

The Duties of Online Marketplaces

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TABLE OF CONTENTS

I.	INTRODUCTION	270
II.	ONLINE PLATFORMS AND THE LAW	274
	<i>A. Definition and Legal Dilemmas</i>	274
	<i>B. Current Conceptualization of Online Platforms</i>	280
III.	PLATFORMS AS MARKET CONSTITUTERS	282
	<i>A. Defining a New Legal Category</i>	283
	<i>B. Justifying Responsibility</i>	288
IV.	THE LEGAL DUTIES OF MARKET-CONSTITUTING PLATFORMS	294
	<i>A. Discrimination and Sexual Harassment</i>	295
	<i>B. Fair Entry and Exit Rules</i>	300
	<i>C. Prior Notice</i>	301
	<i>D. Liability for Harm</i>	303
	<i>E. The Limits of the Market-Constituting Platform Category</i>	306
	<i>F. Legislation</i>	307
V.	CONCLUSION	308

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I. INTRODUCTION

In a remarkable ruling, the Third Circuit Court of Appeals determined that Amazon is a seller under Pennsylvania product liability law.¹ Several procedural stages later, the *Oberdorf v. Amazon* case was finally settled by the parties.² Nonetheless, this case sparked immediate controversy surrounding the liability of Amazon as an online marketplace for products sold by third party vendors.³ However, the debate is currently much too narrow. This Article argues that the legal challenge entangled in this case and many others is correctly identifying the duties of online platforms toward their users. Cases involving online platforms cover a wide range of legal issues, including discrimination, liability for harm, privacy, consumer protection, and others.⁴ Each of these issues is discussed separately, and

1. *Oberdorf v. Amazon.com Inc.*, 930 F.3d 136, 151 (3d Cir. 2019), *vacated and reh'g en banc granted*, 936 F.3d 182 (3d Cir.). This case is remarkable considering the many previous decisions determining that Amazon is not a seller under product liability law. *See, e.g.*, *Eberhart v. Amazon.com, Inc.*, 325 F. Supp. 3d 393, 399–400 (S.D.N.Y. 2018) (holding that Amazon is not a seller or distributor of the product); *Fox v. Amazon.com, Inc.*, No. 3:16-cv-03013, 2018 WL 2431628, at *7–8 (M.D. Tenn. May 30, 2018), *aff'd in part, rev'd in part*, 926 F.3d 295 (6th Cir. 2019), *reh'g granted*, 926 F.3d 295 (6th Cir. 2019), *substituted opinion*, 930 F.3d 415 (6th Cir. 2019); *Allstate N.J. Ins. Co. v. Amazon.com, Inc.*, No. 17-2738, 2018 WL 3546197, at *8–10 (D.N.J. July 24, 2018); *Stiner v. Amazon.com, Inc.*, 120 N.E. 3d 885, 893–94 (Ohio Ct. App. 2019).

2. The case was first granted rehearing en banc. *See Oberdorf v. Amazon.com Inc.*, 936 F.3d 182, 182–83 (3d Cir. 2019). Then the Third Circuit certified a question of law to the Pennsylvania Supreme Court, *see Oberdorf v. Amazon.com Inc.*, 818 F. App'x 138, 139–43 (2020), that was granted, *see Oberdorf v. Amazon.com, Inc.*, 237 A.3d 394 (Pa. 2020). The parties subsequently settled. *See John Beauge, Settlement Prevents Ruling Whether Amazon Is Liable in Pa. for Defective Goods Injuries*, PA. REAL-TIME NEWS (Sept. 25, 2020), <https://www.pennlive.com/news/2020/09/settlement-prevents-ruling-whether-amazon-is-liable-in-pa-for-defective-goods-injuries.html> [<https://perma.cc/ZM2G-2D3Y>].

3. *See* Christoph Busch, *When Product Liability Meets the Platform Economy: A European Perspective on Oberdorf v. Amazon*, 8 J. EUR. CONSUMER & MKT. L. 173, 174 (2019) (discussing possible implications for European consumer law); Ryan Bullard, Note, *Out-Teching Products Liability: Reviving Strict Products Liability in an Age of Amazon*, 20 N.C. J.L. & TECH. ONLINE 181, 223–29 (2019) (arguing that the standard of negligence does not protect consumers); Edward J. Janger & Aaron D. Twerski, *The Heavy Hand of Amazon: A Seller Not a Neutral Platform*, 14 BROOK. J. CORP., FIN. & COM. L. 259, 262–63 (2020) (arguing that Amazon is highly involved in the sale, even more than the case reveals); Amy Elizabeth Shehan, Note, *Amazon's Invincibility: The Effect of Defective Third-Party Vendors' Products on Amazon*, 53 GA. L. REV. 1215, 1216–17 (2019) (analyzing the product liability problem).

4. *See generally* Guido Smorto, *The Protection of the Weaker Parties in the Platform Economy*, in THE CAMBRIDGE HANDBOOK OF THE LAW OF THE SHARING ECONOMY 431 (Nestor M. Davidson, Michèle Finck & John J. Infranca eds., 2018) (discussing various consumer protection issues in the platform economy); David S. Evans & Richard Schmalensee, *The Industrial Organization of Markets with Two-Sided Platforms*, 3 COMPETITION POL'Y INT'L 151, 168–73 (2007); Michal S. Gal, *The Power of*

courts either force platforms into unfitting categories in order to establish liability or exempt platforms from duties altogether.⁵ Instead of this fractured approach, this Article suggests we think of online platforms' legal duties holistically, acknowledging the emerging legal field of platform liability as a creator of a marketplace. Indeed, as others have recognized, platforms often disrupt traditional industries, and create new challenges for competition law, protection from data violation law, and local regulation.⁶ However, a different, no less important challenge has been somewhat downplayed. What are the duties of platforms toward their users with regard to the activity they host?

I argue that online platforms constitute a digital market, and that the law must respond with principles that lay out the legal responsibility that accompanies the constitution and control of online marketplaces. In laying out these principles, this Article purposively avoids the current dichotomy between conceptualizing online platforms as a neutral mediator and treating them as a seller, an employer, or a hotel chain.⁷ Because online

the Crowd in the Sharing Economy, 13 LAW & ETHICS HUM. RTS. 29 (2019) (discussing the power of the crowd to address competition issues in the sharing economy); Martin Kenney & John Zysman, *The Rise of the Platform Economy*, ISSUES IN SCI. & TECH., Spring 2016, at 61, 62–63; Jamilla Jefferson-Jones, *Shut Out of Airbnb: A Proposal for Remediating Housing Discrimination in the Modern Sharing Economy*, FORDHAM URB. L.J.: CITY SQUARE (May 26, 2016), <https://news.law.fordham.edu/fulj/2016/05/26/shut-out-of-airbnb-a-proposal-for-remediating-housing-discrimination-in-the-modern-sharing-economy> [<https://perma.cc/9EBC-E8NX>] (discussing Airbnb's liability for discriminating practices by its users).

5. See sources cited *supra* note 1; see also Jon Porter, *Airbnb Avoids Tougher Regulation in Europe as EU Court Rules It's Not an Estate Agent*, VERGE (Dec. 19, 2019, 8:04 AM), <https://www.theverge.com/2019/12/19/21029606/airbnb-estate-agent-eu-ruling-platform-regulation> [<https://perma.cc/UZ6F-WSHY>].

6. See Kenneth A. Bamberger & Orly Lobel, *Platform Market Power*, 32 BERKELEY TECH. L.J. 1051, 1053 (2017) (“In many ways platform companies have been rightfully celebrated as positively disruptive, introducing much needed new competition in industries that have been otherwise over-mature and stagnant. And yet, some of the leading new platforms have had such meteoric success that their growing market dominance and technical capabilities raises questions about new forms of anticompetitive practices and negative impacts on consumer and employee welfare.”); Julie E. Cohen, *Law for the Platform Economy*, 51 U.C. DAVIS L. REV. 133, 176 (2017); Orly Lobel, *The Law of the Platform*, 101 MINN. L. REV. 87, 90 (2016) (“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, and challenging regulated industries . . .”).

7. Compare Antonio Aloisi, *Commoditized Workers: Case Study Research on Labor Law Issues Arising from a Set of “On-Demand/Gig Economy” Platforms*, 37 COMPAR. LAB. L. & POL'Y J. 653, 653, 655, 656–57 (2016) (arguing that Uber is an

platforms do not easily fit current categories, more often than not, these platforms are exempted from liability altogether.⁸ Of course, online platforms sometimes do fit traditional categories. Uber may very well be the employer of its drivers.⁹ However, the employer category only provides a partial solution, as it neglects the responsibility of Uber toward passengers. Developing the legal responsibilities of online marketplaces is thus important even in these cases.

Online platforms constitute a market because they create the infrastructure for engaging in the activity, the code of acceptable behavior, and the rules of participation in this activity.¹⁰ Platforms control the mechanism for closing a deal, shape many of the terms of the agreement between the parties, and construct the system for evaluating performance in the market.¹¹ They also impact and nudge the level and type of participation by users.¹² The challenge to legal thought and practice is to properly conceptualize the legal role of market-constituting actors and the duties that this role entails.

This Article offers a new legal category: market-constituting platforms. A platform constitutes a market by matching sellers and buyers, owners and users, service providers and service recipients. This category defines the necessary conditions for classifying platforms as market-constituting platforms and the legal implications of such a classification. The definition itself is not monolithic. There are different levels of control and involvement among platforms.¹³ Market-constituting platforms vary, and duties and liabilities must depend on the level of control and involvement across the

employer), and Janger & Twerski, *supra* note 3, at 262–63 (arguing that Amazon is a seller for the purposes of product liability law), and Nancy Leong & Aaron Belzer, *The New Public Accommodations: Race Discrimination in the Platform Economy*, 105 GEO. L.J. 1271, 1298–99 (2017) (arguing that Airbnb functions as a de facto hotel chain), with Niels van Doorn, *A New Institution on the Block: On Platform Urbanism and Airbnb Citizenship*, 22 NEW MEDIA & SOC’Y 1808, 1817 (2020) (“This gospel, which posits the Airbnb platform as a formally neutral technical system that merely facilitates such redistribution, is carefully orchestrated by Airbnb itself.”), and *Terms and Conditions*, UBER, <https://www.uber.com/legal/en/document/?name=general-terms-of-use&country=great-britain&lang=en-gb> [https://perma.cc/N2HZ-TKYM] (Mar. 17, 2020) (“The Services constitute a technology platform that enables users . . . to pre-book and schedule transportation, logistics, delivery and/or vendors services with independent third party providers . . .”).

8. See Porter, *supra* note 5; sources cited *supra* note 1.

9. See *Uber B.V. v. Aslam* [2018] EWCA ((Civ)) 2748 [92] (appeal taken from EAT) (Eng.), *aff’d*, [2021] UKSC 5.

10. See *infra* Sections III.A, III.B.

11. See *infra* Section III.A.

12. See, e.g., Meridith Baer, *Attract More Guests: 10 Simple Tips From Home Staging Expert Meridith Baer*, AIRBNB: BLOG (Apr. 17, 2014), <https://blog.airbnb.com/attract-guests-10-simple-tips-home-staging-expert-meridith-baer/> [https://perma.cc/8CNQ-42KN] (encouraging hosts to remove personal photos and personal belongings from the listing, as they will not make a guest feel welcome).

13. See *infra* Section III.A.

different criteria. This Article discusses the tort, antidiscrimination, sexual harassment, and due process implications of this new category.¹⁴ To make the threshold for the category clearer, this Article compares and contrasts its prototypical examples (Amazon, Airbnb, Uber, and the like) with less involved platforms such as Booking.com and Craigslist, and also with the offline, real life shopping mall.

This Article focuses on online platforms that mediate the sale, rental, or use of products and services, thus creating an online, digital market. Examples include the so-called sharing economy platforms such as Airbnb, Uber, Eatwith, TaskRabbit, and others.¹⁵ It also includes Amazon, eBay, and platforms that market goods sold by third-party vendors.¹⁶ It does not engage with content-based platforms such as Facebook, Twitter, and Google that involve another set of legal problems related to speech, privacy, expression, and information.¹⁷

The Article proceeds as follows: Part II defines online platforms and presents the key examples of online platforms. It then surveys a number of legal issues that commentators address, relying on existing legal categories to impose platform liability. This Part continues to discuss the legal conceptualizations offered by scholars today, and explains their shortcomings, particularly in capturing the role as a market-constituting platform. Part III presents and explains the new category of market-constituting platforms. It discusses the relevant criteria supporting a conclusion that a particular platform indeed constitutes a market. This Part continues to justify imposing

14. See *infra* Part IV.

15. See Tomio Geron, *Airbnb and the Unstoppable Rise of the Share Economy*, FORBES (Jan. 23, 2013, 7:00 AM), <http://www.forbes.com/sites/tomiogeron/2013/01/23/airbnb-and-the-unstoppable-rise-of-the-share-economy/> [<https://perma.cc/Y3DY-DUXL>]; Liran Einav, Chiara Farronato & Jonathan Levin, *Peer-to-Peer Markets*, 8 ANN. REV. ECON. 615, 616 (2016); see also Rashmi Dyal-Chand, *Regulating Sharing: The Sharing Economy as an Alternative Capitalist System*, 90 TUL. L. REV. 241, 245–46 (2015); Sofia Ranchordás, *Does Sharing Mean Caring? Regulating Innovation in the Sharing Economy*, 16 MINN. J.L. SCI. & TECH. 413, 416 (2015); Mansoor Iqbal, *Uber Revenue and Usage Statistics (2020)*, BUS. APPS, <http://www.businessofapps.com/data/uber-statistics/> [<https://perma.cc/A7QK-PGH9>] (Oct. 23, 2020).

16. See Janger & Twerski, *supra* note 3, at 260–63 (discussing Amazon’s activity).

17. Most scholars discuss all relevant platforms: Uber, Amazon, Facebook, and Google together. See, e.g., NICK SRNICEK, PLATFORM CAPITALISM 4–5 (2017); Jack M. Balkin, *Information Fiduciaries and the First Amendment*, 49 U.C. DAVIS L. REV. 1183, 1187 (2016); Cohen, *supra* note 6, at 142; K. Sabeel Rahman, *The New Utilities: Private Power, Social Infrastructure, and the Revival of the Public Utility Tradition*, 39 CARDOZO L. REV. 1621, 1626 (2018).

legal duties on actors who create a market. Part IV analyzes the legal implications of constituting a market. Instead of clinging to old distinctions, this Part explains how the new category establishes liability and creates duties that pertain to its legal role. The Article ends with concluding remarks.

II. ONLINE PLATFORMS AND THE LAW

A. Definition and Legal Dilemmas

Online platforms create a marketplace for goods, services, ideas, and content.¹⁸ Platforms are defined as digital infrastructure that enable different groups to interact with one another.¹⁹ A different definition refers to platforms “as an algorithmic structure providing a digital market and potentially an ecosystem, albeit one it controls.”²⁰

According to Nick Srnicek, platforms have three central characteristics.²¹ First, platforms are intermediaries that host users’ activities and are therefore in a unique position to collect, record, and store data.²² Second, platforms rely on network effects.²³ The more users a platform hosts, the more attractive to other users it becomes.²⁴ As the platform get stronger, users and owners are less likely to exit the platform.²⁵ Even if a new market competitor emerges, users will know that the established platform already has a significant number of participants.²⁶ Third, platforms dictate the rules of interaction, manipulate products, and manage services.²⁷

Although these definitions and characteristics treat platforms as one holistic category, platforms differ considerably in the type of activity they host and in their level of involvement in activities. This Article purposively brackets platforms who manage content, most prominently Facebook, Google, and YouTube, and problems of free speech, ownership of content and

18. See SRNICEK, *supra* note 17, at 43–44.

19. *Id.* at 43.

20. Kenney & Zysman, *supra* note 4, at 65.

21. See SRNICEK, *supra* note 17, at 43–46.

22. *Id.* at 43.

23. *Id.* at 45.

24. See, e.g., Evans & Schmalensee, *supra* note 4, at 164; Gal, *supra* note 4, at 37.

25. See SRNICEK, *supra* note 17, at 45.

26. Gal, *supra* note 4, at 37 (“These include two-sided network effects: The more suppliers that use a platform, the higher the value of using the platform for consumers, and vice versa. Accordingly, a platform that has built up both sides of its market enjoys a significant advantage compared with a new entrant.” (citing Stephen P. King, *Sharing Economy: What Challenges for Competition Law?*, 6 J. EUR. COMPETITION L. & PRACTICE 731 (2015); BRHMI BALARAM, ACTION & RES. CTR., FAIR SHARE: RECLAIMING POWER IN THE SHARING ECONOMY 19 (2016), <https://www.thersa.org/globalassets/pdfs/reports/rsa-fair-share.pdf> [<https://perma.cc/8KJW-2XY7>])).

27. See SRNICEK, *supra* note 17, at 46.

profiles, and fake news.²⁸ Instead, it focuses on platforms that mediate transactions in goods and services and discusses problems that relate to the management of the marketplace that these platforms constitute.²⁹

Among the platforms discussed in this Article are sharing economy platforms.³⁰ The sharing economy is defined as collaboration in the use of products and services, simplified and redefined by technological advances.³¹ Airbnb and Uber are the most recognized examples, but Eatwith, TaskRabbit, and Turo are other important platforms.³² These platforms mediate transactions that take place offline among peers.³³ They create peer markets that allow owners to rent out assets such as cars, homes, and bikes, or offer services to strangers.³⁴ Airbnb is a touristic marketplace that allows people

28. See sources cited *supra* note 17.

29. See *infra* Section III.A.

30. See generally Yochai Benkler, *Sharing Nicely: On Shareable Goods and the Emergence of Sharing as a Modality of Economic Production*, 114 YALE L.J. 273, 279 (2004) (discussing the economic motivation for certain types of sharing); RACHEL BOTSMAN & ROO ROGERS, WHAT'S MINE IS YOURS: THE RISE OF COLLABORATIVE CONSUMPTION 67–96 (2010) (discussing the rise of the sharing economy); Shelly Kreiczer-Levy, *Consumption Property in the Sharing Economy*, 43 PEPP. L. REV. 61, 83 (2015) (discussing the challenges that the sharing economy poses to property definitions).

31. BOTSMAN & ROGERS, *supra* note 30, at iv.

32. David Berke, *Products Liability in the Sharing Economy*, 33 YALE J. ON REG. 603, 606–07 (2016) (discussing Turo and explaining “a consumer who purchased a car for her personal use is, through Turo’s digital platform, renting that car out to another consumer looking for a one-off trip. Turo takes a cut of the proceeds; the lessor gets extra cash for letting others use the car when it would otherwise sit unused; and the lessee gets a flexible (and perhaps) cheaper rental.” (citing Grayson Bell, *Peer-to-Peer Rental Agencies Throughout the U.S.*, TURO BLOG (Dec. 20, 2013), <http://relayrides.flywheesites.com/2013/12/peer-to-peer-rentals-beat-rental-agencies-throughout-the-us> (inactive website))); Hubert Horan, *Will the Growth of Uber Increase Economic Welfare?*, 44 TRANSP. L.J. 33, 36 (2017) (assessing Uber’s economic ability to earn profit in a competitive market); Abbey Stemler, *The Myth of the Sharing Economy and Its Implications for Regulating Innovation*, 67 EMORY L.J. 197, 213, 240 (2017) (discussing Eatwith, a platform that matches diners and home chefs for meals); Joseph W. McHugh, Comment, *Looking Through the (Mis)Classifieds: Why TaskRabbit Is Better Suited than Uber and Lyft to Succeed Against a Worker Misclassification Claim*, 66 CLEV. ST. L. REV. 649, 651–52 (2018) (“TaskRabbit’s model . . . makes TaskRabbit more of a marketplace than Uber or Lyft . . . [and] guarantees that its workers remain classified as independent contractors under either worker classification test should a court challenge arise.”); Geron, *supra* note 15.

33. See Berke, *supra* note 32, at 609–10.

34. Peer-to-peer (P2P) markets are markets where trade occurs between peers. See, e.g., Anindya Ghose, Panagiotis G. Ipeirotis & Arun Sundarajan, *Reputation Premiums in Electronic Peer-to-Peer Markets: Analyzing Textual Feedback and Network Structure*, 2005 PROC. ACM SIGCOMM WORKSHOP ON P2P ECON. 150, 150–01.

to rent out houses or rooms for short-term periods.³⁵ Uber and Lyft are ride-sharing platforms that connect passengers with nonprofessional drivers that will take them to their desired location.³⁶ Eatwith allows chefs to cook meals in their home,³⁷ Prosper and Lending Club are peer-to-peer lending sites,³⁸ Fiverr connects business service providers with companies or individuals who are in need of a logo design or digital marketing.³⁹

An additional, and equally dominant, category of online platforms includes marketplaces for the sales of various goods. Amazon and eBay are key examples.⁴⁰ These platforms facilitate the sales of books, clothes, electronics, video games, furniture, toys, and jewelry.⁴¹ The platforms control most aspects of the sale of products including how it is fulfilled, and the search algorithm matching buyers and vendors.⁴²

These platforms are incredibly powerful. They control many aspects of users' activity, the limits and scope of user participation, and the rules of conduct.⁴³ The literature warns us against key problems that platform dominance creates. Platforms are international businesses worth billions

35. See Kreiczler-Levy, *supra* note 30, at 63; see also Brianna J. Santolli, Note, *Winning the Battle, Losing the War: European Cities Fight Airbnb*, 49 GEO. WASH. INT'L L. REV. 673, 677–80 (2017) (describing the rise of Airbnb and the causes for its success).

36. Ryan Calo & Alex Rosenblat, *The Taking Economy: Uber, Information, and Power*, 117 COLUM. L. REV. 1623, 1654 (2017) (discussing Uber and its ability to abuse its power over workers); see also Zane Muller, Comment, *Algorithmic Harms to Workers in the Platform Economy: The Case of Uber*, 53 COLUM. J.L. & SOC. PROBS. 167, 178 (2020) (discussing Uber's exploitation of workers by algorithmic design choices).

37. See Stemler, *supra* note 32, at 213.

38. Andrew Verstein, *The Misregulation of Person-to-Person Lending*, 45 U.C. DAVIS L. REV. 445, 452 (2011) ("P2P financial companies assist borrowers and lenders to effect financial transactions without employing a traditional intermediary. While users must rely on a P2P platform to facilitate lender-borrower connections, lenders ultimately finance borrowers without banks interposing their own credit risks and guarantees. Thus, P2P lending hints at a world with the benefits of intermediation but none of the costs.").

39. See Kaitlin A. Dohse, *Fabricating Feedback: Blurring the Line Between Brand Management and Bogus Reviews*, 2013 U. ILL. J.L. TECH. & POL'Y 363, 371; see also Deepa Das Acevedo, *Invisible Bosses for Invisible Workers, or Why the Sharing Economy is Actually Minimally Disruptive*, 2017 U. CHI. LEGAL F. 35, 43.

40. See sources cited *supra* note 3; see also Anjanette H. Raymond & Abbey Stemler, *Trusting Strangers: Dispute Resolution in the Crowd*, 16 CARDOZO J. CONFLICT RESOL. 357, 376 (2015) ("eBay is an online platform where individuals create accounts to enable buying and selling of items through an online auction process. Without going into unnecessary details, the key to eBay's success is trust within the eBay community.").

41. Lina M. Khan, *The Separation of Platforms and Commerce*, 119 COLUM. L. REV. 973, 985–86 (2019) (describing the evolution of Amazon's marketplace); Daniel F. Spulber, *Solving the Circular Conundrum: Communication and Coordination in Internet Markets*, 104 NW. U. L. REV. 537, 577 n.113 (2010).

42. See Janger & Twerski, *supra* note 3, at 264, 266.

43. See SHELLY KREICZLER-LEVY, *DESTABILIZED PROPERTY: PROPERTY LAW IN THE SHARING ECONOMY* 146–56 (2019) [hereinafter *DESTABILIZED PROPERTY*].

of dollars,⁴⁴ and they are “developing power that may be even more formidable than was that of the factory owners in the early industrial revolution.”⁴⁵ Moreover, due to acute information asymmetries and structural power, platforms are in a unique position to manipulate transactions and frequency of use.⁴⁶ Users are dependent on the platform who dictates the terms of the transaction and effectively controls patterns of use.

These broad concerns translate to concrete legal issues. One of the more recent legal debates includes the possible liability of Amazon for faulty products sold by different vendors using its platform.⁴⁷ According to product liability law, Amazon will be liable for damages if the courts deem it a seller.⁴⁸ Most cases so far determined that it is not a seller, because Amazon does not easily fit the category.⁴⁹ Despite its control over many aspects of the sale, courts noted that Amazon never takes title to the product and does not produce or market the products.⁵⁰ Most courts thus concluded that Amazon provides the platform that matches the seller and the buyer, but does not sell the product.⁵¹ The Third Circuit reached an opposite conclusion.⁵² Amazon is a seller because its “involvement in transactions extends beyond a mere editorial function; it plays a large role in the actual sales process. This includes receiving customer shipping information, processing customer payments, relaying funds and information to third-party vendors, and collecting the fees it charges for providing these services.”⁵³ The case was vacated and awaiting an *en banc* review when the parties settled.⁵⁴

44. Anders Hansen Henten & Iwona Maria Windekilde, *Transaction Costs and the Sharing Economy*, 18 INFO 1, 7–10 (2016).

45. Kenney & Zysman, *supra* note 4, at 62.

46. See SRNICEK, *supra* note 17, at 6.

47. See sources cited *supra* note 3.

48. See Shehan, *supra* note 3, at 1217.

49. See Janger & Twerski, *supra* note 3, at 260–61.

50. See *Erie Ins. Co. v. Amazon.com, Inc.*, 925 F.3d 135, 141–42 (4th Cir. 2019) (applying Maryland law); *Carpenter v. Amazon.com, Inc.*, No. 17-cv-03221-JST, 2019 WL 1259158 (N.D. Cal. Mar. 19, 2019); Janger & Twerski, *supra* note 3, at 264.

51. See Janger & Twerski, *supra* note 3, at 260–62; see also *Garber v. Amazon.com, Inc.*, 380 F. Supp. 3d 766, 778 (N.D. Ill. 2019) (applying Illinois law); *Eberhart v. Amazon.com, Inc.*, 325 F. Supp. 3d 393, 397–400 (S.D.N.Y. 2018) (applying New York law); *Stiner v. Amazon.com, Inc.*, 120 N.E.3d 885, 887, 896 (Ohio Ct. App. 2019) (applying Ohio law).

52. See *Oberdorf v. Amazon.com Inc.*, 930 F.3d 136, 153 (3d Cir. 2019), *vacated and reh'g en banc granted*, 936 F.3d 182 (3d Cir.).

53. *Id.*

54. See *supra* note 2 and accompanying text.

This controversy remains within the limits of the legal category of a seller. The problem with this framing is that courts are working with categories that fit traditional markets. Instead of working with old categories, new laws are needed. Laws must begin with considering the responsibilities associated with platforms that constitute a market, and the threshold conditions that justify liability in a particular case. The next question will be whether platform liability should be subject to a strict liability standard. This broader context will also include liability for harm in other cases that do not involve a sale of product, but rather peer-to-peer rentals of houses, cars, clothes and bikes. Part III expands on this idea. Finally, liability for food safety and fire safety is also an important legal concern.⁵⁵

A second legal issue concerns discrimination practiced by users in their activity hosted by the platform. Although the sharing economy promises to be a meeting place for people from different backgrounds, there are numerous reports of racial and gender discrimination in these enterprises.⁵⁶ Studies have found that users with names that sound African-American were 16% less likely to be accepted as guests on Airbnb than users with names that sound white.⁵⁷ Similarly, research found that non-black hosts charge approximately twelve percent more than black hosts for the equivalent rental, and attributes it to renters' preference to rent units from non-blacks.⁵⁸ There is anecdotal evidence of cases where a host rejected a guest based on discriminating factors.⁵⁹ There are other reports of discriminating practices in other sharing economy platforms.⁶⁰

55. See Daniel K. McDonald, *Reputation Will Teach the Sharing Economy to Share*, 27 U. FLA. J.L. & PUB. POL'Y 219, 226–27 (2016); Michèle Finck & Sofia Ranchordás, *Sharing and the City*, 49 VAND. J. TRANSNAT'L L. 1299, 1352 (2016).

56. See *infra* notes 57–60 and accompanying text.

57. See Benjamin Edelman, Michael Luca & Dan Svirsky, *Racial Discrimination in the Sharing Economy: Evidence from a Field Experiment*, AM. ECON. J. APPLIED ECON., Apr. 2017, at 1, 1. As the authors explain, “Discrimination occurs among landlords of all sizes, including small landlords sharing the property and larger landlords with multiple properties.” *Id.*

58. Benjamin Edelman & Michael Luca, *Digital Discrimination: The Case of Airbnb.com* 3 (Harv. Bus. Sch., Working Paper No. 15-054, 2014).

59. See, e.g., Rohan Gilkes, *I'm a Black Man. Here's What Happened When I Booked an Airbnb.*, MEDIUM: STAY WOKE (May 25, 2016), <https://medium.com/stay-woke/i-read-about-this-phenomenon-of-black-people-being-rejected-on-airbnb-f36dd3ab0375> [<https://perma.cc/8SGP-4MJ7>]; Elaine Glusac, *As Airbnb Grows, So Do Claims of Discrimination*, N.Y. TIMES (June 21, 2016), <https://www.nytimes.com/2016/06/26/travel/airbnb-discrimination-lawsuit.html> [<https://perma.cc/S44A-5N96>]; Cheyenne Roundtree, *'I Wouldn't Rent to You If You Were the Last Person on Earth': Trump-Supporting Airbnb Host Cancels Woman's Booking During Snowstorm Because She Is Asian*, DAILYMAIL.COM (Apr. 7, 2017, 11:05 PM), <http://www.dailymail.co.uk/news/article-4392494/Woman-denied-Airbnb-snowstorm-Asian.html> [<https://perma.cc/67NM-CX5G>].

60. See Leong & Belzer, *supra* note 7, at 1271 (discussing conscious and unconscious racial bias in ride sharing platforms); Arianne Renan Barzilay & Anat Ben-David,

Regulating discrimination in the sharing economy is difficult. For one thing, it is not clear whether it is legally prohibited.⁶¹ Businesses that are open to the public cannot discriminate against protected classes.⁶² However, renting out private and personal possessions on occasion may not be an instance of public accommodation.⁶³ This argument builds on the distinction between places that are personal and private, and places that are open to the public.⁶⁴ Sharing personal possessions can be legally classified as working within a personal, private sphere and therefore remains unaffected by antidiscrimination laws. In previous work, I have argued in favor of amending antidiscrimination laws and expanding their scope to sharing economy projects.⁶⁵

This Article involves a different dilemma. Do online platforms have a responsibility to oversee, control, and mitigate discrimination practiced by their users? Platforms occasionally take voluntary steps to confront discrimination. Airbnb commissioned a report to review its current policies and suggest ways to address these problems.⁶⁶ Part IV returns to these policies and considers whether market-constituting platforms have a legal duty to actively reduce discrimination.

Platform Inequality: Gender in the Gig-Economy, 47 SETON HALL L. REV. 393, 394 (2017) (finding that women's hourly rate on the studied platform was significantly lower than men's, even though women work for more hours on the platform); Tamar Kricheli-Katz & Tali Regev, *How Many Cents on the Dollar? Women and Men in Product Markets*, SCI. ADVANCES (Feb. 19, 2016), <https://advances.sciencemag.org/content/2/2/e1500599> [<https://perma.cc/EL99-GJ4X>] (finding gender disparities in online product markets; "women sellers received about 80 cents for every dollar a man received when selling the identical new product and 97 cents when selling the same used product").

61. See Lisa Gabrielle Lerman & Annette K. Sanderson, Project, *Discrimination in Access to Public Places: A Survey of State and Federal Public Accommodations Laws*, 7 N.Y.U. REV. L. & SOC. CHANGE 215, 217 (1978).

62. See *id.* at 218.

63. See Joseph William Singer, *No Right to Exclude: Public Accommodations and Private Property*, 90 NW. U. L. REV. 1283, 1369–70 (1996).

64. *Id.* at 1448.

65. See generally Kreiczer-Levy, *supra* note 30; Shelly Kreiczer-Levy, *Share, Own, Access*, 36 YALE L. & POL'Y REV. 155 (2017).

66. See generally LAURA W. MURPHY, AIRBNB'S WORK TO FIGHT DISCRIMINATION AND BUILD INCLUSION: A REPORT SUBMITTED TO AIRBNB (2016), https://blog.atairbnb.com/wp-content/uploads/2016/09/REPORT_Airbnbs-Work-to-Fight-Discrimination-and-Build-Inclusion_09292016.pdf [<https://perma.cc/GE2Z-JN45>].

Sexual harassment poses a similar dilemma. Female drivers on ride-sharing platforms report being harassed by riders.⁶⁷ Is Uber responsible for protecting its users, both riders and drivers, and for creating a safe environment? In a similar vein, do platforms have a duty to protect their users from unfair dealing and profiteering in a time of need? In the midst of the COVID-19 pandemic, several Amazon and eBay vendors ran up prices for sanitizer, wipes, and face masks.⁶⁸ Amazon pulled these listings and suspended some of vendors, and eBay prohibited any sale of masks or sanitizer.⁶⁹ These actions are definitely welcome, but should Amazon and eBay be legally responsible for making sure the market they host is fair?

The current legal regime has yet to acknowledge platforms' role in creating a market and shaping its norms. These problems and many others create the need for a legal field whose principles detail the duties and liabilities of market-constituting platforms.

B. Current Conceptualization of Online Platforms

The legal relations between the platform and its users are governed by a standard contract, the terms of service offered by the platform; the user simply agrees.⁷⁰ This contract is non-negotiable.⁷¹ Typically, the contract characterizes the platform as a neutral service provider.⁷² The contract does not recognize the platform's control over the transactions, its conditions,

67. See Naomi Schoenbaum, *Gender and the Sharing Economy*, 43 *FORDHAM URB. L.J.* 1023, 1045 (2016) ("Female drivers report [being harassed] . . . particularly by intoxicated men, including being propositioned for sex, facing other unwanted come-ons, and even physical fondling. Female drivers also report non-sexual physical assaults. And female Uber drivers have faced harassment from male passengers who have located them using the service's 'Lost and Found' feature . . ." (citing Ellen Huet, *Why Aren't There More Female Uber and Lyft Drivers?*, *FORBES* (Apr. 9, 2015), <http://www.forbes.com/sites/ellenhuet/2015/04/09/female-uber-lyftdrivers> [<https://perma.cc/P6N8-YFKP>]); see also Rebecca Greenfield, *Want More Female Uber Drivers? Here's How to Make It Happen*, *FAST CO.* (Mar. 16, 2015), <http://www.fastcompany.com/3043622/most-innovative-companies/want-more-female-uber-drivers-heres-how-to-make-it-happen> [<https://perma.cc/WLF6-HVN6>]).

68. Jack Nicas, *He Has 17,700 Bottles of Hand Sanitizers and Nowhere to Sell Them*, *N.Y. TIMES* (Mar. 14, 2020), <https://www.nytimes.com/2020/03/14/technology/coronavirus-purell-wipes-amazon-sellers.html> [<https://perma.cc/X9FY-QVP6>].

69. *Id.* ("[Amazon] suspended some of the sellers behind the listings and warned many others that if they kept running up prices, they'd lose their accounts. eBay soon followed with even stricter measures, prohibiting any U.S. sales of masks or sanitizer.")

70. See Guido Noto La Diega & Luce Jacovella, *UBERTRUST: How Uber Represents Itself to Its Customers Through Its Legal and Non-Legal Documents*, 5 *J. CIV. & LEGAL SCIS.* 199, 200, 202 (2016) (discussing Uber's legal documents, including its terms of service, and arguing it is opaque).

71. *Id.* at 204.

72. *Id.* at 200.

and overall participation.⁷³ Recognizing the limitations of this contract, scholars have offered different legal concepts that may apply to online platforms.⁷⁴

Some scholars argue that platforms are effectively the employers of users who provide a service through the platform. In particular, they argue that Uber is the employer of its drivers.⁷⁵ As convincing as this characterization might be, it is only applicable to service-oriented platforms, such as Uber, Lyft, and TaskRabbit.⁷⁶ It will not apply to platforms that mediate the sale or rental of goods, such as Amazon, Ebay, Turo, or Airbnb. Moreover, this conceptualization only addresses the role of the platform toward one type of users, service providers, and not toward users of the platform who consume the service.⁷⁷ Only the drivers can be the employees of Uber, not the riders.

A different characterization of platforms is rooted in administrative law. Sabeel Rahman argues that platforms function as public utilities because they manage a vital service to our social infrastructure.⁷⁸ This definition groups sharing economy platforms with other internet platforms such as Facebook, Google, and Amazon.⁷⁹ The public utilities approach argues in favor of imposing public law duties on certain platforms.⁸⁰ Indeed, platforms hold the power to regulate transactions, determine entry and exit, and manipulate use.⁸¹ However, not all platforms offer an essential service that is part of our social infrastructure.⁸² Airbnb, TaskRabbit, and Uber offer guests a luxury service; consumers have other available choices.

73. *Id.*

74. *See infra* notes 75–89 and accompanying text.

75. Antonio Aloisi, *Commoditized Workers: Case Study Research on Labor Law Issues Arising from a Set of “On-Demand/Gig Economy” Platforms*, 37 COMP. LAB. L. & POL’Y J. 653–54 (2016) (explaining that although certain platforms, including Uber, present themselves as brokers, it could be argued that they act like employers); Liya Palagashvili, *Disrupting the Employee and Contractor Laws*, 2017 U. CHI. LEGAL F. 379, 382–83 (“Uber has at least fifteen pending misclassification lawsuits in federal and California state courts alone.”); *see also In re Uber Techs. Inc.*, No. 016-23494 (N.Y. Unemployment Ins. Appeal Bd. July 12, 2018), <http://www.nyctaxinews.com/Uber%20AB%20Decision-redacted.pdf> [<https://perma.cc/1BT6-RCLG>]; *infra* note 157 and accompanying text.

76. Julia Tomassetti, *Digital Platform Work as Interactive Service Work*, 22 EMP. RTS. & EMP. POL’Y J. 1, 2 (2018).

77. *Id.*

78. Rahman, *supra* note 17, at 1621.

79. *Id.* at 1626.

80. *Id.* at 1667.

81. *See infra* Section III.A.

82. Rahman, *supra* note 17, at 1675–76.

Rahman indeed acknowledges that access economy platforms are only partial utilities.⁸³

A different approach targets information specifically. Jack Balkin argues that Google, Facebook, and Uber are information fiduciaries.⁸⁴ An information fiduciary is defined as “a person or business who, because of their relationship with another, has taken on special duties with respect to the information they obtain in the course of the relationship.”⁸⁵ Users trust platforms with sensitive information because platforms present themselves as trustworthy.⁸⁶ As a result of this representation of trust, platforms take on fiduciary responsibilities with regard to this information.⁸⁷ The information fiduciary argument has been criticized as ambiguous, failing to address structural power and abandoning more robust public regulation.⁸⁸ Balkin’s argument and its critique target the problem of misusing users’ information.⁸⁹ It does not sufficiently engage with platforms’ market-constituting function and the legal duties it entails toward their users.

Both of these important approaches, the public utilities and the information fiduciary conceptualization, address power relations. The next Part expands on the idea of power and explains its ramifications in the context of the constitution of a market.

III. PLATFORMS AS MARKET CONSTITUTERS

This Article argues that market-constituting platforms have a responsibility toward market participants, on both sides of the transaction. This Article thus presents a novel legal category that explains the duties of centralized online market operators in a consistent manner. It is a three-part argument, consisting of a definition, a justification, and legal implications. First, we must define the category of market-constituting platforms and assess the level of involvement of a particular platform. Next, we need to justify the imposition of legal responsibility on market-constituting platforms. The

83. *Id.* at 1676 (“But it is unclear to what extent these services are ‘necessities’ warranting a full-blown public utility treatment.”).

84. *See generally* Balkin, *supra* note 17.

85. *Id.* at 1209 (citing Jack M. Balkin, *Information Fiduciaries and the First Amendment*, 49 U.C. DAVIS L. REV. 1183 (2016)).

86. *Id.* at 1222.

87. *Id.* at 1221.

88. Lina M. Khan & David E. Pozen, *A Skeptical View of Information Fiduciaries*, 133 HARV. L. REV. 497, 503 (2019) (“This article . . . calls attention to the potential costs of adopting an information-fiduciary framework—a framework that, we fear, invites an enervating complacency about issues of structural power and a premature abandonment of more robust visions of public regulation.”).

89. *Id.* at 502–03; Balkin, *supra* note 17, at 1222–24.

final step includes an analysis of the concrete legal implications of the category.

A. Defining a New Legal Category

Market-constituting platforms create a bilateral market, effectively controlling both parties to the transaction. Not all platforms constitute a market, and the level of control in the activity differs among platforms as well. The category builds on a four-factor test designed to help lawyers and policymakers identify a market-constituting platform, and evaluate the level of control it holds over users' activity in the market.

First, market-constituting platforms control participation through their terms of service.⁹⁰ They can withhold entry and force exit from their activity.⁹¹ The platforms are currently under no obligation to hear a user's claim prior to a decision to block participation or suspend users.⁹²

Second, market-constituting platforms shape the terms of the transactions formed among users: owners and renters, sellers and buyers, service providers and service recipients. They determine the mechanism for closing a deal,

90. Airbnb declares, for example, that it will ban users who discriminate from the platform. See *General Questions About the Airbnb Community Commitment*, AIRBNB BLOG, <https://www.airbnb.com/help/article/1523/general-questions-about-the-airbnb-community-commitment> [<https://perma.cc/B7ST-SVNE>] [hereinafter *General Questions*]. Uber has a similar policy. See *Uber Non-Discrimination Policy*, UBER, <https://www.uber.com/legal/policies/non-discrimination-policy/en/> [<https://perma.cc/8YXB-HEZQ>]. These policies are examples that demonstrate that platforms are gatekeepers of their activity.

91. See Khan, *supra* note 41, at 985–86 (arguing that Amazon structures access to the market).

92. See, e.g., Jackson Cunningham, *Digital Exile: How I Got Banned for Life from AirBnB*, MEDIUM (July 13, 2018), <https://medium.com/@jacksoncunningham/digital-exile-how-i-got-banned-for-life-from-airbnb-615434c6eeba> [<https://perma.cc/9PVV-8TMJ>]. The author recounts his story as he got banned permanently from Airbnb's activity with no explanation. *Id.* The email he received states:

We regret to inform you that we'll be unable to support your account moving forward, and have exercised our discretion under our Terms of Service to disable your account(s). *This decision is irreversible* and will affect any duplicated or future accounts.

Please understand that we are not obligated to provide an explanation for the action taken against your account. Furthermore, we are not liable to you in any way with respect to disabling or canceling your account. Airbnb reserves the right to make the final determination with respect to such matters, and this decision will not be reversed.

Id.

and the terms that the parties can and cannot negotiate.⁹³ Amazon used to require sellers to keep price parity between goods they sell on the platform and goods sold using other venues.⁹⁴ Uber sets the price for each ride, and obligates drivers to use a mapping service in determining their routes.⁹⁵

Platforms also influence the marketing and style of goods in the market. Airbnb influences hosts' behavior in their home, the house's style and décor, and their interactions with guests.⁹⁶ For example, Airbnb recommends that its hosts "show personality, not personal items."⁹⁷ The Airbnb blog explains to hosts that personal items and personal photos will not make a guest feel comfortable in their home.⁹⁸ Airbnb also nudges hosts to become more professional.⁹⁹ Jill Bishop only enjoyed interacting with guests and spending time with them, but Airbnb began requiring her to host people who were just looking for a place to stay.¹⁰⁰ These policies nudge users into a particular form of property use and property design. Another example is Amazon's broad control over product marketing. Amazon reserves the sole discretion "to determine the content, appearance, design and functionality of any product that Amazon puts online [and] . . . curtails the right of third-party vendors to communicate with Amazon site users."¹⁰¹ Finally, many online platforms offer an in-house online dispute resolution mechanism,

93. See, e.g., *How Does the Airbnb Cancellation Policy Work? [COVID-19 Update]*, iGMS (Aug. 19, 2020), <https://www.airgms.com/airbnb-cancellation-policy/> [<https://perma.cc/MUD2-VQES>] (explaining Airbnb's cancellation policy). Airbnb allows hosts to choose from a list of six options regarding their cancellation ranging from flexible to strict policy. *Id.*

During the coronavirus pandemic, the cancellation policy states,

Guests can cancel a reservation for stays and Experiences booked on or before March 14, 2020, with a check-in date between March 14, 2020, and June 30, 2020. [¶] Airbnb claims to refund such reservations fully or issue travel credit for the amount they paid. The policy doesn't cover reservations that have already begun.

Id.

94. Janger & Twerski, *supra* note 3, at 263 (citing *Oberdorf v. Amazon.com Inc.*, 930 F.3d 136, 141 (3d Cir. 2019), *vacated and reh'g en banc granted*, 936 F.3d 182 (3d Cir.)).

95. Calo & Rosenblat, *supra* note 36, at 1630.

96. Baer, *supra* note 12; Katie Benner, *Airbnb Tries to Behave More Like a Hotel*, N.Y. TIMES (June 17, 2017), <https://www.nytimes.com/2017/06/17/technology/airbnbs-hosts-professional-hotels.html> [<https://perma.cc/5EDF-MSYY>]; see also *Your Guide to Hosting Success on Airbnb*, AIRBNB (Jan. 11, 2017), <https://blog.airbnb.com/guide-to-hosting-success/> [<https://perma.cc/4243-LNUA>].

97. Baer, *supra* note 12.

98. *Id.*

99. Benner, *supra* note 96.

100. *Id.*

101. Janger & Twerski, *supra* note 3, at 263 (citing *Oberdorf v. Amazon.com Inc.*, 930 F.3d 136, 141 (3d Cir. 2019), *vacated and reh'g en banc granted*, 936 F.3d 182 (3d Cir.)).

and thus make sure that users' disputes will be settled swiftly and efficiently.¹⁰²

Third, market-constituting platforms enforce a standard of behavior in the market. Rules of conduct may refer to the terms of the transaction including, for example, choosing a route for drivers.¹⁰³ Platforms may nudge participants into a particular interaction with renters, guests, or passengers, and instruct them to become more professional.¹⁰⁴ The type of use is also being manipulated. As Ryan Calo and Alex Rosenblat explain:

Uber may also be manipulating consumer access to various tiers of service. Uber offers a variety of services under its umbrella, with variations in price and quality of service. Anecdotally speaking, for some consumers, the cheaper service uberPool appears as a default, requiring the consumer to overcome default bias in search of another option. For other consumers, perhaps those that Uber somehow understands to be better resourced or who potentially have a habit of preferring one tier of service to another, the more expensive uberX appears as a default.¹⁰⁵

In addition, these platforms control the evaluation mechanism by establishing and managing a system of reviews.¹⁰⁶ They create the conditions that shape users' behavior by controlling and designing the review mechanism.¹⁰⁷ Because reviews—of both parties to the transaction—are

102. Orna Rabinovich-Einy & Ethan Katsh, *A New Relationship Between Public and Private Dispute Resolution: Lessons from Online Dispute Resolution*, 32 OHIO ST. J. ON DISP. RESOL. 695, 696–97 (2017) (“In the last twenty years, the field of online dispute resolution (ODR) has brought forth a new form of dispute resolution that defies traditional assumptions and goals that defined the field in the past. These changes are occurring because of the qualities of the ‘fourth party’ (digital technology employed in dispute resolution)—enhanced efficiency through online communication . . .” (citing ETHAN KATSH & ORNA RABINOVICH-EINY, *DIGITAL JUSTICE: TECHNOLOGY AND THE INTERNET OF DISPUTES* 37–38 (2017))).

103. Calo & Rosenblat, *supra* note 36, at 1630.

104. Benner, *supra* note 96 (naming among the instructions “[l]ess chatting on the couch; fewer idiosyncratic toiletries in the bath”); *see also Your Guide to Hosting Success on Airbnb*, *supra* note 96 (suggesting that hosts “[c]ommunicate early and often”).

105. Calo & Rosenblat, *supra* note 36, at 1659 (footnote omitted).

106. Online reviews are highly susceptible to manipulation by the platform and users. *See* ALEX ROSENBLAT ET AL., *DATA & SOC’Y, DISCRIMINATING TASTES: CUSTOMER RATINGS AS VEHICLES FOR BIAS* 8 (2016), <https://datasociety.net/library/discriminating-tastes-customer-ratings-as-vehicles-for-bias/> [<https://perma.cc/24XR-A4XD>] (arguing that Uber rating system can hide consumer biases); *see also* Leong & Belzer, *supra* note 7, at 1288–93; Sarah Hajian, Francesco Bonchi & Carlos Castillo, *Algorithmic Bias: From Discrimination Discovery to Fairness-Aware Data Mining*, 22 *PROC. ACM SIGKDD INT’L CONF. ON KNOWLEDGE DISCOVERY & DATA MINING* 2125, 2125 (2016).

107. *See* Calo & Rosenblat, *supra* note 36, at 1656, 1658–69.

important for future transactions and affect profitability,¹⁰⁸ participants will likely adopt the behavior and manners that will be best perceived and appropriately ranked by the other party to the transaction.

Fourth, market-constituting platforms may create the representation that they secure the transaction and guarantee the safety of the activities in the market. Buyers feel secure when they purchase a product on Amazon because they rely on the reputation of the market it created.¹⁰⁹ They may believe Amazon is more involved than it actually is.¹¹⁰ Moreover, at times buyers may not even know that they are purchasing a product from a third-party vendor.¹¹¹

These four factors indicate not only whether a given platform is indeed a market-constituting platform, but also the extent of its involvement in the market and in shaping its norms. The more a platform is involved in entry and exit of the activity; shaping the terms of services; enforcing a standard of behavior; and creating a representation of safety in the market, the more responsibility it owes toward market participants.

There are platforms or institutions that mediate transactions, but do not necessarily meet these criteria. If a platform controls the entry and exit of one category of participants but not the other, and is not involved in regulating behavior, it is not a market-constituting platform. For example, Booking.com is a two-sided online travel agent.¹¹² It offers a platform that connects consumers and hotels in different countries across the world.¹¹³

108. *Id.* at 1659.

109. Janger & Twerski, *supra* note 3, at 262–63 (“Amazon exercises significant control over the transaction, both in terms of how it is fulfilled and who gets the opportunity to ‘make the sale.’ Buyers rely on the Amazon’s name and reputation when purchasing goods on Amazon. We will show, however, that the buyers’ experience is characterized by a significant lack of transparency as Amazon emphasizes or deemphasizes its role to *their* perceived best advantage.”).

110. *See id.* at 263.

111. *See id.* at 267–78 (“For a buyer, the identity of the nominal seller is often unclear. Indeed, through its manipulation of the so-called ‘Buy Box,’ Amazon does everything it can to maximize that confusion. A buyer may go to the Amazon website and search on a particular product, say a food processor, then click on it with the intention to buy it. So far, the buyer has interacted with two known parties: Amazon and the manufacturer. When the buyer clicks on the product, Amazon takes them to a screen which includes additional product details, and in the top right-hand corner, two buttons: ‘buy now’ and ‘add to cart.’ This location on the screen is referred to in Amazon parlance as the ‘Buy Box.’ Near these buttons, there is additional information. It is likely to say one of three things: (1) sold by XXX and shipped by XXX; (2) Sold by XXX and fulfilled by Amazon; or (3) sold and shipped by Amazon. This is the only indication the buyer gets of who is nominally selling the product. The buyer may never even notice it.”).

112. Chiara Caccinelli & Joelle Toledano, *Assessing Anticompetitive Practices in Two-Sided Markets: The Booking.com Cases*, 14 J. COMPETITION L. & ECON. 193, 202 (2018) (describing antitrust regulation of two-sided markets in Europe).

113. *Id.*

Booking.com controls entry and exit of hotels, but consumers are free to decide when and if to use the platform. In contrast, Amazon can ban consumers as well as vendors.¹¹⁴ In addition, platforms that do not have a system of review or an alternative mechanism that regulates users' behavior cannot be considered market-constituting platforms.¹¹⁵ Craigslist, a classified advertisements website, is an example of a platform that does not have an evaluation mechanism.¹¹⁶ These platforms may still be liable under different laws,¹¹⁷ but they are not market-constituting platforms in the sense that this Article discusses and promotes.

The market-constituting concept confronts the specific problem of online platforms that constitute a market, but the concept is not a-priori limited to online platforms. One may argue that a shopping mall also constitutes a market. Malls are planned retail developments comprising various retail outlets, which are under one freehold ownership and managed and marketed as a unit.¹¹⁸ Malls are also leisure centers where visitors spend time with their friends and family.¹¹⁹ While the stores in the mall set prices and have full discretion over the goods being sold, the mall management controls retail assortment, mall atmosphere, and introduces sales and price promotions.¹²⁰ Malls influence some terms of the transaction between customers and stores, as promotion affects prices. Malls also control the entry and exit

114. Brett Molina, *Return Too Much Stuff to Amazon? You Might Get Banned*, USA TODAY (May 23, 2018, 10:33 AM), <https://www.usatoday.com/story/tech/talkingtech/2018/05/23/amazon-bans-customers-who-return-too-many-orders/636089002/> [<https://perma.cc/Z6NK-RA4D>] (discussing cases of consumers who were banned from using the site without warning).

115. *Cf.* sources cited *supra* note 106 and accompanying text (discussing reviews in platforms).

116. *See generally* Shahrzad T. Radbod, Note, *Craigslist—A Case for Criminal Liability for Online Service Providers?*, 25 BERKELEY TECH. L.J. 597 (2010) (describing the history of Craigslist).

117. Caccinelli & Toledano, *supra* note 112, at 197, 203–04 (discussing antitrust regulation of Booking.com); Radbod, *supra* note 116, at 597, 598 (discussing possible criminal liability for the publication of content).

118. Clifford Guy, *Whatever Happened to Regional Shopping Centres?*, 79 GEOGRAPHY 293, 294 (1994); Gary Warnaby & Kit Man Yip, *Promotional Planning in UK Regional Shopping Centres: An Exploratory Study*, MKTG. INTEL. & PLANNING, Jan. 2005, at 43, 44 (citing Clifford M. Guy, *Controlling New Retail Spaces: The Impress of Planning Policies in Western Europe*, 35 URB. STUD. 953, 958 (1998)).

119. *See* Warnaby & Yip, *supra* note 118, at 50–51.

120. Muhammad Hassan Bucha et al., *Saving the Malls: A Promotion Strategy for UK Retail Sector*, 35 PAKISTAN J. SOC. SCI. 1167, 1168, 1169, 1170, 1172 (2015).

point of the market for stores, but not for customers.¹²¹ However, malls do not create a representation of securing a transaction, they do not control the entry and exit of customers, and there is no evaluation mechanisms other than the sales of the store. Therefore, traditional shopping malls are not market-constituting platforms.

As characteristics of a particular platform change, we should re-examine whether it functions as a market-constituting platform. The proposed definition seeks to capture the platform's involvement in framing the transaction, influencing participants' behavior, and creating market norms.

B. *Justifying Responsibility*

Market-constituting platforms create a virtual spatiality that hosts users' commercial activity. This spatiality is governed by specific rules designed by the platform, who profits from users' activity.¹²² Users participate in the activity because they trust the platform and the market it offers.¹²³ They expect the market to be open, reasonably stable, safe, and procedurally fair. This expectation is not legally protected today as the law does not recognize the duties of actors who constitute a market. Instead, rules are applied to platforms sporadically, and most often, platforms are exempt from liability altogether.¹²⁴ There is a need, then, for a legal category that regulates platforms' legal duties holistically.

In constructing this category, I suggest we rely on the work done in the area of fiduciary law. This suggestion differs from Balkin's information fiduciary theory in two key ways. First, the focus is the implications of constituting a market and not users' information.¹²⁵ Second, I do not suggest

121. Eric D. Gould, B. Peter Pashigian & Canice J. Prendergast, *Contracts, Externalities, and Incentives in Shopping Malls*, 87 REV. ECON. & STAT. 411, 411 (2005) (discussing incentives of mall owners, to attract stores that draw customers, increase traffic, and benefit other stores).

122. SRNICEK, *supra* note 17, at 83.

123. Cf. Balkin, *supra* note 17, at 1221–22 (“What I do claim is that in the digital age, because we trust them with sensitive information, certain types of online service providers take on fiduciary responsibilities” and “they hold themselves out as trustworthy organizations who act consistent with our interests, even though they also hope to turn a profit.”); see also Jack M. Balkin, *Free Speech in the Algorithmic Society: Big Data, Private Governance, and New School Speech Regulation*, 51 U.C. DAVIS L. REV. 1149, 1160–63 (2018); Jack M. Balkin, *Free Speech Is a Triangle*, 118 COLUM. L. REV. 2011, 2047–54 (2018); Jack M. Balkin, *Information Fiduciaries in the Digital Age*, BALKINIZATION (Mar. 5, 2014, 4:50 PM), <https://balkin.blogspot.com/2014/03/information-fiduciaries-in-digital-age.html> [<https://perma.cc/Q7D4-9DG5>] (Balkin developed this idea in several additional essays).

124. See sources cited *supra* note 5 and accompanying text.

125. Balkin, *supra* note 17, at 1225 (arguing that certain platforms, including Google, Facebook and Uber, are information fiduciaries).

we apply fiduciary law to platforms.¹²⁶ The information fiduciary concept was criticized for remaining in the realm of fiduciary law and possibly rejecting public regulation.¹²⁷ Instead, we can learn from fiduciary law's core idea of the loyalty expected from an actor who controls the interests of others *for the purpose of public regulation*.¹²⁸ Fiduciary law is a private law area that deals with governing others, and thus has public law characteristics.¹²⁹ It can serve as a useful guide broadly and allow us to conceptualize the role of market-constituting platform. Once the justification is clear, I discuss its implications, the duties of market-constituting platforms. As I explain in Part IV, these implications must be legislated in a new law that regulates market-constituting platforms.

126. In the book *Destabilized Property*, I argued that we should draw inspiration from fiduciary law in regulating access platforms. *DESTABILIZED PROPERTY*, *supra* note 43, at 146–56. The argument in this Article is different as it promotes comprehensive legislation that is not limited to access platforms (i.e., property-related sharing economy platforms). Moreover, this Article detaches from fiduciary theory and suggests regulation is a better solution; it also further develops the argument and covers various legal issues.

127. Khan & Pozen, *supra* note 88, at 502.

128. See Paul B. Miller, *Justifying Fiduciary Duties*, 58 MCGILL L.J. 969, 972 (2013) (“All fiduciaries are, by virtue of this duty of loyalty, subject to exacting expectations of faithful service. Fiduciaries are expected only to pursue the interests of beneficiaries when executing a fiduciary mandate. To that end, the duty of loyalty strictly forbids conflicts of interest and conflicts of duty, on pain of powerful remedies that strip fiduciaries of any gains realized in breach.”); Ethan J. Leib & Stephen R. Galoob, *Fiduciary Political Theory: A Critique*, 125 YALE L.J. 1820, 1826, 1855 (2016); Lionel Smith, *Fiduciary Relationships: Ensuring the Loyal Exercise of Judgement on Behalf of Another*, 130 LAW Q. REV. 608, 614–15, 634 (2014).

129. Cf. Paul B. Miller & Andrew S. Gold, *Fiduciary Governance*, 57 WM. & MARY L. REV. 513, 513, 518 (2015) (distinguishing between traditional service fiduciaries that manage the affairs or property of persons and governance fiduciaries that advance abstract purposes, including charitable trusts and state-owned public purpose corporations); Stephen R. Galoob & Ethan J. Leib, *Fiduciary Loyalty: Inside and Out*, 92 S. CAL. L. REV. 69, 70 (2018) (“A fiduciary is someone with a certain form of discretion, power, or authority over the legal and practical interests of a beneficiary. As a result of this arrangement, the beneficiary is vulnerable to predation by the fiduciary. Fiduciary relationships trigger a suite of duties, at the core of which is the duty of loyalty. In a sense, the fiduciary relationship is oriented around the possibilities of trust and betrayal. One point of fiduciary duties is to prevent betrayal or, failing that, to assure that betrayals are rectified insofar as possible. What constitutes loyalty or betrayal in fiduciary law, however, is not always clear.”).

Fiduciary law, both the traditional private law applications¹³⁰ and the newer, more controversial applications in public law,¹³¹ is an area of law that addresses power and vulnerability.¹³² The principles of fiduciary law should serve as the foundation for the legal category of market-constituting platform. Market-constituting platforms hold considerable control over the interests of users, or in other words, market participants.

Fiduciary law is a complex legal field.¹³³ Its definition and boundaries are controversial.¹³⁴ It regulates the discretionary power that the fiduciary holds over the interests of the beneficiary.¹³⁵ Examples of fiduciary relations include the trust, an agency, and the relationship formed between professionals such as lawyers, doctors, and investors and their clients.¹³⁶ Beneficiaries are inherently vulnerable as someone else acts in their name.¹³⁷ The law protects them with rules that guard them from abuses of power.¹³⁸

The most important legal implication of fiduciary relations is the duty of loyalty that a fiduciary owes the beneficiary.¹³⁹ The duty of loyalty means that fiduciaries must avoid a conflict of interest, and promote the

130. See sources cited *supra* notes 128–29; see also Victor Brudney *Contract and Fiduciary Duty in Corporate Law*, 38 B.C. L. REV. 595, 595 (1997).

131. Evan J. Criddle & Evan Fox-Decent, *Guardians of Legal Order: The Dual Commissions of Public Fiduciaries*, in FIDUCIARY GOVERNMENT 67, 67 (Evan J. Criddle et al. eds., 2018); Laura S. Underkuffler, *Fiduciary Theory: The Missing Piece for Positive Rights*, in FIDUCIARY GOVERNMENT, *supra*, at 96, 107–13 (using public fiduciary theory to justify the enforcement of positive rights). See generally EVAN FOX-DECENT, SOVEREIGNTY'S PROMISE: THE STATE AS FIDUCIARY (2012) (arguing that the state has fiduciary duties).

132. Hanoch Dagan, *Fiduciary Law and Pluralism*, in THE OXFORD HANDBOOK OF FIDUCIARY LAW 833, 844–45 (Evan J. Criddle, Paul B. Miller & Robert H. Stikoff eds., 2019) (arguing the structural similarities of fiduciary relations includes relationships of dependence and vulnerability wherein “one party is subject to the authority entrusted to another”).

133. Alexander Styhre, *What We Talk About When We Talk About Fiduciary Duties: The Changing Role of a Legal Theory Concept in Corporate Governance Studies*, 13 MGMT & ORG. HIST. 113, 113 (2018), <https://www.tandfonline.com/doi/full/10.1080/17449359.2018.1476160> [<https://perma.cc/7ES8-M8JX>].

134. J. Robert Smith, *Are You a Fiduciary?*, FIDUCIARY L. BLOG (Aug. 20, 2014), <https://fiduciarylblog.com/2014/08/are-you-a-fiduciary.html> [<https://perma.cc/6WXR-Q4EL>].

135. DAGAN, *supra* note 132, at 839.

136. Paul B. Miller, *Justifying Fiduciary Duties*, 58 MCGILL L.J. 969, 1021 (2013) (“By regulating the ends for which fiduciary power may be exercised, the duty of loyalty does not guarantee satisfaction of the particular ends of beneficiaries in particular fiduciary relationships. It does, however, secure the exclusivity of their claim upon fiduciary power as a means to be applied to their ends.”).

137. Smith, *supra* note 128, at 610, 613–14.

138. Tamar Frankel, *The Rise of Fiduciary Law 2*, 6 (Boston Univ. Sch. of Law, Pub. L. Rsch. Paper No. 18-18, 2018), <https://ssrn.com/abstract=3237023> [<https://perma.cc/ZPU5-ARJ5>].

139. Miller, *supra* note 128, at 972; Leib & Galoob, *supra* note 128, at 1826, 1855; Smith, *supra* note 128, at 609.

beneficiary's interests and not her own,¹⁴⁰ or at least prioritize them.¹⁴¹ There are also additional specific requirements.¹⁴²

In the last few decades, the concept of fiduciary relations has been broadened and applied to new types of power-centered relationships.¹⁴³ As Tamar Frankel explains, new applications of the concept “depend[s] on the terms of their services, their entrustment of property or power, the temptation that they face, and the ability of individuals and institutions as well as the markets to control these power holders and their temptation to abuse the trust in them.”¹⁴⁴ Among these developments are the fiduciary role of the state and the fiduciary role of parents.¹⁴⁵

It is tempting to argue that market-constituting platforms represent a new fiduciary role.¹⁴⁶ Indeed, market-constituting platforms hold considerable power over their users, and yet, they do not act in the users' name.¹⁴⁷ Furthermore, platforms promote their own interests, and do not prioritize the interests of users.¹⁴⁸ Finally, fiduciary law may lead to the abandonment of more comprehensive legislation.

140. Miller, *supra* note 128, at 972.

141. Leib & Galoob, *supra* note 128, at 1826.

142. *Id.* at 1824 (examples include deliberation, conscientiousness, and the need to respond to new information).

143. See TAMAR FRANKEL, *FIDUCIARY LAW* 53 (2011).

144. *Id.*

145. Eyal Benvenisti, *Sovereigns as Trustees of Humanity: On the Accountability of States to Foreign Stakeholders*, 107 AM. J. INT'L. L. 295, 300 (2013) (proposing a reinterpretation of sovereignty in international law where sovereigns are trustees of their people, but also have duties to noncitizens); Elizabeth S. Scott & Robert E. Scott, *Parents as Fiduciaries*, 81 VA. L. REV. 2401, 2402 (1995) (“There are information asymmetries in this family relationship that are analogous to those of other fiduciary relationships. Moreover, satisfactory performance by parents, like that of other fiduciaries, requires considerable discretion, and children, like other principals, are not in a position to direct or control that performance. Here, as in other contexts, the challenge for legal regulation is to encourage the parent to act so as to serve the interests of the child rather than her own conflicting interests, and yet to do so in a context in which monitoring parental behavior is difficult.”); see also Criddle & Fox-Decent, *supra* note 131, at 67; FOX-DECENT, *supra* note 131, at 28–29; Underkuffler, *supra* note 131, at 107, 109, 113. For a critique of public fiduciary law, see generally Seth Davis, *The False Promise of Fiduciary Government*, 89 NOTRE DAME L. REV. 1145 (2014) (arguing that the fiduciary theory of government involves problems of fit, intent, and function).

146. *Cf.* DESTABILIZED PROPERTY, *supra* note 43, at 152–56 (arguing that sharing economy platforms are fiduciaries).

147. *Cf.* Smith, *supra* note 128, at 613. Unlike lawyers and investors, platforms do not make the decision for their users, they only structure, oversee, advise, and nudge choices.

148. Balkin, *supra* note 17, at 1227.

These differences suggest that while it is possible to apply fiduciary law to market-constituting platforms, such an application may prove cumbersome and ill-fitting. Instead, I suggest we adapt the core idea of the duty of loyalty and reshape it to fit the role of actors who constitute a market. The power to constitute a market and control its norms has significant normative similarities to the power of a fiduciary to make decisions in the name of a beneficiary.¹⁴⁹ Platforms broker transactions, consult over terms of agreements, and provide a matching algorithm that connects the parties and manages the type of transactions performed.¹⁵⁰ Platforms also manipulate use, nudge user behavior, and offer safety measures and a reputation system.¹⁵¹

149. See, e.g., 90A C.J.S. *Trusts* § 340 (2020) (“A trustee is a fiduciary in relation to the trust beneficiary, owing the beneficiary a fiduciary’s standard of care and conduct exercising the trustee’s powers and duties with fidelity, loyalty, honor, integrity, impartiality, and prudence, acting fairly, justly, honestly, reasonably, openly, and with the utmost good faith.” (first citing *Trolan v. Trolan*, 243 Cal. Rptr. 3d 264 (Cal. Ct. App. 2019); *Peterson v. Peterson*, 835 S.E.2d 651 (Ga. Ct. App. 2019); *Gearhart v. Gearhart*, 2020 IL App (1st) 190042; *Howe v. Links Club Condo. Ass’n*, 823 S.E.2d 439 (N.C. Ct. App. 2018); *Dueck v. Clifton Club Co.*, 2017-Ohio-7161, 95 N.E.3d 1032; *In re Tr. Fund Created Under Terms of Last Will and Testament of Baumgart*, 2015 SD 65, 868 N.W.2d 568; *ETC Texas Pipeline, Ltd. v. Addison Expl. & Dev., LLC*, 582 S.W.3d 823 (Tex. App. 2019); *In re Estate of Reugh*, 447 P.3d 544 (Wash. Ct. App. 2019); *Shriners Hosps. for Children v. First N. Bank of Wyo.*, 2016 WY 51, 373 P.3d 392 (Wyo. 2016); *Hadassah v. Melcer*, 268 So. 3d 759 (Fla. Dist. Ct. App. 2019); and then citing 90A C.J.S. *Trusts* § 333 (2020)).

150. Airbnb is involved in the transaction. It manages payments and transaction history. *Where Do I Find My Payout Information?*, AIRBNB: HELP CTR., [https://www.airbnb.com/help/article/304/where-do-i-find-my-payout-information? \[https://perma.cc/5T9M-X75V\]](https://www.airbnb.com/help/article/304/where-do-i-find-my-payout-information? [https://perma.cc/5T9M-X75V]). Airbnb provides a search engine that prioritizes hosts that offer instant booking and respond quickly to requests. *What Factors Determine How My Listing Shows in Search Results?*, AIRBNB: HELP CTR., [https://www.airbnb.com/help/article/39/what-factors-determine-how-my-listing-shows-in-search-results \[https://perma.cc/4XZW-TLHW\]](https://www.airbnb.com/help/article/39/what-factors-determine-how-my-listing-shows-in-search-results [https://perma.cc/4XZW-TLHW]). The more available a host is, the easier it will be for guests to find the listing. *How Airbnb Search Works*, AIRBNB RES. CTR. (Dec. 1, 2019), [https://www.airbnb.com/resources/hosting-homes/a/how-airbnb-search-works-44 \[https://perma.cc/3JTT-LKDF\]](https://www.airbnb.com/resources/hosting-homes/a/how-airbnb-search-works-44 [https://perma.cc/3JTT-LKDF]). It also offers a dispute resolution mechanism. *Airbnb’s Dispute Moderation for Reviews*, AIRBNB: HELP CTR., [https://www.airbnb.com/help/article/548/airbnbs-dispute-moderation-for-reviews \[https://perma.cc/74NE-UMKD\]](https://www.airbnb.com/help/article/548/airbnbs-dispute-moderation-for-reviews [https://perma.cc/74NE-UMKD]); see also Megan Rose Dickey, *Airbnb Hosts Can Kick You Out After You’ve Checked in*, TECHCRUNCH (Mar. 22, 2018, 9:39 AM), [https://techcrunch.com/2018/03/22/airbnb-hosts-can-kick-you-out-after-youve-checked-in/ \[https://perma.cc/6B93-V32X\]](https://techcrunch.com/2018/03/22/airbnb-hosts-can-kick-you-out-after-youve-checked-in/ [https://perma.cc/6B93-V32X]) (telling the story of a guest who was forced to check out after three days from a thirty-day booking). For Uber’s algorithm, see *supra* note 105 and accompanying text. For Amazon’s algorithm, see *infra* note 225 and accompanying text.

151. See, e.g., *How Do Reviews Work for Stays?*, AIRBNB: HELP CTR., [https://www.airbnb.com/help/article/13/how-do-reviews-work-for-stays \[https://perma.cc/2H99-PCL8\]](https://www.airbnb.com/help/article/13/how-do-reviews-work-for-stays [https://perma.cc/2H99-PCL8]); Calo & Rosenblat, *supra* note 36, at 1657, 1659, 1662; Janger & Twerski, *supra* note 3, at 265, 272; Baer, *supra* note 12 (giving tips on how hosts may also nudge users towards their listings); Benner, *supra* note 96 (illustrating how Airbnb nudges its own hosts to perform like hotels).

These functions affect users' choices and limit their autonomy.¹⁵² In addition, and more importantly perhaps, platforms create a spatiality that hosts the activity, the acceptable norms, the rules of exit and entry to the activity, and guide the level of participation.¹⁵³ The normative similarities between fiduciary power and platform power provides the justification for regulating market-constituting platforms. However, the concrete legal implications require modeling the duty of loyalty concept so that it fits the power exerted by these actors.

Participants have very little control over the conditions of the market and its design, and they trust platforms to construct a market that is stable, open, safe, and includes due process.¹⁵⁴ If we adapt the duty of loyalty to the problem of market-constituting platforms, the implication will be that platforms have to respect the interests of their users and their expectation of a stable, open, and safe market with fair procedural rules for all participants. This is a normative requirement that fits platforms' involvements in private law transactions.¹⁵⁵ The concrete implications of this duty are discussed in Part IV.

This conceptualization represents a middle ground between two competing understandings of platforms. Online platforms maintain that they are technological companies that allow users to connect.¹⁵⁶ This understanding reduces their role to neutral facilitators. Conversely, some conceptualize platforms using traditional legal categories and claim they are de facto

152. Reviews on Airbnb are written by guests and hosts. *How Do Reviews Work for Stays?*, *supra* note 151. The platform has dispute moderation for reviews. Airbnb Help Center, *Airbnb's Dispute Moderation for Reviews*, *supra* note 151. For nudging behaviors, see Baer, *supra* note 12, and Benner, *supra* note 96. For Uber, see Calo & Rosenblat, *supra* note 36, at 1630–31.

153. See *supra* notes 90–92 and accompanying text.

154. Cf. Balkin, *supra* note 17, at 1221–22 (explaining we trust platforms with our personal information). My argument similarly relies on the trust that platforms encourage in order for their service to succeed. This trust however is broader, and is not limited to information. Users trust platforms' role in securing the activity and designing fair rules. See *id.*

155. See *supra* note 150 and accompanying text.

156. For Uber's Terms of Service, see *Uber B.V. v. Aslam* [2018] EWCA ((Civ)) 2748 [29] (appeal taken from EAT) (Eng.), *aff'd*, [2021] UKSC 5 (“The Services constitute a technology platform that enables users to pre-book and schedule transportation, logistics, delivery and/or vendors services with independent third party providers.”); *O'Connor v. Uber Techs., Inc.*, 82 F. Supp. 3d 1133, 1135 (N.D. Cal. 2015) (“Uber bills itself as a ‘technology company,’ not a ‘transportation company”); Janger & Twerski, *supra* note 3, at 266–67.

employers of service-providers,¹⁵⁷ or de facto sellers for the purposes of product liability law.¹⁵⁸ The conceptualization of market-constituting platforms does not contend that platforms control users' activity entirely, as the employer or seller conceptualization may suggest, nor does it belittle the role of the platform, as the technological-facilitated argument implies. Instead, it discerns the concrete function of access platforms and draws the normative implications of this control.

IV. THE LEGAL DUTIES OF MARKET-CONSTITUTING PLATFORMS

The duties of market-constituting platforms are to create a market that is procedurally fair, open, stable, and safe. Platforms owe these duties to all market participants, owners and renters, buyers and sellers, and service providers and service recipients.¹⁵⁹ This concept does not address possible conflicts between interest groups within a given platform. A platform has wide discretion to regulate possible conflicts within its spatiality. The duties of market-constituting platforms are owed toward all possible users, because all users share a vulnerability in the market.¹⁶⁰

These general duties translate to specific requirements. I give a few examples here, and discuss mitigating discrimination, protecting from sexual harassment, fair entry and exit rules, the duty to give prior notice, and liability for harm.¹⁶¹ These suggested rules do not make up a final list. As the need arises, and other challenges emerge, it may be necessary to add concrete duties. It is also important to note that market-constituting platforms are not identical, and therefore duties cannot be applied uniformly. Rather,

157. Sandra Fredman & Darcy Du Toit, Note, *One Small Step Toward Decent Work: Uber v. Aslam in the Court of Appeal*, 48 *INDUS. L.J.* 260, 260–61 (2019); Tomassetti, *supra* note 76, at 4 (“Some of more contentious regulatory challenges that implicate the matching mythos involve platforms of the Uber ilk – companies that provide branded services and exercise substantial control over the workers who interact with customers, depriving the workers of the ability to carry out business independently.”). I do not argue with this argument, but suggest that in addition to employment, Uber may also owe duties as an actor who constitutes a market.

158. *Oberdorf v. Amazon.com Inc.*, 930 F.3d 136, 140, 143, 145 (3d Cir. 2019), *vacated and reh'g en banc granted*, 936 F.3d 182 (3d Cir.).

159. One of the claims raised against the public fiduciary theory is that the duty of loyalty cannot be owed to parties with conflicting interests. Davis, *supra* note 145, at 1160–63. While owners and renters, buyers and sellers, service providers and service recipients may have conflicting interests, they also have shared interests as participants in the market. See, e.g., Balkin, *supra* note 17, at 1220–23. The article discusses these interests.

160. See *supra* notes 96–105 and accompanying text; cf. Daniel Susser, Beate Roessler & Helen Nissenbaum, *Online Manipulation: Hidden Influences in a Digital World*, 4 *GEO. L. TECH. REV.* 1, 2–4 (2019) (arguing that users of digital platforms are vulnerable to manipulation, defined as “the covert subversion of another person’s decision-making power”).

161. See *infra* Sections IV.A–D.

we must consider the level of involvement of a given platform measured by the four-factor test and the characteristics of each particular market. The purpose of the examples surveyed here is to demonstrate the kind of analysis that gives content to the new legal category of market-constituting platforms.

A. Discrimination and Sexual Harassment

Evidence of discrimination in the sharing economy has led scholars to argue that access platforms have a responsibility to mitigate discrimination practiced by users.¹⁶² To support this claim, some scholars argue that platforms are under an obligation to mitigate discrimination because they have the ability to control its scope.¹⁶³ Others use current legal categories and maintain that Airbnb is a de facto real estate broker¹⁶⁴ or a chain of hotels.¹⁶⁵ I argue that the conceptualization of platforms must address the new activity and inner-workings of these markets, and provide a broad conceptualization that fits a category of platforms, rather than one single example.

It is the duty of market-constituting platforms to establish a market that is, among other things, open and safe.¹⁶⁶ Platforms have to constitute a market and organize its conditions so that it is not easy for a user to discriminate. A platform may not be able to eradicate discrimination altogether, nor is it its duty, but it can limit the number of opportunities available to discriminate and mitigate the overall level of discrimination

162. Jason McCloskey, Note, *Discriminatorybnb: A Discussion of Airbnb's Race Problem, Its New Anti-Discrimination Policies, and the Need for External Regulation*, 57 WASH. U. J.L. & POL'Y 203, 204–05, 217, 220 (2018) (arguing in favor of imposing liability on Airbnb for the discriminatory actions of its hosts).

163. Barzilay & Ben-David, *supra* note 60, at 399 (“call[ing] for contemplating new mechanisms for promoting work equality” and “suggest[ing] that we could use platform technology itself to promote Equality-By-Design (EbD) as a mechanism toward enhancing gender parity in platform-facilitated labor”).

164. Jefferson-Jones, *supra* note 4, at 14 (“[O]nline lodging platforms, such as Airbnb, are ‘transactional intermediaries’ that are similar in function to real estate brokers and agents and, therefore, should be held to the same standards of accountability and liability for discrimination.”).

165. Leong & Belzer, *supra* note 7, at 1298–99 (arguing that Airbnb fills the same consumer need as a hotel chain and that Uber fills the consumer need of a taxi ride).

166. See *supra* notes 150–54 and accompanying text.

in the market.¹⁶⁷ Similarly, a market has to be safe, and platforms have to create conditions that protect users who are vulnerable to sexual harassment.¹⁶⁸

Discrimination is often difficult to prove, and difficult to fight.¹⁶⁹ However, the online world offers new techniques to combat discrimination. Online platforms can and should design features that deter discriminatory practices. For example, Airbnb declared that posting a listing using discriminatory language may cause suspension unless the user is willing to edit the listing.¹⁷⁰ While this rule is important, it is not enough. Discrimination is rarely openly disclosed.¹⁷¹ Another, stronger design feature is to block the option to rent out a home on certain dates, once the host has refused to rent it to a guest from a protected class for reasons of lack of availability.¹⁷²

167. Cf. Naomi Cahn, June Carbone & Nancy Levit, *Discrimination by Design?*, 51 ARIZ. ST. L.J. 1, 58 (2019) (arguing that platforms have a duty to test their design for gender disparities and to improve their design following these tests).

168. See *infra* notes 187–91 and accompanying text.

169. Michael Selmi, *Proving Intentional Discrimination: The Reality of Supreme Court Rhetoric*, 86 GEO. L.J. 279, 287 (1997) (“To reach the core of this question, it is necessary to determine what can properly be treated as intentional discrimination—a question that proves more difficult to answer than it may first appear. Indeed, intentional discrimination is too often defined by what it excludes, rather than by what it includes. Requiring proof of intent to establish a constitutional violation is said to mean that such a claim cannot be based solely on the effects of the challenged practice or policy, unlike certain statutory contexts in which it is possible to establish a claim based purely on the discriminatory effects of the practice or policy without proving intent.”); see also Michael J. Zimmer, *A Chain of Inferences Proving Discrimination*, 79 U. COLO. L. REV. 1243, 1244 (2008) (arguing that intent to discriminate is the most problematic element of antidiscrimination law and the hardest to prove).

170. Madison Malone Kircher, *Airbnb Will Now Require Hosts to Agree to Anti-Discrimination Policy*, N.Y. MAG. (Nov. 1, 2016), <https://nymag.com/intelligencer/2016/11/new-airbnb-mandatory-anti-discrimination-policy-for-hosts.html> [<https://perma.cc/WM9Y-345F>].

171. See, e.g., Megan Rose Dickey, *How Airbnb Handles Discrimination Claims*, TECHCRUNCH (Nov. 19, 2019, 3:32 PM), <https://techcrunch.com/2019/11/19/how-airbnb-handles-discrimination-claims/> [<https://perma.cc/YBE6-WUJ9>] (telling the story of a guest whose reservation was cancelled after she mentioned her guide dog would accompany her and how Airbnb did not initially disclose its recourse actions with the host and only decided to suspend the host after the guest contacted TechCrunch); see also Benjamin Edelman, Michael Luca & Dan Svirsky, *Racial Discrimination in the Sharing Economy: Evidence from a Field Experiment*, 9 AM. ECON. J. APPLIED ECON. 1, 1–2, 9, 19–20 (2017).

172. Norrinda Brown Hayat, *Trying to Appear “Not Too Black” on Airbnb Is Exhausting*, CNN (Nov. 4, 2016, 10:48 PM), <http://www.cnn.com/2016/09/12/opinions/too-black-rent-airbnb-hayat/index.html> [<https://perma.cc/D3LH-9LWM>] (“Among other actions, Airbnb’s plans to address discrimination on its site include developing a feature to help prevent hosts from rejecting one guest by alleging that their space is unavailable and then renting to another, by automatically blocking the calendar for subsequent reservation requests for that same trip.”).

This and other similar features are measures that platforms can and should take to actively deter and reduce discrimination.

Some platforms have already taken voluntary steps to address discrimination.¹⁷³ Airbnb and Uber issued community commitments that every user must accept in order to participate in the market.¹⁷⁴ The efficiency of community commitments is disputed.¹⁷⁵ Most scholars agree they offer a fairly limited response to discrimination.¹⁷⁶ Airbnb also commissioned a report to review its policies and suggest ways to address these problems.¹⁷⁷ The report suggested replacing personal photos with objective information, and increasing the “Instant Booking” feature that does not require the host’s approval prior to the booking.¹⁷⁸ Airbnb did not endorse these steps, but it does encourage hosts to choose the instant booking option, as a way to achieve the Superhost status.¹⁷⁹

Some of these steps may indeed mitigate discrimination, but they also obscure the intimate and personal character of some of these transactions in the market.¹⁸⁰ Airbnb, Turo, and other sharing economy platforms

173. See *infra* notes 174–80 and accompanying text.

174. Airbnb’s community commitment states that “By joining this community, you commit to treat all fellow members of this community, regardless of race, religion, national origin, disability, sex, gender identity, sexual orientation or age, with respect, and without judgment or bias.” Julie286, *Age Discrimination and New Air BNB Policy*, AIRBNB CMTY. CTR. (Aug. 9, 2016, 11:21 AM), <https://community.withairbnb.com/t5/Help/Age-Discrimination-and-new-Air-BNB-Policy/td-p/191482> [<https://perma.cc/XT5F-QEV9>]. Uber’s policy similarly states “when you use Uber you will meet people who may look differently or think differently from you. Please respect those differences. We believe that everyone should feel supported and welcomed when they use the Uber apps.” See *Uber Community Guidelines*, UBER, <https://www.uber.com/legal/community-guidelines/us-en> [<https://perma.cc/5FJB-FFK5>] (Apr. 22, 2020).

175. McCloskey, *supra* note 162, at 215–18.

176. *Id.*; see also Norinda Brown Hayat, *Accommodating Bias in the Sharing Economy*, 83 BROOK. L. REV. 613, 615–16 (2018).

177. MURPHY, *supra* note 66, at 10.

178. *Id.*

179. Allyson E. Gold, *Community Consequences of Airbnb*, 94 WASH. L. REV. 1577, 1628 (2019).

180. DESTABILIZED PROPERTY, *supra* note 43, at 130 (“The access economy . . . nonetheless relies on mitigating mechanisms, such as photos, descriptions, and public reviews, to replace the trust of dealing with family, friends, and neighbors. Interaction with strangers in one’s home can be scary, and rebuilding trust is one of the most important innovations of the access economy. Regulating the market aspects of access economy transactions is challenging. Balancing market norms and the intimate dimensions of the property is not easy, but it is still necessary.” (citing Paolo Parigi & Karen Cook, *Trust and Relationships in the Sharing Economy*, 14 CONTEXTS 18, 18 (2015))).

allow people to rent out their intimate property to strangers.¹⁸¹ Building and maintaining trust is an important innovation of the sharing economy.¹⁸² Personal features such as photos, descriptions, and reviews quiet some of the concerns of dealing with unfamiliar people.¹⁸³ A platform design needs to deter discrimination while still preserving the personal feel of the market.

In addition to discrimination along racial or ethnic lines, there is also evidence of gender biases and sexual harassment in online platforms' activity.¹⁸⁴ Documentation of biases clashes with our expectations of color-blind and gender-blind online economy.¹⁸⁵ As Naomi Cahn et al. explain:

Platform world promises to be part of a large-scale redesign of the production of goods and services, producing a societal transformation on the order of the industrial revolution. Digitally based platforms like Uber, TaskRabbit, and Airbnb offer flexibility in hours and the ability to have arms-length, impersonal, and often anonymous interactions that match the personal preferences of buyers and sellers.¹⁸⁶

The reality of online economy does not live up to this promise. Reviews are a crucial feature of many online platforms, and studies have found that they reflect gender and racial biases.¹⁸⁷ Other design features affect biases especially when it comes to a service given, and the price one sets for this service.¹⁸⁸ Moreover, women are vulnerable to online harassment, and they report that users send them pornographic texts and pictures.¹⁸⁹ They are also physically vulnerable when the service requires interactions with service recipients.¹⁹⁰

Cahn et al. argue that platforms create infrastructure from which they profit and they are therefore under an obligation to consider whether their design perpetuates, multiplies, and reinforces discrimination.¹⁹¹

181. *Id.*

182. Parigi & Cook, *supra* note 180, at 18.

183. See DESTABILIZED PROPERTY, *supra* note 43, at 130.

184. Schoenbaum, *supra* note 67, at 1045; see also Cahn, Carbone & Levit, *supra* note 167, at 1–2.

185. Cahn, Carbone & Levit, *supra* note 167, at 8.

186. *Id.*

187. *Id.* at 30; David R. Hekman et al., *An Examination of Whether and How Racial and Gender Biases Influence Customer Satisfaction*, 53 ACAD. MGMT. J. 238, 256 (2010); Anikó Hannák et al., *Bias in Online Freelance Marketplaces: Evidence from TaskRabbit and Fiverr*, 2017 PROC. ACM CONF. ON COMPUT. SUPPORTED WORK & SOC. COMPUTING 1914, 1915, 1927, <https://dl.acm.org/citation.cfm?id=2998327> [<https://perma.cc/N5WU-BJHJ>].

188. Cahn, Carbone & Levit, *supra* note 167, at 4–6.

189. *Id.* at 43.

190. *Id.*

191. *Id.* at 66.

I agree that platforms should be obligated to test and adjust their design so as to mitigate discrimination and biases. However, I argue that the justification for such an obligation is rooted in the market these platforms constitute. Because platforms constitute a market and control its design and the activities they host, they hold unique power over market participants. Platforms have a responsibility to make sure this market is open and safe.¹⁹² In addition to its focus on the market, this argument adds to Cahn et al.'s persuasive thesis a broad and holistic conceptualization that attributes responsibility in a variety of legal issues.

Critics might argue that imposing duties to mitigate discrimination and create a safe environment for users turns online platforms into de facto employers.¹⁹³ The more protection a platform owes its users, the more the relationship resembles that of an employer and its employees. Indeed, both employers and actors who constitute a market manage a spatiality where people interact with one another, and both are responsible, at least to some extent, for these people's well-being. Nonetheless, their duties do differ. Employers are more involved with their employees' lives and working conditions and are therefore more responsible for their welfare.¹⁹⁴ Actors who constitute a market are not responsible for minimum wages, health benefits or paid leave.¹⁹⁵ Of course, an actor can be both a market-constituting

192. See discussion *supra* Section III.B (providing a normative argument for platforms' obligations towards users that relies, in part, on fiduciary law concepts).

193. Employers have a legal duty to create a safe environment, free from sexual harassment and discrimination. See, e.g., David Benjamin Oppenheimer, *Exacerbating the Exasperating: Title VII Liability of Employers for Sexual Harassment Committed by Their Supervisors*, 81 CORNELL L. REV. 66, 70–71 (1995) (“It is well established that sexual harassment constitutes unlawful sex discrimination under Title VII. A number of early cases, as well as the guidelines adopted by the Equal Employment Opportunity Commission (EEOC) in 1980, imposed absolute vicarious liability on the employer when an employee was harassed by a supervisor.” (footnotes omitted)); see also Estelle D. Franklin, *Maneuvering Through the Labyrinth: The Employers' Paradox in Responding to Hostile Environment Sexual Harassment—A Proposed Way Out*, 67 FORDHAM L. REV. 1517, 1519 (1999) (“When employers recognize that it is occurring at their workplace, or when they substantiate a complaint of sexual harassment, they must take some action against the harasser or face almost certain liability for the harassment.” (footnote omitted)).

194. See generally Seth C. Oranburg, *Unbundling Employment: Flexible Benefits for the Gig Economy*, 11 DREXEL L. REV. 1, 28 (2018).

195. Employees are entitled to certain protections and benefits. *Id.* (“[A]n employee is protected by a forty-hour, five-day workweek with time-and-a-half pay for overtime (unless exempt). Other benefits required by law include workers' compensation, part-time disability, and the FMLA. Employees usually get health, dental, and vision insurance from employers, whereas independent contractors have to pay for that on their own. Employees

platform and an employer. For example, some argue that Uber is an employer of its drivers.¹⁹⁶ It is still be responsible as a market-constituting platform for its *riders*' well-being.

B. Fair Entry and Exit Rules

A market-constituting platform has an obligation to constitute a market that is procedurally fair and reasonably stable. Currently, continued activity in a market depends on a platform's discretion. Platforms may decide to suspend or ban users that do not comply with their policies.¹⁹⁷ In these cases, users risk losing access to a market that provides them with a source of income or a useful service.¹⁹⁸ Indeed, platforms' decisions to suspend a user may be plausible. Users may discriminate, run up prices in time of crisis or engage in bullying other users.¹⁹⁹ Nonetheless, even in these cases, decisions that result in barring entry and forcing exit rules must follow certain procedural rules.

Before an access platform decides to ban a user from participating in its market, it has to conduct a fair process, one that allows the user to be

are usually included in a retirement plan, often with an employer's matching contribution, such as a 401(k) or a 403(b). Employee pensions are now less common, but at one time they were quite common. Life insurance is not required by law, but employees often receive it as part of their package, plus paid vacation time." (citing *Hire and Manage Employees*, U.S. SMALL BUS. ASS'N, <https://www.sba.gov/business-guide/manage-your-business/hire-manage-employees#section-header-6> [<https://perma.cc/H94Y-E2U4>])).

196. See *supra* notes 75, 157 and accompanying text.

197. See *supra* note 92 and accompanying text; see also Jason Murdock, *Uber Will Block You for Six Months if You Have Less than a Four Star Rating*, NEWSWEEK (Sept. 5, 2018, 8:50 AM), <https://www.newsweek.com/uber-will-block-you-six-months-if-you-have-less-four-star-rating-1106010> [<https://perma.cc/3DXM-WHX8>]; Biz Carson, *Here's What Can Get You Banned as a Rider from Uber*, INDEP. (Dec. 8, 2016), <https://www.independent.co.uk/life-style/gadgets-and-tech/uber-rating-banned-passenger-a7463866.html> [<https://perma.cc/C3JC-8Z7V>].

198. See Stemler, *supra* note 32, at 202 ("Airbnb reports that 45% of their hosts in Portland, Oregon are 'self-employed, freelancers, or part-time workers, and 12% of these hosts have used Airbnb income to support themselves while launching a new business. Uber reports that 74% of its drivers do so 'to help maintain a steady source of income to supplement unpredictable earnings.'" (first citing Molly Turner, *The Airbnb Community's Economic Impact in Portland*, AIRBNB (Apr. 22, 2014), <http://publicpolicy.airbnb.com/airbnb-communitys-economic-impact-portland> [<https://perma.cc/M54J-PSGU>]; and then citing Jonathan Hall, *In the Driver's Seat: A Closer Look at the Uber Partner Experience*, UBER NEWSROOM (Jan. 22, 2015), <https://newsroom.uber.com/in-the-drivers-seat-understanding-the-uber-partner-experience> [<https://perma.cc/XCN3-T9W5>])).

199. See Nicas, *supra* note 68 (Amazon and eBay suspend sellers who run up prices in the midst of Coronavirus pandemic); *supra* notes 56–59 and accompanying text (discrimination practiced by users); *supra* notes 189–90 and accompanying text (sexual harassment).

heard, gives notice, and provides an explanation for the decision.²⁰⁰ The right to be heard gives the user voice and aids the platform in determining the facts of the case.²⁰¹ Moreover, denying the right to be heard is problematic because “a lack of personal participation causes alienation and a loss of that dignity and self-respect that society properly deems independently valuable.”²⁰² Several scholars emphasize the importance of digital procedural justice of internet intermediaries, and focus in particular on transparency and accountability.²⁰³ I advocate procedural justice requirements that pertain to participation in the market. As platforms govern the activity in the market, they have a responsibility to make the decision-making process fair and transparent.

C. Prior Notice

The duty to constitute a reasonably stable market requires that users be given prior notice before the platform decides to shut down activity in a certain area. Consider Uber’s and Lyft’s operation in Austin, Texas. After local voters rejected a proposal that would allow ride-sharing companies to self-regulate, and upheld stricter regulation, Uber and Lyft pulled out of the city immediately, within a couple of days.²⁰⁴ Users, both drivers and riders, were given no time to adjust to the new reality and find

200. Cf. S. Umit Kucuk, *Consumerism in the Digital Age*, 50 J. CONSUMER AFFS. 515, 531 (2016) (discussing consumer vulnerabilities in the digital age).

201. Victor D. Quintanilla, *Taboo Procedural Tradeoffs: Examining How the Public Experiences Tradeoffs Between Procedural Justice and Cost*, 15 NEV. L.J. 882, 916 (2015).

202. Jerry L. Mashaw, *The Supreme Court’s Due Process Calculus for Administrative Adjudication in Mathews v. Eldridge: Three Factors in Search of a Theory of Value*, 44 U. CHI. L. REV. 28, 50 (1976).

203. REBECCA MACKINNON, *CONSENT OF THE NETWORKED: THE WORLDWIDE STRUGGLE FOR INTERNET FREEDOM* 81 (2012) (arguing that without transparency and accountability in the use of information, democracy will be eroded); JULIE E. COHEN, *CONFIGURING THE NETWORKED SELF: LAW, CODE, AND THE PLAY OF EVERYDAY PRACTICE* 224 (2012) (discussing the need for operational transparency); Derek E. Bambauer, *Cybersieves*, 59 DUKE L.J. 377, 379 (2009) (arguing for a process-based method for evaluating the efforts of countries to limit materials online); Ira Steven Nathenson, *Super-Intermediaries, Code, Human Rights*, 8 INTERCULTURAL HUM. RTS. L. REV. 19, 19 (2013) (arguing in favor of digital due process).

204. Alex Hern, *Uber and Lyft Pull Out of Austin After Locals Vote against Self-Regulation*, *GUARDIAN* (May 9, 2015, 4:45 AM), <https://www.theguardian.com/technology/2016/may/09/uber-lyft-austin-vote-against-self-regulation> [<https://perma.cc/EPK9-LUHX>] (“[R]ide-sharing drivers are required to pass fingerprint-based background checks, clearly mark their cars with the ride-sharing company’s logo, and not pick up or drop off their passengers in certain lanes of the city’s streets.”).

alternatives.²⁰⁵ Drivers depend on activity in the market for their livelihood, and riders may depend on the transportation service in lieu of buying a car.²⁰⁶ This specific story has a happy ending. Market forces prevailed and alternative platforms quickly stepped in,²⁰⁷ but this will not always be the case. This example reveals the risk that all users assume in choosing to participate in a market dominated by a powerful platform.

I argue that platforms have an obligation to give proper notice before relocating or shutting down activity in a certain area. Notice is a strong legal concept both theoretically and practically.²⁰⁸ It is fundamentally tied to due process,²⁰⁹ and in many countries, notice is required when dismissing an employee.²¹⁰ The clear purpose of notice in employment law is to aid employees to transition out of a job.²¹¹ Although platforms are not necessarily employers, the same rationales apply. The prior notice obligation provides a safety net that protects market participants from a sudden change of practices. Notice should apply to all participants, not only workers, but also riders, owners, renters, and buyers.

Importantly, the platform is not obligated to continue to operate when it is not profitable. Instead, it has to give notice of a few weeks so that users can search for an alternative. Although this requirement will probably result in a higher premium for consumers, it is necessary to allow users to plan ahead and to make these markets a more secure choice.

205. *Id.*

206. In this particular case, there were other companies that stepped in. See Dan Solomon, *One Year After Fleeing Austin, Uber and Lyft Prepare a Fresh Invasion*, WIRED (July 5, 2017), <https://www.wired.com/2017/05/one-year-fleeing-austin-uber-lyft-prepare-fresh-invasion/> [<https://perma.cc/422M-2P3V>].

207. *Id.*

208. Michael S. Catlett, Note, *Clearly Not Established: Decisional Law and the Qualified Immunity Doctrine*, 47 ARIZ. L. REV. 1031, 1031 (2005).

209. *Id.* (discussing the meaning and importance of the concept of notice in law).

210. Samuel Estreicher & Jeffrey M. Hirsch, *Comparative Wrongful Dismissal Law: Reassessing American Exceptionalism*, 92 N.C. L. REV. 343, 352–53 (2014) (“Virtually all of the surveyed jurisdictions prohibit unjust dismissals, and in each jurisdiction an unjust dismissal triggers a notice, or payment in lieu of notice, requirement. The concept behind this latter requirement is that notice periods can help employees transition out of a job and, in some cases, can serve as a type of severance payment reflecting prior service. In addition, some countries mandate that an employer provide an explanation for termination of an employee, which might also be thought to improve employer decision-making and thus reduce the incidence of unjust dismissal.” (footnotes omitted) (citing Richard I. Abrams & Dennis R. Nolan, *Toward a Theory of “Just Cause” in Employee Discipline Cases*, 1985 DUKE L.J. 594, 599–601, 610)).

211. *Id.*

D. Liability for Harm

Transactions in online markets may result in harm.²¹² Are market-constituting platforms liable for damages caused by one of the transacting parties? Liability for harm depends on whether the platform actively promotes a representation that it secures transactions.²¹³ Participants may believe that the platform screens vendors, hosts or drivers, or that it offers compensation when something goes wrong. If participants participate in the market because the platform cultivated a reputation that imbues trust among users, then the platform has a responsibility toward them.²¹⁴

There are two possible types of harm for which a market-constituting platform may be responsible. The first type concerns the sale of a faulty product. The *Oberdorf v. Amazon* case and many other similar cases involving product liability provide good examples.²¹⁵ The second type of harm concerns damages from problems in the execution of the transaction, resulting most often in a breach of contract. For example, a host that cancels the reservation minutes before the guests arrive, guests that trash the host's house, drivers that do not arrive to pick up the rider, and vendors that do not send the product in due time.²¹⁶ These two possibilities present different challenges.

Liability for faulty products is covered by product liability law. According to the law, a seller is liable for damage caused by a product in "defective condition unreasonably dangerous to the user" that caused physical harm

212. For discussions of product liability, see sources cited *supra* note 1, and also see Alan Yuhas, *Airbnb Hosts Return to Find Home Trashed After 'Drug-Induced Orgy,'* GUARDIAN (Apr. 30, 2015, 5:08 PM), <https://www.theguardian.com/technology/2015/apr/30/airbnb-calgary-home-trashed-drug-induced-orgy> [<https://perma.cc/P8KS-T2U7>].

213. *Cf.* Janger & Twerski, *supra* note 3, at 263 (arguing that customers rely on Amazon's reputation in purchasing goods).

214. *Id.*

215. See sources cited *supra* note 1.

216. See Chris80, *House Trashed, Wrecked, Destroyed by Guest*, AIRBNB CMTY. CTR. (Apr. 4, 2016, 10:45 AM), <https://community.withairbnb.com/t5/Hosting/House-trashed-wrecked-destroyed-by-guest/td-p/76067> [<https://perma.cc/59LL-DFGV>] ("I just had a guest check out and they destroyed my house, causing over \$3500 in damages and lost bookings."); see also Brendan Dorsey, *Why Your Uber Driver May Force You to Cancel Your Ride and Pay a Fee*, POINTS GUY (Sept. 12, 2018), <https://thepointsguy.com/news/uber-drivers-cancellation-fee-scam/> [<https://perma.cc/8BDJ-UGES>] (documenting the phenomenon of Uber drivers deceiving customers into late ride cancellations such that the drivers can collect a \$5 late cancellation fee without providing a ride).

to the user, the consumer, or their property.²¹⁷ This is a strict liability rule, which means that even if the seller has exercised all possible care in the preparation and sale of their product, the seller is liable for damages.²¹⁸ The rationale behind the strict liability standard is to create “incentives for [sellers] to deal only with reputable, financially responsible manufacturers and distributors, thereby helping to protect the interests of users and consumers.”²¹⁹

Cases like *Oberdorf* struggle with the definition of a seller in new online markets. While the actual seller is a third-party vendor, Amazon is highly involved in the sale, and in certain cases, in the process of supplying the product.²²⁰ Nonetheless, it does not comfortably fit the category of a seller.²²¹ Courts repeatedly refuse to impose liability on Amazon because “the sale did not include transferring ownership or possession of the product.”²²² And yet, Amazon’s role should not be understated. Amazon defines the market and controls the visibility and success of different vendors.²²³ It is in a position to screen vendors and ensure that vendors have appropriate insurance.²²⁴ As Edward Janger & Aaron Twerski explain:

Amazon exercises control over each sale through a host of mechanisms that maximize its profit and determine who will buy what from whom. First, by selling priority space to the highest bidder, it controls the likelihood that the product will be seen by a potential buyer. Second, by selling key words to the highest bidder, it increases the chance that a buyer will be directed to the product that Amazon prefers. Third, by allowing substitution of products from different third-party sellers who have placed their products in Amazon’s inventory, it effectively makes a sale that differs from the one described in the “Buy Box.” The product may be the same, but the product may not have been supplied to Amazon by the seller identified in the “Buy Box.” Fourth, by confusing the various forms

217. RESTATEMENT (SECOND) OF TORTS § 402A (AM. L. INST. 1965); *see also* RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 1 cmt. e (AM. L. INST. 1998).

218. RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 1 cmt. e.

219. *Id.* § 2 cmt. a.

220. *See* Janger & Twerski, *supra* note 3, at 266–67 (“FBA products are labeled by Amazon and usually shipped in Amazon boxes. For products that are FBA, Amazon handles all returns and customer service requests. FBA stands out for the amount of control Amazon takes over the product. Once an item is sent to one of Amazon’s fulfillment centers, the seller never touches it again. Amazon handles every other part of the transaction with the consumer.” (citing *Fulfillment by Amazon: Save Time and Help Grow Your Business with FBA*, AMAZON, <https://sell.amazon.com/fulfillment-by-amazon.html> [<https://perma.cc/4PW7-FQVY>])).

221. It is possible that in some cases where the platform is so involved in the fulfillment of the product, it may be considered a seller after all.

222. *Oberdorf v. Amazon.com Inc.*, 930 F.3d 136, 157 (3d Cir. 2019) (Scirica, J., concurring in part and dissenting in part), *vacated and reh’g en banc granted*, 936 F.3d 182 (3d Cir.).

223. *See* Janger & Twerski, *supra* note 3, at 263.

224. *Id.* (citing *Oberdorf*, 930 F.3d at 142, 145).

of sales on Amazon, the consumer does not know for which sales Amazon is disclaiming liability.²²⁵

The rationales of product liability law apply here.²²⁶ Instead of using old categories, I propose creating a new category that applies to market-constituting platforms. In cases where the platform hosts a market for the sale of goods, and where the platform creates a representation that it secures the market, the platform should be liable for damages. As the platform is not a seller, the platform should be subject to liability only in cases where the vendor is not available for redress.²²⁷ Product liability laws need to be amended to include this new category. Alternatively, a new law that stipulates the duties of platforms is required, and product liability will be one of its terms.

The second type of harm refers to damages resulting from poor service, misuse of property, or substandard rentals.²²⁸ Some of these problems amount to a breach of contract between the seller and the buyer, the owner and the renter, or the service provider and the service recipients.²²⁹ Tort principles assign fault based on several elements: establishing duty, finding the breach of duty, causation, and damages.²³⁰ The identification of a duty

225. *Id.* at 272.

226. *See supra* note 219 and accompanying text; *see also* Richard C. Ausness, *Unavoidably Unsafe Products and Strict Products Liability: What Liability Rule Should Be Applied to the Sellers of Pharmaceutical Products?*, 78 KY. L.J. 705, 745–46 (1990) (“Many courts agree with the ‘safety incentive’ theory of strict liability. According to this view, product sellers have little incentive to spend money on product safety where they bear no responsibility for product-related injuries. By requiring product sellers to compensate injured consumers, strict liability forces them to choose between paying for the cost of product injuries or spending money on injury-prevention measures.” (footnotes omitted)).

227. *See Oberdorf*, 930 F.3d at 144 (using a four-factor test for ruling whether an actor is a seller, including “whether the actor is the ‘only member of the marketing chain available to the injured plaintiff for redress’” (quoting *Musser v. Vilsmeier Auction Co.*, 562 A.2d 279, 282 (Pa. 1989))).

228. *See, e.g., supra* note 212 and accompanying text.

229. *Cf.* Sandra Chutorian, Note, *Tort Remedies for Breach of Contract: The Expansion of Tortious Breach of the Implied Covenant of Good Faith and Fair Dealing into the Commercial Realm*, 86 COLUM. L. REV. 377, 378 (1986) (discussing breach of contract and possible damages).

230. Agnieszka A. McPeak, *Sharing Tort Liability in the New Sharing Economy*, 49 CONN. L. REV. 171, 190 (2016) (citing OLIVER WENDELL HOLMES, *THE COMMON LAW* 94 (1881); Thomas C. Grey, *Accidental Torts*, 54 VAND. L. REV. 1225, 1262 (2001)).

depends on various normative considerations.²³¹ A market-constituting platform may be responsible for damages, depending on the facts of the case.²³² However, even if the platform is not directly under a duty, it may be liable under principles such as vicarious liability or comparative fault principles.²³³ Tort law is therefore flexible enough to address platforms' responsibility. As the law of platforms develops, principles that directly relate to a platform's activity may evolve as well.

E. *The Limits of the Market-Constituting Platform Category*

As the central legal implications are now clear, it is important to mark the boundaries of the new legal category. The list of implications is by no means closed. Other implications may be added to it, as long as they are justified by the duty to constitute a market that is open, procedurally fair, stable, and safe.²³⁴ Nonetheless, the market-constituting platform is not a catch-all category. The platform is not responsible for all possible damages, nor is it required to provide long-term security.

Three main examples help clarify these boundaries. *First*, the market-constituting platform is not required to provide users with health or social benefits, unless it is established separately that the platform is effectively an employer.²³⁵ *Second*, unless otherwise implicated, the platform is not criminally responsible for acts performed by its users.²³⁶ *Third*, the market-

231. On normativity and tort law, see Ernest J. Weinrib, *Correlativity, Personality, and the Emerging Consensus on Corrective Justice*, 2 THEORETICAL INQUIRIES L. 107, 108–09, 113–14 (2001).

232. Agnieszka A. McPeak, *Regulating Ridesharing Through Tort Law*, 39 U. HAW. L. REV. 357, 360, 381 (2017).

233. See McPeak, *supra* note 230, at 191 (“Vicarious liability means that tortious acts of the wrongdoer are the responsibility of a third party who did not cause the harm personally. In many instances, that third party is a company or other entity with a business relationship with the wrongdoer. It is different than a direct claim against the company itself, such as a negligent supervision, retention, and hiring claim against the company. Rather, for vicarious liability, a company that did nothing wrong stands in the shoes of the wrongdoer and is on the hook to the plaintiff for the full extent of damages, often with a right of indemnity.” (citing Fowler v. Harper & Posey M. Kime, *The Duty to Control the Conduct of Another*, 43 YALE L.J. 886, 890–91 (1934))).

234. See *supra* note 154 and accompanying text.

235. Cf. *supra* note 195 and accompanying text (discussing employers' duty to provide benefits).

236. Cf. Ryan J.P. Dyer, Comment, *The Communication Decency Act Gone Wild: A Case for Renewing the Presumption Against Preemption*, 37 SEATTLE U. L. REV. 837, 837 (2014) (explaining the immunity from liability platforms receive with regard to content produced by users: “in the effort to unbind the ‘vibrant and competitive free market’ of ideas on the Internet, Congress enacted section 230 of the Communications Decency Act (CDA)[, which] grants immunity to ‘interactive computer service providers’ (ICSPs) from liability for information provided by a third party.” (quoting 47 U.S.C. § 230(b)(2), (c)(1))). I do not endorse expanding immunity to other criminal acts.

constituting concept does not entail responsibility for market participants who sell products in the platform's market and violate the intellectual rights of third-parties outside said market.²³⁷

These examples and others explain the boundaries of the category, and they do not negate liability of market-constituting platforms for these types of actions under different laws.

F. Legislation

All proposed rules represent a starting point for the analysis. Rules need to be developed, evaluated, and legislated. I recommend that the law of market-constituting platforms be regulated as part of comprehensive legislation rather than developed gradually in case law. Legislation provides more certainty in the market and unlike common law, it does not depend on a particular set of facts.²³⁸ Although statutes tend to be less flexible, they can be subsequently interpreted by courts.²³⁹

Most importantly, courts are limited in their ability to invent legal doctrines, and they rely on current legal rules.²⁴⁰ As Lyria Bennet Moses explains in the similar context of adapting the law to technological changes, "A proposal for judicial law reform is not like a proposal for new legislation; there is no guarantee that the changes one wishes to make will fit into existing common law paradigms."²⁴¹ Finally, judges look at one case at a time and a statute has a broader perspective that can apply to multiple platforms.²⁴²

A case-by-case decision-making process too often results in exempting the platform from liability because platforms do not easily fit traditional

237. Cf. Kurt M. Saunders & Gerlinde Berger-Walliser, *The Liability of Online Markets for Counterfeit Goods: A Comparative Analysis of Secondary Trademark Infringement in the United States and Europe*, 32 NW. J. INT'L L. & BUS. 37, 38–39 (2011) (discussing the secondary market for trademark infringement by online market operators).

238. See Lyria Bennett Moses, Comment, *Adapting the Law to Technological Change: A Comparison of Common Law and Legislation*, 26 U.N.S.W. L.J. 394, 397 (2003); see also Cass R. Sunstein, *On Analogical Reasoning*, 106 HARV. L. REV. 741, 746, 750 (1993).

239. See Moses, *supra* note 238, at 403.

240. See *S. Pac. Co. v. Jensen*, 244 U.S. 205, 221 (1917) (Holmes, J., dissenting) ("[J]udges do and must legislate, but they can do so only interstitially . . ."); Moses, *supra* note 238, at 406 ("While judges frequently can choose how the law is formulated and applied, there are bounds."); see also *Breen v. Williams* (1996) 186 CLR 71, 115 (Austl.) ("Judges have no authority to invent legal doctrine that distorts or does not extend or modify accepted legal rules and principles.").

241. Moses, *supra* note 238, at 406.

242. Cf. *id.* at 407 (discussing the broader perspective of legislation in the context of general technological change).

categories.²⁴³ Thinking of platforms as constituting a market circumvents this difficulty. It provides a strong legal foundation for regulating platforms and paves the way for a new legal field based on legislation first and then continued development by courts.

V. CONCLUSION

In the midst of COVID-19 pandemic, Amazon and eBay suspended sellers who were running up prices for bottles of hand sanitizer, wipes and face masks.²⁴⁴ Do they have a legal obligation to make sure the market they are hosting is fair? If Amazon is a neutral platform, why does it interfere with the prices set by the seller? Most of us condemn price gouging and eagerly support the platforms' action. However, we do not need to accept platforms' actions as a token from a benefactor, but rather understand these measures as part of the platforms' duties toward participants in the markets they constitute.

Platforms constitute a market, and they have duties toward participants in the market.²⁴⁵ This argument allows us to see the common thread of many different, seemingly isolated legal disputes. Discrimination in online markets, product liability, liability for harm, and consumer protection in platforms such as Airbnb, Uber, Amazon, eBay and TaskRabbit are not a bundle of unrelated legal issues. They are all part of the emergent legal field of online marketplaces.

This Article argues that constituting a market entails responsibility. This responsibility is not simply ethical or moral, it is a legal responsibility to design a market that is safe and procedurally fair, open, and reasonably stable. Some legal implications were discussed, including the duty to mitigate discrimination, the duty to give prior notice, the duty to provide fair entry and exit rules, and liability for harm. These implications are meant to be examples that mark the starting point for designing comprehensive legislation that regulates the duties of market-constituting platforms.

243. See *supra* notes 1, 55 and accompanying text.

244. See Nicas, *supra* note 69.

245. See *supra* Section III.B.