

## The Common Carrier Barrier: An Analysis of Standard of Care Requirements, Insurance Policies, and Liability Regulations for Ride-Sharing Companies

Riebana Sachs

Follow this and additional works at: <https://via.library.depaul.edu/law-review>



Part of the [Law Commons](#)

---

### Recommended Citation

Riebana Sachs, *The Common Carrier Barrier: An Analysis of Standard of Care Requirements, Insurance Policies, and Liability Regulations for Ride-Sharing Companies*, 65 DePaul L. Rev. (2016)

Available at: <https://via.library.depaul.edu/law-review/vol65/iss2/20>

This Comments is brought to you for free and open access by the College of Law at Via Sapientiae. It has been accepted for inclusion in DePaul Law Review by an authorized editor of Via Sapientiae. For more information, please contact [digitalservices@depaul.edu](mailto:digitalservices@depaul.edu).

**THE COMMON CARRIER BARRIER:  
AN ANALYSIS OF STANDARD OF CARE  
REQUIREMENTS, INSURANCE POLICIES,  
AND LIABILITY REGULATIONS FOR  
RIDE-SHARING COMPANIES**

INTRODUCTION

In recent years, smartphone technology has not only maximized the amount of service offerings to consumers but has also enabled the average consumer to become a service provider.<sup>1</sup> Entrepreneurs are now able to forgo many of the time consuming and expensive hassles that starting a business entails<sup>2</sup> by taking part in the rising “sharing economy” in which people rent and share their resources, such as rooms in their houses, rides in their cars, or even their time and skill sets.<sup>3</sup> Ride-sharing enables individuals to share a seat in their car for a fee or a “donation”<sup>4</sup> and has become a popular service in the sharing economy.<sup>5</sup> Transportation network companies (TNCs), such as Lyft, Sidecar, and Uber, provide a technological platform that connects drivers with customers who are seeking a ride.<sup>6</sup> Riders are joined “with drivers using their phones’ GPS, much like a taxi company’s

---

1. See generally Molly Cohen & Corey Zehngebot, *What’s Old Becomes New: Regulating the Sharing Economy*, Bos. B.J., Spring 2014, <http://www.bostonbar.org/docs/default-document-library/boston-bar-journal-spring-2014-edition.pdf> (describing the various types of sharing platforms and the issues involved with operating and utilizing these services).

2. See Timothy Sandefur, *A Public Convenience and Necessity and Other Conspiracies Against Trade: A Case Study from the Missouri Moving Industry*, 24 GEO. MASON U. C.R. L.J. 159, 159 (2014) (“Accumulating capital, hiring talent, buying insurance, doing market research—all these tasks and more make opening a small business among the hardest things a person can ever attempt.”).

3. See RACHEL BOTSMAN & ROO ROGERS, *WHAT’S MINE IS YOURS: THE RISE OF COLLABORATIVE CONSUMPTION* xv (2010) (coining the term “collaborative consumption,” which includes “traditional sharing, bartering, lending, trading, [and] renting . . . redefined through technology and peer communities”); Cohen & Zehngebot, *supra* note 1; *All Eyes on the Sharing Economy*, *ECONOMIST: TECH Q. (SPECIAL ISSUE)*, Mar. 9, 2013, at 13–15.

4. Stephanie Francis Ward, *‘App’ Me a Ride*, A.B.A. J., Jan. 2014, at 13, 13.

5. Gwynedd Stuart, *Can Chicago’s Taxi Industry Survive the Rideshare Revolution?*, *CHI. READER* (Oct. 1, 2014), <http://www.chicagoreader.com/chicago/rideshare-chicago-uber-lyft-uberx-taxi-industry-cab-drivers-extinct/Content?oid=15165161>.

6. John G. Browning, *Conning the IADC Newsletters: Emerging Technology and Its Impact on Automotive Litigation*, 81 DEF. COUNS. J. 83, 84 (2014); see *Manzo v. Uber Techs., Inc.*, No. 13 C 2407, 2014 WL 3495401, at \*1 (N.D. Ill. July 14, 2014).

dispatch system would send the nearest available cab.”<sup>7</sup> Although many consumers have enjoyed this new mode of transportation and the lower fares it brings,<sup>8</sup> legislators, insurance companies, and courts are trying to tackle safety and regulatory concerns, insurance issues, and rising lawsuits, respectively.<sup>9</sup>

Only a few jurisdictions and municipalities have tried to ban ride-sharing services outright;<sup>10</sup> however, many jurisdictions, and especially courts, grapple with determining how to treat ride-sharing operators compared to licensed taxi drivers.<sup>11</sup> While courts in almost all jurisdictions have yet to answer the question of what standard of care should apply to ride-sharing services,<sup>12</sup> a variety of states have enacted, or are in the process of enacting, statutes that expressly exclude ride-sharing services from being considered common carriers.<sup>13</sup> In 2014, former Illinois Governor Pat Quinn vetoed the proposed H.B. 4075 bill, which would have amended the Illinois Vehicle Code as well

7. Browning, *supra* note 6, at 84.

8. See Stuart, *supra* note 5.

9. See Cohen & Zehngelot, *supra* note 1; Harrison Weber, *As Uber Battles 13 Lawsuits, Cabbies & State Agencies Are Out for Blood (Update)*, VENTUREBEAT, <http://venturebeat.com/2014/05/08/as-uber-battles-13-lawsuits-cabbies-state-agencies-are-out-for-blood/> (last updated May 8, 2014, 10:20 AM).

10. See, e.g., Luz Lazo, *Virginia Reaches Deal with Uber, Lyft, To Allow Services To Operate in the State*, WASH. POST, Aug. 6, 2014, <http://www.washingtonpost.com/blogs/dr-gridlock/wp/2014/08/06/virginia-reaches-deal-with-uber-lyft-to-allow-services-to-operate-in-the-state/> (describing an agreement between Virginia officials and TNCs, which allowed ride-sharing services to legally operate after a cease and desist order was issued in June 2014); Jon Brooks, *City by City, Lyft and Uber Take on Taxis, Regulators*, KQED NEWS (Mar. 3, 2014), <http://www.kqed.org/news/2014/03/03/lyft-uber-regulation/> (stating that New Orleans, Miami, and Portland have banned the services); Ross Palombo, *Miami-Dade Commissioners Approve UberX, Lyft Services*, LOCAL10.COM, <http://www.local10.com/news/miamidade-commissioners-approve-uberx-lyft-services/26966748> (last updated July 15, 2014, 9:58 PM) (reporting on an initial vote by the Miami-Dade Commissioner to move forward in legalizing ride-sharing services in Miami despite the disappointment of angry taxi drivers).

11. See, e.g., *Manzo*, 2014 WL 3495401, at \*4; *Bos. Cab Dispatch, Inc. v. Uber Techs., Inc.*, No. 13-10769-NMG, 2014 WL 1338148, at \*1-6 (D. Mass. Mar. 27, 2014); *City of Columbus v. Uber Techs.*, No. 2014 EVH 060125, 2014 Ohio Misc. LEXIS 11, at \*5-6 (Ohio Mun. Ct. Apr. 30, 2014).

12. In an administrative proceeding, the Maryland Public Service Commission recently held that “Uber is a common carrier within the meaning prescribed by [Public Utilities Act] § 1-101(e)(1)” because Uber “is engaged in the public transportation of persons for hire.” *In re An Investigation To Consider the Nature & Extent of Regulation over the Operations of Uber Techs., Inc. & Other Similar Companies*, Md. Pub. Serv. Comm’n, Order No. 86528, at 17-18 (Aug. 6, 2014) [hereinafter Order of Md. Pub. Serv. Comm’n] (quoting MD. CODE ANN., Pub. Util. § 1-101(e)(1) (LexisNexis 2015)).

13. See, e.g., S.B. 1457, Gen. Assemb. (Pa. 2014) (“‘Call or demand service’ or ‘taxicab service.’ Local common carrier service for passengers . . . . The term shall not include transportation network services . . . .”); Dan Packel, *Pa. Sen. Floats Bill To Legitimize Uber, Lyft Services*, LAW 360 (July 8, 2014, 1:57 PM), <http://www.law360.com/articles/555307/pa-sen-floats-bill-to-legitimize-uber-lyft-services>.

as the Ride-Sharing Arrangement Act.<sup>14</sup> The proposed bill set strict requirements for ride-sharing services, such as “distinctive registration plates issued by the Secretary of State.”<sup>15</sup> Additionally, the bill would have required “vehicle[s] used in commercial ridesharing arrangements . . . to undergo the same safety tests that a unit of local government requires for other vehicles used in transporting passengers for-hire[.]”<sup>16</sup> thus, closely aligning ride-sharing services with transportation services traditionally viewed as common carriers. Generally, common carriers are held to a higher standard of care, subjected to liability for “even the slightest degree of negligence toward a fare-paying passenger,” or are required to maintain “specific duties of care.”<sup>17</sup>

This Comment contends that a ride-sharing driver’s liability should be assessed under a lesser standard of care despite the fact that courts should generally apply a uniform standard of care to commercial driving activities in the absence of clear legislation. Moreover, the Illinois legislature should affirmatively pass a bill excluding ride-sharing services from common carrier definitions and imposing ride-sharing friendly regulation similar to Pennsylvania S.B. 1457.<sup>18</sup> Part II of this Comment provides: (1) a conceptual outline of the sharing economy as a whole; (2) a narrative on the development of ride-sharing companies and their business models; (3) a comparison of ride-sharing services and traditional taxi services; (4) a brief explanation of the common carrier standard of care and its historical purpose; (5) a description of current and potential insurance issues ride-sharing drivers face; (6) an account of courts’ general responses to ride-sharing technology, liability, and standard of care issues; and (7) the legisla-

---

14. Dave McKinney, *Quinn Nixes Uber Bill, Says It Would Be a Disservice to Consumers*, CHI. SUN-TIMES, Aug. 25, 2014, <http://chicago.suntimes.com/?p=160461> (discussing H.B. 4075, 98th Gen. Assemb., Reg. Sess. (Ill. 2014)).

15. Ill. H.B. 4075.

16. *Bill Status of HB 4075*, ILL. GEN. ASSEMBLY, <http://www.ilga.gov/legislation/BillStatus.asp?DocNum=4075&GAID=12&DocTypeID=HB&SessionID=85&GA=98> (last updated Nov. 21, 2014) (vetoed).

17. 3-12A PREMISES LIABILITY: LAW AND PRACTICE § 12A.01-02 (2015).

18. See Packel, *supra* note 13; see also Michael Faure et al., *The Regulator’s Dilemma: Caught Between the Need for Flexibility & the Demands of Foreseeability. Reassessing the Lex Certa Principle*, 24 ALB. L.J. SCI. & TECH. 283, 287-90 (explaining the difficulties and tensions between regulatory demands and technological advances, however, ultimately arguing for greater legal certainty through less flexible regulations). This Comment does not opine that ride-sharing services and companies should not be regulated at all. Indeed, legal certainty for ride-sharing drivers, as well as safety and reliable service to the consumer, are important and necessary. However, this cannot be accomplished by forcing a new mode of transportation service into an outdated regulatory scheme.

tors’ responses to ride-sharing technology.<sup>19</sup> Part III argues that ride-sharing drivers may not be adequately informed about the heightened standard of care and that although ride-sharing drivers may not possess training and experience equal to that of a taxi driver, a consumer should have the freedom to accept a potentially lower safety standard in exchange for lower fares.<sup>20</sup> Additionally, Part III compares ride-sharing services to dating websites and contends that, in the past, courts have successfully abandoned common law standards for new technological principles.<sup>21</sup> Further, Part III proposes examples of ride-sharing friendly legislation (excluding ride-sharing services from the common carrier definition) and urges the Illinois legislature to affirmatively adopt a ride-sharing friendly bill.<sup>22</sup> Part IV discusses the impact of older laws on technological innovations and describes the consequences that would likely follow if the law fails to adapt.<sup>23</sup> Part V concludes that classifying ride-sharing services as common carriers will have a detrimental effect on the ride-sharing business model and proposes alternative ways to enhance safety standards.<sup>24</sup>

## II. BACKGROUND

### A. *The Concept of a Sharing Economy*

In a sharing economy, or “peer economy,” consumers engage in collaborative consumption<sup>25</sup> or “peer-to-peer services.”<sup>26</sup> The sharing economy began to rise in 2008 after the financial crisis, enabling consumers to become “microentrepreneurs.”<sup>27</sup> The financial crisis reshaped consumers’ approaches to owning and consumption.<sup>28</sup> For decades, consumers worked long hours and took on debt to own houses, cars, and the latest household gadgets.<sup>29</sup> The sharing economy now offers an alternative to ownership: instead of buying and spending money on an item, collaborative consumption allows con-

19. See *infra* notes 25–140 and accompanying text.

20. See *infra* notes 141–76 and accompanying text.

21. See *infra* notes 177–235 and accompanying text.

22. See *infra* notes 206–43 and accompanying text.

23. See *infra* notes 236–73 and accompanying text.

24. See *infra* notes 274–76 and accompanying text.

25. BOTSCHAN & ROGERS, *supra* note 3, at xv.

26. *All Eyes on the Sharing Economy*, *supra* note 3, at 13–15.

27. BOTSCHAN & ROGERS, *supra* note 3, at xviii (citing L.S., *Collaborative Consumption*, ECONOMIST: BLOG (Apr. 22, 2010, 10:09 PM), [http://www.economist.com/blogs/babbage/2010/04/peer-peer\\_car\\_rentals](http://www.economist.com/blogs/babbage/2010/04/peer-peer_car_rentals)); Thomas L. Friedman, *Welcome to the ‘Sharing Economy,’* N.Y. TIMES, July 21, 2013, at SR11.

28. Jenny Kassin & Janelle Orsi, *The LEGAL Landscape of the Sharing Economy*, 27 J. ENVTL. L. & LITIG. 1, 2 (2015).

29. See *id.* at 4.

R  
R  
R  
R  
R  
R  
R

sumers to “have access to many things that [they] need without having to own [or buy] them all by [them]selves.”<sup>30</sup> Peer-to-peer services allow consumers to directly share their rooms,<sup>31</sup> cars,<sup>32</sup> time,<sup>33</sup> and other assets with consumers who are connected with them through the internet or smartphone technology.<sup>34</sup> Consequently, the sharing economy enables consumers to access more but own less; in other words, “access trumps ownership.”<sup>35</sup> In their book *What’s Mine Is Yours: The Rise of Collaborative Consumption*, Rachel Botsman and Roo Rogers argued that a sharing economy has several benefits, such as providing owners with the opportunity to profit from underused assets.<sup>36</sup>

In addition to its economic impact, other scholars and journalists see a cultural value in the sharing economy, arguing that peer-to-peer type services enhance trust and create cohesiveness between fellow citizens.<sup>37</sup> Companies such as AirBnB, Lyft, Uber, and TaskRabbit “act as matchmakers” between peers who are seeking and offering services.<sup>38</sup> Although some critics call the sharing economy “unregulated, tech-enabled, supply-and-demand entrepreneurial capitalism[,]”<sup>39</sup> the majority of scholars, thinkers, and bloggers agree that peer-to-peer services have revolutionized consumers’ approaches to sharing assets and business.<sup>40</sup> As the sharing economy rises, so too

30. *Id.*

31. See AIRBNB, <https://www.airbnb.com/> (last visited Dec. 29, 2015) (matchmaking service for lodging).

32. See LYFT, <https://www.lyft.com/> (last visited Dec. 29, 2015) (personal transportation); SIDECAR, <http://www.sidecar.com/> (last visited Dec. 29, 2015) (outsourcing on-demand delivery for food or other products); UBER, <https://www.uber.com/> (last visited Dec. 29, 2015) (matchmaking service for personal transportation).

33. See TASKRABBIT, <https://www.taskrabbit.com/> (last visited Dec. 29, 2015) (matchmaking service for assistance with, or performance of, tasks and chores).

34. See generally Cohen & Zehngbot, *supra* note 1 (describing the major sharing platforms and the issues involved in using these types of services).

35. *All Eyes on the Sharing Economy*, *supra* note 3, at 13.

36. BOTSMAN & ROGERS, *supra* note 3, at 83–84; see *All Eyes on the Sharing Economy*, *supra* note 3, at 13.

37. See, e.g., Jason Tanz, *How AirBnB and Lyft Finally Got Americans To Trust Each Other*, WIRED (Apr. 23, 2014, 6:30 AM), <http://www.wired.com/2014/04/trust-in-the-share-economy/> (“We are entrusting complete strangers with our most valuable possessions . . . . This is not just an economic breakthrough. It is a cultural one, . . . a set of digital tools that enable and encourage us to trust our fellow human beings.”); see also e.g., *All Eyes on the Sharing Economy*, *supra* note 3, at 14.

38. *All Eyes on the Sharing Economy*, *supra* note 3, at 13.

39. Brad Truttel, *Can We Stop Pretending That the Sharing Economy Is All About Sharing?*, TIME: MONEY.COM (June 30, 2014), <http://time.com/money/2933937/sharing-economy-airbnb-uber-monkeyparking/>.

40. See, e.g., Friedman *supra* note 27, at SR11; *All Eyes on the Sharing Economy*, *supra* note 3, at 14 (“The idea of renting from a person rather than a faceless company will survive, even if the

R

R

R

R

R

R

R

does the demand for regulation and legislative concerns.<sup>41</sup> To provide sufficient accountability between consumers and providers, many “sharing-companies” have created a two-way rating system to create a “self-enforcing form of consumer protection.”<sup>42</sup> Additionally, almost all peer-to-peer services involve an in-person service, taking away the anonymity consumers experience when they transact via e-commerce websites, such as Amazon or eBay.<sup>43</sup> The service’s in-person nature serves as a check against abuses of the services because, as psychological studies point out, “we don’t mess with people we know.”<sup>44</sup>

Regulators, on the other hand, are not convinced and struggle with this new service concept.<sup>45</sup> More importantly, lobbyists of heavily regulated industries are demanding stricter regulations as those industries begin to fear for their survival.<sup>46</sup> However, one fact remains unchanged: peer-to-peer services, with their convenience, accessibility, and low costs, are growing in popularity among consumers.<sup>47</sup> Although the market and regulations for peer-to-peer services may change, the demand for peer-to-peer services will likely remain.<sup>48</sup>

### B. Ride-Sharing Technology

The ride-sharing revolution started with John Zimmer and Logan Green’s 2008 California start-up “Zimride.”<sup>49</sup> Zimride, through the use of an online platform, intended to establish a “social layer of effi-

---

early idealism of the sharing economy does not.”). “[T]his new sharing economy is the real deal and will increasingly be a source of income for more and more people.” Thomas L. Friedman, *And Now for a Bit of Good News . . .*, N.Y. TIMES, July 19, 2014, at SR1.

41. *All Eyes on the Sharing Economy*, *supra* note 3, at 15.

42. Cohen & Zehngebot, *supra* note 1, at 7 (quoting Tom Keane, Opinion, *Change Is Coming, and It’s with Smartphone Apps*, BOS. GLOBE, Apr. 7, 2013, <https://www.bostonglobe.com/opinion/2013/04/06/the-end-taxicab-medallion/S5aQXzCezcR6ByuehZygBN/story.html>).

43. Tanz, *supra* note 37.

44. *Id.*

45. *All Eyes on the Sharing Economy*, *supra* note 3, at 15.

46. Emily Badger, *Taxi Medallions Have Been the Best Investment in America for Years. Now Uber May Be Changing That*, WASH. POST: WONKBLOG, (June 20, 2014), <http://www.washingtonpost.com/blogs/wonkblog/wp/2014/06/20/taxi-medallions-have-been-the-best-investment-in-america-for-years-now-uber-may-be-changing-that/>.

47. *All Eyes on the Sharing Economy*, *supra* note 3, at 13.

48. *Id.* at 15 (“The idea of renting from a person rather than a faceless company will survive, even if the early idealism of the sharing economy does not. The fact that regulators, tax collectors and big companies are now sniffing around a model that has been embraced by millions of people is a measure of its value and growth potential.”).

49. See Sam Gustin, *Lyft: Ride Sharing Startup Zimride Hits the Gas Pedal in San Francisco*, TIME (Sept. 4, 2014), <http://business.time.com/2012/09/04/need-a-lyft-ride-sharing-startup-zimride-hits-the-gas-pedal/>. Contrary to popular belief, the name Zimride is inspired by Logan’s personal experience with Zimbabwe’s transportation system as opposed to Zimmer’s last name. *Id.*

R

R

R

R

R

ciency on our current transportation infrastructure” by filling the empty seats of the millions of cars that were driving on the roads on a daily basis.<sup>50</sup> Initially, Zimride aimed to appeal to and connect college students because much of this population does not own cars and is more likely to carpool.<sup>51</sup> In 2012, Zimride launched its smartphone app, “Lyft,” which enabled users to request a ride through their smartphones.<sup>52</sup> The concept of modern ride-sharing was born, and Lyft’s competitors, such as Sidecar and Uber, followed suit.<sup>53</sup> Uber initially connected off-duty taxi drivers and chauffeurs with customers; however, Uber quickly expanded its service and added “UberX,” which uses privately owned vehicles driven by private individuals who provide cheaper driving services as compared to other transportation services, such as taxicabs.<sup>54</sup>

TNCs, provide a technological platform that connects drivers with customers seeking a ride.<sup>55</sup> To summon a ride, customers access a free smartphone app, which uses the phone’s GPS to determine the customer’s location and then connects the customer to the nearest available driver.<sup>56</sup> Riders automatically pay at the end of their ride using their credit card, which is linked to the ride-sharing app.<sup>57</sup> The TNCs, in turn, take “varying percentage[s] of fares.”<sup>58</sup> Uber, for example, charges its drivers “a . . . software license fee,”<sup>59</sup> which provides the driver with access to the smartphone app and its contents; however, in return, Uber takes 20% of the driver’s fares.<sup>60</sup> Uber also offers its drivers the option of renting a phone from the company, but if the drivers choose to do so, Uber charges a service fee, which is typically \$10 a week.<sup>61</sup>

Although services and fare structures may vary, each TNC seems to stress that it is not a transportation carrier but, rather, a connection tool between independent contractors and the app users.<sup>62</sup> For exam-

---

50. *Id.* (quoting John Zimmer).

51. *Id.*

52. *Id.*

53. *Id.*

54. See *Bos. Cab Dispatch, Inc. v. Uber Techs., Inc.*, No. 13-10769-NMG, 2014 WL 1338144, at \*6 (D. Mass. Feb. 28, 2014), *adopted in part and rejected in part* by No. 13-10769-NMG, 2014 WL 1338148 (D. Mass. Mar. 27, 2014); Browning, *supra* note 6, at 84–85.

55. Browning, *supra* note 6, at 84.

56. *Id.*

57. Ward, *supra* note 4, at 13.

58. *Id.*

59. UBER, <https://get.uber.com/cl/financing/> (follow “What does It Cost To Drive with Uber?” hyperlink) (last visited Dec. 29, 2015).

60. See Lazo, *supra* note 10.

61. *Id.*

62. See, e.g., Browning, *supra* note 6, at 84 (describing Uber’s stance).

ple, on its website, Uber specifically refers to its drivers as “partners” and advertises the concept of being “an independent contractor” to potential drivers.<sup>63</sup> Lyft, on the other hand, “considers itself an internet site[;]”<sup>64</sup> however, it limits its drivers’ activity to “Lyft’s operating hours.”<sup>65</sup> The requirements to become a ride-sharing driver are similar across TNCs. Most TNCs: (1) implement a minimum age requirement; (2) require drivers to have a car of a certain category, type, and model year; (3) require drivers to maintain personal liability insurance; (4) mandate drivers to undergo a background check; and (5) implement a brief training for drivers.<sup>66</sup> The TNCs argue that ride-sharing drivers have a unique status and that these drivers and the TNC business model should not fall under the same regulatory standards as that of traditional taxi drivers and companies.<sup>67</sup>

### C. Ride-Sharing Technology Compared to Traditional Taxi Services

Traditional taxi drivers and companies are part of a heavily regulated and highly political industry.<sup>68</sup> Not only are taxi drivers held to a higher standard of care and subject to mandatory drug testing as well as special licensures, but large cities have established a complicated system of regulation through “taxi medallion” requirements.<sup>69</sup> Many large U.S. cities, such as Boston, Chicago, and New York, limit the number of taxis allowed within city limits and require taxi drivers to have a special license, or taxi medallion, “in addition to an individual taxicab driver’s license.”<sup>70</sup> Because the supply of taxi medallions is limited, “taxicab licenses often are bought and sold much like conventional property rights in tangible things such as houses.”<sup>71</sup> Indeed, in Chicago, a taxi medallion costs approximately \$350,000, allowing taxi drivers to operate one of the 6,904 taxis in the city.<sup>72</sup> The medallion system mostly benefits large investors who finance the expensive

---

63. See UBER, <https://get.uber.com/drive/> (last visited Dec. 29, 2015) (“Need something outside the 9 to 5? As an independent contractor with Uber, you’ve got freedom and flexibility to drive whenever you have time.”).

64. Ward, *supra* note 4, at 14.

65. See LYFT, <https://www.lyft.com/drivers> (last visited Dec. 29, 2015).

66. See, e.g., Ward, *supra* note 4, at 14.

67. E.g., City of Columbus v. Uber Techs., No. 2014 EVH 060125, 2014 Ohio Misc. LEXIS 11, \*5–6 (Ohio Mun. Ct. Apr. 30, 2014).

68. Badger, *supra* note 46.

69. See generally *id.* (describing Chicago’s taxi medallion system).

70. Katrina Miriam Wyman, *Problematic Private Property: The Case of New York Taxicab Medallions*, 30 YALE J. ON REG. 125, 127 (2013).

71. *Id.*

72. Badger, *supra* note 46.

R

R

R

R

medallions and lease them to the actual taxi drivers.<sup>73</sup> Lease fees can run up to hundreds of dollars each week.<sup>74</sup> Taxi medallions are quickly losing their exclusivity and value because ride-sharing drivers have entered the market and are not subject to the medallion requirement.<sup>75</sup> The medallion system created barriers to entry that prevented market competition—a system that is now threatened.<sup>76</sup>

Taxi medallions have not only been a great investment, but they have also been used as policy tools.<sup>77</sup> For example, in Boston, a hackney carriage, also known as a taxicab, must have “a protective partition between the driver and the passenger, a taximeter that calculates the fare and the distance traveled, an approved credit card machine and a “two-way communication” system with “an approved dispatch service.”<sup>78</sup> Similarly, the Chicago Municipal Code sets vehicle safety standards for taxis and requires taxi license applicants to “successfully complete a mandatory course of study as prescribed and approved by the commissioner.”<sup>79</sup> In requiring applicants to fulfill certain features to obtain or maintain a taxi-medallion, legislators and policy makers are able to shape and create uniform safety standards and equipment for taxicabs.<sup>80</sup>

Lastly, taxi drivers, as well as taxi companies, have historically been defined as public common carriers, thus subjecting them to a higher standard of care regarding liability.<sup>81</sup> Public common carriers, for example, may not discriminate against passengers and must undertake “to transport any member of the general public, if the carrier has space and unless it has a legal excuse for refusal to do so.”<sup>82</sup> This is in stark contrast to ride-sharing drivers who may choose their passengers based on a two-way rating system.<sup>83</sup>

---

73. *Id.*; see Wyman, *supra* note 70, at 132 n.33.

74. Badger, *supra* note 46.

75. *Id.*

76. *Id.*

77. *Id.*; see, e.g., Wyman, *supra* note 70, at 133.

78. *Bos. Cab Dispatch, Inc. v. Uber Techs., Inc.*, No. 13-10769-NMG, 2014 U.S. Dist. LEXIS 42068, at \*15 (D. Mass. Feb. 28, 2014).

79. CHL., ILL., MUN. CODE § 9-112-100 (2014).

80. See, e.g., *id.* § 9-112-140 (“Licensees are required to equip all their taxicabs, while the vehicles are operating as a taxicab, with at least one of the following safety features or combination of safety features . . . : (1) A safety shield device capable of completely separating the driver’s seat from the rear passenger compartment; or (2) A mounted camera unit that will take a visual record or photograph(s) of the passenger(s) . . .”).

81. 26 PERSONAL INJURY: ACTIONS, DEFENSES, DAMAGES § 136.01 (Louis R. Frumer & Melvin I. Friedman eds., 2015).

82. *Id.*

83. See Tanz, *supra* note 37. Lyft, for example, provides drivers and riders with “the exact same scale and rating system[,]” allowing drivers and riders to rate each other on a scale from

R  
R

R

R

*D. The Common Carrier Standard of Care*

Traditionally, a common carrier is an operator for hire who undertakes to transport the general public.<sup>84</sup>

In order to qualify as a common carrier: (1) the carriage must be part of the carrier's business; (2) the carriage must be for hire or remuneration; and (3) the carrier must represent to the general public that the services are a part of the business in which the carrier is engaged, and that the carrier is willing to serve the public in that business.<sup>85</sup>

Historically, a common carrier was (1) obligated "to contract with and serve all" who requested the common carrier's services; (2) held strictly liable for any type of damage or loss; and (3) "only exceptional cases, such as an act of God" relieved a common carrier from strict liability.<sup>86</sup> In many jurisdictions that "apply the common carrier's heightened duty of care . . . liability [is] often imposed for even the slightest degree of negligence [towards] fare-paying . . . passenger[s]."<sup>87</sup> Courts often define this standard of care as "imposing the 'highest degree of care,' 'the utmost care,' or 'extraordinary care.'"<sup>88</sup> Other jurisdictions have developed a "'reasonable prudent carrier' standard" of care, usually reaching the same result without "expressly adopt[ing] the higher common carrier standard of care."<sup>89</sup> Legal scholars have developed several theories regarding the purpose of the common carrier's classification and heightened standard of care.<sup>90</sup> In *Railroad Co. v. Lockwood*,<sup>91</sup> the U.S. Supreme Court reasoned that "[i]n regulating the public establishment of common carriers, the great object of the law was to secure the utmost care and diligence in the performance of their important duties—an object essential to the welfare of every civilized community."<sup>92</sup>

---

1–5. Matthew Ley, *New Ride-Sharing Alternatives: Uber, Lyft Revolutionize Transportation*, CCNN LIVE (Jan. 21, 2015, 5:08 PM), <http://ccnnlive.com/?p=1646>.

84. 3 PREMISES LIABILITY: LAW AND PRACTICE § 12A.01–02 (Norman J. Landau & Edward C. Martin eds., perm. ed., rev. vol. 2011).

85. 7 PERSONAL INJURY: ACTIONS, DEFENSES, DAMAGES § 23.03 (Louis R. Frumer & Melvin I. Friedman eds., 2015).

86. Jurgen Basedow, *Common Carriers—Continuity and Disintegration in United States Transportation Law*, 13 TRANSP. L.J. 1, 3 (1983) (quoting OTTO KAHN-FREUND, *THE LAW OF CARRIAGE BY INLAND TRANSPORT* 189–92 (3d ed. 1956)).

87. 3 PREMISES LIABILITY: LAW AND PRACTICE § 12A.02.

88. *Id.*

89. *Id.*

90. *Id.* § 12A.01.

91. 84 U.S. 357 (1873).

92. *Id.* at 377.

In Illinois, examples of common carriers include railroad trains,<sup>93</sup> elevators,<sup>94</sup> and taxicabs.<sup>95</sup> In determining whether a “carrier is a common carrier,” Illinois courts ask “whether the carrier serves all of the public alike.”<sup>96</sup> Conversely, private carriers are described as a carrier that “transports only by special agreement, and is not bound to serve every person who may apply.”<sup>97</sup>

### E. Insurance Issues for Ride-Sharing Drivers

Assuring adequate insurance for ride-sharing drivers remains an open issue.<sup>98</sup> Although ride-sharing drivers are required to have personal insurance and ride-sharing companies typically provide drivers with commercial coverage, not all policies cover damage to the actual car.<sup>99</sup> Some insurance companies, such as Geico and State Farm, have emphasized that their personal automobile insurance policies exclude commercial driving activities, and some insurers have even rejected applicants that reported driving for a ride-sharing company.<sup>100</sup> Due to a tragic accident in San Francisco on New Year’s Eve 2013, which resulted in the death of a six-year-old, Uber expanded its insurance coverage, valued at \$1 million, to include all drivers logged into the app and available for a fare.<sup>101</sup> In *Yellow Group LLC v. Uber Techs., Inc.*,<sup>102</sup> a class of “taxi medallion owners, taxi affiliations, and livery service providers” filed a lawsuit in the U.S. District Court for the Northern District of Illinois against Uber, alleging misrepresentations of insurance coverage.<sup>103</sup> The taxi affiliate’s complaint alleged that

---

93. See, e.g., *Uebelein v. Chi. Transit Auth.*, 230 N.E.2d 33, 37 (Ill. App. Ct. 1967) (“[T]he obligation of a [railroad] common carrier [as] to do all that human care, vigilance and foresight can reasonably do, consistent with the mode of conveyance and the practical operation of the road, to convey its passengers to their destinations in safety.”).

94. *Shoemaker v. Rush-Presbyterian-St. Luke’s Med. Ctr.*, 543 N.E.2d 1014, 1017 (Ill. App. Ct. 1989).

95. *Anderson v. Yellow Cab Co.*, 329 N.E.2d 278, 280 (Ill. App. Ct. 1975).

96. *Doe v. Rockdale Sch. Dist.*, 679 N.E.2d 771, 773 (Ill. App. Ct. 1997) (explaining the difference between common carriers and private carriers).

97. *Id.*

98. See *Browning*, *supra* note 6, at 85; *Cohen & Zehngbot*, *supra* note 1.

99. David Berg, *What Uber and Lyft Drivers Need To Know About Car Insurance*, NOLO, <http://www.all-about-car-accidents.com/resources/what-uber-and-lyft-drivers-need-to-know-car-insurance.html> (last visited Oct. 10, 2014).

100. See, e.g., R.J. Lehmann, *Why Major Insurers Won’t Cover Uber, Lyft Drivers*, S.F. EXAMINER (Oct. 16, 2014), <http://www.sfexaminer.com/sanfrancisco/why-major-insurers-wont-cover-uber-lyft-drivers/Content?oid=2909369>.

101. Beth Winegarner, *Uber Expands Drivers’ Insurance After Fatal Crash*, LAW360 (Mar. 14, 2014, 8:15 PM), <http://www.law360.com/articles/518869/uber-expands-drivers-insurance-after-fatal-crash>.

102. No. 12 C 1967, 2014 WL 3396055 (N.D. Ill. July 10, 2014).

103. *Id.* at \*1–2.

Uber falsely promised \$1 million insurance coverage for UberX drivers and passengers without actually providing any insurance coverage to drivers and passengers.<sup>104</sup> Although the court dismissed the plaintiffs' claim for misrepresentation of insurance,<sup>105</sup> legislators, legal scholars, and legal professionals remain concerned about underinsured drivers.

Meanwhile, the Property Causality Insurers Association of America has issued a "Transportation Network Company (Ride-Sharing) Issue Status" in an effort to inform consumers of regulatory and legislative updates regarding insurance policies and requirements.<sup>106</sup> Some states' insurance departments have also issued consumer alerts, advising ride-sharing drivers that they may not be covered under their auto insurance.<sup>107</sup> In the event of a personal insurance policy rejecting commercial driving activities, the driver would be forced to supplement her insurance through a commercial policy.<sup>108</sup> As a recent study from a nonprofit public policy research organization, R Street Institute,<sup>109</sup> pointed out: "rates for commercial auto insurance to cover livery services are unlikely to be affordable for most part-time drivers, running in the range of \$8,000 to \$10,000 annually."<sup>110</sup> Moreover, when R Street's policy study asked "[r]epresentatives of several of the nation's largest auto insurers—including State Farm, Allstate, Progressive, USAA and Liberty Mutual—" if their "standard personal lines [policies] . . . exclude[d] coverage for commercial use[.]" each insurer confirmed.<sup>111</sup>

---

104. *Id.* at \*4.

105. *Id.* at \*14. The court held that the plaintiffs failed to allege an actual misrepresentation because "Uber did not assert that it would provide the insurance policy to UberX drivers and riders, rather that drivers and riders would be covered by at least \$1 million or \$2 million in insurance." *Id.*

106. PROP. CAUSALITY INSURERS ASS'N OF AM., TRANSPORTATION NETWORK COMPANY (RIDE-SHARING) ISSUE STATUS (2014), [http://www.naic.org/documents/cipr\\_events\\_140819\\_tnc\\_issue\\_status.pdf](http://www.naic.org/documents/cipr_events_140819_tnc_issue_status.pdf).

107. *Id.*

108. R.J. Lehmann, *Blurred Lines: Insurance Challenges the Ride-Sharing Market*, R STREET POLICY STUDY NO. 28, Oct. 2014, at 6–7, <http://www.rstreet.org/wp-content/uploads/2014/09/RSTREET28.pdf>.

109. "R Street institute is a non-profit, non-partisan, public policy research organization . . ." *About R Street*, R STREET INST., <http://www.rstreet.org/about/why-r-street/> (last visited Feb. 2, 2015); see Andrew G. Simpson, *Insurance Think Tank Splits from Heartland, Reorganizes as R Street Institute*, INS. J. (May 30, 2012), <http://www.insurancejournal.com/news/national/2012/05/30/249244.htm> ("While advocating for free markets, R Street will strive to be pragmatic in its recommendations.").

110. Lehmann, *supra* note 108, at 7.

111. *Id.* at 6.

F. *Courts' and Legislators' General Responses to Ride-Sharing Technology, Liability, and Standard of Care*

Traditional taxi services fall within the definition of a public common carrier; however, the TNCs dispute whether ride-sharing drivers should be considered common carriers. Still, courts do not seem convinced of the TNCs' arguments. In *City of Columbus v. Uber Technologies*,<sup>112</sup> for example, the Ohio Franklin County Municipal Court clearly stated that "additional evidence [was] necessary to convince the Court that [Uber Technology was] not engaged in carrying the general public."<sup>113</sup> In addition to courts' vague responses, the legislatures still have not given a clear indication of how to decide this issue.<sup>114</sup>

Adding to the confusion, TNCs, such as Uber, maintain that they are technology companies that provide customers with a tool to introduce them to third-party drivers.<sup>115</sup> Thus, Uber argues that it does not employ drivers and cannot be categorized as a transportation carrier; instead, Uber defines itself as a request tool.<sup>116</sup> Uber also maintains that UberX drivers are not engaged in "carrying the public generally"<sup>117</sup> but only serve registered, accepted members of Uber's online community who have agreed to Uber's terms and conditions, which explicitly state that "Uber is a request tool, not a transportation carrier."<sup>118</sup>

While courts have not yet directly addressed the issue of an applicable standard of care, many courts are not convinced that ride-sharing companies are not engaged in carrying the public, and they have denied motions to dismiss regarding claims of licensure misrepresentation.<sup>119</sup> Several lawsuits have been filed, one of which is a wrongful death action against Uber and one of its drivers.<sup>120</sup> As mentioned

112. No. 2014 EVH 060125, 2014 Ohio Misc. LEXIS 11 (Mun. Ct. Apr. 30, 2014).

113. *Id.* at \*6.

114. *See, e.g., McKinney, supra* note 14.

115. Ward, *supra* note 4, at 14.

116. *Bos. Cab Dispatch, Inc. v. Uber Techs., Inc.*, No. 13-10769-NMG, 2014 WL 1338144, at \*5 (D. Mass. Feb. 28, 2014).

117. *City of Columbus*, 2014 Ohio Misc. LEXIS 11, at \*5.

118. *Bos. Cab Dispatch, Inc.*, 2014 WL 1338144, at \*5.

119. *See, e.g., Bost. Cab Dispatch v. Uber Techs., Inc.*, No. 13-10769-NMG, 2014 WL 1338148 at \*6 (D. Mass. March 27, 2014) (agreeing with the magistrate judge that "Uber's argument was based on an unduly narrow conception of the term 'operating'" and that there was "sufficient evidence that Uber exercised control over . . . vehicles-for-hire"); *City of Columbus*, 2014 Ohio Misc. LEXIS 11, at \*6-7 ("[A]dditional evidence is necessary to convince the Court that the Defendants are not engaged in carrying the general public.").

120. Harrison Weber, *As Uber Battles 13 Lawsuits, Cabbies & State Agencies Are Out for Blood (Update)*, VENTUREBEAT, <http://venturebeat.com/2014/05/08/as-uber-battles-13-lawsuits-cabbies-state-agencies-are-out-for-blood/> (last updated May 8, 2014, 10:20 AM).

*supra*, a tragic accident occurred on New Years Eve 2013 in which an Uber driver killed a six-year-old on his way to pick up a passenger.<sup>121</sup> The complaint alleged that Uber's business model was responsible for the accident because Uber required its drivers to respond to ride requests within minutes or otherwise lose the client.<sup>122</sup> In addition, prosecutors in San Francisco claimed that ride-sharing companies were in violation of several municipal and state laws and were prepared to file a restraining order against the TNCs.<sup>123</sup> Considering the courts' tentative responses, it appears as if they would be inclined to view TNCs and their drivers as common carriers in the absence of legislation stating otherwise. For example, in *City of Columbus*, the Franklin County Municipal Court stated that "additional evidence is necessary to convince the Court that the Defendants are not engaged in carrying the general public."<sup>124</sup> Moreover, in *Boston Cab Dispatch Inc. v. Uber Techs Inc.*,<sup>125</sup> the U.S. District Court for the District of Massachusetts affirmed a magistrate judge's decision that "Uber exercises control over . . . vehicles-for-hire" comparable to that of traditional taxi services.<sup>126</sup>

Administrative courts have given similar responses.<sup>127</sup> For example, two administrative law judges in Pennsylvania found that both Lyft and Uber lacked the required brokerage licenses and demanded that these ride-sharing companies stop their services in the Pittsburgh area, which prompted the creation of S.B. 1457.<sup>128</sup> In addition, as noted *supra*, the Maryland Public Service Commission recently held an administrative proceeding that determined that "Uber is a common carrier within the meaning prescribed by [Public Utilities Act] § 1-101(e)(1)" because Uber is engaged in the public transportation of persons for hire."<sup>129</sup>

---

121. Cohen & Zehngelot, *supra* note 1.

122. Complaint for Damages & Demand for Trial by Jury at 6, 8, Liu v. Uber Techs., Inc. (No. CGC-14-536979), 2014 WL 285058.

123. See, e.g., Bos. Cab Dispatch, Inc. v. Uber Techs., Inc., 2014 U.S. Dist. LEXIS 42063, at \*17 (D. Mass. Mar. 27, 2014); City of Columbus v. Uber Techs., No. 2014 EVH 060125, 2014 Ohio Misc. LEXIS 11, \*6-7 (Ohio Mun. Ct. Apr. 30, 2014).

124. *City of Columbus*, 2014 Ohio Misc. LEXIS 11, at \*6-7.

125. No. 13-10769-NMG, 2014 14WL1338148 (D. Mass. Mar. 27, 2014).

126. *Id.*

127. See, e.g., Packel, *supra* note 13.

128. *Id.* (noting that the bill has been referred to the senate consumer protection and professional licensure committee and at this time has not been voted on).

129. Order of Md. Pub. Serv. Comm'n, *supra* note 12, at 17-18 (quoting MD. CODE ANN., PUB. UTIL. § 1-101(e)(1), (x)(1) (LexisNexis 2015)).

R

R

Although some states, such as Texas, struggle with the decision of whether to embrace or ban ride-sharing companies,<sup>130</sup> several other states have responded with ride-sharing friendly legislation.<sup>131</sup> On one hand, proposed bills in the District of Columbia<sup>132</sup> and Pennsylvania<sup>133</sup> explicitly exclude TNCs and ride-sharing drivers from common carrier definitions. Realizing their “[constituents’ interest] in ride-sharing and . . . transportation alternatives,” D.C. and Pennsylvania legislators responded to the courts’ rulings by proposing ride-sharing friendly legislation.<sup>134</sup> To address public safety concerns, the D.C. and Pennsylvania legislation require ride-sharing companies to keep detailed records, establish driver training programs, enforce a zero-tolerance alcohol and drug policy, keep a record of complaints, and create a complaint recording and background check system.<sup>135</sup> The Pennsylvania bill also establishes insurance requirements, such as minimum insurance policy limits, and defines the service standards of TNCs.<sup>136</sup>

On the other hand, former Illinois Governor Pat Quinn vetoed an antiride-sharing bill, H.B. 4075, and cautioned lawmakers not to rush to create a new statewide regulation before the need and scope for this regulation was clearly defined.<sup>137</sup> If it had passed, H.B. 4075 would have imposed strict requirements for ride-sharing services, such as distinctive registration plates issued by the Illinois Secretary of State, and would have required “vehicle[s] used for commercial ridesharing arrangements . . . [to] pass any safety inspections . . . [that] the unit of local government . . . [requires] for vehicles used in transporting passengers for-hire” and, thus, would have closely aligned ride-sharing services to transportation services traditionally viewed as common carriers.<sup>138</sup> In his decision, Quinn acknowledged the consumers’ needs and interests and, in a message to lawmakers, he stated: “To rush into a whole new statewide regulatory network before the need for one is clear would not only stifle innovation, it would be a disservice to consumers who utilize the service while setting a troub-

---

130. Robert Wilonsky, *Here’s How Dallas Wants To Regulate Cabs, Uber and Lyft. Now, Tell City Hall What You Think About the New Rules*, DALL. MORNING NEWS (Aug. 9, 2014, 8:21 AM), <http://cityhallblog.dallasnews.com/2014/08/heres-how-dallas-wants-to-regulate-cabs-uber-and-lyft-now-tell-city-hall-what-you-think-about-the-new-rules.html/>.

131. *See, e.g.*, Packel, *supra* note 13.

132. S.B. 1457, 198th Gen Assemb., Reg. Sess. (Pa. 2013).

133. B20-0445, 20th Counc. (D.C. 2013).

134. Packel, *supra* note 13 (quoting Sen. Wayne Fontona).

135. *Id.*

136. *Id.*

137. McKinney, *supra* note 14.

138. H.B. 4075, Gen. Assemb., Reg. Sess. (Ill. 2014).

R

R

ling precedent for the future.”<sup>139</sup> Alternatively, Chicago alderman demanded regular drug testing for ride-sharing operators through special licensures, mimicking that of taxi medallion requirements.<sup>140</sup> The variety of categorizations and different approaches in courtrooms, as well as the capitol hills of many states, describe a need for clarity and guidance.

### III. ANALYSIS

#### A. *Considerations for Courts: The Effects of the Common Carrier Standard of Care on the Ride-Sharing Business Model*

A ride-sharing driver’s liability should be assessed under a lesser standard of care even though courts should generally apply a uniform standard of care to commercial driving activities. Moreover, the Illinois legislature should pass a bill excluding ride-sharing services from common carrier definitions and imposing ride-sharing friendly regulation.

The main purpose of ride-sharing is deeply rooted in one of the core principles of peer-to-peer services and the sharing-economy: the freedom to profit from unused assets.<sup>141</sup> Botsman and Rogers argued that the sharing economy not only “extend[s] the life of a product” but creates a benefit to the environment by replacing “individually owned product[s] with often limited usage” with “a shared service that maximizes its utility.”<sup>142</sup> Alongside this notion, the very basic inspiration of Zimride and the purpose of the ride-sharing revolution was to maximize utilities and efficiencies of cars by filling empty seats through the use of technology.<sup>143</sup> And, most importantly, consumers continue to embrace and appreciate ride-sharing services due to their convenience, cheaper fares, and necessity.<sup>144</sup> For better or worse, the demand for, and popularity of, ride-sharing services is steadily growing.<sup>145</sup> In considering public policy, courts should ask what

139. McKinney, *supra* note 14 (quoting former Illinois Governor Pat Quinn).

140. Fran Spielman, *Alderman Wants Mandatory Drug Testing for Ride-Sharing Drivers*, CHI. SUN-TIMES, Sept. 10, 2014, <http://politics.suntimes.com/article/chicago/alderman-wants-mandatory-drug-testing-ride-sharing-drivers/wed-09102014-1001am>.

141. *The Rise of the Sharing Economy*, ECONOMIST (Mar. 9, 2013), <http://www.economist.com/news/leaders/21573104-internet-everything-hire-rise-sharing-economy>.

142. BOTSMAN & ROGERS, *supra* note 3, at 72.

143. Gustin, *supra* note 49.

144. Stuart, *supra* note 5. Stuart points out that “[w]e exist in a convenience-driven society that’s generally embraced rideshare apps with enthusiasm . . . . Uber and its ilk have made hailing a ride, not to mention paying a reasonably low fare, as easy as a couple of swipes on a smartphone screen.” *Id.*

145. Lauri Segall, *Uber CEO: ‘Our growth Is Unprecedented’*, CNN MONEY (June 12, 2014, 8:32 AM), <http://money.cnn.com/2014/06/12/technology/innovation/uber-ceo-travis-kalanick/>. In

R

R  
R  
R

serves the public's best interest.<sup>146</sup> Applying a common carrier standard of care would not only limit the public's freedom to contract but would have a detrimental effect on ride-sharing fares and complicate answers to insurance questions.<sup>147</sup>

### 1. Freedom of Contract

Although safety is most certainly important, a consumer's freedom and ability to contract should not be dismissed.<sup>148</sup> Moreover, a person's liberty and autonomy to contract is a significant policy consideration for courts and contract law.<sup>149</sup> Freedom of contract should only be limited when the contract violates law or public policy or when it places the general public at risk.<sup>150</sup> Thus, courts and legislators must generally create a balance between restricting an individual's freedom to form an agreement and the public "good of the community."<sup>151</sup> The *Restatement (Second) of Contracts* recommends that courts use a balancing test that weighs several factors, including the parties' expectations and whether nonenforcement will further a particular public policy to determine whether to enforce a contract.<sup>152</sup> Additionally,

---

an interview, Uber CEO Travis Kalanick stated that his company is worth more than \$18 billion and continues to grow. *Id.*

146. See, e.g., 15 CORBIN ON CONTRACTS § 79.3 (rev. ed. 2003). "Public policy is the present concept of public welfare or general good." *Lazenby v. Universal Underwriters Ins. Co.*, 383 S.W.2d 1, 5 (Tenn. 1964).

147. See Lehmann, *supra* note 108, at 12–13.

148. See generally 15 CORBIN ON CONTRACTS § 79.4 (discussing the principles and policy reasons supporting the freedom to contract).

149. *Id.* Professor Corbin acknowledges that "[w]hile the freedom of contract continues to be a valued commodity and remains of vital concern, the twentieth century has been a time of balancing that freedom with other public interests and goals." *Id.* However, while "[c]ourts also continue to refuse to enforce contracts because enforcement contradicts a public policy . . . . [C]ourts of today seem reticent to refuse to enforce contracts unless the public policy of the jurisdiction is fairly clear." *Id.*

150. *Id.* § 79.1.

151. *Werdehoff v. Gen. Star Indem. Co.*, 600 N.W.2d 214, 218 (Wis. Ct. App. 1999).

152. RESTATEMENT (SECOND) OF CONTRACTS § 178 (AM. LAW INST. 1981). Specifically the Restatement suggests:

- (2) In weighing the interest in the enforcement of a term, account is taken of
  - (a) the parties' justified expectations,
  - (b) any forfeiture that would result if enforcement were denied, and
  - (c) any special public interest in the enforcement of the particular term.
- (3) In weighing a public policy against enforcement of a term, account is taken of
  - (a) the strength of that policy as manifested by legislation or judicial decisions,
  - (b) the likelihood that a refusal to enforce the term will further that policy,
  - (c) the seriousness of any misconduct involved and the extent to which it was deliberate, and
  - (d) the directness of the connection between that misconduct and the term.

*Id.*

the doctrine of unconscionability considers the parties' bargaining power to contract and the existence of each party's "meaningful choice."<sup>153</sup>

After installing a ride-sharing app, each customer must agree to the TNC's terms and conditions before being allowed to register with the particular ride-sharing platform and be accepted as a member of the ride-sharing community.<sup>154</sup> In accepting the TNC's terms and conditions, customers are notified that their ride-sharing driver may be a lay person and not a traditional taxi driver. Further, the terms and conditions advise all consumers to "use their own judgment" and utilize the services at their own risk.<sup>155</sup> All three major TNCs (Lyft, Sidecar, and Uber): (1) use plain language to describe their terms and conditions; (2) highlight especially relevant information, such as using the services at the user's own risk in all capital letters; and (3) inform customers at the beginning of the terms about key aspects of the ride-sharing service agreement, for instance that the respective TNC does not guarantee the rider's safety.<sup>156</sup> Moreover, all three TNCs directly address the reader using the word "you," and separate the terms and conditions into short paragraphs.<sup>157</sup> Furthermore, users of ride-sharing apps possess equal bargaining power because riders have alternative modes of transportation to choose from, such as traditional taxi services or public transportation. In fact, all three TNCs specifically

---

153. See 7 CORBIN ON CONTRACTS § 29.4 (2002); see also MURRAY ON CONTRACTS § 98 (3d ed. 1990).

154. See, e.g., *City of Columbus v. Uber Techs.*, No. 2014 EVH 060125, 2014 Ohio Misc. LEXIS 11, at \*5-6 (Ohio Mun. Ct. Apr. 30, 2014). Uber argued that UberX drivers "only serve register members that [all] have agreed to Uber's terms and conditions and have been accepted as a member of Uber's online community." *Id.*

155. See, e.g., *Lyft Terms of Service*, LYFT (Nov. 3, 2015), <https://www.lyft.com/terms> (informing its customers that if they "do not agree to be bound by the terms and conditions of this Agreement, you may not use or access the Lyft Platform or the Services," and that "Lyft is not responsible for the conduct . . . of any User of the Lyft Platform or Services. You are solely responsible for your interactions with other users."); *Terms and Conditions*, UBER, <https://www.uber.com/en-US/legal/usa/terms> (last updated Apr. 8, 2015) ("UBER DOES NOT GUARANTEE THE QUALITY, SUITABILITY, SAFETY, OR ABILITY OF THIRD PARTY PROVIDERS. YOU AGREE THAT THE ENTIRE RISK ARISING OUT OF YOUR USE OF THE SERVICES, AND ANY SERVICE OR GOOD REQUESTED IN CONNECTION THEREWITH, REMAINS SOLELY WITH YOU, TO THE MAXIMUM EXTENT PERMITTED UNDER APPLICABLE LAW.").

156. See, e.g., *Lyft Terms of Service*, *supra* note 155; *Terms and Conditions*, *supra* note 155; *Terms of Service*, SIDECAR, <http://www.side.cr/policies/terms-of-services/> (last visited Dec. 29, 2015).

157. See, e.g., *Lyft Terms of Service*, *supra* note 155; *Terms and Conditions*, *supra* note 155; *Terms of Service*, *supra* note 156.

R

R  
R

tell the consumer not to use the respective service if the consumer does not agree with the TNC's terms and conditions.<sup>158</sup>

Allowing consumers to choose whether they want to risk their safety is not a novel concept. Consumers routinely contract with businesses and service providers to engage in certain activities with even greater risk of injury, releasing these businesses and service providers from liability. For example, if consumers want to join a gym, go skydiving, or go horseback riding, they are required to agree to the respective business's terms of service and are often required to sign an exculpatory agreement.<sup>159</sup> Although ride-sharing services may have a greater reach in affecting the general public than, for example, skydiving services, the principles of risk taking, choice, and consumer autonomy underlying both services are not substantially different.<sup>160</sup> In both activities, the consumer is aware of a potential risk: ride-sharing consumers are aware that their driver may be a lay person and that the respective TNC creating the match between the consumer and rider does not guarantee safety; similarly, skydivers are aware that jumping out of an airplane may result in injuries and that the skydiving school cannot guarantee safety.<sup>161</sup> Moreover, both activities require the consumer to evaluate the potential risk and to choose whether to engage in the activity.<sup>162</sup>

Although ride-sharing services may negatively affect the public as a whole,<sup>163</sup> ride-sharing services also *benefit* the public as a whole, even those who chose not to take advantage of the ride-sharing services directly. For example, ride-sharing services may help reduce the

---

158. See *Lyft Terms of Service*, *supra* note 155; *Terms and Conditions*, *supra* note 155; *Terms of Service*, *supra* note 156.

159. See, e.g., Patricia Kussmann, *Validity, Construction, and Effect of Agreement Exempting Operator of Fitness or Health Club or Gym from Liability for Personal Injury or Death of Patron*, 61 A.L.R.6th 147 (2011); Douglas Leslie, *Sports Liability Waiver and Transactional Unconscionability*, 14 SETON HALL J. SPORTS & ENT. L 341 (2004).

160. See generally Donald P. Judges, *Of Rocks and Hard Places: The Value of Risk Choice*, 42 EMORY L.J. 1, 8–11 (1993) (discussing the subjective perceptions of risk and its effect on personal choices in modern society).

161. See *id.* at 27.

162. See *id.* at 10. Professor Judges further argued that, “[u]ltimately, an essential component of the concept of . . . ‘risk evaluation’ . . . is subjective and normative: only each individual can define for himself or herself what is ‘undesirable’” and that choice of risks is “an important component of both individual and social self-realization.” *Id.* at 11, 22.

163. See, e.g., Chase Cain & Wire Servs., *Uber Driver Arrested in San Francisco Crash That Killed Girl*, NBC BAY AREA, <http://www.nbcbayarea.com/news/local/Uber-Driver-Arrested-in-San-Francisco-Crash-That-Killed-Girl-238491691.html> (last updated Jan. 15, 2014, 6:27 PM) (describing how an Uber driver struck and killed a six-year-old pedestrian crossing an intersection); Sergio Quintana, *Uber Driver Crash in SF Raises New Safety Issues*, ABC7NEWS.COM (Aug. 4, 2014), <http://abc7news.com/business/uber-driver-crash-in-sf-raises-new-safety-issues/240891/> (describing an Uber driver who suffered from a seizure while driving and struck a pedestrian).

amount of vehicles on the street.<sup>164</sup> Traffic accidents are on the rise and are a harsh reality: the U.S. Department of Transportation's National Highway Safety Administration reported 29,989 fatal automobile accidents in 2014.<sup>165</sup> Moreover, a 2015 newsletter released by the National Highway Safety Administration noted that "[i]n 2013, 4,735 pedestrians were killed and an estimated 66,000 were injured in traffic crashes" and also observed that "[o]n average, a pedestrian was killed every 2 hours and injured every 8 minutes in traffic crashes."<sup>166</sup> In 2014, the U.S. Department of Transportation reported 269,294,302 registered vehicles in the United States.<sup>167</sup> These numbers suggest that the more vehicles participate in traffic, the greater the risk of accidents.<sup>168</sup> Furthermore, a total of 31% of fatal accidents resulted from alcohol-impaired driving.<sup>169</sup> Ride-sharing services actually help alleviate this problem because the core goal of ride-sharing is to reduce the amount of cars on the street by using cars more efficiently and filling empty seats.<sup>170</sup> More importantly, with a less expensive alternative to taxis, individuals may be inclined to leave their personal motor vehicles at home.<sup>171</sup> Additionally, each TNC has a zero tolerance policy for alcohol and drug use for its drivers.<sup>172</sup> Again, because ride sharing is a less expensive alternative to existing options, intoxicated individuals may be more inclined to leave their vehicles at home, thus reducing the risk of traffic accidents.<sup>173</sup> Finally, some the-

164. See Gustin, *supra* note 49.

165. U.S. DEP'T OF TRANSP., NAT'L HIGHWAY SAFETY ADMIN. DOT HS 812 234, QUICK FACTS 2014 at 1 (Jan. 2016), [hereinafter QUICK FACTS 2014], <http://www.nrd.nhtsa.dot.gov/Pubs/812234.pdf>.

166. U.S. DEP'T OF TRANSP., DOT HS 812 124, TRAFFIC SAFETY FACTS: PEDESTRIANS, at 1 (Feb. 2015), <http://www.nrd.nhtsa.dot.gov/Pubs/812124.pdf>.

167. QUICK FACTS 2014, *supra* note 174 at 1.

168. JUSTIN A. HEINONEN & JOHN E. ECK, U.S. DEP'T OF JUSTICE, PEDESTRIAN INJURIES AND FATALITIES, PROBLEM-ORIENTED GUIDES FOR POLICE PROBLEM-SPECIFIC GUIDES SERIES No. 51, at 13 (Oct. 2007) ("[M]ost pedestrian injuries and fatalities occur in urban areas, undoubtedly in part because cities have both more vehicles and more pedestrians when compared with non-urban areas.").

169. U.S. DEP'T OF TRANSP. NAT'L HIGHWAY SAFETY ADMIN. DOT HS 812 231, TRAFFIC SAFETY FACTS: ALCOHOL IMPAIRED DRIVING 7 tbl.4 (Dec. 2015).

170. Gustin, *supra* note 49.

171. See, e.g., Sara Silverstein, *These Animated Charts Tell You Everything About Uber Prices in 21 Cities*, BUS. INSIDER (Oct. 16, 2014, 12:47 PM), <http://www.businessinsider.com/uber-vs-taxi-pricing-by-city-2014-10>. In an anecdotal study, *Business Insider* compared Uber fares with taxi fares in twenty-one different cities across the United States and concluded that using UberX was generally cheaper, especially as the speed of the ride increased. *Id.*

172. See, e.g., *Lyft Terms of Service*, *supra* note 155; *Terms and Conditions*, *supra* note 155; *Terms of Service*, *supra* note 156.

173. See generally NAT'L HIGHWAY TRAFFIC SAFETY ADMIN., ALTERNATIVE TRANSPORTATION PROGRAMS: A COUNTERMEASURE FOR REDUCING IMPAIRED DRIVING (Sept. 2009) (comparing a variety of "alternative transportation programs" aimed at reducing the frequency of

R

R

R  
R

orists suggest that carrying a passenger may incline a driver to drive more cautiously than without a passenger.<sup>174</sup>

In sum, the benefits of ride sharing outweigh the risks, most importantly by allowing consumers to independently assess risks in exchange for benefits.<sup>175</sup> This independence and choice for risk is “an important component of both individual and social self-realization.”<sup>176</sup>

## 2. *Craigslist and Dating Websites: Past Examples of Putting Consumers’ Demands First*

Similar to the ride-sharing revolution, Craigslist and dating websites transformed economic and matchmaking markets in the mid-nineties.<sup>177</sup> Craigslist is an online marketplace, “allowing users to post and view ads pertaining to diverse subject matters.”<sup>178</sup> Comparably, dating websites, such as eHarmony and Match.com, function as matchmaking platforms to customers seeking relationships.<sup>179</sup> Although both Craigslist and dating websites have been welcomed and embraced by the general public, they had their fair share of downsides regarding public safety concerns and consumer needs.<sup>180</sup> These concerns included fraudulent activities, solicitation of prostitution, and sex trafficking.<sup>181</sup>

Courts applied common law standards in deciding defamation suits concerning “third-party internet postings.”<sup>182</sup> These common law standards held publishers of this content “to a higher standard than mere distributors like telephone and telegraph companies.”<sup>183</sup> Under the common law standard, “hosting internet service providers,” such

---

impaired driving and noting that “private taxi systems are far more flexible than mass transit systems, but they can be quite costly and they require more individual initiative and planning [because] the trip to the drinking locations must be made without using personal vehicles”).

174. See *infra* notes 227–31 and accompanying text (discussing the Moral Hazard Theory).

175. See Judges, *supra* note 160, at 27.

176. *Id.* at 26.

177. See Ryan D. O’Day, Note, *Rapists, Sexual Offenders, and Child Molesters: Who Is Your Romantic “Match”? Why Dating Websites Should Perform Criminal Background Checks*, 48 VAL. U. L. REV. 329, 331 (2013).

178. Peter Adamo, Comment, *Craigslist, the CDA, and Inconsistent International Standards Regarding Liability for Third-Party Postings on the Internet*, PACE INT’L. L. REV. ONLINE COMPANION, Feb. 2011, at 1, 1 (Supp.).

179. Lindsey A. Datte, Note, *Chaperoning Love Online: Online Dating Liability and the Wavering Application of CDA § 230*, 20 CARDOZO J.L. & GENDER 769, 770 (2014).

180. Adamo, *supra* note 178, at 1–2; O’Day, *supra* note 177, at 330.

181. See, e.g., Datte, *supra* note 179, at 776–77 (describing the potential of dating scams); Melissa Farley, et al., *Online Prostitution and Trafficking*, 77 ALB. L. REV. 1039, 1040–41, 1047 (2014).

182. See, e.g., Adamo, *supra* note 178, at 3 (discussing *Cubby, Inc. v. CompuServe, Inc.*, 776 F. Supp. 135).

183. *Id.*

R

R  
R

R

as Craigslist and Match.com, “could be held liable upon notice of and failure to remove defamatory content.”<sup>184</sup> In *Cubby, Inc. v. CompuServe, Inc.*,<sup>185</sup> the U.S. District Court for the Southern District of New York was the first court to acknowledge that common law defamation standards could not apply to hosting Internet service providers.<sup>186</sup> However, disagreements among lower courts<sup>187</sup> led Congress to enact the Communications Decency Act (CDA).<sup>188</sup> Section 230 of the CDA specifically “kept internet content services . . . from being considered publishers of third party content under law.”<sup>189</sup>

Even without an applicable common law standard of liability, Craigslist and dating websites remained a staple in the online community.<sup>190</sup> In particular, “online dating now stands as the third most popular form of matchmaking in the United States.”<sup>191</sup> Indeed, online dating has revolutionized the way people connect and interact.<sup>192</sup> “[A]ccording to recent studies, seventeen percent of marriages [in 2013] were between couples that met on the Internet.”<sup>193</sup> Even though online dating has raised safety concerns, such as one dater physically harming or financially exploiting another dater, only a few states and jurisdictions “regulate online dating sites.”<sup>194</sup> Moreover, “[m]ost of these laws focus on issues such as unfair contracts and procedures rather than safety.”<sup>195</sup> Those states (including Illinois) that do address safety concerns “mandate notification of whether the [online dating] service screens participants and, if so, what it searches for and how they use the information[.]” instead of requiring the online dating

184. *Id.*

185. 776 F. Supp. 135 (S.D.N.Y. 1991).

186. *Id.* at 139–41; Adamo, *supra* note 178, at 3.

187. *See, e.g.,* Stratton Oakmont, Inc. v. Prodigy Servs. Co., 1995 WL 323710 (N.Y. Sup. Ct. May 24, 1995) (holding that under certain circumstances, the common law defamation standard should apply to hosting Internet service providers) *superseded by statute*, Communications Decency Act of 1996, Pub. L. No. 104-104, 110 Stat. 133 (codified as amended in scattered sections of 47 U.S.C.), *as recognized in* Shiamili v. Real Estate Grp. of N.Y., Inc., 952 N.E.2d 1011 (N.Y. 2011).

188. 47 U.S.C. § 230 (2012).

189. Adamo, *supra* note 178, at 6 (citing Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (Cox-Wyden Proposal codified as amended at 47 U.S.C. § 230)).

190. Datte, *supra* note 179, at 773 (“[A] study conducted in 2013 concluded that 38% of single adult Internet users looking for love—or about one in ten adults—experienced online dating in some form.”).

191. *Id.* at 769.

192. Phyllis Coleman, *Online Dating: “Murderers, Rapists, and Con Artists, Oh My,”* 13 APPALACHIAN J.L. 147, 147 (2014).

193. *Id.*

194. *Id.* at 184.

195. *Id.*

R

R

R

sites to perform background checks.<sup>196</sup> Additionally, the Illinois Internet Dating, Internet Child Care, Internet Senior Care, and Internet Home Care Safety Act (Illinois Internet Dating Safety Act)<sup>197</sup> instructs online dating services to “provide a safety awareness notification to all Illinois members that includes, at a minimum, a list and description of safety measures reasonably designed to increase awareness of safer dating.”<sup>198</sup> Thus, the statute assures that consumers are informed but ultimately leaves the choice to engage in these activities to the consumers.<sup>199</sup>

Similarly, TNCs also function as matchmakers by connecting people seeking a ride with drivers seeking a rider.<sup>200</sup> Both online dating sites and TNCs serve as platforms to connect two strangers with a common goal: ride-sharing users search for transportation, and dating website users attempt to find a date or companionship.<sup>201</sup> Safety concerns among ride-sharing and online dating users are similar: both platforms connect two strangers with one another.<sup>202</sup> Despite these safety concerns, however, both service providers enable an “exchange . . . between [two] consenting entities.”<sup>203</sup> Taking their approach to online dating as a guide, Illinois legislators should focus on assuring that consumers are enabled to make informed decisions when choosing ride-sharing services by, for example, requiring that TNCs provide consumers with safety awareness notifications similar to those required by the Illinois Internet Dating Safety Act.<sup>204</sup> In passing ride-sharing friendly legislation, the Illinois legislature can once again create awareness by enabling consumers to be mindful of consequences when they assess the risks they consider taking.<sup>205</sup>

---

196. *Id.* at 184–85.

197. 815 ILL. COMP. STAT. 518 (Supp. 2015).

198. *Id.* at 518/10.

199. *See id.* The statute outlines specific examples of safety notification, such as “[t]here is no substitute for acting with caution when communicating with any stranger who wants to meet you[.]” but ultimately allows for the online dating service provider to choose the exact wording and to determine safe practices. *Id.*

200. Browning, *supra* note 6, at 84.

201. *See* Ward, *supra* note 4.

202. *See* Tanz, *supra* note 37.

203. Arun Sundararajan, *Why the Government Doesn't Need To Regulate the Sharing Economy*, WIRED (Oct. 22, 2012, 1:45 PM), <http://www.wired.com/2012/10/from-airbnb-to-coursera-why-the-government-shouldnt-regulate-the-sharing-economy/>.

204. *See, e.g., Code of Conduct*, UBER <https://www.uber.com/safety/code-of-conduct> (last updated Jan. 18, 2016). Uber provides a code of conduct to its users and drivers, which includes “a shared standard for respect, accountability, and common courtesy” as well as requirements to ensure safety. *Id.* *See generally* 815 ILL. COMP. STAT. 518/10.

205. *See* 815 ILL. COMP. STAT. 518/2 (“There is a public safety need . . . to increase public awareness of the possible risks associated with Internet dating . . .”).

B. *Considerations for the Illinois Legislator: Benefits of Ride-Sharing Services*

The Illinois legislature should affirmatively pass a bill excluding ride-sharing services from common carrier definitions and imposing ride-sharing friendly regulations. Specifically, in considering a ride-sharing friendly bill, the Illinois legislature should follow California's and Colorado's ride-sharing friendly legislation by: (1) expressly excluding TNCs and ride-sharing services from the public carrier and common carrier standard of care; (2) creating a specific TNC category; and (3) allowing the Illinois Public Utility Commission to regulate ride-sharing services within express boundaries of the statute.<sup>206</sup>

On August 25, 2014, former Illinois Governor Pat Quinn vetoed the proposed ride-sharing bill H.B. 4075, cautioning lawmakers not to “rush into a whole new statewide regulatory network before the need for one is clear [because such a measure] would not only stifle innovation, it would be a disservice to consumers who utilize the service while setting a troubling precedent for the future.”<sup>207</sup> The proposed bill would have placed ride-sharing services in the same category as traditional taxi and livery services.<sup>208</sup> Moreover, the bill would have limited the amount of ride-sharing drivers on the road through a registration plate system, which would have essentially mimicked the taxi medallion system.<sup>209</sup> In essence, the Illinois legislature attempted to regulate the new ride-sharing innovation with an already problematic system.<sup>210</sup> New technology undoubtedly presents unique challenges to twenty-first century regulators, requiring them to “balance [the] risk and the potential harm to human health and the environment against the demand of citizens for new technologies and the benefits

---

206. See Emily Dobson, *Transportation Network Companies: How Should South Carolina Adjust Its Regulatory Framework*, 66 S.C. L. REV. 701, 709 (2015) (citing CAL. PUB. UTIL. CODE §§ 5433–40 (West Supp. 2014) and COLO. REV. STAT. §§ 40-10.1-601 to 608 (2014)).

207. McKinney, *supra* note 14.

208. H.B. 4075, Gen. Assemb., Reg. Sess. (Ill. 2014).

209. See *id.* (“The Secretary of State shall issue for every passenger car used as a taxicab, or livery, or in a commercial ride-sharing arrangement in which the driver participates in commercial ride-sharing arrangements for more than 18 hours per week, distinctive registration plates.”); Stephen Schlickman, *If You Want Real Ride-sharing Alternatives, Veto Those Bills, Gov. Quinn*, CRAIN'S CHI. BUS. (July 29, 2014), <http://www.chicagobusiness.com/article/20140729/OPINION/140729776/if-you-want-real-ride-sharing-alternatives-veto-those-bills-gov-quinn>.

210. See Jeff Horwitz & Chris, *Taken for a Ride*, SLATE (June 6, 2012), [http://www.slate.com/articles/business/moneybox/2012/06/taxi\\_medallions\\_how\\_new\\_york\\_s\\_terrible\\_taxi\\_system\\_makes\\_fares\\_higher\\_and\\_drivers\\_poorer\\_.html](http://www.slate.com/articles/business/moneybox/2012/06/taxi_medallions_how_new_york_s_terrible_taxi_system_makes_fares_higher_and_drivers_poorer_.html) (criticizing the taxi medallion system and calling it a “lose-lose scenario” through which “New York, Chicago, San Francisco, and a host of other cities have created a powerful investor class, medallion owners and financiers, whose interests routinely compete with those of drivers and passengers”).

that they bring.”<sup>211</sup> This balance often results in vague regulations and hastily made decisions because regulators are pressured by heavily regulated markets.<sup>212</sup> Despite this pressure, regulators and legislators should not overregulate new technology because overregulation may stifle innovation.<sup>213</sup> New technology and innovation often create a “positive supply shock: technological advances drop the price of a good or service, thereby boosting output and consumption. As the market opens up, more people can afford to supply and consume the good or service.”<sup>214</sup>

By proposing consumer friendly legislation and ordinances, legislators and city officials will open the door to a dialogue with ride-sharing companies and ride-sharing operators.<sup>215</sup> This dialogue is more beneficial than an outright ban because it respects and considers consumer needs and may even create a proactive regulation model for future inventions and concepts.<sup>216</sup> Safety standards are certainly important and should always be a public official’s concern. However, if safety concerns become a measure to stifle innovation and resemble protectionism of an overregulated industry, these concerns fail their purpose by not serving the public’s best interest.<sup>217</sup> A proposed bill in Pennsylvania, for example, established insurance requirements, such as minimum insurance policy limits, and defined the service standards of TNCs.<sup>218</sup> In doing so, legislators communicate clear standards to courts, TNCs, ride-sharing drivers, and the general public, as well as enable ride-sharing services to function more efficiently. Clear standards manage consumers’ and providers’ expectations, and instead of

---

211. Faure et al., *supra* note 18, at 283 (abstract).

212. *Id.* at 288; see Badger, *supra* note 46.

213. See Browning, *supra* note 6, at 85 (“These are 21st century businesses that are operating with 20th century laws.” (quoting Emily Badger, *The Strange Tale of an Uber Car Crash and What It Means for the Future of Auto Insurance*, CITYLAB (Sept. 10, 2013), <http://www.citylab.com/commute/2013/09/real-future-ride-sharing-may-all-come-down-insurance/6832/>)); see also WILLIAM D. EGGERS & PAUL MACMILLAN, *THE SOLUTION REVOLUTION: HOW BUSINESS, GOVERNMENT, AND SOCIAL ENTERPRISES ARE TEAMING UP TO SOLVE SOCIETY’S TOUGHEST PROBLEMS* 57 (2013).

214. EGGERS & MACMILLAN, *supra* note 213.

215. See Packel, *supra* note 13.

216. See *id.* Professor Faure puts the regulatory flexibility and uncertainty of standards in a criminal context, arguing that regulation with criminal sanctions demands foreseeability and certainty for the regulatee. Faure et al., *supra* note 18, at 289. Although ride-sharing legislation is unlikely to pose criminal sanctions on the consumer, this Comment proposes that foreseeability and certainty is of equal value to the ride-sharing driver and rider.

217. Badger, *supra* note 46; see Stuart, *supra* note 5.

218. Packel, *supra* note 13 (discussing the circumstances of the introduction of the bill and its intended provisions).

R

R

R

R

R

R

R

R

fighting lawsuits that suffer due to a lack of clarity and regulations, TNCs can focus on maximizing their service to the public.<sup>219</sup>

The ride-sharing friendly legislation should entail an individual standard and category for TNCs and ride-sharing drivers.<sup>220</sup> California's and Colorado's ride-sharing friendly legislation could serve as a guide.<sup>221</sup> Similar to the California legislature, the Illinois legislature should create a separate TNC category and define TNCs as well as ride sharing by expressly excluding TNCs and ride sharing from public carriers and the common carrier standard of care.<sup>222</sup> These definitions should mimic California's definition of a TNC as "a company or organization operating in [Illinois] that provides transportation services using an online-enabled platform to connect passengers with drivers using their personal, non-commercial vehicles."<sup>223</sup> By operating in the TNC category, ride-sharing organizations could be required to register with each city's respective regulatory commission, provide commercial liability policies, and take affirmative steps to insure the riders' and drivers' safety.<sup>224</sup> These affirmative steps should involve a zero-tolerance policy for drugs and alcohol, require and provide yearly vehicle inspections of the drivers' cars, and involve yearly safety trainings and workshops.<sup>225</sup>

While taxi companies continue to insist that ride-sharing companies pose a threat to public safety, there is little to no evidence that licensed taxi drivers are actually safer than ride-sharing operators.<sup>226</sup> In fact, one anecdotal study found that taxi-lessees had a substantially worse driving performance than taxi-owners.<sup>227</sup> The researcher explained this outcome using the moral hazard theory. According to the

---

219. See Faure et al., *supra* note 18, at 289.

220. See Catherine Lee Rassman, *Regulation Rideshare Without Stifling Innovation: Examining the Drivers, the Insurance "Gap," and Why Pennsylvania Should Get on Board*, 15 PGH. J. TECH. L. & POL'Y 81, 97 (2014).

221. *Id.*

222. See *id.* at 91.

223. See *id.* (quoting CAL. PUB. UTILITIES COMM'N, OVERVIEW OF LIMOUSINE AND TRANSPORTATION NETWORK COMPANY REGULATIONS (June 2014), [http://www.cpuc.ca.gov/NR/rdon/lyres/208D6DD5-F4A3-4A66-8B7C-65CDB0F4265E/0/TNCLimoRegulation\\_v1.pdf](http://www.cpuc.ca.gov/NR/rdon/lyres/208D6DD5-F4A3-4A66-8B7C-65CDB0F4265E/0/TNCLimoRegulation_v1.pdf)).

224. See *id.* at 91–92.

225. See *id.*

226. Simon Waxman, Opinion, *Uber vs. Taxis*, BOS. GLOBE, May, 23 2014, <http://www.boston-globe.com/opinion/2014/05/23/podium-uber/qDzgx7of6vBP805aGNohN/story.html> (“[The Boston Police] say they receive 10 to 15 complaints about cab drivers every day, according to a report commissioned by the city and released in October of last year. . . . According to that same report, cabs respond to only 78 percent of dispatch requests in Boston.”).

227. Henry Schneider, *Moral Hazard in Leasing Contracts: Evidence from the New York City Taxi Industry*, 53 J. LAW & ECON. 783, 784 (2010) (“In 2005, long-term lessees experienced 62 percent more accidents and 64 percent more driving violations per mile than did owner-drivers . . .”).

moral hazard theory, people may have an incentive to take a greater risk if there is a chance that they will not be held liable for their actions.<sup>228</sup> The researcher illustrated that lessees pay “less or none of many of the variable costs that they generate, including for vehicle maintenance, repair, replacement, and insurance, and hence they have incentives to choose inefficient levels of vehicle care and risk.”<sup>229</sup> Although a leasing option exists for traditional taxi drivers, all three major TNCs require their drivers to own the vehicles they will use for their ride-sharing services.<sup>230</sup> Following the moral hazard theory, ride-sharing drivers who own their own vehicles are, therefore, likely to use more caution while driving.<sup>231</sup>

Dismantled by safety concerns, the primary purpose of taxi-service lobbyists appears to be maintaining the value of the taxi medallion.<sup>232</sup> With ride-sharing services entering the market, taxi medallions are rapidly losing their value, which leaves investors and taxi medallion owners concerned—not with regard to passengers’ safety, but with regard to the profit of their investments.<sup>233</sup> Indeed, Chicago taxi medallion prices have steadily declined in their value, hitting an all-time low in July 2014, when the medallions were estimated at a median price of \$250,000 compared to \$357,000 in April 2014.<sup>234</sup> The Illinois legislature should focus on compromises and ride-sharing friendly regulation because this regulation would benefit society in a utilitarian way: maximizing assets through sharing and establishing a “social layer of efficiency on our current transportation infrastructure.”<sup>235</sup>

#### IV. IMPACT

Technology will continue to evolve, innovate, and change the playing field for businesses and concepts that are firmly rooted in tradition and law.<sup>236</sup> Society is changing, and the law must adapt to meet these new societal demands and needs. If the standard of care and insur-

---

228. *Id.*

229. *Id.*

230. See, e.g., *Driving Jobs vs Driving with Uber*, UBER, <https://www.uber.com/driver-jobs> (last visited Nov. 14, 2014); *Requirements for Lyft Vehicles*, LYFT, <https://help.lyft.com/hc/en-us/articles/214219557> (last visited Nov. 14, 2014); *SIDECAR*, <http://www.side.cr/drivers/> (last visited Nov. 14, 2014).

231. See Schneider, *supra* note 227, at 785.

232. Badger, *supra* note 46.

233. *Id.*

234. CHI. DISPATCHER, CHICAGO MEDALLION PRICES (Sept. 2014), <http://chicagodispatcher.com/clients/chicagodispatcher/September2014MedallionPrices.pdf>.

235. Gustin, *supra* note 49 (quoting John Zimmer).

236. See Sofia Ranchordás, *Does Sharing Mean Caring? Regulating Innovation in the Sharing Economy*, 16 MINN. J.L. SCI. & TECH. 413, 439–40 (2015).

ance issues are not adequately addressed, ride-sharing services may no longer be profitable and may cease to exist, which would harm the public's interest in obtaining affordable and reliable transportation.<sup>237</sup> Technology, combined with the sharing economy, is moving our society forward and generates economical as well as environmental benefits.<sup>238</sup> Courts and legislators have a great responsibility in shaping the future of these programs and innovations.<sup>239</sup> This Part discusses the impact of ridesharing on: (1) consumers; (2) ride-sharing drivers' insurance; and (3) the taxi industry.

#### A. *The Impact on Consumers*

A consumer's freedom to choose depends on the available alternatives. Ride-sharing services offer valuable alternative modes of transportation to consumers, especially in Chicago, because Chicagoans routinely travel long distances across town.<sup>240</sup> For example, consider a hypothetical ride-sharing user named Jane. Jane finds herself in the South Loop neighborhood of Chicago, which is 12.5 miles away from her home in the Rogers Park neighborhood. Jane forgot her wallet at home but has her cell phone. By choosing ride-sharing services, Jane has a ride home because her credit card is automatically charged through her ride-sharing app. Moreover, in times of economical despair, ride sharing can create greater access to transportation for individuals who may otherwise be unable to afford traditional taxi fares.<sup>241</sup> The public's safety and protection should remain a paramount concern to regulators and legislators, and consumers should be provided with an assurance of safety.<sup>242</sup> However, if courts too narrowly interpret the law and if legislatures overregulate, innovators may move on to the next invention. Customers, however, will be stripped of a reliable, alternative mode of transportation because ride-sharing services "increase the overall access to reliable on-demand transportation services in urban areas."<sup>243</sup>

Additionally, ride-sharing drivers, who can also be viewed as consumers of the ride-sharing app, are equally impacted by the lack of

---

237. *See id.* at 446–47.

238. *Id.* at 466; *see also* K. Casey Strong, Comment, *When Apps Pollute: Regulating Transportation Network Companies To Maximize Environmental Benefits*, 86 U. COLO. L. REV. 1049, 1054 (2015).

239. *See* Ranchordás, *supra* note 236, at 421.

240. *See* Stuart, *supra* note 5.

241. *See* Ranchordás, *supra* note 236, at 435.

242. *See id.* at 474 (“[R]egulators [need to] find the balance between the advancement of innovation and the need to safeguard public safety and health . . .”).

243. *See* Strong, *supra* note 238, at 1071.

clear legal guidelines and certainty. Ride-sharing offers flexible employment opportunities to many people in search of a job.<sup>244</sup> If ride-sharing drivers were regulated like traditional taxi or commercial drivers, access to this employment may be lost.<sup>245</sup> Robert Cooter, a Professor of Law at the University of California, Berkeley, who focuses on the interaction between law and economics, correctly pointed out that “freedom requires law, not its absence,” and he also accurately noted that “the [real] enemy of economy liberty is monopoly, which only permits a few to seek wealth . . . with restrictive laws, state officials can . . . choose who is allowed to do business.”<sup>246</sup>

### B. *The Impact on Ride-Sharing Drivers’ Insurance*

A higher standard of care may lead to insurance issues, such as an increase in insurance gaps, which may result in discouraging people from engaging in the ride-sharing business and leave customers underserved. Each TNC promises its drivers a \$1 million commercial insurance policy;<sup>247</sup> however, these commercial policies are intended to supplement in “excess of loss, riding on top of coverage provided by the driver’s primary insurer.”<sup>248</sup> Additionally, the structure of some of the TNCs commercial policies creates insurance gaps; for example, Lyft’s \$1 million commercial policy only goes in effect when a driver has been matched with a passenger.<sup>249</sup> This means that when the ride-sharing driver has the ride-sharing app open but is not matched with a rider, she is not covered under the TNC’s commercial policy and must rely on her own personal insurance.<sup>250</sup> If, however, the driver’s personal automobile insurance excludes commercial driving activities and finds that ride sharing is a commercial driving activity, the driver may not be covered at all.<sup>251</sup> In turn, if courts find that a common carrier standard of care applies, insurers will likely be more inclined to ex-

244. Lisa Eadicicco, *Uber Says It’s Creating 20,000 Jobs Per Month*, BUS. INSIDER (June 6, 2014, 2:11 PM), <http://www.businessinsider.com/uber-creating-jobs-2014-6#ixzz3hY5KjReO>.

245. *See id.*

246. Ranchordás, *supra* note 236, at 467–68 (alterations in original) (quoting ROBERT D. COOTER, LEGALIZE FREEDOM, in *Competition Policy and Patent Law Under Uncertainty: Regulating Innovation*, 27, 39 (Geoffrey A. Manne & Joshua D. Wright eds., 2011)).

247. *See, e.g.*, Nairi, *Insurance for UberX with Ridesharing*, UBER NEWSROOM (Feb. 10, 2014), <http://newsroom.uber.com/2014/02/insurance-for-uberx-with-ridesharing/>; LYFT, <https://www.lyft.com/safety> (last visited Nov. 14, 2014).

248. Lehmann, *supra* note 108, at 7.

249. LYFT, *supra* note 247 (“This means that from the moment you accept a ride request and are on your way to pick up a passenger to the moment you end the ride in the app, Lyft has an insurance policy for liability up to \$1 million per incident.”).

250. Lehmann, *supra* note 108, at 7–8 (discussing Dave Jones’s, a California Insurance Commissioner, proposed solution).

251. *Id.* at 8–9.

R

R

R

R

clude ride sharing from their personal automobile coverage.<sup>252</sup> Although Lyft and Uber offer a contingent liability policy that “will cover up to \$50,000 per-person of bodily injury, \$100,000 per-accident of bodily injury and \$25,000 of property damage, in the event a driver’s personal policy did not respond[,]”<sup>253</sup> these damage coverages may not meet the minimum liability coverage requirement in the particular city that the ride-sharing driver is operating. Indeed, the required minimum liability coverage is much higher for common carriers and commercial drivers.<sup>254</sup> In Chicago, for example, the mandatory minimum liability coverage for taxicabs is \$350,000.<sup>255</sup> Thus, if a ride-sharing driver is held to be a common carrier and subjected to a heightened standard of care, it follows that the higher mandatory minimum liability coverage would apply to ride-sharing drivers as well.<sup>256</sup>

As a result, a ride-sharing driver may need to supplement her personal auto insurance with a more expensive commercial insurance policy.<sup>257</sup> More expensive insurance may have a three-fold effect on the ride-sharing system as a whole: (1) fare prices may rise; (2) drivers may be forced to drive longer hours to make a profit; and (3) the higher rates may prevent people from becoming drivers in the first place. Fare prices may rise because the ride-sharing driver may need a greater incentive to become a ride-sharing driver because drivers currently take an 80% cut from the total fare and already demand higher fares.<sup>258</sup> Additionally, the City of Chicago recently passed a new ordinance that divides transportation companies’ “ride-sharing driver[s] into two categories.”<sup>259</sup> Under the new ordinance, “companies whose driver workforce averages more than 20 hours per person each week will face stronger oversight, including a requirement that all drivers

---

252. *Id.* at 12.

253. *Id.* at 8–9.

254. See Jack Newsham, *Uber, Lyft Save Big by Avoiding Regulations*, BOS. GLOBE, Dec. 25, 2014, <http://www.bostonglobe.com/business/2014/12/25/uber-lyft-save-big-avoiding-regulations/pQAMk1KMOavlyZhWi4XIaJ/story.html>.

255. CHI., ILL., MUN. CODE § 9-112-330(a)(1) (2015) (“Each public liability insurance policy shall provide at least the following minimum coverage for each taxicab: \$350,000.00 combined single limit coverage per occurrence.”).

256. See Lehmann, *supra* note 108, at 1.

257. *Id.* at 7.

258. E.g., Lazo, *supra* note 10; Katy Steinmetz, *UberX Drivers Protest Outside Uber Headquarters*, TIME (May 8, 2014), <http://time.com/92988/uberx-san-francisco-protest-uber/> (noting that UberX drivers used to receive 95%).

259. Lehmann, *supra* note 108, at 9; see also Hal Dardick & Jon Hilkevitch, *Chicago Rideshare Regulations Approved*, CHI. TRIB., May 28, 2014, <http://www.chicagotribune.com/news/local/politics/chi-chicago-rideshare-regulations-approved-20140528-story.html>.

R

R

obtain chauffeur’s licenses.”<sup>260</sup> Companies whose drivers work less than twenty hours per week, on the other hand, “would be required to obtain city approval of their background check, driver training, vehicle inspection and random drug testing procedures.”<sup>261</sup> Furthermore, the licensing fee for the former would be substantially higher.<sup>262</sup> Although the City of Chicago currently estimates that “the vast majority of ride-shar[ing] drivers—up to 75 percent—work only part time[,]”<sup>263</sup> this may change if ride-sharing drivers are forced to drive longer hours to make up for higher insurance rates. One aspect is certain: higher fares will mainly affect consumers who depend on and take advantage of ride sharing, which many view as a cheaper and more practical alternative to traditional taxi services.<sup>264</sup>

Most importantly, the legal uncertainty as to which standard of care applies to ride-sharing services is stifling the creation of new insurance policies.<sup>265</sup> On May 6, 2014, Lyft announced its partnership with MetLife Auto & Home and proposed to develop insurance policies tailored to users of “the sharing economy platform.”<sup>266</sup> However, thus far, “no products from this project [have] been filed in any state.”<sup>267</sup> For insurance underwriters to create “hybrid” policies that combine “features of both personal and commercial auto products[,]” insurers must know what standard of care applies to what type of driving activity.<sup>268</sup> If courts decide that ride-sharing does not fall under the common carrier’s heightened standard of care, as they should, insurance companies could rely on a standard of care that is uniformly applied to all phases of a ride-sharing activity, and new innovative products could be tailored accordingly.<sup>269</sup> By passing a bill stating that ride-sharing drivers are not common carriers, the Illinois legislature would

---

260. Dardick & Hilkevitch, *supra* note 259.

261. *Id.*

262. Lehmann, *supra* note 108, at 9 (“[T]he licensing fee for [those who work more than 20 hours per week] is . . . \$25,000.”).

263. Dardick & Hilkevitch, *supra* note 259.

264. *See* Stuart, *supra* note 5.

265. *See* Lehmann, *supra* note 108, at 12.

266. *Lyft Partners with MetLife*, LYFT: BLOG (May 6, 2014), <http://blog.lyft.com/posts/2014/5/lyft-partners-with-metlife>.

267. Lehmann, *supra* note 108, at 7.

268. *Id.* at 12.

269. *Id.* at 14. Although Lehmann argued for a uniform coverage requirement that includes ride-sharing services as for-hire transportation services, he conceded that “[t]here may be good reasons for some differences in the regulatory treatment of different forms of transportation;” however, he argued that liability coverage should not be among them. *Id.* at 13. This Comment is not trying to answer whether or not TNCs should be vicariously liable for their drivers but, rather, proposes that ride-sharing services are distinct from common carriers who are engaged in transporting the general public.

R

R

R

R

R

R

create even more legal clarity. Thus, with clear guidance from the legislature and a sensible approach from the courts, ride sharing may remain a matchmaking service that consumers and providers choose to enjoy.

### C. *The Impact on the Taxi Industry*

Ride-sharing services create competition to existing monopolies and reduce the value of taxi medallions. One legal scholar argued that “[t]reating taxi medallions like property has fostered an undue sense of entitlement, exacerbating conflict and discouraging innovation.”<sup>270</sup> Instead of focusing on eliminating ride-sharing services, the taxi industry would benefit more from trying to improve its competitiveness with ride-sharing services.<sup>271</sup> Perhaps the traditional privilege of taxi medallions has been outdated and the taxi industry must face a reform; as another scholar correctly pointed out: “Different Game + Same Rules = Game Over.”<sup>272</sup> New competition changes the structure and flow of long-existing traditional businesses. A clear legal framework will help the taxi industry adapt to the new competition and new consumer demands and expectations.<sup>273</sup>

## V. CONCLUSION

Classifying ride-sharing operators as common carriers and applying the highest standard of care will have a detrimental effect on the ride-sharing business model because a heightened standard of care would likely increase insurance premiums for ride-sharing operators and create legal uncertainties for new technologies.<sup>274</sup> Consumers should be free to contract and assess safety standards on their own.<sup>275</sup> Moreover, the Illinois legislature should follow its past regulatory approach to Internet dating to ensure consumers’ awareness of safety standards through ride-sharing friendly regulation.<sup>276</sup> Instead of eliminating new innovations by relying on old standards, the Illinois legislature should develop a new standard of care fitted to twenty-first-century technology. This ride-sharing standard of care could include regulatory mechanisms to ensure basic standards of safety. For example, the

270. Tom W. Bell, *Copyright Porn Trolls, Wasting Taxi Medallions, and the Propriety of “Property,”* 18 CHAP. L. REV. 799, 803 (2015).

271. Dobson, *supra* note 206, at 722.

272. Ranchordás, *supra* note 236, at 474.

273. *Id.* at 475 (arguing that the sharing economy demands a new legal framework.).

274. *See supra* notes 141–235 and accompanying text.

275. *See supra* notes 148–76 and accompanying text.

276. *See supra* notes 177–205 and accompanying text.

2016]

*THE COMMON CARRIER BARRIER*

905

ride-sharing standard of care could impose certain requirements on TNCs as well as ride-sharing drivers: TNCs could be required to maintain records, enforce zero-tolerance drug and alcohol policies, and sporadically review ride-sharing drivers via their driving performance. Furthermore, ride-sharing drivers could be subjected to regular car inspections, road safety trainings, and maintenance of a good driving record. Communal benefits and innovations must not be lost to regulatory and legal uncertainty. Legal innovation should be the answer.

*Riebana Sachs\**

---

\* J.D. Candidate, DePaul University College of Law, 2016; B.S., Iowa State University, 2010. I would like to express my deepest gratitude to the Volume 65 Editorial Board and staff for their dedicated work and brilliant support. I am especially thankful to my Editor, Jenna Stupar, whose advice and endless support turned me into a more confident writer and woman. Another special thank you goes to Professor Max Helveston for his thoughtful insights. I am exceptionally grateful for my family's love and support. Thank you to my Mom and Dad for continuing to challenge me to never stop reaching for the stars. To my brother, Christopher, thank you for always making me laugh. Lastly, to my wonderful husband, John, words cannot express how much I appreciate your love, support, tireless optimism, and unfaltering belief in me. All mistakes are my own.

