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Hold the Phone! "Peer-to-Peer" Ridesharing Services, Regulation, and Liability

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INTRODUCTION

As night fell on San Francisco on New Year's Eve, 2013, a mother was walking home with her two young children.[1] While crossing an intersection with a green signal to walk, a vehicle turned into the crosswalk and struck them.[2] Sofia Liu, a five-year-old girl, ultimately died as a result of her injuries.[3] The girl's family filed suit alleging that the driver negligently operated his vehicle, seeking damages for the young girl's suffering and wrongful death as well as their own claim for emotional distress.[4] This automobile accident, although tragic, may appear unremarkable. But because the driver had a ridesharing application open on his smartphone at the time of the accident, a run-of-the-mill personal injury case transformed into a flashpoint for the proper amount of regulation and allocation of liability in the "sharing economy."[5]

For-hire transportation services have been a fixture of urban economies since the early seventeenth century.[6] In recent years, new customs and technology have superficially altered a business model that

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1. Complaint for Damages and Demand for Trial by Jury at 4, Liu v. Uber Tech., Inc., No. CGC-14-536979 (Cal. Super. Ct. Jan. 27, 2014).
2. *Id.*
3. *Id.*
4. *Id.* at 9–16.
5. The application was UberX. *Id.* at 3. The "sharing economy" refers to the multi-billion dollar industry that has allowed individuals to profit by sharing their resources, such as spare rooms or equipment, through new technologies. Arvind Malhotra & Marshall Van Alstyne, *The Dark Side of the Sharing Economy . . . and How to Lighten It*, 57 COMM. ACM 24, 24 (2014).
6. SIR WALTER GILBEY, EARLY COACHES AND ROADS 26 (1903).

has fundamentally remained unchanged.[7] In the past several years, the development of global positioning system ("GPS") technology and the ubiquity of smartphones equipped with high-speed mobile data capabilities have spawned numerous companies promising to deliver higher quality transportation services.[8] These smartphone applications can increase reliability and provide accurate arrival times by using a passenger's exact geographical location, while also simplifying payment through digital transactions.[9] Uber, the most well-known of these applications, began operation in 2010 by offering individuals a way to bypass traditional cab companies and connect directly with commercial drivers.[10]

This technology has the potential to improve services within the existing for-hire transportation model.[11] Beginning in 2012, however, Lyft and Sidecar began to use these capabilities to fundamentally challenge the traditional for-hire transportation regulatory model by facilitating "peer-to-peer" ridesharing.[12] Uber followed suit, launching UberX shortly thereafter.[13] Instead of connecting passengers with traditionally-regulated providers of transportation services, such as taxicabs and "black" cars, these ridesharing services arrange transportation with ordinary, non-

7. For example, the development of mileage meters at the turn of the nineteenth century allowed drivers to charge fares based on distance, rather than by area. Later meters allowed for the measurement of distance *and* time, allowing drivers to compensate for slower trips. Edward C. Gallick & David E. Sisk, *A Reconsideration of Taxi Regulation*, 3 J.L. ECON. & ORG. 117, 120 (1987).

8. Uber, Lyft, Sidecar, and Taxi Magic (now known as "Curb") are some of the most well-known companies leveraging smartphone technology in the for-hire transportation market. Jordan England-Nelson, *Meet Curb: Taxi Magic App Changes Name, Takes on Uber, Lyft and Others*, DAILY BREEZE (Aug. 5, 2014, 9:00 PM), http://www.dailybreeze.com/business/20140805/meet-curb-taxi-magic-app-changes-name-takes-on-uber-lyft-and-others [http://perma.cc/QH2E-E57K].

9. Michael Oliveira, *On-Demand Car Service Now in Toronto*, WATERLOO REGION REC., Mar. 15, 2012, at C9.

10. Kale Williams & Kurtis Alexander, *Uber Sued Over Girl's Death in S.F.*, SFGATE, http://www.sfgate.com/bayarea/article/Uber-sued-over-girl-s-death-in-S-F-5178921.php [http://perma.cc/26QE-S97G] (last updated Jan. 28, 2014).

11. Some companies have made similar "white-label" applications, which are marketed towards existing taxi services. Christine Dobby, *Taxi-Hailing Apps Draw Fire*, FIN. POST (Oct. 31, 2012, 6:06 PM), http://business.financialpost.com/fp-tech-desk/taxi-apps-draw-fire [http://perma.cc/ZW66-TTYY]. Uber also offers a class of services that arrange rides with existing taxi and livery drivers. *Id.*

12. Christopher Dolan, *The "Sharing Economy"*, PLAINTIFF MAG., March 2014, at 1.

13. *See id.* Note, Uber provides multiple tiers of service. The company's ridesharing service is called UberX. *Uber*, UBER, https://www.uber.com [https://perma.cc/4BGT-438G] (last visited Oct. 20, 2014).

commercially-licensed drivers who use their own personal vehicles.[14] The customer simply downloads the application,[15] receives a "license" to use it after agreeing to the terms of use,[16] and provides payment information.[17] When in need of a ride, the customer opens the ridesharing application to see a map of drivers who are also using the application and have indicated that they are available to accept fares.[18] After the customer selects a driver and requests a ride, the driver is notified and has the option to accept or decline the request.[19] If the ride request is accepted, the driver picks up the customer and the ridesharing service's application calculates the fare,[20] facilitates the financial transaction, and takes a commission.[21]

Peer-to-peer ridesharing services pose a wide spectrum of policy challenges for state and local regulators and courts, especially with regard to public safety. These ridesharing services all stress that they are technology companies—not providers of transportation services—that merely connect individuals with third-party drivers.[22] Such a characterization is clearly an attempt to limit the companies' liability for accidents.[23] Therefore, determining who is ultimately liable for damages

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14. Paul Nussbaum, *Fight Over Ride Sharing Comes to Philadelphia*, PHILLY.COM (July 23, 2014), http://articles.philly.com/2014-07-24/news/51956654_1_uber-and-lyft-transportation-network-companies-uberx [http://perma.cc/8KL8-AQ6W].

15. Emilie Rusch, *From Point A to Point B: Ride-Share Services Offer New, On-Demand Option*, DENVER POST, June 23, 2014, at 3C.

16. *See Terms and Conditions*, UBER, https://www.uber.com/legal/usa/terms [https://perma.cc/J4BX-8G4D] (last updated May 17, 2013) [hereinafter *Uber Terms of Service*]; *Lyft Terms of Service*, LYFT, https://www.lyft.com/terms [https://perma.cc/HZ6W-WV48] (last updated Sept. 18, 2014) [hereinafter *Lyft Terms of Service*]; *Terms of Service*, SIDECAR, http://www.side.cr/terms [http://perma.cc/A6J5-RP6R] (last updated Aug. 12, 2014) [hereinafter *Sidecar Terms of Service*].

17. Rusch, *supra* note 15.

18. Matt Schlueb, *Orlando Cracks Down on Uber 'Rideshare' Service*, ORLANDO SENTINEL, June 26, 2013, at A1.

19. Defendant Uber Techs., Inc.'s Answer to Plaintiff's Unverified Complaint for Damages at 4, Liu v. Uber Tech., Inc., No. CGC-14-536979 (Cal. Super. Ct. Jan. 27, 2014) [hereinafter Answer].

20. Brian X. Chen, Op-Ed., *Car-Hiring Apps in a Snarl*, N.Y. TIMES, Dec. 3, 2012, at B1.

21. Ellen Huet, *Uber Raises UberX Commission to 25 Percent in Five More Markets*, FORBES (Sept. 11, 2015, 1:40 PM), http://www.forbes.com/sites/ellenhuet/2015/09/11/uber-raises-uberx-commission-to-25-percent-in-five-more-markets [http://perma.cc/RCS3-U79Q].

22. *See Uber Terms of Service*, *supra* note 16; *Lyft Terms of Service*, *supra* note 16; *Sidecar Terms of Service*, *supra* note 16; Justine Griffin, *App-Based Taxi Service Uber Tests Local Waters*, SARASOTA HERALD-TRIB., Aug. 19, 2014, at B1.

23. *See* Dolan, *supra* note 12, at 1.

from injuries caused by the activities of ridesharing services is an important public-policy concern.

These ridesharing services continue to operate outside of the public permitting process, with which traditional commercial transportation companies must comply,[24] meaning that drivers have no government-sanctioned permit besides their personal driver's licenses.[25] Likewise, the ridesharing services alone determine whether and how to conduct background checks, training, and discipline for drivers, and these services decide their own specifications, inspections, drivers' hours, and amount of insurance coverage. Recognizing this problem, many local governments have begun regulating ridesharing services, albeit with frameworks that depart significantly from traditional approaches.[26]

Although there are many economic benefits to the proliferation of ridesharing services, governments and courts need to arrive at an appropriate balance of traditional regulation and imposition of liability to ensure public safety in light of the services' rapid expansion.[27] Part I of this Comment explores traditional and existing for-hire transportation regulations and compares them with the modern approaches taken by regulators responding to the creation of ridesharing services. Part II considers many of the potential ways that courts might impose liability upon the ridesharing service providers. Part III discusses how regulation and imposition of liability can work together to minimize the risks that ridesharing services pose to public safety and welfare. As detailed below, the modern regulatory approaches will be effective in ensuring public safety as long as ridesharing services are also held liable for the acts of their drivers.

I. REGULATORY APPROACHES IN THE RIDESHARING SERVICES INDUSTRY

Regulations have been a fixture of the for-hire transportation business for centuries. Reacting to the chaos that resulted from the proliferation of horse-drawn carriages in the cities of seventeenth century England, King Charles I imposed regulations, backed with threats of fines on for-hire

24. *See* Dobby, *supra* note 11.
25. *See* Griffin, *supra* note 22.
26. *See infra* Part I.
27. This Comment's consideration of regulations and liability borrows from a traditional framework for approaching public safety questions. *See* Steven Shavell, *Liability for Harm Versus Regulation of Safety*, 13 J. LEGAL STUD. 357, 357 (1984). Regulation of for-hire transportation services touches on some highly-contentious economic and political considerations, such as restricting competition, setting price controls, and dictating service requirements, which this Comment will not examine. *See* Paul Stephen Dempsey, *Taxi Industry Regulation, Deregulation & Reregulation: The Paradox of Market Failure*, 24 TRANSP. L.J. 73, 76–77 (1996).

hackneys, out of concern for the public's safe passage along the common roads.[28] The United States began to heavily regulate the for-hire transportation industry in the 1920s and 1930s.[29] Although the amount and nature of regulation in the United States has fluctuated over time,[30] the public widely accepts regulations for "securing and maintaining an adequate public transportation system" and the "protection, safety and welfare" of the public.[31] The public's acceptance of such regulations is the reason why public safety is the "paramount purpose" of revisiting regulations in the context of ridesharing services.[32]

Regulations of for-hire transportation services have been divided into several conceptual groups, which include a range of policy considerations.[33] Rather than discussing the economic impact of regulations, this Comment focuses on regulations pertaining to public safety, which conceptually relate to the "quality" of transportation services.[34] Many of the same reasons for regulating the for-hire transportation industry remain relevant in the modern ridesharing services context, such as creating a mechanism for controlling the industry, ensuring the fitness of drivers and vehicles, and securing adequate compensation for those affected by accidents. Although the regulatory schemes adopted by most governments depart significantly from

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28. A.H., *Origin of Hackney Coaches*, 88 GENTLEMAN'S MAG. 223, 223 (1818) ("His Majesty, perceiving that of late the great numbers of hackney coaches were grown a great disturbance to the King, Queen, and Nobility through the streets of [London and Westminster], so as the common passage thereby was hindred [sic] and made dangerous, and the rates and prices of hay and provender and other provisions of the stable thereby made exceeding dear . . . . commands that none should be used therein, except they be to travel at the least three miles out of town . . . .").

29. Dempsey, *supra* note 27, at 76; MARK W. FRANKENA & PAUL A. PAUTLER, AN ECONOMIC ANALYSIS OF TAXICAB REGULATION 15 (1984).

30. *See id.* at 75.

31. BATON ROUGE, LA., CODE OF ORDINANCES § 10:202 (Municode through Ordinance No. 15996, enacted June 10, 2015); *see, e.g.*, PORTLAND, OR., CODE OF ORDINANCES § 16.40.10 (2014) ("[S]ome regulation is necessary to insure that the public safety is protected, the public need provided, and the public convenience promoted.").

32. CAL. PUB. UTIL. COMM'N, r. 12-12-011, ORDER INSTITUTING RULEMAKING ON REGULATIONS RELATING TO PASSENGER CARRIERS, RIDESHARING, AND NEW ONLINE-ENABLED TRANSPORTATION SERVICES 39 (2013) [hereinafter CAL. PUB. UTIL COMM'N RULING 12-12-011].

33. There are five general categories of regulations: (1) entry restrictions (limiting the number of drivers), (2) fare controls (setting the rates for charging passengers), (3) restrictions on the type of services offered (e.g., cruising cabs, cabs at wait stands, dispatch cabs, pre-arranged rides, ridesharing), (4) service requirements (requiring service in certain areas and during certain times), and (5) regulation of the quality of services. FRANKENA & PAUTLER, *supra* note 29, at 2 (providing a detailed explanation of each category of regulation).

34. *Id.*

traditional approaches, they are likely to still address public safety concerns effectively, provided that the schemes avoid certain potential pitfalls.

A. Ridesharing Service Regulations Depart from Traditional Transportation Licensing Approaches

Regulation of urban transportation has been likened to a public utility.[35] Most regulation is administered at the municipal level, though some states govern transportation matters through legislation and regulation by public utility commissions or similar administrative bodies.[36] Some states, such as Texas and California, require that municipalities regulate taxis.[37] Reviewing courts give the decisions made by these local governing bodies "extreme" deference.[38] Authority to regulate for-hire transportation is firmly in the police powers of state and local governments, and such regulations have survived almost all antitrust, due process, and federal preemption challenges.[39]

Licensing and permitting of drivers and transportation companies is the fountainhead of regulation of for-hire transportation. Most jurisdictions within the United States require some form of government approval before a driver or company may provide transportation services for compensation.[40] Chicago, for example, which has a well-established regulatory system typical of large cities, regulates all for-hire transportation and has established separate classifications for taxis and pre-arranged transportation.[41] Regulators in Chicago require that taxi operators be licensed to drive taxis,[42] require that taxi vehicles have a license to operate,[43] make it illegal to solicit or accept

35. Dempsey, *supra* note 27, at 116. Because it is treated like a public utility, regulation of transportation is widely accepted and generally non-controversial.

36. FRANKENA & PAUTLER, *supra* note 29, at 15. States like California, Pennsylvania, and Colorado oversee transportation providers through state utility regulatory bodies. *See, e.g.*, CAL. PUB. UTIL. CODE § 5371 (2014); 66 PA. STAT. ANN. § 2501 (West, Westlaw through Act 2015-15); COLO. REV. STAT. ANN. § 40-10.1-102 (West, Westlaw 2014 through July 1, 2015). Federal law may be implicated, for instance, for taxi accessibility requirements. 49 C.F.R. § 37.29 (2014).

37. Dempsey, *supra* note 27, at 78.

38. *Id.*

39. *Id.* at 77–78.

40. *Id.* at 76.

41. CHI., ILL., MUN. CODE § 9-112-020 (2014) (regulating taxis); *id.* § 9-114-020 (regulating "public passenger vehicles").

42. *Id.* § 9-104-020.

43. *Id.* § 9-112-020(a). Every vehicle operating as a taxi must have a "medallion," a metal plate affixed to the vehicle, which serves as the physical representation of the license to operate. *Id.* § 9-112-010.

business without a license,[44] and limit the number of licenses available.[45] Chicago has similar requirements for pre-arranged transportation services, such as "black" cars.[46] These regulations are backed by a broad power to penalize those who operate outside of the regulatory framework.[47] Many smaller cities have similar regulations,[48] and some regulations can come from the state level.[49]

Licensing and permitting achieves two fundamental goals. First, by giving a company or individual a permit to provide transportation services, regulators verify that certain minimum requirements have been met as a prerequisite to approval. For example, a taxi operating license ensures that the driver has received a background check, that the vehicle is properly registered, and that the driver has complied with the statutory minimum insurance requirement.[50] Second, government agencies are able to effectively assure compliance with regulations through the threat of suspension or revocation of permits and licenses.[51] These penalties can be issued to individual drivers or to the company providing the transportation service.[52]

Ridesharing services such as UberX, Lyft, and Sidecar began operation in cities without going through the permitting process for traditional for-hire transportation services.[53] In California, the birthplace

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44. *Id.* § 9-112-020(c).

45. *Id.* § 9-112-030.

46. *Id.* § 9-104-020. "Livery" vehicles, also commonly referred to as "black" cars, charge a pre-arranged, fixed fee. *Id.* § 9-114-010.

47. *Id.* § 9-112-370. Unlicensed drivers are "subject to fines, vehicle impoundment, and other applicable penalties." *Id.* § 9-112-020(e).

48. Baton Rouge, Louisiana, a medium-sized city, has enacted similar restrictions for the operation of for-hire transportation providers, such as requiring permitting of all for-hire transportation services, BATON ROUGE, LA., CODE OF ORDINANCES § 10:204 (Municode through Ordinance No. 15996, enacted June 10, 2015), reserving the right to revoke or suspend franchises, *id.* § 10:211, and imposing fines or jail time for violations. *Id.* § 10:216.

49. For example, in California, driving without a taxi license subjects the driver to a maximum $2,500 fine (first offense) or $5,000 fine (second offense); unlicensed charter-party carriers face fines of $10,000 (first offense) or $25,000 (second offense). CAL. PUB. UTIL. CODE § 5412.2 (Westlaw 2014).

50. Richard Levin, *Uber Has Uninsured-Motorist Coverage, Do You? Umbrella Insurance Policies Protect Passengers and Drivers*, 24 WESTLAW J. INS. COVERAGE 1, 1 (2014).

51. FRANKENA & PAUTLER, *supra* note 29, at 6.

52. *See, e.g.*, CHI., ILL., MUN. CODE § 9-112-630.

53. *See, e.g.*, Sean Doogan, *Anchorage Judge Hears Arguments Over Legality of Uber Ride-Sharing Service*, ALASKA DISPATCH NEWS (Oct. 9, 2014), http://www.adn.com/article/20141009/anchorage-judge-hears-arguments-over-legality-uber-ride-sharing-service [http://perma.cc/YR7K-TDGP]; *see also*, Dobby, *supra* note 11.

of Uber,[54] regulators had to decide whether these services fell within the regulatory scheme established for for-hire transportation services. Uber, Lyft, and others claimed that the body charged with regulating the state's transportation services, the California Public Utilities Commission ("CPUC"), lacked the authority to regulate them because they were information providers, not common carriers.[55] The CPUC disagreed, and found that they were subject to the state's regulations for for-hire transportation providers, which prevented them from obtaining a waiver to shirk the responsibilities of for-hire transportation providers.[56] The CPUC then imposed a fine of $20,000 on each of the companies for a litany of violations of California for-hire transportation regulations.[57] Most notably, the commission found that the companies had illegally operated as "charter-party carriers"[58] without licenses.[59] Going a step further, the CPUC used its power to regulate charter-party carriers to create an entirely new category of carriers known as "Transportation Network Companies" ("TNC") in September 2013.[60] Many other governmental entities have followed suit by choosing to create an entirely new regulatory classification for these services rather than placing them solely within existing regulations.[61]

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54. Edmund Ingham, *Start-ups Take Note: Uber Made It Big, But Did They Get It Right?*, FORBES (Dec. 5, 2014, 12:16 PM), http://www.forbes.com/sites/edmundingham/2014/12/05/start-ups-take-note-uber-made-it-big-but-did-they-get-it-right [http://perma.cc/Y6CK-LVR9].

55. Dolan, *supra* note 12, at 45.

56. *Id.*

57. Lisa Rayle et al., *App-Based, On-Demand Ride Services: Comparing Taxi and Ridesourcing Trips and User Characteristics in San Francisco* 3–4 (Univ. of Cal. Transp. Ctr., Working Paper, 2014), *available at* http://www.uctc.net/research/papers/UCTC-FR-2014-08.pdf [http://perma.cc/DKP2-BUHJ].

58. "Charter-party carrier" is California's categorization of for-hire transportation providers that are not operating as taxis. CAL. PUB. UTIL. CODE § 5360 (Westlaw 2014) ("'[C]harter-party carrier of passengers' means every person engaged in the transportation of persons by motor vehicle for compensation, whether in common or contract carriage, over any public highway in this state.").

59. Citation for Violation of Public Utilities Code, CF-1593 (Cali. Pub. Util. Comm'n, Nov. 13, 2012) (Lyft); Citation for Violation of Public Utilities Code, F-5195 (Cali. Pub. Util. Comm'n, Nov. 13, 2012) (Uber); Citation for Violation of Public Utilities Code, CF-5194 (Cali. Pub. Util. Comm'n, Nov. 13, 2012) (Sidecar).

60. CAL. PUB. UTIL. COMM'N RULING 12-12-011, *supra* note 32, at 24 ("[A] TNC is defined 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.").

61. *See, e.g.*, CHI., ILL., MUN. CODE §§ 9-115-010 to 250 (2014); BATON ROUGE, LA., CODE OF ORDINANCES §§ 10:600 to 606 (Municode through Ordinance No. 15996, enacted June 10, 2015).

One novel feature of California's approach is that the company obtains the license instead of the individual, requiring ridesharing services to obtain a permit from the CPUC prior to operating as a TNC.[62] The application process ensures some basic compliance with the requirements of TNCs, including proof of insurance.[63] The CPUC has broad discretion over permitted companies, reserving the right to revoke or suspend the operating permit of any company that violates any regulation, rule, order, or demand, among other things.[64] Notably, however, there is no requirement that TNC drivers receive any special licensing besides an ordinary California driver's license.[65] Most jurisdictions have followed this approach, licensing the companies rather than the individuals[66] and maintaining broad discretion to terminate or suspend the companies' operating permits.[67] Still, when companies, instead of individuals, are licensed, many regulators retain the authority to suspend or revoke a driver's privilege of providing ridesharing services[68] or to impose fines on drivers.[69] Control over the fitness of drivers, fitness of vehicles, and the minimum level of insurance for vehicles is therefore effectuated by additional regulations.

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62. CAL. PUB. UTIL. COMM'N RULING 12-12-011, *supra* note 32, at 25.

63. CAL. PUB UTIL. COMM'N, APPLICATION PACKET: TRANSPORTATION NETWORK COMPANIES (2013), *available at* http://www.cpuc.ca.gov/NR/rdonlyres/3DEDC5A3-7151-4991-93F4-2AC17499853F/0/TNC_App_Form20131106.pdf [http://perma.cc/Q7VL-X69H]. Likewise, Chicago requires proof of insurance in the company's application, CHI., ILL., MUN. CODE § 9-115-050(b), as does Baton Rouge, BATON ROUGE, LA., CODE OF ORDINANCES § 10:602(a)(11)(f).

64. CAL. PUB. UTIL. CODE § 5378 (Westlaw 2014). This is true of all charter-party carriers, of which TNCs are a subset. Many other jurisdictions maintain wide discretion to revoke or suspend licenses of drivers who violate TNC regulations. *See* MINNEAPOLIS, MINN., CODE OF ORDINANCES § 343.180 (2014); HOUS., TEX., CODE OF ORDINANCES § 46-5 (Municode through Ordinance No. 2015-668, adopted July 8, 2015) (giving broad discretion to suspend the license of all for-hire vehicle drivers, including taxi and ridesharing drivers, for violating regulations).

65. CAL. PUB. UTIL. COMM'N RULING 12-12-011, *supra* note 32, at 25, 27.

66. *See, e.g.*, BATON ROUGE, LA., CODE OF ORDINANCES § 10:602(a)(11); CHI., ILL., MUN. CODE § 9-115-030; HOUS., TEX., CODE OF ORDINANCES § 46-503; MINNEAPOLIS, MINN., CODE OF ORDINANCES § 343.20.

67. *See, e.g.*, BATON ROUGE, LA., CODE OF ORDINANCES § 10:256; CHI., ILL., MUN. CODE § 9-115-220.

68. *See, e.g.*, CHI., ILL., MUN. CODE § 9-115-250(b).

69. *See, e.g.*, *id.* § 9-115-230; MINNEAPOLIS, MINN., CODE OF ORDINANCES § 343.190.

B. Ridesharing Service Regulations Shift Significant Responsibility to Companies to Ensure the Fitness of Drivers and Vehicles

One important way that governments can assure the public safety of for-hire transportation services is by setting certain minimum requirements for the quality of drivers and vehicles used. Traditional for-hire transportation drivers must have certain qualifications and cannot have certain disqualifications. For example, a driver will likely need to be of a certain age and have an ordinary driver's license.[70] If drivers have a recent or egregious criminal conviction or traffic violation, the regulations will likely disqualify them.[71] Likewise, certain medical conditions may disqualify a driver.[72] Laws then provide for a process by which background investigations are to be conducted either by the local police department or through some other mechanism.[73] Besides ensuring that drivers meet certain quality requirements at the time of licensing, procedures are in place to revoke or suspend a license for subsequent infractions.[74] In addition, regulators may impose additional training requirements[75] to ensure that drivers do not operate their vehicles for unsafe lengths of time.[76]

In contrast, the general approach to ensuring the "quality control" of drivers providing ridesharing services has been to leave it to the companies

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70. *See, e.g.*, BATON ROUGE, LA., CODE OF ORDINANCES § 10:252(1). In addition to requiring that drivers be of a certain age and have a valid driver's license, Chicago requires that drivers can speak, read, and write in English. CHI., ILL., MUN. CODE § 9-104-030(2)(a) to (c).

71. *See, e.g.*, BATON ROUGE, LA., CODE OF ORDINANCES § 10:252(2) to (5); CHI., ILL., MUN. CODE § 9-104-030(2)(f) to (h).

72. *See, e.g.*, CHI., ILL., MUN. CODE § 9-104-030(2)(d) (excluding drivers who have "epilepsy, vertigo, heart disease, defective vision or other infirmity of body or mind which may substantially impair the ability to operate a public vehicle, and is not addicted to the use of drugs or intoxicating liquors").

73. *See, e.g.*, BATON ROUGE, LA., CODE OF ORDINANCES § 10:254; CHI., ILL., MUN. CODE § 9-104-030(3).

74. *See, e.g.*, BATON ROUGE, LA., CODE OF ORDINANCES § 10:256; CHI., ILL., MUN. CODE § 9-104-040. California's Employee Pull Notice ("EPN") program, for example, allows employers to conduct initial checks on drivers and register to receive automatic notifications when a driver has any "convictions, failures to appear, accidents, driver's license suspensions, driver's license revocations, or any other actions taken against the driving privilege or certificate." CAL. VEH. CODE § 1808.1(b) (West, Westlaw through Ch. 9 of 2015 Reg. Sess.).

75. *See, e.g.*, CHI., ILL., MUN. CODE § 9-104-030(2)(e).

76. Chicago prohibits taxi operation by a single driver for more than 12 hours in a 24 hour period, *id.* § 9-112-250(a), and licensees must implement policies that ensure a minimum amount of rest for taxi drivers. *Id.* § 9-112-250(b). California merely requires that drivers' hours are logged. CAL. PUB. UTIL. COMM'N RULING 12-12-011, *supra* note 32, at 32–33.

themselves.[77] Although some regulators require ridesharing drivers to obtain a commercial driver's license similar to those required for other for-hire vehicles,[78] others have given the companies much flexibility to oversee the qualifications and oversight of drivers.[79] Most jurisdictions require that the companies conduct preliminary criminal and traffic background checks on drivers using their own platform, setting forth what violations will disqualify the driver.[80] Likewise, the companies themselves are responsible for periodically monitoring their employees to ensure that they do not commit any particular crimes or vehicular offenses.[81] Zero-tolerance drug and alcohol policies, which demand immediate termination of drivers found impaired while driving, are also common.[82] Some regulators require annual reporting of accidents and violations of ridesharing drivers[83] and explicitly state that they will investigate complaints by inspecting company records and vehicles.[84] For example, Chicago requires ridesharing services to disclose alleged violations of regulations or terms of service by drivers, accidents, and even real-time location data for the purposes of law enforcement or emergency response.[85] Some regulators require that drivers participate in an approved training program provided by the ridesharing service[86] or any approved by regulators,[87] while others require the same

77. *See, e.g.*, BATON ROUGE, LA., CODE OF ORDINANCES § 10:602; MINNEAPOLIS, MINN., CODE OF ORDINANCES § 343.120 (2014).

78. *See, e.g.*, HOUS., TEX., CODE OF ORDINANCES § 46-510 (Municode through Ordinance No. 2015-668, adopted July 8, 2015).

79. *See, e.g.*, BATON ROUGE, LA., CODE OF ORDINANCES § 10:601.

80. Baton Rouge requires that drivers pass a criminal background check and driving record check. *Id.* § 10:601(c),(d) (2014); s*ee also* MINNEAPOLIS, MINN., CODE OF ORDINANCES § 343.120(a)(13).

81. Because the EPN program used for monitoring drivers requires that the drivers be employees, ridesharing services would not be able to participate because they currently contend that the drivers are independent contractors. CAL. PUB. UTIL. COMM'N RULING 12-12-011, *supra* note 32, at 41–42. The CPUC has reached a similar result by requiring that ridesharing services conduct a DMV check on the drivers' records at the time of granting a license to operate and quarterly thereafter, ensuring that the driver has had no "major violations" in the last three years and no alcohol or drug-related criminal offenses in the last seven years. *Id.* at 66.

82. *See, e.g.*, BATON ROUGE, LA., CODE OF ORDINANCES § 10:602(a)(7), (8); MINNEAPOLIS, MINN., CODE OF ORDINANCES § 343.130.

83. *See, e.g.*, MINNEAPOLIS, MINN., CODE OF ORDINANCES § 343.170(b)(3); CAL. PUB. UTIL. COMM'N RULING 12-12-011, *supra* note 32, at 32.

84. *See, e.g.*, MINNEAPOLIS, MINN., CODE OF ORDINANCES § 343.200; CAL. PUB. UTIL. COMM'N RULING 12-12-011, *supra* note 32, at 33.

85. CHI., ILL., MUN. CODE § 9-115-210 (2014).

86. *Id.* § 9-115-150(b)(1)(iv); CAL. PUB. UTIL. COMM'N RULING 12-12-011, *supra* note 32, at 27.

87. *See, e.g.*, MINNEAPOLIS, MINN., CODE OF ORDINANCES § 343.120(a)(11).

training demanded of traditional commercial drivers.[88] Further, some regulators have set specifications on the amount of time that a driver is allowed to work in a day.[89] The various methods of quality control mechanisms that ridesharing companies utilize show the need for uniform regulation.

Besides ensuring that drivers meet certain minimum qualifications, vehicle safety is a nearly universal feature of for-hire transportation regulatory schemes. Periodic inspections of vehicles may be conducted by the regulating agency,[90] a third party,[91] or the transportation provider itself.[92] The inspections may be used to ensure that the vehicle interior and exterior are in satisfactory condition and that necessary equipment is installed.[93] Visual inspections may also ensure the proper operation of controls and the working condition of important safety features such as brakes and windshields.[94] Chicago, for example, has minimum specifications for taxi vehicles, setting standards for the age of vehicles[95] and requiring certain additional safety features, such as a safety shield to separate passengers and the driver, a mounted camera to photograph passengers, and any other requirements deemed necessary by regulators.[96] Failure to comply with inspection requirements, of course, may result in suspension of the taxi license, fines, or other penalties.[97]

In response to the development of ridesharing services, regulators have generally imposed inspection requirements similar to those of other for-hire transportation services, albeit with varying levels of detail.[98] However,

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88. *See, e.g.*, HOUS., TEX., CODE OF ORDINANCES § 46-510 (Municode through Ordinance No. 2015-668, adopted July 8, 2015).

89. Chicago requires that companies guarantee that no driver operates for more than 10 hours within a 24 hour period and that no vehicle shall be driven for more than 10 hours within a 24 hour period. CHI., ILL., MUN. CODE § 9-115-190. Houston allows drivers to drive a maximum 12 hours in any 24 hour period. HOUS., TEX., CODE OF ORDINANCES § 46-511.

90. *See, e.g.*, CHI., ILL., MUN. CODE § 9-112-050.

91. Baton Rouge allows third parties to inspect vehicles without setting qualifications. BATON ROUGE, LA., CODE OF ORDINANCES § 10:602(a)(4) (Municode through Ordinance No. 15996, enacted June 10, 2015). Some municipalities allow for inspections by facilities approved by regulators, although it is unclear whether this could also include ridesharing services themselves. *See, e.g.*, MINNEAPOLIS, MINN., CODE OF ORDINANCES § 343.90(a); HOUS., TEX., CODE OF ORDINANCES § 46-514.

92. *See, e.g.*, BATON ROUGE, LA., CODE OF ORDINANCES § 10:602(a)(4).

93. *See, e.g.*, CHI., ILL., MUN. CODE § 9-112-050.

94. BATON ROUGE, LA., CODE OF ORDINANCES § 10:602(a)(4).

95. CHI., ILL., MUN. CODE § 9-112-070(c).

96. *Id.* § 9-112-140(a).

97. *Id.* § 9-112-050.

98. California requires an annual 19-point inspection, CAL. PUB. UTIL. COMM'N RULING 12-12-011, *supra* note 32, at 28–29, Chicago requires an annual

authorities differ on who must conduct the inspection. Some jurisdictions require that a licensed, third-party facility inspect vehicles,[99] while others allow the service providers to conduct the inspections themselves.[100] Notably, specifications for the vehicles are relatively lax. While some regulators place age requirements and prohibitions on using rebuilt vehicles,[101] others do not.[102] It does not appear that any jurisdictions require additional, non-standard equipment such as that required for other for-hire transportation services.[103]

C. Ridesharing Service Regulations Assure the Availability of Adequate Compensation for Injured Parties Through Novel Insurance Requirements

Adequate insurance is one of the most important requirements imposed on drivers. The primary purpose of minimum automobile insurance requirements is to ensure the availability of compensation for victims of accidents.[104] Absent a mandatory minimum, private actors will only be concerned about their activities to the extent that their assets are at risk.[105] But regulations may compel a company to insure for a greater amount to secure the availability of adequate compensation for anyone who might be injured by its activities. To this end, every state in the United States has minimum insurance requirements as a prerequisite to operate a motor vehicle.[106] Insurance requirements generally require a certain amount of liability coverage for: (1) bodily injury per person, (2) total bodily injury

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22-point inspection, CHI., ILL., MUN. CODE § 9-115-110(b), and Baton Rouge merely requires an inspection for gross damage and "cover brakes, windshield, lights, steering, pollution control devices, tires, and suspension." BATON ROUGE, LA., CODE OF ORDINANCES § 10:602(a)(4).

99. *See, e.g.*, CAL. PUB. UTIL. COMM'N RULING 12-12-011, *supra* note 32, at 28; CHI., ILL., MUN. CODE § 9-115-110(b).

100. *See, e.g.*, BATON ROUGE, LA., CODE OF ORDINANCES § 10:602(a)(4).

101. *See, e.g.*, CHI., ILL., MUN. CODE § 9-115-100(5); MINNEAPOLIS, MINN., CODE OF ORDINANCES § 343.80(b)(4) (2014); HOUS., TEX., CODE OF ORDINANCES § 46-513 (Municode through Ordinance No. 2015-668, adopted July 8, 2015).

102. CAL. PUB. UTIL. COMM'N RULING 12-12-011, *supra* note 32, at 28. Baton Rouge places no requirements on the vehicles.

103. *See, e.g.*, CHI., ILL., MUN. CODE § 9-112-140(a).

104. Johnson v. Occidental Fire & Cas. Co. of N.C., 954 F.2d 1581, 1584 (11th Cir. 1992); Federated Am. Ins. Co. v. Granillo, 835 P.2d 803, 804 (Nev. 1992).

105. Shavell, *supra* note 27, at 360–61.

106. Shamit Choksey, *Car Insurance Requirements by State*, CARS.COM (June 26, 2013), http://www.cars.com/go/advice/Story.jsp?section=ins&subject=ins_req&story=state-insurance-requirements [http://perma.cc/7428-8VCL].

per accident, and (3) damage to property.[107] Uninsured motorist insurance may also be required.[108] Like personal vehicles, regulators generally set specific, though elevated, insurance requirements for for-hire vehicles.[109] Even in towns with minimal taxi regulation, additional insurance is almost universally a requirement for operation.[110]

Prior to the regulatory action taken by the CPUC, ridesharing services in California operated outside of the regulatory framework established for for-hire transportation.[111] Drivers' personal insurance was the first line of protection,[112] backed by commercial insurance.[113] However, commercial use exclusions usually apply when a personal vehicle is used as a "public or livery conveyance," and many modern policies specifically exclude "shared-expense" carpools.[114] As a result, many state regulators began issuing warnings about the inadequacy of insurance coverage for vehicles operating on ridesharing platforms.[115]

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107. Louisiana requires at least $15,000 for bodily injury or death of one person, $30,000 for bodily injury or death of two or more people, and $25,000 for damage to property, LA. REV. STAT. ANN. § 32:900 (2013), and California requires $15,000, $30,000, and $5,000, respectively. CAL. INS. CODE § 11580.1(b) (2014).

108. Uninsured motorist insurance was created in response to an older system that relied on payments from a community fund when a vehicle had inadequate insurance. 2 IRVIN E. SCHERMER & WILLIAM J. SCHERMER, AUTOMOBILE LIABILITY INSURANCE § 19:1 (4th ed., Westlaw through May 2015).

109. Chicago requires at least $350,000 of liability insurance for each vehicle. CHI., ILL., MUN. CODE § 9-112-330 (2014). Louisiana state law requires only a modest bump up insurance, mandating $25,000 per person for bodily injury, $50,000 total per accident for bodily injury, and $25,000 per accident for property damage. LA. REV. STAT. ANN. § 45:200.4 (Supp. 2015). The city of Baton Rouge further requires excess insurance or bond of $5,000 per accident. BATON ROUGE, LA., CODE OF ORDINANCES § 10:206(c) (Municode through Ordinance No. 15996, enacted June 10, 2015).

110. *See* FRANKENA & PAUTLER, *supra* note 29, at 15 n.18.

111. *See supra* note 58.

112. Mike Salinero, *Some Doubt Ride-Sharing Has It Covered Liability-Wise*, TBO: TAMPA TRIB., http://www.tbo.com/news/business/some-doubt-ride-sharing-has-it-covered-liability-wise-20140419/ [http://perma.cc/864A-WJK9] (last updated April 20, 2014, 8:43 AM).

113. *See, e.g.*, Nairi, *Insurance for UberX with Ridesharing*, UBER, http://blog.uber.com/ridesharinginsurance [http://perma.cc/25S4-G6RD] (last updated Mar. 19, 2014) [hereinafter *Insurance for UberX with Ridesharing*]. UberX purports to have had a $1,000,000 commercial liability policy since beginning operation in early 2013. *Id.*

114. 1 SCHERMER & SCHERMER, supra note 108, § 6:16.

115. *See, e.g.*, Press Release, Kan. Ins. Dep't, Consumer Alert: Check Out Ridesharing Services Insurance Liability, Commissioner Says (May 22, 2014) (on file with author); Press Release, La. Dep't of Ins., Consumer Alert, Commissioner Donelon Urges Potential Rideshare Drivers to Review Auto Insurance Coverage Before Signing On (July 24, 2014); Press Release, Mary. Ins. Admin. Commissioner Warns of Potential Coverage Gap for Drivers of Ride-Sharing Services (May 1, 2014).

Ultimately, the CPUC promulgated regulations setting forth minimum requirements for insurance for TNC vehicles, requiring at least $1,000,000 in commercial liability insurance for each accident "while they are providing TNC services."[116] The *Liu* case brought renewed focus to the adequacy of regulations of ridesharing services. When Liu was killed, Uber was required to have insurance for its drivers according to the CPUC regulations, but it was unclear whether the insurance had to cover the period of time when a driver is available for receiving rides, but has not yet accepted a fare.[117] Whether insurance was required at that moment is of great consequence from a public policy and compensatory standpoint. In that case, the plaintiff named Uber's insurance certificate holder in the suit,[118] but the driver's personal insurer was not named.[119] Uber's insurance did not cover accidents when the driver was simply available to receive ride requests, rather than actually providing transportation services.[120]

In the legislative session following Liu's death, the California General Assembly passed a law that codified the TNC designation[121] and established new and more precise insurance requirements.[122] An early version of the bill would have required $750,000 in insurance from the moment the application was activated.[123] The enacted version of the law states that personal insurance will not cover drivers once they are logged into a ridesharing service and requires certain written disclosures to drivers regarding this lack of coverage and the available insurance provided by the TNC.[124] The law also addresses the insurance gap exposed in the *Liu* case by identifying two distinct time periods in which TNC insurance must apply. First, from the moment the driver accepts a ride request until the completion of the ride—or transaction—the TNC insurance shall provide $1,000,000 for death,

116. CAL. PUB. UTIL. COMM'N RULING 12-12-011, *supra* note 32, at 58. This amount was comparable, albeit slightly higher, than the $750,000 commercial insurance requirement for charter-party carriers. *Id.* at 56–57.

117. Don Jergler, *Transportation Network Companies, Uber Liability Gap Worry Insurers*, INS. J. (Feb. 10, 2014), http://www.insurancejournal.com/magazines/features/2014/02/10/319387.htm [http://perma.cc/85MF-EMBX].

118. Complaint for Damages and Demand for Trial by Jury, *supra* note 1, at 2.

119. *Id.* at 1.

120. Jergler, *supra* note 117.

121. *See* CAL. PUB. UTIL. CODE § 5431(a) (Westlaw 2014).

122. *Id.* § 5433(b). These requirements, described below, built upon actions by the California Public Utilities Commission after Liu's death to clarify insurance regulations. CAL. PUB. UTIL. COMM'N RULING 12-12-011, *supra* note 32, at 18.

123. Marc Lifsher, *Bill Regulating Ride-Sharing Insurance OK'd; The State Senate Passes the Measure After Uber and Lyft Drop Opposition*, L.A. TIMES, Aug. 28, 2014, at AA4. The ridesharing service objected. *Id.*

124. CAL. PUB. UTIL. CODE § 5432(a), (b) (2014).

personal injury, and property damage, as well as $1,000,000 in uninsured motorist coverage and underinsured motorist coverage.[125] This applies from the moment a passenger enters the vehicle until they exit.[126] Second, when the driver is logged in and available to receive requests, the TNC insurance shall provide $50,000 for death and personal injury per person, $100,000 for death and personal injury per incident, and $30,000 for property damage[127] in addition to an excess liability policy of at least $200,000 per occurrence.[128] Failure to comply with these regulations may result in fines or criminal penalties, and the law makes it clear that TNC companies will be responsible for paying if their insurance is lacking.[129] A number of jurisdictions have adopted a similar temporal approach to ridesharing insurance requirements.[130]

D. Current Ridesharing Service Regulations Can Effectively Ensure Public Safety

Although ridesharing service regulations have departed from some of the traditional approaches to regulating for-hire transportation, they will likely still ensure public safety. The trend of permitting ridesharing services at the company level, rather than at the individual level, has been one of the most salient characteristics of this new approach. Not requiring drivers to receive a traditional commercial license shifts almost all of the compliance requirements to the ridesharing services. The rationale behind this departure is mysterious, though it may reflect new, more flexible attitudes toward the

125. *See id.* § 5433(b)(1)(C)(2).
126. *See id.*
127. *See id.* § 5433(c)(1).
128. *See id.* § 5433(c)(2).
129. TNC insurance may be lacking if it has "lapsed or ceased to exist," and "the transportation network company shall provide the coverage required by this section beginning with the first dollar of a claim." *Id.* § 5433(e).
130. *See, e.g.*, BATON ROUGE, LA., CODE OF ORDINANCES § 10:602(6) (Municode through Ordinance No. 15996, enacted June 10, 2015) (requiring $1,000,000 in coverage per accident after accepting a fare, $1,000,000 in uninsured motorist coverage, $50,000 for damage to the driver's vehicle, $50,000 per person for bodily injury, $100,000 total per accident for bodily injury, and $25,000 per accident for property damage while available, but between fares); CHI., ILL., MUN. CODE § 9-115-090(c) (2014) (requiring $1,000,000 in general liability coverage per accident for injury and property damage, $1,000,000 in commercial automobile insurance per accident for injury and damage, after accepting a fare, and state minimum insurance requirements while available but between fares); HOUS., TEX., CODE OF ORDINANCES § 46-508(c)(1) (Municode through Ordinance No. 2015-668, adopted July 8, 2015) (requiring the same amount of insurance demanded of all for-hire vehicles when drivers are logged in and available, and $1,000,000 in commercial liability insurance from when a ride has been accepted through completion of the ride).

nature of transportation regulations and the fundamental functions of government. To effectively ensure public safety, regulators should still retain methods of enforcement, such as fines and suspension of licenses, against both the individual driver and the ridesharing service.

As a consequence of this new approach, ridesharing services have taken on several responsibilities that regulators have traditionally held. In terms of bright-line qualifications and disqualifications, such as medical conditions, criminal violations, and maximum hours, this delegation of responsibility will not pose a problem if lawmakers develop clear, objective public safety regulations that assure safe, adequately insured drivers and vehicles are on the road. If lawmakers develop such regulations, they may be adding an extra layer of protection for the public by obligating companies to ensure compliance and requiring them to report information under the scrutiny of regulators.[131] But some regulations regarding the quality of drivers, such as training programs, will yield inconsistent results where ridesharing companies are providing the training instead of participating in a government-operated training program. By retaining some of their traditional roles, governments may better achieve these public safety goals, especially where objective standards may be difficult to set or enforce, such as for training new drivers, or to reduce perverse incentives, such as for vehicle inspections.

Laws that require insurance often accomplish the goal of ensuring the availability of sufficient compensation for potential injuries, as one can see in jurisdictions responding to the arrival of ridesharing services, as well as in the laws that traditionally regulated the for-hire transportation industry.[132] Ridesharing services now have policies that address the insurance gaps that the *Liu* case exposed.[133] Still, not all ridesharing services provide the same level of insurance coverage.[134] Because these services are new, there are good reasons why insurance requirements should be higher than

131. Given the power of this new software, regulators may have missed an important opportunity—the ability to monitor in real-time the quality of drivers. While services like UberX include a rating system of drivers, presumably for their own quality control, regulators could mandate that companies collect and provide them with the data. Erin Griffith, *In a Bitter Fight for Customers, Uber and Lyft Begin to Self-destruct*, FORTUNE (Aug. 13, 2014, 2:13 PM), http://fortune.com/2014/08/13/uber-and-lyft-self-destruct-first-sabotage-and-smear-campaigns-now-ratings-bribery [http://perma.cc/W32J-FNU7]. In addition, some regulations, such as maximum driving hours, could be monitored effectively with the data. Finally, requiring a complaint button on the application would increase the likelihood that regulators know about bad drivers.

132. *See supra* Part I.C.

133. *Id.*

134. UberX holds superior coverage, holding both a $1,000,000 commercial policy and $1,000,000 uninsured or underinsured motorist policy. *See infra* Table 1.

traditional for-hire transportation services. One such reason is simply to err on the side of caution. Ridesharing services have not existed long enough to determine whether their drivers pose an inherently higher risk of accidents compared to ordinary vehicles. But requiring $1,000,000 in commercial liability insurance is a reasonable figure to allow for these services to function financially, while taking into consideration the uncertainty of the risks involved and the public policy goal of ensuring the availability of adequate compensation, especially relating to commercial enterprises.

Effective regulatory schemes are of paramount importance in assuring that ridesharing services do not negatively impact public safety. Regulation alone, however, will not serve as an adequate safeguard. Although the insurance that these companies now carry is greater than most vehicles on the road, including other for-hire transportation providers,[135] the question of who will be liable for any damages that exceed the insurance coverage should also influence the minimum insurance requirement.[136] An inescapable question for ensuring public safety is who will be liable in tort for injuries arising from ridesharing service activities.

II. POTENTIAL SOURCES OF LIABILITY FOR RIDESHARING SERVICES

Few have offered solutions to the potential liability of ridesharing services, although the issue is hotly debated.[137] In fact, the vicarious liability and products liability theories set forth in the *Liu* lawsuit present the court with a genuine case of first impression.[138] General principles of tort law as well as analogous transportation cases may prove useful guides in determining if, when, and how liability will be allocated for injuries to the public arising out of the use of ridesharing applications.[139] In a business that is based entirely on automotive transportation, lawsuits alleging injuries as the result of negligent driving will be the gravest threat to public welfare and the largest source of potential liability. Because most torts

135. *See supra* Part I.C.

136. For a discussion of liability associated with ridesharing services, see discussion *infra* Part II.

137. Salinero, *supra* note 112.

138. The plaintiffs assert that Uber is liable for defective software under products liability, vicariously liable for the driver's negligent driving, vicariously liable for negligent infliction of emotional distress, for negligent development and implementation of the software as to cause inattentive driving, and for negligence per se for violating California state driving laws. Complaint for Damages and Demand for Trial by Jury, *supra* note 1, at 9–13.

139. In keeping with the theme of this Comment, no attempt is made at creating an exhaustive list of all potential sources of liability (e.g., injuries to drivers, false advertisement, or fraud). Rather, this Comment focuses on some of the most probable sources of liability for ridesharing services for physical injuries to the public, whether as passengers or on the public roads.

associated with ridesharing services will arise from automobile accidents, which are a thoroughly litigated area of law, establishing a breach of the standard of care, the causality, and subsequent injury will not present any novel issues in the ridesharing context. Instead, much of the litigation will turn on who is responsible for damages and under what circumstances. Whether ridesharing services or the individual drivers are ultimately liable for these activities will, in turn, determine who has the greatest incentive to prevent accidents. Even though ridesharing services attempt to keep their relationships with drivers at arm's length, they are likely still liable for the drivers' actions under multiple theories of liability.[140] This liability, in turn, will give the companies an incentive to act to ensure public safety.

A. Ridesharing Services Should be Held Vicariously Liable for the Acts of Their Drivers

Perhaps the greatest uncertainty associated with the development of ridesharing services is their potential liability for the acts of drivers using their platforms under a theory of vicarious liability. To impute responsibility under a vicarious liability theory, the plaintiff must establish an employment relationship, and the negligent act or omission must occur within the course and scope of the driver's employment.[141] In contrast, one who retains an independent contractor is generally not responsible for the independent contractor's actions.[142] Unsurprisingly, ridesharing services have sought to limit their potential liability by characterizing their relationship with drivers using their services as one between a technology service and software users, rather than an employment relationship.[143] Sidecar explicitly states that there is no employment or independent contractor relationship with drivers,[144] while Uber and Lyft characterize drivers as independent contractors.[145] In fact, Uber's principal legal argument in the *Liu* case was that its driver was an independent

140. *See infra* Part II.E.

141. RESTATEMENT (THIRD) OF AGENCY § 2.04 (2006) ("An employer is subject to liability for torts committed by employees while acting within the scope of their employment.").

142. *See* RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 56(a) (2012) ("An actor who entrusts work to an independent contractor owes no duty as to the manner in which the work is performed by the contractor, except as provided in Subsection (b)."); *see also* RESTATEMENT (SECOND) OF TORTS § 409 (1965); DeShambo v. Nielsen, 684 N.W.2d 332, 335 (Mich. 2004); Fla. Power & Light Co. v. Robinson, 68 So. 2d 406, 411 (Fla. 1953).

143. *Uber Terms of Service*, *supra* note 16; *Lyft Terms of Service*, *supra* note 16; *Sidecar Terms of Service*, *supra* note 16.

144. *Sidecar Terms of Service*, *supra* note 16.

145. Complaint for Damages and Demand for Trial by Jury, *supra* note 1, at 3; *Lyft Terms of Service*, *supra* note 16.

contractor.[146] In addition, the nature of ridesharing applications also presents interesting questions regarding the course and scope of employment if an employment relationship is established.

1. Identifying Employment Relationships in the Transportation Services Context

The defining characteristics of the employment relationship have changed over the years.[147] The theory of vicarious liability has expanded to impute liability to those who had control over negligent individuals, even where a contractual relationship did not exist.[148] The multi-factor "status" test not only focuses on the amount of control a party has over the negligent actor, but also takes into consideration an extensive list of additional indicia of an employment relationship.[149] Some courts also consider the "economic realities" of the relationship, or the amount of dependence an employee has on the employer.[150] Though not dispositive, control remains the single most

146. Answer, *supra* note 19, at 3.

147. In feudal times, vicarious liability was imputed on a master upon the factual determination that he had control over the negligent servant. Richard R. Carlson, *Why the Law Still Can't Tell an Employee When It Sees One and How It Ought to Stop Trying*, 22 BERKELEY J. EMP. & LAB. L. 295, 302 (2001). However, this unitary focus on control was unable to accommodate the more complex economic relationships that resulted from industrialization. Deanna N. Conn, *When Contract Should Preempt Tort Remedies: Limits on Vicarious Liability for Acts of Independent Contractors*, 15 FORDHAM J. CORP. & FIN. L. 179, 184 (2009).

148. Conn, *supra* note 147, at 185.

149. *Id.* The factors are:

> (a) whether the one performing services is engaged in a distinct occupation or business; (b) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the principal or by a specialist without supervision; (c) the skill required in the particular occupation; (d) whether the principal or the worker supplies the instrumentalities, tools, and the place of work for the person doing the work; (e) the length of time for which the services are to be performed; (f) the method of payment, whether by the time or by the job; (g) whether or not the work is a part of the regular business of the principal; and (h) whether or not the parties believe they are creating the relationship of employer-employee.

Alexander v. FedEx Ground Package Sys., Inc., 765 F.3d 981, 989 (9th Cir. 2014). For the factors for determining the kind of conduct within the scope of employment that were explicitly stated in the previous version, see RESTATEMENT (SECOND) OF AGENCY § 229 (1958). The latest version of the Restatement of Agency favors more general terms. RESTATEMENT (THIRD) OF AGENCY § 7.07 cmt. b (2006).

150. Conn, *supra* note 147, at 185.

important factor.[151] The law does not require that the employer actually direct or control the person; it is sufficient that the employer has the *potential* to control.[152]

Because courts have not addressed the issue of vicarious liability in the ridesharing context, analogizing to the similar factual circumstances that arise in the traditional for-hire transportation industry is a useful exercise. The relationship between taxi and pre-arranged transportation drivers can take on a wide variety of forms. For instance, some drivers lease their vehicles from a taxi company that does not provide dispatch services.[153] Conversely, a taxi driver might use his own vehicle with his own medallion, painted with the colors of a taxi company that provides dispatching services.[154] Courts have also addressed a myriad of intermediate arrangements that require a fact-intensive approach to determine whether an employment relationship exists.[155] Such arrangements have left courts perplexed and have resulted in a range of contradictory determinations.[156] Despite the conflicting decisions, courts have generally used the same factors in determining liability, but give greater weight to certain factors in specific factual circumstances.[157]

Consistent with the traditional application of vicarious liability, courts tasked with determining whether there was an employment relationship in the context of for-hire transportation services first consider the extent of

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151. Dana's Housekeeping v. Butterfield, 807 P.2d 1218, 1220 (Colo. Ct. App. 1990) ("The most important factor, however, in determining whether a person is an independent contractor or employee is the right to control, not the fact of control."); United States v. W. M. Webb, Inc., 397 U.S. 179, 192 (1970).

152. Terminal Cab, Inc. v. United States, 478 F.2d 575, 579 (8th Cir. 1973).

153. *See* New Deal Cab Co. v. Fahs, 174 F.2d 318 (5th Cir. 1949).

154. *See, e.g.*, Ames v. Yellow Cab of D.C., Inc., No. 00-3116, 2006 WL 2711546, at *1 (D.D.C. Sept. 21, 2006).

155. *See infra* Part II.A.1.

156. "That we are presented with a perplexing problem is evident from the opposing results which have been reached and the contrariety of views expressed in a number of [taxi] cases." Party Cab Co. v. United States, 172 F.2d 87, 88 (7th Cir. 1949) (applying the common law test to determine whether taxi drivers were employees for the purposes of Social Security compliance).

157. What follows is a cluster of factors that have been identified as useful in determining employment relationships in the for-hire transportation context. The presence or absence of some factors have also been used to argue for an independent contractor relationship. Some of the transportation-related cases discussed do not involve questions of negligence. The analysis in those cases, however, is still useful where the same common law test for vicarious liability has been used in a variety of non-negligence contexts. *See* Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 319 (1992) (applying the common law test to determine the meaning of an "employee" for ERISA purposes); Marlar, Inc. v. United States, 151 F.3d 962, 967 (9th Cir. 1998) (applying the common law test for the purposes of federal employer taxes).

control a company has over its drivers.[158] Some of the factors considered include whether the driver has the freedom to choose which route the driver will take,[159] the number of hours worked,[160] and whether to accept or reject fares.[161] Setting the standards that a driver must follow does not, without more, establish control.[162] Some courts have recognized that certain industries, such as transportation, inherently only allow general monitoring of employees, and have found this sufficient to establish control.[163]

Applying the more expansive status test, courts have considered similar factors to those outlined in the Restatement of Agency. For example, the courts have considered all of the following as factors: (1) the level of specialization and skill;[164] (2) the supplier of the instrumentalities—such as the vehicle provider[165]—or the instrumentality by which fares are measured;[166] (3) the company's ability to terminate the relationship at

158. *See, e.g.*, *Ames*, 2006 WL 2711546, at *4; Leach v. Kaykov, No. 07-CV-4060, 2011 WL 1240022, at *6 (E.D.N.Y. Mar. 30, 2011).

159. *Ames*, 2006 WL 2711546, at *6.

160. Comm'r of Div. of Unemployment Assistance v. Town Taxi of Cape Cod, Inc., 862 N.E.2d, 430, 435 (Mass. Ct. App. 2007); *Leach*, 2011 WL 1240022, at *6; *Ames*, 2006 WL 2711546, at *5.

161. *Town Taxi of Cape Cod*, 862 N.E.2d at 435.

162. *Ames*, 2006 WL 2711546, at *5 (where driver could still pick up passengers when suspended from using the dispatch service).

163. Air Terminal Cab, Inc. v. United States, 478 F.2d 575, 580 (8th Cir. 1973) ("Where the nature of a person's work requires little supervision, there is no need for actual control. . . . In the instant case, the nature of appellees' businesses simply do not require close hour by hour supervision, but the right to control is not lacking."); Morish v. United States, 555 F.2d 794, 799 (Ct. Cl. 1977) ("The circumstance that plaintiff Morish exercised that right only in a broad sense by generally monitoring the activities of operators and calling them individually to account whenever an operator was not performing to plaintiff Morish's satisfaction does not militate against the *existence* of plaintiff Morish's right of control, particularly as the nature of the work involved here was such that it did not require—or, indeed, permit—very much actual supervision by plaintiff Morish.").

164. Courts reach different conclusions on the weight of various licenses. *Compare Leach*, 2011 WL 1240022, at *19 (where limousine license was considered specialized, and driver had knowledge of the most efficient routes), *with Morish*, 555 F.2d at 800 (where tow truck license was not a specialized skill).

165. Peters v. Haymarket Leasing, Inc., 835 N.E.2d 628, 635 (Mass. App. Ct. 2005); *see also Leach*, 2011 WL 1240022, at *2; *Ames*, 2006 WL 2711546, at *6.

166. United States v. Fleming, 293 F.2d 953, 957 (5th Cir. 1961); *Peters*, 835 N.E.2d at 635.

will;[167] (4) the method of compensation;[168] and (5) the distinct nature of the company's principal business.[169] How the parties characterize their agreement is not determinative of employee status.[170] Several additional factors focus on the economic dependence of the driver, such as: whether the driver is independently licensed,[171] where the driver's fares originate,[172] who is concerned with the accounting,[173] the level of capital investment,[174] and who provides operating expenses like insurance,[175] maintenance,[176] and gasoline.[177] A court considering these factors has a great amount of discretion in deciding which will be given the most importance, making any prediction as to whether an employment relationship will be found particularly difficult.

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167. Alexander v. FedEx Ground Package Sys., Inc., 765 F.3d 981, 988 (9th Cir. 2014). There is some conflict on this matter; it may turn on whether the driver could continue to conduct his activities without the company. Several cases have found this is indicative of an employment relationship. *See, e.g.*, *Air Terminal Cab*, 478 F.2d at 581; *Morish*, 555 F.2d at 799. Others do not find this persuasive. *See, e.g.*, *Ames*, 2006 WL 2711546, at *7 (where driver was independently licensed).

168. Payment on a per-job basis is more likely to indicate a contractor relationship. *Leach*, 2011 WL 1240022, at *20 (where dispatch company received about a quarter of the fare). Some courts have indicated that a percentage commission from a fare is not indicative of an employment relationship, *id.*, while others believe the financial interest in fact does indicate employment. *Fleming*, 293 F.2d at 95; *Morish*, 555 F.2d at 799–800; *see also Ames*, 2006 WL 2711546, at *6.

169. *Ames*, 2006 WL 2711546, at *5 (where company provided its name, logo, and optional dispatch services, operating taxis was not its regular business).

170. *See, e.g.*, *id.* at *4 (where taxi company and driver had a contract that explicitly stated that the driver was an independent contractor, the court stated in dictum that such a characterization was not dispositive); *Leach*, 2011 WL 1240022, at *7.

171. *Peters*, 835 N.E.2d at 635; *Ames*, 2006 WL 2711546, at *6; Comm'r of Div. of Unemployment Assistance v. Town Taxi of Cape Cod, Inc., 862 N.E.2d 430, 435 (Mass. Ct. App. 2007).

172. *Fleming*, 293 F.2d at 957. In *Fleming*, where nearly all of the cab trips had their origin from the company, the court concluded that the fact that fares are provided primarily by the company indicates an employment relationship. *Id.* The court noted that in *New Deal Cab Co. v. Fahs*, 174 F.2d 318 (5th Cir. 1949), there was no employment relationship found, but there was no way for drivers to receive calls from the company. *See also Peters*, 835 N.E.2d at 635.

173. *Fleming*, 293 F.2d at 957; Air Terminal Cab, Inc. v. United States, 478 F.2d 575, 581 (8th Cir. 1973).

174. *Air Terminal Cab*, 478 F.2d at 580.

175. *Peters*, 835 N.E.2d at 635.

176. *Fleming*, 293 F.2d at 957; *Ames*, 2006 WL 2711546, at *6.

177. *Fleming*, 293 F.2d at 957; *Ames*, 2006 WL 2711546, at *6.

2. Determining the Course and Scope of Employment

If an employment relationship is established, the vicarious liability inquiry then shifts to whether the conduct of the employee is within the course and scope of his or her employment.[178] Similar to the inquiry for establishing an employment relationship, the scope of the employment is a fact-specific inquiry, which turns on the unique circumstances of each case.[179] Legal scholars have characterized the course and scope of employment as including "acts which are so closely connected with what the servant is employed to do, and so fairly and reasonably incidental to it, that they may be regarded as methods, even though quite improper ones, of carrying out the objectives of the employment."[180] The two scenarios in which the course and scope of employment is most frequently litigated are intentional tort cases and "frolic and detour" cases, where an employer is not liable when the employee is acting for personal motives.[181]

An employee's tortious acts may fall within the scope of employment even if the acts are willful or malicious, the acts do not benefit the employer, the employee violates his or her official duties, or the employee disregards express orders from the employer.[182] But when the employee acts for his or her own purpose, the employee's actions are no longer considered to fall within the course and scope of employment.[183] For example, in one case where a taxi company was sued because one of its drivers exited his vehicle and struck another driver with a pipe for obstructing his path, the court dismissed the taxi company as a party.[184] The taxi driver was acting for his own purpose because he had no duty as

178. RESTATEMENT (THIRD) OF AGENCY § 7.07 (2006) ("An employee acts within the scope of employment when performing work assigned by the employer or engaging in a course of conduct subject to the employer's control. An employee's act is not within the scope of employment when it occurs within an independent course of conduct not intended by the employee to serve any purpose of the employer.").

179. Bennett v. United States, 102 F.3d 486, 489 (11th Cir. 1996). Whether an employee deviated from the scope is a question of fact for the jury, based on the totality of the circumstances. Doe v. Norwich Roman Catholic Diocesan Corp., 309 F. Supp. 2d 247, 251 (D. Conn. 2004).

180. W. PAGE KEETON, DAN B. DOBBS, ROBERT E. KEETON & DAVID G. OWEN, PROSSER AND KEETON ON THE LAW OF TORTS 502 (5th ed. 1984).

181. Alan Q. Sykes, *The Boundaries of Vicarious Liability: An Economic Analysis of the Scope of Employment Rule and Related Legal Doctrines*, 101 HARV. L. REV. 563, 564 (1988).

182. Mary M. v. City of Los Angeles, 814 P.2d 1341, 1344 (Cal. 1991).

183. "On the other hand, if the servant acts for some independent purpose of his own, wholly disconnected with the furtherance of his master's business, his conduct falls outside the scope of his employment." Crittenden v. Thompson-Walker Co., 341 S.E.2d 385, 387 (S.C. Ct. App. 1986).

184. Rubin v. Yellow Cab Co., 507 N.E.2d 114, 115 (Ill. App. Ct. 1987).

an employee to strike individuals who impeded his progress, striking the other driver was not an act to protect the property of the cab company, and the battery would not have resulted in an expedited continuance of his trip.[185] But when the employee is acting on a personal mission and is aided by an employment relationship in committing a tort, the employer may be found vicariously liable.[186]

3. Drivers are Employees of Ridesharing Services and Often Act Within the Course and Scope of Employment When "Available"

The vicarious liability inquiry is highly fact-intensive and amounts to a balancing test. No single factor is dispositive; courts consider the totality of the circumstances.[187] In this way, the status test often leads to unpredictable results because it depends largely on what importance the court attaches to any particular factor.[188] The most litigable aspect of the analysis is whether an employment relationship exists, upon which courts will undoubtedly come to different conclusions. Under these circumstances, however, there is a strong argument for finding an employment relationship. Ridesharing services will then be vicariously liable for the acts of their drivers in many instances, including the time when they are merely logged into the service and available to receive ride requests.

First, ridesharing services probably have an employment relationship with drivers. In terms of control, ridesharing drivers theoretically have the freedom to take any route once a fare is accepted,[189] to be on call whenever they choose,[190] and to accept or reject ride requests as they please.[191] But as a practical matter, ridesharing services have standards by which drivers are expected to perform. Undoubtedly, ridesharing services will not allow drivers who take bad routes, continuously reject rides, or receive poor ratings to operate on their platform.[192] Drivers are closely monitored, and

185. *Id.* at 115.

186. Costos v. Coconut Island Corp., 137 F.3d 46, 48 (1st Cir. 1998) (where hotel-employer was found vicariously for a rape committed by an employee).

187. *In re* FedEx Ground Package Sys., Inc., Emp't Practices Litig., 758 F. Supp. 2d 638, 688 (N.D. Ind. 2010).

188. Conn, *supra* note 147, at 187.

189. UberX's software now includes a navigation system to direct drivers. Lydia Emmanouilidou, *Drivers, Passengers Say Uber App Doesn't Always Yield Best Routes*, NPR (Sept. 21, 2014, 5:30 AM), http://www.npr.org/2014/09/18/349560787/drivers-passengers-say-uber-app-doesnt-always-yield-best-routes [http://perma.cc/THC6-4X9K].

190. *Id.*

191. *Id.*

192. UberX drivers may have their ability to receive ride requests limited based on their performance. *Id*. Lyft drivers must maintain a 4.5 out of 5 star

all actions are documented.[193] Lyft, for example, dictates the manner in which passengers are to be greeted, restricts the driver from transporting non-paying passengers, and requires drivers to vacuum their vehicle weekly.[194] Ridesharing services also disallow drivers from accepting cash or tips[195] and set the rate at which a vehicle will charge its passengers,[196] which is arguably the most significant aspect of control over the driver.

Several of the additional factors employed by courts indicate an employment relationship between ridesharing services and drivers. Ridesharing services do not hire drivers for any specialized skill—only a regular driver's license is required.[197] These companies provide several of the instrumentalities necessary to do the work, such as the technology to connect with riders, measure and calculate fare, and accept electronic payments,[198] as well as smartphones to run the company's application in the case of UberX.[199] These companies also may terminate a driver's license to use the software at any time,[200] collect and disburse the money they receive to the drivers,[201] and take a percentage of fares—rather than a flat rate.[202] In some instances, these companies have even provided

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rating. Rusch, *supra* note 15. UberX is believed to have a minimum average rating requirement of about 4.6 to 4.7 out of 5 stars. Griffith, *supra* note 131.

193. To comply with regulations, ridesharing services are required to maintain detailed information about past trips as well as real-time location data for law enforcement. *See, e.g.*, CHI., ILL., MUN. CODE § 9-115-210 (2014); MINNEAPOLIS, MINN., CODE OF ORDINANCES § 343.170 (2014).

194. Bob Egelko, *Court: Juries to Decide if State Uber, Lyft Drivers are Employees*, SFGATE, http://www.sfgate.com/bayarea/article/Juries-to-decide-whether-Uber-Lyft-drivers-are-6128899.php [https://perma.cc/N494-BYAZ] (last updated Mar. 11, 2015, 6:42 PM).

195. *Id.*

196. Lyft used to allow drivers to set their own rates, but no longer does. *See* Egelko, *supra* note 194. Ridesharing services may raise prices depending on current market conditions. *See* Rusch, *supra* note 15. Uber has also set its price below the market price to gain market share. Kurtis Alexander & Michael Cabanatuan, *Uber Slashes Prices in Bid for Market Share*, S.F. CHRON., Jan. 11, 2014, at A1.

197. *See, e.g.*, CAL. PUB. UTIL. COMM'N RULING 12-12-011, *supra* note 32, at 27.

198. Rusch, *supra* note 15.

199. Answer, *supra* note 19, at 3.

200. *Lyft Terms of Service*, *supra* note 16; *Sidecar Terms of Service*, *supra* note 16.

201. *See Terms and Conditions*, UBER, https://www.uber.com/legal/usa/terms [https://perma.cc/H8P5-B2DF] (last updated Apr. 8, 2015).

202. Ridesharing services retain 20% to 25% of the total fare. Ellen Huet, *Uber Now Taking Its Biggest UberX Commission Ever: 25 Percent*, FORBES (Sept. 22, 2014, 12:40 PM), http://www.forbes.com/sites/ellenhuet/2014/09/22/uber-now-taking-its-biggest-uberx-commission-ever-25-percent/ [https://perma.cc/N66L-Q5T2]; Egelko, *supra* note 194.

drivers with guaranteed minimums and signing bonuses in an effort to increase service availability.[203]

Conversely, providing the vehicle used in performing the services is a factor cited for establishing an employment relationship in the for-hire transportation industry.[204] Ridesharing services do not provide the vehicles for drivers, claiming that the nature of their business is to merely connect drivers and passengers and to not provide transportation services.[205] The CPUC rejected this argument.[206]

Several economic factors also indicate an employment relationship. Because of the regulatory scheme in place in most jurisdictions, the drivers' ability to conduct this business emanates from the ridesharing service's license, rather than an individual license.[207] This, arguably, is the very definition of economic dependence. Unlike dispatch companies that might provide a driver with fares to supplement their ability to pick up fares on their own, a typical ridesharing driver cannot legally pick up fares without using the application because only the ridesharing services are licensed to provide services. Further, ridesharing services supply the insurance that drivers use,[208] invest substantial sums in advertising their services,[209] and provide promotional offers that substantially discount a passenger's fare, which essentially results in a direct payment to drivers.[210] By contrast, drivers only pay for the maintenance and gasoline for their vehicle.[211]

Second, if an employment relationship is established, the scope of the employment in the context of ridesharing services' unique business model

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203. Ridesharing services have guaranteed drivers as much as $45 per hour and $1000 for signing up. Ellen Huet, *After Record Signups, Lyft Might Not Deliver Its $1000 Bonuses To Drivers*, FORBES (Mar. 4, 2015, 4:00 PM), http://www.forbes.com/sites/ellenhuet/2015/03/04/lyft-might-not-deliver-1000-driver-bonuses [http://perma.cc/VFY9-ZJ6C].

204. *See, e.g.*, Metro Taxi, Inc. v. Brackett, 614 S.E.2d 232, 233 (Ga. Ct. App. 2005).

205. *Uber Terms of Service*, *supra* note 16; *Lyft Terms of Service*, *supra* note 16; *Sidecar Terms of Service*, *supra* note 16.

206. Dolan, *supra* note 12, at 45.

207. *See, e.g.*, CAL. PUB. UTIL. COMM'N RULING 12-12-011, *supra* note 32, at 29. California provides that drivers may apply for a TNC license or obtain a traditional charter-party carrier license, although it is unclear if any individuals can practically choose this option given the nature of the technology. *Id.* at 63.

208. *See Commercial Ride-Sharing*, NAT'L ASS'N INS. COMM'RS (June 03, 2015), http://www.naic.org/cipr_topics/topic_commercial_ride_sharing.htm [http://perma.cc/3KGQ-S8CV]; *Lyft Terms of Service*, *supra* note 16.

209. *See, e.g.*, Alyson Shontell, *10 Ads that Show What A Circus the War Between Uber and Lyft has Become*, BUS. INSIDER (Aug. 13, 2014, 1:01 PM), http://www.businessinsider.com/10-uber-lyft-war-ads-2014-8 [http://perma.cc/6ZV3-UBFF].

210. *See* Huet, *supra* note 203.

211. *Id.*

will necessarily be broad and will include negligent acts by drivers who are "available" to receive fares. Ridesharing services could be exposed to a wide range of drivers' negligent acts, especially those involving wrecks while passengers are in the vehicles. But whether a driver is within the scope of employment is less clear when a driver has the application on and is available to receive fare requests but has not yet accepted a fare. This problem is one of the principal issues in *Liu*.[212]

In that case, Uber claimed that the driver was not engaging in business for the company because, although the driver was available, the driver had not received a fare request.[213] The plaintiffs alleged that by being available to receive ride requests—regardless of whether the driver will accept them—Uber receives an economic benefit for its business.[214] In cases such as this, looking at the nature of the tort is helpful. Where a driver is available and hits a pedestrian, a nexus between the business purpose and the consequence clearly exists. But the employer receives no benefit when a driver is available and commits an armed robbery. Likewise, the robber is not aided by his available status. Thus, the act clearly falls outside the scope of employment.

Undoubtedly, on numerous occasions a driver is concurrently available and also performing personal business. This situation poses an interesting puzzle for the scope of employment inquiry in the ridesharing business model because the driver is simultaneously providing benefit to the employer while also engaging in what otherwise would be considered a frolic and detour. As a practical matter, the plaintiff bears the burden of alleging facts sufficient to establish an inference that the driver was within the scope of the employment and not on a frolic and detour.[215] Once a plaintiff establishes a prima facie case of vicarious liability, the defendant has the burden of proving that the conduct was outside the scope of employment.[216] This, of course, will be difficult to prove, especially because of the value that the driver brings to the company by being available. Perhaps in cases where a defendant can show that the driver could not have practically responded to a ride request despite being available, then a court should find a frolic and detour. However, this argument is undercut by the fact that the mere appearance of availability is beneficial to the company. Thus, practically speaking, drivers who are

212. Complaint for Damages and Demand for Trial by Jury, *supra* note 1, at 3.
213. *Id.* at 4. Technically, Rasier-CA is the subsidiary of Uber that holds licenses for the UberX platform. Throughout this Comment, Uber is used interchangeably with Rasier-CA.
214. *Id.* at 7.
215. Crigger v. Fahnestock & Co., No. 01-CIV-07819, 2003 WL 22170607, at *6 (S.D.N.Y. Sept. 18, 2003).
216. Adams v. Am. President Lines, Ltd., 146 P.2d 1, 5 (Cal. 1944).

available on the application will almost always fall within the scope of employment when involved in accidents, but drivers will not fall within the scope of employment for any tort that is unconnected with the act of driving.

From a policy perspective, imposing liability on an employer who can exert control over those doing the work is reasonable.[217] From an equity perspective, those who benefit economically from an activity should bear the corresponding liability. This rationale is advanced by the "enterprise theory" of vicarious liability, which holds hirers liable for their independent contractors without regard to status.[218] Based on the amount of control that ridesharing services may assert over drivers and the amount of economic dependence that drivers have on the services, ridesharing services could reasonably establish an employment relationship with their drivers. Further, when a driver is available to receive requests on the ridesharing platform, the driver will usually be in the course and scope of employment when involved in accidents because the driver is providing a service for the ridesharing company simply by being available. Even if a court were to dismiss a theory of vicarious liability by finding that drivers are truly independent contractors, several well-accepted theories under which courts may still impose liability exist.

B. Ridesharing Services Should Still be Held Liable for the Acts of Drivers Even if They are Considered Independent Contractors

The theory behind absolving a hirer who retains an independent contractor from liability is based on the lack of control. Because the hirer does not have control over the manner in which the work is done, the hirer should not bear the risk.[219] Uber and Lyft characterize drivers who use their platform as independent contractors.[220] But even when an independent contractor relationship exists, an injured plaintiff might still hold the hirer vicariously liable for the contractor's acts.[221] The *Restatement (Third) of*

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217. "[C]ourts believed it was appropriate that if a company exerted the same kind of control over a 'contractor' as it did over one of its employees, liability should attach for the injuries caused by those workers." Conn, *supra* note 147, at 184.

218. *Id.* at 203. This theory remains mostly in the realm of academia. *Id.*

219. *See* RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 57 cmt. c (2012); RESTATEMENT (SECOND) OF TORTS § 409 cmt. b (1965).

220. *See supra* Part II.A.

221. Conn, *supra* note 147, at 190; *but see* RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM §§ 58–65 (2012) (outlining the various exceptions to the general rule that hirers are not vicariously liable for the acts of independent contractors).

Torts identifies several of these situations.[222] In the context of ridesharing, two seem particularly relevant: the exceptions for non-delegable duties and for apparent agency.

1. Ridesharing Services Have a Non-delegable Duty to Ensure Public Safety

Several of the so-called "independent contractor exceptions" consider the nature of the business being carried out to determine liability. For example, a court may find a hirer of an independent contractor liable for the acts of the contractor if the work contemplated is abnormally dangerous,[223] if the hirer has an obligation to ensure the safety of the public by statute,[224] or if the hirer's business can only be conducted under a government-granted franchise and involves unreasonable risk of harm to others.[225]

Because of the highly regulated nature of the transportation industry, ridesharing services generally have a duty that extends further than normal hirers of independent contractors. First, ridesharing services have a duty to ensure public safety, as evidenced by the extensive rules governing behavior on the roads and the regulations that have been put in place for ridesharing services in many jurisdictions.[226] Second, where ridesharing services can only exist through public licensing, the government will subject them to a higher standard of care. Courts have found that the receipt of a license to operate as a taxi, which is a common carrier, creates a non-delegable duty to protect the public.[227] Thus, where a taxi owner

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222. *See* RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM §§ 58–65 (2012). The Restatement also identifies instances where the employer of an independent contractor will be liable for direct negligence. *See infra* Part II.C.1.

223. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 58 (2012); *see also* Law v. Phillips, 68 S.E.2d 452, 460 (W. Va. 1952). Generally, an "inherently dangerous" activity must be more than a customary human activity, such as driving. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 20 cmt. j (2010) ("For example, automobiles are in such general use that their operation is a matter of common usage. Accordingly, at least for this reason, the operation of automobiles is not an abnormally dangerous activity.").

224. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 63 (2012).

225. *Id.* § 64.

226. *See supra* Part I.

227. *See, e.g.*, Teixeira v. Car Cab Three, Inc., 1994 Mass. App. Div. 154, at *4 (Dist. Ct. 1994) (where medallion holder was a common carrier); Belcher v. Dandridge, 61 Va. Cir. 684, at *3–4 (2002) (where Yellow Cab leased its licenses to operate, it could not delegate its duty to ensure public safety); Hamid v. Metro Limo, Inc., 619 So. 2d 321, 322 (Fla. Dist. Ct. App. 1993) (recognizing that

allowed another person to use his vehicle's license, a court found the taxi owner liable for the intentional torts of the driver as a function of a non-delegable duty, even though no employment or contractor relationship existed.[228]

2. The Drivers' Apparent Agency May Lead to Liability for Ridesharing Services

When a hirer of an independent contractor makes representations that the contractor is in fact an agent of the employer and a third person justifiably relies on the skill of the apparent agent, the employer is vicariously liable for the acts of the contractor.[229] In other words, some act by the employer must manifest an agency relationship,[230] the person must believe the employer is in control,[231] and the reliance must be a but-for cause of the person's decision to patronize the employer.[232] In the transportation context, a vehicle painted with the name of a franchisor, such as Gold Cab, might evidence a manifestation of agency if the company sets standards on ensuring that the vehicle is in an orderly condition.[233] To assert apparent agency, the passenger would need to rely on Gold Cab's reputation in deciding to hire the vehicle.[234] The passenger, who reasonably relied on the representations by the company, could attempt to hold the company liable for the driver's acts if an accident were to occur. A third party, however, could not hold the company liable because the third party did not rely on the company's representation.[235]

Those who have not read the terms of use might reasonably believe that their driver is an agent of the ridesharing service. After all, the applications

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because taxis are common carriers, license holders have a non-delegable duty to guarantee non-negligent operation of licensed vehicles).

228. *Teixeira*, 1994 Mass. App. Div. at *3–4.

229. RESTATEMENT (FIRST) OF AGENCY § 267 (1933) ("One who represents that another is his servant or other agent and thereby causes a third person justifiably to rely upon the care or skill of such apparent agent is subject to liability to the third person for harm caused by the lack of care or skill of the one appearing to be a servant or other agent as if he were such.").

230. Conn, *supra* note 147, at 196–97.

231. Joseph H. King, Jr., *Limiting the Vicarious Liability of Franchisors for the Torts of Their Franchisees*, 62 WASH. & LEE L. REV. 417, 450 (2005).

232. *Id.* at 452.

233. Moussa v. Abdel-Kader, No. 98-5084-F, 2000 WL 991720, at *2–3 (Mass. Dist. Ct. Jun. 30, 2000).

234. Plooy v. Paryani, 657 N.E.2d 12, 22 (Ill. App. Ct. 1995) (where because the passenger had not arranged the taxi ride, there was no reliance on the company's reputation); *Moussa*, 2000 WL 991720, at *5.

235. This exact scenario is contemplated in the comments of the Restatement (Second) of Torts. *See* RESTATEMENT (SECOND) OF TORTS § 429 cmt. a (1965).

are branded with the companies' images, payments are made directly to the services, and drivers' vehicles display the companies' trade dress.[236] A person who has signed this agreement, however, cannot have a "reasonable belief" in the drivers' apparent agency, as the terms clearly state that the company characterizes the drivers as non-agents.[237] Third-parties injured by collisions resulting from ridesharing drivers cannot claim any reliance on any representations of agency; they probably were not aware of the representation and thus could not have relied on it to their detriment.[238] Where a customer arranges a ride through a ridesharing service and then splits the costs of the ride with a friend in a separate cash transaction, however, the friend might have relied on the apparent agency to his detriment if involved in an accident.[239]

C. Ridesharing Services May Face Liability for Their Own Acts

Vicarious liability for the negligence of drivers using ridesharing services is not the only way these companies might find themselves subject to liability. These companies also face significant risks of liability for their own direct acts of negligence and for the products they supply. Courts might recognize negligence per se for a violation of any of the public safety laws or regulations concerning automobile transportation or ridesharing services.[240] The violation of a law, however, is not always dispositive in establishing a breach of the standard of care; sometimes individuals must do more, must merely comply, or may do less than what is required to comply with the law.[241] In any event, because ridesharing services must comply with

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236. CAL. PUB. UTIL. COMM'N RULING 12-12-011, *supra* note 32, at 31.

237. *See Uber Terms of Service*, *supra* note 16; *Lyft Terms of Service*, *supra* note 16; *Sidecar Terms of Service*, *supra* note 16.

238. *See* Peters v. Haymarket Leasing, Inc., 835 N.E.2d 628, 634 (Mass. App. Ct. 2005) (upholding summary judgment on apparent agency claim where victim did not present evidence that he saw the lettering of the cab that injured him or that he relied on this information in any way).

239. If the passengers were to use the application to split the fare, both would presumably have already agreed to the terms, which disavow any agency relationship. For a discussion on the effect of the ridesharing services' user agreements, see *infra* Part II.D.

240. *See* RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 14 (2010).

241. The violation of a law or regulation is generally not dispositive in determining a breach of the standard of care, though it may be used as evidence. RESTATEMENT (SECOND) OF TORTS § 288B (1965). Violation of a traffic code is a classic example of an instance where the standard of care might be implied from legislation. *Id.* at § 288B cmt. d. The common law doctrine of negligence per se may be applied in a case of a statutory violation if the violated law was designed to prevent the injury realized and to protect the class of person injured. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM §

numerous regulatory requirements, they will have an elevated standard of care.[242]

1. Ridesharing Services May be Held Liable for Their Own Negligence

Courts may also find ridesharing services liable for their own negligent acts in cases where the company itself has breached the standard of care. All tort claims involve the same fundamental requirements: a legal duty, a breach of that duty, factual and proximate causation, and damages.[243] Based on the nature of the business, negligence arising from the hiring, retention, and supervision of drivers, as well as negligent misrepresentation, are likely sources of liability. Liability under these theories is wholly separate from the concept of vicarious liability.[244] Although some overlap of liability imputed through vicarious liability may exist, an employer's negligence may capture actions by employees that occur outside of the scope of employment.[245]

A court may find an employer negligent for giving improper or ambiguous directions to an employee, for poor selection of an employee in work involving risk of harm to others, or for failing to supervise employees, among other things.[246] Such liability extends to the negligent selection and supervision of independent contractors.[247] In other words, a court may hold an employer or hirer liable for the negligent hiring, training, or supervision of an employee or independent contractor. Courts will, however, only hold an employer liable for the damage caused by the employee's wrongful acts, and only when the employer's negligence was a cause of the employee's wrongful act.[248] To demonstrate a prima facie case for negligent hiring, the plaintiff must show that the employer "knew or should have known of the

14 (2010). Likewise, compliance with a law or regulation does not assure an actor that he or she will be held free of negligence. *Id.* § 16.

242. *See supra* Part I.

243. *See, e.g.*, Rockweit v. Senecal, 541 N.W.2d 742, 747 (Wis. 1995).

244. *See* Mainella v. Staff Builders Indus. Servs., Inc., 608 A.2d 1141, 1145 (R.I. 1992); *see also* RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 55 cmt. a (2012).

245. For an extended discussion on the permissibility of alleging vicarious liability and direct negligence, see Richard A. Mincer, *The Viability of Direct Negligence Claims Against Motor Carriers in the Face of an Admission of Respondeat Superior*, 10 WYO. L. REV. 229 (2010).

246. RESTATEMENT (SECOND) OF AGENCY § 213 (1958).

247. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 55 cmt. e (2012); *see also* RESTATEMENT (SECOND) OF TORTS § 414 (1965).

248. *See* Miller v. Wal-Mart Stores, Inc., 580 N.W.2d 233, 239 (Wis. 1998).

employee's propensity for the conduct which caused the injury."[249] A cause of action for negligent training requires a showing that the employer's negligent breach of a duty to train resulted in the injuries at issue.[250] Similarly, a cause of action for negligent supervision arises when the employer violates its duty to supervise employees, resulting in an injury.[251]

Ridesharing services have a duty to take reasonable care to guarantee the proper hiring, training, and supervision of drivers, regardless of whether an employment relationship exists.[252] Such a duty is further warranted because of the extensive regulatory scheme that has put the responsibility of ensuring the quality of drivers on the ridesharing services. In addition, ridesharing services may still be subject to liability for the representations that are made regarding the fitness of the drivers on their networks.[253] Of course, all of the ridesharing services provide language in their user agreements that attempt to have their liability waived for such representations,[254] and such waivers as between the parties of the agreement may or may not be valid.[255] But as the law makes clear, an actor is responsible for the reliance of third parties who the actor knows will rely on the information to enter into a transaction.[256] Thus, a passenger who enters into an agreement with the customer who actually requests the ride might rely on the representations as to the fitness of the drivers on the service to the third party passenger's detriment.

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249. State Farm Ins. Co. v. Cent. Parking Sys., Inc., 796 N.Y.S.2d 665, 667 (N.Y. App. Div. 2005).

250. *See* WILLIAM C. MARTUCCI, EMPLOYMENT LAW AND PRACTICE § 17:15, *in* 37 MISSOURI PRACTICE SERIES (West, Westlaw 2014).

251. *See* RESTATEMENT (THIRD) OF EMPLOYMENT LAW § 4.04 (Proposed Final Draft, 2014).

252. For a discussion on whether ridesharing services have an employment relationship with drivers, see *supra* Part II.A.

253. Negligent misrepresentation may apply when an actor provides information in the course of business or any transaction in which the actor has a pecuniary interest and fails to meet the standard of care in ensuring the competence of the information. RESTATEMENT (SECOND) OF TORTS § 552(1) (1977). Claims are limited only to the individuals that the provider of information intends or knows will receive the information, and only when the provider intends or knows that the information will influence an individual to act in a transaction. *Id.* § 552(2). Where the provider of information has a public duty to provide accurate information, claims may be made by anyone damaged in a transaction to which the public duty extends. *Id.* § 552(3). This is typically the case for public officials, though the duty may also extend to private individuals who are required by law to file information for the public benefit, such as lawyers and accountants. *Id.* § 552 cmt. k.

254. *See Uber Terms of Service*, *supra* note 16; *Lyft Terms of Service*, *supra* note 16; *Sidecar Terms of Service*, *supra* note 16.

255. *See infra* Part II.D.

256. *See supra* Part II.C.1.

2. Ridesharing Services May be Held Strictly Liable for Their Products

In the *Liu* case, the plaintiffs alleged that the driver that caused the injuries was distracted while operating his phone in violation of several California traffic laws.[257] The plaintiffs further alleged that Uber was negligent in the "development, implementation, and use" of the application so as to distract drivers while driving,[258] making Uber strictly liable for the defective application or user interface.[259] Uber argued that the products liability claim was barred because that the application was not a "product" subject to strict liability[260] and because it primarily provides services, not products.[261] Uber also denied that the driver was distracted at the time of the accident.[262] Further, Uber not only denied liability for the misuse of the application,[263] but also denied any defective manufacture or design[264] and claimed that the application satisfied the state-of-the-art defense for such items at the time and was fit for normal use.[265]

Products liability claims for physical injuries resulting from the use of computer software and hardware have become increasingly commonplace.[266] Notably, for products liability to apply, the damages must result from the immediate use of the application rather than any services arranged through it.[267] In addition, the danger created by the use of the application—in this case using the software while the driver is driving—would have to be non-apparent to the user.[268] The risk of using a phone while a car is in motion is

257. Complaint for Damages and Demand for Trial by Jury, *supra* note 1, at 13.
258. *Id.* at 9.
259. *Id.* at 10.
260. Answer, *supra* note 19, at 8.
261. *Id.*
262. *Id.* at 6–7. Uber argues that, by design, the application does not allow the driver to send or receive calls, and the only displayed information was the application's GPS. *Id.* Uber claims that because the driver had not yet received a ride request, he had no reason to interact with his phone at the time of the injury. *Id.* at 7.
263. *Id.* at 7.
264. *Id.* at 8.
265. *Id.*
266. Laurel M. Cohn, Annotation, *Products Liability: Computer Hardware and Software*, 59 A.L.R.5TH 461, 461 (1998).
267. In the case of hybrid transactions, where there is a part sale and part rendition of services, courts look to the fundamental nature of the transaction. *See* Newmark v. Gimbel's Inc., 258 A.2d 697, 701 (N.J. 1969). If the transaction is fundamentally a sale, products liability may be applied. *Id.*
268. *See* RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2 cmt. j (1998); RESTATEMENT (SECOND) OF TORTS § 402A cmt. i (1965).

an obvious risk that would bar any recovery for products liability.[269] Further, while the legal theory may be novel, any judgment against a software company would result in immediate changes to their instructions and software design to remedy the problem. Thus, any products liability claim is of relatively little significance when compared to the liability associated with driving discussed above, which is inexorably linked to the nature of the business.

D. Ridesharing Services' Efforts to Limit Liability are Contrary to Public Policy

One of the pronounced features of ridesharing services is that they emphasize that they are technology service companies—mere intermediaries—who connect passengers using their software with drivers who are also using their software.[270] To this end, these companies also include express waivers of liability for any claims of negligence against them in their agreement with passengers.[271] For example, Uber expressly states that they are not responsible for any damages arising out of the services provided by drivers on their network, for any representations as to the quality of drivers using its services, or for any damages arising from use of the software.[272] These waivers, however, will not be enforceable in most, if not all, states in which these services operate.

Based on established legal principles, an individual cannot waive claims for intentional or reckless torts.[273] In fact, many states do not allow individuals to waive *any* liability where a party has negligently breached a legal duty, whether statutory or jurisprudential.[274] Those states that do

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269. *See, e.g.*, Roberts v. Rich Foods, Inc., 654 A.2d 1365, 1371–72 (N.J. 1995) (holding that where tractor trailer driver was entering data into manufacturer's software while driving, the risk created by the product was obvious, thus baring any strict liability on behalf of the manufacturer). One interpretation of the "open and obvious danger" rule is not based on the affirmative defenses of assumption of the risk or comparative fault, but rather states that there is no breach of duty to begin with. Smith v. Am. Motors Sales Corp., 576 N.E.2d 146, 148 (Ill. Ct. App. 1991). This theory does not apply in some states that have adopted strict liability rules for products. *Id.*

270. *See Uber Terms of Service*, *supra* note 16; *Lyft Terms of Service*, *supra* note 16; *Sidecar Terms of Service*, *supra* note 16.

271. *See Uber Terms of Service*, *supra* note 16; *Lyft Terms of Service*, *supra* note 16; *Sidecar Terms of Service*, *supra* note 16.

272. *See Uber Terms of Service*, *supra* note 16.

273. RESTATEMENT (SECOND) OF CONTRACTS § 195 (1981).

274. *See, e.g.*, Spath v. Dillon Enters., Inc., 97 F. Supp. 2d 1215, 1218 (D. Mont. 1999) (where injured party signed a waiver of liability with the rafting company, the waiver was found unenforceable, because Montana public policy does not allow parties to waive their liability arising out of negligent violations of legal duties, whether statutory or jurisprudential).

allow for parties to contractually limit liability for negligence will still find agreements unenforceable if they violate public policy.[275] Public policy reasons include, among other things, activities that are extensively regulated to protect the public from danger.[276] Similarly, some states specifically do not allow waivers that limit liability where a duty to the public exists as a matter of public policy.[277] This would include common carriers, innkeepers, public utilities, and others with a public, non-delegable duty to exercise reasonable care because the performance is important to the public.[278]

The waivers that ridesharing services promulgate are likely facially invalid in many states, especially where they attempt to limit liability for intentional torts or attempt to "contract away" the legal duty to exercise reasonable care. Further, because the ridesharing services have a duty to the public arising out of the regulations imposed by governments,[279] they will not be able to discharge their responsibilities even in states with more liberal approaches to contracting a limitation of liability. Explicitly invalidating these waivers under the regulatory schemes would benefit the public by increasing transparency for consumers and ensuring that ridesharing services remain liable for their activities.[280]

E. Ridesharing Services Will Likely be Liable for the Acts of Drivers, Incentivizing Safe Behaviors

Another way that courts can ensure public safety—both in terms of behavior and compensation—is by holding ridesharing services liable for the acts of their drivers. Several legal theories of liability will impute liability on ridesharing services, though the most likely sources are

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275. *See, e.g.*, Hyatt v. Mini Storage on the Green, 763 S.E. 2d 166, 171 (N.C. Ct. App. 2014) (explaining North Carolina's approach, which allows parties to contractually limit liability for negligence but only when the intent of the parties is clear, and they do not violate a "substantial public interest").

276. *See* Fortson v. McClellan, 508 S.E.2d 549, 551 (N.C. Ct. App. 1998).

277. *See* Vodopest v. MacGregor, 913 P.2d 779, 783 (Wash. 1996) (describing cases where waivers were found unenforceable for public policy reasons and waivers found unenforceable because of duties to the public); RESTATEMENT (SECOND) OF CONTRACTS § 195 (1981).

278. *See* Wagenblast v. Odessa Sch. Dist. No. 105-157-166J, 758 P.2d 968, 970 (Wash. 1988).

279. *See supra* Part II.B.1.

280. The City of Houston, for example, explicitly prohibits ridesharing services from attempting to limit the liability to drivers or passengers through waivers. HOUS., TEX., CODE OF ORDINANCES § 46-516(n) (Municode through Ordinance No. 2015-668, adopted July 8, 2015). California regulators have taken notice of these agreements and plan to address them in their next phase of regulations. CAL. PUB. UTIL. COMM'N RULING 12-12-011, *supra* note 32, at 35.

vicarious liability and the services' non-delegable duty to public safety created by the regulatory framework. Of course, governments are free to impute liability for accidents on ridesharing services by statute in the interest of public policy.[281] Combined with the ineffectiveness of their waivers, ridesharing services will have a financial incentive to reduce risk, even considering the moral hazard associated with insurance.[282] The incentives for safe behavior created by the ridesharing companies' liability will likely trickle down to drivers by way of internal controls to limit liability. Although potential liability will incentivize safer behaviors, regulations are also necessary to ensure public safety.

III. ENSURING PUBLIC SAFETY THROUGH LIABILITY AND REGULATION

Public safety is one of the most fundamental functions of government. In achieving this goal, two approaches to influence actors' behavior are generally recognized: imposing tort liability and creating regulatory schemes that compel compliance.[283] The ideal mix of liability and regulation will maximize social welfare.[284] Of the two approaches, tort liability is a less direct method of influencing behavior, relying on the deterrent effect of damages for harms after they occur.[285] By contrast, standards, prohibitions, or regulations are a more immediate method of affecting behavior, and may operate independently of and prior to the occurrence of actual harm.[286] Harvard Law School Professor Steven Shavell[287] presents a qualitative approach for considering the relative desirability of relying on liability and regulation to influence behavior, using the following four factors: (1) the relative knowledge of actors and

281. For example, many states impose liability on the owners of vehicles by statute, regardless of whether they are present when an accident occurs. 8 STEVEN PLITT, DANIEL MALDONADO, JOSHUA D. ROGERS & JORDAN R. PLITT, COUCH ON INSURANCE § 111:41 (3d ed., Westlaw through June 2015).

282. *See* discussion *infra* Part III.A.

283. Shavell, *supra* note 27, at 357.

284. *Id.* Social welfare "is assumed to equal the benefits parties derive from engaging in their activities, less the sum of the costs of precautions, the harms done, and the administrative expenses associated with the means of social control." *Id.* at 358–59. In other words, costs should be considered in addition to efficacy in determining the ideal mix of liability and regulation.

285. *Id.*; *see also* Charles D. Kolstad, Thomas S. Ulen & Gary V. Johnson, Ex Post *Liability for Harm vs.* Ex Ante *Safety Regulation: Substitutes or Complements?*, 80 AM. ECON. REV. 888, 888 (1990).

286. *See* Shavell, *supra* note 27, at 357.

287. *Steven M. Shavell*, HARV. L. SCH., http://www.law.harvard.edu/faculty/shavell/cv.php [http://perma.cc/MJ67-CFU4] (last updated Oct. 26, 2009). As director of the John M. Olin Center for Law, Economics, and Business at Harvard Law School, much of Professor Shavell's work focuses on the intersection of law and economics. *Id.*

regulators of the benefits and risks of activities, (2) the ability of actors to fully pay for the consequences of their actions, (3) the likelihood that actors will face suit, and (4) the relative costs of administering a regulatory regime as opposed to litigation.[288] Applying these factors after considering the regulations and liability associated with ridesharing services provides insight into the interaction between the two major influences on behavior, and consequently, public safety. Such insight suggests that the regulatory approaches taken by many jurisdictions appropriately supplement the liability of ridesharing services and ensure public safety.

A. Applying the Factors for Determining the Relative Desirability of Liability and Regulation

The first determinant is the relative knowledge between the actors themselves and the government regulators as to the risks associated with the activity in question.[289] When private parties know relatively more about the severity of risks and the costs associated with their avoidance as compared to regulators, relying on the deterrent effect of liability is preferable because regulators may create restrictions that are overly burdensome or inappropriately lax.[290] By contrast, when regulators have greater knowledge of the risks or are better equipped to analyze risk because of superior abilities, relying on regulation is preferred.[291] Regulation is also favorable in industries where the risks are commonly known and therefore the regulatory authority can be confident that the regulation will apply in almost all circumstances, thereby reducing the risk of overbearing regulation.[292] For example, the risks associated with weak elevator cables are widely known, justifying a law to assure that all elevator cables meet certain specifications.[293]

In the case of automobile transportation, anyone who drives knows the risks associated with driving. The industry does not involve any specialized knowledge that would give individual firms a greater understanding of the risks of doing business compared to regulatory agencies. Rather, regulators may have an informational advantage as to the risks in that they are in a position to consider larger trends based on data

288. *See* Shavell, *supra* note 27, at 357–66.
289. *Id.* at 359.
290. *Id.*
291. *See id.* For example, regulators may have better access to information or superior ability to evaluate relevant environmental or health-related risks. *Id.*
292. *Id.* at 369.
293. *Id.*

they obtain through filing requirements.[294] Because the risks that public safety regulations address are apparent and commonly recognized,[295] it is less probable that regulations will be overly burdensome or ineffective. Even though the risks are relatively obvious, the safety standards used in the novel regulatory approach to ridesharing services must clearly and objectively be set forth to compel compliance, such as those for ensuring the quality of drivers and vehicles.[296]

The second determinant for the relative desirability of relying on imposition of liability or enforcement of regulations is the actor's ability to fully pay for the consequences of his or her actions.[297] The value of the actor's assets will determine his or her incentive to avoid causing injuries.[298] For example, if a building caught on fire, the business that owns the building would likely not be able to pay for the significant liability imposed in tort for the injuries sustained. Enforcement of fire code regulations, however, reduces this risk.[299] Liability will effectively influence the behavior of drivers whose assets are of little value. By contrast, regulations can directly influence an actor's behavior regardless of the value of the actor's assets.[300] Thus penalties or fines may be useful in directly affecting an individual's behavior regardless of the value of the individual's assets or whether a court could subject the individual to liability.

Concern for ridesharing services' ability to pay may be addressed by requiring minimum amounts of insurance through regulation. Because ridesharing services are generally required to obtain insurance to operate,[301] further considering their ability to pay may appear irrelevant. When insurance is exhausted, however, the question becomes very important. Generally speaking, ridesharing services are well-positioned to compensate for damages, especially relative to drivers, because they will presumably have greater assets. Because courts will hold them liable for the acts of their drivers,[302] ridesharing services will have a greater incentive to protect their assets, resulting in insurance coverage that goes

294. California's recent legislation specifically provides for future research of the appropriateness of the new insurance requirements. CAL. PUB. UTIL. CODE § 5436 (West, Westlaw through Ch. 224 of 2015 Reg. Sess.) (effective Jan. 1, 2015).

295. *See supra* Part I. The regulations outlined in Part I are all based on risks that are readily apparent to both ridesharing services and regulators.

296. *See supra* Part I.B.

297. Shavell, *supra* note 27, at 360.

298. *Id.* at 360–61.

299. *See id.* at 361–62.

300. *Id.* at 361.

301. *See supra* Part I.C.

302. *See supra* Part II.

beyond the minimum requirements set by law. In addition, ridesharing services are in a better position to obtain insurance at more favorable rates because of their superior bargaining power.[303] Though relying on liability alone would likely result in established ridesharing services having adequate insurance to protect their assets, regulations that require a minimum level of insurance serve an important gatekeeping role by allowing only those companies that can provide adequate insurance to operate.

The third determinant is the likelihood of facing suit.[304] Courts exert less influence on behavior under the liability model where the party is unlikely to face a lawsuit. Certain activities are fundamentally less likely to subject an individual to litigation, whether because the harms are widely dispersed and thus too insignificant for any individual to pursue[305] or because of difficulties in proving causation,[306] such as with the long-term effects of environmental exposure.[307] By contrast, direct regulations over drivers and ridesharing services are effective regardless of the likelihood of suit.[308] In ensuring the safety of transportation services, this determinant favors imposing liability.

When traffic accidents—which regulation and liability both seek to prevent—ultimately do occur, few situations will arise where both the responsible driver and the ridesharing service that the driver was using are unknown. Unlike tortious activity that may escape litigation because of the delay in which the damages are manifested, such as asbestos exposure, the damages caused from unsafe vehicle operation are almost always immediately recognized.[309] If courts can readily identify and hold liable ridesharing services for the injuries caused by their drivers,[310] the prospect of liability will incentivize ridesharing services to create internal controls to reduce the chance of accidents, and thus their liability.[311] The possibility of being sued will also influence drivers. Direct regulation over drivers through suspensions of licenses or fines is necessary to counteract those

303. The insurance market for ridesharing services is in its infancy, and few insurance companies provide policies. *See* Salinero, *supra* note 112.

304. Shavell, *supra* note 27, at 363.

305. *Id.* at 370.

306. *Id.* at 363.

307. *Id.* at 370.

308. *See id.*

309. This Comment focuses on the threats to public safety. Certain behavior outside of this realm, such as ensuring fair metering services, might be more effectively influenced through regulation, because the effect would be widely dispersed among passengers, who would not find it cost-effective to pursue litigation individually.

310. For a discussion of the theories under which ridesharing services may be found liable, see *supra* Part II.

311. *See* Shavell, *supra* note 27, at 362.

drivers who have fewer incentives to avoid accidents because their assets have little value.[312]

The moral hazard created by insurance somewhat reduces the influence of liability on eliminating risk. Because the insurance company will step in to indemnify the ridesharing service, the sued ridesharing service will feel less connected to the suit, potentially diminishing its impetus to ensure safety. The degree of this effect will depend on the "linkage" between the ridesharing service's activities and its insurance premiums.[313] The automobile insurance market takes into account past accidents in determining premiums, and insurers of ridesharing services will undoubtedly be equally responsive in adjusting rates based on unsafe behavior.[314]

The fourth determinant considers the relative cost of administering tort actions and regulatory schemes.[315] The costs associated with relying on liability to affect behavior include the direct costs to parties as a result of damages from litigation and other legal costs.[316] Administrative costs associated with regulatory regimes include the costs borne by the taxpayer, as well as private costs of compliance.[317] Safety precautions that are readily apparent, such as having a certain number of life preservers on a boat, lend themselves well to regulation because the costs of enforcement are low.[318] Regulation may also be favored when using probabilistic methods of enforcement, such as random inspections, which are effective and reduce costs.[319] For example, a regulatory agency inexpensively can enforce vehicle regulations, such as requiring a licensed driver, proof of insurance, a certain number of seatbelts, and no visible body damage to the vehicle. Regulators could easily enforce such requirements by having a quota of vehicles to randomly inspect for compliance for each transportation service. Indeed, putting in place reporting requirements for the troves of data generated by ridesharing services may reduce the total cost of enforcement through probabilistic, and largely electronic, enforcement. Regulators could also gain access to ridesharing services' rating systems to identify poor or non-compliant drivers as a very cost-effective method of enforcement. Overall, ridesharing services' heavy

312. *See id.*
313. *Id.* at 361.
314. UberX's insurer specializes in high-risk, high-value markets. Salinero, *supra* note 112. Presumably, insurance rates will decrease over time as the risks of these activities become more predictable to insurers. *See supra* Part I.D.
315. Shavell, *supra* note 27, at 363.
316. *Id.* at 364.
317. *Id.*
318. *See id.* at 370.
319. *Id.*

reliance on the use of technology should be viewed as an opportunity to greatly reduce enforcement costs.

Who pays the costs of preventing accidents is an important consideration from a public interest perspective. Imposing liability has a cost advantage in the sense that only the parties targeted in litigation will incur the costs associated with litigation or settlement. But this may have harsh results, where litigation may saddle individual actors with high costs. In contrast, increasing the relative reliance on regulations will spread out the costs more evenly among actors. But the regulatory schemes that many jurisdictions have promulgated have imposed several of the costs on the ridesharing services that, in the regulation of traditional for-hire transportation services, are usually borne by the government, such as conducting background checks, issuing licenses, and providing training.[320]

B. Regulation Must Supplement Liability to Ensure Public Safety

Ridesharing services' liability for the acts of drivers will serve as an important incentive for safeguarding public safety. Accidents caused by ridesharing service activities will almost always be litigated because the parties and damages will be readily apparent. The likelihood of facing suit will influence the behavior of the drivers, not only because they will fear personal liability, but also because ridesharing services will develop their own internal controls. Further, ridesharing services will be in a better position to pay for any damages resulting from ridesharing activities, relative to their drivers. Thus, the goal of compensation can be met, while also creating a reason for ridesharing services to reduce risk.

Considering Shavell's determinants for the relative desirability of relying on regulations and liability to ensure public safety, the regulations that many jurisdictions have put in place[321] are justified as proper supplements to tort liability.[322] The risks associated with ridesharing services are common knowledge, which reduces the chance of imposing regulations that are overly burdensome or inadequately lax. Because drivers are relatively less able to pay for injuries they cause, mandatory insurance and direct regulations on their behavior are important supplements to relying on liability. By creating objective and targeted regulations to control licensing[323] and address the risks associated with the quality of drivers,[324]

320. *See supra* Part I.
321. *See supra* Part I.
322. *See supra* Part II.
323. *See supra* Part I.A.
324. *See supra* Part I.B.

fitness of vehicles,[325] and insurance,[326] regulators may significantly reduce the risks to public safety. In addition, the use of probabilistic enforcement and the savings allowed through the use of electronic data support a regulatory scheme because of the relatively low costs that are incurred on the front end, relative to the high costs of litigation.

CONCLUSION

Given the long-perceived inefficiencies associated with for-hire transportation services, the riding public is eager for change. Peer-to-peer ridesharing services have squarely presented governments with the opportunity to embrace the capabilities of cellular communications, real-time global location services, and highly-functional smartphones, if the governments allow the ridesharing services to operate within their jurisdictions. Still, holding ridesharing services liable for the acts of their drivers under one of the many theories discussed above is necessary to incentivize behaviors that guard public safety and provide adequate compensation when damages occur.

But the threat of liability alone will not guarantee public safety. Although ridesharing services' activities do not present risks that seem exceptionally dangerous, government oversight is necessary. Some ridesharing services have demonstrated their willingness to operate outside of the legal framework in some jurisdictions with complete impunity; regulators must either enforce their laws against unlicensed for-hire transportation operations, incorporate these services into their existing regulations, or, as many have done, create a new category altogether. The new regulatory approaches adopted by many jurisdictions to address the risks of ridesharing activities are an appropriate supplement to liability, provided the standards are clear and objective.

It is unclear whether the framework of regulation and liability described above would have prevented the death of Sofia Liu. However, the family would be pursuing compensation under a covered insurance event, rather than testing their theory of liability in court. Ridesharing services have a duty—both regulatory and moral—to ensure that the drivers operating on their platforms are doing so in a safe manner. Inherent risks in driving an automobile exist, but with proper regulation and someone to hold responsible when accidents occur, those public safety risks may be reduced to acceptable levels. Proper regulation will allow the for-hire transportation business model to evolve with promising new

325. *Id.*
326. *See supra* Part I.C.

technology, while remaining faithful to the fundamental objective of ensuring public safety.

Mark Macmurdo[*]

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* J.D./D.C.L., 2016, Paul M. Hebert Law Center, Louisiana State University. The author dedicates this Comment to the loving memory of his father, R. Bruce Macmurdo, a Paul M. Hebert Law Center graduate and Articles Editor for the *Louisiana Law Review*. Bruce inspired boundless curiosity in his children, a legacy for which this author is eternally grateful.

TABLE 1: COMPARISON OF RIDESHARING SERVICE INSURANCE POLICIES

		UberX[327]	Lyft[328]	Sidecar[329]
	Driver unavailable	No coverage provided.	No coverage provided.	No coverage provided.
	Driver available	*Contingent liability*: $50,000/$100,000/ $25,000 with no deductible.	*Contingent liability*: $50,000/$100,000/ $25,000 with no deductible.	*Contingent liability*: $100,000/$300,000/ $25,000 (Washington state only).
	Request accepted until trip complete	*Liability*: Commercial policy with $1,000,000 coverage per incident; expressly primary to personal liability policies (not if driver also has commercial insurance). *UI/UIM*: No deductible, coverage of up to $1,000,000 per incident for bodily injuries to driver or passengers as a result of an uninsured or underinsured motorist. *Contingent collision and comprehensive*: $1,000 deductible, $50,000 in damage to driver's vehicle from collisions or non-collision damage (such as fire or vandalism); requires a comparable personal policy; only applies if denied by personal insurer.	*Liability*: Contingent liability policy, above, is primary. *Commercial Auto Liability & UM/UIM*: No deductible, coverage of up to $1,000,000 per incident for bodily injuries to driver or passengers as a result of an uninsured or underinsured motorist. *Contingent collision and comprehensive*: $2,500 deductible, $50,000 in damage to driver's vehicle from collisions or non-collision damage (such as fire or vandalism); requires a comparable personal policy; only applies if denied by personal insurer.	*Liability*: Commercial policy with $1,000,000 coverage per incident; expressly primary to personal liability policies (not if driver also has commercial insurance). *Contingent collision*: $500 deductible, $50,000 in damage to driver's vehicle from collisions; only applies if denied by personal insurer.

327. *Insurance for UberX with Ridesharing*, *supra* note 113.

328. *Lyft's Insurance Policy*, LYFT, https://www.lyft.com/drive/help/article/1229170 [https://perma.cc/XT4R-WNDT] (last visited Oct. 14, 2014).

329. *Sidecar's Insurance Policy*, SIDECAR, https://www.side.cr/policies/insurance/ [https://perma.cc/475L-4ZTL] (last visited Oct. 14, 2014).