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## The Sharing Revolution: Changing Times Call for Clarifying Tort Liability

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# The Sharing Revolution: Changing Times Call for Clarifying Tort Liability

Cecilia G. Vazquez\*

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\* J.D./D.C.L. candidate 2020, Paul M. Hebert Law Center, Louisiana State University. I would like to thank my parents, Juan and Gina Vazquez, for their unending love, support, and encouragement. I would also like to thank Professors William R. Corbett and John M. Church for introducing me to this Comment's topic and for their guidance. Finally, I would like to thank the *Louisiana Law Review* Volume 80 Board for assisting me with the writing process.

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## INTRODUCTION

In 2009, the San Francisco Chronicle laid off 63-year-old photographer Frederic Larson.<sup>1</sup> Unemployed and with two children in college, Larson managed to find a job teaching photojournalism at a university but took a significant cut in salary and benefits.<sup>2</sup> Needing to earn more income, Larson resorted to the online marketplace.<sup>3</sup> For 12 days each month, Larson now rents out his home in Marin County, California, through Airbnb<sup>4</sup> for \$100 per night.<sup>5</sup> On the nights that Larson rents out his home, he stays in a separate room and showers at his local gym.<sup>6</sup> Four nights each week, Larson turns his Prius into a de facto taxi and drives strangers to their desired destinations through Lyft.<sup>7</sup> He earns an average of \$100 per night.<sup>8</sup> By sharing his home and his vehicle, Larson generates about \$3,000 of additional income each month.<sup>9</sup>

Coined as the “sharing economy,” a new economic culture is revolutionizing the global marketplace and disrupting established commercial industries.<sup>10</sup> The sharing economy, through smartphone

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1. Tomio Geron, *Airbnb and the Unstoppable Rise of the Share Economy*, FORBES (Jan. 23, 2013, 7:00 AM), <https://www.forbes.com/sites/tomiogeron/2013/01/23/airbnb-and-the-unstoppable-rise-of-the-share-economy/> [https://perma.cc/H7H2-A3NK].

2. *Id.*

3. *Id.*

4. See *How It Works*, AIRBNB, <https://www.airbnb.com/help/getting-started/how-it-works> [https://perma.cc/5WBP-9TYD] (last visited Oct. 23, 2018).

5. Geron, *supra* note 1.

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.*

10. Sydney Finkelstein, *Will There Be a Revolt in the Sharing Economy?*, BBC (Mar. 25, 2015), <http://www.bbc.com/capital/story/20150325-revolt-in-the-sharing-economy> [https://perma.cc/D8PM-MVWM].

applications (“apps”),<sup>11</sup> enables millions of people like Frederic Larson to earn income by capitalizing on free time and unused property.<sup>12</sup> At the tap of a finger, consumers can obtain notoriously expensive services, such as car rides and vacation lodging, for affordable prices.<sup>13</sup> The increasing popularity of the sharing economy marks a shift in both workplace and consumer values, and preference for freelance over full-time employment and renting over owning property progressively rises each year.<sup>14</sup> Scholars contend that the United States is experiencing a groundbreaking marketplace shift analogous to the Industrial Revolution.<sup>15</sup> In addition to introducing innovative economic opportunities, however, the sharing economy raises serious liability issues.<sup>16</sup>

On March 15, 2018, for instance, Kevin and Amy Sharp, their twelve-year-old son Wayne, and their seven-year-old daughter Adrianna Marie vacationed to Tulum, Mexico, and rented a condo through the home

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11. *Understanding Mobile Apps*, FED. TRADE COMMISSION, <https://www.consumer.ftc.gov/articles/0018-understanding-mobile-apps> [<https://perma.cc/TEA3-2RHM>] (last visited Oct. 13, 2018). A smartphone application is a streamlined internet platform that users can access on a mobile phone, tablet, or computer. *Id.*

12. Scott M. Prange, *Managing the Workforce in the Gig Economy*, HAW. B.J. 4, 7 (2016).

13. Kurt Matzler et al., *Adapting to the Sharing Economy*, 56 MIT SLOAN MGMT. REV. 71, 72 (Winter 2015). For example, Airbnb lists a studio apartment located in Manhattan’s Upper East Side in New York City for \$70 per night. AIRBNB, <https://www.airbnb.com/rooms/5247202?location=Manhattan%2C%20New%20York%2C%20NY%2C%20USA&guests=1&adults=1> [<https://perma.cc/2H78-CS23>] (last visited Mar. 28, 2019). Hotel listings in the same area generally cost between \$200 to \$700 per night. HOTEL GUIDES, <https://hotelguides.com/new-york/manhattan-nyc-ny-upper-east-side-hotels.html> [<https://perma.cc/KX7R-D5BR>] (last visited Mar. 28, 2019).

14. See Sara Horowitz, *The Freelance Surge Is the Industrial Revolution of Our Time*, ATLANTIC (Sep. 1, 2011), <https://www.theatlantic.com/business/archive/2011/09/the-freelance-surge-is-the-industrial-revolution-of-our-time/244229/> [<https://perma.cc/W65J-276S>].

15. Jose Heftye & Robert Bauer, *Insuring the Sharing Economy*, AMERICAN INT’L GROUP, INC. (2017), <https://www.aig.com/content/dam/aig/america-canada/us/documents/insights/aig-insuring-the-sharing-economy.pdf> [<https://perma.cc/W5QL-YAXV>].

16. See Kate Samuelson, *Faulty Water Heater to Blame for Deaths of Iowa Family of Four in Mexico, Police Say*, TIME (Apr. 6, 2018), <http://time.com/5230715/iowa-family-of-four-dead-mexico-water-heater/> [<https://perma.cc/MT5Z-5733>].

sharing platform VRBO<sup>17</sup> for six days.<sup>18</sup> The Sharp family never returned.<sup>19</sup> Family members reported the Sharps missing to the United States Embassy in Mexico, and Mexican authorities found the entire family dead in the condo several days later.<sup>20</sup> Autopsy reports revealed that the Sharp family died due to “asphyxiation by inhalation of toxic gases.”<sup>21</sup> Investigators identified a rusted, faulty water heater located in the laundry room of the condo as the cause of the toxic gas leak.<sup>22</sup> Authorities believed the family died in their sleep from inhaling toxic gas circulating in the air.<sup>23</sup>

As demonstrated by the Sharp family’s tragedy, the sharing economy poses a significant risk of harm, especially given the lack of oversight sharing-economy companies exercise over their services.<sup>24</sup> Jurisprudence indicates that present tort law is inadequate in defining liability for sharing-economy actors.<sup>25</sup> Sharing-economy companies maintain unprecedented, innovative business models that do not fit the mold of traditional tort classifications for commercial entities, leaving courts uncertain on the question of tort liability.<sup>26</sup> Lawsuits can result in jurisprudence that clarifies or provides the law, but the vast majority of lawsuits against sharing-economy companies settle before the trial stage of litigation.<sup>27</sup> Tort liability in the sharing economy will, therefore, remain

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17. *About the Family*, VRBO, <https://www.vrbo.com/info/about-us/about-the-family> [<https://perma.cc/LAP4-6S7X>] (last visited Nov. 10, 2018).

18. Bill Hutchinson, *Bodies of American Family of 4 Killed by Gas Poisoning in Mexico Coming Home for Funeral: Relatives*, ABC NEWS (Mar. 25, 2018, 5:11 PM), <https://abcnews.go.com/US/bodies-american-family-killed-gas-poisoning-mexico-coming/story?id=54001040> [<https://perma.cc/6VA5-CT3K>].

19. *Id.*

20. *Id.*

21. *Id.*

22. Samuelson, *supra* note 16.

23. Jason M. Volack, Tara Fowler, & Julia Jacobo, *American Family Who Died in Mexico ‘Went to Sleep and Never Woke Up,’ Cousin Says*, ABC NEWS (Mar. 23, 2018, 4:40 PM), <https://abcnews.go.com/US/american-family-found-dead-mexico/story?id=53967241> [<https://perma.cc/2XC2-LGFK>].

24. Samuelson, *supra* note 16.

25. *See generally* Carroll v. Am. Empire Surplus Lines Ins. Co., 289 F. Supp. 3d 767, 769 (E.D. La. 2017); Doe v. Uber Techs., Inc., 184 F. Supp. 3d 774, 782 (N.D. Cal. 2016).

26. *See generally id.*

27. Daniel Fisher, *The Big Question with Uber, Airbnb and the Rest of the ‘Sharing Economy’: Who to Sue?*, FORBES (Mar. 25, 2015, 7:24 AM), <https://www.forbes.com/sites/danielfisher/2015/03/25/the-big-question-with-uber-airbnb-and-the-rest-of-the-sharing-economy-who-to-sue/#140b8a71589d> [<https://perma.c>

uncertain until state legislatures pass or amend legislation to resolve the ambiguity.<sup>28</sup>

To avoid litigation costs and the possibility of having to pay considerable tort damages, some sharing-economy companies have implemented insurance programs to compensate their agents and consumers for harm sustained during use of a company's services.<sup>29</sup> The insurance programs further the underlying tort principles of compensation for harm and deterrence of tortious conduct.<sup>30</sup> Both sharing-economy agents and consumers timely receive definite compensation for damage to their property and persons resulting from negligent acts.<sup>31</sup> Decreasing the amount of insurance claims filed, in turn, incentivizes sharing-economy companies to ensure a higher degree of safety.<sup>32</sup> Private insurance, albeit effective, does not replace the need for a clear standard of liability under tort law.<sup>33</sup>

Accordingly, state legislatures should pass legislation mandating that all sharing-economy companies implement insurance programs to compensate personal injury and property damage resulting from negligent acts.<sup>34</sup> For damage resulting from intentional acts, state legislatures should impose a heightened standard of care for sharing-economy companies.<sup>35</sup> This legislative, insurance-based solution will provide clarity and predictability in sharing-economy litigation.

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c/739F-YTJK]. A settlement is "a legally enforceable agreement in which a claimant agrees not to seek recovery outside the agreement for specified injuries or claims from some or all of the persons who might be liable for those injuries or claims." RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT LIAB. § 24 (AM. LAW INST. 2000).

28. See generally RESTATEMENT (SECOND) OF TORTS § 874A (AM. LAW INST. 1979). State legislatures are charged with articulating the tort law for their respective states. *Id.*

29. Fisher, *supra* note 27.

30. See generally *Host Protection Insurance*, AIRBNB, <https://www.airbnb.com/host-protection-insurance> [<https://perma.cc/N85R-3JA8>] (last visited Oct. 13, 2018); *Auto Insurance to Help Protect You*, UBER, <https://www.uber.com/drive/insurance/> [<https://perma.cc/D5UY-58PH>] (last visited Oct. 13, 2018).

31. See generally *id.*

32. See generally Agnieszka A. McPeak, *Sharing Tort Liability in the New Sharing Economy*, 49 CONN. L. REV. 171, 178 (2016).

33. *Id.*

34. See generally Emily A. Spieler, *(Re)assessing the Grand Bargain: Compensation for Work Injuries in the United States, 1900-2017*, 69 RUTGERS U.L. REV. 891, 920 (2017).

35. See generally RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM § 40(a) (AM. LAW INST. 2012).

Part I of this Comment discusses the sharing economy's revolutionary effect in the marketplace and introduces the complexity of sharing-economy companies' business models. Part II exposes the inadequacy of traditional tort classifications to define liability in the sharing economy by presenting the *Carroll v. American Empire Surplus Lines Insurance Co.* and *Doe v. Uber Technologies* opinions. Part III demonstrates the manner in which Congress or state legislatures may enforce an insurance-based solution and apply such a solution in the context of *Carroll* and *Doe v. Uber*. Finally, this Comment concludes by explaining the advantages of a legislative insurance-based solution to courts, sharing-economy companies, agents, and consumers.

### I. AMERICA'S SECOND INDUSTRIAL REVOLUTION: THE SHARING REVOLUTION

The sharing economy is revolutionizing the commercial market.<sup>36</sup> Rooted in sharing with strangers, the sharing economy is increasingly popular and threatens to displace traditional industries.<sup>37</sup> Since 2014, Uber, one of the most popular "ridesharing"<sup>38</sup> services, has represented 52% of all ground transportation transactions and has had a 254% market growth rate.<sup>39</sup> Yellow taxi cabs now represent only 11% of recorded ground transportation transactions.<sup>40</sup> Similarly, Airbnb, one of the most popular "home sharing" services,<sup>41</sup> advertises nearly five million listings spanning 191 countries, surpassing the number of listed rooms of the top

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36. Juan Martinez, *Uber and Airbnb Are Revolutionizing Business Travel*, ENTREPRENEUR (Jan. 26, 2017), <https://www.entrepreneur.com/article/288346> [<https://perma.cc/G5RC-ZFAU>].

37. Melanie DeFiore, *Where Techs Rush in, Courts Should Fear to Tread: How Courts Should Respond to the Changing Economics of Today*, 38 CARDOZO L. REV. 761, 775 (2016).

38. *What Is Ridesharing?*, GOODWILL COMMUNITY FOUND. GLOBAL, <https://edu.gcfglobal.org/en/sharingeconomy/what-is-ridesharing/1/> [<https://perma.cc/F8SR-YKR6>] (last visited Oct. 13, 2018). The term "ridesharing" refers to a service in the sharing economy that arranges one-way transportation through smartphone applications like Uber and Lyft. *Id.*

39. Martinez, *supra* note 36.

40. *Id.*

41. Chad Marzen, Darren A. Prum, & Robert J. Aalberts, *The New Sharing Economy: The Role of Property, Tort, and Contract Law for Managing the Airbnb Model*, 13 N.Y.U. J.L. & BUS. 295, 296 (2017). The term "home sharing" refers to a service in the sharing economy that enables property owners to rent their homes and apartments to others for a short-term period through technological platforms like Airbnb, VRBO, and Homeaway. *Id.*

five hotel chains combined.<sup>42</sup> Demonstrated by their groundbreaking business models, sharing-economy companies are disrupting established industries and societal norms by promoting freelance work over full-time employment and property renting over ownership.<sup>43</sup>

*A. The Sharing Economy: New Business Models for a New Era*

Consumers of all generations have embraced the new economic culture brought about by the boom in technology and the internet.<sup>44</sup> The sharing economy values the renting, swapping, lending, gifting, and sharing of goods and services, contrary to the previous economy organized around ownership.<sup>45</sup> This shift allows asset owners in the sharing economy to earn additional income by utilizing digital platforms, such as smartphone apps, to capitalize on their free time and unused property.<sup>46</sup> For instance, homeowners can rent out driveway space to strangers for parking via Parking Panda.<sup>47</sup> Additionally, consumers can save a significant amount of money by renting from others in the sharing economy, instead of purchasing goods and services from a traditional commercial entity.<sup>48</sup> Rent the Runway, for example, provides a platform for women to rent designer dresses for affordable prices.<sup>49</sup> These types of sharing-economy transactions generally implicate three parties: (1) the consumer or app user; (2) the sharing-economy company; and (3) the agent, such as the asset owner or individual, who provides the particular service.<sup>50</sup>

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42. *Your Safety Is Our Priority*, AIRBNB, <https://www.airbnb.com/trust> [<https://perma.cc/9FUZ-W8UT>] (last visited Oct. 13, 2018).

43. See Horowitz, *supra* note 14.

44. Inara Scott & Elizabeth Brown, *Redefining and Regulating the New Sharing Economy*, 19 U. PA. J. BUS. L. 553, 554 (2017).

45. *Id.* at 559.

46. *Id.*

47. *Id.* See also PARKING PANDA, <https://www.parkingpanda.com/how-it-works> [<https://perma.cc/DXB4-WSN3>] (last visited Oct. 13, 2018).

48. See generally Geron, *supra* note 1.

49. *How Rent the Runway Works*, RENT THE RUNWAY, [https://www.renttherunway.com/how\\_renting\\_works?action\\_type=footer\\_link](https://www.renttherunway.com/how_renting_works?action_type=footer_link) [<https://perma.cc/6U3H-E8HX>] (last visited Oct. 13, 2018). Rent the Runway provides women the opportunity to rent high-end, designer dresses and clothing at affordable prices for short periods of time. *Id.*

50. *Four Models of Sharing Economy Platforms*, MGMT. OF INFO. SYSTEMS Q. EXECUTIVE, <http://www.misqe.org/ojs2/index.php/misqe/article/viewFile/798/474> [<https://perma.cc/AM7C-ZGMJ>] (last visited Oct. 13, 2018).



The sharing economy traces back to companies like eBay and Craigslist, which continue to enable individual, small-scale sellers to reach a broad audience and to market goods and services online.<sup>51</sup> Today, companies like Airbnb, VRBO, Homeaway, Uber, Lyft, Care.com, and Grubhub dominate the industry.<sup>52</sup> Airbnb, VRBO, and Homeaway evince the trend of homeowners sharing their houses, apartments, and condominiums with others through web-based platforms.<sup>53</sup> For homeowners and tourists alike, home sharing platforms offer new and unexpected economic advantages. Property owners receive assistance in paying off their mortgages, while tourists save a significant amount of money on lodging when traveling.<sup>54</sup>

Sharing-economy companies differ from typical large corporations or enterprises that value skill, training, and organization and operate according to a highly centralized business scheme.<sup>55</sup> In the sharing economy, anyone can become an innkeeper or taxi driver at the tap of a finger, overturning years of highly centralized and organized commercial entities.<sup>56</sup> The sharing economy operates according to a “peer-to-peer,” diverse scheme that functions “on the basis of individual trust and on an ad hoc level.”<sup>57</sup> Essentially acting as a broker, the sharing-economy company facilitates the transaction between the consumer and the asset owner or individual providing the respective service.<sup>58</sup> The degree of control a sharing-economy company exerts over its agent, however, varies from company to company.<sup>59</sup> Some sharing-economy companies exercise a significant degree of control over the manner in which their agents operate, resembling an employment relationship.<sup>60</sup> Other sharing-economy companies exercise minimal control and operate merely as

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51. McPeak, *supra* note 32, at 179.

52. Scott & Brown, *supra* note 44, at 562–65.

53. Marzen, Prum, & Aalberts, *supra* note 41, at 296.

54. *Id.*

55. *Id.*

56. Casey Rockwell et al., *Legal Ambiguity as a Competitive Advantage: Airbnb’s Use of Technological Novelty to Avoid Liability*, 46 REAL EST. L.J. 356 (2017).

57. McPeak, *supra* note 32, at 188–89.

58. Michèle Finck & Sofía Ranchordás, *Sharing and the City*, 49 VAND. J. TRANSNAT’L L. 1299, 1311 (2016).

59. See *Carroll v. Am. Empire Surplus Lines Ins. Co.*, 289 F. Supp. 3d 767, 769 (E.D. La. 2017); *Doe v. Uber Techs., Inc.*, 184 F. Supp. 3d 774, 782 (N.D. Cal. 2016); *Lawson v. GrubHub, Inc.*, 302 F. Supp. 3d 1071 (N.D. Cal. 2018).

60. See, e.g., *How Uber Works*, UBER, <https://www.uber.com/about/how-does-uber-work/> [https://perma.cc/2DPD-REBX] (last visited Oct. 13, 2018).

technological platforms that connect agents and consumers.<sup>61</sup> The business models of Airbnb and Uber, the “poster children”<sup>62</sup> of the sharing economy, exemplify the varying degrees of control sharing-economy companies exert over their agents and the novelty of sharing-economy companies’ business models.<sup>63</sup>

### *1. Airbnb and Airbnb Plus: The Worldwide Home Sharing Platform*

Founded in 2008, Airbnb is a home sharing platform that provides property owners, or hosts, the opportunity to rent their homes to guests seeking short-term lodging.<sup>64</sup> Across the world, Airbnb offers a more affordable and innovative alternative to a hotel room.<sup>65</sup> As opposed to a single hotel room or suite, Airbnb guests can rent entire homes, apartments, tree houses, Airstreams, and even castles.<sup>66</sup> Airbnb connects hosts and guests in more than 81,000 cities and 191 countries.<sup>67</sup> On any given night, homeowners rent to about two million guests through Airbnb’s platform.<sup>68</sup>

To rent through Airbnb, guests first input their intended destinations, dates, and number of guests.<sup>69</sup> Guests may refine the results by filtering a number of preferences, including the type of home, price, type of trip, available amenities, number of beds, type of property, and neighborhood.<sup>70</sup> When sifting through listings, guests may view photos and read reviews of both the residences and the Airbnb hosts.<sup>71</sup> After selecting and booking

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61. See *Carroll*, 289 F. Supp. 3d at 769; *Doe*, 184 F. Supp. 3d at 782.

62. Alice Armitage, Andrew K. Cordova, & Rebecca Siegel, *Design Thinking: The Answer to the Impasse Between Innovation and Regulation*, 2 GEO. L. TECH. REV. 3 (2017).

63. *Id.*

64. Marzen, Prum, & Aalberts, *supra* note 41, at 298.

65. Talia Avakian, *Here’s Where It’s Cheaper to Book an Airbnb Over a Hotel Room*, BUS. INSIDER, <https://www.businessinsider.com/is-it-cheaper-to-airbnb-or-get-a-hotel-2016-2> [<https://perma.cc/7ABH-6DTY>] (last visited Oct. 13, 2018).

66. Sienna Fantozzi, *The Most Unique Airbnbs You Can Rent Right Now*, HOUSE BEAUTIFUL (July 26, 2018) <https://www.housebeautiful.com/lifestyle/g22562433/unique-airbnb-rentals/> [<https://perma.cc/UZ6X-GSNW>].

67. *Your Safety Is Our Priority*, *supra* note 42.

68. *Id.*

69. See AIRBNB, <https://www.airbnb.com> [<https://perma.cc/Q8NE-X489>] (last visited Oct. 13, 2018).

70. *Id.*

71. *Id.*

a residence, Airbnb provides guests with their hosts' email addresses and phone numbers, as well as a private messaging system for discussion of arrangements.<sup>72</sup>

To become an Airbnb host, property owners first create a personal profile that lays out the property details.<sup>73</sup> Airbnb hosts enjoy a significant degree of freedom over the manner in which they rent out their properties through the platform.<sup>74</sup> They retain the right to review each booking request, decline requests, and set their own rental prices.<sup>75</sup> Airbnb requires that hosts meet four requirements: (1) be responsive; (2) accept reservation requests; (3) avoid canceling reservations; and (4) obtain positive reviews.<sup>76</sup> Failure to adhere to these requirements may result in penalties, including a cancellation fee, a blocked calendar that prevents reservations for a period of time, and account suspension.<sup>77</sup> Airbnb also recommends that hosts provide an easy check-in policy, accurate listing details, and essential amenities, such as toilet paper, soap, linens, towels, and pillows.<sup>78</sup>

Before permitting potential hosts and guests to utilize its services, Airbnb conducts limited background checks.<sup>79</sup> Airbnb currently checks public, state, and county criminal records, in addition to state and national sex offender registries.<sup>80</sup> If a background check reveals that a potential host or guest has a serious criminal history reflecting convictions within a certain time frame, Airbnb will either deactivate the account or flag the account for further review.<sup>81</sup> Although Airbnb disclaims on its website that

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72. *Id.*

73. Marzen, Prum, & Aalberts, *supra* note 41, at 298.

74. *Hosting in 3 Steps*, AIRBNB, <https://www.airbnb.com/host/homes> [<https://perma.cc/Z5CU-HE8S>] (last visited May 5, 2019).

75. *Id.*

76. *Hosting on Airbnb*, AIRBNB, <https://www.airbnb.com/hospitality> [<https://perma.cc/V97Q-GXFR>] (last visited Oct. 13, 2018).

77. *What Is the Airbnb Service Fee?*, AIRBNB, <https://www.airbnb.com/help/article/1857/what-is-the-airbnb-service-fee> [<https://perma.cc/S7EP-9U8B>] (last visited Oct. 13, 2018).

78. *Hosting on Airbnb*, AIRBNB, <https://www.airbnb.com/hospitality> (last visited Oct. 13, 2018).

79. *Does Airbnb Perform Background Checks on Members?*, AIRBNB, <https://www.airbnb.com/help/article/1308/does-airbnb-perform-background-checks-on-members> [<https://perma.cc/SCQ2-YLK3>] (last visited Oct. 13, 2018).

80. *Id.*

81. *Id.* Airbnb considers serious crimes to include "murder, terrorism, rape or child molestation." *Id.* Airbnb may also take adverse action against a potential host or guest with a record for crimes like felony burglary, felony larceny, fraud, and property damage. Less serious convictions, such as disorderly conduct and marijuana possession, generally do not result in deactivation. *Id.*

its background checks may be incomplete and that it cannot guarantee user safety, it is unlikely that such disclaimers would relieve the company of liability.<sup>82</sup> Until the question reaches a court through litigation or is addressed by state legislatures through a reform of tort law, the effectiveness of Airbnb's disclaimers remain unclear.<sup>83</sup>

Airbnb's recent launch of "Airbnb Plus" exemplifies the dynamic nature of sharing-economy companies.<sup>84</sup> Airbnb Plus markets homes of "only the highest quality" with hosts who reflect average ratings of 4.8 stars or higher out of 5 stars.<sup>85</sup> An Airbnb partner personally visits all homes advertised as an Airbnb Plus listing "to ensure comfort, consistency, and design."<sup>86</sup> Airbnb hosts must pay a one-time \$149 fee to apply to the Airbnb Plus program, and they must have a professional photographer take photos of the residence.<sup>87</sup> Airbnb specifies a number of requirements to which Airbnb Plus hosts must adhere.<sup>88</sup> For instance, a neutral or pleasant aroma must be present in each room.<sup>89</sup> Showerheads and faucets must not leak, and hosts must display artwork or photographs reflecting their style and personality around the residence.<sup>90</sup> Guests pay a higher price for the Airbnb Plus service and receive a more luxurious experience.<sup>91</sup>

Currently, courts attempt to classify sharing-economy companies based on their original business models.<sup>92</sup> The launch of Airbnb Plus illustrates, however, that sharing-economy companies constantly adopt new features and alter their business models.<sup>93</sup> Although courts have held that Airbnb exerts minimal control over its hosts, Airbnb, through its

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82. *Id.*

83. *See generally id.*

84. *See generally Introducing Airbnb Plus*, AIRBNB, <https://www.airbnb.com/plus> [<https://perma.cc/SCQ2-YLK3>] (last visited Oct. 13, 2018).

85. *Id.*

86. *Id.*

87. *How to Join*, AIRBNB, <https://www.airbnb.com/plus/host> [<https://perma.cc/G8CA-QJPF>] (last visited Oct. 13, 2018).

88. *Id.*

89. *Id.*

90. *Id.*

91. Nick Statt, *Airbnb Reveals New Hotel-Like Service Called Airbnb Plus*, VERGE (Feb. 22, 2018, 12:29 PM), <https://www.theverge.com/2018/2/22/17040684/airbnb-plus-hotels-standard-amenities-service-loyalty-program> [<https://perma.cc/2P3N-NMKX>].

92. *See Carroll v. Am. Empire Surplus Lines Ins. Co.*, 289 F. Supp. 3d 767, 769 (E.D. La. 2017); *Doe v. Uber Techs., Inc.*, 184 F. Supp. 3d 774, 782 (N.D. Cal. 2016); *Lawson v. GrubHub, Inc.*, 302 F. Supp. 3d 1071 (N.D. Cal. 2018).

93. *See generally Introducing Airbnb Plus*, *supra* note 84.

Airbnb Plus program, now undertakes a more direct, hands-on role in the operation of its services.<sup>94</sup> The dynamic nature of sharing-economy companies like Airbnb suggests the need for a consistent standard that courts can apply for sharing-economy litigation.<sup>95</sup> Uber's business model similarly demonstrates the inapplicability of traditional tort theories to sharing-economy companies.

## 2. Uber: The 21st Century Taxi

Unlike Airbnb, Uber exerts a significant amount of control over its drivers.<sup>96</sup> Uber, founded in 2009, is a ridesharing platform that utilizes mobile technology to provide inexpensive taxi-like services to its customers.<sup>97</sup> Uber matches riders with nearby drivers in more than 903 cities and 85 countries.<sup>98</sup> By July 2018, Uber had completed more than five billion rides worldwide and retained more than 75 million global customers.<sup>99</sup>

To hail a ride through Uber, users must first download the Uber app and upload their credit or debit card information.<sup>100</sup> Users then input both their current location and the address of their destination, and Uber connects them with a nearby driver.<sup>101</sup> The app displays a live map for users to view their driver's location along with an estimated time of arrival.<sup>102</sup> Before confirming a ride, users can view the driver's picture, vehicle details, and rating, as well as confirm the fare price.<sup>103</sup> Upon confirmation, drivers pick up users within minutes and bring them to their intended destinations.<sup>104</sup> Uber automatically charges the payment to each

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94. See generally *How to Join*, *supra* note 87.

95. See generally *Introducing Airbnb Plus*, *supra* note 84.

96. See generally *Uber Community Guidelines*, UBER, <https://www.uber.com/legal/community-guidelines/us-en/> [<https://perma.cc/4UNQ-HHZC>] (last visited Oct. 13, 2018).

97. McPeak, *supra* note 32, at 174.

98. *Uber Cities*, UBER ESTIMATOR, <https://uberestimator.com/cities> [<https://perma.cc/M2BT-9F62>] (last visited Jan. 11, 2020).

99. Len Sherman, *Is Uber for Everything a Good Thing?*, FORBES (Jul. 17, 2018, 10:21 PM), <https://www.forbes.com/sites/lensherman/2018/07/17/is-uber-for-everything-a-good-thing/#7dc8879510ef> [<https://perma.cc/8J4F-DGLV>].

100. *How Uber Works*, *supra* note 60.

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.*

user's credit card once the driver completes the ride, and users have the option of later adding a tip or review.<sup>105</sup>

To become an Uber driver, an individual must meet the minimum age as specified by his respective city, have at least one year of driving experience, and clear a background check.<sup>106</sup> The background check, conducted by a third-party company, screens a prospective driver's Motor Vehicle Record and public state and county, or parish, criminal records dating back seven years.<sup>107</sup> Uber generally disqualifies prospective drivers when the background screening reveals major driving violations, a recent history of driving violations, felony convictions, registered sex offender status, violent crimes, sexual offenses, and other types of criminal conduct.<sup>108</sup>

Once accepted, Uber drivers can log into the Uber app at any time and provide rides.<sup>109</sup> Uber does not impose a certain hour requirement, nor does it cap the amount of hours a driver can give rides.<sup>110</sup> Uber drivers set their own hours, and Uber sets ride fare prices without drivers' input.<sup>111</sup> Uber pays drivers per ride and earns a profit by deducting a 25% commission fee from each fare.<sup>112</sup> Uber drivers must supply their own vehicles and insurance.<sup>113</sup> Cell phone communication between a driver and

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105. *Id.*

106. *Here's What You Need to Use the Driver App*, UBER, <https://www.uber.com/en/us/drive/> [<https://perma.cc/8766-Q7PA>] (last visited Oct. 13, 2018). In Baton Rouge, Louisiana, Uber drivers must be at least 21 years of age. UBER, [https://bonjour.uber.com/?state=s4-ZSC3mXjBPcwADUfegVkJ64s0bSXysTpdBih\\_Oxnc%3D&\\_csid=fv2Fs0TjoKwOvgG6UBpBrA#\\_](https://bonjour.uber.com/?state=s4-ZSC3mXjBPcwADUfegVkJ64s0bSXysTpdBih_Oxnc%3D&_csid=fv2Fs0TjoKwOvgG6UBpBrA#_) [<https://perma.cc/5DZ8-8FPP>] (last visited Jan. 19, 2019).

107. *What Does the Background Check Look For?*, UBER, <https://help.uber.com/driving-and-delivering/article/what-does-the-background-check-look-for?nodeId=ee210269-89bf-4bd9-87f6-43471300ebf2> [<https://perma.cc/T9Y9-MYGS>] (last visited Jan. 11, 2020).

108. *Id.* Examples of major driving violations include driving under the influence and reckless driving. *Id.*

109. *How Driving Works*, UBER, <https://www.uber.com/en/us/drive/how-it-works/> [<https://perma.cc/DZB6-L2SW>] (last visited Oct. 13, 2018).

110. *Id.*

111. *Doe v. Uber Techs., Inc.*, 184 F. Supp. 3d 774, 782 (N.D. Cal. 2016).

112. Greg Bensinger, *Uber Drivers Take Riders the Long Way—At Uber's Expense*, WALL ST. J. (Aug. 13, 2018, 6:44 PM), <https://www.wsj.com/articles/uber-drivers-take-riders-the-long-way-at-ubers-expense-1534152602> [<https://perma.cc/E7VH-XDFC>].

113. *Doe*, 184 F. Supp. 3d at 783.

a user strictly occurs through the Uber app, and Uber keeps all contact information anonymous.<sup>114</sup>

A driver's failure to adhere to any of Uber's requirements may result in deactivation or termination of the driver's Uber account.<sup>115</sup> Drivers must maintain high ratings and quality reviews; consistently poor ratings result in deactivation of a driver's account.<sup>116</sup> Uber, however, offers quality improvement courses that provide an opportunity for drivers to learn how to improve their ratings, and completion of a course may allow drivers to regain access to their Uber accounts.<sup>117</sup> Uber drivers must also maintain low cancellation rates and high acceptance rates for rides.<sup>118</sup> In addition, Uber may penalize drivers for taking roundabout routes to a rider's destination.<sup>119</sup>

Scholars characterize the rise of sharing-economy companies like Airbnb and Uber as unprecedented, groundbreaking, disruptive, and legally challenging.<sup>120</sup> At the tap of a finger, consumers can access an array of affordable goods and innovative services.<sup>121</sup> As the American economy shifts toward a primarily digital marketplace and away from valuing ownership, several commentators assert that the nation is experiencing the "Industrial Revolution of our time" and have labeled the phenomenon as the "Sharing Revolution."<sup>122</sup> The Sharing Revolution's economic and social disruption, along with its introduction of new legal issues, greatly resembles the sort of disruption and legal issues that the Industrial Revolution spurred.<sup>123</sup>

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114. *See generally Ride with Confidence*, UBER, <https://www.uber.com/ride/safety/> [<https://perma.cc/3ULK-DYA5>] (last visited Oct. 13, 2018).

115. *See generally Uber Community Guidelines*, *supra* note 96.

116. *See generally id.* Uber riders rate their drivers on a scale of one to five stars, and Uber considers a poor average rating as below 4.6 stars. *Id.*

117. *See generally id.*

118. *See generally id.*

119. *Doe v. Uber Techs., Inc.*, 184 F. Supp. 3d 774, 782 (N.D. Cal. 2016).

120. *See DeFiore*, *supra* note 37, at 796.

121. Horowitz, *supra* note 14.

122. *Id.* The Sharing Revolution, which commentators have described as the third Industrial Revolution, is the "21st century smart digital infrastructure . . . giving rise to a radical new sharing economy that is transforming the way we manage, power and move economic life." *New Documentary: The Third Industrial Revolution—A Radical New Sharing Economy*, SHARE THE WORLD'S RESOURCES (Mar. 15, 2018), <https://www.sharing.org/information-centre/articles/new-documentary-third-industrial-revolution-radical-new-sharing-economy> [<https://perma.cc/L8FU-EUMA>].

123. *Id.*

*B. The Industrial Revolution: Economic and Social Disruption Demanded Tort Law Refinement*

The Industrial Revolution in America resulted in the explosion of cities, skyscrapers, mass transit, radios, department stores, universities, music, and museums.<sup>124</sup> As America's agricultural society quickly embraced industrialization, the nation's economy and culture completely transformed.<sup>125</sup> Before 1870, 90% of Americans lived in rural areas.<sup>126</sup> During the next 50 years, 11 million Americans migrated to cities to take part in the Industrial Revolution.<sup>127</sup> American workers left rural jobs to work in factories and large-scale industries with the hope of obtaining better pay and more opportunities.<sup>128</sup> Assembly lines facilitated the quick and efficient production of goods, and mass transit and communication led to an unprecedented level of interconnectedness.<sup>129</sup>

The Industrial Revolution posed many new tort liability issues.<sup>130</sup> One of the most notable issues arose from the dangerous working conditions in factories.<sup>131</sup> Factory workers frequently suffered injuries, but employees had difficulty recovering compensation pursuant to existing tort theories.<sup>132</sup> Before the Industrial Revolution, common law rules of negligence governed an employee's action to recover for workplace injuries.<sup>133</sup> Under the common law regime, employers consistently escaped liability—even if the employee successfully established the employer's negligence—by raising one of the following three defenses: (1) assumption of the risk,<sup>134</sup> (2) fellow servant doctrine;<sup>135</sup> and

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124. DAVID M. KENNEDY & LIZABETH COHEN, *THE AMERICAN PAGEANT: A HISTORY OF THE AMERICAN PEOPLE* 539–40 (15th ed. 2013).

125. DeFiore, *supra* note 37, at 767.

126. KENNEDY & COHEN, *supra* note 124.

127. *Id.*

128. *Id.*

129. *See id.*

130. Price V. Fishback & Shawn Everett Kantor, *The Adoption of Workers' Compensation in the United States, 1900–1930*, NAT'L BUREAU OF ECON. RES. (1996), <http://www.nber.org/papers/w5840.pdf> [<https://perma.cc/HMM8-RPGV>].

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.* Assumption of the risk provided a means for an employer to escape liability by proving that the employee assumed the risks associated with the particular employment. *Id.*

135. *Id.* The fellow servant doctrine prevented an employee from recovering if a coworker caused the accident. *Id.*



(3) contributory negligence.<sup>136</sup> Workers needed tort law to adapt to the new industrial economy to obtain adequate compensation for injuries, which ultimately spurred state legislatures to enact workers' compensation laws nationwide.<sup>137</sup>

For both employees and employers, workers' compensation schemes provided predictability and clear, uniform means of recovery.<sup>138</sup> Industrial accidents regularly occurred in the workplace, and workers' compensation schemes compensated workers efficiently and equitably.<sup>139</sup> State legislatures sought to preserve and encourage innovation and to protect companies from excessive court judgments that would eventually leave them bankrupt.<sup>140</sup> The workers' compensation schemes, therefore, protected employers by providing them with a tort exemption for injuries covered by the scheme.<sup>141</sup>

Workers' compensation, a form of insurance, operates as a compromise between employers and injured employees.<sup>142</sup> State workers' compensation laws enable an injured employee to obtain compensation for his injuries arising from negligent work-related acts but bars him from bringing a tort action against his employer.<sup>143</sup> Workers' compensation laws provide an exclusive means of recovery in which injured workers file a compensation claim, and some governing body, depending on the state, decides whether the workers should receive compensation.<sup>144</sup> In the event that the governing body denies the worker recovery or if the worker sustained injuries due to intentional tortious conduct, the worker may file formal legal action directly against his employer and recover outside of the compensation scheme.<sup>145</sup>

In the same way the Industrial Revolution marked the transition to urban life and industrialization, the Sharing Revolution is spearheading

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136. *Id.* Employers escaped liability through the contributory negligence defense by proving that the employee acted negligently or failed to exercise reasonable care. *Id.*

137. *Id.*

138. Gregory P. Guyton, *A Brief History of Workers' Compensation*, 19 IOWA ORTHOP. J. 110 (1999).

139. *Id.*

140. *Id.*

141. *Id.*

142. 82 AM. JUR. 2D *Workers' Compensation* § 2 (1992). The American Jurisprudence is a comprehensive legal encyclopedia covering over 400 topics of United States law. *Id.*

143. *Id.*

144. *Id.*

145. *Id.*

the transition to a predominantly digital economy.<sup>146</sup> The Industrial Revolution's economic and social disruption left courts struggling to apply traditional tort theories to new business models, and state legislatures resolved the problem by creating workers' compensation schemes.<sup>147</sup> The Sharing Revolution marks another unprecedented disruption as sharing-economy companies design their business models to avoid classic tort liability.<sup>148</sup> By assuming the role of a "technology company" that simply connects buyers and sellers of a service, sharing-economy companies differ from traditional commercial entities like hotels or taxi companies, and this difference raises crucial legal questions regarding tort liability.<sup>149</sup> Although tort law has yet to adapt to the economy's radical transformation to a digital marketplace, courts nonetheless apply tort classifications suited for traditional commercial entities.<sup>150</sup> Jurisprudence demonstrates the struggle that courts encounter in adjudicating cases involving sharing-economy companies because the companies do not fit the mold of existing classifications, given their unique, complex business models.<sup>151</sup>

## II. TAP TO PLAY THE CLASSIFICATION GAME: TORT LAW'S INADEQUACY IN THE SHARING ECONOMY

Litigation poses a significant economic threat to sharing-economy companies, which generally seek to avoid shouldering the financial burden.<sup>152</sup> Sharing-economy companies are wary of adverse judicial opinions that could negatively affect their business models, which thus incentivizes settlements to avoid risk.<sup>153</sup> Only a handful of courts have rendered decisions on a sharing-economy company's motion for summary judgment.<sup>154</sup> The published decisions on the motions for summary

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146. See generally Guyton, *supra* note 138, at 106–10; Horowitz, *supra* note 14.

147. See generally Horowitz, *supra* note 14.

148. See generally AIRBNB, *supra* note 69; *Why Drive with Uber*, UBER, <https://www.uber.com/drive> [<https://perma.cc/BF8U-6CMK>] (last visited Oct. 13, 2018); McPeak, *supra* note 32.

149. See generally *Doe v. Uber Techs., Inc.*, 184 F. Supp. 3d 774, 787 (N.D. Cal. 2016).

150. See *Carroll v. Am. Empire Surplus Lines Ins. Co.*, 289 F. Supp. 3d 767 (E.D. La. 2017); see also *Doe v. Uber Techs., Inc.*, 184 F. Supp. 3d 774 (N.D. Cal. 2016).

151. See *Carroll*, 289 F. Supp. 3d 767; see also *Doe*, 184 F. Supp. 3d 774.

152. *Id.*

153. See *id.*

154. See *Carroll*, 289 F. Supp. 3d 767; see also *Doe*, 184 F. Supp. 3d 774. A motion for summary judgment is a party's request that the court render a judgment

judgment demonstrate the difficulty in characterizing sharing-economy companies under existing tort theories.<sup>155</sup>

To determine whether to hold traditional commercial entities liable in tort, courts primarily consider the degree of control the entity exerts over its agents.<sup>156</sup> The degree of control indicates the appropriate tort classification, such as employee or independent contractor.<sup>157</sup> Depending on the level of control, courts typically impose liability based on the following tort theories:<sup>158</sup> (1) *respondeat superior*;<sup>159</sup> (2) premises liability;<sup>160</sup> (3) negligent selection, training, retainment, or supervision;<sup>161</sup>

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without trial because “no genuine issue of material fact” exists for a fact-finder to determine. *Motion for Summary Judgment*, BLACK’S LAW DICTIONARY (10th ed. 2014).

155. See *Carroll*, 289 F. Supp. 3d 767; *Doe*, 184 F. Supp. 3d 774.

156. See *Carroll*, 289 F. Supp. 3d 767; *Doe*, 184 F. Supp. 3d 774.

157. See *Carroll*, 289 F. Supp. 3d 767; *Doe*, 184 F. Supp. 3d 774; *Lawson v. GrubHub, Inc.*, 302 F. Supp. 3d 1071 (N.D. Cal. 2018).

158. See *Carroll*, 289 F. Supp. 3d 767; *Doe*, 184 F. Supp. 3d 774; *Lawson*, 302 F. Supp. 3d 1071.

159. The Restatement of Agency, which summarizes United States law governing fiduciary relationships between principals and their agents, provides that employers may be liable for the physical harm that employees cause during the course and scope of employment pursuant to the doctrine of *respondeat superior*. RESTATEMENT (THIRD) OF AGENCY § 7.07 (AM. LAW INST. 2006). The classification of employee turns on the level of control that the principal exerts over the manner in which the agent performs his work. *Id.*

160. The Restatement of Torts, which summarizes general principles of United States tort law, provides that lessors of land may be held liable under certain circumstances for the harm that entrants sustain on the leased premises. RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM § 53 (AM. LAW INST. 2012). The lessor retains a duty of reasonable care for the portions of the land in his control. *Id.* If any dangerous condition exists, the lessor must disclose it to the lessee if the dangerous condition: (1) presents a risk to entrants; (2) subsists on the land when the lessee takes possession; (3) is concealed and unrecognized by the lessee; and (4) is known or should be known to the lessor. *Id.*

161. The Restatement of Agency provides that third parties may file an action directly against a principal for negligently “selecting, training, retaining, supervising, or otherwise controlling” its agent. RESTATEMENT (THIRD) OF AGENCY § 7.05. A claimant’s ability to prevail turns on whether the principal knew or should have known about the risk the agent posed and failed to take measures to protect the consumer. See *Doe*, 184 F. Supp. 3d 774; see also RESTATEMENT (THIRD) OF AGENCY § 7.05. Plaintiffs have asserted this heightened duty of care against sharing-economy companies when seeking to recover for sexual assault. See *Doe*, 184 F. Supp. 3d 774. To establish this heightened duty of care, plaintiffs must establish the following elements: (1) the

or (4) negligent breach of a duty based on a special relationship.<sup>162</sup> Courts, however, are struggling to determine the appropriate tort classifications for sharing-economy companies because the companies' hands-off, peer-to-peer business models truly do not fit the mold of existing classifications for traditional centralized business models.<sup>163</sup>

In attempting to apply existing tort classifications, courts analogize sharing-economy companies to various commercial relationships.<sup>164</sup> The quest to determine the appropriate classification, however, has led to even more unpredictability regarding sharing-economy company liability.<sup>165</sup> Litigation involving Airbnb and Uber—the “poster children” of the sharing economy—exemplifies the jurisprudential struggle to apply traditional tort classifications to sharing-economy companies.<sup>166</sup>

*A. Player One: Carroll v. American Empire Surplus Lines Co.*

In limited situations, Louisiana courts impose a heightened standard of care pursuant to the existence of a special relationship in which the defendant exerts a significant degree of control over the injured plaintiff or where “special attributes of trust or confidence” exist between the parties.<sup>167</sup> Louisiana’s theory of custodial liability mandates the custodian

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company conducted a background check; (2) the background check showed prior criminal history as to give the company actual or constructive knowledge of the risk; and (3) the company failed to take protective measures. *See Doe*, 184 F. Supp. 3d 774. In addition to owing a heightened duty of care based on negligent selection, training, retainment, or supervision, a company may also owe a heightened duty of care based on holding a special relationship with a consumer. *See* RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM § 40(a).

162. The Restatement of Torts provides that an actor may owe a heightened duty of reasonable care to another when a special relationship exists with respect to risks arising in the scope of that relationship. RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM § 40(a). Courts have held that common carrier–passenger and innkeeper–guest relationships constitute special relationships that give rise to a heightened duty of reasonable care. *Id.*

163. Vanessa Katz, *Regulating the Sharing Economy*, 30 BERKELEY TECH. L.J. 1067, 1080 (2015).

164. *See Carroll*, 289 F. Supp. 3d 767; *Doe*, 184 F. Supp. 3d 774.

165. *See Doe*, 184 F. Supp. 3d 774; *Lawson*, 302 F. Supp. 3d 1071.

166. *See Carroll*, 289 F. Supp. 3d 767; *Doe*, 184 F. Supp. 3d 774; *Lawson*, 302 F. Supp. 3d 1071.

167. *Carroll*, 289 F. Supp. 3d 767. Louisiana courts have found a special relationship to exist between common carriers and passengers, innkeepers and guests, employers and injured employees, jailers and prisoners, and teachers and students. *See Reynolds v. Bordelon*, 172 So. 3d 589, 597 (La. 2015).

of property to “keep [it] in a reasonably safe condition[, and to] discover any unreasonably dangerous condition on his premises and either correct the condition or warn potential victims of its existence.”<sup>168</sup> In *Carroll v. American Empire Surplus Lines Co.*, Andrew Callard and his friends rented a property in New Orleans through Airbnb.<sup>169</sup> During their stay, the wooden stairs leading to the front door collapsed while Callard was climbing them. He fell about 10 feet and allegedly suffered severe brain and musculoskeletal injuries.<sup>170</sup> Callard brought negligence<sup>171</sup> and custodial liability<sup>172</sup> claims against Airbnb.<sup>173</sup> The central issue was whether Airbnb owed Callard some duty of protection pursuant to a special or custodial relationship.<sup>174</sup>

The United States District Court for the Eastern District of Louisiana dismissed Callard’s negligence claims and held that Airbnb did not owe a duty to correct the property’s defects and remove the property from the Airbnb platform.<sup>175</sup> Characterizing Airbnb’s role as purely intermediary, the court found that Airbnb and its guests do not hold a special relationship that would give rise to a heightened standard of care and held that Airbnb

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168. *Carroll*, 289 F. Supp. 3d at 774.

169. *Id.* at 769.

170. *Id.*

171. Louisiana Civil Code article 2315 governs general negligence claims in Louisiana. Louisiana courts utilize a duty/risk analysis to determine whether the defendant owed the plaintiff a duty. *Bufkin v. Felipe’s Louisiana, LLC*, 171 So.3d 851, 855 (La. 2014). A plaintiff asserting a negligence claim must prove the following elements:

(1) the defendant had a duty to conform his or her conduct to a specific standard of care; (2) the defendant failed to conform his or her conduct to the appropriate standard of care; (3) the defendant’s substandard conduct was a cause-in-fact of the plaintiff’s injuries; (4) the defendant’s substandard conduct was a legal cause of the plaintiff’s injuries; and (5) actual damages.

*Id.*

172. Louisiana Civil Code articles 2317.1 and 2322 govern custodial liability claims in Louisiana. Louisiana courts hold one who owns or controls a building liable for harm that the building’s defect causes if the plaintiff can prove the following elements: “(1) ownership [or control] of the building; (2) the owner knew or, in the exercise of reasonable care, should have known of the ruin or defect; (3) the damage could have been prevented by the exercise of reasonable care; (4) the defendant failed to exercise such reasonable care; and (5) causation.” *Broussard v. State ex rel. Office of State Bldgs.*, 113 So. 3d 175, 182–83 (La. 2013).

173. *Carroll*, 289 F. Supp. 3d at 769.

174. *Id.*

175. *Id.* at 776.

does not have a duty to protect guests from harm suffered.<sup>176</sup> Even though Airbnb maintained the right to inspect a host's property at any time and remove the property from the listings, the relationship between Airbnb and its hosts does not implicate the direct control inherent in custodial relationships that have traditionally given rise to a duty to protect third parties.<sup>177</sup> Throughout the *Carroll* opinion, the court explored analogies to an exterminator, a real estate agent, a college university, a facilitator of internet transactions, a gatekeeper, and a travel agent in reaching its conclusion that Airbnb does not exert sufficient control over hosts that would establish a special or custodial relationship.<sup>178</sup>

### *1. Round One: Exterminator Versus Real Estate Agent*

In determining whether Airbnb owed Callard a duty of protection pursuant to a special relationship, the *Carroll* court considered the analogy of Airbnb to an extermination company in *Smith v. Orkin*.<sup>179</sup> In *Smith*, the Louisiana First Circuit Court of Appeal held Orkin Exterminator Company, Inc., liable when its employee sexually assaulted a customer during a service call at her home.<sup>180</sup> Orkin's employee had raped female customers on two prior occasions, and his criminal record reflected a burglary conviction.<sup>181</sup> The *Smith* court held that Orkin breached its duty of reasonable care by negligently hiring, supervising, and retaining the employees it sent into customers' homes.<sup>182</sup> Orkin, the court asserted, was in the best position to prevent harm to the plaintiff because the company "actively selected and managed the employee" who sexually assaulted her.<sup>183</sup>

Callard argued that Airbnb's relationship to its hosts was similar to Orkin's relationship to its employees because Airbnb managed some aspects of potential hosts' and guests' ability to use the Airbnb platform, and thus Airbnb owed a duty of reasonable care in hiring, supervising, and retaining Airbnb hosts.<sup>184</sup> Callard noted that Airbnb must affirmatively accept a potential host before he can list his property, and Airbnb retained

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176. *Id.* at 773.

177. *Id.* at 771.

178. *See id.* at 767.

179. *Id.* at 772–73.

180. *Smith v. Orkin*, 540 So. 2d 363, 364–65 (La. Ct. App. 1st Cir. 1989).

181. *Id.* at 368.

182. *Id.* at 366–67.

183. *Carroll*, 289 F. Supp. 3d at 773.

184. *Id.*

the right to delist the property at will.<sup>185</sup> The *Carroll* court rejected Callard's argument, holding that Airbnb is merely an online facilitator of transactions, in contrast to the employment relationship that existed between Orkin and its employee.<sup>186</sup> The *Carroll* court found that Airbnb's exercise of control did not measure up to the "care and discernment" of a company hiring an employee.<sup>187</sup>

The court rejected Callard's analogy of Airbnb to the extermination company in *Smith* and instead analogized Airbnb to a real estate agent because Airbnb, like real estate agents, merely "connect[s] the parties to a transaction."<sup>188</sup> The court further noted that both real estate agents and Airbnb have the ability to accept and terminate property listings at will.<sup>189</sup> As Airbnb's role is similar to a real estate agent, tort law should limit its scope of duty to that of a real estate agent.<sup>190</sup> Louisiana jurisprudence demonstrates that real estate agents owe a duty to potential buyers to disclose the known defects in the property but do not have a duty to inspect the advertised properties.<sup>191</sup> The court concluded, therefore, that Airbnb neither owed a duty to inspect the host's property nor to inform Callard of the stairs' defect, unless Airbnb acquired actual knowledge of the posed risks.<sup>192</sup>

## 2. Round Two: University Versus Facilitator of Internet Transactions

The *Carroll* court also explored the analogy of Airbnb to Louisiana State University (LSU) in resolving whether Airbnb maintains a special relationship with Airbnb guests.<sup>193</sup> In *Fox v. Board of Supervisors of Louisiana State University & Agricultural & Mechanical College*,<sup>194</sup> a visiting rugby player broke his neck at a rugby tournament that LSU's

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185. *Id.*

186. *Id.*

187. *Id.*

188. *Id.*

189. *Id.*

190. *Id.*

191. *Id.*; see also *Waddles v. LaCour*, 950 So. 2d 937, 942 (La. Ct. App. 3d Cir. 2007) (quoting *Osborne v. Ladner*, 621 So. 2d 1245, 1257 (La. Ct. App. 1st Cir. 1997)) ("[T]he duty to disclose any material defects extends only to those defects of which the broker or agent is aware."); *Reeves v. Weber*, 509 So. 2d 158, 160 (La. Ct. App. 1st Cir. 1987).

192. *Carroll*, 289 F. Supp. 3d at 773.

193. *Id.* at 772.

194. *Fox v. Bd. of Sup'rs of La. State Univ. & Agr. & Mech. Coll.*, 576 So. 2d 978 (La. 1991).

rugby club hosted on campus.<sup>195</sup> The Louisiana Supreme Court held that LSU was not liable because no special relationship giving rise to a duty existed between LSU and the visiting player, reasoning that LSU “merely maintained the grounds on which another party staged [a] tournament.”<sup>196</sup> Similarly, Airbnb simply supplies an internet platform where hosts transact with guests for short-term home rentals.<sup>197</sup> The *Carroll* court, therefore, found that Airbnb does not have a duty to ensure guests’ safety.<sup>198</sup>

### 3. Round Three: Gatekeeper Versus Travel Agent

Finally, the *Carroll* court considered the analogy of Airbnb to a gatekeeper in deciding whether to hold Airbnb liable pursuant to custodial liability.<sup>199</sup> Callard argued that Airbnb assumed a role akin to a gatekeeper because Airbnb controls who can access the listed properties.<sup>200</sup> To determine whether to classify an individual or entity as a custodian, the court looked to “the right of direction and control” the alleged custodian exercises over the property.<sup>201</sup> The court found that Airbnb did not retain a right of direction and control over the property in question because Airbnb did not restrict the Airbnb host from allowing others to access the property during time periods without Airbnb rentals.<sup>202</sup> The court further found that Airbnb retained the right to inspect the property only if an accident occurred, and Airbnb’s right to inspection was limited to the damaged property rather than a complete home inspection.<sup>203</sup> Additionally, Airbnb did not have the prerogative to alienate the host’s property, authorize repairs, or enter the property at will.<sup>204</sup> The court, therefore, concluded that Airbnb, unlike a gatekeeper, did not retain a right of direction and control to impose custodial liability.<sup>205</sup>

In rejecting Callard’s analogy of Airbnb to a gatekeeper, the court instead analogized Airbnb to a travel agent.<sup>206</sup> Similar to travel agents, who

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195. *Id.* at 980.

196. *Id.*

197. *Carroll*, 289 F. Supp. 3d at 773.

198. *Id.*

199. *Id.*

200. *Id.* at 775.

201. *Id.* at 774.

202. *Id.* at 775.

203. *Id.*

204. *Id.*

205. *Id.*

206. *Id.*



merely facilitate transactions between hotels and customers, Airbnb merely facilitates transactions between hosts and guests.<sup>207</sup> The court reasoned that travel agents do not retain custody or control over the hotels they book for customers, nor do they have a duty to protect customers from harm caused by the hotels.<sup>208</sup> The court concluded, likewise, that Airbnb does not retain custody or control over hosts' properties and, accordingly, does not have a duty to protect guests from defective conditions on rented premises.<sup>209</sup>

*B. Player Two: Doe v. Uber Technologies*

In addition to the *Carroll* court, the United States District Court for the Northern District of California struggled to apply traditional tort theories to sharing-economy companies in a consolidated sexual assault case.<sup>210</sup> In *Doe*, Jane Doe 1 and her friends hailed a ride through the Uber app in Boston, Massachusetts, from Uber driver Abderrahim Dakiri in February of 2015.<sup>211</sup> After Dakiri drove Doe 1's friends home, Doe 1 gave him the address of her intended destination.<sup>212</sup> Doe 1 alleged that Dakiri then deviated from the direct route to her destination by approximately 15 minutes and parked the vehicle in a remote location where he sexually assaulted her.<sup>213</sup> Doe 1 alleged that she then managed to unlock the door and escape the vehicle.<sup>214</sup>

In August of 2015, Doe 2 and a friend hailed a ride from a bar to the friend's apartment through the Uber app in Charleston, South Carolina, from Uber driver Patrick Aiello.<sup>215</sup> Doe 2 informed her friend that she believed she left her cell phone at the apartment and would walk the two blocks home to her own apartment after retrieving it.<sup>216</sup> After about five to ten minutes of searching for her cell phone at her friend's apartment, Doe 2 walked outside and noticed that Aiello remained outside her friend's

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207. *Id.*

208. *Id.*; see also *Pierre v. Am.-Int'l Travel, Inc.*, 717 F. Supp. 435, 435–37 (M.D. La. 1989) (holding that a travel agent does not owe a duty to customers to protect them from negligence of an airline or airport under Louisiana law).

209. *Carroll*, 289 F. Supp. 3d at 775.

210. See *id.*; see also *Doe v. Uber Techs., Inc.*, 184 F. Supp. 3d 774, 779 (N.D. Cal. 2016).

211. *Doe*, 184 F. Supp. 3d at 779.

212. *Id.*

213. *Id.*

214. *Id.*

215. *Id.* at 780.

216. *Id.*

apartment.<sup>217</sup> Aiello offered to give Doe 2 a ride to her apartment, and Doe 2 accepted and entered his car, “believing that Aiello was acting in capacity as an Uber driver.”<sup>218</sup> Aiello thereafter began driving in the opposite direction from her apartment and told Doe 2 that she owed him a sexual favor.<sup>219</sup> He then locked the doors and parked the vehicle in a remote location where he allegedly raped Doe 2 and threatened to harm her several times.<sup>220</sup> Doe 2 managed to escape the vehicle, and an oncoming vehicle hit her arm as she attempted to flag for assistance.<sup>221</sup> The driver of the oncoming vehicle called 911, and police took her to the hospital.<sup>222</sup> Doe 2 became suicidal and remained in the hospital’s psychiatric unit for three days after the incident.<sup>223</sup>

Before approving Dakiri and Aiello to be Uber drivers, Uber conducted background checks through a third-party company that obtained background information dating back seven years.<sup>224</sup> The background checks did not reveal any prior convictions, despite Aiello’s criminal history.<sup>225</sup>

In October 2015, Doe 1 and Doe 2 filed suit against Uber.<sup>226</sup> In January 2016, the victims filed an amended complaint, alleging that Uber was vicariously liable for battery, assault, false imprisonment, and intentional infliction of emotional distress pursuant to the doctrines of *respondeat superior* and the existence of a special relationship between a common carrier and its passengers.<sup>227</sup> The plaintiffs also asserted a direct negligence claim against Uber for negligent hiring, supervision, and retention.<sup>228</sup> Uber filed a motion to dismiss the plaintiffs’ amended complaint for failure to state a claim to which relief can be granted per Federal Rule of Civil Procedure 12(b)(6).<sup>229</sup>

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217. *Id.*

218. *Id.*

219. *Id.*

220. *Id.*

221. *Id.*

222. *Id.*

223. *Id.*

224. *Id.*

225. *Id.* In 2003, Aiello was arrested for domestic violence and was ultimately convicted of assault. Because Aiello’s background check dated back only seven years, it did not capture his 2003 conviction. *Id.* at 788.

226. *Id.* at 780.

227. *Id.*

228. *Id.*

229. *Id.* For a complaint to survive a motion to dismiss, the Federal Rules of Civil Procedure require the court to determine whether the plaintiff alleged

The court first considered whether Uber could be held liable pursuant to *respondeat superior*.<sup>230</sup> California courts may hold employers vicariously liable under *respondeat superior* for their employees' tortious conduct committed within the course and scope of employment.<sup>231</sup> In answering this question, courts consider the three policy rationales underlying the doctrine of *respondeat superior*: "preventing future injuries, assuring compensation to victims, and spreading the losses caused by an enterprise equitably."<sup>232</sup> To determine whether an employment relationship exists, courts also consider the right to control test, which centers on the amount of control an employer exerts over his employee, and the *Borello* factors, which courts use to define employment status.<sup>233</sup>

Taking into account the policy rationales, the right to control test, and the *Borello* factors, the *Doe* court found that the plaintiffs alleged sufficient facts to plausibly establish the existence of an employment relationship between Uber and its drivers.<sup>234</sup> The court also held that the complaint alleged sufficient facts to establish that Dakiri and Aiello sexually assaulted the plaintiffs while acting within the scope of employment.<sup>235</sup> Sexual assault by a taxi driver, the court explained, is not so unforeseeable that customers would expect taxi companies to conduct

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"enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007).

230. *Doe*, 184 F. Supp. 3d at 784.

231. *Id.*

232. *Id.*

233. *Id.* at 781–82. The *Borello* factors, articulated in *S. G. Borello & Sons, Inc. v. Department of Industrial Relations* to define employment status, include the following:

(1) whether the one performing services is engaged in a distinct occupation or business; (2) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the principal or by a specialist without supervision; (3) the skill required in the particular occupation; (4) whether the principal or the worker supplies the instrumentalities, tools, and the place of work for the person doing the work; (5) the length of time for which the services are to be performed; (6) the method of payment, whether by the time or by the job; (7) whether or not the work is a part of the regular business of the principal; and (8) whether or not the parties believe they are creating the relationship of employer–employee.

*S. G. Borello & Sons, Inc. v. Dep't of Indus. Relations*, 769 P.2d 399, 415 (Cal. 1989).

234. *Doe*, 184 F. Supp. 3d at 783.

235. *Id.* at 785.

background checks on drivers to prevent this exact harm.<sup>236</sup> The court therefore denied Uber's motion to dismiss regarding the *respondeat superior* claims.<sup>237</sup>

The court also considered whether Uber could be held liable pursuant to the existence of a special relationship between a common carrier and its passengers.<sup>238</sup> The Restatement of Torts defines a common carrier as an entity that holds itself out to the public to transport goods or persons from place to place for profit.<sup>239</sup> Given that Uber offers its services to the general public and receives profit in return, the court found that Uber can plausibly be classified as a common carrier and, accordingly, potentially be held liable for Dakiri and Aiello's tortious conduct.<sup>240</sup> The court, therefore, denied Uber's motion to dismiss the battery, assault, false imprisonment, and intentional infliction of emotional distress claims.<sup>241</sup>

The court lastly considered whether to hold Uber directly liable for negligent hiring, supervision, and retention.<sup>242</sup> California law provides that an employer may be held directly liable to third persons "for the employer's negligence in hiring, training, supervising, or retaining" an unfit employee.<sup>243</sup> To determine whether the employer acted negligently, courts consider the employer's knowledge or constructive knowledge of the employee's particular risk at the time of hiring.<sup>244</sup> If the harm that materialized matches the risk that the employee posed, courts will find the employer liable for breaching the duty of reasonable care.<sup>245</sup>

With respect to Aiello, Uber conducted a background check in 2015 that dated back seven years before permitting him to drive for the company, and it did not capture any prior convictions.<sup>246</sup> Aiello, however, received an assault conviction in 2003 for domestic violence, which was 12 years before Uber hired him.<sup>247</sup> The court found that Uber should have known about Aiello's criminal history and the risk he posed, and it denied Uber's motion to dismiss the negligent hiring, supervision, and retention

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236. *Id.*

237. *Id.* at 791.

238. *Id.* at 787.

239. *See generally* RESTATEMENT OF THE LAW, TORTS § 48 (1934).

240. *Doe*, 184 F. Supp. 3d at 787.

241. *Id.*

242. *Id.* at 788.

243. *See Doe*, 184 F. Supp. 3d at 788.

244. *Id.*

245. *Id.*

246. *Id.*

247. *Id.*

claim as to Aiello.<sup>248</sup> As to Dakiri, the court granted Uber's motion to dismiss the negligent hiring, supervision, and retention claims because Dakiri's background did not reflect a criminal history that revealed a dangerous proclivity.<sup>249</sup> Throughout the *Doe* opinion, the court explored classifications of an employee, an independent contractor, a common carrier, and a technology company to determine whether Uber owed a protective duty to its customers.<sup>250</sup>

### *1. Round One: Employee Versus Independent Contractor*

Although the *Doe* court found that the plaintiffs alleged sufficient facts to plausibly establish an employment relationship between Uber and the drivers, the court emphasized its inability to articulate a definite classification.<sup>251</sup> As the court noted, Uber does not fit squarely into existing classifications under tort law.<sup>252</sup> Balancing the right to control that Uber exerts over its drivers and the *Borello* factors, scholars reach different conclusions as to the proper employment status of Uber drivers.<sup>253</sup>

The plaintiffs alleged certain factors supporting a conclusion that Uber and its drivers maintain an employment relationship and thus should be vicariously liable under a *respondeat superior* theory.<sup>254</sup> Uber unilaterally fixes fare prices and does not provide drivers an opportunity to negotiate.<sup>255</sup> If a driver takes a roundabout route to the passenger's destination, Uber can modify the fare without driver input.<sup>256</sup> If a driver refuses to accept a ride request when logged into the Uber app, Uber reserves the right to discipline the driver.<sup>257</sup> Uber also exerts control over various aspects of the manner in which drivers offer rides.<sup>258</sup> For example, the plaintiffs alleged that Uber requires its drivers to play "soft jazz or

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248. *Id.*

249. *Id.* at 789.

250. *Id.* at 774.

251. *Id.*

252. *See id.*

253. McPeak, *supra* note 32; Katz, *supra* note 163; Rick Schmitt, *The Sharing Economy: Can the Law Keep Pace with Innovation?*, STANFORD LAW. (May 31, 2017), <https://law.stanford.edu/stanford-lawyer/articles/the-sharing-economy-can-the-law-keep-pace-with-innovation/> [<https://perma.cc/VU3H-DQZS>].

254. *Doe*, 184 F. Supp. 3d at 782.

255. *Id.*

256. *Id.*

257. *Id.*

258. *Id.*

NPR” or keep the radio off, dress professionally, and pick up the customer on the side of the street where the customer stands.<sup>259</sup>

Conversely, the defendants alleged certain factors supporting a conclusion that courts should classify Uber drivers as independent contractors.<sup>260</sup> Uber drivers operate their own vehicles and supply their own car insurance.<sup>261</sup> Also, Uber does not offer its drivers a salary but instead pays drivers per ride.<sup>262</sup> The court ultimately denied Uber’s motion to dismiss the claims brought under a *respondeat superior* theory, noting its preference to resolve the ambiguity at a later stage in the litigation.<sup>263</sup> Similar to the difficulty in distinguishing between an employment or independent contractor relationship, the *Doe* court struggled to determine whether Uber is a common carrier or merely a technology company.<sup>264</sup>

## 2. Round Two: Common Carrier Versus Technology Company

Courts may classify Uber as a common carrier because it makes its services available to the general public and does not prevent any customers from utilizing its services.<sup>265</sup> Because Uber earns profits by charging customers fixed fees for rides, it qualifies as a common carrier under California tort law.<sup>266</sup> Alternatively, courts can characterize Uber as a technology company or a “broker” of transportation services.<sup>267</sup> Uber, through its smartphone app, connects drivers with riders and could be classified merely as a “provider of technology that allows riders to seek transportation.”<sup>268</sup> Under the technology company or broker approach to classification, the independent drivers provide the transportation services, not Uber.<sup>269</sup>

Despite the plausibility of Uber’s contention that it solely operates as a broker, the court held that the classification dispute should be “more appropriately resolved at a later stage of the litigation.”<sup>270</sup> The court allowed the claim to survive the summary judgment stage because Uber’s

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259. *Id.*

260. *Id.* at 783.

261. *Id.*

262. *Id.*

263. *Id.* at 787.

264. *Id.* at 786–87.

265. *Id.* at 787.

266. *Id.*

267. *Id.*

268. *Brief, Doe*, 184 F. Supp. 3d 774.

269. *Id.*

270. *Doe*, 184 F. Supp. 3d at 787.

business model could lead a reasonable jury to conclude either way.<sup>271</sup> Following the court's ruling on Uber's motion for summary judgment, Uber entered into a settlement agreement with the plaintiffs; thus, the court never reached a decision regarding an appropriate classification.<sup>272</sup>

*C. Game Over: Sharing-Economy Companies Do Not Fit the Mold of Existing Classifications*

Pursuant to Uber's assertion in *Doe* that it is merely a digital platform, sharing-economy companies truly do not belong in any existing category.<sup>273</sup> Sharing-economy companies' business models are so unprecedented and complex that present tort law cannot provide an adequate classification.<sup>274</sup> The *Carroll* and *Doe* decisions demonstrate the struggle that courts encounter in attempting to apply existing tort law to sharing-economy companies and the need for a standard analysis for future courts to follow.<sup>275</sup> Courts' difficulty in classifying sharing-economy companies derives from the digital, hands-off aspect of their business models.<sup>276</sup>

Consistent with sharing-economy values of furthering innovation and efficient access to goods and services, sharing-economy companies constantly adopt new features, indicating that potential tort classifications may likewise constantly change.<sup>277</sup> Airbnb, for example, added the Airbnb Plus program to provide high-end lodging services. This added feature already places the *Carroll* decision into question.<sup>278</sup> The *Carroll* court hinged its decision on the fact that the minimal level of control Airbnb exerts over the hosts' properties or transactions does not give rise to liability for injuries to guests.<sup>279</sup> Airbnb's launch of Airbnb Plus, however, may eventually lead courts to find that Airbnb exercises enough control because of the inspections, requirements, and application process.<sup>280</sup>

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271. *Id.*

272. Kia Kokalitcheva, *Uber Settles Lawsuit over Alleged Sexual Assault by Drivers*, FORTUNE (Nov. 8, 2016), <http://fortune.com/2016/11/07/uber-sexual-assault-lawsuit-settlement/> [<https://perma.cc/A3Q7-HH53>].

273. *See generally id.*

274. McPeak, *supra* note 32, at 178.

275. *See generally* *Carroll v. Am. Empire Surplus Lines Ins. Co.*, 289 F. Supp. 3d 767 (E.D. La. 2017); *Doe*, 184 F. Supp. 3d 774.

276. *See generally id.*

277. *See Introducing Airbnb Plus*, *supra* note 84.

278. *See generally* *Carroll*, 289 F. Supp. 3d 767; *Doe*, 184 F. Supp. 3d 774.

279. *See Carroll*, 289 F. Supp. 3d 767.

280. *Introducing Airbnb Plus*, *supra* note 84.

Airbnb may argue that inspecting some homes for the purpose of “ensuring comfort and quality” may shield it from potential liability because the inspections are not intended to ensure safe premises.<sup>281</sup> Airbnb, however, exerts a significant amount of control over Airbnb Plus hosts, as it imposes over 100 requirements to ensure the highest quality homes.<sup>282</sup>

Furthermore, Airbnb does not invite every applicant whose home it inspects to join the Airbnb Plus program.<sup>283</sup> If an inspector encounters an unsafe condition in a property, Airbnb could acquire actual or constructive knowledge of a risk that certainly would lead to liability under general negligence principles.<sup>284</sup> Consider, for instance, if Airbnb had previously inspected the property at which the *Carroll* plaintiff lodged in New Orleans for consideration of Airbnb Plus status but ultimately declined to extend an invite to the host.<sup>285</sup> Certainly, the Airbnb inspector would have ascended the defective steps, as the *Carroll* plaintiff did, to access the inside of the residence and would have thus acquired knowledge of the dangerous condition.<sup>286</sup> Airbnb, then in the best position to prevent the harm, would be held liable under general negligence principles regardless of proper classification.

Sharing-economy companies continually evolve and undertake new ventures. This constant evolution exacerbates the current struggle courts encounter in applying existing tort law to sharing-economy companies.<sup>287</sup> Existing tort law relies on classifications that sharing-economy companies do not fit.<sup>288</sup> Courts cannot continue to employ a “backward-looking approach” by attempting to extend traditional tort classifications to sharing-economy companies’ dynamic business models.<sup>289</sup> Just as tort law adapted after the Industrial Revolution, tort law must also adapt to the legal gaps and uncertainty that the Sharing Revolution presents.<sup>290</sup> State

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281. *See generally id.*

282. *Id.*

283. *See id.*

284. *See generally* RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM § 3 (AM. LAW INST. 2012).

285. *See generally* *Carroll v. Am. Empire Surplus Lines Ins. Co.*, 289 F. Supp. 3d 767 (E.D. La. 2017).

286. *See generally id.*

287. *See generally* *Introducing Airbnb Plus*, *supra* note 84; *Lawson v. GrubHub, Inc.*, 302 F. Supp. 3d 1071, 1072 (N.D. Cal. 2018); *Carroll*, 289 F. Supp. 3d 767; *Doe v. Uber Techs., Inc.*, 184 F. Supp. 3d 774 (N.D. Cal. 2016).

288. *See generally* *Carroll*, 289 F. Supp. 3d 767; *Doe*, 184 F. Supp. 3d 774.

289. Schmitt, *supra* note 253.

290. *See generally* *Carroll*, 289 F. Supp. 3d 767; *Doe*, 184 F. Supp. 3d 774; McPeak, *supra* note 32.



legislatures should promptly resolve the ambiguity, and insurance presents a practical, effective solution.<sup>291</sup>

### III. MANDATE INSURANCE PROGRAMS

Because tort law involving sharing-economy actors remains underdeveloped and unpredictable, sharing-economy companies fear potential exposure to large damage judgments.<sup>292</sup> Many sharing-economy companies, including Airbnb and Uber, have created free, private insurance programs to compensate consumers for harm sustained during use of the company's services.<sup>293</sup> Insurance presented the most practical solution to the difficulties arising from the Industrial Revolution's economic and social disruption, and state legislatures should likewise adopt an insurance-based solution in resolving the questions of tort liability in the sharing economy.<sup>294</sup> Airbnb and Uber's respective insurance programs serve as models for legislatures to consider when enacting legislation that mandates the creation of insurance programs for sharing-economy companies, as each of their programs balance the interests of both the company and the consumer.<sup>295</sup>

Airbnb provides free coverage to Airbnb hosts under two programs. Under the Host Protection Insurance program, Airbnb insures hosts up to \$1 million to protect against third-party claims of personal injury or property damage.<sup>296</sup> The program explicitly excludes coverage for injuries and property damage that an Airbnb host intentionally causes.<sup>297</sup> Airbnb limits this coverage, however, to \$1 million per location and an aggregate of \$10 million per year.<sup>298</sup> Under the Host Guarantee program, Airbnb insures hosts up to \$1 million for property damage that guests cause during their stays at each residence.<sup>299</sup>

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291. See generally Spieler, *supra* note 34.

292. Sterling A. McMahan, *Moving to Dismiss: Ridesharing and Assaults, and the Emerging Legal Frontier*, TRIAL ADVOC. Q. 11 (2018).

293. See *Host Protection Insurance*, *supra* note 30; *Auto Insurance to Help Protect You*, *supra* note 30.

294. Schmitt, *supra* note 253.

295. See *id.*

296. *Host Protection Insurance*, *supra* note 30.

297. *Id.*

298. Ashley M. Peterson, *Sharing Space to Counteract the Impact on Long-Term Rental Availability Various Jurisdictions Are Restricting the Ability of Homeowners and Tenants to Offer Short-Term Vacation Rentals*, 39 L.A. LAW. 28, 30 (2017).

299. See *Airbnb's Host Guarantee*, AIRBNB, <https://www.airbnb.com/guarantee> [<https://perma.cc/T8VB-TWQ9>] (last visited Mar. 28, 2019).

Uber similarly offers coverage to Uber drivers under the Driver-Partner Insurance program.<sup>300</sup> The first policy covers Uber drivers while they have the Uber app activated but are waiting for a user to request a ride.<sup>301</sup> Under this policy, Uber covers drivers for the injuries they cause to a third party up to \$50,000 per person or \$100,000 per accident for bodily injury.<sup>302</sup> The second policy covers Uber drivers when they have accepted a ride request and applies both during an Uber trip and when the driver is on the way to pick up the rider.<sup>303</sup> Under this policy, Uber provides third-party liability coverage, uninsured or underinsured motorist bodily injury coverage, and contingent collision and comprehensive coverage.<sup>304</sup> When an Uber driver causes an accident, Uber's coverage provides, at most, \$1 million per accident.<sup>305</sup> Like Airbnb's policy, Uber compensates drivers for property damage and explicitly excludes insuring against harm that an Uber driver intentionally inflicts.<sup>306</sup>

These insurance programs balance the interests of sharing-economy companies, agents, and consumers, and they further the underlying policies of tort law—compensation and deterrence.<sup>307</sup> By providing definite and efficient compensation to injured agents and consumers, sharing-economy companies can avoid litigation expenses and the possibility of excessive court judgments.<sup>308</sup> Sharing-economy companies, in turn, take greater safety measures to reduce the number of injured agents and consumers they must compensate.<sup>309</sup> Insurance programs present a functional solution, but the current programs do not fully resolve the questions of tort liability in the sharing economy.<sup>310</sup>

An agent or consumer with a meritorious claim may not recover for sustained injuries depending on the company used or the type of act that

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300. See *Auto Insurance to Help Protect You*, *supra* note 30.

301. See *id.*

302. See *id.*

303. See *id.*

304. See *id.*

305. See *id.*

306. See *id.*

307. See generally *Host Protection Insurance*, *supra* note 30; *Auto Insurance to Help Protect You*, *supra* note 30.

308. See *infra* Section I.B.

309. See generally Tom Krisher, *Uber to Up Its Background Checks for Drivers in the U.S.*, ASSOCIATED PRESS (Apr. 12, 2018), available at <https://www.ctvnews.ca/autos/uber-to-up-its-background-checks-for-drivers-in-the-u-s-1.3881824> [<https://perma.cc/F4G3-CZSA>].

310. See generally *Host Protection Insurance*, *supra* note 30; *Auto Insurance to Help Protect You*, *supra* note 30.

caused the injuries.<sup>311</sup> Only some sharing-economy companies have implemented insurance programs.<sup>312</sup> If an agent or consumer is injured after using the services of a company without an insurance program, he must resort to filing a lawsuit for compensation.<sup>313</sup> As demonstrated by *Carroll* and *Doe*, however, courts are uncertain about tort law's application to sharing-economy companies.<sup>314</sup> Agents and consumers who utilize the services of a company without an insurance program may face consequential barriers to receiving compensation.<sup>315</sup>

In addition, the insurance programs that Airbnb and Uber have implemented contain significant gaps in coverage.<sup>316</sup> The insurance programs generally compensate for injuries resulting from negligent acts, such as accidental bodily injury or property damage, but do not cover injuries resulting from intentional acts, such as sexual assault.<sup>317</sup> Therefore, agents and consumers who sustain injuries from intentional acts must file a lawsuit to obtain compensation, but the unpredictability of lawsuits against sharing-economy companies presents considerable hurdles to recovery.<sup>318</sup> Courts need clear, definite, and predictable tort law to adjudicate these claims so that sharing-economy companies, agents, and consumers can receive just outcomes.<sup>319</sup> State legislatures are generally charged with articulating their respective state's tort law and, accordingly, must reform the law to provide clarity.

#### A. State Legislation Mandating Insurance Programs

State legislatures should mandate that all sharing-economy companies implement free, private insurance programs to establish uniformity within the sharing economy.<sup>320</sup> The existing insurance programs, such as those implemented by Airbnb and Uber, serve the interests of the companies,

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311. See generally *Sharing Economy*, NAT'L ASS'N OF INS. COMMISSIONERS, [https://www.naic.org/cipr\\_topics/topic\\_sharing\\_economy.htm](https://www.naic.org/cipr_topics/topic_sharing_economy.htm) [<https://perma.cc/LHQ7-QXSL>] (last updated Jan. 1, 2020).

312. See generally *id.*

313. See generally *id.*

314. See generally *Carroll v. Am. Empire Surplus Lines Ins. Co.*, 289 F. Supp. 3d 767 (E.D. La. 2017); *Doe v. Uber Techs., Inc.*, 184 F. Supp. 3d 774 (N.D. Cal. 2016).

315. See generally *Sharing Economy*, *supra* note 311.

316. See generally *Host Protection Insurance*, *supra* note 30; *Auto Insurance to Help Protect You*, *supra* note 30.

317. See generally *id.*

318. See generally *Carroll*, 289 F. Supp. 3d 767; *Doe*, 184 F. Supp. 3d 774.

319. See generally *id.*

320. See generally *Spieler*, *supra* note 34, at 920.

agents, and consumers by providing efficient and certain relief for harm, as well as shielding the companies from potentially excessive tort judgments.<sup>321</sup> Airbnb and Uber's insurance programs insure their agents against third-party claims for personal injury or property damage and also compensate for accidental damage to an agent's person or property.<sup>322</sup> State legislatures should specify that the insurance programs cover harms resulting from negligent acts, similar to Airbnb and Uber's programs.<sup>323</sup>

State legislatures should also provide a direct right of action for harms resulting from intentional acts.<sup>324</sup> In devising this mandate, state legislatures should expressly permit an injured party to proceed directly against the sharing-economy company and the agent or consumer, depending on whether an agent intentionally harmed a consumer or vice versa.<sup>325</sup> For public policy reasons, most insurance policies expressly exclude coverage when the underlying tort is intentional in nature.<sup>326</sup> If sharing-economy companies' insurance policies covered intentional acts, they may offer a perverse incentive for tortfeasors to commit harm because of the assurance that the insurance policies will cover their wrongdoing.<sup>327</sup>

Consider the following hypothetical for an application of the direct right of action for intentional harms. In a common carrier scenario, a passenger injured from the intentional act of a driver may recover by proceeding directly against both the driver and the company.<sup>328</sup> If, for instance, the driver sexually assaulted the passenger, the passenger can allege claims against the driver for battery and the company for negligent hiring.<sup>329</sup> Courts will then hold the company to a heightened standard of care pursuant to the existence of a special relationship, in which the company has the duty to exercise reasonable care under the circumstances rather than just a mere obligation not to create harm.<sup>330</sup> Similarly, an

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321. *See generally id.*

322. *See generally Host Protection Insurance, supra* note 30; *Auto Insurance to Help Protect You, supra* note 30.

323. *See generally id.*

324. *See generally id.* For example, if an Uber driver sexually assaults a passenger, the passenger has a direct right of action against Uber for negligent selection, hiring, retention, and supervision. *See generally* RESTATEMENT (THIRD) OF AGENCY § 7.05 (AM. LAW INST. 2006).

325. *See generally* McPeak, *supra* note 32.

326. *See generally* RESTATEMENT (SECOND) OF TORTS § 8A (AM. LAW INST. 1965).

327. *See generally id.*

328. *See generally id.*

329. *See generally id.*

330. *See generally* RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM § 40 (AM. LAW INST. 2012).

injured consumer will have the opportunity to proceed directly against the agent, or vice versa, who directly caused the harm for battery, for example.<sup>331</sup> It is unclear, however, what the standard of care for a sharing economy will be.<sup>332</sup>

*B. State Tort Reform Imposing a Heightened Standard of Care for Intentional Acts*

In addition to providing a direct right of action for harms resulting from intentional acts, state legislatures must resolve the uncertainty regarding the legal classification of sharing-economy companies.<sup>333</sup> Without articulating the standard of care for sharing-economy companies, courts may find that, in cases resulting from an intentional act, the company merely had a duty not to create harm.<sup>334</sup> Sharing-economy companies, however, should be held to a heightened standard of care such that if a company has knowledge of an agent or consumer's propensity for violence but fails to take action, the court will hold the company liable.<sup>335</sup>

State legislatures should hold sharing-economy companies to a heightened standard of care pursuant to a special relationship with the agent or consumer, similar to that of common carriers and innkeepers.<sup>336</sup> The types of special relationships articulated in states' tort laws center around trust, which is the exact foundation of the sharing economy.<sup>337</sup> Special relationships like those that exist between a common carrier and his passengers or an innkeeper and his guests are fundamentally similar to the relationship between Uber and its passengers or Airbnb and its guests.<sup>338</sup> State legislatures, therefore, should expressly establish that the relationship between a sharing-economy company and an agent or consumer qualifies as a special relationship giving rise to a heightened standard of care.<sup>339</sup>

These insurance programs will ultimately protect injured consumers, such as the Sharp family and Callard in *Carroll*, who may not be able to obtain adequate compensation from the VRBO or Airbnb host without stifling innovation or subjecting sharing-economy companies to excessive

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331. See generally *id.*

332. See generally *id.*

333. See generally *id.*

334. See generally McPeak, *supra* note 32.

335. See generally *Doe v. Uber Techs., Inc.*, 184 F. Supp. 3d 774 (N.D. Cal. 2016).

336. See generally McPeak, *supra* note 32.

337. See generally *id.*

338. See generally *id.*

339. See generally *id.*

legal judgments.<sup>340</sup> Sharing-economy companies often sit in the best position to prevent injury to consumers.<sup>341</sup> For instance, when Airbnb inspects homes for acceptance into the Airbnb Plus program, Airbnb inspectors may be put on notice of a home's dangerous conditions, defects, and risks.<sup>342</sup> Uber, similarly, acquires knowledge of a driver's risks and dangerous inclinations by conducting background checks.<sup>343</sup> Whether home sharing companies begin inspecting homes or ride-sharing companies begin to conduct more extensive and thorough background checks, compensation schemes will deter sharing-economy companies from failing to take sufficient measures to ensure safety for consumers.<sup>344</sup>

### CONCLUSION

The Sharing Revolution is changing the present economy in an unprecedented and innovative fashion, similar to the Industrial Revolution. The few courts that have adjudicated tort claims against sharing-economy companies have struggled to reach definite conclusions as to these companies' appropriate tort classifications, which in turn leaves liability questions unanswered.<sup>345</sup> Present tort law is proving inadequate to clearly define the limits of liability with respect to sharing-economy companies, and the dynamic nature of sharing-economy companies indicates the need for a uniform, predictable standard of liability.<sup>346</sup> State legislatures should respond to the problem by mandating insurance programs that balance the interests of both consumers and sharing-economy companies.<sup>347</sup> By creating a scheme that adequately compensates an injured agent or consumer and holds companies to a heightened standard of care, legislation will further the underlying tort policies of compensation and deterrence while continuing to promote innovation and

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340. *See generally id.*

341. *See generally id.*

342. *See generally* *Introducing Airbnb Plus*, *supra* note 84.

343. *See generally* *What Does the Background Check Include?*, UBER, <https://help.uber.com/partners/article/what-does-the-background-check-include?nodeId=6970e704-95ac-4ed3-9355-e779a86db366> [<https://perma.cc/T9Y9-MYGS>] (last visited Oct. 13, 2018).

344. *See generally* Guyton, *supra* note 138, at 109.

345. *See* Carroll v. Am. Empire Surplus Lines Ins. Co., 289 F. Supp. 3d 767, 769 (E.D. La. 2017); *see also* Doe v. Uber Techs., Inc., 184 F. Supp. 3d 774, 782 (N.D. Cal. 2016).

346. *See generally* Carroll v. Am. Empire Surplus Lines Ins. Co., 289 F. Supp. 3d 767, 769 (E.D. La. 2017); Doe v. Uber Techs., Inc., 184 F. Supp. 3d 774, 782 (N.D. Cal. 2016); McPeak, *supra* note 32.

347. *See generally* McPeak, *supra* note 32.

the sharing economy's economic development.<sup>348</sup> Legislation will ensure clarity and predictability for courts to adjudicate tort claims against sharing-economy companies without needing to engage in a classification game.<sup>349</sup>

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348. *See generally id.*

349. *See generally id.*