

When “Disruption” Collides with Accountability: Holding Ridesharing Companies Liable for Acts of Their Drivers

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When Uber launched in San Francisco in 2010, it took the city by storm. Here was a high-tech transportation service that seemingly did everything better than taxicabs: it was more convenient, more accessible, more comfortable, and even cheaper in many instances. Uber’s initial success inspired a number of lower-cost, non-professional “ridesharing” options, which have flourished.

Some skeptics, including taxicab operators, have decried the arrival of these peer-to-peer ridesharing services, now classified by regulators as Transportation Network Companies (TNCs). While such complaints could be easily dismissed as the dying groans of a “disrupted” industry, a string of passenger safety incidents has raised doubts about whether these services are ready to safely replace traditional transportation services.

One critical gray area for consumers is whether injured parties can recover from TNCs rather than their drivers alone. This Note argues that TNCs should be liable for acts of their drivers, and it provides a novel approach—the nondelegable duty rule—that has yet to be argued by plaintiffs in existing cases. Such an approach will place responsibility where it should be: on the companies profiting from the drivers and passengers. More importantly, preventing TNCs from exploiting regulatory loopholes has broader implications for the rapidly growing “sharing economy.”

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INTRODUCTION

On New Year's Eve of 2013 in San Francisco, a driver for the popular "ridesharing" service uberX failed to yield to a six-year-old girl and her family at a crosswalk.¹ The driver struck and killed the little girl and left the mother and brother injured.² The parents of the girl sued not only the driver but also Uber Technologies, LLC, uberX's parent company.³ According to their complaint, the uberX driver hit and killed the girl while he was logged into Uber's phone application and searching for customers.⁴ The girl's mother has since stated that she could "see the light from the cell phone" cast on the driver's face immediately before the accident.⁵ The case implicated

1. David Streitfeld, *Rough Patch for Uber Service's Challenge to Taxis*, N.Y. TIMES (Jan. 26, 2014), <http://www.nytimes.com/2014/01/27/technology/rough-patch-for-uber-services-challenge-to-taxis.html> [<http://perma.cc/4YQT-CWRZ>].

2. *Id.*

3. Complaint for Damages and Demand for Trial by Jury at 1, Liu v. Uber Techs., Inc., No. CGC-14-536979 (Cal. Super. Ct. Jan. 27, 2014) [hereinafter Liu Complaint].

4. *Id.* at 5.

5. Brad Stone, *Invasion of the Taxi Snatchers: Uber Leads an Industry's Disruption*, BLOOMBERG BUSINESSWEEK (Feb. 20, 2014), <http://www.businessweek.com/printer/articles/184857-invasion-of-the-taxi-snatchers-uber-leads-an-industrys-disruption> [<http://perma.cc/QWB9-KVK8>].

California’s distracted-driving law⁶ and, more importantly for the plaintiffs, whether Uber could be held liable for the negligence of one of its drivers.⁷

Uber immediately attempted to distance itself from any responsibility for the girl’s death. In a statement released the following day, Uber first extended condolences to the family of the girl, but then noted: “The driver in question was not providing services on the Uber system during the time of the accident.”⁸ In other words, the company did not consider a driver logged into Uber’s phone application and searching for fares to be “providing services” on its behalf. Of course, to the grieving family, this technicality was irrelevant. The driver may not have been actually transporting or on his way to transport anyone, but he was benefitting Uber by making himself available for passenger ride requests.

The New Year’s Eve death may be the highest profile incident for ridesharing services, but it is far from the only one for these companies, which are now classified by California regulators as Transportation Network Companies (TNCs). Uber customers have alleged numerous incidents of driver misconduct, including driver negligence,⁹ sexual harassment,¹⁰ and even kidnapping.¹¹ And a *Chicago Tribune* investigation revealed that Uber failed to properly screen criminal records of “thousands of drivers,” letting them operate on Uber’s service “despite not knowing whether or not they had felony convictions.”¹² Meanwhile, Lyft, another TNC, experienced its first passenger

6. CAL. VEH. CODE § 23123 (West 2014).

7. See, e.g., Carmel DeAmicis, *Exclusive: Uber Driver Accused of Assault Had Done Prison Time for a Felony, Passed Background Check Anyway*, PANDO (Jan. 6, 2014), <http://pando.com/2014/01/06/exclusive-uber-driver-accused-of-assault-passed-zero-tolerance-background-check-despite-criminal-history> [<http://perma.cc/4LWS-SQMW>]; Stone, *supra* note 5; Kale Williams & Kurtis Alexander, *Uber Sued over Girl’s Death in S.F.*, S.F. CHRONICLE (Jan. 28, 2014), <http://www.sfgate.com/bayarea/article/Uber-sued-over-girl-s-death-in-S-F-5178921.php> [<http://perma.cc/BNJ8-4N9B>].

8. Andrew, *Statement on New Year’s Eve Accident*, UBER BLOG (Jan. 1, 2014), <https://blog.uber.com/2014/01/01/statement-on-new-years-eve-accident> [<https://perma.cc/VK3K-BA5E>]. In response to general criticisms about the Uber application’s potential to distract drivers, Uber’s CEO stated: “[T]he technology Uber provides its partners is far safer than anything the taxi industry offers.” Stone, *supra* note 5.

9. See, e.g., Complaint at 2–3, *Bishop v. Uber Techs., Inc.*, No. 37-2014-00037935-CU-PA-CTL (Cal. Super. Ct. Nov. 5, 2014) [hereinafter *Bishop Complaint*].

10. Olivia Nuzzi, *Uber’s Biggest Problem Isn’t Surge Pricing. What If It’s Sexual Harassment by Drivers?*, DAILY BEAST (Mar. 28, 2014), <http://www.thedailybeast.com/articles/2014/03/28/uber-s-biggest-problem-isn-t-surge-pricing-what-if-it-s-sexual-harassment-by-drivers.html> [<http://perma.cc/8JLM-VDC5>].

11. Julie Zauzmer & Lori Aratani, *Man Visiting D.C. Says Uber Driver Took Him on Wild Ride*, WASH. POST (July 9, 2014), <http://www.washingtonpost.com/blogs/dr-gridlock/wp/2014/07/09/man-visiting-d-c-says-uber-driver-took-him-on-wild-ride> [<http://perma.cc/S3C9-BU9Z>].

12. Leonor Vivanco & Cynthia Dizikes, *Gaps in Some Ride-Sharing Firms’ Background Checks*, CHI. TRIB. (Feb. 14, 2014), http://articles.chicagotribune.com/2014-02-14/news/ct-rideshare-background-checks-met-20140214_1-background-checks-ride-sharing-drivers [<http://perma.cc/H3TA-8MU5>]. Uber released a statement, on the same day, that it had had improved its background checks and deactivated the driver revealed by the *Tribune* to have a prior felony. Nairi, *Statement on Chicago*

fatality on November 1, 2014.¹³ Despite these recent incidents, there is still scant, if any, case law addressing whether TNCs can be liable for tortious acts of their drivers.¹⁴ Given such a void, this Note addresses TNC liability in a way that reflects the unique nature of the services these companies provide and their distinctive employment arrangement with drivers.

The issue is an important one because TNCs, and the sharing economy generally, are growing at a rapid—and largely unchecked—pace. When Uber launched in San Francisco in 2010, it took the city by storm. It was a high-tech service that seemingly did everything better than taxicabs: it was more convenient, more accessible, more comfortable, and even cheaper in many instances. Uber's initial success inspired lower-cost, nonprofessional “ridesharing” options—including uberX, Lyft, and Sidecar—which have flourished. These services are able to operate cheaply, at least in part, because the drivers (unlike taxicab drivers) carry noncommercial licenses and use their personal vehicles rather than company cars.¹⁵ In addition, passengers and drivers find each other using a phone application, cutting out the need to employ full-time dispatchers.¹⁶

But harsh realities are beginning to catch up to TNCs. Taxicab operators have rebelled against TNCs since their inception, arguing that they unfairly benefit from loopholes and a lax, if not completely nonexistent, regulatory framework. Many commentators initially dismissed these complaints as the dying groans of an outmoded industry that had been successfully “disrupted,”¹⁷ business speak for when a new market entrant overtakes an existing industry by

UberX Background Check, UBER (Feb. 14, 2014), <https://blog.uber.com/chiuberxbackgroundcheck> [<http://perma.cc/JS7Z-ZL99>]. In addition to the risk of noncompliance, California and other states require TNCs to conduct significantly less rigorous background checks than those required of taxicab companies. See DeAmicis, *supra* note 7. The appropriateness of conducting pre-hiring background checks for felonies is certainly debatable, but it is outside the scope of this Note.

13. Ellen Huet, *Lyft's First Fatality: Passenger Dies in Crash Near Sacramento*, FORBES (Nov. 2, 2014), <http://www.forbes.com/sites/ellenhuet/2014/11/02/lyfts-first-fatality-passenger-death-crash-sacramento> [<http://perma.cc/3HVA-GQBG>].

14. The case over the Uber driver's New Year's Eve accident, for example, ultimately settled, leaving the question of Uber's legal liability unanswered. See Dan Levine, *Uber Settles Wrongful Death Lawsuit in San Francisco*, REUTERS (July 15, 2015), <http://www.reuters.com/article/2015/07/15/us-uber-tech-crash-settlement-idUSKCN0PO2OW20150715> [<http://perma.cc/U829-P46G>].

15. See *infra* Part II.B.i.

16. See *infra* Part II.B.i.

17. See, e.g., Nick Bilton, *Disruptions: Ride-Sharing Upstarts Challenge Taxi Industry*, N.Y. TIMES (July 21, 2013, 11:00 AM), <http://bits.blogs.nytimes.com/2013/07/21/disruptions-upstarts-challenge-the-taxi-industry> [<http://perma.cc/Y5RC-F8WH>]. Indeed, ridesharing has undercut the taxicab industry: in San Francisco, for example, the average number of rides per month dropped by nearly 65 percent from March 2012—when ridesharing services were just starting—to September 2014. Jessica Kwong, *Report Says SF Taxis Suffering Greatly*, S.F. EXAMINER (Sept. 16, 2014), <http://archives.sfexaminer.com/sanfrancisco/report-says-sf-taxis-suffering-greatly/Content?oid=2899618> [<http://perma.cc/CFM9-5DS5>].

harnessing technology in novel ways or creating a new business model.¹⁸ The complaints and passenger safety incidents, though, have undermined the idea that ridesharing services are ready to replace traditional taxi services.

Amid this uncertainty, courts will need to answer some critical questions: If a TNC customer gets severely injured in an accident because the driver is operating recklessly, will the company step in to cover the customer’s medical costs beyond the driver’s insurance?¹⁹ If a third-party bystander is killed while a TNC driver is distractedly looking for fares on his cell phone, would the company be liable to the bystander’s estate?²⁰ Both of these situations have happened and have resulted in lawsuits.²¹

In addressing the gray area of TNC tort liability, this Note focuses on California law. It does so because California is the birthplace of many ridesharing companies and remains one of their largest markets.²² As the home of Silicon Valley, California policy makers have also led the way in creating new regulations to cover ridesharing services.

Perhaps most significantly, California has begun requiring that all TNC vehicles carry significant accident insurance—a step that helps protect passengers and bystanders.²³ Yet two problems remain: First, the insurance coverage is inadequate. For example, even after California’s new insurance requirements took effect on July 1, 2015, drivers who are available for rides on the TNC application but not actually transporting anyone still carry only \$50,000 worth of insurance per person for death and personal injury.²⁴ In a case where a bystander is killed, the potential award could far exceed the \$50,000 of insurance coverage. Second, just because TNCs now carry insurance does not mean the TNC companies and their insurers will happily

18. See A.W., *What Disruptive Innovation Means*, *ECONOMIST* (Jan. 25, 2015, 11:50 PM), <http://www.economist.com/blogs/economist-explains/2015/01/economist-explains-15> [<http://perma.cc/7BJE-SA66>].

19. California has recently increased the minimum insurance levels that companies like Uber are required to carry while transporting drivers. CAL. PUB. UTIL. CODE § 5433 (West 2014). But simply possessing insurance does not necessarily keep companies like Uber and their insurance agents from attempting to avoid paying damages. See, e.g., Answer of Defendants, *Bishop v. Uber Techs.*, No. 37-2014-00037935-CU-PA-CTL (Cal. Super. Ct. Dec. 29, 2014) [hereinafter *Uber Bishop Answer*] (disclaiming all responsibility for passenger injury at the hands of an allegedly negligent driver).

20. Uber’s insurance would also cover this type of incident, but only for a fraction of the amount available when a driver is transporting a passenger. CAL. PUB. UTIL. CODE § 5433.

21. Bishop Complaint, *supra* note 9, at 2–3 (passenger injury); Liu Complaint, *supra* note 3, at 4 (bystander death).

22. Both Uber and Lyft were founded in San Francisco. See Adam Lashinsky, *Uber: An Oral History*, *FORTUNE* (June 3, 2015), <http://fortune.com/2015/06/03/uber-an-oral-history> [<http://perma.cc/5H8T-YZVN>]; Nicholas Carlson, *Lyft, A Year-Old Startup That Helps Strangers Share Car Rides, Just Raised \$60 Million From Andreessen Horowitz and Others*, *BUS. INSIDER* (May 23, 2013), <http://www.businessinsider.com/lyft-a-startup-that-helps-strangers-share-car-rides-just-raised-60-million-from-andreessen-horowitz-2013-5> [<http://perma.cc/P3HG-4VK7>].

23. CAL. PUB. UTIL. CODE § 5433.

24. *Id.*

pay out every claim made by a passenger or bystander. Indeed, Uber disclaimed all liability after a passenger in San Diego sued the company and its driver for negligent driving.²⁵ And Uber made this claim even though the car presumably carried the required \$1 million insurance policy.²⁶ California's insurance requirements might help, but they do not solve the passenger and bystander safety issues.

This Note seeks to find a path for plaintiffs to hold TNCs liable for acts of their drivers. And it does so in a way not yet argued by plaintiff-side attorneys. So far, injured parties have alleged that drivers and TNCs have an employment relationship that creates vicarious liability.²⁷ Although this theory could be persuasive—indeed, courts have found an employer-employee relationship between drivers and TNCs in the employee benefits context²⁸—it would be unwise for plaintiffs to condition all their claims on establishing that TNC drivers are employees, a complex and subjective test. As one federal judge said of a case concerning the employment relationship presented by TNCs, “The test the California courts have developed over the 20th Century for classifying workers isn’t very helpful in addressing this 21st Century problem.”²⁹ Instead, the jury in that case had been “handed a square peg and asked to choose between two round holes.”³⁰ This Note argues in the alternative that TNCs’ responsibility for acts of their drivers need not be dependent on “20th century” employment tests; instead, the companies can and should be held liable because they have a “nondelegable duty” to protect the safety of passengers and the general public.

Part I explores the common arguments advanced by both TNCs and the plaintiffs hoping to recover from them. It then notes, with cautious optimism, a number of employment benefits cases in which individual drivers have successfully argued that they are employees of TNCs. Part II suggests a new perspective through which to define the relationship between TNCs and

25. See Bishop Complaint, *supra* note 9.

26. See *Insurance Requirements for TNCs*, CAL. PUB. UTIL. COMM’N, <http://www.cpuc.ca.gov/PUC/Enforcement/TNC/TNC+Insurance+Requirements.htm> [<http://perma.cc/26V2-Z4SW>] (last modified July 6, 2015).

27. Bishop Complaint, *supra* note 9, at 3–4; Liu Complaint, *supra* note 3, at 3–4.

28. State agencies in both California and Florida have found that the specific drivers bringing suit over employment benefits were indeed employees and therefore entitled to benefits. See Alyson Shontell, *California Labor Commission Rules an Uber Driver Is an Employee, Which Could Clobber the \$50 Billion Company*, BUS. INSIDER (June 17, 2015), <http://www.businessinsider.com/california-labor-commission-rules-uber-drivers-are-employees-2015-6> [<http://perma.cc/H3GB-RHPJ>] (California); Robert W. Wood, *Florida Says Uber Drivers Are Employees, But FedEx, Other Cases Promise Long Battle*, FORBES (May 26, 2015), <http://www.forbes.com/sites/robertwood/2015/05/26/florida-says-uber-drivers-are-employees-but-fedex-other-cases-promise-long-battle> [<http://perma.cc/C4NT-ZSTL>] (Florida).

29. Ellen Huet, *Juries to Decide Landmark Cases Against Uber and Lyft*, FORBES (Mar. 11, 2015), <http://www.forbes.com/sites/ellenhuet/2015/03/11/lyft-uber-employee-jury-trial-ruling> [<http://perma.cc/9SZJ-PZZ3>] (quoting U.S. District Judge Vince Chhabria).

30. *Id.* (quoting U.S. District Judge Vince Chhabria).

drivers, one that could effectively hold TNCs liable while acknowledging the uniquely modern relationship the companies have with their drivers. The nondelegable duty doctrine is an equitable rule that bars certain types of employers—those that are engaged in a dangerous activity and operate under a public license or franchise—from avoiding liability for acts of their independent contractors.³¹ After laying out strategies for plaintiffs, Part III offers policy recommendations that seek to make TNCs safer and resolve lingering ambiguities about TNC operations.

As with many disruptive industries before them, TNCs appear to be coming to the end of their free-for-all period of uninhibited growth. It is time for courts and policy makers to begin closing the loopholes from which TNCs have benefitted and take a tangible step toward maintaining consumer protections in this era of startups and deregulation. Only then will the public be able to judge whether TNCs are the wave of the future or mere opportunists capitalizing on regulatory carelessness.

I.

THE CHALLENGE OF CLASSIFYING TNCs AND THEIR DRIVERS

TNCs are a novel phenomenon that will require courts to adapt existing legal doctrines to determine liability for driver actions. With vast sums of money at stake, it is no surprise that TNCs and regulators have already butted heads over the extent to which the services bear responsibility for public safety. For their part, TNCs have tried to argue that they are merely technology “platforms” that connect drivers offering services to prospective passengers, and therefore they should not be liable for acts of their drivers. By contrast, the California Public Utilities Commission (CPUC) and the state’s legislature have begun creating new TNC regulations with the express concern of protecting the general public from the potential dangers of using the services.³²

It remains unclear, though, whether victims have any legal recourse against TNCs for the acts of their drivers. TNCs have sought to minimize their relationship with drivers³³—something that would help them avoid liability. At the other end of the spectrum, plaintiffs have argued that TNCs have strong,

31. See *infra* Part II.

32. See *infra* Part II.C.

33. See, e.g., *Lyft Terms of Service*, LYFT (Sept. 11, 2015), <https://www.lyft.com/terms> [<https://perma.cc/2ANF-RZQA>] (“The Lyft Platform provides a marketplace where persons who seek transportation to certain destinations (‘Riders’) can be matched with persons driving to or through those destinations (‘Drivers’.”); *Terms and Conditions*, UBER (Apr. 8, 2015), <https://www.uber.com/en-US/legal/usa/terms> [<https://perma.cc/HNP6-KG22>] (“UBER DOES NOT GUARANTEE THE QUALITY, SUITABILITY, SAFETY OR ABILITY OF THIRD PARTY PROVIDERS.”); *Terms of Services*, SIDECAR (Dec. 12, 2014), <http://www.side.cr/policies/terms-of-services> [<http://perma.cc/RN9X-DN7C>] (“Sidecar drivers explicitly agree that he or she is not an employee or independent contractor of Sidecar, but a user of the Sidecar mobile app and a TNC driver as defined by the California PUC or other regulatory agency with jurisdiction over our service.”).

employer-level relationships with their drivers,³⁴ which could lead to recovery under traditional strict liability theories like respondeat superior. Both of these portrayals are flawed. TNCs exercise far more control over vendors (drivers) than passive buying and selling platforms like eBay and Craigslist. But the amount of control may not fit within the traditional common law definition of an “employer” because drivers retain significant discretion as to how, when, and where they operate.

A. TNCs as Online Platforms

Since their inception, TNCs have clung to the argument that they are mere platforms connecting passengers with drivers, and therefore cannot have any liability for driver actions. Uber has been particularly audacious, arguing that it should be exempt from the CPUC’s and any other state or local transportation agency’s jurisdiction because it is not a transportation company at all.³⁵ The company likened uberX to Google’s PowerMeter service, which is not subject to normal energy utility regulations because it merely monitors energy usage and does not require consumers to pay a fee for the service.³⁶ The CPUC quickly shot down this analogy, noting that uberX does far more than merely “show customers maps of available cars, without giving them a way to book a ride and without controlling or taking a share of the fare.”³⁷

Instead, the CPUC compared uberX to Google’s search function. It reasoned that because Google could be liable for allowing fraudulent advertisements on behalf of third parties, so too should TNCs be liable for the actions of their drivers.³⁸ This analogy is also flawed. The CPUC relied on a case that Google settled,³⁹ and it is far from clear that Google would have actually lost at trial.⁴⁰ More importantly, TNCs are much more involved in

34. See, e.g., Liu Complaint, *supra* note 3, at 3–4.

35. Decision Adopting Rules and Regulations to Protect Public Safety While Allowing New Entrants to the Transportation Industry, at 16–17, R. 12-12-011, Dec. 13-09-045, 2013 WL 10230598 (Cal. Pub. Util. Comm’n Sept. 19, 2013), <http://docs.cpuc.ca.gov/PublishedDocs/Published/G000/M077/K192/77192335.PDF> [<http://perma.cc/Z2JG-U4XZ>] [hereinafter 2013 CPUC Order]; see also Uber Bishop Answer, *supra* note 19, at 6 (“Uber warrants it is a technology company, not a transportation company or common carrier . . .”).

36. 2013 CPUC Order, *supra* note 35, at 15–16. Uber attorneys have also claimed that Uber is an “intellectual property company” and drivers are not servants of Uber but rather customers of the service. Karen Gullo, *Uber and Lyft Drivers May Have Employee Status, Judge Says*, BLOOMBERG (Jan. 30, 2015), <http://www.bloomberg.com/news/articles/2015-01-30/uber-drivers-may-have-employee-status-judge-says> [<http://perma.cc/6T64-SDC9>].

37. 2013 CPUC Order, *supra* note 35, at 16.

38. *Id.* at 16–17.

39. Jake Pearson, *How a Career Con Man Led a Federal Sting That Cost Google \$500 Million*, WIRED (May 14, 2013), <http://www.wired.com/2013/05/google-pharma-whitaker-sting/all> [<http://perma.cc/7XZ2-JQG8>].

40. In fact, federal law generally protects Internet companies from liability for failure to screen offensive material. 47 U.S.C. § 230 (2012).

monitoring their drivers than Google is in vetting advertisers.⁴¹ Unlike the TNC-driver relationship, Google is not required by law to conduct background checks on advertisers, and the company does not mandate appearance standards for advertisers’ websites.

Judges have also weighed in, and their initial reactions are even less favorable to TNCs. “The idea that Uber is simply a software platform, I don’t find that a very persuasive argument,” said one federal judge in response to a lawsuit concerning whether Uber had a duty to pay drivers minimum wage.⁴² Indeed, TNCs do not operate in the same way as online platforms like eBay and Craigslist, which passively connect buyers to sellers of goods. TNCs may likewise connect passengers with drivers, but they do so in a far more extensive manner than online selling websites. Whereas companies like eBay charge a nominal flat rate for most listings,⁴³ TNCs take a significant percentage cut from each fare.⁴⁴ And TNCs, not the drivers, control the means of operation: once hired, drivers generally use a TNC-issued phone for picking up customers,⁴⁵ TNCs set the actual rates that passengers pay for each trip,⁴⁶ and TNCs negotiate with customers over cancellation fees.⁴⁷ In other words, TNCs have significantly more interest in and control over vendors than do typical online selling platforms.

41. Compare 2013 CPUC Order, *supra* note 35 (requiring TNCs to conduct driver background checks for criminal and driving offenses), with Josh Sanburn, *Policing the Web: How Google’s ‘Cops’ Track Down Bad Ads*, TIME (Jan. 18, 2013), <http://business.time.com/2013/01/18/policing-the-web-how-googles-cops-track-down-bad-ads> [<http://perma.cc/4PTG-8W9U>] (explaining that Google’s primary means of vetting advertisers is simply employing software to scan ad content).

42. Gullo, *supra* note 36 (quoting U.S. District Court Judge Edward Chen). Another judge (U.S. District Court Judge Vincent Chhabria) went even further, rejecting historical job definitions and stating that drivers should be classified as employees. *Id.*

43. Traditional selling platforms like eBay generally take a flat fee for posted items. *Standard Selling Fees*, EBAY, <http://pages.ebay.com/help/sell/fees.html> [<http://perma.cc/Z7NY-AY28>] (last visited Oct. 12, 2015).

44. UberX, for example, recently upped its cut to 25 percent of each fare in San Francisco, while Lyft takes 20 percent from drivers in the city. Ellen Huet, *Uber Now Taking its Biggest UberX Commission Ever – 25 Percent*, FORBES (Sept 22, 2014), <http://www.forbes.com/sites/ellenhuet/2014/09/22/uber-now-taking-its-biggest-uberx-commission-ever-25-percent> [<http://perma.cc/47FY-XBDX>].

45. Uber is beginning to allow drivers to use personal phones, but its standard practice has been to require drivers to use a company phone, for which drivers must pay the service \$10 per week. Luz Lazo, *Uber Gives its Drivers Choice to Avoid \$10 Weekly Fee for App Use*, WASH. POST (Sept. 9, 2014), <http://www.washingtonpost.com/blogs/dr-gridlock/wp/2014/09/09/uber-gives-its-drivers-choice-to-avoid-10-weekly-fee-for-app-use> [<http://perma.cc/9G67-LNC4>].

46. In San Francisco, for example, Uber sets the following standard rates for its uberX drivers: \$2.20 base fare; \$5 minimum fare; \$1 “safe rides fee”; \$0.26 per minute; \$1.30 per mile; \$5 cancellation fee. *San Francisco Bay Area*, UBER, <https://www.uber.com/en-US/cities/san-francisco> [<https://perma.cc/2PAA-YQ28>] (last visited Oct. 12, 2015).

47. *Berwick v. Uber Techs., Inc.*, No. 11-46739 E, 2015 WL 4153765, at *6 (Cal. Dept. Labor June 3, 2015). In June 2015, Uber instituted another requirement on both drivers and passengers when the company prohibited guns in Uber vehicles. Dante D’Orazio, *Uber Bans Drivers and Passengers from Carrying Firearms*, VERGE (June 20, 2015), <http://www.theverge.com/2015/6/20/8818247/uber-bans-guns-from-vehicles> [<http://perma.cc/P7H2-BV6E>].

TNCs also play a much greater role from the perspective of the buyer of services. Listings on eBay and Craigslist traditionally last days or even weeks, meaning consumers have plenty of time to weigh all of their options. Buyers can be discerning based on quality, availability, cost, uniqueness, and a host of other subjective and objective factors. By contrast, TNC customers request rides at the moment of need, and the TNC platform then quickly pairs the customers with nearby drivers.⁴⁸ Such a system does not encourage—or usually even allow⁴⁹—consumers to extensively compare the services of each seller on the platform. Instead, the determinative factor for a consumer is most likely which nearby driver happens to accept the ride request first. Even if it were possible to distinguish between drivers, doing so would be largely pointless: TNCs require drivers to have similar cars⁵⁰ and maintain high minimum customer ratings in order to use the platforms.⁵¹

Perhaps most importantly, eBay and Craigslist do not claim to extensively vet sellers on their websites, nor are they required to do so by any laws. By contrast, TNCs advertise their vetting procedures as effective ways of protecting passenger safety,⁵² and the CPUC now requires them to conduct background checks on drivers.⁵³ Such a system puts the onus on TNCs, not the individual drivers, to be accountable for safe operations.

Referral platforms and companies are not an invention of the Internet age, and TNCs share some similarities with traditional referral services, such as those established for childcare. Like TNCs, childcare referral companies have some responsibility for vetting the background of the individuals providing services. But in California, for example, individuals wishing to offer childcare services must themselves undergo a state-run background check.⁵⁴ This means

48. See, e.g., *How Do I Request a Ride?*, UBER, <https://help.uber.com/h/7ef159ca-3674-4242-bc0c-b29024958b26> [<https://perma.cc/WFH6-5J67>] (last visited Oct. 13, 2015).

49. *Can I Request a Particular Driver?*, UBER, <https://help.uber.com/h/65f52320-43a1-4979-b374-e9b7c7c36dae> [<https://perma.cc/269T-QLX3>] (last visited Oct. 13, 2015).

50. Richard N. Velotta, *Uber Brands Taxi Companies' Memoranda Inaccurate*, L.V. REV.-J. (June 11, 2014), <http://www.reviewjournal.com/business/economy/uber-brands-taxi-companies-memoranda-inaccurate> [<http://perma.cc/25K3-AMHR>] (“Uber drivers are required to drive a 2008 or newer vehicle and undergo a vehicle inspection.”).

51. Uber, for example, frequently requires drivers to maintain a minimum rating of 4.5 out of 5 stars or higher in order to access the uberX application. Jeff Bercovici, *Uber's Ratings Terrorize Drivers and Trick Riders. Why Not Fix Them?*, FORBES (Aug. 14, 2014), <http://www.forbes.com/sites/jeffbercovici/2014/08/14/what-are-we-actually-rating-when-we-rate-other-people> [<http://perma.cc/2D5W-L6MP>].

52. See, e.g., *Rider Safety*, UBER, <https://www.uber.com/safety> [<https://perma.cc/AJB6-5JN9>] (last visited Oct. 13, 2015). As of February 2015, Uber was advertising “background checks you can trust.” See *Safest Rides on the Road: Going the Distance to Put People First*, UBER, <https://web.archive.org/web/20150217153537/https://www.uber.com/safety> (last visited Dec. 21, 2015).

53. 2013 CPUC Order, *supra* note 35, at 3.

54. *Doe v. Saenz*, 45 Cal. Rptr. 3d 126, 130–31 (Ct. App. 2006) (“Before any person may register as a trustline provider or operate, work, or be present in a licensed community care facility,

that referral services could only hire individuals who have independently passed background check requirements. This system is different from the regulatory framework in which TNCs now exist because the CPUC has placed the burden of conducting background checks on TNCs (the referrers), not on prospective drivers (the individual service providers).⁵⁵ This difference indicates an intent to make TNCs, rather than the drivers they refer, responsible for ensuring that the services will operate safely.

TNCs simply have a much greater hand in the provision of vendor services than online platforms like Google, eBay, and Craigslist, or traditional referral services. It is therefore very unlikely that any court would find, for liability purposes, that TNCs operate as mere platforms.

B. TNCs as Employers

Although TNCs present themselves as mere buying and selling platforms, plaintiffs are bringing suits against the companies under the theory that these companies operate as traditional employers of their drivers.⁵⁶ By defining the TNC-driver relationship in this way, plaintiffs can argue that the TNCs are liable through respondeat superior. Under this doctrine, “the innocent principal or employer is liable for the torts of the agent or employee, committed while acting within the scope of employment.”⁵⁷ Critically, respondeat superior only applies if plaintiffs prove the employer-employee relationship. Although the respondeat superior argument has succeeded when plaintiffs have brought cases against taxicab companies for acts of their drivers,⁵⁸ it may be less persuasive in regard to TNCs.

that person must obtain either a criminal record clearance or, if convicted, must apply for and obtain a criminal record exemption from the [California] Department [of Social Services].”)

55. 2013 CPUC Order, *supra* note 35, at 3.

56. *See, e.g.*, Bishop Complaint, *supra* note 9, at 3–4 (stating that a ridesharing driver “was serving as the agent of” Uber and its subsidiaries, and therefore the company is vicariously liable for the driver’s negligent driving); Liu Complaint, *supra* note 3, at 3–4 (stating that Uber and its subsidiaries “were the employer of the Defendant [negligent driver], and/or his partner and/or an agency relationship existed between them”). Although, in some contexts, there may be nuanced differences between employer-employee and other employment relationships including principal-agent and master-servant, this Note will not go into the weeds of those individual distinctions. Indeed, commentators have pointed out that, in the context of tort law, the distinctions are relatively meaningless. *See, e.g.*, 1 MODERN TORT LAW: LIABILITY AND LITIGATION § 7:2 (2d ed. 2015) (“The terms ‘principal’ and ‘agent,’ ‘master’ and ‘servant,’ ‘employer’ and ‘employee’ may have separate connotations for purposes of contract authority, but the distinctions are immaterial for tort purposes. A relationship must be established: the wrongdoer must be an employee, agent, or servant in order for a plaintiff to invoke the doctrine of respondeat superior.”).

57. B.E. WITKIN, 3 WITKIN, SUMMARY AGENCY & EMP’T § 165, at 208 (10th ed., 2005).

58. *See, e.g.*, Yellow Cab Coop., Inc. v. Workers’ Comp. Appeals Bd., 277 Cal. Rptr. 434, 440–41 (Ct. App. 1991) (holding that, for workers’ compensation purposes, a taxicab company exercised employer-level control over drivers because the company controlled where drivers went, how they behaved, driver use of radios, and—most significant—the company prohibited drivers from operating on behalf of other companies); People v. Rouse, 249 Cal. Rptr. 281 (App. Dep’t Super. Ct. 1988) (“[T]here is substantial evidence that the driver of the taxi was an employee of L.A. Taxi.”); *see*

This issue was a point of contention in the New Year's Eve lawsuit involving the six-year-old girl struck by an uberX driver. In that case, the plaintiffs argued that the driver was an employee of Uber, and therefore Uber was liable under respondeat superior or a similar principal-agent theory.⁵⁹ Uber countered that it was not liable because “[the driver] was not—and has never been—an employee of [Uber or its subsidiary, Raiser LLC].”⁶⁰ In support of Uber's contention that it does not provide transportation services or employ drivers, the company noted that it does not own the vehicles and that drivers use their own discretion in accepting passenger ride requests.⁶¹ According to the company, at the time of the accident the driver had “no reason . . . to interact with the Uber App.”⁶²

TNCs indeed offer a different set of facts because TNC drivers are generally subject to less control than taxicab drivers. The remainder of this Section explains how courts traditionally gauge employer-level control in the context of transportation services, and it concludes that plaintiffs should consider alternative tactics beyond trying to create liability through an employer-employee relationship.

1. *The Presumption in Favor of an Employment Relationship*

In California, plaintiffs seeking to recover from TNCs can take advantage of a presumption that a worker is an employee rather than an independent contractor if he is “performing services for which a license is required” or “performing such services for [an entity] who is required to obtain such a license.”⁶³ TNC drivers certainly perform work for which the TNC is required to obtain a specialized license—stipulating precautions including driver background checks and minimum insurance levels—as ordered by the CPUC in its 2014 opinion.⁶⁴ As a result, drivers will be presumed to be employees and the burden will be on TNCs to show facts that prove otherwise.

also William D. Bremer, *Liability of Taxicab Company For Cabdriver's Negligence*, 41 AM. JUR. 2D PROOF OF FACTS 239 § 5 (2014) (“The Restatement points out that one might be considered a servant even if there is an understanding that the employer shall not exercise control over the work. As an illustration, the Restatement notes that a full-time cook is regarded as a servant even though it is understood that the employer exercises no control over the cooking. A typical employer of taxicab drivers would have a similarly limited degree of control over the actions of individual drivers.”).

59. Liu Complaint at 3–4, *supra* note 3.

60. Answer and Affirmative Defenses of Defendants Uber Technologies, Inc., at 2, Liu v. Uber Techs., CGC-14-536979 (Cal. Super. Ct. May. 1, 2014) [hereinafter Uber NYE Answer].

61. *Id.* at 3.

62. *Id.*

63. CAL. LAB. CODE § 2750.5 (West 2014).

64. Order Instituting Rulemaking on Regulations Relating to Passenger Carriers, Ridesharing, & New Online-Enabled Transp. Servs., at 12, R. 12-12-011, Dec. 14-04-022, 2014 WL 1478349 (Cal. Pub. Util. Comm'n Apr. 10, 2014) [hereinafter 2014 CPUC Order].

2. *The Case Against Respondeat Superior Liability*

Even with the presumption in favor of plaintiffs, establishing that drivers are employees of TNCs will depend on showing that TNCs exercise a significant amount of control over their drivers,⁶⁵ a complicated determination that could weigh in the TNCs’ favor. The CPUC has grappled with the control analysis for years, and the Commission has largely sided with TNCs in finding that the companies do not have an employer-employee relationship with drivers.

Initially, the CPUC seemed to assume that TNC drivers were employees. In a 2012 published notice citing a number of TNCs for permitting violations, the CPUC referred to the ridesharing companies as “charter-party carriers,” and their drivers as “employee-drivers.”⁶⁶ The notice specifically noted the carriers’ failure to subject drivers to “pre-employment” tests before hiring them.⁶⁷

However, the CPUC largely sided with the TNCs on employment issues in a 2014 rehearing of its 2013 rules and regulations. In this rehearing, the Taxicab Paratransit Association of California argued that, because TNC drivers are not employees of the TNC, they should be required to obtain individual charter-party carrier permits.⁶⁸ The Commission agreed that TNC drivers are not employees, but it countered that drivers are “clearly still agents connected with the firm” who are, therefore, exempt from individual permitting requirements.⁶⁹ In this delicate balancing act, the Commission managed to confer upon TNCs all the permitting benefits of an employer-employee relationship without saddling the companies with any of the other duties that normally come from such a relationship.

Courts, like the CPUC, may be reluctant to expand the definition of employers to cover technology services like the kind provided by TNCs. In dealing with traditional transportation companies, courts have relied on a number of factors for determining employer-level control. Not surprisingly, no single factor is generally dispositive; nor is there a clearly defined threshold for when a worker becomes an employee.⁷⁰ And even if the test did provide bright

65. See 3 WITKIN AGENCY & EMP’Y, *supra* note 57, at 63; see also Bremer, *supra* note 58, § 5 (“In determining for the purposes of respondeat superior whether a person is an agent, the most important test traditionally has been the right of control, that is, the right of the alleged principal to order and control the claimed agent: the right to direct the work to be done, not only as to the result to be accomplished, but also as to the details and method of performing the work.”).

66. Press Release, Cal. Pub. Util. Comm’n, CPUC Cites Passenger Carriers Lyft, Sidecar, and Uber \$20,000 Each for Public Safety Violations (Nov. 14, 2012), <http://www.cpuc.ca.gov/NR/rdonlyres/00BF2F95-21B8-4C72-A268-D8057BD16DFD/0/CPUCcitesPassengerCarriersLyftSideCarandUber20000EachforPublicSafetyViolations.pdf> [<http://perma.cc/89HJ-U2AR>].

67. *Id.* (emphasis added).

68. 2014 CPUC Order, *supra* note 64, at 12.

69. *Id.*

70. Courts and commentators have, however, weighed some factors more heavily than others. Compare *Yellow Cab Coop., Inc. v. Workers’ Comp. Appeals Bd.*, 277 Cal. Rptr. 434, 441 (Ct. App. 1991) (stating that a company’s prohibition on allowing its drivers to contract with other businesses

lines, the analysis would still depend on the factors mapping neatly onto the TNC-driver relationship—which they don't. The remainder of this Subsection grapples with some of the factors courts may use when determining TNC control over drivers.

a. Visual Representations

When taxicab and limousine drivers' cars carry visual identifiers of the dispatch company—such as the company's name and telephone number—courts and commentators have taken this as evidence that the driver is an employee of the dispatcher.⁷¹ Since its founding, Lyft has required on-duty drivers to display a pink moustache on the grill or dashboard of their cars.⁷² Uber had no comparable requirement during the company's formative years,⁷³ so there was generally no way to distinguish between on-duty Uber drivers and everyone else on the road. But in 2013 the CPUC ordered all TNC vehicles to “display consistent trade dress (i.e., distinctive signage or display on the vehicle)” when in service.⁷⁴ The trade dress “shall be sufficient to allow a passenger, government official, or member of the public to associate a vehicle with a particular TNC”⁷⁵ TNCs must file a photograph of this trade dress with the CPUC's Safety and Enforcement Division.⁷⁶ As a result of these new regulations, the “visual representations” factor may tilt in favor of an employer-employee relationship. However, the TNC signage may be much less noticeable than taxicab or trucking company vehicles that have distinctive colors and logos written in prominent, large letters. And visual displays are far from dispositive evidence of an employment relationship.⁷⁷

was the “most significant” factor in finding an employment relationship), *with Bremer, supra* note 58, § 7 (“Of particular importance is whether the driver was required to respond to calls . . .”).

71. *See, e.g.,* *People v. Rouse*, 249 Cal. Rptr. 281, 284 (App. Dep't Super. Ct. 1988) (finding an employment relationship where a taxi “displayed the name and telephone number” of the taxicab company). Even when other factors of employer-level control are not present, it can be possible to hold a company liable when the plaintiff reasonably assumes that the agent is an employee. *See Associated Creditors' Agency v. Davis Eyeglasses*, 530 P.2d 1084, 1100 (Cal. 1975) (“The person dealing with the agent must do so with belief in the agent's authority and this belief must be a reasonable one; such belief must be generated by some act or neglect of the principal sought to be charged; and the third person in relying on the agent's apparent authority must not be guilty of negligence.”).

72. Kyle VanHemert, *Lyft Is Finally Ditching the Furry Pink Mustache*, WIREd (Jan. 20, 2015), <http://www.wired.com/2015/01/lyft-finally-ditching-furry-pink-mustache> [<http://perma.cc/DV7V-SFAJ>].

73. Uber, for example, allows uberX drivers to use their own cars and has no specific requirements for color or labeling. *Vehicle Requirements*, UBER, <http://www.driveubernyc.com/cars> [<http://perma.cc/J7NW-WJRM>] (last visited Oct. 13, 2015).

74. 2013 CPUC Order, *supra* note 35, at 18.

75. *Id.*

76. *Id.*

77. *See, e.g.,* *Holmes v. United Indep. Taxi*, No. B149582, 2002 WL 228197, at 2 (Cal. Ct. App. Feb. 15, 2002) (finding a driver to be an independent contractor, rather than an employee, even though the company required the driver to display a sign in the right lower corner of his car's

b. Accountability to Dispatcher

The element of control would be further strengthened by a finding that drivers are required to maintain communication with the transportation company’s dispatcher and can be punished for failure to follow orders or not work at specific times.⁷⁸ It is tricky to apply this factor to TNCs. On the one hand, drivers do not verbally communicate with TNC operators, or any superior at all, during the normal course of business; their only interaction is with the TNC phone application.⁷⁹ On the other hand, drivers are *constantly* in virtual communication with TNCs when they are logged into the app, which tracks things like driver ratings, ride acceptance rates, and vehicle location.⁸⁰ One could reasonably conclude that this level of control is actually stronger than a taxicab company requiring its drivers to periodically radio into a dispatcher. And at least one TNC, uberX, threatened to sanction drivers who do not maintain minimum ratings from passengers or who refuse too many ride requests, an indication that drivers are highly accountable to the company.⁸¹

Even so, the weight of these considerations is diminished by the fact that drivers are never actually *required* to work or call into a TNC dispatcher; nor are they required to accept specific rides.⁸² Courts are therefore unlikely to find

windshield while transporting conventioners). Plaintiffs could also potentially sue under a theory of estoppel. *Bremer*, *supra* note 58, § 4 (“[I]f the injured party was a passenger in the taxicab, proof that the target company held itself out as the operator of the taxicab may estop the company from denying the agency of the driver. The two elements necessary to establish this estoppel are a holding out by the target company and a justifiable reliance on it by the injured party.”). A Lyft customer, for example, might reasonably and non-negligently rely on a Lyft vehicle’s distinctive branding as a sign that the company is in control of its drivers and responsible for passenger safety. Especially in a hit-and-run scenario, if a bystander could identify Lyft as the operator, but not the specific driver, Lyft could potentially be liable for injuries. *See, e.g.*, *Ass’n of Indep. Taxi Operators v. Kern*, 13 A.2d 374, 376–77 (Md. 1940) (holding that when an unidentified driver perpetrated a hit-and-run in a taxicab identifiable to one company, the company could be held liable to the victim). This argument is set to suffer, though, as Lyft is phasing out its comically oversized and very visible fluffy pink moustache for a smaller, less noticeable glowing pink dashboard ornament. *Vanhemert*, *supra* note 72.

78. *Yellow Cab Coop., Inc. v. Workers’ Comp. Appeals Bd.*, 277 Cal. Rptr. 434, 441 (Ct. App. 1991) (finding the necessary element of control where drivers were extensively monitored by radio communications and punished for not accepting radio orders); *People v. Rouse*, 249 Cal. Rptr. 281, 284 (App. Dep’t Super. Ct. 1988) (noting that a driver’s consistent checking in with his dispatcher by radio, along with sanctions for refusal to accept rides referred by the dispatcher led to a “reasonable inference” that the driver was an employee); *Bremer*, *supra* note 58, § 7 (“Of particular importance is whether the driver was required to respond to calls; if he was, whether by virtue of contract, lease, association rules, or by custom, then the target company had that kind of control generally found to evidence agency. On the other hand, if the driver was free to accept or reject any call then the fact that dispatching services were provided is less significant.”).

79. Uber, for example, automatically assigns drivers to passengers based on algorithms tracking driver locations. Voytek, *Optimizing a Dispatch System Using an AI Simulation Framework*, UBER (Apr. 11, 2014), <http://blog.uber.com/aisimulation> [<http://perma.cc/5D9R-5CNK>].

80. James Cook, *Uber’s Internal Charts Show How its Driver-Rating System Actually Works*, BUS. INSIDER (Feb. 11, 2015), <http://www.businessinsider.com/leaked-charts-show-how-ubers-driver-rating-system-works-2015-2> [<http://perma.cc/GUY4-QXKW>].

81. *Id.*

82. *See* Uber NYE Answer, *supra* note 60, at 2.

that this factor—GPS tracking and minimum quality standards—rises to the level of control exercised by traditional transportation dispatchers who communicate directly with drivers and relay affirmative demands.

c. Vehicle Ownership

The vehicle ownership factor is relatively straightforward: TNC drivers generally use their own cars,⁸³ and this will serve as evidence that they are not employees.⁸⁴ And drivers, not the TNCs, are responsible for vehicle maintenance and fueling costs.⁸⁵ The analysis may become slightly more complicated in light of Uber's recent move to facilitate lease agreements between manufacturers and prospective drivers.⁸⁶ But even this arrangement does not change the simple fact that drivers, not Uber, lease the vehicles. Thus, this factor tilts heavily in favor of TNCs.

d. Non-Competes and Other Contractual Provisions

Courts may also find drivers to be employees of transportation companies based on the actual terms by which they have agreed to operate. For example, one court found that a taxi company forcing drivers not to work for any other companies served as the “most significant” factor in determining that the driver was an employee.⁸⁷ Likewise, TNCs sometimes prohibit drivers from operating for other services,⁸⁸ evidence that weighs in favor of finding an employer-employee relationship.

On the other hand, TNCs may explicitly require drivers to acknowledge that they operate as independent contractors, not employees, as a condition of

83. Ryan Lawler, *Uber Study Shows Its Drivers Make More Per Hour and Work Fewer Hours than Taxi Drivers*, TECHCRUNCH (Jan. 22, 2015), <http://techcrunch.com/2015/01/22/uber-study> [<http://perma.cc/2MRU-LFNG>].

84. *See* *People v. Rouse*, 249 Cal. Rptr. 281, 284 (App. Dep't Super. Ct. 1988).

85. *Id.*

86. Ken Bensinger & Johana Bhuiyan, *Flouting Law, Uber Suspends Drivers for Properly Registering Cars*, BUZZFEED (Jan. 22, 2015), <http://www.buzzfeed.com/kenbensinger/ubers-auto-registration-gambit> [<http://perma.cc/BVU6-2M3J>]. The company has reportedly even directed some of the drivers participating in its car purchase and lease finance programs to register their new cars as personal vehicles rather than commercial ones and has temporarily suspended some driver accounts whose cars were registered as commercial vehicles. *Id.*

87. *Yellow Cab Coop., Inc. v. Workers' Comp. Appeals Bd.*, 277 Cal. Rptr. 434, 441 (Ct. App. 1991).

88. In New York, for example, Uber sent drivers text messages that they could be deactivated (effectively fired) if they did “trips with a base” their “vehicle [isn't] affiliated with,” and even went so far as to call at least one driver and tell him he could not work for Uber unless he terminated his relationship with competitor Lyft. Erica Fink, *Uber Threatens Drivers: Do Not Work for Lyft*, CNN (Aug. 5, 2014), <http://money.cnn.com/2014/08/04/technology/uber-lyft> [<http://perma.cc/N3Z6-5BBJ>]. Limiting an agent's freedom to contract elsewhere in this manner has weighed significantly in finding an employment relationship in the context of workers' compensation. *See Yellow Cab*, 277 Cal. Rptr. at 441. This consideration may be a moot point in California, though, where non-compete clauses are strongly disfavored by both the legislature and the courts. *See Scott v. Snelling & Snelling, Inc.*, 732 F. Supp. 1034, 1042–43 (N.D. Cal. 1990); *D'sa v. Playhut, Inc.*, 85 Cal. App. 4th 927, 933 (2000).

using the services. According to Uber, the driver in the New Year’s Eve accident entered into contracts with the company that declared his status as an “independent, for-hire transportation provider” for uberX and an “independent contractor” of Uber’s subsidiary, Raiser, LLC.⁸⁹ The agreement’s language, assuming it is standard for Uber and other TNCs, weighs in favor of a court finding that TNC drivers are indeed independent contractors.⁹⁰

e. Termination

Finally, the right to terminate workers without cause can serve as evidence of an employee-employer relationship.⁹¹ This factor should weigh

89. Uber NYE Answer, *supra* note 60, at 4. Likewise, in their public statements and terms of service, none of the TNC companies ever refer to drivers as “employees.” Uber’s website formerly characterized its drivers as “independent contractors”; this page was removed from Uber’s website at some point after December 4, 2014. See *Who Are The Drivers On The Uber System?*, UBER, [https://web.archive.org/web/20140524143041/http://support.uber.com/hc/en-us/articles/201955457-Who-are-the-drivers-on-the-Uber-system-] (archived May 24, 2014 and last visited Dec. 4, 2014). Sidecar explains that drivers are not employees but rather “independent workers who voluntarily use our mobile platform to be matched with passengers and obtain payment cashlessly through the app.” *Terms of Services*, SIDECAR, *supra* note 33. The company elaborates on the relationship: “It is up to the driver to decide when he or she wishes to drive using the sidecar app, whether or not to offer a ride to a passenger contacted through the sidecar platform, and what pricing adjustment the driver wishes to set.” *Id.* Lyft, on the other hand, does not explicitly label its drivers, but the company’s Terms of Service still maintains that the company “has no responsibility whatsoever for the actions or conduct of drivers or riders.” *Lyft Terms of Service*, LYFT, *supra* note 33.

90. See, e.g., *Lopez v. El Palmar Taxi, Inc.*, 676 S.E.2d 460, 464 (Ga. App. 2009) (“The evidence does not show that El Palmar assumed control over the time, manner or method of Julaju’s work. He was free to work when and for as long as he wanted, he was not required to accept fares from El Palmar, he could obtain his own fares and he could work anywhere the taxi could legally be operated. The fact that the cars he drove displayed the El Palmar logo and the fact that he received calls from El Palmar are not sufficient to create an employer-employee relationship.”); *Asplund v. Selected Invs. in Fin. Equities, Inc.*, 103 Cal. Rptr. 2d 34, 49 (Ct. App. 2000) (“[T]he limitations set forth in the sales representatives agreement, coupled with the absence of substantial evidence of apparent or actual authority beyond that specified in the agreement, eliminates any basis upon which to impose vicarious liability on [the defendant] under the doctrine of respondeat superior.”). An agreement, though, is far from dispositive. See B.E. WITKIN, 2 WITKIN, SUMMARY WORKERS’ COMP, § 189, at 772 (10th ed., 2005) (“Signing the agreement to forgo coverage as an independent contractor is significant but not controlling where compelling indicia of employment are otherwise present.”). Plaintiffs could argue, however, that the contractual language declaring drivers to be independent contractors is meaningless when the drivers are working solely for one TNC and therefore are not freely contracting their services. This argument has been persuasive in the real estate agent and broker relationship. See *Reagan v. Keller Williams Realty, Inc.*, No. B192890, 2007 WL 2447021, at 10 (Cal. Ct. App. 2007) (“[F]or purposes of tort liability, a real estate agent-broker relationship may not be characterized as that of an independent contractor when the salesperson is acting within the scope of employment Insofar as liability to a third party is concerned, any provision purporting to change the relationship from agent to independent contractor is invalid.”); *Gipson v. Davis Realty Co.*, 30 Cal. Rptr. 253, 262 (Dist. Ct. App. 1963) (finding, based on statutory provisions, that because a real estate salesman “can act only for, on behalf of, and in place of the broker under whom he is licensed, and that his acts are limited to those which he does and performs,” the agent cannot be classified as an independent contractor and “any contract which purports to change that relationship from that of agent to independent contractor is invalid as being contrary to the provisions of the Real Estate Law”).

91. See *Alexander v. FedEx Ground Package Sys., Inc.*, 765 F.3d 981, 988 (9th Cir. 2014) (“The right to terminate at will, without cause, is ‘[s]trong evidence in support of an employment

slightly, though not dispositively, in favor of finding drivers to be independent contractors. Uber, for example, reserves broad power to terminate its relationship with drivers, but this power is limited to situations when “the Transportation Company or its Drivers fail to maintain the standards of appearance and service required by the users of the Uber Software.”⁹² Such qualifications, coupled with the fact that Uber’s employment agreement contains an arbitration clause,⁹³ could serve to support the company’s claim that drivers are independent contractors.⁹⁴

Ultimately, the weighing of employment factors is a murky endeavor. Plaintiffs have had, and may continue to have, some success in arguing that drivers are employees of TNCs, as discussed in the next Subsection; yet relying on such an argument is risky given the subjectivity and intensely fact-specific nature of the employer-control test.

3. *Driver Victories over TNCs*

Though not yet heavily litigated, at least two plaintiffs have prevailed in showing an employment relationship between TNCs and drivers. But these cases have both been in the context of employment benefits, not tort liability.⁹⁵ And the decisions have merely symbolic—not precedential—value; they apply only to the single drivers seeking benefits in each case.⁹⁶ In Florida, the Department of Economic Opportunity (DEO) found that one driver, who had been laid off by Uber, was entitled to collect unemployment benefits because he had been an employee, not an independent contractor, of the company.⁹⁷

Soon after the Florida decision, another Uber driver, appearing *pro per*,⁹⁸ successfully convinced the California Labor Commissioner that she was an

relationship.” (citations omitted)); *Toyota Motor Sales U.S.A., Inc. v. Superior Court*, 269 Cal. Rptr. 647, 653 (Ct. App. 1990), *modified* (June 5, 1990) (“Perhaps no single circumstance is more conclusive to show the relationship of an employee than the right of the employer to end the service whenever he sees fit to do so.”).

92. Uber Software License and Online Services Agreement at 5, *O’Conner v. Uber Techs., Inc.*, No. 3:13-cv-03826-EMC (N.D. Cal. Aug. 3, 2015) (on file with author).

93. *Id.* at 11.

94. See *Alexander*, 765 F.3d at 994 (“The first factor, the right to terminate at will, slightly favors FedEx. The OA contains an arbitration clause and does not give FedEx an unqualified right to terminate.”).

95. Mike Isaac & Natasha Singer, *California Says Uber Driver is Employee, Not a Contractor*, N.Y. TIMES (June 17, 2015), <http://www.nytimes.com/2015/06/18/business/uber-contests-california-labor-ruling-that-says-drivers-should-be-employees.html> [<http://perma.cc/6YL5-NHZ2>].

96. *Id.*

97. Johana Bhuiyan, *Florida Agency Classifies Uber Driver as Employee, Says He Is Eligible for Unemployment*, BUZZFEED (May 22, 2015), <http://www.buzzfeed.com/johanabhuiyan/florida-agency-classifies-uber-driver-as-employee-says-he-is> [<http://perma.cc/95W9-TQUE>].

98. *Berwick v. Uber Techs., Inc.*, No. 11-46739 EK, 2015 WL 4153765, at *1 (Cal. Dept. Labor June 3, 2015).

employee of Uber.⁹⁹ As a result, the Commissioner awarded the employee reimbursement of labor expenses plus interest, a total of \$4,152.20.¹⁰⁰ Although the ruling applies only to the single driver who brought the suit, the Commissioner’s in-depth analysis of Uber’s operations and its control over drivers¹⁰¹ could provide a template for finding that all TNC drivers are employees. In coming to a decision, the Commissioner analyzed a number of factors that could also apply to respondeat superior liability, including Uber’s extensive driver vetting procedures, the company’s control over the “tools” (vehicles) drivers use, and Uber’s authority to set rates for the service.¹⁰²

TNCs should be nervous that the California decision might influence future analyses of their employment relationships with drivers. The distinction between independent contractors and employees could have far-reaching costs for TNCs beyond simply creating tort liability; one report from the National Employment Law Project estimated that re-categorizing drivers could cost the companies an additional 30 percent in labor costs.¹⁰³ Faced with such a dire—and potentially even existential—threat, TNCs have begun expending significant resources to maintain the status quo. Uber has already appealed both the California and Florida decisions,¹⁰⁴ and the company is fighting similar issues “on multiple fronts across the country.”¹⁰⁵ And even though the narrow decisions in California and Florida could be a sign of future trouble for Uber and other TNCs, at least five other states have gone the opposite direction and accepted Uber’s argument that drivers are independent contractors.¹⁰⁶

TNCs are also undertaking major lobbying efforts, which could burnish public and legislative support and ultimately lead to greater statutory

99. *Id.* at *10.

100. *Id.* at *11.

101. *See id.* at *9.

102. *Id.*

103. Ben Popper, *Making Drivers Into Employees, Not Contractors, Could Hurt Uber’s Business*, VERGE (June 17, 2015), <http://www.theverge.com/2015/6/17/8797021/uber-california-lawsuit-labor-employee-contractor> [<http://perma.cc/32ZG-6KEA>]; *see also* *People ex rel. Harris v. Pac Anchor Transp., Inc.*, 329 P.3d 180, 183 (Cal. 2014), *cert. denied*, 135 S. Ct. 1400 (2015) (recognizing a number of requirements unique to the employer-employee relationship: “(1) pay unemployment insurance taxes . . . ; (2) pay employment training fund taxes . . . ; (3) withhold state disability insurance taxes . . . ; (4) withhold state income taxes . . . ; (5) provide worker’s compensation . . . ; (6) provide employees with itemized written wage statements . . . and provide employees with certain records that California’s Industrial Welfare Commission wage order No. 9–2001, section 7, requires . . . ; (7) reimburse employees for business expenses and losses . . . ; and (8) ensure payment at all times of California’s minimum wage”).

104. Celia Ampel, *Uber Appeals State’s Treatment of Drivers as Employees*, DAILY BUS. REV. (June 29, 2015), <http://www.dailybusinessreview.com/id=1202730834966/Uber-Appeals-States-Treatment-of-Drivers-as-Employees?slreturn=20150620124626> [<http://perma.cc/K5X2-G8W8>]; Isaac & Singer, *supra* note 95.

105. Douglas Hanks, *For Uber, Loyal Drivers and a New Fight for Benefits*, MIAMI HERALD (May 21, 2015), <http://www.miamiherald.com/news/business/article21599697.html> [<http://perma.cc/ZCW9-F9LV>].

106. Isaac & Singer, *supra* note 95.

protections for the companies. Uber, for example, now employs 250 lobbyists and twenty-nine lobbying firms in state capitals around the nation—and these figures do not even count the company’s many lobbyists at the municipal level.¹⁰⁷ The companies do not look to be exhausting their war chests any time soon: Uber has attracted billions in private financing, bringing its valuation to over \$50 billion,¹⁰⁸ and Lyft recently received \$100 million in financing from legendary investor Carl Icahn.¹⁰⁹ And TNCs enjoy widespread support among consumers. For example, Uber received nearly a million signatures on petitions supporting the company.¹¹⁰

In other words, TNCs have the political clout and resources to make sure that plaintiffs will not easily prevail in any battle over categorizing drivers as employees.

Lastly, the issue is not static: although some or even most courts might find an employer-employee relationship based on TNCs’ current arrangements, these nimble, well-financed companies have the means to adapt to and circumvent employer-specific regulations. Uber, for example, has already shown great flexibility in modifying contractual arrangements with drivers, as illustrated by a chart the company submitted in opposition to certifying a class of drivers¹¹¹:

107. Karen Weise, *This Is How Uber Takes Over a City*, BLOOMBERG BUSINESS (June 23, 2015), <http://www.bloomberg.com/news/features/2015-06-23/this-is-how-uber-takes-over-a-city> [<http://perma.cc/T7KC-MM5S>]. In Portland, Oregon, alone, the company deployed at least ten people to lobby on its behalf in a recent battle to enter the city—a battle that Uber ultimately won. *Id.*

108. Pui-Wing Tam & Michael J. de la Merced, *Uber Fund-Raising Points to \$50 Billion Valuation*, N.Y. TIMES (May 9, 2015), <http://www.nytimes.com/2015/05/09/technology/uber-fund-raising-points-to-50-billion-valuation.html> [<http://perma.cc/5D79-5RCD>].

109. Mike Isaac & Alexandra Stevenson, *Carl Icahn Invests \$100 Million in Lyft*, N.Y. TIMES (May 15, 2015), <http://www.nytimes.com/2015/05/16/technology/carl-icahn-invests-100-million-in-lyft.html> [<http://perma.cc/4HPQ-83CD>].

110. Weise, *supra* note 107.

111. Amended Ex. 41, *O’Conner v. Uber Techs., Inc.*, No. 3:13-cv-03826-EMC (N.D. Cal. Aug. 3, 2015) (on file with author).

Licensing/Software Agreement	Prohibits the Simultaneous Use of Non-Uber Lead Gen. Apps	Driver May Negotiate Fares	Permits Uber to Adjust Fares	Prohibits Driver From Accepting Tips	Requires Specific Vehicle Models	Uber Arranges Processing of Fare Payment	Parties Have Mutual Right to Terminate “Without Cause”	Contains an Arbitration Provision
Pre-08/2011 Uber Terms & Conditions								
08/2011 Uber Terms and Conditions								
02/2013 Rasier Transp. Provider Service Agt.	✓	✓		✓	✓		✓	✓
07/24/2013 Uber Software License/Online Servs. Agt.						✓		✓
08/27/2013 Rasier Transp. Provider Service Agt.	✓	✓		✓	✓		✓	✓
10/22/2013 Rasier Transp. Provider Service Agt.	✓	✓		✓	✓		✓	✓
12/10/2013 Uber Software License/Online Servs. Agt.						✓		
12/10/2013 Rasier Transp. Provider Service Agt.	✓	✓		✓	✓		✓	
06/21/2014 Uber Software License/Online Servs. Agt.						✓		✓
06/21/2014 Rasier Software Sublicense & Online Services Agt.	✓	✓		✓	✓		✓	✓
11/10/2014 Rasier Software License/Online Servs. Agt.		✓	✓		✓	✓	✓	✓
11/10/2014 Uber Logistik, LLC Software License and Online Services Agt.		✓	✓		✓	✓	✓	✓
04/03/2015 Uber USA, LLC Software License and Online Services Agt.		✓	✓		✓	✓	✓	✓

Uber used this chart to argue that drivers were not similarly situated and therefore no individual plaintiff could represent the class.¹¹² But the chart also shows the potential ease with which TNCs could skirt the employer-employee relationship: with courts weighing a multitude of factors to determine the existence of an employment relationship, TNCs can and likely will make marginal tweaks to their contracts in the hopes of ever-so-slightly tilting the scales in their favor.

II.

THE PROMISE OF THE NONDELEGABLE DUTY DOCTRINE

TNCs have had little success arguing that they are mere platforms for connecting buyers and sellers. And although a few drivers have succeeded in obtaining employment benefits from TNCs, the separate question whether drivers are employees of TNCs for liability purposes remains unsettled. Amid so much uncertainty, this Note proposes a means of holding TNCs liable that will recognize their unique employment structure while also confronting the not-so-unique dangers that TNC services pose to passengers and bystanders.

112. Davey Alba, *Judge: California Drivers Can Go Class-Action to Sue Uber*, WIRED (Sept. 1, 2015), <http://www.wired.com/2015/09/judge-california-drivers-can-go-class-action-sue-uber> [<http://perma.cc/2L9S-76E8>]. Uber failed to persuade the judge, who ultimately certified the class on the question of employment classification. Amended Order Granting in Part and Denying in Part Plaintiffs’ Motion for Class Certification, *O’Conner v. Uber Techs., Inc.*, No. 3:13-cv-03826-EMC (N.D. Cal. Sept. 1, 2015).

Rather than relying exclusively on respondeat superior, plaintiffs may be better served by arguing an alternative route to liability—that in the absence of an employee-employer relationship, TNCs are liable for their drivers because they have a nondelegable duty to operate safely.

In general, an employer cannot be held liable for the acts of an independent contractor.¹¹³ This is likely one of the reasons that TNCs have gone out of their way to describe their drivers as “independent.”¹¹⁴ But the rule is not absolute; it is limited by public policy concerns.¹¹⁵ The nondelegable duty rule alleviates the problem of entities contracting away their rightful responsibilities: a company cannot avoid liability by delegating work to an independent contractor when it is publicly licensed or franchised and its work presents a safety concern to the public.¹¹⁶

Courts sometimes break the nondelegable duty rule into two disjunctive parts, either of which can create a nondelegable duty: (1) where a company is liable when it is subject to public franchise, or (2) where a company undertakes an activity that is inherently dangerous to others.¹¹⁷ But California courts frequently conflate these two criteria based on a pragmatic rationale: “The effectiveness of safety regulations is necessarily impaired if a carrier conducts its business by engaging independent contractors over whom it exercises no control.”¹¹⁸

Plaintiffs would therefore be wise to argue that TNCs both operate under a public franchise *and* engage in an activity that is inherently dangerous to the public. Such a theory will be particularly effective in California, where the CPUC and the state legislature have implemented a variety of regulations—and a new licensing requirement—with the explicit goal of making TNC operations

113. B.E. WITKIN, 6 WITKIN, SUMMARY TORTS § 1253, at 642 (10th ed., 2005) (noting “the general rule of nonliability for negligence of an independent contractor”).

114. There are in fact a host of additional costs that come from re-categorizing workers as employees rather than independent contractors; the National Employment Law Project estimated that making the switch could amount to an additional 30 percent in labor costs for ridesharing companies. Popper, *supra* note 103; *see also* People *ex rel.* Harris v. Pac Anchor Transp., Inc., 329 P.3d 180, 183 (Cal. 2014), *cert. denied*, 135 S. Ct. 1400 (2015) (as quoted *supra* note 103).

115. Barry v. Raskov, 283 Cal. Rptr. 463, 467 (Ct. App. 1991).

116. 6 WITKIN, SUMMARY TORTS, *supra* note 113, § 1247, at 634, 636, 642. The rule is grounded in a sense of fairness. *See* Maloney v. Rath, 445 P.2d 513, 515 (Cal. 1968) (“To the extent that recognition of nondelegable duties tends to insure that there will be financially responsible defendant available to compensate for the negligent harms caused by that defendant’s activity, it ameliorates the need for strict liability to secure compensation.”).

117. Francis M. Dougherty, *Liability of Employer with Regard to Inherently Dangerous Work for Injuries to Employees of Independent Contractor*, 34 A.L.R. 4th 914, § 3 (1984) (“Nondelegable duties, in context of exceptions to general rule that employer is not liable for acts of independent contractor, arise from: (1) affirmative duties that are imposed on employer by statute, contract, franchise, charter, or common law and (2) duties imposed on employer that arise out of work itself because its performance creates dangers to others, i.e., inherently dangerous work; if work to be performed fits into one of these two categories, the employer may delegate the work to an independent contractor, but he cannot delegate the duty.”).

118. *See* Eli v. Murphy, 248 P.2d 756, 757 (Cal. 1952).

safer for passengers and the general public.¹¹⁹ This Section first makes the case that drivers are, at least, independent contractors of TNCs. From there, it explains the purpose of the nondelegable duty rule and why it should apply to TNCs.¹²⁰

A. TNC Drivers as Independent Contractors

As a threshold issue, TNCs can only have a nondelegable duty insofar as they carry out their operations through independent contractors.¹²¹ The nondelegable duty rule would not apply, for example, were TNCs acting as mere platforms, like eBay or Craigslist, on which vendors peddle their services with little oversight.¹²² In other words, plaintiffs need to prove that TNC drivers are independent contractors before they can proceed with a nondelegable duty claim.

It would be difficult for TNCs to argue that drivers are anything *less* than independent contractors. An independent contractor is “one who, in exercising an independent employment, contracts to do certain work according to his or her own methods, without being subject to the control of the employer, except as to the product or result of the work.”¹²³ This is a low bar for plaintiffs. In the context of transportation companies, it is helpful to look at three factors to determine independent contractor status: “(1) [the driver’s] recompense was specified . . . (2) the result was specified . . . and (3) it was left to [the driver] as

119. See *infra* Part II.C.

120. It is important to note, at the outset, that all of the TNCs include exculpatory language in their terms of service. See *Terms and Conditions*, UBER, *supra* note 33 (“[T]he entire risk arising out of your use of the services, and any service or good requested in connection therewith, remains solely with you.”); *Lyft Terms of Service*, LYFT, *supra* note 33 (“[Lyft] does not and does not intend to provide transportation services or act in any manner as a transportation carrier, and has no responsibility or liability for any transportation services voluntarily provided to any rider by any driver using the Lyft platform.”); *Terms of Services*, SIDECAR, *supra* note 33 (“We reserve the right, but have no obligation, to monitor and facilitate the resolution of disputes between you and other users. Sidecar shall have no liability for your interactions with other users, or for its or any user’s action or inaction.”). But these waivers certainly do not create a hopeless situation for plaintiff-customers. Indeed, courts routinely strike down exculpatory language. See C. Connor Crook, *Validity and Enforceability of Liability Waiver on Ski Lift Tickets*, 28 CAMPBELL L. REV. 107, 120–21 (2005) (“Courts are generally reluctant to enforce exculpatory clauses, especially those that include the negligence of the party attempting to enforce the clause. However, . . . courts can take very nuanced approaches . . .”); see also Vanessa Katz, Comment, *Regulating the Sharing Economy*, 30 BERKELEY TECH. L.J. 1067 (2015). Particularly in California, plaintiffs can make a strong argument that exculpatory waivers for a transportation company violate public policy and are therefore unenforceable. See *Gardner v. Downtown Porsche Audi*, 225 Cal. Rptr. 757, 760 (Ct. App. 1986) (finding a car garage’s exculpatory provision invalid because it was against public policy, reasoning that, in part, access to automobile transportation is a practical necessity for “nearly all” members of the public). Furthermore, the waivers would not cover bystander-plaintiffs who have no contractual agreement with the TNC or its driver.

121. See Dougherty, *supra* note 117.

122. See *id.*

123. See Karen L. Schultz, *Definitions and Nature of Term*, 41 AM. JUR. INDEP. CONTRACTORS 2d §1 (2015).

to how he carried out his mandate to provide courtesy transportation.”¹²⁴ Where these factors are met, a transportation company would be unlikely to prevail in claiming that it “merely undertook to screen” potential drivers.¹²⁵

Applying the factors to TNCs, the companies (1) set the pay drivers receive,¹²⁶ (2) dictate the result, meaning that drivers must take passengers to their requested location in order to earn their fare,¹²⁷ and (3) allow drivers to decide the means (the route) by which to accomplish that goal.¹²⁸ Strengthening the case for independent contractor status, TNCs themselves have frequently labeled their drivers as independent contractors or workers.¹²⁹

B. Public Franchise or License

TNCs meet the first criteria for nondelegable duty because they operate “under a license or franchise granted by public authority subject to certain obligations or liabilities imposed by the public authority.”¹³⁰ This element of the nondelegable duty rule has been satisfied in regard to common carriers like trucking companies and taxicab companies,¹³¹ and it likewise applies to TNCs.

The CPUC began regulating TNCs in a manner similar to common carriers and has imposed regulations resembling those that govern taxicab services. These requirements have culminated in the CPUC requiring every TNC to obtain a license to operate in California.¹³² In 2012, the CPUC issued citations to Uber, Lyft, and Sidecar for failing to obtain authority from the CPUC to operate as “charter-party carriers,” which are prearranged services like limousines and shuttles.¹³³ The CPUC later carved out a new category for

124. *Holmes v. United Indep. Taxi*, No. B149582, 2002 WL 228197, at 2 (Cal. Ct. App. Feb. 15, 2002).

125. *Id.*

126. Huet, *supra* note 44.

127. See Lydia Emmanouilidou, *Drivers, Passengers Say Uber App Doesn't Always Yield Best Routes*, NPR (Sept. 21, 2014), <http://www.npr.org/2014/09/18/349560787/drivers-passengers-say-uber-app-doesnt-always-yield-best-routes> [<http://perma.cc/TJ3S-AYTY>].

128. Drivers can use a TNC's GPS navigation software, but they are also free to use their own GPS software. *Id.*

129. See, e.g., *Terms of Services, SIDECAR*, *supra* note 33 (stating that Sidecar's drivers are “independent workers who voluntarily use our mobile platform to be matched with passengers and obtain payment cashlessly through the app”); *Who Are The Drivers On The Uber System?*, UBER *supra* note 89 (until at least December 2014, stating that “drivers on the Uber system are independent contractors”).

130. See *Serna v. Pettey Leach Trucking, Inc.*, 2 Cal. Rptr. 3d 835, 839 (Ct. App. 2003); see also 6 WITKIN, SUMMARY TORTS, *supra* note 113, § 1253, at 642 (“If a carrier or other public service corporation operates under a public franchise, it is liable for the negligence of an independent contractor engaged to act.”).

131. See, e.g., *Serna*, 2 Cal. Rptr. 3d at 844–45 (applying the nondelegable rule to a trucking company because it must operate under a public franchise or authority); *Gamboa v. Conti Trucking, Inc.*, 23 Cal. Rptr. 2d 564, 564–65 (Ct. App. 1993) (similarly applying the nondelegable rule to a highway carrier).

132. See 2013 CPUC Order, *supra* note 35, at 27.

133. Press Release, Cal. Pub. Util. Comm'n, *supra* note 66. Because the companies did not register with the CPUC, they were cited for failing to present “evidence of public liability and property

the ridesharing companies, creating a middle ground between taxicabs and traditional charter-party carriers. In 2013, the Commission defined the ridesharing businesses as “Transportation Network Companies,” a subset of the broader “charter-party carriers” category, which brought the companies under the CPUC’s jurisdiction.¹³⁴ In doing so, the CPUC flatly rejected Uber’s argument that it is simply an online platform and not a transportation company: “Uber is the means by which the transportation service is arranged, and performs essentially the same function as a limousine or shuttle company dispatch office.”¹³⁵ The fact that customers relied on a cell phone application rather than a human dispatcher was of little significance to the CPUC.¹³⁶ The CPUC’s decision turned instead on the fact that Uber makes a profit from its services. As a result, Uber “should also be held responsible if the driver is negligent or not applying Uber safe practices.”¹³⁷

The CPUC took further steps toward making TNCs accountable for their drivers through a set of 2013 regulations, which created new standards for TNC licenses, background checks, driver training programs, and liability insurance that are “equal to” what the San Francisco Municipal Transportation Authority (SFMTA) requires of taxicab drivers.¹³⁸ In 2014, the CPUC considered both insurance requirements for taxicabs in Los Angeles and the Commission’s own insurance requirements for limousines, and it chose to impose the taxicab insurance requirements on TNCs.¹³⁹ Although the CPUC declined to “meddle” with the TNC business model by forcing the companies to designate each driver as an employee or contractor,¹⁴⁰ its regulations have closed the gap between TNCs and taxicabs. By purposely regulating TNCs in a manner similar to their taxicab counterparts, the CPUC has implicitly acknowledged that TNCs and taxicabs serve essentially the same role for consumers, and TNCs should therefore not have a drastically lower bar for safe operations.¹⁴¹

damage insurance coverage” and workers’ compensation insurance, as well as “failing to enroll drivers in the Department of Motor Vehicles Employer Pull Notice Program” and “failing to pre-employment test and enroll drivers in the Controlled Substance and Alcohol Testing Certification Program.” *Id.*

134. 2013 CPUC Order, *supra* note 35, at 23–24. According to the Order, “[t]his Commission defines a TNC as an organization whether a corporation, partnership, sole proprietor, or other form, operating in California that provides prearranged transportation services for compensation using an online-enabled application (app) or platform to connect passengers with drivers using their personal vehicles.” *Id.* at 2.

135. *Id.* at 12.

136. *Id.* at 12–13.

137. *Id.* at 17.

138. *Id.* at 62–63.

139. The state legislature has since increased the amount of insurance required. CAL. PUB. UTIL. CODE § 5433 (West 2014).

140. 2013 CPUC Order, *supra* note 35, at 63.

141. The license application packet lists multiple steps carriers must take in regard to “Safety of Operation.” CAL. PUB. UTIL. COMM’N, 13-09-045, APPLICATION PACKET: TRANSPORTATION NETWORK COMPANIES (TNC), at 3 (2013) [hereinafter TNC Application Packet] http://www.cpuc.ca.gov/NR/rdonlyres/3DED5A3-7151-4991-93F4-2AC17499853F/0/TNC_App_Form20131106.pdf [<http://perma.cc/YC7H-KT5Z>].

This regulatory environment meets the first nondelegable duty factor because it imposes, through public license, affirmative duties on TNCs. Courts have found that such licensure from the CPUC can make carriers liable for acts of their drivers. In *Gamboa v. Conti Trucking*, for example, a man was struck and killed by a truck operated by Alberg Trucking, which had been subhauling for Conti Trucking at the time of the accident.¹⁴² Both companies were licensed by the CPUC and held valid insurance, in compliance with CPUC rules, at the time of the accident.¹⁴³ The man's widow and family brought suit against Conti Trucking for wrongful death, and the appellate court concluded that merely meeting the CPUC's requirements did not extinguish Conti Trucking's nondelegable duty for the negligence of its independent contractor, so the plaintiffs' suit could proceed against both companies.¹⁴⁴ Using the same logic, a TNC could not shirk its nondelegable duty merely by complying with state regulations; it would still be liable for an act of its driver because it, like trucking companies, is subject to public licensing requirements.

There is precedent for extending this element of nondelegable duty to personal transportation companies. Indeed, a number of state courts have used the nondelegable duty doctrine to hold taxicab companies liable for acts of independent contractor drivers. A New Jersey Superior Court held that a lease between a taxicab company, Red Top, and an independent contractor created a source of vicarious liability by which a plaintiff could recover for the driver's negligence.¹⁴⁵ The lease was for both a company car and Red Top's "special privilege to use the public streets [of Newark] for private profit granted by a governmental agency pursuant to statutory authority."¹⁴⁶ Because this privilege required a special license, the court held that Red Top could not delegate its authority and avoid liability for the driver's actions, regardless of whether the driver was an independent contractor or employee.¹⁴⁷

California courts should follow the model set by other jurisdictions that have applied the nondelegable duty doctrine to the taxicab industry. Like taxicab operators, TNCs operate under "special privilege" provided by a license to use city streets for profits.¹⁴⁸ Although TNC drivers do not lease their cars from the companies, as the driver in the *Red Top* decision did,¹⁴⁹ they do effectively lease the TNC license and the ability to pick up customers in exchange for giving TNCs a percentage cut of each fare. Such an arrangement, in the taxicab context, has been sufficient to create liability for taxicab operators for acts of their drivers, even for acts that were unrelated to driving.

142. *Gamboa v. Conti Trucking, Inc.*, 23 Cal. Rptr. 2d 564, 564 (Ct. App. 1993).

143. *Id.*

144. *Id.* at 564, 566.

145. *Paige v. Red Top, Inc.*, 255 A.2d 279, 281–82 (N.J. Super. Ct. App. Div. 1969).

146. *Id.* at 281.

147. *Id.* at 282.

148. *See id.* at 281.

149. *See id.*

For example, a Massachusetts appellate court, relying extensively on the *Red Top* decision in New Jersey, found a taxicab company vicariously liable when the company’s independent contractor driver assaulted a passenger.¹⁵⁰ Unlike in *Red Top*, the driver leased only a license from the taxicab company, not his vehicle.¹⁵¹ Nonetheless, the court held that the taxi company’s medallion—both a visual identifier and an actual license to operate—represented a nondelegable duty to protect its passengers, and the driver’s assault could therefore constitute a breach of this duty by the company.¹⁵² TNCs, similarly, must obtain a permit to operate in California¹⁵³ and other states.¹⁵⁴ And California now also requires TNC vehicles to display the visual identifier of their company.¹⁵⁵

The mandatory licensing requirements also distinguish TNCs from many other types of referral services. For example, when a foster care referral company connected a client with a daycare service, the referral company did not have a nondelegable duty to the client because the daycare service was independently licensed through California’s Department of Social Services Community Care Licensing.¹⁵⁶ TNC drivers, on the other hand, are not independently licensed or insured; they operate under the commercial license and commercial insurance of their parent TNC companies.¹⁵⁷ And the current framework requires TNCs, not drivers, to conduct criminal background checks and vehicle inspections, and to carry accident insurance.¹⁵⁸

In some instances, defendants have managed to avoid nondelegable duty liability because the law governing their industry was too general to create affirmative duties. But those cases are distinguishable from TNCs in California

150. *Teixeira v. Car Cab Three, Inc.*, 1994 Mass. App. Div. 154, 1 (Dist. Ct. 1994) (finding that a company that leased its taxicab medallion did not extinguish its nondelegable duty to operate safely).

151. *Id.* at 3–4.

152. *Id.* at 4; *see also* *Tinkham v. Groveport-Madison Local Sch. Dist.*, 602 N.E.2d 256, 259 (Ohio Ct. App. 1991) (holding that a driver’s status as employee or independent contractor was irrelevant, as was the fact that the driver’s tortious act occurred outside of his taxicab; the taxicab company entered into a contract with a school district to safely transport a child, and the company breached this nondelegable duty when its driver kidnapped and raped a child passenger).

153. 2014 CPUC Order, *supra* note 64, at 12.

154. *See, e.g.*, Christopher Koopman, Opinion, *Koopman: Expensive Licensing Can Drive Away Entrepreneurs*, RICH. TIMES DISPATCH (July 18, 2015), http://www.richmond.com/opinion/their-opinion/guest-columnists/article_96795208-2fde-566d-8293-9fed157ec3e2.html [<http://perma.cc/TLH2-QMPT>] (Virginia); Richard N. Velotta, *Licensing Open to Uber, Others, But Hailing a Ride Months Away*, LV. REV.-J. (June 29, 2015), <http://www.reviewjournal.com/news/traffic-transportation/licensing-open-uber-others-hailing-ride-months-away> [<http://perma.cc/77UE-489C>] (Nevada).

155. 2013 CPUC Order, *supra* note 35, at 18.

156. *See J.L. v. Children’s Inst., Inc.*, 99 Cal. Rptr. 3d 5, 16 (Ct. App. 2009) (“This [nondelegable duty] principle has no application here, given that Yglesias [the daycare service] was independently licensed through CCL. Thus, neither she nor CII [the referral company] can be considered the licensee subject to any nondelegable duty.”).

157. *See* 2014 CPUC Order, *supra* note 64, at 11–12 (license); CAL. PUB. UTIL. CODE § 5433(b) (West 2014) (insurance).

158. 2013 CPUC Order, *supra* note 35, at 26–28.

and other states in which the companies operate under specific safety guidelines. In *Felmler v. Falcon Cable TV*, a California Court of Appeal held that an ordinance requiring a defendant cable company simply to maintain “good service” and “safe conditions for its employees” did not create a breach of nondelegable duty when the plaintiff, an employee of the cable company’s independent contractor, sustained an injury while repairing a cable television line.¹⁵⁹ Following *Felmler*, another court found that a mandate to “‘frequently and thoroughly’ inspect the cable lines to ensure that they are in good condition constitutes a mere general duty to maintain safe conditions, to which the nondelegable duties doctrine is inapplicable.”¹⁶⁰ Here, by contrast, the CPUC and California legislature have laid out specific requirements that are directly tailored to TNCs. Beyond a mere duty to operate safely, the California regulations of TNCs touch on nearly every possible source of danger, including insurance coverage, driver safety checks, vehicle inspections, and drug use.¹⁶¹

Because California has implemented licensing requirements to place affirmative and specific duties on TNC safety in transporting passengers, plaintiffs can succeed on the first nondelegable duty factor.

C. Risk to Public Safety

The previous Section established that TNCs are subject to public licensing requirements. This Section explains that TNC operations, coupled with express statements from the CPUC and state legislators, pose an inherent risk to both passengers and bystanders. Duties under a public license are nondelegable because the licenses are administered “to ensur[e] accountability of licensees to safeguard the public welfare.”¹⁶² In other words, where the purpose of licensing is to protect public safety, a licensee cannot avoid its duty to the public by delegating the license to independent contractors.

Although TNCs downplay their responsibility for public safety, the recent history of state regulations and statutes in California tells a different story. Both the CPUC and the California legislature have repeatedly explained that they are regulating TNCs out of safety concerns. Jack Hagan, director of the CPUC’s Consumer Protection and Safety Division, noted the need to protect passengers from the dangers of TNCs: “This is a matter of public safety . . . if something happens to a passenger while in transport with Lyft, SideCar, or Uber, it is the

159. *Felmler v. Falcon Cable TV*, 43 Cal. Rptr. 2d 158, 158, 162 (Ct. App. 1995), *modified* (July 28, 1995).

160. *Mejia-Gutierrez v. Comcast of Cal. III, Inc.*, No. A132933, 2013 WL 314751, at *9 (Cal. Ct. App. Jan. 28, 2013).

161. *See generally* TNC Application Packet, *supra* note 141.

162. 6 WITKIN, SUMMARY TORTS, *supra* note 113, § 1248, at 636.

responsibility of the CPUC to have done everything in its power to ensure that the company was operating safely according to state law.”¹⁶³

The CPUC confirmed that its primary focus is public safety and, “secondarily,” adapting regulations to changing technology.¹⁶⁴ The CPUC’s new rules evince this emphasis on public safety. For example, the CPUC now requires that TNCs obtain an operating permit certifying, in part, that their proposed service will be “financially able to operate safely.”¹⁶⁵ As part of the licensing process, the TNCs must also conduct background checks of drivers, establish a driver-training program, inspect drivers’ vehicles, implement a zero-tolerance policy on drugs and alcohol, and hold commercial insurance for their drivers.¹⁶⁶ In passing these new requirements, the CPUC has shown a clear recognition that TNCs pose a danger to the public.

While the CPUC dealt with licensing, the state legislature took on the task of defining “adequate insurance” for TNCs. The legislature, like the CPUC, grounded its approach in protecting public safety. Assembly Bill 2293 requires minimum levels of insurance coverage both for when TNC drivers are transporting passengers and when they are online and available to pick up passengers.¹⁶⁷ In passing the bill, the legislature made clear that its goal was to protect consumers and drivers from harm by TNCs by setting a floor, rather than a ceiling, on liability. Although the bill ensures that TNCs will carry insurance, it expressly avoids insulating TNCs from additional liability: “This article shall not limit the liability of a transportation network company arising out of an automobile accident involving a participating driver in any action for damages against a transportation network company for an amount above the required insurance coverage.”¹⁶⁸ The author, State Senator Susan Bonilla, stated that the bill “ensures both drivers and consumers are protected.”¹⁶⁹ And the assembly floor summary notes that the bill “[e]stablishes guidelines for insurance coverage for Transportation Network Companies (TNCs) to ensure personal and financial safety of consumers.”

Courts have relied on this type of legislative and regulatory action to apply the nondelegable duty to other transportation services that implicate

163. James R. Hood, *Lyft Hires its First Lobbyists to Clear the Way for Its Ride-Sharing Service*, CONSUMER AFF. (Apr. 17, 2014), <http://www.consumeraffairs.com/news/lyft-hires-its-first-lobbyists-to-clear-the-way-for-its-ride-sharing-service-041714.html> [<http://perma.cc/U6H7-UVVB>].

164. 2013 CPUC Order, *supra* note 35, at 22.

165. TNC Application Packet, *supra* note 141.

166. 2013 CPUC Order, *supra* note 35, at 3.

167. CAL. PUB. UTIL. CODE § 5433 (West 2014).

168. *Id.*

169. ASSEMBLY FLOOR ANALYSIS, A.B. 2293, 2013–2014 Reg. Sess. (Cal. 2014). The Act passed seventy to zero in the House and thirty-four to six in the Senate. *AB-2293 Transportation Network Companies: Insurance Coverage*, CAL. LEGISLATIVE INFO, https://leginfo.ca.gov/faces/billHistoryClient.xhtml?bill_id=201320140AB2293 [<https://perma.cc/PA7P-JSGA>] (last visited Oct. 13, 2015). Governor Jerry Brown signed it into law on September 17, 2014, and it took effect on July 1, 2015. *Id.*

public safety. In 1952, the California Supreme Court held in *Eli v. Murphy* that a truck company—as a common carrier franchised by the CPUC (formerly the PUC)—could not escape liability even if it used independent contractors as drivers.¹⁷⁰ The legislature had indicated its intent to protect public safety by creating special regulations for highway common carriers like the trucking company,¹⁷¹ and the court held that this legislative intent created a nondelegable duty for trucking companies because “the effectiveness of safety regulations is necessarily impaired if a carrier conducts its business by engaging independent contractors over whom it exercises no control.”¹⁷²

The safety concerns expressed in *Eli* similarly apply to common carriers operating under permit from the CPUC. In *Klein v. Leatherman*, plaintiffs brought suit against a non-franchised trucking company whose subhauler (an independent contractor) had neglected to obtain the proper insurance as required under the California Public Utility Code.¹⁷³ In holding that the trucking contractor had a nondelegable duty, the court noted that the nondelegable duty rule would not be diminished based on technicalities. Instead, the court approached the issue practically: “One truck upon the highway tends to be like any other. It is difficult to discern wherein classification of the operation on the highway as a privilege under franchise, or as a right under a permit, changes the degree of protection required.”¹⁷⁴ Such logic is important for heading off the potential that TNCs will try to distinguish their permit from those that have been applied to trucking companies and taxis. Courts should be aware that, where TNCs fill the same role and present the same dangers as traditional transportation services, minute regulatory differences are of little importance.¹⁷⁵

The key similarity between TNCs and taxicabs is that both supply rides at the moment they are needed and give the driver no control over the rate charged.¹⁷⁶ This means that passengers are unlikely to spend time vetting drivers, prices, or car options. Instead, consumers put their faith in operators—taxicab companies or TNCs—to provide safe services. Consumers are therefore entitled to expect the same level of protection and recourse from a TNC as a taxicab.¹⁷⁷ If the goal of vicarious liability is to protect consumers and the

170. *Eli v. Murphy*, 248 P.2d 756, 757–58 (Cal. 1952).

171. *Id.* at 600.

172. *Id.* at 600–01; *see also* *Gamboa v. Conti Trucking, Inc.*, 23 Cal. Rptr. 2d 564, 565–67 (Ct. App. 1993) (extending *Eli*'s reasoning to a case in which the CPUC, rather than the legislature, imposed permitting requirements on a trucking company).

173. *Klein v. Leatherman*, 76 Cal. Rptr. 190, 191–92 (Ct. App. 1969).

174. *Id.* at 192.

175. *See* James Surowiecki, *Uber Alles*, NEW YORKER (Sep. 16, 2013), <http://www.newyorker.com/magazine/2013/09/16/uber-alles-2> [<http://perma.cc/K3HK-PPWX>].

176. *See id.*

177. *Id.* (“[TNCs] are actually piggybacking on the trust that consumers feel in what is typically a highly regulated economy.”).

general public from harm, TNCs should be treated no differently under the law than taxicab companies and other publicly licensed transportation services.

* * *

California regulators and officials have made their intent very clear: they wish to mitigate the public safety risks TNCs pose. As a result, TNCs must follow an array of regulations and permitting requirements in order to operate in the state. Given this regulatory landscape, courts should allow plaintiffs to hold TNCs liable for acts of their drivers under the nondelegable duty rule.

III.

POLICY RECOMMENDATIONS

In California, the CPUC and the state legislature have already taken some steps to head off safety problems before they occur but both entities can do more.¹⁷⁸ And at the national level, sharing economy abuses have become a wedge issue between presidential candidates.¹⁷⁹ This Part details potential measures that California, and any other state, could take to reduce the likelihood of negligence and intentional torts by TNC drivers.

A. Background Checks

The legislature has already enacted specific requirements for “adequate” insurance that bring TNCs to similar levels as taxicabs; its next step should be to do the same with driver background checks. Whereas taxicab companies are generally required to perform a “LiveScan” background check that provides detailed—and continuous—updates on drivers, the regulatory vagueness applying to TNCs allows the companies to purchase significantly less

178. Indeed, the CPUC, like regulators in other states, has imposed some new rules on TNCs, like the background check requirement, but it has left regulatory oversight of drivers to the companies themselves. Emily Badger, *What Happens When Uber and Airbnb Become Their Own Regulators*, WASH. POST (Feb. 4, 2015), <http://www.washingtonpost.com/blogs/wonkblog/wp/2015/02/04/what-happens-when-uber-and-airbnb-become-their-own-regulators> [http://perma.cc/MW7C-BSL6]. It remains to be seen whether TNCs have the will, or even the ability, to effectively monitor their drivers.

179. In her first major economic policy speech, Hillary Clinton said that while the sharing economy “creat[es] exciting opportunities and unleash[es] innovation . . . it’s also raising hard questions about workplace protections and what a good job will look like in the future.” Claire Zillman, *Hillary Clinton: I’ll Crack Down on Sharing Economy Abuses*, FORTUNE (July 13, 2015), <http://fortune.com/2015/07/13/hillary-clinton-uber-sharing-economy-workers> [http://perma.cc/ZET6-4VAB]. Meanwhile, Jeb Bush promoted the startup economy by using Uber for his transportation to a San Francisco conference, fellow Republican hopeful Ted Cruz declared himself the “Uber” of candidates, and Rand Paul blasted Hillary Clinton in a tweet, saying her ideas about Uber and Lyft are “out of touch.” See Zeke J. Miller, *Jeb Bush Hails Uber In San Francisco, Doesn’t Win Driver’s Vote* (July 16, 2015), <http://time.com/3961288/jeb-bush-uber-san-francisco> [http://perma.cc/W9TX-CVPQ]; Michelle Quinn, *Forget the Iran Nuclear Deal. What’s your Position on Uber?*, SILICON BEAT (July 14, 2015), <http://www.siliconbeat.com/2015/07/14/forget-the-iran-nuclear-deal-whats-your-position-on-uber> [http://perma.cc/9VYS-U98T].

comprehensive checks.¹⁸⁰ Consumers deserve to feel secure that their driver has not been convicted of a DUI or rape since the initial hiring background check, regardless of whether that driver is operating on behalf of a taxi company or a TNC. The legislature can better protect passengers and the general public by requiring TNCs to conduct more comprehensive background checks of drivers.

B. *Employment Status*

Courts and juries can grapple with whether a TNC driver is an employee, an independent contractor, or something else using a fact-specific inquiry on a case-by-case basis. But such an approach will be inefficient and will likely lead to non-uniform results. A driver who is a TNC employee in Anaheim should not become an independent contractor merely because she crossed the county line into Los Angeles. By creating a statewide, or even nationwide, definition of TNC responsibilities toward drivers, regulators could alleviate this issue. As it has done with other industries, for example real estate brokers and their agents, the legislature could require that TNCs maintain adequate levels of supervision and control over their drivers.¹⁸¹ Such a statutory provision would, in turn, encourage courts to hold TNCs responsible for acts of drivers.¹⁸²

C. *Public Representations*

Uber, Lyft, and Sidecar continue to publicly represent themselves as online networking platforms, not transportation services—even though California regulators have already clearly defined them as such.¹⁸³ Likewise, each company includes in its terms of service exculpatory language minimizing their role in, and liability for, the transaction.¹⁸⁴ Not only are these statements

180. DeAmicis, *supra* note 7. Negative publicity may also pressure TNCs to improve background checks. In the wake of allegations that an Uber driver raped a passenger in India, the company pledged that it was “initiating research & development on biometrics and voice verification to build custom tools for enhanced driver screening.” Casey Newton, *Uber Will Use Biometric Scans to Improve Background Checks on Drivers*, VERGE (Dec. 17, 2014), <http://www.theverge.com/2014/12/17/7411153/uber-will-use-biometric-scans-to-improve-background-checks-on-drivers> [<http://perma.cc/SV5P-8A8V>]. However, the company did not offer a timeline for when or where to expect the improved background checks. *Id.*

181. See CAL. BUS. & PROF. CODE § 10177(h) (West 2014) (allowing a real estate broker’s license to be suspended or revoked based on failure to “exercise reasonable supervision over the activities of his or her salespersons”).

182. See *Gipson v. Davis Realty Co.*, 30 Cal. Rptr. 253, 262–63 (Dist. Ct. App. 1963) (finding the statutory provisions governing real estate brokers and agents to be evidence that agents are always employees for tort purposes).

183. Compare *San Francisco Bay Area*, UBER, <https://www.uber.com/en-US/cities/san-francisco> [<https://perma.cc/P7JH-TVUX>] (last visited Oct. 14, 2015) (“Uber is not a transportation provider.”), with 2013 CPUC Order, *supra* note 35, at 50 (“TNCs are clearly designed to provide a car service for compensation.”).

184. Uber’s waiver, for example, requires customers to acknowledge that the company “does not provide transportation or logistics services or function as a transportation carrier.” *Terms and Conditions*, UBER, *supra* note 33. The waiver also states that Uber “does not guarantee the quality,

inaccurate but they also may mislead consumers into wrongly thinking that they have no claims against the companies for acts of TNC drivers.¹⁸⁵ States, and perhaps even the federal government, should crack down on these misleading statements; consumers cannot provide effective oversight of TNCs unless they know their rights.

D. Minimum Time Requirements

Public Utility Code section 5360.5, the standard distinguishing limousines and shuttles from taxicabs, does not define “prearranged.”¹⁸⁶ And the CPUC declined to interpret a minimum waiting time requirement into the code, which would have recognized that passengers do not “prearrange” TNC transportation in the same way they do limousine or shuttle services.¹⁸⁷ But, in perhaps a subtle hint to legislators, the CPUC did acknowledge that other jurisdictions, such as Washington State, have created minimum passenger waiting time requirements.¹⁸⁸ If the CPUC will not create a minimum time requirement, the legislature should. There is little difference between a passenger who waits on the street with his hand out for a few minutes until a taxicab passes by and a person who requests a ride from uberX and waits for a few minutes until a driver uses an iPhone to accept the request.¹⁸⁹ Acknowledging that TNCs

suitability, safety or ability of third party providers. You agree that the entire risk arising out of your use of the services, and any service or good requested in connection therewith, remains solely with you, to the maximum extent permitted under applicable law.” *Id.* The waiver releases Uber from liability “related to, in connection with, or otherwise resulting from any use of the services.” *Id.* Lyft and Sidecar make similar statements to distance themselves from liability. *See Lyft Terms of Service*, LYFT, *supra* note 33 (“LYFT DOES NOT PROVIDE TRANSPORTATION SERVICES, AND LYFT IS NOT A TRANSPORTATION CARRIER . . . Lyft is not responsible for the conduct, whether online or offline, of any User of the Lyft Platform or Services.”); *Terms of Services*, SIDECAR, *supra* note 33 (“We reserve the right, but have no obligation, to monitor and facilitate the resolution of disputes between you and other users. Sidecar shall have no liability for your interactions with other users, or for its or any user’s action or inaction.”).

185. District Attorneys in San Francisco and Los Angeles have already taken action against Uber and Lyft for making misleading statements in regard to the quality of background checks and need for certain fees. Press Release, L.A. Cty. Dist. Att’y, San Francisco and Los Angeles County DAs Announce Settlement with Lyft, Filing Against Uber (Dec. 9, 2014), http://da.lacounty.gov/sites/default/files/press/120914_San_Francisco_and_Los_Angeles_County_DAs_Announce-Settlement_With_Lyft_Filing_Against_Uber.pdf [<http://perma.cc/V2XK-575B>].

186. 2013 CPUC Order, *supra* note 35, at 20.

187. *See id.*

188. *Id.* at 20 n.30.

189. Washington’s law requires that chauffeured for-hire rides must be arranged at least fifteen minutes in advance. WASH. ADMIN. CODE. § 308-83-200(1)(c) (2012). Recognizing that TNCs often operate as electronic street hails, the International Association of Transportation Regulators (a group of taxi regulators) proposed model regulations under which such services would only be considered prearranged if made more than thirty minutes in advance. Tomio Geron, *Taxi Regulators Want To Shut Down Uber—And Mobile App Usage*, FORBES (Dec. 3, 2012), <http://www.forbes.com/sites/tomiogeron/2012/12/03/taxi-regulators-want-to-shut-down-uber-and-mobile-devices-in-cars> [<http://perma.cc/PG4S-4W6T>]. TNCs would likely oppose such requirements; if drivers had to wait fifteen to thirty minutes before picking up passengers, they would certainly lose many fares to taxicabs.

operate more like taxicabs in the eyes of consumers would encourage the CPUC and legislators to continue to bring TNC safety requirements up to the level of the taxicab industry.

* * *

Ultimately, it will take a combination of plaintiffs' lawyers, regulators, and legislators to make sure that TNCs operate safely. Public policy measures have various costs and risks, not least of which is the difficulty of passing regulations amidst heavy lobbying and public relations efforts by TNCs. A January 2015 dispute between TNCs and the California Department of Motor Vehicles (DMV) over classification of the vehicles used for TNC operations exemplifies this challenge. On January 5, 2015, the DMV issued a "clarification" memo instructing that "any passenger vehicle used or maintained for the transportation of persons for hire, compensation or profit is a commercial vehicle," and "even occasional use of a vehicle in this manner requires the vehicle to be registered commercially."¹⁹⁰ Registering a commercial vehicle is inconvenient and costly, and Lyft, Uber, and Sidecar all quickly released statements decrying the DMV's requirement.¹⁹¹ Within a month, the DMV issued a retraction.¹⁹² According to the DMV's director, "The matter requires further review and analysis which the department is undertaking immediately."¹⁹³ The DMV kerfuffle illustrates a key point about the regulatory landscape for ridesharing services: TNCs have significant sway over regulators, and they are more than willing to exercise it the moment new restrictions appear.¹⁹⁴ Thus, policy measures may be less viable in the short term. Given the TNC industry's lobbying power and the timidity with which

190. See Lydia O'Connor, *Uber, Lyft, and Sidecar Win Latest Regulation Battle Against California*, HUFFINGTON POST (Jan. 26, 2015), http://www.huffingtonpost.com/2015/01/23/california-rideshare-commercial-plates_n_6535332.html [<http://perma.cc/76S2-FAPD>].

191. *Id.* Among other things, the companies argued that the CPUC's decision that drivers could use personal vehicles effectively preempted the DMV from requiring otherwise. Lyft even pointed out that the commercial registration requirement "would essentially treat peer-to-peer transportation the same as a taxi," something the company apparently views as self-evidently unfair. *Id.*

192. *Id.* The web address where the DMV's memo originally appeared now features a single page that reads only "VIN 2015-01 Converting From Auto to Commercial Plates had been retracted." CA. DEPT. OF MOTOR VEHICLES, http://apps.dmv.ca.gov/vehindustry/vin_memos/vin2015/15vin01.pdf [<http://perma.cc/J5T9-8VNZ>] (last visited Oct. 14, 2015).

193. O'Connor, *supra* note 190.

194. The January 2015 incident with the DMV serves as one example of TNCs fighting regulations. But some have begun to theorize that the largest of the TNCs, namely Uber and Lyft, may actually support some new regulations that would provide higher barriers to entry into the ridesharing market and thereby reduce threats from new startups. See Jeff Guo, *Uber Might Actually Want Regulation. Here's Why.*, WASH. POST (Feb. 3, 2015), <http://www.washingtonpost.com/blogs/govbeat/wp/2015/02/03/uber-might-actually-want-regulation-heres-why> [<http://perma.cc/MD5U-HUCM>]. On the other hand, the TNC business model owes a great deal to lax regulations, which keep driver costs down and allow TNCs to take 20–25 percent cuts from every ride. See Jack Newsham, *Uber, Lyft Save Big by Avoiding Regulations*, BOS. GLOBE (Dec. 25, 2014), <http://www.bostonglobe.com/business/2014/12/25/uber-lyft-save-big-avoiding-regulations/pQAMk1KMOavlyZhWi4XIaJ/story.html> [<http://perma.cc/WL3Y-ABKG>].

policy makers have acted to protect public safety, the plaintiff’s bar can and should act to hold TNCs accountable.

CONCLUSION

There have already been many incidents of TNC driver negligence and assaults,¹⁹⁵ and the implications of the vicarious liability issue could be far-reaching. For one thing, TNCs are growing rapidly. Uber, for example, claimed in 2014 that the company is employing twenty thousand new drivers per month.¹⁹⁶ One can expect that an increase in TNC usage will lead to a somewhat proportional increase in tortious incidents. And to the extent that transportation service is a zero-sum game, consumers will continue to shift from heavily regulated taxicabs to TNC services that have far fewer safety requirements.

Holding TNCs liable for the acts of their drivers will help protect both passengers and the general public. It will make the companies accountable and encourage them to be more proactive in ensuring drivers operate safely. Perhaps even more importantly, TNCs and other sharing services like AirBnB have been lauded as part of a movement of “disruptive” startups that will bring the American economy into a new age of prosperity.¹⁹⁷ But allowing TNCs and other sharing services to exploit a variety of loopholes, including avoiding liability for vendors, distorts and obscures the actual value of such services.¹⁹⁸ At the moment, it is not clear whether such companies are a true panacea for inefficient, outmoded services or merely opportunists with slick web design teams. It is time to find out.

195. For a few notable examples, see Olivia Nuzzi, *The Ten Worst Uber Horror Stories*, DAILY BEAST (Nov. 19, 2014), <http://www.thedailybeast.com/articles/2014/11/19/the-ten-worst-uber-horror-stories.html> [<http://perma.cc/DE66-VTLW>].

196. Craig, *An Uber Impact: 20,000 Jobs Created on the Uber Platform Every Month*, UBER BLOG (May 27, 2014), <http://blog.uber.com/uberimpact> [<http://perma.cc/V7JM-8V36>]. Uber does not specify how many of these new employees are working as drivers for uberX, the company’s TNC operation, but it seems safe to assume that such drivers represent a sizeable portion of the twenty thousand.

197. For a biting critique of the “disruption” theory, see Jill Lepore, *The Disruption Machine*, NEW YORKER (June 23, 2014), <http://www.newyorker.com/magazine/2014/06/23/the-disruption-machine> [<http://perma.cc/4CDB-THQW>].

198. In other words, TNCs benefit from a regulatory framework that generally does not force them to pay for externalities.

