

REGULATING THE SHARING ECONOMY

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Internet commerce has enabled peer-to-peer (“P2P”) transactions on a larger scale than ever before.¹ While the law slowly adapts to address P2P sales of goods, a wave of online marketplaces has emerged for P2P exchanges of services: short-term rentals of residential housing or office space,² rentals of peer-owned assets,³ transportation network companies (“TNCs”) for short trips in personal vehicles or small planes,⁴ auction houses for temporary licenses,⁵ contracting services for daily chores and

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1. See, e.g., David Gamage & Devin J. Heckman, *A Better Way Forward for State Taxation of E-Commerce*, 92 B.U. L. REV. 483, 484 (2012).

2. Some short-term rental platforms allow users to rent individual bedrooms or entire residences. E.g., AIRBNB, <https://www.airbnb.com/>; HOMEAWAY, <http://www.homeaway.com/>; ROOMORAMA, <https://www.roomorama.com/>. Others allow users to book a workspace, including individual desks and full conference rooms. E.g., PEERSPACE, <http://www.peerspace.com/>; ZIPCUBE, <https://www.zipcube.com/> (all URLs last visited Feb. 26, 2015).

3. E.g., GETAROUND, <https://www.getaround.com/> (cars); BOATBOUND, <https://boatbound.co/> (boat rentals); CAMERALENDS, <https://www.cameralends.com/> (cameras); BESCRAFFY, <https://bescrappy.com/> (tools); LITERATOO, <http://en.literatoo.com/> (books); STYLELEND, <http://stylelend.com/> (high-fashion clothes) (all URLs last visited Feb. 26, 2015).

4. TNCs generally allow riders to contact black cars or other personal vehicles for short trips. LYFT, <https://www.lyft.com/>; SIDECAR, <http://www.side.cr/>. Some services have attempted to allow users to contract with small aircraft for flights. AIRPOOLER, <https://airpooler.com/> (small aircraft); BLACKJET, <https://www.blackjet.com/> (luxury planes) (all URLs last visited Feb. 26, 2015). P2P air transportation, however, has encountered both regulatory and financial setbacks. Scott Kirsner, *‘Uber for Private Jets’ Is Grounded, But CEO Says He Hopes to Raise More Money and Fly Again*, BOSTON.COM (Dec. 19, 2013), http://www.boston.com/business/technology/innoeco/2013/12/uber_for_private_jets_is_groun.html; Jordan Valinsky, *Sorry, But the FAA Has Decided Your ‘Uber for Planes’ Idea Can’t Fly*, GIZMODO (Aug. 16, 2014, 5:00 PM), <http://gizmodo.com/sorry-but-the-faa-has-decided-your-uber-for-planes-ide-1622734282/>.

5. E.g., SWEETCH, <http://www.getsweetch.com/> (last visited Feb. 26, 2015) (auction house for public parking spaces); BETRSPOT, <http://www.betrspot.com/about> (last visited Feb. 26, 2015) (auction house for spots in line and seats in public places). Reservation Hop originally allowed P2P auctions of restaurant reservations, but received so much negative attention that the founders created a new service for restaurant workers to exchange dropped shifts. Brian Mayer, *ReservationHop Does a Hard Pivot: We Are Now OK Shift*, BRIANMAYER.COM (Nov. 6, 2014, 8:00 AM), <http://brianmayer.com/2014/11/reservationhop-does-a-hard-pivot-we-are-now-ok-shift/>.

professional services,⁶ and lending.⁷ These businesses have experienced rapid growth over the past five years and are taking root worldwide.⁸ Commentators have dubbed this phenomenon the “sharing economy.”⁹

However, the sharing economy has raised difficult legal questions. P2P service marketplaces create uncertainty for participants and third parties because these services do not fall neatly into traditional legal categories.¹⁰ Businesses in the sharing economy have caused confusion under insurance, tax, employment, and civil rights statutes.¹¹ Commentators have called the

6. E.g., TASKRABBIT, <https://www.taskrabbit.com/> (chores, including assembling furniture and moving); FANCYHANDS, <https://www.fancyhands.com/> (administrative tasks); HOMEJOY, <https://www.homejoy.com/> (maid service); WASHIO, <http://www.getwashio.com/> (laundry and dry cleaning); ZAARLY, <https://www.zaarly.com/> (home services including plumbing and gardening) (all URLs last visited Feb. 26, 2015).

7. E.g., PROSPER, <https://www.prosper.com/> (last visited Feb. 26, 2015); LENDING CLUB, <https://www.lendingclub.com/> (last visited Feb. 26, 2015). This Note does not address the unique regulatory issues facing P2P lenders, which differ substantially from other sharing platforms. For background information on the regulation of P2P lenders, see generally Paul Slattery, Note, *Square Pegs in a Round Hole: SEC Regulation of Online Peer-to-Peer Lending and the CFPB Alternative*, 30 YALE J. ON REG. 233 (2013); Eric C. Chaffee & Geoffrey C. Rapp, *Regulating Online Peer-to-Peer Lending in the Aftermath of Dodd-Frank: In Search of an Evolving Regulatory Regime for an Evolving Industry*, 69 WASH. & LEE L. REV. 485 (2012).

8. *The Rise of the Sharing Economy*, ECONOMIST (Mar. 9, 2013), <http://www.economist.com/node/21573104/>.

9. There is no standard definition of the sharing economy. The use of the term “sharing” traces back to a seminal article by Yochai Benkler. Yochai Benkler, *Sharing Nicely: On Shareable Goods and the Emergence of Sharing as a Modality of Economic Production*, 114 YALE L.J. 273, 334 (2004); see also RACHEL BOTSMAN & ROO ROGERS, *WHAT’S MINE IS YOURS: THE RISE OF COLLABORATIVE CONSUMPTION* 58 (2010) (referencing Benkler’s article in describing the origins of what Botsman terms “collaborative consumption”). Many have argued that “sharing” is not an accurate description of P2P service models, in part because users exchange money. E.g., Brad Tuttle, *Can We Stop Pretending the Sharing Economy Is All About Sharing?*, TIME (June 30, 2014), <http://time.com/money/2933937/sharing-economy-airbnb-uber-monkeyparking/>. Other authors have framed the sharing economy as a new form of sustainable consumption and see the sharing economy as a societal shift to an access model rather than an ownership model. See generally, e.g., BOTSMAN & ROGERS, *supra*; LISA GANSKY, *THE MESH: WHY THE FUTURE OF BUSINESS IS SHARING* (2010); JANELLE ORSI, *PRACTICING LAW IN THE SHARING ECONOMY: HELPING PEOPLE BUILD COOPERATIVES, SOCIAL ENTERPRISE, AND LOCAL SUSTAINABLE ECONOMIES* (2013).

10. See, e.g., Molly Cohen & Corey Zehngelot, *What’s Old Becomes New: Regulating the Sharing Economy*, 58 BOSTON B.J. 6 (2014).

11. See *infra* Section IV.B.

sharing economy a “disruptive innovation”¹²—a product, service, or business model that repackages old technology to create a new market and thereby “disrupts” incumbent firms.¹³ Professor Nathan Cortez’s term “regulatory disruption”—an “innovation[] that disrupt[s] existing regulatory schemes”—aptly describes the sharing economy.¹⁴

For example, RelayRides is a P2P car rental service. Car owners list their personal vehicle on the RelayRides website, and users can then search available vehicles and schedule a rental. RelayRides provides insurance coverage of \$1 million per accident to all registered car owners and drivers on the site. However, in 2012, a RelayRides rental driver caused a collision, killing himself and injuring four passengers in the other vehicle, resulting in estimated combined damages of \$1.3 million.¹⁵ While the parties ultimately reached a settlement,¹⁶ the incident raised awareness of the risks of participating in the sharing economy and the need for regulatory protections.

This Note surveys regulatory issues surrounding the sharing economy and assesses current proposed solutions to challenges the sharing economy creates. The analysis will largely focus on short-term rental platforms and TNCs because these are the largest sectors of the sharing economy.¹⁷ Part I explores what makes businesses in the sharing economy different from traditional service providers. Part II identifies existing laws for traditional service providers, and who has a stake in the outcome of efforts to reform those laws. Part III explains how regulators have attempted to adapt existing laws to the sharing economy. Finally, Part IV discusses what risks regulators should address moving forward. Part V concludes.

12. Robert T. Shannon, *Disruptive Innovation Demands Delicate Regulation*, LAW360 (Nov. 12, 2014), <http://www.law360.com/articles/595081/disruptive-innovation-demands-delicate-regulation>.

13. CLAYTON M. CHRISTENSEN, *THE INNOVATOR’S DILEMMA: WHEN NEW TECHNOLOGIES CAUSE GREAT FIRMS TO FAIL* 23–24 (1997); Nathan Cortez, *Regulating Disruptive Innovation*, 29 BERK. TECH. L.J. 175, 177 n.2 (2014).

14. Cortez, *supra* note 13, at 177.

15. Ron Lieber, *Fatal Collision Makes Car-Sharing Worries No Longer Theoretical*, N.Y. TIMES (Apr. 13, 2012), <http://www.nytimes.com/2012/04/14/your-money/relayrides-accident-raises-questions-on-liabilities-of-car-sharing.html>.

16. M.P. McQueen, *Beware the Liability of Sharing Your Car With Strangers*, INVESTOPEDIA (Oct. 11, 2013), <http://www.investopedia.com/articles/personal-finance/101013/beware-liability-sharing-your-car-strangers.asp>.

17. *The Sharing Economy: Boom and Backlash*, ECONOMIST (Apr. 26, 2014), <http://www.economist.com/news/business/21601254-consumers-and-investors-are-delighted-startups-offering-spare-rooms-or-rides-across-town/> (“Along with transport, the market most affected by sharing has been accommodation . . .”).

I. DEFINING THE SHARING ECONOMY

What makes the sharing economy unique is at the heart of an ongoing regulatory debate.¹⁸ Many argue that there is nothing new about the sharing economy. These critiques often analogize sharing services to traditional service providers, and portray the sharing model as a thinly veiled ruse for avoiding regulation.¹⁹ Others contend that the sharing economy disrupts existing regulatory schemes precisely because the business model is so new; for that reason, they argue that sharing companies require special regulatory treatment.²⁰ In practice, the sharing model encompasses mundane features of existing online businesses as well as novel implementations of those features. This Note defines the sharing business model as (A) an online intermediary that (B) acts as a market for P2P services and (C) facilitates exchanges by lowering transaction costs.

A. SHARING PLATFORMS ACT AS ONLINE INTERMEDIARIES

First, most sharing platforms operate through either a web portal or a mobile application (“app”). But unlike websites that act as online

18. Decision Adopting Rules and Regulations to Protect Public Safety While Allowing New Entrants to the Transportation Industry, Decision 13-09-045 (Cal. P.U.C. 2013), *available at* <http://docs.cpuc.ca.gov/PublishedDocs/Published/G000/M077/K192/77192335.PDF> [hereinafter Cal. P.U.C. Decision].

19. *See, e.g.*, Tom Slee, *Sharing and Caring*, JACOBIN (Jan. 24, 2014), <https://www.jacobinmag.com/2014/01/sharing-and-caring/> (arguing that the sharing economy obscures profit-driven behavior by tapping into long-standing leftist values such as “decentralization, sustainability, community-level connectedness, and opposition to hierarchical and rigid regulatory regimes”); Jon Evans, *When Old-Economy Jobs Become New-Economy Gigs*, TECHCRUNCH (Sept. 6, 2014), <http://techcrunch.com/2014/09/06/serfing-the-wave/> (comparing “microentrepreneurs” in the sharing economy to serfs); Andrew Leonard, *“Sharing economy” shams: Deception at the Core of the Internet’s Hottest Businesses*, SALON (Mar. 14, 2014, 4:43 AM), http://www.salon.com/2014/03/14/sharing_economy_shams_deception_at_the_core_of_the_internets_hottest_businesses/ (arguing that the sharing economy represents an exploitive movement by companies to profit by avoiding regulation while claiming to promote broader social welfare).

20. *See, e.g.*, *The Power of Connection: Peer-to-Peer Businesses Before the H. Comm. on Small Business*, 113th Cong. 35 (2014) (written testimony of Philip Aeurswald) (“The question is . . . whether there is anything fundamentally new about the sorts of peer-to-peer businesses that have been proliferating in the past five years. The answer is yes.”); *see also* Roberta A. Kaplan, *Regulation and the Sharing Economy*, N.Y. L.J. (2014) (arguing that “innovative technologies [like sharing platforms] present new and fundamentally different circumstances that were unforeseen at the time of the original regulatory enactment”); CHRISTOPHER KOOPMAN ET AL., *THE SHARING ECONOMY AND CONSUMER PROTECTION REGULATION: THE CASE FOR POLICY CHANGE* 16–19 (2014) (arguing that the sharing economy is a self-regulating market and does not require government intervention).

storefronts, sharing platforms are not direct service providers.²¹ Instead, the platform allows “users” (purchasers of services) to connect and transact with “providers” (sellers of services). DogVacay, for example, allows dog-sitters to connect with dog owners through an online web portal. The DogVacay platform itself does not provide dog-sitting services or employ dog sitters.²² This functionality is not new; passive platforms for hosting user-provider transactions predate the sharing economy. In fact, the founders of DogVacay originally ran a small dog-sitting service through Craigslist.²³

The critical distinction between sharing platforms and other online services does not turn solely on the *character* of the services or parties involved, but rather on the *degree of control* the platform exercises over each transaction.²⁴ Sharing platforms exercise control over transactions by directing the form and content of listings, issuing minimum quality standards for providers, providing an electronic payment system, and charging a transaction fee for each exchange.²⁵ DogVacay charges fifteen

21. For example, Fetch! Pet Care, is a traditional pet-services provider with an online storefront. Users directly contract with Fetch for pet services. In other words, Fetch acts as a provider, rather than as a platform. FETCH! PET CARE, <http://www.fetchpetcare.com/> (last visited Feb. 2, 2014).

22. *How It Works*, DOGVACAY, <http://dogvacay.com/how-it-works/> (last visited Feb. 26, 2015). DogVacay requires that pet-sitters receive payment through the platform. *Host Frequently Asked Questions*, DOGVACAY, <http://dogvacay.com/faq-host> (last visited Feb. 26, 2015) (“all payments must go through DogVacay.com”).

23. Erin Griffith, *Exclusive: DogVacay Raises \$25 Million*, FORTUNE (Nov. 10, 2014, 10:16 AM), <http://fortune.com/2014/11/10/dogvacay-raises-25-million/>. Likewise, Couchsurfing has acted as a passive, user-provider platform for short-term rentals since 2004. *About Us*, COUCHSURFING, <http://about.couchsurfing.com/about/> (last visited Feb. 26, 2015). Car sharing programs have existed since the early 70s, and some online car sharing networks have operated for over a decade. Susan Shaheen et. al, *Carsharing in Europe and North America: Past, Present and Future*, 52 TRANSP. QUART. 35 (1998); *About Us*, CITY CARSHARE, <https://citycarshare.org/about-us/> (last visited Feb. 26, 2015).

24. The degree of control exercised is critical for establishing indirect liability. See *infra* Subsection III.C.2. The issue of control has surfaced in many regulatory and judicial decisions regarding sharing platforms. *E.g.*, Cal. P.U.C. Decision, *supra* note 18, at 72–75 (“We reject Uber’s assertion that TNCs are nothing more than an application on smart phones, rather than part of the transportation industry. Uber . . . performs essentially the same function as a limousine”); Bos. Cab Dispatch, Inc. v. Uber Techs., Inc., No. 13-10769-NMG, 2014 WL 1338148, at *6 (D. Mass. Mar. 27, 2014) (“[T]here is sufficient evidence that Uber exercises control over (or is ‘in charge of’) vehicles-for-hire that compete with plaintiffs in the private transportation business.”).

25. Courts have considered similar issues in the context of personal jurisdiction over internet sellers. See, e.g., Zippo Mfg. Co. v. Zippo Dot Com, Inc., 952 F. Supp. 1119, 1124 (W.D. Pa. 1997) (establishing a sliding scale test where “the likelihood that personal jurisdiction can be constitutionally exercised is directly proportionate to the

percent of each booking for its services,²⁶ and transaction fees can range from three to twenty percent.²⁷

Sharing companies fall somewhere along a spectrum between purely passive message boards and direct service providers. Message boards reserve the right to remove listings, but provide minimal guidance on the form and content of listings. These platforms have no employment relationship with providers, and no financial stake in any particular transaction.²⁸ Direct service providers, by contrast, exert complete control over the form and content of listings, and directly benefit from every purchase. Determining whether a platform acts as a passive intermediary or exerts sufficient control over providers to establish liability is a highly fact-dependent question.²⁹ Sharing platforms generally seek to minimize their own liability by characterizing their services as close equivalents to message boards.³⁰ Many critics, however, argue that sharing platforms in practice operate like direct service providers.³¹ Some have decried sharing platforms for using deceptive tactics to evade regulation.³² Though this

nature and quality of commercial activity that an entity conducts over the Internet.”). Unlike sales of goods through ecommerce, the provision of services to an injured party through a sharing platform would typically constitute a sufficient connection to establish personal jurisdiction.

26. *Host Frequently Asked Questions*, DOGVACAY, <http://dogvacay.com/faq-host/> (last visited Feb. 26, 2015).

27. *What Are Host Service Fees?*, AIRBNB, <https://www.airbnb.com/help/article/63/> (last visited Feb. 26, 2015) (charging a three percent host service fee per booking, in addition to a separate guest service fee); Ellen Huet, *Uber Now Taking Its Biggest UberX Commission Ever—25 Percent*, FORBES (Sept. 22, 2014), <http://www.forbes.com/sites/ellenhuet/2014/09/22/uber-now-taking-its-biggest-uberx-commission-ever-25-percent/>.

28. See, e.g., *Terms of Use*, CRAIGSLIST, <http://www.craigslist.org/about/terms.of.use/> (last visited Feb. 26, 2015) (requiring a fee for certain categories of posts, but having no stake in any transaction resulting from a post); *Terms of Use*, ADOOS, <http://support.adoos.com/answer/6/> (last visited Feb. 26, 2015).

29. See *infra* Section III.C.

30. E.g., *United States and Canada: Terms & Conditions*, HOMEJOY, <https://www.homejoy.com/terms/us/en/> (last visited Feb. 2, 2015) (“THE COMPANY DOES NOT PROVIDE CLEANING SERVICES, AND THE COMPANY IS NOT A CLEANING SERVICE PROVIDER.”); *Terms of Service*, GETAROUND, <https://www.getaround.com/terms/> (last visited Feb. 2, 2015) (“GETAROUND WILL NOT BE A PARTY TO OR IN ANY WAY MONITOR ANY TRANSACTION BETWEEN YOU AND THIRD-PARTY PROVIDERS OF PRODUCTS OR SERVICES.”).

31. E.g., Letter from Mark Saber, Central Penn Taxi Ass’n, to Penn. Pub. Util. Comm’n (Aug. 28, 2014), available at http://www.puc.state.pa.us/transport/motor/EnBanc/Testimony-CPATA_082814.pdf (“A transportation network company is nothing more than a call or demand carrier in disguise.”).

32. See, e.g., Avi Asher-Schapiro, *Against Sharing*, JACOBIN (Sept. 19, 2014),

debate remains unresolved in many jurisdictions, the intermediary status of sharing platforms affects both platform liability and local regulatory authority over platforms.³³

B. SHARING PLATFORMS ARE MARKETS FOR PEER-TO-PEER SERVICES

Second, sharing platforms allow informal, small-scale actors to exchange services online. Catering to peer-to-peer transactions, rather than to business-to-consumer transactions, serves two purposes. It allows providers to profit from underused personal assets,³⁴ or to market their skills on a freelance basis.³⁵ For example, instead of leaving a car in the garage during a family vacation, P2P car rental platforms allow car owners to earn money by leasing their personal vehicles. Per-task cleaning services like Homejoy give providers exceptional flexibility over their working hours.³⁶ In addition, informal providers may not be subject to the same regulations as larger businesses.³⁷ However, sharing platforms do not necessarily prohibit professional or skilled providers. In fact, some platforms like Zaarly, a per-task contractor service for home repairs and cleaning, require that all providers have proper accreditations.³⁸ Although sharing platforms generally attempt to exclude businesses and large-scale operators from participating on their sites,³⁹ data from short-term rental

<https://www.jacobinmag.com/2014/09/against-sharing/> (criticizing TNCs and the sharing economy generally for depressing wages and creating unfair working conditions).

33. See *infra* Section III.C.

34. See, e.g., BOTSMAN & ROGERS, *supra* note 9, at 83 (claiming that sharing platforms exploit the “idling capacity” of underused resources).

35. See, e.g., *The New ‘Sharing Economy’ Can Enrich Micro-Entrepreneurs But at What Cost?*, PBS (Oct. 10, 2014), <http://www.pbs.org/newshour/bb/sharing-economy-enrich-micro-entrepreneurs-promote-unregulated-big-business/> (discussing the impact of “microentrepreneurs” on existing businesses).

36. *Start Cleaning with Homejoy*, HOMEJOY, <https://www.homejoy.com/apply/> (last visited Feb. 26, 2015) (“You choose when and where you want to work within Homejoy’s availability. It’s entirely up to you!”).

37. See *infra* Sections II.B, III.B.

38. *How Zaarly Works*, ZAARLY, <https://www.zaarly.com/howzaarlyworks/> (last visited Feb. 26, 2015).

39. E.g., *Host Frequently Asked Questions*, DOGVACAY, <http://dogvacay.com/faq-host/> (last visited Feb. 26, 2015) (limiting dog-sitters to hosting three dogs per day); *Discover the Difference*, VRBO, <http://www.vrbo.com/global/advantages.htm> (last visited Feb. 26, 2015) (differentiating short-term rentals from hotels through a comparison chart). In many cases, sharing platforms restrict access to individuals rather than businesses, but do not necessarily restrict the hours each individual works per week. E.g., *Start Cleaning with Homejoy*, HOMEJOY, <https://www.homejoy.com/apply/> (last visited Feb. 26, 2015) (seeking applications from individual cleaners).

platforms and anecdotal evidence from TNCs suggests that a certain percentage of providers transact at substantially higher volumes than most others.⁴⁰

Sharing platforms offer a wide range of services, from boat rentals to electrical repair. Unlike ecommerce platforms for sales of goods, exchanges of services generally require users and providers to interact in person. Thus, sharing platforms raise distinct legal issues from ecommerce platforms. Contracting with strangers online involves many risks, and therefore much higher transaction costs than similar exchanges with larger businesses.⁴¹

40. The New York Attorney General's recent investigation into Airbnb suggests a stark divide between commercial and casual hosts. Eric T. Schneiderman, N.Y. STATE ATTORNEY GENERAL, AIRBNB IN THE CITY (2014), *available at* <http://www.ag.ny.gov/pdfs/Airbnb%20report.pdf> [hereinafter N.Y. Attorney General Report]. While most hosts list casually, the small minority of full-time commercial hosts are responsible for the vast majority of bookings. *Id.* at 10–11. Airbnb, however, has emphasized that most hosts use the service on an occasional basis, and that Airbnb hosts often rely on the service to help pay for rent rather than treating it as a business. *Hotels vs. Regular New Yorkers*, AIRBNB, <http://publicpolicy.airbnb.com/hotels-vs-regular-new-yorkers/> (last visited Feb. 26, 2015). Some have even argued that scaling up an Airbnb business is not profitable outside a few high-density locations. Nin-Hai Tseng, *Profiting \$13K a Year on an Airbnb Rental? Maybe.*, FORTUNE (Nov. 7, 2013, 7:46 PM), <http://fortune.com/2013/11/07/profitting-13k-a-year-on-an-airbnb-rental-maybe/>. Commentators have suggested a similar division for TNC drivers. Full-time drivers likely work between forty and seventy hours per week. Part-time drivers likely work thirty hours or less per week. Johana Bhuiyan, *What Uber Drivers Really Make (According to Their Pay Stubs)*, BUZZFEED (Nov. 19, 2014), <http://www.buzzfeed.com/johanabhuiyan/what-uber-drivers-really-make-according-to-their-pay-stubs>; *see also* Jack Flanagan, *The Trick Uber Drivers Use to Boost Their Salaries*, DAILYDOT (June 20, 2014), <http://www.dailydot.com/business/uber-driver-actual-salary-earnings-wage-90000/> (noting that “smart” part-time drivers can earn more per hour than full-time drivers). Many full-time drivers are former cab drivers, and some may continue to work for both a traditional dispatch service as well as multiple TNCs. Harry Campbell, *Do Drivers Make More Money With Lyft or Uber?*, THE RIDESHARE GUY (Aug. 13, 2014), <http://therideshareguy.com/do-drivers-make-more-money-with-lyft-or-uber/>; Megan Burks, *Taxi-Turned-Uber Drivers Get a New Lease on Life*, KPBS.ORG (Aug. 15, 2014), <http://www.kpbs.org/news/2014/aug/15/san-diegos-taxi-turned-uber-drivers-get-new-lease-/>.

41. Interacting with strangers is, in fact, necessary in most offline business transactions. For a discussion of why users perceive that peer-to-peer transactions involve greater risks than traditional services, *see*, for example, Jason Tanz, *How Airbnb and Lyft Finally Got Americans to Trust Each Other*, WIRED (Apr. 23, 2014), <http://www.wired.com/2014/04/trust-in-the-share-economy/>.

C. SHARING PLATFORMS REDUCE TRANSACTION COSTS

To reduce transaction costs for users and providers, sharing platforms rely on a variety of features to decrease the information cost of determining whether a provider is trustworthy. Many sharing platforms incorporate a social networking feature—they allow users to (1) create individual profiles, (2) articulate connections to other users' profiles, and (3) search their connections.⁴² This feature allows sharing platforms to track user and provider account information and activity,⁴³ and create “reputation systems”—a review and rating tool for screening bad actors.⁴⁴

In addition, sharing platforms lower transaction costs by standardizing exchanges and providing quality or safety guarantees. Measures to standardize exchanges include user-friendly and uniform interfaces, location-based searches, price comparison, account activity and payment records, and scheduling and booking tools.⁴⁵ Quality or safety guarantees might consist of insurance policies, customer service hotlines, cancellation and refund policies, reputations systems, provider training, and background checks.⁴⁶ Embedding these tools and services into sharing platforms allows users and providers to transact at higher volumes, and encourages casual participants to join the market.⁴⁷ Sharing platforms thus facilitate exchanges that might otherwise never occur due to high

42. See PAUL LAMBERT, *SOCIAL NETWORKING: LAW, RIGHTS AND POLICY* 13–15 (2014). Examples of social network services are friend websites (e.g., Facebook), blogs (e.g., Tumblr), and message boards (e.g., Reddit). To some degree, users can accomplish the same transactions through social networks as through sharing platforms. For example, a dogowner could find a dogsitter by posting a status update or group message on Facebook. The dogowner's Facebook connections would then respond to the dogowner through Facebook. However, this does not make sharing platforms the functional equivalent of social networks. On a social network, the user searches for providers within her circle of connections, rather than through a specialized market for services. And sharing platforms provide additional features that facilitate exchanges between parties.

43. For a discussion of privacy and account tracking on sharing platforms, see *infra* Section III.C.1.

44. E.g., Erica Swallow, *The Rise of the Reputation Economy*, FORBES (Oct. 9, 2013), <http://www.forbes.com/sites/ericaswallow/2013/10/09/reputation-economy/>. For a discussion of reputation systems, see *infra* Section IV.B.2.

45. Many sharing platforms also enable nonmonetary exchanges. See, e.g., 99GAMERS, <https://99gamers.com/> (last visited Feb. 26, 2015).

46. See, e.g., Tanz, *supra* note 41.

47. It is important to note that, unlike an online storefront or social network, sharing platforms function as two-sided markets. In short, sharing platforms coordinate two constituencies—providers and consumers—and the value of the platform for each constituency depends on the size of the other, also known as an indirect network effect. David S. Evans & Michael Noel, *Defining Antitrust Markets When Firms Operate Two-Sided Platforms*, 2005 COLUM. BUS. L. REV. 667 (2005).

transaction costs.⁴⁸ In part because they encourage high volumes of P2P transactions, these platforms have also raised new regulatory concerns.

II. THE EXISTING REGULATORY LANDSCAPE

This Part describes existing regulatory frameworks that might affect sharing platforms and explains why these regulations matter. Many P2P services are closely analogous to traditional service providers. For that reason, sharing platforms often seem to fall under the purview of laws governing traditional service providers.⁴⁹ The following discussion will address two features of these regulatory frameworks. First, modern statutory schemes have roots in common law special relationships, and accordingly impose limits on the freedom of contract between users and providers on sharing platforms. Second, state and local regulatory agencies create complex, overlapping requirements for providers and platforms.⁵⁰

However, sharing platforms differ substantially from traditional service providers, and the sharing economy does not neatly fit into existing regulatory frameworks.⁵¹ Many providers and platforms cannot comply with local regulations. Others face uncertainty as a result of gaps or ambiguities in the law.⁵² To address these problems, sharing platforms have advocated strongly for new rules tailored specifically for P2P service providers.⁵³ This Part concludes by discussing the various interests at stake in the ongoing debate over how to regulate the sharing economy.

48. Kaplan, *supra* note 20 (“Sharing apps and websites act like ‘virtual matchmakers’ by facilitating relationships that otherwise might be too costly or burdensome to arrange.”).

49. E.g., Shannon, *supra* note 12 (describing the “crux” of a suit by the Chicago taxi industry against the city “over enforcement of its existing public chauffeur rules” as a “claim by the taxi industry that [TNCs] have avoided regulations imposed on taxis, even though both are engaged in the same basic activity”).

50. *Infra* Sections II.A–B.

51. *See infra* Section III.B.

52. For a discussion of why sharing platforms elude categorization under current rules, see Emily Badger, *Why We Can't Figure Out How to Regulate Airbnb*, WASH. POST (Apr. 23, 2014), <http://www.washingtonpost.com/blogs/wonkblog/wp/2014/04/23/why-we-cant-figure-out-how-to-regulate-airbnb/>.

53. E.g., Donna Tam, *Airbnb, Lyft Partner with New Share-Economy Advocacy Group*, CNET (July 31, 2013, 12:50 PM), <http://www.cnet.com/news/airbnb-lyft-partner-with-new-share-economy-advocacy-group/> (describing a partnership between several platforms and advocacy group Peers, an organization providing support to sharing platform users and providers); Carolyn Said, *Uber, Lyft, Airbnb Harness Users to Lobby Lawmakers for Them*, SFGATE (Jan. 11, 2015, 10:18 AM), <http://www.sfgate.com/business/article/Uber-Lyft-Airbnb-harness-users-to-lobby-6005562.php>. Several TNCs have hired prominent lobbyists to advocate for responsible

A. COMMON LAW SPECIAL RELATIONSHIPS PRINCIPLES INFORM MODERN RULES

Many sharing platforms offer services with clear common law analogues: TNCs provide transportation services analogous to common carriers,⁵⁴ P2P rentals are governed by product liability,⁵⁵ per-task contractors are affected by various tort law doctrines—particularly premises liability,⁵⁶ and short-term rentals lie at the nexus of landlord-tenant and innkeeper law.⁵⁷ In general, these bodies of law reflect a tension between freedom of contract and the strong public interest inherent in certain transactions.⁵⁸ Based on certain “special relationships” between service providers and consumers, various common law doctrines establish heightened duties for the service provider.⁵⁹ In the context of this Note, special relationships include landlord-tenant, common carrier-passenger, innkeeper-guest, and lessor-lessee—a close parallel to manufacturer-consumer under products liability. This Section explores three assumptions that justify the common law treatment of “special relationships,” and how these assumptions continue to inform modern regulatory frameworks.

regulation. James R. Hood, *Lyft Hires Its First Lobbyists to Clear the Way for Its Ride-Sharing Service*, CONSUMER AFFAIRS (Apr. 17, 2014), <http://www.consumeraffairs.com/news/lyft-hires-its-first-lobbyists-to-clear-the-way-for-its-ride-sharing-service-041714.html>; Rosalind S. Helderman, *Uber Pressures Regulators by Mobilizing Riders and Hiring Vast Lobbying Network*, WASH. POST (Dec. 13, 2014), http://www.washingtonpost.com/politics/uber-presses-regulators-by-mobilizing-riders-and-hiring-vast-lobbying-network/2014/12/13/3f4395c6-7f2a-11e4-9f38-95a187e4c1f7_story.html. In addition, Airbnb has funded several economic studies to demonstrate its positive impact on communities and influence lawmakers. Emily Badger, *Why Airbnb Wants You to Know How Much Its Users Are Spending*, WASH. POST (Mar. 25, 2014), <http://www.washingtonpost.com/blogs/wonkblog/wp/2014/03/25/why-airbnb-wants-you-to-know-how-much-its-users-are-spending/>.

54. See Shannon, *supra* note 12.

55. See KOOPMAN, *supra* note 20, at 18 (suggesting generally that “torts and product liability law, and other legal remedies exist when things go wrong” on sharing platforms).

56. For a discussion of premises liability in the context of short-term rentals, see Ron Lieber, *The Insurance Market Mystifies an Airbnb Host*, N.Y. TIMES (Dec. 19, 2014), <http://www.nytimes.com/2014/12/20/your-money/the-insurance-market-mystifies-an-airbnb-host.html>. Similar concerns apply for per-task contractors, but the liable party in that case is likely the user who invites a contractor to her property. See *infra* Section III.C.

57. See *infra* text accompanying notes 77–80.

58. See, e.g., Joseph William Singer, *No Right to Exclude: Public Accommodations and Private Property*, 90 NW. U. L. REV. 1283, 1304–31 (1996) (discussing the origins of duties under public accommodations law and whether these duties applied to retail stores).

59. E.g., *id.*

First, common law special relationships assume that certain transactions pose unique health, safety, and financial concerns for consumers.⁶⁰ Landlord-tenant law illustrates this heightened public interest in private transactions. In the mid-twentieth century, many jurisdictions adopted the implied warranty of habitability, “a duty on landlords to provide residential tenants with a habitable dwelling unit.”⁶¹ This wave of reform reflected growing acknowledgement of the importance of minimum housing quality standards for public health and safety,⁶² and strongly influenced modern landlord-tenant statutes. Most states have codified the implied warranty of habitability.⁶³ In addition, many states have enacted some form of the Uniform Residential Landlord and Tenant Act to establish remedies and protections against retaliation for tenants.⁶⁴ Today, most jurisdictions prohibit landlords from taking self-help measures to evict tenants, and embed at least some protections for tenants in summary eviction proceedings.⁶⁵

Related to the unique health and safety risks of certain transactions, common law special relationships assume that certain service providers occupy a disproportionately strong bargaining position in relation to

60. *See id.* at 1292–94 (describing the prevailing view among scholars that “necessity required special obligations to protect travelers from hardship when they had no place to sleep at night and were vulnerable to bandits on the highways”); *Escola v. Coca Cola Bottling Co. of Fresno*, 24 Cal. 2d 453, 441 (1944) (Traynor, J., concurring) (noting the inevitable occurrence of accidents resulting from defective products, and arguing that “[a]gainst such a risk there should be general and constant protection and the manufacturer is best situated to afford such protection”).

61. Roger A. Cunningham, *The New Implied and Statutory Warranties of Habitability in Residential Leases: From Contract to Status*, 16 URB. L. ANN. 3, 74 (1979). One of the most widely cited cases on point, *Javins v. First Nat’l Realty Corp.*, 428 F.2d 1071 (D.C. Cir. 1970), described the modern lease agreement as a contract for “a well[-]known package of goods and services—a package which includes not merely walls and ceilings, but also adequate heat, light and ventilation, serviceable plumbing facilities, secure windows and doors, proper sanitation, and proper maintenance.” *Id.* at 1074.

62. David A. Super, *The Rise and Fall of the Implied Warranty of Habitability*, 99 CALIF. L. REV. 389 (2011), 401–03; Gerald Korngold, *Whatever Happened to Landlord-Tenant Law*, 77 NEB. L. REV. 703, 706 (1998); Mary Ann Glendon, *The Transformation of American Landlord-Tenant Law*, 23 B.C. L. REV. 503, 518–19 (1982).

63. Super, *supra* note 62, at 394 (asserting that the implied warranty of habitability was adopted by “almost every state’s legislature or courts”).

64. Gary Goldman, *Uniform Commercial Landlord and Tenant Act—A Proposal to Reform “Law Out of Context”*, 19 T.M. COOLEY L. REV. 175, 185–91 (2002); Olin L. Browder, *The Taming of a Duty—The Tort Liability of Landlords*, 81 MICH. L. REV. 99, 113–16 (1982).

65. *The Eviction Process*, CA. DEP’T CONSUMER AFFAIRS, <http://www.dca.ca.gov/publications/landlordbook/evictions.shtml> (last visited Feb. 26, 2014); Browder, *supra* note 64, at 111–12.

consumers.⁶⁶ For example, both innkeepers and common carriers have a duty of non-discrimination—absent extenuating circumstances, each must accept all guests or passengers.⁶⁷ Denying innkeepers and common carriers the right to refuse service represents a substantial restraint on freedom of contract. However, the particular vulnerability of travelers has historically justified this restraint. Travelers are unfamiliar with local pricing, have limited access to competitor services, and are likely subject to time or circumstantial constraints on their ability to negotiate (e.g., the need to find lodging before sunset, or arrange transportation during a snowstorm).⁶⁸ Modern statutory regimes likewise assume that guests and passengers require special protections, and most jurisdictions today have codified the duty of non-discrimination for hotels and taxis.⁶⁹ In the case of taxis, local ordinances additionally specify metering requirements and set rates.⁷⁰

Finally, common law special relationships typically assume that the service provider is the least-cost avoider—the party who can adopt precautions against a given risk at the lowest cost.⁷¹ These relationships therefore allocate greater liability to the service provider rather than the consumer. For example, in some jurisdictions, a commercial lessor qualifies as a “seller or distributor” under products liability law.⁷² Lessors may incur liability for product defects or for failure to warn the consumer of dangers related to use of the product.⁷³ Courts have typically justified these heightened duties based on the relative positions of the seller and the consumer: the seller has superior knowledge of the condition of a product, and consumers cannot reasonably inspect or protect against the risks

66. See, e.g., Robert M. Hardaway, *Taxi and Limousines: The Last Bastion of Economic Regulation*, 21 HAMLINE J. PUB. L. & POL’Y 319, 357–58 (2000).

67. E.g., Singer, *supra* note 58, at 1304–31; JOHN E.H. SHERRY, *THE LAWS OF INNKEEPERS: FOR HOTELS, MOTELS, RESTAURANTS, AND CLUBS* 33–34 (1981).

68. SHERRY, *supra* note 67, at 126; Hardaway, *supra* note 66, at 357–58; Edmund W. Kitch, Marc Isaacson & Daniel Kasper, *The Regulation of Taxicabs in Chicago*, 14 J. L. & ECON. 285, 306 (1971).

69. See JACK P. JEFFERIES & BANKS BROWN, *UNDERSTANDING HOSPITALITY LAW* 35–37 (2001).

70. Lee A. Harris, *Taxicab Economics: The Freedom to Contract for a Ride*, 1 GEO. J.L. & PUB. POL’Y 195, 201–05 (2002).

71. Richard A. Posner, *Guido Calabresi’s The Costs of Accidents: A Reassessment*, 64 MD. L. REV. 12, 16 (2005) (describing and critiquing Guido Calabresi’s claims regarding liability for the “cheapest cost avoider”).

72. RESTATEMENT (THIRD) OF TORTS § 20(b) (1998).

73. RESTATEMENT (THIRD) OF TORTS § 1 (1998).

associated with many modern manufacturing processes.⁷⁴ Just as sellers and lessors represent the least-cost avoider, so do hotels, taxis, landlords, and other service providers with respect to the average guest, passenger, tenant, or consumer.

As discussed below, sharing platforms disrupt some of the fundamental assumptions underlying common law “special relationships.”⁷⁵ Unlike two-party relationships between service providers and consumers, sharing platforms create three-party relationships between the platform, provider, and user. These new relationships require a different allocation of liability and statutory protection. Consequently, the influence of common law special relationships on modern statutory frameworks often creates problems for sharing platforms. Many jurisdictions, for instance, prohibit leases of fewer than thirty days.⁷⁶ These ordinances prevent landlords from operating residential properties as hotels, but also bar most short-term rental platforms from operating.⁷⁷ However, guests who stay for over thirty days become entitled to statutory protections for tenants.⁷⁸ If those guests refuse to leave the property at the end of the rental period, hosts must pursue formal eviction proceedings.⁷⁹ By contrast, many jurisdictions allow hotels to take self-help measures to evict transient guests.⁸⁰ This example demonstrates how common law special relationships can affect the rights and remedies of sharing platform users under existing regulatory regimes.

B. REGULATORY AUTHORITY IS DIFFUSE, LOCALIZED, AND SPECIALIZED

Beyond the influence of common law “special relationships,” modern statutory frameworks create many other challenges for sharing platforms. First, regulatory authority governing traditional service providers is highly

74. See *Price v. Shell Oil Co.*, 466 P.2d 722, 726 (Cal. 1970) (“[W]e think it makes good sense to impose on the lessors of chattels the same liability for physical harm which has been imposed on the manufacturers and retailers. The former, like the latter, are able to bear the cost of compensating for injuries . . .”).

75. See *infra* Section III.C.

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

77. *Id.*

78. Chuck Thompson, *‘Professional Scammers’ Refuse to Leave Airbnb Host’s House*, CNN (July 24, 2014), <http://www.cnn.com/2014/07/23/travel/airbnb-squatters/>.

79. *Id.*

80. *Who Is A “Landlord” and Who Is A “Tenant”*, CAL. DEPT’ CONSUMER AFFAIRS, <http://www.dca.ca.gov/publications/landlordbook/whois.shtml> (last visited Feb. 26, 2015).

localized. Sharing platforms must navigate rules promulgated by multiple agencies at both state and local levels. Second, the relevant local codes are complex and, as discussed in the previous Section, impose heightened compliance burdens on service providers.

Sharing platforms must contend with multiple regulatory agencies at both the state and local levels. Short-term rentals are typically regulated at the city level.⁸¹ Yet state laws can also affect short-term rental platforms. Notably, Florida has prohibited local legislatures from passing new restrictions on short-term rentals since 2010.⁸² TNCs, by contrast, are often subject to regulation by state public utility commissions and state legislatures.⁸³ However, in many jurisdictions cities retain concurrent or separate regulatory authority over TNCs. The Pennsylvania Public Utilities Commission, for instance, has granted certain TNCs a two-year experimental license, but the city of Philadelphia exercises independent authority over for-hire vehicles and continues to ban TNCs.⁸⁴

Moreover, the local and state rules governing traditional service providers are highly complex, and thus compliance may be costly for providers. For short-term rentals, relevant local ordinances include residential zoning restrictions, health and fire codes, transient occupancy taxes, and licensing and permitting regimes.⁸⁵ These ordinances may also affect per-task contractors operating on residential properties, such as DogVacay.⁸⁶ Taxis are subject to detailed rules governing metering rates, required coverage areas, vehicle inspections, driver background checks, and licensing regimes.⁸⁷ Enforcement of these rules also takes place at the local

81. See Gottlieb, *supra* note 76.

82. FLA. STAT. § 509.032(7)(b) (2014); see also Gottlieb, *supra* note 76.

83. Niraj Chokshi, *Colorado Passes Nation's First Law Regulating UberX, Lyft*, WASH. POST (June 6, 2014), <http://www.washingtonpost.com/blogs/govbeat/wp/2014/06/06/colorado-passes-nations-first-law-regulating-uberx-lyft/>.

84. Paul Nussbaum, *PUC Approves UberX For State, Not Philadelphia*, PHILLY (Nov. 15, 2014), http://articles.philly.com/2014-11-15/business/56394938_1_ride-sharing-service-uberx-uber-service.

85. See Gottlieb, *supra* note 76.

86. E.g., KENNELS, CTY. SAN DIEGO, PLANNING & DEV. SERVS. (2014), available at <http://www.sandiegocounty.gov/pds/zoning/formfields/PDS-359.pdf> (prescribing zoning regulations for kennels, and defining kennels as any lot housing “seven or more dogs, cats, or similar small animals”).

87. Harris, *supra* note 70, at 201–12.

level,⁸⁸ and agencies tasked with investigating violations of city zoning or health codes may have limited resources.

Highly localized and specialized regulatory frameworks pose a challenge for sharing platforms, particularly those that operate nationwide. To clarify ambiguities in local regulations or contest regulations that prohibit sharing services, platforms must advocate for reform on a city-by-city basis.⁸⁹ Even as cities and states begin to pass legislation tailored to sharing platforms, each jurisdiction takes a different approach. Sharing platforms must therefore adapt to a wide range of regulatory solutions. However, many other interest groups also have an interest in the outcome of regulatory action governing sharing platforms.

C. MANY INTEREST GROUPS HAVE A STAKE IN THE REGULATION OF SHARING PLATFORMS

Most jurisdictions have taken an “experimental” approach to regulating sharing platforms,⁹⁰ and a variety of interest groups continue to shape the rulemaking process.⁹¹ The growth of the sharing economy has created substantial economic opportunities for users, providers, and platforms. The New York Attorney General’s Office predicts that in 2014 Airbnb alone will conduct \$282 million of short-term rental transactions within New York.⁹² Moreover, these platforms have acquired broad user bases.⁹³

88. For example, the Mayor’s Office of Special Enforcement enforces rules against illegal hotels in New York City. *Mayor’s Office of Special Enforcement*, N.Y. CITY, <http://www.nyc.gov/html/cjc/html/quality/mose.shtml> (last visited Feb. 26, 2015).

89. See, e.g., Rosalind S. Helderman, *Uber Pressures Regulators by Mobilizing Riders and Hiring Vast Lobbying Network*, WASH. POST (Dec. 13, 2014), http://www.washingtonpost.com/politics/uber-pressures-regulators-by-mobilizing-riders-and-hiring-vast-lobbying-network/2014/12/13/3f4395c6-7f2a-11e4-9f38-95a187e4c1f7_story.html.

90. E.g., Kim Lyons, *PUC Grants Uber License to Operate Experimental Service*, PITTSBURGH POST-GAZETTE (Nov. 13, 2014, 11:43 PM), <http://www.postgazette.com/business/2014/11/13/UbergetslicenseapprovalfromPennsylvaniaPUC/stories/201411130305>; Allen Wallace, *Uber Granted Temporary License to Operate in South Carolina*, COLA DAILY (Jan. 30, 2015), <http://coladaily.com/2015/01/30/uber-granted-temporary-license-to-operate-in-south-carolina/>.

91. See, e.g., Polly Mosendz, *Face-Off: NYC Lawmakers Grill Airbnb on Illegal Hotels*, NEWSWEEK (Jan. 21, 2015), <http://www.newsweek.com/face-nyc-lawmakers-grill-airbnb-illegal-hotels-301060/> (describing the various interest groups participating in a recent New York City Council meeting to debate the merits of changing the city’s short-term rental laws).

92. These figures reflect the overall revenue of hosts; as noted in Part I, the platform itself takes only a six to twelve percent transaction fee. Airbnb’s direct revenue from transaction fees is approximately \$30 million. N.Y. Attorney General Report, *supra* note 40, at 7.

According to Airbnb, total listings on the site grew from 120,000 to 300,000 just in 2012.⁹⁴ TNCs have experienced similarly rapid growth, though some evidence suggests that user signup rates have flattened in primary markets.⁹⁵ Uber claims that it adds 50,000 new drivers per month.⁹⁶ These new stakeholders have a strong financial interest in creating rules that allow sharing platforms to continue operating.

However, sharing platforms also generate negative externalities for third parties. Short-term rentals can change the character of a building or even a community,⁹⁷ and many residents object to finding strangers routinely entering the common areas of an apartment complex.⁹⁸ Likewise, TNC drivers' accidents can injure not only passengers but also pedestrians and other drivers. TNCs also affect other entities like airports, which strictly control the traffic of for-hire vehicles through licenses.⁹⁹ Moreover, the success of sharing platforms threatens traditional service providers. Short-term rental services often serve as close substitutes for hotels, particularly low-end hospitality services,¹⁰⁰ and TNCs serve as direct substitutes for taxis.¹⁰¹

93. *The Shared Economy's Growth Spurt*, CHRISTIAN SCI. MONITOR (Jan. 2, 2014), <http://www.csmonitor.com/Commentary/the-monitors-view/2014/0102/The-shared-economy-s-growth-spurt>.

94. Sonya Chudgar, *Airbnb's Annual Report: We're Still Growing*, INC. (Feb. 8, 2013), <http://www.inc.com/sonya-chudgar/airbnb-annual-report-skirts-legal-issues.html>.

95. Chris Nicholson, *Study: Uber Pulls Ahead of Lyft in Riders and Revenue With 12x Lead in U.S.*, FUTURE ADVISOR (Sept. 11, 2014), <http://blog.futureadvisor.com/study-uber-pulls-ahead-of-lyft-in-riders-and-revenue-with-12x-lead-in-u-s/>.

96. Douglas MacMillan, *Uber's Army of Drivers Growing 50,000 a Month*, WALL ST. J. (Sept. 8, 2014, 4:35 PM), <http://blogs.wsj.com/digits/2014/09/08/ubers-army-of-drivers-growing-50000-a-month/>.

97. Matt Stevens & Martha Groves, *Malibu to Crack Down on Short-Term Rentals Via Airbnb, Other Websites*, L.A. TIMES (May 27, 2014, 8:09 PM), <http://www.latimes.com/local/la-me-malibu-renting-20140528-story.html> (noting that many Malibu residents have complained that short-term rentals change the character of neighborhoods).

98. N.Y. Attorney General Report, *supra* note 40.

99. Ellen Huet, *California Threatens To Shut Down Uber, Lyft, Sidecar Over Airport Rides*, FORBES (June 12, 2014), <http://www.forbes.com/sites/ellenhuet/2014/06/12/california-threatens-to-shut-down-uber-lyft-sidecar-over-airport-rides/>. The overall impact of TNCs on the environment and traffic congestion remains unclear.

100. Gergios Zervas & Davide Proserpio, *The Rise of the Sharing Economy: Estimating the Impact of Airbnb on the Hotel Industry* (Bos. Univ. Sch. Mgmt., Working Paper No. 2013-16, 2013), available at <http://cs-people.bu.edu/dproserp/papers/airbnb.pdf>.

101. A recent survey by MKM Partners suggests that up to twenty-four percent of Uber users "use it as a replacement for rental companies all of the time." Jack Hough,

Regulating the sharing economy therefore requires a balancing of interests. State and local governments must ensure that new rules adequately protect both participants in the sharing economy and third parties. In addition, local governments have a strong public interest in the regulation of sharing platforms. Sharing services can generate substantial tax revenue, but can also disrupt the market for affordable housing¹⁰² and create serious consumer safety hazards.¹⁰³ Many jurisdictions are currently attempting to find regulatory solutions to address the sharing economy.

III. CHALLENGES FOR REGULATORS

The following discussion describes how regulators have approached the sharing economy so far, and the enforcement challenges that regulators face under any approach. This Part then explores what makes the sharing economy a regulatory disruption, and argues that existing rules tailored for two-party relationships cannot address the needs of three-party relationships between platforms, providers, and users. Nor do existing models of intermediary liability provide workable solutions for structuring sharing platform liability.

A. REGULATORS HAVE STRUGGLED TO ADAPT EXISTING REGULATIONS TO SHARING PLATFORMS

Given that existing regulatory frameworks are highly localized,¹⁰⁴ state and municipal legislatures have taken a wide range of approaches in addressing sharing platforms. Sharing platforms often operate legally even without legislative reform, including many per-task contractors, P2P rentals, and some P2P auction houses. Other sharing platforms operate illegally—or arguably illegally¹⁰⁵—and regulators have struggled to deal with these platforms. In particular, short-term rentals of residential housing and TNCs frequently violate local ordinances. Some jurisdictions have attempted to ban these platforms, others have granted “experimental”

Uber, Airbnb a Danger to Car Rentals, Hotels?, BARRON'S (Sept. 25, 2014), <http://online.barrons.com/articles/SB52784017629588234037504580174550733121636>.

102. See, e.g., Jennifer Peltz, *NYC Debates: Does Airbnb Help or Hurt Affordable Housing?*, ABC NEWS (Jan. 20, 2015, 7:02 PM), <http://abcnews.go.com/Health/wireStory/lawmakers-airbnb-affects-nyc-housing-economy-28339911/>.

103. Ben Popken, *States Warn of Rideshare Risks for Passengers*, NBC NEWS (May 28, 2014, 1:52 PM), <http://www.nbcnews.com/business/consumer/states-warn-rideshare-risks-passengers-n116736/>.

104. See *supra* Section II.B.

105. Katie Lobosco, *Uber Agrees to Temporarily Suspend Service in Portland*, CNN MONEY (Dec. 18, 2014, 7:13 PM), <http://money.cnn.com/2014/12/18/technology/uber-portland/>.

licenses to certain platforms before issuing formal rules, and an increasing number of cities have passed legislation for short-term rentals and TNCs.¹⁰⁶ Generally, bans on sharing platforms have met with limited success, and the outcomes under experimental licenses and early legislation are difficult to predict. And under each of these approaches, regulators face similar enforcement challenges.

1. Bans

Absent regulatory reform, many sharing platforms violate local ordinances. Short-term residential rentals—often defined as rentals for fewer than thirty days—are explicitly prohibited in many jurisdictions.¹⁰⁷ In some cities, certain categories of residential housing may host short-term rentals (e.g., single-family homes) while others may not (e.g., multiple dwelling units or apartment complexes),¹⁰⁸ or certain residential

106. *The Sharing Economy: Boom and Backlash*, ECONOMIST (Apr. 26, 2014), <http://www.economist.com/news/business/21601254-consumers-and-investors-are-delighted-startups-offering-spare-rooms-or-rides-across-town/>:

Corey Owens, head of public policy at Uber, says that in his industry local authorities can be put into three “buckets”. In the first are those with strict rules that they intend to keep, such as Austin, London, New York and Philadelphia. In the second are places where the future is ambiguous: here he puts Baltimore, Brussels, Paris and Washington, DC. Authorities in the third bucket have recognised [sic] that the world is changing. California, where the taxi regulator adopted new rules for ride-sharers last year, is the “primary example.”

As noted in this Section, many of these cities have moved into different “buckets” since Owens made this statement.

107. For example, until October 2014, San Francisco prohibited rentals for less than thirty days. The city technically allowed residents to obtain a special permit for short-term rentals, but the expense and difficulty of obtaining such a permit made this option impractical for the average host. Carolyn Said, *S.F. Cracks Down on Airbnb Rentals*, SFGATE (Apr. 7, 2014, 2:26 PM), <http://www.sfgate.com/bayarea/article/S-F-cracks-down-on-Airbnb-rentals-5381237.php>; Doug Sovern, *SF Law Prohibits Short-Term Rentals Popularized By Airbnb*, CBS SF BAY AREA (Aug. 4, 2011, 9:19 AM), <http://sanfrancisco.cbslocal.com/2011/08/04/sf-law-prohibits-short-term-rentals-popularized-by-airbnb/>.

108. The New York Multiple Dwelling code provides that certain categories of “multiple dwelling” units “shall only be used for permanent residence purposes.” The statute defines the relevant category of “class A” multiple dwelling units to include “tenements, flat houses, maisonette apartments, apartment houses, apartment hotels, bachelor apartments, studio apartments, duplex apartments, kitchenette apartments, garden-type maisonette dwelling projects, and all other multiple dwellings except class B multiple dwellings.” N.Y. Mult. Dwell. Law § 4(8)(a) (McKinney 2011). The statute further defines residential use as “occupancy of a dwelling unit by the same natural person or family for thirty consecutive days or more” *Id.* State Senator Liz Krueger has clarified that the statute does not prohibit multiple dwelling residents from renting single

zones may grant limited licenses while other residential zones do not.¹⁰⁹ Similarly, TNCs arguably fall under the definition of for-hire vehicles under many local taxi ordinances.¹¹⁰ Since TNCs generally do not (and often cannot feasibly) comply with taxi ordinances, some courts have ruled that TNCs are illegal taxi operations.¹¹¹ P2P auction houses for parking spaces may also violate local ordinances.¹¹²

Rather than revising local codes to accommodate sharing platforms, some jurisdictions chose to enforce existing laws to prohibit these P2P services. Many cities and states responded to TNCs by issuing cease-and-desist orders, fining platforms, and seeking injunctions.¹¹³ Several cities have also engaged in aggressive efforts to shut down short-term rental hosts,¹¹⁴ and some have revised local ordinances to expressly prohibit particular categories of short-term residential rentals.¹¹⁵ New York City and San Francisco have launched highly visible campaigns against illegal

rooms for less than thirty days, so long as a permanent resident also occupies the unit for the full duration of the short-term rental. Liz Krueger, *Answers for New Yorkers Concerned or Confused About the Illegal Hotel Law*, N.Y. SENATE (May 27, 2014), <http://www.nysenate.gov/report/answers-new-yorkers-concerned-or-confused-about-illegal-hotel-law/>.

109. Bianca Barragan, *The Few Places in Los Angeles Where Airbnbs Might Be Legal*, CURBED L.A. (Mar. 24, 2014), http://la.curbed.com/archives/2014/03/the_few_places_in_los_angeles_where_airbnbs_might_be_legal.php.

110. Broward County in Florida has recently clarified that TNC drivers count as taxis under local ordinances. Brittany Wallman, *Uber Drivers Cited 250 Times, Fined \$35,000*, SUN SENTINEL (Jan. 27, 2015, 4:47 PM), <http://www.sun-sentinel.com/local/broward/fl-uber-showdown-broward-20150127-story.html>.

111. E.g., Eric M. Johnson, *Ridesharing Firm Uber Suspends Operations in Nevada*, REUTERS (Nov. 27, 2014), <http://www.reuters.com/article/2014/11/27/us-usa-nevada-ridesharing-idUSKCN0JB18J20141127>.

112. Laura Entis, *San Francisco Says Enough Monkey Business: Tells Parking Spot App to Shut Down*, ENTREPRENEUR (July 11, 2014), <http://www.entrepreneur.com/article/235575/>.

113. E.g., Sean Doogan, *Judge Sides with City in Decision Allowing Uber to Offer Only Free Ride Sharing*, ALASKA DISPATCH NEWS (Oct. 13, 2014), <http://www.adn.com/article/20141013/judge-sides-city-decision-allowing-uber-offer-only-free-ride-sharing/>; Josephine Woolington, *City Threatens to Fine Uber Drivers*, REGISTER GUARD (Jan. 17, 2015), <http://registerguard.com/rg/news/local/32661556-75/eugene-warns-uber-drivers-of-potential-fines.html.csp>.

114. David Streitfeld, *Airbnb Listings Mostly Illegal, New York State Contends*, N.Y. TIMES (Oct. 15, 2014), <http://www.nytimes.com/2014/10/16/business/airbnb-listings-mostly-illegal-state-contends.html>.

115. Katherine Sayre, *New Orleans City Council Toughens Ban on Unlicensed Short-Term Vacation Rentals*, NOLA (July 10, 2014, 12:23 AM), http://www.nola.com/business/index.ssf/2014/07/new_orleans_city_council_tough.html.

hotel operators.¹¹⁶ In addition, the San Francisco Attorney General issued multiple cease-and-desist orders to P2P auction houses for parking spots.¹¹⁷

These efforts have met with limited success. Short-term rental hosts continue to operate illegally in many cities. Some jurisdictions like New Orleans simply have not acted to enforce formal bans on short-term rentals.¹¹⁸ Even in New York City, enforcement campaigns against short-term rentals have encountered serious obstacles. Likewise, TNCs have often ignored cease-and-desist orders.¹¹⁹ In many cases, TNCs have negotiated with cities to gain temporary authorization rather than discontinuing operations, and in most cases TNCs have obtained temporary licenses.¹²⁰

2. *Legalizing Sharing Platforms: Revising Existing Rules or Creating New Rules*

Increasingly, states and cities have attempted to legalize or partially legalize TNCs and short-term rental platforms. Most jurisdictions have approached short-term rentals by revising existing ordinances, though some have also created new permitting regimes. Short-term rental provisions vary widely. Common restrictions include geographic caps,

116. Streitfeld, *supra* note 114; Katy Steinmetz, *San Francisco Cracks Down on Airbnb 'Abuses'*, TIME (Apr. 15, 2014), <http://time.com/63810/san-francisco-airbnb-crackdown/> (discussing efforts to pass an ordinance clarifying the legality of some short-term rentals, and to encourage enforcement efforts against illegal rentals); Guy Marzorati, *Enforcement Issues Remain as San Francisco's Airbnb Law Takes Effect*, KQED NEWS (Feb. 2, 2015), <http://www2.kqed.org/news/2015/02/02/Enforcement-Issues-San-Francisco-Legalize-Airbnb-Rentals> (discussing opposition to the short-term rental ordinance, and enforcement challenges related to the ordinance).

117. Entis, *supra* note 112.

118. Robert McClendon, *In a Push for Short-Term Rental Legalization, Some New Orleans Owners Ask 'Why Bother?'*, NOLA (Nov. 6, 2014, 7:38 AM), http://www.nola.com/politics/index.ssf/2014/11/new_orleans_short-term_rental.html.

119. Jeremy Allen, *Uber, Lyft ignore Ann Arbor's cease and desist demand; no tickets issued following city's orders*, MLIVE.COM (July 7, 2014), http://www.mlive.com/business/ann-arbor/index.ssf/2014/07/uber_lyft_ignore_ann_arbors_ce.html; Ashley Dejean, *Uber And Lyft Ignore Virginia's Demand To Cease And Desist*, WAMU 88.5 AM. UNIV. RADIO (June 6, 2014), http://wamu.org/news/14/06/06/uber_and_lyft_refuse_virginias_demand_to_cease_and_desist; Amos Maki, *Uber, Lyft Operating Despite Cease-and-Desist Notices*, MEMPHIS DAILY NEWS (July 17, 2014) <http://www.memphisdailynews.com/news/2014/jul/17/uber-lyft-operating-despite-city-notices/>.

120. See text accompanying note 90; see also Mike Isaac, *Uber Suspends Portland Operations in Deal with City Regulators*, N.Y. TIMES (Dec. 18, 2014), <http://bits.blogs.nytimes.com/2014/12/18/uber-suspends-portland-operations-in-deal-with-city-regulators/>.

maximum durations, maximum rentals per year, occupancy limits, and exclusions for multiple dwelling residences.¹²¹ Some jurisdictions have created affirmative duties for short-term rental hosts, such as ensuring adequate parking for guests, providing notice of short-term rentals to neighbors, or liability for nuisances caused by guests.¹²² In jurisdictions with permitting regimes, hosts typically pay an application fee and undergo a safety inspection.¹²³ Many jurisdictions have also decided that transient occupancy taxes apply to short-term rental hosts.¹²⁴

By contrast, most cities and states have approached TNCs by creating a new legal category distinct from for-hire vehicles like taxis and limousines. In some states, the public utilities commission has issued early guidance for TNCs.¹²⁵ Other states and cities have already passed legislation governing TNCs, including Colorado, the city of Chicago, and the District of Columbia.¹²⁶ Some common features of early rules for TNCs include: minimum insurance requirements, regular inspections, driver background checks, duties not to discriminate against disabled riders, vehicle registration and licensing, requirements for distinctive trade dress to mark registered vehicles, and limitations on surge pricing—a practice of increasing fares during peak hours to encourage drivers to work during those hours.¹²⁷ In addition, most states and cities have expressly excluded TNCs from common carrier status, relieving TNCs of the duty of non-discrimination.¹²⁸

Many new rules for TNCs will not take effect until early 2015 or later, and it is too early to judge the success of these regulatory efforts.

121. Gottlieb, *supra* note 76.

122. *Id.*

123. See *Vacation Rental Licensing*, AUSTIN, <http://www.austintexas.gov/str/> (last visited Feb. 26, 2015).

124. See, e.g., Portland, Or., Planning and Zoning § 33.207.070.

125. Cal. P.U.C. Decision, *supra* note 18, at 72–75.

126. COLO. REV. STAT. §§ 40-10.1-601–40-10.1-608 (2014); CHI., ILL., CODE § 9-115-100 (2014); Vehicle-for-Hire Innovation Amendment Act of 2014, 61 D.C. Reg. 012430 (Dec. 5, 2014).

127. Douglas MacMillan, *Uber Laws: A Primer on Ridesharing Regulations*, WALL ST. J. (Jan. 29, 2015, 10:37 PM), <http://blogs.wsj.com/digits/2015/01/29/uber-laws-a-primer-on-ridesharing-regulations/>.

128. E.g., COLO. REV. STAT. § 40-10.1-603 (“A transportation network company is not subject to the [public utility] commission’s rate, entry, operational, or common carrier requirements”), available at <http://cdn.colorado.gov/cs/Satellite/DORA-PUC/CBON/DORA/1251655091163>. Maryland is a notable exception, and has ruled that TNCs are common carriers. Md. P.U.C. Order No. 86528 (Aug. 6, 2014).

Moreover, some jurisdictions have issued experimental licenses to TNCs, but have yet to issue formal rules.¹²⁹

3. *Enforcement*

Whether state and local governments choose to ban or legalize sharing platforms, regulatory agencies must develop strategies for enforcing new or existing laws. Policing sharing platforms often proves more difficult than enacting legislation. Regulators have two main options for enforcement: target providers or target platforms. In some cases, private causes of action may also contribute to enforcement strategies.

a) *Targets: Providers Versus Platforms*

To target providers, regulators must decide how to identify bad actors and what remedy to seek. Regulators have identified illegal conduct by soliciting user information from platforms,¹³⁰ through inspections or policing efforts,¹³¹ and through complaint hotlines.¹³² After regulators uncover illegal conduct, they impose fines¹³³ or they seek injunctive relief to either disband commercial actors or remove accounts from platforms.¹³⁴

129. See test accompanying note 90; see also Mike Isaac, *Uber Suspends Portland Operations in Deal with City Regulators*, N.Y. TIMES (Dec. 18, 2014), <http://bits.blogs.nytimes.com/2014/12/18/uber-suspends-portland-operations-in-deal-with-city-regulators/>.

130. See *Airbnb, Inc. v. Schneiderman*, 989 N.Y.S.2d 786 (N.Y. Sup. Ct. 2014) (quashing as overbroad a subpoena from the New York Attorney General requiring that Airbnb provide personal information of hosts relevant to identifying illegal listings); *Columbus v. Lyft Inc.*, No. 2014 EVH 060145, 2014 WL 4805037 (Sept. 19, 2014) (granting in part and denying in part a public records request from the City of Columbus seeking Lyft's records of drivers' names and personal information).

131. E.g., Marc D. Anderson, *Fairhope to start cracking down on short-term vacation rentals*, AL.COM (Aug. 11, 2014), http://www.al.com/news/mobile/index.ssf/2014/08/fairhope_to_start_cracking_dow.html.

132. E.g., Marc Saltzberg, *VENICE NEIGHBORHOOD COUNCIL, SHORT TERM VACATION RENTAL REPORT* (2013), available at <http://www.venicenc.org/wp-content/uploads/2012/05/Short-Term-Vacation-Rental-Report.pdf> ("The City's Department of Building and Safety (DBS) is charged with enforcing the ordinances which ban vacation rentals. DBS is complaint driven - that is, they don't enforce unless there is a complaint.").

133. See Ron Lieber, *A \$2,400 Fine for an Airbnb Host*, N.Y. TIMES (May 21, 2013), <http://bucks.blogs.nytimes.com/2013/05/21/a-2400-fine-for-an-airbnb-host/> (reporting on Nigel Warren, an Airbnb user in New York who received \$2,400 in fines, and questioning whether Airbnb has a duty to warn or block users in areas where Airbnb hosting is illegal).

134. San Francisco City Attorney Dennis Herrera filed suit in April 2014 against two landlords for evicting tenants under the Ellis Act to convert apartments into short-term rental listings. Bob Egelko, *S.F. city attorney sues 2 landlords over short-term rentals*,

Many cities have addressed short-term rental platforms by policing providers. The New York Attorney General's office has aggressively pursued hosts with illegal listings.¹³⁵ In August, the Attorney General requested that Airbnb reveal the identities of 124 accounts.¹³⁶ San Francisco has similarly pursued actions against landlords who attempted to convert apartments into vacation rental units by evicting long-term tenants.¹³⁷ But shutting down individual hosts requires immense resources, and new offenders can enter the market with ease.

On the other hand, targeting platforms presents less of a logistical challenge. Regulators have generally targeted TNCs, car sharing services, and auction houses at the platform level. Because it is not always clear which local or state agency has the authority to regulate platforms, regulators have sometimes faced an initial hurdle when establishing the correct channel for enforcement.¹³⁸ Regulators can impose fines for specific instances of noncompliance with existing statutes.¹³⁹ However, as discussed above, public enforcement efforts have limited traction because of limited government resources, and because platforms often continue to operate in defiance of cease-and-desist orders or repeated fines.

b) Public Versus Private Enforcement

The previous discussion has assumed that regulatory agencies will primarily enforce legislation governing sharing platforms. The focus on

SFGATE (Apr. 24, 2014, 6:52 AM), <http://www.sfgate.com/bayarea/article/S-F-city-attorney-sues-2-landlords-over-5425826.php>.

135. Polly Mosendz, *Face-Off: NYC Lawmakers Grill Airbnb on Illegal Hotels*, NEWSWEEK (Jan. 21, 2015, 1:26 PM), <http://www.newsweek.com/face-nyc-lawmakers-grill-airbnb-illegal-hotels-301060>.

136. Tom Huddleston, Jr., *Airbnb to reveal names of 124 hosts to New York's Attorney General*, FORTUNE (Aug. 22, 2014), <http://fortune.com/2014/08/22/airbnb-to-reveal-124-hosts-identities-to-new-yorks-attorney-general/>.

137. Bob Egelko, *S.F. City Attorney Sues 2 Landlords Over Short-Term Rentals*, SFGATE (Apr. 24, 2014, 6:52 AM), <http://www.sfgate.com/bayarea/article/SFcityattorneysues2landlordsover5425826.php>.

138. During the administrative review period in 2013, Uber challenged the California Public Utilities Commission's authority over the service "because it is a technology company that does not provide transportation services." Patrick Hoge, *Uber, taxis appeal PUC ruling on private drivers for hire*, S.F. BUS. TIMES (Oct. 24, 2013, 9:53 AM), <http://www.bizjournals.com/sanfrancisco/blog/2013/10/uber-lyft-sidecar-taxicab-puc.html>.

139. The Pennsylvania Public Utility Commission first conducted undercover investigations of Uber and Lyft's services, then threatened the TNCs with fines—\$130,000 for Lyft and \$95,000 for Uber. Yazhou Sun, *Uber and Lyft Face First-Ever Fines in the United States*, ABC NEWS (June 11, 2014), <http://abcnews.go.com/US/uber-lyft-face-fines-united-states/story?id=24089617>.

action by regulatory agencies stems in part from the strong public interest involved in some sharing platforms—particularly TNCs, short-term home and car rentals, P2P lending platforms, and P2P auction houses. Yet in some cases private causes of action offer a viable alternative to regulatory action.

In the context of short-term rental platforms, landlords may constitute the first line of enforcement against hosts. Most landlords include a sublet clause in both commercial and residential leases.¹⁴⁰ A landlord can succeed in a summary eviction proceeding by demonstrating that the tenant illegally hosted short-term guests in violation of the lease.¹⁴¹

Drivers, competitors, and riders have also filed private suits against TNCs. Drivers have claimed that Uber and Lyft misclassify drivers as independent contractors.¹⁴² Riders, on the other hand, have filed both personal injury suits against TNCs¹⁴³ and class actions based on violations of the Americans with Disabilities Act (“ADA”)¹⁴⁴ and unfair business

140. E.g., Ga. Dep’t of Cmty. Affairs, *Basic Rental Agreement or Residential Lease*, available at <http://www.dca.ga.gov/housing/specialneeds/programs/documents/C-2SampleLEASE.pdf>; Coy Davidson, *The Importance of Assignment and Subletting Clauses in Commercial Leases*, TENANT ADVISOR (Sept. 6, 2009), <http://www.coydavidson.com/leasing-tips/the-importance-of-assignment-and-subletting-clauses-in-commercial-leases/>.

141. Kevin Davis, *Guest Wrong*, 100 A.B.A.J. 19, 19–20 (2014).

142. See *Cotter v. Lyft, Inc.*, No. 13-cv-04065-VC, 2014 WL 3884416 (N.D. Cal. Aug. 7, 2014). The IRS, state tax bureaus, and other state agencies each apply similar but varied tests for determining whether a worker qualifies as an employee rather than an independent contractor. These tests generally focus on the degree of control the “employer” exercises over the conduct of the employee. In fact, most states allow taxi dispatch services to hire drivers as independent contractors, depending on the nature of the contractual relationship. UNREGULATED WORK IN THE TAXI INDUSTRY IN NEW YORK CITY, NELP.ORG (2007), available at http://www.nelp.org/page//EJP/Unregulated_Work_Taxi.pdf; INFORMATION SHEET: TAXICAB INDUSTRY, EMP’T DEV. DEP’T OF CAL. (2009), available at http://www.edd.ca.gov/pdf_pub_ctr/de231tc.pdf; *Industry Specific Help for Worker Classification*, OREGON.GOV, <http://www.oregon.gov/IC/pages/07-industries.aspx#taxicab> (noting that some dispatch services hire drivers as independent contractors, and these services must meet state criteria including “(1) that [drivers] be free from the right of another to control how services are performed and, (2) that the worker operates an independently established business”). Taxicab drivers have filed claims against dispatchers for misclassification of drivers as independent contractors in numerous states, with mixed results.

143. See *infra* Section III.B; see also *Mazaheri v. Doe*, No. CIV-14-225-M, 2014 WL 2155049 (W.D. Okla. May 22, 2014).

144. *McPhail v. Lyft, Inc.*, No. A-14-CA-829-LY, 2014 WL 6680393 (W.D. Tex. Nov. 25, 2014); *Salovitz v. Uber Techs., Inc.*, No. A-14-CV-823-LY, 2014 WL 5318031 (W.D. Tex. Oct. 16, 2014).

practices.¹⁴⁵ Likewise, taxi dispatch services in Boston and Chicago have pursued claims against Uber under the Lanham Act and state unfair competition laws.¹⁴⁶ Private actions against sharing platforms can supplement government enforcement efforts. These actions may also help to shape the ongoing legislative efforts to address sharing platforms.

Although state and local governments have taken action to regulate the sharing economy, many problems remain unresolved. Even sharing platforms that already operate legally may raise novel insurance or employment issues warranting regulatory attention. The following Section explores why sharing platforms disrupt existing regulatory frameworks.

B. LEGAL GRAY AREAS: SHARING PLATFORMS DISRUPT
TRADITIONAL LEGAL CATEGORIES

Sharing platforms often operate in legal gray areas, and the regulatory vacuum surrounding these services has raised complex legal questions.¹⁴⁷ Sharing companies erode the distinction between commercial and personal, public and private, and the definition of goods and services.¹⁴⁸ For example, TNC drivers operate personal vehicles for a commercial purpose. Similarly, short-term rental hosts temporarily offer private, residential housing to the public. P2P auction houses and per-task contractor services allow users to purchase temporary licenses, such as a position in line for a movie, a table in a coffee shop, or a public parking spot. Blurring these lines creates difficult legal issues because these categories affect determinations of liability in almost every field of law, from tax¹⁴⁹ to civil rights.¹⁵⁰

145. *Ehret v. Uber Techs., Inc.*, No. C-14-0113 EMC, 2014 WL 4640170 (N.D. Cal. Sept. 17, 2014).

146. *E.g.*, *Bos. Cab Dispatch, Inc. v. Uber Techs., Inc.*, No. 13-10769-NMG, 2014 WL 1338148 (D. Mass. Mar. 27, 2014); *Yellow Grp. LLC v. Uber Techs. Inc.*, No. 12 C 7967, 2014 WL 3396055, at *5 (E.D. Ill. July 10, 2014).

147. Cohen & Zehngebot, *supra* note 10 (“To grossly generalize, the law tends to prefer binary divisions: public and private, business and personal, donation and sale, consumer and provider, and, most saliently, my property and yours. In the sharing economy, many companies blur these boundaries, resulting in a legal gray area.”).

148. *See* Badger, *supra* note 52 (arguing that the real “tough call” for regulators is how to regulate “quasi-professionals,” providers who fall in between traditional regulatory categories).

149. *See* Thomas A. Dickerson & Sylvia O. Hinds-Radix, *Taxing Internet Transactions: Airbnb and the Sharing Economy*, 86 N.Y. ST. B.J. 49 (2014) (“While Expedia, Priceline and Hotwire are best defined as retailers or resellers and, as such, can be controlled and taxed accordingly, it is much more difficult to find a comparable taxing analogue for the Internet-sharing economy.”).

1. Insurance

Insurance liability for TNCs illustrates the gray area between personal and commercial activity. Most personal insurance plans do not cover commercial activity, such as charging fares for rides. Thus TNC drivers cannot rely on personal insurance policies for accidents that occur while they have the TNC app on.¹⁵¹ Some states now require TNCs to purchase insurance to cover this “gap” in the TNC driver’s personal insurance policy.¹⁵² Insurers break down TNC liability into three “periods.” The first period starts when the TNC driver turns on the app and ends when the TNC driver accepts a match. The second period covers the time between the match and when the driver picks up the rider. The third is the time between rider pick up and drop off.¹⁵³ Many jurisdictions have adopted an “app on” rule, where TNCs must provide insurance to drivers from the moment the driver turns on the TNC app.¹⁵⁴

Although TNCs have not always provided primary coverage during periods two and three,¹⁵⁵ most TNCs now voluntarily purchase insurance

150. For example, federal civil rights statutes prohibit discrimination based on gender in “places of accommodation,” and in advertisements of housing rentals. Title II of the Civil Rights Act, 42 U.S.C. § 2000a (2012); Fair Housing Act, 42 U.S.C. § 3604 (2012). The Fair Housing Act, however, makes an exception for advertisements expressing a preference for a particular gender. Memorandum from Roberta Achtenberg, Assistant Sec’y for Fair Housing and Equal Opportunity, U.S. Dep’t Hous. & Urb. Dev. 2 (Jan. 9, 1995), *available at* <http://www.hud.gov/offices/fheo/disabilities/sect804achtenberg.pdf>. Whether short-term rental hosts can take advantage of this exception is unclear.

151. *See, e.g.*, Ron Lieber, *The Question of Coverage for Ride Service Drivers*, N.Y. TIMES (Sept. 5, 2014), <http://www.nytimes.com/2014/09/06/your-money/auto-insurance/offloading-the-risk-in-renting-a-car-ride.html>.

152. *E.g.*, CAL. PUB. UTIL. CODE § 5433(c) (West 2015). California state assemblywoman Susan Bonilla introduced the current insurance mandate for TNCs, bill number AB 2293, in response to Sofia Liu’s death. Ron Lieber, *The Question of Coverage for Ride Service Drivers*, N.Y. TIMES (Sept. 5, 2014), <http://www.nytimes.com/2014/09/06/your-money/auto-insurance/offloading-the-risk-in-renting-a-car-ride.html>; Josh Eidelson, *Is California About to Disrupt Uber?*, BLOOMBERG BUSINESSWEEK (June 26, 2014), <http://www.businessweek.com/articles/2014-06-26/is-california-about-to-disrupt-uber>.

153. *See* Letter from Dave Jones, Ins. Comm’r, Cal. Dep’t Ins., to Michael R. Peevey, President, Cal. Pub. Utils. Comm’n 2 (Apr. 7, 2014), *available at* <http://www.insurance.ca.gov/0400-news/multimedia/0030VideoHearings/upload/CDI-CPUC20140407.pdf>. The California insurance mandate for TNCs instead divides TNC liability into two periods. CAL. PUB. UTIL. CODE § 5433.

154. Don Jergler, *Uber, Lyft, Sidecar Toe-to-Toe With Insurers State-by-State*, INS. JOURNAL (June 27, 2014), <http://www.insurancejournal.com/news/national/2014/06/27/332942.htm>.

155. Prior to 2014, Lyft, Uber, and Sidecar only purchased backup policies in case a driver’s personal insurance declined to cover an accident. Most personal insurance

plans for these periods without a statutorily imposed insurance mandate.¹⁵⁶ However, TNCs have vigorously contested statutory insurance requirements for the second period. TNCs have argued that providing commercial insurance during the second period would be economically wasteful and incentivize drivers to commit insurance fraud. Commercial coverage is more expensive than personal insurance coverage because of the increased liability risks involved. However, drivers have an incentive to leave the TNC app on while doing routine chores or other personal trips to benefit from higher coverage.¹⁵⁷ Regulators have argued that TNCs benefit from drivers who leave the app on even when those drivers do not currently have a passenger request, because the driver is then “available” to prospective passengers.¹⁵⁸

policies, however, have an exception for commercial ride sharing. By requiring drivers to first report claims to their personal insurers, this TNC policy created a perverse incentive for drivers to lie to their insurance providers. *See* Lieber, *supra* note 151.

156. *See* Jergler, *supra* note 154.

157. Sidecar and other TNCs argued during the California Department of Insurance investigatory hearing that mandating full coverage during period one creates a moral hazard for drivers, who may be tempted to leave the TNC app on to take advantage of the higher insurance coverage. *See* Don Jergler, *TNCs, Insurers Square off at California Hearing*, INS. JOURNAL (Mar. 21, 2014), <http://www.insurancejournal.com/news/west/2014/03/21/324004.htm>. TNC driver support forums suggest that this may be a realistic concern; some drivers may literally leave the app on twenty-four hours a day. Uber Jax, *Just Curious as to who leaves their App on 24/7*, UBERPEOPLE.NET (Oct. 3, 2014), <http://uberpeople.net/threads/just-curious-as-to-who-leaves-their-app-on-24-7.4537/> (“I never turn my driver App off! I leave it on 24/7. . . . I just go about my daily life and when I get a ping I drop what I’m doing and take care of business.”). Insurance Commissioner Jones aptly summarized the “moral hazard” argument of TNCs: “(1) drivers may be running personal errands; (2) drivers may have multiple applications open at the same time; (3) drivers with low limits on their personal automobile insurance policy will turn on the application in the event of an accident to secure more robust coverage; and (4) drivers start to look more like employees or independent contractors if the TNC covers this period.” Letter from Dave Jones, Ins. Comm’r, Cal. Dep’t Ins., to Michael R. Peevey, President, Cal. Pub. Utils. Comm’n 2 (Apr. 7, 2014), *available at* <http://www.insurance.ca.gov/0400-news/multimedia/0030VideoHearings/upload/CDI-CPUC20140407.pdf>.

158. California Insurance Commissioner Dave Jones argued in his letter to California Public Utilities Commission: “Even if a driver is running errands during Period 1, if that driver has the app open, the TNC benefits from the driver showing availability to provide rides to customers.” Letter from Dave Jones, Ins. Comm’r, Cal. Dep’t Ins., to Michael R. Peevey, President, Cal. Pub. Utils. Comm’n 2 (Apr. 7, 2014), *available at* <http://www.insurance.ca.gov/0400news/multimedia/0030VideoHearings/upload/CDI-CPUC20140407.pdf>.

2. Tax

Blurring the line between commercial and personal activity complicates many legal areas beyond insurance, such as whether a TNC driver may deduct the cost of car repairs as a business expense for tax purposes. The IRS permits deductions based on the percentage of a driver's yearly mileage attributable to "business" use.¹⁵⁹ This seems to cover the second and third insurance periods for TNCs, but it is unclear whether the app-on rule for insurance liability also establishes that driving during the first insurance period is a "business" purpose when calculating income tax deductions.

3. Lessor Liability

P2P rental platforms may also complicate the distinction between high-volume and casual commercial activity. For example, in many jurisdictions, product liability depends on the commercial character of the seller.¹⁶⁰ Some jurisdictions similarly create an exception to limit "casual lessor" liability for manufacturing defects.¹⁶¹ This would seem to encompass services like Equipify or Spinlister, which allow providers to rent their personal sporting equipment to users, including skis and mountain bikes.¹⁶² Yet providers may transact at vastly different volumes on these platforms.¹⁶³ It is not yet clear at what point a casual lessor of snowboards on a sharing platform becomes a commercial lessor in various

159. Travel, Entertainment, Gift, and Car Expenses: For Use in Preparing 2013 Returns, IRS 16 (2014), *available at* <http://www.irs.gov/pub/irs-pdf/p463.pdf>.

160. Both the second and third restatements limit liability for "occasional" or "noncommercial" sellers. RESTATEMENT (SECOND) OF TORTS § 420A cmt. f (1965); RESTATEMENT (THIRD) OF TORTS: PROD. LIAB. § 1 cmt. c (1998).

161. *E.g.*, 1 MICHAEL WEINBERGER, NEW YORK PRODUCTS LIABILITY § 5:7 (2d ed. 2014) ("[A] commercial lessor of a product will be held strictly liable for personal injuries, just as a product manufacturer would However, casual or occasional lessors of products are not subject to claims of strict liability. At most, the duty of a casual or occasional lessor is to warn the person to whom the product is supplied of known defects that are not obvious or readily discernible.")

162. EQUIPIFY, <http://equipify.me/>; SPINLISTER, <https://www.spinlister.com/>. Similar concerns may also arise for casual rentals of office space, in the context of premises liability. Services like Peerspace allow business to occasionally rent out office space; these social work environments are popular with freelancers and remote workers, and even small businesses hosting occasional retreats. PEERSPACE, <http://www.peerspace.com/>. The duty of care for hosts on these platforms may vary by jurisdiction. *See generally, e.g.*, Rowland v. Christian, 69 Cal. 2d 108 (1968) (abandoning the categories of trespassers, licensees, and invitees in favor of a reasonableness standard). PeerSpace's terms of service indicate that hosts and guests are expected to provide their own insurance. *Terms of Use*, PEERSPACE, <http://www.peerspace.com/terms/>.

163. *See infra* Part I.B.

jurisdictions. These platforms often provide form contracts to providers and users, and in some cases require the parties to sign a contract before processing a transaction.¹⁶⁴ However, contracting does not completely resolve the issue as jurisdictions vary widely in their enforcement of exculpatory clauses.¹⁶⁵

4. *Civil Rights Statutes*

Likewise, TNC platforms' process for matching riders and drivers may establish duties under civil rights statutes. When drivers have the TNC app on, they count as "available" to all users for the purpose of calculating wait-time and surge pricing rates—a dynamic pricing scheme that increases fares to encourage drivers to work during peak hours.¹⁶⁶ Once a user requests a ride, however, TNC drivers may decline to accept the match; in making this decision, the driver typically has access to the user's profile, including her name and potentially her photograph.¹⁶⁷ Given this mechanism, it is unclear whether the "public" nature of TNCs subjects them to obligations under civil rights statutes, including the ADA.¹⁶⁸ Recent lawsuits have raised the issue of Uber's obligations under the ADA. For example, the National Federation of the Blind alleges that drivers discriminate against blind riders by refusing service to riders with service animals or mishandling those animals.¹⁶⁹ Two other class action

164. Spinlister requires that renters and listers sign a form contract. *Ride Rental Agreement*, SPINLISTER, available at <https://www.spinlister.com/safety/>.

165. See C. Connor Crook, *Validity and Enforceability of Liability Waiver on Ski Lift Tickets*, 28 CAMPBELL L. REV. 107, 120–21 (2005) ("Courts are generally reluctant to enforce exculpatory clauses, especially those that include the negligence of the party attempting to enforce the clause. However, . . . courts can take very nuanced approaches . . ."). Spinlister includes a sweeping exculpatory clause in its rental agreement. *Ride Rental Agreement*, *supra* note 164, at § 3.2 (including both "as is" clause and an assumption of risk clause—"EVEN IF SUCH LOSS OR DAMAGE IS DUE TO ANY NEGLIGENCE OF LISTER, SPINLISTER, [or] THEIR AGENTS").

166. *What Is Surge Pricing and How Does It Work?*, UBER, <https://support.uber.com/hc/en-us/articles/201836656-What-is-surge-pricing-and-how-does-it-work-/>.

167. Lyft allows drivers to see a photograph of potential riders before accepting a request, while Uber by design does not. Jenna Wortham, *Ubering While Black*, MATTER (Oct. 23, 2014), <https://medium.com/matter/uber-ing-while-black-146db581b9db/> (discussing the concern that TNC drivers racially discriminate against riders based on profile pictures).

168. 42 U.S.C. §§ 12131–65 (2012); AM. ASS'N OF PEOPLE WITH DISABILITIES, EQUITY IN TRANSPORTATION FOR PEOPLE WITH DISABILITIES (2012), available at <http://www.aapd.com/resources/publications/transportation-disabilities.pdf>.

169. Complaint, Nat'l Fed. Blind Cal. v. Uber Techs., Inc., No. 3:14-cv-04086 (N.D. Cal. Sept. 9, 2014), available at http://dralegal.org/sites/dralegal.org/files/content/0001_complaint_accessible.pdf.

suits have claimed that Uber discriminates against disabled riders by failing to provide sufficient numbers of accessible vehicles.¹⁷⁰ Uber has responded by issuing statements confirming its policy of deactivating drivers who discriminate, but denying any legal duty to do so under the ADA.¹⁷¹ Some public utilities commissions have expressly imposed a duty not to discriminate on TNCs, but these mandates do not specify exact benchmarks for compliance.¹⁷² Many states have not yet clarified a TNC's duty to monitor driver behavior, nor do they impose guidelines for what percentage of a TNC's drivers must provide wheelchair accessible vehicles.¹⁷³

5. *Public Performance and Social Host Liability for Short-Term Rentals*

The distinction between public and private activity plays a significant role in many other areas of the law. For example, providing video rental services in a hotel room qualifies as a "public performance" under copyright infringement law.¹⁷⁴ If a short-term rental host charges guests an extra fee for the use of her home theater and DVD collection, does this also count as a public performance? In some cases, the private nature of the short-term rental might also burden the host with liability. Should a host be liable under a social host ordinance if an underage guest drinks a bottle of wine from her cabinet without permission?¹⁷⁵ In this case and

170. *McPhail v. Lyft, Inc.*, No. A-14-CA-829-LY, 2014 WL 6680393 (W.D. Tex. No. 25, 2014); *Salovitz v. Uber Techs., Inc.*, No. A-14-CV-823-LY, 2014 WL 5318031 (W.D. Tex. Oct. 16, 2014).

171. Bob Egelko, *Blind Riders Sue Uber, Allege Discrimination*, SFGATE (Sept. 11, 2014, 8:12 AM), <http://www.sfgate.com/bayarea/article/Uber-accused-in-suit-of-refusing-customers-with-5746412.php>.

172. The Colorado statute prohibits discrimination against protected categories such as disability. It provides that if a driver is unable to transport a disabled passenger, "the driver shall refer the rider to another driver or transportation service provider" with an accessible vehicle. It does not, however, require TNCs to supply any number of wheelchair-accessible vehicles. Nor are TNCs liable for driver discrimination unless the TNC has received a complaint in writing and "failed to reasonably address the alleged violation." COLO. REV. STAT. § 40-10.1-605 (2014).

173. *See* Cal. P.U.C. Decision, *supra* note 18, at 72–75.

174. *See On Command Video Corp. v. Columbia Pictures Indus.*, 777 F. Supp. 787 (N.D. Cal. 1991) ("Hotel guests watching a video movie in their room through On Command's system are not watching it in a 'public place' but they are nonetheless members of 'the public.'").

175. *See* SOCIAL HOST ORDINANCES IN WISCONSIN, WISCONSIN ALCOHOL POLICY PROJECT 1 (2012) ("Effective social host ordinances cover a wide range of locations and situations, noting the adult 'hosts' must take reasonable steps to prevent

many others, operating in a gray area not only creates confusion for regulators, but exposes providers on sharing platforms to liability on multiple fronts.

6. *Sales of Temporary Licenses*

While many sharing companies like TNCs simply provide an old service through a new channel,¹⁷⁶ some sharing companies challenge the definitions of “goods” and “services.” In particular, some sharing companies create new marketplaces for temporary licenses; these platforms act as auction houses for a temporary right to occupy a position. The two primary examples are auction platforms for public parking spaces and for seating in coffee houses or restaurants.¹⁷⁷ Neither sellers nor purchasers “own” or “provide” the temporary license; the municipal government is responsible for maintaining public parking and restaurants are responsible for providing seating to customers. Many have criticized these platforms as parasitic, and claim that these services interfere with third-party rights. Bloggers have even coined the term “jerk tech” to describe these platforms.¹⁷⁸ Others contend that auction houses optimize efficient use of scarce resources and prevent congestion; users who value a parking spot most can pay for that privilege, and price-sensitive users will accept less conveniently located spots.¹⁷⁹ Because markets for temporary licenses can

underage drinking. Adults who allow or facilitate an underage drinking party may be ticketed even when they are not present during the party.”).

176. In some cases, sharing companies offer a package of products and services. For example, dining-experience sites like Feastly allow users to contract with chefs for single meals at the user or chef's home. The chef provides a meal (a product) but the user also pays for the overall experience (a service). Yet the same reasoning applies to restaurants, and the line between products and services has always been blurry in some sectors.

177. SWEETCH, <http://www.getsweetch.com/> (an auction house for parking spots); RESERVATION HOP, <https://reservationhop.com/> (an auction house for restaurant reservations); BETRSPOT, <http://www.betrspot.com/about> (auction house for spots in line or seating: “We all jockey for space with others. BetrSpot is now THE ADVANTAGE you have to get that spot someone may be leaving before others do.”).

178. E.g., Josh Constantine, *Stop the JerkTech*, TECHCRUNCH (July 3, 2014), <http://techcrunch.com/2014/07/03/go-disrupt-yourself/>; Tekla Perry, *Drawing the Line Between “Peer-to-Peer” and “Jerk” Technology*, IEEE SPECTRUM (July 18, 2014, 1:59 PM), <http://spectrum.ieee.org/view-from-the-valley/at-work/start-ups/drawing-the-line-between-peertopeer-and-jerk-technology/>.

179. See Brian Ng, *The Race to Reinvent Parking: Are Monkey Parking, Sweetch and ParkModo Unethical, Illegal, or the Next AirBnB?*, STRIKINGLY, http://blog.strikingly.com/strikingly_stories/reinvent-parking-monkey-parking-sweetch-parkmodo/ (last visited Oct. 27, 2014) (discussing an interview with Paolo Dobrowolny, cofounder of Monkey Parking, on the parking auction business model).

implicate public goods and disrupt legitimate business operations, these platforms also pose unique regulatory challenges.¹⁸⁰

Current regulatory efforts have not yet addressed many of the legal issues raised by sharing platforms. As the sharing economy continues to grow, regulators will need to confront these gray areas. A particular area of concern is platform and provider liability for user and third-party injuries resulting from transactions on the platform.

C. INTERMEDIARY LIABILITY: TWO-PARTY RULES NO LONGER FIT THREE-PARTY RELATIONSHIPS

For the most part, transactions on sharing platforms do not introduce new risks but new parties. The same accidents can occur in hotels as apartments, taxis as TNC cars, and ski rental shops as P2P ski rental services. For that reason, regulators have argued that providers on sharing platforms should meet the same requirements as traditional service providers. But the balance of power has shifted between the parties on either side of those accidents. Providers do not have the same “special relationship” to users that traditionally justified a higher regulatory burden on service providers. Nor can regulators hold platforms indirectly liable for all accidents resulting from transactions on the platform. To provide clear guidance to courts and enforcement agencies, regulators must decide how to divide liability between providers and platforms.

1. *Provider Liability*

The sharing economy disrupts many of the assumptions that traditionally justified heightened duties for providers: the particular vulnerability of consumers, the superior bargaining position of providers in relation to consumers, and the treatment of providers as least-cost avoiders. Providers on sharing platforms are typically casual or informal market participants. They operate on a smaller scale than traditional service providers (a single bedroom rather than a hotel), use personal resources (a personal vehicle or home) rather than commercial assets (a licensed taxi or commercial building), and are likely less sophisticated than

180. San Francisco Dennis Herrera issued a cease-and-desist order to Monkey Parking in June 2014. Monkey Parking initially ignored the order, but later “temporarily disabled” the app within San Francisco. Laura Entis, *Monkey Business: Tells Parking Spot App to Shut Down*, ENTREPRENEUR (July 11, 2014), <http://www.entrepreneur.com/article/235575/>. It has since expanded its operations to Santa Monica, California. Gene Maddaus, *Kicked Out of San Francisco, MonkeyParking App Plans a Fresh Start in Santa Monica*, L.A. WEEKLY (Sept. 18, 2014), <http://www.entrepreneur.com/article/235575/>.

experienced professionals working for a traditional service provider (a casual cyclist renting her own bicycle versus a professional mechanic or salesman at a bicycle rental business). Thus, providers may be unable to shoulder the same regulatory burdens that apply to traditional service providers.

Although sharing services pose the same health and safety risks for users as traditional service providers, these transactions put providers at risk as well. In many cases, providers are just as vulnerable as users. For example, TNC riders have reported incidents of assault and battery,¹⁸¹ sexual assault,¹⁸² and reckless driving while using the platform.¹⁸³ Yet TNC drivers face many of the same risks as riders,¹⁸⁴ and generally receive minimal if any training on how to handle difficult or dangerous riders.¹⁸⁵ Likewise, short-term rental hosts may encounter serious risks of personal injury or property damage by inviting strangers into their homes.

Moreover, sharing platforms standardize transactions such that providers no longer clearly occupy a superior bargaining position. In many

181. Ellen Huet, *Uber Rider Might Lose An Eye From Driver's Hammer Attack. Could Uber Be Held Liable?*, FORBES (Sept. 30, 2014), <http://www.forbes.com/sites/ellenhuet/2014/09/30/uber-driver-hammer-attack-liability/>.

182. Hal Eisner, *Rideshare Driver Accused of Kidnapping, Sexually Assaulting Passenger*, MY FOX LA, (June 3, 2014), <http://www.myfoxla.com/story/25684061/rideshare-driver-in-custody-accused-of-kidnapping-woman/>.

183. Ben Popken, *States Warn of Rideshare Risks for Passengers*, NBC NEWS (May 28, 2014), <http://www.nbcnews.com/business/consumer/states-warn-rideshare-risks-passengers-n116736/>.

184. OSHA reports that taxi and for-hire drivers are “over 20 times more likely to be murdered on the job than other workers.” PREVENTING VIOLENCE AGAINST TAXI AND FOR-HIRE DRIVERS, OSHA (2010), *available at* <https://www.osha.gov/Publications/taxi-driver-violence-factsheet.pdf>. TNCs eliminate many of the conditions that make taxis high risk, such as transacting electronically rather than in cash and requiring passengers to register for accounts with a valid credit card. But like taxis, TNCs often serve inebriated passengers, and unlike taxis, TNCs drive personal vehicles that do not have physical controls like barriers between the driver and passenger, or silent alarms. LISA RAYLE, ET AL., APP-BASED, ON-DEMAND RIDE SERVICES: COMPARING TAXI AND RIDESOURCING TRIPS AND USER CHARACTERISTICS IN SAN FRANCISCO, UNIV. CAL. TRANSP. CTR., UNIV. CAL. BERKELEY (2014) (finding in a survey that nineteen percent of users listed “[d]idn’t want to drive after drinking” as one of the top two reasons to request a ride). Moreover, while TNCs claim to conduct background checks on drivers, no such checks are in place for riders. *See, e.g.*, LYFT, <https://www.lyft.com/> (last visited Feb. 26, 2015) (“With just one tap, get matched with a friendly, background-checked driver.”).

185. Emily Huet, *Uber Skimps On Driver Training, Then Charges Drivers \$65 For Basic Driver Skills Course*, FORBES (Oct. 8, 2014), <http://www.forbes.com/sites/ellenhuet/2014/10/08/uber-skimps-on-driver-training-then-charges-drivers-65-for-basic-driver-skills-course/>.

cases, the terms of the platform govern all aspects of the transaction, leaving both providers and users only the freedom to accept or reject a potential match.¹⁸⁶ In other cases, the platform provides a default contract or baseline set of terms, but allows users and providers to negotiate privately.¹⁸⁷ It is unclear how often providers actually negotiate with users. Even where these negotiations result in material changes to the contract, both parties occupy relatively even footing. Users can propose and modify terms by bargaining with providers, and can easily comparison-shop.¹⁸⁸ While providers may occupy a superior position in certain markets with limited supply and high user demand, this does not guarantee that providers will have the upper hand across the platform.¹⁸⁹

Finally, on sharing platforms, providers do not necessarily represent the least-cost avoider. Most providers do not transact at sufficient volumes to absorb the cost of accidents.¹⁹⁰ Personal insurance policies may not cover property damage during commercial transactions, and providers may be unable to purchase or afford commercial insurance.¹⁹¹ Since providers

186. Sharing services that operate on this model include TNCs, per-task contractor services, and to some degree, peer-to-peer lending services.

187. Examples include short-term rental platforms, equipment-rental platforms, and auction houses for goods or licenses.

188. Jasper Ribbers, *Three Tips For Airbnb Hosts Negotiating With Guests*, THE TRAVELING DUTCHMAN (July 29, 2014), <http://www.thetravelingdutchman.com/three-tips-airbnb-hosts-negotiating-guests/> (last visited Feb. 26, 2015).

189. Studies of Airbnb use patterns in San Francisco show that hosts may earn more in tourist hotspots. On the other hand, potential suppliers may quickly enter the market in response to high prices from excess demand, and the most expensive listings may simply be higher value properties (luxury apartments) rather than run-of-the-mill spare rooms. See Carolyn Said, *Window into Airbnb's hidden impact on S.F.*, SAN FRANCISCO CHRONICLE, <http://www.sfchronicle.com/business/item/window-into-airbnb-s-hidden-impact-on-s-f-30110.php> (last visited Oct. 27, 2014).

190. Most short-term rental platforms advise both users and guests to purchase travel or vacation rental insurance, and only offer limited coverage for property damage—not personal liability—through the platform. E.g., *How do I protect my property from potential damage?*, VRBO, http://help.vrbo.com/articles/en_US/Article/How-do-I-protect-my-property-from-potential-damage?. San Francisco recently passed legislation requiring platforms to indemnify guests and hosts for up to \$500,000. DAVID CHIU, SHORT-TERM RENTAL REGULATION SUMMARY (2014), available at <http://www.sfbos.org/Modules/ShowDocument.aspx?documentid=50472>. Purchasing appropriate vacation rental insurance, however, may be challenging for hosts who only list single bedrooms. See *Insurance on a rental vacation rental*, COMMUNITY FROM HOMEAWAY, <https://community.homeaway.com/thread/1488> (last visited Oct. 27, 2014).

191. See Lieber, *supra* note 56. Peers, an advocacy group for sharing economy platforms, has introduced a new insurance product to help address the needs of users and providers. See also Ellen Huet, *Peers Launches Home Liability And Car-Replacement Insurance For Airbnb, Uber, Lyft Workers*, FORBES (Dec. 4, 2014),

generally list their personal assets on sharing platforms, the financial toll of unreimbursed property damage may place providers in a highly vulnerable position. With respect to accidents involving users, this may not only prevent providers from guarding against crushing liability, but also leave injured users without adequate remedies.

Nor can providers afford or even feasibly adopt the security measures available to small businesses. For example, TNC drivers cannot reasonably install security barriers in their personal vehicles. Short-term rental hosts may not have control over common areas within apartment complexes.¹⁹² In certain cases where providers may face personal security risks as a result of user behavior, users may be the least-cost avoider. Per-task contractor services like TaskRabbit are a perfect example. The provider generally travels to the user's home or workplace and performs services at the user's direction. The user likely has superior knowledge of concealed dangers on the premises as well as any equipment or goods at issue. Thus, if a user hires a per-task contractor to mow her lawn, the user is in the best position to warn the contractor of pitfalls hidden in her yard.¹⁹³

Given the relative vulnerability of casual providers, it is inappropriate to impose the same duties for providers on sharing platforms as traditional service providers. Regulators may therefore be tempted to establish indirect liability for platforms for accidents related to transactions on the platform.

<http://www.forbes.com/sites/ellenhuett/2014/12/04/peers-home-liability-car-replacement-insurance/>.

192. By contrast, courts have imposed duties of care on both landlords and hotels for tenant or guest safety in common areas. The applicable standard of care often requires that the owner of the premises have notice of relevant risk, and the capacity to adopt protective measures. *See* *Kline v. 1500 Mass. Ave. Apartment Corp.*, 439 F.2d 477 (D.C. Cir. 1970).

193. Homeowner's insurance would cover this accident regardless of whether the contractor had any affiliation with a per-task contractor service. *Filipowicz v. Diletto*, 796 A.2d 296 (N.J. Super. Ct. App. Div. 2002) (finding that a garage sale shopper was an invitee on the homeowner's premises, therefore the homeowner owed a duty of care with respect to maintenance of his yard); *Who cares if the guy mowing my lawn isn't insured, injuries are his problem, not mine. Right?*, SAFETY INSURANCE GROUP INC., https://www.safetyinsurance.com/resource_center/homeowners/lawnmowing.html (last visited Oct. 27, 2014). However, contractors on TaskRabbit accept a variety of tasks, including deliveries and event staffing services; thus, while the user's duty of care may be clear cut in some circumstances, this may not always be the case. Nor does TaskRabbit require that users carry homeowner's insurance.

2. *Platform Liability*

In many cases, the sharing platform represents either the least-cost avoider or the easiest target for enforcement agencies. But sharing platforms act—or purport to act—as neutral intermediaries that facilitate transactions between users and providers.¹⁹⁴ Therefore, regulators can only hold platforms accountable for user and provider activity through indirect liability.¹⁹⁵ This Section describes three models of intermediary liability for online service providers, and how these models might apply to sharing platforms.

Whether platforms are truly neutral intermediaries is not always clear. In some cases, platforms have no formal contractual relationship with providers. For example, P2P rental services and short-term rental platforms do not have an employment relationship with providers. In other cases, platforms hire providers as independent contractors, and therefore are not liable for a contractor's torts.¹⁹⁶ For example, in January 2014 an Uber driver struck and killed a four-year old girl, Sofia Liu. The driver did not have a passenger or a passenger request at the time of the accident, but did have the Uber app on and was distracted by the GPS on his phone. Liu's family later filed suit against Uber for wrongful death. Uber replied that it does not provide a transportation service, and instead "allows riders to connect with, and request transportation services from, a range of independent transportation providers."¹⁹⁷ Therefore Uber contended that it should not be liable for the driver's negligence.

194. Anthony Ha, *SideCar's Sunil Paul On Working With (And Battling) Regulators*, TECHCRUNCH (May 12, 2013), <http://techcrunch.com/2013/05/12/sidecar-sunil-paul-backstage/> (citing an interview where Sunil Paul, Sidecar cofounder, described the company as an "information provider and matching service"); Sarah Buhr, *Brian Chesky Talks About Just How Different The Hotel Business Is From Airbnb*, TECHCRUNCH (Sept. 9, 2014), <http://techcrunch.com/2014/09/09/brian-chesky-hotels-and-airbnb-are-the-same-but-different/> (quoting Brian Chesky, cofounder of Airbnb, claiming that the service is not a hotel: "We had to ask ourselves a couple of years ago we're not in the business of homes, we're not in the business of space, we're in the business of trips").

195. This is true regardless of whether sharing companies properly classify providers as independent contractors or employees. Cf. Doug Lichtman & Eric Posner, *Holding Internet Service Providers Accountable*, 14 SUP. CT. ECON. REV. 221 (2006) (proposing indirect liability for internet service providers by drawing a comparison to "the common law principle of vicarious liability [that] obligates employers to monitor, train, and otherwise exercise control over the behavior of their employees").

196. DAN B. DOBBS ET AL, THE LAW OF TORTS (2d ed. 2011) §§ 431–32.

197. Answer and Affirmative Defenses at 6, *Liu v. Uber Techs., Inc.*, No. CGC-14-536979 (Cal. Super. Ct. Jan. 27, 2014).

Commentators have questioned whether sharing platforms misclassify employees as independent contractors,¹⁹⁸ and several suits have challenged TNCs on this basis.¹⁹⁹ However, determining whether an employer has misclassified an employee is a fact-dependent analysis.²⁰⁰ Taxi drivers, for instance, are typically considered independent contractors, but in some cases courts have found that taxi drivers qualify as employees.²⁰¹ In addition, different states apply different legal standards. Providers on some sharing platforms may qualify as independent contractors while others do not, and some jurisdictions may reach conflicting decisions.

Assuming that platforms do act as online intermediaries, regulators may still hold platforms liable through indirect liability. Scholars disagree on whether internet intermediary liability is desirable, and if so, under what circumstances.²⁰² This Section describes three models for intermediary liability that apply to other online services: (1) the absolute immunity of the Communications Decency Act (“CDA”), (2) the qualified immunity or safe harbors of the Digital Millennium Copyright Right Act (“DMCA”), and (3) an active duty to monitor, comparable to the voluntary enforcement practices of payment intermediaries.

198. *E.g.*, Kevin Roose, *Does Silicon Valley Have a Contract-Worker Problem?*, N.Y. MAG. (Sept. 18, 2014, 8:42 AM), <http://nymag.com/daily/intelligencer/2014/09/silicon-valleys-contract-worker-problem.html>.

199. *Cotter v. Lyft, Inc.*, No. 13-cv-04065-VC, 2014 WL 3884416 (N.D. Cal. Aug. 7, 2014).

200. DAN B. DOBBS, ET AL, *THE LAW OF TORTS* (2d ed. 2011) §§ 431–32.

201. NAT’L EMP. LAW PROJECT, *UNREGULATED WORK IN THE TAXI INDUSTRY IN NEW YORK CITY* (2007), *available at* http://www.nelp.org/page/-/EJP/Unregulated_Work_Taxi.pdf; EMP’T DEV. DEP’T OF CAL., *INFORMATION SHEET: TAXICAB INDUSTRY* (2009), *available at* http://www.edd.ca.gov/pdf_pub_ctr/de231tc.pdf; *Industry Specific Help for Worker Classification*, Oregon.gov, <http://www.oregon.gov/IC/pages/07-industries.aspx#taxicab> (noting that some dispatch services hire drivers as independent contractors, and these services must meet state criteria including “(1) that [drivers] be free from the right of another to control how services are performed and, (2) that the worker operates an independently established business”).

202. Lichtman and Posner have argued that the desirability of indirect intermediary liability for ISPs depends on two considerations: (1) control—whether the intermediary “is in a good position to detect or deter” user and provider misconduct, and (2) activity—whether “liability would serve to encourage [the intermediary] to internalize some significant externality unavoidably associated with its activities.” Lichtman & Posner, *supra* note 195, at 230. Likewise, Ronald Mann and Seth Belzley have criticized ISP immunity, calling for indirect intermediary liability in cases where ISPs are least-cost avoiders. Ronald J. Mann & Seth R. Belzley, *The Promise of Internet Intermediary Liability*, 47 WM. & MARY L. REV. 239 (2005). Mark MacCarthy argues that intermediary liability should depend not only on a cost-benefit analysis, but also equitable considerations. *What Payment Intermediaries Are Doing About Online Liability And Why It Matters*, 25 BERKELEY TECH. L.J. 1037 (2010).

At one end of the spectrum, the CDA provides absolute immunity to “interactive computer service provider[s],” meaning “any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server.” More specifically, § 230 provides that “[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.”²⁰³ Courts have broadly applied § 230 to absolve internet intermediaries from liability for user-generated content, even if the intermediary is aware that the content is illegal and declines to remove it.²⁰⁴ Thus, recent decisions have held that dating services are not responsible for user-created fraudulent dating profiles,²⁰⁵ eBay is not responsible for defects in products sold by users,²⁰⁶ and StubHub is not responsible for user violations of anti-scalping laws.²⁰⁷ Intermediaries may, nevertheless, incur liability for directing or shaping user generated content “in some way [that] specifically encourages the development of *what is offensive about the content*.”²⁰⁸

However, § 230 contains a significant exception for intellectual property claims.²⁰⁹ To fill this gap, the DMCA provides limited safe harbors to internet service providers (“ISPs”) for transmitting, caching, storing, or indexing copyright infringing content at the direction of users.²¹⁰ The conditions of these safe harbors vary. With respect to “[i]nformation residing on systems or networks at [the] direction of users,” ISPs can only benefit from the DMCA safe harbors by implementing a “notice and take-down” system (a system for removing infringing content upon the copyright owner’s request) and a system to identify and terminate the accounts of “repeat infringers.”²¹¹ Beyond these requirements, DMCA § 512(c) has two exceptions that prevent ISPs from taking advantage of this safe harbor: an ISP can be liable for vicarious

203. 47 U.S.C. § 230(c)(1) (2012).

204. Catherine R. Gellis, *2012 State of the Law Regarding Internet Intermediary Liability for User-Generated Content*, 68 BUS. LAW. 289, 289–90 (2012); Mark A. Lemley, *Rationalizing Internet Safe Harbors*, 3 (2007) (unpublished draft).

205. *Christianne Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119 (9th Cir. 2003).

206. *Inman v. Technicolor USA, Inc.*, No. 11-666, 2011 WL 5829024 (W.D. Pa. Nov. 18, 2011).

207. *Hill v. StubHub, Inc.*, No. COA11-685, 2012 WL 696223, at *13 (N.C. Ct. App. Mar. 6, 2012).

208. *Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC*, 666 F.3d 1216 (9th Cir. 2012).

209. 47 U.S.C. § 230(e)(2); Lemley, *supra* note 204, at 4.

210. 17 U.S.C. § 512; Lemley, *supra* note 204, at 4.

211. 17 U.S.C. § 512(c)–(d); Gellis, *supra* note 204, at 293–94.

infringement where the ISP receives a “direct financial benefit attributable to the infringing activity” or where the ISP is aware—or should be aware—of the infringing activity.²¹²

At the other end of the spectrum, legislators could impose an active duty to monitor.²¹³ Though this approach is rare, Congress has proposed legislation that would codify affirmative duties for payment intermediaries to screen out merchants trafficking in child pornography or controlled substances, selling tobacco to minors, and violating online gambling prohibitions.²¹⁴ Payment intermediaries like Visa and MasterCard currently collaborate with law enforcement agencies voluntarily through a “two-part program,” by instituting “due diligence requirements” to keep offending merchants out of the payment system and a “monitoring program to detect and expel” offending merchants.²¹⁵

Regulators could adapt one of these models to establish liability for sharing platforms. For example, regulators could grant platforms immunity for harms that arise from transactions between users and providers. On the other hand, regulators might also create a notice-based system where platforms only become liable for the actions of providers when the platform has previously received notice of the provider’s poor conduct. For instance, a platform might not be liable where a driver assaults a passenger. However, if users have previously submitted complaints about a particular driver’s behavior to the platform, then the platform might become liable for future injuries caused by that driver. Alternatively, regulators could require platforms to take affirmative steps to protect users from dangerous drivers.

It is unclear which of these three approaches to intermediary liability would appropriately allocate liability between sharing companies, users,

212. 17 U.S.C. § 512(c)–(d); Gellis, *supra* note 204, at 293–94.

213. In 2011, Congress nearly passed legislation that would have largely displaced the DMCA, adding private causes of action to enjoin illegal streaming services, and increasing penalties for infringing streaming services. By proxy, this legislation would have imposed an active duty to monitor on ISPs. Stop Online Piracy Act, H.R. 3261, 112th Cong. (2011); Preventing Real Online Threats to Economic Creativity and Theft of Intellectual Property Act of 2011, S. 968, 112th Cong. (2011); *see also* Chris Civil, *When The Net Went Dark: SOPA, PROTECT IP and the Birth of an Internet Movement*, BERKELEY TECH. L.J.: THE BOLT (Feb. 14, 2012), <http://btlj.org/2012/02/14/when-the-net-went-dark-sopa-protect-ip-and-the-birth-of-an-interent-movement/>.

214. MacCarthy, *supra* note 202, at 1059–98.

215. *Id.* at 1075–76, 1079–80, 1090–95. Courts have also declined to impose affirmative duties on payment intermediaries to monitor transactions where websites may contain copyright infringing content. *E.g.*, *Perfect 10, Inc. v. Visa Intern. Serv. Ass’n*, 494 F.3d 788, 807 (2007).

and providers. Unlike internet service providers, sharing companies are not passive; most platforms exercise at least some control over provider and user transactions, and almost all platforms have a financial stake in transactions between users and providers.²¹⁶ This suggests that immunity for platforms is not appropriate. In addition, a notice-based system of liability comparable to the DMCA § 512(c) safe harbor may not sufficiently safeguard users. Yet imposing an affirmative duty to monitor user and provider compliance with local regulations is extremely costly. Even the comparatively easier task of screening offending merchants from payment systems has proven controversial.²¹⁷

Regulators in various jurisdictions have begun to experiment with solutions to these problems. The following discussion highlights and critiques some of these rules, and proposes general principles for future legislation.

IV. PROPOSED SOLUTIONS

As previously discussed, sharing platforms are markets for P2P services. These markets allow informal participants to operate at a small scale by minimizing transaction costs. Sharing services are often closely analogous to traditional service providers.²¹⁸ For the most part, this means that regulators must address old risks that arise from transactions between new parties.²¹⁹ P2P service markets also create some unique risks for users and providers, however. This Part addresses regulatory solutions to old and new risks in turn.

A. OLD RISKS, NEW PARTIES: REGULATORS SHOULD CONSIDER TIERED REGULATIONS, LIMITED INTERMEDIARY LIABILITY, AND DUTIES TO THIRD PARTIES

The proper allocation of liability between users and providers on sharing platforms is highly contextual because both the least-cost avoider and the easiest target for enforcement agencies vary between and within

216. Sharing platforms impose a wide range of transaction fees. *See supra* note 27. Interchange fees might serve as an indirect measure of the degree of control a platform exercises over transactions.

217. *See* MacCarthy, *supra* note 202, at 1083–87 (arguing that imposing statutory duties to monitor for child pornography, controlled substances, and gambling is unnecessary, and even voluntary monitoring programs may not be cost effective); Mann & Belzley, *supra* note 202, at 260 n.59 (claiming that voluntary agreements between intermediaries and enforcers develop in the shadow of the law).

218. *Supra* Sections I.B–II.A.

219. *Supra* Section III.C.

sharing service models. Since sharing platforms often operate on a large scale over multiple jurisdictions, the least-cost avoider for compliance may often be users and providers, who are most familiar with local rules and their own property. Moreover, casual and high volume providers may require different treatment. Yet in other situations platforms may be best positioned to address user or provider misconduct. Regulators will likely need to address sharing platform liability not just on a case-by-case basis, but also on an issue-by-issue basis. This Note therefore proposes that regulators (1) adopt tiered regulatory schemes for providers, (2) design nuanced frameworks for intermediary liability, and (3) impose duties on platforms and providers to third parties.

1. Tiered Regulation for Providers

Because previous justifications for provider liability often do not apply in the sharing context, regulators should consider relaxed regulatory requirements for casual providers.²²⁰ However, many providers operate at sufficiently high volumes to merit stricter standards. The Chicago ordinance governing TNCs provides a working example of tiered regulation. The city offers Class A licenses to drivers whose average service operation is twenty hours or less per week, and Class B licenses to drivers who work in excess of twenty hours per week. Class A licenses cost less and require less stringent yearly inspections.²²¹

Attempting to block high volume users may needlessly inhibit beneficial activity on the platform. For example, the San Francisco short-term rental ordinance requires that hosts occupy the residence “for no less than 275 days out of the calendar year in which [it] is rented.”²²² The legislature intended this provision to prevent the “widespread conversion of residential housing to short-term rentals” and ensure that listed properties “remain truly residential in use.”²²³ However, this provision may bar desirable uses of residential properties. Potential hosts who might not meet the 275-day requirement include professors on sabbatical,

220. The Portland ordinance on short-term rentals, for example, differentiates between Type A rentals, “where no more than [two] bedrooms are rented,” and Type B rentals, “where [three] or more bedrooms are rented.” PORTLAND, OR., PLANNING AND ZONING § 33.207.020 (2015).

221. CHI., ILL., CODE § 9-115-030 (2014).

222. S.F., CAL., ADMIN. CODE § 41A.5(g)(1)(A) (2014). The Portland ordinance on short-term rentals imposes a similar requirement on Type A short-term rentals. PORTLAND, OR., PLANNING AND ZONING § 33.207.040(A)(1) (2015) (“a resident must occupy the dwelling unit for at least 270 days during each calendar year”).

223. S.F., CAL., ADMIN. CODE § 1(c)(1)-(2).

salespeople who regularly travel for business, and those who own a second home in the city. It also permits high volume uses of rooms that might otherwise serve as residential housing. An apartment tenant can rent a second bedroom year round, so long as she co-occupies the residence for at least 275 days. Rooms like this might otherwise serve as long-term housing.²²⁴

Rather than imposing caps on use, regulators should impose higher taxes and stricter regulations on high volume providers.²²⁵ Tiered regulation properly allocates risk to repeat players who benefit most from the platform. For instance, providers who transact at volumes comparable to bed and breakfasts should incur similar liability to a traditional service provider. And TNC drivers who operate like full-time taxis should comply with safety standards comparable to taxis. In addition, tiered regulation levels the playing field between sharing platforms and traditional service providers, and discourages abuse of the platform. In a tiered scheme, regulators can combat “hotelization” by raising the cost for high volume listings of short-term apartments to the point where long-term residential leases become more profitable.

2. *Limited Intermediary Liability for Platforms*

Given the public interest in consumer and worker welfare, absolute immunity for sharing platforms rarely makes sense. Notice-based systems may also fail to adequately protect consumers, because platforms only become liable after a user has interacted with a dangerous provider. Yet imposing affirmative duties on internet intermediaries is an equally extreme solution. Regulators should therefore consider addressing platform liability on an issue-by-issue basis.

Regulators should establish affirmative duties where platforms exercise sufficient control over the relevant aspect of the transaction, and that transaction poses a serious risk of injury for users or providers. For example, several ordinances on TNCs restrict the maximum number of hours that a driver can operate per day, but some TNC platforms do not directly restrict drivers’ hours.²²⁶ If a TNC driver leaves the app on twenty-

224. The same criticisms apply to the New York Multiple Dwelling Statute, which requires that the host co-occupy the residence for the duration of the rental. N.Y. Mult. Dwell. Law § 4(8)(a) (McKinney 2011).

225. *Contra* Badger, *supra* note 52.

226. *E.g.*, COLO. REV. STAT. § 40-10.1-605(1)(e) (2014). Messages on TNC driver forums suggest that it is not uncommon for drivers to work twelve-hour shifts or longer. *E.g.*, SoCal_Uber, *Your longest continuous hours of Uber driving?*, UBERPEOPLE.NET,

four hours a day and recklessly accepts fares without adequate rest, should the platform have a duty to terminate that driver? The platform exercises sufficient control such that it represents both the least-cost avoider and easiest enforcement target. Platforms can monitor the number of hours drivers keep their apps on, and they have the ability to terminate drivers for poor conduct. Moreover, enforcement officials would find it relatively difficult to uncover individual driver misconduct, but could easily determine platform negligence by obtaining the platform's records on driver app usage. Other potential affirmative duties include insurance mandates,²²⁷ background checks for providers,²²⁸ and routine inspections for vehicles or rental property.²²⁹ In addition, regulators could take a sliding scale approach: the greater the risks for users and providers, the less control required to establish an affirmative duty. Even where an affirmative duty to monitor is an appropriate solution, enforcement agencies may find it preferable to request that TNCs take voluntary measures to police provider activity, rather than adopting formal legislation.²³⁰

Where the platform does not exercise sufficient control over user or provider behavior, regulators should instead consider a notice-based system or a limited duty to warn. Under a notice-based system, platforms only become liable if they fail to take action after receiving a complaint from a user or provider. For example, some statutes have established notice-based liability provisions for TNC platforms where drivers discriminate against disabled riders²³¹ or violate a zero-tolerance policy for drugs or alcohol.²³² Beyond background checks for providers, the platform has few additional opportunities to monitor driver behavior. Notice-based systems therefore shield platforms from excessive liability without immunizing the platform. Drivers and platforms remain liable for injuries

<http://uberpeople.net/threads/your-longest-continuous-hours-of-uber-driving.180/> (last visited Feb. 26, 2015).

227. CAL. PUB. UTIL. CODE §§ 5431–37 (West 2015).

228. D.C. CODE § 20j-2 (2015).

229. COLO. REV. STAT. § 40-10.1-605(1)(g).

230. See MacCarthy, *supra* note 202, at 1083–87; Mann & Belzley, *supra* note 202, at 260 n.59.

231. The Colorado TNC law enacts a notice-based system for violations of the duty not to discriminate. COLO. REV. STAT. § 40-10.1-605(7)(a). The Cal. P.U.C. has also imposed a notice-based system for a zero-tolerance policy. CAL. P.U.C., BASIC INFORMATION FOR TRANSPORTATION NETWORK COMPANIES AND APPLICANTS (2013), available at http://www.cpuc.ca.gov/NR/rdonlyres/1788F1F1-EA38-4B68-B221-4116994F2252/0/TNC_App_Instrctns.pdf.

232. D.C. CODE § 20j-1(9) (2015).

that occur as a result of dangerous conduct. However, so long as a platform subsequently takes action to remedy the problem, the platform does not incur liability for violating civil rights statutes or fines related to its zero-tolerance policy. Other cases that merit a notice-based system include violations of local zoning laws and use of the platform for illegal purposes like prostitution or drug trafficking.²³³

In other situations, regulators might consider establishing a limited duty to warn. For example, the San Francisco ordinance on short-term rentals requires that platforms inform hosts of the local requirements for compliance with the housing and tax code.²³⁴ Airbnb has also voluntarily provided similar notice of the New York multiple-dwelling statute to potential hosts within the city.²³⁵ Regulators should consider imposing similar duties where providers represent the least-cost avoider, but platforms can easily convey the relevant information during the hiring or sign-up process.

3. Duties to Third Parties

Beyond risks for users and providers, sharing platforms may create negative externalities for third parties.²³⁶ Short-term rentals, for example, affect residents of multiple-dwelling buildings, neighborhoods, and communities as a whole.²³⁷ Regulators in some jurisdictions have created ordinances to address noise complaints and other nuisances, and some have established complaint hotlines for residents to report bad behavior.²³⁸ These enforcement efforts, however, may prove costly for local

233. E.g., Dana Sauchelli & Bruce Golding, *Hookers Turning Airbnb Apartments Into Brothels*, N.Y. POST (July 31, 2014), <http://nypost.com/2014/04/14/hookers-using-airbnb-to-use-apartments-for-sex-sessions/>; Michael Arrington, *Another Airbnb Victim Tells His Story: "There Were Meth Pipes Everywhere,"* TECHCRUNCH (July 31, 2011), <http://techcrunch.com/2011/07/31/another-airbnb-victim-tells-his-story-there-were-meth-pipes-everywhere/>.

234. S.F., CAL., ADMIN. CODE § 25(A) (2014).

235. Ron Lieber, *A \$2,400 Fine for an Airbnb Host*, N.Y. TIMES (May 21, 2013, 2:22 PM), <http://bucks.blogs.nytimes.com/2013/05/21/a-2400-fine-for-an-airbnb-host/>.

236. E.g., N.Y. Attorney General Report, *supra* note 40, at 38–39 (detailing complaints from neighbors of Airbnb hosts); *see also supra* text accompanying notes 196–197 (discussing TNC liability for driver accidents involving third parties).

237. Jessica Pressler, *"The Dumbest Person in Your Building Is Passing Out Keys to Your Front Door!"*, N.Y. MAG. (Sept. 23, 2014), <http://nymag.com/news/features/airbnb-in-new-york-debate-2014-9/>.

238. GRAND COUNTY, COLO., ZONING REGULATIONS, SECTION XIV SUPPLEMENTAL REGULATIONS § 14.8(2) (2014); *Vacation Rentals*, CITY OF PALM SPRINGS, <http://www.ci.palm-springs.ca.us/index.aspx?page=1098> (last visited Feb. 26, 2015).

administrative agencies. Regulators should shift this burden to platforms and providers—those who most directly benefit from sharing platform activity—by requiring (1) that platforms adopt third-party dispute resolution systems and (2) that providers notify third parties of their activities.

First, platforms should provide a complaint hotline and dispute resolution procedure for third parties who seek to remove listings from the platform or report poor conduct.²³⁹ For short-term rental platforms, affected third parties might include landlords who want to prevent tenants from posting listings in violation of a lease, or neighbors of hosts who seek a remedy against a guest for property damage.²⁴⁰ For TNC or P2P car rental platforms, third parties might report dangerous conduct by TNC drivers, or submit complaints about TNC driver congestion in high traffic areas like airports. These complaints could create a duty to take action under notice-based schemes for platform liability. In addition, platforms could provide limited remedies such as reimbursement for small damages claims, or in some cases removal of an offending listing or profile. Any dispute resolution forum should fairly account for the legitimate interests of users and providers as well as third parties. For instance, before removing a short-term rental listing, platforms might require that landlords demonstrate ownership of the relevant property and an enforceable provision in the lease prohibiting subletting.

In some cases, regulators might also consider requiring providers to give notice of their activities to third parties. Maui requires that short-term rental hosts provide notice to neighbors within 500 feet of the listed property.²⁴¹ Jurisdictions could also create a standardized notice form that requires hosts to provide a contact number for the host, platform, and local government complaint hotline.

239. Some platforms already run call centers for user and community complaints. Spencer Peterson, *Airbnb Creates a Call Center That's Not a Total Nightmare*, CURBED (Dec. 17, 2014), <http://curbed.com/archives/2014/12/17/airbnbs-portland-office-design.php>; *Contact Us!*, DOGVACAY, <http://dogvacay.com/contact/> (last visited Feb. 26, 2015). Others have complaint email services directed toward users and providers. ROOMORAMA, <https://www.roomorama.com/> (last visited Feb. 26, 2015); *Help Center*, LYFT, <https://www.lyft.com/help/contact/passenger> (last visited Feb. 26, 2015).

240. E.g., Joe Coscarelli, *Airbnb Poster-Child Was Evicted for Airbnb-ing a Converted Barn She Didn't Own*, N.Y. MAG. (Oct. 10, 2014), <http://nymag.com/daily/intelligencer/2014/10/airbnb-poster-child-shell-evicted-for-airbnb.html>.

241. MAUI, HI., COUNTY CODE § 19.65.050(B) (2014), available at <http://www.co.maui.hi.us/DocumentCenter/View/91217>.

Regulatory agencies should address negative externalities generated by the sharing economy.²⁴² Yet regulators should balance the costs of regulation against the benefits of innovation. The solutions detailed above—tiered regulation for providers, limited intermediary liability, and duties to third parties—can help regulators to allocate protections and burdens more flexibly.²⁴³

B. NEW PARTIES, NEW RISKS: REGULATORS MUST ADDRESS BIG DATA, REPUTATION SYSTEMS, AND COMPETITION

Although sharing platforms largely pose the same risks as equivalent traditional service providers, these platforms also create new consumer protection issues related to user privacy and reputation systems. Regulators should address both of these issues. In crafting new rules, regulators should also consider whether certain provisions overly restrict competition.

1. *Big Data: Regulators Should Anticipate Privacy Concerns*

TNCs and other sharing companies collect vast quantities of sensitive user data.²⁴⁴ Rider and driver accounts on TNCs, for instance, include personal information like credit card numbers, as well as logs of prior trips.²⁴⁵ Airbnb likewise maintains a “Verified ID” system, which requires

242. Adopting this role would address the concerns of many critics of the sharing economy. *See, e.g.,* Dean Baker, *Don't Buy the 'Sharing Economy' Hype: Airbnb and Uber Are Facilitating Rip-Offs*, GUARDIAN (May 27, 2014), <http://www.theguardian.com/commentisfree/2014/may/27/airbnb-uber-taxes-regulation> (arguing that the sharing economy imposes costs on society at large, and arguing in favor of regulation to create a “level playing field”).

243. For a thorough discussion arguing in favor of balanced regulation, see DEBBIE WOSSKOW, UNLOCKING THE SHARING ECONOMY: AN INDEPENDENT REVIEW (2014). Woskow's report, prepared for the United Kingdom Minister of State for Business, Enterprise and Energy, provides detailed suggestions for reforms that would allow communities and government agencies to take advantage of the sharing economy.

244. Granting access to this data in response to a search warrant could have serious implications for criminal investigations. *See* Andrea Lance, *Comment, Back to the Future of Your Privacy Rights*, 95 MASS. L. REV. 214 (2013) (discussing the Court's decision in *United State v. Jones*, 132 S. Ct. 945 (2012), regarding the installation of a GPS tracking device on a suspect's vehicle). The significance of this issue applies not only to average criminal investigations, but potentially civil discovery orders. In some cases the public interest in allowing disclosure of rider logs may outweigh the rider's privacy interest. For example, consulting firm Hamilton Places Strategies calculated based on congressional campaign filings that Members of Congress relied on Uber for sixty one percent of rides during the 2014 election cycle. Tom Kise, *Uber: Congress' New Private Driver*, HPS (Nov. 11, 2014), <http://www.hamiltonplacestrategies.com/news/uber-congress-new-private-driver/>.

245. Uber has faced intense criticism for its internal use of rider log data. *See, e.g.,* Johana Bhuiyan & Charlie Warzel, “God View”: Uber Investigates Its Top New York

that users provide a copy of a “government-issued ID, such as [a] driver’s license or passport.”²⁴⁶ And the potential for misuse extends beyond disclosure of individual account activity logs. Mining aggregated data can reveal information far more sensitive than that in any single account.²⁴⁷

In many ways, the accumulation of data through sharing platforms parallels the same concerns and disputes faced by any online service provider. One might argue that short-term rental logs are comparable to online databases for hotel guest records, that per-task contractor services grant only as much access to homes as traditional cleaning or repair services, and that TNC rider logs are comparable to GPS logs from personal vehicles.²⁴⁸ Enforcement agencies could therefore address these issues through existing privacy and data security laws.

However, sharing platforms create unique issues regarding platform disclosure of user information to providers and vice versa. For example, TNCs create dummy numbers to allow drivers and riders to communicate before and after a ride. Drivers can only continue to reach the rider through the dummy number for up to half an hour following the ride, but riders can continue to reach the driver indefinitely. In some cases, the dummy number exposes the driver to harassment from disgruntled or

Executive For Privacy Violations, BUZZFEED (Nov. 18, 2014, 8:27 PM), <http://www.buzzfeed.com/johanabhuiyan/uber-is-investigating-its-top-new-york-executive-for-privacy/>; Craig Timberg et al., *Uber executive stirs up privacy controversy*, WASH. POST (Nov. 18, 2014), http://www.washingtonpost.com/business/technology/uber-executive-stirs-up-privacy-controversy/2014/11/18/d0607836-6f61-11e4-ad12-3734c461eab6_story.html (quoting Prof. Chris Hoofnagle: “We have to think about how the service provider itself can be a threat”); Letter from Sen. Al Franken to Travis Kalanick (Nov. 19, 2014), *available at* <http://www.franken.senate.gov/files/letter/141119UberLetter.pdf>.

246. *What Is Verified ID?*, AIRBNB, <https://www.airbnb.com/help/article/450/> (last visited Nov. 22, 2014).

247. In a poignant example, Uber mined user data to discover the percentage of riders using the service for “one-night stands,” dubbing such trips “Ride[s] of Glory” and riders “RoGers.” *Uber Crunches User Data to Determine Where the Most ‘One-Night Stands’ Come From*, CBS SF BAY AREA (Nov. 18, 2014), <http://sanfrancisco.cbslocal.com/2014/11/18/uber-crunches-user-data-to-determine-where-the-most-one-night-stands-come-from/>. Uber originally published the results on the company blog, but has since removed the post. *Rides of Glory*, UBER, <http://blog.uber.com/ridesofglory>, *available at* <http://web.archive.org/web/20140828024924/http://blog.uber.com/ridesofglory>.

248. See Jaclyn Trop, *The Next Data Privacy Battle May Be Waged Inside Your Car*, N.Y. TIMES (Jan. 10, 2014), <http://www.nytimes.com/2014/01/11/business/the-next-privacy-battle-may-be-waged-inside-your-car.html> (describing privacy concerns implicated by the collection of data resulting from GPS devices, cameras, and other technologies that automakers increasingly integrate into personal vehicle designs).

aggressive riders.²⁴⁹ Disclosing a rider's full name can also create risks for users, and some commentators have reported incidents of drivers stalking riders through social media.²⁵⁰ Similar issues can easily arise in the context of per-task contractor services and short-term rental services, where contractors and guests gain access to homes or office spaces.

Despite these risks, disclosure of personal data may be necessary or beneficial in certain contexts. For TNCs, keeping a dummy number active helps riders to contact drivers in the event the rider forgets a personal item in the vehicle.²⁵¹ Regulators may not have sufficient experience with sharing platforms to set viable guidelines for privacy policies. Moreover, users and providers consent to some level of disclosure by joining a sharing platform. Regulators might therefore address novel privacy and data security issues on platforms by ensuring the platforms uphold their stated privacy policies,²⁵² and by adding flexible provisions requiring that platforms do not disclose personal information where doing so would unreasonably threaten the safety of users or providers.²⁵³

249. Polly Mosendz, *Uber Drivers Have Privacy Problems Too*, NEWSWEEK (Nov. 19, 2014), <http://www.newsweek.com/uber-taxi-e-hailing-riding-app-travis-kalanick-emil-michael-josh-mohrer-uber-285642/>.

250. A *Daily Beast* reporter describes her personal experience of harassment, including a driver who photographed her on the street prior to her trip and later emailed the photograph to her employer, and a driver who messaged the author's contacts on Facebook. Olivia Nuzzi, *Uber's Biggest Problem Isn't Surge Pricing. What If It's Sexual Harassment by Drivers?*, DAILY BEAST (Mar. 28, 2014), <http://www.thedailybeast.com/articles/2014/03/28/uber-s-biggest-problem-isn-t-surge-pricing-what-if-it-s-sexual-harassment-by-drivers.html>.

251. Polly Mosendz, *Uber Drivers Have Privacy Problems Too*, NEWSWEEK (Nov. 19, 2014), <http://www.newsweek.com/uber-taxi-e-hailing-riding-app-travis-kalanick-emil-michael-josh-mohrer-uber-285642>.

252. The FTC already brings enforcement actions against other online service providers for failures to uphold a stated privacy policy. *Enforcing Privacy Promises*, FTC, <http://www.ftc.gov/news-events/media-resources/protecting-consumer-privacy/enforcing-privacy-promises>.

253. Some ordinances do expressly consider privacy concerns. For example, the District of Columbia ordinance on TNCs specifies that any administrative rule requiring TNCs to maintain records on drivers must not interfere with the legitimate privacy interests of users. D.C. CODE § 50-329 (2015). Legislatures could also specify some duty of reasonable care for platforms.

2. *Reputation Systems: Regulators Should Encourage Responsible Private Ordering*

Regulators have focused on consumer welfare in proposing ordinances to govern sharing platforms, especially TNCs.²⁵⁴ Proposed rules for TNCs invariably detail required background checks for drivers and inspection procedures for vehicles.²⁵⁵ Many also specify limitations on surge pricing—a dynamic price scheme that increases fares at peak hours to encourage drivers to log on and fulfill the demand for rides.²⁵⁶ In some cases, ordinances specify that TNCs must make the method for calculating fares transparent, and that the TNC app must place the proposed fare prominently on screen in relation to the ride request confirmation button.²⁵⁷

Yet few regulations have addressed reputation systems on sharing platforms. In the context of sharing platforms, a reputation system usually refers to a record of qualitative reviews or numerical ratings tied to a user or provider's profile.²⁵⁸ Most TNCs have a numerical rating system; at the end of a ride, riders rate drivers and vice versa²⁵⁹ on a scale of one to five.²⁶⁰ Short-term rental and per-task contractor platforms, by contrast, generally

254. *E.g.*, San Miguel County Land Use Code, Colo., § 5-3001 (2014) (“The purpose of this Section is to promote public health safety and general welfare by establishing standards for rental of a Primary Residence for less than 30 days.”).

255. Cal. P.U.C. Decision, *supra* note 18, at 72–75.

256. *E.g.*, D.C. CODE § 50-329.02(b)(13) (2015) (“During a state of emergency . . . [a TNC] that engages in surge pricing shall limit the multiplier by which its base fare is multiplied to the next highest multiple below the 3 highest multiples set on different days in the 60 days preceding the declaration of a state of emergency for the same type of service”).

257. *E.g.*, COLO. REV. STAT. § 40-10.1-605(b) (2014) (“A transportation network company shall make available to prospective riders and drivers the method by which the transportation network company calculates fares”); CHI., ILL., CODE § 9-115-200(b) (2014) (“[A]ny licensee shall display a button for displaying a fare quote for any requested trip on the licensee's Internet-enabled application or digital platform in the same size and graphics as the licensee's trip request button.”).

258. Tom Slee, *Some Obvious Things About Internet Reputation Systems*, WHIMSLEY (Sept. 29, 2013), <http://tomslee.net/2013/09/some-obvious-things-about-internet-reputation-systems.html>; *see also* Chrysanthos Dellarocas, *Designing Reputation Systems for the Social Web 2* (Bos. Univ. Sch. Mgmt., Research Paper Series No. 2010-18, 2010).

259. Julie Weed, *For Uber, Airbnb and Other Companies, Customer Ratings Go Both Ways*, N.Y. TIMES (Dec. 1, 2014), <http://www.nytimes.com/2014/12/02/business/for-uber-airbnb-and-other-companies-customer-ratings-go-both-ways.html>.

260. *See, e.g.*, *The Star Rating System*, LYFT, <https://www.lyft.com/help/article/1453135/> (last visited Feb. 26, 2015).

include qualitative reviews on the user or provider's profile.²⁶¹ It is important to note that both user and provider reputations can influence access on the platform—platforms may terminate or block providers with low scores, and providers may decline to accept requests from users with low scores.²⁶² These systems therefore give both users and providers an incentive to behave well on the platform. The exact implementation of a reputation system can also encourage different strategic behaviors on the part of users and providers, and certain system designs will result in more valuable or reliable information than others.²⁶³

While ratings and reviews cannot perform the same protective screening function as background checks and safety inspections,²⁶⁴ reputation systems do play a complementary and vital role in online marketplaces. Even if a provider meets the minimum legal standards within a jurisdiction, that assurance does not help consumers to discern the quality of providers in the market. For example, a car purchaser may know that both a Volvo and a Toyota meet the minimum safety standards for personal vehicles, but the purchaser may require additional information about the quality of the car to make an informed decision. In that sense, reputation systems serve a function similar to a brand or trademark for providers. The provider profile serves as an indication of source, and the reputation system allows the provider to build goodwill within the platform's community of users.²⁶⁵ On the other hand, reputation systems function more closely to credit ratings from the user's perspective.²⁶⁶ Having a higher reputation score can allow users to gain access to more—

261. See, e.g., *How Do I leave a Review or Feedback for the Host?*, ROOMORAMA, <https://help.roomorama.com/hc/en-us/articles/200497795-How-do-I-leave-a-review-or-feedback-for-the-host-/> (last visited Feb. 26, 2015); *How Do I Leave Review?*, TASKRABBIT, <https://taskrabbit.zendesk.com/entries/59906534-How-do-I-leave-review-/> (last visited Oct. 27, 2015).

262. Dara Kerr, *Should Uber and Lyft Keep Passenger Ratings Secret?*, CNET (Sept. 25, 2014, 7:00 AM), <http://www.cnet.com/news/should-uber-and-lyft-keep-passenger-ratings-secret/>.

263. See generally Sergio Marti & Hector Garcia-Molina, *Taxonomy of Trust: Categorizing P2P Reputation Systems*, 50 COMPUTER NETWORKS 472 (2006) (discussing the importance of design choice in creating reputation systems).

264. Some have argued that reputation systems can replace governmental regulation, and that the sharing economy does not require government intervention. KOOPMAN, *supra* note 20, at 16–19.

265. See Beth Simone Noveck, *Trademark Law and The Social Construction Of Trust: Creating the Legal Framework for Online Identity*, 83 WASH. U. L.Q. 1733, 1777–84 (2005).

266. See Danielle Keats Citron & Frank Pasquale, *The Scored Society: Due Process for Automated Predictions*, 89 WASH. L. REV. 1, 8–18 (2014).

and potentially higher quality—services.²⁶⁷ Consequently, both users and providers have a strong interest in earning a high reputation score.

Precisely because users and providers have a substantial financial and personal interest in their scores, reputation systems may raise consumer protection issues. In particular, the design of reputation systems can inadvertently promote discriminatory behavior. For example, a recent study indicated that non-black hosts on Airbnb charge approximately twelve percent more than black hosts for similar listings.²⁶⁸ Since reputation systems can effectively—or literally²⁶⁹—lock out low-rated users and providers, the system design also presents a concern.²⁷⁰ Many platforms do not embed anti-abuse protections or quality control measures into reputation systems.²⁷¹ Moreover, most platforms do not provide a

267. Seth Porges, *Read These Tips, or Nobody Will Ever Let You Be an Airbnb Guest Again*, GIZMODO (June 12, 2012, 11:00 AM), <http://gizmodo.com/5918204/read-these-tips-or-nobody-will-ever-let-you-be-an-airbnb-guest-again>.

268. Benjamin Edelman & Michael Luca, *Digital Discrimination: The Case of Airbnb.com* (Harv. Bus. Sch., Working Paper No. 14-054, 2014); see also Ian Ayres et al., *Race Effects on eBay* (Working Paper, 2011).

269. Some TNCs deactivate drivers who fall below a certain rating threshold. Jeff Bercovici, *Uber's Ratings Terrorize Drivers and Trick Riders. Why Not Fix Them?*, FORBES (Aug. 14, 2014, 12:31 PM), <http://www.forbes.com/sites/jeffbercovici/2014/08/14/what-are-we-actually-rating-when-we-rate-other-people/>.

270. On platforms where users search for providers in an open market, higher rated providers usually appear first on the list. By contrast, TNCs act as true matchmaking services rather than open market places, so the reputation system serves largely to flag bad actors on the system. But users and providers can still decline matches based on a low score or profile picture. Harry Campbell, *Does Race Affect Your Driver Rating?*, RIDESHARE GUY (Aug. 6, 2014), <http://therideshareguy.com/does-race-affect-your-driver-rating/>.

271. Tom Slee has noted that quantitative rating systems on TNC platforms have extremely skewed distribution patterns—users and providers almost universally rank each other at five stars, with a small percentage of one star ratings. Tom Slee, *Some Obvious Things About Internet Reputation Systems*, WHIMSLEY (Sept. 29, 2013), <http://tomslee.net/2013/09/some-obvious-things-about-internet-reputation-systems.html>. The score therefore functions more like a “thumbs up” or “thumbs down.” Some platforms intentionally rely on a “thumbs up” system. *Thumbs Up*, FANCY HANDS, <https://www.fancyhands.com/blog/thumbs-up/> (last visited Feb. 26, 2015). The highly personal interaction involved in many sharing services may discourage users and providers from giving honest feedback on the spot. See, e.g., Dan Harmon & Duncan Trussell, *I Make A 5 Stars*, HARMONTOWN, <http://www.harmontown.com/2014/07/episode-108-i-make-a-5-stars/>. In other cases, strategic behavior may motivate users and providers to “trade” positive ratings. *Feedback Manipulation Policy*, EBAY, <http://pages.ebay.com/help/policies/feedback-manipulation.html> (last visited Feb. 26, 2015).

clear forum for providers and users to challenge false or unfair reviews.²⁷² Platforms do generally provide a complaint hotline for resolving small damages claims or other specific grievances, but some platforms have notably poor track records in responding to user and provider complaints.²⁷³

Of course, platforms have an interest in maintaining the integrity of their reputation systems, because accurate reviews can improve the quality of the platform and thus encourage more users to join.²⁷⁴ Some platforms have taken affirmative steps to improve the design of their reputation systems. Airbnb, for example, recently changed its review system to encourage honest feedback. Before the change, as soon as users and providers submitted a review, Airbnb would publish it. Users and providers could wait up to fourteen days to submit a review, and at the end of the review period the platform would automatically publish any drafted reviews.²⁷⁵ This system encouraged users and providers to avoid negative reviews, for fear of retaliation by the other party.²⁷⁶ Now Airbnb publishes reviews only after both users and providers have submitted a review. The system protects reviewers in that the other side cannot respond in kind to negative reviews.²⁷⁷

272. See, e.g., *Alatraqchi v. Uber Techs., Inc.*, No. C-13-03156 JSC, 2013 WL 4517756 (N.D. Cal. Aug. 22, 2013) (dismissing a deactivated Uber driver's wrongful termination claim); *Can I Remove or Reply to a Review*, AIRBNB, <https://www.airbnb.com/help/article/32/>.

273. Patrick Hoge, *Uber and Lyft Both Get an "F" from the Better Business Bureau; So Does Yellow Cab*, S.F. BUS. TIMES (Oct. 9, 2014, 10:55 AM), <http://www.bizjournals.com/sanfrancisco/blog/2014/10/uber-lyft-f-better-business-bureau.html> (noting that both TNCs and a major taxi dispatcher have received failing grades from the San Francisco Bay Area and Northern Coastal California Better Business Bureau for failing to respond to consumer complaints).

274. Jason Tanz, *Is It Evil to Give a Bad Airbnb Review if Your Host Was Perfectly Nice?*, WIRED (Nov. 21, 2013), http://www.wired.com/2013/11/qq_kia/ ("Bad reviews are 'frankly foundational to the site,' says Chip Conley, Airbnb's head of hospitality.").

275. Seth Porges, *The Strange Game Theory of Airbnb Reviews*, FORBES (Oct. 17, 2014), <http://www.forbes.com/sites/sethporges/2014/10/17/the-strange-game-theory-of-airbnb-reviews/>.

276. Maryam Saeedi has researched retaliatory feedback in a similar context based on eBay's reputation system. Maryam Saeedi et al., *The Value of Feedback: An Analysis of Reputation System* (Working Paper, Nov. 6, 2013), available at http://econ.ohio-state.edu/saeedi/noneg_sss.pdf.

277. Seth Porges, *The Strange Game Theory of Airbnb Reviews*, FORBES (Oct. 17, 2014), <http://www.forbes.com/sites/sethporges/2014/10/17/the-strange-game-theory-of-airbnb-reviews/>.

Platforms can also take steps to combat discriminatory behavior through the design of reputation systems.²⁷⁸ While platforms cannot fully control user and provider discretion, altering the content or layout of individual profiles can affect conduct on the platform. Removing profile pictures or making those pictures less prominent can reduce opportunities for biased decision-making.²⁷⁹ Uber has addressed this problem in the context of underserved neighborhoods by preventing drivers from viewing rider destinations until after the driver has accepted a request.²⁸⁰ Platforms could even adopt stronger measures, such as using algorithmic filtering to detect unfair or biased reviewers.²⁸¹

Although platforms can and should continue to protect users and providers through private ordering, regulators should still take an active role in monitoring reputation systems. Absent regulatory scrutiny, platforms have an incentive to keep reputation systems proprietary.²⁸² Some do not even allow users to view their own reputation score.²⁸³ This prevents users and providers from discovering and addressing abuses of the rating system.²⁸⁴ Legislatures should thus consider enacting rules that require greater transparency.²⁸⁵ For example, the Vehicle for Hire Innovation Amendment Act in the District of Columbia requires that

278. Chrysanthos Dellarocas, *Designing Reputation Systems for the Social Web* (Bos. Univ. Sch. Mgmt., Research Paper Series No. 2010-18, 2010).

279. Benjamin Edelman & Michael Luca, *Digital Discrimination: The Case of Airbnb.com* (Harv. Bus. Sch., Working Paper No. 14-054, 2014).

280. Arielle, *With Uber, Everyone Rides*, UBER (Aug. 20, 2014), <http://blog.uber.com/everyone-rides/> (last visited Feb. 26, 2015).

281. Greg Harman, *The Sharing Economy Is Not as Open as You Might Think*, GUARDIAN (Nov. 12, 2014), <http://www.theguardian.com/sustainable-business/2014/nov/12/algorithms-race-discrimination-uber-lyft-airbnb-peer>.

282. Jason Tanz, *The Sharing Economy Needs to Start Sharing Its Data Too*, WIRED (May 05, 2014, 6 :30 AM), <http://www.wired.com/2014/05/sharing-economy-fico/>.

283. Dara Kerr, *Should Uber and Lyft Keep Passenger Ratings Secret?*, CNET (Sept. 25, 2014, 7:00 AM), <http://www.cnet.com/news/should-uber-and-lyft-keep-passenger-ratings-secret/>.

284. PAM DIXON & ROBERT GELLMAN, THE SCORING OF AMERICA: HOW SECRET CONSUMER SCORES THREATEN YOUR PRIVACY AND YOUR FUTURE 14 (2014), *available at* http://www.worldprivacyforum.org/wp-content/uploads/2014/04/WPF_Scoring_of_America_April2014_fs.pdf.

285. Danielle Keats Citron and Frank Pasquale have argued that automated scoring systems including reputation systems should be subject to procedural safeguards, granting consumers a form of “technological due process.” Citron & Pasquale, *supra* note 266, at 18–30.

users have access to their own reputation score.²⁸⁶ In addition, regulators should expressly prohibit discriminatory ratings, as in the Chicago TNC ordinance.²⁸⁷ Legislatures might consider adding language guaranteeing a private right of action under a state civil rights statute based on violation of the rating discrimination provision.

3. *Promoting Competition: Regulators Should Ensure Provider Mobility and Protect Maverick Platforms*

Though regulators should take action to reduce new consumer protection concerns, they should also consider the potential risks of overly restricting competition. Thus far, regulators have focused on competition between sharing platforms and traditional service providers. In particular, the FTC has issued statements to both the Chicago legislature and the District of Columbia Taxicab Commission arguing that proposed ordinances for TNCs might impose “unwarranted restrictions.”²⁸⁸ Many have applauded TNCs for disrupting local taxi monopolies.²⁸⁹

286. D.C. CODE § 50-331(b)(8) (2015) (“[A] digital dispatch service may rate a customer so long as the customer’s rating may be viewed by the customer and may not be disclosed to a driver until after the driver accepts a ride request from that customer.”).

287. CHI., ILL., CODE § 9-115-140(b) (2014) (TNCs “shall train their drivers not to discriminate against people with disabilities in their passenger ratings. It shall be a violation of this chapter for a driver to rate a passenger based upon a disability.”).

288. Letter from Andrew I. Gavil, Dir. of Office of Policy Planning, FTC, to Brendan Reilly, Alderman 42nd Ward, City of Chicago (Apr. 15, 2014), *available at* http://www.ftc.gov/system/files/documents/advocacy_documents/ftc-staff-comment-honorable-brendan-reilly-concerning-chicago-proposed-ordinance-o2014-1367/140421chicagoridesharing.pdf; Letter from Andrew I. Gavil, Dir. of Office of Policy Planning, FTC, to Jacques P. Lerner, Gen. Counsel, D.C. Taxicab Comm’n (June 7, 2013), *available at* http://www.ftc.gov/sites/default/files/documents/advocacy_documents/ftc-staff-comments-district-columbia-taxicab-commission-concerning-proposed-rulemakings-passenger/130612dctaxicab.pdf.

289. *E.g.*, Sharon Pian Chan, *End the City’s Taxi Monopoly and Let Uber Roll*, SEATTLE TIMES (Aug. 12, 2013), http://seattletimes.com/html/opinion/2021599082_sharonpianchancolumntaxisuber13xml.html; Jim Edwards, *Uber is Destroying the Value of Taxi Monopolies in a Bunch of American Cities*, BUS. INSIDER (Nov. 28, 2014, 7:27 AM), <http://www.businessinsider.com/uberdestroyingvalueoftaximonopoliescartels201411>. Most cities have set strict safety regulations on licensing caps on local taxi industries since the early twentieth century. Some cities experimented with deregulation in during the 1970s, but these efforts often ran into serious problems. Today, economists continue to debate whether taxi deregulation is desirable, and if so what kind of deregulation. *See generally* Hardaway, *supra* note 66; Paul Stephen Dempsey, *Taxi Industry Regulation, Deregulation & Reregulation: the Paradox of Market Failure*, 24 TRANSP. L.J. 73 (1996); Harris, *supra* note 70.

Yet TNC market share may be even more concentrated than the taxi industry. A study by Future Advisor reported that Uber earned twelve times as much as its closest competitor, Lyft, in early 2014.²⁹⁰ To the extent that Uber attracts new users by providing superior services, this growth simply reflects “competition on the merits.”²⁹¹ But dominant platforms can also distort markets by creating artificially high barriers to entry for new competitors²⁹² and eliminating maverick firms.²⁹³

First, dominant platforms can raise the cost of entry for new firms by locking providers into their network. Sharing platforms benefit from indirect network effects—the more providers operate on the platform, the more valuable the service becomes for users.²⁹⁴ Platforms therefore compete to attract top providers, often by offering sign up bonuses or other incentives.²⁹⁵ Uber and Lyft, for example, have adopted aggressive

290. Chris Nicholson, *Study: Uber Pulls Ahead of Lyft in Riders and Revenue With 12x Lead in U.S.*, FUTUREADVISOR (Sept. 11, 2014), <http://blog.futureadvisor.com/study-uber-pulls-ahead-of-lyft-in-riders-and-revenue-with-12x-lead-in-u-s/>. Uber CEO Travis Kalanick has claimed that Uber is twenty times larger than Lyft “on a booking basis” and does ten times as many trips. Liz Gannes, *Travis Kalanick: Uber Is Raising More Money to Fight Lyft and the “Asshole” Taxi Industry*, RE/CODE (May 28, 2014), <http://recode.net/2014/05/28/travis-kalanick-uber-is-raising-more-money-to-fight-lyft-and-the-asshole-taxi-industry/>.

291. *Verizon Commc’ns Inc. v. Law Offices of Curtis v. Trinko LLP*, 540 U.S. 398, 407 (2004) (“To safeguard the incentive to innovate, the possession of monopoly power will not be found unlawful unless it is accompanied by an element of anticompetitive conduct.”); see also *South Park: Handicar* (South Park Digital Studios 2014) (addressing a group of taxi drivers frustrated by competition from a fictional TNC named Handicar: “Why don’t you guys just make your cars cleaner and nicer and try to be better to your customers so that you can compete with Handicar’s popularity in the marketplace?”).

292. Under limited circumstances, a dominant firm can engage in actionable exclusionary conduct under section 2 of the Sherman Act by attempting to block “nascent” technologies from entering the market. *U.S. v. Microsoft Corp.*, 253 F.3d 34, 79 (D.C. Cir. 2001).

293. A maverick is a firm that disproportionately affects the intensity of competition in a market in comparison to its market share. See David T. Scheffman & Mary Coleman, *Quantitative Analyses of Potential Competitive Effects From a Merger*, 12 GEO. MASON L. REV. 319, 321, 325–26 (2003). Removal of a maverick can constitute a theory of harm under the DOJ’s Merger Guidelines. U.S. DEP’T JUSTICE & FED. TRADE COMM’N, HORIZONTAL MERGER GUIDELINES § 2.1.5 (rev. ed. 2010), available at <http://www.ftc.gov/sites/default/files/attachments/merger-review/100819hmg.pdf>.

294. See generally David S. Evans & Michael Noel, *Defining Antitrust Markets When Firms Operate Two-Sided Platforms*, 2005 COLUM. BUS. L. REV. 667 (2005).

295. Michelle Regner, *Want to Be the Next Airbnb or Taskrabbit? Don’t fall for These Marketplace Myths*, VENTUREBEAT (Dec. 14, 2014, 8:25 AM), <http://venturebeat.com/2014/12/14/want-to-be-the-next-airbnb-or-taskrabbit-dont-fall-for-these-marketplace-myths/> (arguing that even if sharing businesses “won’t be buying traditional inventory per se, they will still be buying another type of inventory—

tactics for recruiting drivers.²⁹⁶ Some of these recruitment campaigns may constitute predatory pricing behavior.²⁹⁷ Such tactics potentially serve as a means of excluding competitor platforms or new entrants from the market.²⁹⁸

Second, dominant platforms can target maverick firms to reduce price competition.²⁹⁹ For example, some TNC and P2P car rental services specialize in trips to the airport.³⁰⁰ These rides are often more lucrative opportunities for drivers than short trips.³⁰¹ These specialized services may offer lower prices than other TNCs, and therefore create procompetitive efficiencies in the market as a whole.³⁰² In the long term, dominant TNCs

marketplace vendors"). Actively recruiting providers to join a platform is not anticompetitive behavior; in fact, agreements not to recruit may in some cases create antitrust liability. Jonathan Stempel, *Apple, Google, Intel, Adobe to Pay \$325 Million to Settle Hiring Lawsuit*, REUTERS (May 23, 2014), <http://www.reuters.com/article/2014/05/23/us-apple-google-settlement-idUSBREA4M0MY20140523/>.

296. Serena Saitto, *Uber Woos Drivers With \$1,000 Bonuses in Tussle With Lyft*, BLOOMBERG (July 13, 2014, 9:01 PM) <http://www.bloomberg.com/news/2014-07-14/uber-tussles-with-lyft-wooing-drivers-with-1-000-bonuses.html>; Ellen Huet, *How Uber And Lyft Are Trying To Kill Each Other*, FORBES (May 30, 2014), <http://www.forbes.com/sites/ellenhuet/2014/05/30/how-uber-and-lyft-are-trying-to-kill-each-other/>.

297. Predatory pricing occurs where a firm (1) sets prices "below an appropriate measure of its rival's costs," and (2) the firm's predatory pricing creates "a dangerous probability" of eliminating competition and ultimately allowing the firm to recoup losses through supra-competitive pricing. *Brooke Grope Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 222–24 (1993). Some reports suggest that Uber has offered fares at below cost to drive Lyft out of certain markets. Ellen Huet, *Uber's Newest Tactic: Pay Drivers More Than They Earn*, FORBES (July 2, 2014, 6:13 PM), <http://www.forbes.com/sites/ellenhuet/2014/07/02/ubers-newest-tactic-pay-drivers-more-than-they-earn/>.

298. Hailo, an app that allows riders to request rides from partnering taxis and black cars, has shut down its operations in North America as a result of price competition from TNCs. Chris Welch, *Hailo Is Leaving North America to Escape the War Between Uber and Lyft*, VERGE (Oct. 14, 2014, 12:41 PM), <http://www.theverge.com/2014/10/14/6975049/hailo-taxi-app-leaving-north-america/>.

299. See *supra* text accompanying note 293.

300. WINGZ, <https://wingz.me/> (last visited Feb. 26, 2015); FLIGHTCAR, <https://flightcar.com/> (last visited Feb. 26, 2015) (P2P car rental service).

301. See, e.g., Fallon Glick, *Louisville International Airport steps up enforcement of ridesharing ban*, WDRB (Nov. 21, 2014, 3:28 PM), <http://www.wdrb.com/story/27454057/louisville-international-airport-steps-up-enforcement-of-ridesharing-ban>.

302. For example, Wingz charges a flat fee for airport trips. Carolyn Said, *Wingz gets PUC green light as official TNC provider*, SFGATE (Mar. 18, 2014), <http://blog.sfgate.com/techchron/2014/03/18/wingz-gets-puc-green-light-as-official-tnc-provider/>.

will have strong incentives to eliminate these mavericks by acquiring them,³⁰³ or by entering into exclusive contracts with airports or airlines.³⁰⁴

The DOJ and FTC have the authority to police such anticompetitive mergers and other predatory behaviors as needed, but regulators can also design rules to preemptively combat both of these threats.³⁰⁵ For example, states can require that airports award licenses for TNCs to access drop off points on a nondiscriminatory basis.³⁰⁶ Regulators can also enact tiered legislation, creating tax breaks or other allowances for small platforms. Most importantly, regulators should ensure that providers can freely move between platforms. In particular, the Chicago ordinance on TNCs may unnecessarily restrain drivers by prohibiting licensed taxis from operating as TNC vehicles.³⁰⁷ These restrictions may be necessary in limited circumstances to prevent consumer confusion with the trade dress of taxi dispatch services.³⁰⁸ However, ordinances can at least specify that providers have the right to contract with more than one TNC platform.³⁰⁹

303. Airbnb has acquired smaller competitor services to expand its service network. E.g., Dara Kerr, *Airbnb Buys Crashpadder, Its Largest U.K. Competitor*, CNET (Mar. 20, 2012, 7:38 PM), <http://www.cnet.com/news/airbnb-buys-crashpadder-its-largest-u-k-competitor/>. Fewer mergers have taken place between TNCs. Ellen Huet, *Lyft Buys Carpooling Startup Hitch To Grow Lyft Line*, FORBES (Sept. 22, 2014), <http://www.forbes.com/sites/ellenhuet/2014/09/22/lyft-buys-carpooling-startup-hitch-to-grow-lyft-line/>; Robert Hof, *Uber CEO Travis Kalanick: We're Not In Acquisition Mode (Sorry, Lyft)*, FORBES (Sept. 8, 2014, 1:42 PM), <http://www.forbes.com/sites/roberthof/2014/09/08/uber-ceo-travis-kalanick-were-not-in-acquisition-mode-sorry-lyft/>.

304. Joe Sharkey, *United's Deal With Uber Raises Concerns*, N.Y. TIMES (Sept. 29, 2014), <http://www.nytimes.com/2014/09/30/business/uniteds-deal-with-uber-raises-concerns.html>.

305. In addition, regulators can consider deregulating or amending regulations for traditional for-hire services. Catherine Rampell, *The Familiar Cycle of the Taxi Industry Wars*, WASH. POST (Dec. 8, 2014), http://www.washingtonpost.com/opinions/catherine-rampell-thoughtful-taxi-regulations-should-consider-the-consumer/2014/12/08/d742cd76-7f19-11e4-8882-03cf08410beb_story.html.

306. Airports in several cities have approved TNC permits for airport drop offs and pickups. Katherine Driessen, *City to Allow Ride-Share Operators at Houston Airports*, HOUSTON CHRONICLE (Nov. 12, 2014), <http://www.chron.com/news/houston-texas/houston/article/City-to-allow-ride-share-operators-at-Houston-5888089.php>.

307. See CHI., ILL., CODE § 9-115-100(c) (2014).

308. Dispatch services have argued that allowing TNCs to suggest an affiliation with licensed taxi drivers, or to allude to the distinctive trade dress of another for-hire transportation service constitutes a misrepresentation of association under the Lanham Act. *Yellow Grp. LLC v. Uber Techs. Inc.*, No. 12 C 7967, 2014 WL 3396055, at *5 (E.D. Ill. July 10, 2014).

309. For example, the District of Columbia regulation provides that a “private or public vehicle-for-hire operator may affiliate with more than one company for the

Ultimately, the benefits of scale in some sharing markets may naturally lead to consolidation. However, taking appropriate steps to preserve a competitive marketplace can improve consumer choice, and encourage local and low-cost competitor platforms to enter the market. In enacting rules to protect consumers, regulators should also consider whether particular proposals would disproportionately affect large or small platforms. Nor should regulators shy away from addressing new threats to consumers, including privacy concerns and reputation systems. As Professor Cortez has argued, regulators should address regulatory disruptions through experimentation and prompt action.³¹⁰

V. CONCLUSION

Sharing platforms benefit consumers by increasing the availability of service providers, lowering costs, and providing altogether new services.³¹¹ In addition, these services do not pose an unacceptable danger to users or third parties. Many risks posed by the sharing economy are just as present in the market for traditional service providers.³¹² Regulators can also address these risks without forcing platforms to conform to the same rules as traditional service providers. In some cases, particularly the for-hire vehicle market, loosening restrictions for traditional service providers may be just as warranted as increasing protections for users and providers in the sharing economy.³¹³ Though sharing platforms pose new consumer protection issues, regulators can confront these concerns without shutting down platforms.³¹⁴

Yet even if one takes the position that the harms caused by the sharing economy outweigh the opportunities, most commentators would agree

purpose of using digital dispatch unless otherwise provided for by an agreement between the company and the operator.” D.C. CODE § 50-329.02(b)(15) (2015).

310. *See generally* Cortez, *supra* note 13.

311. Many regulators and commentators likewise adopt this position. *See generally*, e.g., BUS. INNOVATION OBSERVATORY, EUR. COMM’N, THE SHARING ECONOMY: ACCESSIBILITY BASED BUSINESS MODELS FOR PEER-TO-PEER MARKETS (2013), available at http://ec.europa.eu/enterprise/policies/innovation/policy/business-innovation-observatory/files/case-studies/12-she-accessibility-based-business-models-for-peer-to-peer-markets_en.pdf; WOSSKOW, *supra* note 243.

312. *Supra* Section IV.A.

313. E.g., Eric Roper, *City Will Consider Major Reforms to Taxi Regulations*, STAR TRIBUNE (June 30, 2014, 12:51 PM), <http://www.startribune.com/politics/statelocal/265132561.html> (describing Minneapolis’s plans to revise taxi ordinances to more closely approximate new rules for TNCs).

314. *Supra* Section IV.B.

that the sharing economy is here to stay.³¹⁵ In other words, we can no longer close Pandora's box. However, regulators should not simply allow the sharing economy to grow in the shadow of the law. Allowing the sharing economy to self-regulate would not adequately safeguard consumers. Thus, responsible regulation of sharing platforms is a necessity, not a choice. Regulatory authorities and legislators have already begun to experiment with balanced solutions, and the outcomes of these efforts will continue to inform future regulations.

315. Even strong critics of the sharing economy tend to believe that the rise of the sharing economy is inevitable, or at least acknowledge the pervasiveness of that opinion. *E.g.*, Catherine Rampell, *The Dark Side of 'Sharing Economy' Jobs*, WASH. POST (Jan. 26, 2014), http://www.washingtonpost.com/opinions/catherine-rampell-the-dark-side-of-sharing-economy-jobs/2015/01/26/4e05daec-a59f-11e4-a7c2-03d37af98440_story.html (describing the sharing economy as part of a larger—seemingly irreversible—trend of deregulation, most notably the decoupling of employment contracts from safety-net programs such as healthcare); *see also* Tom Slee, *Why Canada Should De-Activate Uber*, WHIMSLEY (Nov. 22, 2014), <http://tomslee.net/2014/11/why-canada-should-de-activate-uber.html> (“Contrary to the way some articles are written, we do have a choice here. A lot of the links above talk as if Uber were some kind of inevitable future. . . . Conflating Uber with the broad advance of technology is just wrong, and it’s also exactly what Uber wants us to do.”).