

Notes

Regulation Through Deregulation: Sharing Economy Companies Gaining Legitimacy by Circumventing Traditional Frameworks

DIANA CAO*

The “sharing economy” is a term describing organized economic activity that may supplant the traditional corporate-centered model and encourages peer-to-peer transactions. It is a system of sharing underused assets or services, for free or for a fee, directly from individuals, bypassing traditional “middle men.” The sharing economy provides much of its services through on-demand platform, such as mobile apps, and matches customer needs with providers to immediately deliver these goods and services.

Does the “sharing economy” share its risk with its consumers? Should the sharing economy be regulated? What effect does the lack of regulation have on its consumers, and would implementation of more regulations change those effects?

This Note uses home-sharing and ridesharing companies in San Francisco as case studies to explore these questions. By comparing the hotel and the taxi industries’ regulations with the emerging regulatory frameworks surrounding Airbnb and Uber, this Note argues that these companies have been left to “self-regulate.” Self-regulation has not proven to be effective, and as a result, the health and safety of consumers has been put in jeopardy. This Note argues that the regulatory regimes in place prior to the rise of the “sharing economy” should be revisited and appropriately restructured for these newly emerged business models.

* J.D. Candidate 2017, University of California Hastings College of the Law. I would like to give a special thanks to Professor Veena Dubal for her continued support while writing this Note. Thank you to *Hastings Law Journal* management and staff for their contributions. Finally, thank you to my family and friends for being great listeners and offering opinions invaluable in helping this Note take shape.

TABLE OF CONTENTS

INTRODUCTION.....	1086
I. EXISTING REGULATORY REGIMES AND SYSTEMS PROTECTING CONSUMERS	1089
II. DISRUPTION OF EXISTING ECONOMIES AND LOSING REGULATION: THE MAJOR PLAYERS OF THE SHARING ECONOMY DISRUPT EXISTING ECONOMIES AND PROMOTE “DEREGULATION”	1091
A. AIRBNB	1092
B. UBER.....	1095
III. RISKS AND RESULTS OF DEREGULATION.....	1097
A. AIRBNB	1097
1. <i>Background Checks</i>	1097
2. <i>Incident Liability</i>	1098
3. <i>Insurance Policies</i>	1100
B. UBER.....	1102
1. <i>Safety and Background Checks</i>	1103
2. <i>Incidents Occurring During Ridesharing</i>	1105
3. <i>Lack of Insurance Available to Drivers</i>	1106
IV. SHARING ECONOMY PLATFORMS RELY ON USER-SUBMITTED DATA TO REGULATE	1108
CONCLUSION	1110

INTRODUCTION

On July 4, 2015, a mother received texts and phone calls from her son asking for help because his Airbnb “host” locked him in an apartment and was rattling knives outside his door, pressuring him to submit to a sexual act. Desperate to save her son, she contacted Airbnb, but was told perfunctorily by representatives that they were unable to give her the address and would not call the police. Her son was sexually assaulted that night.¹

On New Year’s Eve of 2013, a car struck a mother and her two children in San Francisco as they crossed the street. As a result, a six year-old girl died. At the time of the crash, the Uber driver was logged onto the smartphone application (“app”), but was not yet carrying a passenger. Uber fought legal responsibility and claimed that it was only an app.²

1. Ron Lieber, *Airbnb Horror Story Points to Need for Precautions*, N.Y. TIMES (Aug. 14, 2015), <http://www.nytimes.com/2015/08/15/your-money/airbnb-horror-story-points-to-need-for-precautions.html>.

2. Kale Williams, *Uber Denies Fault in S.F. Crash That Killed Girl*, SFGATE (May 7, 2014, 7:54 AM), <http://www.sfgate.com/bayarea/article/Uber-denies-fault-in-S-F-crash-that-killed-girl-5458290.php>.

These accounts exemplify the prominent concerns surrounding two emerging technological companies and the effects of lax or limited regulation. The stories just described illustrate why regulations are needed in this “new economy.” Both Airbnb and Uber have arisen out of existing industries, flouted the laws of those industries, and succeeded because their business models depend on their capitalization on the lack of regulations placed on them. Colloquially, Airbnb, Uber, and similar types of companies have been termed “the sharing economy.”³

A sharing economy aims to offset the cost of owning and maintaining an item (such as a vehicle or temporary rental space), and to connect customers to service providers through technological means, such as online web or smartphone applications.⁴ The term “sharing economy” is used to describe and encompass a wide range of business models. Specifically, it has gained popularity and traction between two groups: travelers seeking lodging accommodations through home-hosting websites, such as Airbnb, and passengers seeking transportation through ridesharing applications that connect them to transportation services, such as Uber.⁵ Airbnb is an online apartment-rental platform.⁶ It operates as a resource for home-sharing by facilitating lodging accommodations and collecting a fee upon the home or room rental. Uber is an on-demand car service.⁷ Its services essentially allow a person to use his or her own car to perform taxicab functions, as there is a centralized dispatch through the app that connects riders to drivers and collects a fee for each connection.

However, these resources present legal situations that have not yet been addressed by the legislature and governmental agencies.⁸ The current regulatory framework fails to address whether the new companies are subject to the same rules as the traditional companies, a different set of rules, or no rules at all.⁹ At the same time, major companies of the sharing economy take advantage and openly flout regulations that others in essentially the same industry are subject to.¹⁰ Major players of the sharing economy include Airbnb and Uber, among others. These two specific examples are not the only companies of their

3. Adam Chandler, *What Should the ‘Sharing Economy’ Really Be Called?*, THE ATLANTIC (May 27, 2016), <http://www.theatlantic.com/business/archive/2016/05/sharing-economy-airbnb-uber-yada/484505/>.

4. Jenny Kassan & Janelle Orsi, *The LEGAL Landscape of the Sharing Economy*, 27 J. ENVTL. L. & LITIG. 1, 2 (2012).

5. Hannah A. Posen, *Ridesharing in the Sharing Economy: Should Regulators Impose Uber Regulations on Uber?*, 101 IOWA L. REV. 405, 413 (2015).

6. Chandler, *supra* note 3.

7. *Id.*

8. Talia G. Loucks, *Travelers Beware: Tort Liability in the Sharing Economy*, 10 WASH. J.L. TECH. & ARTS 329, 338 (2015); Posen, *supra* note 5, at 412.

9. Loucks, *supra* note 8, at 338; Posen, *supra* note 5, at 418.

10. Loucks, *supra* note 8, at 338; Posen, *supra* note 5, at 418.

kind, but have been the first two to make an impact on the city of San Francisco's regulations and ordinances.¹¹ Airbnb's website has more room listings than some of the largest hotel companies, and Uber has shown to be more popular than taxis.¹² The sharing economy industries have "legitimate equivalents" in the same market space, such as the hotel and taxicab industries. These sharing economy companies do not provide new, technological improvements, but have instead found a way to thrive by circumventing the regulations to which their market equivalents are subjected.

Airbnb and Uber present a new spin on a traditional service, but the novelty of their business models allows them to dodge regulatory regimes and pass the risks onto consumers. When an incident occurs, the host of an Airbnb home or the Uber driver often ends up being personally liable and faces penalties from their insurance policies.¹³

Do sharing economy industries like Airbnb and Uber play by the same rules, and should they be subjected to the same regulations as their predecessor hotel and taxi companies? Does the exposure to liability present a great enough risk to compel regulatory agencies to act? In the city and county of San Francisco, both Airbnb and Uber have thus far avoided rigid regulation. For example, Airbnb is not subject to the same city ordinances as hotels or long-term rentals. Additionally, Uber drivers and vehicles are not subject to the same requirements as taxi companies, and are not even regulated by the same agency. Sharing economy companies have disrupted established industries and upset the regulatory

11. *Transportation Network Companies*, CAL. PUB. UTIL. COMMISSION, <http://www.cpuc.ca.gov/General.aspx?id=787> (last visited June 4, 2017) (demonstrating that Uber was the driving force behind implementation of this regulatory framework); Carolyn Said, *S.F. to Create City Office to Enforce Airbnb Law*, SFGATE (last updated July 2, 2015, 8:29 AM), <http://www.sfgate.com/business/article/S-F-to-create-city-office-to-enforce-Airbnb-law-6361832.php> (showing that the city measure that was passed was coined the "Airbnb law" to address Airbnb's influence).

12. Scott Mayerowitz, *For First Time in U.S., Uber Is Now More Popular Among Business Travelers than Taxis*, SKIFT (July 16, 2015, 11:30 PM), <http://skift.com/2015/07/16/for-first-time-in-u-s-uber-is-now-more-popular-among-business-travelers-than-taxis/>; Zainab Mudallal, *Airbnb Will Soon Be Booking More Rooms than the World's Largest Hotel Chains*, QUARTZ (Jan. 20, 2015), <http://qz.com/329735/airbnb-will-soon-be-booking-more-rooms-than-the-worlds-largest-hotel-chains/>; Del Ross, *Airbnb Is the next Big Hotel Distribution Channel*, SKIFT (Oct. 27, 2015, 7:00 AM), <http://skift.com/2015/10/27/the-next-big-hotel-distribution-channel-airbnb/>; Andrew Ross Sorkin, *Why Uber Might Well Be Worth \$18 Billion*, N.Y. TIMES: DEALBOOK (June 9, 2014, 9:09 PM), http://dealbook.nytimes.com/2014/06/09/how-uber-pulls-in-billions-all-via-iphone/?_r=0.

13. See Galen Hayes, *The scary insurance reality for Airbnb hosts*, PROP. CASUALTY 360 (Jan. 5, 2016), http://www.propertycasualty360.com/2016/01/05/the-scary-insurance-reality-for-airbnb-hosts?page_all=1&slreturn=1495838489; Ron Lieber, *A Liability Risk for Airbnb Hosts*, N.Y. TIMES (Dec. 5, 2014), https://www.nytimes.com/2014/12/06/your-money/airbnb-offers-homeowner-liability-coverage-but-hosts-still-have-risks.html?_r=0; Ron Lieber, *The Question of Coverage for Ride Service Drivers*, N.Y. TIMES (Sept. 5, 2014), <https://www.nytimes.com/2014/09/06/your-money/auto-insurance/offloading-the-risk-in-renting-a-car-ride.html>; Christopher Tidball, *Uh oh...Uber Has Some Coverage Issues*, PROP. CASUALTY 360 (Feb. 9, 2015), http://www.propertycasualty360.com/2015/02/09/uh-ohuber-has-some-coverage-issues?page_all=1.

June 2017] REGULATION THROUGH DEREGULATION: THE SHARING ECONOMY 1089

framework of these markets by claiming to be a different type of company altogether. The lack of regulation on companies such as Airbnb and Uber gives these companies preferential treatment unavailable to established industries that are governed by regulations.¹⁴ Furthermore, as regulations are established they are put in place in a piecemeal fashion, as new rules are implemented in response to negative events rather than as preventative measures.

I. EXISTING REGULATORY REGIMES AND SYSTEMS PROTECTING CONSUMERS

Over the past century, many transportation and hospitality industry regulations have been enacted to protect consumers and the general public.¹⁵ In order to continue operation in conformity with practices designed to protect consumers, companies agree to a “wide range of public interest concessions, including price controls, guaranteed access, pre-approval on changing or eliminating services or offering new services, and extensive licensing requirements, oversight, and continuing education.”¹⁶ These companies operate under an extensive regulatory structure put in place to protect workers, consumers, and property owners.¹⁷ Indeed, incumbent companies in the areas of lodging and transportation are currently heavily regulated at the federal, state, and local level.¹⁸

In the hospitality industry, for example, hotels are subject to various internal and external regulations that ensure habitable living conditions and availability of housing to its city residents. San Francisco’s Municipal Code (“the Code”) provides minimum standards that hotels must meet in order to comply with health and safety mandates.¹⁹ Premises are inspected regularly to ensure that guests are not subject to safety and health risks, and personnel are prepared to respond to on-site

14. Jalees Andrabi, *Enraged Cabbies Unite Worldwide Against Uber in 2015*, YAHOO! NEWS (Dec. 20, 2015), <http://news.yahoo.com/enraged-cabbies-unite-worldwide-against-uber-2015-050603209.html>; Sam Frizell, *A Historical Argument Against Uber: Taxi Regulations Are There for a Reason*, TIME (Nov. 19, 2014), <http://time.com/3592035/uber-taxi-history/>; Luz Lazo, *Cab Companies Unite Against Uber and Other Ride-Share Services*, WASH. POST (Aug. 10, 2014), https://www.washingtonpost.com/local/trafficandcommuting/cab-companies-unite-against-uber-and-other-ride-share-services/2014/08/10/11b23d52-1e3f-11e4-82f9-2cd6fa8da5c4_story.html.

15. Larry Downes, *Lessons from Uber: Why Innovation and Regulation Don't Mix*, FORBES (Feb. 6, 2013, 5:00 AM), <http://www.forbes.com/sites/larrydownes/2013/02/06/lessons-from-uber-why-innovation-and-regulation-dont-mix/2/#4bbo66c6f1ef>.

16. *Id.*

17. Alexandra E. Petri, *The Sharing Economy Gets Its Day Before a U.S. House Subcommittee*, SKIFT (Sept. 30, 2015, 6:30 AM), <http://skift.com/2015/09/30/the-sharing-economy-gets-its-day-before-a-u-s-house-subcommittee>.

18. *Id.*

19. See generally *San Francisco Administrative Code*, AM. LEGAL PUBL'G CORP., [http://library.amlegal.com/nxt/gateway.dll/California/administrative/administrativecode?f=templates\\$fn=default.htm\\$3.o\\$vid=amlegal:sanfrancisco_ca\\$sync=1](http://library.amlegal.com/nxt/gateway.dll/California/administrative/administrativecode?f=templates$fn=default.htm$3.o$vid=amlegal:sanfrancisco_ca$sync=1) (last updated Apr. 16, 2017).

emergencies.²⁰ In addition to structural requirements, the Code outlines standards for exit routes (ventilation and lighting), sanitation, security, enclosures (stairways and elevators), sprinklers, and smoke detectors.²¹ The Housing Code, a subset of the Building Inspection Commission Codes, also regulates dwellings including hotels and other lodging.²² The Housing Code aims to prevent substandard and unsanitary dwelling units that are unsafe for human occupancy and habitation.²³ These requirements provide minimum standards to ensure the safety and welfare of travelers who visit and stay in San Francisco. To protect San Franciscans and the character of the city, the city also has regulations relating to rent and zoning ordinances. The Administrative Code mandates zoning regulation of the rental market and short-term rentals to ensure permanent residents of the city have access to housing.²⁴

Similarly, transportation services have long been regulated to ensure that both drivers and passengers are in safe vehicles. Two regulatory regimes exist for private transportation services.²⁵ The California Public Utilities Commission, a state agency, regulates prearranged vehicles for hire, such as limousines.²⁶ City municipalities regulate taxicab operations.²⁷ For example, in San Francisco, taxis are regulated by the San Francisco Municipal Transportation Agency (“SFMTA”).²⁸ Local provisions define taxicab services and guidelines by setting insurance responsibilities, the number of permits allowed, the procedure for obtaining these permits, proscribed driver procedures, limits on services provided by taxicabs, and fares and methods of computing these fares.²⁹ The SFMTA mandates that drivers must have commercial licenses, which requires a higher standard of driving proficiency compared to normal licenses.³⁰ The SFMTA also requires drivers to undergo an extensive fingerprint-based background check to ensure that they do not have a criminal record.³¹ In addition to driver regulations, the commercially-

20. See sources cited *supra* note 19.

21. See sources cited *supra* note 19.

22. See NAT’L CTR. FOR HEALTHY HOUS., CITY OF SAN FRANCISCO, CALIFORNIA HOUSING CODE HEALTHY HOMES PROVISIONS (2008).

23. *Id.* at 1.

24. See *San Francisco Administrative Code*, *supra* note 19.

25. *How to Become a Taxi Driver*, S.F. MUN. TRANSP. AGENCY, <https://www.sfmta.com/services/taxi-industry/become-taxi-driver> (last visited June 4, 2017); *Transportation Network Companies*, CAL. PUB. UTIL. COMMISSION, <http://www.cpuc.ca.gov/tncinfo/> (last visited June 4, 2017); V.B. Dubal, *Wage Slave or Entrepreneur?: Contesting the Dualism of Legal Worker Identities*, 105 CALIF. L. REV. 65, 35 (2017).

26. *How to Become a Taxi Driver*, *supra* note 25; Dubal, *supra* note 25, at 101.

27. Government Code 53075.5 requires every city and county to have guidelines governing taxicab operations. CAL. GOV’T CODE § 53075.5.

28. S.F. TRANSP. CODE, art. 1100.

29. *Id.*

30. *Id.*

31. *Id.*

driven vehicles must also meet a separate set of regulations.³² Taxicabs also undergo regular inspection to ensure that safety and cleanliness standards are met.³³

II. DISRUPTION OF EXISTING ECONOMIES AND LOSING REGULATION: THE MAJOR PLAYERS OF THE SHARING ECONOMY DISRUPT EXISTING ECONOMIES AND PROMOTE “DEREGULATION”

Some commentators have proclaimed that companies like Airbnb and Uber “disrupt” the existing marketplace.³⁴ “Disruption,” in business terms, describes a process where a new company is able to successfully challenge established incumbent businesses.³⁵ Entrants target the same consumer base, delivering a product or service that customers require but that an incumbent company has been lacking.³⁶ Disruption appeals to a core market that already exists; the new company increases popularity and gains market space in that market until it eventually disrupts established competitors.³⁷ Some argue that companies like Airbnb and Uber have only been successful in disrupting their respective industries because they have played by different rules, ignoring regulatory regimes, and operating outside the confines of the law. For example, these commentators argue that despite their marketing, Airbnb is a short-term housing provider and Uber is a taxicab transportation service.³⁸

Whether and how these disrupting actors should be regulated are questions that state and municipal regulators across the nation face. Broadly speaking, governments lack a “strong regulatory framework” by which to control and normalize new technologies of the sharing economy.³⁹ Where an incumbent business is required to follow certain rules that a new business is not, the entering business has an advantage. These new companies thrive at the expense of those who follow the rules. In doing so, the companies allow consumers and workers to bear the risks of utilizing these platforms.

Disrupting actors interpret regulation as an “inefficiency”⁴⁰ that must be avoided, and they attempt to capitalize off the avoidance.⁴¹ By

32. *Id.*

33. *Id.*

34. Clayton M. Christensen et al., *What Is Disruptive Innovation?*, HARV. BUS. REV. (Dec. 2015), <https://hbr.org/2015/12/what-is-disruptive-innovation>.

35. *Id.*

36. *Id.*

37. Sangeet Choudary, *How the Hotel Industry Got Blindsided . . . and Why Yours Could Be Next*, FORBES (July 7, 2014, 11:12 AM), <http://www.forbes.com/sites/groupthink/2014/07/07/how-the-hotel-industry-got-blindsided-and-why-yours-could-be-next/#39d2b3f2557f>.

38. See Christensen et al., *supra* note 34.

39. See Posen, *supra* note 5, at 407.

40. Here, burdens of regulatory regime enforcement act as inefficiencies for these new sharing economy companies. By not having to enforce the regulations, companies such as Airbnb and Uber are

avoiding the regulatory regimes, platforms like Airbnb and Uber gain momentum by “creat[ing] entirely new markets and [] new consumer behavior” in existing markets.⁴² This type of business also forces its users to ignore the regulations because of the appearance of legitimacy of the companies. The actions of these particular sharing economy companies impact the respective industries and create space for similar companies to follow, which does not reflect the best interest of consumers and public safety.

A. AIRBNB

Short-term residential rentals are rentals of all or a portion of a residential unit for periods of less than thirty nights.⁴³ Homeowners who make money through short-term rental sites are in a separate category than hotels and bed and breakfasts, which must submit to health inspections and commercial property taxes.⁴⁴ Commercial establishments like hotels manage risk by purchasing insurance and abiding by regulatory codes and guidelines for hotel guests. These extra costs and regulations exist to protect consumer health and safety.

Airbnb’s business model allows its “hosts” (those who list their private residential space on Airbnb’s website for others to rent) to evade regulations, which in turn allows business to thrive. This evasion has also been the reason for its success. Airbnb’s regulatory evasion has led to hosts’ preference for deregulation, with only immediate benefits in mind. This means that a host will usually recognize short-term benefits of increased profits from unused space and ultimately ignore long-term risks, such as insurance suspension or incident liability. The company’s viability depends on many homeowners and rental property occupants making their homes available for others to rent. Because the model allows hosts to set their own prices and availabilities, hosting a room or entire home can become a convenient and profitable source of income. However, in order to become a host, these homeowners or rental property occupants often must go against one or more regulations, including residential zoning ordinances, safety standards, liability insurance coverage, and contract provisions such as homeowner’s association or lease agreements.

able to defray costs and then pass along these savings to its customers, and can also create new channels and means where they can operate.

41. See Posen, *supra* note 5, at 417.

42. *The Lepore-Christensen Debate: A Repeatable Pattern for Platforms and Disruptive Innovation*, PIPES TO PLATFORMS, <http://platformed.info/lepore-christensen-disruptive-innovation-airbnb/> (last visited June 4, 2017).

43. *What Is a Short-Term Rental?*, S.F. OFF. OF SHORT-TERM RENTALS, <https://shorttermrentals.sfgov.org/about> (last visited June 4, 2017).

44. *Id.*

Specifically, Airbnb challenges local San Francisco hospitality regulations, condominium board rules, and other regulations that cover short-term housing usage.⁴⁵ Airbnb claims to not have the ability to inspect every unit or room that is posted on its site.⁴⁶ With this lack of oversight, users often violate several sections of San Francisco law, including the planning codes, tax laws, rent control, and housing codes.⁴⁷ This consequence is problematic because it goes further than a company's evasion of a regulatory framework. Rather, it pushes the disregard of the regulations on its users and forces these users to shirk the law in order to successfully use the model the company was premised upon: circumvention of regulations. When an incident occurs, the homeowner will be liable for the failure to meet standard safety regulations, not Airbnb. The victim of one of Airbnb's oversights comments that there is "an obligation on the part of an organization that is providing hospitality to have some level of protection for both their hosts and for the guests that use that facility," and Airbnb "seem[s] to want to deny that they are in the business that they are in."⁴⁸

Hotels and neighborhood groups also argue that in addition to putting their users at risk, Airbnb skirts taxes, violates lease terms, uses residentially zoned property for commercial purposes, and lacks safeguards for guests and operators.⁴⁹ Using residentially designated property for commercial purposes cuts into San Francisco's rental market, thereby displacing local communities.⁵⁰ Airbnb also challenges local limitations for short-term housing usage and its associated commercial activities.⁵¹ Short-term rentals in San Francisco were illegal, as set forth by section 41(a) of the Administrative Code.⁵²

Flouting regulations has paid off for Airbnb. Instead of facing punishment, preferences for violating these laws became not only

45. See generally Megan Barber, *Airbnb vs. the City: How Short-Term Rentals Are Changing Urban Neighborhoods*, CURBED (Nov. 10, 2016, 10:00 AM), <https://www.curbed.com/2016/11/10/13582982/airbnb-laws-us-cities>.

46. *A Community Built on Trust*, AIRBNB, <https://www.airbnb.com/standards> (last visited June 4, 2017).

47. Steven T. Jones & Parker Yesko, *Into Thin Air*, S.F. BAY GUARDIAN (Aug. 5, 2013), <http://www.sfbg.com/2013/08/06/thin-air> (archived at <https://issuu.com/sf.guardian/docs/47.45>).

48. Ron Lieber, *Questions About Airbnb's Responsibility After Attack by Dog*, N.Y. TIMES (Apr. 10, 2015), <http://www.nytimes.com/2015/04/11/your-money/questions-about-airbnbs-responsibility-after-vicious-attack-by-dog.html>.

49. Carolyn Said, *S.F. Planners Support, Toughen 'Airbnb Law'*, SFGATE (last updated Aug. 9, 2014, 7:02 AM), <http://www.sfgate.com/realestate/article/S-F-planners-support-toughen-Airbnb-law-5677368.php>; Bruce Watson, *Airbnb's Legal Troubles: The Tip of the Iceberg for the Sharing Economy?*, THE GUARDIAN (Nov. 20, 2013, 5:19 PM), <http://www.theguardian.com/sustainable-business/airbnb-legal-trouble-sharing-economy>.

50. Biz Carson, *The Fight Between Airbnb and San Francisco Just Got Nastier*, BUS. INSIDER (May 15, 2015, 9:00 PM), <http://www.businessinsider.com/san-francisco-report-blames-airbnb-for-housing-shortage-airbnb-strikes-back-2015-5>.

51. See Posen, *supra* note 5, at 422.

52. S.F. ADMIN. CODE § 41(a).

avored, but also the norm for San Francisco residents. In October 2014, Airbnb successfully spent eight million dollars opposing an initiative limiting short-term rentals.⁵³ Because of the seldom-enforced laws and the company's efforts, Airbnb rentals were eventually legalized.⁵⁴ Subsequently, the San Francisco Administrative and Planning Code was amended to allow eligible owners and tenants of residential property to apply and conduct short-term rentals.⁵⁵ Airbnb's efforts were instrumental in passing an amendment to the Administrative and Planning Code that legalized short-term rentals. Hosts have used Airbnb and relied on it as a source of income without complying with the regulations of the hospitality industry.⁵⁶ This deregulation is a prime example of the consequence of lax as well as the lack of regulation. Deregulation sends companies a misleading message, that by averting rules long enough and gaining shortsighted support, they too can gain favorable results as "lawbreakers."

In San Francisco, the short-term rental application requires proof of liability insurance covering at least \$500,000 of damages, no outstanding city code violations, a business registration from the city of San Francisco, and that only one unit is registered.⁵⁷ Although the city of San Francisco indicates specific requirements prior to rentals, it is unclear whether Airbnb mandates registration prior to listing a home.⁵⁸ Its website indicates that the host consults with the city directly or with another professional before taking action.⁵⁹ Although Airbnb lists each city's requirements in order to obtain a short-term rental permit, these obligations are presented merely as information on the company website, and not as a prerequisite for a host to list property on its website.

This shows that Airbnb can circumvent city regulations, and has the ability to enter the same space as other lodging accommodations without the same guidelines that those entities must follow. For example, 205 San Franciscan hosts on Airbnb have three or more listings, but the city ordinance only allows one property to be registered.⁶⁰ Hosts with several listings tend to rent to visitors and tourists instead of renting to San

53. Alison Griswold, *After Offending All of San Francisco, Airbnb Still Trounced the Hotel Industry on Election Day*, SLATE (Nov. 4, 2015, 4:30 PM), http://www.slate.com/blogs/moneybox/2015/11/04/airbnb_defeats_prop_f_in_san_francisco_despite_its_tactless_ad_campaign.html; Heather Somerville, *Airbnb Wages \$8 Million Campaign to Defeat San Francisco Measure*, REUTERS (Nov. 1, 2015, 1:54 PM), <http://www.reuters.com/article/us-airbnb-election-sanfrancisco-idUSKCN0SQ2CJ20151101>.

54. Carolyn Said, *The Airbnb Effect*, S.F. CHRON. (July 12, 2015), <http://www.sfchronicle.com/airbnb-impact-san-francisco-2015/#1>.

55. San Francisco, Cal. Ordinance 218-14 (Oct. 7, 2014); see *Office of Short-Term Rental Registry & FAQs*, *supra* note 43.

56. See Posen, *supra* note 5, at 413.

57. See *What Is a Short-Term Rental?*, *supra* note 43.

58. *How Can We Help?*, AIRBNB (last updated Apr. 5, 2016), <https://www.airbnb.com/help/article/871/san-francisco-ca>.

59. *Id.*

60. See Said, *supra* note 54.

Francisco residents, and as a result, displace locals. The San Francisco ordinance was put into place to ensure the availability of housing to long-term residents.⁶¹ These “super hosts” account for 4.8% of all hosts, but control 993 properties, or 18.2% of all San Francisco listings.⁶² This has led to a proliferation of Airbnb rentals in San Francisco. In 2015, Airbnb’s local listings increased by 661 properties, amounting to over 13.8% of total listings.⁶³

B. UBER

Uber, as well as other rideshare application platforms, has been given the flexibility to operate under a new scheme: as a Transportation Network Company (“TNC”). City municipalities and the California Public Utilities Commission (“CPUC”) regulate taxicab services and chartered party services (limousines, chartered buses, and other prearranged transportation) respectively.⁶⁴ Although Uber now holds itself out to the public as an on-demand service and an alternative to taxicabs, it has not been recognized as a taxicab for regulatory purposes.⁶⁵

Uber began its operation in March 2009 as “UberCab,” and in October 2010 was issued a cease and desist letter by both the city of San Francisco and the CPUC’s Consumer Protection and Safety Department, instructing the company to stop advertising and operating as a passenger carrier for hire without the Commission’s authorization.⁶⁶ “UberCab” only changed its name to “Uber” when it was not authorized to operate as a taxi service. In more recent court filings, however, Uber vehemently maintains that it is not a taxi service, but merely a technology platform.⁶⁷ Uber services are on demand and cannot be prearranged, nor can advance reservations be made. Fare is also calculated similarly to taxicabs, on the basis of a time and distance combination.⁶⁸ Uber cars also operate in the same manner as taxis—the drivers are constantly moving and wait on the street, prepared to be hailed by a passenger on the application platform.⁶⁹

61. *Id.*

62. *Id.*

63. *Id.*

64. See STATE OF CAL. PUB. UTILS. COMM’N, TRANSPORTATION AND LICENSE SECTION: BASIC INFORMATION FOR TRANSPORTATION NETWORK COMPANIES AND APPLICANTS 5 (rev. ed. 2015), http://www.cpuc.ca.gov/uploadedFiles/CPUC_Public_Website/Content/Licensing/Transportation_Network_Companies/BasicInformationforTNCs_7615.pdf.

65. *Id.*

66. Frizell, *supra* note 14; Laurie Segall, *Uber CEO: ‘Our Growth Is Unprecedented,’* CNN TECH (June 12, 2014, 8:32 AM), <http://money.cnn.com/2014/06/12/technology/innovation/uber-ceo-travis-kalanick/>.

67. See Segall, *supra* note 66.

68. *Id.*

69. See Posen, *supra* note 5, at 413.

In August 2012, the CPUC charged Uber with operating as a charter party carrier without authorization in violation of the Public Utilities Code, but Uber continued to do business in violation of law and in defiance of the Commission's order to cease and desist.⁷⁰ Notably, aside from written admonitions, the city and state made little to no effort to actually shut down Uber's operations.⁷¹ Instead, in response to this defiance, the CPUC approved new rules regulating ride services in September 2013 and classified rideshare platforms as TNC's.⁷² The CPUC based its decision on the dubious notion that the use of a smartphone app to hail a driver constituted "prearrangement," a necessary precondition for the Commission to assume jurisdiction.⁷³ This decision put the responsibility of regulating rideshare companies that essentially function like a taxicab in the hands of an entity that was not fully equipped or experienced to oversee the operations.⁷⁴ Therefore, regulations are not being enforced with respect to Uber because the CPUC, rather than the municipality, has taken over regulatory oversight.⁷⁵

Since its introduction in 2012, the ridesharing network industry converted taxi workers to "micro-entrepreneurs."⁷⁶ TNC drivers generally have low start-up costs and do not pay for regulatory fees or training like taxi workers do.⁷⁷ TNCs maintained that they were technology software companies, not transportation companies, and therefore not subject to the same regulations. Characterized as such, these companies were able to evade regulatory mandates by both the CPUC and SFMTA.⁷⁸ Through a separate regulatory scheme, TNCs continue to operate in a minimally regulated market. However, these new regulations set in place for TNCs make self-regulation the only regulation, which is an unworkable standard. The creation of a new, separate category for transportation vehicles allows Uber to operate through deregulation and lack of adherence to existing laws.

70. Dan Blystone, *The Story of Uber*, INVESTOPEDIA (Apr. 14, 2017, 3:33 PM), <http://www.investopedia.com/articles/personal-finance/111015/story-uber.asp>.

71. Lisa Rayle & Onesimo Flores, *The 3 Factors Behind Uber and Lyft's Regulatory Win in California*, TECHCRUNCH (Apr. 17, 2016), <https://techcrunch.com/2016/04/17/the-3-factors-behind-uber-and-lyfts-regulatory-win-in-california/>.

72. Tomio Geron, *California PUC Proposes Legalizing Ride-Sharing from Startups Lyft, SideCar, Uber*, FORBES (July 30, 2013, 7:29 PM), <http://www.forbes.com/sites/tomiogeron/2013/07/30/california-puc-proposes-legalizing-ride-sharing-companies-lyft-sidecar-uber/#3b37404c25f1>.

73. *Id.*

74. *Id.*

75. *Id.*

76. Dubal, *supra* note 25, at 69.

77. *Id.* at 35.

78. *Id.*

III. RISKS AND RESULTS OF DEREGULATION

Companies such as Airbnb and Uber provide a service for which they receive payment, and they are able to keep operational costs low because they do not have inventory costs as traditional businesses do. The costs are passed on to homeowners and drivers. Airbnb does not own any home that it rents to others, and Uber does not own any vehicles for its drivers to use. A problem arises, as this approach leaves unclear who is liable for incidents occurring from the transaction. It would be difficult for the government to regulate or sanction a company that does not own the property in contention and was not a direct actor involved in the accident.⁷⁹

This approach ultimately leaves these sharing economy companies and its participants in a regulatory gray zone where roles, liabilities, and responsibilities are unclear. Leaving innovation unregulated is easier than imposing regulations, but it also leaves society exposed to a number of undesirable risks.⁸⁰ Below are a few situations that outline some major problems caused by lack of regulation. Two common problematic aspects of the sharing economy are safety and background checks, and insurance coverage.

A. AIRBNB

1. Background Checks

Airbnb does not have any type of background check in place. “We strive to provide our hosts and guests with the right tools to make informed decisions regarding who they interact with on the site and in the real world.”⁸¹ Airbnb’s website announces that it aims to build the world’s most trusted community—through a secure messaging system, reviews, its “Host Guarantee,” and its “Verified ID” precaution.⁸² However, self-regulation is not feasible in this context. Self-regulation provides that Airbnb is essentially free of risk, and instead transfers any risk of liability to the hosts. With virtually no background checks, Airbnb runs the risk of putting its renters in danger, especially when other people are also staying in the same home. Tellingly, Airbnb does not have a “Safety” section under Airbnb’s Hosting Standards.⁸³ The “Trust”

79. Koen Frenken et al., *Smarter Regulation for the Sharing Economy*, THE GUARDIAN (May 20, 2015, 2:00 PM), <http://www.theguardian.com/science/political-science/2015/may/20/smarter-regulation-for-the-sharing-economy>.

80. Sofia Ranchordás, *Does Sharing Mean Caring? Regulating Innovation in the Sharing Economy*, 16 MINN. J.L. SCI. & TECH. 413, 438 (2015).

81. *How Does Airbnb Help Build Trust Between Hosts and Guests?*, AIRBNB, <https://www.airbnb.com/help/article/4/does-airbnb-screen-users> (last visited June 4, 2017).

82. *Id.*

83. *Hospitality Standards*, AIRBNB, <https://www.airbnb.com/hospitality> (last visited June 4, 2017).

section of the website offers a “responsible hosting’ guide, which links to safety tips for hosts.”⁸⁴ Without proper precautions in place, risks to hosts and guests run both ways—hosts remain uncertain about the trustworthiness of their invitees and guests remain uncertain about the safety and reliability of the hosts and their homes.

2. *Incident Liability*

Airbnb stands by its use of self-regulation in its rentals to promote safety and security.

Guests can look for listings that indicate they have safety features, including smoke detectors, carbon monoxide detectors, first aid kits, safety cards, and fire extinguishers. . . . If a host or guest ever alerts us to a hazard or safety issue at a listing, [the] Trust and Safety team works quickly to review it, fix the problem or remove the listing from our community.⁸⁵

Self-regulation can prove to be inefficient, especially if it is not used as a preventative measure.

Airbnb initially provided no remedy via insurance in case of incidents at a home rental, but later provided a Host Guarantee that becomes effective after a homeowner’s individual policy has been exhausted.⁸⁶ The fine print of the Airbnb policy indicates that property owners and guests should try to resolve their disputes first before submitting to a possible inspection.⁸⁷ Without basic background checks, it is difficult to predict and prevent unwanted circumstances from occurring—and when they do, it is difficult to decide who takes responsibility. Sexual assault, and even death, may ensue from lack of regulation.

In 2015, a traveler who rented a room in Madrid, Spain, was locked in a fourth-floor apartment by his Airbnb host.⁸⁸ The host, in an attempt to get the traveler to submit to a sexual act, rattled knives in the kitchen drawer to intimidate him.⁸⁹ When the traveler called his mother for help, she reached out to Airbnb to take action.⁹⁰ Instead of intervening, Airbnb referred her to the Madrid police, where she was unable to get

84. Alexander Howard, *A Man Died at an Airbnb Rental. Here’s How the Company Responded*, HUFFINGTON POST: TECH (last updated Nov. 10, 2015), http://www.huffingtonpost.com/entry/a-death-at-an-airbnb-rental-puts-the-tech-company-in-the-hot-seat_us_5640db66e4bob24aee4b18f7.

85. *Id.*

86. *What Is the Airbnb Host Guarantee?*, AIRBNB, <https://www.airbnb.com/help/article/279/what-is-the-airbnb-host-guarantee> (last visited June 4, 2017); Dennis Schaal, *HomeAway Thinks \$1M Airbnb Host Guarantee Is as Empty as a Vacant Apartment*, TNOOZ (May 29, 2012), <https://www.tnooz.com/article/homeaway-thinks-1m-airbnb-host-guarantee-is-as-empty-as-a-vacant-apartment/>.

87. *Terms of Service*, AIRBNB (last updated Oct. 27, 2016), <https://www.airbnb.com/terms>; see Schaal, *supra* note 86.

88. See Lieber, *supra* note 1.

89. *Id.*

90. *Id.*

help for her son.⁹¹ The traveler was eventually sexually assaulted that night.⁹² In this situation, Airbnb was unwilling to assume liability for the incident. The company did not make efforts to safely remove the traveler from that situation, but instead put that responsibility on the mother. This differs from steps that a hotel might take in a similar situation. For example, hotel operators at Starwood Hotels, owners of the Westin and Sheraton brands, when receiving requests from third-parties to check on a guest, will immediately send hotel personnel to investigate.⁹³ Although Airbnb has now instituted Host Protection Coverage, it still does not cover sexual abuse or molestation by any “insured” party.⁹⁴

Another incident occurred in Texas, where a man died from sitting on a rope swing in the backyard of an Airbnb rented property.⁹⁵ The trunk that the swing was connected to broke in half, fell on his head, and eventually led to his death.⁹⁶ In contrast to posting a property on Airbnb, the procedure for becoming a more formal bed and breakfast is more rigorous and requires an actual inspection, which tends to correlate with properties that are more suitable for guests.⁹⁷ As required by the Texas Bed and Breakfast Association, “[new members are] inspected with an overnight stay, and then every two years, [the] properties are inspected, . . . covering everything from cleanliness to decor, and ensuring that individual rooms have a deadbolt, smoke detectors are functioning, and landscaping seems safe.”⁹⁸ However, in this situation, Airbnb also did not assume liability for the incident and lack of property oversight.⁹⁹ Instead, the decedent’s family was able to obtain a settlement from the hosts’ homeowners’ insurance policy, which did not deny coverage for commercial activity.¹⁰⁰ Had the homeowners’ insurance denied the claim for coverage, it would have been unclear who was liable. Since October 22, 2015, Airbnb has offered primary insurance for its stays.¹⁰¹

The lack of regulation over Airbnb also fails to protect consumers from animals that belong to homeowners. In early 2015, a guest visiting

91. *Id.*

92. *Id.*

93. *Id.*

94. *Host Protection Insurance*, AIRBNB, <https://www.airbnb.com/host-protection-insurance> (last visited June 4, 2017).

95. Zak Stone, *Living and Dying on Airbnb*, MATTER (Nov. 8, 2015), <https://medium.com/matter/living-and-dying-on-airbnb-6bff8d600c04#.snra8tyv8>.

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.*

101. *How Does Homeowner’s Insurance Work with Airbnb?*, AIRBNB, <https://www.airbnb.com/help/article/296/how-does-homeowner-s-insurance-work-with-airbnb> (last visited June 4, 2017); Ron Lieber, *Death in Airbnb Rental Raises Liability Questions*, N.Y. TIMES (Nov. 13, 2015), <http://www.nytimes.com/2015/11/14/your-money/death-in-airbnb-rental-raises-liability-questions.html>.

Argentina was attacked by a host's Rottweiler.¹⁰² The online property rental listing did not mention a dog or any pet on the premises, and during the guest's first few days at the property the dog did not bark, growl, or move much.¹⁰³ When the guest reached out to the dog a few days later, the dog attacked him, clamping its jaw on his arm.¹⁰⁴ The guest "suffered a six-square-inch gash and a handful of puncture wounds."¹⁰⁵ The guest was also required to pay a deposit before being admitted into the hospital and the host was not able to provide it.¹⁰⁶ Airbnb does not require that its hosts provide proof of insurance or any sort of minimum liability coverage prior to posting property as a short-term rental.¹⁰⁷ Immediately after the incident the guest requested a reimbursement of medical bills and additional lodging costs, but Airbnb refused to cover his two-night hospital stay or take any other remedial action, except to issue a refund for his stay at the home.¹⁰⁸ The guest also found that Airbnb's primary liability coverage did not extend outside of the United States.¹⁰⁹ Since then, with some pressure, Airbnb has communicated that its representatives are working with the guest to cover some expenses.¹¹⁰

3. *Insurance Policies*

Self-regulation has led to "re-regulation" at the agency level and on a large scale. "Re-regulation" refers to new or additional regulations that are enacted after an industry or sector is deregulated.¹¹¹ This means that Airbnb's measures and additional protections are reactions to events, unlike regulatory restrictions that cities and counties have put in place as a preventative measure or as a planned procedure and response under last-minute or emergency circumstances. Regulatory regimes are preventative measures that provide responses and solutions when unexpected situations arise. Airbnb has instituted monetary guarantees due to negative experiences, but has only addressed these issues after the fact. This process of re-regulation shows that self-regulation has proven

102. Lieber, *supra* note 48.

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.*

107. Ron Lieber, *A Liability Risk for Airbnb Hosts*, N.Y. TIMES (Dec. 5, 2014), <https://www.nytimes.com/2014/12/06/your-money/airbnb-offers-homeowner-liability-coverage-but-hosts-still-have-risks.html>.

108. *Id.*

109. *Id.*

110. *See* Lieber, *supra* note 48.

111. Arnold Kling, *What Financial Re-Regulation?*, LIBR. OF ECON. & LIBERTY (May 30, 2010), http://econlog.econlib.org/archives/2010/05/what_financial.html; *Re-Regulation*, OXFORD ENG. DICTIONARY, <https://en.oxforddictionaries.com/definition/us/re-regulation> (last visited June 4, 2017); *Reregulation*, ENERGY DICTIONARY, <https://www.energyvortex.com/energydictionary/reregulation.html> (last visited June 4, 2017).

June 2017] REGULATION THROUGH DEREGULATION: THE SHARING ECONOMY 1101

unsuccessful and should not be the only means of sharing economy regulation.

In the case of an accident, insurance coverage is difficult to obtain. Often, homeowners' insurance policies do not cover incidents arising from a commercial activity, and in some cases, are terminated if commercial activity is involved.¹¹² For example, when a retired homeowner decided to rent out a few rooms in her home, she sought coverage from her primary insurance company, State Farm.¹¹³ State Farm is also the largest provider of homeowner's insurance in the United States.¹¹⁴ When she talked to her agent about her plans, she learned that State Farm could not offer her any liability protection under her homeowner plan.¹¹⁵ The insurance agent also mentioned installing fire escapes in every bedroom and purchasing a commercial policy that might have cost more than her annual rental income.¹¹⁶ This is State Farm's standard operating procedure for Airbnb hosts, as renting rooms exposes the home to additional risks.¹¹⁷ For these reasons, many homeowners do not disclose their rental activity, as commercial insurance is too costly to maintain. Homeowner's insurance is intended for owner-occupied properties, not rental properties, and is not intended to extend to guests of rental rooms within a home.¹¹⁸ Airbnb takes no action to track whether a homeowner has insurance before allowing them to post on the site.

Although Airbnb has protections for hosts in the case of property damage, this type of guarantee may be insufficient for tortious injury or bodily harm. For example, Airbnb's property guarantees started when a host returned to find her home derelict.¹¹⁹ Initially, Airbnb refused to reimburse the owner for damages and stolen belongings.¹²⁰ However, the CEO of Airbnb vowed to fix the situation after it was publicized.¹²¹ Not long after, another situation occurred where a host returned to a ruined home and found "meth pipes everywhere," damage to the property, and

¹¹² Ron Lieber, *The Insurance Market Mystifies an Airbnb Host*, N.Y. TIMES (Dec. 19, 2014), <http://www.nytimes.com/2014/12/20/your-money/the-insurance-market-mystifies-an-airbnb-host.html>.

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ Standard homeowners' policies may not cover losses incurred while the home is rented out. *What Type of Insurance Do I Need If I'm Renting out My Home?*, INS. INFO. INST., <http://www.iii.org/article/what-type-of-insurance-do-i-need-if-im-renting-out-my-home> (last visited June 4, 2017).

¹¹⁹ Michael Arrington, *The Moment of Truth for Airbnb as User's Home Is Utterly Trashed*, TECHCRUNCH (July 27, 2011), <http://techcrunch.com/2011/07/27/the-moment-of-truth-for-airbnb-as-users-home-is-utterly-trashed/>.

¹²⁰ *Id.*

¹²¹ *Id.*

stolen items throughout the house.¹²² The homeowner pointed out that Airbnb had “no 24-hour help desk for emergencies.”¹²³ Later on, the company decided to implement a \$50,000 guarantee to hosts to cover any damages they may incur.¹²⁴ Eventually, in late 2015, Airbnb debuted its Host Protection Insurance program, which it claims now covers bodily injuries up to one million dollars.¹²⁵ However, the fine print reads that its policy “should not be considered a replacement or stand-in for homeowners or renters insurance.”¹²⁶ Further, the guarantee’s fine print requires that the claimant settle with the homeowner first.¹²⁷ When a settlement cannot be reached, damage must be documented and subject to an Airbnb inspection before any further action will take place.¹²⁸

B. UBER

This Note takes the position that “for-profit” ridesharing is essentially a taxi service. Yet, Uber drivers and vehicles are held to a more relaxed standard than a taxi or any other livery service driver.¹²⁹ Depending on the city of the driver, there may be additional requirements.¹³⁰ Uber shifts risks on to passengers and drivers by conducting very limited background checks (placing passengers in a “ride-at-your-own-risk” situation), and promoting commercial activity without proper insurance, which forces drivers to use personal insurance for Uber activities, thus jeopardizing their policy validity.¹³¹

122. Michael Arrington, *Another Airbnb Victim Tells His Story: “There Were Meth Pipes Everywhere,”* TECHCRUNCH (July 31, 2011), <http://techcrunch.com/2011/07/31/another-airbnb-victim-tells-his-story-there-were-meth-pipes-everywhere/>.

123. *Id.*

124. *Our Commitment to Trust & Safety*, AIRBNB (Aug. 1, 2011), <http://blog.airbnb.com/our-commitment-to-trust-and-safety>.

125. *See Host Protection Insurance*, *supra* note 94; *The \$1,000,000 Host Guarantee*, AIRBNB, <https://www.airbnb.com/guarantee> (last visited June 4, 2017).

126. *Id.*

127. *Id.*

128. Barbara Nichols, *Airbnb Is Crashing the Neighborhood*, NAT’L ASS’N OF REALTORS (Dec. 2015), <http://realtormag.realtor.org/news-and-commentary/commentary/article/2015/12/airbnb-crashing-neighborhood>.

129. *Driving Jobs vs Driving with Uber*, UBER, <https://www.uber.com/driver-jobs> (last visited June 4, 2017). Livery car distinction indicates that the vehicle is licensed for hire in a manner that is prearranged. The livery car industry is regulated in that it may only respond to calls and not be hailed on the street. Melissa Plaut, *Mayor Bloomberg, Back-Seat Driver* (Jan. 21, 2011), N.Y. TIMES, <http://www.nytimes.com/2011/01/22/opinion/22plaut.html?mtref=undefined&gwh=F0C4749B819159E35DDBB67177808527&gwt=pay&assetType=opinion>. The Livery License Plate Program began in 1995, operated by the California Public Utilities Commission and Department of Motor Vehicles. Livery license plates were issued to limousines operated by a charter party carrier authorized by the Commission. ST. OF CA. DEP’T OF MOTOR VEHICLES, VEHICLE INDUSTRY NEWS: DISCOUNTED LIVERY LICENSE PLATE PROGRAM (2014).

130. *Id.*

131. *Id.*

I. Safety and Background Checks

Although different types of Uber services in various states are subject to some additional requirements, the basic requirements are being at least twenty-one years old, driving a car from or newer than the year 2001, and passing a background check.¹³² The initial driver requirements also include insurance coverage, a clean driving record, and three years of driving experience.¹³³ However, Uber's background checks prove to not meet industry standards.¹³⁴ Uber also claimed that its background checks satisfied "the gold standard," indicating a model of excellence, and that it was one of the safest.¹³⁵ In fact, at the time of the writing of this Note, San Francisco and Los Angeles County District Attorneys had filed a joint civil lawsuit, alleging that Uber has misled customers about their safety and the quality of driver background checks.¹³⁶ This civil complaint also uncovered twenty-five instances where California Uber drivers were discovered with criminal records during the discovery process.¹³⁷ The case ended up settling for twenty-five million dollars in 2016 for misleading California customers about the strength of its background checks.¹³⁸ Since then, Uber no longer calls its service the "safest ride on the road," nor does it refer to its background checks as meeting "the gold standard."¹³⁹

San Francisco District Attorney George Gascón also noted that this settlement is a result that "goes well beyond its impact on Uber" and will send a message to businesses that "laws designed to protect consumers cannot be ignored."¹⁴⁰ However, there is no indication that Uber will strengthen its background checks, rather than stop using language that misleads consumers. Uber's reactionary retraction of its self-proclaimed high safety standards proves that the company is willing to take these

132. *Id.*

133. *Uber Vehicle Requirements for 2017*, RIDESHAREAPPS.COM (last updated Jan. 9, 2017), <http://rideshareapps.com/uber-vehicle-requirements-for-2016/>.

134. Sarah Kessler, *The Truth About Uber's Background Checks*, FAST COMPANY (Aug. 26, 2015), <http://www.fastcompany.com/3050172/tech-forecast/the-truth-about-ubers-background-checks>.

135. *Id.*

136. *See id.*; Laura J. Nelson, *Prosecutors: Uber Background Checks Missed Drivers' Criminal Records*, L.A. TIMES (Aug. 19, 2015, 6:15 PM), <http://www.latimes.com/local/lanow/la-me-ln-uber-background-checks-20150819-story.html>.

137. Carolyn Said, *DA: Major Flaws in Uber Background Checks Allow Criminal Drivers*, SFGATE (last updated Aug. 19, 2015, 9:07 PM), <http://www.sfgate.com/business/article/DA-major-flaws-in-Uber-background-checks-allow-6453865.php#photo-8489999>.

138. Curtis Skinner, *Uber Agrees to Pay \$25 Million for Misleading California Customers*, VENTURE BEAT (Apr. 7, 2016, 9:51 PM), <http://venturebeat.com/2016/04/07/uber-agrees-to-pay-25-million-for-misleading-california-customers/>.

139. *Id.*; Heather Kelly, *Uber Settles California Background Check Suit for up to \$25 Million*, CNN TECH (Apr. 7, 2016, 8:57 PM), <http://money.cnn.com/2016/04/07/technology/uber-background-check-suit/>.

140. Jessica Florum, *Uber Settles Lawsuit with SF, LA over Driver Background Checks*, SFGATE (last updated Apr. 7, 2016, 4:44 PM), <http://www.sfgate.com/business/article/Uber-settles-lawsuit-with-SF-LA-over-driver-7235244.php>.

risks until regulation becomes mandated by a government entity. This response further supports the fact that new companies of the sharing economy take reactionary measures instead of precautionary ones. When the effects of a company's failure to self-regulate can be felt by a mass of individuals, mandates should be put in place to require companies to take preventative measures, not merely address problems retroactively.

Uber's background checks misrepresent its commitment to safety and differ from standard taxi regulations.¹⁴¹ One shortcoming of Uber's background inquiry is its failure to use a fingerprint identification test.¹⁴² Uber claims that its screenings are sufficient, and that the background checks return all criminal convictions within the last seven years.¹⁴³ However, unlike fingerprints that allow a background check service to access the FBI's criminal record database, a test that runs only a social security number is deficient because it does not retrieve the same criminal information and potentially allows a person to submit false information without detection.¹⁴⁴ "Gascón hammered home the point that the fingerprint-based Live Scan screening used for taxi and limo drivers looks back further and can thwart those who assume a fake identity just to pass the check."¹⁴⁵ This type of check also allows California registered sex offenders that petitioned to have their names withheld from the Megan's Law website, a database for sex offenders, to pass Uber's background check.¹⁴⁶ According to Gascón, "Uber drivers in Los Angeles and San Francisco include convicted sex offenders, identity thieves, burglars, kidnappers and a murderer."¹⁴⁷ Taxi companies, on the other hand, rely on fingerprint tests, making it possible to pull potential drivers' entire criminal history.

In contrast, the CPUC requires background checks on TNC drivers, but does not explicitly specify a background check method or a timeframe that the companies must look into.¹⁴⁸ Conducting thorough background checks would be costly, in both monetary and nonmonetary ways.¹⁴⁹ In California, for example, the processing fees for a fingerprint check costs between twenty-five dollars and forty-two dollars, with a possible additional fee to obtain federal records.¹⁵⁰ This type of background check is also time-consuming: Companies must wait for results that are generally

141. *Id.*

142. Nelson, *supra* note 136.

143. *Id.*

144. See Kessler, *supra* note 134.

145. See Said, *supra* note 137.

146. *Id.*

147. *Id.* (examining a complaint that cited twenty-five instances of California Uber drivers with criminal records found during the discovery process).

148. *Id.*

149. See Kessler, *supra* note 134.

150. *Id.*

slower to come in before accepting a driver.¹⁵¹ With lax regulations from the CPUC, TNC companies have little incentive to self-impose a stringent and extensive method of checking driver history.

2. Incidents Occurring During Ridesharing

Ridesharing incidents are not uncommon. According to whosdrivingyou.org, a website and public awareness campaign promoting TNC safety, Uber's safety components are inadequate.¹⁵² The Who's Driving You website indicates that,

Uber's process for onboarding drivers is dangerously negligent. [Uber does not use] fingerprints or law enforcement to background-check their drivers. And Uber doesn't even bother to meet with drivers in person before allowing them to ferry passengers. The result is a series of incidents involving "ridesharing" passengers being harmed and criminal offenders behind the wheel.¹⁵³

This initiative provides a list of the accidents and dangerous altercations that Uber drivers are involved with that may be avoided by proper regulation. This webpage lists incidents of death, assaults (and alleged assaults), sexual assaults and harassments, alleged kidnappings, and drivers who are felons and have DUIs among other offenses.¹⁵⁴ The counter on the webpage revealed that to date, there are 58 alleged assaults by drivers, 225 alleged sexual assaults, 10 alleged kidnappings, 50 imposters, and 24 deaths.

Uber has litigated many assault cases. For example, in a case involving verbal abuse and physical assault in San Francisco, Uber conceded that the passenger who used their app was picked up by a different car than the one identified in the app.¹⁵⁵ The driver assured the passenger that he was indeed there for him and urged him to get in and complete the ride.¹⁵⁶ The passenger alleged that the driver repeatedly called him racial and homophobic slurs, and then pulled the car over and ordered him to leave.¹⁵⁷ When the passenger tried to take a picture, the driver knocked the phone out of his hand before the passenger stepped out.¹⁵⁸ The passenger recorded part of the altercation.¹⁵⁹

151. *Id.*

152. *About Our Campaign, WHO'S DRIVING YOU?*, <http://www.whosdrivingyou.org/about> (last visited June 4, 2017).

153. "Ridesharing" Incidents: Reported List of Incidents Involving Uber and Lyft, WHO'S DRIVING YOU?, <http://www.whosdrivingyou.org/rideshare-incidents> (last visited June 4, 2017).

154. *Id.*

155. Carmel DeAmicis, *Uber Customer Claims Abuse and Assault by Driver. Uber Confirms: Yes, He Drives for Us*, PANDO (Nov. 25, 2013), <https://pando.com/2013/11/25/uber-customer-claims-abuse-and-assault-by-driver-uber-confirms-yes-he-works-for-us/>.

156. *Id.*

157. *Id.*

158. *Id.*

159. *Id.*

An Uber representative confirmed that the driver who assaulted the passenger in San Francisco was not employed by Uber, but a subcontracting car company.¹⁶⁰ In some instances, Uber drivers come from the company's partner care companies, which subcontract cars and drivers to Uber. The drivers employed by these car companies still go through Uber's background check and vetting process.¹⁶¹ Uber claimed that the drivers from its affiliates still undergo Uber's background check and vetting process.¹⁶² This raises concerns about safety, as there is no regulation in place for Uber to ensure that one driver will not allow another driver, who may not have passed Uber's background check, to drive using a vetted driver's phone and app. Additionally, in this situation, the assaulted passenger was told by Uber:

[Uber] is not law enforcement . . . By the rider's own account, the police were called to the scene and determined there was no action necessary. So what would you propose that we do? If law enforcement pursues this, we would cooperate. But we're a technology platform that connects riders and providers, so it's not our job to investigate.¹⁶³

In response to the incident, Uber released a statement addressing the misconduct.¹⁶⁴ This press release offered tips for a safe ride and also noted "no action was necessary" in this event, assuring the public that the company took disciplinary steps by suspending the driver.¹⁶⁵ Without more stringent regulation and accountability, Uber can skate by with this statement as its only act of recourse.

3. *Lack of Insurance Available to Drivers*

Another prevalent issue among Uber drivers is the lack of insurance that its drivers carry. Most Uber drivers do not have personal auto insurance to cover driving in a commercial capacity.¹⁶⁶ Uber claims that the driver's personal insurance will cover injury to passengers; however insurance companies disagree.¹⁶⁷ A regular car insurance policy almost always indicates it does not cover commercial activity.¹⁶⁸ "The insurance

160. *Id.*

161. *Id.*

162. *Id.*

163. *Id.*

164. *What to Expect When You Ride*, UBER (last updated Dec. 7, 2015), <https://newsroom.uber.com/uber-safety-transparency/>.

165. *Id.* (emphasis omitted).

166. *Am I Insured If I Take an Uber?*, TIME: MONEY (May 29, 2015), <http://time.com/money/3901606/uber-lyft-insurance-liability-passengers/>; Ron Lieber, *The Question of Coverage for Ride Service Drivers*, N.Y. TIMES (Sept. 5, 2014), <http://www.nytimes.com/2014/09/06/your-money/auto-insurance/offloading-the-risk-in-renting-a-car-ride.html>.

167. Peter Yared, *Regulating the Sharing Economy: How Uber et al Will Soon Face New Rules*, VENTURE BEAT (June 14, 2015, 2:00 PM), <http://venturebeat.com/2015/06/14/regulating-the-sharing-economy-how-uber-et-al-will-soon-face-new-rules>.

168. See Lieber, *supra* note 166.

industry has stated clearly that a driver's personal policy is not going to cover any accident in which the insured was using his or her vehicle for commercial purposes."¹⁶⁹ Most insurance companies maintain that ride service drivers must buy commercial insurance and will not be covered by individual private insurance.¹⁷⁰

Uber began its operations by instructing drivers to submit claims incurred from Uber accidents to their personal insurance carriers first.¹⁷¹ Uber provides a one million dollar backup policy, but it is only available after individual coverage is exhausted.¹⁷² Uber has tried to take advantage of loopholes to deny coverage in confusing "gray areas" like when a driver is waiting for a ride request.¹⁷³ As a result, the CPUC enacted legislation that requires TNC services to carry commercial insurance whenever the driver's app is turned on. TNCs are now required by the CPUC to maintain a minimum of one million dollars in liability insurance.¹⁷⁴ However, TNC companies are not required to cover medical payments, comprehensive, collision, uninsured/underinsured motorists, or other optional coverage.¹⁷⁵ These coverage limits in the new law allow for far lower coverage than those that apply to San Francisco taxis, and the law fails to close other ride service insurance gaps, "leaving the public unprotected in many commonplace, predictable situations."¹⁷⁶ TNC liability policy does not provide as strong or protective of a policy as its taxicab counterpart.¹⁷⁷ This means that the TNC's liability policy does not have to provide coverage for: (1) bodily injury to the TNC driver; (2) damages to the TNC driver's car; or (3) bodily injury or physical damage caused by an uninsured or underinsured motorist.¹⁷⁸

Uber maintains this one million dollar requirement, but this policy is only set in place to supplement a driver's individual coverage, providing

169. Jon Brooks, *Confusion over Insurance for 'Ride-Sharing' Drivers*, KQED NEWS (Nov. 19, 2013), <http://ww2.kqed.org/news/2013/11/14/who-pays-when-ride-share-driver-crashes>.

170. See Brooks, *supra* note 169.

171. *Uber Driver Insurance*, RIDESHARE ACAD., <http://rideshareacademy.com/uber-driver-training/how-uber-works/uber-driver-insurance/> (last visited June 4, 2017); *Insurance for Ridesharing with Uber*, UBER NEWSROOM (Feb. 10, 2014), <https://newsroom.uber.com/insurance-for-uberx-with-ridesharing/>; Torr Leonard, *How Does Car Insurance Work for Uber Drivers?*, ANSWER FIN. (Oct. 21, 2015), <https://www.answerfinancial.com/insurance-center/how-does-car-insurance-work-for-uber-drivers>.

172. *Uber Driver Insurance*, *supra* note 171.

173. Williams, *supra* note 2.

174. *Notice to Transportation Network Company Drivers*, CAL. DEP'T OF INS., <http://www.insurance.ca.gov/0250-insurers/0300-insurers/0200-bulletins/bulletin-notices-commiss-opinion/TransNetwkDrvr.cfm> (last visited June 4, 2017).

175. *Id.*

176. *Why San Francisco Can and Should Regulate Taxi-Like Ride Services*, S.F. TAXI WORKERS ALLIANCE (Jan. 6, 2015), http://www.sftwa.org/white_paper (last visited June 4, 2017).

177. *Id.*

178. *Id.*

coverage when personal policies have been exhausted.¹⁷⁹ The backup policy is set in place and would go into effect if a driver's personal insurance company denied the claim because of a policy exclusion that disallows trading rides for money.¹⁸⁰ Most drivers' insurance policies also exclude ride-service claims and claims arising out of commercial activity.¹⁸¹ Failure to have sufficient insurance during or after an accident not only encourages insurance fraud, but leaves those in accidents unable to remedy the situation.¹⁸² Drivers are then forced to make a difficult decision: whether to (1) disclose intention to use the vehicle for TNC purposes and run the risk of a policy cancellation; or (2) continue without any disclosure with the risk of being dishonest in any claims process if an accident should occur. In an effort to bridge this gap of "no coverage," Uber has improved its insurance coverage to provide more protection for drivers once a customer has hailed the service.¹⁸³ However, this new coverage fails to provide protection while a driver has not yet been summoned for a ride.¹⁸⁴

IV. SHARING ECONOMY PLATFORMS RELY ON USER-SUBMITTED DATA TO REGULATE

Absent formal government agency guidelines, these sharing economy companies maintain that they are self-regulated.¹⁸⁵ The companies of the sharing economy generally hold that user reviews will help filter out bad drivers and hosts with unsafe cars, homes, or services in a given marketplace.¹⁸⁶ Self-regulation and trust is created by a two-way mutual review process, where customers get to rate a host or provider and the host or provider also rates the customer.¹⁸⁷ Both Uber and Airbnb use this mutual rating model. These companies depend on reviews and allow other customers to rely on user-generated data. The user rating system has proved successful in the hotel industry, as people make their decisions based on a hotel's location, value, and customer reviews.¹⁸⁸ In

179. Jon Brooks, *How Many Ride-Share Drivers Are Hiding Status from Insurers?*, KOED NEWS (Jan. 21, 2014), <http://ww2.kqed.org/news/2014/01/20/ride-sharing-insurance-lyft-uberx-sidecar>; Lieber, *supra* note 166.

180. Lieber, *supra* note 166.

181. *Id.*

182. *Id.*

183. *Id.*

184. *Id.*

185. See generally Molly Cohen & Arun Sundararajan, *Self-Regulation and Innovation in the Peer-to-Peer Sharing Economy*, 82 U. CHI. L. REV. DIALOGUE 116 (2015) (discussing self-regulation in shared economies).

186. Howard, *supra* note 84.

187. NIAM YARAGHI & SHAMIKA RAVI, THE CURRENT AND FUTURE STATE OF THE SHARING ECONOMY 10, 18 (2017), https://www.brookings.edu/wp-content/uploads/2016/12/sharingeconomy_032017final.pdf.

188. Vikram Singh, *Why Hotel Brands Should Care About Airbnb's Disruption*, SKIFT (Nov. 28, 2013, 9:00 AM), skift.com/2013/11/28/why-hotel-brands-should-care-about-airbnbs-disruption/.

the context of Uber, passengers rate their driver and experience after every ride, and Uber drivers run the risk of losing access to their driver accounts when their ratings fall below the minimum designated in the driver's city.¹⁸⁹

Although companies of the sharing economy have adopted a system of "self-regulation," where user-submitted feedback creates transparency and promotes or discourages a sale or transaction, self-regulation does not go as far as regulating the information submitted by users.¹⁹⁰ Government rules and regulations are necessary to protect consumers and enforce policies to benefit the consumer.¹⁹¹ Government agencies tend to act with the best interests of public welfare to prevent business exploitation, specifically in the sharing economy context: to provide for safety, accessibility, and preparedness.¹⁹² In contrast, self-regulation is not a viable solution.

At the same time, government regulatory agencies are best suited for looking beyond a single transaction. Unlike the self-regulating mechanisms encouraged by Airbnb and Uber, government regulations provide more than a subjective review of one consumer's specific experience. Government regulations encompass all of the broader public safety and welfare concerns that emerge alongside these new shared economies. An unfortunate side effect of the sharing economy business model is that the desire for self-regulation may inadvertently erode the legitimate safeguards put in place by governmental consumer protections.¹⁹³ Customer reviews given on a smartphone application cannot take the place of public safety regulations.¹⁹⁴ Ratings can be arbitrary, fake, or unfair—and should not be used to replace regulations aimed to ensure public health and safety.

189. *Star Ratings: What to Know as a Driver-Partner*, UBER, <https://www.uber.com/drive/resources/how-ratings-work/> (last visited June 4, 2017) ("To ensure the quality of both the driver-partners and riders in the community, our rating system is a two-way street. Driver-partners must rate every completed trip, while riders have the opportunity to submit a rating along with comments."); *Uber Community Guidelines*, UBER (last updated Apr. 6, 2017), <https://www.uber.com/legal/community-guidelines/us-en/> (explaining deactivation for low star ratings).

190. Arun Sundararajan, *Trusting the 'Sharing Economy' to Regulate Itself*, N.Y. TIMES (Mar. 3, 2014, 12:01 AM), http://economix.blogs.nytimes.com/2014/03/03/trusting-the-sharing-economy-to-regulate-itself/?_r=0.

191. Marc Davis, *Government Regulations: Do They Help Businesses?*, INVESTOPEDIA, <http://www.investopedia.com/articles/economics/11/government-regulations.asp> (last visited June 4, 2017).

192. Sundararajan, *supra* note 190; Davis, *supra* note 191.

193. Jedidiah Bracy, *In the Sharing Economy, Could Reputation Replace Regulation?*, iAPP (June 10, 2015), <https://iapp.org/news/a/in-the-sharing-economy-could-reputation-replace-regulation/>.

194. *Id.*

CONCLUSION

A balance must be struck when analyzing the tension between free economic choice and public safety, especially when considering businesses that so clearly impact the health and welfare of consumers. Where operations affect the wellbeing of individuals in society, government regulation should not be recommended, but *required*. It is important for a knowledgeable and experienced agency to spearhead efforts to regulate sharing economy companies and ensure that protections are in place for the general public. Only where existing regulatory schemes frustrate or prevent informed consumer choice, restrict new entry, or require governmental preapprovals to launch a business for reasons other than public health and safety should these rules should be scrutinized before approval or rejection.

The sharing economy is growing, but in addition to sharing its resources, it also shares risks. Sharing these risks may not be beneficial to unsuspecting consumers or individuals with the primary goal of utilizing a resource. Protections that have been in place for centuries are in all practical respects lifted for these new companies. Today's emerging companies in the sharing economy are trying to change laws as much as they are trying to change our technology, economics, and business models. These companies challenge the regulatory arena not through planning and precautionary measures, but through violating existing regulations and disrupting an existing market space. Policymakers must identify successful regulatory regimes and target outdated rules that must evolve to address new business models.

Regulation must be consistent and should not change depending on the day or user. Self-regulation, by either the individual or the business, is not feasible nor is it workable. "Either the city should deregulate us completely, like [the players in the sharing economy] . . . or regulate [those companies] at least closer to us, and let there be fair business competition."¹⁹⁵ Regulations are set in place to protect consumers. Society is forever evolving and it is in the best interest of society, consumers, businesses, and individuals to allow these companies to innovate and thrive. However, safety should remain paramount in the face of an evolving society. When companies are breaking the law, disrupting existing economies, and circumventing existing regulations prescribed for public safety, they should not be afforded the benefit of deregulation or a lower level of regulation. Airbnb, Uber, and others of their kind should be held to the same standards of safety as existing companies that offer the same type of services. To hold otherwise would jeopardize the wellbeing, health, and safety of our communities.

195. Sophie Quinton, *The Debate over How to Regulate Uber Is Far from Over*, HUFFINGTON POST (last updated Jan. 5, 2017), www.huffingtonpost.com/entry/uber-regulation_us_56548c38e4b0d4093a5933f7.