
NOTE

RISK, REWARD, AND RESPONSIBILITY: A CALL TO HOLD UBERX, LYFT, AND OTHER TRANSPORTATION NETWORK COMPANIES VICARIOUSLY LIABLE FOR THE ACTS OF THEIR DRIVERS

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INTRODUCTION: WITH GREAT POWER COMES GREAT RESPONSIBILITY

On December 31, 2013, a car accident killed one and injured two pedestrians.¹ The deceased: a six-year-old girl.² Her family brought suit in San Francisco against the driver for wrongful death and personal injuries and against Uber Technologies, Inc., Rasier LLC, and Rasier-CA LLC on a theory of vicarious liability.³ The driver had a contract with Uber and

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1. Complaint for Damages and Demand for Trial by Jury at 4, *Liu v. Uber Techs., Inc.*, No. CGC-14-536979 (Cal. Super. Ct. Jan. 27, 2014) [hereinafter *Liu Complaint*]; Answer and Affirmative Defenses of Uber Techs., Inc., Rasier LLC, and Rasier-CA LLC to Plaintiffs' Complaint at 6, *Liu v. Uber Techs., Inc.*, CGC-14-536979 (Cal. Super. Ct. Jan. 27, 2014) [hereinafter *Answer to Liu Complaint*]; John Constine, *Uber's Denial of Liability in Girl's Death Raises Accident Accountability Questions*, TECHCRUNCH (Jan. 2, 2014), <http://techcrunch.com/2014/01/02/should-car-services-provide-insurance-when-ever-their-driver-app-is-open/>; Kale Williams, *Uber Denies Fault in S.F. Crash That Killed Girl*, SFGATE (May 7, 2014, 7:54 AM), <http://www.sfgate.com/bayarea/article/Uber-denies-fault-in-S-F-crash-that-killed-girl-5458290.php>.

2. *Liu Complaint*, *supra* note 1, at 4.

3. *Id.* at 9–16. Rasier LLC is a wholly owned subsidiary of Uber Technologies, Inc. and covers

Rasier-CA LLC when the accident occurred and at that time was allegedly waiting to “match”⁴ with a passenger through Uber’s app.⁵ The question of Uber’s liability centers around whether it should be liable for the acts of its driver at all, and if so, whether it should be liable for the acts of a driver when no passenger is yet in the vehicle. Uber answered the complaint claiming that because it is not a transportation carrier, has an independent contractor relationship with its drivers, and the driver-defendant was neither transporting a passenger nor en route to pick up a passenger, Uber was not liable for any damages.⁶

The advent of rideshare companies has dramatically disrupted and changed the transportation market over the last five years.⁷ Rideshare companies have helped to lower costs and increase mobility for consumers, stimulate job growth by allowing owners of vehicles to enter a more permeable transportation market, and bring new ideas into old markets in need of innovation. “Nearly 150 years ago, in *Bridge Proprietors v.*

UberX, which provides rideshare services. Rasier-CA LLC is “formed to do business in California and to hold any necessary regulatory license within the states of California.” Answer to Liu Complaint, *supra* note 1, at 4. Uber Technologies, Inc.’s services include Uber Black and Uber SUV. These services are not considered rideshare services and are therefore beyond the scope of this Note. Because Uber Technologies, Inc. is the parent company of Rasier LLC and Rasier-CA LLC, when referring to the parent company, this Note will refer to Uber Technologies, Inc. as “Uber.” When referring to the rideshare services covered by Rasier-CA LLC, this Note will refer to Rasier-CA LLC as “UberX.”

4. Answer to Liu Complaint, *supra* note 1, at 6. Depending on the car a driver owns, he or she may offer transportation services for Uber Black, Uber SUV, and UberX. Michael Carney, *Uber Continues to Screw Its “Partners,” Now by Forcing Uber Black Drivers to Accept UberX Fares*, PANDO (Sept. 4, 2014), <https://pando.com/2014/09/04/uber-continues-to-screw-its-partners-now-by-forcing-uber-black-drivers-accept-uberx-fares>. Furthermore, a driver is not precluded for working for both Lyft and UberX. The Uber app allows drivers and passengers to select from a variety of Uber’s services, including, but not limited to, Uber Black, Uber SUV, and UberX. A “match” occurs when a passenger requests a ride through the app, and the software offers the ride to a driver, based on the distance between the driver and passenger as well as the driver’s rating, which is based on feedback from prior passengers. A driver may accept or reject a match. If a driver rejects a match, a new driver will be matched with the passenger, based on similar criteria. *See id.*; Liu Complaint, *supra* note 1, at 5–6.

5. Liu Complaint, *supra* note 1, at 5; Answer to Liu Complaint, *supra* note 1, at 6–7.

6. Answer to Liu Complaint, *supra* note 1, at 3–7. The case was dismissed with prejudice in August 2015 after the parties reached a settlement agreement in July 2015. The terms of the settlement are under seal. Order Granting Petition to Approve Compromise of a Minor’s Claim, Liu v. Uber Techs., Inc., No. CGC-14-536979 (Cal. Super. Ct. Jul. 23, 2015); Request for Dismissal, Liu v. Uber Techs., Inc., No. CGC-14-536979 (Cal. Super. Ct. Jul. 23, 2015). *See* Dan Levine, *Uber Settles Wrongful Death Lawsuit in San Francisco*, REUTERS (July 15, 2015, 1:42 AM), <http://www.reuters.com/article/2015/07/15/us-uber-tech-crash-settlement-idUSKCN0PO2OW20150715>.

7. “Ridesharing” means two or more persons traveling by any mode, including, but not limited to, carpooling, vanpooling, buspooling, taxipooling, jitney, and public transit.” CAL. VEH. CODE § 522 (West 2015).

Hoboken Co., the U.S. Supreme Court lamented the fact that ‘the most remarkable invention of modern times’—the steam engine—had caused the legal system to ‘be met by difficulties of the greatest character.’⁸ Today, emerging technologies continue to outpace the law. Rideshare companies present a predominant demonstration of how the law must adapt to encompass more than merely traditional concepts of liability.

California is at the forefront of recognizing this impact. It was the first state to recognize rideshare companies, such as Lyft and UberX, as charter-party carriers known in California as Transportation Network Companies (TNCs).⁹ Because California leads all other states in this regard and continues to refine its policies as rideshare companies continue to grow, this Note will focus on TNCs in California.

The TNC category applies “to companies that provide prearranged transportation services for compensation using an online-enabled application (app) or platform to connect passengers with drivers using their personal vehicles.”¹⁰ TNCs connect passengers to drivers who operate their personal vehicles; TNCs are not permitted to own and operate their own vehicles or fleets of vehicles.¹¹ The regulation explicitly states that it does not seek to designate TNCs’ business models with regard to whether drivers are employees or independent contractors.¹² As of July 1, 2015, TNC services are defined within three periods:

Period 1: The time in which the app is open and a driver is waiting for a match with a passenger.

Period 2: The time in which the driver has accepted a match, but has

8. John G. Browning, *Emerging Technology and Its Impact on Automotive Litigation*, 81 DEF. COUNSEL J. 83, 83 (2014) (quoting *Bridge Proprietors v. Hoboken Co.*, 68 U.S. 116, 146–47 (1864)).

9. CAL. PUB. UTIL. CODE § 5431 (West Supp. 2015). See also Decision Modifying Decision 13-09-045, at 5–6, Decision 14-11-043, Docket No. R.12-12-011 (Cal. Pub. Utils. Comm’n Nov. 20, 2014) [hereinafter CPUC 2014 Decision], <http://docs.cpuc.ca.gov/PublishedDocs/Published/G000/M143/K313/143313104.PDF>; Press Release, Cal. Pub. Utils. Comm’n, CPUC Establishes Rules For Transp. Network Cos. 1 (Sept. 19, 2013) [hereinafter CPUC Press Release], <http://docs.cpuc.ca.gov/PublishedDocs/Published/G000/M077/K132/77132276.PDF>.

10. CPUC Press Release, *supra*, note 9, at 1. See also PUB. UTIL. § 5431; CPUC 2014 Decision, *supra* note 9, at 6.

11. See PUB. UTIL. § 5431; CPUC 2014 Decision, *supra* note 9, at 6; Decision Adopting Rules and Regulations To Protect Public Safety While Allowing New Entrants to the Transportation Industry 29–30, Decision 13-09-045, Docket No. R.12-12-011 (Cal. Pub. Utils. Comm’n Sept. 19, 2013) [hereinafter CPUC 2013 Decision], <http://docs.cpuc.ca.gov/PublishedDocs/Published/G000/M077/K192/77192335.PDF>.

12. “We will not, however, meddle into their business model by forcing TNCs to designate each driver an employee or contractor. Again, our role is to protect public safety, not to dictate the business models of these companies.” CPUC 2013 Decision, *supra* note 11, at 63.

not yet picked up the passenger; the driver is on his or her way to pick up the passenger.

Period 3: The time in which the passenger is in the driver's vehicle until the passenger safely exits.¹³

TNCs such as UberX and Lyft claim that they provide platforms to match passengers with drivers.¹⁴ Analogizing themselves to modern-day phone books, TNCs claim—and write into their contracts with drivers and passengers—that their business is limited to providing drivers with access to the company's platform or app for which the company charges the driver a fee.¹⁵ Furthermore, these companies explicitly disclaim responsibility and liability for any damages as a result of the transportation service.¹⁶ Contrary to what such companies propose, they are hardly viewed as modern-day phone books.¹⁷ “[I]n reality . . . when you log into the app, it doesn't say ‘We're going to help you find an independent transportation company.’ It's saying ‘Here's an Uber driver. Here's the Uber driver ID. Here's this person being tracked on your phone, and you're going to pay them through us.’”¹⁸ These companies have created a new market for transportation, which generates opportunities for risk—by putting drivers on the road as representatives of the company—and reward—by profiting from the fees earned from the transportation provided.

As rideshare companies continue to increase their market share in the transportation industry and pervade California's roads, this Note will argue that injured plaintiffs must have the opportunity to hold TNCs liable for the

13. CPUC 2014 Decision, *supra* note 9, at 25–26. Based on the aforementioned facts in the Liu Complaint, *supra* note 1, it seems that the defendant-driver would be characterized as having been in Period 1.

14. *Terms and Conditions*, UBER (last updated Apr. 8, 2015) [hereinafter *Uber Terms*], <https://www.uber.com/legal/usa/terms>; *Lyft Terms of Service*, LYFT (Nov. 3, 2015) [hereinafter *Lyft Terms*], <https://www.lyft.com/terms>.

15. See, e.g., UBER TECHS., INC., RASIER SOFTWARE SUBLICENSE & ONLINE SERVICES AGREEMENT 1–5, (2014) [hereinafter RASIER AGREEMENT], https://uber-regulatory-documents.s3.amazonaws.com/country/united_states/p2p/Rasier%20Software%20Sublicense%20Agreement%20June%2021%202014.pdf. See also Emily Badger, *The Strange Tale of an Uber Car Crash and What It Means for the Future of Auto Insurance*, CITYLAB (Sept. 10, 2013), <http://www.citylab.com/commute/2013/09/real-future-ride-sharing-may-all-come-down-insurance/6832/>; *States Warn Consumers About Possible Insurance Gaps with Rideshare Companies*, FOX NEWS (May 27, 2014), <http://www.foxnews.com/us/2014/05/27/states-warn-consumers-about-possible-insurance-gaps-with-rideshare-companies.html>.

16. *Uber Terms*, *supra* note 14; *Lyft Terms*, *supra* note 14.

17. Badger, *supra* note 15; *States Warn Consumers About Possible Insurance Gaps with Rideshare Companies*, *supra* note 15.

18. Badger, *supra* note 15 (quoting Sara Peters, an attorney representing a plaintiff who was injured in a car accident that allegedly involved an Uber driver) (internal quotation marks omitted).

negligent acts caused by TNC drivers. Requiring injured plaintiffs to commence an action against a driver with whom the plaintiff has not contracted, even if the plaintiff were a passenger in the driver's car, increases transaction costs. TNCs that claim no liability for the misconduct of their drivers seem to skirt the justice system. However, passengers are asked to rate their drivers through the app, presumably assisting TNCs in determining who to retain as a driver. The business and economic benefits TNCs achieve—low costs and strong brands—have allowed TNCs to outpace other common carriers, such as taxicabs, limousines, and shuttles. With such power comes great responsibility. A system of vicarious liability for injured plaintiffs to sue TNCs instead of seeking out a driver is necessary to protect the public. TNCs serve “a previously unmet demand for convenient, point-to-point urban travel,” and as they become an integral part of the transportation system, questions of liability must be addressed.¹⁹

There are currently at least four pending suits in California claiming that UberX or Lyft misclassify their drivers as independent contractors.²⁰ Both companies deny these claims.²¹ In June 2015, the California Labor Commissioner held that an UberX driver is an employee because Uber “retained all necessary control over the operation as a whole.”²² Uber has appealed the decision to the San Francisco Superior Court.²³ This is potentially the greatest threat to TNCs' business models and could greatly increase their cost of doing business, making them less competitive in the

19. Lisa Rayle et al., *App-Based, On-Demand Ride Services: Comparing Taxi and Ridesourcing Trips and User Characteristics in San Francisco* 1, 4 (Univ. of Cal. Transp. Ctr., Working Paper No. UCTC-FR-2014-08, 2014), available at <http://www.uctc.net/research/papers/UCTC-FR-2014-08.pdf>. See also Justin Wolfers, *Uber Improves Life, Economists Agree*, N.Y. TIMES: UPSHOT (Sept. 30, 2014), <http://www.nytimes.com/2014/10/01/upshot/uber-improves-life-economists-agree.html> (exploring the unanimous affirmance of forty economists surveyed on the question of whether the entrance of rideshare companies into the transportation market increases consumer welfare).

20. E.g., Class Action Complaint for Damages, *Price v. Uber Techs., Inc.*, No. BC554512 (Cal. Super. Ct. Aug. 12, 2014); Liu Complaint, *supra* note 1; Complaint for Damages, *Fahrbach v. Gafurov*, No. CGC-13-533103 (Cal. Super. Ct. Jul. 25, 2013); Class Action Complaint for Violation of the Unfair Bus. Practices Act, *Goncharov v. Uber Techs., Inc.*, No. CGC-12-526017 (Cal. Super. Ct. Nov. 9, 2012).

21. E.g., Answer to Liu Complaint, *supra* note 1; Defendant Uber Techs., Inc.'s Answer to Plaintiff's Unverified Complaint for Damages, *Fahrbach v. Gafurov*, No. CGC-13-533103 (Cal. Super. Ct. Sept. 6, 2013); Demurrer of Defendant Uber Techs., Inc. to First Amended Complaint, *Goncharov v. Uber Techs., Inc.*, No. CGC-12-526017 (Cal. Super. Ct. Aug. 22, 2013).

22. *Berwick v. Uber Techs., Inc.*, No. 11-46739 EK, slip op. at 8 (Cal. Labor Comm'r June 3, 2015).

23. Labor Comm'n Appeal, *Uber Techs., Inc. v. Berwick*, No. CGC-15-546378 (Cal. Super. Ct. June 16, 2015). See also Ellen Huet, *Uber Driver Is An Employee, Not Contractor, Rules California Labor Commission*, FORBES (June 17, 2015, 12:11 PM), <http://www.forbes.com/sites/ellenhuet/2015/06/17/uber-drivers-are-employees-not-contractors-rules-california-labor-commission/>.

marketplace. If TNC drivers are independent contractors, then based on traditional concepts of liability, rideshare companies like Uber cannot be held vicariously liable for the wrongful death and personal injuries of the six-year-old girl and her family. On the other hand, if TNC drivers are employees, then the companies may be held vicariously liable for the actions of their drivers, so long as the harms caused are within the scope of the drivers' employment.²⁴ Based on the tests put forth by the Supreme Court of California, most recently endorsed in a July 2014 opinion,²⁵ the evidence seems to suggest that TNC drivers are independent contractors. However, in light of the June 2015 California Labor Commission ruling, the Supreme Court of California may likely revisit this controversial issue. However, until this issue is resolved, the relationship between TNCs and their drivers are that of independent contractors.

This Note will put forth a framework proposing that even if TNC drivers are defined as independent contractors, TNCs should still be held vicariously liable for the actions of their drivers on a theory of vicarious liability. Traditional tests defining worker status can no longer stand in this new world of app-based, on-demand services. Through the lens of TNCs, this Note seeks to provide a framework, substantiated by both traditional and modern justifications of tort law, to distinguish when TNCs should be held vicariously liable for the harms caused by their drivers. In Part I, this Note will describe the background behind TNCs and tort law as it applies to taxicabs, limousines, and other closely related transportation services in California. Part II covers the liability imposed on taxicabs and charter-party passenger carriers, which provides a comparative framework for the proposed vicarious liability for TNCs. In Part III, this Note will focus on the impact of ridesharing on (1) the taxicab and limousine industry, (2) consumers and prices, and (3) insurance. Ultimately, Part IV puts forth a system of joint and several liability for TNCs to be held liable for the actions of their drivers, even if their drivers are independent contractors.

24. See RESTATEMENT (SECOND) OF TORTS § 409 (1965).

25. *Ayala v. Antelope Valley Newspapers, Inc.*, 327 P.3d 165, 170 (Cal. 2014). Because the holding in *Ayala* thus far has only permitted classwide assessment for a class action lawsuit by newspaper carriers against a newspaper company, which is a broader inquiry than finding worker status as a matter of law, *S. G. Borello & Sons, Inc. v. Dep't. of Indust. Relations*, 769 P.2d 399 (Cal. 1989), is more pertinent to understanding the nuances of defining worker status. See *infra* Part I.B.2.

I. TRANSPORTATION NETWORK COMPANIES AND TORT LAW IN CALIFORNIA

A. TRANSPORTATION NETWORK COMPANIES: WHAT ARE THEY AND HOW ARE THEY REGULATED?

Throughout the United States, municipal law regulates taxis. In California, cities and counties regulate taxicab services, and the California Public Utilities Commission (“CPUC”) recognizes and regulates charter-party passenger carrier services and passenger-stage companies.²⁶ The Public Utilities Code defines a charter-party passenger carrier as “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.”²⁷ Transportation is for compensation even if the transportation service is free, if the business receives a benefit by providing the transportation services.²⁸

As of September 19, 2013, the CPUC recognized rideshare companies as charter-party passenger carriers under the newly created category, Transportation Network Companies (TNCs).²⁹ The category applies “to companies that provide prearranged transportation services for compensation using an online-enabled application (app) or platform to connect passengers with drivers using their personal vehicles.”³⁰ Among the twenty-eight rules and regulations with which TNCs must comply, the companies must (1) obtain a license from the CPUC to operate in the state; (2) perform a criminal background check on each driver;³¹ (3) implement a

26. CAL. GOV’T CODE § 53075.5 (West 2012); CPUC 2013 Decision, *supra* note 11, at 7, 11. Passenger-stage companies provide scheduled service over fixed routes between fixed points; they include non-publicly owned buses and shuttles. Charter-party carriers provide prearranged services and keep a waybill in the vehicle throughout the transit, which must include, among other details, the name and address of the chartering party (the party who arranged the transit) and of at least one passenger (if not the chartering party), the time and date when the transit was arranged, the number of passengers, and the points of origin and destination. Charter-party carriers do not include taxis, but they include limousines and other prearranged for-hire motor vehicle transit services. TRANSP. LICENSE SECTION, CAL. PUB. UTILS. COMM’N, BASIC INFORMATION FOR PASSENGER CARRIERS AND APPLICANTS 5–7 (2014), http://www.cpuc.ca.gov/NR/rdonlyres/D5E763FD-5706-4F7D-9F95-1DE383C4F92C/0/BasicInformationforPassengerCarriersandApplicants_Nov2014_11172014lct.pdf.

27. CAL. PUB. UTIL. CODE § 5360 (West 2010); CPUC 2013 Decision, *supra* note 11, at 18.

28. CPUC 2013 Decision, *supra* note 11, at 19.

29. *Id.* at 2–3; CPUC Press Release, *supra* note 9, at 1.

30. CPUC Press Release, *supra* note 9, at 1.

31. *But see* Katy Steinmetz, *Prosecutors in San Francisco and Los Angeles Sue Uber, Settle with Lyft*, TIME (Dec. 9, 2014), <http://time.com/3626922/san-francisco-los-angeles-uber-lyft/> (noting that prosecutors claim that Uber and Lyft have violated the CPUC’s requirements by making “false and misleading statements” to consumers about the background checks they conduct for new drivers).

zero-tolerance policy on drugs and alcohol; (4) establish a training program for drivers and obtain each driver's driving record; (5) display "consistent trade dress" when providing ridesharing services; and (6) provide commercial liability insurance.³² A key feature of TNCs is that unlike taxicabs, which a passenger can hail on the street, TNC services must be prearranged. Also, unlike limousines and other charter-party carriers, which generally provide vehicles for their drivers, TNCs connect passengers to drivers who operate their personal vehicles; TNCs are not permitted to own and operate their own vehicles or fleets of vehicles.³³

The regulation explicitly states that it does not seek to force TNCs to designate whether drivers are employees or independent contractors.³⁴

B. TORT LAW IN CALIFORNIA: DUTIES OWED AND LIABILITY FOR BREACH

California law provides that "[e]veryone is responsible, not only for the result of his or her willful acts, but also for an injury occasioned to another by his or her want of ordinary care or skill in the management of his or her property or person."³⁵ Negligence requires proving (1) a legal duty to use care, (2) breach of that duty, (3) the breach was the factual cause of the harm, and (4) the harm was within the scope of liability.³⁶

Drivers of common carriers, which include TNCs, limousines, and taxicabs in California, owe a duty to exercise utmost care to their passengers.³⁷ Contrarily, individuals owe a duty to exercise reasonable care

32. CPUC 2013 Decision, *supra* note 11, at 29–35; CPUC Press Release, *supra* note 9, at 1. Specifically, the insurance requirements mandate that as of July 1, 2015, for Periods 2 and 3, the TNC must provide primary commercial liability insurance of a minimum of \$1 million, and for Period 1, the TNC must provide primary commercial liability insurance of a minimum of \$50,000 for death and personal injury per person, \$100,000 for death and personal injury per incident, and \$30,000 for property damage. The insurance requirements may be satisfied if either the driver maintains the TNC insurance as long as the TNC verifies that the driver's insurance covers the driver's use of a vehicle to provide TNC services or if the TNC maintains the insurance, or through a combination of those options. CPUC 2014 Decision, *supra* note 9, at 23–27.

33. CPUC 2013 Decision, *supra* note 11, at 67–68.

34. *Id.* at 63.

35. CAL. CIV. CODE § 1714(a) (West 2009).

36. RESTATEMENT (SECOND) OF TORTS § 281 (1965).

37. A common carrier under California law is

[O]ne who offers to the public to carry persons, property or messages, excepting only telegraphic messages The distinctive characteristic of a common carrier is that he undertakes to carry for all people indifferently; and hence he is regarded, in some respects, as a public servant. . . . Factors to consider in determining whether a defendant is a common carrier are whether: (1) the defendant maintains a regular place of business for the purpose of transportation; (2) the defendant advertises its services to the general public; and (3) the defendant charges standard fees for its services.

Van Maanen v. Youth with a Mission-Bishop, 852 F. Supp. 2d 1232, 1245–46 (E.D. Cal. 2012) (citations omitted) (internal quotation marks omitted), *aff'd sub nom.* Van Maanen v. Univ. of the

to others foreseeably endangered by their conduct, which is a lower standard than utmost care. The duty of utmost care applies “until the passenger reaches a place outside the sphere of any activity of the carrier which might reasonably constitute a mobile or animated hazard to the passenger.”³⁸ The driver must “use the utmost care and diligence for . . . safe carriage, must provide everything necessary for that purpose, and must exercise to that end a reasonable degree of skill.”³⁹ The duty of utmost care may extend to those *who intend* to become passengers if the driver “takes some action indicating acceptance of the passenger as a traveler.”⁴⁰ The duty to exercise utmost care does not extend to pedestrians or to drivers of other vehicles.⁴¹ Therefore, with regard to pedestrians and other drivers, common carriers owe a duty to exercise reasonable care.

1. Holding Employers Liable

In a tort cause of action, plaintiffs have the right to join as many defendants to the action as they so choose.⁴² If the harm to the plaintiffs is indivisible, each defendant is liable for the entire harm, and the plaintiffs can collect the entire amount from whichever defendant against whom they choose to bring to the action. Known as “joint and several liability,” this system shifts the risk of one defendant’s insolvency onto the remaining defendants.⁴³ It is “plaintiff-centered” in that the purpose is primarily focused on making the injured party whole, but it also allows the defendants to seek proportionate contribution or equitable indemnity from one another.⁴⁴ This leaves the risk of insolvency on the defendants, so a

Nations, Inc., 542 F. App’x 581 (9th Cir. 2013).

38. Orr v. Pac. Sw. Airlines, 257 Cal. Rptr. 18, 20–21 (Ct. App. 1989) (quoting Dayton v. Yellow Cab Co., 193 P.2d 959, 962 (Cal. Ct. App. 1948)).

39. Civ. § 2100 (West 2010). See also McGettigan v. Bay Area Rapid Transit Dist., 67 Cal. Rptr. 2d 516, 520 (Ct. App. 1997) (“While a carrier is not an insurer of its passenger’s safety, a carrier is required by statute [to] use the utmost care and diligence for safe carriage” (citations omitted)).

40. Orr, 257 Cal. Rptr. 2d at 21 (quoting Sanchez v. Pac. Auto Stages, 2 P.2d 845, 847 (Cal. Ct. App. 1931)).

41. See *supra* note 37 and accompanying text; Simon v. Walt Disney World Co., 8 Cal. Rptr. 3d 459, 464–65 (Ct. App. 2004) (holding that the common carrier obligations apply only if the person or entity acts as a common carrier within the meaning of the California Civil Code, and that the duty of utmost care does not apply when no common carrier relationship arises).

42. CAL. CIV. PROC. CODE § 379 (West 2004).

43. See Am. Motorcycle Ass’n v. Superior Court, 578 P.2d 899, 906–07 (Cal. 1978) (citing Li v. Yellow Cab Co., 532 P.2d 1226, 1243 (Cal. 1975)).

44. CAL. CIV. CODE § 1432 (West 2007); CIV. PROC. § 876 (West 2015) (“Where one or more persons are held liable solely for the tort of one of them or of another, as in the case of the liability of a master for the tort of his servant, they shall contribute a single pro rata share, as to which there may be indemnity between them.”). See generally Neil M. Levy & Edmund Ursin, *Tort Law in California: At the Crossroads*, 67 CALIF. L. REV. 497 (1979) (arguing that California tort liability, since the 1960s, has

company-defendant that had the ability to reduce activity levels and purchase insurance absorbs the costs instead of an injured plaintiff.

In case of a tort caused by an employee, the plaintiff may bring the claim against the employer by virtue of vicarious liability, against the employee, or against both parties.⁴⁵ An employer will be held vicariously liable for the physical harm caused by an act or omission of its employee acting within the scope of employment; however, in case of an independent contractor relationship, the employer will not be held liable unless an exception applies.⁴⁶ The plaintiff must seek out the individual contractor and sue him or her independently of the employer, leaving the risk of insolvency on the injured party. An “independent contractor” is one employed by another to perform work “who follows the employer’s ‘desires only as to the results of the work, and not as to the means whereby it is to be accomplished.’”⁴⁷ Thus, vicarious liability is a means of strict liability: it holds the employer liable for acts it did not commit, making it jointly and severally liable for the negligence of its employees.⁴⁸

Vicarious liability is justified based on various theories.⁴⁹ First, as a cost of doing business, also known as enterprise liability, the employer is in a better position to minimize the risks and activity levels of its employees by obtaining insurance and screening hires.⁵⁰ Next, as a means of loss

expanded and continues to do so by shifting losses to defendants who were previously exempt from liability).

45. See *Am. Motorcycle Ass'n*, 578 P.2d at 906–07 (citing *Yellow Cab Co.*, 532 P.2d at 1243).

46. See RESTATEMENT (SECOND) OF TORTS § 409 (1965). Exceptions described *infra* Part I.B.3.

47. *Millsap v. Fed. Express Corp.* 277 Cal. Rptr. 807, 811 (Ct. App. 1991) (quoting *White v. Uniroyal, Inc.*, 202 Cal. Rptr. 141, 155 (Ct. App. 1984) (finding a deliveryman to be an independent contractor based on the fact that he used his own car to deliver the goods; furnished his own gas, liability insurance, and repairs; collected lump sum compensation based on the distance traveled; and received notification of deliveries by calling the employer-company)).

48. Gary T. Schwartz, *The Hidden and Fundamental Issue of Employer Vicarious Liability*, 69 S. CAL. L. REV. 1739, 1742–43 (1996). See also ZERNE P. HANING ET AL., CALIFORNIA PRACTICE GUIDE: PERSONAL INJURY § 2:611 (2015).

49. See 3 WITKIN, SUMMARY OF CALIFORNIA LAW § 166, at 211 (10th ed. 2005) (“More recent decisions have summarized the modern theory by listing three reasons for applying the doctrine: (1) to prevent recurrence of the tortious conduct, (2) to give greater assurance of compensation for the victim, and (3) to ensure that the victim’s losses will be equitably borne by those who benefit from the enterprise that gave rise to the injury.”).

50. See *Johnston v. Long*, 181 P.2d 645, 651 (Cal. 1947) (“The principal justification for the application of the doctrine of *respondeat superior* in any case is the fact that the employer may spread the risk through insurance and carry the cost thereof as part of his costs of doing business.”); W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 69, at 500–01 (5th ed. 1984) (“What has emerged as the modern justification for vicarious liability is a rule of policy, a deliberate allocation of a risk. The losses caused by the torts of employees, which as a practical matter are sure to occur in the conduct of the employer’s enterprise, are placed upon that enterprise itself, as a required cost of doing business. They are placed upon the employer because, having engaged in an enterprise, which

spreading, if an employee injures a third party as a result of the risks the business undertakes, as between the employee and employer, the latter is in a better position to respond to damages and distribute loss—for example, through its cost of goods—to its consumers.⁵¹ Thus, loss is distributed through society at a smaller cost to a large number of individuals as opposed to a few.⁵²

These policies in turn require the law to differentiate between (1) employees whose acts or omissions may bring their employers to be held vicariously liable and (2) independent contractors whose acts or omissions cannot bring vicarious liability on their employer. The law as it exists today therefore requires defining workers' status to determine whether an employer may be held vicariously liable.

2. How Courts Define Worker Status

Vicarious liability applies only if an agency relationship exists, such as in an employer-employee relationship. The California Supreme Court follows the principal “right to control” test to define worker status, which focuses on “whether the person to whom service is rendered has the right to control the manner and means of accomplishing the result desired.”⁵³ A significant factor in determining the right to control “is whether the hirer can discharge the worker without cause, because ‘[t]he power of the principal to terminate the services of the agent gives him the means of controlling the agent’s activities.’”⁵⁴ In addition to the “right to control” test, courts consider a secondary multifactor or “economic realities” test, which requires looking at all of the factors intertwined.⁵⁵ Courts apply

will on the basis of all past experience involve harm to others through the torts of employees, and sought to profit by it, it is just that he, rather than the innocent injured plaintiff, should bear them; and because he is better able to absorb them, and to distribute them, through prices, rates or liability insurance, to the public, and so to shift them to society, to the community at large. Added to this is the makeweight argument that an employer who is held strictly liable is under the greatest incentive to be careful in the selection, instruction and supervision of his servants, and to take every precaution to see that the enterprise is conducted safely.”).

51. Marc C. Carter, Note, *Getting to the Deep Pocket: An Analysis of Employer and Third Party Liability Under Yellow Cab Co. v. Phillips*, 17 T. MARSHALL L. REV. 445, 446–47 (1992).

52. *Hinman v. Westinghouse Elec. Co.* 471 P.2d 988, 990 (Cal. 1970). See also HANING ET AL., *supra* note 48, § 2:612 (“The justification is in part based on ‘deep pockets’: As between employer and employee, it is felt that the employer is more likely to be able to respond in damages to an innocent third person injured by the employee’s tortious conduct (i.e., by working for the employer, the employee has increased the employer’s profits).”).

53. *Ayala v. Antelope Valley Newspapers, Inc.*, 327 P.3d 165, 171 (Cal. 2014) (quoting *S. G. Borello & Sons, Inc. v. Dep’t of Indus. Relations*, 769 P.2d 399, 404 (Cal. 1989)).

54. *Ayala*, 327 P.3d at 171 (quoting *Malloy v. Fong*, 232 P.2d 241, 249 (Cal. 1951)).

55. See *S. G. Borello*, 769 P.2d at 404.

these factors “with deference to the purposes of the protective legislation” at issue.⁵⁶ The factors include:

(a) [W]hether 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.⁵⁷

In *S. G. Borello & Sons, Inc. v. Department of Industrial Relations*, the Supreme Court found that agricultural laborers were employees. The agricultural laborers challenged their status as independent contractors under the California Workers’ Compensation Act.⁵⁸ Even though the grower company maintained no direct field supervision, allowed the laborers to set their own hours and furnish their own tools, and paid the laborers based on the results of their harvest, the Court nonetheless found that the company “retain[ed] all necessary control over a job which can be done only one way.”⁵⁹

The label the parties ascribe to their employment relationship is not dispositive “and will be ignored if their actual conduct establishes a different relationship.”⁶⁰ In *Estrada v. FedEx Ground Package System, Inc.*, an agreement between FedEx and its drivers defining the worker

56. *Id.* at 406.

57. *Id.* at 404. *See also* RESTATEMENT (SECOND) OF AGENCY § 220 (1958).

58. *S. G. Borello*, 769 P.2d at 403. Under the Act, the term “employee” is defined broadly because the Act’s purpose is

(1) [T]o ensure that the cost of industrial injuries will be part of the cost of goods rather than a burden on society, (2) to guarantee prompt, limited compensation for an employee’s work injuries, regardless of fault, as an inevitable cost of production, (3) to spur increased industrial safety, and (4) in return, to insulate the employer from tort liability for his employees’ injuries.

Id. at 406.

59. *Id.* at 401. *See also id.* at 407 (“[T]he workers made no capital investment beyond simple hand tools; they performed manual labor requiring no special skill; their remuneration did not depend on their initiative, judgment, or managerial abilities; their service, though seasonal, was rendered regularly and as an integrated part of the grower’s business; and they were dependent for subsistence on whatever farm work they could obtain.”).

60. *Ruiz v. Affinity Logistics Corp.*, 754 F.3d 1093, 1101 (9th Cir. 2014) (quoting *Estrada v. FedEx Ground Package Sys., Inc.*, 64 Cal. Rptr. 3d 327, 335 (Ct. App. 2007) (“[T]he label that parties place on their employment relationship ‘is not dispositive and will be ignored if their actual conduct establishes a different relationship.’”).

status relationship as an independent contractor was ignored because the court found that FedEx retained “control over every exquisite detail of the drivers’ performance, including the color of their socks and the style of their hair.”⁶¹ Additionally, the secondary factors including skill (drivers needed only the ability to drive), instrumentalities (drivers used specific scanners, forms, and delivery trucks provided by FedEx or FedEx-approved providers), payment (drivers were paid weekly based on a flat daily rate and number of stops made and packages handled, rather than only per delivery or hours worked), and the work as the regular business of FedEx all led the court to conclude that FedEx drivers were employees, not independent contractors.⁶² The Court of Appeals for the Ninth Circuit reaffirmed these factors in *Ruiz v. Affinity Logistics Corp.*, in which the court, applying California law, found furniture-delivery drivers were employees, as opposed to independent contractors.⁶³ Similar to *Estrada*, in *Ruiz*, the company retained substantial control over the drivers, and the secondary factors further demonstrated an employee relationship.⁶⁴

3. Exceptions: When Liability Is Imposed on Employers for Tortious Acts Caused by Independent Contractors

An employer is not liable for the physical harms caused by an independent contractor. This general rule is

[R]iddled with exceptions so that there is “only a small area in which the so-called general rule operates.” 6 Witkin, *Summary of California Law*

61. *Estrada*, 64 Cal. Rptr. 3d at 336.

62. *Id.* at 336–37.

63. *Ruiz*, 754 F.3d at 1096, 1105.

64. Principally, the court found that the company had the right to control the drivers based on a number of reasons: (1) drivers had to be at a warehouse at 6:00 or 6:30 a.m. everyday to pick up their delivery routes which were mapped out by the company; (2) drivers had to attend a meeting with their supervisor after receiving their routes to review “customer satisfaction survey scores”; (3) drivers wore uniforms and had to “abide by certain grooming requirements” (e.g., light blue shirts, shiny shoes, and no visible tattoos or piercings); (4) drivers reported to headquarters each delivery’s arrival and departure time; (5) supervisors would occasionally follow drivers along a part of the route to ensure the drivers complied with the uniform requirements and delivery techniques; (6) drivers were “encouraged” to leave the trucks and keys at the warehouse. *Id.* at 1097–99. As for the secondary factors, the court found that (1) the drivers did not engage in a distinct occupation or business because they were “strongly discouraged” from using the trucks other than for company work; (2) the work was under the principal’s direction based on the fact that a driver “simply had to have a driver’s license, sign a work agreement, and pass a physical examination and drug test”; (3) the drivers did not require substantial skill; (4) the company provided the instrumentalities “by encouraging or requiring that the drivers obtain the tools from them through paid leasing arrangements”; (5) “drivers were essentially paid by a regular rate of pay” because the drivers made approximately the same number of deliveries every day; (6) even though the parties believed their relationship was an independent contractor agreement, such beliefs are not dispositive; and (7) the company’s regular business consisted of home delivery services, so “[w]ithout drivers, Affinity could not be in the home delivery business.” *Id.* at 1104–05.

§ 1009 (1987). California law in this respect is in harmony with the *Restatement (Second) of Torts* § 409, comment b, which states that the rule “can now be said to be general only in the sense that it is applied when no good reason is found for departing from it.”⁶⁵

The reason for the many exceptions to the general rule is based on policy rationales.⁶⁶ These policies underlie the five following exceptions, for which courts hold employers liable for the tortious acts of independent contractors.⁶⁷

a. Personal Negligence of the Employer

An employer may be held liable for the actions of its independent contractor if such harms are based on the employer’s own negligence. Such liability may be based on the employer’s failure to exercise reasonable care in (1) directing the independent contractor’s work,⁶⁸ (2) selecting and hiring the independent contractor,⁶⁹ (3) inspecting the independent contractor’s work after it is done or during its progress to ensure the safety of others,⁷⁰ or (4) supervising the methods and equipment used in the work performed.⁷¹ The rationale behind these exceptions is that the employer has been personally negligent in directing, selecting, inspecting, or supervising the independent contractor, and therefore is responsible for the foreseeable harms the employer caused.

b. Inherently Dangerous Activities

If the employer recognizes that the work contracted for is likely to create a “peculiar risk” of physical harm to others unless special precautions are taken, and if the contract has not provided for precautions, the employer is liable for the contractor’s failure to take precautions.⁷² If the contract does provide for such precautions, the employer is still liable for the harm, but the contractor must indemnify the employer for the harms caused by the contractor’s failure to take precautions.⁷³

“Peculiar risk” means “a special, recognizable danger arising out of

65. *Sugimoto v. Exportadora de Sal, S.A. de C.V.*, 19 F.3d 1309, 1312 (9th Cir. 2014).

66. *See Privette v. Superior Court*, 854 P.2d 721, 724 (Cal. 1993).

67. *See KEETON, supra* note 50, § 71, at 510–16. *See generally* Alan O. Sykes, Note, *An Efficiency Analysis of Vicarious Liability Under the Law of Agency*, 91 *YALE L.J.* 168, 190–91 (1982) (discussing how efficiency analysis provides a basis for policy guidelines regarding vicarious liability).

68. *RESTATEMENT (SECOND) OF TORTS* § 410 (1965).

69. *Id.* § 411.

70. *Id.* § 412.

71. *Id.* §§ 414A, 415.

72. *Id.* §§ 413, 416, 416 cmt. c; *Privette v. Superior Court*, 854 P.2d 721, 728–29 (Cal. 1993).

73. *RESTATEMENT (SECOND) OF TORTS* § 416 cmt. c.

the work itself.”⁷⁴ This exception “is more commonly applied where the danger involved in the work calls for a number of precautions, or involves a number of possible hazards, as in the case of blasting, or painting carried on upon a scaffold above the highway.”⁷⁵ Therefore, given the ubiquity of driving, courts do not apply the exception to taxicabs or charter-party carriers.⁷⁶

c. Nondelegable Duties

If a statute or regulation imposes a duty to exercise a certain degree of care or provide safety precautions, an employer may not delegate the duty to an independent contractor. Thus, if the contractor fails to abide by the duty imposed by statute, the employer will be held liable.⁷⁷ Such nondelegable duties are often found in situations where the duty relates to maintaining land and structures, such as airplanes or construction sites, in a condition not unreasonably dangerous to others.⁷⁸

d. Retained Control

If an employer retains “too much” control over the independent contractor, it may be held liable.⁷⁹ “Too much” control exists when the employer retains “a right of supervision that the contractor is not entirely free to do the work in his own way,” and thus the relationship effectively shifts to mimic a principal-agency relationship.⁸⁰ Even if the relationship does not shift so far, supervisory control—where the employer directs the order in which the work should be performed—is sufficient to make the employer liable. This scenario is generally applicable in the case of a principal contractor and subcontractors, in which the principal superintends

74. *Id.* § 413 cmt. b; *Privette*, 854 P.2d at 726.

75. RESTATEMENT (SECOND) OF TORTS § 416 cmt. a.

76. *See id.* § 413 cmt. b (“The situation is one in which a risk is created which is not a normal, routine matter of customary human activity, such as driving an automobile, but is rather a special danger to those in the vicinity, arising out of the particular situation created, and calling for special precautions.”); *id.* § 416 cmt. d (“Thus if a contractor is employed to transport the employer’s goods by truck over the public highway, the employer is not liable for the contractor’s failure to inspect the brakes on his truck, or for his driving in excess of the speed limit, because the risk is in no way a peculiar one, and only an ordinary precaution is called for. But if the contractor is employed to transport giant logs weighing several tons over the highway, the employer will be subject to liability for the contractor’s failure to take special precautions to anchor them on his trucks.”).

77. *Id.* § 424.

78. *Id.* ch. 15, topic 2, intro. note. *See also* 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, 192–93 (2009).

79. RESTATEMENT (SECOND) OF TORTS § 414. *See also* Conn, *supra* note 78, at 194–95.

80. RESTATEMENT (SECOND) OF TORTS § 414 cmt. c.

the job performed by the subcontractors.⁸¹

e. Apparent Authority

If, viewing the relationship from a third party's perspective, an employer holds the contractor out as an employee and a third party reasonably relies on such a position, the employer is liable for the actions of the independent contractor.⁸² This exception "requires some act on the part of the principal that manifests the agency role, which causes the third party to reasonably believe that the person is an agent of the principal."⁸³ This exception only applies if the independent contractor and consumer enter into a contract. In an effort to skirt this potential for vicarious liability, an employer may take precautions to explain the relationship of the employer and the independent contractor to the third party and to receive confirmation that the third party understands the relationship.⁸⁴

II. TAXICAB AND CHARTER-PARTY PASSENGER CARRIER LIABILITY

Common carriers owe a duty of utmost care to their passengers but owe a duty of reasonable care to all others foreseeably endangered by their conduct.⁸⁵ For example, in *Ingham v. Luxor Cab Co.*, a taxicab driver dropped off a fifty-seven-year-old woman with brittle bones two blocks from a medical clinic rather than outside the clinic as she asked, and she subsequently fractured her hip walking to the clinic. The driver breached his duty of utmost care to her because the driver "made no good-faith effort" to discharge the passenger into a "relatively safe space," as the duty of utmost care requires, and the harm to the passenger was foreseeable in light of the passenger's "physical afflictions."⁸⁶

Because TNCs are common carriers, they similarly owe the duty of utmost care to their passengers and owe a duty of reasonable care with regard to pedestrians, other motorists, and vehicles on the road.⁸⁷ TNCs such as UberX and Lyft assert that they are not liable for damages caused by drivers.⁸⁸ Unlike the taxicab company in *Ingham*, a significant

81. *Id.* § 414 cmt. b.

82. CAL. CIV. CODE §§ 2317, 2334 (West 1985); RESTATEMENT (SECOND) OF TORTS § 429.

83. Conn, *supra* note 78, at 196–97.

84. *See id.* at 198.

85. *Ingham v. Luxor Cab Co.*, 113 Cal. Rptr. 2d 587, 590–91 (Ct. App. 2001).

86. *Id.* at 591–93.

87. TNCs also have a duty to collect and preserve information concerning accidents in which its drivers are involved. *See De Vera v. Long Beach Pub. Transp. Co.*, 225 Cal. Rptr. 789, 795 (Ct. App. 1986).

88. *See supra* notes 6, 20–23 and accompanying text.

difference between taxicab companies and TNCs is that the taxicab companies engage in hailed cab operations, and TNCs engage in prearranged transportation services.

On the other hand, similar to TNCs, charter-party passenger carriers operate on a prearranged basis. Case law is limited with regard to prearranged charter-party carriers. In *Rogoff v. Grabowski*, a couple prearranged, via oral contract, to rent from a limousine company a limousine and a driver for one night.⁸⁹ The driver drove the couple to a party, and was supposed to sit in the parked limousine outside the party while the couple was inside.⁹⁰ However, the driver drove away during the party in violation of the arrangement, taking the couple's belongings and leaving them with no ride at an early-morning hour when it was difficult to get alternative transportation.⁹¹ The court granted the couple leave to amend to state a cause of action against the limousine company for the breach of its duty to exercise utmost care.⁹² It is worth noting that the court did not focus on the liability flowing from the driver to the couple; rather, the court focused on the oral prearrangement between the couple and the limousine company, and the breach of duty owed based on the status of that company.⁹³ “[C]ommon carriers have a specific statutory duty to provide for the safe carriage of those specific individuals who have accepted the carrier's offer of transportation and have put their safety, and even their lives, in the carrier's hands.”⁹⁴ Similar to the limousine company in *Rogoff*, the party with whom the couple prearranged the service, TNCs are the party with whom a passenger prearranges transportation, and courts may find, contrary to the position TNCs take, that TNCs can be at fault in their drivers' failure to exercise utmost care.

III. IMPACT OF RIDESHARING ON TAXICABS AND CHARTER-PARTY CARRIERS, CONSUMERS AND PRICES, AND INSURANCE

“*How Uber Is Changing Night Life in Los Angeles.*”⁹⁵ “*Uber Valued*

89. *Rogoff v. Grabowski*, 246 Cal. Rptr. 185, 186–87 (Ct. App. 1988).

90. *Id.*

91. *Id.* at 187.

92. *Id.* at 187, 191.

93. *Id.* at 190–91.

94. *De Vera v. Long Beach Pub. Transp. Co.*, 225 Cal. Rptr. 789, 793 (Ct. App. 1986) (quoting *Lopez v. S. Cal. Rapid Transit Dist.*, 710 P.2d 907, 912 (Cal. 1985)) (finding that a bus company owed a duty to exercise utmost care to its passengers).

95. Melena Ryzik, *How Uber Is Changing Night Life in Los Angeles*, N.Y. TIMES (Oct. 31, 2014), <http://www.nytimes.com/2014/11/02/fashion/how-uber-is-changing-night-life-in-los-angeles.html>.

at More Than \$50 Billion.”⁹⁶ “*The Sharing Economy: Remove the Roadblocks.*”⁹⁷ These are just a sampling of headlines from commercial publications recognizing the impact rideshare companies have had and continue to have on the many facets of the transportation market.⁹⁸ Specifically, the impact is most prevalent on taxicabs and charter-party carriers, consumers and prices, and on insurance.

A. IMPACT ON TAXICABS AND CHARTER-PARTY PASSENGER CARRIERS

A notable impact of the rise of rideshare companies is most visible through the backlash of taxicab companies across the country. The threat of rideshare companies utilizing simple laws of supply and demand through competitive pricing on user-friendly platforms has caused taxicab companies and drivers to appeal to city and state legislatures, litigate against the rideshare companies (often as class action suits), and attempt to halt the new services.⁹⁹ In many parts of the country and the world, taxicabs and charter-party carriers remain the sole for-hire car transportation service, as legislatures have banned rideshare companies in large part thanks to the backlash of the old regime of taxicab companies.¹⁰⁰ In California, now that rideshare companies are recognized by the state as

96. Douglas MacMillan & Telis Demos, *Uber Valued at More Than \$50 Billion*, WALL ST. J. (July 31, 2015, 8:50 PM), <http://www.wsj.com/articles/uber-valued-at-more-than-50-billion-1438367457>.

97. *The Sharing Economy: Remove the Roadblocks*, ECONOMIST (Apr. 26, 2014), <http://www.economist.com/node/21601257>.

98. See Salvador Rodriguez, *Here's Why Investors Think Uber Is Worth More than Netflix and Twitter*, INT'L BUS. TIMES (Dec. 1, 2014, 4:49 PM), <http://www.ibtimes.com/heres-why-investors-think-uber-worth-more-netflix-twitter-1731523> (“Since launching in 2009, [Uber] has expanded its service to 230 cities in 50 countries and around the globe.”).

99. *The Sharing Economy: Boom and Backlash*, ECONOMIST (Apr. 26, 2014), <http://www.economist.com/node/21601254>. See also Sarah McBride & Jonathan Kaminsky, *California Regulators OK On-Demand Ridesharing, with Conditions*, INS. J. (Sept. 20, 2013), <http://www.insurancejournal.com/news/west/2013/09/20/305851.htm> (“While the services have become very popular with consumers in a number of cities around the world, existing taxi companies have complained they are cutting into their business. Taxi representatives complained the new rules [regarding CPUC regulation of TNCs] were unfair [and argued that the rules were too lax on TNCs].”).

100. E.g., *Uber Suspends Activities In Nevada*, EMERGING MKTS. ONLINE, 2014 WLNR 33995913 (Dec. 2, 2014) (“A [Nevada] District Court imposed a preliminary injunction banning the company's operations in the state, citing regulatory concerns.”). See *The Sharing Economy: Boom and Backlash*, *supra* note 99 (“Taxi drivers on both sides of the Atlantic have complained loudly (and, at least in Milan and Paris, violently) about the intruders who, they say, not only undercut their fares but are poorly vetted and underinsured. They have found ready listeners among officials and judges.”). But cf., Mark Frankena, *More Economic Freedom in the Music City*, 37 REGULATION 2, 2 (2014) (following Uber's introduction into Nashville, which pushed for deregulation of black car restrictions, Nashville's largest black car company, Metro Livery, “was supplying three times as many luxury sedan rides as before . . . There has been incredible change for the better in Nashville's vehicle-for-hire marketplace.”).

TNCs, the effects on the transportation market are more demonstrable than other markets in the country and the world.

According to Kate Toran, Interim Director of Taxis and Accessible Services for the San Francisco Municipal Transportation Agency, over the last two years, taxicab use has declined by 65%.¹⁰¹ While the cause of the decline has not been empirically measured and attributed to rideshare companies, the implication is not so farfetched. A study conducted by the University of California Transportation Center at Berkeley on rideshare companies' impact on urban transportation in San Francisco found "that ridesourcing serves a similar demand to taxis, although some characteristics of users and trips differ."¹⁰² The study found that ridesharing appeals "to generally younger, well-educated users looking for short wait times and fast point-to-point service, while avoiding the inconveniences of driving, like parking and having to drink and drive," thereby enhancing "mobility options for city dwellers, particularly in large, dense cities like San Francisco where parking is constrained and public transit incomplete."¹⁰³ Other cities in California similarly feel the impact. In Los Angeles, Yellow Cab, the city's largest taxi company, "has 15 percent fewer calls coming in, after four years of double-digit growth."¹⁰⁴

As taxicab companies recognize the new players in the for-hire transportation market, they have started to compete with TNCs. According to William Rouse, former president of the Taxicab Association and current General Manager of Yellow Cab of Los Angeles, the competition has caused taxicab companies "to peel back the onion, look at their product, and improve their product."¹⁰⁵ For example, the company now offers an E-Hail app and requires drivers to improve customer service skills. "It seems to be a direct response to the perception that, get in a taxi and you'll be met by a scowl, but ride Uber and the driver will ask what you want on the radio and hand you a chilled bottle of water."¹⁰⁶ Other taxicab companies in San Francisco have introduced E-Hail apps, and the San Francisco

101. Anna Bergren Miller, *Is Ridesharing Killing San Francisco's Taxi Industry?*, SHAREABLE (Sept. 23, 2014), <http://www.shareable.net/blog/is-ridesharing-killing-san-franciscos-taxi-industry>.

102. Rayle et al., *supra* note 19, at 1. In this study, the term "ridesourcing" is used instead of "ridesharing" in order to purposely convey the technology as "a platform used to 'source' rides from a driver pool." *Id.* at 2.

103. *Id.* at 17–18.

104. Ben Bergman, *Taxis vs. Ride-Share: How One Cabbie Views the Industry's Transformation*, 89.3 KPCC: S. CAL. PUB. RADIO (Nov. 14, 2013), <http://www.scpr.org/blogs/economy/2013/11/14/15185/can-yellow-cab-save-the-taxi-industry/>.

105. *Id.*

106. *Id.*

Municipal Transportation Authority has indicated that they may reduce regulatory hurdles for taxicabs and make taxicab driving more financially appealing to allow taxicabs to compete in the changing transportation market.¹⁰⁷ Thus, while TNCs may have displaced taxicabs and charter-party carriers, there is still room for improvement across the market to increase job opportunities, the for-hire transportation experience, and accessibility.

B. IMPACT ON CONSUMERS AND PRICES

The advantage rideshare companies have over taxicab companies and charter-party carriers resides in the rideshare companies' prominent brand and ease of use, which have grown exponentially in a short period of time.

As the firm expands the number of drivers it has in a market, the time it takes for a car to get to a customer shortens, which attracts more passengers, which in turn begets more drivers. As its business grows, drivers also have less downtime, meaning the firm can lower prices, which again attracts more users.¹⁰⁸

The competitive pricing that rideshare companies like UberX and Lyft provide has led taxicab companies to fight against them. While safety is a key issue for regulating public transportation, “[t]he opposition to Lyft and Uber[X] is coming not from customers but from taxi companies, which understand that GPS makes detailed knowledge of the streets redundant and fear cheaper competition.”¹⁰⁹

Ridesharing is empirically cheaper, even with surge pricing, in nearly every city across the country.¹¹⁰ Specifically, in Los Angeles, UberX and Lyft are cheaper than taxis over 95% of the time; in San Francisco, UberX is cheaper than a taxi 75% percent of the time and Lyft is cheaper 72% of the time.¹¹¹ With such accessible pricing, the University of California Transportation Center at Berkeley study found an “induced travel effect of people [in San Francisco] who took trips they otherwise would not

107. Jessica Kwong, *Report Says SF Taxis Suffering Greatly*, S.F. EXAMINER (Sept. 16, 2014), <http://www.sfexaminer.com/sanfrancisco/report-says-sf-taxis-suffering-greatly/Content?oid=2899618&mode>.

108. *Internet Monopolies: Everybody Wants to Rule the World*, ECONOMIST (Nov. 29, 2014), <http://www.economist.com/node/21635077>.

109. *The Sharing Economy: Remove the Roadblocks*, *supra* note 97.

110. Jonathan Goldman & Matthew Liu, *It Pays to Compare: Ride-Sharing by the Numbers*, WHAT'S THE FARE (Oct. 9, 2014), <http://blog.whatsthefare.com/2014/10/it-pays-to-compare.html>. See also Geoffrey A. Fowler, *Testing UberX, Lyft and Sidecar Against a Cab in Six Cities*, WALL ST. J. (Mar. 12, 2014, 12:11 AM), <http://www.wsj.com/articles/SB10001424052702304250204579433113467536876>.

111. Goldman & Liu, *supra* note 110.

have.”¹¹² Similarly, Los Angeles, “one of America’s most auto-centric places,” is a sprawling city in which a night out “used to involve negotiating parking, beating traffic and picking a designated driver.”¹¹³ As the *New York Times* describes, “[o]nce, only the privileged few, the studio bosses and pampered starlets, could afford to have a chauffeur and a waiting car to transport them around sprawling Los Angeles. Now anyone with a credit card can enjoy that freedom.”¹¹⁴

In addition to cheaper prices, the convenience factor is notable. As one *Wall Street Journal* article compares it,

Rather than hailing a cab or calling a taxi dispatcher, you launch an app. Your phone tells the service where you are and shows you the nearest potential rides on a map with little car icons crawling around the screen like gerbils. As your ride comes to pick you up, you can watch its avatar scamper across the map—offering a level of assurance and ETA I’ve never had from traditional taxi companies. With all the services, you use a credit card through the app—no swiping or fumbling for cash.¹¹⁵

The University of California Transportation Center at Berkeley study’s findings support the *Wall Street Journal* writer’s findings: for passengers who took an UberX or Lyft instead of a taxicab, the “key” factor for their choice was convenience.¹¹⁶

C. IMPACT ON INSURANCE

The advent of TNC services has created new complications for insurance. When driving a vehicle for UberX or Lyft, if a driver’s personal auto insurance policy does not cover commercial use of the vehicle, an accident in that vehicle will not be covered by insurance because driving for hire is generally considered commercial use and is specifically excluded.¹¹⁷ With California’s recognition of TNCs, state and municipal governments, insurance companies, and TNCs have worked together to form a new model to insure such accidents.¹¹⁸ As of July 1, 2015, the

112. Rayle et al., *supra* note 19, at 17.

113. Ryzik, *supra* note 95.

114. *Id.*

115. Fowler, *supra* note 110.

116. Rayle et al., *supra* note 19, at 13. Of 313 respondents, the top reasons for using a rideshare company included “ease of payment” (35%), “short wait time” (30%), “fastest way to get there” (30%), “easy to call car” (21%), “didn’t want to drink after driving” (21%), and “don’t need to park” (18%). *Id.* at 15.

117. See McBride & Kaminsky, *supra* note 99 (discussing the commercial liability insurance coverage requirement for TNCs); Amy O’Connor, *Getting a Grip on Ridesharing Coverage*, *INS. J.* (July 17, 2014), <http://www.insurancejournal.com/news/national/2014/07/17/334665.htm> (same).

118. See McBride & Kaminsky, *supra* note 99.

CPUC requires TNCs to provide primary commercial insurance for drivers, although drivers may maintain their own insurance “if the TNC verifies that the driver’s TNC insurance covers the driver’s use of a vehicle for TNC services.”¹¹⁹ TNCs such as Lyft and UberX are hostile to the new requirement that TNCs must provide primary commercial insurance when the TNC app is open on a driver’s device while the driver is waiting for a match (Period 1).¹²⁰

Nonetheless, this new responsibility forced upon the TNCs—that either the drivers have their own commercial liability insurance or the TNCs cover the drivers under the TNCs’ insurance policies—could be one more nail in their coffin that may allow a court or legislature to shift the relationship from that of an independent contractor to that of an employer-employee relationship. This requirement could in turn lead to liability if the TNC chooses to provide its drivers with insurance. For example, in the multifactor economic realities test, courts may find that providing insurance is exemplary of a principal providing the instrumentality for its workers and that the work is part of the regular business of the principal.¹²¹

Coupled with this new insurance market is the reality that all TNC drivers are not covered by their personal auto insurance policies, and are taking a risk in believing they are covered by the TNCs’ policies. This new regulatory requirement could force a repricing of TNCs’ costs as well as of auto insurance costs for all drivers. Increased insurance for TNCs’ independent contractors may lead to increased payments by TNCs and reduced profits for the TNCs. On the other hand, this ensures that when accidents occur, injured parties will be compensated for damages caused by TNCs and their drivers. Additionally, to the extent that TNCs are held to that of an employer-employee relationship with their drivers, TNCs’ costs could exponentially increase as a result of various mandated benefits, workers compensation, and potential Equal Employment Opportunity Commission claims and employer-employee lawsuits.

119. CPUC 2014 Decision, *supra*, note 9, at 14.

120. *See id.* at 24–25 (“For Period 1, TNCs shall provide primary insurance in the amount of at least fifty thousand dollars (\$50,000) for death and personal injury per person, one hundred thousand dollars (\$100,000) for death and personal injury per incident, and thirty thousand dollars (\$30,000) for property damage. TNCs may satisfy this requirement through: (a) TNC insurance maintained by the driver; (b) TNC insurance maintained by the TNC that provides coverage if a driver does not maintain the required TNC insurance, or if the driver’s TNC insurance ceases to exist or is cancelled; or (c) a combination of (a) and (b).”).

121. *See supra* notes 55–64 and accompanying text.

IV. TNCs SHOULD BE HELD VICARIOUSLY LIABLE FOR THE TORTIOUS ACTS CAUSED BY THEIR DRIVERS

Employers are vicariously liable for the physical harms caused by their employees acting within the scope of employment. However, if an independent contractor engages in the same conduct, an employer will not be held liable. The rationale for this general rule of non-liability is that since the employer does not have power of control over the work done by the independent contractor, the manner of work is “regarded as the contractor’s own enterprise, and he, rather than the employer, is the proper party to be charged with the responsibility of preventing the risk, and bearing and distributing it.”¹²² Granted, the application of this general rule is widely regarded as unpredictable, due to the aforementioned exceptions courts have carved out based on policy considerations.¹²³ However, based on California’s formula for defining worker status, TNC drivers fit most plausibly as independent contractors and do not seem to qualify for an exception.¹²⁴ The argument that TNCs exercise control over their drivers is plausible; however, even if the foregoing demonstrates some control, it is insufficient to pass the right to control test mandated by courts.¹²⁵

A. WORKER STATUS OF TNC DRIVERS

TNCs hold their employees out as independent contractors. In both UberX and Lyft’s “Terms and Conditions” provided to their consumers,

122. RESTATEMENT (SECOND) OF TORTS § 409 cmt. b (1965).

123. See *Privette v. Superior Court*, 854 P.2d 721, 724 (Cal. 1993) (“The rule is now primarily important as a preamble to the catalog of its exceptions.”).

124. While the June 2015 opinion by the California Labor Commissioner held that an UberX driver is an employee rather than an independent contractor for purposes of the Workers’ Compensation Act, see *supra* notes 22–25 and accompanying text, the finding can be reconciled with this Note’s postulation that TNC drivers are independent contractors under California’s current formula for defining worker status. First, when challenging worker status under the Workers’ Compensation Act, courts presume an employment relationship exists. “The party seeking to avoid liability has the burden of proving that persons whose services he has retained are independent contractors rather than employees.” *Berwick v. Uber Techs., Inc.*, No. 11-46739 EK, slip op. at 8 (Cal. Labor Comm’r June 3, 2015). Second, the Labor Commissioner’s policy reasons for finding employee status, *id.*, mirror the policy reasons for why TNCs should bear responsibility for the actions of their drivers even if drivers are independent contractors, see *supra* notes 49–52 and accompanying text.

125. See *supra* text accompanying note 25. But see *Berwick*, No. 11-46739 EK, slip op. at 9 (The California Labor Commissioner held that a driver was an employee by finding that Uber was “involved in every aspect of the operation,” given that (1) Uber requires drivers to provide them with “their personal banking and residence information, as well as their Social Security Number”; (2) “[d]rivers cannot use [Uber’s] application unless they pass [Uber’s] background and DMV checks”; (3) “drivers must register their cars” with Uber and keep them in specific working condition; (4) only “approved and registered drivers are allowed to use [Uber’s] intellectual property”; and (5) “passengers pay [Uber] a set price for the trip, and [Uber], in turn, pay[s] their drivers a non-negotiable service fee.”).

and in the employment contract provided to drivers, the TNCs explicitly state that their drivers are independent contractors.¹²⁶ Still, such a clause or label is not dispositive; the definition hangs on the actual conduct of the parties.¹²⁷

1. Right to Control

The termination policies of TNCs such as UberX and Lyft allow the companies to discharge drivers with or without cause, which generally indicates the right to control.¹²⁸ TNCs' policies state that drivers may be terminated without cause.¹²⁹ As of the publication date, a class action has been filed by and on behalf of Uber drivers, claiming that Uber misclassifies its drivers as independent contractors.¹³⁰ Recognizing the significance of termination policies, the district court compelled Uber to produce documents regarding deactivated California drivers.¹³¹ Additionally, the district court compelled Uber to produce "[d]ocuments showing driver expectations, rules, requirements, and policies used in California" because they "are directly relevant to the question of whether Plaintiffs and the putative class are employees or independent contractors."¹³² Although the district court has since certified the class based on the evidence gathered, the issue of worker classification has yet to be established,¹³³ and evidence relating to termination policies is the only compelling evidence that indicates TNCs' right to control.

Other than the ability to terminate at will, TNCs do not exhibit the right to control that courts have demanded to find employer-employee status. Distinct from *Estrada v. FedEx Ground Package System, Inc.* and *Ruiz v. Affinity Logistics Corp.*, in which the defendant corporations controlled drivers' dress and hair styles, their pay rates and routes, their

126. *Uber Terms*, *supra* note 14; *Lyft Terms*, *supra* note 14. *E.g.*, RASIER AGREEMENT, *supra* note 15, at 3.

127. *See Estrada v. FedEx Ground Package Sys., Inc.*, 64 Cal. Rptr. 3d 327, 335 (Ct. App. 2007).

128. *See Ayala v. Antelope Valley Newspapers, Inc.*, 327 P.3d 165, 171 (Cal. 2014) (quoting *Malloy v. Fong*, 232 P.2d 241, 249 (Cal. 1951)) ("Perhaps the strongest evidence of the right to control is whether the hirer can discharge the worker without cause, because '[t]he power of the principal to terminate the services of the agent gives him the means of controlling the agent's activities'").

129. *See, e.g.*, RASIER AGREEMENT, *supra* note 15, at 9–10.

130. Second Amended Class Action Complaint and Jury Demand at 5, *O'Connor v. Uber Techs., Inc.*, No. CV 13-3826-EMC, 2014 WL 10805308 (N.D. Cal. Nov. 12, 2015).

131. Order on Joint Discovery Letter, *O'Connor v. Uber Techs., Inc.*, No. C-13-03826 (EMC) DMR, 2015 U.S. Dist. LEXIS 157275, at *16 (N.D. Cal. Nov. 6, 2014).

132. *Id.* at *14.

133. *See* Amended Order Granting in Part and Denying in Part Plaintiffs' Motion for Class Certification, *O'Connor v. Uber Techs., Inc.*, No. C-13-3826 EMC, 2015 U.S. Dist. LEXIS 116482, at *111–12, *134–35 (N.D. Cal. Sept. 1, 2015).

trucks and electronic devices, and the meetings drivers attended, here, TNCs do not assert similar degrees of control.¹³⁴ Although TNCs require that their drivers adhere certain distinguishing features to their car (UberX drivers must adhere a trademarked “U” to the front windshield; Lyft drivers must adhere a pink mustache to the car), this is generally the only unifying feature of the drivers. The CPUC requires TNCs to screen and monitor their drivers by (1) conducting an initial criminal background check, (2) monitoring their driving records and refusing to permit drivers to operate their vehicles for service if they have been convicted of certain driving violations, (3) allowing drivers and passengers to rate each other, (4) instituting a zero tolerance policy, (5) implementing a driver training program, and (6) inspecting the vehicles.¹³⁵ Drivers may work for however long and at whatever time they choose. They are not required to wear anything in particular, nor are they precluded from wearing anything. Drivers may take whichever route the passenger chooses; while the apps provide the opportunity for the driver to use its integrated map function, passengers may choose the route, or the driver may choose the route. Drivers must provide their own cars. They may use their own iPhone or Android device, or lease one from the TNC. Drivers earn fees for each ride, receiving payment on a fixed schedule.¹³⁶ Such facts generally demonstrate little control.

Based on the sheer number of alternative factors suggesting a lack of control, the right to control analysis leans toward independent contractor worker status. Still, secondary indicia of the nature of the relationship are relevant to define drivers’ worker status.

2. Secondary Factors

a. Distinct Occupation or Business

Although both UberX and Lyft’s contracts with their drivers provide that their drivers are independent “transportation companies” and that UberX and Lyft are not transportation carriers and do not provide transportation services,¹³⁷ such provisions contradict the CPUC’s definition of TNCs and TNC drivers, which states that TNCs provide “transportation services.”¹³⁸ As was the case of the companies in *Estrada* and *Ruiz*, UberX and Lyft seek to emphasize independent contractor status to disclaim

134. See *supra* notes 61–64 and accompanying text.

135. CPUC 2013 Decision, *supra* note 11, at 26–29, 31.

136. See, e.g., RASIER AGREEMENT, *supra* note 15, at 2–7.

137. Browning, *supra* note 8, at 84.

138. CPUC 2013 Decision, *supra* note 11, at 2.

potential vicarious liability. Rather, UberX and Lyft are much like the corporations in *Estrada* and *Ruiz*. The corporations in *Estrada* and *Ruiz* included similar terms in the drivers' contracts to emphasize independent contractor status, but the courts noted that the corporations did not treat the drivers as distinct businesses and as such, looked past these terms.¹³⁹

b. Work Done Under Principal's Direction or by Specialist Without Supervision

Similar to *Estrada* and *Ruiz*, in which the courts found that drivers were not specialists,¹⁴⁰ here, TNC drivers are not specialists. The only skill required is the ability to drive. Similar to *Ruiz*, in which the employer "did not require special driving licenses or even any work experience,"¹⁴¹ here, TNCs do not require any special driving license or any work experience. The CPUC merely requires that TNCs "establish a driver training program to ensure that all drivers are safely operating the vehicle prior to the driver being able to offer service."¹⁴² Thus, TNC drivers are not specialists working without supervision.

Different from *Estrada* and *Ruiz*, in which the courts found that the principals closely supervised their drivers through methods such as creating drivers' routes and mandating meeting times,¹⁴³ here, TNC drivers' work is not under their principals' direction. TNCs only require that their drivers pass an *initial* driver training program.¹⁴⁴ TNCs are required to maintain a zero-tolerance intoxication policy.¹⁴⁵ TNC drivers' work consists of picking up, driving, and dropping off passengers who request a ride through the TNC app. A driver may accept or decline the request for transportation; if the driver rejects, the request is sent to another driver,

139. See *Ruiz v. Affinity Logistics Corp.*, 754 F.3d 1093, 1096, 1103–04 (9th Cir. 2014); *Estrada v. FedEx Ground Package Sys., Inc.*, 64 Cal. Rptr. 3d 327, 334–37 (Ct. App. 2007).

140. See *Ruiz*, 754 F.3d at 1104 (finding that drivers and deliverymen were not specialists given the employer's minimal requirements "to have a driver's license, sign a work agreement, and pass a physical examination and drug test"); *Estrada*, 64 Cal. Rptr. 3d at 335–37 (finding that drivers were not specialists given employer's sole requirement of ability to drive).

141. *Ruiz*, 754 F.3d at 1104.

142. CPUC 2013 Decision, *supra* note 11, at 27.

143. See *Ruiz*, 754 F.3d at 1101–03; *Estrada*, 64 Cal. Rptr. 3d at 335–37.

144. See Kristen V. Brown, *How a Few Drivers Are Turning Uber's Lagging Driver Training into a Cottage Industry*, FUSION (July 1, 2015, 2:56 PM), <http://fusion.net/story/159993/how-a-few-drivers-are-turning-ubers-lagging-driver-training-into-a-cottage-industry/>; Ellen Huet, *Uber Skimps On Driver Training, Then Charges Drivers \$65 for Basic Driver Skills Course*, FORBES (Oct. 8, 2014, 9:00 AM), <http://www.forbes.com/sites/ellenhuet/2014/10/08/uber-skimps-on-driver-training-then-charges-drivers-65-for-basic-driver-skills-course/>.

145. CPUC 2013 Decision, *supra* note 11, at 26–27.

who may also accept or reject.¹⁴⁶ Supervision is left up to a rating system, in which the driver and passenger rate each other after completion of the ride.¹⁴⁷ Only if a driver's rating drops below a certain threshold will the TNC reach out to the driver.¹⁴⁸ These minimal directions the TNCs give to their drivers suggest an independent contractor relationship.

c. Skill Required

Since the enactment of section 5381 of the California Public Utilities Code,¹⁴⁹ which authorized the CPUC to regulate charter passenger carriers, and the CPUC's decision in 2013 to adopt certain rules and regulations for TNCs,¹⁵⁰ California law now requires that drivers "possess a valid California driver's license, be at least 21 years of age, and . . . provide at least one year of driving history before providing TNC services."¹⁵¹ Furthermore, TNCs must annually obtain each driver's driving record before the driver begins working for the TNC and annually thereafter. Last, "[e]ach TNC is required to conduct a criminal background check for each driver prior to that applicant becoming a TNC driver."¹⁵² Similar to *Ruiz* and *Estrada*, in which the courts found that driving an automobile does not require substantial skill,¹⁵³ here, driving a car for-hire does not require substantial skill, which is indicative of employee status.

d. Supply of Instrumentalities, Tools, and Place of Work

The main tool required for driving for a TNC is a personal vehicle with four doors in "good operating" or "excellent condition," which the driver must supply.¹⁵⁴ Additionally, a mobile device running iOS or Android is required. Drivers may use their own device or lease one from the TNC.¹⁵⁵ While TNCs must provide adequate commercial insurance subject to the CPUC's requirements, this is not necessarily a tool, but rather

146. See, e.g., RASIER AGREEMENT, *supra* note 15, at 1–2.

147. See, e.g., *id.* at 5.

148. See, e.g., *id.* The TNC has the option at that point to direct the driver by limiting the driver's rights to accept rides, suspend his or her ability to drive for the company, or even terminate the driver at will. The threshold for termination is generally around 4.5 or 4.6 (on a rating scale from one to five). See Ellen Huet, *How Uber's Shady Firing Policy Could Backfire On The Company*, FORBES (Oct. 30, 2014, 10:00 AM), <http://www.forbes.com/sites/ellenhuet/2014/10/30/uber-driver-firing-policy/>.

149. CAL. PUB. UTIL. CODE § 5381 (West 2013).

150. CPUC 2013 Decision, *supra* note 11.

151. *Id.* at 27.

152. *Id.* at 40.

153. *Ruiz v. Affinity Logistics Corp.*, 754 F.3d 1093, 1104 (9th Cir. 2014); *Estrada v. FedEx Ground Package Sys., Inc.*, 64 Cal. Rptr. 3d 327, 335–37 (Ct. App. 2007).

154. E.g., RASIER AGREEMENT, *supra* note 15, at 4; *Vehicle Criteria*, UBER: UBER OHIO, <https://drive.uber.com/oh/vehicles> (last visited Jan. 14, 2016).

155. See *id.* at 7.

can be seen as a mechanism to control costs. Given that the driver generally supplies the tools and place to perform work, this factor also indicates independent contractor status.¹⁵⁶

e. Length of Time for Performance of Services

The relationship has no contemplated end, and a driver may provide services everyday of the week, once a week, once a month, or fewer times. Both UberX and Lyft's contracts with their drivers state that they may be terminated with or without cause.¹⁵⁷ This ability to fire at will is more demonstrative of employee status because it indicates control.¹⁵⁸ Similarly, the fact that the parties have "no contemplated end" indicates an employer-employee relationship.

f. Method of Payment

TNC drivers earn fees with each ride and are paid on a fixed schedule.¹⁵⁹ Thus, unlike the drivers in *Estrada* and *Ruiz*, in which the drivers were paid a relatively regular salary,¹⁶⁰ TNC drivers are paid per trip, as a function of distance, time, and speed.

Uber's terms state that it "reserves the right to establish, remove and/or revise Charges."¹⁶¹ Similarly, Lyft's terms state that it "reserves the right to determine and modify pricing."¹⁶² Such clauses indicate that the payment is contingent on the ride, based on a number of factors including distance, time, speed, and supply/demand (also known as "surge pricing"). Thus, because the amount of pay can vary—unlike a salaried employee's pay—this variable method of payment indicates independent contractor status.

g. Work Part of Principal's Regular Business

Significantly, the core of TNCs' regular business is providing

156. In 2015, the California Labor Commissioner found that Uber "controls the tools drivers use" because "drivers must register their cars with [Uber], and none of their cars can be more than ten years old." *Berwick v. Uber Techs., Inc.*, No. 11-46739 EK, slip op. at 9 (Cal. Labor Comm'r June 3, 2015). Yet the California Labor Commissioner mistakes control with baseline requirements.

157. *E.g.*, RASIER AGREEMENT, *supra* note 15, at 9–10.

158. *See* Huet, *supra* note 150 ("[T]he companies should always have some control over who drives on their platform, especially when it comes to safety concerns. But when it comes to dealing with disgruntled or underperforming drivers, simply firing them—especially without clear reasons why—could land the companies in trouble in court in the next few years.").

159. *See, e.g.*, RASIER AGREEMENT, *supra* note 15, at 4–5.

160. *See* *Ruiz v. Affinity Logistics Corp.*, 754 F.3d 1093, 1104–05 (9th Cir. 2014); *Estrada v. FedEx Ground Package Sys., Inc.*, 64 Cal. Rptr. 3d 327, 333 (Ct. App. 2007).

161. *Uber Terms*, *supra* note 14.

162. *Lyft Terms*, *supra* note 14.

transportation for-hire. Without drivers, UberX and Lyft could not be in the rideshare business. The California Labor Commissioner similarly found this factor to be significant: “Plaintiff’s [i.e., the driver’s] work was integral to Defendants’ [i.e., Uber’s] business. Defendants are in business to provide transportation services to passengers. Plaintiff did the actual transporting of those passengers. Without drivers such as Plaintiff, Defendants’ business would not exist.”¹⁶³ Nonetheless, UberX and Lyft attempt to skirt such a finding by calling themselves information service providers.¹⁶⁴ The CPUC now labels rideshare companies as TNCs and defines a TNC as “an organization whether a corporation, partnership, sole proprietor, or other form, operating in California that provides prearranged transportation services for compensation using an online-enabled application (app) or platform to connect passengers with drivers using their personal vehicles.”¹⁶⁵ Thus, the definition makes clear that TNC drivers’ work—driving their cars to transport passengers—is essential to the principal’s regular business, indicating employee status.

h. Parties’ Belief

Based on the contracts signed by the parties, it appears that the parties understand their relationship to be an independent contractor agreement. However, as explained by the California Court of Appeal and the U.S. Court of Appeals for the Ninth Circuit, the label the parties ascribe to their relationship will be ignored if the parties’ actual conduct establishes a different one.¹⁶⁶

In *Estrada v. FedEx Ground Package System, Inc.*, an agreement between FedEx and its drivers defining the employment relationship as an independent contractor was ignored because the court found that FedEx retained “control over every exquisite detail of the drivers’ performance, including the color of their socks and the style of their hair.”¹⁶⁷

* * *

Because TNCs seem to lack the right to control the details of their drivers’ work, and because the totality of the secondary factors weigh in favor of independent contractor status, under California’s common law test,

163. *Berwick v. Uber Techs., Inc.*, No. 11-46739 EK, slip op. at 8 (Cal. Labor Comm’r June 3, 2015).

164. See *Uber Terms*, *supra* note 14; *Lyft Terms*, *supra* note 14.

165. CPUC 2013 Decision, *supra* note 11, at 2. See also CAL. PUB. UTIL. CODE § 5431 (West Supp. 2015); CPUC Press Release, *supra* note 9, at 1.

166. See *supra* note 60 and accompanying text.

167. *Estrada v. FedEx Ground Package Sys., Inc.*, 64 Cal. Rptr. 3d 327, 336 (Ct. App. 2007).

TNC drivers appear to be independent contractors rather than employees. Indeed, some secondary factors—special skill is not required and the work is the heart of the principal’s regular business—may indicate employee status. It is more likely, however, that TNC drivers are independent contractors. Specifically, because TNCs do not create drivers’ work schedules or driving routes or mandate any dress code, the primary right-to-control test suggests that TNCs exhibit little control over their drivers. Additionally, many secondary factors—drivers supply their own cars, drivers can work as often or infrequently as they choose, and payment is contingent on each transport provided—indicate independent contractor status. Therefore, the general rule absolving employers of liability for the harms caused by independent contractors would remain to absolve TNCs from liability for the harms their drivers cause to others. Moreover, the exceptions to the general rule—inherently dangerous activities, nondelegable duties, retained control, and apparent authority—do not apply to the TNC model. Courts have held that driving is not an inherently dangerous activity. Nondelegable duties generally apply to situations relating to maintaining land and structures. Retained control is generally applicable to a subcontractor relationship, and not between a contractor and employer. Last, apparent authority fails to apply because TNCs include in their contracts with drivers and consumers a provision stating that drivers are independent contractors, which will bar courts from finding that a principal has acted to cause a third party to reasonably believe that the driver is an employee.¹⁶⁸ Granted, in any particular case, courts could find that a TNC has been personally negligent in directing, selecting, inspecting, and supervising the independent contractor; however, this exception does not apply to the TNC model as a whole.

The current rule and its exceptions fail to take into account the tremendous changes that corporations such as Uber and Lyft have brought to the transportation market. The rules must adapt to account for TNCs in California.

**B. EVEN IF TNC DRIVERS ARE INDEPENDENT CONTRACTORS,
TNCs SHOULD BE HELD VICARIOUSLY LIABLE FOR THE
TORTIOUS ACTS OF THEIR DRIVERS**

TNC drivers owe a duty to exercise utmost care with respect to their passengers and to exercise reasonable care with respect to pedestrians and

168. See *supra* Part I.B.3.e.

other drivers foreseeably endangered by their conduct.¹⁶⁹ Breach of these duties by a driver will occur presumably when the driver is behind the wheel or helping a passenger into or out of the vehicle. TNCs' business models depend on providing transportation services. While companies such as Uber and Lyft argue that they are merely matching consumers with drivers, the reality is that TNCs have created the risk of harm by constructing these app-based rideshare services. It is foreseeable that by putting these drivers on the road, the risk of accidents increases.

1. Policy Considerations Support Vicarious Liability

The five exceptions to the general rule, outlined above,¹⁷⁰ that an employer is not liable for the harms caused by an independent contractor, fail to take into account factors unique to the extensive rise of rideshare companies.

a. TNCs' Financial Impact Supports Imposing Vicarious Liability

TNCs have created an enormous new business that has helped to lower prices, increase job opportunities, and fundamentally change the ride-for-hire transportation market. Uber is valued at more than \$50 billion.¹⁷¹ Lyft is valued at about \$2.5 billion.¹⁷² Risks of a car accident inhere in providing transportation services. Historically, California has imposed regulations on ride-for-hire companies due to health and safety concerns.¹⁷³ For example, regulations in the early twentieth century on jitney transportation services—early examples of ride-for-hire services—were enacted based on the risks that arose from increased traffic on public roads due to the emergence of jitneys.¹⁷⁴ The rules imposed requirements on drivers, transportation providers, and insurers to internalize the costs of increased risk of liability resulting from the jitney services.¹⁷⁵ Similarly, TNCs have emerged in the twenty-first century as the new business model

169. See *supra* notes 37–41 and accompanying text.

170. See discussion *supra* Part I.B.3 and pp. 129–30.

171. MacMillan & Demos, *supra* note 96. See also Beth Jinks, *Icahn Says Lyft Worth More than \$2 Billion Based on Uber Value*, BLOOMBERG (May 19, 2015, 11:12 AM), <http://www.bloomberg.com/news/articles/2015-05-19/icahn-says-lyft-worth-more-than-2-billion-based-on-uber-value>.

172. Jinks, *supra* note 171; Arjun Kharpal, *Taxi Wars Heat Up: Uber Rival Lyft Valued at \$2.5B*, CNBC (Mar. 12, 2015, 5:06 AM), <http://www.cnbc.com/2015/03/12/uber-rival-lyft-valued-at-25b-after-rakuten-investment.html>.

173. See Ravi Mahesh, Note, *From Jitneys to App-Based Ridesharing: California's "Third Way" Approach to Ride-For-Hire Regulation*, 88 S. CAL. L. REV. 965, 968 (2015) (comparing justifications for and the success of regulations on the early twentieth century jitneys and rideshare companies).

174. *Id.* at 990.

175. See *id.*

for transportation providers, amassing a large market share while squeezing taxicabs out of the ride-for-hire market.¹⁷⁶ The CPUC has recognized the importance of regulating app-based rideshare companies by creating the TNC category. Yet the regulations fail to account for the important distinctions between an employee and independent contractor.

From March 2012 to July 2014, San Francisco witnessed a 65% decline in taxicab use.¹⁷⁷ Los Angeles's largest taxicab company experienced 15% fewer calls in 2013 than it did in 2012.¹⁷⁸ Ridesharing is cheaper than a taxicab. These lower prices have attracted consumers to take more trips they would not have otherwise taken.¹⁷⁹ Ridesharing apps make it easier for consumers to access transportation than did hailing taxicabs or calling a taxicab dispatcher.¹⁸⁰ Governments and insurance companies across the country have begun to adapt the traditional models of insurance to the needs of ridesharing.¹⁸¹ According to a June 2015 survey conducted by SherpaShare, of on-demand workers for sharing economy companies such as Uber, Lyft, and Airbnb, about two-thirds of the workers surveyed said they considered themselves to be classified as independent contractors.¹⁸² This provides even more evidence for the need for the law to adapt and “re-examine the 20th-century definitions and employment classification we’re attempting to apply to a 21st-century work force.”¹⁸³

The new technologies at the core of TNCs’ business model—using an app on a mobile device with no exchange of cash—negate the hassles of taxicabs. They have helped to lower costs and increase mobility for consumers, to stimulate job growth by allowing owners of vehicles to enter a more permeable transportation market, and to bring new ideas into old markets in need of innovation. TNC consumers do not hail a ride from an individual driver; rather, they choose a particular company—whether it be

176. See Chris Gayomali, *Why Lyft Thinks the Market Will Be Big Enough for Both Lyft and Uber*, FAST CO. (Dec. 5, 2014, 4:25 PM), <http://www.fastcompany.com/3038891/why-lyft-thinks-the-market-will-be-big-enough-for-both-lyft-and-uber>.

177. See Miller, *supra* note 101.

178. See Bergman, *supra* note 104.

179. See Rayle et al., *supra* note 19, at 13.

180. See *supra* Part III.B.

181. See *supra* Part III.C.

182. Jianming Zhou & Ryder Pearce, *Do On-Demand Workers View Themselves as Independent Contractors or Employees?*, SHERPASHARE (June 15, 2015), <https://sherpashare.com/static/resources/SherpaShare-IndependentContractorEmployeeSurveyResults.pdf>.

183. Mike Isaac & Natasha Singer, *California Says Uber Driver Is Employee, Not a Contractor*, N.Y. TIMES (June 17, 2015), <http://www.nytimes.com/2015/06/18/business/uber-contests-california-labor-ruling-that-says-drivers-should-be-employees.html> (quoting Senator Mark R. Warner (D-VA) regarding the California Labor Commissioner’s June 2015 ruling that an Uber driver should be classified as an employee rather than an independent contractor).

Uber or Lyft or otherwise—and click on the app to seek transportation. The consumer knows the UberX or Lyft arrives because the TNCs’ app says that the car has arrived. The consumer recognizes the UberX or Lyft car by the trademarked “U” or pink mustache affixed to the vehicle. The California State Legislature found, in enacting section 5440 of the California Public Utilities Code, that “[g]iven the rapidly evolving transportation network company service, it is the intent of the Legislature to continue ongoing oversight of the commission’s regulation of these services in order to enact legislation to adjust commission authority and impose specific requirements or prohibitions as deemed necessary as these services evolve.”¹⁸⁴ The California State Legislature has recognized that as technology evolves, the law must change with it. And as TNCs’ drivers permeate the roads, tort law must adapt to make public roads safe places. In the modern age, these new technologies make the difference between independent contractors and employees extremely important, and the current rules are not workable in their present form.

Take, for example, health care providers. Until 1980, hospitals were generally immune from liability for the negligence of their physicians because physicians of hospitals were generally considered independent contractors. The Superior Court of Pennsylvania in *Capan v. Divine Providence Hospital* recognized that “the changing role of the hospital in society creates a likelihood that patients will look to the institution rather than [to] the individual physician for care.”¹⁸⁵ Since then, courts have applied the apparent agency exception to hospitals that hold out their physicians as employees.¹⁸⁶ Similarly, here, the changing role of ride-for-hire transportation creates a likelihood that injured parties look to the TNC rather than to the individual driver for transportation services. However, because Uber and Lyft require all those who engage in business with them to agree via contract stating that the driver is an independent contractor, the argument that TNCs hold out their drivers as employees, required to prove the apparent authority exception, fails with regard to TNCs.

b. Traditional Theories of Liability Support Imposing Vicarious Liability

The social functions of tort law can be divided into rights-based—or fairness—justifications and instrumental—or economic efficiency—

184. CAL. PUB. UTIL. CODE § 5440(b) (West Supp. 2015).

185. *Capan v. Divine Providence Hosp.*, 430 A.2d 647, 649 (Pa. Super. Ct. 1980).

186. See Steven R. Buchholz, Note, *Health Maintenance Organization’s Gatekeeper: Opening the Gate to Liability Through the Ostensible Agency Theory*, 21 W. ST. U. L. REV. 241, 244–48 (1993).

justifications.¹⁸⁷ Both types of justifications support holding TNCs liable for the harms caused by their independent contractor drivers.

Rights-based or fairness justifications are grounded in traditional notions of fairness.¹⁸⁸ The argument follows that tort law exists to shift losses from the injured party to the injurer. Also known as corrective justice, this classic “approach sees the law as providing *rectification* or *redress* for an invasion of a legal right.”¹⁸⁹

Instrumental or economic efficiency justifications seek to identify and provide incentives for parties to avoid unreasonable conduct. Richard Posner notably influenced this line of thought by arguing that tort law should seek to maximize social wealth.¹⁹⁰ As Guido Calabresi and A. Douglas Melamed explain, essentially:

Economic efficiency asks that we choose the set of entitlements which would lead to that allocation of resources which could not be improved in the sense that a further change would not so improve the condition of those who gained by it that they could compensate those who lost from it and still be better off than before.¹⁹¹

In the typical example of a car accident, high transaction costs preclude parties from reaching the efficient or wealth-maximizing entitlement prior to the accident. Therefore, the justification centers on the notion “that in particular contexts like accidents or pollution[,] this suggests putting costs on the party or activity which can most cheaply avoid them” and that the party who can most cheaply avoid the activity is the one who should bear the costs of liability.¹⁹²

Enterprise liability theory is a combination of fairness as well as instrumental justifications.¹⁹³ Its foundation is that “[l]osses that result from

187. See RICHARD A. EPSTEIN & CATHERINE M. SHARKEY, *CASES AND MATERIALS ON TORTS* 135 (10th ed. 2012).

188. *Id.*

189. *Id.*

190. Richard A. Posner, *Wealth Maximization and Tort Law: A Philosophical Inquiry*, in *PHILOSOPHICAL FOUNDATIONS OF TORT LAW* 99, 99 (David G. Owen ed., 1995). Guido Calabresi and A. Douglas Melamed expanded on this idea and stated that “economic efficiency asks for that combination of entitlements to engage in risky activities and to be free from harm from risky activities which will most likely lead to the lowest sum of accident costs and of costs of avoiding accidents.” Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1094 (1972).

191. Calabresi & Melamed, *supra* note 190, at 1093–94.

192. *Id.* at 1096–97.

193. See Gregory C. Keating, *The Theory of Enterprise Liability and Common Law Strict Liability*, 54 VAND. L. REV. 1285, 1329–31 (2001). See also Daniel J. Koevary, Comment, *Automobile Leasing and the Vicarious Liability of Lessors*, 32 FORDHAM URB. L.J. 655, 664–68 (2005).

using contractors should be borne by the party that contracted for the work as an ‘externality’ of doing business so that the cost of goods fully reflects the costs of production.”¹⁹⁴ In short, “[e]nterprise liability seeks to disperse an activity’s accident costs across the activity” by forcing the business to absorb the costs and disperse them in the price paid by consumers.¹⁹⁵

In the case of a car accident negligently caused by a TNC driver, notions of fairness indicate the injurer should compensate the injured. Economic efficiency pulls back the curtain further to hold the TNC liable for the actions of its driver. Yet tort law as it currently stands will fail to hold TNCs liable for the harms caused by their drivers.

The 2008 financial crisis provides a keen example of imposing rules on companies with large financial impacts to force them to internalize the negative externalities they create. In light of the crisis, the federal government created a category for “systemically important” financial institutions.¹⁹⁶ The category applies to financial institutions that the Treasury Department has deemed too big to fail, and are subject to more stringent requirements than their counterparts.¹⁹⁷ The rationale behind the regulation is that “[i]n maximising their private benefits, individual financial institutions may rationally choose outcomes that, from a system-wide level, are sub-optimal because they do not take into account” negative externalities on the financial system.¹⁹⁸ Similarly, California has taken the initial step in categorizing TNCs in order to subject them to more stringent requirements than those that existed in the deregulated app-based rideshare market. Yet the regulations do not require large influential companies such

194. Conn, *supra* note 78, at 203.

195. Keating, *supra* note 193, at 1331. See also Koevary, *supra* note 193, at 667–68.

196. 12 C.F.R. § 1320.2 (2014).

197. *Id.* See also Mary Williams Walsh, *U.S. Panel Proposes Subjecting MetLife to Stricter Regulation*, N.Y. TIMES: DEALBOOK (Sept. 4, 2014, 6:33 PM), <http://dealbook.nytimes.com/2014/09/04/metlife-is-designated-systemically-important-but-firm-plans-a-fight/> (explaining that financial institutions designated systemically important (“Sifis”) “would be subject to additional oversight by the Fed and tougher new capital requirements, rules that reduce the institutions’ degree of leverage”).

198. BASEL COMM. ON BANKING SUPERVISION, BANK FOR INT’L SETTLEMENTS, A FRAMEWORK FOR DEALING WITH DOMESTIC SYSTEMICALLY IMPORTANT BANKS 1 (2012), <http://www.bis.org/publ/bcbs224.pdf>.

These negative externalities include the impact of the failure or impairment of large, interconnected global financial institutions that can send shocks through the financial system which, in turn, can harm the real economy. Moreover, the moral hazard costs associated with direct support and implicit government guarantees may amplify risk-taking, reduce market discipline, create competitive distortions, and further increase the probability of distress in the future. As a result, the costs associated with moral hazard add to any direct costs of support that may be borne by taxpayers.

Id.

as Uber and Lyft to internalize the externalities they bring to the roads. This Note argues that the legislature should revise or enact a new statute holding TNCs liable, or that courts interpret existing law to adapt to the needs of the innovating sharing economy.

2. Framework for Expanding Vicarious Liability to TNCs

Traditional models of liability must adapt to accommodate technological innovations. Employers may be held vicariously liable for the tortious acts of their independent contractors if an exception applies. Because none of the exceptions—personal negligence of the employer, inherently dangerous activities, nondelegable duties, retained control, and apparent authority—apply to the TNC-driver relationship, a new framework is necessary. Policy considerations discussed above support the imposition of vicarious liability on TNCs for the tortious acts of the independent contractors, subject to the following parameters.¹⁹⁹

The framework this Note proposes will coincide with the periods carved out by the CPUC. To reiterate, Period 1 is when the app is open and the driver is waiting for a match, Period 2 is when the driver has matched with a passenger but has not yet picked the passenger up, and Period 3 is the period of time when the driver picks up the passenger and until the driver safely deposits the passenger.²⁰⁰ Incorporating the duties common carriers owe, a TNC driver should owe (a) the duty of reasonable care to all during Period 1, (b) the duty to exercise reasonable care to all non-passengers during Periods 2 and 3, and (c) the duty to exercise utmost care to passengers during Periods 2 and 3.²⁰¹

a. Duty to Exercise Reasonable Care During Period 1: Vicarious Liability for Using a TNC App While Driving

The California Vehicle Code provides that a driver may not use a wireless device while driving, unless it is used in a hands-free configuration.²⁰² A driver who violates the Code by illegally using a wireless device while driving is subject to escalating penalties under the

199. See *supra* Part IV.B.1.

200. See *supra* note 13 and accompanying text.

201. See *supra* text accompanying notes 37–41.

202. The Code states, in relevant part:

A person shall not drive a motor vehicle while using an electronic wireless communications device to write, send, or read a text-based communication, unless the electronic wireless communications device is specifically designed and configured to allow voice-operated and hands-free operation to dictate, send, or listen to a text-based communication, and it is used in that manner while driving.

CAL. VEH. CODE § 23123.5 (West 2015).

Code.²⁰³ Given that TNCs require the use of their apps on their drivers' handheld devices, TNCs should be held vicariously liable for accidents caused by TNC drivers if the drivers are using the app while driving. Use of a mobile device while driving necessarily distracts drivers from exercising reasonable care to those foreseeably endangered by their conduct. Drivers should not use their apps while driving.²⁰⁴ Yet in order to save time and increase efficiency for TNCs' benefit, drivers engage their apps to look for matches while driving. Because such conduct distracts drivers, endangers other pedestrians and motorists, and benefits TNCs by increasing efficiency and profits, TNCs should be held vicariously liable for such accidents caused by their drivers' negligence as a result of using the TNC app during Period 1.

The rationale behind this proposed rule—that TNCs should be held vicariously liable but only if the TNC drivers used the app during Period 1 while driving—is that during Period 1, a driver is not necessarily working for a TNC. Drivers may be at home waiting for a match. Drivers may have multiple TNC apps open if they have contracts with multiple rideshare companies. Because the driver is not working to make a profit for any particular TNC during Period 1, the TNC should not be held vicariously liable for the negligence of a driver during Period 1.²⁰⁵ Only if the driver is using the app while driving and as a result of the distraction, harms another, should the TNC be held vicariously liable.

b. Duty to Exercise Reasonable Care with Respect to Non-Passengers During Periods 2 and 3: Vicarious Liability for the Driver's Negligence

During Periods 2 and 3, TNCs should be held vicariously liable for the negligent acts committed by drivers with respect to non-passengers. TNCs have increased mobility for consumers, who take more trips than they would have otherwise without rideshare options such as UberX and Lyft.²⁰⁶ These companies are eating the market share of taxicab companies and are

203. "A violation of this section is an infraction punishable by a base fine of twenty dollars (\$20) for a first offense and fifty dollars (\$50) for each subsequent offense." *Id.* § 23123.5(d).

204. *See id.* § 23123.5. However, California law does not explicitly prohibit the use of mobile device apps while driving. Case law has therefore interpreted statutes narrowly to find that it prohibits even only "listening and talking" (without hands-free configuration) while driving, which includes when one is stopped at a red light, *People v. Nelson*, 132 Cal. Rptr. 3d 856, 858 (Ct. App. 2011), but it does not prohibit the use of GPS or map features while driving, *People v. Spriggs*, 168 Cal. Rptr. 3d 347, 358 (Ct. App. 2014). Because using the TNC app while driving is a form of communication, use of the app while driving is likely interpreted as a prohibited use.

205. This situation can be viewed as analogous to the employer-employee "within the scope of employment" prong. While a driver is not engaging the app, the driver is arguably not acting within the scope of employment but is merely waiting for work.

206. *See Rayle et al., supra* note 19, at 13, 17.

growing in value. Fairness justifications dictate that the injured should be compensated by the injurer for harms caused. Economic efficiency notions support the argument that large companies should internalize the negative externalities of car accidents inherent in providing transportation services. By adopting this rule of vicarious liability, enterprise liability would, over its large pool of consumers, disperse the costs of liability, so that an individually injured party would be fully compensated by the TNC. Additionally, by adopting this rule of vicarious liability, TNCs would have a vested interest in ensuring public safety by better oversight and training of their drivers.

To implement the proposed rule effectively and fairly, the rule could be drafted similarly to the current rule on employer-employee vicarious liability. Thus, the question of whether the TNC should be held liable would center on whether the harm was caused while the driver was acting within the scope of employment. The scope of driving for the TNC would involve the period during which the driver accepts the match, to when the driver picks up the passenger, and until the passenger has safely exited the vehicle. Actions with respect to pedestrians and other motorists within the scope of driving would include obeying traffic laws, not getting distracted, and driving carefully, as a reasonable person would do under the circumstances. Actions not within the scope of driving would include the driver stopping to pick up a drink from a convenience store on the way to pick up a passenger or texting friends to tell them where they will meet after the driving shift. TNCs should not be held liable for such conduct because these activities are not part of the TNCs' business model, and vicarious liability should attach only if the driver is acting within the scope of the TNCs' business.²⁰⁷

c. Duty to Exercise Utmost Care with Respect to Passengers:
Vicarious Liability for Driver's Breach of Heightened Duty

"A carrier of persons for reward must use the utmost care and diligence for their safe carriage, must provide everything necessary for that purpose, and must exercise to that end a reasonable degree of skill."²⁰⁸ This means that common carriers, which include taxicabs, charter-party carriers, and TNCs, are responsible "for any, even the slightest, negligence."²⁰⁹

207. As with employee-employer analysis, these actions would not be considered to be within the driver's scope of employment. In the traditional view of scope of employment, these activities would be classified as a frolic, for which employers are not held vicariously liable, rather than a mere detour, for which employers can be held vicariously liable. See EPSTEIN & SHARKEY, *supra* note 187, at 695-96.

208. CAL. CIV. CODE § 2100 (West 2010).

209. Leonard v. Pickwick Stage Sys., 7 P.2d 1059, 1061 (Cal. Ct. App. 1932).

Given that TNCs exist because drivers transport passengers who pay the TNC through the TNC's app, TNCs should be held liable for their drivers' violation of the duty to exercise utmost care to the paying passengers.

Passengers "surrender[] themselves to the care and custody" of TNC services; they "give[] up their freedom of movement and actions; there [i]s noting [*sic*] they could do to cause or prevent [an] accident."²¹⁰ The way TNCs such as UberX and Lyft hold out their services, even if it says otherwise in their contracts, is that they provide consumers with transportation to get them from point A to point B. TNCs provide transportation services in which passengers put themselves at the mercy of drivers who passengers do not screen and in cars that passengers do not inspect. Both fairness and economic justifications support holding TNCs vicariously liable for the harms to TNC passengers caused by the driver. TNCs have reaped the benefit of an under-regulated area of transportation. Especially significant is the fact that the injured passenger contracted with the TNC to receive these transportation services. TNCs are in the best position to ensure public safety if they cannot legally escape liability as a direct result of the personal injury and physical damage caused by their drivers.

CONCLUSION

"The triple revolutions in computation, communications, and algorithmic power that have unfolded over the past half century have, as we have been hearing, dramatically lowered the costs of finding a provider of a service, assessing their reliability, and ensuring that the transaction can be performed in an equitable manner."²¹¹ California's creation and recognition of TNCs as a viable system of for-hire transportation was the first step in a dramatic transformation of the market as it existed for over a century. Today, the "sharing economy" utilizes technology "to bring together people with underused assets" with others who seek to use them.²¹² TNCs are an archetypal example of a sharing economy product. They have helped to lower transportation prices; increase job opportunities, accessibility, and mobility; and spur refinement of taxicabs. However, with these benefits

210. *Gomez v. Superior Court*, 113 P.3d 41, 49 (Cal. 2005) (quoting *Lewis v. Buckskin Joe's, Inc.*, 396 P.2d 933, 939 (Colo. 1964)) (finding that common carriers must use the utmost care for their passengers' safe carriage regardless of the type of transportation the carrier undertakes (here, an amusement park ride)).

211. *The Power of Connection: Peer-to-Peer Businesses: Hearing Before the H. Comm. on Small Bus.*, 113th Cong. 9 (2014) (statement of Philip Auerswald, Associate Professor, School of Public Policy, George Mason University).

212. *The Sharing Economy: Boom and Backlash*, *supra* note 99.

come costs: a six-year-old girl, killed, and her brother and father, injured. Uber claims it is not liable for the accident because the driver was an independent contractor waiting for a match, defined as Period 1 by the CPUC. With the large market share and financial impact rideshare companies have amassed comes responsibility for the harms caused by operating TNCs.

TNC drivers are plausibly independent contractors based on California's right-to-control test and the aggregate of the secondary factors. The general rule of non-liability for negligence caused by an independent contractor would therefore seem to absolve TNCs of liability caused by their drivers. Even though this general rule is "riddled with exceptions,"²¹³ the exceptions that currently exist fail to account for this prodigious transformation in the transportation market. "If the inexorable march of technology and its periodic clashes with long-cherished legal doctrines teach us anything, it is that change is inevitable."²¹⁴ California must adapt its laws and recognize an exception to the general rule of non-liability for the harms caused by TNC drivers.

Passengers seeking rideshare transportation specifically choose a particular TNC from whom to hail a ride. While length of wait-time and pricing are factors passengers may consider in choosing which TNC to use, consumers request a ride from one particular TNC. Passengers do not choose their drivers; rather, the TNC matches drivers with passengers. Passengers know which company they called and which company they are paying for services. The app-based rideshare services thrive by their consumers choosing their company regularly. Given that TNCs require passengers to agree in advance to their terms and conditions, and require passengers to seek out their particular company through their specific app or platform, rather than seeking a particular driver or randomly hailing a taxicab, TNCs have a unique and powerful status in the transportation market. With this power comes responsibility: TNCs should be held vicariously liable for the harms caused by their drivers while engaging in commerce on public roads.

The distinctions between Periods 1, 2, and 3, and between the duties owed depending on who is injured, is grounded in TNCs' financial hegemony and traditional tort law justifications.

First, fairness dictates that an injured party should be compensated by the injurer. During Period 1, when the driver is waiting for a match and

213. See *supra* note 65 and accompanying text.

214. Browning, *supra* note 8, at 90.

may be engaged with multiple TNC apps, a TNC should be held vicariously liable for the harms caused by the driver only if the driver is engaging the app when the harm occurs. Here, the TNC should be liable because the injury occurred as a result of the driver working for the benefit of the TNC. Thus, the TNC has contributed to the injury by existing as a transportation-service provider; and as such, the TNC is an injurer and should compensate the injured party. The injured party has not engaged in any business with the TNC and is a victim to the dangers that inhere in providing transportation services.

During Periods 2 and 3, when the driver has matched with a passenger, is en route to pick up the passenger, actually does pick up the passenger, transports the passenger, and drops the passenger off, the driver owes different duties of care with regard to different groups of people. As to all non-passengers foreseeably endangered by driving, the driver owes a duty to exercise reasonable care. As to all passengers, the driver owes a duty to exercise the utmost care. These rules are in line with the current rules owed by common carriers.²¹⁵ Thus, it follows that TNCs should be held vicariously liable for the harms caused by breach of those duties. Fairness supports holding TNCs vicariously liable for harms caused by drivers with respect to non-passengers if the driver was acting within the scope of driving because these activities inhere in transportation activities. The TNC has contributed to the injury by existing as a transportation-service provider and providing the reason for a driver's actions—to drive to a particular location—and as such, is an injurer and should compensate the injured party. Last, fairness supports holding TNCs vicariously liable for breaching the duty of utmost care to passengers because the injured party has contracted with the TNC. Given that they put themselves at the mercy of drivers hired by the TNC, passengers reasonably expect a heightened level of care on behalf of that TNC.

Economic efficiency rationales further justify holding TNCs vicariously liable for the harms caused by their drivers. The theory centers on the notion that the party who can most cheaply avoid accident costs should bear the costs of liability. In the case of TNCs and car accidents, the large companies are the parties who can most cheaply avoid the accident. Their business is ridesharing—the very activity which creates the risk of harm. Therefore, it follows that TNCs should be liable for the harms caused by ridesharing. Given that a negligence cause of action requires proving that the harm is within the scope of liability, the harm must be a result of

215. See *supra* text accompanying notes 37–41, 201.

the TNCs' creation of the risk. This is why the framework absolves the TNC of vicarious liability during Period 1 unless the driver is actually using a particular TNCs' app. This is also why the TNC should be held vicariously liable during Periods 2 and 3 for harms to non-passengers, injured while the driver is acting for the TNC, and not when the driver is acting outside the scope of TNC driving. Last, the TNC should be held vicariously liable for harms to passengers because the TNC can distribute the costs of potential liability to its consumers in order to pay for the accident costs. Furthermore, these proposed rules, viewed through the lens of economic efficiency justifications, would incentivize TNCs to ensure that their drivers act safely in the course of operating their rideshare services.

Enterprise liability most aptly incorporates these notions of fairness and economic efficiency and justifies the creation of new rules for holding TNCs vicariously liable for the actions of their drivers. Similar to the way the federal government imposes more stringent requirements on large financial institutions to necessitate them to internalize negative externalities, these proposed rules merely require TNCs to internalize the negative externalities of the risk of accidents inherent in driving so that the cost of transportation services is fully borne by the TNCs, whose very model depends on driving.

The rules as they currently exist fail to account for the technologically advancing world and the new models that have come into being in the last decade. As states around the country begin to address and recognize rideshare companies as legitimate transportation services with the potential to improve social utility and total wealth, California can continue to be at the forefront of embracing the sharing economy. It is time to adapt the laws to fit with the technological changes.