in often-victorious court battles, allowing it to circumvent licensing laws—seemed to take the United States by storm and displace the traditional taxi driver.⁴ In fact, Uber came to prominence as the defining market disruptor and an inspiring story of entrepreneurship.⁵ Combatting high prices and stifling regulation in taxi markets with traditionally high barriers to entry, Uber has since been studied extensively for its varied successful attacks on regulation.⁶ So, how did this shift in strategy come about?

¹ Jasmine Siu, *Uber drivers in Hong Kong lose final court appeal against convictions for carrying passengers*, SOUTH CHINA MORNING POST (September 1, 2020, 4:05 pm), https://www.scmp.com/news/hong-kong/transport/article/3099732/uber-drivers-hong-kong-lose-final-court-appeal-against?utm_source=thestar&utm_medium=partner&utm_content=3099803&utm_campaign=contentexchange.

² *Id.*

³ *Id.*

⁴ See *Melrose Credit Union Montauk Credit Union v. City of New York*, No. 6443/15, 2015 WL 5320863 (N.Y. Sup. Ct. Sep. 8, 2015).

⁵ Alex Kirvin, *Whose Gig Is It Anyway? Technological Change, Workplace Control and Supervision, and Workers' Rights in the Gig Economy*, 89 U. COLO. L. REV. 249, 251-52 (2018).

⁶ *Id.*

Uber got its start in San Francisco, California, leading the rise of what's been coined the "gig-economy."⁷ Though the taxi industry—which Uber's opponents categorize as essentially what the Uber service provides—is highly regulated by a complex and costly medallion system,⁸ Uber sought to provide a more available and less costly alternative to both the driver and the rider by circumventing that regulation and categorizing itself as a "technological platform" instead.⁹ Capitalizing on the localized nature of regulatory schemes in the United States, Uber's business model was founded on a take-no-prisoners battle against city after city and taxi union after taxi union, eventually gaining a consumer base that it leveraged against governments to change the regulation or rule such that Uber could operate outside of it.¹⁰ As researcher Rick Claypool explained:

⁷ Although the gig economy has been around in various forms, the term is used primarily to describe employment situations which purport to offer individual workers the freedom and flexibility to create their own work schedule and decide on their own hours. See Alex Kirvin, *Whose Gig Is It Anyway? Technological Change, Workplace Control and Supervision, and Workers' Rights in the Gig Economy*, 89 U. COLO. L. REV. 249, 251-52 (2018). Other such companies include Lyft and Airbnb. See generally *id.*

⁸ The medallion system is a form of regulatory capture which artificially depresses the amount of taxis in a given market by requiring each driver to obtain a medallion, typically at auction, and often for prices in excess of \$1 million. By using regulation to create high barriers to entry in the market, the incumbent taxi drivers can charge a higher price for their services, thus creating a "livable" wage where one might not naturally exist. See *infra* for a more in-depth discussion of the medallion system. See Daniel Kowalski, *How Cronyism Created New York City's Taxi Medallion Bubble*, FOUNDATION FOR ECONOMIC EDUCATION (October 8, 2019), <https://fee.org/articles/how-cronyism-created-new-york-city-s-taxi-medallion-bubble>. The word "livable" is in quotations above because in some markets, the wage earned by taxi drivers would still fall below the federal poverty line. *Occupational Outlook Handbook*, U.S. BUREAU OF LABOR STATISTICS (September 21, 2020), <https://www.bls.gov/ooh/transportation-and-material-moving/passenger-vehicle-drivers.htm>.

⁹ J. Domenic Martini, *International Regulatory Entrepreneurship: Uber's Battle with Regulators in France*, 19 SAN DIEGO INT'L L.J. 127, 148 (2017).

¹⁰ See *e.g.* Public Utilities Commission of the State of California, Decision 13-09-045, *Decision Adopting Rules and Regulations To Protect Public Safety While Allowing New Entrants to the Transportation Industry* (September 19, 2013), <https://docs.cpuc.ca.gov/PublishedDocs/Published/G000/M077/K192/77192335.PDF>.

The company often launches in cities in conflict with local officials' interpretations of local regulations, while at the same time insisting on the legality of its business. When local law enforcement and other officials respond, the company mobilizes a campaign to 'save Uber,' . . . Uber usually wins these battles against rules and regulations the company opposes, but when it loses, it keeps fighting. When cities pass laws that Uber opposes, the company commonly seeks to have them preempted with Uber-approved state law or repealed through voter referenda.¹¹

Internationally, Uber faced a much different landscape. Many who followed Uber's rise to prominence may be aware of the violent blockade that the company faced in its attempts to expand into France.¹² On June 29, 2015, Uber France CEO Thibault Simphal and Uber Europe General Manager Pierre-Dmitri Gore-Coty were arrested by Paris police amid raucous protests in Paris, initiated by taxi drivers enraged over the company's infiltration of the Paris ride-for-hire market.¹³ Uber had vastly underestimated the inimitable French labor union and its ability to bring about heightened employment regulation and protection. At face value, while Paris' medallion system and regulatory licensing scheme looked identical to those of the metropolises across the United States—which Uber seemed to be dispatching with ease—France's federal government had a much larger hand in bringing about new legislation, and a much more passionate enforcement system, among other obstacles.¹⁴

Indeed, Uber was in for a rough road in Europe and across much of South America and Asia. The European Union's top-down

¹¹ Edward Onswego, Jr. *quoting* Rick Claypool, *Uber Became Big By Ignoring the Laws (and It Plans to Keep Doing That)*, VICE (Sept. 11, 2019), <https://www.vice.com/en/article/8xwxyv/uber-became-big-by-ignoring-laws-and-it-plans-to-keep-doing-that>.

¹² Martini, *supra* note 9 at 138.

¹³ See Romain Dillet, *Uber France Leaders Arrested For Running Illegal Taxi Company*, TECH CRUNCH (June 29, 2015, 10:38 AM), <https://techcrunch.com/2015/06/29/uber-france-leaders-arrested-for-running-illegal-taxi-company>.

¹⁴ Martini, *supra* note 9 at 138.

governmental regulation scheme was a stark contrast to the United States' notorious brand of confederation, where Uber was able to exploit loopholes, differences, and disagreements among local legislators and secure victories by taking on cities, rather than states, and even states, rather than the federal government.¹⁵

Five years later, by means of its incendiary services UberPOP and UberX, the Spanish court system referred Uber to the European Court of Justice (CJEU) for violation of unfair competition laws,¹⁶ which incited such fervent anti-Uber sentiment in Colombia that Uber drivers caught providing the service had their licenses suspended.¹⁷ Despite working within the regulatory licensing framework in Germany—using actually licensed taxi drivers to provide rides—Uber was hit with an outright ban in the country at one point, handed down by a Frankfurt court.¹⁸

This strategy shift, characterized well by the German experience, often seems to have come too little, too late for Uber. Where it had made a name for itself by bulldozing local legislation and regulation in the United States, it had also announced itself internationally as the antithesis of the union cab driver, the government, and regulation. This comment will argue that Uber's American regulatory success was a hamstring to its international success and that had Uber approached international expansion more cautiously, without the bravado given it by its bludgeoning of American localities' laws, it might not be nearly as entangled in litigation across the world.

This comment will begin by analyzing the antitrust implications of Uber, including its formation and competition within the taxi industry. It will then describe the history of Uber, its takeover

¹⁵ *Id.*

¹⁶ Lavinia Meliti, *Uber Case, Competition Law Implications in Europe and Latin America: Defenders of the Old Economy Versus Advocates of the Digital Revolution*, 26 ILSA J. INT'L & COMP. L. 445, 461 (2020).

¹⁷ *Id.*

¹⁸ Natasha Lomas, *Uber's Ride Hailing Business Hit with Ban in Germany*, TECH CRUNCH (December 19, 2019, 10:54 AM), <https://techcrunch.com/2019/12/19/ubers-ride-hailing-business-hit-with-ban-in-germany>.

of the United States, including San Francisco and New York, and its varying success with expansion into France, the United Kingdom, China, Germany, and Hong Kong. It will conclude that Uber's failures in Europe, Asia, and South America were preventable if Uber had shifted its strategy much earlier in its expansion by analyzing the likelihood of its success as a market disruptor, and shifting that strategy to fit existing regulation in countries where its American strategy would foreseeably fail.

II. BACKGROUND

A. Why Can't Uber Fit Naturally Into Existing Regulation?

As the story goes, Uber founders Travis Kalanick and Garrett Camp created Uber after unsuccessfully trying to hail a cab in Paris during the 2008 tech conference LeWeb.¹⁹ Their difficulty was due partly to the city's heavy regulation of taxi drivers through its medallion system and its fairly stringent licensing requirements.

Most major cities have what's known as the medallion system, which is used to cap the amount of taxis allowed in the city; New York City's issued yellow taxi cab medallions currently stand at 13,587.²⁰ The medallion system, which often separates medallions by type and purpose of taxi, requires each taxi operating in the city to correspond to a single medallion.²¹ Without a medallion, the taxi is not legally allowed to operate. This system, combined with often multi-leveled driving licensure requirements for taxi drivers, creates a market with high barriers to entry.²² Since 2011, corporate New York taxi medallion sale prices have regularly exceeded one million dollars.²³ Because of the

¹⁹ See Dan Blystone, *The Story of Uber*, INVESTOPEDIA (June 25, 2019), <https://www.investopedia.com/articles/personal-finance/111015/story-uber.asp>.

²⁰ See Daniel Kowalski, *How Cronyism Created New York City's Taxi Medallion Bubble*, FOUNDATION FOR ECONOMIC EDUCATION (October 8, 2019), <https://fee.org/articles/how-cronyism-created-new-york-city-s-taxi-medallion-bubble>.

²¹ Katrina Miriam Wyman, *Problematic Private Property: The Case of New York Taxicab Medallions*, 30 YALE J. ON REG. 125, 133 (2013).

²² *Id.*

²³ *Id.* at 126.

inflated cost of market entry, when compared with the fair market value of the service being offered, distortions in the accessibility of the medallions and other market-entry tools provide rife opportunity for abuse from both buyers and sellers.²⁴ Corporate yellow taxi medallions are characterized by the requirement that they be owned in “lots” of two or more, meaning that by nature, their purchasers must have the financial means to spend several million dollars to operate a cab business.²⁵ In a profession where the average salary is \$33,300, that million-dollar price tag is inaccessible to the average driver.²⁶ As a result, taxi labor unions, which have become synonymous with the profession, work to provide equitable salaries and working conditions for taxi drivers.²⁷

Uber, by contrast, has been fundamentally characterized as a sharing economy platform.²⁸ Driven by its original vision to “go somewhere,” Kalanick and Camp took a bet that there was an interested labor supply market who would want to make money by taking people there.²⁹ Uber has created a business model by exploiting not only the availability of a readily accessible labor supply market, but the built-in infrastructure (the driver-partners’ own cars) that comes with it.³⁰ Uber’s interface works by allowing users to simply open an app and enter a destination.³¹ In its most current model, the user is then allowed to choose which service they prefer, and is shown the accompanying price of the ride, calculated by the ride distance, the local market availability or scarcity of drivers, and the varying level of service.³² Some services, such as UberPool, are cheaper because the drivers pick up more than one passenger along the route, or, in the

²⁴ Kowalski, *supra* note 20.

²⁵ Wyman, *supra* note 21 at 133.

²⁶ *Occupational Outlook Handbook*, U.S. BUREAU OF LABOR STATISTICS (September 21, 2020), <https://www.bls.gov/ooh/transportation-and-material-moving/passenger-vehicle-drivers.htm>.

²⁷ *See* Dubal, *infra* note 49.

²⁸ Martini, *supra* note 9 at 152.

²⁹ Blystone, *supra* note 19.

³⁰ Veena B. Dubal et al., *Disrupting Regulation, Regulating Disruption: The Politics of Uber in the United States* at 3, U.C. HASTINGS SCHOLARSHIP REPOSITORY (2018).

³¹ *A guide for how to use Uber*, UBER, <https://www.uber.com/us/en/ride/how-it-works/> (last visited Nov. 6, 2021).

³² *Id.*

case of UberX (as it's known in the United States), because the driver is not using a luxury vehicle.³³ Once the rider chooses their desired service, Uber connects the nearest driver providing that service to the rider, and provides the rider identifying information about the driver and vehicle, including the license plate number, the name, and the make and model of the car.³⁴ The rider can then follow along through the drive on the map in the app until the ride is completed.³⁵

Uber exposed the possibility of myriad improvements to the ride-for-hire system, namely, the features offered in their app, such as allowing Uber users to follow the route in real time, and showing passengers when the driver deviates from the fastest route.³⁶ Where taxi users count on drivers' meters to give them a final price at the end of the ride, the Uber app informs users of each ride's estimated cost before they even step foot into the car.³⁷ Uber also offers rating systems for both drivers and passengers (though criticized) which are meant to screen out abusive drivers or passengers.³⁸ In this regard, Kalanick and Uber not only posed the question, "Why can't you have an alternative?" they also inquired, "Why can't you have a *better* alternative?"

The answer to that question lies in legislation prohibiting unfair competition. As one French cab driver put it, "Those guys are totally illegal! They're cheating the system and driving us out of business!"³⁹

³³ Uber has used different names for the same service across different countries – for instance, UberX in the United States does not use luxury vehicles or limousine licensed drivers, but in France it does. Morgan Brown, et al. *Uber – What's Fueling Uber's Growth Engine*, GROWTH HACKERS (2013), <https://www.uber.com/us/en/ride/uberpool>.

³⁴ *A guide for how to use Uber*, UBER, <https://www.uber.com/us/en/ride/how-it-works> (last visited Nov. 6, 2021).

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ See Caroline O. Donovan, *That Four Star Rating You Left Could Cost Your Uber Driver Her Job*, BUZZFEED NEWS (April 11, 2017, 9:30 AM), <https://www.buzzfeednews.com/article/carolineodonovan/the-fault-in-five-stars>.

³⁹ Liz Alderman, *Uber's French Resistance*, N. Y. TIMES (June 3, 2015), https://www.nytimes.com/2015/06/07/magazine/ubers-french-resistance.html?_r=0.

Uber's lower prices and shorter waiting times stem from their unchecked ability to flood the market with more labor supply than the yellow cab companies, which they accomplish by simply ignoring legislation that likely applies to them.⁴⁰ For instance, the New York City Administrative Code 19-504(a)(1) states:

A taxi-cab, coach, . . . or for-hire vehicle shall operate within the city of New York only if the owner shall first have obtained from the commission a taxicab, coach, . . . or for-hire vehicle license for such vehicle and only while such license is in full force and effect.⁴¹

Other provisions in the same code require for-hire vehicles to pass inspection every four months, for-hire drivers to pay an annual license fee, operate for a certain number of consecutive days or risk losing their license, and be fingerprinted.⁴²

The crux of the disagreement between Uber, the government, and its competitors is that Uber and its drivers should be required to comply with the existing taxi regulation, including the medallions and licensure.⁴³ Uber has bypassed this by arguing that it is simply a technological platform, meant to facilitate the network effect of willing drivers to needy passengers.⁴⁴ This self-classification is considered inherently suspect, and Uber's attempts to assert it have been shot down by international courts, including the Court of Justice of the European Union (CJEU), which stated in a 2017 ruling:

[A]n intermediation service such as that at issue in the main proceedings, the purpose of which is to connect, by means of a smartphone application and for remuneration, non-professional drivers using their own vehicle with persons who wish to make urban journeys, must be regarded as being inherently linked to a transport service and, accordingly, must be

⁴⁰ New York City, N.Y., Code § 19-504(a)(1).

⁴¹ New York City, N.Y., Code § 19-504(a)(1).

⁴² New York City, N.Y., Code § 19-504(b), (f), (g), (l), (q).

⁴³ Martini, *supra* note 9 at 144.

⁴⁴ Martini, *supra* note 9 at 144.

classified as “a service in the field of transport” within the meaning of EU law.⁴⁵

Unfortunately for Uber, the very essence of unfair competition legislation is to prevent competitors from undercutting the free market price of a service or product by breaking the law.⁴⁶ Taxi unions all across the world have incited gridlocks in service of the protest that Uber is illegally driving them out of business.⁴⁷

B. March 2009: San Francisco, California

Uber’s continuous testing ground is San Francisco, where the company is still headquartered to this day.⁴⁸ Uber was founded as UberCab in San Francisco, though it quickly shortened the name to just “Uber,” considering its legal interest in not being classified as a cab company in most markets.⁴⁹ Uber began to argue that it was not a transportation company because it did not provide vehicles to its for-hire drivers, thereby meaning it should be exempt from the strict taxi regulations common to large municipalities.⁵⁰ Controversially, Uber’s strategy succeeded by passing on most of the actual risk of regulatory intervention (such as fines and jail time for illegally operating as a cab) to its drivers, which it classified as independent contractors rather than employees.⁵¹ San Francisco, like New York and most other cities, had a robustly regulated taxi industry. Unlike most other cities, San Francisco and broader California were fairly quick to simply deregulate

⁴⁵ See Court of Justice of the European Union, PRESS RELEASE NO 136/17 (December 20, 2017), <https://curia.europa.eu/jcms/upload/docs/application/pdf/2017-12/cp170136en.pdf>.

⁴⁶ See C.E., B.O.E. n. 38, Dec. 29, 1978 (Spain).

⁴⁷ See *Taxi Drivers Gridlock European Cities to Protest Uber Cab App*, CNN TRAVEL (June 11, 2014, 12:25 PM), <https://www.cnn.com/2014/06/11/travel/taxi-protests-uber/index.html>.

⁴⁸ *The History of Uber*, UBER (2019), <https://www.uber.com/newsroom/history>.

⁴⁹ V.B. Dubal, *The Drive to Precarity: A Political History of Work, Regulation, & Labor Advocacy in San Francisco’s Taxi & Uber Economies*, 38 BERKELEY J. EMP. & LAB. L. 73, 125 (2017).

⁵⁰ *Id.*

⁵¹ *Id.*

the industry in 2013.⁵² In a decision of the Public Utilities Commission of the State of California, the state laid out what it expected of any new Transportation Network Companies (TNCs):

[W]e require each TNC (not the individual drivers) to obtain a permit from the California Public Utilities Commission (Commission), require criminal background checks for each driver, establish a driver training program, implement a zero-tolerance policy on drugs and alcohol, and require insurance coverage as detailed below.⁵³

One of the reasons that the measure passed so quickly was the relative instability of San Francisco's taxi labor market, particularly right after the 2008 recession. But its swift passing was also due to historic specifics in taxi unions' collective bargaining agreements with the city and their employers.⁵⁴ Taxi drivers actually flocked to Uber and similar companies like Lyft, which left the normally hearty union protests that Uber has faced in every other municipality rather lackluster.⁵⁵ With a few other test runs of products such as UberPool, a carpool service allowing more than one user to be picked up by a driver, and UberX, a cheaper version of the service—most similar to what we know Uber to be today—Uber had an arguably friendly home in San Francisco, notwithstanding a few taxi protests.⁵⁶

After the Superior Court of California ruled that Uber drivers are employees, not independent contractors under state law AB5,⁵⁷

⁵² See Public Utilities Commission of the State of California, Decision 13-09-045, *Decision Adopting Rules and Regulations To Protect Public Safety While Allowing New Entrants to the Transportation Industry* (September 19, 2013), <https://docs.cpuc.ca.gov/PublishedDocs/Published/G000/M077/K192/77192335.PDF>.

⁵³ *Id.* at 2-3.

⁵⁴ Dubal, *supra* note 49, at 125-26.

⁵⁵ *Id.*

⁵⁶ *Id.* at 128-29.

⁵⁷ Bobby Allyn, *California Judge Orders Uber and Lyft to Consider All Drivers Employees*, NPR BUSINESS (Aug. 10, 2020), <https://www.npr.org/2020/08/10/901099643/california-judge-orders-uber-and-lyft-to-consider-all-drivers-employees>.

California voters passed Proposition 22 on November 3, 2020, which expressly permits Uber to continue treating their drivers as independent contractors while offering some conciliatory benefits.⁵⁸

California's safe haven is not the standard landscape that Uber faced in its expansion—particularly its international expansion, and as regulators and lawmakers in California watched the challenges brought by other states, they have walked back some of the protections they initially afforded to Uber.⁵⁹ In particular, Prop. 22 was struck down as unconstitutional in Alameda Superior Court on August 20, 2021, though it will remain in effect through the appeals process.⁶⁰

C. May 2011: New York City, New York

Prior to Uber's entry into New York City, a thousand New Yorkers had already entered their credit card information into the app, even though the service wasn't yet offered in their city.⁶¹ Kalanick bragged to the New York Times that he and his partners were simply responding to the demand for expansion: "We were coming to New York eventually—why not now?"⁶² An early theme throughout Uber's U.S. expansion was municipalities' struggle to pinpoint exactly what it was that they found offensive about Uber. While we now identify the issues of market capture, anticompetitive behavior, and employment misclassification, early articles show that city regulators in New York City were first worried about whether Uber was violating taxi laws because New York City yellow taxi regulations did not allow for pre-

⁵⁸ They do not have to offer full benefits, as they would if drivers continued to be classified as employees per the ruling on AB5. Sarah Ashley O'Brien, *After a \$200 Million California Brawl, Uber and Lyft's Gig Worker Fight is Far From Over*, CNN BUSINESS (Nov. 15, 2020), <https://www.cnn.com/2020/11/15/tech/gig-worker-classification-post-prop-22/index.html>.

⁵⁹ Maeve Allsup and Joyce E. Cutler, *Feud Over Uber-Lyft Law Will Ripple Beyond California*, BLOOMBERG LAW (Aug. 24, 2021), <https://news.bloomberglaw.com/us-law-week/feud-over-uber-lyft-worker-law-will-ripple-beyond-california>

⁶⁰ *Id.*

⁶¹ Jenna Wortham, *With a Start-Up Company, a Ride is Just a Tap of an App Away*, N.Y. TIMES (May 3, 2011), <https://www.nytimes.com/2011/05/04/technology/04ride.html>.

⁶² *Id.*

arranged rides.⁶³ The same 2012 article that addressed this “significant problem” for Uber described other “big” issues for Uber, which included New York City rules prohibiting mobile phone use while driving, and prohibiting cabbies from refusing rides unjustifiably.⁶⁴

It appears that by 2012, city regulators hadn't given real thought to the crux of what would be some of the biggest issues with Uber, namely, that their drivers didn't qualify for classification as taxis.⁶⁵ At a 2012 meeting with the Taxi and Limousine Commission, it was clear from the regulators' questions that they had largely accepted Uber's self-classification as a technological platform, merely existing to create a network between drivers and riders.⁶⁶ The Metropolitan Taxicab Board of Trade,⁶⁷ for instance, was concerned that the interface may automatically charge a tip or not allow passengers to pay cash, both violations of taxi guidelines.⁶⁸

By 2015, however, the New York City government had started an all-out war against Uber, giving rise to Uber's most “smashing” and public success in out-maneuvering regulators through public relations.⁶⁹ Mayor Bill de Blasio had gotten involved, backing a bill threatening to cap Uber's New York City expansion to one percent a year.⁷⁰ Bradley Tusk, a venture capitalist dedicated to helping

⁶³ Matt Flegenheimer & Brian X. Chen, *As a Taxi-Hailing App Comes to New York, Its Legality is Questioned*, N.Y. TIMES (Sept. 4, 2012), <https://www.nytimes.com/2012/09/05/nyregion/as-ubers-taxi-hailing-app-comes-to-new-york-its-legality-is-questioned.html>.

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ The Metropolitan Taxicab Board of Trade represents operators of approximately 25 percent of the New York city yellow taxicab medallion industry. Winnie Hu & Nate Scheweber, *Coronavirus Decimates N.Y.C. Taxi Industry: 'The Worst It's Ever Been,'* N.Y. TIMES (March 25, 2020), <https://www.nytimes.com/2020/03/25/nyregion/coronavirus-nyc-taxi-drivers.html>.

⁶⁸ Flegenheimer and Chen, *supra* note 63.

⁶⁹ BRADLEY TUSK, THE FIXER 129 (Portfolio 2018).

⁷⁰ *Id.* at 119.

companies like Uber who faced political and regulatory challenges, was part of the brains behind Uber's success at quashing the cap.⁷¹

By the time my flight reached cruising altitude, it hit me that the fight to kill de Blasio's proposal of capping Uber's growth at 1% a year would work a lot better if we ran the campaign from his left. He'd never faced that before. (No one had ever thought they could question his progressive bona fides.) Reacting to it would mean coming up with a new playbook on the fly. We could try to catch him by surprise, co-opt everyone who normally sided with him because they didn't want to be seen as illiberal, and create enough chaos to at least put quick passage of the bill in question.⁷²

Uber quickly put together a lobbying scheme within City Hall, and a "massive" public opposition campaign comprising everything from tweets to rallies.⁷³ Eventually, the cap bill was pulled (although it would eventually resurface in 2018), but as Tusk put it, there was a lesson to be taken from this success, for Uber as well as other start-ups. ". . . [M]ost important (for us), all of the attention around the fight helped other startups realize that they had to start taking politics seriously."⁷⁴

D. December 2011: Paris, France

Uber decided to conduct its first test of the international market in the city where the idea came about.⁷⁵ It expanded into France with the operation of two different services: UberX and UberPOP.⁷⁶ UberX operated as a type of car service, requiring its drivers to obtain

⁷¹ *Id.* at 103.

⁷² *Id.* at 119.

⁷³ The reason Tusk refers to running the campaign "from [de Blasio's] left" is because the cap bill would protect taxi and labor unions, which is typically already a progressive ideal. *Id.* at 122-28.

⁷⁴ *Id.* at 129.

⁷⁵ Martini, *supra* note 9, at 146.

⁷⁶ *Id.*

limousine licenses and provide their own black car—a luxury-minded service, which is truer to founder Garrett Camp's vision of the company.⁷⁷ UberPOP, on the other hand, functioned more truly as the Uber that Americans are familiar with, with the main objective to provide lower-cost rides to users.⁷⁸ The difference between the two services is primarily that UberX in France was designed to fit within the regulatory framework already in place, because its drivers were already licensed and insured properly. Limousine licenses are easier to obtain since they are not capped the same way that taxi licenses are.⁷⁹

Uber began in France the same way it did in New York and San Francisco, in the sense that it operated at a severe loss to entice drivers to join and riders to use. At one point, Uber's losses totaled around \$1,100 per driver per week, which was more than three times its revenue earnings per driver per week.⁸⁰ Uber was employing many of the tactics that made its brand of regulatory entrepreneurship so successful in the United States: undercutting competitors, advertising aggressively, and employing an ask-forgiveness-not-permission mindset while garnering enough popularity to force regulators into changing legislation.⁸¹

This message was not well-received in France. Regulators and local enforcement took multiple avenues to attempt to shut down Uber or force it into compliance.⁸² A special police enforcement squad, known colloquially as the Boers, was implemented to cite and fine drivers working for Uber.⁸³ The French government initially passed legislation that attempted to curb Uber by halting the issuance of new limousine licenses for two months in February of 2014.⁸⁴ It then enacted another law that required drivers to wait 15 minutes between

⁷⁷ Martini, *supra* note 9, at 146.

⁷⁸ *Id.*

⁷⁹ *Id.* at 148.

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² See Alderman, *supra* note 39.

⁸³ *Id.*

⁸⁴ Romain Dillet, *Uber, Chauffeur-Privé And Others Can't Recruit New Drivers in France for the Next Two Months*, TECH CRUNCH (February 14, 2014, 12:15 PM), <https://techcrunch.com/2014/02/14/uber-chauffeur-prive-and-others-cant-recruit-new-drivers-in-france-for-the-next-two-months/>.

the time a user ordered a ride and the time they were picked up.⁸⁵ Finally, the French Parliament simply outlawed UberPOP in late 2014 and passed the Thevenoud law, which requires Uber drivers to conform to taxi standards, bans the app from showing car locations, levies \$17,000 fines, and imposes up to a year in prison for drivers operating illegally.⁸⁶

Despite this setback, Uber didn't give up. Drivers continued to operate even after the Thevenoud law was passed, as Uber fought it through a web of French court systems.⁸⁷ Protests against Uber swelled into increasingly violent and tumultuous affairs throughout the summer of 2015, with taxi drivers staging gridlocks in Paris, smashing in Uber car windows, and slashing tires with passengers inside.⁸⁸ Many credit these protests for inspiring the previously mentioned June 29, 2015 arrests of Simphal and Gore-Coty, who were eventually required to pay \$200,000 and \$30,000 fines, respectively, in addition to Uber's \$800,000.⁸⁹

UberPOP was suspended shortly after by its parent company, and Uber eventually took its regulatory activism elsewhere, leaving UberX to operate within the bounds of the limousine laws.⁹⁰ Uber's attitude toward French regulation was seen as "cynical and arrogant,"⁹¹ and though it found some support in tech-progressive politicians like Emmanuel Macron, Uber seriously underestimated the federal regulatory capacity of the French government.⁹² What's more, at this point, much of its litigation had either been referred to or brought to

⁸⁵ Martini, *supra* note 9, at 149.

⁸⁶ *Id.*

⁸⁷ *Id.* at 150.

⁸⁸ See Alderman *supra* note 39.

⁸⁹ Martini, *supra* note 9, at 151.

⁹⁰ *Id.*

⁹¹ *France Cracks Down on Uber Service After Protests*, BBC NEWS (June 26, 2015), <https://www.bbc.com/news/world-europe-33267581>; *Uber Ordered to Pay Taxi Drivers Damages in France*, TECH XPLORE (Sept. 10, 2021), <https://techxplore.com/news/2021-09-uber-taxi-drivers-france.html>.

⁹² *Id.*

the attention of the European Union courts, posing issues for future European expansion.⁹³

E. July 2012: London, United Kingdom

Uber was met in London with much of the same vitriol from London cab drivers as Paris and New York cab drivers had meted out in their respective battles. To add insult to injury for the London cab drivers, the Uber app's location service feature dealt a blow of obsolescence to the requirement that all London "black cabbies" obtain The Knowledge.⁹⁴ Drivers in London, in addition to medallion and licensure requirements, must pass an examination to prove their *savoir faire* of every street within the 36 square miles of London.⁹⁵ One cab driver explained, "I had to commit to memory 25,000 streets and 50,000 points of interest, like pubs, clubs, galleries, monuments and museums."⁹⁶ Uber's embedding of a real-time map within its app could be seen as rendering obsolete the hundreds of hours of studying and experience that the black cabbies underwent to pass this exam.

Furthermore, at this point Uber was faced with the added complication of being on the radar of the CJEU and other European Union governing bodies, like the European Commission.⁹⁷ Contrary to its United States model, which allowed the company to fly under-the-radar until it had achieved enough support to heavily lobby regulators, Uber France had received vocal opposition at nearly every step.⁹⁸ Although, upon its arrival in the United Kingdom in 2012, the 2017 CJEU Decision classifying Uber and other TNCs as transportation services had not been handed down, litigation that

⁹³ Martini, *supra* note 9 at 152.

⁹⁴ London cab drivers are colloquially known as the "black cabbies" because of the distinctive color of their car, along with its old-fashioned "hackney" style body, manufactured by The London Taxi Company. Stephen Beard, *London Taxi Drivers Hail "The Knowledge,"* MARKETPLACE (May 14, 2019), <https://www.marketplace.org/2019/05/14/london-taxi-drivers-hail-the-knowledge/>.

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ The European Court of Justice is known more commonly as the Court of Justice of the European Union (CJEU). *See generally* Martini, *supra* note 9.

⁹⁸ *Id.*

would bring about this decision was already beginning to work its way through courts of other European Union Member States.⁹⁹ With the advent of Brexit, reprieve from the “federal” governance style of the EU was still not to be had, as UK courts have still seen fit to follow the line of judgments of the CJEU when classifying drivers as employees with benefit entitlements.¹⁰⁰

At this point in its growth, Uber had not turned an operating profit.¹⁰¹ In fact, it would not do so until reporting its third-quarter earnings on November 4, 2021, though it still experienced a net loss due to investments.¹⁰² When Uber underwent its initial public offering in 2019, it had lost \$3.03 billion dollars, and warned investors that it may *never* turn an operating profit.¹⁰³ A major contributing factor to this conundrum, ironically, is that Uber’s profit-share model with its “driver-partners,” as they’re known, is somewhat untenable.¹⁰⁴ Uber pays approximately 75 percent of the cost of the ride to the driver and keeps the other 25 percent as a fee for the use of the platform.¹⁰⁵ In cities where Uber drivers are charged fines if found driving for the

⁹⁹ Transportation Network Companies (TNCs), defined *infra*, are the solution that multiple countries’ regulatory bodies have come up with to describe the unique phenomenon of Uber and its peers, who provide a facilitatory platform for drivers who use their personal vehicles to transport passengers. *See* Meliti, *supra* note 16, at 456.

¹⁰⁰ Dinah Wisenberg Brin, *UK Supreme Court’s Uber Ruling May Prompt Gig-Economy Changes*, SHRM (April 14, 2021), <https://www.shrm.org/resourcesandtools/hr-topics/global-hr/pages/uk-uber-ruling-changes.aspx>.

¹⁰¹ Joshua Franklin, *Uber Unveils IPO With Warning It May Never Make a Profit*, REUTERS (April 11, 2019, 4:24 PM), <https://www.reuters.com/article/us-uber-ipo/uber-unveils-ipo-with-warning-it-may-never-make-a-profit-idUSKCN1RN2SK>.

¹⁰² Tina Bellon & Nivedita Balu, *Uber Makes First Operating Profit as Driver Shortage Eases*, REUTERS (Nov. 4, 2021), <https://www.reuters.com/technology/uber-posts-first-small-adjusted-profit-ridership-rises-delivery-gets-more-2021-11-04/>.

¹⁰³ Franklin, *supra* note 101.

¹⁰⁴ *Id.*

¹⁰⁵ *Tracking Your Earnings*, UBER (2020), <https://www.uber.com/gh/en/drive/basics/tracking-your-earnings/#payments-and-earnings>.

company, Uber often pays the drivers' fines as well, at least in the early stages of expansion into that city.¹⁰⁶

When the early protests started to gain traction, the fight over the misclassification of driver-partners as independent contractors, rather than employees, was an unwelcome prospect for Uber's business model. The 2016 ruling in *Uber B.V. v. Aslam* dealt this blow by classifying driver-partners as workers and granting them the right to guaranteed minimum wages, holiday pay, minimum break rights, and protection from discrimination and whistleblowing.¹⁰⁷ The Court implemented the metric described below to determine wage hours for drivers:

Consistent with its earlier reasoning, the ET concluded (subject to cases when a trip would take a driver outside the relevant territory, on which it had heard insufficient argument) the drivers' working time started as soon as they were in their territory, with the app switched on, ready and willing to accept trips, and would end as soon as one of those conditions ceased to apply. . . .¹⁰⁸

The threat of having to give its "driver-partners" full employee benefits is a recurring issue that Uber faces to this day. The California Legislature passed Assembly Bill No. 5 in January of 2020, classifying ride-for-hire drivers as employees rather than independent contractors. Uber responded with a public campaign supporting its Prop. 22 ballot measure, which passed in November 2020, but was struck down as unconstitutional in California Superior Court in August 2021.¹⁰⁹ Uber spends gigantic amounts of money to support measures like Prop. 22 because providing employment benefits for what it originally

¹⁰⁶ See Alderman, *supra* note 39.

¹⁰⁷ Brittany V. Dierken, *Uber's International Tax Scheme: Innovative Tax Avoidance or Simple Tax Evasion?*, 46 SYRACUSE J. INT'L L. & COM. 223, 243 (2018). See generally, *Uber BV v. Aslam* (2018) EWCA Civ 2748.

¹⁰⁸ *Uber BV v. Aslam* (2018) EWCA Civ 2748, 2776.

¹⁰⁹ See generally *People v. Uber Techs., Inc.*, No. A153674, 2019 WL 1253598 (Cal. Ct. App. Mar. 19, 2019); Maeve Allsup and Joyce E. Cutler, *Feud Over Uber-Lyft Law Will Ripple Beyond California*, BLOOMBERG LAW (Aug. 24, 2021), <https://news.bloomberglaw.com/us-law-week/feud-over-uber-lyft-worker-law-will-ripple-beyond-california>.

envisioned to be a part-time, gig-economy labor force has the potential to implode the model.¹¹⁰

F. China

Uber's expansion into China is a tale of two woes, which, when combined, became insurmountable. Once again, Uber faced excruciating state interference, on top of having to fight stiff incumbent competition from Didi Chuxing, another TNC with a better understanding of the Chinese market.¹¹¹ Uber was forced to contend with huge investment costs just to try to compete.¹¹² The nuances of the Chinese market required, for instance, investments in partnerships with Chinese vendors Alipay (cashless payment) and Baidu (a map service to replace Google maps).¹¹³ Uber's standard payment interface required validating credit cards prior to use, which was a barrier for Chinese users, and its use of Google maps didn't work in a country that, at the time, severely limited Google technologies (and has since blocked Google altogether).¹¹⁴ Another huge cost was installing servers on Chinese soil to contend with the Chinese firewall.¹¹⁵

Upon Uber's entry, China looked like a goldmine in terms of its unregulated taxi markets in countless municipalities.¹¹⁶ Uber's ability to enter the space initially without requiring much regulatory capital freed it up to wage the requisite war against its chief rival, Didi

¹¹⁰ See Alia Shoaib, *How Will Uber's Employment Appeal Loss Affect Its Business Model?*, ACCOUNTANCY AGE (Nov. 13, 2017), <https://www.accountancyage.com/2017/11/13/will-ubers-employment-appeal-loss-affect-business-model>.

¹¹¹ William C. Kirby, *The Real Reason Uber is Giving Up in China*, HARVARD BUSINESS REVIEW (Aug. 2, 2016), <https://hbr.org/2016/08/the-real-reason-uber-is-giving-up-in-china>.

¹¹² Kirby, HARVARD BUSINESS REVIEW (Aug. 2, 2016), <https://hbr.org/2016/08/the-real-reason-uber-is-giving-up-in-china>.

¹¹³ *Id.*

¹¹⁴ Matt Sheehan, *How Google Took on China— and Lost*, MIT TECH.REV. (Dec. 19, 2018), <https://www.technologyreview.com/2018/12/19/138307/how-google-took-on-china-and-lost/>.

¹¹⁵ Kirby, *supra* note 112.

¹¹⁶ *Id.*

Chuxing, slashing prices to undercut them and using old Uber tricks to attempt to poach their drivers.¹¹⁷ However, by 2016, China had passed a bill “granting” legal status to TNCs, and effectively handcuffing them.¹¹⁸

Under the new regulations, the data collected by Uber would come under the purview of the government. There would be no more subsidies. Market prices would prevail, the regulations state, “except when municipal government officials believe it is necessary to implement government-guided pricing.” According to Xinhua, ride-hailing companies would be urged to merge with taxi companies. (Many of those also happen to be owned by the local governments.) Uber would have to get both provincial *and* national regulatory approval for its activities anywhere in China. Online and offline services would be regulated separately.¹¹⁹

Uber ended up leaving China that year, selling its infrastructure to Didi Chuxing for \$1 billion and a 20% stake in Didi.¹²⁰ Ironically, the stake in Didi is what cost Uber a net loss in the vaunted third quarter of 2021, where it reported its first-ever operating profit.¹²¹

III. ANALYSIS

A. The Rise of the Gig Economy Entrepreneurship Model

Uber, Lyft, and Airbnb—hallmarks of the gig economy model—were all founded in San Francisco, California, around 2007-

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ Alyssa Abkowitz & Rick Carew, *Uber Sells China Operations to Didi Chuxing*, WALL ST. J. (Aug. 1, 2016), <https://www.wsj.com/articles/china-s-didi-chuxing-to-acquire-rival-uber-s-chinese-operations-1470024403>.

¹²¹ Bellon and Balu, *supra* note 102.

2010.¹²² The gig economy, sometimes referred to as the sharing economy, is characterized by its employment methods.¹²³ Most gig economy companies attract their labor by highlighting the high level of independence they provide for their workers.¹²⁴ As with Uber, gig employees are allowed and encouraged to set their own hours, act as their own bosses, and thus exhibit autonomy over their own salaries.¹²⁵ This model also successfully shifts much of Uber's risk to its drivers, driving down its operating costs.¹²⁶

The rise of gig economy entrepreneurship models in the United States changed the landscape of entrepreneurship altogether. Platform companies such as DoorDash, Postmates, UrbanSitter,¹²⁷ and Bird¹²⁸ have sprung up in the interim period between Uber's founding

¹²² Rebecca Aydin, *How 3 Guys Turned Renting Air Mattresses in Their Apartment into a \$31 Billion Company, Airbnb*, BUSINESS INSIDER (Sept. 20, 2019), <https://www.businessinsider.com/how-airbnb-was-founded-a-visual-history-2016-2#they-created-a-simple-site-airbedandbreakfastcom-bought-three-air-mattresses-and-arranged-them-in-their-loft-5>; Andrew Greiner et al., *A History of Lyft, from Fuzzy Pink Mustaches to Global Ride Share Giant*, CNN BUSINESS (April 2, 2019), <https://www.cnn.com/interactive/2019/03/business/lyft-history/index.html>.

¹²³ Kirvin, *supra* note 5.

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ In places where Uber successfully categorizes its drivers as independent contractors, it's not responsible for paying driver employee benefits such as healthcare, minimum wage, overtime pay, and unemployment insurance or benefits. See Luis Feliz Leon, *Uber and Lyft Drivers' Fight Against Independent Contractor Status Isn't Going Away*, JACOBIN MAGAZINE (Sept. 14, 2020), <https://www.jacobinmag.com/2020/09/uber-lyft-employee-freelance-covid-19>. "Driver-partners" are also required to pay for their own insurance and maintain their own vehicles to Uber's standards. *Vehicle Requirements*, UBER HELP, <https://help.uber.com/driving-and-delivering/article/vehicle-requirements?nodeId=2ddf30ca-64bd-4143-9ef2-e3bc6b929948> (last visited Sept. 24, 2021).

¹²⁷ UrbanSitter is a company that connects nannies with families in need of childcare. See URBANSITTER, <https://www.urbansitter.com>.

¹²⁸ Bird is a public scooter sharing company which has had its own fair share of trouble with local regulations. Bird operates by releasing a certain number of their scooters— equipped with rechargeable batteries, tracking devices, locking mechanisms, and a connection to a payment app—into a new host city. Bird partners, known as "fleet managers," are paid to pick up scooters in the evenings, recharge them, and then "release" them back into the streets in the mornings for customers

in 2009 and now, marking a shift in what was traditionally considered “entrepreneurship.” Where the entrepreneur of the past may have hoped to invent the next gadget, platform sharing economy companies have now spawned phrases such as “platform capitalism.”¹²⁹

Critics of these gig economy companies argue that calling platform companies a part of the “sharing economy” is a gross misclassification. As Sebastian Olma writes:

The first thing we need to understand about the “sharing economy” is that it has absolutely nothing to do with sharing in the sense you and I might think about it. The essence of sharing - if it has any meaning at all - is of course that it does not involve the exchange of money. Sharing only happens in the absence of market transactions. With regard to the poster boys and girls of the “sharing economy,” the very opposite is the case. These are digital platforms that roughly do two things: either making the old practice of re- and multi-using durable goods more efficient or expanding market exchange into economically uncharted territory of society.¹³⁰

In fact, sharing economy companies like Uber have found a way to monetize and profit off of sharing, charging a premium

to use. See BIRD, <https://www.bird.co/#bird-two>. Bird’s operating style, along with that of competitors such as Lime and Spin, has involved often-unannounced “drops” of scooters into unsuspecting cities. Ostensibly, the surprise is intended as a marketing tool, but in practice it often ends up angering city officials, who see the discarded scooters in the middle of public sidewalks and thoroughfares and complain of public safety hazards. See Kate Mancuso, *The Rise of Electric Scooter Regulations*, THE REG. REV. (Jan. 3, 2019), <https://www.theregreview.org/2019/01/03/mancuso-electric-scooter-regulations>. Bird CEO Travis VanderZanden was both a Vice President at Uber and a COO of Lyft. See Travis VanderZanden, LINKEDIN, <https://www.linkedin.com/in/travis1> (last visited June 27, 2021).

¹²⁹ Sebastian Olma, *Never Mind the Sharing Economy: Here’s Platform Capitalism*, INSTITUTE OF NETWORK CULTURES (Oct. 16, 2014, 8:39 p.m.), <https://networkcultures.org/mycreativity/2014/10/16/never-mind-the-sharing-economy-heres-platform-capitalism>.

¹³⁰ *Id.*

platform fee in exchange for creating the mass-scale network effect that makes it possible to connect sharer with share-ee.¹³¹ Although not all platform-based companies operate in this way—Bird, for instance, offers its user the physical use of its scooters—Olma points out that in general, these platforms are more aptly characterized as “coordinating supply and demand of products and services that in their present form were previously unavailable on the market.”¹³²

In the case of Uber, its service—rides for hire—was already on the market and has existed for over a century.¹³³ So not only is it inaccurate to categorize Uber as a sharing economy company, it’s also not providing a novel service.¹³⁴ What it purports to do is reimagine an already-provided service with more accessibility to both customers and workers. Another common identity given to platform companies is that they’re “cutting out the middleman.”¹³⁵

Sharing models, the argument goes, facilitate a more direct exchange between economic agents, thus eliminating the inefficient middle layers and making market exchange simpler and fairer. While it is absolutely true that internet marketplaces and digital platforms can reduce transaction costs, the claim that they cut out the middleman is pure fantasy.¹³⁶

Furthermore, in an industry where getting service only requires standing on the curb and raising a hand, it’s hard to see *what* middleman Uber cut out on the consumer side. Transaction costs decreased because Uber’s business model flooded the market with labor, reducing the scarcity of the ride.¹³⁷ Olma’s blog post goes on to point out that the platform business model objective appears to be the

¹³¹ *Id.*

¹³² *Id.*

¹³³ Mary Bellis, *Hailing: History of the Taxi*, THOUGHTCO (Feb. 5, 2020), <https://www.thoughtco.com/hailing-history-of-the-taxi-1992541>.

¹³⁴ *Id.*

¹³⁵ Olma, *supra* note 129.

¹³⁶ *Id.*

¹³⁷ *Taxi Drivers Accuse Uber of Flooding the Market*, HARTFORD BUSINESS JOURNAL (Feb. 5, 2016), <https://www.hartfordbusiness.com/article/taxi-drivers-accuse-uber-of-flooding-the-market>.

creation of a monopoly, while benefitting from the marketable reputation of increasing accessibility.¹³⁸

How does one create a monopoly? One of the simplest (and defining) ways is to drive your competitors out of the market.¹³⁹ While there are a few ways to do this, the most applicable one to this situation is called predatory pricing: consistently using low pricing strategies (marginal cost greater than marginal benefit) to undercut competitors and drive them out of the market so that the firm can then set whatever price they want.¹⁴⁰

However, in the United States, Section 2 of the Sherman Act, the applicable antitrust law, does not ban short-term low cost pricing, since lower prices are considered *per se* consumer friendly, and “[a] firm’s independent decision to reduce prices to a level below its own costs does not necessarily injure competition, and, in fact, may simply reflect particularly vigorous competition.”¹⁴¹ Multiple courts have ruled that Uber’s pricing strategies don’t rise to the level of predatory or anticompetitive.¹⁴² Although Uber typically operates at a loss, often subsidizing and incentivizing driver income out of their pocket, studies show that once Uber settles into a new market, a traditional taxi ride within a large city may be cheaper, particularly with Uber features such as surge pricing.¹⁴³ However, Uber’s public reputation, both in the

¹³⁸ Olma, *supra* note 129.

¹³⁹ Federal Trade Commission, *Monopolization Defined*, <https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/single-firm-conduct/monopolization-defined> (last accessed Nov. 16, 2021).

¹⁴⁰ “This strategy can only be successful if the short-run losses from pricing below cost will be made up for by much higher prices over a longer period of time after competitors leave the market.” Federal Trade Commission, *Predatory or Below-Cost Pricing*, <https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/single-firm-conduct/predatory-or-below-cost> (last accessed Nov. 16, 2021).

¹⁴¹ *Id.*

¹⁴² Uber Technologies Pricing Cases, 46 Cal. App. 5th 963, 2020 CAL. APP. LEXIS 241, 260 CAL. RPTR. 3d 294, 2020-1 Trade Cas. (CCH) P81,140.

¹⁴³ See Rachel Morgan Cautero, *Is an Uber Really Cheaper than a Taxi?*, LIFEWIRE (Oct. 1, 2020), <https://www.lifewire.com/what-is-cheaper-an-uber-or-a-taxi-4157965>. Surge pricing is a feature on the Uber App that automatically multiplies the price of a given ride when rider demand cannot meet driver supply in a given locale. Uber’s website describes it as a feature meant to “rebalanc[e] the

United States and abroad, has suffered from the accusation that its pricing strategies are anticompetitive, which added fuel to the fire for some regulators.¹⁴⁴

Of course, Uber's anticompetitive reputation isn't helped by other sabotage tactics taken against competitors such as Lyft and Sidecar.¹⁴⁵ Both rivals are not alone in alleging that Uber has purposefully manipulated their respective apps in order to influence drivers to jump to Uber; they also allege anticompetitive and monopolistic pricing practices.¹⁴⁶

It's interesting to note that Uber's original market entry purported to oppose the dominance of the taxi cab industry, with its high barriers to entry and stringent and price-distorting regulations.¹⁴⁷ However, the reality is that the intended result of some of Uber's market manipulations is that Uber becomes the new bogeyman.¹⁴⁸

Uber, however, feels that this is what it takes to be a successful start-up. In fact, Uber employees and outsiders alike have described the company's culture and mentality as a bunch of "bro-grammers"—

marketplace." Uber Marketplace, *What's happening when prices surge?*, <https://marketplace.uber.com/pricing/surge-pricing> (last visited Sept. 24, 2021).

¹⁴⁴ Romain Dillet, *Uber Wants to Take Over the French Market With Aggressive Bonus Tactics*, TECH CRUNCH (Feb. 28, 2014), <https://techcrunch.com/2014/02/28/uber-wants-to-take-over-the-french-market-by-using-dumping-tactics>.

¹⁴⁵ Uber has been accused by Lyft of having its drivers order and cancel thousands of Lyft driver rides, making it appear as though Lyft drivers are unavailable and driving competition over to Uber. See Erica Fink, *Uber's Dirty Tricks Quantified: Rival Counts 5,560 Canceled Rides*, CNN BUSINESS (Aug. 12, 2014), <https://money.cnn.com/2014/08/11/technology/uber-fake-ride-requests-lyft/>. Uber is also being sued by SC Innovations Inc. for similar claims, alleging that Uber has an unchecked ability to use monopolistic pricing practices due to their market power. Nicholas Iovino, *Defunct Ride-Hail's Antitrust Suit Against Uber Likely to Advance*, COURTHOUSE NEWS SERVICE (April 24, 2020), <https://www.courthousenews.com/defunct-ride-hails-antitrust-suit-against-uber-likely-to-advance>.

¹⁴⁶ Fink, CNN BUSINESS (Aug. 12, 2014), <https://money.cnn.com/2014/08/11/technology/uber-fake-ride-requests-lyft/>.

¹⁴⁷ See Onswego, *supra* note 11.

¹⁴⁸ Olma, *supra* note 129.

who need to grow up.”¹⁴⁹ Mark Cuban, mentor to Travis Kalanick and investor in Uber, described Kalanick by saying that “Travis’s biggest strength is that he will run through a wall to accomplish his goals . . . Travis’s biggest weakness is that he will run through a wall to accomplish his goals. That’s the best way to describe him.”¹⁵⁰

If that’s the reputation that Kalanick and Uber developed in the United States, then their success has certainly magnified it. Although Kalanick resigned from the company in 2017,¹⁵¹ Uber’s public relations efforts have largely focused on transitioning the company from the start-up mindset of a “scrappy entrepreneur” to “the leader of a global company.”¹⁵² If Uber had figured out how to do that prior to 2017—when it had already failed in France, Germany, and at the CJEU, for example¹⁵³—it is possible that it could have had a better working relationship with regulators in Europe and across multiple other expansion areas. The bulldozing method of success that Uber had in the United States was precisely the reason that international regulators saw Uber coming.

B. Uber’s International Expansion: What Worked and What Didn’t Work? [Malum Prohibitum v. Malum in se]

A fundamental tenet of a successful “regulatory activist” is the mantra of *malum prohibitum*. The Latin phrase, meaning “wrong due to

¹⁴⁹ Aarti Shahani, *Can Ariana Huffington Save Uber?* NPR MORNING EDITION (March 24, 2017), <https://www.npr.org/sections/alltechconsidered/2017/03/24/521319706/can-arianna-huffington-save-uber>.

¹⁵⁰ Mike Isaac, *Uber’s C.E.O. Plays with Fire*, N.Y. TIMES (April 23, 2017), https://www.nytimes.com/2017/04/23/technology/travis-kalanick-pushes-uber-and-himself-to-the-precipice.html?_r=0.

¹⁵¹ Zoe Kleinman, *Uber: The Scandals That Drove Travis Kalanick Out*, BBC NEWS (June 21, 2017), https://www.nytimes.com/2017/04/23/technology/travis-kalanick-pushes-uber-and-himself-to-the-precipice.html?_r=0.

¹⁵² *Id.*

¹⁵³ Sam Shead, *Uber’s Rocky Road to Growth in Europe: Regulators, Rivals, and Riots*, FORBES (May 10, 2019, 3:58 a.m.), <https://www.forbes.com/sites/samshead/2019/05/10/ubers-rocky-road-to-growth-in-europe-regulators-rivals-and-riots/?sh=43fccd935c67>.

being prohibited”¹⁵⁴ contrasts with the concept of *malum in se*, meaning “wrong in itself.”¹⁵⁵ Historically, society has understood a difference in “wrongness” between crimes it considers to be morally wrong and crimes that are wrong only by statute.¹⁵⁶ Uber took the bet that its existence in the face of a *malum prohibitum* law could be outweighed by its convenience to the consumer. Uber operated a successful branding campaign to both driver-partners and riders, and then used the passion it garnered from its built-up support base to wage a public support campaign against the regulations.¹⁵⁷

The success built using this strategy naturally lent itself to public acceptance (or ignorance) of Uber’s decisions to simply operate anyway in places where it was legally banned.¹⁵⁸ This worked in Uber’s favor. Veena B. Dubal, Ruth Berins Collier, and Christopher L. Carter argue that Uber fits into a disrupted regulation economic model called challenger capture.

We analyze Uber as a model of disrupted regulation, which has two phases. In the first, an existing regulatory regime, in this case for taxis, was not deregulated but disregarded by the challenger, Uber, who flouted entry and price controls, often triggering cease and desist orders from city regulators. A subsequent phase involves regulation and has occurred at both city and state levels—in legislative and sometimes regulatory bodies—and also in judicial venues. It conforms to an elite-dominated model of contending incumbent vs. challenger interests, in which the latter has largely prevailed. In this model of challenger capture, Uber has been able to defend its core interests of low prices, high driver supply (with no

¹⁵⁴ Legal Dictionary, *Malum Prohibitum*, LAW.COM, <https://dictionary.law.com/Default.aspx?selected=1202> (last accessed Nov. 15, 2020).

¹⁵⁵ *Id.* (“crimes based on English common law and obvious violations of society’s standards . . .”).

¹⁵⁶ *Id.*

¹⁵⁷ See Oswego, *supra* note 11.

¹⁵⁸ See TUSK, *supra* note 69 at 109.

labor regulation), and consumer trust. While Uber initially rejected all regulation, it has most vigorously opposed those central to its business model of low-cost service with dynamic pricing, frictionless entry of drivers, and no vehicle caps.¹⁵⁹

This strategy got Uber off the ground and was essential to its American success. However, it was also essential to the vitriol that it faced in Europe, parts of South America, and Asia.¹⁶⁰ France was a huge first bite of the regulatory apple. Inherent in successful *malum prohibitum* law challenges lies the ability to inspire passion for change; if the pro-regulation incumbent (in this case, the taxi union) has the historic ability to rile up an entire country into widespread rioting, the challenger has a tough uphill battle.¹⁶¹ France's labor unions are notoriously politically powerful.¹⁶² It is hard not to look at Kalanick and Uber and wonder whether the upstart entrepreneurs had enough arrogance to think that they were more powerful.

Remiss from the analysis of Uber is evidence that it had decided to consider playing by the rules upon entry into some markets.¹⁶³ When Uber entered China, for example, the entire taxi space was largely unregulated.¹⁶⁴ With intense competition between Uber and other ride-share apps, most notably Didi Chuxing, the Chinese market incumbent, the Chinese government eventually decided to adopt regulation for transportation network companies.¹⁶⁵ At first, Uber and Didi Chuxing welcomed the new regulation; they

¹⁵⁹ Veena B. Dubal et al., *Disrupting Regulation, Regulating Disruption: The Politics of Uber in the United States* at 4, U.C. HASTINGS SCHOLARSHIP REPOSITORY (2018).

¹⁶⁰ *See generally, id.*

¹⁶¹ *See generally, id.*

¹⁶² France's transportation worker strikes, from airline workers to TNF mechanics, have long been a staple in French life. The strike of the yellow vests, or *les gilets jaunes*, in 2018, began in opposition to fuel tax increases, but eventually spawned weeks of deadly riots and expanded into a "call to arms" with a broad list of demands for social and economic change. Maxime Quijoux and Gillaume Gourges, *France's Strikes Show that Unions are Alive*, JACOBIN MAGAZINE (Jan. 8, 2020), <https://jacobinmag.com/2020/1/france-strikes-trade-unions-gilets-jaunes>.

¹⁶³ Kirby, *supra* note 112.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

had been fighting a tough fight against driver corruption that saw drivers for both companies finding loopholes in the largely unregulated market.¹⁶⁶ However, eventually the “standardization” of the service by the Chinese government allowed occasions where the government could set prices and require the issuance of “ride-hailing service driver’s licenses.”¹⁶⁷ Why Uber declined to fight the regulation tooth-and-nail speaks to their fiscal inability to wage two wars at once; they were forced to choose either the regulatory battle or the head-to-head competition with Didi Chuxing.¹⁶⁸ In a market that Kalanick had once called Uber’s most important, Uber ended up selling most of its Chinese operations to Didi Chuxing.¹⁶⁹

Ten years after its start, Uber seems like a company that still doesn’t know how to turn a sustainable profit. It’s also becoming increasingly clear that any chance of success it has with its *original* vision exists in entirely unregulated markets.¹⁷⁰ To have had a chance of reaching profitability at this point, Uber needed to be more intentional about the type of company it wanted to become. It appeared to see immense success in the United States by epitomizing the Silicon Valley big tech entrepreneurship model; unfortunately, Uber struggled, as Ariana Huffington put it, to move from the start-up mindset of a “scrappy entrepreneur” to “the leader of a global company.”¹⁷¹

The top-down regulatory forces that Uber crashed into full-force did not help its plight. Uber vastly overestimated the options it had in the European Union, for instance, where the Court of Justice of the European Union (CJEU) has the ability to pass sweeping

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ Travis Kalanick, *Uber China Merges with Didi Chuxing*, UBER NEWSROOM (Aug. 1, 2016), <https://www.uber.com/newsroom/uber-china-didi>.

¹⁷⁰ *The Onion* satirized the California Prop. 22 employee/independent contractor deregulation ruling in an article title “Passed California Ballot Measure Allows Uber, Lyft to Categorize Workers as Car Parts.” *Passed California Ballot Measure Allows Uber, Lyft to Categorize Workers as Car Parts*, THE ONION (Nov. 4, 2011), https://www.theonion.com/passed-california-ballot-measure-allows-uber-lyft-to-c-1845576241?utm_campaign=TheOnion&utm_content=1604530232&utm_medium=SocialMarketing&utm_source=twitter.

¹⁷¹ Shahani, *supra* note 149.

regulation to all European countries and actually did use the power to the disadvantage of Uber.¹⁷² The CJEU, in one fell swoop, decided the legal issue of whether Uber should be classified as a technology platform or a transportation services company for the entirety of the European Union.¹⁷³ In the United States, this fact-specific legal question is subject to individual interpretation by each governing municipality; it would take a years-long, lengthy appeal system to have any similarly binding ruling by the Supreme Court.

Uber benefited from a wave of gig-economy and sharing-economy entrepreneurship in the United States. It was uniquely successful at branding itself as a populist alternative to taxi cabs, largely because of social and regulatory forces idiosyncratic to its home country. These forces included “bottom-up” regulation, which allowed it to geographically and legally spread out its fight, facing molehills instead of one big mountain.¹⁷⁴ The United States also had largely decentralized labor union forces, which were often too weak to fend off Uber’s tactics— this was not the case in most of the European countries.¹⁷⁵ Uber, therefore, suffered in its international expansion because what was good for the goose wasn’t good for the gander. The challenge of mounting public pressure campaigns is that their volatility can easily be weaponized against their instigator. While popular opinion worked in Uber’s favor in the United States, it became a dual-edged sword that pigeon-holed Uber into a specific, sometimes unlikable force, and warned the rest of the world that Uber was coming.

If Uber had been more intentional (read: deferential) about its expansion tactics, it may have avoided learning these lessons the hard way. Rather, it tested out the success of its American strategy by running full-force into the French government, the French labor

¹⁷² Court of Justice of the European Union, PRESS RELEASE NO 136/17 (Dec. 20, 2017), <https://curia.europa.eu/jcms/upload/docs/application/pdf/2017-12/cp170136en.pdf>.

¹⁷³ *Id.*

¹⁷⁴ Onswego, *supra* note 11.

¹⁷⁵ See Quijoux & Gourges, *supra* note 162.

unions, and then the European court system, hamstringing its hopes of expansion in Germany,¹⁷⁶ Spain,¹⁷⁷ the UK,¹⁷⁸ and other countries.

What's become clear, internationally, is that Uber experienced an unruly teen phase and is now trying to pick up the pieces and forge a new reputation. Uber has managed to make good on its optimistic projection that it expected to make its first operating profit in 2021, adjusted for amortization, taxes, depreciation, and interest.¹⁷⁹ Much of this is operating profit is due to its success with Uber Eats, which provided a much-needed diversification for Uber's business model by using its existing platform infrastructure to transition into a delivery service.¹⁸⁰ It's unclear if Uber will ever divest itself of its initial rideshare model, which, on its own, hasn't proven to be too profitable, as highlighted by this comment.¹⁸¹

IV. CONCLUSION

Whether Uber's rideshare model, in a vacuum, had (or still has) the potential to earn a profit is unclear. Infiltrating and then undercutting a highly regulated market was always an integral piece—indeed, the core—of it. The costs, legal and otherwise, of doing so have thus far proven to be untenable as a pure profit-seeking endeavor

¹⁷⁶ Lomas, *supra* note 18.

¹⁷⁷ David Reid, 'See you later, Barcelona' – Uber Suspends Cab Service in Spanish City, CNBC (Jan. 31, 2019), <https://www.cnbc.com/2019/01/31/uber-suspends-cab-service-in-spanish-city-of-barcelona.html>.

¹⁷⁸ *Uber BV v. Aslam* (2018) EWCA Civ 2748, 2776.

¹⁷⁹ Uber lost \$1.78 billion in the second quarter of 2020, shrinking revenue to \$790 million as compared to the same quarter in 2019. Uber's foray into food delivery seemed to be its savior during the pandemic, with delivery bookings up 113 percent, combatting the 73 percent loss in rideshare bookings. Cathy Bussewitz, *Uber Lost \$1.8B in 2Q As Riders Stayed Home and Ordered In*, THE WASHINGTON POST (Aug. 6, 2020), https://www.washingtonpost.com/business/technology/uber-lost-18b-in-2q-as-riders-stayed-home-and-ordered-in/2020/08/06/5a06da82-d823-11ea-a788-2ce86ce81129_story.html; Tina Bellon and Nivedita Balu, *Uber Makes First Operating Profit as Driver Shortage Eases*, REUTERS (Nov. 4, 2021), <https://www.reuters.com/technology/uber-posts-first-small-adjusted-profit-ridership-rises-delivery-gets-more-2021-11-04/>.

¹⁸⁰ Bellon & Balu, *supra* note 102.

¹⁸¹ *Id.*

(and yet irresistible to investors).¹⁸² But, the part of the model that required the public's backing to overcome the regulatory walls the company encountered often required antagonizing the very bodies that could ease that regulation, and thus inflating Uber's costs. Although—and frankly because—those bodies, when approached in the United States in a divide-and-conquer manner, often gave reprieve to Uber, Uber was emboldened to try the same strategy in its international expansion. Unfortunately for Uber, in many instances, the unstoppable force of Uber met the immovable object of heavy “federal” governing systems. After prolonged, drawn-out battles, attempted strategy shifts and some begging, Uber became stoppable.¹⁸³

¹⁸² Franklin, *supra* note 101.

¹⁸³ Siu, *supra* note 1.