Keynote Speech

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It is a pleasure to be with you here this evening at this first of what will surely be many meetings, discussions and conferences about the so-called gig economy here in Silicon Valley the heart of creative entreprenurialism. Although most of my remarks tonight will focus upon the ride-sharing industry, particularly San Francisco's Uber and Lyft, the fact is that numerous other firms like GrubHub – now in the mist of major litigation in San Francisco – as well as Handy Technologies, Amazon and numerous others are involved in part of the so-called "on demand" economy. These variegated services provided consist of delivery drivers, skilled tradespeople, cleaners, cooks and various kinds of personal assistants. This is the new on demand economy which has provided goods more efficiently and expeditiously and in a less costly manner than its predecessors.

What is this new gig economy? Defined by the Cambridge English dictionary, the gig economy is ": " a way of working that is based on people having temporary jobs or doing separate pieces of work, each paid separately, rather than working for an employer."

But it is more. The new technology enabled platforms and the outsourcing of work previously performed by other employers have spawned so-called alternative work arrangements which are increasing as a percentage of the workforce—some say 15 per cent, but this depends upon the definition given. The contingent workforce – consisting of temporary workers, freelancers, contract workers and casual employees sometimes referred by third parties - was defined by Audrey Freedman of the Conference Board in

the 1980's, long before the gig economy – the name of which really has its roots in the jazz scene which I've followed assiduously, where musicians have gone from club to club, sometimes in different parts of the country.

Again, the efficiencies for the public are to be found in lower costs and expeditious delivery of a needed product. In some measure, it mirrors change wrought by technological innovation and the robotization of manufacturing, the ripples of which we feel today, sometimes under the rubric of globalization. In ride-sharing, the advent of the app and the GPS system has decimated the taxi industry which, it is to be recalled, was antiquated and unresponsive, providing a vacuum into which Uber and Lyft quickly stepped. Thus far (except for the raft of sexual harassment charges which would soon sweep through both Hollywood and the political world)the attention and focus by these firms have been exclusively upon the public as well as board members internecine warfare and investments which will make Uber a public company in 2019.

But what about the drivers? Until the past year or so little attention has been given to them. The New York Times said that while the promises of Silicon Valley relating to the gig economy can "sound appealing" inasmuch as its digital technology supposedly allows workers to become entrepreneurs free from the "drudgery" of 9-5 jobs allowing students, parents and others to make extra cash, in fact they have not provided a "utopia". These companies, said the Times, "..have discovered they can harness advances in software and behavioral sciences to old fashioned worker exploitation ..because employees lack the basic protections of American law".

As a scholar who wrote about this subject more than a decade ago noted, "the high start-up costs" incentivize savings and produce circumstances in which labor becomes the "low-hanging fruit" of the new business model. Thus, for instance, I was

able to take an Uber from DuPont Circle to the Mall in Washington for a mere eight dollars! This is good for the public but not for the driver whose percentage of the fare is unilaterally determined by the firm.

Appealing to a diverse group of workers who may be trying for a bridge to retirement or extra income to pay for tuition or to supplement another low paying job, sometimes consisting of a workforce which is disproportionately composed of new immigrant workers who may want to work 50 or 60 hours per week – the uniform attraction is more autonomy than exists in the traditional workplace. Going to work when you want to and for how long you want to work is unusual.

But, again as the New York Times highlights, the drawbacks are considerable. First amongst them are the unpredictability of the work stream. It may promote as much uncertainty as autonomy. But more fundamentally, the average pay is considerably beneath the level of traditional fulltime employees - as well as benefits enjoyed like, health insurance, vacations, unemployment compensation, minimum wage and overtime benefits, the right to join unions and to be protected against race, sex and religious discrimination. This is because the new gig employers have almost invariably characterized those who work for them as independent contractors rather than employees. Employees are a beneficiary of a safety net – independent contractors are not!

How does one determine whether the workers are employees or independent contractors as a practical matter in industries like ride-sharing under both federal and California law? That is the ongoing inquiry undertaken before administrative agencies, courts and elsewhere.

This is not a new issue. Remember that a half century ago there was much controversy about whether baseball players (and this soon affected other sports as well) were employees—and today addressing an issue far beyond the one we are discussing now—the fight is about whether so-called amateur athletes who pay football here at Stanford, for instance, are employees as well.

One of the basic considerations in making this assessment is whether the workers involved are performing work which is essential to the nature of the business. But what is the business? For instance, when I act as a consultant or expert witness for a firm, I am performing a discrete service or function for it – a consultant is not involved in producing the soap for Proctor and Gamble or the automobiles for General Motors. Even one of my op-ed pieces for a newspaper falls short of this, given the fact that the paper functions with a variety of fulltime writers and news services.

The drivers are performing a function which is essential to Uber and Lyft. All of the agencies and courts confronting the issue have come to the same conclusion. But the companies continue to maintain that their business is that of a technology company and a mere broker of transportation services or an intermediary between drivers and riders. Again, virtually every decision in this country and in Europe has rejected this argument to date. This is one reason why the British Employment Appeals Tribunal concluded that Uber's drivers are employees.

A key consideration is control. Of course, whether one is an independent contractor or an employee, the objective is to do a job according to specifications which satisfies the employer. The objective is to complete a finished and satisfactory product of which the employer approves. The dispute in these cases relates to whether the employer or worker controls the means and methods involved in doing the job.

If the employer has control, the workers are likely to be viewed as employees - and lack of control dictates the opposite result. The companies rely upon the fact that drivers are free to work any number of hours they choose and whenever they choose and argue that this is not normally associated with being an employee. Similarly, they note that the driver is free to work for their competitors, i.e., the driver can have both Uber and Lyft apps and work for both on the same day at different times. But these companies now instruct the drivers to post Uber and Lyft decals on the car. Moreover, the nature of gig work (as well as telecommuting for that matter) means that the employee works at his own schedule—against, of course, a deadline established in most cases. In a major case involving the Lancaster Symphony here in California, the Board and the Court of Appeals for the District of Columbia have held that a holding to the effect that a worker is not an employee because he can work his own hours or not accept a particular assignment or work for others would eliminate most part-time and casual workers from labor law coverage.

The main difference between Uber and Lyft and other new companies like Federal Express is that the latter requires that a certain amount of work be done in a particular period of time, even though the employees in all of these companies have some measure of scheduling autonomy. The ride-sharing companies, for their part, do not require a particular number of hours – though (1) faced with a perennial shortage of labor because of low compensation, Uber, for instance, has devised a number of psychological methods or tricks to induce employees to work a greater number of hours to go to certain locations where the company wants to obtain a “surge price” by providing them with bonuses to work a certain number of hours as well as recruit other drivers; (2) the company will “deactivate” or dismiss a driver who does not accept rides for a

specified period. (The ability to deactivate in so far as it translates into an actual dismissal smacks of an employer-employee relationship.)

The central question, of course, is benefits. As I've said, because the company characterizes the drivers and others as independent contractors the business model objective translates into the denial of benefits because evidence of benefits will weigh in favor of employee status. Truly, any iteration which incentivizes employers to deny benefits is a perverse one. Yet that is what the law as written does—and it should be changed!

This is one reason why the drivers have no health insurance, for instance, although now Uber is said to be helping its drivers sign up for Obamacare. In this way, potential discontent can be eased. And that is why Uber initially prohibited tipping and until recently provided for no app opportunity to write a tip into the app.

But old habits continue to die hard. One driver said to me that he took a surfer ".. to the airport, after spending about 25 minutes strapping surf boards on the roof of my car. I was reluctant to do this and I must have been crazy, but the poor guy was almost in panic about missing his flight. Tip? $0."

I wanted to provide my Washington driver with a tip, particularly knowing his low level of compensation, but had no cash with me at the time! In Boston in August neither the driver nor I knew how to make use of the app- though I'm told that now it can be done.

These are the kinds of problems and issues which are going to come before both the federal courts considering class action litigation – an instrument which may be substantially limited by the Supreme Court in cases pending before that body. These

cases seek overtime, minimum wages, and reimbursements for expenses incurred. (The ride-sharing companies will reimburse for some expenses such as damage done to the car by drunken or unruly passengers).

Similar disputes are before the National Labor Relations Board when its jurisdiction is invoked by employees and unions, though the emergence of a Republican majority appointed by President Trump, has dimmed the prospects for employee victories in this forum.

All of this has provided more focus to one of biggest developments in this arena, i.e., enactment of a Seattle ordinance which says to ride-sharing firms : "okay, you win – these workers are independent contractors". Seattle has taken jurisdiction of these labor disputes between unions and Uber and Lyft because independent contractors are excluded from the National Labor Relations Act and thus state jurisdiction would not be pre-empted. Well, as you can imagine, companies which have been asserting that their drivers are independent contractors have said that maybe it isn't quite so clear when challenging the new ordinance.

The ordinance has been attacked on the grounds that, even though both the unions and the companies accept the proposition that the workers are independent contractors in Seattle, it is quite possible that in some future case a driver could come along successfully asserting the contrary. Therefore, runs the argument, the ordinance is unconstitutionally pre-empted by federal labor law just as it would be if the state of Washington took jurisdiction over employees themselves.

The other point asserted by the ride-sharing companies is that since independent contractors are business people any attempt by them to act in concert with one another

to influence their wages and conditions of employment constitutes a conspiracy and restraint of trade in violation of the Sherman Anti-Trust Act of 1890. A federal district court in Seattle has rejected the positions of Uber and Lyft last August on the ground that state law may immunize such conduct otherwise violative of antitrust law—but the matter is pending before the Court of Appeals for the Ninth Circuit there and could well end up in the U.S. Supreme Court.

Finally, when all is said and done, the new workers in the on demand economy occupy a subordinate status. The Congress has now before it legislation promoting pilot projects which would induce or direct the provision of benefits to such workers on a multi-employer basis regardless of how one characterizes them. Senator Warner of Virginia and Senator Warren of Massachusetts have been leaders in bringing this to the attention of the Congress and the public.

At some point, whether before or after the 2018 Congressional elections, renewed focus must be provided to this glaring inequity so that the practices emerging in the much needed gig economy do not walk in lockstep with other factors furthering greater inequality between the haves and the have-nots, and thus exacerbate the social ills associated with the ever widening income gap—and the driverless cars which may be just down the road.

Thank you very much for your attention. I wish you Godspeed in your deliberations on this and related subjects.