

Spring 2016

## Sharing Property

Kellen Zale

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### Recommended Citation

Kellen Zale, *Sharing Property*, 87 U. COLO. L. REV. 501 (2016).

Available at: <https://scholar.law.colorado.edu/lawreview/vol87/iss2/4>

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# SHARING PROPERTY

KELLEN ZALE\*

*The sharing economy—the rapidly evolving sector of peer-to-peer transactions epitomized by Airbnb and Uber—is the subject of heated debate about whether it is so novel that no laws apply, or whether the sharing economy should be subject to the same regulations as its analog counterparts. The debate has proved frustrating and controversial in large part because we lack a doctrinally cohesive and normatively satisfying way of talking about the underlying activities taking place in the sharing economy. In part, this is because property-sharing activities—renting your car out to a tourist for a day, paying to spend the weekend in a stranger’s spare bedroom—blur the familiar binary divisions of personal and commercial, gratuitous and nongratuitous, formal and informal, that the law employs to characterize human activities. Because we lack a coherent analysis of these underlying property-sharing activities, any judgment about the sharing economy’s social value or attempts to regulate it are incomplete and confusing at best, and possibly inaccurate or counter-productive as well.*

*This Article brings definitional clarity and coherence to this discourse by unpacking the underlying activities taking place within the sharing economy and developing a conceptual framework and taxonomy of sharing. By being more precise about what we mean when we talk about the sharing economy, and situating these activities with respect to existing legal institutions and shifting social norms, this Article provides an essential foundation for academics producing future scholarship, as well as for policymakers*

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\* Assistant Professor, University of Houston Law Center. Many thanks to Nestor Davidson, Dave Fagundes, Jim Hawkins, Stacey Lantagne, Timothy Mulvaney, Chris Odinet, Teddy Rave, and Sarah Schindler for their valuable comments on early drafts of this Article, as well as to the participants at the 2014 Junior Scholars Virtual Colloquium, the 2014 University of Mississippi Scholars Workshop, and the 2015 Local Government Workshop at University of Denver. Thank you also to Jennifer Juergens, K. Greer Kuras, and Tamara Sharkey for their research assistance.

*evaluating regulatory responses to the sharing economy.*

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## INTRODUCTION

The sharing economy—the rapidly evolving sector of peer-to-peer transactions epitomized by Airbnb<sup>1</sup> and Uber<sup>2</sup>—is

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1. Airbnb allows individuals to offer accommodations, ranging from couches

nothing if not controversial.<sup>3</sup> Across the country, a polarized debate has erupted between those who contend that the activities taking place within the sharing economy are so novel that no laws apply to those engaging in those activities, and those who argue that the sharing economy should be treated no differently than its analog counterparts, such as hotels and taxis. Whether it's drivers suing ride-sharing companies like Uber and Lyft for violations of employment laws,<sup>4</sup> or New Orleans banning home-sharing platform Airbnb because of

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or spare bedrooms, to entire homes or apartments, to other individuals for a fee (a portion of which is kept by Airbnb). See *About Us*, AIRBNB, <https://www.airbnb.com/about/about-us> [<https://perma.cc/5LNL-N4GF>] ("Airbnb is a trusted community marketplace for people to list, discover, and book unique accommodations around the world . . . Whether an apartment for a night, a castle for a week, or a villa for a month, . . . Airbnb is the easiest way for people to monetize their extra space and showcase it to an audience of millions."). Airbnb's gross bookings in 2014 were estimated at over \$4 billion and its revenues at \$423 million. See Rafat Ali, *Airbnb's Revenues Will Cross Half Billion Mark in 2015, Analysts Estimate*, SKIFT (Mar. 25, 2015, 7:00 AM), <http://skift.com/2015/03/25/airbnbs-revenues-will-cross-half-billion-mark-in-2015-analysts-estimate/> [<http://perma.cc/YLD4-48F7>] (citing a report by investment bank Piper Jaffray).

2. According to Uber, its app allows individuals to obtain and pay for point-to-point transportation from individuals who have signed up as drivers on the app, with Uber retaining a percentage of the fare. See UBER, <https://www.uber.com/> [<https://perma.cc/UQ83-2R4H>] (providing an overview of how passengers can use their mobile phone to access Uber); see also *Drive*, UBER, <https://get.uber.com/drive/> [<https://perma.cc/SWW6-DRC4>] (describing how to register as an Uber driver and listing the benefits of the role). Uber's revenues in San Francisco alone are \$500 million per year, far exceeding the taxi market's revenues in that city of \$140 million per year. Henry Blodget, *Uber CEO Reveals Mind-Boggling New Statistic That Skeptics Will Hate*, BUS. INSIDER (Jan. 19, 2015, 4:04 AM), <http://www.businessinsider.com/uber-revenue-san-francisco-2015-1> [<http://perma.cc/D8FG-7UNJ>] (referring to a statement making that claim by Uber's CEO). The venture funding valuations of companies such as Airbnb and Uber are even more exponential. See Barry Libert et al., *What Airbnb, Uber and Alibaba Have in Common*, HARV. BUS. REV. (Nov. 20, 2014), <https://hbr.org/2014/11/what-airbnb-uber-and-alibaba-have-in-common> [<https://perma.cc/332S-QQZ8>] (discussing Airbnb's valuation of \$10 billion and Uber's valuation of \$30 billion).

3. Despite the controversy and serious legal and policy questions raised by the sharing economy, it has also been a source of comedic inspiration. See, e.g., *Portlandia: Ecoterrorists* (IFC television broadcast Mar. 6, 2014), <https://www.youtube.com/watch?v=xrUYoleO98> [<https://perma.cc/HM2A-V7TZ>] (providing examples of the wide range of goods and services which can be offered or obtained through the sharing economy).

4. See Dan Levine & Sarah McBride, *Uber, Lyft Face Crucial Courtroom Test over Driver Benefits*, REUTERS (Jan. 28, 2015, 7:15), <http://www.reuters.com/article/2015/01/28/us-uber-lyft-workers-idUSKBN0L11BN20150128> [<http://perma.cc/V7EJ-SS8S>] (describing one of many lawsuits against Uber for employment law violations).

negative impacts on quality of life for residents,<sup>5</sup> or Los Angeles cracking down on free, curbside mini-libraries because of zoning violations,<sup>6</sup> conflicts between sharing economy proponents and participants versus critics and regulators blaze across the headlines on a weekly basis.

Supporters claim the sharing economy is nothing less than a “social, political and economic transformation” that is “democratizing how we produce, consume, govern, and solve social problems.”<sup>7</sup> Sharing economy companies like Couchsurfing,<sup>8</sup> Lyft,<sup>9</sup> and Taskrabbit<sup>10</sup> are supposedly creating a new class of empowered “micro-entrepreneurs,”<sup>11</sup> where a

5. Katherine Sayre, *New Orleans City Council Toughens Ban on Unlicensed Short-Term Rentals*, TIMES-PICAYUNE (July 11, 2014, 12:23 AM), [http://www.nola.com/business/index.ssf/2014/07/new\\_orleans\\_city\\_council\\_tough.html](http://www.nola.com/business/index.ssf/2014/07/new_orleans_city_council_tough.html) [http://perma.cc/SA6X-RRWD].

6. Michael Schaub, *Little Free Libraries on the Wrong Side of the Law*, L.A. TIMES (Feb. 4, 2015, 11:30 AM), [http://www.latimes.com/books/jacketcopy/la-et-jc-little-free-libraries-on-the-wrong-side-of-the-law-20150204-story.html?track=rss&utm\\_source=dlvr.it&utm\\_medium=twitter&dlvrit=717819](http://www.latimes.com/books/jacketcopy/la-et-jc-little-free-libraries-on-the-wrong-side-of-the-law-20150204-story.html?track=rss&utm_source=dlvr.it&utm_medium=twitter&dlvrit=717819) [http://perma.cc/GS7H-7CT3] (describing controversies over “Little Free Libraries” in Los Angeles and Shreveport, Louisiana).

7. *About*, SHAREABLE, <http://www.shareable.net/about> [http://perma.cc/2M5A-G677]. Airbnb’s recent entry into the Cuban home-sharing market illustrates the “win-win” appeal of the sharing economy: the income from renting out a house on Airbnb goes directly to individual Cubans (after Airbnb takes its commission), rather than the Cuban government, and home sharing involves a level of personal connection between individual Cubans and American tourists that is in line with the current warming of relations between the two nations. See *Welcoming Cuba to the Airbnb Community*, AIRBNB (Apr. 2, 2015), <http://blog.airbnb.com/cuba/> [http://perma.cc/8SDP-FNLE] (“Because we’re building on the rich Cuban tradition of home sharing, we’re uniquely positioned to help Cubans reap the rewards of economic growth while preserving their unique culture. When Airbnb guests stay in local neighborhoods, they bring business to surrounding entrepreneurs—whether they be hosts, artists, or even ice cream shop owners.”).

8. Couchsurfing allows individuals to offer free accommodations (not necessarily a couch) to other individuals. See *How It Works*, COUCHSURFING, <http://www.couchsurfing.com/about/how-it-works/> [http://perma.cc/2FXF-LFD3] [hereinafter COUCHSURFING].

9. Lyft offers a point-to-point transportation service similar to Uber. See LYFT, <https://www.lyft.com/> [https://perma.cc/K88B-ZYDB].

10. Taskrabbit allows individuals to obtain and pay for a wide variety of services, ranging from general errand assistance to specific tasks, from other individuals (“Taskers”) for a fee; Taskrabbit retains a portion of the fee and the rest is paid to the Tasker. See *How It Works*, TASKRABBIT, <https://www.taskrabbit.com/how-it-works> [https://perma.cc/57DG-6LXP].

11. Katie Fehrenbacher, *The Collaborative Home: An Infographic of Web Sharing*, GIGAOM (July 7, 2011, 9:30 AM), <https://gigaom.com/2011/07/07/the-collaborative-home-an-infographic-of-web-sharing/> [https://perma.cc/3X4W-8D2W] (providing a graphic illustrating everything that can potentially be shared in the

“dude with a car” can be transformed into a “competitor with Hertz,”<sup>12</sup> and where “[s]tatus formerly associated with autonomy and excess is now better achieved through civic behavior and community participation.”<sup>13</sup>

Others, however, take a less euphoric view of the sharing economy. Calling it the “share-the-scrap economy,”<sup>14</sup> critics point out that much of this economic activity exploits the financial desperation created by the post-2008 weak labor market.<sup>15</sup> They caution that companies like Uber and Airbnb are engaging in massive “share-washing” campaigns<sup>16</sup> by using

“collaborative home” and citing various statistics about how much people can make from various activities in the sharing economy).

12. Joel Stein, *Baby, You Can Rent My Car and Stay in My Guest Room. And Do My Errands. And Rent My Stuff: My Wild Ride Through the New On-Demand Economy*, TIME, Feb. 9, 2015, at 32, 34.

13. LISA GANSKY, THE MESH: WHY THE FUTURE OF BUSINESS IS SHARING 70–71 (2010).

14. Robert Reich, *The Sharing Economy Is Hurling Us Backwards*, SALON (Feb. 4, 2015, 2:45 AM), [http://www.salon.com/2015/02/04/robert\\_reich\\_the\\_sharing\\_economy\\_is\\_hurling\\_us\\_backwards\\_partner/](http://www.salon.com/2015/02/04/robert_reich_the_sharing_economy_is_hurling_us_backwards_partner/) [<http://perma.cc/9QTH-98KP>].

15. See Kevin Roose, *The Sharing Economy Isn't About Trust, It's About Desperation*, N.Y. MAG. (Apr. 24, 2014), <http://nymag.com/daily/intelligencer/2014/04/sharing-economy-is-about-desperation.html> [<http://perma.cc/P4E2-5P5C>] (“A huge precondition for the sharing economy has been a depressed labor market, in which lots of people are trying to fill holes in their income by monetizing their stuff and their labor in creative ways.”). Tom Slee, *Sharing and Caring*, JACOBIN (Jan. 14, 2014), <https://www.jacobinmag.com/2014/01/sharing-and-caring/> [<https://perma.cc/3NLS-9SJK>] (“TaskRabbit and others call their workers ‘micro-entrepreneurs,’ but that is a poor description of precarious piecework.”).

16. Airbnb, Uber, and other companies involved in the sharing economy have actively engaged in lobbying of state and local governments, both to enhance the likelihood of favorable regulations being passed and to bolster their image when stories of the sharing economy gone wrong make headlines. See, e.g., *About STRAC*, SHORT TERM RENTAL ADVOC. CTR., <http://www.stradvocacy.org/about-us/#.VOo6vvnF86s> [<http://perma.cc/2G7E-PGVR>] (“The Short Term Rental Advocacy Center (STRAC) was created by Airbnb, HomeAway, TripAdvisor and FlipKey responding to requests from our communities who asked for help in engaging with policymakers who are considering how smart regulations can responsibly foster this growing industry.”). The organization represents the interests of these sharing economy companies. See, e.g., *Portland: City, Short-Term Rental Hosts Face Off*, SHORT TERM RENTAL ADVOC. CTR. (Jan. 27, 2015), <http://www.stradvocacy.org/portland-city-short-term-rental-hosts-face/#.VOpEEPnF86s> [<http://perma.cc/3CTS-TYK4>] (discussing the organization’s response to the regulation of short-term rentals passed by Portland, Oregon). Another organization, Peers, describes itself as a “member-driven organization to support the sharing economy movement.” PEERS: BLOG, <http://blog.peers.org/> [<http://perma.cc/GCE7-DDB9>]. In fact, Peers was founded by a former Airbnb employee and has lobbied against local government actions which would potentially negatively impact the bottom line of sharing economy companies like

a feel-good euphemism<sup>17</sup> to disguise the fact that the companies are evading regulations designed to protect the public welfare, while refusing to share in the actual risks, costs, and externalities that their platforms create.<sup>18</sup>

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Airbnb. Adrian Glick Kudler, *Airbnb-Affiliated Lobbying Group Defeats Venice's Attempt to Regulate Vacation Rentals in Los Angeles*, CURBED L.A. (Nov. 25, 2013), [http://la.curbed.com/archives/2013/11/airbnbaffiliated\\_lobbying\\_group\\_defeats\\_venices\\_attempt\\_to\\_regulate\\_vacation\\_rentals\\_in\\_los\\_angeles.php](http://la.curbed.com/archives/2013/11/airbnbaffiliated_lobbying_group_defeats_venices_attempt_to_regulate_vacation_rentals_in_los_angeles.php) [<http://perma.cc/PPM2-YYB2>].

Many sharing economy companies also have a very active internet (and real-life, in the case of conferences and symposiums) presence to engage participants in the sharing economy in goals that are in the interest of the companies. *See, e.g.*, AIRBNB: PUB. POLICY BLOG, <http://publicpolicy.airbnb.com/> [<http://perma.cc/58JW-U6U7>] (noting that the company's public policy blog (moderated by an Airbnb employee) is "a space for the Airbnb community to talk about public policy initiatives and issues that affect them"); *Protect Home Sharing at the Venice Neighborhood Council Meeting*, PEERS, <http://action.peers.org/page/s/venice-council-meeting> [<http://perma.cc/SFP3-EX2E>] (alerting Peers members of a local council meeting in Venice, California, regarding home sharing). The potential conflict of interest between the goals of sharing economy companies and participants recently led Peers to split into two divisions, a nonprofit foundation and a for-profit corporation. Shelby Clark, *A Transition at Peers to Create Greater Impact*, PEERS: BLOG (Dec. 11, 2014, 7:35 PM), <http://blog.peers.org/post/104965337094/a-transition> [<http://perma.cc/6G3G-YS2H>].

17. *See, e.g.*, Catherine Rampell, *What Preschoolers Can Teach Silicon Valley About "Sharing,"* WASH. POST (May 15, 2014), [http://www.washingtonpost.com/opinions/catherine-rampell-paying-for-your-fair-share-in-an-app-based-economy/2014/05/15/007da348-dc66-11e3-8009-71de85b9c527\\_story.html](http://www.washingtonpost.com/opinions/catherine-rampell-paying-for-your-fair-share-in-an-app-based-economy/2014/05/15/007da348-dc66-11e3-8009-71de85b9c527_story.html) [<https://perma.cc/VC34-B7QZ>] ("[T]o call these activities 'sharing' is an insult to the intelligence of existing businesses, regulators and 5-year-olds everywhere."). Even proponents of the sharing economy have recognized the potential misnomer of the label. *See The Power of Connection: Peer-to-Peer Business: Hearing Before the H. Comm. on Small Bus.*, 113th Cong. 5 (2014) [hereinafter Sundararajan Testimony] (written testimony of Arun Sundararajan, Professor and NEC Faculty Fellow, NYU Stern School of Business Head, Social Cities Initiative, NYU Center for Urban Sciences and Progress), [http://smallbusiness.house.gov/uploadedfiles/1-15-2014\\_revised\\_sundararajan\\_testimony.pdf](http://smallbusiness.house.gov/uploadedfiles/1-15-2014_revised_sundararajan_testimony.pdf) [<http://perma.cc/D7ZW-97PY>] ("The phrase 'sharing economy' often creates a misconception about these platforms and the businesses they enable. While some may facilitate sharing, they are typically not organized like food cooperatives or farmer collectives. Rather, they are grounded in simple free enterprise, individual property rights, external financing, trade-for-profit, market-based prices, and new opportunities for exchange.").

18. Commentators have also noted the irony of companies such as Airbnb and Uber promoting themselves as leaders in the sharing economy when they appear to be unwilling to share the risks that their users face. For example, when tenants offering their apartments on Airbnb are evicted by landlords for breaching their lease or when passengers in an Uber vehicle are injured in accidents that the driver's personal insurance does not cover, the platforms have been reluctant to offer assistance. *See, e.g.*, Andrew Leonard, *The Sharing Economy Does Not Want to Share Your Legal Bills*, SALON (Apr. 8, 2014, 12:06 PM), [http://www.salon.com/2014/04/08/the\\_sharing\\_economy\\_does\\_not\\_want\\_to\\_share\\_your\\_legal\\_bills/](http://www.salon.com/2014/04/08/the_sharing_economy_does_not_want_to_share_your_legal_bills/) [<http://perma.cc/YMB7-Z2RK>] ("Of course AirBnB [sic] can't

Last year, the rhetoric of the debate over the sharing economy came to a head in a confrontation between Airbnb and the New York Attorney General's Office.<sup>19</sup> The dispute stemmed from the Attorney General's request for user data from Airbnb to determine the extent to which hosts were breaking New York City's "illegal hotel law," which bans short-term rentals of thirty days or less in an effort to preserve affordable long-term rental housing and ensure public safety.<sup>20</sup> While Airbnb eventually handed over anonymized information about rental activities facilitated through its platform,<sup>21</sup> the company initially refused to do so, claiming the company was

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provide individual legal assistance to its hosts! If it did so, the company would not have a sustainable business. Fair enough, but it's very difficult to see how this is an example of sharing. AirBnB [sic] takes a cut of every sublet brokered through its system, but the company doesn't share the legal risk . . ."); 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/> [<http://perma.cc/4ZRJ-8LUE>] ("Airbnb would like to be seen as a cult of compassion, one in which taking 6 to 12 percent off the top of every transaction is secondary to a mission of economic empowerment and social responsibility. . . . And yet: Most of the company's opponents are affordable-housing activists.").

19. Andrea Peterson, *Airbnb Is Facing Off Against New York's Attorney General. Here's Why*, WASH. POST: THE SWITCH (Apr. 22, 2014), <https://www.washingtonpost.com/blogs/the-switch/wp/2014/04/22/airbnb-is-facing-off-against-new-yorks-attorney-general-heres-why> [<https://perma.cc/DTQ8-YNB6>].

20. N.Y.C., N.Y. ADMIN. CODE § 28-210.3(16) (2013). See also *Testimony Before the N.Y.C. Council Comm. on Hous. & Bldgs. "Short Term Rentals—Stimulating the Economy or Destabilizing Neighborhoods?"* (Jan. 20, 2015) (statement of Liz Krueger, N.Y. State Senator), <http://www.nysenate.gov/testimony/testimony-state-senator-liz-krueger-new-york-city-council-committee-housing-and-building-0> [<http://perma.cc/UN5Z-RF3N>].

21. See N.Y. STATE ATTORNEY GENERAL, AIRBNB IN THE CITY 2 (2014) [hereinafter AIRBNB IN THE CITY], <http://www.ag.ny.gov/pdfs/Airbnb%20report.pdf> [<http://perma.cc/9YW7-2WSY>] (describing data received from Airbnb). The Airbnb data revealed that in fact almost three-quarters (72%) of the listings on Airbnb in New York City violated the city's short-term rental laws (in addition to potentially violating zoning laws, occupancy laws, restrictive covenants and contractual lease terms). *Id.* Yet 36% of the total revenue generated by Airbnb in New York City during the analyzed period went to just 6% of hosts, who appeared to be professional commercial property operators of illegal short-term rental units, rather than individuals making ends meet by occasionally renting out their apartment or spare bedroom. *Id.* A 2014 study by the San Francisco Chronicle of Airbnb listings in that city indicated similar patterns. See Carolyn Said, *Window into Airbnb's Hidden Impact on San Francisco*, S.F. CHRON. (June 2014), <http://www.sfchronicle.com/business/item/Window-into-Airbnb-s-hidden-impact-on-S-F-30110.php> [<http://perma.cc/5FCX-78XE>] (discussing listings that appeared to be illegal hostels, hosting more guests at private houses or apartments than permitted by occupancy laws). See *infra* Section II.B.3 for further discussion.



beyond the reach of regulatory oversight by the city.<sup>22</sup> As Brian Chesky, Airbnb's CEO, told a gathering of supporters: "There are laws for people and there are laws for business, but you are a new category, a third category, people as businesses . . . . As hosts, you are microentrepreneurs, and there are no laws written for microentrepreneurs."<sup>23</sup> The Attorney General's office, unsurprisingly, framed the issue through a very different lens: "[B]eing innovative is not a defense to breaking the law."<sup>24</sup>

This clash between Airbnb and the New York Attorney General is just one example of the seemingly endless number of legal issues raised by the sharing economy. Questions range from what is the appropriate tax treatment<sup>25</sup> to how anti-discrimination laws should apply to sharing activities<sup>26</sup> to who

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22. Tomio Geron, *New York State AG Seeks Airbnb Data on Hosts in Legal Battle*, FORBES (Oct. 7, 2013, 5:11 PM), <http://www.forbes.com/sites/tomiogeron/2013/10/07/new-york-state-ag-seeks-airbnb-data-on-hosts-in-legal-battle/> [<http://perma.cc/8VTU-TX2Z>] ("We always want to work with governments to make the Airbnb community stronger, but at this point, this demand is unreasonably broad and we will fight it with everything we've got.") (quoting an Airbnb blog post about the Attorney General's request).

23. David Streitfeld, *Companies Built on Sharing Balk When It Comes to Regulators*, N.Y. TIMES (Apr. 21, 2014), <http://www.nytimes.com/2014/04/22/business/companies-built-on-sharing-balk-when-it-comes-to-regulators.html> [<http://perma.cc/GAU4-XZMF>].

24. *Id.* The Attorney General's concerns about Airbnb's illegal activities did not deter *Inc.* magazine from naming Airbnb its 2014 Company of the Year. See Burt Helm, *Airbnb Is Inc.'s 2014 Company of the Year*, INC., <http://www.inc.com/magazine/201412/burt-helm/airbnb-company-of-the-year-2014.html> [<http://perma.cc/KCA4-8MG2>] ("Disruptive, brazen, and overall brilliant, the (possibly illegal) home-sharing empire has become the biggest lodging provider on Earth—earning it the title of Inc.'s 2014 Company of the Year.")

25. See Chris Gayomali, *Here's Another Thing About the Sharing Economy You Might Not Have Thought of: The Tax Bill*, FAST COMPANY (Jan. 22, 2015, 8:00 AM), <http://www.fastcompany.com/3041127/heres-another-thing-about-the-sharing-economy-you-might-not-have-thought-of-the-tax-bill> [<http://perma.cc/A766-LBV8>] ("[T]he rulebook for rentals is this big, opaque, multi-pronged mess that can change on a whim based on a number of factors: Whether you're renting the whole apartment or just your room, how many times you do it in a year, what you can and can't write-off. It's sort of like a Choose Your Own Adventure, only the wrong decision might mean deducting a couple hundred extra dollars from your saving account.")

26. See, e.g., Benjamin Edelman & Michael Luca, *Digital Discrimination: The Case of Airbnb.com* 4 (Harvard Bus. Sch., Working Paper No. 14-054, 2014) (finding that "non-black hosts charge approximately 12% more than black hosts for the equivalent rental" when controlling for all information visible on the website); *Uber Sued over Allegations of Discrimination, Harassment Against Blind Riders with Guide Dogs*, CBS S.F. (Sept. 9, 2014, 7:28 PM), <http://sanfrancisco.cbslocal.com/2014/09/09/uber-sued-over-allegations-of-discrimination>

bears the risk when shared property is damaged or when shared property damages others?<sup>27</sup>

To answer these important questions, we must first answer a more fundamental question: what does it mean to “share” property? In the rush to label the sharing economy as good or bad, both sides of the debate have largely overlooked this question.<sup>28</sup> We may have an intuitive sense that occasionally offering space on your couch for free to strangers on Couchsurfing is different than continuously renting out your rent-controlled apartment to paying strangers on Airbnb. But what distinguishes these? Is there something truly “innovative” about these activities, or are they simply the same as existing activities, made superficially unfamiliar by the veneer of technology? If the activities are different—both from each other and from other activities that the law regulates, such as operating a hotel—are those differences legally significant enough to justify different regulatory responses?

The debate over the sharing economy thus remains frustrating and controversial in large part because we lack a doctrinally cohesive and normatively satisfying way of talking about the underlying activities occurring within the sharing

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-harassment-against-blind-riders-with-guide-dogs/ [http://perma.cc/66M6-RE7U] (describing a lawsuit filed in federal court by a blind plaintiff alleging that Uber drivers violated state and federal disabilities laws by refusing to pick up and mistreating blind passengers with guide dogs); see also Anand Giridharadas, *Is Technology Fostering a Race to the Bottom?*, N.Y. TIMES (June 1, 2012), [http://www.nytimes.com/2012/06/02/us/02iht-currents02.html?\\_r=2&AE7Z-MKBV](http://www.nytimes.com/2012/06/02/us/02iht-currents02.html?_r=2&AE7Z-MKBV) (“‘The consumer has the right to make their own choices about whom they hire to do work,’ said Ms. Busque, the founder. She described the possibility of discrimination in the choices as an ‘interesting perspective’ that she found unlikely, and one that, in effect, is not TaskRabbit’s problem.”) (quoting the founder of Taskrabit).

27. See, e.g., 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?pagewanted=all&\\_r=1](http://www.nytimes.com/2012/04/14/your-money/relayrides-accident-raises-questions-on-liabilities-of-car-sharing.html?pagewanted=all&_r=1) [http://perma.cc/9SK8-CA5V] (describing the legal issues raised by a fatal car accident involving a car driven by a RelayRides renter).

28. Even those commentators who have recognized that this is a question that needs to be asked have not suggested how it should be answered. See, e.g., Emily Badger, *Why It’s so Hard to Figure out the Sharing Economy’s Winners and Losers*, CITYLAB (Feb. 10, 2014), <http://www.citylab.com/work/2014/02/why-its-so-hard-figure-out-sharing-economys-winners-and-losers/8338/> [http://perma.cc/AU9F-8RGU] (noting that in order to compare activities in the sharing economy with those outside of it, and do things like determine appropriate regulation or evaluate economic impact, “it would certainly help if one of them didn’t exist in a legal netherworld”).

economy. The activities blur the familiar binary divisions—personal and commercial, gratuitous and nongratuitous, formal and informal—that the law employs to characterize human activities.<sup>29</sup> Furthermore, sharing economy activities combine features of familiar property law forms—such as leases and licenses—in ways that may not readily correspond to categories within existing regulatory structures.<sup>30</sup>

Developing a conceptual framework to ground the discourse about the sharing economy is critical from both a theoretical and practical perspective. Without such a framework, any judgment about the sharing economy's social value, or any attempt to regulate it, are incomplete and confusing at best, and possibly inaccurate or counterproductive.<sup>31</sup> Furthermore, as the sharing economy becomes an increasingly dominant mode of economic activity, the need for analytical clarity about the activities occurring within it becomes even more crucial. By some counts, there are over 10,000 companies that are part of the sharing economy.<sup>32</sup>

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29. See *infra* Section I.A. Inconsistencies in the very language used to describe activities occurring in the sharing economy reveal the lack of definitional clarity: for example, users of Airbnb may say that they “booked a place on Airbnb,”—the language of license—or that they “rented an apartment on Airbnb”—the language of leaseholds. Compare Jeremy, *Review for Tiny Zen Cabin in Heart of Austin*, AIRBNB, <https://www.airbnb.com/rooms/1024819?s=hc0y> [<https://perma.cc/5ZXG-L9QT>] (“Easy to book stay, charming neighborhood (Hyde Park) and nice Japanese style garden . . .”) (emphasis added), with Cody, *Review for Modern Downtown Loft on 6th St*, AIRBNB, <https://www.airbnb.com/rooms/347736?s=hc0y> [<https://perma.cc/U5YS-2SD2>] (“Awesome apartment . . . I would 100% rent from Jason again if I were visiting Austin.”) (emphasis added).

30. See *infra* Section II.A.

31. See, e.g., Emily Alpert Reyes, *Los Angeles Gives Hosts, Neighbors Mixed Signals on Short-term Rentals*, L.A. TIMES (Feb. 7, 2015, 10:00 AM), <http://www.latimes.com/local/california/la-me-adv-illegal-rentals-20150208-story.html#page=1> [<http://perma.cc/UL8W-H8NK>] (describing the situation in Los Angeles, where “hundreds of lodging businesses registered to pay taxes in neighborhoods where they are generally barred”). “If someone wants to rent out a property for short stays, ‘the Department of Building and Safety will tell you that you can’t, and the finance department tells you to send your taxes . . . . It’s really a conundrum.” *Id.* (quoting a property owner in the area).

32. Stein, *supra* note 12, at 34. Some commentators have attempted to compile together lists of companies by category. See, e.g., COLLABORATIVE CONSUMPTION DIRECTORY, <http://www.collaborativeconsumption.com/directory/> [<http://perma.cc/7QKJ-3M56>]; Jeremiah Owyang, *The Master List of the Collaborative Economy: Rent and Trade Everything*, WEB STRATEGY: BLOG (Feb. 24, 2013), <http://www.web-strategist.com/blog/2013/02/24/the-master-list-of-the-collaborative-economy-rent-and-trade-everything/> [<http://perma.cc/7CNH-SJ9V>]. However, any estimate of the number of participants in the sharing economy is necessarily subject to a wide margin of error. As discussed *infra* notes 88–93 and

Airbnb has more listings for lodging than the world's largest hotel chains<sup>33</sup> and Uber's annual revenues of \$500 million in San Francisco exceed that of the city's traditional taxi market.<sup>34</sup> While informal sharing and bartering of goods and services have occurred throughout history, the scale of today's sharing activities is vastly expanded. In terms of the number of individuals engaging in the activity, more than a quarter of Americans have participated in a sharing-economy transaction<sup>35</sup>—and the types of property that are being shared range from cars and kayaks to driveways and designer villas.<sup>36</sup>

This Article focuses on those activities taking place within the sharing economy which I call “property-sharing” activities. Property sharing is when property owned or possessed by Party A is temporarily used or accessed by Party B (either exclusively or simultaneously with A), with ownership or possession

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accompanying text, depending on how the sharing economy is defined, the count of participants (both companies and users) will vary. Furthermore, any count is likely to be potentially both an underestimate, since many of these companies are online platforms, with new entrants being developed and marketed faster than the statistics tracking them, and an overestimate, since companies in this arena also fail to gain a user following or needed funding or are merged with other companies. *See, e.g.*, Ryan Lawler, *RelayRides Acquires Wheelz to Boost Inventory and Improve Hardware for Its Peer-to-Peer Car Rentals*, TECHCRUNCH (May 14, 2013), <http://techcrunch.com/2013/05/14/relayrides-acquires-wheelz/> [<http://perma.cc/TJT2-Z6CC>] (describing the merger of two peer-to-peer car-sharing companies, RelayRides and Wheelz).

33. VICKI STERN ET AL., BARCLAYS, HOTELS: IS AIRBNB A GAME-CHANGER? 1, 13 (2015) [hereinafter BARCLAYS REPORT] (reporting that Airbnb is predicted to double in market share in next twelve months and already has seventeen percent share of “hotel” rooms in NYC). *See also* Gregory Ferenstein, *Uber and Airbnb's Incredible Growth in 4 Charts*, VENTUREBEAT (June 19, 2014, 6:00 AM), <http://venturebeat.com/2014/06/19/uber-and-airbnbs-incredible-growth-in-4-charts/> [<http://perma.cc/863R-9WL6>] (charting Airbnb's listings growth, from 50,000 in 2011 to 550,000 in 2014).

34. Blodget, *supra* note 2.

35. *See, e.g.*, *Top 5 Coolest “Sharing Economy” Services You Need in Your Life*, SOCIALDRIVER (Apr. 10, 2014), <http://socialdriver.com/2014/04/10/top-5-coolest-sharing-economy-services-need-life/> [<http://perma.cc/D5TD-M6FX>] (citing studies showing that approximately a quarter of Americans have taken part in a sharing economy transaction). *See also* Tomio Geron, *Airbnb and the Unstoppable Rise of the Sharing Economy*, FORBES (Jan. 23, 2013), <http://www.forbes.com/sites/tomiogeron/2013/01/23/airbnb-and-the-unstoppable-rise-of-the-share-economy/> [<http://perma.cc/2KJR-7M4G>] (estimating 2013 revenue from the sharing economy to be \$3.5 billion, an increase of twenty-five percent from the previous year).

36. *See, e.g.*, RELAYRIDES, <https://relayrides.com/> [<https://perma.cc/HB7D-GPLL>] (cars); GEARCOMMONS, <http://gearcommons.com/> [<http://perma.cc/U5KK-XY99>] (kayaks); JUSTPARK, <https://www.justpark.com/> [<https://perma.cc/5LV2-Y5UV>] (driveways); BEHOMM, <https://www.behomm.com/hello.html> [<https://perma.cc/959K-KYYF>] (designer villas).

returning to Party A after an agreed-upon period of time.<sup>37</sup> While recognizing that this type of activity makes up only part of the overall sharing economy,<sup>38</sup> and that the rapid pace of innovation in the sharing economy is a challenge to developing any fixed taxonomy, this Article focuses on property sharing because it represents a wide swath of activity desperately in need of definitional clarity and legal analysis.

Although scholarship on an owner's right to include and other related scholarship<sup>39</sup> provides valuable insights into the broad themes of inclusion, cooperation, and sharing in property law—and there is no shortage of commentary on the virtues and vices of the sharing economy in the popular media<sup>40</sup>—the existing literature has not yet grappled with this fundamental question of what it means to share property in the context of the sharing economy.

This Article makes an important contribution to the

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37. As will be discussed in more detail *infra* Section II.A, this conception of property sharing, while not the only possible framing mechanism, is intentionally broad, since property sharing in this sense encompasses a wide array of existing property law doctrines that provide a useful analytical foundation for understanding how sharing is treated in property law. Furthermore, this definition is broad enough to capture a wide range of the activities occurring within the sharing economy without a priori assigning a specific legal designation to them.

38. A large segment of the sharing economy involves services and the sharing of non-property assets such as money or time; this is often referred to as the “gig economy.” See *infra* Section I.B.1 for further discussion of the gig economy.

39. See Daniel B. Kelly, *The Right to Include*, 63 EMORY L.J. 857, 871 (2014) (discussing “sharing” as one of the ways property owners exercise their right to include and how formal inclusion mechanisms of contractual obligations or property rights provide more certainty than informal mechanisms such as licenses or waivers). See also Rashmi Dyal-Chand, *Sharing the Cathedral*, 46 CONN. L. REV. 647 (2013); HANOCH DAGAN, *PROPERTY: VALUES AND INSTITUTIONS* (2011) (discussing various forms of sharing as part of broader common law property traditions).

40. See, e.g., Dean Baker, *Don't Buy the “Sharing Economy” Hype: Airbnb and Uber are Facilitating Ripoffs*, GUARDIAN (May 27, 2014, 7:30), <http://www.theguardian.com/commentisfree/2014/may/27/airbnb-uber-taxes-regulation> [<http://perma.cc/DZA7-7HZH>] (suggesting that by allowing people to evade taxes and regulations, sharing economy companies like Uber and Airbnb are “not a net plus to the economy and society”); Ben Schiller, *How the Sharing Economy Could Help the Poorest Among Us*, FAST COMPANY, (Mar. 16, 2015, 11:57 AM), <http://www.fastcoexist.com/3043531/how-the-sharing-economy-could-help-the-poorest-among-us> [<http://perma.cc/X2LU-E7EM>] (citing research indicating that lower-income groups may benefit from activities such as car sharing because of the lower costs of renting rather than owning); see also Reich, *supra* note 14 (criticizing the sharing economy as the “share-the-scrap-economy”); Roose, *supra* note 15 (suggesting the sharing economy is based on economic desperation, not peer-to-peer trust).

nascent legal scholarship on the sharing economy by unpacking the activities taking place within the sharing economy and developing a conceptual framework and taxonomy of sharing that brings clarity and coherence to the discourse about it. Policymakers, platforms, and participants in the sharing economy have been “talking past each other”<sup>41</sup> for too long: by being more precise about what we mean when we talk about the sharing economy, we can move past the rhetoric and better assess both the property-sharing activities occurring within it and the proposed regulatory responses. This Article comprehensively analyzes property-sharing activities and situates these activities with respect to both existing legal institutions and shifting social norms. By doing so, this Article provides an essential foundation for future scholarship on the sharing economy, as well as for policymakers, platforms and participants who need a common language to move the debate about the sharing economy forward.

This Article proceeds as follows. Part I provides an overview of the social norms that ground our understanding of sharing as a mode of human relations. It continues with a discussion of the sharing economy, with a focus on the property-sharing activities within it. Part II delves into the legal context for property sharing. Focusing primarily on property law doctrines that implicate sharing, such as leases and licenses, but also considering nonproperty law doctrines such as contracts and informal norms, this Part considers how the law recognizes and responds to sharing. This Part also considers how three specific doctrinal areas of law—the law of roommates, zoning and accessory uses, and residential rental restrictions—might inform our understanding of property sharing. Part III develops a heuristic analysis to help focus the discourse about property sharing on the underlying characteristics that are most informative to situating it with respect to existing legal forms and shifting social norms. Part IV explores the normative and practical implications of the property-sharing framework developed herein, including how it can help advance the debate over appropriate regulatory

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41. 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> [http://perma.cc/77RM-U27Z] (quoting an Airbnb representative’s comment about discussions between the company and the New York City Council).

responses to the sharing economy. This Article concludes by exploring the normative and practical implications of the property-sharing framework developed herein, including how it can help advance the debate over appropriate regulatory responses to the sharing economy and how it might inform broader property law concepts.

## I. THE SOCIAL CONTEXT FOR PROPERTY SHARING

### A. *Defining Sharing*

The word “sharing” has positive connotations, invoking informal and gratuitous acts in the minds of many who hear the word.<sup>42</sup> The term “sharing economy” has drawn criticism for precisely this reason, since much of it involves monetary transactions and commercial activities, which is not what most people typically think of when they think of sharing.<sup>43</sup>

But sharing as a mode of human relations is more than just gratuitous and informal acts of kindness. Sharing can be liberating, as in the case of microfinance, or it can be enslaving, as with sharecropping. While both involve sharing, the former is considered beneficial to society and the latter is not; accordingly, how we conceive of and respond to the two types of sharing is very different.

The definition of the verb “to share” reflects the multifaceted nature of sharing:

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42. The Sesame Street website, for example, has an entire section devoted to multimedia materials on sharing that parents can use with their children. *See, e.g., Cookie Monster Shares a Cookie*, SESAME STREET, [http://www.sesamestreet.org/playlists#media/playlist\\_8be87b10-9e1e-48a7-9c70-191a1f68e0e4](http://www.sesamestreet.org/playlists#media/playlist_8be87b10-9e1e-48a7-9c70-191a1f68e0e4) [<http://perma.cc/XG2Q-6GPA>].

43. *See, e.g.,* Rampell, *supra* note 17. (“[T]o call these activities ‘sharing’ is an insult to the intelligence of existing businesses, regulators and 5-year-olds everywhere.”). *See also* Anthony Kalamar, *Sharewashing Is the New Greenwashing*, OPEdNEWS (May 13, 2013, 1:10 PM), <http://www.opednews.com/articles/Sharewashing-is-the-New-Gr-by-Anthony-Kalamar-130513-834.html> [<http://perma.cc/4MUB-UC7K>] (“[Use of the term ‘sharing economy’] *disables the very promise of an economy based on sharing* by stealing the very language we use to talk about it, turning a crucial response to our impending ecological crisis into another label for the very same economic logic which got us into that crisis in the first place.”); Lieber, *supra* note 27 (noting that “using the Web to share your car is nothing at all like sharing your vacation pictures or household tools” and describing the potential liability of an individual who made their personal car available to users for a fee on RelayRides after one of the users died while driving the car).

Share (verb, transitive):

- (1) to divide and distribute in shares: apportion;
- (2) (a) to partake of, use, experience, occupy, or enjoy with others; (b) to have in common;
- (3) to grant or give a share in;
- (4) to tell (as thoughts, feelings, or experiences) to others.<sup>44</sup>

As these definitions illustrate, the concept of sharing encompasses a wide range of activities, from the gratuitous and informal—such as a child sharing his lunch with a classmate who forgot her own, to the commercial and monetized—such as an entrepreneur forming a corporation to share ownership with other investors.<sup>45</sup> Sharing may thus be best understood as having several bimodal axes, as illustrated in Figure 1 below.

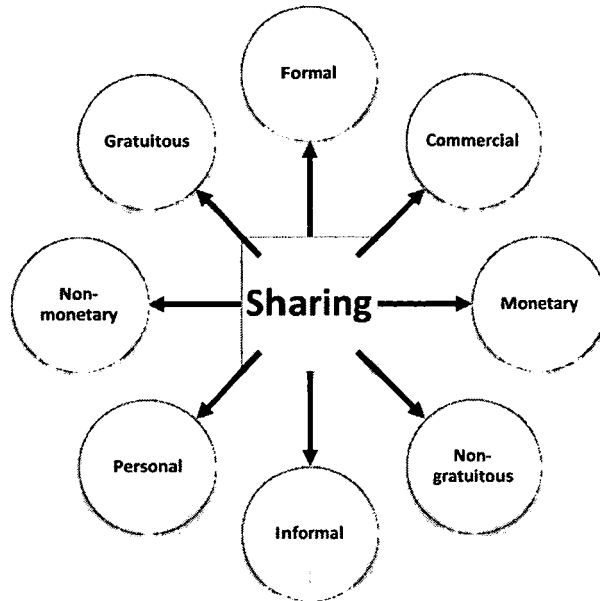
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44. *Share*, THE MERRIAM-WEBSTER DICTIONARY, <http://www.merriam-webster.com/dictionary/share> [<http://perma.cc/XA9S-EEJK>].

45. Some taxonomies in the legal scholarship appear to limit the use of the term “sharing” to gratuitous activities, and would categorize the latter activity as some other form of property inclusion, such as exchange. *See Kelly, supra* note 39, at 871–73. However, analytical inconsistencies in scholarly discussions suggest that the more comprehensive conception of sharing provided by the taxonomy herein is likely to provide valuable clarity. *See id.* at 872–73 (defining sharing as “entail[ing] a gratuitous transfer” to distinguish it from “exchange,” which is defined as a transfer with consideration; but including Airbnb and RelayRides as examples of sharing, despite the fact these are not typically gratuitous acts).



**FIGURE 1:  
THE FOUR BIMODAL AXES OF SHARING**



The eight characteristics of sharing above align on four bimodal axes (formal/informal, gratuitous/nongratuitous, monetary/nonmonetary, and commercial/personal) and provide an overarching structure for understanding sharing within a broader social and historical context. As discussed in more detail below, any particular act of sharing will be located somewhere along the continuum on each of these axes. While some of the bimodal categories may have a tendency to align, each axis should be considered independently, since sharing can involve any number of combinations of these modalities. For example, while sharing that is commercial is often also monetary, it may be nonmonetary, such as when it is conducted through a commercialized barter market. Similarly, while sharing that is personal is often nonmonetary, it may be monetary—for example, when coworkers who are carpooling share the cost of gas. This Section examines in more detail how the concept of sharing is shaped by these four sets of bimodal characteristics.

## 1. Gratuitous vs. Nongratuitous

Gratuitous sharing is sharing conducted without the expectation of consideration—monetary or nonmonetary<sup>46</sup>—or reciprocation.<sup>47</sup> Nongratuitous sharing, conversely, is conducted with the expectation of consideration or reciprocation. Gratuitous sharing has a long history in both religious and social hospitality customs and traditions in many cultures. Religions and cultures from the Middle East to the Scottish Isles have long encouraged their members to take in travelers and provide meals and a place to sleep to strangers.<sup>48</sup> Today, gratuitous sharing is often thought of synonymously with altruistic giving, which may occur in the context of either

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46. Those taking an economic approach might question the distinction between gratuitous and nongratuitous sharing, since they would “assume[] that everyone at bottom has the same motive for doing everything: to maximize his or her utility. This is also true of the altruistic donor,” since he or she derives utility from helping another. Robert A. Katz, *Can Principal-Agent Models Help Explain Charitable Gifts and Organizations?*, 2000 WIS. L. REV. 1, 8 (2000) (discussing Eric Posner’s scholarship on gratuitous promises). Nonetheless, scholars acknowledge there is some meaningful distinction between categories of donors due to the specific intent of the altruistic donor to improve the donee’s well-being, versus the selfish donor’s intent to specifically improve her own well being. *Id.* (“The altruistic donor necessarily respects the recipient as an end in himself. The non-altruistic or wholly self-regarding donor, by contrast, is either indifferent to the recipient or treats him solely as a means to generate utility for herself.”).

47. While it is usually clear whether consideration is expected in exchange for an act of sharing, whether reciprocation is expected may be more difficult to discern. For example, someone may share their spare bedroom with an old college acquaintance traveling through town and expect no consideration for the act of sharing, thus making it appear gratuitous. However, perhaps the host expects to be traveling in the future in the college acquaintance’s town and has offered their spare bedroom because they expect a return offer in the future. In that case, the transaction would fall closer to the nongratuitous end of the axis. While raising interesting philosophical questions about the line between gratuitous and nongratuitous, it is beyond the scope of this Article to answer these questions; rather, these examples suffice to demonstrate that, just as with the other axes of sharing, the gratuitous/nongratuitous axis is less a black and white, either/or axis than a gradation of grays. For an illuminating discussion of the law of gifts and the concept of a reciprocation norm, see Eric A. Posner, *Altruism, Status, and Trust in the Law of Gifts and Gratuitous Promises*, 1997 WIS. L. REV. 567 (1997).

48. See PETER HEINE, *FOOD CULTURE IN THE NEAR EAST, MIDDLE EAST, AND NORTH AFRICA* 4 (Ken Albala ed., 2004) (describing an Islamic tradition of hosting and providing meals to travelers for three days without requesting the purpose of the traveler’s visit); see also Neill Martin, *Friend or Foe? Hospitality and the Threshold in Scottish Tradition*, UNIV. OF EDINBURGH 1 [http://www.ed.ac.uk/polopoly\\_fs/1.64000!/fileManager/FriendorFoe.pdf](http://www.ed.ac.uk/polopoly_fs/1.64000!/fileManager/FriendorFoe.pdf) [<http://perma.cc/LV9M-X5H9>] (“[I]n more geographically isolated regions, hospitality may also be simply a necessary and accepted dimension of a culture where third-party board and lodging provision did not exist.”).

religious or secular charitable activities.<sup>49</sup> Where a particular act of charitable sharing falls on the gratuitous/nongratuitous axis may depend on the motivations of the actor. For example, an individual may engage in charitable sharing for tax benefit or status-enhancing reasons, such as naming rights. Such motivations might be considered forms of nonmonetary consideration,<sup>50</sup> thereby putting these acts of sharing closer to the nongratuitous end of the axis. Other mixed-motive acts of sharing, such as the “trust-enhancing” gift giving discussed by Eric Posner in his scholarship, likely falls closer to the gratuitous end of the axis.<sup>51</sup>

## 2. Formal vs. Informal

Formal sharing is sharing that takes place as part of official, regulated society.<sup>52</sup> In other words, it is sharing that occurs within the confines of the applicable formalized legal systems, whether tax laws, zoning laws, employment regulations, health and safety ordinances, or other regulatory mechanisms.<sup>53</sup> Formal sharing includes most market-based, commercial sharing, as well as nonprofit or governmental institutions that enable nonmonetary sharing within official regulatory mechanisms. Thus, both Netflix, which charges members a fee for access to its content, and public libraries, which do not, can be considered forms of formal sharing,<sup>54</sup>

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49. Note that gratuitous sharing may actually be a result of mixed motivations, both altruistic and self-serving ones. See Posner, *supra* note 47 (discussing various types of gifts and charitable donations).

50. In addition, this type of altruistic sharing might fall closer to the nongratuitous end of the spectrum if the person engaging in the sharing is doing so because they expect reciprocation if they are ever victims of a disaster, or because they expect consideration in the form of religious dispensation or favor. Such motivations, however, are often very difficult to discern and untangle from altruistic motivations. See Posner, *supra* note 47, at 573–74 (noting that motivations for any particular gift are “usually mixed,” and may include altruism as well as other motivations, such as status enhancement).

51. See Posner, *supra* note 47, at 578 (“[T]rust’ means that X expects Y to keep a promise even if the law does not penalize Y for breaking it.”).

52. See SASKIA SASSEN, *THE GLOBAL CITY: NEW YORK, LONDON, TOKYO* 290–91 (2d ed. 2001) (discussing the difference between the formal economy and informal (or underground) economy in similar terms).

53. *Id.*

54. See *Netflix Terms of Use*, NETFLIX, <https://www.netflix.com/TermsOfUse> [<https://perma.cc/5XZH-ZA9E>] (describing Netflix’s membership and billing policies for its streaming services); *DVD Terms and Conditions*, NETFLIX, <https://www.netflix.com/dvterms> [<https://perma.cc/29DD-XCBL>] (describing

In contrast, informal sharing is associated with work and transactions that are “basically licit but take[] place outside the regulatory apparatus covering zoning, taxes, health and safety, minimum wage laws, and other types of standards.”<sup>55</sup> Sometimes referred to as the underground or shadow economy, the informal economy is often associated with developing nations or low-income, urban neighborhoods in the U.S.<sup>56</sup>

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Netflix’s membership and billing policies for its DVD rental service). *See also Get a Library Card*, FREE LIBR. PHILA., <https://know.freelibrary.org/MyResearch/register> [<https://perma.cc/TGA9-7TKZ>] (indicating that anyone who lives in the state of Pennsylvania can obtain a Free Library card for no charge, and that the card provides free access to borrow library books, DVDs, and audio materials, as well as access to electronic databases, streaming videos and music, and other materials).

55. SASSEN, *supra* note 52, at 290.

56. Scholars differ in their taxonomy with respect to this area. *See, e.g., id.* at 290 & nn.18–19 (defining the informal economy as described above, and including it as a subcategory of the overall “underground economy,” which also includes criminal activities (for example, drug sales, prostitution, etc.) and “tax evasion on licit forms of income”); Edgar L. Feige, *The Meaning and Measurement of the Underground Economy*, in *THE UNDERGROUND ECONOMIES* 13, 17 (Edgar L. Feige ed., 1989) (breaking down the “total unrecorded income” produced by the underground economy into three sources: “(1) income produced in prohibited economic activities deemed ‘illegal’ by the law of the land; (2) income produced in non-market (bartered) legal activities; and (3) income produced in legal market activities (monetary) that for various reasons escapes [official governmental measurement]”); Rolf Mirus & Roger S. Smith, *Canada’s Underground Economy: Measurement and Implications*, in *THE UNDERGROUND ECONOMY: GLOBAL EVIDENCE OF ITS SIZE AND IMPACT* 3, 6 (Owen Lippert & Michael Walker eds., 1997) (“A working definition of the underground economy would therefore be: economic activity which would generally be taxable were it reported to the tax authorities.”); Bruce Zagaris, *The Underground Economy in the US: Some Criminal Justice and Legal Perspectives*, in *THE UNDERGROUND ECONOMY: GLOBAL EVIDENCE OF ITS SIZE AND IMPACT*, *supra*, at 109, 109 (“The underground economy [is] defined as all off-the-books and un-regulated activity . . .”). Still other scholars resist any hard and fast definition at all. *See, e.g.,* Manuel Castells & Alejandro Portes, *World Underneath: The Origins, Dynamics, and Effects of the Informal Economy*, in *THE INFORMAL ECONOMY: STUDIES IN ADVANCED AND LESS DEVELOPED COUNTRIES* 11, 11–12 (Alejandro Portes et al. eds., 1989) (“The informal economy is a common-sense notion whose moving social boundaries cannot be captured by a strict definition without closing the debate prematurely . . . [T]he same concept [can] embrace such different situations as those of a street seller in Latin America and a software consultant moonlighting in Silicon Valley.”); SHUDHIR ALLADI VENKATESH, *OFF THE BOOKS: THE UNDERGROUND ECONOMY OF THE URBAN POOR* 8–9 (2006) (“[The underground economy is] a widespread set of activities, usually scattered and not well integrated, through which people earn money that is not reported to the government and that, in some cases, may entail criminal behavior. In other words, the unreported income can derive from *licit* exchange, such as selling homemade food or mowing a neighbor’s lawn, and *illicit* practices, such as advertising sexual favors or selling secondhand guns without a permit.”).

However, the informal economy operates at all levels of society, from software engineers moonlighting for a startup company to suburban teenagers babysitting for local families.<sup>57</sup>

The informal economy, while not as large in the U.S. as in some developing countries, is nonetheless a significant market force. According to one recent study, the informal economy generates almost 20% of revenues in the U.S.<sup>58</sup> As will be discussed in the next Subsection, much of the current criticism of the peer-to-peer transactions in the sharing economy—such as the lack of public safety regulations or labor and employment protections—echoes concerns raised about the informal economy. Thus, rather than it being a “necessary (and justified) response to high taxes and excessive regulation . . . [that] liberate[s] people from the state,” participation in the informal economy has been criticized as resulting in people being “cut off from true participation in an economy that will allow [them] to prosper.”<sup>59</sup>

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57. Giridharadas, *supra* note 26 (suggesting that activities taking place in the sharing economy appear similar to the types of activities associated with lower-income groups in the informal economy). “[T]hey buy packs of cigarettes and sell them as singles; they find houses to clean through cousins of a cousin; they rent out bedrooms to students; they stock up on cellphone credit and peddle sidewalk calls by the minute.” *Id.*

58. Joshua Zumbrun, *More Americans Work in the Underground Economy*, BLOOMBERG BUS. (Mar. 28, 2013), <http://www.bloomberg.com/bw/articles/2013-03-28/more-americans-work-in-the-underground-economy> [<http://perma.cc/8SLX-ZT22>] (citing a 2012 study that found 18–19% of income in the U.S. is not reported to the IRS, resulting in \$2 trillion in unreported income and an annual tax gap of \$450 billion to \$500 billion). Calculating the size of the underground economy is inherently difficult, since its “essential attribute is that it doesn’t show up in the numbers collected by government or reported by employers.” Andrew Leonard, *Inside the Shadow Economy—A Growing Underworld Bazaar*, NEW AM. MEDIA (Sept. 29, 2011), <http://newamericamedia.org/2011/09/inside-the-shadow-economy----a-growing-underworld-bazaar.php> [<https://perma.cc/NVV9-PU2V>].

59. Leonard, *supra* note 58; *see also*, Dzodzi Tsikata, *Toward a Decent Work Regime for Informal Employment in Ghana: Some Preliminary Considerations*, 32 COMP. LAB. L. & POL’Y J. 311, 312–13 (2011) (focusing on informal labor in Ghana, where over eighty percent of laborers are part of the informal market, and arguing that “the atmosphere of uncertainty created by informalization disables workers from insisting on their rights and protesting labor code violations” and advocating for a “new policy framework and interlocking pieces of legislation that address the conditions of different kinds of informal work, protect informal workers from abuse, [and] discourage the proliferation of those labor forms that do not conform to the principles of decent work, and establish effective law enforcement regimes”).

### 3. Monetary vs. Nonmonetary

Perhaps the most conceptually clear axis of sharing, the monetary/nonmonetary dichotomy, asks whether the sharing activity involves the exchange of money, either as consideration or as the item being shared.<sup>60</sup> Nonmonetary sharing activities may be informal and personal, such as when two families trade off childcare obligations on weekends. Other kinds of nonmonetary sharing are formal and commercial; for example, time banking systems have been established by several nonprofit organizations to allow participants to barter their services and “bank” useable time.<sup>61</sup> Nonmonetary sharing may occur on a one-off basis, such as when a backyard gardener with a summertime surplus of zucchini shares her bumper crop with neighbors; or it may be a longstanding, repeated activity, such as barn raising, in which members of some close-knit farming communities share labor and supplies to reconstruct barns.<sup>62</sup>

Categorizing sharing activities on the monetary/nonmonetary axis is often more straightforward than categorization on the other three axes of sharing. For example, paying an Airbnb host \$75 per night for her spare bedroom is a sharing activity at the monetary end of the axis. In contrast, when someone uses Couchsurfing to locate a place to sleep for the night, no money is exchanged between host and guest,<sup>63</sup> making it a sharing activity at the nonmonetary end of the

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60. Thus, while most gratuitous sharing will be nonmonetary, if the gratuitous sharing involves the sharing of money itself—such as when someone walking down the street gives \$1 to a panhandler—that would be a gratuitous, but monetary, transaction.

61. In a time banking system, individuals volunteer their time to perform activities for others and in return receive time credits that they can use to obtain services from other individuals; all time credits are equal, regardless of what activities are performed during the time. See JANELLE ORSI, PRACTICING LAW IN THE SHARING ECONOMY 268–69 (2012) (discussing time bank programs that operate in a number of U.S. cities and states).

62. See Connie Ann Kirk, *Barn Raising*, DICTIONARY OF AM. HIST., <http://www.encyclopedia.com/doc/1G2-3401800376.html> [<http://perma.cc/EM26-FTL7>] (describing the historic practice of barn raising and noting it still continues in some Amish communities today). This historic practice of barn raising has apparently inspired a modern sharing economy company, Barnraiser, which seeks to be the Kickstarter for sustainable food and farming projects. See BARNRAISER, <https://www.barnraiser.us/content/faq> [<https://perma.cc/Y9V8-CUdT>].

63. *Safety FAQ*, COUCHSURFING, <http://www.couchsurfing.com/about/faq/> [<http://perma.cc/R8V3-WHH8>] (“[H]ospitality on Couchsurfing is free. A host should never ask a guest to pay for their lodging, and a guest should not offer.”).

axis. Nonetheless, the sharing economy has introduced an element of gray, even on this relatively black and white axis of sharing. For example, the home-swapping website Love Home Swap provides a platform for people to swap homes—for free—with other users. However, to access the listings, users must pay a membership fee ranging from \$20 to \$68 per month.<sup>64</sup>

#### 4. Commercial vs. Noncommercial

The commercial/noncommercial dichotomy manifests itself in many areas of the law and is often a determinative factor for when government oversight of an activity is appropriate. For example, under the First Amendment, commercial speech has traditionally been entitled to less protection from government regulations than noncommercial speech.<sup>65</sup> In contracts law, portions of the Uniform Commercial Code apply only to merchants,<sup>66</sup> who are defined in terms of their engagement in commercial activity.<sup>67</sup> In tort law, the duty of care owed to guests varies depending on whether the property is a commercial establishment or a private residence.<sup>68</sup> In copyright

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64. LOVEHOMESWAP, <http://www.lovehomeswap.com/choose> [<http://perma.cc/6SHH-42JT>]. Similarly, the sharing economy company TradeYa allows people to post goods and services on its website which then can be traded (bartered) for other goods and services listed; however, when a barter is conducted, the platform charges a \$3 transaction fee to users on both sides of the trade. Lora Kolodny, *L.A. Startup TradeYa Helps People Swap Goods and Services Online*, WALL STREET J.: VENTURE CAP. DISPATCH (Feb. 3, 2014, 3:28 PM), <http://blogs.wsj.com/venturecapital/2014/02/03/1-a-startup-tradeya-helps-people-swap-goods-and-services-online/> [<http://perma.cc/EG9C-2KVH>].

65. See, e.g., *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 456 (1978) (“[W]e instead have afforded commercial speech a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values, while allowing modes of regulation that might be impermissible in the realm of noncommercial expression.”).

66. See, e.g., U.C.C. § 2-314(1) (AM. LAW INST. & UNIF. LAW COMM’N 2014) (implying a warranty of merchantability in the sale of goods only “if the seller is a merchant with respect to goods of that kind”).

67. *Id.* § 2-104(1) (defining a merchant as a “person who deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction”).

68. See RESTATEMENT (SECOND) OF TORTS § 343, cmt. e (1965) (“One who enters a private residence even for purposes connected with the owner’s business, is entitled to expect only such preparation as a reasonably prudent householder makes for the reception of such visitors. On the other hand, one entering a store, theatre, office building, or hotel, is entitled to expect that his host will make far greater preparations to secure the safety of his patrons than a householder will make for his social or even his business visitors.”).

law, courts consider the noncommercial nature of the use by an alleged infringer in determining whether a defense of fair use is available.<sup>69</sup>

However, while the commercial/noncommercial duality is recognized in a wide range of contexts, determining where to draw the line between the two is challenging. As the Supreme Court has acknowledged, “between the[] poles” of activities that warrant government oversight and those that do not, “lies a broad range of human relationships that may make greater or lesser claims to constitutional protection from particular incursions by the State.”<sup>70</sup>

While determining what qualifies as commercial versus noncommercial (or personal) will necessarily be a fact-specific inquiry, a recent study by the Creative Commons provides some insight into how these terms might be applied with respect to sharing.<sup>71</sup> The study considered what the online population—both users and creators of content—understood the label “noncommercial” to mean with respect to uses of online content and copyrighted material.<sup>72</sup> Although the Creative Commons study found that there was no single, agreed upon definition of noncommercial use, the study found there is consensus about what type of use qualified as commercial.<sup>73</sup> A majority of online users and content creators categorized an activity as a commercial use if the actor was reaping commercial advantage or making money from the material (either directly or indirectly).<sup>74</sup> Furthermore, the majority of those polled believed that use of online content and copyrighted material for government or charitable purposes

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69. See *A&M Records v. Napster, Inc.*, 239 F.3d 1004, 1015 (2001) (“This ‘purpose and character’ element also requires the district court to determine whether the allegedly infringing use is commercial or noncommercial. A commercial use weighs against a finding of fair use but is not conclusive on the issue.”) (internal citation omitted).

70. *Roberts v. U.S. Jaycees*, 468 U.S. 609, 620 (1984) (citing competing considerations such as personal and familial autonomy). Relationships that implicate freedom of association concerns “are distinguished by such attributes as relative smallness, a high degree of selectivity in decisions to begin and maintain the affiliation and seclusion from others in critical aspects of the relationship.” *Id.*

71. CREATIVE COMMONS, DEFINING “NONCOMMERCIAL”: A STUDY OF HOW THE ONLINE POPULATION UNDERSTANDS “NONCOMMERCIAL USE,” (2009), [http://mirrors.creativecommons.org/defining-noncommercial/Defining\\_Noncommercial\\_fullreport.pdf](http://mirrors.creativecommons.org/defining-noncommercial/Defining_Noncommercial_fullreport.pdf) [<http://perma.cc/PVS3-8L46>].

72. *Id.* at 10.

73. *Id.* at 11.

74. *Id.*



was less commercial than for-profit uses but still “not decidedly ‘noncommercial.’”<sup>75</sup>

The sharing economy’s “people as businesses” model exacerbates the challenge of demarcating the commercial from the personal.<sup>76</sup> For example, the personhood values<sup>77</sup> implicated in owning a home—as opposed to owning a hotel or retail store—have led some scholars to consider it “one of our quintessential constitutive resources, . . . a priori immune from public regulation.”<sup>78</sup> Yet when homeowners increasingly use their homes in much the same way as a hotel, as some high-volume hosts have done on Airbnb,<sup>79</sup> that *a priori* assumption of immunity from regulation comes into question. The next Section considers in more detail how the sharing economy is increasingly blurring the distinctions between the commercial and personal axis, as well as the other three bimodal characteristics of sharing.

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75. *Id.* at 56 (discussing polling data showing that while uses involving making money and advertising are definitely considered commercial by the majority of those polled, uses by individuals, organizations, and for charitable purposes are considered by a significant percentage of those polled less commercial, “but not decidedly ‘noncommercial’”). See also *A&M Records v. Napster, Inc.*, 239 F.3d 1004, 1015 (2001) (holding that “[d]irect economic benefit” is not necessarily a characteristic of commercial use). “[C]ommercial use is demonstrated by a showing that repeated and exploitative unauthorized copies of copyrighted works were made to save the expense of purchasing authorized copies.” *Id.* As the district court in *Napster* put it, although no money or other consideration was exchanged by Napster users, the activity is commercial because “Napster users get for free something they would ordinarily have to buy.” *Id.* (internal citations omitted).

76. See, ORSI, *supra* note 61, at 437 (“Presumably, or preferably anyway, laws will not interfere to tell us that we may not make a large pot of soup for our family, or even for our 30 neighbors. Laws do, however, sometimes prevent people without permits from making large pots of soups for strangers. As usual, we don’t know exactly where the legal line is drawn, but we can get clues from the courts.”).

77. The personhood value of property has been theorized most thoroughly by Margaret Radin, who argues that when people possess property they feel is “almost part of themselves,” the property should be understood as “part of the way [they] constitute [them]selves as continuing personal entities in the world.” Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957, 959 (1982). Radin specifically identifies one’s home as the type of property that may implicate such personhood values. *Id.*

78. DAGAN, *supra* note 39, at 49.

79. See William Alden, *The Business Tycoons of Airbnb*, N.Y. TIMES MAG. (Nov. 25, 2014), <http://www.nytimes.com/2014/11/30/magazine/the-business-tycoons-of-airbnb.html> [<http://perma.cc/JRE4-JERP>] (describing a New York City resident who has an apartment which he “uses . . . solely for Airbnb, generating up to \$6,000 a month in profit”).

### B. *The Sharing Economy*

Despite the longstanding prevalence of sharing throughout society, it is only recently that the idea of a “sharing economy” has emerged and captured the attention of popular culture,<sup>80</sup> financial markets,<sup>81</sup> and scholars.<sup>82</sup> A number of overlapping but not necessarily interchangeable terms, such as the “peer-to-peer marketplace” and “micro-entrepreneurship,”<sup>83</sup> have also emerged to describe this sector of society and the economy. Labels are powerful agenda setters, and the intuitively positive connotations of the word “sharing” may not make it the most objective moniker.<sup>84</sup> However, as the discussion in the previous

80. See *Portlandia: Ecoterrorists*, *supra* note 3 (parodying the extremes some participants in the sharing economy may go to).

81. See, e.g., BARCLAYS REPORT, *supra* note 33.

82. See, e.g., Victoria Bellotti et al., *A Muddle of Models of Motivation for Using Peer-to-Peer Economy Systems*, CHI 2015 (Apr. 21, 2015), [http://www.researchgate.net/publication/275653007\\_A\\_Muddle\\_of\\_Models\\_of\\_Motivation\\_for\\_Using\\_Peer-to-Peer\\_Economy\\_Systems](http://www.researchgate.net/publication/275653007_A_Muddle_of_Models_of_Motivation_for_Using_Peer-to-Peer_Economy_Systems) [<http://perma.cc/3NBQ-KRS2>]. While legal scholarship on the sharing economy is somewhat limited to date, recent articles discussing regulatory issues in the sharing economy have begun to emerge, and additional scholarship is inevitably forthcoming; see also Stephen R. Miller, *First Principles for Regulating the Sharing Economy*, HARV. J. LEGIS. (forthcoming 2016), <http://ssrn.com/abstract=2568016> [<http://perma.cc/66EF-C87A>]; Sarah Schindler, *Regulating the Underground: Secret Supper Clubs, Pop-Up Restaurants, and the Role of Law*, 82 U. CHI. L. REV. DIALOGUE 16 (2015).

83. Other terms used to describe the sharing economy include “collaborative consumption,” the “mesh economy,” and the “on-demand economy.” See, e.g., Rachel Botsman, *The Sharing Economy Lacks a Shared Definition*, FAST COMPANY (Nov. 21, 2013, 7:30 AM), <http://www.fastcoexist.com/3022028/the-sharing-economy-lacks-a-shared-definition> [<http://perma.cc/ED5D-DWYR>] (providing one commentator’s definition of four related, but arguably distinct, terms most frequently used when referring to this sector of the economy: collaborative economy, collaborative consumption, sharing economy, and peer economy); see also GANSKY, *supra* note 13, at 5 (describing sharing platforms as part of “the Mesh”); Sophie Curtis, *Sharing Economy to Create a Nation of ‘Microentrepreneurs,’* TELEGRAPH (Nov. 26, 2014, 6:00 AM), <http://www.telegraph.co.uk/technology/news/11253016/Sharing-economy-to-create-a-nation-of-microentrepreneurs.html> [<http://perma.cc/5PE7-9AKA>] (describing research predicting that the sharing economy has the potential to transform the UK into a “nation of ‘microentrepreneurs’”); *There’s an App for That*, ECONOMIST, (Jan. 3, 2015), <http://www.economist.com/news/briefing/21637355-freelance-workers-available-moments-notice-will-reshape-nature-companies-and> [<http://perma.cc/N7HQ-CYC3>] (“The on-demand economy is in many ways a continuation of what has been called the ‘sharing economy.’”).

84. See *supra* note 43 and accompanying text (discussing the public relations efforts by sharing economy companies to associate themselves with the positive connotations of the word). See also Kalamar, *supra* note 43 (contending that the amorphous and ever-growing umbrella of the sharing economy has encouraged for-profit companies that do not represent the true collegiality behind sharing to

Section illustrates, a robust understanding of sharing allows us to conceive of it along numerous axes, reflecting a wide range of activities, from the informal and nonmonetary to the nongratuitous and commercial; the term sharing economy is thus adopted here in recognition of the broad scope of the word “sharing.”<sup>85</sup>

The lack of consensus about terminology is driven in large part by the lack of consensus about how to define the sharing economy.<sup>86</sup> Those committed to what might be called the platonic ideal of sharing would include only nonmonetary sharing in their definition of the sharing economy.<sup>87</sup> Such nonmonetary sharing may be formal—as with the Portland Tool Library<sup>88</sup>—or informal, such as when neighbors agree to loan each other gardening equipment on an ad hoc basis. Some would agree to also include commercialized sharing in this version of the sharing economy, as long as it is nonmonetary. For example, a company like Couchsurfing, which connects

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rebrand themselves as part of the sharing economy, thereby engaging in “sharewashing” analogous to the “greenwashing” engaged in by corporations trying to appeal to environmentally conscious consumers).

85. Furthermore, the term “sharing economy” appears to be the de facto term being used by regulators and policymakers, as well as the media and the companies themselves. See, e.g., Nicole DuPuis, *Cities’ Sentiment Toward Sharing Economy is Varied and Evolving*, NAT’L LEAGUE OF CITIES: CITIESPEAK (Dec. 1, 2014), <http://citysspeak.org/2014/12/01/cities-sentiment-toward-sharing-economy-is-varied-and-evolving/> [<http://perma.cc/7E4N-JUNE>] (discussing a National League of Cities study on sentiment and direction of home-sharing and ride-sharing regulations in the thirty most populous U.S. cities). However, the Associated Press recently announced it will now use the term “ride-hailing” as opposed to “ride-sharing” when referring to companies like Uber and Lyft. Abigail Zener, *The AP Bans the Term “Ride-Sharing” for Uber & Lyft*, GREATER WASH. (Jan. 14, 2015), <http://greatergreaterwashington.org/post/25405/the-ap-bans-the-term-ride-sharing-for-uber-lyft/> [<http://perma.cc/3VXC-NLZU>].

86. Even the CEO of Couchsurfing, a platform that most commentators consider part of the sharing economy, has indicated a reluctance to define the term. See Samantha Shankman, *How Couchsurfing Plans to Take Back Its Corner of the Sharing Economy*, SKIFT (Aug. 14, 2014, 7:30 AM), <http://skift.com/2014/08/14/how-couchsurfing-plans-to-take-back-its-corner-of-the-sharing-economy/> [<http://perma.cc/3SRG-PY63>] (“[Couchsurfing’s new CEO] is hesitant to lop Couchsurfing into the larger sharing economy, saying, ‘I think it’s a term that people use in different ways to mean different things.’”).

87. See, e.g., Kalamar, *supra* note 43 (defining the “true” sharing economy as “the non-monetary movement of goods and services between friends and within communities”).

88. See *What is a Tool Library?*, NE. PORTLAND TOOL LIBR., <http://www.neptl.org/what/> [<http://perma.cc/2W4T-Z5TZ>] (“We lend out free of charge an ever-growing inventory of home-repair and gardening tools to Northeast residents and community groups.”).

travelers with a community of hosts around the world willing to offer them a free place to sleep for the night,<sup>89</sup> would be included as part of the nonmonetary version of the sharing economy.

However, the majority of platforms, companies, and individuals labeling themselves as part of the sharing economy do not fit within the idealized, nonmonetary version of the sharing economy.<sup>90</sup> Rather, much of the sharing economy might be more accurately described as the “sharing-for-profit economy.”<sup>91</sup> Four characteristics are associated with this conception of the sharing economy. First, it involves the monetization of assets which were previously not monetized. Second, it focuses on providing access to those assets, rather than ownership. Third, it relies on technology to make access quicker, cheaper, and more desirable than ownership by disaggregating—in both time and space—the assets being shared. Fourth, it involves a transaction between two individuals (peer-to-peer, or P2P), rather than a transaction between an individual and a business (business-to-consumer, or B2C); a third-party entity, however, is often involved as the technological platform for the transaction.

### 1. Monetization of Previously Underutilized Assets

The economic driver of the sharing economy is what some have referred to as the commodification of “idle capacity,”<sup>92</sup> or

89. *About Us*, COUCHSURFING, <http://www.couchsurfing.com/about/about-us/> [<http://perma.cc/QW2B-7QLX>].

90. Both proponents and critics of the sharing economy appear to agree on this point. See Slee, *supra* note 15 (“The entrepreneurial wing of this movement dominates more community-minded initiatives . . . [leading] to rapidly changing business models, leaving the original ideas of community-based sharing farther and farther behind as sharing economy models have become attractive to large enterprises.”); Arun Sundararajan, *Why The Government Doesn't Need to Regulate the Sharing Economy*, WIRED (Oct. 22, 2012, 1:45 PM), <http://www.wired.com/2012/10/from-airbnb-to-coursera-why-the-government-shouldnt-regulate-the-sharing-economy/> [<http://perma.cc/F4N6-PVLT>] (“We may call it the ‘sharing’ economy (its philosophical roots are in peer-to-peer), but the services in it aren’t free or reciprocal—these are real markets in which you pay for what you get.”).

91. See, e.g., Fehrenbacher, *supra* note 11 (presenting a pictograph of “the profit in sharing” and illustrating some of the items in the “collaborative home” that can be monetized under the headline, “Make Money from Your Unused Stuff!”).

92. See Toon Meelen & Koen Frenken, *Stop Saying Uber is Part of the Sharing Economy*, FAST COMPANY (Jan. 14, 2015, 7:56 AM), <http://www.fastcoexist.com/3040863/stop-saying-uber-is-part-of-the-sharing->

the monetization of previously unused or underused assets.<sup>93</sup> The types of assets being monetized fall into two general categories: goods or services.<sup>94</sup> The latter category is often referred to as the “gig economy,” in which services are provided on an ad hoc basis by individuals offering their labor and time in exchange for a fee.<sup>95</sup> Examples of well-known companies that involve the sharing of goods include Airbnb, Couchsurfing, JustPark, RelayRides, and 1000Tools.<sup>96</sup> Other companies—such as Uber, Lyft, Taskrabbit, DogVacay, and Amazon’s Mechanical Turk—facilitate the sharing of services and are

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economy [<http://perma.cc/48T4-77HT>] (defining the sharing economy as “consumers (or firms) granting each other temporary access to their underutilized physical assets (‘idle capacity’), possibly for money”). The authors go on to note that this definition is more restrictive than other possible definitions of the sharing economy. *Id.* It is also broader than the definition proposed in this Article, since it includes B2C transactions, as well as P2P transactions.

93. Not all activities in the sharing economy involve the monetization of assets; for example, community gardens, meal sharing, and tool libraries are often considered part of the sharing economy, *see, e.g.*, ORSI, *supra* note 61, at 2–3, but are nonmonetary asset-sharing activities. However, the aspects of the sharing economy that involve the monetization of assets are generally considered the primary economic driver of this sector as well as a feature that makes the sharing economy different than informal and nonmonetary sharing that has previously existed on an informal basis. *See, e.g.*, *The Rise of the Sharing Economy*, ECONOMIST (Mar. 7, 2013, 4:08 PM), <http://www.economist.com/news/leaders/21573104-internet-everything-hire-rise-sharing-economy> [<http://perma.cc/5JRY-856Q>] (“[T]he core of the sharing economy is people renting things from each other. Such ‘collaborative consumption’ is a good thing for several reasons. Owners make money from underused assets.”).

94. Some proposed taxonomies of the sharing economy break the assets being monetized down into more detailed categories, such as physical property, financing, professional services, freelance services, and education. *See, e.g.*, Sundararajan Testimony, *supra* note 17, at 2–3 (describing seven subcategories of the sharing economy, though noting two of his categories may overlap, and another one may be a separate category entirely). Because this Article’s focus is on property-sharing activities, the simple, binary division above provides the clearest top-level categorization of the sharing economy; as will be seen in the remainder of this Section, descriptions of possible subcategories are suggested with reference to this initial division.

95. Sarah Kessler, *The Gig Economy Won’t Last Because It’s Being Sued to Death*, FAST COMPANY (Feb. 15, 2015, 6:00 AM), <http://www.fastcompany.com/3042248/the-gig-economy-wont-last-because-its-being-sued-to-death> [<http://perma.cc/KK7G-NA9D>] (“[T]he ‘gig economy’ [is] a much-hyped new class of the service industry where workers are expected to operate like mini-businesses.”).

96. *See supra* note 1 for a description of Airbnb; *supra* note 8 for a description of COUCHSURFING; *supra* note 36 for a description of JustPark; *supra* note 36 for a description of RelayRides.; *About, 1000TOOLS*, <https://www.1000tools.com/about> [<https://perma.cc/9A6B-UTYQ>] (describing the company as “a marketplace connecting tool owners and renters”).

considered part of the gig economy.<sup>97</sup> While the gig economy raises challenging legal questions of its own,<sup>98</sup> those legal questions fall outside this Article's property sharing focus. The remainder of this Subsection therefore focuses on issues relating to the monetization of property assets (goods), rather than nonproperty assets (services).<sup>99</sup>

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97. Uber, ÜBER, *supra* note 2, and Lyft, LYFT, *supra* note 9, provide car-hailing services; DogVacay provides pet-sitting services, DOGVACAY, <https://dogvacay.com/> [<https://perma.cc/AY2M-VBE9>]; Taskrabbit provides general errand services, *How It Works*, *supra* note 10; Mechanical Turk provides "human intelligence" services, AMAZON MECHANICAL TURK, <https://www.mturk.com/mturk/help?helpPage=overview> [<https://perma.cc/78SF-2DSK>].

98. Issues raised by the gig economy include the need to identify the underlying legal relationship between the parties that results when an individual provides services, such as dogsitting through DogVacay or errand running through TaskRabbit, and to determine the proper regulatory responses to these types of activities. *See, e.g.*, Kessler, *supra* note 95 (asking, "What benefits can you expect from a quasi-employer?" and "What does it mean to be both independent and tethered to an app-based company?"); Slee, *supra* note 15 (suggesting that gig economy companies like Taskrabbit are "becoming . . . glorified temp agencies], sliding rapidly from neighborliness to the most precarious of casual labour"). *See also* Reich, *supra* note 14 (disagreeing with Prof. Arun Sundararajan, who extols the gig economy for its flexibility and ability to allow people to "monetize[e] their own downtime. . . . [T]his argument confuses 'downtime' with the time people normally reserve for the rest of their lives. There are still only twenty-four hours in a day. When 'downtime' is turned into work time, and that work time is unpredictable and low-paid, what happens to personal relationships? Family? One's own health?"). Prof. Reich, the former Secretary of Labor under President Clinton, suggests that the gig economy is nothing more than "a reversion to the piece work of the nineteenth century—when workers had no power and no legal rights, took all the risks, and worked all hours for almost nothing." *Id.*

99. Other categories of assets that can be monetized include intellectual property (IP), as well as those things for which the label of "property" is a matter of serious ethical debate, such as organs, a topic beyond the scope of this Article. For insightful discussion on the implications of asset monetization and sharing in the IP context, see Aaron Perzanowski & Jason Schultz, *Reconciling Intellectual and Personal Property*, 90 NOTRE DAME L. REV. 1211, 1213–15 (2015) (discussing how the exhaustion doctrine in copyright law is intended to strike a balance between the rights of the owners of IP and the rights of the owners of the personal property in which the IP is located, but is increasingly under assault by both the move to licensing regimes imposed by IP owners, and by the transformation of copies from physical things to intangible networked bits). *See also* JAMES BOYLE, *THE PUBLIC DOMAIN: ENCLOSING THE COMMONS OF THE MIND* (2008); Charlotte Hess & Elinor Ostrom, *Ideas, Artifacts, and Facilities: Information as a Common-Pool Resource*, 66 LAW & CONTEMP. PROBS. 111 (2003) (summarizing literature and research about common-pool resources and applying it to the international information commons); Elizabeth L. Rosenblatt, *A Theory of IP's Negative Space*, 34 COLUM. J.L. & ARTS 317 (2011) (discussing groups that flourish without traditional intellectual property protections); Christopher S. Yoo, *Beyond Coase: Emerging Technologies and Property Theory*, 160 U. PA. L. REV. 2189 (2012) (advocating for a more technological approach to property law and examining the tension between private property and the commons in technology).

The types of property being monetized in the sharing economy spans the gamut from low cost, infrequently used goods, such as blenders and nail guns, to high cost, frequently used goods, such as laptops.<sup>100</sup> However, the “sweet spot” for asset monetization appears to be “high cost, infrequently used” goods.<sup>101</sup> What qualifies as “infrequent use” and “high cost” depends on the particular user, but examples of property falling into this sweet spot include items such as a designer handbag, a place to sleep in a city you do not live in, or a car in a city where it is expensive or inconvenient to own a car.<sup>102</sup>

While many sharing economy proponents have touted the sharing economy for its ability to help people “make ends meet” by monetizing their underutilized assets,<sup>103</sup> the push to monetize seemingly everything—“spare rooms, empty car seats, and idle hands”<sup>104</sup>—raises numerous concerns. Relentless commodification may corrupt the kind of nonmonetary social relations that develop from “the nonmonetary movement of goods and services between friends and within communities.”<sup>105</sup> In addition, asset monetization

100. See Charles F. Donnelly, *Ninja Blender*, RENTAH, <http://www.rentah.com/listing/view.php?id=173> [<http://perma.cc/K2YW-W4YL>] (listing a blender for daily rental of \$15 per day); Suryati Adn, *Laptops*, RENTAH, <http://www.rentah.com/listing/view.php?id=202> [<http://perma.cc/P3XR-RCHD>] (listing a laptop for a rental of \$40 per week).

101. GANSKY, *supra* note 13, at 23.

102. See *id.* at 22 (suggesting examples of goods that fall into the “mesh sweet spot” of infrequently used, high cost items include “musical instruments, specialty sporting equipment, or a second car”).

103. Fehrenbacher, *supra* note 11 (presenting a pictograph of “the profit in sharing” and illustrating some of the items in “collaborative home” that can be monetized under the headline, “Make Money From Your Unused Stuff”).

104. Kalamar, *supra* note 43.

105. *Id.* In fact, there are numerous anecdotes about founders of sharing economy companies having been inspired to start their sharing-for-profit companies after a personal experience involving informal, nonmonetary sharing of this type. See, e.g., *Company Details*, CRUNCHBASE, <https://www.crunchbase.com/organization/taskrabbit#sthash.z8GIUs06.dpuf> [<https://perma.cc/E8LQ-69UD>] (“It was a cold night in Boston . . . when Leah Busque realized she was out of dog food . . . Leah thought to herself, ‘Wouldn’t it be nice if there was a place online I could go to connect with my neighbors—maybe one who was already at the store at that very moment—who could help me out?’ From this experience, TaskRabbit . . . was born.”); Peter Gasca, *Borrow These 8 Lessons from a New Entrant in the Sharing Economy*, ENTREPRENEUR (Jan. 8, 2015), <http://www.entrepreneur.com/article/241418> [<http://perma.cc/5FQD-GQTJ>] (describing the experience that led the founder of Baro.com—where users can pay to access other people’s upscale goods—to start that company). “After visiting Home Depot to purchase supplies, she was shocked at the cost for new equipment, most of which she would use only once. Instead of buying all of the equipment, she

may become a de facto full-time job for some participants in the sharing economy.<sup>106</sup> The result may be an income significantly less than that provided by doing that activity in a traditional employer-employee context, with few or none of the protections offered by traditional employment (such as retirement benefits or the protection of labor laws).<sup>107</sup>

Questions also exist about whether all segments of society are benefitting from the monetization of underutilized assets. By making it possible to access goods, like cars or tools, only when needed, the sharing economy lowers the cost of use of many goods and services. Access to such shared assets may therefore be expanded to people who otherwise would not be able to afford them.<sup>108</sup> For example, an apartment or bedroom on Airbnb may be less expensive than a hotel room in the same neighborhood, and an Uber ride may be cheaper than a taxi fare to the same destination.<sup>109</sup> However, access to these

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spoke with neighbors and was able to borrow everything . . .” *Id.* Ironically, the platforms that these and other companies have developed to monetize everything from the painting equipment laying around in your garage to picking up something from the grocery store for your neighbor may eventually make the kind of informal, gratuitous sharing that inspired them a quaint relic of the past.

106. See Sarah Kessler, *Pixel & Dimed: On (Not) Getting by in the Gig Economy*, FAST COMPANY, (Mar. 18, 2014, 6:00 AM), <http://www.fastcompany.com/3027355/pixel-and-dimed-on-not-getting-by-in-the-gig-economy> [<http://perma.cc/43J4-2527>] (discussing the economic hardship faced by individuals who could not obtain full-time employment and relied solely on sharing economy activities for income).

107. *Id.*; see also Giridharadas, *supra* note 26 (questioning whether the sharing economy is creating a one-sided economic model “going back to what the labor market was like before there were anti-discrimination laws, minimum wages and hours ceilings—with all the liberties and efficiencies and perils that implies”). “Suddenly the guy who wants someone to clean his basement has 50 bidders, some of whom are probably not eating very well these days.” *Id.* (quoting Rich Reiben, *The Internet and the End of the Minimum Wage*, SOCYBERTY: ISSUES (Apr. 4, 2012), <http://socyberty.com/issues/the-internet-and-the-end-of-the-minimum-wage/> [<http://perma.cc/E59V-WP4D>]).

108. However, there is mixed evidence as to whether the sharing economy complements or displaces existing economic activity; rather than “mak[ing] the pie bigger” by stimulating demand where there otherwise would be none, it may divert resources away from providers of comparable goods and services, such as hotels and rental car companies. *Scaling the Sharing Economy: From New York to Topeka and Beyond*, KNOWLEDGE@WHARTON (May 12, 2014), <http://knowledge.wharton.upenn.edu/article/scaling-sharing-economy-new-york-topeka-beyond/> [<http://perma.cc/8RAR-FJ6N>]; see also Badger, *supra* note 28 (considering “whether these platforms are creating new kinds of demand, or whether they’re meeting demand for things we were already buying”).

109. See Emily Badger, *The Real Promise of the ‘Sharing Economy’ Is What It Could Do for the Poor*, WASH. POST: WONKBLOG (Mar. 16, 2015), <http://www.washingtonpost.com/news/wonkblog/wp/2015/03/16/the-real-promise->



potentially more affordable goods and services has thus far been largely limited to those who possess the necessary prerequisites to use most sharing-economy platforms: a credit card and a smartphone.<sup>110</sup> As a result, use of sharing economy platforms like bike sharing and car sharing among low-income populations has been low to date.<sup>111</sup>

Finally, to monetize and share property, there is an implicit underlying requirement that an individual must own—or at least possess—property that others seek to access. Thus, while the sharing economy has been touted as a way for “regular folk” to make ends meet,<sup>112</sup> its current monetization

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of-the-sharing-economy-is-what-it-could-do-for-the-poor/ [http://perma.cc/XLF9-YPY8] (quoting the author of a recent report finding that the sharing economy has the potential to benefit low-income consumers most as saying that the sharing economy “creates this opportunity for people to be able to get stuff and experience stuff that they wouldn’t otherwise be able to afford”). Badger also notes that the “argument makes economic sense, in theory. Any time you create a rental alternative for goods that previously had to be owned, that benefits people who couldn’t afford to buy those goods before.” *Id.*

110. *Id.* (“There’s not a lot of evidence right now that lower-income consumers are using these platforms in large numbers. In fact, there’s some evidence of the opposite.”); see also Juan Sebastian Arias, *How Can Shared Mobility Help Connect Low Income People to Opportunity?*, LIVING CITIES: BLOG (Dec. 8, 2014), <https://www.livingcities.org/blog/740-how-can-shared-mobility-help-connect-low-income-people-to-opportunity> [https://perma.cc/LV26-ZV6B] (discussing two major deterrents to the expansion of transportation-related sharing economy activities in low-income areas: “(1) barriers that deter users from accessing the systems (ranging from structural to cultural reasons), and (2) barriers that deter operators from expanding systems into low-income communities (largely related to profitability risk)”).

111. Arias, *supra* note 110 (discussing a study showing that “low-income people and people of color . . . are not using [ride sharing, car sharing or bike sharing] services at the same rates as the general population”). Efforts are being made to expand the scope of the sharing economy to provide opportunities for lower-income populations to participate. See, e.g., Joel Rose, *Shifting Gears to Make Bike-Sharing More Accessible*, NPR (Dec. 12, 2013, 5:08 AM), <http://www.npr.org/blogs/codeswitch/2013/12/12/243215574/shifting-gears-to-make-bike-sharing-more-accessible> [http://perma.cc/S6DZ-4TDZ] (noting that only 0.5% of the users of New York City’s bike-share program are low income); Tanya Snyder, *How to Make Shared-Vehicle Services Accessible to People of All Incomes*, STREETS BLOG USA (Dec. 8, 2014), <http://usa.streetsblog.org/2014/12/08/how-to-make-shared-vehicle-services-accessible-to-people-of-all-incomes/#more-99127> [http://perma.cc/8RGY-2L48] (discussing Boston’s Hubway bike-share program, which offers subsidized \$5 annual memberships to low-income individuals and has a higher percentage of its ridership made up of low-income users than other city bike-share programs).

112. See, e.g., Charles Gottlieb, *Residential Short-Term Rentals: Should Local Governments Regulate the Industry?*, PLAN. & ENVTL. L., Feb. 2013, at 4, 5 (“Often, a house is the largest asset a person owns, and when hard financial times strike, it can provide a source of income. Mr. Hogan, a New York City resident,

model is directed at a select segment of the population: largely middle-class or upper middle class “folks” who own or possess assets that others are willing to pay for temporary access to.<sup>113</sup> Those without assets to monetize—for example, people who live in public housing or lack their own car—may be limited in their ability to participate meaningfully in the sharing economy as providers or users.<sup>114</sup>

## 2. Prioritizing Access over Ownership

The second key characteristic of the sharing economy is an emphasis on providing users with access to, rather than ownership of, property. Access, as used here, simply means temporary possession or use.<sup>115</sup> While property is often

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was facing fiscal constraints and sought to stabilize his finances by renting his residence to New York City tourists at a lower price than conventional hotels.”); see also Fehrenbacher, *supra* note 11 (stating that the average New York City host on Airbnb makes \$21,000 per year from participating in the sharing economy); Dana Hull, Q&A: *Shelby Clark, Executive Director of PEERS*, SAN JOSE MERCURY NEWS (Dec. 5, 2014, 10:50 AM), [http://www.mercurynews.com/business/ci\\_27076470/mercury-news-interview-shelby-clark-executive-director-peers](http://www.mercurynews.com/business/ci_27076470/mercury-news-interview-shelby-clark-executive-director-peers) [<http://perma.cc/26SN-K3WM>] (quoting Shelby Clark, the founder of RelayRides, as stating that one of the benefits of the expansion of car sharing is “more money in the pockets of owners.”).

113. See Stein, *supra* note 12, at 40 (“These companies have also highlighted the inequality gap. When the sharing economy first started, investors assumed rich people wouldn’t bother listing their homes and cars since they didn’t need the income enough to justify the risk and effort. Instead, Airbnb is full of high-end homes and RelayRides has an awful lot of Teslas. The sharing economy is being used heavily by those least in need of it.”).

114. See Badger, *supra* note 109 (“It’s also worth asking this awkward question: Will upper-income consumers still be as eager to share (or rent) their homes, cars and possessions when these marketplaces expand to include more low-income users? Does this kind of sharing work today, in other words, because most people aren’t sharing across socioeconomic lines?”).

115. While possession may sometimes be a proxy for ownership, the two concepts are distinct. As Joseph Singer has explained, “[b]ecause it is often expensive or difficult to prove ownership, the law presumes that the current possessor of the property has all the rights of the true owner.” JOSEPH WILLIAM SINGER, *PROPERTY* 24 (3d ed. 2010). While possession and ownership often go hand-in-hand, possession is not the same as ownership; while the owner of land in fee simple who lives on the land has both possession and ownership, if the owner leases the land to a tenant, the tenant has possession, and the owner has ownership. *Id.* Possession is defined as the exercise of either

physical control over something with the intent to exercise such control (actual possession) or . . . hav[ing] the power and intention to exercise control over the property, either directly or through another person (constructive possession) . . . Possessors have the right to exclude everyone except the true owner . . . [and] may even be entitled to exclude

conceived of as inherently rivalrous when thought of in terms of rights of owners versus non-owners, by focusing instead on access, the sharing economy introduces an element of nonrivalrousness. As Dyal-Chad has expressed it, the “size of the pie” can be increased by sharing;<sup>116</sup> proponents of the sharing economy have emphasized this as well, with the idea that more people having access to property complements existing property ownership rather than detracting from it.<sup>117</sup> For example, someone who owns a small, fuel-efficient car for their daily life in a city might use a sharing economy platform like RelayRides to access a larger, four-wheel drive SUV for an occasional weekend camping trip.<sup>118</sup>

However, the sharing economy’s focus on access to property as opposed to ownership of property means that assets are increasingly being used more intensively than they traditionally were, as multiple people—owners and non-owners—use property which formerly was typically only used by a single owner. For example, ParkingPanda allows homeowners to rent out their driveways to anyone in the vicinity who needs a parking spot; thus, a residential driveway that was previously unoccupied during hours when the owner was away from home now may have several different cars parked in it over the course of the day.<sup>119</sup> While this may be a more efficient use of a previously underused asset and may have beneficial effects in terms of opening up more parking spots overall in a particular area, other impacts—such as increased traffic in residential areas—may create externalities.

As will be discussed in the next Subection, the ability to

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the record title holder if the title holder has transferred possessory rights to the possessor or someone else, through a lease agreement for example . . . .

*Id.*; see also Christopher Baumeister & Florian V. Wangenheim, *Access vs. Ownership: Understanding Consumers’ Consumption Mode Preference*, SSRN (July 7, 2014), <http://ssrn.com/abstract=2463076> [<http://perma.cc/5PRV-UNS4>] (“Access and ownership differ in a number of features. In case of ownership, money is exchanged for ownership between buyer and seller to complete a market transaction. In contrast, an access transaction exchanges money for consumption time, while the ownership stays with the provider at all times.”).

116. Dyal-Chad, *supra* note 39, at 668.

117. See *Scaling the Sharing Economy*, *supra* note 108. Jamie Viggiano, TaskRabbit’s head of marketing, “see[s] the shared-economy model as adding value to the marketplace,” and asserts the company is “making the pie bigger.” *Id.*

118. *Id.*

119. See *Company*, PARKING PANDA, <https://www.parkingpanda.com/company> [<https://perma.cc/89XK-XH6K>].

choose access over ownership has been enabled in large part by technological developments.<sup>120</sup> But why consumers are choosing access as opposed to ownership is a more complicated question. It may be a choice to embrace “lightweight living”<sup>121</sup> or use resources more sustainably, or it may be the result of economic necessity.<sup>122</sup> While sharing economy platforms often emphasize that they allow people to engage in activities that promote sustainability<sup>123</sup> or community-building,<sup>124</sup> several recent studies about the motivations of those engaged in the sharing economy have found that most users appear to be motivated primarily by economic considerations.<sup>125</sup>

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120. See *infra* Section I.B.3.

121. See, e.g., Thomas L. Friedman, *How to Monetize Your Closet*, N.Y. TIMES (Dec. 21, 2013), [http://www.nytimes.com/2013/12/22/opinion/sunday/friedman-how-to-monetize-your-closet.html?\\_r=1&adxnnl=1&adxnnlx=1424228539-7fQOe/6l2FjHAHwnN4M9A&assetType=opinion](http://www.nytimes.com/2013/12/22/opinion/sunday/friedman-how-to-monetize-your-closet.html?_r=1&adxnnl=1&adxnnlx=1424228539-7fQOe/6l2FjHAHwnN4M9A&assetType=opinion) [http://perma.cc/RPC8-CCD4] (extolling the possibilities of the sharing economy to enable “lightweight living,” in which “durable goods are viewed as temporal objects to enjoy and pass on rather than ‘belongings’”).

122. For example, for privacy or safety reasons, I may prefer not to have strangers staying in my house. However, if I have recently lost my job, I may need the additional income in order to pay my mortgage. Cf. Roose, *supra* note 15 (“A huge precondition for the sharing economy has been a depressed labor market, in which lots of people are trying to fill holes in their income by monetizing their stuff and their labor in creative ways. . . . In almost every case, what compels people to open up their homes and cars to complete strangers is money, not trust.”).

123. See, e.g., Hull, *supra* note 112 (quoting Shelby Clark, the founder of RelayRides, as stating that one of the benefits of car sharing is that it “will lead to fewer cars on the road”).

124. See, e.g., *About Us*, *supra* note 89 (“Couchsurfing began [as] . . . the idea that people anywhere would want to share their homes with strangers (or, as we like to call them, friends you haven’t met yet.)”); Marlice van Romburgh, *Airbnb Gives Out \$1M to Spur Random Acts of Kindness*, S.F. BUS. TIMES (Jan. 2, 2015, 6:52 AM), <http://www.bizjournals.com/sanfrancisco/blog/techflash/2015/01/airbnb-1-million-one-less-stranger-campaign.html> [http://perma.cc/J45X-H4N8] (describing Airbnb’s #OneLessStranger hashtag campaign, through which the company gave money to users to perform acts of kindness).

125. Recent empirical studies have shown that while motivations of sharing economy participants are mixed, in fact, economic factors—things are generally cheaper in the sharing economy—are the primary motivation of most users. See Bellotti et al., *supra* note 82, at 7–8; Juho Hamari et al., *The Sharing Economy: Why People Participate in Collaborative Consumption*, J. ASS’N INFO. SCI. & TECH. (forthcoming 2016) (manuscript at 17), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2271971](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2271971) [http://perma.cc/T96L-7B5F]; see also Patrick C. Shih et al., *Unequal Time for Unequal Value: Implications of Differing Motivations for Participation in Timebanking*, in 33RD ANNUAL CHI CONFERENCE ON HUMAN FACTORS IN COMPUTING SYSTEMS 1075, 1080 (2015), [http://www.researchgate.net/publication/269519106\\_Unequal\\_time\\_for\\_unequal\\_value\\_Design\\_implications\\_of\\_differing\\_motivations\\_for\\_participation\\_in\\_timeban](http://www.researchgate.net/publication/269519106_Unequal_time_for_unequal_value_Design_implications_of_differing_motivations_for_participation_in_timeban)

### 3. Technology-Driven Disaggregation

The two features of the sharing economy discussed thus far—monetization of assets and provision of access as opposed to ownership—have only become possible on a large scale because of relatively new technology, such as GPS, smartphones, and app software. Technology enables the sharing economy by performing three key functions: (i) the large-scale identification of users—both those who have assets they want to monetize and those who want access to those assets; (ii) location services to enable these two groups to find each other at the right time and right place; and (iii) trust verification methods that lower transaction costs involved with “stranger sharing.”<sup>126</sup>

Technology-driven disaggregation offers a solution to the problem of not having enough of the “right [thing] at the right time.”<sup>127</sup> For example, there are over 800 million parking spaces in the U.S., and only 225 million registered cars, yet “[f]or all this parking bounty, it often seems that there’s never anywhere to park.”<sup>128</sup> By disaggregating a homeowner’s driveway from his home during the day when he is at work, or an office’s assigned employee spots when employees have taken vacation, platforms like ParkingPanda both stimulate supply and satisfy demand.

The technological disaggregation of assets has also led to highly specialized markets in the sharing economy. Are you in Philadelphia circling the downtown blocks for a parking spot right now? Are you in Aspen looking for an indoor space to smoke your legally purchased marijuana later today? Have you rented out your apartment for the weekend on Airbnb to make some extra money and now need a place to sleep yourself? In

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king [<http://perma.cc/P3UY-8HCM>].

126. See Juliet Schor, *Debating the Sharing Economy*, GREAT TRANSITION INITIATIVE 7 (Oct. 2014), [http://www.greattransition.org/images/GTI\\_publications/Schor\\_Debating\\_the\\_Sharing\\_Economy.pdf](http://www.greattransition.org/images/GTI_publications/Schor_Debating_the_Sharing_Economy.pdf) [<http://perma.cc/KPU5-SQ3U>] (using the term “stranger sharing” to describe sharing economy transactions “among people who do not know each other and who do not have friends or connections in common”).

127. Matthew Yglesias, *The End of Parking Misery*, SLATE (Dec. 26, 2012, 10:30 AM), [http://www.slate.com/articles/business/small\\_business/2012/12/parking\\_panda\\_rent\\_your\\_unused\\_parking\\_space.html](http://www.slate.com/articles/business/small_business/2012/12/parking_panda_rent_your_unused_parking_space.html) [<http://perma.cc/PP72-U3RC>].

128. *Id.* (speaking colloquially of the frustration many of us are all too familiar with when it comes to parking).

each of these cases, there is a platform designed to connect owners or possessors of each of these types of property with those seeking access to it.<sup>129</sup>

Technology also has made it possible for two people—typically strangers—to engage in sharing activities that had previously taken place primarily in close-knit communities. As described in Elinor Ostrom’s work on limited access commons, because members of close-knit communities who share property “shared a past and expect to share a future[, i]t is important for individuals to maintain their reputations as reliable members of the community.”<sup>130</sup> In the sharing economy, which involves groups of millions of users, that kind of reliability is enabled by technology. For example, many sharing economy platforms require users to register with an account on the site and allow those who engage in sharing transactions to rate each other publicly.<sup>131</sup> While some have questioned the appropriateness of two-way ratings in peer-to-peer transactions,<sup>132</sup> and studies have shown that the ratings

129. PARKINGPANDA, <https://www.parkingpanda.com/> [<https://perma.cc/H33F-LDD7>] (driveways and private parking spots); TRAVELTHC, <http://travelthc.com/> [<http://perma.cc/K7X8-5G7X>] (marijuana-friendly accommodations); CAN I STAY WITH YOU WHILE I RENT MY PLACE ON AIRBNB?, <http://canistaywithyouwhileirentmyplaceonairbnb.com/> [<http://perma.cc/5UAW-4HXF>] (self-explanatory).

130. ELINOR OSTROM, *GOVERNING THE COMMONS: THE EVOLUTION OF INSTITUTIONS FOR COLLECTIVE ACTION* 88 (James E. Alt & Douglass C. North eds., 1990).

131. See, e.g., *Trust*, AIRBNB, <https://www.airbnb.com/trust> [<https://perma.cc/Z3HS-RPME>] (“Guests and hosts verify their IDs by connecting to their social networks and scanning their official ID or confirming personal details[, and users can] get to know [their] guest or host through detailed profiles and confirmed reviews.”).

132. David Streitfeld, *Ratings Now Cut Both Ways, so Don’t Suss Your Uber Driver*, N.Y. TIMES (Jan. 30, 2015), [http://www.nytimes.com/2015/01/31/technology/companies-are-rating-customers.html?smid=tw-share&\\_r=0](http://www.nytimes.com/2015/01/31/technology/companies-are-rating-customers.html?smid=tw-share&_r=0) [<http://perma.cc/3GMH-GR3S>] (suggesting that because both hosts and users on sharing economy platforms, such as Airbnb and Uber, rate each other, users may feel pressured “to submit more upbeat reviews themselves, even if the experience was less than stellar,” since they do not want to be labeled a difficult customer and turned down by future potential hosts).

Subjective, two-way ratings are unique to the sharing economy; while a customer can go on TripAdvisor or Yelp to rate a Hilton hotel or Avis Rent-a-Car, those companies do not typically rate customers on an individual basis, the presumption being that the customer has upheld their end of the bargain as long as they have paid what they were required to (and did not destroy the property that was the subject of the transaction). Of course, if there is damage to property or a dispute regarding payment, hotel or rental car companies may report information about individual consumers to credit agencies; in addition, certain information about all consumers (income, location, and marital status, for

on peer-to-peer sharing transactions are skewed high,<sup>133</sup> the existence of this public rating mechanism may be a kind of technological stand-in for the informal norms in small-scale communities that enable sharing to occur successfully in a limited-access commons.

Finally, the technological disaggregation of assets also means the cost for any particular asset becomes potentially dynamic; depending on the demand for that particular good (or service) at that particular moment, the cost may vary significantly. While this may often benefit users, at times of limited supply, dynamic pricing may result in significant upticks in prices. For example, Uber has been criticized repeatedly for its pricing model, which surges according to demand, even when that demand is the result of public disasters or other crises.<sup>134</sup>

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example) may be aggregated and sold to advertisers or other companies. Even Ebay, which briefly allowed sellers to post subjective reviews of individual buyers, now only allows positive seller feedback about buyers (while still allowing any type of review by buyers of sellers). *Id.*

133. See Georgios Zervas et al., *A First Look at Online Reputation on Airbnb, Where Every Stay Is Above Average*, SSRN 1 (Jan. 28, 2015), <http://ssrn.com/abstract=2554500> [<http://perma.cc/DQL9-FR9T>] (reviewing ratings for over 600,000 properties listed on Airbnb and finding that “nearly 95% of Airbnb properties boast an average user-generated rating of either 4.5 or 5 stars (the maximum); virtually none have lower than a 3.5 star rating”). The same study also reviewed ratings for over 500,000 hotels on Tripadvisor, which has “a much lower average rating of 3.8 stars, and more variance across reviews.” *Id.* Another study of over 400,000 ratings for BlaBlaCar (a car-sharing service) found similarly high-skewing ratings, with forty-nine out of every fifty ratings receiving a full five stars. Slee, *supra* note 15.

At first glance, these highly positive ratings may seem like proof of the success of the sharing economy—“Look, people can all just get along when they’re not forced to deal with customer-unfriendly corporate hotel chains!”—as well as support for the claim that user review systems can serve as an effective substitute for regulatory oversight of the sharing economy. However, concerns are being raised about the negative implications of these types of hyper-positive ratings. See, e.g., Slee, *supra* note 15 (cautioning that the real reasons for these high ratings, such as “the danger of reputation-damaging retaliation and the human wish to avoid disagreeable disputes,” should be kept in mind when faced with claims by sharing economy proponents that their user review systems can serve as an effective substitute for regulatory oversight); Streitfeld, *supra* note 132 (noting concerns from scholars about inaccurate two-way ratings potentially leading us into to a “disinformation economy”).

134. Richard (R.J.) Eskow, *The Sharing Economy Is a Lie: Uber, Ayn Rand and the Truth About Tech and Libertarians*, SLATE (Feb. 1, 2015, 4:57 AM), [http://www.salon.com/2015/02/01/the\\_sharing\\_economy\\_is\\_a\\_lie\\_uber\\_ayn\\_rand\\_and\\_the\\_truth\\_about\\_tech\\_and\\_libertarians/](http://www.salon.com/2015/02/01/the_sharing_economy_is_a_lie_uber_ayn_rand_and_the_truth_about_tech_and_libertarians/) [<http://perma.cc/474S-QK9X>] (describing Uber’s surge pricing in the wake of the hostage crisis in downtown Sydney, Australia in early 2015, where Uber increased rates in the area).

#### 4. Peer-to-Peer Transactions

While the transactions occurring in the sharing economy bear the familiar hallmark of all market activities—supply and demand—much of the sharing economy is characterized by a shift in the identity of the party at the supply end of that equation. Traditionally, businesses—companies or individuals who were acting in the course of their trade or profession—were at the supply end of the equation, offering consumers on the demand side of the equation everything from short-term accommodation, to lawnmowers, to point-to-point private transportation. The sharing economy, however, is characterized by a direct economic interaction between individuals on both the supply and demand ends of the equation. This type of transaction is known as peer-to-peer, as opposed to the more traditional business-to-consumer model.<sup>135</sup>

While peer-to-peer transactions are one of the distinctive features of the sharing economy,<sup>136</sup> third-party companies

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135. Although the focus of this Article is on “peer-to-peer” transactions involving property sharing between individuals, the concept of similarly-situated parties transacting with each other rather than an outside company can be expanded to other contexts. For example, local governments could engage in “municipality-to-municipality” transactions for snow-clearing equipment, rather than purchasing such goods and services from a commercial supplier. See LAUREN HIRSHON ET AL., CITIES, THE SHARING ECONOMY, AND WHAT’S NEXT, NAT’L LEAGUE OF CITIES 1 (2015) [hereinafter NAT’L LEAGUE OF CITIES REPORT], <http://www.nlc.org/Documents/Find%20City%20Solutions/City-Solutions-and-Applied-Research/Report%20-%20%20Cities%20the%20Sharing%20Economy%20and%20Whats%20Next%20final.pdf> [<http://perma.cc/BG8W-GRYL>].

136. Note that an expansive view of the sharing economy might include business-to-consumer transactions, as well as peer-to-peer ones, as long as the transactions involve the provision of access as opposed to ownership. For example, a business-to-consumer company like Zipcar may be considered by some to be part of the sharing economy; however, traditional business-to-consumer car rental companies like Hertz and Avis are usually not. *C.f.* GANSKY, *supra* note 13, at 2–3 (including everything from public transportation systems to public parks to traditional hotels to Airbnb and Taskrabbit as part of the “mesh economy”); Arun Sundararajan, *From Zipcar to the Sharing Economy*, HARV. BUS. REV. (Jan. 3, 2013), <https://hbr.org/2013/01/from-zipcar-to-the-sharing-eco> [<https://perma.cc/ULL6-DU6G>] (acknowledging that companies like Zipcar “pioneered the creative use of technology to open up flexible new ways of renting a car” but distinguishing such companies from “genuine peer-to-peer car rental marketplaces” like RelayRides). While both Zipcar and Avis provide access as opposed to ownership, companies like Zipcar employ technology to disaggregate in time and space the “shared” asset to a much greater extent than traditional business-to-consumer providers, like car rental companies or hotels. For example, Zipcar and Car2Go offer rates by the half-hour and minute, respectively, rather than the typical one-day minimum fee charged by car rental companies (regardless of whether you



remain heavily involved in the sharing economy, and are often essential to the existence of many peer-to-peer marketplaces. Third-party companies perform a variety of functions in peer-to-peer transactions, but the most common functions include: (1) creating the platform where those who have an asset to share can find those who want access to that kind of asset; (2) providing a mechanism for the parties to engage in a monetary transaction with each other electronically; and (3) providing trust verification devices, such as membership requirements and ratings systems, which lower the risks and transaction costs otherwise associated with “stranger sharing.” While not all third-party companies or platforms perform all three functions,<sup>137</sup> many of the largest companies in the sharing economy do. In exchange for their facilitation of property-sharing transactions, these companies and others charge users a fee.<sup>138</sup>

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only use the car for thirty minutes). Zach Shaner, *Zipcar vs. Car2Go*, SEATTLE TRANSIT BLOG (Feb. 12, 2013, 11:00 AM), <http://seattletransitblog.com/2013/02/12/zipcar-vs-car2go/> [<http://perma.cc/5PG9-H6FQ>]. Similarly, these companies often locate their cars on the streets throughout urban areas, rather than the handful of large lots that where car rental companies keep their cars and require customers to come for service. GANSKY, *supra* note 13, at 14. This Article limits its analysis of property-sharing activities to those activities involving peer-to-peer transactions, because those activities present more novel and unique legal questions than business-to-consumer transactions, for which many existing legal rules and regulations have already been developed. In addition, demarcating which business-to-consumer companies are part of the sharing economy and which are not is likely to become increasingly difficult as “old-guard” corporations not only have started to employ disaggregation technology in the provision of their goods and services, but also are acquiring their more sharing economy embedded competitors. See John Kell, *Avis to Buy Car-Sharing Service Zipcar*, WALL STREET J. (Jan. 2, 2013, 1:13 PM), <http://www.wsj.com/articles/SB10001424127887324374004578217121433322386> [<http://perma.cc/EL6J-KR8H>] (“I’ve been somewhat dismissive of car sharing in the past[,] . . . [b]ut what I’ve come to realize is that car sharing, particularly on the scale that Zipcar has achieved and will achieve, is complementary to our traditional business.”) (quoting Avis’s CEO Ron Nelson).

137. For example, Craigslist performs the first role by providing a kind of online bulletin board that allows users in specific geographic locations to find other users providing a wide range of specific services and goods, which are categorized on the Craigslist website. See CRAGSLIST, <https://www.craigslist.org/about/sites#US> [<https://perma.cc/Y4DA-QJVB>]. However, Craigslist does not provide trust-verification devices (other than an option for users to flag postings for removal or list their own postings warning about other postings on the site) and does not collect a fee from those who use its site.

138. The fee, often a percentage of the individual transaction, can be significant. For example, RelayRides takes a twenty-five percent commission from the total rental price and excess mileage charges. *Pricing and Payment*, RELAYRIDES, <https://support.relayrides.com/hc/en-us/articles/203992000-What->

To provide a broader context for where property sharing fits within existing legal frameworks, the next Part explores how sharing is reflected in a wide range of existing legal doctrines and how those doctrines may be informative to the debate surrounding the legal status of the sharing economy.

## II. THE LEGAL CONTEXT FOR PROPERTY SHARING

This Part begins by exploring the role sharing plays in a range of existing legal doctrines. It then considers three areas of law—the law of roommates, zoning law and accessory uses, and the law of barter—that inform the debate surrounding the sharing economy, since each involves doctrinal responses to activities that also blur the familiar binary divisions discussed in Section I.A.

### A. *A Spectrum of Sharing*

Many property law theorists focus on exclusion as the defining feature of property,<sup>139</sup> but inclusion, sharing, and

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will-I-earn-How-do-I-get-paid- [<https://perma.cc/4ASA-XPDP>]. Lyft takes 20% commission from drivers' total ride earnings, *Lyft's Commission Structure*, LYFT, <https://www.lyft.com/drive/help/article/1740201> [<https://perma.cc/CV94-F46C>]; Airbnb collects a 3% commission from hosts, *What Are Host Service Fees?*, AIRBNB, <https://www.airbnb.com/support/article/63> [<https://perma.cc/ECQ7-JUZM>], as well as a 6–12% guest fee from guests, *What Are Guest Service Fees?*, AIRBNB, <https://www.airbnb.com/support/article/104> [<https://perma.cc/CX4C-7D7Q>].

139. Exclusion models of property focus on the “thingness” of property and start by asking what rights the owner of that thing has, only secondarily considering potential limits on the owner's right to exclude. See, e.g., Thomas W. Merrill, *Property and the Right to Exclude*, 77 NEB. L. REV. 730, 730 (1998) (“I shall argue in this Essay that the right to exclude others is more than just ‘one of the most essential’ constituents of property—it is the sine qua non.”); Henry E. Smith, *Property as the Law of Things*, 125 HARV. L. REV. 1691, 1693–94 (2012) (“[P]roperty defines things using an exclusion strategy of ‘keep off’ or ‘don’t touch’ and then enriches the system of domains of owner control with interfaces using governance strategies.”). More tempered versions of the exclusion model de-emphasize the potentially anti-social nature of the exclusion approach, by focusing how the model also recognizes the importance of the owner's right to include others. See, e.g., DAGAN, *supra* note 39, at 39 (“In property as exclusion, sharing comes about not as an external requirement but rather as a voluntary determination of the owner, so that permitting another to use one's property is tantamount to ‘adopting that use as one's own.’”) (quoting J.E. Penner, *The “Bundle of Rights” Picture of Property*, 43 UCLA L. REV. 711, 745 (1996)). In property as Larissa Katz, *Exclusion and Exclusivity in Property Law*, 58 U. TORONTO L.J. 275, 277–78; 315 (2008) (emphasizing the owner's exclusive or “special position to set the agenda for a resource,” rather than the owner's right to

cooperation are also inherent aspects of property law.<sup>140</sup> An array of legal doctrines implicate the concept of sharing in the broad sense of more than one stakeholder having a legal right, interest, or obligation in the property: from insurance law, where policy holders share risks;<sup>141</sup> to the law of corporations, where shareholders own the property (i.e., the corporation),<sup>142</sup> but managers control decisions about its use; to tort law, where joint and several liability provides that joint tortfeasors are each individually liable for the full damage claim, but all potentially share in the costs of the claim.<sup>143</sup>

In property law specifically, numerous property interests enable owners to exercise their right to share their property with others, from trusts and marital property, to the law of common interest communities and co-tenancy arrangements.<sup>144</sup> Furthermore, sharing as inclusion is also reflected in legal doctrines that recognize the right of non-owners to be included,

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exclude others from the *object* of the right). “The exclusivity of ownership ensures that others do not dictate what agenda the owner must set for a thing, and it does not require that the owner elevate the interests of particular other individuals above her own.” *Id.*

140. DAGAN, *supra* note 39, at xiii (“[Limits on the right to exclude] should not be viewed as an embarrassing aberration [from core principle of right to exclude] but rather as entailed by the very values that shape property institutions in the first place . . . . [I]nclusion, although a less characteristic feature of property than exclusion, is just as intrinsic and should not be analyzed as an external limitation or imposition.”); see Dyal-Chand, *supra* note 39, at 679 (introducing a discussion of how various property law doctrines, such as nuisance law and the law of implied easements have the potential to allow for property sharing outcomes and suggesting that sharing in property law can be conceived of as “outcomes that represent compromises of some sort between the parties’ varying interests”); Kelly, *supra* note 39, at 896–918 (describing various forms of proprietary inclusion, such as easements, leases, bailments, and trusts).

141. See APPLEMAN ON INSURANCE LAW & PRACTICE ARCHIVE § 116.6 (2013) (“The very nature of insurance is to share (or pool) the risk of a fortuitous loss by shifting the risk of the loss from a single individual to an aggregation of individuals.”).

142. See MARK J. ROE, STRONG MANAGERS, WEAK OWNERS: THE POLITICAL ROOTS OF AMERICAN CORPORATE FINANCE 6 (1994) (“[C]orporate wealth is held by shareholders as a ‘passive’ investment, and managers control the corporation.”).

143. See, e.g., WILLIAM V. DORSANEO, III & CATHERINE JANE ALDER, TEXAS TORTS AND REMEDIES § 102.01 (2015) (“Under the concept of joint and several liability, each joint tortfeasor remains liable to the plaintiff for the plaintiff’s entire injury, and the tortfeasors, rather than the injured plaintiff, bear the burden of apportioning damages through the mechanisms of contribution and indemnity; for these reasons, the principles of joint and several liability serve to further the fundamental policy of modern tort law to compensate those who are injured.”).

144. See Kelly, *supra* note 39, at 896–916 (describing in detail how various property forms implicate inclusion).

as opposed to the right of the owner to choose to include non-owners.<sup>145</sup> Hanoch Dagan has discussed inclusion in this sense, noting that public accommodations and fair housing law recognize the right of non-owners to be included within certain types of property.<sup>146</sup>

Thus, it is not surprising that property sharing can be achieved through numerous legal mechanisms.<sup>147</sup> Consider for example, A, the owner of a hypothetical property, Blackacre,<sup>148</sup> and B, the party who seeks temporary access to or use of the property. A could grant B an interest in the land terminating on some specified condition, and retain a future interest in the land for herself.<sup>149</sup> A could enter into a leasehold agreement with B for term a years, with A retaining ownership, and B having possession for the duration of the leasehold period.<sup>150</sup> A could grant B an easement over all or part of Blackacre, thereby entitling B to enter and use Blackacre during a specified period of time fixed by an express termination of the

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145. Dagan's conception of "include" is not just physical or monetary sharing of property, but also in terms of "the right of nonowners to be included as buyers, lessees, or 'physical' entrants." DAGAN, *supra* note 39, at 37. For example, federal anti-discrimination laws such as the FHA give buyers or lessees of protected classes right to be included in potential pool of buyers or lessees and owner's or landlord's choices are limited by buyer's or lessee's "right to be included." *See id.*

146. *Id.*

147. Property sharing, as used herein, refers to when a party who owns or possesses property grants temporary access to that property to another party. *See supra* note 115 and accompanying text.

148. For purposes of the example, A is assumed to own Blackacre in fee simple absolute.

149. For example, A could grant B a determinable estate and retain a reversionary interest for herself. *See* RESTATEMENT (FIRST) OF PROP. § 44 (AM. LAW INST. 1936) (defining a fee simple determinable as a conveyance of a fee simple which automatically terminates upon the occurrence of a stated event); *Id.* § 154 (defining a reversionary interest as "any future interest left in a transferor or his successor in interest.").

150. If A were a tenant of Blackacre, not the owner, she could enter into a sublease agreement with B. Leases are a transfer of exclusive possession, entitling the lessee to engage in multiple uses of the leased property, while the lessor retains ownership. *See* STUART M. SAFT, COMMERCIAL REAL ESTATE TRANSACTIONS § 10:1 (3d ed. 2014) ("A lease separates the ownership and possession of real property for a limited period of time. During the lease term, an interest in the leased property is conveyed by the landlord to the tenant. The landlord retains title to the property and the tenant obtains possession for a limited period of time."). Leases are most familiar in the context of real property, but may also be used for personal property, as with leased cars and construction equipment. WILLIAM H. LAWRENCE & JOHN H. MINAN, THE LAW OF PERSONAL PROPERTY LEASING ¶ 1.01 (1993).

easement.<sup>151</sup> A could grant B a license to access or use Blackacre; a license conveys no estate in land, is not assignable, and is usually revocable at the will of the licensor.<sup>152</sup> A could establish a time-sharing arrangement, either by creating and deeding a timeshare estate to B or via a timeshare license.<sup>153</sup> And if A wanted to share her personal property, such as her car, rather than her real property, A could use a lease or license, or she could grant B a bailment in her car, which delivers possession of the car to B without conveying ownership and typically imposes a standard of reasonable care on B with respect to his possession of the property.<sup>154</sup> Furthermore, property law is not the only lens through which property sharing can be accomplished. A party

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151. An easement is a non-possessory property right that entitles the holder to enter and use land possessed by another. RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES § 1.2(1) (AM. LAW INST. 2000). Although easements run with the land by default, *id.* § 5.1, an express easement can be drafted to terminate at any desired time, *id.* § 7.1. The line between easement and lease can be murky: an easement is a non-possessory right to use that is irrevocable (and may or may not be exclusive), while a lease is an exclusive possessory interest. SINGER, *supra* note 115, at 176. However, depending on how broadly the right to use allowed by an easement is framed, and how narrowly the particular possessory interest of a lease is framed, the two categories may become hard to distinguish.

152. THOMAS W. MERRILL & HENRY E. SMITH, PROPERTY: PRINCIPLES AND POLICY 449 (2d ed. 2012) (describing licenses as “a waiver of the owner’s right to exclude”). See also R. Wilson Freyermuth, *Of Hotel Revenues, Rents, and Formalism in the Bankruptcy Courts: Implications for Reforming Commercial Real Estate Finance*, 40 UCLA L. REV. 1461, 1494 (1993) (“A license to occupy land is only a contract, and the holder of a license has a tenuous interest that is generally unprotected by a possessory remedy.”). However, licenses may be transformed into a property interest that is irrevocable (such as an easement by estoppel, a kind of implied easement) under certain circumstances. See RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES § 2.10 cmt. e (2000) (noting that an establishment of an easement by estoppel may be created “where a land owner or occupier gives permission to another to use the land, but does not characterize the permission as an easement or profit, and does not expressly state the duration of the permission”).

153. “Ownership of a timeshare property can be deeded to the purchaser through a timeshare estate or retained by the developer through a timeshare license. A timeshare estate, also called ‘deeded ownership,’ is ‘a property interest whereby fee simple ownership is combined with a right to use the timeshare unit during an annually recurring period of time.’ Alternatively, a timeshare licensee holds exclusive right to the property during a designated period specified in the contract but does not acquire the property’s title.” Elizabeth A. Cameron & Salina Maxwell, *Protecting Consumers: The Contractual and Real Estate Issues Involving Timeshares, Quartershares, and Fractional Ownerships*, 37 REAL EST. L.J. 278, 279–80 (2009).

154. See SINGER, *supra* note 115, at 808 (noting that the standard of care, as well as the liability, if any, of the bailee (Party B here) can also be determined contractually, or with reference to which party is benefitted by the bailment).

can choose to include others in property in ways not recognized by property law<sup>155</sup> through either contractual inclusion or informal norms.<sup>156</sup>

These various mechanisms for sharing property can be thought of as falling along a spectrum of sharing. At one end are more robust property-sharing devices, which provide fairly defined parameters to the property-sharing arrangements between A and B, such as defeasible estates and leaseholds. At the other end of the spectrum are property doctrines that tend to involve looser, more flexible arrangements between parties sharing property, such as licenses. In between are a number of other legal mechanisms, as well as informal norms, that can be used to facilitate property sharing between A and B.<sup>157</sup>

In referencing the spectrum of sharing offered by existing legal institutions, this Article does not mean to suggest that a formulaic approach to property sharing should be adopted or that property-sharing activities will necessarily correlate with any particular property form.<sup>158</sup> Legal analysis requires more than just matching the situation to the right “box” or “form.”<sup>159</sup>

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155. The *numerus clausus* principle limits the ability of private parties to create new forms of property rights. For a detailed analysis of the *numerus clausus* principle, see Thomas W. Merrill & Henry E. Smith, *Optimal Standardization in the Law of Property: The Numerus Clausus Principle*, 110 YALE L.J. 1 (2000).

156. Kelly, *supra* note 39, at 885–88. Professor Kelly distinguishes contractual inclusions from proprietary inclusion because contractual inclusion simply makes damages available to a non-breaching party if the agreed upon inclusion is withdrawn or terminated or the scope of inclusion is exceeded, but does not grant a property right to the non-breaching party. *Id.*

157. Depending on the particular context, informal norms may provide robust parameters to a particular property-sharing arrangement mirroring that provided by things like leaseholds, or may provide a weaker form of property-sharing governance, more similar to a license or bailment. See Pamela Quinn Saunders, *A Sea Change Off the Coast of Maine: Common Pool Resources as Cultural Property*, 60 EMORY L.J. 1323, 1333 (2011) (“No one is quite sure exactly how the territorial system originated. Most likely it was the result of usufructuary rights developing over time as individual owners of waterfront properties fished in adjacent waters . . . . These individual ‘titles’ may have eventually evolved into a system of de facto collective ownership of the fishing territory by all the owners of property on a single island or near a harbor.”).

158. See DAGAN, *supra* note 39, at 27 (“[T]he forms of property—such as the entireties form—[are] . . . important default frameworks of interpersonal interaction. As such, [they] are justifiably limited in number and standardized. Yet, as institutions structuring and channeling people’s relationships, the existing forms are never frozen. Rather, they are subject to ongoing normative (and properly contextual) reevaluation and possible reconfiguration.”).

159. See *id.* at 11 (commenting on how even in one of the most formulistic areas of property law, the system of estates, social context and a balancing of

Existing property institutions provide a relatively stable and predictable filter for analyzing seemingly novel property-sharing activities, and as such, they are an important part of any legal analysis of the sharing economy.<sup>160</sup> But while reference to these forms provides a useful baseline, this inquiry should be the means, not the ends, of determining appropriate balance of rights and responsibilities between the parties. For example, even if we were to conclude using Airbnb to rent out an apartment for two weeks correlates with a particular property form, such as a sublease, that would only be part of the inquiry. A fuller analysis would consider whether the legal rules applicable to subleases should be reevaluated in light of economic, social, or technological developments.<sup>161</sup>

Furthermore, evaluating property sharing with respect to existing property forms requires a consideration of exogenous public policy concerns about social costs and benefits of these institutions as frames for a particular property-sharing activity. For example, depending on the particular legal characterization of the sharing activity, parties engaging in it may be able to evade regulations or conversely, may be deterred from innovation. Similarly, from a regulatory perspective, local governments may be able to collect revenues or may need to develop expensive new enforcement mechanisms.<sup>162</sup> A more detailed discussion of regulatory responses to property sharing is presented in Section IV.A, but it is worth noting here that questions of form have practical implications. The next Section expands on the theme of sharing in property law by considering how it is reflected in three specific legal contexts—the law of roommates, zoning law and accessory uses, and residential rental restrictions.

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interests of different groups of people over different forms of property can result in different outcomes in different jurisdictions, such as in the differing treatment of creditors' ability to reach the assets of a tenancy by the entirety).

160. See *id.* at 30 (“[A] set of fairly precise rules must govern each property institution to enable people to predict the consequences of various future contingencies and to plan structure their lives accordingly.”).

161. See *id.* at 29 (suggesting that proper analysis of property problems involves a “process of identifying the human values underlying the existing property forms and designing governance regimes to promote them”).

162. See NAT'L LEAGUE OF CITIES REPORT, *supra* note 135, at 11, 22 (discussing some of the challenges local governments regulating the sharing economy face with respect to enforcement and revenue collection).

### B. *Doctrinal Responses to Sharing Situations*

This Section discusses three legal contexts—the law of roommates, zoning law and accessory uses, and residential rental restrictions—that are particularly relevant to the property-sharing dialogue. In each of these contexts, legislatures and courts have adapted and recalibrated legal standards in order to accommodate shifting social norms. By considering these areas we can see specific legal approaches that may be directly applicable to certain current property-sharing activities, such as home sharing. Furthermore, rather than offering rigid and monolithic responses to sharing situations, property institutions can adapt and be recalibrated in response to exogenous public policy concerns about the social costs and benefits of sharing activities.

#### 1. The Law of Roommates

Individuals who might be colloquially referred to as roommates have been recognized as having a myriad of legal statuses, depending on the specific factual circumstances, as well as the applicable laws in the jurisdiction. Thus, a roommate may be classified as a tenant, co-tenant, sub-tenant, licensee, social guest, boarder, or lodger, with different rights and obligations resulting depending on the particular classification.<sup>163</sup> For example, when a roommate has been told that he must move out, he may be able to claim the protection of landlord-tenant laws, including the right to notice and hearing before an eviction. However, his ability to do so often depends on a fact-specific inquiry into the roommate living situation. For example, courts may consider whether the roommate has his own room or whether he is an intimate partner who shares all space in the premises with the owner or tenant.<sup>164</sup> In the former case, he would be considered a co-

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163. See SINGER, *supra* note 115, at 441–43 (discussing the differing conclusions courts have reached with respect to the status of college dormitory occupants, roommates, hotel guests, and lodgers). See also Comment, *Tenant, Lodger, and Guest: Questionable Categories for Modern Rental Occupants*, 64 YALE L.J. 391, 391–92 (1955) (discussing some of these categories and criticizing as outdated some of the bases for distinguishing between them).

164. See, e.g., *Kiehm v. Adams*, 126 P.3d 339, 347 (Haw. 2005) (holding that a roommate who was the boyfriend of a tenant who terminated her oral lease with the landlord was a mere licensee with respect to his girlfriend, the tenant. The



tenant or sub-tenant with a “right to occupy a distinct and separate part of the premises” and thereby entitled to the protection of landlord-tenant law.<sup>165</sup> In the latter, however, he would be considered merely a licensee and not entitled to any applicable tenant protections.<sup>166</sup>

In the roommate context, the line between licensees and co-tenants or sub-tenants is often a fine one. Factors that point to a lease, as opposed to a license, include: a right to exclusive possession of a definite space, whether that right is freely assignable, and whether it is for a fixed term.<sup>167</sup> Furthermore, even if a roommate is considered a mere licensee with respect to the other occupants of the property, he or she may be entitled to “receive protection against third persons as the owner[] of possessory interests.”<sup>168</sup>

The same roommate relationship may be framed differently depending on whether it is determinative of the roommates’ rights vis-à-vis each other, or with respect to a third party. For example, a California court has held that a car

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court held that when the girlfriend’s tenancy terminated and the boyfriend remained on the premises, he was a trespasser without right to possession and landlord was under no duty to provide him with notice before ejection). *Cf. DeZerega v. Meggs*, 99 Cal. Rptr. 2d 366, 373–75 (Cal. Ct. App. 2000), *as modified on denial of reh’g* (Sept. 14, 2000) (holding that where a landlord agreed to an additional roommate who was not party to the original written lease, that roommate would be considered a tenant or sub-tenant, entitled to protection from eviction under Berkeley’s eviction-protection laws).

165. *See Kiehm*, 126 P.3d at 346.

166. *Id.* at 346–47.

167. *See Millennium Park Joint Venture, LLC v. Houlihan*, 948 N.E.2d 1, 18–19 (Ill. App. Ct. 2010) (“Although some divestiture of control is inherent in any granting of a license, it is the degree of possession and control that must be considered to determine whether a lease rather than a license has been granted.”).

168. RESTATEMENT (FIRST) OF PROPERTY § 521 cmt. b (AM. LAW INST. 1944) (“Interests which are less than possessory as against the owner of the land may be possessory as against third persons. Interests which do not amount to leases as against the owner of the land, which are as against him only licenses, may be the equivalent of leases as against third persons.”). A number of Supreme Court cases have recognized this fluidity in the status of co-occupants of property in the context of the 4th Amendment’s protection against unreasonable searches and seizures. *See, e.g., Georgia v. Randolph*, 547 U.S. 103, 121–22, (2006) (holding that where a co-occupant of a home is present and objects when police request to search the premises, the consent of the other co-occupant will not be adequate for a reasonable search, but where the co-occupant is not present, even though he would object if he were present, the consent of the other co-occupant is adequate for a reasonable for search); *Stoner v. California*, 376 U.S. 483, 490 (1964) (“No less than a tenant of a house, or the occupant of a room in a boarding house, . . . a guest in a hotel room is entitled to constitutional protection against unreasonable searches and seizures.”) (internal citations omitted).

insurance policy's resident exclusion would not bar a claim by a roommate injured while riding as a passenger in his roommate's insured vehicle.<sup>169</sup> Although valid public policy concerns about collusion and fraud supported the exclusion as applied to related residents of the same household, the court found that those same concerns did not apply to unrelated roommates, who are functionally "legal strangers."<sup>170</sup> Yet, when the question is whether the decision about whom to choose as one's roommate can be based on sex- or race-based personal preferences, the roommate relationship has been called an "intimate one," since a roommate has "full access to the space where we are most vulnerable," and exposes his cohabitants to his "belongings, activities, habits, proclivities, and way of life."<sup>171</sup> Thus, the Ninth Circuit has held FHA inapplicable to personal roommate selection, because of the serious "privacy, autonomy and security" concerns regulating this activity would raise.<sup>172</sup>

Finally, while "roommate" is a catch-all category for any type of cohabitant in many jurisdictions, other jurisdictions use "roommate" as a term of art. In New York, for example, a roommate is defined as a person unrelated to the tenant who shares an apartment with the tenant but who is not named on lease.<sup>173</sup> The New York roommate law grants tenants who are the only signor on a lease in a privately owned building the right to have a roommate live with them (in addition to immediate family members who are not named on the lease), regardless of whether the contractual language of the lease prohibits additional occupants, as long the apartment does not become overcrowded.<sup>174</sup>

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169. *Mercury Cas. Co. v. Chu*, 178 Cal. Rptr. 3d 144, 159–61 (Cal. Ct. App. 2014).

170. *Id.* at 161 n.6.

171. *Fair Hous. Council v. Roommate.com, LLC*, 666 F.3d 1216, 1221 (9th Cir. 2012).

172. *Id.*

173. *Your Right to Have a Roommate: The Roommate Law in New York*, METROPOLITAN COUNCIL ON HOUSING, [http://metcouncilonhousing.org/help\\_and\\_answers/your\\_right\\_to\\_have\\_a\\_roommate#answer08](http://metcouncilonhousing.org/help_and_answers/your_right_to_have_a_roommate#answer08) [<http://perma.cc/5BQT-RAFP>] (defining roommate under New York law, and distinguishing a roommate from a co-tenant, subletter, family member, guest, or licensee).

174. *Id.* See also N.Y. REAL PROP. LAW § 235-f(8) (McKinney 2014).

## 2. Zoning and Accessory Uses

Zoning is a type of land use law enacted pursuant to the police power to promote compatible uses of land and limit potential externalities from non-compatible land uses.<sup>175</sup> Zoning laws accomplish this by regulating the physical development of land.<sup>176</sup> Zoning laws vary widely from traditional Euclidean zoning, which creates separate zones for different types of land uses (such as residential, commercial, industrial) and sets standards for the improvements within each zone, to more modern form-based zoning, which focuses on a particular area's physical characteristics and prescribes a mix of various land uses, rather than segregation of uses.<sup>177</sup>

Regardless of the specifics of the zoning scheme, most zoning ordinances allow for accessory uses, which are defined as those activities "that are necessary or convenient to principal, permitted uses."<sup>178</sup> While jurisdictions vary in the specifics of how they regulate accessory uses,<sup>179</sup> a permitted accessory use is typically defined as one where the use is "incidental" and "subordinate" to the principle use. Incidental simply means that it is reasonably related to the primary use; courts sometimes refer to this as it being "attendant or concomitant" with the primary use.<sup>180</sup> Subordinate means that it must be "proportionally smaller than the principal use."<sup>181</sup> In addition, accessory use analysis may incorporate the question of whether the use is "customary."<sup>182</sup> This is a backward-looking analysis, asking whether this type of activity has been associated with this type of land use in the past.<sup>183</sup>

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175. DAVID L. CALLIES ET AL., *LAND USE* 69 (6th ed. 2012).

176. *Id.*

177. Richard S. Geller, *The Legality of Form Based Zoning Codes*, 26 *J. LAND USE & ENVTL. L.* 35, 36, 44 (2010).

178. CALLIES ET AL., *supra* note 175, at 101. How the precise parameters of the accessory uses permitted are defined depends in part on whether the jurisdiction's zoning code is viewed as permissive—meaning "those matters not specifically permitted are prohibited"—or prohibitive—"where all uses are allowed except those expressly prohibited." *Graff v. Zoning Bd. of Appeals*, 894 A.2d 285, 292 (Conn. 2006).

179. For a summary of the different approaches that local governments may take to accessory uses, see JOHN R. NOLAN ET AL., *LAND USE AND COMMUNITY DEVELOPMENT* 259 (7th ed. 2008).

180. *Graff*, 894 A.2d at 294.

181. NOLAN ET AL., *supra* note 179, at 259.

182. *Id.*

183. The customary inquiry has been questioned by some commentators, since

The concept of accessory uses is a flexible tool that is used in a number of situations involving shared spaces and uses. For example, many jurisdictions have ordinances permitting certain types of home offices or occupations in residential zones as accessory uses.<sup>184</sup> These laws are both a recognition that people have always used their homes to conduct activities related to their livelihood and an acknowledgement of personal liberty and autonomy concerns that weigh in favor of not overly limiting what people can do in their homes.<sup>185</sup> However, home offices and occupations can impose externalities—such as increased traffic and noise—and more subtly change the character of a neighborhood to be inconsistent with the expectations of those who purchase homes in residential areas. Thus, in determining whether the home office or occupation is incidental and subordinate to the principal land use, courts often must explicitly or implicitly consider how to balance these underlying policy concerns.<sup>186</sup>

The concept of accessory use for home occupations has provided policymakers with a tool to accommodate changing social, economic, and technological realities. Thus, as earlier technological innovations such as the home computer and fax

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“new uses might be inoffensive and customary ones may have become offensive over time with changing tastes.” CALLIES ET AL., *supra* note 175, at 108. *See also* Nicole Stelle Garnett, *On Castles and Commerce: Zoning Law and the Home-Business Dilemma*, 42 WM. & MARY L. REV. 1191, 1222 (2001) (noting that technology-based home businesses may be impeded because it may be “difficult to make the case that computer-based businesses are ‘customary’ home occupations”).

184. Some jurisdictions have removed the regulation of home occupations and home offices from the general accessory use regulation, and have ordinances specifically directed to home occupations, which may list precisely what types of home occupations are permitted or what are prohibited. NOLAN ET AL., *supra* note 179, at 270–71. Even where these specific regulations have been adopted, the lists of what is or is not permitted is typically based on a legislative determination of the accessory use “customary, incidental and subordinate” analysis. *Id.*

185. *Id.* *See also* Garnett, *supra* note 183, at 1191–92 (“For most people, for most of human history, work and home have been inextricably intertwined. . . . Indeed, the phenomenon of leaving home to *go to work* did not become the norm until the Industrial Revolution created two ‘separate spheres’ of human existence, the domestic and the commercial.”).

186. However, some courts approach the analysis formalistically; one commentator has noted that “resolution of these disputes often turns on seemingly silly distinctions.” Garnett, *supra* note 183, at 1207 (discussing rulings by courts that a roofing contractor could not maintain an office in his home because he kept business records there, as opposed to a homeowner with a masonry business being allowed to conduct business out of his sunroom because he did not keep files there).

machine enabled increasing numbers of professionals to work from home in the latter-half of the 20<sup>th</sup> century, zoning codes that prohibited “non-residential” activity in residential zones have been modified to allow home offices or small-scale business activities.<sup>187</sup> Nicole Garnett’s observation that there are numerous reasons to further liberalize these home occupation zoning ordinances<sup>188</sup>—from the sustainability benefits in terms of less traffic and sprawl to the potential for lower-income groups to achieve greater economic self-sufficiency—are even more persuasive in light of the sharing economy’s economic model.<sup>189</sup>

Expanding the concept of accessory uses beyond home occupations, numerous municipalities across the country have recently loosened or eliminated blanket prohibitions in residential zones on agricultural activities or the keeping of “barn animals,” such as chickens and goats, and now permit such activities as an accessory use.<sup>190</sup> Such zoning bans on agriculture and livestock activities in residential zones may have been appropriate at the time these zoning laws were adopted: when the concern was large-scale agricultural operations, with all the health and safety concerns posed by such operations.<sup>191</sup> However, keeping a few backyard chickens or operating a quarter-acre, nonprofit community garden, while technically “agricultural land uses,” are not the types of large-scale activities, with the attendant large-scale externalities, for

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187. *Id.* at 1241–43 (discussing an example of a jurisdiction that modified its zoning laws to more permissively allow for home businesses).

188. *See id.* at 1198 (suggesting that existing zoning laws still overly limit people’s ability to work from home, and fail to take into account the many benefits more liberalized home occupation regulations could have, such as providing “a viable solution to the dilemmas faced by parents struggling to balance work and family, . . . enabl[ing] low-income individuals to achieve economic self-sufficiency,” and potentially helping “alleviate the social and environmental problems caused by suburban sprawl”).

189. *Id.* *See also* Patricia E. Salkin, *Zoning and Land Use Planning*, 35 REAL EST. L.J. 181, 184 (2006) (discussing “ways to modernize local zoning laws to balance the growing demand by residents to engage in legitimate home-based businesses while protecting community character and the health, safety, and welfare of neighbors in residential zoning districts”).

190. Sarah B. Schindler, *Of Backyard Chickens and Front Yard Gardens: The Conflict Between Local Governments and Locavores*, 87 TUL. L. REV. 231, 287–92 & nn. 284–313 (2012) (discussing zoning laws that have been adopted in numerous jurisdictions to allow for small-scale urban agriculture and livestock activities).

191. *Id.* at 246–53.

which these zoning bans were originally intended.<sup>192</sup> Particularly in light of the potential for small-scale agriculture and livestock activities to advance sustainability goals, promote public health, and encourage “green” businesses, numerous cities have modified their zoning codes and now allow certain types of small-scale agricultural activities as an accessory use in residential zones.<sup>193</sup>

Short-term rentals of residential properties have largely been addressed by specific residential rental restrictions, which are discussed in the next Subection.<sup>194</sup> However, in some jurisdictions, the doctrine of accessory uses has been used to permit short-term rentals. For example, in Alaska, bed-and-breakfast operations are permitted as a “minor and incidental commercial activity” in any residential zone as long as the owner occupies the property and there are three or fewer guest rooms.<sup>195</sup> In addition, numerous decisions from the early- and mid-20<sup>th</sup> century also recognize the right of individuals living in residential zones to take in short-term boarders or lodgers as long as the activity was “merely incidental and accessory to the principal use of the house as a home by the family of the occupant.”<sup>196</sup> However, more recent decisions tend to find that

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192. See *id.* at 246–58, 274–79. Note, however, that the potential iterative effects of a large number of small-scale activities, even if geographically dispersed and not individually imposing the types of externalities that a single large-scale land use of that type would create, may nonetheless impose cumulative impacts that justify regulation. This issue of iteration effects is discussed in more detail *infra* Part IV.

193. Schindler, *supra* note 190, at 287–92. The law has responded to rapidly evolving social norms in this area: in the early 2000s, one land use scholar noted that “zoning laws probably prohibit residents in most neighborhoods from raising pigs or chickens, and the pages of modern law reviews are hardly filled with pleas for regulatory relief by swine and fowl lovers.” Garnett, *supra* note 183, at 1211. Yet by 2012, scholarship by Sarah Schindler highlighted the changing social values that have led to liberalization of urban agricultural zoning laws across the country. See Schindler, *supra* note 190, at 235–36 (“Now, as conceptions of harm are changing, localities can use those same police powers that originally justified bans on urban agriculture to instead justify more permissive uses of residential property for agricultural purposes to further broader public health and welfare goals. To those ends, some localities have recently put in place ordinances that proactively address and govern urban agriculture practices.”).

194. See *infra* Section II.B.3.

195. ANCHORAGE, ALASKA, MUN. CODE § 21.45.250 (2014).

196. See 2 ARDEN H. RATHKOPF ET AL., RATHKOPF’S THE LAW OF ZONING AND PLANNING § 33:35, Westlaw (database updated Nov. 2015) (discussing several cases from the early-20<sup>th</sup> century illustrating the “general rule . . . that a limited number of boarders is a customarily accessory use of residential property but that where the number of boarders is disproportionate to the primary residential use

short-term lodgers or boarders in residential zones are not permissible accessory uses of those properties.<sup>197</sup> Some of these decisions have been based on the fact that the applicable jurisdiction's zoning ordinance was explicitly amended to prohibit such uses.<sup>198</sup> In other jurisdictions, courts engage in the traditional accessory use analysis, but find the character of the activity involving rentals to boarders was no longer subordinate and incidental to the principal residential use for which the property was zoned.<sup>199</sup>

### 3. Residential Rental Restrictions

Residential rental restrictions exist in many communities and may be imposed either through local land use laws or through private covenants and deed restrictions. Restrictions may be relatively minimal, such as a requirement that owners who rent their properties register with the city.<sup>200</sup> Or restrictions may be more significant, such as prohibitions on short-term rentals in resort communities concerned with loss of community character or even complete bans on residential rentals imposed by owner-occupancy requirements in some homeowner associations' deed restrictions.<sup>201</sup>

Justifications for both short-term and long-term rental

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by the principal occupant it becomes a business”).

197. See 4 NORMAN WILLIAMS, JR. & JOHN M. TAYLOR, *AMERICAN LAND PLANNING LAW* § 79:29, Westlaw (database updated Nov. 2015) (summarizing relevant case law). However, when the challenge to short-term rental activity was framed not as an accessory use issue, but as a question of whether short-term rentals are “residential” land uses (and thereby permitted in residential zones), courts in several states have found that these activities are residential and are therefore permitted in residential zones in the absence of any specific prohibition against them. See *infra* notes 209–15 and accompanying text.

198. See 4 WILLIAMS & TAYLOR, *supra* note 197, § 79:29, (discussing relevant cases).

199. *Id.*

200. See Ngai Pindell, *Home Sweet Home? The Efficacy of Rental Restrictions to Promote Neighborhood Stability*, 29 ST. LOUIS U. PUB. L. REV. 41, 46–49 (2009) (providing a thorough discussion of registration requirements and other rental restrictions).

201. *Id.* at 54–55, 60–61. While the focus in this Section is on short term rental restrictions adopted by local governments, for an informative discussion of long term rental restrictions or absolute bans imposed by private covenants in common interest communities, see Andrea J. Boyack, *American Dream in Flux: The Endangered Right to Lease a Home*, 49 REAL PROP., TR. & EST. L.J. 203 (2014) (discussing the negative impacts of rental restrictions contained in private covenants on both owners (who cannot rent out their homes) and would-be renters (who cannot live in the community)).

restrictions include concerns about maintaining residential character and neighborhood stability,<sup>202</sup> as well as reducing potential externalities caused by a high concentration of rental properties, such as issues with parking, noise, and lack of upkeep.<sup>203</sup> However, short-term rental restrictions—banning or limiting rentals of thirty days or fewer for property in designated residential zones—are also often enacted with the goal of preserving the long-term rental property stock in the community.<sup>204</sup> Short-term rentals typically produce

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202. See, e.g., *Ewing v. City of Carmel-by-the-Sea*, 286 Cal. Rptr. 382, 388 (Cal. Ct. App. 1991) (“It stands to reason that the ‘residential character’ of a neighborhood is threatened when a significant number of homes . . . are occupied not by permanent residents but by a stream of tenants staying a weekend, a week, or even 29 days. Whether or not transient rentals have the other ‘unmitigatable, adverse impacts’ cited by the Council, such rentals undoubtedly affect the essential character of a neighborhood and the stability of a community. Short-term tenants have little interest in public agencies or in the welfare of the citizenry. . . . Literally, they are here today and gone tomorrow—without engaging in the sort of activities that weld and strengthen a community.”). Concerns about the perceived negative effect of renters, even long-term renters, on neighborhood stability and community character, have also been used to justify absolute rental bans imposed by homeowners associations through deed restrictions. See Boyack, *supra* note 201, at 210. However, absolute bans on rentals have been criticized as “imperfect proxies” for achieving legitimate community goals: “Renters may have lengthy tenures, be friendly, and become involved community members. Therefore, prohibiting renter occupants is an inexact method for obtaining the widely touted benefits of community stability, value, and harmony.” *Id.* at 294.

203. See Pindell, *supra* note 200, at 49 (discussing procedural rental restrictions that many university or resort towns impose on landlords to account for the potential externalities created by “the disproportionately large number of renters in these areas”).

204. See, e.g., S.F., CAL. ADMIN. CODE § 41A.2 (defining “tourist or transient use” as “[u]se of a Residential Unit for occupancy for less than a 30-day term of tenancy, or occupancy for less than 30 days of a Residential Unit leased or owned by a Business Entity, whether on a short-term or long-term basis”); *id.* § 41A.4 (“It is the purpose of this ordinance to benefit the general public by minimizing adverse impacts on the housing supply and on persons and households of all income levels resulting from the loss of residential units through their conversion to tourist and transient use. This is to be accomplished by regulating the conversion of residential units to tourist and transient use, and through appropriate administrative and judicial remedies.”); see also Liz Krueger, *Answers for New Yorkers Concerned or Confused about the Illegal Hotel Law*, N.Y. STATE SENATOR LIZ KRUEGER (May 27, 2014), <http://www.nysenate.gov/report/answers-new-yorkers-concerned-or-confused-about-illegal-hotel-law> [<http://perma.cc/2MZ7-QG7V>] (explaining why Senator Krueger supported a 2010 New York state law known as the “Illegal Hotel Law,” which prohibits rentals of thirty days or less). “Every unit that’s used all or most of the time for illegal hotel activity is an apartment that’s not on the residential housing market. That means illegal hotels are worsening New York City’s chronic housing shortage and increasing the rents of everyday New Yorkers.” *Id.*



significantly more rental income for landlords, who may subsequently be incentivized to convert long-term rental units into short-term rentals, thereby exacerbating housing shortages and driving up rents for long-term housing.<sup>205</sup>

Thus, short-term rental bans and limitations have been upheld in numerous jurisdictions as legitimate exercises of the local government's police power in furtherance of the legitimate government goals of promoting the availability of long-term rental housing, as well as improving community stability.<sup>206</sup> Furthermore, claims that such short-term bans or limitations are a taking have been largely dismissed on the grounds that owners are left with numerous other viable economic uses of the property, including renting for longer periods of time or selling the property.<sup>207</sup> As the California Supreme Court explained in a decision upholding Carmel-by-the-Sea's short-term rental ban: a "zoning ordinance does not constitute a taking simply because it narrows a property owner's options."<sup>208</sup>

In the absence of a specific ordinance banning or limiting

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205. See Tim Logan et al., *Airbnb and Other Short-Term Rentals Worsen Housing Shortage, Critics Say*, L.A. TIMES (Mar. 11, 2015, 3:00 AM), <http://www.latimes.com/business/realstate/la-fi-airbnb-housing-market-20150311-story.html#page=1> [<http://perma.cc/Q2UZ-UTRM>] (noting that "[m]ore money might be made renting to tourists a few days at a time than to a local for 12 months or more" and citing a study that estimated that over 7,000 houses and apartments had been removed from the long-term rental market in metro Los Angeles and converted to short-term rentals).

206. See, e.g., *Ewing*, 286 Cal. Rptr. at 389 (finding that preserving residential character and community stability is a legitimate government interest and upholding local ordinance banning rentals in residential zones for fewer than thirty days against a takings challenge); *Cope v. City of Cannon Beach*, 855 P.2d 1083, 1086 (Or. 1993) (upholding a local ordinance banning the rental of dwelling units in certain residential zones for less than fourteen days against a takings challenge because it substantially advanced legitimate government interests "in securing affordable housing for permanent residents and in preserving the character and integrity of residential neighborhoods"). For a more detailed discussion of the logistics of various short-term rental restriction ordinances that have been enacted in communities across the country, see Gottlieb, *supra* note 112.

207. See, e.g., *Ewing*, 286 Cal. Rptr. at 389.

208. *Id.* However, such laws can still be preempted by contrary state law. Florida, for example, recently passed a state law prohibiting cities and counties that do not already have existing short-term rental laws from enacting any type of regulations regarding "residential vacation rental," defined as residential properties rented for thirty days or fewer more than three times a year. Kim Hackett, *Local Governments Banned from Restricting Short-Term Rentals*, SARASOTA HERALD TRIB. (June 3, 2011, 1:22 PM), <http://www.heraldtribune.com/article/20110603/ARTICLE/110609878> [<http://perma.cc/WW32-TP3X>].

short-term rentals, courts have reached differing outcomes about whether short-term rentals are permissible in residential zones. In some cases, the fact that the occupant is a short-term renter has been held not to transform the land use into a non-residential use, since the short-term renter is using the property for his residence, albeit a temporary one. For example, a Utah court considered whether short-term rentals were permissible in a city whose zoning ordinance provided that land uses in residential zones were limited to single-family dwellings.<sup>209</sup> The zoning ordinance defined single-family dwellings as those “designed for occupancy by one family,” but it did not contain an express duration limit regarding the occupancy of such dwellings.<sup>210</sup> The court held that short-term rentals of several days or weeks in residential zones did not violate the zoning ordinance. “Despite [the City of] Sandy’s ability to pass an ordinance to restrict short-term leasing, as discussed above, we must construe existing zoning ordinances strictly against the City.”<sup>211</sup>

In contrast, the Supreme Court of Indiana rejected a homeowner’s argument that the court should construe similar language in a city’s zoning code—restricting uses in residential uses to single-family dwellings, which were defined as those used “exclusively as a residence by one family”—to allow for short-term rentals.<sup>212</sup> The court rejected the owner’s claim that the zoning code language simply meant that the dwelling must be occupied by one family at a time (but not necessarily the same family); rather, the court held the language was unambiguous and clearly limited use in residential zones to “a dwelling intended to be used by only one family as a residence,

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209. *Brown v. Sandy City Bd. of Adjustment*, 957 P.2d 207, 208 (Utah Ct. App. 1998).

210. *Id.*

211. *Id.* at 212. *See also In re Toor*, 59 A.3d 722, 728 (Vt. 2012) (holding that where a zoning ordinance limited uses in residential zones to “occupancy by a family living as a household unit,” short-term rentals are permissible). “[A]ppellants rent to tenants who use it for the same purpose as appellants . . . [E]ach renter is a single family that maintains a household during the period of the rental.” *Id.* The court in *Toor* construed the language of the zoning ordinance strictly and rejected the government’s argument that even though each use by short-term renters may have technically satisfied the literal language of the zoning code, “taken as a whole, the use has changed from a personal use to a commercial use or to a mixture of both.” *Id.* “The Town could clearly prohibit appellants’ use, but we cannot read the current bylaws as having done so.” *Id.* at 729.

212. *Siwinski v. Town of Ogden Dunes*, 949 N.E.2d 825, 828 (Ind. 2011).

and not rented to another family for a profit.”<sup>213</sup>

While the interpretation of whether short-term rentals qualify as a residential use varies by jurisdiction, even courts strictly construing the language in zoning ordinances against local governments (and thereby allowing short-term rentals in residential zones) acknowledge that local governments have the power to regulate and can choose to limit these activities. Communities may have legitimate concerns about such activities and the externalities they impose, as the Vermont Supreme Court acknowledged in a decision upholding a property owner’s short-term rental activity in the face of a zoning ordinance that did not clearly prohibit such activity.<sup>214</sup> However, the court emphasized that balancing those interests is the role of the legislature, not the judiciary: “[c]reating a bylaw that balances the interests of the landowner, other landowners nearby and the Town is the only proper way to address these interests and effects . . . [but] fashion[ing] a balanced solution is well beyond our role.”<sup>215</sup>

In each of the three contexts discussed above—the law of roommates, zoning and accessory uses, and residential rental restrictions—the regulatory responses to property sharing have been based on inquiries into the underlying features of the sharing activity at issue, such as the relationship between roommates, the type of home business, or the frequency or location of residential rentals. The next Part considers how an inquiry into the underlying features of property-sharing activities can help bring analytical clarity to the debate over the sharing economy.

### III. THE ARCHITECTURE OF PROPERTY SHARING

Drawing on the analysis of the social and legal context for sharing presented in the previous sections of the Article, this Part develops a non-exhaustive set of factors that characterize

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213. *Id.* at 829–30. (“It makes sense that Ogden Dunes, a small, quiet, lakeshore town on Lake Michigan, would not want renters overwhelming its residential district during the summer lake season. . . . The residents are able to determine the use of their town’s land through the zoning ordinances, and they intended to keep the unique nature of a small residential beach community intact by not allowing for rental property in their residential district. Should the town, by its elected officers, choose to modify the ordinances, it is its prerogative.”).

214. *In re Toor*, 59 A.3d at 729.

215. *Id.* at 729–30.

property-sharing activities. Just as the windows, floors, stairs, and roof of a building combine to determine its overall architecture, these underlying characteristics form the architecture of any particular property sharing.

Considering the underlying characteristics of a particular property-sharing activity not only allows us to compare one form of property sharing to another, but also allows us to situate the activity with respect to existing legal forms and social norms. In doing so, a clearer picture emerges as to whether a particular property-sharing activity is so novel that existing regulatory models are inappropriate or, conversely, whether it is sufficiently analogous to existing uses of property that it should receive the same legal treatment. This Part discusses the characteristics that are key to this inquiry. Part IV will then consider how these characteristics inform the regulatory response to the sharing economy. A summary of the property-sharing characteristics, discussed herein, is provided in condensed form in Table 1 at the conclusion of this Part.

#### A. *Identity of the Party Sharing Property*

The identity of those sharing property generally falls into two categories: owners and non-owners (who are typically either tenants or licensees). An owner is generally considered to have a complete bundle of rights with respect to the property owned, such as the right to use, control, transfer, exclude, and destroy.<sup>216</sup> Note, however, the content of the bundle varies depending on the type of property owned. For example, an owner who enters a one-year lease with a tenant has effectively transferred the right to occupy and possess to the tenant for the lease period.<sup>217</sup>

Depending on the particular identity of the non-owner, the rights with respect to the property will vary. For example, a

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216. See, e.g., J.E. Penner, *The "Bundle of Rights" Picture of Property Law*, 43 UCLA L. REV. 711, 741 (1996).

217. SINGER, *supra* note 115, at 3. Furthermore, for certain types of personal property, the bundle of rights the owner is vested with may be even more limited; for example, corporations are owned by shareholders, but shareholders have few of the sticks in the bundle of rights that are normally associated with ownership (e.g., no right to control, no right to receive share of profits, etc.). See ROE, *supra* note 142, at 1–2 (discussing the advantages of the diffuse ownership structure of corporations and the limited power of the corporation's owners (i.e., shareholders)).

tenant is a non-owner, but has possession of the leased property and is considered to have a relatively robust bundle of possessory rights with respect to the property.<sup>218</sup> In contrast, a non-owner licensee may have a much more limited range of rights with respect to the property. For example, a guest at a hotel is considered a licensee and has no property right in his hotel room.<sup>219</sup> Thus, he is not entitled to the protections of landlord-tenant law in his dealings with the hotel management. As a result, if he is erroneously accused of violating hotel policy and is removed from his room, he has no claim to be physically put back into possession of his room; rather, he will be limited to a monetary damages claim for the hotel's breach of the agreed upon access.<sup>220</sup>

### *B. Type of Property Being Shared*

Property sharing can involve three different types of property: real property, personal property, and quasi-property.<sup>221</sup> Real property includes land and permanent, immobile improvements on the land, i.e., buildings.<sup>222</sup> Personal property, also known as chattels, is all other tangible and intangible property except that which is considered intellectual property.<sup>223</sup> Quasi-property, as used here,<sup>224</sup> refers to categories of assets that are treated like property to some degree but are not fully recognized as being real or personal property.

While identifying real property and personal property is relatively straightforward, quasi-property requires somewhat more explanation. A number of property-like assets exist that are not easily categorized as one type of property or another.

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218. SINGER, *supra* note 115, at 3.

219. 43A C.J.S. *Inns, Hotels, and Eating Places* § 9, Westlaw (database updated Dec. 2015).

220. RESTATEMENT (SECOND) OF PROP., LANDLORD & TENANT § 1.2, reporter's note (AM. LAW INST. 1977) ("Guests in a hotel . . . have only a personal contract and no interest in the realty.").

221. As mentioned in *supra* note 99, intellectual property is also obviously the subject of much sharing activity, but is not the focus of the framework developed in this Article for the reasons discussed above.

222. SINGER, *supra* note 115, at 796.

223. *Id.*

224. The concept of quasi-property has been given different parameters by scholars investigating its legal ramifications. See, e.g., Shyamkrishna Balganes, *Quasi-Property: Like, but Not Quite Property*, 160 U. PA. L. REV. 1889 (2012).

For example, we often seem to recognize some property interest in the physical space a person occupies in a line, but not a full bundle of property rights.<sup>225</sup> Similarly, if you are the holder of a residential parking permit for a certain city block that entitles you to legally park on the street at hours when the general public is not permitted, you might be said to have some property interest in a physical parking space on that street, even though the street itself is owned by the government.

Property-sharing activities often involve the sharing of more than one form of property. For example, an apartment listed on Airbnb involves the sharing of both real property (the apartment) and personal property (the furniture and household goods). Similarly, a meal-sharing dinner listed on Munchery involves both the sharing of personal property (food) and real property (the kitchen and dining room in which the host and guests will eat). Typically, however, the sharing of one type of property is the primary focus of the sharing activity (as with food shared on Munchery), while the other type of property is merely shared incidentally (the kitchen/dining room portions of the host's house).

### C. Consideration

Although not all property-sharing activities involve consideration, the monetization of assets is one of the defining features of the sharing economy, and a large proportion of property-sharing activities do involve consideration, either monetary or nonmonetary. As part of the consideration analysis, one should ask whether the transaction includes consideration and, if so, *to whom* such consideration is paid. In most peer-to-peer property-sharing transactions, if consideration is paid at all, it is paid by Party B to Party A; the third-party platform, such as Airbnb, facilitating the

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225. For example, if you are waiting in line and need to use the restroom, there appears to be a norm that you can ask someone to save "your place" in line. See generally David Fagundes, *The Social Norms of Waiting in Line* (forthcoming), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2568322](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2568322) [https://perma.cc/43XC-WCK7]. See also Molly Cohen & Corey Zehngbot, *What's Old Becomes New: Regulating the Sharing Economy*, 58 BOS. B.J. 6 (2014) (providing the example of a space in line at a Starbucks store, which might be conceived of as a non-transferrable license by Starbucks, thus invalidating an attempt to share—for a fee—a space in line through a sharing economy platform such as TaskRabbit).

transaction, may also charge a fee.<sup>226</sup> However, in some peer-to-peer transactions, Party B pays consideration, but pays it to the external party-platform exclusively or to another third party, such as a nonprofit. For example, Housetaurant is a sharing platform that enables people to host meals for guests to raise money for 501(c)(3) charities; any amount paid by the guests in consideration of the meal provided to them by the host does not necessarily go to the host, but may go instead to the charitable nonprofit which has been designated as the beneficiary of the dinner.<sup>227</sup> Another sharing platform, Love Home Swap, facilitates home swaps between members, a kind of bartering in which Party A and B stay in each others' homes; while no monetary consideration is exchanged between the parties swapping their homes, to access the homes available for swapping on the platform, each party must pay a monthly fee to the company.<sup>228</sup>

#### D. Exclusivity

While property sharing can temper the rivalrous nature of property to some extent,<sup>229</sup> exclusivity of use or possession is necessarily embedded into property-sharing activities. Exclusivity has both physical and temporal dimensions with respect to whether the property being shared is being used or possessed exclusively by one party or whether there is co-occupation or co-use of the property.

Consider the range of exclusivity of possession in these three house-sharing scenarios.<sup>230</sup> In the first scenario, I am

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226. See, e.g., *What are Host Service Fees?*, *supra* note 138 (“Airbnb charges hosts a 3% host service fee every time a booking is completed on our online platform.”); *What are Guest Service Fees?*, *supra* note 138 (“We charge a 6–12% guest service fee every time a reservation is booked. . . . If a guest cancels a reservation, the service fee is non-refundable.”).

227. HOUSETAURANT, <http://www.housetaurant.com> [<http://perma.cc/PF2X-RBQW>].

228. LOVEHOMESWAP, *supra* note 64.

229. See Laura S. Underkuffler, *Property and Change: The Constitutional Conundrum*, 91 TEX. L. REV. 2015, 2029 (2013) (“Property in physical, finite, nonsharable resources is *inherently rivalrous* in nature . . . [and] involves allocation; as a result, [t]he extension of property protection to one person necessarily and inevitably denies the same rights to others.”) (internal citations omitted).

230. Note that while a different sharing economy platform is used in this example to locate the three different types of house-sharing scenarios, in fact, Airbnb could be used to find a listing of any of three types of house-sharing

planning a trip to Miami and want a house or apartment to myself for the weekend, so I use VRBO to find such a property.<sup>231</sup> What I obtain will be exclusive possession of the entire property and no temporal or physical co-occupation with the host during the agreed upon period of time; the exclusivity of possession thus mirrors to a large extent that which a lessee or sub-lessee is entitled to under a lease.<sup>232</sup> In the second scenario, I only want a private room to sleep in at night, so I use Airbnb to find such accommodation.<sup>233</sup> What I obtain will be exclusive possession of the private bedroom, but temporal and physical co-occupation with the host (and possibly other guests) of the common space in the house and no possession at all of spaces the host deems private, such as his bedroom; the exclusivity of possession here thus mirrors that which a roommate might have. In the third scenario, I am on a limited budget, so I use Couchsurfing to find a shared room for the weekend.<sup>234</sup> What I obtain will be exclusive possession of the personal property I am sleeping on (the couch or bed), but once again, temporal and physical co-occupation with the host (and possibly other guests) of the room in which the personal property is located, as well as other common areas of the house, and no possession at all of the host's private spaces.

### *E. Idle Capacity Usage*

This characteristic of property sharing relates to the extent to which the property-sharing activity utilizes otherwise idle

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arrangements (which it refers to as “Entire Place,” “Private Room,” and “Shared Room.”). See *How to Travel*, AIRBNB, <https://www.airbnb.com/support/getting-started/how-to-travel> [<https://perma.cc/MH32-2BF8>] (“[I]f you’re looking to make friends and stay with a host, select Private Room or Shared Room. Or if you’re looking for an entire space to call your own, go ahead and select the Entire Place filter.”).

231. VRBO, <http://www.vrbo.com/> [<http://perma.cc/CRH9-R9RL>].

232. See *id.* It does not exactly mirror the type of exclusive possession typically granted under a lease, since even when a host lists an entire house on Airbnb, typically there are still portions of the house that the temporary possessor does not have access to (i.e., locked/closed closets, garage or storage shed, etc.). See *What Are House Manuals and House Rules?*, AIRBNB, <https://www.airbnb.com/help/article/472/what-are-house-manuals-and-house-rules> [<https://perma.cc/G2UC-L2BY>] (noting that a property may have “areas beyond the listing space that are off-limits”).

233. *How to Travel*, *supra* note 230 (noting that Airbnb users can select to stay in a host's private room).

234. COUCHSURFING, *supra* note 8.



capacity of an asset. In other words, if the property-sharing activity were not to occur, would the asset be under- or unutilized? An example can help illustrate this concept. If I drive my car alone everyday from my neighborhood to my office an hour away, and have three empty seats, I may decide to use a service like BlaBlaCar to locate other commuters located along my route whom I could provide rides to in exchange for a fee.<sup>235</sup> I have thereby utilized the otherwise unused capacity (the three empty seats). In contrast, if I sign up as a driver with Lyft Line, I have agreed to drive around in my car and pick up multiple riders going to destinations in the same direction.<sup>236</sup> In this case, unless it was my plan to drive around in my car alone all day, my property-sharing activity does not utilize otherwise idle capacity, but rather creates new market activity.

#### *F. Third-Party Platform Involvement*

As discussed in Part I, while peer-to-peer property-sharing activities have long taken place within close-knit communities (families, neighbors, etc.), and even between strangers in certain contexts (e.g., hospitality traditions of hosting travelers), the explosion in property-sharing activities is largely the result of technological developments by third-party platforms, enabling those who have property they are willing to share to connect with those who want shared access to that property.

The level of third-party platforms' involvement in property-sharing activities varies. Some property-sharing activities—such as in informal backyard garden vegetable shares organized between neighbors via word of mouth—involve no third-party platforms. Other property-sharing activities, such as ride-sharing or short-term rentals conducted via Craigslist, involve third-party platforms, but their involvement is limited to serving as a virtual bulletin board.<sup>237</sup>

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235. BLABLACAR, <https://www.blablacar.com/> [<https://perma.cc/C74K-RR6K>]; see also CARMA, <http://www.carmacarpool.com> [<http://perma.cc/MUE7-9SLP>].

236. See *Lyft Line*, LYFT, <https://www.lyft.com/line> [<https://perma.cc/7CXE-SRPK>] (describing Lyft Line as “an affordable new way to ride,” in which passengers “[s]hare the ride with others going the same way, and pay up to 60% less.”); see also *UberPool*, UBER, <https://get.uber.com/cl/uberpool/> [<https://perma.cc/L32E-2JFP>] (describing Uber’s shared ride service comparable to Lyft Line).

237. See, e.g., CRAIGSLIST, <https://www.craigslist.org/about/sites#US> [<https://perma.cc/Y4DA-QJVB>].

Finally, some third-party platforms, such as Airbnb and RelayRides, facilitate property-sharing transactions in numerous ways, such as through their membership requirements, trust verification and ratings systems, and facilitation of payments between parties.<sup>238</sup>

As a stand-alone component, the involvement of a third-party platform in a property-sharing activity is not necessarily determinative of that activity's legal status. However, because third-party platforms often capture a fee for facilitating property-sharing activities,<sup>239</sup> the involvement of third-party platforms may signal that a sharing activity falls at the commercialized end of the personal-commercial axis of sharing, making regulatory treatment more appropriate.<sup>240</sup>

Furthermore, the involvement of a third-party platform also signals that the property-sharing activity falls on the formal end of the formal-informal axis of sharing. Many property-sharing activities appear to mirror the kind of informal sharing that has long occurred outside the confines of regulation and taxation—such as the shared rides services offered by Uber and Lyft (UberPool and Lyft Line),<sup>241</sup> which look very similar to the ad hoc unlicensed taxis and “gypsy cabs” that have long operated in developing countries as well as urban neighborhoods in the U.S. not regularly serviced by licensed cabs.<sup>242</sup> These ad hoc shared-ride transactions are usually considered part of the informal economy since they typically involve cash transactions that are difficult to monitor,

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238. See e.g., *Trust*, *supra* note 131.

239. See *supra* note 137 and accompanying text (discussing the trust verification and other transaction cost lowering services platforms provide).

240. By recognizing the commercial or for-profit nature of companies like Airbnb or Uber, this is not to say that they do not legitimately include charitable or sustainable or community-minded goals as part of their business model; many of them do. See, e.g., van Romburgh, *supra* note 124 (describing Airbnb's charitable efforts through its #OneLessStranger campaign); MUNCHERY, <https://munchery.com/how-it-works/> [<https://perma.cc/48PG-YLAS>] (“[E]very time you order, we donate to a local food bank, providing someone in need with a meal.”). But just like Hilton and Avis, who may also contribute to charitable and community campaigns, Airbnb, Uber, and Munchery, like many other sharing economy companies, are for-profit companies, not charitable institutions or community social clubs.

241. Alex, *Announcing UberPool*, UBER (Aug. 5, 2014) <http://newsroom.uber.com/announcing-uberpool/> [<http://perma.cc/D7XT-SXWA>]; *Lyft Line*, *supra* note 236.

242. See Katrina Miriam Wyman, *Problematic Private Property: The Case of New York Taxicab Medallions*, 30 YALE J. ON REG. 125, 170–72 (2013) (describing the history of gypsy cabs in New York City).

regulate, and tax. In contrast, when the activities are conducted via a third-party platform that captures user and financial information, as uberPOOL and Lyft Line are, the nature of the sharing activity moves away from the informal end of the axis and towards the formal end.<sup>243</sup>

### G. Scale

This component in the architecture of property sharing differs analytically somewhat from the others discussed in this Part. Rather than looking at the characteristics of a particular property-sharing activity as a stand-alone matter, the issue of scale involves consideration of the activity within a broader context and asks two questions. First, how many property-sharing transactions *by this party* are occurring? Second, how many property-sharing transactions *of this type* are occurring?

The first question about scale can help identify where on the personal-commercial axis of sharing this activity falls, since how often an activity is engaged in by a party is often used as a rough correlation of the commercial nature of the activity. For example, if A hosts a clothing swap at her house twice a year for her friends to exchange used clothes, that activity likely falls on the personal end of the spectrum. However, if A holds clothing swaps on a monthly or weekly basis and opens the events to the general public, the activity moves away from the informal and personal ends of the spectrum towards the formal

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243. To be fully on the formal end of that axis of sharing, the activities would need to be regulated and taxed, something that remains difficult since many sharing economy companies like Uber and Airbnb continue to resist attempts by regulators to access the user and financial information that is necessary for these activities to be regulated. While these companies often cite their users' privacy concerns as reasons for refusing to share the information with government regulators, *see, e.g.*, Geron, *supra* note 22, the claims also appear to be grounded in the erroneous belief that because the activities the platforms facilitate are informal, the activities are outside the bounds of regulatory oversight, *see id.* ("Airbnb says the subpoena is too broad[,] and '[t]he vast majority of these hosts are everyday New Yorkers who occasionally share the home in which they live.'). This claim misconceives the formal-informal axis of sharing: the activities being conducted on the informal end of this axis are often ones that the government would like to regulate and has the authority to regulate (such as gypsy cabs), but because of high transaction costs (lack of enforcement mechanisms, difficulty of identifying the activities because of cash transactions, etc.), the activity goes unregulated. Thus, simply categorizing a property-sharing activity as informal does not necessarily imply that it is normatively one that should not be subject to regulation.

and commercial ends. Because A is engaging with the public and potentially creating externalities (such as increased traffic and parking issues), the increased scale of her activity means that regulatory oversight may be appropriate.<sup>244</sup>

The second aspect of scale to be considered—how many property-sharing transactions *of this type* are occurring—is intended to probe at the potential for iteration effects. Iteration effects result from the repetition of an activity over and over. When considered as an individual, stand-alone action, the activity may not cause any negative impacts, but when repeated by numerous individual actors, the activity imposes negative impacts due to externalities resulting from cumulative actions.<sup>245</sup> To minimize such iteration effects, the initial rules applying to individual actions should be adjusted to account for the negative cumulative effect.

For example, when considered as a discrete, stand-alone action, an individual renting out her apartment while she is out of town for the week may create few, if any, negative externalities. However, when large numbers of tenants under long-term leases start renting out their apartments in a similar manner, the iterative impacts may result in a decrease in long term rental availability, as landlords take units out of the long-term rental market and move them into the more profitable short-term rental market. It may also result in a decrease in rental affordability, as landlords raise rents on the assumption that everyone signing a long-term lease will be engaging in this activity.<sup>246</sup>

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244. For example, she may solicit new groups of swappers by posting information about the swaps online or on coffee shop bulletin boards, and hold the swaps at her house on a weekly basis, leading to more traffic and cars and noise in her residential neighborhood.

245. See Kellen Zale, *The Government's Right to Destroy*, 47 ARIZ. ST. L.J. 269, 301 (2015) ("Iteration effects can thus be understood as a type of externality; if enough individuals engage in the particular action, the cumulative negative impacts are imposed on society and not fully borne by the individual actors engaging in the activity."); see also Eric Biber & J.B. Ruhl, *Regulating the "Sharing Economy,"* REGBLOG (July 28, 2014), <http://www.regblog.org/2014/07/28/28-biber-ruhl-regulating-the-sharing-economy/> [<http://perma.cc/N433-QR5R>] (voicing concerns about imposing overly strict regulations on "large numbers of actors doing small-scale activities" but "recogniz[ing] that the cumulative impacts of those activities might be significant").

246. Housing advocates have alleged there is evidence of both of these kinds of iteration effects in cities where Airbnb has a large presence. See, e.g., Emily Alpert Reyes, *New Soldiers in Airbnb Battle: PR and Politics*, L.A. TIMES (Apr. 4, 2015, 12:00 PM), <http://www.latimes.com/local/politics/la-me-adv-airbnb-politics->

Questions of scale—both with respect to a particular party and with respect to a particular type of transaction—almost inevitably will require re-evaluation as underlying property-sharing activity evolves. A one-off activity, such as inviting a friend of a friend in town for a conference to spend the night on your couch, is an informal, nonmonetary, personal, and likely gratuitous act of sharing.<sup>247</sup> This activity, however, might evolve into offering air mattresses in your spare bedroom to attendees of the next conference that comes through town and charging the visitors a fee. The sharing activity might further evolve as you tell your friends in other cities about what you are doing and they do the same thing where they live. Eventually the sharing activity may evolve into a formal, monetary, nongratuitous and commercial operation that is valued in the billions.<sup>248</sup> Thus, the scale component not only suggests consideration of where along this spectrum of scale the property-sharing activity is currently, but also a re-examination of the activity if and when it scales up in size and scope.

#### *H. Duration*

Finally, in characterizing a particular property-sharing activity, we should consider the duration of time for which access is provided to the property being shared. Property sharing involves the provision of temporary access to property.<sup>249</sup> However, although the property sharing may be

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20150405-story.html#page=2 [http://perma.cc/878X-XQMN] (citing a study by the Los Angeles Alliance for a New Economy indicating that 7,000 houses and apartments units in Los Angeles had been removed from the long-term rental market as a result of being converted to Airbnb short-term rentals).

247. Even if the activity is not purely gratuitous, such informal sharing at most typically involves a gift of a nice bottle of wine to the host or taking the host out to dinner. *See* Posner, *supra* note 47, at 584.

248. This is essentially the story of how Airbnb started (minus the initial friend of a friend step). *See* Helm, *supra* note 24 (describing the evolution of Airbnb from air mattresses on the floor of the founders' apartment to becoming the "biggest lodging provider on earth"). *See also* ORSI, *supra* note 61, at 262–67 (describing the evolution of a hypothetical "soup-sharing" activity from casual soup dinner parties thrown once a month for friends to a formalized barter exchange in which "soup bucks" have been created and circulate among the wider community to facilitate exchanges of soup for other services or goods).

249. *See supra* note 37 and accompanying text. When thinking more broadly about sharing in the context of property, we can see how many well-established property law doctrines implicate sharing in a more permanent sense (such as

temporary, there can be wide variation in the duration of access to the property, with some property-sharing activities involving longer periods of access than others. Although duration will rarely be a determinative factor of the legal status of a property-sharing activity, duration is potentially a relevant consideration. For example, if attempting to analogize the property-sharing activity to a lease or a license, the duration of time that possession of the property is granted is one of the determinative factors in distinguishing the two.

**TABLE 1:  
THE ARCHITECTURE OF PROPERTY SHARING**

<b>Component of Property Sharing</b>	<b>Description</b>
Identity of the Party Sharing	Owner
Property	Non-Owner
Type of Property	Real Property Personal Property Quasi-Property
Consideration	Monetary Nonmonetary
Exclusivity	Exclusive use or possession Co-use or co-occupation
Third-Party Platform Involvement	Membership requirement Trust verification mechanisms Payment facilitation
Idle Capacity Usage	Existing under-utilization
Scale	Transactions by this party Transactions of this type
Duration	Length of time property is accessed

The next Part discusses the practical implications of using this architecture of property sharing, as well as the concepts developed in Parts I and II, to evaluate regulatory responses to the sharing economy. It then considers how the Article's theoretical framework might inform the broader discussions around our concepts of ownership and exclusion.

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leases for terms of years, or co-tenancy agreements, or ownership in a common interest community or condominium development). Even these arrangements, however, are not absolutely permanent, since to promote the free alienability of property, even these less temporary sharing arrangements can be terminated.

#### IV. CONCLUSION: IMPLICATIONS OF THE PROPERTY-SHARING FRAMEWORK

This Part begins with a discussion of the practical implications of using this Article's property-sharing framework to evaluate regulatory responses to the sharing economy. It concludes with a more theoretical discussion of how the property-sharing framework developed herein can open up space around our conceptions of ownership and exclusion by potentially allowing for a more nuanced understanding of property-sharing activities.

##### A. *Regulating Property-Sharing Activities*

The framework developed in this Article provides a more precise way of talking about activities occurring in the sharing economy and situating them with respect to legal doctrine and social norms. This Section considers how this framework can be used to further the discussion about appropriate regulatory responses. Note, however, that it is not the purpose of this Section to evaluate the wide range of regulatory responses that local governments have proposed to the sharing economy; while a subject ripe for potential future empirical study, that task is beyond the scope of this Article.<sup>250</sup> Rather, this Section focuses on how the property-sharing framework developed herein can enable a more productive dialogue between policymakers and sharing economy companies and participants about appropriate regulatory responses.

First, by situating property-sharing activities within contextually relevant property law doctrines, the framework allows regulators to respond to the claims often made by property-sharing proponents that these activities are so novel that they are beyond the reach of the law.<sup>251</sup> Undoubtedly,

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250. Important, early inroads into this type of regulatory analysis have been produced by both legal scholars and the cities themselves. See, e.g., NAT'L LEAGUE OF CITIES REPORT, *supra* note 135; Miller, *supra* note 82; Schindler, *supra* note 82.

251. See, e.g., Streitfeld, *supra* note 23 (quoting Airbnb's CEO that companies like Airbnb are in "a new category, . . . people as businesses . . . [for whom] there are no laws written"); Nathan Schneider, *Owning Is the New Sharing*, SHAREABLE (Dec. 21, 2014), [http://www.shareable.net/blog/owning-is-the-new-sharing?utm\\_content=2014-01-21%2015%3A10%3A36&utm\\_source=VerticalResponse&utm\\_medium=Email&utm\\_term=Read%20more%20%26raquo%3B&utm\\_campaign=Owning%20is%20the%20New%20Sharing%20%26%20Complementary%20Currenci](http://www.shareable.net/blog/owning-is-the-new-sharing?utm_content=2014-01-21%2015%3A10%3A36&utm_source=VerticalResponse&utm_medium=Email&utm_term=Read%20more%20%26raquo%3B&utm_campaign=Owning%20is%20the%20New%20Sharing%20%26%20Complementary%20Currenci)

there is a mismatch between many of the activities occurring in the sharing economy and existing regulations designed for the analog counterparts. Because today's property-sharing activities tend to blur the lines of the binary categorizations, such as commercial vs. personal, that the law tends to rely on,<sup>252</sup> the property-sharing activities occurring in today's sharing economy often implicate a different balance of costs and benefits than the activities existing regulations were designed for. Additionally, property-sharing activities may have hybrid characteristics which make them less clearly and immediately identifiable as fitting within pre-existing legal forms, as in the case of home-sharing activities, which often have characteristics of both licenses and leases.

However, the discourse of novelty as grounds for exempting property sharing from regulatory oversight is often overstated. As the discussion in Section I.A illustrated, many of the property-sharing activities taking place in the sharing economy are contemporary versions of informal or personal sharing activities that have long occurred. Someone renting out her spare bedroom on Airbnb is in many ways undertaking the same underlying activity as a Depression-era family taking in a boarder, just as someone using Feastly to host guests for a home-cooked dinner at her house is engaging in the same type of activity as neighborhood potluck groups long have done.<sup>253</sup> Similarly, as demonstrated by the discussion of doctrinal responses to sharing situations in Section II.B, courts and legislatures have long grappled with short-term rentals and home occupations, and the status of roommates, drawing lines

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es%20and%20Povertycontent [http://perma.cc/5CF7-5KD9] ("I like the idea that we don't need to have a specific legal status . . . . It's more about hacking an existing legal status and making these hacks work.") (quoting the founder of the online collaborative society platform, Ouishare).

252. See, e.g., Cohen & Zehngbot, *supra* 225, at 6 ("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."); see also ORSI, *supra* note 61, at 14–15 (suggesting that the regulatory mismatch stems from the fact that legal regulations tend to associate human activity in one of three distinct categories—commercial, personal, and charitable—but that activities taking place in the sharing economy may straddle the line between these categories).

253. About, FEASTLY.COM, <https://eatfeastly.com/info/about/> [https://perma.cc/5Z3S-XZAK] ("Feastly is a growing community of eaters and chefs who want more from dining. Feasters seek authentic food, served around big tables with good people . . . . And, our chefs are a talented, hospitable group of food lovers with incredible abilities to turn their homes into warm, inviting spaces . . . .").



in the gray areas between personal and commercial, gratuitous and nongratuitous, where much of today's property-sharing activities fall.<sup>254</sup>

Yet the unique features of the sharing economy—such as the involvement of third-party platforms in facilitating the peer-to-peer sharing and the ability of technology to enable these transactions to occur between strangers on a larger scale than ever before possible—results in a different balance of costs and benefits being produced by similar underlying activities. As a result, the law's response to these activities may need to be recalibrated. It may be informative here to consider the debate that transpired at the dawn of the internet between Professor Lawrence Lessig and Judge Frank Easterbrook about whether the internet was so unique that it warranted internet-specific legal responses. Such a response amounted to an unnecessary "law of the horse," in Judge Easterbrook's opinion, but was considered a necessary adaptation to the displacement of existing law by internet norms in Professor Lessig's opinion.<sup>255</sup> While Easterbrook believed that existing legal frameworks, rather than new, internet-specific approaches, were the best way to respond to the questions raised by rapidly evolving technology,<sup>256</sup> Lessig suggested that the underlying design of cyberspace was different enough that existing legal frameworks would not be adequate.<sup>257</sup> Although Lessig rejected the idea that cyberspace was ungovernable,<sup>258</sup> he suggested

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254. See *supra* Section II.B.

255. See *infra* notes 257–59. Judge Easterbrook famously suggested that teaching a course on the law of cyberspace would be like teaching a course on "the Law of the Horse." See Frank H. Easterbrook, *Cyberspace and the Law of the Horse*, 1996 U. CHI. LEGAL F. 207, 207 (1996) ("Lots of cases deal with sales of horses; others deal with people kicked by horses; still more deal with the licensing and racing of horses, or with the care veterinarians give to horses, or with prizes at horse shows. Any effort to collect these strands into a course on 'The Law of the Horse' is doomed to be shallow and to miss unifying principles.").

256. Easterbrook, *supra* note 255, at 210. Judge Easterbrook suggested that the law's response to the Internet should be to "keep doing what you have been doing. Most behavior in cyberspace is easy to classify under current property principles." *Id.*

257. See Lawrence Lessig, *The Law of the Horse: What Cyberlaw Might Teach*, 113 HARV. L. REV. 501, 502 (1999) ("[U]nlike Easterbrook, I believe that there is an important general point that comes from thinking in particular about how law and cyberspace connect.").

258. *Id.* at 505–06 ("Many believe that cyberspace simply cannot be regulated. . . . This belief about cyberspace is wrong. . . . [Cyberspace's] code can change, either because it evolves in a different way, or because government or business pushes it to evolve in a particular way. And while particular versions of

“that the optimal mode of government’s regulation will be different when it regulates behavior in cyberspace.”<sup>259</sup>

Echoes of Lessig’s concerns are seen in objections raised by sharing economy companies and users about current regulations being ill-suited to today’s property-sharing activities. For example, traditional bed-and-breakfast regulations may impose licensing fees in the thousands of dollars and involve extensive inspection requirements. Applying such regulations to someone renting out their house or spare bedroom occasionally on Airbnb is likely to result in one of two outcomes. Either there will be massive non-compliance, if enforcement of the regulations is perceived as unlikely, or there will be a shutdown of the activity, if the regulations are strictly enforced.<sup>260</sup> Neither outcome is desirable: the first results in a disregard for the law, while the second cuts off what may be socially beneficial activities.

Yet as home-sharing activities become more like the commercial, formal, monetary, nongratiuitous sharing conducted by operators of commercial bed and breakfasts and hotels, some level of regulation seems appropriate. However, it can be difficult to determine what is “enough” regulation.<sup>261</sup> As Saskia Sassen has noted in her scholarship on the informal economy, when activities “diverge from the model for which extant regulations were designed . . . [and] take on a

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cyberspace do resist effective regulation, it does not follow that every version of cyberspace does so as well. Or alternatively, there are versions of cyberspace where behavior can be regulated, and the government can take steps to increase this regulability.”).

259. *Id.* at 514.

260. For example, Portland, Oregon, originally applied its traditional bed-and-breakfast regulations to Airbnb hosts, requiring them to pay a \$4,130 fee for a license, as well as comply with significant inspection requirements. Steve Law, *Airbnb Rules May Cool City’s Underground Rentals*, PORTLAND TRIB. (Jun. 3, 2013, 7:00), <http://www.pamplinmedia.com/pt/9-news/222831-83954-airbnb-rules-may-cool-citys-underground-rentals-> [<http://perma.cc/X5HZ-5JCS>]. In recognition of the fact that many residents were conducting home-sharing activities but not complying with the commercial bed and breakfast requirements because of the expense and regulatory hurdles, the city revised its home-sharing laws. *See infra* note 264 and accompanying text.

261. Emily Badger, *Why We Can’t Figure Out How to Regulate Airbnb*, WASH. POST: WONKBLOG (Apr. 23, 2014), <http://www.washingtonpost.com/blogs/wonkblog/wp/2014/04/23/why-we-cant-figure-out-how-to-regulate-airbnb/> [<http://perma.cc/NCY2-GYWX>] (noting that in this context, “enough” is a relative concept). “In the safest possible world, a city health inspector would test the food on your plate at every restaurant every time you dine out. But of course we don’t do that. We have spot inspections.” *Id.*

recognizable shape of their own, it becomes meaningless to speak of regulatory violations.”<sup>262</sup> Rather, these “regulatory fractures” point to a need to recalibrate existing regulatory models.<sup>263</sup>

The property-sharing framework developed herein offers a way of advancing the dialogue through the “regulatory fracture” stage. By employing a heuristic analysis to unpack the legally relevant features of the sharing activity, what is unique about the activity can be separated from what is not, and regulations can be modified or crafted accordingly. For example, a number of cities have now developed a more streamlined and inexpensive licensing system for the types of home-sharing activities taking place on platforms like Airbnb and HomeAway that typically do not rise to the level of traditional bed-and-breakfast operations.<sup>264</sup>

This Article’s framework can also help shed light on the differences between the underlying property-sharing activities that are taking place, both across the different platforms, as well as within the same platform. For example, consider the following home-sharing arrangements: (1) a host listing her entire home on Airbnb or HomeAway; (2) a host listing a spare bedroom at his home on Airbnb; (3) a host listing a space to sleep (either a private room or shared space) on Couchsurfing; (4) a host listing her entire home on Love Home Swap. Depending on how each of these activities implicates the underlying components discussed in Part III—such as whether there is consideration involved in the sharing transaction, what the duration of the arrangement is, whether the guest occupies

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262. Saskia Sassen, *The Informal Economy: Between New Developments and Old Regulations*, 103 YALE L.J. 2289, 2291 (1994).

263. *Id.*

264. In Portland, Oregon, for example, new regulations were adopted to allow owners/renters of houses and duplexes (but not condos or apartments) to “rent one or two bedrooms of their primary home for less than 30 days at a time, if they get a city inspection and pay a \$180 fee once every two years.” See Law, *supra* note 260. Other cities have also begun to offer a tiered licensing system for smaller-scale home-sharing activities. See, e.g., *The Basics of Legal Short-Term Rentals*, CURBED CHI. (Apr. 5, 2013), <http://chicago.curbed.com/archives/2013/04/05/the-basics-of-legal-shortterm-rentals.php> [<http://perma.cc/29GF-YNUM>]; Farzad Mashhood, *Austin Broadens Short-Term Rental Rules*, AUSTIN AM. STATESMAN (Feb. 28, 2013, 8:40 PM), <http://www.statesman.com/news/news/local-govt-politics/austin-broadens-short-term-rental-rules/nWdHG> [<http://perma.cc/5H6A-Q5W4>]. However, enforcing even these tiered systems has proved difficult and non-compliance appears to be extensive in many cities. See *infra* note 271 and accompanying text.

the space exclusively, and how many of these types of transactions the host engages in—the appropriate regulatory response is likely to be different, even though all of these activities would be considered a type of home sharing.

There also may be an advantage to a fluidity in how particular sharing activities are treated. For example, while it may be appropriate to impose permitting and licensing requirements on ride-sharing services like Uber and Lyft (such as background checks for drivers and inspection requirements for vehicles), for practical reasons, it may not be appropriate to impose the same accessibility requirements on individual Uber and Lyft drivers that are imposed on commercial taxi operators, where the fleet of vehicles is often owned by one entity.<sup>265</sup> Yet to ensure that this sharing activity does not undermine public policy interests in accessible transportation for those in wheelchairs or with other mobility challenges, cities can require that Uber and Lyft fares include a surcharge that can be collected by the city and used to ensure adequate wheelchair-accessible transportation in alternate forms.<sup>266</sup>

In addition, utilizing the property-sharing framework allows for the recognition that sometimes no formal regulation at all is the most appropriate response to property sharing. Sharing activities that fall on the informal and personal ends of the property-sharing axes—things like school bake sales, potluck dinners, and coworker carpools—have always been subject to minimal or no regulatory oversight.<sup>267</sup> While such activities theoretically could be subjected to the same regulatory standards as commercial bakeries, restaurants, and

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265. See Wyman, *supra* note 242, at 162 n.185 (describing advocacy efforts by persons with disabilities to make the New York City taxicab fleet more accessible to those with mobility disabilities).

266. See NAT'L LEAGUE OF CITIES REPORT, *supra* note 135, at 23 (discussing how Washington, D.C., Chicago, and Seattle have enacted these types of regulations).

267. Where there are significant health or safety concerns, even personal and informal property sharing may be regulated. See ORSI, *supra* note 61, at 433–34 (noting that milk is a “rare example” of personal, noncommercial property sharing not only being regulated, but prohibited unless it meets with regulatory standards, and citing the California regulation as an example of a state statute making it illegal to “sell, buy, deliver, give away or knowingly receive milk that has not been certified” by the state regulatory agency). For more on the debate over informal milk sharing, see Jess Bidgood, *Maine Court Fight Pits Farmers Against State and One Another*, N.Y. TIMES (June 18, 2014), [http://www.nytimes.com/2014/06/19/us/maine-court-fight-pits-farmers-against-state-and-one-another.html?\\_r=1](http://www.nytimes.com/2014/06/19/us/maine-court-fight-pits-farmers-against-state-and-one-another.html?_r=1) [<http://perma.cc/9JH6-DJMY>].

vans, they are either explicitly outside the bounds of regulation or potentially applicable regulations are simply not enforced against them.<sup>268</sup> Not only do autonomy and privacy concerns warrant limiting regulation of these informal, personal sharing activities, but regulation imposes transaction costs in excess of the potential benefits to be gained.<sup>269</sup> Furthermore, reputational factors and other informal norms imposed by the relatively discrete communities engaged in such sharing transactions may be able to effectively accomplish the same goals as regulation in these cases.<sup>270</sup> And in some cases, self-regulation may be appropriate, such as when the externalities imposed by the activity are relatively infrequent or minor, or where the local government simply does not have the resources to implement and enforce external regulations.<sup>271</sup>

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268. See, e.g., *Barter Exchanges*, IRS (Jan. 9, 2015), <http://www.irs.gov/Businesses/Small-Businesses-&-Self-Employed/Barter-Exchanges> [<http://perma.cc/QU66-4H6H>] (describing the tax filing requirements for barter exchanges and distinguishing such exchanges from “arrangements that provide solely for the informal exchange of similar services on a noncommercial basis,” to which the requirements applied to barter exchanges do not apply).

269. See Badger, *supra* note 261 (“We’re always making a tradeoff between the burden of regulation, and the safety—or public benefit—created by it.”).

270. Reputation mechanisms like two-way rating systems, while they may create the kind of trust that allows strangers to share their homes and cars with each other, should not automatically be assumed to be an adequate substitute for public safety regulations. While a friendly and pleasant Uber driver or Airbnb host may garner five-star reviews on the rating systems, if he lacks car or home insurance, or has failed to get his brakes checked or instal batteries in his smoke detectors, members of the public will not be protected by ratings systems alone. Cf. Sundararajan, *supra* note 90 (“In the sharing economy, *reputation* serves as the digital institution that protects buyers and prevents the market failure that economists and policy makers worry about.”).

271. However, self-regulation involves its own significant risks, most glaringly, that the regulated entities will not effectively regulate themselves, as was the situation in the securities markets prior to the financial crisis of 2008. Cf. Arun Sundararajan, *Trusting the ‘Sharing Economy’ to Regulate Itself*, N.Y. TIMES (Mar. 13, 2014, 12:01 AM), [http://economix.blogs.nytimes.com/2014/03/03/trusting-the-sharing-economy-to-regulate-itself/?\\_r=1](http://economix.blogs.nytimes.com/2014/03/03/trusting-the-sharing-economy-to-regulate-itself/?_r=1) [<http://perma.cc/X5TJ-EJ6M>] (suggesting the securities industry’s self-regulatory organizations as a model for the self-regulation by sharing economy companies). Early experiences with self-policing in the sharing economy appear to indicate that self-policing is not producing the outcomes regulators had hoped. See also Phil Matier & Andy Ross, *‘No Way of Enforcing’ Airbnb Law, S.F. Planning Memo Says*, S.F. CHRON. (Mar. 22, 2015), <http://www.sfchronicle.com/bayarea/matier-ross/article/No-way-of-enforcing-Airbnb-law-S-F-planning-6151592.php> [<http://perma.cc/2R5W-K2MZ>] (“Privately, advocates on both sides of [San Francisco’s Airbnb law] say the law’s enforcement mechanism was flawed from the get-go—and that the idea of ‘self-policing’ hosts voluntarily signing up and following the rules has little chance of working.”); Reyes, *supra* note 246 (citing the difficulties faced by the city of

While the property-sharing framework developed herein can help policymakers better calibrate regulatory responses to the sharing economy with the underlying property-sharing activities, there are admittedly trade-offs. Bright-line, either-or rules are more efficient and easily applied than the multi-factor approach, with multiple axes and gradations of gray, offered by this Article. In addition, the rapidly evolving nature of technological innovation in the sharing economy means that crafting a regulatory response will necessarily entail keeping pace with changing technology.<sup>272</sup>

Enforcement of regulations presents a particularly difficult issue. The most nuanced and well-drafted regulation is of no use if it cannot be effectively implemented and enforced. For example, just six months after an extensively negotiated home-sharing ordinance was enacted in San Francisco and less than two months after it went into effect, the city planning department decried it as “unworkable” and indicated that the department lacked the resources or access to information (held by Airbnb) necessary to enforce the law.<sup>273</sup> In addition, in cities where “transportation and homesharing services comprise a relatively small portion of the budget, but take a significant amount of time to tackle,” crafting regulations to respond to property-sharing activities may impose a significant drain on

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Portland, Oregon in enforcing its short-term rental law due to the fact that Airbnb refuses to provide host data that is needed to allow the city “to track down scofflaws who had failed to seek a newly required city permit and undergo safety inspections”).

272. See NAT'L LEAGUE OF CITIES REPORT, *supra* note 135, at 30 (recognizing that while legislation will need to evolve to accommodate the evolving nature of the sharing economy, this “iterative process can be time-consuming and frustrating”). “Cities that tackle regulation in a piecemeal manner may find themselves continually rewriting legislation.” *Id.* While sliding scale regulations may be more complex and time-consuming to craft, policymakers are increasingly recognizing that it may be the most appropriate way to regulate certain sharing economy activities. *Id.* at 30 (“For instance, regulation should look different for someone renting their apartment while they vacation a few times a year versus a developer who purchases property solely to list on Airbnb.”).

273. Matier & Ross, *supra* note 271 (citing three major flaws in the “Airbnb law” that had been passed just six months earlier, in October 2014: (1) lack of access to Airbnb’s booking data, to ensure hosts on the site are actually registered with the City as required by the October 2014 law; (2) the law’s “limit of 90 days on renting out a unit if the owner isn’t home—something that’s “virtually impossible” to prove”; and (3) lack of funding to cover the costs of enforcing the law (the \$50 registration fee for a host permit, even if all hosts actually paid it (which they appear not to be, since there is no enforcement mechanisms because of problem (1) being inadequate to the task).

city resources.<sup>274</sup>

The differing outcomes that are possible under this framework's multi-faceted approach also means that property-sharing activities will likely continue to be regulated differently in different jurisdictions, resulting in a patchwork of regulations for companies and participants to contend with. However, I argue that diversity in regulatory outcomes is desirable, at least at this early stage. The line between property sharing which should be regulated robustly and that which should be treated with a lighter regulatory touch, or none at all, is not a static one, particularly in light of the rapidly evolving technology driving much of the sharing economy. Responding to shifting societal norms and drawing difficult lines by making fact-specific, contextual inquiries about a wide range of human activities and relationships is exactly the type of calibration for which the law is equipped.<sup>275</sup>

### *B. Sharing, Exclusion, and Property Norms*

The sharing economy, and property sharing specifically, represents a major paradigm shift in how individuals choose to relate to property, and the activities that take place within it increasingly blur the binary divisions—personal and commercial, gratuitous and nongratuitous, formal and informal—that the law employs to characterize human activities. As such, it is likely to continue to raise challenging questions that participants, platforms, and policymakers must grapple with. However, the question is not whether it would be possible to continue to respond to the sharing economy in the confrontational and ad hoc manner that has characterized much of the discourse thus far—we undoubtedly could—but whether by being more precise about what we mean when we talk about the sharing economy, we can better assess the

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274. NAT'L LEAGUE OF CITIES REPORT, *supra* note 135, at 32.

275. Furthermore, as regulatory responses are refined and technological innovations are crystalized, there will likely be increased coherence in legal responses to property sharing. However, just as in many other areas of property law, where minority and majority rules about things like a landlord's duty to mitigate upon tenant abandonment or the ability of creditors of one spouse to reach the assets of a tenancy by entirety estate, reflect differing normative judgments about these aspects of landlord-tenant law and marital property law, even after the dust settles somewhat on the sharing economy and regulators have time to catch up to the technological innovations driving it, there is likely to remain diverging approaches to certain aspects of property-sharing activities.

property-sharing activities that are occurring and the proposed regulatory responses.

Intuitively, we know that there are different ways of sharing property and that the types of activities occurring in the sharing economy are not a monolithic whole; occasionally offering your couch for free on Couchsurfing feels different from continuously renting out your apartment on Airbnb while you move in with a significant other. The property framework developed herein offers a way to articulate this intuition in a way that recognizes both social norms and legal doctrine, and thereby craft governance approaches that are responsive to both.

This Article's framework, while providing a crucial first step in terms of giving us the means to be precise in our discussions about property sharing, is only the start of a larger inquiry that is just beginning to be made into the sharing economy. Sharing is no longer occurring at the margins of society, to be dealt with by exceptions to the right to exclude.<sup>276</sup> Rather, property sharing is becoming a fundamental part of our understanding of what property is, and, as such, may offer an alternative perspective to the dominant exclusion model on the shape of property rights and responsibilities. By providing a conceptual framework and taxonomy for property sharing, this Article opens the door to further inquiries into the doctrinal and normative implications of the sharing economy.

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276. See, e.g., MERRILL & SMITH, *supra* note 152, at 361 (framing their casebook's discussion of owner sovereignty around the "considerable arsenal of weapons to vindicate [owners'] right to exclude others," after which exceptions to the right to exclude are considered).



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