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Burning Down the Housing Market: Communal Living in New York

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BURNING DOWN THE HOUSING MARKET: COMMUNAL LIVING IN NEW YORK

*France Svistovski**

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INTRODUCTION

If you have been to college, it is likely that you have experienced dorm-room living and the sharing of a living space with roommates previously unknown to you. The basic concept of dorm-living is a group of strangers sharing a common space with private (or semi-private) sleeping quarters. Dorm-living is usually limited to college life. After graduation, most people leave their college lifestyles (and dorm living) behind; however, in recent years “adult dorms” have been making waves in urban centres. This phenomenon is known as “communal living” (also known as co-living or co-housing). Communal living was once looked down upon as an undesirable form of living,¹ but has since become a prominent lifestyle trend, gaining traction in big cities like New York, San Francisco, and Seattle. Proponents claim communal living can provide more affordable housing because the consumer is renting private bedrooms with shared living spaces, such as kitchens and bathrooms, rather than an entirely private space.² Many development companies are looking to develop buildings specifically tailored to this kind of living.³ The rise of a new venture in the disruptive sharing economy often raises many questions regarding their place within the existing traditional legal and regulatory structure. While there is plenty of academic material on sharing economy ventures such as Uber or Airbnb, very little (if any) exists on communal living. In New York, several companies have already begun building communal living complexes — some have already begun housing individuals within completed buildings.⁴ These complexes consist of apartments with several private sleeping

1. See Brian J. Sullivan & Jonathan Burke, *Single-Room Occupancy Housing in New York City: The Origins and Dimensions of a Crisis*, 17 CUNY L. REV. 113, 120 (2013).

2. See Max Blau, *Tired of Dirty Dishes and ‘Hacker Houses’, Millennials Revamp Communal Living*, POLITICO (Aug. 23, 2018), <https://www.politico.com/magazine/story/2018/08/23/co-living-millennials-san-jose-what-works-219378> [<https://perma.cc/RW4R-5DZT>]; see also Catey Hill, *This Bunk Bed in a Shared Room in San Francisco Will Cost You \$1,200 A Month*, MARKETWATCH (July 8, 2019), <https://www.marketwatch.com/story/millennials-are-lining-up-to-live-in-instagram-worthy-communes-2018-11-21> [<https://perma.cc/VL26-KF6N>].

3. Elisabeth Braw, *Communal Living Projects Moving From Hippie to Mainstream*, GUARDIAN (May 11, 2015), <https://www.theguardian.com/sustainable-business/2015/may/11/communal-living-projects-moving-from-hippie-to-mainstream> [<https://perma.cc/ZU86-3A8X>].

4. Mimi O’Connor, *Brick Underground’s 2019 Guide to Co-Living Spaces in NYC: How to Tell the Communal Disruptors Apart*, BRICK UNDERGROUND (Aug. 19, 2019), <https://www.brickunderground.com/rent/nyc-coliving-spaces-differences-features-prices> [<https://perma.cc/5PWS-JBFA>].

quarters and larger, shared communal spaces.⁵ The full-fledged commitment to this modern mode of living in New York raises similar questions other sharing economy ventures have raised: How does communal living fit within the current legal and regulatory framework in New York and what legal changes are necessary to optimize the success of communal living in the city — or at least to minimize any potential pitfalls?

This Note argues that New York State laws and New York City Municipal laws are inadequate because they fail to specifically address the unique characteristics of the communal living model in two ways. Part I outlines the history of communal living in New York and establishes a working definition of “communal living.” This definition will be referred to throughout the Note to highlight the ways in which the regulatory structure fails to address each element comprising co-living. Part II evaluates the legal and regulatory challenges at both the state and municipal level. At the state level, the Note analyzes both the New York Multiple Dwelling Law and landlord-tenant laws. At the municipal level, the Note analyzes the New York City Housing Maintenance Code, the Rent Stabilization Code, and Zoning Regulations. Part III argues that the state and municipal laws fail to address communal living in two ways: first, they fail to recognize the unique circumstances that arise from a communal living arrangement; and second, inconsistencies within the legal definitions create confusion and uncertainty regarding how the law ought to apply, as well as which law ought to apply. To conclude, this Note considers potential solutions to these inadequacies, including homogenizing the current state and municipal laws to remove any inconsistencies and including specific references to communal living.

I. A BACKGROUND TO COMMUNAL LIVING AND THE SHARING ECONOMY

Part I briefly introduces modern communal living and establishes a working definition of communal living based on the model used by co-living companies in New York City. Furthermore, this Part shows common living is a desirable form of living in the city because it creates a new form of affordable long-term rental housing. The history of co-living in New York City is also explored, highlighting New York legislators’ negative views towards communal housing’s predecessor. This sets the tone for the specific regulatory and legal

5. See discussion *infra* Section I.C, for a working definition of “communal housing.”

challenges which plague developers of communal housing in the City. Finally, Part I addresses the difference between short-term and long-term rentals.

A. Communal Living, Contextualized

Communal living is hardly a new phenomenon. In fact, it is “as old as New York City itself.”⁶ Its predecessor, single-room occupancy housing (SRO), has been around for a very long time.⁷ Like the modern communal living ventures, SROs are a type of occupancy usually consisting of a single room within an apartment and access to shared facilities, such as bathrooms or kitchens.⁸ Though they predate this era, SROs rose in popularity during the Great Depression, when landlords began dividing their apartment units to accommodate individuals affected by the deplorable economic times.⁹ By the twentieth century, immigrants and the poor were the most common tenants of SROs.¹⁰ As a result, SROs were looked down upon and attacked by various city policies beginning in the mid-1950s. One policy banned people from building new SRO units, another excluded families from living in SRO units, and another provided tax incentives encouraging landlords to convert their SRO units into normal apartments.¹¹ These anti-SRO policies resulted in the elimination of over 100,000 affordable, rentable units.¹²

Beyond SROs, boarding houses¹³ offered a similar alternative for New Yorkers looking for an affordable place to stay.¹⁴ Since the

6. Sullivan & Burke, *supra* note 1, at 119.

7. *Id.* While SROs have been around since at least the early 1900s, they became quite popular in the 1920s and 1930s as a result of the need for low-rent housing during the Great Depression. *Id.* at 120.

8. *Id.* at 115, 117 n.7.

9. *Id.* at 120.

10. *Id.* at 120–22.

11. *Id.* at 121–22 (“The City banned the construction of new SRO units, restricted SRO occupancy to exclude families, mandated the reconversion of many of the new SRO units, altered building and zoning codes to discourage SRO occupancy, and, from the mid-1970s until the 1980s, provided tax incentives to encourage the conversion of all SRO units to (higher rent) apartments.”).

12. *Id.* at 123.

13. Boarding houses are also known as “rooming houses.” While there is no definition for “boarding houses” under the New York Multiple Dwelling Law, the definition of “rooming house” fits the description. *See* N.Y. MULT. DWELL. LAW § 4(13) (McKinney 2011). Not to be confused with a transient “lodging house,” which New York’s Multiple Dwelling Law defines as:

[A] multiple dwelling, other than a hotel, a rooming house or a furnished room house, in which persons are housed for hire for a single night, or for

1800s and until the mid-1950s, boarding houses were a popular living choice because they offered inexpensive, flexible accommodations, as well as a sense of community to people migrating to the city in search for work.¹⁵ Boarding houses allow lodgers to rent a private room for a period of time with access to shared spaces.¹⁶ A distinct feature of the boarding house is they often not only provide accommodations, but also warm meals.¹⁷ Though some boarding houses still operate today,¹⁸ stricter regulations (the same which plagued the SROs)¹⁹ and changes in societal attitudes have led to its decline.²⁰ Tenement homes are yet another example of SRO-adjacent housing which, by the mid-1900s, had fallen out of favor.²¹ Tenement homes are single-family homes which have been converted and subdivided to house multiple families, typically in cramped and unsanitary conditions.²² Similarly to SROs and boarding houses, tenement homes often housed low-income immigrants.²³ Tenements have been highly regulated by New York's Multiple Dwelling Law, including defining

less than one week at one time, or any part of which is let for any person to sleep in for any term less than a week.

Id. § 4(14).

14. Cait Etherington, *The Boarding House's Long History of Hosting Single New Yorkers*, 6SQFT (Sept. 12, 2017), <https://www.6sqft.com/the-history-of-new-york-city-boarding-house-and-where-you-can-still-find-them/> [<https://perma.cc/ZG98-SLD4>].

15. Jessica Leigh Hester, *A Brief History of Co-Living Spaces*, CITYLAB (Feb. 22, 2016), <https://www.citylab.com/life/2016/02/brief-history-of-co-living-spaces/470115/> [<https://perma.cc/4UTD-YUN7>].

16. Emily Badger, *Is It Time to Bring Back the Boarding House?*, CITYLAB (July 18, 2013), <https://www.citylab.com/equity/2013/07/it-time-bring-back-boarding-house/6236/> [<https://perma.cc/6U55-RCMH>].

17. *See* Hester, *supra* note 15.

18. *See* JEANNE D'ARC RESIDENCE, <https://jdaresidence.com/about> [<https://perma.cc/CG6Y-AS8L>] (last visited Dec. 23, 2019); *see also* THE WEBSTER APARTMENTS, <https://websterapartments.org/about-us/> [<https://perma.cc/D6MX-CZ3K>] (last visited Dec. 23, 2019).

19. Kim Velsey, *Return of the S.R.O., With A Twist*, N.Y. TIMES (May 19, 2017), <https://www.nytimes.com/2017/05/19/realestate/return-of-the-sro-with-a-twist.html> [<https://perma.cc/63AF-M6WC>]; *see also* OFFICE OF RENT ADMIN., N.Y. STATE DIV. OF HOUS. & CMTY RENEWAL, FACT SHEET #42: HOTELS, SROs AND ROOMING HOUSES 1 (2013).

20. Etherington, *supra* note 14.

21. Carmen Nigro, *Tenement Homes: The Outsized Legacy of New York's Notoriously Cramped Apartments*, N.Y. PUB. LIBR. BLOG (June 7, 2018), <https://www.nypl.org/blog/2018/06/07/tenement-homes-new-york-history-cramped-apartments> [<https://perma.cc/6R8F-CPGJ>].

22. *Id.*

23. *Id.*

minimum room sizes²⁴ and requiring the presence of a window in every room.²⁵

SROs, boarding houses, and tenement houses all share certain common features: smaller living spaces shared with others available at a lower cost. The regulations against SROs, boarding houses, and tenement houses were purportedly put in place to remedy the squalid living conditions the lower class were forced to live in,²⁶ though some argue they were put in place to remove the poor from certain neighbourhoods.²⁷ Regardless of the motivation behind these regulations, their effect today is clear: this anti-SRO (and anti-boarding house, anti-tenement home) legacy has resulted in the existence of several laws and regulations which roadblock the trend towards modern communal living in New York City. This will be further elaborated upon in Part II of this Note.

B. The Sharing Economy

The modern iteration of communal living — where individuals rent an individual, private bedroom while sharing spaces like kitchens and bathrooms — falls within the sharing economy insofar as it modernizes something that has always existed.²⁸ The fact that communal living modernizes housing is an important component of its sharing economy status, because the sharing economy is often credited with “disrupting” conventional business models.²⁹ The

24. N.Y. MULT. DWELL. LAW § 213 (McKinney 1929).

25. *Id.* § 214.

26. Robert W. DeForest, *Introduction: Tenement Reform in New York Since 1901*, in THE TENEMENT HOUSE PROBLEM xvi (Robert Weeks DeForest & Lawrence Veiller eds., 1903) (“The second line of action in solving New York’s tenement house problem as enunciated by the Commission was ‘to remedy the errors of past years by altering and improving the old tenement houses as to make them fit for human habitation.’”).

27. Badger, *supra* note 16.

28. See Hannah Wood, *Co-Living 2030: Are You Ready for the Sharing Economy?*, ARCHINECT FEATURES (Dec. 28, 2017), <https://archinect.com/features/article/150042590/co-living-2030-are-you-ready-for-the-sharing-economy> [<https://perma.cc/QP8F-Z35P>].

29. Pablo Muñoz & Boyd Cohen, *A Compass for Navigating Sharing Economy Business Models*, 60 CAL. MGMT. REV. 114, 114 (2018); see also *Meet the 2018 CNBC Disruptor 50 Companies*, CNBC (May 22, 2018), <https://www.cnbc.com/2018/05/22/meet-the-2018-cnbc-disruptor-50-companies.html> [<https://perma.cc/J5QG-M6CY>]. The sharing economy is mostly associated with peer-to-peer ventures facilitating service sharing through technology (such as Uber or Airbnb). See Muñoz & Cohen, *supra* note 29 at 126–33. P2P platforms are those which act as intermediaries between the individual “sharer” of underutilized goods or services and the consumer. See Michael Cusumano, *Technology Strategy and*

reason for the sharing economy's reputation for disruption is that many sharing economy businesses have been developed within a legal landscape that is unprepared to accommodate them.³⁰ A less cynical view of the impact of the sharing economy on the existing regulatory structure is that it sometimes forces lawmakers to revisit the relevant legal rules to better accommodate them and protect their users. In other words, sharing economy business approaches circumvent established business models and the laws and regulations governing them.³¹

Management: The Sharing Economy Meets Reality, COMM. ACM, Jan. 2018, at 26 (“The sharing economy depends on digital platforms that enable people who do not know each other to access underutilized assets . . .”). For example, companies such as Uber or Lyft act as intermediaries through mobile applications that connect a consumer seeking a lift, and the available driver. It is worth mentioning that the sharing economy does not necessarily require the use of platforms such as mobile applications or websites, even though many sharing economy ventures do use them. However, the sharing economy encompasses a much broader scope than simply the technological platforms from which they are accessed. Aurélien Acquier defined four types of initiatives within the sharing economy, each of which boasting different objectives. The objectives listed are varied, from the creation and provision of free access to public goods, to the provision of monetized access to a centralized pool of proprietary resources, to intermediating between peers either for a social cause or for profit. *See generally* Aurélien Acquier, *Uberization Meets Organizational Theory: Platform Capitalism and the Rebirth of the Putting-Out System*, in *THE CAMBRIDGE HANDBOOK OF THE LAW OF THE SHARING ECONOMY* 13 (Nestor Davidson et al. eds., 2018). Other scholars have also divined their own analysis of what comprises the sharing economy: Pablo Muñoz and Boyd Cohen have defined a “compass” which recognizes six separate dimensions. *See* Muñoz & Cohen, *supra* note 29 at 116. Other approaches to the sharing economy include the business-to-business platform (B2B), which are like P2P platforms, but deal with the sharing of assets or services between businesses. *Id* at 133. A third approach to the sharing economy is the business-to-crowd platform (B2C). B2C ventures do not act as intermediaries: they provide both the platform *and* the good or service to the consumer. Well-known sharing economy B2C platforms include Renttherunway.com, a website which allows consumers to rent designer apparel and accessories. *See How It Works*, RENT THE RUNWAY, https://www.renttherunway.com/how_renting_works?action_type=footer_link [<https://perma.cc/QF99-TTUQ>] (last visited Dec. 23, 2019).

30. *See* JANELLE ORSI, *PRACTICING LAW IN THE SHARING ECONOMY: HELPING PEOPLE BUILD COOPERATIVES, SOCIAL ENTERPRISE, AND LOCAL SUSTAINABLE ECONOMIES* 12–13 (2012).

31. For example, Uber and Airbnb, two of the most well-known iterations of the sharing economy business model, have been heavily criticized for operating whilst avoiding regulations pestering the taxi cab industry and the hotel industry, respectively. *See* Dean Baker, *Don't Buy The 'Sharing Economy' Hype: Airbnb and Uber Are Facilitating Rip-Offs*, *GUARDIAN* (May 27, 2014), <https://www.theguardian.com/commentisfree/2014/may/27/airbnb-uber-taxes-regulation> [<https://perma.cc/WGS2-5VKU>]; *see also* Muñoz & Cohen, *supra* note 29 at 116.

C. The Rise of Modern Communal Living in Urban Centers

The concept of “communal living” is on the rise in major urban centers around the world, thanks to its introduction to the market by start-up companies. The companies responsible for the creation of communal living enterprises are often real estate developers, building houses specifically tailored to the communal living lifestyle.³² Like many other sharing economy ventures,³³ communal living has been developing in largely urban centers. One such developer is Ollie, which has two locations in New York, one location in Pittsburgh, and plans to open locations in Los Angeles, Boston, and Newark.³⁴ Another developer, Common, boasts 21 locations in New York, Los Angeles, San Francisco, Chicago, Seattle, and Washington, D.C.³⁵ Some start-ups, like Node, are based internationally, with locations in Brooklyn, Los Angeles, and Seattle, and abroad in Toronto, Canada, Dublin, Ireland, and London and Manchester, England.³⁶ The Collective, a London-based communal living company, is looking to expand to New York City,³⁷ and short-term rental giant (and one of the most well-known sharing economy companies), Airbnb, is looking to expand into the communal long-term rental market with the creation of their communal-living initiative, The Backyard.³⁸

The current model of communal living co-living companies are adopting uses the sharing economy’s business-to-consumer (B2C)

32. See generally Hill, *supra* note 2.

33. Nestor M. Davidson & John J. Infranca, *The Sharing Economy as an Urban Phenomenon*, 34 YALE L. & POL’Y REV. 215, 217–18 (2016) (“What distinguishes the current wave of innovation is that most of the services enabled by the platforms and networks that make up the sharing economy fundamentally rely for their value proposition on distinctly urban conditions. Dense urban geography creates inefficiencies and challenges but also opportunities, and it is the very scale, proximity, amenities and specialization that mark city life that enable sharing economy firms to flourish.”).

34. *What Is Coliving?*, OLLIE, <https://www.ollie.co/coliving> [<https://perma.cc/X8MY-KWSY>] (last visited Dec. 23, 2019).

35. COMMON, <https://www.common.com/> [<https://perma.cc/JEW8-BF2Y>] (last visited Dec. 23, 2019).

36. *Locations*, NODE, <https://node-living.com/locations.html> [<https://perma.cc/ME4P-QWHS>] (last visited Dec. 23, 2019).

37. Michelle Cohen, *London Housing Pioneer Will Bring NYC’s Largest Co-Living Location to Brooklyn*, 6SQFT (Oct. 16, 2018), <https://www.6sqft.com/london-housing-pioneer-will-bring-nycs-largest-co-living-location-to-brooklyn/> [<https://perma.cc/25SE-6TH9>].

38. Sarah Berger, *Airbnb to Start Building Homes for More Communal Living as Soon as 2019*, CNBC (Dec. 4, 2018), <https://www.cnbc.com/2018/11/30/airbnb-will-start-building-homes-as-soon-as-2019.html> [<https://perma.cc/2XQ4-MN6J>].

platform³⁹: these companies develop and manage the co-living complexes and create the websites, which provide both a convenient source of information and an avenue to apply for a room. Within the B2C approach employed by these companies, the operating specifics may be approached in a variety of ways in New York. Because the platform is created and managed by each developer, each co-living complex company may have very different ideas regarding how to achieve their goals. Some of these variations may not have much of an impact on the regulatory structure, like the use of technology to facilitate access to the service. Other issues, like the incorporation of short-term rentals in the communal living housing complex, are absolutely affected by the relevant legal and regulatory frameworks.

I surveyed the websites of five major communal living companies to develop a definition that adequately addresses communal living.⁴⁰ Ollie,⁴¹ Common,⁴² Node Living,⁴³ The Collective,⁴⁴ and The

39. See Muñoz & Cohen, *supra* note 29, at 125.

40. Because of the lack of literature on the subject, there does not yet exist a homogenous definition of “communal living.” The definition was developed based on each company’s description of their mission, as well as other factors such as floor plans, pricing, and other information found on their websites. This definition also elaborated upon one developed by Michelle Itkowitz, as presented at the LandlordsNY 2017 Winter Property Management Symposium. See *Co-Living Defined and Dissected*, ITKOWITZ PLLC, <http://itkowitzteachingandpublishing.itkowitz.com/2017/12/co-living-what-it-is-what-it-isnt-how.html?m=1> [<https://perma.cc/4BBV-WZSY>] (last visited Dec. 23, 2019).

41. See *generally* *What Is Coliving?*, *supra* note 34 (“Coliving is an emerging trend in housing that enriches the living experience through community engagement, allowing residences to cultivate meaningful relationships and experiences at home. The coliving concept reflects the shifting value system of today’s renters — values that embrace the quality of relationships and experiences over the quantity of square footage.”).

42. See *generally* COMMON, *supra* note 35 (“Coliving is simply a way to make living in a city work better for you. At Common, our coliving homes provide private furnished bedrooms within beautiful shared suites, where convenience and value go hand-in-hand with comfort and community. Members at Common enjoy the privacy of their own furnished bedrooms with access to community in beautiful shared suits and community spaces in their homes. Best yet, one all-inclusive rate covers your rent, cleaning, laundry, and more.”).

43. See *generally* NODE LIVING, <https://www.node-living.com/> [<https://perma.cc/LC62-DU5A>] (last visited Dec. 23, 2019) (“Enjoy the privacy of living in individually curated furnished rental apartments with great communal areas and a vibrant community life.”).

44. See *generally* COLLECTIVE, <https://www.thecollective.com/> [<https://perma.cc/RQN6-N897>] (last visited Dec. 23, 2019) (“It’s your home, your workplace and your playground. One of a kind shared spaces, a cultural events programme and the little things like wifi and cleaning are all included in one bill — no matter how long you’re with us.”). The Collective does not yet have any operating co-living complexes in New York City.

Backyard.⁴⁵ The current model of communal living is comprised of two elements — the first is the living scenario itself, and the second is the relationship with the landlord. A concise working definition of communal housing is a co-living arrangement consisting of landlord-developers grouping individual, unrelated tenants together in a community-focused space comprising of private sleeping quarters and communal living spaces for at least 30 days, with the cost of rent including amenities such as internet, cleaning services, and the like.

Regarding the “living scenario” element mentioned above, most of the current co-living companies operate with several similarities: fully-furnished private studios and suites, shared communal spaces (for example, bathrooms, kitchens, gyms, work spaces, lounges, and courtyards), and the rent includes additions and amenities such as internet, utilities, laundry services, cleaning services, and social events.⁴⁶ Additionally, most co-living companies are in the business of building their own communal housing complexes.⁴⁷

Regarding the “landlord relationship” element, co-living arrangements consist of landlords grouping individual tenants together to rent a shared apartment for at least 30 days.⁴⁸

There are many reasons why a long-term, sharing economy-style housing arrangement in New York City is attractive to renters. One of the motivating factors of the sharing economy movement is the desire to use under-utilized resources. While the optimization of

45. *Introducing Backyard*, BACKYARD, <https://samara.com/> [<https://perma.cc/BEH2-B8AT>] (last visited Dec. 23, 2019). Backyard does not yet have operating co-living complexes located in New York City.

46. *See generally* O'Connor, *supra* note 4.

47. Node does not build their own complexes, but rather restores Bushwick, Brooklyn buildings from the 1900s. *See Bushwick, Brooklyn*, NODE LIVING, <https://landing.node-living.com/brooklyn/> [<https://perma.cc/3LZS-LFT8>] (last visited Dec. 23, 2019). Ollie's website does not explicitly indicate that they build their own complexes, but a quick search for their Manhattan building, Carmel Place, was New York City's first “micro-suite” apartment and was built in 2016. *See Building: Carmel Place*, STREETEASY, <https://streeteasy.com/building/carmel-place> [<https://perma.cc/KN6C-VL26>] (last visited Dec. 23, 2019).

48. When included in the websites, the lease terms varied from company to company. For example, Node Living offers six- and twelve-month leases. *See Inquire*, NODE LIVING, <https://www.node-living.com/inquire.html> [<https://perma.cc/KEC6-WG92>] (last visited Dec. 23, 2019). Common offers lease terms as low as three months long. *See Havemeyer*, COMMON, <https://www.common.com/havemeyer/> [<https://perma.cc/VW8C-DX5H>] (last visited Dec. 23, 2019). And U.K.-based The Collective offers terms from four-, six-, nine-, and twelve-month terms. *See Old Oak*, COLLECTIVE, <https://www.thecollective.com/co-living/old-oak/> [<https://perma.cc/SG6F-CBFF>] (last visited Dec. 23, 2019).

underutilized resources is not exclusive to “sharing” modes of living,⁴⁹ it has long been considered an important underlying rationale within the sharing economy. For this reason, it is important to consider within the scope of communal living in New York City.⁵⁰ One of the sharing economy’s “promises” is to promote “a more sustainable use of resources by favouring access over ownership.”⁵¹ Other sharing economy ventures make use of underutilized resources by lending out existing resources.⁵² Communal living differs from existing sharing economy ventures but still works towards optimizing underutilized resources in two ways, both of which deal with efficiency and access. The first way is by creating new resources which lessen the impact of underutilized, pre-existing resources. In the communal living context, the underutilized, pre-existing resource at issue is unavailable housing (such as those apartments used for Airbnb rentals),⁵³ by developing new buildings exclusively for co-living complexes, new housing options become available. The second way is by facilitating rental density, since fitting more people in a single area is a more efficient use of space than traditional apartments, thus increasing access and having potentially an even larger impact on the current housing shortage (a shortage exacerbated by short-term rental sharing

49. It is worth noting that Ollie’s location at Carmel Place is considered both a co-living space and a microunit. See *Ollie at Carmel Place*, OLLIE, <https://www.ollie.co/new-york/carmel-place> [<https://perma.cc/G3RN-KLS6>] (last visited Dec. 23, 2019).

50. See Ann Light & Clodagh Miskelly, *Sharing Economy vs Sharing Culture? Designing for Social, Economic and Environmental Good*, 24 INTERACTION DESIGN & ARCHITECTURE 49, 50 (“Botsman defines the *sharing economy* as ‘an economic model based on sharing underutilized assets (from spaces to skills to stuff) for monetary or non-monetary benefits’”) (citing Rachel Botsman, *The Sharing Economy Lacks a Shared Definition*, LINKEDIN: SLIDESHARE (Nov. 19, 2013), <https://www.slideshare.net/CollabLab/shared-def-pptf> [<https://perma.cc/QH5B-QZX2>]). For example, in the short-term rental space, Airbnb’s co-founder, Joe Gebbia, stated that the company “helped people activate underutilized space.” See Berger, *supra* note 38.

51. Aurélien Acquier et al., *Promises and Paradoxes of the Sharing Economy: An Organizing Framework*, 125 TECH. FORECASTING SOC. CHANGE 1, 2 (2017).

52. For example, in the Airbnb context, apartments are rented out as short-term rentals to utilize a space that would be unoccupied if not rented in such a way. See *generally* AIRBNB, www.airbnb.com [<https://perma.cc/X2MW-8E2T>] (last visited Dec. 23, 2019).

53. See DAVID WACHSMUTH ET AL., URBAN POLITICS & GOVERNANCE RESEARCH GRP. AT MCGILL UNIV. SCH. URBAN PLANNING, *THE HIGH COST OF SHORT-TERM RENTALS IN NEW YORK CITY 2* (2018) [hereinafter MCGILL REPORT], <http://www.sharebetter.org/wp-content/uploads/2018/01/High-Cost-Short-Term-Rentals.pdf> [<https://perma.cc/PCM5-GZ93>] (“Airbnb has removed between 7,000 and 13,500 units of housing from New York City’s long-term rental market.”).

economy ventures such as Airbnb).⁵⁴ While Airbnb has had the positive impact of helping lower the costs of short-term rentals, it has had the opposite effect on long-term rentals: a study conducted by the School of Urban Planning at McGill University found short-term rental sharing economy ventures such as Airbnb have actually contributed to the problem of expensive long-term rentals by removing thousands of units from the long-term rental market and consequently increasing the cost of rent.⁵⁵ The 2017 Housing and Vacancy Survey showed nearly 80,000 available apartments were listed as vacant and available.⁵⁶ An additional 75,000 apartments were listed as vacant but unavailable because of “seasonal, recreational, or occasional” use.⁵⁷ While many of these apartments are used as *pieds-à-terre* for occasional use by their wealthy owners,⁵⁸ some of these seasonal apartments are retained by their owners to rent them out through short-term rental platforms like Airbnb.⁵⁹ The McGill report refers to these owners as “commercial operators.”⁶⁰ Similar to the microunit,⁶¹ the development and construction of communal living housing complexes could play an important role in assuaging the current housing crisis by creating more available long-term rental units for renters in New York City, potentially bringing down the cost of rent.⁶²

54. See Muñoz & Cohen, *supra* note 29, at 116–17.

55. See generally MCGILL REPORT, *supra* note 53; see also Muñoz & Cohen, *supra* note 29, at 116.

56. U.S. CENSUS BUREAU & N.Y.C. HOUS. PRES. & DEV., 2017 NEW YORK CITY HOUSING AND VACANCY SURVEY (2018). For a summary of the survey’s findings, see 2017 HVS SELECTED FINDINGS, <https://www1.nyc.gov/assets/hpd/downloads/pdf/about/2017-hvs-initial-findings.pdf> (last visited Apr. 25, 2019).

57. See 2017 HVS SELECTED FINDINGS, *supra* note 56, at 17.

58. See Robert Neuwirth, *247,977 Stories in the Vacant City, Priced Out of Reach for Most Renters*, N.Y. DAILY NEWS (Mar. 25, 2018), <https://www.nydailynews.com/opinion/247-977-stories-vacant-city-priced-reach-article-1.3892656> [<https://perma.cc/E9V2-2FKC>].

59. See MCGILL REPORT, *supra* note 53, at 20–21.

60. *Id.* at 21–23.

61. See *Will Going “Small” Put a Dent in the Affordability Crisis?*, INST. FOR HOUS. STUD. DEPAUL UNIV.: BLOG (May 10, 2018), <https://www.housingstudies.org/blog/will-going-small-put-dent-affordability-crisis/> [<https://perma.cc/G52W-XHAU>]. A “micro-unit” is defined as an apartment under 350 square feet. *Id.*

62. The McGill report demonstrated a correlation between low numbers of available rental units and the higher cost of rent. See MCGILL REPORT, *supra* note 53. In June 2018, CNN reported that rental prices in New York City have been on decline as more apartments became available. See Kathryn Vasel, *Is Manhattan’s Rental Market Finally Cooling Off?*, CNN MONEY (June 20, 2018 11:52 A.M.),

A second element rendering long-term, sharing-economy housing ventures attractive is affordability. Part of the initial appeal of sharing economy ventures like Airbnb was that they offered valuable service (i.e., hotel-like accommodations) at a lower cost for the consumer, typically out-of-town visitors looking to experience a new city like a local.⁶³ The “affordability factor” is a huge justification for communal living spaces, as many of the existing co-living spaces are rented for less than the neighborhood average while including the cost of utilities and other amenities.⁶⁴ The rent is cheaper in communal living complexes because consumers are essentially renting private bedrooms and sharing living space with others.

There is a clear need for more available, affordable, rentable units in New York City; in 2018, half of the city’s rentable apartments cost more than \$2000 a month, boasting a vacancy rate of over 7%.⁶⁵ In contrast, the national average cost of rent in 2018 was \$1405 a month.⁶⁶ A report published by StreetEasy, a NYC rental website, found rents in New York City have risen twice as fast as individual wages between 2010 and 2017.⁶⁷ In that same period, rents have increased by 33%.⁶⁸ To add insult to injury, the rents which increased

https://money.cnn.com/2018/06/20/real_estate/new-york-city-rents/index.html [https://perma.cc/HWG7-Q4Y5]. Increased demand for apartments, without an adequate supply of apartments to catch up with the demand, can contribute to higher rent. See Robert Clark, *Is New York City’s Housing Supply Keeping Up with Demand?*, LIVABL_ (May 28, 2018), <https://www.livabl.com/2018/05/new-york-citys-housing-supply-keeping-demand.html> [https://perma.cc/68N9-YPS7].

63. See Iis P. Tussyadiah & Juho Pesonen, *Impacts of Peer-to-Peer Accommodation Use on Travel Patterns*, 55 J. TRAVEL RES. 1022, 1022 (“The practice of collaborative consumption, which implies various forms of resource redistribution, is viewed as an alternative consumption mode that offers value with less cost”); see also Lara Major, *There’s No Place Like (Your) Home: Evaluating Existing Models and Proposing Solutions for Room-Sharing Regulation*, 53 SAN DIEGO L. REV. 469, 475 (2016).

64. See Hill, *supra* note 2; see also Samantha Cooney, *How to Live in New York for \$1,375 a Month, Thanks to This Startup*, MASHABLE (Apr. 5, 2016), <https://mashable.com/2016/04/05/we-live-new-york-rent/#0lsbali9hZq4> [https://perma.cc/8QDA-2EB7].

65. See Neuwirth, *supra* note 58.

66. See Rachel Layne, *U.S. Housing Rents Hits Record-High of \$1,405 Per Month*, CBS NEWS: MONEYWATCH (July 6, 2018), <https://www.cbsnews.com/news/u-s-urban-rents-hit-all-time-high-at-average-1405-report/> [https://perma.cc/9HVS-TH9J]. This article noted that the average cost of rent in Manhattan was \$4000 per month. *Id.*

67. Grant Long, *The Widening Gap: Rents and Wages in New York City*, STREETEASY: ONE BLOCK OVER (Aug. 16, 2017), <https://streeteasy.com/blog/nyc-rent-affordability-2017/> [https://perma.cc/4X7F-KHKP].

68. *Id.*

the fastest were the rents on the least expensive homes.⁶⁹ Housing is considered “affordable” if less than 30% of the household income goes towards rent.⁷⁰ In New York City, one third of rental households pay more than 50% of their income in rent.⁷¹ More and more adults in the city have been living with roommates, in part as a result of higher housing costs.⁷²

Communal living complexes may offer renters with a new living option that is less costly than other traditional modes of living. The development of new building complexes will also add to the stock of available housing in New York City, potentially contributing to decreased prices in rent.⁷³ The McGill Report showed a correlation between low numbers of available rental units and the higher costs of rent.⁷⁴ This is not a radical claim: Where there is more demand for apartments to rent than the current supply of apartments available to rent, the prices for those apartments increase. As supply and demand equalize, rental prices lower.⁷⁵ In addition, the New York City Department of Housing Preservation is developing a pilot program that offers public financing to developers for communal living complexes.⁷⁶

Without the existence of legal and regulatory barriers, it would be possible for long-term communal housing rentals to lower the cost of housing and more efficiently use limited space. Unfortunately, both New York State and New York City have adopted a plethora of laws, regulations, and zoning ordinances which complicate — if not completely halt — the legal development of communal housing by

69. *Id.*

70. *Id.*

71. N.Y.C. RENT GUIDELINES BD., 2018 INCOME AND AFFORDABILITY STUDY 10 (2018).

72. See Hillary Hoffower, *The Trendy Co-Living Spaces Attracting Millennials in New York and San Francisco Are Just the Latest Version of a Concept That's Been Around For 200 Years*, BUS. INSIDER (Sept. 9, 2018), <https://www.businessinsider.com/co-living-increasing-expensive-cities-old-concept-2018-9> [<https://perma.cc/G2ZY-LDWA>].

73. See MCGILL REPORT, *supra* note 53.

74. *See id.*

75. *See* Clark, *supra* note 62. In June of 2018, CNN reported that, as more apartments became available, rental prices have been in slow decline. *See* Vassel, *supra* note 62.

76. Stefanos Chen, *Co-Living Goes Affordable*, N.Y. TIMES (Nov. 1, 2018), <https://www.nytimes.com/2018/11/01/realestate/co-living-goes-affordable.html> [<https://perma.cc/2E69-B69Y>]; *see also* *Share NYC RFI RFEI*, NYC HOUSING PRESERVATION & DEV., <https://www1.nyc.gov/site/hpd/developers/request-for-expressions-of-interest/share-nyc-rfi-rfei.page> [<https://perma.cc/T6PC-DDXH>] (last visited Dec. 23, 2019).

interested start-ups. Some of these laws were influenced by previous iterations of co-living spaces in New York City. Due to communal living's circumvention of established housing business models, several questions are raised regarding the viability of current laws which were not designed to encompass this shared model of living.

Both the history of SRO regulations and the Airbnb problem⁷⁷ highlight why it is so important that New York create a clear and homogenized legislative structure specifically addressing communal living. Before New York enacted its current laws, unscrupulous landlords attempted to fit as many people as possible into a single dwelling. Where no clear definition governs communal living, there is no assurance these complexes will meet the minimum standards they ought to meet. Furthermore, and significantly, lack of regulations can lead to housing standards which vary from one development company to the next. This creates problems for tenants, who cannot be assured of the safety of each building owned by different communal living companies. Thus, a tenant cannot be sure that the communal living complex they choose to live in meets any important safety standards.

Airbnb presents a case study to this very issue: lacking a clear and specific regulatory structure since its beginnings, Airbnb has been able to flout existing housing regulations partially due to the lack of any oversight mechanism ensuring the legality of such listings.⁷⁸ In fact, many Airbnb listings have taken advantage of such regulatory shortcomings, operating clearly illegal "ghost hotels."⁷⁹ The lesson to be learned from the short-term rental problem is that, absent any specific regulations addressing communal living, unscrupulous individuals may feel empowered to take advantage of any legal grey-areas.

II. FAILURES OF THE LEGAL AND REGULATORY STRUCTURE

Airbnb and other short-term rental ventures in the sharing economy share some similarities with communal living. Both are concerned with housing and accommodating individuals through rentals. However, most of the literature surrounding the sharing economy of housing looks at it from the perspective of short-term rentals. Communal-living housing developers are mostly concerned with long-term rentals (rentals longer than 30 days), though it is possible some developers may toy with the idea of incorporating

77. *See infra* Section II.A.

78. *See Major, supra* note 63, at 478.

79. MCGILL REPORT, *supra* note 53, at 29–31.

space for short-term rentals within their complexes as well. The major difference between regulatory issues for short-term rentals and long-term rentals lies in who is most affected by these legal issues. Part II highlights why this analysis of the current legal and regulatory structure must take place.

A. THE SHORT-TERM RENTAL PROBLEM

Eleven years after it was founded, Airbnb has grown to become a multi-billion dollar company,⁸⁰ operating in over 100,000 cities across the globe.⁸¹ In New York City alone, there are roughly 50,000 short-term rentals listed.⁸² Despite its prevalence in the city, the company has dealt with a variety of legal issues — largely regarding the legality of the short-term listings.⁸³ In New York, it is illegal to rent a permanent residence for less than 30 days.⁸⁴ Airbnb hosts have been pursued by New York City for non-compliance with various laws, such as the Multiple Dwelling Law,⁸⁵ health and safety laws, and zoning or taxation regulations.⁸⁶ Like communal living, short-term rental companies like Airbnb lacked a clear legal or regulatory structure because it was a new type of economy that did not fit into the traditional legal or regulatory rental schemes.⁸⁷ Airbnb raised

80. Harriet Sherwood, *How Airbnb Took Over the World*, GUARDIAN (May 5, 2019), <https://www.theguardian.com/technology/2019/may/05/airbnb-homelessness-renting-housing-accommodation-social-policy-cities-travel-leisure> [https://perma.cc/JN8G-6PX4].

81. *Airbnb About Us*, AIRBNB, <https://news.airbnb.com/about-us/> [https://perma.cc/K6TU-NFCJ] (last visited Dec. 23, 2019).

82. See Nick Tabor, *Is New York Cracking Down on Airbnb to Help Local Residents or Hotels?*, N.Y. MAG. (Aug. 13, 2018), <http://nymag.com/intelligencer/2018/08/airbnb-new-york-crack-down.html> [https://perma.cc/KVP2-HZFM]. Airbnb also recently has been looking to partner with RXR Realty to provide “apartment-style hospitality spaces in commercial buildings” to circumvent some regulatory difficulties. See David Jeans, *Scott Rechler’s RXR Nearing Unorthodox Partnership Deal with Airbnb*, REAL DEAL (Apr. 18, 2019), <https://therealdeal.com/2019/04/18/scott-rechlers-rxr-nearing-unorthodox-partnership-deal-with-airbnb/> [https://perma.cc/D9VQ-2B9Z].

83. See Tabor, *supra* note 82.

84. See J.T. Minor, *Foregoing the Cleaver for the Scalpel: How New York Can Add Some Nuance to Its Short-Term Rental Laws*, 103 IOWA L. REV. 817, 818 (2018); see also *Airbnb, Inc. v. Schneiderman*, 44 Misc.3d 351, 356–58 (N.Y. Sup. Ct. 2014) (“[T]he Multiple Dwelling Law requires that a class A multiple dwelling residence be used for permanent residence purposes only and that such purposes require occupancy of a dwelling unit by the same person or family for thirty consecutive days.”).

85. Major, *supra* note 63, at 471.

86. *Id.* at 484.

87. *Id.* at 476.

novel issues about short-term rentals that legislators establishing the traditional legal or regulatory scheme simply did not anticipate.⁸⁸ In fact, Airbnb avoids most regulations governing the hotel industry by bypassing the need to own real estate or to employ staff — the company merely provides the platform to connect willing hosts and travelers.

The enactment of laws regulating short-term rental companies like Airbnb was necessary because of many problems arising from illegal short-term rentals, such as commercial operators running what were effectively illegal hotels⁸⁹ thus evading extensive regulations of that industry or the obligation to pay taxes.⁹⁰ In 2018, New York City Mayor Bill de Blasio signed a law to bridge this legislative gap: the law required short-term rental companies to share data regarding who is renting apartments and the length of the rentals, so the city may pursue legal action against short-term rental hosts operating what were effectively illegal hotels.⁹¹

Airbnb is a peer-to-peer (P2P) venture, acting as the middleman between individuals renting out their apartments and individuals borrowing them.⁹² Liability for violations of state and municipal law mostly falls on the hosts operating the illegal rentals, not on Airbnb.⁹³

88. See Roberta A. Kaplan & Michael L. Nadler, *Airbnb: A Case Study in Occupancy Regulation & Taxation*, 82 U. CHI. L. REV. 103, 104 (2017).

89. See MCGILL REPORT, *supra* note 53, at 29.

90. See Bruce Watson, *Airbnb's Legal Troubles: The Tip of the Iceberg for the Sharing Economy?*, GUARDIAN: SUSTAINABLE BUS. BLOG (Nov. 20, 2013), <https://www.theguardian.com/sustainable-business/airbnb-legal-trouble-sharing-economy> [<https://perma.cc/PW5C-X9BT>].

91. See generally Aaron Gordon, *Will New York's New Airbnb Law Stop Illegal Listings?*, VILLAGE VOICE (Aug. 8, 2018), <https://www.villagevoice.com/2018/08/08/will-new-yorks-new-airbnb-law-stop-illegal-listings/> [<https://perma.cc/J9TT-ZVNW>]; see also Tabor, *supra* note 45.

92. See discussion *supra* note 29. Airbnb has argued — and certain jurisdictions have agreed — that it is the host's responsibility to pay any required taxes on their listing. See Paris Martineau, *Inside Airbnb's 'Guerrilla War' Against Local Governments*, WIRED (Mar. 20, 2019), <https://www.wired.com/story/inside-airbnbs-guerrilla-war-against-local-governments/> [<https://perma.cc/FL4Y-Q2C3>]. Other jurisdictions are of the view that Airbnb would be responsible for collecting and paying out any occupancy taxes. See *id.* In June of 2018, the Supreme Court ruled that the states may collect sales taxes from online retailers even if they do not have a physical presence in that state, thus overturning the physical presence requirement established in 1992. See *South Dakota v. Wayfair Inc.*, 585 U.S. 13 (2018). Though that case focuses on retail sales taxes, it is possible that this holding may apply to Airbnb. See Chuck Dobrosielski, *AH&LA Cites Supreme Court Case in Call to End Airbnb Tax Deals*, HOTEL MGMT. (Apr. 15, 2019), <https://www.hotelmanagement.net/legal/ah-la-calls-for-states-to-end-airbnb-s-special-tax-deals> [<https://perma.cc/WD33-4VNS>].

93. Major, *supra* note 63, at 482.

This greatly differs from the long-term rental style the bulk of communal housing complexes would adopt, where the developers or owners of these buildings would be liable for operating an illegal form of housing. Where Airbnb's temporary renters would not be affected by any claims against the hosts for illegal violations, the renters of communal living housing complexes may be opening themselves to consequences if action is taken against the landlords.⁹⁴ For example, tenants in an illegal apartment may be evicted and be unable to recoup rent paid towards the illegal apartment.⁹⁵

Airbnb is an example of the problems that may arise when a housing-related sharing economy venture begins to operate in an unregulated environment. Long-term rentals and short-term rentals are different enough to warrant an evaluation of the specific issues in the long-term rental arena. Section II.B below evaluates the current legal and regulatory structure governing long-term rentals in New York City.

B. Challenges to Communal Living in New York

The legal framework, as it stands today, is not suited for communal living since it does not adequately guide developers or protect the tenant's interests. Though there is nothing within New York's legal landscape that explicitly bars communal living, the current laws are inadequate for two reasons. First, the legal and regulatory structure in New York does not recognize or address communal living's unique circumstances. Second, the legal and regulatory structure is fraught with inconsistencies. This analysis will allow for a better understanding of what changes need to be made at both the state and municipal level to optimize the success of communal living in New York, for the developers of these complexes and their potential tenants. While co-living may be approached through a short-term rental lease or even a purchasing scheme, this Note assumes communal living ventures in New York City will exclusively deal with long-term rentals.

Section II.B.i examines three major areas of law at the state level. First, New York's Multiple Dwelling Law (MDL) is problematic as its definitions do not encompass the particularities of communal living.

94. See Alanna Schubach, *I Found out My Apartment Is Illegal, and Now My Landlord Wants to Evict Me. Can I Get My Rent Money Back?*, BRICK UNDERGROUND (Sept. 17, 2018), <https://www.brickunderground.com/rent/illegal-apartment-can-i-get-rent-back> [<https://perma.cc/4J9M-RB3M>].

95. See *id.*

Next, the state's landlord-tenant laws fail to recognize the unique characteristics of the landlord and co-tenant relationship, specifically in the context of enforcement against illegal activity and the warranty of habitability. As a result, the tenant's interests are not adequately protected. Following the analysis of state-level laws, Section II.B.ii evaluates the relevant municipal challenges to communal living. This analysis evaluates the inadequacies of the municipal Housing Maintenance Code's definitions, as well as how they conflict with the definitions present in state law. The consequence to these inadequacies is uncertainty regarding which law applies. This section also evaluates the Housing Maintenance Code's imposition of tenant duties. In addition, single-room occupancy laws at the municipal level is analyzed, including those provisions present within the Housing Maintenance Code and the Rent Stabilization Code. Section II.B.ii also considers New York City's zoning laws to highlight additional barriers to developers. Section II.C. addresses the reasons why the present gaps in the law are so problematic to the establishment of communal living in New York. Lastly, Section II.D examines potential solutions to the inadequate legal structure, such as the homogenization of state and municipal laws.

i. An Analysis of State Laws

a. New York Multiple Dwelling Law

New York's Multiple Dwelling Law (MDL) ensures protection against menaces to the "health, safety, morals, welfare and reasonable comfort of multiple dwellings" in New York City.⁹⁶ In simple terms, a multiple dwelling is a building occupied by more than three families living independently from themselves.⁹⁷ To ensure the safety of those living in these buildings, the law seeks to avoid issues such as overcrowding, improper sanitation, and unsafe conditions caused by defective fire safety measures and inadequate provision of light and air.⁹⁸

To evaluate how communal living fits within New York's MDL, the first area of the law to examine is the definition provision. If communal living's essence is properly reflected in any of the definitions, the inquiry need not go further since an adequate legal

96. N.Y. MULT. DWELL. LAW § 2 (McKinney 1946).

97. *Id.* § 4(7).

98. *Id.* § 2.

basis exists to guide developers, and the State is empowered with clear enforcement tools.

The first definition to unpack is “dwelling.” A “dwelling” is a “building or structure or portion thereof which is occupied in whole or in part as the home, residence, or sleeping place of one or more human beings.”⁹⁹ This definition alone is relatively straightforward and does not raise any issue in the co-housing context, regardless of whether the entire communal housing building, or just a portion of it, is occupied by co-housing tenants living independently from one another.

Next, a “multiple dwelling” is defined as “a dwelling which is either rented, leased, let or hired out, to be occupied, or is occupied as the residence or home of three or more families living independently of each other.”¹⁰⁰

At first glance, this definition does not necessarily exclude from within its purview communal housing. However, the inclusion of “living independently of each other” does raise some questions, particular the phrase “living independently.” In communal housing, individuals inhabit their own private bedrooms and share larger, communal spaces. While independent sleeping quarters arguably may be enough to satisfy the “living independently” definition, the lack of statutory clarity may create unnecessary problems for developers, who do not have much guidance on the issue. Is the law satisfied by a communal living complexes housing multiple individuals sharing a single communal space, or must co-living developers design buildings with three or more communal spaces? There is very little jurisprudence on the definition of “living independently.” In one case dating back to 1959, the City Court of Long Beach found that a building was a multiple dwelling (not a two-family house) because the building was “equipped with all the facilities necessary to permit three families to live therein independently of each other,” as it contained three kitchens with separate sinks and separate ranges.¹⁰¹ Should this interpretation be followed, communal living complexes comprised of only one or two “apartments” (i.e., a single kitchen shared by multiple individuals) would be excluded. In *Wesseley v. Trustees of First German Methodist Episcopal Church of New York*, three women occupied a dwelling which was also occupied by a pastor

99. *Id.* § 4(4).

100. *Id.* § 4(7).

101. *Eichorn v. Goodman*, 22 Misc.2d 516, 517 (N.Y. City Ct. 1959) (“None of the three apartments is lacking in anything required to maintain a family in complete self-reliance.”).

and his family.¹⁰² The court found that the three women did not live independently from each other or from the other occupants because they cooked in a shared kitchen.¹⁰³ Though these cases do address the question of “living independently,” uncertainty remains because they are old decisions, and “living independently” may mean something different in today’s context. It is unclear whether kitchens should determine whether individuals live independently or whether sleeping quarters should be the determining factor.

Furthermore, the definition of “family” within the definition of “multiple dwelling” raises additional questions. New York’s MDL defines “family” as:

[E]ither a person occupying a dwelling and maintaining a household, with not more than four boarders, roomers, or lodgers, or two or more persons occupying a dwelling, living together and maintaining a common household, with not more than four boards, roomers, or lodgers. A “boarder”, “roomer” or “lodger” residing with a family shall mean a person living within the household who pays a consideration for such residence and does not occupy such space within the household as an incident of employment therein.¹⁰⁴

New York’s MDL defines “family” not by personal relationships (either by blood, marriage, or adoption, for example) but by occupancy.¹⁰⁵ This definition means those living within a shared communal living space could potentially fall under the “family” scope, though this is relatively unclear.¹⁰⁶ New York’s MDL does not define the term “household.” The First Department of the New York Supreme Court Appellate Division did reflect on the definition of household more, stating that the MDL’s exclusion of institutions such as hospitals, convents, and asylums reflected “an overall legislative intent to exclude from the definition . . . facilities in which the residents, for whatever reason, are unable to or do not live

102. *See* 165 Misc. 834, 837 (N.Y. City Ct. 1937).

103. *See id.* (citing to *People v. Shkilky*, 201 A.D. 55, 56 (N.Y. App. Div. 1922) (“Persons may be said to live in premises when they maintain their family life there. This includes cooking as well as sleeping, and I think they cannot be said to live independently, unless they cook in their own apartments, as distinguished from a kitchen used in common.”)).

104. MULT. DWELL. LAW § 4(5).

105. *Id.*

106. In *Wessely*, the court held that the three women living with the pastor’s family did not constitute family, but were merely lodgers living with a family. The court found they did not live independently from one another. 165 Misc. at 835.

independently, i.e., maintain independent households.”¹⁰⁷ This definition, however, does not provide sufficient guidance in the realm of communal living, as it does not answer the questions raised above regarding what constitutes “living independently” or “maintaining independent households.”

The Meriam-Webster English Dictionary defines a household as comprising of “a social unit composed of those living together in the same dwelling.”¹⁰⁸ The Oxford English Dictionary defines a household as “a house and its occupants regarded as a unit.”¹⁰⁹ Under these definitions, tenants sharing common spaces in a co-living complex may or may not be considered “families” for the purposes of the MDL. The gaps in the law which could allow co-tenants to be classified as families simply because they share a kitchen seems absurd when one considers other areas of the law (such as same-sex marriage or the rights of step-parents) which have followed a very strict conception of what constitutes a “family.”¹¹⁰

The ambiguity of the wording and the questionable fit of communal living raises some unwanted uncertainty in the legal structure. Some communal housing complexes relish in the “community” aspect of the living structure more than others,¹¹¹ but it is unclear to what extent tenants living in these spaces want to be associated as “families.” The tenants living in communal housing are typically strangers before living in that space. The fact that a kitchen, bathroom, or other communal space is shared does not necessarily make a family, and perhaps the law ought to reflect this. To avoid the

107. *Fischer v. Taub*, 127 Misc.2d 518, 523 (N.Y. App. Term 1984). Additionally, the City Magistrates’ Court of the City of New York stated in 1953 that “a ‘household’ means ‘a group of persons dwelling together under the same roof.’” *People v. Whitted*, 124 N.Y.S.2d 189, 191 (N.Y. City Magis. Ct. 1953). This definition cannot realistically be relied upon, since it is overly broad. Under this definition, anyone living in the same apartment building could be considered “a household.” Regardless, MDL’s definition of “family” limits “household” beyond this definition.

108. *Household*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/household> [<https://perma.cc/V3BR-D5F6>] (last visited Dec. 23, 2019). Merriam-Webster also defines household as “those who dwell under the same roof and compose a family.” *Id.*

109. *Household*, OXFORD DICTIONARY, <https://en.oxforddictionaries.com/definition/household> [<https://perma.cc/8XWG-7BBD>] (last visited Dec. 23, 2019).

110. See generally Elizabeth S. Scott & Robert E. Scott, *From Contract to Status: Collaboration and the Evolution of Novel Family*, 115 COLUM. L. REV. 293 (2015).

111. Mimi O’Connor, *Brick Underground’s 2019 Guide to Co-Living Spaces in NYC: How to Tell the Communal Disruptors Apart*, BRICK UNDERGROUND (Aug. 19, 2019), <https://www.brickunderground.com/rent/nyc-coliving-spaces-differences-features-prices> [<https://perma.cc/7EBG-R7DW>].

problems addressed here, the MDL should be amended to better address the unique living relationships created under a co-living regime. Rather than allowing tenants living in a communal living complex to be defined as a “household” within a “family,” it is best to define this form of occupancy through separate units comprising the whole. This ‘whole’ could be defined by the entirety of the complex, floor by floor, or by the number of communal spaces existing in the building (such as kitchens and living rooms). The legislature may then seek to limit the number of individuals living within each individual unit to avoid overcrowding.

Additional definitions included in the law also fail to adequately convey the essence of communal living. Under New York’s MDL, a multiple dwelling may be classified in two different ways. The first class — and the one relevant to the current discussion — focuses on permanent residences:

A ‘class A’ multiple dwelling is a multiple dwelling that is occupied for permanent residence purposes. This class shall include tenements, flat houses, maisonette apartments, apartment houses, apartment hotels, bachelor apartments, studio apartments, duplex apartments, kitchenette apartments, garden-type maisonette dwelling projects, and all other multiple dwellings except class B. A class A multiple dwelling shall only be used for permanent residence purposes. For the purposes of this definition, ‘permanent residence purposes’ shall consist of occupancy of a dwelling unit by the same natural person or family for thirty consecutive days or more and a person or family so occupying a dwelling unit shall be referred to herein as the permanent occupants of such dwelling unit.¹¹²

The statute later defines some of the modes of living listed in that definition. Subsection 11 defines a “tenement” as a building built prior to April 18, 1929, which is occupied wholly in part as the residence of at least three families living independently of each other.¹¹³ Communal living does not fall under this definition for two reasons. First, the definition once again uses the ambiguous and problematic “independent” language discussed in the context of “multiple dwelling.” Second, a tenement house must have been built prior to 1929. Even if a co-living developer wanted to convert a tenement house into a co-living space, it would no longer be

112. N.Y. MULT. DWELL. LAW § 4(8)(a).

113. *Id.* § 4(11).

considered a tenement house.¹¹⁴ Tenements also include apartment houses and flat houses.

Furthermore, communal living is not covered by the definition of “apartment,” which requires one bathroom and rooms which “are separated and set apart from all other rooms within a multiple dwelling.”¹¹⁵ “Garden-type maisonette dwelling projects” are also contrary to co-living spaces as they are designed to provide at least three apartments.¹¹⁶ None of the other modes of living listed in the above definition are explicitly defined, so the problem of ambiguity and uncertainty is not resolved, even if a communal living complex falls under those definitions. This failure to incorporate communal living within an existing, defined form of living does not bar the existence of co-living spaces, however. While co-living is not *excluded* from the MDL’s purview because of its catch-all language, this “everything-but-the-kitchen-sink” approach fails to adequately address unique co-living characteristics.

The second class of multiple dwelling units defined in New York’s MDL focuses on transient residences:

A ‘class B’ multiple dwelling is a multiple dwelling which is occupied, as a rule transiently, as the more or less temporary abode of individuals or families who are lodged with or without meals. This class shall include hotels, lodging houses, rooming houses, boarding houses, boarding schools, furnished room houses, lodgings, club houses, college and school dormitories and dwellings designed as private dwellings but occupied by one or two families with five or more transient boarders, roomers or lodgers in one household.¹¹⁷

Long-term co-living rentals are, by definition, not covered by this definition. Though communal living has been colloquially called “adult dorms,”¹¹⁸ New York’s MDL defines a dormitory as a very temporary form of occupancy.¹¹⁹ The closest possible definition to capture the essence of communal living might be the “rooming

114. *Id.* § 4(11) (“[A] tenement shall not be deemed to include any converted dwelling.”).

115. *Id.* § 4(15).

116. *Id.* § 4(8)(b).

117. *Id.* § 4(9).

118. See John Van Gieson, *Coliving: Dorms for Adults*, NAT’L ASS’N REALTORS: ON COMMON GROUND (Dec. 21, 2017), <https://www.nar.realtor/on-common-ground/coliving-dorms-for-adults> [https://perma.cc/34Z9-A24T]; see also Lucinda Shen, *Adult Dorms Could Be the Future of City Living*, FORTUNE (Mar. 16, 2016), <http://fortune.com/2016/03/16/adult-dorms-funded-by-venture-capital/> [https://perma.cc/X27E-5T3M].

119. MULT. DWELL. Law § 4(14), (21).

house” definition, which is a “multiple dwelling, other than a hotel, having less than thirty sleeping rooms and in which persons individually or as families are housed for hire or otherwise with or without meals.”¹²⁰ However, the transient nature of the B-classification severely limits co-living in this context, as does the definition’s 29 room limit.

The New York MDL also defines “single room occupancy,” though it is not explicitly categorised within the A or B classes discussed above. New York’s MDL defines single room occupancy as a form of occupancy, not a form of housing.¹²¹ In contrast, the co-living model employed in New York is approached as a form of housing, not a form of occupancy. This emphasizes the previous arguments that the MDL’s definition of multiple dwellings does not actually cover this modern iteration of communal living, since the law does not view it as a type of housing — at least, not yet. As alluded to in the working definition, a “co-living arrangement” is made between a landlord-developer and several tenants to live in “communal living *spaces*.”¹²² The disconnect between the legal approach and the practical reality of communal living greatly limits co-living’s ability to fit within the MDL’s other definitions of housing forms. In addition to this issue, the single-room occupancy definition creates additional problems. Single-room occupancy is defined as:

[T]he occupancy by one or two persons of a single room, or of two or more rooms which are joined together, separated from all other rooms within an apartment in a multiple dwelling, so that the occupant or occupants thereof reside separately and independently of the other occupant or occupants of the same apartment.¹²³

As discussed in the context of Class A Multiple Dwellings, the vague “separately and independently” language raises some concerns regarding the applicability of the law to communal living. Notwithstanding, there is nothing within the definition itself that completely excludes the possibility of communal living. A later provision of New York’s MDL strictly spells out the requirements for legal SROs:

It shall be unlawful to occupy any frame multiple dwelling for single room occupancy. It shall be unlawful to occupy any other existing class A dwelling or part thereof as a rooming house or furnished

120. *Id.* § 4(13).

121. *Id.* § 4(16); *but see* Sullivan & Burke, *supra* note 1, at 115, 115 n. 7.

122. For a working definition, see *supra* Section I.C (emphasis added).

123. MULT. DWELL. LAW § 4(16).

room house or for single room occupancy unless such dwelling or part shall conform to the provisions of this section and to such other provisions of this chapter as were applicable to such dwelling before such conversion.¹²⁴

A “frame dwelling” is a dwelling whose exterior walls (or any structural component of such walls) are made of wood.¹²⁵ As such, the coverage of this provision is relatively limited, particularly considering modern construction. Regardless, the remainder of the definition also states it is unlawful to occupy “any other class A dwelling or part thereof” for single-room occupancy, regardless of the type of dwelling.¹²⁶ The remainder of the section adds several additional qualifiers to single room occupancy, like requiring each room have “unobstructed access to each required means of egress from the dwelling without passing through any sleeping room, bathroom, or water-closet compartment,”¹²⁷ that all hallways are constantly well-lit,¹²⁸ that every bedroom includes a window of a certain size,¹²⁹ and that a manager lives on the premises.¹³⁰ While requiring communal housing developers to abide by these strict requirements may be an important step to help ensure the safety of the tenants living in these complexes, New York City has severely restricted single-room occupancy.¹³¹ As a result, municipal laws have made it impossible for communal living complexes to be legally classified as SROs.¹³²

A thorough review of New York’s MDL shows that, as the law currently stands, there is no definition that adequately addresses every relevant element of modern communal living. Several of the definitions incorporate individual elements, or general ideas, in which co-living may conceivably fit — but the fit is akin to a square peg in a round hole. Co-living under the law may then fall within several different definitions or fall under none at all. Communal living as a form of housing implicates specific needs and concerns for developers and tenants alike, and it is important that the law recognizes this to protect all sides involved. The working definition established in

124. *Id.* § 248.

125. *Id.* § 4(28).

126. *Id.*

127. *Id.* § 248(4)(a).

128. *Id.* § 248(4)(g).

129. *Id.* § 248(11)(a), (c).

130. *Id.* § 248(15).

131. *See supra* Part I.

132. This will be evaluated in-depth *supra* Section II.B.ii.

Section I.C demonstrates that various components of communal living exist in practice.¹³³ The above analysis demonstrates none of these components are properly addressed by New York's MDL. With no sound legal basis to guide the development of co-living in New York, companies may arbitrarily run their co-housing ventures, and courts or town boards may adopt a similar approach in enforcement. The group that may stand to lose the most are the tenants living in these co-housing complexes. The need for adequate legal protection will become clearer as other inadequacies in relevant laws are raised.

b. Landlord-Tenant Laws

The landlord-tenant relationship is highly regulated in New York to achieve balance between protecting the tenant's housing interests and the landlord's financial interests.¹³⁴ Article 7 of the New York Real Property Law (RPL) governs landlord-tenant laws in the state of New York.¹³⁵ Because of the unique circumstances of long-term rentals in communal living complexes, several legal issues regarding the landlord-tenant relationship will be addressed.

One element of communal living which the New York landlord-tenant laws fail to address is the complications relating to the shared spaces in the building. For example, Section 231 of New York's RPL states:

Whenever the lessee or occupant other than the owner of any building or premises, shall use or occupy the same, or any part thereof, for any illegal trade, manufacture or other business, the lease or agreement for the letting or occupancy of such building or premises, or any part thereof shall thereupon become void, and the landlord of such lessee or occupant may enter upon the premises so let or occupied.¹³⁶

The statutory provision granting a landlord the right to enter the premises in the event of illegal activity on the premises certainly serves an important purpose. However, the language of the statute should be qualified to protect innocent co-tenants from invasions of

133. *See infra* Section I.C (“A co-living arrangement consisting of landlord-developers grouping individual, unrelated tenants together in a community-focused space comprising of private sleeping quarters and communal living spaces for at least thirty days, with the cost of rent including amenities like internet, cleaning services, and the like.”).

134. Andrew Scherer & Fern Fischer, § 1.1 *Legal Conflicts Between Landlords and Tenants*, in *RESIDENTIAL LANDLORD TENANT LAW IN NEW YORK* 2–3 (West 2018).

135. *See generally* N.Y. REAL PROP. LAW §§ 220–38 (McKinney 2016).

136. *Id.* § 231(1).

privacy. The potential problems raised by this statute are exacerbated in the context of communal living, which differs from a traditional apartment in two ways. First, tenants do not get to choose the co-tenants they live with in a communal living setting. Second, the boundaries between co-tenants are less clear than those boundaries between tenants in a traditional apartment building, since co-tenants share living spaces. In a traditional apartment building, co-tenants are separated by the walls surrounding their individual units. Living in these individual units presumes a separateness that is not as clear in the communal living context, since the relationship between co-tenants in communal living spaces is more akin to that of roommates by virtue of the shared living spaces.

The statute's language allows the landlord to enter the "premises so let."¹³⁷ This language raises many questions: is this limited to the offending tenant's private unit? Does it include access to the communal areas? What about the co-tenants' private units, which may be entirely separate from any illegal activity? The provision's language is so broad and vague that innocent co-tenants may be unnecessarily subject to it. The landlord's interest in preventing illegal activity on their premises is so great they may be inclined to access innocent co-tenants' units without any reason to believe those tenants are involved in the illegal activity in the first place. In addition, New York courts have found tenants liable for illegal acts committed by subtenants or occupants where they were aware of the illegal activity and acquiesced to it.¹³⁸ An important distinction between a co-tenant in a communal living space and a tenant's responsibility to their own subtenants or occupants lies in the choice of the individual. It is unclear whether co-tenants in a communal living complex will be treated in the same way, particularly if the illegal activity takes place in the common areas of the complex, even though a co-tenant has no choice in who they will be sharing their living spaces with. The statutory text reproduced above does not address the unique circumstances of a communal style of living. This ambiguity may lead to problems for co-tenants.

Perhaps more importantly, the language of Section 231 allows the lease for the entire apartment to be voided when any part of the premises is used for illegal activities. This is particularly problematic for communal living, where the relationship between co-tenants is

137. *Id.*

138. *See* Normandy Realty Inc. v. Boyer, 2 Misc.3d 407, 410 (N.Y. Civ. Ct. 2003) (finding in this case that the tenants should not be evicted because the landlord failed to establish that the premises were being used for drug sales).

closer than tenants living in a traditional apartment. Individuals in co-living spaces share the same living spaces, like kitchens, bathrooms, and lounges, whereas in traditional apartments the shared spaces are limited to areas like hallways and elevators. Under this section, an innocent co-tenant could be subject to a voided lease where the co-tenant engaged in illegal activity limits this activity to their private spaces. Though the section's language does allow for this same outcome in a traditional apartment building, it seems unlikely an entire building's lease would be voided where a single apartment engages in illegal activity. On the other hand, it is more likely for an entire shared apartment to be voided, since the illegally engaged co-tenant permeates that entire space. In an illegal holdover proceeding, a landlord must first prove the occurrence of an illegal activity and then must prove that the tenant either knew or should have known of the activities and acquiesced to them.¹³⁹ Most of the caselaw is based on tenants living in the same apartment unit, not tenants living in the same apartment building.¹⁴⁰ The standard is not favorable to innocent co-tenants, since it can easily be argued a co-tenant sharing a living space with another tenant "should have known" of the illegal activities and they "acquiesced" to such activities.¹⁴¹ The risk to a co-tenant sharing a living space with a stranger is the potential tendency to turn a blind eye to the stranger's illegal conduct (for fear of angering the stranger or because "it has nothing to do with me"), thus "acquiescing" to the illegal activities.

To remedy the issue outlined above, a co-tenant should be made aware of their responsibilities to "take all the steps necessary to ensure that her apartment [is] not used for unlawful purposes."¹⁴² It must be clear to the co-tenant that it will not do for them to choose to ignore any potentially illegal behavior.¹⁴³

139. *See* 855-79 LLC v. Salas, 40 A.D.3d 553, 554–55 (N.Y. App. Div. 2007) ("Pursuant to RPAPL 711(5) and Real Property Law 231(1), the landlord has the burden to prove by a preponderance of the credible evidence that the subject premises were used to facilitate trade in drugs and that the tenant knew or should have known of the activities and acquiesced in the illegal drug activity in the apartment.").

140. *See generally* E. Midtown Plaza Hous. Co. v. Gamble, 60 Misc.3d 9 (N.Y. App. Div. 2018) (finding that an undertenant knew or should have known and acquiesced to prostitution activities in the unit).

141. *See* Hauer v. Manigault, 160 Misc. 758, 782 (N.Y.C. Mun. Ct. 1936) ("Passive acquiescence may spell consent; and a failure to protest or abate, after knowledge or notice is shown, may evidence acquiescence.").

142. 88-09 Realty LLC v. Hill, 190 Misc.2d 286, 288 (N.Y. App. Term 2001), *aff'd sub nom.* 88-09 Realty, LLC v. Hill 305 A.D.2d 409 (N.Y. App. Term 2003).

143. *See Hauer*, 160 Misc. at 782.

The warranty of habitability in landlord-tenant law raises serious concerns in the context of communal housing. The warranty of habitability is a promise, implied in every lease, that the landlord will keep the premises safe and habitable for the tenants. Section 235-b of the New York RPL states that:

In every written or oral lease or rental agreement for residential premises the landlord or lessor shall be deemed to covenant and warrant that the premises so leased or rented and all areas used in connection therewith in common with other tenants or residents are fit for human habitation and for the uses reasonably intended by the parties and that the occupants of such premises shall not be subjected to any conditions which would be dangerous, hazardous or detrimental to their life, health or safety. *When any such condition has been caused by the misconduct of the tenant or lessee or persons under his direction or control, it shall not constitute a breach of such covenants and warranties.*¹⁴⁴

It is clear by the language of the statute that, where a co-tenant damages the communal living space shared by everyone, the landlord is not liable. This is an enormous challenge for co-tenants respectful of the common living areas. While the offending tenants may be liable to the other co-tenants under the law of nuisance,¹⁴⁵ it would depend on the extent of the damage done, since “persons living in organized communities much suffer some damage, annoyance, and inconvenience from each other.”¹⁴⁶ Any damage must be materially harmful to the others sharing the spaces for liability to exist.¹⁴⁷ In any case, the availability of a nuisance claim may mean very little to a co-tenant unable to afford a lawyer’s expensive services or may mean very little when the harm-doer has limited ability to pay any damages to the other co-tenants living in the complex. In addition, since the landlord is not liable for breaches of the warranty of habitability because of damage caused by another tenant, the innocent tenants do not have the ability to withhold rent. In the context of communal living, these issues become exacerbated when one considers the tenants do not get to choose their co-tenants, or may not even know

144. N.Y. REAL PROP. LAW § 235-b(1) (McKinney 1997) (emphasis added).

145. There are five elements which must be met by a plaintiff claiming a cause of action for a private nuisance: (1) an interference substantial in nature, (2) intentional in origin, (3) unreasonable in character, (4) with a person’s property right to use and enjoy land, (5) cause by another’s conduct in acting or failure to act. *See Ewen v. Maccherone*, 32 Misc.3d 12, 14 (N.Y. App. Term 2011) (citing *Copart Indus. v. Consol. Edison Co. of NY*, 362 N.E.2d 968, 972 (N.Y. 1977)).

146. *Campbell v. Seaman*, 63 N.Y. 568, 577 (N.Y. 1876).

147. *See id.*

them at all. In the same way the text of Section 231 does not adequately address the unique characteristics of communal living, the same can be said of Section 235-b. To more adequately provide a legal or regulatory support to communal housing in the state of New York, many changes need to be made.

One existing provision of the New York RPL that may be important in terms of protecting tenants living in co-living complexes is Section 230, which protects the tenants' rights to form, join, or participate in tenants' groups.¹⁴⁸ This provision prevents a landlord from interfering with tenants' rights to be organized and participate as a group.¹⁴⁹ Additionally, the provision denies the landlord the right to charge tenants a fee for the use of "community and social" rooms where these rooms are "normally subject to a fee which is devoted to the common use of all tenants."¹⁵⁰ Where part of the rent paid by the tenants in a co-living complex would go towards the use of the communal spaces, tenants are protected from additional charges under this provision. This provision's reach is quite limited and does not address many of the other issues that should be concerning to communal housing developers and tenants. The drafting of this provision also raises questions about what portion of the rent, if any, is allocated towards the use of common areas. The language of this provision does allow for an argument to be made, where the rent allocated to communal spaces is not specified, the communal rooms are not normally subject to a fee. However, this argument is tenuous at best.

A major aspect of the working definition established in Section I.C. of this Note is the fact that living in a communal-living space entails a landlord-developer grouping several tenants, previously strangers, in a community-focused space. Communal living differs from traditional landlord-tenant relationships in that it is the landlord, not the tenants, who groups the tenants together. The existing landlord-tenant laws do not take this unique aspect of the co-living landlord-tenant relationship into consideration, which raises serious concerns regarding who is responsible for a wrongdoing tenant's infractions.

The state regulatory structure is inadequate as it currently stands. While nothing at the state level explicitly prohibits communal housing, nothing exists which properly reflects the unique needs and challenges this new form of living requires, and certain provisions

148. REAL PROP. LAW § 230.

149. *Id.* § 230(1).

150. *Id.* § 230(2).

may contribute additional challenges. The result of this may open all interested parties — whether developers or tenants — to strife. In addition to these issues, the municipal legal structure adds another level of obstacles facing communal living in New York City.

ii. An Analysis of Municipal Laws

a. New York City Housing Maintenance Code

The New York City Housing Maintenance Code (HMC) was enacted to define minimum housing standards to “protect the people of the city against the consequences of urban blight” and is enforceable legally, equitably, and administratively.¹⁵¹ The HMC applies to all dwellings in the City.¹⁵² Much like New York’s MDL, the HMC includes a variety of conflicting definitions under which one must analyze whether communal living fits in.

The definition of “multiple dwelling” under the HMC and the MDL are mostly similar, as both contain references to an occupation by “three or more families living independently of each other.”¹⁵³ The definition of “family” under the HMC is much more detailed than that of the MDL. The definition encompasses many different relationships, like being related by blood or legal relationship or students living in a dorm.¹⁵⁴ Similar to the MDL, families are defined by the maintenance of a “common household.” Unlike the MDL, however, “household” is defined as: “[a] common household is deemed to exist if every member of the family has access to all parts of the dwelling unit. Lack of access to all parts of the dwelling unit establishes a rebuttable presumption that no common household exists.”¹⁵⁵

While the additional definition of “household” does provide a clearer idea of what falls under the definition of “family,” the definition included in the HMC remains somewhat ambiguous. It is likely tenants living in communal housing not be considered a “household” since an individual’s bedroom would presumably be off-limits to other tenants. However, the fact that the classification of “household” is merely a rebuttable presumption allows for the

151. N.Y.C. ADMIN CODE § 27-2002 (1988).

152. *Id.* § 27-2003.

153. *Id.* § 27-2004 (7) (“A multiple dwelling is a dwelling which is either rented, leased, let or hired out, to be occupied or is occupied, as the residence or home of three or more families living independently of each other.”).

154. *Id.* § 27-2004(4)(a)–(g).

155. *Id.* § 27-2004(a).

possibility that tenants living in a communal living space are considered a “household.” The context of communal living specifically is somewhat more directly addressed in this definition section, though retains the same “household” language: “[n]ot more than three unrelated persons occupying a dwelling unit in a congregate housing or shared living arrangement *and maintaining a common household.*”¹⁵⁶ The fact that “household” is open to interpretation may unnecessarily open developers and co-tenants to problems. Where the living situation is held to be a “household,” the number of people who may live in these complexes is limited, and it is illegal for a communal living space to fail to comply with minimum housing standards. Thus, if a co-living space comprises of more than three unrelated persons within a unit (per the HMC), the co-living space is illegal. This is not an unlikely possibility.¹⁵⁷

In addition to the definition included in the HMC, New York City’s Building Code also includes a separate definition of “family.” The definition is much less detailed than the HMC’s version:

A single individual; or two or more individuals related by blood or marriage or who are parties to a domestic partnership, and living together and maintaining a common household, with not more than four *boarders, roomers or lodgers*; or a group not more than four individuals, not necessarily related by blood, marriage or because they are parties to a domestic partnership, and maintaining a common household.¹⁵⁸

The problematic aspect of this definition lies not only in the use of the phrase “common household.” The number of individuals recognized as consisting of a family within the Building Code is limited to four unrelated persons. The number of unrelated individuals recognized as consisting of a “family” within the HMC is three. In addition, the number of unrelated persons living within a common household with two or more related persons is more generous in the building code (four additional people) than in the HMC (two additional people). The questions remain which definition applies: whether the proper definition is the one used in the HMC, the Building Code, or perhaps even the State MDL, which also differs from these municipal laws. This legal heterogeneity creates an unnecessary, additional difficulty for developers wishing to comply with minimum housing standards. This difficulty cannot be avoided

156. *Id.* § 27-2004(4)(d) (emphasis added).

157. Node Living, located in Brooklyn, currently offers units with four bedrooms. See *Bushwick, Brooklyn*, *supra* note 47.

158. N.Y.C. ADMIN CODE § 27-232.

in a living situation that literally comprises of grouping several, unrelated tenants together to live in the same space.

In addition to the issue of finding a place for communal living to fit within the municipal regulatory scheme, the HMC also includes a provision outlining a tenant's duties which raises some eyebrows in the context of communal living and the above definitions. Tenants are responsible for preventing, where possible, violations of the HMC:

a. A tenant shall, in addition to complying with all provisions of this code and the multiple dwelling law applicable to him or her, be responsible for violations of this code to the extent that he or she has the power to prevent the occurrence of a violation. A tenant has the power to prevent the occurrence of a violation if:

(1) it is caused by his or her own willful act *or that of a member of his or her family or household*, or a guest; or

(2) It is the result of such tenant's gross negligence, neglect or abuse, or the gross negligence, neglect or abuse of a family member of his or her family, *or household* or a guest.¹⁵⁹

Where co-tenants are deemed to be members of a "household," this provision essentially imposes upon a co-tenant a positive responsibility to prevent, where possible, violations of the HMC. The problem with this lies in the fact that most co-tenants are strangers before entering this living arrangement, with no say or control over whom they are sharing a household with. This municipal issue reflects a similar issue discussed in the context of state landlord-tenant laws discussed above; a potential solution to this problem will be addressed later in this Note.¹⁶⁰

b. SROs at the Municipal Level

The history of SROs was briefly outlined in Section I.A of this Note, and the definition of SROs in New York's MDL was shown to be inadequate for modern communal living complexes. Much work has been done at the municipal level to restrict the legality of SRO as a form of occupancy in New York City. This Section will evaluate the restrictions to the SROs within the HMC and the city's Rent Stabilization Code (RSC).

The first issue to raise is the inconsistent definition of SROs at the state or municipal level. The definitions for SRO under New York's

159. *Id.* § 27-2006(a)(1)-(2) (emphasis added).

160. *See infra* Part III.

MDL and the HMC are roughly the same,¹⁶¹ but differ from the definition included in the RSC:

Notwithstanding the provisions of subdivision (a) of this section, single-room occupancy facilities such as single-room occupancy hotels or rooming houses, as defined in the MDL, shall not be subject to reclassification pursuant to this section. However, such housing accommodations shall be included in the definition of hotel as set forth in section 2520.6(b) of this Title for all other purposes of this Code.¹⁶²

The treatment of SROs as hotels is not an insignificant difference. As discussed in Section I.A of this Note, “hotels” are considered class B multiple dwellings — in other words, consisting of temporary residences.¹⁶³ As a result, SROs as defined by New York’s MDL are not covered by rent-stabilization laws. Perhaps the most significant takeaway from the inconsistent definitions is that it reflects the fact that SROs may exist in a variety of different contexts, including short-term and long-term ones.¹⁶⁴

Amongst the most important limitations to the possibility of communal living falling within the legal structure of SROs is the date limitation included in the HMC. For an SRO to be considered legal, the rooming unit must have been classified as an SRO prior to May 15, 1954.¹⁶⁵ The construction of new housing developments cannot, as a rule, be classified as SROs. However, as has been addressed earlier, SROs are considered a form of occupancy, not of housing. Additionally, the inability to legally classify a co-living space as an SRO does not bar a unit from merely *functioning* as such. Regardless, no matter the various interpretations of the relatively

161. *Compare* N.Y.C. ADMIN CODE § 27-2004(17) (“Single room occupancy is the occupancy by one or two persons of a single room or of two or more rooms which are joined together, separated from all other rooms within an apartment in a multiple dwelling, so that the occupant or occupants thereof reside separately and independently of the other occupant or occupants of the same apartment”) *with* N.Y. MULT. DWELL. LAW § 4(16) (McKinney 2011) (“[t]he occupancy by one or two persons of a single room, or of two or more rooms which are joined together, separated from all other rooms within an apartment in a multiple dwelling, so that the occupant or occupants thereof reside separately and independently of the other occupant or occupants of the same apartment.”); *see also* Sullivan & Burke, *supra* note 1, at 115 n.7.

162. N.Y.C. ADMIN CODE § 2521.3; *see also* Sullivan & Burke, *supra* note 1, at 115 n.7.

163. MULT. DWELL. § 4(9).

164. Sullivan & Burke, *supra* note 1, at 115 (“Beyond these basic similarities, SROs vary significantly. They exist in hotels, rooming houses, apartment buildings, lodging houses, and so forth.”); *see also id.* at 115 n.6.

165. N.Y.C. ADMIN CODE § 27-2077.

ambiguous language discussed throughout this essay, communal living simply cannot be legally classified as a form of SRO. This is also true of conversions of existing buildings, since the HMC specifies that the building must have been *classified* as being an SRO prior to 1954.¹⁶⁶

What is the purpose of discussing SROs in such detail, when it has been clearly established the definitions of SROs cannot contain within them modern communal living? When an SRO is illegal to begin with, landlords are hard-pressed to follow the additional, costly legal requirements imposed by this variety of complex, confusing laws and regulations. This may result in unsafe or inadequate housing for the tenants living in these complexes. As of now, it is possible for communal living companies to be operating their housing as illegal SROs, depending on the way the lease is configured.¹⁶⁷

c. Zoning Challenges

New York Town Law empowers municipalities within the state to regulate and restrict, among other things, the height, size, location, and use of buildings.¹⁶⁸ Zoning laws restrict a developer's ability to develop a communal living complex within the city by limiting certain uses to certain areas.¹⁶⁹ This is a challenging area to analyze because

166. *Id.*

167. Virginia K. Smith, *Been Offered a Lease for a Single Room in a Shared Apartment? Yep, It's Too Good to be True*, BRICK UNDERGROUND (Feb. 16, 2017), <https://www.brickunderground.com/rent/lease-for-single-room> [<https://perma.cc/2ME3-URCF>].

168. N.Y. TOWN LAW § 261 (McKinney 1998)

For the purpose of promoting the health, safety, morals, or the general welfare of the community, the town board is hereby empowered by local law or ordinance to regulate and restrict the height, number of stories and size of buildings and other structures, the percentage of lot that may be occupied, the size of yards, courts, and other open spaces, the density of population, and the location and use of buildings, structures and land for trade, industry, residence or other purposes.

Id.

169. The purpose of these regulations is similar to the purpose of the other laws and regulations discussed in this Note: to protect individuals from a variety of evils such as overcrowding. *See id.* § 263. The New York Administrative Code states that the city's commission shall consider the character of buildings in each district (among other things) to achieve the best value for the land. *See* N.Y.C. ADMIN. CODE § 25-110(c) ("The commission shall pay reasonable regard to the character of buildings erected in each district, the value of the land and the use to which it may be put, to the end that such regulations may promote public health, safety and welfare and the most desirable use for which the land of each district may be adapted and may tend to conserve the value of the buildings and may enhance the value of land throughout the city."); *see also id.* § 25-111(c) ("The commission shall give reasonable consideration, among other things, to the character of the district, its peculiar

the city has been defined per a more traditional approach to housing: “Zoning laws have carved up cities and suburbs into single-family homes and units, largely separating household units into isolated spaces. Because they challenge this framework, housing solutions that involve shared spaces often encounter zoning barriers.”¹⁷⁰ The analysis of New York City’s zoning structure will evaluate the major zoning categories and where co-living fits within them.

It is worth mentioning that the Zoning Resolution includes yet another variety of definitions that are not identical to the other state and municipal definitions. Again, the issue of enforcement arises — what definition should developers look to and what definition is used to enforce the law against developers, particularly when they are ‘developing’ buildings consistent to a residential use that the legal framework does not adequately support? For example, the Zoning Resolution’s definition of “family” differs from the MDL or the HMC’s definition.¹⁷¹

The zoning laws seek to regulate a variety of things, such as ensuring that housing is adequately sized, to protect residential areas from overcrowding and congestion, and to protect “the character of certain designated areas.”¹⁷² To do so, zoning laws divide the city into districts, and within those districts certain uses of land are permitted. However, zoning cannot be effective if it is not periodically updated to “reflect and account for the needs and interests of the day.”¹⁷³ New York City’s current Zoning Resolution was adopted in 1961, and while periodic amendments have been made, there has not been a

suitability for particular uses, the conservation of property values, and the direction of building development in accord with a well-considered plan.”).

170. Orsi, *supra* note 30, at 516.

171. N.Y.C., ZONING RESOLUTION Art. I ch.2. § 12-10 (2011)

A ‘family’ is either: (a) a single person occupying a dwelling and maintaining a household, including not more than one ‘boarder, roomer or lodger’ as defined in the Housing Maintenance Code; or (b) two or more persons related by blood or marriage, occupying a dwelling, living together and maintaining a common household, including not more than one such boarder, roomer, or lodger; or (c) not more than four unrelated persons occupying a dwelling, living together and maintaining a common household. A common household shall be deemed to exist if all members thereof have access to all parts of the dwelling.

Id.

172. *Id.* § 21-00.

173. Norman Marcus, *New York City Zoning — 1961–1991: Turning Back the Clock — but with an Up-To-The-Minute Social Agenda*, 19 *FORDHAM URB. L.J.* 707, 708 (1992).

major overhaul since.¹⁷⁴ The last time any zoning changes were made, the City was in the middle of its anti-SRO era.¹⁷⁵

One major roadblock to communal living within New York City's zoning laws are the density restrictions, which limit how many units may be included on a parcel, or the number of unrelated people allowed to live within a certain space.¹⁷⁶ For purposes of this Section, it is important to highlight the way in which existing communal living companies have been operating: larger homes with multiple bedrooms on multiple floors.¹⁷⁷ Assuming every tenant living in a communal living space is unrelated to one another, developers may be quite restricted in terms of where they may locate their buildings.

New York City is divided into ten distinct residential districts — R1 through R10, some of which are subdivided even further. Each district is based on one of four classifications: single-family detached residence districts, detached residence districts, detached and semi-detached residence districts, and general residence districts.¹⁷⁸ Districts R1, R2, and their subdivisions are not suitable for communal living, since they are restricted to single-family residences — as has been shown earlier in this essay, the definition of “family” severely restricts the number of units and/or individuals who may occupy a single dwelling.¹⁷⁹ Districts R3A, R3X, R4A, R3-1, R4-1, and R4B are likewise unsuitable for communal living as they are restricted to single- or two-family residences,¹⁸⁰ though a developer looking to establish a slightly smaller complex may be comfortable within these districts.

174. *About Zoning*, NYC PLANNING, <https://www1.nyc.gov/site/planning/zoning/about-zoning.page> [<https://perma.cc/ZG2C-WY5W>] (last visited Dec. 23, 2019).

175. Sullivan & Burke, *supra* note 1, at 122; see Malcolm Gladwell, *N.Y. Hopes To Help Homeless By Reviving Single Room Occupancy Hotels*, L.A. TIMES (Apr. 25, 1993), http://articles.latimes.com/1993-04-25/news/mn-27098_1_single-room-occupancy-hotels [<https://perma.cc/H5MF-KZDS>]; see also *infra* Section I.A.

176. Orsi, *supra* note 30, at 519; see also *Considering SRO Housing in New York City and Beyond*, PD&R EDGE, <https://www.huduser.gov/portal/pdredge/pdr-edge-trending-062518.html> [<https://perma.cc/7PKZ-2KP9>] (last visited Dec. 23, 2019).

177. *Coliving in New York City*, COMMON, <https://www.common.com/new-york-city/> [<https://perma.cc/KWU8-Y8LW>] (last visited Dec. 23, 2019). When exploring the homes on the online tool, many of them consist of several floors, each of which contain three to four bedrooms. See also O'Connor, *supra* note 4, which links to several communal living providers in New York City and describes generally each developer's stance.

178. N.Y.C., ZONING RESOLUTION, §§ 21-10–21-15 (2011)

179. See *supra* Section II.B.

180. N.Y.C., ZONING RESOLUTION, 2 § 22-12.

The remaining districts are not limited by the number of occupying families. Though developers are not limited by the single- or two-family residences within the remaining districts, that is not the end of their zoning woes. Zoning regulations also define a maximum number of dwelling units permitted on the zoning lot.¹⁸¹ The maximum number is calculated by dividing the maximum floor area permitted on the zoning lot from a district-specific factor specified in the zoning resolution.¹⁸² This calculation may be further limited depending on the existence of other uses within the building.¹⁸³ When considering the working definition of communal living, these problems become pronounced. Communal living is designed to group several individual, unrelated tenants together in a shared space. Developers must be aware of the district's zoning requirements when designing their complexes, ensuring the maximum numbers of dwelling units are respected, the floor area maximums and minimums are respected, and the maximum numbers of unrelated persons living are respected. The limitations zoning regulations impose on communal living complexes may be significant in shaping what communal living ought to look like (i.e., how many individuals will share common spaces), but they are also significant in that they exacerbate the definitional problems addressed in Section II above. Given the state of the law now, and the inconsistencies which exist at different government levels, can developers be certain they are complying with the law? First, developers must be careful not to develop co-living complexes in prohibited zoning districts. What sounds simple enough is complicated by the reality that no single definition properly encompasses communal living, thus it is difficult to know whether such a complex is permitted in a certain district. Second, developers must take extra care to build their complexes in accordance with the maximum dwelling units permitted in the area. Is the entirety of the co-living apartment (i.e., the shared space and its corresponding private rooms) the dwelling unit, or is each individual private room the dwelling unit? This distinction would have serious implications for the developer looking to build its complex.

As shown by municipal laws related to tenants, housing rentals, and zoning considerations for the developer, the municipal legal and regulatory structure governing communal housing is rife with gaps

181. *Id.* §23-20.

182. *Id.* § 23-22. For more detail on how this is calculated, see the illustrative examples included immediately following Section 23-24.

183. *Id.* § 23-24.

and inadequacies. These gaps will have a negative impact on both tenants and developers if they are not addressed.

III. POTENTIAL SOLUTIONS TO THE INADEQUATE LEGAL STRUCTURE

Many of the arguments discussed in the legal and regulatory sections at the municipal level are repetitive of similar issues discussed at the state level. This highlights the fact that there is not a single legal structure which adequately supports communal living as a form of housing. As communal living has been steadily growing in the past few years, the lack of a single, adequate legal structure poses a significant problem. In addition, even though many of the issues are recurring, some conflict exists in the way these issues are handled at the state and municipal levels.

A recurring issue at the state and municipal level is inconsistent definitions. The definition section of a law is incredibly important, since it informs the way each provision of the law is to be approached. Every single law or regulation included a definition provision with different definitions. In some instances, the differences were relatively minimal but in other instances, the differences were significant in that they create enforcement problems.¹⁸⁴

The differing definitions for “family,” for example, create a large amount of confusion in the realm of communal living: which definition governs and how are developers to know? This ambiguity creates several legal consequences. First, developers may be unfairly or arbitrarily pursued for failing to comply with the “right” laws. Alternatively, landlord-developers may use the ambiguity to their advantage, and choose to comply with the least restrictive laws, which may (or may not) have an effect on their tenants. An additional problem with the definition issue is that not all the problematic definitions discussed outright exclude communal living spaces. As a result, communal living exists in a legal “grey-area”¹⁸⁵ whereby it is not exactly unregulated (thanks to the catch-all provisions), but the law fails to adequately address every unique characteristic. If left without specific, particularized regulations and to the developing companies to fill in the gaps, these gaps may cause issues for tenants.

184. Orsi, *supra* note 30, at 463 (“The legal relationships that clients wish to create for the management of land are often limited by laws that dictate how such relationships may be created and how land can be used. These laws are particularly hard to apply when clients have created systems that involve shared use . . . of land.”).

185. *Id.* at 465.

Developers may also be at risk if communal living is unregulated, as the town board or courts may eventually make decisions detrimental to their businesses.

Not only do the definitions and provisions differ from state laws to municipal laws, the definitions and provisions *within* the state law umbrella (as well as the municipal umbrella) are inconsistent. Laws ought to be modernized and, most importantly, homogenized for clarity.

To protect both developers and (most importantly) the tenants living in their buildings, the definition provisions must be made uniform to create certainty. Nothing less than a clear, specific regulatory structure will adequately protect the interests of the developers and tenants involved. This may also help avoid unnecessary litigation and administrative proceedings. The definition should establish that communal living is a form of housing, not a form of occupancy. The definition should also be explicit that communal living is distinct from SRO occupancy. Doing so would benefit communal living development companies, who would no longer run the risk of being considered illegal SRO housing. The changes governing communal living should also include specifics regarding the dimensions of individual sleeping quarters and communal spaces, maximum occupancy per shared space, and other health and safety regulations such as windows, fire escapes, and the like.

There are several different parties whose involvement is necessary to ensure not only that the laws are actually homogenized, but that they are homogenized in a way which ensures that developers' and co-tenants' interests alike are properly represented. New York State and municipal agents must, of course, both participate in this endeavor to ensure any legal or regulatory change made is consistent. At the very least, any changes made by New York State should include a provision stating that, in the event any definition at the municipal level is inconsistent, the state definition prevails.

It is also important that the developers' interests and the co-tenants' interests be properly represented. When the government took it upon themselves to "cure" the problem of SROs and similar forms of housing, their actions resulted in the loss of a significant amount of affordable housing.¹⁸⁶ A series of town hall-style meetings in which government officials consult with co-tenants and developers, sharing their concerns and suggestions for new laws, could help ensure these important perspectives are afforded their proper weight.

186. See Sullivan & Burke, *supra* note 1, at 123.

Developers and co-tenants are in the unique position that they may be able to anticipate certain problems or inconsistencies by virtue of their direct involvement with communal living. A series of such consultations would help ensure any changes made to the current legal and regulatory structure are not made only to render them consistent with each other, but to ensure they are also consistent with protecting the rights and interests of co-tenants and developers alike.

It is important that any changes made to the current legal and regulatory structure include additional protections for co-tenants. The unique nature of the relationship between co-tenants sharing a living space — i.e., that the landlord is the one grouping tenants together — must be addressed. Both state and municipal laws imposed responsibilities on innocent co-tenants regarding other tenants' problematic behavior.¹⁸⁷ Traditional landlord-tenant laws, for example, would impose punishments upon innocent co-tenants as a result of their co-tenants' illegal activity or misconduct resulting in a breach of the warranty of habitability, even though the innocent co-tenant has zero say in who they live with.¹⁸⁸ The municipal HMC even imposes an affirmative responsibility on co-tenants to prevent such misconduct.¹⁸⁹ With no regulation tailored to communal living, co-living companies may implement their own tenant-vetting procedures.¹⁹⁰ This means there is no uniform tenant-vetting process and no way to know exactly how each company conducts such processes, which further exacerbates the unfairness of subjecting the innocent co-tenant to being responsible for a stranger's actions within her home. The problem of unfairness may be easily corrected by including a specific definition within the relevant regulatory and legal structure which is specifically tailored to the needs of communal living. Such a definition should not include the language "household" to avoid imposing the above responsibility on the innocent co-tenant. A definition providing that co-tenants in communal living complexes live independently from one another despite sharing communal areas such as kitchens is one way to protect tenants from such unfair results of their co-tenants' misconduct because it would establish a legal boundary between the tenants. Creating a legal boundary between

187. *See supra* Sections A.II and B.I.

188. *See supra* Section II.B.

189. N.Y.C., BUILDING CODE § 27-2006 (2008).

190. Node & Ollie specifically reference roommate matching services in their websites. *See All Inclusive Coliving in Long Island City*, OLLIE, <https://www.ollie.co/new-york/long-island-city-apartments> [<https://perma.cc/L3FC-SKHX>] (last visited Dec. 23, 2019); NODE LIVING, *supra* note 43.

co-tenants does not prevent co-tenants from viewing themselves as living within a community, but it does protect them from unreasonable responsibilities or punishments.

CONCLUSION

The prevalence and growth of communal living in urban centers like New York City requires a thorough re-examination of the various housing-relevant laws which exist at both the state and the municipal level. This Note highlights the various issues present within the New York Multiple Dwelling Law, Landlord-Tenant Laws, and the Municipal Housing Maintenance Code, Rent Stabilization Code, and Zoning Regulations. For communal living to properly function and serve both tenants and landlord-developers, these laws must be re-examined and amended in two ways. First, definitions within the relevant laws and regulations must be included to accommodate communal living. Second, these definitions must be made consistent in every relevant law and regulation. Updating the legal and regulatory structure to properly address the issue of communal living in New York and ensuring the differing puzzle pieces within that structure fit together properly will not be an easy feat. The solutions described above, in which statutes must be amended to specifically address communal living, is relatively straightforward; the challenge lies in orchestrating a homogenized intervention by different levels of government.

The issues outlined in this Note must be resolved because they affect everyone in the most basic and important element of their lives: how and where they live. Though the modern iteration of communal living is relatively new, it is a living situation that is rapidly expanding. As the popularity of communal living grows and the culture continues to change to accommodate it, it is more likely that communal living becomes a fixture of urban life, rather than a fleeting trend.