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### Pluralism and Regulatory Response to the Sharing Economy

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Cambridge Handbook on Law and Regulation of the Sharing Economy  
(Cambridge University Press 2018).*

## **PLURALISM AND REGULATORY RESPONSE TO THE SHARING ECONOMY**

Erez Aloni\*

*Abstract:* Providers use platforms in dissimilar ways. Some providers create new capacity and designate it for exclusively commercial use via platforms. For example, a provider buys a car that serves predominantly for driving paying passengers, converts a standard residential rental to a short-term rental, or works full-time via a platform. Conversely, other providers leverage their idle capacity and monetize it (e.g., a provider uses the family car to drive platform passengers in the evenings). This chapter argues that the distinction between new and idle capacity is a fundamental concept that should guide regulation of activities in the platform economy. Creating new capacity for platform use creates negative externalities that are likely to reduce choices for consumers and providers. Examples include reduction in the availability of traditional services (e.g., hotels, taxis), decline in availability of standard residential rentals, and cutbacks in protected employment opportunities. However, putting excess capacity to platform use produces lower negative externalities and can bring benefits: increasing the availability of flexible employment opportunities and expanding consumer market choice. The chapter deploys the theory of pluralism to support regulation that increases employee and consumer choices but also curbs harms attendant to the platforms and protects traditional services and institutions that are important to society.

### INTRODUCTION

Not all activities in the platform economy are commensurate. Some nonprofessional providers perform activities infrequently and through increased excess capacity (that is, using their surplus goods, time, or skills). Conversely, specialized providers conduct other activities at a commercial pace by harnessing assets designated primarily for the exchanges. The first set of activities, which I call “work in increased use of excess capacity,” generates more valuable choice to consumers and workers and often produces fewer negative externalities. The latter type of activity sometimes results, or risks resulting, in reduced choice for workers and consumers and often leads to more negative externalities than

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the first type. In this chapter I flesh out the differences between the two kinds of activity and argue that their dissimilarities warrant divergent regulatory responses.

Recent scholarship advancing a theory of pluralism in private law helps to show why the different activities deserve dissimilar regulatory regimes. Consequently, I build on existing literature about pluralistic theory, and develop it further, enlisting its principles to guide the regulation of the platform economy. As I explain below, pluralism charges that the state support increased choice for individuals by facilitating alternative economic and social spheres that embody diverse values. Promoting choice, however, does not mean deregulation but, rather, requires that the state establish a set of different valuable alternatives that safeguard individuals from possible free-market harms. Because work grounded in increased use of excess capacity engenders more choice for consumers and workers, pluralistic principles suggest that the state should encourage these kinds of activities by tailoring regulation to the activities in this category. By the same token, because commercial activities that are not based in increased use of excess capacity yield more negative externalities including reduced choice, lawmakers should adopt more rigorous and protective set of regulations to restrain such harms.

In what follows, I briefly canvass the origins, development, and principles of pluralistic theory. Next, I argue that we should distinguish between activities in the platform economy, based on where they fall on a spectrum of use of excess capacity. I submit that platform-generated activities that leverage increased use of excess capacity promote valuable choice, whereas activities that gravitate toward commercial work with little or no increased use of excess capacity can decrease it. Finally, I use pluralistic theory to underpin my suggestions for the regulation of economic activities facilitated by platforms.

A note about terminology: naming the economic model at stake is a source of fierce and important debate and is not an issue of mere semantics. Because “sharing” is a misnomer, and “gig” economy describes only part of the activities that platforms facilitate (further, its use distracts attention from commercial activities that are a big part of such activities), I employ the more neutral term “platform economy.”<sup>1</sup>

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<sup>1</sup> See Erez Aloni, *Pluralizing the “Sharing” Economy*, 91 WASH. L. REV. 1397, 1406–07 (2016) (critiquing the existing definitions of the platform economic).

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## I. A BRIEF INTRODUCTION TO AUTONOMY-BASED PLURALISM

The term “pluralism” has various meanings in legal academia and other academic disciplines. The version of pluralistic theory that I build on and develop here is an extension of various scholarly investigations. I refer particularly to “autonomy-based pluralism,” a theoretical approach that Hanoch Dagan explicated, primarily by relying on the seminal work of Joseph Raz on the connection between autonomy and pluralism.

For Raz, personal autonomy (to distinguish from moral autonomy) is both instrumentally valuable and a constituent of well-being because it enables individuals to control, navigate, and create good lives. Alternatively, in Raz’s favorite metaphor, it enables them to be the authors of their own lives. Hence, the life of an autonomous person “is, in part, of his own making.”<sup>2</sup> When individuals can shape their own lives, their self-definition and self-realization become conceivable; this, in turn, means that they can maximize their potential.<sup>3</sup> Raz proposes three conditions that are necessary to exercise such personal autonomy: first, an individual must have the mental and physical capabilities required to make rational choices and carry them out; second, individuals must be independent in their choices, which means they must be free from coercion and manipulation; third, an autonomous person must have an *adequate* range of choices from which to choose.<sup>4</sup>

Most important to this account is the third condition. In order to lead an autonomous life, having a choice and the ability to exercise choice are not sufficient conditions for autonomy: an adequate range of choices is a requisite condition. To illustrate, a man trapped in a pit with enough food for survival has the capacity to exercise choice but not enough options to live an autonomous life.<sup>5</sup> Raz states, “A person is autonomous only if he has a variety of acceptable options available to him to choose from, and his life became as it is through his choice of some of these options.”<sup>6</sup> An “adequate range” does not mean the quantity but the variety of alternatives. Many choices of the commensurate thing do not satisfy this

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<sup>2</sup> Joseph Raz, *THE MORALITY OF FREEDOM* 204 (1986).

<sup>3</sup> Joseph Raz, *Liberalism, Autonomy, and the Politics of Neutral Concern*, in 7 *MIDWEST STUDIES IN PHILOSOPHY* 202 (P. French, T. Uehling & H. Wettstein eds. 1982).

<sup>4</sup> Raz, *supra* note 2, at 373.

<sup>5</sup> *Id.* at 373-4.

<sup>6</sup> *Id.* at 204.

requirement.<sup>7</sup>

Valuing autonomy in this sense, Raz maintains, requires adoption of moral pluralism, “the view that there are various forms and styles of life which exemplify different virtues and which are incompatible.”<sup>8</sup> This view endorses the existence of various incompatible and valuable pursuits, relationships, and commitments that individuals can choose from as a means to exercise their autonomy. Razian pluralistic principles thus assume a meaningful range of worthwhile options as a precondition for autonomy. Worthwhile choices do not exist if a buyer can only choose from among a hundred similar houses; an adequate choice would be among a townhouse, an urban flat, and a suburban house.

This conception of autonomy-based pluralism leads Raz to the final relevant observation: the state’s role is to enable conditions that allow people to be the authors of their own lives. Hence, to ensure adequacy of choice, it is not enough that the state be committed to noninterference; rather, it is obligated to “create conditions which enable [its] subjects to enjoy greater liberty than they otherwise would.”<sup>9</sup>

Building on the Razian conceptions of autonomy and pluralism, Dagan’s recent work espouses pluralistic principles as the foundation for private-law theory.<sup>10</sup> His primary contributions relevant to this account are twofold. First, Dagan employs pluralistic theories other than Raz’s to formulate his concepts, and he also deploys Raz’s “value pluralism” to support his theory of the state’s role in regulation.<sup>11</sup> Value pluralism is predicated on the notion that because there exists a plurality of universal values, they cannot be ranked (incommensurable), and there is often conflict between them.<sup>12</sup> For our purposes, and in a simplified version, the

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<sup>7</sup> *Id.* at 375.

<sup>8</sup> Joseph Raz, *Autonomy, Toleration, and the Harm Principle*, in JUSTIFYING TOLERATION: CONCEPTUAL AND HISTORICAL PERSPECTIVES 155, 159 (Susan Mendus ed., 1988).

<sup>9</sup> Raz, *supra* note 2, at 18-19.

<sup>10</sup> See e.g., Hanoch Dagan, *Autonomy, Pluralism, and Contract Law Theory*, 76 L. & CONTEMP. PROBS. 19 (2013).

<sup>11</sup> Hanoch Dagan, *Pluralism and Perfectionism in Private Law*, 112 COLUM. L. REV. 1409, 1412 (2012).

<sup>12</sup> GEORGE CROWDER, LIBERALISM AND VALUE PLURALISM 44–56 (2002) (defining value pluralism based on four elements: (1) universal values (2) plurality (3) incommensurability (4) in conflict); WILLIAM A. GALSTON, LIBERAL PLURALISM: THE IMPLICATIONS OF VALUE PLURALISM FOR POLITICAL THEORY AND PRACTICE 5–6 (2002).

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relevant point is that because the world is composed of plural and diverse universal values, human beings assign a variety of values to the same experiences.<sup>13</sup> Second, Dagan imports Raz's observations to the private-law system, arguing that only a pluralistic approach can explain private-law doctrines and institutions. No single value can or should undergird the private-law structure; only a variety of values, and the balance among them, can serve as a foundation to the entire system of private law.

These two observations merge into one coherent theory concerning the state's role in supporting private-law institutions. Accordingly, Dagan holds that pluralism is grounded in respect for diverse values, or different balances of values, and in the promotion of autonomy that can only be achieved by having adequate and meaningful choices.<sup>14</sup> The role of pluralistic private law "is to offer a rich repertoire of forms of human interaction."<sup>15</sup> While the purpose of this structural pluralistic system is to foster autonomy, the structure incorporates various values beyond autonomy. Thus, Dagan asserts, the "law should facilitate (within limits) the coexistence of various social spheres embodying different modes of valuation."<sup>16</sup> At the same time, facilitating diverse legal options that embed various modes of valuation is not tantamount to embodying free-market principles. As Dagan notes, "[F]acilitation is rarely exhausted by a hands-off policy and a corresponding hospitable attitude to freedom of contract. Rather, facilitation requires the law's active empowerment in providing institutional arrangements, including reliable guarantees against opportunistic behavior."<sup>17</sup>

Dagan's insights are relevant beyond the scope of private law. They can and should serve as guidelines for regulating matters that traditionally fall under the rubric of public law, such as housing and transportation. The state's duty, as defined by Raz, is not limited, as between private parties: it is the state's role to assure the conditions for people to flourish.

Let us now see how pluralistic theory helps to illuminate issues concerning the platform economy and to provide general guidelines for that economy's regulation.

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<sup>13</sup> See e.g., Cass R. Sunstein, *Incommensurability and Valuation in Law*, 92 MICH. L. REV. 779, 780 (1994).

<sup>14</sup> Dagan, *supra* note 11, at 1435.

<sup>15</sup> *Id.* at 1432.

<sup>16</sup> *Id.* at 1424.

<sup>17</sup> *Id.* at 1429.

## II. THE SPECTRUM OF USE OF EXCESS CAPACITY

The platform economy expands valuable choice when it enables more activities in use of excess capacity. By “excess capacity” I mean activities that exploit the surplus of people’s unused or underused time, skills, or assets to create “more capacity than the owner can herself use at once and that can thereby be monetized.”<sup>18</sup>

Before I explain why one type of activity is choice-enhancing and the other is potentially choice-decreasing, one should understand the extent to which *both* activities—work in increased use of excess capacity and traditional work—are dominant in platform activity. That is, a key aspect of the platform economy, which we must take into consideration when discussing its regulations, is the distinction between exchanges based on leveraging surplus capacity and conventional exchanges that are not based on increased use of excess capacity. By failing to distinguish them, and by using terms such as “gig” or “sharing” economy, we blur the immense differences between these activities and qualify similar legal treatment for them. As stated, this is not merely semantics: platform firms often claim that their function is mainly to enable “gigs,” i.e., work through increased use of excess capacity. For example, in response to a court ruling that found a New York City short-term rental, facilitated by Airbnb, illegal,<sup>19</sup> Airbnb stated, “It is time to fix this law and protect hosts who occasionally rent out their own homes. Eighty-seven percent of Airbnb hosts in New York list just a home they live in—they are average New Yorkers trying to make ends meet, not illegal hotels that should be subject to the 2010 law.”<sup>20</sup> Airbnb’s supporters echo this idea by arguing that “[t]he services help provide lower-cost lodging to visitors, while allowing property owners to earn returns on underused assets.”<sup>21</sup> Similarly, in court filings Uber stated that the firm “merely provides a platform for people who own vehicles to leverage their skills and personal assets and connect with other

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<sup>18</sup> See Donald J. Kochan, *I Share, Therefore It’s Mine*, 51 U. RICH. L. REV. 909, 929 (2017).

<sup>19</sup> See *City of New York v. Carrey*, Nos. 13006002 and 1300736 (N.Y.C. Env’tl. Control Bd. May 9, 2013), <https://www.scribd.com/document/142650911/Decision-and-Order-for-NOV-35006622J>.

<sup>20</sup> See *Vacation Rental Site Airbnb Ruled Illegal in New York City*, FOX NEWS (May 21, 2013), <http://www.foxnews.com/travel/2013/05/21/airbnb-illegal-in-new-york-city.html>.

<sup>21</sup> Andrew Moylan, *RoomScore 2016: Short-Term Rental Regulation in U.S. Cities*, R STREET POLICY STUDY NO. 55 (Mar. 2016), <https://www.rstreet.org/wp-content/uploads/2016/03/RSTREET55.pdf>, at 1.

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people looking to pay for those skills and assets.”<sup>22</sup>

Although a vast portion of the work that platforms enable comprises activities based on use of idle capacity, a large segment of that economy encompasses full-time providers who use designated capital (goods employed primarily for this purpose) or rely on their platform-economy work as their main source of income. This segment of the platform economy is large not only in terms of number of participants and transactions but also because it yields a massive part of the platforms’ revenue. Moreover, despite rhetoric emphasizing the “gig” aspect, platform firms, especially in the transportation sector, often encourage commercial use; for example, by incentivizing drivers to work over 40 hours a week.<sup>23</sup>

Despite data limitations regarding the types of consumers and providers in the platform economy, the data are clear about the coexistence of these two types of activities (increased excess-capacity use and conventional use without increased excess capacity) and their prominence. For example, data on short-term rental platforms consistently show how activities vary regarding the extent of underutilization by lessors. Most properties offered by Airbnb lessors capitalize on their genuinely underutilized assets, but a substantial minority use Airbnb to rent their properties commercially. A study conducted by the Penn State University School of Hospitality Management and funded by the American Hotel and Lodging Association examined activities by lessors who posted properties on Airbnb in fourteen large United States metropolitan areas, from October 2014 to September 2015.<sup>24</sup> The study divided “hosts” (lessors) into three categories: those who offered an entire unit for a short time during the year, those who offered a unit for the entire year, and those who had two or more units on the platform. The results demonstrate that those who work with designated capital (property whose primary use is for

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<sup>22</sup> *Salovitz v. Uber Techs., Inc.*, No. A-14-CV-823-LY, 2014 WL 5318031, at \*1 (W.D. Tex. Oct. 16, 2014).

<sup>23</sup> *Uber Launches Power Driver Rewards to Compete with Lyft*, RIDESHARE DASHBOARD, (Mar. 10, 2016), <http://ridesharedashboard.com/2016/03/10/uber-launches-power-driver-rewards-to-compete-with-lyft/>; Brenton J Malin & Curry Chandler, *Free to Work Anxiously: Splintering Precarity Among Drivers for Uber and Lyft*, 10 COMMUN. CULT. CRIT. 382, 391-92 (2016).

<sup>24</sup> JOHN W. O’NEILL & YUXIA OUYANG, AM. HOTEL & LODGING ASS’N, FROM AIR MATTRESSES TO UNREGULATED BUSINESS: AN ANALYSIS OF THE OTHER SIDE OF AIRBNB (2016), [https://www.ahla.com/sites/default/files/2016-10/Airbnb\\_Analysis\\_September\\_2016.pdf](https://www.ahla.com/sites/default/files/2016-10/Airbnb_Analysis_September_2016.pdf).

short-term rentals), although the minority, are consistently present across all of the cities and are responsible for massive revenues for Airbnb. The study found that 2,772 full-time operators (those who made their unit or units available over 360 days a year) constitute 3.5% of the total lessors.<sup>25</sup> While this may seem like a small number, Airbnb revenue from these full-time operators was immense: in the period studied, they yielded \$347,479,616 for Airbnb, or 26% of Airbnb's total revenue in those locations.<sup>26</sup> Furthermore, the study found that lessors who rented two or more units for any amount of time constituted 16.1% of all operators.<sup>27</sup> Finally, mega-operators, defined by the study as hosts who rent more than three units (for any amount of time), constituted 6.5% of the hosts and yielded 24.6% of Airbnb's revenue, or \$328,299,944, in those cities during that period.<sup>28</sup> Data on users in other cities confirm similar results.<sup>29</sup>

For the transportation platforms, data do not exist on how many drivers monetize their underused private cars versus how many purchase a vehicle primarily for commercial rides. Nonetheless, several programs offered by platform transportation firms help drivers to access cars, which implies that drivers with designated vehicles are not a marginal occurrence. Uber, the largest platform transportation company, has programs enabling their drivers to rent, lease, or buy a car.<sup>30</sup> Uber's Xchange leasing program helps drivers with bad or no credit to lease a car,<sup>31</sup> without mileage restriction, and includes the maintenance of the vehicle.<sup>32</sup> Similarly, Lyft, Uber's main competitor, maintains the Express Drive Rental Car Program, which assists its drivers in renting a car.<sup>33</sup> The rental price depends on the number of hours the driver works for Lyft; the higher the number of hours worked, the cheaper the rental price.

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<sup>25</sup> *Id.* at *Key Findings*.

<sup>26</sup> *Id.* at *Appendix: Data Tables, Jan. 2016 Report*.

<sup>27</sup> *Id.* at *National Trends*.

<sup>28</sup> *Id.*

<sup>29</sup> See Erez Aloni, *Capturing Excess in the On-Demand Economy*, 39 U. HAW. L. REV. 315, 324 (2017).

<sup>30</sup> See *Vehicle Solutions*, UBER, <https://www.uber.com/drive/vehicle-solutions/>.

<sup>31</sup> See Eric Newcomer & Olivia Zaleski, *Inside Uber's Auto-Lease Machine, Where Almost Anyone Can Get a Car*, BLOOMBERG (May 31, 2016), <https://www.bloomberg.com/news/articles/2016-05-31/inside-uber-s-auto-lease-machine-where-almost-anyone-can-get-a-car>.

<sup>32</sup> See Harry Campbell, *Uber Vehicle Marketplace*, RIDESHARE GUY, <http://therideshareguy.com/uber-vehicle-marketplace/>.

<sup>33</sup> See *Express Drive Rental Car Program*, LYFT, <https://help.lyft.com/hc/en-us/articles/218196557-Express-Drive-Rental-Car-Program-#cost>.

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In addition to using goods and capital, providers in the platform economy can either work full time or capitalize on their unused or underused hours. The distinction in this case is between workers who use their underutilized labor or skills by working for platforms part time—selling labor-hours that are not available for their full-time job—and those who work full time for platform firms, just as incumbent employees do.

Because most platforms do not provide accurate data about their providers, we rely on alternative surveys and studies to understand the work patterns in platforms. A study by the Requests for Startups group surveyed approximately 900 workers in 78 platform firms, including Airbnb, Uber, Lyft, and TaskRabbit.<sup>34</sup> The authors examined the extent to which providers depend on the income they earn from platforms. If providers obtain most of their income from the platform, this is a good indication that the platform is their main source of employment. Relying partly on the platform income may indicate that it is a gig, a supplement to their main job. The survey found that 39% of workers rely on platform work for 25% of their income; 19% of workers surveyed earn 25–50% of their income from platform firms; 13% of workers, 50–75%; and 29% of workers, 75–100%.<sup>35</sup> Thus, in terms of use of hours, the workers in the platform economy reflect a spectrum in which some work part time, as a gig, while almost 30% use platforms as their primary or sole source of income. Similarly, a survey of approximately 600 Uber drivers, conducted in December 2014, found that almost 40% of Uber drivers had no other job; roughly 30% of drivers had another full-time job; and the other 30% had another part-time job.<sup>36</sup>

In conclusion, data on the use of capital and the number of hours invested in work reveal that activities in the platform economy lie on a spectrum ranging from small gigs leveraging surplus all the way to professional providers with designated capital who work commercially through the platforms. Next, I argue that these activities produce different

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<sup>34</sup> Jennifer Rossa & Anne Riley Moffat, *The Workers*, BLOOMBERG BRIEFS (June 15, 2015), <https://newsletters.briefs.bloomberg.com/document/4vz1acbgrxz8uwan9/the-workers-demographics>; Alison Griswold, *Young Twentysomethings May Have a Leg Up in the 1099 Economy*, MONEYBOX (May 22, 2015), [http://www.slate.com/blogs/moneybox/2015/05/22/1099\\_economy\\_workforce\\_report\\_why\\_twentysomethings\\_may\\_have\\_a\\_leg\\_up.html](http://www.slate.com/blogs/moneybox/2015/05/22/1099_economy_workforce_report_why_twentysomethings_may_have_a_leg_up.html).

<sup>35</sup> See Rossa & Moffat, *supra* note 34.

<sup>36</sup> Jonathan V. Hall & Alan B. Krueger, *An Analysis of the Labor Market for Uber's Driver-Partners in the United States*, 10 (Princeton Univ. Indust. Relations Section, Working Paper No. 587, 2015) (describing a survey conducted by the Benenson Survey Group per Uber's request).

levels of choice and negative externalities based on the level of increased excess capacity they leverage.

### III. THE PLATFORM ECONOMY AS A CHOICE-INCREASING MECHANISM

Looking through the lens of pluralistic theory, we can see that one virtue of the platform economy is that it extends valuable choices to both consumers and providers. The platform economy, de facto, enables and simplifies a set of activities, a sphere of exchanges based on transforming idle capacity (goods, capital, or time) into work. By furnishing technology that is available to many and relatively user-friendly, the platforms reduce entry barriers (e.g., expenses) to excess-maximizing transactions and ease the participation of nonprofessional providers. While work in increased use of excess capacity existed long before the emergence of platforms, the platforms make exchanges based on surplus between nonprofessional providers easier and more efficient than before.

For consumers, the platform economy creates another layer of market choice. Consumers have diverse needs, tastes, and preferences, and the platforms expand options for them. In a PwC survey, 86% of respondents familiar with the platforms agreed that they make life more affordable, and 83% agreed that they make life more convenient and efficient. This survey confirms that the platforms satisfy different needs and preferences for consumers.<sup>37</sup>

Short-term rental platforms, for example, facilitate the option of staying in someone else's permanent home for a short period. In making this alternative more easily available than it was before, this option appeals to consumers who care more about price, as short-term rentals are often cheaper than hotels. This opportunity is also attractive to travelers who prefer experiencing a destination from a local resident's point of view. Conversely, other travelers may be more risk-averse and want to avoid any problem stemming from dealing with private individuals, or they prefer a hotel's scenery or cleanliness, or they care less about cost. A similar distinction applies to the transportation platform firms: they offer another layer of choice to consumers. Some passengers prefer traditional taxis, perhaps because they do not like waiting for a ride; or they perceive taxis as safer; or they want to pay cash or do not have a smartphone. Yet,

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<sup>37</sup> PRICEWATERHOUSECOOPERS, CONSUMER INTELLIGENCE SERIES: THE SHARING ECONOMY 20 (2015), <http://www.pwc.com/us/en/industry/entertainment-media/publications/consumer-intelligence-series/assets/pwc-cis-sharing-economy.pdf>.

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others favor the lower cost of the platform rides and the technological benefit of seeing where the driver is. It is not surprising, then, that in the PwC survey, 32% of respondents indicated that “more choice in the marketplace” is a strong selling point for the transportation platform firms.<sup>38</sup> The bottom line is that, through excess-capacity enhancement, the platform economy provides more choice to consumers.

For providers, the platform economy offers the opportunity to work in a flexible structure, in small gigs, to leverage unused time or skills as a means to earn supplementary income. In other words, by reducing entry barriers into industries that once required initial monetary investment as well as some professional knowledge, the platform economy allows nonprofessional players to maximize their underused skills, from driving to cooking, to make extra income.

Flexible working hours are important to many workers across industries. Researchers at the McKinsey Global Institute examined the experience of freelancers in general (not only those working for platforms) and found that independent contractors emphasized the importance of flexibility and autonomy that this job framework offers.<sup>39</sup> They elaborate, “Many earners strongly prefer the autonomy and flexibility of independent work. They value being their own boss, setting their own hours to some extent, and focusing on work that interests them . . . . The Uber driver can fit his hours around a class schedule or family priorities.”<sup>40</sup> With regard to workers in the platform economy, they found that, in the United States, 87% of those workers chose this working pattern rather than resorting to it as a necessity (i.e., because they could not find a different type of job). Data provided by Uber indicate that its drivers appreciate the flexibility of their work. When drivers were asked how they decide when to work, 40% answered that it depends on what else is on their schedule.<sup>41</sup> Thus, working as a freelancer in the platform economy may increase choice for workers. Therefore, in line with pluralistic theory that individuals put different values on different aspects of life, the

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<sup>38</sup> *Id.*

<sup>39</sup> JAMES BUGHIN ET AL., MCKINSEY GLOB. INST., INDEPENDENT WORK: CHOICE, NECESSITY, AND THE GIG ECONOMY 61 (2016), <http://www.mckinsey.com/~media/McKinsey/Global%20Themes/Employment%20and%20Growth/Independent%20work%20Choice%20necessity%20and%20the%20gig%20economy/Independent-Work-Choice-necessity-and-the-gig-economy-Full-report.ashx>.

<sup>40</sup> *Id.* at 45.

<sup>41</sup> Amy Levin, *The Driver Roadmap: Where Uber Driver-Partners Have Been, and Where They're Going*, BENENSON STRATEGY GRP. 3 (2014), [https://newsroom.uber.com/wp-content/uploads/2015/01/BSG\\_Uber\\_Report.pdf](https://newsroom.uber.com/wp-content/uploads/2015/01/BSG_Uber_Report.pdf).

platform economy boosts consumer and provider choice.

#### IV. THE PLATFORM ECONOMY IS ALSO A CHOICE-DECREASING MECHANISM

The platform economy can also reduce alternatives for consumers and providers. Because of the competition posed by the platforms' suppliers, some conventional services that are not platform-based are at risk of becoming scarcer. The threat to traditional services is especially imminent when platforms sanction commercial work (not using excess capacity). In that case, and without regulation that protects incumbents from unfair competition, traditional (non-platform-enabled) providers may not withstand the competition; we can already see reduction in availability of traditional services.

For instance, transportation platforms' entry into the market has led to a considerable decline in the number of taxi rides. One city that has experienced a dramatic change in the availability of taxis is Los Angeles. A report by the UCLA Labor Center found that between 2013 and 2014, taxi ridership dropped by 18%, a total of 1.4 million fewer trips than in the previous year.<sup>42</sup> This number is likely larger currently because, at the time of the study, platform-operated vehicles were not allowed to pick up passengers from LAX airport, a location that constituted a large source of taxi rides—while now they can. Los Angeles's experience is typical of many U.S. cities.<sup>43</sup> The resulting financial struggles have forced cab companies to fire workers, file for bankruptcy, and even close entirely, making taxi services less available to the general public in some regions.<sup>44</sup>

The decreased availability of traditional taxis is detrimental to consumers who feel less safe or are more likely to encounter discrimination in obtaining services, particularly individuals from

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<sup>42</sup> Saba Waheed, et al., *Ridesharing or Ridestealing? Changes in Taxi Ridership and Revenue in Los Angeles 2009–2014*, UCLA LABOR CTR. (2015), <http://www.labor.ucla.edu/downloads/policy-brief-ridesharing-or-ridestealing/>.

<sup>43</sup> Aloni, *supra* note 29, at 331 (describing similar experience in Seattle and Arlington).

<sup>44</sup> In 2016, San Francisco's biggest taxi company filed for Chapter 11 bankruptcy. *See In re Yellow Cab Cooperative, Inc.*, No. 3:16-bk-30063 (N.D. Cal. Jan. 22, 2016); *see also* Kate Rogers, *Uber, Lyft Put Pressure on Taxi Companies*, CNBC (Jan. 26, 2016, 1:10 PM), <http://www.cnbc.com/2016/01/26/uber-lyft-put-pressure-on-taxi-companies.html>.

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minority groups. For instance, a recent study documented how African Americans had a harder time obtaining Uber and Lyft rides compared to their white counterparts.<sup>45</sup> This study found that in Seattle, African-American passengers had to wait longer before booking a ride via Uber, up to 35% longer than white passengers. In Boston, the study used passengers with African-American-sounding names and found that Uber drivers cancelled rides more than twice as frequently as they cancelled rides for passengers with white-sounding names. Certainly, racial discrimination by traditional taxis is a familiar, well-established fact and occurs on a regular basis.<sup>46</sup> However, while a host of federal and state laws discourage racial discrimination by traditional taxis,<sup>47</sup> the applicability of these laws to the platform-based rides, and to the firms themselves, is a more contested question.<sup>48</sup>

People with disabilities constitute another group that has been harmed by the disappearance or reduction of traditional taxi services. Stories abound of incidents in which Uber drivers refused to take individuals with disabilities, either because they had service animals or used a wheelchair.<sup>49</sup> Indeed, the National Federation of the Blind of California filed a class-action lawsuit on behalf of blind Uber customers, arguing that Uber has violated the Americans with Disabilities Act; Uber replied that the Americans with Disabilities Act does not apply to them.<sup>50</sup> While Uber and Lyft have recently established programs to accommodate the needs of passengers who rely on wheelchairs, some aver that these services are rarely available.<sup>51</sup>

Finally, people who feel more vulnerable may believe that they are

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<sup>45</sup> See Yanbo Ge, et al., *Racial and Gender Discrimination in Transportation Network Companies* (Nat'l Bureau Econ. Research, Working Paper No. 22776, 2016), <http://www.nber.org/papers/w22776>.

<sup>46</sup> See, e.g., *Service Denied: Responding to Taxicab Discrimination in the District of Columbia* i, THE EQUAL RIGHTS CTR. (2003), [https://equalrightscenter.org/wp-content/uploads/taxicab\\_report.pdf](https://equalrightscenter.org/wp-content/uploads/taxicab_report.pdf)

<sup>47</sup> Aaron Belzer & Nancy Leong, *The New Public Accommodations*, 105 GEO. L.J. 1271, 1297-98 (2017).

<sup>48</sup> See, e.g., Brishen Rogers, *The Social Costs of Uber*, 82 U. CHI. L. REV. DIALOGUE 85, 95 (2015).

<sup>49</sup> See Jason Marker, *Wheelchair Using Passenger Films Uber Driver Refusing to Pick Him Up*, AUTO BLOG <http://www.autoblog.com/2017/01/10/wheelchair-using-passenger-films-uber-driver-refusing-to-pick-hi/>.

<sup>50</sup> See Nat'l Fed'n of the Blind of California v. Uber Techs., Inc., 103 F. Supp. 3d 1073, 1082 (N.D. Cal. 2015).

<sup>51</sup> See Heather Kelly, *Uber's Services for the Disabled Lack Actual Cars*, CNN, <http://money.cnn.com/2016/05/02/technology/uber-access/>.

safer taking taxis than using platform-enabled rides. Even though there is no definitive evidence that taxis are safer than platform-facilitated rides or that many people perceive taxis as safer, multiple publicized reports in which platform drivers attacked, harassed, or refused to pick up minorities may deter some from choosing this option.<sup>52</sup> The firms' refusal to fingerprint their drivers, as taxi companies do, may bolster this hesitation.<sup>53</sup> The bottom line is that, for some people, the availability of traditional taxis is still essential because the alternative is viewed as riskier or because it is harder for them to get it.

In a similar fashion, short-term rental platforms threaten the existence of valuable options in traditional accommodations, such as lower-end hotels. Competition with the short-term rental platforms has endangered less expensive hotels because the higher-end hotels are more likely than platforms to attract businesspeople and wealthier tourists. A recent study concluded that Airbnb's impact on the hotel industry in Texas is unevenly distributed because Airbnb threatens mostly lower-end hotels, making them most vulnerable to economic harm.<sup>54</sup> The declining options to stay in such hotels can have the most serious impact on those who cannot afford the more luxurious accommodation options or those who find it harder to book a room through the short-term housing platforms. The option of traditional hotels may be important for those who are not savvy with technology and thus cannot, or do not want to, use platforms. Other individuals may find that booking a room via a platform is more difficult due to discrimination. Researchers recently found that users with names perceived to be distinctively African American were 16% less likely to succeed in booking a stay than were users with identical profiles but who

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<sup>52</sup> See Raymond Rizzo, *Uber Driver James Henneberg is "Bothered" by the "Transgender Thing"; Refuses to be Paired with Gay Couple in Future; Admits to Lying*, E. NASHVILLE NEWS (Jan. 7, 2017), <http://eastnashville.news/2017/01/uber-driver-james-henneberg-is-bothered-by-the-transgender-thing-refuses-to-be-paired-with-gay-couple-in-future-admits-to-lying/>; Mary Emily O'Hara, *Lyft Driver Accused of Threatening Activist Monica Jones in Transphobic Post*, THE DAILY DOT (Feb. 28, 2016), <http://www.dailydot.com/irl/lyft-driver-monica-jones-location-facebook/>.

<sup>53</sup> See, e.g., Heather Kelly, *Uber CEO explains why he thinks fingerprinting drivers is 'unjust'*, CNNMONEY (June 24, 2016), <http://money.cnn.com/2016/06/23/technology/uber-travis-kalanick-ges-fingerprinting/index.html>.

<sup>54</sup> See Georgios Zervas, Davide Prosperio & John Byers, *The Rise of the Sharing Economy: Estimating the Impact of Airbnb on the Hotel Industry* 30 (Boston U. Sch. Mgmt. Research, Working Paper No. 2013-16, 2013), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2366898](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2366898).

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had names considered to be distinctively white.<sup>55</sup>

Finally, consumers may find that the long-term residential rental options in their own cities are decreasing as more owners convert long-term rental units to short-term rentals. This phenomenon of people who invest in apartments to transform them short-term rentals has become widespread, as evidenced, inter alia, by websites that advise potential buyers on the cities in which this practice is most profitable.<sup>56</sup> Communities and local governments have responded with calls for regulations that restrain this phenomenon. Without expanding too much on this, the rise of commercial short-term rentals has exacerbated the shortage of rentals in many popular metropolitan areas and further increased rental prices. Thus, while consumers enjoy more choice in finding vacation rentals, they may face a problem securing long-term rentals in their hometown.

Importantly, the platform economy can also reduce options for workers by decreasing the number of full-time, protected employment opportunities. Workers in the platform economy are not classified “employees”; rather, their status is “independent contractor,” regardless of the time or frequency they work for platform firms or the control the firms retain over them.<sup>57</sup> The different designation matters because the status of “employee” guarantees various employment protections, such as reimbursement of work-related expenses, overtime payment, employer contributions to unemployment insurance, and a minimum wage.<sup>58</sup> Indeed, one study surveyed providers in the platform economy and found that “41 percent say they prefer the security and benefits of working for a traditional company even if it might mean less flexibility.”<sup>59</sup> Hence, another tradeoff of the platform economy: increased flexible work opportunities versus decreased availability of traditional employment.

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<sup>55</sup> See Benjamin Edelman, Michael Luca & Dan Svirsky, *Racial Discrimination in the Sharing Economy: Evidence from a Field Experiment 1* (Harv. Bus. Sch., Working Paper No. 16-069, 2016), [http://www.hbs.edu/faculty/Publication%20Files/16-069\\_5c3b2b36-d9f8-4b38-9639-2175aaf9ebc9.pdf](http://www.hbs.edu/faculty/Publication%20Files/16-069_5c3b2b36-d9f8-4b38-9639-2175aaf9ebc9.pdf).

<sup>56</sup> <https://www.airdna.co/about> (“Airdna provides data and analytics to vacation rental entrepreneurs and investors.”).

<sup>57</sup> Keith Cunningham-Parmeter, *From Amazon to Uber: Defining Employment in the Modern Economy*, 96 B.U. L. Rev. 1673, 1684-88 (2016).

<sup>58</sup> See, e.g., *Cotter v. Lyft, Inc.*, 60 F. Supp. 3d 1067, 1073-74 (N.D. Cal. 2015).

<sup>59</sup> See Press Release, Penn Schoen Berland, *Forty-Five Million Americans Say They Have Worked in the On-Demand Economy, While 86.5 Million Have Used It, According to New Survey* (Jan. 6, 2016), <http://psbresearch.com/wp-content/uploads/2016/01/On-Demand-Economy-Release.pdf>.

In conclusion, the platform economy simultaneously increases and decreases options. Below, I examine what pluralistic theory teaches about this composition of choice in the market.

## V. ENLISTING THE PRINCIPLES OF PLURALISM TO GUIDE THE REGULATION OF THE PLATFORM ECONOMY

The platform economy enables activities that are different in their utilization of excess capacity; and based on their location on the spectrum of use, the exchanges contribute differently to the increase or the decrease in choice. Pluralism prescribes that the state support the extension of choice, which means actively endorsing the platform economy. But support does not mean an invitation to embrace a deregulation regime. The opposite is true: a truly pluralistic structure safeguards providers, consumers, and traditional options from the negative externalities that commercial-activity platforms produce. As Raz clarifies, a nonintervention approach “would undermine the chances of survival of many cherished aspects of our culture.”<sup>60</sup> In our case, these “cherished aspects” are the conventional services that may disappear as a result of some businesses competing under different rules, while providing virtually the same products and services.

Therefore, the first principle flowing from pluralism involves capturing the distinction between activity through increased use of excess capacity and work through activity not based on increased use. Specifically, lawmakers should craft regulations that distinguish between activities based on their location along the spectrum of use of increased excess capacity. Regulations should prevent incumbent-like providers from passing as increased-excess providers as a means to evade laws governing traditional sectors.

Lawmakers can distinguish between the levels of use of increased excess capacity by examining two factors together: the frequency of supply and the infrastructure used for the transaction. The frequency denotes the number of transactions the provider is involved in within a defined period. The more frequently the supplier provides the goods or services, the more likely that she is not working in increased excess capacity. The other distinguishing factor is infrastructure: whether the goods or real property is primarily designated for a commercial purpose or only intermittently converted for such use. For instance, in the

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<sup>60</sup> Raz, *supra* note 2, at 162.

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platform-transportation sector, some municipalities have debated whether to allow drivers to use their “personal vehicle” rather than a designated or rental car.<sup>61</sup> In the short-term rental market, some municipalities have limited the number of nights that residents can lease their properties for short-term stays. The assumption is that a small number of transactions signals providers who leverage their surplus space, while those who exceed this threshold operate commercially. In San Francisco, for example, the threshold is 90 days a year.<sup>62</sup>

Pluralistic principles would also have the state treat each legal regime differently according to the values the regime promotes. For activities of increased use, lawmakers should endorse that innovation and its results by allowing people to leverage their goods, time, and skills. Thus, lawmakers are justified in treating each category differently. Lawmakers should, therefore, create two (or more) different regulatory regimes based on a spectrum of excess-capacity use. Activities based on increased excess capacity should be regulated lightly and tailored to casual, nonprofessional providers. Traditional work done through platforms should be governed by the same rules as those for incumbents unless a significant reason justifies a departure from such regulations.

For some types of critical matters, such as safety regulations, the distinctions between levels of increased excess capacity may not matter. In such matters, policymakers can reasonably insist that there is no difference between work in increased excess capacity and other work. A part-time driver can cause the same harm as one who drives regularly if she drives an unsafe vehicle or without adequate insurance. Thus, lawmakers should impose safety requirements—criminal-background checks, vehicle inspections, insurance coverage—in a way that assures public safety and reasonable allocation of risk. More generally, it means that activities in increased use of excess capacity will be subject to regulation that advances safety and prevents market failures. But the regulations of such activities, to the extent possible, should be designed in

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<sup>61</sup> See, e.g., Order Instituting Rulemaking on Regulations Relating to Passenger Carriers, Ridesharing, and New Online-Enabled Transp. Servs. (Cal. P.U.C. Dec. 27, 2012), <http://docs.cpuc.ca.gov/PublishedDocs/Published/G000/M040/K862/40862944.pdf>; Carolyn Said, *Uber, Lyft may face new rules in California*, SAN FRANCISCO CHRONICLE (April 5, 2016), <http://www.sfchronicle.com/business/article/Uber-Lyft-may-face-new-rules-in-California-7230320.php> (reporting that “The PUC is poised to allow drivers to use leased vehicles, but only if the lease is for more than four months.”).

<sup>62</sup> See S.F., CAL., ADMIN. CODE § 41A.5(g)(1)(A) (2016).

a fashion that minimizes obstacles for casual suppliers.

Except for core issues as safety, however, the regulations of activities in increased use of excess capacity should differ from those imposed on traditional transactions (whether or not operated through platforms). Hotel tax provides an interesting test case on this point. San Francisco, like several other municipalities, created a new set of rules governing short-term rentals; it imposes on each transaction an occupancy tax (collected by Airbnb) equivalent to that levied on hotels.<sup>63</sup> However, regulations may reasonably set different tax rates for various transactions, based on the level of use of excess capacity, since transactions may vary in the type of visitors they attract and in their use of municipalities' infrastructures. Hotels are more likely to draw businesspeople who use amenities such as convention centers or performing-arts centers. Conversely, travelers who turn to platforms to experience a location from a resident's perspective may be less likely to use some of these infrastructures. Airbnb units offered by casual users may also be located in areas that are less touristic in nature; thus, these regions receive less revenue from hotel tax. As renting rooms or units on a short-term basis provides more business for these less-visited locations, lawmakers can incentivize people to visit these areas. Thus, unlike the path taken so far by most cities that collect hotel tax on short-term rentals by platforms, pluralistic principles justify creating a different tax rate for transactions based on casual use. Of course, such casual exchanges may use some services that are funded by hotel taxes; thus, a municipality can offer these providers a reduced tax rate (rather than cutting it altogether). Alternatively, municipalities can impose a tax equal to the regular hotel tax on short-term rentals located in the central tourist zones, while creating a reduced tax rate for short-term rentals in other zones. This should not create extra administrative burdens or confusion because, in regulated regimes, lessors typically register their units; the city can inform them of their hotel-tax rate at the time of registration.

In a similar vein, in employment situations, pluralistic principles suggest that lawmakers should treat full-time workers in the platform economy differently than they treat casual providers in that economy. The former are not substantially different from traditional employees. The

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<sup>63</sup> See *Transient Occupancy Tax (TOT) Frequently Asked Questions for Hosts, Website Companies and Merchants of Record*, OFFICE OF THE TREASURER & TAX COLLECTOR, CITY & CNTY. OF S.F., [http://sftreasurer.org/tot\\_host\\_website\\_merchant\\_faq#1](http://sftreasurer.org/tot_host_website_merchant_faq#1).

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platforms exert a level of control over these workers that is quite similar to employers' control over traditional employees.<sup>64</sup> For instance, in the transportation arena, Lyft and Uber exert more control over workers who work voluminous hours by creating various programs that incentivize their drivers to provide more hours a week.<sup>65</sup> The flexibility and autonomy of the "independent contractor" framework is diminished once the driver is nudged to refuse riders. These drivers' incomes also depend heavily on the platform employer. Thus, when it comes to providers in the platform economy who may or may not be not using their increased excess capacity but, in any case, are essentially working full time (or nearly so) for an employer, they should be recognized as traditional employees for the purpose of benefits and protections. Indeed, some courts around the world have determined that Uber drivers should be classified as employees.<sup>66</sup>

Further, casual workers (those truly leveraging their excess capacity) should receive basic protections, as well. Pluralism calls for innovation and a variety of options. While infrequent providers are more akin to freelancers, essential norms and safeguards, such as minimum wage and overtime pay, should still apply to them. A few commentators have proposed that lawmakers create a special category, an intermediate level between employee and independent contractor, that includes basic employment protections and benefits.<sup>67</sup> So far, even jurisdictions that have regulated transportation platforms have not addressed the employment status of drivers. This omission leaves the final decision about employment status to the courts, which are limited in what they can do. Courts can decide whether workers are classified as employees or independent contractors but cannot create an intermediate status that incorporates the distinction between those who work in increased use of excess capacity and those who do not.

In addition to creating new content, a regulatory regime designed to

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<sup>64</sup> Cunningham-Parmeter, *supra* note 57, at 1687.

<sup>65</sup> See, e.g., *Power Driver Bonus*, LYFT, <https://help.lyft.com/hc/en-us/articles/214586477-Power-Driver-Bonus>.

<sup>66</sup> See, e.g., Reserved Judgment of the Employment Tribunal at 1, *Aslam v. Uber BV* [2016] IRLR 4 (U.K. Empl. Trib.) (No. 2202551/2015), (ruling that Uber drivers are "employed" as "workers" and not self-employed).

<sup>67</sup> See SETH D. HARRIS & ALAN B. KRUEGER, BROOKINGS INST., A PROPOSAL FOR MODERNIZING LABOR LAWS FOR TWENTY-FIRST-CENTURY WORK: THE "INDEPENDENT WORKER" 2 (2015), [www.hamiltonproject.org/assets/files/modernizing\\_labor\\_laws\\_for\\_twenty\\_first\\_century\\_work\\_krueger\\_harris.pdf](http://www.hamiltonproject.org/assets/files/modernizing_labor_laws_for_twenty_first_century_work_krueger_harris.pdf); SARAH LEBERSTEIN, NAT'L EMP'T LAW PROJECT, RIGHTS ON DEMAND: ENSURING WORKPLACE STANDARDS AND WORKER SECURITY IN THE ON-DEMAND ECONOMY 10 (2015), <http://www.nelp.org/content/uploads/Rights-On-Demand-Report.pdf>.

foster increased excess-capacity transactions must be clear and easy to follow and ought to impose minimal administrative burdens. The rules should be crafted with awareness that casual providers are micro-earners rather than sophisticated players with resources to hire legal counsel or capacity to follow complex regulations. Such design would also prevent the lost benefits that stem from evasion of the law when markets operate underground, thus reducing revenue from tax collection and putting workers and customers at risk.

In summary, pluralistic principles would separate transactions based on where they fall on the spectrum of use of increased excess capacity. They support the creation of a regime that boosts activities in monetizing idle capacity and differentiates them from exchanges that pose as using increased excess capacity but are actually akin to conventional transactions.

## CONCLUSION

The platform economy introduces a promise and a risk. Its promise lies in facilitating transactions that are based on the use of increased excess capacity. In so doing, it offers another layer of choice and makes it more possible for people to be the authors of their own lives. When the platform economy functions in this way, pluralistic principles call for letting these activities flourish, with some regulation to ensure no harm to involved or third parties. But the platforms too often turn a blind eye to, or encourage, conventional commercial-work-in-disguise that is not grounded in leveraging surplus capacity. In such cases, choice for consumers, workers, and society at large can be reduced. Then, pluralistic principles call for state intervention—through regulation—to prevent multiple harms and to preserve valuable choice.