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## Beyond Gatekeeping: The Normative Responsibility of Internet Intermediaries

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## *Beyond Gatekeeping: The Normative Responsibility of Internet Intermediaries*

### ABSTRACT

This paper puts forward a normative approach to the responsibility of Internet intermediaries for third-party content they host. It argues that, in thinking about intermediary liability, our focus should be, rather than on the outcomes of intermediaries' decisions, on their responsibility towards the reasoning processes in reaching these. What is necessary is a framework that, at the same time that it attaches responsibilities to such decisions, creates a cushioning system for their making, attenuating the hardship of honest mistakes. Within this framework, intermediaries must be seen not as mere keepers of gates, but as designers of artefacts whose use plans settle normative questions and play a fundamental role in the construction of our normative reality. Accordingly, an interpretive commitment must be required towards the integrity of such a reality. Every time intermediaries make a decision, as they always will and should, – in all this hidden jurisprudence – the integrity of our normative order and the values it reflects are at stake. All this must be seen as part of a broader concern with justice (corrective, normative) in the internal life of the information environment. For the same reason, however, we should not expect perfection from intermediaries, but responsible efforts. Like journalists who are entitled to make mistakes, if only they seek responsibly to avoid these (which is the idea of responsible communication in defamation), so it should be with Internet intermediaries. Understanding so enables us to move away from outcomes-based approaches towards a more granular and fairer system of intermediary liability.

# *Beyond Gatekeeping: The Normative Responsibility of Internet Intermediaries*

Marcelo Thompson \*

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“Actors who implicitly claim that they can change the world through action (and therefore through the creation of risk), and yet that they cannot affect the risks that attend such action, assert a convenient but incoherent powerlessness in the exercise of power. ... To refuse to mitigate the risk of one’s activity is to treat the world as a dumping ground for one’s harmful effects, *as if it were uninhabited by other agents*”.

Ernest Weinrib, *The Idea of Private Law*<sup>1</sup>

## I. INTRODUCTION

### A. *Neutrality & Reasonableness*

In global conversations concerning the role of intermediaries in the life of the information environment, an often-expressed view is that intermediaries should not be held liable for third-party content they host.<sup>2</sup> Such a view – which, for the most part, is also the law in the United States – is, in turn, based on a thesis that holding Internet intermediaries liable would enlist them to act as unofficial censors, making decisions on the nature of content that should not be under their purview. In making these decisions, and in order to avoid liability, more often than not intermediaries would take content down after receiving a complaint by Internet users.<sup>3</sup> Any modulation of information flows according to what intermediaries find legal or illegal would raise evident concerns of legal principle regarding the protection to freedom of expression. After all, the thesis goes, intermediaries should not be the ones expected to make such decisions at all. Decisions as to what is legal or illegal, what stays and what goes, if not by authors themselves, should be made entirely by courts or other instances of public decision-making. Intermediaries should be but neutral implementers of these.<sup>4</sup>

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<sup>1</sup> ERNEST J. WEINRIB, *THE IDEA OF PRIVATE LAW* 152 (2d ed. 2012).

<sup>2</sup> See ARTICLE 19, *INTERNET INTERMEDIARIES: DILEMMA OF LIABILITY* 3 (2013), [https://www.article19.org/data/files/Intermediaries\\_ENGLISH.pdf](https://www.article19.org/data/files/Intermediaries_ENGLISH.pdf) (for a recent characterization of this widely held view. We discuss some of its paradigms and underpinnings below – *see infra* Part I.C).

<sup>3</sup> This has been appropriately referred to in the literature as the problem of *collateral censorship*. See, originally, Michael I. Meyerson, *Authors, Editors, and Uncommon Carriers: Identifying the “Speaker” Within the New Media*, 71 NOTRE DAME L. REV. 78, 116, 118 (1996) and Jack M. Balkin, *Free Speech and Hostile Environments*, 99 COLUM. L. REV. 2295, 2296-2307 (1999) (introducing the problem of collateral censorship). See also Felix T. Wu, *Collateral Censorship and the Limits of Intermediary Immunity*, 87 NOTRE DAME L. REV. 293 (2011) (for an excellent criticism to the granting of immunity without correspondence to the existence of collateral censorship). See *infra* Part I.B for discussion.

<sup>4</sup> See Corey Omer, *Intermediary Liability for Harmful Speech: Lessons from Abroad*, 28 HARV. J.L. & TECH. 289 (2014) (noting that: “The core arguments against intermediary liability today do

Seeming though it may, on its face, to express a fairly reasonable concern with the formidable power intermediaries command in our time, and thus with the consequences of their decisions, the thesis above – let us call it the *neutrality thesis* – cannot respond to a very basic question, namely: if intermediaries do command so strong a power, would it not be worse for freedom of expression, and ultimately for law itself, that their decisions go unchecked? This question may sound paradoxical in light of the notes above. For is it not the neutrality thesis committed precisely to *limiting* the power of intermediaries?

The paradox is only apparent. For reasons we are going to unpack in a minute, the neutrality thesis might in fact, if unsuspectedly, contribute to the unreasonable exercise of power by intermediaries. And it is precisely due to the effects of power exercised unreasonably by Internet intermediaries that we must conceive of a framework that identifies the *reasonable* boundaries of their responsibilities, as well as the conceptual foundations of these. Frameworks that seek to *avoid* the unavoidable or the necessary – namely, that intermediaries make decisions in one way or another, as they always will and should – are a normative misrepresentation of reality. What we really need is a framework *for* reasonable decisions to be made by intermediaries, which, at the same time that it attaches *responsibilities* to such decisions, creates a *cushioning system* for their making, attenuating the hardship of honest mistakes.

Such a framework, in its design and foundations, must treat the problem of intermediary liability as a *normative* one, and one of the central normative problems of our time. It must pay heed to the state-like ‘nodality’<sup>5</sup> of intermediaries in the techno-normative networks that connect our societies – that is, to the gravitational pull that enables intermediaries to reconfigure online flows of information,<sup>6</sup> the social understanding of these and, ultimately, the very *reasons* upon which we act.

Internationally, liability models established so far have tended to steer away from this normative question – this question concerning our reasons for action – and the

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not turn on a belief that all content should be permitted online, but merely that governments cannot encumber intermediaries with the task of judging which content is permissible and which is not”). As this paper will argue, governments not only can, but they should.

<sup>5</sup> See CHRISTOPHER C. HOOD & HELEN Z. MARGETTS, *THE TOOLS OF GOVERNMENT IN THE DIGITAL AGE* (2d ed. 2007) (speaking about nodality as a tool of government – which denotes its “being in the middle of an information or social network”, and constitute a relatively central presence, even if not necessarily “dead centre”). See also Helen Z Margetts, *The Internet and Public Policy* 1 Policy and Internet 1 (for a briefer version of the argument develop in HOOD & MARGETTS, *id.*). But see Seth F. Kreimer, *Censorship by Proxy: The First Amendment, Internet Intermediaries, and the Problem of the Weakest Link*, 155 U. PA. L. REV. 11, 27, 70 (2006) (treating intermediaries as the weak link in the chain of communication).

<sup>6</sup> See WILLIAM H. DUTTON, *SOCIAL TRANSFORMATION IN AN INFORMATION SOCIETY: RETHINKING ACCESS TO YOU AND THE WORLD* 34 (2004) (discussing the idea of “reconfiguring access” as the output of an ecology of decisions, by which different actors “open and close pathways to people, information, services, and technologies in ways that have implications over the longer term for the relative communicative power of any specific actor”. The nodality of any actor will be a function of its communicative power. Nodality, in other words, becomes a physical manifestation of authority).

commitments which, I argue below, it entails. Most recently, one can observe a trend, reflected for instance in the UK Defamation Act 2013<sup>7</sup> and in the world's first Internet Bill of Rights,<sup>8</sup> of adopting exemption regimes that instantiate the ways of thinking of the neutrality thesis – and which come as a late reflection of the model pioneered by the Communications Decency Act of 1996.<sup>9</sup> This model, in turn, as I explain in Part I.C below, is grounded on a strongly utilitarian tradition that sees the Internet as basically a platform to generate ever more innovation;<sup>10</sup> a tradition that, not being favored in today's literature,<sup>11</sup> seeks to affirm the surplus value of speech even where there is none. It is a model where aggregative utilitarian consequences matter more than our thinking about the reasonable boundaries of personal autonomy, and which thus cannot be captured by any form of normative, deontological thinking.

In the field of intermediary liability, this model is reflected in theories that see intermediaries merely as *keepers of gates*,<sup>12</sup> rather than agents whose normative decisions matter, *in themselves*, for how we author our lives. Intermediaries' decisions, in effect, matter, and must be seen as mattering, in the very grounds on which they are made. In their very fabric, they reflect or obscure, promote or undermine values such as privacy, reputation, gender equality, sexual freedom and those generally protected by children's rights. Yet, gatekeeper theories, refrain from conceiving of an institutional landscape in which every actor, in its own particular

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<sup>7</sup> Defamation Act 2013, c. 26 (UK).

<sup>8</sup> Lei No. 12.965, de 23 de Abril de 2014, Diário Oficial da União [D.O.U.] de 24.4.2014 (Braz.) (establishing principles, guarantees, rights and duties for the use of the Internet in Brazil; commonly referred as “Marco Civil da Internet no Brasil” or, simply, “Marco Civil”) [hereinafter *Marco Civil*]. See Kevin Collier, *Brazil signs Marco Civil, its Internet Bill of Rights, into Law*, THE DAILY DOT (Apr 23, 2014, 10:09am), <http://www.dailydot.com/politics/marco-civil-internet-bill-of-rights-brazil-rousseff> (noting that “[t]he world’s first major Internet Bill of Rights is finally law”).

<sup>9</sup> Communications Decency Act, 47 U.S.C. § 230 (2006). As we examine in Parts II.B and III below, the current alternative model to exemption of liability – that is, the model of *strict liability* – is a mirror image of the exemption model, and provides no answer to the questions that concern us here either.

<sup>10</sup> The act itself affirms as the policy of the United states: “(1) to promote the continued development of the Internet and other interactive computer services and other interactive media” and (2) to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, *unfettered by Federal or State regulation*”. *Id.*, § 230(b)(1), (2). Other than reference to criminal laws, intellectual property rights and limited privacy aspects, all of which are areas in which the Act has no effects, no allusions are made to the protection of individual rights.

<sup>11</sup> See Joel R. Reidenberg, Jamela Debelak, Jordan Kovnot and Tiffany Miao, *Section 230 of the Communications Decency Act: A Survey of the Legal Literature and Reform Proposals* 9 (CLIP: Center on Law and Information Policy, Fordham Law School, Research Report, 2012), [http://law.fordham.edu/assets/CLIP/Fordham\\_CLIP\\_CDA\\_230\\_Report\\_4-25-12.pdf](http://law.fordham.edu/assets/CLIP/Fordham_CLIP_CDA_230_Report_4-25-12.pdf) (for a comprehensive survey of Section 230 literature, noting that “the majority of the scholarly literature identified is critical of Section 230”, with a spike reflected from 2007 to date, as issues of cyberbullying and online harassment revealed problems in Section 230’s breadth).

<sup>12</sup> See *infra* Part I.C.

way, is expected to fulfil a certain commitment towards the recognition of such values – values without whose availability no autonomous life is possible. Ultimately, these are theories that dissociate debates concerning the liability of intermediaries from broader debates concerning our conceptions of *justice*.

Although the model of recent exemption regimes has been pioneered in the United States, and is undergirded by its strong First Amendment traditions, the arguments introduced by the paper will give us pause to consider its boundaries and alternative approaches – if only as an exercise of “institutional imagination”.<sup>13</sup> And while legislative debates in the United States seem pretty much settled for around two decades now,<sup>14</sup> the global conversation continues and it is important to engage with it. This paper does so from the perspective of contemporary developments in the Common Law and in the law of the European Union – while also referring to domestic law as appropriate. Far from being jurisdictionally situated, however, the paper raises questions of international resonance, hopefully providing, through their answer, a deeper and more granular understanding of the problem of intermediary liability in the light of its normative dimensions.

Normative coherence is of utmost importance in our task. If the problem we address is indeed, as I claim, a central one, we must see to it that the framework we put forward hangs coherently together with its deeper conceptual foundations. The paper does so by asking what are the commitments that *justice* – *corrective* and, more broadly, *normative* justice (as I will call it here) – require from Internet intermediaries.<sup>15</sup> It puts forward a solution to the problem of liability of intermediaries that seeks to live up to these larger concerns.

In doing so, the paper proposes a *best-efforts* and *norms-based* approach<sup>16</sup> that attempts to calibrate the liability of intermediaries in the light of two competing considerations. On one hand, the proposed approach takes into account the *public interest* in the services rendered by Internet intermediaries and the *difficulties* intermediaries face in settling disputes they are called on to settle. A privacy-infringing public post on Facebook, which may have deleterious consequences but

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<sup>13</sup> Roberto Mangabeira Unger, *Legal Analysis as Institutional Imagination* 59 THE MODERN LAW REVIEW 1 (1996). Approaches in the literature so far have tended to imagine solutions that do not stray far from the two major fixed paradigms this paper discusses – namely, the paradigms of either immunity (or quasi-immunity) and the paradigms of strict liability. See e.g. Mark A. Lemley, *Rationalizing Internet Safe Harbors*, 6 J. ON TELECOMM. & HIGH TECH. L. 101, 115,116 (for an example of the former). See also Michael L Rustad & Thomas H. Koenig, *Rebooting Cybertort Law*, 80 WASH. L. REV. 335, 392 (for an example of the latter). But see Ali G Ziegrowsky, *Immoral Immunity: Using a Totality of the Circumstances Approach to Narrow the Scope of Section 230 of the Communications Decency Act*, 61 HASTINGS L. J. 1307, 1325 (proposing a subjective, totality of the circumstances test that is similar in intention to the approach proposed below – see *infra* Part IV.A for a discussion).

<sup>14</sup> See Joel R. Reidenberg et al, *supra* note 11, at 52 (noting that proposals for legislative change have been minimal). But see Michael L Rustad & Thomas H. Koenig, *supra* note 13, at 376 (noting, as I agree, that “cybertort law is not settled until it is settled right”).

<sup>15</sup> See *infra* Part III.B and C.

<sup>16</sup> See *infra* Part IV.A and C.

which the author refuses to delete, should it stay or should it go? The decision will often rest on underdeterminate technological, legal and more broadly cultural factors, which are hard even for courts to determine on a for sure basis. On the other hand, it is important to recognize that the *risks* to which victims of content online are exposed spring, at least in part, from intermediaries' own services and decisions. Hence, some dimension of *reasonable care* should be expected from intermediaries in putting *efforts* in place to *normatively* evaluate disputes concerning content they host – and, of course, to ultimately act upon the conclusions they reach.

This normative dimension of responsibility matters, in three ways. First, it matters because it shows that the reasonable care expected from intermediaries should *not* be directed merely towards the *taking down* of content.<sup>17</sup> Reasonable care *concerns*, above everything, *reason*. And while this may seem an obvious point to make, it has not proven to be so obvious in the law. Second, the normative dimension of responsibility matters for it indicates an *interpretive commitment*, where truth is an achievement to be striven towards.<sup>18</sup> Intermediaries have thus a *margin of appreciation* to carry out what is not an obligation of results, but one of reasonable interpretive means. They can be mistaken, as long as they responsibly try not to be. Third, the normative dimension matters because it connects the responsibility expected from intermediaries to the normative order as a whole. It indicates, thus, the importance of approaching intermediaries' commitments from a *coherent perspective*, internally and externally so. Given the nodality of intermediaries in the normative community we inhabit,<sup>19</sup> the erosion of their normative responsibilities carries effects that transcend even the (already problematic) logical effects of ordinary cases of incoherence.

In pursuing a normative dimension of intermediaries' responsibility, this paper seeks to reconcile intermediaries' position as *designers* of technological artefacts<sup>20</sup> with, as noted, broader ideals of *justice* within which intermediaries' activities ought to be approached. It is because of these ideals, the paper argues, that an interpretive

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<sup>17</sup> See *infra* Part II.C.

<sup>18</sup> See *infra* Part III.B.

<sup>19</sup> Karine Nahon has explored the idea of nodality under slightly different terminology, in what she calls a “normative theory of network gatekeeping *saliency*”. See Karine Barzilai-Nahon, *Toward a Theory of Network Gatekeeping: A Framework for Exploring Information Control* 59 JOURNAL OF THE AMERICAN SOCIETY FOR INFORMATION SCIENCE AND TECHNOLOGY 1493, 1493 (2008). Network gatekeeping *saliency* here refers to the interactions between gatekeepers and those she calls the *gated* (*Id.*, at 1494.) and the extent to which the latter can respond to the political power of the former. Nahon's work develops an important taxonomy to account for the ways in which, by exercising control over information, gatekeepers shape norms within gated communities, by protecting them from entry from outside (*Id.*, at 1496). Her normative account, however, is limited by the fact that regulation is approached in her work as a *meta*-mechanism that applies to control procedures (*Id.*, at 1498) – seeming to imply a detachment between network *saliency* and a higher normative sphere. I would like to suggest these levels are more interconnected than she implies. The nodality of internet intermediaries, expressed in each of their design decisions, enables them to shape law itself. This is an important dimension of their responsibility.

<sup>20</sup> See *infra* Part III.A.



commitment of integrity is required from intermediaries between the design of their artefacts and an order – the normative order – that *transcends* the *purely factual gates* intermediaries are said to keep. Ultimately, the paper argues, the responsibility intermediaries have towards the normative order finds its closest expression in the idea of *responsible communication in the public interest*, which we see in the common law of defamation.<sup>21</sup> Journalists, it is known, have the duty of acting responsibly towards the truth of facts they ascribe to people, all the while *also* having the hardship of such a duty cushioned by the excuse of honest mistakes. And so should be with Internet intermediaries. The law should expect from them a commitment of normative responsibility towards the cases they settle, yet be accommodating of the difficulties in always getting the facts and the law straight.

Before we proceed with our analysis and exposition of this thesis, two clarifications are necessary. The first is a taxonomic one. We use the terms *Internet intermediary* or, simply, *intermediary* in an elastic – but not too elastic – way. In the universe of intermediaries there are those, like Verizon or Akamai, which are in the business of simply routing content through the Internet or caching it – that is, hosting content transitorily, to enable or facilitate its accessibility via the underlying infrastructure of cables and protocols.<sup>22</sup> These intermediaries have little chance of reflecting upon content they route or cache, and thus to have their reason to a more significant extent *engaged* by such content. They are not the kinds of intermediaries we are concerned with here. Our concern is with intermediaries – from Facebook to Amazon, from Google to Spotify – whose activities entail the prolonged hosting of content of any nature as well as the making available of such content over the Internet. Very importantly, we are also only concerned with such intermediaries to the extent that they have *actual* – rather than purely constructive – *knowledge* of their hosting of such content. Whether intermediaries' reason ought to be engaged

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<sup>21</sup> See *infra* Part IV.C.

<sup>22</sup> Operating at the physical and logical layers of the Internet, these intermediaries relate to the content layer mostly on *topological* terms. To the extent that they have some nodality on the Internet, this nodality rests on aspects of more physical nature – it rests on the ability of these intermediaries to *transport* content or *facilitate* its retrieval. Absent, here, is a *teleological* element that is so important for our analysis, and with which we engage in Part III. The distinction between actors who host and cache or merely conduct content is at the core of the liability provisions of the European Directive on Electronic Commerce (see Council Directive 2000/31, arts. 12-14, 2000 O.J. (L 178) 1 (EC)) [hereinafter *Electronic Commerce Directive*] as well as of Section 512(a) in the US (17 U.S.C. § 512(a)) which, in the field of copyright, exempts from liability service providers merely responsible for transitory digital network communications – though see Nathan Lovejoy, *Standards for Determining When ISPs Have Fallen Out of Section 512(A)*, 27 HARV. J. L. & TECH. 257 (for a discussion of how the boundaries of Section 512(A) are getting eroded). The literature and classificatory diverges regarding Internet layers are vast. Here I employ the classifications adopted in Yochai Benkler, *From Consumers to Users: Shifting the Deeper Structures of Regulation Toward Sustainable Commons and User Access*, 52 FED. COMM. L.J. 561 (2000) (see also YOCHAI BENKLER, *THE WEALTH OF NETWORKS: HOW SOCIAL PRODUCTION TRANSFORMS MARKETS AND FREEDOM* 392 (2006), for a more recent analysis).

even before notice is given to them may be a valid concern, but it is not one that will occupy us here.

The second clarification has to do with the idea of neutrality itself.

### B. *Liability's Pendulum*

Ideals of neutrality, as we find them in the realm of the information environment, can be understood as unwitting restatements of more established doctrines of neutral concern in the realm of politics. Neutral political concern has it that “governments must so conduct themselves that their actions will neither improve nor hinder the chances individuals have of living in accord with their conception of the good”.<sup>23</sup> Complementary to this notion, though approached from a normative dimension, is the notion that governments ought to exclude the pursuit of ideals from the scope of their action. The doctrine of exclusion of ideals, as Joseph Raz suitably terms it, requires governments to be “blind to the truth or falsity of moral ideals, or of conceptions of the good”.<sup>24</sup> It asks governments to see to it “that neither the validity, cogency or truth of any conception of the good, nor the falsity, invalidity or stupidity of any other may be a reason for any governmental action”.<sup>25</sup> Such sorts of commitments, which can be more broadly accommodated within a *theory of political neutrality*,<sup>26</sup> are perhaps the sorts of commitments one may think we should expect from Internet intermediaries; the sort of commitment the neutrality thesis is thought to reflect and advance; that, by exempting intermediaries of liability, we will be fostering their *evaluative restraint* regarding content they host.

There is not much to commend doctrines of neutrality for. In the world of politics, they have been persuasively challenged by communitarians, feminists and, ultimately, by liberals themselves. At the heart of the criticism is the implausibility of principled inaction even where there are strong reasons to act in order to change a certain state of affairs. Doctrines of neutrality work by bracketing certain reasons,<sup>27</sup>

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<sup>23</sup> JOSEPH RAZ, *THE MORALITY OF FREEDOM* 108 (1986).

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> Raz notes the close interdependence between the doctrines of neutral political concern and exclusion of ideals (*Id.*). Kymlicka understands them as two different visions of neutrality, which he terms *consequential neutrality* and *justificatory neutrality* (see Will Kymlicka, *Liberal Individualism and Liberal Neutrality*, 99 *ETHICS* 883, 883-886 (1989)), whereas Rawls divides them between *neutrality of effect* and *neutrality of aim*, recommending the later while noting the implausibility of the former (See JOHN RAWLS, *POLITICAL LIBERALISM* 192-195 (2d ed. 2005)). While we do not pursue this distinction further, our concern is clearly with the justificatory – or, as I prefer to term it, normative – dimension of neutrality – with the extent to which politics engages *reason*.

<sup>27</sup> See STEVEN WALL, *LIBERALISM, PERFECTIONISM AND RESTRAINT* 27-123 (1998) (rejecting what he calls the bracketing strategy of political neutrality). See Marcelo Thompson, *Evaluating Neutrality in the Information Age: on the Value of Persons and Access* 121-160 (May, 2013)

namely conceptions of the good, out from the world of politics. And they do so precisely where action by the state upon such reasons would be necessary to enable individuals and groups to live autonomous lives. On the other hand, whether or not there are merits regarding political neutrality, it is worth recognizing no theory of neutrality commands inaction even in the light of *illegality*. Doctrines of neutrality are typically rights-based doctrines, and work by ascribing to *rights* (which can command state action) a lexical priority over *conceptions of the good* (which cannot).<sup>28</sup> Whether or not there may be reasons for expecting *political* restraint from intermediaries, why should we expect their restraint even before flagrant *illegality*, even before the known violation of fundamental rights by means of their own services?

In earlier works I have explored in greater detail the problem of neutrality in relation to the regulation of the information environment.<sup>29</sup> Here, however, it will be more helpful to deploy our resources towards thinking more directly about what *justice* requires from Internet intermediaries, which we do in Part III. That is so, in particular, since the neutrality thesis comes to be so self-defeating an enterprise that it would be unwarranted for us to take its exploration much further.

There are, indeed, two reasons that speak very strongly against it. The first is that there is not really a neutrality thesis when we see that very little exists to restrain the power of intermediaries to, *on their own accord*, determine the fate of content online. The second is that this is so, *especially*, where a system of exemption of liability is in place. On one hand, systems of exemption of liability do nothing to address, or indeed to preclude, autonomous decision-making by intermediaries. That intermediaries may make autonomous decisions as to whether or not to take content down is, in fact, something that cannot practicably be forestalled, on pain of completely undermining the way the Internet operates. Systems of exemption of liability do not – and cannot – change that. On the other hand, if there is any logical connection between exemption of liability and autonomous decision-making by intermediaries it is, rather, a seemingly unexpected one for advocates of the neutrality thesis. Systems of exemption of liability *further*, rather than preclude, the possibility that autonomous decision-making will be undertaken by intermediaries.<sup>30</sup>

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(unpublished D.Phil. thesis, University of Oxford) (on file with the Bodleian Library) (developing Wall’s argument in relation to the regulation of the information environment).

<sup>28</sup> This division was most famously introduced in John Rawls, *The Priority of Right and Ideas of the Good* 17 PHILOSOPHY & PUBLIC AFFAIRS 251 (1988) and developed as a central feature of Rawls’s conception of justice as fairness in JOHN RAWLS, A THEORY OF JUSTICE (2d ed. 1999) (“The priority of the right over the good in justice as fairness turns out to be a central feature of the conception [of justice as fairness]”, *Id.* 28).

<sup>29</sup> Thompson, *supra* note 12. See, also, Marcelo Thompson, *The Neutralization of Harmony: The Problem of Technological Neutrality, East and West*, 18 B.U. J. SCI. & TECH. L. 303 (2012).

<sup>30</sup> The very logic behind the introduction of the so-called Good Samaritan Defense of Section 230 was the encouragement of principled action by Internet intermediaries. See, e.g., DANIELLE K. CITRON, HATE CRIMES IN CYBERSPACE 170 (2014) (noting that “[i]n passing Section 230, Congress sought to spur investment in Internet Services while incentivizing online intermediaries to restrict access to objectionable material”).

In effect, disconnected from the normative strictures of the rule of law, unencumbered by the concern that courts may hold them accountable for the lack of reasonableness or care every so often reflected in their decisions, intermediaries are left at freedom to reach *whatever* decisions they will. Resources and wisdom invested by them in reaching such decisions will be only as good and as powerful as intermediaries themselves. The worse the intermediary, the worse the decision; the more powerful the intermediary, the more pervasive its effects. And to the victims of all forms of Internet-based whim, the restless seconds that flow from a bad decision are something no court can reinstate into the sands of time. It is easy to see, thus, that no neutrality is truly promoted by the neutrality thesis – quite the contrary.

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All this being said, there is still some limited wisdom in the justifications of the neutrality thesis, the value of which invites our respect. It has indeed been the case that courts and legislatures around the world have embedded systems of *strict liability* for intermediaries in a number of fields of the law. Such systems leave intermediaries in a situation of profound uncertainty as to how to proceed in the face of complaints raised by victims of content they host. The existence of these systems has not, for sure, been a uniform tale – and the legislative tendency around the world has increasingly been one establishing systems of *exemption of liability* for intermediaries. These systems, as noted, have been pioneered by the US and recently found echo in the United Kingdom (in defamation law)<sup>31</sup> and in Brazil (horizontally, as in the US).<sup>32</sup> The adoption of exemption systems reveals an understandable wish to flee the uncertainties of systems of strict liability. Yet, as we argue below, such a wish needs not commit us to the normative problems entailed in the neutrality thesis. Rather, there must be a way between strict liability and no liability whatsoever.

That the trajectory of the law concerning intermediary liability has followed a pendular movement between both extremes above might be due to the also understandable difficulties of identifying legally adequate standards in between. Both such extremes, however, tend to create default situations of unjustifiable challenge to fundamental rights. Strict-liability regimes necessarily threaten freedom

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*See also* Wu, *supra* note 3, at 302 (noting that “§ 230 was premised in part on a desire to encourage, rather than discourage, the filtering of content, by removing legal disincentives to filter”). *But see Doe v. GTE Corp*, 347 F.3d at 655, 660 (2003) (with Judge Easterbrook noting that ““Protection for ‘Good Samaritan’ blocking and screening of offensive material” [is] hardly an apt description if its principal effect is to induce ISPs to do nothing about the distribution of indecent and offensive materials via their services”). *See also* Andrew M. Sevanian, *Section 230 of the Communications Decency Act: A “Good Samaritan” Law Without the Requirement of Acting as a “Good Samaritan”*, 21 UCLA Ent. L. Rev 121 (on how courts have ignored this underlying legislative intent).

<sup>31</sup> *See supra* note 7 (we engage with the context of defamation law in the UK in Part II.A).

<sup>32</sup> *See supra* note 8.

of expression. No-liability regimes jeopardize privacy, reputation, racial and gender integrity, as well as children's rights.<sup>33</sup> In the short-run, no-liability regimes eliminate incentives for intermediaries to respond to notifications concerning violations of such rights. In the long-run, they eliminate incentives to publicize existing criteria and methodologies to deal with violations, let alone to collaborate with other parties towards the common development of these.

Such consequences are yet more problematic in cases where it is not clear that exemption of liability will also extend to violations of freedom of expression. In those cases, while intermediaries are certain to escape liability, say, for damages to reputation arising from the permanence of content online, there would be no such certainty regarding the violation of freedom of expression if intermediaries were to take content down.<sup>34</sup> The easy and natural path would be for the content to stay, however damaging that could be to the integrity of the victim's personality. Neither such extremes – neither strict nor no-liability systems – thus provides an adequate solution to the problem concerning us here.

### C. Gatekeepers: Internet Utilitarianism

The pendular trajectory noted above points to a common limitation of discussions

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<sup>33</sup> See CITRON, *supra* note 30, at 177 (for an excellent treatment of the problem in the context of harassment and nonconsensual pornography, noting that Congress should exclude the application of Section 230 in such cases). Yet, it is worth noting that the immunity of intermediaries should not be foregone only in these extreme cases, of what Citron calls the “worst actors” (*Id.*). Rather, whenever, the law can be calibrated to enable the pursuit of a proper balance by intermediaries between the rights they should observe, at the same time attenuating the hardship of such a pursuit, exemption of liability becomes a wrong response. Felix Wu has developed a similar argument, though focusing on the consequences of liability *for freedom of expression*. In his view, whenever collateral censorship is not a problem immunity is the wrong response. See Wu, *supra* note 3, at 302. I would argue that the collateral violation of speech ceases being a problem whenever we can appropriately calibrate the liability of intermediaries – but so does the violation of other fundamental rights cease being a problem, and ultimately the violation of the very idea of law. The argument cannot be a purely utilitarian one. See *infra* Part I.C.

<sup>34</sup> That is the situation in Brazil. See Marcelo Thompson, *Civil Rights Framework or Demarcation of Rights? Democracy, Reasonableness and the Cracks on the Brazilian Internet*, 261 REVISTA DE DIREITO ADMINISTRATIVO 203 (Br) (in Portuguese). In Europe, neither the takedown nor the keeping of content online are covered by an exemption of liability. See, e.g., Lilian Edwards, *Role and responsibility of the internet intermediaries in the field of copyright and related rights* 12 (Report Commissioned by the World Intellectual Property Organization. Geneva, 2011), [www.wipo.int/export/sites/www/copyright/en/doc/role\\_and\\_responsibility\\_of\\_the\\_internet\\_intermediaries\\_final.pdf](http://www.wipo.int/export/sites/www/copyright/en/doc/role_and_responsibility_of_the_internet_intermediaries_final.pdf) (noting that the absence of any protection in the Electronic Commerce Directive against liability *for takedown* – though also noting the possibility of contractual exemptions). In the US, in turn, while the CDA creates an immunity for intermediaries, First Amendment doctrine, in not reaching intermediaries as it reaches state actors, enables the former to moderate content online in ways the latter cannot. See CITRON, *supra* note 30, at 168.

on intermediary liability. The limitation is that such discussions have tended so far to focus predominantly on the outcomes of intermediaries' decisions rather than on the *reasons* pursued by intermediaries in reaching them.<sup>35</sup> In other words, those are discussions founded on the adoption of *factual*, outcomes-based perspectives, and on the consequential motives for pursuing these, rather than on a more in-depth inquiry concerning their *normative* underpinnings.

Karine Nahon's influential theory of network gatekeeping, for instance, although seeking to advance a normative argument, ends up directing her resources to functional *power* relations, which rest on purely factual assumptions of information control<sup>36</sup> – not on the *reasons* entailed in intermediaries relations with people and in intermediaries' responsibilities towards such reasons. Her concern is thus with the power of Internet intermediaries rather than, more properly, with their *authority*.<sup>37</sup>

This focus on power rather than authority is symptomatic. For while power is indeed an idea that pertains in the realm of facts, authority pertains in the realm of norms. Power, in Robert Dahl's famous conceptualization, is about getting someone to do something he would not otherwise do.<sup>38</sup> Yet, Dahl himself notes that a richer account of the concept must inquire into the *base* of an actor's power,<sup>39</sup> the idea of authority reflecting a special case of such a base.<sup>40</sup> Authority, as Veitch et al note, is power in its normative form<sup>41</sup> for it is power exercised with reference to a certain

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<sup>35</sup> Even in literature more deontological in nature, intermediaries' activities tend to be approached from the perspective of their consequences rather than of the normative means through which these are reached. *See, e.g.*, Citron, *supra* note 30, at 167 (basing her analysis on the role of website operators as "important sources of deterrence and remedy"). *See also* Rustad and Konig, *supra* note 13, at 383-387 (basing their argument in the notion that "ISPs are in the best position to prevent tort injuries" and that "limiting ISP immunity would help solve the injury problem"). This consequences-based approach is entailed in the very notion of collateral censorship (*see supra* note 3) which is deontological only to the extent that it focuses on the reasonable boundaries of freedom of expression, but utilitarian in its seeking to protect everything that exceeds these. *See, e.g.*, Wu, *supra* note 3 at 296 (claiming that "[t]he *unique harm* of collateral censorship, as opposed to self-censorship, lies in the incentives that intermediaries have to suppress more speech than would be suppressed by original speakers") (emphasis added).

<sup>36</sup> *See* Nahon, *supra* note 19, at 1496.

<sup>37</sup> Nahon's framework does account for relations of *authority* held between individuals and the state or industry regulators, and between individuals themselves (e.g. children and their parents as deployers of parental filtering technologies) (*see id.*, at 1498-1499) – but not (or not truly) between intermediaries and people. In the realm of Internet intermediaries, authority only comes into the equation in the *functional* way data-analysis frameworks normally conceives of it – namely, as a mirror image of the linking structure of the Internet. The more links an intermediary has, the more authority is ascribed to it (*see id.*, at 1499).

<sup>38</sup> *See* Robert Dahl, *The Concept of Power*, 2 BEHAVIORAL SCIENCE 201, 202-203 (1957).

<sup>39</sup> *Id.*, at 201.

<sup>40</sup> *Id.*, at 202.

<sup>41</sup> *See* Scott Veitch, Emiliios Christodoulidis & Lindsay Farmer, JURISPRUDENCE: THEMES AND CONCEPTS (2012), at 10.

*normative base*.<sup>42</sup> Not only thus it entails the manipulation of reasons for action,<sup>43</sup> it reflexively grounds that manipulation in reason itself.

It is in the latter realm, that of authority, that we should inquire upon the responsibilities of internet intermediaries. Where does the authority of intermediaries stem from? How does it influence our reasons for action? What are the commitments it demands from intermediaries? Only by attending to these questions, can a richer deontological account be provided of how, in attending to reasons, intermediaries can attend to the values instantiated in them.

We engage with these questions in Part III. For now, it is enough to note that the power invested in Internet intermediaries is normative in two ways to which our analysis ought to attend. It is normative as in the extended definition provided by Veitch et al,<sup>44</sup> for it entails the ability to affect people's reasons for action – and, most importantly, to affect how these reasons ultimately become stabilized in a certain institutional normative order.<sup>45</sup> On the other hand, the power of intermediaries is normative in that it rests on a certain normative base, which is that of the authority of intermediaries as designers of technological artefacts.<sup>46</sup> Ultimately, it is the normative authority of Internet intermediaries that is so important for our analysis – and the source of their responsibility.

To be fair, while attending to this normative dimension is fundamental to ensure the coherence between the responsibility of intermediaries and the normative order as a whole, it is also understandable that courts and the literature would tend to approach the problem of liability from markedly *consequentialist* lenses. After all, there is indeed great consequence in the actions undertaken by intermediaries. Intermediaries are designers of the heart valves through which the lifeblood of our information environment flows. Actions they take or refrain from taking can fundamentally alter medium and message, structure and content of information we impart and receive. Intermediaries, in other words, can transform the very constitution of the environments we inhabit and the lives we live therein.<sup>47</sup>

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<sup>42</sup> Authority is what Spinoza expressed as “*potestas* (the rightful power of rule)”, in opposition to “*potentia* (the actual power of government to achieve objectives)”. MARTIN LOUGHLIN, FOUNDATIONS OF PUBLIC LAW 164 (2010). It is a matter of *political right*, for it concerns “the conviction that there is a mode of right-ordering of public life that free and equal individuals would rationally adopt” (*id.*, at 158).

<sup>43</sup> Veitch et al provide an account of power that adds some normative clarity to Dahl's. They explain power as “being able to affect some other persons, groups or entities in their reasons for acting and indeed in how they act”, which is done “by manipulating in some way the reasons in response to which other people govern their actions” (*supra* note 38 at 10).

<sup>44</sup> *Id.*

<sup>45</sup> See NEIL MCCORMICK, INSTITUTIONS OF LAW: AN ESSAY IN LEGAL THEORY (2007) (on the idea of law as institutional normative order).

<sup>46</sup> See *infra* Part III.A, for discussion.

<sup>47</sup> That the nature of the information environment is indeed so malleable or, as has been said, “plastic”, has been the foundation of policy proposals for leveraging regulation by law through its relations with code – in other words, law can regulate behavior indirectly by regulating the code of computer programs. The point has been made, originally, in Joel R. Reidenberg, *Lex Informatica*:

It may be natural thus that the scholarly literature on the regulation of intermediaries' activities would display particular concern with the *outcomes* that, as *a matter of fact*, these activities enable (rather than with their normative foundations). And particularly symptomatic of this concern has been the literature treating intermediaries as *gatekeepers* – openers or closers gates for the performance of functions whose normative bearings seem to be entirely detached from those of intermediaries themselves. The ways of thinking of this literature have also been reflected in the different legal approaches we exam in Part II.

The foundational legal work on gatekeeping is Reinier Kraakman's,<sup>48</sup> which describes how regulators can take advantage of gatekeepers' privileged positions in order to achieve particular regulatory outcomes. Kraakman's concerns are "issues of practicality and cost" entailed in ascribing liability to gatekeepers for such ends.<sup>49</sup> He defines gatekeeper liability as that "imposed on private parties who are able to disrupt misconduct by withholding their cooperation from wrongdoers".<sup>50</sup> The focus of the definition is thus on the *ability* to disrupt wrongdoing, not on the normative wrongfulness of *cooperation itself*; not on the manners in which, by being wrong and ignored or not cared for by the state and the law, intermediaries' activities can have a *normatively* detrimental significance in our lives. Yet, ultimately, in our case, intermediaries can do so by affecting how the very *values* by reference to which we live come to be *articulated* in the use plans of our information environment.

Internet-related literature has drawn on Kraakman's approach to develop a critique of gatekeeper liability based on the negative externalities that the recognition of liability entails. This kind of critique finds its best expression in Jonathan Zittrain's writings on the history of online gatekeeping<sup>51</sup> and the future of the Internet as a generative platform.<sup>52</sup> Zittrain's concerns are with the innovation costs both of rendering intermediaries liable for third-party content and of direct state intervention to define the technological configurations that intermediaries (and ultimately the Internet grid of computers itself) should adopt. For Zittrain, the best way forward is that currently in place in the United States,<sup>53</sup> namely to approach intermediary liability for wrongdoing as purely a matter of corporate social responsibility – a good Samaritan defense, through which Internet intermediaries

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*The Formulation of Information Policy Rules Through Technology*, 76 TEXAS L. REV. 553 (1998), and developed in LAWRENCE LESSIG, CODE AND OTHER LAWS OF CYBERSPACE 90 (1999). See also James Grimmelmann, *Regulation by Software*, Yale L. J. 1719, 1723 (2005) (explaining plasticity as the idea that "[p]rogrammers can implement almost any system they can imagine and describe precisely").

<sup>48</sup> Reinier H. Kraakman, Gatekeepers: The Anatomy of a Third-Party Enforcement Strategy, 2 J. L. ECON. & ORG. 53 (1986).

<sup>49</sup> *Id.*, at 53.

<sup>50</sup> *Id.*

<sup>51</sup> Jonathan Zittrain, *A History of Online Gatekeeping*, 19 HARV. J.L. & TECH. 253 (2006).

<sup>52</sup> Jonathan Zittrain, *The Generative Internet*, 119 Harv. L. Rev. 1974 (2006) and JONATHAN ZITTRAIN, *THE FUTURE OF THE INTERNET: AND HOW TO STOP IT* (2008).

<sup>53</sup> See Part II below for discussion.



are welcome but not duty-bound to make calls on the legality or illegality of online content. How could they?

One reason given by Zittrain is the usual one – friction that could arise for innocent third parties as intermediaries would tend to “overblock content in an attempt to avoid any possible suggestion of liability”.<sup>54</sup> Beyond that, intermediaries of services such as chat rooms or message boards, incapable of coping with monitoring costs, could be induced to either “shut down entirely” or “to raise drastically the cost for their services”.<sup>55</sup> All these explanations, however reasonable they may seem at first sight, can only go so far. One *still* needs to point to more fundamental reasons as to why it would be a problem if the lives of intermediaries were made more difficult by the ascription of duties of care; or to what *wrong* there would be if intermediaries, incapable of catering for the *dignity* of the inhabitants of the information environment, were simply enjoined to shut their doors.

Zittrain’s focus is overtly based on J.S. Mill,<sup>56</sup> whose utilitarian ideal of the “greatest happiness for the greatest numbers” has its mirror image in Zittrain’s principle of generativity – that is, the maximization of the “overall capacity [of the Internet grid] to produce unprompted change driven by large, varied, and uncoordinated audiences”.<sup>57</sup> The reason why intermediary liability is to be disapproved of is that it reduces the generative potentials of the Internet grid; that it encourages the takedown of content, the enclosure of platforms, and overall discourages the possibilities of participation from which content – and happiness – emerge.

Now, there are ways in which Zittrain’s argument may seem to hint at a deontological approach, such as when he implies a connection between online collaboration and the value of friendship.<sup>58</sup> In this regard, he draws on literature

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<sup>54</sup> Zittrain, *supra* note 51, at 262. Zittrain explanation is precisely that reflected in the notion of collateral censorship (*see supra* note 3), which, collectively, has also been commonly referred to in the literature as the problem of “chilling effects”. *See, e.g.,* Christian Ahlert, Chris Marsden and Chester Yung Table, *How ‘Liberty’ Disappeared from Cyberspace: The Mystery Shopper Tests Internet Content Self-Regulation* (Program of Comparative Media Law and Policy, University of Oxford, Research Report, 2004) and Jennifer M. Urban and Laura Quilter, *Efficient process or “chilling effects”? Takedown notices under section 512 of the Digital Millennium Copyright Act*, 22 SANTA CLARA COMP. & HIGH TECH. L. J. 621 (2006) (for empirical works describing the real-world tendency of intermediaries’ taking content down when confronted with possible liability).

<sup>55</sup> *Id.*, 261-262.

<sup>56</sup> See ZITTRAIN, *supra* note 52, at 90 (noting: “Famed utilitarian John Stuart Mill may have believed in the greatest happiness for the greatest number, but he was also a champion of the individual and a hater of custom. He first linked idiosyncrasy to innovation when he argued that society should “give the freest scope possible to uncustomary things, in order that it may in time appear which of these are fit to be converted into customs.” He then noted the innate value of being able to express oneself idiosyncratically (...).”).

<sup>57</sup> Zittrain, *supra* note 52, at 1980.

<sup>58</sup> See ZITTRAIN, *supra* note 52, at 92 (noting: “The joy of being able to be helpful to someone—to answer a question simply because it is asked and one knows a useful answer, to be part of a team driving toward a worthwhile goal—is one of the best aspects of being human, and our information

that, similarly, sees cultural processes on the Internet as enlarging our democratic practices beyond earlier modes of political participation.<sup>59</sup> Yet, neither this literature nor Zittrain's work seems to see any more ambitious role for politics in regulating the *content* of such practices.

Benkler, for instance, is concerned with how the state can preserve the *structural* conditions for different forms of collaboration – forms which, indeed, have empowered us beyond any measures we could have conceived under modes of production of the past. Yet, for Benkler, this concern should not translate into a concern for *content itself*. On one hand, Benkler criticizes what he calls black-box liberal theories – that is, theories which, although concerned with autonomy, are so only from a formal perspective; “theories that ignore culture”<sup>60</sup> and thus “are rendered incapable of answering some questions that arise in the real world and have real implications for individuals and polities”.<sup>61</sup> Thus, he notes, it is important for liberal theory to attend to the “practical cultural life” of the information environment, and make judgements on which conditions of it are “more or less attractive from the perspective of liberal political theory”.<sup>62</sup> And liberal theory must do so by looking into the “*structure* of the information environment” as something that “is constitutive of our autonomy, not only functionally significant to it”.<sup>63</sup> On the other hand, this should not commit the state to a “program of positive liberty”,<sup>64</sup> it “calls for no therapeutic agenda to educate adults”<sup>65</sup> and invites the state to a “systematic commitment to avoid direct intervention in cultural exchange”.<sup>66</sup> As Benkler sums up:

“Understanding that culture is a matter of political concern even within a liberal framework does not ... translate into an agenda of intervention in the culture sphere as an extension of legitimate decision making. Cultural discourse is systematically not amenable to formal regulation”.<sup>67</sup>

Yet, not all problems in the information environment can be resolved within the internal life of its culture – auspicious though this culture may, for the most part,

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technology architecture has stumbled into a zone where those qualities can be elicited and affirmed for tens of millions of people)”

<sup>59</sup> See William W. Fisher III, *Theories of Intellectual Property*, in NEW ESSAYS IN THE LEGAL AND POLITICAL THEORY OF PROPERTY 169-73 (Stephen R. Munzer ed., 2001) (invoking JOHN FISKE, TELEVISION CULTURE (1998) to speak about the idea of a “semiotic democracy”). See also BENKLER, *supra* note 22, at 15, 276 (2006) (drawing on, inter alia, Jack Balkin, *Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society*, 79 N.Y.U. L. REV. 1 (2004), to explain how the information environment enables the emergence of a democratic, for self-reflective and participatory, culture).

<sup>60</sup> BENKLER, *supra* note 22, at 280.

<sup>61</sup> *Id.*, at 285.

<sup>62</sup> *Id.*, at 281.

<sup>63</sup> *Id.*, at 146.

<sup>64</sup> *Id.*, at 141.

<sup>65</sup> *Id.*, at 151.

<sup>66</sup> *Id.*, at 298.

<sup>67</sup> *Id.*

be. There is much in the Wikipedia that is gendered, politically, geographically and linguistically disproportionate<sup>68</sup> – or generally just the product of an unjust model of authority.<sup>69</sup> Google is not the democratic platform it may have appeared to Benkler in 2006.<sup>70</sup> And, needless to say, there are the bullies, the scorned and vengeful, there is the privacy infringing, defamatory and overall offensive content we find everywhere on the Internet. Offensive Internet practices may at times be simply *bad*, violating our *conceptions of the good*; at others, they amount to *wrongs*, violating our sense of what is right – and, indeed, our *rights*.

We may think state action and responsibility itself should be determined by the crossing of a threshold between both these categories. Or we may think, as I do, that the threshold lies somewhere else. Joseph Raz's theory of autonomy, on which Benkler himself undecidedly draws, has it that the state is called on to act whenever the conditions for our personal autonomy are undermined – whenever social forms of harm leave us without a meaningful range of options based on which to author our lives. These special cases of harm may involve harm to the feelings, as long as such harm, as other forms of harm Raz is concerned with, has the “forward-looking aspect” of “diminishing our prospects”, of “adversely affecting our possibilities”.<sup>71</sup>

But that as it may, it is important to recognize that a threshold *exists* above which responsibility ought to be checked by state action.<sup>72</sup> Such a threshold may concern the structure of the information environment (e.g. property structures or interoperability arrangements) or, as we have been noting, it may concern its content. To blackbox content tout court is as problematic as to blackbox structure. And, albeit political concern ought to involve all sorts of harmful action capable of impairing our personal autonomy, it does not matter so much to our argument if we circumscribe our discussion in this paper to harms to *fundamental rights*. In this

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<sup>68</sup> See Mark Graham, *Wiki Space: Palimpsests and the Politics of Exclusion*, in CRITICAL POINT OF VIEW: A WIKIPEDIA READER 269-282 (Geert Lovink & Nathaniel Tkacz eds., 2011).

<sup>69</sup> See Mathieu O'Neil, *Wikipedia and Authority*, in Lovink & Tkacz, *supra* note 66, at 309-324.

<sup>70</sup> See, e.g., Michael Luca, Timothy Wu, Sebastian Couvidal, Daniel Frank, William Seltzer, *Does Google Content Degrade Google Search? Experimental Evidence* (Research Report, 2012), <http://www.slideshare.net/lutherlowe/wu-1> (explaining how Google reduces consumer welfare by displaying its own content instead of content from other platforms). See, also, Frank Pasquale, *Paradoxes of Digital Antitrust: Why the FTC Failed to Explain Its Inaction on Search Bias*, HARV. J.L. & TECH. OCCASIONAL PAPER SERIES, 1-20, 14 (2013), <http://jolt.law.harvard.edu/antitrust/articles/Pasquale.pdf> (questioning the inconclusive end of an investigation of Google's practices by the Federal Trade Commission. In Pasquale's precise indictment, "the bottom line is that a black box investigation exonerated a black box search engine").

<sup>71</sup> See RAZ, *supra* note 23, at 413-414. This does not mean that state coercion is always the response. For Raz, coercion is to be used only in extreme cases of interference with personal autonomy. See *id.*, at 421 (noting, for instance, that: “Coercion can be used to prevent extreme cases where severely offending or hurting another's feelings interferes with or diminishes that person's ability to lead a normal autonomous life in the community. But offence as such should be restrained and controlled by other means, ones which do not invade freedom”).

<sup>72</sup> At least, and I am ready to make this concession, while Internet culture itself does not develop institutions that perform and replace the *legislative* and *adjudicatory* roles the institutional normative order of the state has served us with so far.

sense, to admit that, just to foster and benefit from a culture of generativity and collaboration regarding content, politics should leave violation of rights such as privacy and reputation outside of its scope is something that can only be justified on purely utilitarian grounds.

I suspect neither Zittrain nor Benkler would disagree on this last point – and, indeed, that they would recognize the role of the state at least (and if only for the time being) in the upholding of rights. Yet, for reasons we will soon examine, the upholding of rights cannot take place if we are to bracket out the responsibility of certain actors – including that of Internet intermediaries – towards the very normative order that ensures the recognition of those rights. It follows that to exclude intermediary liability where the violation of rights is at stake cannot be justified if not on utilitarian grounds – on grounds that regret the demise of certain undertakings for purely innovation-related reasons. To condone the conscious leveraging of speech that degrades, that debases the standing of individuals and groups cannot happen if not by insulating those who leverage such speech from the deontological commitments that fall upon all of us. Regardless of the fleeting utility reflected in speech outcomes, this part of Internet culture – the role of Internet intermediaries in upholding the basic commitments of our normative order – ought also to be amenable to regulation.

## II. THE NORMATIVE DETACHMENT OF INTERNET INTERMEDIARIES

Upholding rights as a basic commitment of our normative order demands an attentiveness towards the normative order itself. It demands so for it asks that we think about the reasonable boundaries of the rights we seek to uphold, of how best to articulate them in light of competing normative considerations. Can intermediaries be detached from this commitment that connects all of us? What would be the *justice* implications of such a detachment? And if intermediaries indeed are so detached, if they have no commitments whatsoever towards the upholding of rights, if they are lifted up from the relations of correlativity that otherwise obtain among people in a society, if they commit no torts, what then grounds their *obligation* of abiding by a court order enjoining them to take content down? Out of what legal relationship would such an obligation emerge?

These are all questions to which we turn in Part III, and they are questions law has ignored so far. Before we engage with them, and in order to do so, it is important first to understand how legal development in this regard has taken place so far, with respect to two fundamental rights – *reputation* and *data privacy*. And while there is plentiful literature on different aspects regarding Section 230,<sup>73</sup> I trust we have much to benefit from engaging with jurisprudence in the Common Law and the law of the European Union in relation to such rights. That is so for, put into perspective,

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<sup>73</sup> See Reidenberg et al, *supra* note 11 (for a comprehensive survey of this literature).

the dynamics in this important jurisprudence enable us to visualize the kind of pendular movement between outcome-based extremes we have referred to in Part I – a kind of movement that ignores the gravity of the reasons between. Understanding so allows us to reclaim our centre of normative gravity and inquire upon the reasonable boundaries of intermediary liability.

#### A. *Defamation: Reputation Between Extremes*

One who reads into the momentous *Leveson Inquiry* into the culture, practice and ethics of the press is left with two immediate impressions on the problem of intermediary liability.<sup>74</sup> The first is that, rather than a central normative problem of our time, intermediary liability is a lesser issue. In effect, out of the one thousand and eight hundred pages of Lord Justice Leveson’s report, less than one and a half – paradoxically titled “The Relevance of the Internet”<sup>75</sup> – have been dedicated to Internet actors altogether. The second impression is that the problem of liability arises in an “ethical vacuum”, we are told, for “the internet does not claim to operate by express ethical standards”<sup>76</sup> – as if its actors were one and the same, and entirely disconnected from the normative universe we inhabit. Recent modifications in English defamation law, brought about by the Defamation Act 2013, have all but extinguished the liability of Internet intermediaries, even for the hosting of content they *know* to be libelous. In this sense, they have transformed Lord Justice Leveson’s hyperbolic observations in a normative directive to live by. It turns out then that, at least for the time being, the matter is settled in the laws of England that the normative stance adopted by an Internet intermediary with regard to defamatory content it hosts is none of the law’s business.

The emptiness of such perceived or constructed normative universes is akin to that of utilitarian theories we examined in the preceding section. But this emptiness is also a mirror image of another normatively extreme universe, namely that instituted by regimes of strict liability for Internet intermediaries which, just months before the new Defamation Act, had been affirmed by the Court of Appeal in a very important decision, whose content and procedural history are important for us to understand.

*Tamiz v. Google*<sup>77</sup> was the first case concerning the liability of an Internet host to reach the Court of Appeal. The case involved the publication of defamatory

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<sup>74</sup> Established in the wake of *News of the World* phone-hacking scandal in the UK, the Leveson Inquiry “looked at the relationship between the press and the public, including phone-hacking and other potentially illegal behavior[u]r, and at the relationships between the press and the police and the press and politicians”. *Press ‘Need to Act’ After Leveson* (Dec. 5, 2012), <http://www.bbc.com/news/uk-15686679>.

<sup>75</sup> The Leveson Inquiry: An Inquiry into the Culture, Practice and Ethics of the Press, 2012, H.C. 780-I, Vol. II, at 736 (U.K).

<sup>76</sup> *Id.*

<sup>77</sup> *Tamiz v. Google Inc* [2013] EWCA (Civ) 68 (Eng.).

comments in a Blog (hosted by Google's Blogger.com), regarding a Muslim Conservative Party Candidate in local elections in Thanet, an administrative district of Kent, in England. Mr. Tamiz had previously, and admittedly, behaved in an unbecoming way, calling local girls "sluts" in a Facebook post, which eventually led him to withdraw his candidacy in the elections. Yet, the comments involved in the court case went far beyond the Facebook episode, imputing serious crimes to Mr. Tamiz without provision of any corresponding evidence. They claimed Mr. Tamiz was a drug dealer and that he had stolen from a former employer.<sup>78</sup>

Most importantly, Google had been notified of the existence of such comments, and failed to take action within any reasonable time. In spite of Google's inaction, Mr. Justice Eady, ruling the case at the High Court, expressed agreement with Google's arguments that, since "the blogs on Blogger.com contain ... more than half a trillion words and 250,000 new words are added every minute ... , it is virtually impossible for the corporation to exercise editorial control over content".<sup>79</sup> Google's position, Eady J. concluded, was no different from that of an Internet access provider like British Telecom,<sup>80</sup> which Eady J. himself had held not to be liable in an earlier case – *Bunt v. Tilley*.<sup>81</sup>

One must contrast, though, the situation in *Bunt* with the one in *Tamiz*. Differently from a blogging platform, an Internet access provider does not get into contact with data it routes for longer than a fraction of a second (let alone the fact that such data is typically split into packets by Internet protocols, only deep packet inspection techniques being able to reveal its content).<sup>82</sup> Accordingly, in *Bunt*, Eady J. stressed the importance of focusing on the state of a defendant's knowledge – "on what the person did, or failed to do, in the chain of communication"<sup>83</sup> – as an important factor in ascertaining his liability. Taking that into account, the implication of Eady J.'s decision in *Tamiz*, if it was to be upheld, would have been profound. If not even a *host* such as Blogger.com could be held liable for content it *knowingly* hosts – and note that here the mental element is as strong as it can be – then no internet intermediary would ever be able to be held liable again.

This position would have contradicted the statutory framework of the European Directive on Electronic Commerce, which states that a host cannot be exempted

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<sup>78</sup> See *id.*, [7].

<sup>79</sup> *Tamiz v. Google Inc Google UK Ltd* [2012] EWHC (QB) 449 [35] (Eng.).

<sup>80</sup> *Id.*, [39] (noting: "As I understand the evidence its role, as a platform provider, is a purely passive one. The situation would thus be closely analogous to that described in *Bunt v Tilley* and thus, in striving to achieve consistency in the court's decision-making, I would rule that Google Inc is not liable at common law as a publisher).

<sup>81</sup> *Bunt v. Tilley & Ors.* [2006] EWHC (QB) 407 (Eng.).

<sup>82</sup> Under the European Directive on Electronic Commerce and its UK Regulations, Internet access providers can be classified as mere conduits – simply put, actors whose service consist in the passive transmission of information in a communications network. They neither initiate the transmission by themselves, nor select the receiver, nor select or modify the transmitted content. See Council Directive 2000/31, *supra* note 22, Art. 12. See also Electronic Commerce (EC Directive) Regulations, 2002, S.I. 2002/2013, § 17 (U.K.).

<sup>83</sup> See *Bunt v. Tilley & Ors.*, *supra* note 81, [21].

from liability for not acting expeditiously in cases where it has actual knowledge of unlawful activity or information it hosts.<sup>84</sup> Jurisprudence of the Court of Justice of the European Union<sup>85</sup> as well as regulations in the UK<sup>86</sup> have it that the existence of notification by a user is generally a fact which courts must take into account in deciding whether actual knowledge has been established.

Fortunately, *to some extent*, Eady J.’s decision was overturned by the Court of Appeal, which endorsed the position of an earlier case also concerning Blogger.com (*Davison v. Habeeb*),<sup>87</sup> where the High Court had held that “following notification [an intermediary] would be unable ... to establish that it was ignorant of the existence of the defamatory *material*”.<sup>88</sup> The position in *Tamiz* has been reflected in a relatively recent case in Hong Kong, whose wording is also relevant to our discussion. There, the Court of Final Appeal held that a host (in the case, the operator of a popular online forum) could only have a defense “if it was established that [he], upon obtaining *knowledge of the content*, promptly took all reasonable *steps to remove the offending content* from circulation as soon as reasonably practicable”.<sup>89</sup>

The expressions in highlights are remarkably important. They announce why such decisions have only been fortunate to some extent. The reason is that courts have held that liability should accrue simply from knowledge *of the content* or *material* that turns out to be defamatory – cumulated with failure by the intermediary in taking reasonable steps to remove it. For the courts, this would be enough to preclude the application of a defense traditionally available in the law of defamation, which is that of the *innocent disseminator* – namely, the person who, not being a commercial publisher (or author or editor of the content), takes reasonable care in relation to the publication, and does not know or has reason to believe that her actions contributed to the publication of a defamatory statement.<sup>90</sup> Intermediaries are not able to avail themselves of such a defense if knowledge of the content is established. If the content turns out to be defamatory, their liability automatically ensues. In other words, the liability of Internet intermediaries is one of a *strict* kind.<sup>91</sup>

Yet, there is significant distance between knowing that content exists and knowing *that it is illegal*, between knowing about *unlawful activity* and knowing about the *unlawfulness of certain activity*. In establishing that liability flows strictly

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<sup>84</sup> See Electronic Commerce Directive, *supra* note 22, Art. 14.1(a).

<sup>85</sup> See Case C-324/09, L’Oréal SA v. eBay Int’l AG, 2011 E.C.R. 1-6011, ¶ 122.

<sup>86</sup> See Electronic Commerce (EC Directive) Regulations, *supra* note 82, § 22(a).

<sup>87</sup> *Davison v Habeeb & Ors.* [2011] EWHC (QB) 3031 (Eng.).

<sup>88</sup> *Id.*, [46].

<sup>89</sup> *Oriental Press Group and Another v. Fevaworks Solutions Ltd.* [2013] 16 HKCFAR 366, 401 (emphasis added). See also *Metropolitan v. Designtechnica*, *infra* note 113.

<sup>90</sup> In England, such a defense, of common law origin, is incorporated in s.1 of the Defamation Act 1996, applicable at the time to the operators of websites – a situation which, as noted above, has been transformed by the new provisions of the Defamation Act 2013. See Defamation Act 2013, § 5.

<sup>91</sup> See *Godfrey v. Demon Internet Limited* [1999] EWHC (QB) 244, [26] (Eng.).

from knowledge of *illegal content*, those decisions fail to create the conditions that cater for the huge difficulty that, at times, exists in inquiring into *illegality itself*. Unable to carry out such an inquiry with a sword of Damocles above their heads, Internet intermediaries would, more often than not, just automatically act to take everything down. This is thus the extreme situation that part of the law would currently have us in – the extreme of automatic liability ensuing from the mere knowledge of the content. Regardless of a responsible, albeit mistaken, conviction about its legality<sup>92</sup>

It was seeking to remedy outcomes like this that the Defamation Act 2013 moved to the *diametrically opposite position* of completely exempting intermediaries – or, in the language of the Act, *operators of websites* – of liability for content of their users.<sup>93</sup> The main condition for so is that the operators must enable the victims of defamatory materials to ascertain the identity of the users who publish those materials.<sup>94</sup> The privacy implications of such a policy are profound, though they lie beyond our discussion. What is important for us to note here is that the

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<sup>92</sup> This is also the situation in one area to which Section 230 does not apply in the United States, namely *obscenity*. It is worth appreciating the reasons why that is so. In *Hamling v. United States*, 418 U.S. 87, 120 (1974), a case involving the crime of mailing nonmailable (in the case, obscene) material, the Supreme Court understood, in reference to *Rosen v. United States*, that the offence was complete when the paper “was deposited in the mail by one who knew or had notice at the time of its contents”, even though “the defendant himself did not regard the paper as one that the statute forbade to be carried in the mails”. *Rosen v. United States*, 161 U.S. 29, 41 (1986). Two reasons are particularly important to compare with our discussions. First, the Court noted that the “evils that Congress sought to remedy continue and increase in volume if the belief of the accused as to what was obscene, lewd, and lascivious was recognized as the test for determining whether the statute had been violated”. *Id.*, at 41-42. The other, which the Court brought from *United States v. Wurzbach*, 280 U.S., 396, 399 (1930) was conveyed in the following terms: “Whenever the law draws a line there will be cases very near each other on opposite sides. The precise course of the line may be uncertain, but no one can come near it without knowing that he does so, if he thinks, and if he does so it is familiar to the criminal law to make him take the risk”. *Id.*, 124. Now, while defamation, besides a tort, is also a criminal offence, it is worth inquiring if, from the perspective of Internet intermediaries, the kind of speech they are dealing with here is, albeit offensive, similar in kind to the “evils” the Court referred to in *Hamling* – which involve the witting purveyance of obscene material to minors (47 U.S. Code § 223(1)(B)(ii)) or the transmission of material which is obscene or child pornography “with the intention to abuse, threaten or harass another person”? (47 U.S. Code § 223(1)(A)) The legislative intention itself implies otherwise, for in cases concerning defamation intermediaries were completely shielded of responsibility, an outcome that itself may be undesirable in the light of our argument. More generally, though, we may wish to consider whether, even in the case of obscenity, the general argument of this paper should continue to apply – and whether it is fair in either case, both of profound normative indeterminacy, “to make [intermediaries] take the risk”.

<sup>93</sup> See Defamation Act 2013, *supra* note 90, *id.*

<sup>94</sup> *Id.*, § 5(3)(a). See Alastair Mullis and Andrew Scott, *Tilting at Windmills: the Defamation Act 2013*, 77 THE MODERN LAW REVIEW 87, at 100 (noting that: “Where posters are not identifiable, the effect of the Act is to encourage website operators voluntarily to disclose their identity and contact details”).



move from one extreme (strict liability) to the other (exemption of liability) has, wittingly or not, the effect of evading what should be the true focus of our inquiry concerning liability – a focus on what to *reasonably* expect from an operator in *ascertaining the legality* of the materials. The granularity of such an approach lies *between* – and much deeper than – the extreme and escapist solutions that so far have marked the problem of intermediary liability.

### B. Data Privacy: Forgetting Reasonableness

Recent decisions related to the liability of Internet intermediaries for violation of data protection rights do point to a more granular approach, by recommending a number of criteria that Internet intermediaries – qua data controllers – should attend to in assessing privacy complaints. These decisions, however, also fall short of truly recognizing the difficulty of applying the criteria they recommend. In particular, they provide no indication that, even if intermediaries try their best in seeking to apply the recommended criteria, courts will consider their diligence in apportioning – or exempting them from – liability. In other words, though the seemingly granular approach, strict standards of liability continue to apply.

The most important of such decisions to date is, unquestionably, *Google Spain*,<sup>95</sup> where the Court of Justice of the European Union adopted what would become known, albeit hyperbolically, as the *right to be forgotten*. In *Google Spain*, the Court recognized the right of individuals to have data about them removed from search engine results whenever such data is processed in incompatibility with provisions of the Data Protection Directive.<sup>96</sup> Rather than an entirely new creature, the right to be forgotten flows from a right to erasure that the Directive already explicitly grants data subjects in those circumstances.<sup>97</sup> The right to erasure would apply, for instance, to cases where information about the data subject is inaccurate, not up to date or, as was the case in *Google Spain*, irrelevant.<sup>98</sup> The recognition of the “right to be forgotten” was expressed in atypically strong terms, as the Court affirmed a *prevalence* of such a right over not only the economic interests of the operator of a search engine but also over the “interest of the general public in finding ... information upon a search relating to the data subject’s name”.<sup>99</sup> Such a prevalence operates as a general rule, though in particular circumstances it may be countervailed by a specific interest of the public to know. In such circumstances, a duty emerges for data controllers to carry out a balancing exercise between the public interest and the right to be forgotten. The paradigmatic cases, noted by the

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<sup>95</sup> Case C-131/12, *Google Spain SL v. Agencia Española de Protección de Datos* 2014 EUR-Lex CELEX 612CJ0131 (May 13, 2014) [hereinafter *Google Spain*].

<sup>96</sup> *Id.*, ¶ 88.

<sup>97</sup> Council Directive 95/46/EC, arts. 12(b) and 14.1(a), 1995 O.J. (L 281) 31 [EC] (hereinafter *Data Protection Directive*).

<sup>98</sup> *Id.*, arts. 6.1(c), (d).

<sup>99</sup> *Google Spain*, *supra* note 95, ¶ 97.

Court, are situations in which a data subject plays a role in public life – a domain which may involve anything, from politics and the arts to the social sphere in general.<sup>100</sup>

The role played by a data subject in public life, the sensitivity of the information in question, the age of the data subject, and even whether the information is defamatory or not – which portrays well the connection between privacy and defamation<sup>101</sup> – are some of the factors that must be taken into account by the data controller in striking a balance.<sup>102</sup> Yet, nothing suggests that, even if it faces up to all the difficulty in carrying out such a balancing exercise, a data controller could be exempted from liability. Even if it applies standards going beyond what would be reasonable to expect from an actor of equivalent economic and technological possibilities, if a data controller fails to reach an outcome, *in the view of the Court*, correct, nothing precludes that liability may apply.

In effect, the current language of the Data Protection Directive entails that, in the presence of *any damage* resulting from *unlawful processing* or any act incompatible with the Directive, compensation is due.<sup>103</sup> A data controller is able to evade liability only by establishing that he was *not responsible for the event* giving rise to the damage<sup>104</sup> – wording that, in principle, seems to indicate merely a notion of causality rather than one of fault. The romance-language versions of the respective provision in the Directive appear to corroborate this interpretation. They speak of exemption from liability in cases where the *facts* leading to the damage are not imputable to the data controller.<sup>105</sup> These versions are not concerned, thus, with the imputation of fault or culpability to the data controller, but with imputation of *the facts themselves*.

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<sup>100</sup> *Id.*. See Council Resolution 1165 (1998), Right to Privacy, ¶ 7, <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=16641&lang=en>.

<sup>101</sup> This connection presents itself not only via the factoring in of defamation questions into privacy problems, but also on the other way round. In *Grant v. Torstar Corp.* for instance, Abella J. noted that the evaluation of the responsible communication defense in defamation (see *infra* Part IV.B) involves “balancing freedom of expression, freedom of the press, the protection of reputation” as well as “privacy concerns, and ... the public interest”. *Grant v. Torstar Corp.*, [2009] 3 S.C.R. 640, 701 (Can.).

<sup>102</sup> Art 29 Data Protection Working Party, *Guidelines on the Implementation of the Court of Justice of the European Union Judgment on "Google Spain and Inc v. Agencia Española de Protección de Datos (AEPD) and Mario Costeja González" C-131/12, 14/EN/WP225* (Nov 26, 2014), [http://ec.europa.eu/justice/data-protection/article-29/documentation/opinion-recommendation/files/2014/wp225\\_en.pdf](http://ec.europa.eu/justice/data-protection/article-29/documentation/opinion-recommendation/files/2014/wp225_en.pdf)

<sup>103</sup> Data Protection Directive, *supra* note 97, Recital 55 and art. 23(1).

<sup>104</sup> *Id.*, art. 23(2).

<sup>105</sup> The French version, for instance, reads: “Le responsable du traitement peut être exonéré partiellement ou totalement de cette responsabilité *s’il prouve que le fait qui a provoqué le dommage ne lui est pas imputable*”. *Id.* (emphasis added).

Yet, however a literal interpretation may seem to indicate so much,<sup>106</sup> it is *also* a fact that Member States have incorporated the liability provisions of the Directive in different ways. Some, such as Spain<sup>107</sup> and France,<sup>108</sup> regulate compensation matters under traditional fault-liability regimes in their Civil Codes; others, such as Sweden<sup>109</sup> and Italy,<sup>110</sup> have introduced provisions in their data protection legislation pointing to strict liability regimes. Italy has gone as far as to equate the situation of data controllers to that of actors who are responsible for dangerous activities<sup>111</sup> – where responsibility ensues simply if the actor cannot establish he has adopted all measures appropriate to avoid the damage.<sup>112</sup> The Italian solution is particularly interesting for our discussion in light of the preceding section.<sup>113</sup> It is so as it enables us to understand how liability in data protection might also present itself in a strict form in the UK – at least if we are to address intermediary liability consistently across defamation and data protection cases. How so?

One would be excused in understanding the approach chosen by the UK for the liability of data controllers as being a fault-based one. That is so as, according to the Data Protection Act 1998, a data controller can evade liability if it is able to demonstrate the adoption of reasonable care to comply with the requirements of the

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<sup>106</sup> *But see* Timoleon Kosmides, *The Legal Nature of the Controller's Civil Liability According to Art. 23 of Directive 95/46 EC (Data Protection Directive)* 2 (Conference Paper, 4th International Conference on Information Law, May 20-21, 2011), [http://conferences.ionio.gr/icil2012/download.php?f=papers/198-kosmides-full\\_text-en-v001.pdf](http://conferences.ionio.gr/icil2012/download.php?f=papers/198-kosmides-full_text-en-v001.pdf) (noting, with reference to German literature, that the question concerning the interpretation of Art. 23 remains largely unresolved).

<sup>107</sup> *See* LEY ORGÁNICA DE PROTECCIÓN DE DATOS DE CARÁCTER PERSONAL, Art. 19.1., B.O.E. n. 298, 43088, Dec. 14, 1999 (Spain) (referring to the general discipline of the CÓDIGO CIVIL, B.O.E. n. 206, 249, July 25, 1889 (Spain)). *See* Graciela Rodriguez-Ferrand, *Spain*, in THE LIBRARY OF CONGRESS, ONLINE PRIVACY LAW: AUSTRALIA, CANADA, FRANCE, GERMANY, ISRAEL, ITALY, JAPAN, NETHERLANDS, PORTUGAL, SPAIN, SWEDEN, AND THE UNITED KINGDOM, 179 (Research Report, 2012) (pointing to the fault liability discipline of the CÓDIGO CIVIL, Art. 19202, as the applicable regime).

<sup>108</sup> *See* Dowe Korff, *Country Studies: A.3 France*, in EUROPEAN COMMISSION, COMPARATIVE STUDY ON DIFFERENT APPROACHES TO NEW PRIVACY CHALLENGES, IN PARTICULAR IN THE LIGHT OF TECHNOLOGICAL DEVELOPMENTS, 34 (Dowe Korff ed., 2010) (noting that data protection legislation in France is largely silent concerning remedies, though the general regime of the CODE CIVIL applies). *See* Nicole Atwill, *France*, in THE LIBRARY OF CONGRESS, *supra* note 107, p. 54 (pointing to the fault based liability discipline of the CODE CIVIL, Art. 1382 (Fr.)), <http://legifrance.gouv.fr/affichCode.do?cidTexte=LEGITEXT000006070721&dateTexte=20120525>.

<sup>109</sup> *See* 49 § PERSONUPPGIFTSLAGEN (SFS 2003:389) (Swed.).

<sup>110</sup> *See* Decreto legislativo 30 giugno 2003, n. 196 (It.) (referring to a strict liability provision of the CODICE CIVILE, Art. 2050).

<sup>111</sup> RICCARDO MAZZON, LA RESPONSABILITÀ CIVILE: RESPONSABILITÀ OGGETTIVA E SEMIOGGETTIVA, 700 (2012) (discussing liability for data protection violation in the general context of liability for dangerous activities).

<sup>112</sup> *Id.*

<sup>113</sup> *See supra* Part II.A.

Act.<sup>114</sup> Given the relative scarcity of compensation cases involving data protection in the UK,<sup>115</sup> it is difficult to estimate what reasonable care may actually amount to. It may be safe, though, to expect case law not to err on the side of data controllers. On one hand, case law has followed a tendency, largely observed in EU jurisprudence, of interpreting data protection provisions liberally so as to afford more protection to data subjects. In *Google v Vidal Hall*, Lord Justices McFarlane and Sharp, based on Arts. 8 of the Convention and the Charter, went as far as setting aside a provision of the Act in order to lift limitations concerning the award of damages for distress. “The consequence of [setting that provision aside]”, their Lordships noticed, “would be that compensation would be recoverable under section 13(1) for any damage suffered as a result of a contravention by a data controller of *any* of the requirements of the DPA”.<sup>116</sup>

On the other hand (and thus why the Italian provision<sup>117</sup> is interesting), would reasonable care by an Internet intermediary under the DPA be something very different from damage control by *merely taking content down*? Remember what, in the defamation cases above, Courts have recognized (and which also flows from the general discipline of the Electronic Commerce Directive): that upon obtaining *knowledge* that it hosts offending *content*, an intermediary needs to promptly take “all reasonable *steps to remove*” such a content from its site.<sup>118</sup> Mere failure to take the content down renders the intermediary responsible for the damage if the content turns out to be illegal. The situation in the UK, after all, would not be different from the Italian one – that is to say, a normative extreme that disregards intermediaries’ normative attitudes; a regime that treats all processing of data, the building blocks of contemporary societies, as dangerous activity.

### C. *The Emptiness of Normative Extremes*

In defamation as in privacy, thus, we see that case law has been transiting from one extreme to the other, without pausing to inquire into the reasonable boundaries of what lies between. It is understandable, though, that this is a difficult inquiry. As Eady J. himself had noted in *Mosley v. News Group Newspapers*, identifying the unlawfulness of published materials rests on complex variables and is “unlikely to be ... clear cut”, thus why failure in succeeding in such an identification is not to be mistaken for “genuine indifference to the lawfulness of [one’s] conduct”.<sup>119</sup> The

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<sup>114</sup> Data Protection Act 1998, Chapter 20, Art. 13(3) (UK).

<sup>115</sup> See PETER CAREY, *DATA PROTECTION: A PRACTICAL GUIDE TO UK AND EU LAW* 155 (2009) (noting that, of the several cases that have reached the courts, most concern celebrities).

<sup>116</sup> *Google Inc. v. Vidal-Hall & Ors.* [2015] EWCA (Civ) 311, [105] (UK).

<sup>117</sup> See *supra* note 110 and accompanying text.

<sup>118</sup> See *supra* text accompanying notes 89, 90.

<sup>119</sup> See *Mosley v News Group Newspapers Ltd.* [2008] EWHC (QB) 1777, [207], [208] (UK). To be more precise, Eady J. makes a distinction between privacy and defamation cases (*id.*), holding the former to be usually more clear cut than the latter – a conclusion that, I fear, may be in the eye

normative complexity of such a reality should indeed be attended to by the courts. In data protection as well as in defamation law, courts should embed in the notion of reasonable care an appreciation of the difficulties faced by intermediaries in *identifying* unlawfulness in Internet behavior – and a cushioning system to attenuate it. Some content is more difficult to recognize as unlawful; some intermediaries have more resources than others for carrying out an evaluation exercise. The Court of Justice seemed to hint at these variations in *Google Spain*, by noting that the case should be appreciated within the framework of responsibilities, powers and capabilities of the data controller. In the Court’s own words:

“the operator of the search engine as the person determining the purposes and means of that activity must ensure, *within the framework of its responsibilities, powers and capabilities*, that the activity meets the requirements of Directive 95/46”.<sup>120</sup>

That recognition by the Court, however, came in a narrower context. What the Court sought to highlight was that the responsibilities of search engines should be understood as additional to – and distinctive from – that of the original websites they index. It is not altogether clear that the Court was proposing any subjective standard for the understanding of to what extent one can be characterized as a data controller. Control remains an either-or matter, and one to be understood expansively. Either one is a data controller, and thus falls within the scope of the Directive, or one is not. The notion of control, in other words, does not belong to the granular reality of *being in control* but rather comes up as an *expectation* directed to whoever happens to “determine the purposes and means of the processing of personal data”.<sup>121</sup> This, which is the definition of data “controller” by the Directive, asserts itself as a ‘purposive’ definition. As noted by the Court of Justice in *Google Spain*, what the Directive sought to accomplish was, “to ensure, through a broad definition of the concept of ‘controller’, effective and complete protection of data subjects”.<sup>122</sup> That purposive definition tends now to be reinforced in the General Data Protection Regulation currently in debate to replace the Data Protection Directive.<sup>123</sup> In its

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of the beholder. That may help explain his difficulty in recognizing the same lawfulness challenge as present in defamation cases. In effect, in *Metropolitan v. Designtecnica*, what was determinant in Eady J.’s evaluation as to whether Google had acted with reasonable care was that efforts were being made by Google to take the content down after notification, that “Google ha[d] taken steps to ensure that certain identified URLs [we]re blocked”. *Metropolitan International Schools Ltd. (t/a Skillstrain and/or Train2game) v. Designtecnica Corporation (t/a Digital Trends) & Ors.* [2009] EWHC (QB) 1765, [57]. See also *Grant v. Torstar Corp.*, *supra* note 101, at *id.*.

<sup>120</sup> *Google Spain SL v. Agencia Española de Protección de Datos*, *supra* note 95, ¶ 38.

<sup>121</sup> Data Protection Directive, *supra* note 97, art. 2(d).

<sup>122</sup> *Google Spain*, *supra* note 95, ¶ 34. See also Case C-73/07, *Tietosuojavaltuutettu v Satakunnan Markkinapörssi Oy and Satamedia Oy*, 2008 E.C.R. I-09831, ¶ 48 (on the requirement of interpreting the Directive in light of its intended effects).

<sup>123</sup> See *Proposal for a Regulation of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation)*, COM (2012) 11 final (Jan. 25, 2012).

latest version approved by the Parliament,<sup>124</sup> the Regulation highlights that responsibility and liability of the controller should be understood in *comprehensive* terms, as well as that a data controller should *ensure* compliance of each processing operation with the Regulation.<sup>125</sup>

Ultimately, thus, we are left at two diametrically opposite extremes in the fields of data protection and defamation. In data protection, intermediaries stand on very uncertain grounds regarding the possibility of evaluating complaints related to potentially privacy-infringing content they host. In the UK, as we saw, the Data Protection Act 1998 prescribes a liability regime based on a standard of reasonable care. However, taking the strictures of EU data protection law and jurisprudence into account, it seems highly unlikely that the legal complexity of a case vis-à-vis the normative reality of a particular data controller could be accepted as legitimate criteria in deciding whether the controller has acted reasonably. For a data controller, then, the final decision to be made regarding the content is a function of how willing the data controller will be to take risks in order to protect freedom of expression. The law speaks against such kind of risk-taking; it designs a normative picture of, to use the Directive's own word, "comprehensive" disincentive for a balancing exercise to be freely carried out.

In defamation, conversely, the situation, which had reached a similarly extreme position in *Tamiz v Google*, has since shifted to the complete opposite side. Whereas in *Tamiz* intermediaries would be enjoined to take content down upon acquiring knowledge of it, from the Defamation Act 2013 on we have an officially endorsed "snitch defense" – that is, a full exemption of liability for intermediaries who are willing to disclose the identity of their users.

Some Internet intermediaries will be more circumspect than others in how they deal with complaints regarding content. The first, recently disclosed numbers concerning decisions made by Google on the "right to be forgotten", for instance, are encouraging.<sup>126</sup> They result from a thoughtful process that involved the

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<sup>124</sup> *Draft European Parliament Legislative Resolution on the Proposal for a Regulation of the European Parliament and of the Council on the Protection of Individuals with Regard to the Processing of Personal Data and on the Free Movement of Such Data (General Data Protection Regulation) (COM(2012)0011 – C7-0025/2012 – 2012/0011(COD))*, EUR. PARL. DOC. TA/2014/212/P7 (adopted in first reading on 12 March 2014).

<sup>125</sup> *Id.*, Recital 60. The Draft Resolution also introduces a principle of responsibility and accountability of the controller, according to which the controller shall implement "technical and organizational measures to ensure ... the processing of personal data is performed in compliance with [the] Regulation". This compliance shall be reflected in measures and procedures "that persistently respect the autonomous choices of data subjects". Interestingly, however, while the principle of accountability has "regard to the state of the art", it also considers the "type of organization" and the "cost of implementation". See *supra* note 124, Art. 22(1) and (1a). In this sense, accountability could possibly open an avenue for interpretations more in light with our proposal in Part IV – as long as the adopted criteria apply not only to evaluate reasonable care of content takedown, but also to mitigate the hardship of normative interpretation.

<sup>126</sup> See Sylvia Tippmann and Julia Powles, *Google accidentally reveals data on 'right to be forgotten'*, THE GUARDIAN (Jul 14, 2015 2:28pm) (explaining that 95% of right to be forgotten

formation of an assembly of notables, as well as an open consultation carried out in a number of EU countries, for Google to determine how to deal with right to be forgotten requests. At a more granular level, the systematics, the thought-processes through which those decisions have been reached is so far obscure. We know very little about Google’s emerging “case law”, which raises evident democratic concerns.<sup>127</sup> Yet, precisely as such concerns are raised, a broader picture emerges which reveals that the true problem with intermediary liability is not just one of approaching facts automatically by one side or the other. The problem with intermediary liability is rather one of creating safeguards for proper *normative* engagement by Internet intermediaries to happen in the first place.

Current systems of liability, in sum, do not carry in them appropriate normative safeguards for reflective forms of decision making by intermediaries to take place. Instead, these systems operate an institutional detachment of intermediaries from the normative spheres of everybody else. Intermediaries are called on to simply implement whatever automatic priority the system prescribes. In systems of strict liability, that priority is for privacy and reputation; in systems of exemption of liability, the priority is for freedom of expression. This is not to say normative engagement does not take place in either case. When it does, however, it happens against or laterally to the institutionalized system – at the cost of great uncertainty for intermediaries and society as a whole. We must thus inquire into the nature and content of intermediaries’ normative responsibilities.

### III. TECHNOLOGY, JUSTICE, AND RESPONSIBILITY

#### A. *On Design and Use Plans*

If we say Internet intermediaries have a normative responsibility to engage with content they host, where does this responsibility spring from? What does it consist in? How to conceive of this responsibility in a way that attends to the *deontological* and *normative* dimensions to which prevailing accounts to date have failed to pay heed? An answer to these questions must start with a more precise inquiry into the

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requests came from ordinary citizens worried about their own private information; not from politicians or other public figures. In the relatively few cases those requests came from public figures, only in a minority of cases (22%) have the requests been granted (being denied in 71% of the cases, as opposed to 37% of the cases for ordinary citizens’ requests), <http://www.theguardian.com/technology/2015/jul/14/google-accidentally-reveals-right-to-be-forgotten-requests>.

<sup>127</sup> See Jemima Kiss, *Dear Google: open letter from 80 academics on 'right to be forgotten'*, THE GUARDIAN (May 14 2015 09.00am) (describing letter from academics “demanding more transparency from Google over how it processes ‘right to be forgotten’ requests”), <http://www.theguardian.com/technology/2015/may/14/dear-google-open-letter-from-80-academics-on-right-to-be-forgotten>.

nature of intermediaries' activities. Until now, we have mostly discussed what intermediaries are not, namely keepers of gates on whose openness or closure they should have no reasoned, autonomous say. In alluding to the importance and consequence of their activities, however, I had noted that Internet intermediaries are *designers* of these pathways through which information traverse, and that their actions can fundamentally alter structure and content of the information environment. To understand the levels at which such transformations operate, and the responsibility that ensues from these, we need first to understand *what* is it that Internet intermediaries design.

In a looser way, we may say Internet intermediaries are designers of their technological platforms – they program their websites and services in different ways, they make choices that are as much a matter of business and law as they are matter of technology. When intermediaries enable their technological platforms to host some kinds of content, or to take other kinds down, they define what *uses* of their technological platforms are possible or *proper* – *physically* and *normatively* – and embed such definitions in the language of (and conceptions about) their software. Those definitions may happen more generally and spontaneously, at different moments of the life of their platform, or they may be provoked by specific complaints from an Internet user or by a Court order. But, in each and all those circumstances, a transformation is intentionally and physically operated in the world of bits, which, in turn, goes on to influence further uses of the technological platform and, with this, future actions by its users – and their *reasons* for choosing these.

In a more precise way, we can understand Internet intermediaries are designers of *technological artefacts* – an expression that admits of a variety of definitions as vast as is its importance for us to get right. Among the different ways to explain technological artefacts, the one that best illuminates the point I want to make in this Part is that which explains a technological artefact as both a *physical* construct and one endowed with a *teleological element*. Allusions to this duality are present in more general forms in earlier accounts,<sup>128</sup> but find their best articulation in contemporary Dutch scholarship on the functions of technological artefacts.

Kroes and Meijers, for instance, note that what distinguishes technological artefacts from other objects is that, beyond their physical dimension, artefacts relate to “human intentionality” – “they are objects to be used for *doing* things and are [thus] characterized by a certain ‘for-ness’”;<sup>129</sup> they perform functions prescribed by

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<sup>128</sup> See, e.g., LESSIG, *supra* note 47 (making an analogy between computer programs and the *law*). See also Langdon Winner, *Do Artifacts Have Politics?*, 109 DAEDALUS 121 (departing from the work of Lewis Mumford to explain how “technical things have *political* qualities”). In the philosophical literature, ideas that technologies determine or “enframe” our understanding of reality go all the way back to Plato and have found its most powerful contemporary statement in the work of Martin Heidegger. See Plato, *Phaedrus*, in 9 PLATO IN TWELVE VOLUMES (Harold N. Fowler trans., 1925). See also Martin Heidegger, *The Question Concerning Technology*, in HEIDEGGER’S THE QUESTION CONCERNING TECHNOLOGY AND OTHER ESSAYS 3 (William Lovitt trans., 1977).

<sup>129</sup> Peter Kroes and Anthonie Meijers, *The Dual Nature of Technical Artefacts*, 37 STUD. HIST. PHIL. SCI. 1, 1 (2006).



human intentionality.<sup>130</sup> Most importantly for our discussions, this teleological dimension expresses itself through *use plans* by which *functions* are ascribed to technological artefacts. As Vermaas and Houkes explain, the functions of technological artefacts “highlight the physical capacities *that play a role within ‘use plans’ by which users can attain goals*”.<sup>131</sup> It is an understanding of what use plans are, who authors them and what roles they play not only in prescribing, but also in justifying certain functions of technological artefacts as proper that is of so much importance for our discussion concerning responsibility.

Use plans are a series of considered actions in which manipulations of artefacts contribute to the realization of a given goal.<sup>132</sup> They exist within a *normative* framework through which the ascription of functions to technological artefacts is *justified*.<sup>133</sup> On one hand, use plans are proposed by designers in normative terms. As Houkes explains, “good design involves communication of implicitly or explicitly designed use plans”.<sup>134</sup> Designers are “socially recognized expert[s]”<sup>135</sup> who privilege ways of using artefacts by communicating such ways as *proper* ones. Users must thus have good *reasons* to go against recommendations by a designer. In Houkes’s words, “knowledge of a *proper* function provides a socially standardized or default reason for using the artefact for a given purpose”,<sup>136</sup> it is not only *a* source of normativity, “one reason among many”,<sup>137</sup> but rather one with “privileged status”.<sup>138</sup> On the other hand, the normative claim to a privileged status entailed in the ascription of a proper function through a use plan must answer to *standards of rationality*.<sup>139</sup>

In effect, reasons provided by a use plan are embedded in a normative network towards which designers have responsibilities. It is from the lenses of normativity that the functions ascribed to technological artefacts will be evaluated as reasonable or unreasonable, proper or improper. If use plans fall short of the normative expectations they raise (which is always a matter of threshold), the functions they propose as *proper* will not be recognized as such. This dialectic between justification and evaluation engages both dimensions of technological artefacts, at times emphasising their physical dimension, at others emphasising how their intentional

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<sup>130</sup> *Id.*, at 2.

<sup>131</sup> Pieter E. Vermaas and Wybo Houkes, *Technical Functions: A Drawbridge Between the Intentional and Structural Natures of Technical Artefacts*, 37 *STUD. HIST. PHIL. SCI.* 5, 6 (2006). See also Wiebe E. Bijker, *The Social Construction of Bakelite: Toward a Theory of Invention*, in *THE SOCIAL CONSTRUCTION OF TECHNOLOGICAL SYSTEMS: NEW DIRECTIONS IN THE SOCIOLOGY AND HISTORY OF TECHNOLOGY* 155, 168 (Wiebe E. Bijker et al. eds., 2012) (employing the similar notion of *technological frames*).

<sup>132</sup> *Id.*, at 6-7.

<sup>133</sup> *Id.*, at 8. Vermaas’s and Houkes’s theory of function-ascription is thus a justificatory one.

<sup>134</sup> Wybo Houkes, *Knowledge of Artefact Functions*, 37 *STUD. HIST. PHIL. SCI.* 102, 108 (2006).

<sup>135</sup> *Id.*, at 112.

<sup>136</sup> *Id.*

<sup>137</sup> *Id.*, at 106.

<sup>138</sup> *Id.*, at 111.

<sup>139</sup> See *id.*, at 105.

dimension interacts with the normative order, impinging upon people's reasons and action. To ascribe to a pencil the function of time traveling is as improper as to ascribe to it the function of assassination – and so is any use plan in which these functions find themselves embedded. In either case, the function ascribed to the technological artefact will fail to justify itself as a proper one.

Hence, the social responsibility of the Internet intermediaries as designers involves a responsibility towards *normative propriety* regarding the functions they seek to ascribe to the technologies they design. We can approach this normative responsibility from at least two dimensions. The first, which we have been alluding to in this section, we may call a *justificatory* dimension. According to it, Internet intermediaries need to be able to speak for the actions they program or condone, they need to be able to justify their normative attitude towards their own technologies and the ends these enable. But there is a second, equally fundamental dimension of normative responsibility, which we may call a *modulatory* one. Similarly to the law, technologies “mediat[e] between people and the rights reasons which apply to them”.<sup>140</sup>

This mediation often happens in a tacit way, when use plans are not explicitly articulated or, as is increasingly the case, consulted by their addressees.<sup>141</sup> In all such cases, technologies impinge upon people's available reasons for action without normatively communicating so much. Filtering and manipulation of content by search engines, insofar as covert, are a clear and powerful example of such normatively implicit effects.<sup>142</sup> That these modulatory effects of technologies and their use plans can happen tacitly adds to the concerns they generally raise regarding personal autonomy and liberal politics in our time. Surreptitiousness, however, is only part of the problem. Even when designers articulate their choices explicitly, *network effects*<sup>143</sup> in the information environment – which amplify the nodality of intermediaries<sup>144</sup> – may still prevent people from acting upon their judgements concerning intermediaries' decisions. Think, for instance, of Facebook and the relative powerlessness of individuals to move away from the platform when the whole world is there. Even as it surfaces that what is shown to people on Facebook

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<sup>140</sup> JOSEPH RAZ, *ETHICS IN THE PUBLIC DOMAIN: ESSAYS IN THE MORALITY OF LAW AND POLITICS* 214 (1994).

<sup>141</sup> MARGARET J. RADIN, *BOILERPLATE: THE FINE PRINT, VANISHING RIGHTS, AND THE RULE OF LAW* 7 (2013) (discussing the legal consequences of the fact that “most of us don't read [the forms we sign], and most of us wouldn't understand them if we did”, and proposing remedies).

<sup>142</sup> See Frank Pasquale, *THE BLACK BOX SOCIETY: THE SECRET ALGORITHMS THAT CONTROL MONEY AND INFORMATION*, 92 (2015) (for a powerful discussion on search and control, concluding: “Internet service providers and major platforms alike will be a major part of our informational environment for the foreseeable future. The normative concerns associated with their unique position of power are here to stay”).

<sup>143</sup> See generally Carl Shapiro and Hal R. Varian, *INFORMATION RULES: A STRATEGIC GUIDE TO THE NETWORK ECONOMY* (1999) 104 (explaining the idea of network effects).

<sup>144</sup> See *supra* note 5 and accompanying text.

may be directed by manipulation-based research,<sup>145</sup> the effect of people's judgements on the platform's functions seems to be fairly limited.

Choices by intermediaries surely matter beyond their utilitarian implications. They matter for how they affect human values, be it immediately, in each single case settled, be it in overarching terms, where the whole of intermediaries' decisions transforms the normative landscape by reference to which we act. Only between May 2014 and August 2015, Google received nearly 300,000 right to be forgotten requests.<sup>146</sup> This is orders of magnitude above the diminished number of privacy cases settled by courts in the United Kingdom. A group of global leading privacy experts has recently released a letter calling for more transparency on right to be forgotten decisions by Google.<sup>147</sup> In their words, "the vast majority of these decisions face no public scrutiny, *though they shape public discourse*. What's more, the *values* at work in this process will/should *inform information policy around the world*".<sup>148</sup> In fact, not only these values should inform policy but they *already* do; they already create a system, reflected in Google's undisclosed use plans, with formidable impacts on our normative order.

It seems entirely natural, thus, to demand from Internet intermediaries a commitment of *integrity* towards the *making* of such normative choices. Use plans they devise should cater not only for propriety in dimensions of more emphatically physical nature – from the aesthetics of interfaces, to the uninterruptedness of information flows. They should also see to it that intermediaries attend to the propriety of the normative choices they make, both with regard to each other of these choices and to the wider normative community in which all of them are embedded. This may demand an engagement with privacy standards, expectations and, ultimately, the law of the state, which intermediaries ought to pursue at different levels of depth, as the circumstances – including their own particular circumstances – dictate.

### B. *Justice and Responsibility*

For all that we saw in earlier sections, we understand that the commitment towards integrity to be expected from Internet intermediaries ought not to be one of perfection, of always getting things right. At the same time, however, justice requires that we treat intermediaries as *members* of the *normative community* to which all of us belong – which speaks against the normative detachment that exemption of liability entails. There are, of course, many different ways of understanding this membership, as there are many different ways of understanding what justice

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<sup>145</sup> Katy Waldman, *Facebook's Unethical Experiment: It Intentionally Manipulated Users' Emotions Without Their Knowledge*, SLATE (June 28, 2014 5:50pm), [http://www.slate.com/articles/health\\_and\\_science/science/2014/06/facebook\\_unethical\\_experiment\\_it\\_made\\_news\\_feeds\\_happier\\_or\\_sadder\\_to\\_manipulate.html](http://www.slate.com/articles/health_and_science/science/2014/06/facebook_unethical_experiment_it_made_news_feeds_happier_or_sadder_to_manipulate.html).

<sup>146</sup> See Sylvia Tippmann and Julia Powles, *supra* note 126.

<sup>147</sup> See Jemima Kiss *supra* note 127.

<sup>148</sup> *Id.*

requires. If we are to go beyond utilitarian theories, however, at a minimum this membership should require *respect for rights*. Now, respect for rights cannot be turned into a synonym of opaque, episodic and non-systematic settling of disputes. Rather, it should entail a commitment of striving towards normative integrity – the more so the more an actor is capable of reflecting upon his interpretations and the more these can affect how we lead our lives.

In *Right, Regulation, and the Technological Revolution*, Roger Brownsword draws on the work of Alan Gewirth to speak of a *community of rights* as the vantage point of a society which accepts that the “development and application of modern technologies should be compatible with respect for individual rights”.<sup>149</sup> Amongst more specific characteristics of such a community would be its integral and coherent embeddedness of a formal moral standpoint and its *reflective and interpretive nature*, as a community that “constantly keeps under review the question of whether the current interpretation of its commitments is the best interpretation”.<sup>150</sup> Justice indeed requires the embeddedness of all capable social actors in such a reflective project – a project that, ultimately, concerns our pursuit of integrity regarding the normative order itself.

To demand such a sort of commitment from Internet intermediaries is not to *substitute* notions of social justice for their autonomy. Rather, it is to understand that *autonomy itself* emerges in – and cannot be understood outside – the context of such a shared normative project.<sup>151</sup> This interpretive or discursive approach towards autonomy and responsibility is widely recommended in contemporary political philosophy. Neil MacCormick, for instance, noted that our moral positions emerge “through a taking of individual responsibility for a body of moral opinion and tradition” that we initially acquire heteronomously but continuously reflect upon, critically, in cooperation with others, and that there is an imperative of carrying out this discourse.<sup>152</sup> As MacCormick explained, “moral deliberation morally ought to proceed through ‘discourse’ and can never proceed in a non-discursive way, by recourse to power-play, rhetorical tricks, or the like”.<sup>153</sup> It is only then that one “come[s – as one must –] to a conclusion on the best view one can form of all the evidence, and in the light of the whole range of one’s moral commitments and beliefs”;<sup>154</sup> that “one “bring[s] these together into the kind of

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<sup>149</sup> ROGER BROWNSWORD, *RIGHTS, REGULATION, AND THE TECHNOLOGICAL REVOLUTION* 24 (2008).

<sup>150</sup> *Id.*, at 25.

<sup>151</sup> See JOSEPH RAZ, *supra* note 23, at 387, 389 (noting that “a person’s life is (in part) of his own making. It is a normative creation, a creation of new values and reasons”. Yet, Raz also notes that people choose their reasons for action amongst social forms available to them, which they in turn go on to affect. “The emerging picture”, he observes, “is of interplay between impersonal, i.e. choice-independent reasons which guide the choice, which then itself changes the balance of reasons and determines the contours of that person’s well-being by creating new reasons which were not there before”).

<sup>152</sup> NEIL MACCORMICK, *supra* note 45, at 251, 252.

<sup>153</sup> *Id.*, at 252.

<sup>154</sup> *Id.*, at 251.

consistent and coherent set of practical principles that it befits a rational agent to possess".<sup>155</sup>

Beyond normative matters concerning technologies generally, there seems to be something particularly consequential in the normativity of use plans we find *in the information environment*. This is that the functional aspects of these entail, more or less directly, but always intensely, problems concerning the proper *recognition* of human personhood and its contours. Be it because functions here deal with intellectual goods, be it because they bear directly on people's privacy and reputation, problems of propriety of design translate as problems to what Seyla Benhabib would call the "reflexive reconstitution of collective identities".<sup>156</sup> They affect out narratives of self-identification as an anchor of our status in public life. This, in turn, calls for responsibility by the political community toward the normative implications of the misrepresentation – of the misrecognition – of our attributes by processes that undermine the integrity of such narratives. There is, ultimately, a democratic imperative of recasting our collective narratives under their best light,<sup>157</sup> of attending to the proper fit of our "webs of interlocution".<sup>158</sup>

This wider social responsibility towards a politics of recognition has not always been so clear in political theory. Traditionally, the problem of recognition has been presented as one concerning the reconciliation between gender or cultural groups and the community as a whole. It has been like that in particular regarding multiculturalist debates that, though ground in universalist aspirations, implied a certain dichotomy between "we" and "the others". Drawing on Fraser, Benhabib, on the other hand, suggested the need of a politics that "accepts the fluidity, porousness, and essential contestability of all cultures" (p. 68). That is, problems of recognition should be seen as transcending the differences and identities of particular groups; while also catering for these – and in order to do so –, they call on us to, more broadly, address the overarching political framework that concerns our

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<sup>155</sup> *Id.*. See, *similarly*, RONALD DWORKIN, JUSTICE FOR HEDGEHOGS 12 (2011) (noting that there can be no neutral grounds on which we can stand on arguments regarding liberty or democracy, and that we must recognize and demand the exercise of our reciprocal moral responsibilities. "[M]oral reasoning", he notes, "must be interpretive. We must take that approach to all our moral and political concepts").

<sup>156</sup> SEYLA BENHABIB, THE CLAIMS OF CULTURE: EQUALITY AND DIVERSITY IN THE GLOBAL ERA 70 (2002).

<sup>157</sup> *Id.*, at 80 (noting: "The goal would be to move a democratic society toward a model of public life in which narratives of self-identification would be more determinant of one's status in public life than would designators and indices imposed upon one by others. Call this a postnational, egalitarian democratic vision of modernist cultural vistas").

<sup>158</sup> CHARLES TAYLOR, SOURCES OF THE SELF: THE MAKING OF MODERN IDENTITY (1989) at 36 (noting: "A self exists only within what I call 'webs of interlocution'. It is this original situation which gives its sense to our concept of 'identity', offering an answer to the question of who I am through a definition of where I am speaking from and to whom. The full definition of someone's identity thus usually involves not only his stand on moral and spiritual matters but also some reference to a defining community").

identity struggles, “by changing our cultural patterns of interpretation, communication, and representation” (p. 69).

Struggles for recognition in the information environment are a paradigmatic example of the importance of this enlarged understanding of the problem of recognition. The misrepresentation of individual identities in the information environment is a profound normative concern for contemporary societies as a whole. As John Clippinger has powerfully explained,<sup>159</sup> the falsification of identity is something that happens at great societal costs.<sup>160</sup> Thus why identity narratives have, in fact, been part of the evolutionary strategies of different species and groups. “Perhaps”, he notes, “we protect identity narratives so fiercely because so much flows from them: without some form of foundational narrative for social identity, even in secular societies there can be no way of securing and enforcing honest reputations, and consequently, no credible means for allocating social rights, duties, and privileges”.<sup>161</sup> Thus why central questions for our societies are: “How do [we] create the conditions for socially constructed and enforced honest signaling? How can reputation signals be credibly communicated and authenticated? ... [H]ow can new identities be defined and grounded on a global scale?”. Ultimately, he says, “[w]hat is required is a new way of framing human identity in an open but precise manner”.<sup>162</sup>

Answering such questions and concerns urges us to fine-tune the use plans of our informational artefacts in order to attend, as precisely as we can, to what our possibilities of self-authorship *generally* require. Reinforcing narratives of self-identification in which all of us are entailed must be seen as a collective responsibility – and one that cannot exclude nodes that are so central for our reflection upon such narratives. Internet intermediaries are not only responsible; they are *particularly* so. They are responsible not only for the generation of utility, but for the coherently interweaving of their use plans with a normative web whose evaluative integrity so centrally depends on the propriety of those. We must approach the integrity of this web, in each of its interpretive nodes, as a public good.

In a work about hate speech, but whose arguments perfectly resonate with our discussions here, Jeremy Waldron noted that the *visible* aspects of a well-ordered society matter as a public good. Wherever the dignity of particular groups is affected by explicitly articulated forms of prejudice against their members, this public good is eroded in ways that impair the possibility that people can “live their lives and go about their business”.<sup>163</sup> People need assurances that this erosion is not going to take place, and this assurance, itself, Waldron explains,

“is like a public good, albeit a silent one. It is implicit rather than explicit, but it is nonetheless real – a pervasive, diffuse, general, sustained, and reliable underpinning of people’s basic dignity and social standing, *provided by all to*

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<sup>159</sup> JOHN CLIPPINGER, *A CROWD OF ONE: THE FUTURE OF INDIVIDUAL IDENTITY* (2007).

<sup>160</sup> *Id.*, at 166.

<sup>161</sup> *Id.*, at 168-169.

<sup>162</sup> *Id.*, at 178-179.

<sup>163</sup> JEREMY WALDRON, *THE HARM IN HATE SPEECH* 16 (2012).

*and for all.* A well-ordered society, it seems to me, has a systemic and structural interest in provision of this public good ... [T]he public good of assurance depends on and arises out of what hundreds of thousands of ordinary citizens do singly and together”.<sup>164</sup>

While Waldron is concerned with the visible, such an erosion can also happen in tacit, but not any less pernicious forms. Waldron’s environmentalism against public expressions of hatred applies just as well to invisible ways through which individual and collective forms of action – or lack thereof – operate to undermine the *architectural assurances* of respect for persons and their rights – the architectural assurances of an information environment whose normative order is deeply founded upon the use plans of enacted by Internet intermediaries. Rather, thus, than on normative detachment, the assurance that the information environment will develop *as a public good* depends on a sense of citizenship, attachment and commitment of all of us – and some of us particularly – towards an interpretation of our informational lives that is as good as it can be. Only by a taking of responsibility towards this shared interpretive project can we have pause to respond to contemporary challenges to human recognition stemming from a dominantly utilitarian outlook of information flows. The problem is very real, and Seyla Benhabib captures it vividly in the words below:

“We are facing the genuine risk that the worldwide movement of peoples and commodities, news and information will create a permanent flow of individuals without commitments, industries without liabilities, news without a public conscience, and the dissemination of information without a sense of boundaries and discretion. In this "global.com civilization", persons will shrink into e-mail addresses in space, and their political and cultural lives will proliferate extensively into the electronic universe, while their temporal attachments will be short-lived, shifting and superficial. Democratic citizenship, internet utopias of global democracy notwithstanding, is incompatible with these trends. Democratic citizenship requires commitment; commitment requires accountability and a deepening of attachments”.<sup>165</sup>

The interplay between freedom of speech and democracy has been most famously explored by Cass Sunstein, in the context of the First Amendment to the United States Constitution. The gist of Sunstein argument is that, in the American tradition itself, “[t]he protection accorded to free speech is designed to allow the polity’s judgments to emerge through general discussion and debate”.<sup>166</sup> This, in turn, is not something to be approached from utilitarian lenses. Revisiting Brandeis’s famous quote, that “liberty is the secret of happiness and courage ... the secret of liberty”, Sunstein notes that “[a] well-functioning system of free expression does not

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<sup>164</sup> *Id.*, at 99. In *Reynolds v Times*, similarly, Nicholls L.J. noted that “it should not be supposed that protection of reputation is a matter of importance only to the affected individual and his family. Protection of reputation is conducive to the public good”. *Reynolds v. Times Newspapers Ltd and Others* [1999] UKHL 45, [2001] 2 A.C. 127 (HL) 201 (appeal taken from England).

<sup>165</sup> SEYLA BENHABIB, *supra* note 156, at 183.

<sup>166</sup> CASS SUNSTEIN, *DEMOCRACY AND THE PROBLEM OF FREE SPEECH* 245 (1993).

simply promote better outcomes; it also has salutary effects on individual character”.<sup>167</sup> In other words, “the free speech principle should be understood as benefiting from and helping to inculcate certain personal characteristic that amount to both collective and individual goods”.<sup>168</sup> Yet, for all that to happen, “[a] system of free expression should ... increase the likelihood that political outcomes will be responsive to the will of the public”,<sup>169</sup> it requires that a public discussion be carried out in “public-regarding terms”.<sup>170</sup> The purpose of the American Constitutional system, Sunstein explains, is “not to furnish the basis for struggle among self-interested private groups”,<sup>171</sup> but rather to engage people in democratic discussion, “to open [them] to the force of argument”,<sup>172</sup> “to allow the polity’s judgements to emerge through general discussion and debate”.<sup>173</sup>

We ought indeed to remember that, whether such a public-regarding system is established or not, the recognition of identities, the affirmation of rights *will* take place through a less perfect, at times wicked system of free expression. Good or bad decisions will be made by Internet intermediaries, as they are made everywhere but with special gravity here, intertwining with our larger system of reasons to define the boundaries of our rights and our possibilities of action in the world. What Sunstein’s system of deliberative democracy reminds us of is that “respect for private rights, the private sphere, and limited government should themselves be justified by publicly articulable reasons, and thus *they too* will be either the preconditions for or the appropriate outcomes of a well-functioning deliberative process”. Deliberative processes, in other words, shape rights, which, in turn, shape deliberative processes.<sup>174</sup> The boundaries of our collective agreements, their public-regarding nature will determine the shape of our rights. Attending to this is an intrinsic dimension of the recognition and affirmation of value in the information environment – including the values of the rule of law and, ultimately, of dignity itself. A commitment to agreement through this public regarding system ought thus to be a regulative ideal for politics itself.<sup>175</sup>

Jeremy Waldron has similarly noted that the *publicness* of legal discourses, that is the imperative that they be carried out in the name of the public, is an element of the very idea of rule of law.<sup>176</sup> It flows from the requirement of *generality* of public norms, in the sense of reaching all agents equally, impersonally and publicly, for treating them as capable of understanding the normativity of rules – towards which, in turn, their responsibility can be demanded.<sup>177</sup> It is only by affirming itself as a

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<sup>167</sup> *Id.*, at 244.

<sup>168</sup> *Id.*, at 255.

<sup>169</sup> *Id.*, at 244.

<sup>170</sup> *Id.*, at 243.

<sup>171</sup> *Id.*, at 241.

<sup>172</sup> *Id.*, at 242.

<sup>173</sup> *Id.*, at 245.

<sup>174</sup> The shape of public deliberation, the imperative of legal discourses being carried out

<sup>175</sup> CASS SUNSTEIN, *THE PARTIAL CONSTITUTION* 137 (1993).

<sup>176</sup> Jeremy Waldron, *The Concept and the Rule of Law*, 43 GA. L. REV. 1, 31 (2009).

<sup>177</sup> *Id.*, at 24.



*public resource* that law can “pay[...] respect to those who live under it, conceiving them now as bearers of individual reason and intelligence”.<sup>178</sup> Recognizing indeed this *argumentative* aspect of legal practice, the requirement of rendering law susceptible to rational analysis and participation, is tantamount to upholding the *dignity* of legal subjects.<sup>179</sup>

It is a matter of rule of law, democratic citizenship and, ultimately, of justice itself, that intermediaries are situated as an integral part of the regulation of our argumentative legal practices. This ought to be seen as a fundamental aspect of the fairness of the normative life of our information environment. This is also currently a regulatory challenge, yet one we can treat, beyond the illusion of automatic choices that, in one direction or another, ignore values fundamental to our self-constitution. It is also a challenge we can tackle, if only we don’t give up. To admit otherwise is to admit the failure of our moral and political systems and, within these, of the institutions of law. The programming of our institutions with a language of impossibility, the embedding of our collective disappointment in the law and in the very design of the information environment violates the public good of assurance that things should be otherwise. As Luciano Floridi remarks, “[w]e live in an improvable infosphere, where moral agents have a *duty* to exercise their ethical stewardship”.<sup>180</sup> At least when rights are at stake, this moral duty Floridi speaks about translates into a notion of responsibility. There can be no privilege in the laws of defamation, privacy or anywhere that undoes our collective assurance that we have grounds to stand with dignity, to live and to improve our lives, and, in all things, to exist in a society that thrives in a culture of self-respect.

### C. *Correlativity and Corrective Justice*

We had noted above that the responsibility of Internet intermediaries should neither be precluded nor taken to be strict; that, rather, it should reflect a commitment of applying the best efforts reasonable to, within their particular economic and technological possibilities, get the facts and the law straight; that it should be expected that intermediaries will fail – even miserably – at times to reach the best interpretation that can be reached regarding the disputes they settle. But we also said that, in any event, what cannot be accepted is that intermediaries become institutionally detached from the normative community – the community of rights – we all inhabit. What we still need to examine, even if briefly, is whether our ideas for addressing the problem of responsibility of intermediaries is coherent with a broader system of which that problem is an integral part – the system of corrective justice in private law. As I will suggest, not only our proposal is compatible with such a system, but it is rather required by this.

Before doing so, a clarification is necessary. From a theoretical standpoint, we have *not* so far in this Part been approaching the responsibility of intermediaries

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<sup>178</sup> *Id.*, at 36.

<sup>179</sup> *See id.*, at 35-36.

<sup>180</sup> LUCIANO FLORIDI, *THE ETHICS OF INFORMATION* 130 (2013).

from the particular perspective of corrective justice, of which tort law is a part. Rather, we have been approaching the problem from the broader perspective of what we may, more simply, call a conception of *normative* justice. Traditionally, following the Aristotelian account, one would divide conceptions of justice in *distributive* (concerned with criteria for the original distribution of resources) and *corrective* (concerning the maintenance and restoration of transactional justice).<sup>181</sup> Both conceptions, as any conception of justice, are, of course, normative,<sup>182</sup> though they approach the question of normativity from different directions. Corrective justice concerns a relationship between two parties and the norms inserted in this bipolar relationship. Distributive justice, on the other hand, encompasses a normative relationship between any number of parties that may exist within a political system – for, as just noted, it concerns the original distribution of resources within such a system. We so far have been speaking of design, use plans and responsibility in a way that seems to refer to the wider normative constellation that distributive justice entails. Yet, we have in fact been approaching the question of normativity from a perspective that concerns the conceptions of *both* distributive and corrective justice – at the same time transcending the resources-allocative concerns that mark both these conceptions.

Our concern has been, in effect, with a conception of justice that provides assurances, including from an architectural standpoint, as to a taking of *normative responsibility* centered on the value of human personhood. Such is a concern that relates as much to the normative bonds between two people as it does to those that exist between people in society as a whole. With this important caveat, let us now understand *why* corrective justice, in particular, requires that we move beyond the normatively detached approaches of Part II. We then conclude this paper with an explanation of *how* corrective justice requires us to approach the responsibility of intermediaries instead.

The point I would like to make here concerns the notion of *correlativity* – an ideal of normative integrity regarding the reasons that hold the parties together in a relationship (in our case of liability), and which makes the intelligibility of phenomena concerning this relationship dependent on the relationship itself, rather

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<sup>181</sup> There is wide controversy on the correctness of this division, as well as on the taxonomical hierarchy between both categories. Brudner and Nadler, for instance, explain Aristotle himself “viewed transactional justice as embedded within a distributive justice framework”, which appears when he notes, in *Nicomachean Ethics*, that “the number of shoes exchanged for a house must ... correspond to the ration of builder to shoemaker”. As the authors note, the reciprocity required for justice in exchange depends on the equality between (and thus on the commensurability) of things in exchange – which, in turn, depends on the justice in social arrangements more broadly, for, in Aristotle’s words, “it is by proportional requital that the city holds together”. ALAN BRUDNER & JENNIFER M. NADLER, *THE UNITY OF THE COMMON LAW* 18 (2nd ed. 2013). Although this controversy will not in itself concern us here, the vision of corrective justice we expound is indeed an embedded one.

<sup>182</sup> See WEINRIB, *supra* note 1, at 350 (noting: “To think of something as an injustice is not to refer to a brute event but to make a normative ascription”).

than on either of its poles.<sup>183</sup> As Weinrib explains, the nature of the wrong in a relationship of liability – and of the liability itself that corrects that wrong – “is intelligible only if the *doing* and the *suffering* are regarded as comprising a *single normative unit* in which each party’s position is the mirror image of the other’s”.<sup>184</sup> This notion of correlativity, in turn, is irreconcilable with the systems of either exemption of liability or strict liability we have examined in Part III. In a very rough summary, we can say it is a violation of that notion that, in ordinary situations, one actor can have a liability without a precise correlation between an underlying duty towards another actor and that actor’s right – and, of course, without the (wrongful) breach of such a right.

In cases of *strict liability*, this irreconcilability is more obvious. Here it is clear that intermediaries risk being held liable over and over again, without a correlated wrong, for actions – decisions on content they host – that are of the *ordinary nature* of their *ordinary activities*. Every time intermediaries interpret the nature of content in light of the law – even when they try their best to respond to enormous normative uncertainty – liability may accrue. Intermediaries here are subjected to Sisyphean lives, always rolling the rock up the hill only to see it rolling back down – a fate indefinitely removed from their own normative context. Systems of strict liability thus are, and cannot but be, an exception to the notion of correlativity between rights and duties that marks the central cases of private law. They belong to the realm of ideas that are “not normal ... elaborations of private law”, and which private law incorporates “only for special occasions and with special justifications”.<sup>185</sup> As John Gardner observes, “[i]n modern legal systems [liability] is typically strict *and conditional*, i.e. it is a strict liability that arises only when one is engaged in certain pursuits, such as blasting and manufacturing consumer products. These extra conditions are needed to meet the problem of institutional fairness”.<sup>186</sup> Or, in Tony Honoré’s view, they are forms of liability that have place when the “conduct of the harm doer carries a special risk of harm”.<sup>187</sup>

Making these exceptions into rules violates the justification of private law as a *normative* system, turning it into a servant of the outcomes of factual controversies.

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<sup>183</sup> *Id.*, at x.

<sup>184</sup> *Id.*, at xi.

<sup>185</sup> *Id.*, at 10.

<sup>186</sup> John Gardner, *Obligations and Outcomes in the Law of Torts*, in *RELATING TO RESPONSIBILITY: ESSAYS FOR TONY HONORÉ* 21 (Peter Cane and John Gardner eds., 2001).

<sup>187</sup> TONY HONORÉ, *RESPONSIBILITY AND FAULT* 27 (1999).

It fulminates the normative coherence<sup>188</sup> and the very self-understanding<sup>189</sup> of private law as a *system*, for it institutionalizes a contradiction of this system, without special, deontological reasons – and does so in one of the most fundamental realms of the law in our time. It is important thus to realign the liability of Internet intermediaries with those that are the central cases of corrective justice – namely, cases of negligence liability. These require the existence of *wrongdoing*, that is, the “failure to live up to *the standard of reasonable care*”<sup>190</sup> – which, in turn, is marked by a minimum of acceptable risk that connects an action by one person to the suffering by another. As Weinrib summarizes, “[t]roughout, negligence law treats the plaintiff and the defendant as correlative to each other: the significance of *doing* lies in the possibility of causing someone to *suffer*, and the *significance of suffering* lies in its being the *consequence of someone else’s doing*. Central to the linkage of plaintiff and defendant is the idea of *risk*, for risk imports *relation*”.<sup>191</sup> The centrality of this relation, however, is undermined in cases where no risk is deemed acceptable, where even situations of profound normative uncertainty – which exist in many hard cases intermediaries need to settle – are met with the threat of liability.

It is precisely the hardship of such situations that defenses and privileges in defamation law seek to remedy, through the creation of regimes that attempt to emulate that of negligence liability. So is the case, for instance, with the innocent dissemination defense, which, we saw above, embeds a standard of reasonable care in defamation taken from negligence liability<sup>192</sup> – even if, as we also saw, this intention is defeated by the strictness of assuming knowledge of the unlawfulness of

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<sup>188</sup> See WEINRIB, *supra* note 1, at 11-13, 170 (noting “that private law is a justificatory enterprise that articulates normative connections between controversies and their resolutions” and that this justification entails a pursuit of internal coherence, in which private law strives to avoid contradiction, to smooth out inconsistencies, and to realize a self-adjusting harmony of principles, rules and standards” – and that, in the common law, this justificatory enterprise presents itself as an responsibility of “tak[ing] reasons for judgement seriously, *as reasons*”. The very concepts of private law, “[a]s the products of juristic thinking, ... are presented to us by positive law, and they invite us to make sense of them and of their normative dimension”. If the coherence of the system is to be preserved, this is a responsibility that should be extended to Internet intermediaries.)

<sup>189</sup> The normative coherence of private law is also a requirement of its internal intelligibility, for it is only through the mutual interconnectedness of the different parts of the system that we can make sense of the system from within, as a self-understanding enterprise. Conceptual integrity plays a fundamental role here. As Weinrib notes “the concepts of private law are both products and channels of [its] self-understanding”. It is only by reflecting upon the coherence of these concepts, as well as the doctrines and institutions that instantiate them, that private law can reflect upon itself and its intelligibility as a system of norms. See WEINRIB, *supra* note 1, at 14.

<sup>190</sup> See WEINRIB, *supra* note 1, at 147.

<sup>191</sup> *Id.*, at 167.

<sup>192</sup> It is indeed a system of negligence liability, based thus on a standard of reasonable care, that the innocent disseminator defense in defamation seeks to replicate. See *Emmens v Pottle*, 16 QBD 354, 357 (1885) (UK) on the negligence foundations of the innocent dissemination defence. See also JAN OSTER, *MEDIA FREEDOM AS A FUNDAMENTAL RIGHT* 59 (2015). See, *still*, MATHEW COLLINS, *COLLINS ON DEFAMATION* 333 (2014).

the content.<sup>193</sup> One particular set of defenses, however, seems most successfully apt to tackle the problem of intermediary liability – that of qualified privilege, known before as the Reynolds defense, and presently reflected in Section 1 of the Defamation Act 2013, as the defense of “publication on matter of public interest”. The gist of that defense, to which we turn in Part IV, as we propose a way forward, is now that factual inaccuracies, which would be normally subject to liability under defamation law, are to be tolerated under a set of justifiable normative circumstances. These are that the publication be of a matter of public interest and that the defendant reasonably believe that to be the case.

The foundation of the defense of “publication on matter of public interest” is a notion of *reciprocity*, which, in turn, instantiates the idea of *correlativity* that more generally grounds tort liability. Here this idea means that, where there is “between the maker of the statement and the recipient [– including the public at large–] some duty or interest in the making of the communication”,<sup>194</sup> a general privilege is recognized to the normative conditions under which the statement is to be made. This privilege, which is an integral part of defamation law, takes into account all the normative circumstances concerning both sides of a communication cycle. Cases there might be in which “the status and activities of certain bodies are such that members of the public are entitled to know of their proceedings”<sup>195</sup> – and here the privilege will derive from the subject-matter alone. Other than that, like in the privacy realm, where the totality of normative circumstances determines the reasonableness of one’s expectation of privacy, here too the reciprocal – or correlative – normative context of the parties will determine whether the publication on matters of public interest defense holds good.

We turn back to the defense of responsible communication soon. But it suffices here to note that what this defense seeks to instill is a sense of subjective responsibility that redeems the coherence between intermediary liability and private law in general. Through it, intermediaries are normatively recast as responsible members of a self-understanding system, a system, that is, which seeks to pursue the best justifications possible for its decisions in light of the integrity of its norms. Only the granularity of a system of reasons and justification enables the relationship between intermediaries and the public in general – a relationship that is ordinary in everything but its importance – to express itself in appropriately correlative forms. Correlativity, indeed, depends on the reasonableness of the commitments that bind both sides together in a relationship. Systems that establish structures of strict liability to deal with ordinary situations lift the relationships between parties from the universe of reasonableness. Their hardship is an anathema to the granularity

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<sup>193</sup> See *supra* Part II.A (on how to the innocent dissemination defense only exempts one who is not a commercial publisher if he takes reasonable steps to take defamatory content down upon obtaining knowledge of it (regardless of how difficult it is to ascertain the defamatory nature of the content). Reasonable, in this sense, care becomes a purely *factual* – rather than *normative* – attitude towards the content. The same may be said of the safe harbor provisions of the Electronic Commerce Directive and its Regulation in the UK.).

<sup>194</sup> Reynolds v. Times Newspapers Ltd. [1999] UKHL 45, [2001] 2 A.C. 127, at 194.

<sup>195</sup> *Id.*, at 196.

we should expect from corrective justice. They violate not only the dignity of the parties in a relationship, but the dignity that the very system of private law, as a whole, seeks to uphold.

Like general systems of strict liability, general systems of *exemption of intermediary liability* also reflect a violation of the notion of correlativity in private law. This violation expresses itself from two different perspectives. The *first perspective* lies in the idea of exemption itself, and is a mirror image of the violations we find with strict liability – all the while resting on the same normative contradictions of strict liability. In general systems of strict liability, correlativity is violated by a doing away with the requirement that an action must be *wrongful* to be a *wrong*. There is no acceptable measure of risk. Insofar as there is risk, any action, no matter how accomplished (or, indeed, how not<sup>196</sup>), may be met with liability. In general systems of exemption of liability, in turn, from an institutional perspective, no matter how effortless, how morally wrongful an action may be, there is just *no* wrong – and thus no corresponding duty of avoiding it. Any risk is acceptable! The conferral of “immunity regarding risks that could have been modulated ... ignore[s] the effect of one’s action on other agents and ... treat[s] them as nonexistent”.<sup>197</sup> In both general systems, of exemption and of strict liability, what happens that the positions of the intermediary and the user – the doer and the sufferer – are institutionally lifted from their foundations in a relation of (acceptable) risk. In both cases – which, let us note again, both concern a central normative question of our time – there is, without justifiable reasons, an institutionalized disconnection of the legal position of the Internet intermediary from the network of correlative positions – and, indeed, from the normative unity – that characterizes private law. Simply put, there is no corrective *justice*.

That this first perspective so far seems to have gone unnoticed may be due to an institutional gimmick that serves at the same time as a cloak and, once we attend to it, as an indictment of current systems of exemption of liability. We find this gimmick, for instance, in the Defamation Act 2013, where it is said, exemption of liability notwithstanding, that:

“[w]here a court gives judgment for the claimant in an action for defamation the court may order ... the operator of a website on which the defamatory statement is posted to remove the statement”.<sup>198</sup>

This gimmick, precisely, is the *second perspective* from which we ought to approach current exemption systems as a violation of the notion of correlativity. It is so for it reflects an attempt to establish a legal relationship with a party which, were it not for the gimmick, would be completely foreign (for it is exempt) to the legal relationship brought before the court – that between the original author of the defamatory material and the victim of the defamation. What justifies that provision

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<sup>196</sup> See Gardner, *supra* note 186, at 4 (noting that strict liability is a mode of liability “in which the law does not care about care-taking, and therefore does not treat the bestowing of care – *any care at all* – as having been obligatory”).

<sup>197</sup> WEINRIB, *supra* note 1, at 152.

<sup>198</sup> Defamation Act 2013, § 13(1)(b).

in the Defamation Act – an injunction to a party that is entirely outside the bonds of correlativity.<sup>199</sup> It could seem that, once a judgement has been issued, a new relationship is formed with the intermediary, based on the, now proclaimed, illegal nature of the content. But that cannot be the case. First, because the content will have been illegal all along; it will not have its nature transformed solely by virtue of the court judgement. Second, because there is no provision recognizing a liability of the intermediary *towards the victim* of the defamatory content. If the order by the court is not complied with, the remedy will not be a remedy within tort law, but simply one within the realm of contempt.<sup>200</sup> This second point makes it very clear that there are no underlying reasons based on which a duty for the intermediary may be established.<sup>201</sup>

Here it is important for us to have in mind what John Gardner has called the *continuity thesis* in tort law – an explanation for the secondary obligations tort law is about, based on the underlying reasons for these. The continuity thesis holds that a secondary obligation in tort law is a “rational echo of the primary obligation, for it exists *to serve*, so far as may still be done, *the reasons for the primary obligation* that was not performed when its performance was due”.<sup>202</sup> In other words, a secondary obligation does not emerge as a mere consequence of the violation of a primary obligation. It has support in the *underlying reasons* on which a primary obligation rests, and which continue to exist after the primary obligation is not fulfilled.<sup>203</sup> So,

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<sup>199</sup> In Lord Watson’s words in *White v. Mellin* “[d]amages and injunction are merely two different forms of remedy against the same wrong; and the facts which must be proved in order to entitle a plaintiff to the first of these remedies are equally necessary in the case of the second” (*White v Mellin* [1895] AC 134 (HL) 167 (appeal taken from Eng.)). Yet, no wrong would seem to underlie an injunction against a third party – and the violation of a court order would rest purely in the realm of contempt of court.

<sup>200</sup> See *Attorney-General v. Newspaper Publishing Plc* [1988] Ch 333, at 380 (Sir Nicolas Browne-Wilkinson noting, for the Court, that witting interferences by third parties with court orders should be regarded as interference with the process of justice. In his words, “[t]he third party would be liable for contempt, subject to proof of mens rea, not because he is in breach of the order, but because he has prevented the court from conducting the proceedings in accordance with its intention”. Sir Browne-Wilkinson did not seem even to be contemplating the possibility of a third party being reached by an order, and thus being in breach of it. The strange situation (which is now the ordinary life) of the Defamation Act 2013, however, is an even clearer case of contempt). See also *X & Y v Persons Unknown* [2006] EWHC 2783 (QB), [2007] EMLR 290, at 72 (UK) (noting that the doctrine reflected in *Attorney-General v. Newspaper Publishing plc*, *id.* – known as the *Spycatcher* doctrine (in reference to Peter Wright’s book, at stake in that case and others) – “as a matter of logic, has no application to a permanent injunction since, obviously, there is no longer any need to preserve the status quo pending a trial”. Yet, there is no similar constraint in the Defamation Act 2013).

<sup>201</sup> Notice, also, that the § 13(1)(b) does not speak of the operator of *the* website, but of the operator of *a* website – which, in principle, seems to enable the court to issue, if not a *contra mundum* injunction, at least an injunction to *any* operator hosting the defamatory statement.

<sup>202</sup> John Gardner, *What is Tort Law For? Par 1. The Place of Corrective Justice*, 30 LAW AND PHILOSOPHY 1, 33(2011).

<sup>203</sup> In the world of the Civil Law, these sorts of obligations are known as ‘natural obligations’. See ROBERT J POTHIER, 1 A TREATISE ON OBLIGATIONS, CONSIDERED IN A MORAL AND LEGAL VIEW

what are the primary reasons on which the requirement that intermediaries comply with a court order is based? There are none. In exempting intermediaries of liability, the law has fulminated any primary reasons that there could be. No reason, thus, can continue, for a secondary obligation to be based on.

The power granted to courts by the Defamation Act 2013 does not thus find any foundation in the law of torts. It is merely a case of injunctions issued against innocent third parties – and at that they seek to render normal what is an abnormal event. As Markesinis and Deakin point out, “[i]n principle, an injunction cannot be granted unless it is based upon some actual or potential cause of action in tort, contract, breach of trust or otherwise”.<sup>204</sup> Note that while in defamation cases before the 2013 Act an injunction against the intermediary was part of the dynamics of defamation law, it was only so when – and because – the intermediary was, himself, liable for a wrong under the law. That is no longer the case.

Now, it is true that, outside of the general principle noted by the authors, such sorts of injunction have been granted in a reduced set of famous cases in the realm of privacy law – most notably in those that became known as cases of ‘super’ or ‘contra-mundum’ injunctions. These, however, had been no more than 4 cases<sup>205</sup> by the time a committee chaired by Lord Neuberger MR issued its Report on the matter, in 2011.<sup>206</sup> In addition, the Report made very strict recommendations for the further concession of such injunctions. Recognizing in them a derogation from the principle of open justice,<sup>207</sup> the Report recommended they be issued only when *strictly necessary*, kept to the *absolute minimum* and subjected to *intense scrutiny*<sup>208</sup> – and, very importantly, noted that a super-injunction “ceases to have any effect”

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114-115 (Francois-Xavier Martin trans., 1802) (noting: "The Roman jurists called natural obligation that which was destitute of action; that is to say, which did not give the person to whom it was contracted, the right of requiring, in law, the payment of it" -- yet, which "had all the other effects which a civil obligation could have". Thus, a "payment of what was due by a mere natural obligation [was] valid and not liable to be recalled"). The notion of natural obligation travelled into the English common law via Lord Mansfield's decision in *Moses v Macferlan* [1760] 2 Burr 1005, 1012; 97 ER 676, 681. See Peter Birks, *English and Roman Learning in Moses v. Macferlan*, 37 CURRENT LEGAL PROBLEMS 1, 17 (1984) (UK). See also Duncan Sheehan, *Natural Obligations in English Law*, LLOYD'S MARITIME AND COMMERCIAL LAW QUARTERLY 172, 178 (2004) (UK).

<sup>204</sup> SIMON DEAKIN, ANGUS JOHNSTON AND BASIL MARKESINIS, MARKESINIS AND DEAKIN'S TORT LAW 874 (7th ed. 2013) (also noting: “[a]n injunction may be issued to restrain a threatened act that, unless restrained, is likely to be repeated, with the result that the claimant will then have an action based on a civil law wrong”. *Id.*).

<sup>205</sup> *Id.*, at 879.

<sup>206</sup> Lord Neuberger of Abbotsbury, *Report of the Committee on Super-Injunctions: Super-Injunctions, Anonymised Injunctions and Open Justice* (May 20, 2011).

<sup>207</sup> Those, to be fair, are injunctions that restrain the possibility that third parties publish the names of parties in a legal dispute before the courts. There is no reason, however, why the precautions prompted by the principle of open justice should not equally be prompted by the right to freedom of expression.

<sup>208</sup> Lord Neuberger of Abbotsbury, *supra* note 205, at 12.



after a “final determination of the parties’ substantive rights”.<sup>209</sup> All that is the absolute opposite of what happens with the injunction rule currently in force in the law of defamation, which seeks to emulate a relation of correlativity where correlativity there is none.

#### IV. RESPONSIBLE COMMUNICATION: EFFORT AND THE BURDENS OF REASON

##### *A. Normative Negligence*

In *Bolton v Stone*, Lord Reid famously said: “If cricket cannot be played on a ground without creating a substantial risk, then it should not be played there at all”.<sup>210</sup> This assertion denotes a recognition that the difficulty of remedial measures should not normally be taken into account in negligence liability. However expensive such measures may be, either they *are* in place to avoid the risk – regardless of the subjective possibilities of the agent – or the activity cannot *rightly* be undertaken without them at all.

When one thinks of Internet intermediaries, a certain discomfort may be felt regarding this assertion. After all, it ignores the, often profound, normative uncertainties with which intermediaries are confronted on a daily basis – and the burdens intermediaries face to respond to these. If risks flow from their activities, as they, at times monumentally, do, should intermediaries be expected just to move their cricket grounds off the Internet?

It is tempting to sketch an answer to this question concerning the burdens of care in either of two ways. First, one can say that the costs of merely taking content down are not bound to be that substantial; that it wouldn’t a problem that intermediaries, once notified they host illegal content, just be expected to proceed expeditiously to purge those. Intermediaries would thus be judged simply on whether or not they apply reasonable measures of *care to take content down* – on whether they unreasonably delay such measures or generally just act carelessly in the identification and purging of the complained materials. Let us call this the “*takedown-negligence* approach” – for it associates negligence to the act of taking down.

A second answer has it that the burdens of intermediaries should not be assessed merely with regard to the taking down of content, but also with regard to the *normative* uncertainties to which an intermediary is exposed if it seeks to reflect upon the content, rather than just simply taking it down. We should, in this sense, recognize it is indeed difficult – and tremendously so – for intermediaries to reach

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<sup>209</sup> *Id.*, at 18.

<sup>210</sup> *Bolton v Stone* [1951] UKHL 2, [1951] 850 AC (HL) 867 (appeal taken from Eng.). The situation is different in the US, where the Learned Hand formula is applied. *See infra* note 214 and accompanying text.

the right *interpretation of legal norms* and thus *succeed in the evaluation* of content they host. Yet, perhaps the law, instead of deviating from *Bolton* by taking into account the burdens of precautions, should just *exempt* intermediaries from the obligation of evaluating content altogether. The concern here, note, is not with the practicality of taking content down, but with the fairness of requiring intermediaries to evaluate it according to underdeterminate normative standards. Let us call this response to such a concern the “*no normative-negligence* approach” – that is, an approach that does away with a requirement of reasonable *care regarding the normative standards* that make the content legal or illegal.

These two sketchy answers do not dialogue with each other. They approach the problem of liability from entirely disconnected dimensions. And they reflect, as you might have suspected, the two extremes with which we have dialogued in Part II – that is, the extreme of *strict liability* and the extreme of *exemption of liability*. The former, we have seen, discourages reflection by rendering the intermediary liable for whatever normative outcome accrues if the intermediary does not take the care of taking the content down. The *burdens* the system articulates, and thus the negligence in attending to them, *concern the taking down of content*. The exemption of liability system, in turn, attends to the normative dimension of things, but just to exonerate the intermediary from the normative *burden* of addressing them – it exonerates intermediaries, that is, from negligence *concerning their normative responsibility* towards the relations in which they are embedded and, ultimately, the system of private law as a whole.

Yet, I would like to propose in concluding our analysis that there is an alternative approach worth considering regarding the burdens of reasonable care, besides the *takedown-negligence* and the *no normative-negligence* approaches. I will call it the “*normative negligence*” approach. As Weinrib explains, the real concern corrective justice expresses is *not* with “*factual but normative* loss consisting in wrongful infringement of the plaintiff’s rights”.<sup>211</sup> The function of the very concept of duty of care is to “span the normative space between the parties by treating the injury that occurred in terms of the wrongful risk out of which it materialized”.<sup>212</sup> What I would like to suggest is an approach that, differently from both approaches above, transcends the factual dimension of content takedown to focus on the *normative* matter of how an Internet intermediary lives up to its normative commitments, how rightly or wrongly it traverses the normative space of his duty of care. The *normative negligence* approach recognizes the difficulties in interpreting the facts (the nature of content) in the light of the normative order (its illegality or illegality). Yet, all the while paying heed to this difficulty, it does not refrain from requiring a commitment of normative integrity. In the case of intermediaries, this commitment requires a pursuit of coherence between the intentional dimension of the artefacts they design and the broader set of reasons that compose the normative order.

The normative negligence approach could be accommodated without major difficulty by negligence law in both the English common law approach and in the US. On one hand, the normative negligence approach runs afoul of the specific

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<sup>211</sup> WEINRIB, *supra* note 1, at 157.

<sup>212</sup> *Id.*, at 164.

discipline of intermediary liability in both jurisdictions, which reflects the problems we have been discussing throughout this paper. On the other hand, the approach proposed should be taken up precisely as an antidote to that discipline – recasting intermediary liability in coherence with the private law system as a whole and the ideas of correlativity we find within it.

At first sight, that could seem not to be the case – in particular if we recall Lord Reid’s ideas, with which we began this section. Those have it that, in general, the burdens of precaution ought not to be considered in negligence law. And, after all, we are suggesting that the normative burdens of Internet intermediaries should be taken into account.

It is important, however, to pursue the point further, in light of the contrast Weinrib makes between the English and the US approaches. Differently from the *Bolton v. Stone* approach,<sup>213</sup> in the US the famous Learned Hand formula holds that risk creation is only tortious when the probabilities of an accident occurring, together with the gravity of the loss arising from it, exceed the burden of adequate precautions in avoiding the accident.<sup>214</sup> Weinrib’s understanding is that the US approach violates the idea of correlativity in private law, for what is important for this idea is the existence of a risk relationship between the parties, not the costs of eliminating it.<sup>215</sup> Weinrib departs from the “standpoint of Kantian right” to note that corrective justice conceives of “doing and suffering as a relationship of free will” in which “doer and sufferer rank equally as self-determining agents in judgments about the level of permissible risk creation”.<sup>216</sup> Introducing *material* calculations about the *economic costs* of precaution would violate this normative equality between the parties – and thus the idea of correlativity in private law. Yet, the point we are pressing in this part is that the burdens to be attenuated here are not economic burdens of precaution only, but normative *burdens to reason itself*.

Sure, accounting for burdens arising from technology can be done as part of a material, cost-related analysis, and thus be accommodated within the Learned Hand formula, in the US. Yet, this is not the *only* reason these burdens can be accounted for. The reason is that technologies, while empowering people to the extent they

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<sup>213</sup> See *supra* note 210 and accompanying text.

<sup>214</sup> See WEINRIB, *supra* note 1, at 148 (discussing *United States v. Carroll Towing Co.*, 159 F. 2d 169, at 173 (2d Cir., 1947)).

<sup>215</sup> *Id.*.

<sup>216</sup> *Id.*, at 152. It is for viewing people as equally morally autonomous that, in determining the standards of reasonable care, tort law abstracts “from such particulars as social status and moral character” of the parties (*id.*, at 81). Weinrib’s ideas of correlativity see people normatively connected merely as abstract doers and sufferers, via formal and universal laws of reasons that “express the dignity of self-determining agency in a coherent tort law” (*id.*, at 203).<sup>216</sup> And, in all fairness, there indeed has been a longstanding jurisprudential trend along these lines, extending from cases like *Vaughan v. Menlove* (1837) 132 ER 490 to date.

master them,<sup>217</sup> can also operate as constraints when they don't.<sup>218</sup> Even designers are only designers to a certain extent. The normativity reflected in use plans occurs in an interplay between reasons which designers can fully master and control, but also between these and reasons that may at times lie completely outside designers' possibilities of mastery. These reasons may spring, inscrutably, from within a use plan itself – or it may spring from other use plans, from an ever proliferating universe of reasons that go beyond the complexity of even the most sophisticated legal system, and whose constraints, we have seen in Part III.A, often operate in a tacit way.

Understanding so does not need to commit us to inquiring into variable psychical circumstances in determining the normative boundaries of intermediary liability – though it is fair to acknowledge the existence of a difficulty here. Taking into account the different possibilities of mastery of technological reasons, as well as the constraints these impose, may seem to open Pandora's box. For perhaps the same points we make about technological reasons may also reasonably be made with regard to legal and, in everything, cultural reasons more broadly. And these are reasons that the idea of correlativity in private law generally tends to put aside, as expressive of subjective criteria whose examination violates the formal equality between parties. Attending to the use plans of technological artefacts might thus just reveal a problem that, throughout its history, negligence law has had difficulties in providing an answer to – namely, the problem of determining where exactly reasons lie, in their existence between moral autonomy and socially determined forms. It reveals that tort law's focus on moral autonomy has happened at expense of the much more granular value of personal autonomy.

But this problem is too large to examine here, and we may still be able to address the central question of this paper even if we do not agree on the points above. The visualization of the problem, however, enables us to see what may be the particular difficulty facing the normative responsibility of intermediaries – and the type of negligence that should attach to its violation. This difficulty, which is extremely fundamental for our inquiry in this paper, is the following. Whenever intermediaries settle disputes, the variable universe discussed in the preceding paragraphs materializes *within these disputes* – it materializes in the circumstances *of the parties* and in the complexities of the relationships between these. When Google settles the hundreds of thousands of data privacy disputes that reach it all the time, the reasons within each of these disputes will vary in ways that may be more or less – some completely – detached from Google's own normative powers and capabilities. There

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<sup>217</sup> See MARSHALL McLuhan, UNDERSTANDING MEDIA: THE EXTENSIONS OF MAN (1964). See also MANUEL CASTELLS, THE NETWORK SOCIETY: A CROSS-CULTURAL PERSPECTIVE 11 (2004) (noting the very idea of an information age, to be characterized by the “augmentation of the human capacity of information processing and communication” enabled by new technologies).

<sup>218</sup> Heidegger thought, more fundamentally, that the essence of technology is enframing, a “destining of revealing”, of “bringing-forth” (poiēsis) the truth. From what follows that our very perception of being is destined by the essence of technology See Heidegger, note 128, at 24-25. See also MAX WEBER, THE PROTESTANT ETHIC AND THE SPIRIT OF CAPITALISM 123 (Talcott Parsons trans. 1992) (speaking of the technical condition as an iron cage for all who are born into it).

is no predictability as to what sorts of disputes will arise concerning what actors and what technological, legal and overall cultural matters.

It may very well be that, in relation to our discussions in the preceding paragraphs, one thinks we should *not* attend to the burdens of precaution in proportion to the normative complexity of intermediaries *self-regarding activities*. Be that as it may, it is the normative complexity of the *other-regarding* universe that, after all, is of the very nature of what being an *intermediary* is, which is of our particular concern in this paper. In this respect, intermediaries may differ from other technological actors who play a more self-sufficient role in the development of their artifacts. The difference may well be one of gravity. All normativity – and indeed, the responsibility towards it – are conversational.<sup>219</sup> But, in each settlement of normative questions, and in embedding these settlements in the use plans of the artefacts they design, intermediaries carry a normative dialogue on with other actors whose centre of gravity concerns much more *reasons regarding these other actors* and their circumstances than reasons regarding intermediaries themselves.

Yet, because intermediaries' settlements regarding these reasons matter – for the values they entail, for their connection to the broader system of reasons that compose private law – intermediaries ought to be held responsible for a pursuit of integrity between them and the larger set of reasons that compose our normative order. It is to this pursuit that the idea of normative negligence attaches.

But just how should this pursuit of normative integrity by Internet intermediaries be carried out – or, in other words, how to conceive of the normative negligence approach regarding Internet intermediaries?

### B. *Responsible Communication*

A preliminary answer has already been sketched in the preceding section – namely, that our approach to intermediary liability should build upon what is now known as the publication on matters in the public interest approach. Normative negligence here would simply mean the placing of an emphasis in the normative dimension of negligence liability – and an indication that current approaches fail to pay heed to this dimension. The placing of an emphasis in this normative dimension entails a duty of reasonable care towards normativity itself, and in turn that a certain threshold must exist to accommodate the existence of honest mistakes. Like those who publish news articles and are allowed to get away even when they fail to get the facts straight – insofar as they *reasonably*, or *responsibly*, believe that the publication

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<sup>219</sup> See MICHAEL MCKENNA, CONVERSATION AND RESPONSIBILITY 2, 3 (noting, based on Strawson, that “moral responsibility is essentially interpersonal”, in that “facts about an agent's being morally responsible depend upon considerations about the nature of holding responsible, where holding responsible is understood as a practical affair, and not just a matter of judging some propositions about an agent to be true or false”. “Holding morally responsible”, in McKenna's view, ought to be “understood as a stage in something analogous to an unfolding conversation of the sort occurring between competent speakers of a language, a dialogue between the morally responsible agent who is responsible, and those in the moral community holding her responsible”).

further the public interest –, so should Internet intermediaries be given a margin of appreciation within which they can responsibly conduct their activities, without an expectation of normative certainty concerning the disputes they settle. As McLaughlin C.J. noted for the Court in *Grant v Torstar Corp.*,

“a degree of deference should be shown to the editorial judgment of the players, particularly professional editors and journalists. For instance, a court should be slow to conclude that the inclusion of a particular defamatory statement was “unnecessary” and therefore outside the scope of the defence. As Lord Hoffmann put it:

The fact that the judge, with the advantage of leisure and hindsight, might have made a different editorial decision should not destroy the defence. That would make the publication of articles which are, *ex hypothesi*, in the public interest, too risky and would discourage investigative reporting”.<sup>220</sup>

There is no reason why the same margin of appreciation could not be conferred to intermediaries, whose challenges are even steeper, on the condition of their responsibility.

Of course, the expected objection to this approach could be, as in the general case of the responsible communication defense, that the criteria for evaluating the reasonableness or responsibility of the intermediary are somewhat underdeterminate – an issue aggravated by the Defamation Act 2013, which sought to lend more flexibility to the criteria until then comprised by the Reynolds defense. Yet, as explained by Nicholls L.J. in *Reynolds*, one must not exaggerate the extent of the uncertainty of the responsible communication test.<sup>221</sup> First, because courts can issue guidelines – in our case strengthened by an emerging case law practiced by intermediaries themselves. Second because, in Nicholls L.J.’s words, “[t]he common law does not seek to set a higher standard than that of responsible journalism, a standard the media themselves espouse”<sup>222</sup> – and, which, in our case should surely be within the purview of intermediaries as well, given the inevitability of their making decisions in one direction or another. The converse, as we examined above, would implicate an exoneration of responsibility that not only is incompatible with the idea of correlativity but ultimately reflects a privilege not extended to other sectors of society. Tipping J.’s eloquent observations in this regard (cited with approval by Nicholls L.J. in *Reynolds*) deserve particular reverence:

“It could be seen as rather ironical that whereas almost all sectors of society, and all other occupations and professions have duties to take reasonable care, and are accountable in one form or another if they are careless, the news media whose power and capacity to cause harm and distress are considerable if that power is not responsibly used, are not liable in negligence, and what is more, can claim qualified privilege even if they are negligent. It may be asked whether the public interest in freedom of expression is so great that the accountability

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<sup>220</sup> *Grant v. Torstar Corp.*, *supra* note 101, at 675.

<sup>221</sup> *Reynolds v. Times Newspapers Ltd and Others*, *supra* note 164, at 202.

<sup>222</sup> *Id.*

which society requires of others, should not also to this extent be required of the news media”.<sup>223</sup>

Note, also, that media ought to be interpreted expansively in the case of the responsible communication defense. As Lord Hoffman made clear per the House of Lords in *Jameel*, “the [responsible communication] defense is of course available to anyone who publishes material of public interest in any medium. The question in each case is whether the defendant behaved fairly and responsibly in gathering and publishing the information”. In *Grant v Torstar Corp.*, the Supreme Court of Canada, noted as the very reason for our speaking of a responsible communication on matters of public interest, the following:

“the traditional media are rapidly being complemented by new ways of communicating on matters of public interest, many of them online, which do not involve journalists. These new disseminators of news and information should, absent good reasons for exclusion, be subject to the same laws as established media outlets”.<sup>224</sup> (...)

“The press and others engaged in public communication on matters of public interest, like bloggers, must act carefully, having regard to the injury to reputation that a false statement can cause. A defense based on responsible conduct reflects the social concern that the media should be held accountable through the law of defamation. As Kirby P. stated in *Ballina Shire Council v. Ringland* (1994), 33 N.S.W.L.R. 680 (C.A.), at p. 700: “The law of defamation is one of the comparatively few checks upon [the media’s] great power”.<sup>225</sup>

There is no reason why the same observations above should not apply to Internet intermediaries – that is, that, like all other occupations, theirs brings them duties to take reasonable care and use responsibly their powers and capacities, on pain of acting negligently otherwise. This is particularly the case when actors have the capacity to cause considerable harm and distress if their powers are not responsibly used, a capacity, this, which no doubts intermediaries do have.<sup>226</sup>

But beyond the boundaries of each incident, the lack of expectations that Internet intermediaries behave responsibly provokes perturbations of more broadly normative nature. The negligence of intermediaries matters for the intelligibility and coherence of private law itself – and their responsibility ought to be recognized as a normative one within this largest context as well. Intermediaries, accordingly, must be called on to “take the task of legal thinking upon themselves”, for their decisions become a fundamental component of the “justificatory enterprise” that private law consists of – a collective wisdom “fined and refined by an infinite number of Grave and Learned Men”, through which “normative connections” get articulated “between controversies and their resolutions”.<sup>227</sup> Intermediaries, indeed, ought to

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<sup>223</sup> *Lange v. Atkinson* [1998] 3 NZLR 424, 477 (NZ).

<sup>224</sup> *Grant v. Torstar Corp.*, *supra* note 101, at 685.

<sup>225</sup> *Id.*, at 669-679

<sup>226</sup> The very intelligibility of risk cannot take place “in abstraction from a set of perils and a set of persons imperiled”. WEINRIB, *supra*, note 1, at 160.

<sup>227</sup> *Id.*, at 12.

adopt a posture of gravity and coherence regarding this collective wisdom, and the law must recognize their responsibility in doing so.

### C. *Effort and Normative Responsibility*

As in the responsible communication defense – and, indeed, as in the law of negligence more broadly – this obligation by intermediaries is one of trying. As John Gardner explains: “Negligence in law is a failure to try assiduously enough to avert (limit, reduce, control) the unwelcome side-effects of one’s (otherwise valuable) endeavours. It follows that the obligation that one fails to perform when one acts negligently is indeed an obligation to try. The nonperformance of an obligation to try is what gives rise to fault”.<sup>228</sup> In the responsible communication defense, likewise, the obligation expected is one of assiduity, rather than one of perfection. As stated by the Supreme Court of Canada in *Grant*, “[p]eople in public life are entitled to expect that the media and other reporters will act responsibly in protecting them from false accusations and innuendo. They are not, however, entitled to demand perfection and the inevitable silencing of critical comment that a standard of perfection would impose”.<sup>229</sup> But a commitment of trying, they must be entitled to.

Very importantly, as in the responsible communication defense, the normative negligence approach to intermediary liability does *not* take trying to entail a *purely factual commitment*. Rather, it ought to mean seeking to reach the best *normative interpretation* possible regarding the disputes intermediaries settle. It does not purely mean trying to take content down (though it may *also* include that as a result), neither does it mean being exempted from trying. The seriousness of the allegation, the urgency and public importance of the matter, the status and reliability of the source, the pursuit and accurate report of the plaintiff’s view, the necessity and proportionality of the publication, the public interest in the making of the statement (rather than in its truth)<sup>230</sup> – these are all factors of strongly normative dimension, more so as they become part of a coherent whole of past decisions, which intermediaries, like the media in general, ought to take into account.

At the same time, however, these are all procedural factors, which do not determine a fixed substance for the duty of care of intermediaries. Such a substance will vary in accordance with the circumstances of the cases intermediaries settle. Which reveals a very interesting feature of this form of liability – not unlike the case with the responsible communication defense in general. Such a feature is that, differently from the general case in tort law, where the standard of care presents an

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<sup>228</sup> Gardner, *supra* note 186, at 13.

<sup>229</sup> *Grant v. Torstar Corp*, *supra* note 101, at 670.

<sup>230</sup> *Id.*, at 694.



objective nature, the standard of care for the liability of intermediaries may, in the end, be a variable one – at least regarding its substance. While for the media in general editorial choice “may involve a variety of considerations and ... should be granted generous scope”,<sup>231</sup> decisions settled by intermediaries will rest on interpretations to whose undertaking courts should give a wide margin of appreciation. They will involve a complex range of factors of technological, legal and, in all this, cultural dimensions. The one responsibility we should require from intermediaries is one of normative integrity – a commitment of trying assiduously enough to succeed in understanding and evaluating the facts brought before them, in coherence with the central normative commitments of the communities they inhabit.

## V. CONCLUSION

But just how hard should an intermediary try? Is the level of commitment expected from an organization like Google the same that should be expected from a startup? We saw that, in the right to be forgotten case, the Court of Justice of the European Union alluded to taking the powers and capabilities of the intermediary into account.<sup>232</sup> Does this mean that responsibility should vary according to the technological and cultural possibilities of the agent? These are questions at whose answers our paper has only been able to hint. Answering them is necessary to provide a more fully systematized approach to intermediary liability in the light of tort law. This is so, in particular, since some of such answers might seem to place intermediary liability in dissonance with the general approach of negligence law.

For instance, the factors highlighted towards the end of the preceding section<sup>233</sup> offer a template that can be applied not only to defamation but to some extent to privacy as well. Their assessment depends on a capacity for inquiry that seems unfair to demand different intermediaries to reflect on an objectively uniform basis, “regardless of [their] individual abilities or disabilities”<sup>234</sup> – knowing though we know this to be the path traditionally taken in the common law of negligence. This author believes this contradiction is only apparent. Further work will show that a variation according to the technological possibilities of the actor, for instance, for it transcends the actor’s own individual circumstances, can be reconciled with the general idea of correlativity we have discussed in this work. Taking this into account does not violate notions of formal equality, insofar as we understand, and

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<sup>231</sup> *Id.*, at 118.

<sup>232</sup> See *supra* note 120 and accompanying text.

<sup>233</sup> See *supra* note 230 and accompanying text.

<sup>234</sup> DEAKIN ET AL., *supra* note 204, at 203.

accommodate within tort law theory, the burdens that contemporary technological development places on practical reason, on the very possibilities of different actors choosing their reasons for action – and, ultimately, on the responsibilities we can expect from them.

What we sought to accomplish in this paper was to highlight the *normative dimension* of intermediary responsibility. What matters, in this sense, is not purely whether content is taken down or not – something of itself not more significantly challenging to accomplish on a wider scale. What matters is the *normative assiduity* of intermediaries, the *reasonable care devoted to the very thought processes* by which intermediaries *choose their reasons for action*. This is not a utilitarian enterprise, nor it is one towards which intermediaries should or can be neutral. As in Ernest Weinrib's statement, with which we began this paper,<sup>235</sup> intermediaries change our world through action. Their actions come via the design of use plans of technological artefacts, which have immense consequence on how other actors author their lives. Such consequences extend and ought to extend beyond the creation of an ever-unfolding highway for expression and technological development. The *propriety of use plans* needs to be judged, beyond their utility, from a deontological and *normative perspective* as well.

Through each single decision on the nature of content, intermediaries decide on the normative configurations of the information environment itself; they exercise their authority as designers and, with this, communicate what, in their tremendously significant views, is proper or improper within the use plans they enact. There is huge responsibility in reaching such decisions. Beyond the very small fraction of cases that will be settled by courts, it is the integrity of intermediaries' decisions that will, for the most part, enable the Internet to affirm or undermine the public good of assurance – the assurance that each of us will have a place to stand and view the world from the height of who we are. Membership in our political community requires responsibility towards this public good. It is a matter of justice, beyond mere allocative correction, that the normative avenues for the recognition of personhood are properly and institutionally designed. This is a project we must all be held as personally committed to.

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<sup>235</sup> See WEINRIB, *supra* note 1 and accompanying text.