

HOLDING AMAZON LIABLE AS A SELLER OF DEFECTIVE GOODS: A CONVERGENCE OF CULTURAL AND ECONOMIC PERSPECTIVES

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INTRODUCTION

Amazon's meteoric growth and expansion—accelerated by the global COVID-19 pandemic¹—signals the revolutionary transformation away from brick-and-mortar physical stores to the virtual marketplace. Known as a “half-platform, half-store,”² Amazon's e-commerce business, which offers a platform for third-party vendors,³ defies conventional categorization for products liability purposes.

From the consumer perspective, “[m]any of the millions of people who shop on Amazon.com see it as if it were an American big-box store, a retailer with goods deemed safe enough for customers.”⁴ Amazon offers innumerable benefits to these consumers, including an abundant supply of goods available in a one-stop shopping venue, competitive prices, and prompt delivery—all the more essential during a pandemic that requires social distancing.

But there is a dark side to the proliferation of products in Amazon's virtual marketplace: As uncovered in a harrowing August 2019 *Wall Street Journal* article, among the items for sale on Amazon are thousands of

¹ See Shantal Riley, *Appeals Court: Amazon Was “Pivotal” in the Sale of Exploding Battery*, FRONTLINE (Aug. 25, 2020), <https://www.pbs.org/wgbh/frontline/article/appeals-court-rules-amazon-can-be-liable/> [https://perma.cc/7KUN-NUM2] (“Amazon's sales have soared this year as more people shop online amidst the coronavirus pandemic. The company's second-quarter sales rose by 40% and net profits have doubled to \$5.2 billion over the same period last year.”); Hamza Shaban, *Amazon to Hire 100,000 Workers as e-Commerce Swells Amid the Pandemic*, WASH. POST (Sept. 14, 2020, 2:28 PM), <https://www.washingtonpost.com/business/2020/09/14/amazon-hire-100000-workers-e-commerce-swells-amid-pandemic/> [https://perma.cc/QMY3-3JDD] (“Amazon said Monday it will hire another 100,000 workers to meet surging demand in the covid-19 era, bolstering an already dramatic expansion of its workforce this year and underscoring the massive shifts in online spending the pandemic has helped fuel.”).

² Colin Lecher, *How Amazon Escapes Liability for the Riskiest Products on Its Site*, VERGE (Jan. 28, 2020, 8:00 AM), <https://www.theverge.com/2020/1/28/21080720/amazon-product-liability-lawsuits-marketplace-damage-third-party> [https://perma.cc/65FM-47QL].

³ Brian Huseman, *Amazon Stands Ready to Support AB 3262 If All Stores Are Held to the Same Standards*, DAYONE: AMAZON BLOG (Aug. 21, 2020), <https://blog.aboutamazon.com/policy/amazon-stands-ready-to-support-ab-3262-if-all-stores-are-held-to-the-same-standards> [https://perma.cc/2BNP-X323] (“Since 1999, Amazon has welcomed third-party sellers onto Amazon.com and enabled them to offer their products right alongside our own, giving entrepreneurs an unprecedented opportunity to reach hundreds of millions of customers worldwide. These sellers, which are mainly small and medium-sized businesses, now sell the vast majority of new products—and nearly 60% of *all* products—purchased on Amazon.com.”).

⁴ Alexandra Berzon, Shane Shifflett & Justin Scheck, *Amazon Has Ceded Control of Its Site. The Result: Thousands of Banned, Unsafe or Mislabeled Products*, WALL ST. J. (Aug. 23, 2019, 8:56 AM), <https://www.wsj.com/articles/amazon-has-ceded-control-of-its-site-the-result-thousands-of-banned-unsafe-or-mislabeled-products-11566564990#:~:text=A%20Wall%20Street%20Journal%20investigation,would%20bar%20from%20their%20shelves> [https://perma.cc/9WFW-N2V6].

products “declared unsafe by federal agencies . . . deceptively labeled or . . . banned by federal regulators.”⁵

Amazon insists that, as an online platform serving as a conduit between third-party vendors and consumers, akin to a virtual flea market, it is not a “seller” of goods and therefore should not be held responsible for defective or unsafe products available on its site.⁶ Courts initially sided with Amazon, primarily focusing on “bright line” doctrinal distinctions, such as the fact that Amazon did not transfer legal title of the third-party goods supplied (finding instead that title was transferred from the third-party vendor to the buyer, with Amazon merely acting as the intermediary).⁷ Indeed, by 2018, as recognized by a New York federal district court, there was “an emerging consensus against construing Amazon as a ‘seller’ or ‘distributor.’”⁸

But we may have reached an inflection point. In July 2019, the U.S. Court of Appeals for the Third Circuit decided *Oberdorf v. Amazon.com, Inc.*, which became the first decision to hold that a customer could proceed with a strict products liability claim against Amazon for harms due to an

⁵ *Id.* (“The Journal identified at least 157 items for sale that Amazon said it banned, including sleeping mats the Food and Drug Administration warns can suffocate infants. . . . Within two weeks of Amazon’s removing or altering the first problematic listings the Journal identified, at least 130 items with the same policy violations reappeared, some sold by the same vendors previously identified by the Journal under different listings.”).

⁶ *See, e.g., Gartner v. Amazon.com, Inc.*, 433 F. Supp. 3d 1034, 1042 (S.D. Tex. 2020) (“[Amazon] contends that its marketplace is much like an auctioneer as they play only an incidental role in a product’s placement in the stream of commerce.”), *appeal docketed sub nom. McMillan v. Amazon.com, Inc.*, No. 20-20108 (5th Cir. Feb. 11, 2020); *see also Berzon, Shifflett & Scheck, supra* note 4 (“In practice, Amazon has increasingly evolved like a flea market. It exercises limited oversight over items listed by millions of third-party sellers, many of them anonymous, many in China, some offering scant information.”).

⁷ *See, e.g., Eberhart v. Amazon.com, Inc.*, 325 F. Supp. 3d 393, 398 (S.D.N.Y. 2018) (“[R]egardless of what attributes are necessary to place an entity within the chain of distribution, the failure to take title to a product places that entity on the outside.”); *Erie Ins. Co. v. Amazon.com, Inc.*, 925 F.3d 135, 141 (4th Cir. 2019) (“[I]nsofar as liability in Maryland for defective products falls on ‘sellers’ and manufacturers (who are also sellers), it is imposed on owners of personal property who transfer title to purchasers of that property for a price.”).

⁸ *Eberhart*, 325 F. Supp. 3d at 400. “[I]t appears that every court to consider the question of Amazon’s liability has concluded that Amazon is not strictly liable for defective products sold on its marketplace.” *Id.* at 399 (citing *Allstate N.J. Ins. Co. v. Amazon.com, Inc.*, No. 17-2738 (FLW)(LHG), 2018 WL 3546197, at *5–12 (D.N.J. July 24, 2018); *Fox v. Amazon.com, Inc.*, No. 3:16-cv-03013, 2018 WL 2431628, at *8 (M.D. Tenn. May 30, 2018), *aff’d in part, rev’d in part*, 930 F.3d 415 (6th Cir. 2019); *Erie Ins. Co. v. Amazon.com Inc.*, No. 16-02679-RWT, 2018 WL 3046243, at *1–3 (D. Md. Jan. 22, 2018), *aff’d in part, rev’d in part*, 925 F.3d 135 (4th Cir. 2019); *Oberdorf v. Amazon.com, Inc.*, 295 F. Supp. 3d 496, 499–501 (M.D. Pa. 2017), *aff’d in part, vacated in part*, 930 F.3d 136 (3d Cir. 2019), *certifying questions to Pa. S. Ct.*, 818 F. App’x 138 (3d Cir. 2020) (en banc), *appeal dismissed per stipulation*; *Stiner v. Amazon.com Inc.*, No. 15CV185837, 2017 WL 9751163, at *5–7 (Ohio Com. Pl. 2017), *aff’d*, 120 N.E.3d 885 (Ohio App. 2019), *aff’d*, No. 2019-0488, 2020 WL 5822477 (Ohio Oct. 1, 2020)).

allegedly unsafe product.⁹ Taking the case en banc, the Third Circuit certified to the Pennsylvania Supreme Court the question whether “an e-commerce business, like Amazon, [is] strictly liable for a defective product that was purchased on its platform from a third-party vendor, which product was neither possessed nor owned by the e-commerce business.”¹⁰

In *Oberdorf*'s wake, a federal district court in Texas and a California state appellate court likewise held that Amazon is a “seller” that may be strictly liable for defective products sold on Amazon.¹¹ Amazon has appealed both of these decisions.¹² And, after the Pennsylvania Supreme Court agreed to answer the certified question in *Oberdorf*, Amazon settled the case, thereby thwarting that court's resolution of this “issue of first impression and substantial public importance.”¹³ Still, with pending appeals in other state and federal courts,¹⁴ the time is ripe for evaluating the case for holding Amazon liable for these dangerous and defective products.

⁹ 930 F.3d 136 (3d Cir. 2019), *vacated*, 936 F.3d 182 (3d Cir. 2019), *certifying question to Pa. S. Ct.*, 818 F. App'x 138 (3d Cir. 2020) (en banc), *appeal dismissed per stipulation*.

¹⁰ *Oberdorf v. Amazon.com Inc.*, 818 F. App'x 138, 143 (3d Cir. 2020) (en banc), *appeal dismissed per stipulation*.

¹¹ *Gartner*, 433 F. Supp. 3d at 1042–43 (finding that “Amazon is integrally involved in and exerts control over the sales of third-party products such that it qualifies as a seller” and “Amazon was engaged in the business of placing the product in the stream of commerce and, therefore, qualifies as a seller”); *Bolger v. Amazon.com, LLC*, 53 Cal. App. 5th 431, 448, 453 (2020), *petition for review filed*, No. S264607 (Cal. Sept. 22, 2020) (finding that Amazon plays an “integral part of the overall producing and marketing enterprise that should bear the cost of injuries resulting from defective products,” is “involved in the vertical distribution of consumer goods” and “responsible for passing the product down the line to the consumer,” and is “one of the entities ‘responsible for placing a defective product into the stream of commerce’”) (internal citations omitted). *But see Stiner v. Amazon.com, Inc.*, No. 2019-0488, 2020 WL 5822477, at *4 (Ohio Oct. 1, 2020) (explaining that “[b]ased on the understanding that placing a product in the stream of commerce requires some act of control over the product, we conclude that Amazon should not be held liable as a supplier under the Ohio Products Liability Act.”).

¹² In its *Bolger* petition for review to the California Supreme Court, Amazon argues that the lower court took an “unprecedented leap” in holding Amazon liable as a seller and “usurped the Legislature’s role” by “creat[ing] entirely new rules of strict liability.” Petition for Review at 6, *Bolger*, No. S264607 (Cal. Sept. 22, 2020). Likewise, in its *McMillan* brief on appeal to the Fifth Circuit, Amazon contends that “[b]asing liability on control over services would produce wildly unpredictable and far-reaching results, which explains why no court has adopted such a rule.” Reply Brief for Appellant at 2, *McMillan v. Amazon.com, Inc.*, No. 20-20108 (5th Cir. July 24, 2020).

¹³ 818 F. App'x at 143.

¹⁴ In addition to the *Bolger* and *McMillan* appeals pending in the California Supreme Court and Fifth Circuit, respectively, an appeal of an underlying grant of summary judgment to Amazon is pending in the Ninth Circuit in *Carpenter v. Amazon.com, Inc.*, No. 19-15695 (9th Cir. Apr. 9, 2019). In *Carpenter*, a California federal district court granted summary judgment to Amazon given plaintiffs’ failure to show that Amazon was “integral” to the business, “such that its conduct was a necessary factor in bringing the defective product to market.” *Carpenter v. Amazon.com, Inc.*, No. 17-cv-03221-JST, 2019 WL 1259158, at *5 (N.D. Cal. Mar. 19, 2019), *appeal filed*, No. 19-15695 (9th Cir. Apr. 9, 2019). Oral argument took place on October 20, 2020. *Carpenter v. Amazon.com, Inc.*, No. 19-15695 (9th Cir. June 25, 2020), ECF No. 42. Additionally, *Papataros v. Amazon.com, Inc.*, was stayed pending the outcome in *Oberdorf*. No. 2:17-cv-9836 (KM)(MAH), 2019 WL 4740669 (D.N.J. Sept. 3, 2019).

David Wilk, the attorney representing Heather Oberdorf—who was blinded in one eye by a retractable dog leash attached to a dog collar she purchased on Amazon—explained that he believes “at its core the decision is about how e-commerce functions in our everyday lives, and that the courts must catch up to consumers’ perception that Amazon is responsible for the goods it sells.”¹⁵ Wilk framed the key issue as: “Really what it comes down to is the court going to recognize how people buy things in the modern world?”¹⁶

Wilk’s comments channel tort law guru Professor Marshall Shapo’s mantra of “tort as a cultural mirror.”¹⁷ Long before the Internet added new complications, Professor Shapo argued that “the seemingly technical issue of whether to impose retailer strict liability for defective products presents a cameo of culturally generated attitudes held both by people generally and by judges.”¹⁸ Although Professor Shapo has not yet weighed in on whether Amazon should be held strictly liable for defective products offered by third-party sellers on its website, I argue in Part I that the evolution of products liability law to hold Amazon liable is consistent with his cultural lens in light of how the reasonable expectations of consumers have changed. The platform economy and the “emerging injury problems”¹⁹ it has spawned represent a seismic shift calling out for a reconception of accountability in products liability law. The recent court decisions holding Amazon liable as a seller follow consumer sentiment and show this cultural shift in action.

Furthermore, as I elaborate in Part II, holding Amazon liable is supported by the economic perspective embodied in the “cheapest cost avoider” analysis—Amazon is best situated to take actions to minimize risks and prevent accidents from happening. To determine whether the doctrine of strict products liability should be applied in a situation without legal

¹⁵ Pamela Boykoff & Clare Sebastian, *Who’s Responsible for What You Buy on Amazon? A Court Is About to Decide*, CNN (Feb. 19, 2020, 7:35 AM), <https://www.cnn.com/2020/02/19/tech/amazon-third-party-lawsuit/index.html> [<https://perma.cc/45UY-WPS6>].

¹⁶ *Id.* In a similar vein, attorney Jeremy Robinson, who represents Angela Bolger—who was hospitalized with third-degree burns after a replacement laptop battery purchased on Amazon exploded in her lap—remarked: “This is the way things are going to get sold in the future I think the sooner the courts and legislatures manage to get their heads around this, the better.” Riley, *supra* note 1.

¹⁷ Marshall S. Shapo, *In the Looking Glass: What Torts Scholarship Can Teach Us About the American Experience*, 89 NW. U. L. REV. 1567, 1570 (1995) [hereinafter Shapo, *In the Looking Glass*]; see also Marshall S. Shapo, *Millennial Torts*, 33 GA. L. REV. 1021, 1045 (1999) [hereinafter Shapo, *Millennial Torts*] (arguing that “tort undoubtedly will continue to serve as a social symbol, a cultural mirror that reflects the moral views of society”); MARSHALL S. SHAPO, TORT LAW AND CULTURE 269 (2003) [hereinafter SHAPO, TORT LAW AND CULTURE] (invoking “tort as a reflector of culture”).

¹⁸ SHAPO, TORT LAW AND CULTURE, *supra* note 17, at 194.

¹⁹ See Shapo, *Millennial Torts*, *supra* note 17, at 1043 (“Tort also will continue to play the role of the initial decider between first-best and second-best solutions for emerging injury problems.”).

precedent, courts should eschew artificial distinctions that frustrate the intended purposes underlying strict liability, including enhancing product safety and minimizing the losses that arise out of the general use of the product.²⁰

This convergence of the cultural and economic perspectives has echoes in history: Just as the changing economic framework of the early twentieth century led to a legal change away from the requirement of privity in products liability to strict liability,²¹ so too should the onset of e-commerce sites like Amazon lead to the expansion of strict products liability to cases involving online commerce businesses. Indeed, the culturally specific norm of efficiency-as-responsibility is now a signature feature of twenty-first century tort law.

I. TORT LAW AS A “CULTURAL MIRROR”

One of Professor Shapo’s signature contributions to the legal field is his articulation of “tort as a cultural mirror.”²² In his 2003 book, *Tort Law and Culture*, Professor Shapo presents the thesis that tort law is an accurate “representation of local, even national, culture,”²³ defining culture as “the vast collection of social customs, rules, standards, and viewpoints that generate attitudes that communities and individuals bring to bear on specific disputes.”²⁴ He then argues that “the way in which a nation responds to the social and individual problems created by injuries provides significant indicators about the texture of its civilization.”²⁵ In the United States, these important issues tend to make their way into our courtrooms.²⁶

²⁰ See generally RICHARD A. EPSTEIN & CATHERINE M. SHARKEY, CASES AND MATERIALS ON TORTS 687–88 (12th ed. 2020) (discussing rationales for strict products liability).

²¹ See *Escola v. Coca Cola Bottling Co.*, 150 P.2d 436, 443 (Cal. 1944) (Traynor, J., concurring) (“As handicrafts have been replaced by mass production with its great markets and transportation facilities, the close relationship between the producer and consumer of a product has been altered.”); William L. Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099, 1140 (1960) (detailing “the whole sweep and progress of the law of the last half century” and highlighting “[t]he public interest in the safety of products,” in particular “standardized products, such as razor blades and automobile tires, where there is uniformity of production methods and quality, and a high degree of safety already has been achieved, so that purchasers feel that they receive, and are entitled to receive, an assurance of such safety”); see also SHAPO, TORT LAW AND CULTURE, *supra* note 17, at 283 (“[I]t is reasonable to conclude that the idea that there should be liability without fault for injuries caused by dangerously defective products was responsive to an underlying set of economic and social realities, reflecting the culture that derived its identity from those realities.”).

²² Shapo, *In the Looking Glass*, *supra* note 17, at 1570.

²³ Shapo, TORT LAW AND CULTURE, *supra* note 17, at 5.

²⁴ *Id.* at 7.

²⁵ *Id.* at 11.

²⁶ *Id.* at 286–87 (“A mantra in academic literature today is Tocqueville’s observation more than 160 years ago . . . that important issues in America tend to wind up in court.”).

Thus, tort, which “is basically judge-made law,” acts both as a reflection of judges’ perception and as a distillation of American culture.²⁷ Indeed, as Professor Shapo elaborates, “tort cases mirror broad competitions among cultural norms and force judges to make choices—if often implicit choices—among those norms.”²⁸ And as technology changes and advances, these choices and the legal norms they create will also evolve.²⁹ Courts are “cultural agents—realigning the law with developments in the economy and with the evolving attitudes of ordinary people who are coming, sometimes only semi-consciously, to comprehend changes in the consumer environment.”³⁰

Through this analysis, Professor Shapo has proclaimed that tort law “presents one evocative set of images of a journey of an increasingly fragmented society that is constantly in the process of discovering itself—one might even say of discovering its soul.”³¹ Central to Professor Shapo’s conception is that courts do not take on the role of telling society what the cultural norms should be, but rather they consider the predominant thoughts and articulations in society and reflect them in legal opinions.³²

Professor Shapo’s “cultural mirror” conception has particular relevance for products liability. For, as Professor Shapo explains,

[p]roducts liability law deals with Americans’ love affairs, with their possessions, and with the special vexations that occur when love encounters frustration and disappointment. It is therefore natural that this branch of the law should be an especially faithful mirror of the tensions that arise from our search for the good through goods.³³

More specifically, Professor Shapo notes that products liability raises interesting issues “concerning what we mean by freedom to choose and what we believe are legally satisfying levels of information concerning the decision to purchase or encounter products.”³⁴ And foremost among “examples of what tort law teaches us about ourselves” include “rank[ing] products and activities by perceived social value, sometimes imposing

²⁷ *Id.* at 269.

²⁸ Shapo, *In the Looking Glass*, *supra* note 17, at 1570.

²⁹ SHAPO, TORT LAW AND CULTURE, *supra* note 17, at 11 (“That response will change with technology and with changes in the social awareness that defines the concept of legal right.”).

³⁰ *Id.* at 284.

³¹ *Id.* at 286.

³² *Id.* at 287 (“[M]ost usually the court does not tell society what it ought to be thinking, but rather represents what society has been thinking, if not articulating.”).

³³ Shapo, *In the Looking Glass*, *supra* note 17, at 1577.

³⁴ *Id.*

liability and sometimes immunizing actors on the basis of those perceived values.”³⁵

Seen through Professor Shapo’s “tort-law-as-culture” lens, the Amazon controversy implicates fundamental shifts in the consumer marketplace and power dynamics. Professor Shapo is particularly attuned to the underlying power dynamics of societal relationships and the way in which “at some level of consciousness, judges attempt to decipher the way that judgments about the appropriate use of power pervade our social consciousness.”³⁶ The recent shift in judicial opinion towards holding Amazon liable reflects this type of shift in cultural norms.

A. Fundamental Shifts in the Consumer Marketplace and Power Dynamics

The twenty-first century has witnessed a revolution in how consumers purchase goods. The “brick-and-mortar” physical store model has been replaced by pervasive Internet e-commerce sites. Whereas consumers once frequented strip malls, they now order over the Internet on ubiquitous online stores. Online retail sales reached \$445 billion in 2017 and are projected to surpass \$1 trillion by 2027.³⁷ Amazon is by far the most dominant player in the online e-commerce domestic and global retail markets.³⁸ It has reaped multibillion-dollar profits from sales via its online marketplace.³⁹

³⁵ *Id.* at 1585.

³⁶ *Id.* at 1570; *see also id.* at 1591 (“The clash of ideas in tort theory should not obscure, but rather should sharpen, our recognition that tort law is a vehicle for resolving competitions among ideas. In fulfilling that mission, it delves into the fiber of our beings: how we react to confrontations between giant corporations and knights errant . . .”).

³⁷ *See* Nandita Bose, *U.S. Online Retail Sales Likely to Surpass \$1 Trillion by 2027: FTI*, REUTERS (Oct. 17, 2017, 6:49 AM), [https://www.reuters.com/article/us-usa-retail-internet/u-s-online-retail-sales-likely-to-surpass-1-trillion-by-2027-fti-idUSKBN1CM1LW#:~:text=CHICAGO%20\(Reuters\)%20%2D%20U.S.%20online,brick%2Dand%2Dmortar%20stores](https://www.reuters.com/article/us-usa-retail-internet/u-s-online-retail-sales-likely-to-surpass-1-trillion-by-2027-fti-idUSKBN1CM1LW#:~:text=CHICAGO%20(Reuters)%20%2D%20U.S.%20online,brick%2Dand%2Dmortar%20stores) [<https://perma.cc/68WF-NLZ4>].

³⁸ In the United States, as of 2017, approximately half of all online shopping dollars were spent on Amazon. Eugene Kim, *More than Half of Online Sales Growth in the US Came from Amazon Last Year*, BUS. INSIDER (Feb. 2, 2017, 12:33 PM), <https://www.businessinsider.com/amazon-drives-more-than-half-us-ecommerce-growth-2016-2017-2> [<https://perma.cc/YT44-XQTV>]; *see also* Lauren Thomas & Courtney Reagan, *Watch Out, Retailers. This Is Just How Big Amazon Is Becoming*, CNBC (July 13, 2018, 2:40 PM), <https://www.cnbc.com/2018/07/12/amazon-to-take-almost-50-percent-of-us-e-commerce-market-by-years-end.html> [<https://perma.cc/Z7EX-KW35>]. And while Amazon has stumbled in 2020, with its share of U.S. e-commerce falling to 38.5% in June, “Amazon is still the big gorilla online, and sales have surged amid the pandemic.” Jay Greene & Abha Bhattarai, *Amazon’s Virus Stumbles Have Been a Boon for Walmart and Target*, WASH. POST (July 30, 2020, 6:02 PM), <https://www.washingtonpost.com/technology/2020/07/30/amazon-struggles-coronavirus/> [<https://perma.cc/8W5Q-F48K>].

³⁹ *See* David Streitfeld, *Amazon Powers Ahead with Robust Profit*, N.Y. TIMES (Jan. 30, 2020), <https://www.nytimes.com/2020/01/30/technology/amazon-earnings.html?searchResultPosition=7> [<https://perma.cc/5PSE-CH95>].

Amazon sells its own products as well as a rapidly increasing share of products from third-party vendors as part of its ever-expanding “marketplace” transactions.⁴⁰ To make a purchase, consumers typically visit Amazon.com, from which point they may search for and purchase goods via the marketplace, while navigating entirely within the Amazon.com Internet domain. Yet, the products they view may not all be Amazon products. Amazon lists all available products and presents them to customers who search for items on their website, eliding the distinction between the third-party sellers and the rest of Amazon’s platform.⁴¹ Moreover, by providing its customers with an “A-to-z Guarantee” for all purchases made on its website, Amazon holds itself out to consumers as the single entity with which they are transacting.⁴² The guarantee originally stated:

We want you to buy with confidence anytime you make a purchase on the Amazon.com website or use Amazon Pay; that’s why we guarantee purchases from third-party sellers when payment is made via the Amazon.com website The condition of the item you buy and its timely delivery are guaranteed under the Amazon A-to-z Guarantee.⁴³

With its “Fulfillment by Amazon” (FBA) service, Amazon agrees with merchants to handle all of the packaging and shipping of their products.⁴⁴ As

⁴⁰ See J. Clement, *Third-Party Seller Share of Amazon Platform 2007–2020*, STATISTA (Aug. 10, 2020), <https://www.statista.com/statistics/259782/third-party-seller-share-of-amazon-platform/> [https://perma.cc/2V66-HGFH] (“In 2019, Amazon generated 53.76 billion U.S. dollars in third-party seller service revenues, up from 42.75 billion U.S. dollars in the previous year.”); Jeff Bezos, *2018 Letter to Shareholders*, AMAZON BLOG (Apr. 11, 2019), https://blog.aboutamazon.com/company-news/2018-letter-to-shareholders?utm_source=social&utm_medium=tw&utm_term=amznews&utm_content=2018-letter&tag=bisafetynet2-20 [https://perma.cc/WN4Z-MV4E] (“[T]he share of physical gross merchandise sales sold on Amazon by independent third-party sellers—mostly small- and medium-sized businesses—as opposed to Amazon retail’s own first party sales . . . [have] grown from 3% of the total to 58%.”); see also *Bolger v. Amazon.com, LLC*, 53 Cal. App. 5th 431, 445 (2020) (“[T]he marketplace has more than a million third-party sellers selling their own products.”).

⁴¹ See 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, 267 (2020) (“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.”).

⁴² See *About A-to-z Guarantee*, AMAZON, <https://www.amazon.com/gp/help/customer/display.html?nodeId=201889410> [https://perma.cc/7YEQ-9NPY].

⁴³ *Bolger*, 53 Cal. App. 5th at 442. It now reads as follows:

The Amazon A-to-z Guarantee protects you when you purchase items sold and fulfilled by a third-party seller. Our guarantee covers both the timely delivery and the condition of your items. If either are unsatisfactory, you can report the problem to us and our team will determine if you are eligible for a refund.

About A-to-z Guarantee, *supra* note 42.

⁴⁴ See *Oberdorf v. Amazon.com Inc.*, 930 F.3d 136, 141 (3d Cir. 2019), *certifying questions to Pa. S. Ct.*, 818 F. App’x 138 (3d Cir. 2020) (en banc), *appeal dismissed per stipulation* (“Amazon also offers

Professors Edward Janger and Aaron Twerski detail: “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.”⁴⁵

Amazon connects hundreds of millions of customers with a seemingly endless array of products, offering unbeatable prices, selection, and convenience. In doing so, the website remains at the center of the customer’s experience, regardless of whether she is purchasing a product supplied by a third-party or from Amazon itself. From the consumer’s perspective, Amazon fulfills many traditional functions of a distributor and retailer. Consider: Who does the consumer think is selling her the good? What does the consumer think of Amazon’s role in that process? Consumers deal with Amazon directly, not third-party vendors.⁴⁶ And even when consumers may understand that third-party sellers are the source of a product, they likely expect that Amazon is selecting and vetting the goods sold on its marketplace. Consumers are therefore reasonably relying on Amazon, sometimes to their detriment, as it turns out.

B. *Holding Amazon Liable Reflects Shifting Cultural Norms*

For Professor Shapo, “the seemingly technical issue of whether to impose retailer strict liability for defective products,” at its core, “presents a cameo of culturally generated attitudes held both by people generally and by judges.”⁴⁷ He has written evocatively that the “clash between the committed opponents on [products liability issues]—and the inner tensions of those who go back and forth on it within their own minds—would replicate struggles in the minds of the judges who must rule on these cases.”⁴⁸

a ‘Fulfillment by Amazon’ service, in which it takes physical possession of third-party vendors’ products and ships those products to consumers.”).

⁴⁵ Janger & Twerski, *supra* note 41, at 266. Professors Janger and Twerski provide a detailed account of Amazon’s business model. *See id.* at 262 (“Whether Amazon should be considered ‘in control’—and therefore a ‘seller’—turns on an examination of both sides of Amazon’s role in the transaction: the relationship with and experience of the buyer; and the heretofore unexamined and underappreciated relationship with and experience of the nominal third-party supplier.”).

⁴⁶ *See Bolger*, 53 Cal. App. 5th at 441 (“The supplier has no direct relationship with the buyer, and indeed in most cases does not even have an indirect relationship with the buyer. That is, in most cases there are no communications between FBA supplier and buyer; the FBA supplier simply discovers in a report or some other form of notification that a product has been sold to the buyer.”).

⁴⁷ SHAPO, TORT LAW AND CULTURE, *supra* note 17, at 194. Professor Shapo notes further: “The existence of the immunizing statutes alongside the judicial decisions imposing liability manifests the internal conflicts that ordinary citizens would have over the fairness of this particular sort of liability.” *Id.*

⁴⁸ *Id.*

The judicial decisions on Amazon’s liability fit Professor Shapo’s paradigm. The most recent decisions seem to reflect a shift in cultural norms—for instance, as the California state appellate court in *Bolger v. Amazon.com, LLC* explained it, “[w]hatever term we use to describe Amazon’s role, be it ‘retailer,’ ‘distributor,’ or merely ‘facilitator,’ it was pivotal in bringing the product here to the consumer.”⁴⁹

But the first rash of judicial decisions absolved Amazon, finding that the company did not fit the “technical” or “ordinary” definition of a seller as the owner of personal property who transfers title to purchasers of that property for a price.⁵⁰ Even where the Fourth Circuit in *Erie Insurance Co. v. Amazon.com* recognized that “Amazon’s services were extensive in facilitating the sale,” it concluded that “they are no more meaningful to the analysis than are the services provided by UPS Ground, which delivered [the product to the customer].”⁵¹ In similar fashion, an Illinois federal district court reasoned that Amazon’s level of participation did not rise to that of a seller, explaining that, “[t]hough Amazon did earn a commission from the [product] sale, its ‘major role’ was providing a venue and marketplace for

⁴⁹ 53 Cal. App. 5th at 438.

⁵⁰ *Erie Ins. Co. v. Amazon.com, Inc.*, 925 F.3d 135, 141 (4th Cir. 2019) (“We thus conclude that insofar as liability in Maryland for defective products falls on ‘sellers’ and manufacturers (who are also sellers), it is imposed on owners of personal property who transfer title to purchasers of that property for a price.”); *Eberhart v. Amazon.com, Inc.*, 325 F. Supp. 3d 393, 398 (S.D.N.Y. 2018) (“[R]egardless of what attributes are necessary to place an entity within the chain of distribution, the failure to take title to a product places that entity on the outside.”). In *Erie*, a customer purchased a headlamp on Amazon’s website and gifted it to friends. The headlight, sold by the company Dream Light but “Fulfilled by Amazon,” malfunctioned and an ensuing fire caused more than \$300,000 in damages. The plaintiff, which insured the damaged house, sued Amazon for reimbursement under theories of negligence, breach of warranty, and strict liability. 925 F.3d at 137. The district court granted summary judgment to Amazon and the Fourth Circuit affirmed. *Id.* at 144.

Judges likewise absolved Amazon by granting its summary judgment motions in a series of cases involving defective hoverboards purchased on Amazon.com that caught fire, causing extensive physical injuries and property damage. *See, e.g.*, *Fox v. Amazon.com, Inc.*, 930 F.3d 415, 425 (6th Cir. 2019) (holding that Amazon did not qualify as a “seller” given that it “did not choose to offer the hoverboard for sale, did not set the price of the hoverboard, and did not make any representations about the safety or specifications of the hoverboard on its marketplace”); *State Farm Fire & Cas. Co. v. Amazon.com, Inc.*, 407 F. Supp. 3d 848, 854 (D. Ariz. 2019) (noting that Amazon did “not have a meaningful ability to inspect [the hoverboards] for defects, never [took] title to them unless asked to, [and] derive[d] only a slight economic benefit from transactions involving [the products]”); *Garber v. Amazon.com, Inc.*, 380 F. Supp. 3d 766, 778 (N.D. Ill. 2019) (“Though Amazon did earn a commission from the hoverboard sale, its ‘major role’ was providing a venue and marketplace for third-party sellers . . . to connect with buyers.”); *Carpenter v. Amazon.com, Inc.*, No. 17-cv-03221-JST, 2019 WL 1259158, at *5 (N.D. Cal. Mar. 19, 2019) (granting summary judgment for Amazon given plaintiffs’ failure to provide “specific evidence that Amazon’s conduct was a ‘necessary factor’ in bringing hoverboards to the initial consumer market”). *Carpenter v. Amazon.com, Inc.*, Doc. No. 19-15695 (9th Cir. Apr. 9, 2019) is currently pending in the Ninth Circuit.

⁵¹ 925 F.3d at 142.

third-party sellers . . . to connect with buyers like the [plaintiffs].”⁵² By 2018, a New York federal district court noted “an emerging consensus against construing Amazon as a ‘seller’ or ‘distributor.’”⁵³ The court instead characterized Amazon as providing three services: “(1) maintaining an online marketplace, (2) warehousing and shipping goods, and (3) processing payments.”⁵⁴

Even as judges ultimately sided with Amazon, there is evidence that they were conflicted in that decision. For instance, although Judge Diana Motz joined the majority’s summary judgment in favor of Amazon in *Erie Insurance Co.*, she expressed concern that

Amazon’s business model shields it from traditional products liability whenever state law strictly requires the exchange of title for seller liability to attach, in many cases forcing consumers to bear the cost of injuries caused by defective products (particularly where the formal “seller” of a product fails even to provide a domestic address for service of process).⁵⁵

Eventually, judges gained greater appreciation of the changing relationship between Amazon and third-party sellers and the implications for consumers of these “new transactions in widespread use . . . in today’s

⁵² *Garber*, 380 F. Supp. 3d at 778.

⁵³ *Eberhart*, 325 F. Supp. 3d at 400. In *Eberhart*, the plaintiff customer purchased a coffeemaker on Amazon.com, sold by the third party CoffeeGet and “Fulfilled by Amazon,” which shattered, causing permanent nerve damage to his thumb. *Id.* at 395–96. The district court granted Amazon’s summary judgment motion, finding that Amazon is not a seller under New York state products liability law. *Id.* at 395; see also *Phila. Indem. Ins. Co. v. Amazon.com, Inc.*, 425 F. Supp. 3d 158, 163, 165 (E.D.N.Y. 2019) (quoting *Eberhart*, 325 F. Supp. 3d at 399) (granting Amazon summary judgment on the ground that Amazon was “better characterized as a provider of services” than a seller).

⁵⁴ *Eberhart*, 325 F. Supp. 3d at 399.

⁵⁵ 925 F.3d at 144 (Motz, J., concurring). Judge Motz reluctantly concurred in the majority judgment, reasoning that, “[g]iven the policy-intensive nature of this inquiry, the lack of on-point Maryland precedent, and Amazon’s novel business model, I cannot confidently predict that Maryland courts would treat Amazon as a seller under state law.” *Id.* at 145. At the same time, Judge Motz recognized that “Amazon’s strategy of removing nearly every products liability case to federal court has complicated this endeavor and arguably stunted the development of state law,” and suggested that “legislative reforms, nonremovable lawsuits, and (in appropriate cases) certification remain available to consumers and state leaders who seek to confront these uniquely modern challenges.” *Id.*

Indeed, states are considering such legislation. For instance, “California is currently weighing legislation that would make large online sellers like Amazon responsible for sales of defective products in the same way it does brick-and-mortar stores.” Riley, *supra* note 1. Moreover, Amazon has signaled its support for such legislation, so long as it applies to all online marketplaces. Huseman, *supra* note 3, (“We share the California legislature’s goal of keeping consumers safe. To further that goal, this legislation aimed at protecting consumers should apply equally to *all* stores, including all online marketplaces.”).

business world.”⁵⁶ Moreover, judges came to realize the depth of Amazon’s involvement in these transactions. *State Farm Fire & Casualty Co. v. Amazon.com, Inc.* is a case in point. A customer purchased a bathtub faucet on Amazon, sold by Chinese company XMJ.⁵⁷ The order was “Fulfilled by Amazon” and was shipped in the same box as another product sold by Amazon.⁵⁸ The faucet malfunctioned and flooded the customer’s home. The home was insured by the plaintiff, who sued Amazon for strict products liability under Wisconsin law.⁵⁹ The district court denied Amazon’s summary judgment motion because “Amazon was so deeply involved in the transaction.”⁶⁰

Indeed, as the California state appellate court in *Bolger* explained, Amazon’s business model compels the consumer to interact directly with Amazon, not the seller, when placing an order and paying for a product.⁶¹ In Professor Shapo’s conception, in these emergent cases, judges have seemingly come full circle, with the realization that, from the perspective of the consumer, “Amazon took on all the roles of a traditional—and very powerful—reseller/distributor.”⁶²

⁵⁶ *Bolger v. Amazon.com, LLC*, 53 Cal. App. 5th 431, 438 (2020) (internal quotation omitted). Moreover, as judges “[a]pply[] the 1980s retail-sales paradigm to modern e-commerce,” they have begun to recognize that state products liability acts drafted in the 1980s “do[] not address many of the contemporary standards in technology, communications, and commerce—standards that have changed radically since 1988.” *Stiner v. Amazon.com, Inc.*, No. 2019-0488, 2020 WL 5822477, at *7 (Ohio Oct. 1, 2020) (Donnelly, J., concurring in the judgment only). As Justice Donnelly aptly noted: “The divide between the pre-Internet age and the current age is so profound that laws like this [Ohio Products Liability] Act might as well have been written in the stone age.” *Id.* And “[e]ven if Amazon cannot be considered a supplier in the traditional pre-Internet sense, . . . its all-encompassing participation in the sales transactions of its third-party merchants places Amazon squarely on the supply chain, between the seller and the consumer.” *Id.* at *16.

⁵⁷ *State Farm Fire & Cas. Co. v. Amazon.com, Inc.*, 390 F. Supp. 3d 964, 967 (W.D. Wis. 2019).

⁵⁸ *Id.* at 967–68.

⁵⁹ *Id.* at 968. Under the 2011 Wisconsin statute, “plaintiff can recover from a seller or distributor of a defective product, only if the seller or distributor undertakes the manufacturer’s duties, or if the manufacturer is unavailable or judgment proof.” *Id.* at 969.

⁶⁰ *Id.* at 966.

⁶¹ 53 Cal. App. 5th at 452 (“[Amazon’s] business model compels the consumer to interact directly with Amazon, not the seller, to place the order for the product and pay the purchase price.”); see also *Oberdorf v. Amazon.com, Inc.*, 930 F.3d 136, 147 (3d Cir. 2019), *certifying questions to Pa. S. Ct.*, 818 F. App’x 138 (3d Cir. 2020) (en banc), *appeal dismissed per stipulation* (“Amazon specifically curtails the channels that third-party vendors may use to communicate with customers”); Janger & Twerski, *supra* note 41, at 263 (“Amazon curtails the right of third-party vendors to communicate with Amazon site users. They may not do so without Amazon’s permission.”); *id.* at 267 (“[F]or a broad swath of products purchased through the platform, Amazon itself controls access to the site, the manner in which the items are displayed, and receives compensation at every stage. In fact, except for the formality of title, the level of integration in Amazon’s supply chain is comparable to that of a standard brick-and-mortar seller.”).

⁶² *State Farm Fire & Cas. Co. v. Amazon.com, Inc.*, 390 F. Supp. 3d 964, 972 (W.D. Wis. 2019).

This transformative shift is reminiscent of a previous historical juncture when a strict form of liability for products was developed to account for new market realities and cover the widespread new transactions used in the business world. Nearly a century ago, Justice Roger Traynor famously observed that “[a]s handicrafts have been replaced by mass production with its great markets and transportation facilities, the close relationship between the producer and consumer of a product has been altered.”⁶³ Significantly, “[t]he consumer no longer has means or skill enough to investigate for himself the soundness of a product . . . and his erstwhile vigilance has been lulled by the steady efforts of manufacturers to build up confidence by advertising and marketing devices”⁶⁴ Moreover, strict liability extended from manufacturers to retailers, and others similarly involved in the vertical distribution of consumer goods, on the ground that “[r]etailers like manufacturers are engaged in the business of distributing goods to the public” and “are an integral part of the overall producing and marketing enterprise that should bear the cost of injuries resulting from defective products.”⁶⁵

Professor Shapo captured this “most stunning doctrinal event of the sixties”⁶⁶ with his cultural lens, arguing that during this era “an undercurrent of concern with asserted imbalances of power in favor of sellers drove the courts to consumer-oriented decisions.”⁶⁷ In his view, “[e]ven more strongly than it operates in the front lines of response to technology, tort law plays the metaphorical role of point man in the response to power. It occupies this role with respect to power wielded by private parties, by governments, and by officials.”⁶⁸

Projecting Professor Shapo’s view forward to the modern controversy over Amazon, it would seem that, then and now, the changing marketplace and power imbalances warrant the imposition of strict products liability to protect individuals from harms caused by defective and unsafe products. As summed up by a California state appellate court in *Bolger*, “Amazon . . . act[s] as a *powerful* intermediary between the third-party seller and the consumer [and] is the only member of the enterprise reasonably available to

⁶³ *Escola v. Coca Cola Bottling Co.*, 150 P.2d 436, 443 (Cal. 1944) (Traynor, J., concurring).

⁶⁴ *Id.*

⁶⁵ *Vandermark v. Ford Motor Co.*, 391 P.2d 168, 171 (Cal. 1964).

⁶⁶ Shapo, *Millennial Torts*, *supra* note 17, at 1025.

⁶⁷ *Id.* at 1026.

⁶⁸ *Id.* at 1034.

an injured consumer in some cases”⁶⁹ This context seems tailor-made for Professor Shapo’s invocation of tort law as “point man in the response to power” to protect particularly vulnerable consumers.⁷⁰

II. AMAZON AS “CHEAPEST COST AVOIDER”

The policy-intensive nature of the question of holding Amazon liable as a seller lends itself to a law and economics “cheapest cost avoider” analysis. As I have argued elsewhere:

The rise and expansion of modern products liability law has resulted in “a profound shift in the orientation of legal doctrine,” away from addressing product-related harms via contract between parties in privity of contract to recognition of the direct regulation of defective products as an appropriate judicial function. In their attempts to deter harmful conduct, courts often sought to identify the party for whom an assignment of liability would result in the most efficient reduction in the accident costs—namely, the cheapest cost avoider.⁷¹

A touchstone of products liability law is to hold liable entities involved in creating the product and bringing it to the consumer, who are best positioned to prevent against defective products entering the marketplace in the first instance and to internalize the costs of defects when they occur (including by pursuing indemnification claims against those it allows to sell on its site).⁷² Strict liability expanded from manufacturers to retailers precisely because “the retailer himself may play a substantial part in insuring that the product is safe or may be in a position to exert pressure on the manufacturer to that end; the retailer’s strict liability thus serves as an added incentive to safety.”⁷³

⁶⁹ *Bolger v. Amazon.com, LLC*, 53 Cal. App. 5th 431, 2020 WL 4692387, at *2 (Cal. Ct. App. 2020) (emphasis added); *see also id.* at *12 (“Amazon, like conventional retailers, may be the only member of the distribution chain reasonably available to an injured plaintiff who purchases a product on its website.”). For example, “third-party vendors [may] conceal themselves from the customer, leaving customers injured by defective products with no direct recourse to the third-party vendor. There are numerous cases in which neither Amazon nor the party injured by a defective product, sold by Amazon.com, were able to locate the product’s third-party vendor or manufacturer.” *Oberdorf v. Amazon.com Inc.*, 930 F.3d 136, 145 (3d Cir. 2019), *certifying questions to Pa. S. Ct.*, 818 F. App’x 138 (3d Cir. 2020) (en banc), *appeal dismissed per stipulation*.

⁷⁰ Shapo, *Millennial Torts*, *supra* note 17, at 1034.

⁷¹ Catherine M. Sharkey, *Modern Tort Law: Preventing Harms, Not Recognizing Wrongs*, 134 HARV. L. REV. (forthcoming Feb. 2021) (manuscript at 13–14) (on file with *Northwestern University Law Review*) (internal citation omitted) (reviewing JOHN C. P. GOLDBERG & BENJAMIN C. ZIPURSKY, *RECOGNIZING WRONGS* (2020)) (on file with *Northwestern University Law Review*).

⁷² *See id.* at 17–30.

⁷³ *Vandermark v. Ford Motor Co.*, 391 P.2d 168, 171–72 (Cal. 1964).

This same deterrence-based, prevention-of-harms rationale has been explicitly invoked in recent cases holding Amazon liable. As the California state appellate court in *Bolger* reasoned: “The strict liability doctrine derives from judicially perceived public policy considerations, i.e., enhancing product safety, maximizing protection to the injured plaintiff, and apportioning costs among the defendants.”⁷⁴

Significantly, Amazon itself touts safety as a top priority.⁷⁵ According to an Amazon spokeswoman, the company “uses automated tools that scan hundreds of millions of items every few minutes to screen would-be sellers and block suspicious ones from registering and listing items, using the tools to block three billion items in 2018.”⁷⁶ When the systems alert Amazon employees of a concern, they “move quickly to protect customers and work directly with sellers, brands, and government agencies.”⁷⁷ Amazon is thus “in a position to halt the flow of any defective goods of which it bec[o]me[s] aware.”⁷⁸ Indeed, “Amazon is uniquely positioned to receive reports of defective products, which in turn can lead to such products being removed from circulation.”⁷⁹

However, “[b]y design, Amazon’s business model cuts out the middlemen between manufacturers and consumers, reducing the friction that might keep foreign (or otherwise judgment-proof) manufacturers from putting dangerous products on the market.”⁸⁰ Moreover, “Amazon requires that its vendors release it and agree to indemnify, defend, and hold it harmless against any claim, loss, damage, settlement, cost, expense, or other liability.”⁸¹ Amazon’s business model, in other words, is designed to insulate it from traditional strict products liability.

⁷⁴ 53 Cal. App. 5th, 2020 WL 4692387, at *8 (internal citation omitted); *see also* *Stiner v. Amazon.com, Inc.*, No. 2019-0488, 2020 WL 5822477, at *6 (Ohio Oct. 1, 2020) (Donnelly, J., concurring in the judgment only) (“The use of strict liability would incentivize Amazon to select and monitor reputable merchants with safer products just as strict liability incentivizes sellers to select safer products that are sourced from reputable wholesalers or manufacturers.”).

⁷⁵ *See* Berzon, Shifflett & Scheck, *supra* note 4.

⁷⁶ *Id.*

⁷⁷ *Id.* (quoting an Amazon spokesperson).

⁷⁸ *State Farm Fire & Cas. Co. v. Amazon.com, Inc.*, 390 F. Supp. 3d 964, 972 (W.D. Wis. 2019); *see also* *Oberdorf v. Amazon.com Inc.*, 930 F.3d 136, 146 (3d Cir. 2019), *certifying questions to Pa. S. Ct.*, 818 F. App’x 138 (3d Cir. 2020) (en banc), *appeal dismissed per stipulation* (“Amazon is fully capable, in its sole discretion, of removing unsafe products from its website.”); *Gartner v. Amazon.com, Inc.*, 433 F. Supp. 3d 1034, 1044 (S.D. Tex. 2020) (“Amazon could halt the placement of defective products in the stream of commerce, deterring future injuries.”).

⁷⁹ *Oberdorf*, 930 F.3d at 146.

⁸⁰ *Erie Ins. Co. v. Amazon.com, Inc.*, 925 F.3d 135, 144 (4th Cir. 2019) (Motz, J., concurring).

⁸¹ *Oberdorf*, 930 F.3d at 142.

Amazon plays a critical function in the modern consumer marketplace: as intermediary between manufacturer and purchaser, it has the ability to pressure those who make consumer goods to ensure that they are safe. As the federal district court in Wisconsin recognized, as “an integral part of the chain of distribution,” Amazon is “an entity well-positioned to allocate the risks of defective products to the participants in the chain” and equally “positioned to insure against the risk of defective products.”⁸² Amazon, in other words, is the cheapest cost avoider upon whom liability should be imposed.

CONCLUSION

The twenty-first century platform economy poses challenges for the existing twentieth century products liability regime. As Professor Shapo presciently foresaw, “[e]ven with the increase of government regulation in many areas of safety, torts remains in the trenches where scientific and technological advance creates new patterns of injury.”⁸³ Moreover, “[t]ort also will continue to play the role of the initial decider between first-best and second-best solutions for emerging injury problems.”⁸⁴

The question of Amazon’s liability provides a perfect case study to illustrate how cultural and economic perspectives converge in the field of products liability; both the “tort-as-culture” lens and cheapest-cost-avoider analysis point in the direction of holding Amazon liable for dangerous or defective products sold through its platform.

Moreover, I expect Professor Shapo would heartily embrace this convergence of cultural and economic perspectives. In the introduction to his 2012 book, *An Injury Law Constitution*, he wrote:

It is often useful to analyze society’s efforts to control risky conduct from an economic perspective. But running through the social judgments that are made on risk-generating behavior are moral notions of reparation, sometimes of punishment, often of vindication. All of these ideas partake of custom and culture, and the jagged profile of injury law reflects the fact that we are a land

⁸² *State Farm Fire & Cas. Co.*, 390 F. Supp. 3d at 972; see *Stiner v. Amazon.com, Inc.*, No. 2019-0488, 2020 WL 5822477, at *6 (Ohio Oct. 1, 2020) (Donnelly, J., concurring in the judgment only) (“Because Amazon is so deeply involved in the chain of distribution leading to the Amazon customer, Amazon is well positioned to monitor third-party sellers and their products and to limit its e-commerce services to reputable third-party sellers that select safer products, just as sellers are in a position to select safer products that are sourced from reputable wholesalers or manufacturers.”).

⁸³ Shapo, *Millennial Torts*, *supra* note 17, at 1031.

⁸⁴ *Id.* at 1043.

of competing cultures and many customs. Mirroring these complexities are the different intensities of signals that the law sends out.⁸⁵

And as far back as his 1977 book, *The Duty to Act: Tort Law, Power, and Public Policy*, Professor Shapo wrote:

Although I make rather little specific reference to this [economic perspective on tort law] in this work, this does not denigrate my debt to these and other authors who have enriched my thinking about tort law, but rather reflects the absorption of their ideas in the common currency of torts scholarship. It will also, however, imply a belief on my part that the analyses and usages of these scholars may be improved by the articulation of a framework centered on considerations of power relationships.⁸⁶

Perhaps the convergence of cultural and economic perspectives is a distinct feature of modern torts, where given the culture and politics of American law in 2020, a culturally specific norm incorporating power dynamics is efficiency-as-responsibility, meaning that the party with greatest control over a risk must pay for damages in the event of harm.

⁸⁵ MARSHALL S. SHAPO, AN INJURY LAW CONSTITUTION, at xv (2012).

⁸⁶ MARSHALL S. SHAPO, THE DUTY TO ACT: TORT LAW, POWER, AND PUBLIC POLICY, at xviii (1977).