

ITENANT: HOW THE LAW SHOULD TREAT RENTAL  
RELATIONSHIPS IN THE SHARING ECONOMY

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## INTRODUCTION

A hotel guest, intent on squatting, overstays his reservation; what does the hotel manager do? The answer is relatively simple: he uses his legal right as an innkeeper to evict the unwelcomed guest. For Airbnb<sup>1</sup> hosts, however, such a right to evict is dubious at best.

Cory Tschogl discovered the hard way how indifferent the law is to her position as an Airbnb host.<sup>2</sup> After listing her San Francisco condominium on Airbnb to help afford rent, Tschogl accepted a guest for a forty-four-day stay.<sup>3</sup> The guest had no reviews from other Airbnb hosts, so Tschogl accepted his reservation blindly (much like a hotelier accepting travelers as they walk in the door or make reservations online).<sup>4</sup> None of this is out of the ordinary for users of the room-sharing website. But, after the guest refused to pay beyond the first thirty days, Tschogl learned that who she thought was simply a guest had actually become her tenant.<sup>5</sup> Thus, Tschogl could not evict the guest without going through the process prescribed in California's eviction laws: an expensive, months-long legal fight to finally remove the Airbnb squatter in her condominium.<sup>6</sup> In the meantime, the squatter threatened to sue Tschogl for blackmail and medical costs allegedly resulting from unsafe tap water.<sup>7</sup> This unnecessary nightmare could have been avoided had California law differentiated between Airbnb host-guest relationships and those of the traditional landlord and tenant.

California is not alone in this view. Current doctrine in several states treats Airbnb hosts as landlords, particularly when guests

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1. Airbnb is an online marketplace that allows ordinary people to rent out their properties or spare rooms to guests. See *About Us*, AIRBNB, <https://press.airbnb.com/about-us/> [<https://perma.cc/N3L4-6CCC>]. For a more descriptive background of the company, see *infra* Part I.

2. See Chris Matyszczyk, *Airbnb Guest Stays More than 30 Days, Gets Tenant's Rights*, CNET (July 22, 2014, 7:00 PM), <https://www.cnet.com/news/airbnb-guest-stays-30-days-gets-tenants-rights/> [<https://perma.cc/MUY8-T4LD>].

3. See *id.*

4. See *id.*

5. *Id.*

6. *Id.*

7. *Id.*

stay for a length of time exceeding thirty days,<sup>8</sup> and even for guests staying under thirty days.<sup>9</sup> Additionally, many locales have yet to recognize short-term Airbnb listings as legal, compromising the ability of hosts to evict guests who should not be considered tenants even under traditional law.<sup>10</sup> The result for Airbnb hosts is a legal limbo: either they are treated as landlords, subject to burdensome eviction laws, or they are considered black-market hoteliers, hesitant to use local law enforcement to evict guests because regulators have outlawed short-term rentals.<sup>11</sup> This limbo has created a quasi-underground marketplace, with unclear legal and regulatory guidelines—an unacceptable approach to a fast-growing sector of the modern economy.

Because the sharing economy presents new challenges and opportunities that are independent of either traditional hospitality law or landlord-tenant doctrine, legislatures and state courts should adopt a uniform regulatory scheme for all Airbnb host-guest relationships that: (1) provides innkeeper tort liability for hosts; (2) relieves hosts of eviction procedures; and (3) treats hosts as micro-hoteliers, not landlords. This Note proposes a model for how the law should treat Airbnb hosts (as the preeminent example of room-sharing entrepreneurs), bringing together existing paradigms from traditional areas of the law to create a new doctrinal treatment focused on promoting the sharing economy and ensuring proper regulation of its users.

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8. See, e.g., N.Y.C. ADMIN. CODE § 26-521 (2017) (“It shall be unlawful for any person to evict or attempt to evict an occupant of a dwelling unit who has lawfully occupied the dwelling unit for thirty consecutive days or longer.”); *What Are Some Things I Should Consider Before Hosting Long-Term Guests?*, AIRBNB, <https://www.airbnb.com/help/article/805/what-are-some-things-i-should-consider-before-hosting-long-term-guests> [<https://perma.cc/D26U-Z26W>] (“In most states and localities in the United States, guests who stay in a home or apartment for approximately 30 days ... may establish rights as a tenant.”); Matyszczyk, *supra* note 2 (“In California, if someone rents for 30 days, they are considered on a month-to-month lease.”).

9. See Talia G. Loucks, *Travelers Beware: Tort Liability in the Sharing Economy*, 10 WASH. J.L. TECH. & ARTS 329, 334 (2015) (“New York courts have held that hosts in Airbnb room shares are indeed landlords.”).

10. Airbnb hosts for short-term guests must decide between revealing their operations to local authorities that might levy sanctions and using those authorities to remove unruly guests. For examples of the harsh treatment of Airbnb in some localities, see *infra* notes 86-89 and accompanying text.

11. For specific attitudes local regulators have had toward Airbnb, see *infra* Parts I.A.2-3.

This Note will argue that instead of treating Airbnb hosts as landlords, and their guests as tenants, the law should see the platform as establishing a modern take on the innkeeper role. But even then, much of hospitality law places too great a burden on Airbnb hosts, which would threaten to stifle the growth of this new industry. In the interest of promoting the sharing economy as a new opportunity for tax and tourism revenues, governments should instead aim to steer the line between uniformly regulating the established (that is, brick-and-mortar hotels) and unestablished (that is, room-sharing services) sectors of the hospitality industry, on the one hand, and promoting noncommercialized use of room-sharing platforms, on the other. Applying a modern take on innkeeper doctrine would provide tort protections to guests that are greater than those given to tenants, while giving hosts the ability to evict unwelcome squatters. The doctrine would compel hosts providing hospitality services to show greater care for their guests, but would not require the full medley of regulation imposed on professional hoteliers. This Note will explore doctrinal options and propose ways to both regulate room-sharing platforms where the interest in safety and guest enjoyment so requires, and allow hosts the freedom to use these platforms as money-making mechanisms, promoting the overall growth of the sharing economy.

Part I will cover the development of Airbnb as the forerunner of the room-sharing economy, analyzing both its impact on the hospitality industry, rental markets, and community harmony, and the potential for meaningful regulation. Part II will juxtapose and summarize landlord-tenant law and traditional innkeeper doctrine in the context of Airbnb. Given this setup, Part III will make the case for why landlord-tenant law misses the mark when it comes to the room-sharing relationship. Part IV will propose a new treatment for Airbnb hosts that recognizes them as micro-hoteliers with a duty to protect guests from known hazards, while affording hosts the ability to evict destructive squatters at will. Ultimately, this Note proposes a framework that will help bring uniformity and congruence to an industry currently in regulatory flux.

## I. THE RISE OF AIRBNB AND THE ROOM-SHARING ECONOMY

Although other room-sharing applications and services exist, Airbnb has undoubtedly experienced the most exponential growth.<sup>12</sup> Officially started in 2008, a year after three friends with air mattresses filled a need for more lodging at a design conference in San Francisco,<sup>13</sup> Airbnb has grown to have a larger inventory of rooms than the largest hotel chains in the world.<sup>14</sup> By 2014, the site had “more lodging than Hilton Worldwide or InterContinental Hotels Group or any other hotel chain in the world.”<sup>15</sup> As of 2017, the site reported over 3 million listings in more than 191 countries and over 160 million total guest arrivals.<sup>16</sup> More impressive than its sheer size is Airbnb’s rate of growth, with forty-seven thousand guests in 2010 growing to sixteen million in 2015.<sup>17</sup> Arguably, one of the primary catalysts of this growth has been the novelty of many

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12. See Johanna Interian, Note, *Up in the Air: Harmonizing the Sharing Economy Through Airbnb Regulations*, 39 B.C. INT’L & COMP. L. REV. 129, 132 (2016) (“Airbnb’s growth ... makes it the irrefutable leader of the home-sharing apps industry.”). Compare *About Us*, AIRBNB, <https://www.airbnb.com/about/about-us> [<https://perma.cc/4UC2-6UZC>] (reporting over three million listings in sixty-five thousand cities as of mid-2017), with *About FlipKey*, FLIPKEY, [https://www.flipkey.com/pages/about\\_us/](https://www.flipkey.com/pages/about_us/) [<https://perma.cc/8F75-M64F>] (reporting three hundred thousand listings in eleven thousand cities), and *About HomeAway, Inc.*, HOMEAWAY, <https://www.homeaway.com/info/about-us/company-info> [<https://perma.cc/MMG9-EZUD>] (reporting 1.2 million listings as of mid-2017). For summaries of Airbnb alternatives, see *Best 9 Sites Like Airbnb to Book Your Vacation*, TECHBOOMERS, <https://techboomers.com/t/sites-like-airbnb> [<https://perma.cc/N7D2-X3GJ>].

13. See Jessica Salter, *Airbnb: The Story Behind the \$1.3bn Room-Letting Website*, TELEGRAPH (Sept. 7, 2012, 7:00 AM), <http://www.telegraph.co.uk/technology/news/9525267/Airbnb-The-story-behind-the-1.3bn-room-letting-website.html> [<https://perma.cc/U6FN-2Z3A>].

14. Alamea Deede Bitran, Comment, *The Uber Innovations that Lyfted Our Standards out of Thin Air[bnb]*, *Because Now*, “*There’s an App for That*,” 8 ELON L. REV. 503, 505 (2016).

15. *Id.* (quoting Burt Helm, *Airbnb Is Inc.’s 2014 Company of the Year*, INC. (Dec. 2014-Jan. 2015), <http://www.inc.com/magazine/201412/burt-helm/airbnb-company-of-the-year-2014.html> [<https://perma.cc/QZB5-SXDE>]).

16. *Fast Facts*, AIRBNB, <https://press.atairbnb.com/fast-facts/> [<https://perma.cc/DC9G-SW4Y>]. The company’s single largest night to date was New Year’s Eve 2016, “with nearly 2 million guests staying at listings worldwide.” *Id.*

17. See Nathan McAlone, *This Chart Shows Exactly How Insane Airbnb’s Growth Has Been over the Past 5 Years*, BUS. INSIDER (Sept. 8, 2015, 1:55 PM), <http://www.businessinsider.com/airbnbs-summer-reach-has-grown-by-353-times-in-5-years-2015-9> [<https://perma.cc/GA84-PLLR>] (“That means that Airbnb’s summer reach is 353 times what it was five years ago.”).

Airbnb accommodations, including opportunities to stay in castles, treehouses, and yurts.<sup>18</sup>

From its tremendous volume of transactions, the company generates revenue by collecting a flat, 3 percent commission on the money hosts receive, and by charging an additional reservation fee (between 6 and 12 percent) to guests.<sup>19</sup> In 2015, the company brought in a reported \$900 million in revenue (though it still operated at a loss of an estimated \$150 million).<sup>20</sup> That is compared to 2013, when the company brought in \$250 million.<sup>21</sup> In 2016, experts valued the company at up to \$30 billion,<sup>22</sup> and predicted it would bring in \$1.7 billion in revenue.<sup>23</sup> These numbers show the continued vitality of Airbnb—despite regulatory blockades—although the company still relies on investors to raise critical revenue.<sup>24</sup>

As such a large, fast-growing company, Airbnb has created concerns and garnered criticisms as an unregulated threat to hotel establishments, rental markets, and community harmony.<sup>25</sup> But these concerns and criticisms are not necessarily well founded, nor do they capture the full picture. And the potential benefits of room-sharing to the twenty-first-century city necessitates accommodation

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18. See, e.g., AIRBNB, *supra* note 1; McAlone, *supra* note 17.

19. Sramana Mitra, *Here Are the Numbers Behind Airbnb's Staggering Growth*, INC. (Aug. 23, 2016), <http://www.inc.com/linkedin/sramana-mitra/billion-dollar-unicorn-airbnb-continues-soar-sramana-mitra.html> [<https://perma.cc/5KTZ-VJY8>].

20. *Id.*

21. *Id.*

22. See *id.* (noting that Airbnb is the third most valuable private company in the world). This valuation likely will diminish, however, once regulations force Airbnb to behave more like a hotel chain. See Leila Abboud, *Uber and Airbnb, It's Time to Get Real*, BLOOMBERG GADFLY (Nov. 7, 2016, 5:15 AM), <https://www.bloomberg.com/gadfly/articles/2016-11-07/time-for-uber-and-airbnb-to-get-real> [<https://perma.cc/UAC5-GY7J>] (noting Airbnb's growth stagnation after Berlin implemented restrictions on short-term rentals).

23. See Megan Barber, *Airbnb vs. the City: How Short-Term Rentals Are Changing Urban Neighborhoods*, CURBED (Nov. 10, 2016, 10:00 AM), <http://www.curbed.com/2016/11/10/13582982/airbnb-laws-us-cities> [<https://perma.cc/HRM2-8KQA>]. By 2025, analysts project Airbnb will bring in \$335 billion in revenue. See Joseph Shuford, *Hotel, Motel, Holiday Inn and Peer-to-Peer Rentals: The Sharing Economy, North Carolina, and the Constitution*, 16 N.C. J.L. & TECH. ONLINE 301, 310 (2015) (noting that such a projection would be a “2,200 percent increase in 12 years”).

24. See Mitra, *supra* note 19 (“Airbnb has been venture funded so far. [In total, i]t has raised \$3.4 billion from investors.”).

25. See *infra* Part I.A.

for, and fair regulation of, Airbnb moving forward.<sup>26</sup> The next two subparts will consider the major criticisms of Airbnb, studying the validity of those concerns and the potential for meaningful regulations to target negative externalities while allowing room-sharing to benefit local economies in a significant way.

### A. *Economic and Societal Impacts and Criticisms*

Economically, Airbnb contributes more tourist dollars per guest than comparable hotel lodgings.<sup>27</sup> Much of this economic benefit is attributable to two factors: (1) Airbnb helps guests save money on lodging, allowing them to stay longer, spend more on other expenses, or both;<sup>28</sup> and (2) whereas hotels are often clustered in a particular district, the locations of Airbnb listings are widely dispersed throughout cities, spreading the impact of Airbnb guests' spending.<sup>29</sup>

In addition, Airbnb accommodations benefit localities that host large, seminal events (for example, festivals and concerts) that price many potential tourists out of a city as hotel rates skyrocket.<sup>30</sup>

26. For more on how Airbnb spurs a reconceptualization of the twenty-first-century city, see *infra* Part I.A.3.

27. See Roberta A. Kaplan & Michael L. Nadler, *Airbnb: A Case Study in Occupancy Regulation and Taxation*, 82 U. CHI. L. REV. DIALOGUE 103, 104-05 (2015) ("As compared to tourists staying in hotels, Airbnb guests in New York City tend to stay ... longer and spend nearly \$200 more at local businesses during their visit." (citing *New Study: Airbnb Generated \$632 Million in Economic Activity in New York*, AIRBNB (Oct. 22, 2013), <https://www.airbnb.com/press/news/new-study-airbnb-generated-632-million-in-economic-activity-in-new-york> [<https://perma.cc/9D5H-VEN2>])).

28. See Courtney Banks, *Budget Rentals Under Fire*, WALL ST. J. (July 22, 2010), <http://www.wsj.com/articles/SB10001424052748704684604575381390324767922> [<https://perma.cc/3BX7-78ZD>] (describing the attraction of Airbnb for "[b]udget-minded travelers"); Craig Karmin, *Airbnb Finds Little Hospitality in New York Market*, WALL ST. J. (Oct. 20, 2013, 7:41 PM), <http://www.wsj.com/articles/SB10001424052702304384104579141790931429948> [<https://perma.cc/2R8M-FLLS>].

29. See Kaplan & Nadler, *supra* note 27, at 105 ("[W]hile the vast majority of New York City hotels are clustered in midtown Manhattan, as of 2013, 82 percent of Airbnb accommodations were spread across the rest of the city."); Kate Krader, *Airbnb: We Generate \$4.5 Billion Globally for Local Restaurants*, BLOOMBERG (Oct. 20, 2016, 10:00 AM), <https://www.bloomberg.com/news/articles/2016-10-20/airbnb-we-generate-4-5-billion-globally-for-local-restaurants> [<https://perma.cc/K5GK-AYBU>] (noting Airbnb found "42 percent of guests spend money in the neighborhoods where they're staying").

30. See, e.g., John Divine, *Is Airbnb a Threat to the Hotel Industry?*, U.S. NEWS & WORLD REP. (Nov. 2, 2016, 9:00 AM), <http://money.usnews.com/investing/articles/2016-11-02/is-airbnb-a-threat-to-the-hotel-industry> [<https://perma.cc/JS2V-P88U>] (describing how travelers who used to skip big cities are now considering them because Airbnb provides an affordable

Whereas a locality without Airbnb listings might host an event that fills all of its short-term hotel spaces, localities with Airbnb options can accommodate more guests. More guests means more money for local businesses and more taxes for local governments, increasing the aggregate benefit of an event.<sup>31</sup> The extra income for hosts also injects revenue into local economies.<sup>32</sup> These benefits further compound in localities that, unlike the biggest cities, rely on a few, specialized events—such as strawberry festivals, fairs, and craft shows—to bring in most, if not all, of their tourism revenues.<sup>33</sup>

Airbnb's economic benefits are only the beginning. The fuller picture shows the room-sharing economy can both benefit local economies and meet the demands of regulators intent on addressing its negative externalities, making meaningful regulation not only a possibility, but an imperative.<sup>34</sup>

### 1. Hotel Industry Criticisms

As Airbnb has risen in popularity, it has come under attack from institutions that perceive cheaper, short-term rentals as a threat to their business model. Hoteliers have been particularly critical of the sharing economy's impact on their revenues,<sup>35</sup> and there is some

alternative). Within its first year, Airbnb helped provide more than six hundred people attending the Democratic National Convention with housing “when traditional accommodations in Denver were overbooked.” See Interian, *supra* note 12, at 133. And, as hotel spaces fill up, Canadians are turning to Airbnb for the 2017 Canada Day celebrations in Ottawa. See Vito Pilioci, *Likely Hotel Room Shortage for Canada Day 2017 Opens Door for Airbnb*, OTTAWA CITIZEN (Nov. 8, 2016, 6:32 PM), <http://ottawacitizen.com/news/local-news/likely-hotel-room-shortage-for-canada-day-2017-opens-door-for-airbnb> [https://perma.cc/T8P4-CQHJ].

31. See Kaplan & Nadler, *supra* note 27, at 105-06.

32. See, e.g., Ally Marotti, *Chicago Airbnb Hosts Made \$2.6 Million During World Series*, CHI. TRIB. (Nov. 1, 2016, 3:26 PM), <http://www.chicagotribune.com/business/ct-airbnb-chicago-cubs-world-series-1102-biz-20161101-story.html> [https://perma.cc/3535-VVMH] (“The \$2.6 million flowing into Chicago via Airbnb will give a nice temporary punch to the local economy.”).

33. For the benefits and importance of festivals to small-town communities, see, for example, Jessi Stone, *Festival Frenzy Fueling Local Economies*, SMOKY MOUNTAIN NEWS (Apr. 15, 2015, 1:09 PM), <http://www.smokymountainnews.com/news/item/15546-festival-frenzy-fueling-local-economies> [https://perma.cc/22YH-P5HU] (“Macon County’s 25,292 households pay \$660 less in state and local taxes as a result of tourism spending.”).

34. See *infra* Part I.B.

35. See Bitran, *supra* note 14, at 506 (“Unfortunately ... the hotel industry’s goal is to shut down its competition by rallying for overregulation of ‘sharing economies.’” (quoting Daniel Rauch & David Schleicher, *Like Uber, but for Local Government Policy: The Future of*

reason to worry. At upwards of \$30 billion, Airbnb's market value is greater than several of the largest hotel companies.<sup>36</sup> The room-sharing service also boasts a much larger stock of rooms and lower marginal costs to add additional inventory, allowing for faster growth.<sup>37</sup> A recent study found that Airbnb averages nearly 22 percent more guests per night than Hilton Worldwide.<sup>38</sup> And Airbnb has essentially eliminated the need for hotel and vacation rental brokers—whose job is to help vacationers find places to stay—affecting a wider swath of the hospitality trade than just brick-and-mortar hotels.<sup>39</sup>

But “Airbnb’s growth does not necessarily come at the expense of the hotel industry.”<sup>40</sup> Airbnb can in fact alleviate the strain on hotels during peak seasons and events.<sup>41</sup> Rather than directly competing with hotels, Airbnb provides a low-price alternative to visitors unable to otherwise afford the hotels with which Airbnb supposedly competes.<sup>42</sup> Where Airbnb and hotels do directly compete,

*Local Regulation of the “Shared Economy”* 29 (N.Y. Univ. Marron Inst. Urban Mgmt. Working Paper No. 21, 2015), [http://marroninstitute.nyu.edu/uploads/content/The\\_Future\\_of\\_Local\\_Regulation\\_of\\_the\\_Shared\\_Economy.pdf](http://marroninstitute.nyu.edu/uploads/content/The_Future_of_Local_Regulation_of_the_Shared_Economy.pdf) [<https://perma.cc/2NUR-S7W5>]).

36. See Mitra, *supra* note 19; see also Bitran, *supra* note 14, at 505. But Airbnb’s revenues still fall far short of the largest hotel chains. See Jason Clampet, *State of Travel 2016: Airbnb vs. Hotel Rivals in 6 Charts*, SKIFT (May 3, 2016, 7:15 AM), <https://skift.com/2016/05/03/state-of-travel-2016-airbnb-vs-hotel-rivals-in-6-charts/> [<https://perma.cc/88RW-CTZA>] (showing \$340 million in third quarter revenue for Airbnb in 2015, compared with \$3.6 billion for Marriott and \$2.9 billion for Hilton for the same quarter).

37. See Stephen R. Miller, *First Principles for Regulating the Sharing Economy*, 53 HARV. J. ON LEGIS. 147, 160-61 (2016) (“In other words, the largest hotel chains had fewer rooms, much slower growth rates, and much lower valuations compared to their revenues than Airbnb.”); Divine, *supra* note 30 (noting that it cost hotel giant Marriott \$13 billion to expand its inventory by 375,000 rooms; meanwhile, it cost Airbnb nothing to add one million rooms to its inventory by 2015). *But see* Benjamin G. Edelman & Damien Geradin, *Efficiencies and Regulatory Shortcuts: How Should We Regulate Companies Like Airbnb and Uber?*, 19 STAN. TECH. L. REV. 293, 304-05 (2016) (observing that Airbnb’s growth is limited, though nominally, by the practical difficulties hosts face trying to handle a large number of listings and storage of personal belongings).

38. Lara Major, Comment, *There’s No Place Like (Your) Home: Evaluating Existing Models and Proposing Solutions for Room-Sharing Regulation*, 53 SAN DIEGO L. REV. 469, 474 (2016).

39. See Miller, *supra* note 37, at 163.

40. Kaplan & Nadler, *supra* note 27, at 106.

41. See *supra* notes 30-33 and accompanying text.

42. See Kaplan & Nadler, *supra* note 27, at 106. *But see* Elaine Glusac, *Hotels vs. Airbnb: Let the Battle Begin*, N.Y. TIMES (July 20, 2016), [https://www.nytimes.com/2016/07/24/travel/airbnb-hotels.html?\\_r=0](https://www.nytimes.com/2016/07/24/travel/airbnb-hotels.html?_r=0) [<https://perma.cc/ASJ6-CYPU>] (reporting that 31 percent of Airbnb

the competition creates favorable outcomes for consumers by decreasing prices and creating better consumer experiences as hotels are forced to adapt.<sup>43</sup>

A comprehensive study of Airbnb's impact on the hotel industry shows increases in Airbnb listings resulted in only marginal decreases in hotel revenues for the same area.<sup>44</sup> The study looked at the hotel industry in Texas and found Airbnb had the greatest impact on lower-priced, independent hotels providing fewer amenities and not targeted at business travelers (in other words, the hotels most like the average Airbnb listing).<sup>45</sup> Even as business use increases on Airbnb, hotel chains continue to see growth in business travel—albeit at a slower rate—and still outpace Airbnb in pure volume of business guests.<sup>46</sup> In fact, in 2015, revenue per available room—a significant hotel financial metric—grew by 5 percent at both Marriott and Hilton.<sup>47</sup> Where Airbnb does directly compete with hotel chains, evidence suggests its impact only slightly decreases occupancy rates but significantly decreases hotel room prices—a benefit to all consumers.<sup>48</sup>

Mutually exclusive competition between hotels and room-sharing companies is not necessarily the only option, either. In fact, the

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users in 2015 used it for business); Brian Solomon, *Airbnb Gets Business Friendly in Growth Push*, FORBES (June 8, 2016, 1:25 PM), <http://www.forbes.com/sites/briansolomon/2016/06/08/airbnb-gets-business-friendly-in-growth-push/#4a83d24cfbf4> [<https://perma.cc/4S43-LKXU>] (“Airbnb says more than 50,000 companies have now booked travel through Airbnb for Business, and 10% of all travel that happens on the platform is for business cases.”).

43. For a discussion on how hotels have started to respond to Airbnb as a competitor, see Glusac, *supra* note 42 (noting that hotels have responded to Airbnb by creating experiences that cater to local cultures, socialization, shared spaces, and technology).

44. Georgios Zervas et al., *The Rise of the Sharing Economy: Estimating the Impact of Airbnb on the Hotel Industry* 3 (B.U. Sch. Mgmt. Research Paper No. 2013-16, 2016), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2366898##](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2366898##) [<https://perma.cc/SKG3-SEJ4>].

45. *See id.* at 4. Las Vegas illustrates this phenomenon, where casino-hotels have had little trouble competing with Airbnb listings that cannot provide the same all-inclusive amenities. See Bradley Seth McNew, *Why Las Vegas Casino-Hotels Aren't Worried About Airbnb*, FOX BUS. (Nov. 10, 2016), <http://www.foxbusiness.com/markets/2016/11/10/why-las-vegas-casino-hotels-arent-worried-about-airbnb.html> [<https://perma.cc/MUF7-AAEB>].

46. See Kevin May, *Large Increase in Business Travelers Found Using Airbnb*, TNOOZ (Nov. 7, 2016), <https://www.tnooz.com/article/large-increase-seen-in-corporate-travel-use-of-airbnb/> [<https://perma.cc/5L9J-75A7>] (“Concur found that major hotel chains are also experiencing growth, ... [and] total business travel is still 250 times greater than that on Airbnb.”).

47. Divine, *supra* note 30.

48. See Zervas et al., *supra* note 44, at 3.

sharing economy presents opportunities for traditional chains to expand. As the short-term rental market gains legal recognition, established hotel chains are already entering the field.<sup>49</sup> The same phenomenon has emerged in the analogous ride-sharing economy, where taxi companies have developed applications to compete with Uber and Lyft.<sup>50</sup> So hoteliers should not lose hope, but should instead be prepared to adapt and compete, advocating for legal recognition and standardized regulation of Airbnb rather than forcing it further into the underground marketplace. Ultimately, bringing Airbnb under a clear regulatory framework will simultaneously benefit the sharing economy through legitimization and the hotel industry through fairer competition and new opportunities for growth—a win-win for consumers and commerce alike.

## 2. *Airbnb and Housing Shortage Concerns*

Hoteliers are not the only group to resist the rapid growth of Airbnb. Landlords and local governments have both criticized the company for allowing hosts to permanently rent out housing space—sometimes entire homes and apartments—thereby depriving cities of much needed living space and increasing rental costs for local tenants.<sup>51</sup> Indeed, there are incentives to rent out a location short term instead of long term,<sup>52</sup> but the causal link between Airbnb and

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49. See Miller, *supra* note 37, at 164-65 (claiming hotels likely would seek to enter the short-term rental market if major cities took action to legalize home-sharing); see also, e.g., Edelman & Geradin, *supra* note 37, at 304 (“[S]ome hotels even list rooms on Airbnb.”); Glusac, *supra* note 42 (“AccorHotels, the French hotel company whose brands include Sofitel and Raffles, has invested directly in the sharing economy, in its acquisition of Onefinestay, a London-based home sharing service that focuses on the high-end market.”).

50. See Miller, *supra* note 37, at 165.

51. See OFFICE OF THE N.Y. STATE ATT’Y GEN., AIRBNB IN THE CITY 3, 12 (2014); Dana Palombo, Comment, *A Tale of Two Cities: The Regulatory Battle to Incorporate Short-Term Rentals into Modern Law*, 4 AM. U. BUS. L. REV. 287, 310-11 (2015) (“In 2014, City Attorney David Herrera filed two lawsuits against landlords in San Francisco because they each used residential properties as illegal hotels, making those spaces unavailable to permanent renters while San Francisco was in a housing shortage.”); Barber, *supra* note 23. Tenants have even gone so far as to coin the term “Airbnb’d” to describe the practice of landlords kicking them out—often illegally—to make room for Airbnb guests. See Steven Hill, *The Unsavory Side of Airbnb*, AM. PROSPECT (Oct. 19, 2015), <http://prospect.org/article/evictions-and-conversions-dark-side-airbnb> [<https://perma.cc/3ZFE-7BDW>].

52. See Barber, *supra* note 23 (stating that it takes “just 83 nights” of renting on Airbnb in Los Angeles to bring in the same revenue as a year-long lease).

skyrocketing rent is not as definite as critics suggest.<sup>53</sup> “[T]he *San Francisco Chronicle* [for example,] confirmed that 86 percent of Airbnb users in San Francisco had only one residence listed, and 98 percent had three or fewer, suggesting that only a miniscule proportion of users seek to operate on a commercial scale.”<sup>54</sup> Airbnb is also unlikely to impact rental prices in the most expensive neighborhoods, where long-term renting is more profitable.<sup>55</sup> If anything, Airbnb helps tenants afford their rent by sharing their living space with short-term (one or two night) guests, serving landlords’ interests in receiving on-time payments and avoiding eviction proceedings.<sup>56</sup>

Although there are concerns that Airbnb increases rental costs, the real culprit, if any, is commercialization of the platform,<sup>57</sup> an issue states and localities can tackle without exterminating Airbnb altogether.<sup>58</sup> Localities have the means to alter the regulatory

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53. See Miller, *supra* note 37, at 182 (noting uncertainty over whether the short-term rental market has had a significant effect on rent or real estate pricing); Jim Edwards, *Here’s Exactly What Airbnb Does to Rent in Popular Cities*, BUS. INSIDER (Oct. 20, 2016, 5:00 AM), <http://www.businessinsider.com/statistics-data-airbnb-rent-prices-2016-10> [<https://perma.cc/94RC-PWS3>] (“[I]t [is] not possible to say definitively that Airbnb puts up the prices of rents and properties.”); see also Allie Howell & Jared Meyer, *Don’t Blame Airbnb for New York City’s High Rents*, REASON.COM (Oct. 15, 2016), <http://reason.com/archives/2016/10/15/dont-blame-airbnb-for-new-york-citys-hig> [<https://perma.cc/36RA-NRUM>] (arguing that land use regulations, rent controls, and construction costs are the more likely causes of high rent in New York City given Airbnb’s miniscule share of the market).

54. Kaplan & Nadler, *supra* note 27, at 107 (citing Carolyn Said, *Window into Airbnb’s Hidden Impact on SF*, S.F. CHRON. (June 15, 2014), <http://www.sfchronicle.com/business/item/window-into-airbnb-s-hidden-impact-on-s-f-30110.php> [<https://perma.cc/S2XQ-9JZ7>]). That said, commercial users do make a substantial amount of the overall revenue. See Shuford, *supra* note 23, at 311-12 (“[I]n New York City, commercial Airbnb renters generated thirty-seven percent of the total revenue of Airbnb users, despite representing just six percent of Airbnb hosts.”).

55. See Edwards, *supra* note 53.

56. See Bitran, *supra* note 14, at 510; Kaplan & Nadler, *supra* note 27, at 106-07.

57. See Ariel Stulberg, *Airbnb Probably Isn’t Driving Rents up Much, at Least Not Yet*, FIVETHIRTYEIGHT (Aug. 24, 2016, 7:00 AM), <http://fivethirtyeight.com/features/airbnb-probably-isnt-driving-rents-up-much-at-least-not-yet/> [<https://perma.cc/QRM9-RRNV>] (describing the impact of commercialized Airbnb listings on rental markets and the profitability of commercial listings).

58. See, e.g., 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/S2XQ-9JZ7>] (describing legislation in San Francisco that would legalize room-sharing services while regulating their operations). For a summary of Airbnb regulations in the United States, see Interian, *supra* note 12, at 146-48.

landscape so as to permit short-term rentals while cracking down on abusive landlords who evict long-term tenants in order to charge exorbitant rent to short-term guests.<sup>59</sup> Chicago and San Francisco, for instance, have both required hosts to register with the city, allowing better monitoring of abusive and detrimental renting.<sup>60</sup> Airbnb itself has taken measures to prevent commercialization of the platform in San Francisco.<sup>61</sup> And treating Airbnb hosts as innkeepers is likely to dissuade landlords from leaving the long-term rental market because of the greater liability they must assume for guests on their premises.<sup>62</sup> If landlords want to try and profit from short-term rental schemes to the detriment of long-term tenants, they should assume greater responsibility for guest safety. One thing is clear: the concerns that local governments have about Airbnb's impact on rent prices can be addressed through precise regulation aimed at limiting commercialization, without the need for abolition en masse.

### 3. *Short-Term Rentals and Community Harmony*

Critiques of Airbnb's disruptive impact do not end with rental markets; community planners have also attacked transient occupancy as a threat to the economic and social stability of neighborhoods.<sup>63</sup> Specifically, public officials and residential constituents have opined that zoning for renters in a neighborhood leads to increased traffic and other community disruptions.<sup>64</sup> Many contend

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59. See, e.g., Palombo, *supra* note 51, at 311-12 (noting that San Francisco's Ellis Act permits landlords to rent short-term, but does not allow them to evict tenants for those purposes); Said, *supra* note 58.

60. See Mitra, *supra* note 19. But enforcement of these requirements has not been easy. See *id.*

61. See *One Host, One Home: San Francisco*, AIRBNB CITIZEN (Oct. 24, 2016), <https://sanfrancisco.airbnbcitizen.com/one-host-one-home-san-francisco/> [<https://perma.cc/M4J5-T9CM>].

62. For the specific liability imputed to innkeepers, see *infra* Part II.B.

63. See, e.g., Palombo, *supra* note 51, at 306 (arguing that altering a zoning district from residential to commercial to accommodate short-term rentals threatens to undermine the stability of residential areas).

64. These concerns have been used by cities in legal arguments. See *City of New York v. Smart Apartments LLC*, 959 N.Y.S. 2d 890, 892 (N.Y. Sup. Ct. 2013) (“[The City argues that transient residents] bother the non-transient residents ... because [they] host loud, late night parties; vomit, dump garbage; ... and generally do not conduct themselves in the civilized, genteel manner of the locals.”).

that renters do not have the same incentives as a homeowner to maintain their residence, and therefore rental properties will be poorly kept and cause depreciated home values for everyone else.<sup>65</sup> Others worry Airbnb creates transience in communities, causing them to lose a valuable social asset: neighbors.<sup>66</sup> But these negative attributes of renters are not necessarily fair,<sup>67</sup> and the rise of the sharing economy raises new questions about the desirability of single-use zoning districts in the first place.<sup>68</sup>

Of course, disruptions to communities are valid concerns for zoning commissions and local governments, but the exclusion of short-term renters, particularly Airbnb users, goes no further to help protect community harmony than other policies that already preserve home values and neighborhood tranquility (for example, home manicure ordinances and nuisance laws).<sup>69</sup> In fact, the sharing economy is a cheaper tool cities can use to redevelop and revitalize areas that otherwise cannot compete with more affordable land in the suburbs.<sup>70</sup> Sharing economy applications also provide services that assist local governments in giving full-service accommodations to their constituents and consumers, making a locality more attractive to visitors, residents, and businesses.<sup>71</sup> Thus, the sharing economy, and Airbnb in particular, may actually help cities get more out of underused and underdeveloped areas, creating multi-use

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65. See Ngai Pindell, *Home Sweet Home? The Efficacy of Rental Restrictions to Promote Neighborhood Stability*, 29 ST. LOUIS U. PUB. L. REV. 41, 72 (2009).

66. See Barber, *supra* note 23 (“In popular tourist destinations ... the sound of rolling suitcases and calls for ‘housekeeping’ have replaced neighborly meetups.”).

67. See Pindell, *supra* note 65, at 46-47 (“Negative impacts on a community commonly ascribed to renters—overcrowding, short-term horizons, increased traffic, limited care of property—can also be attributed to many owners.”).

68. See Miller, *supra* note 37, at 167 (“The [Short-Term Rental] Market may ... usher in a new era in which extended stays become a part of the hotel districts.”); *id.* at 158 (pointing out the limited land available to cities from which to gain profit and arguing that “[t]he sharing economy ... offers a second bite at the apple for those jurisdictions that have already built out their land”).

69. See *id.* at 199.

70. See *id.* at 159 (“[The] monetization opportunity [of previously non-monetized neighborhoods] provide[s] cities a way to reconceptualize the cities’ economies with a much lighter touch than the traditional tools—annexation, redevelopment, infrastructure—have typically required.”).

71. See *id.* (noting the advantages Airbnb-style accommodations provide to families with small children over the typical hotel accommodations).

neighborhoods that offer revenue to urban dwellers, while maintaining or enhancing the desirable attributes of community.

Notably, Airbnb claims its mission is to develop communities by bringing the purely commercial relationship of guest and innkeeper to a personal level, connecting strangers and exposing communities to diverse perspectives.<sup>72</sup> One could argue this diversification makes communities stronger.<sup>73</sup> Additionally, Airbnb nets higher profits to homeowners, incentivizing reinvestment in Airbnb listings and improving the commercial value of homes in a given area.<sup>74</sup>

So the question is not so much whether Airbnb has ruined the neighborhood as we know it, but whether the neighborhood as we know it is even worth preserving—or if it even exists. The sharing economy likely is not the cause of the vast changes seen in neighborhood communities today. Rather, Airbnb could well be a symptom of a twenty-first-century lifestyle that is less localized and more globalized, and connected via larger webs of online communities. What the urban communities of nineteenth-century America have lost, the sharing economy has the potential to replace and enhance with a new perspective on what it means to live and act in a global community from the comfort of one's own home.

#### *4. Short-Term Rental Markets and Housing Speculation*

There are legitimate concerns, however, that permissively allowing short-term rentals in the residential housing market will encourage speculation in home prices, creating artificial and unstable housing bubbles.<sup>75</sup> Speculative homebuyers purchase residential homes in hopes that housing prices will increase and they can sell the home a short time after purchasing for a quick return on their

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72. See Brian Chesky, *Belong Anywhere*, AIRBNB BLOG (July 16, 2014), <http://blog.airbnb.com/belong-anywhere/> [<https://perma.cc/2EDD-V4PM>]; see also Barber, *supra* note 23 (“They’ve taken something that’s been a purely commercial endeavor—renting a hotel room—and made it personal, too.”).

73. See Miller, *supra* note 37, at 184 (equating the relationship short-term renters build with their neighbors to those built while backpacking across Europe, redefining what “neighborhood” will mean in the future).

74. See, e.g., Barber, *supra* note 23 (“[The Airbnb host has] since reinvested much of his revenue back into the property through renovations.”).

75. See Pindell, *supra* note 65, at 65.

investment.<sup>76</sup> In the meantime, speculators rent out the investment homes to short-term tenants to cushion costs.<sup>77</sup> Speculation results in unnatural increases in housing demand, which in turn increases home prices, requiring lenders to extend greater amounts of credit to other homebuyers with the expectation prices will continue to increase.<sup>78</sup> When the bubble bursts, however, homeowners are left with mortgages they cannot afford and homes that banks refuse to refinance, leading to widespread foreclosures and neighborhood degradation.<sup>79</sup> And the individual homeowners are not the only ones who suffer when the housing bubble collapses. Local educational, social, and governmental institutions are all affected.<sup>80</sup>

Although unproven, in theory Airbnb helps speculators rent out investment homes to short-term guests, which only compounds the harmful effect of speculation on long-term housing prices. Indeed, Airbnb can itself induce speculation by increasing property prices in areas tourists frequently rent via the room-sharing economy, where the expectation of rental revenues artificially increases property values.<sup>81</sup> If and when a catastrophic event (for example, disease, terror attack, or a natural disaster) occurs, tourists are driven away and the realization of additional revenues is undermined, thereby collapsing the Airbnb bubble.<sup>82</sup>

Because of its potential impact on speculation, local decision makers are understandably hesitant to change zoning ordinances to allow short-term rentals. But these concerns ignore other ways to regulate speculation sales (for example, Vermont's land gains tax on short-term sales).<sup>83</sup> And the causal connection between short-term rental platforms and speculation is far from concrete. Speculation

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76. *See id.* at 66.

77. *Cf. id.* at 67-68 (discussing the problems renters face when banks foreclose on speculators' homes).

78. *See id.* at 66-67.

79. *See id.* at 67 ("Foreclosed houses can remain vacant for months or even years, falling into disrepair and becoming susceptible to vandalism or other property crimes.").

80. *See id.* ("[Foreclosed homeowners'] children can experience significant educational and social disruption. Surrounding homeowners can also suffer.... Cities face falling property tax revenue, as well as increased administrative costs.").

81. *See Barber, supra* note 23 (discussing the effects of short-term renting on housing and long-term rental prices).

82. *See id.*

83. For the options available to localities when regulating speculative sales, and the challenges they face, see Pindell, *supra* note 65, at 68-71.

existed before the room-sharing economy thrived, so calling it an Airbnb problem improperly frames the issue, confusing an enabling factor with the problem's root causes.<sup>84</sup> Localities have several regulatory options that promote a revenue-generating sharing economy while also mitigating the risks of speculation. This is not unlike any other complex community planning issue, with myriad solutions of varying effectiveness.<sup>85</sup>

### *B. The Opportunity for Meaningful Regulation*

In recent years, the municipalities most affected by Airbnb have responded by ratcheting up fines and punishing room-sharing hosts. Austin, Texas, for example, banned advertising for short-term rentals in February 2016.<sup>86</sup> In March 2016, Miami Beach amended its city code, providing for fines up to \$20,000 for anyone renting for periods of less than six months.<sup>87</sup> And New York State passed one of the toughest laws to combat the short-term rental economy, fining anyone who advertises short-term stays in unoccupied apartments.<sup>88</sup> Even cities that do not prohibit room-sharing per se have construed existing codes to punish Airbnb hosts.<sup>89</sup> But eliminating short-term rentals altogether is neither appropriate nor practical.

Despite opposition from hoteliers, landlords, and policymakers, reality suggests the room-sharing economy fills an underserved niche in the market that operates to promote the aggregate amount of tourism revenue in any given locale.<sup>90</sup> There are some concerns the room-sharing economy can be abused to operate illegal hotels that deprive deserving local tenants of long-term rental space, but there is little evidence to show that Airbnb has actually impacted

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84. See Miller, *supra* note 37, at 182 (“[T]he [Short-Term Rental] Market has not had an appreciable difference on real estate purchase prices.”).

85. Notably, one option—exclusion of renters altogether—presents fair housing concerns. See Pindell, *supra* note 65, at 71-72.

86. See Barber, *supra* note 23.

87. See *id.*

88. See *id.*

89. See, e.g., Major, *supra* note 38, at 472 (“While no San Diego code provision specifically addresses room-sharing, the court reasoned that room-sharing potentially implicates several sections.... Because [the Airbnb host] operated an illegal bed and breakfast for at least part of the time, the court found [her] liable.”).

90. See *supra* Part I.A.

rental prices by any appreciable measure.<sup>91</sup> And there are means to regulate commercializing the platform without eliminating the sharing economy. The opportunity to regulate the room-sharing economy in a meaningful way, while enabling it to serve local interests, is ripe for the taking.<sup>92</sup> Overregulation threatens to only hurt localities by promoting exclusive industry cartels and monopolies at a cost to consumers and local governments.<sup>93</sup> It also makes practical sense to accept that Airbnb, as a titan of the sharing economy, is here to stay and too big to fail; and trying to force it out of business goes against the tides of modern prosumerism.<sup>94</sup> Although regulation is certainly needed, punishing hosts while taxing their revenue creates a regulatory mismatch—legitimizing the sharing economy on the one hand and pushing it further underground on the other. As this Note will analyze in the next three parts, one way to meaningfully regulate Airbnb is to move hosts outside of the landlord-tenant framework and into the realm of innkeeper regulation.

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91. See *supra* Part I.A.2.

92. For a discussion of how one city (San Francisco) embraced Airbnb and other short-term rental sites, and the opposition that embrace now faces, see Palombo, *supra* note 51, at 313-17 (“Legislation was passed ... that legalizes short-term rentals in a highly regulated manner, by limiting the rentals to ninety nights per year, and requiring permanent residents to occupy their homes for at least 275 days per year.”).

93. See Bitran, *supra* note 14, at 512 (“A tax memo estimates that San Francisco will lose approximately \$58 million in tax revenue if [a proposed room-sharing regulation] passes, because the legislation would limit homes to seventy-five rental nights annually.”); see also *id.* at 536 (“If ... hotels want to compete with the technology-created sharing economy ..., then they need to improve their services and efficiency, not ban competition.”); Palombo, *supra* note 51, at 318.

94. See Bitran, *supra* note 14, at 528-29; see also Palombo, *supra* note 51, at 318. “Prosumerism” is a term coined for the sharing economy participants who are both traditional consumers in the economy and producers of their own products and services sold on sharing economy sites. See *The New Consumer and the Sharing Economy*, HAVAS WORLDWIDE: THE MAG (June 26, 2015), <http://mag.havas.com/prosumer-report/the-new-consumer-and-the-sharing-economy> [<https://perma.cc/9YVA-6C8B>]. For recent research on trends toward prosumerism and the collaborative economy, see generally *id.*

## II. A SUMMARY OF LANDLORD-TENANT AND INNKEEPER DOCTRINES

Much commentary exists about Airbnb's impact on housing and hospitality and ways to tax and regulate its negative externalities, but current literature and law have assumed that it is only natural—or simply an accepted part of the legal landscape—for hosts to be treated as landlords and their guests as tenants.<sup>95</sup> Regulating hosts as landlords is admittedly not the worst circumstance for hosts, who can avoid liability for many injuries guests might incur on their property.<sup>96</sup> But, as Part III will discuss, the advantages to hosts come at a cost to Airbnb guests, and the current legal landscape misunderstands the position Airbnb guests—even those staying over thirty days—are in.<sup>97</sup> This Part will juxtapose the basic legal frameworks for the landlord-tenant and innkeeper doctrines, previewing the particular implications of each for Airbnb hosts.

### *A. Landlord-Tenant Treatment of Airbnb Hosts*

For two main reasons, New York and California have become bellwethers for the doctrinal treatment of Airbnb hosts in other parts of the nation. First, by sheer volume, New York and California are the jurisdictional homes of Airbnb's largest U.S. markets by active listings (New York City and Los Angeles),<sup>98</sup> and the company itself is headquartered in San Francisco.<sup>99</sup> Second, New York and California have given rise to the most extensive litigation on a relatively new issue.<sup>100</sup> Finally, localities in both states have already taken various regulatory steps to adapt to, prohibit, or accommodate

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95. See Loucks, *supra* note 9, at 334 (“Some jurisdictions treat Airbnb hosts as landlords instead of innkeepers or mere property owners granting gratuitous licenses.”); *infra* Part II.A.

96. See Loucks, *supra* note 9, at 334.

97. See *id.* (“[Treating hosts as landlords] seems somewhat counterintuitive because Airbnb guests are more analogous to a hotel guest or a mere licensee, rather than a tenant who holds some interest in the property.”).

98. See *Fast Facts*, AIRBNB, <https://press.airbnb.com/fast-facts/> [<https://perma.cc/DC9G-SW4Y>].

99. See Salter, *supra* note 13.

100. See, e.g., Katie Benner, *Airbnb in Disputes with New York and San Francisco*, N.Y. TIMES (June 28, 2016), <https://www.nytimes.com/2016/06/29/technology/airbnb-sues-san-francisco-over-a-law-it-had-helped-pass.html> [<https://perma.cc/9EH9-NT79>].

Airbnb. Looking at these two states, therefore, provides key insights into the current legal framework surrounding Airbnb host-guest relationships.<sup>101</sup>

In California, state law allocates tenant rights to any guests staying over thirty days.<sup>102</sup> To avoid this classification, Airbnb hosts must meet impractical requirements.<sup>103</sup> Specifically, in addition to maintaining the right of access and control, California law requires those wishing to avoid landlord classification to provide all of the following services to guests: (1) a fireproof safe; (2) a central telephone service; (3) maid, mail, and room service; and (4) food service by an establishment within the hotel or operated in conjunction therewith.<sup>104</sup> For obvious reasons, few—if any—Airbnb listings provide the requisite services and right of entry that allow hosts to escape characterization as a landlord. In a state where tenants are granted considerable rights, Airbnb hosts face significant obstacles if they have unruly or obstinate guests.<sup>105</sup>

Likewise, in New York State, the courts have characterized Airbnb hosts as landlords when determining whether hosts can rent out property zoned for permanent residences.<sup>106</sup> In *City of New York v. Smart Apartments LLC*, for example, the court treated Smart Apartment's owners, who used a room-sharing method to rent out rooms, as landlords, not innkeepers, even when hosting transient guests for under thirty days.<sup>107</sup> Similarly, in *Airbnb, Inc. v. Schneiderman*, the court agreed to allow New York's Attorney General to

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101. See Dara Kerr, *Airbnb Dealt Blow as Judge Rejects Bid to Block SF Law*, CNET (Nov. 8, 2016, 5:40 PM), <https://www.cnet.com/news/airbnb-dealt-blow-judge-rejects-bid-to-block-law-san-francisco/> [https://perma.cc/9L5P-C2RD] (“[L]awmakers throughout the US are looking to San Francisco to set an example of how to regulate [Airbnb].”).

102. See CAL. CIV. CODE § 1940(a)-(b)(1) (West 2017); CAL. REV. & TAX CODE § 7280(a) (West 2017).

103. See CAL. CIV. CODE § 1940(a).

104. See *id.* § 1940(b)(2).

105. See *supra* notes 2-6 and accompanying text.

106. See *Airbnb, Inc. v. Schneiderman*, 989 N.Y.S.2d 786, 790-91 (N.Y. Sup. Ct. 2014) (holding the Attorney General had a factual basis to find violations of New York's Multiple Dwelling Law because Airbnb hosts were renting out living space for less than thirty days while not also residing in the same residence, thereby acting as landlords). The court denied the subpoena on other grounds. *Id.* at 792; see also *City of New York v. Smart Apartments LLC*, 959 N.Y.S.2d 890, 898 (N.Y. Sup. Ct. 2013) (enjoining Smart Apartments from renting to transient occupants of less than 30 days in part because it violated the Multiple Dwelling Law that prohibits landlords from renting to short-term guests without also residing in the residence).

107. See 959 N.Y.S.2d at 892-93.

subpoena records of 124 Airbnb hosts suspected of operating illegal hotels, implying the hosts were landlords and not hoteliers.<sup>108</sup>

Legally, classifying Airbnb hosts as landlords means hosts have reduced liability for guest injuries and increased difficulty evicting squatters. Under the laws of a majority of states, landlords are liable for *physical* injuries to tenants resulting from the landlord's failure to repair a dangerous condition.<sup>109</sup> For liability to impute, furthermore, the dangerous condition must violate either: "(1) an implied warranty of habitability; or (2) a duty created by statute or administrative regulation."<sup>110</sup> Landlords are subject to liability only for conditions about which they are aware, could have discovered with the exercise of reasonable care, or are given notice by the tenant.<sup>111</sup> Thus, the law acts to limit a landlord's liability for harm to tenants by first requiring the landlord's reasonable awareness, and, even if the landlord is aware, further requiring the dangerous condition be one that violates the warranty of habitability or other law. In many jurisdictions—even those with more tenant-friendly laws<sup>112</sup>—the warranty of habitability is a minimal standard, requiring landlords to provide only a basic level of sanitation, heat, and structural integrity.<sup>113</sup> In effect, landlords need only repair those conditions that seriously impact the ability of one to live in reasonable comfort and good health.<sup>114</sup> Even if a landlord violates

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108. See Palombo, *supra* note 51, at 302-03.

109. See RESTATEMENT (SECOND) OF PROP.: LANDLORD & TENANT § 18.3 (AM. LAW INST. 1977).

110. *Id.*

111. *Id.* cmt. c.

112. See, e.g., *Dealing with Problems*, CAL. DEP'T CONSUMER AFF., <http://www.dca.ca.gov/publications/landlordbook/problems.shtml> [<https://perma.cc/SA73-TV58>] (outlining the basic habitability requirements and noting "[t]he implied warranty of habitability is *not* violated merely because the rental unit is not in perfect, aesthetically pleasing condition ... [nor] if there are minor housing code violations").

113. The most basic requirements of the implied warranty are: (1) a structurally sound roof; (2) functioning heat and hot water; (3) access to clean water; (4) adequate lighting; (5) walls and floors not at risk of collapse; (6) the absence of lead, asbestos, and mold; (7) a functioning sewage system; (8) door locks; and (9) functioning smoke alarms throughout the tenancy. *Implied Warranty of Habitability*, LEGAL DICTIONARY, <http://legaldictionary.net/IMPLIED-WARRANTY-OF-HABITABILITY/> [<https://perma.cc/93XC-8PCL>].

114. See Myron Moskowitz, *The Implied Warranty of Habitability: A New Doctrine Raising New Issues*, 62 CALIF. L. REV. 1444, 1458 (1974) ("[Some courts] have indicated that the warranty requires defects serious enough to have constituted a constructive eviction."). Moskowitz also points out that "[d]eprivation of essential residential functions" is a common

the warranty, moreover, some courts afford landlords reasonable time to repair the problem.<sup>115</sup>

In the Airbnb context, guests are unlikely to be familiar enough with the property—or be at a property long enough to become familiar—that either giving notice or granting reasonable time for repair is impractical.<sup>116</sup> Even if notice and reasonable time were possible, many risks that do not affect the habitability of a listing are nonetheless threatening and undiscoverable to a temporary guest.<sup>117</sup>

Although enjoying limited liability for guest safety, Airbnb landlord-hosts are constrained by laws proscribing self-help when evicting holdover tenants. As a general rule, if a “speedy” judicial remedy (for example, summary proceeding) exists, a landlord may not evict or exclude a tenant from a leasehold property using their own resources.<sup>118</sup> Thus, state law prohibits Airbnb hosts classified as landlords from evicting an unruly guest extrajudicially, creating a tremendous burden for the host that exceeds the intentions of the Airbnb relationship.<sup>119</sup>

For these and many other reasons discussed in Part III, the landlord-tenant approach to the room-sharing economy is incongruent and improper, applying traditional law to an untraditional market.

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threshold among warranty of habitability decisions. *Id.* at 1459. Essentially, so long as the tenant can eat, sleep, and go to the bathroom, the landlord will have satisfied the warranty. *See id.*

115. *See id.* at 1462-63.

116. *See* Airbnb, Inc., *Airbnb Economic Impact*, AIRBNB BLOG, <http://blog.atairbnb.com/economic-impact-airbnb/> [<https://perma.cc/QNQ7-TBM6>] (noting that Airbnb guests stay on average 5.5 days in San Francisco and 6.4 nights in New York).

117. *See, e.g., infra* notes 194-97.

118. RESTATEMENT (SECOND) OF PROP.: LANDLORD & TENANT § 14.2 (AM. LAW INST. 1977).

119. *See, e.g., supra* notes 2-7 and accompanying text.

### *B. A Summary of Innkeeper Doctrine*

In contrast to the duties and rights of landlords, the long-standing innkeeper doctrine better protects guests and allows hosts to evict disruptive lodgers at will. As Part IV will argue, these two characteristics are among the primary reasons why the innkeeper doctrine is a better regulatory approach for Airbnb hosts.

The Restatement (Second) of Torts summarizes a long-held duty imputed to innkeepers at common law. An innkeeper is held to have a special relationship with his guests that creates a duty for the innkeeper to protect said guests “against unreasonable risk of physical harm, and ... to give them first aid.”<sup>120</sup> This duty is an exception to the general rule of negligence that recognizing the need to aid others does not itself impose a duty to act.<sup>121</sup> Innkeepers, by way of their relation to a guest, have a duty to obviate any unreasonable risk of harm that might arise out of the guest’s stay on the innkeeper’s premises.<sup>122</sup> In addition, innkeepers have a duty to provide aid to guests for injuries or illnesses arising from natural causes, pure accident, or third parties.<sup>123</sup> The duty to protect and aid guests does not apply when the innkeeper does not know, or has no reason to know or anticipate, a risk to the guest.<sup>124</sup> Thus, the law serves to impute greater liability to innkeepers by expanding the situations in which an innkeeper would have a duty to protect, warn, and cure guests of risks and harms. Although the innkeeper must still have actual knowledge, or reason to know, of risks, the duty imputed to innkeepers naturally requires more consideration of guests’ interests and safety than is required in a landlord-tenant relationship.<sup>125</sup>

Furthermore, treating hosts as innkeepers is not just a benefit to guests. As stressed throughout this Note, innkeeper-hosts generally have a greater right to evict guests using self-help.<sup>126</sup> In particular, innkeepers may evict guests so long as the reasons for the eviction

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120. RESTATEMENT (SECOND) OF TORTS § 314A(1)-(2) (AM. LAW INST. 1965).

121. *Id.* cmt. b.

122. *Id.* cmt. c.

123. *Id.* cmt. d.

124. *Id.* cmt. e.

125. Compare *id.* § 314A(1)-(2), with RESTATEMENT (SECOND) OF PROP.: LANDLORD & TENANT § 18.3 (AM. LAW INST. 1977).

126. See 43A C.J.S. *Inns, Hotels, and Eating Places* § 24 (2017).

are valid and the innkeeper does not use excessive force.<sup>127</sup> Valid reasons include the guest's failure to pay, violations of the law, or general misconduct.<sup>128</sup> The law still protects guests conducting themselves "in a proper and peaceful manner," preventing abuse of the eviction right.<sup>129</sup> For this and several other reasons, the innkeeper approach better reflects the relationship at play in the room-sharing economy.<sup>130</sup>

### III. SHORTCOMINGS OF THE LANDLORD-TENANT APPROACH

This Part will outline three primary concerns with the landlord-tenant approach to Airbnb, specifically: (1) the mismatch between the treatment of Airbnb hosts as landlords and the intent of the parties entering the relationship; (2) Airbnb's own claims of corporate impunity, leaving guests with little redress if hosts also lack a duty to warn and protect; and (3) the incongruence of the exploitative theory behind landlord-tenant law and the collaborative theory reinvigorated by the sharing economy.

#### *A. The Mismatch of Legal Treatment and Actual Practice*

A large problem with the landlord-tenant approach to Airbnb is that the doctrinal treatment fails to account for the actual interests of the parties in a room-sharing relationship. Airbnb aims to connect guests with local hosts, bringing guests directly into unfamiliar environments where they can interact with a given destination in an organic way.<sup>131</sup> Airbnb users are looking for a temporary roof over their heads and the potential insights of a local; they do not seek out permanent living quarters or a legal interest in property.<sup>132</sup>

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127. *See id.*

128. *See id.*

129. *See id.*

130. *See infra* Part IV.

131. *See* AIRBNB, *supra* note 1. As Airbnb co-founder, Brian Chesky, explained, "Airbnb is about so much more than just renting space .... It's about people and experiences.... You're not just getting a room, you're getting a sense of belonging." Burt Helm, *Airbnb Is Inc.'s 2014 Company of the Year*, INC. (Dec. 2014-Jan. 2015), <http://www.inc.com/magazine/201412/burt-helm/airbnb-company-of-the-year-2014.html> [<https://perma.cc/QZB5-SXDE>].

132. *See* Loucks, *supra* note 9, at 334 (noting that Airbnb guests are more analogous to hotel guests than to tenants with a legal interest in a property).

Yet, the landlord perspective assumes guests desire, or even need, a leasehold interest in a particular listing.

Even if the parties did desire to create a landlord-tenant relationship, Airbnb itself implicitly undermines the creation of tenancies. Unlike landlords, who often require extensive background information and references before renting property,<sup>133</sup> Airbnb hosts—even for long-term guests—rely on informal, less thorough means to predict guest behavior.<sup>134</sup> The checks Airbnb does provide, moreover, are unlikely to pick up all red flags concerning past crimes, or a guest's propensity to be dangerous and destructive.<sup>135</sup> The bulwark of Airbnb's verification program, for example, is the site's two-way review system, whereby guests and hosts review each other after a transaction ends, attaching the review to that person's profile for other users to see.<sup>136</sup> But the veracity and depth of such reviews is vulnerable to the pressures of social norms and business incentives.<sup>137</sup> Granted, truly awful guests are unlikely to escape without

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133. See, e.g., Eric Dunn & Marina Grabchuk, *Background Checks and Social Effects: Contemporary Residential Tenant-Screening Problems in Washington State*, 9 SEATTLE J. FOR SOC. JUST. 319, 320 (2010) ("In today's age of online public records and digital transmission, a rental applicant's complete residential history, credit report, criminal record, civil litigation background, and other information are available within hours or even minutes.")

134. See *I'm a Host. What Are Some Safety Tips I Can Follow?*, AIRBNB, <https://www.airbnb.com/help/article/231/i-m-a-host--what-are-some-safety-tips-i-can-follow> [<https://perma.cc/VXA8-KA9K>] (discussing various means for hosts to insure guests are who they say they are, namely: (1) interacting only through Airbnb; (2) providing rules; (3) obtaining insurance; and (4) establishing requirements such as security deposits and verified ID through the Airbnb system). Airbnb's verification of user identities is largely superficial, relying on users to link to social media accounts and contact information, both of which are easily forged, though users have the option to share government issued identification. See *What Are Profile Verifications and How Do I Get Them?*, AIRBNB, <https://www.airbnb.com/help/article/336/what-are-profile-verifications-and-how-do-i-get-them> [<https://perma.cc/44K5-NVUX>].

135. See *Does Airbnb Perform Background Checks on Members?*, AIRBNB, <https://www.airbnb.com/help/article/1308/does-airbnb-perform-background-checks-on-members> [<https://perma.cc/2M2S-PG9Q>] ("Although background checks may help ... where records are available [the] checks don't always identify a person's past crimes or other red flags.") As further protection, Airbnb holds the reservation fee for the first twenty-four hours of a booking to allow guests and hosts to make sure things are in order, though it is unlikely an intent to scam the host or plans for a destructive party are revealed to the host within that timeframe. See *When Am I Charged for a Reservation?*, AIRBNB, <https://www.airbnb.com/help/article/92/when-am-i-charged-for-a-reservation> [<https://perma.cc/BF8M-P332>].

136. See *How Do Reviews Work?*, AIRBNB, <https://www.airbnb.com/help/article/13/how-do-reviews-work> [<https://perma.cc/UG5Y-NVSF>].

137. See Molly Mulshine, *After a Disappointing Airbnb Stay, I Realized There's a Major Flaw in the Review System*, BUS. INSIDER (June 18, 2015, 11:00 AM), <http://www.businessinsider.com/airbnb-review-system-flaw>.

a bad review, but such situations are few and far between, as the review system tilts in the guest's favor.<sup>138</sup> Even badly reviewed guests can use the instant book feature—pushed by Airbnb in recent years—to book a stay without any host approval at all.<sup>139</sup> The review system also fails to capture what a particular host cannot see.<sup>140</sup> Whereas a guest might be considerably pleasant while staying with one host, the next stay with a new host could turn out quite differently.<sup>141</sup>

Beyond the impracticalities of its verification system, Airbnb further undermines the creation of tenancies by means of its payment procedures. Although Airbnb does collect payments for up to the first month of any booking at the time of a reservation, users can cancel cards or close payment accounts so Airbnb can no longer collect payments for nights beyond the first month,<sup>142</sup> at which point

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insider.com/why-airbnb-reviews-are-a-problem-for-the-site-2015-6 [https://perma.cc/8VZ2-NDP5] (“[T]he problem is that these reviews aren’t anonymous, and I believe this causes people ... to post reviews that lean positive.”). Users, moreover, can choose to abstain from submitting a review instead of providing a negative evaluation of a guest (or host). AIRBNB, *supra* note 136. But Airbnb has improved the review system to reduce incentives to play nice and avoid honesty. See Seth Porges, *The Strange Game Theory of Airbnb Reviews*, FORBES (Oct. 17, 2014, 2:21 PM), <http://www.forbes.com/sites/sethporges/2014/10/17/the-strange-game-theory-of-airbnb-reviews/#781da3e15e56> [https://perma.cc/J5PN-TUSD] (describing how Airbnb’s new double-blind review system encourages hosts to be more honest about guests).

138. See Seth Porges, *The One Issue with Airbnb Reviews that Causes Hosts to Burnout*, FORBES (June 29, 2016, 9:15 AM), <http://www.forbes.com/sites/sethporges/2016/06/29/the-one-issue-with-airbnb-reviews-that-causes-hosts-to-burnout/#1957b6ff36a9> [https://perma.cc/LBT6-4B8X] (noting that ratings below five stars can affect the ranking of the host’s listing in a search and loss of the “Super Host” title). Airbnb hosts can also reserve criticism of guests for private feedback, seen only by the specific guest, preventing future hosts from understanding the full picture. AIRBNB, *supra* note 136.

139. See *What Is Instant Book?*, AIRBNB, <https://www.airbnb.com/help/article/523/what-is-instant-book> [https://perma.cc/53UQ-QJ9W]. Airbnb touts instant booking as a means to prevent host discrimination. See Katie Benner, *Airbnb Adopts Rules to Fight Discrimination by Its Hosts*, N.Y. TIMES (Sept. 8, 2016), [http://www.nytimes.com/2016/09/09/technology/airbnb-anti-discrimination-rules.html?\\_r=0](http://www.nytimes.com/2016/09/09/technology/airbnb-anti-discrimination-rules.html?_r=0) [https://perma.cc/K7W7-BSUJ].

140. See Edelman & Geradin, *supra* note 37, at 317.

141. See Georgios Zervas, David Proserpio & John W. Byers, *A First Look at Online Reputation on Airbnb, Where Every Stay Is Above Average* 5 (Apr. 12, 2015) (unpublished manuscript), <https://ssrn.com/abstract=2554500> [https://perma.cc/AG3M-UGZB] (noting that hosts cannot see an overall average of a guest’s ratings, requiring hosts to read through user-supplied information to catch any red flags).

142. See *How Do I Pay for My Long-Term Reservation?*, AIRBNB, <https://www.airbnb.com/help/article/245/how-do-i-pay-for-my-long-term-reservation> [https://perma.cc/D5U5-EMEU]; see also, e.g., *supra* notes 2-5 and accompanying text.

the guest likely has obtained tenant rights.<sup>143</sup> This abuse of the payment system is the exact issue described in the Introduction, and leaves hosts vulnerable to squatters and scam artists.<sup>144</sup>

Thus, if hosts want to create a tenancy, Airbnb is an impractical forum for doing so, implicitly disincentivizing such behavior by inhibiting a host's ability to predict guest behavior and to receive timely payments. For these practical reasons, and the purpose of the site generally, one can assume most hosts do not intend to give guests a legal interest in their property, and most guests do not intend to seek out such an interest, yet the law currently leaves Airbnb users with no practical workaround.<sup>145</sup> The mismatch of party intent and landlord-tenant doctrine is further compounded when considering the difficulty with which an injured guest can seek legal remedies against either Airbnb or its hosts under the current framework.<sup>146</sup>

### *B. Airbnb's Corporate Impunity*

The lack of liability imputed to Airbnb hosts under landlord-tenant doctrine is particularly problematic because of the corresponding lack of liability imputed to Airbnb as a company. Fearing that internet startups would be stifled by litigation and liability concerns, Congress passed section 230 of the Communications Decency Act (CDA) in 1996.<sup>147</sup> The CDA essentially immunizes Internet Service Providers (ISPs) from liability for the information and content posted by an "information content provider."<sup>148</sup> The broad definition of ISPs protected by the law includes Airbnb because hosts serve as separate information content providers on the Airbnb platform.<sup>149</sup> The law protects Airbnb from liability for the content posted by hosts that it does not have a hand in creating, although courts have limited the scope of this protection to free speech issues

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143. See *supra* Part II.A.

144. See *supra* notes 4-5 and accompanying text.

145. See *supra* Part II.A.

146. See *supra* notes 109-15 and accompanying text; see also *infra* Part III.B.

147. Interian, *supra* note 12, at 138.

148. 47 U.S.C. § 230(c)(1) (2012).

149. Interian, *supra* note 12, at 138.

and not to other claims.<sup>150</sup> In recent litigation, for example, the District Court for the Northern District of California rejected Airbnb's argument that a San Francisco ordinance, which made Airbnb liable for collecting fees from unregistered hosts, violated the CDA.<sup>151</sup> The court found the ordinance did not punish Airbnb for the actual content hosts posted, so Airbnb was not immune from sanctions.<sup>152</sup> Nonetheless, the court accepted that the law would protect Airbnb from liability if, say, a host omitted to mention the poor conditions of a particular location or otherwise lied about the quality of the accommodations provided.<sup>153</sup>

The CDA is not the end of Airbnb's legal immunity arguments, either. The company can also argue it should not be liable for its hosts' torts because each host is an independent contractor and not an employee—an argument made by the ride-sharing application Uber with mixed results.<sup>154</sup> Although no Airbnb-specific case law yet exists, Airbnb places fewer restrictions on its hosts and could therefore argue it should not be liable for its hosts' negligence.<sup>155</sup> If

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150. See, e.g., *Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157, 1164-65 (9th Cir. 2008).

151. *Airbnb, Inc. v. City & Cty. of S.F.*, No. 3:16-cv-03615-JD, 2016 WL 6599821, at \*4 (N.D. Cal. Nov. 8, 2016). For a discussion of the ruling's implications, see Kerr, *supra* note 101 ("The home-rental company ... has used similar arguments in its battles with other cities, including New York. Additionally, lawmakers throughout the US are looking to San Francisco to set an example of how to regulate the eight-year-old startup.").

152. See *Airbnb, Inc.*, 2016 WL 6599821, at \*4.

153. See *id.* at \*5 (refusing to preempt the San Francisco ordinance because it "d[id] not turn on holding an Internet service liable for posting or failing to remove content provided by a third party," implying that if the ordinance had held Airbnb liable for what its hosts post then the CDA would protect it).

154. Compare *McGillis v. Dep't of Econ. Opportunity*, 210 So. 3d 220, 225-26 (Fla. Dist. Ct. App. 2017) (holding Uber drivers were not employees for the purposes of unemployment compensation because they provided their own vehicles and controlled "when, where, with whom, and how to accept and perform trip requests"), with *Interian*, *supra* note 12, at 142 ("[Uber] has struggled to cast off responsibility for its drivers by claiming that they are independent contractors or simply 'App-users,' rather than traditional service employees.").

155. See *Interian*, *supra* note 12, at 152-53; see also *Palombo*, *supra* note 51, at 299 ("Airbnb contends that it is just a matchmaker, similar to an online dating platform. A dating site connects two parties ... but what happens from there is not the dating site's responsibility."). But Airbnb has started to exert more control over its hosts. See *Interian*, *supra* note 12, at 154-56 (noting several measures Airbnb has taken to exert control over hosts, including remittance of taxes, and finding that these controls "bring[] Airbnb's practices closer to those of Uber").

successful, the independent contractor argument would severely restrict guests' redress for injuries at Airbnb listings.

The company is further insulated from liability through contract. Specifically, Airbnb provides its own, one-million-dollar insurance only after hosts exhaust all their personal coverage.<sup>156</sup> The company's terms and conditions, which all users agree to, also clarify Airbnb's position as a third-party platform.<sup>157</sup> The terms explicitly state: "Airbnb is not a party to any agreements entered into between hosts and guests, nor is Airbnb a real estate broker, agent or insurer."<sup>158</sup> These provisions provide legal grounds for Airbnb to separate itself from contractual and tort claims that might arise between hosts and guests, and leave hosts with little backup except as far as Airbnb is willing to avoid a public relations faux pas.<sup>159</sup> The result for guests is a legal in-between, where neither hosts nor the corporate "matchmaker" can be held responsible for many injuries at Airbnb locations.<sup>160</sup> These difficulties highlight the tremendous disparity between the treatment of Airbnb hosts as landlords in the courts and the reality of the situation on the ground. A disparity that extends to the very legal philosophy underpinning landlord-tenant law.

### C. A Mismatch of Legal Philosophies

Traditional landlord-tenant law developed on the idea that the relationships between landlords and their tenants were becoming "increasingly polarized or exploitive," and that the law was a means "to regulate relationships in a competitive economy, not a collabora-

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156. Palombo, *supra* note 51, at 300.

157. *Terms of Service*, AIRBNB, <https://www.airbnb.com/terms> [<https://perma.cc/X763-WAEV>].

158. *Id.*

159. In the case of Cory Tschogl, for example, Airbnb agreed to help pay some of the costs of evicting the squatter in her condominium because it failed to adequately respond to her initial request for help. See Matyszczyk, *supra* note 2.

160. Of course, many hosts would be judgement-proof and unable to pay damages if found liable, but presumably innkeeper-hosts would pressure Airbnb to cover costs, and Airbnb, in turn, could incentivize hosts to mitigate liability (perhaps through a fee system). See *infra* Part IV.D.

tive one.”<sup>161</sup> But the sharing economy, including Airbnb, is about primarily horizontal, not vertical, power relationships.<sup>162</sup> An Airbnb host typically is not a sophisticated businessperson with exploitive interests.<sup>163</sup> Rather, hosts are looking to share extra space with short-term guests who are equally uninterested in bargaining for property rights.<sup>164</sup> Yet, the law does not recognize the difference.<sup>165</sup> Landlord-tenant law is built on the idea of capitalist competition and exploitation and, as such, fails to adapt to the rejuvenation of collaborative parity—once a hallmark of agrarian societies—in the sharing economy.<sup>166</sup> Thus, the legal theory under which landlord-tenant law has developed is inappropriate for room-sharing relationships. The answer, addressed in Part IV, is to regulate hosts as what they are: amateur innkeepers operating micro-businesses that service guests with limited rental interests, even for stays over thirty days.

#### IV. REGULATING HOSTS AS INNKEEPERS

Given the shortfalls of the landlord-tenant approach, innkeeper liability and a hospitality perspective better encompass the relationship Airbnb creates. First, innkeeper liability more directly remedies the asymmetry at play in an Airbnb transaction, based not on power but knowledge.<sup>167</sup> The innkeeper treatment of hosts is also consistent with Airbnb’s treatment in other areas of the law (namely, taxation).<sup>168</sup> And treating hosts as innkeepers will allow for at-will eviction of unruly guests—a key issue this Note seeks to remedy.<sup>169</sup> Finally, the hospitality perspective provides a framework for local regulators to bring Airbnb listings into compliance with

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161. See Jenny Kassan & Janelle Orsi, *The LEGAL Landscape of the Sharing Economy*, 27 J. ENVTL. L. & LITIG. 1, 13 (2012).

162. See *id.* at 14.

163. Cf. *supra* note 54 and accompanying text.

164. See AIRBNB, *supra* note 116 (noting the average length of stay in New York and San Francisco is less than a week).

165. See *supra* Part II.A.

166. See Kassan & Orsi, *supra* note 161, at 14.

167. See *infra* Part IV.A.

168. See *infra* Part IV.B.

169. See *infra* Part IV.C.

consumer-focused safety standards;<sup>170</sup> a framework that landlord-tenant law fails to adequately provide.

*A. The Innkeeper Framework Better Reflects the Asymmetries of the Airbnb Host-Guest Relationship*

As with innkeeper-guest relationships, the Airbnb host-guest relationship is not so much a power asymmetry as an informational one. Although landlords have a basic understanding of the property they lease, they do not know the day-to-day, moment-by-moment circumstantial risks that arise, because the landlord, in many instances, is not frequently present.<sup>171</sup> Airbnb hosts, on the other hand, frequently either live on the property being rented or, by the nature of the amenities the host is providing, must frequently visit the property in person or through an agent.<sup>172</sup> The personal relationship a host has with a listed property establishes a familiarity with the property's inherent risks, giving hosts more reasonable control of those risks. The Airbnb host, therefore, likely has more awareness—or should have more awareness—of the risks on his or her property than a landlord who manages a leasehold at arm's length.

More importantly, Airbnb guests, relative to tenants, have less awareness of the property where they are staying. Tenants, by virtue of the legal interest in the property they seek, have incentives to inspect the property and research its habitability, risks, and deficiencies. Tenants also develop an intimate familiarity with the property they rent, and have at least limited flexibility to customize the property to suit their living needs. Airbnb guests, on the other hand, lack the same incentives and are practically limited in their

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170. See *infra* Part IV.D.

171. In fact, many jurisdictions hold landlords liable for accessing a tenant's property without consent or a good faith reason (for example, seeking payment of overdue rent). See 49 AM. JUR. 2D *Landlord & Tenant* § 385 (2017).

172. See Palombo, *supra* note 51, at 303 (“[E]ighty-seven percent of hosts rent the property where they permanently reside and are not transforming residential buildings into illegal hotels.”). Airbnb has also removed around 2,000 listings suspected of abusing the platform. *Id.* But see Barber, *supra* note 23 (“According to Inside Airbnb, the majority of Airbnb listings are not shared rooms rented out while the host is present. Rather, 58.6 percent of Los Angeles listings, 72.3 percent of New Orleans listings, and 66.6 percent of Seattle listings are for entire homes.”).

ability to physically inspect a location before reserving it.<sup>173</sup> While staying on the property, an Airbnb guest, even for greater than thirty days, has little need or right to customize the property to suit his needs and therefore must take the Airbnb rental as is. Thus, Airbnb hosts and guests have a larger informational asymmetry than a landlord and tenant: the hosts are more familiar with the property they rent than a landlord, while guests are more unaware of the properties they are staying at than the average tenant. This asymmetry is better reflected through the innkeeper framework.

Treatment of hosts as innkeepers—at least as far as their duty to guests—better protects consumers in the sharing economy, who often stay on premises more unfamiliar and risk-inherent than most modern-day hotels. The current law simply mismatches the illness (the asymmetry at play) with the treatment, failing to remedy what is actually occurring in the sharing economy. Beyond a theoretical match, innkeeper doctrine is consistent with the treatment of Airbnb in other areas of law, providing practical, as well as theoretical, consistency.

### *B. Innkeeper Treatment Is Consistent with the Tax Treatment of Airbnb*

Treating Airbnb hosts as innkeepers is congruent with the prevailing trend in many localities to tax Airbnb transactions under a hospitality/occupancy framework. Airbnb is already taxed like a hotel in at least six major cities.<sup>174</sup> Elsewhere, Airbnb has sought taxation as a means to legitimize its business, promising at least

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173. They must rely instead on Airbnb's review system, discussed *supra* Part III.A, which suffers several deficiencies. See also Zervas et al., *supra* note 141, at 1, 3 (finding that 95 percent of Airbnb listings have an average user-generated rating of 4.5 or 5 stars and noting that "existing review platforms have been shown to generate implausible distributions of star-ratings that are unlikely to reflect true product quality").

174. Interian, *supra* note 12, at 135 ("[T]he company already has begun collecting tourist taxes from guests on behalf of Airbnb hosts in Portland, San Francisco, San Jose, Chicago, Washington, D.C., and Amsterdam."). Specifically, Airbnb claims to have paid \$5 million in taxes to San Francisco and Portland in 2014. See Amina Elahi, *Airbnb to Begin Collecting Chicago Hotel Tax Feb. 15*, CHI. TRIB. (Jan. 30, 2015, 3:45 PM), <http://www.chicagotribune.com/bluesky/originals/chi-airbnb-chicago-taxes-bsi-20150130-story.html> [https://perma.cc/PUD8-937Y].

\$65 million in revenue per year for New York City, alone.<sup>175</sup> In San Francisco, Airbnb collects a 14 percent tax on hosts' profits.<sup>176</sup> And, in Los Angeles, Airbnb agreed to pay the city at least \$5 million in back taxes on unregulated rentals.<sup>177</sup> In total, Airbnb claims to have paid \$110 million in lodging taxes since 2014.<sup>178</sup> Localities willingly accept the tax revenue as if it were any other hotel tax—to the mutual benefit of Airbnb, hosts, and local governments.<sup>179</sup>

To collect from room-sharing services as if they were hotels on one hand, but treat hosts as landlords on the other, is a dysfunctional practice. Instead, hosts should be viewed as micro-entrepreneurs, running micro-hotels that are taxed for the occupancy income they produce. Treatment of hosts as innkeepers, therefore, is consistent with taxation of the room-sharing economy and creates uniformity in the regulation of this new marketplace. Ultimately, if hosts are taxed like hoteliers, they should possess the rights and responsibilities of hoteliers, including the right to evict guests at will.

### *C. Innkeeper-Hosts Could Evict Unruly Guests at Will*

Treating Airbnb hosts as micro-innkeepers would remove the problem highlighted in the introduction: the inability of hosts to evict unruly visitors without difficulty.<sup>180</sup> Under the law of many states, landlords must go through judicial processes to evict guests who squat on their property or otherwise violate a lease agree-

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175. See Ryan Lawler, *As It Seeks New Regulations in NY, Airbnb Estimates It Would Collect \$65 Million in Taxes There*, TECH CRUNCH (Jan. 16, 2015), <https://techcrunch.com/2015/01/16/airbnb-65-million-in-ny/> [<https://perma.cc/2EL9-WPB3>] (arguing that the amount of tax revenue would only increase). Interestingly, the New York hotel industry originally requested taxation of Airbnb, but when Airbnb tried to accept it, hoteliers opposed the move. See Palombo, *supra* note 51, at 304.

176. Palombo, *supra* note 51, at 312.

177. Barber, *supra* note 23.

178. *Id.*

179. See Palombo, *supra* note 51, at 313.

180. See *supra* notes 2-6 and accompanying text. For examples of the damage guests can cause, see, for example, John Annese, *Airbnb Guest Steals \$5G in Valuables from Manhattan Apartment*, N.Y. DAILY NEWS (Aug. 9, 2016, 4:02 AM), <http://www.nydailynews.com/new-york/nyc-crime/airbnb-guest-steals-5g-valuables-manhattan-apartment-article-1.2743622> [<https://perma.cc/BKS7-E8UD>] (“Two more Airbnb guests stole tens of thousands in valuables from two homes in Williamsburg, Brooklyn, in July, taking TVs, electronics and designer handbags, police said.”).

ment.<sup>181</sup> These summary proceedings can be particularly burdensome and expensive.<sup>182</sup> Innkeepers, on the other hand, have a general right to evict guests without resorting to court proceedings so long as there is a valid reason and excessive force is not used.<sup>183</sup>

For several reasons discussed in this Note, the eviction protections afforded to Airbnb guests are unnecessary. First, most guests do not seek a legal interest in the property where they stay, and, if they do, Airbnb does not create that relationship.<sup>184</sup> Second, guests—even those who stay over thirty days—are unlikely to settle at an Airbnb location, and those who do settle create a relationship outside of the Airbnb rental period, which rightfully would remove hosts from the role of innkeeper. Third, the sharing economy benefits from hosts' freedom to evict unruly guests. After all, it is the host's furniture and personal belongings the guests use and potentially threaten. Finally, hosts will be hesitant to evict guests without cause for fear of a bad review that will harm business, so hosts are unlikely to abuse the system.<sup>185</sup> If hosts do abuse the eviction right, it likely will not be long before Airbnb removes them from the platform.<sup>186</sup> In fact, the longstanding law of most jurisdictions proscribes innkeepers from "interfer[ing] with the peace and quiet

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181. Airbnb hosts (as landlords) who resort to self-help instead of judicial summary eviction may be held liable to their guests (as tenants). See 49 AM. JUR. 2D *Landlord & Tenant* § 837 (2017).

182. See, e.g., Matyszczyk, *supra* note 2 ("In order to get him out of her condo, [an Airbnb host] has to go through a full eviction process, which might take three to six months and cost ... up to \$5,000.").

183. See 43A C.J.S. *Inns, Hotels, and Eating Places* § 24 (2017).

184. See *supra* Part III.A.

185. For example, hosts have incentives to be certified as a "Superhost" by meeting certain criteria, and will therefore likely avoid confrontational relationships with guests. See *How Do I Become a Superhost?*, AIRBNB, <https://www.airbnb.com/help/article/829/how-do-i-become-a-superhost> [<https://perma.cc/DA9Q-TDNQ>] (noting, among other things, that Superhosts must receive a 5-star rating on at least 80 percent of their reviews); see also *supra* notes 137-38 and accompanying text.

186. Cf. Caroline O'Donovan, *Airbnb Removes Host Who Denied a Trans Woman a Place to Stay*, BUZZFEED (June 6, 2016, 1:35 PM), [https://www.buzzfeed.com/carolineodonovan/host-who-denied-a-trans-woman-a-place-to-stay-removed-from-a?utm\\_term=.jgQJxXWW6#.oaaz4DAAo](https://www.buzzfeed.com/carolineodonovan/host-who-denied-a-trans-woman-a-place-to-stay-removed-from-a?utm_term=.jgQJxXWW6#.oaaz4DAAo) [<https://perma.cc/VUP2-J3DW>] (noting that Airbnb removed a host for refusing to serve a transgender woman).

enjoyment of the guests,"<sup>187</sup> and requires hosts to have a valid reason to evict.<sup>188</sup>

It is worth noting that even hotels may, in specific situations, establish tenancies with guests.<sup>189</sup> However, although some guests at a hotel may obtain tenant rights in unique circumstances, it is unlikely those circumstances will arise in the Airbnb context.<sup>190</sup> Even so, pragmatic considerations warrant greater leniency in allowing Airbnb hosts to evict guests in most circumstances.<sup>191</sup>

Ultimately, although treating hosts as innkeepers imputes greater liability for the hosts' negligence, such treatment has the added benefit of allowing at-will contracting. This permits hosts to end risky or unsatisfactory guest relationships without resorting to months-long judicial procedures. By providing guest protections where necessary and removing them where they are not needed, the innkeeper framework better accounts for the interests of guests and hosts alike.

#### *D. Regulating Airbnb Safety from the Hotel Perspective*

The above reasons notwithstanding, regulating hosts as innkeepers is not completely ideal. Some hoteliers, for example, have lobbied for overregulation of Airbnb hosts as a means to stifle what

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187. L.W.B., Annotation, *Liability of Innkeeper for Interference with Guest*, 17 A.L.R. 139 (1922).

188. See *supra* note 183 and accompanying text; *supra* Part II.B.

189. Specifically, some courts have considered hotel guests tenants if they were non-transient, furnished or repaired their living space, paid monthly, did not use a maid service, and maintained the right to exclusive possession. See, e.g., *Hundley v. Milner Hotel Mgmt. Co.*, 114 F. Supp. 206, 208 (W.D. Ky. 1953); *Bourque v. Morris*, 460 A.2d 1251, 1253 (Conn. 1983) (stressing the transience requirement to obtain tenant rights); *Ortner v. Linch*, 128 So. 2d 152, 155 (Fla. Dist. Ct. App. 1960) (requiring exclusive right of possession to become a tenant); *Neely v. Lott Hotels Co.*, 78 N.E.2d 659, 659 (Ill. App. Ct. 1948) (holding use of maid and linen services precluded creation of tenancy).

190. See *supra* Part III.A.

191. Because Airbnb inhibits the creation of tenancies and hosts lack the sophistication of hoteliers or landlords, it is incumbent upon regulators to allow more lenient eviction laws for hosts. And, unlike hoteliers, who do not share living space with guests, many Airbnb hosts are offering portions of their own homes. Prohibiting at-will eviction, therefore, threatens to disturb the privacy and property rights of hosts. See *supra* notes 180-81 and accompanying text.

they perceive as a threat to their profits.<sup>192</sup> Hotels have encouraged enforcement of health and safety laws that would require Airbnb hosts to provide clean towels, sprinklers, and emergency exits, making operating an Airbnb cost inhibitive or simply impractical for many hosts.<sup>193</sup> Instead, states and localities should avoid overregulating hosts in the interest of the revenue and community benefits that room-sharing markets can bring, while tailoring policies to Airbnb that promote consumer safety and mirror the established hotel industry.

There are genuine concerns about the safety of Airbnb guests, and accidents—sometimes fatal—do occur on Airbnb properties.<sup>194</sup> However, imputing innkeeper liability to hosts already creates incentives for them to provide safe, habitable accommodations. The current alternative, landlord-tenant law, obligates hosts to make inherent dangers known to guests in relatively limited circumstances.<sup>195</sup> Hosts, as landlords, are liable only for violations of the warranty of habitability, which has relatively high thresholds before landlords must act;<sup>196</sup> innkeeper-hosts, on the other hand, would have a duty to inform their guests of risks and provide safety protections to cure the inherent dangers at an Airbnb listing.<sup>197</sup>

Indeed, the threat of personal liability is often used to enforce regulations, and is an effective way to help protect the safety of Airbnb guests. By allowing guests to sue hosts for negligence, regulators create incentives (1) for hosts to provide safe accommoda-

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192. See Biz Carson, *If the Hotel Industry Has Its Way, Here's How Hard It Would Be to Rent Out Your House*, BUS. INSIDER (Nov. 2, 2016, 7:30 PM), <http://www.businessinsider.com/ahla-proposes-model-legislation-on-short-term-rentals-like-airbnb-2016-11> [<https://perma.cc/T2QP-NSUH>] (discussing model legislation hotel trade groups are pushing, including requirements for health and safety inspections). For a discussion on why Airbnb is not necessarily the threat hoteliers characterize it as, see *supra* Part I.A.1.

193. See Bitran, *supra* note 14, at 510-11; Major, *supra* note 38, at 481-82 (“While hotels are generally financially secure enough to spread losses, a private person renting out an apartment will likely be unable to afford any damages.”).

194. For examples of accidents occurring at Airbnb locations, see Palombo, *supra* note 51, at 298 (“On one occasion, a hot water heater could have led to severe injuries had a guest bumped into it.”); and Christina Bonnington, *The Tragic Airbnb Problem You've Probably Never Thought About*, REFINERY29 (Nov. 9, 2015, 5:20 PM), <http://www.refinery29.com/97263> [<https://perma.cc/JD9H-AG4S>] (“The [Airbnb] property had a rope swing attached to a tree. [The guest's] father got on the swing, and was then killed.”).

195. See Palombo, *supra* note 51, at 306; *supra* Part II.A.

196. See *supra* Part II.A.

197. See *supra* Part II.B.

tions, and (2) for Airbnb to offer more effective and encompassing insurance coverage to hosts, who would likely feel pressured to leave the company if it did not step up to help them.<sup>198</sup> Imputing liability to hosts will encourage, if not coerce, Airbnb to bear at least some of the financial costs for violations of the law, much like a hotel chain—something a company as large and unbridled as Airbnb should do.

Beyond imposing innkeeper liability, localities also have flexibility to require or incentivize Airbnb hosts to provide some of the common-sense safety features found in hotels. Airbnb has already encouraged hosts to place carbon monoxide and smoke detectors in every listing.<sup>199</sup> Portland, Oregon, has gone as far as requiring all listings to pass inspection, which includes checking that each unit has certain detectors.<sup>200</sup>

As governments consider what to compel Airbnb listings to provide, they must contemplate the practical difficulties that come with enforcing regulations on discrete and dispersed micro-businesses. Most localities likely do not have the time or infrastructure to enforce a hands-on regulatory scheme. An obvious alternative will be self-enforcement provisions, which would allow guests to sue hosts who violate local safety regulations. By requiring applicable regulations to be posted at each listing and informing guests of their rights, localities can effectuate a self-enforced system. Coupled with random inspections and licensing requirements, self-enforcement provisions are a low-cost means to achieve uniform regulation of Airbnb listings. And localities should not forget that Airbnb, as a company, can and should be a willing partner in helping to enforce safer accommodations for transient occupants.<sup>201</sup> In fact, the company's

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198. See Major, *supra* note 38, at 482 (noting that Airbnb's claim that it is merely a "facilitator" would place financial liability solely on hosts, thereby creating pressure on Airbnb to voluntarily assume liability or risk losing inventory).

199. Brian Chesky, *Shared City*, MEDIUM (Mar. 26, 2014), <https://medium.com/@bchesky/shared-city-db9746750a3a#qj46weakr> [<https://perma.cc/64CU-KBZL>].

200. Miller, *supra* note 37, at 191 (citing PORTLAND, OR., ZONING CODE §§ 33.207.040, .050 (2015)).

201. For a discussion on how Airbnb can provide more support for enforcing laws and regulations on hosts, see Palombo, *supra* note 51, at 320 (arguing, for example, that "[t]he legal information on Airbnb's website needs to be comprehensive for users because hosts are still responsible for Airbnb-related infractions"). San Francisco already requires Airbnb to inform hosts of laws applicable to their operations, or face a penalty. S.F., CAL., ADMIN. CODE

online tracking of user behavior provides better information for regulators to use than more traditional hospitality businesses.<sup>202</sup>

In the end, unlike hotels equipped for hundreds of guests, the vast majority of Airbnb hosts are renting one room or location to no more than a family-sized group of visitors. To require a residential location that presumably meets state and local standards of habitability to provide advanced, hotel-like safety features for small numbers of guests amounts to a stifling abuse of the law that threatens to hinder competition.<sup>203</sup> Compelling Airbnb hosts to meet all the standards of a hotel in hopes it will discourage short-term rentals rejects what is already a reality: the sharing economy is too cheap and convenient for consumers to abandon, even if that economy is forced to operate outside the law.<sup>204</sup> Nonetheless, the hospitality perspective is a good starting point from which localities can achieve uniformly safer accommodations in the short-term rental market.

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§ 41A.5(g)(4)(A),(C) (2017).

202. See Edelman & Geradin, *supra* note 37, at 325-26 (noting that platforms like Airbnb “create a virtual roadmap of users’ activities ... [that are] both granular and well-organized,” with the ability to better control users’ behavior); Major, *supra* note 38, at 501 (“Municipalities can require room-sharing platforms ... 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.”).

203. For a complete argument of why traditional business regulation is not suited for micro-businesses and the sharing economy, see Miller, *supra* note 37, at 167-68 (discussing the impracticalities of total bans, de minimis exceptions, and command-and-control regulations, and noting a “city[s] response will likely require alternative approaches that rely on markets, information, and perhaps even regulatory structures that model the sharing economy more directly”).

204. See Miller, *supra* note 37, at 168 (“Attempts to crack down on a particular site would likely simply lead to other sites emerging to perform the same service.”); Barber, *supra* note 23 (“[A]lmost all urban areas, at some point, have had laws or zoning provisions prohibiting short-term rentals of less than 30 days without a special permit. And yet, that hasn’t stopped the incredible boom in the number of listings on Airbnb.”). Airbnb’s popularity also has the potential to wield considerable political clout at higher levels of government. Cf. Miller, *supra* note 37, at 156-57 (describing how Uber lobbied Idaho’s conservative state legislature when Boise banned the company, usurping the local government’s authority to regulate transportation networks). Airbnb is not just a millennial trend, either. Co-founder Brian Chesky told a reporter, “We’ve got more people aged 55 and over on the site than those aged 18-25, who only make up seven per cent of the site.” Salter, *supra* note 13.

## CONCLUSION

As state, local, and national governments grapple with the challenge of regulating sharing economy platforms, a varied patchwork of liberal and restrictive policies has emerged. In the case of Airbnb, some locales have embraced the company as a stimulus to the economy, while others, such as New York, have condemned the service. Airbnb's rapid rise and potential for commercial abuse do create genuine concerns for communities nationwide, and it is undeniable that some regulation, which Airbnb should welcome as a means to legitimacy, is necessary to mitigate this impact. But Airbnb's potential to reach new tourists, create competition with hospitality cartels, and generate considerable tax revenue should serve as word to the wise as policymakers consider on which end of the regulatory spectrum their locality will fall.

Regardless of the other factors regulators consider, it will be necessary for courts, legislatures, and city councils to revisit how room-sharing hosts fit within the traditional doctrinal framework. As this Note points out, landlord-tenant law simply fails to understand the relationship created in the prosumerist economy.<sup>205</sup> Landlord-tenant law assumes a relationship of economic exploitation and the creation of a legal interest in property, but room-sharing—even when the host is absent—is grounded on the concept of just that: sharing. Airbnb guests do not seek to protect their legal property interests against sophisticated landlords; instead, Airbnb users are unfamiliar, disinterested renters looking for a place to stay in a foreign destination.<sup>206</sup> The informational asymmetry between Airbnb hosts and their guests is best remedied not by landlord-tenant law, which imputes little responsibility to hosts to serve guests' interests, but by traditional innkeeper liability, which creates a responsibility for hosts to mitigate risks and warn guests of potential dangers.<sup>207</sup> Other regulations of Airbnb have already assumed the company's place in the hotel industry, and innkeeper liability for hosts would be consistent with this trend.

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205. *See supra* Part III.

206. *See supra* Part III.C.

207. *See supra* Part IV.

Innkeeper liability for all Airbnb transactions—even those over thirty days—also helps to avoid abuse by landlords seeking to make a quick buck at the expense of long-term tenants. If landlords want to abuse the Airbnb platform, they should have to assume greater liability for the guests staying on their property. Ultimately, innkeeper liability would be one tool to help mitigate some of the primary negative externalities of short-term rentals (for example, speculation and housing shortages).

Moving forward, Airbnb is approaching a new era of regulation that likely will reduce its value and slow its tremendous growth. Airbnb may fight some of this regulation, but consistent, predictable laws will be better for the company—and the sharing economy—in the long run. Airbnb is here to stay, and it is time for the law to catchup. It is time to recognize Airbnb's place in traditional legal doctrines, and to adjust doctrine where it does not address the sharing economy's unique characteristics. Treating hosts as micro-hoteliere is just one way the law can promote a safer, consumer-focused room-sharing economy while encouraging its potential.

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