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## There's No Place Like (Your) Home: Evaluating Existing Models and Proposing Solutions for Room-sharing Regulation

Lara Major

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# There’s No Place Like (Your) Home: Evaluating Existing Models and Proposing Solutions for Room-sharing Regulation

LARA MAJOR\*

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## I. INTRODUCTION

As urban housing grows increasingly unaffordable, city-dwelling millennials are forced to consider novel ways to pay the rent.<sup>1</sup> The intersection of costs outpacing a reasonable share of income, demand for short-term housing, and ubiquitous personal technology has spawned an entire “room-sharing” industry, dominated by start-up Airbnb.<sup>2</sup> Facilitated by Airbnb’s smartphone application, millennials open up their condominiums, houses, and apartments to complete strangers for short-term use. But, with the growth of the room-sharing economy come concerns for its participants, such as apportioning liability and, the focus of this Comment, determining how room-sharing fits within existing regulatory schemes.

Room-sharing hosts turn to applications such as Airbnb, usually without fully understanding the legal consequences of room-sharing in their jurisdiction. For instance, New York City resident Nigel Warren turned his condominium into a source of income by renting it out to strangers for \$100 per night.<sup>3</sup> Warren—like thousands of others—used Airbnb to find travelers who needed temporary housing during days when he was away on vacation.<sup>4</sup>

After one trip in September 2012, however, Warren returned home to a surprise. During his absence, special enforcement officers had shown up at his apartment, levying \$2,400 in fines on his unsuspecting landlord.<sup>5</sup> While Warren’s guest, a foreign tourist, took advantage of a below-market-cost stay, Warren faced breaking his lease and potential criminal

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1. See Patrick Clark, *The Exact Moment Big Cities Got Too Expensive for Millennials*, BLOOMBERG BUS. (July 15, 2015, 8:38 AM), <http://www.bloomberg.com/news/articles/2015-07-15/the-exact-moment-big-cities-got-too-expensive-for-millennials> [https://perma.cc/U9GA-PLY9], for a survey of the percentage of income paid by a typical millennial for rent in nine major U.S. cities. Clark finds that in all but two of these cities, rent, on average, costs more than the maximum acceptable 30% of renters’ income. In six of these cities, rent’s outpacing income is a recent phenomenon, starting in the early 2000s. *Id.*

2. Airbnb is an internet-based platform, connecting hosts who offer accommodations with guests. See *About Us*, AIRBNB, <https://www.airbnb.com/about/about-us> [https://perma.cc/Y2KW-P3WJ] (last visited May 15, 2016). When a prospective “Guest” and “Host” agree on price and terms, Airbnb facilitates the transaction, taking a portion of the rental price. See *Airbnb Terms of Service*, AIRBNB, <https://www.airbnb.com/terms/> [https://perma.cc/SEL5-282M] (last updated Mar. 29, 2016). For further discussion of Airbnb, see notes 12–23 and accompanying text.

3. See Ron Lieber, *A Warning for Hosts of Airbnb Travelers*, N.Y. TIMES, Dec. 1, 2012, at B1, <http://www.nytimes.com/2012/12/01/your-money/a-warning-for-airbnb-hosts-who-may-be-breaking-the-law.html?pagewanted=all>.

4. *City of New York v. Carrey*, NOV 35006622J, at 4 (Environmental Control Board May 9, 2013), <http://www.scribd.com/doc/142650911/Decision-and-Order-for-NOV-35006622J>. Warren’s description on the Airbnb website described a two-bedroom apartment with a “low-key and truly awesome” roommate. *Id.* at 4 n.5.

5. *Id.* at 1; see Lieber, *supra* note 3.

charges for operating an illegal hotel.<sup>6</sup> On appeal, the Environmental Control Board dismissed the fines against Warren, reasoning he was not operating an illegal hotel because his roommate was present.<sup>7</sup> The Board reasoned “occupancy of the cited . . . apartment by a tourist for less than thirty consecutive days while a permanent occupant was present in the apartment [was] consistent with using such apartment for permanent resident purposes.”<sup>8</sup>

Since Warren’s case, New York’s attorney general, Eric Schneiderman, has focused on tenants engaged in regularly renting out single-occupancy apartments using room-sharing platforms.<sup>9</sup> The attorney general’s office subpoenaed Airbnb to provide information on hosts within the state and the gross revenue of each host and accommodation.<sup>10</sup> The state asserted that hosts rented out their accommodations in violation of the New York Multiple Dwelling Law, which makes renting permanent residences for periods of more than thirty days a misdemeanor, as well as various tax laws.<sup>11</sup> Airbnb successfully quashed the subpoena, but New York housing

6. The City sued the condominium owner and Warren for using the space for transient occupancy, contrary to the Certificate of Occupancy and local zoning requirements and violating other safety standards. *See Carrey, supra* note 4, at 4. An administrative law judge found Warren guilty solely of changing the occupancy type, as the City had not shown the condominium’s use as an illegal transient hotel. *Id.* at 5.

7. *See City of New York v. Carrey*, Appeal Nos. 13006002 and 1300736 (Environmental Control Board Sept. 26, 2013), <http://www.scribd.com/doc/171532677/City-of-New-York-v-Abe-Carrey>; Lieber, *supra* note 3.

8. *City of New York v. Carrey*, Appeal Nos. 13006002 and 1300736 (Environmental Control Board Sept. 26, 2013), <http://www.scribd.com/doc/171532677/City-of-New-York-v-Abe-Carrey>.

9. *See Airbnb, Inc. v. Schneiderman*, 989 N.Y.S.2d 786, 790 (S. Ct. 2014). Like previous attorneys general, Schneiderman uses his office as a platform to police New York business, insisting that “corporations play by the rules.” Michael Craig, *Eric Schneiderman vs. Airbnb*, N.Y. OBSERVER (Feb. 25, 2014, 3:50 PM), <http://observer.com/2014/02/eric-schneiderman-vs-airbnb/> [<https://perma.cc/BWW6-EVMY>]. The increased focus on Airbnb and room-sharing occurred after the release of Schneiderman’s 2014 report, revealing most of New York City’s Airbnb rentals are illegal. OFFICE OF THE ATTORNEY GEN. OF N.Y., AIRBNB IN THE CITY 2 (Oct. 2014), <http://www.ag.ny.gov/pdfs/Airbnb%20report.pdf> [<https://perma.cc/3YXY-UKST>].

10. *Airbnb, Inc.*, 989 N.Y.S.2d at 788–89.

11. *Id.* at 790; *see* N.Y. MULT. DWELL. LAW § 61 (McKinney 2015) (mandating compliance with local law in conducting business in a multiple dwelling). The attorney general argued that, in addition to Multiple Dwelling Law violations, Airbnb hosts failed to remit the Hotel Room Occupancy Tax and state and local sales tax. *Airbnb, Inc.*, 989 N.Y.S.2d at 790–91.

agencies are clearly willing to press charges against hosts violating state and city laws.<sup>12</sup>

Further complicating matters for hosts is that municipalities may interpret their codes to bar room-sharing, even if the code does not, on its face, contain any provision that governs room-sharing. In a close-to-home example, the City of San Diego assessed \$22,400 in civil penalties against homeowner Rachel Smith for using Airbnb to rent out rooms in her historic craftsman home near Balboa Park for \$80 nightly.<sup>13</sup> While no San Diego code provision specifically addresses room-sharing, the court reasoned that room-sharing potentially implicates several sections: permissible rentals to a single boarder for more than thirty days, hotels, rooming houses, or bed and breakfasts.<sup>14</sup> Because she operated an illegal bed and breakfast for at least part of the time, the court found Smith liable.<sup>15</sup>

But Smith maintains that the bed-and-breakfast section’s applicability is unclear, depending on whether her rentals were “primarily to friends and family” or “primarily to visitors and tourists.”<sup>16</sup> In agreement with Smith, Airbnb sent an open letter to San Diego’s mayor and city council, calling for the council to “suspend enforcement efforts against . . . home sharers” while it considers ordinance and code changes to directly address room-sharing, to clarify the confusion of Airbnb hosts such as Smith.<sup>17</sup>

#### A. Overview: *The Rise of the Sharing Economy*<sup>18</sup>

Airbnb and its competitors represent a recently emerging trend in business—platforms based on peer-to-peer sharing, facilitated by the

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12. *Airbnb, Inc.*, 989 N.Y.S.2d at 788–89, 792. Airbnb successfully quashed the subpoena on the grounds that it was overbroad, requesting information on all Hosts in New York State, instead of more narrowly those who rented their apartments for less than thirty days in violation of the Multiple Dwelling Law. *Id.* at 791–92.

13. Civil Penalties Decision and Administrative Enforcement Order, *Rachel Smith v. San Diego*, 20150107.1-SD-CES-CMM (AHP Mar. 5, 2015), ¶¶ II(5), (7); V(2), [http://media.nbcbayarea.com/documents/AirBnB+Host+Penalites\\_Judges+Findings.pdf](http://media.nbcbayarea.com/documents/AirBnB+Host+Penalites_Judges+Findings.pdf) [<https://perma.cc/6N76-XZGR>].

14. *Id.* at ¶¶ II(31–32).

15. *Id.* at ¶¶ IV(12–15).

16. *Id.* at ¶ II(36).

17. Open letter from David Owen, Airbnb, to Kevin Faulconer, Mayor of San Diego, and San Diego City Council (Aug. 12, 2015), <https://www.documentcloud.org/documents/2273911-airbnb-letter-to-san-diego-city-council.html> [<https://perma.cc/AYG4-C965>].

18. While many economists use the term “sharing economy,” platforms such as Airbnb cannot, of course, strictly be termed “sharing” because they involve profitable transactions. See Arun Sundararajan, *Collaborative Consumption and the Sharing Economy*, *TECHONOMY* (Nov. 12, 2012), <http://techonomy.com/conf/12-tucson/internet-economy/collaborative-consumption-and-the-sharing-economy/> [<https://perma.cc/GT5W-E48N>].

internet and replacing traditional business models.<sup>19</sup> Technology makes resource-sharing ever easier, and millennials are well-versed in using new platforms to monetize their assets.<sup>20</sup> With the movement towards peer-to-peer sharing, consumers transfer reliance to services rather than goods, reducing consumption and increasing the benefits of ownership.<sup>21</sup> And while using privately owned resources to generate revenue, sharing platforms gain an advantage over the heavily regulated industries with which they compete—sharing platforms can typically evade the burden of regulatory compliance.<sup>22</sup>

With the advent of the sharing economy<sup>23</sup> and widespread smartphone ownership, innovative new platforms span a multitude of industries, allowing

19. See Sangeet Paul Choudary, *Why Business Models Fail: Pipes vs. Platform*, WIRED (Oct. 21, 2013), <http://www.wired.com/2013/10/why-business-models-fail-pipes-vs-platforms/> [https://perma.cc/3CJV-N3CU]. Business such as Airbnb are arguably the next of many iterations of the “typical” business model over the last two centuries, as business models transform from “value chains”—pipes, with value created and pushed out in the form of consumable goods—to platforms enabling interaction between participants and relying on customer participation to create value. See *id.* Airbnb, the most prominent room-sharing platform, has been extremely successful. Between January and June 2012, the company doubled its business, announcing ten million nights booked. Emily Chang, *Airbnb Celebrates Record Growth With Over 10 Million Guest Nights Booked*, MKT. WIRED (June 19, 2012, 6:00 AM), <http://www.marketwired.com/press-release/airbnb-celebrates-record-growth-with-10-million-guest-nights-booked-1670787.htm> [https://perma.cc/NA9Q-BRSZ]. Early in 2014, the company secured a \$450 million investment from private equity firm TPG, making it one of the world’s most valuable startups. Mike Spector, Douglas MacMillan, & Evelyn M. Rusli, *TPG-Led Group Closes \$450 Million Investment in Airbnb*, WALL STREET J. (Apr. 18, 2014, 5:33 PM), <http://www.wsj.com/articles/SB10001424052702304626304579509800267341652>.

20. See *The Power of Connection: Peer-to-Peer Businesses: Hearing Before the H. Comm. on Small Bus.*, 113th Cong. 3–4 (2014) (statement of Arun Sundararajan, Professor and NEC Fellow, Stern School of Business, Head, Social Cities Initiative, Center for Urban Science and Progress, New York University), [http://smallbusiness.house.gov/uploaded\\_files/1-15-2014\\_revised\\_sundararajan\\_testimony.pdf](http://smallbusiness.house.gov/uploaded_files/1-15-2014_revised_sundararajan_testimony.pdf) [https://perma.cc/2U3S-SN59]. Sundararajan, an economist specializing in the sharing economy, lists “consumerization of digital technologies,” “emergence of ‘digital institutions,’” “[u]rbanization and globalization,” and “[e]cological and resource concerns” as key factors promoting the rise of the peer economy. *Id.*

21. Sundararajan, *supra* note 20.

22. See Bruce Watson, *Airbnb’s Legal Troubles: The Tip of the Iceberg for the Sharing Economy?*, GUARDIAN (Nov. 20, 2013, 5:19 PM), <http://www.theguardian.com/sustainable-business/airbnb-legal-trouble-sharing-economy> [https://perma.cc/KC8F-86XS].

23. A recent PricewaterhouseCoopers study found that 19% of American adults have engaged in a sharing economy transaction. PricewaterhouseCoopers, LLP, *The Sharing Economy: Consumer Intelligence Series 8* (2015), <http://www.pwc.com/us/en/industry/entertainment-media/publications/consumer-intelligence-series/assets/pwc-cis-sharing-economy.pdf> [https://perma.cc/U8DX-7TGW] [hereinafter *The Sharing Economy*].

users to monetize personal belongings from bathrooms to parking spaces.<sup>24</sup> For the savvy smartphone user, a ride to her destination in another's private car, a share in someone's leftovers, and even a stranger to watch her pet are only a few taps away.<sup>25</sup> Sharing companies are strong competitors in many industries—the pink-mustached visages of cars operated by taxi competitor Lyft, for example, are likely familiar to most readers.<sup>26</sup>

Mirroring the success of companies Lyft and Uber within the taxi industry, Airbnb, the largest room-sharing company, has fast emerged as a heavy contender within the hotel industry—Airbnb averages almost half a million guests per night, nearly 22% more than Hilton Worldwide.<sup>27</sup> Airbnb, founded in San Francisco in 2008, now lists rentals including rooms, apartments, and entire homes in tens of thousands of cities worldwide.<sup>28</sup> Aspiring hosts and guests register on the Airbnb website, creating profiles that allow them to either offer unused space for rent or search listings to temporarily lease a room or entire dwelling.<sup>29</sup> Although Airbnb does not personally interview either hosts or guests, the company maintains that its

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24. See, e.g., VINTED, [www.vinted.com](http://www.vinted.com) [<https://perma.cc/DH5R-L429>] (last visited May 15, 2016) (enabling buying, selling, or swapping pre-owned clothes); SPINLISTER, <https://www.spinlister.com> [<https://perma.cc/RT83-5MDW>] (last visited May 15, 2016) (renting others' bicycles or snowboarding or surfing equipment); JUSTPARK, [www.justpark.com](http://www.justpark.com) [<https://perma.cc/SFV7-S6NM>] (last visited May 15, 2016) (connecting those in possession of parking spaces with others willing to rent the spaces); AIRPNP, <http://www.airpnp.co> [<https://perma.cc/8RJX-45P2>] (last visited May 15, 2016) (providing private bathrooms); FEASTLY, [www.eatfeastly.com](http://www.eatfeastly.com) [<https://perma.cc/V5U3-H8T6>] (last visited May 15, 2016) (connecting dining guests with eager home chefs).

25. See LEFTOVER SWAP, <http://www.leftoverswap.com> [<https://perma.cc/F9M3-HLW6>] (last visited May 15, 2016); TURO, <https://turo.com> [<https://perma.cc/VY36-AZEM>] (last visited May 15, 2016) (allowing strangers to rent idle cars for a daily fee); DOGVACAY, <http://www.dogvacay.com> [<https://perma.cc/DEF8-L5AB>] (last visited May 15, 2016) (linking vacationing pet owners with people willing to pet sit).

26. Lyft, Uber, and Airbnb are all “rental” services, repurposing peers' property and increasing the scope of an existing industry. See Sundararajan, *supra* note 20, at 2.

27. *The Sharing Economy*, *supra* note 23, at 14.

28. The concept behind Airbnb began when two San Franciscan roommates started hosting overnight guests in their apartment in order to pay their rent. Realizing others renters would be willing to host impromptu bed-and-breakfasts of their own, the roommates developed a website to connect travelers with empty rooms and couches. Christine Lagorio-Chafkin, Brian Chesky, Joe Gebbia, and Nathan Blecharczyk, *Founders of AirBnB*, INC. (July 19, 2010), <http://www.inc.com/30under30/2010/profile-brian-chesky-joe-gebbia-nathan-blecharczyk-airbnb.html>. With eager investors contributing millions, the company grew quickly, and is worth \$13 billion as of 2015—more than Hyatt Hotels. *The Sharing Economy*, *supra* note 23, at 23.

29. See *Airbnb Terms of Service*, *supra* note 2. This Comment uses the term *guest* consistently with Airbnb's terms of service: one renting a room or dwelling through a sharing platform, rather than a social visitor.

verification mechanisms ensure the safety of both parties.<sup>30</sup> After creating an account and verifying their identities using a social media profile, photo identification, or other mechanism, guests and hosts may view ratings and reviews left by other site users to provide further assurance of a profile's veracity.<sup>31</sup>

For guests, Airbnb—and similar platforms—offer accommodations at a substantial discount from hotel prices.<sup>32</sup> And for renters or property owners in popular destinations, well-managed Airbnb postings can be very lucrative.<sup>33</sup> But as Smith, Warren, and other hosts have discovered, room-sharing is not a risk-free source of income.

This Comment argues that the sharing economy, particularly room-sharing, is here to stay and that it represents an untapped source of funding for municipalities. It analyzes whether the room-sharing market should be regulated and ultimately advocates for municipalities to enact regulations tailored to the needs of their communities. Part II argues that government

30. See *What Are Verifications?*, AIRBNB, <https://www.airbnb.com/help/article/336> [<https://perma.cc/Z6LZ-ZSVK>] (last visited May 15, 2016). Airbnb offers a variety of verification mechanisms: confirming an email address or phone number, connecting your profile to a Facebook, LinkedIn, or Google account, using pre-existing or reviews, completing reservations, and having professional photographs of the rental space uploaded. See *How Do I Get Verifications?*, AIRBNB, <https://www.airbnb.com/help/article/269> [<https://perma.cc/EG4J-AQZS>] (last visited May 15, 2016). Completing the verification process results in the addition of a “Verified ID” badge to a profile, which Airbnb says users find “useful when deciding who to interact with on Airbnb.” *What is Verified ID?*, AIRBNB, <https://www.airbnb.com/help/article/450> [<https://perma.cc/Y7BF-GQP9>] (last visited May 15, 2016). These mechanisms appear a somewhat superficial increase in security, motivated more to placate users than truly prevent fraud—neither Facebook nor any other social media platform used to “verify” Airbnb accounts investigates the veracity of its users’ profile information until false profiles have been reported. See, e.g., *How Do I Report a Fake Account?*, FACEBOOK, <https://www.facebook.com/help/167722253287296> [<https://perma.cc/5LFX-LJGZ>] (last visited May 15, 2016).

31. See *What Are Verifications?*, *supra* note 30.

32. A 2013 comparison found entire-apartment rentals facilitated by Airbnb were on average about 20% less than a hotel room and single room rentals through Airbnb were typically half the price of a hotel room. *Airbnb vs. Hotels: A Price Comparison*, PRICEONOMICS (June 17, 2013), <http://priceonomics.com/hotels/> [<https://perma.cc/ZJ7C-CKW5>].

33. Particularly if hosting is more than just an occasional activity—for instance, a “professional” Airbnb host documented the economics of hosting in a \$40,000 Las Vegas apartment he purchased solely to rent on Airbnb. Jon Wheatley, *I Bought an Apartment to Rent Out on Airbnb*, NEED/WANT (Oct. 28, 2013, 2:48 AM), <http://needwant.com/p/buying-apartment-airbnb/> [<https://perma.cc/C6JN-6CS7>]. His costs included \$10,000 for renovating and furnishing the apartment and \$200 monthly for a third party to manage and clean the apartment. *Id.* After a year, his total profit was over \$13,000. *Id.*

intervention is necessary in this market, responding to the idea of laissez-faire regulation of the sharing economy and examining the parallels between policies for hotel regulation and room-sharing concerns. Part III analyzes existing regulations, particularly focusing on laws governing hotels and whether they will likely apply to room-sharing hosts. Part IV focuses on the legality of room-sharing in New York City, San Francisco, and Portland, Oregon—cities acknowledging potential issues with room-sharing and illustrating several approaches to the sharing economy, varying from hostile to relatively welcoming. Finally, Part V criticizes retrofitting existing regulation to fit the sharing economy, proposing a new, quota-based regulatory model.

## II. SHOULD ROOM-SHARING BE REGULATED?

From the perspective of supporters of the sharing economy, there is no reason to place a regulatory burden on participants. Supporters tout the affordability, convenience, promotion of community values, and benefit to the environment resulting from the sharing economy as advantages over traditional models. Airbnb, for instance, claims “using Airbnb promotes a more efficient use of existing resources and is an environmentally sustainable way to travel.”<sup>34</sup> According to one study commissioned by Airbnb, Airbnb guests use less water and its hosts fewer harsh cleaning chemicals than guests of their commercial hotel counterparts.<sup>35</sup>

At least the environmental impact claims seem somewhat dubious. Studies like the one commissioned by Airbnb certainly lend support to the idea that the cost-conscious millennials who are likely to use room-sharing platforms are a more environmentally conscious group of consumers.<sup>36</sup> But this does not necessarily support the idea that room-sharing is actually *causing* consumers to be more environmentally conscious. Rather, such

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34. *A Greener Way to Travel: The Environmental Impacts of Home Sharing*, AIRBNB (July 31, 2014), <http://blog.airbnb.com/environmental-impacts-of-home-sharing/> [<https://perma.cc/FZC6-4ZFP>].

35. *Id.* Airbnb compared 8,000 survey results from guests and hosts with “some of the most sustainable” hotels and claimed the results showed Airbnb hosts and guests are more environmentally aware and follow more sustainable practices than their hotel counterparts. *Id.*

36. See Kari Mercer Dalton, *Bridging the Digital Divide and Guiding the Millennial Generation’s Research and Analysis*, 18 BARRY L. REV. 167, 173 (2012) (explaining research suggests millennials are more environmentally-conscious than their predecessors (citing Diana Oblinger & James Oblinger, *Is it Age of IT: First Steps Toward Understanding the Net Generation*, in EDUCATING THE NET GENERATION 2.1, 2.7 (EDUCAUSE ed., 2005); Irina Ozolina, *At Youth Summit Environmental Issues are a Prime Concern for Millennials*, POLICY.MIC (June 6, 2012), <https://mic.com/articles/9300/at-youth-summit-environmental-issues-are-a-prime-concern-for-millennials#.3YFm84spa> [<https://perma.cc/AAN9-EXD9>]); *A Greener Way to Travel*, *supra* note 34.

claims suggest corporate *greenwashing* to appeal to an environmentally conscious customer base—part of Airbnb's efforts to brand itself to compete with established hospitality businesses.<sup>37</sup>

The other benefits of the sharing economy, in contrast, are more apparent. Peer-to-peer sharing allows “access to many things that we need without having to own them all by ourselves,” lessening consumption of durable goods.<sup>38</sup> The sharing economy probably does encourage trusting strangers and build stronger communities.<sup>39</sup> And it stimulates new consumption by raising productivity and catalyzing individual innovation and entrepreneurship.<sup>40</sup> In New York City, for instance, Airbnb claims that in one year, room-sharing activity facilitated by its platform resulted in \$632 million in economic activity in the city.<sup>41</sup> In high-rent cities, Airbnb also helps hosts keep their homes by providing supplemental income.<sup>42</sup>

37. *Greenwashing* is “what happens when a hopeful public eager to behave . . . is presented with ‘evidence’ that makes an industry . . . seem friendly to the environment when, in fact [it] . . . is not as wholly amicable as it . . . might be.” JANE HOFFMAN & MICHAEL HOFFMAN, *GREEN: YOUR PLACE IN THE NEW ENERGY REVOLUTION* 67 (2008).

38. JANELLE ORSI, *PRACTICING LAW IN THE SHARING ECONOMY* 4 (2012).

39. See *The Sharing Economy*, *supra* note 23, at 9; *The Power of Connection: Peer-to-Peer Businesses: Hearing Before the H. Comm. on Small Bus.*, 113th Cong. 2 (2014) (statement of Philip Auerswald, Associate Professor, School of Public Policy, George Mason University) [http://smallbusiness.house.gov/uploadedfiles/1-15-2014\\_revised\\_auerswald\\_testimony.pdf](http://smallbusiness.house.gov/uploadedfiles/1-15-2014_revised_auerswald_testimony.pdf) [<https://perma.cc/8TB7-GCVA>]. (stating that the peer-to-peer economy represents a return to a past before brand names, consumerism, and personalized services, nostalgically evoking the “distinctly American character” of sharing platforms).

For an example of a more specific benefit of at least one segment of the sharing economy, see Brad N. Greenwood & Sunil Watal, *Show Me the Way to Go Home: An Empirical Investigation of Ride Sharing and Alcohol Related Motor Vehicle Homicide* (Jan. 29, 2015) (unpublished research paper), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2557612](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2557612) [<https://perma.cc/MYY6-J8PB>]. Greenwood and Watal examined statistics of California highway accidents, finding that the presence of ridesharing application Uber reduced the incidence of motor vehicle homicides due to intoxication by 3.6%–5.6%. *Id.* at 2–3, 21.

40. See Sundararajan, *supra* note 20, at 5.

41. *Airbnb Economic Impact*, AIRBNB, [http://blog.airbnb.com/economic-impact-airbnb/?\\_ga=1.134296569.945248043.1451258873#new-york](http://blog.airbnb.com/economic-impact-airbnb/?_ga=1.134296569.945248043.1451258873#new-york) [<https://perma.cc/4U2B-SUQV>] (last visited May 15, 2016). Unfortunately, it is unclear the extent to which this economic activity was in addition to, rather than supplanting, the traditional hotel industry. Airbnb visitors on average spend an additional 2.9 days compared to hotel guests. *Id.*; see also *infra* note 43.

42. See *Airbnb Economic Impact*, *supra* note 41 (reporting “62[%] of Airbnb hosts say Airbnb helped them stay in their homes” and most hosts are nontraditional workers, without reliable sources of income).

While the extent of room-sharing's replacing traditional hospitality arrangements is disputed,<sup>43</sup> room-sharing benefits consumers by providing them with more than just a price break. Consumers also obtain the option of locally owned alternatives to the hotel industry, which is dominated by gigantic corporate hotel groups in the United States.<sup>44</sup> Airbnb guests not only usually obtain better pricing, but also more authentic experiences of "local flavor," an important consideration for many consumers—and one that is difficult for established brands to compete with.<sup>45</sup>

At least some regulation is uncontroversial—Airbnb itself encourages hosts to collect and remit local taxes and in some cities, Airbnb even collects tax on the hosts' behalf by arrangement with local authority.<sup>46</sup> Sharing platform users should not be able to circumvent paying taxes, particularly when municipalities greatly need tax income.<sup>47</sup> Taxation is a promising

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43. Both Airbnb and major hotel chains maintain that room-sharing does not significantly impact the hotel industry. Georgios Zervas et al., *The Rise of the Sharing Economy: Estimating the Impact of Airbnb on the Hotel Industry 2* (Boston Univ. Sch. of Mgmt., Working Paper No. 2013-16, 2015) ("[H]otel executives have publicly issued largely dismissive statements regarding competitors like Airbnb, arguing that these peer-to-peer platforms are either a small niche market or that they target complementary market segments from that targeted by hotel chains."). But third-party estimates have found room-sharing results in decreases in local hotel revenue of up to 10% in certain areas. See, e.g., *id.* at 3 ("[C]omparing differences in revenue for hotels in cities affected by Airbnb before and after Airbnb's entry against a baseline of differences in revenue for hotel in cities unaffected by Airbnb over the same period of time[,] . . . we find that, in Texas, each additional 10% increase in the size of the Airbnb market resulted in a 0.37% decrease in hotel room revenue . . . resulting in an estimated revenue impact of over 8-10% for the most vulnerable hotels in our data.").

44. MKG Group, *U.S. Hotel Groups Still Dominate at Home with Hilton Leading the Pack*, HOTEL ONLINE (Sept. 6, 2011), [http://www.hotel-online.com/News/PR2011\\_3rd/Sep11\\_USGroupMarketShare.html](http://www.hotel-online.com/News/PR2011_3rd/Sep11_USGroupMarketShare.html) [<https://perma.cc/558S-K44T>].

45. *The Sharing Economy*, *supra* note 23, at 24.

46. See *What Is Occupancy Tax? Do I Need to Collect or Pay It?*, AIRBNB, <https://www.airbnb.com/help/article/654/what-is-occupancy-tax-do-i-need-to-collect-or-pay-it> [<https://perma.cc/T2MW-A7HW>] (last visited May 15, 2016) ("We want to help hosts follow the laws relevant to them, and we understand that many of these rules are complex and difficult to follow. We're continuing to work with governments across the world to explore ways to help facilitate occupancy tax collection in as many locations as possible."). Airbnb collects and remits local taxes on behalf of hosts in some U.S. cities—Washington, D.C.; Malibu, Oakland, Palo Alto, San Diego, San Francisco, San Jose, Santa Clara, and Santa Monica, California; Philadelphia, Pennsylvania; and Phoenix, Arizona—and states—Florida, Illinois, Oregon, North Carolina, Rhode Island, and Washington. *In What Areas Is Occupancy Tax Collection and Remittance by Airbnb Available?*, AIRBNB.COM, <https://www.airbnb.com/help/article/653/in-what-areas-is-occupancy-tax-collection-and-remittance-by-airbnb-available> [<https://perma.cc/PS5D-TAV5>] (last visited May 15, 2016).

47. See Scott M. Susko & Lucia Cucu, *State and Local Governments Turn to Online Business for Tax Revenue in an Attempt to Remedy Budget Shortfalls*, J. MULTISTATE TAX'N & INCENTIVES, Sept. 2009, at 14 (noting the increase of municipal budget woes, particularly on the heels of the recession).

source of municipal income in cities where room-sharing is prevalent and falls under a variety of local tax regulations, including occupancy, lodging, sales, tourist, or hotel taxes.<sup>48</sup> As municipalities increasingly face high amounts of debt and even the likelihood of bankruptcy, it is only fair for room-sharing participants to bear their share of the tax burden.<sup>49</sup>

The focus of this Comment is not taxation, however, but the more controversial position that room-sharing should be monitored by local authorities to ensure consumer safety and minimize its impact on communities.<sup>50</sup> While new technology should not be banned merely because it does not fit within existing regulatory schemes, innovation should not allow room-sharing platforms to escape regulation entirely.<sup>51</sup> Consumer safety has long been guarded by legislation in housing, securities, the workplace, food and drug, and other industries.<sup>52</sup> Because of technological advances, the time has come for reform focused on the sharing economy.<sup>53</sup>

48. See *Expedia, Inc. v. New York Dep't of Fin.*, 22 N.Y.3d 121, 124 (2013); T.J. Evans, Case Note, *Online Travel Companies Find Issues with Hotels Extremely Taxing: Georgia's Hotel-Motel Occupancy Excise Tax and Expedia, Inc. v. City of Columbus*, 61 MERCER L. REV. 1263, 1273 (Summer 2010) (describing taxability of online travel companies in Georgia); see *infra* notes 112–14 and accompanying text.

49. WAYNE H. WINEGARDEN, PACIFIC RESEARCH INSTITUTE, GOING BROKE ONE CITY AT A TIME: MUNICIPAL BANKRUPTCIES IN AMERICA 3 (Jan. 2014), [http://www.pacificresearch.org/fileadmin/templates/pri/images/Studies/PDFs/2013-2015/MunicipalBankruptcy2014\\_F.pdf](http://www.pacificresearch.org/fileadmin/templates/pri/images/Studies/PDFs/2013-2015/MunicipalBankruptcy2014_F.pdf) [<https://perma.cc/TYP2-TEQD>] (noting economic weakness and liabilities for pensions and retirement benefits as factors increasing the likelihood of municipal bankruptcies in the coming years).

50. Recently, for instance, a man died after swinging on a rope swing at an Airbnb rental, when the tree branch supporting the swing broke. Zak Stone, *Living and Dying on Airbnb*, MEDIUM (Nov. 8, 2015), <https://medium.com/matter/living-and-dying-on-airbnb-6bff8d600c04#.8tx7dsg8i> [<https://perma.cc/L78Y-KPHQ>]. Most homeowner's insurance policies do not cover commercial use of the home—Airbnb offers secondary coverage up to \$1 million, but if Airbnb refuses to provide coverage or if the amount sought exceeds the coverage, renters face personal liability. See Ron Lieber, *A Liability Risk for Airbnb Hosts*, N.Y. TIMES (Dec. 5, 2014), <http://www.nytimes.com/2014/12/06/your-money/airbnb-offers-homeowner-liability-coverage-but-hosts-still-have-risks.html?r=0>.

51. For the contrary position, see Roberta A. Kaplan, *Regulation and the Sharing Economy*, N.Y. L.J. 1, July 18, 2014 (“Although incumbents tend to portray disruptive innovation as ‘evading’ established systems of regulation, this is true only in the sense that the automobile ‘evaded’ the horse tax and saddle regulations.”).

52. See Daniel B. Klein, *Consumer Protection*, in CONCISE ENCYCLOPEDIA OF ECONOMICS 81–83 (David R. Henderson ed., 2008).

53. For a discussion of the ways in which industry forces challenge consumer protection laws, see, for example, Mark E. Budnitz, *The Development of Consumer Protection Law, the Institutionalization of Consumerism, & Future Prospects & Perils*, 26 GA. ST. U. L. REV. 1147, 1181–98 (2010).

Airbnb and other room-sharing platforms are examples of technological innovation outstripping consumer protections. By eschewing the traditional hospitality industry, guests trust hosts to provide safe and legal rooms, putting themselves at risk when staying in any of tens of thousands of room-sharing listings.

Neither are participants in the hospitality industry traditionally unregulated—hoteliers, room-sharing hosts’ commercial counterparts, are uncontroversially subject to a variety of duties and laws.<sup>54</sup> At common law, for example, the innkeeper historically had three duties to his guests: to provide shelter, to safeguard them from harm, and to furnish “wholesome” food.<sup>55</sup> Although modern jurisprudence lessens the common law’s application of strict liability to hotel operators, hotels nevertheless maintain duties to provide courteous treatment and safe accommodations or else face paying civil damages to guests.<sup>56</sup> Hoteliers are not insurers of the safety of their guests, but the law presupposes a duty of care for hotel operators to furnish safe appliances and premises as well as warn guests of any hidden dangers.<sup>57</sup> Beyond these tort doctrines, legislation also creates criminal punishment for hotels failing to meet certain standards, inducing safer practices in the hospitality industry.<sup>58</sup>

These duties stem from the concept that hotels and inns, by soliciting consumers to frequent their establishments, are not “blameless” for injuries incurred at their establishments.<sup>59</sup> Ideally, hotels are as “safe and secure

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54. See THOMAS A. DICKERSON, TRAVEL LAW § 4.02[1] (1992) (suggesting that hotel law stems from the simple premise that “a hotel must be as safe and secure as one’s home”).

55. JOHN H. SHERRY, THE LAWS OF INNKEEPERS 157 (1972).

56. DICKERSON, *supra* note 54. See *Penchas v. Hilton Hotels Corp.*, 590 N.Y.S.2d 669, 670 (Sup. Ct. 1992) (noting that the law has historically held innkeepers to a high level of care, as inns were safe havens on dangerous highways where travelers expected protection from thieves and the elements).

57. See, e.g., *Dye-Washburn Hotel Co. v. Aldridge*, 93 So. 512, 514–15 (Ala. 1922); *Lincoln Operating Co. v. Gillis*, 114 N.E.2d 873, 875–76 (Ind. 1953); *Connelly v. Family Inns of Am., Inc.*, 540 S.E.2d 38, 41, 45 (N.C. 2000); *Barnes v. Hotel O. Henry Corp.*, 51 S.E.2d 180, 181–82 (N.C. 1949). Liability is not unlimited, however; state statutes in every state limit the liability of innkeepers to hosts. Jeffrey Miller, *Feature, Hospitality Law*, GEN. PRAC., SOLO & SMALL FIRM DIV., April–May 2010, at 14, 15–16.

58. See *infra* Section III.A.

59. Fred C. Zacharias, *The Politics of Torts*, 95 YALE L.J. 698, 709 (1986).

By inviting customers in order to secure financial gain, an enterprise fosters crime. It provides a pool of victims and booty in a convenient location for potential wrongdoers. The enterprise is also in a position to take advance measures to avoid the danger. . . . The government’s general responsibility for law enforcement does not eliminate the business’s separate duty to supplement public compensation and public protection.

as one's home"<sup>60</sup>—but they tend to be particularly dangerous when guests are in a new area, unfamiliar with local dangers, without acquaintances, and easy targets for criminals.<sup>61</sup>

The same characteristics that make hotel guests as a class particularly vulnerable also provide support for regulating the room-sharing industry.<sup>62</sup> Just like traditional host guests, room-sharing guests contract with a host, abide by the terms of a contract provided by the sharing platform, and stay in a location for a limited period of time.<sup>63</sup> And like a hotel guest, a room-sharing guest stays in an unfamiliar residence and is unacquainted with the surroundings, so the same safety requirements, such as posting signs for fire exits or having carbon monoxide detectors, should apply to room-sharing hosts.<sup>64</sup> Additionally, hosts represent themselves as innkeepers, so to speak, by advertising lodging on an online platform.<sup>65</sup> Once homeowners or apartment tenants hire out a room to the general public, they are no longer using their property merely for private purposes.<sup>66</sup>

Granted, hosts and hotels are not interchangeable: hosts are private persons, less sophisticated and less able to bear risk.<sup>67</sup> While hotels are generally financially secure enough to spread losses, a private person

*Id.* (citing RESTATEMENT (SECOND) OF TORTS § 442B (1965); Gary S. Becker, *Crime and Punishment: An Economic Approach*, in *ESSAYS IN THE ECONOMICS OF CRIME AND PUNISHMENT* 1, 35 (Gary S. Becker & William M. Landes eds., 1974)).

60. DICKERSON, *supra* note 54.

61. See Zacharias, *supra* note 59, at 744. However, few contemporary hotel locations resemble their Medieval English predecessors, where roads were “infested with outlaws and robbers of all sorts” and hotels were essential for “protection at night from thieves and outlaws.” SHERRY, *supra* note 55, at 3.

62. See Zacharias, *supra* note 59, at 744.

63. See *Terms of Service*, *supra* note 2.

64. See, e.g., N.Y. MULT. RESID. LAW § 56 (McKinney 1951) (“Every means of egress [in a hotel or similar dwelling] shall be indicated by a sign reading “EXIT” in red letters at least eight inches high on a white background, or vice versa.”).

65. See SHERRY, *supra* note 55, at 157. Sherry defines an innkeeper by “the profession of readiness to serve the public need,” explaining “it is enough that by word or act the innkeeper makes public his intention to become such.” *Id.* at 17. Although examples of methods of soliciting the public do not include creating an online profile, using a sharing platform website to advertise an available room is similar to “advertising, . . . keeping a public register, [or] . . . running a coach to a railroad station.” *Id.*

66. *Id.* at 32. Some 19th century cases dealt with private individuals receiving members of the public into their houses, reasoning that the distinction between an innkeeper and a private individual was a question of fact. *Id.* At least one case held that a homeowner may maintain his house is private, yet be an innkeeper by holding himself out to the public as a course of business. SHERRY, *supra* note 55, at 10–12.

67. See discussion *supra* notes 54–57.

renting out an apartment will likely be unable to afford any damages.<sup>68</sup> Because Airbnb and other sharing platforms limit their responsibility by maintaining their status as facilitators and not parties to the contract, the individual hosts are the ones who must bear the cost of breaking the law.<sup>69</sup>

Rather than impracticability, some argue that room-sharing need not be regulated because internal incentives are adequate to ensure consumer safety.<sup>70</sup> In January 2014, economist Arun Sundararajan testified before the House of Representatives, explaining that the peer economy should be left to regulate itself:

The interests of the platforms are well aligned with facilitating safe and profitable peer-to-peer trade (since their revenues are directly linked to the volume and continued growth of such trade). The platforms are also better positioned to “take action” against infringing entrepreneurs and consumers (for example, by simply disconnecting them from the platform).<sup>71</sup>

But Airbnb confounds a *laissez-faire* approach.<sup>72</sup> The company and its competitors do not have a direct incentive to encourage compliance with applicable laws because they are effectively insulated from liability.<sup>73</sup> Airbnb’s terms of service state “AIRBNB HAS NO CONTROL OVER THE CONDUCT OF HOSTS, GUESTS[,] AND OTHER USERS OF THE SITE, APPLICATION[,] AND SERVICES OR ANY ACCOMMODATIONS, AND DISCLAIMS ALL LIABILITY IN THIS REGARD TO THE MAXIMUM EXTENT PERMITTED BY LAW.”<sup>74</sup> And the disclaimer

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68. Airbnb does provide a “host guarantee,” similar to insurance for hosts to cover damage to their homes or apartments. See *What Is the Airbnb Host Guarantee?*, AIRBNB, <https://www.airbnb.com/help/article/279> [https://perma.cc/JDX9-LFCT] (last visited May 15, 2016). However, as Airbnb’s terms of use direct hosts to comply with local regulations, the insurance will not cover fines or other penalties for breaking the law. See *Terms of Service*, *supra* note 2.

69. See *Terms of Service*, *supra* note 2.

70. See Sundararajan, *supra* note 20, at 7.

71. *Id.* Sundararajan is a professor at New York University, specializing in the economics of digital goods and network effects. *Faculty Index Page: Arun Sundararajan*, NYU, <http://www.stern.nyu.edu/faculty/bio/arun-sundararajan> [https://perma.cc/3B49-E4QG] (last visited May 15, 2016). His scholarly research includes many works on the impact of sharing platform businesses on the economy. *Id.*

72. A *laissez-faire* approach conceives of an ideally competitive market and criticizes government interference as creating “sluggish and inefficient” corporations. See THOMAS DONALDSON, *CORPORATIONS AND MORALITY* 93 (1982). Such assumptions minimize the realities of imperfectly available information, cost externalization, imperfect competition, and other factors. *Id.*

73. See *Terms of Service*, *supra* note 2 (stating that Airbnb is not liable for the illegality of hosts’ activities because it is merely a service connecting hosts and guests—like a matchmaker).

74. *Id.*

is likely effective, given room-sharing platforms' limited role beyond that of connecting potential hosts and guests.<sup>75</sup>

Rather than continue to ban room-sharing, cities should implement regulations specifically addressing room-sharing activity and lightening the burden of compliance for hosts.<sup>76</sup> Hosts, who are likely not sophisticated parties able to decipher and comply with local law, can benefit from proactive efforts to implement room-sharing-friendly schemes. Further, as Airbnb and its competitors aim to be firmly established in nearly every city, local authorities will face practical barriers in attempting to crack down on illegal room-sharing under current law.<sup>77</sup> While regulation undoubtedly will inhibit room-sharing to some extent, the fears regulation's opponents express are less concerning than the dangers of an unmonitored, flourishing alternative to the heavily-regulated hotel industry.

### III. SURVEY OF EXISTING REGULATION

A variety of laws govern room-sharing, but municipal regulations take on the most important role. Factors determining a particular host's liability under most laws include whether she is an owner or renter, whether she remains in her residence or abandons it entirely to the guest, and for how many days annually she hosts guests brokered through the platform.<sup>78</sup> Thus, "professional" room-sharers—individuals owning multiple listings that are exclusively used on sharing platforms—will be most likely to be breaking the law.<sup>79</sup>

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75. *Supra* notes 30–31 and accompanying text.

76. *Infra* notes 188–211 and accompanying text.

77. See David Matthews, *Why Airbnb Is Launching a Print Magazine*, FAST COMPANY, (Nov. 17, 2014, 11:32 AM), <http://www.fastcompany.com/3038652/why-airbnb-is-launching-a-print-magazine> [https://perma.cc/P64B-7Q3Z]; Steve Mertl, *Quebec Government Targets Airbnb "Hosts" for Offering Unlicensed Accommodations*, YAHOO! NEWS CANADA (May 27, 2013), <https://ca.news.yahoo.com/blogs/dailybrew/quebec-government-targets-airbnb-hosts-offering-unlicensed-accommodations-184805349.html> [https://perma.cc/HBT2-XLFS] (explaining a city wide crackdown on room-sharing in Quebec would mean charging thousands of city residents with violating local laws).

78. See CAL. CIV. CODE § 1940 (West 1989). In California, for instance, a host can inadvertently become a landlord if the guest stays for more than 30 days. See *id.* Thus one Palm Springs, California host had to resort to eviction proceedings to get rid of a crafty houseguest. See Skip Descant, *Airbnb 'Squatter' Checks out of Palm Springs Condo*, USA TODAY (Aug. 21, 2014, 1:05 AM), <http://www.usatoday.com/story/news/nation/2014/08/21/airbnb-squatter-leaves-condo/14375429/> [https://perma.cc/EH5B-DYBN].

79. While Airbnb maintains that the majority of its hosts casually use the site, a substantial number of the listings posted on Airbnb are not from "regular people," but from

### A. Local Law

Four limitations restrict the ability of local government to regulate business: (1) the state must implicitly or expressly delegate the power to the municipality; (2) there “must be a rational connection between the restriction and some legitimate end of government policy;” (3) the restriction must not violate constitutional due process; and (4) any distinctions drawn between different types of business must be reasonable and not violate equal protection.<sup>80</sup> Under this framework, cities can regulate room-sharing businesses, because regulation falls under the legitimate policy catchall of promoting general welfare and protecting consumers.<sup>81</sup> Several categories of permissible city and municipal law impact room-sharing, including health and safety, zoning, and tax regulations.

In cities, code enforcement agencies police the regulation of local health and safety requirements.<sup>82</sup> Common examples of code enforcement divisions include building code inspectors, fire marshals, and health inspectors, empowered by the municipality to inspect for violations and issue various sanctions. In New York City, for instance, the Environmental Control Board issues tickets for “non-criminal quality-of-life violations,” such as allowing rodents or pest infestations in a residence.<sup>83</sup> At least one Airbnb host already contested a ticket after the Board issued violation notices for

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hosts with multiple listings. *The Shape of Airbnb’s Business*, TOMSLEE.NET (May 26, 2014), <http://tomslee.net/2014/05/the-shape-of-airbnbs-business.html> [https://perma.cc/MB85-8U6F] (examining Airbnb’s listings and finding that Airbnb’s self-published figures are skewed to reflect the percentage of *hosts* who rent the residence they reside in, but that the percentage of *listings* shows a much higher proportion of multiple-listing owners than Airbnb admits).

80. OSBORNE M. REYNOLDS, JR., *HANDBOOK OF LOCAL GOVERNMENT LAW* 591–92 (2d ed. 2001). States delegate much of their police powers to local government because “many functions can best be provided at the community level, where the government is not a distant, dimly perceived entity, but is close to—and [should] be kept responsive to—its constituents.” *Id.* at 1–2.

81. See *McClellan v. Kansas City*, 379 S.W.2d 500, 504 (Mo. 1964) (recognizing the right of municipalities to create laws advancing consumer safety protection); REYNOLDS, *supra* note 80, at 593.

82. See, e.g., *Wasted Water*, LAS VEGAS VALLEY WATER DIST., <https://www.lvvwd.com/conservation/waste.html> [https://perma.cc/BLD5-VZ5W] (last visited May 15, 2016) (explaining that like fire or food inspectors, the Las Vegas Water District, who inspect reports of wasted water).

83. *Environmental Control Board Violations*, NYC.GOV, <http://www1.nyc.gov/nyc-resources/service/1614/environmental-control-board-violation-information> [https://perma.cc/Q2Z7-8B6L] (last visited May 15, 2016) (providing examples of common violations, including unleashed dogs, public indecency, and rollerblading or motorcycling in a forbidden area).

insufficient fire safety and building exits and using a “permanent dwelling for non-permanent purposes.”<sup>84</sup>

Zoning rules restrict the usage of land within city limits, usually for the purposes of managing and protecting resources and access to utilities.<sup>85</sup> For instance, the New York City Charter empowers the city’s zoning commission “to restrict the locations of trades and industries and location of buildings designed for specific uses.”<sup>86</sup> Although zoning is a function of state legislative power, state legislatures often delegate zoning power to municipal governments in light of the local nature of zoning rules.<sup>87</sup> Municipalities have wider discretion over zoning powers through home rule laws,<sup>88</sup> as “[c]ontrol over, and planning of, the uses made of land within a community is one of the chief functions of local government.”<sup>89</sup>

84. Ctr. for N.Y.C. Law, *Fined \$4,200 for Illegal Transient Use*, 20 CITY L. 101 (2014) (citing NYC v. ECC Realty LLC, ECB Appeal No. 1400480 (July 31, 2014)). The owners of the apartment complex had to pay \$4,200 for the violations. *Id.*

85. ORSI, *supra* note 38, at 516.

86. NEW YORK CITY, N.Y., CHARTER § 200 (2004).

87. PATRICIA E. SALKIN, 1 AM. LAW. ZONING § 2:1 (5th ed. 2015) [hereinafter AM. LAW. ZONING]. Zoning laws are an exercise of legislative power, falling within state police powers. *Id.* Although states tend to delegate these powers to local governments, the state may explicitly reserve zoning powers to itself, either through legislation or through creating statewide planning agencies. *Id.* § 2:3. In New York, for instance, the state legislature primarily delegates zoning power to municipalities through constitutional amendment. PATRICIA E. SALKIN, 1 N.Y. ZONING LAW & PRAC. § 2:03 (4th ed. 2015) [hereinafter N.Y. ZONING LAW & PRAC.].

88. REYNOLDS, *supra* note 80, at 76. Since the late 19th century, many states recognized the “home rule” doctrine, prioritizing local sovereignty over local matters. *Id.* The “home rule doctrine,” much like vertical federalism in the relationship between the states and the federal government, distinguishes between “matters of purely municipal or local import, and those of general, statewide concern,” with city law trumping state law when the former are implicated. *Id.* Home rule persists as a creature of statutory or constitutional provision rather than as an inherent right. *Id.* at 84. The existence of charter cities refines the home rule doctrine. *Id.* The strongest form of city government is the incorporated city or “public corporation”; more than a mere subservient of state government, the incorporated city exists solely to serve the independent needs of its citizens. *Id.* at 19–20. States interpret the extent of a charter’s grant of power differently: in Oregon, as in a majority of states, a municipal charter is a “grant of power to a locality,” meaning the municipality’s powers are only “expressed or implied in its charter.” *Id.* at 157. Local law governs local matters and state law governs state matters. *Id.* However, in a minority of states, including California, the municipal charter is “a limitation on powers and not a grant,” so that a city has the power to regulate local matters, even when the power to regulate those matters is not granted in the city charter. *Id.* at 156–58.

89. REYNOLDS, *supra* note 80, at 409; *see also* AM. LAW. ZONING, *supra* note 87, at § 2:4. Generally, municipalities are more capable of policing room-sharing and ensuring

Room-sharing may violate several types of zoning requirements, including single-family use and exclusionary ordinances.<sup>90</sup> For instance, a homeowner in a single-family use zone, by renting a room in her house to a guest, would violate the zoning requirement unless she vacates the house during that period.<sup>91</sup> Regular use of a family residence for room-sharing seems in tension with “what the early zoners considered to be the ‘highest’ use of land, the dwelling constructed and used as a residence for one family.”<sup>92</sup> In New York, local zoning ordinances mandate single-family residences in some areas and forbid using the residences for “lodging.”<sup>93</sup> In 2008, a state court ruled that short-term rentals violate the zoning ordinance, determining that a “lodger,” in was “a[ny] person who contracts for less than a landlord/tenant relationship wherein unexclusive occupancy of real property is granted and the owner does not surrender dominion over the premises to the lodger.”<sup>94</sup> While controversial, single-family use ordinances are a common limitation on the usage of private property in residential areas.<sup>95</sup>

Some municipalities preserve a homeowner’s right to rent out rooms, under special laws addressing tourist homes or “transient residences.” These cities include Atlanta, Georgia<sup>96</sup> and Tampa, Florida.<sup>97</sup> In these places,

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hosts comply with particular regulations than their state counterparts. REYNOLDS, *supra* note 80, at 16–17.

90. See Paul E. King, *Exclusionary Zoning and Open Housing: A Brief Judicial History*, 68 GEOGRAPHICAL REV. 459, 459 (1978).

91. See *City of White Plains v. Ferraioli*, 313 N.E.2d 756, 757 (N.Y. 1974).

92. N.Y. ZONING LAW & PRAC., *supra* note 87, at § 7:22. One Supreme Court justice waxed sentimental in his support for single-family zoning, picturing:

A quiet place where yards are wide, people few, and motor vehicles restricted are legitimate guidelines in a land-use project addressed to family needs . . . .

The police power is not confined to elimination of filth, stench, and unhealthy places. It is ample to lay out zones where family values, youth values, and the blessings of quiet seclusion, and clean air make the area a sanctuary for people.

*Village of Belle Terre v. Boraas*, 416 U.S. 1, 8 (1974).

93. *But see City of Worcester v. Coll. Hill Properties*, 987 N.E.2d 1236, 1246 (Mass. 2013) (interpreting the Lodging House Act to apply to student apartments would lead to absurd results and suggesting a better way to protect inhabitants’ safety would be to enforce applicable zoning ordinances and fire safety and sanitary codes).

94. See *People v. Hyland*, No. BATO 61–08 (N.Y. Dist. Ct. Apr. 2, 2008), *appeal dismissed*, No. 2008-943 S. CR. (App. Term Jan. 12, 2009), and *leave to appeal denied*, 881 N.Y.S.2d 25 (2009).

95. See King, *supra* note 90, at 459.

96. “A building other than a hotel where lodging is provided and offered to the public for compensation for not more than twenty (20) individuals and open to transient guests.” ATLANTA, GA., ZONING MANUAL, art. III § 1 (1965).

97. See TAMPA, FL., ZONING ORDINANCE § 39-8.1 (1966).

the law provides for accessory lodging uses, often by allowing “tourist homes,” a predecessor to Airbnb-type rentals.<sup>98</sup>

Accessory rentals are only legal, however, when a host is not in the business of renting rooms.<sup>99</sup> A small number of cases and statutes address this distinction in the transient rental context, typically relying on case-by-case determinations of whether a house is being rented principally as a profit-making enterprise.<sup>100</sup> Statutes may alternatively require the court inquire into whether the use is customary in the area.<sup>101</sup> In a Maryland case, the court determined the homeowners were not renting their house as an accessory use, explaining:

In the case before us, we think it evident that the business tail is wagging the residential dog. . . . There can be no real doubt that the [Defendants] are not renting the seven rooms as an incident of or as accessory to their use of the property as a home, but rather are occupying the property as a place for the carrying on of the business of renting apartments and rooms. The principal use of the building clearly would seem to be the renting of dwelling quarters to others.<sup>102</sup>

Other cases base the distinction on whether the owner of the home remains there with the guests, unless the statute provides further clarification.<sup>103</sup>

Alternatively, room-sharing may be likened to operating a bed-and-breakfast, as contemplated by San Diego.<sup>104</sup> Similarly, Boston authorities

98. See, e.g., *Richardson v. Passmore*, 63 S.E.2d 392, 394 (Ga. 1951).

99. See *id.* at 394.

100. See, e.g., *Richardson*, 63 S.E.2d at 394; *Keseling v. City of Baltimore*, 151 A.2d 726, 729 (Md. 1959); *NYC v. ECC Realty LLC*, ECB Appeal No. 1400480 (July 31, 2014); *Town of Alta v. Ben Hame Corp.*, 836 P.2d 797, 800 (Utah Ct. App. 1992); see also 4 NORMAN WILLIAMS, JR. & JOHN M. TAYLOR, *AMERICAN LAND PLANNING LAW* § 79:29 (rev. ed. 2003).

101. See *Town of Alta v. Ben Hame Corp.*, 836 P.2d 797, 800 (Utah Ct. App. 1992).

102. *Keseling v. City of Baltimore*, 151 A.2d 726, 729 (Md. 1959).

103. See *Reynolds v. Zoning Hearing Bd.*, 578 A.2d 629 (Pa. 1990) (holding bed-and-breakfast was not clearly incidental or secondary to use of dwelling for dwelling purposes and was therefore not home occupation qualifying as special use in residential district); N.Y. *ZONING LAW & PRAC.*, *supra* note 87, § 13:19.

104. See *supra* notes 13–17 and accompanying text; see also Letter from Travis R. Crane, Planning and Zoning Administrator to Ruffin Hall, City Manager (Jan. 9, 2015) [hereinafter Crane Letter], <http://www.wral.com/asset/news/local/2015/01/20/14370331/AirbnbReport.pdf> [<https://perma.cc/8ZWV-8W5U>]; Memorandum from William Christopher, Jr., Commissioner of Inspections Services, to Senior Management and Staff of Boston (June 18, 2014) [hereinafter Christopher Memorandum], <https://www.scribd.com/doc/233075162/ISD-Short-Term-Dwelling-Unit-Rental-Memo> [<https://perma.cc/4C9Z-7F2Y>] (stating Airbnb and other room-sharing hosts are “subject to local licensure as bed and breakfast[s].”).

are “currently examining how these services fit within . . . existing zoning and permitting definitions,” and one state official opined that Airbnb falls under the category of “bed and breakfast” for the purpose of licensure requirements.<sup>105</sup> However, regulation as a bed and breakfast likely will not exempt hosts from complying with hotel regulations.<sup>106</sup>

Cases addressing room-sharing as operating a hotel, running a bed-and-breakfast, or falling within a tourist exception all are similar: courts examine the nature of the use and whether it is accessory or primary to occupation.<sup>107</sup> And despite differing local approaches and vocabulary, all courts will disfavor hosts who violate residential covenants or whose activities are harming their neighborhoods.<sup>108</sup> A California appellate court, for instance, enforced a covenant against an offending homeowner despite strictly reading the covenants in favor of furthering “unencumbered use.”<sup>109</sup> The Court held “[evidence of operating a beauty salon] reasonably supports an inference that the use complained of was detrimental to respondents in appreciably detracting from the residential character of the neighborhood.”<sup>110</sup> Neighbors’ complaints about foot traffic, concerns about strangers residing, and damage or noise caused by guests would similarly factor against a room-sharing host contending her rentals are “incidental use.”<sup>111</sup>

Municipal tax laws—in addition to state laws—also apply to hosts, as state law or a home rule charter empowers local government to collect funding for its functions.<sup>112</sup> As the operator of a business, the host must pay local business tax, sales tax, and, possibly, special hotel taxes.<sup>113</sup>

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105. Christopher Memorandum, *supra* note 104.

106. See 83 AM. JUR. 2D ZONING AND PLANNING § 162 (2013) (citing *Town of Sullivan Island v. Bynum*, 413 S.E.2d 325, 328 (S.C. Ct. App. 1992) (per curiam) (“A home for overnight guests, commonly called a ‘bed and breakfast,’ is not clearly incidental and secondary to the residential use of property and therefore does not constitute a home occupation.”). At least one state court found that a bed-and-breakfast must still comply with safety regulations (such as fire safety requirements), even if operated in a single family dwelling. See *Orth v. Dep’t of Labor & Indus.*, 588 A.2d 113, 114–16 (Pa. Commw. Ct. 1991).

107. See e.g., *Town of Milford v. Bottazzi*, 433 A.2d 1269, 1270 (N.H. 1981); *Hughes v. Zoning Bd. of Appeals of Waterville*, 631 N.Y.S.2d 1009, 1011 (Sup. Ct. 1995); 83 AM. JUR. 2D ZONING AND PLANNING § 176 (2013).

108. See Mark S. Dennison, Annotation, *Construction and Application of “Residential Purposes Only” or Similar Covenant Restriction to Incidental Use of Dwelling for Business, Professional, or Other Purposes*, 1 A.L.R.6th 135, 152–55 (2005). But see *Richey v. Olson*, 709 P.2d 963, 964 (Colo. App. 1985) (allowing bed-and-breakfast despite restrictive residential covenant).

109. *Biagini v. Hyde*, 83 Cal. Rptr. 875, 877 (Ct. App. 1970).

110. *Id.* at 877.

111. See *id.* at 876–77.

112. See REYNOLDS, *supra* note 80, at 334–35.

113. ORSI, *supra* note 38, at 527. Some states may require hosts to collect and remit sales tax; for example, New York requires hotel occupancy purveyors to pay sales tax

Airbnb recently agreed to collect and remit these taxes in some cities, but in most jurisdictions, hosts still bear the burden of compliance, rather than the sharing platform facilitating the arrangement.<sup>114</sup>

### B. State Law

While room-sharing is most likely to be regulated at the municipal level, state law can also affect short-term rentals. For instance, if a short-term rental operates as an illegal hotel, hosts potentially are subject to duties set at the state level.<sup>115</sup> Treatment as a hotelier places a higher burden of compliance on hosts, imposing duties such as receiving guests, not discriminating against them, and protecting them from harm.<sup>116</sup> Some state statutes, for instance, codify the common law duty to receive guests when there is no just cause for turning them away.<sup>117</sup> Violation of New York's duty to receive statute is a misdemeanor, for which an innkeeper

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regardless of the amount of sales made. N.Y. STATE DEP'T OF TAXATION & FIN., BULLETIN NO. TB-ST-175, DO I NEED TO REGISTER FOR SALES TAX? (Mar. 26, 2010), [https://www.tax.ny.gov/pdf/tg\\_bulletins/sales/b15\\_175s.pdf](https://www.tax.ny.gov/pdf/tg_bulletins/sales/b15_175s.pdf) [<https://perma.cc/TNK8-PGVG>].

114. See *Pitt Cty. v. Hotels.com, L.P.*, 553 F.3d 308, 313 (4th Cir. 2009) (“A business that arranges for the rental of hotel rooms over the internet, but that does not physically provide the rooms, is not a business that is of a similar type to a hotel, motel, or tourist home or camp.”).

115. See 43A C.J.S. *Inns, Hotels, and Eating Places* § 11 (2014). However, depending on the nature of the agreement between a guest and a host, the relationship could foreseeably also be that of a landlord/tenant. *Id.* at 556–58. Primarily, the difference rests on guests having a license to share the space of another, while tenants have a possessory interest in the property. See SHERRY, *supra* note 55, at 143 (“The question whether a person receiving accommodations at an inn is a guest or a lodger, boarder, or tenant, is one of fact.” (citing *Hancock v. Rand*, 94 N.Y. 1, 7–8 (1883)); Comment, *Tenant, Lodger, and Guest: Questionable Categories for Modern Rental Occupants*, 64 YALE L.J. 391, 392–93 (1955)).

116. States may construe this duty narrowly, for instance only where an innkeeper-guest relationship exists. See *Langdon v. Google, Inc.*, 474 F. Supp. 2d 622, 634 (D. Del. 2007) (refusing to extend a duty to receive to internet search engines).

117. See, e.g., CAL. PENAL CODE § 365 (West 2010) (“Every person . . . carrying on business as an innkeeper . . . who refuses, without just cause or excuse, to receive and entertain any guest . . . is guilty of a misdemeanor.”); DEL. CODE ANN. tit. 24, § 1501 (West 2011) (stating an exception to the duty to receive for customers who would be offensive to the majority of the proprietor's guests); GA. CODE ANN. § 43-21-3 (2011) (“An innkeeper who advertises himself as such is bound to receive as guests, so far as he can accommodate them, all persons of good character who desire accommodation and who are willing to comply with his rules.”); N.Y. CIV. RIGHTS LAW § 40-e (McKinney 1965) (“A person, who . . . carries on business as innkeeper . . . and refuses, without just cause or excuse, to receive and entertain any guest . . . is guilty of a misdemeanor.”).

may be held civilly liable.<sup>118</sup> In California, where an offending innkeeper faces both civil and criminal liability for failing to receive a guest, state court interpretations of “inn” or “hotel” are expansive enough to include a room-sharing host.<sup>119</sup> An inn or hotel is “a house which is held out to the public as a place where all transient persons who come will be received and entertained as guests for compensation.”<sup>120</sup> Following the logic of one California case, even an atypical establishment qualifies as an inn or hotel:

An hotel is [nonetheless] one because in some respects it may be conducted differently or have more attractions than other public hotels, so long as it is held out to the public as a place for the entertainment of all transient persons who may have occasion to patronize it.<sup>121</sup>

This definition is broad, encompassing a homeowner or apartment tenant advertising her personal residence for paying guests.

The majority of states also have civil rights laws applicable to hotels and other places of public accommodation.<sup>122</sup> In New York, for instance, a civil rights law protects people from discrimination in any “place of public accommodation, resort or amusement” on the basis of “race, creed, color, or national origin.”<sup>123</sup> This law applies to any “hotel,” defined as:

A house where all who conduct themselves properly, and who are able and ready to pay for their entertainment, are received, if there is accommodation for them, and who, without any stipulated engagement as to the duration of their stay, or as to the rate of compensation, are, while there, supplied at a reasonable charge with meals, their lodgings, and such services and attention as are necessarily incident to the use of the house as a temporary home.<sup>124</sup>

Subsequent case law suggests an even broader interpretation of “hotel” as a word that should “be construed according to its common acceptance . . . designat[ing] what is ordinarily and popularly known as an inn or tavern, or place for the entertainment of travelers, and where all their wants can

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118. CIV. RIGHTS LAW § 40-e.

119. See PENAL § 365 (“Every person . . . carrying on business as an innkeeper . . . who refuses, without just cause or excuse, to receive and entertain any guest, or to receive and carry any passenger, is guilty of a misdemeanor.”); *Archibald v. Cinerama Hawaiian Hotels, Inc.*, 140 Cal. Rptr. 599, 604–05 (Ct. App. 1977) *abrogated on other grounds by* *Koire v. Metro Car Wash*, 707 P.2d 195 (Cal. 1985).

120. *Fay v. Pac. Imp. Co.*, 26 P. 1099, 1100 (Cal. 1891) *aff’d*, 28 P. 943 (1892).

121. *Id.*

122. SHERRY, *supra* note 55, at 49.

123. *Id.* (quoting N.Y. CIV. RIGHTS LAW § 40 (McKinney 2009)). Violation of the New York Civil Rights Law results in civil liability as well as a misdemeanor conviction and fine. See N.Y. CIV. RIGHTS LAW § 40 (McKinney 2009).

124. *Alsberg v. Lucerne Hotel Co.*, 92 N.Y.S. 851, 852 (1905) (quoting *Cromwell v. Stevens*, 3 Abb. Pr. (n.s.) 26 (1867)).

be supplied.”<sup>125</sup> If a user of a room-sharing platform succeeds in proving a violation of New York civil rights law, then the broad definition of hotel would likely create liability for the host under state law.<sup>126</sup>

Once the parties establish a host–guest relationship, many courts presume duties on the part of the host to care for the guest.<sup>127</sup> The relationship exists even in the absence of a formal contract, obligating the host to various responsibilities.<sup>128</sup> Hosts, when acting as innkeepers, respect the guest’s right to exclusive use and possession of his room, and also furnish accommodations and safeguard their guests from reasonable harm.<sup>129</sup>

The innkeeper’s common law duty to safeguard applies to guests, as well as their belongings. It includes the obligation to protect guests from injury by third persons when such is within the innkeeper’s power.<sup>130</sup> Proprietors of public places of business are not generally responsible for the safety of patrons against injuries caused by people for whose actions the proprietors are not responsible.<sup>131</sup> Nevertheless, courts often find negligence on the part of the innkeeper who knows the perpetrator to be

125. *Dixon v. Robbins*, 158 N.E. 63, 63 (N.Y. 1927) (noting various definitions of both “inn” and “hotel” include a variety of houses where, as a matter of business, travelers are entertained and provided lodging.”).

126. *See Lieber, supra* note 3. In fact, Airbnb specifically warns hosts that “[they] may also be subject to . . . local laws that prohibit discrimination. *ADA and FHA Compliance*, AIRBNB, <https://www.airbnb.com/help/article/898> [<https://perma.cc/AA94-MQ85>] (last visited May 15, 2016). Many states and local communities have passed anti-discrimination ordinances and statutes, and renters’ rights vary. . . . [Hosts] should be familiar with the [applicable] laws.” *Id.*

127. *See SHERRY, supra* note 55, at 114. Registration, including registration in advance that would occur using a room-sharing platform, customarily creates this relationship. *See id.* at 131–34.

128. *See Holland v. Pack*, 7 Tenn. (Peck) 151 (1823) (responsibility for a guest’s stolen horse); *see also State v. Anonymous* (1977–7), 379 A.2d 1 (Conn. Super. Ct. 1977) (noting the length of stay, existence of a special contract, host’s ownership of another home, and host’s presence as “material circumstances in determining whether . . . a guest or a lodger.”). Airbnb creates the host-guest relationship through contract. *See Terms of Service, supra* note 2.

129. *See SHERRY, supra* note 55, at 159, 162, 179. The duty to safeguard guests from harm includes providing safe premises, including ceilings, stairways, floors, doors, elevators, bathroom, and room furnishings and ensuring the premises are free of vermin. *Id.* at 179–204. However, the hotel proprietor is not strictly liable under the doctrine of products liability “for injuries to hotel guests caused by defects in the premises.” *Peterson v. Superior Court*, 899 P.2d 905, 907 (Cal. 1995).

130. *See SHERRY, supra* note 55, at 219–48.

131. *See Hibbs v. Brown Hotel Co.*, 302 S.W.2d 127 (Ky. 1957).

violent or likely to assault a guest.<sup>132</sup> In addition to safeguarding guests, innkeepers have a duty to safeguard their belongings, although many states enacted legislation to protect innkeepers from strict liability for the loss or destruction of goods.<sup>133</sup> In California, for instance, innkeepers, hotel keepers, and others operating “a licensed hotel” must keep a fireproof safe for storing valuables, in order to limit liability for lost items.<sup>134</sup>

### C. Private Law

Both homeowners and tenants offer strangers the use of their residences on room-sharing platforms.<sup>135</sup> For tenants, lease agreements confine their ability to advertise for guests even when complying with state or local laws.<sup>136</sup> These tenants may face eviction for renting out their apartments on room-sharing platforms.<sup>137</sup> For homeowners, private covenants may similarly restrict land use, although some courts have been disinclined to enforce private covenants against short-term renters.<sup>138</sup> Courts’ reluctance to enforce these private covenants reflects a disfavor toward restricting the use of land.<sup>139</sup> Whether renting their own or others’ residences, hosts must

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132. See SHERRY, *supra* note 55, at 220–21. For instance, courts have delineated between injuries caused by an “enthusiastic” jitterbugging couple (defendant hotel not negligent) and a trigger-happy porter (defendant hotelier negligent). See *Hibbs*, 302 S.W.2d at 128; *Clancy v. Barker*, 103 N.W. 446, 447 (Neb. 1905).

133. See N.Y. GEN. BUS. LAW § 200 (McKinney 2012).

134. CAL. CIV. CODE § 1860 (West 2010).

135. See *Who Can Host on AirBNB?*, AIRBNB, <https://www.airbnb.com/help/article/18> [<https://www.airbnb.com/help/article/18>] (assuring availability of almost any type of residence, including “airbeds in apartments, entire houses, rooms in bed-and-breakfasts, hotel rooms, tree houses in the woods, boats on the water, or enchanted castles”) (last visited May 21, 2016).

136. See *Responsible Hosting*, AIRBNB, <https://www.airbnb.com/help/responsible-hosting> (last visited Dec. 26, 2014).

137. See *id.* New York City resident Chris Dannen, for instance, spent a “heady year” renting his Brooklyn apartment out to tourists, grossing over \$20,000 in nine months. Chris Dannen, *How Airbnb Earned Me \$20,000 and a Restraining Order from My Landlord*, FAST COMPANY (June 6, 2012, 12:25 AM), <http://www.fastcompany.com/1839465/how-airbnb-earned-me-20000-and-restraining-order-my-landlord> [<https://perma.cc/P34H-XCFM>]. His landlord served him with a restraining order, based on his Airbnb rentals violating provisions of his lease—specifically, failing to obtain his roommates’ permission before listing. *Id.* Dannen was ultimately evicted for his activities. Chris Dannen, *My Airbnb Biz Got Me Evicted, Here’s What I Learned*, FAST COMPANY (June 19, 2012, 12:15 AM), <http://www.fastcompany.com/1840715/my-airbnb-biz-got-me-evicted-heres-what-i-learned> [<https://perma.cc/RVB3-K29H>].

138. See *Scott v. Walker*, 645 S.E.2d 278, 283 (Va. 2007) (deciding interests in favor of free use of property and against restrictions tipped the scales toward allowing short term rentals).

139. See, e.g., *Dunn v. Aamodt*, 695 F.3d 797, 802 (8th Cir. 2012); *Slaby v. Mountain River Estates Residential Ass’n*, 100 So. 3d 569, 582 (Ala. Civ. App. 2012), *cert. denied* (Aug. 10, 2012); *Lowden v. Bosley*, 909 A.2d 261, 266 (Md. 2006); *Mullin*

be sure to research both their local public laws and the terms of their contracts or deeds.

#### IV. THREE CASE STUDIES

New York City, San Francisco, and Portland, Oregon provide useful case studies of the various responses to room-sharing's boom in American cities. The following sections discuss the progress of Airbnb's struggle to avoid regulation in each of the three cities, varying from hostile authorities in New York City to cooperation between city and corporate government in Portland and San Francisco.

##### A. New York

Airbnb's largest market is New York City, where it has met vocal opposition. The state attorney general publicly decries Airbnb's practices as a threat to New York communities' "safety, affordability, and residential character."<sup>140</sup> The attorney general's office claims the majority of Airbnb hosts flout both state and local law.<sup>141</sup> Cooperation with the law is challenging for residential users, and New York City ordinances and New York state laws aptly illustrate the inaccessibility of laws governing rentals to all but the most sophisticated tenants.<sup>142</sup> A plethora of dwelling laws apply to tenants, including state laws such as the Multiple Dwelling Law, the Multiple Residence Law, and provisions of the New York City Administrative

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v. Silvercreek Condo. Owner's Ass'n, 195 S.W.3d 484, 490 (Mo. Ct. App. 2006); Mason Family Trust v. DeVaney, 207 P.3d 1176, 1178 (N.M. Ct. App. 2009); *Scott*, 645 S.E.2d at 283; *Wilkinson v. Chiwawa Cmty. Ass'n*, 327 P.3d 614, 620 (Wa. 2014).

140. Research Dep't and Internet Bureau, *supra* note 9, at 2.

141. *See id.*; *see also* Jason Clampet, *Airbnb in NYC: The Real Numbers Behind the Sharing Story*, SKIFT (Feb. 13, 2014, 9:00 AM), <http://skift.com/2014/02/13/airbnb-in-nyc-the-real-numbers-behind-the-sharing-story/> [<https://perma.cc/AAC2-KWZL>] (finding in a third-party investigation that two thirds of the listings with user reviews were for the "entire home/apartment" room type); discussion *supra* note 79.

142. *See Terms of Service*, *supra* note 2. Airbnb places the burden of learning about and complying with local law on hosts, disclaiming any liability for illegality of room-sharing within a jurisdiction. *See id.* The website provides minimal guidance as to complying with these rules. *See What Legal and Regulatory Issues Should I Consider Before Hosting on Airbnb?*, AIRBNB, <https://www.airbnb.com/help/article/376/what-legal-and-regulatory-issues-should-i-consider-before-hosting-on-airbnb> [<https://perma.cc/N893-SQW6>] (last visited May 16, 2016).

Code.<sup>143</sup> Room-sharing hosts also face liability under local tax laws—although it is unclear whether some or all room-sharing hosts qualify as “hotel operators.”<sup>144</sup>

While Warren escaped paying fines on his rental,<sup>145</sup> other cases prosecuted by New York courts make it likely the new amendments to the Multiple Dwelling Law will be applied to criminalize room-sharing.<sup>146</sup> In June 2014, for example, a city housing court found that a tenant violated the law by using Airbnb to rent out her apartment.<sup>147</sup> Before that, another case granted a preliminary injunction against the operators of a small room-sharing platform, preventing them from advertising, contracting for, or allowing transient occupancy of the dwelling.<sup>148</sup> In a decision with negative implications for all room-sharing platforms, the court stated the defendants created a public nuisance by promoting the illegal use of non-

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143. See generally N.Y. MULT. DWELL. LAW (McKinney 2012); N.Y. MULT. RESID. LAW (McKinney 1992 & Supp. 2015) (creating limitations on businesses operating within residential areas). Under the Multiple Dwelling Law, as amended in 2010, one cannot rent out an apartment in a “Class A” multiple dwelling for less than thirty days, unless a permanent resident is present during the rental period. N.Y. MULT. DWELL. LAW § 4 (McKinney 2012). A “multiple dwelling” is a dwelling occupied by three or more families living independently. *Id.* The purpose of this prohibition is to protect guests, ensure the proper fire and safety codes, and protect permanent residents who “must endure the inconvenience of hotel occupancy in their buildings.” See Senate Bill S6873B, N.Y. State Senate (2010), <https://www.nysenate.gov/legislation/bills/2009/s6873/amendment/b> [<https://perma.cc/7ADZ-HXQ8>] (scroll down to “S6873B (Active)—Bill Texts;” then select “View Sponsor Memo”). It was also designed to preserve the supply of affordable permanent housing. *Id.*

144. New York City levies a hotel room occupancy tax, which may or may not apply to hosts. N.Y.C., N.Y., ADMIN. CODE § 11-2502. Airbnb has to-date been unsuccessful in its appeal to the City to change the law to allow Airbnb to collect and remit tax on behalf of hosts, as many other cities allow. Craig Karmin, *Airbnb to New York’s Mayor: Tax Our Hosts, Fund Pet Programs*, WALL STREET J. (Mar. 27, 2014, 10:31 PM), <http://www.wsj.com/articles/SB10001424052702303779504579465532885246114>.

145. See Lieber, *supra* note 2.

146. See *Subletting Your Apartment*, METRO. COUNCIL ON HOUS., [http://metcouncilonhousing.org/help\\_and\\_answers/subletting](http://metcouncilonhousing.org/help_and_answers/subletting) [<https://perma.cc/2UKB-Z3QD>] (last visited May 16, 2016) (“It is not legal to charge rent to anyone who stays for a period of fewer than 30 days [in New York City].”).

147. Natalie Rodriguez, *NYC Housing Court Ties Landlords’ Hands in Airbnb Fight*, LAW360 (June 18, 2014, 8:30 PM), <http://www.kelaw.com/files/20140625111556-Article%20-%20NYC%20Housing%20Court%20Ties%20Landlords.pdf> [<https://perma.cc/W3XA-G8ST>]. The court did not, however, enforce the tenant’s eviction, as she “cured” her violation by ceasing the illegal activity. *Id.*

148. *City of New York v. Smart Apartments LLC*, 959 N.Y.S.2d 890 (Sup. Ct. 2013) (claiming violations of state multiple dwelling law as well as city housing maintenance and building codes). Interestingly, one of defendants’ few arguments warranting judicial consideration in this case was that their small room-sharing platform (smartapartments.com) was the target of city enforcement rather than Airbnb, because New York City Mayor Michael Bloomberg was part of a venture fund with \$100 million invested in Airbnb. *Id.*

transient apartments because the apartments did not meet health and safety codes.<sup>149</sup> The aftermath of these cases indicates that Airbnb hosts risk criminal charges for their illegal room-sharing, contingent on enforcement by the city.

Even without a violation of the Multiple Dwelling Law, short-term rentals may break city law. For instance, New York City Administrative Code § 28-118.3.2 “prohibits changes to the use, occupancy, or egress of a building.”<sup>150</sup> Absent express authorization of the building’s occupancy certificate, short-term rentals of non-Class A residences violate this ordinance.<sup>151</sup> If a host wishes to apply to the City to room-share as an “accessory use,” she must comply with New York City Zoning Resolution Section 12, which explains that an accessory use fits the following criteria:

- (1) is clearly incidental to or secondary to the residential use of a dwelling unit or rooming unit;
- (2) is carried on within a dwelling unit, rooming unit, or accessory building by one or more occupants of such dwelling unit or rooming unit . . . and
- (3) occupies not more than 25% of the total floor area of such dwelling unit or rooming unit and in no event more than 500 feet of the floor area.<sup>152</sup>

If the use is not “clearly incidental” or even occupies too much space, it is a change to the building’s primary use.

Cases interpreting this section have given deference to the city’s judgment of what uses are accessory. The superior court generally noted that “courts are not sympathetic toward property owners who employ this means of changing a nonconforming use.”<sup>153</sup> New York State courts also interpreted similar provisions in other municipalities against incidental residential usage.<sup>154</sup> Two of these cases held that using a dwelling as a boardinghouse went beyond an incidental use, emphasizing the fact that the boarders were strangers rather than family members of the hosts.<sup>155</sup> For New Yorkers, the city’s aggressive stance toward illegal rentals means hosts face a likelihood of litigation for Multiple Dwelling Law and accessory usage violations.

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149. *See id.*

150. OFFICE OF THE ATTORNEY GEN. OF N.Y., *supra* note 9, at 18.

151. *Id.*

152. N.Y.C., N.Y., ZONING RESOLUTION § 12-10 (emphasis omitted).

153. N.Y. ZONING LAW & PRAC, *supra* note 87, § 10:27.

154. *See Mayer v. Livingston*, 172 N.Y.S.2d 45 (Sup. Ct. 1958); *Kiernan v. Snowden*, 123 N.Y.S.2d 895 (Sup. Ct. 1953).

155. *See Mayer*, 172 N.Y.S.2d at 46–47; *Kiernan*, 123 N.Y.S.2d at 899, 901.

## B. San Francisco

The birthplace of Airbnb, San Francisco, houses thousands of listings and has been somewhat more open to room-sharing than New York City.<sup>156</sup> Until recently, room-sharing was mostly illegal, due to a San Francisco city ordinance penalizing the offering of a residential unit for tourist or transient use for less than thirty days at a time.<sup>157</sup> San Francisco room-sharing hosts also ran afoul of Planning Code ordinances, designating short-term rentals as illegal residential conversions to hotels.<sup>158</sup>

However, in early September 2014, a San Francisco supervisor introduced legislation allowing city residents to rent out their primary residences for up to three months every year, so long as they complied with tax and rent control laws.<sup>159</sup> His proposal required registration and rental only of a primary residence to ensure enforcement through increased penalties for reoffenders, forbade rent-controlled units from listing, and prevented units with outstanding building, electrical, plumbing, mechanical, fire, health, housing, or planning code violations from listing.<sup>160</sup> The City approved the proposal in October and it took effect in early 2015 when the Planning Department required prospective hosts to show up in-person to register.<sup>161</sup> Nearly a year later, however, the law faces challenges as San Franciscans vote on a measure, vehemently opposed by Airbnb, that would limit short-term rentals to seventy-five days per year and allow lawsuits against hosts *and Airbnb* for violations.<sup>162</sup>

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156. *San Francisco Listings*, AIRBNB, <https://www.airbnb.com/s/San-Francisco>—CA [https://perma.cc/LA36-SCF2] (last visited May 16, 2016).

157. S.F. ADMIN. CODE §41.A5 (2016).

It shall be unlawful for . . . any owner to offer an apartment residential unit for rent for tourist or transient use . . . any owner to offer a residential unit for rent to a business entity that will allow the use of a residential unit for tourist or transient use, or . . . any business entity to allow the use of a residential unit for tourist or transient use.

*Id.*

158. See S.F. PLANNING CODE §§ 102, 209.2(d), 317 (2016); S.F. ADMIN. CODE § 41 (2016).

159. *Chiu Toughens Proposed SF Airbnb Legislation*, SEATTLE PI (Sept. 2, 2014, 5:53 PM), <http://blog.seattlepi.com/techchron/2014/09/02/chiu-toughens-proposed-sf-airbnb-legislation/> [https://perma.cc/3PVK-3PDU].

160. *Id.*

161. Julie Bort, *San Francisco Makes Airbnb Legal at Last*, BUS. INSIDER (Oct. 10, 2014, 12:41 PM), <http://www.businessinsider.com/san-francisco-makes-airbnb-legal-at-last-2014-10> [https://perma.cc/E32K-U7CH]; Carol Said, *Airbnb Hosts Must Appear in Person to Comply with New SF Law*, S.F. GATE (Jan. 19, 2015, 9:32 PM), <http://www.sfgate.com/business/article/Airbnb-hosts-must-appear-in-person-to-comply-with-6025767.php> [https://perma.cc/5YWJ-MYTL].

162. Janie Har, *Airbnb Battles Hostile Ballot Measure in San Francisco*, ASSOCIATED PRESS (Oct. 25, 2015, 10:47 AM), <http://bigstory.ap.org/article/aebf97d3eb35488d>

The current law bans renting *entire* houses and apartments when a resident is not present during the rental period, so it will not affect Airbnb users hosting others in part of their residences.<sup>163</sup> However, for competitors such as VRBO (Vacation Rentals by Owner) and HomeAway, which list entire residences, the new law “hobbles” their businesses in San Francisco.<sup>164</sup> The city defended this policy, explaining that the law’s exception only applies to permanent San Francisco residents sharing their homes because it is “vital . . . to prevent much-needed permanent housing from being diverted into lucrative short-term rentals.”<sup>165</sup>

The new law’s disparate treatment is consistent with city law, which differentiates between primary and accessory use of residences as rentals. San Francisco’s Planning Code only permits accessory usages using less than a quarter of residential floor space and not involving a commercial usage unless permitted under another section.<sup>166</sup> The rule requires a conditional use permit for short-term vacation rental property providing accommodation for transient overnight guests.<sup>167</sup>

An ongoing class action lawsuit against Airbnb in the superior court illustrates the need for city attention on illegal room-sharing.<sup>168</sup> Plaintiffs filed the suit as representatives of “tenants who lived in a residential unit while other units within the building were rented through Airbnb’s platform,” seeking class certification in order to litigate their claims of violations of the San Francisco city code as well as unfair competition.<sup>169</sup> Their complaint alleges that Airbnb knowingly encourages illegal room rentals, violating San Francisco’s rules concerning single-room occupancy

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8157a9f6827bba45/airbnb-battles-hostile-ballot-measure-san-francisco [https://perma.cc/6JWS-3LHY].

163. See Carol Said, *Airbnb Law Would Make Business Harder for Airbnb’s Chief Rival*, S.F. GATE (Oct. 10, 2014, 8:42 AM), <http://www.sfgate.com/bayarea/article/Airbnb-law-would-make-business-harder-for-5812918.php> [https://perma.cc/58WY-67ZN].

164. *Id.* Both VRBO and Homeaway offer entire houses for rent, rather than individual rooms or space within a house or apartment. See Michelle Higgins, *Surfing for a Vacation Rental*, N.Y. TIMES, Jan. 22, 2012, at TR3, <http://www.nytimes.com/2012/01/22/travel/vacation-rental-sites.html>.

165. *Id.*

166. S.F. PLANNING CODE § 204.2 (2016).

167. S.F. PLANNING CODE § 209.2(d) (2016).

168. *Class Calls AirBnB Illegal in San Francisco*, COURTHOUSE NEWS SERV. (Sept. 8, 2014, 9:02 AM), <https://www.oximity.com/article/Class-Calls-AirBnB-Illegal-in-San-Fran-1> [https://perma.cc/Q8DD-QE3G].

169. *Id.*

units.<sup>170</sup> The plaintiffs accuse Airbnb of contributing to the housing shortage in San Francisco and creating foot traffic and security issues for neighbors of short term rentals.<sup>171</sup> While many San Franciscans turn to room-sharing to afford the high cost of living in the Bay Area, others such as the named plaintiffs in *Gamache* worry that Airbnb only contributes to the problem.

### C. Portland

Airbnb's most successful partnership with local government is in Portland, Oregon, where short-term rentals became legal within the last two years.<sup>172</sup> On July 30, 2014, the City Council revamped Portland's Zoning Code, allowing short-term rentals of single family homes and accessory dwelling units.<sup>173</sup> Now, prospective hosts pay an initial fee of \$178.08 for a "Type-A Accessory Short Term Rental Permit," allowing short-term rentals, although not of apartments or condominiums.<sup>174</sup> Noting that the definition of "short term rental" varies "from state to state and city to city," the city emphasizes that renting must be an accessory use of the building.<sup>175</sup> Thus, Portland allows only short-term rentals where the owner remains a long

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170. Joshua Sabatini, *Lawsuit Alleges Tenderloin Single Room Occupancy Hotel Rooms Rented Through Airbnb*, EXAMINER (Sept. 8, 2014), <http://archives.sfexaminer.com/sanfrancisco/lawsuit-alleges-tenderloin-single-room-occupancy-hotel-rooms-rented-through-airbnb/Content?oid=2893684> [<https://perma.cc/CHP3-V8J2>].

171. Complaint at 3, *Gamache v. Airbnb*, No. CGC-14-541477 (Cal. Super. Ct. Sept. 3, 2014).

172. Previously, the Oregon Supreme Court had ruled in favor of accessory bed-and-breakfast rentals, although at least one older case suggested state courts strictly interpreted single family zoning requirements against short term bed-and-breakfast rentals. *Cf. Yogman v. Parrott*, 937 P.2d 1019 (Or. 1997); *Bruni v. Thacker* 853 P.2d 307 (Or. Ct. App. 1993).

173. *City of Portland Implements New Accessory Short-Term Rental Regulations*, BUREAU OF DEV. SERVS. (Sept. 2, 2014), <http://us1.campaign-archive1.com/?u=67b8e15a10439671ba1512b85&id=0c6d341f2e&e=23685c738d> [<https://perma.cc/78WH-N7NG>]. Changes to the Zoning Code indicate the city's desire to allow efficient use of residential housing, which "keeps [it] primarily in residential use, and without detracting from neighborhood character . . . [and] provide[s] an alternative form of lodging for visitors who prefer a residential setting." PORTLAND, OR. PLANNING & ZONING CODE, ch. 33-207 (1991), <http://www.portlandonline.com/auditor/index.cfm?c=28197&a=501886> [<https://perma.cc/U5EK-7HMR>]. The law also provides that, for a Type A permit, the host must reside in the unit at least 270 days per year. *Id.*

174. *Frequently Asked Questions*, DEV. SERVS., <https://www.portlandoregon.gov/bds/66835> [<https://perma.cc/3ZMT-STTT>] (last visited May 21, 2016). However, renters of dwellings other than apartments and condominiums may obtain a license with the permission of their landlords. *Id.*

175. *Accessory Short-Term Rental Permits*, DEV. SERVS., <https://www.portlandoregon.gov/bds/65603> [<https://perma.cc/N6P3-AFQD>] (last visited May 21, 2016) (explaining that the overall purpose of the residence must still be long term occupancy for a Portlander).

term occupant and only rents a part of her home.<sup>176</sup> Portland is further considering an ordinance that would fine non-compliant hosts \$500 per violation.<sup>177</sup>

Prospective hosts must file for a permit, notify neighbors about their intention to rent their residence, obtain a business license, and file for exemption from payment related to the business's proceeds annually.<sup>178</sup> After receiving permits, hosts must "prominently" display them in the rental unit and continue to comply with additional duties to keep their licenses.<sup>179</sup> They must keep log books, collect and remit occupancy taxes to the city, and renew the permit every two years.<sup>180</sup> Although not a statutory duty, Portland's explanation of the host's role states that a host must "manage [her] accessory short-term rental so that guests will be respectful of the neighborhood in which [she] live[s] and be courteous to [her] neighbors."<sup>181</sup>

By legalizing short-term rentals, Portland took the lead among municipalities in addressing the inevitability of residents using room-sharing platforms as a source of income.<sup>182</sup> The regulation combats health and safety concerns by creating inspection requirements, ensuring that rentals meet basic standards.<sup>183</sup> In addition, hosts must make an effort to keep permits current by complying with Portland's standards and must

176. *Id.*

177. Aaron Mesh, *Lobbying Group Including Airbnb Pushes Back on Portland's Plan to Toughen Short-Term Rental Rules*, WILLAMETTE WEEK (Dec. 17, 2014), [http://www.wweek.com/portland/blog-32595-lobbying\\_group\\_including\\_airbnb\\_pushes\\_back\\_on\\_portlands\\_plan\\_to\\_toughen\\_short\\_term\\_rental\\_rules.html](http://www.wweek.com/portland/blog-32595-lobbying_group_including_airbnb_pushes_back_on_portlands_plan_to_toughen_short_term_rental_rules.html) [<https://perma.cc/79T3-DL8J>].

178. *How Do I Apply for a Type A Accessory Short-Term Rental Permit – 1&2 Dwelling Structure*, DEV. SERVS., <https://www.portlandoregon.gov/bds/article/518135> [<https://perma.cc/85XH-GEZB>] (last visited May 21, 2016).

179. *What Happens After My Permit Application Is Approved?—1&2 Dwelling Structure*, DEV. SERVS., <https://www.portlandoregon.gov/bds/article/518459> [<https://perma.cc/YEJ9-VC7E>] (last visited May 21, 2016). Hosts must also include their licensing in advertisements. *Id.*

180. *Id.* The log-books requirement is analogous to hotel law provisions. *See e.g.* L.A., CAL., MUNICIPAL CODE § 41.49 (2008).

181. *Id.* Such provisions help to allay the concerns of neighbors that short-term occupants will be noisy, destructive, and disruptive. *See supra* note 111 and accompanying text.

182. *See* Jessica Plautz, *Portland Could Soon Be the Most Airbnb-Friendly City in the U.S.*, MASHABLE (July 23, 2014), <http://mashable.com/2014/07/23/portland-airbnb/> [<https://perma.cc/Q5PP-ZYRC>].

183. *City of Portland Implements New Accessory Short-Term Rental Regulations*, *supra* note 173.

pay fines if they fail to do so.<sup>184</sup> Despite Portland’s attempt to legalize room-sharing, the city has received only a few permit applications so far—perhaps indicating that the bulk of room-sharing hosts will continue to subvert the law.<sup>185</sup>

## V. SUGGESTED APPROACH TO REGULATING ROOM-SHARING

Regulation is a necessity in the room-sharing industry.<sup>186</sup> State and local governments must weigh the interests of various stakeholders—hosts, guests, and others in communities who do not participate in the sharing economy, but whose lives are nevertheless affected by increased traffic, noise, and presence of strangers.<sup>187</sup> Policymakers could choose to ban short-term rentals entirely, but this Comment proposes that taxation and local regulation can best minimize any dangers caused by room-sharing, while helping residents in expensive urban areas continue to afford their homes.

The first step toward regulation would be to identify hosts by requiring self-disclosure and verifying information through room-sharing platforms. Disclosure requirements have been criticized in some markets, but here, little more than biographical details would be necessary.<sup>188</sup> Although schemes such as San Francisco’s are in their infancy, it does not seem farfetched to expect information disclosure by sites such as Airbnb.<sup>189</sup> After all, Airbnb and every other sharing site are essentially just depositories of information for hosts and guests to peruse.<sup>190</sup> This nature of platforms

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184. See *supra* notes 177–81 and accompanying text.

185. Elliot Njus, *Portlanders Aren’t Rushing to Legitimize Their Airbnb Short-Term Rentals*, OREGONIAN (Sept. 3, 2014, 9:37 AM), [http://www.oregonlive.com/front-porch/index.ssf/2014/09/no\\_rush\\_to\\_legalize\\_airbnb-sty.html](http://www.oregonlive.com/front-porch/index.ssf/2014/09/no_rush_to_legalize_airbnb-sty.html) [<https://perma.cc/Q3W2-U5NM>]. Airbnb continues to resist efforts in Portland to force disclosure of hosts’ names, decrying the “unnecessary burden” of compliance. Steve Law, *Airbnb Resists City Efforts to Restrict Hosts Without Permits*, PORTLAND TRIB. (Dec. 23, 2014, 7:00 PM) <http://portlandtribune.com/pt/9-news/244745-112103-airbnb-resists-city-efforts-to-restrict-hosts-without-permits> [<https://perma.cc/DL57-ZTBH>].

186. New regulation will clarify the existing law, a source of confusion to both regulators and room sharers. See generally Crane Letter, *supra* note 104.

187. See Ngai Pindell, *Home Sweet Home? The Efficacy of Rental Restrictions to Promote Neighborhood Stability*, 29 ST. LOUIS U. PUB. L. REV. 41, 54 (2009), for an examination of the effects of short-term rental activity on neighbors.

188. See 17 C.F.R. § 240.10b-5 (2016) (prohibiting fraud or deceit in the purchase or sale of any security); discussion *infra* notes 202–03 and accompanying text.

189. See Douglas MacMillan, *San Francisco Passes “Airbnb Law” to Legalize Short-Term Rentals*, WALL STREET J. BLOGS (Oct. 8, 2014, 1:32 PM), <http://blogs.wsj.com/digits/2014/10/08/san-francisco-passes-airbnb-law-to-legalize-short-term-rentals/>.

190. See, e.g., *About Us*, *supra* note 2; HOMEAWAY, <http://www.homeaway.com/> [<https://perma.cc/G2CP-6XGH>] (last visited May 21, 2016); VRBO, <http://www.vrbo.com/> [<https://perma.cc/692F-TVJ9>] (last visited May 21, 2016).

makes room-sharing disclosure easy. Data about state residency, location, and length of rentals is easily calculable and already available to the sharing platform.

Municipalities can require room-sharing platforms such as Airbnb to release lists of all available rooms within the city limits, either to verify self-reporting or to avoid relying on hosts to self-report. Statutory duties could be imposed, making room-sharing platforms liable if they do not comply with disclosure requirements.<sup>191</sup> By requiring disclosure of hosts' listings, identities, and facts such as the income and number of days residents rent their dwellings, local government can more easily monitor violations of the law. Already, Portland—a city that took the lead in adapting its regulations to be friendlier to room-sharing—is implementing disclosure requirements.<sup>192</sup>

After enacting regulations mandating disclosure of hosts' names, addresses, and other information about their short-term rentals, local governments should study the impact of short-term rentals on their communities and decide how to classify short-term rentals and whether to enact additional restrictions. As discussed, local regulations typically already include provisions for short-term rental, which may be supplemented or replaced with rules tailored to Airbnb-type activity.<sup>193</sup> “Accessory use” statutory amendments, for example, could expressly allow short-term rentals.

Municipalities have already begun adapting new local regulations to allow short-term rentals, but with various idiosyncrasies adapting short-term rentals to local preferences. For example, San Francisco's law, reflecting the chronic scarcity of local housing, requires a permanent resident's presence in each residence during the rental period.<sup>194</sup> In San Luis Obispo County, California, short-term rentals—those for less than

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191. See, e.g., Har, *supra* note 162. Some people may not use Airbnb to list their residence in hopes of avoiding regulatory compliance, but these individuals would represent just a few of the most flagrant offenders. Further, since Airbnb and a handful of other sharing platforms dominate the room-sharing industry, the freedom from regulation costs would be offset by reduced ability to advertise for guests.

192. See Steve Law, *Portland to Crack Down on Airbnb Hosts Who Fail to Get Permits*, PORTLAND TRIB. (Jan. 21, 2015, 1:05 PM), <http://portlandtribune.com/pt/9-news/247793-116145-portland-to-crack-down-on-airbnb-hosts-who-fail-to-get-permits-> [<https://perma.cc/84AD-5SP7>]. In January, 2015, the Portland City Council approved giving the Portland Revenue Bureau the power to demand room-sharing brokers to provide hosts' names and addresses. *Id.*

193. See *supra* notes 96–111 and accompanying text.

194. See MacMillan, *supra* note 189.

thirty days—cannot be within 200 feet of each other.<sup>195</sup> And Mendocino County, California, requires a ratio of “thirteen . . . long term residential dwelling units to either one . . . single unit rental or vacation home rental.”<sup>196</sup>

In areas with high rates of short-term rental activity, this Comment proposes establishing outreach programs and comprehensive regulatory schemes to govern room-sharing. Palm Springs, California, for example, has adopted detailed standards governing room-sharing activity.<sup>197</sup> In addition to complying with local regulations, hosts also have duties designed to minimize the impact of room-sharing, including ensuring guests are not disorderly or unreasonably loud, requiring guests agree to comply with local law, and responding to any complaints about the use of the property.<sup>198</sup>

Cities should also address consumer safety concerns by requiring prospective hosts to obtain permits, conditioned on passing a safety inspection. An initial inspection could require hosts to meet the same standards as a hotel to protect transient guests—for instance, clearly marked fire escapes and locking windows and doors could be required. Conditioning the maintenance of a permit on passing yearly inspections would ensure that hosts maintain safe and secure lodgings.

Finally, cities must make realistic choices about enforcing the new laws. One issue with current regulatory approaches is that the sheer number of room-sharing listings in some cities make inspection, ticketing, and enforcing any registration requirements, at worst, impossible and, at best, impractical.<sup>199</sup> Although cities will likely choose to define what an accessory use is for the purpose of room-sharing—for instance, by number of days—an alternative exists. Regulators could focus on the most flagrant offenders, creating ex-post regulatory standards that target a certain top bracket of the disclosed hosts.<sup>200</sup> For instance, code enforcement could target the hosts who rent for the most days per year without being present in their homes. With information available from sharing platform disclosures, the city could choose an arbitrary percentage—perhaps the 10% of people who

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195. SAN LUIS OBISPO COUNTY, CAL., COASTAL ZONE LAND USE CODE § 23.08.165(c) (2012).

196. MENDOCINO COUNTY, CAL., ZONING CODE § 20.748.020(A) (1995).

197. See PALM SPRINGS, CAL., MUNICIPAL CODE ch. 5.25 (2014).

198. PALM SPRINGS, CAL., MUNICIPAL CODE § 5.25.070(d), (f), (g) (2008).

199. In San Francisco, the *Chronicle* estimates nearly 5,000 listings on Airbnb alone. Carolyn Said, *Window into Airbnb's Hidden Impact on S.F.*, S.F. CHRON. (June 2014), <http://www.sfchronicle.com/business/item/window-into-airbnb-s-hidden-impact-on-s-f-30110.php> [<https://perma.cc/6M9W-5239>]. The New York Attorney General's office estimates 16,483 units booked in New York City during the first five months of 2014 alone. OFFICE OF THE ATTORNEY GEN. OF N.Y., *supra* note 9, at 6.

200. As one San Francisco commentator points out, without more stringent requirements, it is unlikely that many San Franciscans will comply with the new law. See Said, *supra* note 161.

host most frequently, or a flat threshold that targets rentals for more than thirty days per year—to focus on.<sup>201</sup>

Similar strategic regulation tactics have been proposed in the securities market to cure problems with disclosure requirements by creating broad standards by which to judge compliance after the fact.<sup>202</sup> This approach critiques disclosure requirements for allowing participants wiggle room that incentivizes them to cheat the system—for instance, to give opaque disclosures and overwhelm authorities with information.<sup>203</sup> Instead, a standards-based model creates uncertainty by choosing an arbitrary, flexible group of offenders to target—a strategy which tends toward creating over-compliance, rather than participants searching for loopholes, and which allows local governments flexibility as they decide how to implement the new room-sharing regulations.

Other commentators have suggested stricter standards, proposing that in addition to enforcing new, comprehensive ordinances, local governments should enact stricter “noise limits, property care standards, public gathering ordinances, curfews, and general parking restrictions.”<sup>204</sup> Enforcing these ordinances ensures that the secondary effects of room-sharing are controlled.<sup>205</sup> But while perhaps ideal, stricter enforcement is not practical if municipal budgets are already stretched; local governments must consider

201. The federal government took a similar, rather arbitrary approach in applying “short swing” rules to stocks. “Short swing rules” are laws restricting insiders of a company from making short-term profits and intended to guard against so-called insider trading. See WILLIAM A. KLEIN ET AL., *BUSINESS ASSOCIATIONS: AGENCY, PARTNERSHIPS, AND CORPORATIONS* 511 (6th ed. 2006). Section 16(b) of the Securities Exchange Act of 1934 allows recovery of profits from sales of stock made by corporate insiders and principal shareholders if resulting from a sale within six months from the stock’s purchase. Securities Exchange Act of 1934 § 16(b), Pub. L. No. 88-467, § 8, 48 Stat. 881, 896 (1934) (codified as amended at 15 U.S.C. § 78p(b) (2012)). Section 16(b) does not take into account either the “intent of the insider or the existence of actual speculation” when forcing an insider to forego profits made on sales of his company’s stock within six months of purchase. *Bershad v. McDonough*, 428 F.2d 693, 696 (7th Cir. 1970). Instead, it creates “a relatively arbitrary rule capable of easy administration” adopted by Congress “to insure the optimum prophylactic effect.” *Id.* The government simply targets trading within shorter periods as an indicia of the existence of insider trading, rather than investigating each potentially culpable transaction.

202. See generally Frank Partnoy, *The Right Way to Regulate from Behind*, 18 N.C. BANKING INST. 113 (2013).

203. See *id.* at 116.

204. See Charles Gottlieb, *Residential Short-Term Rentals: Should Local Governments Regulate the “Industry”?*, 65 PLAN. & ENVTL. L. 4, 6 (2013).

205. *Id.* at 7.

the pervasiveness of room-sharing and other practical concerns when determining how to deal with the sharing industry on a local level.

On the state level, lawmakers should consider whether they want to allow short-term rentals, preempting local regulation. For instance, in a striking move to protect the room-sharing industry, Florida's legislature passed a 2011 bill amending state law to prevent "local governments from regulating, restricting, or prohibiting vacation rentals based solely on their classification, use, or occupancy."<sup>206</sup> The legislature intended the bill to protect the thriving local short-term rental business; however, in 2014, the state changed the text of the statute again and reauthorized local regulations in an attempt to regain control of the vacation rental industry.<sup>207</sup> The short-lived change to Florida law indicates the lobbying influence of hotel industries, particularly in areas relying on the tourist industry.<sup>208</sup>

A similar state law could broadly address all local municipalities by stating that short-term rentals are legal. Such a state law might only have a limited effect on urban areas, as some city charters limit the extent to which states can regulate local governments' administration of "municipal affairs."<sup>209</sup> For instance, in California, under some circumstances, the ordinances of a city charter will supersede state law.<sup>210</sup> As such, this Comment focuses on local regulation—at least on the municipal level—as the most useful. However, a state law would have a more powerful effect in unincorporated and rural areas of the state.<sup>211</sup>

## VI. CONCLUSION

For increasingly tech-savvy and socially networked Americans, the sharing economy provides a creative and cost-friendly alternative to industries dominated by traditional business models.<sup>212</sup> Airbnb and its competitors

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206. H.B. 883, 22d Leg., Reg. Sess. (Fl. 2011) (modifying Fla. Stat. § 509.032).

207. *Id.*; see Sarah Kennedy, *Bradenton's Sen. Galvano Proposes Amendment to Vacation Rental Bill*, BRADENTON HERALD (Mar. 20 2014, 12:00 AM), <http://www.bradenton.com/news/politics-government/state-politics/article34710411.html> [<https://perma.cc/8AW3-NBCZ>] (explaining the intention of the legislature in introducing the original bill).

208. Dennis Schaal, *How Online Travel Agency Lobbyists Helped Kill Florida Hotel Tax Lawsuit*, SKIFT (Oct. 29, 2014, 3:00 PM), <http://skift.com/2014/10/29/how-online-travel-agency-lobbyists-helped-kill-florida-hotel-tax-lawsuit/> [<https://perma.cc/K2W6-58F2>].

209. See *supra* note 88 and accompanying text (discussing the home rule doctrine).

210. Brett A. Stroud, *Preserving Home Rule: The Text, Purpose, and Political Theory of California's Municipal Affairs Clause*, 41 PEPP. L. REV. 587, 588 (2014) (citing CAL. CONST. art. 11, § 5).

211. Although state residents in these areas are less likely to have a market for their residences, because Airbnb and related sites operate primarily in populous tourism centers, the law would at least ensure no municipalities grant preferential treatment to their own residents.

212. See *supra* notes 24–26.

have capitalized on users' need for affordable, flexible vacation housing by allowing apartment and homeowners to rent out their unused space. As urban centers gentrify, increasingly high costs of living coupled with financial hardship makes room-sharing a valuable supplement to hosts' household incomes.<sup>213</sup>

Room-sharing is a positive for most. It enables more people to afford to live in expensive urban centers, encourages competition with the hotel industry, promotes community values and plausibly environmentally-friendly behavior, and provides a source of taxable revenue for local governments. Unfortunately, with the boom of room-sharing comes the bane of thousands of residents turning over their residences to strangers in a mostly unregulated, unsupervised new industry. In addition to putting guests at risk, for those living near hosts, room-sharing can mean the unwelcome invasion of their neighborhoods, resulting in increased foot traffic and questionable community safety.

Recognizing that short-term housing necessitates regulation comparable to the hotel and bed-and-breakfast industries, city and state governments must decide on regulatory amendments to address room-sharing. Local governments could follow the lead of San Francisco and Portland and provide legal templates for short-term rentals; alternatively, local governments could simply adopt their regulations to allow room-sharing as a form of bed-and-breakfast or travel home.

Regardless of how municipalities choose to regulate room-sharing, regulation must be addressed. The boom of the sharing economy has caught many participants and regulators unaware of the legal aspects of peer-to-peer platforms, a consequence best addressed by immediate local action.<sup>214</sup>

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213. See Sal Rosselli, *Health Care Workers Struggle with Cost of Living in SF*, S.F. EXAMINER (Dec. 10, 2014), <http://www.sfexaminer.com/sanfrancisco/health-care-workers-struggle-with-cost-of-living-in-sf/Content?oid=2913898> [<https://perma.cc/PXU4-SR8N>].

214. See Suzanne Carlson, *Connecticut's Thriving Airbnb Community Is Catching Officials Unaware*, HARTFORD COURANT (Oct. 20, 2014, 9:38 AM), <http://www.courant.com/community/west-hartford/hc-west-hartford-town-cracks-down-on-airbnb-20141020-story.html#page=1> [<https://perma.cc/8DUF-M3TM>] (explaining how West Hartford officials are baffled by how to regulate Airbnb listings in their area).

