

UC Berkeley

Journal of Law and Political Economy

Title

The Legal Tragedy of Exploitation: Irresponsibility and the Complicity of Law

Permalink

<https://escholarship.org/uc/item/0bs1258k>

Journal

Journal of Law and Political Economy, 6(1)

Author

Astone, Daniel P.

Publication Date

2026-06-11

DOI

10.5070/LP6.66205

Copyright Information

This work is made available under the terms of a Creative Commons Attribution-NonCommercial-ShareAlike License, available at

<https://creativecommons.org/licenses/by-nc-sa/4.0/>

Peer reviewed



Daniel P. Astone, University of Hong Kong*

The Legal Tragedy of Exploitation: Irresponsibility and the Complicity of Law

Abstract: The article argues that labor litigation helps to sustain, rather than interrupt, the process of worker exploitation. Using legal claims raised by Uber drivers and Deliveroo riders in the UK as a backdrop, it focuses on undue exploitation—exploitation beyond the limits set by law—as a mechanism that facilitates capital accumulation while hedging against the liability this mode of exploitation imposes. While assuming this outcome is socially undesirable and ideally curtailed by law, the article shows that the legal framework of labor litigation produces two complementary effects that reinforce exploitation through the embeddedness of irresponsibility. First, it disassembles the reciprocity between exploitation and liability, enabling extraordinary profit flows for exploiters. Second, it normalizes residual profits that persist beyond court awards. These effects frame exploitation as a gamble that will generally pay off, all the while embedding its social effects at a level no longer retrievable by law.

Keywords: exploitation, labor litigation, Uber, Deliveroo, courts, ablegality, irresponsibility

I. Introduction

This article argues that labor litigation helps to sustain, rather than interrupt, the process of worker exploitation. Drawing on the legal claims of Uber drivers and Deliveroo riders in the UK, it focuses on *undue exploitation*—exploitation beyond the limits set by law—as a mechanism of capital accumulation shielded by legal irresponsibility. Assuming this outcome is socially undesirable and ideally curtailed by law, the article shows how labor litigation produces two reinforcing effects. First, it disassembles the reciprocity between exploitation and liability, enabling extraordinary profits; second, it normalizes residual profits that persist beyond court awards. These effects render exploitation a gamble that tends to pay off—while its harms become embedded in ways law cannot retrieve.

When it comes to court rulings on matters of worker exploitation, the parallel reading of different proceedings may suggest a contradiction. Occasionally, distinct legal outcomes stem from similar—although generally not equal—circumstances. Yet it does not take much to convince a legal audience that differences otherwise deemed banal may fundamentally set those circumstances apart, allowing someone to argue either for or against a certain legal outcome despite other factual similarities. We all know where the devil is, and the purpose of this article is definitely not to mischaracterize the details that could lead to seemingly disparate court awards. Big or small, these

* Global Academic Fellow, Faculty of Law, University of Hong Kong, Hong Kong. Please direct correspondence to astone@hku.hk. The author is grateful for the valuable feedback received from Pål Wrange, Emiliós Christodoulidis, David Kennedy, Fiona Macmillan, Sabine Frerichs, Yifeng Chen, Dina Waked, Poul Kjaer, Gregor Noll, and Mauro Zamboni, as well as the generous remarks raised by the anonymous reviewers at the *Journal of Law and Political Economy*.

differences are internal to law and, to this extent, they *must* make sense in legal terms, else they are liable to being legally rectified.

A dogmatic reading, for sure. But what if we force an encounter between those internal contradictions and the world out there? If the focus is kept on discrete instances where exploitation is evinced intersubjectively, it is hardly questionable that a favorable ruling will benefit workers who are victims of exploitation. We can flex rhetoric a bit and challenge the adjective there, so let's assume that whatever "favorable" accomplishes in that context does indeed reflect positively and somewhat sufficiently on the lived experience of those workers. An unfavorable ruling, then, either harms further or confirms the legality of whatever harm was experienced by the exploited.

Fine. Now we remove the worker *as an individual* from the picture. Once we detach exploitation from its intersubjective outline, the substantive outcomes of those court awards will be shown *not to really matter*. Exploitation endures, it will be argued, because of the distinction between its material manifestation and the corresponding legal depiction. In other words, it endures by virtue of a historically specific framework for the cognitive scope of the law that allows for certain elements of experience to remain unseen, even if circumstantially, in a way that happens to be productive for contemporary capitalism. For this reason, the article will argue that some of the distinctions internal to law hardly matter when what is at stake is a phenomenon—exploitation in this case—situated at least partially outside the confines of legality proper.

For instance, we might identify a set of court awards interfering with whatever equilibrium obtains between profit rates and wages—discussing the standards for the payment of overtime, for example—but those will do little to intervene on the circumstance that workers will be exploited regardless. For exploitation to endure legally unscathed, the proposition advanced in this article is that there is an epistemological rupture in the symmetry expected between a court award and the materialization of that court award. As will be shown, the cognitive remainder resulting from such a rupture is liable to appropriation due to remaining legally invisibilized. Consequently, at the moment a court ruling has been activated—the point where the material issue of exploitation is put under the scrutiny of the legal system—the exploiter would already have won. Such is the contradiction lying at the core of this article. At least in the context of contemporary, common-law jurisdictions, the social phenomenon of exploitation seems to have become virtually impervious to court ruling.

But there is a small caveat here. While the main issue has been referred to as exploitation, the object of analysis is somewhat stylized. First, it is assumed that not all exploitation is the same. Working under exploitative conditions is a feature of capitalism, one of its foundational characteristics that requires workers to generate surplus, that is, to receive wages that are, on average, lower than the value accrued from their labor (Luxemburg 2015, 40). Workers get paid less than their labor's worth so that whatever difference remains can be incorporated as profits and, eventually, as capital.

While critiques of political economy abound in this matter (Marx 2019; Commons 1924; Harvey 2004; Veblen 1899), the aim of this article is more modest. By assuming that exploitation is a universalized phenomenon in capitalism, it is also assumed that its universalization is regulated by law so as to be deemed fair, sustainable, or whatever framing must be used to render a certain level of exploitation socially stable. In this sense, the role of the court could be said to focus primarily on adjusting abuses of the capitalist's prerogative of exploiting and rendering them legally compliant (Althusser 2014, 203). Hence, whenever exploitation is excessive, undue, or abusive, a court ruling might emerge as a correction mechanism (Luhmann 2008, 194). These excesses would probably be more appropriately labeled "undue exploitation" or some equivalent term, but for the

sake of simplicity, throughout the article the term *exploitation* shall signify not any and all forms of exploitation, but specifically an excess found between the corresponding legal threshold and the concrete experience of being exploited.

To illustrate these arguments, the article offers an engagement with two decisions issued by the Supreme Court of the United Kingdom within the context of the gig economy. The first case relates to Uber. Drivers filed for the recognition of their employment status as a consequence of legal and factual circumstances demonstrating their subordination vis-à-vis Uber, who retained significant control over their work regime despite contractual remarks on their presumed independence. Ultimately, this led to the recognition of their status of workers, a milder classification if measured against the status of employees but still importantly distinguished from the status of independent contractors.

The second case followed shortly after Uber's and relates to Deliveroo, a British-based company with a portfolio quite similar to that of Uber Eats. The subordination thesis was found not to apply despite the substantive similarities between the work regime of Deliveroo riders and Uber drivers, mainly due to a clause that allowed riders to freely choose substitutes, even though that clause was found to be hardly used. Consequently, the Court rejected the recognition of the status of Deliveroo riders as either workers or employees. On a different note, as a means to provide additional context to the court documents, the two decisions will be read alongside the corporate reports filed by each company with the relevant authority in their countries of incorporation—the US and UK, respectively.

Unsurprisingly, the two cases share commonalities, yet each offers specific aspects that could, at least in legal terms, render them markedly distinct from one another. In fact, this is what the examples show to us, what they communicate. But for every communication, there is something else that *has to remain* unsaid (Luhmann 2013, 85). With support on Niklas Luhmann's systems theory, a theory of communication, the article will advance an understanding of the selective constraints that characterize the cognitive scope of the legal system. The particular distribution of those constraints will be shown to maintain a productive relationship with the economic system in a way that facilitates the embeddedness of exploitative patterns despite their intrinsic illegality.

But Luhmann is categorical when it comes to the threshold of legality: That which is not legal *is* illegal, and vice versa (Luhmann 2008, 191). This is to say, if exploitation is not illegal, it is, by way of necessity, legal. If this is the case, one has to build an argument to justify that exploitation: a phenomenon that is in principle legal by virtue of the regulation provided by most contemporary labor legal regimes could be said to retain an intrinsic illegality. To this end, it will be argued that exploitation is an iterative process, marked by ongoing cycles of *expropriation* and *accumulation*, each governed by distinct standards of legality that are both asynchronous and asymmetric. Expropriation is understood as the gesture of taking away something from someone without due consideration (Vrousalis 2022, 19–21), while accumulation obtains through the incorporation of this “something” as capital so that it, capital, can be reproduced (Harvey 2018, 312–13). Thus, despite its legal origins, exploitation evolves outside the legal system through accumulation, only to subsequently reenter the realm of law, enabling further expropriation. Even though the law, and courts in particular, may aspire to rectify the expropriatory dimension of exploitation, it will be shown to remain utterly powerless when it comes to regulating accumulation.

Indeed, Luhmann does recognize expropriation as illegal in the scope of contemporary legal regimes (Luhmann 2008, 392). In fact, the illegality of expropriation is paramount to his understanding of property as the foremost means for the legal system to interact with the economic system (*ibid.* at 392). Yet Luhmann does not seem prepared to transpose that same illegality toward

the broader process of exploitation. As the article will show, exploitation is rendered legal precisely through the systematic invisibilization of its underlying expropriatory driver, which is kept dormant until after the process of accumulation expires. Once value that has been expropriated becomes capital, the original legal status of expropriation—the sheer illegality to expropriate without due compensation—evinces its full force. By its very nature, it can be everything *but* legal to expropriate capital. Such is the foundational nature of expropriation within the process of exploitation, displaying a mode of organized *irresponsibility* that is as structuring to capitalism as its counterpart, the more widely discussed award of legal responsabilization (Veitch 2007, 68).

The metaphor of invisibilization deployed above was conceptualized elsewhere as *ablegality* (Astone 2024). The *ab-* particle denotes an absence that is at once precarious and productive. Luhmann teaches us that whatever escapes the law's cognitive selection is stable, to the extent that a social system does not interfere with elements it does not acknowledge (Luhmann 2012, 25). Alegality, a concept that evokes a distinction from *being* legally invisible for the sake of being *invisibilized*, amounts to a gesture of deferred recognition rather than outright ignorance. In this sense, the stability that comes from nonrecognition does not necessarily operate. Alegality installs potentiality where Luhmann would see stability, not so much as a by-product, but rather as an instance of intralegal cognitive dissonance. Alegality does not equate to an award of legality in absentia but a caesura: So long as there is absence, the evaluation of legality might be postponed. As will be argued, the historically specific organization of the timing and substance of the law's response has a decisive weight in determining if and how exploitation can be embedded in the social fabric.

In the examples analyzed in this article, alegality will register the impossibility between the illegality implied by expropriation and the legality of property awarded over the fruits of exploitation. In this sense, it will be argued that the legal system provides certain conditions of possibility for other systems to operate within the temporal and substantive gaps created by the specific configuration of legal cognition. The product of this configuration, which will be discussed further in the scope of the Uber and Deliveroo cases, can be observed in the difference between a set of factual events and the legal appearance of those same events, in terms that are both temporal and substantive (Luhmann 2008, 181–82). For instance, in the difference between the moment a harm is experienced and the moment that harm is marked by the legal code, or the nuanced phenomenology of exploitation and the reductive impetus of money awards occasionally resulting from a court ruling. As long as this configuration remains unchanged, the article concludes, exploitation will remain virtually impervious to court ruling. From a systemic perspective, winning or losing a court case becomes irrelevant, at least to the extent that the breaking of a pattern of exploitation were to remain on the horizon.

To advance this argument, the article is structured as follows. Part II presents two cases where exploitation was decided on by the Supreme Court of the United Kingdom, concerning Uber (*Uber BV v. Aslam* [2021] UKSC 5) and Deliveroo (*Independent Workers Union of Great Britain v. Central Arbitration Committee* [2023] UKSC 43). The Court's assessment is supplemented by an analysis of their latest annual reports, where the companies' self-description and evaluation of risk factors provide important insight into the issue of workers' exploitation. Part III presents a tentative model for how exploitation operates to provide an extraordinary flow of value for exploiters, particularly in the earlier stages of its market operation, engaging with the notion of an iterative process of leveraging and hedging vis-à-vis the legal consequences provoked by exploitation. This model portrays exploitation as a gamble that will be resolved most likely—and consequently not always—by courts. Part IV briefly introduces Niklas Luhmann's theory to engage with the issue of the law's cognitive dissonance and how it permeates the series of legal steps taken in the process that embeds exploitation as an ongoing feature of contemporary capitalism. The final part

concludes by discussing the relationship between the strategic deployment of cognitive contingency and the deep rootedness of irresponsibility it signifies.

II. Uber, Deliveroo, and What It Means to Be an Independent Worker

“Accessible, flexible, independent work has offered an option for many workers historically marginalized from the labor market At Uber, we believe that being your own boss should not have to come at the expense of security and dignity in work” (Uber Technologies Inc. 2022, 9). “In particular, as we aim to reduce Driver incentives to improve our financial performance, we expect Driver dissatisfaction will generally increase Further, we are investing in our autonomous vehicle strategy, which may add to Driver dissatisfaction over time, as it may reduce the need for Drivers” (ibid. at 16).

Those excerpts were taken from Uber’s 2022 Form 10-K, a document filed by US-incorporated companies every year to provide stockholders and prospective investors with relevant information for decision-making. The document is publicly available through the United States Securities and Exchange Commission’s website and accounts for Uber’s perception of market opportunities, its risks, its financial situation, its current and potential liabilities, and other matters that are deemed strategic for its investors. As such, it provides a snapshot of the view the company has of its changing social perceptions, court proceedings, legislation, and technological developments, all without the luster normally found in ordinary press releases.

Importantly, it offers an insight into Uber’s own views on the precariousness of the legal status of affiliated drivers, portraying exploitation as a competitive advantage that is central to its business model. Exploitation is understood here as a standing feature of capitalism, in the sense that, on average, workers earn less than they produce to allow for surplus value to flow upward. In such a context, labor standards put a legal limit to the rate at which workers may be exploited, consequently implying that exploitation *ad absurdum* would, at least in principle, be rejected (Vrousalis 2022, 100–01).

Still, the issue of whether exploitation is undue, abusive, or whatever adjective might be tied to it is by no means restricted to Uber or other so-called gig economy companies. For instance, when *The Guardian* reported on the growing problem of modern slavery and child labor in US agriculture—surveying large-scale farm operations in the apparently progressive state of Colorado, where children are allowed to work unlimited hours provided they do not miss school—the headline stressed that labor is “hard and hazardous work but the Hispanic migrants need every cent” (Helmore 2023). Granted, this refers to at least apparently legally compliant exploitation, but the message is laid bare: Weak labor standards have been situated dangerously close to modern slavery and child labor. It goes without saying that even if labor standards might indeed put a limit to the rate of exploitation, the existence of *some* standard does not necessarily warrant dignity.

Another example is found in one of Uber’s conceptual offspring, Deliveroo, which maintains a food and grocery delivery operation in a range of countries and is currently incorporated in the United Kingdom. Although slightly less impactful in its remarks, Deliveroo’s annual accounts filed with the UK’s Companies House under Form AR01 also provides important insights (Deliveroo PLC 2022). As is further detailed below, Deliveroo’s awareness level is as high as Uber’s regarding the risk it faces that its so-called independent workers would be reclassified as workers for the purposes of UK law. Since the reading of their respective annual reports reveals astonishing similarities, they will be engaged simultaneously.

On the other hand, the two UK Supreme Court cases involving Uber and Deliveroo will be dealt with separately, emphasizing their differences in terms of the legal framing of employment statuses and labor issues more generally. It is worth mentioning that the cases were heard roughly two years apart; the Uber case was ruled on in 2021, while Deliveroo's was decided in 2023. Most procedural aspects were left out of the case analyses to privilege the core theme central to the merit of this article: whether Uber drivers and Deliveroo riders are independent contractors, as the companies hold, or workers entitled to the relevant legal protections. In other words, against the background that in both cases workers have been systematically exploited, whether this has happened with or against the law.

A. The Annual Reports

The main similarity between the two companies lies in the fact that they engage drivers and riders to provide services to customers through a smartphone app, charging a fee for intermediation. Although their markets differ slightly, they overlap when it comes to food and grocery delivery, where both companies must engage as a third party with suppliers, among them cafes, restaurants, and supermarkets who sell goods through each company's app.

The annual reports of both companies indicate the centrality of their so-called independent work format, which is insisted on as a principal component of their business models. Its relevance is highlighted by the fact that this format is mentioned concurrently both as an asset and as a central risk for their operations. Although this cannot be directly derived from the report, the frequent mention of the unstable legal status of independent work could indicate that the companies are in fact aware of its inherent precariousness. For instance, both Uber and Deliveroo list worker (re)classification as a major, if not the main, regulatory and legal risk for their operations:

Our business would be adversely affected if [Uber] Drivers were classified as employees, workers or quasi-employees. . . . We believe that Drivers are independent contractors because, among other things, they can choose whether, when, and where to provide services on our platform, are free to provide services on our competitors' platforms, and provide a vehicle to perform services on our platform. (Uber Technologies Inc. 2022, 12)

Our business would be adversely affected if our rider model or approach to rider status and our operating practices were successfully challenged or if changes in law required us to reclassify our riders as employees including with retrospective effect. . . . Our rider model continues to be a principal risk for the Group. The level of risk differs by market depending upon specific local circumstances, including legislative changes, but the overall profile of this risk is unchanged. (iii) [I]n a business like Deliveroo, the inherent risk remains high, due to the continually evolving nature of the legislation and the emerging policy in this area. (Deliveroo PLC 2022, 63)

These annual reports are not completely interchangeable in the sense that Uber files them under United States regulation, whereas Deliveroo is incorporated in the United Kingdom. Still, in addition to remarks such as the above, they are reasonably adequate to provide a quantitative dimension to the issue of the exploitation of so-called independent workers. As is common knowledge, Uber's main remit is to intermediate the relationship between passengers and drivers, which it refers to as Mobility, although it also operates in ancillary markets—Delivery and Freight—spread over seventy countries (Uber Technologies Inc. 2022, 4). In terms of revenue, for the fiscal year 2022, each operation netted \$14,029 million, \$10,901 million, and \$6,947 million US respectively, for a total of \$31,877 million (*ibid.* at 74). Uber had an operational loss (profit minus the cost of sales and administrative and financial expenses other than interest) of \$1,832 million

(74). Last, Uber grouped its legal liabilities in the account “accrued legal, regulatory and non-income tax related,” totaling \$1,573 million (110).

In its turn, Deliveroo’s operation consists ordinarily of grocery and food deliveries in ten countries, mostly in Europe and the Middle East, plus Hong Kong and Singapore. Its revenue for 2022 was £1,974 million (Deliveroo PLC 2022, 164). Deliveroo lists separately the legal provisions (£129.3 million) and disclosed contingent liabilities (£24.6 million), and provides an estimate for contingent liabilities relating to the regulatory risk posed by worker classification¹ in the range of £50–200 million (*ibid.* at 143). Last, Deliveroo had a gross profit of £643.2 million in 2022 and an operational loss of £242.2 million (149).

This data puts additional perspective to the issue of the (re)classification of workers. If the labor costs in total are somewhat hard to estimate based on the aggregated information provided in the reports, the substantive figures for provisions made for legal, regulatory, and non-income-related taxes put the economic significance of workers’ misclassification in perspective. These figures include taxes that would at least partially be due as a consequence of employment statuses, such as VAT increases (Deliveroo PLC 2022, 143). This perception is enhanced by the fact that the liability figures might seem relatively secondary to each company’s gross revenue, yet they are by no means irrelevant when contrasted with each one’s financial results. While it is true that both companies have maintained an ongoing operational loss since their inception due to prioritizing expansion over profitability, their estimated liabilities are very significant vis-à-vis their results, standing at approximately 86 percent in the case of Uber, and between 84 and 146 percent in Deliveroo’s case.

At least conceptually speaking, whatever result these companies obtain seems to come almost directly from the precarious status of their respective workers. This finding will be highlighted further by a reading of the two cases decided by the Supreme Court of the United Kingdom that dealt with the contractual model imposed by each company on prospective workers.

B. *Uber*

Uber’s court case was initiated by twenty-five drivers based in London, of which Yaseen Aslam and James Farrar were singled out by the Court for employment test purposes. Their goal was for their employment status to be assessed based on their subordinate relation to Uber, which would grant them rights such as the national minimum wage, yearly paid leave, and access to a pension scheme, among others. Uber argued in its defense that it acted as a mere intermediary, facilitating contractual relationships that were formed between drivers and passengers alone, for which it charged a fee, at the time, of 20 percent. *Uber BV v. Aslam* [2021] UKSC 5, ¶¶1, 23–24. The Court found that Uber unilaterally set several requirements in terms of acceptance rates, customer service, vehicle standards, and a series of disciplinary mechanisms that could lead to driver suspension or expulsion in the event of inobservance. *Uber BV* [2021] UKSC 5, ¶¶17–21.

The Court recognized that drivers had agency concerning the decision about when and for how long to work for Uber, all the while pointing out that once work had been initiated, it occurred under Uber’s direction. Subordination was emphasized through five main points retrieved from the appealed judgment:

First, where a ride is booked through the Uber app, it is Uber that sets the fare and drivers are not permitted to charge more than the fare calculated by the Uber app. It is therefore

¹ Uber does not provide a separate estimation for that risk.

Uber which dictates how much drivers are paid for the work they do [94]. Second, the contract terms on which drivers perform their services are imposed by Uber and drivers have no say in them [95]. Third, once a driver has logged onto the Uber app, the driver's choice about whether to accept requests for rides is constrained by Uber [96]. One way in which this is done is by monitoring the driver's rate of acceptance (and cancellation) of trip requests and imposing what amounts to a penalty if too many trip requests are declined or cancelled by automatically logging the driver off the Uber app for ten minutes, thereby preventing the driver from working until allowed to log back on [97]. Fourth, Uber also exercises significant control over the way in which drivers deliver their services. One of several methods mentioned in the judgment is the use of a ratings system whereby passengers are asked to rate the driver on a scale of 1 to 5 after each trip. Any driver who fails to maintain a required average rating will receive a series of warnings and, if their average rating does not improve, eventually have their relationship with Uber terminated [98–99]. A fifth significant factor is that Uber restricts communications between passenger and driver to the minimum necessary to perform the particular trip and takes active steps to prevent drivers from establishing any relationship with a passenger capable of extending beyond an individual ride [100].²

Each of these points was addressed by the Court and is worthy of additional comment. The first point was deemed significant in that it grants Uber full discretion in setting its own commission, resolving disputes that might result in partial or full refunds to passengers, and retaining agency over discount policies offered by the company that ultimately come at the expense of the driver's earnings. *Uber BV* [2021] UKSC 5, ¶29. The second issue highlights the standardized format of the written agreement between Uber and prospective drivers, where, again, drivers had no voice. The third to fifth issues were critical in that they referred to Uber's practices of withholding information such as passenger destination and contacts, Uber's fare structure, and, importantly, Uber's close monitoring of acceptance rates and customer reviews:

Uber argues that this practice is justified because refusals or cancellations of trip requests cause delay to passengers in finding a driver and lead to customer dissatisfaction. I do not doubt this. The question, however, is not whether the system of control operated by Uber is in its commercial interests, but whether it places drivers in a position of subordination to Uber. It plainly does. *Uber BV* [2021] UKSC 5, ¶97. Finally, the Court dismissed the appeal and confirmed a previous judgment from the employment tribunal to grant Yaseen Aslam and James Farrar the status of workers under UK law, a status that is applied when characteristics such as a strict schedule and even higher standards of subordination are not present. In other words, even though the requirements for the recognition of employee status were not met, the Court decided that drivers were not independent contractors. After this landmark ruling, Uber recognized the worker status of over seventy thousand drivers countrywide, initiated a pension plan, and went forward with settlements to resolve similar disputes, although an undisclosed number remain (*Uber Technologies Inc.* 2022, 120–21).

C. *Deliveroo*

Deliveroo's legal case followed a different path. It was not primarily aimed at the recognition of employment status, even though this ended up being the defining factor of the UK Supreme Court's ruling. It was brought by the Independent Workers Union of Great Britain on behalf of affiliated riders in the Camden and Kentish Town area of London. The union's objective was to

² *Uber BV v. Aslam* [2021] UKSC 5, Press Summary, 2–3 (February 19, 2021), https://www.supremecourt.uk/uploads/uksc_2019_0029_press_summary_573bbeb959.pdf. Bracketed numbers refer to the paragraphs in the Supreme Court's judgment.

challenge a decision issued in 2016 by the Central Arbitration Committee following the union's 2016 application, a "quasi-judicial body which, under Schedule A1 [to the Trade Union and Labour Relations (Consolidation) Act 1992], has the power to order an employer to recognize a union and engage in collective bargaining if the conditions set out in that Schedule are met," *Independent Workers Union* [2023] UKSC 43, ¶3, in response to Deliveroo's refusal to recognize the union for the purposes of collective bargaining.

The Central Arbitration Committee agreed with Deliveroo's argument that riders would not qualify as workers according to domestic law, a point that the union contested on the basis that this misrecognition would conflict with provisions found in Article 11 of the European Convention on Human Rights. Permission for judicial review was granted exclusively in relation to the purported conflict with the provisions of the Convention. *Independent Workers Union* [2023] UKSC 43, ¶5. The union challenged the Committee's decision on the grounds that although riders did not work under an employment contract, they did personally provide services to Deliveroo, satisfying the legal requirements set by UK law. *Independent Workers Union* [2023] UKSC 43, ¶20.

After the first hearing of the Committee in the early days of the arbitral procedure, Deliveroo introduced changes to the standard agreement imposed on riders, with the specific purpose of defeating the key arguments of the union. *Independent Workers Union* [2023] UKSC 43, ¶23. These generally concerned disciplinary measures, uniforms, and substitutions. Incidentally, although this circumstance was not made explicit in the judgment, Deliveroo's arbitral procedure was initiated after the first hearing of Uber's case at the employment tribunal. This suggests that some of the core issues at stake could have been singled out at the time and repurposed accordingly in the scope of the standard agreement riders must adhere to, *Independent Workers Union* [2023] UKSC 43, ¶23, a suspicion that is also present in the literature (Woodcock and Cant 2022).

In Deliveroo's case, the Court recognized that the parties had agreed that any future arbitral decision should consider the new version of the agreement, which was mandatory for new riders and encouraged for existing ones. *Independent Workers Union* [2023] UKSC 43, ¶23. New clauses provided, for instance, for the unrestricted right of riders to choose a substitute, and the choice whether or not to log into Deliveroo's app, all without prior approval, *Independent Workers Union* [2023] UKSC 43, ¶24–25, although Deliveroo retained the right to terminate contracts "for any reason" on one week's notice, *Independent Workers Union* [2023] UKSC 43, ¶27.

While the Committee accepted that resorting to substitutes was an exceptional practice among riders, if used at all, its final decision was based on the hypothesis that this right would undermine one of the core requirements of the statutory framework for "worker status," which is to *personally* provide services to another. *Independent Workers Union* [2023] UKSC 43, ¶¶31–36.

The UK Supreme Court upheld that decision, in spite of its observation that UK law provides for compulsory collective bargaining mechanisms. *Independent Workers Union* [2023] UKSC 43, ¶¶81–84. However, because the analysis of conflicts with domestic law lay beyond the scope of arbitration, the Court decided that the case law on Article 11 of the European Convention on Human Rights did not trigger an equivalent compulsoriness. *Independent Workers Union* [2023] UKSC 43, ¶139.

III. A Basic Model for Exploitation

From this reading of both the annual reports and the two court cases, it is possible to infer that the business model used by Uber and Deliveroo relies significantly on exploitation. More specifically, it relies on a multitude of factors that will be seen to hold a synergistic relationship

with exploitation, in such a way as to leverage the position of said companies vis-à-vis their competitors and workers at large. One example of this is Uber's explicit appeal to the precariousness of exploitation at a structural level, that is, as a feature of capitalism itself, when it claims to have reached the "many workers historically marginalized from the labor market" (Uber Technologies Inc. 2022, 9). Deliveroo's report has a somewhat milder and more pragmatic tone in this regard, for instance by basing its labor policies on an undisclosed rider satisfaction survey (Deliveroo PLC 2022, 15).

A common thread in the documents surveyed is the insistence on a set of advantages that workers hold, for example, the flexibility of working for several companies at once and the freedom to choose one's own workload. Conversely, for courts, legislators, and drivers around the world, legal actions have been characterized by the disadvantages imposed on workers by the precarious conditions that flow from a lack of minimum labor standards and other forms of social protection (Davidov 2016). In addition to those readings, an inquiry into who those historically marginalized workers are is revealing. They are mostly immigrants and their descendants, families who have often had to leave their countries of origin under the pressure of poverty, military conflict, natural and human-made disaster, and terrorism, including state-led terrorism (Hua and Ray 2022; Kamasak et al. 2019; Holtum et al. 2022; Berger et al. 2019; Ruhs and Anderson 2012).

The result is a tension between the hypothetical freedom to choose one's own workload and the bare necessity of working for a living. This tension stems from the fact that the freedom to contract, elevated to the status of a paradigmatic choice that is hypothetically capable of legitimizing the deregulation of labor relations, is entirely absent in circumstances where vulnerability takes root (Denning 2016; Lewis et al. 2015). In other words, once the alternatives available to workers are actualized, there is only one option for them to choose from. Their independence is, so to say, grounded in their ability to work *more* (Vrousalis 2022, 30–31).

It comes as no surprise, then, that the gig economy's libertarian rhetoric has been frequently confronted by increased regulation seeking to protect basic human rights and public safety. In the case of Uber, it is symbolic that the freedom to become one's own boss has been curtailed in some jurisdictions, as the company was forced to establish maximum work hours for its drivers once it was discovered that a significant number were working to exhaustion simply to make a living (NYC Taxi and Limousine Commission, n.d.; Berger et al. 2019; Chen et al. 2017). In those cases, the absence of regulation did not result in increased freedom and flexibility, but rather in overwork far beyond generally accepted levels—levels that could be further thematized as *sustainable*, to match the managerial tone that these companies liberally adopt.

This is noteworthy. It is a bold assumption, but an assumption nonetheless, to claim that the main problem here concerns what has been referred to thus far as exploitation beyond the legal threshold instead of exploitation in general. This could imply that an alternative regulatory framework for labor relations could eventually suffice to grant workers adequate living conditions, at least in mature democracies.

This is not at all trivial. There is an abundant literature engaging with how the limits of minimum labor standards have been increasingly overstretched (Dickinson 2016; Ruan 2017; Sissons et al. 2018; Vedder and Gallaway 2002; Wills and Linneker 2014), most notably where unionization rates decrease (Brady et al. 2013). As this literature indicates, we cannot lose sight of the fact that even in the context of the UK and the US, two paradigmatic examples of contemporary capitalism, there is a massive share of people classified as *working* poor. It evinces a state of deprivation that runs against the idea that the problem here is "illegal" exploitation and not exploitation in general.

Still, this distinction matters. In spite of legally compliant labor standards that render the status of working poor enduring, companies like Uber and Deliveroo engage in practices that enable them to impose even lower labor standards. As was seen in the preceding section, those companies necessarily make substantive provision for liability that might arise because of their misclassification of workers' statuses. This indicates that deregulated work, or independent work as they call it, is comparatively cheaper than statutory work, even though the latter may still be insufficient to guarantee an adequate standard of living. Critically, as will be addressed shortly, it suggests that the economic difference between deregulated and statutory work is available for appropriation by these companies, who profit from it at the expense of the workers themselves, reproducing on a superlative scale the general mode of exploitation extensively studied in critiques of capitalism at least since Marx (Marx 2019; 1981; Veblen 1899; Luxemburg 2015; Commons 1924; Harvey 2004).

Maintaining workers in a position of accentuated precariousness, it seems, feeds into the so-called gig economy's motto of providing services *on demand*, a demand that is met by exacerbating the offer of labor that comes not from the companies but from impoverished persons who must work long, underpaid shifts just to meet their basic needs in an increasingly unequal society (Francis-Devine 2023). For no other reason, the gig economy has been characterized not as a threat to labor in itself but as a mode of exaggerated exploitation that remains on the fringes, preying on the most vulnerable without being able yet to claim widespread protagonism (Fleming et al. 2019).

With this corrective in mind, the following subsections will sketch a basic model for the repurposing of exploitation as an asset open to appropriation. This will become particularly pronounced once exploitation is considered by the court in the process of labor litigation. It will be followed by the proposition that it is a key feature of the current legal framework to embed these modes of exploitation in a patterned way: through the deployment and self-reproduction of legal forms characterized by a historically specific mode of cognitive deficit further conceptualized, with Luhmann, as an expression of the contingency of the legal system.

A. First Argument: Iteration Between "Leverage On" and "Hedge Against" Harm Caused

The first hypothesis that frames exploitation as an asset is the idea that the exploiter leverages the extraordinary profits made from harming the exploited (that is, in excess of what is legally compliant), by using these profits to concurrently hedge against the imposition of legal responsibility for causing those same harms.

In an ideal scenario, rational agents would not unduly exploit workers provided adequate regulation were in place (Vrousalis 2022, 103–04). This, of course, only holds if we assume that what the law says is more of an expression of the socially desirable outcome than what the law does, in a way that could reject the actualization of exploitation based on provisions derived from the letter of the law. If this were in fact the case, any anomaly would be treated accordingly by the legal system so that the average outcome would, within a reasonable timeframe, follow a pattern of law abidance. In the same sense, it would be impossible, or at least impracticable, to benefit twice from the profits of undue exploitation, as any penalties flowing from unlawful practices would be effective enough to render at least a net-zero outcome out of the legal infringement.

In other words, adequate remedies would negate the benefits of exploitation. However, assessing legal remedies in terms of their efficiency vis-à-vis exploitation at large does not correctly address the problem here once the dynamic of exploitation is fully taken into account—or at least would address it only against the insurmountable cost of acquiring and processing relevant information.

There are two core issues at stake when it comes to the leveraging of the position that one has attained through exploitation, both of which will be further discussed below. The first is temporal specificity. The double use of exploitative profits is enabled by the deferred liquidation that affects both harm and responsibility. Said differently, the temporal mismatch between accruing profit from exploitation and having to compensate for that is *in itself* profitable—if anything, through interest. The second concerns the normalization of residual profits once a court case is settled. Through due process, it will be argued, the net profit of exploitation will be rendered legal in spite of any original illegality it might have had, that is, due to workers being exploited against the law. Against payment, exploitation is then normalized and possibly integrated into a society's stock of capital so as to enable further rounds of exploitation (Luxemburg 2015, 260–61).

It will be advanced in the following section that the cognitive contingency of the law plays a decisive role in both issues, as it draws on cognitive barriers in law that are not specific to this or that court case. Rather, it will be seen to relate to the transformation of facts in the world into legal facts, in a manner that renders the law compatible with the political economy of capitalism in itself. Like a cat-and-mouse game, exploitation unfolds in constant tension with extant legislation. Apart from the self-evident nature of the argument here—undue exploitation is illegal in the first place—this is particularly noticeable in both Uber's and Deliveroo's assessments of risks and liabilities, as discussed above. That is to say, the companies themselves recognize that there is a standing risk that accompanies exploitation, expressed in terms of eventual challenges to their interpretation of worker statuses. As such, it can also be said that exploitation offers these companies an edge. In the particular case of Uber and Deliveroo, it reveals itself as a competitive advantage that operates in favor of entrant companies in a highly competitive market. Similarly, in a more mature market, where statutory work is the norm, there could be no doubt that lower labor costs would offer a company a decisive competitive advantage.

Temporal specificity plays its part when the precariousness of this competitive advantage is considered. While it allows for an extraordinary flow of profit, exploitation increases the company's exposure to legal risks. Still, whatever consequences might follow, they will arrive only at a later stage. Hence, responsibility is deferred, delayed, and, importantly, conditional. Only if courts decide in a particular way will responsibility follow. Profit, on the other hand, accrues almost immediately. Workers perform their roles in the present and turnover promptly follows. It seems reasonably safe to assume then that, though neither company could cushion the blow of a major court award in the early years of their operations, they could likely absorb the loss once they have reached such large, multinational scales, with the facility to cross-subsidize local operations. Like interest over whatever source of capital these companies obtained, the economic cost of exploitation emerges post factum, after years of distributing profits,³ lavishly paying executives, IPOs, stock market speculation, and so on, all of them profit-extracting activities that would not exist without initial and ongoing exploitation. In addition, any remaining liability will likely remain limited to the companies' own assets, providing additional insulation for capital from the inherent risk that frequently justifies its premium.

B. *Second Argument: Court Awards and the Normalization of Extraordinary Profits*

The second argument posits that the gains flowing from exploitation that persist beyond court awards will become lawfully integrated into the social stratum. This requires further scrutiny, particularly on efficiency grounds. For instance, if we consider a scenario where a company profits

³ Although for tax purposes there was no profit distribution in the case of Uber and Deliveroo as per their annual reports for 2022.

x amount while exploited workers have a credit worth y , a court award that yields $x > y$ would effectively legalize the extraordinary profit, thereby removing the precarious status derived from the illegality of its source. Consequently, provided that the regulatory framework is calibrated to achieve socially desirable outcomes, measures can be implemented that ensure that court awards prevent the possibility of illegal profiteering from exploitation. This might include provisions on penalties, remuneratory interest rates, court fees, or other economic disincentives aimed at ensuring a net result where $x \leq y$. In cases where such measures are effective, any gains derived from undue exploitation would be nullified, leaving nothing to be embedded in society.

A closer look, however, reveals this to be a naïve argument. If exploitation were indeed to be positioned as a core strategic element for labor-intensive companies to emerge, reversing the gains made from illegality would likely amount to bankruptcy or some sort of disgorgement *ad absurdum*, dragging with it investors and actors that could otherwise be said to act in good faith. Scholars of Law and Economics would likely read this under the lens of efficient breach, suggesting that disobeying legal provisions against payment could be acceptable in circumstances where nonperformance could be shown to increase welfare, in other words, an increase in the generation of wealth (Macneil 1982; Posner 2014). After all, the often-called “simple theory” of efficient breach claims that “[a] contractual duty is a duty to perform or pay damages because, having priced breach correctly, the law wants the promisor sometimes to choose breach” (Klass 2014, 362).

The rejection of the argument on remedies is equally straightforward: remedies that could sufficiently address the issue of exploitation from the perspective of workers would ultimately result in higher prices (Klass 2014, 381). Companies would factor in the legal and regulatory risks just as they did in their liability accounts examined above, translating such increased risk perception into market prices. If exploitation were to be removed altogether from the realm of possibilities, so would at least a significant part of companies’ competitive edge, rendering their current operation unsustainable. For these reasons, whenever social interest so demands, the violation of *some* rights will not be enforced by prices at large, but through what was canonically defined as inalienable entitlements (Calabresi and Melamed 1972). In other words, if this were in fact the goal of the legislator, structural violations of labor law would not be addressed primarily by court awards but bluntly forbidden and even criminalized.

This is not the case. As the court cases indicate, the law responds sparingly despite the scale of legal infringements. The notion of profit resulting from undue exploitation considered only what labor regulations required as minimum standards that were not paid accordingly. It dealt with a large collection of individual legal incidents, not a well-thought-out practice, carefully crafted for the purpose of creating a competitive advantage, as was inferred from the annual reports. In such cases, whatever benefits endure beyond the court award—especially leverage—will be permanently embedded by virtue of the structure of rule-of-law operations that interdicts exploitation from reexamination. The judgment, in these cases, will mark the boundaries of a legal enclosure that is deemed normalized once appeals are exhausted.

Hence, how the cognitive threshold of the law operates in the process of consubstantiating courts’ interpretive frameworks is absolutely critical. This issue sits at the core of the argument advanced here in relation to efficiency-oriented legal analyses. It will be dealt with accordingly in the next section, highlighting not only the role of the law’s cognitive boundaries but also the relevance of strategically *deploying* those boundaries in such a way as to legally ensure irresponsibility remains unfettered (Veitch 2007).

IV. Three Movements of Contingency Within the Process of Exploitation

So far, this article has argued that labor-intensive companies could benefit from exploiting workers by leveraging the underpayment of wages to create a competitive advantage, using said profits to hedge against liability and ultimately whitewashing residual gains through the court system. This section focuses on exploring the law's contribution to the embedding of this mode of exploitation as a *feature*, arguing for a relationship of performance between the legal system and capitalism proper. It does so by adopting as a frame of reference Luhmann's conceptualization of contingency in relation to the legal system. As a theory-focused analysis of the role of legal contingency within capitalism has been provided elsewhere (Astone 2024), the goal here is to briefly introduce and subsequently test the key sites where the cognitive contingency of the law plays a role—perhaps decisively—in informing the structural maintenance of injustice and exploitation.

Luhmann explains that cognitive contingency, akin to the breadth and depth of a discrete piece of information as it is internalized by a given system, is foundational for social systems. It relates to the cognitive threshold a system self-imposes as a means of managing the level of complexity necessary for subsequent, intrasystemic operations (Luhmann 2013, 83–84). This renders systems operationally closed while remaining cognitively open, provided they are capable of filtering environmental noise and formulating endogenous information, in other words, information that is internalized and unique to a given system (*ibid.* at 84). Complexity, says Luhmann, is closely related to rationality, as the rational move decides which elements of a certain scenario will be singled out, simultaneously restraining the relations formed between those elements, which can then be considered in the scope of further operations. In this context, to be rational equates to the ability to formulate premises for decision-making, constraining the interpretive frame of a given system in a way that is productive for the internal generation of further complexity (123–24).

Rational premises, in this sense, attempt to insulate a system against an overflow of environmental complexity, all the while providing for further internal complexity in a way that is conducive to the self-reproduction (autopoiesis) of a social system, that is, the reproduction of a system by and under its own premises (Luhmann 2013, 136–37). This formulation equally informs the double distinction between the system and the environment where a system is situated, in that the environment cannot be overburdened by system-generated complexity. In this sense, despite their specialization, social systems must not be understood as simplified versions of the environment. System and environment are therefore codependent in a nonhierarchical, nondeterministic fashion (*ibid.* at 121). This renders the grasp of contingency particularly noticeable in the forms that negotiate the structural coupling between systems, and between systems and the environment (198). Luhmann has written extensively on this matter, and it is impractical to describe here the level of nuance structural coupling might reach in our contemporary, functionally differentiated society (Luhmann 2012). Consequently, for reasons that are as rational as they are contingent, this section will focus on the layers of cognitive limitation imposed by the legal system, in order to subsequently discuss the ways in which these layers become productive in the scope of exploitation.

Three aspects have been singled out here to engage with the critical interventions found in an engagement with the thresholds of the law's cognitive contingency. The first concerns the deficient assessment of the range of choices available to vulnerable workers when they act as contracting parties in labor relations, in other words, their so-called freedom to contract and the relevance of this allegory in supporting the primacy of contractual terms against the phenomenology of work. The second is the overall approach to liability, understood as a legal-economic assessment of the difference between legal prescription and factual outcome (and vice versa) in such a manner that

ignores the material consequences that undue exploitation entails, tracking closely the arguments laid out in the preceding section. The third, raised thus far *en passant*, refers to the double contingency of the judgment, accounting for the reduction of complexity taken as an input to court reasoning and the output of devolved complexity. It will be shown to interfere synergistically with elements left out of the selective constraint of legal contingency, suggesting some level of epistemological interpenetration, or at least signaling that the framing of legal contingency is less clear-cut and temporally delimited than it appears.

A. “Freedom” to Contract

Within the realm of labor relations, the grasp of cognitive contingency is particularly noticeable in the canonical assumption that parties are free to contract. The necessary interrogation here is obvious—what exactly does *freedom* mean in this context?—whereas the standard response will come accompanied by an adjective: What is at stake is *formal* freedom. Granted, whenever imbalances can be sufficiently accounted for, safeguards tend to be in place so that formal freedom is not deployed in every circumstance without regard to the parties’ ability to exercise *actual* freedom. Discretion is densely modulated by law, as can be exemplified by the freedom of choice in the contexts of consumer, refugee, and child law. The very existence of minimum labor standards denotes that workers in general are also considered deserving of a kind of protection not necessarily provided for by the general framework that characterizes subjects who are just *formally* free.

On a different note, as the court cases indicate, much of the analysis concerning the statutory classification of workers is based on a series of tests to attribute subordination, even though work itself remains undisputed. The way these tests are deployed marks one of the epistemological disconnections between the vivid experience of exploitation and its legal assessment.⁴ Uber drivers were considered workers since there was a host of business practices placing them in a condition of subordination. Deliveroo riders were *not* considered workers because the contracts they had with the company allowed for their free choice of a substitute, even though the UK Supreme Court expressly recognized that this substitution clause was rarely used.

Careful readers of the court documents will rightly point out that that distinction is not necessarily as trivial as this reading might suggest. Uber indeed had a stronger hand in laying out driver policy than did Deliveroo, which, as the judgment itself recognized, incrementally changed its rider agreement during the arbitral procedure to counter preliminary findings suggesting the violation of labor protection. *Independent Workers Union of Great Britain v. Central Arbitration* [2023] UKSC 43, ¶23. From a formalist perspective, Uber drivers do seem to be *more subordinated* than Deliveroo riders. In other words, what is being disputed here is not the outcome of particular cases, which serve first and foremost as illustrations, but the fact that what characterizes work is not the act of working, as much as what characterizes subordination is the layout of a hierarchical relation.

Here again, Law and Economics scholarship offers an ample tool set to prescribe alternative framings of the problem under the guise of efficiency. Chicago School scholars would say that there is no way, at least in principle, for regulatory bodies to properly assess the intricacies of a market economy and intervene in such a manner as to outperform the efficiency-oriented features of the free market (Coase 1960; 1998; Demsetz 2008; Williamson 2010). As they advocate, agents have a bounded rationality, which is particularly relevant when state intervention comes from a few public sources to circumscribe actions undertaken by a host of private actors. This is paired

⁴ “What registers in law as a wrong? This question has a deceptively simple answer: what registers in the law as a wrong is a breach of the law” (Veitch 2007, 92).

with the reality that the distribution of information is highly asymmetric and the retrieval of that information is costly, sometimes prohibitively so. At the same time, still thinking in terms of efficiency, it could be speculated that companies would not normally exploit workers to exhaustion, as it would run against their own—the companies’—best interest. After all, workers are also deemed rational agents who, in a market with low enough transaction costs, are free to leave an exploitative job if they so wish. Last, deviant actors would be outperformed by more reasonable companies attracting the best workers and efficiently increasing output and/or profitability. Against this backdrop, it can be said that it is not the fault of private actors that workers choose to work under exploitative conditions; if the choice is either being exploited or perishing, the former is still self-evidently rational (Veitch 2007, 69–70).

To put it differently, by denying recognition of the status of workers in this situation, the court ruling could amount to saying that drivers and riders can actually choose—freely—between different companies and activities, and importantly, can afford not to work if no reasonable alternatives are present. This is, against better judgment, what freedom to contract should amount to. If the option not to be exposed to deregulated, exploitative work conditions is not present, what is at stake cannot be said to be freedom. It is only because the allegory of freedom of contract is taken for granted—as a cognitive premise, a demarcation of the threshold of legal contingency—that courts might undertake the analysis of discrete rules to determine if workers are being exploited too much, or even just enough for them to not be referred to as workers in the first place.

Hence, the point here is to stress that a set of factual conditions can be purposefully sidelined in the scope of court awards and legal reasoning more generally, to allow for an outcome that is legally sound despite being factually partial (Veitch 2007, 103). It is thus no surprise that the cognitive contingency that is characteristic of social systems impairs facts selectively (Astone 2024), marking an irrecoverable difference between lived facts and legal facts. However, it is less obvious that such selectivity is productive, or even essential for the extractive trend of labor relations to endure.

B. Responsibility, Discrete Versus Structural

The second movement of cognitive contingency deals with the substantive difference between, on the one hand, responsibility, understood as the duty to repair born out of the tension between the fluid event that is exploitation and its time-specific legal consequence, and, on the other, the collection of benefits that exploiters can extract. In a conventional sense, addressing instances of systemic responsibility would normally take place when collections of discrete, intersubjective instances of violation are addressed in the scope of regulation broadly understood—for example, antitrust and collective rights—as a means to protect society or “the economy” against abuses of power in its different conformations. This is not disputed here. Instead, the locus of contingency in this particular case lies once again in the limits of law’s cognitive premises: How far ought legal reasoning to go when it is asked to address the material consequences of exploitation?

One might take issue with the abuses of the right to exploit within the limits set by law from a variety of angles. Still, from the perspective of a strict adherence to legal rules, exploitation in general remains at least in principle lawful. Conversely, by deploying a teleological justification, it could be argued that the rules as they stand are unjust, for instance, to the extent that they run contrary to human rights. However, there is no denying here that both Uber and Deliveroo appear to have followed due process and that, in the case of Uber, whatever outcome the court award had was paid out accordingly; if not, again, courts could step in and address issues of nonperformance.

However, apart from circumstances of legal interpretation that could be deemed marginal vis-à-vis the very concrete problem of exploitation, such rules could hardly be considered unlawful.

In the judgments, the issue of exploitation was framed in terms of whether an intersubjective relation exists that conforms with the statutory definition of a worker. Importantly, this framing was not a matter of necessity. It could have been described differently, for example by addressing the reliance on exploitation as a means of creating a competitive advantage that allows companies to increase their market share at the expense of workers themselves, competitors, and society at large. For the sake of this argument, it does not matter whether this would exceed the remit of the employment tribunal or even the Supreme Court, nor the scope of the case under analysis, of state intervention, and so forth. The issue here is that from a set of facts that inform the conditions of possibility for exploitation *in general*—that is, deprivation, inequality, and other legally informed forces that render workers exploited as a consequence of their structural precariousness (Veitch 2007, 68)—a limited few were singled out for the purpose of legal reasoning. It is important to stress this: The aim here is not to take issue with a specific court decision but rather to highlight that legal reasoning is, by its own nature, contingent. The cognitive contingency portrayed here allows for the structural aspects of exploitation to remain unaddressed, sidelined by a discrete legal analysis that will subsequently insulate exploitation proper from further examination.

This principled contradiction offers a baseline for the analysis of exploitation. Legal endowments are distributed in a certain way, while some believe they ought to be distributed differently. This is certainly valid and legitimate, yet it does not offer easy access to the operations happening at the level of legal reasoning that could embed exploitation not as an aberration but as a feature of capitalism. In this sense, under a strictly dogmatic approach, there is arguably nothing unlawful in the conduct of Uber and Deliveroo *anymore*, once that illegality is addressed by the courts and the debt is paid. But there was.

Being able to breach the law without facing the consequences in due course—in other words, in such a manner that could effectively hamper unlawful acts—is no less a productive deployment of legal contingency. The disassembling of the structural dimension of liability into numerous individual cases, neatly situated in time, counters the compound effect that exploitation has. It is conducive to the resolution of a legal problem under economic terms: how much one owes someone else, brought to present value. Put differently, if workers who were underpaid are now sufficiently compensated, the legal dimension of the problem is satisfied, rendering whatever was deemed illegal now legalized by means of a sufficiently calibrated court award. As long as the issue is evaluated in terms of disaggregated infringements of labor regulation, evening out the economic representation of harms will bring the illegal benefit obtained from undue exploitation to a halt.

However, the contingent effect observed between harm caused and the respective compensation is time-specific to the extent that it superficially brings to a halt a scenario of legal abuse without dealing with the full scope of its consequences. It *declares* the legality, against sufficient compensation, of a previous illegality that will still produce structural effects. Not only will these structural effects remain unaccounted for; the fact that illegality was erased could amount to rendering those effects legally invisible, though certainly not unfelt. By deploying the scope of legal cognitive contingency in a manner that disregards the structural effects of exploitation, the legal system contributes to rendering them *stable*, as will be seen shortly with Luhmann. Bluntly speaking, the possibility of legal intervention is withheld in relation to something the law simply cannot register.

C. *The Management of Complexity*

Leverage on the profits of undue exploitation was possible, at least in part, because of a framework deployed to obtain a certain configuration of legal facts from the much more complex set of social facts and to process them accordingly. Similarly, the level of complexity generated in the scope of legal communications had to be reduced before it was returned to society, that is, to the environment of the legal system. This subsection addresses the management of complexity by the legal system as the third and final debate on contingency. It will engage the latter as a moment of selective forgetfulness that is above all else historically specific and generative; in the case under analysis, generative of opportunities for unwarranted appropriation.

As a starting point, it is logically impossible to expect a legal assessment that openly disregards the unity of social facts during its input phase to be capable of accounting for the totality of social consequences once it reaches a legal conclusion. This by no means implies that it ought to be otherwise—that is, to altogether negate cognitive contingency, which is a feature of social systems rather than a problem waiting to be solved—but rather to recognize the limits of legal assessment regardless of any further normative implication.

Another angle from which to approach this problem is in terms of the interpretive enclosure effected by the law's cognitive contingency as it operates in the process of dispute resolution. Whenever a social event is translated into a legal event, cognitive contingency obtains. For law to manage the complexity of social life, as in any social system, simplifications are necessary. It comes as no surprise then that one of Luhmann's most elementary references to the concept of a system's cognitive contingency is framed as "meaning selection constraint" (Luhmann 2012, 25). In terms of the main issues discussed thus far, the phenomenology of exploitation will invoke a cohort of elements of emotional, cognitive, cultural, and physiological significance—among many others—yet its legal depiction will be reduced to a limited preestablished few. The difference between the two is therefore unprotected, subject to a power game that occurs concurrently *because of* and *despite* legality proper.

Luhmann referred to elements situated on the negative side of cognitive contingency as the unprotected counterpart of whatever meaning is being communicated (Luhmann 2012, 25; 2008, 209). Because it has escaped the selection proper—after all, cognitive contingency is meaning *selection* constraint—it exists in a stable state, whereas whatever was appropriated in the communicative process will be liable to further transformation (Luhmann 2008, 209). However, this stability is partial (Astone 2024). In cases like exploitation, the remainder of cognitive contingency still rests within the subject. Even though experience was just partially taken into account in the scope of legal reasoning, whatever remains cannot be un-lived or unexperienced. Conversely, the outcome of a legal award might indeed interfere with and even attenuate the experience of being exploited, yet the factual remainder that there was exploitation in the first place bears witness to the stability of whatever aspects of the world the legal system failed to register.

The notion of becoming unprotected beyond the phase of meaning selection constraint has a perverse side effect. Since it is unprotected, as something that is not only unknown but eventually ignored altogether by legal reasoning, the excess of harm suffered that remains unaddressed may be subject to appropriation. On the one hand, the harm suffered is irrecoverable from the perspective of the exploited; on the other, the judgment that attributes an economic award to exploitation places a price on suffering. This amounts to the legitimation of exploitation as a sort of forced labor arrangement that is everything but illegal, since gains derived from illegality will be ultimately paid for even though its phenomenology endures. Therefore, exploitation is free to

reemerge following a distinctively capitalist “see you soon” that will further entrench inequality and feed into incoming cycles of accumulation.

As such, the cognitive impairment of contingency lends itself to the metaphor of a bowtie, as a mirroring of double contingencies characterized first by an instance of complexity reduction, and subsequently by a flow of devolved complexity, two stages that are conjoined by legality to project effects that extend beyond its foundational epistemological grasp. In light of the examples studied here, this issue could be depicted as the metatrial of exploitation, a trial that endures as long as it is circumscribed to the legal reductionism of lived facts, agnostic to power imbalances and cognitive biases. To the same extent that the factual input vis-à-vis the complexity of exploitation ought to be reduced before being manipulated by the legal system, the latter will return the coded event of exploitation to society with the aim of interfering not only with selected facts but with the unity of the event exploitation. In short: Law reads a partial picture of exploitation but aspires to answer to the issue as a whole. Such a unity, Luhmann explains, is unachievable (2013, 3).

There is an inherent irrecoverability of the past vis-à-vis the present in the deferred approach that characterizes conduct and consequence. Widening the scope of legal protections, either preemptively or in the form of post factum court awards, would likely fall short of the aspiration of delivering a just outcome other than providing a sense of justice that, if anything, would reveal itself as second best. Whatever the outcome of a particular court proceeding, it will necessarily leave at least some aspects of the experience of exploitation unaffected. Nothing can remedy its phenomenology in full; once it has happened, it has happened. Even though we could hope for a more attentive framework for legal interpretation, the core issue concerning its time specificity remains. On the other hand, the affected persons exist in a state of structural disadvantage, weakened by the lack of alternatives, precarious social integration, and bare necessity. This severe state of inequality escapes the sensibilities associated with the status of formal equality that is expected in contractual relations. As seen above, for almost all relevant legal purposes, whoever engages with Uber, Deliveroo, or whichever company is offering an exploitative labor framework is doing so by *choice*.

Thus, exploitation suffered cannot be actualized properly without the departure from this individualizing and deferred perspective if the purpose is to achieve a meaningful sense of redress, as it remains incapable of targeting the embeddedness of ongoing bouts of accumulation and the consequent inequality they foster (Christodoulidis 2021). Taken to an extreme, if exploitation were to be fully outlawed at this very moment, the allocative effects it has generated thus far would remain beyond the reach of the law, because the analytic framework remains heavily skewed toward intersubjective relations. Even in this seemingly extreme scenario, the gamble of illegal exploitation would have paid off once again. Following this trend, the next section will engage with the deficit of accountability that comes about under the current operative framework of the law’s cognitive contingency.

V. Conclusion: Contingency and Irresponsibility

Following what has been advanced in this article, the court award that resolves issues of exploitation will irradiate beyond the legal facts that consubstantiated a given claim, capturing elements outside the interpretive framework of legality all the while marking them with the code legal/illegal (Luhmann 2008, 93). Whatever excess remains—aspects that were phenomenologically impaired by exploitation but escaped the first instance of its legal register—will be available for appropriation by the exploiter, who will then do so *legally*. Exploitation is about taking away unwarrantedly, and if it is not exploitation proper that is put on trial but its contingent

caricature, then whatever escapes this framing is liable to a mode of appropriation that is no longer fenced by the standards of legality.

It has been discussed elsewhere that an important distinction between the allocative effects informed by legal-economic operations might be summarized as the separate allocation of property rights (that is, as legal entitlements, rather than conventionally understood rights to property) and asset ownership (Astone 2024). In light of the reasoning and outcomes of the court cases addressed above, it seems reasonable to argue that labor litigation lends itself to privileging the latter not only at the expense, but precisely to insulate the former. In other words, the compensation of legal violations occurs at the level of asset exchange, that is, who pays whom, all the while shielding the infrastructure of expropriation represented by deeply rooted property rights from legal scrutiny. The law does so by partially addressing the complexity that characterizes exploitation, from the social to the intersubjective level, outputting decisions that are tantamount to the mere transfer of resources that keeps the persistent violation of a broad spectrum of rights unfettered. But the legal system does not inquire into who the *owner* of labor is. Rather, it is satisfied with the arbitrary, second-level arrangement that is the distribution of property rights over the asset labor.

On the one hand, exploiters have increased the scope of their legal entitlements disproportionately, beyond the immediate economic damage inflicted on the exploited through the misclassification of their worker status. On the other hand, those who have suffered exploitation have experienced an impairment of legal entitlements that cannot be measured simply by the economic value of a court award, but must also be understood in light of diminished opportunities, peace of mind, time with family, and other losses whose cumulative effect is to reproduce dependence, vulnerability, and renewed exploitation. This compounded intersubjective harm has a further consequence, which is the creation of a status of vulnerability that allows for subsequent cycles of exploitation—legal and illegal—to endure. Importantly, any sense of causality that could otherwise be restored between capital accumulation on the one hand and exploitative suffering on the other remains interdicted:

The invisible hand [of irresponsibility], here, does not do the work of bringing together that which was separate, but performs the contrary role: it is as if an invisible hand keeps *apart* all of these mechanisms so that, when seen from the *perspective of the experience of suffering*, there will be *no* aggregation possible—no aggregation that would reconnect that experience with its causes. Here *disaggregation* is, and endures as, the norm. (Veitch 2007, 73)

As such, the profoundly asymmetric interaction between exploiter and exploited is at best resolved in terms of a credit-debit outcome. Underpaid workers receive whatever monies they are due, rendering normalized through omission the host of ancillary consequences that exploitation entails. The event *exploitation* vanishes, being replaced by its economic equivalent also in its temporal dimension. If, and only if, the credit contract that is exploitation becomes justiciable, this will only happen a number of years after its factual origin. The lapse between the harmful event and the invariably belated reparation is in itself harmful, as it actualizes an enduring process of expropriation that is necessarily irrecoverable in terms of its unity. As such, the exploitative impetus is rendered doubly protected: once by the possibility of buying out the exploited, twice by its delayed response. Remarkably, both elements further the harm caused by exploitation in itself, even though it is little surprise which party will bear the consequences of an issue that is as diffuse as it is pervasive.

Yet legality itself remains unaffected. The mosaic of harms that characterize exploitation *is not* illegal per se. Leverage through exploitation, as a process, is at once created, mediated, supported, and obscured by law. The rendering of exploitation as a legal process allows for the *justification* of

the act of exploiting whenever this is done within *reason*, in other words, within the boundaries set by law, selectively issuing reparations and attributing piecemeal responsibility (Veitch 2007, 21–22). Establishing the threshold for reasonability amounts to the determining of the premises against which exploitation will be measured. This is to say, the premises that will filter the noise found in the complexity of the social and segregate the elements and relations deemed relevant for further analysis by the legal system.

This can be seen in the cases addressed here, where Uber and Deliveroo profited from exploitation, leveraged their positions, and grew into listed companies with solid market participation in a range of countries. As their annual reports indicate, if there were legal issues along the way, those were either paid, appealed, or financially accounted for. Whatever normative dispute remains is obscured by the circumstance that their operation is legally compliant, as most likely is the massive capital it mobilizes, reproduces, and accumulates. As Veitch explains, commenting on the mass harms caused by the US and the UK in the context of the sanctions on Iraq:

If this were to be so, then it would be because the law would be functioning as a kind of amnesiac, a guarantor of total impunity in a very specific and powerful way, one in which law dominated entirely in terms on which responsibility could be made possible. Displaced onto the realm of impersonal legal regulation, no person or government would *be* responsible, the status of the sanctions' legality even dispensing with the need to claim that the policy was *justifiably* bad in terms of its outcomes. The question of *irresponsibility* would, accordingly, only arise as a function of perspective or standpoint: what would seem, from one perspective, to be profoundly irresponsible would, from another, not raise the question of responsibility at all. But from the perspective of those who suffered, this second reading would be *even more* irresponsible than the first, since it would make the very question of responsibility vanish entirely. And this is the crucial point, because here, in other words, the matter of legality itself would operate at once to put beyond measure the excesses of the consequences *and* make those excesses impossible to register in terms of *any* normative response.

This (as we might call it) categorical mode of disavowal operates as a form of preclusion that bars certain forms of experience and criticism from even being acknowledged. (Veitch 2007, 22)

Stressing some of the theoretical boundaries of labor litigation, as was advanced here, contributes to demonstrating that the dogmatic pursuit of the law that has been violated in effect reinforces the structural problem as much as it finds an imperfect solution (Veitch 2007, 71). The two excerpts from Uber's reports in Part II, where it read that the company engages mostly marginalized workers all the while progressively reducing their wages and the very need for their labor, were selected because each of them, as well as both statements taken together, are paradoxically true: Exploitation unfolds simultaneously as a necessity and as deprivation. Workers do need to rely on "independent" work—in the sense of deregulated, unprotected work—against the promise of higher rates of pay and the flexibility to have an extra job. Upon closer inspection though, those so-called independent workers, exposed to the precariousness of their circumstances and a sheer lack of alternatives, experience lower wages, longer hours, and a virtual lack of welfare protection (*Uber BV v. Aslam* [2021] UKSC 5, ¶101; Berger et al. 2019; Fleming et al. 2019). Because there is an absolute *need* to work, these workers can be deprived *further*.

Yet legal protection is profoundly selective when it comes to assessing the collection of facts that relate to the experience of being exploited, along with the consequence of its strategic deployment from the perspective of the exploiter. The *determinate abstraction* of the law, as Althusser puts it

(Althusser 2014, 70), is everything but deterministic. The legal arrangement that cyclically provides for, embeds, and protects the vile gains that come from exploitation is historically specific, and, as such, it lends itself to political dispute. Throughout this article, due caution was taken to specify the limits of *legal* contingency and court awards to preserve the possibility of engaging with the law reflexively—and politically, disputing its interpretive framework and the self-referential boundaries of its contingencies (Christodoulidis 2021). These are, after all, some of the core strategies pursued by drivers and riders themselves (Adams 2023; Quondamatteo and Marrone 2023).

The law's cognitive contingency and its role in organizing irresponsibility are intimately linked when it comes to the disaggregation of harm and accountability, a combination that is anything but occasional. It suggests that the interpretive and temporal specificities of legal awards, features that were shown to be significantly affected by a nondeterministic form of contingency, could play a relevant part in the cycle of capital accumulation normally referred to as *primitive accumulation*, by renewing and reinserting illegal and ultimately immoral gains as *capital* in the hands of capital owners (Luxemburg 2015). Irresponsibility, then, can be interpreted not simply as the disavowal of discrete responsibility proper, but as a structural mode of legal reasoning that inscribes misrecognition in the very code of society, doing so through the denial of the legal entitlements of a multitude experiencing quotidian acts of disrespect that remain unaccounted for.

It can be said, then, that the legal resolution of labor disputes acts as a caesura, an ephemeral glimpse of legality that obscures the inhumane contradiction of exploitation and legitimizes its perverse distributive outcomes. The outrageous human dimension of exploitation *must* be suspended; it demands a pause, an act of silencing that renders it rational and sustainable, that pacifies systematic expropriation with the support not of the law per se, but of a specific configuration of law that could be otherwise.

In the face of exploitation, the law's cognitive contingency and the resulting framing of irresponsibility stage a tragedy that is prematurely interrupted. If deliverance is ever to be expected from courts of law, it is critical that the catharsis of exploitation remain unsettled and as such, achievable. A structural reading of legality reveals that to nurture hope for change, it might be necessary to engage immanently with the law and challenge it on the grounds of the political struggle that it manifests. Thus, while we may sorrow over the tragedy of exploitation, it is our moral duty to prevent it from ever being actualized as farce.

REFERENCES

Adams, Zoe. 2023. "Legal Mobilisations, Trade Unions and Radical Social Change: A Case Study of the IWGB." 52 *Industrial Law Journal* 560.

Althusser, Louis. 2014. *On the Reproduction of Capitalism: Ideology and Ideological State Apparatuses*. Verso.

Astone, Daniel Pinheiro. 2024. "Ablegality: A Primer on Systems Theory as a Critical Legal Framework." SSRN Scholarly Paper No. 4809723. Social Science Research Network. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4809723.

Berger, Thor, Carl Benedikt Frey, Guy Levin, and Santosh Rao Danda. 2019. "Uber Happy? Work and Well-Being in the 'Gig Economy.'" 34 *Economic Policy* 429.

Brady, David, Regina S. Baker, and Ryan Finnigan. 2013. "When Unionization Disappears: State-Level Unionization and Working Poverty in the United States." 78 *American Sociological Review* 872. <https://doi.org/10.1177/0003122413501859>.

Calabresi, Guido, and A. Douglas Melamed. 1972. "Property Rules, Liability Rules, and Inalienability: One View of the Cathedral." 85 *Harvard Law Review* 1089.

Chen, M. Keith, Judith A. Chevalier, Peter E. Rossi, and Emily Oehlsen. 2017. "The Value of Flexible Work: Evidence from Uber Drivers." Working Paper No. 23296. National Bureau of Economic Research, June. <http://www.nber.org/papers/w23296>.

Christodoulidis, Emiliós. 2021. *The Redress of Law: Globalisation, Constitutionalism and Market Capture*. Cambridge University Press.

Coase, Ronald H. 1960. "The Problem of Social Cost." 3 *Journal of Law and Economics* 1.

Coase, Ronald H. 1998. "The New Institutional Economics." 88 *American Economic Review* 72.

Commons, John R. 1924. *Legal Foundations of Capitalism*. Macmillan.

Davidov, Guy. 2016. "The Status of Uber Drivers: A Purposive Approach." SSRN Scholarly Paper No. 2877134. Social Science Research Network. <https://papers.ssrn.com/abstract=2877134>.

Deliveroo PLC. 2022. *Our Path to Profitability: Annual Report 2022*. Full Accounts Made Up to 31 December 2022 (filed May 9, 2023). <https://find-and-update.company-information.service.gov.uk/company/13227665/filing-history/>.

Demsetz, Harold. 2008. *From Economic Man to Economic System: Essays on Human Behavior and the Institutions of Capitalism*. Cambridge University Press.

Denning, Michael. 2016. "Wageless Life." In *Global Histories of Work*, edited by Andreas Eckert, 273. De Gruyter Oldenbourg. <https://doi.org/10.1515/9783110437201-011>.

Dickinson, Maggie. 2016. "Working for Food Stamps: Economic Citizenship and the Post-Fordist Welfare State in New York City." 43 *American Ethnologist* 270.

Fleming, Peter, Carl Rhodes, and Kyoung-Hee Yu. 2019. "On Why Uber Has Not Taken over the World." 48 *Economy and Society* 488.

Francis-Devine, Brigid. 2023. *Poverty in the UK: Statistics*. House of Commons Library. <https://researchbriefings.files.parliament.uk/documents/SN07096/SN07096.pdf>.

Harvey, David. 2004. "The 'New' Imperialism: Accumulation by Dispossession." 40 *Socialist Register* 63. <https://socialistregister.com/index.php/srv/article/view/5811>.

Harvey, David. 2018. *A Companion to Marx's Capital*. Complete ed. Verso.

Helmore, Edward. 2023. "'It's Slavery for Modern Times': How Children of 12 Toil in Colorado's Fields." *Guardian*, September 6. <https://www.theguardian.com/global-development/2023/sep/06/how-children-of-12-toil-in-colorado-san-luis-valley-farms>.

- Holtum, Peter James, Elnaz Irannezhad, Greg Marston, and Renuka Mahadevan. 2022. "Business or Pleasure? A Comparison of Migrant and Non-Migrant Uber Drivers in Australia." 36 *Work, Employment and Society* 290.
- Hua, Julietta, and Kasturi Ray. 2022. "Beyond the Precariat: Race, Gender, and Labor in the Taxi and Uber Economy." In *Postsocialist Politics and the Ends of Revolution*, edited by Neda Atanasoski and Kalindi Vora, 133. Routledge.
- Kamasak, Rifat, Mustafa F. Özbilgin, Meltem Yavuz, and Can Akalin. 2019. "Race Discrimination at Work in the United Kingdom." In *Race Discrimination and Management of Ethnic Diversity and Migration at Work*, edited by Joana Vassilopoulou, Julienne Brabet, and Victoria Showunmi, 107. Vol. 6 of *International Perspectives on Equality, Diversity and Inclusion*, edited by Mustafa Ozbilgin. Emerald.
- Klass, Gregory. 2014. "Efficient Breach." In *Philosophical Foundations of Contract Law*, edited by Gregory Klass, George Letsas, and Prince Saprai, 362. Oxford University Press.
- Lewis, Hannah, Peter Dwyer, Stuart Hodgkinson, and Louise Waite. 2015. "Hyper-Precarious Lives: Migrants, Work and Forced Labour in the Global North." 39 *Progress in Human Geography* 580. <https://doi.org/10.1177/0309132514548303>.
- Luhmann, Niklas. 2008. *Law as a Social System*. Translated by Klaus A. Ziegert. Oxford University Press.
- Luhmann, Niklas. 2012. *Theory of Society*. Translated by Rhodes Barrett. Cultural Memory in the Present. Stanford University Press.
- Luhmann, Niklas. 2013. *Introduction to Systems Theory*. Edited by Dirk Baecker. Translated by Peter Gilgen. Polity.
- Luxemburg, Rosa. 2015. *The Complete Works of Rosa Luxemburg*. Vol. 2. Edited by Peter Hudis and Paul LeBlanc. Verso.
- Macneil, Ian. 1982. "Efficient Breach of Contract: Circles in the Sky." 68 *Virginia Law Review* 947.
- Marx, Karl. 1981. *Capital: A Critique of Political Economy*. Vol. 3. Edited by Friedrich Engels. Translated by Ben Fowkes and David Fernbach. Penguin Books.
- Marx, Karl. 2019. *Capital: A Critique of Political Economy*. Vol. 1. Historical Reprint. Ancient Wisdom Publications.
- NYC Taxi and Limousine Commission. n.d. "Fatigued Driving Prevention—Frequently Asked Questions." <https://www.nyc.gov/site/tlc/about/fatigued-driving-prevention-frequently-asked-questions.page>.
- Posner, Richard A. 2014. *Economic Analysis of Law*. 9th ed. Wolters Kluwer Law & Business.
- Quondamatteo, Nicola, and Marco Marrone. 2023. "Struggle for Recognition, a Lever to Establish Industrial Relations from Below: Reinterpreting Couriers' Mobilisations in Food Delivery Sector in Italy." In "Labour Conflict, Forms of Organization and Class," special issue,

16 *Partecipazione e Conflitto* 252. <https://doi.org/10.1285/I20356609V16I2P252>.

Ruan, Nantiya. 2017. “Corporate Masters & Low-Wage Servants: The Social Control of Workers in Poverty.” 24 *Washington and Lee Journal of Civil Rights and Social Justice* 103.

Ruhs, Martin, and Bridget Anderson. 2012. *Who Needs Migrant Workers? Labour Shortages, Immigration, and Public Policy*. Oxford University Press.

Sissons, Paul, Anne E. Green, and Neil Lee. 2018. “Linking the Sectoral Employment Structure and Household Poverty in the United Kingdom.” 32 *Work, Employment and Society* 1078. <https://doi.org/10.1177/0950017017722939>.

Uber Technologies Inc. 2022. *Annual Report Pursuant to Section 13 or 15(d) of the Securities Exchange Act of 1934* (Form 10-K). <https://www.sec.gov/Archives/edgar/data/1543151/000154315123000010/uber-20221231.htm>.

Veblen, Thorstein. 1899. *The Theory of the Leisure Class*. Macmillan.

Vedder, Richard, and Lowell Gallaway. 2002. “The Minimum Wage and Poverty Among Full-Time Workers.” 23 *Journal of Labor Research* 41.

Veitch, Scott. 2007. *Law and Irresponsibility: On the Legitimation of Human Suffering*. Routledge.

Vrousalis, Nicholas. 2022. *Exploitation as Domination: What Makes Capitalism Unjust*. Oxford University Press. <https://doi.org/10.1093/oso/9780192867698.001.0001>.

Williamson, Oliver E. 2010. *The Economic Institutions of Capitalism*. Free Press.

Wills, Jane, and Brian Linneker. 2014. “In-Work Poverty and the Living Wage in the United Kingdom: A Geographical Perspective.” 39 *Transactions of the Institute of British Geographers* 182.

Woodcock, Jamie, and Callum Cant. 2022. “Platform Worker Organising at Deliveroo in the UK: From Wildcat Strikes to Building Power.” 25 *Journal of Labor and Society* 220. <https://doi.org/10.1163/24714607-bja10050>.

Appendix A: Court Cases

	Uber⁵	Deliveroo⁶
Citation	[2021] UKSC 5	[2023] UKSC 43
Summary	This appeal concerns the employment status of private hire vehicle drivers who provide their services through the Uber smartphone application (the “Uber app”). The main question raised is whether an Uber driver is a “worker” for the purposes of employment legislation which gives “workers” rights to be paid at least the national minimum wage, to receive annual paid leave and to benefit from certain other protections. The Supreme Court also considers the related question of what time counts, if drivers are “workers,” as working time for the purpose of the relevant rights.	This appeal concerns the collective bargaining rights of a group of Deliveroo riders working in the Camden and Kentish Town area of London. These riders became members of the Independent Workers Union of Great Britain (“the IWGB”). In November 2016, the IWGB made a formal request to Deliveroo to recognize the union for collective bargaining on behalf of riders in Camden and Kentish Town.
Key Facts	At the time of the tribunal hearing in 2016, the number of Uber drivers operating in the UK was estimated to be around 40,000, of whom around 30,000 were operating in the London area. The definition of a “worker” in section 230(3) of the Employment Rights Act 1996 and other relevant legislation includes anyone employed under a contract of employment but also extends to some individuals who are self-employed. In particular, the definition includes an individual who	Deliveroo rejected this request [for union recognition], and the IWGB made an application to the Central Arbitration Committee (the CAC) under Schedule A1 to the Trade Union and Labour Relations (Consolidation) Act 1992 (the 1992 Act). Having analyzed the nature of the relationship between the riders and Deliveroo, the CAC accepted Deliveroo’s argument that the riders in question were not workers within that definition. It rejected an additional argument made by the IWGB that

⁵ Text below corresponding to Uber is excerpted from Uber BV v. Aslam [2021] UKSC 5, Press Summary (February 19, 2021), https://www.supremecourt.uk/uploads/uksc_2019_0029_press_summary_573bbeb959.pdf. Bracketed numbers refer to the paragraphs in the Supreme Court’s judgment.

⁶ Text below corresponding to Deliveroo is excerpted from Independent Workers Union of Great Britain v. Central Arbitration Committee [2023] UKSC 43, Press Summary (November 21, 2023), https://www.supremecourt.uk/uploads/uksc_2021_0155_press_summary_fbbf3d3937.pdf. Bracketed numbers refer to the paragraphs in the Supreme Court’s judgment.

	works under a contract “whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual.”	refusing to recognize the Union would breach the riders’ rights under article 11 of the European Convention on Human Rights (the ECHR), which protects freedom of peaceful assembly and association. The IWGB sought permission to challenge the CAC’s decision by judicial review. The High Court granted permission for the IWGB to bring its claim on one ground only: that the CAC’s decision breached the riders’ human rights under article 11 ECHR.
Issues	The central question on this appeal is whether an employment tribunal was entitled to find that drivers whose work is arranged through Uber’s smartphone application (“the Uber app”) work for Uber under workers’ contracts and so qualify for the national minimum wage, paid annual leave and other workers’ rights; or whether, as Uber contends, the drivers do not have these rights because they work for themselves as independent contractors, performing services under contracts made with passengers through Uber as their booking agent. If drivers work for Uber under workers’ contracts, a secondary question arises as to whether the employment tribunal was also entitled to find that the drivers who have brought the present claims were working under such contracts whenever they were logged into the Uber app within the territory in which they were licensed to operate and ready and willing to accept trips; or whether, as Uber argues, they were working only when driving passengers to their destinations.	(i) Issue 1: Do the Riders fall within the scope of article 11 such that the rights conferred by that article to join and be represented by a trade union are conferred on them? (ii) Issue 2: If the Riders do have rights under article 11, do those rights include the right that the United Kingdom legislate to require Deliveroo as their employer to engage in collective bargaining with the Union either in all circumstances or, alternatively, where the United Kingdom has chosen to confer such a right under Schedule A1 on some, but not all workers, within the scope of article 11? (iii) Issue 3: If the Riders have such a right to require Deliveroo to bargain with the Union, is their exclusion from the apparatus of Schedule A1 because of the restrictive definition of “worker” in section 296 a violation of that right or is it justified under article 11(2) as being necessary in a democratic society etc.? (iv) Issue 4: If there has been a violation of the Riders’ rights under article 11 because they are not covered by the definition of “workers,” can that definition be read down so as to include them?
Key Findings	Uber argued that Uber BV acted	The European Court has held that to

	solely as a technology provider with its subsidiary (Uber London in this case) acting as a booking agent for drivers who are approved by Uber London to use the Uber app. Uber argued that, when a ride is booked through the Uber app, a contract is thereby made directly between the driver and the passenger whereby the driver agrees to provide transportation services to the passenger [1, 43]. The fare is calculated by the Uber app and paid by the passenger to Uber BV, which deducts part (20% in these cases) and pays the balance to the driver. Uber characterizes this process as collecting payment on behalf of the driver and charging a “service fee” to the driver for the use of its technology and other services. To support its case, Uber relied on the wording of its standard written contracts between Uber BV and drivers and between the Uber companies and passengers (summarized at [22–29]). Uber also emphasized that drivers are free to work when they want and as much or as little as they want. In summary, Uber argued that drivers are independent contractors who work under contracts made with customers and do not work for Uber. As on the facts there was no written contract between the drivers and Uber London, the nature of their legal relationship had to be inferred from the parties’ conduct [45–46] and there was no factual basis for asserting that Uber London acted as an agent for drivers [50–56]. The correct inference was that Uber London contracts with passengers and engages drivers to carry out bookings for it [54–56]. In any event, it is wrong in principle to treat the written agreements as a starting point in deciding whether an individual is a “worker” [57, 76].	decide whether there is an employment relationship for the purposes of article 11, a court should have regard to the factors set out in the International Labour Organization Employment Relationship Recommendation, 2006 No 198. That recommendation makes the point that the assessment of such a relationship should be guided primarily by the facts relating to the performance of work and the remuneration of the worker, notwithstanding how the relationship is characterized in any contract or other agreement between the parties. The correct approach requires the Court to consider many different factors, focusing on the practicalities of the relationship and how it operates in reality [61]. Applying this approach to the facts of the case, the riders do not have an employment relationship with Deliveroo for the purposes of article 11 [71]. First, the contract between the riders and Deliveroo gives riders a broad and virtually unfettered right to appoint a substitute to take on their jobs. This right, on its face, is totally inconsistent with there being an employment relationship [69]. The CAC found that Deliveroo did not police a rider’s decision to use a substitute and riders would not be criticized or sanctioned for doing so. Secondly, the CAC found that Deliveroo did not terminate riders’ contracts for failing to accept a certain percentage of orders or failing to make themselves sufficiently available. The riders were free to work or not as convenient to them. Finally, the CAC found that Deliveroo did not object to riders working simultaneously for Deliveroo’s competitors. In all the circumstances, the CAC was entitled to conclude that the provisions in the contract genuinely reflected the reality of the relationship and that that was not
--	---	---

	The correct approach is to consider the purpose of the relevant employment legislation [70]. That purpose is to give protection to vulnerable individuals who have little or no say over their pay and working conditions because they are in a subordinate and dependent position in relation to a person or organization which exercises control over their work [71–76]. The legislation also precludes employers, frequently in a stronger bargaining position, from contracting out of these protections [79–82]. First, where a ride is booked through the Uber app, it is Uber that sets the fare and drivers are not permitted to charge more than the fare calculated by the Uber app. It is therefore Uber which dictates how much drivers are paid for the work they do [94]. Second, the contract terms on which drivers perform their services are imposed by Uber and drivers have no say in them [95]. Third, once a driver has logged onto the Uber app, the driver's choice about whether to accept requests for rides is constrained by Uber [96]. One way in which this is done is by monitoring the driver's rate of acceptance (and cancellation) of trip requests and imposing what amounts to a penalty if too many trip requests are declined or cancelled by automatically logging the driver off the Uber app for ten minutes, thereby preventing the driver from working until allowed to log back on [97]. Fourth, Uber also exercises significant control over the way in which drivers deliver their services. One of several methods mentioned in the judgment is the use of a ratings system whereby passengers are asked to rate the driver on a scale of 1 to 5 after each trip. Any driver who fails to maintain a required average rating will receive a series of	an employment relationship [70]. As the riders do not have an employment relationship, they are not able to rely on the trade union rights conferred by article 11. However, as there is some lack of clarity in the case law, the Court also addresses the scope of the collective bargaining rights that article 11 confers for those workers who do have an employment relationship. The European Court of Human Rights has reiterated that states have a wide margin of discretion in how they choose to protect trade-union freedom [129], and it has not held that article 11 goes so far as to include a right to compulsory collective bargaining [134]. While states can go further than the Convention requires, as the UK has done by enacting Schedule A1, it would not be a breach of article 11 for a state to decline to legislate for compulsory collective bargaining [130].
--	--	---

	warnings and, if their average rating does not improve, eventually have their relationship with Uber terminated [98–99]. A fifth significant factor is that Uber restricts communications between passenger and driver to the minimum necessary to perform the particular trip and takes active steps to prevent drivers from establishing any relationship with a passenger capable of extending beyond an individual ride [100]. Taking these factors together, the transportation service performed by drivers and offered to passengers through the Uber app is very tightly defined and controlled by Uber. Drivers are in a position of subordination and dependency in relation to Uber such that they have little or no ability to improve their economic position through professional or entrepreneurial skill. In practice the only way in which they can increase their earnings is by working longer hours while constantly meeting Uber’s measures of performance [101]. The Supreme Court considers that comparisons made by Uber with digital platforms which act as booking agents for hotels and other accommodation [103–08] and with minicab drivers [109–17] do not advance its case. The drivers were rightly found to be “workers” [119]. The Supreme Court also holds that the employment tribunal was entitled to find that time spent by the claimants working for Uber was not limited (as Uber argued) to periods when they were actually driving passengers to their destinations, but included any period when the driver was logged into the Uber app within the territory in which the driver was licensed to operate and was ready and willing to accept trips. [136–37].	
--	---	--

Ruling	The Supreme Court unanimously dismisses Uber's appeal.	The Supreme Court unanimously dismisses the IWGB's appeal. It holds that the riders were not in an employment relationship for the purposes of article 11 ECHR, and the provisions of that article which protect trade union activity do not apply to them.
---------------	--	---

Appendix B: Annual Reports (2022)

	Uber ⁷	Deliveroo ⁸
Founding	2009	2013
Risk Assessment	Our business would be adversely affected if Drivers were classified as employees, workers or quasi-employees. . . . We believe that Drivers are independent contractors because, among other things, they can choose whether, when, and where to provide services on our platform, are free to provide services on our competitors' platforms, and provide a vehicle to perform services on our platform. (12) The mobility, delivery, and logistics industries are highly competitive, with well-established and low-cost alternatives that have been available for decades, low barriers to entry, low switching costs, and well-capitalized competitors in nearly every major geographic region. If we are unable to compete effectively in these industries, our business and financial prospects would be adversely impacted. (13) Reclassification of Drivers as employees, workers or quasi-employees where those statuses exist, have and could lead to groups of Drivers becoming represented by labor unions and similar organizations. For example, in May 2021, we formally recognized a UK driver union. If a significant number of Drivers were to become unionized and collective bargaining agreement terms were to deviate significantly from our business model, our business, financial condition,	Our business would be adversely affected if our rider model or approach to rider status and our operating practices were successfully challenged or if changes in law required us to reclassify our riders as employees including with retrospective effect. (63) Our rider model continues to be a principal risk for the Group. The level of risk differs by market depending upon specific local circumstances, including legislative changes, but the overall profile of this risk is unchanged. Although the exits from the Netherlands and Australia were driven by economic factors, these exits have indirectly reduced the scope of regulatory scrutiny on platform work across the portfolio. However, in a business like Deliveroo, the inherent risk remains high, due to the continually evolving nature of the legislation and the emerging policy in this area. (63) The European Union published initial proposals for a reform to platform work in December 2021. Throughout 2022, these have been debated by the European Parliament and Council. Deliveroo believes the proposals could provide welcome clarity on the tests to determine the status of platform workers and continues to engage with relevant stakeholders. Original proposals provided important clarity that national law would determine final employment status decisions. (53) The legal status of the Group's riders

⁷ Text below corresponding to Uber is excerpted or summarized from Uber's 2022 annual report (Uber Technologies Inc. 2022). Numbers in parentheses refer to page numbers.

⁸ Text below corresponding to Deliveroo is excerpted or summarized from Deliveroo's 2022 annual report (Deliveroo PLC 2022). Numbers in parentheses refer to page numbers.

	operating results and cash flows could be materially adversely affected. In addition, a labor dispute involving Drivers may harm our reputation, disrupt our operations and reduce our net revenues, and the resolution of labor disputes may increase our costs. (13) In addition, if we are required to classify Drivers as employees, workers or quasi-employees, this may impact our current financial statement presentation including revenue, cost of revenue, incentives and promotions. (13) To remain competitive in certain markets, we have in the past lowered, and may continue to lower, fares or service fees, and we have in the past offered, and may continue to offer, significant Driver incentives and consumer discounts and promotions, which has adversely affected and may continue to adversely affect our financial performance. (14) We have existing litigation, including class actions, Private Attorney General Act lawsuits, arbitration claims, and governmental administrative and audit proceedings, asserting claims by or on behalf of Drivers that Drivers are misclassified as independent contractors. In connection with the enactment of California State Assembly Bill 5 (AB5), we have received and expect to continue to receive—in California and in other jurisdictions—an increased number of misclassification claims. (121)	potentially has implications for taxation, VAT, and pension payments. (143)
Non-UK Jurisdictions	150,000 US drivers settled for approximately \$521 million US total (2022). (12) California, Massachusetts, New Jersey, New York, France,	France, Netherlands, Italy (53)

	Switzerland, Spain, Netherlands (121–23)	
Revenue (2022)	\$31,877 million (74)	£1,974.7 million (164)
Legal Provision	Accrued and other liabilities \$6,232 million (73) Accrued legal, regulatory, and non-income taxes \$1,573 million (110) From time to time, we are a party to various claims, non-income tax audits and litigation in the normal course of business. As of December 31, 2021 and 2022, we had recorded aggregate liabilities of \$2.2 billion and \$1.6 billion, respectively, of which \$1.3 billion and \$0.6 billion relate to non-income tax matters in accrued and other current liabilities on the consolidated balance sheets for all of our legal, regulatory and non-income tax matters that were probable and reasonably estimable. (121)	The Group recognized legal provisions of £129.3 million (2021: £81.7 million) . . . and disclosed contingent liabilities of £24.6 million (2021: £37.3 million), with an additional contingent liability in relation to a regulatory challenge for which the entity has assessed a range from £50.0 million to £200.0 million representing their best estimate in the event of a potential adverse outcome. (143)
Additional Comments on Legal Provisions	We review the developments in our contingencies that could affect the amount of the provisions that have been previously recorded, and the matters and related reasonably possible losses disclosed. We make adjustments to our provisions and changes to our disclosures accordingly to reflect the impact of negotiations, settlements, rulings, advice of legal counsel, and updated information. Significant judgment is required to determine both the probability and the estimated amount of loss. These estimates have been based on our assessment of the facts and circumstances at each balance sheet date and are subject to change based on new information and future events. (65–66) On October 31, 2022, we settled our UK VAT dispute with the HMRC, the UK tax regulator, for all periods prior	When preparing the financial statements, management has made a number of estimates and assumptions regarding the future and has made some significant judgements in applying the Group's accounting policies. Accounting estimates are reviewed on an ongoing basis, and revisions to such estimates are recognized in the current and future periods as applicable. . . . Provisions are calculated based on the information available at the time of signing these accounts. Key inputs to the calculations of such provisions include the likelihood of receiving claims, the scope of those claims, the likelihood of making payments, an assessment of the time value of money and the risks specific to each potential obligation. A change in the assessment of these assumptions could materially change the measurement of a provision or contingent liability. In rare

	to March 14, 2022. As a result of the settlement agreement, these prior periods are closed to assessment and Uber made a payment of \$733 million (GBP 613 million) in the fourth quarter of 2022 for this resolution. (124) We have been and continue to be subject to various government inquiries and investigations surrounding the legality of certain of our business practices, compliance with antitrust, anti-bribery and anti-corruption laws (including Foreign Corrupt Practices Act) and other global regulatory requirements, labor laws, securities laws, data protection and privacy laws, consumer protection laws, environmental laws, and the infringement of certain intellectual property rights. We have investigated and continue to investigate many of these matters and we are implementing a number of recommendations to our managerial, operational and compliance practices, as well as strengthening our overall governance structure. In many cases, we are unable to predict the outcomes and implications of these inquiries and investigations on our business which could be time consuming, costly to investigate and require significant management attention. Furthermore, the outcome of these inquiries and investigations could negatively impact our business, reputation, financial condition and operating results, including possible fines and penalties and requiring changes to operational activities and procedures. (124)	circumstances, where there are too many variables, the Directors may conclude it is not possible to estimate a contingent liability and disclose the fact. It is expected that the resolutions to these matters may extend over several years. (161)
--	---	---