New App City

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Nestor M. Davidson & John J. Infranca, *The Sharing Economy as an Urban Phenomenon*, 34 **Yale L. & Pol'y Rev.** 215 (2016).

It may seem odd to put this article in the category of "Cyberlaw," since it is so thoroughly about the embodied nature of new business models usually attributed to the distributed, placeless internet. But that's precisely the point: the internet has a materiality that is vital to its functioning, and so do specific parts of it. Regulation, too, must contend with the physical basis of online activities. Julie Cohen has often written about the situatedness of the digital self and its construction within a field of other people, institutions, and activities; Davidson and Infranca explore that situatedness by explaining why local government law is an important matter for internet theorists.

Davidson and Infranca's article thus puts an important emphasis on the materiality of internet-coordinated activities, even if my take is ultimately more pessimistic than that of the authors. They begin by noting that

> [u]nlike for earlier generations of disruptive technology, the regulatory response to these new entrants has primarily been at the municipal level. Where AT&T, Microsoft, Google, Amazon and other earlier waves of technological innovation primarily faced federal (and international) regulatory scrutiny, sharing enterprises are being shaped by zoning codes, hotel licensing regimes, taxi medallion requirements, insurance mandates, and similar distinctly local legal issues.

Why? The authors argue that these new services "fundamentally rely for their value proposition on distinctly urban conditions. … [I]t is the very scale, proximity, amenities, and specialization that mark city life that enable sharing economy firms to flourish." An Uber driver in a rural area doesn't have the same customer base that could easily take advantage of the extra space in her car, or her house; someone like me who wants to find a Latin tutor for one hour per week is going to have much more luck in the Metro Washington area than in a rural area. Indeed,

> the sharing economy is actually thriving … because it recombines assets and people in a decidedly grounded, place-based way. Sharing economy firms have found success by providing innovative solutions to the challenges of life in crowded urban areas. Even the reputation scoring and other trust mechanisms that are so central to sharing economy platforms create value by responding to particular urban conditions of dense, mass anonymity.

Moreover, urban regulations can limit the supply of urban amenities, like taxis and cheap spaces to sleep in during visits, making the need for relief greater than in rural areas. And the new economic entities can improve matching between people who would want to transact if only they knew about each other, a process that gets better at larger scales and thus works best in larger groups of people. The authors' account of these benefits and their relationship to the affordances of the city is persuasive and readable. Their point about using platform-based reputation to mitigate some of the risks of anonymity while preserving most of its benefits is especially insightful.

There are also, of course, risks associated with these new entities. Davidson and Infranca primarily identify congestion (such as housing shortages allegedly exacerbated by investors' use of properties for Airbnb guests rather than long-term residents) and "bad" regulatory arbitrage as the risks to which municipal regulation can be an appropriate response. The authors are largely positive about the potential these changes offer for local governments, arguing that "the political economy of the sharing economy is nudging local governments to be more transparent about the goals of public intervention and to justify empirically the link between local regulatory regimes and their intended outcomes." Thus, Uber, Airbnb, and the like will create not only a new economy, but also "a new urban geography," and a new regulatory landscape.

It's a really nice story, in which everyone can win. For example, big data can improve regulatory outcomes: "Given the intersection between the data generated by the sharing economy and the local spaces through which goods and services move, local governments are well situated to tailor regulation in a holistic but still fine-grained manner." But can local governments actually take advantage of this data? When we look at Uber's market capitalization and ability to hire national political figures as lobbyists, versus the resources of a city struggling to make regulatory distinctions, can we be sure that Uber will share the data that a city needs? So far, Uber's release of information has been extremely controlled, except when dissemination is in its own interests, including its interest in deterring criticism. Davidson and Infranca do note Uber's pushback on local regulations as well as its successful battle with New York City's mayor. (Pushback might be the nicest term. Intentional lawbreaking might also fit.) The authors also rightly highlight Airbnb's apparent manipulation of data it released to lawmakers in order to support its claims that there weren't a lot of investor-owned units in New York. I'm all for regulatory transparency, but it has to be matched with transparency and truth from the regulated.

Consider, in relation to these regulatory struggles, Anil Dash's point on Twitter that Alton Sterling and Eric Garner, two African-American men who were killed by the police in the course of their on-street sales of consumer goods, were "bending the law to [a] far lesser degree than execs at AirBNB & Uber." In the same thread, he continued, "The 'gig economy' that's being advocated — who can participate without being endangered?" Whose "regulatory arbitrage" is met with discussion over whether it's wrongful or brilliant, and whose with bullets? This is a topic also explored in Kate Losse's The Unbearable Whiteness of Breaking Things. If only certain entrepreneurs can stress and strain local regulation without being met with physical force, then the distributional effects of the sharing economy will be even more tilted in favor of those who already have access to cultural and market capital.

And then there's the separately harmful but related problem of participating in sharing economy institutions while black. The authors are hopeful that even if the "sharing economy" companies weaken some social ties by encouraging the monetization of ordinary neighborliness, "[t]he platforms that facilitate the pairing of providers and users of sharing-economy services and goods might enable interactions across heterogeneous groups that would not occur in the absence of the platform." But they don't explicitly discuss racial discrimination, either structural or individual. They offer one example of a "sharing economy" institution targeting members of the African diaspora for co-working space, but in a world where Trump supporters have their own dating app, it seems to me that the risks of discrimination deserve more attention. Davidson and Infranca briefly note the problem of ADA compliance, but it merits even more attention, especially since avoiding the cost of accessibility is one of the things that enables new sharing economy entrants to avoid cost-spreading and underprice existing services.

Consider these ads for TaskRabbit, which I saw on the DC Metro a few weeks ago, as statements about economic and social class: A white woman in a yoga pose, captioned "Mopping the Floors," and a white man on a climbing wall, captioned "Hanging Shelves," with the TaskRabbit slogan "We do chores. You live life," beneath both. But then when do "we" live *our* lives? Or are "our" lives appropriately lived doing chores, while "yours" are not? (In reality, I am among the "you" hailed here, even though I don't do yoga.) And, invisibly, there are the owners of TaskRabbit, who actually *don't* do the chores, though they take their cut of the payments. What do you mean, "we"?

To deal with distributional problems, Davidson and Infranca suggest encouraging local co-ops and government provision of sharing services—which might actually justify the name "sharing." Those suggestions are promising, but not very much like most existing models, except for that venerable institution so rarely invoked in discussions of the "sharing economy," the public library. Indeed, the authors' analysis might have been strengthened by further reference to the coordinating and capacity-enhancing roles played by public libraries.

Reluctant or unable to tax in order to fund libraries and other public services, though, many municipalities have decided to make lots of their money by ticketing the poor. Meanwhile, a lot of the regulatory arbitrage of the sharing economy means that the "platforms" aren't bearing costs related to inspection, taxes, etc. that are imposed on local operators who aren't backed by Silicon Valley. One could argue that this isn't just a contrast, but instead that these phenomena are linked and mutually reinforcing. But this is not the kind of separating equilibrium that we should be aiming for.

And this leads me to another point: Davidson and Infranca convincingly explain why municipalities would want to, and should, regulate the "sharing economy," given its likely profound impact on them. But why does that mean that states and the national government *wouldn't* want to regulate sharing economy actors, given that cities are pretty substantial parts of most states and of the nation as a whole? Many phenomena that were and are characteristic of urban life invoked federal or state intervention in previous decades, including the Clean Air Act; multiple rounds of federal housing legislation; and the Highway Act of 1973, which provided funding for public transit. Municipalities are currently being left on their own to regulate because many state governments, and an urban-investment-hostile Congress, are repeating President Ford's famous advice to cities: drop dead! (I'm a fan of Section 230, but I can see where it fits into a narrative in which cities are *not* left to themselves, but actively precluded from regulating in the interest of their own citizens.)

From all this, one might conclude that the online "sharing economy" is a variant on Eddie Murphy's classic skit: it's a way for mainly non-African-Americans to get the benefits of urban living without having to deal with a feared urban underclass. Just as white suburbs, historically, often benefited from the amenities of the city without having to pay for them or for the city's schools, reintermediation using new online entities allows that ability to pick and choose urban interactions, so "our" connections become ever more granular. Davidson and Infranca reference Jane Jacobs' classic account of the benefits of the city, but, as they note, many of those benefits came from positive externalities conferred on other people. Many “sharing economy” entrepreneurs are struggling mightily to internalize those benefits for themselves.

Ultimately, the authors provide an important descriptive account that makes the physicality of new online businesses more salient in ways that will assist in any discussion of the appropriate regulatory responses to them. And they offer an optimistic view of the future of municipal governance—one I am more than happy to hope materializes.

(Title courtesy of James Grimmelmann.)

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