

UCLA Journal of Law & Technology

ROADS CLOSED: RIDESHARE DRIVERS’ PRIVACY INTERESTS CREATE A ROADBLOCK TO ADDRESSING INCREASING PUBLIC SAFETY CONCERNS ASSOCIATED WITH RIDESHARING

Hayley Hofmann

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Roads Closed: Rideshare Drivers' Privacy Interests Create a Roadblock to Addressing Increasing Public Safety Concerns Associated with Ridesharing

Hayley Hoffmann

I. Introduction

In September 2019, fourteen women from eight states, representing a growing class of individuals who have been sexually assaulted by Lyft drivers, filed a mass tort complaint against Lyft. The complaint attacks the company for failing to implement appropriate safety measures, among other things, amidst the ongoing ridesharing “sexual predator crisis.”¹ Paragraph twenty-seven of the complaint, articulating the factual basis of their claim, reads:

LYFT continues to hire drivers without performing adequate background checks. LYFT continues to allow culpable drivers who have complaints of rape and sexual assault lodged against them to keep driving for LYFT. And, most importantly, LYFT has failed to adopt and implement reasonable driver monitoring procedures designed to protect the safety of its passengers.²

The plaintiffs allege that Lyft “fails to utilize its own technology” to ensure drivers remain law abiding and do not compromise the safety of their passengers.³ Their lawsuit invokes several calls for action to address growing concern over passenger safety in the increasingly popular rideshare market.⁴ One suggestion offered is that Lyft “[i]mplement a surveillance camera within the App that can audio and video record all rides and have footage saved and accessible for up to 72 hours after each ride.”⁵

This lawsuit is only the most recent development in a series of many public outcries lamenting the risks associated with the growing ridesharing economy and rideshare giants like Uber’s and Lyfts’ failure to adopt safety measures to adequately address those risks.⁶ As technology

¹ Complaint at 1–4, *Roe v. Lyft*, No. CGC-19-578975 (Cal. Super. Ct. Sept. 4, 2019).

² *Id.* at 4.

³ *Id.* at 6.

⁴ *Id.* at 6–15.

⁵ *Id.* at 8.

⁶ See, e.g., Sandra E. Garcia, *In Kidnapping Attempt, Uber Driver Told 2 Women ‘You’re Not Going Anywhere,’ Police Say*, N.Y. TIMES (May 13, 2019), <https://www.nytimes.com/2019/05/13/us/uber->

advances, more effective and less expensive means are available to ensure passenger safety.⁷ Still, Uber and Lyft’s responses have been limited, and incidents remain “frighteningly common.”⁸

This Article hypothesizes that the privacy implications in imposing such surveillance upon rideshare drivers keep rideshare providers like Uber and Lyft from implementing the proposed safety measures despite growing safety concerns and external pressure to do so. The proposed video surveillance would affect control over rideshare drivers in a way that raises privacy concerns, presenting a new pothole in navigating the already complicated terrain as to whether rideshare drivers are appropriately classified as employees or independent contractors. Indeed, in understanding the privacy implications of the use of video surveillance measures within the independent contractor versus employee context, there are two significant roadblocks to imposing the proposed safety measures. First, inasmuch as rideshare drivers remain classified as independent contractors, the use of such video surveillance may violate their reasonable expectation of privacy. Second, notwithstanding whether the proposed safety measures would violate drivers’ privacy, rideshare providers are significantly deterred from using video surveillance because doing so affects control over drivers in such a way that could result in their reclassification as employees, which companies like Uber and Lyft have been careful to avoid.

II. Safety Concerns Associated with Ridesharing

Passenger safety and driver misconduct have been increasingly at issue in the rideshare industry. Moreover, “[t]he troubling experiences suffered by Uber [and Lyft] passengers at the hands of drivers around the world demonstrate the urgency and necessity for increased safety protections.”⁹

For example, in 2017, a Brooklyn woman alleged a Lyft driver picked her up, and, rather than driving her home as requested, the driver brought her to a site in New Jersey, where he and two

driver-kidnapping-women.html (noting that present safety measures “have not necessarily thwarted the rash of passengers’ reports of assaults and misconduct by drivers”).

⁷ Indeed, such means, such as in-car cameras and GPS tracking, are already available to be used “to ensure that drivers keep the camera running during the entire ride and that the driver remains on course to the passenger’s destination.” Complaint, *supra* note 1, at 6.

⁸ Adrienne LaFrance & Rose Eveleth, *Are Taxis Safer Than Uber?* ATLANTIC (Mar. 3, 2015), <https://www.theatlantic.com/technology/archive/2015/03/are-taxis-safer-than-uber/386207>.

⁹ Emily L. Dyer, *Need a Ride? Uber: The Trendy Choice That Could Turn Threatening*, 17 NEV. L.J. 239, 252–53 (2016) (citing several allegations of varying degrees of Uber driver misconduct against passengers in 2014 and 2015).

other men held her at gunpoint and took turns raping her.¹⁰ In 2018, an Uber driver in Ohio pulled a knife on two passengers after one of them said his vehicle smelled like smoke, and a physical altercation ensued.¹¹ In 2019, an Uber driver in Pittsburgh was charged with kidnapping, harassment, and false imprisonment after trying to lock two female passengers in his car and saying, “[y]ou’re not going anywhere.”¹² In Long Island, an Uber driver was charged with felony kidnapping, child endangerment, and unlawful imprisonment of a 15-year-old girl.¹³ Prosecutors believed he was planning to engage in sexual misconduct when he cancelled the route, disabling the GPS, while the underage girl remained in the car.¹⁴

There is no publicly available data for assaults by rideshare drivers,¹⁵ and such data tracking assaults by occupation is generally not collected by law enforcement.¹⁶ However, a CNN investigation reviewing police reports and court records in twenty major U.S. cities found that at least 103 Uber drivers and eighteen Lyft drivers were accused of sexually assaulting or abusing their passengers between 2014 and 2018.¹⁷ The actual number of incidents is in reality much larger. The CNN investigation does not account for other markets or types of assaults outside of its investigation,¹⁸ the number of assaults reported to the ridesharing company but not to law

¹⁰ Eric Westervelt, *Lawsuits Say Lyft Doesn’t Do Enough to Protect Women from Predatory Drivers*, NPR (Sept. 12, 2019, 11:51 AM), <https://www.npr.org/2019/09/12/759876637/lawsuits-say-lyft-doesnt-do-enough-to-protect-women-from-predator-drivers>. Upon reaching out to a Lyft representative regarding the incident, she was still charged \$12.81 for the ride. *Id.*

¹¹ Kaylyn Hlavaty, *Uber Driver Allegedly Pulled Knife on Passengers in Ohio, Police Say*, ABC15 ARIZ. (Mar. 19, 2018, 8:22 AM), <https://www.abc15.com/news/national/uber-driver-allegedly-pulled-knife-on-passengers-in-ohio-police-say>.

¹² Garcia, *supra* note 6.

¹³ Michael Gold, *Every Parent’s Nightmare: A Teenage Girl and an Uber Driver with His Own Plan*, N.Y. TIMES (Aug. 27, 2019), <https://www.nytimes.com/2019/08/27/nyregion/uber-driver-kidnapping.html>.

¹⁴ *Id.*

¹⁵ Sara Ashley O’Brien et al, *CNN Investigation: 103 Uber Drivers Accused of Sexual Assault or Abuse*, CNN: BUS. (Apr. 30, 2018, 5:43 PM), <https://money.cnn.com/2018/04/30/technology/uber-driver-sexual-assault/index.html>.

¹⁶ *See* Westervelt, *supra* note 10.

¹⁷ O’Brien et al, *supra* note 15.

¹⁸ *See* Greg Bensinger, *When Rides Go Wrong: How Uber’s Investigations Unit Works to Limit the Company’s Liability*, WASH. POST (Sept. 26, 2019, 8:25 AM), <https://www.washingtonpost.com/technology/2019/09/25/ubers-investigations-unit-finds-what-went-wrong-rides-its-never-companys-fault> (noting that a former investigator for Uber reported that only about one-third of cases reported to Uber dealt with sexual misconduct).

enforcement, or the number of assaults which go unreported altogether.¹⁹ In Denver alone, the Denver Police Department reported 43 sex crimes committed by rideshare drivers from 2015 to 2019.²⁰ Amid the rise in popularity of ridesharing and increasing concerns about passenger security, some hypothesize that the increase of reported rapes and other sex crimes may be attributed to ridesharing services.²¹

Uber and Lyft acknowledge the risks associated with using their platform and maintain that safety is among their highest priorities.²² Both companies devote entire sections of their websites to promoting passenger safety,²³ and Uber advertises its use of safety features and community guidelines intended to keep drivers accountable on its home page.²⁴ Accordingly, Uber promises “to continuously raise the bar, [by] building new safety technology, setting guidelines for respectful and positive experiences, and more,”²⁵ and Lyft’s promises are similar, if not “often steps behind.”²⁶ Yet, while assaults against passengers persist and these companies face increasing external pressure to address safety issues, their responses have been limited.

¹⁹ Uber has a policy to not report incidents to law enforcement officials absent an immediate and present danger, and investigators “underst[and] that if they contac[t] the police or advis[e] victims to do so, they could be reprimanded or even fired.” *Id.*

²⁰ Westervelt, *supra* note 10.

²¹ Pauline M. Tarife, *Female-Only Platforms in the Ride-Sharing Economy: Discriminatory or Necessary?* 70 RUTGERS UNIV. L. REV. 295, 304 (2017) (noting “[s]tunningly, some jurisdictions have even attributed a growth in general sexual offense statistics to these ride-sharing services”) (citing Thomas Macmillan & Pervaiz Shallwani, *Rise in Sexual Assaults Reported by Taxi Passengers*, WALL ST. J. (Jan. 10, 2016, 8:48 PM), <https://www.wsj.com/articles/rise-in-sexual-assaults-reported-by-taxi-passengers-1452476904> (reporting a 6 percent rise in reports of rape and a 42 percent increase in reports of stranger-rape specifically from 2014 to 2015 in New York City, noting that New York City police attributed at least part of the increase to Uber and Lyft)).

²² *Details on Safety*, UBER: NEWSROOM, <https://newsroom.uber.com/details-on-safety> (last updated May 12, 2016). Additionally, in 2018 both Lyft and Uber promised to release a transparency safety report including data on reports of sexual assault. Sara Ashley O’Brien, *Amid Sexual Assault Concerns, Lyft Tries to Reassure Drivers with Safety Measures*, CNN BUS. (Sept. 10, 2019, 7:58 PM), <https://www.cnn.com/2019/09/10/tech/lyft-safety-updates/index.html>. As of October 2019, those reports have yet to be released.

²³ *See generally Uber’s Approach to Safety*, UBER, <https://www.uber.com/us/en/safety> (last visited Oct. 13, 2019); *How Lyft Works to Keep Drivers Safe*, LYFT, <https://www.lyft.com/rider/safety> (last visited Oct. 13, 2019).

²⁴ UBER, <https://www.uber.com> (last visited Oct. 13, 2019).

²⁵ *Uber’s Approach to Safety*, *supra* note 23.

²⁶ O’Brien, *supra* note 22 (recognizing Uber and Lyft face similar issues of passenger safety, but as Uber has historically been subject to more litigation it has had more incentive to adopt additional safety measures); accord Faiz Siddiqui, *How Lyft Lost the Trust of #DeleteUber Women Who Thought it was ‘Woke’*, WASH. POST (Aug. 2, 2019), <https://www.washingtonpost.com/technology/2019/08/02/how-lyft->

In response to the increasing number of assaults against passengers, in 2018 Uber announced new safety measures, including an in-app 911 emergency button and RideCheck.²⁷ Lyft promises to implement similar features.²⁸ However, as recent litigation emphasizes, more effective and comprehensive surveillance measures remain available but underutilized.²⁹ Particularly, Uber and Lyft have yet to implement video surveillance as a deterrent mechanism despite the availability of such technology. The issue becomes even further exacerbated by the fact that these companies fail to do so in the face of such demonstrated safety risks and against persuasive external pressure.³⁰

lost-trust-deleteuber-women-who-thought-it-was-woke (explaining how it has taken Lyft over a year to implement safety measures on par with Uber's despite marketing itself as "woke" and "friendlier" than Uber, causing its reputation to become "increasingly under fire").

²⁷ RideCheck will send a push notification to riders in situations such as a long stop or possible crash, to which riders can then respond if they need help. Dana Kerr, *Uber's New Safety Feature Checks on Rides When it Detects Something Amiss*, CNET (Sept. 17, 2019, 6:00 AM), <https://www.cnet.com/news/ubers-ridecheck-safety-feature-checks-on-rides-when-it-detects-something-dangerous>.

²⁸ See John Zimmer, *Reinforcing Our Commitment to Safety*, LYFT BLOG (Sept. 10, 2019), <https://blog.lyft.com/posts/reinforcing-lyfts-commitment-to-safety>.

²⁹ Complaint, *supra* note 1, at 4 (stating amongst factual allegations that "most importantly, LYFT has failed to adopt and implement reasonable driver monitoring procedures designed to protect the safety of its passengers"); accord Alexandra Fiore & Matthew Weinick, *Undignified in Defeat: An Analysis of the Stagnation and Demise of Proposed Legislation Limiting Video Surveillance in the Workplace and Suggestions for Change*, 25 HOFSTRA LAB. & EMP. L.J. 525, 525 (2008) (acknowledging the increased practicability of surveillance in the workplace, understanding that "while the sophistication of surveillance equipment is increasing, the cost is falling precipitously").

³⁰ New rideshare providers such as ScoopM and Safr are addressing the safety issues and have the potential to create competition with Uber and Lyft. See Anne Marie Hagerty, *New Ride-Share Service in Charlotte Offers Safer Options for Riders*, WBTV NEWS (Apr. 3, 2019, 11:57 AM), <https://www.wbtv.com/2019/04/01/new-ride-share-service-charlotte-offers-safer-options-riders> (describing ScoopM as a carpool service "developed with the safety of women and children in mind" by offering cameras recording inside and outside their vehicles); Ida Mojada, *Rideshare App for Women Emerges Amid Chilling Oakland Ride*, SFWEEKLY (Sept. 6, 2018, 10:23 AM), <http://www.sfweekly.com/news/rideshare-app-for-women-emerges-amid-chilling-oakland-ride> (describing Safr as a female-centric rideshare provider that allows women to request female drivers to avoid the risks of sexual assault). The growing public ill-will can also be costly in and of itself. See Madison Malone Kircher, *How Much Did #DeleteUber Actually Help Lyft?* INTELLIGENCER (Apr. 27, 2017), <http://nymag.com/intelligencer/2017/04/lyft-user-numbers-spiked-after-delete-uber-campaign.html> (reporting Lyft usage increased significantly when potential passengers avoided using Uber's service amidst #DeleteUber campaign).

III. Background

Rideshare providers are no stranger to controversy, and these companies, especially Uber, have dealt with considerable amounts of litigation since their inception.³¹ Particularly, Uber and Lyfts' race to the forefront of the transportation and technology sectors has been complicated at every twist and turn by the debate as to whether rideshare drivers are appropriately classified as employees or independent contractors.³² The appropriate classification of rideshare drivers as employees or independent contractors remains heavily debated,³³ and a determination either way proves highly consequential.³⁴ The proposed use of video surveillance technology to address growing safety concerns introduces a new road-bump in navigating the already contentious employee versus independent contractor debate. For the time being at least, rideshare drivers are generally considered independent contractors.³⁵ But rideshare providers' use of video surveillance technology to monitor drivers and deter unsafe conduct implicates driver privacy

³¹ Uber was sued at least 435 times, and Lyft was sued at least 115 times, between January and August 2017 alone. Eric Lieberman, *Uber Sued at Least 435 Times in 2017, Says Report*, DAILY CALLER (Aug. 23, 2017, 2:31 PM), <https://dailycaller.com/2017/08/23/uber-sued-at-least-435-times-in-2017-says-report>.

³² Kristen V. Brown, *Here's What's Going on with All of Those Uber Lawsuits*, SPLINTER (June 16, 2016, 5:18 PM), <https://splinternews.com/heres-whats-going-on-with-all-of-those-uber-lawsuits-1793857601> (“Many of the cases challenge Uber’s basic business model, arguing that that Uber misclassifies drivers as independent contractors, rather than employees.”).

³³ This Article is not concerned with whether rideshare drivers are appropriately classified as employees or independent contractors. Significant academic discourse exploring the subject already exists. *See, e.g.*, Richard A. Bales & Christian Patrick Woo, *The Uber Million Dollar Question: Are Uber Drivers Employees or Independent Contractors?*, 68 MERCER L. REV. 461, 485–87 (2017) (arguing that classification is appropriately made on a case-by-case basis to consider the different types of individuals participating in the sharing economy); Andre Andoyan, *Independent Contractor or Employee: I'm Uber Confused! Why California Should Create an Exception for Uber Drivers and the “On-Demand Economy”*, 47 GOLDEN GATE U. L. REV. 153, 168–69 (2017) (arguing that ridesharing does not fit within the existing legal framework and advocating for adoption of a new hybrid classification for rideshare drivers); Nicholas L. DeBruyne, *Uber Drivers: A Disputed Employment Relationship in Light of the Sharing Economy*, 92 CHI. KENT L. REV. 289, 292 (2017) (arguing Uber drivers should be classified as independent contractors under a slightly modified economic realities test). Rather, this Article discusses driver classification either way only inasmuch as the designation may implicate driver privacy concerns.

³⁴ *See infra* notes 36–44 and accompanying text.

³⁵ *See* Jillian Kaltner, *Employment Status of Uber and Lyft Drivers: Unsettlingly Settled*, 29 HASTINGS WOMEN'S L.J. 29, 30–31 (2018) (recognizing that drivers are classified as independent contractors by rideshare providers and discussing the obstacles litigators have faced combatting that designation); *accord* Jayme L. Sopher, Nat'l Labor Relations Bd., Advice Memorandum 1 (Apr. 16, 2019) (holding UberX and Uber Black drivers to be independent contractors); *but see* Assemb. B. No. 5, Reg. Sess. (Cal. 2019) (recently passed legislation modifying the requirements for employment status in California).

interests in a way that has yet to be explored within the employee versus independent contractor debate.

A. Principles Motivating the Employee versus Independent Contractor Debate

Significant discourse surrounding driver classification has been premised on the need to extend statutorily prescribed employee benefits and protections to drivers.³⁶ An individual's designation as either an employee or independent contractor is consequential because "the law protects employees in various ways that it does not protect independent contractors."³⁷ Most employment rights do not extend to independent contractors, so drivers classified as such are left vulnerable. Current and former drivers for Uber and Lyft have brought significant litigation against these rideshare companies seeking reclassification as employees in an effort to receive these benefits.³⁸ Efforts to classify drivers as employees are ongoing.³⁹

However, rideshare providers have a "substantial financial motivation" to classify their drivers as independent contractors and adamantly oppose their classification as employees.⁴⁰ Driver reclassification would severely disrupt rideshare providers' business models and cut into profits in addition to expanding their potential tort liability.⁴¹ If drivers were classified as employees, Uber and Lyft would be required to offer healthcare, minimum wage, overtime, scheduled breaks, pension, and workers compensation, in addition to having tax withholding and unemployment insurance obligations, among other things, which would add considerable

³⁶ See DeBruyne, *supra* note 33, at 290 (addressing the criticism that rideshare providers "dodg[e] various employment regulations and protections" by classifying drivers as independent contractors rather than employees). The National Labor Relations Act extends collective bargaining rights to employees. 29 U.S.C. § 157 (2012). The Fair Labor Standards Act guarantees employees a minimum wage and overtime pay. 29 U.S.C. §§ 206–07 (2012). Title VII of the Civil Rights Act protects employees from racial discrimination. 42 U.S.C. §§ 2000e-2-2000e-3. (2012). The Americans with Disabilities Act similarly protects employees with disabilities. 42 U.S.C. § 12112 (2012). None of these protections are extended to independent contractors.

³⁷ Ben Z. Steinberger, *Redefining 'Employee' in the Gig Economy: Shielding Workers from the Uber Model*, 23 *FORDHAM J. CORP. & FIN. L.* 577, 578 (2018).

³⁸ See Lieberman, *supra* note 31.

³⁹ See, e.g., Noam Scheiber, *New Lawsuit Against Uber is Set to Test Its Classification of Workers*, N.Y. TIMES (Sept. 12, 2019), <https://www.nytimes.com/2019/09/12/technology/uber-drivers-california.html> (discussing the implications of a recently passed California bill that would appear to reclassify Uber's drivers as employees).

⁴⁰ DeBruyne, *supra* note 33, at 292.

⁴¹ See, e.g., Agnieszka A. McPeak, *Sharing Tort Liability in the New Sharing Economy*, 49 *CONN. L. REV.* 171 (2016) (discussing the practical implications of applying existing tort liability to new technology).

expenses.⁴² As a result, Uber and Lyft have been willing to settle classification disputes for large sums, promising to address these concerns out of court to avoid legal scrutiny and judicial determination of driver classification.⁴³ The risks of rideshare drivers being classified as employees thus offers a significant deterrent to ridesharing service providers like Uber and Lyft implementing the proposed surveillance measures.⁴⁴

B. Privacy Implications of Proposed Safety Measures

In 1890, Justices Samuel Warren and Louis Brandeis found themselves confronted with previously unencountered harms arising out of innovations in print media, namely the use of new photograph and newspaper technologies to disseminate information about persons without their knowledge or permission.⁴⁵ Addressing these concerns in their Article *The Right to Privacy*, which has become the seminal text and canonical in U.S. privacy jurisprudence, the Justices identified the existence of a right to privacy at common law.⁴⁶ Identifying this right, they noted “the existing law affords a principle which may be invoked to protect the privacy of the individual from invasion either by the too enterprising press, the photographer, or the possessor of any other modern device for recording or reproducing scenes or sounds.”⁴⁷ Rideshare providers’ potential use of available video surveillance technologies to address safety concerns arising out of ridesharing’s innovative business model similarly implicates privacy interests.

⁴² See Kaltner *supra* note 35, at 30 (elaborating on this point and noting that if drivers were found to be misclassified as independent contractors at trial the damages could be upwards of \$1 billion).

⁴³ Lyft recently paid a \$27-million settlement to absolve a class of more than 95,000 drivers seeking reclassification. See Samantha Masunaga, *Judge Gives Final Approval of \$27-Million Settlement in Lyft Class-Action Lawsuit*, L.A. TIMES (Mar. 17, 2017, 9:55 AM), <http://www.latimes.com/business/la-fi-lyft-settlement-20170317-story.html>. Uber was willing to settle a similar suit for a proposed \$100-million settlement in order to avoid the risk of drivers being found misclassified, although that was rejected by the judge presiding. *O’Connor v. Uber Techs., Inc.*, 201 F. Supp. 3d 1110 (N.D. Cal. 2016) (denying preliminary approval for proposed settlement).

⁴⁴ See Part IV.B for discussion of how implementation of video surveillance could lead to employee classification.

⁴⁵ Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 195–97 (1890); see generally Ann E. Cudd & Mark C. Navin, *Introduction: Conceptualizing Privacy Harms and Values*, in CORE CONCEPTS AND CONTEMPORARY ISSUES IN PRIVACY 1, 3 (Ann E. Cudd & Mark C. Navin eds., 2018).

⁴⁶ Warren & Brandeis, *supra* note 45, at 195 (“Recent inventions and business methods call attention to the next step which must be taken for the protection of the person, and for securing to the individual . . . the right ‘to be let alone.’”) (quoting THOMAS M. COOLEY, A TREATISE ON THE LAW OF TORTS OR THE WRONGS WHICH ARISE INDEPENDENT OF CONTRACT 29 (1879)).

⁴⁷ Warren & Brandeis, *supra* note 45, at 206.

Privacy is a nebulous concept and not easily conceptualized, but it is helpful to understand how the proposed surveillance affects drivers' privacy more specifically. When Justices Warren and Brandeis first posited the existence of privacy interests at common law, they understood the individual's right to privacy to be derived from a "principle of . . . inviolate personality."⁴⁸ Although the Justices did not go so far as to clearly describe that interest, Dr. Edward Bloustein⁴⁹ has postulated that they were moved to recognize common law privacy protections out of fear that intrusions thereon would "emasculate individual freedom and independence."⁵⁰ As such, privacy rights are meant to protect "the individual's independence, dignity, and integrity."⁵¹

Subsequent efforts to refine this concept recognize that privacy rights protect "autonomy or control over the intimacies of [one's] personal identity."⁵² In this sense, privacy interests dictate "control over when and by whom various parts of us can be sensed by others."⁵³ It is control – control over one's self and over others' perception thereof – which is at the heart of common law privacy interests.⁵⁴ Moreover, for the purposes of this Article, an individual's right to privacy generally presupposes a freedom from surveillance, because surveillance affects external control in conflict with these principles.⁵⁵

⁴⁸ *Id.* at 205.

⁴⁹ Dr. Bloustein, a legal scholar and president of Rutgers, The State University of New Jersey, contributed significant and distinctive work to the field of privacy law during his lifetime. Sheldon W. Halpern, *The "Inviolable Personality" – Warren and Brandeis After One Hundred Years: Introduction to a Symposium on the Right of Privacy*, 10 N. ILL. U. L. REV. 387, 391 n.25 (1990).

⁵⁰ Edward J. Bloustein, *Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser*, 39 N.Y.U. L. REV. 962, 970–71 (1964) ("Unfortunately, the learned authors were not as successful in describing the interest").

⁵¹ *Id.* at 971.

⁵² Tom Gerety, *Redefining Privacy*, 12 HARV. C.R.-C.L. L. REV. 233, 236 (1977).

⁵³ Richard B. Parker, *A Definition of Privacy*, 27 RUTGERS L. REV. 275, 281 (1974). "By 'sensed,' is meant simply seen, heard, touched, smelled, or tasted. By 'parts of us,' is meant the parts of our bodies, our voices, and the products of our bodies." *Id.*

⁵⁴ See Steven P. Lee, *The Nature and Value of Privacy*, in CORE CONCEPTS AND CONTEMPORARY ISSUES IN PRIVACY 47, 48 (Ann E. Cudd & Mark C. Navin eds., 2018) (positing a "control-based" definition of privacy). The degree of privacy is the level of control people have over information about themselves and the extent to which that information is available to others. *Id.*

⁵⁵ Eugene Volokh, *Tort Law vs. Privacy*, 114 COLUM. L. REV. 879, 881 n.2 (2014) (noting freedom from surveillance "seems to be the standard definition"); see also Julie E. Cohen, *What Privacy Is For*, 126 HARV. L. REV. 1904, 1905–06 (2013) (noting that "freedom from surveillance, whether public or private, is foundational to the practice of informed and reflective citizenship" and should be understood as an aspect of privacy).

Specifically, the proposed safety measures would affect control over rideshare drivers in two respects, implicating both informational and decisional privacy.⁵⁶ Informational privacy interests concern an individual's control over the disclosure, acquisition, and use of personal information.⁵⁷ Rideshare providers' imposition of video surveillance to monitor drivers directly interferes with drivers' ability to control the extent to which and by whom their actions are visible to others, namely the agents of the provider who would monitor the recording. Requiring that drivers subject themselves to video surveillance during the course of their duties creates an external standard of visibility in conflict with the individual's right to determine how and when they may be seen, or "sensed," by others.⁵⁸ Further, decisional privacy interests concern an individual's control over his or her actions and freedom to make decisions without interference.⁵⁹ Inasmuch as the proposed measures mean to deter drivers from engaging in conduct that is dangerous to passengers, the video surveillance essentially enforces an implied standard of conduct which indirectly affects how drivers choose to conduct themselves.⁶⁰ The safety measures direct drivers to act a certain way, limiting their freedom of choice.

From this discussion, it is clear how the proposed safety measures implicate drivers' privacy interests in multiple ways. Indeed, one can see how the interests at play are "functionally interconnected" and "simultaneously implicated" by the use of surveillance technologies to

⁵⁶ One can understand privacy rights as falling into three broad categories: spatial, decisional, and informational. Jerry Kang, *Information Privacy in Cyberspace Transactions*, 50 STAN. L. REV. 1193, 1202–03 (1998). Video surveillance does not implicate spatial privacy because it does not involve any physical or sensory invasion into the driver's physical space. *See id.* at 1202.

⁵⁷ *Id.* at 1203.

⁵⁸ *See Parker supra* note 53 and accompanying text.

⁵⁹ Kang, *supra* note 56, at 1202. Dr. Kang discusses decisional privacy as it relates to specifically recognized constitutional rights, however the same principles may be more generally implicated in the common law interest as well. *See id.* at 1202–03.

⁶⁰ The court recognized this consequence in *O'Connor v. Uber Technologies, Inc.*, 82 F. Supp. 3d 1133 (N.D. Cal. 2015) (denying Uber's motion for summary judgment, which contended that Uber drivers were independent contractors as a matter of law, upon consideration of the extent of control Uber exerted over its drivers). The court explained:

Uber drivers . . . are monitored by Uber customers (for Uber's benefit, as Uber uses the customer rankings to make decisions regarding which drivers to fire) during each and every ride they give, and Uber's application data can similarly be used to constantly monitor certain aspects of a driver's behavior. This level of monitoring, where drivers are potentially observable at all times, arguably gives Uber a tremendous amount of control over the 'manner and means' of its drivers' performance.

Id. at 1151; *accord* Casey Thomas, *Ride Oversharing: Privacy Regulation Within the Gig Economy*, 36 CARDOZO ARTS & ENT. L.J. 247, 256–58 (2018) (noting the existence of privacy issues for independent contractor rideshare drivers who are under surveillance through GPS technology and indirectly through passengers as "watchers" rating drivers).

monitor drivers and deter misconduct.⁶¹ None of this is to say, however, that implementation of such technologies to address growing safety concerns in the rideshare industry necessarily violates drivers' common law privacy rights.⁶² Rather, driver privacy interests are a factor to be considered in assessing the practicability of introducing video surveillance safety measures and why rideshare providers have yet to do so.

IV. Barriers to Addressing Safety Concerns

In light of the ways in which the proposed safety measures implicate rideshare driver privacy concerns, these concerns, complicated by the employee versus independent contractor debate, create a roadblock to rideshare companies addressing safety concerns in two respects. As independent contractors, rideshare drivers may have a reasonable expectation of privacy that protects them from being monitored through video surveillance, and imposition thereof could expose rideshare providers to liability for violating drivers' privacy rights. But even if driver privacy rights do not extend to preclude surveillance by rideshare providers, these providers are significantly deterred from implementing such measures out of fear that doing so could result in drivers being classified as employees.

A. Proposed Safety Measures Interfere with Driver Privacy Rights as Independent Contractors

“American jurisprudence [relies] on the concept of privacy to battle workplace surveillance.”⁶³ Outside of common law, an individual may derive a right to privacy from any of several sources: the U.S. or state constitutions, federal statutes, state laws, or contract.⁶⁴ However, common law privacy interests are typically determinative in the employment or agency context, especially as it relates to rideshare drivers in the present case. In the private employment context, the common law tort of intrusion upon seclusion proves most relevant to protecting employee privacy

⁶¹ Kang, *supra* note 56, at 1203. To understand how these privacy interests relate to each other, consider how informational privacy can create the breathing space necessary for decisional privacy. *Id.* For example, keeping the fact of pregnancy to oneself can afford one the freedom to choose whether to have an abortion. *Id.*

⁶² Although the next part of this Article hypothesizes that rideshare providers' use of video surveillance does in fact violate rideshare drivers' privacy rights as independent contractors. *See infra* Part IV.A.

⁶³ Alexandra Fiore & Matthew Weinick, *Undignified in Defeat: An Analysis of the Stagnation and Demise of Proposed Legislation Limiting Video Surveillance in the Workplace and Suggestions for Change*, 25 HOFSTRA LAB. & EMP. L.J. 525, 528 (2008).

⁶⁴ Ronald P. Angerer II, *Moving Beyond a Brick and Mortar Understanding of State Action: The Case for a More Majestic State Action Doctrine to Protect Employee Privacy in the Workplace*, 4 CHARLOTTE L. REV. 1, 7–10 (2013).

interests.⁶⁵ The common law provides for a cause of action where an employer’s intrusion upon their employee’s “reasonable expectation of privacy”⁶⁶ is “highly offensive to the reasonable person.”⁶⁷ In the public employer context, video surveillance over employees falls under Fourth Amendment protections against unreasonable search and seizure. While the Fourth Amendment protection does not extend to private employers, this jurisprudence informs a private employee’s reasonable expectation of privacy.⁶⁸ As rideshare drivers are generally classified as private independent contractors,⁶⁹ they are not directly governed by case law in either of these categories.⁷⁰ Nonetheless, these same principles can similarly inform the independent contractor privacy analysis.

From these principles, courts generally consider three factors when determining whether an employee’s right to privacy has been violated: “(1) whether the employee had a reasonable expectation of privacy; (2) the extent of the employer’s intrusion on that reasonable expectation; and (3) the employer’s legitimate business reasons for the intrusion.”⁷¹ Further, claims relating to workplace privacy are “highly factual inquiries”⁷² which “must be addressed on a case-by-case basis.”⁷³ Because courts have yet to decide the question of whether the proposed video surveillance measures would violate rideshare drivers’ privacy rights specifically, the issue is presently unresolved. However, upon consideration of these general factors pertaining to employee privacy – taking into account the unique features of the independent contractor

⁶⁵ Fiore & Weinick, *supra* note 63, at 546.

⁶⁶ *Katz v. United States*, 389 U.S. 347, 360 (1967) (Harlan, J., concurring) (“[A] person has a constitutionally protected reasonable expectation of privacy . . .”). A person’s reasonable expectation of privacy presents “a twofold requirement,” that (1) the person exhibit a subjective expectation of privacy, and (2) the expectation is “one that society is prepared to recognize as ‘reasonable.’” *Id.* at 361.

⁶⁷ RESTATEMENT (SECOND) OF TORTS § 652B (1977) (stating the principle that a person is subject to liability for intrusion upon seclusion of a party where an intrusion “would be highly offensive to a reasonable person”).

⁶⁸ While *Ortega* specifically dealt with the constitutionality of a search by a public employer, its rationale “serves as the touchstone framework for most employment privacy tests.” Emily J. Tewes, *#Privatesphere: Can Privacy Law Adequately Protect Employees Amidst the Complexities of the Modern Employment Relationship?*, 57 SANTA CLARA L. REV. 287, 300 n.77 (2017). Indeed, “constitutional requirements for a recognized right to privacy often lay the foundation for common law privacy rights.” Lothar Determann & Robert Sprague, *Intrusive Monitoring: Employee Privacy Expectations Are Reasonable in Europe, Destroyed in the United States*, 26 BERKELEY TECH. L.J. 979, 986 (2011).

⁶⁹ See *supra* note 35 and accompanying text.

⁷⁰ Moreover, there does not seem to be case law addressing independent contractor privacy concerns specifically.

⁷¹ Tewes, *supra* note 68, at 300 (citing *O’Connor v. Ortega*, 480 U.S. 709, 725–26 (1987) (noting that such inquiries are highly circumstantial)).

⁷² *Id.* at 300.

⁷³ *Ortega*, 480 U.S. at 718.

relationship⁷⁴ – it is reasonable to understand that drivers’ classification as independent contractors would afford a greater degree of privacy protections than if they were classified as employees, and thus driver privacy rights in the present state of the employee versus independent contractor debate may create a barrier to rideshare providers implementing the proposed surveillance.

Inasmuch as “it is ‘the element of control that distinguishes the employer-employee relationship from the independent contractor relationship,’” the lack of control inherent in the independent contractor relationship mitigates the extent to which rideshare providers may reasonably be expected to exert control over their drivers.⁷⁵ Thus, as independent contractors, rideshare drivers’ reasonable expectation of privacy is more substantial than if they were employees.

Additionally, an employee’s reasonable expectation of privacy is limited in comparison with an independent contractor’s because “employees are provided with payment in consideration for relinquishing some rights.”⁷⁶ Part III.B of this Article discussed how the proposed surveillance measures affect control over drivers and thus intrude upon drivers’ privacy interests.

While “[e]mployees and prospective employees have remarkably little privacy in the U.S. today,”⁷⁷ and the use of video surveillance to supervise employees at work is not considered a significant intrusion to constitute a violation,⁷⁸ implementation of the proposed safety measures would affect a more extensive intrusion upon the independent contractor drivers’ reasonable expectation of privacy, because that expectation is greater to begin with. Therefore, not only would the proposed measures implicate rideshare safety interest but it also would impose a significant intrusion towards being highly offensive to the reasonable person.⁷⁹

On the other hand, the prevalence of safety concerns surrounding the rideshare industry may indicate a legitimate justification for intrusion. This may allow for use of video surveillance measures without violating drivers’ privacy rights. However, while it is a public interest, it is not explicitly a business interest. In light of the expanded reasonable expectation of privacy afforded to independent contractors, mere existence of this interest is not enough to discount privacy

⁷⁴ See, *supra* note 71 and accompanying text. Consider (1) the rideshare drivers’ reasonable expectation of privacy, (2) the extent to which rideshare providers use video surveillance, and (3) rideshare providers’ legitimate business interests for the intrusion.

⁷⁵ DeBruyne, *supra* note 33, at 299 (citation omitted).

⁷⁶ Thomas, *supra* note 60, at 258.

⁷⁷ John G. Francis & Leslie P. Francis, *Privacy, Employment, and Dignity*, in CORE CONCEPTS AND CONTEMPORARY ISSUES IN PRIVACY 207, 210 (Ann E. Cudd & Mark C. Navin eds., 2018).

⁷⁸ Fiore & Weinick, *supra* note 63, at 547 (noting “[i]t is extremely difficult for an employee to succeed on an intrusion claim [relating to electronic monitoring] in all but the most egregious circumstances”).

⁷⁹ See *supra* note 67 and accompanying text.

concerns. The question as to driver privacy expectation in this regard offers the opportunity for meaningful litigation.

Nonetheless, at the very least, the mitigated element of control that rideshare providers may exert over drivers in the independent contractor context would seem to increase drivers' reasonable expectation of privacy. Introduction of the proposed surveillance measures have the potential to violate these privacy rights, which may explain why rideshare providers hesitate to utilize available technology in this way. Again, this has yet to be litigated, and courts will need to address this issue before any surveillance technologies meant to combat safety concerns may be introduced.

B. Possibility That Use of Surveillance Could Result in Driver Reclassification as Employees Deters Rideshare Providers from Implementing the Proposed Safety Measures

Even if the surveillance measures would not violate driver privacy rights, the fact that use of these technologies to monitor drivers and deter unsafe conduct would weigh in favor of creating an employment relationship between rideshare providers creates an additional roadblock to implementation of these increased safety measures. Litigation surrounding rideshare driver classification illustrates that the extent to which Uber and Lyft supervise their drivers is material to their drivers' classification. More specifically, the lack of supervision that rideshare providers impose upon drivers has helped maintain drivers' classification as independent contractors. It is understandable that the risk that utilization of the proposed surveillance technology, which would affect more control over drivers, could result in drivers being reclassified as employees, and that this poses a significant deterrent to rideshare providers doing so.⁸⁰

On April 16, 2019, the National Labor Relations Board (“the Board”) released an advice memorandum in which it declared UberX⁸¹ and Uber Black⁸² drivers are independent contractors.⁸³ To reach this conclusion, the Board applied the common law Agency Test, and accordingly considered the list of factors outlined in the Restatement (Second) of Agency.⁸⁴ The

⁸⁰ Rideshare providers have strong incentives to maintain independent contractor classification. *See supra* notes 36–44 and accompanying text.

⁸¹ The UberX option offers riders to request a private ride in a sedan for up to four people at an economic price. *UberX*, UBER, <https://www.uber.com/us/en/ride/uberx> (last visited Oct. 15, 2019).

⁸² The Uber Black option offers the same services as UberX but as a luxury experience, with high-end black cars and professional drivers at a more expensive cost. *Uber Black*, UBER, <https://www.uber.com/us/en/ride/uberblack> (last visited Oct. 15, 2019).

⁸³ Sophir, *supra* note 35, at 3.

⁸⁴ *Id.* at 3–13. The Restatement (Second) of Agency identifies ten non-exhaustive factors to be considered in the classification analysis:

Board gave exceptional weight to two factors: “(1) the extent of the company’s control over the manner and means by which drivers conduct business, and (2) the relationship between the company’s compensation and the amount of fares collected.”⁸⁵ Further, three particular features of the relationship between Uber and its drivers were significant: (1) drivers have the freedom to set their own work schedule, (2) drivers control their work locations, and (3) drivers can, and do, work for other companies.⁸⁶ Moreover, the Board distinguished Uber drivers from ‘black-car’ drivers, which the Board declared were employees in *Elite Limousine Plus, Inc.*⁸⁷ The Board based the distinction on the fact that Uber does not use a quality insurance committee to monitor drivers’ compliance with Uber’s Community Guidelines while on the road.⁸⁸ Overall, Uber drivers’ “near-absolute autonomy in performing their daily work without supervision” was a material fact in support of upholding drivers’ independent contractor status.⁸⁹

(2) In determining whether one acting for another is a servant or an independent contractor, the following matters of fact, among others, are considered:

- (a) the extent of control which, by the agreement, the master may exercise over the details of the work;
- (b) whether or not the one employed is engaged in a distinct occupation or business; the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;
- (c) the skill required in the particular occupation;
- (d) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work;
- (e) the length of time for which the person is employed;
- (f) the method of payment, whether by the time or by the job;
- (g) whether or not the work is a part of the regular business of the employer;
- (h) whether or not the parties believe they are creating the relation of master and servant; and
- (i) whether the principal is or is not in business.

RESTATEMENT (SECOND) OF AGENCY §220 (1958).

⁸⁵ Sophir, *supra* note 35, at 4.

⁸⁶ Furthermore, the Board determined that “drivers had significant entrepreneurial opportunity by virtue of their near complete control of their cars and work schedules, together with freedom to choose log-in locations and to work for competitors of Uber.” *Id.* at 5.

⁸⁷ 324 N.L.R.B. 992 (1997).

⁸⁸ Sophir, *supra* note 35, at 10. *Cf. Elite Limousine Plus*, 324 N.L.R.B. at 1002–03. The Board further distinguished UberX from black-car drivers in that UberX drivers “were not subject to restrictions on their work locations [or] extensive and detailed rules and regulations enforced through extensive and detailed sanctions[.]” Sophir, *supra* note 35, at 10.

⁸⁹ Sophir, *supra* note 35, at 12 (quoting *SuperShuttle DFW, Inc.*, 367 N.L.R.B. No. 75, slip op. at 14 (Jan. 25, 2019) (establishing the Restatement Agency Test as the appropriate standard and finding SuperShuttle franchises to be independent contractors).

Florida’s District Court of Appeal adopted similar rationale in *McGillis v. Department of Economic Opportunity*, in which the Court declared Uber drivers to be independent contractors for the purpose of reemployment assistance.⁹⁰ Also applying the common law Agency Test,⁹¹ the court recognized that extent of control exercised by the principal is “the most important factor” in determining whether a person is an employee or independent contractor.⁹² Further, the court acknowledged that “[t]he extent of control exercised over the details of the work turns on whether the control is focused on simply the result to be obtained or extends to the means to be employed.”⁹³ The court relied on the same characteristics as the Board, namely that drivers had freedom to choose “whether, when, where, with whom, and how to accept and perform trip requests” and that Uber “provide[d] no direct supervision,” to classify rideshare drivers as independent contractors.⁹⁴

Furthermore, Uber more explicitly advocated for the standards it has in place meant to maintain driver designation as independent contractors in *O’Connor v. Uber Technologies, Inc.*,⁹⁵ a leading case addressing the issue of appropriate driver classification. Although the decision itself is not dispositive of rideshare drivers’ classification, and the litigants in *O’Connor* ended up proceeding with their claims in arbitration,⁹⁶ the arguments articulated both for and against independent contractor status are informative of the legal implications of different features of the relationship between Uber and its drivers.

In *O’Connor*, Uber contended that it exerts very little meaningful control over its drivers.⁹⁷ Uber maintains that drivers can reject as many rides as they want without penalty and control how to give the rides they accept.⁹⁸ Uber argued it has no ability to actively monitor driver performance

⁹⁰ 210 So. 3d 220 (Fla. Dist. Ct. App. 2017).

⁹¹ RESTATEMENT (SECOND) OF AGENCY, § 220 *supra* note 82.

⁹² *McGillis*, 210 So. 3d at 224–25.

⁹³ *Id.* at 225. “If control is confined to results only, there is generally an independent contractor relationship [But] if control is extended to the means used to achieve the results, there is generally an employer-employee relationship.” *Id.*

⁹⁴ *Id.* at 225–26.

⁹⁵ *O’Connor v. Uber Techs., Inc.*, 82 F. Supp. 3d 1133 (N.D. Cal. 2015) (denying Uber’s motion for summary judgment, finding a genuine issue of material fact existed as to whether drivers were appropriately classified as independent contractors under California law).

⁹⁶ *See O’Connor v. Uber Techs., Inc.*, 904 F.3d 1087 (9th Cir. 2018).

⁹⁷ *O’Connor*, 82 F. Supp. 3d at 1138 (noting that Uber contends it “exercises minimal control over how its transportation providers actually provide transportation services to Uber customers”).

⁹⁸ *See id.* at 1149. It is worth noting that while this was Uber’s official position in the litigation, this contention was actually “very much in dispute” in the eyes of the court. *Id.* The court pointed out, for instance, that while Uber suggests drivers never actually have to accept ride requests, the Uber Driver Handbook expressly states an expectation that drivers accept rides while logged into the application, and

or ensure that drivers actually comply by any company standards.⁹⁹ Uber contends it controls neither the manner nor the means of drivers' work.¹⁰⁰ However, the court noted that the more "relevant inquiry is how much control Uber has over its drivers while they are on duty."¹⁰¹ Moreover, the court points to Uber's customer ratings system and the data collected and stored through the Uber application as supervisory mechanisms through which Uber has an opportunity to exert enough control over its drivers to create an issue of material fact as to their classification.¹⁰² Such mechanisms amount to "constant" supervision and "persistent performance monitoring," which, albeit indirectly, assure drivers adhere to standards imposed by Uber.¹⁰³

Thus, the amount of supervision, or lack thereof, that rideshare providers impose on their drivers is material to driver classification as either independent contractors or employees. In each of the above cases, lack of supervision in Uber's existing business practice weighed in favor of classifying drivers as independent contractors, because failure to supervise afforded drivers a certain freedom to operate outside of Uber's control.¹⁰⁴ This is consistent with the principle that surveillance affects external control over the individual being surveyed.¹⁰⁵ Essentially, more

failure to do so "could lead to possible termination." *Id.* The fact that this was so contested reinforces the idea that rideshare driver designation is tenuous.

⁹⁹ *Id.* at 1150. Uber denies imposing any standards at all, only "suggestions." *Id.*

¹⁰⁰ *Id.* at 1150–52 (particularly emphasizing lack of control over when and how often drivers work).

¹⁰¹ *Id.* at 1152.

¹⁰² *Id.* at 1151–52.

¹⁰³ *Id.* at 1151–52 (Uber drivers are "monitored by Uber customers . . . during each and every ride they give, and Uber's application data can similarly be used to constantly monitor certain aspects of a driver's behavior. This level of monitoring, where drivers are potentially observable at all times, arguably gives Uber a tremendous amount of control over the "manner and means" of its drivers' performance.") (citing MICHEL FOUCAULT, DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON 201 (Alan Sheridan trans., Vintage Books 2d ed. 1995) (1977) ("[A] 'state of conscious and permanent visibility [] assures the automatic functioning of power'")).

¹⁰⁴ *See supra* note 60. The Court in *O'Connor* explicitly addressed how Uber affects control over its drivers through indirect methods. *Id.* at 1148-52; *accord* Keith Cunningham-Parmeter, *From Amazon to Uber: Defining Employment in the Modern Economy*, 96 BOS. U. L. REV. 1673, 1707–08 (2016) (explaining how although rideshare providers "do not hire physical supervisors to accompany drivers, these companies can monitor workers through customer reviews that reward or punish drivers based on their star ratings" by which providers "retain the power to ensure that workers comply with performance mandates even though no face-to-face supervision takes place"). Monitoring through video surveillance affords even stronger power in this sense.

¹⁰⁵ *See supra* Part III.B, for an explanation on how surveillance affects control over individuals in such a way as to implicate privacy interests.

surveillance affects greater control over drivers tending towards creating an employment relationship.¹⁰⁶

This substantially deters rideshare providers from implementing the proposed surveillance measures. More rigorous supervision could create an employment relationship between rideshare providers and drivers, because “the more you treat independent contractors as employees, the more likely you’ll lose the right to define them as independent contractors.”¹⁰⁷ Due to rideshare providers’ significant incentives to classify drivers as independent contractors, this possible consequence of the proposed safety measures creates a substantial deterrent to rideshare providers electing to utilize such technologies regardless of the severity of the public safety concern.

V. Conclusion

In summary, rideshare providers like Uber and Lyft find themselves facing a “sexual predator crisis.”¹⁰⁸ Recent litigation and public outrage surrounding increasing numbers of assaults against passengers by rideshare drivers dually invoke a call to action for rideshare providers to address the growing safety concerns associated with their services. Rideshare providers have technology at their disposal, particularly in the form of video surveillance, which these companies can easily and cost-effectively implement to deter drivers from engaging in

¹⁰⁶ The definition of an independent contractor is one “who is not controlled by the other nor subject to the other’s right to control with respect to his physical conduct in the performance of the undertaking.” RESTATEMENT (SECOND) OF AGENCY, *supra* note 82, § 2(3). This is to be contrasted with the definition of a servant, or employee, “whose physical conduct in the performance of the service is controlled or is subject to the right to control by the master.” *Id.* § 2(2). “While employers of employees can control how their workers behave to carry out their jobs, they cannot leverage that control over independent contractors.” Alex Rosenblat & Luke Stark, *Uber’s Drivers: Information Asymmetries and Control in Dynamic Work* (Centre for European Policy Studies, 2015), <https://algorithmsatwork.files.wordpress.com/2016/02/rosenblat-stark-information-asymmetries-and-control-in-dynamic-work-cscw-2016.pdf> (discussing the means by which Uber indirectly “structure[s] and control[s] the etiquette and uniformity of drivers’ behavior[,]” including its customer rating system).

¹⁰⁷ *Should We Give Reviews to Independent Contractors?*, BUS. MGMT. DAILY (June 8, 2007), <https://www.businessmanagementdaily.com/2735/should-we-give-reviews-to-independent-contractors> (advising employer/principal of the consequences of treating independent contractors similarly to employees); accord Ron Brown, *Robots, New Technology, and Industry 4.0 in Changing Workplaces: Impacts on Labor and Employment Laws*, 7 AM. U. BUS. L. REV. 349, 381 (2018) (“[T]he employer must be mindful of sufficiently monitoring the workplaces but at the same time considering whether it is exercising such dominion and control over ‘independent contractors’ to convert them into ‘employees’ . . .”).

¹⁰⁸ Complaint, *supra* note 1, at 4.

misconduct. However, the question of whether rideshare providers will implement these technologies, even in the face of strong external pressures, is much more complicated.

The use of video surveillance technologies to monitor drivers and deter misconduct raises privacy concerns which must be analyzed within the context of the driver classification debate – as either employees or independent contractors – that is so consequential within the ridesharing industry. Particularly, video surveillance affects control over drivers in such a way that (1) interferes with their reasonable expectation of privacy, and (2) weighs in favor of classifying drivers as employees rather than independent contractors. Each of these consequences significantly deters rideshare providers from utilizing available technology to address the growing safety concerns associated with their platforms. For the time being, it seems, the courts or external actors will have to get involved in order to address these safety concerns. The privacy implications and control associated with the use of video surveillance technologies, even in the face of a legitimate social interest, keep rideshare providers from doing so themselves.