
STRATEGIC LAW AVOIDANCE USING THE INTERNET: A SHORT HISTORY

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We are now some twenty years into the story of the Internet’s bold challenge to law and the legal system. In the early 2000s, Jack Goldsmith and I wrote *Who Controls the Internet*, a book that might be understood as a chronicle of some the early and more outlandish stages of the story.¹ Professors Pollman and Barry’s excellent article, *Regulatory Entrepreneurship*, adds to and updates that story with subsequent chapters and a sophisticated analysis of the strategies more recently employed to avoid law using the Internet in some way.² While Pollman and Barry’s article stands on its own, I write this Article to connect these two periods. I also wish to offer a slightly different normative assessment of the legal avoidance efforts described here, along with my opinion as to how law enforcement should conduct itself in these situations.

Behind regulatory entrepreneurship lies a history, albeit a short one, and one that has much to teach us about the very nature of law and the legal system as it interacts with new technologies. Viewed in context, Pollman and Barry’s “regulatory entrepreneurs” can be understood as, in fact, a second generation of entrepreneurs who learned lessons from an earlier generation that was active in the late 1990s and early 2000s. What both generations have in common is the idea that the Internet might provide profitable opportunities at the edges of the legal system. What has changed is the abandonment of so-called “evasion” strategies—ones that relied on concealment or geography (described below)—and a migration to

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1. JACK GOLDSMITH & TIM WU, *WHO CONTROLS THE INTERNET?: ILLUSIONS OF A BORDERLESS WORLD* (2006).

2. Elizabeth Pollman & Jordan M. Barry, *Regulatory Entrepreneurship*, 90 S. CAL. L. REV. 383 (2017).

strategies depending on “avoidance,” that is, avoiding the law’s direct application. In particular, the most successful entrepreneurs have relied on what might be called a mimicry strategy: they shape potentially illegal or regulated conduct to make it look like legal or unregulated conduct, thereby hopefully avoiding the weight of laws and regulatory regimes.

I take a different, though not necessarily inconsistent, normative position than do Pollman and Barry. Law avoidance is a complex phenomenon. Some of it is undignified avoidance of burdens faced by others, and it is not much different, normatively, from securities fraud or tax evasion. But it is also true that, over the long history of the Anglo-American system, efforts to avoid the law have played an important, and sometimes essential, role in the process of legal evolution; that is, in the process of the salutary adaption of our legal system to our current normative and technological environment. Sometimes technologies may genuinely make laws obsolete or unnecessary. Sometimes it is changing social norms that prompt challenges to the law: the best of such efforts, like forms of legal disobedience during the civil rights era, have become understood as dignified and justified.

But laws do not challenge themselves: someone or something must prompt a reevaluation of an existing regime, which I think is the strongest normative case for some tolerance of regulatory entrepreneurship and other forms of law avoidance. That said, for such a reexamination to provoke a full debate, I think it essential that law enforcement play its part in the dialogue. Sometimes it should vigorously enforce “old laws,” unless the law in question is so obviously moribund that doing so would be ridiculous. Enforcement creates an adversarial process where we, the public, can reexamine whether the values and goals that motivated the law’s enactment remain important or valuable today. This is, of course, necessarily an imperfect process, but one that I think is part of the poorly understood path of legal evolution. The struggle surrounding the Internet’s challenge to law provides a good opportunity to consider these questions afresh.

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Let us return to the 1990s when the Internet and the Web were new, or at least newish. In those days, the online world was frequently described as a “place” or a “space” where one went, and the moniker “cyberspace” was used by respectable people.³ That metaphor of space helped lead more than

3. Lawrence Lessig, *The Zones of Cyberspace*, 48 STAN. L. REV. 1403, 1403 (1996) (“Cyberspace is a place. People live there. They experience all the sorts of things that they experience in

a few people to think that perhaps the Internet would become a location where one might do things that the law had previously barred. For who was to say what law actually governed “cyberspace?” The best legal articulation of the point came from David Johnson and Robert Post, who wrote in the *Stanford Law Review*:

Cyberspace radically undermines the relationship between legally significant (online) phenomena and physical location. The rise of the global computer network is destroying the link between geographical location and: (1) the *power* of local governments to assert control over online behavior; (2) the *effects* of online behavior on individuals or things; (3) the *legitimacy* of a local sovereign’s efforts to regulate global phenomena; and (4) the ability of physical location to give *notice* of which sets of rules apply.⁴

Meanwhile, the idea of using the Internet as a challenge to territorial sovereignty was, quite literally, the subject of science fiction. Neal Stephenson’s 1999 novel, *Cryptnomicon*, presented the exciting premise of building a “data haven” in some remote country with loose laws, which might then be accessible from everywhere, thereby rendering the law itself obsolete.

Perhaps influenced by *Cryptnomicon*, or by John Perry Barlow’s declaration that “cyberspace” was “sovereign,”⁵ the first generation of challengers to the law employed a principal move which can be termed “geographical evasion.” This strategy took advantage of a feature of the Internet itself: a supposed indifference to national borders, the result of a design that made sites or addresses accessible from anywhere (that’s how things were in the 1990s, at least, before filtering technologies got better). Hence, the physical aspects of the illegal activity—whether gambling, copyright infringement, or the sale of contraband—were simply moved to a place where it *wasn’t* illegal, but could still be accessed. In practice that meant the servers, and sometimes the people involved, left the United States or Europe for some country unconcerned with things like bans on gambling, foreign copyright laws, or drug laws.

The story of Sealand provides perhaps one of the more colorful examples of this first-generation strategy.⁶ Sealand is a tiny, self-

real space, there.”).

4. David R. Johnson & David Post, *Law and Borders—The Rise of Law in Cyberspace*, 48 STAN. L. REV. 1367, 1370 (1996) (emphases in original).

5. John Perry Barlow, *A Declaration of the Independence of Cyberspace*, ELEC. FRONTIER FOUND. (Feb. 8, 1996), <https://www.eff.org/cyberspace-independence>.

6. *About Us*, PRINCIPALITY OF SEALAND, www.sealandgov.org/about (last visited Apr. 3, 2017).

proclaimed kingdom, some seven miles off the coast of England; it is comprised of an abandoned offshore platform originally built as a sea fortress during the Second World War. In the early 2000s, a firm named HavenCo, evidently borrowing Stephenson's idea in *Cryptmonicon*, set up servers within the Kingdom of Sealand and proclaimed to the world that they were now "the first place on earth where people are free to conduct business without someone looking over their shoulder."⁷ The data on Sealand servers would be "physically secure against any legal action," HavenCo boasted.⁸

While HavenCo didn't meet the success for which its founders had hoped,⁹ a more practical version of the data haven idea succeeded in other locations, including dozens of gambling sites in small Caribbean nations, on the rock of Gibraltar, and the Isle of Mann. Similarly, the KaZaa Company, now forgotten, but once the world's most successful file sharing company, was invented in Holland by Swedish entrepreneurs who incorporated the company in Vanuatu, a tiny island in Micronesia. The Pirate Bay, a more enduring site designed to facilitate piracy, operated with apparent impunity out of Sweden, then Seychelles, surviving even the arrest of its founders.¹⁰

On the whole, geographic evasion did not prove a strategy of lasting significance. The empire—or the nation-state—struck back, and over the 2000s largely reestablished the primacy of territorial sovereignty. In other words, law enforcement managed to reestablish the expectation and practice that even Internet firms would follow the rules dictated by the geographically local government.¹¹ And while the United States was aggressive in establishing this norm, it was not alone. Other states, in particular the European nations, and most of all China, were even more

7. Roy Bates, *Rebel Sea Fortress Dreams of Being 'Data Haven,'* WALL ST. J., June 26, 2000, at C21A.

8. *About HavenCo*, HAVENCO, http://www.havenco.com/about_havenco/index.html (last visited Jan. 25, 2017) [https://web-beta.archive.org/web/20050810234738/http://www.havenco.com:80/about_havenco/index.html].

9. GOLDSMITH & WU, *supra* note 1, at 66.

10. Natasha Lomas, *Pirate Bay Co-Founder Peter Sunde Arrested Years After Conviction*, TECHCRUNCH (June 1, 2014), <https://techcrunch.com/2014/06/01/pirate-bay-peter-sunde-arrest/>.

11. It is notable that, over the 00s, the "too big to ban" strategy discussed by Pollman and Barry was not effective standing on its own. That strategy, whose greatest previous success was probably the Sony Betamax, suggests that regulators or courts won't be willing to move against something that has millions of users. But in practice, companies like Napster and Grokster, despite having millions of users, nonetheless were shut down. As we will discuss in a moment, the same phenomenon occurred with popular online poker sites.

aggressive.¹² With this movement, the idea of cyberspace as a legal space died an early death. Law's existential crisis passed.

Looking back, we can see that, for example, in the entertainment industries, the basic system created by copyright and its associated licensing regimes buckled and swayed, but did not break. When it came to video markets (film and television), file sharing sites never fully went away (consider The Pirate Bay), but ultimately did not prove an existential threat to the revenue models of Hollywood's mainline entertainment industries. Some firms like YouTube, always ostensibly compliant with copyright laws, eventually agreed to filter copyrighted materials more aggressively and to share revenue surrounding their display. Finally, if the music industry was transformed to a greater extent than other parts of the entertainment industry, the rise of online vendors like iTunes and Spotify legalized the use of the Internet for getting music and essentially outcompeted the infringing rivals.¹³

The same can be said of some of the other major efforts to avoid restrictive laws. Online gambling was reduced by attacks on key intermediaries, like credit cards and banks.¹⁴ Some of the early drug sites were simply shut down and their owners arrested. From the early years, arguably the only previously-illegal activity to successfully migrate to a new level of legality was the pornography industry, which survived and even prospered during the administration of George W. Bush, which was ostensibly hostile to it.¹⁵

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Over the 2010s, if broader ideas of a cyber-immunity died, the sense of opportunity remained. A second generation of law-avoiding entrepreneurs followed one of two paths. The first centered on improved tactics of "evasion" and the second centered on better strategies of "avoidance." The first depended on better technologies to hide from law enforcement; the second relied on a combination of code design, lawyering,

12. GOLDSMITH & WU, *supra* note 1, at 65–104.

13. Spotify, interestingly, sold itself to the music labels as an alternative means of reaching a generation raised on piracy. See marcel845, *Spotify Launches Next Generation Music Platform*, SPOTIFY NEWS (Apr. 27, 2010), <https://news.spotify.com/ph/2010/04/27/spotify-launches-next-generation-music-platform/> ("Spotify is an innovative music management platform created with the vision of offering music fans a legal and superior quality user alternative to music piracy.").

14. See GOLDSMITH & WU, *supra* note 1, at 76–77.

15. See Tim Wu, *American Lawbreaking: How Laws Die*, SLATE (Oct. 15, 2007, 7:29 AM), http://www.slate.com/articles/news_and_politics/jurisprudence/features/2007/american_lawbreaking/how_laws_die.html.

and political techniques. It was the second that would prove more influential.

Following the first path, some sites responded to the nation-state's assertions of legal authority by adopting more technically sophisticated means for hiding their conduct, yielding what was colloquially called the "dark web." The best known of these efforts was the Silk Road website and its successors (there are also lesser-known dark web sites devoted to providing hacking services, fraud and counterfeiting services, the organization of terrorism, and child pornography). These sites continued the strategy of brazen lawbreaking, but tried to conceal it more effectively. They may have been more successful than their predecessors in some ways, but were by definition harder to access, and therefore less threatening to the legal system.

The second strategy was that chronicled in Pollman and Barry's paper, which is, intrinsically, an "avoidance" strategy. More lawyerly than technological, regulatory entrepreneurship is about loopholes, grey areas, "avoision," and the shaping of conduct to appear just right so as to sidestep unfriendly legal regimes.

Pollman and Barry describe this second strategy as "strategically operating in a zone of questionable legality or breaking the law until they can (hopefully) change it."¹⁶ While I don't disagree with this description, I'd describe the most successful efforts as a "mimicry" strategy, one made possible, to use an old Larry Lessig-ism, by the "plasticity of code."¹⁷ It works like this: one avoids a regulatory regime by shaping the conduct in such a way as to resemble conduct that is both normatively accepted and considered legal, or at least within a grey zone. The idea is to "redesign[] behavior for legal advantage."¹⁸ The method can be compared to the strategies used by tax attorneys; it is what Leo Katz calls "avoision," or efforts to "exploit the differences between a law's goals and its self-defined limits."¹⁹ Proponents of this strategy hope that with time and good lobbying, they will be able to gain social, political, and legal acceptance.

An importance difference between the two approaches is rhetorical, even semiotic. The new generation of regulatory entrepreneurs made studied efforts to project an image of respect for the law and legal system.

16. Pollman & Barry, *supra* note 2, at 399.

17. LAWRENCE LESSIG, CODE AND OTHER LAWS OF CYBERSPACE (1999).

18. Tim Wu, *When Code Isn't Law*, 89 VA. L. REV. 679, 682 (2003).

19. *Id.* at 692.

That stands in stark contrast with the first generation and their dark web descendants, who made, at best, only minimal efforts to shape their behavior to look good—and were anything but polite about it. Their lawbreaking was brazen, sometimes proudly so. Anarchy and libertarian rhetoric was the norm, and there was no kowtowing done or lobbyists employed. Instead, the idea was to give users exactly what they wanted, law be damned, by relying on the magic of the atterritorial Internet or strong encryption techniques. Consider that the first online gambling sites offered roulette, blackjack, and slots—the kind of things you find in a casino. The music sharing sites made some pretense of claiming to be about sharing rather than piracy, but not in a manner that was particularly convincing. Indeed, the Supreme Court’s *Grokster* decision, which sank the file sharing industry, such as it was, fixated on the fact that, when it came down to it, these were companies whose entire identity depended on inducing piracy.²⁰

Silk Road and the dark web sites, which arose in the 2010s, were perhaps most brazen of all. It was immediately obvious to any user that Silk Road was not the Internet version of Sears Roebuck, but rather an underground bazaar for buying illegal drugs and other contraband like forged passports or bomb-making manuals. Here’s how its founder, who went by “Dread Pirate Roberts,” described the site:

Silk Road was founded on libertarian principles and continues to be operated on them. It is a great idea and a great practical system The same principles that have allowed Silk Road to flourish can and do work anywhere human beings come together. The only difference is that the State is unable to get its thieving murderous mitts on it.²¹

To say that today’s regulatory entrepreneurs have tried to distance themselves from Silk Road’s image is merely to state the obvious. Like the first generation, the second generation—firms like Airbnb, Uber, and Daily Fantasy—faced (and sought out) hostile regulatory regimes. But instead of brazenly challenging those laws, they argued that they were perfectly fine laws that were just meant for someone else.

A counterfactual might make the difference clear. If Uber had been invented in 2000, it might have called itself the “Dreaded Gypsy-Cabs

20. *Metro-Golden-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913, 939 (2004) (“[E]ach company showed itself to be aiming to satisfy a known source of demand for copyright infringement . . .”).

21. Andy Greenberg, *Collected Quotations of the Dread Pirate Roberts, Founder of Underground Drug Site Silk Road and Radical Libertarian*, FORBES (Apr. 29, 2013, 9:28 AM), <http://www.forbes.com/sites/andygreenberg/2013/04/29/collected-quotations-of-the-dread-pirate-roberts-founder-of-the-drug-site-silk-road-and-radical-libertarian/#6de69c894f51>.

Grokster” or something similar and provided an encrypted, secret way to get at cheaper taxi services, probably throwing in some tax avoidance for good measure. It would have probably based itself in the Caribbean, and its founders might have been even more vocal about their contempt for the regulatory state. It would also have provided an even bigger target for local law enforcement, and probably led to the U.S. indictment of the founders at some point. The real Uber, while providing a similar challenge to the regulatory system, was far more lawyerly and political about doing so. It seized on the legality of private car services (black cars) in some markets and some of the norms of ride-sharing, and made itself into at least a quasi-legitimate firm that remained, nonetheless, a major challenge to the regulatory regime that governs taxicabs. It also used its users to threaten politicians, a tactic that file sharing sites never convincingly managed to use.

The story of online gambling offers perhaps the clearest example of this evolution from evasion to avoidance. The original Internet gambling sites were, as we’ve said, virtual replicas of casinos, usually located overseas. This scheme worked until a crackdown in 2002 by then-New York Attorney General Eliot Spitzer, after which the online casinos lost access to the easiest ways for gamblers to fund their accounts—Visa, MasterCard, and major banks.²² This made their expansion difficult and confined the casinos to a customer base of hardcore gamblers willing to go through the hassle of wiring money to overseas entities. In what amounted to a second round, online gambling had a comeback in the mid-2000s with the opening of a series of online poker rooms, some backed by prominent poker celebrities like Howard Lederer, the “Professor of Poker,” who lent his name to a firm named “Full Tilt Poker.”²³ The legal theory of the poker rooms, such as it was, was that poker was a game of skill and therefore did not constitute gambling under federal or state laws. (Displaying some lack of confidence in their theory, the sites were also, for good measure, located overseas.)

Online poker had a decent run in the United States that lasted until April 15, 2011, the so-called “Black Friday” of the industry. On that day, Preet Bharara, the U.S. Attorney for the Southern District of New York, seized the domain names of the major poker firms (Pokerstars, Full Tilt,

22. See GOLDSMITH & WU, *supra* note 1, at 82.

23. Michael Friedman, *Team Full Tilt: The World’s First Poker Dynasty*, CARDPLAYER (Aug. 8, 2006), <http://www.cardplayer.com/cardplayer-poker-magazines/65595-team-full-tilt-19-15/articles/15597-team-fulltilt-the-world-39-s-first-poker-dynasty> [<http://archive.li/jBrZZ>].

and Absolute Poker) and criminally indicted all of their founders on charges of money laundering, bank fraud, and violations of the Unlawful Internet Gambling Enforcement Act.²⁴ Suffice it to say that online poker, at least in the United States, did not prosper thereafter.

As poker proved a bust, a man named Nigel Eccles, who was involved in the earlier versions of online gambling, came up with a new strategy that depended more cleverly on the mimicry described above. The founders of this new strategy noticed the general social acceptance of fantasy sports leagues (in which players draft a virtual “team” of players who then compete against the virtual teams of other players, based on their actual performance), and a favorable exception in the federal law that seemed to exempt fantasy sports from a general ban on online gambling.²⁵ The only problem was that fantasy sports leagues typically took an entire season to play one “round,” making it unsuitable as a high volume gambling product. The solution was a new product, “Daily Fantasy Sports,” which condensed the fantasy product into something that could be played on a daily basis, and, moreover, made it possible to place dozens or even hundreds of bets at once.²⁶ In other words, it was a gambling product that, unlike poker or blackjack, had a good reputation and wasn’t even understood by most people to be gambling at all.

Seen this way, the invention of Daily Fantasy Sports can be understood as an effort to side-step the gambling laws, not by moving overseas, but by imitating something both socially accepted and if not clearly legal, at least arguably legal. By virtue of their purported legality, the main two fantasy sports companies, Fanduel and DraftKings, were able to attract partnerships with legitimate entities including Major League Baseball and the National Football League, attract investments from major banks, and were able to run advertising on networks that otherwise banned advertisements for gambling.

The legal theory supporting Daily Fantasy Sports was, in practice, a

24. Press Release, U.S. Attorney’s Office S. Dist. of N.Y., Manhattan U.S. Attorney Charges Principals of Three Largest Internet Poker Companies with Bank Fraud, Illegal Gambling Offenses, and Laundering Billions in Illegal Gambling Proceeds (Apr. 15, 2011), <https://archives.fbi.gov/archives/newyork/press-releases/2011/manhattan-u.s.-attorney-charges-principals-of-three-largest-internet-poker-companies-with-bank-fraud-illegal-gambling-offenses-and-laundering-billions-in-illegal-gambling-proceeds>.

25. Unlawful Internet Gambling Enforcement Act of 2006, 31 U.S.C. § 5362(1)(E)(ix) (2012) (exempting participation in fantasy sports from the definition of “bet or wager”); Complaint at 8, *New York v. DraftKings, Inc.*, No. 453054/2015, 2015 WL 7290279 (N.Y. Sup. Ct. Nov. 17, 2015).

26. See Complaint, *DraftKings*, 2015 WL 7290279, at 1. New York State’s suit against DraftKings was later settled, providing that DraftKings would cease to operate in New York.

little shakier than as represented by the firms to their investors. Another New York Attorney General, Eric Schneiderman, filed suit in 2015, alleging that Daily Fantasy Sports was simply a new form of illegal gambling (namely, sports wagering or pool betting, long illegal in New York). And the Attorney General, like his predecessors, met with initial success in the courts.²⁷ But the ending of the Daily Fantasy Sports story differed from that of the last two rounds, for during round three, the New York Legislature became convinced that the best course of action was to legalize and regulate fantasy gambling, citing, among other things, its popularity.²⁸ Hence, unlike their predecessors in online gambling, Daily Fantasy Sports has managed to achieve both a legality and lasting influence that evaded its predecessors. It also effected, if not a full legalization of online gambling in New York, a partial legalization of it, and as such, was a successful strategy of regulatory entrepreneurship.

If one looks carefully at other regulatory entrepreneurs, the same patterns are evident. Airbnb, a platform for leasing rooms for short terms, faced the challenge of the extensive regulations that govern hotels. Running underground hotels itself wasn't going to fly normatively or legally. On the other hand, practices like vacation rentals, subletting, and the casual renting out of rooms have long been tolerated. Airbnb took advantage of this latter norm—though its approach has not been without setbacks, especially, once again, in the state of New York. There, the legislature, unlike its approach to gambling, acted to increase the penalties for private room-sharing.²⁹

The mimicry approach doesn't always work, as the story of Aereo suggests. Aereo was a company, backed by media mogul Barry Diller, that provided a television service by allowing its customers to lease tiny antennas located remotely. It was, at some level, an easier way to get broadcast television without the trouble of buying and installing an antenna. But it was also, at another level, a challenge to the copyright regime that governs the cable industry and requires it to pay for the retransmission of content.³⁰ Predictably, Aereo was immediately sued for

27. See Trial Order at 1, *New York v. Fanduel, Inc.*, No. 453056/15, 2015 WL 8490461 (N.Y. Sup. Ct. Dec. 11, 2015) (enjoining and restraining Fanduel and DraftKings from doing business in the state of New York).

28. S. 8153, 2015–16 Leg. Sess. (N.Y. 2016) (“[T]he Internet has become an integral part of society, and interactive fantasy sports a major form of entertainment for many consumers . . .”).

29. S. 6340A, 2015–16 Leg. Sess. (N.Y. 2016). Signed into law on October 21, 2016, the bill makes it illegal within the five boroughs of New York City to advertise entire homes on home sharing websites like Airbnb for occupancies fewer than 30 days.

30. 17 U.S.C. § 111 (2012).

copyright infringement, and while the Second Circuit bought the remote antenna idea, unfortunately for Aereo, the Supreme Court didn't. Instead, the Court condemned the company as a regulatory end run,³¹ which of course it was, but then again, so are many companies.

Aereo isn't the only instance of failed mimicry. In some markets—particularly Europe—regulators, unimpressed with the rhetoric of ride-sharing, have similarly opined that Uber is nothing but an illegal taxi service. And when New York passed a new bill increasing the fines dramatically for Airbnb hosts, the Governor's office opined that Airbnb's services were "already expressly prohibited by law."³²

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Stepping back, what is one to make of these challenges to the laws and what Pollman and Barry describe as regulatory entrepreneurship? And, to take a question of some personal interest, just what should law enforcement do when faced with what is, when examined carefully, an effort that depends on avoiding an extant regulatory regime? In their piece, Pollman and Barry describe certain potential benefits and limitations, with which I agree, but I wish to explore a more jurisprudential assessment.

At bottom, law avoidance is complex: it can represent social disorder or unfair opportunism, yet also, paradoxically, play an important role in the democratic process and the evolution of a legal system. For this reason, I think any blanket condemnation or blind acceptance of law avoidance is simply inappropriate. Consider that law avoidance has particular bearing on the well-known problem of generational sovereignty first discussed by Thomas Jefferson. The laws on the books represent a judgment at a certain time and place, by one generation, that reflects both prevailing norms and technological reality of that time, yet may have little to do with what following generations think about an issue. As Jefferson put it, it is the question of whether "one generation of men has a right to bind another?"³³ For what we think about something like drinking alcohol, smoking marijuana, gay marriage, or other issues can and does change. Yet laws do not reexamine themselves—there needs to be a prompting of some kind. Law avoiders, like those described in this Article, can be understood as providing one means for the reexamination of old laws, and to that extent

31. See *Am. Broad. Cos. v. Aereo*, 134 S. Ct. 2498, 2509–10 (2014).

32. Katie Benner, *Airbnb Sues Over New Law Regulating New York Rentals*, N.Y. TIMES (Oct. 21, 2016), <https://nyti.ms/2n513kA>.

33. Letter from Thomas Jefferson to James Madison (Sept. 6, 1789), in THOMAS JEFFERSON: DIPLOMATIC CORRESPONDENCE PARIS, 1784–1789, 305, 305 (Brett F. Woods ed., 2016).

play a salutary role in a democratic system.

This is hardly an endorsement of lawbreaking. Much of the breach of existing laws, especially the core criminal laws, are acts of evil, universally condemned, and not novel questions for the democratic system. Other lawbreaking constitutes harm to others, such as the many varieties of fraud perpetrated on consumers and investors. Some is mere opportunism—tax evasion, flouting of environmental laws, avoidance of health and safety laws—all efforts to avoid burdens borne by others. None of these categories of lawbreaking, in the usual course, raises important questions for law’s evolution.

But there is a narrower category of lawbreaking that raises questions about which there exists true uncertainty in the law and either an existing division of public opinion or an underdeveloped debate. Consider the former illegality of sodomy in most states, which left many gay men as lawbreakers—but surely of a different kind than the ordinary criminal. While less fundamental or moral, the questions raised by Airbnb, Uber, or daily fantasy sports are challenging ones, worthy of public debate. Do we really think gambling is wrong or dangerous, or, with the proliferation of state lotteries and casinos across the country, do we no longer care? Is commercial sharing of private rooms or apartments through Airbnb desirable, or a menace? These are questions over which reasonable people disagree, and some of the disagreement may vary by location and community. Dwellers of New York City, which is dense and crowded, have been notably more hostile to Airbnb than inhabitants of other areas, where neighbors are not in such close proximity.

The point is that a debate over such questions can be a healthy process, and notably, is not one with a predictable outcome. It may result in a rededication to the old laws (as largely happened in copyright) or an abandonment of the laws (as with pornography) or something in-between—a compromise, as with Uber. The result may also differ by place, as with Airbnb.

I wish also to address what role law enforcement should play, and here I should disclose that my views were formed working at the New York Attorney General’s office, where we faced much of this conduct head on. In my view, law enforcement can and should play its proper role in the dialogue, which will usually mean faithfully enforcing the existing law if it can be fairly read to legalize the conduct in question—if the law is not so obviously moribund as to make its enforcement an absurdity.

That may seem obvious, but it hasn't always been the position taken. It is indefensible, in my view, to simply decline to enforce the law on the premise that it was not written with "this" in mind. To do so is to create a loophole machine. Of course, there is such a thing as prosecutorial discretion, and I would agree that a law that is hopelessly out of date or absurd should not be enforced (consider, for example, the ban on fornication, still largely extant). But prosecutorial discretion does not and should not go as far as the usurpation of the legislative process, which is what non-enforcement amounts to. Instead, assuming there is an apparent violation of existing law, I think it is the proper role of law enforcement to begin faithfully executing the laws as written—and through that mechanism, actually learn what the public, stakeholders, and the legislature really think about the conduct in question. Ultimately, if the legislature decides it wants to change the law, it can. This position may sometimes make law enforcement unpopular in some quarters, but it is the more principled position.

Some might object that this approach is too deferential to legislatures, which themselves are hardly models of enlightened judgment. Looking back at the last twenty years, it is evident that well-represented groups, like the entertainment industry or hotel lobby, have had greater success keeping intact the laws designed to protect them, as compared with, say, the families who are harmed by gambling's effects but have no legislative voice, or the men and women who are swept into the pornography industry. But the legislature remains our system for translating norms into law, and in the end, we live not in the ideal world, but in this more unfortunate one. Perhaps all that should be said is that legislatures should take pains to try and understand the evil to which the original law was directed and see whether it is something that the public still cares about. I don't much care for referenda, but perhaps this is one place where it might be appropriate, given that the questions are usually, at some levels, matters of public morality.

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Looking back over the last twenty years, what is probably most surprising is how resilient the basic legal and regulatory paradigm proved to be despite such dramatic changes in technology. If Internet avoidance was a kind of front line of a challenge to the nation-state, it seems clear that the nation-state won; companies like Uber or Airbnb are clearly within and part of the system, and are not a real challenge to it. What we see in regulatory entrepreneurship in this sense falls within a more conventional public choice analysis than within the Internet's first challenges to the legal

system. No one will write a science fiction book about Airbnb's lobbying efforts.

But overall, the experience may have ultimately taught us something about the nature of law itself. Law, as John Austin wrote, consists primarily of commands backed by threats of force.³⁴ So long as we retain our physical identities, and as long as we, or a company, have to be somewhere, the power of law remains unavoidable. Yes, it can be shaped, avoided, moderated, and changed—that is what regulatory entrepreneurship is all about. But the leviathan remains, essentially unchallenged on his throne. At least for now.

34. See JOHN AUSTIN, LECTURES ON JURISPRUDENCE (1875). I say "primarily" in deference to H. L. A. Hart's *The Concept of Law*.