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Regulating the Sharing Economy: New and Old Insights into an Oversight Regime for the Peer-to-Peer Economy

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Raymond H. Brescia*

Regulating the Sharing Economy: New and Old Insights into an Oversight Regime for the Peer-to-Peer Economy

TABLE OF CONTENTS

I. Introduction	88
II. Regulation, the Legal Profession, and the Sharing Economy	93
A. Latent Resources and an Independent Workforce...	94
B. Regulation, Independence, and Consumer Protection in a Relationship of Trust	95
1. Attorney–Client Relationships, Trust, and Regulation	95
2. Sharing Economy Relationships, Trust, and Regulation	99
C. Consumer Protection in a Relationship Designed to Encourage Creativity and Innovation, While Generating Profit	106
III. The Evolution of Regulation of the Legal Profession....	110
A. Brief History of Regulation of the Legal Profession, from the Colonial to the Contemporary Eras	110
B. Key Questions and Themes Underlying the Evolution of the Regulation of the Legal Profession	113
1. Self-Regulation to Secure Professional Independence and Uphold the Rule of Law	114
2. Self-Regulation to Fend Off Regulation by Outside Entities	118
3. Barriers to Entry	120

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4.	The Right to a Livelihood	121
C.	The Legal Profession's Regulatory Regime	122
1.	Barriers to Entry	123
2.	Unauthorized Practice of Law	124
3.	Codes of Conduct and Self-Regulation	125
4.	Disciplinary Machinery	126
5.	An Insurance Regime	127
6.	Recourse through the Courts and Tort Liability	129
D.	New Governance and Regulation of the Legal Profession: Flexibility, Adaptability, and Local Experimentation	131
IV.	What the Evolution of the Regulation of the Legal Profession and New Governance Theory Can Tell Us about the Need for and the Contours of Regulation of the Sharing Economy	133
A.	Self-Regulation, Barriers to Entry, and Codes of Conduct	136
B.	Disciplinary Machinery	140
C.	Ongoing Judicial Oversight to Ensure Consumer Protection with "Supervisor" Liability	141
D.	Insurance Mechanisms	142
E.	Flexibility, Adaptability, and Local Experimentation	143
V.	Conclusion	144

I. INTRODUCTION

Recent startup ventures that are based on new models made possible by the Internet and mobile technologies have upended a range of industries, including taxi services, retail sales, and hotels. They typically offer convenience and low cost to consumers and job and income opportunities for producers. They are investment targets for large and small investors and have made their founders very wealthy. Some companies that use these new models have grown at such a rapid pace that their market capitalization far exceeds that of traditional companies located within those industries.¹ An example of this is the housing services company Airbnb, which is valued at \$26 billion, more than the hotel chain Marriott and its competitor, Hilton.² These companies, thriving in a new transnational economy that is connected

1. For a description of the scope of the Sharing Economy, see PwC, *THE SHARING ECONOMY* (2015), <https://www.pwc.com/us/en/technology/publications/assets/pwc-consumer-intelligence-series-the-sharing-economy.pdf> [<https://perma.unl.edu/QD7K-Z2ND>].

2. Alison Griswold, *Airbnb is Thriving. Hotels are Thriving. How Is That Possible?*, SLATE (July 6, 2015 6:00 AM), <http://www.slate.com/articles/business/moneybox/>

virtually, are doing what many would call disrupting the normal way of doing business in these industries, offering services to the consumer in a more efficient and effective manner directly through the Internet and mobile technologies.³ They are unleashing latent assets that can be deployed in new, innovative, and lucrative ways. These new economic actors, and the networks and platforms they have created, have become significant drivers of economic activity and made their founders very rich, while attracting billions of dollars from investors.

For lack of a better term, many of these companies operate within what many call the “sharing economy.”⁴ Not surprisingly, they have faced stiff resistance from their more traditional counterparts, industry incumbents who face significant encroachments on their customer bases and profits. Government actors are struggling to keep up with these new business models, and the activities of these companies can raise significant consumer protection concerns.⁵ Indeed, consumer protection watchdogs raise concerns about product and service safety.⁶ While consumers appreciate the panoply of choices and the fact that sharing economy platforms often offer a lower cost for products and services than traditional providers, safety concerns and a reticence to trust relatively unregulated platforms threaten to undermine their growth and profitability and are driving some jurisdictions to heavily regulate or ban certain enterprises outright.⁷ Elected officials and other government actors share consumer protection concerns and also raise fears that new models of product and service delivery can sidestep tax- and fee-generating mechanisms, like

2015/07/airbnb_disrupting_hotels_it_hasn_t_happened_yet_and_both_are_thriving_what.2.html [https://perma.unl.edu/A8QY-D6NM].

3. There is some debate over whether platforms like Uber are merely sustaining existing industries or truly disrupting them. See Clayton M. Christensen et al., *What Is Disruptive Innovation?*, HARV. BUS. REV. (Dec. 2015) <https://hbr.org/2015/12/what-is-disruptive-innovation> [https://perma.unl.edu/CUW5-QA87].
4. For a discussion of the definitional issues around the “sharing economy,” see *infra* Part II.
5. Daniel E. Rauch & David Schleicher, *Like Uber, But for Local Government Policy: The Future of Local Regulation of the ‘Sharing Economy,’* GEO. MASON U. L. & ECON. RES. PAPER SERIES, Jan. 14, 2015, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2549919 [https://perma.unl.edu/6C9L-VX4D] (describing potential local government approaches to regulating the sharing economy).
6. *The Opportunities and Risks of the Sharing Economy: Hearing on “The Disrupter Series: How the Sharing Economy Creates Jobs, Benefits Consumers, and Raises Policy Questions” Before the Subcomm. on Commerce, Mfg., and Trade of the H. Comm. on Energy and Commerce*, 114th Cong. 5–8 (2015) (statement of Dean Baker, Co-Director, Center for Economic and Policy Research) (describing consumer protection concerns with sharing economy businesses).
7. For a description of the challenges Uber has faced in Germany, for example, see Mark Scott, *Uber’s No-Holds-Barred Expansion Strategy Fizzles in Germany*, N.Y. TIMES (Jan. 3, 2016), http://www.nytimes.com/2016/01/04/technology/ubers-no-holds-barred-expansion-strategy-fizzles-in-germany.html?_r=0.

hotel taxes and licensing fees collected from providers within these industries.⁸ Labor leaders and workers fear the erosion of traditional worker protections in sharing economy platforms.⁹ The founders and leaders of these sharing economy companies bristle over calls for regulation, saying any such effort will stifle the entrepreneurial spirit and innovation.¹⁰ The search is on for the right level of oversight that will regulate these new economic models effectively without chilling innovation or harming consumer and worker interests.¹¹

What proponents and detractors alike fail to recognize is that the sharing economy—for lack of a better term—can learn from an industry that has struggled, over the centuries, to find the right balance between innovation and oversight. This sector has shared features of these new economic actors and has experimented with and put into place regulatory components that attempt to find the sweet spot between regulation, consumer protection, and creativity. Indeed, one industry has exhibited the features of the sharing economy for centuries and has developed a regulatory approach that attempts to strike a delicate balance between consumer protection and provider independence. Like sharing economy platforms, it has involved the provision of on-demand services by independent actors that have tapped into latent assets to serve a range of customers at the same time. It has organized itself primarily through outsourcing, where providers offer services to customers based on reputation. The customer is free to change service providers, generally, at will; the customer pays for services as needed and in accordance with his or her use of those services.

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8. Ann Carrns, *Lodging Taxes and Airbnb Hosts: Who Pays, and How*, N.Y. TIMES (June 16, 2015), http://www.nytimes.com/2015/06/17/your-money/lodging-taxes-and-airbnb-hosts-who-pays-and-how.html?_r=0 (describing hotel taxes paid by Airbnb hosts in different jurisdictions).
 9. Robert Reich, *Why the Sharing Economy is Harming Workers—and What Must Be Done*, HUFFINGTON POST (Nov. 28, 2015, 12:02 PM), http://www.huffingtonpost.com/robert-reich/why-the-sharing-economy-i_1_b_8672120.html [https://perma.unl.edu/QND8-8EWA] (discussing workers rights concerns in the sharing economy). While the issues surrounding worker rights and interests are considerable, and I am personally cognizant and sympathetic to these concerns, this Article will focus on consumer interests and not on issues concerning worker rights. For a critical view of the sharing economy and its effects on worker interests, see STEVEN HILL, *RAW DEAL: HOW THE “UBER” ECONOMY AND RUNAWAY CAPITALISM ARE SCREWING AMERICAN WORKERS* (2015).
 10. Sofia Ranchordas, *Does Sharing Mean Caring? Regulating Innovation in the Sharing Economy*, 16 MINN. J.L. SCI. & TECH. 413 (2015) (describing the need to balance innovation with the need for regulation).
 11. Sarah Cannon & Lawrence H. Summers, *How Uber and the Sharing Economy Can Win Over Regulators*, HARV. BUS. REV. (Oct. 13, 2014), https://hbr.org/2014/10/how-uber-and-the-sharing-economy-can-win-over-regulators&cm_sp=Article-_-Links-_-End%20of%20Page%20Recirculation [https://perma.unl.edu/Q8AM-U983] (arguing “[r]egulation is often the most significant barrier to future growth for sharing economy firms”).

In these ways, the sharing economy, whether consciously or unconsciously, is borrowing features from the manner in which the legal profession has delivered legal services in the United States since the birth of the nation. As the legal profession grew and its role became more central in the functioning of the economy and society, finding the right balance between consumer protection, innovation, and regulatory oversight has been a central theme in the evolution of the profession's regulation.

The major components of legal professional oversight have not changed much over the last 100 years or so. These components are designed to encourage both zealous advocacy and creativity while ensuring quality control and consumer protection. In fact, the elements of this balance have always been seen through the lens of a sort of legal profession exceptionalism—the notion that there is something different about the practice of law that requires a zealous vigilance around the frontiers of oversight and that regulation of the profession must be undertaken in such a way that will protect the important role the legal profession plays in ensuring the proper functioning of American democracy.¹² It is perhaps no accident that there is a similar exceptionalism that now permeates the debate around regulation of the sharing economy—the notion that disruptive innovation in a range of industries, designed to supercharge the economy, unleash capital, create opportunity for millions, and improve consumer access should not be held down by stifling regulatory oversight.

A more recent development that can also inform questions regarding the most efficient and effective way to regulate the sharing economy has been the emergence of so-called “New Governance” models of regulatory oversight. Developed in response to changes in technology, economic forces, globalization, and a need to make regulatory systems more experimental, adaptive, transparent, and responsive, New Governance models promote an engaged dialogue among stakeholders: regulators, the regulated, and consumers.¹³ They straddle the government, private, and civil society sectors in a search for optimal approaches to regulation that encourage innovation while protecting consumers. Interestingly, just as the sharing economy shares features of the legal profession in the U.S., the regulatory infrastructure that governs the legal profession has itself developed through an approach that has many of the hallmarks of New Governance Theory, long before its emergence as a theory. Indeed, this infrastructure, which

12. See, e.g., Deborah L. Rhode, *Legal Ethics in an Adversary System: Some Persistent Questions*, 34 HOFSTRA L. REV. 641, 655–61 (2006) (describing relative regulatory independence of the legal profession and the impact it has had on actor accountability within the regulatory system). See *infra* subsection III.B.1 for a discussion of these themes in greater detail.

13. See *infra* Part IV.

hinges on a self-regulatory model, has been experimental, decentralized, iterative, and adaptive.

Because the legal profession shares so many features of the sharing economy and has wrestled with many of the same questions with which actors inside and outside the sharing economy now struggle, lessons learned through centuries-long development of the rules and protections governing the legal profession can help inform the debate over the need for (and contours of) any coming regulatory oversight of the sharing economy. Moreover, as the manner in which the legal profession has been regulated over the last two centuries exhibits many of the hallmarks of New Governance approaches to regulation, one can also consider New Governance models in any approach to regulation of the sharing economy. Thus, this Article analyzes the evolution of regulation of the legal profession in the United States to unearth lessons from that evolution and draw insights that might inform approaches to regulating the sharing economy and strike a balance between innovation and consumer protection. These prescriptions consciously borrow from New Governance models to suggest an approach to regulation of the sharing economy that encourages experimentation and innovation, while not jeopardizing consumer safety.

Over the centuries, oversight of the legal profession has gone through two stages. The first involved little, if any, oversight, other than a requirement that individuals wishing to practice law had to apprentice with someone already admitted to practice and take a brief, often ad hoc examination administered by a judge or admitted attorney. The second stage, in which we still find ourselves now, involves court-supervised regulation of the profession, led in many ways by a trade association—the American Bar Association—in cooperation with the court systems of the fifty states. This oversight regime has the following features. First, it is mostly self-regulatory, including the adoption of codes of conduct with some backstopping by courts, state legislatures, and tort law. This system is designed with an eye toward independence and creativity. It incorporates significant barriers to entry to ensure competence and consumer protection and provides ongoing oversight to ensure minimal competence by providers. It contains disciplinary machinery to police the profession, including the authority to strip actors of their ability to practice within the industry. Over the years, the relative extensiveness and intensity of these features have ebbed and flowed, with some gaining greater prominence while others have diminished in importance.

As this Article argues, these same components, which are animated by a concern for encouraging innovation and professional independence while ensuring consumer protection and maintaining the profession's reputation as a vital cog in our democracy and economy, are the same that should animate any discussion over regulation of

the sharing economy. It is for these reasons that this Article outlines the evolution of the regulation of the legal profession at a time when a healthy and vigorous debate has arisen over the need for and potential contours of a regulatory regime to oversee the actors in the sharing economy.

With these animating thoughts, this Article proceeds as follows. Part I provides an overview of the sharing economy and introduces the debate over the need for regulation of the actors within it. It draws parallels between the debates over the sharing economy and those that have informed discussions over the regulation of the legal profession, identifying the similarities between the forces that might influence any approach to regulation of the sharing economy and those that have impacted the evolution of regulation of the legal profession. Part II traces the evolution of the legal profession's regulatory framework to understand how this evolution has addressed some aspects of the ongoing debate over the need for oversight of the sharing economy. Part III describes how the lessons learned through efforts to regulate the legal profession, efforts that bear the hallmarks of New Governance approaches, might inform the debate over the shape of any effort to regulate the sharing economy; indeed, this final Part utilizes the insights from New Governance theory to suggest a way forward on regulation of these new economic models—one that is experimental, diversified, and decentralized. It gives a degree of deference to sharing economy actors to self-regulate, while recognizing the need for regulatory and judicial oversight to backstop such self-regulation.

II. REGULATION, THE LEGAL PROFESSION, AND THE SHARING ECONOMY

There are many ways that the sharing economy mimics the ways in which the legal industry has delivered services to U.S. consumers over the last 200 years. Before I embark on a discussion of the similarities between the sharing economy and the legal profession, it is appropriate to define exactly what the sharing economy is and what actors within it do. Rachel Botsman uses the following definition of the sharing economy: “An economic model based on sharing underutilized assets . . . for monetary or non-monetary benefits.”¹⁴ I would ex-

14. Rachel Botsman, *The Sharing Economy Lacks a Shared Definition*, FAST COMPANY (Nov. 21, 2013 7:30AM), <http://www.fastcoexist.com/3022028/the-sharing-economy-lacks-a-shared-definition> [<https://perma.unl.edu/XV7N-F3G5>]. See also Christopher Koopman et al., *The Sharing Economy and Consumer Protection Regulation: The Case for Policy Change*, 8 J. BUS. ENTREPRENEURSHIP & L. 529, 531 (2015) (defining the sharing economy as “any marketplace that brings together distributed networks of individuals to share or exchange otherwise underutilized assets”) (citation omitted); Rauch & Schleicher, *supra* note 5, at 9–11 (describing debate over the definition of the sharing economy).

pand the definition a bit to identify some of the key features of sharing economy platforms, including those that such platforms share with the legal profession: (1) a latent or otherwise underutilized supply of a good or service that is put to productive use by an independent workforce that does not fit within the traditional employer–employee relationship;¹⁵ (2) a relationship of trust that is difficult to regulate; and (3) a need for a degree of freedom to experiment and innovate within the relationship of trust and beyond. As I will attempt to show below, it is these shared features that make sharing economy models similar to the legal profession and justify a review of the manner in which the legal profession is regulated to inform decisions about the most effective way to regulate the sharing economy. These features are described in greater detail, in turn, below.

A. Latent Resources and an Independent Workforce

The sharing economy approach is one that purports to take otherwise latent assets and put them to productive use. The notion is that providers who join such platforms will make their latent time and resources available to consumers in need of sharing economy goods or services. While it may seem a stretch to assign this feature to the delivery of legal services, there are strong similarities here to the way that legal services are provided in the United States. Admittedly, though many lawyers today work as general counsel in corporations or for government, the overwhelming majority of lawyers—whether they work in “Big Law,” in small firms, as solo practitioners, or in public interest organizations—spread their efforts among a range of clients, taking on such clients until they meet their own or their organization’s capacity.¹⁶ Again, as opposed to in-house counsel and government lawyers, they do not form an employer–employee relationship with their clients, choosing instead to work as independent contractors. For many lawyers, they put their otherwise latent and most important resources—their time, training, skills, and judgment—to use

15. I recognize that the question of whether a provider in a sharing economy network is an employee of the platform with which she is affiliated is still an open question in some jurisdictions; for our purposes here, I am focusing on the relationship between the consumer and the provider. No one considers a seller on eBay, an Uber driver, an artist on Etsy, or a host on Airbnb to be an employee of the consumer of the goods and services available through such platforms. For a discussion of the status of ride-hailing companies as employees of the platforms through which they operate, see James Surowiecki, *Gigs with Benefits*, NEW YORKER (July 13, 2015), <http://www.newyorker.com/magazine/2015/07/06/gigs-with-benefits> [<https://perma.unl.edu/ZA8P-EUKW>].

16. AM. BAR ASS’N, *LAWYER DEMOGRAPHICS* (2012), http://www.americanbar.org/content/dam/aba/migrated/marketresearch/PublicDocuments/lawyer_demographics_2012_revised.authcheckdam.pdf [<https://perma.unl.edu/C5HG-TX62>].

to serve their clients until they reach their own capacity for service.¹⁷ Thus, two of the key features of the sharing economy—that providers put their otherwise latent resources to use in the service of consumers in need but do not form employer–employee relationships with those consumers—are present in the delivery of legal services. While some could argue that many economic relationships work this way, there are other key similarities between sharing economy platforms and the delivery of legal services.

B. Regulation, Independence, and Consumer Protection in a Relationship of Trust

While many different economic relationships might appear to share the same features described above (latent resources and an independent workforce), the attorney–client relationship is one that has unique characteristics that set it apart from that of, say, a business consultant. What is more, the nature of this relationship makes it difficult to regulate, and a degree of freedom from regulation and oversight is necessary to make the relationship function. As a result, unlike in many other consultancies, even commercial ones, a higher degree of freedom from regulation is necessary to instill the trust necessary to make the relationship function the way it is intended. Similarly, sharing economy relationships, in ways described more fully below, require a degree of freedom from regulation in order to make them function the way they are designed to function. They, too, must rely on trust, for the most part, to ensure consumer protection.

These similarities warrant a discussion about the interplay between the optimal level of regulation that will help foster trust yet generate consumer protection. Trust is central to the attorney–client relationship (as it is with sharing economy platforms). Too much regulation can inhibit the proper functioning of the attorney–client relationship. What follows is an exploration of the ways in which legal profession relationships and sharing economy relationships share some of these features; they are inherently relationships of trust where regulation could serve to inhibit their effective functioning.

1. Attorney–Client Relationships, Trust, and Regulation

One of the central aspects of the attorney–client relationship is that we cloak the communications within the relationship from over-

17. On the deployment of lawyer latent “human capital” within a firm, see MARC GALANTER & THOMAS PALAY, *TOURNAMENT OF LAWYERS: THE TRANSFORMATION OF THE BIG LAW FIRMS* 90–92 (1991). Admittedly, this portrayal may be a bit of an idealized view and at least some lawyers—especially recently admitted ones—are struggling for work and clients.

sight so as to foster trust and candor.¹⁸ We free the client to speak his or her mind, reveal innermost secrets, talk strategy, and reveal information he or she wants to remain confidential so that the attorney can apply his or her skill, knowledge, and expertise to the problem.¹⁹ By getting the complete picture of the client's situation, the lawyer can best deploy his or her craft to serve the client's goals. Interjecting oversight into the relationship would undermine the trust that fuels the candor needed to promote the free flow of information between the attorney and the client so that the attorney can fully represent the client.²⁰

The attorney–client relationship is one infused with trust and a degree of intimacy that sets it apart from other consultant–client relationships. While a business might deal with trade secrets or other matters a client might want to maintain as confidential, the attorney–client relationship is one in which the attorney becomes more than a mere confidant. We may protect the consumer's communications with a therapist or religious professional, but neither engages in the conduct that the lawyer undertakes in light of those confidential communications; neither makes strategic decisions or undertakes critical actions in light of those communications on behalf of the client.²¹ Moreover, while a religious professional or a therapist might offer repentance for, insights into, or commiserate with someone over his or her personal transgressions, challenges, or experiences, the attorney can hold in his or her hand the individual's freedom, the future of one's business or intellectual property, or the safety of one's home or inheritance.²²

18. John W. Gergacz, *A Proposal for Protecting Executive Communications with Corporate Counsel After the Corporate Client Has Waived Its Attorney-Client Privilege*, 13 *FORDHAM J. CORP. & FIN. L.* 35, 41 (2008) (describing purposes of the attorney–client privilege to promote trust and candor).

19. Geoffrey C. Hazard, Jr., *An Historical Perspective on the Attorney-Client Privilege*, 66 *CALIF. L. REV.* 1061, 1061 (1978) (describing the purpose of the attorney–client privilege).

20. For an assessment of the role of the privilege in promoting candor between the attorney and the client, see Vincent C. Alexander, *The Corporate Attorney-Client Privilege: A Study of the Participants*, 63 *ST. JOHN'S L. REV.* 191 (1989).

21. As the Supreme Court said in 1888:

The rule which places the seal of secrecy upon communications between client and attorney is founded upon the necessity, in the interest and administration of justice, of the aid of persons having knowledge of the law and skilled in its practice, which assistance can only be safely and readily availed of when free from the consequences or the apprehension of disclosure.

Hunt v. Blackburn, 128 U.S. 464, 470 (1888).

22. Because of the weight of this responsibility, we clothe the attorney–client relationship with fiduciary obligations, unlike many of the other relationships described here. For a description of the attorney's fiduciary duties to clients, see Ray Ryden Anderson & Walter W. Steele, Jr., *Fiduciary Duty, Tort and Contract: A Primer on the Legal Malpractice Puzzle*, 47 *SMU L. REV.* 235 (1994).

Like those other relationships, however, the attorney–client relationship is one that is also difficult to regulate on a number of levels. The intimacy of the relationship, the confidential nature of the communications, and the fact that the trappings of regulation—recording conversations, extensive warnings in advance of conversations (think trigger warnings or an explanation of *Miranda* rights, etc.)—generally have no place in a relationship of trust, and, in some ways, are a response to a lack of trust.²³ Thus, the relationship is one that attempts to foster trust in the absence of extensive outside oversight and intrusive regulation.²⁴ The absence of oversight over the communications is designed to generate the candor essential for the successful execution of the attorney’s duties.

We free the attorney–client relationship from oversight to such a degree that we even look the other way as lawyers often engage in a deceptive act that is designed, ironically, to foster trust. Indeed, many attorneys engage in a type of trust-building communication that is itself deceptive. The relationship of candor that a lawyer generally wants to encourage between her client and herself often begins, quite frankly, with a lie. When I give continuing legal education trainings to attorneys on legal ethics and discuss confidentiality in the attorney–client relationship, I often ask those in attendance to raise a hand if they say something like the following in a conversation with a client: “I am your attorney and everything you say to me is confidential.” Virtually everyone in the room raises a hand. I then ask them if they also warn the client that this protection might not apply if the client’s communication with the attorney is in furtherance of a crime or fraud, if the lawyer needs to defend him or herself, or if the client is an imminent physical threat to a third party.²⁵ Invariably, no one raises a hand. Yet each of these bases is grounds upon which an attorney may divulge a client’s communication with the lawyer. Thus, this relationship of trust is one that is often initiated by an act of deceit: i.e., one that is intended to instill trust and likely has that effect.

Yet, we do not punish lawyers for building trust with the client in this way. This is just one example of how the attorney–client relationship is one that is difficult to police precisely because it is supposed to instill trust of the client in the attorney. If clients believed their attorneys could share their communications with authorities, estranged spouses, and opposing parties, it is unlikely that they would divulge

23. For a discussion of the role of distrust with the police in the development of *Miranda* protections, see Russell Dean Covey, *Miranda and the Media: Tracing the Cultural Evolution of a Constitutional Revolution*, 10 CHAP. L. REV. 761 (2007).

24. For the regulatory regime of the legal profession, the extent to which it is self-regulatory, based on standards, not rules, and seeks to avoid extensive interference from outside the profession see *infra* Part II.

25. See, e.g., MODEL RULES OF PROF’L CONDUCT r. 1.6(b) (AM. BAR. ASS’N 2013) (listing exceptions to the attorney–client privilege).

their secrets to their attorneys.²⁶ As a result, we must insulate the attorney–client relationship from a degree of oversight with limitations, of course, like those described above—i.e., where a client is using the lawyer to carry out a crime, when the client divulges the fact that he or she intends to harm a third party, etc. For the most part, though, we have established a zone of privacy and protection around the attorney–client relationship that helps to foster the trust between the attorney and the client so that the client will share critical information that the attorney needs to carry out his or her representation of the client.²⁷

There are also other ways in which the attorney–client relationship, by design, is one where there must be a degree of trust and one that is difficult to regulate because of the risk that such regulation will undermine the functioning of the relationship itself. Indeed, interjecting the State into the relationship between an attorney and client, particularly in settings where the State might be an interested party—like in a criminal proceeding, an anti-trust action, or other instance where government oversight is implicated—poses its own problems.²⁸ Obviously, the independence of the attorney and client is critical in such situations, and state oversight is not just anathema to the attorney–client relationship. It would threaten the adversarial system and undermine the role of the courts and the attorneys who litigate in them as checks on governmental overreach. I will return to this theme below.²⁹

The need to free the attorney–client relationship from a degree of oversight and regulation in order to instill the trust necessary for the attorney–client relationship to function the way it is designed and in order for it to fulfill a core function in democracy is one example of the delicate interplay between regulation and trust. The need for regulation is offset by an understanding that, to a great extent, intrusive, command-and-control oversight would undermine, if not destroy, the

26. This is one view of the purpose of attorney–client confidentiality rules. For an opposing view, see Fred C. Zacharias, *Rethinking Confidentiality*, 74 IOWA L. REV. 351 (1989) (challenging the premises of attorney–client confidentiality rules).

27. The difference between other relationships of trust that also carry with it evidentiary privilege is the purpose of attorney–client privilege is much more functional—it leads to direct action on the part of the attorney, unlike other relationships of trust that often serve more consultative or therapeutic purposes. For an argument that judicial sympathy toward the attorney–client privilege, bred by familiarity with it, leads to its relative strength when compared to other evidentiary privileges, see Benjamin H. Barton, *Do Judges Systematically Favor the Interests of the Legal Profession?*, 59 ALA. L. REV. 453, 465–72 (2008).

28. Monica M. Clark, *Challenging Privilege Claims in Congressional Inquiries*, 23 GEO. J. LEGAL ETHICS 539 (2010) (describing government efforts, in a range of fields, to infringe upon the attorney–client privilege).

29. *See infra* subsection III.B.1.

ability of the attorney–client relationship to function the way it must in order to generate the benefits that trust and independence can produce. For these reasons, the attorney–client relationship is one where a “lighter touch” regulatory regime is needed to make sure the system functions the way it is designed to function.

Similar to the attorney–client relationship in many ways, sharing economy models would also suffer from a regulatory approach that undermines the very economic models of such enterprises; as a result, such models must rely on trust—as in the attorney–client relationship—to function in ways that generate the benefits sharing economy models offer. This relationship between the sharing economy, trust, and regulation is an issue I turn to next.

2. *Sharing Economy Relationships, Trust, and Regulation*

Sharing economy relationships are often ones that are—somewhat by necessity and somewhat by their nature—also difficult to police and regulate, and the presence of regulatory oversight can undermine the very essence of the economic model. Whether it is an eBay auction, a trip in a car to the airport, or a weekend stay in a spare room in a brownstone in Brooklyn, these economic changes are difficult for a regulator to police. The nature of the goods or services being offered makes them relatively difficult to oversee, short of issuing licenses, conducting regular inspections, and monitoring ongoing conditions and actions. Think of a system for regulating restaurants. There is a need for a relatively extensive and expensive licensing system and regular and random health inspections in order to ensure consumer health and safety.³⁰ Even food cart vendors in many cities require licenses and are subject to inspection, although the level of regulation is often much lower than that which applies to brick-and-mortar restaurants.³¹

One could certainly think of ways to regulate car services and housing accommodations. In fact, we already do. Most jurisdictions already regulate many of the types of services that are available in the sharing economy, through licensing and monitoring of taxi services and hotels, for example.³² But in a sharing economy world, the ab-

30. Lainie Rutkow et al., *Local Governments and the Food System: Innovative Approaches to Public Health Law and Policy*, 22 ANNALS HEALTH L. 355 (2013) (describing local government efforts to regulate restaurants).

31. See Sarah E. Needleman, *Street Fight: Food Trucks vs. Restaurants*, WALL STREET J., Aug. 9, 2012, at B8. For a discussion of the efforts to regulate non-traditional restaurants, see Sarah Schindler, *Regulating the Underground: Secret Supper Clubs, Pop-Up Restaurants, and the Role of Law*, 82 U. CHI. L. REV. DIALOGUE 16 (2015).

32. For a description of taxi regulations, see Paul Stephen Dempsey, *Taxi Industry Regulation, Deregulation & Reregulation: The Paradox of Market Failure*, 24 TRANSP. L.J. 73 (1996). For a description of rules governing hotels in New York

sence of barriers to entry and ongoing monitoring are, in many respects, the means through which the system works. If a homeowner with a spare bedroom had to apply for approval from a local authority to rent his or her spare room, a process which entailed licensing, a costly application, and would bring with it ongoing monitoring and inspections, it is likely many would eschew the privilege of renting out their home for some extra cash. Similarly, the taxi industry in many communities is regulated by authorities and commissions that determine the optimum number of licenses to allow, set rates, regulate the machines that calculate the fee, conduct site inspections of taxis and garages, etc. If the average Uber driver had to submit to this sort of oversight, again, it is unlikely he or she would go through the trouble and expense for a relatively modest boost in earnings.

Thus, just as the interjection of oversight into the attorney–client relationship would undermine the trust and effectiveness of that relationship, the imposition of a regulatory regime with too heavy a hand would undermine the ability of sharing economy providers and platforms to take advantage of their critical strategic advantages: direct, peer-to-peer ease of access and relatively low cost. The development of an extensive and expensive oversight regime would likely have a negative effect on the functioning of sharing economy platforms.³³ Of course, all regulation and oversight imposes some burden on providers, but the advantage of the sharing economy approach seems to be the relatively low barriers to entry; the ease with which needy consumers can be matched with willing providers; and the low cost that, in many ways, is a function of the first two features: low barriers to entry and ease of matchmaking. While any business might argue that regulation imposes costs that make it difficult to operate, the cost associated with complying with that oversight is factored into the price of a product.³⁴ The first thing that comes to mind when we consider the need to regulate sharing economy models is that they are likely to lose their competitive advantage should a regulatory regime remove one of their central benefits—the ability to provide competitive pricing because the current absence of regulatory oversight reduces the trans-

City, see ERIC T. SCHNEIDERMAN, N.Y. STATE ATT'Y GEN., AIRBNB IN THE CITY (Oct. 2014).

33. Vanessa Katz, *Regulating the Sharing Economy*, 30 BERKELEY TECH. L.J. 1067, 1112–13 (2015) (arguing for an approach to regulation of the sharing economy that would not inhibit innovation).

34. Frank B. Cross, *When Environmental Regulations Kill: The Role of Health/Health Analysis*, 22 ECOLOGY L.Q. 729, 758–59 (1995) (discussing situations in which the costs of regulatory compliance are passed along to consumers in the form of higher prices).

action costs associated with the delivery of goods and services in the sharing economy.³⁵

Another component of the advantageous pricing of sharing economy goods and services is the peer-to-peer aspect of many sharing economy platforms, which itself brings with it issues of trust. Whether it is a car service, an auction, or a spare room in an apartment, the strategic marketing and matchmaking functions the platforms offer make goods and services in the sharing economy often less expensive to provide, even if the platform siphons off a percentage of the proceeds of the sales, which is central to these platforms' business models. Regardless, except for instances where the cost of sharing economy products and services might exceed those of more traditional providers (as when Uber engages in "surge pricing"—raising the cost of a ride at times when services are in greater demand),³⁶ sharing economy platforms typically offer highly competitive pricing, which is often a result of the streamlined delivery system that comes from direct, peer-to-peer marketing and matchmaking.³⁷

By eliminating the "middle person," sharing economy platforms are able to offer highly competitive pricing, but these peer-to-peer systems rely more heavily on traditional forms of trust, rather than the trust that one might bring to a relationship because of either brand recognition or one's understanding that a relationship is bounded by contract law or governmental oversight that often facilitates commercial transactions.³⁸ Ultimately, what sharing economy platforms do is reduce transaction costs, which enable them to engage in more competitive pricing.³⁹ But one of the aspects of Ronald Coase's theory of transaction costs is that the actions that lead to transaction costs themselves often generate the trust necessary to facilitate commercial

35. For a discussion of the innovations in the Sharing Economy that lead to reductions in transaction costs, see Orly Lobel, *The Law of the Platform* (2015) (unpublished manuscript) (on file with author).

36. What is Surge Pricing?, UBER, <https://help.uber.com/h/6c8065cf-5535-4a8b-9940-d292ffdce119> [<https://perma.unl.edu/B67A-YF2W>].

37. Rashmi Dyal-Chand, *Regulating Sharing: The Sharing Economy as an Alternative Capitalist System*, 90 TUL. L. REV. 241, 256–57 (2015) (describing how the "overriding feature" of many sharing economy ventures is their low prices in comparison to traditional competitors).

38. Charles Green, *Trusting and Being Trusted in the Sharing Economy*, FORBES (May 2, 2012, 2:01 PM), <http://www.forbes.com/sites/trustedadvisor/2012/05/02/trusting-and-being-trusted-in-the-sharing-economy/#27115e4857a0b45c3ca93608a> [<http://perma.unl.edu/4ASK-L37H>] (describing role of trust in the sharing economy).

39. Peer-to-Peer Rental: The Rise of the Sharing Economy, ECONOMIST (Mar. 9, 2013), <http://www.economist.com/news/leaders/21573104-internet-everything-hire-rise-sharing-economy> [<http://perma.unl.edu/L7UM-JTA7>] (describing the role of reduced transaction costs in the pricing and availability of sharing economy goods and services).

transactions in the first place.⁴⁰ Indeed, Coase classified transaction costs into four categories: search, information, negotiation, and enforcement.⁴¹ Each of these transaction costs is, in a way, a substitute for trust.⁴² Law often serves as a stand in for trust,⁴³ formalizing these functions, providing rules of the road, and serving as a backstop when trust is breached.⁴⁴

The problem sharing economy platforms must overcome when they offer competitive pricing because they have eliminated some transaction costs is the trust deficit the absence of those transactions costs generate. Thus, law and the sharing economy must find a way to foster trust while maintaining the sharing economy's competitive advantage on pricing generated by the reduced transaction costs these platforms offer.⁴⁵

40. Mark Granovetter, *Economic Action and Social Structure: The Problem of Embeddedness*, 91 AM. J. SOC. 481, 491 (1985) (arguing that contracts can generate trust). For a discussion of the determinants of trust in business transactions, see Avner Ben-Ner & Louis Putterman, *Trusting and Trustworthiness*, 81 B.U. L. REV. 523 (2001).

41. R. H. Coase, *The Nature of the Firm*, ECONOMICA 386, 390–92 (1937).

42. As Francis Fukuyama explains:

[P]eople who do not trust one another will end up cooperating only under a system of formal rules and regulations, which have to be negotiated, agreed to, litigated, and enforced, sometimes by coercive means. This legal apparatus, serving as a substitute for trust, entails what economists call “transaction costs.” Widespread distrust in a society, in other words, imposes a kind of tax on all forms of economic activity, a tax that high-trust societies do not have to pay.

FRANCIS FUKUYAMA, *TRUST: THE SOCIAL VIRTUES AND THE CREATION OF PROSPERITY* 27–28 (1995).

43. Russell Hardin, *Distrust*, 81 B.U. L. REV. 495, 519 (2001); see also Gregg P. Macey, *Cooperative Institutions in Cultural Commons*, 95 CORNELL L. REV. 757, 764 (2010) (positing that “[i]n economic-institutional frameworks generally, institutions do not so much produce elements that are necessary to rise above a social dilemma, such as trust, as provide functional substitutes for them in the form of rules”); Claire A. Hill & Erin Ann O’Hara, *A Cognitive Theory of Trust*, 84 WASH. U. L. REV. 1717, 1755 (2006) (arguing “[l]aw can promote trust by helping to minimize the likelihood of untrustworthy behavior.”); Christopher R. Leslie, *Trust, Distrust, and Antitrust*, 82 TEX. L. REV. 515, 601 (2004) (arguing that “[i]n relationships where trust is either not present or not possible, the law often fills the void.”).

44. Daniel A. Farber & John H. Matheson, *Beyond Promissory Estoppel: Contract Law and the “Invisible Handshake,”* 52 U. CHI. L. REV. 903 (1985). Some theorists believe that legalistic approaches can undermine trust. See, e.g., FUKUYAMA, *supra* note 42, at 309–11 (arguing that legalistic approaches to dispute resolution are less effective and efficient than trust-based solutions); MARY ANN GLENDON, *RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE* (1991) (arguing that legalistic, individual rights-based approaches undermine the creation of communities of shared interests); Larry E. Ribstein, *Law v. Trust*, 81 B.U. L. REV. 553, 580–84 (2001) (arguing that regulation promotes opportunistic behavior that undermines trust).

45. Of course, there are those who argue that more detailed, complex contractual arrangements are less likely to generate trust and that simple, more straightfor-

The strategic advantage of the sharing economy is that the freedom from a great deal of regulatory oversight is likely the key to the price providers are able to offer. While some may prefer a room in a private home to one in a Ritz Carlton, if they both cost the same, the typical consumer might be more inclined to choose the latter. Thus, the pricing advantage sharing economy goods and services enjoy is likely the key strategic advantage they offer in the market. Impose regulations that drive up the price and one is likely to kill the business. The typical hotelier might say “good,” but, with so many taking advantage of a business like Airbnb and Uber, there are many benefits to the sharing economy model. These platforms are putting millions to work; tapping latent assets; making travel easier, less expensive and more convenient; and bringing resources to some previously underserved communities, as is evidenced by the strong support of communities of color in places like New York City that have been historically underserved by traditional taxi providers.⁴⁶

Yet, the absence of oversight and regulation comes at a price. There are reasons for rules governing the operation of cabs and hotels that go beyond simply serving a gatekeeping function that protects incumbents from challengers, maintains tax revenue and licensing fees, and gives government regulators something to do. There is a critical consumer protection component of regulations, especially in the industries where sharing economy platforms are flourishing. Government, primarily at the state and local level, must exercise its police power to monitor the safety of the goods and services offered in these sectors of the economy. Returning to the notion of trust, the government oversight of these sectors helps facilitate commerce; government offers its “seal of approval” by granting licenses, permitting providers to begin and continue operating, and prescribing rules for operating within the sector. This oversight serves as a stand-in for trust; if government licenses the provider and the provider is in compliance with the rules for operation required of the relevant industry, these actions in conformity with the regulatory regime will engender consumer confidence.⁴⁷

ward arrangements can foster trust and trustworthiness. See, e.g., Stewart Macaulay, *Non-Contractual Relations in Business*, 28 AM. SOC. REV. 55, 64 (1963). Karen Eggleston et al., *The Design and Interpretation of Contracts: Why Complexity Matters*, 95 NW. U. L. REV. 91, 118–19 (2000).

46. Kelly Weill, *Shifting Tactics, Uber Hits City on Race Issues*, POLITICO N.Y. (July 14, 2015, 5:07 PM), <http://www.capitalnewyork.com/article/city-hall/2015/07/8572061/shifting-tactics-uber-hits-city-race-issues> [https://perma.unl.edu/T5ND-9394] (describing Uber’s tactics of enlisting leaders from communities of color in New York City for support).

47. As President Obama explained, the need for regulatory reform in the financial industry, which led to the passage of a financial reform package through Congress in 2010, was in part motivated by a desire to restore trust to the financial system. Press Release, The White House, Remarks by President Barack Obama

The recent scandal involving Volkswagen's manipulation of the emissions output of several of its diesel-powered engines helps illuminate some of the questions regarding trust that arise when government seeks to regulate an industry and a regulated entity attempts to evade that oversight. Government fuel efficiency and emissions standards are one of the main sources of information for consumers about the cars they purchase, and consumers trust the information generated by this regulatory regime in making decisions about which cars to purchase and drive. Without government-generated data related to this information, consumers would have no way to comparison shop among vehicle makes and models and would not be able to choose the car with the profile that best matches their needs.⁴⁸ In order to promote the supposed fuel efficiency of its diesel engines, and the extent to which they were "clean burning" (meaning they emitted fewer harmful emissions into the atmosphere than traditional combustion engines) Volkswagen manipulated the means of monitoring the emissions of its engines so that when tested by government regulators, they could fool the test.⁴⁹ Through its attempts to beat the system, one designed to foster trust and confidence, Volkswagen ended up destroying consumer trust and is already facing class action lawsuits based on fraud, i.e., the claim that trust has been breached, for these actions.⁵⁰ Thus, the Volkswagen example highlights the critical role that regulatory oversight plays in fostering consumer trust and reveals one way that trust can be threatened: when regulated entities seek to manipulate and cheat the regulatory system for their own gain.

When regulators fail to provide adequate oversight, the public can also lose faith in regulators and the regulatory system itself. The recent scandal involving the Internal Revenue Service's Exempt Organizations Division reveals how regulators, who used otherwise apolitical

on Executive Compensation with Sec'y Geithner (Feb. 4, 2009), <https://www.whitehouse.gov/the-press-office/remarks-president-barack-obama-executive-compensation-with-secretary-geithner> [<https://perma.unl.edu/9HM7-AX29>].

48. Such a regime is founded on the basis of using disclosure as a way of fostering market discipline. This type of disclosure regime is precisely what was adopted in recent financial reform legislation. U.S. S. COMM. ON BANKING, HOUS. & URBAN AFFAIRS, BRIEF SUMMARY OF THE DODD-FRANK WALL STREET REFORM AND CONSUMER PROTECTION ACT (2010), http://www.calstrs.com/sites/main/files/file-attachments/070110_dodd_frank_wall_street_reform_comprehensive_summary_final.pdf [<https://perma.unl.edu/5VBT-EHUG>].
49. Tom Krisher, *AP News Guide: A Look at the Volkswagen Emissions Scandal*, ASSOCIATED PRESS (Nov. 5, 2015 7:52AM), <http://bigstory.ap.org/article/2290770da8bd4b8c8e9114e85bc47a/ap-news-guide-look-volkswagen-emissions-scandal> [<https://perma.unl.edu/DP78-ZK2D>] (providing an overview of the Volkswagen emissions scandal).
50. Bourree Lam, *Phase Two of the Volkswagen Scandal: Lawsuits*, ATLANTIC (Sept. 29, 2015), <http://www.theatlantic.com/business/archive/2015/09/vw-volkswagen-lawsuits-emissions-scandal/407800/>.

regulatory mechanisms for political ends, undermined trust.⁵¹ We also see the same tension between trust, oversight, and deceit play out in professional sports, as doping scandals in professional baseball have turned record breaking feats into symbols not of achievement, but of deception.⁵² Similarly, in international soccer, FIFA's bribery scandal, which permeates all aspects of the sport, has caused a serious blow to trust in the system itself. In these examples, the perceived complicity of the stakeholders in the system in doping and bribery has threatened not only the integrity of regulatory and oversight regime, but also of the games themselves. When the customers (here, the sports' respective fan bases) do not trust the regulatory regime to police inappropriate conduct, it undermines the faith in the system itself.⁵³ Such incidents of the failure of regulatory systems to function properly, which, in turn, undermine public trust, are so frequent that one can hardly pick up a newspaper without spotting them. On a single day in January 2016, one could read of such stories of the failure of regulatory systems, from the silly (the so-called "Deflategate Scandal" involving American football and equipment tampering)⁵⁴ to the tragic (the Flint, Michigan, poisoned water scandal).⁵⁵ In Michigan, Governor Rick Snyder recently gave his annual State of the State address and discussed the breach of trust the Flint scandal has exposed: "Government failed you: federal, state and local leaders by breaking the trust you placed in us." He vowed to try to win back that trust: "The people of Flint have chosen a new Mayor and I am personally committed to work hand-in-hand with Mayor Weaver so that we can rebuild the trust that has been broken."⁵⁶

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51. Katherine Levine Einstein & David M. Glick, *Scandals, Conspiracies and the Vicious Cycle of Cynicism* (Aug. 30, 2013) (unpublished manuscript), <http://sites.bu.edu/dmglick/files/2014/01/BLS-IRSV5.pdf> [https://perma.unl.edu/Q2NE-A42Z] (suggesting IRS scandal undermined trust in government).
 52. The failure of Major League Baseball to police itself around steroids led to calls for outside regulators. MARK FAINARU-WADA & LANCE WILLIAMS, *GAME OF SHADOWS: BARRY BONDS, BALCO, AND THE STEROIDS SCANDAL THAT ROCKED PROFESSIONAL SPORTS* 221 (2006).
 53. For a discussion of the impact of the FIFA scandal on fan trust, see Richard Whittall, *FIFA Needs a Miracle*, *NEW YORKER* (June 22, 2015), <http://www.newyorker.com/news/sporting-scene/fifa-needs-a-miracle> [https://perma.unl.edu/MKH4-NRCU].
 54. Joe Nocera, *True Scandal of Deflategate Lies in the N.F.L.'s Behavior*, *N.Y. TIMES* (Jan. 22, 2016), http://www.nytimes.com/2016/01/23/sports/football/nfl-ignores-ball-deflation-science-at-new-england-patriots-expense.html?_r=0.
 55. Julie Bosman & Monica Davey, *Anger in Michigan over Appointing Emergency Managers*, *N.Y. TIMES* (Jan. 22, 2016), <http://www.nytimes.com/2016/01/23/us/anger-in-michigan-over-appointing-emergency-managers.html>.
 56. Governor Rick Snyder, 2016 Michigan State of the State Address (Jan. 19, 2016), http://www.michigan.gov/documents/snyder/2016_Michigan_State_of_the_State_Transcript_511676_7.pdf [https://perma.unl.edu/94KW-XHJX].

A regulatory regime designed to promote the integrity of an industry by ensuring consumers are not harmed by the providers of goods and services within that industry is one that instills trust in not just those providers but also the regulatory regime itself.⁵⁷ Since sharing economy platforms seek to operate with a lower threshold of regulatory oversight, they must seek out ways to engender that trust, while maintaining some degree of freedom from oversight, which is essential to bring about the reduction in transaction costs necessary for sharing economy economic models. The legal industry also faces this challenge. It must insulate the delivery of legal services from extensive regulation while instilling trust—trust in a particular attorney, trust in the oversight regime, and trust in the legal system itself—that encourages clients and potential clients to seek out means of legal recourse as opposed to other, extrajudicial means of resolving disputes.⁵⁸ The similarities between the delicate role of oversight and trust play out in both Sharing Economy platforms and the delivery of legal services. These similarities serve as an additional reason to review the legal profession's approach to finding the correct balance between oversight and independence, trust, and regulation in order to inform any approach to regulating the sharing economy.

C. Consumer Protection in a Relationship Designed to Encourage Creativity and Innovation, While Generating Profit

There is a final similarity between sharing economy platforms and the delivery of legal services that also suggests one can draw lessons from the latter in service of designing a regulatory approach for the former. Just as intensive regulation of sharing economy relationships can pose regulatory challenges because of the peer-to-peer nature of such relationships—similar to the attorney–client relationship—there is another reason that sharing economy platforms, like activities carried out by attorneys, might seek to shield themselves from extensive oversight. As in the attorney–client relationship, sharing economy platforms seek a degree of freedom from oversight so that they can continue to iterate, innovate, and explore new models of service delivery as engines of economic growth, consumer convenience, and profit.⁵⁹ If an attorney's actions were subject to constant oversight

57. Turning once again to the financial system, we see the central role that trust plays, not just in financial markets, but also the role of a regulatory regime in fostering that trust. See, e.g., Ronald J. Colombo, *The Role of Trust in Financial Regulation*, 55 VILL. L. REV. 577 (2010).

58. On the role of trust in the legal system and vigilantism, see Tom R. Tyler, *Citizen Discontent with Legal Procedures: A Social Science Perspective on Civil Procedure Reform*, 45 AM. J. COMP. L. 871 (1997).

59. For a discussion of the need to balance regulation with innovation in the Sharing Economy, see Knowledge@Wharton, *Sharing Economy 2.0: Can Innovation and*

and review, especially by the State, it is hard to imagine attorneys developing creative and groundbreaking legal arguments, especially those challenging state power. In the last seventy years, creative lawyering has helped end de jure school segregation and Jim Crow laws, overturned wrongful convictions, and brought about the victory in the marriage equality campaign. Creative lawyering is a critical font of social change, and the independence of the legal profession is a central component of that creativity.⁶⁰

While lawyers can play a significant role in social change, this role does not need to leave them destitute. The independence that fosters creativity can also result in financial gain for the lawyer. No one expects lawyers to work for nothing; they are entitled to earn a living, and the need to give them independence, while serving clients with zeal, is also balanced against the lawyer's interest in generating earnings from his or her effort.⁶¹ Thus, the lawyer's role is one that balances fealty to the client and his or her cause with the ability to earn an income from the work. Moreover, the lawyer cannot exploit the position of trust he or she holds to take advantage of the client. Similarly, the lawyer should not exploit his or her position of trust as an advocate for a client to threaten the integrity of the legal system, to cause unnecessary harm to third parties, or to harm society as a whole. As a result, regulation of the profession seeks to strike this balance between independence, consumer protection and profit—between the right to a degree of freedom to practice one's craft while earning a living, remaining loyal to the client, and maintaining the integrity of the legal system as a whole. And it is the need to strike this balance that makes regulation of the legal profession an ongoing challenge, even as the law, client needs, and society evolve.⁶²

The best, most creative, and possibly most successful lawyers are those able to exploit their independence to generate creative arguments and innovative modes of representation in the zealous, but lawful, pursuit of their clients' goals. The lawyer is operating at the top of the profession when he or she converts his or her skills and abilities into constructive pursuits that preserve and further the client's inter-

Regulation Work Together?, PARIS TECH REV. (Dec. 31, 2014), <http://www.paris-techreview.com/2014/12/31/sharing-economy-regulation/> [<https://perma.unl.edu/7ULV-9SHX>] and Molly Cohen & Arun Sundararajan, *Self-Regulation and Innovation in the Peer-to-Peer Sharing Economy*, 82 U. CHI. L. REV. DIALOGUE 116 (2015).

60. See, e.g., FED. R. CIV. P. 11 advisory committee's note to 1983 amendment (stating that Rule 11 "is not intended to chill an attorney's enthusiasm or creativity in pursuing factual or legal theories.").

61. See, e.g., *Bates v. State Bar of Ariz.*, 433 U.S. 350, 368 (1977) (acknowledging the "real-life fact that lawyers earn their livelihood at the bar").

62. MONROE H. FREEDMAN & ABBE SMITH, *UNDERSTANDING LAWYERS' ETHICS* § 4.03 (4th ed. 2010) (describing the lawyer's interest in earning a living as having moral implications).

ests, while acting in a manner consistent with the lawyer's professional obligations. In an adversarial system, clients and society are best served by the lawyer who pursues his or her clients' interests with zeal, but "within the bounds of the law," a phrase common in the rules that govern the profession.⁶³

Similarly, the most successful sharing economy platforms are those that have proven creative in translating technological innovation into incredibly successful companies and business models. In addition, they seem to operate best in environments where they press for competitive advantages that often hinge on their ability to exploit a lack of regulatory oversight. A range of sharing economy companies operate in this way. The most prominent example of this is probably Uber, which provides mostly unregulated services that look a lot like those provided by taxis, even in many markets with robust oversight regimes of the taxi industry.⁶⁴ Similarly, LegalZoom offers a range of services akin to legal services but, at least arguably, without crossing the line into the regulated market for legal services governed by unauthorized practice of law statutes.⁶⁵ Sharing economy platforms thus look to exploit regulatory "holes" to develop their competitive advantage. But does this exploitation come at a price in terms of consumer protection? And can sharing economy platforms learn from the manner in which oversight of the legal profession has sought to balance innovation and profit with regulation?

There is an obvious role for consumer protection in the delivery of sharing economy goods and services. Sharing economy providers should not be able to operate in a way that harms consumers and puts the general public at risk. A reckless Uber driver threatens not just his or her passengers but passengers in other cars on the road and pedestrians in cross- and sidewalks. An Airbnb host who rents out his or her apartment or home to unruly guests who create a constant stream of traffic, loud parties, and disruptive behavior can impact

63. This phrase appeared in the *Model Code of Professional Responsibility* as Canon 7, which provided that "[a] lawyer should represent a client zealously within the bounds of the law." MODEL CODE OF PROF'L RESPONSIBILITY CANON 7 (AM. BAR ASS'N 1980). The Model Rules have not adopted this language, preferring the following: "The law, both procedural and substantive, establishes the limits within which an advocate may proceed. However, the law is not always clear and never is static. Accordingly, in determining the proper scope of advocacy, account must be taken of the law's ambiguities and potential for change." MODEL RULES OF PROF'L CONDUCT r. 3.1 cmt. 1 (AM. BAR ASS'N 2013).

64. For a comparative description of regulations in the U.S. taxi industry, see GORMAN GILBERT & ROBERT E. SAMUELS, *THE TAXICAB: AN URBAN TRANSPORTATION SURVIVOR* 142–55 (1982).

65. For a discussion of some of LegalZoom's wrangling over the effect of the unauthorized practice of law provision on its work, see Raymond H. Brescia et al., *Embracing Disruption: How Technological Change in the Delivery of Legal Services Can Improve Access to Justice*, 78 ALB. L. REV. 553, 583–84 (2014/2015).

neighboring residents. Guests, too, can fall prey to reckless or predatory hosts, who may assault their guests or rent space that is unfit and dangerous for human habitation.⁶⁶ While there are clear benefits that the sharing economy brings for society, there is also clearly a need for some degree of oversight over these innovative platforms. Finding the right balance between oversight and innovation finds parallels in the manner in which the legal profession is regulated.

Questions about how to strike this balance between regulation, oversight, and innovation have been at the center of discussions about how best to regulate the legal profession for centuries. These questions permeate all aspects of these discussions. They implicate not just the scope or contours of regulation, but also the issue of who gets to regulate the profession: who writes the rules and who oversees their enforcement.

But the profession of law is not just about innovation or even altruism. Indeed, just as the debate around regulating the sharing economy has lurking beneath it the issue that sharing economy platforms are businesses, out to make profits, boost their valuations, and lure investors, the legal industry has sought to elevate itself to the status of a profession, while recognizing the fact that lawyers must earn a living.⁶⁷ Indeed, any discussion of the scope and content of legal profession regulation has always sought to strike another balance: between the obligations of a lawyer to his or her client, to the profession, and to society as a whole and the lawyer's need to receive payment for his or her work.⁶⁸ This need cannot overshadow the interests of the client, but it also cannot be overlooked entirely. A lawyer's role should not lead to penury in the furtherance of the interests of the client; at the same time, the lawyer cannot take advantage of the special position he or she holds in relation to the client to exploit that position to the detriment of the client. Against the backdrop of the lawyer's interest in earning a living is also the need to protect the client's interests and to ensure the lawyer does not abuse the trust the client has in him or her for his or her own private gain⁶⁹

66. For the tragic story of the death of the father of journalist Zak Stone while staying in an Airbnb rental, see Zak Stone, *Living and Dying on Airbnb*, MEDIUM (Nov. 8, 2015), <https://medium.com/matter/living-and-dying-on-airbnb-6bff8d600c04#r469j9ey4> [<https://perma.unl.edu/T7VG-72BJ>].

67. Rob Atkinson, *Growing Greener Grass: Looking from Legal Ethics to Business Ethics, and Back*, 1 U. ST. THOMAS L.J. 951 (2004) (discussing the propriety of lawyers seeking to earn a living while practicing their profession).

68. MODEL RULES OF PROF'L CONDUCT Preamble para. 9 (AM. BAR ASS'N 2013).

69. As Comment 1 to Model Rule 1.8 makes clear, a "lawyer's legal skill and training, together with the relationship of trust and confidence between lawyer and client, create the possibility of overreaching when the lawyer participates in a business, property or financial transaction with a client." For these reasons, the Model Rules impose limits on the types of business transactions a lawyer may enter into

Thus, we see in this tension—the need to offer lawyers some degree of latitude and independence while enabling them to receive payment for their services without doing so to the disadvantage of a client—another key parallel to the interests to be balanced when considering regulation of the sharing economy. It encapsulates the interests to be served and considered when striving for creativity, profit, and consumer protection. Since the legal profession has sought to strike this balance over the centuries, along with the other interests described above, which also find parallels in any discussion over regulation of the legal profession and the sharing economy, there is value in reviewing the history of the regulation of the legal profession to understand the ways that stakeholders have addressed these issues and have balanced independence, creativity, profit, and consumer protection. While no one would say the regulation of the legal profession has been perfect, one cannot dispute that the history of this regulation seems to exhibit a balancing of these issues and tensions to arrive at a well-established infrastructure for providing oversight of the profession.⁷⁰ This infrastructure attempts to find the right relationship between independence and consumer protection, using somewhat familiar but somewhat unique regulatory techniques, approaches, and mechanisms. The next Part explores this history and identifies the ways that stakeholders who have had a role in setting the rules for the profession and enforcing them have attempted to strike the balance between these competing interests. It is to these issues that I now turn.

III. THE EVOLUTION OF REGULATION OF THE LEGAL PROFESSION

A. Brief History of Regulation of the Legal Profession, from the Colonial to the Contemporary Eras

As long as there has been civil society in the United States, there have been lawyers, but they have not always been welcome. During the Colonial Era, they were, at best, tolerated in some colonies and outlawed in others.⁷¹ By the time of the American Revolution, however, many had risen to prominence, and nearly half of the signers of

with a client, and sets up procedures for those in which such transactions are permitted. MODEL RULES OF PROF'L CONDUCT r. 1.8 cmt. 1 (AM. BAR ASS'N 2013).

70. A recounting of the centuries-long debate over legal ethics is well beyond the scope of this Article. Representative scholarship on legal ethics include: DAVID LUBAN, *LAWYERS AND JUSTICE: AN ETHICAL STUDY* (1988); DANIEL MARKOVITS, *A MODERN LEGAL ETHICS: ADVERSARY ADVOCACY IN A DEMOCRATIC AGE* (2008); DEBORAH L. RHODE, *IN THE INTERESTS OF JUSTICE: REFORMING THE LEGAL PROFESSION* (2000); WILLIAM H. SIMON, *THE PRACTICE OF JUSTICE: A THEORY OF LAWYERS' ETHICS* (1998).

71. LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 53 (3d ed. 2005).

the Declaration of Independence and a majority of the delegates to the Constitutional Convention were lawyers.⁷² Gaining the right to practice law was not that complicated during the late eighteenth century; it typically consisted of an apprenticeship with a local lawyer and possibly an “examination” by a local judge or lawyer, which could consist of as little as a three or four basic questions about the law, an affidavit from a personal reference, or both.⁷³ Lawyers protected their monopoly on the practice of law by not accepting apprentices, and it was not uncommon for the lawyers in a community to come together and regulate the influx of new lawyers simply by agreeing to limit the number of apprentices one lawyer could host.⁷⁴ Some lawyers found that they enjoyed hosting apprentices so much that they devoted their energies to supervising apprentices, and the first schools of law were born.⁷⁵

By the time of Alexis de Tocqueville’s visit to the United States in the 1830s, the legal profession had assumed a more prominent role in society than in pre-colonial times, as he would dub them the closest thing to an aristocracy that the US had at the time.⁷⁶ Nevertheless, the anti-elitist sentiments of the Jacksonian Era led to a weakening of the standing of lawyers in society, while barriers to entry to the profession were low.⁷⁷ By the end of the nineteenth century, the growth in population and in the immigrant populations in the New World meant an expansion of the size of the legal profession and the beginnings of a change in demographics of those who practiced within it.

A range of concerns, some of them legitimate and some of them shameful, sparked the beginning of both the American Bar Association (ABA), founded in 1878, and the American Association of Law Schools (AALS), founded in 1900. Both were concerned with the quality of attorneys practicing law and professed a desire to protect the general public from unqualified rubes. But the ABA was at the time

72. John V. Orth, *Common Law: Historical Roots*, in *THE OXFORD COMPANION TO AMERICAN LAW* 129 (Kermit L. Hall et al. eds., 2002).

73. For a description of the attorney admissions process in the nineteenth century, see Carol M. Langford, *Barbarians at the Bar: Regulation of the Legal Profession through the Admissions Process*, 36 *HOFSTRA L. REV.* 1193, 1200–01 (2008) and citations contained therein.

74. RICHARD L. ABEL, *AMERICAN LAWYERS* 43 (1989); 1 ANTON-HERMANN CHROUST, *THE RISE OF THE LEGAL PROFESSION* 201 (1965).

75. Friedman, *supra* note 71, at 237–38.

76. 1 ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 279 (Phillips Bradley ed., Alfred A. Knopf, Inc. 1946) (1835).

77. On the role of lawyer regulation in the Jacksonian Era, see ERWIN N. GRISWOLD, *LAW AND LAWYERS IN THE UNITED STATES: THE COMMON LAW UNDER STRESS* 20 (1965); ABEL, *supra* note 74, at 4–5; Mary M. Devlin, *Historical Overview: The Development of Lawyer Disciplinary Procedures in the United States*, 7 *GEO. J. LEGAL ETHICS* 911, 918 (1994).

an “elitist organization”⁷⁸ that limited its membership and excluded African-American and women attorneys for many years.⁷⁹ There was a fear that opening up the profession to non-white, non-male lawyers would not just diminish the profession in the eyes of the public, but would also threaten the livelihoods of incumbent practitioners. The birth of more stringent quality controls was motivated by both a desire to preserve the monopoly of the legal profession for certain types of individuals as well as the more laudable goal of protecting the reputation of the profession and the interests of the public in obtaining quality representation.⁸⁰

During this period, courts, bar associations, and law schools collaborated to create a clear pipeline to the profession, with a preference for attendance at a law school approved by the courts but also accredited by the ABA and the AALS. Whereas many lawyers at the turn of the nineteenth to the twentieth centuries still obtained their ability to practice through an apprenticeship, just a few decades later, a majority of newly admitted attorneys obtained access to a now formal bar examination by studying law at a law school—first for two years and then for three.⁸¹ While the ability to sit for some state bar examinations after a shorter stint in law school and a period of apprenticeship still exists on the books in several states, actually obtaining one’s legal education in this way is virtually unheard of today.⁸²

While developing standards for law schools and bar admission, the practicing bar, through the ABA and local state bar associations, began to formulate ethical guidelines for lawyers. In 1908, the ABA passed its *Canons of Professional Ethics*.⁸³ These were merely guidelines and difficult to enforce.⁸⁴ It was not until 1970 that the ABA

78. Lloyd B. Snyder, *Rhetoric, Evidence, and Bar Agency Restrictions on Speech by Attorneys*, 28 CREIGHTON L. REV. 357, 362 (1995).

79. Helia Garrido Hull, *Diversity in the Legal Profession: Moving from Rhetoric to Reality*, 4 COLUM. J. RACE & L. 1, 4 (2013).

80. For a recounting of some of the efforts of the ABA to preserve the dominant status of white, Anglo-Saxon males in the profession, see JEROLD S. AUERBACH, *UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA* 63–73, 107–08 (1976). For a description of the goals of some of the law schools in the late nineteenth century, see George Critchlow, *Beyond Elitism: Legal Education for the Public Good*, 46 U. TOL. L. REV. 311, 322 (2015) (arguing “[t]he goal of many of these schools was explicitly elitist.”).

81. BENJAMIN H. BARTON, *GLASS HALF FULL: THE DECLINE AND REBIRTH OF THE LEGAL PROFESSION* 135–136 (2015).

82. *See, e.g.*, Robertson B. Cohen, *An Alternative to Law School: The Apprenticeship Model*, 38 COLO. LAW. 83, 83–84 (2009) (describing several states where individuals who combine some traditional course of study with a period in an apprenticeship-type setting are permitted to sit for the bar exam).

83. Douglas R. Richmond, *Why Legal Ethics Rules Are Relevant to Lawyer Liability*, 38 ST. MARY’S L.J. 929, 935 (2007).

84. Andrew R. Herron, *Collegiality, Justice, and the Public Image: Why One Lawyer’s Pleasure Is Another’s Poison*, 44 U. MIAMI L. REV. 807, 819–820 (1990).

passed the modern ethics code, the *Code of Professional Responsibility*, which was adopted in nearly every state⁸⁵ and then followed by the ABA's passage of the *Model Rules of Professional Conduct*, in 1983, which still exist, though routinely modified and amended over the years, to this day.⁸⁶

As a complement to these formal codes of conduct and admission criteria a body of law has also emerged over time through the courts to hold attorneys liable for breaches of their professional obligations. Indeed, legal malpractice, described further below, is a well-established body of law and mechanism for reining in attorney misconduct, which has emerged as a complement to attorney codes of conduct and which, in some respects, offers clients a forum in the courts to enforce those codes of conduct when they are breached. Thus, in addition to playing a role in the attorney admission process, courts also are involved in adjudicating disputes regarding alleged attorney misconduct.

What this very brief history of the evolution of a regulatory regime to govern the legal profession leaves out are the key questions and themes that have emerged over time as critical stakeholders—lawyers, courts, legislators, and consumers—have grappled with in bringing the present regime into existence. The next section explores these questions and themes, and it leads further discussion of the specific components of the regulatory regime that has emerged.

B. Key Questions and Themes Underlying the Evolution of the Regulation of the Legal Profession

Lurking beneath this description of the evolution of the regulatory regime governing lawyers are a number of questions that surface throughout these periods when the appropriate scope and substance of oversight of the legal profession have been considered. First, who does the regulating? Second, who writes the rules? Third, how specific should those rules be? Fourth, how should those rules be enforced? Fifth, how does one balance the need for lawyers against the importance of quality control and the need to limit access to the profession to only those qualified to provide legal services—that is, as a means of consumer protection?

In response to addressing these questions, several themes have emerged as the regulatory infrastructure has evolved. First, the legal profession's unique role in society demands both self-regulation and a

85. Richmond, *supra* note 83.

86. MODEL RULES OF PROF'L CONDUCT (AM. BAR ASS'N 2013). For a list of states that have adopted these Rules and their dates of adoption, see State Adoption of the ABA Model Rules of Professional Conduct, AM. BAR ASS'N, http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/alpha_list_state_adopting_model_rules.html [https://perma.unl.edu/DDK5-Z4LG].

degree of independence, but also that such independence not be boundless; it should ultimately serve broader societal goals like the rule of law. Second, the legal profession should make a meaningful effort to engage in self-regulation or lose the ability to regulate itself to outside entities. Third, the legitimacy of the profession and its own existence as a profession bring with it a need to regulate entry into it, but the regulation of that entry should not be too restrictive, or once again, the profession will lose its ability to self-regulate. Fourth, the legal profession is one that can generate profit for its members. These themes will be discussed, in turn, below.

1. *Self-Regulation to Secure Professional Independence and Uphold the Rule of Law*

A central component of regulatory oversight of the legal profession is the concept of “self-regulation,” the idea that lawyers have taken it upon themselves to regulate themselves. While this is not entirely true—the courts, for example, play a significant role in oversight of the profession—much of this oversight begins with the profession itself.⁸⁷ Lawyers themselves, often acting through bar associations at all jurisdictional levels, play a significant role in the regulation of the profession in a range of ways. They propose codes of conduct, as the ABA has done and continues to do, provide oversight of law schools and monitor entrance to the profession through so-called integrated bar associations (where membership in the state bar association is a pre-requisite to the practice of law in a jurisdiction), and issue ethics opinions that offer lawyers guidance on their professional responsibilities.

The main argument for the legal profession to play such an outsized role in policing the profession is that only lawyers understand what lawyers do and can take into account the subtle interplay of attorney obligations and responsibilities when assessing the propriety of attorney conduct. In some respects, this relates to the notion of the legal profession as a “profession” under the formal definition of the term. According to one definition, a profession is “a calling requiring specialized knowledge and often long and intensive academic preparation.”⁸⁸

Let us leave the second part of the definition for a later discussion, but the first part, which identifies “specialized knowledge” as one of the components of a profession, is perhaps the source of the legal pro-

87. For a critique of the “myth” of self-regulation, one that spells out the ways that the legal profession is a “heavily regulated industry” and articulates the harm caused by perpetuation of the myth, see Fred C. Zacharias, *The Myth of Self-Regulation*, 93 MINN. L. REV. 1147 (2009).

88. *Profession*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/profession> [<https://perma.unl.edu/A7ZU-RHSA>].

profession exceptionalism that justifies self-regulation of the profession by the profession. The argument is based on the notion that only lawyers possess this specialized knowledge and can know what it is like to study the law; practice the art; bear responsibility for a client's well-being; and balance the responsibilities of being a lawyer with one's duty to the profession, the client, the legal system, and society at large. As a result, the legal profession has forcefully argued for the primacy of its role in providing oversight over the profession.⁸⁹

A central reason for self-regulation as the cornerstone of the law governing lawyers is the need for a degree of professional independence; that, when exercising their professional judgment, lawyers should have a degree of latitude to do so. Apart from clear violations of their professional obligations, they must have the ability to exercise professional judgment, especially in areas where the lawyer's obligations are not clear. They should also have the freedom to make tactical decisions free from second guessing. While there are some bright lines—like rules against stealing client funds—the violations of which can result in serious penalties, including disbarment, the rules guiding the legal profession offer some degree of guidance but give practitioners a degree of flexibility to exercise their judgment to operate within them.⁹⁰ A certain degree of latitude should be afforded attorneys, first, so that they may operate in such a way as to enable them to engage in creative arguments to advance the evolution of the law, and, second, so they may make critical strategic decisions that should not be second guessed by oversight bodies or the courts.⁹¹

The argument for this independence centers on the lawyer's role as a champion of democracy and the advancement of individual liberty

89. See, e.g., Allen Blumenthal, *Attorney Self-Regulation, Consumer Protection, and the Future of the Legal Profession*, 3 KAN. J.L. & PUB. POL'Y 6 (1993/1994) (providing justifications for attorney self-regulation); W. Bradley Wendel, *Foreword: The Profession's Monopoly and Its Core Values*, 82 FORDHAM L. REV. 2563 (2014) (outlining debate over the need for attorney self-regulation). For a critique of the justifications for self-regulation, see DEBORAH L. RHODE, *IN THE INTERESTS OF JUSTICE: REFORMING THE LEGAL PROFESSION* 143-147 (2000).

90. As an example of this discretion, the Supreme Court rejected a rigid set of guidelines for defense counsel when assessing the effective assistance of counsel in the criminal defense setting, saying any such rules "would interfere with the constitutionally protected independence of counsel and restrict the wide latitude counsel must have in making tactical decisions." *Strickland v. Washington*, 466 U.S. 668, 689 (1984).

91. For an overview of the different aspects and justifications for lawyer independence, see Robert W. Gordon, *The Independence of Lawyers*, 68 B.U. L. REV. 1 (1988). For the argument that independence and oversight are not incompatible when it comes to regulating the legal profession, see David B. Wilkins, *Who Should Regulate Lawyers*, 105 HARV. L. REV. 799 (1992).

and societal well-being.⁹² The preamble to the *Model Rules of Professional Conduct* emphasizes this notion: “An independent legal profession is an important force in preserving government under law, for abuse of legal authority is more readily challenged by a profession whose members are not dependent on government for the right to practice.”⁹³ Whether it was John Adams defending British troops after the Boston Massacre before the nation’s birth,⁹⁴ Alexander Hamilton defending tory landowners in its early years,⁹⁵ or David Boies and Ted Olson, opponents in the *Bush v. Gore* litigation teaming up to promote the cause of marriage equality through the courts,⁹⁶ lawyers play a central role in the causes that contribute to the evolution of the law, protect the nation’s democratic ideals, and preserve the notion of the rule of law.⁹⁷

This notion of the rule of law means that lawyers have a degree of independence, but that their independence is not boundless. Indeed, that independence brings with it a degree of freedom that is limited by the notion that lawyers must not use the courts to further their clients’ interests at all costs, by doing such things as fabricating claims or evidence. For example, Rule 11 of the *Federal Rules of Civil Procedure*, as well as many of its state corollaries, provides that attorneys must only assert “claims, defenses, and other legal contentions” that are “warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law.”⁹⁸ This is echoed in Rule 3.1 of the ABA’s *Model Rules of Professional Conduct* which provides that a lawyer shall not bring a claim or assert a factual contention “unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for

92. For a discussion of some components of this type of lawyer independence, see Bruce A. Green, *Lawyers’ Professional Independence: Overrated or Undervalued*, 46 AKRON L. REV. 599 (2013).

93. MODEL RULES OF PROF’L CONDUCT Preamble para. 11 (AM. BAR ASS’N 2013). Interestingly, the preceding sentence in this paragraph links this independence explicitly to self-regulation: “Self-regulation also helps maintain the legal profession’s independence from government domination.” *Id.*

94. JOHN ADAMS, ADAMS’ ARGUMENT FOR THE DEFENSE (Dec. 3-4, 1770), in 3 LEGAL PAPERS OF JOHN ADAMS 242 (L. Kinvin Wroth & Hiller B. Zobel eds., 1965).

95. Daniel J. Hulsebosch, *A Discrete and Cosmopolitan Minority: The Loyalists, the Atlantic World, and the Origins of Judicial Review*, 81 CHI.-KENT L. REV. 825, 844 (describing Alexander Hamilton’s role defending American and British loyalists after the American Revolution).

96. DAVID BOIES & THEODORE B. OLSON, REDEEMING THE DREAM: THE CASE FOR MARRIAGE EQUALITY (2014) (describing the legal campaign for marriage equality that culminated in the successful challenge to California’s Proposition 8).

97. On the role of lawyer independence in promoting the rule of law, see Gordon Turriff, *The Importance of Being Earnestly Independent*, 2012 MICH. ST. L. REV. 281 (2012).

98. FED. R. CIV. P. 11.

an extension, modification or reversal of existing law.”⁹⁹ Thus, while lawyers should have a degree of independence to pursue creative claims, this independence is not without limits, and other societal values serve as a check on that independence. If an attorney’s practices within the legal system should taint that system, it would undermine faith in the system itself and make a mockery of the rule of law. The lawyer’s independence is therefore circumscribed by the very ideals it seeks to uphold: democratic values, legitimacy of legal processes, and defense of the rule of law. With the privilege of independence comes the responsibility to preserve the contours of a system within which that independence can function even as the system evolves; this is achieved through faithful adherence to preserving the legitimacy of the process—the rules of the road—by which that evolution occurs.

Against this backdrop of the need for professional independence is the notion that a regulatory regime that can provide oversight to the profession must be flexible and deal in standards, not rules. Such oversight cannot entail a so-called command-and-control approach, one where every aspect of the conduct of the actors operating under the regime is policed in an exacting and intrusive fashion. The independence essential for the functioning of the legal profession means a command-and-control approach cannot work. As stated previously, the attorney–client relationship is one that must be insulated from extensive oversight in order to permit the proper functioning of the relationship. Such proper functioning centers around the need for trust, and an aggressive regulatory regime would undermine that trust by interjecting a regulatory body into the relationship. In instances where that regulatory body—presumably, the State—was a party with a unique interest in the relationship between the attorney and the client (for example, where the client is a criminal defendant), there are obvious problems with such a regulatory approach.

The freedom from extensive oversight and regulation of the attorney–client relationship helps to foster the independence so central to the attorney’s role. The nature of the relationship is one in which a degree of judgment and creativity is essential to the very functioning of the profession. Some lawyers have winning, effective strategies, and those strategies set them apart within the market. Presumably, they help to attract new client–customers. If every decision of an attorney was subject to review and second guessing, it is likely that the practice of law would become far less creative, and there would be far less room for experimentation and innovation. The relative independence of the attorney is central to the very functioning of the profession as a profession. A command-and-control approach to regulation of the profession, as opposed to a lighter touch regime centering on

99. MODEL RULES OF PROF’L CONDUCT r. 3.1 (AM. BAR ASS’N 2013).

self-regulation as its cornerstone, is more likely to foster the independence critical to the functioning of the profession.

For these reasons, it is argued, a legal profession exceptionalism warrants a self-regulatory regime that leaves much of the standard-setting—some degree of oversight and some control over barriers to entry—to the legal profession itself.

2. *Self-Regulation to Fend Off Regulation by Outside Entities*

But apart from the argument from exceptionalism, there is also another motive that animates the call for self-regulation of the profession, and it goes to the very need for regulation. For the legal profession, the calls for self-regulation have often been motivated by a desire to fend off regulation by others. If the legal profession fails to police itself and consumers are harmed as a result, some other body or entity will likely step in to ensure consumer protection. Thus, while some may prefer fewer restrictions on the practice of law by attorneys (other than robust barriers to entry), there is an implicit understanding, sometimes made explicit, that lawyers must police themselves, otherwise others will do it for them. An ABA report on professionalism crystallized this view, arguing that if self-regulatory reform was not undertaken to combat a lack of professionalism in the bar, “far more extensive and perhaps less-considered proposals may arise from governmental and quasi-governmental entities attempting to regulate the profession.” The report continued: “The challenge remains. It is up to us to seize the opportunity while it is ours.”¹⁰⁰ In some respects, then, efforts designed to supply self-regulation of the profession are animated by a desire to head off more aggressive regulation by outside entities, like Congress or state legislative bodies, entities that will be, no doubt, populated to a certain extent by lawyers, but by no means exclusively.

Thus, self-regulation has what I might call a marketing component. The fact that self-regulation exists has itself a role to play in fending off regulation by others—to inoculate the profession from attempts by others to regulate it.

If regulation of the profession is handed over to those outside of the profession, would the profession lose its status *qua* profession? Would the profession lose control over the activities of the individuals within it? Will those outside entities, whose members do not share the same specialized knowledge as those within the profession, truly appreciate the responsibilities and the special obligations imposed on the profession such that they can serve effectively in an oversight role?

100. AM. BAR ASS'N COMM'N ON PROFESSIONALISM, “. . . IN THE SPIRIT OF PUBLIC SERVICE:” A BLUEPRINT FOR THE REKINDLING OF LAWYER PROFESSIONALISM 56 (1986).

But the legal profession, in pressing for and guarding self-regulation, must strike a delicate balance. It certainly can step in where the absence of regulation threatens consumer and societal interests in order to ward off extensive outside oversight,¹⁰¹ but overly aggressive regulation can also generate calls for a softening of the rules governing the profession. Indeed, we may be at a key inflection point where the balance threatens to tip in the other direction: toward less attorney regulation, not more. Just as calls for oversight of attorneys to ensure that consumers are protected from advocates of poor quality, in the name of consumer protection, some may argue against overly aggressive attorney regulation, particularly as such regulation may relate to the creation of aggressive barriers to entry. Entities like LegalZoom and others are testing the boundaries of unauthorized practice of law protections. If such entities provide effective services at reasonable rates, a groundswell of support may arise from the public that such services are desired more than it wants zealous monitoring of the boundaries of the practice of law.¹⁰² Similarly, as the employment rates of recent law school graduates remain unacceptably low, there have been calls for stiffer oversight of the law schools by the U.S. Department of Education, which could weaken the role of the ABA and AALS in law school accreditation.¹⁰³

Another component of self-regulation, undertaken with an eye toward fending off greater outside oversight and related to the idea that the profession is best situated to oversee itself, is that when attorneys practice together, lawyers with supervisory authority will be held responsible for failing to have appropriate protections in place to ensure the lawyers acting within the firm uphold their ethical obligations.¹⁰⁴ Supervisory attorneys are also responsible for the functioning of non-lawyer staff,¹⁰⁵ and even so-called “subordinate” lawyers are required to ensure that they and their supervisors uphold their ethical obligations.¹⁰⁶ “Self-regulation begins at home” could be the motto, and

101. Irwin D. Miller, *Preventing Misconduct by Promoting the Ethics of Attorneys’ Supervisory Duties*, 70 NOTRE DAME L. REV. 259, 260–261 (1994) (arguing that “public outcry against lawyers might be loud enough to mark the end of the profession’s privilege of self-regulation” if the profession does not ensure meaningful punishment of breaches of ethics).

102. For an argument for considering barriers to entry to the profession in light of the needs of the public, see Deborah L. Rhode & Lucy Buford Ricca, *Protecting the Profession or the Public? Rethinking Unauthorized-Practice Enforcement*, 82 FORDHAM L. REV. 2587 (2014).

103. News Release, Coburn, Boxer Call for Department of Education to Examine Questions of Law School Transparency, Office of Senator Barbara Boxer (Oct. 14, 2011), <https://www.boxer.senate.gov/?p=release&id=492> [<https://perma.unl.edu/EK4M-FZMC>].

104. MODEL RULES OF PROF’L CONDUCT r. 5.1 (AM. BAR ASS’N 2013).

105. *Id.* r. 5.3.

106. *Id.* r. 5.2.

some degree of independence for the lawyer brings with it the understanding that when lawyers act together, they can be held responsible for the actions of those with whom they formally associate. Again, however, a degree of independence is built into the system, as supervisory lawyers are held responsible only when they fail to have appropriate controls in place to prevent unethical behavior, or when they know or should have known of the lawyer's unethical conduct such that they could have taken steps to avoid or mitigate the harms that were the consequence of that conduct.

3. *Barriers to Entry*

The delicate balance between fending off stiffer regulation while not restricting consumer access to justice reveals another consistent theme in the history of the regulation of the legal profession: the desire to control entry to the profession to ward off outside competition and maintain the profession's control over the supply of individuals who can carry out the tasks that lawyers perform. Whether it was early American attorneys limiting the number of apprentices they would mentor to restrict the flow of new lawyers into the field or the ABA and AALS limiting the number of law schools that may exist, the legal profession has always played a role in restricting access to the profession. While the imposition of strong and high barriers to entry has a consumer protection component to it because it strives to ensure only qualified practitioners are allowed to practice law, it also has the effect of limiting access to the legal profession for consumers. Impose impenetrable or unreasonable barriers in the name of consumer protection and one makes access to justice more unattainable, which itself has important consumer protection effects. If limits on entry into the profession keep enough prospective lawyers out of the profession, coupled with a monopoly for the profession over the practice of law, soon enough, voices will emerge that call for lowering those barriers or to take control over the barriers away from the profession that stands to gain the most from them.

Efforts to restrict access to the profession have not always been successful, and over the last few years in particular, the legal profession has ceded much ground in this area, dropping the fight to fend off non-lawyer handling of many real estate transactions and providing tax guidance. Recently, Washington State has authorized the licensing of "limited licenses" to non-lawyers to provide services in discrete areas of law, particularly family law, permitting these licensees to

handle divorces, child custody matters, and other areas within that field.¹⁰⁷

Thus, another component of the notion of self-regulation is the idea that lawyers should play a significant role in policing the boundaries of the profession—to have a say in erecting and maintaining the barriers to entry to the profession that helps to protect the reputation of lawyers by ensuring only qualified individuals enter and provide services through the profession. Once again, the argument is that lawyers know best what it is lawyers do, and thus members of the profession should have a say in who becomes a member of that profession. This protection is also directly related to consumer protection: if only qualified, trained, and competent individuals are admitted into the ranks of the profession, it will preserve the interests of the public in receiving qualified and competent services. Here we see the second half of the definition of the profession cited earlier coming into play: i.e, the idea that a profession may be joined only after “long and intensive academic preparation.”

Such controls ultimately have the effect of controlling the flow of individuals into the profession, with obvious impacts on the cost and availability of services. Thus, one of the central themes of the regulatory scheme that has evolved over the years to cover the legal profession is the notion that members of the profession must guard and enforce the barriers to entry to preserve the reputation of the profession, provide a degree of consumer protection, and regulate the number of attorneys available in the market as a way of preserving the market share of the incumbent members of the profession.

4. *The Right to a Livelihood*

In addition to internal checks on lawyer conduct that serve as a means of regulating attorney independence, another check on the lawyer’s discretion and independence to serve the client is that the lawyer is not obligated to take whatever steps are necessary to serve the client to the point of his or her own penury. The pursuit of their client’s interests is undertaken with an eye toward their own interest in earning a living, and no lawyer must bankrupt him- or herself to carry out the wishes of a client. One aspect of this is that a tension can arise because what a client may want the lawyer to do may be inconsistent with his or her professional obligations. And by not doing what the client wants, a lawyer may jeopardize his or her relationship with that client. As the ABA recognizes, many ethical dilemmas an attorney may face arise when he or she must choose between honoring a client’s

107. See *Limited License Legal Technician Program*, WASH. STATE BAR ASS’N, <http://www.wsba.org/licensing-and-lawyer-conduct/limited-licenses/legal-technicians> [<https://perma.unl.edu/6HJH-36YU>].

wishes (and keeping that client as a result) and acting within his or her ethical limitations. As the preamble to the Model Rules articulates: “Virtually all difficult ethical problems arise from conflict between a lawyer’s responsibilities to clients, to the legal system and to the lawyer’s own interest in remaining an ethical person while earning a satisfactory living.”¹⁰⁸

This tension reveals another consistent theme surrounding the evolution of the regulation of the profession: is there a conflict between seeing the practice of law as a professional endeavor and one that views it as a business, designed for profit? Can these two notions co-exist? The profession itself promotes the belief that there is not a tension here: i.e., that the profession can exist as a profession, while permitting its members to earn a living (sometimes one that is extremely lucrative).¹⁰⁹

Thus, the regime that has evolved, described in more detail below, has done so against a backdrop of key themes. Such themes are that the legal profession’s unique role in society demands the following: self-regulation designed to promote independence; self-regulation as a means of preventing outside regulation; the ability to erect, police, and modify barriers to entry; and the ability to earn a living. We will return to these themes throughout the remainder of this Article as I highlight the extent to which these same themes might animate questions regarding regulation of the sharing economy.

C. The Legal Profession’s Regulatory Regime

From these key themes surrounding the nature of regulation of the profession, a regulatory regime has emerged. This regime provides oversight of the legal profession and has several key components: barriers to entry to service providers, limits on the authorized provision of services, codes of conduct to govern provider behavior, a means of disciplining improper conduct, an insurance regime to protect consumers, recourse for consumers through the courts and through tort liability, and a flexible and adaptable approach that strives to encourage innovation while providing consumer protection. Each of these components is discussed, in turn, below.

108. MODEL RULES OF PROF’L CONDUCT Preamble para. 9 (AM. BAR ASS’N 2013).

109. For a lament on the loss of professionalism in the pursuit of profit, see ANTHONY T. KRONMAN, *THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION* 11 (1993).

1. *Barriers to Entry*

In order to provide a good or service, one must be competent to do so. One must demonstrate a degree of skill and knowledge of the field in which one is trying to enter to ensure that providing a good or service within that field will cause no harm to consumers seeking that good or service. One of the main components of sharing economy platforms is that they usually impose low barriers to entry for providers on such platforms. But some type of barrier to entry is required, and that should hinge on the risk associated with the provision of the good or service. Many sharing economy platforms fall short in conducting an adequate level of screening of their providers, which is a by-product of having few barriers to entry. Unlike in most sharing economy contexts, however, where few barriers to entry exist, the legal profession has developed a system for imposing barriers to entry to the legal profession—even if it has done so in fits and starts. Thus, it has a well-established means for preventing individuals from providing legal services without some degree of skill, training, and a knowledge of the risks associated with failing to provide services with an appropriate level of care.

In the legal profession, aspiring lawyers must generally overcome three barriers to entry. First, they must enroll in an ABA-accredited law school, where the accreditation process itself imposes many burdens on law schools that receive approval.¹¹⁰ Most law schools train their students over a three-year course of study, although critics argue that this is too long, and some schools are exploring ways to accelerate the learning process so that it can be completed in two years.¹¹¹ Second, graduates of such law schools must then pass a state-approved bar examination. Third, whether it is the state court system or a state bar committee conducting the review, states also impose a “character” assessment of the individual applying for admission to the bar, which is undertaken to review whether the applicant can be trusted with the responsibilities that come with being a lawyer: e.g., holding client funds and property, defending a person’s liberty and even his or her

110. For a description and analysis of the law school accreditation process, see, e.g., Jay Conison, *The Architecture of Accreditation*, 96 IOWA L. REV. 1515 (2011). For a critique of the process and the role of the American Bar Association in that process, see, e.g., Gerard J. Clark, *Monopoly Power in Defense of the Status Quo: A Critique of the ABA’s Role in the Regulation of the Legal Profession*, 45 SUFFOLK U. L. REV. 1009 (2012).

111. For a critique of efforts to offer a program in which law students could earn a juris doctor degree in two years, see Kenneth Jost, *Law Schools: Is a Legal Education Worth Its Costs?*, 23 CQ RESEARCHER 353, 361 (2013). For the status of two-year degree programs, see Elizabeth Olson, *The 2-Year Law Education Fails to Take Off*, N.Y. TIMES (Dec. 25, 2015), http://www.nytimes.com/2015/12/26/business/dealbook/the-2-year-law-education-fails-to-take-off.html?_r=0.

life, etc.¹¹² Recent high-profile examples of state courts preventing applicants from obtaining bar admission include a case involving Stephen Glass, a former journalist who was denied bar membership in several states after he lost his job as a journalist because he fabricated stories,¹¹³ and another where an applicant had amassed over \$400,000 in debt, and was delinquent in payment of this debt. The court determined that this fiscal situation indicated a lack of fitness for the bar.¹¹⁴

Whether one agrees with the approach the legal profession takes, and there are many critics, it has developed, over time, a process through which candidates for entry into the profession are assessed for their fitness to practice law, whether they can master the knowledge and skills necessary to provide competent representation, and that they possess the requisite moral compass to uphold their fiduciary duties as attorneys.

2. *Unauthorized Practice of Law*

With the barriers to entry to the legal profession being somewhat high, there is a corollary to the law school/bar admission requirements that prevents individuals from entering the market without the express authority granted through the bar admission machinery: unauthorized practice of law (UPL) laws and regulations.¹¹⁵ By policing when individuals provide services that fall under the definition of the practice of law without being licensed to do so, the courts, prosecutors, bar associations, individual lawyers, and even lay parties play a role in ensuring that no one provides services to consumers that require the requisite skill and knowledge that a lawyer is supposed to possess.¹¹⁶ Through UPL statutes, state legislatures typically define

112. For an overview of these admission requirements, see Comprehensive Guide to Bar Admission Requirements, AM. BAR ASS'N (2015), http://www.americanbar.org/content/dam/aba/publications/misc/legal_education/2015_comprehensive_guide_to_bar_admission_requirements.authcheckdam.pdf [https://perma.unl.edu/J7VK-F4TW].

113. Julie Bosman, *California Denies Scorned Journalist Stephen Glass Right to Practice Law*, N.Y. TIMES (Jan. 28, 2014), http://www.nytimes.com/2014/01/28/business/media/california-denies-scorned-journalist-stephen-glass-right-to-practice-law.html?_r=0.

114. Jonathan D. Glater, *Finding Debt a Bigger Hurdle Than Bar Exam*, N.Y. TIMES (July 1, 2009), <http://www.nytimes.com/2009/07/02/business/02lawyer.html>.

115. Deborah L. Rhode, *Policing the Professional Monopoly*, 34 STAN. L. REV. 1 (1981) (providing empirical assessment of the state of laws related to unauthorized practice of law).

116. Rhode, *id.*, provides an overview of the range of entities engaged in enforcing UPL provisions. For a description of the private right of action in unauthorized practice of law litigation, see Susan D. Hoppock, *Enforcing Unauthorized Practice of Law Prohibitions: The Emergence of the Private Cause of Action and Its Impact on Effective Enforcement*, 20 GEO. J. LEGAL ETHICS 719 (2007).

what it is to engage in the practice of law and then criminalize acts that meet that definition when carried out by someone not licensed to practice law in the state. When UPL statutes are violated, they are typically violated in one of two ways. First, someone who is not licensed to practice law carries out acts that meet the definition of the practice of law. Second, someone who is licensed to practice law does so in a state in which he or she is not authorized to do so.¹¹⁷ While there are certain areas of law where licensing, or its equivalent, can occur without state bar admission (the ability to practice in special immigration courts can be handled apart from state licensing mechanisms, for example),¹¹⁸ generally speaking, the ability to practice law is a function of the state-sanctioned mechanisms for doing so (described above), carried out under the shadow of, or as a complement to, UPL statutes.¹¹⁹

3. *Codes of Conduct and Self-Regulation*

One of the challenges of the sharing economy as it evolves is the need to balance regulation and oversight with innovation. One of the distinct competitive advantages of a platform like Airbnb compared to providers in the hotel industry is the virtual absence of all regulation governing hosting through this platform. It is the proverbial “Wild West” in that few regulations govern the provision of services over many sharing economy platforms, and this leaves consumers without protections and providers without guidance on how best to offer services in a safe way. Unlike in these burgeoning sharing economy platforms, the legal industry is one where codes of conduct have been in effect for over a century. These, too, have evolved over time, but they have evolved to some degree of specificity in tune with the growing needs of customers and the profession.

As stated above, the first of these codes was adopted by the American Bar Association in 1908, and, since that time, they have been adopted in each state; have gone through several iterations; and are the subject of constant revision, reflection, and debate from within the ABA, in state bar associations, state legislatures and the courts.¹²⁰

117. For an overview of the elements of UPL, see Derek A. Denckla, *Nonlawyers and the Unauthorized Practice of Law: An Overview of Legal and Ethical Parameters*, 67 *FORDHAM L. REV.* 2581 (1999).

118. See, e.g., Careen Shannon, *To License or Not to License?: A Look at Differing Approaches to Policing the Activities of Nonlawyer Immigration Service Providers*, 33 *CARDOZO L. REV.* 437, 447–453 (2011) (describing requirements for practice before U.S. immigration courts).

119. Rhode, *supra* note 115, at 6–42 (describing enforcement mechanisms for prohibitions on the unauthorized practice of law).

120. For a brief history of the adoption of attorney codes of conduct, see Leonard M. Niehoff, *In the Shadow of the Shrine: Regulation and Aspiration in the ABA Model Rules of Professional Conduct*, 54 *WAYNE L. REV.* 3, 6–11 (2008).

These codes do not attempt to define every act or practice in which a lawyer may be engaged, nor do they anticipate every situation in which a client might find him- or herself. Rather, they serve as both guides to the members of the profession and the public regarding the types of behavior expected of legal practitioners, as well as a yardstick against which to measure attorney conduct after the fact. While also imperfect, and the subject of constant discussion, debate, and revision, they are well developed and sophisticated treatments of a wide range of issues—from avoiding conflicts of interest to handling client property and client secrets. When combined with the disciplinary machinery described below, they serve as a means of not just informing attorney behavior, but providing some oversight of such behavior as well.

In addition, as an example of the layers of protections built into the system to ensure compliance, these codes of conduct typically impose a degree of supervisor liability for the actions of subordinate lawyers and non-lawyer personnel associated with a firm. These protections and this liability strive to ensure that there is a level of oversight in place that is in close proximity to the work that is being performed by attorneys and non-attorneys on the ground. Again, however, this layer of oversight recognizes the realities of law practice and a desire for professional independence and is thus imposed with an understanding that even a supervisory lawyer cannot police every action and communication undertaken by a subordinate lawyer and non-legal staff. It requires that, at most, a supervisory lawyer must train these subordinate actors in their responsibilities and have appropriate procedures in place to ensure compliance with the rules. Knowledge of unethical conduct is imputed only when the supervisory lawyers knows or should have known of the conduct. Thus, even this requirement is not as onerous as a strict liability regime that would make the supervising attorney responsible for all acts of subordinate attorneys and non-attorney staff regardless of those supervisors' knowledge of the conduct, whether they had reason to know of the conduct, and whether they had provided guidance and training to such supervisees of their ethical obligations in advance of the inappropriate conduct to help them avoid it.

4. *Disciplinary Machinery*

Another component of the pre-existing regulatory machinery that envelops the practice of law is that attorneys, once admitted to practice law, are subject to oversight that has the power to strip them of the authority to practice law for considerable transgressions that violate client trust and cause harm to clients and the broader community. Through state disciplinary infrastructure, should a lawyer engage in conduct that calls into serious question his or her ability to practice

law in a competent fashion or that constitutes a serious breach of the ethical standards imposed on lawyers, a lawyer can lose his or her ability to practice law within a particular jurisdiction where he or she is admitted.¹²¹ This machinery is invoked by complaints filed by dissatisfied clients, opposing counsel, the courts, or the general public. Typically an adjunct to the court system in a state and subject to judicial review, the disciplinary infrastructure within a state has the ability to receive complaints, investigate them, hold hearings, and issue rulings that can mete out a range of sanctions, such as private or public admonition, suspension of the right to practice law, or its outright ban with respect to a particular attorney.¹²² In this way, the disciplinary machinery serves as a backstop to the barriers to entry. If an individual is able to overcome those barriers and gain admission, yet then proves unfit to practice law, the disciplinary machinery can step in to police attorney conduct after admission to ensure attorneys are upholding their ethical obligations after they begin practice.

5. *An Insurance Regime*

In the legal profession, lawyers are not required to have malpractice insurance, though many, if not most, do. When dealing with billion dollar deals, when a client's liberty or life is at stake, or when a client's home is threatened, a lawyer can face significant liability should he or she fail to provide competent representation. States generally do not mandate that a lawyer have an insurance policy, but some are experimenting with the idea of mandating disclosure to clients or even the general public as to whether a particular lawyer has malpractice insurance. In 2004, the ABA House of Delegates adopted a model rule for court systems to utilize that would require lawyers to disclose to their state's highest court whether they are covered by malpractice insurance.¹²³ The adopted rule stated that those courts would have leeway to consider ways to make that information available to the general public and that states could sanction or suspend lawyers who failed to comply with the rule or provided false information about their coverage. It also provided that lawyers should report any change or lapse in coverage to the courts.¹²⁴

Soon after the ABA adopted this rule, states that had not already adopted something like it began incorporating it or similar provisions

121. See, e.g., 7A C.J.S. *Attorney & Client* § 101 (describing powers of courts and other entities to disbar admitted attorneys).

122. For an overview of the disciplinary infrastructure of the various states, see Jennifer Gerarda Brown & Liana G.T. Wolf, *The Paradox and Promise of Restorative Attorney Discipline*, 12 NEV. L. J. 253, 258–274 (2012).

123. See AM. BAR ASS'N, RESOLUTION ON MODEL COURT RULE ON INSURANCE DISCLOSURE (2004), http://www.americanbar.org/content/dam/aba/migrated/cpr/client-pro/malprac_disc_rule.authcheckdam.pdf [https://perma.unl.edu/L26B-ZXBY].

124. *Id.*

in their own attorney codes of conduct. One state bar commissioner explained the reasons for pursuing the adoption of these sorts of disclosure requirements:

Why are we doing this? Is it to make life more difficult for solo practitioners or new lawyers? To increase the price of legal fees and malpractice suits against our colleagues? The answer is that disclosure or lack of minimum insurance coverage will have a positive impact on our profession: it will increase our 'professionalism,' protect the interests of our members, protect the interests of clients and serve the public.¹²⁵

In addition to mandated disclosure of malpractice insurance coverage, some states have also imposed professional fees on attorneys that go into a fund to cover clients who are harmed by attorneys who are judgment proof and/or have no malpractice insurance. Connecticut is one state that provides this sort of protection through its Client Security Fund, with the financial support for this resource coming from practicing attorneys, court, and other officials in the legal system. According to the Fund's website, the fund is designed to compensate victims of attorney misconduct who have no other recourse:

The Client Security Fund is a fund established by the rules of the Connecticut Superior Court to provide reimbursement to individuals who have lost money or property as a result of the dishonest conduct of an attorney practicing law in the State of Connecticut, in the course of the attorney-client relationship. The fund provides a remedy for clients who are unable to obtain reimbursement for their loss from any other source.¹²⁶

Similar to a workers' compensation scheme that protects workers whose employers flout their coverage requirements, an approach such as Connecticut's strives to ensure that even clients whose lawyers fail to obtain coverage will have some means of compensation when their lawyer engages in malpractice.

The purpose of these approaches to insurance—with some states requiring disclosure of insurance protection and others collecting a fee to protect the clients of the uninsured—shows how the legal profession is grappling with the issue of promoting insurance coverage for attorneys as a way to instill trust in the profession, increase insurance coverage, and ensure that clients who are harmed by lawyers without coverage have some form of recourse.

125. Yvette Donosso Diaz, *Why the Bar Might Mandate Disclosure of Uninsured Practice*, UTAH ST. BAR J. (Oct. 16, 2005), <http://www.utahbar.org/utah-bar-journal/commissioner-corner/why-the-bar-might-mandate-disclosure-of-uninsured-practice/> [https://perma.unl.edu/4M75-X3GB].

126. Client Sec. Fund Comm., *Frequently Asked Questions*, STATE OF CONN. JUDICIAL BRANCH, <http://www.jud.ct.gov/CSF/FAQ.htm> [https://perma.unl.edu/T6GC-D6WE].

6. *Recourse through the Courts and Tort Liability*

Consumers who have been harmed through sharing economy platforms face significant hurdles when they seek recourse through the courts, either in actions against the providers who harmed them or against the platforms themselves. To date, platforms have stood behind the independent nature of the providers on the platform to shield themselves from liability to consumers harmed by such providers. Sorting out the chains of responsibility has been a challenge to litigants and courts alike, and legal doctrines corralling provider and platform conduct and imposing liability are still evolving.¹²⁷ In the context of the legal profession, however, well-established norms and mechanisms exist to protect consumers and the general public alike from misconduct by attorneys. These norms and mechanisms have evolved over time and offer both guidance to attorneys on what the minimum “standard of care” is owed clients in different situations as well as avenues for recourse.

First, attorneys engaged in litigation before courts or administrative tribunals are subject to oversight and review by the judicial bodies before which they are appearing as attorneys. Courts have not just formal rules regarding the expected conduct of attorneys before them, but many possess what are known as “inherent powers” to sanction lawyers for misconduct that occurs in their presence.¹²⁸ Whether it is formal mechanisms like Rule 11 of the *Federal Rules of Civil Procedure* (FRCP), which requires that lawyers only bring legal claims in good faith and have a basis for the factual claims they assert in filings; FRCP Rules 26 and 37, which regulate the discovery process; or 28 U.S.C. § 1927, which prevents abusive litigation tactics—to name just some of the provisions that regulate attorney conduct in federal courts alone—litigants, judges, and other lawyers have a wide arsenal available to them to rein in improper conduct by lawyers engaged in litigation. Given the nature of the adversarial system, most of these legal weapons are wielded by opposing parties when a lawyer engages in misconduct, but courts can often employ them on their own when attorney behavior falls below acceptable norms. When such misconduct occurs, courts often look to the codes of conduct described above to ascertain whether offending attorneys have committed a violation that warrants sanction.¹²⁹ In instances where attorney conduct vio-

127. For a discussion of platform liability in sharing economy settings, see Kia Kokalitcheva, *Who's Liable When an Airbnb Stay or Uber Ride Ends Badly*, *FORTUNE* (Nov. 10, 2015), <http://fortune.com/2015/11/10/sharing-economy-safety-liability/> [https://perma.unl.edu/D7BC-Y89J].

128. *See, e.g.*, *NASCO v. Chambers*, 501 U.S. 32 (1991) (describing the inherent powers of courts).

129. *See, e.g.*, *Gordon v. Obiakor*, 984 N.Y.S.2d 421 (N.Y. App. Div. 2014) (holding courts can look to codes of professional conduct for guidance in meting out attor-

lates acceptable norms of behavior, courts can issue a wide array of punishment, such as levying monetary penalties; issuing a private or public censure; and dismissing a case, claim, or defense.¹³⁰ In more egregious cases of attorney misconduct, courts can refer a matter to the state disciplinary authorities to assess the attorney's fitness to practice law.¹³¹

Outside of the protections inherent in judicial tribunals, court systems serve as adjudicatory bodies to resolve claims of clients against their own attorneys when the conduct of such attorneys fails to meet the standard of care expected of them in different contexts. These actions can arise as either tort or contract actions or as an action for breach of an attorney's fiduciary obligations toward a client.¹³² Attorney misconduct has been the subject of tort system oversight for over 200 years.¹³³ To establish the tort of attorney malpractice, which arises under state law, the client must generally show that an attorney-client relationship existed between the attorney and her, that the applicable duty of care was breached, that the breach was the proximate cause of her injuries, and that she suffered some damages as a result of the breach.¹³⁴ A typical case might involve an attorney failing to file a complaint within the applicable statute of limitations, resulting in the client being barred from bringing a claim. If the attorney failed to act diligently in preparing the case or to inquire about the applicable statute of limitations, a court might find that the lawyer failed to act competently in prosecuting the case. If it can be determined that the client would have otherwise won the case and obtained monetary compensation in the action had the attorney not failed to bring the case within the statute of limitations, the attorney will likely have to compensate the client in the amount she would have won had the attorney not failed to act in accordance with the

ney discipline but are not bound by them); see also Ann Peters, *The Model Rules as a Guide for Legal Malpractice*, 6 GEO. J. LEGAL ETHICS 609 (1993) (describing judicial use of attorney codes of conduct in assessing legal malpractice).

130. For a collection of sanctions imposed by courts in select reported cases from state and federal courts, see Judith A. McMarrow, et al., *Judicial Attitudes Toward Confronting Attorney Misconduct: A View from the Reported Decisions*, 32 HOFSTRA L. REV. 1425, 1466-1471 (2004).
131. See, e.g., *Kersey's Case*, 797 A.2d 864 (N.H. 2002) (holding repeated examples of contempt of court warranted referral to disciplinary body for disbarment proceedings).
132. For a description of the interplay among different theories of recovery against attorneys, see Ray Ryden Anderson & Walter Steele Jr., *Fiduciary Duty, Tort, and Contract: A Primer on the Legal Malpractice Puzzle*, 47 SMU L. REV. 235 (1994).
133. For an early tort case implicating an attorney's failure to maintain the duty of care to a client, see *Stephens v. White*, 2 Va. (1 Call) 203 (1796).
134. Benjamin C. Zipursky, *Legal Malpractice and the Structure of Negligence Law*, 67 FORDHAM L. REV. 649, 662-79 (1998) (describing elements of legal malpractice).

standard of care by missing the statute of limitations.¹³⁵ Different legal contexts identify the standard of care in a particular setting: e.g., the failure to call a key witness or the failure to object to the introduction of evidence. Attorneys can also commit malpractice in transactional or business contexts by, for example, failing to negotiate reasonable terms in a contract.¹³⁶ When the attorney fails to meet the standard of care and the client is harmed by that failure, the attorney can be held liable for the damages that client suffered as a result of the attorney's failure to act in accordance with the standard of care.

The malpractice tort regime is now well established in the law as a means of policing attorney misconduct, and clients have recourse through the courts to police attorney behavior that fails to uphold an appropriate duty of care and that failure harms the client. In the legal context, not just the attorney, but his or her entire firm may be held liable when the firm fails to have appropriate mechanisms in place to oversee its attorneys.¹³⁷ Lawyers have also been held liable for malpractice by the actions of other attorneys: e.g., when an attorney from outside the firm acts as local counsel and commits malpractice.¹³⁸ This liability can arise when the firm retains the outside counsel without the knowledge of the client, is complicit in the outside counsel's conduct, or takes on the responsibility of supervising that attorney.¹³⁹

This well-established regime of tort liability has thus developed over time to respond to the ways in which the legal profession has evolved, taking into account the manner in which lawyers respond to client needs, the ways in which they organize themselves to do so, and the extended arrangements they sometimes create to provide legal services.

D. New Governance and Regulation of the Legal Profession: Flexibility, Adaptability, and Local Experimentation

The previous discussion shows that the legal profession has developed, over time, a sophisticated array of regulatory responses that

135. *See, e.g.*, *Fuschetti v. Bierman*, 319 A.2d 781 (N.J. Super. Ct. Law Div. 1974) (holding attorney's failure to bring action within statute of limitations can serve as basis of a malpractice action).

136. For an overview of legal malpractice actions in the transactional context, see George S. Mahaffey Jr., *Cause-in-Fact and the Plaintiff's Burden of Proof with Regard to Causation and Damages in Transactional Legal Malpractice Matters: The Necessity of Demonstrating the Better Deal*, 37 SUFFOLK U. L. REV. 393 (2004).

137. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 58 (AM. LAW INST. 2000).

138. *Whalen v. DeGraff, Foy, Conway, Holt-Harris, & Mealey*, 863 N.Y.S.2d 100 (N.Y. App. Div. 2008).

139. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 58 cmt. e. (AM. LAW INST. 2000).

govern conduct within the sector to, first, ensure consumers and the general public are protected from abusive practices and, second, develop trust in the sector. This array includes barriers to entry, unauthorized practice rules, codes of conduct, disciplinary machinery, insurance protections, and recourse through the courts. These have developed in response to changes in the market for legal services, are experimental and adaptive, are decentralized such that the states adopt their own sets of legal ethics rules, and are developed through a dialogue between the regulated and the regulators (attorneys and the courts) with an eye toward consumer protection, thus taking into account the importance of that stakeholder sector.

While more commonly recognized sharing economy models are struggling to develop the right balance of oversight, innovation, and legal recourse, the legal profession has 200 years of experience developing this balance. One final component of the legal profession's oversight infrastructure is its malleability. The overarching oversight infrastructure recognizes the role of innovation and experimentation in the law and is adaptable to change with changing times, technology, and the new realities of practice.¹⁴⁰ This is evident in the codes of conduct that are repeatedly updated to respond to changing times by, for example, providing guidance on attorney use of technologies like social media and cloud computing; an appreciation for the need for attorneys to have the freedom to pursue innovation in their legal claims, provided they are pursued in good faith;¹⁴¹ or an understanding that courts and oversight committees should not "second guess" legitimate questions of attorney judgment.¹⁴²

It has also developed in a fashion that encourages experimentation. With the ABA debating the proper contours of oversight of the profession and setting forth general guidelines for such oversight, it is in the states, which Justice Brandeis called laboratories of democracy,¹⁴³ where the explicit rules governing the profession are established. Similarly, the state courts, from which the federal courts often

140. Carol Rice Andrews, *Standards of Conduct for Lawyers: An 800-Year Evolution*, 57 SMU L. REV. 1385 (2004) (tracing the evolution of attorney ethical standards).

141. The main vehicle for policing claims is Rule 11 of the *Federal Rules of Civil Procedure*, which requires that all claims are grounded, at a minimum, in "a non-frivolous argument for extending, modifying, or reversing existing law or for establishing new law." For an overview of the role of Rule 11 in policing the profession, see Georgene Vairo, *Rule 11 and the Profession*, 67 FORDHAM L. REV. 589 (1998).

142. *Strickland v. Washington*, 466 U.S. 669, 689–91 (1984) (giving judicial deference to attorney decisions on judgment and strategy).

143. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (stating that "a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country" (internal citation omitted)).

take their lead on how to handle matters of attorney misconduct,¹⁴⁴ set the pace on tort liability and the incorporation of state codes of conduct into the jurisprudence on the law governing lawyers.¹⁴⁵

What I have hoped to show in this section is the themes that animate and the components that flesh out the contours of regulation of the legal profession. In the next section, I will attempt to apply the lessons learned from the evolution of the regulation of the legal profession to help inform any effort to devise a regulatory infrastructure for sharing economy platforms and ventures.

IV. WHAT THE EVOLUTION OF THE REGULATION OF THE LEGAL PROFESSION AND NEW GOVERNANCE THEORY CAN TELL US ABOUT THE NEED FOR AND THE CONTOURS OF REGULATION OF THE SHARING ECONOMY

In previous sections, I have highlighted the similarities between aspects of the legal profession as it has evolved over the years and the relatively new sharing economy. As described above, lawyers, for the most part, operate in the same way many actors within the sharing economy function—as independent contractors filling their time serving multiple clients in an on-demand fashion. Apart from this similarity in the manner in which the two sectors operate, there are other, deeper similarities that warrant a hard look at the ways the regulation of the profession has evolved to determine if its lessons can offer guidance into the manner in which one might approach the regulation of the sharing economy. Central to the functioning of the legal profession is a need for a degree of independence from more robust regulatory oversight. This independence stems from the nature of the profession. It is one in which the fundamental relationship at the core of the practice of the profession is one that must rely on trust, trust which is fostered not by regulatory oversight but by layers of other types of restrictions, restrictions designed to accomplish several things at once: preserve the independence of the profession, provide a degree of consumer protection, and protect the proper functioning of society as a whole. The sharing economy shares many of these same

144. *See, e.g.*, *USPPS, Ltd., v. Avery Dennison Corp.*, 676 F.3d 1341, 1353 (Fed. Cir. 2012) (holding “state courts are the traditional arbiter of such misconduct, which is governed by long-standing common law principles of negligence, fraud and breach of fiduciary duty”); *Alexander Interactive, Inc., v. Adorama, Inc.*, 2014 WL 2968528, *3 (S.D.N.Y. 2014) (holding federal courts “often look to the standards of professional conduct in the state where the federal court sits.”).

145. *See, e.g.*, *Gordon v. Obiakor*, 984 N.Y.S.2d 421, 422 (N.Y. App. Div. 2014) (holding courts are not bound by specific rules of professional conduct but can refer to them as guidelines in weighing competing interests when assessing attorney conduct).

features. It is a sector of the economy that likely functions best through a degree of independence, but independence bound by a need for a degree of consumer protection that preserves the independence of the actors within it but not at a greater cost to society.

While the legal profession shares features of the sharing economy, the approach to the regulation of the legal profession bears the hallmarks of regulatory approaches that fall under the theory loosely termed New Governance. A New Governance approach recognizes that there are important benefits to including a broader pool of stakeholders and decision makers in the articulation, execution, and evolution of policy, law, norms development, oversight and regulation. Not only is it more consistent with democratic, participatory, and representative ideals, it also stands to gain by broadening the pool of ideas and learning from the practitioners who are carrying out the functions of the regulated sphere on the ground and have unique insights into the best balance of regulation, freedom, oversight, and control. By including not just the regulated but also those who consume in the sector, it strives to find common ground and a balance between freedom to act and control of action. It also recognizes that there is a benefit to decentralized policymaking and pluralistic approaches to regulation, not just to ensure that a regulatory regime is responsive to local needs, but also to ensure a degree of experimentation that generates knowledge about what works and what does not and to surface positive deviance that can inform other jurisdictions and markets.¹⁴⁶

New Governance approaches are uniquely suited to sharing economy models. A recurring theme in the evolution of law and the sharing economy is the understanding that new economic models call for new regulatory approaches, and one of the strengths of New Governance approaches is that they are designed to adapt, to be responsive and reflexive, and to incorporate change and evolve as facts on the ground evolve.¹⁴⁷ Another common refrain among sharing economy champions is that heavy-handed regulation is likely to stifle the entrepreneurial spirit animating peer-to-peer innovations; New Governance approaches embrace the entrepreneurial spirit and strive to

146. As is evidenced by the evolution of regulation of the legal profession, regulatory approaches that some may say fall under the umbrella of New Governance Theory have been around for centuries. Nevertheless, New Governance Theory attempts to harness these flexible and pluralistic decision-making processes in the service of responsive and effective government. Representative scholarship that embodies these principles includes IAN AYRES & JOHN BRAITHWAITE, *RESPONSIVE REGULATION: TRANSCENDING THE DEREGULATION DEBATE* (1992); Michael C. Dorf, *Legal Indeterminacy and Institutional Design*, 78 N.Y.U. L. REV. 875 (2003); and Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentation*, 98 COLUM. L. REV. 267 (1998).

147. Orly Lobel, *The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought*, 89 MINN. L. REV. 342, 443 (2004).

adopt a mindset that is consumer oriented and responsive to the needs of the market. As Orly Lobel explains:

An entrepreneurial government is one that begins with identifying its customers, determining their needs, and moving forward to identify the best practices that would meet these needs. Under this subset of rationales, the basic assumptions of a market economy—profit motivation under competitive supply and demand conditions—are often projected onto public management ideals. . . . [T]hese developments correspond with the organizing principles of the governance model including flexibility, competition, adaptability, and learning.¹⁴⁸

Features of New Governance Theory are clearly present in the manner in which the regulation of the legal profession has evolved over the last two centuries. Thus, the legal profession's regulatory regime both reflects and benefits from New Governance Theory approaches. At the same time, there are aspects of the legal profession that are similar to aspects of the sharing economy, as more fully described above. Given these similarities, it is worthwhile to review how New Governance Theory components are present in the legal profession, the manner in which the regulatory regime that governs the legal profession has evolved and embodied aspects of New Governance theory, and the key themes in the evolution of legal profession regulation that have emerged, themes that resonate with any project to regulate the sharing economy.

First, the evolution of the regulatory regime that governs the legal profession exhibits key features of New Governance theory, and it has done so for centuries. It has evolved mostly as a self-regulatory regime, a common feature of New Governance approaches.¹⁴⁹ It has been experimental and decentralized, evolving at the national level for diffuse adoption, iteration, modification, and adaptation in the states, while encouraging dialogue at the local level, and even the hyper-local level in individual court rooms as individual judges put their particular gloss on the practice of law with local court rules and individual rulings on matters of ethics that arise before them. It enlists a diverse range of stakeholders—while recognizing the primacy of the legal practitioner—in the development of the standards to apply to the profession.¹⁵⁰ It also prefers standards to rules, adopting a so-called

148. *Id.* at 366–67.

149. For a discussion of the role of self-regulation in New Governance Theory, see Jason M. Solomon, *New Governance, Preemptive Self-Regulation, and the Blurring of Boundaries in Regulatory Theory and Practice*, 2010 WIS. L. REV. 591 (2010).

150. Jaime Alison Lee, “Can You Hear Me Now?": *Making Participatory Governance Work for the Poor*, 7 HARV. L. & POL'Y REV. 405, 406 (2013) (describing as a “core principle” of New Governance theory “a commitment to decentralized problem solving by local stakeholders, and the ongoing adjustment of rules and policies informed by on-the-ground monitoring and feedback”).

“soft” law as opposed to a command-and-control approach, a central theme of most New Governance models.¹⁵¹

Turning to the key themes shared by the legal profession and the sharing economy, such key themes center on the notion that both the legal profession and the sharing economy hold a unique place in society. The four key themes outlined above can be synthesized even further into three core ideas. First, the legal profession is entitled to a degree of self-regulation and a degree of independence but only to the extent that independence serves larger, societal goals. Second, actors within that system are allowed to exploit this unique position to earn a living. And, third, a command-and-control regulatory regime may undercut the value the sector brings to society at large. Given the parallels between the sharing economy and the legal profession, any discussion of the regulation of the former can benefit from taking these themes into account.

With these themes in mind, an eye towards New Governance approaches, and being conscious of the contours of the regulatory regime governing the legal profession that has evolved, the following section discusses how features of the legal profession’s regulatory regime might inform any regulatory regime for the sharing economy. This is by no means an exhaustive or detailed description of what a regulatory approach to sharing economy ventures could or should look like. I attempt to draw broad themes from, and parallels to, the manner in which regulation of the legal profession has evolved over the last two centuries in the United States. It is my hope that this brief discussion will help contribute to the dialogue around the best regulatory approach to provide oversight over, develop trust in, and facilitate sustainable, fair, and just growth of sharing economy businesses.

A. Self-Regulation, Barriers to Entry, and Codes of Conduct

Regulation of the sharing economy is coming; in some jurisdictions it will be extensive and likely drive actors away from such markets. In others, eager for sharing economy goods and services, it will be far more welcoming.¹⁵² Regardless of the form it ultimately takes, it seems apparent that jurisdictions across the U.S. and elsewhere are looking to regulate the sharing economy, and in some jurisdictions,

151. For a discussion of soft law and New Governance Theory, see David M. Trubek & Louise G. Trubek, *Hard and Soft Law in the Construction of Social Europe: The Role of the Open Method of Co-ordination*, 11 EUR. L. J. 343 (2005).

152. See, e.g., Ariz. Governor Doug Ducey, Arizona State of the State Address (Jan. 11, 2016) (transcript available at <http://azgovernor.gov/governor/news/2016/01/arizona-state-state-address> [<https://perma.unl.edu/Y5VE-J2SJJ>]) (stating “Arizona should be to the Sharing Economy, what Texas is to Oil and what Silicon Valley used to be to the tech industry”).

looking to ban actors within it outright.¹⁵³ Of course, one of the strategic advantages of sharing economy platforms is that they often seek to operate largely outside of regulatory regimes, which means their transaction costs are lower, and such savings can be passed on to the consumers. Jurisdictions seek to regulate these platforms for many reasons: to protect consumers, to favor incumbent operators in the sectors within which the platforms are seeking a beachhead, etc. Whatever the goals of legislators and regulators, some degree of regulation is coming to the sharing economy. Nevertheless, platforms are working with lobbyists to fend off this regulation as best they can across the U.S. and in jurisdictions around the world.¹⁵⁴ However, there may be a better route—one that would impose some degree of oversight over the sharing economy platforms while preserving the independence and the self-identified exceptionalism of such platforms.

The sharing economy could take a page out of the legal profession's centuries-old playbook and strive to adopt some degree of self-regulation. Such self-regulation would begin with the imposition of both some barriers to entry and codes of conduct for sharing economy providers operating within these platforms. At present, there are almost no barriers to entry to many sharing economy platforms. Virtually anyone can drive a car for Uber and Lyft; rent out a home, room, or apartment on Airbnb; or sell goods on eBay and Etsy. What these platforms gain by having low barriers to entry—reduced price and ease of connecting providers with consumers through direct, peer-to-peer platforms—may, paradoxically, undermine the trust essential to economic transactions. It is this trust that some degree of regulation can help to generate.

Sharing economy platforms share so much more with the legal profession than simply the form in which such services are rendered (latent services offered by independent contractors). Indeed, one of the core similarities between the sharing economy and the legal profession is the notion that some degree of independence from oversight is necessary to help these sectors flourish. For the legal profession, a degree of independence from regulatory oversight is necessary to ensure that lawyers can do their jobs well, can gain the trust of their clients, and offer creative and effective arguments with a certain amount of freedom from the state. The need for this independence is particularly acute where lawyers and movements are seeking to bring about social change, upset the status quo, and change legal norms im-

153. *Sao Paulo City Council Votes to Prohibit Uber Amid Protests*, ASSOCIATED PRESS (Sept. 9, 2015), <http://bigstory.ap.org/article/da92491a15b0437795c0a3686fd95314/brazil-taxi-drivers-protest-against-uber> [https://perma.unl.edu/CG7Z-GSZZT].

154. *Uber Uses Lobbying to Drive Expansion*, POLITICO (Sept. 18, 2013), <http://www.politico.com/story/2013/09/uber-taxi-lobbying-expansion-097028> [https://perma.unl.edu/28NG-HBPA].

posed by state action or facilitated by its inaction. There is, thus, a legal profession exceptionalism that says: “lawyers are different.”

Similarly, a common refrain of sharing economy platforms is also “we are different.” The founders and leaders of these platforms believe they are bringing new economic models to the fore that make consumer life better, offer new employment opportunities, and stimulate economic growth. Some fear that excessive regulation—at times, any regulation—will kill the economic models, stifle innovation, and put an end to the economic benefits they bring to society.¹⁵⁵ Such regulation will do this by imposing transaction costs on the delivery of services through these platforms that are the product of barriers to entry and ongoing oversight. The more sharing economy platforms look like incumbents in terms of how they are regulated, the more they will mimic those incumbents in price, access, and convenience of use, which is to say they will likely be more expensive, harder to access, and less convenient to access.

Just as with the legal profession, the need for lighter touch regulation is central to the functioning of sharing economy platforms. The nature of these relationships—whether it is attorney–client or peer-to-peer—requires a degree of independence in order for the relationship to function well. In the attorney–client relationship, this pairing requires independence from direct oversight in order for the relationship to foster trust and creativity. Similarly, the peer-to-peer relationship requires that same sort of independence from oversight if it is going to flourish: if it is infused with a degree of oversight that destroys the central competitive advantage it offers—reduced transaction costs which have an impact on pricing and convenience—it will eliminate the primary benefits many sharing economy platforms offer. What such platforms are trying to do is to create a new relationship between provider and consumer, one that reduces transaction costs and friction in the market, thereby lowering the price and making access to goods and services more convenient.

But what sharing economy platforms miss is the extent to which these regulatory controls, which certainly appear as transaction costs, tend to generate trust. And in a peer-to-peer relationship, one in which a consumer is assuming a degree of risk by engaging in such relationships given the nature of the goods and services being offered, trust is essential to facilitate the economic arrangement in the first place. It is here where sharing economy platforms can gain from a degree of regulation, while not undermining their competitive advantages.

155. Koen Franken, *Smarter Regulation for the Sharing Economy*, GUARDIAN (May 20, 2015), <https://www.theguardian.com/science/political-science/2015/may/20/smarter-regulation-for-the-sharing-economy> [https://perma.unl.edu/GW8D-CX2G].

As in the legal profession, these platforms can choose to adopt self-regulation as a means of fostering the trust necessary to facilitate economic exchange but can maintain their independence and flexibility necessary to remain innovative and to continue to generate profit across the range of sharing economy platforms. If these platforms truly are exceptional and only those operating within them understand the economic models and the technologies they are trying to deploy, then self-regulation would appear an attractive option. By adopting a self-regulatory approach, one that (self-) imposes relevant and effective barriers to entry and codes of conduct on providers within these platforms, they might also obviate the need for deeper regulation by outside regulatory authorities.

At present, some sharing economy platforms have adopted guidelines that, either explicitly or implicitly, operate as early stage codes of conduct. For example, Uber has adopted a “Code of Conduct” that is just 592 words in length. It urges “safety,” “compliance with the law,” and a “zero-tolerance policy regarding all forms of discrimination, harassment or abuse.”¹⁵⁶ Airbnb has almost no standards, and merely urges hosts to provide “amenities” (hosts “should *consider* providing basic amenities like soap, toilet paper, sheets, and towels”).¹⁵⁷ These codes of conduct, as presently drafted, are skeletal or merely suggestive, at best, and would require far more detail and guidance to providers and consumers alike.

Similarly, any codes of conduct for sharing economy platforms should incorporate notions of “platform liability.” As a component of self-regulation, sharing economy platforms will need to assume some liability for the conduct of providers within their platform networks.¹⁵⁸ At present, platforms have been resistant to the imposition of such liability, but this will have to change if they are to encourage the type of trust necessary to ensure customer loyalty. Customers need some degree of confidence that they will have recourse when a platform provider engages in misconduct. Once again, this type of liability should not be anything more than what is expected of supervi-

156. *Code of Conduct*, UBER, <https://www.uber.com/safety/code-of-conduct> [<https://perma.unl.edu/RG3A-Z76A>].

157. *What Are Amenities and Why Are They Important to Guests?*, AIRBNB, <https://www.airbnb.com/help/article/562/what-are-amenities-and-why-are-they-important-to-guests?topic=206> [<https://perma.unl.edu/E29Z-3W5A>].

158. If sharing economy platforms wish to proceed with fewer transaction costs as a way to deliver less expensive products and services to consumers, they should insist that they are the ones best positioned to provide this screening and oversight of providers. They should embrace the opportunity to ensure their platforms are populated by providers who will not harm consumers through the platform. They would serve, in the words of Judge Calabresi, as the “cheapest cost avoider”: the entity in the best position to reduce the harm that might be caused and maintain transaction costs at their lowest level. GUIDO CALABRESI, *THE COST OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS* 135 (1970).

sors in the context of legal ethics. A platform must have mechanisms in place for some screening and guidance for providers within the platform. When they stray from such clear guidance, despite the platform's best efforts, those platforms should not be held responsible.

Should sharing economy platforms embrace self-regulation, they would develop some screening mechanisms that impose appropriate barriers to entry to promote adequate consumer protection, should issue codes of conduct for providers within platform networks, and should accept some degree of liability when those screening mechanisms are not adequately applied or codes of conduct are ignored for want of the adequacy of the platform's training of providers on those codes. How such platforms would go about generating these components of self-regulation is an issue I will take up *infra* section III.E.

B. Disciplinary Machinery

Sharing economy platforms typically attempt to police the ranks of their providers through user-generated reviews and by fielding complaints by individual customers about providers who have engaged in some untrustworthy or abusive conduct. Without more significant barriers to entry, this *ex post facto* supervision relies, for the most part, on customer feedback. It can result in discipline—including removal—of a provider from the network when it is unwarranted—for example, where an Uber customer has an interaction with a driver that turns sour through no fault of the driver and that driver receives a bad customer complaint.¹⁵⁹ Once an Uber driver's overall rating dips below a relatively high number on the ratings scale, he or she is removed from the platform. A customer may not resort to filing a complaint or providing feedback to the platform for a bad interaction, meaning providers that operate in an unsatisfactory manner go unchecked.¹⁶⁰ While some potential customers rely heavily on user-generated reviews and it has become a key source of information in many fields, from retail to the market for household services, such a system, standing alone, leaves customers with little direct recourse and few options for restitution should they suffer harm due to improper conduct from a provider operating through a sharing economy platform. Consumers do not always know what might happen to a particular provider if he or she performs poorly and may lose faith in the platform if that consumer does not know the platform is taking steps to police providers who fail to provide competent services. For these and

159. On the unreliability of Uber ratings, see Kate Kane, *The Big Hidden Problem with Uber? Insincere 5-Star Ratings*, WIRED MAG. (Mar. 13, 2016), <http://www.wired.com/2015/03/bogus-uber-reviews/> [https://perma.unl.edu/ND2A-36UV].

160. For a description of Uber's user review system, see *How the Rating System Works*, UBER MIAMI, <http://ubersouthflorida.com/how-does-the-rating-system-work/> [https://perma.unl.edu/WH7D-NDBG].

other reasons, these customer feedback systems can be manipulated and run the risk of being unreliable.¹⁶¹

Once again, taking a page from the legal profession and consistent with the notion of self-regulation, sharing economy platforms would gain by creating more consistent and rigorous disciplinary machinery that would help monitor provider conduct, send a clear message to consumers that a standard of care is required of all providers, and likely generate the type of trust in the system that it can protect consumers when providers fail to conform to expected norms in the delivery of goods and services. This machinery could operate within a sharing economy platform or be set up by a platform through a third-party dispute resolution outlet. The design of such a dispute resolution mechanism would have to be transparent, efficient, and offered at no cost to the customer. The investment by the platforms in such mechanisms would likely pay for themselves in terms of the trust in those platforms the very existence of an avenue for dispute resolution would generate. And this trust would likely not just maintain the customer base; it might expand it.

C. Ongoing Judicial Oversight to Ensure Consumer Protection with “Supervisor” Liability

Just as in the legal profession context, self-regulatory disciplinary machinery is not always sufficient to remedy significant lapses in conduct, and while restitution is possible through “internal” dispute resolution mechanisms, sometimes judicial intervention is necessary to ensure a fair adjudication of a dispute and full compensation. This is an area where a well-developed jurisprudence has evolved to give a degree of guidance to lawyers and litigants as to the proper bounds of attorney conduct, when such conduct violates the attorney’s duty to the client, and what types of relief will be awarded the client when that duty is breached. A similar jurisprudential body of work has not developed in the sharing economy, and courts are still working through some of the issues, relying on general fraud provisions and others for violations of trust and improper conduct by sharing economy providers.¹⁶² Sharing economy platforms must recognize the critical role courts can play in policing the outer boundaries of inappropriate provider conduct and should not resist efforts to seek recourse through the judicial system to serve as an outlet for dispute

161. On the potential manipulation of on-line customer reviews, G. Jeffrey MacDonald, *Is That Online Review Fake?*, CHRISTIAN SCI. MONITOR (Oct. 18, 2012), <http://www.csmonitor.com/Business/2012/1018/Is-that-online-review-a-fake> [<https://perma.unl.edu/HL9X-3VRM>].

162. *See, e.g.*, *O’Connor v. Uber Techs. Inc.*, 58 F. Supp. 3d 989 (N.D. Cal. Sept. 4, 2014) (dismissing, inter alia, fraud claim against Uber for alleged false advertising).

resolution in cases where deployment of internal processes is inappropriate. Similarly, supervisor/platform liability will be appropriate to impose in situations where platforms failed to screen and train providers.

D. Insurance Mechanisms

The legal profession attempts to ensure some degree of protection to clients and trust in the profession by encouraging attorneys to possess malpractice insurance, creating mechanisms through which clients who are unable to obtain recourse from uninsured lawyers can seek compensation. Sharing economy platforms are beginning to explore these avenues, with Airbnb announcing a \$1 million secondary insurance policy covering guests who suffer some injury while staying in a location secured through Airbnb. Presumably, Airbnb is seeking to instill faith in the platform's services. It wishes to establish consumer trust that individuals harmed by Airbnb hosts will have some recourse if they cannot obtain compensation from their hosts. One can imagine such situations arising where the Airbnb stay is overseas—where bringing suit in a foreign court is inconvenient or perhaps hostile to foreign litigants, or where the host has no insurance, few assets, declares bankruptcy, or is otherwise judgment proof. Uber and Lyft drivers are typically required to have their own insurance because they must do that simply as operators of motor vehicles in most jurisdictions,¹⁶³ and, to the extent LegalZoom partners with licensed attorneys in the provision of services as affiliates with LegalZoom, those lawyers will be liable to the consumer for any malpractice, and, hopefully, those lawyers have their own malpractice insurance.

Automobile insurance is mandatory for drivers, but it will have policy limits, and malpractice insurance is not generally required for lawyers. Sharing economy platforms should thus both provide their own insurance for customers that will exceed the policy limits if their providers have insurance already and impose their own requirements that their providers have to protect consumers. If platforms and providers are concerned that the imposition of an insurance requirement will be a cost passed along to consumers, undermining the providers' competitive advantage on pricing, those platforms can self-insure and include a modest surcharge on every exchange, one that might be less expensive for providers, and perhaps one that is so low that it does not filter down to consumers. Indeed, given the nature of the services offered, one attorney affiliated with LegalZoom asserts that his mal-

163. Uber also provides certain types of coverage for several of its services. *Insurance for uberX with Ridesharing*, UBER, <https://newsroom.uber.com/insurance-for-uberx-with-ridesharing/> [https://perma.unl.edu/VC2M-L9Q4].

practice insurance premiums for the work he does through LegalZoom are actually less expensive than that for his conventional practice.¹⁶⁴

Adding a layer of insurance to protect consumers accessing sharing economy platforms may help to provide a modicum of protection to consumers eager to explore sharing economy exchanges but uncomfortable with the informality of the regulatory infrastructure currently in place. Indeed, Airbnb and some other providers are beginning to do this. This layer will certainly impose additional costs on the provision of services, but given the present size of the sharing economy and the platforms operating within it, an economical approach to the provision of services might entail a system of self-insurance offered through the platforms themselves. While those costs may reduce the competitive advantage sharing economy providers gain through pricing, the benefits in a new, expanded, or more loyal customer base could offset those additional costs such that they will not have to be passed on to the consumer. At the same time, consumers might be willing to pay more for insured providers.

E. Flexibility, Adaptability, and Local Experimentation

The approaches to regulating the sharing economy described above—self-regulation (including barriers to entry and codes of conduct), disciplinary machinery, judicial oversight, and insurance—borrow heavily from the manner in which the regulatory regime governing the legal profession is regulated. It is also informed, just as the legal profession's regulatory regime has been informed, by the lessons and strains of New Governance Theory. Central to both the legal profession's system of regulation in particular and New Governance approaches in general is the notion of flexibility, adaptability, and local experimentation. A final piece of the regulatory puzzle facing sharing economy oversight is the extent to which it will bear these hallmarks as well. We are already seeing different jurisdictions taking different approaches to sharing economy platforms. In some places around the world, they are being welcomed with open arms. In others, they are being regulated. In still others, they are being banned. In some ways, this is not just to be expected but to be desired. Different regulatory approaches are central to New Governance models, and if certain jurisdictions wish to impose stiff regulations or escort these platforms to the edge of town and warn them to never come back, these are all experiments that generate data. Will the platforms suffer under the weight of excessive regulation such that they can no longer offer the types of advantages consumers seek? Will consumers rise up in opposition to draconian measures designed to keep sharing economies outside of the communities in which they live and take

164. Interview with Mark L. Russakow (Oct. 26, 2015) (on file with author).

elected officials to task at the ballot box? Will platforms thrive in communities implementing the light touch regulatory regime described above, generating a call for such an approach to spread to other communities? These are all data points to be generated through an experimental approach to regulation of the sharing economy—data which can inform further iterations and evolutions of any regulatory regime or regimes that is or are chosen. An essentially evolutionary process, a New Governance approach to regulation of the sharing economy will necessarily entail multiple strategies. Instead, the models will vary and the strategies will multiply in an effort to strike the right balance between the competing forces and interests while stimulating the economic benefits and the social promise of sharing economy models.

V. CONCLUSION

The components set forth above, which describe ways to regulate the sharing economy, are grounded in not just an appreciation for the evolution of the regulatory regime that currently governs the legal profession but also a sense of the role that New Governance approaches can inform any foray into building a regulatory infrastructure for evolving peer-to-peer economic ventures. At their heart is the notion of iteration, transparency, and local experimentation developed through a dialogue about the best approaches to regulate in this ever-evolving economic and social space. In many ways, it is akin to the very entrepreneurial spirit that animates the sharing economy itself. It is also based on the market-based principles—but a market for ideas, not businesses. It hinges on a dialogue with stakeholders, both providers and consumers, facilitated by government. It is centered around a cornerstone of self-regulation with backstopping by courts; internal and third-party disciplinary machinery; and market-based solutions like insurance remedies. In these ways, it is a reflection of the manner in which the regulation of the legal profession has evolved, with a nod to the ways in which that evolution has exhibited the features central to New Governance Theory. In the end, the process of the development of these diffuse, diverse, and decentralized systems for regulating the sharing economy will inform an ongoing, ever-evolving dialogue about the right balance between oversight and innovation, independence and regulation, economic growth and development, and consumer protection.

The process by which this dialogue takes place and is made manifest in flexible, adaptable, and scalable solutions is almost as important as identifying those solutions themselves. What is more, such a dialogue will generate data. Such data will, in turn, inform the dialogue about the proper scope and contours of a regulatory system—or systems—for providing oversight of the sharing economy. The system that has evolved for regulating the legal profession has generated this

data over time and that system has adapted and changed to the growing needs of a larger and more diverse population, an expanded economy, and the realities of practice within a democratic, yet capitalistic, society. Similar experimentation with the sharing economy will generate the empirical information necessary to empower regulators, the regulated, and the general public to make informed choices about how to shape and mold the regulatory system moving forward in an iterative and transparent fashion. Such a process would help assess whether the legal profession's blend of oversight techniques and bodies makes sense for the sharing economy.

At the heart of an approach to regulating the sharing economy that borrows from our system for regulating the legal profession is the understanding that innovation and accountability can go hand-in-hand. Indeed, eighteenth century England promoted innovation and creativity by loosening restrictions on trade but also protecting property rights,¹⁶⁵ the need to balance innovation with accountability is central to the regulatory approach to sharing economy models. If, as Lobel claims, "talent wants to be free,"¹⁶⁶ it also must be reined in through sensible means that encourage entrepreneurship while preserving consumer protection.

165. JOEL MOKYR, *THE ENLIGHTENED ECONOMY: AN ECONOMIC HISTORY OF BRITAIN 1700–1850*, at 65 (2009).

166. ORLY LOBEL, *TALENT WANTS TO BE FREE: WHY WE SHOULD LEARN TO LOVE LEAKS, RAIDS, AND FREE RIDING* (2013).