

Neighbors Not Nightmares

Fix SB 1350

STRs Kill Hospitality

STRs KILL HOSPITALITY

Simply put, STRs are very profitable because they can charge rates that compete with legitimate hotels, while the costs of running a residential property are much, much lower than commercial hotels.

STRs have virtually NO regulations or restrictions thanks to SB 1350. STRs have no occupancy limits, no on-site staff, no health or safety standards, and no ADA requirements. STRs have preferential zoning and pay lower property taxes and utility rates.

STRs get a “free ride” off of taxpayers and neighbors. Neighbors are forced to serve as the “front desk” to monitor and report problems and the local police department is the security staff (at taxpayer expense). Operators also call the police on their own guests (at taxpayer expense) because they are out of town and can’t deal with the problem themselves. Why should taxpayers subsidize STRs as they invade our neighborhoods?!?!?

Legitimate hotels have a substantially higher cost structure for many reasons, such as:

- Higher cost for commercially zoned land
- Higher building costs to meet stricter commercial codes that include fire, safety and other requirements
- ADA compliance to provide access for the 18% of Americans with disabilities
- Higher staffing levels (jobs) of 0.5 to 2.0 full time employees per guest room
- 24/7 staff and security
- Compliance with state and local health codes and standards
- Cost of meeting “Brand” standards of the chain or franchisor

The list goes on. In the end, the radically different costs structures for legitimate, regulated hotels and unregulated, unrestricted STRs amounts to unfair competition for Arizona's hospitality industry and the 200,000 jobs it provides.

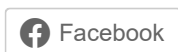
How unfair? A look at standard industry metrics tells the tale. A common measure of performance for hospitality properties is "Revenue Per Available Room", or "REVPAR". (Please google REVPAR if you'd like a complete explanation of the term.)

For STRs breakeven REVPAR is about \$25 to \$50 per bedroom. That is, assuming 25% operating expenses and typical costs for financing and taxes an STR will break even with revenue of \$25 to \$50 per available room. This rule of thumb covers everything from a \$100k condo all the way to a multi-million mansion with 10 bedrooms or more.

Legitimate hotels have breakeven REVPAR of \$49 (limited service) to \$141 (resorts) based on a 2018 CBRE Hotels' America Research report. It is almost impossible for hotels to compete with the unfair costs advantages of STRs. This is a huge, unsustainable difference in cost structures. With a breakeven REVPAR that is 2 to 3 times higher, in the long run legitimate hotels are in serious danger of being run out of business by STRs.

**If you work in hospitality in Arizona you might want to contact your legislator
about fixing SB 1350 while you still have a job.**

Share this:



Neighbors Not Nightmares / Proudly powered by WordPress

Neighbors Not Nightmares

Fix SB 1350

STRs are Job Killers

SHORT TERM RENTALS ARE JOB KILLERS

Legitimate Hotels create 0.5 to 2.0 jobs per room, depending on whether the hotel is a limited service, full service or luxury/resort property. So a 100 room limited service hotel would employ about 50 people and a 200 room luxury hotel would employ about 400 people.

These jobs include front desk, security, bellmen, valet, housekeeping, hosts, waiters, bartenders, cooks, busboys, gardening, retail, engineering, accounting, marketing, and management. Many of these positions provide steady jobs, substantial earnings and professional careers.

Presuming a residential property already has a pool service, landscaper and occasional handyman before it starts operating as an STR, the only increase in employment as an STR is for housekeeping. Housekeepers typically clean 15-20 hotel rooms per day, but an STR also has a kitchen and living room to clean, so let's say they can clean 8 bedrooms per day, or two 4 bedroom houses a day. House cleaning services also quote about 4 hours to clean a 4 bedroom home.

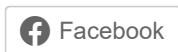
The average length of stay at an STR is 4.3 days, but let's say its 3.5 days so there are two cleanings per week. Two cleanings is one full day of employment per week for a housekeeper, which is 1/5th or 0.2 of a full time job.

So a 4 bedroom STR creates only 0.2 jobs in housekeeping while 4 rooms in a legitimate hotel create 2 to 8 full time jobs. And the STR housekeeper probably has a "gig" job with low earnings, no benefits and little stability.

Compared to legitimate hotels, **EVERY BEDROOM IN AN STR KILLS ABOUT 1 HOSPITALITY JOB IN ARIZONA**, along with the income taxes, housing demand, multiplier effect and long term growth that goes along with each job.

STRs KILL JOBS AND DESTROY NEIGHBORHOODS. FIX 1350!!

Share this:



Neighbors Not Nightmares / Proudly powered by WordPress

Airbnb and Neighborhood Crime: The Incursion of Tourists or the Erosion of Local Social Dynamics?

Laiyang Ke^{1,3}, Dan O'Brien^{1,3}, and Babak Heydari^{2,1*+}

¹Northeastern University, School of Public Policy and Urban Affairs, Boston, 02115, USA

²Northeastern University, Department of Mechanical and Industrial Engineering, Boston, 02115, USA

³Northeastern University, Boston Area Research Initiative (BARI), Boston, 02115, USA

*b.heydari@northeastern.edu

+these authors contributed equally to this work

ABSTRACT

The proliferation of internet-based home-sharing platforms like Airbnb has raised heated debates, with many in the general public believing that the presence of Airbnb can lead to an increase in crime and disorder in residential neighborhoods. Despite the importance of this debate to residents, policymakers, and other stakeholders, few studies have examined the causal linkage between Airbnb and crime in neighborhoods. We conduct the first such empirical test in Boston neighborhoods, focusing on two potential mechanisms: (1) the inflow of tourists might generate or attract crime; and (2) the creation of transient properties undermines local social dynamics. Corresponding to these mechanisms, we examine whether the number of tourists (approximated with reviews) or the prevalence of listings predict more incidents of private conflict, social disorder, and violence both concurrently and in the following year. We find evidence that increases in Airbnb listings—but not reviews—led to more violence in neighborhoods in later years. This supports the notion that the prevalence of Airbnb listings erodes the natural ability of a neighborhood to prevent crime, but does not support the interpretation that elevated numbers of tourists bring crime with them.

1 Introduction

2 The expansion of internet-based short-term rental platforms like Airbnb has raised heated debates in recent years. Airbnb
3 enables travelers and visitors to stay in idle private residential properties as an alternative to hotels. Consequently, it creates an
4 inflow of tourists into residential neighborhoods without hotels where they were previously unlikely to go, potentially causing
5 undesirable impacts (aka negative externalities) for these neighborhoods¹. One of the concerns held by many in the general
6 public is that the presence of Airbnbs can lead to an increase in crime and disorder in a neighborhood. In the past few years, a
7 variety of media reports have covered the disruptions and instabilities associated with Airbnb in residential neighborhoods. For
8 example, an article in 2016 in the New York Times reported that residents in New Orleans were distraught at Airbnb guests'
9 disruptive behaviors². The story resulted in a city-wide request for stricter regulations on home-sharing activities. Another
10 article from Splinter News told a broader story of how sharing economy platforms like Uber and Airbnb are exploited by
11 criminals³. Similar concerns have even given rise to websites like AirbnbHell.com, which documents the dangers of using
12 Airbnb services. However, despite a number of media claims and anecdotal evidence, few studies have examined the causal
13 linkage between Airbnb and crime in neighborhoods, and those that have have done so largely descriptively⁴. Thus, there
14 remains a need for a robust empirical test of this relationship that can inform residents, policy makers, and other stakeholders.

15 **Short-Term Rentals and Crime: Two Potential Mechanisms**

16 Most of the discussions about Airbnb and crime in neighborhoods rest on the logic that tourists might bring such issues, a
17 relationship that has been investigated more generally by researchers in both criminology and tourism. Often, this relationship
18 is framed in terms of routine activities theory⁵, in which a crime is understood as requiring three minimal elements: a motivated
19 offender, a suitable target, and the lack of a guardian. There are three hypotheses that arise from this framing. Ryan (1993)
20 makes the case for two of these. One is that tourists make for suitable targets, either because they are known to have money on
21 them or are more vulnerable when navigating an unfamiliar city. Second, he argues that because tourist locations are known to
22 have many suitable targets, they attract more potential offenders, putting both tourists and residents at greater risk⁶. There
23 is more evidence for the first of these two hypotheses, as at least three studies have found that tourists are more likely to be
24 victimized than locals⁷⁻¹³. Third, some have noted that tourists might engage in criminal or disruptive behavior themselves.
25 For example, Boivin and Felson (2018) found that urban neighborhoods with more visitors feature elevated rates of crime
26 committed by visitors but no increase in crimes committed by locals¹⁴. Similarly, arguments against Airbnbs often hinge on the
27 assumption that tourists might bring drunkenness or other unruly behavior with them. Such behaviors might be standard in
28 downtown areas but out of place in residential neighborhoods where there are many Airbnbs.

29 We also note a second mechanism by which Airbnb might impact neighborhood crime, one that is less prevalent in public
30 discussions. It draws off of the criminological concept of social organization—that is, neighborhoods whose residents know and
31 trust each other and share common values are more able to establish and enforce social norms¹⁵. In turn, they tend to have
32 lower levels of crime¹⁶. One of the main factors that inhibits a strong social organization is residential instability, because it
33 is hard to develop relationships and establish norms if a sizable proportion of the population is transient¹⁷. It would stand to
34 reason, then, that if a sufficient number of units throughout a community have been converted to short-term rentals—the most
35 transient form of occupancy possible—it can undermine the social organization and its ability to discourage and prevent crime.
36 A strong social organization is also associated with and able to support various dynamics and processes subsumed under the
37 term 'social capital,' including trust, reciprocity, and social cooperation¹⁸. Further, researchers focusing more on this latter set
38 of terminologies has repeatedly found that numerous manifestations of social capital are associated with lower incidence of
39 crime^{19,20}. Moreover, previous theoretical work by one of the co-authors have demonstrated a strong impact of community
40 structure (measured by network modularity) on population level attributes such as cooperation, fairness and stability²¹⁻²⁴.

41 We then have two potential mechanisms by which Airbnb listings can lead to increased crime in a neighborhood—by
42 bringing tourists who then perpetrate crime and disorder, or by creating transience that undermines local social dynamics that
43 might in turn mitigate or prevent crime. It is important to note that these mechanisms are not mutually exclusive and could
44 be operating simultaneously. That said, we note two analytic considerations that might disentangle their presence. The first
45 consideration is temporal. If issues generated by the prevalence of Airbnb arise from the presence of tourists themselves, we
46 would anticipate increases in Airbnb and crime to be nearly if not perfectly concurrent. In contrast, if an abundance of listings
47 is undermining the social organization of the community and its natural ability to prevent and discourage crime, then there

would be a more gradual erosion. In this case we would expect to see any effect of Airbnb on crime be lagged, increasing over time. The second consideration regards the way we measure the presence of Airbnb in a community. If tourists themselves are perpetrating crime and disorder, the focus should be on the quantity of tourists listings are bringing to the neighborhood, rather than the listings themselves. Alternatively, if the concern is transience, we will want to focus on the quantity of listings. We describe our measurement strategy for each in the next subsection.

Previous Evidence and the Current Study

Whether those staying in Airbnbs attract or perpetrate crime, or, alternatively, a large number of Airbnbs undermine the social organization of the community, it has become a common perception that the rise of Airbnb in a residential neighborhood will be accompanied by a rise in crime. This has only been examined by two empirical studies, though neither directly tests this causal claim. One study looking at the association only examined the correlation between crime and Airbnbs and did not control for other neighborhood characteristics nor the temporal relationship between the arrival of Airbnbs and shifts in the crime rate⁴. Another paper used policy implementations as a natural experiment, but analyzed only at the citywide scale²⁵.

Here we fill this gap in the literature by testing whether the presence of Airbnb leads to increases in crime across the neighborhoods of Boston, MA. As noted above, we use two measurement strategies to test the two hypotheses. First, we quantify the influx of Airbnb-related tourists by tabulating reviews for Airbnb listings in the neighborhood. This measure of *usage* is drawn from the work of²⁶. Our second strategy focuses on the listings in a neighborhood, for which we employ two such measures. The more common measure in the literature is what we refer to as *density*, which is the number of listings divided by the total number of households. This, however, does not take into account the geographic distribution of these listings. To illustrate, consider two neighborhoods with the same number of households and the same number of Airbnb listings. In one, the listings are distributed throughout the neighborhood, in the other, they are concentrated in two condo buildings that have been effectively converted into unofficial hotels. It would seem likely that the former would have a more pernicious impact on the neighborhood's social networks by undermining relationships more broadly, whereas the impacts of the latter would be more contained at a handful of properties. Thus, we also adopt a measure we refer to as *penetration*, which is defined as the proportion of buildings in the neighborhood with Airbnb listings. This better captures how Airbnb listings are distributed through the community, potentially better capturing how likely they are to impact the social organization. As described above, an association between usage and crime would be evidence that tourists are generating or attracting crime and disorder themselves. Meanwhile, if penetration or density are predictive of crime and disorder and usage is not, there is a stronger case that an abundance of listings in a neighborhood are undermining the social organization.

We examine the relationships between the measures of Airbnb usage, penetration, and density and three types of social disorder and crime: public social disorder (e.g., drunkenness, loitering), private conflict (e.g., landlord-tenant disputes, vandalism), and violence (e.g., fights), all per 1,000 persons in a neighborhood. This allows us to examine in a nuanced way the nature of the impact that Airbnb might have on neighborhoods. We use fixed effects models to conduct these analyses, comparing the relationships between these variables from 2011-2017, as Airbnb went from a minor to more major factor

81 in Boston neighborhoods. As noted above, the two mechanisms by which Airbnb might impact neighborhoods—either the
82 tourists generating or attracting crime themselves, or the prevalence of listings eroding the social organization—would operate
83 on different time scales. If the presence of tourists is responsible for crime, we would anticipate the impacts to occur in the
84 same year as the increase of usage. The erosion of the social organization would take more time to result in elevated crime,
85 lagging increases in listings by one or more years. Thus, we run the fixed effects models with the Airbnb measures as measured
86 concurrently with the crime outcome measures, with a one-year lag between the Airbnb measures and crime and disorder, and
87 then with a two-year lag. Importantly, this work adds a rigorous empirical perspective to the ongoing debate regarding the
88 negative externalities of short-term rental platforms such as Airbnb.

89 **Results**

90 **Descriptive Analyses**

91 Before testing our main question, it is useful to examine the growth and distribution of Airbnb activities in Boston. As depicted
92 in Figure 1, Airbnb had limited presence in Boston at first, with a negligible number of listings and reviews before 2014. There
93 was rapid growth, however, between 2014 and 2018, over which time the number of listings more than doubled from 2,558 to
94 6,014. There were also nearly 80,000 total reviews by 2018. That is not to say, however, that this growth was uniform across
95 neighborhoods. Certain census tracts were the first to have a measurable presence of Airbnb and then proceeded to have high
96 levels of Airbnb listings. Figure 2 shows how Airbnb services increased from 2010 to 2018 and across census tracts in Boston.
97 We focus on two main measures to capture Airbnb activities: penetration, or the proportion of buildings with at least one listing;
98 and usage, or the number of reviews per housing unit in the neighborhood. As indicated in Figure 2a, by 2018, the tracts with
99 the highest penetration of Airbnb had listings in as many as 40% of buildings. Likewise, the neighborhoods with the highest
100 level of usage had as many as one review per housing unit. In contrast, in many other tracts the presence of Airbnb was limited
101 or even absent throughout the study period. Meanwhile a handful of tracts started with very low Airbnb presence and then
102 witnessed rapid growth of Airbnb-related activities.

103 Figure 3 maps the spatial distributions of the three measures of Airbnb supply over time. For Airbnb density (Figure 3a), we
104 see that census tracts in the urban center (northeast on the map) show relatively high Airbnb presence from the beginning, but
105 that in recent years the tracts with the highest level of Airbnb penetration emanate further out into surrounding, more residential
106 neighborhoods.

107 **The Concurrent and Lagged Impacts of Airbnb on Crime**

108 We use difference-in-difference models to test whether a rise in the prevalence of Airbnb in a census tract in one year predicts
109 increases in crime and disorder in the following year. We focus on two ways in which Airbnb can impact a neighborhood.
110 The first is through two measures of the quantity of listings in a neighborhood: the penetration of Airbnb, measured as the
111 proportion of buildings with at least one listing; and the density of Airbnb, or the ratio of listings to total households. We
112 believe the latter is the stronger measure for our purposes (see Introduction for more), but include both as a check. The second

113 strategy is to capture the amount of tourists brought in by listings via the measurement of usage, or the ratio of user reviews
114 to households. The model outcomes include three measures of crime and disorder: private conflict between people who live
115 together, like landlord-tenant disputes; public social disorder, like drunkenness and noise complaints; and public violence,
116 including fights (see Methods). The models control for tract-level and year fixed effects.

117 We begin by testing the relationship between Airbnb prevalence and crime in the same year (See Table XX). We see only
118 one significant effect, which is Airbnb penetration predicting higher levels of violent crime ($\beta = 0.328, p < 0.05$). Otherwise,
119 density and usage were not associated with any forms of crime, nor were social disorder or private conflict associated with any
120 of the Airbnb measures.

121 We then compare these results to models that test the relationship between Airbnb measures from the previous year on
122 crime (i.e., one-year lags). In these models, neighborhoods with a higher level of Airbnb penetration saw rises in violent crime
123 in the following year ($\beta = 0.546, p < 0.0001$), and notably to a greater extent than the concurrent measure of penetration.
124 There was still no corresponding effect on public social disorder or private conflict, however. Airbnb density in the previous
125 year was also associated with higher levels of violent crime, albeit at a lower significance, and thus magnitude, relative to
126 penetration ($\beta = 1.407, p < 0.05$). Airbnb usage had no effect on any of the three measures in the following year (see Table 1).

127 **Extended Longitudinal Effects and Robustness Checks**

128 If the increase in crime rate is driven by changes in social organization, we expect to see the effect to persist and possibly
129 strengthen over a more extended period of time. To confirm this, we repeated the previous analysis, this time with a two-year
130 lag on independent variables.

131 Results of the two-year lagged analysis are in general agreement with those with one-year lag in terms of the impact of
132 Airbnb penetration on events of violence. Moreover, Airbnb penetration not only predicted increased violence at this time scale,
133 but also showed a moderate impact on events of private conflict ($\beta = 0.097, p < 0.05$), an effect that was not present in the
134 one-year lagged analysis. The effects of Airbnb usage and density also concurred with the one-year lagged analysis.

135 In addition, the intent here has been to test whether Airbnb activity in a neighborhood impacts crime, but there are two
136 alternative interpretations to our results that need to be considered. The first is that the reverse effect—that crime leads to Airbnb
137 listings, possibly by deterring property owners from renting long-term or living there themselves—could be true. To assess
138 this, we reran our models with the Airbnb measures from one and two years after the year of the crime measures (full models
139 reported in the SI). The one-year lead model still had the single effect of Airbnb penetration on violence, though attenuated
140 relative. This is not entirely surprising given the collinearity between variables shifted by one year. But the two-year lead model
141 saw no significant effects. These results are consistent with an interpretation of Airbnb impacting crime and not the reverse.

142 A second concern could be the effects of unmeasured variables. Though the DiD models control for the initial conditions of
143 neighborhoods, they do not necessarily control for trends in these variables that parallel the increases in both Airbnb and crime.
144 For example, there is some evidence that gentrifying neighborhoods experience increases in certain types of crime²⁷, and Airbnb
145 has also been associated with gentrification²⁸. We reran the models incorporating shifts in four demographic factors—percentage

146 Black residents, percentage Hispanic residents, median income, and homeownership rate—that are associated with crime or
147 Airbnb. We did this by assigning indicators from American Community Survey’s five-year estimates for 2009-2013 to data for
148 2011-2013, and estimates for 2014-2018 to data for 2014-2017. This is consistent with guidance to not include overlapping
149 estimates in a single analysis²⁹. These models did not impact any of the significant effects from the original set of models,
150 indicating our findings were robust to shifts in demographics.

151 Discussion

152 This study tested the hypothesis that the arrival and growth of Airbnb, or home-sharing platforms in general, may increase
153 crime and disorder in neighborhoods, focusing specifically on private conflict, public social disorder, and violence. We find that
154 the answer is rather nuanced. Airbnb prevalence in a neighborhood appears to be associated with increases in violence, but not
155 with public social disorder or private conflict. Interestingly, the effect on violence was only consistent visible for the measure of
156 Airbnb penetration—or the extent to which buildings in the neighborhood have one or more listings (and for the measure of
157 density, or the listings per household in the two-year lags). It was never present for overall usage, or the estimated quantity of
158 Airbnb guests. Further, the effect of penetration on violence appears to emerge and strengthen over multiple years.

159 The specific findings suggest that Airbnb’s impacts on crime are not a consequence of attracting tourists themselves.
160 Instead, the results point to the possibility that the large-scale conversion of housing units into short-term rentals undermines
161 a neighborhood’s social organization, and in turn its natural ability of a neighborhood to counteract and discourage crime,
162 specifically violent crime. Further, the lagged effects suggest a long-term erosion of the social organization, which would stand
163 in contrast to the more immediate impacts that the presence of tourists would be expected to have. We of course have not
164 directly tested whether social organization is indeed the intervening variable, but it seems clear that the issue is not the tourists
165 themselves but something about how the extreme transience of a short-term rental unit fails to contribute to critical neighborhood
166 social dynamics. We do note that the effects were exclusively on public violence, apart from penetration predicting higher
167 private conflict in the two-year lag. This might be for a few reasons. First, social organization is often argued to be particularly
168 important for managing behaviors in public spaces relative to private ones¹⁷. In addition, public social disorder as measured
169 here, which includes public drunkenness, panhandling, and loitering, is heavily concentrated in Boston’s commercial districts.
170 Thus, such events may be unlikely in residential neighborhoods even with the erosion of social organization. The lack of effects
171 on social disorder, especially drunkenness, might also be taken as additional evidence that tourists staying in Airbnb are not
172 systematically bringing nuisances to the neighborhood.

173 The results have important practical implications. To our knowledge, this paper is the first study to robustly test this
174 particular externality of Airbnb at the neighborhood level. Airbnb-related crimes are viewed as a possible consequence of the
175 home-sharing platform because the costs of these incidents are not addressed by the transactions between Airbnb hosts and
176 guests. Instead, these costs are shouldered by increased expenditures for law enforcement and disturbances to neighbors. **It is**
177 **striking to see that the issue is not the visitors themselves but the conversion of units into short-term rentals. In a certain light,**

178 this is analogous to the effect of Airbnb on housing prices³⁰⁻³³. In the one case, Airbnb has removed material capital from
179 the market, raising prices for renters; in the other, Airbnb removes social capital from the neighborhood in the form of stable
180 households, weakening the associated community dynamics.

181 The apparent unimportance of the tourists themselves might come as something of a surprise given the conceptual and
182 empirical support for the impacts of tourism on crime. It suggests multiple potential explanations. First, although Airbnb has
183 seen notable growth, it might not bring a sufficient quantity of tourists to a neighborhood to have a sustained impact. If there are
184 only a handful of tourists in a neighborhood, the opportunity might not be rich enough to attract predatory crime. Given that we
185 do not expect that other cities have markedly higher Airbnb presence than Boston, we believe this interpretation is extensible to
186 other locales. Second, Airbnb travelers may behave differently in "true" tourist areas than when in the residential neighborhood
187 they are staying in. This could mean that they are less likely to be disorderly or to call attention to themselves as suitable targets.

188 We note two limitations to our research that call for future studies. First, we have tested this hypothesis in a single city,
189 owing to the availability of both Airbnb listings and 911 dispatches for Boston. Future studies should replicate this analysis in
190 other cities, especially those of different sizes or demographic makeup. Second, we examined a single, hypothesized negative
191 externality of Airbnb. It does not on its own tell the whole story. Airbnb might have other impacts on neighborhoods—both good
192 and bad. These other relationships require further empirical investigation. Currently, a number of papers have explored how
193 urban planners and policy-makers could respond to potential externalities imposed by Airbnb on urban neighborhoods³⁴⁻³⁶,
194 and such efforts will be better informed as we better understand the multifaceted impacts Airbnb can have.

195 **Data and Methods**

196 **Measuring Airbnb presence**

197 To estimate the presence of Airbnb in a neighborhood, we obtained datasets from InsideAirbnb.com, an independent, non-
198 commercial website that scrapes and publishes longitudinal Airbnb listings' records for cities across the world for the purpose
199 of research. InsideAribnb.com has published these data annually since 2015, but Airbnb entered Boston in 2009. In order to
200 overcome this limitation, we leveraged the "host since" field, which indicates the date a property became an Airbnb listing, to
201 estimate which Airbnb listings were present in each year 2011-2014. Koster et al. (2018) took a similar approach using the date
202 of a listing's first review, but we found that the "host since" variable more consistently had a value and would be more precise
203 in any case. InsideAirbnb.com also publishes a separate dataset on the reviews received by each listing along with the listings
204 data³⁷. The reviews datasets have been used to estimate the amount of tourists brought by Airbnb services^{26,38}.

205 Following the practice of Horn & Merante (2017), we use census tracts to approximate neighborhoods (avg. population
206 = 4,000; 168 with meaningful population in Boston). We then linked listings to the containing census tract, allowing us to
207 calculate neighborhood-level measures of Airbnb's prevalence. Though listings are not necessarily geographically precise,
208 InsideAirbnb.com indicates that listings are 0-450 feet from the actual address. Meanwhile, census tracts cover .5 mile radius,
209 meaning that most listings should fall in the appropriate census tract.

210 We use three measures to quantify the level of Airbnb presence in each tract. Specifically, these aim to operationalize the
211 quantity of listings and the quantity of tourists they bring to the neighborhood. For listings, our primary measure *penetration*
212 sought to capture how they were spatially distributed across the neighborhoods. It was calculated as the number of unique
213 addresses with listings divided by the number of parcels (lots that contain one or more units, per the City of Boston's Assessing
214 Department) in the census tract, thereby approximating the number of buildings with at least one Airbnb listing. This might
215 be a more appropriate proxy, for instance, when Airbnb listings are many in a neighborhood but concentrated in one or two
216 condo buildings, thus geographically constraining their overall impact. For robustness, we also measured *density*, or the ratio of
217 Airbnb listings to housing units. This measurement has been widely adopted in previous studies on Airbnb^{31,39}. The quantity
218 of tourists attracted was operationalized as *usage*, calculated as the number of reviews divided by housing units in a census tract
219 as recommended by Schild (2019)²⁶.

220 Using 911 call data to measure crime activity

221 We utilized three variables measuring crime and disorder developed by the Boston Area Research Initiative from 911 dispatches
222 from 2011-2018. These measures were calculated as the rate per 1,000 residents of events falling into a pre-determined set of
223 categories from the dispatches. They include: public social disorder, including intoxicated individuals, lewdness, and drunken
224 disturbances; private conflict includes issues like landlord/tenant trouble, breaking and entering, and vandalism; and violence
225 includes events like armed robberies, assaults, a person with knife, and fights.

226 Estimation strategies

The key research question we ask in this study is whether the proliferation of Airbnb in a neighborhood lead to higher level of
crime events in that neighborhood. The panel data set we assembled at the census tract-level allows us to employ a generalized
Difference-in-Difference (DID) design, Airbnb presence acting as a "treatment" predicting changes in crime in a neighborhood.
The estimated equation is:

$$Y_{i,t} = \alpha + \gamma \text{Airbnb}_{i,t} + \delta \text{Income}_{i,t} + \eta_i + \beta_t + \varepsilon_{i,t} \quad (1)$$

227 where i represents the census tract, t represents the year. $Y_{i,t}$ is the crime level measured by the number of private conflict,
228 social disorder, and violence events per 1,000 people, γ is the estimated causal effect of Airbnb presence. η and β are the tract
229 and year fixed effects, respectively, capturing both time-invariant characteristics of tracts and spatially-invariant characteristics
230 of years (for example, a city-wide increase in Airbnb prevalence or crime level). $\text{Income}_{i,t}$ is the control variable of median
231 household income (drawn from the American Community Survey's five year estimations at the census tract-level, appropriate
232 to the year in question).

References

- 233 1. Shapley, L. S. & Shubik, M. On the core of an economic system with externalities. *The Am. Econ. Rev.* **59**, 678–684, DOI:
234 <https://www.jstor.org/stable/1813240> (1969).
- 235 2. Walker, R. Airbnb pits neighbor against neighbor in tourist-friendly new orleans. *The New York Times* DOI: <http://nyti.ms/21QH5Yv> (2016).
- 236 3. Brown, K. V. How criminals use uber, tinder and airbnb. *Splinter*. [https://splinternews.com/how-criminals-use-uber-tinder-](https://splinternews.com/how-criminals-use-uber-tinder-and-airbnb-1793853427)
237 [and-airbnb-1793853427](https://splinternews.com/how-criminals-use-uber-tinder-and-airbnb-1793853427) (2015).
- 238 4. Xu, Y.-H., Pennington-Gray, L. & Kim, J. The sharing economy: a geographically weighted regression approach to examine
239 crime and the shared lodging sector. *J. travel research* **58**, 1193–1208, DOI: <https://doi.org/10.1177/0047287518797197>
240 (2019).
- 241 5. Cohen, L. E. & Felson, M. Social change and crime rate trends: A routine activity approach. *Am. sociological review*
242 588–608, DOI: <https://doi.org/10.2307/2094589> (1979).
- 243 6. Ryan, C. Crime, violence, terrorism and tourism: an accidental or intrinsic relationship? *Tour. Manag.* **14**, 173–183, DOI:
244 [https://doi.org/10.1016/0261-5177\(93\)90018-G](https://doi.org/10.1016/0261-5177(93)90018-G) (1993).
- 245 7. Brunt, P., Mawby, R. & Hambly, Z. Tourist victimisation and the fear of crime on holiday. *Tour. Manag.* **21**, 417–424,
246 DOI: [https://doi.org/10.1016/S0261-5177\(99\)00084-9](https://doi.org/10.1016/S0261-5177(99)00084-9) (2000).
- 247 8. Biagi, B. & Detotto, C. Crime as tourism externality. *Reg. Stud.* **48**, 693–709, DOI: [https://doi.org/10.1080/00343404.](https://doi.org/10.1080/00343404.2011.649005)
248 [2011.649005](https://doi.org/10.1080/00343404.2011.649005) (2014).
- 249 9. De Albuquerque, K. & McElroy, J. Tourism and crime in the caribbean. *Annals tourism research* **26**, 968–984, DOI:
250 [https://doi.org/10.1016/S0160-7383\(99\)00031-6](https://doi.org/10.1016/S0160-7383(99)00031-6) (1999).
- 251 10. Stults, B. J. & Hasbrouck, M. The effect of commuting on city-level crime rates. *J. Quant. Criminol.* **31**, 331–350, DOI:
252 <https://doi.org/10.1007/s10940-015-9251-z> (2015).
- 253 11. Farley, J. E. Suburbanization and central-city crime rates: New evidence and a reinterpretation. *Am. journal sociology* **93**,
254 688–700, DOI: <https://doi.org/10.1086/228793> (1987).
- 255 12. Schiebler, S. A., Crotts, J. C., Hollinger, R. C. *et al.* Florida tourists' vulnerability to crime. *Tour. crime international*
256 *security issues* 37–50, DOI: [https://popcenter.asu.edu/sites/default/files/problems/crimes_against_tourists/PDFs/Schiebler_](https://popcenter.asu.edu/sites/default/files/problems/crimes_against_tourists/PDFs/Schiebler_Crotts_&Hollinger_1996.pdf)
257 [Crotts_&Hollinger_1996.pdf](https://popcenter.asu.edu/sites/default/files/problems/crimes_against_tourists/PDFs/Schiebler_Crotts_&Hollinger_1996.pdf) (1996).
- 258 13. Harper Jr, D. W. *et al.* Comparing tourists crime victimization. *Annals Tour. Res.* **28**, 1053–1056, DOI: [http://dx.doi.org/](http://dx.doi.org/10.1016/S0160-7383(01)00016-0)
259 [10.1016/S0160-7383\(01\)00016-0](http://dx.doi.org/10.1016/S0160-7383(01)00016-0) (2001).
- 260 14. Boivin, R. & Felson, M. Crimes by visitors versus crimes by residents: The influence of visitor inflows. *J. Quant. Criminol.*
261 **34**, 465–480, DOI: <https://doi.org/10.1007/s10940-017-9341-1> (2018).

- 264 **15.** Sampson, R. J. & Groves, W. B. Community structure and crime: Testing social-disorganization theory. *Am. journal*
265 *sociology* **94**, 774–802 (1989).
- 266 **16.** Kawachi, I., Kennedy, B. P. & Wilkinson, R. G. Crime: social disorganization and relative deprivation. *Soc. science &*
267 *medicine* **48**, 719–731 (1999).
- 268 **17.** Sampson, R. J. *Great American city: Chicago and the enduring neighborhood effect* (University of Chicago Press, 2012).
- 269 **18.** Coleman, J. S. Social capital in the creation of human capital. *Am. journal sociology* **94**, S95–S120 (1988).
- 270 **19.** Kennedy, B. P., Kawachi, I., Prothrow-Stith, D., Lochner, K. & Gupta, V. Social capital, income inequality, and firearm
271 violent crime. *Soc. science & medicine* **47**, 7–17 (1998).
- 272 **20.** Hirschfield, A. & Bowers, K. J. The effect of social cohesion on levels of recorded crime in disadvantaged areas. *Urban*
273 *Stud.* **34**, 1275–1295 (1997).
- 274 **21.** Gianetto, D. A. & Heydari, B. Network modularity is essential for evolution of cooperation under uncertainty. *Sci. reports*
275 **5**, 9340 (2015).
- 276 **22.** Mosleh, M. & Heydari, B. Fair topologies: Community structures and network hubs drive emergence of fairness norms.
277 *Sci. reports* **7**, 1–9 (2017).
- 278 **23.** Heydari, B., Heydari, P. & Mosleh, M. Not all bridges connect: integration in multi-community networks. *The J. Math.*
279 *Sociol.* 1–22 (2019).
- 280 **24.** Gianetto, D. A. & Heydari, B. Sparse cliques trump scale-free networks in coordination and competition. *Sci. reports* **6**,
281 21870 (2016).
- 282 **25.** Han, W. & Wang, X. Does home sharing impact crime rate? a tale of two cities. DOI: [https://aisel.aisnet.org/icis2019/](https://aisel.aisnet.org/icis2019/sustainable_is/sustainable_is/6/)
283 [sustainable_is/sustainable_is/6/](https://aisel.aisnet.org/icis2019/sustainable_is/sustainable_is/6/) (2019).
- 284 **26.** Schild, J. *Unintended Consequences of the Sharing Economy: Airbnb's Role in Tourism Gentrification*. Ph.D. thesis,
285 Indiana University (2019).
- 286 **27.** Papachristos, S. C. M. S. M. L., Andrew V. & Fugiero, M. A. More coffee, less crime? the relationship between
287 gentrification and neighborhood crime rates in chicago, 1991 to 2005. *City Community* **10**, 215–240 (2011).
- 288 **28.** Wachsmuth, D. & Weisler, A. Airbnb and the rent gap: gentrification through the sharing economy. *Environ. Plan. A:*
289 *Econ. Space* **50**, 1147–1170 (2018).
- 290 **29.** on the Functionality, P., Usability of Data from the American Community Survey, C. F., Citro & Kalton, G. *Using the*
291 *American Community Survey: benefits and challenges* (National Research Council, 2007).
- 292 **30.** Sheppard, S., Udell, A. *et al.* Do airbnb properties affect house prices. *Williams Coll. Dep. Econ. Work. Pap.* **3** (2016).
- 293 **31.** Horn, K. & Merante, M. Is home sharing driving up rents? evidence from airbnb in boston. *J. Hous. Econ.* **38**, 14–24,
294 DOI: <https://doi.org/10.1016/j.jhe.2017.08.002> (2017).

- 295 **32.** Segú, M. *et al.* Do short-term rent platforms affect rents? evidence from airbnb in barcelona. Tech. Rep., University
296 Library of Munich, Germany (2018).
- 297 **33.** Barron, K., Kung, E. & Proserpio, D. The sharing economy and housing affordability: Evidence from Airbnb. *SSRN*
298 *Electron. J.* (2018).
- 299 **34.** Gurran, N. & Phibbs, P. When tourists move in: how should urban planners respond to airbnb? *J. Am. planning association*
300 **83**, 80–92, DOI: <https://doi.org/10.1080/01944363.2016.1249011> (2017).
- 301 **35.** Espinosa, T. P. The cost of sharing and the common law: How to address the negative externalities of home-sharing. *Chap.*
302 *L. Rev.* **19**, 597, DOI: <https://heinonline.org/HOL/LandingPage?handle=hein.journals/chlr19&div=30&id=&page=> (2016).
- 303 **36.** Nieuwland, S. & van Melik, R. Regulating airbnb: how cities deal with perceived negative externalities of short-term
304 rentals. *Curr. Issues Tour.* 1–15, DOI: <https://doi.org/10.1080/13683500.2018.1504899> (2018).
- 305 **37.** Koster, H., van Ommeren, J. & Volkhausen, N. Short-term rentals and the housing market: Quasi-experimental evidence
306 from airbnb in los angeles. (2018).
- 307 **38.** Alyakoob, M. & Rahman, M. S. Shared prosperity (or lack thereof) in the sharing economy. Available at *SSRN 3180278*
308 DOI: <https://dx.doi.org/10.2139/ssrn.3180278> (2019).
- 309 **39.** Wegmann, J. & Jiao, J. Taming airbnb: Toward guiding principles for local regulation of urban vacation rentals based on
310 empirical results from five us cities. *Land Use Policy* **69**, 494–501, DOI: <https://doi.org/10.1016/j.landusepol.2017.09.025>
311 (2017).

312 **Acknowledgements**

313 During this research, the authors were supported by the TIER 1: Seed Grant/Proof of Concept Program of Northeastern
314 University

315 **Competing interests**

316 The authors declare no competing interests.

317 **Additional information**

318 **Supplementary information** is available for this paper at

319

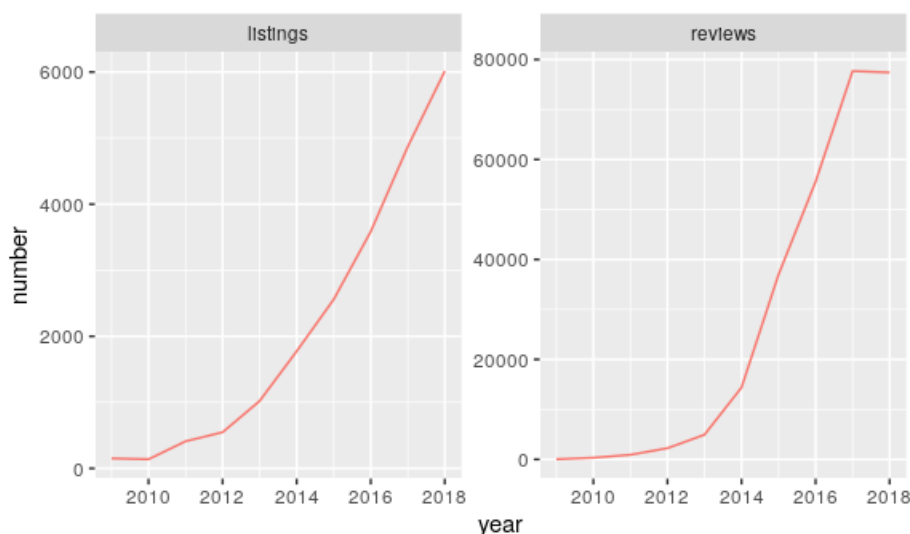


Figure 1. Airbnb's Expansion in Boston: 2009-2018

	Events of Private Conflict			Events of Social Disorder			Events of Violence		
	(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)
Airbnb Penetration (lag 1)	0.041 (0.039)			-0.115 (0.118)			0.546*** (0.133)		
Airbnb Density (lag 1)		-0.112 (0.227)			-0.426 (0.293)			1.407* (0.614)	
Airbnb Usage (lag 1)			0.001 (0.009)			-0.011 (0.016)			0.037 (0.021)
Tract FE	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Year FE	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Controls	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Observations	1004	1004	1004	1004	1004	1004	1004	1004	1004
F	0.62	0.16	0.04	0.8	1.32	0.79	8.7	2.69	1.56

Note: clustered standard errors are displayed in parenthesis. Control variable is median household income.
Significance levels: * p<0.05; ** p<0.01; *** p<0.001.

Table 1. One-year lagged independent variables

	Events of Private Conflict			Events of Social Disorder			Events of Violence		
	(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)
Airbnb Penetration (lag 2)	0.097* (0.041)			-0.162 (0.107)			0.553*** (0.119)		
Airbnb Density (lag 2)		0.039 (0.215)			-0.884 (0.472)			1.167* (0.529)	
Airbnb Usage (lag 2)			0.014 (0.013)			-0.036 (0.029)			0.037 (0.027)
Tract FE	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Year FE	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Controls	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Observations	837	837	837	837	837	837	837	837	837
F	3.41	0.53	1.02	2.71	3.71	2.79	10.8	2.43	1.04

Note: clustered standard errors are displayed in parenthesis. Control variable is median household income.
Significance levels: * p<0.05; ** p<0.01; *** p<0.001.

Table 2. Two-year lagged independent variables

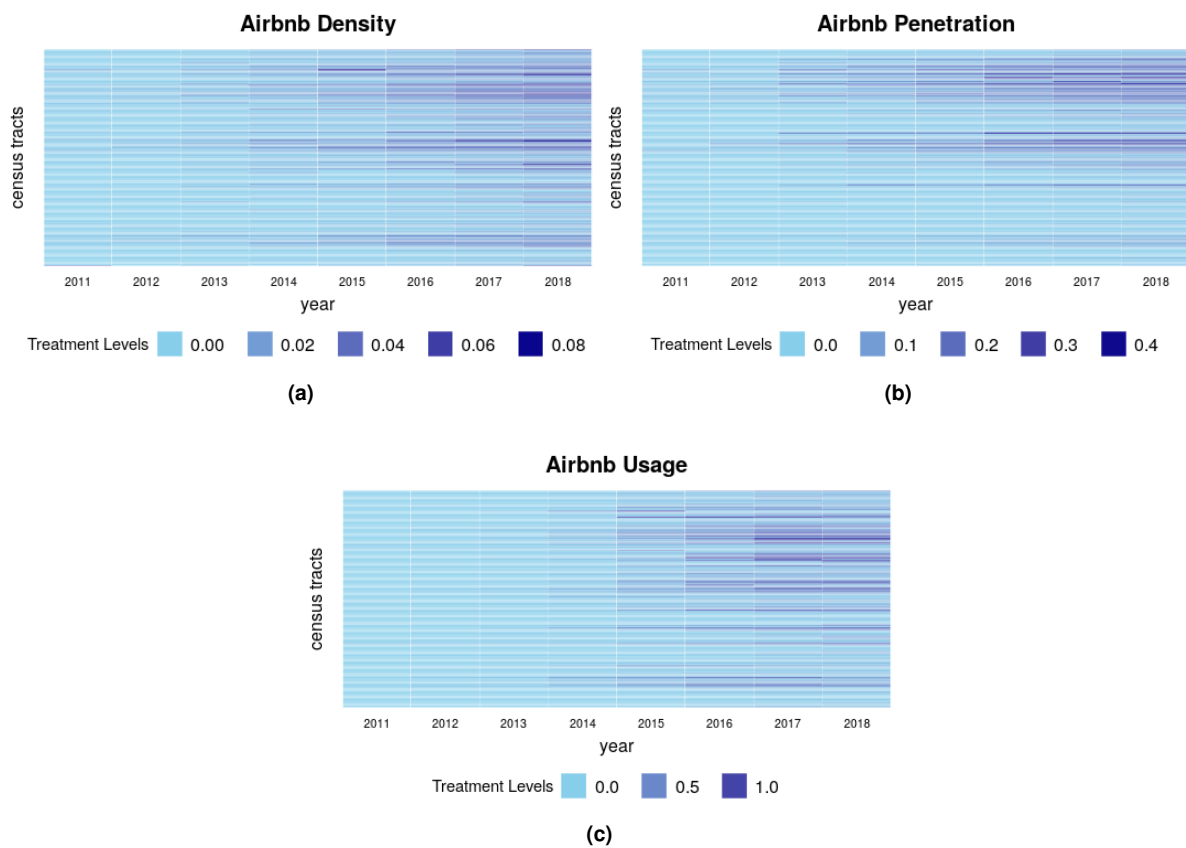


Figure 2. Airbnb’s Presence in Boston. (a) Airbnb density, (b) Airbnb penetration, and (c) Airbnb usage. Each row represents a census tract from 2011 to 2018. The darker the color, the higher the Airbnb presence. Tracts are in the same position in each panel, meaning we can compare panels to confirm that most tracts with high level of presence on one measure scored similarly on the other measures.

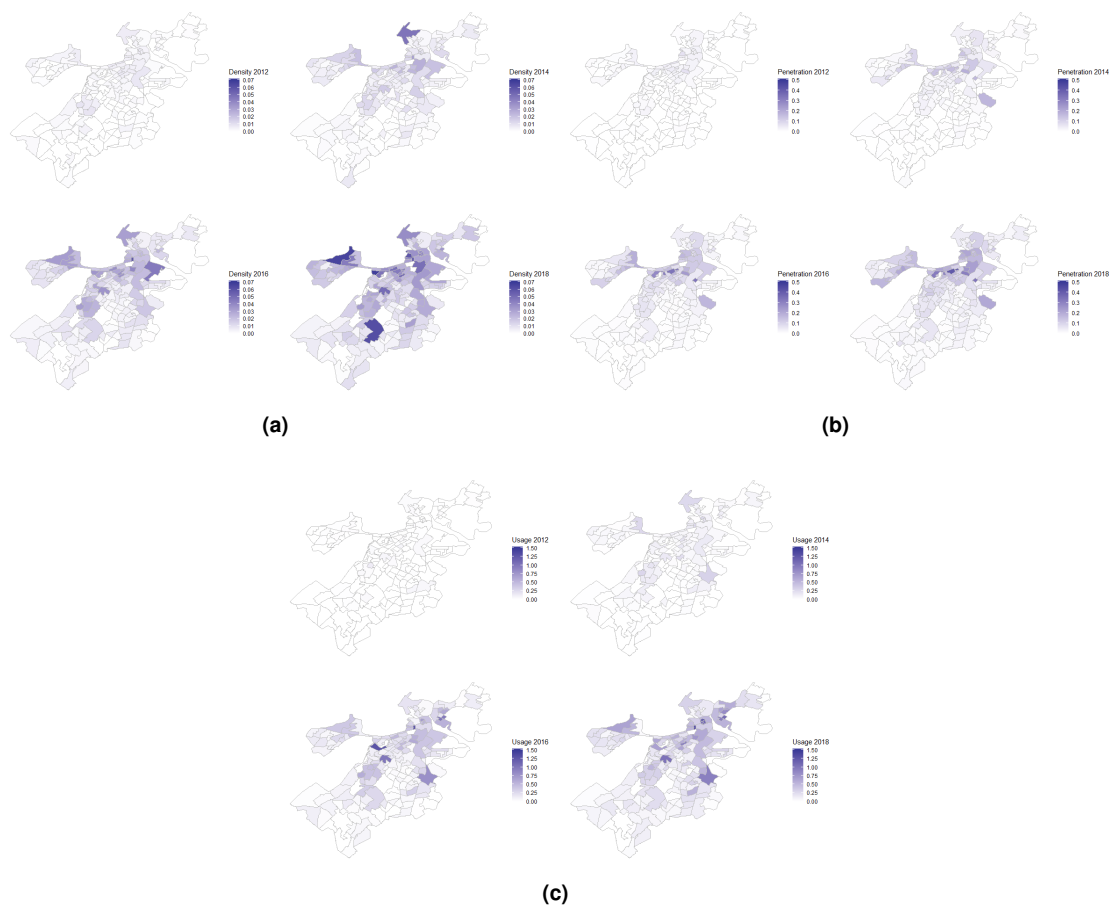


Figure 3. Spatial distributions of (a) Airbnb density, (b) Airbnb penetration, and (c) Airbnb usage in 2012, 2014, 2016, and 2018.

Supplementary Information for the paper
Airbnb and Neighborhood Crime: The Incursion of Tourists or the
Erosion of Local Social Dynamics?

Laiyang Ke^{1,3}, Dan O'Brien^{1,3}, and Babak Heydari^{2,1*+}

¹Northeastern University, School of Public Policy and Urban Affairs, Boston, 02115, USA

²Northeastern University, Department of Mechanical and Industrial Engineering, Boston, 02115, USA

³Northeastern University, Boston Area Research Initiative (BARI), Boston, 02115, USA

1 A. Measures of Disorder and Violent Crime

2 Levels of disorder and crime were calculated from dispatches made by the City of Boston's 911 system. The
3 system generates 700,000 dispatches annually, 91% of which could be referenced to an address or intersection
4 that could be uniquely identified in the list of known locations maintained by the City of Boston (see section
5 on Geographical Coordination of Data). Importantly, these locations are the location where services were
6 required, not necessarily the location from which the request was made. All records contain the date and
7 time the request was received as well as a "case type" drawn from a standardized list to categorize a request
8 at the time of receipt according to the nature of the issue and the services required. Previous work with
9 Boston's 911 archives used confirmatory factor analysis to develop groupings of case types that act as two
10 indices of social disorder and one of violent crime. (O'Brien and Sampson 2015)¹: public social disorder,
11 such as panhandlers, drunks, and loud disturbances; private conflict arising from personal relationships (e.g.,
12 landlord-tenant conflicts); and public violence that did not involve a gun (e.g., fight); and prevalence of guns,
13 as indicated by shootings or other incidents involving guns. Table S1 reports constituent case types for each
14 index and their frequencies for 2011.

¹The confirmatory factor analyses were based on counts of events of case types for census block groups, maximizing the extent to which case types included in a single category of events (e.g., private conflict) were co-incident at this level of geography.

Public Violence		Public Social Disorder		Private Conflict	
Case Type	Count (2011)	Case Type	Count (2011)	Case Type	Count (2011)
Assault and battery in progress	2181	Intoxication: individual	975	Breaking and entering in progress	1426
Assault and battery report	1565	Drunks causing disturbance	759	Landlord/tenant trouble	667
Armed robbery	350	Panhandler	573	Vandalism report	3502
Emotionally disturbed person: violent or injured	5896	Sex offense/lewd behavior	657	Violation of restraining order	972
Fight	4623	Vandalism in progress	657		
Person with knife	687				

B. Geographic Coordination of Data

The City of Boston’s Street and Address Management (SAM) system and Tax Assessor track all properties (i.e., the smallest ownable unit) and land parcels (i.e., geographically-bounded lots that contain one or more properties). SAM also contains a list of street intersections. It is worth noting that this includes all addresses, even if there is no building present (e.g., residential parking lot). Together these form the basis of the Boston Area Research Initiative’s Geographical Infrastructure for Boston (GI; O’Brien et al. 2019), which condenses them slightly by combining distinct land parcels with the same postal address that are sufficiently close to each other to be impossible to differentiate. These land parcels are then mapped to U.S. Census TIGER line street segments (i.e., the undivided length of street between two intersections or an intersection and a dead end) and nested within census geographies. This infrastructure is the basis for all analyses in the paper. 911 dispatches typically reference “addresses,” which are most consistent with land parcels. They were immediately geocoded to a location in the SAM system by municipal servers until June 2014, which were then directly incorporated into the GI. After that time, a new system was introduced and the coordinates of the 911 calls were projected into latitude and longitude. These were then spatially joined to the nearest land parcel in the GI. Neighborhood measures were then calculated by tabulating the number of social disorder and crime events occurring in each category at each parcel and intersection within a given census tract, divided by the total population in thousands (thereby calculating a rate per 1,000 residents). Airbnb listings come with a “fuzzed” latitude and longitude in the vicinity of the precise address of the listing. InsideAirbnb.com, the organization that scrapes and shares the listings publicly, indicates that the fuzzed coordinates are 0-450 ft. from the actual address. We spatially joined these points to the containing census tract and to the nearest land parcel in the GI and use them to calculate all three measures of Airbnb prevalence in a neighborhood: usage, or the number of reviews of listings in a census tract; density, or the number of listings in a tract divided by the total number of households; and penetration, or the proportion of parcels with at least one listing. We recognize that Airbnb’s fuzzing process introduces error into each of these measures. For usage and density, these errors are probably rather low as most census tracts cover a space with approximate radius of 0.5 miles (2,500 feet), meaning the vast majority of listings will fall in

41 the correct census tract. For penetration, the assumption that parcels are accurate is a bit more vulnerable.
42 That said, our primary goal here is to capture whether the listings in a given census tract are geographically
43 concentrated in one or two areas versus distributed throughout. As such, this is the best proxy available
44 of penetration throughout the neighborhood as differentiated from density, which can be geographically
45 concentrated as traditionally calculated.

46 **C. Same Year Analysis**

	Events of Private Conflict	Events of Social Disorder	Events of Violence
Airbnb Density (%)	-0.207 (0.207)	0.080 (0.285)	1.226 (0.621)
Tract FE	Yes	Yes	Yes
Year FE	Yes	Yes	Yes
Controls	Yes	Yes	Yes
Observations	1171	1171	1171
R^2	0.846	0.850	0.913
F	0.88	1.20	2.17

Note: clustered standard errors are displayed in parenthesis. Control variable is median household income. Significance levels: * p<0.05; ** p<0.01; *** p<0.001.

Table 1: Fixed Effects Regressions on Social Disorder and Crime

	Events of Private Conflict	Events of Social Disorder	Events of Violence
Airbnb Penetration (%)	0.005 (0.035)	-0.004 (0.073)	0.328* (0.133)
Tract FE	Yes	Yes	Yes
Year FE	Yes	Yes	Yes
Controls	Yes	Yes	Yes
Observations	1171	1171	1171
R^2	0.846	0.850	0.914
F	0.36	0.97	3.13

Note: clustered standard errors are displayed in parenthesis. Control variable is median household income. Significance levels: * p<0.05; ** p<0.01; *** p<0.001.

Table 2: Fixed Effects Regressions (Airbnb penetration)

	Events of Private Conflict	Events of Social Disorder	Events of Violence
Airbnb Usage (%)	0.000 (0.008)	-0.004 (0.011)	0.025 (0.021)
Tract FE	Yes	Yes	Yes
Year FE	Yes	Yes	Yes
Controls	Yes	Yes	Yes
Observations	1171	1171	1171
R^2	0.846	0.85	0.912
F	0.36	0.93	0.77

Note: clustered standard errors are displayed in parenthesis. Control variable is median household income. Significance levels: * p<0.05; ** p<0.01; *** p<0.001.

Table 3: Fixed Effects Regressions (Airbnb usage)

Neighbors Not Nightmares

Fix SB 1350

Fun Facts About STRs and WHRs

FUN FACTS ABOUT STRs and WHRs:

- In Scottsdale, STRs are 211 times more likely to have a Nuisance Party / Unruly Gathering violation than an actual resident.
- Only 16% of STRs in Scottsdale are registered as required.

CORPORATE CONSOLIDATION:

- 1/3 of all Airbnb “Whole House” listings are by hosts with a single property. 1/3 are listings by hosts with 2 to 24 properties. And **1/3 are listings by hosts with 25 or more properties.** (WSJ 4/28/20).
- In Scottsdale 65% of Airbnb listings have owner / operators with 4 or more properties. (“Experience Scottsdale” and Scottsdale Planning Dept.)
- In Phoenix 62% of all registered STRs have multi-unit operators, 61% are from out of state, and 44% are both multi-unit and out of state operators. The top 3 operators have 65 units (Stay Alfred, Inc.), 32 units (Sonder) and 20 units (KLIS). (Phoenix Planning Dept. Registry of STRs)

****** Short Term Rentals aren’t about “Mom & Pop” Home Sharing – They’re about corporate investment groups invading residential neighborhoods. ******

GROWTH:

– Airbnb revenues from “Whole House Rentals” (WHRs) grew 76% in the past year. (Airbnb Statistics 2020)

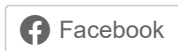
****** There are already more STR bedrooms in Scottsdale than legitimate hotel rooms (about 12,000 STR bedrooms v. about 8,000 hotel rooms). ******

TRENDS

- 60% of Airbnb listings offer “Instant Booking” with only a click. **** This eliminates any contact and vetting between guest and host before booking. Combined with “Self Check In” (using keypad locks) and no on-site staff there is no face to face screening of transients coming into Arizona neighborhoods. Great for operators, great for guests, a recipe for disaster for neighbors.
- Airbnb is now heavily promoting “Airbnb +” which provides an upscale, standardized, “branded” product to compete directly with “branded” hotels. Another clear indication that Airbnb is no longer about Home Sharing but about commercial investment groups invading residential areas.
- Nuisance complaints involving STRs are up 114% in 2020 vs 2019 in Paradise Valley (FOIA request from PV)

**STRs BENEFIT CORPORATE INVESTORS AND DESTROY NEIGHBORHOODS – FIX
1350!**

Share this:



Neighbors Not Nightmares / Proudly powered by WordPress

Neighbors Not Nightmares

Fix SB 1350

Residents vs Transients

It really comes down to the obvious fact that the behavior of 3 families away for a weekend vacation in an STR has no relation to the behavior of a single family that has lived in the house for years.

Residents are committed to the area, known to their neighbors and accountable for their actions.

Transients are “just passing through”, anonymous and unaccountable.

Share this:



Neighbors Not Nightmares / Proudly powered by WordPress

Neighbors Not Nightmares

Fix SB 1350

Home Sharing vs Short Term Rental (STR)

HOME SHARING vs SHORT TERM RENTALS

Home Sharing is when the actual resident of a residential property offers it for lodging to paying guests. After all, if it's not your actual home it's not sharing, it's just an investment property. Home Sharing is often a "Mom & Pop" situation that offers spare rooms in a home while the resident is present, or the "whole house" for less than 183 days per year (otherwise it would not be the actual residence of the operator).

We support Home Sharing as it provides "supplemental income" to the resident and has a minor impact on the surrounding area since:

- There is an actual resident associated with the property;
- The resident is actually present in the home to supervise guests, or;
- The resident is fairly particular about guests as they will be staying in their actual home,
- The resident is unlikely to "pack the house" with a large number of guests, and;
- The rental activity is offered on a part-time or occasional basis to guests.

Online platforms (Airbnb, VRBO, etc) like to emphasize the "Mom & Pop" aspects of Home Sharing as a shield against complaints about absentee and corporate investors operating STRs. **However, in several Arizona communities less than 10% of listings are true Home Sharing and over 90% are investor owned or "whole house rentals"!! It's not "Mom & Pop" anymore, it's about corporate investors invading residential neighborhoods.**

Short Term Rentals (STRs), Vacation Rental Properties (VRPs) or Whole House Rentals (WHRs) are typically:

- Operated on a commercial basis for investment returns
- Owned by absentee investors
- Offered for rent full time throughout the year
- Rented for less than 30 consecutive days – by definition in Arizona this makes them “transient lodging” not residential
- Often managed by third parties
- Often abuse the “unlimited occupancy” provided by SB 1350 with large numbers of guests
- Often part of a “mini-chain” of multiple properties owned or managed by the same investor. 1/3 of all listings are for operators with 25 units or more!
- Not a true residence to anyone, not a true neighbor to anyone – but located in residential neighborhoods
- More than 80% of Airbnb revenues (not Home Sharing)
- More than 90% of listings in several Arizona communities

STRs are popular with guests and profitable for investors. However, they are clearly engaged in the commercial activity of providing transient lodging, belong in commercially zoned areas and should meet the same commercial codes and standards as other hotels.

SOME OF THE EFFECTS OF STRs on the NEIGHBORHOOD

STRs belong in commercial areas, NOT residential areas because:

STRs are worse than having a hotel next door since there is NO occupancy limit and NO on-site management or staff to monitor and control the behavior, noise, parking or other safety and nuisance issues of their transient guests.

The revolving door of complete strangers, unsupervised transients coming and going at all hours is totally at odds with the settled nature of a residential neighborhood. Residents must remain on guard and on edge about the transients’ behavior, dreading what the next unknown group of strangers might bring to the area.

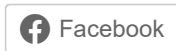
STRs degrade residential neighborhoods while the benefits go to investors and guests. Guests get to “live like a local” as the constant flow of transients ruins the local character of the area. STRs are cheaper than hotels and guests cook at home, so transients save money instead of supporting the community.

Investors make above average returns by charging rates that compete with hotels while having much lower costs for staff, overhead and operating expenses. Investors make big returns while the neighborhood endures noise, nuisance, anxiety and red cups in their front yard. STRs are like polluters, making big money while poisoning the environment.

HOME SHARING IS COMPATIBLE WITH RESIDENTIAL NEIGHBORHOODS.

STRs ARE COMMERCIAL OPERATIONS THAT BELONG IN COMMERCIAL AREAS.

Share this:



Neighbors Not Nightmares / Proudly powered by WordPress

Neighbors Not Nightmares

Fix SB 1350

Scottsdale STR Working Group Info

Scottsdale has formed a “Working Group” on STRs to make recommendations to the City Manager, Mayor and City Council on how to manage the impacts of STRs. Since there was no solution to the STR problem at the State Legislature this session it’s extremely important that you participate and push for change at the local level to address the many problems and issues with STRs in your community.

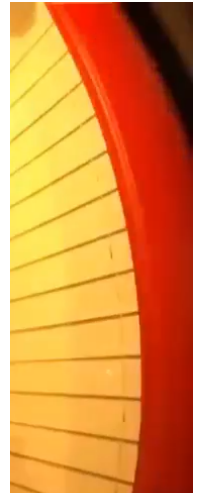
Learn more about the Group and see their agendas at: [SCOTTSDALE STR WORKING GROUP INFO](#)

Send them comments about your experiences and recommendations for STRs at: [STR PUBLIC COMMENTS](#)

=====

Drunk Strangers at Your Door at 2:33 AM

This 30 second video will convince anyone that STRs are a nuisance and a threat that should be banned from residential areas. Why should anyone have to endure this garbage at their front door? IS YOUR HOUSE – OR YOUR MOM’s HOUSE – NEXT?? Shouldn’t our legislators be protecting us from this instead of putting Airbnb profits ahead of residents’ safety??



=====

Appalling Airbnb Statistics for Scottsdale

New numbers from Scottsdale Police Department and City administration prove how bad STRs are for neighborhoods, Cities and Arizona:

- Only 16% of Active STRs are registered as required in Scottsdale – This just proves the vast majority of STR operators are shady scofflaws – bad apples – looking to make a quick buck by strip mining our neighborhoods and putting the safety of our families at risk.
- 90% of Nuisance Party and Unruly Gathering violations are from STRs – 90%!! –
- Since there are only 5,000 STRs and about 120,000 non-STR households it means **STRs are 211 TIMES MORE LIKELY to have a Nuisance Party violation than an actual resident.** How can this possibly be good for Arizona’s residents and communities? For a cleaner, safer, quieter neighborhood GET RID OF STRs!!

There are now more STR bedrooms than hotel rooms in Scottsdale. Does anybody think it makes sense to get rid of occupancy limits or fire safety requirements or on-site management or prohibit audits at hotels? Of course not! So why do we let STRs, which are now bigger than hotels get away with these blatant rip-offs?!?! Enough with people being driven from their homes of 30 years, of having to stay in a hotel or sleep in their garage because of the noise – **ENOUGH WITH OUT OF CONTROL STRs RUINING THE “QUIET ENJOYMENT” OF OUR HOMES, OUR QUALITY OF LIFE AND OUR NEIGHBORHOODS.**

=====

Airbnb’s Arrogance gets Slapped Down by AZ Legislature!

Airbnb’s SB 1379 sponsored by Senator Mesnard went down in flames in the House vote.

Why? – Because legislators saw how toothless this self-serving “industry bill” was – Because Airbnb refused to engage with the League of Cities and Towns – Because Airbnb’s business model of simply telling Arizona what to do is broken – **BECAUSE LEGISLATORS KNOW AIRBNBS ARE CAUSING MASSIVE PROBLEMS ACROSS THE STATE THAT NEED REAL SOLUTIONS INSTEAD OF MORE PANDERING TO AN INDUSTRY THAT CAN’T BE TRUSTED –**

=====

Airbnbs are “A Pig in the Parlor”

Zoning Regulations to protect communities from nuisance uses were ruled Constitutional almost 100 years ago. “A nuisance may be merely a right thing in the wrong place, like a pig in a parlor instead of the barnyard.” Transient Lodging, especially investor owned STRs with no on-site management is obviously commercial activity that is incompatible with residential areas – a “right thing in the wrong place”. See more from [Euclid v. Ambler](#)

The STR industry and their lobbyists claim “**Property Rights**” allow them to use their property any way they want. But property rights stop at the property line, while the noise, parking problems, traffic, trash, random strangers and nuisance behaviors that affect the larger community on a daily basis do not. Local Zoning was established and ruled Constitutional precisely to protect communities from these “pigs in the parlor”. Arizona desperately needs to reinstate Local Zoning to **RESTORE THE RIGHTS OF RESIDENTS TO THE “QUIET ENJOYMENT” OF THEIR HOMES** – the “Property Rights” that Airbnb, Ducey and SB 1350 destroyed.

=====

The Pollack Report On STRs – “Arizona’s Recipe for Disaster”

“In Arizona this problem is at the most extreme” – Get the full report by clicking

[ARIZONA’S RECIPE FOR DISASTER](#)

The “Airbnb Bill” was passed without any economic impact study or analysis of any kind. Finally there is a thoughtful review of what STRs are actually doing to our neighborhoods, employment and tax base. Huge benefits for a few investors, a disaster for everyone else.

=====

33 Mayors Representing over half the State Urge Reform!

Are you listening Airbnb? Are you listening Gov. Ducey? When 33 Mayors including many of Arizona’s largest Cities and Towns band together because of the disruptions and harm STRs bring to their communities, maybe it’s time to pay attention and come up with real solutions to real problems. Click below to see the letter these mayors sent to Airbnb and VRBO, and a video highlighting the nuisances and threats to safety STRs bring to neighborhoods that used to be quiet and safe .

[Click to read Letter from 33 Mayors](#)

[Click to see Mayors' Video](#)

The Problem with Short Term Rentals in AZ

Arizona State Law 1350 gave Short Term Rentals, like Airbnb and VRBO a “sweetheart” deal

that stripped away local zoning, prohibited regulations, allowed unlimited occupancy, gave away tax breaks and a bunch of other “goodies” to the STR Industry. The result is overcrowded, unstaffed, unregulated “STR motels” taking over Single Family Residential neighborhoods with nuisance properties. It’s like having a combination of “Animal House” and Motel 6 next door instead of an actual neighbor.

The Solution for STRs in AZ

The State Legislature needs to pass corrective legislation with **Common Sense provisions that protect Arizona residents** instead of Silicon Valley Billionaires, including:

RETURN OF LOCAL ZONING – The State stripped away local zoning and forced commercial STRs into residential areas. Communities should once again be able to determine their own zoning according to their own needs and standards and set their own fees and penalties.

OCCUPANCY LIMITS – Allowing overcrowded STRs with no occupancy limit is simply reckless and the greatest source of nuisance behaviors. 99% of all U.S. families have 6 or fewer members. If STRs are in Single Family Areas they should meet Single Family norms with a maximum of 6 people. Otherwise high occupancy STRs belong in commercial areas.

REQUIRE REGISTRATION and VERIFY LISTINGS – “Non Compliance Rates” for STRs are 40 to 80% in many areas. These unregistered, unlicensed “pirate properties” increase nuisance and decrease tax collections. Online Platforms like Airbnb are already set up to verify that listings are legitimate before taking any bookings, and they already do this in dozens of jurisdictions. **Arizona should absolutely require the platforms to verify listings** instead of enabling illegal properties and shady operators in our neighborhoods.

=====

Airbnb and Neighborhood Crime – Northeastern University Study

“Increases in Airbnb listings led to more violence in neighborhoods” – “Airbnb listings erode the natural ability of a neighborhood to prevent crime” See the full study: [AIRBNB](#)

[AND NEIGHBORHOOD CRIME](#)

=====

WHAT?? NO!!

Now Party House STRs are bringing **PARTY BUSES** too! If this happened next to Gov. Ducey's house you can bet we'd have regulations on STRs real quick – But he lives in a protected HOA that doesn't allow STRs.

=====

This kind of Host ruins it for everyone

["Why I have a Party Airbnb"](#)

“Now that I have those Big Old Parties I bring in an extra \$2,000 to 3,000 a month!” (at 1:58)
 “If you want to have a massive rager, sure go ahead!” (at 2:53) Great – so this guy makes big money while the neighbors pay the price – what a grotesque situation – Looks like an instructional video on how to ruin neighborhoods even faster. This guy is from Dallas, but with unlimited STR occupancy 1350 allows “Massive Ragers” in Arizona anytime, anywhere, and nothing can be done about it until 1350 is fixed.

=====

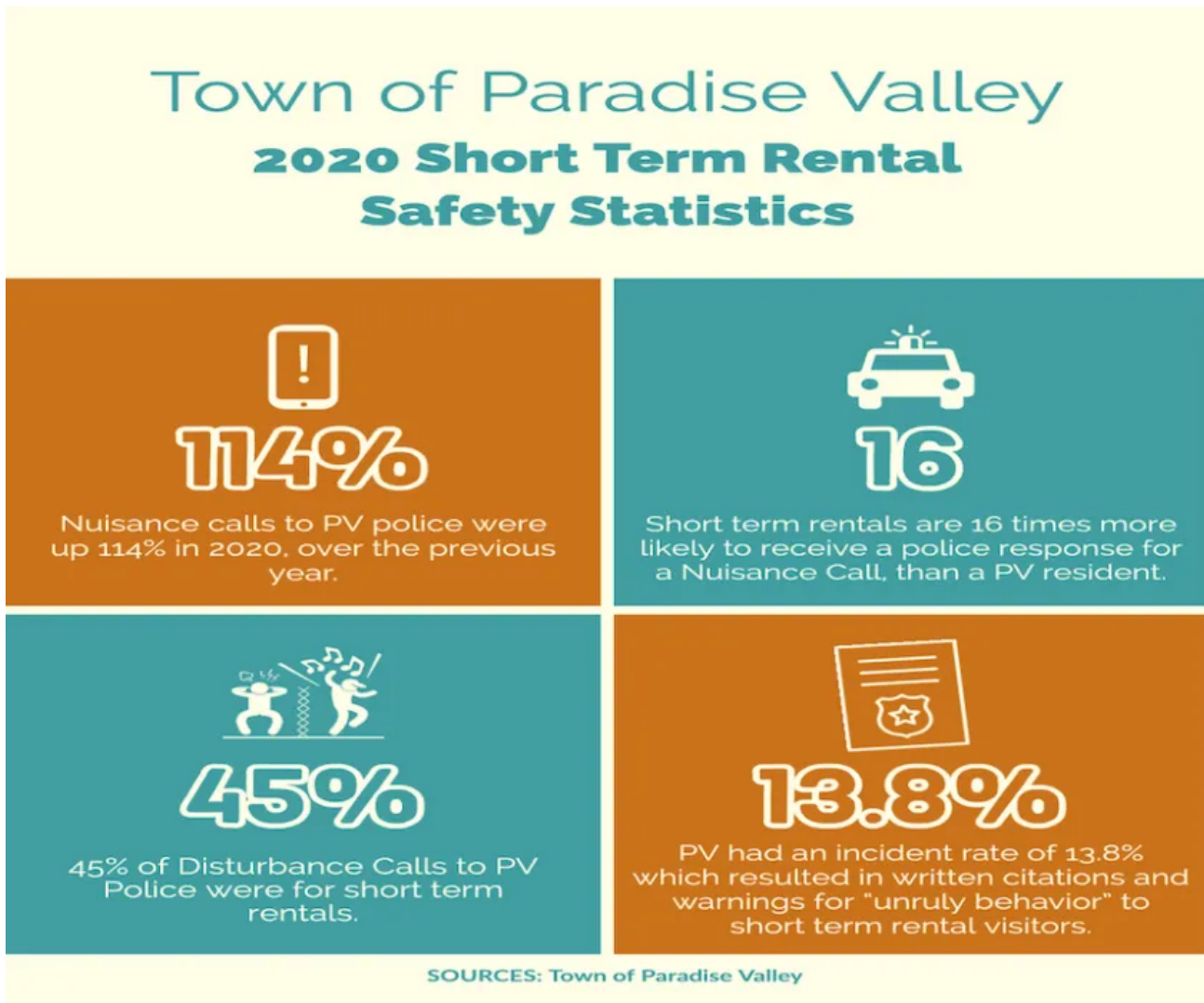
Ugly Facts about Short Term Rentals:

STRs CRUSH TAX REVENUE – STR room rates are less than half the rate for legitimate hotel rooms, so tax revenues are cut in half too – **Arizona loses money with every STR.**

SCOTTSDALE HAS MORE STR ROOMS THAN HOTEL ROOMS. Statewide there are 70% as many STR rooms as legitimate hotel rooms.

THE RICH GET RICHER – STRs make about 3x as much as long term rentals and the vast majority are investor owned (NOT Mom & Pop!) – So investors make HUGE returns while

ruining neighborhoods and crushing the affordability and availability of housing for Arizona residents.



READ: RECENT ARTICLES ON STRs

Wall St Journal – [“Airbnb Posts Steep Losses After Going Public”](#) – 2-26-21 – [Comments](#)

Wall St Journal – [“For These Retirees STR Bans Aren’t Just a Perk – They’re a Must”](#) – 2-25-21 – [Comments](#)

NY Times – [“Airbnb Is Driving Hosts Elsewhere”](#) – 2-21-21

Wall St Journal – [“Airbnb’s IPO Warning: Unhappy Neighbors Are Fighting Back”](#) – 12-9-20

=====

WATCH: VIDEOS ON SHORT TERM RENTALS IN ARIZONA

[ABOUT STRs IN AZ](#)

[WHAT CAN I DO?](#)

=====

STRs ARE HAZARDOUS TO YOUR HEALTH

Another out of control Short Term Rental Party House – When the guns came out there were 100 shots fired, 5 houses, 5 cars, 1 person hit. The area was a lovely residential cut-de-sac in Scottsdale. But Gov. Ducey’s failed SB 1350 law brought in unregulated, unsupervised, unrestricted **Short Term Rentals that literally SHOT UP THE NEIGHBORHOOD**. Now decent residents fear for their lives while transient Short Term Renters continue to run wild and destroy neighborhoods. 1350 has turned family neighborhoods into **WAR ZONES!** THIS IS INSANE!! Why is this tolerated? THE SAFETY OF CITIZENS SHOULD COME BEFORE PROFITS OF AIRBNB INVESTORS!! **When will Ducey end the madness of 1350 and make neighborhoods safe for residents again?!?!?**

[See Police Report](#)

[See Video 1 from CBS 5](#)

[See Video 2 from CBS 5](#)

NEIGHBORS NOT
NIGHTMARES
FIX SB 1350!!

Take a look at our Facebook page too!

[Go To Facebook Page](#)

This website was established to connect and **support Arizona Residents** in our efforts to preserve Residential Neighborhoods and protect them from the Invasion of Investor Owned, commercial hotels with absentee management known as Short Term Rentals (STRs), like **Airbnb, VRBO, Homeaway and others**.

Neighborhoods are for ***neighbors living in homes***, not transient strangers using unstaffed motels.

We just want quiet, safe neighborhoods again, along with the **zoning** we relied on when we bought or rented our homes.

=====

CONTACT YOUR LEGISLATORS!!

If you have complaints about Short Term Rentals (Airbnb, VRBO, etc.) in your area, send them to: **GOV. DOUG DUCEY** – Email: Engage@az.gov Phone: 602 542 4331 Mail: 1700 W. Washington St, Phoenix, AZ 85007

YOUR STATE LEGISLATORS:

[Find Your District](#)

[Find Your Legislator](#)

These are the people responsible for uncontrolled Short Term Rentals in Arizona. **THEY ARE THE ONLY ONES THAT CAN FIX IT.** Send them a complaint each and every time you have a disturbance, nuisance, threat or have the “quiet enjoyment” of your home affected by an STR or their transient guests. Send a complaint **EACH AND EVERY TIME** you are disturbed until Gov. Ducey and your legislators get the message and **FIX** the mess they created with SB 1350.

=====

There is a crucial difference between Home Sharing and Short Term Rentals. True **Home Sharing** is an actual resident sharing their actual residence with paying guests. We support this as compatible with residential areas. However, **Short Term Rentals** that are owned and operated for purely investment purposes with no resident and absentee management are clearly, blatantly commercial lodging operations, businesses that simply don’t belong in residential areas.

It is obvious and indisputable that short term **transient vacationers** have entirely different attitudes and behaviors than full time, permanent residents. Vacationers are looking for a

good time, **actual residents** have to get up and go to work in the morning. It's the difference between a "one night stand" and a committed relationship, which is why zoning laws have sensibly separated transients from residents for decades. The constant flow of "one night stands", overcrowded houses, parties, trash, noise, drugs and worse are a nuisance and a threat to Arizona residents in their own homes and neighborhoods.

WHO'S YOUR NEIGHBOR?

Click below to open the map and zoom in on STRs in your area. Click on the icon for address and owner info.

There are over 12,000 STRs in Maricopa County, we've only had time to log about 1,000 so far – So reality is **12 TIMES WORSE** than what's shown on the map.

[Go to STR Map](#)

Arizona is UNIQUE in the nation for having a STATE LAW, **SB 1350**, that stripped away long

established protections provided by local zoning and prohibits cities and towns from having rules and regulations that could deal with the nuisance of STRs. The state tore up the rules and left residents defenseless against the invasion of Short Term Rentals.

SB 1350 allows **UNLIMITED OCCUPANCY** in Short Term Rentals with no on-site management (100 people in a 3 bedroom house is perfectly legal!) and grants giant **tax loopholes** with immunity from audit for STR operators. SB 1350 also allows RV parks, homeless shelters and “rent by the hour” motels to open right next door to you, threatening your family’s safety, sanity and security.

Registered **sex offenders** visiting from out of state don’t have to inform Arizona authorities for 10 days. So SB 1350 opens the doors to **sexual predators** for anonymous short term stays at the Airbnb right next door to you and your family. With no notice, no on site supervision, no limit and no protection for you and your children. Shouldn’t Governor Ducey and the state legislature be protecting Arizona families from sexual predators instead of inviting them into family neighborhoods? STRs don’t belong in residential areas!

With no local zoning and no rules of course things are out of hand. As STRs proliferate uncontrolled, Party Houses are now turning into “Party Zones”. One jurisdiction in Arizona had a 114% increase in complaints on STRs. **45% of Police Department responses now relate to Short Term Rentals.** Why should taxpayers foot the bill while Airbnb profits by bringing these nuisance STRs into our neighborhoods?

It’s gotten so bad under SB 1350 that other groups are using Arizona as an example of “**what not to do**” – [CLICK HERE](#) to link to Barnstable Watch’s excellent website. (They’re on Cape Cod and facing a similar threat.)

Any net **tax benefit** from STRs is pure **fantasy**. SB 1350 was passed without an economic impact statement so it was just a wild, uninformed guess about what might happen. In reality, an actual resident pays more in taxes than an STR in the same home. Hotel room rates are about 3 times the rate per room for STRs, so “**bed taxes**” are **3 times higher when visitors stay in hotels instead of STRs**. Hotels pay commercial property taxes which are almost twice the residential rate STRs pay. STR visitors are far more likely to eat and drink

at “home”, killing revenues for bars, restaurants and Arizona’s Food & Beverage taxes. STRs lower population counts, decreasing the number of taxpayers and **increasing the burden on actual residents.**

Arizona is clearly far better off on taxes, jobs and quality of life with actual residents in homes and visitors in hotels and resorts. **There is a clear economic benefit to banning STRs.**

So Ducey’s “signature bill” 1350 destroys neighborhoods, kills hospitality and crushes tourist tax revenues all at the same time! How is this good governance? How is this good for Arizona?

Contrary to what Airbnb would have you believe, **it’s not about Mom & Pop** making extra income anymore. The vast majority of listings are **multi-property investment groups** that are rapidly consolidating and invading residential areas. Of the 25,000 STR listings currently in Arizona we estimate that most are controlled by around 5,000 investors. Why does the state give special treatment to 5,000 investors while their STRs ruin the quality of life for 7 million residents? Isn’t this a total sellout to special interests at the expense of Arizona residents?

It’s not about “innovation” or “technology” – It’s about **trashing established zoning** to put investor owned commercial “transient lodging” businesses in residential areas. This wholesale re-zoning of the entire state was never put to a general vote or passed by referendum. Nobody WANTS an Airbnb next door. Airbnb with its BILLION\$ in venture capital and army of lobbyists **stuffed this down our throats.**

This is a **NON-PARTISAN** issue affecting the quality of life for ALL Arizonans

Don't let Arizona politicians put Silicon Valley Billionaires and corporate investors ahead of the rights and sanity of their CITIZENS!

REINSTATE LOCAL ZONING TO CONTROL THE NUISANCE AND THREAT OF SHORT TERM RENTALS!!

CONTACT YOUR LEGISLATORS AND GOV DUCEY TO FIX SB 1350!!

WE SUPPORT

TRUE “HOME SHARING” – That is, an actual resident sharing their actual home with paying guests. If it’s not your home it’s not sharing, it’s an investment property. If there’s no actual resident it’s a business and belongs in a commercial area.

REINSTATING SINGLE FAMILY ZONING WITH LOCAL CONTROL – With SB 1350 the state legislature “pre-empted” local single family zoning and gave special treatment to STRs statewide. One size does not fit all. Local communities should be able to determine their own zoning and regulations for STRs. Communities should be able to maximize quality of life for residents instead of maximizing profits for Airbnb!

SHORT TERM RENTALS (STRs) IN APPROPRIATE LOCATIONS – We support STRs when located in commercial areas. These investor owned hotels with no on-site management are obviously commercial “transient lodging” businesses that don’t belong in residential neighborhoods. You need a resident to be residential!

COMMON SENSE REGULATIONS – There is NO LIMIT on how many people can occupy an STR and local regulations are prohibited on occupancy, use or length of stay. The situation is totally out of hand. 99% of all U.S. families have 6 or fewer members. STRs should be limited to 6 occupants in single family areas. Limits on STR use and behavior should be allowed at the local level.

WE OPPOSE SHORT TERM RENTALS (STRs):

That are investor owned, commercial hotels in residential areas with:

- NO actual RESIDENT and NO neighbor – You need a resident to be residential!
- NO LIMITS on OCCUPANCY – 100 people in a 2 Bedroom house makes no sense but is perfectly legal
- NO MINIMUM STAY – “Rent by the hour” or constant turnover is perfectly legal for STRs in residential areas with long term residents and families.
- NO ON-SITE MANAGEMENT – No limit on occupancy, constant turnover and No On-Site management – THIS DOESN'T BELONG IN OUR RESIDENTIAL NEIGHBORHOODS!

HELP FIX SB 1350!! TAKE ACTION!!

Contact your state legislators and local elected officials and tell them to:

- Fix Arizona State Law SB 1350, also known as “The Airbnb Law”
- Bring single family zoning, limits on occupancy and limits on what uses are allowed in residential areas back to the local level.
- Allow local communities to regulate STRs according to their local needs and standards.
- Make residential rentals of less than 30 days “commercial” unless it’s the primary residence of the “host”.

Contact Your State Legislators!!

Clicking below takes you to AZleg.gov, the website for Arizona’s State Legislature. You can find your Senator and 2 Representatives, their address, phone and email information. Let all 3 know by phone, mail and email they need to “Fix The Airbnb Law”! You can even send them an email directly from the site.

FIND YOUR DISTRICT – If you don’t know your district click here:

[FIND YOUR DISTRICT](#)

LEGISLATOR CONTACT INFO – If you know your district click here for email and phone info for your State Senator and 2 Representatives. Contact all 3 of them by clicking on their email or giving them a call!

[LEGISLATOR CONTACT INFO](#)

Contact Governor Ducey!!

Click to go to the Governor's website, send him an email about bringing back zoning to protect the safety and sanity of residential areas!

[EMAIL GOV. DUCEY](#)

More You Can Do:

- Talk to your friends and neighbors, encourage them to get involved and contact their legislators
- Request a “Neighbors Not Nightmares” yard sign (click below) – Show your neighbors and the STRs where you stand!
- Raise awareness through social media, Facebook, Twitter, Next Door, letters to the Editor, etc.
- [SUBSCRIBE](#) so we can notify you of pending legislation and events affecting STRs
- Send us your stories and pictures of STR problems that we can post and send to legislators

GET A YARD SIGN:

[Yard Sign Info](#)

=====

Instead of “rolling over” for special interests and giving away the store like Arizona, here is how other communities that respect their residents, neighborhoods and quality of life have handled Short Term Rentals:

Tahoe – Enjoy winter skiing, summer swimming, and golf, but not in a residential zone: short-term transient rentals are banned except for commercial areas.

Palm Springs – A tourist favorite with over \$7 billion in annual spending, it’s meticulous about zoning and occupancy. Two bedrooms, four adults max.

Palm Desert – This great destination in California’s Coachella Valley has golf courses, great shops, and forbids short-term rentals in residential zones.

Denver – With 31 million visitors a year, Denver bans investor Airbnbs. Rental licenses are denied or revoked if it’s found the activity hurts the neighborhood.

The Hamptons – These diverse villages ban investor-owned transient rentals. Primary

residences only, no rentals under two weeks, four unrelated adults max.

Santa Monica – In this iconic community, you rent your actual home only. Airbnb and Expedia sued. U.S. Court of Appeals just upheld the absentee investor ban.

Miami Beach – Regulations include a mandatory sex offender registry check. Airbnb filed and settled a lawsuit, paid Miami's \$380,000 in attorney fees.

Daytona Beach – Airbnb-type rentals allowed only in zones where hotels, motels, and bed and breakfasts are. After lawsuits and appeals, the rule was upheld.

New York – State law: no investor-owned rentals, sites must delete "hosts" with multiple properties. Airbnb sued and lost. NYC alone has 62 million tourists a year.

London – Seeing "hollowed out communities," London enforces a 90-day-per-year limit on Airbnb-type rentals. Absentee investor-owners are banned.

NYC via Jersey City – New York said "no," so investors invaded here for easy NYC access. Voters revolted. Now, rent the home you live in only, be present with guests.

San Francisco – Airbnb HQ city forbids absentee investors. Rules: live in the home at least 275 nights a year, be present with renters, rent 90 days a year max.

Learn More by Clicking on the Topics Below:

[SUMMARY ISSUES](#)

Here are the basic issues surrounding STRs in Arizona

Download a FACT SHEET – [CLICK HERE](#)

WHO WE ARE

Just Arizona residents and homeowners worried about our neighborhoods.

HOME SHARING vs SHORT TERM RENTAL

They are completely different

RESIDENTS vs TRANSIENTS

Literally the difference between “one night stands” and committed relationships

STRs KILL HOSPITALITY

Hotels have to play by the rules – STRs get special treatment and “free rides”

STRs KILL JOBS

Every STR bedroom kills another Arizona Hospitality Job

ZONING

Why doesn't Zoning protect us from having unmanaged commercial hotels in single family residential areas? How can this happen?

[VOLUNTARY COLLECTION AGREEMENTS](#)

It's about the money. The secret deals that sold out the entire state.

[TAX ISSUES](#) – STRs get special deals, giant loopholes and can't be audited. Every taxpayer in Arizona should be outraged.

[ABOUT SB 1350](#) – The “Airbnb Law” passed in 2016 that stripped away single family zoning, allowed STRs with unlimited occupancy to open anywhere and prohibited towns and cities from regulating them.

WHAT TO DO IF AN STR OPENS NEXT DOOR – Some basic steps to deal with the nuisance and threat of STRs. Most important: Call the police. Contact your legislators.

QUOTES – What people are saying about STRs in their neighborhood.

FUN FACTS ABOUT STRs – Corporate consolidation driving out Mom & Pops – Nuisance complaints up 114% since last year – and more!

Neighbors Not Nightmares / Proudly powered by WordPress

FLORIDA COMMUNITY ASSOCIATIONS VERSUS AIRBNB AND VRBO IN FLORIDA

📅 Vol. 91, No. 2 February 2017 Pg 16 👤 William P. Sklar and Jerry C. Edwards

📁 Real Property, Probate and Trust Law

The internet has spawned yet another market disrupting concept. Airbnb and VRBO, relying in part on “I own it and can use it as I wish,” a traditional real property belief, collide in numerous battlegrounds across the state with another traditional belief, the ability of communities to restrict perceived disruptive uses. Florida law has consistently upheld community covenants and restrictions regulating the level of occupancy and limiting an owner’s ability to transfer a condominium unit. Most often found in a declaration of condominium or covenants, conditions, and restrictions (CCR), leasing restrictions, leasing approval requirements, and, more often than not, restrictions on the frequency and duration of leases and guest occupancy of units reflect a general discord existing between resident owners and nonresident owners and their lessees because of what is perceived as differing interests in the use and maintenance of property. As a result, many communities have attempted to strengthen their ability to control occupancy of condominium units by promulgating regulations to further restrict, if not completely prohibit, an owner’s ability to lease or rent that owner’s parcel within an association-governed community.¹ These restrictions have been adopted by either boards of directors exercising their rulemaking authority or by parcel owners amending their CCRs and declarations.

Restrictions on leasing units, whether contained in the original declaration or in subsequent declaration amendments, are reasonable indirect restraints on alienation, which are not violative of the unit owner rights that are subject to the restrictions.²

Unfortunately, associations in nonresort communities are now administratively burdened to undertake resort or hotel-type burdens as a result of the frequency of such reservations and implementation of regulations seeking to protect the community, its residents, and its property. The convergence of an association’s right to regulate unit occupancy and the frequent short-term rentals at the center of the business models of Airbnb, Inc., and Vacation Rentals by Owner (VRBO) squarely presents concerns for community associations seeking to enforce residency and occupancy restrictions. Those who oppose Airbnb and VRBO can utilize zoning laws, restrictive covenants, land use ordinances, and tax laws to target these companies and others that share a similar business model. Notwithstanding these methodologies, F.S. §509.032(7)(b) (2016) provides that a local law, ordinance, or regulation, adopted after June 1, 2011, may not prohibit vacation rentals or regulate the

duration or frequency of rental of vacation rentals. This restricts the ability of local governments to regulate short-term rentals. However, Florida's First District Court of Appeal in *Bennett v. Walton County*, 174 So. 3d 386 (Fla. 1st DCA 2015), presented a means to potentially and significantly legally impair the Airbnb and VRBO business model.

The Business Models of Airbnb and VRBO

Airbnb collects money by providing a matching service online for property owners and short-term renters.³ Airbnb generally does not own or operate the properties.⁴ Rather, Airbnb collects a fee on each transaction for acting as an intermediary.⁵ Airbnb offloads responsibility for cleaning, maintenance, repairs, insurance, and compliance with regulations and laws to the property owners who act as independent contractors.⁶ What are Airbnb's responsibilities? It handles advertising, owner-renter communications, booking, and payment processing in exchange for commissions from both the renters and the property owners.⁷

VRBO operates its business somewhat similarly to Airbnb. VRBO also acts as an intermediary between property owners and short-term renters.⁸ However, VRBO acts similarly to the classified pages in a newspaper by allowing property owners to advertise on its site for a flat fee, rather than collecting a commission and involving itself in the transaction like Airbnb.⁹ VRBO also only lists entire homes whereas Airbnb lists anything from entire homes to single rooms.¹⁰ That said, Airbnb's and VRBO's business models are both essentially built around acting as middlemen between property owners and short-term renters.

The Potential Implication of the *Bennett v. Walton County* Interpretation of Zoning Laws

The Bennetts rented out beachfront property for weddings and other events approximately 30 times in 2009, 13 times in 2010, and 20 times in 2011 and 2012.¹¹ The property was in a residential preservation area under Walton County's Land Development Code,¹² which meant that nonresidential uses were not allowed.¹³ Complaints from neighbors caused Walton County to investigate and bring enforcement proceedings against the Bennetts for violating the code, since the weddings and events amounted to prohibited nonresidential uses.¹⁴ After initial uncertainty over how many events were enough to constitute a prohibited nonresidential use, Walton County eventually decided that any event held by a renter on the Bennetts' property would result in a code violation.¹⁵ Following this, the Bennetts' sued, alleging substantive due process violations under the U.S. Constitution and the Florida Constitution.¹⁶

The First District Court of Appeal held that the code's prohibition on nonresidential uses was not unconstitutionally ambiguous on its face. The code conveyed a clear and sufficient standard as applied to the Bennetts, and the county's enforcement of the code was not arbitrary.¹⁷ The court's focus was on the frequency and intensity of the Bennetts' rentals.¹⁸ On the topic of frequency, the court explained that "[t]he rate and scope of the Lawn's rental usage — up to 30 weddings per year on the Bennetts' lot — isn't typical residential usage as measured by common practice."¹⁹ Intensity, the court meant that the events often extended for days, involved drinking, and were raucous enough for neighbors to complain and for the Bennetts' to hire an off-duty police officer to remain on the site for the events.²⁰ In fact, one neighbor complained of guests at the events urinating under his building, pulling the breakers on his air conditioning unit, and even giving him "one finger salutes."²¹

This case materially affects companies, such as Airbnb and VRBO, that rely on residential property owners frequently renting their property to short-term renters. The first issue presented is the court's focus on frequency. Property owners who use Airbnb often rent out their properties frequently for short periods of time. Additionally, the court explained that the Bennetts essentially introduced a wedding event business into their residential preservation area-zoned neighborhood, attracting renters who might otherwise rent churches, meeting halls, parks, country clubs, or other venues to stage their events.²² Airbnb and VRBO perform a similar function by depending on short-term room or property rentals.

However, the court focused on facts that are distinguishable from Airbnb's and VRBO's business models. The court discussed the intensity of the events, which sometimes affected the quietude of the development. Airbnb and VRBO act as intermediaries between renters and property owners, but their businesses do not book weddings or other events. Likewise, the court focused on the fact that people were renting the property for events, rather than simply for residential purposes. Short-term renters from Airbnb and VRBO generally use properties in a manner that is more consistent with what a court would consider residential purposes. Thus, *Bennett* is arguably distinguishable from the challenges that Airbnb and VRBO would face.

In another zoning case, the First Judicial Circuit Court of Florida struck down a directive of the Escambia County Board of County Commissioners that sought to bar property owners in residential neighborhoods from offering their homes for short-term rental.²³ The trial judge found that F.S. §509.032(7)(b) preempted the county's land development code.²⁴

This trial court decision parallels Florida Attorney General Pam Bondi's explanation that "zoning may not be used to prohibit vacation rentals in a particular area where residential use is otherwise allowed."²⁵

Ultimately, there is a risk that courts will follow the reasoning of the First District Court of Appeal in *Bennett* and apply a frequency-based test to determine whether a use qualifies as residential. If that occurs, a frequency-based test will pose a significant issue for Airbnb, VRBO, and other similar businesses. However, a frequency-based test could result in the impairment of rental property owners who do not use Airbnb or VRBO and affect the short-term rental market as a whole, which would have major economic repercussions. That said, courts could also choose to follow the decision of the First Judicial Circuit Court and not allow counties to use zoning laws to circumvent limitations imposed by state statutory law.

The Applicability of Restrictive Covenants to Airbnb and VRBO

In addition to zoning laws, Airbnb and VRBO must be mindful of restrictive covenants and community association regulations prohibiting nonresidential use or otherwise regulating the duration and frequency of rentals. Florida courts have, in few instances, ruled on the topic of restrictive covenants. These opinions are instructive on how a trial court may analyze a restrictive covenant prohibiting nonresidential use.

In *Moss v. Inverness Highlands S. & W. Civic Ass'n, Inc.*, 521 So. 2d 359 (Fla. 5th DCA 1988), the lots in the subdivision were burdened by a restrictive covenant.²⁶ The court held that the property owner opening her home to "these elderly folks" who pay room and board did not violate that restrictive covenant.²⁷ The court reasoned that the act of charging elderly people for using the lot for "purely residential purposes" did not make the use nonresidential in nature.²⁸ Notably, in a manner that may have been a precursor to *Bennett*, and demonstrating line drawing to protect the residential nature of a community, the *Moss* opinion continued, albeit in dicta, that if there was a nonresidential use in conjunction with residential occupancy, "then we would agree that the restriction would be violated."²⁹

In a second opinion dealing with different restrictive covenants, *Robins v. Walter*, 670 So. 2d 971 (Fla. 1st DCA 1995), the court held that a bed and breakfast inn is a business or commercial use of property, which violated the restrictive covenants.³⁰ The property owner built the house with five separate bedrooms each with a separate entrance to the outside, and the home was marketed as a bed and breakfast.³¹ *Robins* distinguished *Moss* on the grounds that in *Moss* the elderly patrons were intended to be permanent residents.³² The *Robins* court focused on the short-term nature of the rentals in its reasoning.³³

Robins implicitly encourages a frequency-based test. The use of the property in *Robins* was similar to the use of many properties listed on Airbnb. An argument may be made that *Robins* is binding on courts interpreting the treatment of restrictive covenants prohibiting nonresidential uses. If that is true, when combined with the *Bennett* case in communities with frequency-based restrictions, properties rented through Airbnb and VRBO may be subject to a frequency-based test regarding their restrictive covenants.

Opinions from other jurisdictions are also instructive on how to construe this issue. In *Barrickman v. Wells*, 2013-CA-001578-MR, 2015 WL 2357179 (Ky. Ct. App. 2015), a Kentucky court presided over a case dealing with the issue of whether property owners violated a restrictive covenant of a community association prohibiting “commercial use” when the owners rented their house frequently through VRBO.³⁴ The *Barrickman* court affirmed the trial court’s finding that no restriction expressly prevented the property owner from renting his home to a third party.³⁵ The restriction did not define “commercial use,” which appeared ambiguous under Kentucky law, thus, the court inquired into the drafter’s intent and concluded that if the association intended to prohibit leasing then the association could have done so, but it did not do so.³⁶ A dissenting judge, however, argued that the frequency and short duration of the stays made the use of the home analogous to a hotel or motel; thus, it was commercial use.³⁷

VRBO’s model was directly at issue in a Colorado case, *Houston v. Wilson Mesa Ranch Homeowners Ass’n, Inc.*, 360 P.3d 255 (Colo. App. 2015), which held that the property owners did not violate the community association’s restrictive covenant’s requirements that the lots be used as “residential tracts” and shall not “ever be occupied or used for any commercial or business purpose nor for any noxious activity and nothing shall be done...on any of said lands which is a nuisance or might become a nuisance to the...owners of any of said lands.”³⁸ In response to the owners’ advertising on VRBO and rentals, the association’s board of directors adopted a 30-day minimum rental period enforced with \$500 fines.³⁹

Acknowledging the novel issue for the state, the court carefully identified the polestars for decisionmaking, the purpose or intent of the restriction, and if not clear on its face, “ambiguity or doubt” results in “unrestricted use of property.”⁴⁰ The court explained that temporary or short-term use of a residence does not preclude that use from being residential because “their homes, as distinguished from one which is used for commercial or business purposes[,]”⁴¹ are still occupied, even if rental income is realized.⁴² Similarly, the receipt of income does not transform residential use to “commercial.”⁴³ The court focused on the fact that the renters continued to use the property for living purposes.⁴⁴ Thus, the court explicitly concluded that short-term vacation rentals were not prohibited by the restrictive covenant at issue.⁴⁵

The *Houston* court rejected the application of a frequency-based test by holding the board adopted 30-day restriction to be not enforceable. The board's asserted justification of clarifying the covenants was found insufficient as the covenants, as held in the court's analysis, did not prohibit short-term rentals.⁴⁶

One interpretation that was common to both *Houston* and *Barrickman* was the court's narrow construction of restrictive covenants. These courts' predicates are similar to Florida's jurisprudence narrowly construing real property covenants.⁴⁷ Thus, if Florida community associations similarly seek to construe restrictive leasing covenants, the associations must be specific in their prohibition of short-term rentals.

Florida courts appear to be leaning in the opposite direction, despite not having addressed VRBO or Airbnb, directly. *Robins* and *Bennett* both stand for the potential of a frequency-based test in Florida to evaluate whether a use is nonresidential or residential in type; however, *Moss* undermines the argument for a frequency-based test. In fact, the reasoning and holding in *Moss* are similar to the reasoning and holding in *Houston*, the Colorado case. Both courts determined that receipt of income alone does not transform residential use to commercial use. The courts preferred a test focused on the nature of the use, instead of its frequency.

If a Florida court were to apply a frequency-based test, restrictions prohibiting nonresidential use would prove to be an effective tool to regulate or prohibit Airbnb and VRBO. There is a risk, however, that rental property owners who do not use Airbnb or other similar businesses could become collateral damage under that interpretation. Community associations could utilize a frequency-based test to prevent temporary rentals in their neighborhoods, in addition to using nuisance-type restrictive covenants to address and prevent the types of activities deemed offensive, such as those in *Bennett*.⁴⁸ That all said, the Florida Legislature has addressed frequency-based restrictions to some degree with F.S. §718.110(13) (2016).⁴⁹ The legislature mandated that amendments regulating the duration or frequency of rentals only apply to unit owners who approve the amendment or purchase their units after the effective date of that amendment.⁵⁰ Thus, the Florida Legislature has enacted laws protecting property owners from frequency-based restrictions, so restraint should be exercised by courts when faced with frequency-based or duration-based tests for determining residential use.

Local Government Ordinances Targeting Airbnb, VRBO, and Similar Businesses

Local governments and state legislatures throughout America are currently taking steps to regulate Airbnb, VRBO, and other businesses that utilize the same business model.⁵¹ These regulations generally take the form of restrictions on short-term rentals and the imposition

of taxes. Florida has imposed some of these regulations on the state and local level. However, Florida also has a statute limiting the ability of local governments to regulate short-term rentals in certain areas.

F.S. §509.032(7)(b) restricts local laws, ordinances, and regulations from prohibiting vacation rentals or regulating the duration or frequency of vacation rentals. However, that statute does not apply to any local laws, ordinances, or regulations adopted on or before June 1, 2011.⁵² This statute formerly prohibited local laws, ordinances, and regulations from restricting the use of vacation rentals, prohibiting vacation rentals, or regulating vacation rentals based solely on their classification, use, or occupancy, prior to being amended in 2014.⁵³ Essentially, the statute previously barred local governments from regulating short-term rentals, except for regulations adopted on or before June 1, 2011. The legislature amended the statute in 2014, and it now only bars local governments from prohibiting short-term rentals entirely or regulating the frequency or duration of short-term rentals. Under the current statute, for example, a local government cannot create an ordinance that prohibits property owners from renting their property more than 10 times in a year or mandates that rentals must be for at least seven days.

Despite the statute, local governments in Florida have found methods to regulate short-term rentals. For example, the City of Miami Beach code bans short-term rentals in all single-family homes and only allows short-term rentals in certain zoning districts.⁵⁴ Ft. Lauderdale recently enacted an ordinance requiring all vacation rentals, except timeshares, to officially register their property with the city and pass a maintenance and life safety inspection.⁵⁵ Flagler County also enacted comprehensive short-term rental regulations ranging from the maximum number of occupants to the minimum number of parking spaces and garbage containers needed per guest.⁵⁶ Additionally, other local governments passed ordinances similar to the ones discussed above, such as Anna Maria.⁵⁷

Property owners have challenged some of these ordinances. For example, two property owners challenged the aforementioned Flagler County ordinance on the grounds that state law preempted the ordinance, the ordinance violated the Equal Protection Clause of the Florida Constitution, and the ordinance violated the privacy rights of the property owners.⁵⁸ The trial judge upheld the ordinance in its entirety but found that the government could not apply the ordinance to contracts entered into before its adoption.⁵⁹ In *30 Cinnamon Beach Way, LLC v. Flagler County*, No. 5D15-2296, 2016 WL 194800 (Fla. 5th DCA Jan. 12, 2016), the Fifth District Court of Appeal affirmed, without opinion, the holding of the trial court.⁶⁰

Additionally, the imposition of taxes by state and local governments is a significant issue for Airbnb, VRBO, and similar businesses. Under F.S. §212.03(1)(a) (West 2016), Florida collects a six percent “transient rental tax” for rentals of less than six months, and under F.S. §§125.0104(3)(a)1-2, Florida counties may also collect a “tourist development tax” for rentals of less than six months. When combined, these taxes can exceed 11 percent of the listed price.⁶¹ Airbnb agreed to pay these occupancy taxes commencing in December 1, 2015.⁶² Prior to that time, the counties struggled to have Airbnb comply with the taxes, and Palm Beach County even filed suit to force Airbnb and other similar companies to pay the “tourist development tax” that the county claimed they owed.⁶³ Other businesses with models similar to Airbnb must keep these tax implications in mind as they move forward with business operations in Florida. These businesses face the same sort of tax implications that traditional hotel businesses do, which is consistent with the service they are providing.

Looking toward the future, there is still the possibility of major change on the horizon. Members of the legislature have put forward bills, in both 2015 and 2016, seeking to amend F.S. §509.032(7)(b) to allow local governments to regulate the duration and frequency of vacation rentals.⁶⁴ This will continue to be a hotly contested issue into the future. If the legislature amends the statute to allow local governments to regulate the duration and frequency of vacation rentals, the business models of Airbnb, VRBO, and similar businesses could suffer severe setbacks in Florida.

Conclusion

The *Bennett* decision poses significant questions as to how courts will proceed in interpreting what constitutes residential use. In the realm of zoning laws, ordinances, and restrictive covenants, courts should interpret residential use consistently with the limitations placed on local governments and community associations under F.S. §509.032(7)(b) and F.S. §718.110(13). Based on these statutes, courts should be reluctant to adopt a frequency-based test for determining whether a use is residential in nature. Colorado’s approach in *Houston* provides a useful guide for how Florida courts can interpret residential use consistently with the free use of property. Adopting a frequency-based test for residential use could lead to unintended consequences and have a far-reaching economic impact on short-term rentals in Florida. A policy shift of that magnitude is likely best left to the legislature, especially when there exists statutes reflecting the legislature’s wish to limit local governments’ and community associations’ regulation of short-term rentals.

¹ See, e.g., *Beachwood Villas Condominium v. Poor*, 448 So. 2d 1143 (Fla. 4th DCA 1984); *Seagate Condominium Ass'n, Inc. v. Duffy*, 330 So. 2d 484 (Fla. 4th DCA 1976); *Kroop v. Caravelle Condominium, Inc.*, 323 So. 2d 307 (Fla. 3d DCA 1975).

² See *Woodside Village Condominium Ass'n, Inc.*, 806 So. 2d 452 (Fla. 2002).

³ Jeffrey Pfeffer, *How to Make a Fortune Without 'Doing' Anything: The Uber, Airbnb Store, Fortune* (Nov. 24, 2014), available at <http://fortune.com/2014/11/24/uber-airbnb-sharing-economy-fallacy/>.

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ Carolyn Said, *'Airbnb Law' Would Make Business Harder for Airbnb's Chief Rival*, SF Gate (Oct. 10, 2014), available at <http://www.sfgate.com/bayarea/article/Airbnb-law-would-make-business-harder-for-5812918.php>.

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Bennett*, 174 So. 3d at 389.

¹² See *id.* at 387.

¹³ *Id.* at 388.

¹⁴ *Id.* at 392-93 (Makar, J., concurring in part, dissenting in part).

¹⁵ *Id.* at 393.

¹⁶ *Id.* at 394.

¹⁷ *Id.* at 388-90 (majority opinion).

¹⁸ *Id.* at 389.

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.* at 392 (Makar, J., concurring in part, dissenting in part).

²² *Id.* at 389 (majority opinion).

²³ Order on Appeal, *Hostetter v. Escambia Cty., Fla.*, 2015-CA-1383 (J) at 1-4 (Fla. 1st Cir. Dec. 16, 2015); Will Isern, *Escambia Loses Short Term Rentals Case*, Pensacola News J. (Dec. 21, 2015), available at <http://www.pnj.com/story/news/2015/12/21/escambia-loses-short-term-rentals-case/77695078/>.

²⁴ Order on Appeal, *Hostetter v. Escambia Cty., Fla.*, 2015-CA-1383 (J) at 3 (1st Cir. Dec. 16, 2015).

²⁵ Pam Bondi, Florida Office of the Attorney General, Advisory Legal Opinion, AGO 2014-09 (Nov. 13, 2014), available at <http://www.myfloridalegal.com/ago.nsf/Opinions/5DFB7F27FB483C4685257D900050D65E>.

²⁶ The restrictive covenant stated: "All lots shall be used for residential purposes only." *Moss*, 521 So. 2d at 359.

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Robins*, 670 So. 2d at 974. (The relevant restrictive covenants stated: "2. No structure shall be erected, altered, placed, or permitted to remain on any residential building lot *other than one detached single family dwelling unit* with attached or detached garage, with quarters for domestics attached to the garage. 3. *No structure of any said lot shall be used for business or commercial purposes* provided, however, the renting of the premises in whole or in part shall not be construed to be a business or commercial operation....6. No *business* shall be permitted or maintained on any lot or lots except lot 16-A, 17, 18, 19 and 20 in Block B, lots 1, 2, 14 and 15 in Block D, and lots 1, 2 and 3 in Block F." *Id.* at 973 (emphasis added)).

³¹ *Id.* at 973.

³² See *id.* at 975. (The court in *Robins* also stated: “The fifth district compares the facility to the leasing or renting of a residence and specifically notes that the facility in that case did not provide overnight accommodations.”). *Id.* *Robins* actually misstated the facts in *Moss* because the facility in *Moss* did provide overnight accommodations to the elderly patrons who resided there. See *Moss v. Inverness Highlands S. & W. Civic Ass’n, Inc.*, 521 So. 2d 359, 359 (Fla. 5th DCA 1988).

³³ *Robins*, 670 So. 2d at 975.

³⁴ See *Barrickman*, 2015 WL 2357179 at *1 (“Restriction #6 in the Green Creek Estates’ Declaration of Protective Covenants and Restrictions prohibits ‘commercial use’ of property.”).

³⁵ *Id.* at *2.

³⁶ *Id.*

³⁷ See *id.* at *6 (Vanmeter, J., dissenting). See also *Hyatt v. Court*, 2008-CA-001474-MR, 2009 WL 2633659 at *4 (Ky. Ct. App. 2009) (explaining that “it is not what the tenants do to occupy their time while on the property that is forbidden, it is the fact that the property is being held out for remuneration in much the same manner as a hotel or motel that is restricted” in a case that dealt with a restrictive covenant barring commercial use); *Vonderhaar v. Lakeside Place Homeowners Ass’n, Inc.*, 2012-CA-002193-MR, 2014 WL 3887913 at *4 (Ky. Ct. App. 2014) (using the exact language from *Hyatt* while analyzing whether the property owner violated the community association’s restrictive covenant prohibiting business or commercial use).

³⁸ *Houston*, 360 P.3d at 256.

³⁹ *Id.*

⁴⁰ *Id.* at 257.

⁴¹ *Id.* at 258.

⁴² *Id.* at 259.

⁴³ *Id.* at 260.

⁴⁴ *Id.* at 259.

⁴⁵ *Id.* at 260.

⁴⁶ *Id.* at 261.

⁴⁷ See, e.g., *Eckerd Corp. v. Corners Grp., Inc.*, 786 So. 2d 588, 591 (Fla. 5th DCA 2000) (“[R]estrictive covenants should be narrowly construed in favor of the free transferability of property....”); *Robins*, 670 So. 2d at 974 (Fla. 1st DCA 1995) (“[W]e are aware that restrictive covenants should be narrowly construed....”); *Brower v. Hubbard*, 643 So. 2d 28, 29 (Fla. 4th DCA 1994) (“[R]estrictive covenants should be narrowly construed in favor of the free transferability of property....”).

⁴⁸ For a discussion of the offensive activities in *Bennett*, see note 21 and the accompanying discussion.

⁴⁹ The statute states: “An amendment prohibiting unit owners from renting their units or altering the duration of the rental term or specifying or limiting the number of times unit owners are entitled to rent their units during a specified period applies only to unit owners who consent to the amendment and unit owners who acquire title to their units after the effective date of that amendment.” *Id.*

⁵⁰ *Id.*

⁵¹ See, e.g., Austin, Tex., Land Dev. Code §25-2-950 (2016) (discontinuing short-term rentals for properties when the owner does not live on-site by April 1, 2022, at latest); Virginia Beach, Va., Code §35-252 (2016) (assessing a tax on short-term rental property owners and defining “short-term rental property”).

⁵² *Id.*

⁵³ Fla. Stat. §509.032(7)(b) (2012).

⁵⁴ Miami Beach, Fla., Code §142-905(b)(5) (2016) (banning rentals of less than six months and one day in single-family homes); Miami Beach, Fla., Code §142-1111(b) (2016) (allowing for short-term rentals in certain zoning districts if the procedure of the ordinance is followed); Katherine Kallergis, *How is Miami Dealing with Airbnb’s Growth?*, Real Deal (May 5, 2016), available at <http://therealdeal.com/miami/2016/05/05/how-is-miami-dealing-with-airbnbs-growth/>.

⁵⁵ Fort Lauderdale, Fla., Code §§15-272–279 (2016); Hortense Leon, *Airbnb Spreading in South Florida — with Mixed Response*, Real Deal (Feb. 11, 2016), available at <http://therealdeal.com/miami/2016/02/11/airbnb-spreading-in-south-florida-with-mixed-response/>.

⁵⁶ Flagler Cty., Fla., Code §3.06.14. (2016); *Ending Long Fight, County Approves Short-Term Rental Regulations–With Grandfather Clause*, FlagerLive.com (Feb. 19, 2015), <http://flaglerlive.com/75159/short-term-rentals-ordinance-flagler/>.

⁵⁷ Anna Maria, Fla., Code §§108-21–108-43 (2016); Amaris Castillo, *Anna Maria Officials Unanimously Pass Vacation Rental Ordinance*, Bradenton Herald (Apr. 10, 2015), available at <http://www.bradenton.com/news/business/article34874895.html>.

⁵⁸ Verified Compl. For Decl. & Inj. Relief, *30 Cinnamon Beach Way, LLC v. Flagler County*, 2015 CA 000167 at 13-35 (7th Cir. Jun. 1, 2015). See also Tony Holt, *Vacation Rental Owners File Lawsuit Against Flagler County*, Daytona Beach News-Journal (Mar. 6, 2015), available at <http://www.news-journalonline.com/news/20150306/vacation-rental-owners-file-lawsuit-against-flagler-county>.

⁵⁹ Order on Pls.' Mot. For Prelim. Inj., *30 Cinnamon Beach Way, LLC v. Flagler County*, 2015 CA 000167 at 21-22 (7th Cir. Jun. 1, 2015); Jonathan Simmons, *County's Vacation Rental Ordinance Passes Legal Challenge*, Palm Coast Observer (Jun. 2, 2015), available at <http://www.palmcoastobserver.com/article/countys-vacation-rental-ordinance-passes-legal-challenge>.

⁶⁰ *30 Cinnamon Beach Way*, 2016 WL 194800 at *1.

⁶¹ See Mitch Perry, *Airbnb to Start Collecting Florida Tourist Taxes Beginning Dec. 1*, Florida Politics (Nov. 18, 2015), available at <http://floridapolitics.com/archives/194890-airbnb-to-start-collecting-florida-tourist-taxes-beginning-december-1>.

⁶² *Id.*

⁶³ *Id.* See also *Compl., Gannon v. Airbnb, Inc.*, 2014 CA 000428 at 1-12 (15th Cir. Jan. 13, 2014).

⁶⁴ Paul S. Figg, *The Fight Over Vacation Rentals: Florida's Continuing Struggle to Adapt to the Sharing Economy*, Lexology (Dec. 8, 2015), available at <http://www.lexology.com/library/detail.aspx?g=96f989c0-9174-449b-8799-cba40f8c93f1>.

William P. Sklar is of counsel at Carlton Fields. He is board certified in real estate law, a fellow of the American College of Real Estate Lawyers, an adjunct professor of law on the University of Miami's Real Estate Development LLM faculty, and director of the Boyer Institute on Condominium and Cluster Development.

Jerry C. Edwards is a third-year law student at the University of Florida Levin College of Law.

This column is submitted on behalf of the Real Property, Probate and Trust Law Section, Deborah Packer Goodall, chair, and Doug Christy and Jeff Goethe, editors.

 **Real Property, Probate and Trust Law**

[◀◀ Newer Column](#)

[Older Column ▶▶](#)

Error 503 Backend fetch failed

Backend fetch failed

Guru Meditation:

XID: 69116581

Varnish cache server



Miami Herald



ADVERTISEMENT

TOURISM & CRUISES

Why Airbnb is making it harder for Miami locals to find a place to rent

BY [TAYLOR DOLVEN](#), [KYRA GURNEY](#), AND [DOUGLAS HANKS](#)

JUNE 23, 2019 07:00 AM, UPDATED AUGUST 04, 2019 10:04 AM





★ ENTIRE HOME 3BED, 2BA,
SLEEPS 8 NEAR COCOWALK ★

Miami

• Entire house
8 guests 3 bedrooms 5 beds 2 baths

In Coconut Grove, owners can make 16 percent more renting to tourists on Airbnb than renting to locals long term, according to data from BNBVestor. This 1960s three-bedroom house launched on Airbnb in June for around \$170 a night and already has five positive reviews. CHARLIE ORTEGA GUIFARRO CGUIFARRO@MIAMIHERALD.COM



Listen to this article now

24:24

Powered by [Trinity Audio](#)

MORE FROM THE SERIES

Priced out of Paradise: City in Transition

Miami-Dade is the most expensive metro in the U.S. for renters and one of the costliest for home buyers. This series explains why that's so and what it means for the region and its residents. Our interactive tool helps renters and buyers match their budgets to affordable neighborhoods. Future stories will explore solutions to South Florida's housing crisis.

EXPAND ALL

For landlords in Miami, the secret to profits rests with renting to visitors, not locals.

That was the message of a recent seminar touting the profitability of Airbnb for property investors debating whether to rent their houses and condos to long-term tenants or overnight guests.

“You will get more money for your rental if you have it on Airbnb,” said real estate data guru Francisco Mago, founder of BNBVestor. “Regular rentals are overrated.” Launched in 2017, [BNBVestor](#) offers seminars and a monthly subscription to a database of home-sharing trends based on data scraped from Airbnb and long-term rental sites like Zillow.

TOP ARTICLES

The free ride on Broward buses will soon be over. Here's what to know

This day, the audience of 20 gathered in Doral included property managers, real estate investors and even a stand-up comedian. Each coughed up the \$99 seminar fee as a way into the Airbnb business.

And why wouldn't they want in? Business is booming.

\$2 for 2 months

Subscribe for unlimited access to our website, app, eEdition and more.

[CLAIM OFFER](#)

Data provided by Airbnb indicates the number of entire homes listed on the site for Miami-Dade has jumped 33 percent since 2017, up to around 13,500 today. In the current market, Miami landlords and property managers can make an average of around 40 percent more renting entire homes or apartments to tourists on Airbnb than renting to locals on annual leases, according to BNBVestor. In areas like South Miami and North Miami Airbnb yields up to 62 percent and 51 percent, respectively, more per month with rates around \$140 a night.

The problem for locals: More houses, apartments and condos available on home-sharing platforms translates into fewer options for those who live here full time. As Miami-Dade faces a crisis in housing affordability with a 130,000-unit deficit, as many as 13,500 existing units in good condition sit unavailable to the people who need them.





Miami's Biscayne Park Airbnb is the most popular in Florida and in the top 20 in the United States.

BY [CHARLES TRAINOR JR.](#) ✉

Mago said BNBVestor scrapes data from Airbnb and long-term rental sites such as Realtor.com and Zillow.com. Airbnb disputes the numbers, saying many of the listings on its site belong to live-in owners who make their homes available on Airbnb only when they are out of town. Half of the entire homes rented on Airbnb are rented for less than 60 days out of the year, according to the company. Some entire home listings are guesthouses, RVs, or boats.

“We’re proud that home sharing and short-term rentals help thousands of everyday Miamians better afford to stay in their homes and live in an increasingly expensive region,” said Tom Martinelli, Airbnb’s Florida policy director. “We support measures to protect affordable housing and target bad actors here in Miami-Dade and across the United States.”

Business newsletter

Keep up with local business news and small business advice.

[SIGN UP](#)

This site is protected by reCAPTCHA and the Google [Privacy Policy](#) and [Terms of Service](#) apply.

Evidence about Airbnb’s impact on the local rental market varies. In March 2017, the not-for-profit fact-checking website [Politifact](#) rated then-Miami Beach mayor Philip Levine’s comment that Airbnb “decreases real estate values and increases costs for workforce housing” as mostly false, saying the market hadn’t been around long enough to get an accurate picture. But a 2019 Miami Herald analysis of Airbnb data available through new third party sites and interviews with Airbnb entrepreneurs suggests an increasing number of investors are converting Miami rentals into residential hotel rooms, leaving locals with fewer rental units.



[EXPLORE](#)

Where can you afford to rent or buy in South Florida? This tool will show you

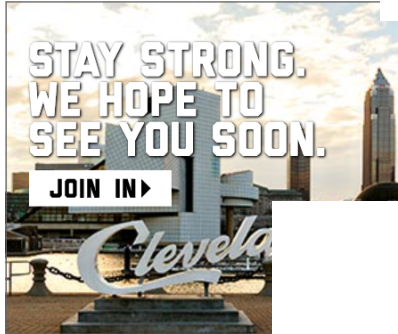
JUNE 05, 2019

Miami real estate entrepreneurs are picking up on the obvious economic incentives, and affordable housing experts say the practice is surely having an impact.

“At the top there’s an abundance of units, more high-end units than rich people,” said Jake Wegmann, an assistant professor at the University of Texas at Austin school of architecture. “Down the income scale, at the very bottom there’s a huge shortage.

If Airbnb is eroding units that are in the middle, then almost certainly that would not be good, that would be tightening the pinch that people in that segment of the market are facing.”

A [working paper recently summarized in the Harvard Business Review](#) found that a 1 percent increase in Airbnb listings translates into a 0.018 percent increase in long-term rental rates and a decrease in the amount of long-term units on the market.



SIDE-GIG MYTH

Airbnb’s origins are rooted in San Francisco’s affordable housing crisis.

In 2007, a pair of Silicon Valley roommates wedged three air mattresses into their loft and charged \$80 for a night’s stay as a way to make their rent. They quickly launched the Air Bed and Breakfast website so that others could do the same. Amid the stress of the housing crash, the home-sharing concept caught fire. By 2011, one million nights had been booked on the Airbnb.com website. Today consumers can stay in an Airbnb in 191 countries — including more than 900,000 listings in the U.S. — and book via smaller short-term rental sites including [VRBO](#), [HomeAway](#), [Expedia](#), [Travelocity](#), [Vacasa](#), [SabaticalHomes](#), [FlipKey](#) and [Turnkey](#). Tech analyst firm Juniper Research estimates the U.S. residential sharing economy is worth \$13 billion. [Forbes estimates](#) privately held Airbnb is worth \$38 billion.

During the same decade, Miami’s tourism market has expanded. More than [16.5 million overnight visitors came to Miami last year](#), a 36 percent increase over a decade ago. While demand for all types of accommodation has increased, millennials seeking cheaper digs and more authentic experiences have gravitated to home sharing.

The past decade has also brought Miami a development boom, [an influx of foreign buyers](#), and [more acute inequality](#). [Housing costs](#) have skyrocketed, far [outpacing wage increases](#).

For Miami-Dade, the boom in short-term rentals brought some benefits. In public statements Airbnb celebrates hosts’ earnings from Airbnb as “supplemental income”

and touts the site as a tool that helps everyday Miamians make ends meet.

[Airbnb hosts turned over \\$10 million in tax revenue to the county in 2018.](#)

Additionally, Airbnb entrepreneurs say they are upgrading housing stock when they renovate units before listing them. And Airbnbs in traditionally less-visited areas like Homestead — with around 110 entire homes listed on the Airbnb website — or Hialeah — with around 60 — bring tourist dollars to business owners who wouldn't otherwise benefit.



In Coconut Grove, where more than half of residents spend more than 35 percent of their income on rent, there are 450 entire homes listed on Airbnb today, including this 1930s duplex in the historically black West Grove that goes for \$100 a night on the site. Charlie Ortega Guifarro CGUIFARRO@MIAMIHERALD.COM

But what originally began as a website enabling homeowners to run a viable side gig has morphed into a high-return real estate investment industry. Today, just 25 percent of Airbnbbers in Miami rent out private rooms, according to BNBVestor.

The bulk of Airbnbs in Miami-Dade county — 75 percent — are entire homes or apartments.

FULL-TIME BUSINESS

Local seminars for budding Airbnb entrepreneurs show that for some listing on the site, this is their full-time job.

Some investors buy homes to list on Airbnb, others seek out rentals to re-rent on the site. The latter strategy requires far less capital and allows newbies to test out their hospitality skills without breaking the bank.

The best way to get started, Mago explained at a recent seminar, is to target a “tired landlord” — someone who has owned a property for more than four years — and offer to take a rental unit off their hands. The Airbnbber pays the owner the same monthly rent as a long-term tenant, and then turns around and rents the apartment on Airbnb and pockets the difference. The Airbnbber is responsible for furnishing the apartment and answering any guest complaints. Perks for the unit or homeowner include less wear and tear on the property, frequent professional cleanings and little use of appliances and water.

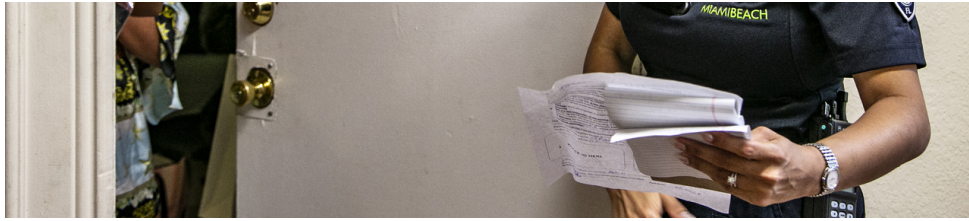
BNBVestor has emerged as a subscription data service for those deciding where and how to break into the market. The data can estimate which ZIP codes have the highest occupancy rate and average daily rate, then translate that information to estimated revenue by neighborhood. It can also forecast the kind of home — one-bedroom apartment vs. four-bedroom house — that will be most profitable in each area and compare estimated Airbnb revenue to estimated revenue for regular long-term rentals.

[AirDNA](#), a competitor subscription service, provides similar data scraped from Airbnb and other smaller short-term rental sites. Its analysis reaches similar conclusions about the vacation rental market to BNBvestor.

Airbnb disputes the conclusions of scrapers like BNBvestor and AirDNA, saying those programs cannot differentiate when a unit is booked by a guest from when it is made unavailable by the host.

Representatives from both BNBvestor and AirDNA estimate that their margin of error for occupancy is less than five percent.





Miami Beach Code Compliance Officer Vijma Maharaj speaks to tourists staying at 1518 Drexel Avenue as she inspects for illegal short-term rentals on Friday, Feb. 22, 2019. BY [AL DIAZ](#) ✉

Neither local governments nor Airbnb track the number of Airbnbs rented by people who actually live in the unit and only make it available when they're away, leaving regulators and the public blind to a surging corner of the hospitality industry.

But data scraped from Airbnb offers a hint: According to BNBVestor, more than two-thirds of entire home listings on Airbnb in Miami-Dade are managed by hosts with more than one property on the site.

European cities are more attuned to the impact. This month, 10 European cities sent a [letter to the European Union](#) demanding more help in pushing back against Airbnbs.

“European cities believe that homes should be used first and foremost for living in,” the letter said. “Many cities suffer from a serious housing shortage. Where homes can be used more lucratively for renting out to tourists, they disappear from the traditional housing market, prices are driven up even further and housing of citizens who live and work in our cities is hampered.”

‘HOME-RUN INDUSTRY’

The data highlights how ineffective some Miami municipalities have been in regulating short-term rentals and enforcing their existing laws.

Case in point: Short-term rentals in Coral Gables are illegal in all residential areas, encompassing 76 percent of the city, yet hundreds of entire Gables homes are available on Airbnb.

Like many other local municipalities, the City of Miami does not track the number of short-term rentals in its limits or require owners to register. Currently around 7,000 entire homes in the City of Miami are listed on Airbnb, more than in any other Miami-Dade municipality, according to BNBVestor.

In the 33127 ZIP code that includes parts of Little Haiti, Wynwood, Model City and Edgewater, the median household income for the 32,000 locals who live in the neighborhood is about \$30,000, well below the county median of \$50,000. Nearly one-third of those employed work in the service industry. Tenants in 60 percent of the rental units in the neighborhood are spending more than 35 percent of their income on rent. There are around 11,000 housing units in the ZIP code, according to the U.S. Census.



All four units in this Wynwood apartment building launched on Airbnb in February for around \$150 per night and already have dozens of positive reviews. Locals in 60 percent of the long-term rental units in the neighborhood are spending more than 35 percent of their income on rent. Charlie Ortega Guifarro CGUIFARRO@MIAMIHERALD.COM

Yet the neighborhood is among the 10 most popular for Airbnb investors in the City of Miami. Some 370 entire homes in the ZIP code are listed on the site. Airbnbbers can charge an average daily rate of \$107, enabling them to earn 40 percent more renting homes there to tourists instead of locals. Thirty percent of hosts control 63 percent of Airbnbs in the area.

One investor is mortgage broker Nicholas Lara, 29, who said he runs 11 properties across the county. Four of his Wynwood units fill a 1960s apartment building. Real estate records show that in January, all four units were rented for \$1,700 per month. They became available on Airbnb in February for around \$150 per night and already have dozens of positive guest reviews. Lara said he expects he can make up to \$400 per night on the units during big events like music festivals.

Lara said he got into the business when an Airbnb host approached him about renting one of his units out on the site. He agreed and accepted the \$3,400 rent payment. When he saw that the host was making around \$10,000 per month, he said he decided to give it a try. Slowly, he said, he converted all of his long-term lease apartments to Airbnbs.

“This is a home-run industry,” he said at a recent seminar in Broward titled “The Scoop on Airbnb.” He called the boom in Airbnbs in South Florida a phenomenon that only businesses would outlast. “This weeds out people who are riding the wave. If you’re a business — not just renting out a spare room — and working as a

professional, you're going to be fine.”

Nicholas Lara, who said he operates this 1960s single-family home in the historically black section of Coconut Grove, said he pays the owner \$2,400 in rent for the house. It launched on Airbnb for around \$170 a night and has drawn five positive reviews since May. Charlie Ortega Guifarro CGUIFARRO@MIAMIHERALD.COM

The Grove's 33133 ZIP code encompasses the gated Grove Isle condo complex — where apartments start at \$4,000 a month — and crosses U.S. 1 into Coral Gables. The ZIP code is the 9th most popular for Airbnbbers with around 450 homes today. Twenty-six percent of hosts control 62 percent of the listings in Coconut Grove.

The median income among the 35,000 locals who live in the area is \$65,000, above the county median. Still, more than half of people who rent in Coconut Grove spend more than 35 percent of their income on rent. There are around 17,000 housing units in the ZIP code.

Lara said he operates two homes in the historically black West Coconut Grove, which faces increasing gentrification. In Coconut Grove hosts can make around 16 percent more renting to tourists than locals, according to BNBVestor. Lara said he approached the owner of a 1960s three-bedroom house listed for rent for \$2,700 per month and offered her \$2,400 per month for two years. He said he invested \$10,000 upgrading the property with renovations and furniture. The house is listed on Airbnb for around \$170 per night and received five positive guest reviews since May. The 1930s duplex Lara said he manages a few blocks away debuted on Airbnb around the same time for around \$100 a night and already has two positive reviews.

UNINCORPORATED MIAMI-DADE

Outside the limits of Miami-Dade County's 34 cities, county zoning rules govern short-term rentals.

At the recent seminar for aspiring Airbnb entrepreneurs in Doral, Mago suggested the county as the ideal place to break into the business.

“If you want to be safe...stick to unincorporated Miami-Dade,” he said.

And with good reason. The county's rules are largely ignored, according to the numbers.

The county began requiring permits, known as “certificates of use,” when it passed [regulations for Airbnb](#) and its smaller competitors in the fall of 2017. But while at least 725 short-term vacation homes are listed on Airbnb in the county's unincorporated area, Miami-Dade has only 58 required permits on file as of this spring.

County regulators are asking the San Francisco-based online booking giant for help in making its short-term renters obey the rules.

“We are communicating with Airbnb, because we'd like to have their assistance in fostering some greater compliance,” said Lourdes Gomez, deputy director of the county's Regulatory and Economic Resources Department, which oversees zoning and permitting.

She said the county's squad of code enforcers rely on complaints to start cases, and that suburban residents have mostly stayed silent on issues involving short-term rentals. Trash and parking dominate the calls, accounting for more than 11,000 complaints in the last 12 months. Vacation rentals accounted for 48.

If enforced, the [2017 legislation](#) could be a significant hurdle to the practice of a host renting multiple units. For the low-density zoning areas, the county requires the person renting a short-term unit to also live there for at least six months out of the year. That zoning area holds about 250,000 residences, accounting for about 60 percent of all units in the unincorporated area.

Dubbed the Mango House for the tree in the backyard, the Airbnb listing in unincorporated Miami-Dade near the University of Miami launched in May starting at around \$110 a night and already has two positive reviews. Charlie Ortega Guifarro CGUIFARRO@MIAMIHERALD.COM

Gomez noted the county rules restrict parking to the property being rented as a short-term rental, and require enough curbside pick-up bins to handle trash for the maximum occupancy allowed. She said those quality-of-life issues were the county's priority for short-term rentals.

"As long as Airbnb can operate in a way that's invisible to their neighbors, that's the framework we wanted," she said.

Sebastian Giraldo, 28, is one of the few with a certificate for his property, a single-family home near the University of Miami in a ZIP code shared by Coral Gables and unincorporated Miami-Dade with nearly 5,000 dwellings; 90 are listed as Airbnbs, according to BNBvestor. The home is one of 15 Airbnbs he said he manages in Miami-Dade. Giraldo said he originally called the owner of the house about a different property of his — an apartment building in Edgewater — seeking to rent the units there through Airbnb. He said the owner wasn't comfortable kicking out tenants who had lived in the building for decades but asked if he'd be interested in a 1940s three-bedroom house where his tenants paying around \$2,400 a month would soon be moving out.

Giraldo said he invested \$15,000 in renovating the house; he and the owner are splitting the Airbnb earnings. Now dubbed the Mango House for the tree in the backyard, the listing launched in May starting at around \$110 a night and already has two positive reviews.

According to BNBvestor, owners can make 24 percent more renting to tourists in that neighborhood.

"Once football season starts, graduations — we're going to be set," Giraldo said. "There's opportunity here; you just have to navigate the regulations."

MIAMI BEACH

In Miami Beach, rentals of six months or less are illegal in most residential areas, but that hasn't kept a large vacation rental market from flourishing. The city licenses fewer than 1,000 short-term rentals, but approximately 4,500 entire homes are advertised on Airbnb, according to BNBvestor data.

From March 2016, when Miami Beach first instituted its current fine structure — which starts at \$20,000 — through March 2019, code compliance officers cited approximately 260 different units for violating short-term rental laws, records show.

The list of fines is full of addresses in historic South Beach buildings that [once provided affordable housing](#) for the waiters, bartenders and hotel workers who power the island's tourism industry.

And the 260 units that have been cited — some of them multiple times — are just the tip of the iceberg.

Over the past five years, the number of short-term rental investigations in Miami Beach has nearly tripled, from roughly 600 during the 2013-14 fiscal year to more than 1,700 last year. To cite a property owner for operating a vacation rental, code enforcement officers must visit the property while it's being rented and secure confirmation from guests. That isn't always possible.

This year Airbnb agreed to prevent people from creating listings for homes in areas where Miami Beach doesn't allow short-term rentals, but stopped short of requiring hosts to get permits from the city. [Airbnb sued Miami Beach](#) over its new ordinance mandating both things in January.

Illegal vacation rentals aren't the only problem.

The city also allows short-term rentals in specific areas, including a swath of North Beach, which has traditionally been home to some of the island's most affordable neighborhoods.

One of the less than 1,000 legal short-term rentals is 8040 Harding Avenue, a typical 1940s Miami Modern apartment building in North Beach with an exterior staircase. Carlos Dominguez and his wife Carmen bought the property in 1991 for \$200,000 and rented the apartments to locals.

A decade ago this 1940s Miami Beach apartment building was home to construction workers and grocers. Now, all eight units are legal short term rentals. Kyra Gurney *MIAMI HERALD*

"There were people who worked in Miami Beach and people who were retired and others who worked in Miami," Dominguez said. "Some of them worked in construction, others in a grocery store. They weren't lawyers or doctors."

But Dominguez and his wife sold the building in 2009 and the current owner, a company called Caurus LLC, operates all eight apartments as legal short-term rentals. The units are offered online on various rental platforms — currently not Airbnb — for \$129-to-\$142 a night. Caurus LLC's representatives listed on the state's official Sunbiz.org website are Matteo Soldatini and Gabriele Braha; one declined to comment and the other could not be reached.

Residents have noticed the strain on Miami Beach's already-limited stock of reasonably priced apartments. The city's Human Rights Committee has discussed the impact of the proliferation of short-term rentals, said chair Alan Fishman.

The problem, he said, is that "people have found it more lucrative to rent their apartments nightly" to tourists than to rent to residents for a year at a time. "We're finding that workers that work here cannot find affordable housing to live here," Fishman said.

Miami Beach hasn't yet been able to collect all of the nearly \$8 million in fines it has levied against property owners, but the city has pocketed more than \$500,000 so far.

Initially, Miami Beach planned to spend the first \$200,000 on homeless services and 80 percent of any additional fines on affordable and workforce housing needs. Commissioners later decided to set aside all \$500,000 for homeless and domestic violence services. Commissioner John Elizabeth Alemán, who proposed the idea of using short-term rental fines for affordable housing, said she hopes future fines can be used for that purpose.

“I do hope we’re able to accumulate some serious funds in that account and actually put a dent in affordable housing,” she said.

Vijma Maharaj takes a photo of documents presented by Michael Simmer, a tourist who stayed at 1518 Drexel Avenue, an illegal short-term rental in Miami Beach, on Friday, February, 22, 2019. AL DIAZ ADIAZ@MIAMIHERALD.COM

Not all affordable housing advocates think vacation rentals should be painted with the same brush. Sarah Leddick, a Miami Beach resident who sits on the city’s affordable housing advisory committee, said that she and her colleagues have talked about the negative impact short-term rentals have had on affordable housing, particularly in North Beach. But Leddick said that when it comes to short-term rental regulations, “one size does not fit all.”

She wants to see the city lower the legal rental period to two weeks or a month in some areas to accommodate responsible visitors staying on the island for more than a few days. She said that would help house hunters who need somewhere to stay while they’re looking at properties on the island, for example.

In some cases, the existing fines do seem to be dissuading owners from renting illegally.

Neighbors of a two-story apartment building at 1518 Drexel Ave. in the heart of South Beach say the building once provided housing for young people who worked in the area. “Basically the residents were like most residents in the neighborhood area. The property didn’t stick out,” said one neighbor.

The building was converted to condominiums in 2015, according to county records, and the property became “a full-blown hotel,” said the neighbor, who asked that his name be withheld. A person associated with the short-term rental operation previously threatened residents in his building, he said.

Over the past three years, city records show, the owners or operators of 15 of the building’s 24 units have been cited for illegal short-term rentals, although the owners are appealing some of the fines. When the Miami Herald accompanied a code compliance officer on her rounds in February, the officer encountered out-of-town visitors staying in several apartments in the building and cited the owners.

Since then, the neighbor said, the units no longer appear to be short-term rentals. The building hasn’t been cited for vacation rentals since February, city records show.

On a recent Monday afternoon, the building showed signs of long-term tenants. There was a scooter parked in the interior patio under a rain tarp and shoes arranged near the window of a second-story apartment.

“How many other affordable residential properties are ‘missing’ because they are used as illegal hotel rooms in Miami Beach and SoBe in particular?” the neighbor said in an email. “If it is affordable housing the city is concerned about, then stop all the multi-family building units from being used as hotel rooms,” he added. “That is the quickest way to add the most affordable housing units in Miami Beach.”

THE HOTEL EXPERIENCE

At the Airbnb seminar in Broward on a recent Thursday, Mago asked everyone in the audience of 50 to raise their hands if they already operate Airbnbs.

One Airbnb entrepreneur who declined to give her name said she began her short-term rental career five years ago, while she was on maternity leave in her Miami apartment. A neighbor moved out and the unit became vacant, so she said she asked

the landlord if she could pay rent for it and then rent the apartment on Airbnb. Once she saw how lucrative it could be, she gobbled up four more units in the building. Now she said she manages 10 units in total and attends monthly meet-ups with Giraldo and other Airbnbbers.

“Five years ago [landlords] didn’t know what Airbnb was,” she said. “I was able to take care of my child.”

The true number of people who have a stake in the Airbnb business is difficult to calculate. There are cleaning, communication and furniture companies entirely dedicated to facilitating short-term rentals — for a price. The more properties you have, the more money you can make, and the less maintenance you have to take care of yourself.

“The goal is not to have two properties, it’s to have 100 properties,” said Mago.

One thing experienced Airbnbbers made clear to those just starting out: as much as tourists say they want an authentic experience, they don’t actually want to stay in someone else’s home if they don’t have to.

The beach basket at Paola Ugolini’s Airbnb cottage, includes towels, lunch boxes and other beach essentials. Her Biscayne Park guesthouse is the most popular Airbnb listing in Florida. CHARLES TRAINOR JR. CTRAINOR@MIAMIHERALD.COM

“If you’re going to rent your own house, that’s not a business,” Mago said. “You need to give them the hotel experience.”

Often that comes down to the details: Leaving guests a bottle of wine, or securing them discounts at local restaurants and bars. Most importantly, though, is clearing out any personal belongings and making the entire property as Instagrammable as possible.

“I want people to come into my Airbnb to say look at this,” said Lara while raising his phone high in the air and pretending to pose for a selfie. “This gives us the opportunity as everyday people to break into the hospitality business without millions of money on a hotel.”

The end goal for these Airbnbbers is to have guests book directly with them and cut out the platform altogether. Many promote their short-term rentals on social media and collect guests’ emails so they can send them discounts for future stays.

Giraldo said he recently secured a deal with the owner of an eight-unit apartment building in Wynwood to kick out each current long-term tenant when their leases come up for renewal. Asked if he was worried about the impact of the Airbnb business on affordable housing for locals, he responded like a true capitalist.




“It’s a free market, let the markets behave,” he said. “There’s always going to be the suburbs.”

Do you know of a formerly affordable property converted into an Airbnb? Get in touch: tdolven@miamiherald.com

ABOUT THIS SERIES




Priced out of Paradise is an ongoing series about housing affordability in South Florida. Read previous installments at [MiamiHerald.com/pricedoutofparadise](https://miamiherald.com/pricedoutofparadise).

TAYLOR DOLVEN

   305-376-2052

Taylor Dolven is a business journalist who has covered the tourism industry at the Miami Herald since 2018. Her reporting has uncovered environmental violations of cruise companies, the impact of vacation rentals on affordable housing supply, safety concerns among pilots at MIA's largest cargo airline and the hotel industry's efforts to delay a law meant to protect workers from sexual harassment.

KYRA GURNEY

   305-376-3205

Kyra Gurney lives in Miami Beach and covers the island for the Miami Herald. She attended Columbia University and Colorado College and grew up in New Mexico.

[Support my work with a digital subscription](#)

 [COMMENTS](#) 

TRENDING STORIES

Is there a gas shortage in Florida or are you just panic-pumping? Here's what to know

UPDATED MAY 12, 2021 09:44 PM

Orlando lawyer and mother left her kids at home to run an SUV into their father's house

UPDATED MAY 12, 2021 09:05 PM

Miami man who bought Lamborghini with COVID-19 relief money sentenced to six years

UPDATED MAY 12, 2021 07:05 PM

Oregon's Cristobal dishes on Jevon Holland. And what he told Dolphins about Penei Sewell

UPDATED MAY 13, 2021 03:48 PM

Football coach at Hialeah-Miami Lakes High had romantic relationship with teen girl, police say

UPDATED MAY 12, 2021 05:40 PM

CORONAVIRUS

PortMiami may not have cruising, but it now has Pfizer and J&J vaccines to offer

UPDATED MAY 10, 2021 08:48 PM

TOURISM & CRUISES

PortMiami wins \$2M EPA grant, one step closer to reducing air pollution from cruise ships

UPDATED MAY 08, 2021 07:59 AM

CRIME

Another brawl breaks out at Miami International Airport. It's part of a national trend

UPDATED MAY 10, 2021 10:28 AM

EDITORIALS

State of Florida should mind its own business. Let Norwegian require COVID vaccines on its ships | Editorial

UPDATED MAY 07, 2021 05:13 PM

TOURISM & CRUISES

DeSantis ban on vaccine proof may send one company's cruise ships out of Florida

UPDATED MAY 10, 2021 09:38 AM

TOURISM & CRUISES

CDC issues instructions for test cruises with volunteer passengers, and the real thing

UPDATED MAY 06, 2021 06:14 AM

Take Us With You

Real-time updates and all local stories you want right in the palm of your hand.

[MIAMI HERALD APP](#) →

[VIEW NEWSLETTERS](#) →

SUBSCRIPTIONS

[Start a Subscription](#)

[Customer Service](#)

[eEdition](#)

[Vacation Hold](#)

[Pay Your Bill](#)

LEARN MORE

[About Us](#)

[Contact Us](#)

[Newsletters](#)

[News in Education](#)

[Public Insight Network](#)

[Reader Panel](#)

[Archives](#)

ADVERTISING

[Place a Classified](#)

[Media Kit](#)

[Public Notices](#)

COPYRIGHT

[COMMENTING POLICY](#)


[PRIVACY POLICY](#)

[TERMS OF SERVICE](#)

Feb 21, 2020, 06:54am EST | 35,733 views

The Airbnb Effect On Housing And Rent



Gary Barker Senior Contributor 

Real Estate

I write about sales and rental property trends in the UK.



Airbnb currently hosts over 7 million listings and is active in more than 100,000 cities across 220 ...

[+] SHUTTERSTOCK

The Wall Street Journal reported earlier this month that [Airbnb had recorded a \\$322 million](#) (£248.65 million) net loss in the first nine months to September in 2019. That's a considerable drop from the \$200-million profit reported by the world's largest online marketplace for lodgings in 2018.

For a company with a valuation of \$31 billion, according to [Pitchbook](#) in 2017, it's a sign that the horn of this start-up unicorn might just be a carrot ahead of its hotly anticipated public IPO later this year.

However, although this is disappointing news for Airbnb stakeholders and investors, cities and countries around the world suffering from extended housing crises may celebrate its diminishing market influence.

The influence of the so-called 'Airbnb effect' on local housing markets has grown into a significant cause for concern, particularly when looking at its impacts on housing stock, prices and communities.

But even if Airbnb really is damaging local housing markets, can anything be done to stop the hugely popular, multi-billion-dollar juggernaut?

The cost of the world's largest holiday platform

MORE FOR YOU

Has The U.K. Property Market Hit Its Ceiling?

Airbnb currently hosts over [7 million listings](#) and is active in more than 100,000 cities across 220 countries and regions. It's not lacking in vision either – Airbnb aims for [1 billion guests](#) annually by 2028.

The platform is widely enjoyed for its access to holiday lets ranging from single rooms to entire properties, varying in quality and affordability, *and* offering a markedly different experience to that found in a hotel.

Then there are the clear economic benefits for local economies that stand to gain from the increase in tourists supported with a wider variety of affordable and available holiday listings. Homeowners and landlords also benefit, as turning their rooms and properties into short-term lets can offer an alternative and lucrative source of revenue.

But in recent years the impact of Airbnb's service on local economics and rental markets has come under the spotlight. And analysis conducted by the [Economic Policy Institute](#), a non-profit, non-partisan American think tank, found that the economic costs of Airbnb likely outweigh the benefits:

'While the introduction and expansion of Airbnb into cities around the world carries large potential economic benefits and costs, the costs to renters and local jurisdictions likely exceed the benefits to travellers and property owners.'

The 'Airbnb effect' is to some extent [remarkably similar to gentrification](#) in that it slowly increases the value of an area to the detriment of the indigenous residents, many of whom are pushed out due to financial constraints.

Cities, popular ones especially, seem to fare the worst. In major cities such as Amsterdam, Barcelona, Edinburgh, and Los Angeles, studies on the 'Airbnb effect' have found that over-tourism facilitated by platforms such as Airbnb negatively impacts on [house prices and communities](#).

The short-term rental sector is just as affected. Research conducted by the [Harvard Business Review](#) across the US found that Airbnb is having a detrimental impact on housing stock as it encourages landlords to move their properties out from out of the long-term rental and for-sale markets and into the short-term rental market.

A separate [U.S. study](#) found that a 1% increase in Airbnb listings leads to a 0.018% increase in rents and a 0.026% increase in house prices. It might not seem like much on the surface but there's a cost creep for those looking to rent long-term or buy.

It would be a mistake to say all markets are equal, but housing markets in the U.S. have a socioeconomic cousin across the pond, and for the city with the world's highest number of Airbnb listings, it should indicate a warning.

A case study: What's happening in the U.K?

Airbnb's U.K. growth has been rapid and extensive. If you were wondering which global city has the greatest number of Airbnb listings, it's London, with over [80,000 listings](#) – and 55% plus of these listings are for entire properties.

Some see this as an opportunity for agents, that 2020 could be the '[year of Airbnb](#)'. That certainly could be true for short-term landlords, and agents looking to take a bite of that market. But of this I would be wary, as short-term gain can undermine long-term sustainability.

A [recently published report](#) from the London-based economic research consultancy [Capital Economics](#), commissioned by [ARLA](#), analysed the scale of U.K.'s short-term lets sector and the wider implications for the private rented sector. The research found that active listings on Airbnb in the U.K. increased from 168,000 in 2017 to 223,000 in 2018 – that's a 33% leap, and a significant market share of the growing U.K. lettings market. It's also not the whole picture though, as data for similar short-term lettings services like Booking.com and Homeaway are unavailable.

The report further showed that 2.7% of the U.K.'s 1.5-million strong landlord population have already made the switch from long-term rental properties in the private rented sector to short-term lets, equating to 50,000 homes made unavailable to long-term tenants.

And worryingly, around 10% of U.K. landlords surveyed responded that they are considering moving their private rented properties to the short-term market.

The factors behind this are myriad, but over one-third of landlords surveyed acknowledged that it was because of changes to mortgage interest relief, which from April this year will be reduced to a 0% deductible.

Other forms of long-term regulation including higher stamp duty, the Tenant Fees Act, and the abolishment of Section 21 legislation currently under consideration are also cited as factors persuading landlords in the buy-to-let sector that the grass is greener on the other side.

Here's the kicker. If every landlord in that 10% does move their properties to the short-term market, up to an estimated 470,000 properties would be removed from the private rented housing supply – around 8.7% of the entire U.K. rented sector stock. And that would significantly stretch already strained housing supply.

I've said previously that [supply and demand](#) in the lettings market is a leaking ship that threatens to capsize landlords and tenants if not navigated correctly through rough waters. If more stock is moved into the short-term lettings market through platforms like Airbnb it could have collateral impacts on the wider market.

Airbnb claims that between July 2017 and July 2018, the [U.K. economy gained £3.5 billion](#) from hosts and guests using the platform, with an estimated 8.4-million inbound guests using the platform over this period.

Great for the economy, you might think? But a healthy housing market is the real bedrock of a healthy economy, and the U.K. housing market is not in great straits at the moment.

Restrained confidence and uncertainty due to the earlier election and Brexit are only now loosening up. But whilst market confidence is returning, low stock in both the sales and rental markets is pushing up prices.

The latest [Home Asking Price Index](#) reports that total sales stock is down 10.1% year-on-year in February; and it's worse for the rental sector, with the supply of available rental properties in the U.K. down 18% over the same period.

Low supply and increasing rents in the U.K. are a major concern. The latest [official government statistics](#) on U.K. rental housing show that private rents have increased 1.5% year-on-year in the 12 months to January 2020. But an extended trend outlook reveals that between January 2015 and December 2019, private rents increase by 8.6%. That's a significant increase.

It's even worse for the London, Airbnb's bread and butter. According to Rightmove, asking rents in the capital have [increased almost twice as quickly](#) compared with the rest of the U.K.

Many Londoners are now paying more than half their income on rent each month. And with more than [1 in 50 London homes](#) listed as short-term lets, it's questionable whether Airbnb can continue its free reign throughout the capital and the U.K. when the country is in such dire need for affordable housing stock.

Pushing back against the short-let industry

With spiralling costs fuelling a chronic housing crisis, the voices calling for [regulation of Airbnb-style short-term lets](#) are getting louder.

The U.K. lags behind other countries when it comes to regulation for short-term letting sites like Airbnb, and it might be time to reconsider that.

Research unveiled by *The Guardian* on February 20 reveals that in some parts of the U.K. [one in four homes](#) is an Airbnb listing.

Simultaneously produced research from the publication highlights that Airbnb's presence in certain barrios (neighbourhoods) in Spain has pushed rent increases by [as much as 50%](#), forcing locals to move to more affordable areas. It's a warning sign the U.K. would do well to take note of.

Several countries and cities have started to push back against Airbnb and other short-term lettings platform because of the impacts felt on local communities and housing costs:

Berlin has enforced restrictions against short-term lets on platforms like Airbnb since 2016, requiring landlords to acquire a permit if they want to rent 50% or more of their main residence as a short let.

New York City is currently embroiled in a legal battle with Airbnb regarding the turn-over of host data. In fact, since launching in 2008, Airbnb has been involved in **at least 11 lawsuits** against an American city or state, with the majority of cases taking place within the last two years.

Edinburgh will soon bring in a licensing scheme from 2021 empowering councils to regulate 'holiday-style' lets if they feel it's better for local communities. And in 'control areas', landlords will require planning permission before they can convert a whole property for short-term lets.

Perhaps to pre-empt any future legislation in London, Airbnb introduced in January 2017 the '90-Day Airbnb Rule', whereby short-term rentals for entire homes are capped at 90 days per year. But this has had mixed results, and research commissioned by City Hall has suggested that as many as **23%** of London's approximately 80,000 listings at the time of study were in breach of the 90-day limit.

Airbnb has disputed the figures, claiming the data is wrong as it comes from third-party scrapers which it considers inaccurate.

There have been calls to introduce a licencing scheme for the rest of the U.K., similar to what's being introduced in Edinburgh. But this scheme is not being introduced by the government or city councils, it's an Airbnb initiative.

Who really has the lead on legislation?

Back in January, Airbnb won a significant victory in a top E.U. court to be ruled as an '**information society service**', or an online platform rather than an estate agency, if you will. It means that they get to avoid stringent regulations in place across Europe affecting how the company operates, and

for the time being (whilst the U.K. remains part of the E.U.) gives them stronger freedoms against regulation in cities such as London.

Airbnb is certainly happy with the result, but does it match with the platform's recent corporate pledge to make a 'positive contribution to society'? That could be the intended impression.

The platform this month kicked off a series of [registration roadshows](#) in cities across the U.K. The aim of which is to 'consult on proposals for a clear, modern and simple registration system for short-term rentals in collaboration with policymakers, communities and local hosts.' In a recent ITV interview, they stated that: "We are good partners to cities and we have worked with more than 500 governments and organisations around the world to help hosts share their homes and follow the rules. We were the first platform to work with London to limit how often hosts can share their homes and we have led calls for a national registration system in the UK."

It should be taken as a positive that Airbnb is trying to lead the way on responsible legislation. But forgive the cynic in me if I'm a little less optimistic. What's more likely is that Airbnb is well aware of the impacts of their service in many cities and is trying to control the narrative and build a favourable impression ahead of their expected IPO later this year, whilst safeguarding against any threats towards their future revenues.

In summary

Whilst it's easy to slay Airbnb as the cause of rising prices and lack of rental stock in popular cities, one can't help but wonder if they aren't merely the backdoor escape for landlords that have been cornered into an impossible scenario, with everything from scrapped tenant fee bans to zero mortgage relief, to a list of compliancy legislation so lengthy that it's near impossible to self-manage a property, counting against them. Perhaps Airbnb is just the tip of the iceberg, where an unforgiving approach to landlords and a lack of government capacity to deliver on their house-building promises are the

bulk of the problem that's propping up Airbnb as the visible, easily targeted problem.

Forbes | Daily Dozen Newsletter

Always be the most interesting person in the room.

Get the top stories from Forbes, hand-curated by the editors, and delivered straight to your inbox every weekday morning.

Email address

Job Title

Sign Up You may opt out any time. By signing up for this newsletter, you agree to the [Terms and Conditions](#) and [Privacy Policy](#)

Follow me on [Twitter](#) or [LinkedIn](#).



Gary Barker

Follow

I am a Non-Exec with the Guild of Professional Agents and the Fine and Country Network. I was previously the CEO of Reapit and was responsible for driving its vision,...

Read More

Reprints & Permissions

ADVERTISEMENT

Economics

Research: When Airbnb Listings in a City Increase, So Do Rent Prices

by Kyle Barron, Edward Kung, and Davide Proserpio

April 17, 2019



HBR Staff/Westend61/Getty Images

Summary. Airbnb has listings for millions of properties around the world, but what does its popularity mean for the cities it operates in? According to a new study, it leads to an increase in rents. The authors examined zip code–level data on rent prices and demographic data... [more](#)

Only a few years ago, most travelers stayed in hotels. Airbnb changed that. As of 2018, the company offers over 5 million properties, in over 85,000 cities across the world, and its market valuation exceeds \$30 billion. In 2017 alone, Airbnb users booked over 100 million nights.

But what does the company's growth and popularity mean for the cities and municipalities it operates in? According to Airbnb, it brings more money to these cities, in the form of both rental fees and the money that renters spend during their stays. The company also notes that roughly three-quarters of its listings aren't in traditional tourist neighborhoods, which means that money is going to communities typically ignored by the hospitality industry.

Critics, on the other hand, have argued that home-sharing platforms like Airbnb raise the cost of living for local renters. There is not much evidence to support this claim one way or the other, though a study focused on Boston found that an increase in Airbnb listings there was associated with an increase in rents. It is not difficult to see why the idea could be true more widely: By making short-term rentals easier, Airbnb could cause some landlords to switch their properties from long-term rentals, which are aimed at local residents, to short-term rentals, which are aimed at visitors. Cities and towns have a finite supply of housing, so this process would drive up rental rates over time.

Because of the limited empirical evidence, we decided to dig deeper. The results of our analysis are in a working paper. We started by collecting data from three sources: (1) consumer-facing information, from Airbnb, about the complete set of Airbnb properties in the U.S. (there are more than 1 million) and the hosts who offer them; (2) zip code-level information, from Zillow, about rental rates and housing prices in the U.S. real estate market; and (3) zip code-level data from the American Community Survey, an ongoing survey by the U.S. Census Bureau, including median household incomes, populations, employment rates, and education levels. We combined these different sources of information in order to study the impact of Airbnb on the housing market.

However, measuring this impact is not straightforward. The main challenge is that the housing market is, of course, affected by factors other than Airbnb, such as gentrification and economic trends. In our study, we control for these factors, and additionally use a technique known as instrumental variables to isolate the part of housing costs that is driven only by changes in Airbnb supply.

In simple terms, we argue that if a zip code is “touristy,” meaning it has a lot of restaurants and bars, and if awareness of Airbnb increases, which we measure using the Google search index for the keyword “Airbnb,” then any jump in Airbnb supply in that zip code is likely driven by an increase in demand for short-term rentals through Airbnb, rather than local economic conditions.

Under this assumption, we show that a 1% increase in Airbnb listings is causally associated with a 0.018% increase in rental rates and a 0.026% increase in house prices. While these effects may seem very small, consider that Airbnb’s year-over-year average growth is about 44%.

This means that, in aggregate, the growth in home-sharing through Airbnb contributes to about one-fifth of the average annual increase in U.S. rents and about one-seventh of the average annual increase in U.S. housing prices. By contrast, annual zip code demographic changes and general city trends contribute about three-fourths of the total rent growth and about three-fourths of the total housing price growth.

These results show that Airbnb does have an impact on the housing market. However, they don’t tell the full story of how it is happening. In our study, we present two additional results that help explain the underlying economics.

First, we show that zip codes with higher owner-occupancy rates (the fraction of properties occupied by the owners themselves) are less affected by Airbnb. Those rates are important because the landlords who switch their properties from long-term rentals to short-term

rentals are those who don't live in the houses they rent. Owner-occupiers do use Airbnb, but they use it to rent out their spare rooms or perhaps the whole home while they are away. However, these homes are still primarily occupied by a long-term resident (the owner), so they are not the ones being reallocated as short-term rentals through Airbnb.

Second, we present evidence that Airbnb affects the housing market through the reallocation of housing stock. By looking at housing vacancies, we show two things about the Airbnb supply: it is *positively* correlated with the share of homes that are vacant for seasonal or recreational use — which is how the Census Bureau classifies houses that are part of the short-term rental market — and *negatively* correlated with the share of homes in the market for long-term rentals.

Taken together, our results are consistent with the story that, because of Airbnb, absentee landlords are moving their properties out of the long-term rental and for-sale markets and into the short-term rental market.

Policy makers around the world are struggling to find the best way to regulate home-sharing platforms like Airbnb. On the one hand, these platforms allow homeowners to make money when they have more room than they need. On the other hand, absentee landlords are reducing the housing supply, which, in turn, increases the cost of living for local renters. According to our results, one way to reduce the latter effect while retaining the benefits of home-sharing would be to limit how many homes can be added to the short-term rental market, while still allowing owner-occupiers to share their extra space.

KB

Kyle Barron holds a BA in economics from UCLA and is a former healthcare researcher at the

National Bureau of Economic Research.
Passionate about contributing to open-source software, Kyle developed an interface to connect Stata and Jupyter that has exceeded 50,000 downloads.

EK

Edward Kung is an assistant professor of economics at UCLA. He is interested in how technology affects housing markets and urban economic outcomes, and his work has appeared in peer-reviewed journals such as the American Economic Review and the Journal of Urban Economics.

Davide Proserpio is an assistant professor of marketing at the University of Southern California. He is interested in the impact of digital platforms on industries and markets, and most of his work focuses on the empirical analysis of a variety of companies including Airbnb, TripAdvisor, and Expedia.

2011

The Community Aspect of Private Ownership

Nadav Shoked
0@0.com

Follow this and additional works at: <https://ir.law.fsu.edu/lr>



Part of the Law Commons

Recommended Citation

Nadav Shoked, *The Community Aspect of Private Ownership*, 38 Fla. St. U. L. Rev. (2011) .
<https://ir.law.fsu.edu/lr/vol38/iss4/2>

This Article is brought to you for free and open access by Scholarship Repository. It has been accepted for inclusion in Florida State University Law Review by an authorized editor of Scholarship Repository. For more information, please contact efarrell@law.fsu.edu.

FLORIDA STATE UNIVERSITY LAW REVIEW



THE COMMUNITY ASPECT OF PRIVATE OWNERSHIP

Nadav Shoked

VOLUME 38

SUMMER 2011

NUMBER 4

Recommended citation: Nadav Shoked, *The Community Aspect of Private Ownership*, 38 FLA. ST. U. L. REV. 759 (2011).

THE COMMUNITY ASPECT OF PRIVATE OWNERSHIP

NADAV SHOKED*

ABSTRACT

This Article advances a new understanding of property rights by introducing the concept of the community aspect of private ownership. Unlike traditional accounts, which assign property rights to the individual owner alone, this Article argues that property rights should be conceived as held by the individual owner in partnership with her immediate community. The neighborhood within which a residential property is located holds a limited interest in that property. The Article reaches this conclusion following a discerning reading of the prevalent theories of property law. As they have so far mostly failed to acknowledge this community aspect of ownership, writers in these diverse traditions have not been able to provide a conceptualization of ownership that will correspond to their theories' own premises. Through the prism of the community aspect of ownership, this Article thus provides not only a more accurate notion of ownership, but also a better view of the contending philosophies of property. In addition, this Article suggests a legal reform that will promote the community aspect of ownership by stabilizing neighborhoods experiencing rapid change in the form of either abandonment or gentrification. Finally, this Article examines the ways in which its proposed community-invested idea of ownership can be applied to problems in other fields of property, torts, and intellectual property law.

I. INTRODUCTION.....	760
II. THE COMMUNITY ASPECT OF PRIVATE OWNERSHIP AND PROPERTY THEORY	766
A. Communitarian Theories	766
1. The Communitarian Worldview.....	767
2. Complicating to the Communitarian Worldview.....	772
3. The Communitarian Worldview in Property Law.....	774
4. Conclusion	777
B. Utilitarian Theories.....	778
1. Preferences for a Stable Community	778
2. Providing for a Stable Community: Markets and Dilemmas	781
a. Stable Communities as a Public Good	781
b. The Failure of Market Mechanisms in Policing the Provision of Community Stability.....	782
c. The Strategic Dilemma Neighbors Face.....	784
3. Conclusion	791
C. Right-Based Arguments	791
1. Personhood Theory.....	792
2. Labor-Desert Theory	794
a. The Theory.....	794
b. The Production of Value.....	795
c. The Production of Residential Properties' Value	798
d. Conclusion.....	799
3. Property as a Natural Right.....	800
4. Property as a Social Phenomenon	803
5. Conclusion	805
D. Conclusion.....	806

* Visiting Assistant Professor, University of Texas School of Law. S.J.D., LL.M. Harvard Law School; LL.B. Hebrew University. This Article originated in a paper written under the supervision of Joseph Singer at Harvard Law School, who was always extraordinarily generous with his time and advice. I further benefitted from extremely helpful comments on varied drafts of this Article from Ronen Avraham, Oren Bracha, William Forbath, Gerald Frug, Morton Horwitz, and Duncan Kennedy. Finally, thanks are due to participants in the Project on Welfare, Justice, and Economics Workshop Series at Harvard University.

III. THE COMMUNITY ASPECT OF PRIVATE OWNERSHIP AND PROPERTY LAW PRACTICE: A PROPOSAL	806
A. <i>An Improving Neighborhood</i>	807
B. <i>A Declining Neighborhood</i>	811
IV. THE COMMUNITY ASPECT OF PRIVATE OWNERSHIP AND OTHER LEGAL PROBLEMS	813
A. <i>Properties Other than Residential Units</i>	813
1. <i>Places of Worship</i>	814
2. <i>Sports Teams</i>	815
3. <i>Other Examples</i>	816
C. <i>Stigma-Based Nuisances</i>	817
D. <i>Intellectual Properties</i>	819
1. <i>Copyright</i>	819
2. <i>The Right of Publicity</i>	823
3. <i>Patents</i>	823
V. CONCLUSION	825

I. INTRODUCTION

“For the quality of owning freezes you forever into ‘I,’ and cuts you off forever from the ‘we.’” John Steinbeck, *The Grapes of Wrath*.¹

On September 22, 1988, the City of Chicago issued a rezoning ordinance revising the land uses allowed on a parcel of land where an abandoned factory stood. The ordinance permitted commercial-residential planned development.² Maria Rodriguez, who lived nearby in a building she owned, should have been thrilled. Everyone predicted an increase in property values following the development—a true windfall for Ms. Rodriguez.³ Nevertheless, Ms. Rodriguez did not view the ordinance as a blessing. Quite the opposite; she chose to go to court, arguing that the ordinance was a deprivation of her property in violation of the Illinois Constitution’s substantive due process guarantees.⁴

How so? If anything, her private property rights appeared to have been enhanced, as real estate values were to increase. Yet Ms. Rodriguez was looking beyond this traditional perception of enhancement and deprivation of private property rights. She understood her property right as implying a broader entitlement; as being more than a mere economic private endowment. For Ms. Rodriguez, her private property right contained a community component without which it would lose much of its value. The rezoning ordinance was putting at risk that important element of her right. She feared the governmental act would entail a change in her community, offsetting any monetary gain brought about by the increase in the property’s market value. She believed that the rise in property values following the rezoning would generate higher rents and property taxes leading to

1. JOHN STEINBECK, *THE GRAPES OF WRATH* 152 (centennial ed. 2002).
 2. *Rodriguez v. Henderson*, 578 N.E.2d 57, 59 (Ill. App. Ct. 1991).
 3. *Id.*
 4. *Id.* (citing ILL. CONST. art. I, § 2).

residents' displacement, thereby changing the local social fabric. Similarly, she worried that higher taxes might force her to move. Though she would sell her house at a profit, she would not be able to recreate elsewhere the atmosphere of her old neighborhood. By thus potentially transforming the community, the ordinance could decrease her subjective valuation of her land, even though it did not touch her parcel or injure the parcel's objective valuation.

Such an argument strikes legal observers as novel, perhaps too novel. The Illinois trial court dismissed Ms. Rodriguez's complaint, noting that it was "unaware of precedent which would recognize an increase in the property value as an injury" to an owner.⁵ But the state appellate court was undeterred by the unconventionality of the legal challenge, and it reversed the decision.⁶ It explained that "even if [Ms. Rodriguez's] property might experience net dollar value increases, theoretically realizable in the future,"⁷ she would suffer harms, "including destruction of . . . neighborhood social and commercial fabric."⁸ Accordingly the court concluded that she had stated a constitutional claim.

In so doing, the Illinois Appellate Court implicitly recognized the community aspect of an owner's property right. The Illinois Constitution mandates due process of law when a person is "deprived of . . . property."⁹ Ms. Rodriguez was not deprived of her property under any traditional understanding of the terms "deprivation" or "property."¹⁰ The building was not confiscated, nor did it lose value.¹¹ Regardless, as the court understood, her holdings were being altered in an irreversible way. This alteration was as troubling as any other damage

5. *Id.* at 60.

6. *Id.* at 66.

7. *Id.* at 63.

8. *Id.* at 64.

9. ILL. CONST. art. I, § 2.

10. Neither was her property "taken," as this latter term is normally used and understood in constitutional takings clauses. The Illinois Constitution employs the term in its eminent domain clause. ILL. CONST. art. I, § 15 ("Private property shall not be taken . . . for public use without just compensation."). The term and its common legal meaning are not irrelevant for due process analysis since American courts have not always clearly distinguished the takings test from the due process test when reviewing zoning ordinances. To find that a zoning ordinance violated substantive due process rights the Illinois courts require a showing that the enactment was "arbitrary, capricious and unrelated to the public morals, safety and general welfare." *Mercer Lumber Cos. v. Vill. of Glencoe*, 60 N.E.2d 913, 916 (Ill. 1945). This test closely traces the federal standard, set by the Supreme Court in *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926). That landmark decision blurred the lines between due process and takings. See Steven J. Eagle, *Property Tests, Due Process Tests and Regulatory Takings Jurisprudence*, 2007 BYU L. REV. 899, 906-07 (2007). The ambiguity persisted for decades, even though takings jurisprudence appeared to have emerged as an independent body of law a few years earlier. The starting point for modern takings jurisprudence is *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922).

11. On the importance of loss of economic value in takings jurisprudence, see *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992).

the government could inflict on her land. While maybe not directly invading Ms. Rodriguez's own private property, the government action was impinging on her community. The Illinois ruling stands for the idea that the value of the individual piece of private property is intertwined with the value of the surrounding community. This Article will argue that property law theory should embrace this view.

Owning property means more than owning land and walls. It denotes owning specific land and walls, which other lands and walls, owned by others, surround.¹² Owning land is owning a part of a specific community. Removal of the community, just like removal of the land and walls, alters the nature of the property right. It does so in a different way that might be perceived as less intrusive, but it does so nonetheless.

Ownership contains a community aspect, and this aspect of ownership is not merely an attribute of an owner's right that should be shielded from arbitrary government interference in the manner envisioned by the Illinois court. The community aspect of ownership is much more meaningful than that. Ms. Rodriguez's story illustrates this point nicely, for it did not end in the courts, where Ms. Rodriguez won the battle. Unfortunately, on her neighborhood's streets, she probably lost the campaign. Her neighborhood, West Town,¹³ was to become the focal point for gentrification processes: households' median income soared by more than 50%, and the median home value rose 176%.¹⁴ The neighborhood's racial composition exhibited a clear trend of change: the non-Latino white population increased from 27.4% to 39.39%, as the percentage of persons of Latino origin decreased from 59% to 46.85%.¹⁵ Latino homeowners were squeezed out as the assessed value of their properties for tax purposes increased dramatically.¹⁶ Thanks to all these developments West Town ended up extolled as the equivalent of New York City's SoHo,¹⁷ unfortunately, this eventuality was in all likelihood the exact outcome Ms.

12. Lee Anne Fennell coined the very useful and accurate term "the unbounded home." The home has come unbound since threats to its value originate from events and conditions that lie outside the parcel's boundaries and never cross those boundaries in a physical sense. Fennell mostly focuses on threats to the house's objective monetary value. LEE ANNE FENNEL, *THE UNBOUNDED HOME: PROPERTY VALUES BEYOND PROPERTY LINES* 13, 25 (2009).

13. The decision does not specify the location of the property, but it does include the address of the rezoned factory, which is nearby. It is within the West Town neighborhood.

14. See David Mendell & Darnell Little, *Rich '90s Failed to Lift All: Income Disparity Between Races Widened Greatly, Census Analysis Shows*, CHI. TRIB., Aug. 20, 2002, http://articles.chicagotribune.com/2002-08-20/news/0208200185_1_median-household-income-whites-blacks.

15. U. ILL. AT CHI. NATHALIE P. VOORHEES CENTER FOR NEIGHBORHOOD AND COMMUNITY IMPROVEMENT, *GENTRIFICATION IN WEST TOWN: CONTESTED GROUND* 20 (2001).

16. A case study of one home owned by a Latino family shows consistent increases, including a jump in assessed value of 117% between 1995 and 1996 alone. *Id.* at 17.

17. John J. Betancur, *The Politics of Gentrification: The Case of West Town in Chicago*, 37 URB. AFF. REV. 780, 792 (2002). For more on gentrification in West Town, see *id.*

Rodriguez was dreading. It must have been an interference with the community aspect of her ownership: a stark decrease in her property right's subjective value.¹⁸ Yet the state court, which had identified such harm as a deprivation of property, could not have come to her rescue this time around. Its decision introduced a remedy applicable where the cause of harm was a specific governmental decision;¹⁹ but here, the harm was generated mainly by the cumulative effect of private decisions made by Ms. Rodriguez's neighbors—a decision to sell their houses to gentrifiers and leave. The court was willing to act when there was state action: it addressed the problem within the contours of public law; but the underlying problem is broader than that—it extends to private law as well.

The fact that Ms. Rodriguez could find no legal redress for the diminution in her property right is a problem for property law. It also presents a challenge for the way we think about what property rights mean. This specific—though rather widespread—predicament endured by Ms. Rodriguez and her neighbors should propel us to engage a broader review of our theories of property. This Article will answer that call by highlighting the community aspect of ownership, thereby enriching our understanding of ownership as a concept and a legal institution. The time is ripe for such an intervention since the scholarly debate over the nature of property rights and their social role has recently gained much needed momentum.²⁰

Yet, until it acknowledges the community aspect of ownership, this normative discussion will remain lacking. The action taken by the Illinois court was a bold move in recognizing the community aspect of ownership; still it was merely a first, and insufficient, step. In order for the community aspect of property to exist and benefit owners, it must also burden owners and limit their freedom. For Ms. Rodriguez to be able to safeguard the stable community that allowed her to enjoy her property, curtailing governmental powers was obviously not enough. Recognizing her neighbors'—and her own—obligations created by the community interest in property is, as this Article will explain, necessary.

18. For details on racial conflicts and outrage of the Latino community, see U. ILL. AT CHI., *supra* note 15.

19. For examples of earlier such proposals, see Frank I. Michelman, *Property as a Constitutional Right*, 38 WASH. & LEE L. REV. 1097 (1981) and Richard Lewis, *Destruction of Community*, 35 BUFF. L. REV. 365 (1986).

20. See, e.g., JOSEPH WILLIAM SINGER, ENTITLEMENT: THE PARADOXES OF PROPERTY (2000); LAURA S. UNDERKUFFLER, THE IDEA OF PROPERTY: ITS MEANING AND POWER (2003); Abraham Bell & Gideon Parchomovsky, *A Theory of Property*, 90 CORNELL L. REV. 531 (2005); Hanoch Dagan, *The Craft of Property*, 91 CALIF. L. REV. 1517 (2003); Michael A. Heller, *The Boundaries of Private Property*, 108 YALE L.J. 1163, 1193-94 (1999); Thomas W. Merrill & Henry E. Smith, *Optimal Standardization in the Law of Property: The Numerus Clausus Principle*, 110 YALE L.J. 1 (2000).

The right to a stable community carries a correlative duty on community members, i.e., the opposite of an unlimited freedom to move out.²¹ Lee Ann Fennell explains that while property within a neighborhood can be divided into individually owned units, important aspects of neighborhood life (e.g. “atmosphere” and greenbelts) are not amenable to being parceled out.²² Thus, as she argues, the neighborhood has both privately owned elements and elements held in common by all neighbors and it should be viewed as a semicommons.²³ This very valid point can—and should—be carried further. Even the supposed privately owned elements of the community (i.e. individual parcels and structures) contain elements held in common. The concept of the community aspect of ownership, as promoted by this Article, holds that private property rights, normally perceived as belonging to the individual owner alone, are in fact held by the owner in partnership with the surrounding immediate community. In this partnership, the owner is by far the senior partner—her stake in the land is much greater than the neighborhood’s. Still, other members of the community hold an interest in the individual homes of their counterparts, as the latter affect their enjoyment of their own homes. A private owner has a right to expect the law to protect her property interests, and the community has a right to expect the same. The community interest in ownership, and the community itself, cannot be obliterated without hindrance. The neighborhood’s interest in the properties of residents entails the maintenance, at least to some degree, of community stability, even at the cost of making it more burdensome for owners to exercise their freedom to sell their properties and leave.

This community interest in ownership should be introduced since it is a natural outgrowth of our thinking about property. As long as we do not recognize it, the property rules we adopt fail to serve their function. They treat a right that is inherently social as if it were a mere individual entitlement, independent, in its enjoyment, promise, and setbacks, from the surroundings. Commonly, it is assumed that this is only true if communitarian or relational conceptions of property law’s role are adopted. These approaches highlight property rights’ contextual and social nature.²⁴ When read in this fashion, it is easy to detect in property rights a community aspect. Yet property is not always interpreted in this way. For some theories of property, property is all about the individual and her independence from soci-

21. On rights and their correlatives, see Wesley N. Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16, 30-44 (1913).

22. FENNELL, *supra* note 12, at 55, 64.

23. On semicommon property rights, see Henry E. Smith, *Semicommon Property Rights and Scattering in the Open Fields*, 29 J. LEGAL STUD. 131 (2000).

24. See *infra* Sections II.A and II.C.4.

ety. According to such worldviews, property stands for privacy, for the ability to detach oneself from others' desires and pursue idiosyncratic preferences.²⁵ Still it is the thesis of this Article that even in reliance on such individualistic theories of property the community's stake in private ownership cannot be ignored. Even without assuming that society predates private property, or that the community's existence is an objective good, the community should be viewed as owning a stake in an individual's private property. Recognizing this element of ownership entails a certain role for property rules: property law should do more to stabilize communities so that the community aspect of a given property is preserved.

In order to make this argument, Part II will analyze the competing theories that account for the existence of property rights and will demonstrate why law should recognize the community interest inherent to property rights. The first theory to be examined will be communitarianism, under which the case for the community aspect of property is the easiest to make. Afterwards, I will move to theories that at first blush appear less hospitable to my argument, examining utilitarian and right-based arguments. The objective of the exercise made in Part II is to illustrate how these diverse theories can all justify, and even necessitate, the recognition of the community interest in property. It follows that it is not the goal of Part II, or of this Article as a whole, to pass judgment on the merits of these rival theories of property.

By the same token, the reader need not adopt all of the perspectives presented in Part II in order to accept my conclusion. On the contrary, Part II aims at proving that be one's preferred theoretical approach to property as it may, she should seriously consider the existence of the community aspect of private property. In this regard this Article assumes an approach that differs from that embraced by most property theorists whose work is reviewed in Part II. Adherents of competing schools of thought normally write with the aim of refuting their counterparts' theories. They thus focus on the polarities between theories. In this Article, I will rather try to bridge the gap between the different theories. I will demonstrate that, despite their many important contrasts, and mostly without even realizing it, these theories share common grounds with regards to the interplay of community and ownership. Without renouncing their own tenets or claims at exclusivity and superiority, the disparate theories should embrace an understanding of property that includes a community aspect. In order to make this argument in a coherent and persuasive manner Part II will introduce the contending theories with some detail. Those well versed in the relevant literature might naturally prefer to

25. See *infra* Sections II.B and II.C.1-3.

read the more general segments of the discussion less closely and focus on the more particularized treatment of the community aspect.

To better understand the meaning of this proposed community aspect, I will supplement the theoretical discussion with a practical one. Part III will explain how the new understanding of the essence of property emerging from Part II should affect property law. As one possible application I will put forward a novel approach for tackling rapid neighborhood change—in the form of gentrification or abandonment—relying on varied legal tools including local taxation, rent control, and the provision of municipal services. Part III will thereby address the problem faced by Ms. Rodriguez and the many others whose plight as owners is currently ignored. Part IV will further bolster the theoretical argument by reviewing its implications for other legal rules in the fields of property, nuisance, and intellectual property.

Finally, an important caveat should be kept in mind throughout this Article. The community right suggested here is not absolute. I am arguing that the community should be accorded partnership status in private properties. But in our liberal society, the community is solely the owner's *junior* partner—and it must remain so. While property has a community aspect that should provide security and assure some degree of neighborhood stability, property is also a tool to promote liberty. The community interest in ownership does not imply an attempt to negate an owner's ability to move out of her home and community. As its name indicates, the community aspect of ownership merely calls for the introduction of another aspect to private ownership, not for the institution's abolition.

II. THE COMMUNITY ASPECT OF PRIVATE OWNERSHIP AND PROPERTY THEORY

A. *Communitarian Theories*

In an influential study, sociologist Herbert Gans found that Levittown, New Jersey—the quintessential postwar American suburb—was neither an economic unit whose members depended on each other, nor a cohesive social body.²⁶ In this respect it differed greatly from earlier communities, such as the medieval town.²⁷ Nevertheless, Gans discovered that in Levittown, very much like in the medieval town, there was the possibility of “an intense identification with the community” if exposed to an external threat.²⁸ Communitarian theo-

26. HERBERT J. GANS, *THE LEVITTOWNERS: WAYS OF LIFE AND POLITICS IN A NEW SUBURBAN COMMUNITY* 145 (1967). The town has since reverted to its original name: Willingboro Township.

27. On the medieval town, see GERALD E. FRUG, *CITY MAKING: BUILDING COMMUNITIES WITHOUT BUILDING WALLS* 27-30 (1999).

28. GANS, *supra* note 26, at 145.

ries seize upon this persistent sociological, non-materialistic role of communities in defining individuals.

Though pursued elsewhere for decades, these theories' application to property discourse is a recent phenomenon.²⁹ Nonetheless, as they make the most natural argument for recognizing community attributes of private ownership, they should serve as the starting point for this Article's theoretical discussion. This Section will show how communitarianism recognizes the community element inherent to ownership and advocates for an ensuing need to maintain stable neighborhoods.

1. *The Communitarian Worldview*

Communitarian thought evolved in reaction to the liberal tradition,³⁰ and many of its proponents trace its roots to the Aristotelian idea of the "good life."³¹ Communitarians reject the liberal notion that the "right" is prior to the "good." They believe that "principles of justice depend for their justification on the moral worth . . . of the ends they serve,"³² i.e., on a particular conception of the good life.³³ This position stands in stark contrast to the liberal aspiration at neutrality, epitomized in the positioning of individual liberty as the substitute for any predetermined set of values describing the good life. This liberal celebration of individual liberty is grounded in a conception of the individual that is rejected by communitarians.

The liberal individual is depicted by communitarians as an empty, atomized, disembodied, solitary, characterless self. The liberal self exists before her attributes, associations, and ends, which she only

29. See, e.g., Gregory S. Alexander & Eduardo M. Peñalver, *Properties of Community*, 10 THEORETICAL INQUIRIES L. 127 (2009); Eduardo M. Peñalver, *Property as Entrance*, 91 VA. L. REV. 1889 (2005). In addition, Gerald Frug applied communitarian theories to local government law, FRUG, *supra* note 27, at 85-89, and Gregory S. Alexander, *Dilemmas of Group Autonomy: Residential Associations and Community*, 75 CORNELL L. REV. 1 (1989) to homeowners associations. The value of groups has also been used to justify the constitutional protection of group rights. See Ronald R. Garet, *Communitarianism and Existence: The Rights of Groups*, 56 S. CAL. L. REV. 1001 (1983).

30. Michael Walzer, *The Communitarian Critique of Liberalism*, 18 POL. THEORY 6, 20 (1990).

31. Aristotle believed that humans are not born with the capacity to live full human lives. Such lives require the cultivation of intellectual and moral virtues that can only take place when an individual forms a part of a political community. Humans can perform their highest actions, such as philosophy or virtuous acts, only within a community. Hence Aristotle described the relationship between the individual and the community as a part-whole relationship. Many, though not all, philosophers further argue that for Aristotle the community was a natural, or organic, entity. Compare David Keyt, *Three Fundamental Theorems in Aristotle's Politics*, 32 PHRONESIS 54 (1987), with Robert Mayhew, *Part and Whole in Aristotle's Political Philosophy*, 1 J. ETHICS 325 (1997).

32. MICHAEL J. SANDEL, *LIBERALISM AND THE LIMITS OF JUSTICE* xi (2d ed. 1998).

33. *Id.* at 185-86.

later chooses in an independent manner.³⁴ The resulting liberal society is constituted by many different selves, each with different ends. Values become nothing but the distinct expressions of preferences of the separate selves. In such a society there can be no aspiration towards reaching an agreement regarding values or the nature of the good life, and hence each individual must be left free to set her own perceptions of the good life.³⁵

Against this detached liberal self, communitarians posit their alternative: a social self, deeply attached to her community. She is a situated self—born and placed into certain associations. The attachments to these associations define her and mold her identity.³⁶ Without them, the self is not only devoid of character,³⁷ but also of the ability to feel, since feelings are learned through the experience of others and cannot be described even to oneself without sharing a tradition of discourse.³⁸ As Charles Taylor explains, “[m]y identity is defined by the commitments and identifications which provide the frame or horizon within which I can try to determine from case to case what is good, or valuable, or what ought to be done, or what I endorse or oppose.”³⁹ This is not to say that the self enjoys no independence; the self can decide at a certain point in her life to break loose from her community and develop her unique identity and values. However, the uniqueness of her new values—indeed her independence itself—will be defined in relation to the social values she previously absorbed.⁴⁰

This portrayal of the self’s communal constitution is perceived as the heart of communitarian thinking. Michael Walzer, however, argues that fellow communitarians carry the point too far. He believes that the central issue is not the self’s constitution, but rather the pattern of social relations.⁴¹ Liberalism is a theory of relationship that has voluntary associations at its center, with voluntarism meaning a persistent right of rupture.⁴² Communitarians view these ties not as

34. *Id.* at 62-65, 94-95, 133, 186-88; ALASDAIR MACINTYRE, *AFTER VIRTUE: A STUDY IN MORAL THEORY* 33 (2d ed. 1984); CHARLES TAYLOR, *SOURCES OF THE SELF: THE MAKING OF THE MODERN IDENTITY* 35 (1989).

35. See SANDEL, *supra* note 32, at 175-77; TAYLOR, *supra* note 34, at 507 (arguing further that since under such an outlook nothing outside subjective goals can be allowed to trump self-realization, the resulting modes of life are shallow).

36. See SANDEL, *supra* note 32, at 150; MACINTYRE, *supra* note 34, at 33-34; see also Duncan Kennedy, *Political Power and Cultural Subordination: A Case for Affirmative Action in Legal Academia*, in *AFTER IDENTITY: A READER IN LAW AND CULTURE* 83, 90 (Dan Danielson & Karen Engle eds., 1995).

37. SANDEL, *supra* note 32, at 179.

38. ROBERTO MANGABEIRA UNGER, *PASSION: AN ESSAY ON PERSONALITY* 20-21 (1984).

39. TAYLOR, *supra* note 34, at 27.

40. *Id.* at 36, 39.

41. Walzer, *supra* note 30, at 21.

42. *Id.* at 20-21.

associations but as attachments, which the individual does not choose and which she is limited in her ability to sever.

The contrast between liberalism and communitarianism concerning the nature of relationships is not merely theoretical. It has an empirical component. In this regard communitarianism is of a dualistic quality. On the one hand it is a normative attack on a modern society that has allegedly become liberal, lacking consensus and guided by private caprices. On the other hand, it is a sociological-empirical condemnation of modern liberal thinking for misrepresenting real life, in which social ties still matter. The normative and empirical arguments cannot coexist: each implies an opposite diagnosis of modern society. Walzer settles the inconsistency by concluding that each of the two claims is only partly right.⁴³ Modern society is indeed characterized by a continuous motion of individuals, who leave behind, more easily than before, old associations and attachments. But individuals have remained to some degree creatures of community, whose ties of place, class, family, and politics survive new mobility.⁴⁴

As the culmination of this—partly normative, partly sociological—criticism of liberalism, communitarians prescribe a clear policy. Alasdair MacIntyre, who laments the loss of morality reaching its climax with modern liberalism, concludes with these powerful words:

What matters at this stage is the construction of local forms of community within which civility and the intellectual and moral life can be sustained through the new dark ages which are already upon us. And if the tradition of the virtues was able to survive the horrors of the last dark ages, we are not entirely without grounds for hope. This time however the barbarians are not waiting beyond the frontiers; they have already been governing us for quite some time.⁴⁵

MacIntyre and others view the reinstatement and reinforcement of communities as a moral concern. But it is not only a moral imperative. It is also a political concern for the democratic state. Unlike Enlightenment European republicans who viewed intermediate communities as a threat to general society,⁴⁶ communitarians regard these “partial societies” as vital for the survival of the state. The shattering of local communities will lead to the disintegration of the larger national community since a “society of self-fulfillers,” where

43. *Id.* at 20-22.

44. *Id.* at 7-14.

45. MACINTYRE, *supra* note 34, at 263.

46. JEAN-JACQUES ROUSSEAU, ON THE SOCIAL CONTRACT 17-18 (G. Cole trans., 2003). Some argue that Rousseau's objection to intermediate associations was more attenuated. See Maure L. Goldschmidt, *Rousseau on Intermediate Associations*, in VOLUNTARY ASSOCIATIONS: NOMOS XI 119 (J. Roland Pennock & John W. Chapman eds., 1969). Regardless, American civic republicans have traditionally been much more sympathetic to intermediate communal entities. See generally Frank Michelman, *Law's Republic*, 97 YALE L.J. 1493 (1988).

affiliations are perceived as revocable, cannot sustain the strong identification with the political community democracy requires.⁴⁷ For this reason, in the words of John Dewey:

When a state is a good state . . . [i]t renders the desirable associations solider and more coherent . . . it gives the individual members of valued associations greater liberty and security: it relieves them of hampering conditions which if they had to cope with personally would absorb their energies in mere negative struggle against evils. It enables individual members to count with reasonable certainty upon what others will do, and thus facilitates mutually helpful coöperations [*sic*].⁴⁸

In so acting to preserve a community, the state unavoidably inflicts harms on some members of that community—it curtails their freedom in order to serve their community’s interests. As seen in the Introduction, the community interest is not only a right, but also a duty placed on community members. Under communitarian premises this harm is justified, even from the standpoint of the injured party. When required to enlist her resources in the service of a communal endeavor, the communitarian individual is not being used for others’ ends; she is contributing to the purposes of a community she regards, or regarded in the recent past, as her own. The justification for her sacrifice “is not the abstract assurance that unknown others will gain more than [she] will lose, but the rather more compelling notion that by [her loss she] contribute[s] to the realization of a way of life in which she take[s] pride and with which [her] identity is bound.”⁴⁹

So far we have seen why community matters, why the state must act in order to help it survive, and why, when doing so, the state may demand contributions from community members. This is not enough for the purposes of this Article’s argument. For communitarianism to serve as grounds for recognizing a community aspect inherent to private property and necessitating legal action to stabilize surroundings, it must be shown that the neighborhood—private land’s environment—is a community. For communitarians a community is not a spatial notion. A community is created by “a common vocabulary of discourse and a background of implicit practices and understandings within which the opacity of the participants is reduced if never finally dissolved.”⁵⁰

47. TAYLOR, *supra* note 34, at 508.

48. JOHN DEWEY, *THE PUBLIC AND ITS PROBLEMS* 71-72 (Swallow Press 1991) (1927).

49. SANDEL, *supra* note 32, at 143. Not surprisingly, critics of communitarianism find such “ethics of sacrifice” worrisome. *See, e.g.*, Hanoch Dagan, *Reimagining Takings Law*, in *PROPERTY AND COMMUNITY* 39, 44 (Gregory S. Alexander & Eduardo M. Peñalver eds., 2010).

50. *Id.* at 172.

Localities are frequently invoked in communitarian writings as examples of such communities,⁵¹ and it is widely believed that social groups are often constituted by their connection to land.⁵² As Jennifer Wolch and Michael Dear wrote, “social life structures territory . . . and territory shapes social life.”⁵³ These claims are bolstered by the works of urban scientists who have found that neighborhoods provide residents with an important source of identity. Over the past half-century the traditional notion of the neighborhood as an organic self-contained unit has receded.⁵⁴ Nonetheless, planners and social scientists still consider the neighborhood to be a meaningful unit. While they accept that the neighborhood is a contested concept lacking a settled definition,⁵⁵ most contend that this indeterminacy does not disprove the neighborhood’s existence.⁵⁶ Even the currently prevalent open-ended definitions—such as that “a neighborhood is a limited territory within a larger urban area where people inhabit dwellings and interact socially”⁵⁷—posit that neighborhoods offer not only spatial demarcations but also social demarcations. Therefore it is not surprising that studies have found that residents will act passionately relying on the meaning the neighborhood provides them.⁵⁸

Communitarians will agree that the individual and her private abode are meaningless when separated from their surrounding community. Part of what makes an individual an individual, and a home a home, is their close environment. Identity is intimately tied to memory and a person’s memory is interconnected with the histories of her neighbors.⁵⁹ Therefore,

a more humane conception of land has to go beyond the notion of a physical, material space demarcated by a finite number of square feet. It also must be understood as an integral part of the social

51. *See, e.g., id.* at 143.

52. Alexander, *supra* note 29, at 11-12.

53. *THE POWER OF GEOGRAPHY: HOW TERRITORY SHAPES SOCIAL LIFE* 4 (Jennifer Wolch & Michael J. Dear eds., 1989).

54. *See, e.g.,* GERALD D. SUTTLES, *THE SOCIAL CONSTRUCTION OF COMMUNITIES* (1972); HERBERT J. GANS, *PEOPLE, PLANS, AND POLICIES: ESSAYS ON POVERTY, RACISM, AND OTHER NATIONAL URBAN PROBLEMS* (1991).

55. ROBERT K. YIN, *CONSERVING AMERICA’S NEIGHBORHOODS* 121 (1982); NAT’L COMM’N ON NEIGHBORHOODS, PEOPLE, BUILDING NEIGHBORHOODS: FINAL REPORT TO THE PRESIDENT AND THE CONGRESS OF THE UNITED STATES 7 (1979).

56. HOWARD W. HALLMAN, *NEIGHBORHOODS: THEIR PLACE IN URBAN LIFE* 15 (1984).

57. *Id.* at 13. For a similar definition, see ANTHONY DOWNS, *NEIGHBORHOODS AND URBAN DEVELOPMENT* 15 (1981).

58. JOHN R. LOGAN & HARVEY L. MOLOTCH, *URBAN FORTUNES: THE POLITICAL ECONOMY OF PLACE* 101-02, 107-08 (1987).

59. DOLORES HAYDEN, *THE POWER OF PLACE: URBAN LANDSCAPES AS PUBLIC HISTORY* 9 (1997).

and spiritual life of our communities—socially produced *places* that have meaning for all of us.⁶⁰

Communitarians will argue that measures should be adopted so that the neighborhood, given its importance as a community, can persist. In a similar vein, a communitarian will object to the perception of the neighborhood as a mere commodity, whose fate is to be determined by market dynamics generated by the actions of supposedly despotic owners. The mere use of price rhetoric in this context can be accused of engendering social alienation, of undermining personal identity, and of doing “violence to our deepest understanding of what it is to be human.”⁶¹

2. *Complicating to the Communitarian Worldview*

While the communitarian endorsement of neighborhoods as communities that property law should embrace is straightforward, it often seems too simplistic. It should be fine-tuned. I will now examine several critiques of communitarianism and use their counter-arguments to question and revise several of the broad statements made above.

A forceful denial of many communitarian assumptions is found in post-modernist theory. Post modernists, occupied with the deconstruction of identity, view the self as fragmented and shifting.⁶² This post-modern self is embedded within a matrix of social and psychological factors.⁶³ The effort at prescribing one identity to the self is not merely fruitless—it is dangerous; all the interlacing identities within the self are delusional and serve as tools for exercising power over her, by defining the “self” and contrasting her with the “other.” The self’s identity and relationships, complex and highly mobile, are performances. They are not an “internal” feature of hers, but an effort she makes to live up to an invented figure others created for her. The choice of words here is important: the self is invented, but is by no means false, as there is no “true inner self” to be repressed.⁶⁴

These few lines cannot begin to convey the richness and complexity of post-modernist literature, but they introduce the essence of the post-modernist reply to this Section’s themes. They suggest that the neighborhood should not be treated as the self’s main source of iden-

60. TOM ANGOTTI, NEW YORK FOR SALE: COMMUNITY PLANNING CONFRONTS GLOBAL REAL ESTATE 22 (2008).

61. Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849, 1905-06 (1987); see also ELIZABETH ANDERSON, VALUE IN ETHICS AND ECONOMICS 164-66 (1993).

62. Joan C. Williams, *Dissolving the Sameness/Difference Debate: A Post-Modern Path Beyond Essentialism in Feminist and Critical Race Theory*, 1991 DUKE L.J. 296, 307-08 (1991).

63. *Id.* at 307.

64. See JUDITH BUTLER, GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY xiv-xv, 181-90 (1999); FRUG, *supra* note 27, at 92-97; JEAN-FRANÇOIS LYOTARD, THE POSTMODERN CONDITION: A REPORT ON KNOWLEDGE 14-17 (1984); ROBIN WEST, CARING FOR JUSTICE 281-84 (1997); Williams, *supra* note 62, at 306-08.

tity; that we should be sensitive to the discourse of power associated with spatial identities and with any community component inserted into private rights. The basic demand post-modernism makes is to realize that the community and the connections that allegedly tie individual residents to it are performances. But what are the implications of these observations?

Mostly they advise us to exercise caution in arguing for the social component of the self generally and for neighborhood stability particularly. Caution here does not necessarily entail a substantial revision of the communitarian project. Caution implies acknowledging that each individual has many identities, and that the neighborhood—or any other community—may be the mainstream’s weapon for subjugating minorities. Despite this cautionary note, the post-modernist perspective does not deny the need for personal and community identity. Post-modernism does not require law to ignore the enabling and constitutive power that identities and communities exert over people’s lives and feelings. They might be performances, mythical rather than real connections, but they still influence people and hence deserve recognition.

The neighborhood is an “imagined community,”⁶⁵ often defined less by actual interactions and “true” identity than by subjective perceptions and beliefs regarding the existence and importance of said interactions and identity.⁶⁶ This does not mean that the neighborhood is a mere personal fantasy that can persist indefinitely regardless of changes to surrounding places and people.⁶⁷ Rather it is an intersubjective creation. Being a “neighbor” might be a performance, but one that needs to be performed with, and in front of, others who are engaged in the same performance and understand it. The fleeting and seemingly meaningless sight of a neighbor, the knowledge that she is there, constructs the neighborhood and confers psychic benefits. The neighborhood might be imagined, but it is still important for individuals and thus should carry legal weight.

65. The term “imagined community” was coined by Benedict Anderson to describe the notion of the nation. Anderson explained that the nation is imagined since its members view themselves as related to one another, despite the fact that they have never met all their “fellow” nationals. BENEDICT ANDERSON, *IMAGINED COMMUNITIES: REFLECTIONS ON THE ORIGIN AND SPREAD OF NATIONALISM* 5-6 (rev. ed. 1991).

66. Residents sometimes even have difficulty describing the boundaries of their neighborhoods. See generally ALBERT HUNTER, *SYMBOLIC COMMUNITIES* (1974). They will talk about “their neighborhood” or “their community,” even though the boundaries and meanings of these self-defined places are unlikely to be exact. WILLIAM PETERMAN, *NEIGHBORHOOD PLANNING AND COMMUNITY-BASED DEVELOPMENT: THE POTENTIAL AND LIMITS OF GRASSROOTS ACTION* 21 (2000).

67. See ANGOTTI, *supra* note 60, at 22 (“[S]tories of people threatened with displacement show how land may evoke deep feelings and emotions associated with the everyday lives and activities of people. This approach cannot be understood as purely ‘subjective’ because ideologies and symbols have a material base and are a material force in the world.”).

This revised understanding of the nature of community can be used as a reply to a critique of the communitarian case coming from another quarter. Some argue that it is a mistake to group all neighborhoods under the same heading. They concede that some neighborhoods are communities and should be protected, but they contend that other neighborhoods are not communities. These views are associated with an understanding of community as implying real life interactions. When faced with a neighborhood where one resident has never talked to another, adherents to this understanding deny the neighborhood's pretensions of community status.⁶⁸ This "behavioralist" approach would therefore require, before a specific locale is granted protection, an empirical examination to determine to what degree its residents interact.⁶⁹

But the portrayal of the neighborhood as an imagined community renders unsustainable such cries for empirical distinctions. The experience of community is richer than that represented by any metric of interactions suggested by a behavioralist approach. As we saw, the neighborhood defies easy objective definitions.⁷⁰ The community is based on imagination and beliefs, and thus there is no need for it to always have actual, objective, or easily identifiable features. "A neighborhood is a subjective entity as well as an objective reality. Its face and form and the social relations within are what individual residents perceive."⁷¹ The neighborhood as residents imagine it, an abstract invented idea, may be more important than the neighborhood residents actually experience. Even when its beneficial attributes are a shared fantasy, the neighborhood still delivers those beneficial attributes. Without them, the individual loses something that is important to her constitution, and her private property ceases to perform a function that is extremely important.

3. *The Communitarian Worldview in Property Law*

Communitarian theories are invoked much less often than theories presented in the following Sections when property law rules are debated. Still, their neglect does not render them irrelevant; they are not alien to existing property rules.

The Supreme Court acknowledged the importance of maintaining communities, noting that "the State has a legitimate interest in local

68. MARGARET JANE RADIN, REINTERPRETING PROPERTY 87-89 (1993).

69. An example for this research approach is social networks analysis. See, e.g., Gary Bridge, *Gentrification, Class and Community: A Social Network Approach*, in THE URBAN CONTEXT: ETHNICITY, SOCIAL NETWORKS AND SITUATIONAL ANALYSIS 259 (Alisdair Rogers & Steven Vertovec eds., 1995).

70. See *supra* notes 55-58 and accompanying text.

71. HALLMAN, *supra* note 56, at 13. See also NAT'L COMM'N ON NEIGHBORHOODS, *supra* note 55, at 7 (admitting an inability to provide an agreed definition of "neighborhood," and concluding that "[i]n the last analysis, each neighborhood is what the inhabitants think it is").

neighborhood preservation, continuity, and stability.”⁷² It thus upheld a property tax scheme that discriminated against similarly located properties in the service of neighborhood preservation.⁷³ Elsewhere, citing the same public interest in preserving neighborhood character, the Court authorized the curtailment of owners’ free speech in an effort to disperse adult motion picture theatres throughout the city.⁷⁴ Other courts have addressed governmentally inflicted harms to neighborhoods’ stability in similar communitarian terms. When New York City approved the construction of a luxury building in Chinatown, the state Court of Appeals ruled that under the State Environmental Quality Review Act,⁷⁵ the city should have considered detrimental effects on the Chinatown community. The court construed the phrase “environmental impact” as including impact upon “neighborhood character.”⁷⁶

Furthermore, communitarian thinking exerts tremendous influence throughout whole bodies of property law. Zoning laws, often presented as tools for spatial engineering, function to a great extent as measures of social engineering. They are employed to control the community, not just the environment.⁷⁷ Restricting construction to single-family units, mandating minimum lot sizes, limiting the ability to subdivide, capping the number of unrelated occupants—these laws serve to keep unwanted persons out of the community.⁷⁸ Exclusionary zoning is many times attributed to municipalities’ desire in ensuring a tax base,⁷⁹ but some argue that it is mainly driven by non-fiscal reasons, such as preferences for racial and income homogeneity and preservation of suburban lifestyles.⁸⁰ These non-fiscal reasons can be understood, at least to some extent, as communitarian.

Zoning laws are no longer the only instrument designing the environments and communities within which owners exercise their rights.

72. *Nordlinger v. Hahn*, 505 U.S. 1, 12 (1992).

73. *Id.*

74. *Young v. Am. Mini Theatres, Inc.*, 427 U.S. 50 (1976).

75. N.Y. ENVTL. CONSERV. LAW § 8 (Consol. 2011).

76. *Chinese Staff & Workers Ass’n v. City of New York*, 502 N.E.2d 176, 180 (N.Y. 1986). The federal statute, the National Environmental Policy Act, 42 U.S.C. §4321, has not been interpreted in this manner. See *Breckinridge v. Rumsfeld*, 537 F.2d 864 (6th Cir. 1976).

77. See, e.g., J. Gregory Richards, *Zoning for Direct Social Control*, 1982 DUKE L.J. 761, 762-67, 777-78, 806-07 (1982).

78. LOGAN & MOLOTCH, *supra* note 58, at 186.

79. See *S. Burlington Cnty. NAACP v. Twp. of Mount Laurel*, 336 A.2d 713, 730-31 (N.J. 1975). The seminal paper on fiscal zoning is Bruce W. Hamilton, *Zoning and Property Taxation in a System of Local Governments*, 12 URB. STUD. 205 (1975) (explaining that by setting a minimum value for properties in the locality, zoning assures that buyers will pay a minimum share of property taxes). There are other economic motives for exclusionary land use control, as explained in Lee Anne Fennell, *Exclusion’s Attraction: Land Use Controls in Tieboutian Perspective*, in THE TIEBOUT MODEL AT FIFTY: ESSAYS IN PUBLIC ECONOMICS IN HONOR OF WALLACE OATES 163, 173-77 (William A. Fischel ed., 2006).

80. DUANE WINDSOR, FISCAL ZONING IN SUBURBAN COMMUNITIES 38-39, 41-42 (1979).

As many as sixty million Americans are now living in housing subject to covenants limiting the uses of their properties and governed by a condominium or homeowners association.⁸¹ Traditionally, property law placed many restrictions on the ability to create and enforce covenants, as they curtail the owner's freedom to use her land. The legal drive to liberalize these old laws of restrictive covenants culminated in the adoption of the *Restatement (Third) of Prop. (Servitudes)* in the year 2000. It has facilitated the placement of intrusive restrictions on the rights of owners.⁸² These can, for example, forbid repainting,⁸³ constructing or dismantling a fence,⁸⁴ hanging curtains,⁸⁵ planting trees,⁸⁶ or keeping pets.⁸⁷ They might also limit an owner's freedom to lease or sell her property.⁸⁸ Such restrictions do not merely safeguard certain desired neighborhood aesthetics; they also ensure that the residents themselves correspond to a certain "community character."⁸⁹ Affirmative covenants, such as a duty to pay fees for membership in a recreational club,⁹⁰ serve a similar function.

Covenants are regarded by many as forms of private governance, assuming roles once ascribed to public government.⁹¹ Yet individualistic-utilitarian explanations cannot alone account for homeowners associations' popularity. Covenants have generally not been carefully designed to assure maximization of property values. For example,

81. According to estimates, as of 2010, 62 million Americans were living in homeowners associations, condominiums, or cooperatives. An estimated 309,600 such planned communities existed, containing 24.8 housing units overall. Cmty. Ass'ns Inst., *Industry Data: National Statistics*, <http://www.caionline.org/info/research/Pages/default.aspx> (last visited Sept. 2, 2011).

82. For more on restrictive covenants and homeowners associations, see, for example, EVAN MCKENZIE, *PRIVATOPIA: HOMEOWNER ASSOCIATIONS AND THE RISE OF RESIDENTIAL PRIVATE GOVERNMENT* (1994) and James L. Winokur, *The Mixed Blessings of Promissory Servitudes: Toward Optimizing Economic Utility, Individual Liberty, and Personal Identity*, 1989 WIS. L. REV. 1, 88 (1989).

83. See, e.g., *W. Hill Colony, Inc. v. Sauerwein*, 138 N.E.2d 403 (Ohio Ct. App. 1956).

84. See, e.g., *Cohen v. Kite Hill Cmty. Ass'n*, 191 Cal. Rptr. 209 (Cal. Ct. App. 1983).

85. See Paula A. Franzese, *Does It Take a Village? Privatization, Patterns of Restrictiveness and the Demise of Community*, 47 VILL. L. REV. 553, 556 (2002).

86. See, e.g., *Ironwood Owners Ass'n IX v. Solomon*, 224 Cal. Rptr. 18 (Cal. Ct. App. 1986).

87. See, e.g., *Nahrstedt v. Lakeside Vill. Condo. Ass'n*, 33 Cal. Rptr. 2d 63 (Cal. 1994). *But see* CAL. CIV. CODE § 1360.5 (West 2007) (adopted following the decision, and making it illegal for an association to prohibit owners from keeping at least one pet).

88. See, e.g., *Laguna Royale Owners Ass'n v. Darger*, 174 Cal. Rptr. 136, 141 (Cal. Ct. App. 1981) (holding that a restriction on the right of alienation requiring that the condominium board consent to a sale will be upheld if exercised reasonably); *Franklin v. Spadafora*, 447 N.E.2d 1244, 1250 (Mass. 1983) (upholding covenant limiting the number of units a person can own in a condominium, thereby barring one resident from selling to another); *Worthinglen Condo. Unit Owners' Ass'n v. Brown*, 566 N.E.2d 1275, 1279 (Ohio Ct. App. 1989) (holding that condominium declaration prohibited leases).

89. Racially restrictive covenants, though, are now forbidden. See Fair Housing Act, 42 U.S.C. §§ 3601-3619, 3631 (2006); *Shelley v. Kraemer*, 334 U.S. 1, 120 (1948).

90. See, e.g., *Regency Homes Ass'n v. Egermayer*, 498 N.W.2d 783, 793 (Neb. 1993).

91. See Uriel Reichman, *Residential Private Governments: An Introductory Survey*, 43 U. CHI. L. REV. 253 (1976).

they do not allow for deviation from association rules whenever an expert panel predicts that an owner's proposed action will increase property values.⁹² The reason is that covenants are not only meant to keep property values from declining; they are meant to preserve community character, even when threatened by actions that increase property values.

In light of this role of homeowners associations, the legal regime that allowed them to prosper can be viewed as corresponding to communitarian views.⁹³ The willingness of property law in this and the other contexts presented in this Subsection to further communitarian causes illustrates how communitarian ideas can be employed to legitimize the recognition of the community interest in property. It shows that doing so will not be out of line with existing property principles.

If anything, it will complement them. Law has on many occasions restricted its recognition of the community interest to affluent communities. While exclusionary zoning and homeowners association laws serve communitarian goals in private properties situated in relatively affluent neighborhoods, political authorities and courts have been much less eager to adopt similar community-promoting property rules when inner city properties are concerned.⁹⁴ This discrimination against the community needs of lower income residents is troubling, since the local community and the social ties it engenders play a larger role in the lives of the poor than in the lives of the affluent.⁹⁵ The latter, given their resources and salience, may much more easily find and, if necessary, create other communities within which they feel at home and freely express their identities.⁹⁶

4. *Conclusion*

Communitarian theories insist that the individual cannot exist without the community, and thus she cannot be served by private rights, such as ownership, that lack a community component. They advocate for the protection of neighborhood stability, and property law indeed recognizes this need in many fields. Yet as persuasive as the communitarian case may be, the protection of neighborhood stability must not be absolute. An extreme communitarian conception will lead to effacement of the individual and erosion of freedom.⁹⁷

92. Homeowners associations' staunch supporters have recognized the need for allowing covenants' modification without a unanimous vote, as is customary. See Richard A. Epstein, *Covenants and Constitutions*, 73 CORNELL L. REV. 906, 922 (1988).

93. See Alexander, *supra* note 29, at 11-12, 40-42.

94. See FRUG, *supra* note 27, at 81-82.

95. Jeffery James Minton, *Rent Control: Can and Should It Be Used to Combat Gentrification?* 23 OHIO N.U. L. REV. 823, 827, 833 (1997).

96. For a similar argument, see RADIN, *supra* note 68, at 70, 97.

97. BENJAMIN R. BARBER, *STRONG DEMOCRACY: PARTICIPATORY POLITICS FOR A NEW AGE* 147-50, 231-32 (1984); Dagan, *supra* note 49, at 44.

Furthermore, community members are not the only ones to pay the price of the community's empowerment. Outsiders, the "others" used to define the community members' "we," pay a higher toll.⁹⁸ As put by Gregory Alexander, "[c]ommunities by their very nature exclude."⁹⁹

Rigid adherence to the ideal of stable neighborhoods is extremely dangerous. It will block residents from moving out, impeding their pursuit of lives they desire. It will prevent others, immigrants who could have improved their own living standards and enriched the neighborhood, from moving in.¹⁰⁰ We must not blind ourselves to the costs of zealously promoting community stability. This is a key theme of this Article—stability and change must be allowed to interplay. We need and want stability to exist side by side with change, not at its expense. Most communitarians will agree with this contention;¹⁰¹ it is not clear, however, whether communitarianism can offer a sensible balance. Communitarians should not ignore the role of the individual and mobility, just as liberals should not ignore the role of the community and stability.

B. Utilitarian Theories

In the preceding Section the justification for recognizing the community's stake in a private owner's right and the ensuing legal need to promote neighborhood stability was derived from the community's alleged intrinsic value. That is, the community was perceived as a good in itself. Utilitarian theories vehemently reject any such notion. The only goods they recognize are those originating in the individual and her preferences. The community as such is of no value.¹⁰² But what if individuals, independently, want a community? This Section will put forward possible utilitarian responses to this challenge, developing a utilitarian case for the community aspect of ownership.

1. Preferences for a Stable Community

Welfare economics, probably the currently most prevalent utilitarian theory, assesses policies exclusively in terms of their effects on individuals' wellbeing.¹⁰³ The notion of wellbeing—"utility"—incorporates everything that an individual might value.¹⁰⁴ The analy-

98. See William H. Simon, *Social-Republican Property*, 38 UCLA L. REV. 1335, 1403-1412 (1991).

99. Alexander, *supra* note 29, at 52.

100. See Robert C. Ellickson, *Rent Control: A Comment on Olsen*, 67 CHI.-KENT L. REV. 947, 953 (1991).

101. See, e.g., Walzer, *supra* note 30, at 21-22.

102. See JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 12 (J. H. Burns & H. L. A. Hart eds., Oxford University Press 1996) (1781).

103. LOUIS KAPLOW & STEVEN SHAVELL, FAIRNESS VERSUS WELFARE 16 (2002).

104. *Id.* at 18.

sis revolves around the *actual* preferences of individuals, not on what the analyst thinks these preferences *ought* to be.¹⁰⁵

Hence, for welfare economics to support legal promotion of community stability, it must be shown that stability corresponds to individuals' actual preferences. Some evidence for the existence of such a preference was provided earlier when the popularity of homeowners associations was noted. Americans are eager to be able to exercise control not only upon the physical contours of their homes, but also upon the surroundings' human composition. Their motivation might be assuring quality of living, and it might also be that such control preserves property values: in either case the premiums owners put on exerting this power indicate a potent preference for avoiding change.

A strong consumer preference for living in homogenous neighborhoods exists.¹⁰⁶ Housing in such neighborhoods commands a substantial "exclusivity premium."¹⁰⁷ Anxiety and social fright are widely associated with anticipated neighborhood change.¹⁰⁸ The American suburban dream has been based on the constant fear of being caught up by people of lower standing, of neighborhoods being "invaded." More recently, as the Introduction demonstrated, inner city homeowners have turned apprehensive as higher-class residents invade their neighborhoods. All these observations indicate an intense preference for neighborhood stability.

This preference is readily explicable. The neighborhood is the focal point of residents' daily routine. Since routines only develop after a lengthy process of trial and error, neighborhood change undermining a routine's element is costly. Neighborhoods also supply residents with informal support networks, which deliver various goods, ranging from a cup of sugar and babysitting to political connections. These bonds enable people to rely on one another.¹⁰⁹ The bonds of trust also allow residents to learn what to expect from each other. Residents can then cooperate in order to achieve common goals, such as better local services.¹¹⁰ Neighborhood bonds facilitate the creation of social norms and other coping mechanisms that invisibly control behavior and prevent unacceptable actions, like parking across another's driveway or playing loud music at night. These civil forces control uncivil actions, and only in exceptional cases is police intervention

105. See *id.* at 409-463.

106. See Robert C. Ellickson, *The Irony of "Inclusionary" Zoning*, 54 S. CAL. L. REV. 1167, 1199-1201 (1981).

107. Andrew G. Dietderich, *An Egalitarian's Market: The Economics of Inclusionary Zoning Reclaimed*, 24 FORDHAM URB. L.J. 23, 55-59 (1996).

108. CONSTANCE PERIN, EVERYTHING IN ITS PLACE: SOCIAL ORDER AND LAND USE IN AMERICA 109 (1977).

109. See LOGAN & MOLOTCH, *supra* note 58, at 103-05.

110. Lee Anne Fennell, *Beyond Exit and Voice: User Participation in the Production of Local Public Goods*, 80 TEX. L. REV. 1, 71 (2001).

needed. These norms and their informal enforcement render residents' lives more agreeable. When neighborhood stability is lost, social norms break down.¹¹¹ In addition, a stable neighborhood provides a sense of physical and psychic security that comes with a familiar and dependable environment. Being a part of a stable community provides the benefit of membership in an orderly and protective social space. Finally, a neighborhood enables residents to benefit from economies of scale; residents enjoy benefits that would have been unavailable had they not been living within the community. The concentration of a large number of similar people stimulates the development of agglomerations appropriate to their needs. For example, in an immigrants' community residents will enjoy restaurants, shops, and entertainment venues tailored to their customs. If the community disintegrates and its members disperse, such businesses will not be operated and the individuals will be deprived of goods they desire.¹¹²

The conclusion is that individuals entertain a preference for stable communities, as these enhance their welfare. Obviously, this preference is different from a preference for, say, running water or heating. Unlike running water or heating, a stable community is an intangible good. The quantification of such a good is always difficult. It is rendered even more difficult in this case since a stable community entertains characteristics of an irreplaceable good. Owners prize their community because it is unique, and hence its valuation increases dramatically when the individual owns a right in it. Therefore, the discrepancy between relevant asking and offering prices is likely to be substantial,¹¹³ and the allocation of a property right in the community's preservation will greatly influence its valuation.

These characteristics make it challenging for economic analysis to calculate the preference, since the analysis tends to focus on preferences' monetary values. Indeed, efficiency analysis has been criticized for not accounting for the loss of a community's way of life as a cost.¹¹⁴ Yet the difficulty associated with appraising such intangible preferences, accompanied by lack of rigor on the part of some analysts, is no valid justification for welfare economics to ignore a viable preference.¹¹⁵ Welfare economics, as explained above, is interested in all actual preferences regardless of their nature.

111. ROLF GOETZE, UNDERSTANDING NEIGHBORHOOD CHANGE: THE ROLE OF EXPECTATIONS IN URBAN REVITALIZATION 92 (1979).

112. See LOGAN & MOLOTCH, *supra* note 58, at 105-09.

113. On these problems of valuating irreplaceable goods, see Daniel S. Levy & David Friedman, *The Revenge of the Redwoods? Reconsidering Property Rights and the Economic Allocation of Natural Resources*, 61 U. CHI. L. REV. 493, 506-15 (1994).

114. See SINGER, *supra* note 20, at 124-125; Radin, *supra* note 61, at 1878.

115. See SINGER, *supra* note 20, at 124-125; Radin, *supra* note 61, at 1878; KAPLOW & SHAVELL, *supra* note 103, at 454-55.

2. *Providing for a Stable Community: Markets and Dilemmas*

After a preference for a good has been identified, welfare economic analysis inquires whether legal intervention in the allocation of rights is necessary to assure the supply of desired quantities of the good. I intend to prove that such a need exists since problems of collective action inhibit the market from providing desired levels of community stability.

a. *Stable Communities as a Public Good*

A stable community is in many ways a public good, yet it is not a classic or pure public good. Public goods are defined by two attributes: non-rivalry of consumption and non-excludability of benefits.¹¹⁶ Application of these criteria to neighborhood stability produces ambiguous results. As to non-rivalry of consumption, a resident's partaking in the consumption of neighborhood stability's benefits does not reduce the benefits derived by others. On the other hand, each outsider added to the pool of consumers of neighborhood stability—each new resident—is likely to subtract from the enjoyment of stability by other neighbors: newcomers, by their very nature, contradict stability. In this regard neighborhood stability corresponds to the definition of a "club good," which involves only a certain degree of "publicness" in consumption. It is a good optimally consumed by more than one person but less than an infinitely large number of persons. Beyond a certain group size, the benefit that the individual places on the good will decline as congestion sets in.¹¹⁷

The non-excludability criterion also indicates that we are faced with a case of a partially public good: insiders cannot be excluded from enjoying the benefits derived from a stable community, while outsiders can be excluded. The latter can be blocked via zoning or covenants from moving into the neighborhood and enjoying the community's stability. Still, not all benefits generated by a stable community can be withheld from outsiders. A community's stability may confer benefits on the entire society. Displacement, gentrification, and neighborhood abandonment have negative social and economic effects—externalities—burdening the entire society. These include extreme poverty, social unrest, homelessness, crime, and arson.¹¹⁸ To

116. RICHARD CORNES & TODD SANDLER, *THE THEORY OF EXTERNALITIES, PUBLIC GOODS, AND CLUB GOODS* 8-9 (2d ed. 1996); *see also* RICHARD A. MUSGRAVE & PEGGY B. MUSGRAVE, *PUBLIC FINANCE IN THEORY AND PRACTICE* 44 (Scott D. Stratford ed., 5th ed. 1989) (noting that "[a]lthough the features of nonrival consumption and nonexcludability need not go together, they frequently do").

117. James M. Buchanan, *An Economic Theory of Clubs*, 32 *ECONOMICA* 1 (1965).

118. *See* James Brady, *The Social Economy of Arson: Vandals, Gangsters, Bankers and Officials in the Making of an Urban Problem*, in 6 *RESEARCH IN LAW, DEVIANCE AND SOCIAL CONTROL: A RESEARCH ANNUAL* 199, 212 (Steven Spitzer & Andrew T. Scull eds., 1984).

the extent that neighborhood stability prevents such phenomena, its benefits are non-excludable.

b. The Failure of Market Mechanisms in Policing the Provision of Community Stability

That neighborhood stability is not endowed with all the characteristics of a public good does not necessarily render it a regular consumer good. No good fits fully the polar definition of a public good.¹¹⁹ Moreover, the major market mechanism regulating the provision of private goods is highly problematic when used for the efficient provision of neighborhood stability. The “exit” mechanism represents the ability to stop consuming a certain producer’s products. It is vital to the functioning of an efficient market, as it communicates consumers’ desires to producers and forces them to adjust. Goods provided by local government have triggered debate regarding their dual nature as public and consumer goods, mainly due to the controversial role of this “exit” mechanism in local life.

In a highly influential article, Charles Tiebout sought to show that local services are very much like ordinary private goods.¹²⁰ In his model, the nation is perceived as a market, where each municipality supplies public goods—such as education, sanitation, and security—at a price—represented by taxation—and consumers choose freely the municipality that satisfies best their set of preferences. Citizens pick a locality in the same manner as they choose any other product: Tiebout compares the citizen’s search for a community to a “shopping trip.”¹²¹ The model’s basic premise is that if the city does not provide the services desired by an individual she can move to another provider—she can exercise the “exit” mechanism. This ability to leave a municipality spurs competition over consumers, assuring municipalities’ efficiency.¹²²

The model’s assumptions—e.g., that people are fully mobile and have perfect knowledge regarding the quality of municipal services—have been denounced as unrealistic.¹²³ More important for this Article’s purposes, the mere exercise of the action of leaving a community—i.e., the operation of the “exit” mechanism—dramatically decreases social welfare. Normally, when a consumer chooses to avoid

119. 5 JAMES M. BUCHANAN, *THE DEMAND AND SUPPLY OF PUBLIC GOODS* 48-50 (1999).

120. See Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416 (1956).

121. *Id.* at 422.

122. See ALBERT O. HIRSCHMAN, *EXIT, VOICE, AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES* 21 (1970).

123. See, e.g., Gerald E. Frug, *City Services*, 73 N.Y.U. L. REV. 23, 26-27 (1998); Clayton P. Gillette, *The Wrong Side of the Tracks: A Revolutionary Rediscovery of the Common Law Tradition of Fairness in the Struggle Against Inequality*, 100 HARV. L. REV. 946, 959-60 (1987) (book review). Tiebout himself admitted that these two assumptions are problematic. See Tiebout, *supra* note 120, at 423.

consuming a product, her choice does not directly and immediately affect her peers' ability to remain loyal to that product and reap the benefits they detect in it. This, however, is not the case with the choice of a municipality. "Everybody who selects a new environment affects the environments of those he leaves and those he moves among."¹²⁴ A consumer's decision to leave a municipality hampers the ability of those left behind to enjoy local services, especially as the first to exit a deteriorating community are the most quality-conscious members, those who could make the greatest contribution to fighting deterioration.¹²⁵

In the context of neighborhood stability the problem intensifies: a member's choice to resort to the "exit" mechanism not only hastens the deterioration of the good's supply to others, but it actually embodies the deterioration. Since stability—people not departing *en masse*—is the product, its supply cannot systematically be improved by residents' departure.¹²⁶ True, the "exit" mechanism is not wholly counterproductive. Stability implies that the residents maintain a certain character, not necessarily that they remain the same individuals. Some individual turnover may even be vital to the maintenance of the characteristic that makes some neighborhoods desirable. For example, a neighborhood cherished by owners as a good environment for families can only persist if at least some of its residents leave once they become empty nesters.¹²⁷ At that time those owners should choose a neighborhood which better fits their new preferences. Similarly, an immigrants' neighborhood cannot be maintained unless the established and integrated younger generations depart and are replaced by more recent immigrants. But even in such neighborhoods, when those exercising the "exit" mechanism are the residents who contribute to the neighborhood's character (i.e. in the first case families with children and in the second case recently arrived immigrants), stability—the relevant good—is threatened.

Moreover, the "exit" mechanism not only impedes the ability of those who remain to enjoy the good, it also fails to provide the consumer opting for exit greater benefits from the good. Exiting a community and entering a different one stands in opposition to the exiting individual's own desire to enjoy a stable community, for mobility contrasts stability. The definition of the relevant good—neighborhood

124. THOMAS C. SCHELLING, *MICROMOTIVES AND MACROBEHAVIOR* 150 (1978).

125. See HIRSCHMAN, *supra* note 122, at 45-47, 49-51.

126. See Fennell, *supra* note 110, at 28-30 (arguing that "exit" cannot serve as a viable feedback mechanism for spurring improvement in local education and security services because the consumers *are* the product: consumers of municipalities don't choose a product, but rather who to live with. Thus, when they choose to leave one pool of users, the remaining consumers cannot improve who they are).

127. This assumes, of course, that not all neighbors become empty nesters at the same moment and accordingly adopt a new preference regarding the character of the neighborhood.

stability—is limited membership turnover; that is to say, limited exits and entries. Hence offering “exit” as a mechanism to supply the good is very often contradictory to the good’s nature.

The “exit” mechanism cannot be fully relied on to discipline the community to better appease members’ tastes, which is its healthy market effect elsewhere. “Exit,” however, is not the only market mechanism regulating the provision of goods. The other mechanism associated with consumer goods and often appealed to when local government services are discussed is the mechanism of “voice.”¹²⁸ As first explained by Albert Hirschman, the customer’s option of “exit” is sometimes complemented or even substituted by expressing dissatisfaction to the managing authority.¹²⁹ Thanks to the ability of consumers to voice their concerns, producers become advised of market preferences and the market can operate more efficiently. Unfortunately, the ability to assure desired levels of neighborhood stability as a consumer good via the mechanism of “voice” is limited. The notion of “voice” assumes a distinction between consumers and management. It presupposes a tiered system with one level of consumers and another of decisionmakers charged with controlling the quality of the good provided to costumers.¹³⁰ With neighborhood stability as a good, the role of such central decisionmakers is secondary. Each member needs to influence not only government to act, but other members to act—i.e., to stay (recall the Introduction). Obviously, governmental policies may indirectly influence other members’ decisions, yet eventually each member makes her own decision. Hence utilizing one’s “voice” to influence “management” can only help in providing the good up to a certain point.

c. The Strategic Dilemma Neighbors Face

Market tools are inadequate for the supply of community stability. The main reason is that many times the situation involves a strategic dilemma. All neighbors may want a stable community, but in order to attain and maintain it they must act in concert. At the same time, each neighbor may have an incentive to bail out whenever market conditions make selling her house appealing.¹³¹ The situation is likely to be aggravated by a fear of change strengthening the tendency to

128. See LYNN A. BAKER & CLAYTON P. GILLETTE, *LOCAL GOVERNMENT LAW: CASES AND MATERIALS* 338 (3d ed. 2004) (and sources listed therein).

129. HIRSCHMAN, *supra* note 122, at 4; see also *id.* at 15-20, 30-43.

130. Fennell, *supra* note 110, at 23-24.

131. See Thomas C. Schelling, *A Process of Residential Segregation: Neighborhood Tipping*, in *RACIAL DISCRIMINATION IN ECONOMIC LIFE* 157, 174 (Anthony H. Pascal ed., 1972) (discussing the case of the deteriorating community, in which the owner seeks to limit her monetary exposure). Since an owner risks a capital loss, she attempts to get rid of her house a little sooner than everyone else. This is a strong incentive leading to spirals of neighborhood decline. See *id.*

sell, thereby prompting change in a “feedback loop.”¹³² Housing markets are easily susceptible to such self-fulfilling prophecies, as owners are sensitive to perceived “changes in the wind” that may alter neighborhood characteristics.¹³³ Prominent commentators argue that this dynamic—in which homeowners can sustain or improve the neighborhood if they all stay and invest in their properties, but an owner who stays and invests when others leave will lose most of her home’s value—resembles the Prisoner’s Dilemma.¹³⁴ As the ensuing discussion will illustrate, this proposition is inaccurate and leads to misguided policy suggestions. A more accurate characterization of the situation will suggest recognizing the community interest in private ownership as the strategic dilemma’s solution.

The Prisoner’s Dilemma is a strategic game in which the preferences of the actors are ranked as follows: (1) I defect, other actor cooperates, (2) I cooperate, other actor cooperates, (3) I defect, other actor defects, (4) I cooperate, other actor defects. Regardless of the other actor’s decision, a rational actor will choose to defect. This option leaves her better off no matter what the other actor chooses to do: at the most it allows her to free ride the efforts of the other actor (option (1)), and at the least it assures her that the other actor will not free ride her efforts (option (3)). The result is that all actors defect and the preference fulfilled is option (3), even though all actors would have been better off with another outcome (i.e. the resultant option (3) does not represent maximum social welfare).¹³⁵ Thus in a Prisoner’s Dilemma the best result is unattainable in the absence of intervention.

Yet the structure of the Prisoner’s Dilemma does not correspond to neighborhood dynamics. Before laying out the perimeters of the more representative dynamics, the assumptions guiding them should be specified. Based on the discussion in Section II.B.1., I will assume that a resident has an absolute preference to stay in her stable neighborhood. I will relax this unrealistic assumption later. Deprived of the possibility to enjoy a stable community, she will prefer to leave and sell her house for the highest price. Monetary benefit, according to these assumptions, is a motivation, but it is only secondary to stabil-

132. Cf. DAVID A. MOSS, WHEN ALL ELSE FAILS: GOVERNMENT AS THE ULTIMATE RISK MANAGER 310-11 (2002) (discussing debates in the 1930s concerning the possibility that “feedback loops” could arise as a result of deposit insurance and unemployment insurance).

133. C. Leven, J. Little & H. Nourse, *Neighborhood Change: Lessons in the Dynamics of Urban Decay*, in HOUSING IN AMERICA: PROBLEMS AND PERSPECTIVES 192, 196 (Roger Montgomery & Daniel R. Mandelker eds., 2d ed. 1979); see also OSCAR NEWMAN, COMMUNITY OF INTEREST 83 (1980).

134. See, e.g., BUCHANAN, *supra* note 119, at 13-15; Duncan Kennedy, *Legal Economics of U.S. Low Income Housing Markets in Light of “Informality” Analysis*, 4 J.L. SOC’Y 71, 76 (2002).

135. See generally MORTON D. DAVIS, GAME THEORY: A NONTECHNICAL INTRODUCTION 108-19 (Dover Publications rev. ed. 1997) (1970) (discussing the historical evolution of game theory and its potential applications, including the Prisoner’s Dilemma); RUSSELL HARDIN, COLLECTIVE ACTION 22-30 (1982).

ity. I will further assume, at this preliminary stage, that stability can be preserved only if all actors cooperate and stay in the neighborhood.

Based on these assumptions, the proper ranking of the actors' preferences is: (1) I cooperate, other actor cooperates, (2) I defect, other actor cooperates, (3) I defect, other actor defects, (4) I cooperate, other actor defects.¹³⁶ I assumed that residents' highest preference is having their environment remain stable, which means that both they and their neighbors remain. Unlike the situation in the Prisoner's Dilemma, free riding is not available as an option here: in order to enjoy neighborhood stability, one must cooperate.¹³⁷ Defection, by definition, carries a price of losing the enjoyment the actor derives from the stable community. Hence, unlike in the Prisoner's Dilemma, it is not the most preferred option, and that is why I swapped the rankings of preferences (1) and (2) of the Prisoner's Dilemma.¹³⁸ Once no possibility of enjoying the stable community survives, the actor would like, at least, to cut her financial losses (or make a gain) and leave the community. Yet when she decides to leave, other actors' decisions cease to influence her enjoyment of a stable community. They do probably influence the financial reward she reaps when defecting: if others sell as well, the price a buyer will pay her diminishes. Therefore, option (2) in most cases will be preferable to option (3).¹³⁹ The worst option, as in the Prisoner's Dilemma, is staying in the neighborhood, investing in the property while the community disintegrates. In this scenario, the actor loses both the benefits of stability and the financial benefits associated with a sale. Her investments in

136. A similar ranking of preferences has been suggested for the decision whether to rehabilitate a house in a rundown neighborhood. See McKim N. Barnes, *A Strategy for Residential Rehabilitation*, REAL EST. REV., Fall 1976, at 40, 41.

137. The provision of stable communities differs from other local public goods, such as lighting and security, where free riding is possible. See Gillette, *supra* note 123, at 957.

138. This ordering is even clearer in a deteriorating neighborhood: an owner will prefer to have stability reintroduced over selling her home at a loss. In this case (unlike the gentrifying neighborhood) preferences for neighborhood stability and for financial benefits correspond.

139. I chose to restrict this statement to most cases and not all since there might be a difference between a declining and improving neighborhood. The logic of positions preference (2) before preference (3) is obvious in a declining neighborhood: the demand for housing is limited to begin with and hence as supply grows, prices decrease. In gentrifying neighborhoods the situation is more complex. On the one hand, the above analysis of supply and demand may apply: the demand for housing may not be strong enough to offset the rise in supply. On the other hand, the demand for housing in such neighborhood may rise dramatically only after a certain point is attained. Most wealthy incomers arrive only after the neighborhood has been partially transformed by earlier movers. Therefore, owners of assets in a gentrifying neighborhood can receive higher consideration for their homes if they sell only after the turnover rate intensified (and major gentrification set in motion). Theoretically, being the last to sell might be the most lucrative option (preferences (4) and (2) change places). However, in many cases this is not a viable option, since rising living expenses in the improved neighborhood may exact a high price from a resident choosing to stay too long. Therefore in a gentrifying neighborhood there is no rule ordering options (2) and (3) (and to a lesser degree option(4)), since they depend on the elasticity of the supply and demand curves.

the neighborhood, which may solely amount to the loss of opportunity to sell earlier at a better price, are gone to waste. The actor cannot retrieve them, while standing alone they do nothing to provide desired neighborhood stability.

Changing the ordering of preferences in this manner changes the dynamics of neighbors' interaction. The problem arising out of this ranking of preferences is similar to the Assurance Problem, rather than to the Prisoner's Dilemma.¹⁴⁰ The major characteristic of the Assurance Problem is that if the actor expects the other to cooperate, she will cooperate as well, thereby assuring an efficient result.¹⁴¹ Contrast this outcome to the one envisioned in the Prisoner's Dilemma: there, even when the actor expects her counterpart to cooperate, she will defect (since she can free ride), and an efficient result is unachievable. Our case, on the other hand, is covered by reciprocity theory: the collective action problem *can* be solved, but because of the assurance problem, we cannot predict that it *will* be solved.¹⁴² An actor confronted with an Assurance Problem, unlike one confronted with a Prisoner's Dilemma, has no dominant strategy: her preferred action is influenced by her expectations of the other's actions.¹⁴³

This difference is of dramatic importance for policy-making. While the Prisoner's Dilemma presents a problem of compulsory enforcement, the Assurance Problem does not. In an Assurance Problem, assurances as to other actors' behavior are sufficient to achieve an efficient result, and outside enforcement is unnecessary.¹⁴⁴ Assurance is needed because in its absence an actor may not trust the others to cooperate. The actor will choose not to cooperate since her contribution will only have a miniscule effect on the desired outcome of a stable community, while it may result in the worst outcome for her: investing in the neighborhood without reward.¹⁴⁵ However, once assur-

140. The Assurance Problem was identified in Amartya K. Sen, *Isolation, Assurance and the Social Rate of Discount*, 81 Q.J. ECON. 112 (1967). The lack of clarity regarding the ordering of options (2) and (3) is not detrimental to the characterization as an Assurance Problem. Some variants of the Problem reverse the ordering of options (2) and (3). See, e.g., Daphna Lewinsohn-Zamir, *Consumer Preferences, Citizen Preferences, and the Provision of Public Goods*, 108 YALE L.J. 377, 392 n.40 (1998).

141. Sen, *supra* note 140, at 114.

142. For a discussion on reciprocity theory and the assurance problem, see Robert Sugden, *Reciprocity: The Supply of Public Goods through Voluntary Contributions*, 94 ECON. J. 772, 781 (1984).

143. The Assurance Problem is similar to the "Stag Hunt Game." Hungry hunters have two options: work together and hunt a stag, which will provide them with a good meal, or individually chase rabbits, which will provide a poorer meal. If one hunter deserts the company and chases rabbits, the stag escapes. The best option, hence, is cooperating, while the worst is chasing the stag when all others deserted to chase rabbits (in which case the remaining cooperators starve). The choice is based on expectations regarding the fellow hunters' behavior. See EDNA ULLMANN-MARGALIT, *THE EMERGENCE OF NORMS* 121-24 (1977).

144. Sen, *supra* note 140, at 114-15.

145. This motivation to defect in an Assurance Problem has been labeled "hopelessness." Lewinsohn-Zamir, *supra* note 140, at 392-94.

ance is provided, enforcement is not needed in the Assurance Problem, for the result in which both actors cooperate is an “equilibrium point”—a point from which no actor would depart even after the other actor’s choices are revealed—since it is the actor’s top individual preference.¹⁴⁶ In the Prisoner’s Dilemma, the result where all actors cooperate is not an equilibrium point: each actor will still have an incentive to defect and move to the result which is better from her standpoint. Therefore assurances as to the other’s behavior are insufficient in the Prisoner’s Dilemma.¹⁴⁷

The assurance needed in an Assurance Problem, such as the one here, might be supplied by contracts: parties can promise each other that they will cooperate. This is the practice of residents in homeowners associations. Often enough, as seen in Section II.A.3., properties within such communities are subject to restraints on alienation. Rights accorded to the association to block a unit’s transfer guarantee that no resident will be able to defect in a manner hurtful to the community.¹⁴⁸ However, outside such associations, in large and already constructed neighborhoods, the transaction costs of subjecting all developed properties to restraints on alienation impede contractual assurances.

In the absence of explicit contracts, an implicit contract might still serve as assurance. Implicit contracts can take the form of norms based on ideas of honor¹⁴⁹ or loyalty to the community.¹⁵⁰ The reputational injury associated with violating social norms may assure that the actor internalizes harms her defection causes to the community. Though such intangible factors probably are at play, they are not robust checks on defections from neighborhoods, as the empirical record shows.¹⁵¹ The costs of being denounced as a deserter are not likely to affect a community member contemplating a move, because she will not be around to suffer the harsh reaction.

Seeing that the market cannot produce an efficient contractual assurance that will allow an efficient outcome, the solution is regulatory intervention. Recall that in the Assurance Problem defecting is not a dominant strategy. There is no natural and unavoidable tendency to defect. The actor’s choice between defection and cooperation is motivated by three factors: the costs associated with not defecting

146. Once more, in a declining neighborhood the same result is achieved without such assumption. See *infra* note 159.

147. See Sen, *supra* note 140, at 122.

148. Restraints on alienation held by homeowners associations, unlike those held by parties in other contexts, are generally upheld by courts if they either require the association to act reasonably or are in the form of preemptive rights. JOSEPH WILLIAM SINGER, PROPERTY LAW: RULES, POLICIES, AND PRACTICES 526 (3d ed. 2002).

149. ULLMAN-MARGALIT, *supra* note 143, at 36-37, 40-41.

150. For a discussion of the role of loyalty in economic and political markets, see HIRSCHMAN, *supra* note 122, at 76-105.

151. Fennell, *supra* note 110, at 51.

when others defect, the rewards offered by defecting, and the expectations regarding others' behavior. One regulatory tool for adjusting the payoffs—the first two factors affecting an actor's decision—is a partial locking device. This locking device ought to make the resident contemplating leaving internalize the costs her departure will inflict on the community. It should make the option of leaving less financially attractive, and of staying less financially risky.

This alteration in the attractiveness of defecting vis-à-vis cooperating also serves as an assurance. The resident, whose motivations have been changed, knows that her neighbors' incentives to defect have also been decreased. Since she knows that moving has become costlier for her neighbors, she has more grounds to expect them to remain.¹⁵² Given this assurance that neighbors are likelier to stay, her inclination to defect decreases. The locking device sparks a reinforcing loop of incentives to stay, which renders the attainment of a stable community more probable.¹⁵³

There is no need, though, for an absolute locking device making a departure impossible. Such a radical solution is only called for by a Prisoner's Dilemma, where the cooperative result is not an equilibrium point. Since this is an Assurance Problem, stability and change are allowed to coexist. Furthermore, because the game does not require such drastic measures, the recommendations it generates survive the relaxation of the assumptions laid at its foundation.

Two of the assumptions made earlier are unrealistic. The first was that there is an absolute preference for a stable community. This is a false assumption, as residents might prefer to leave a stable community in certain circumstances and given certain financial rewards. Therefore, let me now assume a pool of residents, some still holding the ordering of preferences presented above in the Assurance Problem, while others, added to the pool, do not hold an overriding preference for a stable community. For the latter, option (2)—I defect, other actor cooperates—and probably even option (3)—I defect, other actor defects—are preferable to option (1)—I cooperate, other actor cooperates.¹⁵⁴ The entry of residents with this preferences ordering to the

152. Cf. Abraham Bell & Gideon Parchomovsky, *The Integration Game*, 100 COLUM. L. REV. 1965, 2007 (2000) (noting that purchasing home equity insurance can signal to other homeowners an intention to stay in a neighborhood experiencing white flight).

153. Another possible positive effect barriers to exit can have is that of stimulating "voice": neighbors who remain in a deteriorating community will work to improve the neighborhood. See HIRSCHMAN, *supra* note 122, at 79-80. However, the concern has been raised that people locked in a particular pool against their will may show a tendency not to cooperate, particularly where they view escape as imminent. Fennell, *supra* note 110, at 72-73. Such reservations might not be pertinent to the neighborhood stability context (unlike education), since non-cooperation will injure the resident's possible financial reward for leaving.

154. The different way in which the two groups of residents rank their preferences relates to the two distinct values that an owner derives from her house. Logan and Molotch use the terms "use value" and "exchange value" to describe these two different benefits.

pool does not render a stable community unattainable for those other residents who cling to the original ordering. The reason is that a second unrealistic assumption should be relaxed. I assumed that all neighbors must cooperate in the creation of a stable community. In reality, a neighborhood may endure a certain degree of turnover and remain stable; indeed, as mentioned earlier,¹⁵⁵ turnover may in some instances be needed to maintain stability.

The partial locking device suggested by the analysis based on the unrealistic assumptions can now be examined in a more realistic world based on this new set of assumptions where a “mixed game” exists. With a partial locking device, those newly introduced residents who prefer option (2) to option (1) are still able to move, but the exercise of this option will become more expensive for them. The result will, however, remain efficient, as long as the locking device reflects their actions’ externalities—the harm their departure causes to those who seek to preserve the community.¹⁵⁶ If this harm, now internalized by the mover, is greater than the increase in welfare the mover gains by moving, she will not move (her ordering of preferences will change and she will join the group preferring option (1) to option (2)), which is the efficient result. The externalities of a move will decrease as the number of residents interested in stability decreases. Therefore as their number dwindles, the impediment placed on others’ ability to act on their preference to move lessens. This result is efficient, as it reflects individuals’ actual preferences: they now prefer moving to remaining. Even at this point a Prisoner’s Dilemma does not emerge: if all prefer moving, they may all move without injuring others.¹⁵⁷

I can now summarize the conclusions of the neighborhood stability dilemma. In order to allow residents interested in preserving their

“Exchange value” relates to financial return, and “use value” relates to the essential needs of life, for example securing a “home.” Their analysis centers upon the interaction between residents, who prefer use value, and entrepreneurs, who prefer exchange value. LOGAN & MOLOTCH, *supra* note 58, at 1-2. My analysis centers upon the interaction between different residents, assuming that different individuals, and indeed each individual, might hold the two conflicting preferences. Residents hold their houses both as a consumer good and an investment. The relative importance of these two values is not constant: residents differ in their attitudes, and over time a resident’s own attitude is susceptible to change.

155. See *supra* text accompanying note 127.

156. Restraints on alienation within a homeowners association, discussed above, follow this model. If the action of leaving is more valuable to the seller than her staying is valuable to the community, she will be able to buy from the association its refusal right. If she cannot offer enough money to persuade it to approve the sale, her staying is more valuable to the community than her departure is for her, and a decision to sell is indeed inefficient. Courts should apply this analysis in deciding whether in an association’s exercise of a refusal right is reasonable.

157. When an owner wants to leave the influence the decision of others to leave will have upon her wellbeing is not as dramatic as in the Prisoner’s Dilemma. It might influence to some degree the economic reward she gets, but it will not make her prefer the cooperative result over the result in which all defect. Her first priority is to leave, and thus possibilities of cooperation are ranked as lower preferences.

community to do so, the payoffs of leaving the community must be altered. This alteration is achieved by introducing a partial locking device, which makes residents contemplating leaving internalize the costs of their move to the residents left behind who prefer the preservation of neighborhood stability. The partial locking device will entail subjecting ownership rights to some kind of a community interest in the property that makes its transfer less attractive. This community interest is a peculiar right. It is amorphous and fluctuating. Its size and effect change as the influence of the property owner's actions on her neighbors' preferences for a stable community changes. Nevertheless, it achieves its important goal: it allows owners, otherwise hopelessly locked in a group dilemma, to enjoy the balance between neighborhood stability and mobility that best suits their personal preferences.

3. *Conclusion*

Even without ascribing any intrinsic value to the community, law ought to provide it with protection. Individuals prefer a stable community as a good that allows them to better enjoy their lives. Market failures prevent them from satisfying this preference, creating a loss of efficiency. Actions of actors in the real estate market generate externalities that are not internalized. As property rights have historically been created, according to utilitarians, in response to needs for internalization of externalities,¹⁵⁸ a community property right ought to be established. This right will diminish social losses created by absolute private property rights and allow the internalization of the harmful effects of an owner's decision to sell her property.

C. *Right-Based Arguments*

In the previous Sections justifications for the community interest in property were sought in theories that view and evaluate reality through a social prism: the community for the communitarian, aggregate social welfare for the utilitarian. In this Section I will demonstrate that even theories that focus solely on the individual and her rights, rights that should not be overridden for community goals or collective welfare, support recognizing the community aspect of property.

As Jeremy Waldron defines it, a "right-based argument for private property is . . . an argument which takes an individual interest to be sufficiently important in itself to justify holding others (especially the government) to be under duties to create, secure, maintain, or respect an institution of private property."¹⁵⁹ This Section will review two such individual interests that lie at the heart of influential right-

158. Harold Demsetz, *Toward a Theory of Property Rights*, 57 AM. ECON. REV. 347, 348-50 (1967).

159. JEREMY WALDRON, *THE RIGHT TO PRIVATE PROPERTY* 115 (1988).

based arguments for private property: personhood and labor-desert. The Section will demonstrate that neither is sufficiently important to justify holding others under a duty to maintain absolute individualistic property rights. Both will be shown to justify a duty to respect a community interest in private property rights.

1. *Personhood Theory*

No right-based argument for property focuses more on the individual and her powers as an independent owner than personhood theory. This theory ties the institution of private property to the owner's basic attributes of personality; it relates property to a person's humanity. Still, as the ensuing discussion will show, despite its avowed individualism, personhood theory's conception of private property is incoherent, on its own terms, without recognizing the community aspect of ownership. In order to serve the important role that personhood theory assigns to it, ownership must include a community component that will assure the stability of the neighborhood where the property is situated.

Personhood theory is a tradition originating in the ideas of Aristotle and Hegel.¹⁶⁰ Its most prominent modern advocate is Margaret Radin. Radin claims that certain properties, "personal properties," are bound up with personhood,¹⁶¹ and that these properties must be guaranteed to every person.¹⁶² Such "personal properties" deserve more extensive protection than other kinds of property—"fungible" properties—held for purely instrumental reasons.¹⁶³ The determination as to which properties constitute "personal properties" is based on shared understandings.¹⁶⁴ Radin and others present the home as the most striking example of a "personal property."¹⁶⁵ A shared understanding has evolved in American society that housing is not a mere commodity, but a crucial element in allowing people to flourish personally.¹⁶⁶

Therefore, personhood theory, as Radin explains, holds that a person should be allowed to have the choice between leaving and remaining in the home and environment—"context"—to which she has become attached.¹⁶⁷ For this reason, property law must extend special

160. Lawrence C. Becker, *The Moral Basis of Property Rights*, in NOMOS XXII: PROPERTY 187, 209-10 (J. Roland Pennock & John W. Chapman eds., 1980). For a survey and critique of Hegel's discussion of property see WALDRON, *supra* note 159, at 351-89.

161. RADIN, *supra* note 68, at 37.

162. *Id.* at 36-38, 43.

163. *Id.* at 53, 55-56.

164. *Id.* at 11, 18.

165. See, e.g., *id.* at 56-57, 84; WALDRON, *supra* note 159, at 296; Joseph William Singer, *The Reliance Interest in Property*, 40 STAN. L. REV. 611, 682-84 (1988).

166. GREGORY S. ALEXANDER, *COMMODITY AND PROPRIETY: COMPETING VISIONS OF PROPERTY IN AMERICAN LEGAL THOUGHT 1776-1970*, at 361 (1997).

167. RADIN, *supra* note 68, at 23-24, 30.

protection to an owner's right to keep her home. This protection is apparent in different bodies of law, such as adverse possession, eminent domain, privacy, takings jurisprudence, and tenant rights.

This legal approach of personhood theory, however, ignores an important variable: it might assure a person's option of remaining in the "context," yet it does not assure her that the "context"—the community—will remain. Personhood theory envisions the home as a rich and meaningful social institution, embodying the person's relationship to herself and her surroundings. But when translating this philosophical notion into property law rules, the theory conceives the home as merely a parcel of land and four walls to be protected. If it were to follow its own ideas regarding the home's role, the theory would adopt a broader legal attitude to preserving the home. Describing the ideas animating personhood theory, Radin explains:

Contextuality means that physical and social contexts are integral to personal individuation, to self-development. . . . The relationship between personhood and context requires a positive commitment to act so as to create and maintain particular contexts of environment and community. Recognition of the need for such a commitment turns toward a positive view of freedom . . . in which proper self-development, as a requirement of personhood, could in principle sometimes take precedence over one's momentary desires or preferences.¹⁶⁸

This exploration into the notion of "contextuality" implies a need for subjecting at times the individual's impulses to restraints assuring the context's survival. Yet the common celebration of the homeowner's "personal right" by personhood theory ignores this duty which is essential to being part of a context.

If property law is to respect constitutive attachments, as personhood theory demands, it should strengthen the resident's right to her home—the traditional banner of personhood theory—but also provide disincentives against dissolving the community. This does not mean that one resident's option to leave should be blocked so as to allow another resident to preserve her "context" forever undisturbed. The first resident too enjoys personhood rights allowing her the same choice between remaining in her "context" and leaving. Even when property is conceived as freedom to create the social arrangements a person desires, the person's choice does not have conclusive effect, since other persons—other decisionmakers—are involved.¹⁶⁹ However, rendering the choice to leave the "context" harder is legitimate in personhood theory's terms.

A resident choosing to leave her house and neighborhood perceives the house and neighborhood as "fungible goods," goods that she can

168. Radin, *supra* note 61, at 1905.

169. See WALDRON, *supra* note 159, at 296-97.

replace. By moving she is actively seeking to replace them, and thus now these goods only represent in her eyes an instrumental monetary value. In contrast, for the neighbor remaining behind, the context still represents a “personal good.” In the conflict between the two, the interest of the person for whom the good is a “personal good” should prevail, according to personhood theory.¹⁷⁰ Therefore the community’s interest in property, a tool that will make leaving a neighborhood more difficult as means for preserving the “context,” can and should become a part of personhood theory.

Without it, and as long as personhood focuses solely on the individual right to a specific asset, personhood theory cannot serve its own goals of creating property rules that preserve the owner’s personality and deepest attachments. As William Simon notes when critiquing the theory, “[i]t may be harder to assimilate into a new community than to recreate a comfortable home environment, and loss of membership in a community seems a more serious threat to identity than loss of a particular dwelling.”¹⁷¹

Simon believes that the community can only be afforded the necessary legal protection under communitarian theories, reviewed in Section II.A. This conclusion may be too hasty. The emphasis on a person’s attachment to her community can come not only from a firm belief in the community, but also from an unwavering dedication to the person and her needs as a human being. The obligation to preserve the community can be explained within personhood theory’s framework. This result is conditioned upon the framework being widened, so as to make it, in practice and not only theory, inclusive and responsive to a person’s attachment to her home and environment. Only in this manner can personhood theory and its emphasis on personal ties to “context” remain coherent.

2. *Labor-Desert Theory*

a. The Theory

Personhood theory presents a forceful right-based argument for private property. Still the most influential right-based argument for property is found elsewhere—in labor theory. The idea that labor creates a property right is deeply rooted in legal thought: “It would seem to be a first principle of Anglo-American jurisprudence, an axiom of the most fundamental nature, that every person is entitled to the fruit of his labors unless there are important countervailing public policy considerations.”¹⁷² This idea traces back to the philoso-

170. See *supra* note 163 and accompanying text.

171. Simon, *supra* note 98, at 1361.

172. Melville B. Nimmer, *The Right of Publicity*, 19 LAW & CONTEMP. PROBS. 203, 216 (1954).

phy of John Locke. Locke's theory of property holds that by mixing her labor with an unowned—or rather, owned by the commons—part of the earth or its fruits, a person makes that part her own.¹⁷³ The entitlement to the products of one's labor is frequently explained by a notion of desert. Though it is unclear whether this was Locke's own intention,¹⁷⁴ the labor theory is often read as a desert theory: a person deserves the product of her work.

If labor is the basis of entitlement to property, it must be defined. Locke himself did not devote much attention to this matter. Commentators have suggested several alternative notions of labor. One is the production of something (even if valueless to society) that otherwise would not have existed.¹⁷⁵ A second possibility is that only labor producing something of value to others deserves reward—a “value added” labor theory.¹⁷⁶ Finally, labor might be an activity that involves pain to the laborer.¹⁷⁷

b. The Production of Value

This Article is concerned with rights in a residential unit. More specifically, it contends that the surrounding community should be assigned an interest in a house, that it should be entitled to some of its value. For labor-desert theory, the central task, when assigning property rights, is to identify the asset's creator. Thus this Article's question, “Who should have a right to the house and its value?” translates to the question, “Who labored and produced it?” This, in turn, given the possible definitions of labor, implies an inquiry as to the identity of those creating the house, adding value to it, or exerting pains in doing so. Is the house's value “natural?” Is it produced solely by the dweller? Is it the result of the labor of others who deserve corresponding rights? To answer these questions it is necessary to address the general issue of the origin and nature of goods' values.

Until at least the second half of the seventeenth century, scientists believed that when placed in the open air, putrefying meat generates, out of itself, maggots of flies. Following such experiments as those conducted by Francesco Redi and later Louis Pasteur, this theory of “spontaneous generation” was eventually abandoned.¹⁷⁸ Similarly, few will contend today that if a house is placed in a neighbor-

173. See 2 JOHN LOCKE, TWO TREATISES OF GOVERNMENT §§ 27-28 (Peter Laslett ed., 1988). Locke placed limits on the ability to appropriate, none of which are relevant here.

174. WALDRON, *supra* note 159, at 206.

175. Becker, *supra* note 160, at 193.

176. *Id.*; Justin Hughes, *The Philosophy of Intellectual Property*, 77 GEO. L.J. 287, 305 (1988).

177. *Id.* at 302-03; Lawrence C. Becker, *The Labor Theory of Property Acquisition*, 73 J. PHIL. 653, 655-56, 659 (1976).

178. For more on the demise of the theory, see John Farley, *The Spontaneous Generation Controversy (1700-1860): The Origins of Parasitic Worms*, 5 J. HIST. BIOLOGY 95 (1972).

hood, it will generate, out of itself, its value. More generally, it is accepted that “our concern for goods . . . does not arise in spontaneous consumer need,” as renowned economist John Galbraith put it.¹⁷⁹ Nevertheless, while “spontaneous generation” has long ceased to influence thinking about the natural sciences, the belief that assets’ values are created organically by some natural need still affects our thinking about the moral justification for an owner’s right to the value of her asset and any increases in it. The remainder of this Subsection will criticize this outdated idea. In its stead, it will promote the argument that if the justification for property is that she who labors upon a thing deserves to own it, then when part of the thing’s value is created by society, society deserves an interest in it.

Philosophers and economists have been noting that the values of goods, and accordingly their prices, are not natural, but social. Locke himself distinguished money and other “treasures” from goods that are naturally needed. “[A]s to Money, and such Riches and Treasure,” he wrote,

these are none of Natures Goods, they have but a Phantastical imaginary value: Nature has put no such upon them: They are of no more account by her standard, than the Wampompeke of the *Americans* to an *European* Prince, or the Silver Money of *Europe* would have been formerly to an *American*.¹⁸⁰

Jean-Jacques Rousseau, who lamented the replacement of the romantic state of nature by civilized society, described the latter as an “assemblage of artificial men and factitious passions, which . . . have no foundation in nature.”¹⁸¹ He viewed civilized man as constantly living “outside himself,” a man whose needs and desires—anything but natural—are created by society, and who has hence ceased to be free.¹⁸²

Like Rousseau, John Stuart Mill was concerned about the modern separation of actual values and desires from natural needs and “true” values. Relying on a labor theory and conceiving labor as related to efforts, Mill criticized the economy of his times, where labor’s rewards were not proportional to the pains exerted.¹⁸³ Karl Marx’s approach to workers’ entitlements in the nineteenth century was similar. Furthermore, he sought to make people realize that decisions regarding production and distribution are not natural, but are rather made by men. He believed that the characterization of such decisions

179. JOHN KENNETH GALBRAITH, *THE AFFLUENT SOCIETY* 132 (4th ed. 1984).

180. LOCKE, *supra* note 173, § 184.

181. JEAN-JACQUES ROUSSEAU, *THE SOCIAL CONTRACT AND THE FIRST AND SECOND DISCOURSES* 137 (Susan Dunn ed., 2002).

182. *Id.* at 122-23, 137-38. On Rousseau’s thesis that man has come to live outside of himself see ALAN RYAN, *PROPERTY AND POLITICAL THEORY* 53-54 (1984).

183. JOHN STUART MILL, *PRINCIPLES OF POLITICAL ECONOMY* 235-36 (Jonathan Riley ed., Oxford Univ. Press 1994) (1848).

as natural consequences of properties of the produced commodities, accompanied by the claim that value is intrinsic to the commodity, were means of concealing the true nature of these decisions and values.¹⁸⁴ In reality, they are events that individuals themselves bring about through concrete social activities. By hiding this reality, an illusion is created that the actual patterns of production and distribution are the necessary ones.¹⁸⁵

These insights have been largely incorporated into twentieth century theories of markets and prices. As already seen, Galbraith attacked the myth of consumer sovereignty. He emphasized that preferences and demand were to some degree created by production—the same activity depicted as reacting to consumer needs.¹⁸⁶ Similarly, Walzer argues that goods themselves are inter-subjective, and not objective, creations:

All the goods with which distributive justice is concerned are social goods. . . . Goods in the world have shared meanings because conception and creation are social processes. For the same reason, goods have different meanings in different societies. The same 'thing' is valued for different reasons, or it is valued here and disvalued there.¹⁸⁷

Ross Zucker elaborates on the impact of this realization upon concepts of justice and equality. Social influences—generated by all community members—greatly affect the formation and character of individuals' consumer wants, which determine economic value. Zucker explains that needs are formed in an interdependent, inter-subjective manner because the individual constitutes herself so as to accommodate others' needs; she must be able to provide others with means to satisfy their needs so she can receive in exchange means to satisfy her needs.¹⁸⁸ She must also develop her needs in a manner that will enable them to be satisfied by things other persons provide.¹⁸⁹ The capitalist system is thus sustained by common action of all the members of the economic community.¹⁹⁰ Zucker concludes that every member of the economic community should be entitled to an equal share of some of the national income, as each contributed to its creation.¹⁹¹

184. Duncan Kennedy, *The Role of Law in Economic Thought: Essays on the Fetishism of Commodities*, 34 AM. U. L. REV. 939, 969, 984 (1985).

185. *See id.* at 968-88.

186. GALBRAITH, *supra* note 179, at 131-33.

187. MICHAEL WALZER, SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY 7 (1983).

188. ROSS ZUCKER, DEMOCRATIC DISTRIBUTIVE JUSTICE 29-30, 112-13 (2001).

189. *Id.* at 113.

190. *Id.* at 206, 238.

191. *Id.* at 86-88, 119, 254-55.

c. The Production of Residential Properties' Value

All these arguments highlight the social nature of the economic value of assets, which is evident in the case of residential properties. In his book *The Production of Space*, discussing urban space in general, the influential French sociologist and philosopher, Henri Lefebvre, wrote that "Space is permeated with social relations; it is not only supported by social relations but it is also producing and *produced by social relations*."¹⁹² The value of a house is the product of many factors, only one of which is the structure's quality and the owner's patterns of investment in it. Other impactful factors are generated by the surrounding community. First, much of the change in a house's value is the outcome of public investment in the city, of changes in the regional and national economy, and of changes in the way the real estate market is regulated and taxed.¹⁹³ Second, an upgrade to one property may improve the market value of nearby properties (neglect will have similar, though detrimental, effects).¹⁹⁴ Hence, some of the value of my property is created by the investment of my neighbor in her property. Third, the house's value is influenced by neighborhood context. In the dynamics associated with neighborhood change, areal factors play a major role.¹⁹⁵ The value of my property is a function of the common perception of my neighborhood: if others view it as up-and-coming and desirable, the value will increase. If they perceive it as declining, the value will decrease.¹⁹⁶ The stigma or status conferred on a particular neighborhood distorts the allocation of resources.¹⁹⁷ Rolf Goetze goes as far as stating that actual events such as changes in credit availability and facts regarding turnover rates often go unnoticed when deciding whether to live in a neighborhood and invest in a house, until reported by the media.¹⁹⁸ Neighborhood confidence, which determines property values, is produced by attitudes' change, rather than by housing obsolescence.¹⁹⁹

A house's value is deeply influenced by social perceptions. Hence, labor-desert ideas can hardly justify the owner's entitlement to the full increase in its value. The owner did not create it alone. The same goes for decreases in value. This conclusion holds, no matter which

192. HENRI LEFEBVRE, *THE PRODUCTION OF SPACE* 286 (Donald Nicholson-Smith tr., 1991) (emphasis added).

193. JOHN EMMES DAVIS, NAT'L HOUS. INST., *SHARED EQUITY HOMEOWNERSHIP: THE CHANGING LANDSCAPE OF RESALE-RESTRICTED, OWNER-OCCUPIED HOUSING* 65 (2006).

194. *See generally* Barnes, *supra* note 136, at 41-45 (examining the rehabilitation experience in Boston's South End and its impact on property values).

195. *HOUSING IN AMERICA: PROBLEMS AND PERSPECTIVES* 192 (Roger Montgomery & Daniel R. Mandelker eds., 2d ed. 1979).

196. *See* Leven et al., *supra* note 133, at 199.

197. GOETZE, *supra* note 111, at 31.

198. *Id.* at 61.

199. *Id.* at 62.

meaning of labor is adopted. The owner did not create something new, the added value was not wholly due to her efforts, and the pains she suffered are limited to those associated with improvements she made, which form only part of the story. The community, on the other hand, labored on the asset and accordingly deserves reward. It created something new: a trendy neighborhood where previously there was a forgotten one. This something new is of value to society. Finally, efforts were made by the community: the improvement in the perception of one neighborhood normally entails the deterioration of that of others—the harms caused to those other neighborhoods are “pains” the community endured.²⁰⁰

d. Conclusion

Part of the change in a residential unit’s value is due to changing attributes of the community where it is situated. These attributes are created not by the unit’s owner, but by public perceptions or economic circumstances, improvements to neighbors’ houses, and government investment in infrastructure. As John Morgan and Harvey Molotch conclude, in the market for places and homes “*price is sociological*.”²⁰¹ There is nothing “natural” about it.²⁰² Therefore, in accordance with notions of desert, the community that labored on creating part of the asset’s value should maintain a property right in that part: the community aspect of property.

Still, a caveat must be added regarding this application of Lockean theory. The relationship of the preceding analysis to labor theory is complicated. The discussion is consonant with the theory’s spirit and logic, yet the theory as written by Locke might not accommodate it. Locke’s theory was a theory of first appropriation: the first man who labors on an unowned asset is entitled to own it. After this appropriation, a later laborer on the same—but now owned—asset will acquire nothing. Locke’s is a theory of natural rights, of historical entitlements.²⁰³ As such, it encounters difficulties in acknowledging any property interest in the house credited to the community (or anyone else) after an original owner acquired the asset. Theories of natural rights are static theories; they thus might be irrelevant to real-world problems of a developed interdependent society. I will address this difficulty in the following two Subsections.

200. On the harms gentrification in one neighborhood inflicts on other neighborhoods, see Peter Marcuse, *Gentrification, Abandonment, and Displacement: Connections, Causes, and Policy Responses in New York City*, 28 WASH. U. J. URB. & CONTEMP. L. 195, 216-17 (1985).

201. LOGAN & MOLOTCH, *supra* note 58, at 9.

202. WALDRON, *supra* note 159, at 138.

203. *Id.*

3. *Property as a Natural Right*

The preceding discussion explored two right-based arguments justifying property rights and concluded that they call for recognizing a community interest in such rights. This might not have been the case had those right-based arguments been read as natural right theories of property. The strongest opposition to the community interest in private property stems from natural rights theories. I will now point at the concerns raised by these theories and highlight the problematic nature of their understanding of the role and law of property.

A natural rights and historical entitlement system is not a specific right-based argument justifying property. The natural right to property can emerge from whatever source—labor and personhood being two contenders. The key element in a natural rights/historical entitlement philosophy is that afterwards—after the right’s original creation—it is forever protected. The particular rule that determines the just origin of the property right is only of secondary importance.

Therefore, Robert Nozick, the most prominent philosopher of the historical entitlement theory, refrains from formulating the “principles of justice in acquisition,” though they are an important component in his system of justice.²⁰⁴ Nozick holds that in a just world, a person who acquires a holding in accordance with the principles of justice in acquisition is entitled to that holding.²⁰⁵ The only way another person can become entitled to that holding is by acquiring it from her in accordance with the “principle of justice in transfer” (also not detailed by Nozick).²⁰⁶ This is a historical theory of justice in distribution, rather than an end-result theory of justice. The determination whether a distribution is just depends upon how it came about, and not upon how things are distributed at the present.²⁰⁷ For the existing system of property to be just, it must be the result of transfers of assets from those who acquired them in accordance with the original principle of acquisition. If those transfers were made following the governing rules of transfer then the result is just—regardless of its specific character.

Such a theory would arguably deny the introduction of the community’s interest in property. Nozick differentiates his principles of justice from “*patterned*” principles of distribution.²⁰⁸ The latter specify “that a distribution is to vary along with some natural dimension, weighted sum of natural dimensions, or lexicographic ordering of natural dimensions.”²⁰⁹ According to his theory, if a distribution is

204. ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 150, 153 (1974).

205. *Id.* at 151.

206. *Id.*

207. *Id.* at 153-55.

208. *Id.* at 155-56.

209. *Id.* at 156.

arrived at by the principles of historical entitlement, it is just, no matter how “unpatterned” and random.²¹⁰ Hence arguments for distribution according to “patterns” of moral merit, needs, or marginal product, are alien to the system.²¹¹ The claims made in the former two Subsections that the community is entitled to an interest in property because of notions of desert or due to individual needs for maintaining constitutive attachments are irrelevant to a Nozickean system.

This denial is reinforced when the role of first acquisition is further strengthened, as it is by other writers in the natural rights tradition. The desire to acquire is sometimes presented as inherent to human nature: a biological instinct or an uncontrollable psychological impulse, serving both as means for survival and tool for self-fulfillment. For this reason property is understood as a natural right, predating organized society.²¹² On a less abstract and deterministic note, first possession has been justified as the source of property due to its alleged enduring role in most societies.²¹³

If first acquisition or possession is the controlling factor, it is hard to argue for an interest emerging for the community’s benefit in a house already acquired and possessed. It is not, however, an impossible argument to make. Individuals can maintain natural rights in assets they acquired, and still those rights may be subject to limitations, even in a natural rights/libertarian world—if the individuals *choose* the limitations. The property right voluntarily restricted *ex ante* is a complicated issue for libertarian approaches.²¹⁴ On the one hand, such theories object to limits placed on property rights. On the other hand, they celebrate individual choice. Nozick’s assignment of a key role to voluntary communities is thus highly intriguing.²¹⁵ The proliferation of these communities represents utopia for Nozick. His utopia is a framework—a minimal state—within which many societies exist, each living its members’ idea of the utopian society. Every group of persons sharing the same idea of utopia may come together and realize its ideal. Internally, the different communities may impose restrictions on their members to assure the realization of their utopia. Had they been imposed by the state, these restrictions would have been unjustifiable on libertarian grounds. Yet the different communities may enforce these limitations on freedom. For example, a communist community may redistribute wealth between its members,

210. *Id.* at 156-58.

211. *See id.* at 155-60.

212. *See* RICHARD PIPES, PROPERTY AND FREEDOM 65-86, 286 (1999).

213. Richard A. Epstein, *Possession as the Root of Title*, 13 GA. L. REV. 1221, 1241-43 (1979).

214. *See* RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY 43 (2004).

215. Nozick is a strong proponent of free contract: he believes that an individual should be allowed to sell himself into slavery. NOZICK, *supra* note 204, at 331.

while the central government may not redistribute wealth between communities.²¹⁶

It may follow that the different communities should be preserved so that they can continue to live diverse utopias, thereby allowing each person to choose her utopia. However, Nozick emphasizes that the system should be based on a person's ability to leave one community and move to another.²¹⁷ Community stability is to be achieved by the payoffs the community awards each member, persuading her to stay.²¹⁸ Nozick's utopia consists of "a world which all rational inhabitants may leave for any other world they can imagine . . . an *association*," and not of a "world in which some rational inhabitants are not permitted to emigrate to some of the associations they can imagine, an *east-berlin* [*sic*]."²¹⁹

But at the same time, Nozick acknowledges that absolute rights to leave a community lead to an impasse:

[P]roblems arise if an individual can plausibly be viewed as *owing* something to the other members of the community he wishes to leave: for example, he has been educated at their expense on the explicit agreement that he would use his acquired skills and knowledge in the home community. Or, he has acquired certain family obligations that he will abandon by shifting communities. Or, without such ties, he wishes to leave. What may he take out with him? . . . Clearly the principles will be complicated ones.²²⁰

If the idea of "owing something" to the community is broadly conceived, loyalty and a duty to allow peers to continue living their utopia may serve as justifications for making leaving a community more difficult. Recall the issues explored in Section II.B.2.ii.: the Nozickean utopia is analogous to Tiebout's model of the market for local public goods. While Tiebout's individuals shop for municipalities, Nozick's shop for utopias. Accordingly, Nozick's utopia encounters problems similar to those that Tiebout's model faced, namely the damage inflicted to the community by every departure. This problem renders the visions impossible to realize. Like Tiebout's model, Nozick's utopia can be saved only following the introduction of reasonable controls allowing communities' survival without turning them into "east-berlins." This idea might, to the superficial observer, contrast the notion of the minimal state, which is Nozick's framework for utopia.²²¹ But the minimal state always plays an active role in

216. See generally *id.* at 297-334.

217. *Id.* at 302, 317.

218. *Id.* at 306.

219. *Id.* at 299.

220. *Id.* at 330.

221. *Id.* at 333-34.

protecting property rights,²²² or—in Nozick’s terms—in rectifying deviations from the principles of justice in acquisition and transfer. So why must it refrain from acting to protect a certain form of property right and community desired by owners?

These ambiguities make it difficult to assess the response of libertarian thinking to the reinforcement of voluntary associations’ powers. They are symptoms of libertarianism’s general deficiencies. The theory is attractive as it offers clear-cut notions of justice, freedom, and property; but, for the same reason, it is also unrealistic. It fails to recognize the complex nature of property rights. In a world with more than one owner, property rights conflict and regulation must be introduced to determine which right shall prevail.²²³ This Article demonstrates the problem: while one owner—for example Ms. Rodriguez of the Introduction—seeks to preserve her property right as it were, another demands to secure her ability to use or transfer her property right as she pleases. Yet if the latter is allowed to act, the former cannot maintain her property right in its current condition. Answers to such conflicts—between one owner’s security and another’s freedom—cannot be found by resorting to an endorsement of “natural property rights” and to a denial of “regulation,” because property rights are found on both sides of the dispute. Society, not nature, picks the winners in such contests.

4. *Property as a Social Phenomenon*

The natural rights conception of property is juxtaposed with a very different idea regarding the origin of property, explained by Rousseau in this famous excerpt:

The first man, who after enclosing a piece of ground, took it into his head to say, *this is mine*, and found people simple enough to believe him, was the real founder of civil society. How many crimes . . . how many misfortunes and horrors, would that man have saved the human species, who pulling up the stakes or filling up the ditches should have cried to his fellows: Beware of listening to this impostor; you are lost, if you forget that the fruits of the earth belong equally to us all, and the earth itself to nobody!²²⁴

This conception of property rights as a social phenomenon that could not have antedated society shatters any pretences of sanctity on the part of property rights. First acquisition can no longer be portrayed as natural. In a style reminiscent of Rousseau, Carol Rose explains the common law’s acceptance of first acquisition as ownership’s origin by its being a manner for communicating a message, a “text” intelli-

222. Singer, *supra* note 165, at 651.

223. SINGER, *supra* note 20, at 94, 171-74.

224. ROUSSEAU, *supra* note 181, at 113.

gible to others. It therefore is not enough for the person to say "it's mine"; "some relevant world must understand the claim it makes and take that claim seriously."²²⁵ First possession is "the articulation of a specific vocabulary within a structure of symbols approved and understood by a commercial people."²²⁶

Property rights can only exist within a society. They are not a natural right that cannot be modified after the individual enters society. As society defines the right, it may set the right's limits.²²⁷ This conception of property makes it easier to recognize the need to reward the community's labor on the creation of the house's value, and to constrain property rights in residential units in a manner that will better protect owners' personhood.

More importantly, this social conception of property allows an understanding of property that integrates the different theoretical approaches explored in this Part of the Article. Joseph Singer has proposed replacing the ownership model with an entitlement model, which will direct attention to the way in which property law structures relations.²²⁸ He explains that property rules not only protect individual rights, but also form the overall social context in which individuals live.²²⁹ Accordingly, the property rules chosen are those that shape the contours of social relations in a manner which accords with our considered judgments about the appropriate forms of social life. The central normative goal of property law is to protect justified expectations. The decision as to what constitutes justified expectations relies both on utilitarian and right-based arguments.²³⁰ As seen in this Section, right-based arguments, both those appealing to labor-desert and those appealing to personhood, lead to the conclusion that the expectation that a neighbor will not easily leave her fellows behind, is justified. Utilitarian arguments, explored in the preceding Section, and communitarian ideas, reviewed still earlier, converge on the same result.

These insights counsel that emphasis be placed upon the relations that develop between neighbors. This is indeed the approach advocated by Singer:

The relational approach shifts our attention from asking "Who is the owner?" to the question "What relationships have been established?" The shift is partly a shift from focusing on the relation between the owner and the resources owned to the relation between

225. Carol M. Rose, *Possession as the Origin of Property*, 52 U. CHI. L. REV. 73, 81, 84-85 (1985).

226. *Id.* at 88.

227. See Singer, *supra* note 165, at 647-48, 650-51.

228. SINGER, *supra* note 20, at 91.

229. *Id.*

230. *Id.* at 90, 130-39, 146, 210-12.

the owner and non-owners who have benefited from the resources. But more important, the shift is from a perspective that focuses on the owner as an isolated individual whose presumptive control of the resource is absolute within her sphere of power to a perspective that understands individuals to be in a continuing relation to each other as part of a common enterprise.²³¹

This property theory has been applied to gentrification and neighborhood change. One researcher found that neighborhood activists in Vancouver based their struggle against development that would have led to gentrification and displacement on an alleged community property right in a privately owned department store and a public park.²³² Residents viewed themselves as owners of the properties, in defiance of the classical ownership model.²³³ They invoked the entitlement model arguing that these properties became part of the community.²³⁴

In this manner the relational theory was enlisted to regulate the relations between the community and external forces. It can guide the internal relations between neighborhood residents just as well. The relationship between residents should be viewed as constituting a common enterprise—a community—on which all residents are dependent. The residents rely on the relationship's continuity: they invest in their houses and make them the center of their lives, based on an assumption that their relationship with their surroundings, which benefits all involved, will persist. The reliance on such relationships should be protected.²³⁵ Owners should have property rights—community property rights—in the private holdings of their neighbors.

Property rights are the creation of society, not nature or god. As such, society may model property rights according to its conceptions of individuals' needs, of justice and desert, and of desired social relationships. Hence property rights should be recognized when people reasonably rely on existing relationships with others. Reliance on the character of one's environment, on lasting interactions with surrounding people, is something that socially created property rights seek to promote.

5. *Conclusion*

Right-based arguments, in their vast majority, necessitate the protection of the community's interest in private property. The community is entitled to such an interest as a reward for its labor on the

231. Singer, *supra* note 165, at 657.

232. NICHOLAS BLOMLEY, *UNSETTLING THE CITY: URBAN LAND AND THE POLITICS OF PROPERTY* 37-53 (2004).

233. *Id.* at 55-65.

234. *Id.* at 73-74.

235. *See* Singer, *supra* note 165, at 661.

creation of a portion of a house's value. This interest is also vital in order to enable the existence of the individual's personhood and to safeguard her "personal properties," which cannot be detached from the "context" where she lives. Even if these or other right-based arguments are regarded as creating natural property rights, they may still be understood as requiring the protection of certain communities—certain forms of property—that people voluntarily choose. Regardless, social conceptions of property rights may be deemed preferable to natural rights worldviews. From the perspective of these relational readings of rights, the absence of protection for the community's interest in ownership is particularly troubling.

D. Conclusion

This Part of the Article has explored diverse property theories and illustrated how they all could support—indeed, necessitate—the recognition of the community aspect of private ownership. It must be stressed, however, that the fact that communitarianism, welfare economics, and rights-based arguments all converge on this conclusion does not imply that their rationalizations are identical or that the specific contributions they make are useful for the same purposes. Thus, for example, communitarianism provides us with a rich understanding of the meaning and import of the neighborhood, but it falls short in putting forward detailed principles for regulating the relationship between the neighborhood and the individual: for balancing neighborhood stability against individual freedom. Welfare economics presents the groundwork for such a balancing scheme, but the intangible value of the neighborhood is, too often, not a natural element in its calculus. Rights-based arguments ground the community aspect of ownership in the very powerful tradition and rhetoric of property rights, but, as each right-based explanation isolates one salient attribute of reality, such accounts' notion of community is rather thin. Those not exclusively attached to one specific theory will draw in a pragmatic manner on all of them when considering the community aspect of ownership. Those adhering to one or another of the theories are bound to view the community aspect in divergent lights. That being said—they are still likely to view it favorably.

III. THE COMMUNITY ASPECT OF PRIVATE OWNERSHIP AND PROPERTY LAW PRACTICE: A PROPOSAL

A clear conclusion emerged from Part II of the Article. The community's interest in property should be recognized. But how can this goal be achieved? How—if at all—can the community aspect of property don a practical garb? The impetus for challenging property law theory to recognize the community interest was provided by a real

world problem presented in the Introduction. It originated in a difficulty faced by actual owners whose neighborhoods are destabilized. It is thus important that the community aspect of ownership not be constricted to the realm of theory. This Part of the Article will suggest one possible way of giving it concrete substance. I will propose a scheme that will grant the community the partnership interest in assets' value to which it is entitled, in a way that can alleviate the plight of owners whose community is threatened.

The proposal distinguishes two disparate situations: one where properties' market values are increasing dramatically—the conditions characteristic of an improving/gentrifying neighborhood—and another where property values are decreasing dramatically—the common occurrence in a declining neighborhood.

A. An Improving Neighborhood

In the improving neighborhood the traditional individualized notion of property and the community-invested idea of property, introduced by this Article, contrast most strikingly. Therefore Ms. Rodriguez's story served as a good illustration of the problem property law faces. In a gentrifying neighborhood properties' monetary values increase, while the community aspect of those same properties is threatened. Local residents are displaced. The owners among them—like Ms. Rodriguez—might be able to reap a profit when selling. Yet they lose their community, which was a constitutive element of their property right and the enjoyment they derived from it.

In light of the fact that, as already seen, this result is inefficient and unjust, what should be the policy response? I suggest imposing a tax calculated as a percentage of the profit made in selling property and collected at the time of sale, accompanied by rent control. The tax rates are to be set according to the intensity of gentrification, with higher taxes levied the more intense the process. The establishment of such a tax corresponds to the requirements of the theoretical approaches reviewed in Part II. The tax will deter sales since it will render them less lucrative, thereby carrying a stabilizing effect.²³⁶ In this manner it will convey upon residents better chances at preserving their attachment to their neighborhood, as suggested by communitarian and personhood theories. It will make emigrants internalize their departure's costs, thereby solving the collective action problem identified by utilitarian theories. It will compensate those remaining behind for the upsetting of their reliance and expectations, as required by relational theories. The tax will also be a reward to

236. For a similar proposal of a sales tax aimed at deterring further destabilization and resegregation in neighborhoods undergoing racial integration, see Bell & Pachomovsky, *supra* note 152, at 2009-11.

society for its work on the creation of the increase in the house's value, a reward merited in accordance with labor-desert theory.

The tax will be levied at sale. At that time, the difference between the price for which the owner bought the house, and the price for which she is selling it, will be taxed. Subtractions should be introduced for improvements she made to the property, as well as for general increases in housing prices in the entire region and nation.

The best way to understand these characteristics of the proposed tax is by identifying the tax's relationship to other taxes to which property owners are subject. The proposed tax, like existing property taxes, will be paid to a local authority. Another similarity between these two taxes lies in their normative structure. The tax contemplated is based to some degree on the "benefit tax" principle of taxation, as property taxes are held to be.²³⁷ The benefit principle of taxation dictates that a person be taxed in keeping with the amount of benefit she derives from services provided by the relevant governmental body. Property taxes represent a payment a homeowner makes for her enjoyment of local public services. More importantly, these services enhance property values. Hence, when paying property taxes, calculated based on her home's value, the taxpayer is paying the local government consideration for its services. Similarly, the proposed tax will be paid in accordance with the contribution the community, via public and private investment, made to the value of the taxpayer's asset.

But unlike property taxes, the proposed tax will only be paid when the investment is realized—upon the occurrence of a sale. In this feature, the tax is comparable to the capital gains tax, which forms a part of the income tax.²³⁸ The reason for emulating the capital gains tax in this regard is obvious; levying the suggested tax while the owner is still occupying the house will achieve a result opposite to the desired outcome. Subjecting homeowners in a gentrifying neighborhood to higher taxes puts further pressure on them, making displacement practically unavoidable.²³⁹ Conditioning the tax on a sale relates it to the principle of taxation according to ability to pay (which contrasts the benefit principle of taxation)—the guiding principle in income taxation.²⁴⁰ A homeowner is being taxed according to her ability to pay since she only pays the tax when she is in actual

237. See William A. Fischel, *Municipal Corporations, Homeowners and the Benefit View of the Property Tax*, in PROPERTY TAXATION AND LOCAL GOVERNMENT FINANCE 33 (Wallace E. Oates ed., 2001).

238. For more on taxation upon realization, see Charles T. Terry, *Normative Capital Cost Recovery for a Realization-based Income Tax*, 5 FLA. TAX REV. 467 (2002).

239. Property taxes might be viewed as undermining property rights, since they might compel owners to sell their properties. See RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 496 (6th ed. 2003).

240. RICHARD A. MUSGRAVE, *THE THEORY OF PUBLIC FINANCE: A STUDY IN PUBLIC ECONOMY* 61-63 (1959).

possession of the funds representing the increase in her home's value, i.e., after she sold it for a profit. Nevertheless, the tax does not truly embody the taxpayer's ability to pay. Unlike income taxation, the proposed tax is paid without considering the taxpayer's overall wealth. It only deals with income gained from one source—the sale of a house. Such an approach naturally deviates from the ability to pay principle, which sets taxes according to the taxpayer's entire income.²⁴¹ It also contradicts a major aspiration of income taxation, which is to tax similarly different investments, so as not to distort capital market decisions (i.e., not to have investors choose an investment solely because it is taxed favorably).²⁴² The proposed tax targets a specific investment—residential units—while leaving other investments untouched. Still, this is not a problem: the tax explicitly aims at “distorting” decisions in this one market.

Because of these major differences the tax is neither an addition to the capital gains tax, nor a part of its normative structure. Rather, it in some ways evokes Henry George's late nineteenth century proposed comprehensive taxation of land value as a single tax.²⁴³ Although rejected in most jurisdictions,²⁴⁴ that proposal still exerts much influence on the way scholars think about land taxation.²⁴⁵ The famed economist and politician envisioned one single tax whose amount is determined solely by the value of land, discounting structures built on it. He believed that such a tax would be both efficient and progressive in incidence. In addition, he saw it as just, since land's value increases due to social and economic developments, as well as governmental investment, while owners do practically nothing to bring about such value increases. Hence, George did not believe that landowners earn these increments in value and conceived owners as occupying a different position than individuals who contribute labor and capital to production and earn their compensation.²⁴⁶ This Article's community interest in property, as explained in Section II.C.2., shares this rationale, though it does not separate the value of buildings from the value of land. In addition, the tax sug-

241. On determining a taxpayer's income, see HENRY C. SIMONS, PERSONAL INCOME TAXATION: THE DEFINITION OF INCOME AS A PROBLEM OF FISCAL POLICY 49-50 (1938) and Robert Murray Haig, *The Concept of Income—Economic and Legal Aspects*, in READINGS IN THE ECONOMICS OF TAXATION 54, 75 (Richard A. Musgrave & Carl S. Shoup eds., 1959).

242. See John K. McNulty, *Flat Tax, Consumption Tax, Consumption-Type Income Tax Proposals in the United States: A Tax Policy Discussion of Fundamental Tax Reform*, 88 CALIF. L. REV. 2095, 2138 (2000).

243. See generally HENRY GEORGE, PROGRESS AND POVERTY (1942).

244. Pennsylvania is the main exception. J. Anthony Coughlan, *Land Value Taxation and Constitutional Uniformity*, 7 GEO. MASON L. REV. 261, 262 (1999).

245. See, e.g., LAND VALUE TAXATION: CAN IT AND WILL IT WORK TODAY? (Dick Netzer ed., 1998).

246. See generally Coughlan, *supra* note 244, at 263-68 (examining arguments in favor of land value taxation).

gested has no aspirations at replacing other forms of taxation, in stark contrast to George's plan.

Now that the proposed tax has been situated among other taxation schemes, and its roles and characteristics clarified, it is necessary, in order to evaluate its effects, to try and predict who will actually pay it. Foreseeing the economic incidence of a tax²⁴⁷ is practically impossible, as it depends, among other factors, on the elasticities of supply and demand.²⁴⁸ As far as the relationship between seller and buyer is concerned, this is not a major worry: whether the owner/seller pays the tax, or whether she passes the tax on to the buyer, the tax's purposes are attained. In both scenarios, the sale is deterred, and either the owner moving out or the in-mover internalizes the move's costs to the neighborhood.

The incidence of the tax does raise a concern with regards to the possibility that owners will pass it on not to potential buyers, but to tenants. When sales' profits are taxed, owners have an incentive to lease their properties for higher rents rather than sell them.²⁴⁹ Theoretically, rent proceeds should be taxed as sale proceeds since the two are economically equivalent. However, the danger is that landlords will pass on, via higher rents, rent income tax to current tenants, leading to displacement and the community's demise. A better approach, thus, is to avoid taxing rent income. Instead, the sales tax should be supplemented by a more traditional rent control policy. Rent control prevents landlords from increasing rents beyond a set amount representing fair return on their investment. It thereby prevents higher-income in-movers from outbidding lower-income tenants.²⁵⁰ The rent control suggested here correlates to the taxation of sales and is thus justified on the same grounds justifying the tax: it is an embodiment of the community's interest in the asset. Rent control will check owners' ability to realize value increases by leasing for higher rents, thereby evading the tax levied at sale. It will allow this Article's proposal, which otherwise centers on homeowners, to convey benefits directly to tenants. Rent control is probably the only tool that can effectively help tenants stay in a gentrifying community.²⁵¹

247. The economic incidence of the tax relates to the identity of the party who is unable to pass along the burden of the tax. It need not correlate to the legal incidence.

248. *Fulton Corp. v. Faulkner*, 516 U.S. 325, 341-42 (1996); Walter Hellerstein, *Complementary Taxes as a Defense to Unconstitutional State Tax Discrimination*, 39 TAX LAW. 405, 438-42 (1986).

249. For a similar scenario with a land improvement tax, see POSNER, *supra* note 239, at 496.

250. Rent control has been controversial for years. For an overview of the debate, see SINGER, *supra* note 148, at 777-81. For the debate in the context of gentrification, compare Molly McUsic, Note, *Reassessing Rent Control: Its Economic Impact in a Gentrifying Housing Market*, 101 HARV. L. REV. 1835 (1988) with Minton, *supra* note 95.

251. See, e.g., J. Peter Byrne, *Two Cheers for Gentrification*, 46 HOW. L.J. 405, 426 (2003).

Aiding tenants is necessary for the realization of the community interest in ownership, as their displacement threatens the community.

B. A Declining Neighborhood

This Article focused on the operation of the community interest in a gentrifying neighborhood. However, as has been made clear, the community aspect of property is operable in all situations, and community stability is at threat in declining neighborhoods as well. In fact, the declining neighborhood presents an easier case for justifying the community interest in property. Maintaining it in such neighborhoods implies combating the drop in property values, and thus it correlates to traditional individualized understandings of property protection. However, when it comes to practical implementation, the challenge of protecting the community's interest in such neighborhoods might be more complex than in improving neighborhoods. The reason is that the theoretical justifications for the community interest explored in Part II of this Article may diverge in their recommendations here.

When understood as created by society, the decrease in property values calls for a transfer of funds from society to the owner/seller, perhaps in the form of a negative tax.²⁵² As seen in Section II.B.2, society is the entity responsible for locations losing appeal. If the community is a silent partner in land ownership, partaking in its benefits (as suggested by the tax discussed above), it should also share in the losses.

However, the stabilizing effect of such a scheme is questionable at best. A promising precedent is the experience of Oak Park, Illinois. When, during the 1970s, the Chicago community bordering Oak Park became segregated following white flight and neighborhood decline, the Oak Park community fought back by enacting an equity assurance plan.²⁵³ The plan—financed by a one percent general tax on all local properties—is open to any single-family homeowner that enrolls by paying a fee covering the cost of appraisal.²⁵⁴ An appraisal is then made of the home's value. Five years after the owner enters the program, the protection sets in, and if an owner is unable to sell her residence at the appraised value, she is reimbursed for eighty percent of the loss.²⁵⁵ The plan has been perceived as a success: no owner has

252. The term negative tax describes government payments made to citizen through the tax system instead of the welfare system. See James Tobin, Joseph Pechman & Peter M. Mieszkowski, *Is a Negative Income Tax Practical?* 77 *YALE L.J.* 1, 2 (1967).

253. Maureen A. McNamara, *The Legality and Efficacy of Homeowner's Equity Assurance: A Study of Oak Park, Illinois*, 78 *NW. U. L. REV.* 1463, 1466-67 (1984).

254. *Id.* at 1468.

255. *Id.*

ever sought reimbursement and the community remains remarkably stable. As a result, other municipalities adopted similar programs.²⁵⁶

Still, in Oak Park the municipality promised to reimburse owners for eighty percent of their losses. It is doubtful whether less affluent locales could assume such a financial burden. Yet if they solely pledge partial compensation for owners' losses, the chances of replicating Oak Park's success dramatically decrease. A partial monetary compensation might not hand the owner a strong enough incentive to refrain from selling; she might fear the cost of waiting will be greater.²⁵⁷

Therefore, another policy tool should be developed. One possible approach might be lowering property taxes using public funding (generated by the proposed tax collected in improving neighborhoods) to finance the ensuing tax deficit. It is imperative that local authorities advise residents that the same level of public services will be maintained (or even enhanced) despite the decrease in property taxes. At times of abandonment city government often reduces services, or at least does not keep up with the greater needs of the poor neighborhood.²⁵⁸ It thereby, if only inadvertently, intensifies the spiral of neighborhood decline. In contrast, assurances that public investments in the neighborhood will remain steady, accompanied by the decrease in living costs, serve as incentives to stay.²⁵⁹ They help preserve the community. The plan plays a role in reinstating neighborhood confidence, which, as seen in Section II.B.2.iii., is vital to neighborhood recovery. Indeed, property tax abatements have been known to encourage private investment in neighborhood rehabilitation.²⁶⁰

Furthermore, this plan, despite its eschewal of straightforward reimbursements for property value losses, is not inconsistent with the community interest's goal of reflecting the partnership between owner and neighborhood. Though not a direct transfer of funds, this scheme provides compensation for losses created by society: studies show that fiscal factors, namely tax rates and per capita municipal

256. See, e.g., 65 ILL. COMP. STAT. ANN. 95/1-20 (West 2010). On the plan elsewhere, see Bell & Parchomovsky, *supra* note 152, at 2005 n.136, 2006 n.140.

257. See *supra* note 131 and accompanying text.

258. HALLMAN, *supra* note 56, at 218.

259. Theoretically, any price stabilization scheme could also lead to the opposite result: it may induce moves. When the market trends downward, owners may refuse to accept prices that are lower than those the properties could have commanded earlier, and therefore they tend to stay put. The reason is liquidity constraints and also loss aversion. Once the market is stabilized, owners are thus less hesitant to sell. Lee Anne Fennell, *Homeownership 2.0*, 102 NW. U. L. REV. 1047, 1109-10 (2008). While this may be true to some extent in the general market, deteriorating neighborhoods normally, as seen, experience an exodus of residents. In such places, the pre-intervention baseline is excessive mobility, rather than the lack thereof.

260. Judith Bernstein-Baker, *Cooperative Conversion: Is It Only for the Wealthy? Proposals that Promote Affordable Cooperative Housing in Philadelphia*, 61 TEMP. L. REV. 393, 419 & n.229 (1988).

expenditures, are capitalized into house values.²⁶¹ Hence, under the plan suggested here, the community will monetarily compensate the homeowner whose house decreased in value: the more favorable fiscal environment will offset part of the decrease in the asset's value.²⁶²

IV. THE COMMUNITY ASPECT OF PRIVATE OWNERSHIP AND OTHER LEGAL PROBLEMS

Part III of this Article translated Part II's theoretical insights into practice by suggesting a plan implementing the community's interest in residential properties. This Article's theoretical insights have implications for the design and defense of still other rules of law. This concluding part of the Article will briefly review several such implications. I will highlight rules in other fields of property law that are, or can be, justified by reference to concepts similar to the community interest. I will also use the Article's thesis to suggest reforms in several of these rules. The discussion of each example will be merely introductory. My goal is to point at directions for further research, and I entertain no pretensions of engaging a full exploration of each and every example.

The discussion will be divided into three groupings of legal issues: properties other than residential housing, nuisance law, and intellectual property law.

A. *Properties Other than Residential Units*

This Article focused on the need to subject residential ownership to a community interest. The thesis relates to earlier calls for the acknowledgment of a similar interest in factories,²⁶³ and commercial and public assets important to a community.²⁶⁴ Several other assets with similar attributes, in which a community may claim an interest, exist.

261. For a survey of these studies, see Vicki Been, *"Exit" as a Constraint on Land Use Exactions: Rethinking the Unconstitutional Conditions Doctrine*, 91 COLUM. L. REV. 473, 521-22 (1991).

262. The plan proposed in this Part of the Article, in both its facets, can be viewed as a form of home-equity insurance. It insulates, to some extent, the homeowner from decreases in the value of her home that are beyond her control. The premium she pays for this insurance is the loss of the ability to realize some of the increases in the value of said home. For an example of a scheme reimagining property rights in a way that will allow for the easier provision of home equity insurance, see Fennell, *supra* note 259. The program as proposed in this Article is a form of public—rather than private—insurance. Such an approach to the provision of the relevant insurance product might be justified as moral hazards are likely precluding its provision by private insurers. See, e.g., ROBERT J. SHILLER, *MACRO MARKETS: CREATING INSTITUTIONS FOR MANAGING SOCIETY'S LARGEST ECONOMIC RISKS* 79, 82-83 (1993).

263. See Singer, *supra* note 165.

264. See BLOMLEY, *supra* note 232.

1. *Places of Worship*

Church closings have become a major issue over the past few years.²⁶⁵ Faced with declining attendance and mounting costs, archdioceses close churches that no longer appear viable. But worshippers feel that their churches should not be treated as standard assets with which the owner—the Catholic Church—can do as it pleases. They perceive themselves as entitled to a holding in what is not just a real estate commodity, but also an institution central to their communities and lives. Though not cloaked in legal terms, this is a debate about ownership rights in churches.

Throughout the years, courts have dealt with ownership in church properties mainly when confronted with controversies between religious factions, arising out of a schism. Difficulties in deciding these cases stem from the First Amendment's Free Exercise and Establishment Clauses. Because of the latter, the Supreme Court has held that courts adjudicating such disputes must refrain from analyzing religious doctrines in an effort to determine which fraction is "loyal" to the church's tenets.²⁶⁶ Rather, the Court has suggested two alternative approaches. Under the first, courts must defer to the church's governmental structure. This structure may be hierarchal (as in the Roman Catholic Church) or congregational (as with Judaism and Baptist Christianity). If the church's governance is hierarchical, ownership of church properties resides with the church's highest authority, whose decisions are binding even when arbitrary or fraudulent. If the church is organized on a congregational basis, each congregation owns its own property and governs it. Under the second approach legitimized by the Court for settling controversies over church properties, a court is to apply "neutral" secular legal principles. It is to employ standard property and contract doctrines to the relevant documents setting the assets' status.²⁶⁷

When a church closing is at issue there is hardly doubt that both these approaches allow an archdiocese to proceed with its plans.²⁶⁸ The Catholic Church is the prototypical hierarchical organization, and it is also the properties' owner according to secular principles. Thus traditional legal analysis of church property controversies pays scant attention to the interests of community members. Commenta-

265. See, e.g., James Barron & Jennifer Lee, *After Vigil to Protest Church Closing, Six Women Are Arrested*, N.Y. TIMES, Feb. 13, 2007, at B2; *Vigil Ends as Police Seal Boston Area Church*, N.Y. TIMES, Dec. 27, 2004, at A13.

266. See, e.g., *Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church*, 393 U.S. 440, 449 (1969). For a review of the cases, see Kent Greenawalt, *Hands Off! Civil Court Involvement in Conflicts over Religious Property*, 98 COLUM. L. REV. 1843, 1846-55 (1998).

267. For an analysis of the approaches, see Louis J. Sirico, Jr., *Church Property Disputes: Churches as Secular and Alien Institutions*, 55 FORDHAM L. REV. 335, 348-57 (1986).

268. See *Akoury v. Roman Catholic Archbishop of Boston*, 18 Mass. L. Rptr. 271 (Mass. 2004).

tors share this bias. In prescribing standards for church property disputes, the only individuals whose intent and reliance is mentioned as meriting consideration are those who donated money to the purchase and upkeep of the specific church.²⁶⁹

This legal attitude is too restrictive. Part II of this Article suggests that the community aspect of church properties ought to be acknowledged. This goal can be attained if courts, in applying "neutral" standards to church property disputes, identify and enforce implied agreements between members and the church. Over the lifespan of the parish an implied agreement comes into being, encompassing an understanding that the church will, at least to some extent, protect parishioners' reasonable expectations. The agreement implies that closing a church will only be the solution of last resort, and that the community will be supplied with an alternative place of worship. Progress can also be made if courts categorize churches' governmental structure as congregational more liberally. Since courts must avoid religious doctrine, there is little barring them from setting their own secular criteria for defining a local church as an empowered congregation, even when the church's doctrine requires otherwise.

2. Sports Teams

For many, sports teams are an indispensable component of their community and an important part of their identity.²⁷⁰ As noted elsewhere, "[f]or better or ill, a cultural hallmark of our era is the truism that almost any community's most visible and cherished asset is a local major league professional sports franchise."²⁷¹ Yet most sports teams are private properties that can easily relocate.²⁷²

This reality bluntly ignores teams' roles in constituting communities, fans' attachment to them, and fans' contributions to a team's reputation. Several legal solutions have been proposed for these problems. First, there is the community-owned team model. The National

269. See Greenawalt, *supra* note 266, at 1865; see also Catharine Pierce Wells, *Who Owns the Local Church? A Pressing Issue for Dioceses in Bankruptcy*, 29 SETON HALL LEGIS. J. 375, 389-95 (2005) (examining the impact of donations on a church's ability to declare bankruptcy).

270. See MICHAEL MANDELBAUM, *THE MEANING OF SPORTS: WHY AMERICANS WATCH BASEBALL, FOOTBALL, AND BASKETBALL AND WHAT THEY SEE WHEN THEY DO* 33 (2004).

271. Matthew J. Mitten & Bruce W. Burton, *Professional Sports Franchise Relocations from Private Law and Public Law Perspectives: Balancing Marketplace Competition, League Autonomy, and the Need for a Level Playing Field*, 56 MD. L. REV. 57, 57 (1997).

272. The ability to restrict the mobility of sports franchises is limited by law. NFL policies restricting franchise relocation violate the Sherman Antitrust Act. *L.A. Mem'l Coliseum Comm'n v. NFL*, 726 F.2d 1381 (9th Cir. 1984). The situation of baseball teams is different since the Court exempted them from the Act. See *Fed. Baseball Club of Baltimore, Inc. v. Nat'l League of Prof'l Base Ball Clubs*, 259 U.S. 200 (1922); see also Jeffrey Gordon, *Baseball's Antitrust Exemption and Franchise Relocation: Can a Team Move?* 26 FORDHAM URB. L.J. 1201, 1213-21 (1999) (discussing baseball's antitrust exemption).

Football League's Green Bay Packers is incorporated as a non-profit organization, whose shares are owned by fans.²⁷³ Another possible solution is limiting teams' ability to relocate and obliging relevant approving bodies to consider the implications for the community.²⁷⁴ A third proposal is to award a team's home city trademark rights in the team's name, logo, and colors.²⁷⁵ Finally, there have been failed attempts at acquiring by eminent domain the property of a sports franchise contemplating a move.²⁷⁶

All these proposals raise serious issues of law and policy. However, they all evidence a belief shared by many that private sports teams have a community aspect.

3. Other Examples

The community interest in the preservation of its culture and architectural history may serve as justification for historic preservation legislation.²⁷⁷ Cultural heritage is created by the community and helps define it. Consequently it deserves protection.

Even in non-historic districts, buildings' façades are important to neighborhood life and confidence. The maintenance of the neighborhood's appearance presents a collective action problem. Thus statutory obligations placed on homeowners to renovate their buildings'

273. See Lynn Reynolds Hartel, Comment, *Community-Based Ownership of a National Football League Franchise: The Answer to Relocation and Taxpayer Financing of NFL Teams*, 18 LOY. L.A. ENT. L.J. 589, 593-95 (1998).

274. See Gordon, *supra* note 272, at 1259-64.

275. See Alvin B. Lindsay, Comment, *Our Team, Our Name, Our Colors: The Trademark Rights of Cities in Team Name Ownership*, 21 WHITTIER L. REV. 915, 936-61 (2000). In one recent case, parties arrived at this solution by agreement. Ending litigation initiated by the city of Seattle seeking to stop the relocation of the local professional basketball team—the SuperSonics—the team owners agreed in a settlement that though they will retain the rights to the SuperSonics' name, colors, and logos, they will not use them after moving to Oklahoma City. If a new National Basketball Association team arrives in Seattle, the owners will turn over those rights to the new team's owner at no cost. In addition, the team left behind all banners, trophies, and retired jerseys. Jeff Latzke, *Seattle to Retain SuperSonics Banners and Trophies*, SEATTLE TIMES, Aug. 20, 2008, http://seattletimes.nwsourc.com/html/nba/2008127774_websoni20.html. A similar agreement was reached in 1996 when the original Cleveland Browns left for Baltimore, where they became the Ravens. In an accord with the city, the National Football League allowed the city to keep that team's name, colors and records, for use by a new promised team, which entered the league in 1999. Jon Morgan, *Deal Clears NFL Path to Baltimore*, THE BALT. SUN, Feb. 9, 1996.

276. See, e.g., *Indianapolis Colts v. Mayor & City Council of Baltimore*, 741 F.2d 954 (7th Cir. 1984); *Mayor & City Council of Balt. v. Balt. Football Club, Inc.*, 624 F. Supp. 278 (D. Md. 1985); *City of Oakland v. Oakland Raiders*, 646 P.2d 835 (Cal. 1982); *City of Oakland v. Oakland Raiders*, 646 P.2d 835 (Cal. Ct. App. 1985), *cert. denied*, 478 U.S. 1007 (1986).

277. See generally Carol M. Rose, *Preservation and Community: New Directions in the Law of Historic Preservation*, 33 STAN. L. REV. 473 (1981).

exteriors might be justified (lower income owners should be provided financial support to enable them to abide by such obligations).²⁷⁸

Finally, for more than three decades now, banks have been subject to a statutory duty to meet their communities' credit needs.²⁷⁹ Said legislation was introduced to combat redlining (the practice of denying credit to certain, mostly poor and minority, communities) and to force banks to reinvest in communities from which they obtain deposits. It is based on a belief that banks are obliged to serve their communities: that they are not merely market actors, but entities that carry societal duties.²⁸⁰ Though the law's efficacy is debatable,²⁸¹ it reflects a conception of financial institutions imbued with a community aspect.

C. Stigma-Based Nuisances

A nuisance is "a substantial and unreasonable interference with the use or enjoyment of land."²⁸² Courts have stated that a diminution in property value, standing alone, does not constitute an actionable interference.²⁸³ Thus, if, for example, an owner discharges hazardous waste contaminating a neighbor's land, she may be sued for nuisance. But if the hazardous waste does not reach the neighbor's land, yet public perceptions stigmatize the area educing a diminution in the land's value, the situation becomes more complex. As the *Restatement (Second) of Torts* explains, the tort protects the owner's interest in "[f]reedom from discomfort and annoyance while using land[,] . . . freedom from physical interruption with his use[,] . . . [and] freedom from detrimental change in the physical condition of the land itself."²⁸⁴ Stigmas do not cause discomfort and annoyance, nor are

278. Many cities require owners to maintain the exterior façades of their buildings in a safe condition. See generally BUILDING FACADE MAINTENANCE, REPAIR, AND INSPECTION 3-44 (Jeffrey L. Erdly & Thomas A. Schwartz eds., 2004). In Israel the city of Tel-Aviv went beyond mere safety concerns and adopted an ordinance forcing owners to renovate a building's exterior every fifteen years. Ranit Nahum-Halevy, *Tel Aviv Landlords Now Required to Renovate Buildings Every 15 Years*, HAARETZ.COM (July 13, 2010), <http://www.haaretz.com/news/national/tev-aviv-landlords-now-required-to-renovate-buildings-every-15-years-1.301585>.

279. Community Reinvestment Act of 1977, 12 U.S.C. §§ 2901-2908 (2006).

280. Wendy Cassity, Note, *The Case for a Credit Union Community Reinvestment Act*, 100 COLUM. L. REV. 331, 349-50 (2000). But see A. Brook Overby, *The Community Reinvestment Act Reconsidered*, 143 U. PA. L. REV. 1431 (1995) (arguing the Act is better explained by principles of individual equality).

281. See, e.g., Jonathan R. Macey & Geoffrey P. Miller, *The Community Reinvestment Act: An Economic Analysis*, 79 VA. L. REV. 291, 294-97 (1993); Lawrence J. White, *The Community Reinvestment Act: Good Intentions Headed in the Wrong Direction*, 20 FORDHAM URB. L.J. 281, 281-87 (1993).

282. SINGER, *supra* note 148, at 305. See, e.g., Alaska Stat. § 09-45-255 (2010); see also San Diego Gas & Elec. Co. v. Superior Court, 920 P.2d 669, 696-97 (Cal. 1996); RESTATEMENT (SECOND) OF TORTS § 822 (1979).

283. See John Copeland Nagle, *Moral Nuisances*, 50 EMORY L.J. 265, 299 (2001).

284. RESTATEMENT (SECOND) OF TORTS § 821D cmt. b (1979).

they physical interruptions. At the most, they may cause emotional distress, but the Restatement holds that the tort is not addressed at protecting the owner's "interest in freedom from emotional distress."²⁸⁵

Courts are thus mostly hostile to nuisance claims arising from stigmas not accompanied by physical damage.²⁸⁶ For their part, commentators are spilt on the topic. Some believe that damages should be awarded as owners suffer economic affliction because of stigmas.²⁸⁷ In contrast, others claim that stigmas are prone to transformation as public perceptions shift, and therefore plaintiffs may not suffer any financial harm; seeing that by the time they sell their houses the stigma might subside, owners' claims for such damages are speculative.²⁸⁸

The problems accompanying stigma-based nuisance claims relate to many of the topics discussed in Part II of this Article. The social origins of market values, the role of perceptions in setting housing market trends, and stigmas' negative influences on communities are connected to the review of the community aspect of property. It is thus likely that the policy proposal put forward in Part III of the Article will partially solve the problem of stigma-induced property devaluation. When the fair market values of properties in a certain community drop, residents will receive property tax abatements. The decrease's cause may be neighborhood change, but it may also be stigmas. Providing residents of neighborhoods affected by stigmas such compensation may replace nuisance awards.

This scheme acknowledges the damage suffered by residents and is sensitive to stigmas' devastating effects on communities. In this last regard it follows the cue of courts that have become aware of the dire prospects facing affected communities. Some courts tend to be more receptive to nuisance claims based on contamination stigmas when plaintiffs succeed in tying property devaluation "to a general loss in community quality of life caused by a particular source of contamination."²⁸⁹ Another advantage of the plan promoted in this Article is that it only awards residents compensation for as long as the stigma actually impacts the neighborhood: when its effect subsides, values will re-stabilize and taxes will cease to be subsidized. Thus the

285. *Id.* In the past, courts accepted claims for nuisance based on emotional anguish, especially those concerning the operation of funeral homes and prostitution houses. Courts have mostly retreated from such holdings. See Michael D. Riseberg, Comment, *Exhuming the Funeral Home Cases: Proposing A Private Nuisance Action Based on the Mental Anguish Caused by Pollution*, 21 B.C. ENVTL. AFF. L. REV. 557, 574-78 (1994).

286. See SINGER, *supra* note 148, at 319.

287. See, e.g., Alex Geisinger, *Nothing but Fear Itself: A Social-Psychological Model of Stigma Harm and Its Legal Implications*, 76 NEB. L. REV. 452, 496 (1997); Jennifer L. Young, Comment, *Stigma Damages: Defining the Appropriate Balance Between Full Compensation and Reasonable Certainty*, 52 S.C. L. REV. 409, 423-24 (2001).

288. See E. Jean Johnson, *Environmental Stigma Damages: Speculative Damages in Environmental Tort Cases*, 15 UCLA J. ENVTL. L. & POL'Y 185 (1997).

289. Geisinger, *supra* note 287, at 467.

program mollifies the main concern of compensation's opponents—the fear of damages awarded to residents suffering no harm.

It should be noted, however, that this solution will not deter the original producers who created the pollution generating the stigma.²⁹⁰ They will not be burdened with the compensation costs associated with stigma damages—a task that will be undertaken by government. Since the polluters will be liable for the physical damages they caused, regardless of any stigma damages, it is not clear that such extra-deterrence is needed. The public, on the other hand, which did not produce the pollution but generated the stigma, will be “deterred.” Thus, the duty to subsidize taxes in declining neighborhoods creates incentives for authorities to better educate the public in an effort to combat misguided stigmas.

D. Intellectual Properties

1. Copyright

“Why buy a Vermeer when a Metsu is available?” The eminent art historian Francis Haskell argued that this “question, which may sound odd today[,] . . . would have been natural enough in 1800.”²⁹¹ In the twenty-first century Johannes Vermeer is a superstar, while his countryman and contemporary Gabriel Metsu is only known to dedicated art lovers. Yet for the first centuries following their deaths, the situation was reversed: starting in the early eighteenth century Metsu became one of the most celebrated artists among collectors and critics, while Vermeer slowly lapsed into near oblivion. Vermeer's modern rise, and the ensuing reversal in the artists' critical fortunes, is largely due to a few exhibitions and a heap of publications, including a best-selling novel.²⁹² The current comparative stature of the artists “says more about our taste than the artists' paintings.”²⁹³ Since their creation in the seventeenth century, the paintings have not changed. The transformation in their relative stature reflects the arbitrary nature of art-world popularity.

290. On liability's role in achieving optimal levels of deterrence, see STEVEN SHAVELL, *FOUNDATIONS OF ECONOMIC ANALYSIS OF LAW* 178-204 (2004).

291. FRANCIS HASKELL, *REDISCOVERIES IN ART: SOME ASPECTS OF TASTE, FASHION AND COLLECTING IN ENGLAND AND FRANCE* 21-23 (1976).

292. The only time when the two artists' reputations seem to have been more or less on par was during their own lifetime. Illustrating the changes in later centuries Adriaan Waiboer writes: “Whereas Le Brun needed the epithet ‘in the manner of Metsu’ to raise Vermeer's profile in 1792, present-day taste requires phrases such as ‘in the age of Vermeer’ in order to promote paintings by Metsu.” Adriaan E. Waiboer, *Why Buy a Vermeer when a Metsu is Available?’ The Relationship between Two Dutch Genre Painters*, in GABRIEL METSU 29, 50 (Adriaan E. Waiboer ed., 2010). For more see *id.*

293. *Id.* at 50. “It reflects our modern penchant for streamlined and stylized aesthetic, as evidenced by contemporary design and architecture.” *Id.* This preference contrasts that which dominated during the artists' lifetime, when people preferred works with a “decorating richness” of objects. *Id.*

What changed was not the works, but rather the public perception of them.

Intellectual creations, such as Vermeer's works, have an inherently social character, and thus the discussion of the community aspect of property applies to them. The value of protected intellectual works is created to a large extent by the community, and not merely by the creator's talent.²⁹⁴ At the same time, these works are a constitutive element of the community and its culture.²⁹⁵ These observations help explain the limitations law places on copyright protection.

First, a major exception to copyright is the fair use doctrine, which exempts some otherwise infringing uses under a complex calculus involving multiple factors.²⁹⁶ Some courts were willing to give substantial weight to the public interest/benefit under the first fair use factor, "the purpose and character of the use." Some courts appealed directly to "public interest" while others folded "public benefits" into other concepts such as "transformative use" or "parody."²⁹⁷ Commentators have further suggested that the greater the work's relationship to the community's shared values, the greater the need for public availability. In such cases, and despite rulings to the contrary,²⁹⁸ the fair use defense, so it has been argued, should be stronger.²⁹⁹

Another restriction placed on copyright is the temporal limitation.³⁰⁰ A justification for this limitation can be found in the community aspect of the work. As Vermeer's case demonstrates, the farther we move from the original creative act, the more likely it is that the work's continuing success is due to factors unrelated to the original creative labor.³⁰¹ As time goes by, it may well be that a work's success "owes . . . more to the contributions of society . . . in imbuing [it] . . . with certain meanings."³⁰² Furthermore, as time passes, works begin the passage from pure products of creative expression to objects that are part of the community's collective cultural history.³⁰³

294. See Stewart E. Sterk, *Rhetoric and Reality in Copyright Law*, 94 MICH. L. REV. 1197, 1237-38 (1996).

295. See John H. Merryman, *The Public Interest in Cultural Property*, 77 CALIF. L. REV. 339 (1989).

296. See 17 U.S.C. § 107 (2006).

297. See, e.g., *Campbell v. Acuff-Rose Music*, 510 U.S. 569 (1994); *SunTrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257 (11th Cir. 2001); *American Geophysical Union v. Texaco*, 60 F.3d 913 (3d Cir. 1994); *Sega Enterprises v. Accolade*, 977 F.2d 1510 (9th Cir. 1992).

298. See, e.g., *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539 (1985).

299. See Linda J. Lacey, *Of Bread and Roses and Copyrights*, 1989 DUKE L.J. 1532, 1586-87 (1989).

300. Today, in most cases, copyright protection lasts for 70 years after the death of the author. 17 U.S.C. § 302 (2006).

301. For an economic approach to the issue, see William M. Landes & Richard A. Posner, *Indefinitely Renewable Copyright*, 70 U. CHI. L. REV. 471 (2003).

302. Joseph P. Liu, *Copyright and Time: A Proposal*, 101 MICH. L. REV. 409, 446 (2002).

303. *Id.* at 441-42.

Another field of copyright law where the community interest is relevant is the artist's moral rights. Moral rights confer on the artist entitlements relating to the meaning, representation, and attribution of the work even after she has relinquished title to either the physical object or the copyright in the work.³⁰⁴ Though mainly justified in reliance on personhood theory and the bond between the artist and her creation,³⁰⁵ some moral rights, especially the right of integrity, play a social role in preserving art for the community's benefit. Clearly, for instance, there is a public interest in preventing the owner of a Rembrandt painting from destroying it.³⁰⁶ By carving an exception to the property owner's ability to modify or destroy the artwork she owns, the right of integrity assures the safeguard of cultural properties.³⁰⁷ The social nature of the protection guaranteed by the right is demonstrated in several state moral rights statutes. California's law, for example, was named the Art Preservation Act, and declares a dual purpose—communal and personal.³⁰⁸ This recognition of the moral right's community aspect has an operative meaning: the Act allows public interest organizations—and not only artists themselves—to commence actions for injunctive relief to preserve works' integrity.³⁰⁹

The right of integrity is also, to some extent, protected by the federal Copyright Act.³¹⁰ However, the protection of the community in-

304. See Berne Convention for the Protection of Literary and Artistic Works, September 9, 1886, 828 U.N.T.S. 221, 235 (1972). The moral rights include the right of integrity, the right of attribution, the right of disclosure (i.e., the right to decide if and when the work should be presented to the public), and the right of withdrawal (i.e., the right to remove the work from public eye). Sometimes the rights are defined and distinguished differently. See 3 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 8D.01[A] (rev. ed. 2010).

305. See Susan P. Liemer, *Understanding Artists' Moral Rights: A Primer*, 7 B.U. PUB. INT. L.J. 41, 42-45 (1998). See generally Edward J. Damich, *The Right of Personality: A Common-Law Basis for the Protection of Moral Rights of Authors*, 23 GA. L. REV. 1 (1988).

306. See JOSEPH L. SAX, PLAYING DARTS WITH A REMBRANDT: PUBLIC AND PRIVATE RIGHTS IN CULTURAL TREASURES (1999); Peter Linzer, *The Decline of Assent: At-Will Employment as a Case Study of the Breakdown of Private Law Theory*, 20 GA. L. REV. 323, 421 (1986).

307. Eric M. Brooks, Book Note, "Tilted" Justice: Site-Specific Art and Moral Rights After U.S. Adherence to the Berne Convention, 77 CALIF. L. REV. 1431, 1434 (1989). A counterargument can be made: the public interest may call for the freedom to alter the work. This argument, however, is much more forceful when the right of integrity is applied to the intellectual work, as opposed to its physical embodiment. My focus, as can be seen in the text, is on the latter: on prohibiting mutilation of the physical object. While it is conceivable that the public may benefit from a freedom to make changes to an object (e.g., in the case of public art or alterations to an architectural work), the benefits of integrity in this context are likely to, more often than not, outweigh these.

308. CAL. CIV. CODE § 987(a) (Deering 2011).

309. *Id.* § 989.

310. 17 U.S.C. § 106A, allows the author of "a work of visual art" to prevent modification of her work only if it is intentional and would be "prejudicial to . . . her honor or reputation." 17 U.S.C. § 106A (2006). It also allows her to prevent the destruction of the work, if it is "of recognized stature." *Id.* For a discussion of the role of the notion of a public stake in protection of important works of art in the legislative history, see JOSEPH L. SAX,

terest afforded by the moral right of integrity is not absolute: as the moral right is personal, it is limited in time,³¹¹ and, furthermore, the community's interests and those of the artist may diverge.³¹² A famous example is the order the author Franz Kafka gave his friend, Max Brod, to destroy his unpublished works after his death.³¹³

A related element of copyright law that can be tied into the current discussion is the *droit de suite*. This right "provides that an artist shall share in the profits accruing to subsequent purchasers from the appreciation in value of the artist's work."³¹⁴ The right is recognized only in California.³¹⁵ It can be constructed to further promote the community interest in the work. In fact, it can be made the equivalent of the taxation of profits from selling residential units, proposed in Part III of this Article. The discussion of the community aspect of property implies that much of the increase in the work's value is due to society's labor—not the effort of the artist who is currently accorded the benefit of *droit de suite*. Thus, perhaps *droit de suite* should be redesigned to make royalties payable to a public entity promoting public access to art.³¹⁶ When considering such a proposal, its effects on art dealers' and collectors' incentives should be considered. Furthermore, it should also allow for compensation to collectors who sell works at a loss, as did the program put forward in Part III of the Article with regard to sellers of houses.

The role of collectors calls attention to one more manifestation of the community interest in copyrighted works. If the work is to some degree a creation of the community, and if it is a constituent part of the community, rights of public access to works—even when privately owned—should be assured. This suggestion has already been made elsewhere.³¹⁷

PLAYING DARTS WITH A REMBRANDT: PUBLIC AND PRIVATE RIGHT IN CULTURAL TREASURES 25-26 (1999).

311. According to § 106A(d) of the federal Copyright Act, it lasts for the duration of the author's lifetime.

312. See Nicole B. Wilkes, *Public Responsibilities of Private Owners of Cultural Property: Toward a National Art Preservation Statute*, 24 COLUM.-VLA J.L. & ARTS 177, 187-92 (2001).

313. Luckily, Brod disobeyed. See Douglas E. Litowitz, *Franz Kafka's Outsider Jurisprudence*, 27 L. & SOC. INQUIRY 103, 115 (2002).

314. ROBERT A. GORMAN & JANE C. GINSBURG, COPYRIGHT: CASES AND MATERIALS 551 (6th ed. 2002).

315. The author of a work of fine art is entitled to 5% of the profits of any re-sale of her work, provided she "resides in California or the sale takes place in California." CAL. CIV. CODE § 986(a) (Deering 2005).

316. In California, if the owner of the work cannot find the author when she sells the work, the royalty due is paid to the state Arts Council for use in acquiring fine art. *Id.* § 986(a)(2)-(5).

317. See SAX, *supra* note 310, at 65-68. For a critique of Sax's proposal, see Jason Y. Hall, *Who "Owns" a Cultural Treasure?*, 98 MICH. L. REV. 1863, 1869-70 (2000) (book review).

2. *The Right of Publicity*

The right of publicity, recognized in more than half the states,³¹⁸ is the right a person, mostly a celebrity, holds to control the commercial use of her persona—her name, appearance, and voice.³¹⁹ Courts and scholars have debated the justifications for the right's existence.³²⁰ Michael Madow made an interesting argument against it:

Fame is a “relational” phenomenon, something that is *conferred by others*. A person can, within the limits of his natural talents, *make himself* strong or swift or learned. But he cannot, in this same sense, make himself famous, any more than he can make himself loved. Furthermore, fame is often conferred or withheld, just as love is, for reasons and on grounds other than “merit.” . . . [T]he reason one person wins universal acclaim, and another does not, may have less to do with their intrinsic merits or accomplishments than with the needs, interests, and purposes of their audience. . . . [T]he canon [of great names]—literary, scientific, cultural, even athletic—is in fact a “socially constructed reality,” not a “law of nature.”³²¹

This argument is similar to this Article's claims regarding the community aspect of property. The discussion concerning the creation of value in Section II.C.2.ii. illustrated that all properties' values are social constructions. Madow's depiction of the origins of fame is persuasive. Yet, as seen, publicity is not wholly different from other assets in this respect. The case against the labor-desert rationale for the right of publicity, when framed in such terms, can be reiterated, even if only to a lesser degree, against other property rights.

3. *Patents*

Copyright law, as seen above, considers the public interest in the protected work in some instances, but it is still mostly attached to the primacy of the contribution made by the original owner. Patent law moved closer to a more cumulative, collaborative conception of crea-

318. See J. Thomas McCarthy & Paul M. Anderson, *Protection of the Athlete's Identity: The Right of Publicity, Endorsements and Domain Names*, 11 MARQ. SPORTS L. REV. 195, 199 (2001).

319. See Melissa B. Jacoby & Diane Leenheer Zimmerman, *Foreclosing on Fame: Exploring the Uncharted Boundaries of the Right of Publicity*, 77 N.Y.U. L. REV. 1322, 1328-30, 1335-38 (2002).

320. See, e.g., *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 573-76 (1977) (discussing the differences in state interests and the degree of intrusion on dissemination between “false light” and “right of publicity” cases); *Cardtoons, L.C. v. Major League Baseball Players Ass'n*, 95 F.3d 959, 973-76 (10th Cir. 1996) (discussing the various economic and noneconomic justifications for the right of publicity); Peter L. Felcher & Edward L. Rubin, *Privacy, Publicity, and the Portrayal of Real People by the Media*, 88 YALE L.J. 1577 (1979); Alice Haemmerli, *Whose Who? The Case for a Kantian Right of Publicity*, 49 DUKE L.J. 383 (1999).

321. Michael Madow, *Private Ownership of Public Image: Popular Culture and Publicity Rights*, 81 CALIF. L. REV. 125, 188 (1993) (citation omitted).

tion in granting some protection to improvement patents.³²² An inventor adding an improvement to an existing patent can patent her improvement (assuming it meets the threshold for patentability) even if it infringes upon the underlying patent.³²³ But the new patent does not privilege the infringement on the original patent. Since the material covered by that original patent is put to use by the new patent, the original owner may block the improver from using the new patent. At the same time the original owner is also blocked from using the improvement—which is now patented by the improver. The result is known as “blocking patents.” The only way for either of the parties to benefit from the improvement is by striking a bargain. This arrangement contrasts with that which by and large prevails in copyright law: there, the original owner is bestowed with exclusive rights over future alterations to the work.³²⁴ The approach adopted by patent law relates to several of the arguments made in this Article. The value of the asset—the improvement patent—is perceived as the product of the work of several individuals and not only the original patent owner. Rights in patents are accordingly assigned in a manner that seeks to promote efficient bargaining between the different contributors and to incentivize behaviors that avoid the detrimental effects of individualistic decisionmaking on joint production. The community aspect of ownership, as seen in Part II.B, aims at a similar goal.

Another relevant analogy from the field of intellectual property law is presented by proposals for replacing law’s exclusive rights regime with a reward system.³²⁵ A reward system decouples the question of the creator’s compensation from the question of the scope of protection awarded to a work. It assures the creator remuneration deemed fair by society, without granting her the full ability to control the use of her work by other members of society. Even more than existing rules, it allows society to strike a balance between the interests of the individual owner and those of other members of society. It does so by dislodging, at least to some extent, the traditional property

322. See Mark A. Lemley, *The Economics of Improvement in Intellectual Property Law*, 75 TEX. L. REV. 989 (1997). I am grateful to Oren Bracha for drawing my attention to this issue.

323. 35 U.S.C. § 101 (2006) (“Whoever invents or discovers any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof, may obtain a patent therefor.”).

324. Section 106(2) of the Copyright Act grants the owner of a copyrighted work the right to control “derivative works.” 17 U.S.C. § 106(2) (2006). Section 103(a) provides that only the owner of the underlying copyrighted work can copyright any original contribution made in the creation of the derivative work. 17 U.S.C. § 103(a) (2006).

325. See WILLIAM W. FISHER III, PROMISES TO KEEP: TECHNOLOGY, LAW, AND THE FUTURE OF ENTERTAINMENT 199-258 (2004); Michael Abramowicz, *Perfecting Patent Prizes*, 56 VAND. L. REV. 115 (2003); Neil Weinstock Netanel, *Impose a Noncommercial Use Levy to Allow Free Peer-to-Peer File Sharing*, 17 HARV. J.L. & TECH. 1 (2003); Steven Shavell & Tanguy Van Ypersele, *Rewards versus Intellectual Property Rights*, 44 J.L. & ECON. 525 (2001).

rights-based market pricing mechanism. A reward system is, in this respect, very much like the argument made in this Article about the social aspect of rights heretofore read as primarily individual.

V. CONCLUSION

“This is the beginning—from ‘I’ to ‘we.’” John Steinbeck, *The Grapes of Wrath*.³²⁶

We live in an era of constant change. Technological progress, globalization, and an array of economic and social developments have contributed to the creation of a society where everything and everyone must keep upgrading themselves or be left behind. Against this background, it is easy to believe that law, in order to remain loyal to its commitment to freedom, should concentrate its efforts on facilitating the ability to progress, change, and evolve.

This Article strived to show that, at least with regards to housing, this perception is mistaken. It proved that different theoretical frameworks converge on one conclusion: community stability must be preserved. Property rights should be subjected to a community interest. In order to breathe life into this theoretical insight, the Article suggested instituting the community aspect of property, a device making the option of leaving a neighborhood less attractive, thereby helping keep communities intact.

However, “[n]one of this is any guarantee against the erosion of the underlying communities or the death of local loyalties. It is a matter of principle that communities must always be at risk.”³²⁷ The aim of the community interest is to allow us to reach the middle ground, not to bring about a move from one pole—absolute mobility—to the other—absolute rigidity. The community interest is to be molded in keeping with one of property law’s main social functions: to establish “a compromise between the desire for change and the desire for stability.”³²⁸ The community interest in property will render the departure from a neighborhood less attractive—but not impossible. It will not turn property law upside down. It will only make it more responsive to the needs and desires of actual owners.

Property law should lend a hand to Ms. Rodriguez and the many others who aspire to preserve communities they have come to cherish and regard as part of not only their ownership interests, but also their lives. This is by no means a desire felt only in gentrifying or declining neighborhoods, though it becomes more pressing in times of community crisis. We all want stability. Yet absolute stability is un-

326. JOHN STEINBECK, *THE GRAPES OF WRATH* 152 (centennial ed. 2002).

327. Walzer, *supra* note 30.

328. JOSEPH SINGER, *THE EDGES OF THE FIELD: LESSONS ON THE OBLIGATIONS OF OWNERSHIP* 30 (2000).

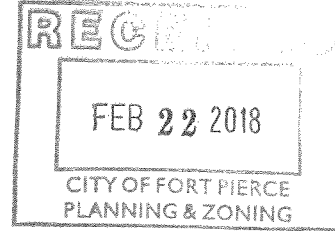
attainable; furthermore, it is paralyzing. A balance must be struck: between stability and mobility, between safeguarding the status quo and making room for transformation. This Article proposed injecting a greater degree of stability to property law and community life, since currently, while very much attentive to needs for change, law does not always devote enough attention to complementary needs for security.



THE SUNRISE CITY
FORT PIERCE
CITY CLERK'S OFFICE
Florida

February 21, 2018

Mr. Andy Drucker
3475 Sheridan Street, # 301
Hollywood, FL. 33021



Dear Mr. Drucker:

At their meeting on Tuesday, February 20, 2018, the City Commission considered an application for a Conditional Use with No New Construction, submitted by Property Owner, Raul Arenas and Applicant, Andrew Drucker to operate a Dwelling Rental, offering lodging for less than six (6) months with a minimum rental period of one (1) month, at 1218 S. 11th Street, Fort Pierce, FL. After consideration, the City Commission denied your request in an effort to protect the health, welfare, safety and morals of the community on the following bases:

1. Extensive discussion on the close proximity between the property and the school and the problems that might spring therefrom;
2. Lack of connectivity to other attractions due to the lack of sidewalks;
3. Testimony about the history of speeding in the area and the fact that homeowners offered up their driveways to curb speeding; and
4. The inability to satisfy the requirement of a resident manager.

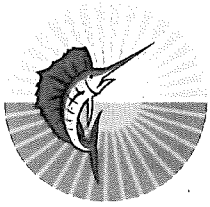
If you have any questions, please contact the Planning Department.

Very truly yours,

Linda W. Cox
City Clerk

cc: Rebecca Grohall, Planning Director

Raul Arenas
1218 S. 11th Street
Fort Pierce, FL. 34950



THE SUNRISE CITY

FORT PIERCE
CITY CLERK'S OFFICE
Florida

March 21, 2019

RECEIVED

MAR 21 2019

Jeff Binner, Weichert Realtors
2361 SE Seafury
Port St. Lucie, FL 34952

CITY OF FORT PIERCE
PLANNING & ZONING

Dear Mr. Binner:

At their meeting on Monday, March 18, 2019, the City Commission considered your application for a Conditional Use with No New Construction submitted by property owner, Igor Kublitskiy and representative, Jeff Binner, to establish a Dwelling Rental, offering lodging for less than six (6) months; with a minimum of thirty-one (31) days at 2005 Mimosa Avenue, Fort Pierce, FL. The property is zoned Single-Family Intermediate Density Zone (R-2), Parcel ID: 2412-503-0061-000-0. After hearing all testimony, the City Commission denied your application based upon the following competent substantial evidence:

- Overcapacity trash creation for a single-family home being used as a dwelling rental.
- Overcapacity parking of vehicles for a single-family home being used as a dwelling rental.
- Inadequate monitoring and management of end-users (vacationers) for a single-family home being used as a dwelling rental.
- Inappropriate noise for a single-family home being used as a dwelling rental.
- Negatively impact house values in the immediately adjacent area.
- Likely non-conforming use of a single-family home in an R2 zone district, pursuant to City Code.

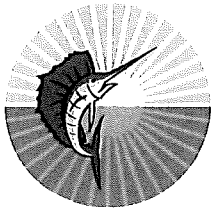
If you have any questions, please contact the planning department at 467-3729.

Very truly yours,

Linda W. Cox
City Clerk

cc: Rebecca Grohall, Planning Director

Igor Kublitskiy
2005 Mimosa Avenue
Fort Pierce, FL 34949



THE SUNRISE CITY
FORT PIERCE
CITY CLERK'S OFFICE
Florida

RECEIVED

2019/8/7/2019

CITY OF FORT PIERCE
PLANNING & ZONING

August 6, 2019

Mr. Michael Robbins
1014 South 7th Street
Fort Pierce, FL 34950

Dear Mr. Robbins:

On Monday, August 5, 2019, the City Commission of the City of Fort Pierce, Florida considered an application for Conditional Use with No New Construction submitted by property owner and applicant, Michael Robbins, to establish a Dwelling Rental, offering lodging for less than six (6) months, with a minimum of thirty-one (31) days at 1014 South 7th Street, Fort Pierce, FL. After hearing all testimony, the City Commission denied your application based upon the following competent substantial evidence:

- Overcapacity trash creation for a single-family home being used as a dwelling rental.
- Overcapacity parking of vehicles for a single-family home being used as a dwelling rental.
- Inadequate monitoring and management of end-users (vacationers) for a single-family home being used as a dwelling rental.
- Likely non-conforming use of a single-family home in an R2 zone district, pursuant to City Code.
- Student safety concerns with nearly 100 students living within a half-mile radius and four schools to which they walk.
- Failure to meet minimum housing standard requirements
- Inconsistent current building application versus existing prior records
- Currently advertising inconsistent with current City application process.

If you have any questions, please contact the planning department at 467-3729.

Very truly yours,

Linda W. Cox
City Clerk

cc: Rebeca Guerra, Interim Planning Director

Conditions of Faber Court

Exhibit one...Cul de Sac Faber Ct.



Exhibit 2-Faber Ct. Cul de Sac is 56.8 feet...new requirements are 100 feet.



Exhibit 3-Faber Court....only 19.7 feet wide!



Exhibit 4- Faber Ct. approaching cul de sac



Exhibit 5- Faber Ct. Cul de sac...note patches in the road



Exhibit 6- Faber Ct...This basketball hoop was hit by the moving van coming to 1507 Faber Court last week. The van just had no room to maneuver.



Exhibit 7- Approaching Faber Court Cul de sac....note patches in the road and how little space there is between the driveways



Exhibit 8- Faber Court leaving the Cul de sac



Exhibit 9- Faber Court cul de sac note road condition



Exhibit 10- more cracks and patches in the cul de sac



Exhibit 11 - again just more patches and cracks in the narrow cul de sac



Exhibit 12- Thumb Point Drive...the entrance to Thumb Pt. Again, the street width is less than 20 feet.



Exhibit 13-Garbage pickup on the Cul de sac



Exhibit 14-Garbage truck trying to turn around in the cul de sac



Exhibit 15-Garbage truck leaving the cul de sac..it takes up the whole street.



Faber Court, like Plover in Surfside is very narrow and in need of repair. The Cul de sac on Faber Court is less than 60 feetnew code requires 100. It too is in need of repair.

You can see from the photos the difficulty our garbage truck has. It is smaller than the lawn pick up truck and the household truck is even larger.



April 20, 2021

J & J PSL Investments, LLC
P.O. Box 7244
Port St. Lucie, FL 34985

Michelle Longarzo
715 South Ocean Drive Unit D
Fort Pierce, FL 34949

Dear Owner and Applicant:

At their meeting on Monday, April 19, 2021 the City Commission considered an Application Conditional Use with No New Construction submitted by property owner, J&J PSL Investments, LLC, to operate a Dwelling Rental, offering lodging for less than six (6) months with a minimum rental period identified as less than 30 days. The property is located at 1801 Plover Avenue and is zoned Single-family Intermediate Density (R-2). Parcel ID: 2401-501-0042-000-5.

At the conclusion of the quasi-judicial hearing, the City Commission denied your application for the following reason:

- The road known as Plover has unsafe conditions and is currently registered on the City's list of deteriorating roads.

If you have any questions, please contact the Planning Department.

Very truly yours,

Linda W. Cox
City Clerk

cc: Jenn Hofmeister, Planning Director

Re: 1577 Thumb Point Drive
Insurance Considerations

My husband and I reside at 1562 Thumb Point, having purchased our home in 1990. We enjoy the tranquility of our neighborhood which is currently occupied by home owners and object to 1577 being potentially converted to a short term rental property for all of the reasons that were cited in the hearing on April 19.

At that hearing, the question of insurance arose. I want to offer some information on that subject and a bit on my career which I believe qualifies me to do so. I worked as a commercial insurance broker for just short of 50 years, specializing in casualty insurance. One of the clients for whom I brokered their casualty insurance program was Hyatt Corporation. I was licensed as a Broker in the State of Florida until my recent retirement.

A homeowners policy will not provide coverage for a short term rental property. Homeowner policies:
Exclude business pursuits
Provide coverage for the "insured location" - the residence premises - the dwelling where
you, as owner, reside

A short term rental requires a Business Policy. From a risk standpoint it bears little difference from a hotel and in fact is subject to hospitality law, holding the owner liable for virtually any injury sustained by the guest. The home is "open for business" and is open to the public.

Insurance companies determine their premiums based on the risk presented, data, and claims history. As such, a short term rental policy is approximately twice the price of a homeowners policy.

Some of the booking platforms provide "free" coverage. Airbnb for example provides a \$1 million per occurrence policy which is subject to a \$10 million annual aggregate. Meaning that the most it will pay in any one year is \$1 million, 10 times. With 80,000 booking per night, the aggregate limit doesn't go very far. Also, the Named Insured on the policy is Airbnb. Where does that leave the owner and everyone else in the line of liability?

If a severe injury or death were to occur at a short term rental, an attorney, looking for deep pockets, would include the:
Property owner (no coverage from homeowners policy)
Property manager (coverage only from a Professional Liability policy)
Booking Platform
City of Ft. Pierce

Did the City's TRC Review identify the hazard which caused the loss? The city's professionals based their review on the standards required of an existing single family residence. In the parlance of short term rentals, the house is a "Dwelling Rental." In the case of liability issues, it's no different from a hotel. In fact it's riskier in that there is no manager on duty. The City's review standards should be revised to reflect the increased risk that a short term rental presents.

Please refuse this permit for the sake of Public Health, Good Order, and General Welfare.

Thank you
Nancy Aque