

REDLIKING: WHEN REDLINING GOES ONLINE

ALLYSON E. GOLD*

ABSTRACT

Airbnb's structure, design, and algorithm create a website architecture that allows user discrimination to prevent minority hosts from realizing the same economic benefits from short-term rental platforms as White hosts, a phenomenon this Article refers to as "redliking." For hosts with an unused home, a spare room, or an extra couch, Airbnb provides an opportunity to create new income streams and increase wealth. Airbnb encourages prospective guests to view host photographs, names, and personal information when considering potential accommodations, thereby inviting bias, both implicit and overt, to permeate transactions. This bias has financial consequences. Empirical research on host earning rates found that White hosts earn significantly more than minorities, even when controlling for location, size, and amenities. Airbnb's algorithm augments the effects and propensity of individual user bias, creating a system wherein allegedly race-neutral variables serve as proxies for discrimination. Contemporary redliking perpetuates historic inequality related to housing wealth. In the early twentieth century,

* Allyson E. Gold is an Assistant Professor of Clinical Legal Instruction and Director of the Elder Law Clinic at the University of Alabama School of Law. This piece has benefitted tremendously from thoughtful feedback received at the New York University Law School Clinical Writers Workshop and the University of Alabama School of Law Faculty Workshop. Thank you to Courtney Cross, Richard Delgado, Amy Kimpel, Meredith Render, Florence Wagman Roisman, Kathryn Sabbeth, and Stacy Seicshnaydre, Jean Stefancic, and Fred Vars, for invaluable feedback and insights throughout the Article's development. I am grateful to Emma Merrill, Karsyn Keener, Patton Solowey, Evan Baines, Clay Kulesza, Taylor Lain, Spencer Leroux, Margaret Lowry, Davis McKinney, Gabrielle Bohannon, Thomas Rueter, Kayla Burris, Christian Lansinger, Caroline Lewis, Ethan Whitaker, Laura Love Feild, Savannah Kimble, Jeffrey Tyler, Joshua Wagner, Jenna Chaudari, Julia Sappey, and Cesare Piemarini for excellent editing.

redlining maps were used to justify withholding investments from Black communities. Today, redliking continues the practice of directing wealth to White communities, reinforces systemic real property barriers by depriving minority hosts of important revenue streams, and exacerbates the racial wealth gap.

This Article examines the liability of Airbnb and similar websites for discrimination experienced by minority short-term rental hosts. The ability of the Fair Housing Act and Civil Rights Act, laws originally enacted to abolish housing discrimination and protect minority consumers, to combat redliking is complicated by the fact that sites such as Airbnb serve multiple purposes; while guests use the platform to identify and book lodging, hosts use the site to advertise available accommodations. Looking to judicial interpretation of platform liability in the context of online speech, this Article proposes two approaches—a general-function test and a fragmented-function test—to determine website liability for discrimination against short-term rental hosts. Noting the limitations of the existing antidiscrimination legal framework, this Article argues that eradicating redliking requires incorporating lessons on platform design from behavioral economics as well as eliminating opportunities for website algorithms to amplify and operationalize user discrimination.

TABLE OF CONTENTS

| | |
|--|------|
| INTRODUCTION | 1844 |
| I. THE RACIAL WEALTH GAP | 1849 |
| A. <i>Housing and Wealth Accumulation</i> | 1851 |
| 1. <i>Redlining and Historic Housing Equity</i> | |
| <i>Discrimination</i> | 1852 |
| 2. <i>Housing Discrimination and the</i> | |
| <i>Racial Wealth Gap</i> | 1856 |
| B. <i>Short-Term Rental Platforms and Wealth</i> | |
| <i>Accumulation</i> | 1858 |
| II. UNDERSTANDING REDLIKING: CONSUMER DISCRIMINATION ON | |
| SHORT-TERM RENTAL PLATFORMS. | 1861 |
| A. <i>Facilitating Trust Online</i> | 1865 |
| B. <i>Economic Consequences of Guest Discrimination</i> | 1867 |
| III. ANTIDISCRIMINATION LAW AND REDLIKING | 1870 |
| A. <i>Platform Liability for Discrimination Against Short-Term</i> | |
| <i>Rental Guests</i> | 1873 |
| B. <i>Distinguishing Guests from Hosts</i> | 1880 |
| C. <i>Assessing Platform Operator Liability for</i> | |
| <i>Discrimination Against Hosts</i> | 1883 |
| 1. <i>General-Function Test</i> | 1883 |
| 2. <i>Fragmented-Function Test</i> | 1887 |
| 3. <i>State-Level Protections</i> | 1890 |
| IV. BEYOND THE TRADITIONAL ANTIDISCRIMINATION LAW | |
| APPROACH | 1893 |
| A. <i>Behavioral Economics Approach</i> | 1894 |
| B. <i>Algorithm-Based Approach</i> | 1903 |
| CONCLUSION | 1909 |

INTRODUCTION

In 2016, the average White family's wealth was more than ten times that of the average Black family.¹ This racial wealth gap is explained in part by access to capital in the form of real property. As Professor William A. Darity Jr. stated, "[t]he origins of the racial wealth gap start with the failure to provide the formerly enslaved with the land grants of 40 acres."² Housing equity comprises nearly "two-thirds of all wealth" for median households.³ For most families, "the racial wealth gap is primarily a housing wealth gap."⁴ American housing policy has created and perpetuated the housing wealth gap. Federal and local policies prevented Black families and other minorities from accessing housing wealth through a host of practices working in concert, such as zoning, restrictive covenants, discriminatory lending practices, and the creation of color-coded maps that classified neighborhoods based on their perceived risk, with green signifying the most desirable and red representing the least desirable areas.⁵ "[A]reas with even a small black population were

1. See Nick Noel, Duwain Pinder, Shelley Stewart & Jason Wright, *The Economic Impact of Closing the Racial Wealth Gap*, MCKINSEY & CO. (Aug. 13, 2019), <https://www.mckinsey.com/industries/public-and-social-sector/our-insights/the-economic-impact-of-closing-the-racial-wealth-gap#> [<https://perma.cc/QTH9-KRWE>] (noting that the racial wealth gap increased from \$100,000 in 1992 to \$154,000 in 2016); see also Edward N. Wolff, *Household Wealth Trends in the United States, 1962 to 2016: Has Middle Class Wealth Recovered?* 26-27, 42, 56 (Nat'l Bureau of Econ. Rsch., Working Paper No. 24085, 2017), https://www.nber.org/system/files/working_papers/w24085/w24085.pdf [<https://perma.cc/YS9N-HEB8>] (recalibrating all numbers to represent 2016 dollars). American family wealth has increased dramatically over the last half century. In 1962, the median American family had a net worth of \$57,100; by 2007, that number had more than doubled to \$118,600. *Id.* at 42. Even in the aftermath of the Great Recession, the median American family had a net worth of \$78,100. *Id.* White families, however, have disproportionately realized these gains. *Id.* at 56.

2. Trymaine Lee, *A Vast Wealth Gap, Driven by Segregation, Redlining, Evictions and Exclusion, Separates Black and White America*, N.Y. TIMES (Aug. 14, 2019), <https://www.nytimes.com/interactive/2019/08/14/magazine/racial-wealth-gap.html> [<https://perma.cc/C38U-EJL9>].

3. Janelle Jones, *The Racial Wealth Gap: How African-Americans Have Been Shortchanged Out of the Materials to Build Wealth*, ECON. POL'Y INST. (Feb. 13, 2017, 12:01 PM), <https://www.epi.org/blog/the-racial-wealth-gap-how-african-americans-have-been-shortchanged-out-of-the-materials-to-build-wealth/> [<https://perma.cc/PLE5-SMBJ>].

4. *Id.*

5. Ian Appel & Jordan Nickerson, *Pockets of Poverty: The Long-Term Effects of Redlining 6-7* (Oct. 15, 2016) (unpublished manuscript), <https://papers.ssrn.com/sol3/>

generally given [the] lowest rating.”⁶ Based on these maps, the term *redlining* became shorthand for “deeming certain neighborhoods as ‘hazardous’ and denying mortgages there as a matter of policy, regardless of the applicant’s means.”⁷ Redlining baked racism into the housing market, affecting the actions of individual actors. The private market simultaneously reinforced these systemic barriers, directing wealth to White neighborhoods and withholding it from Black communities.⁸

Today, short-term rental platforms replicate historic redlining practices by allowing discrimination to permeate online transactions. Airbnb, the largest short-term rental provider in the world, allows individual hosts to market available space—a spare room, guest suite, or whole home—to prospective short-term guests.⁹ Airbnb uses photos of the space, as well as demographic information about the host and guest, to facilitate the transaction on its platform.¹⁰ Airbnb’s algorithm suggests potential accommodations based on a number of factors, such as previous guest engagement with the listing.¹¹ Based on these recommendations, guests can decide to book immediately or click an icon to “like” the listing and save it for later consideration.¹² Algorithms can uncover latent bias, which results in a “supposedly neutral system” that, in actuality, operationalizes discrimination.¹³ Together, the user information included on the platform combined with the algorithms that determine what

papers.cfm?abstract_id=2852856 [https://perma.cc/9QQQ-52XN].

6. *Id.* at 7.

7. Eliza Wallace, *Addressing Racial Inequality by Investigating Mortgage Denials*, POLICYMAP (Jan. 16, 2020), <https://www.policymap.com/2020/01/addressing-racial-inequality-by-investigating-mortgage-denials/> [https://perma.cc/V4M5-WSWJ].

8. See Michela Zonta, *Racial Disparities in Home Appreciation*, CTR. FOR AM. PROGRESS (July 15, 2019, 12:01 AM), <https://www.americanprogress.org/issues/economy/reports/2019/07/15/469838/racial-disparities-home-appreciation/> [https://perma.cc/4XCL-NV4E].

9. *What Is Airbnb? 12 Questions Answered on the World’s Fastest-Growing Holiday Website*, BT (Sept. 1, 2018, 3:38 PM), <https://perma.cc/7JDD-L7CH>.

10. *See id.*

11. *How Airbnb Search Works*, AIRBNB RES. CTR. (Mar. 5, 2020), <https://www.airbnb.com/resources/hosting-homes/a/how-airbnb-search-works-44#:~:text=Airbnb%20search%20basics,to%20bookings%20in%20the%20past.> [https://perma.cc/M82K-TA8W].

12. *How Do I Manage My List of Saved Homes?*, AIRBNB HELP CTR., <https://www.airbnb.com/help/article/1236/how-do-i-manage-my-list-of-saved-homes> [https://perma.cc/6NRT-SA7Y].

13. ALEX ROSENBLAT, *UBERLAND: HOW ALGORITHMS ARE REWRITING THE RULES OF WORK* 112-13 (2018).

listings are displayed creates a system wherein more economic opportunities are directed to White hosts.

The use of redlining maps in the early twentieth century prohibited minorities from accumulating wealth and financial security through homeownership by denying loans to Black neighborhoods as well as excluding minority homeowners from purchasing in White neighborhoods.¹⁴ Today, Airbnb's structure, design, and algorithm create a website architecture that allows user discrimination to prevent minorities from realizing the same economic benefits from short-term rental hosting, a phenomenon that this Article refers to as *redliking*.

Airbnb has well-documented discrimination issues against guests on its platform. Researchers found that “applications from guests with distinctively African American names are 16 percent less likely to be accepted relative to identical guests with distinctively white names.”¹⁵ The results were constant even when controlling for other factors, including sex of the host, whether the property was shared or unhosted, experience level of the host, diversity of the neighborhood, and price of the listing.¹⁶ In recognition of this discrimination, Airbnb changed its booking policy in October 2018 to no longer allow hosts the opportunity to access guest photos before accepting a request for accommodation.¹⁷

While Airbnb made some changes to its booking practices to limit the ability of hosts to discriminate against guests, discrimination by guests against hosts remains an issue. Discrimination against hosts of color affects rates of booking and average asking rents on short-term rental platforms.¹⁸ As documented in a Harvard Business School study, non-Black hosts in New York City are able to charge

14. Appel & Nickerson, *supra* note 5, at 1-3.

15. Benjamin Edelman, Michael Luca & Dan Svirsky, *Racial Discrimination in the Sharing Economy: Evidence from a Field Experiment*, 9 AM. ECON. J.: APPLIED ECON. 1, 1-2 (2017) (“To test for discrimination, we conduct a field experiment in which we inquire about the availability of roughly 6,400 listings on Airbnb across five cities. Specifically, we create guest accounts that differ by name but are otherwise identical ... one distinctively African American and the other distinctively white.”).

16. *Id.* at 2.

17. *Update on Profile Photos*, AIRBNB NEWSROOM (Oct. 22, 2018), <https://news.airbnb.com/update-on-profile-photos/> [<https://perma.cc/7A44-99QV>].

18. See Allyson E. Gold, *Community Consequences of Airbnb*, 94 WASH. L. REV. 1577, 1599 (2019).

12 percent more than Black hosts, even when controlling for location, accommodation characteristics, and quality.¹⁹ On average, Black hosts received \$107 per night for every \$144 per night received by non-Black hosts.²⁰ Research on host earning rates in Oakland and Berkeley, California, likewise found discrimination against minority hosts, with Asian hosts earning 20 percent less than White hosts.²¹

Discrimination against hosts has financial consequences. Short-term rental platforms, such as Airbnb, provide hosts with the opportunity to increase their income and wealth.²² This is accomplished through two channels. First, a host creates a new income stream by listing a property on a short-term rental site.²³ Second, creating a new source of income increases the value of the underlying real estate.²⁴ Home-sharing on short-term rental platforms can be transformative for individual hosts. By creating an additional revenue source, home-sharing allows an individual to realize immediate financial gains while simultaneously increasing the equity of the core asset.²⁵ Airbnb's annual sales surpassed those of nearly all hotels in 2018, including legacy companies such as Hilton, IHG, and Hyatt.²⁶ As Airbnb continues to grow, so too will the financial benefits of hosting on the platform. However, without intervention,

19. Benjamin Edelman & Michael Luca, *Digital Discrimination: The Case of Airbnb.com* § 1 (Harv. Bus. Sch., Working Paper No. 14-054, 2014), <http://hbswk.hbs.edu/item/digital-discrimination-the-case-of-airbnb-com> [<https://perma.cc/D5TK-V4L3>]. The study was conducted in 2014, prior to New York City's regulation and the subsequent curtailing of Airbnb listings. See Gold, *supra* note 18, at 1626.

20. Edelman & Luca, *supra* note 19, § 4.2.

21. David Wang, Stephen Xi & John Gilheany, *The Model Minority? Not on Airbnb.com: A Hedonic Pricing Model to Quantify Racial Bias Against Asian Americans*, TECH. SCI. (Sept. 1, 2015), <https://techscience.org/a/2015090104/> [<https://perma.cc/DFD6-6B25>].

22. Gold, *supra* note 18, at 1585-87. Further, depending on the jurisdiction, renters as well as homeowners may be able to act as hosts on short-term rental platforms. See *id.* at 1608.

23. *Id.* at 1585 (noting, however, that "profitability ... can vary widely depending on its location as well as the expenses unique to that property").

24. *Id.* at 1585-87.

25. See *id.*

26. Only Marriott, the largest hotel chain in the world, surpassed Airbnb in 2018 sales. Kate Gessner, *Ahead of IPO, Airbnb's Consumer Sales Surpass Most Hotel Brands*, SECOND MEASURE (Mar. 25, 2019), <https://secondmeasure.com/datapoints/airbnb-sales-surpass-most-hotel-brands/> [<https://perma.cc/VF82-GAMT>]; see Halah Touryalai, *World's Largest Hotels 2019: Marriott Leads Again, Hyatt & Accor Rise*, FORBES (May 15, 2019, 5:50 PM), <https://www.forbes.com/sites/halahtouryalai/2019/05/15/worlds-largest-hotels-2019/#6588e977796d> [<https://perma.cc/XW99-9MEV>].

redliking will perpetuate historic inequity related to housing, thereby contributing to and exacerbating the racial wealth gap.

This Article examines legal recourse for minority hosts that experience bias on short-term rental platforms. Other scholars have studied the legal implications of discrimination against short-term rental guests.²⁷ Likewise, others have evaluated tort²⁸ and consumer law²⁹ interventions to address the ways in which websites manipulate information about individual users. However, none have analyzed how the design of short-term rental platforms allows for discrimination against minority hosts, perpetuates the racial wealth gap, and parallels historic housing equity discrimination. This Article fills that gap.

In developing these points, this Article proceeds in four parts. Part I defines the racial wealth gap and discusses the role of housing discrimination in creating and exacerbating wealth inequality. It situates contemporary discrimination on short-term rental platforms as a continuation of historic housing inequality, focusing on early twentieth-century redlining practices. Part II defines redliking—the infrastructure that permits discrimination against minority hosts on short-term rental platforms—and how this contemporary discrimination and its relationship to real property parallel historic redlining practices. This Part describes the importance of facilitating trust in online transactions and how this creates opportunities for bias to infiltrate transactions. In doing so, it examines the attendant financial consequences. Part III assesses the ability of antidiscrimination law originally enacted to abolish racist policies like redlining to combat contemporary redliking. This Part begins by analyzing the applicability of the Fair Housing Act and Civil Rights Act to *guests* who experience discrimination on short-term rental platforms. It then distinguishes the services Airbnb provides to guests from those it provides to hosts. In light of the platform's dual role, this Part proposes two approaches—a general-function test and a fragmented-function test—to determine

27. See, e.g., Nancy Leong & Aaron Belzer, *The New Public Accommodations: Race Discrimination in the Platform Economy*, 105 GEO. L.J. 1271, 1301 (2017); Norrinda Brown Hayat, *Accommodating Bias in the Sharing Economy*, 83 BROOK. L. REV. 613, 614-16 (2018).

28. See Michal Lavi, *Evil Nudges*, 21 VAND. J. ENT. & TECH. L. 1, 4-5 (2018).

29. See Ryan Calo & Alex Rosenblat, *The Taking Economy: Uber, Information, and Power*, 117 COLUM. L. REV. 1623, 1627-28, 1631 (2017).

platform operator liability for discrimination against minority short-term rental hosts under the Civil Rights Act. This Part also discusses remedies under state law. Recognizing the limitations of the existing antidiscrimination legal framework, Part IV proposes incorporating lessons from behavioral economics on choice architecture as well as reform of the algorithms powering short-term rental platforms to prevent face-neutral variables from serving as proxies for discrimination against minority hosts.

I. THE RACIAL WEALTH GAP

The racial wealth gap refers to the “difference in wealth holdings between the median household among populations grouped by race or ethnicity.”³⁰ According to the Survey of Income and Program Participation (SIPP), Black households have less than seven cents of wealth for every dollar held by White households.³¹ White households living near the poverty line typically have \$18,000 in wealth; however, similarly situated Black households typically have zero wealth.³²

These differences persist at the other end of the financial spectrum. At the 99th percentile, the average Black family has wealth of \$1,575,000; the average White family in the 99th percentile, in contrast, holds over \$12 million.³³ Black families and individuals comprise 13.4 percent of the entire U.S. population,³⁴ yet they own less than 3 percent of the country’s wealth.³⁵ This has

30. LAURA SULLIVAN, TATJANA MESCHEDÉ, LARS DIETRICH, THOMAS SHAPIRO, AMY TRAUB, CATHERINE RUETSCHLIN & TAMARA DRAUT, DEMOS, *THE RACIAL WEALTH GAP: WHY POLICY MATTERS* 7 (2015), <https://www.demos.org/research/racial-wealth-gap-why-policy-matters> [<https://perma.cc/T2GB-5BY7>].

31. WILLIAM DARITY JR., DARRICK HAMILTON, MARK PAUL, ALAN AJA, ANNE PRICE, ANTONIO MOORE & CATERINA CHIOPRIS, SAMUEL DUBOIS COOK CTR. ON SOC. EQUITY, *WHAT WE GET WRONG ABOUT CLOSING THE RACIAL WEALTH GAP 2* (2018), <https://socialequity.duke.edu/portfolio-item/what-we-get-wrong-about-closing-the-racial-wealth-gap/> [<https://perma.cc/E3DV-F2BE>].

32. *Id.*

33. Antonio Moore & Matt Bruenig, *Without the Family Car Black Wealth Barely Exists*, PEOPLE’S POL’Y PROJECT (Sept. 30, 2017), <https://www.peoplespolicyproject.org/2017/09/30/without-the-family-car-black-wealth-barely-exists/> [<https://perma.cc/GXU4-C6TR>].

34. *Quick Facts*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/table/US/PST045218> [<https://perma.cc/T3YH-G9YR>].

35. DARITY ET AL., *supra* note 31, at 3.

significant effects on intergenerational wealth accumulation. One of the primary ways that wealth is accumulated and transferred is through inheritance.³⁶ In general, “financial gifts from parents to adult children comprise at least 20 percent of wealth, and inheritances account for up to 50 percent of total wealth in the United States.”³⁷ If Black American families hold significantly less wealth than their White counterparts, there is less wealth to pass to their beneficiaries, which perpetuates wealth inequality in subsequent generations.³⁸

Analysis of wealth accumulation between 1983 and 2013 underscores the magnitude of racial wealth disparities in the United States. During that time, average White family wealth grew by 84 percent, or 1.2 times greater than the rate of wealth growth for Latinos and three times the rate of wealth growth for Black individuals and families.³⁹ If wealth continues to accumulate along racial lines at the same rates of growth, “it would take Black families 228 years to amass the same amount of wealth White families have today.”⁴⁰ The effects of wealth compound over time. Wealth can be leveraged to provide for educational opportunities, pay for family health needs, and weather economic hardship.⁴¹ For example, “[f]amily wealth is an important predictor of both college

36. *Id.* (“While income primarily is earned in the labor market, wealth is built primarily by the transfer of resources across generations, locking-in the deep divides we observe across racial groups.”); Nancy A. Denton, *The Role of Residential Segregation in Promoting and Maintaining Inequality in Wealth and Property*, 34 *IND. L. REV.* 1199, 1199 (2001).

37. Tatjana Meschede, Joanna Taylor, Alexis Mann & Thomas Shapiro, “*Family Achievements?: How a College Degree Accumulates Wealth for Whites and Not for Blacks*,” 99 *FED. RES. BANK ST. LOUIS REV.* 121, 124 (2017); see Samuel Bowles & Herbert Gintis, *The Inheritance of Inequality*, 16 *J. ECON. PERSPS.* 3, 4 (2002) (“[R]ecent research shows that the [previous] estimates of high levels of intergenerational mobility were artifacts of two types of measurement error: mistakes in reporting income, particularly when individuals were asked to recall the income of their parents, and transitory components in current income uncorrelated with underlying permanent income.”).

38. See Meschede et al., *supra* note 37, at 124-25 (“White households are more likely to receive inheritances and financial gifts than their counterparts of color ... and in larger amounts.” (citation omitted)).

39. DEDRICK ASANTE-MUHAMMED, CHUCK COLLINS, JOSH HOXIE & EMANUEL NIEVES, *THE EVER-GROWING GAP: WITHOUT CHANGE, AFRICAN-AMERICAN AND LATINO FAMILIES WON’T MATCH WHITE WEALTH FOR CENTURIES 5* (2016), https://ips-dc.org/wp-content/uploads/2016/08/The-Ever-Growing-Gap-CFED_IPS-Final-1.pdf [<https://perma.cc/FEL4-TB35>].

40. *Id.*

41. Maury Gittleman & Edward N. Wolff, *Racial Differences in Patterns of Wealth Accumulation*, 39 *J. HUM. RES.* 193, 194 (2004).

attendance and college completion.”⁴² Reflecting this, status is commonly a multigenerational trait; unlike income, parents can transfer wealth to their children via planning documents or even intestate succession.⁴³ For these reasons, parental economic status is typically replicated and entrenched in future generations.⁴⁴

A. *Housing and Wealth Accumulation*

For many, home acquisition and appreciation are crucial components of personal wealth. According to the Harvard University Joint Center for Housing Studies, five factors underlie the relationship between homeownership and wealth: forced savings through mortgage amortization, asset appreciation over time, receiving the benefit of leveraged financing, tax benefits, and hedging against inflation.⁴⁵ In addition, homeowners may have the ability to increase their income and wealth by making real property available on short-term rental platforms.⁴⁶ This is accomplished through two channels. First, a homeowner-host creates a new income stream by listing a

42. Meschede et al., *supra* note 37, at 122-23 (“[T]he racial wealth gap plays a significant role in the opportunities and barriers young people of color face. White students may capitalize on family resources to launch stable careers and continue wealth accumulation, while Black students may start out with fewer resources, resulting in lower long-term wealth returns.... [S]tudents whose families experienced an increase in housing wealth just before reaching college age are more likely to enroll in college, attend higher-quality universities, and complete college, particularly students from low-income families. Black families have lower homeownership rates, lower average home values, and were hit harder by the immediate and long-term impacts of the Great Recession, making it harder for them to use housing wealth to support higher education.” (citations omitted)).

43. RICHARD ROTHSTEIN, *THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA* 179 (2017).

44. *Id.*; MELVIN L. OLIVER & THOMAS M. SHAPIRO, *BLACK WEALTH/WHITE WEALTH: A NEW PERSPECTIVE ON RACIAL INEQUALITY* 36-37 (1995) (“The major reason that blacks and whites differ in their ability to accumulate wealth is ... that the structure of investment opportunity that blacks and whites face has been dramatically different.”).

45. Christopher E. Herbert, Daniel T. McCue & Rocio Sanchez-Moyano, *Is Homeownership Still an Effective Means of Building Wealth for Low-Income and Minority Households? (Was It Ever?)* 3-5 (2013) (on file with the Harvard University Joint Center for Housing Studies), <https://www.jchs.harvard.edu/sites/default/files/hbtl-06.pdf> [<https://perma.cc/ZBV3-7MEK>].

46. *See* Gold, *supra* note 18, at 1579-80. The degree to which a homeowner can earn additional income and increase the property value of her holding will depend on regulations governing the realty in that particular area. Further, depending on the jurisdiction, renters as well as homeowners may be able to act as hosts on short-term rental platforms. *See id.* at 1604-05, 1608.

property on a short-term rental site.⁴⁷ Second, creating a new source of income increases the value of the underlying real estate.⁴⁸ The importance of real estate to the racial wealth gap is the result of more than a century's worth of government policies and private sector action.

1. *Redlining and Historic Housing Equity Discrimination*

While a full history of housing inequality is beyond the scope of this Article,⁴⁹ a brief summary provides the context necessary to understand how the issue of discrimination on short-term rental platforms perpetuates historic inequality and why it is relevant when examining contemporary legal frameworks. “Individual prejudice has been with us for generations, but as the Commission on Race and Housing pointed out some years ago: ‘It is the real estate brokers, builders, and the mortgage finance institutions which translate prejudice into discriminatory action.’”⁵⁰ The federal government had an active role in creating, facilitating, and promoting housing discrimination. In 1933, in response to a massive economic downturn that resulted in widespread foreclosure, the federal government created the Home Owners’ Loan Corporation (HOLC).⁵¹ HOLC did a number of things to stabilize the housing market. First, it helped homeowners avoid default by refinancing

47. *Id.* at 1580, 1585 (“[A]s the home’s potential to generate additional income rises, its total value as an asset grows, leading to increased home equity for the host....[However, the] profitability of an individual short-term rental can vary widely depending on its location as well as the expenses unique to that property.”).

48. *Id.* at 1580. While not the focus of this Section, it is important to note that renters are often prevented from realizing economic gains created by short-term rental hosting. In some jurisdictions, participation in short-term rental markets is limited to homeowners. In West Hollywood, California, for example, “homesharing is prohibited in ... ‘any rental unit.’” *Id.* at 1619 (quoting WEST HOLLYWOOD, CAL. MUNICIPAL CODE § 5.66.020 (2019)). This itself affects the racial wealth gap, as decades of discriminatory practices affecting access to homeownership opportunities have resulted in minorities being over-represented among renters.

49. For a detailed history of housing discrimination in the United States, see generally ROTHSTEIN, *supra* note 43.

50. U.S. COMM’N ON C.R., UNDERSTANDING FAIR HOUSING, 3, 5 (1973) (“The housing industry, aided and abetted by Government, must bear the primary responsibility for the legacy of segregated housing.... Government and private industry came together to create a system of residential segregation.”).

51. Gregory Sharp & Matthew Hall, *Emerging Forms of Racial Inequality in Homeownership Exit, 1968-2009*, 61 SOC. PROBS. 427, 428 (2014).

their mortgages and also provided low-interest loans to prospective homebuyers, many of whom had already lost their homes to foreclosure in the Great Depression and needed replacement housing.⁵² Second, HOLC pioneered an appraisal system “to evaluate the risks associated with loans made to specific urban neighborhoods.”⁵³ HOLC used four categories to rate neighborhoods, with ethnic and minority neighborhoods designated in red, the lowest category.⁵⁴ Invariably, Black neighborhoods, “even those with small black percentages,” were placed in the red, a practice referred to as redlining.⁵⁵ “HOLC did not invent these standards of racial worth in real estate—they were already well established by the 1920s—it bureaucratized them and applied them on an exceptional scale[,] ... len[ding] the power, prestige, and support of the federal government to the systematic practice of racial discrimination in housing.”⁵⁶

52. DOUGLAS S. MASSEY & NANCY A. DENTON, *AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS* 51 (1993) (“HOLC was the first government-sponsored program to introduce, on a mass scale, the use of long-term, self-amortizing mortgages with uniform payments.”); *see also* PATRICK SHARKEY, *STUCK IN PLACE: URBAN NEIGHBORHOODS AND THE END OF PROGRESS TOWARD RACIAL EQUALITY* 59 (2013) (“The HOLC was created as a means to provide low-interest refinancing to families in danger of losing their homes during the Depression, while also funding loans to allow some families to reacquire homes lost to foreclosure.”).

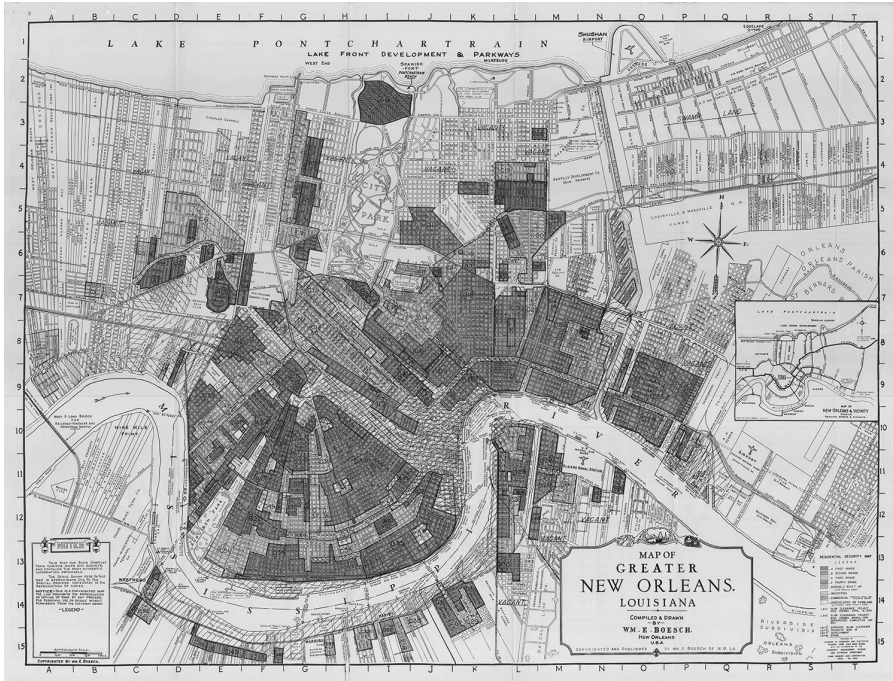
53. MASSEY & DENTON, *supra* note 52, at 51.

54. *Id.*

55. *Id.* at 52 (“HOLC underwriters were far more concerned about the location and movement of blacks than about any other demographic trend.... [A] confidential 1941 HOLC survey of real estate prospects in the St. Louis area ... repeatedly mentions ‘the rapidly increasing Negro population’ and the consequent ‘problem in the maintenance of real estate values.’”).

56. *Id.*

Figure 1. Redlined Map of New Orleans with Neighborhoods Color-Coded by Alleged Risk Level⁵⁷



HOLC's redlining maps were adopted by the nascent Federal Housing Administration (FHA). Formed in 1934, the FHA was instrumental in increasing homeownership rates in the United States by expanding access to mortgages.⁵⁸ As part of its mortgage underwriting/backing service, the FHA provided home appraisals while using an Underwriting Manual. The first Manual instructed appraisers that “[i]f a neighborhood is to retain stability it is necessary that properties shall continue to be occupied by the same social and racial classes. A change in social or racial occupancy

57. Robert K. Nelson et al., *Mapping Inequality: Redlining in New Deal America*, AMERICAN PANORAMA: AN ATLAS OF U.S. HIST., <https://dsl.richmond.edu/panorama/redlining/#loc=5/39.1/-94.58> [<https://perma.cc/T7WQ-8JNA>] (this map was developed by teams at the University of Richmond, Virginia Tech, the University of Maryland, and Johns Hopkins, as well as with the assistance of others at UNC Chapel Hill, UC Irvine, Duke, and UC San Diego).

58. Sharp & Hall, *supra* note 51, at 428.

generally contributes to instability and a decline in values.”⁵⁹ “All mortgages on properties protected against [such] unfavorable influences, to the extent protection is possible, will obtain a high rating.”⁶⁰

In addition to adopting HOLC’s redlining maps, the FHA endorsed racially restrictive covenants in real-estate contracts between private parties,⁶¹ as a means of ensuring the racial stability of the neighborhood,⁶² racially restrictive covenants worked in concert with redlining to ensure that no minorities could enter, and impair the ratings of, White neighborhoods. This continued until the practice was declared unconstitutional in *Shelley v. Kraemer*.⁶³ Realizing that minority families, particularly Black families, continued to experience persistent discrimination and “the prevailing patterns of racial segregation,”⁶⁴ Congress passed the Fair

59. FED. HOUS. ADMIN., UNDERWRITING MANUAL: UNDERWRITING AND VALUATION PROCEDURE UNDER TITLE II OF THE NATIONAL HOUSING ACT ¶ 937 (1938), <https://www.huduser.gov/portal/sites/default/files/pdf/Federal-Housing-Administration-Underwriting-Manual.pdf> [<https://perma.cc/CM99-49XP>].

60. See ROTHSTEIN, *supra* note 43, at 65 (alteration in original) (quoting FED. HOUS. ADMIN., *supra* note 59).

61. Sharp & Hall, *supra* note 51, at 428.

62. SHARKEY, *supra* note 52, at 60 (“The FHA manuals actually encouraged the use of restrictive covenants as a means of ensuring the stability of the neighborhood. As a consequence, the home ownership boom never reached nonwhite populations in America’s cities.” (footnote omitted)).

63. 334 U.S. 1, 20-21 (1948) (“We hold that in granting judicial enforcement of the restrictive agreements in these cases, the States have denied petitioners the equal protection of the laws and that, therefore, the action of the state courts cannot stand. We have noted that freedom from discrimination by the States in the enjoyment of property rights was among the basic objectives sought to be effectuated by the framers of the Fourteenth Amendment. That such discrimination has occurred in these cases is clear. Because of the race or color of these petitioners they have been denied rights of ownership or occupancy enjoyed as a matter of course by other citizens of different race or color.”); see also FROM TENEMENTS TO THE TAYLOR HOMES: IN SEARCH OF AN URBAN HOUSING POLICY IN TWENTIETH-CENTURY AMERICA 212-13 (John F. Bauman, Roger Biles & Kristin M. Szylvian eds., 2000). Despite the fact that *Shelley* was decided in 1948, “[i]n substance, the [Federal Housing Administration] agreed to render ineligible for mortgage insurance all property bound by racially restrictive covenants recorded after February 15, 1950.... The intent ... was ‘to bring the mortgage insurance operations of the [FHA] fully into line with the policy underlying the recent decisions of the Supreme Court ... in the covenant cases.’” *Id.*

64. U.S. NAT’L ADVISORY COMM’N ON CIV. DISORDERS, KERNER REPORT 1, 29 (Princeton Univ. Press 2016) (1968) (declaring that “[o]ur nation is moving toward two societies, one black, one white—separate and unequal”); see also SHARKEY, *supra* note 52, at 53 (describing how President Johnson assembled the Kerner Commission “to investigate the causes of the urban riots that ripped through America’s cities over the previous summer,” and how the

Housing Act in 1968.⁶⁵ Under the law, discrimination in the sale and rental of housing, mortgage lending, and other practices was prohibited.⁶⁶

After World War II, the Servicemen's Readjustment Act provided returning servicemen with a host of benefits, including mortgage guarantees, through the newly created Veterans' Administration (VA).⁶⁷ The VA quickly adopted the FHA's Underwriting Manual in its own appraisals and lending decisions.⁶⁸ "By 1950, the FHA and VA together were insuring half of all new mortgages nationwide."⁶⁹ Given the ubiquity of redlining maps, minority homebuyers were excluded from government programs created to help the new burgeoning middle class acquire equity and wealth. Redlining made Black borrowers ineligible for home loans in Black neighborhoods and also prevented them from entering White neighborhoods, which concentrated minority populations within distinct geographic areas. Entrenched and pervasive segregation following this period was "the direct result of an unprecedented collaboration between local and national government."⁷⁰

2. *Housing Discrimination and the Racial Wealth Gap*

The racial wealth gap is in part explained by access to capital in the form of real property. Home equity is the largest asset for most

Commission "recommended both fair housing legislation and an active policy to promote the construction of affordable housing outside of the ghetto").

65. Pub. L. No. 90-284, 82 Stat. 73 (codified as amended at 42 U.S.C. § 3601).

66. *Housing Discrimination Under the Fair Housing Act*, U.S. DEPT OF HOUS. & URB. DEV., https://www.hud.gov/program_offices/fair_housing_equal_opp/fair_housing_act_overview#_What_Is_Prohibited? [<https://perma.cc/QG3G-E3VW>].

67. Pub. L. No. 346, 58 Stat. 284 (codified as amended at 38 U.S.C. § 101). Minorities were excluded from and women were unable to access FHA benefits from the VA. Florence Wagman Roisman, *National Ingratitude: The Egregious Deficiencies of the United States' Housing Programs for Veterans and the "Public Scandal" of Veterans' Homelessness*, 38 IND. L. REV. 103, 147-50 (2005) ("The relative inability of women to use the housing program was due to several causes.... Many women who served in various units associated with the military were not accorded veteran status.... Moreover, even women who were accorded veteran status were less likely than men to secure benefits counseling from veterans' organizations and were, for other reasons, less likely to claim veterans' status.").

68. ROTHSTEIN, *supra* note 43, at 70.

69. *Id.*

70. MASSEY & DENTON, *supra* note 52, at 57.

families.⁷¹ Housing equity comprises nearly two-thirds of all wealth for most median households.⁷² For most families, “the racial wealth gap is primarily a housing wealth gap.”⁷³ “This enormous difference in (wealth) is almost entirely attributable to federal housing policy implemented through the 20th century.”⁷⁴

Policies and laws that prevented Black families “from acquiring land, created redlining and restrictive covenants, and encouraged lending discrimination reinforced the racial wealth gap for decades.”⁷⁵ Real estate discrimination and its resulting segregation, coupled with “systematic disinvestment in black neighborhoods through lending discrimination” prevented Black families from obtaining homes and accumulating wealth “during the long, postwar economic boom.”⁷⁶ The effects of these policies affected individuals and families in subsequent generations. “African American families today, whose parents and grandparents were denied participation in the equity-accumulating boom of the 1950s and 1960s, have great difficulty catching up now.”⁷⁷ Moreover, even after legislation, such as the Fair Housing Act and Civil Rights Act, prohibited it, housing

71. THOMAS SHAPIRO, TATJANA MESCHEDÉ & SAM OSORO, INST. ON ASSETS & SOC. POL’Y, *THE ROOTS OF THE WIDENING RACIAL WEALTH GAP: EXPLAINING THE BLACK-WHITE ECONOMIC DIVIDE 3* (2013), <https://heller.brandeis.edu/iasp/pdfs/racial-wealth-equity/racial-wealth-gap/roots-widening-racial-wealth-gap.pdf> [https://perma.cc/YK6H-C3QR] (“Homes are the largest investment that most American families make and by far the biggest item in their wealth portfolio.”). See generally Gittleman & Wolff, *supra* note 41.

72. LAWRENCE MISHÉL, JOSH BIVENS, ELISE GOULD & HEIDI SHIERHOLZ, *THE STATE OF WORKING AMERICA* 393 (12th ed. 2012) (“While stock market fluctuations garner much attention, housing equity is a far more important form of wealth for most households.”).

73. Jones, *supra* note 3; Meghan Kuebler & Jacob S. Rugh, *New Evidence on Racial and Ethnic Disparities in Homeownership in the United States from 2001 to 2010*, 42 SOC. SCI. RSCH. 1357, 1358 (2013) (“Even after controlling for socioeconomic differences, in most cases minorities in the U.S. exhibit lower levels of homeownership than do non-Hispanic whites. Owing largely to the white/nonwhite gap in homeownership, substantial racial and ethnic differences in wealth persist across numerous studies and periods. Disparities in wealth and capital accumulation have been historically tied to racial disparities in homeownership and have reinforced one another.” (citations omitted)).

74. Pedro da Costa, *Housing Discrimination Underpins the Staggering Wealth Gap Between Blacks and Whites*, ECON. POL’Y INST. (Apr. 8, 2019, 8:00 AM) (alteration in original), <https://www.epi.org/blog/housing-discrimination-underpins-the-staggering-wealth-gap-between-blacks-and-whites/> [https://perma.cc/SB3Z-FP84].

75. Jones, *supra* note 3.

76. Justin P. Steil, Len Albright, Jacob S. Rugh & Douglas S. Massey, *The Social Structure of Mortgage Discrimination*, 33 HOUS. STUD. 759, 761 (2018).

77. ROTHSTEIN, *supra* note 43, at 185.

discrimination and segregation persisted and contributed to the racial wealth gap.⁷⁸ For example, in the decade leading up to the Great Recession, Black and Latino borrowers disproportionately received “high-cost, high-risk mortgages that later pushed borrowers into foreclosure and repossession.”⁷⁹

The effects of discriminatory housing policies and practices compound over time. Analysis of American household wealth between 1984 and 2009—a period of twenty-five years—found that homeownership accounted for 27 percent of the difference in relative wealth growth between Black and White families during that time.⁸⁰ Given the importance of homeownership and equity to wealth accumulation, it is very difficult for Black families that were excluded from the mid-twentieth-century housing equity boom to close the racial wealth gap.⁸¹

B. Short-Term Rental Platforms and Wealth Accumulation

Short-term rental platforms are online websites that connect hosts, those with an interest in a property, with prospective guests, those seeking temporary accommodations. While there are several such platforms, including Homeaway, VRBO, Flipkey, and Noirbnb, none have a greater market share than Airbnb. Founded in 2008 in San Francisco,⁸² today Airbnb boasts hosts in more than 220 countries and regions around the world.⁸³ Sales on Airbnb have grown exponentially since its founding in 2008.⁸⁴ In 2018, Airbnb

78. See Steil et al., *supra* note 76, at 761.

79. *Id.* at 772.

80. SHAPIRO ET AL., *supra* note 71, at 2-3; see also ROTHSTEIN, *supra* note 43, at 184-85 (“Median white family income is now about \$60,000, while median black family income is about \$37,000—about 60 percent as much. You might expect that the ratio of black to white household wealth would be similar. But median white household wealth ... is about \$134,000, while median black household wealth is about \$11,000—less than 10 percent as much. Not all of this enormous difference is attributable to the government’s racial housing policy, but a good portion of it certainly is.”).

81. ROTHSTEIN, *supra* note 43, at 185.

82. *What Is Airbnb and How Does It Work?*, AIRBNB: HELP CTR., <https://www.airbnb.com/help/article/2503/what-is-airbnb-and-how-does-it-work> [<https://perma.cc/UWB6-2R5D>].

83. *About Us*, AIRBNB NEWSROOM, <https://news.airbnb.com/en-in/about-us/> [<https://perma.cc/CS23-4R2V>].

84. Rani Molla, *American Consumers Spent More on Airbnb than on Hilton Last Year*, VOX (Mar. 25, 2019, 8:17 AM), <https://www.vox.com/2019/3/25/18276296/airbnb-hotels-hilton->

sales surpassed that of legacy hotel companies including Hilton, IHG, Hyatt, and Wyndham, among others.⁸⁵ Only Marriott, “the world’s largest hotel company,” had greater sales in 2018.⁸⁶ With this growth, Airbnb clinched nearly 20 percent of the U.S. consumer lodging market.⁸⁷

On Airbnb, anyone can be a host, and it is free to sign up and list your space.⁸⁸ Once a host publishes a listing on the platform, guests can request to book the accommodation. Hosts control the nightly rates for their listings and can create custom pricing for certain days, weeks, or times of the year.⁸⁹ The guest pays money to Airbnb, which then releases payout to the host roughly twenty-four hours after the guest’s scheduled check-in time.⁹⁰

Property owners who elect to become hosts on short-term rental sites have the opportunity to increase their wealth through multiple channels. First, participation in the short-term rental market creates a new income stream.⁹¹ The net profitability of an individual listing will vary depending on underlying costs associated with the property, such as rent or mortgage, utilities, and capital expenses.⁹² However, the average Airbnb host earns 81 percent of the rent by listing one bedroom of a two-bedroom property on Airbnb.⁹³ While profitability may vary, studies suggest that listing a home on the short-term rental market can be more profitable than the more

marriott-us-spending [https://perma.cc/Z8SJ-KG58] (“The data shows roughly 30 percent growth [in 2018] in US consumer spending on Airbnb.”).

85. Gessner, *supra* note 26 (“[Airbnb’s] annual sales surpassed Hilton’s in 2018, based on data from U.S. travelers that excludes business spending.”).

86. Molla, *supra* note 84.

87. Gessner, *supra* note 26 (“Airbnb held 19 percent of market share nationwide amongst the biggest hotel chains and HomeAway, [though] its performance varied widely by state.”).

88. *What Is Airbnb and How Does It Work?*, *supra* note 82.

89. *How Do I Set a Custom Price for Specific Nights, Weeks, or Months?*, AIRBNB HELP CTR., <https://www.airbnb.com/help/article/503/how-do-i-set-a-custom-price-for-specific-nights-weeks-or-months> [https://perma.cc/M6AH-LFCS].

90. *When Will I Get My Payout?*, AIRBNB HELP CTR., <https://www.airbnb.com/help/article/425/when-will-i-get-my-payout> [https://perma.cc/5WB9-JLVQ].

91. Gold, *supra* note 18, at 1585.

92. *Id.* at 1585-86.

93. Nick Wallace, *Where Do Airbnb Hosts Make the Most Money?*, SMARTASSET (Feb. 20, 2018), <https://smartasset.com/mortgage/where-do-airbnb-hosts-make-the-most-money> [https://perma.cc/H4D4-KNFG] (“First, we calculated expected revenue of private-room Airbnb rentals in each city.... Then, we calculated expected net profits (after average rent, utilities and internet) for full-home rentals in each city.”).

traditional, long-term rental market. A study of Airbnb listings in New York City found that “hosts of frequently rented entire-home Airbnb listings earn 200% or more [than] the median long-term neighborhood rent.”⁹⁴

Second, by creating a new income stream, property owners can increase the value of the underlying assets.⁹⁵ The opportunity to increase wealth through participation in the short-term rental market is “likely quite skewed to those with more wealth” in the first place.⁹⁶ Housing wealth is “concentrated among white and high-income households.”⁹⁷ According to the U.S. Census Bureau, the homeownership rate among White households is nearly 30 percent higher than among Black households.⁹⁸ Moreover, “it is likely that much of the benefit of Airbnb’s introduction and expansion accrues to those with more than one property (one for occupying and one or more for renting).”⁹⁹ Indeed, a significant portion of

94. DAVID WACHSMUTH, DAVID CHANEY, DANIELLE KERRIGAN, ANDREA SHILLOLO & ROBIN BASALAEV-BINDER, *THE HIGH COST OF SHORT-TERM RENTALS IN NEW YORK CITY* 34 (2018), <http://www.sharebetter.org/wp-content/uploads/2018/01/High-Cost-Short-Term-Rentals.pdf> [<https://perma.cc/K9T2-NV38>]. This study was conducted before New York City enacted legislation curtailing the ability to use properties as short-term rental accommodations. See Gold, *supra* note 18, at 1626.

95. Gold, *supra* note 18, at 1585; see also *The Appraisal Process*, PICKENSASSESSOR, <https://pickensassessor.org/wp-content/uploads/sites/26/2018/07/Appraisal-Process.pdf> [<https://perma.cc/WP6Y-FY5A>] (stating that the income approach to real estate valuation expressly looks to income generated by the property to determine its fair market value).

96. JOSH BIVENS, *THE ECONOMIC COSTS AND BENEFITS OF AIRBNB: NO REASON FOR LOCAL POLICYMAKERS TO LET AIRBNB BYPASS TAX OR REGULATORY OBLIGATIONS* 6 (2019), <https://www.epi.org/publication/the-economic-costs-and-benefits-of-airbnb-no-reason-for-local-policy-makers-to-let-airbnb-bypass-tax-or-regulatory-obligations/> [<https://perma.cc/QJ34-X2LM>] (“If the only barrier to renting out residential property to short-term visitors were the associated transaction costs, then in theory the creation and expansion of Airbnb could be reducing these transaction costs and making short-term rental options more viable. It does seem intuitive that transaction costs of screening and booking short-term renters would be higher over the course of a year than such costs for renting to long-term residents (or the costs of maintaining owner-occupied property). However, the potential benefits are only the *difference* between what the property owner earned before the introduction of Airbnb and what the property owners earned from short-term rentals booked through the Airbnb platform.”).

97. *Id.*

98. See U.S. CENSUS BUREAU, *QUARTERLY RESIDENTIAL VACANCIES AND HOMEOWNERSHIP, FOURTH QUARTER 2019* (2020), <https://www.census.gov/housing/hvs/files/qtr419/Q419press.pdf> [<https://perma.cc/3B5L-UGEE>] (“[T]he fourth quarter 2019 homeownership rate for non-Hispanic White Alone householders reporting a single race was highest at 73.7 percent.... Black Alone householders was lowest at 44.0 percent.”).

99. BIVENS, *supra* note 96, at 6 (“The distribution of property wealth generated by

Airbnb hosts operate more than one listing. Analysis of Austin, Boston, Chicago, San Francisco, and Washington, D.C. found that the portion of the Airbnb market held by hosts with more than one listing ranged from 30 percent (Austin) to 44 percent (Boston).¹⁰⁰

Given the relationship between historic housing discrimination, contemporary homeownership rates,¹⁰¹ and the housing wealth gap, it is likely that the majority of property owners who benefit from the growing short-term rental market are White. White homeowners continue to profit and accumulate wealth based on their advantage built on racist policies instituted and perpetuated decades ago.

II. UNDERSTANDING REDLIKING: CONSUMER DISCRIMINATION ON SHORT-TERM RENTAL PLATFORMS

It is well established that consumers can discriminate “in every step of a ... transaction.”¹⁰² Empirical research has identified discrimination in giving taxicab gratuities,¹⁰³ acquiring rental

nonprimary residential real estate is even more concentrated than housing wealth overall.”).

100. Jake Wegmann & Junfeng Jiao, *Taming Airbnb: Toward Guiding Principles for Local Regulation of Urban Vacation Rentals Based on Empirical Results from Five US Cities*, 69 LAND USE POL'Y 494, 496-98 (2017) (“The data analyzed in this paper was obtained from ‘scrapes’ of Airbnb’s website conducted by New York-based photojournalist and data analyst Murray Cox.... Data for each of the five cities was collected in the late spring or early summer of 2015.”). Of the remaining cities, Chicago’s share was 38 percent, San Francisco’s share was 34 percent, and Washington, D.C.’s share was 39 percent. *Id.* at 498. The analysis was conducted in 2015, before San Francisco enacted new laws regulating short-term rentals. For more information on changes to San Francisco’s short-term rental regulation, see Gold, *supra* note 18, at 1623-24.

101. See U.S. CENSUS BUREAU, *supra* note 98.

102. Katharine T. Bartlett & Mitu Gulati, *Discrimination by Customers*, 102 IOWA L. REV. 223, 224 (2016).

103. *E.g.*, Ian Ayres, Fredrick E. Vars & Nasser Zakariya, *To Insure Prejudice: Racial Disparities in Taxicab Tipping*, 114 YALE L.J. 1613, 1616 (2005) (finding “African-American cab drivers on average were tipped approximately one-third less than white cab drivers”).

housing,¹⁰⁴ and purchasing a new car,¹⁰⁵ among other transactions.¹⁰⁶

The shift of consumer transactions to online platforms allows other forms of consumer discrimination to be observed through empirical research.¹⁰⁷ Perhaps unsurprisingly, the data show that consumers also discriminate when transacting online. A study of eBay transactions found that when a Black hand held baseball cards, they sold for 20 percent less than when a White hand held baseball cards.¹⁰⁸ Similarly, a study of online advertisements for

104. *E.g.*, John Yinger, *Evidence on Discrimination in Consumer Markets*, 12 J. ECON. PERSPS. 23, 31 (1998) (stating that, based on the landmark Housing Discrimination Study conducted by the federal Department of Housing and Urban Development (HUD), “black renters faced a 10.7 percent chance of being excluded altogether from housing made available to comparable white renters and a 23.5 percent chance of learning about fewer apartments”); *see also* SHARKEY, *supra* note 52, at 54 (noting that HUD’s 2000 Housing Discrimination Study found that “in 17 to 25 percent of cases African Americans and Latinos are ‘consistently’ treated unfavorably when compared with their white counterparts”).

105. *E.g.*, Peter Siegelman, *Racial Discrimination in “Everyday” Commercial Transactions: What Do We Know, What Do We Need to Know, and How Can We Find Out?*, in A NATIONAL REPORT CARD ON DISCRIMINATION IN AMERICA: THE ROLE OF TESTING 69, 72-73 (Michael Fix & Margery Austin Turner eds., 1998), <https://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.923.8761&rep=rep1&type=pdf> [<https://perma.cc/39KA-QLPJ>] (finding that “white male testers were able to negotiate an average final markup of roughly \$560, while white females were quoted a final price that was roughly \$130 higher than this.... Black testers in our study negotiated final offers that were much higher than their white male counterparts. Black female testers were asked to pay an additional \$400, and black males an additional \$1,060 over what white males were quoted for similar cars at the identical dealerships”).

106. *See, e.g.*, John M. Nunley, Adam Pugh, Nicholas Romero & Richard Alan Seals, Jr., *An Examination of Racial Discrimination in the Labor Market for Recent College Graduates: Estimates from the Field* (Auburn Univ. Dep’t of Econ., Working Paper Series 2014-06, 2014), <https://cla.auburn.edu/econwp/archives/2014/2014-06.pdf> [<https://perma.cc/BWH7-LEUJ>] (“Online job advertisements were answered with over 9,000 résumés from fictitious, recently-graduated job seekers. We find strong evidence of differential treatment by race.”).

107. *See* Alex Rosenblat, Karen E.C. Levy, Solon Barocas & Tim Hwang, *Discriminating Tastes: Uber’s Customer Ratings as Vehicles for Workplace Discrimination*, 9 POL’Y & INTERNET 256, 263 (2017) (“[Online] platforms offer a convenient way to conduct field experiments.”). *See generally* Marianne Bertrand & Esther Duflo, *Field Experiments on Discrimination 1* (Nat’l Bureau of Econ. Rsch., Working Paper No. 22014, 2016), https://www.nber.org/system/files/working_papers/w22014/w22014.pdf [<https://perma.cc/7HJN-WBP2>] (providing a detailed overview of “existing field experimentation literature on the prevalence of discrimination, the consequences of such discrimination, and possible approaches to undermine it”). Regarding internet-based transactions, Bertrand and Duflo note that “[t]he expansion of online platforms allows researchers to use the correspondence method to also study discrimination in retail markets.” *Id.* at 22.

108. Ian Ayres, Mahzarin Banaji & Christine Jolls, *Race Effects on eBay*, 46 RAND J. ECON. 891, 910 (2015) (“Baseball cards we auctioned on eBay sold for significantly less when held

iPods found that when the device was displayed in a Black hand, the advertisement received “13% fewer responses and 18% fewer offers” than when displayed in a White hand.¹⁰⁹ Online purchasers were 17 percent less likely to put their names in emails, 44 percent less likely to accept mail delivery, and 56 percent more likely to be concerned about long-distance payments when buying from Black sellers.¹¹⁰ Minority Uber drivers receive lower ratings than their White counterparts.¹¹¹

Studies of online transactions highlight how the availability of demographic information can lead to discriminatory outcomes for minority users.¹¹² Underscoring this finding, the absence of demographic information leads to more equitable results. In in-person car sales, when demographic information is readily available, Black and Hispanic buyers pay a markup that is 30 percent higher than the

by an African-American hand than when held by a Caucasian hand. A simple auction market (eBay) appears to produce disproportionately negative outcomes for African-Americans even when there is no opportunity to observe demeanor, socioeconomic status, or other nonrace but potentially race-correlated features of potential transaction partners.”)

109. Jennifer L. Doleac & Luke C.D. Stein, *The Visible Hand: Race and Online Market Outcomes*, 123 *ECON. J.* F469, F490 (2013).

110. *Id.* at F490-91.

111. See ROSENBLAT, *supra* note 13, at 113.

112. Discrimination is not unique to platforms that facilitate the sale of goods and services. In a 2014 study of race and attraction, OkCupid co-founder Christian Rudder wrote that African-American women and Asian men were rated as less attractive than their peers. Ashley Brown, *‘Least Desirable’? How Racial Discrimination Plays Out in Online Dating*, NPR (Jan. 9, 2018, 5:06 AM), <https://www.npr.org/2018/01/09/575352051/least-desirable-how-racial-discrimination-plays-out-in-online-dating> [<https://perma.cc/FHB6-TXRN>]. In response, OkCupid executives consulted with social scientists to better understand how and why discrimination is perpetuated on their platform. *Id.* Noting the relationship between real-life familiarity and online practices, OkCupid’s Chief Marketing Officer said, “[When it comes to attraction,] familiarity is a really big piece ... [s]o people tend to be often attracted to the people that they are familiar with. And in a segregated society, that can be harder in certain areas than in others.” *Id.* (first alteration in original); see also Jevan A. Hutson, Jessie G. Taft, Solon Barocas & Karen Levy, *Debiasing Desire: Addressing Bias & Discrimination on Intimate Platforms*, 2 *PROC. ACM HUM.—COMPUT. INTERACTION* 73, 73:3 (2018) (“The intimate realm represents one of the only remaining domains in which individuals may feel entitled to express explicit preferences along lines of race and disability. Even describing such preferences as biased or discriminatory can be challenging. As a matter of personal preference, sexual attraction might seem definitionally discriminatory: to have *any* preference is to favor some people, and disfavor others, as potential partners. But describing desire as discriminatory is a way to capture more than the mere fact of sexual preference; it is a way to recognize and name intimate affinities that emerge from histories of subjugation and segregation.” (footnote omitted)).

price paid by White buyers.¹¹³ In contrast, a study of online car sales in which the buyer's demographic information was hidden from the seller found that "the Internet eliminates most variation in new car prices that results from individual characteristics associated with race and ethnicity."¹¹⁴ When demographic information was withheld from the seller, minority buyers paid the same prices as their White counterparts in online transactions, even when controlling for income, education, and search costs.¹¹⁵

Short-term rental platforms such as Airbnb are not immune from discrimination carried out by users. To understand how discrimination occurs on such platforms, an overview of Airbnb's booking policy is instructive. Airbnb divides its users into two categories: (1) guests and (2) hosts.¹¹⁶ All users are required by the website to share photographs and personal information, including name, likes and dislikes, and hobbies, among others.¹¹⁷ Once a prospective guest searches a destination for potential accommodations, Airbnb's algorithm will populate available listings in the results. A guest can then click on available listings to obtain additional information about the amenities, view photographs of the property, and learn the identity of the host. The host's name and photograph automatically appear at the top of the page, directly adjacent to the name of the listing. The prospective guest can click on the photograph to learn more about the host. The guest can decide to book immediately or click the heart icon to "like" the listing and save it for later consideration.¹¹⁸

113. Fiona Scott Morton, Florian Zettelmeyer & Jorge Silva-Risso, *Consumer Information and Price Discrimination: Does the Internet Affect the Pricing of New Cars to Women and Minorities?* 3 (Nat'l Bureau of Econ. Rsch., Working Paper No. 8668, 2001), <https://www.nber.org/papers/w8668.pdf> [<https://perma.cc/KK8M-A47Z>]. The study notes that "about 65% of the minority price premium can be attributed to observable individual differences in income, education, and search costs." *Id.*

114. *Id.* at 23.

115. *Id.*

116. *What Is Airbnb and How Does It Work?*, *supra* note 82.

117. *Why Do I Need to Have an Airbnb Profile?*, AIRBNB HELP CTR., <https://airbnb.com/help/article/67/why-do-i-need-to-have-an-airbnb-profile> [<https://perma.cc/V2RK-MU3F>].

118. This allows users "to keep track of listings [they] like." *See How Do I Manage My List of Saved Homes?*, *supra* note 12.

This Part discusses the need to create trust in online commercial exchanges, the relationship between that need and discrimination, and the economic consequences of consumer discrimination.

A. *Facilitating Trust Online*

Transactions are predicated on establishing trusting relationships between the parties. Trust involves “a subjective belief that one party (the trustee) will behave in a [certain] manner which is in the interest of another party (the trustor) within a transaction.”¹¹⁹

Transactions in the traditional, brick-and-mortar market typically include a face-to-face interaction (for example, a buyer entering a shop and purchasing goods and services directly from a seller). In contrast, sharing economy parties never meet in person nor do buyers have the opportunity to “squeeze the oranges” before committing to the purchase.¹²⁰ Moreover, transactions in brick-and-mortar establishments are understood to be regulated by relevant laws and policies, thereby protecting the parties from harm or injury that may occur. To overcome hesitation surrounding perceived—and real—lack of regulation, and therefore perception of increased risk, online parties use other means to establish trust.¹²¹ Online, this generally manifests in users exchanging names, photos, and other identifying information.¹²² The importance of establishing trust increases when transactions involve services, rather than goods.¹²³

119. Feng Li, Dariusz Pieńkowski, Aad van Moorsel & Chris Smith, *A Holistic Framework for Trust in Online Transactions*, 14 INT'L J. MGMT. REVS. 85, 88 (2012) (noting that there are three broad categories of trust: “(1) inter-personal trust; (2) system trust; and (3) dispositional trust”).

120. *Id.* at 87 (“[O]nline transactions also cross cultural, social or regulatory boundaries more often than their offline counterparts.”).

121. Trust is distinct and separate from reputation:

Trust and reputation in e-commerce are closely related, but not identical, concepts. Reputation is a public opinion that represents a collective evaluation of a group regarding the characteristic of an entity or a person.... Trust is a subjective feeling that the trustee will behave in a certain way according to an implicit or explicit promise she makes. It is an essential ingredient [in peer to peer] marketplaces, since two strangers are unlikely to engage in a monetary transaction without trusting one another.

Eyal Ert, Aliza Fleischer & Nathan Magen, *Trust and Reputation in the Sharing Economy: The Role of Personal Photos in Airbnb*, 55 TOURISM MGMT. 62, 64 (2016).

122. *See generally id.*

123. *See id.* at 63.

Whereas transactions concerning products involve monetary risks, transactions concerning services include additional risks to personal safety.¹²⁴ In the online tourism and travel business context, trust is one of the most important factors for success.¹²⁵

The use of photographs and personal information to facilitate online transactions encourages bias, both implicit and overt, in consumer transactions.¹²⁶ By encouraging users to share personal information, platforms expressly invite personal reactions to play a role in commercial spaces, resulting in economic consequences. Airbnb uses names and photos as a mechanism to verify users' identities as well as "to foster an increased sense of personal contact."¹²⁷ Short-term rental platforms are designed to promote connections between users. These connections are meant to help users overcome the perceived risks of transacting with individual actors, rather than regulated corporate vendors.¹²⁸ As such, short-term rental platforms such as Airbnb require both hosts and guests to create profiles, wherein they are encouraged to include their name, photograph, information about their likes and dislikes, and even their life motto.¹²⁹

Empirical research on the effect of host photos on perceived trustworthiness "found that the level of hosts' trustworthiness, mainly as inferred from their photos, affects listings' prices and probability of being chosen, even when all listing information is

124. *Id.*; see, e.g., Shivani Vora, *Airbnb Sued by Guest Who Says a Host Sexually Assaulted Her*, N.Y. TIMES (Aug. 2, 2017), <https://www.nytimes.com/2017/08/02/travel/airbnb-lawsuit-host-sexual-assault.html> [<https://perma.cc/7MS2-9ARR>] (describing a lawsuit filed by an Airbnb guest after she was allegedly sexually assaulted by a host during a short-term rental stay booked on Airbnb).

125. Myung-Ja Kim, Namho Chung & Choong-Ki Lee, *The Effect of Perceived Trust on Electronic Commerce: Shopping Online for Tourism Products and Services in South Korea*, 32 TOURISM MGMT. 256, 257 (2011).

126. See Naomi Schoenbaum, *Intimacy and Equality in the Sharing Economy*, in THE CAMBRIDGE HANDBOOK OF THE LAW OF THE SHARING ECONOMY 459, 460 (Nestor M. Davidson, Michèle Finck & John J. Infranca eds., 2018) ("Intimacy in the market tends to breed discrimination.").

127. Ert et al., *supra* note 121, at 62-63; Daniel Guttentag, *Airbnb: Disruptive Innovation and the Rise of an Informal Tourism Accommodation Sector*, 18 CURRENT ISSUES TOURISM 1192, 1195-96 (2015).

128. Venoo Kakar, Joel Voelz, Julia Wu & Julisa Franco, *The Visible Host: Does Race Guide Airbnb Rental Rates in San Francisco?*, 40 J. HOUS. ECON. 25, 28 (2018).

129. See *Why Do I Need to Have an Airbnb Profile?*, *supra* note 117.

controlled.”¹³⁰ This means that when listing characteristics—such as location, square footage, and amenities—are equal, the listing with the host that is perceived to be more trustworthy will be selected.¹³¹ Moreover, the same study found that the host photo remains a significant factor even when review scores are varied,¹³² which suggests that online reviews are not as important to prospective guests in booking decisions as trustworthiness, as inferred from a host’s photograph.¹³³

B. Economic Consequences of Guest Discrimination

Host photographs may promote trust, but they also allow for user bias. The information provided by prospective Airbnb hosts and guests may allow users to forge a “relationship,” but it also provides opportunities for discrimination that are not possible when booking accommodation reservations on a hotel website.¹³⁴ Professor Naomi Schoenbaum argues that because “sharing-economy transactions ... merge home and market,” they are “more intimate ... than the traditional economy.”¹³⁵ The greater the degree of intimacy, the more likely that bias—both implicit and overt—affects the transaction.¹³⁶ Whereas an online hotel booking is made without any knowledge of, or reference to, the identities of the lodger or hotel staff, short-term rental hosts and guests have the ability to peruse personal information of hosts and guests prior to confirming a reservation. Until October 2018, when Airbnb removed guest information prior to a confirmed booking, hosts could use information

130. Ert et al., *supra* note 121, at 71-72.

131. *Id.* Interestingly, the research found weak evidence to suggest that the hosts perceived as most trustworthy are attractive and female. *Id.* at 72.

132. *Id.* at 64, 69 (noting that online review scores communicate a host’s reputation, while the photo communicates the host’s trustworthiness).

133. This is consistent with previous studies finding that individuals may trust strangers with unknown reputations, and that self-interest alone cannot explain the behavior. *See, e.g.*, Joyce Berg, John Dickhaut & Kevin McCabe, *Trust, Reciprocity, and Social History*, 10 GAMES & ECON. BEHAV. 122, 137 (1995).

134. *See* Gold, *supra* note 18, at 1628.

135. Naomi Schoenbaum, *Gender and the Sharing Economy*, 43 FORDHAM URB. L.J. 1023, 1029 (2016).

136. *See id.* at 1052. While Schoenbaum specifically analyzes the manifestation of gender biases, the insights regarding the relationship between intimacy and bias may be applied to other salient demographic characteristics.

about a prospective guest, such as their race or gender, in deciding whether to accept a potential reservation.¹³⁷ This allowed hosts prior to 2018 to engage in discrimination against prospective minority guests.

Empirical research evidenced host discrimination against minority guests. A Harvard Business School study found that “applications from guests with distinctively African American names [were] 16 percent less likely to be accepted relative to identical guests with distinctly white names.”¹³⁸ The results were consistent across a variety of factors including sex of the host, whether the property was shared or unhosted, experience level of the host, diversity of the neighborhood, and price of the listing.¹³⁹

While there has been research, discussion, and even policy change related to discrimination against short-term rental guests, less attention has been paid to the inverse phenomenon: discrimination against short-term rental hosts. Discrimination against hosts of color affects rates of booking and average asking rents on short-term rental platforms. As mentioned previously, empirical analysis found that non-Black hosts in New York City¹⁴⁰ are able to charge 12 percent more than Black hosts, even when controlling for location, accommodation characteristics, and quality.¹⁴¹ On average, Black hosts received \$107 per night for every \$144 per night received by a non-Black host.¹⁴² These results are echoed by other research finding that in Oakland and Berkeley, California, Asian hosts earned 20 percent less than White hosts.¹⁴³

Empirical research demonstrates that discrimination by short-term rental guests has an economic effect on hosts. Discrimination prevents minority hosts from realizing the same pecuniary benefits from short-term rental platforms as their White counterparts. This

137. See Gold, *supra* note 18, at 1635-36.

138. Edelman et al., *supra* note 15, at 1-2 (“To test for discrimination, we conducted a field experiment in which we inquire about the availability of roughly 6,400 listings on Airbnb across five cities. Specifically, we create guest accounts that differ by name but are otherwise identical ... one distinctively African American and the other distinctively white.”).

139. *Id.* at 2.

140. The study was conducted in 2014, prior to New York City’s enactment of significant restrictions on listings. See Gold, *supra* note 18, at 1625.

141. Edelman & Luca, *supra* note 19, § 1.

142. *Id.* § 4.2.

143. Wang et al., *supra* note 21.

Article offers the term “redliking” to describe the website structures, features, and underlying systems that allow discrimination against minority short-term rental hosts and the resulting economic consequences. Redliking allows White hosts to enjoy disproportionate financial benefits from short-term rental platforms and perpetuates historic inequality related to housing equity. Redlining functioned to lock communities of color out of asset-building opportunities and corresponding increases in wealth. Similarly, redliking is a system that deprives minority hosts from enjoying important opportunities to increase wealth through new income streams and increasing the value of the underlying asset.

Admittedly, redlining, unlike redliking, was perpetuated by state actors: “[b]ecause the FHA’s appraisal standards included a whites-only requirement, racial segregation now became an official requirement of the federal mortgage insurance program.”¹⁴⁴ Through HOLC maps and the FHA underwriting manual, the federal government created a structure that prevented minorities from entering large swaths of the suburban landscape and accumulating wealth and financial security through homeownership.¹⁴⁵ While contemporary redliking is carried out solely by private market actors, the practice has an analogous effect. The information included on Airbnb’s platform, together with the algorithms that control which listings are displayed and in what order, creates an architecture that directs greater economic opportunities to White hosts. By soliciting users to share demographic information, Airbnb facilitates private discrimination in a way that echoes traditional redlining; both redliking and redlining create and promote systems that direct opportunities to Whites and away from minorities. In light of Airbnb’s growing market share, failure to address redliking will direct even more wealth to White homeowners, will reinforce systemic real property barriers affecting minorities, and will exacerbate the racial wealth gap.

144. ROTHSTEIN, *supra* note 43, at 64-65.

145. *See supra* Part I.A.1.

III. ANTIDISCRIMINATION LAW AND REDLIKING

Redliking implicates three parties: the host, the prospective guest, and the short-term rental platform facilitating the exchange. The applicability of antidiscrimination laws to a discriminatory action between the parties will turn, in part, on which of these actors is engaged in the practice. As Professors Bartlett and Gulati note, “we generally take for granted the right of customers to discriminate when they exercise their buying power.”¹⁴⁶ Moreover, regulating individual short-term rental platform guest actions may run counter to principles of privacy and individual autonomy.¹⁴⁷ “[H]owever undesirable an individual customer’s prejudices may be, they are prejudices that an individual in a free society has a right to have.”¹⁴⁸ In a free society, asymmetry of discrimination is possible; the law does not, and should not, dictate where consumers dine, where customers shop, or with which merchants customers do business. White customers can favor White businesses for reasons related to racial bias without legal liability; the law does not force consumers to patronize minority-owned businesses, even if minority groups experience outsized economic consequences.

In fact, there may be certain situations in which “customer discrimination might be considered tolerable, even desirable, because it helps to reverse historical patterns of discrimination that subordinate people based on a protected characteristic, like race or sex.”¹⁴⁹ Such instances—for example, the Montgomery bus boycott; the boycott of White merchants in Claiborne County, Mississippi;

146. Bartlett & Gulati, *supra* note 102, at 226.

147. *See id.* at 227.

148. *Id.* at 238. *But see* Florence Wagman Roisman, *The Impact of the Civil Rights Act of 1866 on Racially Discriminatory Donative Transfers*, 53 ALA. L. REV. 463, 467 (2002) (analyzing judicial application of the Civil Rights Act of 1866, codified at 42 U.S.C. §§ 1981(a) and 1982, to prohibit most discriminatory private, donative property transfers). While in theory this may open up the door to prohibit customer discrimination, it would be difficult to accomplish in practice. Unlike trusts and wills, in which discriminatory intent is written into the document that facilitates the property transfer, consumers do not generally share that they are making a purchase from a White proprietor because of race. Further, this type of consumer regulation may have the unintended consequence of undermining boycotts designed to accomplish social change and buoy minority businesses.

149. Bartlett & Gulati, *supra* note 102, at 242 (“Customers sometimes discriminate by race or gender, in concert, to *promote* non-discrimination goals.”).

contemporary #BuyBlack campaigns; and others—are important to achieve social change. Likewise, calls for consumers to patronize minority-owned businesses seek to encourage economic growth in historically disadvantaged communities.¹⁵⁰ As the Supreme Court recognized, “the practice of persons sharing common views banding together to achieve a common end is deeply embedded in the American political process.... [B]y collective effort individuals can make their views known, when, individually, their voices would be faint or lost.”¹⁵¹ The protection of personal choice in the marketplace, as well as the social value of collective consumer practices in certain situations, makes it challenging to regulate individual behavior.

In contrast, merchants—in this case, short-term rental platform operators—are easier to regulate. Merchants “are already subject to many state obligations and regulations in exchange for the privilege of doing business in the state; and they have owners and managers who can be held accountable.”¹⁵² Because merchants are motivated by profit, they are incentivized “to identify and eliminate potential inefficiencies within their organizations, including discrimination.”¹⁵³ Likewise, there is legal momentum to limit immunity for intermediaries that substantially contribute to otherwise prohibited conduct.¹⁵⁴ Evidentiary requirements also make it easier to bring action against platform operators, rather than individual guests. Whereas direct evidence would be necessary to prove a guest’s actions were based on discriminatory intent, circumstantial evidence is sufficient to prove operator liability.¹⁵⁵

150. See, e.g., Jeanne Sahadi, *How to Help a Black-Owned Business on #BlackoutDay2020*, CNN (July 7, 2020, 12:21 PM), <https://www.cnn.com/2020/07/07/success/blackoutday2020-support-black-owned-businesses/index.html> [<https://perma.cc/VCP3-SPTM>].

151. *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290, 294 (1981).

152. Bartlett & Gulati, *supra* note 102, at 228-29.

153. *Id.* at 229.

154. E.g., Lavi, *supra* note 28, at 85 (citing Danielle Keats Citron & Benjamin Wittes, *The Internet Will Not Break: Denying Bad Samaritans § 230 Immunity*, 86 *FORDHAM L. REV.* 401, 419 (2017)).

155. See *infra* note 202 and accompanying text. Practically, it is difficult to regulate discrimination by individual customers on a short-term rental platform. Short of direct evidence—for example, discriminatory statements by prospective guests—it would be difficult to prove that prejudice was a motivating factor in an individual guest’s booking decision.

Much of the existing scholarship around platform liability for user discrimination concerns discrimination directed at prospective guests. This analysis adapts existing legal frameworks, those that were originally enacted to combat redlining and discrimination against minority consumers in brick-and-mortar establishments, for use in online transactions.

The Fair Housing Act of 1968 (FHA) rendered it unlawful “[t]o refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin.”¹⁵⁶ In doing so, the FHA “banned racial discrimination in the sale and rental of housing ... [and] expressly banned many of the public actions and private practices that had evolved over the years to deny blacks’ access to housing.”¹⁵⁷ The FHA prevents discrimination against minority home purchasers and tenants. It generally does not protect landlords. As such, it does not provide a basis of recourse for minority hosts who experience discrimination on short-term rental platforms.

In 1964, Title II of the landmark Civil Rights Act (CRA) outlawed discrimination in public accommodations. Specifically, the CRA states: “All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation ... without discrimination or segregation on the ground of race, color, religion, or national origin.”¹⁵⁸ Under the CRA, public accommodations include “any inn, hotel, motel, or other establishment which provides lodging to transient guests, other than an establishment located within a building which contains not more than five rooms for rent

156. 42 U.S.C. § 3604(a).

157. Douglas S. Massey, *The Legacy of the 1968 Fair Housing Act*, 30 SOCIO. F. 571, 575-76, 578 (2015) (“[The FHA] outlawed the refusal to rent or sell to someone because of race; it prohibited racial discrimination in the terms and conditions of rental or sale; it barred discrimination in real estate advertising; it banned agents from making untrue statements about a dwelling’s availability in order to deny access to blacks; and it enjoined real estate agents from making comments about the race of neighbors or in-movers in order to promote panic selling. Although the new law applied only to around 80% of the nation’s housing stock, a Supreme Court decision adjudicated just two months later extended its reach to all housing in the United States.” (citations omitted)).

158. 42 U.S.C. § 2000a(a).

or hire and which is actually occupied by the proprietor of such establishment as his residence.”¹⁵⁹

This Part examines platform liability for discrimination against short-term rental guests and the challenges in applying the plain language of the law to discrimination against short-term rental hosts. The application of the CRA to instances of discrimination against short-term rental hosts is complicated by the fact that short-term rental platforms serve a different purpose and provide different services to hosts and guests. In light of the platform’s dual role, this Part proposes two approaches—a general-function test and a fragmented-function test—to determine the applicability of the CRA to short-term rental platforms. Finally, this Part discusses remedies under state antidiscrimination law.

A. Platform Liability for Discrimination Against Short-Term Rental Guests

Federal law generally prohibits discrimination against minority guests on short-term rental platforms. However, whether the particular listing is hosted or unhosted will determine the cause of action available to the affected guest.¹⁶⁰ Hosted listings—those in which the host lists a spare room or couch in the residence occupied by the host—are properly governed by the FHA. Under the FHA, landlords cannot discriminate on the basis of race, color, religion, sex, familial status, or national origin when renting out a *dwelling*.¹⁶¹ Dwelling is narrowly defined as any part of a building or structure to be occupied as a “residence.”¹⁶² However, the FHA provides for the “Mrs. Murphy exemption.”¹⁶³ Under this rule, dwellings intended to be occupied by four or fewer families are

159. *Id.* § 2000a(b)(1).

160. Gold, *supra* note 18, at 1610-11.

161. 42 U.S.C. § 3604(a) (“It shall be unlawful ... [t]o refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin.”).

162. *Id.* § 3602(b).

163. For a discussion of the history, legacy, and effect of the Mrs. Murphy exemption, see generally James D. Walsh, *Reaching Mrs. Murphy: A Call for Repeal of the Mrs. Murphy Exemption to the Fair Housing Act*, 34 HARV. C.R.-C.L. L. REV. 605 (1999); in contrast, the Civil Rights Act has no such exemption.

exempt if the owner lives in one of the units.¹⁶⁴ This exemption effectively allows landlords of owner-occupied dwellings to discriminate when *selecting* tenants.¹⁶⁵ Hosted accommodations fall into the “Mrs. Murphy” exemption, thereby allowing some hosts to legally select guests for reasons having to do with bias.¹⁶⁶ The FHA also exempts single family homes rented by an owner if the owner “does not own more than three such single-family houses at any one time” and the owner does not engage the services of a broker or agent.¹⁶⁷

In contrast, unhosted properties are the equivalent of hotel rooms, not dwellings, and are correctly viewed as public accommodations pursuant to the CRA.¹⁶⁸ Title II of the CRA entitles all persons “to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation.”¹⁶⁹ The CRA is expansive in its view of a public accommodation. Under Title II, a public accommodation

164. 42 U.S.C. § 3603(b)(2).

165. Walsh, *supra* note 163, at 606.

166. See generally Hayat, *supra* note 27 (discussing the applicability of the Mrs. Murphy exception to Airbnb hosts and arguing that Title II should apply in most cases). Note, though, that the FHA prohibits Mrs. Murphy from engaging in discriminatory advertising. 42 U.S.C. § 3604(c).

167. 42 U.S.C. § 3603(b)(1) (“*Provided further*, That after December 31, 1969, the sale or rental of any such single-family house shall be excepted from the application of this subchapter only if such house is sold or rented (A) without the use in any manner of the sales or rental facilities or the sales or rental services of any real estate broker, agent, or salesman, or of such facilities or services of any person in the business of selling or renting dwellings, or of any employee or agent of any such broker, agent, salesman, or person and (B) without the publication, posting or mailing, after notice, of any advertisement or written notice [that expresses discriminatory intent].”).

168. Gold, *supra* note 18, at 1635 (“[L]awmakers must categorize unhosted Airbnb listings as public accommodations under Title II of the 1964 Civil Rights Act.”); Leong & Belzer, *supra* note 27, at 1301 (“Like the public accommodations traditionally covered by Title II of the Civil Rights Act, [platform economy businesses] are held out as open to the public, so ensuring that such entities do not engage in race discrimination comports with the purpose of that legislation.... Finally, the analogous precedent from the disability arena favors a conclusion that [platform economy businesses] are public accommodations.”); Hayat, *supra* note 27, at 615-16 (arguing that rather than “expos[ing] a ‘soft spot’ in our discrimination laws where Title II may be eluded.... Title II is applicable to the sharing economy presently and that the Mrs. Murphy exception is inapplicable to a large number of hosts”).

169. 42 U.S.C. § 2000a(a).

may fall into one of several categories, including those that provide lodging,¹⁷⁰ food,¹⁷¹ or entertainment.¹⁷² When examining whether short-term rental platforms such as Airbnb are public accommodations under Title II, many scholars have focused on the law's lodging provision.¹⁷³ Under this category, "any inn, hotel, motel, or other establishment which *provides lodging to transient guests*"¹⁷⁴ is a public accommodation. Because short-term rental platforms function like an inn, hotel, or motel, and provide lodging to transient guests, they are properly viewed as a public accommodation under the CRA.

Categorizing a short-term rental accommodation as a public accommodation under the CRA is only the first step to determine liability for discrimination against guests. After this, the question becomes whether the platform provider itself—for example, Airbnb, VRBO, or Homeaway—is liable for discrimination against guests. Professor Norrinda Brown Hayat as well as Nancy Leong and Aaron Belzer argue that platform operators themselves could face liability for discrimination perpetuated by hosts against minority guests if the platform operator knew that its policies contributed to or facilitated the discrimination.¹⁷⁵ Hayat's work examines the history of Title II, notes the limited application of the Mrs. Murphy exemption to short-term rental accommodations, and details the regulation of landlords under both the FHA and the Americans with Disabilities Act (ADA) in supporting application of the CRA to short-term rental hosts.¹⁷⁶ Leong and Belzer analyze two issues to determine that platform economy businesses, such as Airbnb, are public accommodations and that the platform operators themselves are

170. *Id.* § 2000a(b)(1) (governing "any inn, hotel, motel, or other establishment which provides lodging to transient guests, other than an establishment located within a building which contains not more than five rooms for rent or hire and which is actually occupied by the proprietor of such establishment as his residence").

171. *Id.* § 2000a(b)(2) (governing "any restaurant, cafeteria, lunchroom, lunch counter, soda fountain or other facility principally engaged in selling food for consumption on the premises").

172. *Id.* § 2000a(b)(3) (governing "any motion picture house, theater, concert hall, sports arena, stadium, or other place of exhibition or entertainment").

173. *See, e.g.*, Leong & Belzer, *supra* note 27, at 1297; Hayat, *supra* note 27, at 615-16.

174. 42 U.S.C. § 2000a(b)(1) (emphasis added).

175. Hayat, *supra* note 27, at 615-16; Leong & Belzer, *supra* note 27, at 1311-12.

176. Hayat, *supra* note 27.

responsible.¹⁷⁷ First, they note that such platforms “are displacing and replacing businesses that are subject to” the CRA.¹⁷⁸ Second, given that the platforms are public accommodations, the controlling businesses are therefore public accommodations.¹⁷⁹

The Oregon courts were the first to examine this issue. In March 2017, Patricia Harrington filed a case against Airbnb in Multnomah County, Oregon, Circuit Court.¹⁸⁰ Harrington’s complaint alleged that “discriminatory Airbnb hosts regularly take advantage of Airbnb’s booking policies to deny booking requests from prospective guests on account of protected characteristics, including race, in violation of Oregon’s statutory prohibition of unlawful discrimination in public accommodations.”¹⁸¹ In support of her claim, Harrington cited Airbnb’s requirement that all users, both hosts and guests, create a profile that includes the user’s photo and full name, among other information.¹⁸² Some hosts may opt into Airbnb’s Instant Book feature, which allows guests to immediately book and confirm an

177. Leong & Belzer, *supra* note 27, at 1298-99.

178. *Id.* at 1298 (“[Platform economy businesses] should be considered subject to Title II simply because they are displacing and replacing businesses that are subject to Title II, and because, from the perspective of the consumer, they fulfill exactly the same needs as traditional businesses that are in fact subject to Title II.”).

179. *Id.* at 1299 (“Because these platforms are public accommodations within the meaning of Title II, so are the businesses, and individuals must be able to access both the platforms and the services those platforms provide.” (footnote omitted)).

180. *Harrington v. Airbnb, Inc.*, No. 3:17-cv-00558-YY, 2017 WL 3392496, at *1 (D. Or. July 21, 2017), *report and recommendation adopted*, No. 3:17-cv-00558, 2017 WL 3391645 (D. Or. Aug. 7, 2017); *see also* *Harrington v. Airbnb, Inc.*, 348 F. Supp. 3d 1085, 1088 (D. Or. 2018) (“Before filing this lawsuit, Ms. Harrington wrote a letter to Airbnb requesting that it change its policies so that all accommodations on its online platform may be available to all prospective guests regardless of race or color. Ms. Harrington specifically asked Airbnb to change its policy that allows a host to wait to confirm a booking until after the host has seen the full name and photograph of a prospective guest. She expressly asked Airbnb not to provide information to hosts before accepting a reservation or confirming a booking from a prospective guest that would reveal statutorily-protected immutable characteristics, like race. Airbnb denied the request to change its policy, but offered to assist Ms. Harrington in securing alternative accommodations if she ever were discriminated against by an Airbnb host. Airbnb also promised to investigate any reported claims of racial discrimination and take appropriate action.”).

181. *Harrington*, 2017 WL 3392496, at *1.

182. *Id.*

accommodation, without prior approval from the host.¹⁸³ This function is similar to booking with a traditional hotel.

However, hosts are not compelled to participate in Instant Book. If a host has not opted into Instant Book, a prospective guest must request to stay in the host's accommodation.¹⁸⁴ After receiving such a request, the host can confirm, reject, or ignore the request.¹⁸⁵ If the host rejects or ignores the request, the guest cannot book the accommodation.¹⁸⁶ This means that, under Airbnb's current booking policy, hosts have the ability to reject or ignore a prospective guest's request to book after viewing the guest's name and photograph. Harrington's complaint alleged that "discriminatory hosts use Airbnb's booking policies to deny African-Americans access to accommodations."¹⁸⁷ As such, Harrington argued that "Airbnb is directly liable for discrimination because its policies directly act to deny African-Americans full and equal accommodations, advantages, facilities, and privileges of a place of public accommodation."¹⁸⁸ Harrington alleged that these policies violated Oregon law prohibiting discrimination in a place of public accommodation¹⁸⁹ "on behalf of '[a]ll African-American residents of Oregon who are not currently, and have never been, members of Airbnb.'"¹⁹⁰ Under Oregon law, public accommodation is defined as "[a]ny place or service offering to the public accommodations, advantages, facilities or privileges whether in the nature of goods, services, lodgings, amusements, transportation or otherwise."¹⁹¹ Oregon's statute is

183. See *What Is Instant Book?*, AIRBNB HELP CTR., <https://www.airbnb.com/help/article/523/what-is-instant-book> [<https://perma.cc/P2C2-DUUM>] ("Instant Book listings don't require approval from the host before they can be booked. Instead, guests can just choose their travel dates, book, and discuss check-in plans with the host.").

184. *Harrington*, 2017 WL 3392496, at *1.

185. *Id.*

186. *Id.*

187. *Id.* at *2.

188. *Id.*

189. OR. REV. STAT. § 659A.403(1), (3) (2020) ("Except as provided in subsection (2) of this section, all persons within the jurisdiction of this state are entitled to the full and equal accommodations, advantages, facilities and privileges of any place of public accommodation, without any distinction, discrimination or restriction on account of race, color, religion, sex, sexual orientation, national origin, marital status or age.... It is an unlawful practice for any person to deny full and equal accommodations, advantages, facilities and privileges of any place of public accommodation in violation of this section.").

190. *Harrington*, 2017 WL 3392496, at *2 (alteration in original).

191. § 659A.400(1)(a).

more inclusive than federal law, which is narrowly tailored to only include places of lodging, dining, and amusements.¹⁹² However, Harrington's complaint was rooted in Airbnb's provision of lodging services, rather than "[a]ny place ... offering ... advantages, facilities or privileges,"¹⁹³ including both goods and services.¹⁹⁴ Therefore, even though Harrington brought this action under Oregon law, the same argument could be made under the CRA.

Airbnb's booking process differs from that of traditional public accommodations. As Harrington noted, "traditional hotels and bed and breakfasts" as well as "restaurants, do not 'approve' guests by reviewing a prospective guest's name and photograph and making a booking decision on that information."¹⁹⁵ In this way, Airbnb hosts have the ability "to deny public accommodations to would-be guests based on immutable protected characteristics ... in violation of the law."¹⁹⁶ While Airbnb acknowledged discrimination on its platform, it maintained that its policy of allowing hosts to view photographs and names of prospective guests prior to booking "allows a host to conclude that a guest is 'reliable, authentic, and committed to the spirit of Airbnb.'"¹⁹⁷

On appeal, and after removal to federal court, the United States District Court for the District of Oregon noted that "Airbnb is aware that some hosts refuse to rent accommodations to prospective guests on the basis of race or color. Airbnb is also aware that African-Americans are less likely to be confirmed for booking as guests on Airbnb's online platform than are persons who are not African-Americans."¹⁹⁸ As a result of discriminatory practices by some Airbnb hosts, "African-Americans ... do not have full and equal access to the accommodations and services offered on Airbnb's online platform."¹⁹⁹ The court was similarly unmoved by Airbnb's claim that it did not personally operate the individual listings nor make

192. See 42 U.S.C. § 2000a(b).

193. § 659A.400(1)(a).

194. See *Harrington*, 2017 WL 3392496, at *2.

195. Plaintiff's Motion to Remand at 3, *Harrington*, No. 3:17-CV-00558-YY, 2017 WL 11048581 (D. Or. May 5, 2017).

196. *Id.* at 2.

197. *Harrington v. Airbnb, Inc.*, 348 F. Supp. 3d 1085, 1088 (D. Or. 2018).

198. *Id.* at 1087.

199. *Id.*

decisions about whether to accept individual guests. As the court noted, “[i]t is irrelevant that Airbnb does not itself directly rent or own the accommodations being rented out because what Airbnb provides to the public is the service of using its online platform to browse, locate, book, and pay for accommodations in private homes.”²⁰⁰ As a result, the court concluded that Ms. Harrington established a *prima facie* case.²⁰¹

In ruling against Airbnb’s motion to dismiss Ms. Harrington’s claim, the court noted that circumstantial evidence is sufficient to support a finding of discriminatory intent.²⁰² Airbnb “devised and chose to maintain its mandatory photograph policy, even after Airbnb became aware that its policy was leading to racial discrimination on its platform.”²⁰³ As such, the complaint “sufficiently plead[ed] that Airbnb intentionally makes many of the accommodations listed on its online platform unavailable to [Ms. Harrington] and others on account of their race by maintaining policies that enable hosts to refuse service to prospective guests who are African-American.”²⁰⁴

After the legal challenge to its booking practices, Airbnb eliminated the ability of hosts to request prospective guests’ photographs prior to confirming a booking. On October 22, 2018, Airbnb announced that “[m]oving forward, rather than displaying a potential guest’s profile photo *before* the booking is accepted, hosts will receive a guest’s photo in the booking process only *after* they’ve accepted the booking request.”²⁰⁵ Moreover, if a host cancels a

200. *Id.* at 1093.

201. *See id.*

202. *See id.* at 1089-91 (citing *Lindsey v. STL L.A., LLC*, 447 F.3d 1138, 1140-41 (9th Cir. 2006)) (“[W]hile direct evidence of racial discrimination could support a finding of discriminatory intent, it is not required, and circumstantial evidence alone may be sufficient.”).

203. *Id.* at 1090.

204. *Id.* (“African-Americans do not have full and equal access to all the accommodations on the Airbnb online platform to which persons who are not African-Americans have access.”). Ms. Harrington alleged

that when Airbnb repeatedly reaffirmed and recommitted to its mandatory photograph policy, Airbnb made a calculated decision that it was not only willing to tolerate racial discrimination on its online platform rather than risk losing potential hosts and potential revenues, but it was also intentionally enabling, and thus furthering, racial discrimination.

Id.

205. *Update on Profile Photos*, *supra* note 17.

booking after the guest shares a photo, the platform will provide the guest with “an easy way to contact Airbnb and report any concerns about potential discrimination by the host.”²⁰⁶ Further, as Ms. Harrington requested in her complaint, Airbnb will no longer require all guests to include a photograph.²⁰⁷

Harrington and Airbnb’s reaction are significant to challenge redliking for multiple reasons. First, the case signals judicial willingness to consider the application of the CRA to online platforms, opening up potential avenues of relief for short-term rental hosts. Second, Airbnb’s changes to its platform design and booking process demonstrate that it is possible to facilitate successful transactions while eliminating pathways for user bias. Moreover, the change signals that any additional trust that may be gained by sharing demographic information prior to booking confirmation is outweighed by the potential for discrimination.²⁰⁸

B. Distinguishing Guests from Hosts

The Oregon District Court’s analysis of Airbnb’s liability in *Harrington* provides a powerful remedy for *guests* who experience discrimination on short-term home platforms. Missing from the dicta, however, is a discussion of how and whether the CRA applies to *hosts* who experience discrimination. Intuition and bedrock principles underpinning the legal system “suggest that businesses open to the public have a duty to serve the public without unjust discrimination. Yet the formal law does not unequivocally reflect this principle.”²⁰⁹ As enumerated under Title II of the CRA, public accommodations are limited to restaurants, places of lodging, gas

206. *Id.*

207. *See id.* Airbnb characterized this change as a “balance” between guests’ concerns and hosts’ desires, recognizing that host photographs may “be misused in a way that violates our nondiscrimination policy.” *Id.*

208. *See id.* (“[P]hotos can be a useful tool for enhancing trust and promoting community.... Because some hosts value profile photos and want to be able to know who they can expect at their front door, we will give hosts the option to ask that guests provide a profile photo prior to booking, which will only be presented to the host after the host accepts the booking request.”).

209. Joseph William Singer, *No Right to Exclude: Public Accommodations and Private Property*, 90 NW. U. L. REV. 1283, 1291 (1996).

stations, and places of entertainment.²¹⁰ Conspicuously absent from this list are retail and other service industries.²¹¹ While Sections 1981 and 1982 of the Civil Rights Act of 1866 may govern retail establishments,²¹² public accommodation scholar Professor Joseph Singer is not optimistic: “[W]e might well conclude that the assumption that the Supreme Court would necessarily interpret federal law to prohibit racial discrimination in access to retail stores constitutes wishful thinking.”²¹³

Many are surprised to learn that the CRA does not expressly bar discrimination in retail establishments; the list of covered establishments under the CRA conspicuously omits retail institutions.²¹⁴ Singer argues that both a textual analysis²¹⁵ and the legislative

210. 42 U.S.C. § 2000a(b).

211. See IAN AYRES, PERVERSIVE PREJUDICE?: UNCONVENTIONAL EVIDENCE OF RACE AND GENDER DISCRIMINATION 3 (2001) (“The nonregulation of retail discrimination seems to be premised on a vague coterie of assumptions: (1) retail discrimination does not exist because retailers have no motive to discriminate; (2) retail discrimination does not exist because competition forces retailers not to discriminate; and (3) any retail discrimination that does occur does not have serious consequences because of effective counterstrategies by potential victims.”).

212. See, e.g., Singer, *supra* note 209, at 1425.

213. *Id.* at 1289. “Section 1981 grants ‘[a]ll persons ... the same right ... to make and enforce contracts ... as is enjoyed by white citizens,’ while Section 1982 grants ‘all citizens ... the same right ... as is enjoyed by white citizens ... to purchase ... personal property.’” *Id.* at 1288 (alteration in original) (footnote omitted). While the Supreme Court has found that Sections 1981 and 1982 apply to “private conduct of nongovernmental actors[,” the Court] has never held that the Civil Rights Act of 1866 constitutes a general public accommodations law.” *Id.* at 1288-89 (footnote omitted).

Although the matter is far from certain, there is reason to believe that the Supreme Court ... might very well *not* interpret either Sections 1981 or 1982 as requiring a retail store to admit customers regardless of race.... One obvious distinction is that the duty to serve the public incumbent on public accommodations might be conceptualized, not as a right to enter into contracts or a right to purchase property, but as a right to enter real property possessed by another—a right not definitively included in either Sections 1981 or 1982.

Id. at 1289 (footnotes omitted).

214. See *id.* at 1288 (“Title II of the Civil Rights Act of 1964 regulates restaurants, innkeepers, gas stations, and places of entertainment. Retail stores are not covered. Most people are surprised, even shocked, to learn this.” (footnote omitted)).

215. *Id.* at 1413-14 (“If one is a textualist in statutory interpretation, it is an obvious conclusion that” establishments affecting interstate commerce or supported in their activities by State action as places of public accommodation; lodgings; facilities principally engaged in selling food for consumption on the premises; gasoline stations; places of exhibition or entertainment; and other covered establishments “define[] which businesses constitute ‘places of public accommodation’ regulated by paragraph (a),” which states, all persons shall be

history “support[] the notion that the list was intended to be exhaustive.”²¹⁶ The Supreme Court’s recent decision—and perhaps more importantly, the majority’s textualist reasoning—in *Bostock v. Clayton County*,²¹⁷ may contradict Singer.²¹⁸ Applying the *Bostock* majority’s textualist approach to sections 1981 and 1982 of the CRA may support a finding that these sections apply to a license to enter a retail establishment. However, this outcome is far from certain.²¹⁹ If hosts’ legal recourse remains limited under Sections 1981 and 1982, then hosts will look to Title II of the CRA. The Court may interpret the CRA to exclude all establishments not explicitly enumerated in the original text, including retail establishments, which would, in turn, limit the potential legal recourse available for hosts who experience discrimination on short-term rental platforms. While a short-term rental platform functions as an inn or place of lodging for a guest, a short-term rental platform serves a different function for hosts.

As discussed above, the liability of short-term rental platforms to prospective guests is predicated on the recognition that a short-term rental platform performs the same function as an inn, hotel, motel, or other establishment that provides lodging to guests within the meaning of Title II of the CRA. However, while short-term rental platforms serve a lodging function for guests, they serve a related but arguably distinct function for hosts. A platform such as Airbnb does not provide lodging to the host; instead, it provides a host with

entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, as defined in this section, without discrimination or segregation on the ground of race, color, religion, or national origin, “especially since the operative provisions in paragraph (a) are limited to places of public accommodation ‘as defined in this section.’”).

216. *Id.* at 1416.

217. 140 S. Ct. 1731 (2020).

218. Tara Leigh Grove, Comment, *Which Textualism?*, 134 HARV. L. REV. 265, 266-67 (2020) (arguing that there are two types of textualism: (1) “‘formalistic textualism,’ an approach that instructs interpreters to carefully parse the statutory language, focusing on semantic context and downplaying policy concerns or the practical ... consequences of the case,” and (2) “‘flexible textualism,’ an approach that attends to text but permits interpreters to make sense of that text by considering policy and social context as well as practical consequences”). Writing for the majority, Justice Gorsuch adopted what Grove calls “formalistic textualism” to determine that Title VII of the Civil Right Act of 1964 prohibits discrimination against LGBTQ individuals. *See id.*

219. This is even more uncertain in light of Justice Amy Coney Barrett’s addition to the Court.

the opportunity to join a large lodging marketplace, or advertising forum, that connects the host to prospective guests in search of accommodation and facilitates booking and payment. In essence, the host is similar to an innkeeper who is compensating the website in exchange for the ability to advertise available accommodations and facilitating payment. The duality of the platform's role raises questions about available legal recourse under Title II for hosts who experience discrimination.

C. Assessing Platform Operator Liability for Discrimination Against Hosts

Judicial treatment of websites in related contexts is instructive to understanding how courts may interpret a short-term rental platform's dual roles. This Article proposes two approaches courts may take to regulate operator liability for discrimination experienced by short-term rental hosts on the platform. Based on judicial interpretation of the ADA, a court may apply a general-function test to determine the applicability of the CRA to short-term rental platforms. Alternatively, relying on analysis of website speech under the Communications Decency Act (CDA), federal courts may apply a fragmented-function test and conclude that Title II of the CRA does not provide any recourse for hosts. Were the courts to apply the fragmented-function test and determine that Title II does not provide recourse, minority short-term rental hosts may instead look to state antidiscrimination doctrine to bring action against platform operators who fail to make changes that would eliminate, or at least greatly reduce, discrimination on their websites.

1. General-Function Test

Courts may use a general-function test to determine whether a website qualifies as a public accommodation under the CRA. Under this approach, the fact-finder would look at the attributes of the website, and if its primary purpose falls into a category recognized as a public accommodation, then all users would be entitled to CRA protection. While scarce under the CRA, a growing body of judicial opinions has considered the application of federal public

accommodation law to websites under the ADA.²²⁰ This line of ADA public accommodation cases may support the use of a general-function test when assessing the ability of CRA public accommodation law to protect short-term rental hosts.

In *Robles v. Domino's Pizza, LLC*, the Ninth Circuit examined the purpose of a website's brick and mortar equivalent to determine whether the online site itself was a public accommodation under the ADA.²²¹ Under the ADA, "[n]o individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation."²²² The court determined that the ADA "applies to the services of a place of public accommodation, not services in a place of public accommodation."²²³ Therefore, because it provided services available to patrons of physical Domino's Pizza restaurants, the website was subject to the requirements of the ADA.²²⁴

While *Robles v. Domino's* involved a website that served the same function as its companion brick-and-mortar locations, courts have also examined website liability under the ADA in the absence of a physical counterpart. In *National Ass'n of the Deaf v. Netflix, Inc.*, the United States District Court of Massachusetts considered whether Netflix, "the leading provider of streaming television and

220. Circuit courts are split on the appropriate test to determine whether a website is subject to Title III of the ADA. The First and Seventh Circuits have found that online services are always subject to the ADA, regardless of whether there is any physical storefront. See *Carparts Distrib. Ctr., Inc. v. Auto. Wholesaler's Ass'n of New England, Inc.*, 37 F.3d 12, 19-20 (1st Cir. 1994); *Doe v. Mut. of Omaha Ins.*, 179 F.3d 557, 559 (7th Cir. 1999). And the Ninth and Eleventh Circuits have found ADA applicability when there is a nexus between a website and a physical location. See *Robles v. Domino's Pizza, LLC*, 913 F.3d 898, 905 (9th Cir. 2019); *Haynes v. Dunkin' Donuts LLC*, 741 F. App'x. 752, 754 (11th Cir. 2018). On the other hand, the Fifth Circuit has found that online services are never subject to the ADA. See generally *Magee v. Coca-Cola Refreshments USA, Inc.*, 833 F.3d 530 (5th Cir. 2016) (defining place of public accommodation narrowly as referring to physical establishments); *McNeil v. Time Ins.*, 205 F.3d 179, 188 (5th Cir. 2000) (interpreting Title III of the ADA to apply to access to place of accommodation rather than the content of goods and services offered).

221. 913 F.3d 898, 902-05 (9th Cir. 2019).

222. 42 U.S.C. § 12182(a). This applies to "any person who owns, leases (or leases to), or operates a place of public accommodation." *Id.*

223. See *Robles*, 913 F.3d at 905 (quoting *Nat'l Fed'n of the Blind v. Target Corp.*, 452 F. Supp. 2d 946, 953 (N.D. Cal. 2006)).

224. *Id.* at 905-06.

movies on the Internet,”²²⁵ had an obligation to provide closed captioning on all of its streaming library pursuant to the ADA.²²⁶ In defending its practice of not providing closed captioning on all of its streaming library, Netflix asserted that websites in general, and its website in particular, are not “place[s] of public accommodation” under the ADA.²²⁷ The court rejected this reasoning, recognizing that “business is increasingly conducted online” and noted that “‘places of public accommodation’ are not limited to ‘actual physical structures.’”²²⁸ It is irrelevant that the ADA definition of public accommodation did not, and does not, specifically include web-based services, as Congress intended the definition of public accommodation under the ADA “to adapt to changes in technology.”²²⁹ As the court noted, “[i]t would be irrational to conclude that persons who enter an office to purchase services are protected by the ADA, but persons who purchase the same services over the telephone or by mail are not. Congress could not have intended such an absurd result.”²³⁰ The court ultimately concluded that Netflix may qualify as a

“service establishment” in that it provides customers with the ability to stream video programming through the internet; a “place of exhibition or entertainment” in that it displays movies, television programming, and other content; and a “rental establishment” in that it engages customers to pay for the rental of video programming.²³¹

While the analysis in both *Robles v. Domino’s* and *National Ass’n for the Deaf v. Netflix* deals with the definition of a public accommodation under the ADA, the analysis is instructive in interpreting

225. 869 F. Supp. 2d 196, 199 (D. Mass. 2012).

226. *See id.* at 198-99. The plaintiffs further asserted that “captioned films are not categorized in the same manner as other films, making it impossible for deaf and hard of hearing individuals to use Netflix’s personalized film recommendations.” *Id.* at 199.

227. *Id.* at 199-200.

228. *Id.* at 200 (quoting *Carparts Distrib. Ctr. v. Auto. Wholesaler’s Ass’n of New England*, 37 F.3d 12, 19 (1st Cir. 1994)).

229. *Id.* at 200-01.

230. *Id.* at 200 (alteration in original) (quoting *Carparts Distrib. Ctr.*, 37 F.3d at 19) (“*Carparts’s* reasoning applies with equal force to services purchased over the Internet, such as video programming offered through the Watch Instantly web site.”).

231. *Id.* at 201 (quoting 42 U.S.C. § 12181(7)).

Airbnb's status as a public accommodation under the CRA. In both ADA cases, the courts made clear that operation of a marketplace online, rather than in a physical space, does not obviate a business's responsibilities to consumers.²³² As the *Netflix* court noted,

In a society in which business is increasingly conducted online, excluding businesses that sell services through the Internet from the ADA would "run afoul of the purposes of the ADA and would severely frustrate Congress's intent that individuals with disabilities fully enjoy the goods, services, privileges and advantages, available indiscriminately to other members of the general public."²³³

The same should hold for websites offering activities traditionally regulated by the CRA. To exclude online transactions, such as short-term rental accommodation bookings, from the CRA because they take place entirely on the internet would undermine the purpose of the CRA.

Critics may point out, rightly, that both *Netflix* and *Robles* dealt with categories of service that were already expressly protected by the ADA, which is broader than the CRA.²³⁴ While the ADA applies to twelve categories of entities whose "operations ... affect commerce,"²³⁵ the CRA public accommodation list applies to entities that provide lodging, food, or entertainment.²³⁶ However, as the *Netflix* court noted, the "[p]laintiffs must show only that the web site falls within a *general category* listed under the ADA."²³⁷ The courts'

232. This reasoning echoes the "holding out theory," which requires "innkeepers and carriers of goods to serve the public if they held themselves out to serve the public." Terri R. Day & Danielle Weatherby, *Contemplating Masterpiece Cakeshop*, 74 WASH. & LEE L. REV. ONLINE 86, 91 (2017).

233. *Netflix, Inc.*, 869 F. Supp. 2d at 200 (quoting *Carparts Distrib. Ctr.*, 37 F.3d at 20).

234. Under the ADA, there are twelve categories of entities whose "operations ... affect commerce" and therefore qualify as public accommodations. 42 U.S.C. § 12181(7)(A)-(L). These include entities that provide lodging, dining, and entertainment; places of public gathering; sales or rental establishments; service establishments such as laundromats, dry cleaners, banks, barber shops, and travel services; stations used for specified public transportation; museums or places of public display or collection; places of recreation; places of education; social service center establishments; and places of exercise or recreation. *Id.*

235. *Id.* § 12181(7).

236. *Id.* § 2000a(b).

237. 869 F. Supp. 2d at 201 (emphasis added) ("[W]ithin each of these categories, the legislation only lists a few examples and then, in most cases, adds the phrase 'other similar'

willingness to recognize that contemporary websites fall into a general category of protected establishments under the ADA suggests that the overarching purpose of the site may be a dominant factor in determining the applicability of federal protections, regardless of the type of user.

Applying this analysis to Title II's definition of public accommodation, a court would look at the general category into which a short-term rental platform may be grouped. Supporting this approach, the CRA lodging provision does not require discrimination to be experienced by the "transient guest[.]"²³⁸ The text states that "[a]ll persons [are] entitled to the full and equal enjoyment of the ... services ... of any place of public accommodation,"²³⁹ suggesting that protection is instead triggered by the type of establishment. Short-term rental platforms deal generally with the provision of lodging services, an enumerated public accommodation. Under this approach, because a lodging qualifies broadly as a public accommodation, and because short-term rental platforms provide lodging services, all persons could seek legal recourse under the CRA for discrimination that they experience on the platform.

2. *Fragmented-Function Test*

Alternatively, courts may determine whether a short-term rental platform is a public accommodation within the meaning of the CRA based on the specific type of user experience. Both *Robles* and *Netflix* dealt with transactions that involved two parties: the website owner and the user, with the court affirming the obligations of the website to the user under ADA public accommodation doctrine.²⁴⁰ In the case of short-term rental platforms, there are three relevant parties: (1) the company operating the website, (2) the

entities. The Committee intends that the 'other similar' terminology should be construed liberally consistent with the intent of the legislation." (quoting S. REP. NO. 116, at 59 (1990)); see also *Access Now, Inc. v. Blue Apron, LLC*, No. 17-cv-116-JL, 2017 WL 5186354, at *4 (D.N.H. Nov. 8, 2017) (finding that Blue Apron may be like an online grocery store, which is a public accommodation under the ADA, or may fall into the broader "other sales" or "other service establishment" categories).

238. See 42 U.S.C. § 2000a(b)(1).

239. *Id.* § 2000a(a).

240. See *Robles v. Domino's Pizza, LLC*, 913 F.3d 898, 902-05 (9th Cir. 2019); *Netflix, Inc.*, 869 F. Supp. 2d at 198, 199-202.

prospective guest, and (3) the prospective host. Given the additional user, courts may be willing to analyze specifically what each party gives and receives in the course of the transaction to determine the applicability of federal antidiscrimination law.

Under this fragmented-function test, a court may determine that a platform such as Airbnb is a public accommodation for guests, but not for hosts. This determination is based on the service each party receives from the platform. While guests use sites like Airbnb to identify and book lodgings, hosts use such platforms to advertise available accommodations and facilitate booking and payment.

Courts' willingness to parse out the creation and authorship of speech line-by-line under the CDA could signal judicial willingness to distinguish short-term rental platform user experiences for the purposes of the CRA, thereby limiting its applicability and available relief to hosts. Under section 230 of the CDA, providers of internet services are immune from liability for content created by third parties.²⁴¹ The threshold question in the CDA analysis is whether a website operator functions as a service provider or a content provider.²⁴² A site is a service provider "[i]f it passively displays content that is created entirely by third parties"; in contrast, a site falls into the latter category if it is "responsible, in whole or in part' for creating or developing" content.²⁴³ However, it is also possible for a site to function as a service provider for some of the information it displays and a content provider for other information.²⁴⁴

The Ninth Circuit considered this issue when assessing the liability of Roommates.com, a platform that connects prospective roommates. Ultimately, the court held that Roommates.com was an information content provider because the platform asked users to describe their age, gender, sexual orientation, occupation, and children and then to answer similar questions about roommate

241. 47 U.S.C. § 230(c)(1) ("No provider ... of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.").

242. Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC, 521 F.3d 1157, 1162-63 (9th Cir. 2008).

243. *Id.* at 1162 (quoting 47 U.S.C. § 230(f)(3)).

244. *Id.* at 1162-63 ("In passing [the CDA], Congress sought to spare interactive computer services this grim choice by allowing them to perform some editing on user-generated content without thereby becoming liable for all defamatory or otherwise unlawful messages that they didn't edit or delete.").

preferences.²⁴⁵ In doing so, the platform “help[ed] ‘develop’ at least ‘in part’ the information in the profiles.”²⁴⁶ In contrast, the Northern District of Illinois found no liability for Craigslist.com when its users posted comments that would otherwise violate the CRA, such as “NO MINORITIES.”²⁴⁷ As the court noted, Craigslist.com did not request demographic information or preferences of its users and did nothing to solicit such statements.²⁴⁸ As such, it was a service provider rather than a content provider and therefore immune under the CDA.²⁴⁹

Treatment of website “speech” under the CDA is instructive in determining whether the CRA is applicable to finding short-term rental platform liability for discrimination against hosts. At first blush, it may appear that Airbnb is similar to Roommates.com, as both sites request specific information from users.²⁵⁰ However, while Airbnb’s active role as a content provider may be probative of its responsibility for facilitating discrimination, it does not overcome the Title II hurdle of finding that the website is a public accommodation for hosts. In fact, both the Roommates.com and Craigslist cases demonstrate judicial willingness to investigate a website’s relationship with users and parse out the website’s specific role. This suggests that courts would be likely to engage in a granular analysis of a website’s function and would investigate what services it provides to different types of users.

Should the courts take a similar approach to CDA jurisprudence, it is likely that Title II of the CRA will not apply. For Title II to apply, the short-term rental platform must function as a public accommodation.²⁵¹ If courts bifurcate the website’s functions, then courts will likely determine that, while a short-term rental platform functions as a lodging accommodation for guests, the platform merely functions as an advertising and retail space for hosts. Hosts

245. *Id.* at 1164, 1169-70.

246. *Id.* at 1165.

247. Chi. Laws.’ Comm. for C.R. Under the L., Inc., v. Craigslist, Inc., 461 F. Supp. 2d 681, 685-86, 698-99 (N.D. Ill. 2006).

248. *Id.* at 698.

249. *Id.* at 698-99.

250. *Fair Hous. Council*, 521 F.3d at 1161-62; see *Who Can Host on Airbnb?*, AIRBNB HELP CTR., <https://www.airbnb.com/help/article/18/who-can-host-onairbnb> [<https://perma.cc/F3N6-VKNW>].

251. See 42 U.S.C. § 2000a(a)-(b).

do not use short-term rental platforms to seek lodging services. Instead, a host uses the site to advertise available accommodations and facilitate the booking with the guest. Importantly, the purchase of advertising services does not fall into any of Title II's narrowly enumerated public accommodation categories of lodging, dining, or entertainment.²⁵² Because the service that hosts receive from short-term rental sites is similar to a retail establishment, and because retail is not an expressly enumerated public accommodation, Title II cannot apply. Therefore, if courts used a fragmented-function approach like that used to determine CDA liability, courts would find that, for hosts, Title II of the CRA does not apply.

3. State-Level Protections

Courts are more likely to employ a fragmented-function approach to determine the scope of rights available to short-term rental hosts. Under this framework, hosts are deemed to receive retail services from short-term rental platforms, which are not an enumerated public accommodation under the CRA. In the absence of federal protection from discrimination in retail establishments, individuals are subject to protections at the state level.

Not all states have a public accommodation law,²⁵³ and even among those that do, not all include retail establishments.²⁵⁴ Forty-five states have public accommodation laws for nondisabled individuals.²⁵⁵ Of those, the vast majority include language that is broader than that of federal law. In defining a public accommodation, many states use language such as “all establishments which

252. *Id.* § 2000a(b).

253. Alabama, Georgia, Mississippi, North Carolina, and Texas do not have public accommodation statutes for nondisabled individuals. *State Public Accommodation Laws*, NCLS (Apr. 8, 2019), <https://www.ncsl.org/research/civil-and-criminal-justice/state-public-accommodation-laws.aspx> [<https://perma.cc/7FCX-9HE9>]. According to the United States Census Bureau, these states represent more than 17.5 percent of the population. *US States—Ranked by Population 2020*, WORLD POPULATION REV., <https://worldpopulationreview.com/states> [<https://perma.cc/2BFA-NUU9>].

254. See Jeremy D. Bayless & Sophie F. Wang, *Racism on Aisle Two: A Survey of Federal and State Anti-discrimination Public Accommodation Laws*, RACISM (Jan. 18, 2013), <https://racism.org/articles/basic-needs/public-facilities/1581-publicaccommodations02?showall=1> [<https://perma.cc/6YRV-H42A>].

255. See *id.*

cater or offer their services, facilities or goods to or solicit patronage from the members of the general public.”²⁵⁶ Similarly, several jurisdictions define a public accommodation as “any place, store, or other establishment ... that ... accepts the patronage or trade of the general public.”²⁵⁷ Other jurisdictions go even further, defining a public accommodation as “any establishment which ... offers its services or facilities or goods to the general public”²⁵⁸ or “places to which the general public is invited.”²⁵⁹ Public accommodation law at the state level is primarily concerned with whether the business is open to the general public.

Short-term rental platforms are businesses open to the general public. Airbnb, for example, states that hosts can “[s]hare any space” on Airbnb.²⁶⁰ Even short-term rental sites that cater to affinity groups are open to all.²⁶¹ If short-term rental platforms ran their services out of brick-and-mortar locations, there would be no question that they constitute a public accommodation under state law. A website offering the same service should be subject to the same law. To find otherwise would frustrate the purpose of public accommodation law by creating an “internet loophole.” Websites, therefore, are not immune from liability under state

256. *E.g.*, ARIZ. REV. STAT. ANN. § 41-1441(2) (2020).

257. *E.g.*, ARK. CODE ANN. § 16-123-102(7) (2020).

258. *E.g.*, CONN. GEN. STAT. § 46a-63(1) (2020).

259. *E.g.*, FLA. STAT. § 413.08(2)(c) (2019).

260. *Rent Out Your House, Apartment or Room on Airbnb*, AIRBNB, <https://airbnb.com/host/homes> [<https://perma.cc/RDP3-4SXS>]. The site further states that “[a]lmost anyone can be a host. It’s free to sign up and list both stays and experiences.... Stays and experiences are offered all around the world, though we’re required to comply with international regulations that restrict the use of our site by residents of certain countries.” *Who Can Host on Airbnb?*, *supra* note 250.

261. If a short-term rental platform has an express policy of prohibiting minority hosts from participating, it would be challenged. Affinity groups can, and do, operate platforms. For example, *Noirbnb.com* is a short-term rental platform that was created in response to racism experienced by minority Airbnb users and caters specifically to “stress-free travel for the African Diaspora.” *NOIRBNB*, <https://noirbnb.com/> [<https://perma.cc/FT2G-8AVF>]. However, the site emphatically states that it is “open to all!” *Frequently Asked Questions*, *NOIRBNB*, <https://noirbnb.com/faqs> [<https://perma.cc/FZ7B-83L2>]. Similarly, *Innclusive* was created in response to discrimination experienced by minority users on Airbnb. Danielle T. Pointdujour, *Innclusive Founder on Her Plans to Make #AirBnBWhileBlack a Thing of the Past*, *EBONY* (June 9, 2016), <https://www.ebony.com/life/travel-innclusive/> [<https://perma.cc/8JPX-YMRL>]. *Innclusive*’s founder touted the platform as an important tool to fight discrimination and designed *Innclusive* as a “safe place” for all. *Id.* Despite its admirable goals, *Innclusive* no longer existed when this Article was published.

antidiscrimination law, nor may they circumvent their obligations to be free of discrimination just because they only exist online.

Notably, however, five states do not have a public accommodation statute for nondisabled individuals: Alabama, Georgia, Mississippi, North Carolina, and Texas.²⁶² According to data from the United States Census Bureau, these states represent more than 17.5 percent of the population.²⁶³ If federal courts apply a fragmented-function test and determine the CRA does not apply, hosts in these jurisdictions who experience discrimination will be left without meaningful legal recourse.

Determining that a short-term rental platform is a public accommodation for hosts within the meaning of state law is only the first step to assessing platform operator liability. Hosts must also prove they experienced discrimination in order to prevail. It is difficult to prove that any single decision not to book with a space listed by a minority host is the result of discrimination. However, in analyzing platform liability, direct evidence is not necessary to succeed on a CRA claim.²⁶⁴ As the Supreme Court stated, circumstantial evidence of discrimination is sufficient to infer discrimination.²⁶⁵ However, disparate impact arguments—that is, a showing that a race neutral policy has a disparate effect on a protected class—are not permitted under the CRA. As such, empirical data, such as studies finding discrimination against minority short-term rental hosts in New York City and Northern California, may be used to satisfy evidentiary requirements if they demonstrate a platform intentionally or facially discriminates against minority short-term rental hosts. This evidentiary hurdle creates the need for additional avenues to overcome redlining that are not subject to the same challenges.

262. *State Public Accommodation Laws*, *supra* note 253.

263. *See US States—Ranked by Population 2020*, *supra* note 253.

264. *Cf. Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 147 (2000) (concluding that the trier of fact can infer employment discrimination from circumstantial evidence).

265. *Id.* (“Proof that the defendant’s explanation is unworthy of credence is simply one form of circumstantial evidence that is probative of intentional discrimination, and it may be quite persuasive.”); *see also Lindsey v. SLT L.A., LLC*, 447 F.3d 1138, 1149 (9th Cir. 2006) (“[T]he proper procedure ... is to set before the factfinder the task of analyzing the entire record in order to evaluate the credibility of the reasons proffered, the possibility of other non-discriminatory reasons, and the ultimate likelihood that the main motive was discriminatory.”).

IV. BEYOND THE TRADITIONAL ANTIDISCRIMINATION LAW APPROACH

The existing legal framework cannot fully respond to discrimination against hosts in the sharing economy. At the federal level, the law was conceived to protect consumers of lodging, restaurant, and recreation services, rather than merchants or those receiving retail services.²⁶⁶ This is partly rooted in American traditions of free market and individual decision-making.²⁶⁷ The law allows consumers to be able to shop anywhere and does not dictate that they only patronize certain institutions, even if shopping at a certain business achieves a social good.²⁶⁸ Should the courts find the CRA inapplicable, it is likely that hosts have no recourse under federal antidiscrimination law. This will result in state remedies that vary by jurisdiction. Given the potential barriers to finding home-sharing platforms legally liable for discrimination against short-term rental hosts discussed above, this Part proposes nonlegal strategies to address redliking.

“[S]tructures that promote and preserve” reproduction preferences of bias and exclusion have “serious implications for social equality.”²⁶⁹ Online platforms contain built-in design features that allow users to actualize discriminatory preferences.²⁷⁰ As platforms gain prominence, both in number of users as well as market share, design features that permit discriminatory preferences by individuals will have outside effects in the aggregate.²⁷¹ Design features include both the way that information is presented on the platform as well as underlying algorithms that determine order and rank of listings.²⁷² Reduction of redliking, therefore, will require a

266. See Bartlett & Gulati, *supra* note 102, at 225 (discussing how current federal and state law does not prevent discrimination by customers).

267. See *id.* at 238.

268. See *id.*

269. Hutson et al., *supra* note 112, at 73:3 (“As others have shown, the intimate sphere has historically been a crucial locus of state control, as well as a key determinant of social and economic welfare.”).

270. *Id.* at 73:4.

271. *Id.*

272. See Calo & Rosenblat, *supra* note 29, at 1652 (“Th[e] combination of visibility and sociotechnical design confers upon sharing economy firms exquisite control of the interactions

multifaceted approach that incorporates lessons from behavioral economics as well as reform of algorithm-driven processes.

A. Behavioral Economics Approach

Given the potential limitations of the current legal framework to adequately protect hosts from discrimination, behavioral economics may provide a viable alternative. In the abstract, markets are impersonal.²⁷³ In theory, “[t]here is no particular relation between a supplier and a demander; that is, a supplier is indifferent about supplying one demander or another, and vice versa.”²⁷⁴ However, bias makes such an exchange highly unlikely.²⁷⁵

Coined by Professor Cass Sunstein, choice architecture suggests that the organization of “the context in which people make decisions” will directly affect the choices people make.²⁷⁶ Short-term rental platform operators, including Airbnb, Homeaway, and VRBO, are choice architects. As such, the way they organize information on their sites affects the booking decisions users make.²⁷⁷ In doing so, short-term rental “platforms exercise enormous control over the type of information made available to transacting parties.”²⁷⁸ These decisions have financial consequences for hosts. Left unchecked, the cumulative effect of these decisions provides disproportionate economic benefits to White hosts. Therefore, it is incumbent on short-term rental platform operators, as choice architects, to consider presenting information to users in a way that will diminish the financial impact of their biases.²⁷⁹

they facilitate.”).

273. Kenneth J. Arrow, *What Has Economics to Say About Racial Discrimination?*, 12 J. ECON. PERSPS. 91, 94 (1998).

274. *Id.*

275. *See id.*

276. Richard H. Thaler, Cass R. Sunstein & John P. Balz, *Choice Architecture*, in THE BEHAVIORAL FOUNDATIONS OF PUBLIC POLICY 428, 428 (Eldar Shafir ed., 2013) (“Doctors describing the available treatments to patients, human-resource administrators creating and managing health-care plan enrollment, marketers devising sales strategies, ballot designers deciding where to put candidate names on a page, parents explaining the educational options available to a teenager; these are just a few examples of choice architects.”).

277. *See id.*

278. *See* Karen Levy & Solon Barocas, *Designing Against Discrimination in Online Markets*, 32 BERKELEY TECH. L.J. 1183, 1210 (2017).

279. *See, e.g.*, Iris Bohnet, Alexandra van Geen & Max Bazerman, *When Performance*

“Defaults are ubiquitous and powerful.”²⁸⁰ They provide an easy path, deviation from which requires effort and deliberate thought.²⁸¹ Moreover, “[n]o design choice is neutral: even attempts to cede as much control as possible to users does not relieve platforms of their powerful roles in structuring mediated social interactions.”²⁸² Acknowledging the role that design plays in shaping user behavior, platforms must scrutinize their design to identify and eliminate, or at least minimize, opportunities for discriminatory behavior.²⁸³

On Airbnb, the default structure organizes available listings with photographs of the property, initially without mention of the host.²⁸⁴

Trumps Gender Bias: Joint vs. Separate Evaluation, 62 MGMT. SCI. 1225, 1225 (2016) (“Effective mechanisms to decrease the impact of such biases are blind evaluation procedures. For example, many major orchestras have musicians audition behind a curtain. These methods have proven to substantially decrease gender discrimination in the selection of musicians for orchestras.”).

280. Thaler et al., *supra* note 276, at 430.

281. CASS R. SUNSTEIN, *WHY NUDGE? THE POLITICS OF LIBERTARIAN PATERNALISM* 9-10 (2014) (ebook).

282. Hutson et al., *supra* note 112, at 73:11 (“Claims of neutrality from platforms ignore the inevitability of their role in shaping interpersonal interactions that can lead to systemic disadvantage.”).

283. *Id.*

284. *See generally* AIRBNB, <https://www.airbnb.com> [<https://perma.cc/XDA8-SYJJ>].

Figure 2. Sample Results from a Search of “Places to Stay” in New Orleans²⁸⁵

airbnb.com/s/New-Orleans--LA--United-States/homes?refinement_paths%5B%5D=%2Fhomes&screen_size=large&query=New%20Orleans%2C%20LA%2C%20United%20States&place_id=ChIJZYIRslSkIIYRtNMiXuhbBts&source=structured_search_input_header&search_type=autocomplete_click [https://perma.cc/W6SE-D9CM].

Click to go forward, hold to see history

Q New Orleans · Stays

Become a host Saved Trips Messages* Help

Dates Guests Work trip Type of place Price Instant Book More filters Show Map

Over 360,000 guest reviews for places to stay in New Orleans, with an average of 4.8 out of 5 stars.

300+ places to stay

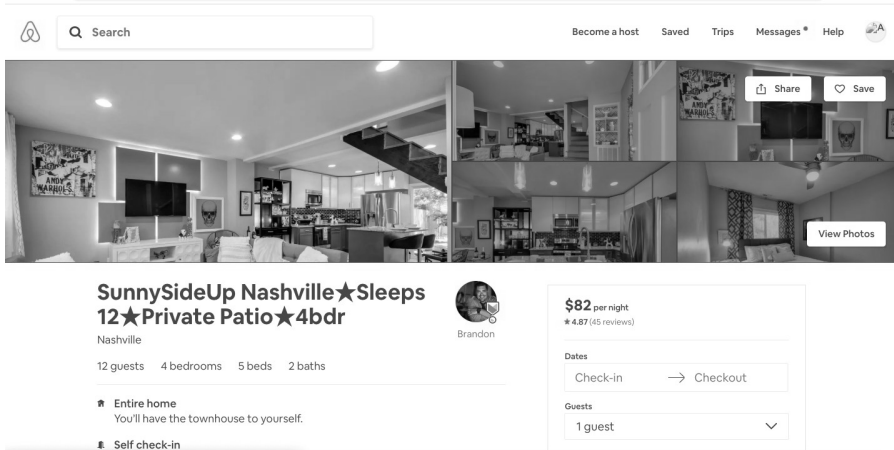
SUPERHOST Entire house ★ 4.99 (317)
Treme Guesthouse Just a Half-Block to the Quarter
 2 guests · 1 bedroom · 1 bed · 1 bath
 Wifi · Kitchen · Air conditioning
 \$125 / night

SUPERHOST Entire house ★ 4.88 (125)
Home Away from Home

Map showing search results for New Orleans, LA, with prices ranging from \$42 to \$129 per night.

Once a prospective guest clicks a potential listing to learn more about the property, however, the site directs the prospective guest to a page where the host’s photograph and name are prominently displayed at the top, next to the name of the listing and the nightly rate. The host’s name and photograph appear before nearly all information about the property itself, including a description of the space, amenities, sleeping arrangements, and reviews.

285. See generally *Stays in New Orleans*, AIRBNB, https://www.airbnb.com/s/New-Orleans--LA--United-States/homes?tab_id=home_tab&refinement_paths%5B%5D=%2Fhomes&date_picker_type=calendar&query=New%20Orleans%2C%20LA%2C%20United%20States&place_id=ChIJZYIRslSkIIYRtNMiXuhbBts&source=structured_search_input_header&search_type=autocomplete_click [https://perma.cc/W6SE-D9CM].

Figure 3. Individual Page for a Listing in Nashville²⁸⁶

When a prospective guest clicks on the host’s photograph, the prospective guest is directed to the host’s profile page, on which hosts can choose what to share with others. This default organization encourages guests to consider a host’s demographics when contemplating making a reservation.

Airbnb and other short-term rental sites should consider how its design promotes—or at least fails to prevent—redliking by short-term rental guests. As scholars analyzing discrimination on dating platforms note, design features can be effective in mitigating user bias.²⁸⁷ For example, eliminating features that allow users to sort themselves by race and ethnicity as well as including design

286. See generally *Nashville Listing*, AIRBNB, https://www.airbnb.com/rooms/33719117?source_impression_id=p3_1617372869_9Jn0RRaBOAWSJ%2Fex&guests+1&adults=1 [https://perma.cc/P57U-U8UA]. The badge icon denotes that the host has achieved “Superhost” status. *What Is a Superhost?*, AIRBNB HELP CTR., <https://www.airbnb.com/help/article/828/what-is-a-superhost> [https://perma.cc/TN9A-PFEJ] (“Superhosts are experienced hosts who provide a shining example for other hosts, and extraordinary experiences for their guests.”). To achieve Superhost status, a host must meet several requirements related to their services and “[m]aintain[] a 4.8 overall rating.” *How Do I Become a Superhost?*, AIRBNB HELP CTR., <https://www.airbnb.com/help/article/829/how-do-i-become-a-superhost> [https://perma.cc/A6RM-D2G5].

287. Hutson et al., *supra* note 112, at 73:6 (pointing to “search, sort, and filter tools,” “matching by algorithm,” and “community policies and messaging” as mechanisms to eliminate user bias on intimate platforms).

features that overtly “warn against inappropriate behavior or promote respect and openness.”²⁸⁸

Firms such as Airbnb that collect user information on a massive scale are well positioned to analyze their data to uncover bias and how such bias affects user interaction with listings.²⁸⁹ Airbnb is aware of the importance of platform design to facilitating, or preventing, discrimination by users.²⁹⁰ In its 2016 report on its work to fight discrimination and build inclusion, the company notes that it is “paying particular attention to the design of our platform and how it did or did not facilitate fair interactions between people who do not know one another.”²⁹¹ Airbnb does not require or ask users to input data about their race or ethnicity; however, host photographs serve as a proxy to convey that information.

Airbnb acknowledges that the platform has discrimination issues.²⁹² Since the report’s publication in 2016, Airbnb has made changes to the information provided about guests prior to booking and strategically partnered with the NAACP to increase the number of minority hosts using the platform.²⁹³ More recently, in June 2020, Airbnb announced Project Lighthouse, an initiative designed in partnership with civil rights groups²⁹⁴ to “begin[] with research to understand when and where racial discrimination happens on [the]

288. *Id.* at 73:10.

289. Calo & Rosenblat, *supra* note 29, at 1651-52 (“Rather than draw from a set of known cognitive limitations, such as propensity to stick with defaults, companies can now use pattern recognition to spot the many idiosyncratic ways consumers depart from rational decisionmaking within their digital ecosystem.... Sharing economy firms such as Airbnb, Lyft, and Uber sit between transactions among multiple parties, which places them in a position to study both the provider of the service and its consumer, individually and collectively.”).

290. LAURA W. MURPHY, AIRBNB’S WORK TO FIGHT DISCRIMINATION AND BUILD INCLUSION: A REPORT SUBMITTED TO AIRBNB 14 (2016), https://blog.atairbnb.com/wp-content/uploads/2016/09/REPORT_Airbnbs-Work-to-Fight-Discrimination-and-Build-Inclusion.pdf [<https://perma.cc/U7FC-DWW3>].

291. *Id.*

292. *Id.* at 16.

293. *Id.* at 15, 17, 25.

294. *A New Way We’re Fighting Discrimination on Airbnb*, AIRBNB RES. CTR. (Aug. 20, 2020), <https://www.airbnb.com/resources/hosting-homes/a/a-new-way-were-fighting-discrimination-on-airbnb-201> [<https://perma.cc/6CJX-TD73>] [hereinafter Airbnb, *Fighting Discrimination*]. Airbnb partnered with Asian Americans Advancing Justice, Center for Democracy & Technology, Color of Change, The Leadership Conference on Civil & Human Rights, LULAC, the NAACP, National Action Network, and Upturn. MURPHY, *supra* note 290, at 15.

platform and the effectiveness of policies that fight it.”²⁹⁵ Under this initiative, Airbnb will research the acceptance gap, which Airbnb defines as the difference between rates at which hosts accept guests’ reservation requests for guests in different demographic groups.²⁹⁶ Specifically, Project Lighthouse will analyze the acceptance gap rate between “guests who are perceived to be white and guests who are perceived to be black within the United States.”²⁹⁷ Airbnb plans to use the information gathered during Project Lighthouse to “develop new features and policies that create a more equitable experience on [the] platform.”²⁹⁸ In developing the project, the platform noted that “[w]hile profile photos have been removed during the initial booking process, we’re interested in understanding how profile photos might impact ... things like cancellations or reviews.”²⁹⁹

These initiatives are important to reduce bias on the platform. However, they are not designed to uncover and prevent discrimination expressed by short-term rental guests toward short-term rental hosts. Moreover, Airbnb has not indicated it has any plans to make changes to how and when guests may access demographic information about hosts. By not including discrimination against short-term rental hosts in its research initiative or altering its website design to change when and how host information is accessed, Airbnb perpetuates an architecture that allows guests to continue to discriminate against minority hosts, resulting in fewer bookings and lower earnings as compared to White hosts.

Even if the court does not find Airbnb liable under the CRA, the company could—and should—make several changes to its website design to curb discrimination by prospective guests against minority hosts. The most far-reaching measure Airbnb could take would be to eliminate the display of personal information entirely. This is consistent with the changes Airbnb made to limit access to personal

295. Airbnb, *Fighting Discrimination*, *supra* note 294.

296. SID BASU, ADAM BLOOMSTON & ANNE DIAZ, AIRBNB, MEASURING DISCREPANCIES IN AIRBNB GUEST ACCEPTANCE RATES USING ANONYMIZED DEMOGRAPHIC DATA 3 (2020), <https://news.airbnb.com/wp-content/uploads/sites/4/2020/06/Project-Lighthouse-Airbnb-2020-06-12.pdf> [<https://perma.cc/2LE2-UB9T>].

297. *Id.*

298. Airbnb, *Fighting Discrimination*, *supra* note 294.

299. *Id.*

information about guests.³⁰⁰ As discussed above, Airbnb realized that the availability of guest photographs prior to confirmation of a booking resulted in discrimination against minority guests.³⁰¹ Therefore, as Airbnb did for guest photographs in 2018,³⁰² Airbnb could eliminate the use of host photographs or withhold hosts' names and photographs until after a guest has made a reservation. Doing so would eliminate the ability of bias against minority hosts to influence a guest's decision to book a particular accommodation.

Withholding host information may come at a cost. In response to the global protests following the killing of George Floyd, a wave of businesses took steps to articulate their alleged support to combat systemic racism.³⁰³ Some companies even created pages on their websites to direct consumers to Black creators and entrepreneurs.³⁰⁴ Hiding host information would make it impossible for guests to actively direct their business to minority hosts. To address this concern, Airbnb could instead make host information prior to booking optional. This would allow the host to decide whether their listing page includes any demographic information. Currently, many professional management companies on Airbnb use a generic landscape photo or company logo for their host profile picture. However, mom-and-pop hosts may not realize this is an option and, due to Airbnb's emphasis on person-to-person connection, may feel pressured to use personally identifying information. Airbnb should clearly communicate that all hosts have the option of using an impersonal photo as well as let hosts decide not to share any information. For hosts who choose to withhold all information until

300. See *Update on Profile Photos*, *supra* note 17.

301. See MURPHY, *supra* note 290, at 17.

302. *Update on Profile Photos*, *supra* note 17.

303. Shaun R. Harper, *Corporations Say They Support Black Lives Matter. Their Employees Doubt Them.*, WASH. POST (June 16, 2020, 6:00 AM), <https://www.washingtonpost.com/outlook/2020/06/16/corporations-say-they-support-black-lives-matter-their-employees-doubt-them/> [<https://perma.cc/2EB6-NVR2>].

304. See, e.g., *Black-Owned Etsy Shops*, ETSY, <https://www.etsy.com/featured/blackownedshops> [<https://perma.cc/XH9M-45JJ>]. Online marketplace Etsy, which allows individuals to sell vintage and homemade products through "shops," has set up a page that focuses on "Black-owned Etsy shops" stating "[w]e believe in showcasing, celebrating, and uplifting the talents of independent creatives. Discover one-of-a-kind creations from Black sellers in our community." *Id.*

after a booking is confirmed, Airbnb must offer a page design that does not emphasize this absence.³⁰⁵

Less drastically, Airbnb could redesign its site to decrease the prominence of hosts' personal information. For example, a host's name and photograph could appear below all information about the listing, signaling its diminished importance relative to other information displayed about the accommodation. Airbnb could even restructure information so that, in order to learn about the host, a prospective guest must click through one or more additional pages. This would allow guests to form a strong opinion about the listing before being presented with host information. Alternatively, the platform could make changes to its design to allow users to opt into demographic sharing, rather than mandate it. For example, Airbnb could let hosts decide whether to share demographic information, or to only share after a reservation is made and accepted.³⁰⁶ The latter mirrors Airbnb's current policy on sharing demographic information of guests.³⁰⁷

In addition to making changes about whether—and how—hosts' personal information is presented, Airbnb could design its platform to actively, and repeatedly, communicate its policies on user discrimination. Currently, a prospective guest can search for accommodations on the site without overt reminders about Airbnb's antidiscrimination policy.³⁰⁸ When a user conducts a search, available listings populate the display on the platform. In order to proactively learn about Airbnb's antidiscrimination policy, a user must click on "Terms" located in the bottom left-hand corner.³⁰⁹

305. Twitter uses a conspicuous "egg head" as a default image when a user does not upload their own photo. See generally TWITTER, <https://twitter.com/> [<https://perma.cc/39CE-BYRJ>].

306. This is similar to the platform and process design of Innclusive, an Airbnb competitor. *How Inclusive Addresses Issues of Discrimination*, INNCLUSIVE, <https://perma.cc/3J5J-G7DV>. Other platforms use a different approach. Hotels.com, an online booking site for hotels around the world, offers prospective guests the ability to filter for "gay-friendly hotels," which are operated by people from the local LGBTQ economy, and will provide guests with information about local establishments that cater to the LGBTQ community. *What to Expect from a Gay-Friendly Hotel*, HOTELS, <https://www.hotels.com/articles/ar015478/gay-rfriendly-hotels-47110/> [<https://perma.cc/DDE7-JDV6>].

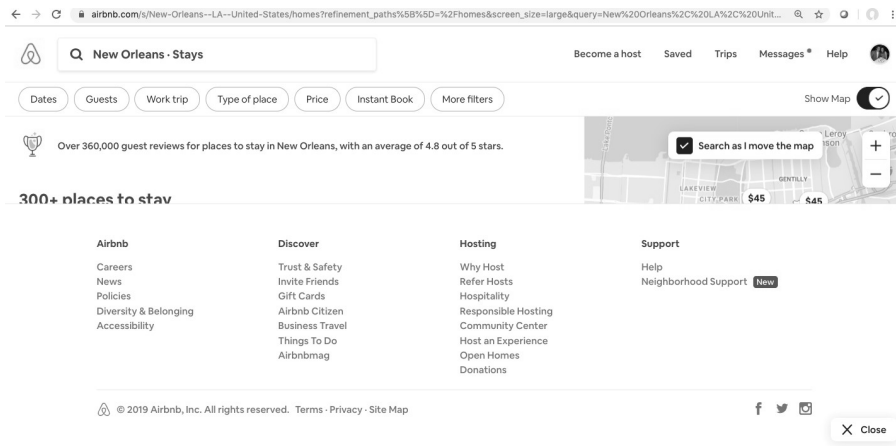
307. It should be noted, however, that diminishing or eliminating a host's demographic information "is cynical about the ability to change discriminatory attitudes, and operates by disabling such attitudes rather than challenging them." Schoenbaum, *supra* note 126, at 470.

308. See generally AIRBNB, *supra* note 284.

309. See, e.g., *id.*

Once a user clicks, a pop-up appears giving the user an opportunity to select a header called “Nondiscrimination Policy.”³¹⁰

Figure 4. Users Can Scroll to the Bottom of the Page and Select “Diversity & Belonging” from Beneath the “Community” Heading³¹¹



Only after selecting “Diversity & Belonging” can a user obtain information about Airbnb’s discrimination policy.³¹² If a guest does not proactively seek out information about Airbnb’s policy, it is not until they attempt to book a space that the guest is presented with “a message asking them to affirmatively certify that they agree” with Airbnb’s commitment to diversity.³¹³ This is too late. By the time a guest takes steps to book a particular listing, bias has already had an opportunity to influence the decision-making process. For the statement to diminish the effect of bias on the

310. *Terms of Service*, AIRBNB, <https://www.airbnb.com/terms> [<https://perma.cc/65YZ-CDC3>].

311. See generally AIRBNB, *supra* note 284.

312. *Our Diverse Global Community Makes Airbnb Possible*, AIRBNB, <https://www.airbnb.com/diversity> [<https://perma.cc/6CZR-497K>].

313. MURPHY, *supra* note 290, at 19 (“We believe that no matter who you are, where you are from, or where you travel, should be able to belong to the Airbnb community. By joining this community, you commit to treat all fellow members of this community, regardless of race, religion, national origin, disability, sex, gender identity, sexual orientation or age, with respect, and without judgment or bias.”).

platform, it needs to appear prior to when the decision about which property to book has been made.

Adoption of these design recommendations by short-term rental platforms would create a new default structure that reduces opportunities for discrimination to permeate transactions. This would mitigate bias that disproportionately harms financial gains of minority hosts while preserving free choice of individual users.

B. Algorithm-Based Approach

Algorithms have the ability to enhance and multiply the effects and propensity of redliking. Assessing the role of Airbnb's algorithm is a related but distinct issue from choice architecture and behavioral economics. Whereas the behavioral economics approach deals with how users engage with information as it is presented to them on short-term rental accommodation platforms, an algorithm or big data approach is concerned with how and why the platform is displaying certain information in the first place. The order in which listings are displayed on Airbnb's website facilitates prospective guests' ability to engage in redliking. This is determined by Airbnb's listing algorithm.³¹⁴

"An algorithm is a sequence of instructions telling a computer what to do."³¹⁵ Algorithms power a multitude of information and processes including screening decisions, social media news feeds, search engine results, automated market trading, the display of advertisements on websites, and the listings a short-term rental platform presents to prospective guests.³¹⁶ Generally, algorithms

314. "Algorithms shape users' online experience by selecting what information to present in sociotechnical systems." Motahhare Eslami & Karrie Karahalios, *Embracing Seamfulness and Uncertainty in Designing Around Hidden Algorithms* (CHI Uncertainty Workshop, 2017), <http://social.cs.uiuc.edu/papers/Motahhare-CHIWorkshop17-CameraReady.pdf> [<https://perma.cc/NY95-2TSV>].

315. PEDRO DOMINGOS, *THE MASTER ALGORITHM: HOW THE QUEST FOR THE ULTIMATE LEARNING MACHINE WILL REMAKE OUR WORLD* 1 (2015); see also Jacob Brogan, *What's the Deal with Algorithms?*, SLATE (Feb. 2, 2016, 10:29 AM), <https://slate.com/technology/2016/02/whats-the-deal-with-algorithms.html> [<https://perma.cc/QQT6-B73V>].

316. See Jon Kleinberg, Jens Ludwig, Sendhil Mullainathan & Cass R. Sunstein, *Discrimination in the Age of Algorithms*, 10 J. LEGAL ANALYSIS 113, 115 (2018) ("Algorithms can be used to produce predictions of the candidate's outcomes, such as future performance after acceptance of a job offer or admission to an academic program.").

are initially programmed by people who select parameters that influence search and display terms.³¹⁷ However, “[l]earning algorithms ... are algorithms that make other algorithms.”³¹⁸ Learning algorithms engage in what is commonly referred to as “machine learning,” the process by which “computers write their own programs.”³¹⁹ In the business context, learning algorithms allow companies to implement a system to sort accumulated data to better match prospective consumer preferences.³²⁰

However, as algorithms engage in machine learning, thereby “effectively programming themselves,” the results can skew from the original intent, becoming unpredictable to repugnant.³²¹ Empirical research has identified algorithmic bias in online recruitment tools,³²² word associations,³²³ online advertisements,³²⁴ facial recognition technology,³²⁵ and computer programs used to sentence

317. *Id.* at 117 (“Algorithms do not build themselves. The Achilles’ heel of all algorithms is the humans who build them and the choices they make about outcomes.... A critical element of regulating algorithms is regulating humans.”).

318. DOMINGOS, *supra* note 315, at 6.

319. *Id.* “Machine learning takes many different forms and goes by many different names: pattern recognition, statistical modeling, data mining, knowledge discovery, predictive analytics, data science, adaptive systems, self-organizing systems, and more.” *Id.* at 8.

320. *Id.* at 11 (“Learning algorithms are the matchmakers: they find producers and consumers for each other, cutting through the information overload.... Learn[ing] [algorithms] are not perfect, and the last step of the decision is usually still for humans to make, but learn[ing] [algorithms] intelligently reduce the choices to something a human can manage.”).

321. Brogan, *supra* note 315; ROSENBLAT, *supra* note 13, at 112 (“Research by computer scientist Latanya Sweeney found that when African American names, like ‘Darnell,’ were plugged into Google’s search engine, the site returned advertisements for criminal justice background checks, evoking the possibility of a connection between anyone with an African American-associated name and a criminal background. When white-dominant names were used, like ‘Jill’ or ‘Geoffrey,’ the advertisements served had no connection to criminal justice.”).

322. Isobel Asher Hamilton, *Why It’s Totally Unsurprising that Amazon’s Recruitment AI Was Biased Against Women*, BUS. INSIDER (Oct. 13, 2018, 4:00 AM), <https://www.businessinsider.com/amazon-ai-biased-against-women-no-surprise-sandra-wachter-2018-10> [<https://perma.cc/CV2E-CT25>] (“Amazon abandoned a project to build an AI recruitment tool, which engineers found was discriminating against female candidates.”).

323. Adam Hadhazy, *Biased Bots: Artificial-Intelligence Systems Echo Human Prejudices*, PRINCETON (Apr. 18, 2017, 12:00 PM), <https://www.princeton.edu/news/2017/04/18/biased-bots-artificial-intelligence-systems-echo-human-prejudices> [<https://perma.cc/D3A7-PN23>] (finding that a machine-learning algorithm picked up on gender and racial biases through word associations).

324. *See generally* Latanya Sweeney, *Discrimination in Online Ad Delivery*, 56 COMM’NS. ASS’N COMPUTING MACH. 44 (2013).

325. Larry Hardesty, *Study Finds Gender and Skin-Type Bias in Commercial Artificial-*

criminal defendants.³²⁶ In one particularly egregious case, Google's photo identification software identified two images of Black users as "[g]orillas."³²⁷ In the wake of such incidents, there is heightened attention on how algorithms engaged in machine learning perpetuate discrimination and racism.³²⁸

Machine learning algorithms power the search features on short-term rental accommodation sites. "[A]lgorithm-driven approaches promise to simplify the matching process," but are not without risk.³²⁹ For example, research on the role of algorithms in online dating platform matches notes that "[t]o the extent that matching algorithms rely on users' stated preferences for protected characteristics, these mechanisms can reify group differences and naturalize historically fraught decision criteria for selecting romantic partners."³³⁰ Moreover, "users may be unable to determine precisely how their matches were selected, or why others were deemed incompatible and thus made invisible."³³¹

According to Airbnb, "[t]he goal of the Airbnb search ranking algorithm is to help guests find the perfect listing for their trip ... [looking at] nearly 100 different factors for every listing in every

Intelligence Systems, MITNEWS (Feb. 11, 2018), <http://news.mit.edu/2018/study-finds-gender-skin-type-bias-artificial-intelligence-systems-0212> [<https://perma.cc/6AWJ-NM5E>] ("Examination of facial-analysis software shows error rate of 0.8 percent for light-skinned men, 34.7 percent for dark-skinned women.")

326. Julia Angwin, Jeff Larson, Surya Mattu & Lauren Kirchner, *Machine Bias*, PROPUBLICA (May 23, 2016), <https://www.propublica.org/article/machine-bias-risk-assessments-in-criminal-sentencing> [<https://perma.cc/M2NH-PBAJ>] (finding bias in algorithms used by judges to determine sentencing for criminal defendants).

327. Jacob Brogan, *Google Scrambles After Software IDs Photo of Two Black People as "Gorillas"*, SLATE (June 30, 2015, 12:13 PM), <https://slate.com/technology/2015/06/google-s-image-recognition-software-returns-some-surprisingly-racist-results.html> [<https://perma.cc/AF9K-W98H>].

328. Ruomeng Cui, Jun Li & Dennis J. Zhang, *Reducing Discrimination with Reviews in the Sharing Economy: Evidence from Field Experiments on Airbnb 1, 2* (Dec. 8, 2016) (unpublished manuscript), <https://ssrn.com/abstract=2882982> [<https://perma.cc/KWM3-F83K>] ("As discrimination in the sharing economy has become a well-known issue to the public ... reducing discrimination has become an important issue in marketplace design and operations.... [Further], [w]hile there is a burgeoning literature in operations management that focuses on the design of marketplaces to improve market efficiency ... and social welfare ... discriminatory behavior is often an overlooked factor that hinders effective market mechanisms." (citations omitted)).

329. Hutson et al., *supra* note 112, at 73:9.

330. *Id.*

331. *Id.*

search.”³³² Airbnb keeps the “exact list of features” confidential but generally considers the following categories: guest needs,³³³ listing details,³³⁴ and trip details.³³⁵ Clicks in search results also affect how a listing is displayed. Clicks in search results refer to whether a prospective guest selects, or clicks, the listing to learn more information.³³⁶ Requests from a listing page is a factor that measures how many guests choose to book a particular listing.³³⁷

Airbnb does not expressly solicit data about race when registering users. On its face, it may seem as though this obviates the role that algorithms play in allowing, or even perpetuating, discriminatory practices and racial bias by prospective guests on the platform.³³⁸ However, if prospective guest bias affects variables that are used by the algorithm, such bias provides a latent pathway for Airbnb’s algorithm to express discrimination.³³⁹ For example, Airbnb states that its search results are informed, at least in part, by guest reviews and ratings.³⁴⁰ If racial bias affects guest ratings, then discrimination would affect search results through a ratings proxy. In fact, research on Uber’s rating system, which allows riders to rate

332. *What Factors Determine How My Listing Appears in Search Results?*, AIRBNB HELP CTR., <https://www.airbnb.com/help/article/39/what-factors-determine-how-my-listing-appears-in-search-results> [<https://perma.cc/F6CY-V587>].

333. *Id.* (“We review factors related to the guest, including where they’re searching from, their previous trips, which listings they’ve added to their Wish List or clicked on, and more.”).

334. *Id.* (“We consider things like the number of five-star reviews, price, location of the listing, if Instant Book is turned on, how quickly the host of the listing responds to requests, and many other factors.”).

335. *Id.* (“We note how many guests will be traveling, how long the trip will be, how far in the future the trip is, if they have set a minimum or a maximum price, and a variety of other factors.”).

336. *Id.* (“To ensure that this is fair for our whole host community, we only count clicks from different guests.”).

337. *Id.*

338. Kleinberg et al., *supra* note 316, at 154 (“The use of an algorithm is an alternative way to try to deal with the bias of human decision-making. To the algorithm, the name on a resume, race, age, sex, or any other applicant characteristic are candidate predictors like any other: variable X42. If this variable is not predictive of the outcome, the algorithm will not use it. And since predicting the outcome is *all* the algorithm is designed to do, we do not have to worry about any hidden agenda on the part of the algorithm itself.”).

339. *See id.* at 137 (“[I]f we see an algorithm that does not include a protected personal attribute like race in the final model, that does not mean that a correlated proxy for race is not playing a role. It is worth underlining this point: an algorithm that is formally blind to race or sex might be using a correlated proxy.”).

340. *What Factors Determine How My Listing Appears in Search Results?*, *supra* note 332.

their drivers, much like Airbnb encourages guests to rate hosts, found this to be the case.³⁴¹ Empirical research on Uber driver ratings suggests that “[c]onsumer-sourced ratings like those used by Uber are highly likely to be influenced by bias on the basis of factors like race or ethnicity.”³⁴²

Similarly, the placement of a listing within search results—that is, whether it is first or fiftieth—is affected by how previous prospective guests interacted with the listing. If a user looks at a listing and clicks within it, it will appear higher in future searches, which is more likely to lead to increased bookings and therefore increased profitability.³⁴³ If a prospective guest initially selects a listing, and then, upon seeing that it is operated by a minority host, ceases interaction, it will negatively affect how that listing appears in future searches. This is significant because clicks, on face, appear race neutral.³⁴⁴ However, if clicks are influenced by prospective guest bias, that is, if a guest does not engage or click further on a listing after learning it is operated by a minority host, then it will create a negative feedback loop whereby the listing is pushed further down in the search results where it is less likely to be selected.³⁴⁵

Without knowing more details about Airbnb’s algorithm, such as the specific variables and their relative weight, it is difficult to know exactly the degree to which discrimination permeates otherwise facially neutral variables. The situation does, however, implore Airbnb and its engineers to interrogate their processes to determine

341. Rosenblat et al., *supra* note 13, at 263.

342. *Id.* (“[W]hile appearing outwardly neutral [such ratings] can operate as vehicles through which consumer bias can adversely impact protected groups.... [Moreover,] [a] plethora of social science research has established that racial and gender bias commonly ‘creeps into’ ratings of all sorts.”).

343. See *What Factors Determine How My Listing Appears in Search Results?*, *supra* note 332.

344. *Cf.* Hutson et al., *supra* note 112, at 73:11 (discussing how platforms try to remain neutral but arguing that truly neutral design choices do not exist).

345. To underscore the point, if bias prevents people from booking, then the listing appears less prominently in search results, which causes fewer bookings, leading to fewer opportunities to rent out the space, pushing it further and further down the list. See Nicol Turner Lee, Paul Resnick & Genie Barton, *Algorithmic Bias Detection and Mitigation: Best Practices and Policies to Reduce Consumer Harms*, BROOKINGS (May 22, 2019), <https://www.brookings.edu/research/algorithmic-bias-detection-and-mitigation-best-practices-and-policies-to-reduce-consumer-harms/#footnote-44> [<https://perma.cc/L57T-F5U9>].

how bias is affecting search results and subsequent bookings.³⁴⁶ Airbnb states that it “is one of the few companies with a dedicated product team” working to fight bias and discrimination.³⁴⁷ However, for now, the changes implemented to combat bias have focused on adding sections to the platform such as functions to “help users easily report negative content,” or removing information, such as “removal of guest profile pictures from the booking process.”³⁴⁸ These are welcome changes to the platform, but they only go so far. Without scrutiny of the underlying algorithm, variables may continue to serve as proxies for discrimination, the results of which are multiplied by the algorithm, resulting in negative economic questions for minority hosts. This is consistent with calls for companies to conduct algorithmic impact assessments (AIAs). New York University’s AI Now Institute proposed that entities implement AIAs to “evaluate the potential detrimental effects of an algorithm in the same manner as environmental, privacy, data, or human rights impact statements.”³⁴⁹ Further, as sites such as Airbnb continue to refine or make changes to their algorithms, they should include diversity in their designs as well as employ cross-functional work teams with varied areas of expertise.³⁵⁰ Collaboration can overcome blind spots of siloed organizations. “Bringing together experts from various departments, disciplines, and sectors will help facilitate accountability standards and strategies for mitigating online biases.”³⁵¹

346. *See id.*

347. LAURA W. MURPHY, AIRBNB, THREE YEAR REVIEW—AIRBNB’S WORK TO FIGHT DISCRIMINATION AND BUILD INCLUSION 6 (2019), https://news.airbnb.com/wp-content/uploads/sites/4/2020/07/Airbnb_Work-to-Fight-Discrimination_0331.pdf [<https://perma.cc/8M5F-U65X>] (“Product Teams work to improve the website and mobile app for our entire community and are composed of engineers, data scientists, researchers, and designers.”).

348. *Id.*

349. Lee et al., *supra* note 345.

350. *See generally* DILLON REISMAN, JASON SCHULTZ, KATE CRAWFORD & MEREDITH WHITTAKER, AI NOW INST., ALGORITHM IMPACT ASSESSMENTS: A PRACTICAL FRAMEWORK FOR PUBLIC AGENCY ACCOUNTABILITY (2018), <https://ainowinstitute.org/aiareport2018.pdf> [<https://perma.cc/5RWZ-W5YC>] (discussing the benefits of AIAs and methods to implement them).

351. Lee et al., *supra* note 345.

CONCLUSION

This Article adds to the scholarship on the sharing economy by examining the liability of short-term rental website operators for discrimination against minority hosts. In doing so, this Article offers the term redliking to describe the platform structure that allows user discrimination to prevent minority hosts from realizing the same economic benefits from the short-term rental market as White hosts. Like redlining that came before it, redliking contributes to inequality related to housing equity and exacerbates the racial wealth gap.

Regulating redliking under federal law, however, is complicated by the fact that platforms such as Airbnb serve dual roles. While they provide guests with the ability to book lodging accommodations, such platforms only offer hosts the ability to advertise available lodging. Traditional antidiscrimination laws such as the Fair Housing Act and Civil Rights Act (CRA) were designed to eliminate discrimination in the purchase and rental of real property and abolish racism by entities that offer lodging, dining, and entertainment. However, these laws do not include provisions that regulate discrimination by consumers. Further, free market principles and privacy concerns caution against a regulatory scheme that mandates which establishments consumers must patronize. Analysis of website liability under the Americans with Disabilities Act and the Communications Decency Act suggests two approaches courts may take to determine short-term rental platform operator liability for redliking under Title II of the CRA. Given the limitations of federal law, eradicating redliking requires a multifaceted approach that incorporates lessons from behavioral economics and eliminates the ability of algorithmic systems to operationalize discrimination.