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EFFECTIVE AND EFFICIENT REGULATION OF NEW SHARING ECONOMY TRANSPORTATION NETWORK COMPANIES

The Sharing Economy has developed quickly. As with most new developments, such as the internet, legislation and regulation lag far behind these advancements. As the sharing economy has developed, governments are realizing the need for regulation. Conflicts have arisen between individuals, other companies, and regulating governments. The primary question is how to either fit the sharing economy companies like Uber into existing regulations, or how to create new regulations governing these companies that will benefit society the most.

Governments throughout the world are attempting to answer this question with very different results. This paper will begin by looking at the quick development of the sharing economy. The second section of the paper will discuss the conflicts generated specifically by the sharing economy as it relates to transportation network companies (TNCs) as well as policy concerns. The third section of this paper will analyze the laws and regulations in different countries to determine how these countries have answered the question of how to regulate TNCs. It will conclude with a discussion of the theory of law and economics, and how the most efficient regulation of TNCs may not be consistent worldwide.

I. THE SHARING ECONOMY

“Over the past few years, the sharing economy has matured from a fringe movement into a legitimate economic force”¹ It is remarkable how quickly the sharing economy has developed. What is more remarkable is how quickly our society has accepted it as a part of our lives. For most of us, five years ago we would not have considered jumping into a stranger’s personal car for a ride, staying at a stranger’s house in their spare room, or even dropping our dogs off at a stranger’s house for the weekend. But these are the kinds of things that have become, if not yet “normal,” at least accepted.²

Companies like Uber, Lyft, Airbnb, and DogVacay, connect individuals with others to share resources, time, and services in exchange for a fee. “The Sharing Economy is a socio-economic ecosystem built around the sharing of human and physical resources. It includes the

1. Jason Tanz, *How Airbnb and Lyft Finally Got Americans to Trust Each Other*, WIRED.COM (Apr. 23, 2014 6:30 AM), www.wired.com/2014/04/trust-in-the-share-economy/.

2. *Id.*

shared creation, production, distribution, trade and consumption of goods and services by different people and organisations.”³

The sharing economy differs from time-shares, car pools, and bed and breakfasts because technology has increased the ease of sharing and decreased transaction costs.⁴ The increased use of cell phones, computers, and the internet has improved and significantly broadened access to resources, making it easier and less costly to share. Electronic payment systems have made it easier to exchange money. Along with technological advancements has come increased willingness to rely on others’ ratings and reviews as a proxy for first-hand knowledge of quality and trustworthiness, but this has not always been the case.

As the sharing economy began gaining ground, people were skeptical. Many people are still skeptical about trusting strangers with their personal belongings, homes, and even pets. “That skepticism reflects a widely held, deeply ingrained attitude reinforced by decades of warnings about poisoned Halloween candy and drink-spiking pickup artists.”⁵ Traditional transactions with strangers in stores, restaurants, and even taxicabs are “undergirded and supported by a complicated series of regulations, backstops, and assurances that go back to the Industrial Revolution.”⁶ These types of regulations and assurances do not yet exist for the sharing economy.⁷

During a time when our communities were so small that everyone knew everyone else, there was an incentive to treat everyone well or risk getting a bad reputation.⁸ Over the years the population has grown and people are less likely to know everyone in their community, which decreased the incentive to treat everyone well. As a result, trust in our neighbors and people we do business with also decreased.⁹ Technological advances have created a system of reviews and ratings that “make[] it easy to spot lousy drivers, bathrobe-pilferers and surfboard-wreckers.”¹⁰ This system serves as a proxy for trust. The prospect of receiving a poor review provides an incentive to behave in an appropriate way or risk not being able to engage in future transactions. This allows people to rely on the representations of other people and creates a sense of trust. Platforms

3. Benita Matofska, *What is the Sharing Economy?*, THEPEOPLEWHOSHARE.COM (last visited Feb. 14, 2016), <http://www.thepeoplewhoshare.com/blog/what-is-the-sharing-economy/>.

4. *The Rise of the Sharing Economy*, THE ECONOMIST (Mar. 9, 2013), <http://www.economist.com/news/leaders/21573104-internet-everything-hire-rise-sharing-economy>.

5. Tanz, *supra* note 1.

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.*

10. *The Rise of the Sharing Economy*, *supra* note 4.

that allow reviews and ratings to be posted by both parties to a transaction increase this sense of trust.¹¹

Despite the lack of governing regulation and assurances, the sharing economy is a cultural and economic breakthrough that benefits society in profound ways.¹² It has widespread economic, environmental, and social benefits.¹³ Executives of sharing economy companies recognize these benefits and society's need for them.¹⁴

The sharing economy provides economic benefits to individuals by empowering them and enabling a more equal distribution of power.¹⁵ "As more [people] stitch together a flexible work schedule, more start-ups have emerged in the sharing economy space."¹⁶ The sharing economy allows owners to "make money from underused assets" and allows renters to pay less for using those assets than if they purchased them or used a taxi or hotel.¹⁷ This arrangement is mutually economically beneficial.

Environmental benefits result from a more efficient use of resources.¹⁸ For example, using a ride share service or "renting a car when you need it, rather than owning one, means fewer cars are required and fewer resources must be devoted to making them."¹⁹ Not owning a car also encourages use of public transportation, cycling, and walking, which reduce pollution from vehicle emissions.

Social benefits of the sharing economy include more "active citizens, deeply engaged in their communities and in the development of the environments they live and work in."²⁰ The sharing economy also promotes a culture that is less focused on the individual and more focused on the benefits to the community and the greater good.²¹ Sociable people benefit from meeting new people.²²

11. *Id.*

12. Tanz, *supra* note 1.

13. Matofska, *supra* note 3.

14. Tanz, *supra* note 1 ("No wonder some of the loftier sharing-economy executives see their mission as not just building a business but fundamentally rewiring our relationships with one another. Much as the traditional Internet helped strangers meet and communicate online, they say, the modern Internet can link individuals and communities in the physical world.").

15. Matofska, *supra* note 3.

16. Kate Rogers, *Uber Drivers' Suit Given Class Action Status*, CNBC (Sept. 2 2015), <http://www.cnbc.com/2015/09/02/uber-drivers-suit-given-class-action-status.html>.

17. *The Rise of the Sharing Economy*, *supra* note 4 ("Airbnb says hosts in San Francisco who rent out their homes do so for an average of 58 nights a year, making \$9,300. Car owners who rent their vehicles to others using RelayRides make an average of \$250 a month; some make more than \$1,000.").

18. Matofska, *supra* note 3.

19. *The Rise of the Sharing Economy*, *supra* note 4.

20. Matofska, *supra* note 3.

21. *Id.*

22. *The Rise of the Sharing Economy*, *supra* note 4.

Although the sharing economy offers many benefits, it also has some negative impacts. While the sharing economy provides economic benefits to some people, it creates financial hardship for others. Services provided through platforms like Airbnb and Uber take business away from existing, highly regulated companies like hotel and taxi companies.²³ This competition has contributed to the atomization of the labor market. “To stay alive economically, you must be prepared to switch careers and employers often. Atomization means much less personal security and a constant need to stay current in what you do.”²⁴

II. EXISTING REGULATION MISFIT FOR SHARING ECONOMY

The idea behind the sharing economy is an equitable sharing by individuals, rather than the inequitable system of large corporations getting disproportionately wealthier while individuals only improve their situation marginally. Governments have enacted regulations to protect the consumer. Similarly, regulations exist to protect employees who are vulnerable to being taken advantage of by employers. These regulations do not fit well in the more equitable system of the sharing economy. For example, a cab company is strictly regulated to ensure drivers are not required to work too many hours by a powerful employer. In contrast, drivers for a TNC control when and where they work. They are not at risk of being abused or taken advantage of in the same way as an employee is.

Another example of how taxi regulations do not fit TNCs is in inspection requirements. In New York, taxis are required to return to the garage. An inspector can make a single trip to inspect a taxi company’s vehicles at the garage. The inspection process for TNCs would be more complicated. Drivers use their personal vehicles. Inspectors cannot make a single trip to inspect all of the vehicles operated through the TNC, and locating the vehicles would be more difficult and time-consuming. The problem that society is facing now is how to create regulation and assurances to prevent or reduce the negative impact of the sharing economy without eliminating the benefits.

III. UBER TECHNOLOGIES BUSINESS MODEL EXAMPLE

Typical of a sharing economy company, Uber connects individuals with other people who can provide a needed service.²⁵ Through the Uber

23. Luz Lazo, *Cab Companies Unite Against Uber and Other Ride-Share Services*, WASHINGTON POST (Aug. 10, 2014), https://www.washingtonpost.com/local/trafficandcommuting/cab-companies-unite-against-uber-and-other-ride-share-services/2014/08/10/11b23d52-1e3f-11e4-82f9-2cd6fa8da5c4_story.html.

24. David L. Birch, *The Atomization Of America*, INC.COM (Mar. 1, 1987), <http://www.inc.com/magazine/19870301/524.html>.

25. While Uber provides different services under different brands, this article refers to the Uber business model in a general sense. The Uber app that has caused the most conflict with the taxi market in the European Union is UberPop, which, like the Uber app that is used in the United States,

app, a person who needs a ride is connected with someone who is willing to give them a ride in their personal vehicle.²⁶ Because Uber is not a taxi company, but individuals offering rides in their personal vehicles, it is not subject to the strict regulations that taxis must abide by. As a result, Uber drivers are able to offer their services at lower rates. This lack of regulation and lower rates has caused unfair competition concerns amongst taxi companies.

To begin driving for Uber, drivers must apply to Uber to be able to use their app, must pass a background check, and their vehicle must pass an inspection.²⁷ Uber designed these requirements to alleviate concerns about public safety. Additionally, Uber provides liability insurance while the driver has a passenger in the car.

Drivers are never required to drive a certain amount and do not work according to any schedule. Uber claims to simply be a platform for drivers and riders to connect and it does not employ the drivers who use their app.²⁸ This creates flexibility and freedom for drivers, but has caused employment concerns.

IV. POLICY CONCERNS AND UNFAIR COMPETITION

With new developments and advances come risks, conflicts, and policy concerns. Some of the policy concerns with ride-sharing services are unfair competition for highly regulated taxi companies, public safety issues, labor and employment issues, insurance and liability concerns, tax issues, and the desire to continue encouraging innovation and advancement. Some countries place different priorities on these issues and therefore regulations for TNCs like Uber look very different from country to country.

a. Unfair Competition

The policy concern that has made the most headlines worldwide recently is unfair competition. The people who are most affected by the startup of TNCs are taxi drivers. TNCs provide the same service as a taxi, a ride from point A to point B, often at a cheaper rate. Additionally, the method of hiring a TNC using a mobile phone app is often much more convenient for riders. The savings in time and money by using a TNC means that more people are using them instead of hailing a traditional taxi on the street, or calling a dispatch office.

depends on private drivers. FILIPA AZEVEDO & MARIUSZ MACIEJEWSKI, EUROPEAN PARLIAMENT BRIEFING: SOCIAL, ECONOMIC AND LEGAL CONSEQUENCES OF UBER AND SIMILAR TRANSPORTATION NETWORK COMPANIES (TNCs) 5 (2015) [http://www.europarl.europa.eu/RegData/etudes/BRIE/2015/563398/IPOL_BRI\(2015\)563398_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/BRIE/2015/563398/IPOL_BRI(2015)563398_EN.pdf).

26. Ben Edelman, *Assessing Uber: Competition and Regulation in Transportation Networks*, BENEDELMAN.ORG (Nov. 24, 2015), <http://www.benedelman.org/news/112415-1.html>.

27. *Id.*

28. Rogers, *supra* note 16.

This new competition threatens the livelihood of cab drivers, many of which have spent years and large amounts of money preparing for and building their business. Cab drivers in most countries are highly regulated. This means that they often have to spend a lot of time preparing for and passing various practical skill and knowledge tests. In London, taxi drivers must pass “The Knowledge.”²⁹ This test is one of the most difficult in the world and takes the average person two to four years to complete.³⁰ The test requires the driver “to memorise every possible route through the city as well as memorising landmarks and points of interest, museums, parks, police stations, churches, theatres and schools and not just the famous landmarks like Buckingham Palace and Nelson’s Column.”³¹ In contrast, TNCs can operate in London without drivers passing the same rigorous tests. TNC drivers use GPS devices to navigate rather than the memorized information required to pass the Knowledge. In places like New York, cab drivers operate in a medallion system.³² This kind of system requires cab drivers to have a valid medallion to operate a taxicab.³³ These medallions are limited in number and often extremely expensive.³⁴ TNCs on the other hand are not limited in the same way.³⁵

Cab drivers who have invested so much time and money in their livelihood are not seeing the return on their investment that they had hoped for and need. TNCs are threatening their livelihood and cab drivers throughout the world have been very vocal about the unfair competition of TNCs. Cab drivers in various countries are staging protests and demonstrations.³⁶ Some of these demonstrations are peaceful and simply cause trouble by destroying any flow of traffic.³⁷ Others have become violent, involving the destruction of property and physical injury.³⁸

29. THE KNOWLEDGE TAXI - LONDON KNOWLEDGE, <http://www.theknowledgetaxi.co.uk> (last visited Dec. 9, 2015)

30. *Id.*

31. *Id.*

32. Jeff Horwitz & Chris Cumming, *Taken for a Ride*, SLATE.COM (June 6, 2012), http://www.slate.com/articles/business/moneybox/2012/06/taxi_medallions_how_new_york_s_terrible_taxi_system_makes_fares_higher_and_drivers_poorer_.html.

33. Scott Beyer, *How to Solve the Uber vs Taxi Conflict? Medallion Reform*, FORBES (May 8, 2015, 9:00 PM), <http://www.forbes.com/sites/scottbeyer/2015/05/08/how-to-solve-the-uber-vs-taxi-conflict-medallion-reform/>.

34. *Id.*

35. *Id.*

36. See Ben McPartland, *Taxis Versus Uber Battle Turns Ugly in France*, THELOCAL.FR (June 23, 2015, 3:49 PM), <http://www.thelocal.fr/20150623/taxi-versus-uber-battle-in-france-turns-ugly>; Darren Boyle, *Black Cab Drivers Bring Central London to a Standstill in Protest at TfL Licensing Hundreds of New Minicabs Every Week as Calls Grow for a Crackdown of Apps like Uber*, DAILYMAIL.COM (Sept. 30, 2015), <http://www.dailymail.co.uk/news/article-3255282/Black-cab-drivers-bring-central-London-standstill-protest-TfL-licensing-hundreds-new-minicabs-week-calls-grow-crackdown-apps-like-Uber.html>; *Frustration Escalates as Toronto Taxi Drivers Stage Mass Uber Protest*, THEGLOBEANDMAIL.COM (Dec. 9, 2015, 12:32 PM), <http://www.theglobeandmail.com/news/toronto/taxi-drivers-clog-toronto-streets-in-mass-uber-protest/article27658787/>.

37. Boyle, *supra* note 36.

38. McPartland, *supra* note 36.

These demonstrations are bringing to light the disparate regulations governing taxicabs and TNCs.

b. Public Safety – Background Checks, Insurance Regulations & Liability

Cab drivers in most countries must pass a background check in addition to passing skill and knowledge tests in order to begin operating a taxi. TNCs do not have the same requirements for skill and knowledge tests, but like Uber, may require at least a basic background check.³⁹ There are concerns that TNCs like Uber do not require drivers to pass background checks frequently enough.⁴⁰ However, the primary concern is that these background checks do not actually protect the public as intended. Some people argue that these background checks are not extensive enough.⁴¹ This concern stems from situations where drivers harm passengers. For example, in India an Uber driver kidnapped and raped a female passenger.⁴² In the US, an Uber driver attempted to burglarize a passenger's home after dropping her off at the airport.⁴³

Insurance requirements and liability are another public safety concern. Cab companies and drivers in most countries are subject to strict labor regulations and insurance requirements. Because TNCs are not taxicabs, they do not have to meet these same requirements.⁴⁴ The problem arises when there is a gap in insurance coverage, leaving people with very little recourse in the case of injury.⁴⁵

Insurance companies are very specific about when coverage kicks in. Since TNC drivers use their personal vehicles, unless the company provides insurance, the driver, passengers, and third parties rely on the driver's insurance.⁴⁶ For example, in the United States, states require liability insurance.⁴⁷ However, "[a]s with most forms of insurance, the insurer defines the terms under which it will assume liability, subject to state limitations."⁴⁸ If an individual is using a personal vehicle to transport people for a fee, and the services are available to the public, an

39. Edelman, *supra* note 26.

40. *Id.*

41. *Id.*

42. *India Uber Driver Guilty of Rape*, BBC (Oct. 20, 2015), <http://www.bbc.com/news/world-asia-india-34578477>.

43. Noelle Phillips, *Denver Uber Driver Charged with Attempted Burglary of Passenger's Home*, DENVER POST, Apr. 6, 2015, 4:09 PM), http://www.denverpost.com/news/ci_27859912/denver-uber-driver-charged-attempted-burglary-passengers-home.

44. *Id.*

45. Talia G. Loucks, *Travelers Beware: Tort Liability in the Sharing Economy*, 10 WASH. J. L. TECH. & ARTS 329, 336 (2015).

46. *Id.*

47. *Id.*

48. *Id.*

insurance company can exclude coverage while the vehicle is being used for that purpose.⁴⁹

There are four periods of liability exposure.⁵⁰ The first period is when the driver uses the vehicle for personal use with the app turned off and not enabled.⁵¹ The second period is when the app is enabled, but the driver “has not yet accepted a ride request.”⁵² The third period is when the “driver has accepted a ride request . . . and is in transit to the passenger.”⁵³ The final period is when the passenger is in the car.⁵⁴ If injury occurs, courts will have to determine during which of these periods the services become available to the public.⁵⁵

A gap in insurance coverage occurs when neither the TNC’s insurance nor the driver’s private insurance covers injury or loss.⁵⁶ For example, a six year old girl was killed when an Uber driver hit her with his car while she was crossing the street.⁵⁷ He had the app on and was looking for ride requests when the incident happened.⁵⁸ Initially Uber took the stance that the driver did not have a passenger in the car, and therefore was “not working for the company at the time. But amid widespread criticism over its response to . . . questions about its insurance policies, a few months later the company announced it would cover drivers who had the app activated but had not yet accepted a ride.”⁵⁹

c. Labor Regulations

Along with the difficulties caused for taxicab drivers and the threat to their livelihood come some negative impacts for TNC drivers. Taxi companies in most countries classify their drivers as employees and are subject to labor law regulations. However, TNCs do not classify drivers as employees, and therefore escape these labor law regulations.⁶⁰ This has a significant impact on drivers. Issues such as not making minimum wage, not having the option to enroll in health insurance through an employer, and no worker compensation benefits are the most significant problems with not classifying drivers as employees.

49. Hilary Rowen & Kara DiBasio, *The Insurance Coverage Implications of Using a Cell Phone App to Hail a Ride*, 44 BRIEF 12, 14 (2015).

50. *Id.* at 13.

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.* at 14.

56. Loucks, *supra* note 45.

57. *Family of 6-Year-Old Girl Killed by Uber Driver Settles Lawsuit*, ABC7NEWS.COM (July 14, 2015), <http://abc7news.com/business/family-of-6-year-old-girl-killed-by-uber-driver-settles-lawsuit/852108/>.

58. *Id.*

59. *Id.*

60. Rogers, *supra* note 16.

Employers (in most developed countries) are required to pay their employees a minimum wage. This ensures that employees make enough money to live. TNC drivers are not employees and so do not have a guarantee of making at least a minimum wage. Driving their own personal vehicles means that they are responsible for the expense of buying fuel, maintaining the vehicle, cleaning the vehicle, and the depreciation due to use and mileage. Some drivers do not make enough money by driving for a TNC to cover these expenses and still make a living wage. In addition to not making a living wage, drivers are responsible for providing their own health insurance. In some countries, this is a costly expense that drivers cannot afford.

In some countries, worker compensation covers employees in the case of injury or illness. However, independent contractors do not receive this same benefit. This means that if driving for a TNC is the only source of income for an individual, they may be unable to pay bills and buy necessities, including insurance, if they are injured while driving and they fall in the insurance gap discussed above.

Some drivers believe they should be classified as employees, and should receive the benefits and protections afforded to employees.⁶¹ For example, Uber drivers in San Francisco filed a class action lawsuit against Uber, claiming that Uber treats them “like employees without offering benefits, and avoiding costs associated with payroll taxes.”⁶² The judge denied Uber’s motion for summary judgment because “the drivers perform a service that benefits the company, which presumably makes them employees under California law and subject to the state’s labor code.” However, a jury will ultimately decide whether drivers are employees “by considering whether Uber has the right to control the manner and means of the service.”⁶³ The primary appeal to TNC drivers is flexibility.⁶⁴ Some speculate that most drivers do not rely on driving for Uber as a primary source of income, but drive for Uber as a way to supplement their income.⁶⁵ If California decides that it should classify Uber drivers as employees, they would lose this flexibility.⁶⁶ “[T]hey would have set shifts, earn a fixed hourly wage, and be unable to use other ridesharing apps.”⁶⁷

61. Rogers, *supra* note 16.

62. *Id.*

63. Tricia Gorman, *Uber Drivers in California Can Pursue Unpaid Tips as a Class*, 30 WESTLAW JOURNAL EMPLOYMENT 4 (2015).

64. *Uber's Landmark Legal Case Just Got Even Bigger*, THEWEEK.CO.UK (Dec. 10, 2015), <http://www.theweek.co.uk/uber/58491/uber-black-cabs-fight-back-with-new-app>.

65. Interview with anonymous Uber driver (Dec. 15, 2015).

66. *Uber's Landmark Legal Case Just Got Even Bigger*, *supra* note 64.

67. *Id.*

d. Tax

An issue tied to the concern of labor regulations is employment tax. Employers in the United States are required to pay payroll tax.⁶⁸ These taxes contribute to Social Security and Medicare.⁶⁹ The amount of money contributed to Social Security for each employee “is directly correlated with the amount an employee can expect to receive through Social Security upon retirement or disability.”⁷⁰ By not classifying drivers as employees, they will not receive the benefits of these payroll taxes upon retirement. Income tax reporting requirements for employers also would not apply to TNCs, making it possible for drivers to evade income tax.

Additionally, it is uncertain how TNCs should be taxed. For example, taxis in New York City pay sales tax, a per ride surcharge to the Metropolitan Transportation Authority (MTA), city road tax, medallion licensing fees, and corporate tax.⁷¹ In contrast, Uber does not pay the surcharge to the MTA, road tax, or medallion licensing fees.⁷² As TNCs reduce taxi business, the income from these taxes and surcharges decreases. This can cause a problem for cities that rely on these taxes for revenue to improve infrastructure such as road and bridge maintenance. This lost revenue is difficult to replace.

e. Innovation

Innovation is “a path to long-term economic growth, a word of hope for economic recovery in times of crisis, and a vital opportunity for economies . . . to maintain high levels of competitiveness.”⁷³ Most governments prioritize the advancement of innovation but do not always succeed in promoting it. Well-intentioned regulations to allow or regulate TNCs have the potential to advance or impede innovation.⁷⁴ The concern with creating new regulations to severely limit or prohibit TNCs is that this stifles innovation and prevents advancement.

Legislation by nature is a slow moving process. Innovation on the other hand “moves at the speed of sound: it can ‘happen’ anywhere and anytime.”⁷⁵ This difference in pace often results in legislation lagging far behind innovation, as is the case for TNCs. To remedy this problem, innovation needs either to slow or stop as legislation catches up, or new

68. *Understanding the Purpose of Payroll Taxes*, LAWS.COM (last visited Dec. 9, 2015), <http://tax.laws.com/payroll-tax/payroll-tax-purpose>

69. *Id.*

70. *Id.*

71. Ron Sherman, *Yellow Cabs vs. Uber: Tale of the Tax Tape*, NEW YORK DAILY NEWS (Aug. 27, 2015), <http://www.nydailynews.com/opinion/ron-sherman-yellow-cabs-uber-tale-tax-tape-article-1.2338390>.

72. *Id.*

73. Sofia Ranchordas, *Innovation-Friendly Regulation: the Sunset of Regulation, the Sunrise of Innovation*, 55 JURIMETRICS J. 201, 201 (forthcoming).

74. *Id.*

75. *Id.*

regulations need to be flexible to allow for innovation as technology advances very quickly. However, flexibility is difficult to achieve when legislators are still responding to the last crisis. The European Union is experiencing this difficulty as countries respond to the crisis, with very different results.

V. REGULATION OF TNCs

European Union countries have very different approaches to the conflicts and policy concerns surrounding TNCs. Uber has been in the news recently for actions in the United Kingdom, France, Germany, and Spain. Recently, the European Union has been asked to determine what the appropriate solution is to the unfair competition problem between TNCs and taxicabs.⁷⁶ The European Union has not yet given an answer to this question. In the meantime, European Union countries are doing their best to regulate TNCs without violating European Union law. This same disparity in regulations can be seen within the United States. Some governments have chosen to allow TNCs by either applying existing regulations or creating new ones. Others have chosen to ban TNCs altogether.

a. Allowing TNCs

i. New regulation

Colorado was the first state in the United States to specifically legalize TNCs through legislation.⁷⁷ Colorado enacted the Transportation Network Company Act in June 2014.⁷⁸ This law allows TNCs to operate legally by obtaining permits from the Public Utilities Commission.⁷⁹ Under the law, TNCs are required to carry at least one million dollars in liability insurance.⁸⁰ TNCs or TNC drivers are also required to carry primary insurance during the insurance gap period discussed above.⁸¹ In addition to addressing the insurance requirements, the law addresses public safety concerns by requiring that the vehicle be inspected for safety by a TNC inspector or certified mechanic.⁸² It also requires that drivers provide proof that they are medically fit to drive, prohibits drivers from providing services for more than twelve consecutive hours, requires zero tolerance of driving while under the influence of intoxicating substances, and requires drivers to provide a background check.⁸³ “[P]rivate compa-

76. Azevedo & Maciejewski, *supra* note 25, at 2.

77. Andy Vuong, *Colorado First to Authorize Lyft and Uber's Ridesharing Services*, DENVER POST (June 5, 2014, 5:06 PM) http://www.denverpost.com/business/ci_25907057/colorado-first-authorize-lyft-and-ubers-ridesharing-services.

78. COLO. REV. STAT. § 40-10.1-601 (2015).

79. *Id.* § 40-10.1-606.

80. *Id.* § 40-10.1-604(2).

81. *Id.* § 40-10.1-604(3).

82. *Id.* § 40-10.1-605(1)(g).

83. *Id.* § 40-10.1-605.

nies that use publicly available data” can do these background checks, which is a less thorough background check than the one required for taxi drivers who “are subject to fingerprint background checks performed by the Federal and Colorado Bureaus of Investigation.”⁸⁴ The Public Utilities Commission issued rules in November 2015 to elaborate and clarify the requirements under the Transportation Network Company Act.⁸⁵ The Colorado government prioritized innovation and advancement by specifically allowing these companies to operate legally, but attempted to craft laws that would protect the public.

California was the first state in the United States to legalize TNCs through common law. Following the California Public Utilities Commission (CPUC) decision in 2013, TNCs can legally operate within the state.⁸⁶ Since this decision, California has seen a rise in conflicts concerning Uber and has passed legislation similar to Colorado’s in order to address some of these conflicts, primarily public safety, insurance, and discrimination against people with disabilities. There are concerns that Uber continuously and intentionally refuses to abide by the law.⁸⁷ Because its actions are seen as intentionally flouting the law, in July 2015 a CPUC judge recommended that Uber be suspended from operating in California and be fined \$7.3 million for noncompliance.⁸⁸ California is known as a state that promotes advancements through innovation, but recent cases demonstrate that even an innovative state like California will protect vulnerable people and will not take kindly to scofflaws.

ii. Applying existing regulation

The United Kingdom has answered the question of how to regulate TNCs by declaring them legal businesses as long as they operate within existing law.⁸⁹ The United Kingdom has specific regulations governing taxicabs. Its laws are also very specific about what TNCs are allowed to do and how they can look.⁹⁰ TNCs are not allowed to use taximeters, they cannot be hailed on the street, and they cannot look like the traditional black cabs.⁹¹ Recently, Transport For London (TFL) has claimed

84. Vuong, *supra* note 77.

85. The Proposed Rules Regulating Transp. Network Cos., 4 COLO. CODE REGS. 723-6 (2015).

Decision Addressing Exceptions to Recommended Decision R15-0985; and Amending Proposed Rules, Decision C15-1201, November 4, 2015.

86. Ken Yeung, *California Regulators Approve Ride-Sharing Rules For Uber, Lyft, Sidecar*, THENEXTWEB.COM (Sept. 19, 2013, 7:44 PM), <http://thenextweb.com/insider/2013/09/19/california-becomes-first-state-to-regulate-ride-sharing-services/>.

87. Laura J. Nelson et al., *Uber Should Be Suspended in California and Fined \$7.3 Million, Judge Says*, LA TIMES (July 15, 2015), <http://www.latimes.com/business/la-fi-uber-suspended-20150715-story.html>.

88. *Id.*

89. *Uber High Court Decision Q&A*, BBC (Oct. 16, 2015), <http://www.bbc.com/news/uk-england-london-34542100>.

90. *Id.*

91. *Id.*

that Uber's app is a taximeter and simulates hailing a cab on the street.⁹² The mayor of London accused Uber of "systematically breaking the law."⁹³ However, the High Court ruled that the app does not simulate hailing a cab on the street and is not a taximeter.⁹⁴ TFL claims to welcome the ruling as well, stating, "[T]here had been 'significant public interest in establishing legal certainty in the matter.'"⁹⁵ In addition to advancing the value of certainty, the United Kingdom government welcomes "disruptive technology," valuing innovation highly despite the fact that the mayor is trying to restrict TNCs.⁹⁶ Rather than focusing on public safety, the conflict in the United Kingdom appears to be focused on unfair competition and protecting traditional taxicabs.

b. Banning TNCs

Delhi banned Uber after Uber failed to perform an adequate background check and a driver raped a female passenger.⁹⁷ Germany has completely banned most TNC models of business that utilize the mobile app. The country has a well-regulated market and consumer protections in place, making it virtually impossible for Uber to operate.⁹⁸ "The German society values consumer protection, safety and training. Uber interprets this as 'difficult market conditions'. But as a matter of fact, these conditions apply to every company in Germany, radio taxis and taxi drivers operate accordingly."⁹⁹ Germany also values order, consistency, and certainty. Thus, fewer people are willing to flout laws and utilize Uber, making it difficult for Uber to continue operating in Germany while the app is banned.

In other European countries, Uber continues to operate despite bans on its apps.¹⁰⁰ France and Spain have also banned Uber.¹⁰¹ The bans on Uber in France and Spain are effected by overly burdensome laws, such as requiring drivers to return to a parking lot or their base in between rides, minimum pricing, and not allowing them to drive around while looking for passengers.¹⁰² Uber has filed complaints with the European

92. Jamie Grierson, *Boris Johnson Accuses Uber of 'Systematically Breaking the Law,'* THE GUARDIAN (Oct. 5, 2015), <http://www.theguardian.com/technology/2015/oct/05/boris-johnson-accuses-uber-of-systematically-breaking-the-law>.

93. *Id.*

94. *Uber Taxi-Hailing App Does Not Break Law, High Court Rules*, BBC (Oct. 16, 2015), <http://www.bbc.com/news/uk-england-london-34549700>.

95. *Id.*

96. *Id.*

97. *India Uber Driver Guilty of Rape*, *supra* note 42.

98. Natasha Lomas, *Uber Pulls Out Of Three German Cities After Court Ban Shrinks Driver Pool*, TECHCRUNCH.COM (Nov. 2, 2015), <http://techcrunch.com/2015/11/02/uber-retrenches-in-germany/#.zhn1ufl:Yohy>.

99. *Id.*

100. *Id.*

101. *Id.*

102. *French Court Upholds Ban on Unlicensed Taxis, Hitting Uber*, REUTERS.COM (May 22, 2015, 4:55 AM), <http://www.reuters.com/article/france-taxis-idUSL5N0YD1EW20150522>; Sam

Court of Justice, requesting that the court overturn the laws banning Uber in Germany, France, and Spain because they are “a patchwork of European taxi regulations that protect established taxi companies from new competitors.”¹⁰³ In the European Union, countries have the freedom to regulate transportation companies because transportation regulations are exempt from the European Union services directive.¹⁰⁴ The European Commission will also address the issue in guidelines that it is set to issue next year.¹⁰⁵ The guidelines will include how the European Union should deal with the sharing economy; they will “include more powers to guarantee consumers’ protection,” and simplified VAT regulations.¹⁰⁶

VI. ECONOMIC EFFICIENT REGULATION

An economic approach to law is based on the notion of efficiency.¹⁰⁷ “Pareto efficiency” represents an allocation of resources in which no party can be made better off without making someone else worse off.¹⁰⁸ A Pareto Improvement occurs when two people are made better by a transaction.¹⁰⁹ If there are no trades in resources that two people could make so that both would obtain a higher overall welfare, those two parties are already at a Pareto optimal position and there are no more “win-win” trades.¹¹⁰ The optimum allocation of resources is not attained so long as it is possible to improve the position of at least one individual while keeping everyone else as well off as they were before.¹¹¹ The economist Ronald Coase said that people will naturally find themselves in this type of Pareto efficient situation as long as they have freedom of contract, perfect information, and no transaction cost.¹¹² If these three things exist, then the content of the law does not matter.¹¹³

For freedom of contract to exist, “the bargain must be struck on the basis of freedom and equality,” a completely level playing field.¹¹⁴ To have perfect information a person would have to be omniscient. “Parties must possess full and accurate knowledge about their own values and preferences, the other parties’ values and preferences, and all aspects of

Schechner, *Uber to Fight EU Rules in Europe’s Top Court*, WALL STREET JOURNAL (July 20, 2015), <http://www.wsj.com/articles/case-against-uber-referred-to-europes-top-court-1437402253>.

103. Schechner, *supra* note 102.

104. *Id.*

105. Eric Maurice, *Commission to Publish Guidelines on Uber-like Activities*, EUOBSERVER.COM, (Oct. 28, 2015), <https://euobserver.com/economic/130874>.

106. *Id.*

107. Robert D. Cooter, *The Best Right Laws: Value Foundations of the Economic Analysis of Law*, 64 Notre Dame L. Rev. 817, 817 (1989).

108. *Id.* at 821.

109. *Id.*

110. *Id.*

111. *Id.*

112. See R. H. Coase, *The Problem of Social Cost*, 3 J.L. & Econ. 1, 15 (1960).

113. *Id.*

114. Michael R. Siebecker, Professor of Law, Univ. of Denver Sturm Coll. of Law, *An Economic Approach to Law*, (Sep. 2015) (on file with author).

the world they inhabit. Everything must be completely transparent and fully understood.”¹¹⁵ Zero transaction costs exist when there are no costs to identifying willing parties with whom to transact, negotiating the transaction, obtaining information, executing the agreement, and enforcing the agreement.¹¹⁶ In addition to money, costs include time, effort, and energy.

Since we do not live in a world where freedom of contract, perfect information, and no transaction costs exist, the content of the law actually matters.¹¹⁷ To attain the most efficient outcome, the law should reflect what we would have traded or negotiated for if we lived in the Pareto utopian world.¹¹⁸ It is difficult, and often impossible to achieve the optimum outcome. This can be particularly true when trying to regulate a new and unknown phenomenon like the sharing economy and specifically TNCs. It is even possible that what is most economically efficient for one country is not economically efficient for the rest of the world.

The first step in deciding what the law should be is deciding who should have a voice in the decision. This requires determining who the interested parties to a transaction are. When it comes to TNCs, there are four primary groups of interested parties: (1) TNCs, (2) TNC drivers, (3) taxi drivers, and (4) consumers and the public.

Two methods are used when deciding what the content of the law should be to reflect what the parties would have negotiated in that hypothetical world. These two approaches are the empirical and rational actor approaches. The empirical method looks empirical data, including the preferences of the people affected by the decision. Empirical data is gathered by asking interested parties what their views and preferences are. This can be done through surveys and analyzing historical data. This can often be a daunting or impossible task if it is too costly in terms of time and resources, if the interested parties are too numerous to survey, or if it is not possible to locate or determine the identity of all of the interested parties. If it is an impossible task, the empirical data can also be gathered by looking to similarly situated parties, members of relevant communities, or surrogates for the parties.

The rational actor approach requires stating assumptions about what rationality entails and what rational actors would prefer. There are two different methods for the rational actor approach. These are the wealth maximization and behavioral economic approaches.¹¹⁹ The first method

115. *Id.*

116. Coase, *supra* note 112.

117. *Id.* at 16.

118. *Id.* at 38.

119. Whitney Cunningham, *Testing Posner's Strong Theory of Wealth Maximization*, 81 *Geo. L.J.* 141, 142 (1992); Christine Jolls et al., *A Behavioral Approach to Law and Economics*, 50 *Stan. L. Rev.* 1471, 1471 (1998).

assumes that people are only interested in maximizing monetary gain.¹²⁰ The second considers other hard-to-measure factors such as compassion, environmental justice, and integrity.¹²¹

The rational actor approach will necessarily place a priority on some preferences while disregarding others. As rational actors, TNCs are primarily concerned with wealth maximization. Consumers and the public value safety, cheap transportation, and the freedom to choose. TNC drivers and taxi drivers are also interested in wealth maximization, but there are other behavioral economic factors that these parties value. For example, taxi drivers are concerned with making a living. Perhaps they can increase potential income by adapting and evolving to look more like TNCs. This may increase income while also decreasing transactional costs by using an app to identify and accept nearby fares quickly, and by implementing a more efficient system for collecting payment. However, in some countries like the United Kingdom, where taxi drivers have spent years preparing to pass the knowledge, adapting to look like TNCs may not best represent their interests. Patience, hard work, and the investment of time and money to attain an iconic position may outweigh the wealth maximization potential. On the other hand, people (including taxi drivers) generally think innovation and advancement are good things so banning TNCs altogether would not be the most economically efficient outcome for society as a whole. As long as safety measures exist, having the option of taking a taxi or an Uber may be a primary interest for consumers. For the United Kingdom, keeping taxis very distinct from TNCs may be the most efficient outcome possible for all parties.

In contrast, United States TNC conflicts focus more on public safety and employment. If becoming a taxi driver in the United States takes less time and does not hold the same status as becoming a cab driver in London, taxi drivers will be more open to adapting and evolving to look like TNCs. In the United States, the taxi industry is more likely to be viewed as an “out of date, heavily unionized, and overbearingly regulated industry.”¹²² TNC drivers in the United States may be more open to additional regulation requiring insurance and other mechanisms to provide public safety because more and more public safety is becoming a priority for our society over wealth maximization. In the United States the most efficient outcome is more likely to be a balance between conservatively de-regulating taxis to allow them to stay competitive with TNCs, while also

120. Cunningham, *supra* note 119.

121. Jolls, *supra* note 119.

122. Oliver Lane, *The Battle Over Uber Taxis Perfectly Encapsulates the Conflict Between Traditional and Modern, Liberal Conservatism*, BREITBART.COM (Oct. 1, 2013), <http://www.breitbart.com/london/2015/10/01/the-battle-over-uber-taxis-perfectly-encapsulates-the-conflict-between-traditional-and-modern-liberal-conservatism/>.

increasing regulations for TNCs to ensure public safety and to address employment concerns.¹²³

Germany, France, and Spain have all chosen to ban Uber. Taking into account all of the benefits of the sharing economy, it is difficult to believe that banning TNCs is an efficient outcome for any country. Rather than reflecting a careful consideration of the interests of all parties, it suggests strong protectionist motives. Interestingly, France has not banned other sharing economy type businesses, further adding to this suspicion.¹²⁴

VII. CONCLUSION

The sharing economy will continue to grow and this will continue to be a challenge for regulators. As governments are scrambling to address the crisis created by TNCs, they will likely look to other governments to see how they have handled the situation. While there are common threads of conflict surrounding TNCs, looking at the challenges from a behavioral economics evaluation shows that values and priorities in different parts of the world may necessarily lead to differing legislation regarding TNCs.

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123. See Vuong, *supra* note 77 (Colorado Governor John Hickenlooper “called for Colorado regulators to review rules placed on taxis and limos, questioning whether they’re still appropriate or necessary with the advent of so-called transportation network companies like Lyft and Uber”).

124. Nicholas Vinocur, *Sacrebleu! Uber Conquers France*, POLITICO (Sept. 30, 2015), <http://www.politico.eu/article/uber-conquers-france-airbnb-sharing-economy-unions-hollande-socialists-clash/>.