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Holding Ridesharing Companies Accountable in Texas

Martha Alejandra Salas

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COMMENT

HOLDING RIDESHARING COMPANIES ACCOUNTABLE IN TEXAS

MARTHA ALEJANDRA SALAS*

*“Our technological powers increase, but the side effects and potential hazards
also escalate.”¹*

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I. INTRODUCTION

“Request. Ride. Pay.” According to ridesharing companies, making use of their services requires only these three simple steps.² Simplicity is likely the reason why many consumers have opted to use services offered

2. See *How Uber Works*, UBER, <https://www.uber.com/ride/how-uber-works/> [<https://perma.cc/4QHS-HJYG>] (detailing how Uber works via three steps); *accord* LYFT, <https://www.lyft.com> [<https://perma.cc/TP2G-X59F>] (“Request a ride and you’ll be on your way in minutes. Request. Ride. Repeat.”); *Something or Somewhere*, GETME, <https://www.getme.com/somewhere.html> [<https://perma.cc/Q6WA-L2SA>] (“Just tap to request a ride and a driver will accept your request. . . . At the end of your ride, you’ll get an in-App receipt as well as an emailed receipt.”); *cf.* *How Do I Schedule a Ride on Wingz?*, WINGZ, <https://help.wingz.me/hc/en-us/articles/205823345-How-do-I-schedule-a-ride-on-Wingz-> [<https://perma.cc/L3PN-66RQ>] (describing the process of scheduling a ride in four steps).

by companies, such as Uber, Lyft, GetMe, Rideshare, and Wingz, over those offered by traditional taxi cabs. Upon taking advantage of the services offered by ridesharing companies, however, consumers are finding their rides costly and less secure.³

On September 8, 2013, a group of men were assaulted by an Uber driver who pulled out a knife and stabbed one of them approximately six times.⁴ On February 8, 2015, an Uber driver drove a young woman home after a night out with friends and sexually assaulted her.⁵ In March of 2015, an Uber driver attempted to burglarize a home after dropping off the homeowner at the airport.⁶ In the United Kingdom, a woman reported that she was threatened by an Uber driver over the phone after she canceled a ride on July 5, 2015.⁷ On August 9, 2015, another woman was driven home by an Uber driver who proceeded to sexually assault her.⁸ In 2016, after an Uber driver was pulled over while driving three passengers, police officers “found a concealed knife, methamphetamine and drug paraphernalia and several Xanax bars” on him.⁹ In 2017, a Lyft driver was charged with “threaten[ing] two passengers with a metal pipe in

3. See, e.g., *Doe v. Uber Techs., Inc.*, 184 F. Supp. 3d 774, 779–80 (N.D. Cal. 2016) (alleging two young women were sexually assaulted by two different Uber drivers).

4. See *Search v. Uber Techs., Inc.*, 128 F. Supp. 3d 222, 227 (D.D.C. 2015) (recounting the stabbing, which was to the man’s “chest and left arm”).

5. See Complaint & Jury Trial Demand at 17–18, *Doe v. Uber Techs., Inc.*, 184 F. Supp. 3d 774, 779–80 (N.D. Cal. 2016) (No. 3:15-cv-04670) (reporting Doe 1 and her friends ordered an Uber through their phone app on the early morning of February 8, 2015, and that after taking Doe 1’s friends home, the driver drove to a destination fifteen minutes off route to sexually assault her).

6. Ryan Parker, *Uber Driver Tried to Burgle Denver Home After Airport Drop-Off, Police Say*, L.A. TIMES (Mar. 31, 2015, 7:07 PM), <http://www.latimes.com/nation/nationnow/la-na-nn-uber-break-into-home-20150331-story.html> [<https://perma.cc/5PS6-KY26>] (“An Uber driver in Colorado was arrested Tuesday after he tried to break into the home of a passenger he had dropped off at an airport, Denver police said.”).

7. Alan White, *Uber Driver Left a Woman a Voicemail Threatening to Cut Her Neck*, BUZZFEED NEWS (July 8, 2015, 12:15 PM), https://www.buzzfeed.com/alanwhite/an-uber-driver-appears-to-have-left-a-voicemail-threatening?utm_term=.jfG70xAB1M#.ltx4AkaEWG [<https://perma.cc/6UDC-QRP3>] (covering a threatening voicemail left by an Uber driver).

8. See Complaint & Jury Trial Demand, *supra* note 5, at 21–23 (stating Doe 2’s friends ordered an Uber driver for a 5:00 p.m. pick-up on August 9, 2015, and that the during the ride, the driver drove to a remote parking lot where he raped and threatened Doe 2).

9. *Uber Driver Arrested in Costa Mesa with Drugs, Knife, Police Say*, EYEWITNESS NEWS (Aug. 15, 2016), <http://abc7.com/news/uber-driver-arrested-in-costa-mesa-with-drugs-knife-police-say/1471061/> [<http://perma.cc/GT5J-QDS6>].

Boston[.]”¹⁰ and another Lyft driver was accused of “pull[ing] a gun on a pedicab driver and threaten[ing] to kill her” in Austin, Texas.¹¹ There are many more incidents similar to these.

With the rise and increasing popularity of ridesharing companies, also commonly known as Transportation Network Companies (TNCs),¹² passengers have begun filing lawsuits against TNCs in attempts to hold the TNCs liable for their drivers' tortious acts.¹³ TNCs, however, have been proactive in denying liability for their drivers' actions, alleging drivers are independent contractors, not employees.¹⁴ More specifically, TNCs allege that because their drivers are not employees over whom they have control,

10. *Police Charge Lyft Driver for Assaulting 2 Passengers*, U.S. NEWS (Nov. 27, 2017, 2:07 AM), <https://www.usnews.com/news/best-states/massachusetts/articles/2017-11-27/police-charge-lyft-driver-for-assaulting-2-passengers> [<https://perma.cc/G8BH-QYVW>].

11. Elizabeth Findell, *Pedicab Cyclist: Lyft Driver Pulled a Gun After Rainey Street Dustup*, AUSTIN AM. STATESMAN (June 24, 2017, 5:40 PM), <http://www.mystatesman.com/news/local/pedicab-cyclist-lyft-driver-pulled-gun-after-rainey-street-dustup/nQ5O1k3wwu2f9qzgjGLjP/> [<https://perma.cc/Z5WU-W8GJ>].

12. See Dorothy J. Glancy, *Autonomous and Automated and Connected Cars—Oh My! First Generation Autonomous Cars in the Legal Ecosystem*, 16 MINN. J.L. SCI. & TECH. 619, 666 n.169 (2015) (observing companies like Uber and Lyft are being “regulated as Transportation Network Companies”). Likewise, other commentators assert that companies providing ridesharing services, like Uber and Lyft, are referred to as transportation network providers. See, e.g., David K. Suska, *Regulatory Takings and Ridesharing: “Just Compensation” for Taxi Medallion Owners?*, 19 N.Y.U. J. LEGIS. & PUB. POL'Y 183, 188 (2016) (distinguishing Uber and Lyft as prominent transportation network providers). There are also scholars that refer to companies like Uber, Lyft, and Sidecar as “ride-sourcing” companies; these experts note that:

Despite referring to themselves as “ride-sharing” companies, Lyft and Uber have largely been in the business of what transportation experts call “ride-sourcing,” because they essentially provide the same service as taxis through their own platforms. “I’ve studied ride-sharing for a long time, and the definition of ride-sharing is really carpooling And a carpool is an incidental trip.” That is, it’s a trip that a driver was going to take regardless of whether anyone else was with them in that car.

Katy Steinmetz, *How Uber and Lyft Are Trying to Solve America's Carpooling Problem*, TIME (June 23, 2015), <http://time.com/3923031/uber-lyft-carpooling/> [<https://perma.cc/NPX7-7ZLM>].

13. See *Greater Hous. Transp. Co. v. Uber Techs., Inc.*, 155 F. Supp. 3d 670, 677 (S.D. Tex. 2015) (“On April 1, 2015, one of Houston’s Uber drivers was arrested for allegedly sexually assaulting a passenger. . . . The Uber driver had passed an Uber background check despite having a criminal record.”); see also *Evanston Ins. Co. v. Uber Techs., Inc.*, No. C 15-03988 WHA, 2015 WL 8597239, at *1 (N.D. Cal. Dec. 14, 2015) (depicting two car accidents where the Uber drivers struck several pedestrians and killed two); *Mazaheri v. Doe*, No. CIV-14-225-M, 2014 WL 2155049, at *1 (W.D. Okla. May 22, 2014) (recounting how the Uber driver got out of the vehicle while the victim was exiting, walked over to the victim and his wife, and allegedly hit the victim in the face).

14. *Doe v. Uber Techs., Inc.*, 184 F. Supp. 3d 774, 781 (N.D. Cal. 2016).

the TNC is not liable—under any theory of liability—for torts committed by their drivers while on the job.¹⁵ Alternatively, TNCs argue that even if their drivers were employees, the TNC could not be held vicariously liable for the intentional torts of their drivers because those actions are not within the scope of the drivers' employment.¹⁶ Under these circumstances, the legal system is left with: (1) drivers who are unable to pay injured parties out of pocket for their tortious acts;¹⁷ and (2) TNCs who are making millions of dollars¹⁸ from the transactions between riders and drivers, but who incur zero costs from incidents arising from these transactions, and who have minimal responsibilities regarding the hiring and control of their drivers.¹⁹ Unfortunately for injured parties, Texas law favors the arguments advocated by TNCs.

TNCs' current method of operation contradicts public policy. For example, TNCs are currently being valued at millions and billions of dollars.²⁰ Freeing TNCs from any obligation relating to their drivers'

15. See *id.* (stating “Uber urge[d] the court to dismiss plaintiffs’ claims” based on respondeat superior); see also *Search v. Uber Techs., Inc.*, 128 F. Supp. 3d 222, 226 (D.D.C. 2015) (noting Uber alleges that because its driver was an independent contractor the court should grant its motion to dismiss a case where the plaintiff was stabbed by his Uber driver).

16. See, e.g., *Doe*, 184 F. Supp. 3d at 781 (considering Uber’s argument that their driver’s sexual assault “falls outside the scope of an employee’s duties”).

17. See, e.g., Brian Strong, *Laws to Regulate Ride-Hailing Services Are . . . Racing to Keep Up*, PA. LAW., Mar. 2016, at 49, 50 (observing personal insurance will exclude coverage when the driver is using their vehicle for commercial purposes).

18. See, e.g., Jennifer S. Fan, *Regulating Unicorns: Disclosures and the New Private Economy*, 57 B.C. L. REV. 583, 633 (2016) (“According to the slide deck, in the month of December 2013, Uber generated \$18 million in revenue in San Francisco alone.”).

19. See *O’Connor v. Uber Techs., Inc.*, 82 F. Supp. 3d 1133, 1145 (N.D. Cal. 2015) (alleging Uber profits from the transportation services it provides through its drivers); see also Andrea Bolton, Comment, *Regulating Ride-Share Apps: A Study on Tailored Reregulation Regarding Transportation Network Companies, Benefitting Both Consumers and Drivers*, 46 CUMB. L. REV. 137, 175 (2016) (asserting Lyft’s only source of income comes from the twenty percent of administrative fee it takes from its drivers’ gratuity); Jennifer Pinsof, Note, *A New Take on an Old Problem: Employee Misclassification in the Modern Gig-Economy*, 22 MICH. TELECOMM. & TECH. L. REV. 341, 360 (2016) (“Uber does not earn revenue by selling its software products; it earns revenue by taking a cut of its drivers’ fares.”).

20. See Sarah Buhr, *Lyft, Now Worth \$5.5 Billion, Hops into the Autonomous Car Race with General Motors*, TECHCRUNCH (Jan. 4, 2016), <https://techcrunch.com/2016/01/04/lyft-now-worth-5-5-billion-plans-to-get-into-the-autonomous-car-race-with-general-motors/> [<https://perma.cc/8Q5K-4UZP>] (“[Lyft] is now worth a whopping \$5.5 billion . . .”); see also Tracey Lien & Jennifer Van Grove, *It’s the End of the Road for Sidecar*, L.A. TIMES (Dec. 30, 2015, 6:14 AM) <http://www.latimes.com/business/technology/la-fi-tn-sidecar-quits-ridehailing-20151229-story.html> [<https://perma.cc/LDB3-AS2B>] (announcing Sidecar “raised \$35 million in financing during its lifetime”); Harrison Weber, *Timeline: How Uber’s Valuation Went from \$60M in 2011 to a Rumored \$50B This Month*, VENTUREBEAT (May 10, 2015, 12:24 PM), <http://venturebeat.com/2016/09/28/6->

actions while allowing drivers with minimal resources to pick up the tab via pricey insurance premiums defeats public policy that favors entities paying for the cost of doing business and loss spreading.²¹

This Comment will argue that TNCs *should* be held accountable in some way for the torts of their drivers. It will analyze Texas law to demonstrate that it does not provide relief to all parties injured by TNC drivers. Thus, this Comment will urge consumers to seek relief through the Texas legislature by demanding comprehensive legislation that can better regulate TNCs' activities within the state and hold TNCs to a higher safety standard. Part II will detail the history of TNCs and their rapid growth. It will also enumerate the policy concerns arising from their development. Part III will analyze the obstacles precluding Texas courts from holding TNCs liable based on negligence, the theory of respondeat superior, and the nondelegable duty doctrine. Part IV will report on the current state of TNC regulation in Texas. In particular, it will discuss House Bill 100 ("H.B. 100"), the newest Texas statute regulating TNCs state-wide. Moreover, it will explain how the regulation favors TNCs—despite creating uniformity and preventing TNCs from choosing to operate only in the cities they find convenient—making it easier for TNCs to operate in Texas with minimal responsibility to the public at large. Finally, Part V will propose two amendments to H.B. 100 that are necessary to hold TNCs to a higher safety standard and to better regulate their operations.

II. HISTORY & DEVELOPMENT OF TNCs

A. *The Growth of TNCs*

Transportation Network Companies were first introduced in California,²² the birthplace of two of the most popular TNCs today—Uber and Lyft.²³ Founders of both companies have cited a discontent

things-startups-need-to-know-about-venture-capitalists/ [https://perma.cc/GNY3-NJD9] (valuing Uber at about \$50 billion in 2015).

21. *See, e.g.*, St. Joseph Hosp. v. Wolff, 94 S.W.3d 513, 540–41 (Tex. 2002) (noting the cost of doing business is placed on the employer because they are better able to spread the loss and bear costs).

22. *See, e.g.*, Alexi Pfeffer-Gillett, Note, *When "Disruption" Collides with Accountability: Holding Ridesharing Companies Liable for Acts of Their Drivers*, 104 CALIF. L. REV. 233, 237 (2016) (observing California is the birthplace of many transportation network companies).

23. *See Uber vs Lyft: Comparing the Rideshare Titans*, RIDESHAREAPPS.COM (Nov. 3, 2017), <http://rideshareapps.com/uber-vs-lyft-comparison/> [https://perma.cc/BVC9-3GYP] ("Uber and Lyft were both founded in San Francisco, California.").

with transportation services as the motivating force behind building their respective companies.²⁴ Their business model aims to “connect passengers to a ride on demand,”²⁵ and to soothe congestion in urban areas.²⁶

Soon after their introduction to the public, TNCs began to expand and generate profits exponentially.²⁷ In 2010, Uber began its first test run in New York with only three drivers and a few customers; shortly thereafter it launched in San Francisco, California.²⁸ By 2011, Uber was valued at \$330 million.²⁹ Only two years later, in 2013, it was operating in twenty-five cities³⁰ with a value of approximately \$3.4 billion dollars.³¹ During the same year, two other major TNCs, Lyft and Sidecar, were operating in fifteen and six cities, respectively; Lyft was worth \$275 million at the

24. See Ryan Lawler, *Lyft-Off: Zimride's Long Road to Overnight Success*, TECHCRUNCH (Aug. 29, 2014), <https://techcrunch.com/2014/08/29/6000-words-about-a-pink-mustache/> [<https://perma.cc/7C3H-4PJX>] (detailing the motivation of one of the co-founders of Lyft who developed the idea of Lyft after finding it difficult to obtain proper transportation in Santa Barbara during his college years); see also *Our Story*, UBER, <https://www.uber.com/our-story/> [<https://perma.cc/Q7ZJ-BP6H>] (“On a snowy Paris evening in 2008, Travis Kalanick and Garrett Camp had trouble hailing a cab. So they came up with a simple idea—tap a button, get a ride.”).

25. Bolton, *supra* note 19, at 139.

26. See Gregory Ferenstein, *Uber Shows New Carpooling Feature Reduces Traffic Congestion 50% in Pilot Areas*, VENTUREBEAT (Oct. 7, 2014, 2:30 PM), <http://venturebeat.com/2014/10/07/uber-shows-new-carpooling-feature-reduces-traffic-congestion-50-in-pilot-areas/> [<https://perma.cc/V3WR-MR3X>] (“In select cities where Uber’s version, UberPool, is available, Uber confirmed to VentureBeat that the service reduces traffic congestion by roughly 55 percent.”).

27. See, e.g., Daniel C. Vock, *State Regulators Step in on Ridesharing Controversies*, PEW CHARITABLE TRUSTS (Oct. 10, 2013), <http://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2013/10/10/state-regulators-step-in-on-ridesharing-controversies> [<https://perma.cc/7P4N-DE2E>] (reporting Uber, Lyft, and Sidecar have experienced a “rapid growth and growing popularity”).

28. See Michael Arrington, *Uber CEO “Super Pumped” About Being Replaced by Founder*, TECHCRUNCH (Dec. 22, 2010), <https://techcrunch.com/2010/12/22/uber-ceo-super-pumped-about-being-replaced-by-founder/> [<https://perma.cc/9RMP-5JFN>] (“By January 2010 [Uber] did [its] first test run in New York. [Uber] had 3 cars cruising the SOHO/Chelsea/Union Square areas and had a few people using the system.”).

29. Alyson Shontell, *The Vision for \$3.4 Billion Uber Is Much More Than Just a Car Service, and It Could Vastly Improve Our Lives*, BUS. INSIDER (Aug. 23, 2013, 5:16 PM), <http://www.businessinsider.com/why-uber-is-worth-34-billion-2013-8> [<https://perma.cc/U92Q-PRLD>].

30. See Juan Matute, *The Growth and Growing Pains of Transportation Network Companies*, STREETS BLOG LA (Mar. 12, 2014), <http://la.streetsblog.org/2014/03/12/the-growth-and-growing-pains-of-transportation-network-companies/> [<https://perma.cc/5W4D-5K2J>] (describing Uber’s operation in twenty-five cities in 2013).

31. Shontell, *supra* note 29.

time.³² By March of 2014, Uber had expanded to thirty-six cities³³ and, in June of 2014, had a valuation of \$17 billion.³⁴ In 2015, it was rumored that Uber was valued at \$50 billion,³⁵ with over 300,000 active drivers.³⁶ Lyft had over 100,000 drivers operating in over 150 cities³⁷ with a value of \$5.5 billion in 2016,³⁸ while Sidecar, before shutting down in 2015, had raised a total of \$35 million.³⁹

With the rapid expansion of TNCs, many states and the federal government saw a need to identify and categorize these entities to better regulate their activities.⁴⁰ California was the first state to do so.⁴¹ The general definition of a TNC among various states includes:

32. Matute, *supra* note 30.

33. *Id.*

34. Weber, *supra* note 20.

35. *Id.* A more recent valuation shows Uber was, at some point after 2015, worth roughly \$69 billion dollars. Henry Grabar, *It's Official: Uber Is Worth 30 Percent Less Than It Was in 2015*, SLATE (Dec. 28, 2017, 6:06 PM), <https://slate.com/business/2017/12/uber-value-drops-30-percent-since-2015.html> [<https://perma.cc/RZQ8-FTMT>]. According to a report by the *Wall Street Journal*, Uber's valuation has dropped to \$48 billion since then. Harrison Weber, *Uber's Unreal \$70 Billion Valuation Really Was Unreal*, GIZMODO (Dec. 28, 2017, 6:15 PM), <https://gizmodo.com/uber-s-unreal-70-billion-valuation-really-was-unreal-1821633772> [<https://perma.cc/K68G-5VG8>]. Some speculate that the drop in Uber's valuation can be credited to negative press due to its irresponsible and uncivil behavior. *See id.* ("As for what's causing the drop, maybe it's because Uber, as of a year ago, was still losing billions of dollars. Or maybe the company's awful behavior has simply caught up to it this year, resulting in new regulatory hurdles, swaths of legal battles, and, ultimately, a smaller-but-still-gigantic valuation.")

36. Biz Carson, *Why There's a Good Chance Your Uber Driver Is New*, BUS. INSIDER (Oct. 24, 2015, 11:34 AM), <http://www.businessinsider.com/uber-doubles-its-drivers-in-2015-2015-10> [<https://perma.cc/VH9Z-U9ZV>]. The expansion of companies like Uber can also be measured by the number of rides (its primary service) they provide. *See* Brian Soloman, *Uber Just Completed Its Two Billionth Ride*, FORBES (July 18, 2016, 11:00 AM), <https://www.forbes.com/sites/briansolomon/2016/07/18/uber-just-completed-its-two-billionth-ride/#7f475f0e5224> [<https://perma.cc/EEB9-H2HQ>] (examining the growth of Uber by the company's increase in overall rides). Uber, in New York alone, was at 300,000 rides in 2013, a number which increased to 3.5 million by 2015. Casey Leins, *Who's a Sharing Economy Worker*, U.S. NEWS & WORLD REPORT (Aug. 21, 2015, 1:49 PM), <http://www.usnews.com/news/blogs/data-mine/2015/08/21/uber-airbnb-etsy-who-are-the-sharing-economy-workers> [<https://perma.cc/WF7L-KKRE>].

37. Heather Kelly, *Lyft Battles Uber for Drivers with New Perks*, CNN MONEY (Oct. 8, 2015, 11:30 PM), <http://money.cnn.com/2015/10/08/technology/lyft-gas-perks-uber/> [<https://perma.cc/AM9Z-LDCL>].

38. Buhr, *supra* note 20.

39. *See* Lien & Van Grove, *supra* note 20 ("The nearly 4-year-old San Francisco company, which raised \$35 million in financing during its lifetime, has left the door open for using any remaining funds to jump-start an alternative business.")

40. *See* CAL. PUB. UTIL. CODE § 5431 (West 2018) (creating a new category to regulate TNCs in California); *see also* COL. REV. STAT. ANN. § 40-10. 1-602 (West 2018) (illustrating TNCs and

- (1) the use of a digital network to connect drivers and riders,
- (2) to set up a prearranged ride,
- (3) which the driver provides using his personal vehicle.⁴²

In Texas,⁴³ congress defined a TNC as “a corporation, partnership, sole proprietorship, or other entity that, for compensation, enables a passenger to prearrange with a driver, exclusively through the entity’s digital network, a digitally prearranged ride.”⁴⁴ Because a new category was created by

enumerating services that are not included in the definition); L.A. STAT. ANN. § 45:201.4 (West 2017) (defining TNCs).

41. See, e.g., Lisa Rayle et al., *App-Based, On-Demand Ride Services: Comparing Taxi and Ridesourcing Trips and User Characteristics in San Francisco* 4 (Nov. 15, 2014) (unpublished working paper), https://www.its.dot.gov/itspac/dec2014/ridesourcingwhitepaper_nov2014.pdf [<https://perma.cc/66NX-8YPZ>] (observing the California Public Utility Code created a new category of carriers, referred to as transportation network companies, in September of 2013). Forty-eight states and D.C. have some type of state-wide TNC regulation as of August 2017. MAARIT MORAN ET AL., TEX. A&M TRANSP. INST., POLICY IMPLICATIONS OF TRANSPORTATION NETWORK COMPANIES: FINAL REPORT 3 (2017), <https://static.tti.tamu.edu/tti.tamu.edu/documents/PRC-17-70-F.pdf> [<https://perma.cc/5RKP-FZD8>]. Of the forty-eight states regulating TNCs, forty-one define companies as TNCs. *Id.* at 20 tbl.2.

42. See CAL. PUB. UTIL. CODE § 5431 (characterizing a TNC as an organization “operating in California that provides prearranged transportation services for compensation using an online-enabled application or platform to connect passengers with drivers using a personal vehicle”); L.A. STAT. ANN. § 45:201.4. The Louisiana statute reads:

[TNC] means a person, whether natural or juridical, that uses a digital network to connect transportation network company riders to transportation network company drivers who provide prearranged rides, or . . . that provides a technology platform to a transportation network company rider that enables the . . . rider to schedule a prearranged ride.

Id. In Colorado, the statute defining a transportation network company included services that are excluded from the definition. See COL. REV. STAT. ANN. § 40-10.1-602 (defining a TNC as a “corporation, partnership, sole proprietorship, or other entity . . . that uses a digital network to connect riders to drivers for the purpose of providing transportation” one that “does not provide taxi service, transportation service arranged through a transportation broker, ridesharing arrangements . . . or any transportation service over fixed routes at regular intervals”).

43. A report by the Texas A&M University Transportation Institute found a total of ten TNCs operating in Texas in 2017. MORAN ET AL., *supra* note 41, at 15 (including “Fare, Fasten, Get Me, Liberty Mobility, Lyft, RideAustin, Tride, Uber, Via, and Wingz” in their report).

44. TEX. OCC. CODE ANN. § 2402.001(5) (West Supp. 2017). The Texas Insurance Code defines a TNC as:

[A] corporation, partnership, sole proprietorship, or other entity operating in this state that uses a digital network to connect a transportation network company rider to a transportation network company driver for a prearranged ride.

TEX. INS. CODE ANN. § 1954.001(4) (West Supp. 2017). The Texas Administration Code also defines TNCs for purposes not related to their regulation. See 34 TEX. ADMIN. CODE § 5.1(5) (2016)

state legislatures, as opposed to characterizing TNCs as a taxi service,⁴⁵ it became clear that state governments were in agreement that TNCs are not taxis, or any other form of transportation service already in existence.⁴⁶ Rather, they were to be regarded as a brand new beast, taking the transportation industry by surprise and creating legal troubles along the way.

B. *It Looks Like a Taxi, It Operates Like a Taxi, But It's Not a Taxi*

As mentioned above, TNCs are not considered taxis in most states,⁴⁷ and, it is argued, they do not function in the same manner.⁴⁸ Thus, TNCs

("Transportation network company—An entity that uses a digital network service to connect people to transportation services provided by a transportation network driver.").

45. The Texas legislature specifically included the following language:

The term does not include an entity that provides:

- (A) street-hail taxicab services;
- (B) limousine or other car services arranged by a method other than through a digital network;
- (C) shared expense carpool or vanpool arrangements; or
- (D) a type of ride service for which:
 - (i) the fee received by the driver does not exceed the driver's costs of providing the ride; or
 - (ii) the driver receives a fee that exceeds the driver's costs associated with providing the ride but makes not more than three round-trips per day between the driver's or passenger's place of employment and the driver's or passenger's home.

OCC.

46. There are people who argue that the rapid growth of TNCs is due in part by the fact that TNCs are not being regulated as taxi services. Sam Frizell, *A Historical Argument Against Uber: Taxi Regulations Are There for a Reason*, TIME (Nov. 19, 2014), <http://time.com/3592035/uber-taxi-history/> [<https://perma.cc/AS2H-2XGS>].

47. See *Greater Hous. Transp. Co. v. Uber Techs., Inc.*, 155 F. Supp. 3d 670, 677 (S.D. Tex. 2015) (distinguishing Uber from traditional ground transportation services because it does not employ its drivers or own the vehicles that they drive); see also Nathan Rott, *California's New Rules Could Change the Rideshare Game*, NPR (Aug. 8, 2013, 3:15 AM), <http://www.npr.org/sections/alltechconsidered/2013/08/08/209885782/californias-new-rules-could-change-the-rideshare-game> [<https://perma.cc/G5E2-XMRZ>] (reporting that the California Public Utilities Commission placed "all of the companies under a new legal label: Transportation Network Companies, or TNCs—not taxis"). But see *Uber's Motion To Dismiss First Amended Complaint In Intervention at 2, Municipality of Anchorage v. Uber Techs., Inc.*, No. 3AN-14-09530CI, 2015 WL 1968762 (Alaska Super. Ct. Jan. 14, 2015), 2014 WL 8771183 (stating the municipality filed a lawsuit arguing that it has the power to regulate Uber as a taxi).

48. *Contra Glyca Trans LLC v. City of N.Y.*, No. 8962/15, 2015 WL 5320868, at *3 (N.Y. Sup. Ct. Sept. 8, 2015) ("The New York City Taxi and Limousine Commission (TLC) also

are not treated as such in courts.⁴⁹ TNCs operate through a cell phone application that permits users, whether drivers or riders, to connect with each other to prearrange a ride.⁵⁰ Generally, a transaction with a TNC includes:

- (1) a *request* from a rider for a prearranged ride through the TNC's app;
- (2) a *ride* offered by a ridesharing company driver; and
- (3) a *payment* charged to the rider by the ridesharing company.⁵¹

During the third step, the TNC normally retains a percentage from the driver's commission⁵² or charges riders a fixed fee apart from the commission paid to the driver.⁵³ At the end of the week some TNCs—Uber for example—pay each driver their netted income.⁵⁴

Initially, aside from the guidelines imposed by the TNC for which they work, Texas drivers were not regulated by city codes or state statutes.⁵⁵

started a pilot program which allowed yellow medallion taxis to arrange passenger pickups by way of smart phone applications.”).

49. See Alamea D. Bitran, Comment, *The Uber Innovation That Lyfted Our Standards Out of Thin Air(Bnb), Because Now, “There’s an App for That”*, 8 ELON L. REV. 503, 526 (2016) (“[S]ome courts and legislatures are beginning to recognize Uber is not a ‘taxi substitute.’”).

50. See Jeremy Horpedahl, *Ideology Uber Alles? Economic Bloggers on Uber, Lyft and Other Transportation Network Companies*, 12 ECON. J. WATCH 360, 360 (2015) (noting TNCs operate through a smartphone application).

51. See *How to Give a Lyft Ride: How to Give a Ride*, LYFT, <https://help.lyft.com/hc/en-us/articles/115013080028-How-to-give-a-Lyft-ride> [<https://perma.cc/TV34-KMKC>] (providing the steps required for a ride with a Lyft driver). There are other communications that ensue during the transaction, for example riders may provide drivers a rating based on their service, some TNCs allow you to choose your driver and type of car needed, and if you did not set a destination on the app, you must tell your driver where you are going so that he may insert the information on their GPS. See, e.g., *Something or Somewhere*, *supra* note 2 (illustrating how Get Me functions).

52. Uber operates by dictating “the fares charged in each jurisdiction . . . collect[ing] the appropriate payment from each passenger, and . . . pass[ing] on to its drivers 75–80% of the fares collected while keeping the remaining portion for itself.” *Search v. Uber Techs., Inc.*, 128 F. Supp. 3d 222, 226 (D.D.C. 2015). Lyft takes a 20% commission from drivers who applied to be drivers before January 2016, and a 25% commission from drivers who applied after January 2016. *Lyft’s Fees*, LYFT, <https://help.lyft.com/hc/en-us/articles/115012927407> [<https://perma.cc/YCX3-8KWD>].

53. See *Terms of Use*, WINGZ (May 30, 2017), <https://www.wingz.me/terms-of-use/> [<https://perma.cc/EJT2-SP8P>] (declaring Wingz charges its riders a fixed fee aside from the commission paid to the driver for their service).

54. See *Getting Paid*, UBER, <https://www.uber.com/en-SG/drive/singapore/resources/getting-paid/> [<https://perma.cc/Z6FR-9847>] (“Your earnings will be sent to you via direct deposit into your bank account every Thursday.”).

55. See, e.g., Drew Joseph, *Lyft, Uber Plan to Stop Operating in San Antonio Even with Policy Changes*, SAN ANTONIO EXPRESS-NEWS (Mar. 5, 2015, 10:31 PM), <http://www.expressnews.com/>

Today, this remains partly true.⁵⁶ Additionally, TNCs argue they exercise “minimal control over how its transportation providers actually provide transportation services to . . . customers.”⁵⁷ In other words, TNC drivers were largely given free reign over the method of transportation provided to riders. Over the past few years, however, control over drivers became more stringent as many Texas cities, and then finally the Texas legislature, began to regulate TNCs.⁵⁸ During the early years, when TNCs were regulated by individual city ordinances, several cities enacted regulations that were more rigid than others, causing some TNCs to halt operations in the cities they believed imposed exceedingly limiting laws.⁵⁹

In comparison, in certain cities “[t]axis are authorized to pick up passengers only through street hails[,]” known as the “walk-up market.”⁶⁰

news/local/article/City-Council-hears-pros-and-cons-about-rules-for-6116908.php [https://perma.cc/5V4F-XWNR] (noting Uber operated in San Antonio unregulated for almost a year).

56. After the enactment of H.B. 100—which regulates TNCs statewide—city ordinances regulating TNCs within Texas city limits became preempted. *See, e.g., MORAN ET AL., supra* note 41, at 10 (“HB 100 nullified all local TNC regulations and established one set of statewide regulations governing TNCs.”).

57. O'Connor v. Uber Techs., Inc., 82 F. Supp. 3d 1133, 1138 (N.D. Cal. 2015).

58. *See, e.g., Sara Thornton, Comment, The Transportation Monopoly Game: Why Taxicabs Are Losing and Why Texas Should Let Transportation Network Company Tokens Play*, 47 TEX. TECH L. REV. 893, 905 (2015) (“Texas follows the most common approach to regulating vehicles-for-hire in the United States: regulation through local municipal ordinances.”). *See generally* TEX. OCC. CODE ANN. § 2402.001(5) (West Supp. 2017) (enumerating restrictions and requirements on TNCs’ operation in Texas). Since the enactment of H.B. 100, which made it easier for TNCs to operate by lowering city standards, several TNCs returned to cities they had previously ceased operations in. *See* Alex Samuels, *Uber, Lyft Returning to Austin on Monday*, TEX. TRIB. (May 25, 2017, 12:00 PM), <https://www.texastribune.org/2017/05/25/uber-lyft-returning-austin-monday/> [https://perma.cc/D6PT-GLDE] (“Uber and Lyft will relaunch services in Austin on Monday, now that Texas lawmakers have passed a bill overriding local regulations on ride-hailing companies.”).

59. *See* Dug Begley, *Objecting to New Rules, Uber Pulls Out of Galveston*, HOUS. CHRON. (Feb. 4, 2016, 7:40 PM) <http://www.houstonchronicle.com/news/houston-texas/houston/article/Objecting-to-new-rules-Uber-pulls-out-of-6804545.php> [https://perma.cc/QYJ4-UCXG] (announcing Uber left Galveston when the city passed an ordinance regulating TNCs in virtually the same way as taxi cab companies); *see also City of Midland Releases Statement After Uber Discontinues Services*, CBS 7 (Feb. 2, 2016, 2:54 PM), <http://www.cbs7.com/content/news/Uber-Discontinues-Services-for-Midland-County-367299811.html> [https://perma.cc/3SW2-UB49] (“Uber Transportation Services have announced they will no longer provide services to the residents of Midland County. The company says it is because of the new vehicle-for-hire regulations passed by the Midland City Council.”); Eliana Dockterman, *Uber and Lyft Are Leaving Austin After Losing Background Check Vote*, TIME (May 8, 2016), <http://time.com/4322348/uber-lyft-austin-background-check-vote/> [https://perma.cc/U8DL-XKA7] (reporting Uber and Lyft announced their departure from Austin after the proposition, which would allow them to self-regulate, failed to pass).

60. Katrina M. Wyman, *Problematic Private Property: The Case of New York Taxi Medallions*, 30 YALE J. ON REG. 125, 132 (2013). The Texas legislature explicitly excluded companies that

In Texas, you can either call a cab and prearrange a ride or wait around for one to pick you up, that is, if the location is one where taxis generally congregate.⁶¹ In most cities, taxis are regulated by the municipality in which they operate.⁶² The regulations imposed on taxis include: paying various fees to operate; holding a chauffeur's license; passing physical, mental, and drug tests; providing fingerprints; going through training; obtaining liability insurance covering the taxi at all times—in some cities with a \$1 million minimum; meeting the age requirement; and acquiring medallions to operate, among others.⁶³

Due to the differences in the way TNCs and taxicab companies are regulated, courts have refused to apply law applicable to taxis in cases involving TNCs⁶⁴—although, generally, they operate in a similar manner and provide the same services.⁶⁵ The creation of this new category has produced a need to institutionalize recovery avenues for injured victims.⁶⁶ It is also crucial, for the benefit of consumers, to push for more stringent state-wide regulations, holding TNCs to a higher standard of operation.

provide “street-hail taxicab services” from the definition of a “TNC.” TEX. OCC. CODE ANN. § 2402.001(5).

61. See, e.g., *Why Austin Cab*, AUSTIN CAB CO. (Aug. 12, 2015, 11:26 AM), <http://www.austincab.com/id18.html> [<https://perma.cc/6FH6-U6PQ>] (indicating they accept “[a]dvance orders for service”).

62. See Horpedahl, *supra* note 50, at 362 (“In most U.S. cities today, taxicab markets are not organized on the principles of free competition. Instead, suppliers operate as cartels, almost always sanctioned by municipal authorities.”).

63. See, e.g., Katherine E. O’Connor, Comment, *Along for the Ride: Regulating Transportation Network Companies*, 51 TULSA L. REV. 579, 582–83 (2016) (enumerating a list of regulations imposed on taxi drivers in New York and San Francisco, California). Most importantly, the organizations within the municipalities charged with overseeing the taxi industry within the city create regulations limiting and controlling the method in which taxi drivers operate in order to make the services safer for consumers. See generally Paul Stephen Dempsey, *Taxi Industry Regulation, Deregulation & Reregulation: The Paradox of Market Failure*, 24 TRANSP. L.J. 73, 76–86 (1996) (providing a history of taxi regulation in various cities).

64. See *Doe v. Uber Techs., Inc.*, 184 F. Supp. 3d 774, 779 (N.D. Cal. 2016) (recognizing that Uber operated as a TNC); see also *Greater Hous. Transp. Co. v. Uber Techs., Inc.*, 155 F. Supp. 3d 670, 676 (S.D. Tex. 2015) (“Uber is a self-[]described mobile-based transportation network company (‘TNC’) based in San Francisco, California . . .”).

65. See Steinmetz, *supra* note 12 (reporting Uber and Lyft are in the business of “‘ride-sourcing,’ because they essentially provide the same services as taxis through their own platforms”).

66. See, e.g., Pfeffer-Gillett, *supra* note 22, at 235 (“Despite these recent incidents, there is still scant, if any, case law addressing whether TNCs can be liable for tortious acts of their drivers.”).

C. *Defying Public Policy*

One of the issues with TNCs, as previously mentioned, is their ability to conduct business on an international level and produce millions of dollars in revenue without incurring substantial costs related to their drivers' actions or having to enforce effective safety mechanisms for their drivers.⁶⁷ Essentially, via their business model, TNCs are creating a separate taxicab company in every one of their drivers. In doing so, TNCs divert paying costs associated with doing business to drivers who are less able to bear the expense when TNCs are largely and directly benefitting from the services provided by drivers. This business model challenges the public policy in favor of companies paying for the cost of doing business, which, under theories of vicarious liability, includes losses incurred due to the tortious acts of workers.⁶⁸

To ensure that such public concerns are effectively addressed, TNCs must be held to a higher safety standard. By doing so, TNCs will be more likely to provide a safer environment for consumers engaging their services, and from whom they largely benefit.⁶⁹

67. Some would argue that:

These services are able to operate cheaply, at least in part, because the drivers (unlike taxicab drivers) carry noncommercial licenses and use their personal vehicles rather than company cars. In addition, passengers and drivers find each other using a phone application, cutting out the need to employ full-time dispatchers.

Id. at 236 (footnotes omitted).

68. In *St. Joseph Hosp. v. Wolff*, the Texas Supreme Court stated:

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 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.

St. Joseph Hosp. v. Wolff, 94 S.W.3d 513, 540–41 (Tex. 2002) (citing W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS 500–01 (W. Page Keeton et al. eds., 5th ed. 1984)).

69. *Cf.* W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS 500–01 (W. Page Keeton et al. eds., 5th ed. 1984) (arguing that employers that are strictly liable for the actions of their employees have a greater incentive to ensure the enterprise is conducted in a safe manner).

III. LIMITED AVENUES FOR HOLDING TNCs LIABLE

Parties have sought and maneuvered arguments in favor of holding TNCs liable for the tortious acts of their drivers. In Texas courts, most of these arguments should be struck down. That is not to say that there are no cases in which TNCs, based on the facts of the particular case, can be held accountable for their own negligent behavior. The theories of liability and factual context under which injured parties *may* be able to recover, however, are not always applicable to TNCs or are limited. Moreover, courts cannot forge a recovery avenue where there is none.⁷⁰

A. *Employees in Disguise? Let the Superior Make Answer*⁷¹

The most popular path to recovery used against TNCs appears to be respondeat superior.⁷² With this approach, however, comes the biggest hurdle: defining TNCs' drivers' status, one of the most contentious issues in lawsuits against TNCs today.⁷³ Judges have noted that the line separating employees and independent contractors is not a clear one.⁷⁴

70. Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 415 (1989) (discussing the role of the judge as an agent whose role is to apply legislative acts without "considerations that cannot be traced to an authoritative text").

71. This phrase is the Latin translation of the common term "respondeat superior." *Respondeat Superior*, BLACK'S LAW DICTIONARY (10th ed. 2014).

72. See Phillips v. Uber Techs., Inc., No. 16 Civ. 295 (DAB), 2017 WL 2782036, at *2 (S.D.N.Y. June 14, 2017) ("Uber argues that it cannot be liable for the torts of [its driver] under a *respondeat superior* or partnership theory because [the driver] was never Uber's employee or partner." (emphasis added)); see also Doe v. Uber Techs., Inc., 184 F. Supp. 3d 774, 780 (N.D. Cal. 2016) (seeking relief under the theory of respondeat superior); Search v. Uber Techs., Inc., 128 F. Supp. 3d 222, 229 (D.D.C. 2015) (asserting a cause of action under respondeat superior).

73. See, e.g., Aarti Shahani, *Uber Settles 2 Lawsuits over Whether Drivers Are Employees or Contractors*, NPR (Apr. 22, 2016, 5:10 AM), <http://www.npr.org/2016/04/22/475228363/uber-settles-2-lawsuits-over-whether-drivers-are-employees-or-contrators> [<https://perma.cc/6THV-NQ2A>] (noting Uber will pay over \$100,000,000 to settle lawsuits regarding the classification of its drivers). In 2016, Uber was fighting similar lawsuits over driver classifications in Pennsylvania, Florida, and Arizona. See Mike Isaac & Noam Scheiber, *Uber Settles Cases with Concessions, but Drivers Stay Freelancers*, N.Y. TIMES (Apr. 21, 2016), <http://www.nytimes.com/2016/04/22/technology/uber-settles-cases-with-concessions-but-drivers-stay-freelancers.html> [<https://perma.cc/5ZJ3-TNA5>] ("Uber still faces litigation about driver status in other states, including similar lawsuits in Florida, Arizona and Pennsylvania."). It should also be noted that in August of 2016, a California district court judge overturned a settlement agreement between Uber and California Uber drivers. See Mike Isaac, *Judge Overturns Uber's Settlement with Drivers*, N.Y. TIMES (Aug. 18, 2016), http://www.nytimes.com/2016/08/19/technology/uber-settlement-california-drivers.html?_r=0 [<https://perma.cc/9AH8-UHRK>] (discussing Uber's settlement with drivers).

74. See, e.g., N.L.R.B. v. Hearst Publ'ns, Inc., 322 U.S. 111, 121 (1944) ("Few problems in the law have given greater variety of application and conflict in results than the cases arising in the

The Texas legislature, however, provided a straight-forward structure to determine the status of TNC drivers when it enacted H.B. 100.⁷⁵ Nevertheless, in order to fully understand this theory of recovery, as applied to TNCs, and the implications it carries, one must explore the independent contractor versus employee debate.

1. The H.B. 100 Elements

As noted above, whether TNC drivers are considered employees or independent contractors has been the subject of much debate.⁷⁶ In Texas, and seventeen other states,⁷⁷ the legislature provided guidelines in an attempt to illuminate a solution.⁷⁸ Under section 2402.114 of the Texas Occupational Code:

A driver who is authorized to log in to a transportation network company's digital network is considered an independent contractor for all purposes, and not an employee of the company in any manner, if:

- (1) the company does not:
 - (A) prescribe the specific hours during which the driver is required to be logged in to the company's digital network;
 - (B) impose restrictions on the driver's ability to use other transportation network companies' digital networks;
 - (C) limit the territory within which the driver may provide digitally prearranged rides; or
 - (D) restrict the driver from engaging in another occupation or business; *and*

borderland between what is clearly an employer-employee relationship and what is clearly one of independent entrepreneurial dealing?"), *overruled on other grounds by* Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318 (1992).

75. See Act of May 29, 2017, 85th Leg., R.S., H.B. 100, § 1 (codified at TEX. OCC. CODE ANN. § 2402.114 (West Supp. 2017)) (setting forth factors to determine whether a driver is an independent contractor or an employee).

76. See, e.g., Dug Begley, *Houston-Area Drivers Sue Uber Over Employment Status*, HOUS. CHRON. (June 30, 2017, 8:11 PM), <http://www.houstonchronicle.com/news/transportation/article/Houston-area-drivers-sue-Uber-over-employment-11259881.php> [<https://perma.cc/DMV3-NNJA>] (discussing a class action against Uber over the classification of its drivers in Texas).

77. See MORAN ET AL., *supra* note 41, at 20 tbl.2 (reporting seventeen states require TNCs to "[c]omply with some definition of employee or workers compensation criteria").

78. See *id.* (noting the number of states defining companies as TNCs).

- (2) the company and the driver agree in writing that the driver is an independent contractor.⁷⁹

When working for a TNC, most of these elements are met, making drivers independent contractors under the Texas statute, and thus allowing TNCs to avoid liability via respondeat superior. This is because most TNCs do not prescribe how many hours a driver must work,⁸⁰ nor do they restrict drivers from driving for other TNCs.⁸¹ Further, TNC drivers are not limited geographically to one location within a city; rather, drivers are allowed to work in whichever city they reside or even to move across city lines.⁸² Most drivers have a full-time job and only utilize TNCs “to supplement their income[.]”⁸³ Thus, TNCs do not limit drivers’ ability to “engag[e] in another occupation.”⁸⁴ Finally, most TNCs require that drivers agree that they are independent contractors when signing a contract to drive for the TNC.⁸⁵ Accordingly, under the new statute, TNC drivers are classified as independent contractors “for all purposes” because they meet the elements set out.⁸⁶ Even if the statute is not

79. OCC. (emphasis added).

80. See *Drive with Lyft*, LYFT, <https://www.lyft.com/drive-with-lyft> [<https://perma.cc/535L-9LR9>] (advertising drivers choose when they work); see also *Drive with Uber*, UBER, <https://www.uber.com/drive/> [<https://perma.cc/8T8B-JS3>] (“You can drive with Uber anytime, day or night, 365 days a year.”). Although, in 2018 Uber announced that drivers were required to take “six hours rest for every 12 hours of driving time.” Faiz Siddiqui, *Uber Mandates a Six-Hour Rest Period for Frequent Drivers*, WASH. POST (Feb. 12, 2018), https://www.washingtonpost.com/news/dr-gridlock/wp/2018/02/12/uber-mandates-a-six-hour-rest-period-for-frequent-drivers/?utm_term=.e62137db58e4 [<https://perma.cc/QG6E-54L9>].

81. See, e.g., Mitch Wander, *I Drive for Uber and Lyft*, GREATER WASH. (Feb. 8, 2017), <https://ggwash.org/view/62300/i-drive-for-uber-and-lyft-and-i-have-nine-tips-for-making-your-ride-go-more> [<https://perma.cc/92RE-W4AQ>] (noting the author has driven for both Uber and Lyft).

82. Although regulated state-wide, various TNCs, including Uber, have requirements based on city ordinances. See, e.g., *Cities*, UBER, <https://www.uber.com/cities/> [<https://perma.cc/3VJ8-YVY9>] (dividing Uber’s operation by cities). But see House Comm. on Transp., Bill Analysis, Tex. H.B. 100, 85th Leg., R.S. (2017) (“Under [H.B. 100], drivers could serve multiple cities[.]”).

83. See, e.g., Steve Lopez, *After Driving for Uber, He’s Keeping His Day Job*, L.A. TIMES (Sept. 19, 2015, 12:00 PM), <http://www.latimes.com/local/california/la-me-0920-lopez-uber-20150920-column.html> [<https://perma.cc/Q477-PXLL>] (stating two-thirds of Uber drivers have a full-time job).

84. OCC. § 2402.114(1)(D).

85. See, e.g., *Getme Terms of Service (EULA)*, GET ME (Dec. 23, 2016), <https://www.getme.com/terms.html> [<https://perma.cc/95AC-N97A>] (“By providing Services as a Go-Getter on the getme Platform, you represent, warrant, and agree that: . . . you are an independent contractor and not an employee of getme.”).

86. OCC. § 2402.114.

determinative on the issue,⁸⁷ not only does Texas law reinforce the conclusion that drivers are simply independent contractors, there are also no other courts setting precedent by holding TNCs accountable.

2. The Independent Contractor v. Employee Argument in Federal Courts

Black's Law Dictionary defines an *employee* as “[s]omeone who works in the service of another person (the employer) under an express or implied contract of hire, under which the employer has the right to control the details of work performance.”⁸⁸ In contrast, an *independent contractor* is defined as:

Someone who is entrusted to undertake a specific project but who is left free to do the assigned work and to choose the method for accomplishing it. It does not matter whether the work is done for pay or gratuitously. Unlike an employee, an independent contractor who commits a wrong while carrying out the work usu[ally] does not create liability for the one who did the hiring.⁸⁹

If courts labeled TNC drivers “employees,” then TNCs *could* be held vicariously liable for their torts.⁹⁰ On the other hand, if drivers are labeled independent contractors, TNCs *could not* be held vicariously liable for their drivers’ tortious acts.⁹¹ Most TNCs include in their terms that drivers are independent third-party transportation providers, thereby rejecting liability for any acts committed by their drivers.⁹² For example,

87. It is unrealistic to believe that this statute will end the debate over whether TNC drivers are independent contractors or employees given the turmoil and years of arguments made by legislators, activists, and others concerned with workers’ rights in the gig economy. See, e.g., Caroline O’Donovan, *Uber’s Latest Concession to Drivers Could Spell Trouble for Gig Workers*, BUZZFEED NEWS (Jan. 26, 2018, 1:16 PM), https://www.buzzfeed.com/carolineodonovan/uber-wants-to-help-drivers-get-benefits-but-some-say-this?utm_term=.pidExkEq2#.aip28Q2E7 [https://perma.cc/2DHY-RLVR] (reporting lawyers and labor activists have, for years, battled over the classification of drivers as independent contractors).

88. *Employee*, BLACK’S LAW DICTIONARY (10th ed. 2014).

89. *Independent Contractor*, BLACK’S LAW DICTIONARY (10th ed. 2014).

90. See, e.g., *F.F.P. Operating Partners, L.P. v. Duenez*, 237 S.W.3d 680, 686 (Tex. 2007) (upholding the common law that a superior is vicariously liable for the torts committed by his employees).

91. See *Woodard v. Sw. States, Inc.*, 384 S.W.2d 674, 675 (Tex. 1964) (explaining the rule that an employer cannot be held liable for the tortious acts of its independent contractors).

92. See *Lyft Terms of Service*, LYFT (Feb. 6, 2018), <https://www.lyft.com/terms> [https://perma.cc/V95G-YXP9] (imposing an independent contractor relationship with its drivers by stating the agreement between Lyft and drivers is “solely that of independent contracting

the TNC “Get Me” was very explicit and required drivers to agree that they “are an independent contractor and not an employee of getme.”⁹³

In 2016, Uber pushed to settle lawsuits brought by its employees for misclassification in two states: California and Massachusetts.⁹⁴ Any settlement, however, only signifies that drivers agree to be classified as independent contractors, not that the courts in those states have definitively ruled that TNC drivers, specifically Uber drivers, are indeed independent contractors in the eyes of the law.⁹⁵

In *Cotter v. Lyft, Inc.*,⁹⁶ the Northern District of California denied Lyft’s motion for summary judgment on Lyft’s drivers’ claim for wages, holding a question of fact remained “as to whether [Lyft] retained [the] right to control drivers.”⁹⁷ In noting that Lyft drivers do not meet the traditional concept of independent contractors in California, the court observed that:

Lyft drivers use no special skill when they give rides. Their work is central, not tangential, to Lyft’s business. Lyft might not control when the drivers work, but it has a great deal of power over how they actually do their work, including the power to fire them if they don’t meet Lyft’s specifications about how to give rides. And some Lyft drivers no doubt treat their work as a full-time job—their livelihood may depend solely or primarily on weekly payments from Lyft, even while they lack any power to negotiate their rate of pay. Indeed, this type of Lyft driver—the driver who gives ‘Lyfts’ 50 hours a week and relies on the income to feed his family—looks very much

parties”); see also *Terms and Conditions*, UBER (Jan. 2, 2016), <https://www.uber.com/legal/terms/us/> [<https://perma.cc/QP7F-66F7>] (providing Uber’s technology platform allows users to connect with “independent third party transportation providers”).

93. *Getme Terms of Service (EULA)*, *supra* note 85.

94. See Shahani, *supra* note 73 (“Uber will pay up to \$100 million to settle the suits, and drivers will stay independent contractors, not employees, in California and Massachusetts, just as the ride-booking company had maintained.”). The settlement in California was later overturned by a federal judge who believed the settlement, which was agreed to by both sides, was “not fair, adequate, and reasonable[.]” Isaac, *supra* note 73.

95. See, e.g., Tracey Lien, *Uber Will Pay Up to \$100 Million to Settle Suits with Drivers Seeking Employee Status*, L.A. TIMES (Apr. 21, 2016, 9:25 PM), <http://www.latimes.com/business/technology/la-fi-tn-0422-uber-settlement-story.html> [<https://perma.cc/K735-SHWC>] (acknowledging courts have yet to decide whether Uber drivers are independent contractors or employees).

96. *Cotter v. Lyft, Inc.*, 60 F. Supp. 3d 1067 (N.D. Cal. 2015).

97. See *id.* at 1067, 1070 (holding the case must go to trial because “numerous factors for deciding whether a worker is an employee or an independent contractor point in decidedly different directions, a reasonable jury could go either way”). This case has since been settled for \$1 million. *Cotter v. Lyft, Inc.*, 193 F. Supp. 3d 1030, 1031 (N.D. Cal. 2016).

like the kind of worker the California Legislature has always intended to protect as an 'employee.'⁹⁸

Unlike California, there are no federal district courts in Texas that thoroughly, or even slightly, examine the relationship between TNCs and their drivers. The closest there is to a discussion on the issue is the Western District's determination that Uber contradicted itself in alleging that it has no control over the conditions in which its drivers operate in an American Disabilities Act claim.⁹⁹ The court noted that Uber's complaint acknowledged that "anyone with a valid driver's license, car insurance, a clean record and a four-door vehicle can log onto the App and connect with ride-seekers," and that these requirements are an indication that Uber has *some* control over its drivers' conditions of operation.¹⁰⁰ All in all, however, there are no federal decisions classifying TNC drivers as employees or independent contractors on which other federal courts can rely.¹⁰¹

3. Respondeat Superior in Texas

In Texas, "the doctrine of vicarious liability, or respondeat superior, makes a principal liable for the conduct of his employee or agent."¹⁰²

98. *Cotter*, 60 F. Supp. 3d at 1069.

99. *See Ramos v. Uber Techs., Inc.*, No. SA-14-CA-502-XR, 2015 WL 758087, at *11 (W.D. Tex. Feb. 20, 2015) (noting Uber has some control over the conditions of operation of its drivers based on the requirements imposed for people attempting to become Uber drivers).

100. *Id.* The court also argued that Uber controls the application that its drivers use, in effect controlling its drivers' avenue for contracting with riders. *See id.* at *11 n.7 ("Uber also makes the perplexing statement that it 'controls no aspect of drivers' means or methods of connecting with riders. However, Uber controls the app that *is* the means/method of connecting drivers with riders." (citation omitted)).

101. *See, e.g., Robert Mclean, Uber Will Pay Up to \$100 Million to Settle Labor Suits*, CNN (Apr. 22, 2016, 2:34 AM), <http://money.cnn.com/2016/04/22/technology/uber-drivers-labor-settlement/> [<https://perma.cc/FTG6-Y5SL>] (indicating no court has yet decided on the employment status of Uber drivers). There have been many suits filed since 2016; however, many of the decisions made on the status of TNC drivers have been made by state judges. *See McGillis v. Dep't of Econ. Opportunity*, 210 So. 3d 220, 226 (Fla. Dist. Ct. App. 2017) ("Due in large part to the transformative nature of the [I]nternet and smartphones, Uber drivers like McGillis decide whether, when, where, with whom, and how to provide rides using Uber's computer programs. This level of free agency is incompatible with the control to which a traditional employee is subject."); *see also Dan Rivoli, N.Y. Judge Grants Uber Drivers Employee Status*, DAILY NEWS N.Y. (June 13, 2017, 8:05 PM), <http://www.nydailynews.com/new-york/n-y-judge-grants-uber-drivers-employee-status-article-1.3245310> [<https://perma.cc/V6jZ-YEZ4>] ("The June 9 ruling from a state Department of Labor administrative law judge granted the coveted status to all 'similarly situated' drivers . . .").

102. F.F.P. Operating Partners, L.P. v. Duenez, 237 S.W.3d 680, 686 (Tex. 2007) (citing *Baptist Mem'l Hosp. Sys. v. Sampson*, 969 S.W.2d 945, 947 (Tex. 1998)).

Liability rests on the basis that the employer has a right to control the employee's actions, which are assumed to advance the employer's objectives.¹⁰³ Before determining whether a TNC driver acted within the scope of employment—which is also an element of respondeat superior¹⁰⁴—it must first be determined whether the TNC driver is an employee of the TNC.¹⁰⁵

In *Newspaper, Inc. v. Love*,¹⁰⁶ the Supreme Court of Texas announced that, in determining whether a worker is an employee or an independent contractor, courts must apply the right of control test.¹⁰⁷ The Court further noted that, when there is a contract that expressly provides for an independent contractor relationship that does not impose a “right to control the details of the work” on the employer, outside evidence must be presented to show that the contract vested a right to control on the employer.¹⁰⁸ The true test, however, continues to be the right of control and, thus, “the *exercise* of control is evidentiary only.”¹⁰⁹ Holding otherwise, the court noted, would frustrate the purpose of contract rights and any relationship arising therefrom.¹¹⁰ In *Thompson v. Travelers Indemnity*

103. *See id.* (“This liability is based on the principal’s control or right to control the agent’s actions undertaken to further the principal’s objectives.” (citing *Wingfoot v. Alvarado*, 111 S.W.3d 134, 136 (Tex. 2003); W. PAGE KEETON ET AL., PROSSER & KEETON ON THE LAW OF TORTS, § 69–70 (W. Page Keeton et al. eds., 5th ed. 1984))).

104. *See generally id.* (discussing the theory of respondeat superior).

105. *See, e.g., Darensburg v. Tobey*, 887 S.W.2d 84, 88 (Tex. App.—Dallas 1994, writ denied) (reiterating that the first step in determining whether an employer is vicariously liable for their worker’s action is to find whether the worker is an independent contractor or an employee).

106. *Newspapers, Inc. v. Love*, 380 S.W.2d 582 (Tex. 1964).

107. *See id.* at 586 (“We believe, however, that the solution of the question presented in this case is correctly reached by the application of the test of right of control, which, according to our decisions and most of the modern cases, is used as the supreme test.” (quoting *Standard. Ins. Co. v. McKee*, 205 S.W.2d 362, 364 (Tex. 1947))).

108. *Id.* at 592. The Court specifically states that:

When, however, the parties, as in this case, have entered into a definite contract that expressly provides for an independent contract relationship and does not vest in the principal or the employer the right to control the details of the work, evidence outside the contract must be produced to show that despite the terms of the primary contract the true operating agreement was one which vested the right of control in the alleged master.

Id.

109. *Id.* (emphasis added).

110. *See id.* (acknowledging “contract rights and relationships based thereon” would be ruined if the court were to hold that the right of control test was controlling in cases where the master and servant have signed a written contract).

Co.,¹¹¹ the Texas Supreme Court further explained that it must determine the employer's "right to control the progress, details, and methods of operations of employee's work."¹¹² "The employer must control not merely the end sought to be accomplished, but also the means and details of its accomplishment"¹¹³

a. The Right of Control Test

Contracts between TNCs and their drivers explicitly state that TNC drivers are independent contractors.¹¹⁴ Thus, we look to the factors considered in Texas courts to determine TNC drivers' status.¹¹⁵ Texas courts assert that the employer's right to control is specifically measured by considering:

- (1) the independent nature of the worker's business;
- (2) the worker's obligation to furnish necessary tools, supplies, and materials to perform the job;
- (3) the worker's right to control the progress of the work except about final results;
- (4) the time for which the worker is employed; and
- (5) the method of payment, whether by unit of time or by the job.¹¹⁶

In *Limestone Production Distribution, Inc. v. McNamara*,¹¹⁷ the Texas Supreme Court found that a limestone delivery driver was an independent

111. *Thompson v. Travelers Indem. Co.*, 789 S.W.2d 277 (Tex. 1990).

112. *Id.* at 278 (citing *Newspapers, Inc. v. Love*, 380 S.W.2d 582, 585–90 (Tex. 1964)).

113. *Id.* (citing *Travelers Ins. Co. v. Ray*, 262 S.W.2d 801, 803 (Tex. Civ. App.—Eastland 1953, writ ref'd)). The Supreme Court of Texas thoroughly defined an independent contractor as:

[A] person who, in pursuit of an independent business, undertakes to do specific work for another person, using his own means and methods *without submitting himself to the control of such other person with respect to the details of the work*, and who represents the will of such other person only as to the result of his work and not as to the means by which it is accomplished.

St. Joseph Hosp. v. Wolff, 94 S.W.3d 513, 538 (Tex. 2002).

114. *See, e.g., Terms of Use, supra* note 53 ("The User and Wingz are independent contractors, and no agency, partnership, joint venture, employee-employer or franchisor-franchisee relationship is intended or created by this Agreement.").

115. *See, e.g., Newspapers, Inc.*, 380 S.W.2d at 592 (acknowledging that "evidence outside the contract must be produced to show that despite the terms of the primary contract" the agreement between the parties is that which creates a right to control by the employer).

116. *Limestone Prod. Distrib., Inc. v. McNamara*, 71 S.W.3d 308, 312 (Tex. 2002) (citing *Pitchfork Land & Cattle Co. v. King*, 346 S.W.2d 598, 603 (Tex. 1961); *Farrell v. Greater Houston Transp. Co.*, 908 S.W.2d 1, 3 (Tex. App.—Houston [1st Dist.] 1995, writ denied)).

contractor where the driver retained discretion over how to perform many aspects of his job, even when the driver was directed to perform certain tasks.¹¹⁸ Among the things the driver controlled were, the ability to choose what route to take when delivering the loads, when to visit the office, what hours to work, and what tools and equipment to use.¹¹⁹ Moreover, the driver did not receive “vacation, sick leave, or holidays.”¹²⁰ The driver paid his own insurance, expenses incurred from the job, social security, and federal income taxes, and he was paid only if he delivered a load.¹²¹ The court specifically held:

When we apply the right-to-control test to the summary-judgment evidence here, we hold that it conclusively shows that Mathis was an independent contractor when the accident occurred. . . .

Although some of these factors may not, alone, be enough to demonstrate a worker’s independent-contractor status, together they provide conclusive summary-judgment evidence that Mathis was an independent contractor and not Limestone’s employee when the accident occurred. In other words, the summary-judgment evidence establishes that Limestone merely controlled the end sought to be accomplished—determining where and when to deliver the load—whereas Mathis controlled the means and details of accomplishing the work.¹²²

Similarly, most TNC drivers choose what routes to take,¹²³ what hours to work, and what riders to service.¹²⁴ TNC drivers, for the most part,

117. *Limestone Prod. Distrib., Inc. v. McNamara*, 71 S.W.3d 308 (Tex. 2002).

118. *See id.* at 312–13 (providing reasons for classifying the delivery driver as an independent contractor).

119. *Id.* at 312.

120. *Id.* at 312–13.

121. *Id.*

122. *Id.* (citations omitted) (citing *Thompson v. Travelers Indem. Co. of R.I.*, 789 S.W.2d 277, 278–79 (Tex. 1990); *Pitchfork Land & Cattle Co. v. King*, 346 S.W.2d 598, 603 (Tex. 1961); *Farrell v. Greater Houston Trans. Co.*, 908 S.W.2d 1, 3 (Tex. App.—Houston [1st Dist.] 1995, writ denied); *Darensburg v. Tobey*, 887 S.W.2d 84, 88 (Tex. App.—Dallas 1994, writ denied); *Eagle Trucking Co. v. Tex. Bitulithic Co.*, 612 S.W.2d 503, 508 (Tex. 1981); *U.S. Fid. & Guar. Co. v. Goodson*, 568 S.W.2d 443, 447 (Tex. Civ. App.—Texarkana 1978, writ ref’d n.r.e.); *Travelers Ins. Co. v. Ray*, 262 S.W.2d 801, 803 (Tex. Civ. App.—Eastland 1953, writ ref’d)).

123. *See, e.g.*, Lydia Emmanouilidou, *Drivers, Passengers Say Uber App Doesn’t Always Yield Best Routes*, NPR (Sept. 21, 2014, 5:30 AM) <http://www.npr.org/2014/09/18/349560787/drivers-passengers-say-uber-app-doesnt-always-yield-best-routes> [<https://perma.cc/3F9W-QM2W>] (indicating Uber drivers can take alternative routes by choosing to use navigation apps other than the navigation app proved by Uber). Even if Texas were to require TNC drivers to take the most direct route via a statute (similar to ordinances enforced prior to the enactment of H.B. 100), the specific

utilize their personal vehicles to provide rides¹²⁵—they pay for all expenses incurred from using their automobiles for commercial purposes,¹²⁶ they do not receive paid vacation, sick leave, or holidays, and they report their own taxes.¹²⁷ Based on the *McNamara* holding, it is evident that the law in Texas weighs in favor of finding that TNC drivers are independent contractors—not employees.¹²⁸ Thus, courts should conclude, based on precedent, that TNC drivers control the means and details in accomplishing the work requested by riders using the TNC's

TNC would still lack control over which route the driver could take. See GINGER GOODIN & MAARIT MORAN, TEX. A&M TRANSP. INST., TRANSPORTATION NETWORK COMPANIES 17 (2016), <https://static.tti.tamu.edu/tti.tamu.edu/documents/tti-prc-testimony-08302016.pdf> [<https://perma.cc/98W2-DIT9>] (indicating at least two cities required TNC drivers take the more direct route). Moreover, Texas courts have found that although “the driver was instructed to use the most practical and direct route, to observe traffic laws, to drive slowly in passing schools and churches, and was paid on a mileage basis” they were still considered independent contractors. *Pitchfork Land & Cattle Co.*, 346 S.W.2d at 603 (citing *Dave Lehr, Inc. v. Brown*, 91 S.W.2d 693, 694 (Tex. 1936)).

124. See *Drive with Lyft*, *supra* note 80 (advertising the fact that drivers choose when they work); accord Mary Beth Quirk, *Uber Drivers Say That When They Turn Down Ride Requests, They Get Timeouts*, CONSUMERIST (July 28, 2016, 1:16 PM), <https://consumerist.com/2016/07/28/uber-drivers-say-that-when-they-turn-down-ride-requests-they-get-timeouts/> [<https://perma.cc/FZH5-2Z42>] (reporting Uber drivers can deny ride requests). Some TNCs, Uber for example, limit the number of riders a TNC driver may reject before they are disciplined for passing up requests. See, e.g., Mary Beth Quirk, *Uber Drivers Say That When They Turn Down Ride Requests, They Get Timeouts*, CONSUMERIST (July 28, 2016, 1:16 PM), <https://consumerist.com/2016/07/28/uber-drivers-say-that-when-they-turn-down-ride-requests-they-get-timeouts/> [<https://perma.cc/FZH5-2Z42>] (announcing Uber drivers are locked out of the system for up to fifteen minutes if they reject too many rides). This regulation, however, is minimal as it allows drivers to continue using their service after only fifteen minutes, and it does not provide TNCs control over the way drivers perform their job.

125. See generally *Vehicle Requirements: San Antonio*, UBER, <https://www.uber.com/drive/san-antonio/vehicle-requirements/> [<https://perma.cc/S8HU-Z68R>] (listing vehicle requirements for San Antonio drivers). There are some requirements TNCs must impose on drivers regarding the vehicles they utilize to service riders; however, requirements are imposed pursuant to a Texas statute, and thus, this aspect is not controlled by the TNC but by the state. See TEX. OCC. CODE ANN. § 2402.111 (West Supp. 2017) (listing vehicle requirements for drivers of transportation network companies).

126. Cf. *Cotter v. Lyft, Inc.*, 60 F. Supp. 3d 1067, 1073 (N.D. Cal. 2015) (alleging Lyft has failed to reimburse drivers for expenses associated with driving for Lyft).

127. See, e.g., *How Much Does Uber Pay?*, LYFT UBER NEWSL., <http://lyftubernewsletter.com/how-much-does-uber-pay-in-2016/> [<https://perma.cc/7YW3-K4VK>] (asserting Uber drivers, recognized as independent contractors, are responsible to report their own taxes and do not receive certain “fringe benefits”).

128. See *Limestone Prod. Distrib., Inc. v. McNamara*, 71 S.W.3d 308, 312 (Tex. 2002) (holding the driver was an independent contractor).

network platform.¹²⁹

b. Other Factors

The Texas Insurance Code explicitly states that, “A transportation network company does not control, direct, or manage a personal vehicle or a transportation network company driver who connects to the company’s digital network except as agreed by written contract.”¹³⁰ The drafters of this provision seem to acknowledge that by imposing insurance minimums not only on TNC drivers but also on the TNCs, they were imposing a right to control a driver on the TNC. They chose to prohibit, however, a determination that the insurance requirement created a TNC’s right to control its drivers. Thus, unless the written contract between the driver and the TNC states that the TNC has a right to control the driver’s method of performance, the insurance regulation does not create an

129. In *Industrial Indemnity Exchange v. Southard*, the Supreme Court of Texas also held a delivery driver was an independent contractor when the following factors were involved:

The trucks used in hauling the logs to the sawmill did not belong to the Lumber Company, and the truck used by [the driver] was owned by him; and he paid for its upkeep and for the gasoline and oil used in its operation. In some instances[,] the owners of the trucks did not personally operate them, but employed drivers to do this work. The owners of the trucks were compensated by the Lumber Company on a quantitative basis, [] that is, at so much per one thousand feet of logs hauled. [The driver] was at liberty to haul or not to haul logs at any time. He could determine the number of hours and the number of logs he would haul per day. It was the policy of the Lumber Company, when it became necessary to reduce the number of trucks engaged in hauling, to give preference to the trucks with the greatest seniority in point of time. . . . The Lumber Company’s woods foreman, whose duty it was to keep the mill supplied with logs, testified that if the truck drivers knew of any better roads than those laid out by the Lumber Company in the forest, the truck drivers were at liberty to use them. . . . The woods foreman of the Lumber Company gave out a letter to the truck drivers, advising against reckless driving and urging the truck drivers to drive carefully and obey traffic regulations.

Indus. Indem. Exch. v. Southard, 160 S.W.2d 905, 906 (Tex. 1942). The court noted that, “Under the undisputed facts, it is quite obvious that it was necessary for the Lumber Company to exercise some supervision over the loading and unloading of the trucks, if the hauling of the logs was to be done efficiently and expeditiously.” *Id.* at 907. Thus, it held:

The courts of this State have repeatedly held that an employer has the right to exercise such control over an independent contractor as is necessary to secure the performance of the contract according to its terms, in order to accomplish the results contemplated by the parties in making the contract, without thereby creating such contractor an employee of such company.

Id.

130. TEX. INS. CODE ANN. § 1954.102 (West Supp. 2017).

employment relationship between the TNC and the driver.¹³¹

One of the stronger arguments in California for classifying drivers as employees is that Uber has the right to terminate the driver at will.¹³² In Texas, however, the Supreme Court has held that a business's right to terminate the at will worker is not indicative of their right to control the details of the work.¹³³ One could also argue that TNCs require drivers to follow certain rules based on state regulations thus controlling the driver's performance. This argument, however, would also fail in Texas, where courts have held that merely requiring "that a worker comply with applicable laws, regulations and safety requirements that relate to performance of the contract likewise do not constitute evidence that the employer controls the details of how the worker performs his job."¹³⁴

In conclusion, under the right of control test adopted by Texas courts, an analysis of the contractual relationship between TNCs and their drivers characterizes the drivers as independent contractors, not employees. Moreover, when the right to control test is applied to the relationship between TNCs and drivers, the result labels TNC drivers as independent contractors, barring any injured party from holding the TNC accountable based on the theory of respondeat superior.

B. *Accountability for Independent Contractors: The Nondelegable Duty Doctrine*

Employers are generally not liable for the tortious acts of their independent

131. See generally *Uber Needs Partners Like You*, UBER, <https://www.uber.com/a/join?exp=70801c> [<https://perma.cc/YW25-HE3N>] ("Drive with Uber and earn money as an independent contractor."). Other TNCs have similar provisions in their contracts with their drivers. See *Lyft Terms of Service*, *supra* note 92 ("[T]his Agreement is solely that of independent contracting parties.").

132. See, e.g., *Cotter v. Lyft, Inc.*, 60 F. Supp. 3d 1067, 1076 (N.D. Cal. 2015) (affirming the right to terminate is compelling evidence that there is an employer/employee relationship).

133. See *Cont'l Ins. Co. v. Wolford*, 526 S.W.2d 539, 541 (Tex. 1975) ("The testimony merely reflects the view that if the supervisor from Tiffany Homes was dissatisfied with Wolford's work product, Wolford could be discharged. It is not, in our opinion, evidence that details of his work were being controlled or were subject to Tiffany's control."); see also *Bell v. VPSI, Inc.*, 205 S.W.3d 706, 714 (Tex. App.—Fort Worth 2006, no pet.) ("The right to terminate an agreement as to a worker is not evidence that details of the work are subject to the principal's control." (citing *Mary Kay Inc. v. Woolf*, 146 S.W.3d 813, 819 (Tex. App.—Dallas 2004, pet. denied))).

134. *Bell*, 205 S.W.3d at 714 (citing *Granger v. Tealstone Contractors, L.P.*, No. 05-04-00636-CV, 2005 WL 565098, at *1 (Tex. App.—Dallas March 11, 2005, pet. denied) (mem. op.); *Hoechst Celanese Corp. v. Compton*, 899 S.W.2d 215, 221 (Tex. App.—Houston [14th Dist.] 1994, writ denied)).

contractors.¹³⁵ Additionally, an employer is under no obligation to ensure its independent contractor's work is performed in a safe manner.¹³⁶ In Texas, however, employers are liable for the tortious acts of an independent contractor if "the employer maintains detailed control over the independent contractor's acts or if the work itself involves a nondelegable duty, whether inherently dangerous or statutorily prescribed."¹³⁷ Under the Nondelegable Duty Doctrine, an employer is "vicariously liable for the torts of an independent contractor involving the breach of a nondelegable duty."¹³⁸ The duty may arise due to the inherent danger in the activity involved or because it has been designated by law or statute.¹³⁹

1. Duties Imposed by Law

"[W]hen a duty is imposed by law on the basis of concerns for public safety, the party bearing the duty cannot escape it by delegating it to an independent contractor."¹⁴⁰ Further, the duty imposed must be one which requires the employer to "provide specified safeguards or precautions for the safety of others."¹⁴¹ Thus, to hold a TNC accountable for the tortious acts of their drivers under this doctrine, a duty must be imposed by law which requires the TNC to provide specific protections or to take certain precautions for public safety.

In Texas, prior to the enactment of H.B. 100, city ordinances and the Texas insurance statute required that TNCs: perform a background check on potential drivers, that they meet the insurance requirement, establish a

135. *Cf.* Woodard v. Sw. States, Inc., 384 S.W.2d 674, 675 (Tex. 1964) (indicating a "contractee is not liable for the acts of an independent contractor" (citing *Siratt v. City of River Oaks*, 305 S.W.2d 207 (Tex. Civ. App.—Fort Worth 1957, writ ref'd))).

136. *See, e.g.*, Gen. Elec. Co. v. Moritz, 257 S.W.3d 211, 214 (Tex. 2008) (upholding the general rule that an employer need not ensure its independent contractors complete their work in a safe manner).

137. *Fifth Club, Inc. v. Ramirez*, 196 S.W.3d 788, 795 (Tex. 2006) (citing *Shell Oil Co. v. Khan*, 138 S.W.3d 288, 292 (Tex. 2004); *Lee Lewis Constr., Inc. v. Harrison*, 70 S.W.3d 778, 794 n.36 (Tex. 2001); *MBank El Paso, N.A. v. Sanchez*, 836 S.W.2d 151, 153 (Tex. 1992)).

138. VINCENT R. JOHNSON, *STUDIES IN AMERICAN TORT LAW* 665 (5th ed. 2013).

139. *See, e.g.*, *Randall Noe Chrysler Dodge, LLP v. Oakley Tire Co.*, 308 S.W.3d 542, 546–47 (Tex. App.—Dallas 2010, pet. denied) (specifying a non-delegable duty arises if the work duty is prescribed by law or due to the dangerousness of the work performed).

140. *Sanchez*, 836 S.W.2d at 153.

141. RESTATEMENT (SECOND) OF TORTS § 424 (AM. LAW INST. 1965).

driver-training program,¹⁴² prohibit drug and alcohol use,¹⁴³ and impose age restrictions.¹⁴⁴ Not one of these requirements, however, was delegated by TNCs to drivers. Nevertheless, these regulations are no longer in force.¹⁴⁵ With H.B. 100, the Texas legislature introduced a series of new regulations and adopted some regulations that were already imposed by cities on TNCs.¹⁴⁶ While the regulations in H.B. 100 impose duties on TNCs, those duties are not the type that can be delegated to drivers because failure to comply would prompt the state to revoke the TNCs operating license.¹⁴⁷

2. Duties Arising from Inherent Danger

Texas has adopted the Restatement (Second) of Torts section 427, which provides that:

One who employs an independent contractor to do work involving a special danger to others which the employer knows or has reason to know to be inherent in or normal to the work, or which he contemplates or has reason to contemplate when making the contract, is subject to liability for physical harm caused to such others by the contractor's failure to take reasonable precautions against such danger.¹⁴⁸

Inherently dangerous activities arise from the “work” provided, not the manner of performance; thus, liability cannot be delegated to the independent contractor hired to do the job while failing to account for the

142. This requirement was limited to four cities: Dallas, Houston, San Antonio, and Austin. GOODIN & MORAN, *supra* note 123, at 16–17 tbl.4.

143. *See id.* at 16 tbl.4 (noting Abilene, College Station, Dallas, Houston, San Marcos, San Antonio, Austin, Galveston, and Midland have drug and alcohol provisions).

144. *See id.* at 17 tbl.4 (observing Houston, Corpus Christi, Galveston, and Midland impose age restrictions).

145. *See* TEX. OCC. CODE ANN. § 2402.003(a) (West Supp. 2017) (“[T]he regulation of transportation network companies, drivers logged in to a digital network, and vehicles used to provide digitally prearranged rides: (1) is an exclusive power and function of this state; and (2) may not be regulated by a municipality or other local entity . . .”).

146. Act of May 29, 2017, 85th Leg., R.S., H.B. 100, § 1 (codified at TEX. OCC. CODE ANN. §§ 2402.001–2402.201).

147. This result is due to Section 2402.201 of the Texas Occupation Code, which gives the department the right to “suspend or revoke a permit issued to a [TNC] that violates a provision” of Chapter 2402 regulating TNCs. TEX. OCC. CODE ANN. § 2402.201. Because Uber, Lyft, and other ridesharing companies are still operating in Texas, the assumption is they have met the permit requirements.

148. RESTATEMENT (SECOND) OF TORTS § 427 (AM. LAW INST. 1965).

employer's role.¹⁴⁹ Courts in Texas have deemed few activities inherently dangerous enough to warrant the imposition of a nondelegable duty.¹⁵⁰ The courts have, however, refused to apply the standard to various instances, such as “delivering groceries to a refrigerated box at [a] shore base facility,”¹⁵¹ transporting utility poles,¹⁵² and patrolling an apartment complex.¹⁵³ The activity that TNCs and drivers are engaged in is that of transporting persons from point A to point B. Given Texas courts' track record in refusing to find an inherently dangerous risk in other activities involving the transportation of items,¹⁵⁴ it is highly unlikely that they will find such a risk in providing transportation services to persons.

C. *Negligent Hiring*

The most promising avenue for recovery is negligent hiring, which is applicable even when a nondelegable duty is not involved.¹⁵⁵ This method of accountability, however, is limited. Injured victims may bring a claim alleging negligence in hiring when the TNC driver commits an act, whether intentional or negligent, that the TNC should have foreseen.¹⁵⁶ The injured party must establish the employer's failure to thoroughly investigate, screen, or supervise the TNC driver and prove that the failure

149. See *Fifth Club, Inc. v. Ramirez*, 196 S.W.3d 788, 795 (Tex. 2006) (noting “the responsibility for creating the danger cannot be shifted completely to the contractor performing the work, while ignoring the employer” where an activity is inherently dangerous (citing RESTATEMENT (SECOND) OF TORTS §§ 427, 427A (AM. LAW INST. 1965))).

150. See 1 TEXAS PRACTICE GUIDE: PERSONAL INJURY § 4:99 (2d ed. 2017) (“Texas courts have found very few activities so inherently dangerous as to impose a nondelegable duty.”).

151. *Hanna v. Vastar Res., Inc.*, 84 S.W.3d 372, 378 (Tex. App.—Beaumont 2002, no pet.).

152. See *Victoria Elec. Coop., Inc. v. Williams*, 100 S.W.3d 323, 331 (Tex. App.—San Antonio 2002, pet. denied) (declining the argument that the transportation of utility poles posed an inherently dangerous risk).

153. See *Ross v. Tex. One P'ship*, 796 S.W.2d 206, 214 (Tex. App.—Dallas 1990) (noting the work performed by a security guard “of caring for and protecting the property was not inherently dangerous” (citing *Gessell v. Traweck*, 628 S.W.2d 479, 482 (Tex. App.—Texarkana 1982, writ ref'd n.r.e.), *writ denied*, 806 S.W.2d 222 (Tex. 1991) (per curiam))).

154. *Hanna*, 84 S.W.3d at 378; see also *Williams*, 100 S.W.3d at 331.

155. See generally JOHNSON, *supra* note 138, at 672 (recognizing the doctrine of negligent hiring may apply when a non-delegable duty is not involved).

156. See, e.g., 1 TEXAS PRACTICE GUIDE: PERSONAL INJURY § 4:117 (2d ed. 2017) (“Under the tort of negligent hiring, an employer who negligently hires an incompetent or unfit individual may be directly liable to a third party whose injury was proximately caused by the employee's negligent or intentional act.”).

to screen was the proximate cause of the injuries sustained.¹⁵⁷ For example, an assault victim would have to prove that had the TNC thoroughly investigated the driver, the TNC would have found something in the driver's background to prevent a reasonable employer from hiring the driver, or to foresee creating a risk to the public by hiring the driver.¹⁵⁸ Proving that a TNC was negligent in vetting a driver is particularly difficult.¹⁵⁹

There is, at least, one pending case before a federal court in California that contains the facts necessary to hold a TNC liable for negligent hiring.¹⁶⁰ As previously mentioned, however, this avenue of recovery is

157. See *Fifth Club, Inc. v. Ramirez*, 196 S.W.3d 788, 796 (Tex. 2006) (alterations in original) (“Negligence in hiring requires that the employer’s ‘failure to investigate, screen, or supervise its [hires] proximately caused the injuries the plaintiffs allege.’” (quoting *Doe v. Boys Clubs of Greater Dallas, Inc.*, 907 S.W.2d 472, 477 (Tex. 1995))). In *Houser v. Smith*, the court reiterated that:

The basis of responsibility under the doctrine of negligent hiring is the master’s negligence in hiring or retaining in his employ an incompetent servant whom the master knows or by the exercise of reasonable care should have known was incompetent or unfit and thereby creating an unreasonable risk of harm to others.

Houser v. Smith, 968 S.W.2d 542, 546 (Tex. 1998) (quoting *Estate of Arrington v. Fields*, 578 S.W.2d 173, 178 (Tex. Civ. App.—Tyler 1979, writ ref’d n.r.e.)).

158. See *TXI Transp. Co. v. Hughes*, 306 S.W.3d 230, 240 (Tex. 2010) (alterations in original) (“[A] plaintiff must show that anything found in a background check ‘would cause a reasonable employer to not hire’ the employee, or would be sufficient to put the employer ‘on notice that hiring [the employee] would create a risk of harm to the public.’” (quoting *Fifth Club*, 196 S.W.3d at 796–97)).

159. See, e.g., *Mazaheri v. Doe*, No. CIV-14-225-M, 2014 WL 2155049, at *3 (W.D. Okla. May 22, 2014) (“Although plaintiff asserts that because of plaintiff’s ‘simple application and hiring process, it is unlikely that [defendant] would be able to determine whether John Doe posed any level of risk towards [defendant] customers[,]’ that defendant failed to train its employees concerning physical violence, and other conclusive allegations, the Court finds that these statements are merely speculative and conclusive statements. Accordingly, because plaintiff’s conclusive and speculative allegations lack the required factual enhancement to sufficiently allege that defendant had prior knowledge that John Doe had propensity to commit assault, the Court finds that plaintiff’s cause of action against defendant for negligent hiring, supervision, and retention should be dismissed.” (alterations in original) (citation omitted)).

160. See *Doe v. Uber Techs., Inc.*, 184 F. Supp. 3d 774, 788 (N.D. Cal. 2016) (finding Doe “sufficiently alleged that Uber should have” been on notice regarding its driver’s criminal history as to be held liable for negligent hiring). *Contra Mazaheri*, 2014 WL 2155049, at *3 (“Having carefully reviewed plaintiff’s petition, the Court finds plaintiff has not set forth sufficient factual allegations to state a claim for negligent hiring, supervision, and retention [P]laintiff has not set forth any factual allegations regarding any prior knowledge by defendant of [driver]’s propensity to engage in assault.”). There are two more reported incidents in which the victims have initiated lawsuits against Uber after being assaulted by an Uber driver. See *Johana Bhuiyan, Uber Is Being Sued by Two Separate Women Claiming Sexual Assault by Its Drivers*, RECODE (June 30, 2017, 4:18 PM),

limited to situations in which the driver's background check would have raised a red flag.¹⁶¹ Thus, riders who are unlucky enough to suffer an injury at the hands of a driver who has a clean record would find it difficult to recover under a negligent hiring theory. Similarly, TNCs would not be accountable for the actions of a driver who has a history of acting violently more than seven years prior to the TNC running a background check because TNCs are only statutorily required to go back seven years.¹⁶²

D. *Inadequate Accountability*

There are recovery avenues for both the negligent and intentional acts of drivers; however, they are limited to occasions where something in the driver's background would show that they are a risk to public safety. Moreover, the background checks conducted by TNCs go back only a certain amount of years—in Texas they are only required to search within the last seven years.¹⁶³ Thus, TNCs bear little to no responsibility for the actions of the persons they hire as drivers, and who perform services from which the TNC benefits. Additionally, the only recovery avenue available holds TNCs accountable for their own negligence but not for that of their drivers. This leaves courts with no grounds on which to hold TNCs liable under Texas law for the tortious acts of their drivers.

<https://www.recode.net/2017/6/30/15904770/uber-lawsuit-sexual-assault-negligence-background-checks> [<https://perma.cc/7H7G-PB9E>] (reporting a woman in California and a woman in Missouri are suing Uber under a negligent hiring theory).

161. It is argued, and the author agrees, that Uber's current vetting policy—which does not require a fingerprint background check—is not sufficient to indicate whether a potential driver has a propensity for violence. See Bhuiyan, *supra* note 160 (alleging, in two lawsuits against Uber, that “more rigorous background checks, including fingerprinting, could have prevented incidents like [two assaults on women] from happening”).

162. The new Texas statute only requires that TNCs inquire whether a driver “has been convicted in the preceding seven-year period of . . . an act of violence[.]” TEX. OCC. CODE ANN. § 2402.107(b)(2) (West Supp. 2017).

163. See Adrienne LaFrance & Rose Eveleth, *Are Taxis Safer than Uber?*, ATLANTIC (Mar. 3, 2015), <http://www.theatlantic.com/technology/archive/2015/03/are-taxis-safer-than-uber/386207/> [<https://perma.cc/L83A-344P>] (“Uber background checks use a database that can only go back seven years for some information.”).

IV. THE CURRENT STATE OF TNC REGULATION IN TEXAS

A. *State-Wide Insurance Requirements*

In 2015, the Texas legislature took the first step in holding TNCs accountable for the cost of doing business. House Bill 1733 was proposed to regulate insurance requirements for TNCs and their drivers.¹⁶⁴ This Bill was enacted under the Texas Insurance Code.¹⁶⁵ The statute requires that “[a] transportation network company driver or transportation network company on the driver’s behalf [] maintain primary automobile insurance as required by this subchapter.”¹⁶⁶ Moreover, it demands that the driver be covered by that insurance while using his vehicle for commercial purposes.¹⁶⁷ The statute clarifies that the insurance requirement can be met by either the TNC driver, the TNC, or a combination of the two.¹⁶⁸ The statute divides the insurance requirement into two phases, the first is *between* prearranged rides and the second is *during* prearranged rides.¹⁶⁹ Finally, the statute provides that if the TNC driver’s insurance has lapsed or if the coverage provided by the insurance policy is insufficient, the TNC itself *must* provide the coverage.¹⁷⁰

1. Phase One: Between Prearranged Rides

Phase one takes place when the TNC driver is logged into the TNC’s mobile application and waiting for a prearranged ride, but before actually providing the prearranged ride.¹⁷¹ At this point, the TNC driver is required to be covered by an insurance policy providing a minimum of “\$50,000 for bodily injury to or death for each person in an incident . . . [,] \$100,000 for bodily injury to or death of a person per incident . . . [,] and] \$25,000 for damage to or destruction of property of others in an

164. Act of June 17, 2015, 84th Leg., R.S., ch. 742, § 1, 2015 TEX. GEN. LAWS 2271 (codified at TEX. INS. CODE ANN. § 1954 (West Supp. 2017)).

165. INS. § 1954.

166. *Id.* § 1954.051(a).

167. *See id.* § 1954.051(b) (requiring coverage for the TNC driver when “the driver is logged on to the [TNC’s] digital network” or “the driver is engaged in a prearranged ride”).

168. *Id.* § 1954.051(d).

169. *See id.* § 1954.052 (setting forth the insurance requirements during phase one); *see also id.* § 1954.053 (explaining the insurance requirements during phase two).

170. *See id.* § 1954.054 (requiring TNCs to supply coverage if the “insurance policy maintained by a transportation network company driver under this subchapter has lapsed or does not provide the coverage required by this subchapter”).

171. *Id.* § 1954.052.

incident.”¹⁷² This coverage, however, is insufficient for some injured parties. For example, on December 31, 2013, a six-year-old girl, her brother, and her mother were hit by an Uber driver who had logged into the Uber app and was waiting for riders to request a ride.¹⁷³ Only six months after the accident, a report specified their medical bills were at \$185,000 and still rising.¹⁷⁴ In Texas, courts have recognized the ability to recover medical and funeral expenses in wrongful death claims.¹⁷⁵ Moreover, courts have allowed the recovery of loss of companionship and society and damages for mental anguish for the loss of a minor child.¹⁷⁶ Seemingly, the minimum insurance requirement would be insufficient to cover injuries sustained by all victims of negligent TNC drivers during phase one. And, it is unlikely drivers have the ability to cover whatever amount surpasses the insurance coverage.

2. Phase Two: During Prearranged Rides

Phase two takes place when the driver is in the process of providing a prearranged ride.¹⁷⁷ At this point, the insurance policy must provide a

172. *Id.* §§ 1954.052(1)(A)–(C). The basic liability requirements in Texas are \$30,000 for bodily injury to or death for each person in the incident, \$60,000 for bodily injury to or death of a person per incident, and \$25,000 for property damages. Melanie Torre, *New Law Outlines Texas Insurance Requirements for Uber, Lyft*, CBS AUSTIN (Jan. 4, 2016), <http://cbsaustin.com/news/local/new-law-outlines-texas-insurance-requirements-for-uber-lyft> [<https://perma.cc/JQ2P-9KME>] (reporting on the Texas insurance statute for TNCs).

173. Patrick Hoge, *Dead Girl's Family Steps into Legislator's Insurance Fight over Uber, Lyft*, S.F. BUS. TIMES (June 25, 2014, 2:26 PM), <http://www.bizjournals.com/sanfrancisco/blog/techflash/2014/06/uber-lyft-insurance-sofia-liu-susan-bonilla.html> [<https://perma.cc/D4RP-TPKC>] (reporting the mother saw an Uber driver “looking at a smartphone in his hand when he ran into her, her daughter and son as they were in a crosswalk at Ellis and Polk Streets returning home from visiting the children’s grandmother”).

174. *Id.*

175. *See* *Russell v. Ingersoll-Rand Co.*, 841 S.W.2d 343, 345 (Tex. 1992) (recognizing plaintiffs may recover for medical expenses in a wrongful death action); *see also* *Landers v. B.F. Goodrich Co.*, 369 S.W.2d 33, 34–35 (Tex. 1963) (finding funeral expenses may be recovered in a wrongful death action).

176. *See, e.g.,* *Sanchez v. Schindler*, 651 S.W.2d 249, 254 (Tex. 1983) (“[A] plaintiff may recover under the Wrongful Death Statute for loss of society and companionship and damages for mental anguish for the death of his or her minor child.” (citing *Downs v. J.M. Huber Corp.*, 580 F.2d 794, 797 (5th Cir. 1978); *Taggart v. Taggart*, 552 S.W.2d 422, 423 (Tex. 1977); *Felderhoff v. Felderhoff*, 473 S.W.2d 928, 933 (Tex. 1971))).

177. *See* TEX. INS. CODE ANN. § 1954.053 (West Supp. 2017) (describing phase two as “the time a transportation network company driver is engaged in a prearranged ride”).

minimum \$1 million coverage for “death, bodily injury, and property damage for each incident.”¹⁷⁸

The state-wide insurance requirements imposed on TNCs and their drivers provides more accountability for persons injured by the negligence of TNC drivers. However, while the insurance statute allows for the compensation of injured parties, TNCs remain largely excused for their involvement in the industry. The TNC driver is still responsible for maintaining personal liability insurance and collision coverage or comprehensive insurance to be covered for physical damage under the TNC's insurance during phase two.¹⁷⁹ During phase one, some TNCs, for example, Uber, only provide the remaining coverage in instances where the driver is not covered.¹⁸⁰ Thus, while TNCs are taking some responsibility for the cost of doing business, they are diverting most of that cost to their drivers via insurance premiums.

B. Pre-2017: Municipal-Wide Regulations

Prior to the enactment of H.B. 100, ordinances regulated TNCs in individual municipalities.¹⁸¹ Between the years of 2014 and 2016, twenty cities had enacted ordinances regulating TNCs.¹⁸² These cities included: Abilene, Amarillo, Austin, Beaumont, Bryan, College Station, Corpus Christi, Dallas, El Paso, Fort Worth, Galveston, Houston, Longview, Lubbock, Midland, New Braunfels, Odessa, San Antonio, San Marcos, and Tyler.¹⁸³ In at least five of those cities, some TNCs ceased operating because of their unwillingness to respect regulations, in particular regulations requiring fingerprint background checks.¹⁸⁴

178. *Id.* § 1954.053(1).

179. *See Insurance: How You're Covered*, UBER, <https://www.uber.com/drive/insurance/> [<https://perma.cc/X2LA-UCV3>] (noting collision and comprehensive coverage is provided to drivers if the driver has “such coverage on [their] personal insurance”); *see also* Torre, *supra* note 172 (“Industry experts recommend TNC drivers talk with their insurance agents to make sure they have the right coverage because at the end of the day, they're the ones behind the wheel and they're the ones responsible.”).

180. *See Insurance: How You're Covered*, *supra* note 179 (announcing Uber maintains liability insurance on its drivers' behalf if the driver fails to maintain the required insurance).

181. *See, e.g.*, MORAN ET AL., *supra* note 41, at 25 (mapping the cities that enacted TNC ordinances).

182. *See, e.g., id.* at 24.

183. *See id.* at 25 (including Figure 4 to display the cities in Texas that had enacted local ordinances regulating TNCs).

184. *See id.* (noting both Uber and Lyft left San Antonio, Austin, Corpus Christi, Galveston, Houston, and Midland). A few months after Uber and Lyft left San Antonio, the city created a

C. *Post-2017: State-Wide Regulation*

On February 6, 2017, H.B. 100 was introduced in the Texas House of Representatives.¹⁸⁵ After some debate,¹⁸⁶ the Bill passed both the House, on April 20, 2017, and the Senate, on May 17, 2017.¹⁸⁷ The Governor signed the Bill on May 29, 2017.¹⁸⁸ And, because the Bill passed the senate on a 21–9 vote, more than two-thirds support, the Bill went “into effect immediately after the [G]overnor sign[ed] it.”¹⁸⁹

The Bill is divided into five subchapters.¹⁹⁰ The first subchapter provides general provisions covering definitions, the nature of TNCs, drivers, and vehicles, the controlling authority, and indicates that the provision is applicable to drivers logged into the TNC’s network.¹⁹¹ The second subchapter delineates permit requirements.¹⁹² The third subchapter regulates the operation of TNCs.¹⁹³ The fourth subchapter covers records and other information.¹⁹⁴ Finally, the fifth subchapter

temporary compromise agreement which led to the return of both TNCs to the city. See GOODIN & MORAN, *supra* note 123, at 15 (“In October 2015, the City Council passed a temporary, compromise agreement, and Uber and Lyft returned to San Antonio.”).

185. HB 100 Legislative History, Texas Legis. Online, <http://www.legis.state.tx.us/BillLookup/History.aspx?LegSess=85R&Bill=HB100> [<https://perma.cc/CHA8-5BME>]. The Bill was authored by Representatives Chris Paddie, Senfronia Thompson, Poncho Nevárez, John Kuempel, and Geanie W. Morrison. *Id.*

186. See Alex Samuels, *Senate Sends Bill Creating Statewide Ride-Hailing Regulations to Governor*, TEX. TRIB. (May 17, 2017), <https://www.texastribune.org/2017/05/17/senate-tentatively-backs-measure-creating-statewide-regulations-ride-h/> [<https://perma.cc/53GK-S2TW>] (“After a debate among lawmakers over the best way to regulate services like Uber and Lyft, the Texas Senate on Wednesday backed a proposal that would override local regulations concerning ride-hailing companies.”); see also Ben Wear, *Texas House Gives Initial Approval to State Ride-Hailing Bill*, MYSTATESMAN (Apr. 19, 2017, 4:26 PM), <http://www.mystatesman.com/news/transportation/texas-house-gives-initial-approval-state-ride-hailing-bill/5vi1We6kKidi2TqGKkbNv/> [<https://perma.cc/8EYP-XWLZ>] (opining H.B. 100 “easily passed the Texas House . . . after an exhaustive five-hour debate”).

187. HB 100 Legislative History, *supra* note 185.

188. *Id.*

189. Samuels, *supra* note 186.

190. See Act of May 29, 2017, 85th Leg., R.S., H.B. 100, § 1 (codified at TEX. OCC. CODE ANN. § 2402 (West Supp. 2017) (dividing the bill into subchapters A through E).

191. *Id.* (codified at OCC. §§ 2402.001–.004).

192. *Id.* (codified at OCC. §§ 2402.051–.052).

193. *Id.* (codified at OCC. §§ 2402.101–.115). This subchapter governs insurance, fares, share rides, receipts, identifications of drivers and vehicles, alcohol policy, driver requirements, types of rides allowed, digital identification, vehicle requirements, nondiscrimination policy, accessibility programs, drivers as independent contractors, and agreements with third parties. *Id.*

194. *Id.* (codified at OCC. §§ 2402.151–.154).

outlines enforcement mechanisms.¹⁹⁵

Texas' latest state-wide regulation on TNCs has led to uniformity. Now that TNCs are regulated in a similar fashion across the state, TNCs are less likely to pick and choose which cities are the most convenient to operate in—that is, which are less costly—as they did in previous years.¹⁹⁶ Further, state-wide application will reduce compliance costs. For example, TNCs will no longer have to pay a permit fee in each city in which they decide to operate; rather, the TNC will pay an annual fee of \$5,000 to the Texas Department of Licensing and Regulation.¹⁹⁷ This should, in effect, reduce the cost of the service for consumers. Finally, by enacting a statute regulating TNCs state-wide, Texas has made a move supported by many and advocated for on the national level.¹⁹⁸ Currently, Texas has joined the ranks of forty-seven states and Washington, D.C., in enacting

195. *Id.* (codified at OCC. § 2402.201).

196. See Joe Martin, *With Rideshare Bill Passed, Uber, Lyft Re-Enter Houston-Area Markets*, HOUS. BUS. J. (May 30, 2017, 12:11 PM), <https://www.bizjournals.com/houston/news/2017/05/30/lyft-to-relaunch-in-houston-this-week.html> [<https://perma.cc/A4EG-666T>] (noting Lyft left Houston in 2014 and Uber left Galveston in 2016 after the cities passed regulations limiting the TNCs' operations); Lauren Melear, *Uber Returns to Midland*, EMPOWER TEXANS (June 6, 2016), <https://empowertexans.com/around-texas/uber-returns-to-midland/> [<https://perma.cc/X5SP-VA5U>] (reporting Uber ceased operating in Midland due to disagreements over city regulations). It should be noted that although this statute deters TNCs from choosing which cities are more convenient to operate in, it has also made it easier for TNCs to operate anywhere in Texas because it lowered safety standards. See David Piperno, *A Regulation That Would Be a Disaster for Austin and the Rest of Texas*, TRIBTALK (May 16, 2017), <https://www.tribtalk.org/2017/05/16/a-regulation-that-would-be-a-disaster-for-austin-and-the-rest-of-texas/> [<https://perma.cc/XAW8-N5XN>] (discussing the negative effects of H.B. 100). See generally Dockterman, *supra* note 59 (announcing Uber and Lyft will be leaving Austin after proposition 1, a pro-TNC ordinance, failed to pass).

197. See House Comm. on Transp., Bill Analysis, Tex. H.B. 100, 85th Leg., R.S. (2017) (“A TNC would be required to apply for and receive a permit before operating in the state. Permit holders would have to meet the requirements of the bill and pay an annual fee of \$5,000 to TDLR.”). Drivers will also have the ability to move across city lines while working for a TNC, but need not obtain a permit in each city they operate in. See *id.* (“Under [H.B. 100], drivers could serve multiple cities without applying for a new driver permit in each one. TNCs and drivers currently need city specific permits in many municipalities.”).

198. See, e.g., Jon Herskovitz, *Texas Lawmakers Clear Way for Uber, Lyft Return to Major Cities*, REUTERS (May 21, 2017, 6:13 AM), <https://www.reuters.com/article/us-texas-ridesharing/texas-lawmakers-clear-way-for-uber-lyft-return-to-major-cities-idUSKBN18H0I> [<https://perma.cc/7ZEC-9S1T>] (quoting the statement by deputy assistant director of administration and regulatory affairs for the city of Houston recognizing that there is a national push “from the industry to enact regulations for [TNCs] at the state rather than city level”).

legislation regulating the operation of TNCs state-wide.¹⁹⁹ Nevertheless, the statute lacks safety features, allowing TNCs to easily operate in more Texas cities than before without the protections previously instituted for the benefit of consumers.

V. THE NEED FOR BETTER SAFETY STANDARDS VIA LEGISLATIVE ACTION

Rather than burden courts with the task of holding TNCs liable under theories of liability that are not applicable to TNCs or that may take many years to develop, consumers should turn to the Texas Legislature and request that they provide better protections, not merely *acceptable* standards. The new state-wide regulation should contain provisions geared toward providing for the safety and protection of Texans. While there are various features that should be added to the Texas statute, two in particular would increase the safety of consumers: driver training programs and fingerprint-based background checks.

A. *Fingerprint-Based Background Checks*

As noted above, two of the more popular TNCs, Lyft and Uber, left various cities after city ordinances mandated they comply with more rigorous background checks.²⁰⁰ More specifically, the city ordinances required TNCs to conduct “fingerprint-based background checks,” which

199. See MORAN ET AL., *supra* note 41, at 8 (listing the types of regulations instituted in forty-eight states and Washington, D.C., including Texas). Among the functions regulated by the states are: operational standards, background check requirements, operating permits and fees, driver and vehicle requirements, insurance requirements, passenger safety, and nondiscrimination provisions. See FLA. STAT. ANN. § 627.748(5) (West 2018) (mandating TNCs disclose driver and vehicle information to passengers); NEV. REV. STAT. ANN. § 690B.470 (West 2018) (detailing insurance requirements for TNCs operating in Nevada); N.M. STAT. ANN. § 65-7-16 (2018) (requiring nondiscrimination policies); 66 PA. STAT. AND CONS. STAT. ANN. §§ 2604.1(a), (b) (West 2018) (listing licensure requirements for TNCs in Pennsylvania); VA. CODE. ANN. § 46.2-2099.49 (West 2018) (enumerating requirements for TNC drivers in Virginia, including a mandatory background screening).

200. Alex Samuels & Todd Wiseman, *We Asked Texans Who Should Regulate Uber and Lyft. Here's What They Said*, TEX. TRIB. (June 26, 2017, 12:00 AM), <https://www.texastribune.org/2017/06/26/how-uber-and-lyfts-return-texas-cities-are-affecting-drivers-and-custo/> [https://perma.cc/NY9K-A8LR] (reporting Lyft left Houston in 2014 “after a mandate [] went into effect requiring ride-hailing companies to perform fingerprint background checks on drivers,” and that Uber and Lyft left Austin in 2016 “after the Austin City Council passed an ordinance requiring ride-hailing companies to perform fingerprint background checks on drivers”).

are typically conducted via a government agency.²⁰¹ Such background checks, cities argued, would procure public safety.²⁰² A city of Houston spokeswoman, Lara Cottingham, stated: “We are proud we have one of the strongest, if not the strongest ordinance, in the country The city of Houston wants to ensure that if you get into a cab, limo, Uber or Lyft, the city knows that the driver is safe and the vehicle is safe.”²⁰³ TNCs, however, urged for, and succeeded in obtaining, a less rigorous standard, the name and Social Security-based background checks.²⁰⁴ TNCs argue that “third-party background checks are safe and reliable.”²⁰⁵ After being sued by two women who alleged they were assaulted by an Uber driver, Uber described “its background checks as ‘industry leading’ or the ‘gold standard.’”²⁰⁶

When it enacted H.B. 100, Texas also refused to mandate fingerprint-based background checks.²⁰⁷ Not only did the legislature

201. MORAN ET AL., *supra* note 41, at 11.

202. See Aman Batheja, *Uber, Lyft Shun Driver Fingerprint Requirements*, TEX. TRIB. (Oct. 7, 2015, 6:00 AM), <https://www.texastribune.org/2015/10/07/background-checks-center-city-fights-uber/> [<https://perma.cc/B687-W9UA>] (quoting Austin City Councilwoman Ann Kitchen who stated that Austin’s responsibility is to protect “Austinites and visitors,” which is why the city of Austin requires fingerprint-based background checks for all ground transportation in Austin, including taxis, limos, and bus drivers).

203. *Id.*

204. See MORAN ET AL., *supra* note 41, at 11 (“The public discourse about TNC background checks has focused on the relative merits of two predominant types of checks routinely used to screen an individual’s criminal background: a fingerprint-based background check . . . and a name-based check, which is the preferred screening approach of some TNCs (notably Uber and Lyft.)”); see also Dug Begley, *Lawmakers Proceeding with Texas-Wide Rules for Ride-Hailing Companies*, HOUS. CHRON. (Apr. 20, 2017, 8:51 AM), <https://www.houstonchronicle.com/news/transportation/article/Lawmakers-proceeding-with-Texas-wide-rules-for-11084623.php> [<https://perma.cc/3F5S-XLKN>] (“The companies vigorously oppose fingerprint background checks, favoring their background checks based on Social Security numbers.”). Not one state regulating TNCs has instituted a fingerprint-based background check. MORAN ET AL., *supra* note 41, at 11.

205. MORAN ET AL., *supra* note 41, at 11–12.

206. Bhuiyan, *supra* note 160. Due to a claim of misrepresentation, Uber has since ceased referring to their background check with such language. *Id.*

207. Act of May 29, 2017, 85th Leg., R.S., H.B. 100, § 1 (codified at TEX. OCC. CODE ANN. § 2402.107(a)(2)). Rather than requiring fingerprint-based background checks, the legislature enacted the following requirements:

Before permitting an individual to log in as a driver on the company’s digital network, a transportation network company must . . . (2) conduct, or cause to be conducted, a local, state, and national criminal background check for the individual that includes the use of: (A) a commercial multistate and multijurisdictional criminal records locator or other similar nationwide database; and (B) the national sex offender public website maintained by the United States Department of Justice or a successor agency[.]

disregard various cities who had implemented a strict background check requirement to protect their residents from assaults by drivers,²⁰⁸ but they also disregarded Texas residents who voted for such protections.²⁰⁹ The legislature defended its position by noting that TNCs “use accredited multi-state commercial background checks and screen against the national sex offender registry. Additionally, security features built into TNCs, including GPS tracking, driver photos, and standards based on rider reviews, provide *acceptable* rider safety.”²¹⁰

By mandating that TNC drivers undergo fingerprint-based background checks, there is a higher probability of ensuring the safety of consumers in Texas.²¹¹ And, although the legislature argued that there are security features built into TNCs, by the time the safety features are used, the potentially dangerous driver may have already passed a background check. It would be safer for consumers, in this author’s opinion, to filter potentially dangerous drivers via a rigorous background check, rather than tracking down the driver once he or she has already been allowed to use the TNC’s system. Moreover, even when claiming that fingerprint-based background checks are burdensome and ineffective, TNCs have continued operating in cities like Houston where fingerprint-based background checks were required prior to the enactment of H.B. 100.²¹² It is also true

Id.

208. See MORAN ET AL., *supra* note 41, at 25 fig.4 (showing cities where TNCs suspended service after the passage of regulations the TNCs did not support, including cities that passed fingerprint-based background checks).

209. See, e.g., Nolan Hicks & Ben Wear, *Prop. 1 Goes Down As Activist Proclaims: ‘Austin Made Uber an Example’*, AUSTIN AM. STATESMAN (May 8, 2016, 12:18 AM), <http://www.statesman.com/news/local-govt—politics/prop-goes-down-activist-proclaims-austin-made-uber-example/E0P3Ba6O2ZkW9QrHmc7xvI/> [<https://perma.cc/4JAN-CE3T>] (“Austin voters on Saturday decisively rejected Uber and Lyft’s \$8.6 million bid to overturn the city’s rules for ride-hailing apps, bringing a stunning conclusion to the most expensive campaign in city history. . . . The results keep in place the ordinance that the City Council approved in December, which requires drivers with ride-hailing apps to undergo fingerprint-based background checks by Feb. 1, 2017.”).

210. House Comm. on Transp., Bill Analysis, Tex. H.B. 100, 85th Leg., R.S. (2017) (emphasis added).

211. See Audrey McGlinchy, *Groups Say Fingerprint-Based Background Checks Could Lead to Racial Discrimination*, KUT (Oct. 19, 2015), <http://kut.org/post/groups-say-fingerprint-based-background-checks-could-lead-racial-discrimination> [<https://perma.cc/KFC4-X2XJ>] (reporting on allegations that fingerprint-based background checks help eliminate false or duplicate names and provide more accuracy).

212. See Batheja, *supra* note 202 (“Houston is one of Uber’s only markets in which its drivers have to undergo fingerprinting. . . . Though Uber is still available there, the company isn’t exactly thrilled with Houston’s policy.”).

that not all TNCs ceased operating in cities that enacted laws requiring fingerprint background checks, evidencing the feasibility of such a requirement.²¹³ It is clear that the burden of requiring any type of background check is outweighed by the need to protect the public's safety.²¹⁴

B. *Driver Training Programs*

The Texas legislature also failed to institute a mandatory driver training program.²¹⁵ Other states have instituted such programs in order “to address public safety concerns[.]”²¹⁶ including California,²¹⁷ Nebraska,²¹⁸ and Washington, D.C.²¹⁹ The program established in California by the TNC Lyft educates drivers on: “Driver/passenger safety and support. Drivers learn tips for ensuring safe trips, how to contact support, etc.”²²⁰ Drivers are also paired with a mentor who conducts a “safety ride-along that covers a driver's ability to obey traffic laws; reactions behind the wheel when dealing with other drivers, bicyclists, pedestrians, etc.; and the ability to focus on the road while holding a conversation.”²²¹ Moreover, Lyft's program provides further training via webinars, by tracking driver

213. See Dave Byknish, *Remaining Austin Ride-Sharing Companies All in Compliance with Code*, KXAN (Jan. 24, 2017, 6:21 AM), <http://kxan.com/2017/01/24/remaining-austin-ride-sharing-companies-all-in-compliance-with-code/> [<https://perma.cc/Z27Z-R33G>] (noting the TNCs Fare, Fasten, GetMe, InstaRyde, RideAustin, Tride, Wingz, and zTrip were, in 2017, almost completely complying with the Austin ordinance requiring fingerprint-based background checks).

214. When the city of Austin required that TNCs run a fingerprint-based background check, the TNCs that continued operating had 8,343 drivers complete background checks. *Id.* Such background checks resulted in 197 applicants being rejected, in effect removing potential danger and protecting consumers. *Id.*

215. See generally TEX. OCC. CODE ANN. § 2402.107 (West Supp. 2017) (detailing the requirements individuals must fulfill before they are permitted to drive for a TNC but failing to require participation in a mandatory driver training program).

216. MORAN ET AL., *supra* note 41, at 45.

217. See *id.* (“CPUC requires that all licensed TNCs operating in California report on their driver training programs to ‘ensure all drivers are safely operating their vehicle prior to being able to offer service.’”).

218. See NEB. REV. STAT. ANN. § 75-325 (West 2018) (“Every transportation network company shall: . . . (h) Establish a driver training program designed to ensure that each driver safely operates his or her personal vehicle prior to the driver being able to offer services on the transportation network company's online-enabled application or platform[.]”).

219. See MORAN ET AL., *supra* note 41, at 45 (“California, Nebraska, and Washington, D.C., require TNCs to establish some form of driver training program.”).

220. *Id.*

221. *Id.*

performance, and—among other options—through coaching.²²² Additionally, prior to the enactment of H.B. 100, Dallas, Houston, San Antonio, and Austin all required that TNCs establish a driver training program.²²³ TNCs who operated in these cities before H.B. 100 found a way to balance public safety with the alleged burden of establishing a driver training program.²²⁴

Instituting driver training programs will require more on the part of TNCs; however, such programs will ensure drivers are qualified and educated to drive under conditions they would not normally drive in.

VI. CONCLUSION

TNCs have created a loophole in the transportation industry, which allows them to operate and produce considerable profits while avoiding liability for costs incurred by other transportation companies. More specifically, TNCs are able to deny liability for their drivers' tortious acts and still significantly profit from the services their drivers provide. However, while TNCs should be held accountable for the safety of consumers and third parties, they should not be held liable where they have failed to violate any laws or where the law provides no protection. It is not the judicial but rather the legislative branch that has failed Texas residents by refusing to enact policy that is focused on public safety rather than empowering large companies. While the insurance requirement and the state-wide regulation under H.B. 100 are an enormous step forward in regulating and holding TNCs accountable, despite H.B. 100's TNC-friendly provisions, the legislature must do more to ensure public safety—a duty that falls within the scope of the legislature's power. Thus, it is of upmost importance that concerns regarding the regulation of TNCs and the public safety of Texans are voiced to the legislature in the form of requests for more stringent regulations, including the two proposals set forth in this Comment.

222. *Id.* at 45–46.

223. GOODIN & MORAN, *supra* note 123, at 17 tbl.4.

224. *See* Byknish, *supra* note 213 (noting TNCs that remained in Austin are complying with the city ordinance after it required more stringent background checks and driver training programs).