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Preface

Sharing Thoughts on the Sharing Economy

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In addition to publishing at least two issues per year, the University of Hawai'i Law Review hosts a biennial symposium comprised of legal scholars, practitioners, jurists, and students, to share and discuss ideas and knowledge regarding various legal issues, particularly those relevant to Hawai'i. This year's symposium brought together a small, but prominent sampling of professors and practitioners from Hawai'i and abroad to discuss issues related to the "sharing economy," and several of the participants have contributed written articles to this symposium issue.

As with any thorough legal analysis, some of the symposium presenters started out by defining the term "sharing economy." Known by many names, including the gig economy, the platform economy, the peer-to-peer economy, the on-demand economy, or the collaborative economy, the term "sharing economy" brings to mind online companies, such as Airbnb, VRBO, Lyft, and Uber. Indeed, many of these platforms involve sharing—homesharing and ridesharing. But our keynote speaker, Professor Erez Aloni, opined that the term "sharing economy" is a misnomer, in that the primary focus is not actually sharing, but rather, access and excess.

Whatever this phenomenon is called, and however it is defined, legislatures and governments have rushed to promulgate new laws to regulate this "new" economy. A variety of legal issues arise in the sharing economy, including land use and zoning issues, labor laws and workforce protections, and civil rights and discrimination. In addition, many of these issues are particularly present in Hawai'i, given the State's tourism-based economy and limited resources.

But as Professor Agnieszka McPeak suggests, additional regulation may be unnecessary, because many of the legal issues that arise in the sharing economy can be addressed within existing legal frameworks. And as Christina Sandefur suggests, regulation can easily lead to overregulation,

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especially when conducted in a manner that infringes upon the constitutional property rights of market participants.

There are many individuals and organizations that were instrumental in making this symposium successful. We gratefully acknowledge the participation and contributions of our keynote speaker, Erez Aloni,[1] as well as our symposium panelists: Christina Sandefur,[2] Gregory W. Kugle,[3] Stephen R. Miller,[4] Brad T. Saito,[5] Agnieszka McPeak,[6] Timothy Burr, Jr.,[7] Michael Formby,[8] Linda H. Krieger,[9] and Robin Wurtzel.[10] We are thankful for the thoughtful contributions of our moderators, David L. Callies,[11] Robert H. Thomas,[12] and Justin D. Levinson.[13] We are indebted to our generous sponsors, the Student Activity and Program Fee Board of the University of Hawaii at Manoa, the Student Bar Association of the William S. Richardson School of Law, Damon Key Leong Kupchak Hastert, Lyft, Inc., LexisNexis, and Bloomberg Law, that helped to fund this symposium. Finally, we express our deepest appreciation to Dean Aviam Soifer, and Associate Deans Denise Antolini and Ronette Kawakami, for not only their support with this symposium, but also for their constant and continuous support of the Law Review.

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Foreword: "Property" and Investment-Backed Expectations in Ridesharing Regulatory Takings Claims

Robert H. Thomas*

I. INTRODUCTION

The sharing economy: enterprises such as Uber,[1] Lyft,[2] Air BnB,[3] and . . . DogVacay.[4] As we are constantly reminded by the enterprises themselves, they are not taxicab companies, or hotels, or pet boarding services. They are merely technology platforms, which allow peer-to-peer sharing. They put riders together with drivers, hosts with guests, and pet owners with those willing to look after Fido for a few days. But they sure do look a lot like the industries they are trying so hard to *not* be, no?

The technology behind ridesharing enterprises is evolving at lightning pace, and because of that, the legal issues which arise when trying to fit these sharing enterprises into existing regulatory regimes can result in decisions that draw competing philosophies into focus. Police power hawks believe that these things should—like just about everything else—be subject to pervasive regulation. The public needs to be protected! Libertarians applaud free market forces at play. Let a thousand flowers of thought bloom! The property rights advocates . . . well, as I will suggest in this essay, we end up with a somewhat mixed bag.

I say that because these interests draw me in opposite directions. I am not a big fan of regulations which limit entry into markets, and which stifle innovation. But I also favor a regulatory system, if it must exist, which allows investment and reliance, without fearing the government will just decide one day to ignore its own regulatory requirements and exempt others similarly situated from the regulations which govern existing participants.

This essay will review several cases which the sharing economy has thus far produced, cases where taxicab companies have sued municipalities for

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[1] UBER, http://www.uber.com (last visited June 18, 2017).

[2] LYFT, http://www.lyft.com (last visited June 18, 2017).

[3] AIRBNB, http://www.airbnb.com (last visited June 18, 2017).

[4] DogVacay recently rebranded itself as Rover. *See* ROVER, http://www.rover.com (last visited June 18, 2017). Sidebar: this last one reminds me of Jack Handey's faux sponsor of *Saturday Night Live*'s "Unfrozen Caveman Lawyer" skit, "Dog Assassin" ("When you can't bear to put him to sleep, maybe it's time to call . . . Dog Assassin."). *See Sound of Young America: Jack Handey, Author, TV Writer and Creator of "Deep Thoughts,"* NPR (May 30, 2008) (downloaded using iTunes).

allowing ridesharing services to operate without medallions, most often employing a regulatory takings theory. I argue that the approach employed by these courts wrongly focus on the property interests involved, rather than where the real analytical question resides: what are the investment-backed expectations of those already providing vehicle-for-hire services in the marketplace. Shifting the analysis from artificial distinctions between property for purposes of the Takings Clause and other forms of property, would, I conclude, put the focus where it should be—an owner's expectations when she obtains a taxicab medallion. Doing so would place these questions in the proper takings context, to be measured along with the other factors which courts consider in most regulatory takings cases.

II. A CRASH COURSE IN REGULATORY TAKINGS

The regulatory takings doctrine is built on the idea that certain exercises of government power have such a dramatic impact on private property that they are the functional equivalent of an affirmative exercise of eminent domain, and the government should either back off the regulation, or compensate the property owner. Most courts approach these cases by tracking the text of the Fifth Amendment,[5] and asking, in order: does the claimant own "private property," has the property been "taken," and if so, what compensation is "just."[6]

The government may not intend to condemn property—it is only regulating it, most often under the "police power"—but as Justice Holmes famously opined, left unchecked by the Takings Clause, the police power would eventually to swallow up the very notion of private property.[7] The

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[5] The Takings Clause of the U.S. Constitution provides, "nor shall private property be taken for public use, without just compensation." U.S. CONST. amend. V.

[6] United States v. General Motors Corp., 323 U.S. 373, 377 (1945) ("The critical terms are 'property,' 'taken' and 'just compensation.'"). The most common remedy in regulatory takings cases is an award of just compensation. *See* Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 536–37 (2005). In *Lingle*, the Court explained:

> As its text makes plain, the Takings Clause 'does not prohibit the taking of private property, but instead places a condition on the exercise of that power.' First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304, 314 (1987). In other words, it 'is designed not to limit the governmental interference with property rights per se, but rather to secure compensation in the event of otherwise proper interference amounting to a taking.' *Id.* at 315 (emphasis in original).

Id. Although in certain circumstances, declaratory or injunctive relief may be available. *See* E. Enters. v. Apfel, 524 U.S. 498, 522 (1998) ("Based on the nature of the taking alleged in this case, we conclude that the declaratory judgment and injunction sought by petitioner constitute an appropriate remedy under the circumstances, and that it is within the district courts' power to award such equitable relief.").

[7] Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922) ("When this seemingly absolute protection is found to be qualified by the police power, the natural tendency of

principle driving the analysis is whether it is fair to require a single property owner (or a class of property owners) to shoulder the entire economic burden of worthy regulations: "We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change."[8]

Justice Holmes also gave us the catchy but notoriously difficult-to-apply maxim that "[t]he general rule, at least, is that, while property may be regulated to a certain extent, if regulation goes too far, it will be recognized as a taking."[9] What "goes too far," and where the line is between regulations that may be applied without paying compensation, and a taking is one that has confounded the courts ever since.[10] In the ensuing decades, the Supreme Court struggled to draw that line, finally settling in *Lingle v. Chevron U.S.A. Inc.*[11] on a takings jurisprudence that, although continuing to be difficult to apply, at least was at least doctrinally clear.

In certain "relatively narrow" circumstances, it is easy to determine there's been a taking, and the Supreme Court has established two categories of regulations that will be deemed *per se* takings triggering the right to compensation. First, "where government requires an owner to suffer a permanent physical invasion of her property—however minor—it must provide just compensation."[12] Second, a *per se* taking also occurs when a regulation deprives an owner of "'all economically beneficial us[e]' of her property."[13] But *Lingle* also affirmed that most regulatory takings cases

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human nature is to extend the qualification more and more, until at last private property disappears.").

[8] *Id.* at 416; *see* Armstrong v. United States, 364 U.S. 40, 49 (1960) (holding that the Just Compensation Clause is designed "to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.").

[9] *Pa. Coal Co.*, 260 U.S. at 416. More than a half-century later, Justice O'Connor, writing for a unanimous Court, would label Justice Holmes' "goes too far" formula "storied but cryptic." *Lingle*, 544 U.S. at 537 (citing *Pa. Coal Co.*, 260 U.S. at 416) ("In Justice Holmes' storied but cryptic formulation, "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.")

[10] "The rub, of course, has been—and remains—how to discern how far is 'too far.'" *Lingle*, 544 U.S. at 538.

[11] 544 U.S. 528 (2005).

[12] *Id.* In support, the Court cited Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982), which held that a law requiring property owners to allow installation of a small cable box on buildings was a taking, and Nollan v. California Coastal Commission, 483 U.S. 825 (1987), a case analyzing a takings claim where an agency required landowner to dedicate a public easement as a condition of development approvals. *Id.*

[13] *Lingle*, 544 U.S. at 538 (quoting Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1019 (1992) (emphasis omitted)).

should be treated by the courts by applying a multi-factored balancing test which originated in the Court's earlier opinion in *Penn Central Transportation Co. v. City of New York.*[14] To determine whether a regulation "goes too far" when there is no physical invasion or near-total deprivation of economic benefit, a court examines the economic impact of the regulation (the loss in value experienced by the claimant resulting from the regulation), the property owner's "distinct investment-backed expectations," and the "character of the government action."[15]

Courts continue to struggle with what these factors actually mean.[16] No one factor of *Penn Central's* three is dispositive, and judges tend to throw them into a blender and somehow try to balance one versus the rest.[17] In other words, "regulatory taking" is shorthand for the notion that government's power to enact regulations affecting private property operates on a continuum, and when it crosses an equitable boundary determined in most cases by reference to a multitude of case-specific facts, the label attached to the exercise of power is irrelevant, and what matters is the impact of the regulation on the owner.[18] Against this backdrop, I next discuss several cases about ridesharing and takings.

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[14] 438 U.S. 104 (1978).

[15] *Id.* at 124–25 (citing Goldblatt v. Town of Hempstead, 369 U.S. 590, 594 (1962)). *Lingle* labeled the *Penn Central* test the "default" test. *See Lingle*, 544 U.S. at 538–39; *see also* Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 326 n.23 (2002) (quoting Palazzolo v. Rhode Island, 533 U.S. 606, 633 (2001) (O'Connor J., concurring) ("[O]ur polestar . . . remains the principles set forth in *Penn Central* itself," which require a "careful examination and weighing of all the relevant circumstances.")).

[16] John D. Echeverria, *Making Sense of* Penn Central, 23 UCLA J. ENVTL. L. & POL'Y 171, 172 (2005) ("The next 'big thing'—perhaps the last big thing—in regulatory takings law will be resolving the meaning of the *Penn Central* factors.").

[17] *See, e.g.*, Reoforce, Inc. v. United States, 853 F.3d 1249, 1269–71 (Fed. Cir. 2017); Cass Cnty. Joint Water Res. Dist. v. Brakke (*In re* 2015 Application for Permit to Enter Land for Surveys and Examination), 883 N.W.2d 844, 849 (N.D. 2016); FLCT, Ltd. v. City of Frisco, 493 S.W.3d 238, 272–76 (Tex. App. 2016).

[18] *See Lingle*, 544 U.S. at 537 (The Court "recognized that government regulation of private property may, in some instances, be so onerous that its effect is tantamount to a direct appropriation or ouster—and that such 'regulatory takings' may be compensable under the Fifth Amendment."); First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304, 316 (1987) ("While the typical taking occurs when the government acts to condemn property in the exercise of its power of eminent domain, the entire doctrine of inverse condemnation is predicated on the proposition that a taking may occur without such formal proceedings."); Andrus v. Allard, 444 U.S. 51, 64 n.21 (1979) (federal power to protect endangered species measured against Takings Clause; "[t]here is no abstract or fixed point at which judicial intervention under the Takings Clause becomes appropriate"); Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922) (Kohler Act enacted pursuant to state's police power went "too far").

III. SEVENTH CIRCUIT TO TAXIS: GET A CAT!

A panel of the U.S. Court of Appeals for the Seventh Circuit in two opinions authored by Judge Richard Posner (did you really expect anyone else would draw this assignment?), concluded that holdovers from the legacy economy—the owners of city-issued taxi medallions and permits—did not have their property taken under the Fifth Amendment when the city allowed ridesharing services to operate.[19]

The court acknowledged that the taxicab industry is "tightly regulated" by municipalities.[20] Indeed, you can't operate a taxicab without a medallion or permit from the local municipality.[21] And ridesharing services, although somewhat regulated, are certainly subject to much less government gatekeeping, in that you don't need major government permission to start chauffeuring people around for money via ridesharing services. That was the point the plaintiff taxicab operators objected to: we relied on the government-controlled market, which created a property right in our medallions and permits, they argued, and letting these interlopers do essentially the same thing we do without also having to get a medallion is a taking of our government-sanctioned property.

The panel rejected the claim in both cases,[22] calling the taxicab operators' claim "absurd."[23] Although it agreed that taxicab medallions are "property," the court held that there was no taking because owning a medallion is a property right to operate a taxicab, and isn't a property right to stop others from driving people around the city for money: "The City has created a property right in taxi medallions; it has not created a property right in all commercial transportation of persons by automobile in Chicago."[24]

The panel acknowledged that if the cities were to have outright confiscated the taxicab medallions (which would have prohibited the

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[19] *See* Joe Sanfelippo Cabs, Inc. v. City of Milwaukee, 839 F.3d 613 (7th Cir. 2016); Ill. Transp. Trade Ass'n v. City of Chi., 839 F.3d 594 (2016), *cert. denied*, 197 L. Ed. 2d. 761 (2017).

[20] *Ill. Transp. Trade Ass'n*, 839 F.3d at 596 ("companies are tightly regulated by the City regarding driver and vehicle qualifications, licensing, fares, and insurance"); *see also Joe Sanfelippo Cabs, Inc.* at 614–15 (discussing municipal regulation of taxicabs in Milwaukee).

[21] *See* MILWAUKEE, WIS., CODE OF ORDINANCES § 100-50 (2017).

[22] See *Joe Sanfelippo Cabs, Inc.*, 839 F.3d at 615; *Ill. Transp. Trade Ass'n*, 839 F.3d at 596–97.

[23] *See Joe Sanfelippo Cabs, Inc.*, 839 F.3d at 615 ("The plaintiffs' contention that the increased number of permits has taken property away from the plaintiffs without compensation, in violation of the constitutional protection of property, borders on the absurd.").

[24] *Ill. Transp. Trade Ass'n*, 839 F.3d at 597.

taxicab operators from operating taxicabs), it would be a taking.[25] The panel reasoned:

> A variant of such a claim would have merit had the City confiscated taxi medallions, which are the licenses that authorize the use of an automobile as a taxi. Confiscation of the medallions would amount to confiscation of the taxis: no medallion, no right to own a taxi, . . . though the company might be able to convert the vehicle to another use.[26]

But allowing Uber and Lyft to run services that *look* like taxicabs (but are not taxicabs) "is not confiscating any taxi medallions; it is merely exposing the taxicab companies to new competition—competition from Uber and the other transportation network providers."[27] The court pointed to what it concluded were critical differences between the two: you can't physically hail down an Uber or Lyft vehicle on the street but must use a smartphone application to do it for you, and a taxi's fare structure is determined by the city, while ridesharing services' are not.[28] And that, to the court, was the critical difference. Thus, ridesharing services are not taxicabs, and Uber and Lyft are as different from cabs as dogs are from cats. The court proclaimed:

> Here's an analogy: Most cities and towns require dogs but not cats to be licensed. There are differences between the animals. Dogs on average are bigger, stronger, and more aggressive than cats, are feared by more people, can give people serious bites, and make a lot of noise outdoors, barking and howling. Feral cats generally are innocuous, and many pet cats are confined indoors. Dog owners, other than those who own cats as well, would like cats to have to be licensed, but do not argue that the failure of government to require that the "competing" animal be licensed deprives the dog owners of a constitutionally protected property right, or alternatively that it subjects them to unconstitutional discrimination.[29]

In the same way that many cities require dogs to have a license, but not cats, the city can determine that taxicabs need a medallion, while ridesharing services do not.[30]

Because Uber and Lyft are not taxicabs, allowing them to drive people around the city for money doesn't interfere with the rights of taxicabs to drive people around the city for money. The court told the taxi medallion owner that if they think Uber and Lyft have a competitive edge over

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[25] *Id.* at 596.
[26] *Id.* (internal citation omitted).
[27] *Id.*
[28] *See id.* at 597–98.
[29] *Id.*
[30] *See id.*

traditional taxicab services, then they should get with the program and start competing (or perhaps start driving for Uber or Lyft).

IV. "YOU KEEP USING 'TAXI MEDALLION.' I DO NOT THINK IT MEANS WHAT YOU THINK IT MEANS!"[31]

In *Abramyan v. Georgia*,[32] the Georgia Supreme Court concluded that taxicab operators have no property interest in their taxi medallions which would allow them to stop ridesharing services from operating in the same space.[33] The Georgia legislature adopted a statute which made it easier for ridesharing services to operate, by limiting the power of local governments to regulate ridesharing and taxi services.[34] The statute prohibited local governments from adopting any new ordinances requiring either taxicabs or "vehicles for hire" to obtain a Certificate of Public Necessity, otherwise known as a taxi medallion.[35] These medallions subject taxicabs to "an extensive regulatory scheme."[36]

The previous version of the statute required Georgia taxis *and* vehicles for hire to obtain a medallion in order to operate.[37] As a result of the amended statute, Georgia municipalities could increase the number of ridesharing vehicles, and the medallion owners asserted that this interfered with their "exclusive right to provide rides originating in the city limits which charged fares based on time and mileage."[38] They asserted, in effect, that they had a government-sanctioned monopoly on taxicab-like services, and that the legislature's new law loosening that monopoly was a regulatory taking.[39]

The Georgia Supreme Court applied Georgia takings law (which mirrors, in large part, Fifth Amendment law), and concluded that government-issued licenses can be "property" protected by the regulatory takings doctrine, but that the medallion owners didn't quite possess the exclusive rights they

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[31] *See* Nobody115 & Brad, *You Keep Using That Word, I Do Not Think It Means What You Think It Means*, KNOW YOUR MEME (JUNE 27, 2012), http://knowyourmeme.com/memes/you-keep-using-that-word-i-do-not-think-it-means-what-you-think-it-means ("You Keep Using That Word, I Do Not Think It Means What You Think It Means" is a phrase used to call out someone else's incorrect use of a word or phrase during online conversations. It is typically iterated as an image macro series featuring the fictional character Inigo Montoya from the 1987 romantic comedy film THE PRINCESS BRIDE.").

[32] Abramyan v. Georgia, No. S17A0004, 2017 Ga. LEXIS 385 (May 15, 2017).

[33] *Id.* at *5–8.

[34] *See id.* at *1–2.

[35] *Id.* at *1.

[36] *Id.* at *2.

[37] *See id.* at *1–2.

[38] *Id.* at *3.

[39] *See id.*

argued they did.[40] A medallion isn't a government promise to enforce a monopoly, nor is it a guarantee that the government would limit the number of competitors offering the same or similar services:

> Further, even if this Court were to assume arguendo that former OCGA § 36-60-25 (a) and the regulatory scheme enacted by the City of Atlanta—which, together, control the application, transferability, use, renewal, and revocation of CPNCs [taxi medallions], as well as permit CPNC holders to use their medallions as collateral for a secured loan—created a protected property right, the harm about which Appellants complain is not amongst the rights associated with the taxi medallion.[41]

A municipality could have, for example, simply increased the number of medallions.[42] Yes, a medallion is a monopoly of sorts, but it isn't one that is limited in size. The regulating municipality can always increase the number of medallions, even if that "waters down" the value of the existing medallions.[43] And that's what happened here. No property interest meant no taking, and the court did not need to analyze the claims further. In essence, the court concluded that the legislature was responding to changing economics, and was within its authority to have opened the ride-for-hire market to more competition, and didn't need to "pay for the change."[44]

V. WHAT THE KING GIVETH, THE KING MAY TAKETH AWAY?

Our final case is *Boston Taxi Owners Association v. City of Boston*,[45] a case in which a federal district court rejected a takings claim that was premised on the city's failure to enforce its medallion requirements against ridesharing services.[46] The owners of taxi medallions thought that they had

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[40] *Id.* at *4–5.

[41] *Id.* at *5–6.

[42] *See id.* at *6–7 (citing Minneapolis Taxis Owners Coalition, Inc. v. City of Minneapolis, 572 F.3d 503 (8th Cir. 2009) (rejecting a takings claim when a municipality increased the number of medallions it issued)) ("Appellants have pointed to no law that would have prevented the City of Atlanta or the legislature from increasing the [medallion] limit (and thus, the number of drivers) as those variables changed, and there is no reasonable basis to conclude that any property interest Appellants may have in their respective [medallions] extends to exclusivity or a limited supply of [medallions].").

[43] *See id.*

[44] Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 416 (1922) ("We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change.").

[45] 84 F. Supp. 3d 72 (D. Mass. 2015).

[46] *Id.* at 78 ("Plaintiffs assert that the City has effectively taken the exclusive rights to operate taxicabs within Boston from medallion owners without just compensation by its

some kind of special relationship with the city,[47] perhaps understandably so. After all, taxi medallions are tough to get, are expensive, require the owner to comply with stringent regulations, and are the only commercial vehicles which can pick up passengers on the street (in other words, be "hailed"). But apparently, this relationship wasn't special enough, because the city, according to the plaintiff, wasn't doing much of anything to crack down on ridesharing services like Uber, Lyft, and Sidecar.[48] While their models differ somewhat, at their core these services allow owners of private vehicles to give rides to passengers that might otherwise be using taxis. And this meant trouble for the owners of taxi medallions because this lower-cost competition hurts their bottom line.[49] The owners sought a preliminary injunction.[50]

The bulk of the court's order rejecting the relief is devoted to the likelihood of success on the merits part of the injunction test, and the court concluded it was very unlikely that the plaintiffs would be able to show either a taking, or a violation of their equal protection rights.[51] The court held that the owners did not possess a property interest in the market value of a taxi medallion, which is derived through the closed nature of the taxi market.[52] The court reasoned, "[u]ltimately, purchasing a taxicab medallion does not entitle the buyer to 'an unalterable monopoly' over the taxicab market or the overall for-hire transportation market."[53]

It's that word "unalterable" that lies at the heart of the court's rationale. Yes, you thought you had a relationship with the city, but you operators mistakenly thought that part of the deal in return for you going through the hoops of getting a medallion was that the city would not let others compete with you unless they also went through those same hoops. It wasn't.

The court continued:

> Finally, the Court fails to perceive how the City's decision *not* to enforce Rule 403 against TNCs constitutes a "taking" of plaintiffs' property. The City's inaction undoubtedly permits new companies to offer services that directly compete with traditional taxicab services but simply allowing increased

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continuing decision not to enforce Rule 403 against TNCs.").

[47] *See id.* at 79–80.

[48] *See id.*

[49] *See id.* at 81 ("The City's inaction undoubtedly permits new companies to offer services that directly compete with traditional taxicab services but simply allowing increased market competition, which may ultimately reduce the market value of a medallion does not constitute a taking.").

[50] *See id.* at 77.

[51] *Id.* at 78–82.

[52] *Id.* at 79–80.

[53] *Id.* (internal citations omitted).

> market competition, which may ultimately reduce the market value of a medallion does not constitute a taking.[54]

Taxis owe their existence to the highly regulated market into which the operators voluntarily injected themselves.[55] In other words, if you live by the sword . . . [56] However, even if a medallion is a property interest, the plaintiff's claim was not that the city rendered taxicab medallions valueless, only that by not enforcing the rules against rideshare services, it made those medallions *less* valuable, which put the analysis, according to the court, in *Penn Central*'s three factors territory. The court focused on the owners' "investment-backed expectations" and held that they are "significantly tempered" because the market is highly regulated. Live by the sword . . . Ironically, that the market is highly regulated and controlled seems to be the operators' exact point. Their claim is that the city was not policing the monopoly well enough.

VI. SOME THOUGHTS ON THE TAKINGS ANALYSIS

The various analyses these courts undertake—all focused on defining the property interest—are not completely satisfying, and, I suggest, detract from the correct approach, which should focus the taking calculus on the "investment-backed expectations" *Penn Central* factor, in which the question of "property" is baked in.

I first take issue with the Seventh Circuit's conclusion that ridesharing services are wholly different than taxicabs. These services—at least from the consumer's standpoint—operate a heck of a lot like taxis do. You hail a ride (not with your arm and a sharp whistle, but with your fingers and your smartphone), you get in, you go, you get where you are going, you pay the driver (again, with the app, not by handing the driver cash or your credit card). Is that enough of a difference to say that ridesharing isn't taxicabbing? On that, I am mostly with the taxicab operators. Having used Uber and Lyft more than a few times, they sure do seem like taxis with some very inconsequential differences.

But to the Seventh Circuit panel, those distinctions were enough. Whether to regulate ridesharing services the same as taxicabs was within the discretion of the city, in the same way that many cities require pet dogs to have a license, but not cats. Don't like having to obtain a license for

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[54] *Id.* (emphasis added).

[55] *See id.* at 79 (citing Dennis Melancon, Inc. v. City of New Orleans, 703 F.3d 262 (5th Cir. 2012), for the proposition that "a protected property interest simply cannot arise in an area voluntarily entered into . . . .").

[56] *See id.* ("The Court agrees that the market value in a taxicab medallion, which is derived solely from the strict regulation of taxicabs in the City, cannot constitute a protected property interest in the context of the Takings Clause.").

your pet? Be sure to get a cat. You don't want to get a taxi medallion? Drive an Uber. That seems like a very blithe approach to those who may have invested hundreds of thousands of dollars in a taxicab medallion, perhaps rightfully believing that the city had a *pet* license requirement. To those who already relied on the regulatory system in place to invest in a medallion, and who thought this was a high barrier to entry into the driving-people-around-for-money market? Chumps.[57] Like the *Boston Taxi* court's approach, this is a case of "what the King giveth, the King may taketh away," much like the cases which hold that there is no property right in the continued existence of a statute.[58] And that is really the Seventh Circuit panel's main thrust.[59] You shouldn't rely on a regulation, unless the things you are relying on are welfare benefits, or employment, or other forms of "New Property," a holding implicit in the panel's conclusion that medallions are "property," just not property for purposes of this takings claim.[60] Owners of New Property can rely. But not here, this is Old Property. Why there's a difference, I can't really say.

The Georgia Supreme Court's approach is also less than satisfying. The government's ability to expand the regulated market really doesn't go to whether you possess property, but rather the nature of what the property right entails. This is an owner-centric analysis about expectations, and not whether the plaintiff has a "legitimate claim of entitlement" to a taxicab medallion.[61] Each of the three opinions that we reviewed above concluded that the plaintiffs' taxi medallions were "property," just not property for purposes of takings analysis. The Seventh Circuit even concluded that if the municipalities were trying to revoke the medallions, the owners would undoubtedly possess property entitling them to due process. But "property" for purposes of takings analysis is a different story, according to the court. It shouldn't be. Instead of focusing on what the nature and scope of the property interest owned by the plaintiffs, and treating it as a separate,

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[57] Ever since Chief Justice Roberts made "chumps" a legal term of art, I am committed to employing that term every time the opportunity presents itself. *See* Arizona State Legislature v. Independent Redistricting Comm'n, 135 S. Ct. 2652, 2677 (2015) (Roberts, C.J., dissenting) ("What chumps!"). You should too.

[58] *See, e.g.*, American Pelagic Fishing Co. v. United States, 379 F.3d 1363 (Fed. Cir. 2004).

[59] *See* Ill. Transp. Trade Ass'n v. City of Chi., 839 F.3d 594, 599 (2016), *cert. denied*, 197 L. Ed. 2d. 761 (2017) ("A 'legislature, having created a statutory entitlement, is not precluded from altering or even eliminating the entitlement by later legislation.'").

[60] I'm referring to entitlements. *See* Goldberg v. Kelly, 397 U.S. 254, 262 n.8 (1970) (citing Charles A. Reich, *The New Property*, 73 YALE L.J. 733 (1964)) ("It may be realistic today to regard welfare entitlements as more like 'property' than a 'gratuity.'").

[61] *See* Bd. of Regents of State Colleges v. Roth, 408 U.S. 564, 577 (1972) (defining property for Due Process purposes as a "legitimate claim of entitlement.").

threshold analysis as these courts do, I think the better approach is to conclude the plaintiffs own property because they have a government-backed license to operate taxicab services. This is a license that has "the law behind it,"[62] and thus should be easily considered property within the meaning of both the Takings Clause and the Due Process Clause. The analysis each of our courts undertake on what the owners' legitimate expectations were, and the extent to which they invested into the licensing scheme based on those expectations—in other words, *Penn Central*'s "legitimate investment-backed expectations" factor—is the more appropriate home for these questions.

Third, what of the *Boston Taxi* court's reasoning that taxicab licenses are merely government-issued licenses, and because the market has been highly regulated, the owners do not possess Fifth Amendment property? This too is less than satisfying. The entrance of app-based ridesharing services has revealed one thing perhaps not evident before: that there's really not much of a need for tight regulation of the ride-for-hire market, at least as a gatekeeping function. The *Boston Taxi* court's analysis should be reserved for such things where the license at issue truly is a government gift, and the market would not exist but for the government.

The paradigmatic example of that, in my view, is the Hawai'i Supreme Court's decision in *Damon v. Tsutsui*,[63] which turned on whether a lessee had offshore fishing rights allegedly granted to his predecessor during the Hawaiian Kingdom period. Exclusive fishing rights were originally created in 1839 when the King (who, as the sovereign, possessed allodial title to all land and fishing rights) "gave" a portion of them "to the common people."[64] These rights—which granted fishing rights to tenants of the locality (the ahupua'a, for those knowledgeable in Hawaiian property concepts), as long as they remained tenants—were eventually codified by statute. The *Damon* court made it clear that these rights were limited and stemmed from, and thus were dependent upon, the King's original gift: "But for this gift or grant the tenants would not have had any rights; and they have them only to the extent and with limitations expressed in the grant."[65]

After annexation of Hawai'i by the United States in 1898, the Hawai'i Organic Act of 1900 repealed these laws, exempting those who could show "vested rights" by judicial confirmation. Those who did not confirm their fishing rights were not "vested" under the Act and were subject to the repeal of the King's gift: "In our opinion those persons who became tenants after April 30, 1900, as did Tsutsui in 1929, did not have any

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[62] Kaiser Aetna v. United States, 444 U.S. 164, 178 (1978).

[63] 31 Haw. 678 (Terr. 1930).

[64] Haalelea v. Montgomery, 2 Haw. 62, 65 (Kingdom 1858).

[65] *Damon*, 31 Haw. at 688.

'vested' rights within the meaning of the Organic Act and therefore the repealing clause was operative as against them."[66]

But the ability to use a fishery attached to a specific parcel of land which was originally gifted from the sovereign is a long way from piloting a car on city streets. The fishing right at issue in *Damon* was solely the product of positive law that could be altered or repealed by the sovereign, while the latter is more akin to a right shared by everyone, and has a normative component immunizing it from undue government regulation without condemnation and payment of just compensation. As Justice Thurgood Marshall once noted:

> Quite serious constitutional questions might be raised if a legislature attempted to abolish certain categories of common-law rights in some general way. Indeed, our cases demonstrate that there are limits on governmental authority to abolish "core" common-law rights, including rights against trespass, at least without a compelling showing of necessity or a provision for a reasonable alternative remedy.[67]

I conclude by asking what difference does it make whether a court undertakes this analysis as part of its "property" determination, or as part of the *Penn Central* inquiry? The big difference, in my view, is that the *Penn Central* factors are inherently fact-based, and "depends largely upon the particular circumstances [in each] case."[68] In other words, shifting the analysis from the threshold "property" question to the owner's specific investment-backed expectations would allow some of these claims now dismissed by summary judgment to be determined by juries. These should be case-specific factual inquiries and not only a determination of the legal nature of the interest allegedly taken. Instead of being placed in the hands of judges, these questions should be resolved by juries.[69]

VII. CONCLUSION

Shifting the analytical focus from the "property" question to *Penn Central*'s investment-backed expectations would clarify the way courts approach ridesharing takings claims, allow these questions to be viewed in their larger context, and would permit juries, not judges, to make the determination of whether there's been a taking.

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[66] *Id.* at 693.

[67] PruneYard Shopping Center v. Robins, 447 U.S. 74, 93–94 (1980) (Marshall, J., concurring).

[68] Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978).

[69] *See* City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687, 720–21 (1999) ("[W]e hold that the issue whether a landowner has been deprived of all economically viable use of his property is a predominantly factual question . . . [and that] question is for the jury.").

Capturing Excess in the On-Demand Economy

Erez Aloni*

INTRODUCTION

Jeannie Ralston, an author and journalist, owned an apartment southwest of Austin, Texas, which she used to lease as a long-term rental, for $650 a month.[1] "Jump[ing] on the Airbnb gravy train," as she describes it in a *New York Times* column, she and her husband decided to take the apartment off the long-term rental market and turn it into a short-term rental.[2] Their calculation was that it would take only six nights of renting through Airbnb for them to make the equivalent of a month's rent under their long-term lease.[3] Ryan Scott took it one step further: he owns twelve properties and manages ten more in San Diego, California—all used for short-term rentals via Airbnb.[4] The reporter says that Ryan, in an interview, confessed that

* Assistant Professor, Peter A. Allard School of Law, University of British Columbia. I would like to thank Melissa J. Durkee for helpful conversations about this article. I am also indebted to Sara Gold for her excellent research assistance. And I am grateful to the members of the *University of Hawai'i Law Review* for the productive symposium that generated this piece as well as for their exceptional editorial work.

[1] *See* Jeannie Ralston, *How to Survive Being an Airbnb Host*, N.Y. TIMES (June 21, 2016), https://www.nytimes.com/2016/06/26/travel/airbnb-host.html.

[2] *See id.*

[3] *See id.*

[4] *See* Lori Weisberg, *Airbnb: Opportunity or Nuisance?*, SAN DIEGO UNION TRIBUNE (June 10, 2016, 12:00 PM), http://www.sandiegouniontribune.com/business/tourism/sdut-airbnb-opportunity-or-nuisance-2016jun10-story.html.

"he has become addicted to the intoxicating short-term rental revenues [that] his properties have been generating over the last few years."[5] Michael Naess, who lives in a two-bedroom apartment in Queens, New York, rented one of his bedrooms to seventy-two guests in ten months—using Airbnb.[6] The guests stay in the extra bedroom in his apartment.[7] Finally, Jordan Reeves occasionally rents out his Brooklyn apartment while he is away.[8]

What is common to all of these cases? They all involve properties rented for short-term stays (under thirty days) via Airbnb. But that is where the similarities end. Each one of the lessors uses Airbnb for a different type of short-term rental. Jeannie Ralston's operation is akin to a bed and breakfast.[9] Ryan Scott uses apartments for investment; he finds some that were rented long term, takes them off the residency market, and converts them to vacation rentals.[10] Michael Naess rents his unoccupied room to make some extra money on a permanent basis.[11] And Jordan Reeves subleases on a temporary basis when his apartment is empty because he is away.[12]

One key distinguishing factor between these activities, I argue, is the level (or lack) of utilization of excess capacity. Increased utilization of excess capacity means leveraging the "'surplus value' of these unused or under-utilized assets" to create "more capacity than the owner can herself use at once and that can thereby be monetized."[13] Some types of use that on-demand platforms facilitate leverage this "idle capacity," making sure that goods and skills that can be monetized are not wasted.[14] Conversely, other usage is akin to conventional commercial use—not significantly different from the supply that incumbents provide. By "on-demand

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[5] *See id.*

[6] *See* N. R. Kleinfield, *Airbnb Host Welcomes Travelers from All Over*, N.Y. TIMES (Apr. 25, 2014), https://www.nytimes.com/2014/04/27/nyregion/airbnb-host-welcomes-travelers-from-all-over.html.

[7] *See id.*

[8] *See* Deepti Hajela, *Some New York City Hosts are Confused About New Airbnb Advertising Law*, SKIFT (Oct. 30, 2016, 7:00 PM), https://skift.com/2016/10/30/some-new-york-city-hosts-are-still-confused-about-new-airbnb-advertising-law/.

[9] *See* Ralston, *supra* note 1.

[10] *See* Weisberg, *supra* note 4.

[11] *See* Kleinfield, *supra* note 6.

[12] *See* Hajela, *supra* note 8.

[13] *See* Donald J. Kochan, *I Share, Therefore It's Mine*, 51 U. RICH. L. REV. (forthcoming May 2017) (manuscript at 25) (on file with SSRN), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2820456.

[14] *See* Orly Lobel, *The Law of Platform*, 101 MINN. L. REV. 87, 108 (2016) ("A key principle of the platform is putting idle capacity to work.").

economy" (often referred to by the misnomer "the sharing economy"),[15] I mean an economic model where people—for profit—exchange goods, services, spaces, and money with each other via peer-to-peer platforms.[16]

I hence consider activities that the on-demand platforms facilitate on a spectrum: one end consists of activities in increased utilization of excess capacity, and the other end is composed of traditional commercial work without utilization of idle capacity. I will call activities on the former end "casual work," "work in increased excess capacity," or work "in increased utilization." I will call activities on the latter end—i.e., those not grounded primarily in utilization of excess capacity—"conventional work," "commercial work," or "excess in disguise."

Accordingly, we can rank all of the above examples on a spectrum based on their level of use—or lack thereof—of increased excess capacity. Scott, who rents twenty-two units, creates new capacity (infrastructure) when he buys properties intended exclusively for short-term rentals.[17] Ralston, who converted one unit from long-term to short-term rental, uses existing capacity by changing the purpose of the infrastructure she already has.[18] Conversely, Reeves and Naess capitalize on their otherwise underutilized goods to produce more income.[19] But these two are different, too; the former rents occasionally, while the latter has turned an empty room into a permanent vacation unit.

Yet, despite the differences in use of these properties, and the different economic and societal consequences of each of these uses, the law in many jurisdictions still treats three of these cases as the same activity: with the exception of Naess,[20] all these uses are illegal in most jurisdictions in the United States and in other Western democracies abroad.[21]

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[15] "'[S]haring' and [other] kindred designations are misnomers. Even if there are some altruistic or communal motives among those in the P2P economy, the heart of the industry is financial gain and not altruistic exchanges." Erez Aloni, *Pluralizing the Sharing Economy*, 91 WASH. L. REV. 1397, 1407 (2016). Thus, in this Article, to avoid this misnomer I use the term "on-demand economy."

[16] *Id.* at 1410 (defining the peer-to-peer economy as "an economic model where people exchange goods, services, space, and money with each other via peer-to-peer platforms").

[17] *See* Weisberg, *supra* note 4.

[18] *See* Ralston, *supra* note 1.

[19] *See* Hajela, *supra* note 8; Kleinfield, *supra* note 6.

[20] Naess's rental is lawful in presumably all jurisdictions because he is in the property during the lessee's ("guest's") entire stay.

[21] *See, e.g.*, CHI., ILL., MUN. CODE §§ 4-6-300(h)(8), 4-14-060(d) (prohibiting short-term rental unless unit is homeowner's "primary residence"); HONOLULU, HAW., LAND USE ORDINANCE § 21-10.1 (2016) (prohibiting short-term rentals for periods of less than thirty days); N.Y. MULT. DWELL. LAW § 4(8)(a) (prohibiting short-term rental unless permanent resident occupies unit concurrently with visitor); N.Y.C. ADMIN. CODE tit. 27, § 287.1 (banning advertising of short-term rentals that violate the NEW YORK MULTIPLE DWELLING

In this Article, I submit that activities facilitated by the on-demand platforms produce a different level of negative and positive externalities, based on their location along the spectrum of increased utilization. Transactions in increased excess capacity produce the fewest negative externalities and produce more positive externalities; the more we move along the spectrum toward *no* use of excess capacity, the more negative externalities the activity produces. As such, a unique set of rules—tailored to address the particular benefits and harms that stem from each activity—should govern each category.

This distinction between work in increased excess capacity and other conventional uses in disguise is also prevalent in other sectors of the "on-demand economy." For example, in the transportation arena some drivers for Uber work part-time, leveraging their increased excess capacity in terms of labor.[22] Similarly, some drivers use their private, not-for-business vehicle, thus monetizing the time during which their car otherwise would not be serving an economically useful end.[23] Others, conversely, work full time as drivers, using vehicles with the primary purpose of transporting passengers.[24] The point is that the on-demand economy, although it often promotes the exchange of activities based on increased excess capacity, is also used simply as an alternative business method to commercial offerings that do not utilize idle capacity.

The distinction between the level of increased utilization—or the lack of such increase—is crucial to understanding and evaluating the social and economic costs that the on-demand economy produces. First, activities in increased excess capacity expand valuable choice, both for consumers and

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LAW); Zweckentfremdungsverbot-Gesetz [ZwVbG] [Act on the Prohibition of Illegal Repurposing of Housing], Nov. 29, 2013; GESETZ-UND VERORDNUNGSBLATT FÜR BERLIN [BLN GVBl.] at 626, § 2(1) (Ger.) (defining "illegal repurposing of housing" to include the use of an entire home as a vacation rental). *See generally* Michele Finck & Sofia Ranchordás, *Sharing and the City*, 49 VAND. J. TRANSNAT'L L. 1299 (2016) (conducting comparative analysis of P2P economy regulation in the U.S. and Europe).

[22] *See* Aloni, *supra* note 15, at 1435 (citing STEVEN HILL, RAW DEAL: HOW THE "UBER ECONOMY" AND RUNAWAY CAPITALISM ARE SCREWING AMERICAN WORKERS 122 (2015)); Jacob Davidson, *Uber Reveals How Much Its Drivers Really Earn . . . Sort of*, TIME (Jan. 22, 2015), http://time.com/money/3678389/uber-drivers-wages/; *see also* AMY LEVIN, BENENSON STRATEGY GRP., THE DRIVER ROADMAP: WHERE UBER DRIVER-PARTNERS HAVE BEEN, AND WHERE THEY'RE GOING 3 (2014), https://newsroom.uber.com/wp-content/uploads/2015/01/BSG_Uber_Report.pdf (noting, in study commissioned by Uber, that just over half of Uber drivers drove on a part-time basis).

[23] *See* Aloni, *supra* note 15, at 1435.

[24] *See id.*; LEVIN, *supra* note 22, at 5 (finding, in study commissioned by Uber, that 55% of UberBLACK drivers, representing 18% of total Uber drivers, drive more than 30 hours per week); *see also infra* notes 68–72 and accompanying text.

for providers.[25] For example, the amplified opportunities for travelers to stay in a local resident's apartment allow those visitors to experience the destination from that resident's perspective.[26] Likewise, for workers using increased excess capacity, the on-demand economy offers the option to work part time in a flexible setting.[27] Conversely, while traditional activities created by on-demand platforms can extend choice, they can also result in *reduction* of valuable choice by eliminating the availability of traditional services and jobs.[28] For instance, the accessibility of traditional lower-end hotels may be endangered by unfair competition from those who offer their units for rent full-time but do not have to abide by the regulation of such facilities (and can offer their units for a lower price).[29] Correspondingly, people's opportunities to find a full-time job, with all the benefits and protections that accompany it, get scarcer when similar work is offered by providers who do not get similar protections—and thus proffer the same job at a cheaper price.[30]

Second, transactions in increased utilization produce fewer negative externalities than on-demand activities that do not leverage excess capacity. For instance, temporarily renting one's property via Home Away or Airbnb creates some negative externalities. As examples: unfamiliar people in the common area, nuisances, and pressures on shared utilities such as parking.[31] But activity that does not utilize excess capacity, such as renting a property the entire year on a short-term basis, is likely to intensify the negative externalities.[32] It can result in housing shortages, housing price increases,

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[25] *See* Aloni, *supra* note 15, at 1413–16, 1434–35.

[26] Roberta A. Kaplan & Michael L. Nadler, *Airbnb: A Case Study in Occupancy Regulation and Taxation*, 82 U. CHI. L. REV. DIALOGUE 103, 105 (2015) ("One of the primary benefits that it provides is that it allows guests to 'live like a local' and explore neighborhoods that do not typically cater to tourists, both by providing accommodations in a wide variety of locales and by connecting visitors with local residents.").

[27] Aloni, *supra* note 15, at 1435 (citing HILL, *supra* note 22, at 122; Davidson, *supra* note 22).

[28] *See id.* at 1437 (citing Lauren Weber, *One in Three U.S. Workers Is a Freelancer*, WALL ST. J. (Sept. 4, 2014), http://blogs.wsj.com/atwork/2014/09/04/one-in-three-u-s-workers-is-a-freelancer/).

[29] *See id.* at 1417 (citing Georgios Zervas, Davide Prosperio & John Byers, *The Rise of the Sharing Economy: Estimating the Impact of Airbnb on the Hotel Industry*, 30 (Boston U. Sch. Mgmt. Research, Working Paper No. 2013-16), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2366898).

[30] *See infra* notes 137–145 and accompanying text.

[31] *See* Stephen R. Miller, *First Principles for Regulating the Sharing Economy*, 53 HARV. J. ON LEGIS. 147, 192–93 (2016) (discussing "Good Neighbor Regulations" aimed at alleviating noise, parking, and trash concerns).

[32] *See infra* notes 153–172 and accompanying text.

decline in revenue from hotel taxes, and collapse of some hotels, to name a few of the negative externalities.

The challenge for regulation of the on-demand economy, I contend, is in crafting rules that will capture this distinction. Regulation that treats the two categories differently will impose more rigorous (classic) rules of compliance when one does not leverage excess capacity, and an easy-to-administer regime, with light regulation, for activity in underutilized goods or time, that recognizes the particular value and nature of these activities. In this Article, I offer basic principles for how to capture (by regulation) which activities operate in increased utilization of excess capacity and what the basic principles of such regulations should be.

The Article proceeds in the following way: Part I demonstrates that the distinction between work in increased idle capacity and traditional work is significant in terms of presentation in the on-demand economy and cuts across different industries of the on-demand economy. Part II contends that the two activities have different societal and economic impacts: increased utilization produces more choice and fewer negative externalities, while traditional work can result in loss of valuable options and produce more negative externalities. Part III lays out the basic principles of regulation for the on-demand economy, based on this distinction, and evaluates laws that have embraced these principles.

I. THE SPECTRUM OF WORK IN INCREASED UTILIZATION

The growth of the on-demand economy has raised significant regulatory dilemmas for lawmakers around the world.[33] On one side, some consumers, scholars, and lobbyists, rooting for the on-demand firms, have asked lawmakers to limit their intervention and let the innovation flourish.[34] On the other side, incumbents, labor rights advocates, and communities affected by on-demand activities request lawmakers to constrain some of the harms inflicted by the rise of this model.[35]

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[33] *See* Aloni, *supra* note 15, at 1400.

[34] *See, e.g.*, Arun Sundararajan, *Why the Government Doesn't Need to Regulate the Sharing Economy*, WIRED (Oct. 22, 2012, 1:45 PM), https://www.wired.com/2012/10/from-airbnb-to-coursera-why-the-government-shouldnt-regulate-the-sharing-economy/ ("By making both product and trader quality instantly transparent, [the self-regulatory transaction feedback] approach reduces the risks that often lead to market failure [and] provides a first digital safeguard against much of what regulators aim to protect consumers from. After all, *profit* is a much more powerful driver for quality than regulatory compliance.").

[35] *See* Aloni, *supra* note 15, at 1427–29 (describing the different approaches for regulation of the on-demand economy); Frank Pasquale, *Two Narratives of Platform Capitalism*, 35 YALE L. & POL'Y REV. 309, 316 (2016) (analyzing the competing narratives towards the on-demand economy).

Within this debate, the role that work in increased excess capacity occupies in the on-demand economy takes on a special significance. Scholars, commentators, and the on-demand firms themselves often base many of their arguments against regulatory requirements on the premise that the model is characterized primarily by transactions in increased excess capacity.[36] For example, in response to a court ruling[37] that found a New York City short-term rental, facilitated by Airbnb, illegal, Airbnb proffered:

> It is time to fix this law and protect hosts who occasionally rent out their own homes. Eighty-seven percent of Airbnb hosts in New York list just a home they live in—they are average New Yorkers trying to make ends meet, not illegal hotels that should be subject to the 2010 law.[38]

And Uber stated, in court filings concerning the classification of its workers, that the firm "merely provides a platform for people who own vehicles to leverage their skills and personal assets and connect with other people looking to pay for those skills and assets."[39]

The claim that most suppliers in the on-demand economy use their increased excess capacity is critical to the argument in support of the on-demand economy because it distinguishes the on-demand market from the traditional market. Thus, it should free the on-demand firms from regulations that are tailored for conventional industries. If workers are only maximizing their assets and time, the argument goes, they are different from incumbents who work with designated capital and as full-time

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[36] *See, e.g.*, Andrew T. Bond, *An App for That: Local Governments and the Rise of the Sharing Economy*, 90 NOTRE DAME L. REV. ONLINE 77, 78 (2015) ("The sharing economy is a microeconomic system built around the utilization of unused human and physical resources."); Timothy Doescher, *How Congress Can Clear the Road for Uber, Lyft, and the Gig Economy*, THE DAILY SIGNAL (Oct. 27, 2016), http://dailysignal.com/2016/10/27/how-congress-can-clear-the-road-for-uber-lyft-and-the-gig-economy/ (arguing that the benefit of the gig economy is grounded in flexibility and that "[o]ne fact . . . may explain this: over half of the drivers surveyed are part-time drivers working other jobs."); Hugo Martin, *Big Chunk of Airbnb's Revenue Comes from Year-Round Rentals, Study Finds*, L.A. TIMES (Jan. 20, 2016, 11:16 AM), http://www.latimes.com/business/la-fi-airbnb-hotels-20160120-story.html (Responding to a report commissioned by the American Hotel and Lodging Association, which found that multi-unit operators are responsible for a third of Airbnb's revenue, the company stated, "This report uses misleading data to make false claims and attack middle class families who share their homes and use the money they earn to pay the bills.").

[37] *See* City of New York v. Carrey, Nos. 13006002 and 1300736 (N.Y.C. Envtl. Control Bd. May 9, 2013), https://www.scribd.com/document/142650911/Decision-and-Order-for-NOV-35006622J.

[38] *See Vacation Rental Site Airbnb Ruled Illegal in New York City*, FOX NEWS (May 21, 2013), http://www.foxnews.com/travel/2013/05/21/airbnb-illegal-in-new-york-city.html.

[39] Salovitz v. Uber Techs., Inc., No. A-14-CV-823-LY, 2014 WL 5318031, at *1 (W.D. Tex. Oct. 16, 2014).

employees. Put differently, the work of the on-demand market is *not* one that replaces or competes with the work of incumbents; rather, it is a new market, occupied by microearners.[40] The result is a model that increases options for consumers and workers, giving them the opportunity to work in small gigs to make some supplemental income. It is, essentially, a "gig economy": a small-scale economy of people who monetize their underutilized time, skills, and goods.[41] Conversely, if this market is populated by incumbent-like transactions, then it calls for regulation more akin to the traditional paradigm. Hence, proving that the on-demand economy truly is a small-scale, gig economy that creates new markets and extended options is essential to the argument that the on-demand economy should not be governed by traditional regulation.

Much of the data regarding the on-demand economy are debatable, and some of them are funded or provided directly by interested parties.[42] Yet, despite this limitation, the data show a clear picture: an immense portion of the on-demand economy is comprised of work done that is—i.e., work that is based on utilization of idle capacity.[43] Simultaneously, a large segment of that economy is not based on increased utilization but is comprised of full-time workers sometimes using designated capital: goods that are used primarily for this purpose.[44] This fragment of the on-demand economy is

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[40] *Cf.* Lobel, *supra* note 14, at 93 ("[P]art of the value produced by the platform lies in its differentiation from traditional, offline exchanges. In other words, it reveals how the platform economy is not simply competing efficiently over the same markets of regulated industries but also constituting new markets, norms, and behaviors.").

[41] *See* Daniel E. Rauch & David Schleicher, *Like Uber, but for Local Government Law: The Future of Local Regulation of the Sharing Economy*, 76 OHIO ST. L. J. 901, 925 (2015) ("[T]he rise of sharing firms as replacements for traditional, full-time jobs leads some to lament the rising 'gig economy' as a wealth transfer from workers to capital, shifting risk from employers to workers. Sharing firms resist this claim, arguing their employees . . . are given supplementary income that would otherwise be unavailable.").

[42] *See, e.g.*, LEVIN, *supra* note 22 (touting benefits of driving for Uber based on driver surveys in study funded by Uber); JOHN W. O'NEILL & YUXIA OUYANG, AM. HOTEL & LODGING ASS'N, FROM AIR MATTRESSES TO UNREGULATED BUSINESS: AN ANALYSIS OF THE OTHER SIDE OF AIRBNB (2016), https://www.ahla.com/sites/default/files/2016-10/Airbnb_Analysis_September_2016.pdf (criticizing Airbnb in study funded by the American Hotel and Lodging Association).

[43] *See* LEVIN, *supra* note 22, at 5 (finding that Uber was rarely a sole source of income); O'NEILL & OUYANG, *supra* note 42, at 5, 7–8 (finding that only "26% of Airbnb's revenue is derived from . . . full-time hosts" and comparing full-time hosts to all hosts using Airbnb's platform).

[44] *See* LEVIN, *supra* note 22, at 5 ("62% of people who lease/finance their car use Uber to help with car payments"); O'NEILL & OUYANG, *supra* note 42, at 5, 7–8 (finding that "[a] growing number of hosts are using the Airbnb platform to operate full-time businesses" and noting that full-time operators "represented only 3.5% of operators, but generated 26.0% of revenue").

not only large in terms of number of participants and transactions but also yields a vast part of the revenue of the on-demand firms.[45] And despite rhetoric that emphasizes the excess-capacity aspect, work without excess utilization is sometimes even encouraged by the on-demand firms themselves.[46]

I will begin with the data about the short-term on-demand rental market. To distinguish between lessors who use their underutilized assets and those who use designated capital, I delve into data about the number of lessors who have more than one unit posted on on-demand platforms or whose unit is available for an entire year for short-term rental. The principle is that posting a unit as available for a period of more than a few months for short-term rentals indicates that it is for commercial use, rather than for incidental use in capitalizing idle capacity.

A study, run by the Penn State University School of Hospitality Management and funded by the American Hotel and Lodging Association, examined the lessors who posted properties on Airbnb in fourteen big United States metropolitan areas, from October 2014 to September 2015.[47] The study divided "hosts" (lessors) into three categories: those who offered an entire unit for a short time during the year, those who offered a unit for the entire year, and those who had two or more units on the platform.[48] The results demonstrate that those who work with designated capital, although the minority, are consistently present across all of the cities and are responsible for massive revenues for Airbnb. The study found that 2,772 full-time operators (those who made their unit or units available more than 360 days a year) constitute 3.5% of the total lessors.[49] While this may seem like a small number, the revenue that Airbnb derived from these full-time operators was enormous. In the period studied, they yielded $347,479,616 for Airbnb, which constitutes 26% of Airbnb's total revenue in those locations during that period.[50] Further, the study found that lessors who rented two or more units for any amount of time constituted 16.2% of all operators.[51] Finally, mega-operators—defined by the study as hosts who rent more than three units (for any amount of time)—constituted 6.5% of the hosts and yielded 24.6% of Airbnb's revenue, or $328,299,944, in those cities during that period.[52]

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[45] *See* notes 47–49 and accompanying text.
[46] *See* notes 221–223 and accompanying text.
[47] O'NEILL & OUYANG, *supra* note 42.
[48] *Id.* at 4.
[49] *Id.* at 7.
[50] *Id.*
[51] *Id.*
[52] *Id.* at 6.

Further, looking at data from a few specific cities (not included in the above study) provides a more nuanced picture that confirms the same conclusions.[53] For example, in Honolulu, Hawai'i, in March 2017, there were 1,519 active hosts.[54] Of these, 1,000 had one unit, 238 had two, 88 had three, 57 had four, and 117 had five or more.[55] Again, most lessors had one unit; but around one third were multi-unit operators of different degrees.[56] Further, of the 3,358 rentals available in 2016, 33% were available for ten to twelve months; 20.8%, for seven to nine months; and only 17.4%, for one to three months.[57] Thus, this smaller-scale data from Honolulu ratifies the distinction between commercial use and increased usage of excess capacity.

The data about short-term rentals via various on-line on-demand platforms in Vancouver, British Columbia, Canada, are the most nuanced and comprehensive. The data are presented in a report submitted to the Standing Committee on Policy and Strategic Priorities (in the city of Vancouver) for consideration of new regulations of short-term rentals.[58] The report reviewed the number of whole-unit listings active in 2015.[59] The data show that 43% of whole-unit listings in 2015 were rented on a nightly basis for fewer than thirty days that year, 19% were available between thirty-one to sixty days, and 12% were available between sixty-one to ninety days.[60] Conversely, 4% of entire units were available for more than nine months, and 8% were available for six to nine months.[61]

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[53] *See generally* Dayne Lee, *How Airbnb Short-Term Rentals Exacerbate Los Angeles's Affordable Housing Crisis: Analysis and Policy Recommendations*, 10 HARV. L. & POL'Y REV. 229 (2016). Lee noted:

> In practice, 64% of Airbnb listings in Los Angeles are for [short-term rentals] of units that are never occupied by their owners or leaseholders, and operate year-round essentially as independent, unlicensed hotel rooms. Chances are, an apartment booked through the service is managed by a full-time investor or company that also owns or leases dozens of other Airbnb listings.

Id. at 234.

[54] *Honolulu, Hawaii—Airbnb Data and Analytics*, AIRDNA, https://www.airdna.co/city/us/hawaii/honolulu (last visited Mar. 1, 2017). Note that the data presented on this website are aggregated and updated daily. *See Airdna Data Methodology*, AIRDNA, https://www.airdna.co/services/datafeed.

[55] *Honolulu, Hawaii—Airbnb Data and Analytics*, AIRDNA, https://www.airdna.co/city/us/hawaii/honolulu (last visited Mar. 1, 2017).

[56] *Id.*

[57] *Id.*

[58] KAYE KRISHNA, CITY OF VANCOUVER, REGULATING SHORT-TERM RENTALS IN VANCOUVER (2016), http://council.vancouver.ca/20161005/documents/pspc1c.pdf.

[59] *Id.* at 5, 29.

[60] *Id.* at 5–6.

[61] *Id.*

The housing data, therefore, show consistently that the use of on-demand rental platforms varies with respect to the extent of underutilization. The majority of properties are offered by lessors who use the increased excess capacity of their principal residency, while a substantial minority of lessors use these platforms to rent their properties not based on increased utilization but as a commercial use.

When it comes to the on-demand transportation arena, there are no available data on the number of drivers who use their private car (designated for leisure) and monetize it for commercial use versus those who use a car designated primarily for commercial use. However, anecdotal evidence shows that a nontrivial number of drivers use a car that they bought or rented for the primary purpose of driving passengers.[62] Uber, the world's largest on-demand transportation company, has programs helping drivers to rent, lease, or buy a car.[63] Uber's Xchange leasing program enables drivers with insufficient (or no) credit to lease a car,[64] without mileage restrictions, and includes maintenance of the vehicle.[65] Similarly, Lyft, Uber's main competitor, maintains the Express Drive Rental Car Program, which helps its drivers to rent a car.[66] The rental's price depends on the number of hours the driver works for Lyft: the greater the hours, the cheaper the rental price.[67]

Beyond the increased utilization of the goods used, sellers in the on-demand economy can also capitalize on their free hours. Thus, the distinction here is between those who use their underutilized labor or skills—by working for on-demand firms part time and selling hours that are not available for their full-time job—and those who work full time for on-demand platforms, just like incumbents do. One way to discern the scale of this distinction (or, more accurately, the spectrum) is through the worker's reliance on the income she makes from her work for the platforms.

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[62] *See* Nicole Dieker, *Where do Uber and Lyft Drivers Get Their Cars? They Rent Them From Another Startup*, BILLFOLD (Apr. 13, 2015), https://thebillfold.com/where-do-uber-and-lyft-drivers-get-their-cars-they-rent-them-from-another-startup-8e6eb04dcac5.

[63] *Vehicle Solutions*, UBER, https://www.uber.com/drive/vehicle-solutions/ (last visited Mar. 7, 2017).

[64] *See* Eric Newcomer & Olivia Zaleski, *Inside Uber's Auto-Lease Machine, Where Almost Anyone Can Get a Car*, BLOOMBERG (May 31, 2016), https://www.bloomberg.com/news/articles/2016-05-31/inside-uber-s-auto-lease-machine-where-almost-anyone-can-get-a-car.

[65] *See* Harry Campbell, *Uber Vehicle Marketplace*, RIDESHARE GUY, http://therideshareguy.com/uber-vehicle-marketplace/ (last visited Mar. 7, 2017).

[66] *See Express Drive Rental Car Program*, LYFT, https://help.lyft.com/hc/en-us/articles/218196557-Express-Drive-Rental-Car-Program-#cost (last visited Mar. 7, 2017).

[67] *Id.*

A study by Requests for Startups examined the level of income that workers in the on-demand economy rely on.[68] The authors surveyed approximately 900 workers in seventy-eight on-demand firms, including Airbnb, DoorDash, Homejoy, Thumbtack, Uber, Lyft, and TaskRabbit.[69] It found that 39% of such workers rely on this work for a quarter of their income; 19% of workers, for 25–50%; 13% of workers, for 50–75%; and 29% of workers for 75–100% of their income.[70]

Other studies confirm the same result. A survey of approximately 600 Uber drivers, conducted in December 2014, found that almost 40% have no other job, roughly 30% had another full-time job, and another 30% had another part-time job.[71] A McKinsey report found that 40% of Uber drivers in the United States earn their primary living through the platform, but just 7% of those who rent properties on Airbnb rely on it as their primary source of income.[72] Thus, workers in the on-demand economy fall on a spectrum of utilization of hours: some work part time, as a gig, while for a good portion of workers—between 30% and 40%—the on-demand economy is their main or only source of income.[73]

In conclusion, the on-demand economy shows a range of use predicated on increased use of excess capacity. On one end of that range, some people work intermittently, leveraging their personal capital to produce otherwise unrealized income. At other end are those who exploit the on-demand platform to commercialize use without leveraging their idle capacity.

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[68] *See* Jennifer Rossa, *The Workers*, BLOOMBERG BRIEF (June 15, 2015), https://newsletters.briefs.bloomberg.com/document/4vz1acbgfrxz8uwan9/the-workers-demographics; Alison Griswold, *Young Twentysomethings May Have a Leg Up in the 1099 Economy*, SLATE (May 22, 2015, 6:49 PM), http://www.slate.com/blogs/moneybox/2015/05/22/_1099_economy_workforce_report_why_twentysomethings_may_have_a_leg_up.html.

[69] *See id.*

[70] *See id.*

[71] *See* Jonathan V. Hall & Alan B. Krueger, *An Analysis of the Labor Market for Uber's Driver-Partners in the United States* 10 (Princeton Univ. Indust. Rel. Sec., Working Paper No. 587, 2015) (describing LEVIN, *supra* note 22, a survey conducted by the Benenson Survey Group per Uber's request).

[72] *See* JAMES BUGHIN ET AL., MCKINSEY GLOB. INST., INDEPENDENT WORK: CHOICE, NECESSITY, AND THE GIG ECONOMY 61 (2016), http://www.mckinsey.com/~/media/McKinsey/Global%20Themes/Employment%20and%20Growth/Independent%20work%20Choice%20necessity%20and%20the%20gig%20economy/Independent-Work-Choice-necessity-and-the-gig-economy-Full-report.ashx.

[73] *Id.*

II. THE SOCIAL AND ECONOMIC BENEFITS OF WORK IN EXCESS CAPACITY

So far I have shown that activities in the on-demand economy fall on a spectrum based on the level of use or non-use of increased utilization of good, time, or skills. This Section investigates the financial and societal consequences that activities on each side of the spectrum create. Part A explores the different influences that each activity has on expansion of choice to consumers and providers. Part B analyzes the other negative and positive externalities that each activity produces.

A. Increased Utilization as a Choice-Enhancing Mechanism

Viewed through the prism of choice, the main value of the on-demand economy is expanding the range of work options that revolve around increased use of excess capacity. As I explain below, while the ability to work through using one's excess skills or property has long existed, the on-demand economy makes such work more readily offered, available, and used. At the same time, work that is situated on the other end of the spectrum of increased utilization can result, and in fact has resulted, in decreased choice of other valuable options.

Choice is a central concept in a liberal democracy.[74] Choice is closely associated with autonomy because it allows people to self-determine the course of their lives.[75] Human beings know best what their preferences are and are thus best situated to make their own choices.[76] As stated famously by John Stuart Mill, "The human faculties of perception, judgment, discriminative feeling, mental activity, and even moral preference, are exercised only in making a choice."[77] Other philosophers have expanded on the importance of choice because "autonomous individuals shape their lives on their own terms and this self-creative activity is exercised primarily through choice."[78] Thus, generally, facilitating choice is one of the main responsibilities of lawmakers in a liberal state.[79]

The on-demand economy, especially when employed by casual sellers, contributes to the expansion of choice. Undoubtedly, the practice of

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[74] *See* CASS R. SUNSTEIN, CHOOSING NOT TO CHOOSE: UNDERSTANDING THE VALUE OF CHOICE x (2015).

[75] *See id.*

[76] *See id.*

[77] JOHN STUART MILL, ON LIBERTY 65 (Emery Neff ed., 1926).

[78] STEVEN LECCE, AGAINST PERFECTIONISM: DEFENDING LIBERAL NEUTRALITY 106 (2008) (analyzing Joseph Raz's approach to autonomy and choice).

[79] *See* Aloni, *supra* note 15, at 1431–33.

maximizing otherwise underutilized goods and time existed long before the on-demand economy.[80] Working as a freelance in a flexible setting, in small gigs, and as an "independent contractor" predated the on-demand economy.[81] Renting properties for short periods while away also preceded the on-demand economy but was done through more conventional and less efficient methods, such as publishing an ad in a newspaper.[82] Carpooling and other forms of collaborative transportation are also far from new.[83]

Yet, the on-demand economy intensifies the opportunities to maximize underutilized goods and time. The introduction of simple-to-use technology offers a greater supply of otherwise wasted capital and labor because more people can now easily offer their idle capacity for sale.[84] These platforms reduce the expense of creating such transactions and enable the sale of one's merchantability with little or no cost. In so doing, the on-demand economy eases barriers to entry into markets that were previously reserved primarily for professionals.[85] Simultaneously, the on-demand economy increases choice and supply "by allowing users to slice up time and space into smaller units."[86] That is, by facilitating the connection between peers, the on-demand economy enables suppliers to sell smaller portions of their time and goods in an efficient manner. Accordingly, the on-demand economy "reduces barriers to entry into transactions, allows non-expert participants to exchange services and goods and to sell smaller segments of their labor, and therefore enables another layer of market choice."[87] The result is more valuable choices for consumers and workers alike.

For consumers, the on-demand economy is beneficial in accommodating different types of values and preferences.[88] Individuals perceive what is important in diverse ways, and the excess-capacity model supports increased diversity of choices by making options more easily accessible.[89]

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[80] *See* Lobel, *supra* note 14, at 131.

[81] *See id.* ("The rise of the contingent workforce precedes the rise of the platform. The contingent workforce now constitutes more than one-third of all employees with predictions that it will rise to nearly half of the workforce by 2020.").

[82] *See* HILL, *supra* note 22, at 4–8.

[83] *See, e.g.*, Jeff Cozza, *The History of Carpooling, from Jitneys to Ridesharing*, SHAREABLE (Feb. 7, 2012), http://www.shareable.net/blog/the-history-of-carpooling-from-jitneys-to-ridesharing.

[84] *See* Lobel, *supra* note 14, at 108 ("[S]upply is increased by adding under-utilized assets into the market and, in turn, costs are reduced.").

[85] *See id.* at 110–11.

[86] *See id.* at 108.

[87] *See* Aloni, *supra* note 15, at 1410.

[88] *See id.* at 1413–14.

[89] *See* Lobel, *supra* note 14, at 113–14 ("Consumers convey a preference for a different

Hence, if a consumer prefers staying at a unit offered by a resident and viewing the location from the eye of a local, the on-demand platforms enable this. But if one is more risk-averse and would like to avoid any hazard (such as finding that the unit is different from what was described, or located in a less favorable part of the city), a hotel may be a better option. Some consumers care more about hygiene and would prefer to stay at a hotel for that reason.[90] Some passengers show a preference for knowing the exact time that their Lyft driver will arrive, while others may not have a smartphone, or prefer to pay cash for the transaction (which is not an option with Uber or Lyft), or may be in a rush—so favor catching a taxi on the street.[91] Some consumers view Uber as safer, while other view taxis as safer; some care more about the price than others.[92] Indeed, in a survey conducted by PricewaterhouseCoopers, 32% of respondents indicated that "more choice in the marketplace" is a strong selling point for on-demand transportation platforms.[93] The bottom line is that the on-demand economy offers consumers another layer of market choice that fits their particular preferences.

For providers, the on-demand economy offers the opportunity to work in a flexible framework, in small gigs, to capitalize on their unused time in order to earn some supplementary income.[94] In reducing barriers to entrance into industries, the on-demand economy also allows nonprofessional players to leverage their unused skills—from driving to cooking—for the purpose of making extra money.[95]

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kind of market exchange.").

[90] *See* Aloni, *supra* note 15, at 1414 (citing PRICEWATERHOUSECOOPERS, CONSUMER INTELLIGENCE SERIES: THE SHARING ECONOMY 20 (2015), http://www.pwc.com/us/en/industry/entertainment-media/publications/consumer-intelligence-series/assets/pwc-cis-sharing-economy.pdf).

[91] *See* Larry Magid, *Ride Sharing is Great As Long As We Address Downsides*, THE MERCURY NEWS (Feb. 23, 2017, 9:07 AM), http://www.mercurynews.com/2017/02/23/ride-sharing-is-great-as-long-as-we-address-downsides ("The reason I worry about the taxi industry is that there are times when a taxi is a better choice than a ride-hailing service, especially if you're in a hurry and there's one nearby.").

[92] *See* Anthony Neal Macri, *#QuickTapLive Survey: Three Quarters of Millenials Prefer Uber, Despite Damaging Media Reports*, QUICKTAPSURVEY BLOG (Jan. 29, 2016), http://www.quicktapsurvey.com/blog/2016/01/29/uber-vs-taxi/ (surveying consumers' reasons to pick Uber over a taxi).

[93] PRICEWATERHOUSECOOPERS, *supra* note 90, at 20.

[94] *See* Lobel, *supra* note 14, at 108 (explaining that many workers in the on-demand economy "seek to fill up their free time and leverage their flexibility to earn extra income. In other words, the platform resurrects dormant capital—be it tangible products or human capital."); Aloni, *supra* note 15, at 1435.

[95] *See* Lobel, *supra* note 14, at 108; Aloni, *supra* note 15, at 1435 ("The model reduces barriers to entering markets previously reserved to those whose full-time work or expertise,

A study conducted by McKinsey Global Institute and published in October 2016 examines several aspects of independent contractors across six countries, including the United States.[96] The study was not limited to workers in the on-demand economy, as freelancers who work for on-demand platforms constituted 15% of the workers surveyed.[97] It found that a significant proportion of all casual workers—approximately 70%—were freelancers by choice, rather than because they were unable to find a full-time alternative.[98] This segment of workers emphasized the degree of flexibility and autonomy that this job framework offers them.[99] Thus, the report elaborates: "Many earners strongly prefer the autonomy and flexibility of independent work. They value being their own boss, setting their own hours to some extent, and focusing on work that interests them [. . .] The Uber driver can fit his hours around a class schedule or family priorities."[100] When it came to workers in the on-demand economy, the report found that, in the United States, 87% of workers for this industry chose this working pattern rather than selecting it as a necessity (because they could not find a different type of job).[101] Other data, provided by Uber, indicate that Uber drivers appreciate the flexibility in their work. Asked how they decide when to work, 40% of drivers answered that it depends on what else is on their schedule.[102]

At the same time, the impact of the on-demand economy can also translate into reduced choice for consumers and workers. As a result of the competition posed by the on-demand industries, some traditional (conventional) services that are not provided via platforms are at risk of becoming scarcer or disappearing altogether. This is especially true when the on-demand economy promotes suppliers who work commercially (not in utilization of idle capacity). Without regulation that distinguishes these types of activities, the alternatives that incumbents offer cannot withstand the competition, and reduction of such services has resulted.

For instance, one traditional service that may be endangered is traditional taxicabs. The entrance of the Transportation Network Companies ("TNC," essentially the on-demand transportation companies) into the market has led to a considerable contraction of the number of taxicab rides. The UCLA Labor Center studied the economic implications for the taxi industry in Los

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for the most part, is the provision of such services.").

[96] BUGHIN ET AL., *supra* note 72, at 1.

[97] *Id.* at 12.

[98] *Id.*

[99] *Id.*

[100] *Id.* at 45.

[101] *Id.* at 59.

[102] LEVIN, *supra* note 22, at 2.

Angeles and documented how the entrance of Lyft and Uber gave rise to significant shrinkage in the number of rides.[103] It found that, between 2013 and 2014, taxi ridership dropped by 18%, a total of 1.4 million fewer trips than the previous year.[104] This number is likely bigger now as, at the time of the study, Lyft and Uber were not allowed to pick up passengers from LAX airport, a route that constituted a large source of rides exclusively for taxicabs.[105] In Seattle, after Uber and Lyft became authorized to pick up passengers from the airport, every month showed a further decline in the number of taxi rides: from –9.5% in June 2016 to –16.6% in August 2016.[106] In Arlington, Virginia, dispatched cab trips saw a steep reduction in just two years: falling from 2.6 million annually to 1.7 million annually between 2013 and 2015.[107] The resultant financial struggles have forced cab companies to fire workers, file for bankruptcy, and even close entirely, making taxi services less available to the general public in some regions.[108]

The decreased availability of traditional services constitutes a problem for consumers who need greater protections. For instance, traditional taxicabs are an important choice for some consumers, especially minorities. This is because people who are part of minority groups may feel safer taking a traditional taxi or find it harder to get rides through on-demand

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[103] SABA WAHEED ET AL., UCLA LABOR CENT., RIDESHARING OR RIDESTEALING? CHANGES IN TAXI RIDERSHIP AND REVENUE IN LOS ANGELES 2009–2014 (2015), http://www.labor.ucla.edu/downloads/policy-brief-ridesharing-or-ridestealing/.

[104] *Id.* at 2.

[105] *Id.* ("The Los Angeles airport is still restricted to TNCs from doing business on the premises, but this month the Los Angeles World Airport (LAWA) Commissioners are expected to vote to lift a ban on TNCs at LAX."); *see also* Laura J. Nelson & Katie Shepherd, *LAX Becomes Largest U.S. Airport to Allow Uber, Lyft Pickups*, L.A. TIMES (July 16, 2015), http://www.latimes.com/local/lanow/la-me-ln-uber-legal-lax-20150716-story.html.

[106] *See* Sara Bernard, *Uber and the Uncertain Future of Taxis at the Airport*, SEATTLE WEEKLY (Sept. 28, 2016, 1:30 AM), http://www.seattleweekly.com/news/uber-and-the-uncertain-future-of-taxis-at-the-airport/.

[107] *See Uber and Lyft are Killing Arlington's Taxi Business*, ARL NOW (July 13, 2016, 2:30 PM), https://www.arlnow.com/2016/07/13/uber-and-lyft-are-killing-arlingtons-taxi-business/.

[108] In 2016, San Francisco's biggest taxi company filed for Chapter 11 bankruptcy. *See In re* Yellow Cab Cooperative, Inc., No. 3:16-bk-30063 (N.D. Cal. Jan. 22, 2016); *see also* Kate Rogers, *Uber, Lyft Put Pressure on Taxi Companies*, CNBC (Jan. 26, 2016, 1:10 PM), http://www.cnbc.com/2016/01/26/uber-lyft-put-pressure-on-taxi-companies.html. Cab company closures have occurred nationwide, including in Santa Ana, California, and Albuquerque, New Mexico. *See* Lauren Williams, *Fare Fallout: Uber, Lyft, and Rising Costs Force Santa Ana Taxi Firm to Close*, ORANGE CTY. REG. (Apr. 6, 2016, 7:54 AM), http://www.ocregister.com/articles/taxi-710936-county-uber.html; Chris Guardaro, *Albuquerque Cab Company Closes, Lays Off 70 Employees at Once*, KOAT (Mar. 6, 2017, 10:31 PM), http://www.koat.com/article/video-cab-company-out-of-business/9099591.

transportation companies. Researchers from the Massachusetts Institute of Technology recently tested whether being perceived as an African American passenger makes it harder to get a ride with Lyft and Uber.[109] In Seattle, the study found that African American passengers had to wait longer before booking a ride via Uber—up to a 35% increase in waiting time compared with their white counterparts.[110] In Boston, the study used passengers with African American–sounding names and found that Uber drivers cancelled rides more than twice as frequently as they cancelled rides for passengers with white-sounding names.[111] No doubt, racial discrimination by traditional taxi drivers is a familiar and well-established fact, which occurs on a regular basis.[112] However, while a host of federal and state laws forbid traditional taxicabs from discriminating based on race,[113] the applicability of these laws to the on-demand drivers, and firms themselves, is a more contested question.[114]

Further, people with disabilities have documented cases in which Uber drivers refused to take them, either because the latter had service animals or used a wheelchair.[115] In a lawsuit filed by the National Federation of the

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[109] *See* Yanbo Ge et al., *Racial and Gender Discrimination in Transportation Network Companies* (Nat'l Bureau Econ. Research, Working Paper No. 22776, 2016), http://www.nber.org/papers/w22776.

[110] *Id.* at 2.

[111] *Id.* at 1–2.

[112] *See, e.g.*, THE EQUAL RIGHTS CENTER, SERVICE DENIED: RESPONDING TO TAXICAB DISCRIMINATION IN THE DISTRICT OF COLUMBIA i (2003), https://equalrightscenter.org/wp-content/uploads/taxicab_report.pdf ("Each year, thousands of minority residents and visitors are unable to hail a taxicab in the District of Columbia because of the color of their skin or because they want to go to a predominantly African-American neighborhood."); Aaron Belzer & Nancy Leong, *The New Public Accommodations*, 105 GEO. L.J. (forthcoming 2017) (manuscript at 26) (on file with SSRN), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2687486 ("Both research and anecdotal evidence suggest that non-white people have more difficulty hailing taxi cabs.").

[113] *See, e.g.*, Mitchell v. DCX, Inc., 274 F. Supp. 2d 33, 44 (D.D.C. 2003) (alleging racial discrimination by a taxi company under 42 U.S.C. § 1981); Belzer & Leong, *supra* note 112, at 36 (stating that many commentators have assumed that taxi cabs are public accommodations and thus answerable to federal laws, while others have argued that taxi cabs are not bound, although various state laws consider taxi rides "public accommodation").

[114] *See, e.g.*, Brishen Rogers, *The Social Costs of Uber*, 82 U. CHI. L. REV. DIALOGUE 85, 95 (2015) ("Uber's exact duties under federal and state civil rights laws are not yet clear.").

[115] *See* Jason Marker, *Wheelchair Using Passenger Films Uber Driver Refusing to Pick Him Up*, AUTO BLOG (Jan. 10, 2017, 11:41 AM), http://www.autoblog.com/2017/01/10/wheelchair-using-passenger-films-uber-driver-refusing-to-pick-hi/ (describing Uber driver's refusal to pick up wheelchair-bound passenger after stating that "[d]isabled people need disabled car(s)"); Nina Strochlic, *Uber: Disability Laws Don't Apply to Us*, DAILY BEAST (May 21, 2015, 2:15 AM), http://www.thedailybeast.com/articles/2015/05/21/uber-

Blind of California, Uber argued that the Americans with Disabilities Act does not apply to them.[116] While Uber and Lyft have recently started to offer services that can accommodate people who rely on wheelchairs, consumers have complained that these services are rarely available.[117]

Finally, some people who feel more vulnerable may believe that they are safer taking taxis than using an on-demand platform for their rides. While there is no definitive indication that taxis are safer than TNCs, or that many people perceive taxis as safer, anecdotal evidence explains why individuals may feel safer using taxis; thus, publicized reports in which TNC drivers attacked, harassed, or refused to pick up transgender individuals may deter some from choosing this option.[118] This hesitation may be bolstered on account of a few widely reported incidents of TNC drivers who raped or sexually assaulted passengers,[119] as well as by the TNC firms' refusal to fingerprint their drivers as taxi drivers do.[120] The bottom line is that, for some people, the availability of traditional taxicabs is still an essential option because the on-demand economy alternative is viewed as more risky.

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disability-laws-don-t-apply-to-us.html (describing Uber driver's refusal to pick up wheelchair-bound passenger based on claim that wheelchair would not fit in driver's trunk); Hannah Wise, *Mansfield Woman Says Uber Drivers Won't Pick Her Up Because of Service Dog*, DALLAS NEWS (Oct. 3, 2016), https://www.dallasnews.com/news/transportation/2016/10/03/mansfield-woman-says-uber-drivers-pick-service-dog (describing passenger's experience hailing rides through Uber and Lyft with her service dog).

[116] *See* Nat'l Fed'n of the Blind of California v. Uber Techs., Inc., 103 F. Supp. 3d 1073, 1082 (N.D. Cal. 2015) (claiming, *inter alia*, violation of the Americans with Disabilities Act in class action on behalf of blind Uber customers).

[117] *See* Heather Kelly, *Uber's Services for the Disabled Lack Actual Cars*, CNN (May 3, 2016, 1:16 PM), http://money.cnn.com/2016/05/02/technology/uber-access/.

[118] *See* Mary Emily O'Hara, *Lyft Driver Accused of Threatening Activist Monica Jones in Transphobic Post*, THE DAILY DOT (Feb. 28, 2016), http://www.dailydot.com/irl/lyft-driver-monica-jones-location-facebook/ (describing trans activist Monica Jones's experience with transphobic Lyft driver); Raymond Rizzo, *Uber Driver James Henneberg is "Bothered" by the "Transgender Thing"; Refuses to be Paired with Gay Couple in Future; Admits to Lying*, E. NASHVILLE NEWS (Jan. 7, 2017), http://eastnashville.news/2017/01/uber-driver-james-henneberg-is-bothered-by-the-transgender-thing-refuses-to-be-paired-with-gay-couple-in-future-admits-to-lying/ (exposing Uber driver's transphobic and homophobic social media comments regarding interactions with passengers).

[119] *See Reported List of Incidents Involving Uber and Lyft*, WHO'S DRIVING YOU?, http://www.whosdrivingyou.org/rideshare-incidents (collecting data on number of reported assaults by Uber and Lyft drivers) (last visited May 2, 2017).

[120] In 2016, Uber CEO Travis Kalanick stated that Uber's reliance on alternative background-checking methods gives people with past, possibly unjustified, arrests a fair opportunity to drive for the company. *See* Heather Kelly, *Uber CEO Explains Why He Thinks Fingerprinting Drivers is 'Unjust,'* CNN (June 24, 2016, 12:28 AM), http://money.cnn.com/2016/06/23/technology/uber-travis-kalanick-ges-fingerprinting/.

Relatedly, the short-term on-demand platforms may threaten the existence of valuable options of traditional accommodations, such as lower-end hotels. Competition with the on-demand platform has endangered lower-end hotels because the more luxurious hotels are more likely than short-term on-demand rental platforms to attract businesspeople and wealthier tourists.[121] Indeed, a recent study concluded that Airbnb's impact on the hotel industry in Texas is unevenly distributed because Airbnb affects mostly lower-end hotels, making them more vulnerable to economic harm.[122]

Reduced options to stay in a less expensive hotel can have the most serious impact on those who cannot afford the more luxurious options or who find it harder to book a room through the on-demand economy housing platforms. Some have good reasons to persist in using traditional services: some individuals are more risk averse; others lack the technological access required to book such stay; still others may face discrimination in finding a room via on-demand platforms.[123] A recent study found that prospective Airbnb lessees with names perceived to be distinctively African American were 16% less likely to succeed in booking a stay than users with identical profiles but who had names that are considered distinctively white names.[124] For these consumers, the survival of traditional options can be especially vital.

Finally, and importantly, another aspect in which the on-demand economy decreases choice—particularly when work is not in utilization of excess capacity—is in its effect on the number of long-term rentals available on the housing market. Viewed through this lens, while consumers may enjoy more choice when they travel, they may find it harder to find a long-term rental to live in, in their own city (if they reside in a

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[121] *See* Lobel, *supra* note 14, at 115 ("In general, Airbnb competes more directly with bargain and boutique independent hotels, while luxury hotels and bigger hotel chains, which cater to business clients, are less affected.").

[122] *See* Georgios Zervas, Davide Prosperio & John Byers, *The Rise of the Sharing Economy: Estimating the Impact of Airbnb on the Hotel Industry* 30 (Boston U. Sch. Mgmt. Research, Working Paper No. 2013-16, 2013), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2366898.

[123] *See* Aloni, *supra* note 15, at 1424 ("On the other hand, P2P services are not available to everyone because they require a credit or debit card, an internet-connected computer, and sometimes a smartphone. Smartphone ownership, however, correlates with income level and age.").

[124] *See* Benjamin Edelman, Michael Luca & Dan Svirsky, *Racial Discrimination in the Sharing Economy: Evidence from a Field Experiment* 1 (Harv. Bus. Sch., Working Paper No. 16-069, 2016), http://www.hbs.edu/faculty/Publication%20Files/16-069_5c3b2b36-d9f8-4b38-9639-2175aaf9ebc9.pdf.

location with a thriving short-term rental market).[125] This is because of the trend of converting long-term units to short-term rentals. This development has led to further housing shortages and price increases in the long-term rental market.

To understand this phenomenon and its consequences, it is first important to recognize the financial incentive in taking an apartment off of the long-term rental market and renting it short term. Almost always, renting the unit for short term yields considerable more money than renting it long term.[126] Take Honolulu, Hawai'i: according to AirDNA, a company that provides analytics of Airbnb businesses—as a means to advise people where it is best to invest in properties for Airbnb—the average monthly rent of a one-bedroom (long-term rental) is around $1,300; the average Airbnb monthly revenue from one bedroom is $2,800; and lessors who are at the ninetieth percentile of Airbnb's revenue in Honolulu (the most successful lessors in the area) can earn as much as $4,550 a month.[127] Thus, in Honolulu, converting a unit from long term to short term, on average, would yield more than double—and possibly triple, almost quadruple—the lessor's revenue. Honolulu is in no way unique: data from all other main metropolitan cities reveal the incentive in taking apartments off the long-term market. In Vancouver, British Columbia, renting a one-bedroom unit for nine to twelve days (depending on the area) would yield the same revenue as a monthly long-term rental.[128]

Because of this level of monetary incentive, gradually, more rental apartments are taken off the market, and their removal contributes to housing shortages and rent surges.[129] Particularly in tight markets, reductions of available units are likely to increase rental prices.[130] This impact is already noticeable in several cities. In October 2014, the New

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[125] *See* Aloni, *supra* note 15, at 1449 ("[A nonintervention approach] increases choice for some tourists and affords extra income for renters, but those limited benefits come at the price of harm to others—neighbors, hotels, and taxpayers.").

[126] *See* Lee, *supra* note 53, at 234 ("So long as a property owner or leaseholder can earn a substantial premium from Airbnb rather than renting to city residents, there is an overpowering incentive to 'hotelize' entire buildings . . . .").

[127] *See* Scott Shatford, *The Best Places to Buy Airbnb Investment Property in America*, AIRDNA (Aug. 11, 2015), http://blog.airdna.co/most-profitable-airbnb-cities-in-america/.

[128] KRISHNA, *supra* note 58, at 8.

[129] *See, e.g.*, Carolyn Said, *The Airbnb Effect*, S.F. CHRONICLE (July 12, 2015), http://www.sfchronicle.com/airbnb-impact-san-francisco-2015/#1 (finding that in San Francisco at least 350 entire homes listed on Airbnb appear to be full-time vacation rentals—in a city "wracked by a housing crisis, where a typical year sees just 2,000 new units added, a few hundred units off the market makes a significant dent").

[130] *See* Lee, *supra* note 53, at 237 ("In tight housing markets with near-zero vacancy rates, a sudden reduction in supply naturally increases rents, particularly because neither the market nor the public sector can swiftly add to the housing stock.").

York Office of the Attorney General released a report about the impact of Airbnb on housing availability in New York City.[131] It found that over 4,600 units were available on Airbnb as short-term rentals for more than three months and therefore were unavailable for long-term residents—and that the number of such units is likely even larger.[132] A more recent study, commissioned by the Housing Conservation Coordinators and MFY Legal Services, used the most rigorous method to measure the impact of Airbnb on long-term rental availability in NYC. The study documented units that they define as "impact listing"—meaning that the listings, in 2015, were (1) an entire unit; (2) a regular short-term rental, meaning the unit was booked for short periods more than once per month and had at least one nonbooked day per month; and (3) commercial, meaning the unit was listed for at least three months in the year by the lessor, who listed more than one unit on Airbnb, or was listed for at least six months a year by the lessor, who listed only one unit on Airbnb.[133] These "impact units" are properties that are most likely for commercial use, unavailable for long-term rent, and thus have the strongest negative impact on housing availability.[134] The study found that, in 2015, nearly 16%—or 8,058 listings—of all Airbnb listings in New York City fell under the definition of impact listings.[135] Returning these units to the long-term market, the report estimates, would increase housing availability by 10%. Further, because the Airbnb market is most active in Manhattan, releasing these units back to the market would increase the number of vacant units for long-term rental in Manhattan by 21%.[136]

In a similar vein, the employment structure that on-demand companies employ can also prompt a reduction of choices for workers, specifically for traditional employment opportunities in which the worker is defined as an "employee." Most on-demand firms classify their workers as "independent contractors."[137] This classification saves the firms large amounts of money,

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[131] *See* N.Y. STATE OFFICE OF THE ATT'Y GEN., AIRBNB IN THE CITY (2016), https://ag.ny.gov/pdfs/AIRBNB%20REPORT.pdf.

[132] *Id.* at 12.

[133] *See* HÉBER MANUEL DELGADO-MEDRANO & KATIE LYON, BJH ADVISORS, SHORTCHANGING NEW YORK CITY: THE IMPACT OF AIRBNB ON NEW YORK CITY'S HOUSING MARKET 15–16 (2016), http://www.sharebetter.org/wp-content/uploads/2016/06/NYC HousingReport_Final.pdf.

[134] *Id.* at 17.

[135] *Id.* at 26.

[136] *Id.* at 28.

[137] *See* Keith Cunningham-Parmeter, *From Amazon to Uber: Defining Employment in the Modern Economy*, 96 B.U. L. REV. 1673, 1686 (2016); *see also* Zenelaj v. Handybook, Inc., 82 F. Supp. 3d 968 (N.D. Cal. 2015) (concerning a class-action lawsuit brought against Handybook, a housecleaning on-demand platform, by its workers for misclassification as independent workers).

because they do not need to offer these workers various employment protections such as reimbursement of work-related expenses, overtime payment, employer contributions to unemployment insurance,[138] and minimum wages.[139] As an example, according to one estimate, "Uber can save up to thirty percent in payroll taxes simply by classifying its drivers as nonemployees."[140]

The expansion of the on-demand economy, especially when workers do not provide only "gigs" but, rather, derive most of their income from this work, can culminate in a decrease of traditional, protected positions. For example, in the transportation sector, the entrance of Uber and Lyft into the market precipitated a significant drop in the number of taxicab jobs.[141] Not all taxi drivers are defined as "employees"—even in the traditional-sector taxi industry, some work as independent contractors.[142] A worker's classification as "employee" versus "independent contractor" depends on the level of control that the employer retains over the worker.[143] But many of them are classified as employees, making them recipients of a host of benefits, as noted above—thus, such positions are now more difficult to gain.

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[138] *See, e.g.*, Cotter v. Lyft, Inc., 60 F. Supp. 3d 1067, 1073–74 (N.D. Cal. 2015). In that case, the court stated:

> [W]hether a worker is classified as an employee or an independent contractor has great consequences. California law gives many benefits and protections to employees; independent contractors get virtually none. Employees are generally entitled to, among other things, minimum wage and overtime pay, meal and rest breaks, reimbursement for work-related expenses, workers' compensation, and employer contributions to unemployment insurance.

Id. at 1073–74 (internal citations omitted).

[139] Robert Sprague, *Worker (Mis)classification in the Sharing Economy: Trying to Fit Square Pegs Into Round Holes*, 31 A.B.A. J. LAB. & EMP. L. 53, 72 (2015) ("It is often economically efficient for a business to use independent contractors.").

[140] Cunningham-Parmeter, *supra* note 137, at 1686.

[141] *See* WAHEED ET AL., *supra* note 103, at 2 ("Between 2013 and 2014, taxi revenue droped by 9 percent and total completed trips dropped by 18 percent."); *see also* Associated Press, *Taxi Ridership on the Decline as Riders Opt for Uber, Lyft*, WASH. TIMES (Dec. 15, 2016), http://www.washingtontimes.com/news/2016/dec/15/taxi-ridership-on-the-decline-as-riders-opt-for-ub/ ("Taxi companies have been trying to deal with declining ridership and revenue due to the increased popularity of newcomers Uber and Lyft.").

[142] *See, e.g.*, NLRB. v. Friendly Cab Co., Inc., 512 F.3d 1090, 1103 (9th Cir. 2008) (holding that taxi drivers are employees); Yellow Cab Coop. Inc. v. Worker's Comp. Appeals Bd., 277 Cal. Rptr. 434, 436–38 (finding that taxi drivers were "employees" for workers' compensation purposes).

[143] Cunningham-Parmeter, *supra* note 137, at 1691 ("Nearly every employment protection depends on the existence of an employer-employee relationship, and every employment test considers the level of control that putative employers retain over workers.").

As stated, the McKinsey Global Institute assessed that 87% of workers in the on-demand economy work by choice rather than due to an inability to find other gainful employment.[144] However, this means that 13% of workers work in the on-demand economy because they cannot find full-time stable employment. But a different study, which surveyed providers in the on-demand economy, found that "41 percent say they prefer the security and benefits of working for a traditional company even if it might mean less flexibility."[145] Which is why the accurate number is a debatable question. But there is no doubt that the rise of the on-demand economy—and especially its lack of regulation with regard to employment rights—results in the reduction of stable employment opportunities.

The reduction of choice for consumers and workers is correlated to the spectrum of utilization players use in the on-demand economy. For consumers, it may not matter if the product they buy derived from casual or commercial work. But the consequences that stem from the magnitude of commercial work can eventually mean less choice for consumers. Infrequent casual work in increased excess capacity accordingly has less impact on the reduction of choice. For providers, the distinction is more obvious: as unregulated work in excess-in-disguise grows more common, the fewer options exist for traditional, protected work. Hence, choice and level of utilization of excess capacity are correlated.

B. Other Negative Externalities

In addition to the expansion or reduction of choice, activities from opposite ends of the utilization spectrum produce different levels of negative externalities. Activities in increased excess capacity produce fewer negative externalities, whereas commercial use without utilization of excess capacity typically produces more negative externalities.

In the short-term on-demand rental market, the magnitude of negative externalities attached to commercial use of short-term rentals is noticeable.[146] To be sure, casually renting a unit every once in a while can produce some negative externalities, too, such as nuisance and safety

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[144] BUGHIN ET AL., *supra* note 72, at 41.

[145] *See* Press Release, Penn Schoen Berland, Forty-Five Million Americans Say They Have Worked in the On-Demand Economy, While 86.5 Million Have Used It, According to New Survey (Jan. 6, 2016), http://psbresearch.com/wp-content/uploads/2016/01/On-Demand-Economy-Release.pdf.

[146] *See* KRISHNA, *supra* note 58, at 7–11 (reporting on a survey of residents in Vancouver about the impact of short-term rental platforms and surveying the number of complaints filed by residents referencing Airbnb or other short-term rentals).

concerns.[147] Having strangers in a building can make the residents feel less safe; it can create extra noise by people who come to vacation; it can also generate some added pressure on shared resources—from recycling and trash, to parking and elevators, to gym usage (where one exists).[148] However, when one rents an apartment via platforms consistently and commercially, the magnitude of these harms grows;[149] e.g., from occasionally seeing unfamiliar faces in the hallway and parking areas to seeing different unfamiliar faces all the time, from intermittent noise to more constant noise, and so on.

The use of short-term rentals that do not involve utilization of excess space, in residences that are not designed to operate as hotels, intensifies these setbacks. Indeed, in a survey conducted in Vancouver, British Columbia, 42% of those questioned said that short-term rentals reduce safety in buildings and neighborhoods, and 41% said that they increase noise and property damage.[150]

Lara Williams, an author and freelance writer who lives in Manchester, UK, describes the major inconvenience and noise she experienced from an apartment adjacent to hers, which was converted to be a short-term rental unit.[151] She experienced loud noise, parties, music, and even "men wrestling on the floor outside my flat, someone trying to kick in my door, and fights that have left blood smears across the corridor walls."[152] Lara recognizes the distinction between commercial use and renting short term by increased utilization. She writes, "I had nothing against someone trying to make a little extra cash over the weekend. It was when it became clear the property was being entirely used for short-term rentals, and after my second phone call to the police, that I started complaining."[153] This seems to be a common view: many people agree that their neighbors should be able to leverage their underutilized goods, but they do not want to live next to what functions as a semi–hotel room.[154]

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[147] *See id.* at 11.

[148] *See id.*

[149] *See generally* O'NEIL & OUYANG, *supra* note 42.

[150] KRISHNA, *supra* note 58, at 8.

[151] *See* Lara Williams, *When Airbnb Rentals Turn Into Nuisance Neighbours*, THE GUARDIAN (Sept. 18, 2016), https://www.theguardian.com/technology/2016/sep/17/airbnb-nuisance-neighbours-tribunal-ruling.

[152] *See id.*

[153] *See id.*

[154] *See, e.g.*, Scott Gruby, *Why Your Short-Term Airbnb Rental is a Problem*, VOICE OF SAN DIEGO (Feb. 15, 2015), http://www.voiceofsandiego.org/tourism/why-your-short-term-airbnb-rental-is-a-problem/ ("[M]any people don't seem to mind a neighbor renting out a room for a few weeks, or even an entire house while the owner is away.").

What is more, the nuisance resulting from vast conversions to short-term rentals in residential areas threatens to change the nature of entire neighborhoods. In popular tourist destinations, which are very profitable for operators of short-terms, residents report that the short-term market facilitated through the platforms has promoted nuisance, noise, and feelings of insecurity.[155] People who live in residential areas have found themselves neighboring with hotel-like operations. As described by a report written by the Los Angeles Alliance for a New Economy:

> In Venice [California], as many as 12.5 percent of all housing units have become AirBnB units, all without public approval. There are 360 AirBnB units per square mile in Venice and longtime residents who never intended to live next to hotels now find themselves dealing with noise and safety concerns that negatively impact their quality of life.[156]

The ramifications of on-demand platforms on the availability of long-term rentals can also contribute to changes in the character of a community. If an area is populated with apartments that are rented only short term, when they are not booked these units remain empty.[157] At the same time, local residents cannot find homes—due to the housing shortage and increase in prices—and have to leave the area.[158] As described by a resident of Marfa, Texas: "Instead of having someone live in that house who's contributing to the community, you're turning the house into a place that gets rented out a couple of times a month."[159]

Another negative externality of short-term rentals via on-demand platforms is reduction in revenue from transient occupancy tax (aka, hotel tax).[160] Hotel taxes are used in big cities to facilitate collaboration between the city and the hotel industry.[161] The hotel collects the taxes for the city or state to use for infrastructure, such as convention centers and transportation, that attracts tourism.[162] Thus, when more visitors stay in short-term

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[155] *See, e.g.*, KRISHNA, *supra* note 58, at 8.

[156] ROY SAMAAN, L.A. ALLIANCE FOR A NEW ECONOMY, AIRBNB, RISING RENT, AND THE HOUSING CRISIS IN LOS ANGELES 3 (2015), https://www.ftc.gov/system/files/documents/public_comments/2015/05/01166-96023.pdf.

[157] *See id.* at 16–21.

[158] *See id.* at 2–3. *Cf.* Lee, *supra* note 53, at 240 ("Airbnb [short-term rentals] impede integration and exacerbate socioeconomic inequality.").

[159] Rachel Monroe, *More Guests, Empty Houses*, SLATE (Feb. 13, 2014, 8:08 AM), http://www.slate.com/articles/business/moneybox/2014/02/airbnb_gentrification_how_the_sharing_economy_drives_up_housing_prices.html.

[160] *See* SAMAAN, *supra* note 156, at 28–29.

[161] *See* Miller, *supra* note 31, at 162–63 (describing the "convention complex" in which "hotels are part of a systematic collaboration between government and industry").

[162] *See id.* at 162, 173.

residences rather than hotels, the result is less revenue to the city.[163] In some municipalities this is no longer a problem, as Airbnb has started to collect the tax for the city.[164] In other municipalities, this is still a problem.[165] And regarding hotel tax, too, there is a difference between increased use and commercial use. When a unit is rented full time, it is likely to be in an area that is already highly attractive to tourists.[166] The implication is that a large number of visitors who use the infrastructures funded by hotel taxes do not contribute to this use; conversely, the loss of revenue from casual lessees is less significant because their number is smaller. Further, when one rents an excess-capacity unit only rarely, it can be located in areas that are further from "the tourist path" and thus bring more economic activity to such areas (these are also generally areas that receive less direct benefit from hotel tax revenue).[167]

The same holds true with regard to commercial use of TNCs: it is likely to produce more negative externalities than increased-utilization driving does.[168] To be sure, work as a driver in increased utilization also produces some negative externalities; the difference between the externalities that commercial versus casual use creates lies in their magnitude.[169] The expansion of TNC services can increase the number of cars on the road and,

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[163] *Id.* at 173.

[164] In 2015, Airbnb reportedly owed the city of San Francisco as much as $25 million in hotel back-taxes. *See* Phillip Matier & Andrew Ross, *Airbnb Pays Tax Bill of 'Tens of Millions' to S.F.*, S.F. GATE (Feb. 18, 2015, 8:48 PM), http://www.sfgate.com/bayarea/matier-ross/article/M-R-Airbnb-pays-tens-of-millions-in-back-6087802.php.

[165] Miller, *supra* note 31, at 189–90 (surveying laws regarding transient occupancy tax collection by short-term rental providers on behalf of municipalities); *see* Cathy Bussewitz, *Hawaii Governor Will Veto Bill Allowing Airbnb to Collect Taxes*, SKIFT (Jun. 30, 2016, 2:00 PM), https://skift.com/2016/06/30/hawaii-governor-will-veto-bill-allowing-airbnb-to-collect-taxes/.

[166] *See* Lee, *supra* note 53, at 235 ("Airbnb listings are concentrated in just seven of the city's densest, most expensive neighborhoods: Venice, Downtown, Miracle Mile, Hollywood, Hollywood Hills, Echo Park, and Silver Lake. These tourist destinations account for nearly half of Airbnb listings, and 69% of all Airbnb-generated revenue in Los Angeles."); DELGADO-MEDRANO & LYON, *supra* note 133, at 5 ("Airbnb listings are concentrated in a few neighborhoods in Manhattan and Brooklyn."); KRISHNA, *supra* note 58, at 5 (describing geographical distribution of Airbnb rentals in Vancouver and concluding that "most short-term rental listings are concentrated in and around downtown").

[167] *See* Lobel, *supra* note 14, at 124 ("When renters stay at an Airbnb location, they are often staying in local neighborhoods, eating at local restaurants, and shopping at local vendors.").

[168] *See generally* WAHEED ET AL., *supra* note 103 (describing negative impact of ridesharing on tax industry); Ge et al., *supra* note 109 (examining instances of racial and gender discrimination in ridesharing).

[169] *See generally* BUGHIN ET AL., *supra* note 72, at 41–62 (analyzing results of survey of casual versus full-time workers in the P2P economy).

therefore, create more air pollution and traffic congestion.[170] This is because, unlike with taxicabs, there is no cap on the number of automobiles that TNCs use.[171] Further, there is a risk that passengers may use public transportation less frequently, because TNC services serve as an alternative option to public transportation.[172] And only infrequently do TNCs serve as replacements for car ownership, so they do not decrease in significant ways the number of cars on the street.[173] They mainly serve as an alternative to taxis.[174] Indeed, there are some strong indications that the lower prices of TNC rides generate greater numbers of rides than would otherwise exist with traditional taxis.[175] In NYC, there has been debate on the impact of TNCs on traffic, with contradictory evidence produced by both sides. On the one side, in January 2016, the Office of the Mayor published a long-awaited report on the connection between TNCs and intensified traffic in Manhattan.[176] The report concluded that "E-dispatch is a contributor to overall congestion, but did not drive the recent increase in congestion in the CBD [Manhattan's Central Business District]."[177] This report, however,

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[170] *See* Aloni, *supra* note 15, at 1438–39 (citing Steven Hill, *Is the Sharing Economy Truly Green?*, SIERRA CLUB (Mar. 14, 2016), http://www.sierraclub.org/sierra/2016-2-march-april/green-life/sharing-economy-truly-green); Rogers, *supra* note 114, at 91; Tarun Wadhwa, *Could Lyft and Uber Put Public Transit Out of Business?*, FORBES (Nov. 13, 2014, 12:44 PM), http://www.forbes.com/sites/tarunwadhwa/2014/11/13/will-lyft-and-ubers-shared-ride-service-put-public-transit-out-of-business/#67878d371f58).

[171] *See generally* Katrina Miriam Wyman, *Problematic Private Property: The Case of New York Tax Medallions*, 30 YALE J. ON REG. 125 (2013) (describing New York's taxi medallion regulation system).

[172] *See* BRUCE SCHALLER, SCHALLER CONSULTING, UNSUSTAINABLE? THE GROWTH OF APP-BASED RIDE SERVICES AND TRAFFIC, TRAVEL AND THE FUTURE OF NEW YORK CITY 1 (2017), http://schallerconsult.com/rideservices/unsustainable.pdf ("In 2015 and to an even greater extent in 2016, growth in taxi and for-hire ridership outpaced growth in transit (subway and bus) ridership and is now the leading source of growth in non-auto travel in New York City.").

[173] *See* John Kuo, *Can I Avoid Car Insurance by Using Lyft and Uber?*, NERDWALLET (Oct. 14, 2014), http://www.nerdwallet.com/blog/insurance/2014/10/14/avoid-car-insurance-costs-lyft-uber/. A recent analysis by NerdWallet studied, across all 50 states, the costs of using Uber and Lyft as compared to owning a car. *See id.* The study found that car ownership is cheaper than taking Uber or Lyft for every trip. *See id.* Especially in cities where a commute is required, TNC services are not a good or cheaper alternative to car ownership. *See id.*

[174] E-dispatch trips are largely replacing yellow taxi trips in New York City's Central Business District. *See* N.Y.C. OFFICE OF THE MAYOR, FOR-HIRE VEHICLE TRANSPORTATION STUDY 5 (2016), http://www1.nyc.gov/assets/operations/downloads/pdf/For-Hire-Vehicle-Transportation-Study.pdf [hereinafter N.Y.C. FOR-HIRE VEHICLE TRANSPORTATION STUDY].

[175] *See* Hill, *supra* note 170 (arguing that TNC services increase consumption, negatively affecting the environment and traffic congestion).

[176] *See* N.Y.C. FOR-HIRE VEHICLE TRANSPORTATION STUDY, *supra* note 174.

[177] *Id.* at 5.

was criticized for its unclear methodology and lack of data about the way conclusions were generated.[178]

Other accounts claim the opposite: a recent report concluded, "TNCs accounted for the addition of 600 million miles of vehicular travel to the city's roadway network [between 2013 and 2016] . . . . exceed[ing] the total mileage driven by yellow cabs in Manhattan."[179] This report, as well as others, argues that the TNCs accrue more rides and numbers of vehicles on the streets while they trim the number of rides in public transportation.[180] Other data from San Francisco and London show similar consequences: a swell in number of rides, a surge in traffic congestion, and concerns about air quality as a result.[181]

Additional negative externalities may appear as more people work in TNCs as super drivers. The growing number of untrained drivers can increase the number of car accidents. In municipalities that charge a tax for each taxi ride but have not enacted a similar duty on the TNCs, tax revenues are reduced.

To conclude, the magnitude of work that is not based on increased use of excess capacity does most of the job of producing more negative extremities here. It does that by enlarging the number of transactions and by making the type of work offered more comparable to that of traditional offerings. As such, it threatens the rationales that existing regulations are grounded in, like limiting the number of taxis on the road, increasing revenues from tax collection, or controlling nuisances through zoning laws.

III. PRINCIPLES OF REGULATORY APPROACH

Activities of the on-demand economy create different levels of negative and positive externalities, often in correlation with their position on the

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[178] *See* Emma G. Fitzsimmons, *Uber Not to Blame for Rise in Manhattan Traffic Congestion, Report Says*, N.Y. TIMES (Jan. 15, 2016), https://www.nytimes.com/2016/01/16/nyregion/uber-not-to-blame-for-rise-in-manhattan-traffic-congestion-report-says.html ("Charles Komanoff, a transportation analyst, called the study 'unbelievably flimsy' and questioned the research model the City used.").

[179] SCHALLER, *supra* note 172, at 5.

[180] *See* Steven Hill, *Uber is a Nightmare: They're Selling a Big Lie–And the New York Times Keeps Buying It*, SALON (Apr. 9, 2016, 11:00 AM), http://www.salon.com/2016/04/09/uber_is_a_nightmare_theyre_selling_a_big_lie_and_the_new_york_times_keeps_buying_it/.

[181] *See id.* ("Ed Reiskin, director of transportation for San Francisco's Municipal Transportation Agency, says, '[Uber and Lyft] have put . . .' an estimated 15,000 [more] autos [on the streets] in San Francisco alone . . . . In London, a study by the Department for Transport found that the rise of taxi apps such as Uber has played a part in worsening congestion.").

spectrum of utilization.[182] As such, apposite regulations should aim to differentiate between the two types of activities and treat each with a separate set of rules. This Section provides some basic principles of regulation that embody this concept, while looking at municipalities that have enacted policies incorporating some of these principles—successfully and unsuccessfully.

The first principle involves capturing the distinction between work in increased excess capacity and activity that is not based on increased utilization. Namely, lawmakers should craft regulations that discern when work in increased utilization transforms into an activity that is more akin to traditional commercial work. Regulations, thus, should prevent incumbent-like providers from passing as increased-excess providers in order to evade regulation governing the traditional sectors.

How can policymakers design rules to distinguish between activities that derive from increased utilization and those that do not? When cataloging different undertakings, lawmakers ought to look at two factors together: the frequency of supply and the infrastructure used for the transaction. The frequency denotes the number of transactions the provider is involved with in a defined period. The more frequently that the supplier provides the goods or services, the more likely that she is not working in increased excess capacity. The other distinguishing factor for policymakers to focus on is infrastructure: whether the goods are primarily designated for a commercial purpose or only intermittently converted for commercial use. If the provider uses her goods predominantly for her own leisure, and only occasionally for commercial purposes, this indicates that she is selling idle capacity.

The type of indicators that lawmakers can consider to pinpoint the frequency of use and the function of the infrastructure depends on the type of regulation at stake. For example, in determining the appropriate employment classification of providers and the protections that workers should get, the factors that lawmakers should contemplate include: the number of hours the worker puts into the work, the portion of that worker's income derived from this work, the number of miles she drives over a period of time, and the function of the vehicle (e.g., private versus rented car). For short-term rentals, lawmakers should take into consideration the number of transactions per year (the total nights per year that the provider offers the unit on a short-term basis) and whether the provider is a principal resident, because these factors indicate whether the provider uses her property primarily for commercial purposes.

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[182] *See supra* Part II.

A few municipalities have commenced crafting and implementing regulations that aim to distinguish between these different uses.[183] While the content of these rules are still open to debate and do not embed this concept perfectly, they generally delineate what such regulations should look like. California, the first state to legalize and regulate on-demand transportation services, defines TNC as an "online-enabled app or platform to connect passengers with drivers using their *personal vehicles*."[184] In promulgating these rules, the California Public Utilities Commission said, "The primary distinction between a TNC and other TCPs [Transportation Charter Permits] is that a TNC connects riders to drivers who drive their personal vehicle, not a vehicle such as a limousine purchased primarily for a commercial purpose. To that end, a TNC is not permitted to itself own vehicles used in its operation or own fleets of vehicles."[185] The definition, thus, relies on the provider's and firms' infrastructures: i.e., whether it is a private car used to leverage idle capacity or a car designated predominantly for commercial use.

The interpretation of the term "personal vehicle" is a source of fierce debate.[186] On the one hand, opponents of on-demand firms argue that Uber's and Lyft's programs to lease and sell vehicles to their drivers blur this line between traditional taxi drivers who use cars designated primarily to drive passengers and TNC drivers who, under these programs, do the same.[187] Thus, critics argue, TNCs that sell and lease cars to their providers should abide by traditional regulations.[188] On the other hand, the TNCs

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[183] *See, e.g.*, Order Instituting Rulemaking on Regulations Relating to Passenger Carriers, Ridesharing, and New Online-Enabled Transp. Servs. (Cal. P.U.C. Dec. 27, 2012), http://docs.cpuc.ca.gov/PublishedDocs/Published/G000/M040/K862/40862944.pdf; Decision Adopting Rules and Regulations to Protect Public Safety While Allowing New Entrants to the Transportation Industry, 24 (Cal. P.U.C. Sept. 19, 2013), http://docs.cpuc.ca.gov/PublishedDocs/Published/G000/M077/K122/77122741.pdf .

[184] *Id.* (emphasis added).

[185] *Id.*

[186] *See, e.g.*, S.F. Int'l Airport et al., Reply Comments on the Concept of Personal Vehicles, Rulemaking on Regulations Relating to Passenger Carriers, Ridesharing, and New Online-Enabled Transp. Servs. (Cal. P.U.C. July 25, 2016), http://docs.cpuc.ca.gov/PublishedDocs/Efile/G000/M167/K737/167737529.pdf.

[187] *See id.* at 1 ("In September 2013, the Commission drew a bright line in its decision to recognize and regulate a new type of charter-party carrier . . . . It appears that line is being erased.").

[188] *See id.* at 7. In their concluding discussion, the commentators argued:

> With the proliferation of business relationships between TNCs and car rental agencies and manufacturers for the express purpose of providing vehicles to be used for TNC services, it seems clear that there is no meaningful difference between TCP limousine services and TNC services. TNCs now control fleets by proxy, and TNC drivers drive vehicles procured for purely commercial purposes. As TNC law continues to evolve,

oppose what they perceive as a narrow definition of "personal vehicle"; and, further, they contest imposing restrictions based on a vehicle's designation.[189] When first promulgating these rules, the Commission did not clarify the definition of "personal vehicle."[190] In the second phase of rulemaking, the Commission decided to postpone its ruling on the topic until the third phase, to allow parties to submit their comments,[191] but stated, for the time being, that "[l]ease or rental agreements with a term of less than four months are not permitted as a form of personal vehicle ownership for TNC drivers."[192] In its recent proposed decision regarding the definition of "personal vehicle," the Commission revised its position to define "personal vehicle" to mean a vehicle that is "owned, leased, rented for a term that does not exceed 30 days[,]" instead of the previous definition of "less than four months."[193] Thus, although the issue has still not been finally determined, it seems that California's regulations concerning operation of TNCs incorporate distinctions between activities involved with excess capacity and those that are not.

The particular details about where the Commission will draw the line between cars for professional use and those involving increased utilization are still unclear and subject to modification.[194] It is still to be seen whether the Commission will embed these characteristics further,[195] creating

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> we urge the Commission to subject TNCs to the same safety requirements imposed on TCP limousine services.

Id.

[189] *See* Decision on Phase II Issues and Reserving Additional Issues for Resolution in Phase III, at 58 (Cal. P.U.C. Apr. 21, 2016), http://docs.cpuc.ca.gov/PublishedDocs/Published/G000/M161/K474/161474505.pdf.

[190] *See id.* at 39 ("SFO/MTA requests the Commission amend the scope to: (1) clarify the definition of 'personal vehicle' . . . . Below, we clarify the definition of personal vehicles . . . ."), 51 ("SFMTA and SFIA claim the definition of personal vehicle is confusing . . . . Our clarification is set out . . . above.").

[191] *Id.* at 58 ("The Commission will issue a separate ruling posing questions about . . . the definition of personal vehicle for party comment.").

[192] *Id.* at 3.

[193] *See* Proposed Decision for Phase III.A.: Definition of Personal Vehicle, at 4 (Cal. P.U.C. Dec. 16, 2016), http://docs.cpuc.ca.gov/PublishedDocs/Published/G000/M171/K329/171329614.pdf. *Compare id.*, *with* Decision on Phase II Issues, *supra* note 189, at 3 (imposing temporary definition of "personal vehicle").

[194] *See supra* note 191 and accompanying text.

[195] On October 26, 2016, the California Public Utilities Commission opened a Phase III in the rulemaking proceeding. Phase III.B. Scoping Memo and Ruling of Assigned Comm'r, at 1 (Cal. P.U.C. Apr. 4, 2017), http://docs.cpuc.ca.gov/PublishedDocs/Efile/G000/M183/K388/183388905.pdf. The Commission separated Phase III into two sub-phases, Phase III.A. and Phase III.B. *Id.* On December 15, 2016, the Commission issued a proposed decision for Phase III.A, which addresses the definition of "personal vehicle." *See* Proposed Decision for Phase III.A., *supra* note 193. Although the Commission has not yet adopted

genuine distinctions between workers in increased excess capacity and those who essentially operate the same as traditional taxicabs but have less burdensome regulatory requirements to follow. In any case, the Commission's work illustrates regulations that attempt to distinguish between the two activities based on the infrastructure used.

In the short-term rental market, some municipalities—to differentiate casual lessors from those who do *not* leverage idle capacity—place a limit on the number of nights that residents can lease their properties for short-term stays.[196] The assumption is that a small number of transactions signals providers who are merely increasing their utilization of excess capacity, while those who exceed this threshold operate commercially. For example, in San Francisco, the threshold is ninety days a year,[197] and Seattle has introduced a similar restriction (currently pending).[198] Vancouver, British Columbia, in its pending proposal, has decided not to adopt a distinction based on maximum number nights because "tracking and enforcing a nightly rental cap is extremely difficult and poses a high administrative burden with unpredictable results."[199] Instead, the proposed regulations in Vancouver will permit short-term rentals only by those who are defined as "principal residents."[200] For a lessor to demonstrate that she is the principal resident of a unit, she would have to present evidence that she controls the rented unit (as owner or tenant) and provide proof of regular personal business at this address—indicated by a utility bill with the lessor's name or other government identification that shows she actually lives at the address in question.[201] The premise of this "principal resident" proposal is that such category distinguishes between units that are *primarily* for short-term rentals and those that are available only through increased utilization.

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the Proposed Decision for Phase III.A. because the period for comment on the Proposed Decision has not elapsed, on April 7, 2017, the Commission opened Phase III.B. of the rulemaking proceeding. Phase III.B. Scoping Memo and Ruling of Assigned Comm'r, *supra*, at 1. The Commission expects to issue a proposed ruling on Phase III.B. of the rulemaking proceeding in the third quarter of 2017. *See id.* at 8.

[196] *See infra* notes 197–198 and accompanying text.

[197] *See* S.F., CAL., ADMIN. CODE § 41A.5(g)(1)(A) (2016) ("[A] Permanent Resident may offer his or her Primary Residence as a Short-Term Residential Rental if: (A) the Permanent Resident occupies the Residential Unit for no less than 275 days out of the calendar year in which the Residential Unit is rented as a Short-Term Residential Rental[.]").

[198] *See generally* Regulating Short Term Rentals, SEATTLE.GOV, https://www.seattle.gov/council/issues/regulating-short-term-rentals (last visited May 4, 2017).

[199] KRISHNA, *supra* note 58, at 17.

[200] *Id.* at 18 ("To obtain a short-term rental business license, an operator must demonstrate Principal Residence through . . . [c]ontrol of the dwelling unit . . . . [and] [p]roof of regular personal business[.]").

[201] *Id.*

How should the policymaker decide which on-demand activity crosses the line from casual use (work in increased utilization) to commercial work? This is different from the previous query, which was how to differentiate between the two activities. Here, the examination is: at what point do lawmakers think an activity is becoming more commercial in nature? How do lawmakers draw such line between activities? Said differently, at what point does an activity considered to produce mainly positive externalities morph into one that produces more negative externalities? For instance, in short-term rentals, should the line be set at thirty days a year, sixty days a year, ninety days a year?

Indeed, in some cases, it is not easy to draw the line between pursuits. The resolution here should rely on the negative externalities that commercial use may produce. The city of San Francisco decided that ninety days a year was the limit, because they evaluated that that was the point at which short-term rental revenue would break even with long-term rentals (the amount of money a lessor would make renting from a tenant for a whole year).[202] Thus, if the city allows a provider to offer short-term rentals for more than ninety days a year, it incentivizes lessors to convert long-term rentals to short-term ones.[203]

Further, take, for example, the stories in this Introduction regarding individuals who use Airbnb in various ways. Ryan Scott, who owns twelve units in San Diego and manages an additional ten units, is on the extreme end of the spectrum (working consistently with new infrastructure and thus very likely inflicting damage on the housing market and possibly on the fabric of the community).[204] Next, Jeannie Ralston, who converted an apartment originally used for resident rental to one for short-term rental, also does not work in increased excess capacity.[205] Conversely, Jordan Reeves, a casual user who leases the property when it is otherwise not used,

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[202] *Contra* Emily Green, *SF Deals Major Blow to Airbnb with Tough Short-Term Rental Law*, S.F. GATE (Nov. 15, 2016, 10:26 PM), http://www.sfgate.com/news/article/SF-deals-major-blow-to-Airbnb-with-tough-10617319.php (NYU business professor Arun Sandararajan disputes whether San Francisco's 90-day policy truly achieves the city's stated objective of promoting long-term rentals: "The story that is being told is that people take units off the long-term rental market to rent them on Airbnb . . . But if you look at the data . . . it is very clear that if there is any effect that Airbnb is having on the availability of long-term rentals, it is very small compared to the effects of rent stabilization and population growth.").

[202] *Cf. id.*

[203] *See id.*

[204] *See* Weisberg, *supra* note 4.

[205] *See* Ralston, *supra* note 1.

is on the other end of the spectrum—a classic case of someone whose activities fall within the utilization of idle capacity.[206]

Of all the cases discussed, Michael Naess—who, seventy times per year, rents a room within his own property while he is present—introduces the most challenging case.[207] On the one hand, if we look only at the infrastructure he uses, he is clearly leveraging otherwise-dead capital: the extra room in his own home.[208] What is more, by always staying in the apartment, he insures that his guests are not going to be too noisy or create certain kinds of safety concerns; so, his situation avoids some negative externalities.[209] It is not surprising, then, that such use is almost always considered legal.[210]

On the other hand, looking at the frequency of transactions and other possible negative externalities, we might conclude that his activity is somewhere in the middle of the spectrum of utilization. This is because Naess uses the room for short-term rentals constantly (rather than casually).[211] As a result, his neighbors might feel unsafe or uncomfortable having new people in the hallway every few days. In a municipality in which short-term rental owners do not pay hotel tax, it can also mean loss of revenue to the city.[212] Therefore, Naess's case presents a challenge in drawing the line. In a world with perfect legislation and no enforcement problems, lawmakers may designate it as a "semi-excess capacity" activity and impose only some limitations on its use. But in a less than perfect world, the lawmaker will need to decide whether such use crosses the line or not.

After policymakers are able to draw the line and differentiate the two activities, the next substantial issue is the content of the regulations: which obligations and rules are attached to each category? Fundamentally, activities in increased utilization produce positive externalities—they offer more choice for consumers and providers. Lawmakers should support the innovation and its results by allowing people to leverage their goods, time, and skills. Because transactions based on increased utilization are different

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[206] *See* Hajela, supra note 8.

[207] *See* Kleinfield, *supra* note 6.

[208] *See id.*

[209] *See id.*

[210] *See* KRISHNA, *supra* note 58, at 12–14 (surveying short-term rental regulations in several cities; in all of them, shared rooms are permitted for unlimited periods of time).

[211] *See* Kleinfield, *supra* note 6.

[212] *See supra* notes 160–162 and accompanying text; O'NEILL & OUYOANG, *supra* note 42, at 11, 15, 24, 32, 40 (estimating the lost hotel tax revenue arising from short-term rentals in Phoenix, Los Angeles, Miami, New York City, and San Francisco).

from other, traditional work in the level of negative externalities they produce, each category should be governed by a different set of rules.[213]

Lawmakers should, thus, create two different categories of activities based on the spectrum of excess-capacity utilization. Activities based on increased excess capacity should be regulated lightly and tailored to casual, unsophisticated providers. Traditional work done through platforms should be governed by the same rules as incumbents unless there is a significant reason justifying a departure from these regulations.

But this does not mean that transactions in increased excess capacity should be a regulation-free zone. For some types of regulations—such as safety—this distinction may not matter at all because lawmakers can reasonably insist that, for these critical areas, there is no difference between work in increased excess capacity and other work. A part-time driver can cause the same harm as one who drives regularly if she drives an unsafe vehicle or without adequate insurance. Thus, lawmakers should impose safety requirements—criminal-background checks, vehicle inspections, insurance coverage—in a way that assures public safety and reasonable allocation of risk. The category of activities in increased excess capacity, thus, should come under minimal regulation: only to protect safety and prevent market failures.

In other aspects, regulations can take a different form from those imposed on incumbents or on incumbent-like work operated through on-demand platforms. Hotel tax provides an interesting test case. San Francisco, which created a new regime responding to the problems caused by on-demand short-term rentals, imposes on short-term Airbnb transactions an occupancy tax (collected by Airbnb) equivalent to that levied on hotels.[214] However, a regime premised on the distinction between transactions on the spectrum of utilization may reasonably levy different tax rates for these activities since they may vary in the type of visitors they attract and in their use of municipalities' infrastructures. Hotels are more likely to draw businesspeople who use infrastructure as convention centers or performing arts centers.[215] Conversely, visitors who turn to Airbnb to experience a location from a local's perspective may be less likely to use some of these infrastructures.[216] Airbnb units offered by casual users also may be located in parts of town that are less touristic in their nature; thus,

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[213] *See supra* Part II.

[214] *See Transient Occupancy Tax (TOT) Frequently Asked Questions for Hosts, Website Companies and Merchants of Record*, OFFICE OF THE TREASURER & TAX COLLECTOR, CITY & CNTY. OF S.F., http://sftreasurer.org/tot_host_website_merchant_faq#1 (last visited Mar. 24, 2017).

[215] *See* sources cited *supra* notes 160–162.

[216] *See* note 26 and accompanying text.

revenue from hotel tax is less targeted to these areas.[217] Further, as renting out rooms or units on a short-term basis provides more business to these less-visited municipal areas, lawmakers can even incentivize people to visit the areas.[218] Thus, unlike the path taken by San Francisco, a municipality may be justified in creating a different hotel-tax rate for transactions based on casual use.

Alternatively, municipalities can impose a tax—equal to its "regular" hotel tax—on short-term rentals located in the central tourist zones, while creating a reduced tax for short-term rentals in other zones. This should not create an extra administrative burden or confusion, because, in regulated regimes, lessors must register their units; the city can inform them of their hotel tax rate at the time of registration.

In a similar vein, in employment situations, lawmakers should treat full-time workers in the on-demand economy differently than they treat casual providers in that same economy. The former are not substantially different from traditional employees. On-demand firms exert a level of control over these workers very similar to employers' control over traditional employees.[219] In the transportation arena, Uber and Lyft have created various programs to incentivize their drivers to provide more hours a week—to make them "super-drivers."[220] For instance, Lyft's Power Driver Bonus program requires drivers to put in some minimum hours a week, plus maintain a 90% acceptance rate.[221] In return, Lyft waives most of its commission to drivers who fulfill these requirements, thus granting them approximately 20% more than they would otherwise be paid.[222] Lyft and Uber exert more control over workers who work voluminous hours. The flexibility attendant to the "independent contractor" status is lost once the driver is incentivized to work more hours a week and not to refuse riders. These drivers' level of income dependence on the employer is also strong.[223] Thus, when it comes to workers who are not using their increased

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[217] *See* KRISHNA, *supra* note 58, at 5 (describing geographical distribution of Airbnb rentals in Vancouver).

[218] *See id.*

[219] *See* Cunningham-Parmeter, *supra* note 137, at 1687, 1717–23 (discussing the control of Uber and Lyft over their drivers).

[220] *See, e.g.*, *Power Driver Bonus*, LYFT, https://help.lyft.com/hc/en-us/articles/214586477-Power-Driver-Bonus (last visited May 5, 2017) ("The Power Driver Bonus program rewards drivers with bonuses based on how much they drove in a week.").

[221] *Id.*

[222] *Id.* ("Power Driver Bonus has helped thousands of Lyft drivers earn back most or all of their commissions.").

[223] *See* Cunningham-Parmeter, *supra* note 137, at 1687, 1717–23 (arguing that workers for "gig economy" can be subject to less traditional—but legally meaningful—control by the firms).

excess capacity, they should be recognized as traditional "employees" for the purpose of benefits and protections. Indeed, some courts around the world have determined that Uber drivers should be classified as "employees."[224]

However, treating such workers as traditional employees does not mean that more casual workers (those truly leveraging their excess capacity) should not enjoy any rights and benefits. While these providers are not akin to traditional employees and enjoy a degree of flexibility, they should still receive basic protections, including minimum wage and overtime pay. A few commentators have proposed that lawmakers create a special category—an intermediate level—between employee and independent contractor, which includes basic employment protections and benefits.[225] So far, even jurisdictions that have regulated TNCs have not addressed the employment status of workers in that sector. The problem with this omission is that leaves the final decision about employment status to courts. Indeed, courts all around the globe are now facing lawsuits on this issue.[226] But courts are limited in what they can do: they can decide whether workers are classified as employees or independent contractors but cannot create an intermediate status that incorporates the distinction between those who work in increased excess capacity and those who do not.

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[224] *See, e.g.*, Reserved Judgment of the Employment Tribunal at 1, Aslam v. Uber BV [2016] IRLR 4 (U.K. Empl. Trib.) (No. 2202551/2015), (ruling that Uber drivers are "employed" as "workers" and not self-employed).

[225] *See* SETH D. HARRIS & ALAN B. KRUEGER, BROOKINGS INST., A PROPOSAL FOR MODERNIZING LABOR LAWS FOR TWENTY-FIRST-CENTURY WORK: THE "INDEPENDENT WORKER" 2 (2015), www.hamiltonproject.org/assets/files/modernizing_labor_laws_for_twenty_first_century_work_krueger_harris.pdf (proposing new legal category of "independent workers, for those who occupy the gray area between employers and independent contractors"); SARAH LEBERSTEIN, NAT'L EMP'T LAW PROJECT, RIGHTS ON DEMAND: ENSURING WORKPLACE STANDARDS AND WORKER SECURITY IN THE ON-DEMAND ECONOMY 10 (2015), http://www.nelp.org/content/uploads/Rights-On-Demand-Report.pdf ("Some policymakers are advocating for a new category of worker, to be situated someplace between the present categories of "employee" and "independent contractor."). *But see* Ross Eisenbrey & Lawrence Mishel, *Uber Business Model Does Not Justify a New "Independent Worker" Category*, ECON. POL'Y INST. (Mar. 17, 2016), http://www.epi.org/publication/uber-business-model-does-not-justify-a-new-independent-worker-category/ (arguing that there is no justification for the formation of a new employment category because the "better approach is simply to establish that Uber and Lyft drivers and similar workers are employees with all attendant rights").

[226] *See, e.g.*, Michael Lewis, *Proposed Ontario Class-Action Claims Uber Drivers Are Employees Not Contractors*, THESTAR.COM (Jan. 24, 2017), https://www.thestar.com/business/2017/01/24/proposed-ontario-class-action-claims-uber-drivers-are-employees-not-contractors.html.

In addition to creating new content, the new rules for the increased excess capacity category must be clear and easy to follow, and impose the least administrative burdens possible. They should be designed with the awareness that these providers are micro-earners rather than sophisticated players with resources to hire legal counsel. Another benefit of a clear and easy-to-follow regulatory regime is that it prevents the lost benefits that stem from evasion of the law. The risk of not having such a regime is a market that operates underground, thus reducing revenue from tax collection and putting drivers and customers at risk.

San Francisco provides a tale about how *not* to do it. The City created a license regime not only limiting the number of nights a lessor may offer her unit for short-term use but also requiring registration with the municipality.[227] The registration is comprised of two steps. First, the lessor must obtain a San Francisco Business Registration Certificate.[228] Afterward, the lessor must schedule an in-person appointment to register her unit with the Office of Short-Term Rentals.[229] The fee for such application, initially set at $50,[230] was changed to $250 in November 2016.[231] Lessors are also required to submit a quarterly report detailing all of the stays in their units during the past three months.[232]

With such an onerous and complicated process, it is not surprising that most lessors in San Francisco are out of compliance.[233] As of April 2016, 2,587 lessors had obtained the business registration; yet, as of July 2016, only 1,472 had registered with the Office of Short-Term Rentals[234] out of at least 7,000 entire-units that are regularly offered in San Francisco (and likely many more).[235] Predictably, the City's Board of Supervisors

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[227] *See* FRED BROSSEAU ET AL., S.F. BUDGET AND LEGISLATIVE ANALYST'S OFFICE, SHORT-TERM RENTALS 2016 UPDATE 19 (2016), http://sfbos.org/sites/default/files/File Center/Documents/55575-BLA.ShortTermRentals%20040716.pdf.

[228] *Id.*

[229] *Id.*

[230] *Id.*

[231] *See Office of Short-Term Rental Registry & FAQs*, S.F. PLANNING DEP'T, http://sf-planning.org/office-short-term-rental-registry-faqs (last visited May 5, 2017).

[232] *See* S.F., CAL., ADMIN. CODE § 41A.5(g)(3)(C) (2016) ("[T]he Permanent Resident shall submit a quarterly report to the Department beginning on January 1, 2016, and on January 1, April 1, July 1, and October 1 of each year thereafter[.]").

[233] *See* Carolyn Said, *For Most Hosts, Rental Rules Mean Little*, S.F. CHRON. (July 22, 2016), http://projects.sfchronicle.com/2016/airbnb/laws/ ("Vacation-rental hosts in San Francisco are supposed to meet a number of requirements, but only a fraction of the thousands of hosts comply.").

[234] *Id.*

[235] According to a report by staff members of the San Francisco Budget and Legislative Analyst's Office, as of March 2016, the Office of Short-Term Rentals had received 1,647 registration applications out of 7,046 unique lessors on Airbnb at the time, which indicates

attributes some of this massive noncompliance to the complexity of the registration. The board states that "[t]he two-stage process with separate business tax registration and short-term rental host registration processes might deter or confuse otherwise compliant short-term rental hosts."[236] The report also questioned the fact that registration requires physical attendance at the office: "Ideally, the entire registration process could be completed online, assuming sufficient mechanisms could be established to verify the identity of hosts, as well as home ownership and residency status. This would remove what could be one of the most significant barriers to compliance . . . ."[237]

Compare San Francisco's approach to the one currently pending in Vancouver. In recommending a system that will require "principal residents" to register if they want to offer their units for short-term rent, the process will be "easy to understand, [and] inspires high levels of voluntary compliance."[238] To achieve this goal, the proposal states, "Lessons learned from short-term rental licensing recommend a simple, inexpensive, online licensing system where applicants post copies of the above evidence and self-declare the evidence is true and that they will comply with short-term rental regulations."[239] The approach taken by Vancouver thus distinguishes between casual and commercial users not only by differentiating the activities but also by reducing barriers to compliance. San Francisco's system, which aims to do the same, creates obstacles to participation by laypeople who harmlessly wish to capitalize on their underutilized goods.

In summary, various municipalities are now experimenting with regulations that embed these principles. And while no state, city, or town has yet promulgated a perfect set of rules, these initial responses provide a good guideline for what works and what does not. There is a challenge in crafting policy that distinguishes between on-demand activities, encouraging one and constraining the other. But there is also some promise.

CONCLUSION

The on-demand firms and their proponents often emphasize the way that microearners—nonprofessional providers—are now able to participate in markets that were previously reserved to incumbents. The new economy is

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that around 76.6% of Airbnb lessors are noncompliant with the law. *See* BROUSSEAU ET AL., *supra* note 227, at 2.

[236] *Id.* at 26.

[237] *Id.* at 27.

[238] KRISHNA, *supra* note 58, at 15.

[239] *Id.* at 18.

equalizing in allowing anyone, without the need to invest in new materials, the chance to maximize her skills, time, and goods.[240] In this tale, the new economy disrupts monopolies, obsolete regulations, and corrupted industries.[241] Those who oppose this view are portrayed as self-serving or as oppositionists to innovation who cannot get used to new technologies.[242] For consumers, it is easy to buy into this narrative. They see that they are now paying less for accommodations at their favorite tourist destinations and they can find cheaper rides.[243] For others, renting their home occasionally is a means to survive the growing cost of housing and other basic services.[244] Imposing restrictions on such usage reasonably seems like hampering a legitimate way to improve their well-being.

But this narrative ignores a sea change that is occurring under the auspices of the storyline proffered by the on-demand firms, their lobbyists, and their supporters.[245] The on-demand economy opens a wide door to those who are far from being laypersons who maximize their underutilized excess capacity.[246] Too often, on-demand platforms are used for commercial services without in any way leveraging idle capacity—and without the protection of the rules that control incumbent markets.[247] The on-demand firms turn a blind eye to these usages and frequently even feed them.[248] The consequences of this phenomenon of the on-demand market on our lives are becoming clear: it impacts fundamental employment structures, threatens the fabric of neighborhoods, and further restricts housing availability.[249] The boosters of this non-gig economy attempt to hide this aspect of the market, but it is sizeable and noticeable: companies now advise people where they should buy units for short-term investment, and more workers provide services without having basic employee protections. If the on-demand firms wanted to curtail commercial use of their goods and services, they could easily do so. However, these commercial transactions are vastly profitable to them; therefore, more often than not, despite their contrary rhetoric, they encourage such transactions. For consumers, it is easy to ignore the problems of the commercial side of the on-demand economy, since they see the more convenient and less

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240 *See supra* Part I.
241 *See id.*
242 *See id.*
243 *See id.*
244 *See id.*
245 *See supra* Part II.
246 *See supra* Part I.
247 *See supra* Part II.
248 *See id.*
249 *See id.*

expensive services that that economy has helped to create. But this head-in-the-sand attitude comes with a price to others: one's cheaper vacation or more-available ride is another's difficulty in finding housing or stable employment.

Obviously, not all is bad in the on-demand economy. The opposite, in fact, is true: in its essence, the narrative that the on-demand firms sell us is real. It does offer exciting new economic and social opportunities for those who use these platforms to maximize their underutilized resources. A policy that distinguishes between the two types of activities discussed here would allow our society to get the most benefit out of this model while restraining the harms that can be—and are being—inflicted.[250]

[250] *See supra* Part III.

Regulating Ridesharing Platforms Through Tort Law

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* Associate Professor, University of Toledo College of Law. I would like to thank Sianha Gualano, Ross Uehara-Tilton, and the members of the University of Hawaii Law Review for organizing a fantastic symposium and teaching me about the "Aloha" spirit. Special thanks to Jamie R. Abrams and Erez Aloni for their insights on the ideas underlying this article, and to Joe and Robin McPeak for their support and encouragement.

I. INTRODUCTION

In 1933, Elizabeth Rhone called Try Me Cab Company's advertised phone number to order a cab.[1] The company dispatched a vehicle bearing its logo.[2] Unfortunately, the driver negligently operated the cab and injured Ms. Rhone.[3] She sued the company for her injuries, but the company responded by saying it is not "engaged in carrying passengers for hire."[4] Rather, the company characterized itself as "a nonprofit-sharing corporation, incorporated under the laws of the District of Columbia for the purpose of furnishing its members a telephone service and the advantages offered by use of the corporate name, while the company did not own this or any other cab."[5] Although Try Me Cab Company held the license to operate the cabs, it maintained that drivers were the passengers' independent contractors and claimed it was not vicariously liable for Ms. Rhone's harm.[6]

In essence, Try Me Cab Company went to great lengths to design its business to avoid being liable, but the court looked beyond the company's own characterization of its role.[7] It noted how the public relied on the company's advertising, and that the company itself created a perception of responsibility through the use of its name and logo in advertising transportation services.[8] The court looked at the reality of the company's business and held that the facts supported the use of vicarious liability.[9]

That same year, a pushcart operator on the streets of Washington, D.C., was struck and injured by a cab bearing a logo from Diamond Cab Company.[10] Diamond Cab Company did not own the cab, but its logo appeared on it, and Diamond Cab Company made thousands of dollars a month in revenues from the cab's operation.[11] The court commented that

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[1] Rhone v. Try Me Cab Co., 65 F.2d 834, 835 (D.C. Cir. 1933).

[2] *Id.* at 835.

[3] *See id.* at 834.

[4] *Id.*

[5] *Id.* at 835.

[6] *Id.* at 834.

[7] *See id.* at 835. Of course, companies are free to set up legitimate business structures that minimize exposure to liability. *See, e.g.*, Walkovszky v. Carlton, 223 N.E.2d 6, 14 (N.Y. 1966) (court accepted corporate structure of cab company that treated each cab as separate business in order to limit liability). *But see* Mangan v. Terminal Transp. Sys., Inc., 247 A.D. 853, 853 (N.Y. App. Div. 1936) (disregarding corporate form for a single defendant who operated and controlled four taxicab corporations, finding personal liability).

[8] *Rhone*, 65 F.2d at 835.

[9] *See id.* at 835–36.

[10] Callas v. Indep. Taxi Owners' Ass'n, 66 F.2d 192, 192 (D.C. Cir. 1933).

[11] *Id.* at 193.

this "case presents an aspect of the familiar but elusive problem of who is responsible for injuries caused by a cab performing under the colors and name of one of the so-called cab companies operating in Washington."[12] The court ultimately held that the facts of the case could support a finding of vicarious liability—in particular, respondeat superior and joint enterprise liability.[13]

When Uber launched its "ridesharing" platform in 2010, it called itself UberCab.[14] Its first website included a slogan for UberCab: "Everyone's Private Driver."[15] That same year, UberCab received a cease and desist letter from the San Francisco Metro Transit Authority and the Public Utilities Commission of California, ordering it to stop operating for failure to comply with regulations that apply to a "for hire passenger carrier."[16] In UberCab's public response to the letter, the company attempted to place itself outside of the law by virtue of its technological innovation:

> UberCab is a first to market, cutting edge transportation technology and it must be recognized that the regulations from both city and state regulatory bodies have not been written with these innovations in mind. As such, we are happy to help educate the regulatory bodies on this new generation of technology . . . .[17]

It may very well be true that companies like Uber are different from the legacy economy of traditional taxi operators in many ways. And it may follow that, in the regulatory sphere, change is needed because Uber does not fit neatly within traditional models for transportation services.[18]

But the assertion that old rules whole-cloth do not apply to ridesharing platforms is certainly false when it comes to tort law. Under tort law, courts look beneath the surface and, guided by tort policy, determine when liability is appropriate using long-standing doctrine. Tort law is flexible and evolves over time to adapt to new realities and social norms.[19] It is capable of being applied to seemingly new scenarios in order to meet its

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[12] *See id.* at 192–93.

[13] *Id.* at 194–95.

[14] Maya Kosoff, *In 2010, Uber Was a Brand-New Company—Here's What its First Website Looked Like*, BUSINESS INSIDER (Jan. 31, 2016, 12:38 PM), http://www.businessinsider.com/what-ubers-first-website-looked-like-2016-1.

[15] *See id.*

[16] Ryan Graves, *Uber's Cease & Desist*, UBER NEWSROOM (Oct. 25, 2010), https://newsroom.uber.com/ubers-cease-desist/.

[17] *Id.*

[18] *See* Ill. Transp. Trade Ass'n v. City of Chicago, 839 F.3d 594, 595 (7th Cir. 2016) (upholding a city ordinance that treats ridesharing platforms differently than traditional taxi services, noting the differences between the two types of services provided).

[19] *See* OLIVER WENDELL HOLMES, THE COMMON LAW 5 (Boston, Little Brown 1881) (describing how tort law adapts over time to deal with new realities).

underlying purpose and goals.[20] Here, too, tort law is well-equipped to reach fair resolution of liability issues, even for innovative new platforms like Uber.

Thus, as the sharing economy digs its heels into the American mainstream, it turns the existing regulatory structure on its head. But the law needs to both facilitate innovation while balancing countervailing concerns like safety and cost allocation. While finding the best way to regulate ridesharing platforms is important, tort law plays a crucial, complementary role as well. On the regulation side, regulators need to craft meaningful rules that promote fairness across the industry—to both sharing economy actors and traditional enterprises. But comprehensive federal regulation under the new Trump administration seems like an unlikely solution. And local regulators run the risk of unnecessarily burdening the sharing economy through barriers to entry or other anti-competitive or onerous regulatory schemes.

Tort law is thus a critical legal tool for regulating ridesharing platforms, and the main focus of this article. While regulations provide prospective limits that may stifle innovation, tort law, on the other hand, addresses retrospective harms and deters future bad conduct. Allowing tort law to provide solutions may be key to preventing over-regulation while still promoting fairness. Thus, while propositions to fix the regulatory piece of the puzzle certainly have merit, tort law is also an important aspect to consider.

This article builds off of longstanding cases dealing with taxi or other transportation services and concludes that tort law is already able to handle the seemingly unique liability concerns arising from ridesharing platforms. In particular, it focuses on vicarious liability doctrines, like joint enterprise liability, as the means for achieving important regulatory goals through the tort system. By using tort law to address some of the concerns surrounding the sharing economy, important objectives can be achieved without risking over-regulation.

II. OVERVIEW OF SHARING ECONOMY CHALLENGES

Uber is an example of the modern "sharing economy." Generally speaking, the term "sharing economy" may refer to a new form of trade that disaggregates goods and services and allows them to be priced, matched, or exchanged with others on a digital platform.[21] It seems to build upon a

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[20] *Id.*

[21] *See* Arun Sundararajan, *From Zipcar to the Sharing Economy*, HARV. BUS. REV., (January 3, 2013), https://hbr.org/2013/01/from-zipcar-to-the-sharing-eco. The Oxford Dictionary contains a similar definition of sharing economy: "[a]n economic system in

traditional barter system, which used to involve informal, small-scale exchanges among individual actors.[22] While bartering historically required little or no monetary payments, the modern sharing economy extends beyond merely trading goods and services and includes traditional profit motives.[23]

Notably, the term "sharing economy" implies an innocuous pooling of otherwise under-used resources in a new, informal marketplace for goods and services.[24] In reality, however, some aspects of the sharing economy operate as large, for-profit enterprises that are more about making money for providers and intermediaries than they are about sharing.[25] The term "ridesharing," in particular, connotes carpooling with neighbors to work, or a driver giving another person a lift to a location near where the driver happened to be going anyway. Uber drivers, on the other hand, drive for the sole purpose of earning income: they log into the Uber app to find customers and are on the road to move passengers around for money.[26] And Uber, as intermediary, makes a substantial profit from these underlying activities. Thus, what used to be a small, one-on-one barter system has become a highly organized and potentially profitable business enterprise for many facets of the so-called "sharing economy."[27]

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which assets or services are shared between private individuals, either for free or for a fee, typically by means of the Internet." *Sharing Economy*, OXFORD UNIV. PRESS, http://www.oxforddictionaries.com/us/definition/american_english/sharing-economy (last visited Jan. 11, 2016).

[22] *See* DAVID. E. HARDESTY, ELECTRONIC COMMERCE TAXATION AND PLANNING 1 (2016) (defining barter transactions as ones involving "no money or debt: property for property, property for services, or services for services").

[23] *See* Erez Aloni, *Pluralizing the "Sharing" Economy*, 91 WASH. L. REV. 1397, 1397 (2016). This symposium's keynote speaker, Professor Erez Aloni, has urged for a distinction between true "sharing economy" activities (that provide temporary use of under-utilized goods and services) with those that are conventional transactions merely capitalizing on using new platforms. *See id.*

[24] *See id.*

[25] Ritka Shah, *New Investment Round Could Put Uber Valuation at $62.5 Billion*, CNBC (Dec. 3, 2015, 5:34 PM), http://www.cnbc.com/2015/12/03/uber-to-be-valued-at-more-than-62-billion.html. Uber is believed to be valued at over $60 billion, for example.. *Id.*; *see also* Douglas MacMillan & Telis Demos, *Uber Valued at More than $50 Billion*, WALL ST. J., (July 31, 2015), http://www.wsj.com/articles/uber-valued-at-more-than-50-billion-1438367457 (noting that Uber surpassed Facebook's venture capital success as a startup).

[26] Aloni, *supra* note 23, at 1398. Professor Aloni, for example, prefers to refer to the "sharing economy" as a whole as the "P2P Economy." He then differentiates between conventional economic transactions with what he calls "access-to-excess" transactions, which make use of under-utilized goods and services. *See id.* at 1410.

[27] *See* Christopher Koopman et al., *The Sharing Economy and Consumer Protection Regulation: The Case for Policy Change*, 8 J. BUS. ENTREPRENEURSHIP & L. 529, 540

But people all over the world have embraced this new economic model—and ridesharing platforms in particular. Its success draws on two needs. First, on the consumer side, ridesharing platforms have gained popularity in part because of frustration with the traditional taxi cab industry.[28] The app design itself also makes the transaction seamless, fun, and efficient. Second, on the provider side, ridesharing platforms provide an opportunity for drivers to earn a little extra cash on the side, while still allowing for flexibility and control over work hours. These benefits of the sharing economy are met with some major drawbacks. For consumers, ridesharing services bring uncertainty, particularly in light of the lack of clarity as to safety and the impact sharing economy activities have on cities and individuals. For providers, little employment law protections exist, and pricing or other policies may hurt their ability to benefit in the long run. The result is that ridesharing platforms provide new and unique approaches to an established and entrenched industry, while still raising many of the same issues that underlie regulation and liability concerns in the legacy economy.

In this section, I discuss how ridesharing platforms work in general, employment law concerns, the common carrier classification, regulatory approaches and their failings, and how tort law interplays with regulation.

A. How Ridesharing Works

Ridesharing platforms like Uber and Lyft use a mobile app to connect drivers to passengers. As with other companies in the new sharing economy, ridesharing services "connect" someone in need of a service with a provider of that service.[29] In the case of ridesharing, the drivers are

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(2015) (noting how information technology provides consumers with a lot of information about goods and services, and gives them the ability to "come together and act on that information").

[28] *See, e.g.*, Larry Downes, *Lessons From Uber: Why Innovation and Regulation Don't Mix*, FORBES TECH (Feb. 6, 2013, 5:00 AM), http://www.forbes.com/sites/larrydownes/2013/02/06/lessons-from-uber-why-innovation-and-regulation-dont-mix/#22b8191d31fd; Kara Swisher, *Man and Uber Man*, VANITY FAIR (Nov. 5, 2014), http://www.vanityfair.com/news/2014/12/uber-travis-kalanick-controversy. Uber's own founding myth illustrates the frustrations consumers felt with the traditional taxi industry. The story goes that Uber's soon-to-be CEO had difficulty hailing a cab on a snowy night in Paris, and realized innovations were badly needed. *See id.* Less than two years later, he launched Uber. *See id.*

[29] "Connect" appears to be a very popular verb among sharing economy platforms. *See, e.g.*, *About Us*, HANDY, http://www.handy.com/about (last visited May 6, 2017) ("Handy is the leading platform for connecting individuals looking for household services with top-quality, pre-screened independent service professionals."); *How It Works*, TASKRABBIT, https://www.taskrabbit.com/how-it-works (last visited May 6, 2017) ("TaskRabbit connects

vetted, to some extent, by the platform before they are allowed to use the app to get customers.[30] Passengers, on the other hand, simply download the app, create an account, and click through a few screens to request a ride.[31]

One of the big draws of ridesharing platforms is the easy-to-use interface. The app itself stores credit card and profile information so that the transactions themselves are automatic and cashless.[32] Passengers select their pickup location and destination, view the estimated price, and submit the request for a ride.[33] On the other end, a driver has the Uber app open on a mobile device, sees the fare pop up, and can choose to accept it.[34] Almost instantly, passengers receive information about their driver and their vehicle.[35] The app uses GPS technology to help passengers and drivers find each other. In some locations, Uber cars have to display an Uber logo, though this is not the case in all cities.[36]

Once the ride is complete, the passenger's credit card is charged for the ride. Fares are set by Uber and the final payment includes all tips and fees.[37] Thus, no cash need be exchanged. Uber also allows split fares and coupons, all of which is handled in the app at the time of the transaction. Drivers receive their portion of the fare directly from Uber, which keeps a flat amount for itself before paying drivers.[38]

Users submit online reviews of drivers via the app. The review and star rating are important to Uber, as drivers may be banned from Uber based on

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you with the same-day help in 3 simple steps."); *How Peer Lending Works*, LENDING CLUB, https://www.lendingclub.com/public/how-peer-lending-works.action (last visited May 6, 2017) ("Lending Club is the world's largest online marketplace connecting borrowers and investors.").

[30] *Safety*, UBER, https://www.uber.com/safety (last visited May 6, 2017).

[31] *Ride,* UBER, https://www.uber.com/ride/ (last visited May 6, 2017).

[32] *Can the Uber App Tip My Driver?*, UBER, https://help.uber.com/h/f7385bf5-1748-4fd0-a57f-3d9b62facc45 (last visited May 6, 2017).

[33] *Ride, supra* note 31.

[34] *Partner App*, UBER, https://www.uber.com/drive/partner-app/ (last visited May 5, 2017).

[35] *Id.*

[36] Uber does not seem to require its drivers to display an Uber logo unless local law or other regulation requires it. The Driver, *What You Need to Know About Uber's New User Agreement,* RIDESHARE DASHBOARD (Dec. 15, 2015), http://ridesharedashboard.com/2015/12/11/what-you-need-to-know-about-ubers-new-driver-agreement/. *See also* Nate Boroyan, *It's All About the 'U': Boston Uber Drivers are Getting More Recognizable*, BOSTINNO (Jan. 8, 2015, 6:30 AM), http://bostinno.streetwise.co/2015/01/08/uber-u-emblem-boston-uberx-drivers-required-to-have-uber-u-on-windshield/ (describing company's request to Boston UberX drivers to display the Uber U logo on cars).

[37] *How Do I Get a Fare Estimate?*, UBER, https://help.uber.com/h/c577181c-59d1-47d7-96f8-153f89889302 (last visited Mar. 11, 2017).

[38] *See Partner App*, *supra* note 34.

consistently low reviews.[39] Additionally, Uber holds drivers to some safety standards and mandates minimum amounts of insurance coverage.[40] Uber also carries its own insurance. Notably, Uber sets some requirements about the quality and age of vehicles its drivers may use. Recently Uber even launched a vehicle leasing and rental program.[41] Under the program, an Uber driver can lease or rent a car through Uber, and car payments may be deducted from driver earnings directly.[42]

1. Employment Law Concerns

On its website, Uber calls its drivers "partners," and classifies them as independent contractors and not employees.[43] But based on the facts of Uber's relationship with its drivers, the label "independent contractor" may not withstand scrutiny. Uber exerts control over the mode and manner of its drivers' performance and goes beyond merely connecting a driver to a passenger. Thus, a more traditional employment relationship may very well exist.

The issue of whether Uber drivers are employees has been a contentious one in several forums.[44] Most notably, the California Labor Department disagreed with Uber's own classification and found that drivers indeed are

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[39] *See I'd Like to Know My Rating*, UBER, https://help.uber.com/h/e9302f73-8625-427f-abf7-dbe7ab25af7d (last visited Jan 25, 2016) (describing Uber's rating system for customers and drivers). While deemed an important part of building trust in the sharing economy, rating systems like Uber's have been criticized as untrustworthy and ineffective. *See, e.g.*, Jeff Bercovici, *Uber's Ratings Terrorize Drivers and Trick Riders. Why Not Fix Them?*, FORBES (Aug. 14, 2014), http://www.forbes.com/sites/jeffbercovici/2014/08/14/what-are-we-actually-rating-when-we-rate-other-people/#5fb0b6e68ba7 (arguing that passing judgment on people is part of the problem with Uber); Kat Kane, *The Big Hidden Problem with Uber? Insincere 5-Star Ratings*, WIRED (Mar. 19, 2015), http://www.wired.com/2015/03/bogus-uber-reviews/.

[40] *See Uber Driver Jobs*, UBER, https://www.uber.com/driver-jobs (last visited Feb. 5, 2016) (describing that drivers must, at a minimum, have personal auto insurance); *see also* Jennie Davis, *Drive at Your Own Risk: Uber Violates Unfair Competition Laws by Misleading Uberx Drivers About Their Insurance Coverage*, 56 B.C. L. REV. 1097, 1101 (2015) (arguing that Uber misrepresented its insurance coverage for UberX drivers and may have violated California unfair trade practices laws).

[41] *See Vehicle Solutions*, UBER, https://www.uber.com/drive/vehicle-solutions/ (last visited May 5, 2017).

[42] *Leasing*, UBER, https://www.uber.com/drive/vehicle-solutions/leasing/ (last visited May 5, 2017).

[43] *Uber Partners*, UBER, https://partners.uber.com/join/ (last visited Jan. 25, 2016).

[44] *See, e.g.*, Ashley L. Crank, O'Connor v. Uber Technologies, Inc.: *The Dispute Lingers—Are Workers in the On-Demand Economy Employees or Independent Contractors?*, 39 AM. J. TRIAL ADVOC. 609 (2016).

employees under a California labor statute.[45] Factors the agency considered include the integral role drivers play in Uber's business and the ways Uber controls the mode and manner of their performance.[46] In particular, the agency cited the facts that Uber requires its drivers to use iPhones, mandates the age and condition of vehicles, requires insurance coverage, sets all prices, and performs background checks.[47] The agency flatly rejected Uber's characterization of its role as a mere "neutral technological platform" that simply matches a driver to a passenger.[48] Instead, the agency held that, in reality, Uber controlled all aspects of its operations and that its drivers should be classified as employees under California labor and employment law.[49]

The issue of whether Uber drivers are employees has not been decided yet in a tort law context. While the issue has come up in litigation, lawsuits that raised respondeat superior arguments have been settled without judicial resolution. For example, Uber was sued in San Francisco after one of its drivers struck and killed a child.[50] On New Year's Eve 2013, six-year-old Sophia Liu was crossing a San Francisco street in a crosswalk with her mother and brother when an Uber driver hit her.[51] The driver was logged into Uber at the time of the accident, searching for his next fare.[52] In a civil suit over Liu's death, plaintiffs argued that Uber should be held vicariously

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[45] *See* Berwick v. Uber Techs., Inc., No. 11-46739 EK, 2015 WL 4153765, at *6 (Cal. Dep't of Labor June 3, 2015). The Commissioner noted:

> Plaintiff's car and her labor were her only assets. Plaintiff's work did not entail any 'managerial' skills that could affect profit or loss. Aside from her car, Plaintiff had no investment in the business. Defendants provided the iPhone application, which was essential to the work. But for Defendant's intellectual property, Plaintiff would not have been able to perform the work. In light of the above, Plaintiff was Defendants' employee.

Id. at *6.

[46] *Id.* at *3–4.

[47] *Id.*

[48] *Id.* at *6.

[49] *Id.*

[50] *Family of Girl Killed in SF Crosswalk Suing Uber for Wrongful Death*, CBS S.F. BAY AREA (Jan. 27, 2014, 4:13 PM), http://sanfrancisco.cbslocal.com/2014/01/27/family-of-girl-killed-in-sf-crosswalk-suing-uber-for-wrongful-death/.

[51] *Family of 6-Year-Old Girl Killed By Uber Driver In San Francisco Settles Lawsuit*, CBS S.F. BAY AREA (July 14, 2015, 8:21 PM), http://sanfrancisco.cbslocal.com/2015/07/14/uber-lawsuit-sofia-liu-san-francisco/.

[52] *Id.*

liable for the driver's negligence.[53] The case settled without judicial resolution of the issue.[54]

Scholars have also weighed in on whether ridesharing platforms should be deemed vicariously liable under respondeat superior or other principles.[55] Indeed, the impact ridesharing has had on labor and employment law has been the topic of much scholarly inquiry to date,[56] and continues to be an unsettled issue under the law.

2. For-Hire Classifications

Ridesharing platforms are in the business of providing transportation to members of the public in exchange for payment. In this way, passengers using ridesharing services are more than mere social guests, and companies like Uber and Lyft fit the mold of a transportation service provider acting as a common or private carrier. The classification is significant: common and private carriers are held to specific regulations and standards. Taxi cab services, for example, undergo permit and licensure requirements that vary by jurisdiction, and often pay special fees for the privilege of operating.[57]

In the tort context, the classification of common carrier may play an important role in determining tort liability and vicarious liability. Common carriers are held to a higher standard of care by virtue of the service they provide to the public.[58] Safety is paramount, and liability to injured

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[53] *See id.* (discussing the Liu family's wrongful death lawsuit, which sought damages against Uber for injuries caused by one of its drivers).

[54] *Id.*

[55] *See* Lauren Geisser, Note, *Risk, Reward, and Responsibility: A Call to Hold Uberx, Lyft, and Other Transportation Network Companies Vicariously Liable for the Acts of Their Drivers*, 89 S. CAL. L. REV. 317, 347 (2016) (arguing that Transportation Network Companies ("TNCs") should be vicariously liable under California law for the acts of their drivers under either respondeat superior or liability for independent contractors).

[56] *See, e.g.*, V.B. Dubal, *Wage Slave or Entrepreneur?: Contesting the Dualism of Legal Worker Identities*, 105 CAL. L. REV. 65 (2017); Blake E. Stafford, Comment, *Riding the Line Between "Employee" and "Independent Contractor" in the Modern Sharing Economy*, 51 WAKE FOREST L. REV. 1223 (2016); Grant E. Brown, Comment, *An Uberdilemma: Employees and Independent Contractors in the Sharing Economy*, 75 MD. L. REV. Endnotes 15 (2016); Robert L. Redfearn III, Comment, *Sharing Economy Misclassification: Employees and Independent Contractors in Transportation Network Companies*, 31 BERKELEY TECH. L.J. 1023 (2016).

[57] *See* Katherine E. O'Connor, Comment, *Along for the Ride: Regulating Transportation Network Companies*, 51 TULSA L. REV. 579, 583 (2016).

[58] *See, e.g.*, Butigan v. Yellow Cab Co., 320 P.2d 500, 503 (Cal. 1958) (holding that taxis are common carriers subject to the upmost degree of care); Ingham v. Luxor Cab Co., 93 Cal. App. 4th 1045, 1058 (2001) (noting that California law holds ride services as common carriers, unless a passenger is given a ride gratuitously); Harding v. Triplett, 235

passengers will attach for even slight negligence in some instances.[59] Further, common carriers have a non-delegable duty of safety.[60] This means that having an independent contractor perform a safety role will do little to insulate the common carrier from liability. Rather, the common carrier remains on the hook for someone else's breach of a non-delegable duty.[61] Uber, however, argues that it is not a common carrier,[62] while some scholars have discussed whether ridesharing services should be deemed common carriers.[63]

Alternatively, ridesharing platforms may fall under the private carrier classification. A private carrier is a driver for hire who does not serve the public at large, but rather enters into a specific agreement to provide transport.[64] They are still held to an ordinary standard of care, even to passengers in the vehicle.[65]

The tort law inquiry into carrier status looks beyond the company's own classification and at the facts of their operation. In this way, even new platforms that do not fit neatly into the legacy economy may be deemed common or private carriers under tort law. This inquiry may look to regulation, but it is a separate inquiry and a distinct factor for determining duty and scope of liability in tort.

S.W.2d 112, 113 (Mo. Ct. App. 1950) (holding that a ride service that offers to transport members of the public from one place to another is a common carrier subject to the highest degree of care and safety).

[59] *See id.*

[60] *See* Geisser, *supra* note 55, at 331 (citing RESTATEMENT (SECOND) OF TORTS § 424).

[61] *See, e.g.*, Maloney v. Rath, 445 P.2d 513, 515–16 (Cal. 1968) (en banc) (holding an employer liable for contractor's negligence when contractor performing a nondelegable duty); *see also* RESTATEMENT (THIRD) OF AGENCY § 7.06 (AM. LAW. INST. 2006).

[62] *E.g.*, Doe v. Uber Techs., Inc., 184 F. Supp. 3d 774, 786–91 (N.D. Cal. 2016) (denying Uber's claims in a motion to dismiss that its drivers were independent contractors and that the service did not operate as a common carrier under California law).

[63] *See* Shelly Kreiczer-Levy, *Consumption Property in the Sharing Economy*, 43 PEPP. L. REV. 61, 122 (2015) (noting regulatory options for dealing with sharing economy challenges); Kevin Werbach, *Is Uber A Common Carrier?*, 12 I/S: J.L. & POL'Y FOR INFO. SOC'Y 135, 141 (2015) (labeling TNCs as "internet-based utilities" and suggesting a new or revised regulatory scheme that treats them like a common carrier); Vanessa Katz, Comment, *Regulating the Sharing Economy*, 30 BERKELEY TECH. L.J. 1067, 1069 (2015) (surveying regulatory approaches and noting key considerations for regulators); Riebana Sachs, Comment, *The Common Carrier Barrier: An Analysis of Standard of Care Requirements, Insurance Policies, and Liability Regulations for Ride-Sharing Companies*, 65 DEPAUL L. REV. 873, 874 (2016) (arguing that ridesharing companies like Uber should be legislatively excluded from common carrier classification).

[64] MICHAEL PAUL THOMAS ET AL., CAL. CIV. PRAC. TORTS § 28:2 (2016).

[65] *See id.*

B. Existing Regulatory Approaches

Regulating ridesharing through enacted law and government agencies has been a focal point of the sharing economy debate.[66] The regulatory challenges stem from the fact that the taxi industry is already highly regulated, yet ridesharing does not fit neatly into the existing framework.[67] Additionally, ridesharing services have entered markets without first complying with regulatory requirements for traditional transportation providers, which has led to clashes with the taxi lobby.[68]

The regulation discussion has involved two aspects. The first is who should regulate ridesharing services, and the second is how to regulate them.

1. Who Should Regulate Ridesharing

Government regulation can happen on a federal, state, or local level. Alternatively, an industry can be self-regulated, relying not on any government requirements but meeting the needs of consumers through its own industry-wide or internal policies and procedures.

On the federal level, agencies like the Federal Trade Commission ("FTC") have already begun looking at what to do about ridesharing services. And some have called for federal regulation of ridesharing platforms.[69] But under the current Trump administration, new comprehensive federal regulation seems unlikely.

The FTC seeks to address two specific concerns in the sharing economy. On the one hand, it wants to ensure fair competition and operation of the free market. On the other, it seeks to protect consumers from unfair trade practices. For example, the FTC warned the city of Chicago about its restrictions on ridesharing services that were designed to provide a special benefit to the existing taxi lobby.[70] The FTC noted that the rules were anti-

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[66] *See infra* notes 78–79.

[67] *See infra* Section IV.A.

[68] *See* DUNCAN MCLAREN & JULIAN AGYEMAN, SHARING CITIES: A CASE FOR TRULY SMART AND SUSTAINABLE CITIES 25 (2015).

[69] *See, e.g.*, Joshua M. Mastracci, Comment, *A Case for Federal Ride-Sharing Regulations: How Protectionism and Inconsistent Lawmaking Stunt Uber-Led Technological Entrepreneurship*, 18 TUL. J. TECH. & INTELL. PROP. 189, 190 (2015) (suggesting that federal-level uniform regulations will promote innovation).

[70] Paul Merrion, *FTC Warns Chicago: Don't Let Ride-Sharing Regs Hurt Competition*, CHI. BUS. (Apr. 21, 2014), http://www.chicagobusiness.com/article/20140421/news02/140429966/ftc-warns-chicago-dont-let-ride-sharing-regs-hurt-competition; *see also* Ill. Transp. Trade Ass'n v. City of Chicago, 839 F.3d 594, 595 (7th Cir. 2016) (criticizing taxi group's challenge to ridesharing platform regulation as anti-competitive in nature).

competitive and unfairly restricted Uber's ability to operate.[71] Additionally, the FTC held a workshop in June 2015 to discuss regulatory challenges in the new sharing economy, and a report summarizing the workshop and sharing economy concerns generally was issued in November 2016.[72]

Comprehensive federal regulations seem like an unrealistic solution, however. Under the Trump administration, new regulations are unlikely as the executive branch pushes to reduce regulations across the board. On January 30, 2017, an executive order was issued titled "Presidential Executive Order on Reducing Regulation and Controlling Regulatory Costs."[73] It requires that two existing regulations be eliminated for every new regulation issued.[74] This reduction in regulations is also supposed to offset the cost of the new regulation.[75] Additionally, the new regulation, as offset by the eliminated regulation, cannot impose any new costs on industry actors:

> [T]he heads of all agencies are directed that the total incremental cost of all new regulations, including repealed regulations, to be finalized this year shall be no greater than zero, unless otherwise required by law or consistent with advice provided by the Director of the Office of Management and Budget.[76]

Thus, a massive reduction in regulations—both as to amount of regulations and costs—is one of the goals of the Trump administration.

Further, changes at the FTC under the Trump administration may mean few, if any, controls over the sharing economy on a federal level. President Trump has designated Commissioner Maureen K. Ohlhausen to serve as the new chairman of the FTC.[77] Ohlhausen delivered some prepared remarks during the June 2015 sharing economy workshop, during which she stressed that the FTC is not necessarily looking to implement broad

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[71] Merrion, *supra* note 70.

[72] EDITH RAMIREZ ET AL., FED. TRADE COMM'N, THE "SHARING" ECONOMY: ISSUES FACING PLATFORMS, PARTICIPANTS, AND REGULATORS (2016), https://www.ftc.gov/system/files/documents/reports/sharing-economy-issues-facing-platforms-participants-regulators-federal-trade-commission-staff/p151200_ftc_staff_report_on_the_sharing_economy.pdf [hereinafter *FTC Staff Report*] ("The Workshop examined competition, consumer protection, and regulatory issues posed by the rise of sharing economy platforms, exploring how regulators can pursue legitimate regulatory goals such as those relating to health, safety, or consumer protection, while avoiding regulations that may unnecessarily chill innovation, entry, and competition.").

[73] Exec. Order No. 13771, 82 Fed. Reg. 9339 (Jan. 30, 2017).

[74] *Id.* § 2(a), 82 Fed. Reg. at 9340.

[75] *Id.* § 2(c), 82 Fed. Reg. at 9340.

[76] *Id.* § 2(b), 82 Fed. Reg. at 9340.

[77] Press Release, FTC, Statement of Acting FTC Chairman Ohlhausen on Appointment by President Trump (Jan. 25, 2017), https://www.ftc.gov/news-events/press-releases/2017/01/statement-acting-ftc-chairman-ohlhausen-appointment-president.

enforcement action against sharing economy actors.[78] Rather, she expressed a need to offer guidance and avoid over-regulation instead:

> I want to assure you that we did not convene today's workshop as a prelude to some planned, big enforcement push in this [sharing economy] space. Rather, I see this workshop as an important part of our broader responsibility to advocate for the interests of consumers using the full panoply of our tools and expertise. Particularly in an area like this, where many of the key issues are playing out at the state and local level, we need to tailor our approach to the facts on the ground. I am going to repeat myself here because I really cannot stress this enough: interest in new developments in the economy by the FTC does not automatically portend a flurry of future enforcement actions.[79]

Ohlhausen went on to suggest that the FTC can provide neutral analysis of the economic impact of proposed state legislation or general industry guidelines, without enforcement action.[80] In this way, local regulations will become even more important. States, cities, and counties have already attempted to create their own regulatory schemes to deal with ridesharing services on a local level.[81] And several scholars have also examined whether local regulation is the best way to deal with the sharing economy.[82]

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[78] Maureen K. Ohlhausen, Commissioner, Fed. Trade Comm'n, *Sharing Some Thoughts on the "Sharing" Economy* (June 9, 2015), https://www.ftc.gov/system/files/documents/public_statements/671141/150609sharingeconomy.pdf.

[79] *Id.* at 2.

[80] *Id.* at 3.

[81] *See, e.g.*, Caleb Holloway, Comment, *Uber Unsettled: How Existing Taxicab Regulations Fail to Address Transportation Network Companies and Why Local Regulators Should Embrace Uber, Lyft, and Comparable Innovators*, 16 WAKE FOREST J. BUS. & INTELL. PROP. L. 20, 32–33 (2015).

[82] *See, e.g.*, Benjamin G. Edelman & Damien Geradin, *Efficiencies and Regulatory Shortcuts: How Should we Regulate Companies like AirBnB and Uber?* , 19 Stan. Tech. L. Rev. 293, 326–27 (2016) (noting that the rules should apply equally to platforms and legacy economy actors so that they may compete on a level playing field); Holloway, *supra* note 81, at 63 (noting the social benefits of TNCs and advocating for regulations that embrace the sharing economy); O'Connor, *supra* note 57, at 581 (arguing that state-level regulation is the best solution for regulating TNCs); Daniel E. Rauch & David Schleicher, Comment, *Like Uber, but for Local Government Law: The Future of Local Regulation of the Sharing Economy*, 76 OHIO ST. L.J. 901, 902 (2015) (suggesting that state and local governments should develop policy regimes utilizing agglomeration economics and public choice to regulate the sharing economy, focusing not only on consumer protection but also on economic development and equity distribution goals); Sara Thornton, Comment, *The Transportation Monopoly Game: Why Taxicabs Are Losing and Why Texas Should Let Transportation Network Company Tokens Play*, 47 TEX. TECH L. REV. 893, 897 (2015) (calling for deregulation of transportation companies across the board with re-regulation on the local level using hybrid models that benefit both traditional taxi companies and TNCs).

Lastly, self-regulation is an approach often lauded by members of the industry seeking to avoid government regulation.[83] In the sharing economy context, ridesharing platforms purport to merely connect providers with customers, and that the relationship among its users is one built on a system of trust.[84] That trust system itself serves as regulation, at least according to some.[85]

While the debate over who should regulate the sharing economy continues, it seems unlikely that the federal government will pass comprehensive, formal regulation. Rather, local regulation, be it on the state, county, or city level, seems like a more likely solution. While self-regulation is also an option, some form of other regulation of ridesharing likely will be necessary, at least to some extent. What form that regulation takes, however, also matters.

2. How Should Ridesharing Be Regulated

Regardless of whether regulation occurs on a local or federal level, consideration must be given to the form this regulation should take. Many options exist. First, ridesharing platforms could be held to the same standards as the existing taxi industry. Second, ridesharing platforms could be subject to new, unique regulation that applies only to them. Third, entirely new forms of regulation could be created to apply to both ridesharing and taxi services equally. And lastly, ridesharing could remain unregulated in its entirety, instead relying on industry self-regulation.

First, some advocates within the existing taxi lobby want ridesharing platforms to be held to the same, existing standard as the legacy transportation industry.[86] But the FTC cautions against trying to fit new business models into existing regulatory schemes, as such an approach necessarily hinders fair competition.[87] At the same time, the goals of pre-existing regulation may be undermined when those regulations are not equally applied to new actors, and it is unfair to make only legacy providers bear the regulatory costs and burdens.[88] Some of the existing regulation of the taxi industry serve as a barrier to entry in order to prevent a flood of competitors, so ridesharing services like Uber would have a difficult time

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[83] *See, e.g.*, Molly Cohen & Arun Sundararajan, *Self-Regulation and Innovation in the Peer-to-Peer Sharing Economy*, 82 U. CHI. L. REV. DIALOGUE 116, 129–30 (2015).

[84] *See* Thornton, *supra* note 82, at 917–18.

[85] *See, e.g.*, *id.* at 920.

[86] *See FTC Staff Report*, *supra* note 72, at 54–55 (citing testimony of taxi lobby).

[87] *Id.* at 52.

[88] *See id.* at 54.

participating and competing if held to existing standards.[89] This may explain why companies like Uber seem to take an ask-forgiveness-not-permission approach, entering markets without complying with regulatory requirements beforehand. Naturally, this approach has been criticized by regulators.[90]

Second, some say that ridesharing should be subject to less stringent regulations than traditional actors.[91] But Ohlhausen even cautioned against the unfair competitive advantage ridesharing would have if they had to comply with a different, less stringent set of rules.[92]

Some state and local regulations have emerged that allow ridesharing platforms to operate, but under certain safety or insurance requirements. California has a specific law that refers to ridesharing platforms as Transportation Network Companies ("TNCs"), which are defined as a company "that provides prearranged transportation services for compensation using an online-enabled application or platform to connect passengers with drivers using a personal vehicle."[93] The law itself focuses

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[89] *See id.* at 56. The FTC Report describes over 160,000 new for-hire providers that have registered with Uber alone. *Id.* at 68. Critics point out that companies like Uber benefit from jumping into markets without complying with burdensome regulations in advance—regulations that traditional industry actors are being held to. *See id.* Some also note that the recession itself has fueled the desire of drivers to sign up for Uber, but at the cost of those who have established careers in the taxi industry. *See id.* (citing Jill Ward, *Uber Effect Sees Taxi Fares Tank Around the World, Deutsche Says*, BLOOMBERG (May 19, 2016, 7:52 AM), http://www.bloomberg.com/news/articles/2016-05-19/uber-effect-sees-taxi-fares-tank-around-the-world-deutsche-says (noting the effect Uber has had on lowering fares)); *see also* Dubal, *supra* note 56, at 134–38 (describing economic impact on privatization of medallions in the city of San Francisco).

[90] *See FTC Staff Report*, *supra* note 72, at 55, 72. For example, a commissioner for the California Public Utilities Commission has criticized sharing economy companies that offer a service before seeking permission to do so, citing such conduct as illegal and as undermining public confidence. *Id.* *But see* Benjamin Edelman & Damien Geradin, *Spontaneous Deregulation: How to Compete with Platforms that Ignore the Rules*, HARV. BUS. REV., Apr. 2016, at 4, https://myhbp.org/leadingedge/d/cla?&c=43839&i=43841&cs=03cd442117f246b7350f7c772465a3ab (noting that "spontaneous private deregulation" is not a new phenomenon, and that early automobile and aviation industry actors initially took similar approaches.)

[91] *See FTC Staff Report*, *supra* note 72, at 55 (citing Edelman & Geradin, *supra* note 82, at 311).

[92] Ohlhausen, *supra* note 78, at 4–5.

[93] CAL. PUB. UTIL. CODE § 5431(a) (West 2016); *see also* Ravi Mahesh, Note, *From Jitneys to App-Based Ridesharing: California's "Third Way" Approach to Ride-for-Hire Regulation*, 88 S. CAL. L. REV. 965, 1009 (2015) (discussing TNCs and California's adoption of the definition).

on background checks for drivers, vehicle and driver safety, and adequate insurance coverage at the platform level.[94]

Similarly, Honolulu has passed its own ordinance to deal with Uber and Lyft. It requires a special certification for all drivers, which includes satisfactorily displaying driving ability, knowledge of the city, proof of medical fitness, and national background check.[95] It prohibits certification if the driver has a certain number of traffic violations, prior convictions for certain crimes, or is a registered sex offender.[96] It also requires specific recordkeeping, vehicle certification by the platform, and vehicle display of the platform's logo.[97]

Finally, industry self-regulation is another mechanism for regulating the sharing economy. Under this approach, sharing economy companies themselves—rather than the government—enforce certain standards of conduct. One of the methods for self-regulation is the online review process, which builds on the nature of sharing economies as trust and reputation systems.[98] Additionally, ridesharing services may set their own requirements for driver qualifications and insurance, rather than relying on government-mandated standards.[99]

As ridesharing platforms gain popularity in numerous markets, regulations will continue to evolve to address them. Industry self-regulation will likely continue as well, in an effort to reduce the need for government involvement. But accidents continue to happen, and tort law's role must be considered.

C. Interplay of Tort Law and Regulation

Tort law, at its core, is a system of private liability to right individual wrongs. Multiple theories support tort law's imposition of costs on a wrongdoer, including just compensation for injuries, deterrence of future bad conduct, corrective justice, allocation of costs, and enterprise liability theory.[100] Unlike regulation that is designed to prospectively prevent

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[94] *See* CAL. PUB. UTIL. CODE § 5433.

[95] Honolulu, Haw., Ordinance 16-38, § 9 (Dec. 16, 2016) (to be codified at HONOLULU, HAW., REV. ORDINANCES ch. 12).

[96] *Id.*

[97] *Id.*

[98] *See FTC Staff Report*, *supra* note 72, at 60 (discussing the ways self-regulation can occur, including criticism of self-regulation as the only form of sharing economy regulation).

[99] *See id.* at 67 (describing the current state of for-hire transport sharing economy services).

[100] *See* Mark A. Geistfeld, *The Coherence of Compensation-Deterrence Theory in Tort Law*, 61 DEPAUL L. REV. 383, 384 (2012); John C.P. Goldberg & Benjamin C. Zipursky, *Torts As Wrongs*, 88 TEX. L. REV. 917, 986 (2010) (arguing that tort law should be

certain conduct, tort law addresses retrospective harms by looking at past conduct and making the victim whole again. But tort law also influences economic actors by dictating what precautions they take to avoid future liability. In this way, tort law is an important corollary to government regulation of certain industries. The deterrence effect of tort law influences business decisions, dictates what companies insure against, and guides industry standards.

Enterprise liability theory also supports the use of tort law to regulate the sharing economy to an equal degree as other industry actors. Enterprise liability theory is the idea that the actor who benefits from certain activity should also bear the liability costs associated with that activity.[101] It veers away from a negligence-based approach because it permits imposing liability on a non-tortfeasor who nonetheless is the one who benefitted from the tortfeasor's activities.[102] Enterprise liability theory also serves to treat fairly multiple actors within an industry. As with government regulation, the concern is that the playing field must be level for the traditional taxi industry and new ridesharing platforms. Taxi companies already face vicarious liability and other tort liability as a result of the services they provide.[103] It follows that ridesharing services should have the same rules applied to them to the same extent.

These theories that underlie tort law and its purpose support the generous use of tort as a regulatory mechanism in the sharing economy. Indeed, tort law is an effective tool for dealing with some enterprise-level concerns. The liability regime established in the common law influences industry actors, and essentially regulates conduct. In this way, tort law is an important complementary concept to formal government regulation. And as economic realities continue to change, tort law's flexibility enables both legacy economy actors and platform-based newcomers to continue to

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conceptualized as righting a legal wrong and not merely as a system for allocating costs for accidental losses); John C.P. Goldberg & Benjamin C. Zipursky, *Tort Law and Moral Luck*, 92 CORNELL L. REV. 1123, 1127 (2007) (emphasizing the corrective justice purpose of tort law over "moral luck"); Gary T. Schwartz, *Reality in the Economic Analysis of Tort Law: Does Tort Law Really Deter?*, 42 UCLA L. REV. 377, 430 (1994) (asserting that different tort regimes have varying deterrent capacities); Benjamin Shmueli, *Legal Pluralism in Tort Law Theory: Balancing Instrumental Theories and Corrective Justice*, 48 U. MICH. J.L. REFORM 745, 748–49 (2015) (arguing for a pluralistic approach that balances multiple goals of tort law).

[101] Gregory C. Keating, *The Idea of Fairness in the Law of Enterprise Liability*, 95 MICH. L. REV. 1266, 1267 (1997).

[102] *See id.* at 1269.

[103] *See, e.g.*, Secci v. United Indep. Taxi Drivers, Inc., 214 Cal. Rptr. 3d 379, 389–91 (Ct. App. 2017) (holding that government regulations which require taxi companies to exert a certain amount of control over their drivers does not preclude vicarious liability).

evolve.[104] Ultimately, tort law may interplay with regulation to provide a complete solution to complicated liability problems.

III. TORT LAW PRINCIPLES AND THE SHARING ECONOMY

Several existing mechanisms within the law of tort prove useful in addressing the unique liability concerns raised by the sharing economy. Specifically, tort law provides numerous ways to hold a company liable for the acts of others, whether they are employees, independent contractors, or mere business "partners." This section will examine vicarious liability principles in general and how they have been applied in the transportation context in particular.

A. Vicarious Liability Principles Generally

Vicarious liability plays a key role in tort law. In its most basic sense, vicarious liability means a third party stands in the shoes of the tortfeasor and is liable for the tortfeasor's tortious conduct despite committing no wrongful act personally.[105]

While vicarious liability represents another form of no-fault liability, it nonetheless is supported by various principles underlying tort law, including cost allocation and adequate compensation, corrective justice, and deterrence. First, vicarious liability supports cost allocation and adequate compensation for victims because a solvent defendant may bear the cost of a judgment rather than the victim or individual tortfeasor.[106] In this way, the risk of non-recovery is reduced and the costs of injuries are placed on the entity most able to absorb them.

Second, corrective justice goals may be served by vicarious liability. After all, it is the employer who stood to benefit from the employee's activity and, as such, justice may be served by holding the employer accountable.[107] On the other hand, some argue that the concept of "justice" is hard to define in the accident context, even though our sense of fairness

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[104] Even though the sharing economy has caused unique disruptions in the marketplace, platform-based businesses will eventually become established, and may even venture into offline industries. At the same time, legacy economy actors may react by evolving into platform-based services. Orly Lobel, *The Law of the Platform*, 101 MINN. L. REV. 87, 162–63 (2016).

[105] *See* Geisser, *supra* note 55, at 326.

[106] *See, e.g.*, Bussard v. Minimed, Inc., 129 Cal. Rptr. 2d 675, 679 (Ct. App. 2003) (discussing the principle that "a business should absorb the costs" associated with the liability of its employees as part of an allocation of risk for the cost of doing business).

[107] Jules L. Coleman, *Tort Law and the Demands of Corrective Justice*, 67 IND. L. J. 349, 375 (1992) (noting that "[c]orrective justice requires annulling wrongful gains and losses").

remains relevant nonetheless.[108] While it is debatable whether notions of fairness can meaningfully inform tort law, vicarious liability nonetheless may be supported by corrective justice tort theory.

Third, deterrence goals also support the use of vicarious liability. Even though vicarious liability is a form of no-fault liability, it nonetheless dictates conduct. Thus, a third party that knows it may be liable for the torts of others over whom they have some control will insist on maintaining certain safety measures. Companies will minimize their exposure to liability and will engage in practices that promote fewer instances of tortious conduct.[109] And decisions to insure against certain losses are influenced by potential liability under tort law. Thus, companies will insure against tort liability if they will be on the hook vicariously for certain conduct.

These theories support the use of vicarious liability, particularly in the sharing economy context. This section examines basics as to when vicarious liability usually attaches generally, including (1) liability for employees and independent contractors, and (2) joint enterprise liability.

1. Liability for Acts of Employees & Independent Contractors

Respondeat superior allows an employer to be held liable for the tortious act of its employee under certain circumstances. In order for respondeat superior to apply, two general requirements must be met: an employment relationship and an employee acting within the scope of employment. Even if these two elements are not met, however, and employer may still be liable for the work of independent contractors in some instances.

First, an employment relationship exists when the employer has the right of control over the means and manner of the employee's performance.[110] Employment contemplates a continuing relationship between the employer and employee, and not merely hiring someone for a specific, narrow task. Thus, the ability to control the mode of manner of performance becomes an important element. In order to have control, the employer has the authority to direct the employee as to what the employee may or must do and exert some influence over the employee's work.[111] This can include providing

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[108] *See, e.g.*, GUIDO CALABRESI, THE COSTS OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS, 293–94 (1970).

[109] *See* Shmueli, *supra* note 100, at 790 (noting that vicarious liability motivates employers to invest in restricting employees' wrongdoing).

[110] *See* RESTATEMENT (THIRD) OF AGENCY § 2.04 (AM. LAW. INST. 2006) ("An employer is subject to liability for torts committed by employees while acting within the scope of their employment.").

[111] *Id.* § 1.01 cmt. f.

instructions, assigning specific tasks, assessing performance, and even terminating the relationship.[112]

Second, the employee must be acting within the scope of employment in order for vicarious liability to attach. This means the employee must be doing business for the employer at the time of the tort. But the employee may be on a "frolic and detour" and thereby acting beyond the scope of employment.[113] "Frolic and detour" means the tortfeasor, even if an employee on the job, nonetheless is acting for his own purpose rather than his employer's purpose.[114] As a result, no vicarious liability attaches.

Even without an employment relationship and respondeat superior, an employer may be liable for the work of an independent contractor, such as when the independent contractor acts with apparent authority or performs non-delegable duties.[115] First, as to apparent authority, the independent contractor may be the employer's agent and thus has authority to perform certain tasks. If the independent contractor exceeds authority, however, the employer may still be liable to a third person if the independent contractor acted with apparent authority.[116] In other words, the third party justifiably relies on the independent contractor's apparent authority, and the employer thus is liable vicariously.

Second, certain tasks are non-delegable, such as safety duties or inherently dangerous or illegal activities. Thus, the employer who hires an independent contractor to perform such tasks is held vicariously liable for the contractor's torts by virtue of a non-delegable duty.[117]

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[112] *Id.*

[113] *See* Kerl v. Dennis Rasmussen, Inc., 682 N.W.2d 328, 335 (Wis. 2004) ("A deviation or stepping away from the master's business—a 'frolic and detour' in the language of the early common law—may preclude vicarious liability."); Joel v. Morison (1834) 172 Eng. Rep. 1338, 1339; 6 C & P 501, 504 (stating that if the servant goes on a "frolic of his own" without being on his master's business, the master will not be liable); RESTATEMENT (THIRD) OF AGENCY § 7.07 (AM. LAW. INST. 2006) (stating that conduct not intended by an employee to serve any purpose of an employer is outside the scope of employment).

[114] *See Kerl*, 682 N.W.2d at 335.

[115] Another relevant doctrine here is that of the "borrowed servant": an employer may hire an outsourced employee who is permanently employed by another employer. Both employers may be vicariously liable for the borrowed servant's negligence depending on the circumstances. *See* J. Dennis Hynes, *Chaos and the Law of Borrowed Servant: An Argument for Consistency*, 14 J.L. & COM. 1, 4–7 (1994) (criticizing the uncertain state of the "borrowed servant" doctrine and indicating that the "spot control" rule focuses on which employer had control over work at the time of an injury; the "dual liability" rule reasons that both employers are liable since the employment constitutes a double service; and the "transfer of allegiance" rule finds the general employer liable unless a new relationship with the borrowing employer can be found).

[116] RESTATEMENT (SECOND) OF AGENCY § 267.

[117] *See, e.g.*, Maloney v. Rath, 445 P.2d 513, 515–16 (Cal. 1968) (en banc) (holding an

Therefore, vicarious liability may apply when an employment relationship exists, but it is also an option in some instances involving independent contractors.

2. Joint Enterprise Liability

Joint enterprise liability is another form of vicarious liability. A joint enterprise is a business form that may exist when two persons are engaged in a common business purpose.[118] Under joint enterprise liability, one of the participants in the joint enterprise may be liable for the negligence of another participant.[119] While the definitions and elements of joint enterprise liability vary from jurisdiction to jurisdiction, it typically involves a single business purpose and a common profit motive.[120] Additionally, some sort of contract must exist between the parties, and both parties must have "mutual control over the subject matter of the enterprise or over the property engaged therein."[121] A joint enterprise may be found even though no formal business association, like a partnership, exists.[122]

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employer liable for a contractor's negligence when a contractor performs a non-delegable duty); *see also* Hester v. Bandy, 627 So. 2d 833, 842 (Miss. 1993) (holding an employer liable for a contractor hired to perform an illegal activity); Pusey v. Bator, 762 N.E.2d 968, 975 (Ohio 2002) (holding that an employer could be liable for a contractor's negligent performance of an inherently dangerous activity); RESTATEMENT (THIRD) OF AGENCY § 7.06.

[118] Generally, a joint enterprise is synonymous with a joint venture. *See, e.g.*, *Existence of Joint Venture*, 12 AM. JUR. PROOF OF FACTS 2D 295, § 1 (1977) (citing Ross v. Willett, 27 N.Y.S. 785 (N.Y. Sup. Ct. Feb 16, 1984)). The concept of a joint venture as a possible business form seems to arise in an 1894 New York case. *See id.* Cases from around that time also discussed joint enterprise as a concept in tort law, potentially barring recovery when a defendant's negligence is imputed on the plaintiff by virtue of a joint enterprise. *See, e.g.*, Cunningham v. City of Thief River Falls, 86 N.W. 763, 765–66 (Minn. 1901) (rejecting argument that plaintiff was in a joint venture with defendant and thereby barred from recovery).

[119] *See* RESTATEMENT (SECOND) OF TORTS § 491 (AM. LAW INST. 1965); 48A C.J.S. *Joint Ventures* § 60 (1981).

[120] The RESTATEMENT (SECOND) OF TORTS lists the elements for joint enterprise liability as follows:

> (1) an agreement, express or implied, among the members of the group; (2) a common purpose to be carried out by the group; (3) a community of pecuniary interest in that purpose, among the members; and (4) an equal right to a voice in the direction of the enterprise, which gives an equal right of control.

Id. § 491 cmt. c; *see also* Stephens v. Jones, 710 S.W.2d 38, 41 (Tenn. Ct. App. 1984) (holding that joint enterprise liability requires a common business purpose); Popejoy v. Steinle, 820 P.2d 545, 553 (Wyo. 1991) (finding that a trip to buy a calf was not a joint enterprise but rather a family undertaking).

[121] Shell Oil Co. v. Prestidge, 249 F.2d 413, 415 (9th Cir. 1957).

[122] *See, e.g.*, 12 AM. JUR. PROOF OF FACTS 2D, *supra* note 118, §1.

As with other forms of vicarious liability, joint enterprise liability does not give rise to an independent duty; rather, the non-negligent party's liability arises out of the relationship with the tortfeasor.[123] It is essentially imputed negligence.[124] At its core, joint enterprise liability extends from an express or implied voluntary contractual relationship among the joint venturers.[125]

Joint enterprise liability has been used to hold a landlord and a tenant bar owner jointly liable, given that both had a significant pecuniary interest in the bar and control over its operation.[126] It has also been used to hold a city and county liable for damages arising from a sewer project.[127] There, an agreement between the city and county established that both jointly owned parts of the sewer system, and that both had some degree of control over it.[128] An oil company was held liable to another oil company's job candidate who was injured while at a drilling site awaiting an interview.[129] The court held that both oil companies were sharing profits and control over the drilling site under an agreement between them, which was sufficient for applying joint enterprise liability.[130] And joint enterprise liability applied to hold a city transit authority and a state department of transportation jointly liable for an accident occurring on a negligently maintained carpool lane.[131] The court's decision involved an analysis of the specific arrangement between the two agencies: they were embarked on a joint project with a mass-transit purpose, their agreement allocated roles and responsibilities among the agencies, and they shared some responsibilities such as

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[123] *See* Montagazzi v. Crisci, 994 A.2d 626, 634 (Pa. Super. Ct. 2010) (noting that joint enterprise liability does not create a separate, independent duty but instead applies when a violation under some other law occurs). Similarly, joint enterprise liability is different than a direct claim against a business partner or company for negligent hiring or negligent supervision, for example. *See* RESTATEMENT (SECOND) OF TORTS § 491.

[124] In one early example, joint enterprise liability was used to bar a plaintiff's claim. Cullinan v. Tetrault, 122 A. 770, 771–72 (Me. 1923). There, the court held that the plaintiff was in a joint enterprise with the defendant. *Id.* Thus, the plaintiff was barred from recovering because that jurisdiction had a contributory negligence rule at the time, under which any amount of negligence on the plaintiff's part barred recovery. *Id.*

[125] *See, e.g.*, Blount v. Bordens, Inc., 910 S.W.2d 931, 933 (Tex. 1995) (holding that joint enterprise liability did not apply because passengers and a driver of a truck were picking up horses for family and friends and were not involved in a common pecuniary interest).

[126] Bragg v. Soley, No. Civ. A. CV-03-034, 2004 WL 1598676, at *3 (Me. Super. Ct. May 26, 2004).

[127] DeKalb County v. Lenowitz, 463 S.E.2d 539, 542–43 (Ga. Ct. App. 1995).

[128] *Id.*

[129] Shell Oil Co. v. Prestidge, 249 F.2d 413, 415 (9th Cir. 1957).

[130] *Id.*

[131] Tex. Dep't. of Transp. v. Able, 35 S.W.3d 608, 616 (Tex. 2000).

maintenance.[132] Financial burdens were also shared.[133] Thus, a joint enterprise existed for the purposes of applying vicarious liability.[134]

Joint enterprise liability is a flexible doctrine that looks to the underlying facts of the business transaction and the relationship among those that stand to profit from it. In this way, it remains flexible as economic and social norms evolve.

B. Tort Law and the Transportation Industry

Applying tort law to the transportation industry requires looking at possible claims based on both direct and vicarious liability. It also requires a look at the relationship among the victim, tortfeasors, and third parties. Government regulation and some legislative developments have further influenced the analysis. But as a whole, much guidance can be gleaned from viewing the evolution of tort law with transportation industry cases over the last century.

1. Direct Claims against Drivers or Owners

Since the advent of the automobile, courts have developed tort doctrine to address accidents and liability issues. Legislatures too have carved out specific regimes to handle tort liability for automobile accidents. In general, ordinary negligence is the basic standard for vehicle accidents. But passengers who are mere social guests of the driver have a harder time bringing a claim, while certain for-hire carriers may owe special, higher duties to their passengers.

When the victim is the passenger, particular rules may limit liability based upon the reason for the ride. Three categories of drivers have emerged in the law over time: social host, private carrier, or common carrier.[135] Which category applies dictates the scope of liability to the passenger. For social hosts, their liability may be limited by statute or common law. A social host gives the passenger a ride for purely social reasons, with no remuneration of any kind. In order to recover against a social host, the passenger must establish gross negligence or willful or

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[132] *Id.*

[133] *Id.*

[134] *Id.*

[135] *See* A.S. Klein, Annotation, *Nonmonetary Benefits or Contributions by Rider as Affecting His Status Under Automobile Guest Statutes*, 39 A.L.R.3d 1083, § 1 (1971) ("Such statutes frequently do not define the term 'guest' other than as one who has not given 'compensation,' or 'payment,' for his ride.").

wanton conduct, and not just ordinary negligence.[136] Statutes limiting driver liability in this way are often called "Automobile Guest Statutes" and substantially reduce a passenger's ability to sue the driver who is a social host.[137]

For private carriers, an ordinary standard of care likely applies.[138] A private carrier gives the passenger a ride for some sort of remuneration. Monetary payments beyond simple reimbursement for costs certainly count. Or it may simply involve giving the ride for a benefit that is more than just social. For example, driving someone to one's house to fix something may make the driver a private carrier rather than a social host.[139] When the driver is deemed a private carrier, the automobile guest statute or similar exception to liability do not limit liability, and the private carrier is on the hook for damages caused under an ordinary negligence standard.

Common carriers, by contrast, are held to a higher standard than ordinary negligence.[140] A common carrier serves the public at large to provide transportation services for remuneration.[141] As a result, the law places a higher burden on common carriers to protect the safety of its passengers.

Aside from the driver, the automobile owner may also face direct liability in some instances. If the owner was negligent in granting access to the car to the driver, a negligent entrustment claim may exist against the owner.[142] Negligent entrustment claims generally rely on an ordinary negligence standard,[143] but guest statutes may protect owners from claims of social guests as well.[144] For employers who own the vehicles, they also may face negligent retention, supervision, or hiring claims, which are premised on the owner's lack of performing background checks or failing to enforce

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[136] *Id.*

[137] W.C. Crais III, Annotation, *Applicability of Guest Statute and its Requirement of Gross Negligence, Wanton or Willful Misconduct, or the Like, to Owner's Liability for Injuries to Guest in Vehicle Negligently Entrusted to Incompetent Driver*, 91 A.L.R.2d 323, § 5 (1963).

[138] *See* Stiltner v. Bahner, 227 N.E.2d 192, 194–95 (Ohio 1967) (noting that riding along to driver's home to provide him with companionship is mere social benefit rather than remuneration).

[139] *See* Duncan v. Hutchinson, 39 N.E.2d 140, 142–43 (Ohio 1942) (internal citations omitted) (listing examples of remuneration that preclude application of automobile guest statutes).

[140] MICHAEL PAUL THOMAS ET AL., CAL. CIV. PRAC. TORTS § 28:2 (2016).

[141] DAN B. DOBBS ET AL., THE LAW OF TORTS § 263 (2d ed. 2016).

[142] *See, e.g.*, Henderson v. Prof'l Coatings Corp., 72 Haw. 387, 395, 819 P.2d 84, 90 (1991).

[143] *See* Crais, *supra* note 137, at 3.

[144] *See id.*

safety regulations, for example.[145] As with negligent entrustment, these claims usually require ordinary negligence.[146]

Other direct claims may exist against an employer regardless of who owns the vehicle. For example, an employer of a driver may be sued for negligent supervision, retention, and hiring. These claims hinge on the wrongful act of the employer itself, and not merely holding the employer accountable for the employee's tort.[147] An admission of vicarious liability precludes a direct negligence claim and is often used as an affirmative defense to prevent a finding of actual fault on behalf of a company.[148]

2. *Respondeat Superior and Taxi Companies*

Respondeat superior hinges on the existence of an employment relationship, a factual inquiry that is complicated in the taxi industry context. First, some taxi companies may operate under a somewhat traditional model, under which a company owns cabs and hires drivers as employees. Second, a taxi company may lease cabs to drivers, a model that does not fit as neatly in the employer-employee mold. Third, other companies are less centralized and do not own their own cabs. Rather, drivers may own the cabs but use the cab company as a dispatch service. Dispatch services in turn have varying levels of control and involvement over drivers. These and other permutations make respondeat superior a tricky concept to apply in the taxi context. Nonetheless, courts have crafted rules to allow for vicarious liability in some instances over the last century.

First, as to company-owned cabs, a rebuttable presumption of an employment relationship is created.[149] Thus, respondeat superior is presumed for cab companies that use a more traditional model, although

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[145] *See, e.g.*, C.L. Feinstock, Annotation, *Liability, For Personal Injury or Property Damage, For Negligence in Teaching or Supervision of Learning Driver*, 5 A.L.R.3d 271, 2 (1978).

[146] *See id.*

[147] Fowler V. Harper & Posey M. Kime, *The Duty to Control the Conduct of Another*, 43 YALE L.J. 886, 890–91 (1934) (explaining the early distinctions between vicarious liability and direct negligence).

[148] *See* Richard A. Mincer, *The Viability of Direct Negligence Claims Against Motor Carriers in the Face of an Admission of Respondeat Superior*, 10 WYO. L. REV. 229, 230 (2010) (stating that courts correctly dismiss direct negligence claims against motor carriers that admit vicarious liability for a driver's negligent acts); J.J. Burns, Comment, *Respondeat Superior as an Affirmative Defense: How Employers Immunize Themselves from Direct Negligence Claims*, 109 MICH. L. REV. 657, 671 (2011) (criticizing the majority rule of dismissing direct claims once vicarious liability is admitted, arguing that damages for a direct claim should also be apportioned under comparative fault principles).

[149] Shields v. Yellow Cab, Inc., 174 A. 567, 569 (N.J. 1934) (stating that ownership creates a rebuttable presumption of a master-servant relationship).

this can be rebutted by evidence showing no employment relationship.[150] For the second and third categories, no rebuttable presumption exists because the cab company does not own the car. Nonetheless, respondeat superior can be found based on the particular facts of the case.

For companies that lease its cars to drivers, intentionally classifying drivers as mere independent contractors does not prevent application of respondeat superior. In *H.T. Cab Co. v. Ginns*,[151] the court scrutinized the company's arrangement with its drivers and held that a jury could determine an employment relationship exists.[152] Relevant factors identified by the court included the fact that the taxi company owned the cabs, earned a weekly fee from drivers, and connected the drivers to passengers.[153] Similarly, in a worker's compensation case, a dispatch service that subleased cars to drivers was found to be an employer.[154] There, the dispatch service monitored its drivers' movements, limited a driver's ability to reject a fare, forced drivers to leave their radios on, and possessed the authority to fire drivers.[155] All of this amounted to an employment relationship for worker's compensation purposes.[156]

For companies that operate as a dispatch service and do not own cars, liability may still attach based on degree of control and other factors. In *Callas v. Independent Taxi Owners Association*,[157] discussed in the introduction, the court noted the "elusive problem" of assigning responsibility for an accident caused by a driver operating under the name of a cab company.[158] There, a cab hit and injured a pedestrian who was

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[150] *See id.*; English v. Yellow Cab Co., 168 S.E.2d 920, 921 (Ga. Ct. App. 1969) (showing a high probability that a cab involved in an accident was owned by Yellow Cab, thus creating a rebuttable presumption of vicarious liability). Sometimes a statute modifies the common law to hold that an owner is liable for the negligent act of a driver, even though the driver is acting as an independent contractor. *See* Red Top Cab Co. v. Hyder, 204 S.E.2d 814, 815 (Ga. Ct. App. 1974) ("While it is true that proof that the [taxi company] owned the taxi would have raised a presumption that [the driver] was its agent, however, the uncontradicted evidence that the taxi was leased to [the driver] rebutted the inference which disappeared upon proof of the uncontradicted evidence to the contrary."); William D. Bremer, *Liability of Taxicab Company for Cabdriver's Negligence*, 41 AM. JUR. PROOF OF FACTS 2D 239, § 3 (1985) (analyzing ownership of taxicab as basis for imposing vicatious liability); *id.* § 10 (describing the shifting of the burden of proof in disputes involving scope of employment).

[151] 280 S.W.2d 360 (Tex. Civ. App. 1955).

[152] *See id.* at 365–65.

[153] *Id.* at 364.

[154] Scott v. Manzi Taxi & Transp. Co., 579 N.Y.S.2d 225, 226 (App. Div. 1992).

[155] *Id.*

[156] *Id.*

[157] 66 F.2d 192 (D.C. Cir. 1933).

[158] *Id.* at 192.

operating a pushcart in Washington, D.C.[159] The court looked at the particular structure of the company's business: the cab company did not own the cabs or employ the driver.[160] But the cab owned the registered trade name and logo that appeared on the cabs.[161] Further, the cab company received thousands of dollars a month in revenue from the cabs' operation and was the one with authority to operate cabs.[162] The court held that these factors were relevant for analyzing whether respondeat superior applied.[163]

Similarly, the taxi company in *Rhone v. Try Me Cab Co.*,[164] also discussed in the introduction, did not own its cabs and instead functioned more like a dispatch service.[165] In that case, the taxi company had the necessary permits, displayed its logos on the cars, and sent "independent contractor" drivers to get passengers who called the taxi company.[166] The court noted that the arrangement supported respondeat superior liability, and that the company cannot deceive the public by creating a perception of responsibility through its logo and advertising—on which customers will rely.[167] Similarly, in *Weingarten v. XYZ Two Way Radio Service, Inc.*,[168] a dispatch service was deemed an employer for worker's compensation purposes.[169] There, the drivers owned their own vehicles, but the dispatch service assigned fares to drivers in a certain order, made drivers keep their radios on, expected drivers to buy shares in the dispatch service, and used a voucher system with penalties for drivers who took fares from other sources.[170] The court concluded that the service had "exclusive authority over the handling and processing of the voucher payment system" and this, with other factors, established that the drivers were employees of the dispatch services for worker's compensation purposes.[171]

Thus, respondeat superior may be found under various arrangements between transportation service providers and drivers, despite the ways companies attempt to carve themselves out of the traditional employment relationship.

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[159] *Id.*

[160] *Id.* at 194.

[161] *Id.* at 193.

[162] *Id.*

[163] *Id.* at 194. The court reversed a directed verdict in favor of the cab company and remanded the case for further proceedings. *Id.*

[164] 65 F.2d 834 (D.C. Cir. 1933).

[165] *Id.* at 835.

[166] *Id.*

[167] *Id.* at 835–36.

[168] 583 N.Y.S.2d 316 (N.Y. App. Div. 1992).

[169] *Id.* at 317.

[170] *Id.*

[171] *Id.*

3. Joint Enterprise Liability in the Transportation Context

Joint enterprise liability has been applied in some cases dealing with transportation services, both as to the passenger and driver, or as to the driver and some third party. Joint enterprise liability has also been applied in some trucking industry cases as well.

First, some courts have found that a joint enterprise existed between a passenger and a driver. In those cases, courts have analyzed whether the passenger and driver are embarking on a common business purpose with a profit motive.[172] In some cases, however, a finding of joint enterprise liability among a passenger and a driver had the effect of barring the passenger's suit altogether under certain contributory negligence rules.[173] Thus, some courts have criticized such usage as unfair.[174]

Second, joint enterprise liability has also been used to hold a car owner liable for the acts of a driver; in some instances, courts applied the dangerous instrumentality doctrine, which resulted in strict vicarious liability for car owners (or someone with an identifiable property interest in the vehicle) for the negligence of the driver.[175] This form of liability posed special problems for companies in the business of renting or leasing cars. In response, states have taken different approaches on the issue of liability for car dealers and rental agencies; some jurisdictions, including New York and Florida, enacted statutes mandating vicarious liability for lessors.[176]

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[172] *See, e.g.*, Painter v. Lingon, 71 S.E.2d 355 (Va. 1952) (husband's negligence as driver not imputed onto wife, who was a passenger and injured, despite their co-ownership of vehicle).

[173] *See, e.g.*, Yant v. Woods, 120 S.W.3d 574, 580 (Ark. 2003); Smalich v. Westfall, 269 A.2d 476, 483 (Pa. 1970) (holding that jury properly found that no vicarious liability existed and passenger can prevail in suit against driver).

[174] *See* Reed v. Hinderland, 660 P.2d 464, 466 (Ariz. 1983) (holding that imputed contributory negligence of passenger is not presumed when passenger sues driver for damages); Gilmer v. Carney, 608 N.E.2d 709, 711 (Ind. Ct. App. 1993) (holding that imputed negligence through joint enterprise only applies in actions against third persons); Kalechman v. Drew Auto Rental, Inc., 308 N.E.2d 886, 891 (N.Y. 1973) (holding that a passenger's wrongful death claim against a driver is not to be barred by joint enterprise doctrine).

[175] *See e.g.*, Fojtik v. Hunter, 828 A.2d 589, 595 (Conn. 2003) (holding that an entity renting or leasing a vehicle is liable for damages to the same extent as the vehicle's operator); Christensen v. Bowen, 140 So. 3d 498, 500 (Fla. 2014) (holding that a vehicle owner had control and use over the vehicle and exercised control by granting custody to the operator, thereby accepting potential liability); Murdza v. Zimmerman, 786 N.E.2d 440, 443 (N.Y. 2003) (holding that a vehicle owner is liable for accidents in the vehicle in order to provide recourse against financially responsible defendants, promote care in who can operate a vehicle, and remove hardships for injured plaintiffs).

[176] *See* William Sprouse, *Grave Danger? Concerns and Possible Solutions for*

These liability issues resulted in the passing of federal legislation in 2005 designed to limit the vicarious liability of companies that rent and lease vehicles.[177] Known as the Graves Amendment, this law preempted many state laws that allowed for joint enterprise liability as a means for imputing a driver's negligence on the vehicle's owner.[178] Thus, the Graves Amendment did away with vicarious liability for car lessors in many instances. As to preemption of state law, most state laws imposing vicarious liability are preempted by the Graves Amendment, except laws that merely impose financial responsibility or liability insurance requirements.[179]

Third, joint enterprise liability also has been used in taxi cab cases. For example, in the *Callas* case, discussed above, the court also held that joint enterprise liability may attach to a cab company that did not own its cabs but that had authority to operate cabs, had its logos on a fleet of cars, and in fact received considerable revenue from cab operations.[180] In *American Association of Cab Companies v. Parham*,[181] two related taxi companies were held jointly liable under both respondeat superior[182] and joint enterprise theories of liability.[183] The taxi cab companies had an agreement with the driver and the owner of the cab (which, in some instances was co-owned by the cab companies themselves).[184] The cab companies also required drivers to provide proof of insurance and their driver's license and record.[185] Additionally, the cars bore the insignia of one of the cab companies and driver had to pay monthly fees to the cab companies.[186] Incident reports were also required by the cab companies if any accidents

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Individuals Injured by Drivers of Leased Vehicles, 15 SUFFOLK J. TRIAL & APP. ADVOC. 209, 213–16 (2010).

[177] *See id.* at 211–12.

[178] *See id.* at 212; *see also, e.g.*, *Christensen*, 140 So. 3d at 499 (holding that a title co-owner of a vehicle involved in a drunk driving crash may be vicariously liable for the acts of a driver under the dangerous instrumentality doctrine); Vargas v. Enter. Leasing Co., 60 So. 3d 1037, 1042 (Fla. 2011).

[179] *See* Rosado v. DaimlerChrysler Fin. Servs. Trust, 112 So. 3d 1165, 1167 (Fla. 2013) (holding that the Graves Amendment preempts Florida law imposing vicarious liability on lessors who enter into short-term lease arrangements).

[180] Callas v. Indep. Taxi Owners Assoc., 66 F.2d 192, 193 (D.C. Cir. 1933).

[181] 661 S.E.2d 161 (Ga. Ct. App. 2008).

[182] Factors that contributed to the finding of respondeat superior include the taxi companies co-owning the taxi involved in the accident with a third party. *Id.* at 164. Additionally, both companies exerted some control over the mode and manner of performance. *Id.*

[183] *See id.* at 165. (upholding a jury verdict against the taxi companies).

[184] *Id.* at 163.

[185] *Id.* at 164.

[186] *Id.* at 168.

occurred.[187] Based on these facts, a joint enterprise existed among the cab companies, car owners, and drivers, and joint enterprise liability was applied as to the particular accident at issue.[188]

In addition to taxi companies, other motor carrier service providers have been found liable under a joint enterprise theory. One example is third-party logistics providers in the trucking industry.[189] The term "third-party logistics provider" refers to participants in the supply chain who are "at least once removed from the actor or the direct matter/principal of the actor causing the injury."[190] Up until some deregulation occurred in 1979, trucking companies were highly regulated on a federal level.[191] That year, motor carrier brokers were given broader options for contracting with motor carriers.[192] Motor carriers, in turn, were allowed to function as brokers.[193] Thus, deregulation broadened the roles agents and brokers could play in the shipping supply chain, which in turn meant that third-party logistics providers became more involved in providing goods to customers.[194]

Because of the changing roles in the trucking industry, courts had to analyze the interplay between various industry actors to determine whether vicarious liability applied, particularly as to third-party logistics providers who worked as liaisons between drivers and customers. Respondeat superior did not necessarily apply, however, because of the unique role third-party logistic providers played.[195] But joint enterprise liability has been used depending on the facts of the case.

For example, joint enterprise liability applied in the case of *Johnson v. Pacific Intermountain Express Co.*[196] There, a truck driver was shipping goods for a customer when he negligently struck and killed plaintiff's husband.[197] The truck driver was employed by Tabor, an individual who was the lease-holder for the truck.[198] The shipment was arranged by Marlo

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[187] *Id.* at 164.

[188] *Id.* at 169.

[189] *See* Daniel C. Sullivan & Matthew P. Barrette, *Transportation Tort Liability Travels Up the Supply Chain*, 34 TRANSP. L.J. 289, 293–94 (2007).

[190] *Id.* (listing examples like brokers, transportation intermediaries, and shippers' agents).

[191] *See id.* at 292 (describing the 1979 Interstate Commerce Commission actions that eliminated restrictions on motor carrier brokers).

[192] *Id.*

[193] *Id.* at 293.

[194] *Id.*

[195] *See, e.g.*, Harward v. C.H. Robinson Co., 24 N.E.3d 48, 55–56 (Ill. App. Ct. 2014) (analyzing the standard for independent contractor vicarious liability).

[196] 662 S.W.2d 237 (Mo. 1983).

[197] *Id.* at 238.

[198] *Id.* at 239.

Transport, a third-party logistics provider.[199] The court held that Marlo Transport and Tabor were engaged in a joint enterprise, and thus both were liable to plaintiff for the accident.[200] Factors considered by the court included Marlo Transport's role in finding customers, collecting payments, and keeping a flat percentage as a brokerage fee.[201] Additionally, the court noted that a joint enterprise does not require formalities and can be found for even a single truck haul like in this case.[202] The arrangement between Tabor and Marlo Transport involved equal rights of control, in part because Marlo Transport "was instrumental in launching and directing the truck journey."[203] Thus, the court held that Marlo Transport is also liable and cannot "escape liability by asserting independent contractor status."[204] Further, the court seems to embrace an enterprise theory of liability, expressly noting that a company that engages in a business for profit cannot then say it is off the hook for damages caused by negligence in the process of conducting that business.[205]

By contrast, in *Hayward v. C.H. Robinson Co.*,[206] Robinson, a third-party logistics provider, was not vicariously liable for the negligent acts of a driver.[207] There, Robinson hired Pella, a trucking company, to move some freight, calling them an independent contractor.[208] During the shipment, the driver employed by Pella negligently killed a motorist.[209] The court upheld a grant of summary judgment for Robinson, noting that the lower court properly concluded no joint enterprise liability existed.[210] Under the agreement between the parties, Robinson's role was to arrange for customer cargo to be moved, while Pella's role was to transport the cargo.[211] Robinson paid Pella directly, and Pella was responsible for all of its own costs, including licenses, fees, tolls, equipment, and fuel.[212] Pella was also responsible for training drivers, maintaining safety, and complying with state and federal safety requirements.[213] None of the equipment was owned

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199 *Id.* at 240.
200 *Id.* at 241–42.
201 *Id.* at 241.
202 *Id.*
203 *Id.* at 241–42.
204 *Id.* at 242.
205 *Id.* at 241–42.
206 24 N.E.3d 48 (Ill. App. Ct. 2014).
207 *Id.* at 58.
208 *Id.* at 50.
209 *Id.*
210 *Id.* at 58.
211 *Id.* at 51–52.
212 *Id.*
213 *Id.*

or leased by Robinson.[214] And Pella was responsible for its own insurance.[215] Thus, Robinson showed it had no control over Pella or its driver, thereby escaping joint enterprise liability.[216]

Joint enterprise liability clearly requires a fact-specific inquiry into the relationship between the entities working together to provide transportation services. But it functions as an important path to finding vicarious liability when appropriate because it captures non-traditional relationships that otherwise fail to fit the mold of respondeat superior or other forms of liability.

IV. TORT LAW AS RIDESHARING PLATFORM REGULATION

Ridesharing platforms fill a new role in the legacy economy and challenge existing legal structures, and government regulators are trying to tackle the challenges sharing economy companies create for traditional models of regulation. But as local, state, and federal regulators examine how best to deal with the sharing economy, tort law must be used as an important piece to the regulatory puzzle.

Retrospective tort-based solutions serve as another form of regulating ridesharing platforms. The prospect of liability in tort gives way to more insurance coverage, safety protocols, and other risk-avoidance measures.[217] And tort law helps protect the public from solely bearing the costs and burdens of tortious conduct. Thus, if ridesharing companies know that they may be liable for the acts of their drivers, they will conduct themselves in ways that limit their exposure to liability, and the public will be given some protection from harm.

The key, then, is deciding when and how companies are also liable under tort. Ridesharing platforms, by their very essence, intentionally do not fit neatly into historic categories of enterprise actors. First, ridesharing platforms attempt to classify their drivers as independent contractors instead of employees.[218] Second, ridesharing platforms purport to merely "connect" passengers and drivers, rather than acting as private or common carriers.[219] Third, ridesharing platforms tend to include click-through arbitration agreements in their apps as a way to limit liability.[220] And lastly,

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[214] *Id.*

[215] *Id.*

[216] *Id.* at 53.

[217] Deterrence is a legitimate goal of tort law, and one which serves a regulatory-like function in dictating future conduct. *See, e.g.*, Schwartz, *supra* note 100, at 443–44.

[218] *See supra* Section II.A.1.

[219] *See supra* note 29 and accompanying text.

[220] *See, e.g.*, Mohamed v. Uber Techs., Inc., 836 F.3d 1102, 1106–07 (9th Cir. 2016)

ridesharing companies "partner" with drivers but do not maintain that they are truly business partners with them.[221]

All of these self-classification decisions are examples of how ridesharing platforms attempt to carve themselves out of the existing rules and in turn limit their liability. While it is true companies are free to set up business models and policies in ways that seek to limit liability,[222] the mere fact that ridesharing platforms claim they are not like traditional taxis does not take away the need for thorough, individualized analysis of the realities of their operations.

First, as to independent contractor status, the reality of Uber's arrangement with drivers may very well amount to an employment relationship. The California Labor Commissioner has already deemed Uber drivers employees after thoroughly examining the facts of Uber's operations.[223] Thus, it is very possible that Uber drivers are employees for respondeat superior purposes as well.

But even if the ridesharing platform's drivers are mere independent contractors, vicarious liability may still attach. For example, safety may be a non-delegable duty.[224] In its terms of use, Uber expressly states that it "does not guarantee the quality, suitability, safety or ability of third party

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(requiring the plaintiff to agree to an arbitration provision before signing into the Uber smartphone application). Additionally, platforms may attempt to assert tort immunity under section 230 of the Communication Decency Act (CDA), 47 U.S.C. § 230 (2012). While no cases have examined the applicability of this provision to sharing economy platforms, AirBnB used section 230 of the CDA to argue that it need not comply with a San Francisco ordinance designed to limit short-term rental hosts to registered (and fee-paying) persons or entities only. *See, e.g.*, Tracey Lien, AirBnB's Legal Argument: Don't Hold Us Accountable for the Actions of our Hosts, L.A. TIMES (June 29, 2016, 4:03 PM), http://www.latimes.com/business/technology/la-fi-tn-airbnb-free-speech-20160629-snap-story.html [https://perma.cc/6RAY-WL47]. The case recently settled after AirBnB agreed to redirect potential hosts to a city website to register and to provide data to the city to cross-check for compliance. *See* Colin Dwyer, AirBnB Settles Suit with San Francisco, Aims to Smooth Host Registration, NAT'L PUB. RADIO (May 1, 2017, 5:24 PM), http://www.npr.org/sections/thetwo-way/2017/05/01/526421009/airbnb-settles-suit-with-san-francisco-aims-to-smooth-host-registration.

[221] *See supra* Section II.A.1.

[222] *See, e.g.*, Walkovszky v. Carlton, 223 N.E.2d 6 (N.Y. 1966) (accepting corporate structure of cab company that treated each cab as separate business in order to limit liability). *But see* Mangan v. Terminal Transp. Sys., Inc., 247 A.D. 853, 853 (N.Y. App. Div. 1936) (disregarding corporate form for a single defendant who operated and controlled four taxicab corporations, finding personal liability).

[223] *See* Berwick v. Uber Techs., Inc., No. 11-46739 EK, 2015 WL 4153765, at *6 (Cal. Dep't of Labor June 3, 2015).

[224] *See, e.g.*, Maloney v. Rath, 445 P.2d 513, 515–16 (Cal. 1968) (en banc) (holding an employer liable for contractor's negligence where contractor performed a nondelegable duty); *see also* RESTATEMENT (THIRD) OF AGENCY § 7.06 (AM. LAW. INST. 2006).

providers."[225] Thus, having drivers manage safety could give rise to liability for the ridesharing platform.[226] Additionally, agency principles may indicate that liability still attaches for the actions of an apparent agent or borrowed servant.[227] Even if drivers are mere independent contractors, vicarious liability principles may still require that the ridesharing platform be held liable.[228]

The same is true for the common carrier classification. Ridesharing companies make an effort to avoid being deemed a common carrier, even though their activities may very well fit the definition of a common carrier.[229] For example, Uber's legal terms include the following language (in all capital letters): "You acknowledge that your ability to obtain transportation, logistics and/or delivery services through the use of the services does not establish Uber as a provider of transportation, logistics or delivery services or as a transportation carrier."[230] Regardless, however, tort liability may still exist even if ridesharing companies are not deemed common carriers. For instance, the fact that money is paid for the ride undermines any argument that these platforms somehow connect people for purely social host purposes.[231] The conveyance of money means that drivers are acting as private carriers at the very least, and such private carriers are held to an ordinary negligence standard.[232]

Ridesharing companies also rely on arbitration clauses; for example, Uber's arbitration clause for customers includes a waiver to the right to a jury trial and of the ability to be a part of a class action.[233] But the app user is the one who accepts these terms by using the app, and he or she generally cannot bind third parties. Situations may arise when the passenger is not the person who used the app to request the ride, such as when the app user may have ordered a ride for someone else or the app user is joined by other passengers who did not use the app themselves. The arbitration clause in the app's customer agreement also does not insulate Uber from claims by pedestrians or persons in other vehicles.[234] Thus, while the arbitration clause may serve as a limit on the app user's claims, it does not foreclose

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[225] *U.S. Terms of Use*, UBER, https://www.uber.com/legal/terms/us/ (last visited May 7, 2017) (emphasis omitted).

[226] *See Maloney*, 445 P.2d at 515–16.

[227] *See supra* Section III.A.1.

[228] *See supra* Section III.A.1.

[229] *See supra* notes 62–63 and accompanying text.

[230] *U.S. Terms of Use*, *supra* note 225.

[231] *See supra* Section III.B.1.

[232] *See supra* Section III.B.1.

[233] *U.S. Terms of Use*, supra note 225.

[234] *Id.*

other persons from suing Uber. Direct and vicarious liability claims may still reach courts.

Lastly, joint enterprise liability is a key tool for analyzing the new and unique structure of ridesharing platforms. Drivers are deemed "partners" who share control with the ridesharing company in many areas.[235] Profits are also shared.[236] In the early taxi cab and trucking industry cases, courts analyzed exactly these types of relationships and at times found joint enterprise liability attached.[237] For the taxi cases, the most analogous situation may be that of a dispatch service that connects passengers with drivers and dictates specific aspects of the performance, such as a logo on the vehicle and the price for rides.[238] Similarly, ridesharing services may be analogous with third-party logistics providers in the trucking context, in which companies work to connect a customer with a freight carrier and earn a brokerage fee in the process.[239] Under both of these examples, courts analyzed the specific facts of the relationships among the intermediary and the providers.[240] But both examples focused on key factors that are also present in the ridesharing example: shared control over safety and manner of performance, sharing of profits, and common business purpose. A similar analysis may apply for finding joint enterprise liability in the ridesharing sphere.

Notably, several tort theories support the use of vicarious liability principles to impute negligence on ridesharing platforms, including just compensation for injuries, deterrence of future bad conduct, corrective justice, allocation of costs, and enterprise liability theory.

First, victims may be undercompensated when individual, ad-hoc service providers are solely on the hook for tort damages. A key way ridesharing platforms attempt to differentiate themselves from the legacy economy is the ability for anyone to dabble as a service provider.[241] This setup necessarily creates under-monetized individual drivers who are not professionals. As a result, a provider in the sharing economy is likely unable to bear the brunt of liability when accidents occur. While ridesharing platforms carry some of their own insurance and have attempted to make providers rely on personal insurance policies, these are imperfect

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235 *See supra* Section II.A.1.
236 *See supra* Section II.
237 *See supra* Sections III.B.2–3.
238 *See supra* text accompanying notes 157–71.
239 *See supra* text accompanying notes 189–216.
240 *See supra* text accompanying notes 157–71, 189–216.
241 *See supra* Section II.A.2.

and controversial solutions.[242] Tort law must provide a legal basis for holding ridesharing companies responsible for those losses.

Deterrence goals are also furthered by using vicarious liability in the ridesharing context. If companies face the risk of paying large tort judgments to victims, they will alter their behavior to avoid such risk. Even though vicarious liability is a no-fault liability regime[243] (in so much as the non-negligent party is on the hook for someone else's tortious conduct), deterrence is still a valid goal of vicarious liability: ridesharing platforms will adopt policies to minimize the risk that their providers will act negligently.[244]

Cost allocation and enterprise liability are other tort theories that further support imposition of vicarious liability in the sharing economy context. Ridesharing companies are large businesses that stand to profit substantially from the work of their providers. Because they stand to profit from the activities of drivers, it is unfair for them to not also share in the liability as well. The cost of accidents should not be allocated to victims or solely to individual providers, but ridesharing platforms, who reap the benefits, should also pay the costs. Because ridesharing companies reap the benefits, they too should bear the burdens.

Thus, the liberal use of tort law doctrines, like vicarious liability, promotes regulating sharing economy platforms in ways that protect consumers and ensure fairness. While formal government regulation is also important, comprehensive federal regulation is unlikely and local regulation runs the risk of imposing onerous and inconsistent requirements on sharing economy platforms. Therefore, tort law should be used to fill an important regulatory role as well.

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[242] *See, e.g.*, Nairi, *Insurance for Ridesharing with Uber*, UBER (Feb. 10, 2014) https://newsroom.uber.com/insurance-for-uberx-with-ridesharing/ (last updated July 8, 2016) (explaining Uber's insurance requirements). Flaws in Uber's insurance scheme led to regulatory changes in places like California. Morgan Paige Suder & Krystal Norris Weaver, *Recent Developments in Automobile Litigation*, 51 TORT TRIAL & INS. PRAC. L.J. 289, 293–94 (2016). California's law establishes a three-part structure for rideshare insurance coverage, which includes holding TNCs responsible for providing primary insurance for passenger and third-party losses and contingent coverage for driver losses. *Id.* at 294. For the period when the driver is logged into the app but before a fare is accepted, either the driver or the TNC must maintain a "hybrid insurance policy that explicitly allows for transportation network company (TNC) work[.]" *Id.*

[243] *See supra* Section III.A.

[244] *See id.*

V. CONCLUSION

Tort law is well poised to deal with the unique liability issues that may arise in the new sharing economy. Particularly as to ridesharing platforms, established tort doctrines, like joint enterprise liability, provide an avenue for analyzing the extent to which a platform should be liable for the negligent acts of an ad-hoc service provider. The theories underlying tort law also support the use of these established doctrines as a means for achieving fairness within the existing legal structure.

By looking to tort law, an important regulatory function can be filled. Tort law, through its deterrence role, can prevent future harms by narrowly addressing retrospective ones. In this way, tort law provides a means for regulating the sharing economy without imposing onerous prospective government regulation. In essence, tort law is an important piece to the regulatory puzzle, and one that can help achieve balance between innovation and consumer protection.

Turning Homeowners into Outlaws: How Anti-Home-Sharing Regulations Chip Away at the Foundation of an American Dream

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I. INTRODUCTION

"Home-sharing" may sound like a modern invention, part of the cutting-edge, high-tech "sharing economy." In fact, home-sharing is a centuries-old American tradition. For generations, people have let visitors stay in their homes, rather than in hotels, sometimes in exchange for money or for doing chores. Students have often stayed in private houses while attending colleges far from home. New immigrants frequently stayed in the homes of more established immigrants.[1] During the days of segregation, traveling businessmen or musicians would often spend nights in the homes of local residents because they were excluded from hotels.[2]

The only difference now is that the practice has become more efficient: the internet has enabled homeowners and travelers to connect better than ever before, and online home-sharing platforms such as Airbnb and Homeaway now help millions of homeowners rent rooms or houses to help pay their bills. To get a sense of how grand this revolution has been, consider that Airbnb alone now offers more rooms than major international hotel chains such as Hilton and Marriott,[3] and makes up about eight- to seventeen-percent of the short-term rental supply in New York City alone.[4] Washington, D.C., has about 31,000 hotel rooms, but on the evening of the 2017 presidential inauguration, Airbnb reported renting out some 13,000.[5] And home-sharing isn't just for tourists. A recent study by the travel-expense company Concur found that home-sharing bookings by business travelers have grown fifty-six-percent over last year.[6]

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[1] *See, e.g.*, BRIAN MCCOOK, THE BORDERS OF INTEGRATION: POLISH MIGRANTS IN GERMANY AND THE UNITED STATES, 1870–1924, at 31 (2011); DIANA C. VECCHIO, MERCHANTS, MIDWIVES, AND LABORING WOMEN: ITALIAN MIGRANTS IN URBAN AMERICA 68 (2006).

[2] *See, e.g.*, THOMAS J. HENNESSEY, FROM JAZZ TO SWING: AFRICAN AMERICAN MUSICIANS AND THEIR MUSIC 1890–1935, at 132 (1994); CARLOTTA WALLS NANIER, A MIGHTY LONG WAY: MY JOURNEY TO JUSTICE AT LITTLE ROCK CENTRAL HIGH SCHOOL 148-50 (2009).

[3] Julie Weed, *Airbnb Grows to a Million Rooms, and Hotel Rivals Are Quiet, for Now*, N.Y. TIMES (May 11, 2015), http://www.nytimes.com/2015/05/12/business/airbnb-grows-to-a-million-rooms-and-hotel-rivals-are-quiet-for-now.html?_r=0.

[4] Ariel Stulberg, *How Much Does Airbnb Impact Rents in NYC?*, THE REAL DEAL (Oct. 14, 2015), http://therealdeal.com/blog/2015/10/14/how-much-does-airbnb-impact-nyc-rents/.

[5] *Airbnb And The 2017 Presidential Inauguration*, AIRBNB CITIZEN (Jan. 13, 2017), https://washington-dc.airbnbcitizen.com/airbnb-2017-presidential-inauguration/.

[6] *Global Business Travel and Spend Report Reveals New Sharing Economy Trends,*

Home-sharing helps homeowners pay their mortgages and other bills and gives entrepreneurs an incentive to buy dilapidated houses and restore them. Most importantly, home-sharing represents an important new way for property owners to exercise their basic right to choose whether to let someone stay in their home—a right the Supreme Court has called "one of the most essential sticks in the bundle of rights that are commonly characterized as property."[7]

Yet cities nationwide have responded to innovations in home-sharing not by welcoming this economic opportunity or respecting the rights of property owners, but by imposing draconian new rules that deprive Americans of some of their most basic constitutional rights. From New York City[8] to Santa Monica,[9] places with bustling tourism economies are rushing to restrict homeowners from offering rooms in their homes to travelers. Officials in Kaua'i County, Hawai'i, can levy fines of up to *$10,000 per day* for homeowners who offer short-term rentals.[10] New York imposes fines of up to $7500 on people who publicize their willingness to let guests stay in their apartments.[11] Despite studies showing home-sharing had a $253 million impact on the local economy in 2016, that same year, Miami Beach, Florida, voted to impose fines of $20,000 on home-sharers.[12]

Business Traveler Behaviors, CONCUR (July 18, 2016), https://www.concur.com/newsroom/article/global-business-travel-and-spend-report-reveals-new-sharing-economy.

[7] Kaiser Aetna v. United States, 444 U.S. 164, 176 (1979).

[8] Since 2011, New York has banned short-term rentals that last fewer than 30 days. S. Johanna Robledo, *Hey Wanna Rent My Couch?*, N.Y MAGAZINE (Nov. 27, 2011), http://nymag.com/realestate/realestatecolumn/short-term-rentals-2011-12. Property owners may not offer their non-primary residences as short-term rentals, even if they do so free of charge. Bd. of Managers of S. Star v. Grishanova, 969 N.Y.S.2d 801 (Sup. Ct. 2013), *dismissed*, 985 N.Y.S.2d 72 (2014).

[9] In Santa Monica, it is illegal to rent a home for fewer than 30 days when the owner is not on-site. Tim Logan, *Santa Monica Comes Down Hard on Airbnb; Will Crackdown Spread?*, L.A. TIMES (May 13, 2015), http://www.latimes.com/business/realestate/la-fi-santa-monica-council-oks-tough-rental-regs-20150512-story.html.

[10] Jessica Else, County *Still Wrangling With Illegal Rentals*, THE GARDEN ISLAND (Jan. 15, 2016), http://thegardenisland.com/news/local/govt-and-politics/county-still-wrangling-with-illegal-rentals/article_92f3d7ad-8a5a-57d1-a0ac-1498160a3b06.html.

[11] Greg Bensinger, *New York Governor Signs Bill Authorizing Fines for Airbnb Rentals*, WALL ST. J. (Oct. 21, 2016), http://www.wsj.com/articles/new-york-governor-signs-bill-authorizing-fines-for-airbnb-rentals-1477079740.

[12] Chabeli Herrera, *How Much Has Miami Beach Left on the Table by not Signing Airbnb Deal? A Lot*, MIAMI HERALD, (Feb. 8, 2017), http://www.miamiherald.com/news/business/article131560879.html; Chabeli Herrera, *How $20,000 Fines Have Made Miami Beach an Airbnb Battleground*, MIAMI HERALD (Nov. 27, 2016), http://www.miamiherald.com/news/business/biz-monday/article117332773.html.

Although these are the heftiest fines in the country, Miami Beach Mayor Philip Levine complained that they should be more.[13] San Francisco, California, recently imposed a rule that threatens home-sharing companies with $1000 fines for simply *hosting* a listing of an outlawed rental.[14]

Perhaps the most extreme of the new anti-home-sharing rules is the new 58-page ordinance that Chicago Mayor Rahm Emmanuel signed into law in June 2016, which forces home-sharers to allow city inspectors to search their properties, without a warrant, "*at any time and in any manner*," as often as city officials desire.[15] Other provisions of that ordinance punish home-sharers if their guests make noise that "exceeds the average conversational level"[16]—a term that is not defined. These rules do not apply to hotels or bed-and-breakfasts. Punishment for home-sharers who don't comply includes fines of $1500 to $3000 *per day*.[17] The ordinance also levies a whopping $10,000 licensing fee on rental platforms like Airbnb.[18]

All of this hurts communities and punishes the responsible majority of property owners for the potential wrongs of a few. Worse, these laws violate fundamental constitutional protections, impose arbitrary searches on homeowners, discriminate against non-residents, and subject them to extreme punishment without fair warning or clear guidelines.

This article surveys some of the most egregious home-sharing restrictions and some of the ways they violate critical constitutional rights. First, this article explains that the recent rash of home-sharing restrictions results from the fact that, with few exceptions, courts have permitted government to deprive owners of their right to use property so long as government technically does not take title to the land. Next, the article explores how home-sharing restrictions, while aimed at the use of property, have actually deprived Americans of other constitutional rights, including privacy. The article then identifies and addresses some of the primary arguments in favor of home-sharing restrictions and explains why those arguments do not justify stifling property rights and other freedoms. Finally, the article proposes alternatives to outright bans, and ways

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[13] Chabeli Herrera, *How $20,000 Fines Have Made Miami Beach an Airbnb Battleground,* MIAMI HERALD (Nov. 27, 2016), http://www.miamiherald.com/news/business/biz-monday/article117332773.html.

[14] S.F., CAL., MUN. CODE ch. 41A.

[15] CHI., ILL., MUN. CODE §§ 4-6-300(e)(1), 4-16-230 (2016) (emphasis added).

[16] *Id.* §§ 4-6-300(j)(2)(ii), 4-14-080(c)(2).

[17] *Id.* §§ 4-6-300(k), 4-14-090(a).

[18] *Id.* §§ 4-5-010(36)–(37) (2016).

government can regulate home-sharing to address legitimate concerns without violating constitutional rights.

II. RESTRICTING THE RIGHT TO USE ONE'S PROPERTY

Private property is a fundamental human right—the guardian of all other rights.[19] Such freedoms as press or religion would be meaningless if people were prohibited from owning printing presses or churches. America's Founders understood this, which is why the U.S. Constitution provides more protections for private property than for any other right.[20] Unfortunately, thanks to precedents dating back to the New Deal era, courts today typically treat this right as a "poor relation,"[21] and accord it only the barely functional protection of rational-basis scrutiny.[22] That means courts routinely uphold intrusions on private property rights, even where they are supported by only the flimsiest justifications.

This problem is particularly acute when it comes to so-called "regulatory takings": restrictions on the use of property that fall short of the actual seizure of the physical land. Regulatory takings are often more burdensome to property owners than the outright use of eminent domain, because in an eminent domain case, the owner is at least entitled to just compensation, while under today's precedent, the owner whose property value is diminished by a regulatory taking usually cannot hope for just compensation,[23] and is left holding the land. He is thus liable for all the costs associated with it, even though he cannot use it as he intended, and

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[19] JAMES W. ELY, JR., THE GUARDIAN OF EVERY OTHER RIGHT xi (3d ed. 2007).

[20] In addition to two separate provisions forbidding the taking of property without due process of law, U.S. CONST. amends. V, XIV, the Constitution also prohibits the use of eminent domain except for public use, *id.* amend. V; preserves the rights of creditors to "debts" and the right of contracting parties to their contracts, *id.* art. I, § 10, cl. 1; protects "houses" and "things" against search and seizure, *id.* amend. IV, and against the quartering of soldiers, *id.* amend. III; and protects the right of the people to "keep" firearms. *Id.* amend II. It also restricts state manipulation of contracts and debts, *id.* art. I, § 10, cl. 1, and includes other protections that have important consequences for property rights.

[21] Dolan v. City of Tigard, 512 U.S. 374, 392 (1994).

[22] *See generally* TIMOTHY SANDEFUR & CHRISTINA SANDEFUR, CORNERSTONE OF LIBERTY: PROPERTY RIGHTS IN 21ST CENTURY AMERICA 70–78 (2d ed. 2016).

[23] *See* Gideon Kanner, *"[Un]equal Justice Under Law": The Invidiously Disparate Treatment of American Property Owners in Taking Cases*, 40 LOY. L.A. L. REV. 1065, 1074 (2007) (detailing the "crudely discriminatory treatment of property owners by the courts"); William A. Fischel, *Why Are Judges So Wary of Regulatory Takings?*, *in* PRIVATE PROPERTY IN THE 21ST CENTURY: THE FUTURE OF AN AMERICAN IDEAL 50, 55 (Harvey M. Jacobs ed., 2004) (the "bottom line is that the complaining property owner almost always loses" in regulatory takings cases).

often cannot sell it because nobody will want to buy it with the regulatory restriction in place.

Yet courts are usually willing to indulge even the least substantial government justifications for limiting the owner's rights. Thus, for example, courts typically allow the government to deprive owners of their right to use property in order to "preserve the character and integrity of residential neighborhoods."[24] The "legitimate government interest" prong of the analysis in a regulatory takings case is virtually always a "bare conclusion"—a rubber-stamp of whatever rationalization the government advances for a limitation on owners' rights.[25] And although property owners are, in theory, entitled to compensation if a regulation destroys *all* economically viable use of the land, they are not entitled to *any* compensation if the regulation falls short of imposing a total wipeout, even by just a little bit. Government officials are therefore careful to leave property owners with a token interest—just enough to avoid triggering the compensation requirement.[26]

The history of regulatory takings jurisprudence is convoluted, and the doctrine of reasonable investment-backed expectations in particular remains murky.[27] Although, in theory, the Court recognizes *per se* compensation rules for two specific types of regulatory takings,[28] in practice, these rules

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[24] *See, e.g.*, 7250 Corp. v. Bd. of Cty. Comm'rs, 799 P.2d 917, 923 (Colo. 1990); Cope v. City of Cannon Beach, 855 P.2d 1083, 1086 (Or. 1993).

[25] RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 109 (1985).

[26] In *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001), the Court declared that "a State may not evade the duty to compensate on the premise that the landowner is left with a token interest," *id.* at 631, but in reality, that is exactly what happened in the *Palazzolo* case itself, where the property owner's plans to develop eighteen acres into a multimillion-dollar recreational beach facility were destroyed by a regulation that nevertheless left him with the right to build *a single house* on the property. The *Palazzolo* Court found that this was enough that the owner was entitled to no compensation. *Id.*

[27] *See e.g.*, Nathan Blackburn, *Planning Ahead: Consistency with a Comprehensive Land Use Plan Yields Consistent Results for Municipalities*, 60 OKLA. L. REV. 73, 73 (2007) ("The Court's interpretation of the Fifth Amendment has resulted in the adoption and abandonment of a constantly evolving series of tests that have become increasingly difficult for courts and local regulatory bodies to apply.").

[28] These specific types are the rule from *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), that a mandated physical invasion of the owner's property is a compensable taking, *id.* at 421, and the rule from *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992), that a regulation that deprives the owner of *all* economically viable use is compensable, *id.* at 1016. But the *Loretto* rule was not applied in *Yee v. City of Escondido, Cal.*, 503 U.S. 519 (1992), which involved a state law forcing property owners to allow people to stay on their land against their will. *See Yee*, 503 U.S. at 531–32. And as

are very rarely enforced.[29] Outside of these categories, most regulatory takings jurisprudence employs an *ad hoc*, fact-intensive analysis[30]—despite the fact that one of the main concerns of the rule of law is to limit dangerous *ad hoc* decision-making.[31]

The Court first applied that fact-intensive, multi-factor balancing test in 1978, in *Penn Central v. City of New York*,[32] but how courts should apply that test remains unclear.[33] That case came about when Penn Central Transportation Company applied to the City of New York for a permit to build a fifty-five story tower on top of Grand Central Station.[34] The city denied the permit request under the City's landmark preservation ordinance.[35] Penn Central brought a takings claim, arguing that the ordinance effected a regulatory taking by reducing the property's value, and that Penn Central was entitled to just compensation.[36]

In determining that the ordinance did not constitute a taking, the Court constructed a fact-intensive test.[37] According to this test, courts must balance (1) "[t]he economic impact of the regulation on the claimant," (2) "the extent to which the regulation has interfered with distinct investment-backed expectations," and (3) "the character of the governmental action."[38]

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mentioned above, the *Lucas* rule is easily evaded by officials leaving property owners with a token value. *See* discussion *supra* note 26.

[29] *See e.g.*, Mark W. Cordes, *Takings Jurisprudence as Three-Tiered Review*, 20 J. NAT. RESOURCES & ENVTL. L. 1, 16 (2006) ("[t]he Court in *Lucas* acknowledged it was addressing a very rare scenario"); Blackburn, *supra* note 27, at 80 (recognizing that *per se* takings analyses are rare, and the *Penn Central* framework is the common means of determining a takings claim).

[30] Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978) (noting Court's preference for "essentially ad hoc, factual inquiries" in regulatory takings cases).

[31] *See, e.g.*, LON FULLER, THE MORALITY OF LAW 39 (1969) ("The first and most obvious" of the "routes to disaster" in the effort to establish a rule of law is "failure to achieve rules at all, so that every issue must be decided on an ad hoc basis."); *see also* Susan Rose-Ackerman, *Against Ad Hocery: A Comment on Michelman*, 88 COLUM. L. REV. 1697, 1702 (1988) ("The ad hoc nature of [current regulatory takings] law introduces an element of uncertainty into private investment decisions.").

[32] 438 U.S. 104 (1978).

[33] *See* Cordes, *supra* note 29, at 1 (acknowledging that the Court's *Penn Central* framework is "a constitutional quagmire, with little in the way of predictable results or coherent principles").

[34] *Penn Cent.*, 438 U.S. at 116.

[35] *Id.* at 117.

[36] *Id.* at 120.

[37] *Id.* at 124.

[38] *Id.* Technically, the *Penn Central* Court did not separate the economic impact and investment-backed expectations prongs, but considered them together as a single prong. Gary Lawson et al., *"Oh Lord, Please Don't Let Me Be Misunderstood!": Rediscovering*

The Court emphasized that, instead of a strict formula, these factors are simply a set of guidelines with the ultimate goal of allocating the costs of a challenged regulation to the public when "fairness and justice" so require.[39] *Penn Central* did not explain what constituted a "distinct investment-backed expectation," but this factor was a major impediment in the plaintiff's claim because Penn Central still earned money from its train operation.[40]

Furthermore, the Court analyzed the impact of the regulation on Penn Central's parcel in its entirety, rather than considering only the portion of the property affected by that regulation.[41] The City's failure to prohibit *all* construction above the terminal and Penn Central's ability to make use of its transferable development rights were not deciding factors in the decision.[42] But to this day, courts considering regulatory takings cases typically review the effect of the regulation on the owner's *entire* holdings, so that a *total* eradication of half of an owner's property is considered as only a fifty percent reduction in value—instead of as a total wipeout of that half, which would be *per se* compensable.[43] Worsening the confusion, it was not long after *Penn Central* was announced that the Court altered the expectations test to "*reasonable* investment-backed expectations."[44] The result of this shift was that courts could now consider whether the property owner's investment plans were "rational," rather than simply confirming that such plans existed.[45] This allows courts so much leeway when

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the Matthews v. Eldridge *and* Penn Central *Frameworks*, 81 NOTRE DAME L. REV. 1, 33 (2005). The Court first split the economic impact and investment-backed expectations prongs in *Kaiser Aetna v. United States*, 444 U.S. 164 (1979). *See id.* at 175. However, lawyers, judges, and scholars refer to the three-pronged *ad hoc* framework as the *Penn Central* framework rather than the *Kaiser Aetna* framework. Lawson et al., *supra*, at 37.

[39] *Penn Cent.*, 438 U.S. at 123 (quoting Armstrong v. United States, 364 U.S. 40, 49 (1960)).

[40] Blackburn, *supra* note 27, at 78. Penn Central's primary expectation was the ability to continue operating its passenger train business, which is what it had "always done" with its property. *Id.* Since the permit denial did not prevent Penn Central from earning money from its train operation, the Court found no interference with Penn Central's investment-backed expectations. *Penn Cent.*, 438 U.S. at 136.

[41] *Penn Cent.*, 438 U.S. at 137.

[42] *Id.* (acknowledging that while the TDRs might not have been enough to qualify as just compensation for a taking, they "mitigate whatever financial burdens the law has imposed" and thus can be considered in judging the impact of the regulation).

[43] The Supreme Court has granted certiorari in a case to address this question and heard oral arguments on March 20th, 2017. *See* Murr v. Wisconsin, 859 N.W.2d 628 (Wisc. App. 2014), *cert. granted*, 136 S. Ct. 890 (2016).

[44] Kaiser Aetna v. United States, 444 U.S. 164, 175 (1979) (emphasis added).

[45] *See* J. David Breemer & R. S. Radford, *The (Less?) Murky Doctrine of Investment-*

adjudicating regulatory takings cases that whether or not a property owner possesses the requisite reasonable investment-backed expectations depends greatly on the particular court's definition of the doctrine. In short, the reasonable expectations prong "is unacceptably open to subjective manipulation."[46] Little surprise, then, that almost forty years after *Penn Central,* the Supreme Court has never compensated a property owner under that test, and empirical surveys show that "owners simply do not prevail in significant numbers"[47] in lower courts using the *Penn Central* analysis—on those rare occasions where the merits of regulatory takings cases are even reached.[48] Some courts have even denied owners compensation for restrictions on property use impose after their purchase, on the theory that the owners should have known that the government might later pass a law banning them from proceeding with their plans.[49]

The facts well substantiate Professor Gideon Kanner's conclusion that "in today's American law we confront a legal regime of invidiously unequal treatment of people in their capacity as property owners, particularly—and perversely—when the government seeks to take their property from them."[50]

When local governments forbid home-sharing, they deprive owners of a crucial "stick" in their "bundle" of property rights and diminish the value of their properties. But the current status of regulatory takings law does not bode well for home-sharers. Courts are likely to deny them compensation for such deprivations even if they have been renting their homes for years, since officials only need to claim that home-sharing is really a commercial use,[51] and that it is consequently irrational for homeowners to expect to be

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Backed Expectations After Palazzolo, *and the Lower Courts' Disturbing Insistence on Wallowing in the Pre-*Palazzolo *Muck*, 34 SW. U. L. REV. 351, 357 (2005) ("This alteration invited courts to rely on their own evaluation of the validity—not just the existence—of a claimant's plans for her property.").

[46] Lise Johnson, *After* Tahoe Sierra, *One Thing is Clearer: There is Still a Fundamental Lack of Clarity*, 46 ARIZ. L. REV. 353, 375 (2004).

[47] Adam R. Pomeroy, Penn Central *After 35 Years: A Three Part Balancing Test or A One Strike Rule?*, 22 FED. CIRCUIT B.J. 677, 692 (2013).

[48] Beyond the scope of this article are the many procedural technicalities, including the "*Williamson County* trap," that denies property owners their day in court in most instances. *See generally* SANDEFUR & SANDEFUR, *supra* note 22 at 116 (citing Williamson County Reg'l Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 186, 194–95 (1985)); Madeline J. Meacham, *The* Williamson *Trap*, 32 URB. LAW. 239 (2000).

[49] *Id.* at 152.

[50] Gideon Kanner, *"[Un]equal Justice Under Law": The Invidiously Disparate Treatment of American Property Owners in Taking Cases*, 40 LOY. L.A. L. REV. 1065, 1067 (2007).

[51] *See, e.g.*, Bethany Rogers, *Montgomery County Residents Use Airbnb To Court*

able to rent their homes.[52] And because such bans leave the owners with the right to live in the homes themselves, or to rent their properties *long-term*, owners have virtually no chance to obtain the compensation to which they are justly entitled.[53]

When the City of Cannon Beach, Oregon, passed an ordinance prohibiting homeowners from renting their homes for fewer than 14 days and phasing out all such existing rentals, homeowners who offered their homes as short-term rentals demanded just compensation from the City for taking away their right to rent their property.[54] In determining whether homeowners were entitled to compensation, the Supreme Court of Oregon asked whether the ordinance advanced a legitimate government interest and left owners with economically viable uses for their property,[55] both very low bars. It answered both questions in the affirmative. The City's avowed goals of "affordable housing for permanent residents and the preservation of the residential character of certain neighborhoods" were aimed at maintaining "quality of life" and thus were sufficient to justify the ordinance.[56] And because the ordinance still allowed homeowners to rent for periods of over fourteen days or to reside in the homes themselves, the Court held that the City did not deprive homeowners of all economically viable uses for their land.[57] It made no difference in the Court's analysis that those uses "may not be as profitable as are shorter-term rentals of the properties."[58] So long as *some* economically viable uses remained, the homeowners were not entitled to compensation.[59]

Thus, despite the principle that restricting or regulating one's right to have visitors in her own home violates constitutional privacy guarantees, decades of regulatory takings jurisprudence have empowered cities to restrict or even ban home-sharing without fear of having to pay owners for

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Inauguration Travelers, BETHESDA MAG. (Jan 13, 2017), http://www.bethesdamagazine.com/Bethesda-Beat/2017/Montgomery-County-Residents-Use-Airbnb-To-Court-Inauguration-Travelers/; Nick Kotsopoulos, *Politics and the City: Home Sharing Rattles City Council Roof*, WORCESTER TELEGRAM (Dec. 18, 2016), http://www.telegram.com/news/20161218/politics-and-city-home-sharing-rattles-city-council-roof.

[52] See discussion *infra* Section VII.B (discussing residential/commercial distinction).

[53] *See, e.g.*, Cope v. City of Cannon Beach, 855 P.2d 1083, 1086 (Or. 1993).

[54] *Id.* at 1084.

[55] *Id.* at 1086–87.

[56] *Id.* at 1086.

[57] *Id.* at 1086–87.

[58] *Id.* at 1087.

[59] *Id.*

these takings, no matter how much economic harm such restrictions might impose.

III. UNDERMINING OTHER RIGHTS

In addition to chipping away at property rights, the recent wave of anti-home-sharing rules has also had consequences for other rights. For example, punishing people for sharing information, as Anaheim and New York have done, treads on free speech rights guaranteed by the First Amendment. Chicago's ordinance undermines home-sharers' and guests' privacy rights by subjecting them to warrantless searches of their property at any time and in any manner,[60] and also forces them to collect guests' confidential personal information to turn over to city inspectors for any reason they wish, without a warrant.[61]

Cities may not deprive homeowners of their constitutionally protected rights simply because they offer their homes for rent on Airbnb or Homeaway. Indeed, the Supreme Court has held that government cannot impose "unconstitutional conditions" on people who seek permits, licenses, or government benefits.[62] This rule "functions to ensure that the Government may not indirectly accomplish a restriction on constitutional rights which it is powerless to decree directly."[63] Yet city officials are doing just that: forcing people to give up their constitutional rights in exchange for being allowed to share their homes with overnight guests.[64] And the potential for abuse is heightened in the home-sharing context, where the "permission" at issue is the bedrock principle that property owners have the right to decide whether or not to let others stay in their homes.[65]

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[60] CHI., ILL., MUN. CODE §§ 4-6-300(e)(1) (2016), 4-16-230 (2016).

[61] *Id.* §§ 4-6-300(f)(2) (2016), (3); 4-14-040(8), (9) (2016).

[62] *See, e.g.*, Koontz v. St. Johns River Water Mgmt. Dist., 133 S. Ct. 2586, 2594 (2013); Nollan v. California Coastal Comm'n, 483 U.S. 825, 837 (1987); Black v. Vill. of Park Forest, 20 F. Supp. 2d 1218, 1220 (N.D. Ill. 1998).

[63] La. Pac. Corp. v. Beazer Materials & Servs. Inc., 842 F. Supp. 1243, 1248 (E.D. Cal. 1994).

[64] *See* discussion *infra* Part III.

[65] Minnesota v. Carter, 525 U.S. 83, 107 (1998) (Ginsburg, J., dissenting) ("Our decisions indicate that people have a reasonable expectation of privacy in their homes in part because they have the prerogative to exclude others.").

A. Intruding on Privacy

Enforcing prohibitions or restrictions on home-sharing inevitably offends essential privacy rights, at a minimum because determining whether an occupant is a homeowner or a guest requires officials to inquire into—or invade—a person's private home.

In Honolulu, Hawai'i, for example, which has prohibited homeowners from renting to guests for fewer than thirty days,[66] officials have cut across public beaches, climbed over closed gates, and entered private yards and homes without search warrants or the owners' permission, in order to "investigate" whether a home is being rented in violation of the ordinance.[67]

Perhaps the most egregious regulations are those buried within Chicago's labyrinthine ordinance, which force home-sharers to relinquish their constitutional rights against arbitrary searches. Home-sharers licensed under the Chicago ordinance must open their homes to city inspectors "at any time and in any manner," without a warrant or even a reason, and as often as city officials wish.[68] They must also collect their guests' sensitive personal information, including names, home addresses, signatures, and dates they visited, and keep that information for three years, during which time city officials can demand that information without a warrant or reason.[69] Home-sharers who don't comply with these demands are subject to fines of $1,500 to $3,000 per day.[70]

The ordinance does not require any independent official to find probable cause, or to obtain a warrant before demanding guests' information or inspecting a private home. Instead, the city building commissioner may conduct—or, perhaps worse, may commission a third party to conduct—searches of homes, at any time and for any reason or no reason.[71] Given that the ordinance only allows owners to rent out their own primary residences (except in cases involving large apartment buildings), the property subject to search under the Chicago ordinance is not business or

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[66] *See* HONOLULU, HAW., LAND USE ORDINANCE § 21-10.1 (defining "bread and breakfast home" as "a use in which overnight accommodations are provided to guests for compensation, for a period of less than 30 days . . ."); *id.* § 21-4.110-2(a) ("The purpose of this section is to prohibit bed and breakfast homes, while permitting certain bed and breakfast homes which have been in operation since prior to December 28, 1989 to continue to operate as nonconforming uses . . . .").

[67] *See* Complaint ¶¶ 21–22, Kokua Coalition v. Honolulu Dep't of Planning and Permitting, Civ. No. 16-00387-DKW-RLP (D. Haw. Jul 11, 2016), ECF No. 1.

[68] CHI., ILL., MUN. CODE §§ 4-6-300(e)(1), 4-16-230 (2016) (emphasis added).

[69] *Id.* §§ 4-6-300(f)(2), (3); §§ 4-14-040(8), (9) (2016).

[70] *Id.* §§ 4-6-300(k), 4-14-090(a).

[71] *Id.* §§ 4-6-300(e)(1), 4-16-230.

investment property, but *the owner's own private home.*[72] Simply put, the Chicago ordinance's search provisions are among the most extreme ever imposed by a local government in the United States.

The Fourth Amendment to the U.S. Constitution protects Americans against unreasonable searches and seizures, and state constitutions, including those of Hawai'i[73] and Illinois,[74] often explicitly protect the right of privacy. Forcing homeowners to waive these rights in exchange for permission to allow overnight guests in their homes violates essential privacy rights while simultaneously restricting private property.

But officials may not force people to give up their constitutional rights in exchange for permission to use property that belongs to them,[75] nor may they force business or homeowners to give up their right to be free from unwarranted searches as a condition of using their property.[76] Yet that is precisely what the Chicago ordinance requires.

The Constitution does not allow cities to conduct warrantless or suspicionless searches "at any time or in any manner," as Chicago does. On the contrary, home-sharers, like all citizens, have a constitutionally protected right to security in their homes and property under the Fourth Amendment, and a right to privacy under the state Constitution. Under these provisions, "[a] search of [their] private houses is presumptively unreasonable"—and unconstitutional—"if conducted without a warrant."[77] But while private residences receive the *greatest* constitutional protection against unreasonable searches,[78] those guarantees do not just extend to homeowners. The U.S. Supreme Court has held that even a guest can have

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[72] *Id.* §§ 4-6-300(h)(8), (9); 4-14-060(d), (e) (2016).

[73] The Hawai'i Constitution specifically protects against "invasions of privacy," HAW. CONST. art. I, § 7, and "the right of the people to privacy is recognized and shall not be infringed without the showing of a compelling state interest[,]" *id.* art. I, § 6.

[74] The Illinois Constitution prohibits "invasions of privacy." ILL. CONST. art. I, § 6.

[75] *See, e.g.*, Koontz v. St. Johns River Water Mgmt. Dist., 133 S. Ct. 2586, 2596 (2013); Nollan v. California Coastal Comm'n, 483 U.S. 825, 831 (1987).

[76] City of Los Angeles v. Patel, 135 S. Ct. 2443, 2451–52 (2015); Black v. Vill. of Park Forest, 20 F. Supp. 2d 1218, 1220 (N.D. Ill. 1998); Marshall v. Barlow's, Inc., 436 U.S. 307, 311–12 (1978).

[77] See v. City of Seattle, 387 U.S. 541, 543 (1967); *see also Patel*, 135 S. Ct. at 2452 ("[S]earches conducted outside the judicial process, without prior approval by [a] judge or [a] magistrate [judge], are *per se* unreasonable . . . subject only to a few specifically established and well-delineated exceptions." (citation and quotation marks omitted)); People v. Pitman, ("Warrantless searches are generally considered unreasonable unless they fall within a few specific exceptions.").

[78] *See, e.g.*, People v. Wear, 893 N.E.2d 631, 641(2008) (citations omitted) ("The physical entry of the home is the chief evil against which the wording of the fourth amendment is directed.").

"a legally sufficient interest" in privacy "in a place other than his own home," such "that the Fourth Amendment protects him from unreasonable governmental intrusion into that place."[79] And a home-sharing guest enjoys protection against unreasonable searches regardless of whether the premises are the owner's residence or her secondary property. Indeed, the Supreme Court has categorically held that Fourth Amendment protections extend to guests in hotels.[80] Yet the Chicago ordinance deprives property owners of these traditional privacy protections if they allow overnight guests to stay in their home for money.

In *Marshall v. Barlow's, Inc.*,[81] the Supreme Court struck down a provision of the Occupational Health and Safety Act that gave inspectors "unbridled discretion" to decide on the stop "when to search and whom to search" for potential violations of the Act.[82] However important it may be for enforcement officers to seek evidence of potential violations, the Fourth Amendment could did not allow government officers to exercise unbridled discretion to determine in the field whether to search a property. "'The businessman, like the occupant of a residence, has a constitutional right to go about his business free from unreasonable official entries upon his private commercial property,'" the Court held.[83] That right would be worthless "'if the decision to enter and inspect for violation of regulatory laws can be made and enforced by the inspector in the field without official authority evidenced by a warrant.'"[84] A warrant or other equivalent form of independent pre-approval by an independent magistrate must be in place to ensure that inspections are reasonable, statutorily authorized, and within the scope of a specific purpose "beyond which limits the inspector is not expected to proceed."[85]

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[79] Minnesota v. Olson, 495 U.S. 91, 97–98 (1990) (citations omitted).

[80] Hoffa v. United States, 385 U.S. 293, 301 (1966)("A hotel room can clearly be the object of Fourth Amendment protection as much as a home or an office. . . . [T]he Fourth Amendment protects . . . the security a man relies upon when he places himself or his property within a constitutionally protected area, be it his home or . . . his hotel room . . . ." (citations omitted)); *cf.* People v. Vought, 528 N.E.2d 1095, 1098 (Ill. App. Ct. 1988) ("[A] hotel guest receives the same constitutional protection against unreasonable searches . . . in his room that an occupant of a more permanent type of residence receives with regard to his house or apartment." (citation omitted)).

[81] 436 U.S. 307 (1978).

[82] *Id.* at 323.

[83] *Id.* at 312 (quoting See v. City of Seattle, 387 U.S. 541, 543 (1967)).

[84] *Id.*

[85] *Id.*; *see also* City of Los Angeles v. Patel, 135 S. Ct. 2443, 2452–53 (2015) (ordinance authorizing searches of hotel records without a warrant or precompliance review violated Fourth Amendment).

Under these principles, the search provisions of Chicago's anti-home-sharing ordinance are plainly unconstitutional. That ordinance does not even afford home-sharers the basic "precompliance review" that *commercial* premises like hotels or business must be provided, let alone the warrant protections that private residences enjoy. The ordinance provides no review, no limits, and no guidelines *at all*. It does not require probable cause or reasonable suspicion. It contains *no* criteria to limit a search. It provides *none* of the assurances or boundaries that would be required for a warrant. It does not even require city officials to state any particular *reason* for conducting a search. While even "broad statutory safeguards are no substitute for individualized review" of a warrant application by a judge,[86] the Chicago regulations fail to provide even those minimal protections for citizens' rights. In short, Chicago's home-sharing ordinance "leaves the occupant subject to the discretion of the official in the field,"[87] which is precisely what the *Marshall* Court found unconstitutional.[88]

True, the Supreme Court has held that there are "certain carefully defined classes of cases" in which an industry is so closely regulated by the government "that no reasonable expectation of privacy" applies; in such cases, there is an "administrative search" exception to the usual Fourth Amendment rules.[89] But the Court has categorically held that the hotel industry is *not* one of them.[90] Moreover, even if the "administrative search" exception did apply, business owners still have the right to be free from inspections made without the equivalent of a warrant.[91] *Some* form of prior approval by an independent magistrate is constitutionally required even for regulatory compliance inspections, because they "provide assurances from a neutral officer that the inspection is reasonable under the Constitution, is authorized by statute, and is pursuant to an administrative plan containing specific neutral criteria" and because such procedures "advise the owner of the scope and objects of the search, beyond which limits the inspector is not expected to proceed."[92]

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[86] Camara v. Mun. Ct. of S.F., 387 U.S. 523, 533 (1967).

[87] *Id.* at 532.

[88] *Cf.* 436 U.S. at 323.

[89] *Patel*, 135 S. Ct. at 2452.

[90] *Id.*

[91] *Marshall*, 436 U.S. at 323–24.

[92] *Id.*; *see also* Feller v. Twp. of W. Bloomfield, 767 F. Supp. 2d 769 (E.D. Mich. 2011) (zoning inspectors violated Fourth Amendment by entering homeowner's backyard without a warrant to investigate a claimed violation of a stop work order).

Chicago's ordinance also allows officials to demand that owners turn over their guests' personal information—but does not require reasonable suspicion or probable cause, or a warrant, or provide the owner with any opportunity for a hearing before being required to turn over the information. The ordinance does not even require officials to state any reason for such a demand. These provisions violate the federal Fourth Amendment as well as the Illinois Constitution, which protects citizens from government "interceptions of communications."[93]

In *City of Los Angeles v. Patel*,[94] the U.S. Supreme Court condemned precisely this type of warrantless demand, when it struck down a Los Angeles ordinance that forced hotel operators to turn over their guest registries to the police—registries that contained the same information that the Chicago Ordinance requires home-sharers to obtain and keep—without a warrant or any other form of prior judicial approval.[95] This violated the Fourth Amendment because "[a]bsent an opportunity for precompliance review, the ordinance create[d] an intolerable risk that searches authorized by it [would] exceed statutory limits, or be used as a pretext to harass hotel operators and their guests."[96] The government must provide such precompliance review even when it only wishes to inspect records that it requires regulated entities to maintain.[97] And, again, although government can require certain heavily-regulated businesses to submit records to the government without first obtaining a warrant—a rule the Court found does *not* apply to the hotel industry[98]—even then, the statute providing for such inspections must provide adequate notice to the business and place clear limits on the government. The *Patel* Court noted that, because the Los Angeles ordinance lacked such limits, "[e]ven if a hotel ha[d] been searched 10 times a day, every day, for three months, without any violation being found, the operator [could] only refuse to comply with an officer's demand to turn over the registry at his or her own peril."[99]

The Chicago ordinance has precisely the same shortcomings. It requires home-sharers to obtain and keep private information from their guests and to turn it over to the government without any process for pre-compliance review—so that the risk of harassment or subjective enforcement is heightened just as in *Patel*. And under the Chicago ordinance, a home-

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[93] ILL. CONST. art. I, § 6.
[94] 135 S. Ct. 2443 (2015)
[95] *Id.* at 2447–48.
[96] *Id.* at 2452–53.
[97] *Id.* at 2456.
[98] *Id.* at 2454–56.
[99] *Id.* at 2453.

sharer whose home has been searched ten times a day every day for three months without any evidence being uncovered, would still be forced to allow yet another search—or face punishment.[100] In fact, the Chicago ordinance is *more* constitutionally objectionable than the Los Angeles ordinance, because the properties subject to the Chicago ordinance are often the owners' *private residences*.

In addition to these federal protections, many state constitutions—including Illinois'—contain express protections for privacy rights.[101] The Chicago ordinance violates those protections. While Illinois courts have ruled that the state's privacy provision generally mirrors the federal Fourth Amendment, there is one respect in which it is more protective: specifically, it singles out privacy rights in "books and records."[102] State courts have explained that this protects a person's right not to have "his or her 'private records' . . . exposed to public view or . . . scrutinized absent a valid reason,"[103] and have held that such protection applies to bank records, whether on paper or in electronic format.[104]

The personal identifying information that the Chicago Ordinance requires home-sharers to divulge to City officials on demand consists of *private records*: identifying information similar to financial records and copies of cancelled checks. And the Chicago ordinance authorizes government officials to obtain this information without any form of prior independent approval, which makes it impossible to "consider whether the intrusion was reasonable by balancing the public's interest in the information against the individual's need for private security."[105]

This, of course, is in addition to the fact that the Illinois Constitution also prohibits warrantless searches,[106] so that whatever violates the Fourth Amendment—as the Los Angeles ordinance in *Patel* did—also violates the state's privacy provisions. In short, given that state constitutions protect more rights than the federal Constitution, and that the federal Constitution bars suspicionless and warrantless demands for the private identifying information of hotel guests, it logically follows that the Illinois Constitution guarantees property owners and their guests protection against causeless, warrantless, suspicionless demands for disclosure of private information. By empowering the City to seize personal information without obtaining a

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[100] *Cf. id.* at 2453.

[101] ILL. CONST. art. I, § 6.

[102] People v. Nesbitt, 938 N.E.2d 600, 604–05 (Ill. App. Ct. 2010) (citation omitted).

[103] *Id.* at 605 (citation omitted).

[104] *Id.* at 606.

[105] *Id.* at 839 (citation omitted).

[106] ILL. CONST. art. I, § 6.

warrant or offering any process for precompliance review, the Chicago ordinance violates even the most lenient of constitutional protections for privacy.

B. Stifling Free Speech

In addition to levying fines on homeowners who rent their homes, the cities of San Francisco,[107] Santa Monica,[108] and Anaheim[109] have enacted new ordinances that force home-sharing platforms like Airbnb and Homeaway to police homeowners who use their websites. San Francisco's 2016 law threatens these companies with $1000 daily fines and misdemeanor penalties for each rental listing that does not conform to the City's regulations.[110] Airbnb filed a lawsuit challenging the ordinance,[111] but in May 2017, the company settled the lawsuit, agreeing to comply with city registration demands.[112] New York lawmakers also enacted the first

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[107] S.F., CAL., ADMIN CODE ch. 41.A (2016).

[108] In May 2015, Santa Monica approved an ordinance banning renting units for fewer than 30 days and holding platforms accountable for unlawful listings. Airbnb filed a lawsuit against the City on September 2, 2016. Prior to this article's publication, that lawsuit had been stayed pending City action on proposed amendments to the ordinance. Order Re: Stipulation to Stay Proceedings Pending Proposed Amendments to the Challenged Ordinance, Airbnb, Inc. v. City of Santa Monica, Civ. No. 16-06645-ODW-AFM (C.D. Cal. Sept. 22, 2016), ECF No. 20. At the time of this article's publication, the stay had been lifted but subsequently re-imposed pending resolution of a related case by Airbnb, Inc. against the City and County of San Francisco. Order Regarding Stay of Proceedings Pending Appeal or Dismissal of Related Case (C.D. Cal. Feb. 28, 2017), ECF No. 28; *see* Airbnb, Inc. v. City and County of San Francisco, No. 3:16-CV-03615-JD (N.D. Cal. Nov. 8, 2016).

[109] In July 2016, Anaheim approved an ordinance outlawing home-sharing and fining platforms up to $2000 per listing of outlawed properties. ANAHEIM, CAL., MUN. CODE § 4.05.130.0103 (2016). Only a month later, after Airbnb and Homeaway filed a lawsuit against the City, Anaheim agreed not to enforce the ordinance against the online rental sites and the platforms dismissed the lawsuit. Hugo Martin, *Anaheim Won't Fine Short-Term Rental Companies for Hosts' Violations,* L.A. TIMES (Aug. 22, 2016), http://www.latimes.com/business/la-fi-anaheim-airbnb-20160823-snap-story.html.

[110] S.F., CAL., ADMIN CODE ch. 41.A. While San Francisco permits home-sharing if the homeowner is present during the rental period, it caps "unhosted rentals" at ninety days a year. Mollie Reilly, *San Francisco Mayor Rejects Tough Restrictions On Airbnb*, HUFFINGTON POST, Dec. 9, 2016, http://www.huffingtonpost.com/entry/san-francisco-airbnb-regulations_us_584af753e4b04c8e2bafabbc.

[111] Bigad Shaban, *Airbnb's New Rules Abroad Could Impact San Francisco,* NBC BAY AREA (Dec. 1, 2016), http://www.nbcbayarea.com/news/local/Airbnb-Announces-New-Rules-for-Users-Abroad-Could-Impact-Hosts-in-US-404125246.html.

[112] *See* Heather Sommerville & Dan Levine, *Airbnb, San Francisco Settle Lawsuit Over*

state-wide prohibition on home-sharing,[113] which includes similar prohibitions on online advertising. That law imposes fines of up to $7500 on people who publicize their willingness to let guests stay in their apartments,[114] and holds platforms accountable for hosting information about such rentals.[115]

The right to speak and share information freely is protected by the federal Constitution and all state constitutions. The First Amendment makes no distinction between different kinds of speech.[116] Yet the Supreme Court has held that the Constitution does not protect *commercial* speech—speech that advertises a product or service—as much as it protects other types of speech. Under the Court's *Central Hudson* Test, government may even censor lawful, non-misleading commercial speech if that censorship directly serves a substantial government interest and is not more extensive than necessary.[117] Thus, officials might argue that home-sharing advertisements are not entitled to the same level of constitutional speech protections as other speech, because the information being shared is for commercial purposes.

But punishing people for sharing truthful information about their homes being available for rent means imposing content-based and identity-based restrictions on speech: the Anaheim and San Francisco rules specifically target communications that relate to the renting of a home for money.[118] The Supreme Court has made clear that government may not impose

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Short-Term Rental Law, Reuters (May 1, 2017), http://www.reuters.com/article/us-airbnb-sanfrancisco-settlement-idUSKBN17X254.

[113] Since 2011, New York City has banned short-term rentals that last fewer than 30 days. Robledo, *supra* note 8. Property owners may not offer their non-primary residences as short-term rentals, even if they do so free of charge. Bd. of Managers of S. Star v. Grishanova, 969 N.Y.S.2d 801 (Sup. Ct. 2013), *app. dismissed*, 985 N.Y.S.2d 72 (2014).

[114] Bensinger, *supra* note 11.

[115] N.Y. MULT. DWELL. LAW §§ 120–121 (2016). Airbnb sued both New York State and City over the provisions holding platforms accountable for unlawful listings but has dismissed both lawsuits after the State and City both promised not to enforce the laws against platforms. Greg Bensinger, *Airbnb Won't Pursue Legal Case Against New York City Over Rental Law*, WALL ST. J., Dec. 2, 2016, http://www.wsj.com/articles/airbnb-wont-pursue-legal-case-against-new-york-city-over-rental-law-1480738473.

[116] U.S. CONST. amend. I.

[117] Central Hudson Gas & Elec. v. Pub. Serv. Comm'n, 447 U.S. 557, 566 (1980).

[118] Indeed, the Supreme Court struck down an ordinance that prohibited residential real estate signs to curb white homeowners from leaving a racially integrated community as violating the First Amendment. Linmark Assocs., Inc. v. Willingboro Twp., 431 U.S. 85, 85 (1977). The Court found it inappropriate that the government "proscribed particular types of signs based on their content because it fears their 'primary' effect that they will cause those receiving the information to act upon it." *Id.* at 94.

burdens on speech based on the speaker's identity,[119] or commercial motive,[120] or the content of the message.[121] And however broad government's power may be to restrict commercial speech, the First Amendment does protect the distribution of information for marketing purposes.[122] In *Sorrell v. IMS Health, Inc.*,[123] the Court struck down a Vermont law that prohibited the transmission of information relating to doctors' prescribing practices for a pharmaceutical company's commercial use. The Court held that targeting specific types of companies and activities for censorship was unconstitutional because it "imposes a burden based on the content of speech and the identity of the speaker."[124] Even if the conveying of information "results from an economic motive," the Constitution protects it.[125]

Officials nevertheless contend that they may prohibit home-sharing advertisements altogether—and compel home-sharing platforms to enforce those prohibitions—because the cities have already outlawed home-sharing, so they may also outlaw advertisements for these illegal services.[126] While courts have held that speech about unlawful or criminal activities can be regulated or limited,[127] that argument can be taken too far. As the Fifth Circuit Court of Appeals observed in a similar case, if government can

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[119] Sorrell v. IMS Health, Inc., 564 U.S. 552, 579–80 (2011).

[120] *Id.* at 566, 570 (rejecting government's argument "that heightened judicial scrutiny is unwarranted in this case because sales, transfer, and use of . . . information are conduct, not speech," because "the creation and dissemination of information are speech within the meaning of the First Amendment").

[121] Reed v. Town of Gilbert, 135 S. Ct. 2218, 2226–27 (2015).

[122] *Sorrell*, 564 U.S. at 576–78.

[123] 564 U.S. 552 (2011).

[124] *Id.* at 567.

[125] *Id.*

[126] Jessica Soultanian-Braunstein, *Legislation Proposed in NY State Assembly Would Put an End to Online Advertising of Illegal Short-Term Apartment Rentals*, CITY LAND (Mar. 1, 2016), http://www.citylandnyc.org/23749-2/ (Assemblywoman Rosenthal said of New York's ban on home-sharing advertisements, "This legislation targets serial illegal hotel kingpins who advertise and rent out multiple units by providing enforcement entitles with strong new tools to crack down on this egregious law-breaking."); Mike Vilensky, *Albany Approves Airbnb Penalties*, WALL ST. J. (June 17, 2016), http://www.wsj.com/articles/albany-approves-airbnb-penalties-1466206171.; Kia Kokalitcheva, *Airbnb Threatens to Sue New York if Gov. Signs New Home-Sharing Bill*, FORTUNE (Sept. 7, 2016), http://fortune.com/2016/09/07/airbnb-sues-new-york-state/ (Assemblywoman Deborah Glick was surprised that the New York law was controversial, because, "You can't advertise an illegal activity.").

[127] Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 563–64 (1980).

criminalize harmless behavior to empower itself to censor people, constitutional rights are doubly at risk.[128]

Additionally, ordinances that punish home-sharing platforms for messages communicated by others—in this case, homeowners' advertisements—violate Section 230 of the federal Communications Decency Act, a federal law that prohibits government from holding website owners accountable for information other people post on their websites.[129] Congress passed Section 230 in response to court decisions that held internet hosts legally responsible for content posted by third parties.[130] In 1995, a New York court held that Prodigy, an internet service provider that hosted a financial computer bulletin board where members could post about financial news, could be sued for libelous content posted by one of its members.[131] Because Prodigy exercised some editorial control over content on the site (it retained the right to delete comments, for example), the court held that the company acted more like a publisher than a distributor, and could be held liable for content members posted.[132] This created a perverse incentive, however, by encouraging internet platforms not to regulate content at all, so as not to be characterized as a "publisher" for legal purposes.

Section 230 explicitly relieved internet platforms of liability. Thus, in 1997 the Fourth Circuit held that America Online was not liable for defamatory messages about the 1995 Oklahoma City bombing that an anonymous third party posted on its bulletin board.[133] Congress enacted Section 230 "to maintain the robust nature of Internet communication" and "to remove the disincentives to self-regulation created by" previous court

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[128] Byrum v. Landreth, 566 F.3d 442, 447 (5th Cir. 2009) (state's claim that calling oneself an "interior designer" without receiving a government license is unprotected speech is circular and would "authorize legislatures to license speech and reduce its constitutional protection by means of the licensing alone.").

[129] 47 U.S.C. § 230 (2012) ("No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.").

[130] *See* Shiamili v. Real Estate Grp. of N.Y., Inc., 952 N.E.2d 1011, 1016 (N.Y. 2011) ("[Section 230] was a response to cases such as Stratton Oakmont, Inc. v. Prodigy Servs. Co., in which an Internet service provider was found liable for defamatory statements posted by third parties because it had voluntarily screened and edited some offensive content, and so was considered a publisher.'" (internal citations omitted)).

[131] Stratton Oakmont, Inc. v. Prodigy Servs. Co., No. 31063/94, 1995 WL 323710, at *5 (N.Y. Sup. Ct. May 24, 1995), *superseded by statute*, 47 U.S.C. § 230 (2012), *as recognized in* Shiamili v. Real Estate Grp. of N.Y., Inc., 952 N.E.2d 1011, 1016 (N.Y. 2011).

[132] *Id.* at *2–5.

[133] Zeran v. Am. Online, Inc., 129 F.3d 327, 331 (4th Cir. 1997).

decisions.[134] Thus "lawsuits seeking to hold a service provider liable for its exercise of a publisher's traditional editorial functions—such as deciding whether to publish, withdraw, postpone or alter content—are barred."[135] Although Section 230 does not shield internet platforms from federal criminal law or intellectual property infringements,[136] it does protect platforms from liability under state criminal law.[137] Thus Section 230 has been used to shield from liability platforms like eBay when a seller forged an autograph on sports memorabilia,[138] an online dating service when a member fraudulently created a defamatory profile,[139] Orbitz when a user created a fraudulent listing for ticket sales,[140] and Roommates.com when a user's listing made discriminatory statements in violation of the Fair Housing Act.[141]

However, Section 230 has not completely shielded platforms from liability for unlawful activities resulting from connections made on their websites. While agreeing with the Seventh Circuit that Roommates.com was not liable for discriminatory comments made by users, the Ninth Circuit Court of Appeals held in 2008 that the company was not immune from a discrimination lawsuit that alleged that Roommates.com's website itself used traits like gender and sexual orientation to match prospective roommates based on their stated preferences, and therefore that the company, aside from its users, had engaged in discrimination.[142] The same circuit also held that Section 230 did not insulate ModelMayhem.com from negligence claims for failure to warn users that a known online rapist was monitoring the site.[143] In each of these cases, the platform was subject to liability for actions that it had taken (or failed to take) on its own, rather than for actions taken by third-parties.

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[134] *Id.* at 331.

[135] *Id.* at 330.

[136] 47 U.S.C. §§ 230(e)(1)–(e)(2) (2012).

[137] *Id.* § 230(e)(3) (2012) ("No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section."). *Cf.* Backpage.com, LLC v. McKenna, 881 F. Supp. 2d 1262, 1273 (W.D. Wash. 2012) (section 230 preempts state law "criminaliz[ing] the 'knowing' publication, dissemination, or display of specified content").

[138] *See* Gentry v. eBay, Inc., 99 Cal. App. 4th 816, 830 (2002).

[139] *See* Carafano v. Metrosplash.com, Inc., 339 F.3d 1119, 1121 (9th Cir. 2003).

[140] *See* Milgram v. Orbitz Worldwide, LLC, 16 A.3d 1113, 1117–18 (N.J. Super. Ct. 2010)

[141] *See* Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC, 521 F.3d 1157, 1175 (9th Cir. 2008) (*en banc*).

[142] *See id.*

[143] Jane Doe No. 14 v. Internet Brands, Inc., 767 F.3d 894, 898 (9th Cir. 2014)

Unlike Roommates.com and ModelMayhem.com, home-sharing platforms like Airbnb and Homeaway are protected by Section 230, because the content is wholly generated by the user, not the company that operates the site where the posts can be found.[144] It makes no difference for purposes of Section 230 whether a city has criminalized home-sharing, since Section 230 preempts such regulations.[145] While Airbnb encourages hosts and guests to comply with local laws,[146] that alone does not render Airbnb responsible for *enforcing* those laws under Section 230. On the contrary, Section 230's protections were meant to remove the disincentive that might otherwise deter platforms from overseeing user-generated content on their sites. Thus, forcing companies to police listings on their websites, as San Francisco is doing, is contrary to the purpose of Section 230, and encourages companies to treat their websites as mere bulletin-boards without editorial oversight—precisely the situation that gave rise to Section 230.

IV. DISCRIMINATING AGAINST "DISFAVORED" OWNERS AND GUESTS

Laws that target home-sharing often discriminate unfairly against one class of homeowners without good reason. Some allow only certain home-owners to share their homes—or allow only certain guests to stay there—based on age, or state of residence, or based on criteria that are so broad or confusing that even attorneys—much less ordinary homeowners—have difficulty understanding them, and that consequently allow government officials to arbitrarily choose whom to punish, and when to look the other way.

A. Restricting Who May Rent Based on Age, State of Residence, or Arbitrary Numbers

Some ordinances discriminate by allowing only certain guests to stay in homes. Rancho Mirage, California, for example, requires at least one occupant to be thirty-years-old, thus discriminating against younger legal

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[144] Airbnb's terms of service state that hosts "alone are responsible for any and all Listings and Member Content [they] post." *Terms of Service* § 7, AIRBNB, https://www.airbnb.com/terms (last visited Apr. 24, 2017) [hereinafter "Airbnb Terms of Service"].

[145] *See supra* note 137 and accompanying text.

[146] *See* Airbnb Terms of Service, *supra* note 144, § 12.C.iii (permitting termination of a host's account for violation of applicable laws and regulations).

adults.[147] Others discriminate by arbitrarily limiting who may rent out a home. Thus Nashville, Tennessee limits the number of properties that may be "non-owner-occupied short-term rentals" to an arbitrary number of three percent of that neighborhood.[148] That means property owners who have been renting their homes for years, but were not first in line to get a permit, are simply out of luck by government fiat.[149]

The Chicago ordinance discriminates in several ways. First, it caps the number of units within a building that may be used for home-sharing—a cap that does not apply to other types of rentals. If a building has five or more units, only six units or one quarter of the total number of units (whichever is less) can be licensed for home-sharing.[150] In buildings with four or fewer units, only *one* can be licensed for home-sharing.[151] These caps are not tied to how often—or even whether—a property is actually rented to guests. Rather, the caps are triggered when a property owner merely gets a license, even if he or she never actually rents out the property. No such limits apply to hotels, motels, or bed-and-breakfasts. They can rent out as many units to overnight guests as they wish. Other homes are forbidden from being rented at *all* unless the unit is the owner's "primary residence"[152]—unless the government gives the owner a special exception under subjective and arbitrary criteria.[153]

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[147] RANCHO MIRAGE, CAL., MUN. CODE § 3.25.030 (defining "responsible person" as "an occupant of the vacation rental unit who is at least thirty (30) years of age and who shall be legal responsible for ensuring that all occupants of the vacation rental unit . . . comply with all applicable laws, rules and regulations"); *see also* Xochitl Peña, *Lawsuit Challenges Rancho Mirage Vacation Rental Law*, DESERT SUN (September 26, 2014), http://www.desertsun.com/story/news/local/2014/09/26/rent-rancho-mirage/16296603. It is not clear whether this restriction violates California's Unruh Civil Rights Act. *See* Unruh Civil Rights Act, CAL. CIV. CODE § 51 (2016). While age discrimination is permitted under that Act when such discrimination "operate[s] as a reasonable and permissible means . . . of establishing and preserving specialized facilities for those particularly in need of [the] . . . services or environment" of a retirement community, the Act "does not permit a business enterprise to exclude an entire class of individuals on the basis of a generalized prediction that the class 'as a whole' is more likely to commit misconduct than some other class of the public." Marina Point, Ltd. v. Wolfson, 640 P.2d 115, 125, 127–28 (Cal. 1982) (citations omitted).

[148] NASHVILLE, TENN., METRO. CODE § 6.28.030(Q) (2015).

[149] Bobby Allyn, *Airbnb Regs for Nashville Would Limit Guest Numbers, Tax Hosts Like Hotels*, NASHVILLE PUBLIC RADIO WPLN NEWS ARCHIVE (Nov. 13, 2014), http://nashvillepublicmedia.org/blog/2014/11/13/nashville-decides-start-regulating-airbnb.

[150] CHI., ILL., MUN. CODE §§ 4-6-300(h)(10), 4-14-060(f) (2016).

[151] *Id.* §§ 4-6-300(h)(9), 4-14-060(e).

[152] *Id.* §§ 4-6-300(h)(8), 4-14-060(d).

[153] *Id.* §§ 4-6-300(h)(8), (9); 4-14-060(d), (e).

The Chicago ordinance also singles out home-sharers for unfair treatment in other ways. For example, home-sharers must pay a special four percent tax that does not apply to hotels, motels, or bed-and-breakfasts.[154] And the ordinance also limits who may rent a home based on where a property owner resides. The U.S. Constitution forbids state and local governments from imposing rules that discriminate against people who reside in other states.[155] Yet Chicago prohibits owners of single family homes and homes located in "buildings with up to four dwelling units" from home-sharing unless the home is the "licensee's primary residence."[156]

Under the "dormant commerce clause," state and local governments may not put up barriers against businesses that are headquartered in other states, or restrict the rights of people who travel to other states for business purposes.[157] As the Supreme Court has put it, the Constitution creates a "federal free trade unit" which "protect[s] interstate movement of goods against local burdens and repressions."[158] Prohibiting a Chicago home-owner—or a person from another city or state who owns a home in Chicago—from renting out that home, simply because it is not his primary residence, is unconstitutional. By letting Chicago residents offer homes for rent, but forbidding non-residents who own property in Chicago from doing the same thing, the ordinance treats in-state and out-of-state persons differently, benefitting the former and burdening the latter.

Restricting home-sharing to owners' primary residences does nothing to protect people against any danger that home-sharing might cause. These rules do not require home-owners to be *present* when renting out a home. So even if the rules were intended to ensure that home-sharers monitor guests to prevent noise or other disturbances, they do not accomplish that goal. Cities can more effectively achieve their purposes by enforcing the ordinary, common-sense rules against noise and nuisances that are already on the books, rather than unconstitutionally discriminating against home-sharers.[159]

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[154] *Id.* § 3-24-030.

[155] U.S. CONST. art. I, § 8, cl. 3; *id.* art. IV, § 2.

[156] CHI., ILL., MUN. CODE §§ 4-6-300(h)(8), (9), 4-14-060(d), (e). The Ordinance defines "primary residence" as "the dwelling unit where a person lives on a daily basis at least 245 days in the applicable calendar year." *Id.* §§ 4-6-300(a), 4-14-010. Worse, "[t]he failure of a person to claim a Cook County homeowner exemption for a dwelling unit shall create a rebuttable presumption that such dwelling unit is not the person's primary residence." *Id.* § 4-14-010.

[157] Am. Trucking Assocs. v. Mich. Pub. Serv. Comm'n, 545 U.S. 429, 433 (2005).

[158] H. P. Hood & Sons, Inc. v. Du Mond, 336 U.S. 525, 538 (1949).

[159] *See infra* Section VII.

B. Vagueness

Other restrictions on home-sharing do not discriminate on their face, but are so vague or confusing that they unavoidably lead to arbitrary and discriminatory enforcement. This deprives property owners of their right to due process of law and to equal treatment.

The Equal Protection Clause requires that, when government treats people differently, the classifications it creates must be rationally drawn to promote a legitimate government interest.[160] This rule applies to housing regulation as much as anything else. In *City of Cleburne v. Cleburne Living Center*,[161] the U.S. Supreme Court struck down a municipal ordinance that required homes for the mentally disabled to obtain a special use permit, but did not require such a permit for other uses such as apartments, multiple dwellings, or fraternity houses.[162] The Court concluded that "[t]he record does not reveal any rational basis for believing" that the home for the mentally retarded "would pose any special threat to the city's legitimate interests."[163] Likewise, due process of law forbids the government from imposing vague laws—laws that are so broadly worded that citizens cannot know what is and is not illegal.[164] Such laws, the Supreme Court has explained, "authorize and even encourage arbitrary and discriminatory enforcement,"[165] and "impermissibly delegate[] basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis."[166]

Regulations like those imposed by Rancho Mirage, Nashville, Chicago, and other cities violate these rules. They prevent some people from renting homes but allow others to do so, and tax residential home-sharers at a higher rate than commercial hotels, motels, and bed-and-breakfasts, without good reason.[167] And they often impose restrictions so vague that owners and their guests cannot know what is and is not allowed.

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[160] City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 440 (1985).

[161] 473 U.S. 432 (1985).

[162] *Id.* at 447–48.

[163] *Id.* at 448.

[164] Baggett v. Bullitt, 377 U.S. 360, 367 (1964) (citations omitted) ("[A] law forbidding or requiring conduct in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates due process of law.").

[165] City of Chicago v. Morales, 527 U.S. 41, 56 (1999).

[166] Grayned v. City of Rockford, 408 U.S. 104, 108–09 (1972).

[167] For a discussion of cities' insufficient justifications for banning home-sharing, *see infra* Sections VII.A–B.

Consider, for instance, the incoherent and unpredictable rules imposed by Honolulu's ordinance. It prohibits rentals "provided for compensation to transient occupants for less than thirty days."[168] Yet officials have, at least in some circumstances, taken the extreme position that to be in compliance with the ordinance, guests must physically occupy the rented property *every moment* of the entire thirty days.[169] Other times, officials have agreed that guests need to physically occupy the home interminably, so long as the home is rented exclusively to those guests for thirty days.[170] Because it is unclear whether "provided for" means "rented exclusively" or "occupied continuously," officials have inconsistently enforced the ordinance, making it impossible for homeowners to know whether or not they are in violation. Worse, homeowners who are accused of violating the ordinance bear the burden of proving they are in compliance (rather than government proving that the homeowner broke the law), without even being provided with the evidence against them to know which behaviors are considered unlawful.[171] This means homeowners are guilty until proven innocent, with no way to know in advance which actions are unlawful.

Similarly, the Nashville ordinance exempts hotels, bed and breakfasts, boarding houses, and motels from the three percent rental cap. However, the definitions overlap and are so confusing that it is impossible for an owner to tell she is running a "short-term rental," in which case she is subject to the rental cap, or a "hotel," "bed and breakfast," or "boarding house," in which case she is exempt.[172] A Tennessee trial court recently enjoined these arbitrary and incoherent provisions of the Nashville ordinance.[173]

Once again, Chicago's ordinance is the most offensive. It is so vague that a property owner cannot know whether her property falls into one category or another. The ordinance classifies home-sharing properties as either "vacation rentals" or "shared housing units," but does so in words that are nearly identical, and, at the same time, exactly the opposite. It defines "vacation rental" as "a dwelling unit that contains six or fewer

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[168] HONOLULU, HAW., LAND USE ORDINANCE § 21-10.1 (2016).

[169] *See* Complaint ¶ 23, Kokua Coalition v. Honolulu Dep't of Planning and Permitting, Civ. No. 16-00387-DKW-RLP (D. Haw. Jul 11, 2016), ECF No. 1.

[170] *See id.*

[171] *See id.* ¶¶ 40–42.

[172] *See* Complaint for Declaratory and Injunctive Relief, Anderson v. Nashville, No. 15-CV-3212 (Tenn Cir. Ct. Aug. 26, 2015), http://www.beacontn.org/wp-content/uploads/2015/12/complaint-SIGNED.pdf.

[173] *See* Order, Anderson v. Nashville, No. 15-CV-3212 (Tenn. Cir Ct. Oct. 28, 2016), http://www.beacontn.org/wp-content/uploads/2015/08/Signed-order.pdf.

sleeping rooms that are available for rent," and defines a "shared housing unit" as "a dwelling unit containing six or fewer sleeping rooms that is rented"—yet the ordinance also says that if a property is a "shared housing unit," it is not a "vacation rental," and if it is a "vacation rental," it is not a "shared housing unit."[174] This wording makes it impossible to know which category applies to a property.

The Chicago ordinance's noise restrictions are also too vague to be consistently or reasonably applied. A home-sharer can completely lose her right to rent her home if city officials think her guests are making noises "louder than average conversational level."[175] Yet the ordinance never defines what "louder than average conversational level" means—and it contains no objective measurement criteria, such as a specific decibel level, the way other city noise ordinances do.[176] Instead, the noise rules are based entirely on the subjective opinions of city officials. Without reference some objective standard, Chicago's prohibition on noises above "average conversational level" would permit officials to revoke home-sharers' licenses anytime a baby cries or a garage door opens. That is why the Supreme Court struck down a similar ordinance in 1971 that punished people on public sidewalks who "conduct themselves in a manner annoying to persons passing by."[177] It held that the term "annoying" was not defined and therefore allowed officials to punish people based on their own subjective beliefs about what they consider "annoying."[178]

Sadly, some courts have been unwilling to strike down vague home-sharing regulations. For example, a California appellate court upheld an anti-rental ordinance even though the city attorney admitted that the ordinance's plain language prohibited house-sitting, house swapping, or even a homeowner allowing his overnight guest to pick up the tab for dinner or help with yard work.[179]

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[174] *Compare* CHI. ILL., MUN. CODE § 4-6-300 (2016), *with id.* § 4-14-010 (2016).

[175] *Id.* §§ 4-6-300(j)(2)(ii), 4-14-080(c)(2).

[176] These noise rules also do not apply to bed-and-breakfasts or hotels. CHI. ILL., MUN. CODE §§ 8-32-150, 8-32-170.

[177] Coates v. Cincinnati, 402 U.S. 611, 611 (1971).

[178] *Id.* at 615–16.

[179] Ewing v. City of Carmel-By-The-Sea, 234 Cal. App. 3d 1579, 1595 (1991).

Vague laws are a boon to those in power, who can use the opportunities of vagueness to pick winners and losers arbitrarily.[180] Often, political leaders are quite open about their intent to arbitrarily enforce this so-called "discretion." New York City lawmakers, for example, recently assured the public that they will only "enforce this and other existing laws against bad actors," and so-called "illegal, short-term stay hotels."[181] But what do these terms mean? Who qualifies as a "bad actor" deserving of punishment? When does an overnight rental cross the line into an "illegal hotel"? Vague legal definitions or enforcement standards mean that the punishable act is in the eye of the beholder, which enables officials to selectively enforce the law and subject citizens to bureaucrats' whims. Failing to abide by objective, predictable standards breeds uncertainty and paves the way for special interest groups—such as competitor hotels or NIMBY neighbors—to hijack the enforcement process.

V. PROTECTING NEIGHBORHOODS *AND* HOME-SHARERS

Although regulations aimed at the common (and age-old) practice of home-sharing often infringe upon property rights and a host of other constitutional rights, government officials nevertheless claim that such rules are necessary to protect neighborhoods. This section will (1) explain why popular rationales behind banning and overregulating home-sharing are unconvincing from a policy perspective and poor justifications for violating homeowners' constitutional rights, and (2) offer new solutions for addressing legitimate neighborhood concerns while safeguarding property rights.

A. Controlling Nuisance and Housing Costs

Officials often justify restrictions on home-sharing on the theory that home-sharing disrupts neighborhoods and causes noise or traffic.[182] But

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[180] As the late Christopher Hitchens observed, "The conventional word that is employed to describe tyranny is 'systematic.' The true essence of a dictatorship is in fact not is regularity but its unpredictability and *caprice*; those who live under it must never be able to relax, must never be quite sure if they have followed the rules correctly or not . . . . Thus, the ruled can always be found to be in the wrong." CHRISTOPHER HITCHENS, HITCH-22: A MEMOIR 51 (2010).

[181] Eric Boehm, *Airbnb Drops Lawsuit Against New York's Anti-Free-Speech Homesharing Law,* REASON (Dec. 6, 2016), https://reason.com/blog/2016/12/06/airbnb-wont-keep-fighting-new-yorks-anti.

[182] These fears may be exaggerated. Studies often show that the number of nuisance

while it is understandable that neighbors do not want loud renters next door or excessive traffic on their streets, cities already have better tools for preventing noise, traffic problems, and other nuisances without violating constitutional rights. Cities do not outlaw all backyard barbecues just because some get noisy, or prohibit all birthday parties or baby showers because guests sometimes take up parking spots on the street. Instead, they rely on existing rules that limit noise, enforce parking restrictions, and proscribe other nuisances.[183]

Actually, diverting valuable public resources to policing home-sharing and negotiating petty arguments between neighbors instead of enforcing existing anti-nuisance laws does nothing to improve neighborhoods—and may make things worse by fostering "underground" rentals and creating an atmosphere of snooping and suspicion. That was one reason why San Francisco voters rejected a 2015 ballot initiative that would have restricted short-term rentals to seventy-five days a year, regardless of whether the homeowner was present during the rental period, forced homeowners to submit quarterly home-sharing reports to the City, and allowed neighbors to sue people who rent their homes.[184] The following year, San Francisco Mayor Ed Lee vetoed an ordinance that would have capped home-sharing at sixty days a year, because it "risk[ed] driving even more people to illegal rent units."[185] These restrictions threatened to turn neighbors into spies watching over each other's back fences to ensure that the guests are just friends rather than Airbnb customers.

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complaints related to home-sharing are minimal. *Cf.* FISCAL CHOICE CONSULTING, REPORT ON STAFFING AND ORGANIZATION OF THE PROPERTY STANDARDS DIVISION: METROPOLITAN GOVERNMENT OF NASHVILLE & DAVIDSON COUNTY, TENNESSEE 13 (Dec. 20, 2016) [hereinafter NASHVILLE REPORT] ("[I]n 2013 and 2014 there were no specific 'STR' complaints reported. In 2015, there were a total of 15.").

[183] Additionally, home-sharing platforms themselves provide resources to help neighbors deal with disruptive rental guests. For example, Airbnb opened an online hotline that allows neighbors—anonymously if they prefer—to file complaints about noisy guests, parking violations, and more. *See Airbnb Neighbors—Contact Us*, AIRBNB, https://www.airbnb.com/neighbors (last visited Apr. 24, 2017).

[184] Mollie Reilly, *San Francisco Votes Down Tough Airbnb Regulations,* HUFFINGTON POST (Nov. 4, 2015), http://www.huffingtonpost.com/entry/airbnb-san-francisco-vote_us_5637d49ae4b027f9b969ac7c.

[185] Mollie Reilly, *San Francisco Mayor Rejects Tough Restrictions on Airbnb,* HUFFINGTON POST (Dec. 9, 2016), http://www.huffingtonpost.com/entry/san-francisco-airbnb-regulations_us_584af753e4b04c8e2bafabbc.

An independent consultant for the City of Nashville recently found that the restrictive cap on home-sharing actually encouraged homeowners to offer their homes for rent:

> Economic principles teach us that limiting supply increases price and that increasing price increases profit. When profits increase, so too does the incentive to enter the market—tempting some people to operate illegally. Combined with Nashville's reputation as a "fun destination" and the limited number of existing hotel rooms, the financial incentive to operate a short-term rental is significant.[186]

Home-sharing regulations are often nothing more than a turf war by existing businesses, such as hotels, who use political connections to block potential competition.[187] In fact, a recent *New York Daily News* editorial argued explicitly that home-sharing should be banned because homeowners who rent out their guest rooms "compete with the city's hotels and threaten the jobs they create."[188] But by that logic, homeowners should also be prohibited from letting friends or relatives spend the night for free, or from hosting dinner parties in their homes, to avoid diverting business from the local Holiday Inn or Applebee's.

At other times, these excuses are simply façades for old-fashioned NIMBY-ism; the desires of locals to keep visitors away.[189] But while these preferences may guide individual actions, determining who is and is not suitable to live in a given neighborhood is not the proper function of government. Indeed, it is exceptionally dangerous. Local officials have frequently used this excuse to target politically unpopular groups or

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[186] NASHVILLE REPORT, *supra* note 182, at 12.

[187] Katie Benner, *Inside the Hotel Industry's Plan to Combat Airbnb*, N.Y. TIMES (Apr 16, 2017), https://www.nytimes.com/2017/04/16/technology/inside-the-hotel-industrys-plan-to-combat-airbnb.html?_r=0 (exposing the American Hotel and Lodging Association's detailed plan for "lobbying politicians and state attorneys general to reduce the number of Airbnb hosts").

[188] Jumaane Williams & John Banks, *An Airbnb Crackdown the City Badly Needs*, N.Y. DAILY NEWS (June 24, 2016), http://www.nydailynews.com/opinion/williams-banks-airbnb-crackdown-city-badly-article-1.2685700.

[189] In November 2016, homeowners sued the City of Laguna Beach, California, over its restrictions on home-sharing, alleging that "[a] few outspoken Laguna residents do not want to share their city with visiting and vacationing persons and families of very low, low and moderate income," and that they "prod[ed] the city to ban the short-term rental units these persons can afford," thus unlawfully discriminating against low-income renters and vacationers. Cassandra Reinhart, *Suit Contests Laguna's Short-Term Rental Law,* LAGUNA BEACH INDEP. (Nov. 23, 2016), http://www.lagunabeachindy.com/suit-contests-lagunas-short-term-rental-law.

individuals.[190] Indeed, the Supreme Court has found equal protection violations in cases involving classes as small as a "class of one," where the government treats a party unequally from those similarly situated when there is no rational basis for the difference in treatment.[191] The Constitution was designed to "withdraw certain subjects from the vicissitudes of political controversy," so that special interests could not hijack government to undermine others' liberties. "One's right to life, liberty, and *property*, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections."[192] When local officials decide what a neighborhood should "look like," they frequently—sometimes unconsciously[193]—decide it should look like *them*, and not like a disfavored minority group.

Local officials have also justified home-sharing regulations on the theory that the practice threatens the supply of affordable housing. Dale A. Carlson, one of the leaders of the San Francisco anti-home-sharing initiative, lamented that the city was experiencing "the worst housing crunch . . . since the 1906 earthquake," and that it was "just insanity" to "lose housing units for tourist accommodations."[194] But the blame for San Francisco's housing shortage belongs with city officials, not with homeowners who decide what to do with their property. San Francisco makes it prohibitively difficult to construct new housing by imposing burdensome regulations, delays, and costs whenever a developer seeks permission to build. A recent report from the National Association of Home Builders showed nearly a 30-percent increase in the cost of complying with regulations in just the past five years.[195] Federal Judge

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[190] *See, e.g.*, City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 446–47 (1985); Moore v. City of East Cleveland, 431 U.S. 494, 502 (1977); U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973); Buchanan v. Warley, 245 U.S. 60, 80–81 (1917).

[191] *See* Village of Willowbrook v. Olech, 528 U.S. 562, 564 (2000) (ruling that homeowner could assert equal protection claim as a "class of one" when a village demanded a thirty-three-foot easement as a condition for connecting the homeowner's property to the municipal water supply, while requiring only a fifteen-foot easement from similarly-situated property owners).

[192] W. Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1943) (emphasis added).

[193] *See, e.g.*, Texas Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc., 135 S. Ct. 2507, 2522 (2015).

[194] Alejandro Lazo, *'Airbnb Initiative' Would Limit Home Sharing in San Francisco*, WALL ST. J. (Oct. 24, 2015), http://www.wsj.com/articles/san-francisco-to-vote-on-limits-to-home-sharing-1445679003.

[195] Paul Emrath, *Government Regulation in the Price of a New Home*, NAT'L ASS'N OF

Charles Breyer recently ruled that "the limited supply—and correspondingly high price—of rental units in San Francisco" was the result of "structural decisions made by the City long ago in the management of its housing stock," rather than the fault of private property owners who struggle to meet demand, often over hurdles imposed by government.[196]

Even if allowing homeowners to rent their property does increase the value of a home, what of it? The alternative is for the government to take away a property right—to prevent homeowners from using their property as they see fit—in order to artificially *decrease* the price of homes. Indeed, if officials work hard enough at making property unattractive and unusable, they can make it virtually free![197]

Banning or overregulating home-sharing often has detrimental effects on the local economy. Home-sharing often helps homeowners cover their mortgages in the face of soaring costs. Airbnb reports that thirteen-percent of its Los Angeles hosts would have lost their homes through foreclosure without the extra income from home-sharing.[198] In New York City, seventy-six-percent of Airbnb hosts use their home-sharing income to stay in their homes.[199] And for Americans over age sixty-five, Airbnb hosting provides an average supplemental income of $8350 per year, about a fifty-two-percent increase over Social Security income.[200]

HOME BUILDERS (May 2, 2016), https://www.nahbclassic.org/generic.aspx?sectionID=734&genericContentID=250611&channelID=311 ("Applying the average percentages from NAHB's studies to these home prices produces an estimate that average regulatory costs in a home built for sale went from $65,224 to $84,671 in the roughly five-year period from April 2011 to March 2016—a 29.8 percent increase.").

[196] Levin v. City & Cty. of San Francisco, 71 F. Supp. 3d 1072, 1084 (N.D. Cal. 2014).

[197] Indeed, if the lack of housing in San Francisco is sufficient ground for prohibiting homeowners from deciding when and whether to allow guests in their homes, how far does this logic extend? Should homeowners also be compelled to give up a guest-room to strangers in need of homes? This may seem an extreme proposition, but it has been done. Soviet officials forced home and apartment owners to reside with strangers for this reason. *See generally* P. MESSANA, SOVIET COMMUNAL LIVING: AN ORAL HISTORY OF THE KOMMUNALKA (2011). California and federal courts have even allowed the government to force property owners to rent or continue renting property against their will. *See, e.g.*, Yee v. City of Escondido, 503 U.S. 519 (1992); Nash v. City of Santa Monica, 688 P.2d 894 (Cal. 1984); San Remo Hotel L.P. v. City and Cty. of San Francisco, 41 P.3d 87 (Cal. 2002).

[198] *Airbnb Home Sharing Activity Report: Los Angeles*, AIRBNB CITIZEN (May 9, 2016), https://los-angeles.airbnbcitizen.com/airbnb-home-sharing-activity-report-los-angeles/.

[199] *One Host, One Home: New York City*, AIRBNB CITIZEN (Oct. 2016), https://www.airbnbaction.com/wp-content/uploads/2016/11/Data-Release-October-2016-Writeup-1.pdf.

[200] *Airbnb Helps Older Americans Stay in Their Homes*, AIRBNB CITIZEN (Nov. 21, 2016), https://www.airbnbcitizen.com/report-airbnb-helps-older-americans-stay-in-their-

The costs to taxpayers of enforcing bans on home-sharing are astronomical. Last year, Santa Monica, California, estimated that it would cost nearly half a million dollars in just the first year to staff a full-time task force to implement its ban on home-sharing.[201] It took more than a year for the city to convict its first homeowner: Scott Shatford, a thirteen-year resident, who had listed five properties for rent and even written a book on home-sharing.[202] There were no accusations that his properties were poorly maintained or that guests had been cheated, but local prosecutors charged him with a crime, fined him $3500, and put him on two years' probation.[203] He has since announced plans to leave California for Colorado.[204] Meanwhile, faced with having to decide how to employ its limited resources, the Nashville Police Department recently announced their opposition to enforcing the City's home-sharing rules.[205] "[P]olice officers have plenty on their plates answering calls for service and proactively working to deter criminal activity," the Department contended, arguing that citizens would be better served by a police force that "responds to quality of life issues such as vehicles blocking rights of way and noise complaints."[206]

B. Commercial Activity in Residential Neighborhoods

Often, lawmakers justify restrictions on home-sharing by claiming that it is commercial activity, and therefore inappropriate for residential neighborhoods. But the question should not be whether an owner is running a business, but whether and owner is engaging in a nuisance. There is no reason commercial activity should *per se* be prohibited from neighborhoods, and enforcing such a rule consistently would be practically impossible. Homeowners often sell things on eBay, or run counseling or

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homes/.

[201] Kristen Lepore, *How Santa Monica Will Enforce Its Airbnb Ban*, 89.3 KPCC S. CAL. PUB. RADIO (May 18, 2015), http://www.scpr.org/news/2015/05/18/51728/how-santa-monica-will-enforce-its-airbnb-ban.

[202] *Id.*

[203] *Id.*

[204] Hailey Branson-Potts, *Santa Monica Convicts Its First Airbnb Host Under Tough Home-Sharing Laws*, L.A. TIMES (July 13, 2016), http://www.latimes.com/local/lanow/la-me-ln-santa-monica-airbnb-conviction-20160713-snap-story.html.

[205] Joey Garrison, *Nashville Police Opposed to Enforcing Airbnb Rules*, TENNESSEEAN (Sept. 26, 2016), http://www.tennessean.com/story/news/2016/09/26/nashville-police-opposed-being-airbnb-rule-enforcers/91114720/.

[206] Joey Garrison, *Nashville Police Opposed to Enforcing Airbnb Rules*, TENNESSEEAN (Sept. 26, 2016), http://www.tennessean.com/story/news/2016/09/26/nashville-police-opposed-being-airbnb-rule-enforcers/91114720/.

daycare services in their homes. Also, homeowners often let people stay in their homes in exchange for non-monetary compensation—the guest washes the dishes, for instance, or makes or buys dinner for the family. If a homeowner has the right to decide whether to allow someone to stay in her home, then she should have a right to receive payment in exchange. In other words, "the market does not transform what were permissible acts into impermissible acts."[207] The same rule applies to time limits. If a person rents a home for a year or two years, or for ten years, or for just a few days, that does not make it any less a residence, or change the residential nature of the neighborhood.

There is nothing magic about home-sharing. Indeed, when determining whether a shared housing arrangement is consistent with local residential or family zoning, state courts have considered *how a home is being used* rather than the relationships between the parties involved in or characteristics of the transaction. For example, the Wisconsin Supreme Court held that a group of women missionaries living together was a "family" for zoning purposes, where the statute did not require consanguinity, but defined family as "one or more individuals living, sleeping, cooking, or eating on premises as a single housekeeping unit."[208] Similarly, the Pennsylvania Supreme Court found that a group of elderly residents who lived together, shared kitchen facilities, and paid dues to participate qualified as a single family residence.[209] The court held that in determining whether a rental is consistent with the local zoning scheme, "the focus . . . should be directed to the *quality* of the relationship during the period of residency rather than its *duration*."[210] It also rejected the idea that a contract to pay dues substantively altered the living arrangement into a commercial transaction.[211] Finally, a Kentucky appellate court held that a group residence of nurses functioned as a single housekeeping unit, even though they had separate rooms, because they shared a kitchen and other common facilities.[212] For zoning purposes, what mattered in determining whether the use was residential (as opposed to commercial) is whether the residents operated like a single family unit, not the financial relationships or sleeping arrangements or length of occupancy.

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[207] JASON F. BRENNAN & PETER JAWORSKI, MARKETS WITHOUT LIMITS: MORAL VIRTUES AND COMMERCIAL INTERESTS 10 (2016).

[208] Missionaries of Our Lady of La Salette v. Whitefish Bay, 66 N.W.2d 627, 629 (Wisc. 1954).

[209] *In re* Miller, 515 A.2d 904, 909 (Pa. 1986).

[210] *Id.* at 908–09 (emphasis added).

[211] *Id.* at 907.

[212] Robertson v. W. Baptist Hosp., 267 S.W.2d 395, 397 (Ky. Ct. App. 1954).

C. A New Way to Protect Communities While Respecting Rights and Entrepreneurship

By contrast with many other places, Arizona has chosen to embrace the opportunities of the sharing economy. In fact, its pioneering legislation has made the Grand Canyon State the most home-sharing-friendly state in the nation.

That story begins in 2006, when Arizona voters responded to the infamous eminent domain decision, *Kelo v. New London*,[213] by overwhelmingly approving the Private Property Rights Protection Act,[214] a ballot initiative that, in addition to restricting the use of eminent domain, also requires government to compensate owners when it imposes regulations that reduce the value of their property in ways not justified by public safety needs. While owners can be barred from engaging in pollution, maintaining dangerous conditions on their property, or using their land in ways that violate their neighbors' rights, they cannot be prohibited from building or renovating homes or operating legitimate businesses—nor can they be forced to use their land in ways they don't want to—unless the government pays them for depriving them of their property rights.

This Act played a central role in a 2014 case involving an effort by the city of Sedona to ban so-called "vacation rentals." Because the Act does not require compensation for land-use rules that protect public safety and health, city officials tried to shoehorn their restriction on property rights into this exemption by claiming that the ban protected public safety. But rather than explain how it did so, officials claimed that the burden of proof was not on them—their mere declaration was "not subject to second-guessing by the courts."[215] Fortunately, the Arizona Court of Appeals rejected this argument. When the government claims that restricting private property rights is necessary to protect the public, *it* bears the burden of proving, by a preponderance of the evidence, that the public safety exemption applies.[216] Although state courts have not yet specified how closely a property regulation must serve a public health problem before being exempt, it is clear that the Act requires realistic judicial review when officials assert the public safety exception, in order to ensure that this is not merely a pretext.

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[213] 545 U.S. 469 (2005).

[214] ARIZ. REV. STAT. §§ 12-1131–1138 (2016).

[215] Defendants' Motion for Partial Summary Judgment, at 4, Sedona Grand, LLC v. City of Sedona, No. 1 CA-CV 10-0782 (Sept. 4, 2014) (on file with the Goldwater Institute).

[216] Sedona Grand, LLC v. City of Sedona, 270 P.3d 864, 869 (Ariz. Ct. App. 2012).

In cases in which a land use restriction does in fact protect public health and safety, it is typically a simple matter for the government to prove this. In the Sedona case, the court used two examples: laws that prevent people from accumulating waste in their yards obviously relate to health and safety because they prevent "insects, rodents, snakes and fire,"[217] and floodplain ordinances have a "commonsense, self-evident nexus" to preventing emergencies and protecting lives and property.[218]

But "the nexus between prohibition of short-term occupancy and public health" was "not self-evident."[219] If officials wanted to avoid paying property owners for taking away their right to use their property, those officials had the obligation of demonstrating—by real evidence—that such deprivations meaningfully protected public safety. They could not do so. Despite vague references to "the peace, safety and general welfare of the residents," city records showed that officials adopted the rental ban in order to protect the city's "small-town character" and "scenic beauty," not to prevent any public dangers.[220] The complaints officials received from residents all related to general grievances about roadside parking or traffic, or neighbors expressing a desire to live in a "small town" where "you know most everyone." These residents urged the city to ban short-term rentals in order to maintain "a quiet, friendly, family" neighborhood—not to protect public safety.[221] Thus the court refused to blindly accept the city's claim that the rental ban was exempt from the compensation requirement.[222]

Even more outlandish were the efforts of officials in the mountainside community of Jerome to fit their home-sharing ban into the "public safety" exemption. In 2012, Glenn Odegard fell in love with Jerome, a tiny, former mining town that has become a tourist destination featuring ghost tours, art galleries, bed-and-breakfasts, restaurants, and shops. He bought a 118-year-old Victorian house that had been abandoned and left vacant for six decades; the house was literally buried under rocks and mud, with a tree growing in what had once been the living room. Where others would have seen an eyesore, he saw an opportunity: he could restore the house to its

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[217] *Id.* at 869–70.

[218] *Id.* at 870.

[219] *Id.*

[220] SEDONA, ARIZ., CODE § 8-4-2 (2008).

[221] Defendant's Statement of Facts, at ¶ 5, Ex. B, Sedona Grand, LLC v. City of Sedona, No. 1 CA-CV 10-0782 (Sept. 4, 2014) (on file with the Goldwater Institute).

[222] Under Advisement Ruling on Motions for Partial Summary Judgment, at 5–6, Sedona Grand, LLC v. City of Sedona, No. V1300CV820080129 (Feb. 24, 2015), https://goldwater-media.s3.amazonaws.com/cms_page_media/2015/3/10/05%20-%20Trial%20Court%20Final%20Judgment%20on%20MPSJ%20%282.24.15%29.pdf).

original condition and recoup his costs by renting the home to visitors—thus contributing to the town's economy and restoring a little bit of its beauty. Odegard's hard work paid off when the house was featured in *Arizona Highways* magazine and added to the Jerome Historic Home and Building Tour.

Nevertheless, town officials decided they didn't want Odegard to rent out his house to overnight guests. They decreed that "vacation rentals" were illegal, and threatened Odegard with fines and even jail time for allowing people to stay in his home. Seeking to justify this prohibition as a "public safety" rule, so as to evade the duty to compensate, Jerome officials claimed banning short-term rentals was necessary to protect the tourists who might not be aware of potholes in the streets. The ban would also maintain cleanliness, they said, because nonresidents might not know when garbage day is. They even claimed the prohibition would ensure that there was enough long-term housing in the town that citizens would remain in the area and run for offices in city government.[223]

In May 2016, to prevent city officials like those in Sedona and Jerome from imposing extreme and arbitrary rules against home-sharing, Arizona lawmakers adopted legislation that expressly forbids local governments from imposing blanket bans on home-sharing.[224] The new law allows local communities to enforce nuisance rules that protect quiet, clean, and safe neighborhoods, but blocks one-size-fits-all prohibitions that cause more problems than they solve.[225] To protect property owners from abuse, the law requires local governments to demonstrate that new regulations are specifically needed to prevent crime, loud noises, or other nuisances. Municipal officials cannot limit what homeowners may do with their land out of simple dislike or distaste.[226]

Tailoring rules to legitimate government public health and safety concerns protects property rights as well as rights that are often incidentally violated or burdened by severe restrictions on home-sharing. And requiring local governments to treat home-sharing the same as other residential occupancies, without regard for the duration of the rental, whether the home is the owner's primary residence, or what compensation is offered, protects homeowners against unclear rules and arbitrary enforcement.

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[223] Jerome, Ariz., Ordinance 405 and attachments (2013) (on file with the Goldwater Institute).

[224] ARIZ. REV. STAT. §§ 9-500.38; 11-269.15 (2016).

[225] *Id.* §§ 9-500.38(A)–(B), 11-269.15(A)–(B).

[226] *Id.* §§ 9-500.38(B)(1), 11-269.15(B)(1).

Passed with overwhelming bipartisan support, Arizona's Homesharing Act put an end to the days when homeowners like Jerome's Odegard could face jail time and thousands of dollars in fines for letting guests stay in their homes.[227] With its first-in-the-nation comprehensive protection for home-sharing and its broader statutory protection against burdensome property regulations, Arizona is without a doubt the most property-rights friendly state in the union. Other states should follow suit—and some state lawmakers are already doing so.

Unfortunately, some lawmakers oppose these statewide protections, preferring instead–in the words of Indiana Rep. Jerry Torr (R)—to "trust our local officials to decide because every community's different."[228] But these concerns are misguided. Local control is not an end in itself. It is a tool that allows communities to come together and make decisions within the proper scope, such as how to deal with nuisances. It should never be used as a weapon against individual rights. When local control becomes destructive of those ends, when it is being oppressive, as has been the case in the home-sharing context, then the state has a duty to step in and protect people's rights.

VI. CONCLUSION

As technology transforms the American economy into a more service-oriented, peer-to-peer market, one can expect to see more problems caused by broad-brush laws that stifle these information innovations. This is especially true with something as simple as allowing overnight guests to stay in one's home. Rather than trying to stretch an old regulatory framework to fit new technologies, government should allow people to experiment with new methods of communicating about age-old practices like home-sharing. This ordinary activity has simply become more efficient and a more common source of income due to technological innovations like Airbnb and Homeaway.

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[227] A similar law on the books in Florida was recently used to stop Miami city officials from enforcing a new short-term rental ban. David Smiley, *Judge Blocks City of Miami from Targeting Airbnb Hosts*, Miami Herald (Apr 19, 2017), http://www.miamiherald.com/news/local/community/miami-dade/article145611469.html. However, Florida's law is far narrower than Arizona's, as it only prevents local governments from enacting outright bans, but allows officials to regulate short-term rentals. FLA. STAT. ANN. § 509.032(7)(b). Moreover, the Florida law does not apply to regulations enacted before June 1, 2011. *Id.*

[228] Brandon Smith, *Short-Term Rentals Bill Fails on House Floor*, IND. PUB. MEDIA (Feb 7, 2017), https://indianapublicmedia.org/news/shortterm-rentals-bill-fails-house-floor-113632/.

No one knows what the future holds, which ventures will be successful and which will fail. That is precisely why the United States Constitution protects individual rights—including the rights of home-sharers. Violating property rights also deprives people of the right to privacy, to express themselves, to keep the fruits of their labor, and to provide for their future and that of their families. On the other hand, when people are free to make their own decisions and to experiment, they are empowered to shape their own lives.

Airbnb in Paradise: Updating Hawai'i's Legal Approach Towards Racial Discrimination in the Sharing Economy

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INTRODUCTION

> The public policy of the State of Hawai'i disfavoring racial discrimination is embodied in our statutes and our Constitution. The strength of this expressed public policy against racial discrimination is beyond question.[1]

In May 2016, Gregory Selden filed a class action lawsuit against Airbnb,[2] an online platform that connects short-term renters with willing property owners.[3] In his suit, Selden accused the company of facilitating racial discrimination.[4] Selden is an African-American man who attempted to book a short-term rental accommodation through Airbnb in Philadelphia, Pennsylvania, in March 2015.[5] His profile on the Airbnb platform included a picture of his face, his full name, and other details regarding his background.[6] The owner of the housing unit that Selden sought to rent from promptly denied Selden's request for accommodations, claiming the unit had already been booked.[7]

After noticing that the same rental unit remained available on Airbnb despite having been told it was filled, Selden suspected he was denied a booking because of his race.[8] "Smelling a rat," Selden created two new imitation Airbnb profiles that featured photos of anonymous white individuals, named "Jessie" and "Todd."[9] Using these new profiles, Selden again inquired into the same housing unit with the same dates he used with his previous account.[10] The owner promptly accepted the booking requests

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[1] Hyatt Corp. v. Honolulu Liquor Comm'n, 69 Haw. 238, 244, 738 P.2d 1205, 1208–09 (Haw. 1987) (citations omitted).

[2] Selden v. Airbnb, Inc., No. 16-cv-00933 (CRC), 2016 WL 6476934, at *1 (D. D.C. Nov. 1, 2016); *see* Vauhini Vara, *How Airbnb Makes it Hard to Sue for Discrimination*, NEW YORKER (Nov. 3, 2016), http://www.newyorker.com/business/currency/how-Airbnb-makes-it-hard-to-sue-for-discrimination (chronicling Gregory Selden's experience that gave rise to the lawsuit).

[3] *See About Us*, AIRBNB, https://www.airbnb.com/about/about-us (last visited Apr. 6, 2017).

[4] *Selden*, 2016 WL 6476934, at *1 (citing Elaine Glusac, *As Airbnb Grows, So Do Claims of Discrimination*, N.Y. TIMES (June 26, 2016), http://www.nytimes.com/2016/06/26/travel/airbnb-discrimination-lawsuit.html); *see* Vara, *supra* note 2 ("Selden alleged all this in a lawsuit, filed in May [2016] in the U.S. District Court for the District of Columbia, accusing Airbnb of facilitating racial discrimination.").

[5] *Selden*, 2016 WL 6476934, at *1–2.

[6] *Id.* at *2.

[7] *Id.*

[8] *Id.*

[9] *Id.*; Vara, *supra* note 2.

[10] *Selden*, 2016 WL 6476934, at *2.

from both of the new profiles; Selden's "white" Airbnb profiles were accepted on the same day that his "black" profile was rejected.[11]

The Court eventually stayed Selden's lawsuit because of the mandatory arbitration clause in Airbnb's Terms of Service,[12] but it shined a spotlight on a new legal issue that has arisen through the advent of the sharing economy. Featuring peer-to-peer platforms that help to facilitate the sharing of goods and services, the "sharing economy" has developed substantially in recent years and remains the foundation upon which companies such as Uber, Lyft, and Airbnb have thrived.[13] Since many sharing economy companies circumnavigate traditional modes of business, federal and state governments sometimes struggle to channel such companies into existing regulatory schemes. The State of Hawai'i is no exception.

The discrimination issues which have plagued Airbnb should be a cause of concern for Hawai'i's legal community. Currently, there are approximately 10,000 properties in Hawai'i listed on Airbnb,[14] and that number could easily rise in the coming years. While it would be easy to dismiss Selden's experience of racial discrimination through Airbnb as an exceptional case, studies show that racial discrimination and bias still

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[11] *Id.*; Vara, *supra* note 2.

[12] *Selden*, 2016 WL 6476934, at *9 (granting Airbnb's Motion to Compel Arbitration, staying the case.). The "Dispute Resolution" clause of Airbnb's Terms of Service stated as follows:

> You and Airbnb agree that *any dispute, claim or controversy arising out of or relating to these Terms* or the breach, termination, enforcement, interpretation or validity thereof, or to the use of the Services or use of the Site or Application (collectively, "Disputes") will be settled by binding arbitration, except that each party retains the right to seek injunctive or other equitable relief in a court of competent jurisdiction to prevent the actual or threatened infringement, misappropriation or violation of a party's copyrights, trademarks, trade secrets, patents, or other intellectual property rights. You acknowledge and agree that you and Airbnb are each waiving the right to a trial by jury or to participate as a plaintiff or class member in any purported class action or representative proceeding. If this specific paragraph is held unenforceable, then the entirety of this "Dispute Resolution" section will be deemed void. Except as provided in the preceding sentence, this "Dispute Resolution" section will survive any termination of these Terms.

Id. at *3 (emphasis added).

[13] *See generally* Orly Lobel, *The Law of the Platform*, 101 MINN. L. REV. 87 (2016) (describing the rise of new digital platform companies and offering novel framework for addressing the tax, consumer protection, employment, zoning, intellectual property, discrimination, and anti-trust issues in the sharing economy).

[14] Lorin Eleni Gill, *Airbnb Reveals the Total Number of Its Hawai'i Listings*, PAC. BUS. NEWS (Apr. 12, 2016, 2:49 PM), http://www.bizjournals.com/pacific/news/2016/04/12/Airbnb-reveals-the-total-number-of-its-Hawaii.html; Meghan Miner, *Lodgers and Tax Dodgers*, HAW. BUS. (Jan. 2016) http://www.hawaiibusiness.com/lodgers-and-tax-dodgers/).

exists, both in Hawai'i[15] and across the nation.[16] As Gregory Selden's story illustrates, homesharing is not immune from discrimination.[17]

In light of the growing number of Airbnb users and hosts within the State, Hawai'i's lawmakers should anticipate the litigation of discrimination issues that will arise out of Airbnb rental transactions.[18] To Airbnb's credit, the company recently began requiring its users, both those who offer accommodations and those who book accommodations, to accept and agree to the following policy: "I agree to treat everyone in the Airbnb community—regardless of their race, religion, national origin, ethnicity,

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[15] *See, e.g.*, Rachel D. Godsil & James S. Freeman, *Race, Ethnicity, and Place Identity: Implicit Bias and Competing Belief Systems*, 37 U. HAW. L. REV. 313, 329–37 (describing the role of ethnicity in land use disputes in Hawai'i); Justin D. Levinson, Koichi Hioki & Syugo Hotta, *Implicit Bias in Hawai'i: An Empirical Study*, 37 U. HAW. L. REV. 429, 448–53 (2015) (finding that different racial groups were implicitly and explicitly warmer to some groups than other groups).

[16] *See, e.g.*, Godsil & Freeman, *supra* note 15, at 319–29 (describing "the extant social science literature supporting the contention that implicit biases and other forms of racial bias play a significant role in housing and land use decisions"); Kenneth Lawson, *Police Shootings of Black Men and Implicit Racial Bias: Can't We All Just Get Along?*, 37 U. HAW. L. REV. 339, 350–58 (describing culturally embedded racial stereotypes); Ronson P. Honeychurch, Comment, *Exclusive Democracy: Contemporary Voter Discrimination and the Constitutionality of Prophylactic Congressional Legislation*, 37 U. HAW. L. REV. 535, 540–543 (2015) (arguing that "American voter discrimination is alive and well").

[17] *See supra* notes 2–12 and accompanying text; *see also* Nancy Leong, *New Economy, Old Biases*, 100 MINN. L. REV. 2153, 2161–62 (citing Benjamin Edelman & Michael Luca, *Digitial Discrimination: The Case of Airbnb.com* 3 (Harv. Bus. Sch., Working Paper No. 14-054, 2014)) (describing study that found "non-black hosts are able to charge approximately 12% more than black hosts, holding location, rental characteristics, and quality constant"); Benjamin G. Edelman, Michael Luca & Dan Svirksy, *Racial Discrimination in the Sharing Economy: Evidence from a Field Experiment*, AM. ECON. J.: APPLIED ECON. (forthcoming 2016) (manuscript at 1), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2701902 (finding with respect to homesharing that "[A]pplications from guests with distinctively African-American names are 16% less likely to be accepted relative to identical guests with distinctively White names."); Michael Todisco, Note, *Share and Share Alike? Considering Racial Discrimination in the Nascent Room-Sharing Economy*, 67 STAN. L. REV. ONLINE 121 (2015).

[18] The number of vacation rental units individually advertised online in Hawai'i has grown from approximately 22,238 in 2014 to 27,177 by October 2015. HAW. TOURISM AUTH., 2015 VISITOR PLANT SURVEY 60 (2015), http://files.Hawaii.gov/dbedt/visitor/visitor-plant/2015VPI.pdf. Airbnb alone had nearly 250,000 customers in Hawai'i during 2015 and approximately 10,000 listings in Hawai'i in April 2016. *See* Mileka Lincoln, *Bill Would Collect $15M in Taxes from Hawai'i's Airbnb Hosts*, HAW. NEWS NOW (May 3, 2016, 6:42 PM), http://www.hawaiinewsnow.com/story/31884499/bill-could-lead-to-15m-in-tax-collections-from-home-sharing-companies ("Visitor industry analysts say Airbnb was estimated to have had nearly 250,000 customers in Hawai'i [in 2015]."); *see also* Gill, *supra* note 14.

disability, sex, gender identity, sexual orientation, or age—with respect, and without judgment or bias."[19] However, to further protect the interests of Hawai'i's residents and visitors, state anti-discrimination laws should be updated to address the impacts of sharing economy businesses, such as Airbnb.

This article will examine both the protections that Hawai'i's existing anti-discrimination laws currently provide to Airbnb users and the areas where those laws may fail. Part I will examine both State and federal public accommodation laws, and will argue that the laws should be modified to expressly include internet platforms as a type of public accommodation. Part II will evaluate the Hawai'i Discrimination in Real Property Transactions Act and analyze the potential legal remedies available for prospective plaintiffs harmed by racial discrimination in the State. This article ultimately seeks to guide Hawai'i's legal community towards a balanced approach to racial discrimination in the sharing economy; one which protects the interests of the people without hindering the progress of technology.

I. PUBLIC ACCOMMODATION LAWS

A. Hawai'i Public Accommodation Laws

In Hawai'i, discrimination on the basis of race is prohibited by law in places of public accommodation:

> Unfair discriminatory practices that deny, or attempt to deny, a person the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of a place of public accommodation on the basis of race, sex, including gender identity or expression, sexual orientation, color, religion, ancestry, or disability are prohibited.[20]

The original intent of Hawai'i's public accommodation statute was to combat racial discrimination,[21] especially in the military,[22] in restaurants, and in bars[23]. Section 489-2 of the Hawai'i Revised Statutes defines a

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[19] *General Questions About the Airbnb Community Commitment*, AIRBNB, https://www.airbnb.com/help/article/1523/general-questions-about-the-airbnb-community-commitment (last visited Feb. 28, 2017).

[20] HAW. REV. STAT. § 489-3 (2016).

[21] Public Discrimination in Public Accommodations, 1986 Haw. Sess. Laws 533, Act 292 § -1(a).

[22] Haw. H. Journal, 13th Leg., Reg. Sess., 377 (Mar. 5, 1986) (statement of rep. Marumoto in support of H.B. No. 1857-86) ("This bill is of great importance to the military in Hawai'i, symbolically and substantively, and they are very cognizant of its existence.")

[23] *Id.* at 375 (statement of rep. Lardizabal in support of H.B. No. 1857-86) ("The bill

"place of public accommodation" as "a business, accommodation, refreshment, entertainment, recreation, or transportation facility of any kind whose goods, services, facilities, privileges, advantages, or accommodations are extended, offered, sold, or otherwise made available to the general public as customers, clients, or visitors."[24] The language of the statute, however, enumerates a list of public accommodations to include the following physical facilities and establishments:

> [P]lace of public accommodation includes *facilities* of the following types:
>
> (1) A facility providing services relating to travel or transportation;
>
> (2) An inn, hotel, motel, or other establishment that provides lodging to transient guests;
>
> (3) A restaurant, cafeteria, lunchroom, lunch counter, soda fountain, or other facility principally engaged in selling food for consumption on the premises of a retail establishment;
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> (4) A shopping center or any establishment that sells goods or services at retail;
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> * * *
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> (6) A motion picture theater, other theater, auditorium, convention center, lecture hall, concert hall, sports arena, stadium, or other place of exhibition or entertainment;
>
> (7) A barber shop, beauty shop, bathhouse, swimming pool, gymnasium, reducing or massage salon, or other establishment conducted to serve the health, appearance, or physical condition of persons;
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> (8) A park, a campsite, or trailer facility, or other recreation facility;
>
> (9) A comfort station; or a dispensary, clinic, hospital, convalescent home, or other institution for the infirm;
>
> (10) A professional office of a health care provider, . . . or other similar service establishment;
>
> (11) A mortuary or undertaking establishment; and
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> (12) An establishment that is physically located within the premises of an establishment otherwise covered by this definition, or within the premises of which is physically located a covered establishment, and which holds itself out as serving patrons of the covered establishment.[25]

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attempts to just create a cause of action for any person denied entrance to a restaurant, disco, et cetera based on the color of their skin.")

[24] HAW. REV. STAT. § 489-2 (2016).

[25] HAW. REV. STAT. § 489-2 (emphasis added).

This definition renders enforcement against a company such as Airbnb problematic, because its online platform lacks a physical component that could otherwise qualify it as facility or establishment.[26] Although Section 489-2 enumerates several examples of places of public accommodation to help clarify its meaning, the plain language of the statute makes no express mention of Internet websites.[27] If one were to interpret the definition of "public accommodation," broadly, one might conclude that Airbnb's online platform does fit into the definition of a public accommodation, either as "[a] facility providing services relating to travel or transportation[,]"[28] "[a]n inn, hotel, motel or other establishment that provides lodging to transient guests[,]"[29] or a "place of exhibition or entertainment[.]"[30] Such a reading is consistent with the legislative intent behind the law,[31] and would expand the scope of protection for Hawai'i's residents and guests. Indeed, the statute provides examples of public accommodations "by way of example, but not of limitation[.]"[32]

However, one could also make several compelling arguments to exclude an Internet website from the definition of a "public accommodation." For example, the phrase "[a] facility providing services relating to travel or transportation," could be limited to a physical facility such as a bus terminal or airport. Given that the other enumerated types of "public accommodation" are physical spaces, interpreting "facility" to include an Internet website would be inconsistent with the principle of *ejusdem generis*, which holds that when a general term follows a list of two or more specific terms, the otherwise wide meaning of the general term must be restricted to the same class of the specific terms.[33] Airbnb would argue that

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[26] *See* Cullen v. Netflix Inc., 880 F.Supp.2d 1017, 1023 (D. Cal. 2012) (noting that California Northern District Court does not consider websites to be places of public accommodation under the Americans with Disabilities Act "because they are not actual physical places").

[27] *See* HAW. REV. STAT. § 489-2.

[28] *Id.*

[29] *Id.*

[30] *Id.*

[31] Haw. H. Journal, 13th Leg., Reg. Sess., 377 (Mar. 5, 1986) (statement of rep. Tungpalan in support of H.B. No. 1857-86) ("We the people of Hawai'i will be sending a clear message to everyone who lives here that we will no longer tolerate discrimination.")

[32] HAW. REV. STAT. § 489-2.

[33] *See* Brown v. KFC Nat'l Mgmt. Co., 82 Haw. 226, 236 n.13, 921 P.2d 146, 156 (1996) (quoting Jones v. Hawaiian Elec. Co., 64 Haw. 289, 294, 639 P.2d 1103, 1108 (1982)) (citing Richardson v. City and County of Honolulu, 76 Haw. 46, 74, 868 P.2d 1193, 1221, *reconsideration denied*, 76 Haw. 247, 871 P.2d 795 (1994) (Klein, J., dissenting)) ("Pursuant to the rule of *ejusdem generis*, which is an 'established rule of statutory construction, where words of general description follow the enumeration of certain things, those words are restricted in their meaning to objects of like kind and character with those

the company does not operate "[a]n inn, hotel, motel, or other establishment that provides lodging to transient guests[,]"[34] but rather, like other sharing economy platforms, acts as an electronic intermediary connecting consumers and service providers.[35] A plaintiff would argue that the Hawai'i legislature intended the definition to be interpreted broadly, by its disclaimer that the enumerated list of public accommodations is not intended to be limiting.[36] But at some point, a line must be drawn between what is and is not a "public accommodation" within the meaning of section 489-2, and the precise location of that line has yet to be determined.

Hawai'i case law offers little guidance on this matter. Although Hawai'i courts have interpreted the definition of "public accommodation,"[37] the courts have refrained from extending its definition beyond physical spaces.[38] Despite the absence of an express reference to online platforms from the text of the section 489-2, however, it is also true that online platforms are not expressly excluded from the statutory definition of public accommodations.[39] Therefore, as in the case of interpreting other state civil rights statutes, Hawai'i courts are often left to look to analogous federal laws and court decisions for guidance. By examining how federal courts have interpreted public accommodation laws in regards to online platforms, Hawai'i's courts can better prepare themselves to deal with the new legal issues surrounding sharing economy businesses such as Airbnb.

B. Federal Public Accommodation Laws

1. Title II of the Civil Rights Act of 1964

Hawai'i's public accommodation statute[40] mirrors Title II of the Civil Rights Act of 1964,[41] and therefore, Hawai'i courts may look to Title II

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specified.'").

[34] HAW. REV. STAT. § 489-2.

[35] *See* Agnieszka McPeak, *Regulating Ridesharing Platforms Through Tort Law*, 39 U. HAW. L. REV. (2017) (noting that sharing economy companies generally "'connect' someone in need of a service with a provider of that service").

[36] HAW. REV. STAT. § 489-2.

[37] *See, e.g.*, Hawai'i v. Hoshijo, 76 P.3d 550, 561 (Haw. 2003) (concluding that the University of Hawai'i Special Events Arena is a public accommodation).

[38] *See, e.g.*, Boy Scouts of America v. Dale, 530 U.S. 640, 657 (2000) (noting that the New Jersey Supreme Court applied its public accommodations law "without even attempting to tie the term 'place' to a physical location.").

[39] *See* HAW. REV. STAT. § 489-2.

[40] *Id.* § 489-3.

[41] 42 U.S.C. § 2000a (2012).

jurisprudence for guidance.[42] Title II, like Hawai'i's statute, prohibits discrimination in a place of public accommodation.[43] It defines "place of public accommodation" to include "[e]stablishments affecting interstate commerce or supported in their activities by State action as places of public accommodation; lodgings, facilities principally engaged in selling food for consumption on the premises; gasoline stations; places of exhibition or entertainment; [and] other covered establishments."[44]

While on its face such language indicates that public accommodations are limited to apply only to physical structures or places, several cases have attempted to expand the scope of Title II to include non-physical entities.[45] The defendants in these cases argued that membership organizations themselves should be considered places of public accommodation:

In *Welsh v. Boy Scouts of America*,[46] the plaintiff alleged that the Boy Scouts of America violated Title II by practicing unlawful religious discrimination and wrongfully denying him membership.[47] Based on the plain language of the statute,[48] the Seventh Circuit held that a membership organization cannot qualify as a place of public accommodation.[49] The court also noted that, despite the expansion of the definition of "place of public accommodation" in the more recently enacted Americans with Disabilities Act of 1990 ("ADA"),[50] if Congress, by its expansion of the definition of "place of public accommodation in the ADA, "intended to include membership organizations lacking a close connection to a specific facility" in the definition of "place of public accommodation," under Title II "it would have "incorporated such a mandate in the [ADA]."[51] In other

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[42] *Hoshijo*, 76 P.3d at 560. ("[W]e may look to Title II of the Civil Rights Act of 1964 after which HRS Chapter 489 was patterned for guidance.").

[43] *Compare* 42 U.S.C. § 2000a(a) ("All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, as defined in this section, without discrimination or segregation on the ground of race . . . ."), *with* HAW. REV. STAT. § 489-3. ("Unfair discriminatory practices that deny, or attempt to deny, a person the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of a place of public accommodation on the basis of race, sex, including gender identity or expression, sexual orientation, color, religion, ancestry, or disability are prohibited.").

[44] 42 U.S.C. § 2000a(b).

[45] *See, e.g.*, Boy Scouts of America v. Dale, 530 U.S. 640 (2000); Clegg v. Cult Awareness Network, 18 F.3d 752 (9th Cir. 1994); Welsh v. Boy Scouts of America, 993 F.2d 1267 (7th Cir. 1993).

[46] 993 F.2d 1267 (7th Cir. 1993).

[47] *Id.* at 1268.

[48] *Id.* at 1270.

[49] *Id.* at 1278.

[50] 42 U.S.C. § 12181 (1992).

[51] *Welsh*, 993 F.2d at 1270.

words, the fact that Congress broadened the definition of "place of public accommodation" under a different statute did not grant the court license to expand the definition under Title II.[52] But the court stopped there, and did not define what specifically constitutes a "place" within the meaning of Title II, beyond its holding that a "membership organization" is not a "place."[53]

In *Boy Scouts of America v. Dale*,[54] the plaintiff claimed that the Boy Scouts of America's policy of excluding homosexuals from their organization was public accommodation discrimination.[55] The New Jersey Supreme Court held that the Boy Scouts of America had violated the state public accommodation statute by revoking a scoutmaster's membership in the organization on the basis of the scoutmaster's homosexuality.[56] The U.S. Supreme Court reversed the New Jersey Supreme Court's ruling, excluding Boy Scouts of America as a public accommodation because the definition of "place" requires a "tie . . . to a physical location."[57] The Boy Scouts of America, a membership organization, did not constitute a "place" of public accommodation, and the New Jersey Supreme Court erred in applying its public accommodations law, "without even attempting to tie the term 'place' to a physical location."[58] The Court noted that the historical intent of public accommodation laws were to prevent discrimination in "*traditional* places of public accommodation—like inns and trains."[59] The Court recognized that New Jersey's characterization of a membership organization was groundbreaking; noting "[f]our State Supreme Courts and one United States Court of Appeals have ruled that the Boy Scouts [of America] is not a place of public accommodation[,]" and "[n]o federal appellate court or state supreme court, except the New Jersey Supreme Court in this case, has reached a contrary result."[60] The Court ultimately ruled in favor of the Boy Scouts of America, but on First

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[52] *See id.*

[53] *See id.* at 1278.

[54] 530 U.S. 640 (2000).

[55] *Id.* at 643.

[56] *Id.*

[57] *Id.* at 657 (footnote omitted).

[58] *Id.*

[59] *Id.* at 656 (emphasis added) (citing Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., 515 U.S. 557, 571–72 (1995); Romer v. Evans, 517 U.S. 620, 627–29 (1996)).

[60] *Id.*. at 657 n.3 (citing Welsh v. Boy Scouts of America, 993 F.2d 1267 (7th Cir. 1993)); Curran v. Mount Diablo Council of the Boy Scouts of Am., 952 P.2d 218 (Cal. 1998); Seabourn v. Coronado Area Council, Boy Scouts of America, 891 P.2d 385 (Kan. 1995); Quinnipiac Council, Boy Scouts of America, Inc. v. Comm'n on Human Rights & Opportunities, 528 A.2d 352 (Conn. 1987); Schwenk v. Boy Scouts of America, 551 P.2d 465 (Or. 1976)).

Amendment grounds rather than the New Jersey Supreme Court's interpretation of the public accommodations statute.[61]

Membership organizations may be considered places of public accommodation where the organizations govern physical facilities. The Ninth Circuit made this distinction clear in *Clegg v. Cult Awareness Network*.[62] In *Clegg*, the court held that Title II protections do not apply to membership organizations "[w]hen the organization is unconnected to entry into a public place or facility[.]"[63] The Court distinguished the Cult Awareness Network, an organization providing information to the public regarding cult organizations, from "[o]*rganizations* . . . [whose] entry into a facility open to the public is dependent on membership in the organization *governing the facility*[,]" which would "fall under the purview of Title II[.]"[64] The court noted that concluding that Title II covers membership organizations that do not govern public facilities "would be tantamount to finding that an organization is a 'place[;]' . . . an interpretation [that] would be at odds with the express language of [Title II]."[65] As examples of membership organizations that *govern* places of public accommodation, the court cited a community swimming pool open to owners of membership shares,[66] a recreational facility that charged a membership fee for boating, swimming, miniature golf, dancing facilities, and a snack bar,[67] and the YMCA facilities in Montgomery, Alabama,[68] and Raleigh, North Carolina.[69]

Unlike these cases, Airbnb is not connected to and does not govern a physical place of public accommodation. Rather, Airbnb is more analogous to a membership organization that lacks a connection to a physical place.[70] *Welsh*, *Dale*, and *Clegg* do not necessarily resolve the question of whether Internet sites can qualify as public accommodations.[71] However, courts

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[61] *Id.* at 659.

[62] 18 F.3d 752 (9th Cir. 1994).

[63] *Id.* at 756.

[64] *Id.* at 755 (emphasis added) (citations omitted).

[65] *Id.* (citing Welsh v. Boy Scouts of Am., 993 F.2d 1267, 1275 (7th Cir. 1993)).

[66] *Id.* (citing Sullivan v. Little Hunting Park, Inc., 396 U.S. 229 (1969)).

[67] *Id.* (citing Daniel v. Paul, 395 U.S. 298 (1969)).

[68] *Id.* (citing Smith v. Young Men's Christian Ass'n of Montgomery, Inc., 462 F.2d 634 (5th Cir. 1972)).

[69] *Id.* (citing Nesmith v. Young Men's Christian Ass'n of Raleigh, 397 F.2d 96 (4th Cir. 1968)).

[70] *See* Tara E. Thompson, Comment, *Locating Discrimination: Interactive Web Sites As Public Accommodations Under Title II of the Civil Rights Act*, 2002 U. CHI. LEGAL F. 409, 417–18 (2002) (noting that courts might not recognize Internet forums as public accommodations since they lack ties to physical places).

[71] *See id.* (noting that the *Welsh* decision does not necessarily exclude the internet as a type of public accommodation).

have thus far been unwilling to construe Internet websites as places of public accommodation.[72]

The language of Hawaii's public accommodation statute is similar to the language of Title II and implies that a physical connection to a "facility" is a necessary requirement.[73] Therefore, Hawai'i courts would likely follow the interpretations of *Welsh*, *Dale* and *Clegg* and conclude that an online platform such as Airbnb does not qualify for anti-discrimination protections since the organization does not "govern" a physical facility.[74] Given that the public policy of Hawaii disfavors racial discrimination[75], the State should consider updating its public accommodation laws to specifically extend discrimination protections to online platforms. The State could follow the example of Oregon, where the definition of public accommodation includes both places and services.[76]

Oregon's Place of Accommodation Act,[77] defines a place of accommodation as "any place or *service* offering to the public accommodations, advantages, facilities or privileges whether in the nature of goods, services, lodgings, amusements, transportations or otherwise."[78] However, the Oregon statute includes what is known as the "Mrs. Murphy exemption," an exception for "[a]ny institution, bona fide club or place of accommodation that is in its nature distinctly private."[79] Although the Mrs. Murphy exemption could apply to individual Airbnb operators, it does not apply to Airbnb itself.

Under the Oregon statute, Oregon courts have recognized a two-part inquiry to determine whether an organization can qualify as a public accommodation.[80] The first part of the inquiry asks whether the

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[72] *See* Noah v. AOL Time Warner Inc., 261 F. Supp. 2d 532, 541 (E.D. Va. 2003) ("'[P]laces of public accommodation' are limited to actual, physical places and structures, and thus cannot include chat rooms, which are not actual physical facilities but instead are virtual forums for communication[.]").

[73] *Compare* HAW. REV. STAT. § 489-2 (2016), *with* 42 U.S.C. § 2000(b) (1964).

[74] *See* Boy Scouts of Am. v. Dale, 530 U.S. 640, 657 (2000); Clegg v. Cult Awareness Network, 18 F.3d 752 (9th Cir. 1994); Welsh v. Boy Scouts of America, 993 F.2d 1267, 1278 (7th Cir. 1993).

[75] Hyatt Corp. v. Honolulu Liquor Comm'n, 69 Haw. 238, 244, 738 P.2d 1205, 1208 (1987) (stating, "[t]he public policy of the State of Hawai'i disfavoring racial discrimination is embodied in our statutes and our Constitution.").

[76] OR. REV. STAT. § 659A.400 (2014).

[77] *Id.*

[78] *Id.* (emphasis added).

[79] *Id.* For a particularly thorough analysis of the Mrs. Murpy exemption in state and local public accommodation laws, *see* David M. Forman, *A Room for "Adam and Steve" at Mrs. Murphy's Bed and Breakfast: Avoiding the Sin of Inhospitality in Places of Public Accommodation*, 23 COLUM. J. GENDER & L. 326 (2012).

[80] *See* Lahmann v. Grand Aerie of Fraternal Order of Eagles, 121 P.3d 671, 675 (Or.

organization is a business or commercial enterprise.[81] The second part asks whether the organizations membership policies "are so unselective that the organization can fairly be said to offer its services to the public."[82]

In *Lahmann v. Grand Aerie of Fraternal Order of Eagles*, the state-level Oregon Court of Appeals held that a national fraternal organization satisfied both parts of the inquiry, as they indiscriminately provided services to the public at large.[83] The Fraternal Order of Eagles is a national organization that seeks to promote "liberty, truth, justice, [and] equality for home, for country, and for God."[84] The appellate court affirmed the trial court's characterization of the organization as a place of public accommodation because the organization "emphasizes recruitment, offers its services to the public, and is unselective in recruiting except for [the rule at issue in the case] against admitting women to aeries."[85] In contrast, the federal-level Oregon District Court, in *Vejo v. Portland Public Schools*,[86] held that the Lewis & Clark College Graduate School of Education and Counseling was not a public accommodation.[87] The District Court concluded that although Lewis & Clark constituted a business or commercial enterprise, satisfying the first part of the inquiry, it failed to meet the requirements of the second part, as its admissions policy excluded a third of all applicants.[88] Therefore, the organization did not offer its services to the public.[89]

Under the Oregon statute,[90] Oregon courts could characterize Airbnb as a public accommodation based on the two-prong test. Airbnb is clearly a commercial enterprise. Founded in 2008, Airbnb advertises itself as an

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2005) (noting that "O[r.] R[ev.] S[tat.] § 30.675 stated a two-part inquiry for determining what organizations are 'public accommodations'"); Roberts v. Legacy Meridian Park Hosp., Inc., Case No. 3:13-cv-01136-SI, 2014 WL 294549, at *15 n.2 (D. Or. Jan. 24, 2014) (citing *Lahmann*, 121 P.3d at 676, for the holding that there is a two-part inquiry for determining whether an entity is a public accommodation).

[81] *Lahmann*, 121 P.3d at 674 (citing Lahmann v. Grand Aerie of Fraternal Order of Eagles, 43 P.3d 1130, 1137 (2002)).

[82] *Id.*

[83] *Id.* at 685 ("The Public Accommodations Act applies to the Eagles because . . . the organization provides amusement and civic services, and it offers them unselectively to the male public.").

[84] *Id.* at 673 (alterations in original).

[85] *Id.* at 674.

[86] 204 F. Supp. 3d 1149, 1160 (D. Or. 2016).

[87] *Id.* at 1168.

[88] *Id.*

[89] *Id.* The Plaintiffs argued that because Lewis & Clark accepted two-thirds of the applicants to its counseling program, the program was not so unselective that the program was *de facto* open to the public. *Id.* However, the court rejected that claim, reasoning that "a program that rejects one-third of its applicants is not *de facto* open to the public." *Id.*

[90] OR. REV. STAT. § 659A.400 (2014).

online marketplace which allows users to list and book accommodations through its website.[91] It is a global corporation that provides more than three million property listings around the world, serving more than 150 million guests to date.[92] Nothing other than an Internet connection is required for a potential guest to view Airbnb's listings. To request a reservation at one of the properties listed on Airbnb's website, a user must create an account, but account registration which requires only a user's name, email address, and date of birth. These minimal requirements render Airbnb's registration process "so unselective that it can fairly be said to offer its services to the public."[93] Airbnb itself asserts that it is a company dedicated to inclusion and institutes a policy which emphasizes "drawing together individuals of different cultures, values, and norms."[94]

Furthermore, the legislative history of Section 659A.400 demonstrates that the definition of public accommodation was intended to be broad and include any business or commercial enterprise which offered its services to the public.[95] The Oregon legislature gradually expanded the language of the statute, from its original intent to cover "operators and owners of businesses catering to the general public,"[96] to the 1961 amendment to "end discrimination in health a beauty salons, barber shops[,] and medical services,"[97] to its most recent 1973 amendment, which not only includes discrimination based on sex and marital status, but also any "service" offered to the public.[98] In support of the 1973 amendments, Eleanor M. Meyers, Director of the Women's Equal Employment Opportunity Program in the Civil Rights Division of the Bureau of Labor, testified that including the word "services" would "include literally all phases of [a]ny business soliciting public patronage[.]"[99]

Under this definition, even if Airbnb does not have control over a physical establishment, its listing service could be construed as a "*phase* of [a] business soliciting public patronage."[100] Therefore, an Oregon court would likely conclude that Airbnb's business structure qualifies the

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[91] *About Us*, *supra* note 3.

[92] *Id.*

[93] Lahmann v. Grand Aerie of Fraternal Order of Eagles, 121 P.3d 671, 674 (2005) (citations omitted).

[94] *Airbnb's Nondiscrimination Policy: Our Commitment to Inclusion and Respect*, https://www.airbnb.com/help/topic/250/terms---policies (last visited Nov. 7, 2016).

[95] *See* Schwenk v. Boy Scouts of America, 551 P.2d 465, 468 (1976).

[96] *Id.* at 467.

[97] *Id.* at 467–68.

[98] *Id.* at 468.

[99] *Id.*

[100] *See id.* (emphasis added).

company as a public accommodation under section 659A.400(1)(a), because it unselectively offers its services to the public.[101]

Unlike Oregon, the corresponding Hawai'i statute does not expressly cover "services" as a type of public accommodation.[102] If the Hawai'i legislature were to amend section 489-2 to include "services" as a type of public accommodation, Hawai'i's anti-discrimination laws could be more easily applied to online commercial platforms such as Airbnb. This change of language would broaden the scope of Hawai'i's public accommodation laws and ensure greater legal protections for its residents and out-of-state visitors.[103] Moreover, such an expansion of the scope of businesses covered and legal protections afforded would be consistent with Hawai'i's public policy of disfavoring racial discrimination.[104] On one hand, legislative history and intent appear to support broad applications of anti-discrimination statutes.[105] But on the other hand, extending the application of those statutes beyond what courts have held to be their plain meaning would be to "read into the statute[s] what [legislatures] have declined to include."[106]

2. The Americans With Disabilities Act

As Hawai'i's public accommodation laws currently stand, a plaintiff seeking relief from Airbnb for discriminatory harm would face many legal hurdles under section 489-2.[107] Since this statute does not contain language that can easily apply to Internet websites offering services, a plaintiff would be hard-pressed to prove a tenable physical connection between Airbnb's online platform and a physical facility.[108] However, where section 489-2 falls short in this regard, the federal American with Disabilities Act (ADA) may provide a solution.

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[101] *See* OR. REV. STAT. § 659A.400 (2014).

[102] *See* HAW. REV. STAT. § 489-2 (2016).

[103] *See id.*

[104] *See* Hyatt Corp. v. Honolulu Liquor Comm'n, 69 Haw. 238, 244, 738 P.2d 1205, 1208 (1987) ("The public policy of the State of Hawai'i disfavoring racial discrimination is embodied in our statutes and our Constitution.") (citations omitted).

[105] *See supra* notes 32–35 and accompanying text.

[106] Welsh v. Boy Scouts of America, 993 F.2d 1267,1270 (7th Cir. 1993).

[107] *See supra* Section I.B.1.

[108] *Compare* HAW. REV. STAT. § 489-2, *with* Boy Scouts of America v. Dale, 530 U.S. 640, 644 (2000) (finding that "the state interests embodied in New Jersey's public accommodations law do not justify such a severe intrusion on the Boy Scouts' rights to freedom of expressive association. That being the case, we hold that the First Amendment prohibits the State from imposing such a requirement through the application of its public accommodations law.").

The ADA prohibits discrimination against the disabled, similar in many respects to Title II.[109] Where the ADA differs however is its definition of "public accommodation." The ADA is much more broad and inclusive than Title II and names "establishment[s]", "place[s] of entertainment", "place[s] of public gathering" and "service establishment[s]" as public accommodations.[110] Courts have interpreted the definition to mean that the term "public accommodation" is not limited to physical structures.[111] In *Carparts Distribution Center v. Automobile Wholesaler's Association of New England*,[112] the First Circuit Court of Appeals noted that the plain

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[109] *Compare* 42 U.S.C. § 12182(a) (1990) ("No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation."), *with* 42 U.S.C. § 2000a(a) (1964) ("All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, as defined in this section, without discrimination or segregation on the ground of race, color, religion, or national origin.").

[110] The ADA defines "public accommodation" as:

> (A) an inn, hotel, motel, or other place of lodging, except for an establishment located within a building that contains not more than five rooms for rent or hire and that is actually occupied by the proprietor of such establishment as the residence of such proprietor;
>
> (B) a restaurant, bar, or other establishment serving food or drink;
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> (C) a motion picture house, theater, concert hall, stadium, or other place of exhibition or entertainment;
>
> (D) an auditorium, convention center, lecture hall, or other place of public gathering;
>
> (E) a bakery, grocery store, clothing store, hardware store, shopping center, or other sales or rental establishment;
>
> (F) a laundromat, dry-cleaner, bank, barber shop, beauty shop, travel service, shoe repair service, funeral parlor, gas station, office of an accountant or lawyer, pharmacy, insurance office, professional office of a health care provider, hospital, or other service establishment;
>
> (G) a terminal, depot, or other station used for specified public transportation;
>
> (H) a museum, library, gallery, or other place of public display or collection;
>
> (I) a park, zoo, amusement park, or other place of recreation;
>
> (J) a nursery, elementary, secondary, undergraduate, or postgraduate private school, or other place of education;
>
> (K) a day care center, senior citizen center, homeless shelter, food bank, adoption agency, or other social service center establishment; and
>
> (L) a gymnasium, health spa, bowling alley, golf course, or other place of exercise or recreation.

42 U.S.C. § 12181(7).

[111] *See, e.g.*, Doe v. Mutual of Omaha Ins. Co., 179 F.3d 557, 559 (7th Cir. 1999); Carparts Distrib. Ctr. v. Auto. Wholesaler's Ass'n, 37 F.3d 12, 19 (1st Cir. 1994); Cloutier v. Prudential Ins. Co. of America, 946 F. Supp. 299, 302 (N.D. Cal. 1997); Nat'l Fed'n of Blind v. Scribd, 97 F. Supp. 3d 565, 575–76 (D. Vt. 2015).

[112] 37 F.3d 12 (1st Cir. 1999).

meanings of the types of establishments in the definition of "public accommodation" did not require a public accommodation to have physical structures to enter.[113] The court continued that even if the plain meaning of the statute did require a physical structure, the definition was at least ambiguous.[114] "This ambiguity, considered together with agency regulations and public policy concerns, persuaded [the court] that the phrase "public accommodation" is not limited to actual physical structures."[115]

There are a few instances of courts holding online platforms as public accommodations in itself. In *Doe v. Mutual of Omaha Insurance Co.*[116], the Seventh Circuit Court of Appeals held that insurance companies are prohibited from discriminating against disabled persons, "whether in physical space or in electronic space[.]"[117] The court specifically asserted that a web site could constitute a "facility" under the language of the ADA.[118] Therefore, an online platform could qualify as a public accommodation itself.[119]

In *National Federation of the Blind v. Scribd*, a federal district court held that an online digital library service was a public accommodation under the ADA.[120] The court echoed the sentiments of *Carparts* and *Mutual of Omaha* and noted that service establishments that operate without a public, physical property should still be prohibited from discriminatory practices.[121] As the court noted, "it would make little sense if a customer who bought insurance from someone selling policies door to door was not covered but someone buying the same policy in the parent company's office was covered."[122]

As these cases demonstrate, some courts have concluded that Internet sites can qualify as establishments, places of gathering or facilities under the language of the ADA.[123] ADA protections extend to cover Internet websites.[124] Cases interpreting the definition of "public accommodation" under the ADA could be extended to interpret the definition of "public accommodation" under Title II. Plaintiffs seeking federal protections

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[113] *Id.* at 19.
[114] *Id.*
[115] *Id.*
[116] 179 F.3d 557, 559 (7th Cir. 1999).
[117] *Id.* at 559 (citing *Carparts*, 37 F.3d at 19).
[118] *Id.*
[119] *Id.*
[120] Nat'l Fed'n of the Blind v. Scribd, 97 F. Supp. 3d 565, 576 (D. Vt. 2015).
[121] *Id.* at 572–73.
[122] *Id.*
[123] *Id.* at 576; *Mutual of Omaha*, 179 F.3d at 559; *Carparts*, 37 F.3d at 19.
[124] *See Scribd*, 97 F. Supp. 3d at 576.

against racial discrimination may be able to persuasively cite to these ADA cases to also apply similar standards for Title II discrimination cases.[125] Thus, if an Internet website is deemed a public accommodation under the ADA, a court may find it retains a similar classification under Title II.[126]

However, the courts are split on this matter. Some courts have declined to extend ADA protections to Internet websites completely.[127] Other courts have held that a website can only qualify as a place of public accommodation if there exists a sufficient "nexus" between the digital site and a physical facility or structure.[128]

In *National Federation of the Blind v. Target Corp.*, a plaintiff sought declaratory relief against Target Corporation, alleging that the company violated the ADA by limiting access to its online stores for blind customers.[129] The Court concluded that in order to file a discrimination suit against an online site under the ADA, a plaintiff would have to establish the existence of a "nexus" between the Internet website and the physical place of public accommodation that the website served.[130] Although the Court determined that there was a nexus between Target, the brick and mortar store, and Target.com, the website, the ADA could only protect against discrimination that applied to goods and services offered *within* that nexus.[131] Therefore, any sale or offer that was available only online and not within the physical store could not be said to discriminate against blind customers.[132] A claim for relief would arise only if the sale or offer was one that was available to both the online site as well as the physical store could a valid claim for relief arise.[133]

This holding was later extended to several other cases within the Ninth Circuit.[134] In *Cullen v. Netflix*, the Court determined that because Netflix's

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[125] Thompson, *supra* note 63, at 418–19. (asserting that, "drawing analogies between the two statutes is appropriate").

[126] *See id.*

[127] Nikki D. Kessling, *Why the* Target *"Nexus Test" Leaves Disabled Americans Disconnected: A Better Approach to Determine Whether Private Commercial Websites Are "Places of Public Accommodation"*, 45 HOUS. L. REV. 991, 112 (2008).

[128] Mark Keddis, *Separation Anxiety: Redefining the Contours of the "Nexus" Approach Under Title III of the Americans with Disabilities Act for Heavily Integrated But Separately Owned Websites and "Places of Public Accommodation"*, 43 SETON HALL L. REV. 843, 846–47 (2013).

[129] 452 F. Supp. 2d 946, 949 (N.D. Cal. 2006).

[130] *Id.* at 952.

[131] *See id.* at 956. ("To the extent that Target.com offers information and services unconnected to Target stores, which do not affect the enjoyment of goods and services offered in Target stores, the plaintiffs fail to state a claim under Title III of the ADA.").

[132] *Id.*

[133] *Id.*

[134] *See generally* Jancik v. Redbox Automated Retail, LLC, No. SACV 13-1387-DOC,

online streaming video library is not a physical place itself and does not have a nexus to a physical place, it cannot be considered a place of public accommodation under the meaning of the ADA.[135] Similarly, in *Young v. Facebook*, the Court concluded that although some retail stores may sell Facebook gift cards that may be used for Facebooks online services, since Facebook does not own or operate those stores, a sufficient nexus cannot exist between Facebook's online site and a place of public accommodation.[136] Finally, in *Jancik v. Redbox Automated Retail, LLC,* the Court held that Redbox's website did not have a sufficient nexus with the company's physical kiosks and therefore could not be considered a place of public accommodation.[137]

In contrast with the holdings of the First, Second and Seventh Circuits[138], courts using a "nexus approach" apply a limited definition of public accommodations under the ADA.[139] These courts adhere to the original language of the ADA that was drafted by Congress in 1990, at a time when the internet was not yet a "staple of popular culture".[140] Although Congress held hearings to consider amending the language of the ADA to include internet sites in 2000, ultimately no changes were made.[141] Presumably, Congress was hesitant to expand the scope of ADA protections since it would limit the growth of e-commerce.[142]

Applying the nexus approach would exclude Airbnb from the definition of "public accommodation" under the ADA.[143] Unlike businesses such as Target or Redbox, Airbnb does not actually own or operate its property listings.[144] Because Airbnb lacks a physical structure, there can be no nexus between the company and a physical structure.[145]

There is still hope for prospective plaintiffs seeking discrimination protections under the ADA, however. In 2015, in *National Federation of*

2014 WL 1920751, at *8 (D. Cal. May 14, 2014); Cullen v. Netflix Inc., 880 F. Supp. 2d 1017, 1023–24 (D. Cal. 2012); Young v. Facebook, Inc., 790 F. Supp. 2d 1110, 1116 (D. Cal. 2011).

[135] *See Netflix*, 880 F. Supp. 2d at 1024.

[136] *Facebook*, 790 F. Supp. 2d at 1116.

[137] *Redbox*, 2014 WL 1920751, at *8.

[138] *See generally Redbox*, 2014 WL 1920751; *Netflix*, 880 F. Supp. 2d 1017; *Facebook*, 790 F. Supp. 2d 1110; *Target*, 452 F. Supp. 2d 946.

[139] *See* Keddis, *supra* note 128 at 846–48.

[140] *See* Kessling, *supra* note 127, at 1009.

[141] *Id.* at 1011.

[142] *Id.*

[143] *See Redbox*, 2014 WL 1920751, at *8; *Facebook*, 790 F. Supp. 2d at 1116; *Target*, 452 F. Supp. 2d at 956.

[144] *See About Us*, *supra* note 3.

[145] *See Redbox*, 2014 WL 1920751, at *8; *Facebook*, 790 F.Supp.2d at 1116; *Target*, 452 F. Supp. 2d at 956.

the Blind v. Uber Technologies, Inc.,[146] a California District Court issued an opinion, referencing *Carparts*, which noted that "Congress clearly contemplated that 'service establishments' include providers of services which do not require a person to physically enter an actual physical structure."[147] The court concluded that as a type of "travel service," Uber, an online service which connects users with drivers,[148] may qualify as a public accommodation under the ADA.[149] In doing so, the court rejected the nexus approach in favor of a broader, more inclusive definition of public accommodations.

Hawai'i courts should look to this recent Ninth Circuit decision for guidance in determining the status of Airbnb as a public accommodation. Airbnb, a kind of "Uber for houses," offers its users a booking service to connect users with hosts.[150] Therefore, a Hawai'i court could classify Airbnb as a service establishment, in concurrence with the decisions reached in *Carparts*,[151] *Mutual of Omaha*,[152] and *Scribd*.[153] As a service establishment that operates through a non-physical structure, Airbnb could be prohibited from discriminating against its users based on race.[154] Such a holding by Hawai'i courts would be consistent with the State's policy against racial discrimination.[155] Rejecting the nexus approach would also help Hawai'i's courts to align themselves with a progressive, modern policy that anticipates further expansion of the sharing economy.

II. THE HAWAI'I DISCRIMINATION IN REAL PROPERTY TRANSACTIONS ACT

Another Hawai'i law that potentially offers protection to Airbnb guests is the Hawai'i Discrimination in Real Property Transactions Act (HDRPTA).[156] The HDRPTA prohibits discrimination in real estate transactions on the basis of race, sex, gender identity or expression, sexual orientation, color, religion, marital status, familial status, ancestry,

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[146] 103 F. Supp. 3d 1073 (N.D. Cal. 2015).

[147] *Id.* at 1083 (citing Carparts Distrib. Ctr. Inc. v. Auto. Wholesaler's Ass'n, 37 F.3d 12, 19 (1st Cir. 1994)).

[148] *Id.* at 1076.

[149] *Id.* at 1083.

[150] *See About Us*, *supra* note 3

[151] 37 F.3d 12 (1st Cir. 1994).

[152] 179 F.3d 557 (7th Cir. 1999).

[153] 97 F. Supp. 3d 565 (D. Vt. 2015).

[154] *See Carparts*, 37 F.3d at 12–13.

[155] *See* Hyatt Corp. v. Honolulu Liquor Comm'n, 69 Haw. 238, 244, 738 P.2d 1205, 1208 (1987).

[156] HAW. REV. STAT. § 515-1–20 (2016).

disability, age, or infection with human immunodeficiency virus.[157] A "real estate transaction" is a "sale, exchange, *rental*, or lease of real property."[158] The prohibition applies broadly to owners, lessors, real estate brokers or sales persons, and to any person or business engaging in a real property or real estate transaction.[159] The purpose of the law is to "secure for all individuals within the State freedom from discrimination because of race . . . in connection with real property transactions, and thereby protect their interest in personal dignity. . . ."[160]

While there is an absence of case law concerning the HDRPTA and Airbnb, the plain text of the HDRPTA suggests that aggrieved guests could obtain relief from both the individual hosts, as owners or lessors, and Airbnb itself, as a "person" engaged in a real property transaction.[161] Cases litigated under the Fair Housing Act (FHA),[162] the HDRPTA's federal law counterpart,[163] involving discrimination in rentals lend additional support to this conclusion. However, there is an exemption under the HDRPTA that may severely limit any relief that aggrieved guests may otherwise obtain, leading us to conclude that the exemption must be rethought.

A. Liability for Individual Airbnb Hosts

Those that face discrimination while using Airbnb can first attempt to sue the individual hosts who use Airbnb to list their rentals. Under the HDRPTA, it is an unlawful discriminatory practice "[t]o refuse to engage in

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[157] *Id.* § 515-3.

[158] *Id.* § 515-2 (emphasis added).

[159] *Id.* §§ 1-19 (2016) ("The word 'person,' or words importing persons, . . . signify not only individuals, but corporations, firms, [and] associations. . . ."); 515-2 ("'Person' refers to the definition of section 1-19 and includes a legal representative, partnership, receiver, trust, trustee, trustee in bankruptcy, the State, or any governmental entity or agency."); 515-3 (extending the prohibitions on discrimination to owners, any other person engaging in a real estate transaction, real estate brokers, and salespersons).

[160] 1967 Haw. Sess. Laws 194-95.

[161] *See* Haw Rev. Stat. §§ 515-2 to -3 (extending the prohibitions to both individuals and businesses or firms).

[162] 42 U.S.C. §§ 3601–3619 (2016).

[163] Hicks v. Makaha Valley Plantation Homeowners Ass'n, Civ. No. 14-00254 HG-BMK, 2015 WL 4041531, at *8 (D. Haw. June 30, 2015) (describing the HDRPTA as Hawai'i's state law FHA counterpart). The FHA and HDRPTA are also "nearly identical . . . in language and purpose." DuBois v. Ass'n of Apartment Owners of 2987 Kalakaua, 453 F.3d 1175, 1180 (9th Cir. 2006). Thus, federal FHA cases are analogous to potential HDRPTA claims, as "[i]n the absence of Hawai'i state cases interpreting the [HDRPTA], [federal courts] turn to [their] FHA jurisprudence for guidance as to how the state's highest court might rule." *Id.* (citing Assurance Co. of America v. Wall & Assocs. LLC, 379 F.3d 557, 560 (9th Cir. 2004)).

a real estate transaction with a person . . . [or] [t]o represent to a person that real property is not available for . . . rental . . . when in fact it is available . . . " because of a person's race.[164] As owners or lessors, individual hosts, like those in *Selden v. Airbnb, Inc.*,[165] are prohibited in Hawai'i by the HDRPTA from either refusing to rent, or from lying about the availability of, a home or room based on a person's race.[166]

Due to a lack of case law involving racial discrimination in rentals under the Act, we turn to cases litigated under the FHA.[167] Refusing to rent, or lying about the availability of, a home or room based on a person's race is also prohibited by the FHA.[168] When enacting these prohibitions, Congress "conferred on all 'persons' a legal right to truthful information about available housing."[169] In cases involving misrepresentations about availability, a plaintiff generally needs to show four things: (1) the plaintiff is a member of a protected class, (2) the plaintiff requested information on the availability of the accommodation, (3) the defendant failed or refused to provide truthful information as to the availability, and (4) applicants who were not members of a protected class were provided with truthful information.[170]

In *Neuifi v. Snow Garden Apartments*,[171] separate Polynesian and African-American plaintiffs alleged that an apartment complex and its employees violated the FHA by misrepresenting the availability of certain apartments.[172] Both groups of plaintiffs alleged that when visiting the complex on separate occasions, its employees either "indicated that the apartments were full" or stated that they were "99-percent certain that the apartment complex was full."[173] The Polynesian plaintiffs, suspecting that they were discriminated against, sent three self-described "Caucasian or

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[164] Haw. Rev. Stat. §§ 515-3(1), (5).

[165] Case No. 16-cv-00933 (CRC), 2016 WL 6476934 (D.D.C. Nov. 1, 2016).

[166] *See id.* at *1; Vara, *supra* note 2.

[167] *See supra* note 163 and accompanying text.

[168] 42 U.S.C. § 3604(a), (d).

[169] Havens Realty Corp. v. Coleman, 455 U.S. 363, 373 (1982) (holding that "testers," defined as "individuals who, without an intent to rent or purchase a home or apartment, pose as renters or purchasers for the purpose of collecting evidence of unlawful steering practices," have standing to sue under the FHA).

[170] Neuifi v. Snow Garden Apartments, No. 2:12-CV-00774, 2014 WL 7405472, at *9 (D. Utah Dec. 30, 2014) (citing Open House Ctr., Inc. v. Kessler Realty Inc., 96-CV-6234 (ILG), 2001 WL 1328446, at *6 (E.D.N.Y. Sept. 18, 2001)); Fair Housing Justice Ctr., Inc. v. Broadway Crescent Realty Inc., 2011 WL 856095, at *5 (S.D.N.Y. Mar. 9, 2011) (citing *Open House Ctr.*, 2001 WL 1328446; Darby v. Heather Ridge, 806 F. Supp. 170, 176 (E.D. Mich. 1992)).

[171] *Neuifi*, 2014 WL 7405472.

[172] *Id.* at *1.

[173] *Id.* at *2.

white" friends to the apartments to inquire about housing.[174] The three white friends were later told that the complex would be able to house them.[175] In denying the defendant's motion for summary judgment, the court held that "[a] reasonable juror could conclude that [the apartment complex] either failed or intentionally refused to provide truthful information to minority applicants when its manager stated she was 99-percent certain housing was unavailable but then reached out and offered housing to Caucasian students."[176]

Similarly, in *Lincoln v. Case*,[177] the Fifth Circuit affirmed the liability of a defendant who misrepresented the availability of an apartment that he co-owned with his wife.[178] The plaintiffs there were an Asian-American woman and her African-American boyfriend.[179] When the plaintiffs visited the apartment, the defendant informed them that the unit was unavailable despite numerous "for rent" signs posted nearby.[180] The following week, the plaintiffs had their Caucasian co-worker call "to inquire into the availability of the apartment."[181] The defendant's wife answered and indicated that the apartment was available.[]"[182] Subsequently, the plaintiffs contacted the Greater New Orleans Fair Housing Action Center, which sent four testers (two African-American and two white) to inquire about the availability of the apartment. The white testers were told that the apartment was available, while the African-American testers encountered the opposite result.[183]

The cases above illustrate how an Airbnb host like the one Selden encountered would be held liable under the HDRPTA should a Hawai'i court use the same analysis. Selden and other minorities, like the plaintiffs in *Neuifi* and *Lincoln*, are members of a protected class.[184] The Airbnb host would know this when he sees Selden's profile picture and name. Selden's situation may be similar to the *Neuifi* and *Lincoln* plaintiffs because he would have requested, and likely been refused, truthful information on the

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[174] *Id.*
[175] *Id.*
[176] *Id.*
[177] 340 F.3d 283 (5th Cir. 2003).
[178] *Id.* at 295.
[179] *Id.* at 286.
[180] *Id.*
[181] *Id.*
[182] *Id.*
[183] *Id.*
[184] *See id.*; Selden v. Airbnb, Inc., Case No. 16-cv-00933 (CRC), 2016 WL 6476934, at *1 (D.D.C. Nov. 1, 2016); Neuifi v. Snow Garden Apartments, No. 2:12-CV-00774, 2014 WL 7405472, at *1 (D. Utah Dec. 30, 2014).

availability of the host's accommodations.[185] Finally, like the *Neuifi* and *Lincoln* plaintiffs, Selden would be able to show a violation of the HDRPTA when the host subsequently tells Selden's white friends or testers that the accommodation is indeed available for rental.[186]

B. Liability for Airbnb

Aggrieved guests could also sue Airbnb directly for its own actions and policies. Doing so would be more beneficial than suing the individual hosts, and be best for effectuating social change. Airbnb is in the best position to prevent discrimination against guests through its own policies and procedures, because the vast majority of Airbnb hosts depend on Airbnb to solicit guests. Aggrieved guests could sue Airbnb directly under the HDRPTA by either bringing what we will call a "listings" claim or a disparate impact claim.

1. Listings Claim

An aggrieved Airbnb guest can bring a listings claim under the HDRPTA to hold Airbnb liable for its accommodation listings. A listings claim alleges that a person or firm violated the HDRPTA when the person or firm conducted the following discriminatory act: "[t]o offer, solicit, use, or *retain a listing* of real property *with the understanding* that a person *may* be discriminated against in a real estate transaction. . . ."[187] Listings liability requires both an act and knowledge: a violation occurs when a person or firm (1) lists an accommodation, and (2) knows or understands that a person may be discriminated against.[188] The typical Airbnb transaction satisfies the act requirement by publishing a host's accommodation listing.

An aggrieved guest could show that Airbnb satisfies the knowledge requirement of the HDRPTA's because the company is well aware of discrimination occurring through its listings. An internal Airbnb report released in September, 2016, noted that "[a]n increasing number of Airbnb hosts and guests have voiced their concerns about being discriminated against when trying to book a listing. . . ."[189] The report states that in

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[185] *See Selden*, 2016 WL 6476934, at *1; *Neuifi*, 2014 WL 7405472, at *2; *Lincoln*, 340 F.3d at 286.

[186] *See Selden*, 2016 WL 6476934, at *1; *Neuifi*, 2014 WL 7405472, at *2; *Lincoln*, 340 F.3d at 286.

[187] HAW. REV. STAT. § 515-3(6)(2016)(emphasis added).

[188] *See id.*

[189] Laura Murphy, *Airbnb's Work to Fight Discrimination and Build Inclusion: A Report Submitted to Airbnb*, AIRBNB 13 (Sept. 8, 2016), http://blog.AirBnB.com/wp-

response to the "many unacceptable instances of people being discriminated against on Airbnb," the company has committed to making product and policy changes to fight such bias.[190] Some of these policy changes include: (1) requiring all users to affirmatively acknowledge and agree to uphold a commitment to treat all Airbnb users with respect and without bias, (2) assembling a permanent, full-time team to advance inclusion and to root out bias, and (3) reducing the importance and prominence of profile photos during the booking process.[191]

Thus, Airbnb's recognition of, and response to, a pervasive problem of discrimination displays an "understanding" that a person may be discriminated against when retaining its hosts listings. Airbnb knows that discrimination between hosts and guests is a problem. Such a conclusion and interpretation of the term "understanding" should be accepted by the courts, as the terms of the HDRPTA are to be "liberally construed."[192] Further, any ambiguous words may be interpreted by considering "[t]he reason and spirit of the law, and the cause which induced the legislature to enact it,"[193] which, in the case of the HDRPTA, is to protect the people within the State from discrimination in housing.[194]

2. *Disparate Impact Claim*

An aggrieved Airbnb guest could also bring a disparate impact claim against Airbnb. The Hawai'i Administrative Rules, created to implement the HDRPTA, state that it is a discriminatory practice to "institute or apply facially neutral policies or restrictions which result in a *disparate adverse impact*."[195] Neither the HDRPTA, the Hawai'i Administrative Rules, nor the Hawai'i courts provide guidance on how exactly to bring a disparate

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content/uploads/2016/09/REPORT_AirBnBs-Work-to-Fight-Discrimination-and-Build-Inclusion.pdf.

[190] *Id.* at 10.

[191] *Id.* at 19–25.

[192] *See* HAW. REV. STAT. § 515-1 ("This chapter shall be construed according to the fair import of its terms and shall be liberally construed.").

[193] *Id.* § 1-15(2) (2016) ("Where the words of a law are ambiguous: . . . The reason and spirit of the law, and the cause which induced the legislature to enact it, may be considered to discover its true meaning.").

[194] Act of June 4, 1967, 1967 Haw. Sess. Laws 194–95 (stating that the purpose of the law is to "secure for all individuals within the State freedom from discrimination because of race . . . in connection with real property transactions, and thereby protect their interest in personal dignity . . . .").

[195] Haw. Code R. § 12-46-305 (2016) (emphasis added).

impact claim under the HDRPTA. However, literature and federal cases analyzing disparate impact claims under the FHA are instructive.[196]

A disparate impact claim "challenges practices that have a 'disproportionately adverse effect on minorities' and are otherwise unjustified by a legitimate rationale."[197] There are three steps to a disparate impact claim. First, a plaintiff must show that a defendant's practice has a disparate impact by proving that "a challenged practice caused or predictably will cause a discriminatory effect."[198] Here, Airbnb guests would challenge Airbnb's practice of providing potential hosts the names and pictures of prospective guests, alleging that there is no need for such a practice and that it has already caused, or predictably will cause, a discriminatory effect. The aggrieved guests could support this argument by pointing to Selden's case and the recent Harvard study finding that hosts are using guests' names and pictures as a basis for making discriminatory decisions.[199]

Next, the defendant has the burden to prove that "the challenged practice is necessary to achieve one or more substantial, legitimate, nondiscriminatory interests."[200] Here, Airbnb would argue that their hosts have a right to determine who stays in their homes, and that providing names and pictures is necessary to facilitate this right.[201]

Finally, if the defendant fulfills its burden, the plaintiff then must prove that the "substantial, legitimate, nondiscriminatory interests supporting the challenged practice could be served by another practice that has a less discriminatory effect."[202] Here, Airbnb guests would argue that there are other types of information that could be provided in lieu of profile pictures and names, and that such information would be less likely to lead to discrimination while at the same time allowing hosts to feel safer with whom they are letting into their homes.[203]

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[196] *See supra* text accompanying note 163.

[197] Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc., 135 S.Ct. 2507, 2514 (2015) (quoting Ricci v. DeStefano, 557 U.S. 557, 577 (2009)).

[198] *Id.* at 2514 (quoting 24 CFR § 100.500(c)(1) (2014)).

[199] *See* Vara, *supra* note 2 (describing Selden's "African-American" Airbnb profiles being rejected for accommodation listings and that his "white" profiles were subsequently able to book); Edelman et al., *supra* note 14, at 1 (finding that guests with distinctively African-American names are 16% less likely to be accepted relative to identical guests with distinctively White names).

[200] *Tex. Dep't of Hous.*, 135 S.Ct. at 2515 (quoting 24 CFR § 100.500(c)(2) (2014)).

[201] *See* MURPHY, *supra* note 189, at 5, 11 (noting that Airbnb hosts want the freedom to determine who stays in their home and that profile photos "help hosts and guests get to know one another and can serve as an important security feature.").

[202] *Tex. Dep't of Hous.*, 135 S.Ct. at 2515 (quoting 24 CFR § 100.500(c)(3) (2014)).

[203] *See* MURPHY, *supra* note 189, at 17 (noting that "[w]hile important, photos capture

While it remains to be seen whether a plaintiff will be successful in holding Airbnb liable through either a listings or disparate impact claim under the HDRPTA, aggrieved guests have a reasonable and non-frivolous basis under the statute for initiating a claim.

C. Re-thinking the HDRPTA's Mrs. Murphy Exemption

Although the HDRPTA can provide substantial protections from discrimination, the statute does contain a notable exemption. The statute's "Mrs. Murphy Exemption" could allow many Airbnb hosts, and Airbnb itself, to escape liability. Under the Mrs. Murphy Exemption, the HDRPTA does not apply to:

> (1) To the rental of a housing accommodation in a building which contains housing accommodations for not more than two families living independently of each other if the owner or lessor resides in one of the housing accommodations; or (2) To the rental of a room or up to four rooms in a housing accommodation by an owner or lessor if the owner or lessor resides in the housing accommodation.[204]

Thus, the HDRPTA does not prohibit owners or lessors from discriminating in a transaction that involves rental of a unit in a duplex when the owner or lessor resides in the other unit, or up to four rooms in a single home in which the owner or lessor resides.[205]

The Mrs. Murphy Exemption gets its name from the corresponding exemptions existing under Title II of the Civil Rights Act of 1964 and the FHA.[206] The exemption, originally called the "Mrs. Murphy Boardinghouse" exemption, was meant to protect the First Amendment freedom of association rights of the hypothetical "Mrs. Murphy," a widow operating a small tourist home who, without the exemptions, would be forced to accept all transients without regard to whom she wished to associate with.[207] The exemption, thus, is intended "to exempt those who, by their direct personal nature of their activities, have a close personal relationship with their tenants."[208]

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only one dimension of a person's identity.").

[204] HAW. REV. STAT. § 515-4(a) (2016).

[205] *See id.*

[206] *See* James D. Walsh, *Reaching Mrs. Murphy: A Call for Repeal of the Mrs. Murphy Exemption to the Fair Housing Act*, 34 HARV. C.R.-C.L. L. REV. 605, 605–09 (1999) (citing 42 U.S.C. §§ 2000a(b)(1), 3603(b)(2)) (describing the history of the Mrs. Murphy exemptions under Title II of the Civil Rights Act of 1964 and the FHA).

[207] *Id.* at 607–09.

[208] *Id.* at 607 (quoting statement of Senator Walter F. Mondale, 114 CONG. REC. 2495 (1968), co-sponsor of the FHA).

While the spirit of the exemption is commendable, the Mrs. Murphy Exemption has been criticized as being a regulation that allows pervasive discrimination to continue[209] while being too rigid to keep up with new issues arising from the advent of the sharing economy.[210]

For example, both the FHA and HDRPTA Mrs. Murphy Exemptions contain ambiguity regarding exactly when an Airbnb host would be protected from liability. The FHA's prohibitions do not apply to "rooms or units in dwellings containing living quarters occupied or intended to be occupied by no more than four families living independently of each other, if the owner actually maintains and *occupies* one such living quarters as his residence."[211] Similarly, the HDRPTA exempts owners and lessors from liability if they "reside" within the duplex or home they are renting out, if renting out up to four rooms in the home.[212] Neither the FHA nor the HDRPTA define "occupies" or "reside," respectively. Does an Airbnb host "occupy" or "reside" in his home when he is away on vacation?

Michael Todisco elaborates on this issue in his article, *Share and Share Alike? Considering Racial Discrimination in the Nascent Room-Sharing Economy*. There, he states:

> The application of the Mrs. Murphy exception to Airbnb users demonstrates the difficulty of jamming square-pegged new technologies into round-holed existing laws. Do Airbnb hosts "actually occupy" their residence? Hosts who rent out just a single room (and are staying in their units contemporaneously with their guests) would almost certainly qualify. But would a host who rents out her entire apartment still actually occupy it? While these hosts do not actually stay in their apartment for the night it is rented to their guest, many still generally reside in that apartment and call it home. Since Congress in 1964 did not consider the possibility that homeowners might rent out their bed one night and sleep in it the next, we are left to wonder.[213]

Congress could not have foreseen this issue, and neither could the Hawai'i legislature. A lack of case law makes the analysis difficult. The

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[209] *See e.g.*, Marie Failinger, *Remembering Mrs. Murphy: A Remedies Approach to the Conflict Between Gay/Lesbian Renters and Religious Landlords*, 29 CAP. U. L. REV. 383, 384 (2001) (citations omitted) ("The evidence suggests that . . . Mrs. Murphy may still be refusing to rent her rooms to African Americans, given that over half of all African Americans and Latinos report discrimination in the rental and purchase of housing."); Walsh, *supra* note 206, at 606–07 (arguing that "[e]ven if the exemption were scaled back to dwellings occupied by two families . . . the FHA would still condone overt discrimination.").

[210] *See* Todisco, *supra* note 17, at 122 (arguing that "Airbnb and other housing-focused companies of the new 'Sharing Economy' facilitate virtually unregulated discrimination . . . in housing and accommodations.").

[211] 42 U.S.C. § 3603(b)(2)(2016) (emphasis added).

[212] HAW. REV. STAT. §§ 515-4(a)(1), (2) (2016).

[213] Todisco, *supra* note 210, at 125.

closest that federal courts have come to resolving the issue is defining the word "residence" as used in the definition of "dwelling" under the FHA. The Third Circuit in *Lakeside Resort Enterprises, LP v. Board of Supervisors of Palmyra Township*,[214] affirmed an earlier decision defining "residence" as "a temporary or permanent dwelling place, abode, or habitation to which one intends to return as distinguished from a place of temporary sojourn or transient visit."[215] Under that definition, an argument could be made that even while away for a short time, an Airbnb host still "occupies" or "resides" in his home for the purposes of the HDRPTA because he "intends to return."[216]

Depending on which way a Hawai'i court would rule on the definition of "resides," there would be a big impact on the number of hosts exposed to liability. A 2016 Airbnb survey showed that over 60% of its hosts in Hawai'i are renting out space in their permanent homes.[217] Additionally, between October 2015 and October 2016, there were 8,134 "entire home" listings on Airbnb with at least one booking in Hawai'i.[218] If the courts were to determine that a host's physical presence is required under the definition of "resides," those 8,134 hosts would be allowed to discriminate, as they are not physically present if their entire home is being rented out.[219]

To more comprehensively protect Airbnb guests from discrimination, the HDRPTA's Mrs. Murphy exemption should be repealed and replaced by the "nexus of connection model," proposed by Shelly Kreiczer-Levy in her article *Consumption in the Sharing Economy*.[220] Kreiczer-Levy explains that the FHA, and indeed many other legal doctrines, make a distinction between commercial and personal property, the latter of which is afforded more protections from government intrusions.[221] The Mrs. Murphy Exemption reflects this distinction; as noted above, the exemption protects Mrs. Murphy's right to free association within her own home.[222] However, Kreiczer-Levy notes that the sharing economy "reveals a continuum of

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[214] 455 F.3d 154 (3d Cir. 2006).

[215] *Id.* at 156–57 (citing United States v. Columbus Country Club, 915 F.2d 877, 881 (3d Cir. 1990)).

[216] *See id.*

[217] AIRBNB, AIRBNB IN HAWAII 1 (2016), https://www.airbnbaction.com/wp-content/uploads/2016/03/AirbnbHawaiiReport.pdf.

[218] RICKY CASSIDAY, AIRBNB & HAWAII HOUSING 1 (Jan. 9, 2017), https://hawaii.airbnbcitizen.com/wp-content/uploads/sites/27/2017/01/HawaiiAirbnbReportDesigned.pdf.

[219] *See id.*

[220] Shelly Kreiczer-Levy, *Consumption Property in the Sharing Economy*, 43 PEPP. L. REV. 61, 122 (2015).

[221] *See id.* at 68–75 (describing the distinction generally and the rationale behind the distinction between commercial and personal property).).

[222] *See* Walsh, *supra* note 206.

possibilities" between the bright-line commercial-or-private categories that the current "binary view fails to appreciate."[223] For example, under the current binary view, a homeowner who routinely rents out her home through Airbnb while on vacation is protected from regulation, despite the situation lacking the "personal nature" that the Mrs. Murphy exemption is intended to protect.[224]

To remedy this issue, Kreiczer-Levy's nexus of connection model employs "subcategories that focus on the type of use, the owner's preferences, and the nature of the interaction with users"[225] as opposed to "simply applying a dichotomy between private and commercial use."[226] The analysis "focus[es] on the purpose and characteristics of the project, rather than simply apply applying a dichotomy between private and commercial use." [227]

The subcategories under the nexus of connection model would allow those like the hypothetical Mrs. Murphy to still choose whom they wish to allow into their homes when renting them out.[228] In such situations, "where houseguests effectively live with the owners", there is "a stronger case for intimacy" which would still be recognized under the nexus of connection model.[229] At the same time, in the example of the homeowner gone on vacation, the prohibition on discrimination may apply if more "open-to-the-public elements are prominent."[230] Hawai'i should adopt the nexus of connection model and apply the analysis to the HDRPTA. This would allow courts to consider Airbnb hosts on a spectrum rather than a binary commercial-or-personal basis, allowing for more flexibility in protecting both the right to intimacy and the right to discrimination-free accommodations.

CONCLUSION

Existing anti-discrimination protections in Hawai'i are insufficient to regulate the business practices of a sharing economy business such as Airbnb. Although Hawai'i's public accommodation and real property transactions laws offer some protections to Airbnb users who may face discrimination, they are far from fool-proof. Plaintiffs must overcome

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[223] Kreiczer-Levy, *supra* note 220, at 116.
[224] *See* Walsh, *supra* note 206, at 607.
[225] Kreiczer-Levy, *supra* note 220, at 116.
[226] *Id.* at 118.
[227] *Id.*
[228] *See id.*
[229] *See id.* at 117–18.
[230] *See id.*

several hurdles to successfully obtain relief, yet despite these efforts, sharing economy businesses may still be able to escape liability through exemptions. The State must look to update its laws to maintain consistent protections for its residents and guests. For public accommodation laws, Hawai'i should modify its statutes to include "services" such as Airbnb's online platform as a type of place of public accommodation. For real property transactions, the HDRPTA should recognize the type of use, owners' preferences and the nature of interaction between owners and users as subcategories. Furthermore, the HDRPTA should be amended to recognize disparate impact claims as valid.

By taking proactive steps to address these legal issues, Hawai'i can serve as a progressive model for other states to follow. In doing so, Hawai'i can continue to serve in the best interests of both its people and its businesses.

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- Parallel citations are still required for cases decided by Hawai'i state courts; and
- Words of Hawaiian origin should incorporate diacritical marks ('okina and kahakō) as stated in the most current editions of *Hawaiian Dictionary* (Mary Kawena Pukui & Samuel H. Elbert eds., rev. ed. 1986), or *Place Names of Hawai'i* (Mary Kawena Pukui, Samuel H. Elbert & Esther T. Mookini eds., rev. ed. 1974).

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We strive to view issues pertinent to Hawai‘i through a broader global lens. We balance provocative articles on contemporary legal issues with practical articles that are in the vanguard of legal change in Hawai‘i and internationally, particularly on such topics as military law, sustainability, property law, and native rights.

Kūlia mākou e kilo i nā nīnau i pili iā Hawai‘i me ke kuana‘ike laulā. Ho‘okomo mākou i nā ‘atikala e ulu ai i ka hoi e pili ana i nā nīnau kū kānāwai o kēia wā a me nā ‘atikala waiwai e ho‘ololi ana i nā mea kū kānāwai ma Hawai‘i a ma nā ‘āina ‘ē, me ke kālele ‘ana i nā kumuhana like ‘ole e like me nā kānāwai pū‘ali koa, ka mālama ‘āina, nā kānāwai ona ‘āina, a nā pono o nā po‘e ‘ōiwi.

Translation by Pauahi Ho‘okano

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