The Shape of Things to Come

The On-Demand Economy and the Normative Stakes of Regulating 21st-Century Capitalism

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The "sharing economy" represents a growing challenge to regulatory policy. In this article, I argue that these debates about the sharing economy are better understood as a broader normative and policy problem of updating our regulatory tools for the new dynamics of 21st century capitalism. The new "on-demand" economy reflects more widespread trends in the structure of business organization, driven by new developments in finance and technology. I argue that we should analyze these changes through the normative lens of the balance of economic power: what is especially troubling about the on-demand economy is the way in which it outstrips the modes of accountability and countervailing power enabled by 20th century labor, safety net, and economic regulations. The article then suggests key frontiers for regulatory innovation, in particular: (1) expanding regulatory oversight of concentrated market and economic power among on-demand platforms; (2) expanding the relative power of workers to counteract the concentrated power of platforms in the on-demand economy (for example by expanding safety net protections and the ability to organize collectively); and (3) by reinventing systems of collective urban planning processes in the face of the on-demand economy. All three of these focus areas for regulation would entail a variety of specific interventions, but share a common premise of rebalancing economic power in this new economy. The payoffs of these shifts would be more than an expansion of welfare or efficiency, but rather the creation of a policy regime that enables a richer form of economic freedom that achieves more genuine economic independence from domination of various kinds.

Introduction

Last fall, Uber, the ride-sharing app, announced its latest proposed round of fundraising, which analysts estimate will result in a valuation upwards of $70 billion.[1] Uber has taken the world by storm, quickly dominating the taxi and ride-share markets in major metro areas around the world, and with its latest rounds of fundraising, spending aggressively to extend its reach abroad, and to move beyond taxi services to everything from food delivery, courier service, and merchant delivery programs.[2] Uber is a paragon of the latest wave of 'disruptive' business models coming out of Silicon Valley: the rise of on-demand platform-based companies that seek to match consumers to a variety of goods and services

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1 Leslie Picker and Mike Isaac, "Uber Said to Plan Another $1 Billion in Fund-Raising," New York Times, Dealbook, October 23, 2015 (available online at: http://www.nytimes.com/2015/10/24/business/dealbook/uber-said-to-plan-another-1-billion-in-fund-raising.html?_r=0).

2 See coverage at TechCrunch, e.g.: "Uber is Quietly Testing a Massive Merchant Delivery Program," April 28, 2015 (online at http://techcrunch.com/2015/04/28/uber-is-quietly-testing-a-massive-merchant-delivery-program/); "Uber Takes on Postmates with UberRUSH, an On-Demand Delivery Service," October 14, 2015 (online at http://techcrunch.com/2015/10/14/uber-takes-on

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through user-friendly apps backed by extensive networks of service providers and sophisticated algorithms.

The value of Uber is clear. By creating a fluid network of potential who can clock in and clock out at-will, Uber can more dynamically meet fluctuating rider demand, while providing "freelancer" drivers greater personal control they have over when, where, and how much they choose to work.[3] Uber's vertical and horizontal integration of the taxi market has made it radically easier for riders to find drivers and vice versa, and by creating a single platform that operates across cities Uber has made this kind of taxi service provision much more efficient and effective than local taxi franchises.[4] Similarly, concerns about consumer protection and licensing are often overblown. Uber's internal system of consumer ratings are purportedly more efficient at maintaining consumer trust in the network, rather than bureaucratic *ex ante* licensing regimes.[5] Yet the regulatory and policy concerns raised by Uber are myriad. There are concerns that Uber's algorithm could enable problematic forms of price or even racial discrimination; that its drivers lack access to basic labor protections and the kinds of safety net benefits normally accorded to full-time work; and that, like the monopolies of old, increasingly wields its economic clout to bulldoze its way past city officials and existing regulations. As a technology company with no direct driver-employees, Uber claims it should bypass existing regulations, but it is hard to argue against the reality of Uber as a transportation (and eventually logistics and delivery) company.

These regulatory anxieties represent a broader pattern arising in context of many "sharing economy" business models, from Airbnb's dominance of short-term rentals, to the rise of piecemeal work and help platforms like TaskRabbit. Replacing traditional middlemen by connecting providers and users, buyers and sellers through a technology-enabled platform but without the structure of full-time employed service providers is increasingly at the heart of the Silicon Valley playbook.[6] These new business models frustrate conventional regulatory systems, whether for labor or consumer protection. The controversies around Uber and similar business models stem from the fact that these businesses are situated at the *convergence* of multiple, overlapping regulatory questions from corporate governance to labor law to the design and operation of the social contract to the processes and purposes of urban planning and development. Ultimately, the widespread anxiety about Uber (and its cousin companies like Airbnb) is much more about *what Uber represents*: a major shift in the dynamics of modern capitalism, exemplifying practices of corporate structure, business models, labor practices, and relationships with government actors and the public at large that is somehow deeply problematic for fundamental values of democracy, accountability, and economic equality.

There is a growing and rich literature on the "sharing economy," "collaborative consumption," and "peer-to-peer production", exploring the emergence of these new modes of social and economic organization, their legal and organizational structures, their impact on workers, and their implications for regulation and policy.[7] While there is much that is distinctive about these new business models, this article takes a different, though complementary, starting point, situating the challenges of the sharing economy in context of the broader transformations and normative tensions of the 21st century economy.

As this article will suggest, the idea of a "sharing economy" is something of a misnomer. There is no separate "sharing economy" sector; instead, we see "sharing economy" firms arising in a variety of sectors: transit, hotels, delivery services, domestic help, and the like. What makes the "sharing economy" a distinct category is that these businesses do share

-postmates-with-uberrush-to-deliver-all-the-retail-things-to-you/#.mzzkwd:X0k7); "Uber's New Update Gives Food Delivery As Much Attention As Transportation," August 17, 2015 (online at http://techcrunch.com/2015/08/17/ubers-new-update-gives-food-delivery-as-much-attention-as-transportation/#.mzzkwd:abIH).

3 See e.g. "Freelancing in America: 2015," Report by Freelancers' Union and Upwork, available at https://www.upwork.com/press/2015/10/01/freelancers-union-and-upwork-release-new-study-revealing-insights-into-the-almost-54-million-people-freelancing-in-america/

4 *See* Brishen Rogers, "The Social Costs of Uber" (2015) *University of Chicago Law Review Dialogue* 82, 88-90.

5 See e.g. Brishen Rogers, "The Social Costs of Uber" (2015) *University of Chicago Law Review Dialogue* 82, 93.

6 Claire Cain Miller, "Where Uber and Airbnb Meet in the Real World," New York Times, Dealbook, October 17, 2014 (online at http://www.nytimes.com/2014/10/19/upshot/when-uber-lyft-and-airbnb-meet-the-real-world.html?smid=pl-share)

7 See e.g. Arun Sundararajan, *The Sharing Economy: The End of Employment and the Rise of Crowd-Based Capitalism* (MIT Press, 2016); Jenny Kassan and Janelle Orsi, "The Legal Landscape of the Sharing Economy" (2012) 27(1) *Journal of Environmental Law and Litigation* 2-20; Valerio De Stefano, "Crowd-Sourcing, the Gig Economy, and the Law" (2016) 37 *Comparative Labor Law and Policy Journal* 461-470; Sofia Ranchordas, "Does Sharing Mean Caring? Regulating Innovation in the Sharing Economy" (2015) 16(1) *Minnesota Journal of Law, Science, & Technology* 413-475.

some common underlying drivers. Definitionally, I also suggest that what is really going on in these business models is not so much sharing as it is the creation of a system for "on-demand" production and consumption, at scale. Furthermore, the quick rise of the on-demand economy itself exploits, exacerbates, and lays bare a convergence of broader trends and challenges that are shaping both online and "offline" industries. If that is the case, then, I suggest, our regulatory focus really ought to be not on the businesses themselves (though of course there should be attention paid to allegations of fraud or lack of safety), but more critically on these underlying dynamics and tensions. As a regulatory problem, then, the on-demand economy is an indicator of more widespread normative and policy challenges to come. The realities of 21st century business organization, finance, and technology have outstripped 20th century models of the social contract, worker protection, and political accountability.

This article explores this relationship between the on-demand economy and the broader challenges of 21st century capitalism. While much of the contribution foregrounds these policy and normative debates in context of the United States legal regime, these themes have implications for similar debates in other industrialized countries.

In Part I, I argue that the on-demand economy represents a manifestation of deeper trends in the changing structure of capitalism, and the reallocation of economic power. On-demand businesses emerge from deeper structural problems in the organization of the 21st century economy, particularly its treatment of corporate structure, finance, and technology. At their core, on-demand firms are animated by a unique leveraging of *technology* to create online platforms dynamically linking producers and consumers; and they are often additionally empowered by significant *financial backing* from investors and venture capital. These deeper trends are what make possible the unique corporate and organizational structure of on-demand production organized through a combination of freelance labor, and technological platforms. The problem with these developments is that this changing nature of business organization dramatically alters the distribution of economic power in modern capitalism.

Next in Part II, this article suggests that this shift in economic power has outstripped our conventional mechanisms for holding private power accountable, and enabling countervailing power of workers and regulators alike. Thus, this article then explores the ways in which legal and regulatory changes might develop new checks on the modern nature of private power in the on-demand economy. Specifically, this part of the article discusses three frontiers for regulatory and policy innovation: (A) expanding regulatory oversight of concentrated market and economic power among on-demand platforms; (B) expanding the relative power of workers to counteract the concentrated power of platforms in the on-demand economy (for example by expanding safety net protections and the ability to organize collectively); and (C) by reinventing systems of collective urban planning processes in the face of the on-demand economy. All three of these focus areas for regulation would entail a variety of specific interventions, but share a common premise of rebalancing economic power in this new economy.

In Part III, the article concludes by highlighting the broader normative stakes of these policy proposals. If the central problem of the on-demand economy is its reallocation of economic power, and if our regulatory responses involve finding new ways of holding such power accountable—such as through expanded worker organizing, or more sophisticated and democratic modes of regulatory oversight—then the payoffs of these shifts would be more than an expansion of welfare or efficiency, but rather the creation of a policy regime that enables a richer form of economic freedom in a changing economy. As the rhetoric of "sharing economy" and "collaborative consumption" indicates, much of the normative appeal of the sharing economy stems from its expression of a two particular kinds of economic liberation. First, it evokes the liberation that comes with the shift from highly bureaucratized work to freelance and independent producerism. Second, it evokes the liberation that comes from individuals being able to access a wider range of goods and services provided through sharing economy companies that expand their capacities to pursue their life ends. These aspirations are real. But they are frustrated by the realities of power and precarity described in Part I. A reinvented regulatory regime would, by contrast, enable more normatively desirable forms of these aspirations to autonomy and liberation. Indeed, as the article will suggest, pursuing the strategies described below can deepen the rhetoric of freedom emanating from Silicon Valley firms, into a richer normative vision that achieves more genuine economic independence from domination of various kinds.

I. The Restructuring of Economic Organization and Power

Part of what makes Uber and other on-demand firms difficult from a regulatory perspective is that it is unclear what 'industry' these firms belong to. Uber is both a "technology" company—its primary product is an app, its direct employees are coders—and also a private transportation and taxi company. This poses a regulatory challenge: as a technology company, Uber has very few employees, and none of them are drivers; as such it claims exemption from the kinds of regulations that might apply to taxis and limousine services. As a private transportation company, however, Uber absolutely helps activate, and structure, a whole alternative system for hiring drivers. The same ambiguity applies to other on-demand companies like Airbnb in relation to the conventional hotel industry. Ultimately, what is distinct about Uber, Airbnb, and other similar ventures is that they operate primarily by creating a technologically-enabled *platform* through which service providers match with consumers. This platform approach is what gives rise to the paradoxical nature of these businesses: on paper, they have few direct employers, and very little responsibility over the conduct, wages, and benefits for the service providers whose "voluntary" (and rapidly scalable) participation in the platform makes the service attractive to consumers; yet they also seem to exert an outsized level of control over the markets in which they enter.

In this, the on-demand businesses exemplify a broader set of structural changes in economic organization and power in the economy at large. In the "offline" economy, economist David Weill has called this broader trend the move towards a "fissured workplace." As Weill documents, industries like restaurants, fast-food chains, and apparel manufacture have gradually shifted in recent decades to a very different model of business organization. Instead of including all aspects of production within a single corporate structure, these industries now entail a highly fragmented, disaggregated supply chain linked together by legal contracts for subcontracting, franchising, and outsourcing. Thus, brand leaders like McDonald's or Nieman Marcus provide the well-known brand identity and front-end stores, but contract with external firms to conduct the production process.[8] In so doing, the lead brands are able to shed labor costs; rather than bargaining with workers within the firm, they instead create a market among low-wage producers and workers competing for the contract with the large brand. As Weil documents, the result is a shift to a low-wage, precarious workforce, without access to safety-net and labor protections.

This fragmentation of the corporate structure is partly a product of technology: advances in computer and information technologies reduce dramatically the cost for the primary corporations to monitor and oversee its various subcontractors and franchisees. As search, information, and transaction costs decrease, following the logic of Ronald Coase's famous article on the size of firms, it becomes more efficient for firms to procure goods and services over the open market rather than internally.[9] But there is a strong economic and legal incentive as well. As corporate law scholars have argued, in the late 20th century corporate governance shifted to a model of "shareholder primacy,"[10] which was "internalized as the dominant norms of a rising generation of business leaders, investors, academics, journalists, and lawmakers" into an "omnipresent belief system."[11] This shareholder model suggests that battles between management and shareholders over the control and direction of the firm would ensure corporations optimized their activities efficiently and accountably, disciplined by capital markets.[12] Increasing the power of shareholders to hold managers more accountable, for example through expanded powers to set internal governance rules or intervene in major management decisions, would prevent corruption, and promote economic growth.[13]

8 David Weil, *The Fissured Workplace: Why Work Became So Bad For So Many and What Can Be Done to Improve It* (Harvard University Press, 2014).

9 *See* Ronald Coase, "The Nature of the Firm" (1937) 4(16) *Economica* 386.

10 Henry Hansmann and Reiner Kraakman, "The End of History for Corporate Law" (2001) 84 *Georgetown Law Journal* 439.

11 Stout, *op.cit.*, 1178.

12 See e.g., John Macey, *Corporate governance: Promises kept, promises broken* (New Jersey: Princeton University Press, 2010); Lucian Bebchuk, 'The Case for Increasing Shareholder Power" (2005) 118 *Harvard Law Review* 833.

13 Lucian Bebchuk, "The Case for Increasing Shareholder Power" (2005) 118 *Harvard Law Review* 833.

According to Weil, it is this pressure from shareholders to cut costs and deliver short-term returns that drives the decision to raise profits and cut costs by offloading and contracting-out labor. This investor pressure is further magnified by the growing financialization of the economy. As several studies indicate, the financial sector accounts for a growing share of profits and volume of capital. With the rise of institutional investors like hedge funds and the rise of new financial products and trades, firms are increasingly oriented towards investors and financial engineering as an easier way to generate return.[14]

The rise of on-demand platforms is an extension and acceleration of this broader trend.[15] Just as the brand leaders in the offline 'fissured workplace' are the primary orchestrators and beneficiaries of disaggregated corporate structure, so too are on-demand platforms like Uber the orchestrators and beneficiaries of the ecosystem of on-demand work. This "platform power" means that even as platform technologies help distribute out the work of production across diffuse networks of service providers linked through a sophisticated platform and matching algorithm, power and control is ironically *centralized* among those groups that control the platforms and algorithms that enable the coordination of these distributed and automated modes of production.[16]

Uber is indicative here: the ultimate control of the Uber system lies not with the drivers, but with the coders who design and operate the platform itself. By creating and operating a platform on which the rest of the ecosystem depends, the platform operators can extract rents as a condition for participating in the platform itself. The platform operators also control the terms of exchange, setting prices, wages, and standards. The power of platform over workers is mirrored by the platform's often-hidden ability to skew and shape the consumers experience as well. Unbeknownst to many users, the underlying algorithms automating the platform's matching of buyers and sellers can charge different users different prices, can favor (or discriminate) among users, intentionally or otherwise.[17]

In the offline case of the fissured workplace, Weill describes how the brand corporations are incentivized to meet the demands of investors for profits, and the demands of consumers to maintain quality and provide desired goods and services.

Platform power in the on-demand economy is similarly responsive to these same loci of power: investors and consumers. Investors, whether in the form of venture capital, private equity, or other forms, structure the incentives of platforms to prioritize returns and cost-cutting over other social objectives. Consumer demand, meanwhile, remains the ultimate siren call for these firms: so long as they can capture greater market share and consumer dollars—particularly from higher-income consumers who are willing and able to spend more on the margin—these businesses can thrive. This is particularly true for higher-end consumers: indeed, many of these on-demand companies implicitly cater to those consumers wealthy enough to pay for the provided services.

In both offline and online systems in this new model of business organization, workers are left out of this distribution of power, subordinated to the interests of investors, consumers, and the platform itself. Workers in low-wage, precarious, fissured workplaces like fast food are thus situated much like workers in the on-demand economy. Also left out is the public, whose interests, nominally represented through government regulation and public policy, are increasingly obsolete and toothless in the face of these structural changes.

Uber again is indicative. The social value created by Uber's platform and network of drivers does not primarily accrue to the drivers to make Uber work and who make Uber a valuable service. Despite promises of $15-20 per hour wages, Uber drivers often take home far less, while bearing the costs of their own gas and insurance. Rather, the fabulous wealth generated by Uber flows primarily to its investors—who, by owning the "capital" of the product, the technological platform itself and its underlying data, are capturing

14 See e.g. Greeta Krippner, *Capitalizing on Crisis* (Cambridge: Harvard University Press, 2011); Gerald Davis and Suntae Kim, "Financialization of the Economy" (2015) 41 *Annual Review of Sociology* 203; Rana Foroohar, *Makers and Takers: The Rise of Finance and the Fall of American Business* (Crown Business, 2016).

15 Gerald Davis, "What Might Replace the Modern Corporation? Uberization and the Web Page Enterprise" (2016) 39 *Seattle University Law Review* 501.

16 See K. Sabeel Rahman, "Curbing the New Corporate Power," *Boston Review* (May 4, 2015); Evgeny Morozov, *To Save Everything Click Here* ; Morozov, "Where Uber and Amazon rule: Welcome to the world of the platform," *The Guardian*, June 6, 2015 (online at: http://www.theguardian.com/technology/2015/jun/07/facebook-uber-amazon-platform-economy); Frank Pasquale, *The Black Box Society* (Harvard University Press, 2015).

17 See e.g. Cathy O'Neil, *Weapons of Math Destruction: How Big Data Increases Inequality and Threatens Democracy* (Crown, 2016).

the returns—and to a lesser extent to its founders and top leadership, the highly-skilled and thus highly-remunerated workers at the top. Uber drivers, by contrast, are beholden to the requirements and dictates of the platform in order to access its network of consumers: as a result, Uber exercises even more direct control and authority over its drivers than many conventional managers do over their employees, governing everything from take-home pay to the greeting that drivers must give to customers upon hire. Drivers, dependent on the platform for their livelihood, have no choice but to comply, or risk being blackballed from the platform. Though they are not formally workers, the service providers in these on-demand systems are just as vulnerable and subordinate to the platform as workers in any dominating workplace.

Finance also enables and supercharges the impact of Uber and similar firms. These companies can run roughshod over existing regulations and public agencies in large part because of their vast reserves of venture financing; lawsuits and regulatory fines, even hefty ones are simply priced in to their cost of doing business. This vast store of financing also insulates these firms from many of the forms of countervailing power that we would ordinarily expect to incentive good behavior or welfare-enhancing innovation. There is less competitive pressure from the market since few rivals can match the financial war chest of these leading firms—if they even survive long enough as independent entities rather than being bought out or acquired. The small number of investor-owners means that there is little countervailing power or checks and balances from shareholders within the corporate governance of these firms.[18] Finance is thus a deep driver that insulates these firms from checks and balances that would ordinarily arise from public actors, market competitors, or internal corporate stakeholders and shareholders.

The problems of the on-demand economy—its poor treatment of workers; the risks of unfair practices baked into online platforms and algorithms; the overriding of regulatory oversight—are thus more extreme (and more visible) forms of problems afflicting the broader economy. The common underlying problem is one of a reallocation of economic power: away from workers and the public, towards platforms, their investors, and their consumers. This diagnosis of the underlying structural problems of the on-demand economy suggests a particular set of regulatory strategies that address these underlying drivers.

II. Regulation and Countervailing Power in an On-demand Economy

If the central problem of the on-demand economy lies in the way in which it concentrates power into the central node of the platform, enabled by technology and financial capital, then this diagnosis suggests that the long-term policy response must address this structural shift in economic power. The problem of the on-demand economy lies in its reallocation of power towards platforms, and away from workers on the one hand and regulators or the public at large on the other. This in turn suggests three corresponding focus areas for regulatory responding to the challenges of the on-demand economy.

First, we must develop policies and regulations that directly respond to the concentration of economic power within on-demand platforms (Part II.1 below). Second, we must expand the countervailing power of workers to counterbalance the power of these platforms (Part II.1 below). This approach might entail policies that update the social safety net, providing workers in an on-demand economy with greater autonomy, security, and independence from the conditions of otherwise precarious or low-wage work. It would also entail interventions that expand the ability of workers in the on-demand economy to mobilize and organize. Third, we must develop new regulatory processes that allow government to better realize civic and public values in the face of the broader systemic and urban impacts of these on-demand platforms (Part II.3 below).

1. Regulatory Restraints on Concentrated Private Power

If one of the central problems of the on-demand economy is its concentration of power in the entity of the central platform, this suggests that a central regula-

18 On the ways in which modern financing empowers managers and reduces the scope for meaningful stakeholder empowerment via corporate governance, see e.g. Lynn Stout, "On the Rise of Shareholder Primacy, Signs of Its Fall, and the Return of Managerialism (in the Closet)" (2013) 36 *Seattle University Law Review* 1169; Kent Greenfield, "The Stakeholder Strategy" (2012) *Democracy: A Journal of Ideas* 47.

tory response must involve the regulatory check on such private power. Precisely because on-demand platforms exhibit increasing returns to scale—as they accumulate providers and users, they become more and more dominant and entrenched, harder to dislodge by rival upstart competitors[19]—we need regulatory oversight to assure fair market transactions.

The exercise of platform power through underlying technologies like computer algorithms suggests the need to develop regulatory responses that can address deeper, more diffuse and often hidden problems of systemic bias, discrimination, or exploitation that can operate, even unintentionally, through the design of code.[20] One response would be to develop modern-day equivalents of old "common carrier" regulations, which required infrastructural services like railroads—in the nineteenth century, a critical new conduit for linking producers and buyers, not too dissimilar from the function of modern on-demand platforms—to serve all comers equally without discrimination, to charge fair and reasonable rates, and to make their services interconnected and compatible with competing ones.[21] These public obligations would have to be enforced by regulators, whether at the national level through oversight by the Federal Trade Commission and the Federal Communications Commission, or through state and local consumer protection agencies.[22] Another response might be to encourage or help create "public options" in some of these markets: publicly-authorized rivals that offer "plain vanilla" versions of the services on terms that are cheaper and with greater algorithmic protections against bias, discrimination, or exploitation.

Similarly, the concentration of financial capital that enables on-demand platforms to have such influence and power can be counteracted by updated regulatory strategies. As discussed in Part I, venture financing and concentrated financial capital enables on-demand startups to be insulated from the countervailing pressures of stakeholder voice, market competition, or public agencies. Updates to regulatory oversight of capital markets, securities markets, and financial investment can reduce this undue power to some degree. To take one simple example, currently companies can avoid triggering the requirements for 'going public'—which not only would expand the number and diversity of shareholders, but also force a variety of transparency requirements—by claiming to have a small number of investors below the SEC threshold for "publicness". But those investors while few in number may in fact themselves channel the interests and finances of a wide number of institutional and venture investors, funneled through a vehicle that falls short of securities regulation thresholds. Modifying these thresholds to be enforced in a more functional rather than formalistic manner would radically expand the applicability of conventional transparency and securities regulations on venture-backed, market dominant on-demand companies.[23]

Other approaches to regulatory oversight can help curb the problem of unaccountable power of on-demand platforms. Weill himself suggests that labor regulators can engage in "strategic enforcement," making the 'node' companies in the fissured workplace more directly liable for violations of labor standards. This approach can be extended from the brand names in the case of 'offline' work discussed by Weill to the platforms themselves in the case on-demand firms. Similarly, shifts in corporate law might create greater power for workers and other stakeholders by expanding the ownership and allocation of shares.[24]

2. Restoring Worker Power

While regulators can directly attempt to curb the concentrated power of on-demand firms, another set of

19 See e.g. Yochai Benkler, *Wealth of Networks* (Yale University Press, 2006).

20 See e.g. Frank Pasquale, *Black Box Society* (Harvard University Press, 2015); K. Sabeel Rahman, "Curbing the New Corporate Power," *Boston Review*, May/June 2015; Cathy O'Neil, *Weapons of Math Destruction* (Crown, 2016).

21 See K. Sabeel Rahman, *Democracy Against Domination* (Oxford University Press, 2017); William Novak, "Law and the Social Control of American Capitalism" (2010) 60 *Emory Law Journal* 377; William Boyd, "Public Utility and the Low-Carbon Future" (2014) 61 *UCLA Law Review* 1614; Gail Radford, *The Rise of the Public Authority: Statebuilding and Economic Development in Twentieth-Century America* (Chicago: University of Chicago Press, 2013); Frank Pasquale, "Internet Nondiscrimination Principles: Commercial Ethics for Carriers and Search Engines," 2008 Univ. Chi. L. Forum 263.

22 K. Sabeel Rahman, *Democracy Against Domination* (Oxford University Press, 2017); Gail Radford, *The Rise of the Public Authority: Statebuilding and Economic Development in Twentieth-Century America* (Chicago: University of Chicago Press, 2013).

23 See e.g. Donald Langevoort and Robert Thompson, "Publicness in Contemporary Securities Regulation after the JOBS Act" (2012) 101 *Georgetown Law Journal* 342.

24 See e.g. Kent Greenfield, "Reclaiming Corporate Law in a New Gilded Age" (2008) 2 *Harvard Law. & Policy Rev*iew 1.

responses can address this problem of power by expanding the countervailing power of workers themselves.

As described in Part I, workers are increasingly disempowered in the on-demand economy. On-demand platforms capitalize on a readily-available low-wage workforce willing to take its offer of insecure, underwaged labor, precisely because of the structural rise in inequality. Recent data suggests that as many as 54 million Americans, over a third of workers, have taken on work as "freelancers"—a category that includes not only individual entrepreneurs, but also temp workers, independent contractors, and workers cobbling together income from a mix of employers and 'gigs.'[25] At the same time, there are a growing number of vulnerable "precarious" workers—low-wage, often communities of color. As a number of critics have noted, the so-called "sharing economy" actually depends on the displacement of workers and their exploitation: because of the lack of wages and jobs in the economy as a whole across most wage and skill levels, there are plenty of workers willing to accept the unfair and skewed terms offered by companies like Uber, lacking in job security, benefits, or stability.[26] The image of a sharing economy seamlessly matching skills (e.g. drivers) with demand (e.g. riders) and spreading the benefits equitably is a sham. This is less futuristic egalitarian utopia, and more conventional, nineteenth century capitalism at work: an extraction of value from workers with little choice in the matter and few mechanisms for collective bargaining or advocacy, sanctified by the appeal to a superficial notion of liberty of contract, where workers are free to take it or leave it.

Regulatory reforms can address this disparity of power through a variety of strategies.

a. Updating the Safety Net

First, we can update our systems of social insurance and the social safety net. The root problem here arises from a deeper structural insecurity in our modern political economy with the erosion of 20th century forms of social insurance and social security. Many of the baseline protections and social safety net benefits like healthcare, unemployment insurance, or pensions have been conditioned on—and implemented through—full-time employment in large corporate entities. This New Deal social contract envisioned a world modeled on large industrial employers like General Motors and Ford. Deliberately left out of this social contract in the United States were women, agricultural workers, African-Americans and communities of color.[27] Yet in the on-demand economy—as in the 21st century economy more broadly—more and more workers now exist outside of such full-time, benefits-providing work.[28]

We can see many of the major regulatory initiatives of recent years—such as the Affordable Care Act and the creation of state exchanges where individuals can access health insurance, and the recent Department of Labor proposal to extend the reach of traditional overtime pay to cover a wider range of middle-income and white-collar workers[29]—as partial attempts to reinvent the system of social insurance for a changing economy. The reality of on-demand work suggests even more radical regulatory change is needed in this direction. If access to the basic needs of the social contract—healthcare, pensions, unemployment insurance—can be decoupled from full-time, conventional employment, the result would be an increase in the relative bargaining power of on-demand workers and producers, who would able to enter (or exit) on-demand work arrangements from a position of security and stability rather than vulnerability and urgency.

This idea of "portable benefits" has become increasingly central to debates over revising the regulatory structure of the social contract. In one proposal, workers could have individualized "Shared Security Accounts," which accrue basic employment benefits like social security, days off, paid sick leave, retirement, health insurance, workers' compensation, and the like over time, regardless of particular employers, full-time or part-time work. Employers would pay in to these accounts on a prorated basis, but instead of the benefits being tied to a particular

25 "Freelancing in America: 2015", supra note 2.

26 See Avi Asher-Schapiro, "Against Sharing," *Jacobin*, September 9, 2014 (online at https://www.jacobinmag.com/2014/09/against-sharing/); Leo Mirani, "The secret to the Uber economy is wealth inequality," *Quartz*, December 16, 2014 (online at: http://qz.com/312537/the-secret-to-the-uber-economy-is-wealth-inequality/); Brian Van Slyke and David Morgan, "The 'Sharing Economy' is the Problem," Grassroots Economic Organizing, July 3, 2015 (online at: http://www.geo.coop/story/sharing-economy-problem).

27 See e.g. Ira Katzelson. *Fear Itself: The New Deal and the Origins of Our Time* (WW Norton & Company, 2013).

28 See e.g., David Rolf, *The Fight for Fifteen* (New Press, 2015).

29 Department of Labor, Wage and Hours Division, "Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees," 80 F.R. 38515 (July 6, 2015).

employer and particular job, they would be portable and owned by the workers themselves.[30]

b. Organizing On-demand Workers

Second, just as social insurance systems would have to be updated for the on-demand economy, so too must our models (and accompanying regulations) for labor organizing. Groups like Peers.org and the Freelancers Union have sought to organize workers and producers in the on-demand economy. The Machinists Union recently reached a deal with Uber to allow for some modified forms of driver unionization. The National Domestic Workers' Alliance, which has organized domestic workers, has proposed a Good Work Code for Uber and other on-demand companies, calling on on-demand companies to modify their relationship with service providers to prioritize values of *stability and flexibility, transparency, livable wages, shared prosperity,* and *inclusion and input.*[31]

To support and expand these efforts at developing new models of worker organizing will require major changes to existing labor laws and regulations, as several labor law scholars have argued. Most social safety net benefits such as pensions are conditioned on full-time work. One key frontier of regulatory reform has been to update definitions of what kinds of work count as full-time employment, rather than "freelance" or "independent contractor" status. Indeed, last summer, a California labor commission ruled that Uber drivers could, under certain circumstances, be considered full-time employees.[32] As Brishen Rogers suggests, a more expansive definition of "employment" would serve to expand the power of workers and enable them to resist exploitation or domination in on the structure of on-demand work.[33]

More broadly, new models of union organizing—pioneered by groups like Coworker.org and Dynamo—offer decentralized, platform-based systems enabling workers in on-demand areas to self-organize, while providing mutual aid, social insurance supports, training programs, and advocacy services. But these organizations operate outside of existing labor laws. In particular, they do not have the exclusive right to bargain on behalf of the workers in their sector. This allows these groups to be more dynamic, serving the needs of on-demand workers who cut across specific sectors and trades. But on the other hand, this also means that existing labor laws do little to support—and if anything continue to inhibit—the proliferation and growth of alternative models of labor organizing.[34]

Indeed, the 20th century development of labor law deliberately exempted many of the industries that are now at the front-lines of the on-demand economy such as domestic work and farmworkers, in large part because of the attempts by New Deal reformers to win over votes in Congress from Southern elected officials, who sought to preserve racially-discriminatory practices of Jim Crow and economic exploitation. By contrast, if labor regulations were to be amended—for example, by eliminating secondary boycott restrictions, expanding the kinds of collective action that unions are permitted to undertake, relaxing the requirement for monopolized collective bargaining, and making it easier for individuals to freely join (or leave) unions—the result would be a proliferation of greater experimentation with alternative modes of worker organizing and collective action.[35]

3. Public Values in Urban Planning

Just as changes to the safety net and labor law can expand the relative power of workers vis-à-vis on-demand platforms, so too must the institutions representing public interests—government regulators—be updated. The regulatory strategies described above would expand protections for and power of workers. But on-demand firms like Uber, Airbnb

30 Nick Hanauer and David Rolf, "Shared Security, Shared Growth," *Democracy: A Journal of Ideas* (Summer 2015), 6-20; Shayna Strom and Mark Schmitt, "Protecting Workers in a Patchwork Economy," *The Century Foundation*, 7 April 2016, available at https://tcf.org/content/report/protecting-workers-patchwork-economy/.

31 Good Work Code, online at http://www.goodworkcode.org/.

32 See *Uber v. Berwick*, California Labor Commission, Case # CGC-15-546378 (June 16, 2015). Available online at: https://www.scribd.com/doc/268911290/Uber-vs-Berwick. See also Mike Isaac and Natasha Singer, "California Says Uber Driver Is Employee, Not Contractor," New York Times, June 17, 2015 (online at: http://www.nytimes.com/2015/06/18/business/uber-contests-california-labor-ruling-that-says-drivers-should-be-employees.html).

33 Brishen Rogers, "Employment Rights in the Platform Economy: Getting Back to Basics" (2016) *Harvard Law & Policy Review* 480.

34 See e.g. Michelle Miller, "The Union of the Future," The Next American Economy Project, Roosevelt Institute, July 2015; Brishen Rogers, "Libertarian Corporatism Is not an Oxymoron" (2016) 94 *Texas Law Review* 94.

35 Kate Andrias, "New Labor Law" (2017) *Yale Law Journal* (forthcoming), preliminary version available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2853485.

and others raise a variety of other civic and public concerns affecting third party interests. Thus, we must also consider the civic dimensions of on-demand firms, especially as they rapidly grow in scale and. To address these concerns against the concentrated power of on-demand platforms, regulatory institutions will have to similarly update their approaches.

Consider Airbnb and Uber in the modern city. These services, while nominally accessible to all, cater primarily to upper-income consumer demand: it is ultimately the relatively well-off who can enjoy the benefits of easy ride-sharing, and short-term vacation rentals. Others may participate in these transactions as service providers ("sharers") but they are ultimately in the position of offering services for sale to wealthier clients. At the same time, these services also represent a skewing of labor and city resources towards servicing a tourist class of visitors.

As urban scholars have long noted, some cities orient themselves towards catering to the needs of tourists rather than residents, selling themselves as a place to visit, and investing in services, amenities, and infrastructure that address tourist needs.[36] This "tourist city" is often a deliberate policy choice by urban governments, mediated through the structure of local government law.[37]

What is distinctive about the proliferation of on-demand platforms like Airbnb and Uber is that it creates an infrastructure oriented towards tourist needs that operates at a scale that it can skew and repurpose infrastructure (such as housing units) away from local needs—regardless of the deliberate policy choices of democratically-elected city officials. Indeed, these platforms can accelerate and exacerbate the trends of privatization of common and public spaces in urban areas.[38] For example, as these platform services become more prevalent and saturated, they can induce a dramatic reorientation of the city away from its residents, particularly working and middle class residents. At the extreme, recent studies by the Los Angeles Alliance for a New Economy (LAANE) suggest that Airbnb alone has pulled over 60 percent of all new housing units that came online in the last four years out of the rental market into the short-term vacation rental space—in a city facing a chronic housing and affordability crisis.[39] Further investigation indicates that the majority of Airbnb listings and revenue comes from landlords with multiple listings operating de facto hotel services, in turn spurring greater harassment and eviction of existing rental tenants already under pressure in rapidly gentrifying cities like New York and Los Angeles.[40]

The issue here is not so much the evasion of hotel industry tax and regulatory regimes, although that has been a major sticking point for most city governments. Rather, the broader problem is the ways in which decisions about the very character of cities and neighborhoods—about zoning, urban planning, urban infrastructure, and development—are effectively being outsourced to platforms channeling flows of people and resources without particular attention to these systematic consequences. And yet there is tremendous potential to leverage these platforms to magnify our ability to make livable, inclusive cities. There is a growing literature on the concept of "sharing cities", how the technologies and platforms of on-demand systems can be used to create more genuinely collaborative and cooperative urban spaces.[41] Cities can modify their regulations to make these collaborative forms of urban sharing more prevalent, in contrast to the more privatized and extractive tendencies. Imagine if the data collection, algorithmic optimization, and market-making capacities of platforms could be utilized to fill gaps in mass transit systems, housing access, or urban planning more broadly. This would require a major shift on the part of Silicon Valley platforms. Rather than "everyone's private driver," Uber for example would have to reorient to act as a responsible partner in developing a *public* and *collective* infrastructure for transit in the metro area. Rather than servicing wealthy tourists, Airbnb could actively help weed out illegal rental conversions through its data algorithms, and even help

36 See Dennis Judd and Susan Fainstein (eds.), *The Tourist City* (Yale University Press, 1999); Melanie Smith (ed.), *Tourism, Culture and Regeneration* (Cabi, 2007).

37 See Gerald Frug and David Barron, *City-Bound: How States Stifle Urban Innovation* (Cornell University Press, 2013).

38 Sheila Foster and Christian Iaione, "City as Commons" (2016) 34 *Yale Law & Policy Review* 281.

39 Roy Samaan, "Short-Term Rentals and L.A.'s Lost Housing," LAANE, August 2015.

40 See Steven Hill, "The Unsavory Side of Airbnb," *The American Prospect*, Fall 2015 (online at http://prospect.org/article/evictions-and-conversions-dark-side-airbnb).

41 See e.g., Duncan McLaren and Julian Agyeman, *Sharing Cities: A Case Study For Truly Smart and Sustainable Cities* (MIT Press, 2015); Julian Agyeman, Duncan McLaren, and Adrianne Schaefer-Borrego, "Sharing Cities," Friends of the Earth briefing (September 2013); Michèle Finck and Sofia Ranchordas, "Sharing and the City" (2016) *Vanderbilt Journal of Transnational Law* (forthcoming)

cities bridge chronic housing shortages and coordinate with neighborhood development planning. Government would also have to radically change its stance from a knee-jerk and oppositional one to a more dynamic and collaborationist mode. There are numerous proposals for how cities can develop more inclusive systems for urban planning to engage and empower a wider range of stakeholders—from democratizing the budgeting and urban planning process to employing new technological tools for stakeholder engagement to directly engaging communities in formulating and monitoring economic development plans.[42] These initiatives take on greater importance in context of the potential skewing of urban spaces by the proliferation of on-demand platforms—but they will also have to be deployed to address the specific urban planning challenges posed by these platforms.

III. Conclusion: Economic Freedom in an On-Demand Economy

The regulatory challenges of the on-demand economy are rooted in a set of deeper trends that affect both on-demand and "offline" industries, particularly changes in technology and financialization that serve to concentrate economic power in lead companies, their investors, and their consumers—away from workers and publics at large. This shift in power can be counterbalanced by regulatory innovations that curb private power (such as through greater antitrust or labor law enforcement); proposals that expand the countervailing power of workers; and shifts in urban planning processes to incorporate a wider range of stakeholder interests.

The stakes of pursuing these regulatory strategies are more than just enhancing the well-being of on-demand workers and citizens in modern cities. It also entails the realization—or failure—of normative ideals of economic freedom in 21st century capitalism.

The rhetoric of freedom and flexibility isn't just self-serving public relations-speak on the part of on-demand platforms. Organizations that work with service providers in the on-demand economy echo some of this language of individual agency as a value that is surprisingly prized by freelancers and "gig"-based workers. The Freelancers Union, for example, finds that most of its members do not necessarily want to convert to full-time employees of individual firms; rather what they want is to not have to choose between the social insurance, stability, and interpersonal community that comes with full-time work, and the autonomy and agency that comes with freelance work. Similarly, Peers.org defines its own mission in terms of preserving the autonomy afforded by freelance work, but remedying the precarity that such work often entails:

> We believe the sharing economy has created a new kind of work. Work where you can use what you have to earn what you need. A way to work for yourself, building your own personal brand, with the independence of a micro-entrepreneur. Flexible work that fits to your lifestyle, rather than dictating it.[43]

However, the lived experience of the on-demand economy rarely seems to provide this kind of freedom for its participants.[44] The problem with this notion of worker freedom embedded in the on-demand economy is not its notion of worker agency, but rather the different presumptions made about what social conditions are needed to *achieve* such agency. At the moment, only relatively well-off and high-skill freelancers can truly afford to move freely between gigs and across organizational roles; for others, this is less an expression of freedom in practice than a manifestation of insecurity.

This article has described the power imbalances leading to this unfreedom, and the regulatory strategies needed to address these imbalances. But there is also a normative project underlying these strategies: deepening our understanding of freedom.

The notion of entrepreneurial freedom in the rhetoric of on-demand companies can be easily dismissed as a libertarian fantasy unique to Silicon Valley, and present in the normative tradition of market-oriented conceptions of freedom that focus narrow-

42 See e.g. Edward de Barbieri, "Do Community Benefits Agreements Benefit Communities?" (2016) 37 *Cardozo Law Review* 1773; Beth Noveck, *Smart Citizens, Smarter State: The Technologies of Expertise and the Future of Governing* (Harvard University Press, 2015); Hollie Russon Gilman, "Transformative Deliberations: Participatory Budgeting in the United States" (2012) 8(2) *Journal of Public Deliberation* Article 11; Archon Fung, "Recipes for Public Spheres: Eight Institutional Design Choices and their Consequences" (2003) 11(3) *Journal of Political Philosophy* 338.

43 See Peers.org (online at http://www.peers.org/about/).

44 See e.g. Sarah Kessler, "Pixel and Dimed: On (Not) Getting By in the Gig Economy," Fast Company (May 2014); Susie Cagle, "The Case Against Sharing," Medium, May 2014.

ly on the freedom to engage in free transactions on the market—as a consumer, or as a seller of labor.[45] By contrast, the proposals described above—limiting private power, expanding countervailing power of workers, and expanding the democratic planning and oversight of policymakers—evoke a different normative tradition of freedom, which might be understood as a more radically republican conception. In this normative view, freedom consists of the freedom from domination—the concentrated, arbitrary power of dominators such as employers, owners, financiers; or the structural unfreedoms created by unequal systems such as unfair market forces. Achieving freedom thus requires curbing such concentrated power, creating greater economic independence, and restoring democratic accountability and control of the market through public institutions.[46] This thicker conception of economic freedom resonates with a more radical tradition of labor republicanism going back to the late nineteenth century. It also resonates with the civil rights and welfare rights movements of the 1960s.[47] How we regulate the on-demand economy will go a long way towards reconstituting—and indeed expanding—the social contract, making this broader sense of individual, economic, and political freedom a reality for more individuals and communities.

45 See e.g. John Tomasi, *Free Market Fairness* (Princeton University Press, 2012).

46 For a deeper discussion of this tripartite understanding of freedom in its dyadic, structural, and political forms, see e.g. K. Sabeel Rahman, *Democracy Against Domination* (Oxford University Press, 2017), chapter 4; and K. Sabeel Rahman, "Democracy Against Domination: Contesting Economic Power in Progressive and Neorepublican Thought," *Contemporary Political Theory* (April 2016).

47 See Alex Gourevitch, *From Slavery to the Cooperative Commonwealth: Labor and Republican Liberty in the Nineteenth Century* (Cambridge University Press, 2015).