

REGULATION BEFORE CONDEMNATION: REWORKING THE AIRBNB BAN IN NEW YORK CITY

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INTRODUCTION

On October 21, 2016, New York banned the advertisement of entire-home rentals for less than thirty days on short-term home rental services, including Airbnb.¹ This ban effectively decimated tenants’ ability to rent their apartments in the state of New York for less than thirty days.² While a great number of legislators and citizens applauded the ban for a variety of reasons, many others who have used or were currently using Airbnb’s short-term hospitality service as a source of supplemental income were concerned and dismayed by Governor Andrew Cuomo’s decision to sign the bill.³ This Essay argues that the ban against advertising Airbnb rentals was an inappropriate solution to address the tenant protection concerns raised by Airbnb opponents, and

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1. N.Y. MULT. DWELL. § 121 (McKinney 2017); Bob Fredericks & Kirstan Conley, *Cuomo Signs Bill that Deals Huge Blow to Airbnb*, N.Y. POST (Oct. 21, 2016), <http://nypost.com/2016/10/21/cuomo-signs-off-on-tighter-restrictions-for-airbnb> [https://perma.cc/ZS4Q-ULGD].

2. See Fredericks & Conley, *supra* note 1.

3. See *id.*

instead posits that the public policy reasons that led to the ban could and should have been addressed by proper regulation rather than a full ban.

This Essay will first examine the history behind tenant protection laws in New York City. It will focus on three major areas of tenant protection laws: affordability, habitability, and fairness to tenants and landlords alike. This Essay will then examine the arguments made in favor of banning the use of Airbnb. By juxtaposing the public policy behind the tenant protection laws with the arguments against the use of Airbnb, it will show that the Airbnb ban was an inappropriate solution to address the historical and broader public policy issues behind tenant protections in New York City. Finally, this Essay will levy some suggestions for proper regulation of Airbnb rentals that would address the concerns of Airbnb opponents, while still maintaining the longstanding public policy goals of tenant protection laws.

While effectively banning Airbnb may have been the quick and easy option for New York legislators, the law has paralyzed many Airbnb users who relied on the service as an economic lifeline. The ban was an improper solution for New York City in light of the public policy behind the tenant protection laws that exist today.

THE ORIGIN OF TENANTS' PROTECTIONS AND TODAY'S LAWS

Throughout history, the state legislature in New York has enacted a variety of measures to protect tenants and control housing in the city. This section focuses on three main areas of tenant concerns in New York City and the corresponding tenant protection laws that have been specifically developed to address those tenant concerns. First, this section will examine the history of laws addressing affordability in New York. Next, this section will address the warranty of habitability and its protections to ensure safety for tenants. Finally, this section will demonstrate how the law is structured to provide fair processes and judgments for tenants and landlords alike through an analysis of eviction law. By understanding the history behind the legal doctrine protecting tenants in New York, this section will develop a framework for evaluating the concerns of Airbnb opponents in the subsequent sections.

A. Affordability

One major concern for tenants specifically in New York City is their ability to find affordable housing.⁴ Since 2011, New York City has

4. See generally AARP, 2013 SURVEY OF NYC VOTERS AGE 50+: MULTI-CULTURAL VOTER ANALYSIS, <http://www.aarp.org/content/dam/aarp/research/surveys>

risen in the list of the world's most expensive cities to live in and is currently ranked as the seventh most expensive city.⁵ Rental and housing costs are a major contributor to this distinguished ranking.⁶ Rent is an inflexible charge, meaning that if rent rises, a tenant has little choice but to pay more or to move to a less expensive alternative.⁷ Unfortunately, the lack of less expensive living alternatives in New York City renders tenants largely unable to combat rent change other than to move away from the city entirely.⁸ It may appear that the problems associated with New York's affordability are of recent memory, but the city has faced many affordability problems throughout its history given its sheer size and population.⁹ These problems began as early as 1833, when the lack of affordable housing led to packed, multi-family tenements where families suffered a myriad of health and social problems, including a cholera epidemic.¹⁰

Similarly, rent inflexibility in New York is not a new phenomenon, but has persisted for decades. During the nineteenth century, complaints of landlord profiteering grew and tenant evictions became commonplace.¹¹ Resultantly, the first revolutionary rent legislation in New York was passed in April 1920, which developed a system to protect tenants from oppressive landlords.¹² Tenants were given the ability to challenge any rent increase under a reasonableness standard, with the prevailing presumption that any increase of rent by a landlord

_statistics/general/2013/2013-survey-nyc-voters-age-50plus-MME-voter-analysis-aarp-pol.pdf [https://perma.cc/S8CA-FUJW].

5. Maureen O'Hare, *The World's Most Expensive City in 2016*, CNN (Apr. 7, 2016), <http://www.cnn.com/2016/03/10/travel/most-expensive-cities-2016> [https://perma.cc/89X8-L4CD].

6. *How is the Cost-of-Living Index Calculated?*, ECONOMIC INTELLIGENCE UNIT <http://help.worldwidecostofliving.com/AbouttheEIUWorldwideCostofLivingsurvey/Howisthecostoflivingindexcalculated.aspx> [https://web.archive.org/web/20161123195413/http://help.worldwidecostofliving.com/AbouttheEIUWorldwideCostofLivingsurvey/Howisthecostoflivingindexcalculated.aspx].

7. John W. Willis, *Short History of Rent Control Laws*, 36 CORNELL L. REV. 54, 57 (1950).

8. See Mark Uh, *Priced Out: Big Cities Are Becoming Too Costly for Lower-Income Residents*, TRULIA (Apr. 28, 2016, 12:01 AM), <https://www.trulia.com/blog/trends/priced-out-migration> [https://perma.cc/D7NH-DPRW].

9. TIMOTHY COLLINS, N.Y.C. RENT GUIDELINES BOARD, AN INTRODUCTION TO THE NYC RENT GUIDELINES BOARD AND THE RENT STABILIZATION SYSTEM, 18–19 (Feb. 2016), http://www.nycrgb.org/html/about/intro%20PDF/full%20pdf/intro_2016.pdf [https://perma.cc/3TWC-NH67].

10. *Id.*

11. Willis, *supra* note 7, at 70.

12. See Collins, *supra* note 9, at 21.

was “unjust, unreasonable and oppressive.”¹³ The burden was placed on the owner or landlord to demonstrate that the rent increase was appropriate, and landlords were required to submit a bill of particulars detailing their gross income and expenses.¹⁴

These revolutionary rent laws expired in 1929, but were followed by both federal and state rent regulations in the following decades.¹⁵ The absence of rent regulation in New York City during the 1930s is attributed to the Great Depression, where both tenants and landlords alike suffered and rent control was not a prevalent issue.¹⁶ However, historical records show that as early as 1936, many families were forced to double up in small living quarters, effectively concealing the housing shortage from data collectors.¹⁷ In 1942, the federal legislature enacted the Emergency Price Control Act in response to World War II, effectively reinstating rent control measures.¹⁸

In 1969, the next major New York-specific rent regulation arrived.¹⁹ While the 1920 rent regulation laws centered on the reasonability of a landlord’s rent increase, the New York City Rent Stabilization Law of 1969 focused on stabilizing rents to avoid a citywide affordability crisis.²⁰ The language of the law stated that a public emergency in housing “necessitated the intervention of federal, state and local governments in order to prevent speculative, unwarranted and abnormal increases in rents”²¹ In other words, while this law was still concerned with protecting the individual tenant, it is clear that this legislation was primarily designed to address the widespread problem of rent inflexibility in New York City.

Today, both rent controlled apartments and rent stabilized apartments exist.²² Rent control restricts the amount of rent a landlord or owner can charge a tenant and also places restrictions on the ability of a

13. *Id.*; see, e.g., *Lewine v. Berkowitz*, 188 N.Y.S. 385 (1921) (demonstrating how courts used the reasonableness standard to address rent increases during the 1920s).

14. See *Collins*, *supra* note 9, at 21.

15. See *id.* at 22.

16. See *id.* at 24.

17. See *id.*

18. See *id.* See generally Exec. Order No. 8,734, 6 Fed. Reg. 1917 (Apr. 15, 1941); David Ginsburg, *The Emergency Price Control Act of 1942: Basic Authority and Sanctions*, 9 LAW & CONTEMP. PROBS. 22, 24–25 (1942);

19. See *Collins*, *supra* note 9, at 30.

20. See *id.*

21. *Collins*, *supra* note 9, at 59.

22. *Rent Control FAQ*, N.Y.C. RENT GUIDELINES BD. (Sept. 23, 2016), <http://www.nycrgb.org/html/resources/faq/rentcontrol.html> [<https://perma.cc/57T3-3LPU>].

landlord to evict a tenant.²³ Rent controlled apartments are apartments in buildings that were constructed prior to February 1947 and have been occupied continuously by the same tenant or a family member, spouse, or partner of the tenant since July 1, 1971.²⁴ Rent control covers apartments in buildings of six or more units that were built between February 1, 1947 and January 1, 1974 and were either priced below \$2,000 per month before 2011 or are priced below \$2,500 per month today.²⁵ Given these limiting requirements for rent control eligibility, only 2 percent of apartments in New York City are still covered and those, too, will eventually cease to exist.²⁶

On the other hand, 45 percent of apartments in New York City are currently subject to rent stabilization.²⁷ For leases beginning October 1, 2016 through September 30, 2017, landlords with rent stabilized apartments cannot increase their rent on a one-year lease and may increase the rent by only 2 percent on a two-year lease, provided that the tenant is paying legally regulated rent for their apartment.²⁸ A landlord can deregulate an apartment from rent stabilization and restore the rent to the market rate if a tenant's income exceeds \$200,000 for two consecutive years or once the rent reaches \$2,700 per month.²⁹ The goal of rent stabilization was and still is to protect tenants from sharp increases in rent and ensure that tenants have the right to renew their leases without being subject to inordinate rent increases.³⁰

Rent stabilization exists and persists today to challenge the rising cost of housing in New York City at the hands of phenomena like gentrification, in which neighborhoods that were once dominated by low socioeconomic households have experienced an influx of higher socioeconomic households, displacing the former.³¹ Gentrifying neighborhoods have decreased the amount of housing units available

23. N.Y. STATE DIV. OF HOUS. & CMTY. RENEWAL & OFFICE OF RENT ADMIN., FACT SHEET: #1 RENT STABILIZATION AND RENT CONTROL 3 (2016), <http://www.nyshcr.org/Rent/FactSheets/orafac1.pdf> [<https://perma.cc/WX8N-SX9P>].

24. *Id.*

25. *Id.*

26. *See Rent Regulation*, NAKED APARTMENTS, <http://www.nakedapartments.com/guides/nyc/renting-in-new-york-city/rent-regulation> [<https://perma.cc/AB8Z-6WUU>].

27. *Id.*

28. *New York City Rent Increase*, NYC.GOV, <http://www1.nyc.gov/nyc-resources/service/2069/new-york-city-rent-increase> [<https://perma.cc/X8CH-HSQZ>].

29. N.Y.C. RENT GUIDELINES BD., *supra* note 22.

30. *See id.*; Collins, *supra* note 9, at 30.

31. N.Y.U. FURMAN CTR., FOCUS ON GENTRIFICATION 4 (2016), http://www.furmancenter.org/files/sotc/Part_1_Gentrification_SOCin2015_9JUNE2016.pdf [<https://perma.cc/NDV7-93DQ>].

from 1970 to 2010 by 1.8 percent.³² Additionally, a 2016 report by the Economist Intelligence Unit ranked New York City as the world's seventh most expensive city to live in.³³ Although the historical laws of New York City focused on protecting the individual tenant and preventing a citywide affordability crisis, it is clear that rent control and rent stabilization intend to accomplish the same goals today in a city characterized by its lack of affordability.

B. Habitability

Another primary concern for prospective tenants is that the apartment or other dwelling one chooses to rent is habitable. A habitable home is defined in a legal context as “safe and livable.”³⁴ The “warranty of habitability” is the legal doctrine that makes a landlord or owner responsible for keeping a tenant’s living quarters habitable at all times.³⁵ Understanding the history of the implied warranty of habitability prior to its codification in New York is valuable in evaluating its importance today.

Prior to the codification of the warranty of habitability, courts historically applied a doctrine of caveat emptor to the landlord-tenant relationship.³⁶ This standard was based on the fact that prospective tenants had the ability to examine the premises they intended to rent, and thus an express warranty was created between the tenants and the landlord after the tenant had viewed the premises and consented to renting the home, ensuring that the premises would remain in the same condition as when they were initially viewed.³⁷ The first laws in New York protecting the safety and health of tenants began in the nineteenth century with the Tenement House Act of 1867, which mandated the

32. *Id.* at 8.

33. ECONOMIST INTELLIGENCE UNIT, *WORLDWIDE COST OF LIVING 2016 2* (2016), <http://www.eiu.com/Handlers/WhitepaperHandler.ashx?fi=EIUWCOL2016FreeReport.pdf&mode=wp&campaignid=WCOL2016>; *see also* Nick Timiraos, *The Most Expensive Cities in the World to Live*, WALL ST. JOURNAL (Mar. 10, 2016), <http://blogs.wsj.com/economics/2016/03/10/the-most-expensive-cities-in-the-world-to-live/> [<https://web.archive.org/web/20170201065100/https://blogs.wsj.com/economics/2016/03/10/the-most-expensive-cities-in-the-world-to-live/>].

34. N.Y.C. CIVIL COURT RESEARCH CTR., *LANDLORD/TENANT ANSWER IN PERSON FACT SHEET (CIV-LT-91) #10: WARRANTY OF HABITABILITY (2006)*, <http://nycourts.gov/COURTS/nyc/housing/pdfs/warrantyofhabitability.pdf> [<https://perma.cc/MG87-HNDE>].

35. *See id.*

36. Francis S. L’Abbate, *Recovery Under the Implied Warranty of Habitability*, 10 FORDHAM URB. L.J. 285, 287 (1981).

37. *See id.*

installation of fire escapes for non-fireproof buildings and other safety-based regulations.³⁸

During the 1960s, a social welfare movement emerged that resulted in not only many of the welfare programs that exist today, but also the original implied warranty of habitability.³⁹ Prior to an implied warranty of habitability, a tenant's only available course of action was to engage in costly litigation based on tort theories that were unlikely to succeed in court.⁴⁰

Additionally, New York City's growth accompanied societal concerns that served as an impetus for the adoption of the warranty of habitability. With goals of urban restoration and improved rental housing conditions, the concept of a minimum standard of repair became desirable in New York City.⁴¹ Relatedly, the humanitarian goal of bettering the lives of low-income tenants ignited the tenants' rights movement.⁴² Middle-class voters were generally sympathetic to efforts to help the lower class and thus it made sense that the middle class would push for the codification of laws protecting tenants from their landlords.⁴³ During the 1960s, there was also a large push to lessen the burdens of poverty for low-income tenants by redistributing power, wealth, and income into the pockets of those living in poverty and with lower household incomes.⁴⁴

An implied warranty of habitability was developed to combat these issues, as well as depressed property values (and, consequently, lower property tax revenues), insect and rodent infestation, and a negative image with tourists and visitors.⁴⁵ While tenants without funds to afford litigation were largely powerless before, the implied warranty of habitability became an affirmative defense, which allowed tenants to withhold their rent intentionally and to file counterclaims.⁴⁶

Through these goals and public policy concerns, the implied warranty of habitability was upheld by courts in New York until the

38. Collins, *supra* note 9, at 19.

39. David A. Super, *The Rise and Fall of the Implied Warranty of Habitability*, 99 CAL. L. REV. 389, 389 (2011).

40. *See id.* at 403.

41. *Id.* at 401.

42. *Id.* at 403.

43. *See id.*

44. Super, *supra* note 39, at 402.

45. *Id.* at 401.

46. L'Abbate, *supra* note 36, at 299–300; *see* Park West Mgmt. Corp. v. Mitchell, 391 N.E.2d 1288, 1293 (1979) (discussing how the tenants elected to withhold their rent in response to extensive service interruptions).

codification of section 235-b of the New York Real Property Law in 1975.⁴⁷ Specifically, section 235-b(1) states:

[T]he landlord or lessor shall be deemed to covenant and warrant that the premises so leased or rented and all areas used in connection therewith in common with other tenants or residents are fit for human habitation and for the uses reasonably intended by the parties and that the occupants of such premises shall not be subjected to any conditions which would be dangerous, hazardous or detrimental to their life, health or safety.⁴⁸

There are many factors that can render a home in New York City uninhabitable, including no water, no hot water, vermin or insects, mold, gas (none or leaking), carbon monoxide or other gas fumes, amongst other things.⁴⁹ Section 78.2 of the New York Multiple Dwelling Law (MDL) also mandates that “every multiple dwelling . . . shall be kept in good repair” and that “whenever, the light, ventilation, or any matter or thing . . . is in the opinion of the department in a condition or in its effect dangerous to life or health,” the department may order it to be repaired or take action necessary to remove any “danger to life or health.”⁵⁰ If any of these conditions is violated, a tenant has the right to withhold rent and can subsequently raise the warranty of habitability as an affirmative defense or as a counterclaim in a New York court.⁵¹

Although the habitability standard could mean higher costs for landlords and thus increased rents for tenants,⁵² the origin of these laws is important to keep in mind. The implied warranty of habitability and its eventual codification emerged to address social concerns about tenants’ rights, and were juxtaposed with cost measures—such as rent controls—to ensure that these habitability guarantees did not effectively tip the scale towards less affordability.⁵³ Additionally, landlords’ desire to raise their rents to absorb the costs of meeting habitability standards is countered by the risk of vacant apartments due to an inability to attract higher income renters.⁵⁴ Compounding this concern is the fact that many

47. L’Abbate, *supra* note 36, at 298 n.57.

48. N.Y. REAL PROP. § 235-b (McKinney 2017).

49. See N.Y.C. CIVIL COURT RESEARCH CTR., *supra* note 34, at 1–3.

50. N.Y. MULT. DWELL. § 78 (McKinney 2017).

51. See N.Y.C. CIVIL COURT RESEARCH CTR., *supra* note 34, at 4.

52. See Super, *supra* note 39, at 462 (arguing that cost spreading should be considered as a concern when adopting humanitarian regulatory reforms).

53. Super, *supra* note 39, at 420.

54. See *id.* at 420-21.

of landlords' costs are fixed regardless of whether their apartments are occupied.⁵⁵

The warranty of habitability is vitally important to directly ensure that tenants are not subject to unsafe living conditions that are detrimental to everyday life and health. The codification of the warranty of habitability redistributed power from landlords back to tenants, ensuring that tenants today have a mechanism to challenge their landlords in order to guarantee themselves livable homes in New York.

C. Fairness to Tenants and Landlords

A third concern for tenants in New York is that they can live in their apartments without fear of being unfairly treated by their landlords or even evicted. Eviction is the process by which a landlord can recover possession of his or her leased property from any tenant who is unwilling to leave.⁵⁶ Retaliatory eviction is an eviction that occurs when a landlord tries to evict a tenant in response to the tenant's claim that the landlord violated a housing code or other regulation.⁵⁷ During the 1920s, tenants could be evicted for any reason, including for violating the landlord's wishes, even if a tenant's actions were lawful.⁵⁸ A landlord could evict any tenant just by obtaining an action for ejectment or summary proceeding.⁵⁹

From a public policy perspective, allowing landlords to evict their tenants for raising housing code violations was plainly unfair and "frustrate[d] the effectiveness [of housing codes] as a means of upgrading the quality of housing."⁶⁰ The ability of landlords to easily evict their tenants for any reason was of grave concern in light of growing public policy to protect tenants from their landlords.⁶¹ Further, if the law condoned this kind of retaliatory behavior, it would discourage other tenants from raising health concerns, undermining the very purpose of other tenant protection laws and their corresponding public policy.⁶²

55. *See id.* at 421.

56. *See Eviction*, CORNELL LEGAL INFO. INST., <https://www.law.cornell.edu/wex/eviction> [<https://perma.cc/95JS-7352>].

57. Douglas Lowe, *Retaliatory Eviction Protection in New York—Unraveling Section 223-b*, 49 *FORDHAM L. REV.* 861, 861–62 (1981).

58. *Id.*

59. *Id.*

60. *See id.* at 862–63 (quoting *Edwards v. Habib*, 397 F.2d 687, 701 (D.C. Cir. 1968)).

61. *See generally* Super, *supra* note 39, at 389.

62. *See* Lowe, *supra* note 57, at 863.

In 1979, a ban against retaliatory eviction was finally codified in section 223-b of the New York Real Property Law as a measure to “preserve and upgrade the quality of [New York’s] existing housing” and to accordingly protect tenants from their landlords exercising a meritless eviction action.⁶³ The law could be raised as an affirmative defense against a summary proceeding, provided: the tenant filed a good faith complaint with governmental authorities regarding a housing condition; exercised his or her rights under a rental agreement or housing law; or participated in a tenant organization, and was being evicted in response to one of the aforementioned actions.⁶⁴ Section 223-b still exists today and prevents unfair retaliation by a landlord against a tenant, placing the burden on the landlord to provide “a credible explanation of a non-retaliatory motive for his acts.”⁶⁵ Guided by the same public policy of protecting tenants from their landlords, the law also prohibits any fee or monetary penalty in retaliation for a tenant filing a bona fide complaint regarding the condition of the premises.⁶⁶

Eviction law in New York collectively mandates a process that ensures that tenants are not unfairly evicted and that tenants have the opportunity to cure any error or violation prior to being evicted. Further, the law provides a process that gives landlords the ability to evict a tenant when necessary and deemed fair by the courts. If a landlord today wants to evict a tenant, the landlord has to file a summary proceeding.⁶⁷ For any reason other than nonpayment of rent, a holdover summary proceeding is required.⁶⁸ In order to file a holdover summary proceeding, a landlord must serve several predicate notices by law, which may give the tenant time to correct the error prior to being evicted.⁶⁹ The predicate notices include Notices to Quit, Notices to Cure a Substantial Violation of the Lease, Notices of Termination, and

63. *Id.* at 865.

64. *See id.*

65. N.Y. REAL PROP. § 223-b (McKinney 2017).

66. *Id.*

67. Amelia T. R. Starr et al., *Summary Proceeding in New York’s Town and Village Courts: Ideas for Improvement*, FUND FOR MODERN COURTS 2–4 (2012), <http://moderncourts.org/files/2013/10/Summary-Proceedings-in-New-York-Town-and-Village-Justice-Courts-Ideas-for-Improvement.pdf> [<https://web.archive.org/web/20170417084457/http://moderncourts.org/files/2013/10/Summary-Proceedings-in-New-York-Town-and-Village-Justice-Courts-Ideas-for-Improvement.pdf>].

68. *See New York City Housing Court: Starting a Case*, NEW YORK STATE UNIFIED COURT SYSTEM, <https://www.nycourts.gov/courts/nyc/housing/startingholdover.shtml> [<https://perma.cc/3N3D-8RUV>].

69. *See id.*

Notices of Intent Not to Renew a Lease.⁷⁰ Landlords are first required to purchase the appropriate notice form and serve said notice on a tenant, following a variety of rules.⁷¹

Alternatively, if a landlord wishes to evict a tenant for nonpayment of rent, a landlord must file a nonpayment proceeding.⁷² For a nonpayment of rent eviction, a court of competent jurisdiction must still authorize any eviction or removal action prior to removing a tenant from the premises.⁷³ Only a city marshal has the authority to evict a tenant after a landlord or owner has taken said tenant to housing court and won a favorable judgment.⁷⁴

Though complicated, the process for evicting a tenant today ensures a fair process for both tenants and landlords alike. While the historical goal of tenant protection laws was primarily protecting tenants, these laws are also concerned with maintaining a fair balance of power between tenants and landlords.⁷⁵ A fair balance does not imply an equal balance, but rather, an appropriate balance given that landlords presumably can afford to litigate their claims and take on greater burdens in their role as owners. Throughout the history of tenant protection law, there has been a clear intention to create these fair processes for both parties, and that intention still motivates tenant protection laws today.

II. AIRBNB OPPONENTS' ARGUMENTS AND CONCERNS

In 2008, Airbnb disrupted the hotel space and consumer travel experience by developing a new way for travelers to lodge during their excursions.⁷⁶ Airbnb describes itself as a “trusted community marketplace for people to list, discover, and book unique accommodations around the world—online or from a mobile phone or tablet.”⁷⁷ As opposed to the traditional process of booking a hotel, Airbnb allows travelers to rent lodging from everyday people hosting

70. *See id.*

71. *Id.*

72. *See* Starr et al., *supra* note 67, at 2–3.

73. *See id.*

74. *See* N.Y. STATE COURTS, NEW YORK CITY TENANTS: QUESTIONS & ANSWERS ABOUT HOUSING COURT 24 (Nov. 2016), <http://nycourts.gov/courts/nyc/housing/pdfs/tenantsguide.pdf> [<https://perma.cc/H3JR-F6B2>].

75. Super, *supra* note 39, at 393.

76. *See About Us*, AIRBNB, INC., <https://www.airbnb.com/about/about-us> [<https://perma.cc/75SQ-H86R>].

77. *See id.*

their homes or apartments.⁷⁸ The individuals offering their homes or apartments are called “hosts” and often use Airbnb as a source of supplemental income.⁷⁹ A host can rent out a room, multiple rooms, or an entire home/apartment for reasonable prices as a “double win to both owners and renters.”⁸⁰ Hosts have the opportunity to vet potential guests and use the online Airbnb platform to communicate with potential guests.⁸¹ Although Airbnb has only existed for eight years, it has made a tremendous impact on the travel experience and marketplace with Airbnb hosts in 34,000 cities and in 191 countries.⁸² As of writing, over sixty million guests worldwide have booked lodging through Airbnb, and currently more than two million active listings can be found on the Airbnb website.⁸³

Disruptors to the marketplace are often met with stiff competition or the more debilitating hand of governmental regulation; Airbnb’s journey has been no exception. New York’s “war” against Airbnb began as early as 2014, when New York State Attorney General Eric Schneiderman released an official report analyzing Airbnb booking data in New York City.⁸⁴ The report found that many Airbnb listings from January 1, 2010 through June 2, 2014 were directly in violation of the Multiple Dwelling Law in New York City, which “prohibits rentals in ‘[c]lass A’ buildings . . . for stays of less than 30 days.”⁸⁵ Effectively every single residence in New York City, excluding hotels, other lodging houses, boarding houses, and dormitories, qualifies as a Class A multiple dwelling.⁸⁶ The MDL specifically states that a class A residence “shall

78. Bin Fang, Qiang Ye & Rob Law, *Effect of Sharing Economy on Tourism Industry Employment*, 57 ANNALS OF TOURISM RES. 264, 264 (2016) (describing how owners can earn extra income by renting out unused capacity in their houses or rooms and renters can book accommodations at lower costs); Mike Isaac, *Airbnb Releases Trove of New York City Home-Sharing Data*, N.Y. TIMES (Dec. 1, 2015), <http://www.nytimes.com/2015/12/02/technology/airbnb-releases-trove-of-new-york-city-home-sharing-data.html> [<https://web.archive.org/web/20160917141311/http://www.nytimes.com/2015/12/02/technology/airbnb-releases-trove-of-new-york-city-home-sharing-data.html>].

79. See Fang, Ye, & Law, *supra* note 78, at 264.

80. *Id.*

81. See *How it Works*, AIRBNB, INC., <https://www.airbnb.com/help/getting-started/how-it-works> [<https://perma.cc/H247-JAQP>].

82. *Id.*

83. *Id.*

84. See N.Y. STATE OFFICE OF THE ATT’Y GEN., AIRBNB IN THE CITY 2 (2014), <http://www.ag.ny.gov/pdfs/AIRBNB%20REPORT.pdf> [<https://perma.cc/UP5Q-JEAX>].

85. See *id.* at 4.

86. N.Y. MULT. DWELL. § 4.8(A) (McKinney 2017) (“[Class A] shall include multiple dwelling that is occupied for permanent residence purposes . . . includ[ing]

only be used for permanent residence purposes,” meaning that the dwelling is occupied for thirty consecutive days or more by the resident.⁸⁷

Over 36,000 rental listings in New York City could be found on Airbnb as of December 2015.⁸⁸ These listings were spread amongst New York City’s boroughs: 13,800 active listings in Brooklyn; 13,400 active listings in Outer Manhattan; 5,300 active listings in Central Manhattan; 2,500 active listings in Queens; 430 active listings in the Bronx; and 200 active listings in Staten Island.⁸⁹ Airbnb released data to show that “99 percent of people on Airbnb in New York City are using it as an economic lifeline,” challenging Airbnb opponents and their theories that the platform was being exploited by commercial users who own multiple apartments solely for business purposes.⁹⁰ Commercial users are “bad actors” that use Airbnb to offer short-term rentals in multiple homes, essentially running illegal hotels as opposed to renting personal homes for supplemental income.⁹¹ Airbnb also released details about how its New York City hosts use the platform, including the fact that 95 percent of listings on the site are the only listing by the user and that 99 percent of listings are by users with no more than two total listings on the site.⁹²

Many legislators fought to pass an outright ban on advertising short-term rentals on Airbnb, and on October 21, 2016, their wish was granted when Governor Cuomo signed New York Senate Bill S6340A, adding section 121 to the New York MDL,⁹³ which reads:

1. It shall be unlawful to advertise occupancy or use of dwelling units in a Class A multiple dwelling for occupancy that would violate subdivision eight of section four of this chapter defining a

tenements, flat houses, masonette apartments, apartment houses, apartment hotels, bachelor apartments, studio apartments, duplex apartments, kitchenette apartments, garden-type masonette dwelling projects, and all other multiple dwellings except class B multiple dwellings”); N.Y. MULT. DWELL. § 4.9(A) (McKinney 2017) (“[Class B] shall include hotels, lodging houses, rooming houses, boarding houses, boarding schools, furnished room houses, lodgings, club houses, college and school dormitories and dwellings designed as private dwellings but occupied by one or two families with five or more transient boarders, roomers or lodgers in one household.”)

87. N.Y. MULT. DWELL. § 4.8(A) (McKinney 2017).

88. See AIRBNB, INC., *supra* note 81.

89. *Id.*

90. Isaac, *supra* note 78.

91. *See id.*

92. *Id.*

93. See N.Y. MULT. DWELL. § 121 (McKinney 2017); see S6340A, S. Sess. 2015-2016. (N.Y. 2016); see Kia Kokalitcheva, *New York Just Cracked Down on Airbnb with a New Law*, FORTUNE (Oct. 21, 2016), <http://fortune.com/2016/10/21/airbnb-new-york-2> [https://perma.cc/47AU-J74E].

“Class A” multiple dwelling as a multiple dwelling that is occupied for permanent residence purposes.⁹⁴

While renting an entire home for less than thirty days was already illegal under the MDL, the new bill instituted a fine for advertising any of these illegal rentals:

2. Any person found to have violated the provisions of subdivision one of this section shall be liable for a civil penalty of not more than one thousand dollars for the first violation, five thousand dollars for the second violation and seven thousand five hundred dollars for the third and subsequent violations.⁹⁵

In other words, while the previous law banned short-term rentals of entire homes, the new law prohibits advertisement of these rentals and institutes a financial penalty for doing so, impeding much of Airbnb’s activity in New York.

While Airbnb’s efforts to improve transparency and to refute its opponents were clearly futile given the passage of the ban, the data are crucial to understanding and evaluating the policy arguments of Airbnb’s opponents in support of the ban. This section of the Essay will evaluate the arguments raised by Airbnb opponents in light of the aforementioned tenant protection laws.

A. Affordability

New York City has been plagued by housing affordability crises and continues to suffer affordability issues today. Airbnb opponents argue that the lack of affordable housing in New York is only magnified by the use and promotion of Airbnb.⁹⁶ The Housing Conservation Coordinators and MFY Legal Services commissioned a statistical report showing that “for each of the top 20 neighborhoods for Airbnb listings in Manhattan and Brooklyn, average rent increases have nearly doubled the citywide average from 2011 to 2015” due to the loss of 8,058 housing units to Airbnb commercial renters.⁹⁷ While the number of housing units on Airbnb might seem small, research from Citi Habitats,

94. *Id.*

95. *Id.*

96. See BJH ADVISORS LLC, SHORT CHANGING NEW YORK CITY: THE IMPACT OF AIRBNB ON NEW YORK CITY’S HOUSING MARKET 5 (2016), http://www.sharebetter.org/wp-content/uploads/2016/06/NYCHousingReport_Final.pdf [<https://perma.cc/794M-VU7P>].

97. *Id.*; see Deanna Ting, *Measuring the Impact of Airbnb Rentals on New York City’s Housing Crisis*, SKIFT (Jun. 28, 2016), <https://skift.com/2016/06/28/measuring-the-impact-of-airbnb-rentals-on-new-york-citys-housing-crisis> [<https://perma.cc/RE43-YDSL>].

a real estate company, showed that as of 2014, only 1.92 percent of all apartments in New York City were available for rental at any time, which amounts to 16,500 apartments citywide.⁹⁸ Between June 2015 and May 2016, 2,464 of the apartments listed on Airbnb in New York were rented for more than 180 days in the year, and thus presumably were being offered by commercial users.⁹⁹ Juxtaposing the 16,500 available apartments citywide with the estimated number of commercial users indicates that Airbnb could already be having a large impact on vacancy rates.¹⁰⁰

Airbnb could argue that these 2,464 apartments may be owned by presumably wealthy, non-permanent residents of New York—non-commercial bad actors—simply renting out their secondary homes.¹⁰¹ Even if this is the case, the Airbnb service makes owning a non-primary residence in New York a more fiscally feasible option, permitting non-permanent residents to defray carrying costs. However, it is equally likely that many of these 2,464 apartments are commercially owned and thus a direct example of the commercial impact of Airbnb on New York's vacancy rates.

While Airbnb claims to remove commercial renters from their platform, many commercial listings have reappeared; thus the problem persists despite reports from Airbnb stating otherwise.¹⁰² This reappearance of commercial renters using Airbnb as a means to run illicit hotels has been confirmed in part by the aforementioned data showing that 2,464 listings, or approximately 8 percent of New York City's listings, between June 2015 and May 2016 were for whole apartments for more than 180 days out of the year.¹⁰³

Although Airbnb has released data in the past to dispute the presence of commercial users on their platform, opponents of Airbnb have argued that Airbnb's responses are false and misleading projections of pseudo-transparency.¹⁰⁴ New York State Senator Liz Krueger

98. Ariel Stulberg, *Airbnb Probably Isn't Driving Rents Up Much, At Least Not Yet*, FIVETHIRTYEIGHT (Aug. 24, 2016), <http://fivethirtyeight.com/features/airbnb-probably-isnt-driving-rents-up-much-at-least-not-yet> [https://perma.cc/2Y9W-K5WF]; Nathan Tempey, *Here's How Much of a Bite Airbnb is Taking Out of NYC's Apartment Availability*, GOTHAMIST (Aug. 26, 2016), http://gothamist.com/2016/08/26/airbnb_home_wrecker.php [https://perma.cc/5WA7-LH72].

99. See Tempey, *supra* note 98.

100. See *id.*

101. See *id.*

102. See Ting, *supra* note 97.

103. Tempey, *supra* note 98.

104. *Airbnb's Economic Impact on the NYC Community*, AIRBNB, INC., <http://blog.airbnb.com/airbnbs-economic-impact-nyc-community> [https://perma.cc/46PW-XBG3];

described Airbnb's data releases as solely for "propaganda purposes" and asserted that they are filled with misleading numbers.¹⁰⁵ The reappearance of these allegedly commercial listings only helps to substantiate Senator Krueger and other Airbnb opponents' claims that Airbnb continues to negatively impact availability and affordability of housing in New York City.

B. Habitability

The warranty of habitability was developed at least in part to improve the living conditions of lower-income tenants.¹⁰⁶ Airbnb opponents argue that the public policy behind the warranty of habitability is in direct conflict with the practice of short-term renting on Airbnb. The habitability requirement that landlords must maintain working fire escapes, smoke detectors, and carbon monoxide detectors indicates a public policy intention to ensure that landlords guarantee long-term safety for their tenants.¹⁰⁷

Airbnb opponents argue that habitability issues are disregarded when short-term guests frequent homes that are unfamiliar to them. The Chief of Fire Prevention of the New York City Fire Department cited a myriad of concerns for short-term rentals in light of safety and evacuation procedures.¹⁰⁸ For example, a guest who is new to an apartment is most likely unaware of the emergency evacuation procedures, as well as the exit stairwells and fire escapes.¹⁰⁹ As a result, in the unfortunate event of an emergency, such guests would not be familiar with, or even aware of, the evacuation procedures of the building, thus putting themselves and the neighboring tenants in danger. Senator Krueger cites this risk as a reason to support the Airbnb ban, and proffers that a ban is the only way to protect neighboring tenants.¹¹⁰

Other concerns raised by Airbnb opponents are the potential presence of dangerous guests and illegal activities conducted by

see Liz Krueger, *Statement from Senator Krueger on Airbnb's Misleading Data*, N.Y. STATE SENATE (Feb. 10, 2016), <https://www.nysenate.gov/newsroom/press-releases/liz-krueger/statement-senator-krueger-airbnbs-misleading-data> [https://perma.cc/6MKP-AYVE].

105. See Krueger, *supra* note 104.

106. See discussion *supra* Section I.B.

107. N.Y.C. CIVIL COURT RESEARCH CTR., *supra* note 35, at 3.

108. See *generally id.* at 21.

109. See *id.* at 23.

110. See Krueger, *supra* note 104.

guests.¹¹¹ Senator Krueger argues that allowing strangers to come and go from hosts' apartments impacts not only the host tenant, but all of the surrounding neighbors.¹¹² For example, Senator Krueger cites the use of Airbnb rentals as brothels to show that these rentals are perfect for engaging in illegal activity.¹¹³ This poses a risk to neighboring tenants. Senator Krueger also asserts that many of her constituents have expressed concerns with their neighbors using Airbnb, saying that they no longer even feel safe in their hallways.¹¹⁴ Although Airbnb champions itself as a service for everyday people, Senator Krueger argues that the use of Airbnb can put the safety of tenants at risk for a multitude of reasons; thus, its ban was appropriate and even necessary to ensure the safety of tenants in their homes.¹¹⁵

While landlords would naturally be concerned with these aforementioned potential safety issues and illegal operations, the Airbnb process removes landlords from the renting equation; in many scenarios, the landlords are entirely unaware that their units are being rented.¹¹⁶ While landlords are required by law to maintain habitable residences for their tenants and take measures to ensure their tenants' safety, landlords who do not know that their tenants are even using Airbnb are unable to guarantee habitability for Airbnb guests.¹¹⁷ Further, Airbnb as a corporation disclaims all liability to the maximum extent of the law in almost all regards; thus, Airbnb as a corporation does not assume the role of the landlord in the renting equation, but positions itself solely as an intermediary.¹¹⁸ Thus, while the law demands that landlords ensure

111. Nancy Scola, *Q&A: New York Senator Liz Krueger, Airbnb's Doubter-in-Chief*, NEXT CITY (Apr. 21, 2014), <https://nextcity.org/daily/entry/qa-new-york-senator-liz-krueger-airbnbs-doubter-in-chief> [<https://perma.cc/EX4Q-DFJ7>].

112. *See id.*

113. *Id.*; *see also* Dana Sauchelli & Bruce Golding, *Hookers Turning Airbnb Apartments into Brothels*, N.Y. POST (Apr. 14, 2014), <http://nypost.com/2014/04/14/hookers-using-airbnb-to-use-apartments-for-sex-sessions> [<https://perma.cc/59XV-HAMB>].

114. *See* Scola, *supra* note 111; *see Chelsea Residents Worry that Airbnb Lock Boxes Are Putting their Homes at Risk*, CBS N.Y. (July 26, 2016), <http://newyork.cbslocal.com/2016/07/26/chelsea-residents-worry-that-air-bnb-lock-boxes-are-putting-their-homes-at-risk> [<https://perma.cc/VNL9-3QKD>].

115. *See* Krueger, *supra* note 104.

116. *See e.g.*, Becky Bower, *Are Tenants Listing Your Property on Airbnb?*, RENTOMETER BLOG (Jan. 22, 2016), <https://www.rentometer.com/articles/are-tenants-listing-your-property-on-airbnb> [<https://perma.cc/8VUW-8FDX>] (providing instructions for landlords to try to discern whether their tenants are using Airbnb)

117. *See id.*

118. *See* AIRBNB, INC., *Terms of Service*, <https://www.airbnb.com/terms> [<https://perma.cc/V55K-4GU6>].

safety for tenants, opponents argue that the Airbnb service directly interferes with this landlord-tenant relationship by adding an extra, unprotected, and unknown party to the relationship.

C. Fairness to Tenants and Landlords

The eviction process was historically structured to ensure that an eviction occurs only after a tenant has had a fair opportunity to remedy the landlord's issue and that a court has rendered a fair judgment. Opponents to Airbnb argue that the goal of fairness in tenant protection laws, like in eviction law, is disrupted by tenants illicitly using Airbnb.¹¹⁹ Many landlords argue that the use of Airbnb qualifies as a short-term sublease, and that tenants are violating their lease agreements which prohibit these subleases. Under section 226-b of the New York Property Law, subleases are permitted only after a tenant is granted permission by the landlord.¹²⁰ In order to request a sublease, tenants must provide their landlord with details regarding the sublessee, including: the term of the sublease; the name of the proposed sublessee; the business and the permanent home address of the proposed sublessee; the reason for the sublet request; the address for the term of the sublease; the written consent from the co-tenant/guarantor on the lease; and a copy of the proposed sublease.¹²¹ Landlords have ten days to request financial information from the sublessee following a sublease request.¹²² Landlords are required to respond to the sublease request within thirty days and can reasonably deny any sublease request.¹²³ To prohibit a sublease, the landlord must provide a reasonable justification for disallowing the sublease.¹²⁴

This process essentially provides a landlord with all of the information about the sublease and gives them the opportunity to make any reasonable objections, just as the landlord could have done in renting to the original tenant (within the bounds of the law; for example, not in a discriminatory manner).¹²⁵ However, landlords argue that the

119. See Jennifer Hunter, *Could You Be Evicted for Being an Airbnb Host?*, APARTMENT THERAPY (Mar. 20, 2014), <http://www.apartmenttherapy.com/could-you-get-evicted-for-being-an-airbnb-host-201528> [<https://perma.cc/ALZ5-N7Q3>].

120. N.Y. REAL PROP. § 226-b (McKinney 2017).

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.*

125. See, e.g., Fair Housing Act, 42 U.S.C. § 3604 (2012); accord Nancy Leong & Aaron Belzer, *The New Public Accommodations: Race Discrimination in the Platform Economy*, 105 Geo. L.J. 1271, 1303–04 (2017) (arguing that the Fair Housing Act applies to Airbnb rentals). *But cf.*, Fair Housing Council v. Roommate.com, LLC, 666

use of Airbnb unfairly skirts this subletting process when tenants secretly rent their apartments for short-term stays under the false premise that their short-term rental does not qualify as a sublease.¹²⁶

When lessees rent their apartments illicitly, landlords are forced to bear the costs of addressing neighboring tenant safety concerns, while also litigating eviction suits against tenants who are knowingly violating their lease.¹²⁷ Landlords screen all tenants and sublessees when the traditional process is initiated; however, when tenants distribute their keys to Airbnb guests without asking for their landlords' permission, other tenants may feel unsafe as the main access to their building has been shared by someone without the landlord's approval.

Resultantly, landlords have been forced to change the locks to their buildings and implement other security measures, such as cameras or new lock systems, to prevent the use of Airbnb in their buildings.¹²⁸ Some landlords have even gone so far as to reach out to private investigators to determine whether their tenants are illegally renting their apartments on Airbnb.¹²⁹ Landlords and Airbnb opponents argue that this process is inherently unfair to landlords and results in added costs to the other tenants when landlords are forced to pay for additional, unplanned expenses to address illicit rentals.

III. PROPOSED REGULATION SOLUTIONS

This section will juxtapose the public policy behind the tenant protection laws that exist today in New York with the concerns raised by Airbnb's opponents. This section will show that banning advertising on Airbnb based on these aforementioned concerns is in fact contrary to the public policy goals of today's tenant protection laws. Further, this section will propose Airbnb regulatory measures that could have been put in place in order to maintain New York's public policy goals for its tenants, while alleviating the concerns of Airbnb's opponents.

F.3d 1216 (9th Cir. 2012) (holding that a website used for finding roommates did not violate the Fair Housing Act when it allowed users to post discriminatory listings).

126. See Donna Ferguson, *Landlords Clamp Down on the Rise of Subletting Without Approval*, GUARDIAN (Apr. 2, 2016), <https://www.theguardian.com/money/2016/apr/02/landlords-clamp-down-subletting-without-approval-leaseholders-tenants-repercussions> [https://perma.cc/4BMZ-ZGT9].

127. See Amy Zimmer, *Here's How Landlords Are Striking Back Against Airbnb*, DNA INFO (Dec. 8, 2015), <https://www.dnainfo.com/new-york/20151208/greenpoint/heres-how-landlords-are-striking-back-against-airbnb> [https://web.archive.org/web/20170629212201/https://www.dnainfo.com/new-york/20151208/greenpoint/heres-how-landlords-are-striking-back-against-airbnb].

128. See *id.*

129. See *id.*

This section also makes the assumption that Airbnb would rather exist with limitations than have its New York City business banned entirely. In other words, while these solutions would not restore Airbnb to the number of users it had prior to the ban in New York City, they would at least allow more users to rent out their homes than currently are allowed under the Airbnb ban. While the Airbnb ban may have been the quickest solution to address opponents' concerns, this section will show that proper regulations could have been adopted in order to protect tenants' ability to use Airbnb.

A. Regulating Affordability

In Section I.A., this Essay discussed the affordability concerns in New York City. Affordability has long been an issue in New York City due to the combination of extremely low vacancy rates and the huge demand for housing in a city that is still growing.¹³⁰ Airbnb opponents raise a valid concern based on these vacancy rates.¹³¹ While Airbnb might seem like a small contributor to a city-wide problem, the number of Airbnb apartments used as commercial businesses, as opposed to sources of supplemental income, is larger than Airbnb asserts.¹³² However, New York legislators and Airbnb could have cooperated to develop regulation to address these affordability concerns. By removing commercial users from its platform, Airbnb could ensure that tenants and homeowners using Airbnb as an economic lifeline, rather than as a primary commercial business, would still be able to use the service.

If Airbnb were willing to prohibit all users from listing more than one apartment on its site within New York City, the company could eliminate a large majority of the problem in the city. While Airbnb cites data to show that 99 percent of its users only have one or two listings, it is clear that these data are questionable, and that even after Airbnb removed some of these commercial users, many reappeared on the site.¹³³ Airbnb and New York legislators could have worked alongside one another to ensure that apartments were not being hoarded for use as illegal hotels or commercial businesses. In doing so, Airbnb would have fewer users and thus less income from New York City, but would still have a large population of users who rent their entire apartments while they are away due to work trips or personal trips.

130. See Luke Juday, *How is New York City Growing If It's Constantly Losing People?*, STATCHAT (Apr. 18, 2016), <http://statchatva.org/2016/04/18/age-and-migration-nyc> [<https://perma.cc/9C4P-679Y>].

131. See discussion *supra* Section II.A.

132. See Tempey, *supra* note 98.

133. See Isaac, *supra* note 78; *contra* Tempey, *supra* note 98.

While the most efficient solution would have been for Airbnb to ban these commercial users entirely, New York legislators could have taken action themselves and adopted the less efficient route of drafting legislation in a manner that did not ban Airbnb rentals entirely. If the New York law solely prohibited the advertisement of multiple short-term rentals of entire homes by a single renter, then commercial users would be eliminated and the Airbnb service would still be preserved for tenants renting their personal homes. Alternatively, New York could have redrafted the MDL to classify separate apartments rented simultaneously by one user as part of a collective Class B dwelling and subject to Class B dwelling regulations, like hotels.¹³⁴ While an entire redrafting of the MDL may not be as realistic an option as the other aforementioned solutions, it is clear that Airbnb and New York could have elected alternative measures, including different regulatory schemes, that would have preserved the use of Airbnb while still reducing Airbnb's threat to affordability in New York.

Banning Airbnb on the basis of affordability for citizens contradicts the very goal of legislators to increase affordability. Airbnb can be and was used to tackle the high cost of living in New York City for many users.¹³⁵ Airbnb users that engaged with the platform in this manner would not have had an effect on vacancy rates and would not be in possession of more than one apartment, but would simply be temporarily renting out their home when they could. Tenants renting their actual homes to earn supplemental income have a minimal impact on vacancy rates inflated by non-primary residents, as these renters would be living in a New York home regardless of the presence of Airbnb. On the other hand, commercial users do not actually rent their personal homes, but operate illegal businesses and take homes off the market that could be occupied by full-time tenants; thus, these users have a substantial impact on citywide vacancy rates. Instead of targeting such users, the Airbnb ban prevents all users from renting out their apartments to supplement their income because of bad actors that exploited the Airbnb platform.

While New York Mayor Bill de Blasio has openly stated that officials only intend to combat "illegal, short-term stay hotels" and "bad actors," it is clear that the new law has an over-inclusive definition of who qualifies as a bad actor.¹³⁶ Although New York has consistently

134. N.Y. MULT. DWELL. § 4.9(A) (McKinney 2017).

135. See Fang, Ye, & Law, *supra* note 78, at 264.

136. See Steven Musil, *Airbnb Drops Legal Fight with NYC Over New Rental Law*, CNET (Dec. 4, 2016), <https://www.cnet.com/news/airbnb-drops-legal-fight-with-nyc-over-new-rental-law>

enacted legislation to protect affordability for tenants, in banning Airbnb advertising, it restricted a source of supplemental income that was helping tenants. By developing proper regulation, the city could have curtailed the damage to affordability caused by commercial users of Airbnb, while still allowing the service to be used by those who desperately need the extra income.

B. Regulating Habitability

Section I.B. of this Essay discussed the public policy history that led to the codification of the warranty of habitability. The warranty of habitability was developed to address the societal concerns that accompany a metropolis like New York City, and to ensure that individual tenants were guaranteed habitable homes.¹³⁷

First, Airbnb opponents raise safety concerns, such as a guest's lack of familiarity with a host tenant's apartment, as a justification for banning Airbnb. These concerns are valid considering that guests could hurt themselves or neighboring tenants in an emergency situation due to their lack of knowledge of safety procedures in the building. However, these concerns could have been mitigated by an adaptation to the Airbnb booking system. Airbnb should have implemented non-legal methods to ensure that guests were privy to, and even required to, understand the safety procedures in a place that they were temporarily renting. If Airbnb had been responsive to New York legislators' pleas, the city's retaliatory legislation could have been avoided.

Airbnb could require hosts to upload safety procedures and evacuation directions specific to their building and require guests to read these documents online as a condition of booking their stay. Airbnb hosts could easily draft a set of safety procedures for their apartments or upload the pertinent parts of their leases so that guests are aware of the buildings' layout and safety requirements. Airbnb already requires its hosts and guests to accept certain conditions throughout the booking process, so adding an additional step requiring guests to read through a few pages of safety procedures would presumably not require a total overhaul of the Airbnb system.¹³⁸ If Airbnb required this sort of documentation as a prerequisite for listing a rental on its website, New York legislators' habitability concerns could be greatly ameliorated.

[<https://web.archive.org/web/20170629003031/https://www.cnet.com/news/airbnb-drops-legal-fight-with-nyc-over-new-rental-law>].

137. See discussion *supra* Section I.B.

138. See *Earn Money as an Airbnb Host*, AIRBNB, INC., <https://www.airbnb.com/host/homes> [<https://perma.cc/4GSL-BCUD>].

Further, if Airbnb enforced this step, it could potentially lead to decreased insurance costs for the company. Airbnb currently provides Host Protection Insurance to cover hosts' liability if their guests get hurt.¹³⁹ Although Airbnb is not a publicly traded company and does not disclose its insurance costs,¹⁴⁰ these costs would presumably decrease if Airbnb enacted more control measures to ensure safety for its guests. If this small step was implemented into the Airbnb system, it could appease New York legislators and health officials while also providing Airbnb with an economic incentive as a corporation. While Airbnb guests are required to agree to Airbnb's Terms of Service, which prohibit guests from suing the company in court, Airbnb could presumably reduce the number of potential Host Protection Insurance claims by encouraging procedures that make Airbnb rentals and guests safer.¹⁴¹

The other major habitability issue is that of neighbors concerned about transient guests entering their building and engaging in illegal behavior.¹⁴² Many neighbors of hosts using Airbnb are concerned that a host's apartment could be used for illegal activity and make the building unsafe.¹⁴³ While Airbnb's Host Protection Coverage does cover hosts for some liability, it does not cover "(1) intentional acts including: (i) Assault and Battery or (ii) Sexual Abuse or Molestation – (by the host or any other insured party) . . . [and] (7) Acts of Terrorism."¹⁴⁴

First, with the removal of commercial users from Airbnb, the remaining users, who are using the platform to rent their primary homes, would presumably be more concerned with who is renting the home as well as their personal liability under different scenarios.¹⁴⁵ Second, if Airbnb would be more forthcoming about the risks of using its service as opposed to limiting reviews in its review system to solely 500 words and no pictures or other documentation, it could encourage hosts to be more

139. See *Host Protection Insurance*, AIRBNB, INC., <https://www.airbnb.com/host-protection-insurance> [<https://perma.cc/J8ZB-A3W6>].

140. Leigh Gallagher, *Airbnb's IPO Runaway*, FORTUNE (Mar. 17, 2017), <http://fortune.com/2017/03/17/airbnbs-ipo-runway> [<https://perma.cc/6HYM-2QKK>] (explaining that Airbnb has not made a public offering of its shares).

141. See *Terms of Service*, AIRBNB, INC., <https://www.airbnb.com/terms> [<https://perma.cc/V55K-4GU6>].

142. See Scola, *supra* note 111.

143. See *id.*

144. See *Host Protection Insurance*, AIRBNB, INC., <https://www.airbnb.com/host-protection-insurance> [<http://perma.cc/J8ZB-A3W6>].

145. See discussion *supra* Section II.C.

vigilant in vetting guests.¹⁴⁶ Both of these changes would certainly benefit hosts, landlords, and neighbors and would help quell Airbnb opponents' concerns.

Additionally, Airbnb could add more security features to its interface to ensure that hosts have even more information about their potential guests. While Airbnb does have a review system for hosts to vet potential guests and vice versa, the review system only works for repeat users of the service, because new users have no review data.¹⁴⁷ However, if Airbnb were to implement some other background check system or requirement for potential guests to prove their identities and purpose, it may comfort hosts, landlords, and their neighbors. While Airbnb allows users to connect their Airbnb accounts to other social media accounts, this optional feature is not enough to alleviate the concerns of Airbnb's opponents.¹⁴⁸ Although added security measures might reduce the ease and efficiency of the Airbnb platform, such measures could mitigate many of Airbnb opponents' concerns, and maybe even encourage non-users to join the safer, improved service.

That being said, there is always an inherent risk in allowing a stranger into one's home. While this risk may never be entirely alleviated, Airbnb could have worked to develop more security features that would have prevented the ban by making New York legislators and Airbnb opponents more comfortable with Airbnb rentals.

C. Regulating Fairness to Tenants and Landlords

Section I.C of this Essay analyzed the history of eviction law to demonstrate that legislators intended to create a fair balance of power between tenants and landlords. As opposed to prior legal systems, where landlords could evict their tenants for any reason, the eviction process today is long and arduous to ensure that tenants are only evicted after being given notice and the opportunity to fix or address whatever problem the landlord may have raised.¹⁴⁹

146. See *How Do Reviews Work?*, AIRBNB, INC., <https://www.airbnb.com/help/article/13/how-do-reviews-work> [<https://perma.cc/5MXC-DV2J>]. See generally *Uncensored Airbnb Stories & Reasons Not to Use Airbnb*, AIRBNBHELL.COM, <http://www.airbnbhell.com/airbnb-guest-stories> [<https://perma.cc/T5KD-5K4J>] (a non-Airbnb affiliated site posting actual, unlimited reviews including pictures about horror stories from hosts and guests using Airbnb).

147. See AIRBNB, INC., *supra* note 146.

148. See *What is the Social Connections Feature*, AIRBNB, INC., <https://www.airbnb.com/help/article/198/what-is-the-social-connections-feature> [<https://perma.cc/G8MY-H6PN>].

149. See Starr et al., *supra* note 67, at 2-3.

Understandably, landlords are angered by uses of Airbnb that they believe directly violate their lease agreements and provisions against subleasing.¹⁵⁰ Many landlords have begun including additional riders in their leases to explicitly prevent the use of Airbnb.¹⁵¹ While many protections exist to prevent tenants from being unfairly evicted, certain lease provisions exist to ensure landlords can operate their businesses and maintain their buildings and properties. Instead of banning the rental and advertisement of apartments on Airbnb, legislation could have been drafted to allow tenants to request the right to use Airbnb as they would any sublease under section 226-b of the New York Property Law.¹⁵² While tenants should have the right to request to use their apartment for short-term rentals through Airbnb, landlords should likewise have the opportunity to reject these requests. Landlords should be able to assess requests from their tenants and determine whether their buildings can accommodate short-term rentals.

It is possible that many landlords would not want to allow the use of Airbnb; however, landlords should be required to give an adequate reason, as they are required to under section 226-b for denying subleasing requests.¹⁵³ A key to the entire building must be handed over to the short-term guest, opening a private building to non-tenants,¹⁵⁴ which makes many landlords oppose Airbnb. However, this issue is becoming obsolete, as many landlords are already installing new electronic key systems with temporary passwords that allow tenants access to the building using their cell phones and a secure phone application.¹⁵⁵ Therefore, a landlord could not deny a request to use Airbnb based on issues with keys if one of these electronic systems were in place that allowed a tenant to provide a temporary password to use the building.

Although many landlords may not adopt new technology for the sole purpose of allowing their tenants to use Airbnb, many landlords have already begun updating their systems to attract tenants and to keep their apartments up-to-date.¹⁵⁶ These systems and other new

150. See Zimmer, *supra* note 127.

151. See *id.*

152. See N.Y. REAL PROP. LAW § 226-b (McKinney 2017).

153. See N.Y. REAL PROP. LAW § 226-b (McKinney 2017).

154. See CBS N.Y., *supra* note 114.

155. See Michelle Higgins, *New York Discovers Keyless Entry Systems*, N.Y. TIMES (Jan. 1, 2016), <http://www.nytimes.com/2016/01/03/realestate/new-york-discovers-keyless-entry-systems.html> [<https://web.archive.org/web/20160217075502/http://www.nytimes.com/2016/01/03/realestate/new-york-discovers-keyless-entry-systems.html>].

156. See *id.*

technologies could possibly eradicate many of the fears described by Senator Krueger and thus make Airbnb access a reasonable accommodation for landlords to provide their tenants.¹⁵⁷ If the ability to use Airbnb is extremely important to a prospective tenant and is prohibited by one landlord, a prospective tenant can search for other landlords who may be willing to allow Airbnb rentals.

Opponents to this theory argue that housing in New York City is too limited to allow for this flexibility in apartment searching. However, the goal of this proposed regulation is to restore the fair balance of power between tenants and landlords, as intended by public policy and the existing tenant protection laws. While a landlord may argue that there could be an increased cost to vetting these Airbnb requests, it already is a landlord's responsibility to respond to all subleasing requests, and therefore would not overly burden landlords to also address Airbnb requests. Further, this proposed adaptation to the subleasing system restores some power to landlords by allowing them the opportunity to deny requests, rather than forcing landlords to constantly monitor whether their tenants are illicitly using Airbnb. An outright ban of Airbnb takes away too much power not only from tenants, but also from those landlords who may wish to offer Airbnb use as an enticing benefit to their rentals. Therefore, a total ban was not the appropriate solution.

CONCLUSION

While legislators justified the advertising ban of Airbnb as a measure to protect New York City tenants, this ban was an ineffective and unnecessary measure in light of the goals of existing tenant protection laws; thus, the ban should never have been passed. New York has a long history of drafting laws to address public policy concerns and protect its tenants; however, the passage of the Airbnb ban was an ineffective solution to address these concerns. Airbnb offered a valuable economic lifeline to tenants in New York City who were able to rent their apartments for short-term stays to earn supplemental income. By banning Airbnb, this lifeline was eradicated for tenants who are now unable to afford the places they live or unable to afford New York City entirely.

While Airbnb opponents raise valid concerns regarding affordability, habitability, and fairness, these concerns could have been mitigated by proper regulation and cooperation between Airbnb and New York legislators. Though passing tailored regulations would be a

157. See Scola, *supra* note 111.

more difficult process and require more research and compliance from Airbnb, a resolution could and should have been developed with tenants in mind. Both Airbnb and New York legislators should have been willing to work together and compromise on their issues for the tenants who desperately need Airbnb. Instead, the Airbnb ban failed to protect New York City tenants and thus was an inappropriate solution for all parties.