

The Sh(e)aring Economy. Debates on the Law on Takings

Nofar Sheffi

Faculty of Law and Justice, UNSW Sydney, Sydney, NSW 2052, Australia; n.sheffi@unsw.edu.au

Abstract: Rethinking ‘sharing’ and the relationship between ‘sharing’ and ‘jurisdiction’, this meander proceeds in three parts. It begins with a journey to and through the forests of the nineteenth-century Rhineland, rereading Marx’s journalistic reports on debates in the Sixth Rhine Province Assembly about proposed amendments to forest regulation (including an extension of the definition of ‘wood theft’ to include the gathering of fallen wood) as a reflection on the making of law by legal bodies. From the forests of the Rhineland, the paper journeys to the forests of England, retracing the common story about the development, by legal bodies, of the body of common law principles applicable to ‘innkeeping’. Traveling to and through the ‘concrete jungles’ of the United States of America, the paper concludes with a reflection on Airbnb’s common story of creation as well as debates about the legality of Airbnb, Airbnb-ing, and ‘sharing’.

Keywords: Karl Marx; theft of wood; innkeeping; Airbnb; the ‘sharing economy’; sharing; jurisdiction

... it is common knowledge that the forest only echoes back what you shout into it.

Karl Marx, Contribution to the Critique of Hegel’s Philosophy of Law



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1. The Tree of Life

‘[S]ince time immemorial’,¹ the farmers of the Rhineland enjoyed the riches of the local forests, large and small, woodlands, copses, pastures, and riverbanks. Dependent on these forests for their survival and livelihood, they used wood for heating and building, and twigs and branches for bedding, fencing, hop poles, and kindling. They used foliage for thatch and fodder and collected litter for fertilization and stabling cattle. They made resin out of sap, baskets out of fibre. They fed their animals the fruits of the forest and picked fruits and berries to feed their families. They used plants and plant substances to treat diseases and medical conditions.²

During the early modern period, beginning in the sixteenth century, wood became a matter for and of regulation and ‘scientific’ study, as well as for and of wealth and state building. The turn of the nineteenth century marked not so much a break or a turning point but the climax of supply anxiety and of regulatory and technological efforts to reduce wood consumption. Driven by a fear of wood famine and in response to an increasing demand for (affordable) (commercial) wood, the *forming* Prussian state, represented by a newly established forest administration, staffed by members of a newly developed field of scientific expertise (silviculture), stepped in and swung into action. The preservation of wood and the conservation of regulatory control were treated as matters of urgency; the elaboration and tightening of regulation found correspondence in efforts to increase and regulate (economic and wood) growth. The intertwined development of forest science, the re-forming of forests, the systemization of forest regulation, the ordering of the timber market, the centralization of forest administration, and the construction of the forming Prussian state engendered not only a vision of the state as a firewood-fuelled wooden machine, but also a ‘stripped down’ image of the forest as an aggregate of commercially

¹ (Marx 1975, p. 234).

² See (Lascoumes and Zander 1984, pp. 95–96; Scott 1998, p. 12).

valuable trees of which growth could be managed, marshalled, and manipulated scientifically to optimize outcomes. Scientific knowledge was seen as supporting growth, while economic theory served to imbue scientific forestry with value.³

During the eighteenth century, wood became scarcer and more valuable—not least because access to and use of it were increasingly restricted and controlled.⁴ Not only physical but also regulatory barriers were reinforced or erected to monitor and manage access to and use of the forest. Vast areas—including corporate and village forests—were declared state forests and subject to the control of the newly established forest administration.⁵ Building on the newly formalized forestry science, a variety of measures was implemented to protect and optimize forest growth. ‘Low forests’ (*Niedewälder*) were converted into ‘high forests’ (*Hochwälder*) of high-value, fast-growing pine trees.⁶ Recommended and pushed for by (commercially oriented) forestry experts,⁷ the cultivation of coniferous forests served to marshal forest use and undercut traditional usages, for example, pasturing and foliage collection.⁸ To facilitate the desirable growth of high forests and with a view to the future, tree rotation times remained long at up to 120 or even 180 years.⁹ Despite yielding higher returns than the wood industry, many traditional usages of the forest—such as pasturing, pig-fattening, foliage consumption, and collecting floor litter—were labelled ‘secondary’ and even ‘misuses’ and were undermined and even barred.¹⁰

With the French occupation of the Rhine and the imposition of revolutionary French law,¹¹ the materialization of the modern concept of property, the formation of the Prussian state, the commercialization of wood and wood use, and the exponential increase in demand for construction timber and firewood, the forest became an object of private property. Around the turn of the nineteenth century, the state’s extensive and even ‘monopolistic’ control over extensive areas of forests came under increasing criticism and the forest administration was viewed as corrupt or inefficient. With the rise of public debt and the institution of the modern tax system, calls for privatization of control over the forests intensified. Large forest lands, including in the Rhineland, were parcelled out and transferred, chunk by chunk, to members of the growing class of commercial and industrial bourgeoisie. Serving as fences, private property rights were employed to prevent access to forest land, keep locals out, frame them as trespassers, and stake claims against them.¹² At the same time, many restrictions that had theretofore circumscribed the right of forest owners to private property (under the regulation of hunting and of wood growth and cutting) fell away, leaving private forest owners ‘almost entirely free’.¹³

Property rights were used not only to block regulatory interferences but also to eliminate ‘servitudes’ and to curb the traditional forest rights of the local peasants. During the Middle Ages, it was commonplace for peasants to perform services in return for a licence to use the forest.¹⁴ These servitudes were treated as privileges rather than rights, even though, through time, some have been officially or formally recognized as customary access and use rights. For example, landowners employed peasants to fetch wood from

³ See (Radkau 1996, 2012; Scott 1998, chp. 1). For illustrative examples, see (Bernhardt 1875; Fernow 1911, pp. 22–151).

⁴ (Radkau 2012, pp. 149–51, 181–85).

⁵ (Fernow 1911, pp. 92–93). In Prussia, from 1807 to 1899, the increase of state forest area was at the rate of 14,000 acres per year: (Fernow 1899, p. 210). See also (Linebaugh 1976, p. 12).

⁶ (Radkau 2012, pp. 137, 152, 176–77; Scott 1998, chp. 1)

⁷ (Radkau 2012, p. 176; Fernow 1911, pp. 64–65).

⁸ (Radkau 2012, pp. 176–177).

⁹ (Ibid.).

¹⁰ (Radkau 2012, pp. 177–78; Bernhardt 1875, pp. 140–45).

¹¹ The left bank of the Rhine was under French occupation from 1795 to 1814. During this period, a series of revolutionary reforms overhauled the Rhinish legal system, introducing, among others, the Napoleonic code and the concept of absolute property. Many of these reforms remained in force after the end of the French occupation. See (Lascoumes and Zander 1984, pp. 68–90; Bensaïd 2021, pp. 3–4).

¹² (Radkau 2012, chp. 3). See also (Fernow 1911, pp. 93–94; Lascoumes and Zander 1984, pp. 96–97).

¹³ (Fernow 1911, p. 128). ‘[I]ndeed Prussia, in 1811, issued an edict insuring absolutely unrestricted rights to forest owners, permitting partition and conversion of forest properties, and even denying in such cases the right of interference on the part of possessors of rights of user’: (Fernow 1911, p. 128). See also (Linebaugh 1976, p. 12).

¹⁴ (Radkau 2012, pp. 61–63).

the forest and they ‘paid’ for the labour services performed by granting licences to use the forest—such as to gather wood for personal use or local sale.¹⁵ During the eighteenth and nineteenth centuries, these servitudes were increasingly seen as ‘incumbrances’ or ‘curtailments of property’, as well as inefficient, destructive, and unjustified uses of the forest that must be restricted if not abolished.¹⁶ Where the customary rights of farmers were recognized, agreements were reached whereby farmers would relinquish their use rights in exchange for parcels of forest property and, later on, once money exchange was permitted, for parcels of money. A variety of limitations has further been imposed on the use and enjoyment of forests, by bearers of use rights as well as other users.¹⁷ The coniferization of forests, as discussed above, was one of the techniques employed to render unusable certain use rights; the criminalization of wood theft and other activities was another.

Theft of wood was prohibited already before the nineteenth century, though only the cutting of wood and the theft of ready-split logs and cut wood fell within the definition of ‘wood theft’. It was a matter for local legislation and was considered not a criminal offence but an infraction of forest regulation (*Forstfrevel*), more minor than other types of theft. Charges against alleged wood thieves were brought by representatives of the forest administration (*Forstpolizei*) and handled by local forest administration courts (*Forstpolizeigericht*). Where it was determined that a theft of wood had been committed, a civil fine (for an administrative infraction) was imposed, though courts were able instead to impose a prison sentence or to order forest works. The amount to be paid as a fine was determined by the judge on a case-by-case basis until the seventeenth century, when precise sums were fixed. In the eighteenth century, these sums were adjusted—purportedly to reflect the value of the stolen wood.¹⁸

In 1821, a general law on wood theft was enacted in Prussia, criminalizing the theft of wood, which was defined, as before, as the cutting of wood or the taking of hewn lumber.¹⁹ Following the criminalization of wood theft, the number of cases brought against alleged wood thieves grew exponentially. However, to the great frustration of the Prussian authorities, the forest administration, and private forest owners, the local forest administration courts did not always fall in line.²⁰ Historical records suggest that, despite increases in enforcement efforts and in the number of charges—especially in regions such as the Rhineland, where most of the forestland was privately owned²¹—the share of cases that reached the criminal court system, as opposed to the civil court system, decreased and so did the share of cases in which a prison sentence (as opposed to a fine) was imposed.²²

In 1842, the village commune of Straberg initiated proceedings against the royal government of Düsseldorf (*Königliche Regierung zu Düsseldorf*), claiming that, since 1838, when the forests of the area were transferred from the control of Knechtsteden Abbey to that of the state tax authorities, its inhabitants had been unlawfully prevented from exercising their customary usage rights—rights that were acknowledged in a rescript issued by the Ministry of Finance in 1806. Affirming the commune’s right to use the forests of the ancient Abbey and finding unlawful the restrictions imposed on its exercise, the Tribunal of Düsseldorf sided with the commune. The government appealed, but the Court of Appeal,

¹⁵ (*Ibid.*, pp. 61–65).

¹⁶ For an illustration, see (Fernow 1911, pp. 94–96). ‘The incumbrances which had grown up with regard to forest property under the name of servitudes and which so much retarded the development of better forest management continued into this period, and although through the influences of the French revolution a desire had been stimulated to get rid of all curtailments of property, some have persisted to this day. Indeed, for a time an increase of these servitudes took place, due to the carelessness of forest officials in keeping unjustified use of the forest in check, when ancient usage of these rights of user was claimed and new servitudes were established’: (Fernow 1911, pp. 95–96).

¹⁷ (Radkau 2012, pp. 183–96; Fernow 1911, pp. 85–86).

¹⁸ (Fernow 1911, pp. 82–83, 123–24), translating and truncating (Bernhardt 1875, pp. 140–50).

¹⁹ For the act, see (Hahn 1836, pp. 1–60). The law was amended in 1834 and 1837. On the amendments, see (Lascoumes and Zander 1984, p. 105).

²⁰ (Radkau 2012, pp. 185–186).

²¹ (Linebaugh 1976, pp. 13–14), citing (Valentini 1869).

²² In the Palatine, for example, from 1836–1837 to 1841–1842, the number of criminal charges rose by 7.1%, but the share of criminal charges (as opposed to civil charges) decreased from 76.24% to 69.3%. While the number of criminal convictions rose by 0.4%, the number of civil processes that ended with a conviction decreased by 1.1%: (Lascoumes and Zander 1984, pp. 107–10). See also (Lascoumes and Zander 1984, pp. 98–101).

sitting in Berlin, upheld the Tribunal's decision. Until the late eighteenth century, usage of the forest was indeed considered a privilege, the Court recognized. However, since the French revolution of 1789, it had been treated as a legal right.²³

Also in 1842, the Rhenish Court of Revision and Cassation (*Rheinischer Revisions- und Kassationshof*) annulled a decision by the forest administration court of Stromberg. Submitted by the general prosecutor of Koblenz on behalf of its authorities, the cassation challenged the legality of the forest administration court's alleged practice of automatically referring to the civil court system any case in which a person accused of wood theft claimed to be holding a legal right to that wood. Citing twenty-four such incidents to establish the existence of a practice, the prosecutor claimed that the automatic referral of cases to the civil courts, without considering the validity of such claims, allowed thieves to walk away with impunity and impeded the state's efforts to prevent the devastation of the local forests. The Court of Cassation, sitting in Berlin, accepted the prosecutor's claim, determining that, in accordance with the applicable law, those claiming to be holding a property right must (within eight days) contact the relevant general prosecutor and provide evidence to support their claim.²⁴

Seeking to consolidate power and establish authority, the forming institutions of the Prussian state and private forest owners concentrated their efforts on the penal system. In addition to increased enforcement of existing regulations, they pushed for legislative reforms that would enable the guardians and owners of the forest to defend it more effectively against 'forest criminals', including wood thieves. Wood theft was framed not only as an encroachment on property rights and a threat to the institution of private property, but also as an inefficient and destructive use of the forest and an impediment to its growth and flourishing.²⁵

In 1841, an amendment to forest regulations, which, among other changes, extended the category of 'wood theft' to include the gathering of fallen wood, had been debated in the Sixth Rhine Province Assembly.²⁶ Sitting in the audience was 24-year-old law student Karl Marx. The following year, Marx published in *Die Rheinische Zeitung*, of which he also served as the editor, a series of reports on the Assembly's debates, including a five-part commentary on the 1841 amendment to forest regulations.²⁷ It is this series of reports to which the roots of Marx's critique of capitalism are commonly traced. It is in this article, it is said, that Marx begins to articulate his famous critiques of capitalism and law, as well as his theory of value. It is in this series that young Marx grows into Marx.²⁸ 'In the year 1842–1843, as editor of the *Rheinische Zeitung*', Marx writes in 1859:

I first found myself in the embarrassing position of having to discuss what is known as material interests. The deliberations of the Rhine Province Assembly in thefts of wood and the division of landed property; the official polemic started by Herr von Schaper, then Oberpräsident of the Rhine Province, against the *Rheinische Zeitung* about the condition of the Mosel peasantry, and finally the

²³ The process is described in (Lascoumes and Zander 1984, pp. 99–101). The decision is reported in (1847, pp. 50–52).

²⁴ The decision is summarized in (Lascoumes and Zander 1984, p. 101). The decision is reported in (1842, pp. 33–35).

²⁵ (Lascoumes and Zander 1984, pp. 101–2; Radkau 2012, pp. 183–87).

²⁶ The Assembly was in session from 23 May to 25 July 1841. (Dixon 1975, n. 45). Marx did not see the bill itself, which had been presented to the Province Assembly on behalf the King of Prussia. His reports are based on what was said during the Assembly's debates and, hence, concern these debates. (Marx 1975, p. 224). In addition to extending the definition of wood theft, the bill established that fines due to wood theft will be owed directly to forest owners, and that, in cases where a fine cannot be recovered due to the impecuniosity of the offender, it will be replaced by forestry work for the forest owner or imprisonment. (Bensaïd 2021, p. 8).

²⁷ Written in October 1842, the reports were on the proceedings of the Assembly from 23 May to 25 July 1841 and were published on 25, 27, and 30 October and 1 and 3 November 1842. On the *Rheinische Zeitung*, see (Nichols 2021, pp. xi–xiv).

²⁸ See, for example, (Linebaugh 1976, p. 6; Bensaïd 2021, pp. 5–7). For a contextualisation of this series of reports, see (Lascoumes and Zander 1984; Xifaras 2002; Bensaïd 2021; Xifaras 2018).

debates on free trade and protective tariffs caused me in the first instance to turn my attention to economic questions.²⁹

Marx's five-part diatribe is the third in a series of articles on the debates of the Province Assembly.³⁰ He comes 'down to ground level' to the matter of wood—more precisely, wood theft—after 'describing' the Assembly's 'confusion' over freedom of the press and 'its unfreedom in regard to the confusion'.³¹ He frames his discussion of wood theft as a preamble to his ensuing engagement with 'the really earthly question in all its life-size, the question of the parcellation of landed property', and as a platform for a reflection about the 'spirit' and 'actual physical nature' of the Assembly.³² In his 'account of the Assembly debates on the law on thefts', Marx lays it bare from the outset: he is 'directly describing the Assembly's debates on its legislative function'.³³

The gathering of fallen wood, members of the Assembly reportedly acknowledge straight away, does not currently fall within the definition of wood theft. It is currently not unlawful—hence it is currently lawful—to collect branches that have organically separated from the object of property (the forestland, not the tree as such). A branch that naturally separates from the tree is severed from the object of property (the forestland, not the tree as such) so that it no longer forms part of it. It can no longer be 'stolen'. The Assembly is urged to respond to an exponential growth in the number of wood thefts by extending the scope of the existing definition to include the gathering of fallen branches. The number of wood thefts in the form of branch gathering cannot really be said to have grown. It has not grown because the gathering of fallen wood has until now not been prohibited. The number of wood thefts has not grown but will exponentially grow. It will be the Assembly's decision to accept the bill that will bring into effect the very phenomenon in response to which it is asked to act. The Assembly is in a bind:

On the one hand, after the adoption of the paragraph, it is inevitable that many people not of a criminal disposition are cut off from the green tree of morality and cast like fallen wood into the hell of crime, infamy and misery. On the other hand, after rejection of the paragraph, there is the possibility that some young trees may be damaged, and it needs hardly be said that the wooden idols triumph and human beings are sacrificed!³⁴

The Assembly chooses the latter path; it sides with the young trees, more precisely, the owners of the trees, more precisely, the owners of the forest lands, the objects of property. It decides to extend the definition of wood theft so that an activity that has heretofore fallen outside its scope will, from now on, fall within it. It declares a deep-rooted practice illegal, turning innocent persons into criminals.³⁵ Until now, both owners of forest lands and others could collect fallen branches for personal use and sale. Once the bill is passed, a fallen branch could no longer be collected by anyone other than the forest landowners. It could be used, but only by the forest landowners. It could be reduced to ashes, but only by the forest landowners. It could be sold, but only by the forest landowners. At the same time as the adopted amendment contracts the domain of the lawful, of what does not amount to wood theft, it also expands the object of

²⁹ (Marx 2010, pp. 91–92). In 1895, in a letter to Richard Fischer, Engels writes: 'Was den Moselartikel angeht, so bin ich der Sache soweit sicher, als ich von M[arx] immer gehört, grade durch seine Beschäftigung mit dem Holzdiebstahls-gesetz und mit der Lage der Moselbauern sei er von der bloßen Politik auf ökonomische Verhältnisse verwiesen worden und so zum Sozialismus gekommen' (As far as the Mosel article is concerned, I am certain insofar as I always heard from Marx that, thanks to his work on the law relating to wood theft and to his work on the situation of the Mosel winegrowers, he was led from pure politics to economic relations, and, in this way, to socialism): (1968, pp. 466–67).

³⁰ The first article concerned debates on freedom of the press and publication of the proceedings of the Assembly of the Estates and was published in six parts on 5, 8, 10, 12, 15, and 19 May 1841. The second article—'Debates on the Prussian Government and the Catholic Church'—was banned by censors and thus never published. (Dixon 1975, nn. 44, pp. 88–89).

³¹ (Marx 1975, p. 224). The debate to which Marx refers, to remind, concerned the conflict between the Prussian government and the Catholic Church: n. 30.

³² (Marx 1975, p. 224).

³³ (Ibid., p. 225). On Marx's use of literary techniques, including sarcasm, see (Lascoumes and Zander 1984, pp. 26–31).

³⁴ (Marx 1975, p. 226).

³⁵ (Ibid., p. 247).

property: the forestland, not the trees from which the branches organically separated. It artificially reattaches fallen wood, which ‘has as little organic connection with the growing tree as the cast-off skin has with the snake’,³⁶ to the forest—a whole that can be and is already owned. By transmuting fallen branches into parts of an owned whole, it confers on the owners of forest land the exclusive power to collect fallen branches and sell them off: the power to break off pieces from the whole and convert them into distinct objects of property, wholes that belong and could be capitalized on.³⁷

By extending the definition of ‘wood theft’, Marx further observes, the Assembly denies that a difference exists between the act of cutting off a branch, the act of stealing hewn lumber, and the act of collecting fallen branches.³⁸ The Assembly makes a difference by denying that difference matters for the purpose of the law. Paradoxically, however, the Assembly’s taken position undermines itself. It ‘lays down a common definition for different kinds of action and leaves the difference out of account’, bringing about ‘its own destruction’.³⁹ For to make law is to make a difference and a difference is made by making a difference, by distinguishing what belongs and what does not, the ‘legal’ from the ‘illegal’. By denying the relevance of difference—that acts may be different, or should be treated differently—the Assembly reveals the groundlessness of its own authority. It acts on the assumption that actions can and should be differentiated: that the act of making law is different from that of exercising power lawfully, that the act of exercising power legally is different from that of breaking the law. If difference is irrelevant, how can the position of the law-making body be grounded? What authorizes a decision to distinguish between legal actions and illegal acts? On what basis can the right of owners to use the forest be differentiated from that of others? ‘If every violation of property without distinction, without a more exact definition, is termed theft’, Marx reflects,

will not all private property be theft? By my private ownership do I not exclude every other person from this ownership? Do I not thereby violate his right of ownership? If you deny the difference between essentially different kinds of the same crime, you are denying that crime itself is *different from right*, you are abolishing right itself, for every crime has an aspect in common with right.⁴⁰

The Assembly, moreover, does not really repudiate the difference between wood cutting and wood gathering, Marx observes. Composed of representatives of various ‘estates’, the Assembly refuses ‘to regard it as determining the character of the action, when it is a question of the *interests of the infringers of forest regulations*, but it recognises this difference when it is a question of the *interests of the forest owners*’, that is, ‘when it is a matter of its own interests’.⁴¹ The Assembly does acknowledge that there is a difference when it decides that the sanction for certain classes of wood theft will be heavier—that is, that the cutting of wood with an edged tool will be punished more severely than the cutting of wood with an axe.⁴² It does make a difference when it acknowledges that objects of property are of different value and decides that the value of the stolen goods should be considered in sentencing.⁴³ The power to discriminate that the law-making body purports to exercise is, in effect, groundless, and is exercised discriminatorily.

³⁶ (Ibid., p. 234). See discussion in n. 38.

³⁷ See (Xifaras 2018, p. 16).

³⁸ Marx considered as ‘essentially different’ the appropriation of growing timber, the taking of felled wood, and the collecting of fallen branches. Growing timber ‘has to be forcibly separated from its organic association’, while ‘[f]elled wood is wood that has been worked on’, ‘material that has been produced by the owner’. Both actions should be labelled and punished as theft from ‘from the legal standpoint’. ‘In the case of fallen wood, on the contrary, nothing has been separated from property. It is only what has already been separated from property that is being separated from it’. The gathering of fallen wood should not be called theft. (Marx 1975, pp. 226–27).

³⁹ (Marx 1975, p. 228).

⁴⁰ (Marx 1975, p. 228).

⁴¹ (Ibid., p. 228). On the composition of the Rhine Province Assembly, see (Nichols 2021, pp. xii–xiii).

⁴² (Marx 1975, p. 228).

⁴³ (Ibid., p. 229). The bill also deemed it relevant whether ‘the theft was committed during the night or on a holiday’; whether the offender’s face was concealed or had been ‘blackened’; whether the offender provided incorrect information about their identity: (Bensaïd 2021, p. 8).

To establish an identity, Marx's reflection suggests, more broadly, a body that makes law must first distinguish itself as a growing body from an external environment. It must postulate a place, a grounded position of power, that can be enclosed and defended as its own. To survive and grow, a legal body must yield. It must produce meaning by making sense of events that take place in its environment. To be able to assign meaning, a law-making body must experience its external environment as its inner environment. It must exercise dominion over the very environment from which it has isolated itself. To maintain its integrity, a body that makes law must frame events in its environment as 'expedients' that demand a reaction, threats that must be responded to:

Interest knows how to denigrate right by presenting a prospect of harmful results due to its effects in the external world; it knows how to whitewash what is wrong by ascribing good motives to it, that is, by retreating into the internal world of its thoughts. Law produces bad results in the external world among bad people, wrong springs from good motives in the breast of the honest man who decrees it; but both, the good motives and the harmful results, have in common the peculiar feature that they do not look at a thing in relation to itself, that they do not treat the law as an independent object, but direct attention away from the law either to the external world or to their own mind, that therefore they manoeuvre *behind the back of the law*.⁴⁴

The making of law is not only self-interested, but also one-sided. It 'is not only one-sided, but [also] has the essential function of making the world one-sided'.⁴⁵ To discover an environment that is already ordered, a law-making body must 'extract the particular from the unorganised mass of the whole and give it shape'.⁴⁶ It must confine 'each of the contents of the world in a stable definiteness' and solidify 'the fluid essence of this content'.⁴⁷ It must apply posited abstract categories, distinguishing determinate from indeterminate forms, grounded from ungrounded claims.⁴⁸ It must accept a particular view and take a clear-cut position. It must pick a side. Both the rights of the forest owners and the customary rights of the local communities formed part of the legal ecosystem, but only the former are 'discovered' as 'in existence' by the Assembly. Using the matter up for discussion as material for surplus value generation, the law-making body selects to recognize only the property rights of the owners as being of 'legal status', as being of legal significance, as being of legal value.⁴⁹ 'The principle of *divide et impere* [divide and rule]', Marx writes in a later report in the series,

could not be more adroitly exploited. In considering one paragraph, no attention is paid to the next one, and when the turn of that one comes, the previous one is forgotten. One paragraph has already been discussed, the other has not yet been discussed, so for opposite reasons both of them are raised to a position above all discussion. But the acknowledged principle is 'the sense of right and fairness in protecting the interests of the forest owner', which is directly opposed to the sense of right and fairness in protecting the interests of those whose property consists of life, freedom, humanity, and citizenship of the state, who own nothing except themselves.⁵⁰

What bodies of law are doing when making law, Marx's reflection on the Assembly's debates highlights, is to decide what would fall, what would be included, within the domain of the law and what would not be welcomed, what would break the law, and they do so by dismembering the body politic. Just like the Rhine Province Assembly, legal

⁴⁴ (Marx 1975, p. 248).

⁴⁵ (Ibid., pp. 232–33).

⁴⁶ (Ibid., p. 233).

⁴⁷ (Ibid., p. 233).

⁴⁸ (Ibid., pp. 231–34).

⁴⁹ (Marx 1975, pp. 232–33).

⁵⁰ (Ibid., p. 256).

bodies create meaning that would come to matter by defining who would be framed as law breakers,⁵¹ who would ‘break off’ from the social body and ‘fall into crime’, who could and would be collected by an empowered body. However, Marx contends,

the state must regard the infringer of forest regulations as something more than a wood-pilferer, more than an *enemy to wood*. Is not the state linked with each of its citizens by a thousand vital nerves, and has it the right to sever all these nerves because this citizen has himself arbitrarily severed *one* of them? ⁵²

The state should

regard even an infringer of forest regulations as a human being, a living member of the state, one in whom its heart’s blood flows, a soldier who has to defend his Fatherland, a witness whose voice must be heard by the court, a member of the community with public duties to perform, the father of a family, whose existence is sacred, and, above all, a citizen of the state. ⁵³

The state should

not light-heartedly exclude one of its members from all these functions, for the state amputates itself whenever it turns a citizen into a criminal. ⁵⁴

Just like the Rhine Province Assembly, Marx’s reflection suggests, bodies are formed and transformed by embodying and enacting law. They ground and grow themselves by acting as bodies of law. They act as bodies of law by growing bodies of law. And they grow bodies of law by *shearing*. But it is not some external body that law-making bodies cut. It is not apart they break, and it is not off they shear. What legal bodies are doing when making law, Marx observes, is marking themselves, drawing a line, making an incision, cutting themselves open, and creating bifurcations: internal distinctions between what would be welcomed within the domain of the legal and what would not.⁵⁵ Like the trees that the Province Assembly claimed to protect, legal bodies survive and grow by branching, not off but out. ‘Differentiation’, in the words of Niklas Luhmann, is a ‘reflexive form of system building’.⁵⁶ It ‘performs the reproduction of the system in itself, multiplying specialized versions of its own identity by splitting it into internal systems and environments; it is not simply decomposition into smaller chunks but, in fact, a process of growth by internal disjunction’.⁵⁷

2. From the Forests of Prussia to the Forests of England

‘From the earliest times’,⁵⁸ the hungry and weary travellers of the world have been welcomed as guests in private households, great and small, lodging establishments, and houses of public entertainment. In the ancient world, in Babylon, Assyria, Egypt, and Greece, they stayed in taverns, inns, and thermal baths. Along Middle Eastern routes, they recovered from the day’s journey in caravanserais and taverns. Across the Ottoman Empire,

⁵¹ The multiple meanings of the verb ‘frame’ are related in the work of Judith Butler. To be ‘framed’, Butler notes, ‘is a complex phrase in English: a picture is framed, but so too is a criminal (by the police), or an innocent person (by someone nefarious, often the police), so that to be framed is to be set up, or to have evidence planted against one that ultimately “proves” one’s guilt. When a picture is framed, any number of ways of commenting on or extending the picture may be at stake. But the frame tends to function, even in a minimalist form, as an editorial embellishment of the image, if not a self-commentary on the history of the frame itself. This sense that the frame implicitly guides the interpretation has some resonance with the idea of the frame as a false accusation. If one is “framed,” then a “frame” is constructed around one’s deed such that one’s guilty status becomes the viewer’s inevitable conclusion’: (Butler 2009, p. 8).

⁵² (Marx 1975, p. 236).

⁵³ (Ibid., p. 236).

⁵⁴ (Ibid., p. 236). Note Marx’s two citations of William Shakespeare’s *The Merchant of Venice*. (Marx 1975, pp. 236, 256). After discussing the principle of divide and conquer, before including a citation from the play, he writes: ‘We have, however, reached a point where the forest owner, in exchange for his piece of wood, receives what was once a human being’. (Marx 1975, p. 256).

⁵⁵ Compare with Karen Barad’s notion of ‘agential cut’ (‘cutting together and apart’) (Barad 2007) and Daniela Gandorfer’s matterphorical concept of cuts as onto-epistemological expressions of difference (Gandorfer Forthcoming).

⁵⁶ (Luhmann 1977, p. 31).

⁵⁷ (Ibid., p. 31).

⁵⁸ (Beale 1906, p. 10).

they rested in one of the many khans. Pilgrims and crusaders of medieval Europe spent the night, ate a warm meal, and received medical care in monasteries and abbeys. When in France, travellers recharged their batteries in *auberges*, *chambres d'hôtes*, and *gîtes*. While visiting and travelling across Germany, they made themselves at home in *Fremdenzimmer*, *Pensionen*, and *Gasthäuser*.⁵⁹

Following the departure of the Romans in the sixth century, inns disappeared from the English landscape and historical records. It was only in the twelfth and thirteenth centuries that they slowly made a reappearance, leaving a (paper) trail that could be tracked by historians and common law jurists.⁶⁰ During the Middle Ages, inns sprouted up across England, at crossroads, on main roads of travel, and beside highway houses of entertainment. Through the centuries, they increased in number and size, put out shoots, branched off and out, blossomed, and thrived, and, in the late-eighteenth century, they grew into hotels. A forest of large-scale established hotel branches covered England, casting a shade on small-scale, private, and non-commercial hospitality.

The English inn, a common story of the creation of the English common law of innkeepers goes, was 'a natural outgrowth' of travelling conditions in medieval England.⁶¹ While road travel was undertaken regularly and as a matter of course in medieval England, transport was neither easy nor safe. In very poor condition, the roads left by the Romans were impassable for large and loaded wagons. Wayfarers could not travel in large comfortable wagons and they had to carry baggage that was as light in weight as possible. 'The roads were not only bad, but they were infested with outlaws and robbers of all sorts. Between the villages there were long stretches of forest, and these forests were the refuge of the outlaws who formed a considerable proportion of the population of the country.'⁶² To minimize the risk of attack, travellers proceeded in companies and carried with them as few valuables as they could. At night-time, when the risk was especially high, their journey was brought to a halt. The weary wayfarers of England had to secure protection for themselves, their horses, and their belongings.⁶³

While the religious houses and the great houses of nobles and gentry provided free accommodation for travelling nobles, magnates, and the very poor, the middle class — 'the men who were able to pay their way'—were forced to secure protection elsewhere and to pay for it.⁶⁴ While they were welcomed to enjoy a meal and a drink in the local alehouse or tavern, they were turned away at the stroke of curfew, 'at the very moment when [they] most needed protection'.⁶⁵ It was into private houses situated by the roadside at convenient places that wayfarers were first welcomed. They arrived before nightfall,

⁵⁹ See (Beale 1906, pp. 1–2), as rehashed in (Sherry 1993a, pp. 3–4).

⁶⁰ (Bogen 1996, pp. 51, 53–55).

⁶¹ (Beale 1906, pp. 3–6), as rehashed in, for example, (Sherry 1993a, pp. 4–5; Jonassen 2009, pp. 74–75; Navagh 1956, pp. 62–63). See also (Hare 2013, pp. 477–82). Alternative stories have, of course, been written. According to another common story, the duties and liabilities of the innkeeper at common law arise from the voluntary undertaking to serve the public or to exercise a 'common calling'. See, for example, (Pollock 1897, p. 500). According to a third rehashed story, concern for criminal activity in the inn, rather than outside it, led to the imposition of a duty to serve the public and of strict liability on innkeepers: (Bogen 1996). This story is, of course, not inconsistent with the one told in the main text, specifically given cited concerns of a rise in crime and, specifically, of 'connivance with robbers': (Bogen 1996, pp. 64–65). See further discussion in n. 85. To give a final example, Robert Palmer focuses on the impact of the Black Death, including rising prices and crime, declining population, and deteriorating standards of hospitality, framing the story of innkeeping law against this background. (Palmer 1993, pp. 252–67).

⁶² (Beale 1906, p. 3), relying on (Jusserand 1890, pp. 252–75).

⁶³ (Beale 1906, pp. 3–6), as rehashed in (Sherry 1993a, pp. 4–5). *Rex v Ivens* (1835) 173 ER 94 concerned an indictment against an innkeeper who refused to accommodate a traveller. The innkeeper, who received guests in his family home, argued in defence that his duty to receive the public had not been breached because, among other reasons, the guest was travelling on a Sunday, and at an hour of the night after the innkeeper's family had gone to bed. Coleridge J concluded that 'the lateness of the hour is no excuse to the defendant for refusing to receive the [traveller] into his inn' and said: 'Why are inns established? For the reception of travellers, who are often very far distant from their own homes. Now, at what time is it most essential that travellers should not be denied admission into the inns? I should say when they are benighted, and when, from any casualty, or from the badness of the roads, they arrive at an inn at a very late hour. Indeed, in former times, when the roads were much worse, and were much infested with robbers, a late hour of the night was the time, of all others, at which the traveller most required to be received into an inn. I think, therefore, that if the traveller conducts himself properly, the innkeeper is bound to admit him, at whatever hour of the night he may arrive': *ibid* at 97. On the innkeeper's duty to receive the public, see n. 79 and accompanying text.

⁶⁴ (Beale 1906, pp. 4–5), as rehashed in (Sherry 1993a, p. 5).

⁶⁵ (Beale 1906, p. 5), as rehashed in (Sherry 1993a, p. 6).

had their supper at the great table in the common hall, and were directed to beds that were spread especially for them in different corners of that very room. Guests of means would have rented one of a small number of common chambers, which they shared with a smaller number of 'strange bedfellows'.⁶⁶

In the course of time, this common story continues, some of these private houses gained notoriety as establishments furnishing food, drink, and safe lodging to hungry and exhausted travellers, attracting more and more and a larger and larger share of the wayfarers. Responding to increasing demand, ever more houses opened their doors to the world, offering refreshment, entertainment, and a place to rest one's head. As business increased, especially in larger towns, buildings were erected specifically for the purpose of supplying food and shelter to travellers; in response to a growing demand for privacy, they contained a larger number of private rooms and could take in a greater number of guests.⁶⁷ It is from the private house that the inn—the public house of entertainment—'naturally evolved'.⁶⁸ The welcoming home transformed into a public house and a social institution. The hospitable homeowner transformed into a servant of the public. Hospitality became a course of business. A market was born.

Unlike other markets, it has been commonly said, this market—the hospitality market—has never been 'naturally ordered'. The 'ordinary laws of supply and demand' have never enjoyed exclusive jurisdiction over it. Those laws, it has always been assumed, 'would lead to the establishment of [public] houses by the roadside at places which would sufficiently serve the public convenience; but those laws could not be trusted to secure to each individual the benefit of the food and shelter therein provided'.⁶⁹ The instant and insistent need of the weary traveller for present service creates a temporary monopoly.⁷⁰ It 'will always be so immediate that did the law not interfere in his favor, [the traveller] would pay often an exorbitant price rather than be turned back into the night to seek other accommodations. He has no time to choose, no opportunity to bargain'.⁷¹ If the law did not interpose itself, '[t]he innkeeper would almost invariably have the upper hand, the traveler for the moment be at the chance of his caprice, prejudice, hatred, or greed'.⁷² The innkeeper may charge excessive rates. 'Hatred, prejudice, envy, sloth or undue fastidiousness might influence an innkeeper to refuse entertainment to a traveller, even though he could pay his score'.⁷³ It is, therefore, from the time of this market's inception, that the common law has made it its business 'to ensure that the weary traveler should find at convenient places beside the highway houses of entertainment and shelter to which he might resort during his journey for food, rest and protection'.⁷⁴ Since competition cannot be relied upon for the protection of the public for whose benefit inns are kept, the law has intervened to 'make injustice to the individual traveller impossible',⁷⁵ to ensure that excessive rates are not charged, that the quality of the supplied goods and services is adequate and reasonable, that no person willing to pay is turned back into the night.

From time immemorial, innkeeping has been distinctively regulated by statute and proclamation, as well as by case law. Even today, 'when hotels are many',⁷⁶ the inn and the hotel are not treated at common law as private establishments, innkeeping is not conceived of as an ordinary private enterprise, and the proprietor of an inn or a hotel is not regarded as any other business owner. Under the common law, the 'common inn' is regarded as a

⁶⁶ (Beale 1906, pp. 5–7), as rehashed in (Sherry 1993a, pp. 6–7).

⁶⁷ (Beale 1906, pp. 5–7), as rehashed in (Sherry 1993a, pp. 6–7). See also (Hare 2013, pp. 480–81).

⁶⁸ (Beale 1906, pp. 5–7), as rehashed in (Sherry 1993a, pp. 6–7).

⁶⁹ (Beale 1906, pp. 10–11), as rehashed in (Wyman 1911, pp. 11–12, 87–88).

⁷⁰ (Wyman 1911, pp. 11–12, 87–88).

⁷¹ (Ibid., p. 87).

⁷² (Ibid., p. 87).

⁷³ (Beale 1906, pp. 10–11), as rehashed in (Sherry 1993a, p. 9).

⁷⁴ (Wyman 1911, pp. 11–12).

⁷⁵ (Beale 1906, pp. 10–11), as rehashed in (Sherry 1993a, p. 9).

⁷⁶ (Wyman 1911, p. 87).

public house and innkeeping as a ‘common calling’ or ‘public employment’. The ‘common innkeeper’ is treated as a person who professes a public business: a person who ‘has made profession of a trade which is for the public good, and has thereby exposed and vested an interest of himself in all the king’s subjects that will employ him in the way of his trade’.⁷⁷ Common innkeepers are placed under a variety of special, status-based common law duties, which are founded not upon contract, bailment, or pledge, but on the custom of the realm with regard to innkeepers, and of which breach is actionable on the case.⁷⁸ By becoming keepers of a common inn, common innkeepers undertake to indiscriminately accommodate all travellers willing to pay,⁷⁹ fix reasonable rates and charges,⁸⁰ provide reasonably safe premises and take reasonable steps to ensure the safety of guests,⁸¹ serve food of adequate quality,⁸² and take ‘uncommon care’ of the goods of their guests.⁸³ Owing to the danger of collusion between the marauders against whom protection is sought and the innkeeper in whom the traveller is compelled to repose confidence,⁸⁴ innkeepers are

⁷⁷ *Lane v Cotton* (1701) 12 Mod 472 at 484; 88 ER 1458 at 1464, cited in (Beale 1906, p. 11).

⁷⁸ *Robins & Co v Gray* [1895] 2 QB 501 at 503, per Lord Esher MR. See also (Beale 2019, para. [33–101]; Jelf and Hurst 1904, pp. 16–17, 60–65; Beale 1906, pp. 75–77, 127–29). A breach of the duty to indiscriminately receive the public has also given rise to statutory liability, including criminal. (Jelf and Hurst 1904, pp. 22–23, 32).

⁷⁹ A traveller willing and able to pay may not be turned away, without a reasonable excuse. An innkeeper may, for example, refuse to entertain a traveller if the inn is full. An innkeeper may also refuse to receive a traveller who is not in a fit state to be received, behaves in an indecent or improper manner, brings along an animal, acts in the interest of a rival inn, or suffers from an infectious disease. A comer who is not a ‘traveller’—for example, a neighbour who is a friend—may also be sent away. On the duty to indiscriminately receive travellers, see (Haycraft 1892, pp. 39–46; Jelf and Hurst 1904, pp. 32–42; Beale 1906, pp. 42–43, 63–69; Beven 1928, p. 1035; Sherry 1993a, pp. 39, 141–53). Today, in many jurisdictions, including the United Kingdom, discrimination in common inns based on defined characteristics is prohibited by statute. In the United Kingdom, the Equality Act 2010 prohibits discrimination in the provision of a service to the public or a section of the public on the basis of age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex, and sexual orientation; the Act replaced a variety of antidiscrimination statutes, most relevantly the Disability Discrimination Act 1995, the Sex Discrimination Act 1975, and the Race Relations Act 1976. In the United States of America, to give another example, Title II of the Civil Rights Act of 1964 prohibits discrimination based on race, color, religion, or national origin in places of public accommodation engaged in interstate commerce, including an ‘inn’ or ‘hotel’. Title III of the Americans with Disabilities Act of 1990 prohibits discrimination on the basis of disability by any person who not only owns, but also leases (or leases to), or operates a place of public accommodation, including an ‘inn’ or ‘hotel’.

⁸⁰ (Jelf and Hurst 1904, pp. 17–18; Beale 1906, p. 41; Sherry 1993a, p. 765; McBain 2006, pp. 736–39). Already in 1350, for example, in response to frequent complaints as to excessive prices and petitions to parliament, a statute imposing on ‘hostelers et herberger’ an obligation to sell food at reasonable price was promulgated by Edward III. Another statute, promulgated in 1354, ‘tried to put an end to the “great and outrageous cost of victuals kept up in all the realm by inn-keepers and other retailers of victuals, to the great detriment of the people travelling through the realm”’: (Jusserand 1890, p. 126), cited in (Beale 1906, p. 4) and (Sherry 1993a, p. 5).

⁸¹ On the innkeeper’s duty to furnish reasonably safe premises and protect the person of guests, see (Haycraft 1892, p. 53; Jelf and Hurst 1904, pp. 43–49; Beale 1906, pp. 109–14; Beven 1928, p. 1042; Sherry 1993a, chps. 9–11).

⁸² On the innkeeper’s duty to furnish food of adequate quality, see (Jelf and Hurst 1904, pp. 46–47; Beale 1906, pp. 117–18).

⁸³ (Story 1839, p. 306).

⁸⁴ See, for example, (Winfield 1926, p. 186). In his famous essay on bailment, Williams Jones says that ‘For travellers, who must be numerous in a rich and commercial country, are obliged to rely almost implicitly on the good faith of innholders, whose education and morals are none of the best, and who might have frequent opportunities of associating with ruffians and pilferers, while the injured guest would seldom or never obtain legal proof of such combinations, or even of their negligence, if no actual fraud had been committed by them’: (Jones 1796, p. 134), relied on in (Story 1839, p. 308). See also *Shacklock v Ethorpe* [1939] 3 All ER 372 at 373 per Lord Macmillan: The principle that an innkeeper is responsible to his guests if any of their goods are lost or stolen while on his premises ‘has been said historically to have arisen from the view that the goods of travellers were exposed to special risk owing to the danger of collusion between innkeepers and thieves’. In *Crapo v Rockwell*, 94 NYS 1122 at 1122 (1905), cited in (Beale 1906, pp. 126–27), Cochrane J said that the innkeeper’s strict liability for guests’ goods ‘had its origin in the feudal conditions which were the outgrowth of the Middle Ages. In those days there was little safety outside of castles and fortified towns for the wayfaring traveller, who, exposed on his journey to the depredations of bandits and brigands, had little protection when he sought at night temporary refuge at the wayside inns, established and conducted for his entertainment and convenience. Exposed as he was to robbery and violence, he was compelled to repose confidence, when stopping on his pilgrimages over night, in landlords who were not exempt from temptation; and hence there grew up the salutary principle that a host owed to his guest the duty, not only of hospitality, but also of protection’.

held to strict liability for loss of, and (more recently) damage to, goods brought by guests into the inn.⁸⁵

The growth of inns, the commercialization of hospitality, and the densification of the common law of innkeepers did not eradicate other forms of hospitality. Establishments with owners that have not been subject to the law of innkeepers—including ‘private hotels’, ‘lodging houses’, ‘boarding houses’, alehouses, and houses of public entertainment—have kept their doors open and continued to welcome travellers.⁸⁶ ‘Private hosts’ have likewise continued to ‘receive the stranger and traveller out of mere hospitality, or from motives among which gain is merely incidental’.⁸⁷ The growth of inns and innkeeping law rather made crucial the distinction between the ‘innkeeper’ and other kinds of hosts that are not subject to the duty to indiscriminately receive guests and that do not have strict liability. Indeed, as soon as special duties and liabilities were imposed on ‘innkeepers’ by law, cases against persons alleged to be ‘innkeepers’ reached the courts, forcing juries and judges to identify the subject of the common law of innkeepers.

‘Many attempts have been made to define an “inn,” but they are couched in language so loose and general that they have but little value’.⁸⁸ Three of the most-cited definitions of ‘inn’ were put forward in the same 1820 decision. In *Thompson v Lacy*,⁸⁹ the question was whether a house of public entertainment, called the Globe Tavern and Coffee House, was an ‘inn’. Situated in London rather than the country, the establishment furnished food and accommodation for all persons willing to pay a nightly rate, but had no stables attached to it. The court concluded that the house was an inn, even though it had no stables and no stagecoaches or waggons frequented it. The owner of the Globe, Abbott CJ said, ‘cannot be distinguished from a person who keeps an inn in the country, in the way of travellers’; he ‘keeps a house, where he furnishes beds and provisions to persons in certain stations of life, who may think fit to apply for them’.⁹⁰ Bayley J stated the ‘true definition of an inn to be, a house where the traveller is furnished with every thing which he has occasion for whilst upon his way’.⁹¹ An ‘inn’, Best J said, is ‘a house, the owner of which holds out that he will receive all travellers and sojourners who are willing to pay a price adequate to the sort of accommodation provided, and who come in a situation in which they are fit to be received’.⁹²

⁸⁵ Prior to the enactment of the Hotel Proprietors Act 1956, there was some doubt as to whether the innkeeper was strictly liable only for loss of or also for damage to guests’ goods. The Act either clarified the scope of innkeepers’ strict liability for guests’ goods or extended it to also cover damage to goods. The common view is that, before the Act, the innkeeper was not strictly liable for damage to guests’ goods. Proof of negligence on the part of the innkeeper or of their employee was necessary. See (Beale 2019, para. [33–101]; Palmer 1979, pp. 887–89). The liability of innkeepers is strict, but not absolute. The innkeeper is not strictly liable for loss or damage occasioned through negligence on the part of the guest; when the guest chooses to make himself exclusively responsible for the safety of the lost or damaged goods; for loss arising from an act of God or of alien enemies; or when the loss or damage was caused by an accidental fire: (Beale 2019, para. [33–112]–[33–114]). While the strict liability of innkeepers cannot be contractually excluded, the innkeeper may limit their liability in a manner prescribed by statute. The Innkeepers Act 1863 enabled innkeepers to limit by display of a statutory notice their strict liability for loss (not occasioned through the neglect or wilful act of the innkeeper) of goods (other than horses or live animals and gear appertaining to them or carriages) to £30: (Haycraft 1892, pp. 50–52; Jelf and Hurst 1904, pp. 80–83). It was superseded by the Hotel Proprietors Act 1956, which raised the amount to which the innkeeper’s liability for loss or damage (not occasioned by the innkeeper’s negligence) can be limited to £50 for any one article and £100 in the aggregate, and updated the language of the statutory notice. The Act further excludes liability towards a traveller who has not engaged sleeping accommodation for loss of or damage to any vehicle or any property left in a vehicle, and for loss or damage occurring not during the specified period of time. On the Hotel Proprietors Act 1956, see (Beale 2019, para. [33–101]–[33–120]; Blom-Cooper 1957). In the mid-nineteenth century, legislation ‘alleviating the innkeeper’s predicament under the common law’ was also adopted across the United States: *Minneapolis Fire & Marine Insurance Co v Matson*, 44 Haw 59; 352 P2d 335 (1960). See also (Navagh 1956, pp. 63–64; Sherry 1993a, p. 479; Jonassen 2009, n. 153). On the strict liability of innkeepers at common law for guests’ goods (as modified by statute), see also (1720, pp. 387–95; Jeremy 1815, pp. 114–47; Story 1839, pp. 303–17; Haycraft 1892, pp. 46–52; Jelf and Hurst 1904, pp. 59–100; Palmer 1979, chp. 23; Beale 2019, para. [33–101]–[33–120]).

⁸⁶ (Beale 2019, para. [33–101]; Sherry 1993a, pp. 25–37; Palmer 1979, pp. 881–82; Jelf and Hurst 1904, pp. 4–9).

⁸⁷ (Beale 1906, pp. 11–12), as rehashed in (Sherry 1993a, p. 10).

⁸⁸ (Jelf and Hurst 1904, p. 2).

⁸⁹ (1820) 3 B & Ald 283; 106 ER 667.

⁹⁰ *Thompson v Lacy* (n 89) at pp. 286, 667.

⁹¹ *Thompson v Lacy* (n 89) at pp. 286, 668.

⁹² *Thompson v Lacy* (n 89) at pp. 286, 668.

Whether or not a certain establishment where a comer is entertained is an ‘inn’ is a question of fact, which is settled with regard to the particular circumstances of each case.⁹³ A person is an ‘innkeeper’, for the purpose of the law, if the establishment they own holds itself out to the world as ready to receive all ‘travellers’ who properly apply to be admitted as ‘guests’, and to supply them with food, drink, and lodging. An establishment that accommodates comers is not an ‘inn’, if it is kept for a short season of the year or on certain dates.⁹⁴ An establishment held out as receiving comers, even one that operates 24 hours a day, 7 days a week, 365 days a year, is not an ‘inn’, if it does not furnish certain services to those it receives, for example, food and drink.⁹⁵ An establishment that furnishes sleeping accommodation and food to comers is not an ‘inn’, if the received are not ‘travellers’.⁹⁶ An establishment that is held out as taking in all ‘travellers’ willing to pay, 24 hours a day, 7 days a week, 365 days a year, is not an ‘inn’, if ‘travellers’ are received not as ‘guests’.⁹⁷

Not only in the England,⁹⁸ but also in the United States of America, to where the common law of innkeepers—along with the inn—travelled and (in) which it settled, cases against hosts claiming to be ‘private hosts’ but alleged to be ‘innkeepers’ have frequently reached the courts. US courts have distinguished between persons who make hospitality their business and are hence subject to the duties imposed at common law on innkeepers, and persons who receive compensation for hosting travellers in their private residence but do not derive their livelihood from their hospitality.⁹⁹ In an Iowa case from 1843, a court of appeals upheld a finding by a jury that a defendant, who had entertained several individuals at his house overnight and received compensation for it, was not an innkeeper. ‘To render a person liable as a common innkeeper, it is not sufficient to show that he occasionally entertains travelers’, the court of appeal emphasized:

Most of the farmers in a new country do this, without supposing themselves answerable for the horses or other property of their guests, which may be stolen, or otherwise lost, without any fault of their own. Nor is such the rule in older countries, where it would operate with far less injustice, and be less opposed to good policy than with us. To be subjected to the same responsibilities attaching to innkeepers, a person must make tavern keeping, to some extent, a regular business, a means of livelihood. He should hold himself out to the world as an *Innkeeper*. It is not necessary that he should have a sign or a license, provided that he has in any other manner authorized the general understanding that his was a public house, where strangers had a right to require accommodation. The person who occasionally entertains others for a reasonable compensation is no more subject to the extraordinary responsibility of an innkeeper than he is liable as a common carrier, who in certain special cases carries the property of others from one place to another for hire.¹⁰⁰

⁹³ See (Beale 1906, pp. 19–21; Jelf and Hurst 1904, pp. 2–3; Sherry 1993a, p. 11).

⁹⁴ (Story 1839, p. 310). While an inn may be closed at reasonable hours during the night, reception may be demanded at any hour: *Hawthorne v Hammond* (1844) 1 C & K (Eng) 404, per Parke B; *Rex v Ivens* (n. 63) at 97.

⁹⁵ In the United Kingdom, pursuant to section 1(3) of the Hotel Proprietor Act 1956, an establishment that does not furnish food and drink is not a ‘hotel’ and its owner is not liable as an innkeeper. In accordance with section 2(1) of the Act, furthermore, an innkeeper is strictly liable only towards persons for whom, at the time of the loss or damage, sleeping accommodation has been engaged. See n. 130 and accompanying text.

⁹⁶ *Calye’s Case* (1583) 8 Co Rep 32a. A ‘traveller’ is any member of the public who comes to an inn for the purpose of receiving accommodation and services as are ordinarily given to guests: *Williams v Linnitt* [1951] 1 KB 565 at 574, per Lord Tucker. Persons who hold themselves out as offering accommodation and refreshment to family members, friends, and lodgers, for example, are not ‘innkeepers’, and their house is not considered an ‘inn’. As the duty of the innkeeper to indiscriminately accommodate is owed to ‘travellers’ only, a comer who is not a ‘traveller’ cannot demand to be received at an inn, and a refusal to accept a comer who is not a ‘traveller’ does not amount to an actionable breach of duty: (Beale 1906, pp. 42–43).

⁹⁷ For example, an accommodation that welcomes in ‘travellers’ as ‘lodgers’ is not an inn: *Dansey v Richardson* (1854) 3 El & Bl 144. Moreover, a person who does own an ‘inn’ is not strictly liable for goods of persons who are not ‘guests’ at the inn, for example, family members of the innkeeper, staff members, friends invited as the private guests of the innkeeper, guests who have become lodgers, and ‘persons resorting to the inn for purposes unconnected with the enjoyment of the facilities which it provides as an inn, for example, to repair the drains or to sell the innkeeper a sewing machine’: *Williams v Linnitt* [1951] 1 KB 565 at 579, per Asquith LJ.

⁹⁸ See, for example, *Parker v Flint* (1703) 12 Mod 254; *Parkhurst v Foster* (1699) 1 Lord Raymond 479; 91 ER 1219.

⁹⁹ (Beale 1906, pp. 11–12), as rehashed in (Sherry 1993a, p. 10).

¹⁰⁰ *Lyon v Smith*, 1 Morris 184 at 186 (1843), cited in (Beale 1906, pp. 12–13; Wyman 1911, p. 170; Sherry 1993a, pp. 10–11).

In a Texas case from 1859, a court was called to determine whether a man who uniformly, but irregularly, entertained travellers was or was not an ‘innkeeper’ for the purposes of the law. The defendant’s roadside house was known among travellers, but, at times, he refused altogether to take in guests. The defendant also let his friends and neighbours stay at the house free of charge, and publicly declared on multiple occasions that he was not an innkeeper. The court held that the question was one of fact and therefore for the jury, but instructed the jury to exercise caution:

There are numerous farmers situated on the public roads of the country, who occasionally, and even frequently, take in and accommodate travellers, and receive compensation for it, who are not innkeepers, and are not liable as such. It is not their business or occupation, nor do they prepare and fit up their establishments for it. They yield to the laws of hospitality, in receiving and entertaining the stranger and the traveller, yet they cannot afford to do so without some compensation. This view of the subject the court also presented to the minds of the jury, by telling them in substance that if the defendant only occasionally entertained travellers for compensation, when it suited his own pleasure, he did not thereby become an innkeeper.¹⁰¹

Courts have laboured to articulate what an ‘inn’ is by distinguishing not only the ‘traveller’ from the ‘non-traveller’ and the ‘guest’ from the ‘non-guest’, but also the ‘inn’ from other types of establishments of which keepers are not subject to the common law of innkeeping: the ‘victualling house’, the ‘lodging house’, the ‘boarding house’, the ‘private residential hotel’, the temperance house, the ‘public house’, the ‘alehouse’, the ‘coffee house’, etc.¹⁰² The description or name that the owner may have given to an establishment, it has repeatedly been affirmed, is not conclusive evidence of its function or nature. A sign is just a sign.¹⁰³ To ascertain whether or not an establishment is an inn, courts look not merely to the name by which it is designated, but also to the use to which it is applied.¹⁰⁴ The owner of accommodation designated a ‘hotel’ or an ‘inn’ may not be an innkeeper,¹⁰⁵ while the owner of an establishment designated a ‘boarding house’ may be subject to the law of innkeeping.¹⁰⁶

In the late-eighteenth century, the inn was rebranded and refashioned. The word ‘*hôtel*’, which in French means simply a building, was picked up by British aristocrats on the Grand Tour and, appropriated as a cultural memento, deployed as a marker of cultural sophistication and worldliness.¹⁰⁷ Seeking to retain these customers and increase their appeal, innkeepers across Britain and North America moved to refer to their lodgings as ‘hotels’. While no different from existing inns in size, design, and scale, new establishments of hospitality were opened and branded as such.¹⁰⁸ During the nineteenth century, however, newly built elite establishments across the England and North America ‘grew from relatively small two-to-three storey buildings, similar in scale to a high-status private dwelling, to much larger buildings more akin to public buildings in size and appearance’.¹⁰⁹ The public house transformed into the creature we know and identify today as a ‘hotel’. The word ‘inn’ was no longer used to denote centrally located public houses of entertainment and was instead reserved to describe peripheral and marginal hospitality. While ‘the

¹⁰¹ *Houth v Franklin*, 20 Tex 798, 73 Am Dec 218 (1858), cited in (Beale 1906, p. 12; Wyman 1911, p. 205; Sherry 1993a, p. 10).

¹⁰² See n. 86.

¹⁰³ See (Beale 1906, pp. 19–23); *R v Collins* (1623) Palm 373; *Parker v Flint* (n. 98).

¹⁰⁴ See, for example, *State v Stone*, 6 Vt. 295 (1834) at 286; 668, per Bayley CJ.

¹⁰⁵ See, for example, *Carpenter v Taylor*, 1 Hilt (NY) 193 (1856).

¹⁰⁶ See, for example, *State v Stone*, 6 Vt 295 (1834).

¹⁰⁷ (James et al. 2017, pp. 94–95).

¹⁰⁸ (Ibid., pp. 94–95). See also (Everitt 1973, pp. 92–93). In *Cromwell v Stephens*, 2 Daly (NY) 15 at 20 (1867), Daly F J said: ‘[T]he word hotel came into use in England by the general introduction in London, after 1760, of the kind of establishment that was then common in Paris called an *hôtel garni*, a large house, in which furnished apartments were let by the day, week, or month. [In some early dictionaries] . . . it is incorporated as an English word, and is defined in the latter to be “an inn, having elegant lodgings and accommodations for gentlemen and genteel families”’.

¹⁰⁹ (James et al. 2017, p. 96). On the history of hotels in the United States, see also (Sandoval-Strausz 2007; Berger 2011).

hotel is no less an inn¹¹⁰—that is, subject to the common law of innkeeping—we learn to envision the ‘hotel’ as large, grand, and urban, and the ‘inn’ as cosy, humble, and rural.¹¹¹

At the same time as the inn grew into the hotel and a forest of hotel branches covered the land, legislation was introduced, in the United Kingdom (and across the United States), to alter—extend *and* contract—the liability of the innkeeper at common law.¹¹² Most relevantly, section 1(1) of the Hotel Proprietors Act 1956 introduced a definition of a ‘hotel’, stipulating that the common law duties, liabilities, and rights which, before the Act’s commencement, attached to a keeper of an ‘inn’ as such shall now (subject to the provisions of the Act) attach only to the proprietor of a ‘hotel’, as defined in section 1(3) of the Act:

an establishment held out by the proprietor as offering food, drink and, if so required, sleeping accommodation, without special contract, to any traveller presenting himself who appears able and willing to pay a reasonable sum for the services and facilities provided and who is in a fit state to be received.

Just as we moved to frame trees as timber,¹¹³ we conceived of guests as a composite source of monetary value that can be capitalized on, as a target market. Just as we learned to see the forest as a composition of full-grown trees,¹¹⁴ we came to see hospitality as a forest of large, established hotel branches. Just as we moved to view the forest use as a revenue-generating industry,¹¹⁵ we came to see hospitality through the fiscal lens of revenue needs and profit-making. Just as the modern image of the forest has been rendering invisible woodlands, copses, pastures, and riverbanks,¹¹⁶ non-commercial trees, flora and fauna, foliage, litter, bark, and such,¹¹⁷ small-scale hospitality establishments, private hospitality, and non-commercial modes of hospitality have been cut out of our image of hospitality.

Large-scale hospitality may have overshadowed other forms of hospitality, but, nonetheless, below the canopy of hotel branches, a dense undergrowth continued to flourish. Hosts have continuously welcomed guests into their homes, for free or for a fee. In effect, the ‘growing popularity of travel by automobile’ has increased the visibility of the practice and ‘fertilized by necessity the property owners along the automobile trails’.¹¹⁸ Across the United States, homeowners opened the doors to their private homes, accepting and accommodating weary motorists in search of refuge. They

have placed their second best furniture in the spare room and erected a sign by the highway, ‘Tourist Rooms’, or perhaps something more enticing such as ‘Twilight Rest House’, done in colors. Cabins in varying degrees of artistic taste and luxury have been constructed under cool trees and the blistering sun, in green grass and choking dust. Pasture lots have been converted into camping grounds for the trailer and tent where the occupant may be supplied with electricity and grills or perhaps left unaided to make his peace with nature. The horizon of billboards is obstructed with instructions to ‘Slow Down for Jake’s Cabins’ or ‘Hurry to the Lone Pine Tourist Home’.¹¹⁹

Not far behind, reverent guardians of the law stepped into action and warned against the potential danger posed to travellers by this ‘new’ form of hospitality. In a journal

¹¹⁰ (Beale 1906, pp. 17–18).

¹¹¹ (James et al. 2017, pp. 95–96). See also *Cromwell v Stephens* (n. 62) at 21 per Daly F J: ‘It is to be deduced from the origin and history of the word, and the exposition that has been given of it by English and American lexicographers, that a hotel, in this country, is what in France was known as a *hotellerie*, and in England as a common inn of that superior class usually found in cities and large towns’.

¹¹² See discussion in n. 85.

¹¹³ (Radkau 2012, pp. 70–92; Scott 1998, pp. 11–13).

¹¹⁴ (Radkau 2012, pp. 32–34; Scott 1998, pp. 11–13).

¹¹⁵ (Scott 1998, pp. 11–13).

¹¹⁶ (Radkau 2012, pp. 32–34).

¹¹⁷ (Scott 1998, pp. 11–13).

¹¹⁸ (Cole 1937, p. 242).

¹¹⁹ (Cole 1937, p. 242).

article from 1938, Lyman H Cole criticizes courts and legislatures for failing to ‘anticipate difficulties by providing a few rules which will in most instances provide an equitable disposition of problems’.¹²⁰ Despite the increasing popularity of this ‘new’ DIY form of hospitality, he observes,

the courts appear to have been bothered but little with the problems arising between the proprietor of these establishments and the tourist who patronizes him, but it is inevitable that questions will arise when the proprietor turns the weary tourist from his door, when the tourist’s luggage or automobile is stolen, when the tourist is injured, when the proprietor desires to rid himself of a guest, or where the proprietor prefers to retain the luggage of the tourist rather than accept his check.¹²¹

Putting himself in the place of a future court, Cole moves to predict whether, as a matter of principle, the common law of innkeepers would be interpreted as imposing duties and obligations on the proprietors of these ‘new tourist establishments’—that is, if the law would treat the ‘tourist house’ as it treats the ‘inn’ and subject its owner to the common law of innkeepers. Such a finding is probable (though not certain), he concludes:

The fact that to a large extent the new tourist accommodations are competing with inns and hotels for the patronage of travelers suggests that physical differences are immaterial and that in fairness they should enjoy the same rights and be subject to the same burdens.¹²²

In the course of time, ‘with the great use of automobiles’,¹²³ such new tourist establishments came to be known as ‘motorist’s hotels’, or ‘motels’, in short, and sprouted throughout the entire United States.

These lodging accommodations may be for a short period of time, such as for overnight, or may, especially in resorts, be for a longer period of time, such as weeks or months. Where the guests’ residence is for the longer period, the units are quite frequently constructed with cooking facilities by the inclusion of a kitchenette. Basically and essentially, where the accommodations are without cooking facilities, the same service is furnished as is furnished in the average hotel. Where such kitchen facilities are provided, the same service is furnished as is furnished in so-called ‘efficiency apartments.’ These motels have filled a required need for housing accommodations for transients, making available to them accommodations quite generally more conveniently located for access by the travelling public than the normal hotel, and having greater facilities or accommodations for parking of automobiles immediately adjacent to the building itself. The mode of operation of the average motel results as well in a great deal of ‘self-service’ on the part of the guests and a reduction in the cost to the guest by way of gratuities.¹²⁴

In *Von der Heide v Zoning Board of Appeals*,¹²⁵ decided in 1953, the owner of property situated in a business district in the Town of Somers, New York filed an application to erect a ‘motel’ with the town building inspector. The application was denied by the building inspector on the ground that the town zoning ordinance did not permit a motel in a business

¹²⁰ (Ibid., pp. 264–65).

¹²¹ (Ibid., p. 243). The concerned jurist cites the only reported case he has found on the subject. In *Crockett v Troyk*, Tex Civ App, 78 SW (2d) 1012 (1935), a guest claimed damages for injury caused by the explosion of a gas stove in a cabin in which he stayed. Rather than considering the practice more generally, Cole notes its disappointment, the court simply ‘assumed that the relationship of innkeeper and guest existed’. In his correspondence with the counsel for the plaintiff, it was disclosed that it was never even ‘seriously disputed that the innkeeper–guest relationship existed’. The ‘innkeeper–guest question did not arise until appeal’ and the host ‘only sought to have the issue disregarded as being improperly raised at that time’: (Cole 1937, pp. 243–44).

¹²² (Cole 1937, p. 255).

¹²³ *Schermer v Fremar Corp*, 36 NJ Super 46 at 50 (1955).

¹²⁴ (Cole 1937, pp. 50–51).

¹²⁵ 204 Misc 746, 123 NYS 2d 726 (Sup Ct), affirmed in 282 App Div 1076, 126 NYS 2d 852 (2d Dep’t 1953).

district, and the decision was affirmed by the Zoning Board of Appeals. In his appeal, the petitioner contended that the action of the building inspector and of the board of appeals was 'erroneous, arbitrary and contrary to the provisions of the ordinance' because 'a motel is an inn or a sort of an inn' and the town zoning ordinance expressly permits the erection and maintenance of an 'inn' in a business district. The Supreme Court of Westchester County held that, as the ordinance did not include a definition of 'inn', the term should be given its ordinary meaning. 'True', the court said,

the word 'motel' is a coined and modern word derived from, and an abbreviation of the words 'motorists' hotel' . . . and the word 'inn' in present day use is synonymous with the word 'hotel' . . . But a motel is commonly understood to be an establishment essentially different from an inn or hotel in design, purpose and use . . . An inn or hotel more elaborately defined, may be considered as an establishment where guests, transient or otherwise, are lodged for a consideration and where they may receive for a consideration, meals, maid or room-service, telephone or desk service and all other necessities, conveniences and facilities to completely take care of all their ordinary and proper wants, day and night, for a stay of one day, several days or a long period. On the other hand, a motel, as one generally understands the term, . . . merely furnishes the transient guest with sleeping quarters and bath and toilet facilities, with linen service and a place to park his car. ¹²⁶

The Court found that the proposed 'motel' is not an 'inn' within the ordinary meaning of the word.

In *Schermer v Fremar Corp.*,¹²⁷ decided two years later, the question was whether an establishment designated a 'motel' is a 'hotel' for zoning purposes. 'A hotel,' the court said,

is essentially an establishment which provides lodging for transients, and a place which would otherwise be an inn or hotel does not lose its character as such because of its mode of construction, the appellation bestowed on it by the proprietor, or the fact that food and drink cannot be obtained therein, or are available at the option of the guest.

In modern usage, it may be generally regarded that establishments which furnish lodging to transients, although designated motels, may be deemed hotels. The word 'motel' generally denotes a small hotel where lodgings are available for hire, with a minimum of personal service being furnished by the proprietor. ¹²⁸

As the 'newly acquired import from the American continent' began to 'take root' in the United Kingdom, whether the 'motel' is a 'common inn' was also considered there. ¹²⁹ Again, whether the owner of an establishment is subject to the common law relating to innkeeping depends on the facts of the particular case. Whereas, in the United States, establishments designated 'motels' have been found to be 'hotels' or 'inns', despite not furnishing refreshment, in the United Kingdom, an establishment, 'which does not normally provide food and drink, will be outside the [statutory] definition' of a 'hotel'.¹³⁰ An owner of an accommodation designated a 'motel' is not an innkeeper, for the purposes of the law, if the establishment furnishes lodging to all comers willing to pay, but does not provide food and drink.

Not even the growth of the purpose-built motel and its mushrooming over the United States and around the world have eradicated 'private hospitality'. 'Since about 1980, a new form of accommodation has found favour with the public' in the United States.¹³¹

¹²⁶ (Cole 1937, pp. 748–49).

¹²⁷ 36 NJ Super 46, 114 A2d 757 (1955).

¹²⁸ *Schermer v Fremar Corp* (n. 123) at pp. 51–52.

¹²⁹ (Blom-Cooper 1955, pp. 374, 375).

¹³⁰ (Blom-Cooper 1957, n. 9). See also (Grant and Sharpley 2000, p. 113).

¹³¹ (Sherry 1993a, p. 35).

Known as ‘bed-and-breakfasts’ (‘B&Bs’ or ‘BnBs’, in short), ‘[t]hese establishments cater to the motorist who seeks a more homelike overnight sojourn, one which affords greater privacy and less congestion and services than more traditional inns, hotels, and motels’.¹³² ‘[M]odeled after European style guests houses’,¹³³ the first B&Bs sprouted in the late 1970s. Within a decade, they changed in form to adapt to the new environment and covered the United States and the rest of the world.¹³⁴ While it is a question of fact whether a specific establishment designated ‘B&B’ is an ‘inn’, a ‘bed-and-breakfast’ is commonly defined to be a small collection of rooms which are part of a private residence occupied by the host. The business may or may not be the host’s sole or primary source of income. The only meal provided is a breakfast prepared by the hosts. The meal is served in the host’s private dining area only to those accommodated.¹³⁵

‘The emergence of [B&Bs] as a contending segment of the hospitality industry has brought about many changes within the B&B segment and raised many questions about its future direction. Chief among those changes is the need to define what constitutes a bed-and-breakfast property . . . for the purpose of zoning of other regulations.’¹³⁶ Moreover, the ‘exploding growth’ in their popularity led the US Internal Revenue Service to ‘look more closely at bed-and-breakfasts as home-based businesses’.¹³⁷ The question of whether keepers of B&Bs are subject to the law of innkeeping has, of course, also been raised. In both the United States and the United Kingdom, the common view remains that ‘[b]y their very nature B&B’s generally only offer breakfast and even where they offer an evening meal it is not because the traveller has a *right* to it because it is an inn, rather it is a service which can be contracted for’.¹³⁸ Whether the owner of a particular establishment is an innkeeper depends on the facts of the case. To the extent that an establishment designated a ‘B&B’ supplies only limited services and does not cater for all the traveller’s needs, it is a ‘private operation, akin historically to a private “host for hire”’, and its owner is not subject to the common law regarding innkeeper duties and liabilities.¹³⁹

3. From the Forests of England to the ‘Concrete Jungles’ of the United States

It all began with a bang, the common story of the creation of Airbnb goes. In October 2007, ahead of the biennial conference of the International Council of Societies of Industrial Design held in the ‘concrete jungle’¹⁴⁰ of San Francisco, Brian Chesky and Joe Gebbia, two local product designers struggling to afford their monthly rent, decided to supplement their income by renting out three airbeds in their apartment at 19 Rausch Street to fellow conference attendees. ‘Brian’, Joe wrote to his roommate,

I thought of a way to make a few bucks—turning our place into ‘designers bed and breakfast’—offering young designers who come into town a place to crash during the four day event, complete with wireless internet, a small desk space, sleeping mat, and breakfast each morning. Ha!¹⁴¹

The roommates and former schoolmates designed a simple platform, using it to invite attendees who were unable to book a hotel into their own home. Three fellow designers, Michael, Kat, and Amol, took them up on their offer and ended up

¹³² (Ibid., p. 35).

¹³³ (Lanier and Berman 1993, pp. 15, 18).

¹³⁴ (Ibid., n. 133).

¹³⁵ (Sherry 1993a, p. 35; Lanier and Berman 1993, p. 16).

¹³⁶ (Lanier and Berman 1993, p. 15).

¹³⁷ (Ibid., pp. 15, 17).

¹³⁸ (Grant and Sharpley 2000, p. 113).

¹³⁹ (Sherry 1993b, pp. 12–13).

¹⁴⁰ This is, of course, to highlight the links between the discourse on forests and notions of cities as ‘jungles’, and, in so doing, problematise both the former and the latter. For a critical engagement with the term ‘concrete jungle’, see, for example, (Jaffe 2016, p. 98). On representations of ‘borderscapes’ as ‘jungles’, see (Sanyal 2020).

¹⁴¹ (Carson 2016).

with something more than just an airbed at a slightly messy apartment. They learned . . . [Joe's and Brian's] favorite places to grab coffee, ate the best tacos in the city, and had friends to hang out with whenever they wanted. They were thousands of miles from where they lived, and yet they felt right at home.¹⁴²

Shortly thereafter, Nate Blecharczyk, one of Joe's former roommates, joined the venture and, in 2008, the three cofounders 'created a way for anyone to be a host'.¹⁴³ Joe, Brian, and Nate launched a proper website that matches visitors with locals who want to rent out rooms: AirBed & Breakfast, a name that, a year later, would be officially shortened to Airbnb. The platform expanded, in 2009, 'beyond rooms to offer apartments, whole homes and vacation rentals',¹⁴⁴ in 2011, beyond the United States to cover listings 'across the globe', and, in 2016, beyond places to stay to offer 'Experiences'.¹⁴⁵ Since December 2020, the public is invited not only to join the 'Airbnb Community',¹⁴⁶ but also to own shares of 'common stock' of the enterprise.¹⁴⁷ 'Though [Michael, Kat, and Amol] didn't know it at the time, these three guests . . . would become the first members of the Airbnb global community of guests and hosts now spanning over [220] countries and [100,000] cities worldwide. They were the community foundation for what Airbnb has grown into today: an end-to-end travel platform that combines where you stay, what you do, and how you get there, all in one place'.¹⁴⁸ Thirteen years after Joe and Brian opened their door, 'four million Airbnb hosts have opened theirs'.¹⁴⁹ More than 500 million stays have been booked using the platform and over 800 million Airbnb guests have checked in.¹⁵⁰ As of 30 September 2020, 'Airbnb offers 90,000 cabins, 40,000 farms, 24,000 tiny homes, 5600 boats, 3500 castles, 2800 yurts, 2600 treehouses, 1600 private islands, 300 lighthouses, and 140 igloos'.¹⁵¹

What do jurists and legal theorists make of Airbnb's story? Do they take the perspective of the state and analyse the legality of the service provider's conduct or the conduct powered by the platform? Or do they turn to the state, demanding regulatory intervention or stronger enforcement? Do they cast Airbnb in the role of the 'bad man' and frame the actions of the service providers as responses to the threat of state intervention or judicial decisions against it? Or do they consider the terms of the relations between Airbnb and its users as the outcomes of bargaining 'in the shadow of law'? Do they critique the state for putting in place the rules that enabled the rise of Airbnb and brought into effect the present as we know and experience it? Or do they investigate the impact of Airbnb on its environment, communities, and markets and devise policy recommendations?

In broad strokes, debates among jurists and legal theorists pursue three lines of inquiry.¹⁵² Interlocutors judge whether the conduct of the platform provider, or the conduct enabled by the platform, is 'lawful' or 'unlawful' under 'existing law': mostly, tax law, business licensing regulations, planning and zoning laws, and antidiscrimination law¹⁵³ as well as, of course, the common law of innkeeping.¹⁵⁴ They consider the appropriate or most effective response by law enforcers and administrative bodies, assuming that the

¹⁴² (Chesky 2014).

¹⁴³ (An Important Announcement from Airbnb 2020).

¹⁴⁴ (About Us 2021).

¹⁴⁵ (Ibid.).

¹⁴⁶ On the constitution of the 'Airbnb Community', see (Sheffi 2020a).

¹⁴⁷ Airbnb Inc started trading on the Nasdaq stock exchange on 10 December 2020. See, for example, (Ponciano 2020).

¹⁴⁸ (Airbnb Celebrates Half A Billion Guest Arrivals 2019).

¹⁴⁹ Registration Statement under the Securities Act of 1933 ('Form S-1') as filed by Airbnb Inc with the US Securities and Exchange Commission on 16 November 2020. Available at <<https://www.sec.gov/Archives/edgar/data/1559720/000119312520294801/d81668ds1.htm>> (accessed on 1 March 2021).

¹⁵⁰ (About Us 2021).

¹⁵¹ (About Us 2021).

¹⁵² (Sheffi 2020b).

¹⁵³ (Sheffi 2020a, pp. 497–98). See also (McKee 2017, pp. 459–66).

¹⁵⁴ See, for example, (Maese 2015; Loucks 2014, pp. 331–33; Interian 2016, p. 136; Major 2016, pp. 480–92; Marzen et al. 2016, pp. 301–4; Rosendahl 2017, pp. 753–54, 760–68).

activities or some of the activities at issue break or circumvent the in-place law of the place. And they exchange views about the ‘welcomeness’ of the developments in question. What should be the legal status of the conduct engaged in by the platform provider and by users? If the conduct powered by the platform is lawful, should it be made unlawful? If it is unlawful, should it be legalized and accommodated?

The various participants in these debates may take different positions, but, nonetheless, share common ground. What they disagree *on* forms a platform for exchange, and it is not Airbnb. What is being debated is the status of Airbnb: the lawfulness of the conduct of the legal personality and of the conduct enabled by it. Presented as a question or, rather, a set of questions, the concept of ‘legality’ makes possible, grounds, underpins, and frames discussions about Airbnb. It creates an opening for and welcomes disagreement, but it also structures, orients, contains, and limits it, closing the door on alternative modes of inquiry.

Much like the deliberations in the Rhine Province Assembly, that is to suggest, exchanges about Airbnb can also be viewed as debates about law-making as a process, about the source, scope, and limits of the power to embody law. Much like the members of the Assembly, those who share their take themselves act as bodies of law. Positioning themselves at the gate formed by the framing, the interlocutors confront a ‘new arrival’. They summon an unidentified yet named suspect to account for itself, calling its status into question. They submit a subject to investigation, assessing compliance with in-place principles, criteria, or conditions of hospitality. They mark a line between what belongs and what does not, determining whether this boundary has been transgressed. They consider whether legal status should be granted, whether the questioned should be welcomed and accommodated or be declared a *persona non grata*. Speaking with authority in the name of law, they assume, assert, and exercise jurisdiction, the ‘power to allow entry, a threshold condition of access wherein the subject holding the keys can determine who enters and who is excluded from the country, community or court that [a] gate protects’.¹⁵⁵

Much like the debating members of the Rhine Province Assembly, what is more, participants in discussions about the status and welcomeness of the questioned are concerned with expediencies in the form of ‘takings’ of growing scale. They isolate themselves as legal bodies from an environment composed of demands or threats, demarcating and assuming a position of power, experience this external environment as their internal environment, and exercise dominion by staking out and taking a position, and sharing their take. Some express alarm over tax evasion and avoidance and the overtaking of tax law by the company and by platform users, while others highlight the overtaking of employment and labour law, as well as the impact of Airbnb on employment, employment relations, work conditions, the entitlements of ‘gig economy’ workers, and the pay they take home. Some see regulatory restrictions of Airbnb-ing and short-term leasing as unconstitutional takings, while others call attention to Airbnb’s soaring takings and growth in market share and power. Some respond to Airbnb’s overtaking of the hospitality market and the taking of profits from established hotels and hotel chains, while others react to the overtaking of homes, neighbourhoods, local markets, and economies. Some discern a taking on and away of government functions by the service provider, while others describe the taking down of the boundary between the private and the public. Some celebrate the platform for freeing individuals to take control over their own lives, taking down boundaries to entry, reducing transaction costs, and allowing individuals to take home a little more, while others welcome the taking down of the fences separating the liberal, egoistic subject from other subjects and from the community.

Similar positions have been taken by participants in debates about what came to be known as the ‘sharing economy’, including in discussions that take up questions of legality: is a particular instantiation of ‘sharing’ lawful? Does the law welcome and accommodate ‘sharing’? Does law welcome and accommodate ‘sharing’? Considering ‘sharing’ as

¹⁵⁵ (Goodrich 2008, pp. 215–16). On the etymology of ‘jurisdiction’, see (Goodrich 2008, pp. 217–18; Dorsett and Mcveigh 2007, p. 3; Benveniste 1973, pp. 391–92).

an alternative to the ‘market’, some cite Airbnb as an example of a platform-enabled ‘sharing economy’, while others assert that Airbnb and Airbnb-ing have little or nothing to do with ‘sharing’.¹⁵⁶ Conceding that sharing may take different forms, many contrast commercial, market-driven sharing with commons-based or solidarity-inflected sharing, or with other modes of sociability that value cooperation, localism, building community, and sustainability, and promote democratic self-management and active citizenship.¹⁵⁷ While, especially in earlier days, Airbnb was often celebrated as an alternative to capitalist, market-based production,¹⁵⁸ today, most consider Airbnb-ing either as not a mode of sharing or as an epitome of commercial sharing.¹⁵⁹ Much like participants in jurisdictional disputes about the legality of Airbnb and Airbnb-ing, the various participants in debates about the ‘sharing economy’ must agree in order to disagree. They too must share in order to exchange. They too use a distinction to ground the discussion, as a platform for debate: they assume a juxtaposition between what is and what is not, as well as the power to determine what belongs and what does not.

The term used in French to denote what is referred to in English as the ‘sharing economy’ is ‘*d’économie du partage*’, inviting a reflection on as well as a rethinking of the relationship between ‘sharing’ and ‘jurisdiction’, two concepts which are commonly seen as standing in opposition to each other. To assume, assert, and exercise jurisdiction (to speak and act in law’s name, to embody and enact law), it is said, is to mark a line of divide, to erect or reinforce a fence, to determine what would fall within and what would fall outside, what/who belongs and what/who does not, what/who would be welcomed and what/who would not be. In contrast, ‘sharing’ is said to be all about making ‘common’. To ‘share’ is to practise hospitality: to open up and welcome in, to dismantle a barrier to entry and accommodate. However, as this paper illustrates, ‘jurisdiction’ and ‘sharing’ are intimately related. To share is to assume and exercise jurisdiction and to exercise jurisdiction is to share.

Like the German verb ‘*teilen*’, the French verb ‘*partager*’ carries multiple, seemingly—but only seemingly—contradictory, meanings. ‘*Partager*’ means not only to ‘share’, but also to ‘divide’, to ‘split’ a whole, into multiple parts, to ‘distribute’ what was once part of a whole between parts of another whole. It implies an economy, a shearing economy. Fittingly, the Larousse Dictionary defines the verb by making a difference, distinguishing between multiple uses of the verb:

- Diviser quelque chose en plusieurs éléments distincts: Partager le gâteau en six parts.
- Marquer le partage, la division de quelque chose: La ligne de démarcation partageait la France en deux zones.
- Créer la division entre les membres d’un groupe: Cette question partage le pays.
- Diviser et répartir des parts entre des personnes: Partager les bénéfices entre les associés.
- Réserver, attribuer une part de quelque chose à plusieurs choses ou personnes: Il partage son temps entre son travail et sa famille.
- Posséder quelque chose avec une ou plusieurs personnes: Partager le pouvoir.
- Donner une part de quelque chose à quelqu’un: Il n’aime pas partager.¹⁶⁰

[To divide a thing into multiple distinct elements: To cut the cake into six pieces.
To mark the division of something: The Demarcation line split France into two zones.

¹⁵⁶ (Makela et al. 2018, pp. 1–5).

¹⁵⁷ (Morgan 2018, p. 351).

¹⁵⁸ See, for example, (Botsman and Rogers 2011; Chase 2015).

¹⁵⁹ See, for example, (Makela et al. 2018; Morgan 2018).

¹⁶⁰ (Partager 2021).

To create a division between members of a group: This question divided the country.

To divide and distribute the parts between persons: Divide the benefit between the associates.

To reserve, allocate a part of something to multiple things or persons: He splits his time between his work and his family.

To possess something in common with one or more persons: Sharing power.

To give a part of something to someone: He does not like to share.]

Partager is to cut a pie into pieces, distributing these pieces between multiple recipients, parts of another whole. It is to break apart one unity, forming multiple others. *Partager* is to recognize some others as identities, wholes that form parts of a larger economy. It is to enjoy the fruit of a shared effort, to split up a whole produced by parts of another, distributing shares of the profit as dividends between them. *Partager* is to recognize an 'other' as a distinct whole, a source of power, to consider that other as a partner in a joint enterprise. *Partager* is to give out a part, not a whole, to make common part of what is currently inaccessible to any other. It is to leave some part out, to stake out a position from which a claim of priority can be asserted. *Partager* is to divide a power one already has, ceding a defined part of it to an 'other'. It is to give an 'other' not absolute but a delimited power over oneself, to grant access and power by means of assuming and exercising another power, distinguishable and prior, the power to mark lines of divide and split, to shear, constitute distinct parts, and transfer.

While 'share', 'participate', and 'partake' all 'mean to have, get, or use in common with another or others', the Merriam-Webster Dictionary distinguishes the three verbs: 'share usually implies that one as the original holder grants to another the partial use, enjoyment, or possession of a thing'.¹⁶¹ Originating from the Old English verb '*scearu*', which was used to denote 'division, part into which something may be divided', the Oxford English Dictionary explains, 'share' is related to 'shear'.¹⁶² 'To share' is to 'Have a portion of (something) with another or others' or to 'Give a portion of (something) to another or others'.¹⁶³ It is to 'Use, occupy, or enjoy (something) jointly with another or others', to 'Possess (a view or quality) in common with others'.¹⁶⁴ It is to 'have a part in (something, especially an activity)'.¹⁶⁵ It is to be 'of a number of people or organizations'.¹⁶⁶ To share, the definition further reveals, is to *impart* knowledge by means of *disclosing* information: to 'Tell someone about (something, especially something personal)'.¹⁶⁷ It is to bring some but not others in on a secret, while keeping them in the dark about something else. It is to bring only certain information into the open, while leaving the rest out. Sharing is a mode of *imparting* knowledge/power, a *discursive distribution* of parts and positions. It is an information technology of production, government, and self.¹⁶⁸

The multiple meanings of *partager* are invoked and, indeed, related in the work of Jacques Rancière. In his more recent work, Rancière introduces what he terms '*le partage*

¹⁶¹ (Share 2021a).

¹⁶² (Share 2021b). On the etymology of 'sharing', see also (John 2016, pp. 5–6).

¹⁶³ (Share 2021b).

¹⁶⁴ (Ibid.).

¹⁶⁵ (Ibid.).

¹⁶⁶ (Ibid.).

¹⁶⁷ (Ibid.).

¹⁶⁸ In a 1982 seminar, Michel Foucault distinguished four 'techniques that human beings use to understand themselves': '(1) technologies of production, which permit us to produce, transform, or manipulate things; (2) technologies of sign systems, which permit us to use signs, meanings, symbols, or signification; (3) technologies of power, which determine the conduct of individuals and submit them to certain ends or domination, an objectivizing of the subject; (4) technologies of the self, which permit individuals to effect by their own means or with the help of others a certain number of operations on their own bodies and souls, thoughts, conduct, and way of being, so as to transform themselves in order to attain a certain state of happiness, purity, wisdom, perfection, or immortality'. (Foucault 1988, p. 18). In his later work, Foucault replaced the concept of 'power' with the notion of 'government': the conduct of self and others 'within a more or less open field of possibilities'. (Foucault 1982, pp. 777, 789). See also (Foucault 2009, p. 193).

du sensible', commonly translated as the 'partition' or 'distribution' of the sensible, a translation that obscures precisely that which Rancière seeks to highlight by employing the verb. Rancière devises the concept to refer to 'the system of self-evident facts of sense perception that simultaneously discloses the existence of something in common and the delimitations that define the respective parts and positions within it'.¹⁶⁹ *Le partage du sensible*, he elaborates,

therefore establishes at one and the same time something common that is shared and exclusive parts. This apportionment of parts and positions is based on a distribution of spaces [*un partage des espaces*], times, and forms of activity that determines the very manner in which something in common lends itself to participation and in what way various individuals have a part in this distribution [*partage*].¹⁷⁰

The partition of the sensible (*partage du sensible*), Rancière defines elsewhere, is

is the dividing-up of the world (*de monde*) and of people (*du monde*), the *nemein* upon which the *nomoi* of the community are founded. This partition should be understood in the double sense of the word: on the one hand, as that which separates and excludes; on the other, as that which allows participation [*avoir-part*, which, in French, means both a 'partaking' and a 'partition']. A partition of the sensible refers to the manner in which a relation between a shared common (*un commun partage*) and the distribution of exclusive parts is determined in sensory experience. This latter form of distribution, which, by its sensory self-evidence, anticipates the distribution of part and shares (*parties*), itself presupposes a distribution of what is visible and what not, of what can be heard and what cannot'.¹⁷¹

Sharing, as Rancière's play on the multiple meanings of *partager* intimates, signifies more than simply the act of giving something to someone else or making something common, of opening up, welcoming in, and accommodating. It implies both prior separation and a shared past, both future division and a common future. Only what is shared can be divided. Only what is divided can be shared. Disclosing the existence of something common that is shared, the employment of the verb first and foremost distinguishes that very something from an environment. It weaves together a plurality of activities, forming a common habitat, and only subsequently declares sharing as the law of the place. It transforms a part into a whole, establishing its identity and integrity. It binds together a certain number of individualities, distinct wholes, declaring them parts of something. At the same time as it asserts the existence of a body surrounded by an outside environment common to a community, the employment of the verb also implies an internal distribution of places and positions. It declares everyone share-holding partners in a joint enterprise. It declares every-body a contributor to an economy in which each member takes part and plays a part, a community in which each member takes part differently and plays a different part. One cannot share what is not already distinguished. One cannot make common something which does not already belong to one. One cannot allow access to that to which one is not entitled to deny or restrict access. One cannot invite others to use and enjoy that to which one has no 'exclusive' right, conferred by a system that is already set in

¹⁶⁹ (Rancière 2004b, p. 12).

¹⁷⁰ (Ibid., p. 12).

¹⁷¹ (Rancière 2010, p. 36). Rancière's play on the on the double meaning of '*avoir-part*' is noted by the editor of the first published version of this essay: (Rancière 2001).

place, dividing the common habitat, assigning positions and parts, and establishing modes of placement, participation, and transfer.¹⁷² ‘A “common” world’, Rancière reminds us, is never simply an *ethos*, a shared abode, that results from the sedimentation of a certain number of intertwined acts. It is always a polemical distribution of modes of being and ‘occupations’ in a space of possibilities.¹⁷³ It is always a juris-dictional sh(e)aring economy.

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¹⁷² In *Copyleft and the Theory of Property*, Mikhaïl Xifaras investigates the notion of the ‘commons’, as invoked by the free software movement (Copyleft). Akin to membership agreements, copyleft licences govern access to and use of works that are placed in the ‘public domain’. Presented as being ‘anti-propietary’, Xifaras demonstrates, this type of licensing regime does not in effect form ‘a political alternative to intellectual property’. The copyleft licence ‘derives its regulatory force from a property right . . . understood as an exclusive privilege over creations that is granted to their creators. Without copyright there can be no copyleft. It is because authors are the owners of their own creations that they have the freedom to use their property freely; this includes the freedom to decide how it shall be distributed’: (Xifaras 2010).

¹⁷³ (Rancière 2004a, p. 42).

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