

Regulatory Entrepreneurship, Fair Competition, and Obeying the Law

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This version of the article has been accepted for publication, after peer review, but is not the Version of Record and does not reflect post-acceptance improvements or any corrections. The Version of Record is available online at: <https://doi.org/10.1007/s10551-021-04932-y>. Use of this Accepted Version is subject to the publisher's Accepted Manuscript terms of use: <https://www.springernature.com/gp/open-research/policies/accepted-manuscript-terms>

Abstract: Some sharing economy firms have adopted a strategy of “regulatory entrepreneurship,” openly violating regulations with the aim of rendering them dead letters. This article argues that in a democracy, regulatory entrepreneurship is a presumptively unethical business strategy. In all but the most corrupt political environments, businesses that seek to change their regulatory environment should do so through the democratic political process, and they should do so without using illegal business practices to build a political constituency. To show this, the article defends a qualified moral obligation for businesspeople to obey the law even in societies that fall short of ideal democracy and that are rife with economic injustice. Owners and managers of successful businesses have strong moral reasons to obey laws concerning resource allocation. Such laws include not only property law, but also tax laws, environmental regulations, and other laws that regulate businesses in competitive markets. The moral reasons to obey such laws apply even to laws that business leaders think unfair or inefficient, provided that the laws in question have reasonable, good faith defenders.

In many cities, Uber and Lyft began operations in violation of local taxi laws. City taxi regulations commonly mandate a particular fare structure and require drivers to be licensed as taxi drivers. Some cities require taxis to bear taxi medallions, of which a fixed number are available. The business model of Uber and Lyft, in which riders use cell phone apps to obtain rides from people driving their personal cars, is incompatible with these regulations. Uber and Lyft argued that existing taxi laws should not be applied to their businesses, since applying these laws to “sharing economy” firms would stifle an innovation many consumers want. Whether or not these laws should apply to Uber and Lyft, regulators and courts in some jurisdictions have judged that these laws did apply. Yet the companies continued to operate. In Miami-Dade, for instance, Uber and Lyft paid a total of approximately \$4 million in fines as costs of doing business (Sutta 2016). In Philadelphia, UberX and Lyft operated in violation of an injunction (Mondics 2016). In some places, the choice to operate illegally was unsuccessful. For instance, in the Netherlands, regulators decided not to legalize Uber’s UberPop service, which used drivers not licensed to drive taxis, and Uber ultimately shut down the service (Pelzer, Frenken, and Boon 2019). In Philadelphia and Miami, by contrast, Uber’s and Lyft’s operations were eventually legalized. Was it morally acceptable for Uber and Lyft to operate illegally, or should these firms have put operations on hold in jurisdictions where they were held to be violating the law, pending regulatory change?

Flouting weakly-enforced regulations, or facilitating the flouting of regulations, is central to the business strategy of some companies. Systematically undermining regulations with the aim of shifting public opinion and creating a legal environment more friendly to one’s business has been labeled “regulatory entrepreneurship” (Pollman and Barry 2017). This article argues that in

a democratic society, regulatory entrepreneurship is presumptively ethically objectionable. Lawbreaking may sometimes be a justifiable response to perceived injustice in the law. Businesspeople may often be justified in thinking that regulations treat their businesses unjustly or that the process by which regulations were enacted was unfair. Nevertheless, businesses have a moral duty to obey regulations they disapprove of when three conditions hold: there is a good-faith, reasonable defense of these regulations (in the sense defined below), there is a democratic process, even a flawed democratic process, through which the business could seek to change the regulations, and the business has (and relies on) substantial rights to property—as most businesses do.¹

The core of the argument is that businesspeople cannot justifiably demand that others respect their business's property rights while refusing to respect others' legal rights, including the legal rights of other businesses. Businesses rely on the legally defined allocation of resources. They necessarily demand that others refrain from stealing, destroying, or otherwise interfering with their use of resources they are legally entitled to use. To make this demand of others while refusing to respect others' legally defined rights to resources would be culpably unfair. All laws and regulations that apply to businesses in a competitive market are part of the system of resource allocation law. They define the terms on which businesses may use their resources to compete and on which they may reasonably expect their competitors to use their resources. A business that pursues a strategy of regulatory entrepreneurship thus demands that others (including competitors) respect its legal rights to resources while refusing to respect others' rights (including competitors' rights) to use their resources on terms defined by law. Law-breaking businesses may protest that the laws they wish to flout are unjust, whereas the property

rights they expect others to respect are just. This defense of lawbreaking is reasonable only when the injustice of the flouted laws is transparent and not seriously debatable or when there is no political process through which both supporters and defenders of these regulations might get their arguments a hearing.

My account of the ethical duty to obey the law differs from other accounts in two respects.² First, many accounts of the duty to obey the law defend only a defeasible or *pro tanto* duty, which can be outweighed by moral duties (Edmundson 2004; Lefkowitz 2006). Showing that there is a defeasible moral duty to obey the law does not address the concrete ethical question businesspeople face when they think there is a justice-related reason to disobey the law. Plainly, people are sometimes justified in breaking unjust laws. People are justified in breaking segregation laws, for instance, as these laws are *transparently* unjust. I aim to identify circumstances in which the moral reasons to obey the law are conclusive. A second difference between my account and many extant accounts is that it aims to address the duty to obey in real, flawed democracies. Several accounts of the duty to obey the law appeal to a combination of a natural duty to cooperate with others with a moral requirement to respect democratic procedures (Christiano, 2008, pp. 231-330; Stiliz, 2011; Viehoff, 2014; Waldron, 2001). Such accounts generally presuppose that democracy is functioning well, at least procedurally. To apply standard democracy-based accounts to most actual societies, one would have to take a highly optimistic view about the quality of these societies' democratic processes.³ Though my account takes inspiration from these accounts, it answers a question they do not squarely address: when do businesspeople have a moral duty to obey the law in the societies we *actually* inhabit?

Sections I through III present the article's theoretical core. Section I argues that business lawbreaking is a form of misappropriation. Laws regulating businesses in competitive markets are laws concerning resource allocation. Businesspeople necessarily demand that others respect their business's property rights. They cannot fairly make this demand on others while refusing to respect others' rights under resource allocation law, including the right to compete on the market only with legal competitors. Section II acknowledges that *transparent* injustice in resource allocation laws (including business regulations) can justify lawbreaking, but that businesspeople are not justified in simply ignoring a law they dislike when it has reasonable defenders. Section III explains why regulatory entrepreneurship is an unethical response to perceived (but disputable) injustice in the law when an inclusive democratic process for changing the law is available. It concludes with a set of three sufficient conditions for a conclusive duty to obey business regulations.

Sections IV through VI apply the theory to "sharing economy cases," refining one component of the theory in the process. Section IV argues that the two of the three jointly sufficient conditions for a duty to obey the law apply to many Airbnb hosts that break short-term rental restrictions. The third, concerning the inclusiveness of the political process, would apply in a well-functioning democracy. Section V acknowledges that the third condition does not apply in actual, flawed democracies. It argues that businesspeople with some degree of political access nonetheless have a duty to use a flawed democratic process rather than attempting to delegitimize laws through disobedience. Thus, many Airbnb hosts act wrongly by violating short-term rental laws, and Airbnb itself acts wrongly by knowingly facilitating this lawbreaking. Section VI discusses the difficult case of Uber in Philadelphia. It argues that despite serious

concerns about the substantive and procedural justice of Philadelphia's taxi regulations, it was wrong for UberX to operate in Philadelphia illegally.

I Business lawbreaking as a form of misappropriation

The core of this article's argument is that owners and operators of businesses in competitive markets should refrain from lawbreaking of all sorts for the same reason they should refrain from theft. The reason businesspeople should refrain from theft is simple. Owners and operators of businesses cannot coherently take a lax attitude toward private property rights. Every business relies on the right to exclude others from its resources, including its places of operation and its financial accounts. Businesspeople must insist that others refrain from theft and other forms of substantial interference with their business's use of its resources. It is wrongly unfair to demand that others respect one's property rights while refusing to respect theirs. If one doubts this last claim—it does not seem doubtful to me—one could defend it using the "practical contradiction" interpretation of the Kantian formula of universal law (Korsgaard 1996, 92-101). If it would be inconsistent with one's purposes to endorse others reasoning in a certain way about how to act, one should refrain from reasoning in this way about one's own decisions. Thus, since it is inconsistent with businesspeople's purposes to endorse others treating property rights with contempt, businesspeople should themselves treat property rights with respect.

The next step is to recognize that demanding respect for property rights is demanding that people respect the laws defining property rights. The property rights on which contemporary businesses rely are not natural rights. Natural property rights are property rights that exist independent of laws or customs establishing them; they derive from universal moral principles and from the choices of specific individuals. There is extensive debate in political philosophy

about whether determinate natural property rights are possible.⁴ Even if natural property rights are possible in principle, many property rights that matter to business are not natural property rights. Financial instruments and most contemporary forms of money are creations of legal systems. Since these things have no existence independent of the law, it is impossible to have a natural property right to these things. Many socially recognized property rights to land and mineral resources are morally valid (if they are morally valid) only in virtue of the law. There is no plausible account of natural property rights that would assign them to their present owner, since they have at some point in their history changed hands through wrongful force or fraud.⁵ So if there is a moral duty to respect property rights to things like money, financial instruments, land, and gold, this duty is a duty to respect the law's determination about who has what property rights.

Part of law's role in determining the allocation of resources is to specify which rights come with property interests of different types. People's use of their resources can interfere with others' use of their resources. Universal moral norms do not fully specify what constitutes wrongful interference with someone else's use of their resources. Positive law plays a crucial role. For instance, making furniture with oil-based varnishes and raising families free from noxious fumes are two activities that cannot take place on adjoining plots of land. If one person starts building a wood shop and a neighbor starts building a family home at the same time, there is no universally valid rule about which neighbor should yield. If there are morally binding rules about how to resolve such conflicts, these rules come at least partly from law or custom, not solely from universal morality.

The boundaries that law draws between neighbors are not only geographic. People can have disagreements about what market activities constitute wrongful interference with property owners' rightful use of their resources. Notably, people can disagree about what business practices violate competitors' right to use their resources to compete on the market on fair terms. Part of what it is to own a business is to be entitled to use the business and its resources to compete on the market on fair terms.⁶ People can reasonably disagree about what business practices should be allowed. If there are morally binding rules about how to resolve these conflicts, these rules come at least partly from business regulation. All business regulations, whatever their primary function, also serve the purpose of setting the boundaries between the property rights of business owners. They determine what business practices are acceptable on the market and what practices wrongfully interfere with competitors by attempting to compete on unfair terms.⁷ If one business in a competitive industry flouts a regulation that competitors comply with, it may gain a competitive advantage. Doing so interferes with competitors' entitlement to use their resources to compete on the market on terms defined by law. This form of unfair competition may not be conventionally classified as a violation of property rights, and the victims may not be able to pursue a remedy in the courts. But gaining an advantage through lawbreaking is nevertheless a violation of competitors' legal rights to resources.

As an example, consider a law establishing a minimum drinking age. As applied to alcohol consumption in private homes, this law does not directly give anyone an entitlement to use resources, nor does it specify what constitutes an illegal interference with others' use of their resources. If a parent violates Pennsylvania's stringent drinking age law by serving a glass of wine to their 20-year-old child, they do not thereby interfere with anyone's legally defined rights

to resources. By contrast, the drinking age law as applied to restaurants and bars is concerned with resource allocation, even though this is not its primary purpose. Part of what it is to own a restaurant or a bar is to have a legal right to compete with other establishments on terms defined by law. If a bar or restaurant illegally sells alcohol to underage guests, and thereby gains an advantage over law-abiding competitors, it interferes with competitors' legal right to compete on the terms defined by law. The bar or restaurant violates competitors' legal rights even if the illegal alcohol sales do not violate anyone else's legal rights.

As another example, consider a municipal law prohibiting short-term rentals of whole apartments. Many cities have such restrictions. Some cities, such as Anaheim, Barcelona, and New Orleans, have prohibited short-term rentals altogether in certain neighborhoods. Others, such as Berlin, New York, and Santa Monica, prohibit short-term rentals of whole apartments while allowing rentals of rooms within homes. Still other cities, such as Denver, London, and Paris, limit the number of nights per year a given apartment can be rented short term (Nieuwland and van Melik 2020). These restrictions typically aim to keep rents down for long-term residents and to protect residents of quiet neighborhoods from an unwanted influx of tourists. Whatever the primary purpose of these restrictions, enacting them affects the legal rights of owners of hotels (large and small). Hotel owners have a legal right to use their resources, including their land and buildings, to compete only with legal competitors. Illegally offering a short-term apartment rental thus violates hotel owners' legal right to use their resources as they are legally entitled to use them. Violating the hotel regulations violates competitors' rights to private property.

Not all businesses have direct competitors. When a business without direct competitors adopts a strategy of regulatory entrepreneurship, its lawbreaking will not violate the legal rights of direct competitors, since it has none. It may nonetheless violate others' property rights by a similar mechanism. Suppose that a small town with no hotels restricts short-term rentals to keep rents down for long-term renters. This restriction gives long-term renters a legal right to use their resources (their money) to compete for scarce housing only with other long-term renters, with home-buyers, and with a limited number of legal short-term renters. Landlords who illegally converted apartments or houses to short-term rentals would violate this legal right. Business lawbreaking can no doubt cause harms that do not involve violating legally-defined property rights. Without intending to diminish the significance of other harms lawbreaking can cause, I shall focus on the question when a violation of legally defined property rights constitutes a moral wrong.

II Breaking unjust laws

Violating business regulations generally involves violating others' legally-defined property rights. It would be too quick to conclude that businesspeople should always follow every law and regulation applicable to their business. Not all violations of property rights are morally wrong. Plainly, people are sometimes justified in violating unjust laws, e.g. segregation laws.⁸ Businesspeople could argue that the laws they wish to break are unjust, whereas the laws they expect others to follow—including the laws protecting their business's property rights—are just. It is not unfair to refuse to follow unjust laws while demanding that others obey just laws. Nor is it a violation of the formula of universal law to demand that everyone (including oneself) follow just laws while making no demands regarding compliance with unjust laws.

This argument is a compelling defense of lawbreaking when no one could reasonably think that the law businesspeople propose to break is just. I use the term “reasonable,” here, not in the technical sense used in Rawlsian political philosophy, but in roughly its everyday sense. Estlund’s (2000, 111) definition tracks the common-sense notion: “reasonable disagreement” is “disagreement that has moral weight.” Though the boundary between reasonable and unreasonable disagreement is contested, some forms of disagreement clearly lack moral weight. It is unreasonable to make demands based on unjustifiable empirical beliefs. It is likewise unreasonable to demand that the law show partiality toward oneself or toward a group of which one is a member. There are thus some views about justice one cannot reasonably disagree with. For example, one cannot reasonably deny that racial segregation is unjust. Those who supported segregation did so based on false and unjustified beliefs about race, demands for government partiality, or both. Breaking a segregation law is not wrong; it is admirable. If a business in a segregated society were somehow to gain a competitive advantage over rivals by flouting segregation laws, this advantage would be well deserved.

Matters are different when the justice of laws and regulations is open to reasonable disagreement. Many questions of justice can be topics of reasonable disagreement, even if there is an objectively correct answer, either because the relevant empirical facts are complex or because a nuanced weighing of competing values is required. People can reasonably disagree about what tax rates should be, or about what constitutes fair payment for work, or about what levels of carbon emission are acceptable and what levels unduly burden others. Businesspeople who violate laws that they regard as unjust, but which other people reasonably regard as just, put themselves in an ethically dangerous position. Running a successful business requires reliance on

a wide range of legal entitlements, including ownership of various resources, property interests other than ownership (e.g. leases), and regulatory protections against various forms of unfair competition (e.g. environmental regulations protecting a business from polluting competitors). Businesspeople cannot condone others unilaterally choosing to violate these legal entitlements. Yet in a complex legal system, some well-informed, reasonable people might think that some of the legal claims to resources on which businesses rely are unjust claims. More subtly, people might think that the overall resource allocation system is unjust and that the best remedy for this injustice would be to alter the rules of resource allocation in a way that reduces some business's holdings.⁹ Well-informed, thoughtful people might reasonably hold a range of views about the proper remedy for injustice in the overall resource allocation system. Plausible remedies might include imposition of new taxes, institution of new laws or regulations that burden businesses, or removal of laws or regulations that benefit businesses.

Managers of complex business operations with complex legal rights are unlikely to be justified or warranted in asserting that all these legal rights are spotlessly just and that anyone who has concerns about them is mistaken. Businesspeople should not make this overconfident assertion. They should instead take the position that everyone is morally required to obey the existing rules of the resource allocation system when those rules can be reasonably defended as just. This position would support businesspeople's demand that others respect their business's rights under the existing laws of resource allocation. But then, to avoid unfairly imposing demands on others that they refuse to respect themselves, businesspeople must obey existing laws concerning resource allocation, including business regulations they regard as ill-conceived but that have reasonable, good-faith defenders.

This argument for a qualified ethical obligation to obey resource allocation law has two important limitations. First, it only applies to resource allocation law. There is no obvious unfairness in demanding that everyone respect resource allocation law while refusing to follow laws of other types (e.g., laws concerning the consumption of alcohol in private homes). Second, it applies only to individuals and agents of organizations whose legal claims to resources are large enough or complex enough that they are likely to be contested as unjust. Private individuals with only modest claims to property are not subject to the argument offered here. There are some legal rights that would remain in place under any reasonable proposal to reform the resource allocation system. Addressing injustice in resource allocation law may involve redistribution of wealth, but it would not involve redistribution of most forms of personal property. People who have laptop computers would still have those computers after a reform. Any plausible reform to resource allocation law would allow owners of normally sized homes to keep their homes.

A person whose only property rights are rights that would survive any plausible reform could consistently demand that others respect these clearly just rights while condoning violation of property rights whose justice is open to reasonable dispute. Whether this is an ethically tenable position is a difficult question. To answer it, we would need an account of the moral importance of property and the extent to which everyone, including the less well-off, is morally required to support a system of property rights.¹⁰ It is unnecessary to address these complexities to answer questions about the ethics of lawbreaking by businesspeople working for corporations. All but the tiniest businesses (e.g., “mom and pop shops”) rely on property rights that could reasonably be politically contested as unjust or revised as part of a reform of the resource

allocation system.¹¹ Since businesspeople rely on others' respect for property rights, including controversial rights, they cannot justify simply ignoring others' legal rights to resources.

III The value of having a say

There is a subtle way in which businesspeople could defend lawbreaking in the specific context of regulatory entrepreneurship. Firms engaged in regulatory entrepreneurship do not simply ignore the law. They violate the law or facilitate lawbreaking with the aim of undermining public support for the laws or regulations on the books and building support for change. A manager of a firm engaged in regulatory entrepreneurship could maintain that they are generally law-abiding, and that they condone law-breaking only when it is part of an effort to change the rules in effect. Businesses rely on widespread respect for the rules of resource allocation, but they do not rely on these rules being static. Both justice and efficiency require that the rules of resource allocation be open to challenge. A campaign of law-breaking may be an efficient way of challenging a law or regulation a business considers objectionable. Could businesspeople fairly and consistently engage in this specific form of lawbreaking if they were willing to condone similar forms of lawbreaking that infringe on their own firms' legal rights?

The problem with trying to change the effective resource allocation rules by disobeying the current rules is that in some social contexts, doing so denies others a say about the rules that are to govern their conduct. This problem does not arise in typical cases of civil disobedience, which seek to change the law by persuading voters and legislators to act through the normal political process.¹² The problem arises when lawbreaking aims to change the rules of the game by making both legislation and majority opinion irrelevant. To see this, consider an instance of lawbreaking involving the law of real property. Suppose Jane believes that it is unjust for private

landowners to have a broad entitlement to exclude pedestrians, as they do under her society's current law. She believes that pedestrians should in many circumstances have a right to roam on private land without the owner's permission. Jane starts walking across private land, and she encourages others to do the same. Her aim is not to get easements in particular places, but to introduce a general custom of tolerating pedestrians on private land. In effect, she is trying to replace property law with a mix of law and custom in which private property rights are reduced and public rights are expanded. If enough other people follow Jane's lead, the effective rules of property in Jane's society will change.

Suppose that Jane's proposed changes are, in fact, improvements, but that people could reasonably disagree about whether they are improvements. People can reasonably disagree about the extent to which trespass law should permit rights-of-way. If property owners or others wish to retain existing trespass norms, in the face of a growing movement to reject those norms, what recourse do they have? They could petition the legislature or the executive for stricter enforcement of the law on the books. But landowners (and others) could reasonably think that a rigorously enforced trespass law would be draconian; securing perfect compliance through governmental coercion would require unduly intrusive surveillance. Defenders of existing norms could turn to informal social sanctions, but they will face a similar obstacle. Outside of tight-knit communities, where property owners can easily identify trespassers and impose social sanctions, informal social sanctions cannot be applied regularly enough to be effective. Trespass law relies heavily on voluntary compliance.

So the only recourse for defenders of existing law is to persuade people to respect the existing laws and social norms voluntarily. Landowners could post signs on their property

explaining their position. Defenders of current law (be they landowners or not) could write letters to friends or to newspapers; they could write about the issue on social media; if they have enough resources, they could run television ads. They will be fighting an uphill battle, given the attitude that Jane and her followers take. Jane's attitude is that she has no obligation to defer either to democratically enacted laws or to public opinion if she thinks law or social norms ill-conceived. If even a small minority of the population holds this view about law and social norms, and if they think current trespass law is bad, that small minority can make an unenforced or lightly enforced trespass law a dead letter (at least in areas where detection and identification of trespassers is difficult). By contrast, if people take the attitude that democratically enacted property law should ordinarily be followed, critics and defenders of the current rules are on equal footing; they must persuade a majority. Undermining respect for law thus undermines others' opportunity to have a meaningful say about what the rules in effect will be.

Considering the reasonable disagreement about the justice of trespass law, Jane's procedure for changing social norms is problematic if a more democratic alternative is available. If her society offers a political process through which all citizens have meaningful opportunities to try to change or to preserve the law through rational persuasion, Jane could have tried to change property law by going through the political process.¹³ She and her followers could have made their case to the public that there should be a right to roam. Landowners and others who believe in good faith that there should be no right to roam could have made their case to the public. By opting not to use the political process, Jane denies landowners a say about a constriction of their property rights. She denies most people (landowners or not) a say about the rules that govern their conduct.

Perhaps it is not objectionable to deny people the opportunity to defend existing legal entitlements politically if these people know or should know that these legal entitlements are unjust. But if people reasonably (even if falsely) believe that the existing rules are just, they have a legitimate interest in having a say about changing them. They should be able to make arguments about why people's current legal rights should remain unchanged, they should be able to respond to arguments why some people's rights to resources should contract, and they should have a realistic hope that rational discourse will affect the outcome. So if fellow citizens believe reasonably and in good faith that the laws Jane undermines are just, Jane acts disrespectfully by changing the effective rules unilaterally instead of going through the political process.

To sum up the argument so far: a person is morally required to obey laws that concern resource allocation, including business regulations, if (a) this person's activities rely on others' respect for property interests that are either large or complex, (b) there are well-informed people who reasonably think that the laws in question are just laws, and (c) the political process gives all citizens meaningful opportunities to try to influence the law through rational persuasion. When these conditions hold, a person who objects to the resource allocation rules should pursue this objection through the political process. It would be unethical to change the rules unilaterally when a process that would give everyone a voice is available.

IV The law of short-term rentals

The lawbreaking involved in regulatory entrepreneurship is unethical when the three conditions just described all obtain. Consider landlords who rent apartments short-term through Airbnb in a city that prohibits short-term rentals of whole apartments. They believe that the city law prohibiting short-term rentals is outdated, inefficient, and unfair, and it should be either

repealed or rendered a dead letter. What is wrong with undermining public respect for this law by breaking it, rather than obeying it while seeking change through the democratic process? Part of the answer is that the law-breaking landlords interfere with their competitors' use of their legally defined rights to resources. People who own hotels (large and small) are entitled to use their property to compete on the market on the terms specified in law. This is not the whole answer. Airbnb owners could take the position that they condone violations of legally defined property rights, including their own property rights, when those violations are part of a campaign to address an injustice in the law. This stance is not inconsistent. Is it objectionable in another way?

The answer is yes. These law-breaking landlords deny supporters of existing law a meaningful say about what the rules in effect shall be. Like the law of trespass as applied to outdoor property, a city law against short-term rentals relies heavily for its effectiveness on widespread respect for law. Restrictions on short-term rentals are challenging to enforce effectively, in part because Airbnb and other rental platforms do not show exact addresses and do not require landlords to include outdoor photographs (Nieuwland and van Melik 2020). Perhaps in a suburban environment, a restriction on short-term rentals could be enforced via reports from neighbors. In a large apartment building in a dense city neighborhood, it is typically possible to offer an apartment for short-term rent discreetly. It will be difficult in such environments for the government to impose fines on landlords offering short-term rentals without engaging in draconian surveillance. Informal social sanctions will likewise have limited effect.

Thus, if ten percent of people decide that they do not care either about what the law says or about what their (long-term or short-term) neighbors think, and if they think a city's hotel regulations are unfair, they can through their actions render these laws dead letters. Owners of

hotels may be able to persuade a large majority of the city's population that there should continue to be a rule against short-term rentals. There are good reasons other than rent-seeking to want such a rule, including concerns about rising long-term rents and negative externalities from increased tourism. But persuading ninety percent of the city's residents will have no practical effect if hotel owners cannot persuade scofflaw Airbnb hosts and scofflaw Airbnb customers that the rule against short-term rentals is a good rule. An intransigent minority should not be morally permitted to hold the majority's rights hostage.

Consider the three jointly sufficient conditions (a)-(c) for a duty to obey resource allocation law. Condition (a), again, is that the person subject to resource allocation law relies on others' respect for legal rights to resources that are either financially large or legally complex. Such legal rights are potentially open to reasonable contest on grounds of justice. Do Airbnb hosts fall in this category? An individual who rents out the apartment they live in while traveling arguably does not. People's rights to their own homes are not morally controversial. Except perhaps for extraordinarily large homes, people's property interests in their own homes would persist under any defensible plan of reform to the resource allocation. Arguably, people's right to let out or to sublet their own homes would also persist under any defensible reform. But most short-term rental laws permit short-term rentals of one's primary residence for some part of the year (Nieuwland & van Melik 2020). Most short-term rental laws aim to prevent hotelization of apartments, i.e. the conversion of apartments to permanent use as short-term rentals. Landlords who rent out multiple apartments they do not occupy rely on substantial property rights beyond their morally uncontroversial rights to personal property. They are thus subject to condition (a).

As for condition (b), even if Airbnb hosts correctly believe that their city's restrictions on short-term rentals should be repealed, other city residents may have good faith arguments that the restrictions should be retained. Well-informed people could reasonably believe that the restrictions are necessary to prevent an unfairly burdensome increase in rents for long-term leases. Converting apartments from long-term rentals to full-time Airbnb properties can reduce the stock of housing available to long-term renters. This can in turn lead to rent increases. The introduction of Airbnb has had demonstrable impact on long-term rents in Los Angeles (Lee 2016). In New York, "Airbnb activity may have negated something like half to three quarters of a year's worth of new housing supply in the city" in 2016 (Wachsmuth and Weisler 2018, 1165). During the main period of Airbnb expansion in Portugal from 2014 to 2016, increased Airbnb listing density was strongly correlated with increases in house prices (Franco & Santos 2021).¹⁴ Residents of other locations could be reasonably concerned about Airbnb's effects in their cities.

People could also reasonably believe that short-term rentals create excessive negative externalities in neighborhoods previously not frequented by tourists. Residents of many cities have expressed concerns about negative externalities from Airbnb-hosted tourism, such as noise and traffic, and about loss of neighborhood cohesion (Nieuwland and van Melik 2020). Cities face a difficult question how to balance the interests of long-term renters, hotel owners, and residents concerned about externalities against the interests of landlords and tourists and the possible economic benefits of increased tourism. Perhaps deregulation is in fact the right answer, but one must be in the grip of a dogmatic ideology to think that deregulation is *obviously* the right answer.

If all city residents, including would-be Airbnb hosts, have meaningful opportunities to try to influence the law through the democratic process (c), landlords who seek to change the “rules of the game” should do so through the democratic process. They should not seek to undermine the law by breaking it. The “if” here is a big “if.” When does the democratic process provide everyone a meaningful voice? If it does not, what becomes of businesspeople’s obligation to respect the law of resource allocation?

V Obeying the law in flawed democracies

I promised readers an argument for obeying resource-allocation law that applies to many actual societies, without relying on unreasonably optimistic empirical assumptions about those societies. Section III defended a duty to obey resource-allocation law subject to three conditions, including (c) that everyone subject to law should have meaningful opportunities to try to influence the law through rational persuasion. Elsewhere, I have argued that this last condition can feasibly be met in contemporary societies (Hughes 2014), but I would not argue that it is currently met. To what extent does the moral obligation to obey resource allocation law persist when this condition is unmet?

People have meaningful opportunities to try to influence the law through rational persuasion if they can advance thoughtful arguments with the realistic hope that with enough persistence, the arguments will receive their due. Either their arguments will lead to the result advocates seek, or open-minded listeners will explain to advocates why their arguments are unpersuasive (e.g., because they rely on invalid logic, unjustified factual premises, or value premises that others could reasonably reject). The opportunity to vote is neither necessary nor sufficient for people to have meaningful opportunities to influence the law through rational

persuasion. In principle, if not in practice, a monarchical or oligarchical society could have a legislative process that sincerely considers arguments from people who cannot vote. The lack of universal voting rights would be an injustice, and people would be justified in engaging in civil disobedience to secure the franchise. Nevertheless, the existing opportunities to influence the law through rational persuasion would have value. It would be wrong to engage in a form of protest that deprives fellow citizens of the rational influence they have without doing anything to help them obtain voting rights. Since regulatory entrepreneurship does not aim at securing voting rights, the lack of universal voting rights does not justify regulatory entrepreneurship in a society with a meaningful process to address grievances.

Many actual democracies face a different problem: people have the right to vote but lack meaningful opportunities to influence the law through rational persuasion. The lack of such opportunities results from legislators and other officials who can shape the law being receptive to arguments only from a limited range of sources. They will listen to high-ranking elected leaders, major campaign donors, well-known business leaders, and people with an influential media platform. They will not listen seriously to ordinary citizens, nor are there reliable mechanisms in the public sphere for ordinary citizens to acquire the wealth or media influence that would enable them to draw attention to an issue that matters to them. Under these circumstances, citizens who are effectively excluded from the political process may be justified in going outside the political process to try to change the rules that are effective in their society. When the law is unjust, it is morally permissible for them to try to undermine the public habit of respecting the law. For example, if there had not been a political process in which Jane's complaint about trespass law could have been heard, she would have been justified in disobeying the law to establish a

customary right to roam. Her property-owning fellow citizens would have no complaint that she did not allow their opinions to be considered through the political process, since the political process excluded Jane. Likewise, if there is no political process for a would-be Airbnb host to contest their city's restrictions on short-term rentals, and if those restrictions are unjust, this property owner would be justified in disobeying those restrictions with the aim of undermining these restrictions' social legitimacy.

Matters are different for citizens who *are* included in the political process. If these citizens choose to try to change the resource-allocation rules through lawbreaking, and other members of their relatively privileged class support the existing rules, the lawbreakers disrespectfully treat their peers' views as beneath notice. Citizens who could have had a voice in the political process have a complaint about being treated in this way. The complaint is most serious if they are materially harmed by the change in resource-allocation rules, but it is a valid complaint even if they are not themselves harmed. It might be acceptable to treat the views of fellow citizens as beneath notice if their views are clearly unreasonable and the legal rights they seek to defend are clearly unjust. But in the circumstances stipulated above, i.e. if condition (b) is met, the rights in dispute are not *clearly* unjust. If some citizens believe reasonably and in good faith (if wrongly) that the contested legal rights are justified, they should have the opportunity to try to persuade others to preserve those rights. Suppose, for instance, that a city's political process effectively excludes the poor—they can vote, but their voices on specific issues are unheard—but that property owners can present arguments to the city's political leaders with a reasonable hope of obtaining either a policy change or a reasoned explanation for keeping policy

as it is. Then landlords who wish to change rental restrictions ought to go through the political process, rather than delegitimizing regulations through disobedience.

More generally, suppose that the political process is not straightforwardly corrupt, but one needs money or connections to make one's views heard. A large campaign contribution can enable one to get busy legislators or regulators to take the time to listen to one's arguments—and they may listen to *the arguments*, not merely to the money. A large ad buy can get an issue one cares about onto the political agenda. A personal connection to a legislator, a regulator, or a journalist can likewise enable one to get people in power to consider an argument for changing or for preserving the law. Under these circumstances, those who lack wealth or connections may be justified in disobeying a law with the aim of making it a dead letter. Wealthy people and others who can influence legislators, regulators, or the media can get their reasoned arguments a hearing in the (flawed) democratic political process. They should not try to change the rules unilaterally if other people could reasonably disagree with their arguments for changing the law. Out of respect for the reasoned positions of others who share their relatively privileged situation, they should use the political process, rather than going outside of it and denying a voice to dissenters.

In non-ideal societies, the question when to obey resource allocation law needs a complex answer. For businesspeople who expect others to respect their business's legal rights, the answer is simpler. When it is obvious to all reasonable, informed people that a legal requirement is unjust (e.g. a law mandating racial segregation), disobeying this requirement is ethically permissible. When people could reasonably disagree about what legal requirements or legal rights should change—even when it is uncontroversial that *something* should change—

businesspeople should be reluctant to violate other people's legal rights, including the legal rights of competitors. They should not break the law out of simple self-interest. If considerations of justice (no doubt in combination with self-interest) motivate businesspeople to try to change the rules in effect, they should do this through the democratic political process if they can. If they instead choose to change the rules in effect through private action that involves violating others' legal rights, they thereby implicitly condone others treating their business's legal rights in the same way.

Thus, many Airbnb hosts act unethically by listing rentals that violate local restrictions. What of Airbnb itself? Of the cities that restrict short-term rentals, all penalize the landlord offering the rental, but only some penalize the platform listing the rental (Nieuwland and van Melik 2000). Consider Airbnb's listing of short-term rentals of whole apartments in cities where such rentals are illegal but advertising them is not.¹⁵ If Airbnb continues to list apartments in that city, it does not directly break the law, but it facilitates lawbreaking by others. If the city is large, and if its regulations on short-term rentals are well-publicized, Airbnb's continued listing of whole apartment rentals in that city reflects a decision, not a mere oversight. Removing all whole-apartment listings in that city would involve minimal software costs, as the information needed to assess the legality of a listing is directly provided by the host. Airbnb's continued listing of these rentals reflects an intentional business strategy to profit from illegal rentals. It is unethical intentionally to assist others in doing something unethical. If a business facilitates an activity, and the business's strategy presupposes that people will engage in that activity, then the business intentionally assists others in doing that activity. Thus, when it is unethical for the hosts (i.e., the landlords) to offer illegal rentals, it is unethical for Airbnb to list these rentals. This

conclusion holds not only in ideal democracies, but in actual, flawed democracies in which Airbnb operates. As a prominent corporation, publicly traded since 2020, Airbnb cannot plausibly argue that it lacks an effective political voice.

VI The complex case of Uber in Philadelphia

The analysis so far implies that many instances of regulatory entrepreneurship are unethical. For example, it is unethical for an Airbnb host to offer multiple whole apartments for rent, in violation of a municipal restriction on short term rentals, if the restriction has reasonable, good-faith defenders and if there is a political process to which the would-be host has meaningful access. It is likewise unethical for Airbnb to facilitate unethical lawbreaking by listing these illegal rentals. Some cases of regulatory entrepreneurship raise more complex questions. The case of Uber in Philadelphia is one such case. I limit the discussion here to the ethics of the company's actions. I will not pass judgment on individual Uber drivers, many of whom have limited resources (as do many traditional taxi drivers).

Uber operated illegally in Philadelphia between 2014 and 2016, when the relevant taxi regulations were revised. At the beginning of this period, Uber could argue in good faith that they were in fact following the law, as it was not yet clear that the taxi code applied to them. It is a difficult question what businesspeople are ethically required to do when it is unclear what the law requires of them. Silver (2020) has defended an ethical obligation to respect the spirit, not only the letter, of democratically enacted law. In the specific context of tax compliance, Lenz (2020) defends an ethical obligation to refrain from "aggressive legal interpretation." Issues of interpretation became moot once a court ruled that Philadelphia's taxi regulations did in fact apply to Uber's UberX service (Fiorillo 2015). The continuation of this service in the city then

became unambiguously illegal. Young (2019) argues that Uber's lawbreaking in Philadelphia was justified on both substantive and procedural grounds. Though the details of the case raise serious concerns, Uber's strategy of regulatory entrepreneurship in Philadelphia was in fact unethical.

Prior to 2016, Philadelphia had taxi regulations that were incompatible with the business model of Uber and Lyft. These regulations included requirements that all companies that provides car rides for hire must perform background checks on drivers, use cars that meet certain safety and environmental standards, and charge fares according to a schedule. Philadelphia also required cars providing rides for hire to display taxi medallions, of which there is a limited supply. Young (2019) offers some compelling reasons to consider these regulations objectionable, at least when they are incompatible with the new sharing economy business model. Uber and Lyft increase the number of beneficial transactions, they reduce drunk driving by increasing the number of vehicles for hire, and they provide better service to communities that traditional taxi companies serve poorly.

In determining whether a sharing economy company was justified in adopting a strategy of regulatory entrepreneurship, the salient question of substantive justice is not whether the laws and regulations they challenged via lawbreaking were fair regulations. The salient question is whether these laws and regulations had good faith, reasonable defenders. If some citizens reasonably believed that these laws were fair, it would show culpable disrespect to deny those citizens a say about the rules that govern resource allocation. It would thus be wrong to engage in regulatory entrepreneurship if the democratic process provided a meaningful venue for seeking change. Some cities have adopted taxi regulations that had no good-faith, reasonable defense.

For example, France's *Loi Thévenoud*, enacted in 2014 after violent anti-Uber protests, prohibits "transport vehicles with drivers" from providing geo-location information to customers before reservation and requires drivers to return to their base between rides if they have no other reservation (Edelman and Geradin 2015). These requirements appear to have no purpose other than to protect traditional taxi companies from competition.

It would be a mistake to dismiss all city taxi regulations incompatible with the Uber/Lyft business model as mere rent-seeking by taxi cartels. Driving has negative externalities. Every car on the road affects other drivers, if only by contributing to traffic congestion. Though there are conceivable mechanisms by which the introduction of Uber and Lyft could either increase or decrease traffic, empirical evidence points to an increase. One study of traffic in San Francisco between 2010 and 2016 found that "transportation network companies" such as Uber and Lyft were "the biggest contributor to growing traffic congestion" (Erhardt et al., 2019). A graver externality is the harm caused by accidents. To reduce traffic accidents, many cities require taxis and taxi drivers to meet heightened safety standards. Sharing-economy platform drivers' noncompliance with these regulations creates a negative externality (Edelman and Geradin 2015). Perhaps the most important negative externality of driving is its environmental impact. There is uncertainty about whether the long-run effects of Uber and Lyft on greenhouse gas emissions and other forms of pollution will be positive or negative (Light 2017, 366-370).

Taxi regulations that interfere with Uber's and Lyft's entry into the market also serve to protect drivers' economic interests. The original purpose of the medallion system was to ensure that taxi drivers received a fair income. Before medallion laws were enacted during the Great Depression, competition among drivers desperate for income drove down rates to a point at which taxi drivers had to resort to poor business practices, such as demanding tips and failing to

maintain vehicles, to avoid operating below cost (Posen, 2015). As medallions are now typically owned by investors and leased to drivers, medallion laws do not protect drivers' income as intended. That said, the current taxi company model, on which most drivers do not own either the vehicle they drive or the taxi medallion (where required), presents an important benefit to drivers: they do not need to know the costs of owning and operating the vehicle (Horan 2017). The sharing economy business model, by contrast, advertises gross earnings to workers and requires them to make their own calculations of the costs of doing business, such as vehicle maintenance and depreciation. Sharing economy firms may thus benefit from an information asymmetry. Uber, in particular, has been credibly accused of exploiting information asymmetries with workers (Horan 2017, 46-49; Rosenblat and Stark 2016).

Reasonable, well-informed people could think that regulations on vehicles for hire serve to protect passengers' safety, to limit traffic congestion and emissions, or to ensure that drivers receive fair wages.¹⁶ A plausible but debatable argument that the law is unfair or inefficient does not justify violating business regulations any more than it justifies stealing, trespass, or property damage. Because the substantive arguments against city taxi regulations are open to reasonable dispute, new companies are not morally justified in breaking these regulations without going through the democratic process. That said, a company can seek change through the democratic political process only if there is a democratic process that gives some attention to reasoned arguments. If the regulatory process is deeply undemocratic—e.g., if it is radically corrupt and regulators simply write whatever regulations the highest bidders request—then people who seek change in the law show no disrespect for fellow citizens' views by delegitimizing the products of this corrupt process. The process is not responsive to citizens' reasoned views at all.

Young (2019) argues that this may have been the case in Philadelphia. The Philadelphia Parking Authority (PPA), which regulates vehicles for hire in the city, was labeled a “patronage haven” by the *Philadelphia Inquirer*. Though it regulates an overwhelmingly Democratic city, a controlling majority of its board was appointed by a Republican state governor. There is reason to think that at the time Uber was operating illegally, the PPA was not responsive to the views of most Philadelphians, and that it was strongly influenced by owners of taxi medallions (many of whom are taxi company owners, not drivers).

These facts about the history of the PPA’s taxi regulations are troubling. That regulations have a corrupt history does not settle the question whether one may ethically seek to undermine them through regulatory entrepreneurship. The relevant question is not political history, but the political present: is there now a political process that provides a venue for the arguments of those who seek to change the law and those who *reasonably* wish to keep the law as it is? To assess the ethics of Uber’s conduct in Philadelphia, we would need to know not only whether the PPA was captured by medallion holders, but also whether the Pennsylvania General Assembly was captured. That Uber and Lyft successfully petitioned the Pennsylvania legislature to change the law in 2016 is evidence that they could have gotten meaningful consideration of their arguments earlier. (Meaningful consideration is not the same as guaranteed success.)

Defenders of Uber and Lyft might argue that they could not have received a meaningful hearing in the state legislature without first building a constituency for their business model through illegal operations. There are two reasons to be skeptical of this argument as applied to Uber. First, Uber was putting substantial resources into lobbying by 2014, the year the company’s operations in Philadelphia began. The company secured the services of David

Plouffe, former chief of staff to Barack Obama, and Rachel Whetstone, a former major advisor to British Prime Minister David Cameron (Horan 2017). To claim that Uber in 2014 was a scrappy upstart with no political access would be inaccurate. Second, the strategy of operating illegally to build a constituency for legislative change can backfire. Explaining Uber’s failure to change taxi law in the Netherlands, Pelzer, Frenken, and Boon (2019, 10) write, “The ministry emphasized that they did not regard Uber as a legitimate partner to discuss and ‘co-create’ new regulations as long as the UberPop service remained operational thus violating the taxi law.”

Prior to beginning their operations in Philadelphia, Uber (and perhaps also Lyft) had a realistic hope that the state legislature would consider their arguments for changing the law, making it possible to operate legally from the start. Because Uber had a good faith argument in 2014 that the PPA’s regulations did not apply to their drivers, perhaps Uber was justified in starting operations in Philadelphia, pending resolution of the legal ambiguity. Once the courts ruled that the PPA’s regulations did in fact apply to “sharing economy” firms, making UberX’s operations in Philadelphia unambiguously illegal, the company should not have continued to operate its service illegally. It should have petitioned the legislature, rather than choosing to flout the law in a way that denied medallion owners, traditional taxi drivers, and most Philadelphia residents (and other Pennsylvania residents) a say about vehicles for hire in the city.

VII Conclusion

Owners and managers of successful businesses should hesitate to break the law as a response to perceived injustice. To be sure, they are justified in breaking *clearly* unjust laws, such as laws requiring or enabling racial segregation. But when well-informed, reasonable people can and do disagree about whether the law on the books is just, “regulatory entrepreneurship” is a morally

problematic business strategy. If business leaders could seek change through the democratic process (flawed as it may be), but instead they choose to flout the law in a way that makes the democratic process and public opinion irrelevant, they show contempt for reasonable people who disagree with their views. A business that takes justice into its own hands, flouting others' legal rights in the process, invites others to treat its own legal rights in the same way. That is an invitation businesspeople should be reluctant to extend.¹⁷

Notes

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- ¹Though some make a distinction between duties and obligations, I do not. I shall use the words “duty” and “obligation” interchangeably.
- ² A third way in which my account differs from many accounts is that I defend a subject matter dependent duty to obey the law, rather than a comprehensive or content-independent account. For argument that an ethical obligation to obey the law can be content-dependent, see Klosko (2011) and Marckwick (2003).
- ³As Viehoff acknowledges, “many (perhaps all) existing democratic states fall short” of even a “quite minimal” standard of democratic procedure (2014, p. 342).
- ⁴ For arguments that determinate natural property rights cannot exist, see Otsuka (2003), Rousseau (2012 [1755]), and Steiner (1997).
- ⁵ As Lyons (1977) points out, Nozick’s theory of natural property rights implies that much land in the United States should be taken from its present legal owners and returned to the Native American tribes from which it was stolen centuries ago. Thus, most current legal rights to land in the United States cannot be natural rights on Nozick’s account.
- ⁶ The owners of shares of stock in a firm have a parallel entitlement.
- ⁷ That property owners have a moral entitlement to compete on terms defined by law does not entail that they have or that they ought to have the power to enforce this entitlement via private lawsuits against competitors who violate public law.
- ⁸ People may also be justified in violating just laws to prevent loss of life or limb. The lack of an exception for cases of necessity may not constitute an injustice if lawmakers could not have anticipated the need for an exception. I do not address such cases in the above discussion, as they necessarily involve extraordinary circumstances, whereas regulatory entrepreneurship challenges laws and regulations in some of their ordinary applications.
- ⁹ For example, in a society whose resource allocation law leaves some people involuntarily dependent on charity to meet their basic needs, it is reasonable to believe that the resource allocation system contains an injustice. Dependence on charity makes people unfree, since it makes people’s continued life (and thus all their activities) subject to the discretionary choices of those who can give or withhold charity. This is the Kantian argument for public support of the poor. For recent discussion and development of the argument, see Gilabert (2010); Essert (2016); Ripstein (2009, pp. 25-26, 267-286); Weinrib (2003).
- ¹⁰ I am sympathetic to Ripstein’s (2009) account of the importance of property rights to freedom. I am also sympathetic to Waldron’s (1990) argument that it is not enough for everyone to be able to have property rights; everyone should actually have property rights.
- ¹¹ Thus, a different and more complex argument would be needed to settle the question whether tiny sole proprietorships are ethically required to follow laws their owners regard as unfair. For example, if hair-braiders are legally required to obtain cosmetology licenses, and they think this requirement unfairly burdensome, are they ethically required to get a license before going into practice?
- ¹² There is disagreement about what counts as civil disobedience, e.g. about whether covert lawbreaking can count as civil disobedience and about whether lawbreakers must accept punishment to count as civilly disobedient. It is generally agreed, however, that civil disobedience involves an attempt to change law or policy through persuasion (Delmas 2016).
- ¹³ Giving everyone a meaningful say requires more than giving everyone an equal vote. It also requires ensuring that the grievance of minority groups, including political groups, get a fair public hearing, either through a formal deliberative mechanism (such as judicial review) or through the press and public discussion. When laws deliberately target a minority group for grossly unfair treatment, members of this group are often justified in believing that their grievances will not get a fair public hearing. It is thus appropriate to disobey these laws hoping either to bring about legislative change or to render them dead letters.
- ¹⁴ The correlation was with increased purchase prices, not long-term rents. Franco and Santos suggest that the lack of correlation between increased Airbnb listings and increased rents may be a result of the overlap between the introduction of Airbnb and the liberalization of Portugal’s rent control laws.
- ¹⁵ I do not mean to imply here that the existence of a legal prohibition entails the existence of a penalty.
- ¹⁶ Reasonable people might also think that Uber and Lyft should be regulated differently from existing taxi companies, but that Uber and Lyft should not get a “free pass” while new regulations are being crafted. For discussion of the range of possible regulatory responses to “disruptive” new businesses, see Biber, Light, Ruhl, and Salzman (2017, 1603-1607).
- ¹⁷ For their helpful feedback on previous drafts, I am grateful to David Dick, Thomas Donaldson, R. Edward Freeman, Nien-hê Hsieh, Tobey Scharding, Seana Valentine Shiffrin, Alan Strudler, all the members of the Wharton LGST junior faculty workshop, and audiences at annual meetings of the Association for Social and Political Philosophy, the Legal Philosophy Workshop, the Society for Applied Philosophy, and the Society for Business Ethics.