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THE LAW OF THE PLATFORM

*Orly Lobel**

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* Don Weckstein Professor of Law, University of San Diego. In February 2015, a group of law professors, aided by the platform economy, rented a beach house in Stinson Beach, just north of San Francisco for a Writers' Collaborative. Thanks to Rachel Arnov-Richman, Tristin Green, Camille Rich, Leticia Saucedo, and Michelle Travis for sharing great food, space, drafts, and ideas. Thanks also to On Amir, Vic Fleischer,....., and the participants of workshops at the 2015 Yale Conference on Innovation Beyond IP, the 2015 George Washington University conference on Understanding the Effect of Regulation on Innovation, the 2015 Fordham conference on the Sharing Economy and faculty workshops at Berkeley, USD, Iowa, Michigan, BYU...Thanks also to Hani Farah, Max Halpern, Madison Levine, and Katherine Brown for extraordinary research assistance.

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INTRODUCTION

The web is the ultimate matchmaker, capitalizer, and economizer. New digital technologies are turning everything into an available resource: services, products, spaces, connections, and knowledge, all of which would otherwise be collecting dust. It's been called *the sharing economy*, *the disaggregated economy*, *the peer-2-peer economy (P-2-P)*, *human-to-human (H-2-H)*, *the community marketplace*, *the on-demand economy*, *the app economy*, *mesh economy*, *gig economy*, and also, *the Uberization of everything*. Each of these terms represents an aspect of the digital platform revolution but none completely captures the entire scope of the paradigmatic shift in the ways we produce, consume, work, finance, and learn. A new wave of starts-ups, relying on digital platform technology, are connecting people and transforming behavior and relationships outside of the digital world, closing down on underutilized human, social, and real capital. The life cycle of products is being dramatically extended; the time unit of use is vastly shortened; and connectivity and access exponentially expanded. These new business models are generating billions of dollars annually and their growth rates are overwhelming. Most importantly, the platform economy is radically changing the traditional equilibriums of

supply and demand, blurring the lines between owners and users, producers and consumers, workers and contractors, and transcending the spatial divides of business and home, market and leisure, friend and client, acquaintance and stranger, public and private. What has previously been non-commodified is being brought into the market whether it be a ride share, a spare bedroom, or a lawn mower loaner. What has previously been the realm of personal property is shifting to the realm of access: instead of installing a clunky rabbit ear antenna to intercept broadcasting, members have access to thousands of tiny antennas; and instead of purchasing a bicycle, users ride and drop off bicycles at hubs all around the city.

Unsurprisingly then, the platform economy defies conventional regulatory theory. Millions of people are becoming part-time entrepreneurs, disrupting established business models and entrenched market interests, challenging regulated industries, and turning ideas about consumption, work, risk, and ownership on their head. Paradoxically, as the digital platform economy becomes more established we are also at an all-time high in regulatory permitting, licensing, and protection. The battle over law in the platform is therefore both conceptual and practical. New business models such as Uber, Airbnb, and Aereo are receiving massive amounts support from venture capitalists but also strong pushback from incumbent stakeholders, regulators, and courts. The spectrum of responses is dramatically broad. While some governments such as the United Kingdom and San Francisco are positioning themselves as champions of the platform by introducing policies that will aid its expansion, other legal regimes such as New York, Nevada, Florida, and Germany are introducing new policies to constrain the platform.

Thus far, the literature has failed to offer a comprehensive account of law in the new platform economy. Are companies like Uber and Lyft digital clearinghouses or are they employers violating wage and hour laws? Are zoning laws parsing parts of town for short-term rentals still relevant when residential property owners list their homes on Airbnb? Is Aereo a digital antenna rental company or a service that streams broadcast content thereby infringing copyright law? Is TaskRabbit just an app to connect people searching for odd jobs or a manpower agency that should withhold taxes? Is Kickstarter as a crowdfunding platform violating securities regulation? Companies such as Uber, Lyft, Airbnb, Aereo, TaskRabbit and Kickstarter have been running against existing regulations and the legal battles often turn on how to define the platform business: are these digital companies service providers or brokers of individualized exchanges? This article argues that the platform economy is presenting not only a paradigm

shift for business but also for legal theory. The platform economy does not only disrupt regulated industries but also demands that we inquire into the logic of their correlated regulations. It requires that we go back to first principles about public intervention and market innovation. This article thus offers a new framework of the thinking about the regulation-innovation nexus.

Consumer protection laws, safety and health regulation, permitting and licensing of businesses, property and zoning laws, and financial services regulation have all risen dramatically in the past few decades. The reasons for this surge are mixed, ranging from safety goals and quality controls to less benign goals of entry restrictions lobbied for by incumbents. Each of these bodies of law is increasingly at odds with bottom-up online platforms that offer new models of connectivity and exchange. The article thus poses a foundational inquiry: Do the regulations we have carry over to the platform economy? It uncovers the ways in which the internal logic of regulated industries is now challenged by digital platform businesses. By unpacking the economic and social drives for the rise of the platform economy, the article develops a new framework for asking whether digital disruptions comprise loopholes akin to regulatory arbitrage in the tax field, circumvention akin to controversial copyright protection reforms, or innovation-ripe negative spaces akin to design-around competition in patent law. Bringing together these different bodies of law, the article offers a contemporary account of the relevance of regulation for new business models. The article shows that more often than not legal disruption by the platform economy should be viewed as a feature not a bug of regulatory limits.

The article proceeds as follows: Part I introduces the spectrum of conceptual challenges presented by third generation digital business models, Web 3.0. The literature about the platform is binary – feel good stories about the revolutionary power of sharing and the easy rise of micro entrepreneurs and grassroots exchanges contrasted against dark doomsday dystopias about the role of the platform in subverting established protections and the checks and balances historically placed to correct the unfairness produced by markets. Transcending this utopian/dystopian binary, Part II analyzes the technological, economic and social reasons for the rise of the platform economy and the ways the platform is changing each stage and aspect of market transaction costs. In particular, Part IIA develops a novel taxonomy of ten distinct principles of the platform that together hold the potential to reduce transaction costs to their ideal zero: uber-scale, resurrection of dead capital, the tailoring the unit, the

commodification of everything, deal customization, access over ownership, overhead elimination, reduced barriers to entry, pricing precision, and dynamic systems of information. Moving from conventional Coasean analysis of transaction costs to a behavioral perspective, Part IIB further explains how preferences are being shaped by the platform and argues that part of the value produced by the platform lies in its differentiation from offline traditional exchanges. In other words, the platform economy is not simply competing over the same markets of regulated industries but constituting new markets, norms and behaviors. Building upon these understandings of the internal logic of the rise of the platform, Part III offers a new framework for understanding the range of laws and regulations that platform companies are currently facing. The framework allows us to think more clearly about the range of regulatory challenges which the platform economy is facing. I argue that the regulatory challenges can be divided into easy and hard cases: on one end of the spectrum, regulatory restrictions that operate as barriers to entry, including permitting, occupational licensing, and rate controls are easy cases because their damaging effects in hindering the rise of the platform is direct. On the other end stand taxation requirements, an equally easy case because existing tax law lends itself to direct application on the market exchanges in the platform relative straightforwardly. In the middle of the spectrum stand the hard cases: zoning laws, consumer protection, employment laws, and intellectual property laws. These regulatory fields each has public welfare goals that are challenged by the shifts in market models, emerging social norms and unstable preferences. Moreover, many of the regulatory goals can be achieved by the technological advances of the very business models that are disrupting established structures. Therefore, any inquiry into the regulation-innovation nexus requires an understanding the comparative advantages of public interventions and self-regulation by the platform. Part IV maps these latter shifts onto concepts from innovation theory and policy. Building on insights from different fields of law about regulatory disruption, it considers the continued necessity of certain protections and examines the rise of self-regulation practice, demonstrating that frequently the platform economy comes with built-in regulatory devices, are still very much evolving, and at least in part, thrive because of their definitional defiance. By offering a first schematic treatment of law and the platform economy, the article aims to provide scholars and policymakers a framework that identifies the conditions under which new business models transforming economic structures and how law maps onto those shifts.

I. CECI N'EST PAS UN TAXI: DISRUPTION & DEFINITIONAL DEFIANCE

“In the interest of eliminating bureaucracy, overhead, middlemen and waste, I turned myself into a corporation.” – Joel Stein, Time Magazine, 2015

A. *Web 3.0: The Platform Revolution*

Over 10,000 new platform companies have sprouted and mushroomed in less than a decade and they continue to pop up daily. The platform economy, while not easy to define or quantify, was valued in 2013 at \$26 billion with predictions of an exponential growth to \$110 billion in the next few years.¹ A recent Price Waterhouse report predicts that globally, revenues from the platform sectors could hit \$335 billion by 2025. So what's your business? You don't need to open a restaurant to host cooking events; you don't need to become a taxi driver to offer paid rides; you don't need to open a hotel to be a lodging host; you don't need to start a moving company to get paid for helping someone relocate. Platform businesses are challenging conventional industries in every realm, including hotels (*Airbnb; Couchsurfing; Homeaway; VRBO*), office space (*Liquid Space; ShareDesk*), parking spaces (*ParkingPanda; Park Circa*), transportation (*Lyft; Sidecar; Uber*), restaurants (*Eatwith; Feastly; Blue Apron, Munchery*), used clothing (*ThredUp*), household tools (*Open Shed*), outdoor gear (*Gearcommons*), capital (*Zopa; Prosper, Kickstarter; Bitcoin*), broadcasting (*Aereo; FilmOn.com*), co-developing (*Quirkly, Etsy*), legal services (*Upcounsel*),² medical services (*Healthtap*),³ academic services (*Uguru*), everyday errands, such as grocery shopping and laundry (*TaskRabbit, Instacart; Airtasker; Washio*), and specialized errands, such as flower delivery (*BloomThat*), dog-walking (*DogVacay*) and package delivery (*Shyp*).

The platform economy is so diverse in its offerings that to neatly describe its scope is impractical. There are various ways to slice it: it includes the delivery of services, sharing of assets, and recirculation of goods. The rise of the platform needs to be understood in relation to its digital genealogy. First generation Internet companies connected us to information and knowledge, through search engines like Google and Yahoo!. Tim Berners-Lee, best known as the inventor of the World Wide Web, described the original essence of the web as a space to collaborate,

¹ Cannon & Summers, HBR oct 2014.

² <https://www.upcounsel.com/>

³ <https://www.healthtap.com/>

communicate, and share information. First generation digital companies focused on information sharing. Next, the second generation, Web 2.0 extended the search and communication, forming online marketplaces like Craigslist, eBay and Amazon and digital file sharing like NetSpar and iTunes. These online companies disrupted the publishing industry, traditional media and newspapers, the music industry, and most broadly, the retail industry at large. Amazon transformed and constricted, the bricks-and-mortar bookstores, and file sharing coupled with digital music and film changed the entertainment industry, effectively killing the record and video store. The rise of the platform signifies the third generation of the Internet, Web 3.0, in which technology is transforming the service economy, allowing greater access to offline exchanges for lower prices.⁴ The physical infrastructure of offline markets is itself transformed by the technological infrastructure.

As Airbnb disrupts the hotel industry, it faces legal attacks on both the legislative and judicial fronts. Founded in San Francisco in 2007, Airbnb allows private individuals -- named *hosts* -- to rent out their homes or individual rooms to visitors for a short amount of time.⁵ Within just a few years, Airbnb has grown dramatically and is valued at \$10 billion with 800,000 properties listed in more than 190 countries.⁶ It now offers more bookings than major hotel chains, including the Hyatt, Hilton and Intercontinental. Airbnb defines itself however very differently from a hotel chain. In response to vigorous attempts to limit the operation of the platform, Airbnb has argued that the existing laws simply do not capture its new business model and do not fit the new economy.⁷ Unlike traditional hotel models, Airbnb is a matching platform, connecting private individuals to other individuals, while collecting a 6 to 12 percent booking fee. Airbnb owns no property and provides no services beyond the digital world. Similarly in the commercial real-estate rental market, Loosecubes, Regus and DeskWanted have carved out the shared office space market, matching people who have an extra desk, studio, or office space with independent freelancers and entrepreneurs. Following a similar business model to

⁴ <http://time.com/3687305/testing-the-sharing-economy/>; Michael A. Cusumano, *Technology Strategy and Management: How Traditional Firms Must Compete in the Sharing Economy*, 58 COMM. OF THE ACM 32, 32 (Jan. 2015).

⁵ Tomio Geron, *Airbnb and the Unstoppable Rise of the Share Economy*, Forbes (Feb. 11, 2013).

⁶ AIRBNB, INC., <HTTPS://WWW.AIRBNB.COM/> (last visited Feb. 26, 2015).

⁷ “There are laws for people and there are laws for business, but you are a new category, a third category, people as businesses,” Brian Chesky, Airbnb’s chief executive...“As hosts, you are microentrepreneurs, and there are no laws written for microentrepreneurs.””

Airbnb, Loosecubes charges a 10 percent fee for each transaction and now offers spaces in 535 cities in 66 countries.⁸

Valued at over \$40 billion dollars, Uber is perhaps the best-known example of a disruptive digital platform business. Founded in 2009, the company now has a higher valuation than rental car giants Hertz and Avis. Next to Uber, the second largest transportation platform company Lyft has raised over \$300 million in funding and has tens of thousands of providers in over 65 cities. Other platform competitors have been established around the world, such as BlaBlaBla Car, a France-based transportation company like Uber and Lyft which raised \$100 million in 2014 and has recently expanded into India, its fourteenth market. Other new companies focus on long-distance transportation, such as Tripda, while others such as Zimride, focus on servicing particular markets, such as universities. Uber and Lyft, like many other companies are offering a creative take on traditional markets and are using a variety of disruptive technologies to shake up their respective industries. These new transportation businesses match drivers and passengers via smartphone technology and sophisticated matching algorithms. Unlike taxicabs and limousines, these companies do not position themselves as common carriers, and most do not seek regulatory licensing traditionally required for such services.⁹ Uber asserts it is not a taxi business but rather merely an app and a network. It argues that it owns no cabs and the cab drivers are not employees, but rather independent contractors.¹⁰ Uber stresses that it “does not provide transportation services,” “is not a transportation carrier,” and that the independent contractors or businesses that sign up with it are the true “transportation companies.”¹¹ The taxi cab industry and some regulators are arguing otherwise. Is Uber one big business? Is each driver a small enterprise? Are Uber drivers workers, independent contractors, or franchisees?

These questions are far from theoretical. They are acute and pervasive. Over a 1000 cities now have such services available and new models are being introduced rapidly. For example, still in the transportation

⁸ See Jeremy Rifkin, *The End of the Capitalist Era, and What Comes Next*, Huffington Post (Apr. 1, 2014, 4:59 PM), http://www.huffingtonpost.com/jeremy-rifkin/collaborative-commons-zero-marginal-cost-society_b_5064767.html.

⁹ Stephanie Francis Ward, *App' Me A Ride Internet Car Companies Offer Convenience, but Lawyers See Caution Signs*, ABA J., January 2014, at 13-14.

¹⁰ <http://www.forbes.com/sites/aswathdamodaran/2014/06/10/a-disruptive-cab-ride-to-riches-the-uber-payoff/>

¹¹ Stephanie Francis Ward, *App' Me A Ride Internet Car Companies Offer Convenience, but Lawyers See Caution Signs*, ABA J., January 2014, at 13-14.

realm, other companies are disrupting the car rentals industry. Car2Go and ZipCar offer short-term use of a smart car in a designated zone; DecoBike offers use of bikes throughout the city and return at a designated location. Getaround, founded in San Francisco, allows car owners to rent out their vehicles. Getaround charges a 40 percent commission for car owners, which is rather high for the platform.

Disrupting service and staffing companies, TaskRabbit, similarly founded in San Francisco, allows users to list errands they need to get done, including handyman jobs and personal assistance. TaskRabbits, who have been certified by the site, bid to work on the tasks and TaskRabbit takes an average 15 percent fee of the offer price. Need a dog walker? DogVacay will link you to one. Need a teacher? Skillshare will connect you. Disrupting the restaurant market, Eatwith aggregates offerings of secret suppers and pop-up restaurants, which are held in an individual's home or other private spaces, where food is prepared in a noncommercial kitchen, without formal permits of city health and code enforcement officials.¹² Some of these culinary events are set up through less specialized online sites and instead come together using existing social media platforms such as Facebook, Twitter, and Instagram.

Disrupting network broadcasting and cable providers, Aereo was a start-up founded in 2012, which allowed subscribers to watch and record live TV over the internet for a monthly fee.¹³ It maintained a bank of miniature, dime-sized antennas in each city that it operated in that pulled down local TV signals broadcast over the air, much like old rabbit ears.¹⁴ Every time a subscriber wanted to watch or record a show, Aereo assigned them an antenna.¹⁵ Anticipating the copyright challenges that it would face, Aereo took separate recordings for every single person watching and provided full control to the user over what content they wanted to save and play.¹⁶

¹² Regulating the Underground.

¹³ Jacob Kastrenakes, *Aereo loses to broadcasters in Supreme Court fight for its life*, The Verge, June 25, 2014, available at <http://www.theverge.com/2014/6/25/5801052/aereo-supreme-court-ruling/in/2779059>.

¹⁴ Id.

¹⁵ Id.

¹⁶ Aereo Announces \$20.5M Series A Financing Led by IAC; New Technology Platform Allows Consumers Access to Live TV Over the Internet, Aereo, February 14, 2012, available at <http://www.marketwired.com/press-release/aereo-announces-205m-series-a-financing-led-iac-new-technology-platform-allows-consumers-nasdaq-iaci-1619629.htm>.

The common pattern that emerges is a definitional one. Platform companies adamantly endeavor to be defined first, by what they are not: they are not selling the thing itself; the service itself; the product; the content. They are not selling the ride, they do not own the borrowed item. Rather they are selling access to the software, the matching algorithms, as well as a digital system of reputation and trust between users of the platform business.¹⁷ In turn, the platform breaks down traditional industry categorizations and as a result presents a challenge in labeling the nature of the business: who is the employer, provider, user, employee and consumer.

Figure I: Start-Ups & Regulated Corollaries

Airbnb	Hotel
Loosecubes	Commercial Rental
ParkingPanda	Parking Sites
Uber;Lyft	Taxi Industry
Zipcar	Car Rentals
JustShareIt	Car Dealers
EatWith	Restaurants
TaskRabbit	Manpower Agencies
AirTasker	
DogVaycay	Pet Services
Open Shed	Retail/Manufacturers
3D Printer Sites	
Aereo	Broadcasing/Cable

¹⁷ <http://oecdinsights.org/2014/12/22/what-is-a-taxi-regulation-and-the-sharing-economy/>

FilmOn.com Broadcasting/Cable

Zopa Banks

Kickstarter Equity

B. The Everything Platform: Challenging Labels as a Form of Innovation

The platform economy is a system characterized primarily by what it's not: conventional and static. The most important aspect of the platform economy is that it constitutes an ecology of new business models. The staggering rise of online networks and digital service companies triggers questions about the nature of the business and how it generates its value and in turn, the platform economy is defying simple definitions. Platform companies often have very few real assets. The initial inquiries about their essence and character point to the challenge itself: we are in uncharted territories, a new zone of economic relations. Law and language attempt to chart boundaries and yet they are inherently limited in covering all forms of life and human imagination. Innovation is always disruptive in that regard. When it comes to new industries and embryonic business models, lawmakers need to tread carefully. This has always been true. Yet, the platform is introducing new models and structures of exchange in unprecedented rates. Even more difficult is the ability of platform companies to morph and expand, rendering innovation through definitional defiance unstoppable. Consider Uber's ambitions for a moment. Uber recently changed its motto from *Everyone's Private Driver* to *Where Lifestyle meets Logistics*. The shift from "driving" to "lifestyle" is telling. Uber's critical mass of users and its continuous perfection of its software is opening opportunities for its expansion. Why stop with rides when it can offer delivery services and carpooling? Why stop with cars when the technology it develops can be extended to other forms of transportation, such as boats, planes and, eventually, driverless cars?

This is not a futuristic dream but rather already becoming a reality. Uber has launched a courier delivery service, UberRUSH, as well as UberBOAT, a service to request a water taxi around the Harbor, currently operating in Boston but soon expanding to Sydney, Australia and elsewhere (and other platform economies are offering flights). UberPOOL coordinates individual riders who are travelling to similar locations along a similar route. If there is a match found along the route, the rider will be notified of

the co-riders' first name.¹⁸ Clearly, Uber aspires to be the *Everything Platform*, similar to how Amazon morphed from a bookstore to the *Everything Store*. In 2015, Uber announced that it is investing in research and development of self-driving cars.¹⁹ Uber also just announced that they would develop their own mapping platform and move away from Google Maps. Google at the same time is also realizing the potential of what, can in effect, only be described as the *Everything Economy* and has announced its ambition in getting into the ride-sharing service game with self-driving cars as well.²⁰ A new venture in Silicon Valley, appropriately called *Magic*, promises to further push the totality vision of the platform. Magic's business model is its promise to deliver "Anything you want. As long as it's not illegal" -- a tiger to your door, sushi on a boat, your parking ticket vanished.²¹ The company launched in February 2015 and logged 17,000 requests in its first 48 hours of operation. Magic indeed.

As the platform continues to morph and expand, the disruption of conventional business models, definitional boundaries, and doctrinal order will swell. A recent Price Waterhouse report calls companies to audit all tangible and intangible assets to be profitably introduced into the platform including energy, telecoms and retailing. As it continues to grow, the platform is best understood as clusters of market developments driven by network technology that continuously disrupt previous notions economies of production, consumption, finance, knowledge and education. The potential as well as the peril of such an amorphous beast is at the core of the regulatory pushbacks it is encountering, and even more fundamentally, the binary accounts of its utopian or dystopian nature.

Figure 2: Fifty Ways to Look at the Platform

¹⁸ UberPOOL has received attention from regulators; the Public Utilities Commission in California decided that Uber's new carpooling service is illegal because two distinct riders pay separate fares to share one car" Rogowsky, Mark. 'California Threatens to Shut Down Uber's New Carpooling Service' *Forbes*, 12 September 2014.

¹⁹ <http://techcrunch.com/2015/02/02/uber-opening-robotics-research-facility-in-pittsburgh-to-build-self-driving-cars/>

²⁰ http://www.slate.com/blogs/future_tense/2015/02/02/google_uber_rival_bloomberg_reports_google_working_on_ride_hailing_app.html

²¹ <http://techcrunch.com/2015/02/23/magic-is-a-startup-that-promises-to-bring-you-anything-if-youre-willing-to-pay-for-it/>

<i>Traditional categories</i>	<i>Web 3.0 categories</i>	<i>Meta</i>
<i>Regulated industry</i>	<i>A community market place</i>	<i>Platform</i>
<i>Employer -Employee</i>	<i>A forum</i>	<i>Peer-2-Peer</i>
<i>Seller -Buyer</i>	<i>An app</i>	<i>Access Economy</i>
<i>Producers -Consumers</i>	<i>A tech software</i>	<i>Pooling Systems</i>
<i>Lender - Borrower</i>	<i>lodging/rental/</i>	<i>Mesh Economy</i>
<i>Manpower Agency</i>	<i>service intermediary</i>	<i>Sharing Economy</i>
<i>Cable company</i>	<i>network of members</i>	<i>Collaborative Economy</i>
<i>Taxi dispatcher</i>		<i>Gig Economy</i>
<i>Bank</i>		

C. The Platform Economy: Romantic Utopia or Nightmare Dystopia?

The realities of the recent cycles of financial crises and economic restructuring along with the rise of digital technology and shifts in lifestyle have created the perfect storm for the platform economy. The reasons for the rise of the platform economy are key to analyzing the contemporary challenges presented by existing regulations and the normative questions about law's continued role. One of the striking dimensions of the public debates about the platform is the strong bipolar descriptions of its revolutionary potential. In general, while the benefits of the digital platform are robust, many are questioning whether it comes with a high price. These questions are largely raised in broad brushes and absolute terms either hailing the platform as the anti-corporate utopian answer to 20th century discontent or an accelerated path to further injustice and inequality. While many celebrate the platform's potential to positively transform capitalism to something kinder and fairer, others view the transformation as dangerous to social and work relations, consumer welfare, distributive justice, and regulatory compliance. On one side of the debate, the platform is romantically envisioned as the return to the days without corporate dominance, when interactions happened directly and intimately between

individuals, when design was bottom-up and relationships were based on community rather than markets. On the other side of the spectrum, the platform is a dystopian uber-capitalist development in which every interaction becomes the basis of market exchanges, privacy and leisure are lost, and Silicon Valley style-libertarians become richer at the expense of everyone else. Many commentators decry that “regulatory mechanisms have not kept pace”²² and that this will hurt consumers because platform businesses avoid established regulations and “typically operate outside them.”²³

Most of all, some view the rise of the platform not simply as avoiding regulatory compliance but as directly linked to the desire of businesses to avoid welfare enhancing laws and economic practices such as long-term employment, liability and insurance, and product quality control that have been the bedrock of the 20th century. For example, progressive economist Dean Baker views the platform as “largely based on evading regulations and breaking the law,” subjecting consumers to substandard, often unsafe, products and services. Speaking directly to the utopian/dystopian duality, Anthony Kalamar has coined the term “sharewashing,” in which platform companies under the guise of the misleading term “sharing economy” shift liability and risk onto employees and consumers. Others similarly contend “there is little doubt that the prosharing discourse is blind to the dark side of these innovations.”²⁴ Either way, all agree that while a paradigmatic shift is underway, its costs, benefits and relationship to law are still unsettled.

II. PRINCIPLES OF THE PLATFORM

A. *Transaction Costs Revolution*

Can this new set of marketplaces continue to make admirable profits while enabling the casual owner to monetize possessions or skills that were otherwise collecting dust – Forbes

²² Cohen and Zehngbot, What’s Old Becomes New: Regulating the Sharing Economy Boston Bar J 2014.

²³ Chang Regulation Won’t Kill the Sharing Economy. We Just Need New Rules, Popular Sci (Aug 2014).

²⁴ <http://greattransition.org/publication/debating-the-sharing-economy#top>

Imagine a world without transaction costs. It's easy if you try it with the platform. In 1937, Ronald Coase wrote about the inherent inefficiencies in the market, sourced in the high transaction costs throughout the stages of the deal: "operations are often extremely costly, sufficiently costly at any rate to prevent many transactions that would be carried out in a world in which the pricing system worked without cost."²⁵ Transaction costs include search and information costs for who and what to deal with; negotiation and decision costs, including bargaining for the terms of the deal, reaching an agreed upon price, drafting the contract; and monitoring and compliance costs, necessary for successfully carrying out the terms of the deal.²⁶ In other words, transaction costs can be classified into three categories, correlating with three stages of pre-deal, deal making, and post-deal: 1) search costs; 2) bargaining and decision costs; and 3) policing and enforcement costs.²⁷ Each of these stages depends on information to reduce costs and the platform changing the dynamics of each and every stage. Increased connectivity, access to information, and advanced technology are tying into all aspects of transactions costs, online and offline. As the platform grows, all of these efficiencies grow as well. The market, quite simply, is perfecting.

The platform is driven first and foremost by a combination of technological advancements. In less than a decade, internet access has grown by over 500% percent. Most American consumers have at least one mobile device with high-speed networks, GPS and smart apps. Most of the western world now has internet access and the developing world is rapidly gaining access as well. The internet is predicted to connect 50 billion mobile wireless devices by 2020.²⁸ With more users, better algorithms for matching, better software for pricing, better slicing up of resources to tailor each deal -- transaction costs could be reduced to their utopian zero. In what follows, ten fundamental principles of the platform economy are laid out in more detail. They include the shift from ownership to access (*proprietas to usus*) the monetization of excess, the reduction of overhead, and the extension of the life cycle of products.

²⁵ Coase, Ronald, 'The Nature of the Firm' *Economica* 4(16), (1937): 15.

²⁶ Coase, Ronald, 'The Problem of Social Cost' *Journal of Law and Economics* 3 (1960): 15; Williamson, Oliver, 'The Economics of Organization: The Transaction Cost Approach' *The American Journal of Sociology* 87(3) (1981): 549.

²⁷ Dahlman, Carl J, 'The problem of externality' *Journal of Law and Economics* (1979): 148.

²⁸

As will be described in the Part IIB, beyond the efficiency enhancing principles of the platform, the rise of the platform economy is also driven by shifting preferences, including an increased desire for choice and variety, for authenticity of experience, for reducing one's carbon footprint and for a general anti-corporate sentiment. Whether the platform actually offers what it sells is, at least in part, separate and different from the question of what it is selling, and that is a new dream: one of lifestyle and unique authentic experiences, responsible consumption, connectivity, empowerment, increased social awareness, and a reduction of emission and waste.

1. Economies of Scale

In the industrial era, the corporate structure allowed markets to scale. The scale of informal exchanges was small and left unregulated. Nevertheless, as platform companies enter to compete with established industries, they are increasingly taking a lion's share of their anti-industry. Perhaps counter-intuitively, the rise in wireless tech and the expansion of scale of online connectivity has allowed a return to the pre-industrial village – bartering, sharing, individual-to-individual exchanges – but despite this retro feel the platform village is nothing like the small physical village. Rather, platform companies connect between strangers on a global high-intensity scale.

2. No More Waste

Imagine zero waste. A key principle of the platform is no more idle capacity. The platform enables the use of private resources more efficiently. Most assets are shelved most of the time. The car is used only about 10% of the day. The lawn mower once every two weeks. The spare bedroom only twice a year when the in-laws visit. Still on the supply side, with labor market downturns and high unemployment rates, many are seeking to fill up their free time and flexibly earn extra income. In other words, the platform resurrects dead capital,²⁹ including dead human capital, otherwise known as downtime. Similarly, dead human capital - skills which people have but have not been able to monetize previously – is also resurrected. Many people are good cook, handymen, home-designers, computer wizzes, artists, writers, but do not use those skills professionally. The platform economy gives people who have a skill that is not necessarily their main source of

²⁹ Daniel M. Rothschild, "How Uber and Airbnb Resurrect 'Dead Capital,'" Umlaut, April 9, 2014, <http://theumlaut.com/2014/04/09/how-uber-and-airbnb-resurrect-dead-capital>.

income the ability to commercialize that skill. In turn, costs are reduced by increased supply of under-utilized assets.

3. Tailoring the Unit

Related to the end of idle capacity is the ability of the platform to slice up time and space into smaller units. The platform breaks down both supply and demand into tiny modular units: short term rentals, a few minutes of personal assistance, a couple of hours of furniture installation, an evening a week of a chef's dinner at her private home. There is efficiency in renting a car for an hour rather than for a day; efficiency in crashing on the couch in someone's house rather than getting your own hotel room; efficiency in renting a house together with two other families rather getting three suites at an established resort. Yochai Benkler has termed this feature of online exchanges 'granularity,' the degree to which objects may be broken down into smaller packages. The platform allows services and products to be rented out by the minute resulting in a transactional unit that is extremely small.

4. We are All Capitalists Now

The share of sharing is growing exponentially but sharing is not free. True, the platform offers bartering (Babysitting Co-Ops), gifting (Freecycle and Kashless), and swapping (thredUP and SwapTree) options, but even those formalize and account cashless transactions, but in its majority of exchanges the platform have a price: renting, trading, servicing and borrowing for a fee. In fact, in many ways, the platform tilts the balance away from altruistic/communal interactions to market/commodified exchanges. Imagine the monetization of everything. From a Coasean transaction cost perspective, quite intuitively, increased supply results in reduced costs for consumers. At the same time, there are costs of monetizing everything: your leisure time, your friendships, and your private home.

5. From Prêt-à-Porter to a Haute Couture Economy

In the wake of several economic downturns, consumers are demanding more competitive prices and smaller packaging of their services. They are also demanding more input into the metrics of what they consume. The platform promises to end misfit between non-tailored supply and specific demands. As offerings become extremely disaggregated, consumers can

find exactly what they were looking for: renting a non-smoking, pet friendly, partly furnished apartment for three nights in a specific neighborhood, with specified features and at a specific cost. The platform facilitates better customization of the terms of the exchange to fit individual needs with a new degree of specificity.

6. Access over Ownership

Zero waste and the resurrection of dead capital can be achieved because of a shift from a consumption culture that is dominated by acquisition to a mindset of access. Instead of owning a car, what becomes important is the ability to use one when needed. Instead of purchasing the lawnmower, knowing that it is there to serve you when the grass has grown is sufficient. In particular, as population density and urbanization continue to rise, congestion and smaller spaces push consumer to prefer access over ownership. This shift from property to access, with smaller units of consumption, further reduces transaction costs by reducing the stakes of the deal: purchasing an annual membership in a car sharing platform is not as weighty a deal as buying a car; purchasing use of a car for an hour is not as costly as renting a car for a day.

7. No More Overhead

Transactions are decentralized also in the sense that there is far less intermediation. No more middleman, besides, of course, the platform. Direct exchanges between private individuals are not new, but they are happening on an unprecedented scale. Technology allows private parties to coordinate directly without the need for much more than the software. As described in Part I, while the business models of platform companies vary significantly, many platform companies charge around 15% or less fee for each transaction they facilitate. This overhead is far smaller than when offline companies offer similar services in their respective industries.

8. Reduced Barriers to Entry

The platform economy is encouraging new entrants into industries that have been long entrenched by incumbents. There are very little startup costs to digitally compete. All you need is a domain name and website. By providing a marketplace of programmers, the platform has also lowered these setup costs. At the same time, the platform reliance on scale and trust creates a first mover and mass-scale advantages to some, suggesting that we

might witness recentralization even as the platform allows decentralization.³⁰ Even more importantly, there are virtually zero startup costs to become a user/provider, essentially a micro-entrepreneur, on one of the existing platforms. The platform is fundamentally changing the way we exchange and interact as market actors. If you want to test out your abilities as a chef or a bed and breakfast host, you simply list your offering on an existing platform and wait for an offer.

9. Pricing Precision

When it was just founded, Airbnb realized that choosing a price was the most difficult part in the listing process for private hosts. Now Airbnb uses a sophisticated series of algorithms to suggest pricing to hosts. Airbnb developed a model for providing dynamically tailored price recommendations to hosts based on location, likeness to other properties, and time of the year.³¹ The model takes into account measures like the temperature at any given time as a proxy for seasonality. Similarly, Uber prices dynamically, offering discounts when demand is lower while raising prices in peak hours.³² Uber's 'dynamic' or 'surge' pricing model – adjusts to increase driver efficiency, giving more incentives for supply when demand is high.³³ These sophisticated pricing algorithms allow for a more accurate valuation of goods and services and reduce both negotiation and uncertainty costs in striking the deal.

10. Dynamic Information

Transaction costs are high in the face of information asymmetries. But the platform offers dynamic ratings, reviews, and information which reduce uncertainty and create consumer confidence. It also reduces monitoring costs because the certainty that one will receive a bad review creates an incentive to comply with the terms of the deal. As will be discussed in more length in Part IV, the same technological factors that dramatically reduce transaction costs of search and negotiation also enable monitoring and dynamic quality transparency and records, reducing asymmetric information between providers and consumers and creating

³⁰ Deven R. Desai, *THE NEW STEAM: ON DIGITIZATION, DECENTRALIZATION, AND DISRUPTION* 65 *Hastings L.J.* 1469 2014. As discussed in Part III, this is partly why Uber, Airbnb and other major players appear to be pushing for being taxed. The big guys of the platform are now weary of the newcomers.

³¹ https://ipa.org.au/portal/uploads/Sharing_Economy_December_2014.pdf

³² <https://hbr.org/2014/07/regulation-is-hurting-cabs-and-helping-uber/>

³³ Hill, Dan. 'Open Air: Algorithmic Pricing', *Airbnb Tech Talks*, May 7 2014, www.nerds.airbnb.com/openair-algorithmic-pricing/

confidence in the deal which increases overtime as interlocking networks in the platform mature.

B. Market Challenging or Market Creating?

In large part, the battle over definitions, boundaries and regulation depends on understanding the economic logic of the platform. Are new platform companies successfully competing with established regulated industries because they are introducing new business models and creating a substantively different economic transaction or because they seek regulatory avoidance and generate value from such avoidance? Even if they do not seek regulatory avoidance, the question of whether to extend existing regulations to the platform will depend on whether these new companies are at their core essentially similar to the industries they disrupt. In other words, even accepting the economic logic of reducing transaction costs, in order to answer whether a platform company is simply another business competing within an existing industry or something different, carving out a new market, it is important to recognize the difference between market competition and market differentiation. The platform is doing both: perfecting and changing existing markets as well as creating new ones.

In economics, differentiation, or dynamic competition, refers to ways in which businesses compete not simply over pricing but over the kind of services and products offered.³⁴ The platform is offering new experiences and shaping new preferences. Take for example Uber and Lyft. At Uber, drivers add touches in their car such as a bottle of water, tissue paper, or hard candy. The transactions are cashless and tip-less which are meant to induce convenience but also a sense of safety and perhaps a sense of trust and socially connection; the partial invisibility of the monetary aspect of the exchange, if you will. This may still sounds not a radically different, but rather simply better, service than taxi cabs. So take Lyft. At Lyft passengers ride shotgun with the drivers. The message and signal is one of peers. Ride hailing platform companies also compete with carpooling apps in which people join drivers who are going somewhere anyway, which is further along on the differentiation spectrum. In the case of ride sharing, even more than with ride hailing, the experience is one of carpooling, even if it is mediated through the platform and carrying a price tag. The meaning is transformed into not only to cost saving but to an environmentally responsible practice of reducing the number of cars on the road.

³⁴ Israel M. Kirzner, 35 *Entrepreneurial Discovery and the Competitive Market Process: An Austrian Approach*, *Journal of Economic Literature* 60 (1997).

Lifestyle and social meaning is important to the platform. At the broadest level, the matching system provides a sense of community which maps onto a contemporary anti-corporatist sentiment. People value the idea of paying directly to the provider, even if the platform takes a cut:

No matter how well trained service employees might be, everyone is nicer when they're dealing with customers directly. Even customers. Nearly everyone who stays at an Airbnb rental, for instance, hangs up their bathroom towels after they use them.³⁵

The distinct experience of exchange through the platform is significant if it changes the nature of the transaction, not simply adding a competitor to the existing market. The societal factors for the rise of the platform economy are multiple. Consumers describe a preference for a different kind of market exchange. In part, the rise of Airbnb can be linked to a sense of adventure in renting home directly from its owner. Foodies enjoy the idea of eating at the private home of an aspiring chef and being the first to discover the “new-new thing.” The fact that consumers are choosing with their feet and reporting a preference for the choices presented by platform companies is evident.³⁶ However, the choices and preferences are themselves formed by the deepening of the platform into our everyday life. Consider Airbnb. Studies are finding that consumers that use Airbnb stay longer on vacations and some guests would not have gone a vacation at all but for access to the lodging platform. In other words, the platform constitutes their consumption, rather than merely providing an alternative brand within an existing market. Similarly, the platform may legitimize, not simply make affordable, the hiring of a personal assistant, dog walker, driver, or chef, something that would otherwise seem to many people too awkward and unseemly in an offline world. Web 3.0 is transforming the lifestyle of the masses, not only better matching a static equilibrium of supply and demand,

³⁵ <http://time.com/3687305/testing-the-sharing-economy/>

³⁶ Jeremiah Owyang, “People are Sharing in the Collaborative Economy for Convenience and Price,” *Web-Strategist.com*, March 24, 2014, <http://www.web-strategist.com/blog/2014/03/24/people-are-sharing-in-the-collaborative-economy-for-convenience-and-price>. 46. See, for example, Matthew Mitchell, “An Uber Challenge to Tacky Taxis,” *Washington Times*, August 28, 2013; see also Matthew Mitchell and Christopher Koopman, “Ride-Sharing Shows How Slow Governments Can Be,” *Pittsburgh Post-Gazette*, July 6, 2014

but also generating different sets of supply and demand and reconfiguring markets.

The behavioral aspects and preference formation in the platform can help explain the variance in the level of pushback from established industries in reaction to different platform disruptions. Comparing the taxi industry in the case of ride-sharing and the hotel industry in the case of rent-sharing, the hotel industry has been much less averse to Airbnb compared to the taxi industry reaction to Uber/Lyft.³⁷ In part, the difference can be explained by the nature of the markets and whether the platform presents direct competition. In general, Airbnb competes more directly with bargain and independent hotels while luxury hotels and bigger hotel chains, which cater to business clients, are less affected. A recent study examining the impact of Airbnb on the hotel industry finds only a small, statistically insignificant negative effect of Airbnb on upscale hotels.³⁸ The study concluded that “Airbnb’s impact is non-uniformly distributed, with lower-priced hotels, and hotels not catering to business travel being the most affected segments” and that “affected hotels have responded by reducing prices, an impact that benefits all consumers, not just participants in the sharing economy.”³⁹ At the same time, Airbnb is also changing consumption patterns more fundamentally, aiding consumers to imagine their dream vacations, to plan trip that would not otherwise be planned, and to stay longer at new cities. Indeed, the paradigmatic shift from ownership to access maps onto contemporary social psychology research which shows that experiences trump purchases. These changing patterns of experience consumption that are endogenous to the rise of the platform economy also help explain how business models such as Airbnb and Uber disrupt more than one industry – they reconfigure a range of industries. Rather than simply competing with the hotel industry, Airbnb is intervening in both the hotel and real-estate industry, rentals and titles, in ways that shift the

³⁷ <http://www.allvoices.com/article/100003570>

³⁸ Zervas, Georgios and Proserpio, Davide and Byers, John, *The Rise of the Sharing Economy: Estimating the Impact of Airbnb on the Hotel Industry* (February 11, 2015). Boston U. School of Management Research Paper No. 2013-16. Available at SSRN: <http://ssrn.com/abstract=2366898> (“With most business travel traditionally arranged through employers, an Airbnb stay may be more difficult to substitute for these type of stays. Moreover, business travelers make greater use of those business-related hotel amenities not typically provided by Airbnb properties.”)

³⁹ Zervas, Georgios and Proserpio, Davide and Byers, John, *The Rise of the Sharing Economy: Estimating the Impact of Airbnb on the Hotel Industry* (February 11, 2015). Boston U. School of Management Research Paper No. 2013-16. Available at SSRN: <http://ssrn.com/abstract=2366898> (“We estimate that each 10% increase in Airbnb supply results in a 0.35% decrease in monthly hotel room revenue, translating to an impact exceeding 13% of revenue in Austin, where Airbnb supply is highest.”)

balance between these related industries. The same holds true with Uber. It is creating disruption across the taxi, car rental and car sellers markets.

Experiences are tailored and they involve direct interaction with freelancers. The platform, especially as it is still forming, often has the appeal of exclusivity, hip, edgy, exciting, and unusual experience, while also providing openness and a sense of community and bottom up expansion. The anti-corporate, anti-ownership streak provides value to consumers, further helping to explain the rapid rise of the platform. Platform companies are viewed as having a positive effect on anti-competitive forces; a rejection of corporate concentration, an experience of anti-establishment, underground and fringe. No doubt, as the platform grows, it mainstreams and concentration happens in the digital world as well. Moreover, paradoxically, the anti-corporatist streak also has in some platform exchanges an elitist undertone. A secret non-restaurant culinary dining event set up through the platform can be characterized as skyboxification – grunge for the rich.⁴⁰ Still, platform companies position themselves as experiential, de-centralized, pro-amateur and crowds-based. There is an overarching ethos of newness, innovation, and empowerment. This play between exclusive and for-the-masses, amateur and professional, retro and new are all at the core of what the platform is selling. Whether or not any one descriptive feature reflects the realities of platform companies is not insignificant but it is not the entirety of the inquiry. The consumption experience itself matters. Moreover, the realities of platform will continue to be shaped in part, by how closely it will be regulated in relation to regulated industry competitors. In other words, the question itself is unstable and normatively dependent on the answers we provide as legal theorists and policymakers.

III. CONTESTED GROUNDS OF THE PLATFORM: OWN NO EVIL, EMPLOY NO EVIL, DIRECT NO EVIL

A. Law as Enabler and Inhibitor

Much of its spectacular growth has been fueled by outdated regulation.
– HBR⁴¹

There were laws created for businesses, and there were laws for people. What the sharing economy did was create a third category: people as businesses. – Chesky, co-founder, Airbnb

Some are sad, and some are glad, and some are very very bad. – Dr. Seuss

It is an age-old debate. Does law aid or hinder innovation? New technologies present new opportunities and new challenges for regulation. The rise of the platform adds new types of risk, implicating liability laws, consumer protection laws, insurance laws, employment and labor laws, property and zoning laws, and more. But they also provide new ways to address some of the very same social goals that law has attempted to direct. We are accustomed to thinking in terms of new industry followed by new set of regulations, but market innovation also offers an opportunity for more foundational thinking about the role of regulation. New economic forms push for new legal processes. The platform economy has introduced innovation in services, in entrepreneurship, and in the way we work. When manufacturing rose in the industrial era, New Dealers introduced new regulations, including safety standards for the auto industry. During the era of the Great Society, OSHA, EPA and other cross-industry agencies were formed, and new regulations were introduced, often building on and adopting industry self-standards. In cycles of financial crisis, the financial markets readjusts, new types of financing are introduced as well as new forms of regulation. Beyond outside economic and social forces, observing law as a more closed system, scholars have recognized an internal cyclical story of over- and under-regulation, when disruptive business models enter.⁴²

The goals of regulation are multiple. They can involve correction of market failures and incentivizing competition, public safety, quality control, privacy, access, equality, fairness and distributional concerns. They all are presumed to enhance the public welfare but a realistic understanding of regulation in action is that not all regulation is equally situated in this

⁴¹ <https://hbr.org/2014/07/regulation-is-hurting-cabs-and-helping-uber/>

⁴² Lobel, *The Renew Deal*.

regard. Public choice theory and capture help explain regulatory barriers to entry that do not contribute to overall welfare. Other regulations are simply outdated, based on wrong economic and scientific presumptions, or their goals can be achieved otherwise more efficiently and more accurately. We have seen that the regulatory questions raised by the rapid rise of the platform are expansive. They range from employment law issues, tax, safety and health, quality and consumer protection, and zoning laws. The following section identifies clusters of regulatory logic. The platform pushes us to look at the world of regulation with fresh eyes and to map regulatory requirements with these categories in mind. Laws that are not promoting welfare but protecting entrenched interests are an easy case. On this end of the spectrum, I include permitting and licensing laws and price controls. On the other end are tax laws, which continue with the same logic as in the offline market. Both ends present easy cases. The hardest cases are regulations that are about fairness, externalities, and normative preferences in a democratic process. These include consumer protection laws, quality and safety controls, zoning laws, employment laws and intellectual property laws.

B. Easy Cases: Competition and Barriers to Entry

“The traditional way is you can’t do it unless you get a license. That made sense up until we had data. Now the starting point is yes.” -- Nick Grossman, *Union Square Ventures*⁴³

1. Permitting

There are regulations that enhance public welfare and there are those that enhance the interests of lobbyists, rent seekers and entrenched industry.⁴⁴ In the transportation market, the taxi industry has claimed that Uber and Lyft and other ride sharing platform companies circumvent the regulations and licensing fees that taxicab companies have to contend with. On February 2015, the Broward County Commission voted to regulate ride-sharing services the same way taxis are regulated.⁴⁵ As a result, Uber and Lyft will be required to obtain the same certificates as taxis and limousines.

⁴³ <http://time.com/3687305/testing-the-sharing-economy/>

⁴⁴ See Stigler, *The theory of economic regulation*; Mchesney. *Rent extraction ...j of legal studies* 1987; regulatory arbitrage.

⁴⁵ <http://www.bizjournals.com/southflorida/news/2015/02/10/broward-county-votes-to-regulate-uber-lyft-as-taxi.html?page=all>

Attempts at extending permit requirements, what industry interests often call “leveling the playing field” between ride-sharing companies and taxi companies, or between other platform companies and the businesses they disrupt, are generally harmful to the evolution of the platform and to competitive markets more broadly. Under capture theory, industry players extract rent from special permitting, licensing and other regulatory requirements.⁴⁶ By designing around these regulatory rents, platform businesses create value for consumers as well as push incumbents to become more efficient and responsive in ways that they would otherwise not be. The requirement of obtaining taxi cab medallions is a paradigmatic example of rents. Here is a striking statistic: in the mid 2000s, there were only 12,799 licensed taxicabs in New York City compared with 21,000 in 1931 when the city had about 1 million fewer inhabitants.⁴⁷ Limited grants of permits, especially coupled with regulations such as having the same color (yellow cabs) for all taxis, dramatically reduce incentives to compete.

In 2014, the Pennsylvania Public Utility Commission held separate hearings for Lyft and Uber in Pittsburgh to decide whether the companies should be granted permanent licenses to operate statewide. Similar hearings are underway around the country and across the world. In July 2014 Senate Bill 1457 was introduced to create a new category of transportation company, offering legal status for ride-sharing companies. In California, the Public Utilities Commission reached an interim agreement to allow ride-sharing companies to operate while it weighs proposals that would make them full-fledged, legally operating “transportation network companies.” This would likely involve state licensing, required criminal background checks on drivers, and mandatory insurance coverage even more stringent than that required of limo companies. In other states, like Texas and Colorado, Uber and other ride-sharing services have been essentially shut out by rules governing limo services that restrict charging based on time elapsed or distance traveled.⁴⁸ Uber is encouraged in some cities, including

⁴⁶ George Stigler, “The Theory of Economic Regulation,” *Bell Journal of Economics and Management Science* 2, no. 1 (1971): 3; Sam Peltzman, “Toward a More General Theory of Regulation,” *Journal of Law and Economics* 19, no. 2 (1976): 211–40, doi:10.2307/725163. 16. Steven C. Salop and David T. Scheffman, “Raising Rivals’ Costs,” *American Economic Review* 73, no. 2 (1983): 267–71, doi:10.2307/1816853.

⁴⁷ The New York City Taxicab Fact Book (New York: Schaller Consulting, March 2006), <http://www.schallerconsult.com/taxi/taxifb.pdf>.

⁴⁸

Oregon and Washington but initially banned in Nevada,⁴⁹ Boise,⁵⁰ Brussels, Berlin, followed by a nationwide ban in Germany.⁵¹

In a recent survey of economists, the vast majority agreed it raises consumer welfare to allow platform car services such as Uber or Lyft to compete with taxi firms on equal footing regarding safety and insurance requirements, but without restrictions on prices, routes, and entry.⁵² Instead of permitting, regulators should consider more directly regulation of the benefits that regulation seeks to bring. For example, if risk regulation is the underlying reason for permit requirement, technology companies could be deemed liable for the accidents that the drivers may get into and therefore could be required to provide insurance. Biber and Ruhl have suggested that the paperwork and permitting that seem appropriate for a large-scale, centralized business focused on taxi services are a mismatch with the compliance capabilities of individual drivers.⁵³ They suggest that general permits might be a useful model for tailoring the regulation of individuals participating in these activities, in that they would lower the compliance costs while minimizing the harm to the public.

2. Occupational Licensing

A few decades ago only 5% of jobs required a license. Now nearly one-third of all jobs require some sort of licensing or permitting.⁵⁴ Some professional services have been historically subject to occupational licensing, such as the law bar, the medical profession. More recently, occupational licensing has been extended to such low skill jobs as hairdressers and restaurant workers. Like with permitting, ex-post are generally preferable and more conducive to new entry. Ex post regulations include insurance systems, tort and product liability laws, whereas

⁴⁹ <http://fortune.com/2014/11/28/uber-suspends-activities-in-nevada-after-injunction/>

⁵⁰ Zach Kyle, *Uber Defies Boise. Starts charging*, Dec 31, 2014.

⁵¹ Mark Scott & Melissa Eddy, *Uber Service Banned Across Germany by Frankfurt Court*, N.Y. TIMES (Sept. 2, 2014)

⁵² IGM Forum, "Taxi Competition," September 29, 2014, http://www.igmchicago.org/igm-economic-experts-panelpoll-results?SurveyID=SV_eyDrhnya7vAPrX7.

⁵³ Eric Biber & J.B. Ruhl, *The Permit Power Revisited: The Theory and Practice of Regulatory Permits in the Administrative State*, 64 *Duke L.J.* 133, 232 (2014).

⁵⁴ <http://time.com/3687305/testing-the-sharing-economy/>

permitting and licensing requirements, price controls, and threshold entry standards are all ex ante barriers.⁵⁵

3. Rate Fixing

In February 2015, the City of Orlando passed an ordinance that requires ride-sharing companies to charge the same rate as taxis, \$2.40 a mile.⁵⁶ In general, Taxicabs are regulated through medallion licensing requirements, which are expensive and hard to get. The rates taxis may charge passengers are also regulated. Boston cabs for example have a unified rate for all days and all hours of the day, \$2.60 for the first 1/7 of a mile and \$0.40 for each additional 1/7 mile.⁵⁷ A great innovation of the platform, achieved primarily by technological advances, is accuracy in linking pricing to supply and demand. The technological innovation of dynamic pricing is in many ways in tension with regulatory schemes. Many states have anti-gouging laws, preventing situations when sellers of goods or services raise prices during times of increased demand, such as after a natural disaster. California limits price increases by retailers after an emergency to 10%. While anti-gouging laws are designed to create fairness, beyond great natural disasters, the logic is simply to subvert the market operation of supply and demand.

Sidecar – auctions.

4. Tax Collection

A primary concern of local regulators is whether the platform economy should be taxed at the same levels as competing industries. A central issue for Airbnb has been the question of hotel tax. Airbnb recently paid \$25 million in hotel taxes to the city of San Francisco, backward pay to

⁵⁵ Arun Sundararajan, “Why the Government Doesn’t Need to Regulate the Sharing Economy,” *Wired*, October 22, 2012, <http://www.wired.com/2012/10/from-airbnb-to-coursera-why-the-government-shouldnt-regulate-the-sharing-economy>.

⁵⁶ <http://www.orlandosentinel.com/news/breaking-news/os-uber-orlando-fight-20150202-story.html>. Uber has said that it will pay fines of drivers in Orlando.

⁵⁷ <https://hbr.org/2014/07/regulation-is-hurting-cabs-and-helping-uber/> (““Local governments need to understand that consumers view ride sharing services like Uber as close substitutes to taxis. Regulators are doing its residents an injustice by regulating taxi prices (consumers would benefit from a taxi vs. Uber price war) — and in the process unwittingly fueling Uber’s growth and enriching its stockholders.”)

account for the past several years.⁵⁸ Other cities have started to demand people who home share to collect taxes. For example, New York and Portland require people who rent their homes to add local hotel taxes to visitors' bills.⁵⁹ San Diego requires anyone who owns, operates, or manages rental properties to charge rental unit business taxes.⁶⁰ This includes hotels, motels, and any property that is advertised or rented during the calendar year.⁶¹

Airbnb claims it benefits cities in multiple ways. First, Airbnb claims it can collect as much as \$65,000,000 in hotel occupancy taxes this year, and the number would continue to increase each year. Airbnb claims that in 2014, the community generated \$768,000,000 in economic activity in New York alone and gave travelers an opportunity to visit New York by providing a cheaper alternative for people to stay. In addition, Airbnb claims their guests paid approximately \$33,000,000 in sales tax and spent additional money at local businesses in New York. Airbnb creates additional value that is then added to local economies. When renters stay at an Airbnb location, they are often staying in local neighborhoods, eating at local restaurants, and shopping at local vendors.⁶²

⁵⁸ <http://www.chicagotribune.com/bluesky/originals/chi-airbnb-chicago-taxes-bsi-20150130-story.html>; Will Coldwell, *Airbnb's Legal Troubles: What Are the Issues?*, THE GUARDIAN, July 8, 2014, <http://www.theguardian.com/travel/2014/jul/08/airbnb-legal-troubles-what-are-the-issues> (citing *Airbnb Versus Hotels: Room For All, Room For Now*, THE ECONOMIST (New York), April 26, 2014, <http://www.economist.com/news/business/21601259-there-are-signs-sharing-site-starting-threaten-budget-hotels-room-all>) (*The Economist* predicted in 2016 Airbnb will be taking 10% of hotels' bookings); Lisa Halverstadt, *Cate to Airbnb: Keep Calm and Rent On*, VOICE OF SAN DIEGO (Feb. 23, 2015), <http://www.voiceofsandiego.org/topics/economy/cate-airbnb-hosts-keep-calm-rent/>.

⁵⁹ Alan Pentico, *Don't Take A Vacation from Subletting Rules*, DAILY TRANSCRIPT (June 16, 2014), http://www.sddt.com/Commentary/article.cfm?SourceCode=20140616tza&Commentary_ID=272&t=Dont+take+a+vacation+from+subletting+rules#.VPAfZEvBFuY.

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² Tim Logan, *LA Weighs Regulation, Airbnb Touts Its Economic Impact on City*, LA TIMES (Dec. 4, 2014, 6:00 AM), <http://www.latimes.com/business/la-fi-airbnb-touts-its-impact-in-la-20141203-story.html>. In 2014, Airbnb, had just under 4,500 hosts in Los Angeles and earned a combined \$43,000,000 between May 2013 and April 2014. Airbnb predict that its economic impact is \$312,000,000, which is enough money to support 2,600 local jobs. Airbnb found three-fourths of the hosts in Los Angeles use the money to stay in their homes and 30% of the hosts say the rent helped them start new businesses. The average host in Los Angeles rents 59 nights per year and gets just under \$8,000.

***expand *** For collection purposes, it may make sense to put the responsibility on the platform company rather than individual users. This is a choice that is made based on the tradeoffs between convenience of compliance and defining the enterprise. Barter taxation already regulated but compliance very low.

C. Hard Cases: Public Welfare in the Platform

1. The Experience Economy: Does Airbnb Violate Zoning Laws?

City officials fear property sharing will negatively affect residential life.⁶³ Zoning laws have multiple purposes. They attempt to keep residential areas quiet, clean, and safe, all of which can be at risk with increasing the number of transient users in these areas. Zoning laws can also have population planning goals such as stabilizing rent and increasing the number of affordable housing for students. While some cities are attempting to limit the lodging platform, others cities are changing their zoning laws to create more certainty and enable the rise of new lodge-sharing models. On February 1st 2015, a new city ordinance took effect in San Francisco regulating vacation rentals in private homes. The law legalizes vacation rentals in private homes, restricting them to permanent residents who must register in person with the city's Planning Department and are limited to 90 days a year for entire-home rentals. Previously, residential rentals of less than 30 days were illegal, though the rule was only loosely enforced. The law is designed both to allow short-term private rentals but also to dissuade non-locals from buying San Francisco properties strictly for the business of short-term rentals. The reason behind the latter restriction is a housing shortage in San Francisco, such that the law will keep San Francisco homes available for permanent residents.⁶⁴ While the law has barely taken effect,

⁶³See Julie Bort, *San Francisco Makes Airbnb Legal At Last*, BUSINESS INSIDER (Oct. 10, 2014, 12:41 PM), <http://www.businessinsider.com/san-francisco-makes-airbnb-legal-at-last-2014-10>; see also Hugo Martin, *LA to Consider Regulating Airbnb and Other Short-term Home Rentals*, LA TIMES (Dec. 2, 2014, 2:48 PM), <http://www.latimes.com/business/la-fi-regulating-short-term-home-rentals-20141202-story.html>.

⁶⁴Halverstadt; hosts must pay the transient occupancy tax. Verne Kopytoff, *Airbnb's Woes Show How Far the Sharing Economy Has Come*, TIME (Oct. 7, 2013),

many are already seeking tighter regulation of the lodging platform, such as an amendment that would allow affordable housing nonprofits to directly sue private hosts who break the law.⁶⁵ Others are advocating new legislation that would create new insurance requirements for tenants who proceed with converting their residence into a vacation rental. The insurance would be similar to what is offered to lodging and bed and breakfast companies, removing a landlord's liability for personal injury and property damage done by a sub-tenant.⁶⁶ Other local lawmakers, in cities including San Francisco and San Diego, are pushing for legislation that would maintain zoning laws and the pre-platform "stable and familiar feel of many residential neighborhoods".⁶⁷ Criticism of Airbnb comes from many directions: angry hosts who found themselves the subjects of nasty lawsuits, fines, and eviction notices; city officials who have received complaints from neighborhoods where disrespectful renters have wreaked havoc; and the hotel industry, which has threatened class action lawsuits.⁶⁸ Through lawsuits, blogs, and press releases, these individuals are voicing their concerns about the nebulous regulations surrounding Airbnb, and how they can be made whole after suffering damages. The safety, property value, and quality of life sentiments reverberate across local debates in apartments and condominiums.⁶⁹ Airbnb has been known to violate local hospitality

<http://business.time.com/2013/10/07/airbnbs-woes-show-how-far-the-sharing-economy-has-come/>. The San Francisco hotels are supposed to charge an extra 14% onto guests' bills so the money can be redistributed back into the city. Additionally, San Francisco was expected to collect \$191,000,000 in transient occupancy taxes in the 2013 fiscal year.

⁶⁵ <http://ww2.kqed.org/news/2015/02/02/Enforcement-Issues-San-Francisco-Legalize-Airbnb-Rentals>. One group, Share Better San Francisco, is expected to put out a ballot initiative that would place tighter restrictions on Airbnb hosts. The California Apartment Association wants tighter regulations on Airbnb, including online rental firms to give greater disclosure to tenants that subletting their residences, even for one night, could violate their lease and ultimately result in eviction. http://bizjournals.com/sacramento/news/2015/02/24/state-legislation-could-hit-airbnb-other-rental.html?utm_source=feedburner&utm_medium=feed&utm_campaign=Feed%3A+industry_20+%28Industry+Commercial+Real+Estate%29&r=full

⁶⁶ The Berkeley Rent Stabilization Board has formed a committee to investigate the listings of rent-controlled units on Airbnb, which is a violation of the city's rent stabilization ordinance. The committee will conduct an analysis to determine whether traditional rent-controlled housing is negatively affected by short-term rentals provided by Airbnb and whether the units listed on the Airbnb website violate the rent stabilization ordinance. <http://www.dailycal.org/2015/02/23/city-rent-board-investigate-legality-effects-airbnb-city-housing/>

⁶⁷ Bort.

⁶⁸ *Id* at 156-57.

⁶⁹ See Jonathan Horn, *Man Who Rented Out Condo Fined \$106K*, UT SAN DIEGO (Oct. 24, 2014, 4:55 PM), <http://www.utsandiego.com/news/2014/oct/24/airbnb-vrbo-mark-rent->

regulations, condominium board rules, and other limitations for short-term housing usage.⁷⁰

Like many other states, New York law prohibits private owners from renting out their apartments for short periods unless they are living in the property.⁷¹ In fact, New York City residential zoning and rent control laws render nearly half of Airbnb rentals unlawful.⁷² A New York judge upheld a landlord's decision to evict a tenant who was caught leasing out his apartment for more than twice what he was paying his landlord.⁷³ New York officials have been searching for illegal hotels, people who rent multiple units on the Airbnb site.⁷⁴ New York State also brought action against Airbnb for violating a law passed in 2010 barring private citizens from renting an entire apartment for less than 30 days. New York Attorney General Eric Schneiderman subpoenaed Airbnb for information regarding 225,000 landlords alleging that 75% of rentals on Airbnb were illegal under the current New York law.⁷⁵ Schneiderman has attempted to get the company to shut down illegal hotels that have developed by hosts using this company.⁷⁶ Airbnb reported 124 hosts to the state attorney's office that Airbnb found to have multiple listings on the site.⁷⁷

stealers-gaslamp-condos/; see also Bort (discussing that some homeowner's associations are banning homeowners from placing their units on Airbnb, and some landlords are forbidding their properties to be rented out on Airbnb).

⁷⁰ Ron Klain, *Airbnb's Biggest Disruption: America's Laws*, FORTUNE (Sept. 10, 2014, 1:33 PM), <http://fortune.com/2014/09/10/airbnbs-biggest-disruption-americas-laws/>. For example, the Marks Condominium Association in San Diego sued one of its tenant for violating the terms that stated that a tenant cannot list his unit for leases shorter than the 90 days the complex requires. The tenant lost in the Superior Court and was required to pay \$106,000 in damages to the condominium association. Residents using Airbnb are not just getting fined but they are also receiving eviction notices for violating their landlord's terms (Bort) Horn (explaining that condominiums want to prevent their residential areas from appearing similar to a hotel).

⁷¹ Ryan Lawler, *As It Seeks New Regulations in NY, Airbnb Estimates It Would Collect \$65 Million in Taxes There*, TECHCRUNCH (Jan. 16, 2015), <http://techcrunch.com/2015/01/16/airbnb-65-million-in-ny/>. The law defines short period as 30 days. *Id.*

⁷² <http://skift.com/2013/01/07/airbnbs-growing-pains-mirrored-in-new-york-city-where-half-its-listings-are-illegal-rentals/>

⁷³ <http://nypost.com/2015/02/20/rent-stabilized-tenants-who-peddle-their-pads-may-be-evicted/>

⁷⁴ *Id.*

⁷⁵ Lawler, *supra*.

⁷⁶ San Diego does not have regulations like Portland or San Francisco thus far but the city does expect that Airbnb hosts pay city bed taxes by adding 11% charge to the bill. The hosts need to collect transient occupancy taxes from the guest that stay less than the calendar year. San Diego started to mail letters to dozens of hosts in the city for hotel taxes

David Hantman, the global head of public policy for Airbnb, provided New York with suggested regulations that would stop de facto commercial illegal hotels.⁷⁸ Hantman suggests the city should create tougher penalties for unlicensed hotel operators and amendments that protect regular New Yorkers who want to share their homes.⁷⁹ Second, the law should be amended to regulate people to only share space in the home in which they live.⁸⁰ Third, Airbnb has offered to pay for hosts' hotel and tourist taxes providing New York with \$65 million that can fund public services in the city including increasing enforcement against illegal hotels.⁸¹ Lastly, regulations should prohibit residents to make more through home sharing than they pay in rent each month.⁸²

New Orleans has outright banned Airbnb.

Similar to the reforms in California, the UK similarly announced that it would be removing laws controlling short-term rentals.⁸³ France has legalized short-term rentals of primary residences.⁸⁴ Other international cities are accepting Airbnb but with regulations such as Amsterdam and Berlin. Amsterdam allows residents to rent out their homes for up to two months of the year for up to four people at a time.⁸⁵ The owner will have to pay the relevant taxes, including the tourist tax.⁸⁶ Berlin has created a new housing law, which bans regular short-term renting of rooms without permission of Airbnb hosts in the city.⁸⁷ Other global cities are reacting similar to New York, such as Barcelona, which fined Airbnb €30,000 for breaching local tourism laws.⁸⁸

owed to them. The city also expects any hosts that use Airbnb to give up at least 50% annually in business taxes. San Diego proposed legislation would allow residents rent out their homes or rooms for up to 30 days if the host posts contact information for a local person who could handle neighbors' complaints, and the host must list their city tax certificate number on the websites where they advertise their property.

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ Lawler, *supra* note.

⁸¹ *Id.*

⁸² *Id.*

⁸³ http://pwc.blogs.com/press_room/2014/08/five-key-sharing-economy-sectors-could-generate-9-billion-of-uk-revenues-by-2025.html

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.*

In a related area, some localities have updated their city ordinances to allow temporary dining. Others already have different types of permits that allow non-restaurant commercial dining, such as catering licenses.⁸⁹

2. The Gig Economy: Does Uber Violate Employment Laws?

“Can you imagine if this turns into a Mechanical Turk economy, where everyone is doing piecemeal work at all odd hours, and no one knows when the next job will come, and how much it will pay? What kind of private lives can we possibly have, what kind of relationships, what kind of families?” – Robert Reich

From the perspective of labor market shifts, commentators worry that absent regulatory controls, the platform will lead work to be so app-driven that the internal logic of full-time employment, workplace security, and worker rights will collapse.⁹⁰ Economist Robert Reich has argued that the platform economy is making work life unpredictable, insecure, and not all that profitable.⁹¹ Based on interviews of workers in the platform economy, Reich has concluded that most would rather have regular, good, well-paying jobs.⁹² At the same time, the rise of the contingent workforce precedes the rise of the platform. The contingent workforce now constitutes more than one third of all employees with predictions that it will rise to nearly half of the workforce by 2020. Given the realities of the contemporary labor market, the question of whether one would rather have a high paying stable job offline as opposed to a part time job does not seem like the right one. The comparison should be to the other related options whether through the platform or not. With that comparison in mind, a new study by Princeton economist Alan B. Krueger mines through Uber data in order to analyze the work-life realities of Uber drivers.⁹³ The Krueger report finds that on average Uber drivers work less hours and earn more per hour

⁸⁹ Regulating the Underground; Rajiv Bhatia, Pop Ups and Other Non Traditional Temporary Food Facilities.

⁹⁰ **UBER’S BUSINESS MODEL COULD CHANGE YOUR WORK** JAN. 28, 2015 FARHAD MANJOO

⁹¹ http://www.nytimes.com/2015/01/29/technology/personaltech/uber-a-rising-business-model.html?emc=eta1&_r=1#story-continues-5

⁹² http://www.nytimes.com/2015/01/29/technology/personaltech/uber-a-rising-business-model.html?emc=eta1&_r=1#story-continues-5

⁹³ https://s3.amazonaws.com/uber-static/comms/PDF/Uber_Driver-Partners_Hall_Kreuger_2015.pdf

than traditional taxi drivers, even after accounting for their expenses.⁹⁴ Most Uber drivers are employed full or part-time elsewhere and work for Uber to make additional income.

Still, like with any type of employment of one's labor, work through platform companies raises questions about the nature of the relationship between the providers – drivers, cleaners, hosts, chefs, dog-walkers, personal assistants – and the platform. As we have seen, Uber asserts that it is only a software technology company, which provides a smart phone application that matches ride-seekers with drivers.⁹⁵ Uber subsequently maintains that it “does not employ drivers, own vehicles or otherwise control the means and methods by which a driver chooses to connect with riders . . . it merely provides a platform for people who own vehicles to leverage their skills and personal assets and connect with other people looking to pay for those skills and assets.”⁹⁶ Like Uber, many platform companies, from grocery delivery service *Instacart* to courier services *Postmates* involve people working in time frames and ways that posit a challenge to traditional modes of employment. The employment status of the providers on many of these companies is uncertain. For example, *Handy* is a cleaning service, but unlike local cleaning franchises before it, it digitally directly connects between customer and cleaner and takes a 15% commission of every hour worked. Handy classifies its cleaners as independent contractors, which is currently the subject of a class action lawsuit against the company, alleging that the company misclassifies its workers. The class action seeks compensation for missed lunch breaks, minimum wage compensation, reimbursement for business expenses, and overtime.⁹⁷ Handy has argued that its users “choose the Handy platform because it provides much needed flexibility by allowing them to book whatever jobs best suit them.” In the company's terms of service, when referring to its cleaners, it includes five repetitions of an agreement that they are independent contractors rather than employees.

The most high profile battles are occurring with platform drivers. While both Uber and Lyft have been firm in classifying its drivers as independent contractors, others have viewed the arrangement differently.

⁹⁴ There are critiques of this account <http://www.cepr.net/index.php/blogs/beat-the-press/ubernomics>

⁹⁵ *Salovitz v. Uber Techs., Inc.*, No. A-14-CV-823-LY, 2014 WL 5318031, at *1 (W.D. Tex. Oct. 16, 2014).

⁹⁶ *Salovitz v. Uber Techs., Inc.*, No. A-14-CV-823-LY, 2014 WL 5318031, at *1 (W.D. Tex. Oct. 16, 2014).

⁹⁷ <http://www.fastcompany.com/3042248/the-gig-economy-wont-last-because-its-being-sued-to-death>

Recent suits brought against Uber and Lyft by drivers claiming misclassification stress the degree of control and direction that is exercised by these leading transportation platform companies. In the lawsuits against Uber, plaintiffs claim that while Uber drivers decide when to turn on the app in order to get notification about ride requests, drivers “must respond to assignments generated by the Uber computer system ‘within seconds’ or they will lose the job.”⁹⁸ Further, Uber sets the pickup time, the passenger pay rate, the method of pay, and which passengers the drivers must pick up.⁹⁹ The payment goes to a centralized account set up by Uber.¹⁰⁰ Uber has responded with other factors that look more like an independent contractor relationship: its drivers supply the instrumentalities of their work (the cars), they are paid by the job, and Uber has no control over the drivers’ hours, which geographic area they target for pickups, and whether they choose to accept a passenger’s request for a ride.¹⁰¹ Uber drivers own the vehicle and smartphones with the required GPS but in some instances, Uber has provided these phones and assisted drivers in securing leases for vehicles.¹⁰² In preliminary hearings in one such lawsuit brought against Uber by its drivers, Judge Edward Chen stated, “the idea that Uber is simply a software platform, I don’t find that a very persuasive argument.”¹⁰³ Chen said that the fact that Uber sets the rates by which drivers are paid, screens them, and can terminate them weighs in favor of finding them to be employees.¹⁰⁴ The judge in the Lyft case stated, “people who do the kind of things that Lyft drivers do here are employees”.¹⁰⁵

⁹⁸ Boston Cab Dispatch, Inc. v. Uber Techs., Inc., No. 13-10769-NMG, 2014 WL 1338148, at *2 (Mass. March 27, 2014).

⁹⁹ Boston Cab Dispatch, Inc. v. Uber Techs., Inc., No. 13-10769-NMG, 2014 WL 1338148, at *2 (Mass. March 27, 2014).

¹⁰⁰ Ali v. U.S.A. Cab Ltd., 176 Cal. App. 4th 1333, 1337 (2009); Boston Cab Dispatch, Inc. v. Uber Techs., Inc., No. 13-10769-NMG, 2014 WL 1338148, at *2 (Mass. March 27, 2014).

¹⁰¹ Id.

¹⁰² <http://uberwest.weebly.com/applying-to-drive.html>

¹⁰³ <http://www.bloomberg.com/news/articles/2015-01-30/uber-drivers-may-have-employee-status-judge-says>

¹⁰⁴ <http://www.bloomberg.com/news/articles/2015-01-30/uber-drivers-may-have-employee-status-judge-says>

¹⁰⁵ <http://ralawemployment.blogspot.com/> *O’Connor v. Uber Technologies Inc. and Cotter v. Lyft Inc.* U.S. District Judge Vincent Chhabria said that California legal precedents “point pretty strongly in the direction” that “people who do the kinds of things that Lyft drivers do here are employees.” *O’Connor v. Uber Technologies Inc. and Cotter v. Lyft Inc.*

What is important to note is that these employment law issues are far from unique to the platform. Nearly a century after the passage of the Fair Labor Standards Act, uncertainty about the boundaries between covered employees and independent contractors is as high as ever. Recently Fed Ex lost several class action suits that allege misclassification of its drivers as independent contractors. In *Alexander v. FedEx Ground Systems*, the Ninth Circuit found that FedEx held “all necessary control” over its drivers.¹⁰⁶ Taxi drivers themselves, operating under the conventional pre-platform model, have similarly fought over the boundaries and classification of their employment status. In *Ali v. U.S.A. Cab Ltd.*, the plaintiff sought class certification of one hundred taxi drivers arguing they were misclassified as independent contractors with respect to wage and hour law provisions of the California Labor Code and that they did not receive workers’ compensation insurance.¹⁰⁷ The court denied certification holding that there was not enough commonality and raised questions about the fit of all the drivers under the common law test of employee. The court pointed to the fact taxi drivers had provided equipment, including cell phones, GPS, and credit card machines, and that some of the taxi drivers advertised their services via the internet, telephone yellow pages, and business cards.¹⁰⁸ In effect, these battles about employment status online and offline are virtually identical. They have to do with the challenge of line-drawing using multi-factor, common law tests that are often quite outdated given new patterns of work and production.

The deeper questions are more normative about the desirability of turning every aspect and every minute of one’s life, labor, skill and energy into a commodity. Will the changing patterns of work mean further decline in stable work and never overtime pay? Is the platform further destabilizing job security and long term employment? Is it a cause or a symptom of the shifting patterns of the labor market? The answer is that it is both. The rise of the platform is partly due to the decline of full time long-term jobs and cycles of high rates in unemployment. It also represents a shift in preferences, in which many people entering the labor market today prefer flexibility and control over their work-time. The platform also offers opportunities to profit more directly from one’s labor. Take for example traditional home health care aides working through manpower agencies. In that relationship, the agency usually took a very high percentage of the hourly fees. The platform allows for a greater share of the pay to go to the

¹⁰⁶ *Alexander v. FedEx Ground Package Serv.*, 765 F.3d 981, (9th Cir. 2014).

¹⁰⁷ *Ali v. U.S.A. Cab Ltd.*, 176 Cal. App. 4th 1333, 1337 (2009).

¹⁰⁸ *Ali v. U.S.A. Cab Ltd.*, 176 Cal. App. 4th 1333, 1349 (2009).

worker. The platform may also be an opportunity to connect workers to each other and organize in ways that were not previously available. Amazon's Mechanical Turk is an online platform that pays independent contractors cents per task. Its workers have organized a letter-writing campaign to Amazon's CEO Jeff Bezos asking him "to see that Turkers are not only actual human beings, but people who deserve respect, fair treatment, and open communication."¹⁰⁹ With the technology of the platform lowering barriers of entry, it is not impossible to imagine that if there is a critical mass of discontents among providers, workers could create co-op versions of companies like Uber and Mechanical Turk.¹¹⁰ An example is a taxi cooperative in Portland, Oregon, which has adopted the same technology used by Uber and Lyft, but is essentially a driver owned transportation platform.¹¹¹

In 2014, the National Economic Council invited economists studying the platform, key business leaders and union leaders to the White House. The agenda was set to think about the shifts from traditional employment safety nets and new forms of work in the digital world. Again the questions of shifting patterns of work are not unique to the platform and there are important legislative proposals designed to increase security in ways other than job stability.¹¹² As venture capitalist Marc Andreessen explains, "perhaps the single biggest key enabler for the sharing/gig/1099 economy in the U.S.: Affordable Care Act of 2010, a.k.a. Obamacare."¹¹³ HealthCare.gov becomes a human-resources site of the platform economy.

The platform enables "ridiculously easy group-forming," which "matters because the desire to be part of a group that shares, cooperates, or acts in concert is a basic human instinct that has always been constrained by transaction costs."¹¹⁴ Peers, an organization for platform economy workers and an advocacy group for the platform economy provides services to its members such as personal-liability protection for home sharing.¹¹⁵ It offers replacement cars to ride-sharing drivers after an accident. Peers is planning on expanding such services for worker's compensation insurance. Peers

¹⁰⁹ A Mechanical Turk worker working for Crowdfunder launched a class-action lawsuit in 2012, alleging misclassification of employees as independent contractors.

¹¹⁰ Fast company

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¹¹² Lobel, Michigan Law Review.

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¹¹⁴ Shirky, *Here Comes Everybody*, 47–54 (describing "ladder of activities . . . that are enabled by social tools" and create new opportunities for organizing, collaboration, and collective action).

¹¹⁵ <http://www.peers.org/product/keep-driving/>

describes itself as a “grassroots organization” with the goal to “mainstream, protect, and grow the sharing economy.” Peers already has over 11,000 members and dozens corporate partnerships.¹¹⁶ Other local groups of users are forming to share advice, think about policy, push risk and responsibilities back from the individual provider to the platform company, and standardize pricing. Online communities have been able to organize and affect policy in other realms, such as organizing against SOPA/PIPA.

3. The Cloud Economy: Does Aereo Infringe Copyright Law?

In a different field of consumption, TV content, the Supreme Court decided this summer that Aereo, a provider of online streaming technology for over-the-air broadcast content, was an illegal service operating in violation of copyright law. Aereo allowed users to watch broadcast TV without paying retransmission fees. Incumbent industries want everyone to play by the same rules. Aereo's service allowed subscribers to watch and record live TV over the internet for a monthly fee.¹¹⁷ It maintained a bank of tiny antennas in each city that it operated in that pull down local TV signals broadcast over the air, much like old rabbit ears.¹¹⁸ Every time a subscriber wants to watch or record a show, Aereo assigns an antenna to them.¹¹⁹ Aereo actually took separate recordings for every single person watching and did not allow them to be shared.¹²⁰ On June 25, 2014, the Supreme Court of the United States ruled against Aereo in a case brought by several broadcast networks. The Court found that Aereo infringed upon the rights of copyright holders.¹²¹ The point of contention was whether Aereo's business model constituted a "public performance", which would legally require it to obtain permission from the copyright owners of any programs it transmits.¹²² The court ruled in a 6-3 decision that Aereo's business model was no different from that of a cable television provider, despite the differences in technology.¹²³ Immediately following the

¹¹⁶ <http://www.forbes.com/sites/tarunwadhwa/2013/09/16/the-sharing-economy-fights-back-against-regulators-with-an-advocacy-group/>

¹¹⁷ Jacob Kastrenakes, *Aereo loses to broadcasters in Supreme Court fight for its life*, The Verge, June 25, 2014, available at <http://www.theverge.com/2014/6/25/5801052/aereo-supreme-court-ruling/in/2779059>.

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Am. Broad. Companies, Inc. v. Aereo, Inc.*, 134 S. Ct. 2498 (2014).

¹²² *Id.*

¹²³ *Id.*

decision, the company announced it would immediately suspend its services.¹²⁴ Another company based on similar technology, FilmOn.com, has faced the same fate.¹²⁵

On remand to the United States District Court in the Southern District of New York, on October 23, 2014, Aereo interposed a number of new arguments in opposition to the preliminary injunction.¹²⁶ First, Aereo argued that in light of the Supreme Court's holding in *Aereo III*, it should be considered a “cable system” that is entitled to a compulsory license under § 111 of the Copyright Act, 17 U.S.C. § 111.¹²⁷ Second, even if it is not a cable system for purposes of § 111, Aereo argued that it should be considered a mere conduit entitled to the safe harbor protection of § 512(a) of the Copyright Act, 17 U.S.C. § 512(a).¹²⁸ Third, even if it is not a cable system entitled to a compulsory license or a mere conduit entitled to a safe harbor, Aereo argued that a preliminary injunction should not issue because Plaintiffs presently are unable to show any imminent irreparable harm.¹²⁹ Finally, Aereo argued that the scope of the preliminary injunction should be narrowed to a modest delay, such as ten minutes, following the commencement of a broadcast.¹³⁰

Regarding the first argument Aereo proposed, that Aereo should be considered a cable system that is entitled to a compulsory license under § 111 of the Copyright Act, 17 U.S.C. § 111, the United States District Court disagreed. The court reasoned that while all cable systems may perform publicly, not all entities that perform publicly are necessarily cable systems, and nothing in the Supreme Court's opinion indicates otherwise.¹³¹ Aereo's second argument regarding Section 512(a)'s Safe Harbor, the Court also disagreed. The Court reasoned that Aereo never so much as asserts in its opposition brief—or anywhere else for that matter—that it has satisfied all

¹²⁴ See *Supra* note.

¹²⁵ *CBS Broad. Inc. v. FilmOn.com, Inc.*, No. 10 CIV. 7532 NRB, 2014 WL 3702568 (S.D.N.Y. July 24, 2014)

¹²⁶ *Am. Broad. Companies, Inc. v. Aereo, Inc.*, No. 12-CV-1540, 2014 WL 5393867, at *2 (S.D.N.Y. Oct. 23, 2014).

¹²⁷ *Id.*; See also Ex Parte Presentation notice, Interpretation of the Terms “Multichannel Video Programming Distributor” and “Channel,” MB Docket No. 12-83, available at <http://apps.fcc.gov/ecfs/document/view?id=60000972464>.

¹²⁸ *Am. Broad. Companies, Inc. v. Aereo, Inc.*, No. 12-CV-1540, 2014 WL 5393867, at *2 (S.D.N.Y. Oct. 23, 2014).

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.* at *4.

the eligibility conditions for the § 512 safe harbors stated in § 512(i).¹³² For example, to qualify for a § 512 safe harbor, the service provider must have in place a policy for terminating repeat infringers, but Aereo omits any assertion that it has a repeat infringer policy in place as required by § 512(i)(1)(A).¹³³ The Court was also not persuaded by Aereo's third argument of no irreparable harm to Plaintiff. The Court reasoned that Aereo does not challenge any of the Court's other findings of irreparable harm to Plaintiffs based on loss of subscribers due to cord cutting, loss of control over copyrighted content, and damage to relationships with content providers, advertisers, or licensees.¹³⁴ Thus, even putting aside the two factual findings that Aereo now seeks to re-litigate, there is still substantial evidence of irreparable harm to Plaintiffs that Aereo does not challenge.¹³⁵ Lastly, Aereo's last argument regarding the preliminary injunction's scope was also denied. The Court reasoned that Aereo cannot limit the scope of the preliminary injunction to anything short of the complete airing of the broadcast despite its contention at oral argument that the Supreme Court intended "near-live retransmission" to mean something less than a ten-minute delay.¹³⁶

In November 2014, Aereo filed for Chapter 11 bankruptcy.¹³⁷ A new FCC proposed rule could lead to Aereo's revival if it survives the bankruptcy. Aereo was put into a no-win situation. It was deemed to resemble a cable company enough to be a cable company in terms of liability, but as an over-the-top content provider, it received none of the benefits given to cable or satellite companies, most importantly the compulsory license. The Supreme Court told Aereo it needed a license, and yet it was not able to obtain a compulsory license because it was an internet provider not regulated by the FCC.¹³⁸

Aereo is thus a striking example of a disruptive platform business facing bad timing, outdated laws and strong industry foes. Aereo was not

¹³² *Id.* at *7.

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.* at 9.

¹³⁷ Emily Steel, Aereo Concedes Defeat and Files for Bankruptcy, NY Times, November 21, 2014, available at http://www.nytimes.com/2014/11/22/business/aereo-files-for-bankruptcy.html?_r=0; Jack Newsham, Boston-based digital TV service Aereo files for bankruptcy, Boston Globe, November 21, 2014, available at <http://www.bostonglobe.com/business/2014/11/21/digital-service-aereo-files-for-bankruptcy/OmCjWdUPMyYjTbWkyNb0qK/story.html>; Tanya Agrawal & Jonathan Stempel, Video streaming service Aereo files for bankruptcy, Reuters, November 21, 2014.

¹³⁸ <http://regmedia.co.uk/2015/01/21/foxdishmotion.pdf>

granted a compulsory license because it was an internet provider, which are not entitled to the license per FCC rules.¹³⁹ On Thursday, January 15, the FCC released a new proposed rule for public comment on permitting providers like Aereo.¹⁴⁰ It might be too late for Aereo¹⁴¹, but the rule will be impactful regardless with online video services becoming more popular. Aereo could have survived and thrived if the FCC regulations were up to date and included television providers that operate over the Internet. Aereo's plight illuminates the risk for new platform businesses operating in the shadow of law. ***Winners and losers. Entrepreneurial risk. Regulatory arbitrage literature points to the importance of lobbying – influencing the politics.

One of the big issues at oral argument in the Aereo Supreme Court hearings was how a decision against Aereo would influence new cloud technologies. Recently, music storage specifically was the subject of such inquiry. In *Capitol Records, Inc. v. MP3tunes, LLC*, MP3tunes provided an integrated music service through two websites: MP3tunes.com and Sideload.com. MP3tunes.com provided online storage “lockers” where users could store music and stream or download it from the locker to any computer with an Internet connection. Sideload.com was a search engine that allowed users to search for free music downloads. Sideload users could install the sideload plugin to their Internet browser and, when navigating to a website with MPS files, use the plugin to sideload the file. Sideload is similar to downloading except that the destination of the file was not the user's computer, rather, it was the user's MP3tunes locker and Sideload. Once an MP3 file was sideloaded, it was available to anybody who visited Sideload.¹⁴² MP3tunes was found liable for copyright infringement, but the court explicitly rejected plaintiffs' attempt to apply the Aereo decision to the case: “Plaintiffs also argue that the Supreme Court's opinion in *Aereo* establishes that the third-party websites performed the work publicly. But the Supreme Court expressly excluded “novel issues not before the Court,

¹³⁹ <http://www.broadcastlawblog.com/2014/10/articles/fcc-policy-by-blog-post-over-the-top-internet-delivered-television-programming-providers-may-be-treated-as-mvpds-a-reaction-to-aereo/>

¹⁴⁰ <http://www.gpo.gov/fdsys/pkg/FR-2015-01-15/pdf/2014-30777.pdf>

¹⁴¹ Recently at the bankruptcy sale, TiVo acquired the right to use Aereo's trademark and its customer lists. Aereo is now suing the Broadcast companies under anti-trust law for causing Aereo to earn less than they should have at their bankruptcy sale by saying that Aereo's technology is only appropriate for violating the law. <http://www.bostonglobe.com/business/2015/03/10/bankrupt-aereo-attacks-nets-again/vzXYiKCiCeP39VcMd10WHP/story.html>

¹⁴² *Capitol Records, Inc. v. MP3tunes, LLC*, No. 07CV9931, 2014 WL 4851719 (S.D.N.Y. Sept. 29, 2014)

as to which ‘Congress has not plainly marked [the] course.’¹⁴³ Because the third-party domains here are not “substantially similar” to a community antenna television provider, they are beyond *Aereo's* reach.”¹⁴⁴

Last month, in the Central District of California, a court refused to apply the *Aereo* decision to Dish Networks’ “DISH Anywhere” service, which allows users to watch live television on their smartphones or tablets. The court said that “DISH Anywhere” is different from *Aereo* because Dish, has a license to transmit the programming while *Aereo* did not.¹⁴⁵ The court stated:

“The ultimate function of DISH Anywhere is to transmit programming that is already legitimately on a user’s in-home hardware to a user’s Internet-connected mobile device. Relying on external servers and equipment to ensure that content travels between those devices properly does not transform that service into a traditional cable company.”¹⁴⁶

Importantly, consumers legitimately had the programming *Aereo* provided on their in-home hardware (provided they have an antenna) since the programming *Aereo* provided was on the public airwaves consumers had access to without a cable package.

Aereo as a broadcasting platform company allowed users to customize their viewing and delink over the air television content from geography or location. *Aereo* in theory, and the way they presented themselves, was basically a cloud-based local antenna, analogous to the rabbit ears one could install on their TV. The challenge was however that in reality however, users that subscribed to *Aereo* could purchase the local television package of any city in which *Aereo* operated regardless of where the user was located. This meant that someone in California could purchase the local TV package for New York City. *Aereo's* controls on who could watch a certain television package were very loose – it required users to check a box stating “I live in the designated area”, something like Airbnb’s warning of hosts to respect local zoning laws.

¹⁴³ *Am. Broad. Cos. v. Aereo, Inc.*, — U.S. —, 134 S.Ct. 2498, 2511, 189 L.Ed.2d 476 (2014).

¹⁴⁴ *Capitol Records, Inc. v. MP3tunes, LLC*, at *10

¹⁴⁵ *Fox Broadcasting Co. v. Dish Network LLC*, No. 12-4529 (C.D. Cal. Jan. 12, 2015)

¹⁴⁶ *Fox Broadcasting Co. v. Dish Network LLC*, No. 12-4529 (C.D. Cal. Jan. 12, 2015) <http://regmedia.co.uk/2015/01/21/foxdishmotion.pdf> - Page 20

If an Aereo copycat were to emerge under the new FCC rules, with a compulsory license, the new company might no longer need the geographic restrictions. Many viewers who have moved around in their life continue to enjoy watching the local television programming from their hometown, especially in the areas the Aereo thrived in, live sporting events and live news, all area specific content that is not likely to be recorded and watched at a later point and that is not available through a cable package. Similar to the way other areas in which the platform economy customizes consumption for active users, Aereo provided these options, changing the nature and the range of options available in the area of television. Instead of purchasing an enormous cable package in which 70% of the channels are not watched, and some of the preferred content unavailable in one's cable zone, Aereo provided a cheaper option with a small amount of channels that are watched. Similar to the way Uber users do not need to own a car because they have access to the use of a car, Aereo users do not physically need an antenna because they have access to the use of a cloud-based antenna rented from Aereo. Moreover, Aereo helped to reduce the barriers of entry for small-independent broadcasters, who aired niche television content that was ignored by the major broadcasters and cable companies. These small broadcasters lacked the infrastructure and equipment to broadcast their channels beyond their locality.

The restrictions placed on Aereo, or a similar business should be ones that raise consumer welfare, not simply those that protect incumbent networks and cable providers' interests.

As the platform economy rapidly grows, many companies are running against regulatory hurdles. *Licensing/permitting – continued relevance in question/ taxation, liability – neutral / consumer protection/employment laws – alternatives.* As thousands of companies—food, education and finance are transforming every aspect of our lives, the lines we drew through regulation are now being redrawn. The fluidity between home/hotel; ride/taxi; ownership/loan; work/gig. In the hard questions: problem of incommensurability and normative democratic decision making.

[Figure 4: schematic parallels]

tailored and directed by consumer - driven by variety versus certification and quality control; price controls v. dynamic pricing by algorithm

IV. FROM CODE AS LAW TO PLATFORM AS REGULATION

“Modern digital communications allow sharing to happen across a global village of consumers and providers, with trust established through electronic peer reviews.” -- John Hawksworth, chief economist at PwC

“The key to this shift was the discovery that while we totally distrust strangers, we totally trust people—significantly more than we trust corporations or governments.” – Joel Stein, Time Magazine¹⁴⁷

A. *Law of The Horse and Law of the Platform*

In a short essay written as the introduction for a symposium about the law of cyberspace, Easterbrook began with the following statement:

When he was dean of this law school, Gerhard Casper was proud that the University of Chicago did not offer a course in “The Law of the Horse.” He did not mean by this that Illinois specializes in grain rather than livestock. His point, rather, was that “Law and . . .” courses should be limited to subjects that could illuminate the entire law. Instead of offering courses suited to dilettantes, the University of Chicago offered courses in Law and Economics, and Law and Literature, taught by people who could be appointed to the world's top economics and literature departments--even win the Nobel Prize in economics, as Ronald Coase has done.

For Easterbrook, there was nothing new about regulating the newly rising World Wide Web. The same principles that have always been applied to earlier innovation in industry, in technology, in business throughout history would be applied to this new space. At the same time, he warned that errors in regulation are a great risk especially in the face of technology that is not fully understood and still in formation. Therefore, he urged policymakers to “not struggle to match an imperfect legal system to an evolving world that we understand poorly.”

¹⁴⁷ <http://time.com/3687305/testing-the-sharing-economy/>

EXPAND: regulation as interrelated ordering by architecture/norms/price/law ****

B. Just an App? Platform Immunity and the Communications Decency Act

An overarching practical implication of the shift to Web 3.0 is the protection of platform business models under the Communications Decency Act. The 1996 law was passed in the early days of online communication designed to protect providers of an interactive computer service from civil liability for actions taken by others. It holds that no provider or user of an interactive computer service can be treated as the publisher or speaker of information provided by another “information content provider.”¹⁴⁸ Companies like Uber, Lyft, Airbnb, based on their self-definition as purely online tech sites, are arguing that they fall under the definition of the Act and thereby protected from civil liability in the event of an accident under Section 230 of the Communications Decency Act. The Act provides a legal background against which Internet platforms like Airbnb can operate with some degree of legal certainty as to their liability for actions their users take. At the same time, the protection under Section 230 while important is limited. Section 230 of the Communications Decency Act grants broad immunity to websites with user-generated content but it does not apply to internet sites that materially contribute in branding or giving them the tools of the trade as you may be moving out of the role of being a pure publisher under Section 230. Additionally, Section 230 also does not apply to internet sites that materially contribute to unlawful contents. Lastly, Section 230(e) does not protect internet site from federal criminal violations nor state regulations.¹⁴⁹

A year before the Decency Communications Act was passed, in 1995, San Francisco-based programmer Craig Newmark created Craigslist.org, a website that enables users to post classified ads and interact in forums.¹⁵⁰ Craigslist’s simple design, modest beginnings, and its firm reluctance to selling advertising space contributed significantly to its

¹⁴⁸ Section 230 provides that “no provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.” And: “[n]o cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section.”

¹⁴⁹ Section 230(e)(3) states that “nothing in this section shall be construed to prevent any State from enforcing any State law that is consistent with this section.”

¹⁵⁰ Shahrzad T. Radbod, *Craigslist-A Case for Criminal Liability for Online Service Providers?*, 25 BERKELEY TECH. L.J. 597, 597 (2010).

success in more than 450 cities worldwide.¹⁵¹ Still now, fifteen years after its founding, Craigslist is one of the most popular sites in the world, with over twenty billion page views per month.¹⁵² To date, Craigslist has avoided every civil charge raised against it under Section 230 and has recently implemented many changes to its website in order to avoid future liability.¹⁵³ However, two recent cases demonstrate that there are limits to Section 230 immunity.¹⁵⁴ For example, in a recent Roommates.com case the court determined that Section 230 immunity did not apply because Roommates.com acted as an information content provider when it required website users to complete questionnaires it had created.¹⁵⁵ Roommates.com contributed to the content that was placed on its website.¹⁵⁶ The court held that Section 230 did not shield online services providers from civil claims when they “materially contribute” to the unlawfulness of the content.¹⁵⁷ The court reasoned that “the Communications Decency Act was not meant to create a lawless no-man’s-land on the Internet.”¹⁵⁸

Because section 230 operates as a liability shield for Internet platforms like Airbnb, local and state governments possess only limited power against the online companies in their interactions with consumers, and within larger and related industries.¹⁵⁹ Consequently, many local and state agencies have focused their regulatory and enforcement powers on the users of platform services, instead of focusing on the actual companies as a result.¹⁶⁰ This is a problematic result, recalling the prosecution of individual people who download music or infringe upon patents, a problem which these days is often referred to in intellectual property debates as trolling.

An interactive computer service provider with a slightly different fact pattern might not be as fortunate as Craigslist if prosecutors bring charges that fall within the § 230(e) exceptions. Fine lines - branding or supplying the tools of the trade, GPS devices or equipment to process transactions, setting the pricing and the transactional conditions, unclear if still pure publisher. The Platform Trolls - Trolls are market creating

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ Brittany McNamara, *Airbnb: A Not-So-Safe Resting Place*, 13 *Colo. Tech. L.J.* 149, 150-51 (2015).

¹⁶⁰ *Id.*

intermediaries – they create a market. They buy; they patent; they transform some public goods into market goods; private goods into sellable goods... And perversely, the flipside: immunity from platform liability means going after end users – analogous to trolling against end-users.

C. Systems of Stranger Trust

In olden times, villagers built trust through repeated interactions with neighbors.¹⁶¹ Familiarity, proximity, reciprocity, continuity, repeat interactions, and immediate accountability in the small community enhanced compliance and conformity.¹⁶² Over time, as exchanges grew in scale and pace, and as the corporate form took over, this trust was broken and regulators stepped in to protect and enforce. The platform is anything but a return to the small-scale community of villager trust. The platform is characterized by its vast scale, which is generated by access and connectivity between strangers. At the same time, access, scale and technological identification combine to create a new system of stranger trust. The platform is introducing new forms of private regulation: reviews, ratings, and social network recommendations. These features of the platform can combine to provide alternatives to traditional regulation. The same technological advancements that enable the rise of new business models also enable forms of dynamic mass monitoring and transparency. The confidence that is generated by state permitting, occupational licensing and other regulatory requirements can be substituted by crowd confidence.

Web 2.0 marketplace pioneer, eBay, was also a pioneer in creating a “Trust and Safety” division and, not coincidentally, many of the next generation of start-ups were led by former eBay insiders.¹⁶³ Many of the new platform companies are offering similar services to increase user protection and confidence. Airbnb for example has recently stepped up its own “Trust & Safety” unit, creating an around the clock hotline; offering an insurance policy covering \$1,000,000 for loss or damages.¹⁶⁴ Airbnb also

¹⁶¹ John Hawksworth, chief economist at PwC

¹⁶² Cite Ostrom on conditions for commons.

¹⁶³ <http://time.com/3687305/testing-the-sharing-economy/>

¹⁶⁴ See Claire Cain Miller, *When Uber and Airbnb Meet the Real World*, NY TIMES, (Oct. 17, 2014), <http://www.nytimes.com/2014/10/19/upshot/when-uber-lyft-and-airbnb-meet-the-real-world.html? r=0>; ; Brittany McNamara, *Airbnb: A Not-So-Safe Resting*

advises its hosts on best practices, recently holding its first ever convention over 1,500 of its most productive providers. Airbnb has taken the lead in proactively engaging in knowledge sharing, building best practices, disseminating information about hospitality standards and guidelines, meet-ups for hosts.¹⁶⁵ Airbnb notifies its users about their obligation to abide by their zoning restrictions, local government laws, and tax regulations.¹⁶⁶ At the same time, this comes with a caveat: Airbnb users are warned in the terms and conditions on Airbnb's website not to break any laws, but also are required to release the company from any responsibility for hosts' compliance with the laws.¹⁶⁷

(1) Insurance

Insurance is the more traditional response to risk regulation. After Gawker published a story about a San Francisco woman whose house was vandalized by Airbnb renters, Airbnb added a \$50,000 host guarantee against vandalism. RelayRides recently received a cease-and-desist letter from New York State's Department of Financial Services (DFS), charging RelayRides with "false advertising and violations of insurance law."¹⁶⁸ DFS also issued a "scam alert" because New York insurance law could leave car-sharing users unprotected in the event of an accident.¹⁶⁹ DFS further stated that car-sharing programs may be in violation of existing insurance policies, which in turn may lead to losing their coverage.¹⁷⁰ As a result, RelayRides suspended services for NY cars. Uber has a liability policy of \$5 million in coverage for each trip and some of its services are covered by commercial insurance. Regulators can play a role in directing insurance policies on the

Place, 13 COLO. TECH. L.J. 149, 150-51 (2015).

¹⁶⁵ Lobbying efforts: D.C. [David Plouffe](#) (Uber) and [David Hantman](#) (Airbnb).

¹⁶⁶ Airbnb "User Conduct"; guidance on "legal and regulatory issues".

¹⁶⁷ <https://www.airbnb.com/terms>; see also, http://www.nytimes.com/2012/12/01/your-money/a-warning-for-airbnb-hosts-who-may-be-breaking-the-law.html?pagewanted=all&_r=0

¹⁶⁸ <http://www.zdnet.com/article/car-sharing-service-relayrides-halts-service-after-cess-and-desist-letter/>

¹⁶⁹ <http://www.zdnet.com/article/car-sharing-service-relayrides-halts-service-after-cess-and-desist-letter/>

¹⁷⁰ <http://www.zdnet.com/article/car-sharing-service-relayrides-halts-service-after-cess-and-desist-letter/>

platform. The UK government recently brought insurance leaders together to design good policies for platform business models.¹⁷¹ In Colorado, ride-sharing companies must offer up to \$1 million in liability insurance from the time a driver accepts a request to the moment when the rider leaves the car. California's law is more stringent. Starting next July, the law will require ride-sharing companies to provide insurance the moment a driver turns on the app.¹⁷² Proposed legislation in the state of Washington, similar to California's law, would require insurance to be valid as soon as the driver logs into the app.¹⁷³ In Washington D.C., the law requires ride-sharing services to provide primary insurance coverage "of at least \$1 million per occurrence for accidents" from the time a driver accepts a call until the passenger exits the car.¹⁷⁴ Other platforms are similarly offering insurance for its users. Feastly offers insurance when booking a culinary pop up event through it.

(2) Background Checks

Background checks of providers is another more traditional response to risk. All ride-sharing legislations impose safety regulations, including driver background checks and car inspections. The area for disagreement is how stringent the tests should be. Colorado, for example, imposes background checks on Uber drivers that are less stringent than those required of taxi drivers. In Colorado, taxi drivers are subject to fingerprint background checks performed by the Federal and Colorado Bureaus of Investigation while ride-sharing drivers will remain vetted by private companies that use publicly available data.¹⁷⁵ In May 2014, Illinois legislators passed two bills, supported by the taxi industry, that more heavily regulated ride-sharing services, including requiring state-conducted background checks for drivers.¹⁷⁶ The governor however vetoed the bills. On January 12 2015, the Illinois governor signed a ride-sharing bill into law, but with less stringent background check requirements.¹⁷⁷ New laws

¹⁷¹ http://pwc.blogs.com/press_room/2014/08/five-key-sharing-economy-sectors-could-generate-9-billion-of-uk-revenues-by-2025.html

¹⁷² <http://blogs.wsj.com/digits/2015/01/29/uber-laws-a-primer-on-ride-sharing-regulations/>

¹⁷³ <http://www.reuters.com/article/2015/02/03/us-usa-washington-ridesharing-idUSKBN0L625420150203>

¹⁷⁴ <http://www.washingtonpost.com/blogs/dr-gridlock/wp/2014/10/28/d-c-council-okays-bill-to-legalize-lyft-sidecar-uberx-type-services-in-the-district/>

¹⁷⁵ http://www.denverpost.com/business/ci_25907057/colorado-first-authorize-lyft-and-ubers-ridesharing-services

¹⁷⁶ <http://www.nytimes.com/2014/12/10/technology/ubers-system-for-screening-drivers-comes-under-scrutiny.html>

¹⁷⁷ <http://www.chicagotribune.com/news/local/politics/chi-quinn-leaves-political-traps->

regulating ride-sharing in Virginia¹⁷⁸ and Washington D.C.,¹⁷⁹ have less stringent background check requirements similar to Colorado and Illinois. In Washington D.C., ride-sharing companies are required to suspend drivers when a customer complains they might have used drugs or alcohol, or refused service on the basis of discrimination.¹⁸⁰

Regardless of state regulation, Uber itself, following media criticisms about the safety of its service, pre-screens its drivers under four separate checks on drivers: driving history; criminal background checks, including checks against the National Sex Offender Registry; vehicle inspections; and medical checks. The car of Uber drivers also undergoes testing. First, no Uber vehicle is allowed to be older than a 2004 model and in reality, the average model year for vehicles is typically 2008. RelayRides and Lyft similarly pre-screen their drivers along with provide liability insurance. TaskRabbit has more than 30,000 “taskers”, each has undergone pre-screening and background checks.

(3) Ratings and Reviews

More revolutionary than background checks is the dynamic ratings and recording of each transaction on the platform. At Uber, a record of every transaction is kept and works two ways: riders rate drivers; drivers rate riders. Safety goes both ways, with the credit card and other identifying information stored for each customer. Riders or drivers that fall beneath a certain rating can be suspended. Uber also has a consultation process for drops in ratings. All of these combine to incentivize consistently good service:

[D]rivers have an incentive to provide great service because at the end of each trip, passengers rate them on a scale of 1 – 5 (with 5 being the best). Uber drops drivers with low scores – market incentives tend to yield better service than the “who else are you going to use” attitude often associated with regulated monopolies such as taxis.”¹⁸¹

for-rauner-on-way-out-door-20150112-story.html

¹⁷⁸ <http://www.washingtonpost.com/blogs/dr-gridlock/wp/2015/02/18/uber-and-lyft-are-now-legal-in-virginia/>

¹⁷⁹ <http://www.washingtonpost.com/blogs/dr-gridlock/wp/2014/10/28/d-c-council-okays-bill-to-legalize-lyft-sidecar-uberx-type-services-in-the-district/>

¹⁸⁰ <http://blogs.wsj.com/digits/2015/01/29/uber-laws-a-primer-on-ride-sharing-regulations/>

¹⁸¹ It is interesting to note that while reviews are one of the best features of the sharing economy, being able to easily identify what is a good purchase and what is not, it is also

Technology allows for a variety of real-time monitoring. Uber and Lyft make the GPS path visible for consumer so they can monitor the route the driver chooses. These types of systemic controls mean that incentives on both end of the deal are aligned. All users of the platform, whether buyers or sellers, host or guest, driver or rider, errand runner or errand giver, are interested in a successful transaction to maintain high ratings on the platform. The systems of identification, review and ratings create trust that is multi-layered: trust in participants; in value exchanged; in platform/network. Pre-platform consumer groups were the watchdog intermediaries of the market. Watchdogging is now crowdsourced. Above the layer of the reviews of each individual company, specialized consumer review sites aggregate information and compare reviews across companies making such sites more important than advertising.¹⁸² Aggregators also include sites like AlltheRoom, which looks at the various lodging platform competitors and presents information about all availabilities. In many ways, these new forms of regulation are superior to traditional ones. Technology creates a record of each transaction and digital rating systems can function as a substitute for personal trust and regulated standards.¹⁸³ Insurance focuses on liability when things go wrong. Background checks are backward looking. But ratings systems are real-time and dynamic. They are relevant, updated, broad and deep. Every service, product, provider tracked and reviewed for customer satisfaction. Every customer is also identified, rated and reviewed. This creates a true Foucauldian panopticon, or what Eric Goldman has referred to the rise of the “secondary invisible hand”:

“When information about producers and vendors is costly, reputational information can improve the operation of the invisible hand by helping consumers make better decisions. In this case, reputational information acts like an invisible hand of the invisible hand (an effect I call the secondary invisible hand) because reputational information can guide consumers to make marketplace

the one of the features that could shake up in the entire industry on the employment law front. It is great that everyone is accountable, but using low ratings to suspend Uber drivers is one of the main arguments for making Uber drivers employees rather than independent contractors.

¹⁸² Paul Resnick et al., “Reputation Systems,” *Communications of the ACM* 43, no. 12 (2000): 47, <http://dl.acm.org/citation.cfm?id=355122>. 53.

¹⁸³ Lior Strahlevitz, ‘How’s My Driving?’ for Everyone (and Everything), 81 *N.Y.U. L. REV.* 1661 (2006). Lior Strahlevitz, ‘How’s My Driving?’ for Everyone (and Everything), 81 *N.Y.U. L. REV.* 1661 (2006).

choices that in aggregate enable the invisible hand.”¹⁸⁴

Figure 5: The Reputation Pyramid

businesses/individuals/platform/user/provider/for one service/across services. When safety, fairness, concerns arise, for many the default is to urge for government top down regulation. reputation background checks; dynamic.

*** Occupational licensing rose as the consumer protection default of quality control. Professional certification serves as an alternative and provides variety and choice -- another layer of reputational cert. AirtaskerPRO - ID check and in-person interview. Reputational capital – Klout. API (application programming interface) adopted by brands ranging from TripAdvisor and OpenTable to Starbucks and Hilton. Ratings are getting another step up – delinked from one digital service or company. Critical mass of participants: groupon – many others replicated.

*** Platform companies are also using their data to conduct studies and influence policy. Airbnb commissioned a study that found that Airbnb rentals are cheaper than hotels, leading people to stay longer and spend on average \$1,100 in San Fran compared with \$840 for hotel guests. The study also found that 14% of customers would not have visited the city at all if

¹⁸⁴ Eric Goldman, “Regulating Reputation,” in *The Reputation Society: How Online Opinions Are Reshaping the Offline World*, ed. Hassan Masum and Mark Tovey (Cambridge, MA: MIT Press, 2011), 53; Chrysanthos Dellarocas, “Designing Reputation Systems for the Social Web,” in *The Reputation Society: How Online Opinions Are Reshaping the Offline World*, ed. Hassan Masum and Mark Tovey (Cambridge, MA: MIT Press, 2011), 3. 55. David D. Friedman, *Future Imperfect: Technology and Freedom in an Uncertain World* (Cambridge: Cambridge University Press, 2008), 100; Daniel Klein, “Knowledge, Reputation, and Trust, by Voluntary Means,” in *Reputation: Studies in the Voluntary Elicitation of Good Conduct*, ed. Daniel Klein (Ann Arbor, MI: University of Michigan Press, 1997), 1–14; Liangjun You and Riyaz Sikora, “Performance of Online Reputation Mechanisms under the Influence of Different Types of Biases,” *Information Systems and e-Business Management* (2014): 418. 54.

Airbnb stay was not available. Platform companies are producing data on emissions and on the labor market.¹⁸⁵

D. Design Around Regulation: Arbitrage, Circumvention, Loopholes & Negative Spaces

We have seen that the definitional challenge is part of the business model. Are ride sharing companies, software technology online businesses or transportation companies? If a company does not employ its service providers, is not responsible for their taxes and benefits, they can operate at a significantly lower cost than the competition. Law is all about definitions. On the one hand, inevitably there will be loopholes around definitions that were meant to cover new circumstances. On the other hand, because of the limits of imagination and the inevitable lag of law behind life, we can expect regulation through false analogies and insertion into existing boxes that no longer fit the goals for which they were designed.

A key to differentiating between avoidance and legitimate innovation is to track as closely as possible “the economic substance of deals in accordance with the policy goals of that regime.”¹⁸⁶ In this context, it is useful to think about regulatory arbitrage, primarily developed in the scholarship in the context of tax and financial planning. Victor Fleischer defines regulatory arbitrage as “a perfectly legal planning technique used to avoid taxes, accounting rules, securities disclosure, and other regulatory costs. Regulatory arbitrage exploits the gap between the economic substance of a transaction and its legal or regulatory treatment, taking advantage of the legal system’s intrinsically limited ability to attach formal labels that track the economics of transactions with sufficient precision.” Regulation imposes costs and if that cost can be reduced, the two sides, the buyer/seller; user-provider can split the savings. The challenge of sorting out regulatory avoidance from innovation is at the core of debates about the regulation of new business models:

“When new forms are chosen because they reduce transaction costs, legal innovation presumptively increases efficiency. But when new forms are chosen because they reduce regulatory costs and increase transaction costs compare to the old structure, we lose twice: efficiency is reduced by the increase in transaction costs, and the

¹⁸⁵ Cannon and Summers, HBR Oct 2014.

¹⁸⁶ Fleischer

regulatory burden is shifted onto those who cannot engage in arbitrage.”¹⁸⁷

With the platform we have seen the economic and social logic, pushing down transaction costs in all stages of the deal as well as creating new markets that map onto new preferences and lifestyle, as the primary *raison d’être* of the rise of the platform.

*** EXPAND

E. Keep the Platform Weird: A Digital New Deal

“Why has the Internet proved to be such a powerful engine for creativity, innovation, and economic growth? A big part of the answer traces back to one key decision by the Internet’s original architects: to make the Internet an open system.” --- FCC Chairman Julius Genachowski

The platform is redefining consumption and with that comes the responsibility of reinventing consumer protection law. In *Aereo*, the dissent called the architecture of the system “over-engineered” and a “Rube Goldberg” model. Supreme Court dismissed the argument that the technological differences made *Aereo* legal.

Anti-circumvention provides a good lens to understand the dynamics of technological innovation and disruption. Proponents argued it was necessary to extend existing legal rights, namely copyright, into new forms of consumption, digitization. Critics argued that the push comes from entrenched business interests and is designed to prevent participation and active use. A central insight from anti-circumvention critics has been about overreaching. Regulation through anti-circumvention prevents not only infringement but also fair use.

**** EXPAND -- First movers in the platform itself want some light regulation and will want to shape the regulatory field. Service platform – perhaps will lend itself to more competition than search [google]; social media [facebook]; retail [amazon] – that become quasi monopoly. This has been the story of many Web 2.0 companies, such as eBay which started as a collection of individuals and quickly its sellers demographics shifted to medium to large businesses.¹⁸⁸ Amazon began with an affiliate marketplace for individuals and small businesses. The platform is similarly transforming in some parts:

“Many listings on Airbnb now come from professional property managers, and when the company hired a “head of global hospitality” this fall, users became concerned that the focus on standards and requirements may shut the door on casual hosts. Car sharing services are also experiencing a movement towards professionalism. Individual owner/practitioners are now moving into operating small fleets of cars exclusively for rental on places like Uber.”¹⁸⁹

**** New governance lessons, shift away from adversarial relationships – cities can see the benefits of collaborating and participating in the platform economy.¹⁹⁰

CONCLUSION

*** To Follow ***

¹⁸⁸ <http://www.forbes.com/sites/ciocentral/2013/10/09/how-capitalism-and-regulation-will-reshape-the-sharing-economy/>

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¹⁹⁰ Cite new article that suggests ways for local gov to build on sharing.