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Beyond Gatekeeping: The Normative Responsibility of Internet Intermediaries

*Marcelo Thompson**

ABSTRACT

This Article 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, the focus should be on intermediaries' responsibility towards the reasoning processes in reaching decisions, rather than on the outcomes of intermediaries' decisions. What is necessary is a framework that, while attaching responsibilities to such decisions, creates a cushioning system for their making, mitigating the hardship of honest mistakes. Within this framework, intermediaries must be seen not as mere keepers of gates, but as designers of artifacts whose use plans settle normative questions and play a vital role in the construction of our normative reality. Accordingly, an interpretive commitment must be required toward the integrity of such a reality. Every time intermediaries make a decision, as they always will and should—in all of this hidden jurisprudence—the integrity of our normative order and the values it reflects are at stake. This commitment to integrity must be seen as part of a broader concern with justice (both corrective and normative) in the internal life of the information environment. For the same reason, however, we should expect responsible efforts, not

* Assistant Professor of Law and Deputy Director, Law and Technology Centre, Faculty of Law, The University of Hong Kong. This Article has had a long gestation and benefited from the inputs of very different audiences. Ideas leading to it have been presented in different forms at the “Connected Life 2014” Conference, jointly held between the Oxford Internet Institute and Balliol College, at the University of Oxford, where it received the Best Paper Presentation Award at the “Law, Obligation and Community” Workshop held at HKU, as well as in HKU’s Legal Theory Research Group, in a lecture at the Europa Institute at the University of Zurich (EIZ) and in a Keynote address at the Second International Conference on Internet Science in Brussels. I am grateful for very helpful feedback in all these and other opportunities, for which I take the liberty of thanking in particular: Rolf Weber, Marco Wan, Scott Veitch, Shitong Qiao, Kyle McGee, Dan Matthews, Celia Matias, Chris Marsden, Paul Lejot, Emiliios Christodoulidis, Clement Chen, Peter Chau, Cora Chan, and Jef Ausloos.

perfection, from intermediaries. Like journalists who are entitled to make mistakes, if only they seek responsibly to avoid the same (which is the idea of responsible communication in defamation), so it should be with Internet intermediaries. Understanding the above enables us to move away from outcomes-based approaches towards a more granular and fair system of intermediary liability.

TABLE OF CONTENTS

I.	INTRODUCTION	784
	<i>A. Neutrality and Reasonableness</i>	784
	<i>B. Liability's Pendulum</i>	791
	<i>C. Gatekeepers: Internet Utilitarianism</i>	795
II.	THE NORMATIVE DETACHMENT OF INTERNET INTERMEDIARIES	803
	<i>A. Defamation: Reputation Between Extremes</i>	804
	<i>B. Data Privacy: Forgetting Reasonableness</i>	808
	<i>C. The Emptiness of Normative Extremes</i>	813
III.	TECHNOLOGY, JUSTICE, AND RESPONSIBILITY	816
	<i>A. On Design and Use Plans</i>	816
	<i>B. Justice and Responsibility</i>	821
	<i>C. Correlativity and Corrective Justice</i>	829
IV.	RESPONSIBLE COMMUNICATION: EFFORT AND THE BURDENS OF REASON	838
	<i>A. Normative Negligence</i>	838
	<i>B. Responsible Communication</i>	843
	<i>C. Effort and Normative Responsibility</i>	846
V.	CONCLUSION	847

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*¹

I. INTRODUCTION

A. Neutrality and Reasonableness

In global conversations concerning the role of intermediaries in the life of the information environment, an often-expressed view is

1. Ernest J. Weinrib, *The Idea of Private Law* 152 (2d ed. 2012) (emphasis added).

that intermediaries should not be held liable for third-party content they host.² Such a view is based on a thesis that holding Internet intermediaries liable would conscript them to act as unofficial censors, making decisions on the nature of content that should not be under their purview. To avoid liability, intermediaries would more often than not simply take content down after receiving a complaint by Internet users.³ Any modulation of information flows according to what intermediaries find legal or illegal would raise concerns of legal principle regarding the protection to freedom of expression. After all, 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, should be made entirely by courts or other public decision-making authorities, if not by authors themselves. Intermediaries should be neutral implementers of these decisions.⁴

This thesis above—call it the *neutrality thesis*—supposes that the exemption of intermediaries from liability will lead to their restraint from the making of decisions regarding content they host. Though the neutrality thesis may, on its face, express a fairly reasonable concern with the formidable power intermediaries command in our time, it cannot respond to a very basic question: if intermediaries do command so strong a power, would it not be worse for freedom of expression, and ultimately for law itself, if their decisions go unchecked? This question may sound paradoxical in light of the notes above; is the neutrality thesis not committed precisely to limiting the power of intermediaries?

The paradox is only apparent. For reasons explained below, 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 law and policy must conceive of a framework that identifies the *reasonable* boundaries of intermediaries' responsibilities,

2. See, e.g., ARTICLE 19, INTERNET INTERMEDIARIES: DILEMMA OF LIABILITY 3 (2013); see also *infra* Section I.C for further discussion.

3. This has been appropriately referred to in the literature as the problem of collateral censorship. See J.M. Balkin, *Free Speech and Hostile Environments*, 99 COLUM. L. REV. 2295, 2296–307 (1999) (introducing the problem of collateral censorship); Michael I. Meyerson, *Authors, Editors, and Uncommon Carriers: Identifying the “Speaker” Within the New Media*, 71 NOTRE DAME L. REV. 79, 118 (1995); Felix T. Wu, *Collateral Censorship and the Limits of Intermediary Immunity*, 87 NOTRE DAME L. REV. 293 (2011) (criticizing provision of immunity without correspondence to the existence of collateral censorship); see also *infra* Section I.B for discussion.

4. See Corey Omer, *Intermediary Liability for Harmful Speech: Lessons from Abroad*, 28 HARV. J.L. & TECH. 289, 315 (2014) (“The core arguments against intermediary liability today do 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 Article will argue, governments not only can, but they should.

as well as the conceptual foundations of these boundaries. Frameworks that seek to avoid the unavoidable or the necessary—namely, that intermediaries make decisions in one way or another—are a normative misrepresentation of reality. What law and policy really need is a framework for reasonable decisions to be made by intermediaries, which creates a cushioning system for decision making at the same time that it attaches responsibilities to such decisions, 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. The framework must pay heed to the state-like “nodality”⁵ of intermediaries in the technonormative networks that connect societies—that is, the gravitational pull that enables intermediaries to reconfigure online flows of information,⁶ the social understanding of these, and ultimately the very reasons upon which we act.

Internationally, intermediary liability models have tended to steer away from this normative question and the commitment towards reasonableness and responsibility that the question entails. Most recently, one can observe a trend, reflected in the UK Defamation Act of 2013⁷ and in the world’s first Internet Bill of Rights,⁸ of adopting exemption regimes that instantiate the ways of thinking of the neutrality thesis—coming as a late reflection of the model pioneered by the Communications Decency Act of 1996 (CDA).⁹ This model, addressed in Section I.C below, is grounded on a strongly utilitarian

5. See HELEN MARGETTS, INFORMATION TECHNOLOGY IN GOVERNMENT: BRITAIN AND AMERICA 3 (photo. reprint 2003) (1999) (speaking about nodality as a tool of government and denoting it as “being in the middle of an information or social network”); Helen Z Margetts, *The Internet and Public Policy*, 1 POL. & INTERNET 1 (2009). 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).

6. See WILLIAM H. DUTTON, SOCIAL TRANSFORMATION IN AN INFORMATION SOCIETY: RETHINKING ACCESS TO YOU AND THE WORLD 34 (2004) (discussing “reconfiguring access” as the output of an ecology of decisions, which equates access with communicative power and nodality ultimately becomes a physical manifestation of authority).

7. Defamation Act 2013, 2013, c. 26 (U.K.).

8. 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) [hereinafter *Marco Civil*]; see also Kevin Collier, *Brazil Signs Marco Civil, its Internet Bill of Rights, into Law*, THE DAILY DOT (Apr. 23, 2014, 10:09 AM), <http://www.dailydot.com/politics/marco-civil-internet-bill-of-rights-brazil-rousseff> [https://perma.cc/HX3L-T7XP] (“The world’s first major Internet Bill of Rights is finally law.”).

9. Communications Decency Act, 47 U.S.C. § 230 (2006). The current alternative model to exemption of liability—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. See *infra* Section II.B and Part III.

tradition that sees the Internet as basically a platform to generate ever more innovation;¹⁰ a tradition that, unfavored in today's literature,¹¹ seeks to affirm the value of speech even where value there is none. It is a model where aggregative utilitarian consequences matter more than 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,¹² rather than agents whose normative decisions matter, *in themselves*, for how we author our lives. Yet, intermediaries' decisions effectively matter—and must be seen as mattering—in the grounds on which they are made. In their very fabric, these decisions reflect or obscure, promote or undermine values such as privacy, reputation, gender equality, sexual freedom, and values generally protected by children's rights. Yet, existing gatekeeper theories refrain from conceiving of an institutional landscape in which every actor, in its own particular way, is expected to fulfill a certain commitment towards the recognition of such 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 this Article will provide pause to consider the model's boundaries and alternative approaches—if only as an exercise of “institutional imagination.”¹³

10. The Act itself affirms the policy of the United States: “(1) to promote the continued development of the Internet and other interactive computer services and other interactive media; (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* . . .” 47 U.S.C. § 230 (b)(1)–(2) (emphasis added). 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. *See* 47 U.S.C. § 230.

11. *See* Joel R. Reidenberg, Jamela Debelak, Jordan Kovnot & Tiffany Miao, Fordham Law School-Center on Law and Information Policy, Fordham L. Legal Stud. Res. Paper No. 2046230, Section 230 of the Communications Decency Act: A Survey of the Legal Literature and Reform Proposals 9 (2012) (noting the increase in scholarly literature critical of Section 230 since 2007 due to issues such as cyberbullying and online harassment illustrates problems in Section 230's breadth).

12. *See infra* Section I.C.

13. *See generally* Roberto Mangabeira Unger, *Legal Analysis as Institutional Imagination*, 59 MOD. L. REV. 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 article discusses: the paradigm of immunity (or quasi-immunity) and the paradigm of strict liability. *See, e.g.*, Mark A. Lemley, *Rationalizing Internet Safe Harbors*, 6 J. ON TELECOMM. & HIGH TECH. L. 101, 115–16 (2007) (paradigm of immunity); Michael L. Rustad & Thomas H. Koenig, *Rebooting*

While legislative debates in the United States have seemed pretty much settled for around two decades now,¹⁴ the global conversation continues, and it is important to engage with. This Article does so from the perspective of contemporary developments in the common law of Canada and the United Kingdom and in the law of the European Union while also referring to domestic law as appropriate. Far from being jurisdictionally situated, however, this Article raises questions of international resonance. Through answering these questions, a deeper and more granular understanding of the problem of intermediary liability is hopefully provided in light of its normative dimensions.

Normative coherence is of utmost importance in this task. If the problem this Article addresses is indeed a central one, the framework put forward here ought to hang coherently together with its deeper conceptual foundations. This Article does so by asking what commitments justice—corrective and, more broadly, *normative* justice—requires from Internet intermediaries.¹⁵ Accordingly, this Article engages, on one hand, with theories of justice regarding relations of correlativity we find in private law generally and tort law in particular, and, on the other hand, with theories that understand justice as entailing a requirement of responsibility towards our normative commitments and the normative order more broadly. It puts forward a solution to the problem of liability of intermediaries that seeks to live up to these larger concerns.

In doing so, this Article proposes a best-efforts and norms-based approach¹⁶ 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. For example, should a privacy-infringing public post on Facebook, which may have deleterious consequences but which the author refuses to delete, remain? The decision will often rest on indeterminate technological, legal, and—more broadly—cultural factors, which are difficult even for courts to determine. On the other

Cybertort Law, 80 WASH. L. REV. 335, 392 (2005) (paradigm of strict liability). *But see* Ali Grace 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 (2010) (proposing a subjective, totality of the circumstances test).

14. *See* REIDENBERG ET AL., *supra* note 11, at 52 (noting that proposals for legislative change have been minimal). *But see* Rustad & Koenig, *supra* note 13, at 376 (“Cybertort law is not settled until it is settled right . . .”).

15. *See infra* Sections III.B–C.

16. *See infra* Sections IV.A and C.

hand, it is important to recognize that the risks to which victims of online content 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.¹⁷ 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 because it indicates an interpretive commitment, where truth is an achievement worth striving towards.¹⁸ Intermediaries thus have 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, both internally and externally. Given the nodality of intermediaries in the normative community,¹⁹ 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 Article seeks to reconcile intermediaries' position

17. See *infra* Section II.C.

18. See *infra* Section III.B.

19. Karine Nahon has explored the idea of nodality under slightly different terminology, in what she calls a "normative theory of network gatekeeping *salience*." See Karine Barzilai-Nahon, *Toward a Theory of Network Gatekeeping: A Framework for Exploring Information Control*, 59 J. AM. SOC'Y FOR INFO. SCI. & TECH. 1493, 1493 (2008). Network gatekeeping salience here refers to the interactions between gatekeepers and those she calls the "gated" and the extent to which the latter can respond to the political power of the former. *Id.* at 1494. 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—seeming to imply a detachment between network salience and a higher normative sphere. *Id.* at 1498. 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 because it fundamentally affects how we lead our lives and find our bearings in the world.

as designers of technological artifacts²⁰ with broader ideals of justice within which intermediaries' activities ought to be approached. Because of these ideals, an interpretive commitment of integrity is required from intermediaries between the design of their artifacts and a normative order that *transcends* the purely factual gates intermediaries are said to keep. Ultimately, this Article argues that intermediaries' responsibilities regarding the normative order find their closest expression in the idea of responsible communication in the public interest.²¹ Journalists have the duty of acting responsibly towards the truth of facts they ascribe to people, though the hardship of such a duty is cushioned by the excuse of honest mistakes. And so it also 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. This Article uses the terms "Internet intermediary" or simply "intermediary" in a somewhat elastic way. In the universe of intermediaries, there are those entities, like Verizon or Akamai, which are either 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.²² These intermediaries have little chance to reflect upon content they route or cache and thus also have little chance to have their reason engaged by such content to any significant extent. They are not the kinds of intermediaries we are concerned with here. The concern here is with intermediaries—from Facebook to Amazon,

20. See *infra* Section III.A.

21. See *infra* Section IV.B for a discussion on the common law of defamation.

22. 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. See *infra* Part III (discussing *teleological* element that is vital to analysis). 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/EC, arts. 12–14, 2000 O.J. (L 178) 1 [hereinafter *Electronic Commerce Directive*]; see also 17 U.S.C. § 512(a) (2010) (exempting US service providers from copyright liability for transitory digital network communications). *But see* Nathan Lovejoy, *Standards for Determining When ISPs Have Fallen Out of Section 512(A)*, 27 HARV. J.L. & TECH. 257 (2013) (discussing erosion of Section 512(A) boundaries). 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). For a more recent analysis, see also YOCHAI BENKLER, *THE WEALTH OF NETWORKS: HOW SOCIAL PRODUCTION TRANSFORMS MARKETS AND FREEDOM* 392 (2006).

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 even before notice is given to them may be a valid concern, but it is not one that will occupy us here.²³

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.”²⁴ 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.”²⁵ 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.”²⁶ Such sorts of commitments, which can be more broadly accommodated within a *theory of political neutrality*,²⁷ are perhaps the sorts of commitments

23. Statute and case law concerning the kind of intermediaries we focus on here tends to circumscribe liability to situations where notice has been given to such intermediaries. One interesting derivation of these discussions concerns the liability of Search Engine Operators (SEO), where courts have tended to recognize the more active and instrumental role of SEOs in the aggregation, sorting and presentation of content. Even here, however, courts have tended to limit SEOs’ responsibilities to situations where notice has been given and SEOs have nonetheless refrained from taking the content down within reasonable time. For a good overview of jurisprudence in this regard, see Anne Cheung, *Defaming by Suggestions: Searching for Search Engine Liability in the Autocomplete Era*, in *COMPARATIVE PERSPECTIVES ON THE FUNDAMENTAL FREEDOM OF EXPRESSION* (Andras Koltay ed., 2015).

24. Joseph Raz, *THE MORALITY OF FREEDOM* 108 (1986).

25. *Id.*

26. *Id.*

27. 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*, whereas Rawls

one may think we should expect from Internet intermediaries. These are 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 for which to commend doctrines of neutrality. 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 reasons²⁸—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).²⁹ 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.³⁰ Here however, it will be more helpful to deploy

divides them between *neutrality of effect* and *neutrality of aim*, recommending the later while noting the implausibility of the former. Compare Will Kymlicka, *Liberal Individualism and Liberal Neutrality*, 99 ETHICS 883, 883–86 (1989), with JOHN RAWLS, POLITICAL LIBERALISM 192–95 (1993). While this Article does not pursue this distinction further, the concern here is clearly with the justificatory, or normative, dimension of neutrality—with the extent to which politics engages reason.

28. 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 (2013) (unpublished Ph.D. thesis, University of Oxford) (on file with the Bodleian Library, University of Oxford) (developing Wall's argument in relation to the regulation of the information environment); see MONIQUE DEVEAUX, CULTURAL PLURALISM AND DILEMMAS OF JUSTICE 104–05 (2000) (criticizing “neutral liberal political bracketing”).

29. John Rawls, *The Priority of Right and Ideas of the Good*, 17 PHIL. & PUB. AFF. 251 (1988). This notion was later developed as a central feature of Rawls's conception of justice as fairness. See JOHN RAWLS, A THEORY OF JUSTICE 28 (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].”).

30. Thompson, *supra* note 28; 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).

resources towards thinking more directly about what *justice* requires from Internet intermediaries, which is addressed in Part III. We must be focused on the requirements of justice, in particular, since the neutrality thesis reveals itself so self-defeating an enterprise that it would be unwarranted for us to take its exploration much further.

There are two points that speak very strongly against the neutrality thesis. The first is that there is not really a neutrality thesis when we see that very little exists to restrain intermediaries' power of, *on their own accord*, determining the fate of content online. The second is that such a lack of restraint is especially pronounced where a system of exemption of liability is in place. On one hand, systems of exemption 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 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.³¹

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 occasionally reflected in their decisions, intermediaries are left with freedom to reach *whatever* decisions they will. The resources and wisdom invested by intermediaries 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

31. 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 KEATS CITRON, HATE CRIMES IN CYBERSPACE 170 (2014) (“In passing Section 230, Congress sought to spur investment in Internet services while incentivizing online intermediaries to restrict access to objectionable material.”); Wu, *supra* note 3, at 302 (“§ 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 655, 660 (7th Cir. 2003) (J. Easterbrook, noting “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.”); 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 (2014) (explaining how courts have ignored underlying legislative intent of Section 230).

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.

However, there is still some limited wisdom in the justifications of the neutrality thesis which invites 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 been a uniform tale—and the legislative tendency around the world has increasingly been one of establishing systems of *exemption of liability* for intermediaries. These systems, as noted, have been pioneered by the United States and recently adopted in the United Kingdom (in defamation law)³² and in Brazil (horizontally, as in the United States).³³ The adoption of exemption systems reveals an understandable wish to flee the uncertainties of systems of strict liability. Yet, as is argued 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 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 of expression. No-liability regimes jeopardize privacy, reputation, racial and gender integrity, as well as children's rights.³⁴ In the short run,

32. See Defamation Act 2013, 2013, c. 26 (U.K.).

33. See *Marco Civil*, *supra* note 8.

34. See CITRON, *supra* note 31, at 177 (discussing the problem in the context of harassment and nonconsensual pornography and suggesting 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.” See *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 developed a similar argument by 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. However, the collateral violation of speech ceases to be a problem whenever the liability of intermediaries can be appropriately calibrated—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* Section I.C.

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 those.

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, for example 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.³⁵ 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. Thus, neither such extreme—neither strict nor no-liability systems—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 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* used by intermediaries in reaching them.³⁶ In other words, those are

35. That is the situation in Brazil. See Marcelo Thompson, *Marco civil ou demarcação de direitos? Democracia, razoabilidade e as fendas na internet do Brasil* [Civil Rights Framework or Demarcation of Rights? Democracy, Reasonableness and the Cracks on the Brazilian Internet], 261 *REVISTA DE DIREITO ADMINISTRATIVO* 203 (2012) (Braz.). In Europe, neither the takedown nor the keeping of content online are covered by an exemption of liability. See, e.g., LILLIAN EDWARDS, *WORLD INTELLECTUAL PROP. ORG. [WIPO], ROLE AND RESPONSIBILITY OF THE INTERNET INTERMEDIARIES IN THE FIELD OF COPYRIGHT AND RELATED RIGHTS* 12 (2010), http://www.wipo.int/export/sites/www/copyright/en/doc/role_and_responsibility_of_the_internet_intermediaries_final.pdf [<https://perma.cc/W698-KEWA>] (noting the absence of any protection in the Electronic Commerce Directive against liability for takedown but also the possibility of contractual exemptions). In the United States, the CDA creates immunity for intermediaries through First Amendment doctrine. By not reaching intermediaries as it reaches state actors, this enables the former to moderate content online in ways the latter cannot. See CITRON, *supra* note 31, at 168.

36. 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 31, at 167 (basing her analysis on the role of website operators as "important sources of deterrence and remedy"); see also Rustad and Koenig, *supra* note 13, at 383–87 (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, 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 ("The *unique harm* of collateral censorship, as opposed to self-

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 control³⁷—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*.³⁸

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 they would not otherwise do.³⁹ Yet, Dahl himself notes that a richer account of the concept must inquire into the *base* of an actor's power,⁴⁰ the idea of authority reflecting a special case of such a base.⁴¹ Authority, as Veitch et al. note, is power in its normative form,⁴² for it is power exercised with reference to a certain *normative base*.⁴³ Authority not only entails the manipulation of reasons for action,⁴⁴ it reflexively grounds that manipulation in reason itself.

censorship, lies in the incentives that intermediaries have to suppress more speech than would be suppressed by original speakers.") (emphasis added).

37. See Nahon, *supra* note 19, at 1496.

38. Nahon's framework does account for relations of *authority* held between individuals and the state or industry regulators, and between individuals themselves, but not between intermediaries and people. See *id.* at 1498–99. 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.

39. See Robert A. Dahl, *The Concept of Power*, 2 BEHAV. SCI. 201, 202–03 (1957).

40. *Id.* at 201. For Dahl, "The base of an actor's power consists of all the resources—opportunities, acts, objects, etc.—that he can exploit in order to effect the behavior of another." *Id.* at 203.

41. *Id.* at 202.

42. See SCOTT VEITCH, EMILIOS CHRISTODOULIDIS & LINDSAY FARMER, JURISPRUDENCE: THEMES AND CONCEPTS 10 (2012).

43. Authority is what Spinoza expressed as "*potestas* (the rightful power of rule)," in opposition to "*potentia* (the actual power of government to achieve objectives)." See 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.

44. 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

It is in the latter realm of authority that the inquiry regarding the responsibilities of Internet intermediaries should focus. From where does the authority of intermediaries stem? How does it influence people's 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.

Part III engages with these questions. For now, it is enough to note that the power invested in Internet intermediaries is normative in two ways. On one hand, it is normative as in the extended definition provided by Veitch et al.,⁴⁵ for such a power 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.⁴⁶ On the other hand, the power of intermediaries is normative because it rests on a specific normative base: the authority of intermediaries as designers of technological artifacts.⁴⁷ Ultimately, it is the normative authority of Internet intermediaries that is so important for this analysis—and the source of their responsibility.

To be fair, while attending to this normative dimension is fundamental to ensuring 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 a markedly consequentialist lens. After all, there is great consequence in the actions undertaken by intermediaries. Intermediaries are the 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. In other words, intermediaries can transform the very constitution of the environments we inhabit and the lives we live therein.⁴⁸

reasons in response to which other people govern their actions." VEITCH ET AL., *supra* note 42, at 10.

45. *See id.*

46. *See* NEIL MACCORMICK, INSTITUTIONS OF LAW: AN ESSAY IN LEGAL THEORY 289 (2007) (on the idea of law as institutional normative order).

47. *See* discussion *infra* Section III.A.

48. 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: The Formulation of Information Policy Rules Through Technology*, 76 TEXAS L. REV. 553, 553 (1998), and developed in LAWRENCE LESSIG, CODE AND OTHER LAWS OF CYBERSPACE 90 (1999); *see also* James Grimmelman, *Regulation by Software*, YALE L.J.

Thus, it may be natural that the scholarly literature on the regulation of intermediaries' activities would display particular concern with the *factual outcomes* that these activities enable (rather than with their normative foundations). Particularly symptomatic of this concern has been the literature treating intermediaries as *gatekeepers*—openers or closers of gates for the performance of functions whose normative bearings seem to be entirely detached from those of intermediaries themselves. This way of thinking has also been reflected in the different legal approaches that Part II examines.

The foundational legal work on gatekeeping is Reinier Kraakman's,⁴⁹ which describes how regulators can take advantage of gatekeepers' privileged positions in order to achieve particular regulatory outcomes. Kraakman's primary concerns are "issues of practicality and cost" entailed in ascribing liability to gatekeepers.⁵⁰ He defines gatekeeper liability as that "imposed on private parties who are able to disrupt misconduct by withholding their cooperation from wrongdoers."⁵¹ 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, in their being wrong and yet ignored or not cared for by the state and the law, intermediaries' activities can have a normatively detrimental significance in our lives. But intermediaries *can* have such a normative effect on how the very values which we live by 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 gatekeeping⁵² and the future of the Internet as a generative platform.⁵³ Zittrain's concerns regard the innovation costs both of rendering intermediaries liable for third-party content and of

1719, 1723 (2005) (explaining plasticity as the idea that "[p]rogrammers can implement almost any system they can imagine and describe precisely").

49. Reinier H. Kraakman, *Gatekeepers: The Anatomy of a Third-Party Enforcement Strategy*, 2 J.L. ECON. & ORG. 53, 53 (1986).

50. *Id.* at 53.

51. *Id.*

52. Jonathan Zittrain, *A History of Online Gatekeeping*, 19 HARV. J.L. & TECH. 253 (2006) [hereinafter *A History of Online Gatekeeping*].

53. JONATHAN ZITTRAIN, *THE FUTURE OF THE INTERNET: AND HOW TO STOP IT* (2008); Jonathan Zittrain, *The Generative Internet*, 119 HARV. L. REV. 1974 (2006) [hereinafter *The Generative Internet*]. Generativity, as Zittrain defines it, is the "overall capacity [of a technology] to produce unprompted change driven by large, varied, and uncoordinated audiences"—in turn creating, in the case of the Internet, the conditions for innovation and creative endeavors of all kinds. *Id.* at 1976.

direct state intervention in defining 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 States⁵⁴—namely, to approach intermediary liability for wrongdoing as a matter of corporate social responsibility, essentially a good Samaritan defense, through which Internet intermediaries are welcome but not duty-bound to make calls on the legality or illegality of online content.

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.”⁵⁵ 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.”⁵⁶ 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 what wrong would there would be if intermediaries, incapable of catering to the dignity of the inhabitants of the information environment, were simply enjoined to shut their doors?

Zittrain’s focus is overtly based on John Stuart Mill,⁵⁷ 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.”⁵⁸ The reason why intermediary liability is to be

54. See discussion *infra* Part II.

55. A *History of Online Gatekeeping*, *supra* note 52, at 262. Zittrain’s 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, *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).

56. A *History of Online Gatekeeping*, *supra* note 52, at 261–62.

57. See ZITTRAIN, *supra* note 53, at 90 (“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 . . .”).

58. *The Generative Internet*, *supra* note 53, at 1980.

disapproved of is that it reduces the generative potentials of the Internet grid; it encourages the takedown of content, the enclosure of platforms, and overall discourages the possibilities of participation in activities from which content—and happiness—emerge.

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.⁵⁹ In this regard, he draws on literature that similarly sees cultural processes on the Internet as enlarging our democratic practices beyond earlier modes of political participation.⁶⁰ 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 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 liberal theories that deal with content as a black box—and which are concerned with autonomy from only a formal perspective. More specifically, he argues “theories that ignore culture”⁶¹ “are rendered incapable of answering some questions that arise in the real world and have real implications for individuals and polities.”⁶² Thus, it is important for liberal theory to attend to the “practical cultural life” of the information environment and make judgments on which environmental conditions are “more or less attractive from the perspective of liberal political theory.”⁶³ Liberal theory must do so by looking into the “*structure* of the information environment” not as something that merely

59. See ZITTRAIN, *supra* note 53, at 92 (noting that “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 technology architecture has stumbled into a zone where those qualities can be elicited and affirmed for tens of millions of people”).

60. 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); see also YOCHAI BENKLER, *THE WEALTH OF NETWORKS: HOW SOCIAL PRODUCTION TRANSFORMS MARKETS AND FREEDOM* 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); Sonia Katyal, *Between Semiotic Democracy and Disobedience: Two Views of Branding, Culture and Intellectual Property*, 4 WIPO J. INTELL. PROP. 50 (2012) (invoking John Fiske, *Television Culture* (1998) to speak about the idea of a “semiotic democracy”).

61. BENKLER, *supra* note 60, at 280.

62. *Id.* at 285.

63. *Id.* at 281.

contributes to our personal autonomy, but rather as something that *constitutes* our possibilities of self-authorship.⁶⁴ On the other hand, this perspective should not commit the state to a “program of positive liberty,”⁶⁵ it “calls for no therapeutic agenda to educate adults”⁶⁶ and invites the state to a “systematic commitment to avoid direct intervention in cultural exchange.”⁶⁷ 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.”⁶⁸

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, be. Much of Wikipedia’s content is gendered and politically, geographically, and linguistically disproportionate⁶⁹—or generally just the product of an unjust model of authority.⁷⁰ Google, though it has matured as a principled company (in fact a subsidiary of Alphabet), is not (and cannot be) the democratic utopia it may have appeared to Benkler in 2006.⁷¹ And then there are the bullies, the scorned, the vengeful; there is the privacy infringing, defamatory, and overall offensive content users find everywhere on the Internet. Offensive Internet practices may at times be simply *bad*, in terms of violating our *conceptions of the good*. At other times, they amount to *wrongs*, violating our sense of what is right—and, indeed, our *rights*.

64. *Id.* at 146.

65. *Id.* at 141.

66. *Id.* at 151.

67. *Id.* at 298.

68. *Id.*

69. See Mark Graham, *Wiki Space: Palimpsests and the Politics of Exclusion*, in *CRITICAL POINT OF VIEW: A WIKIPEDIA READER* 269–82 (Geert Lovink & Nathaniel Tkacz eds., 2011).

70. See Mathieu O’Neil, *Wikipedia and Authority*, in Lovink & Tkacz, *supra* note 69, at 309–24.

71. 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> [<https://perma.cc/GJC7-5MNL>] (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, 14 (2013), <http://jolt.law.harvard.edu/antitrust/articles/Pasquale.pdf> [<https://perma.cc/BZ9W-23GC>] (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”).

One 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 this author does, that the threshold lies somewhere else. Joseph Raz's theory of autonomy, on which Benkler himself undecidedly draws, holds 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.”⁷²

Be that as it may, it is important to recognize that a threshold exists above which responsibility ought to be checked by state action.⁷³ Such a threshold may concern the structure of the information environment (for example, excessive intellectual property structures may undermine freedom of expression, and the unavailability of interoperability arrangements may lead to Internet users' lock-in under certain platforms) or, as noted, it may concern the very texture of its content. To blackbox content *tout court* is as problematic as to blackbox structure. Yet, albeit political concern ought to involve all sorts of harmful action capable of impairing our personal autonomy, it does not matter so much to the argument if we circumscribe our discussion in this Article to harms to *fundamental rights*. In this sense, to admit that, solely to foster and benefit from a culture of generativity and collaboration regarding content, politics should leave violation of rights such as those of privacy and reputation outside of its scope is something that can only be justified on purely utilitarian grounds.

This author suspects neither Zittrain nor Benkler would disagree on this last point—and indeed, that they would recognize the role of the state at least (if only for the time being) in the upholding of rights. Yet, for reasons this Article will soon examine, the upholding of rights cannot take place if we are to exclude the responsibility of certain actors—including that of Internet intermediaries—towards the

72. See RAZ, *supra* note 24, at 413–14. 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 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”).

73. 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.

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 unless on utilitarian grounds—grounds that regret the demise of certain undertakings for purely innovation-related reasons. To condone the conscious leveraging of speech that degrades or 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 the 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 asks that we think about the reasonable boundaries of the rights we seek to uphold and 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, and 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 that Part III addresses, and they are questions that 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 of the Communications Decency Act,⁷⁴ this author trusts 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. Put into perspective, the dynamics in this important jurisprudence enable us to visualize the kind of pendular movement between outcome-based extremes referred to in Part I—a kind of movement that ignores the gravity of the reasons between these extremes. Understanding these

74. See Reidenberg et al., *supra* note 11, for a comprehensive survey of this literature.

dynamics allows us to reclaim our center 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.⁷⁵ The first is that, rather than a central normative problem of our time, intermediary liability is a lesser issue. To illustrate, out of the 1,800 pages of Lord Justice Leveson's report, less than one and a half—paradoxically titled “The Relevance of the Internet”⁷⁶—have been dedicated to Internet actors altogether. The second impression is that the problem of liability arises in an “ethical vacuum,” readers are told, for “the internet does not claim to operate by express ethical standards”⁷⁷—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 into a normative directive to live by. It turns out then that, 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 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.

75. See *Press 'Need to Act' After Leveson* (Dec. 5, 2012), <http://www.bbc.com/news/uk-15686679> [<https://perma.cc/JQE9-N69A>]. Established in the wake of *News of the World* phone-hacking scandal in the United Kingdom, the Leveson Inquiry “looked at the relationship between the press and the public, including phone-hacking and other potentially illegal behaviour, and at the relationships between the press and the police and the press and politicians.”

76. 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.).

77. See *id.*

*Tamiz v. Google*⁷⁸ was the first case concerning the liability of an Internet host to reach the Court of Appeal. The case involved the publication of defamatory 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. 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 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.⁷⁹

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, 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."⁸⁰ Google's position, Eady concluded, was no different from that of an Internet access provider like British Telecom,⁸¹ which Eady himself had held not to be liable in an earlier case—*Bunt v. Tilley*.⁸²

One must contrast, though, the situation in *Bunt* with the one in *Tamiz*. Unlike 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 could reveal its content).⁸³ Accordingly, in *Bunt*, Eady 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

78. *Tamiz v. Google Inc.* [2013] EWCA Civ 68 (QB) (Eng.).

79. *See id.* at 7.

80. *Tamiz v. Google Inc. Google UK Ltd.* [2012] EWHC 449 (QB) [35] (Eng.).

81. *Id.* at 39 ("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.").

82. *Bunt v. Tilley & Ors.* [2006] EWHC 407 (QB) (Eng.).

83. 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, S.I. 2002/2013 § 17 (2002) (Eng.).

communication”⁸⁴—as an important factor in ascertaining liability. Taking that factor into account, the implications of Eady’s decision in *Tamiz*, if upheld, would have been profound. If not even a host such as Blogger.com could be held liable for content it *knowingly* hosts—note that here the demonstrated mental element is, cases of malice aside, as strong as it can be without attaching liability under the Defamation Act of 2013—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 from liability for not acting expeditiously in cases where it has actual knowledge of unlawful activity or information it hosts.⁸⁵ Jurisprudence of the Court of Justice of the European Union⁸⁶ as well as regulations in the United Kingdom⁸⁷ indicate 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’s decision was overturned by the Court of Appeal, which endorsed the position of an earlier case also concerning Blogger.com,⁸⁸ 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.”⁸⁹ 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 that case, the operator of a popular online forum) could only have a defense “if it was established that, upon obtaining *knowledge of the content*, he promptly took all reasonable *steps to remove the offending content* from circulation as soon as reasonably practicable.”⁹⁰

The expressions in italics 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—along with failure by the intermediary in taking

84. See Bunt EWHC 407, at 21.

85. See Electronic Commerce Directive, *supra* note 22, Art. 14.1(a).

86. See L’Oréal SA v. eBay Int’l AG, 2011 E.C.R. 1-6011, ¶ 122.

87. See Electronic Commerce (EC Directive) Regulations, *supra* note 83, § 22(a).

88. Davison v. Habeeb & Ors. [2011] EWHC 3031 (QB) (Eng.).

89. *Id.* at 46.

90. Oriental Press Group and Another v. Fevaworks Solutions Ltd. [2013] 16 H.K.C.F.A.R. 366, 401(H.K.) (emphasis added); see also Metropolitan International Schools Ltd. (t/a Skillstrain and/or Train2game) v. Designtechica Corporation (t/a Digital Trends) & Ors. [2009] EWHC (QB) 1765, *infra* note 121.

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.⁹¹ 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.⁹²

Yet, there is significant distance between knowing that content exists and knowing *that it is illegal*. In establishing that liability flows strictly from knowledge of *illegal content*, those decisions fail to create the conditions that address 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.⁹³

91. In England, such a defense, of common law origin, is incorporated in Section 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, c. 26 § 5 (Eng.).

92. See *Godfrey v. Demon Internet Limited* [1999] EWHC 244 (QB) [26] (Eng.).

93. 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 (1896). 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: “Wherever 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.* at 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.C. Section 223(1)(B)(ii) (2013), or the transmission of material which is obscene or child pornography “with the intention to abuse, threaten or harass another person.” 47 U.S.C. §

It was in 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.⁹⁴ The main condition for this is that the operators must enable the victims of defamatory materials to ascertain the identity of the users who publish those materials.⁹⁵ The privacy implications of such a policy are profound, though they lie beyond the current discussion. What is important for us to note here is that the 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, 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, through the seemingly granular approach, strict standards of liability continue to apply.

223(1)(A) (2013). 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 Article should continue to apply—and whether it is fair in either case, both of profound normative indeterminacy, “to make [intermediaries] take the risk.”

94. See Defamation Act 2013, ch. 26 § 5 (Eng.).

95. *Id.* § 5(3)(a); see Alastair Mullis & Andrew Scott, *Tilting at Windmills: the Defamation Act 2013*, 77 MOD. L. REV. 87, 100 (2014) (“Where posters are not identifiable, the effect of the Act is to encourage website operators voluntarily to disclose their identity and contact details.”).

The most important of such decisions to date is unquestionably *Google Spain*,⁹⁶ 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.⁹⁷ Rather than being an entirely new creature, the right to be forgotten flows from a right to erasure that the Directive already explicitly grants data subjects in particular circumstances.⁹⁸ 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.⁹⁹ The recognition of the “right to be forgotten” was expressed in atypically strong terms, as the court affirmed the supremacy 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.”¹⁰⁰ Such 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 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.¹⁰¹

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 defamation¹⁰²—are some of the factors that must be taken into account by the data controller in

96. Case C-131/12, *Google Spain SL v. Agencia Española de Protección de Datos* 2014 EUR-Lex CELEX 612CJ0131 ¶ 88 (May 13, 2014) [hereinafter *Google Spain*].

97. *Id.*

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

99. *Id.*, art. 6.1(c), (d).

100. *Google Spain*, C-131/12, ¶ 97.

101. *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> [<https://perma.cc/9LGQ-SRBN>].

102. 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* Section 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.).

striking a balance.¹⁰³ Yet, nothing suggests that, even if it faces up to all the difficulty in carrying out such a balancing exercise, a data controller would 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, *in the view of the court*, a correct outcome, nothing precludes that liability may apply.

In effect, the current language of the Data Protection Directive requires that, in the presence of *any damage* resulting from *unlawful processing* or any act incompatible with the Directive, compensation is due.¹⁰⁴ A data controller is able to evade liability only by establishing that he was *not responsible for the event* giving rise to the damage¹⁰⁵— wording that, in principle, seems to indicate merely a notion of causality, rather than one of fault. 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.¹⁰⁶ These versions are not concerned with the imputation of fault or culpability to the data controller, but with imputation of *the facts themselves*.

Yet, however a literal interpretation may seem to indicate the above perspective,¹⁰⁷ it is also a fact that Member States have incorporated the liability provisions of the Directive in different ways.

103. 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 [<https://perma.cc/KX8C-BPUC>].

104. Data Protection Directive, *supra* note 98, Recital 55 and art. 23(1).

105. *Id.* art. 23(2).

106. 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), whereas the Spanish version reads, equivalently: “El responsable del tratamiento podrá ser eximido parcial o totalmente de dicha responsabilidad *si demuestra que no se le puede imputar el hecho que ha provocado el daño.*” *Id.* (emphasis added). The same goes for the Portuguese and Romanian versions. *But see* the Italian version, with text more directly corresponding to the English one: “Il responsabile del trattamento può essere esonerato in tutto o in parte da tale responsabilità *se prova che l’evento dannoso non gli è imputabile.*” (emphasis added)

107. *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, 4th International Conference on Information Law, (Conference Paper) (May 20–21, 2011), http://conferences.ionio.gr/icil2012/download.php?f=papers/198-kosmides-full_text-en-v001.pdf [<https://perma.cc/F28P-KMNG>] (noting, with reference to German literature, that the question concerning the interpretation of Article 23 remains largely unresolved).

Some, including Spain¹⁰⁸ and France,¹⁰⁹ regulate compensation matters under traditional fault-liability regimes in their Civil Codes; others, such as Sweden¹¹⁰ and Italy,¹¹¹ 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 activities¹¹²—where responsibility is determined simply if the actor cannot establish he has adopted all measures appropriate to avoid the damage (regardless thus of whether his actions had been perfectly legal and compliant with the relevant standards).¹¹³ The Italian solution is particularly interesting for this discussion in light of the preceding Section.¹¹⁴ It provides an understanding into how liability in data protection might also present itself in a strict form in the United Kingdom—at least if one is to address intermediary liability consistently across defamation and data protection cases.

One would be excused in misconstruing the approach chosen by the United Kingdom for the liability of data controllers as being a fault-based one. According to the Data Protection Act 1998, a data

108. 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 also 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) [hereinafter LIBRARY OF CONGRESS] (pointing to the fault liability discipline of the CÓDIGO CIVIL, Art. 19202, as the applicable regime).

109. See Douwe 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* (Douwe 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 also Nicole Atwill, *France, in Library of Congress* (pointing to the fault based liability discipline of the Code civil [C. civ.] [Civil Code] Art. 1382 (Fr.), <http://legifrance.gouv.fr/affichCode.do?cidTexte=LEGITEXT000006070721&dateTexte=20120525> [<https://perma.cc/FZ9H-H9P9>]).

110. See 49 § PERSONUPPGIFTSLAGEN (SFS 2003:389) (Swed.).

111. See Decreto legislativo 30 giugno 2003, n.196 (It.) (referring to a strict liability provision of the Codice Civile, Art. 2050).

112. 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).

113. *Id.* As Mazzon explains, according to Art. 2050 of the Codice Civile, it is not enough for the actor (the “tortfeasor”) to demonstrate his conduct or omission has not breached any legal obligation or standard of care. He has to specifically establish he has employed every measure or care able to avoid the event. In the absence of these, one must conclude the tortfeasor responds regardless of whether a mental element (e.g. negligence) is present at all and of whether his conduct is perfectly legal. All this is a deviation from the general liability rule in the Civil Law where both illegality and some measure of culpability must be present, as well as from typical cases of strict liability where, though dispensing with culpability, illegality of the conduct is still required.

114. See *supra* Section II.A.

controller can evade liability if it is able to demonstrate the adoption of reasonable care to comply with the requirements of the Act.¹¹⁵ Given the relative scarcity of compensation cases involving data protection in the United Kingdom,¹¹⁶ it is difficult to estimate what reasonable care may actually be.

However, it may be safe to expect case law not to err on the side of data controllers. On one hand, case law has 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 Articles 8 of the Convention and of the Charter of Fundamental Rights of the European Union, 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.”¹¹⁷ This language seems to limit circumstances of compensation to those in which provisions of the DPA might have been specifically violated by the data controller. Yet, the tendency of courts not to err on the side of data controllers may go beyond this limitation.

It may go so because, on the other hand (and why the Italian provision¹¹⁸ is interesting), reasonable care by an Internet intermediary under the DPA may turn out not to be something very different from damage control by *merely taking content down*. Remember, in the defamation cases above, courts have recognized (also flowing 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.¹¹⁹ Mere failure to take the content down renders the intermediary responsible for the damage if the content turns out to be illegal. Hence, regardless of whether or not the intermediary had failed to live by any standards of legality of care *in assessing the nature of the content*, liability would ensue merely from the fact that the intermediary has *failed to take the content down*. The situation in the United Kingdom, in the end, would not be different from the Italian one—that is to say, a normative extreme

115. Data Protection Act 1998, Chapter 20, Art. 13(3) (U.K.).

116. See PETER CAREY, DATA PROTECTION: A PRACTICAL GUIDE TO UK AND EU LAW 46 (2004) (noting at the time that of the several cases that have reached the courts, most concern celebrities).

117. *Google Inc. v. Vidal-Hall & Ors.* [2015] EWCA (Civ) 311, [105] (U.K.).

118. See *supra* note 111 and accompanying text.

119. See *supra* text accompanying notes 93.

that entirely disregards the nuances of 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 and in privacy, thus, law and policy have been transiting from one extreme to the other without pausing to inquire into the reasonable boundaries of what lies between. However, it is understandable that this is a difficult inquiry. As Eady himself noted in *Mosley v. News Group Newspapers*,¹²⁰ identifying the unlawfulness of published materials rests on complex variables and is “unlikely to be . . . clear cut.” This is why failure in such an identification is not to be mistaken for “genuine indifference to the lawfulness of [one’s] conduct.”¹²¹ The 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 preclude punishment based on identification failures alone. 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.”¹²²

That recognition by the court, however, came in a narrower context. What the court sought to highlight was that the

120. See *Mosley v. News Group Newspapers Ltd.* [2008] EWHC (QB) 1777, [207], [208] (UK). http://news.bbc.co.uk/2/shared/bsp/hi/pdfs/24_07_08mosleyvnewsgroup.pdf [<https://perma.cc/24XA-FKUL>].

121. *Id.* To be more precise, Justice Eady 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 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. Design Technica*, what was determinant in Eady’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. Design Technica Corporation (t/a Digital Trends) & Ors.* [2009] EWHC (QB) 1765, [57]; see also *Grant v. Torstar Corp.*, *supra* note 102, at *id.*

122. *Google Spain*, *supra* note 96, ¶ 38.

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 the extent to which 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 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.”¹²³ Thus, the definition of data “controller” by the Directive, is 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.”¹²⁴ That purposive definition tends now to be reinforced in the General Data Protection Regulation currently in debate to replace the Data Protection Directive.¹²⁵ In its latest published version approved by the Parliament,¹²⁶ the Regulation highlights that responsibility and liability of the controller should be understood in *comprehensive* terms, and a data controller should *ensure* compliance of each processing operation with the Regulation.¹²⁷

123. Data Protection Directive, *supra* note 98, Art. 2(d).

124. *Google Spain*, *supra* note 96, ¶ 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).

125. *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).

126. 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 Mar. 12, 2014).

127. *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 125, 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.

Ultimately 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 United Kingdom, discussed above, 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 this kind of risk-taking; it designs a normative picture of “comprehensive” disincentive for a balancing exercise to be freely carried out.¹²⁸

Conversely, the situation in defamation, 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, since the Defamation Act 2013, Britain has 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 recently disclosed numbers concerning decisions made by Google on the right to be forgotten, for instance, are encouraging.¹²⁹ They result from a thoughtful process that involved the 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 nuanced level, the systematics (the

128. 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 Mar. 12, 2014).

129. See Sylvia Tippmann and Julia Powles, *Google Accidentally Reveals Data on ‘Right to be Forgotten,’* THE GUARDIAN (Jul. 14, 2015, 2:28 PM) (explaining that 95 percent of right to be forgotten 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 percent) have the requests been granted (being denied in 71 percent of the cases, as opposed to 37 percent of the cases for ordinary citizens’ requests)), <http://www.theguardian.com/technology/2015/jul/14/google-accidentally-reveals-right-to-be-forgotten-requests> [<https://perma.cc/5VJM-KV72>].

thought-processes through which those decisions have been reached) are so far obscure. We know very little about Google's emerging "case law," which raises evident democratic concerns.¹³⁰ 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 that allow proper *normative* engagement by Internet intermediaries to occur in the first place.

In sum, current systems of liability do not carry appropriate normative safeguards that allow reflective forms of decision making by intermediaries to take place. Instead, these systems force an institutional detachment of intermediaries from the normative sphere, in separation from 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. However, when it does, it happens against, or laterally to, the institutionalized system—at the cost of great uncertainty for intermediaries and society as a whole. Thus, an inquiry into the nature and content of intermediaries' normative responsibilities is necessary.

III. TECHNOLOGY, JUSTICE, AND RESPONSIBILITY

A. On Design and Use Plans

If Internet intermediaries have a normative responsibility to engage with content they host, from where does this responsibility spring? Of what does it consist? How should actors conceive of this responsibility in a way that attends to the *deontological, normative* dimensions that prevailing accounts have failed to pay heed to date? An answer to these questions must start with a more precise inquiry into the nature of intermediaries' activities. Up to this point, this Article has 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

130. See Jemima Kiss, *Dear Google: Open Letter from 80 Academics on 'Right to be Forgotten,'* THE GUARDIAN (May 14 2015, 09:00 AM), <http://www.theguardian.com/technology/2015/may/14/dear-google-open-letter-from-80-academics-on-right-to-be-forgotten> [<https://perma.cc/9D7V-M977>] (describing letter from academics "demanding more transparency from Google over how it processes 'right to be forgotten' requests").

consequence of their activities, however, this author had noted that Internet intermediaries are *designers* of these pathways through which information traverses 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, one needs first to understand *what* it is that Internet intermediaries design.

In a general sense, Internet intermediaries are designers of technological platforms; they program their websites and services in different ways and make choices that are as much a matter of business and law as they are a matter of technology. When intermediaries enable their technological platforms to host certain types of content, or to take others 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 circumstance, 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 future actions by its users—and their reasons for choosing these.¹³¹

In a more precise way, Internet intermediaries are designers of *technological artifacts*—an expression that admits a variety of definitions as vast as is its importance for us to get right. Among the different ways to explain technological artifacts, the one that best illuminates the focus of this Part is that a technological artifact is both a *physical* construct and one endowed with a *teleological element*. Allusions to this duality are present in more general forms in earlier accounts¹³² but find their best articulation in contemporary Dutch scholarship on the functions of technological artifacts.

131. How reasons are affected by (and reflected in) the design of technological artifact can be understood by considering the teleological dimension of artifacts, which is explained from the subsequent paragraph above.

132. See, e.g., LESSIG, *supra* note 48 (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).

Peter Kroes and Anthonie Meijers, for instance, note that what distinguishes technological artifacts from other objects is that, beyond their physical dimension, artifacts relate to “human intentionality”—“they are objects to be used for doing things and are [thus] characterized by a certain ‘for-ness.’”¹³³ They perform functions prescribed by human intentionality.¹³⁴ Most importantly for this Article, this teleological dimension expresses itself through “use plans” by which functions are ascribed to technological artifacts. As Pieter Vermaas and Wybo Houkes explain, the functions of technological artifacts “highlight the physical capacities that play a role within ‘use plans’ by which users can attain goals.”¹³⁵ 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 artifacts 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 artifacts contribute to the realization of a given goal.¹³⁶ They exist within a normative framework through which the ascription of functions to technological artifacts is justified.¹³⁷ On one hand, use plans are proposed by designers in normative terms. As Houkes explains, “[G]ood design involves communication of implicitly or explicitly designed use plans.”¹³⁸ Designers are “socially recognized expert[s]”¹³⁹ who privilege ways of using artifacts 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.”¹⁴⁰ It is not only a source of normativity, “one reason among many,”¹⁴¹ but rather

133. Peter Kroes and Anthonie Meijers, *The Dual Nature of Technical Artefacts*, 37 *STUD. HIST. PHIL. SCI.* 1, 1 (2006).

134. *Id.* at 2.

135. 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).

136. *Id.* at 6–7.

137. *Id.* at 8. Vermaas’s and Houkes’s theory of function-ascription is thus a justificatory one.

138. Wybo Houkes, *Knowledge of Artefact Functions*, 37 *STUD. HIST. PHIL. SCI.* 102, 108 (2006).

139. *Id.* at 112.

140. *Id.*

141. *Id.* at 106.

one with “privileged status.”¹⁴² 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*.¹⁴³

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 artifacts 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 artifacts, at times emphasising their physical dimension, at others emphasising how their intentional dimension interacts with the normative order, thus 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 artifact will fail to justify itself as a proper one.

Hence, the social responsibility of Internet intermediaries as designers involves a responsibility towards *normative propriety* regarding the functions they seek to ascribe to the technologies they design. One can approach this normative responsibility from at least two dimensions. The first, which has been alluded to in this Section, is a *justificatory* dimension. From this approach, Internet intermediaries need to be able to speak for the actions that, in devising and revising their use plans, they program or condone; intermediaries 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 this author will call a *modulatory* one. Similarly to the law, technologies “mediat[e] between people and the rights reasons which apply to them.”¹⁴⁴

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.¹⁴⁵ In all such cases, technologies impinge upon

142. *Id.* at 111.

143. *See id.* at 105.

144. JOSEPH RAZ, ETHICS IN THE PUBLIC DOMAIN: ESSAYS IN THE MORALITY OF LAW AND POLITICS 214 (1994).

145. 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

people's available reasons for action without normatively communicating so much. Filtering and manipulation of content by search engines, insofar as is carried out with regard to unconcealed criteria, are a clear and powerful example of such normatively implicit effects.¹⁴⁶ 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*¹⁴⁷ in the information environment—which amplify the nodality of intermediaries¹⁴⁸—may still prevent people from acting upon their judgments concerning intermediaries' decisions. Think, for instance, of Facebook and the relative powerlessness of individuals to move away from the platform because the whole world is there. Even as it surfaces that the content shown to people on Facebook may be directed by manipulation-based research,¹⁴⁹ the effect of people's judgments on the platform's functions seems to be fairly limited, as its user-base is unlikely to change in any more significant way.

Choices by intermediaries surely matter beyond their utilitarian implications. Specifically, these choices matter for how they affect human values, be it immediately in each case settled or be it in overarching terms where the whole of intermediaries' decisions transforms the normative landscape by reference to which we act. Between May 2014 and August 2015, Google received nearly 300,000 right to be forgotten requests.¹⁵⁰ This statistic 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.¹⁵¹ In their words, “the vast majority of these decisions face no public scrutiny, *though they shape public*

[the forms we sign], and most of us wouldn't understand them if we did,” and proposing remedies).

146. See FRANK PASQUALE, *THE BLACK BOX SOCIETY: THE SECRET ALGORITHMS THAT CONTROL MONEY AND INFORMATION* 92 (2015) (discussing search and control and 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”).

147. See generally Carl Shapiro & Hal R. Varian, *Information Rules: A Strategic Guide to the Network Economy* 104 (1999) (explaining the idea of network effects).

148. See *supra* note 5 and accompanying text.

149. Katy Waldman, *Facebook's Unethical Experiment: It Intentionally Manipulated Users' Emotions Without Their Knowledge*, SLATE (June 28, 2014, 5:50 PM), http://www.slate.com/articles/health_and_science/science/2014/06/facebook_unethical_experiment_it_made_news_feeds_happier_or_sadder_to_manipulate.html [<https://perma.cc/J8VF-6T5W>].

150. See Tippmann & Powles, *supra* note 129.

151. See Jemima Kiss *supra* note 130.

discourse. What's more, the *values* at work in this process will/should *inform information policy around the world*.¹⁵² To wit, not only should these values inform policy, but they already do; they have created a system, reflected in Google's world-enveloping 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. The use plans they devise should aim not only for propriety in dimensions of a more emphatically physical nature—from the aesthetics of user interfaces to the uninterruptedness of information flows. Internet intermediaries should see to it that they attend to the propriety of the normative choices they make, both with regard to each 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 differing levels of depth, as the circumstances—including their own particular circumstances—dictate.

B. Justice and Responsibility

From the discussion in earlier Sections, it must be concluded that the expected commitment towards integrity from Internet intermediaries ought not to be one of perfection. At the same time, justice requires that we treat intermediaries as *members* of the *normative community* to which we all 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 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 to striving towards normative integrity—with differing obligations dependent on how capable an actor is of reflecting upon its interpretations and how these can affect people's 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

152. *Id.*

be compatible with respect for individual rights.”¹⁵³ Specific characteristics of such a community would be an 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.”¹⁵⁴ Justice indeed requires the embeddedness of all capable social actors in such a reflective project¹⁵⁵—a project that, ultimately, concerns our pursuit of integrity regarding the normative order itself. When integrity is not a horizon in the interpretation and pursuit of society’s normative commitments, no ethical perspective exists that can ground its wider possibilities of flourishing.

Now, to demand commitment towards a common project of normative integrity from Internet intermediaries is not to substitute notions of *social* justice for *their* autonomy. Rather, to demand such a commitment is to understand that *autonomy itself* emerges in—and cannot be understood outside of—the context of such a shared normative project.¹⁵⁶ 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 one initially acquires heteronomously but continuously reflects upon critically, in cooperation with others, and that carrying out this discourse is

153. Roger Brownsword, RIGHTS, REGULATION, AND THE TECHNOLOGICAL REVOLUTION 24 (2008).

154. *Id.* at 25.

155. This is a notion well understood since ancient times, in the West and in the East. Comparing the philosophical projects of Aristotle and Confucius, Max Hamburger noted: “The inseparability of ethics and politics in the Confucian texts first very much reminds us of the Aristotelian approach. According to Analects, XIII, 3, and the Biography of Confucius, attributed to Szema Chien, Confucius was asked by a sovereign how he would begin if he was put in power of a country, and answered: ‘by establishing the correct usage of terminology, since the proper use of language and terms does secure order in the state.’” This is in line with Aristotle’s contention made in the Politics (I. 2) that man is a political animal and the only animal enabled by the gift of speech to set forth the expedient and the inexpedient, the just and the unjust. And in his Rhetoric he remarks that the use of rational speech is more distinctive of human beings than the use of their limbs (I. 1), wherefore the training in rhetoric is an essential part of civic education.” Max Hamburger, 20 J. OF THE HIST. OF IDEAS 236, 241 (1959).

156. See JOSEPH RAZ, *supra* note 24, 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”).

imperative.¹⁵⁷ As MacCormick explained, “[M]oral 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.”¹⁵⁸ It is only then that one “come[s] 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”¹⁵⁹—that “one bring[s] these together into the kind of consistent and coherent set of practical principles that it befits a rational agent to possess.”¹⁶⁰ Without a pursuit of coherence, or integrity, in her normative commitments, hardly can one speak of a person as autonomous.¹⁶¹ In turn, a society whose individuals fail to engage discursively in such a pursuit will hardly develop the levels of ethical self-understanding that are not simply necessary for its flourishing but consanguineous with it.

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*. Namely, 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, or because they bear directly on people’s privacy and reputation, problems of propriety of design translate as problems of what Seyla Benhabib would call the “reflexive reconstitution of collective identities.”¹⁶² They affect our narratives of

157. NEIL MACCORMICK, *supra* note 46, at 251–52.

158. *Id.* at 252.

159. *Id.* at 251.

160. *Id.*; see also 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 must be interpretive.” He notes, “We must take that approach to all our moral and political concepts”).

161. It is in this sense that Joseph Raz talks about an autonomous person being a person of integrity. See JOSEPH RAZ, *supra* note 24, at 382. A person of integrity, for Raz, is a person who identifies with her choices and is loyal to them. *Id.* But, of course, identification and loyalty cannot come without a refined understanding of the very content of such choices. Social conventions are very important in this regard. Raz, in effect, sees them as constitutive rules, for they define the practice undertaken by an agent. *Id.* at 383. Loyalty to them is part of being loyal to oneself and to one’s own choices, everything leading to a complex interplay between individual choices and social norms. In Raz’s words, “The typical role of our decisions and choices, of having come to care about one thing rather than another, is to settle what was, prior to our commitment, unsettled. The emerging picture is of interplay between [personal and] 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.” *Id.* at 389.

162. Seyla Benhabib, THE CLAIMS OF CULTURE: EQUALITY AND DIVERSITY IN THE GLOBAL ERA 70 (2002).

self-identification as an anchor of our status in public life. This, in turn, calls for the political community's responsibility 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,¹⁶³ of attending to the proper fit of our “webs of interlocution.”¹⁶⁴

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. This issue is particularly apparent in multiculturalist debates that, though grounded in universalist aspirations, implied a certain dichotomy between “we” and “the others.” Drawing on Fraser, Benhabib, to contrast, suggested the need of a politics that “accepts the fluidity, porousness, and essential contestability of all cultures.”¹⁶⁵ 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 identity struggles, “by changing our cultural patterns of interpretation, communication, and representation.”¹⁶⁶

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,¹⁶⁷ the falsification of identity is something that happens at great societal costs.¹⁶⁸ This is why identity narratives have been part of the evolutionary strategies of different species and groups. “Perhaps,” he notes, “we protect identity

163. *Id.* at 80 (“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.”).

164. CHARLES TAYLOR, *SOURCES OF THE SELF: THE MAKING OF MODERN IDENTITY* 36 (1989) (“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.”).

165. *Id.* at 68.

166. *Id.* at 69.

167. JOHN CLIPPINGER, *A CROWD OF ONE: THE FUTURE OF INDIVIDUAL IDENTITY* (2007).

168. *Id.* at 166.

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.”¹⁶⁹ Thus, central questions for our societies include: “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, “What is required is a new way of framing human identity in an open but precise manner.”¹⁷⁰

Clippinger’s questions and concerns point to the centrality of adequate means of identification and recognition for the normative development of our societies. They speak of a social narrative without whose coherent pursuit no situated understanding of justice and the conditions of human flourishing is even possible. In the context of the information environment, answering such questions and concerns urges us to fine-tune the use plans of our informational artifacts in order to attend, as precisely as possible, to what our possibilities of self-authorship generally require. Reinforcing narratives of self-identification in which all of us are involved 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 here are not only responsible; they are *particularly* so. They are responsible not only for the generation of utility, but also for coherently interweaving their use plans with a normative web whose evaluative integrity so centrally depends on the propriety of those use plans. We must approach the integrity of this web, in each of its interpretive nodes, as a public good.

In a work about hate speech whose arguments perfectly resonate with 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.”¹⁷¹ 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

169. *Id.* at 168–69.

170. *Id.* at 178–79.

171. JEREMY WALDRON, *THE HARM IN HATE SPEECH* 16 (2012).

people's basic dignity and social standing, *provided by all to 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.¹⁷²

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 rooted in the use plans enacted by Internet intermediaries. Rather than depending on normative detachment, the assurance that the information environment will develop *as a public good* depends on a sense of citizenship, attachment, and commitment by all social actors—and some of them particularly—towards an interpretation of our informational lives that is as good as it can be. Only by taking responsibility for this shared interpretive project can we 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.¹⁷³

Benhabib speaks thus about the need for a pursuit of boundaries in information flows that are grounded in attachments and commitments between *persons*, rather than on the fleeting utility of informational *goods*. As Waldron's public good of assurance, Benhabib's view of democratic citizenship is a call for an appropriate recognition of the normative foundations of speech, which replaces the lack of accountability and liability that increasingly seems to characterize the information environment.

172. *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 AC 127 (HL) 201 (appeal taken from England).

173. BENHABIB, *supra* note 162, at 183.

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 US Constitution. The gist of Sunstein's argument is that, in the American tradition, "[t]he protection accorded to free speech is designed to allow the polity's judgments to emerge through general discussion and debate."¹⁷⁴ This view, 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 simply promote better outcomes; it also has salutary effects on individual character."¹⁷⁵ In other words, "the free speech principle should be understood as benefiting from and helping to inculcate certain personal characteristics that amount to both collective and individual goods."¹⁷⁶ 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."¹⁷⁷ It further requires that a public discussion be carried out in "public-regarding terms."¹⁷⁸ The purpose of the American Constitutional system, Sunstein explains, is "not to furnish the basis for struggle among self-interested private groups,"¹⁷⁹ but rather to engage people in democratic discussion, "to open [them] to the force of argument,"¹⁸⁰ so "to allow the polity's judgements to emerge through general discussion and debate."¹⁸¹

One ought indeed to remember that, whether such a public-regarding system is established or not, the recognition of identities and 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 they will be so with special gravity here, intertwining with a larger system of reasons to define the boundaries of people's rights and 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-

174. CASS SUNSTEIN, *DEMOCRACY AND THE PROBLEM OF FREE SPEECH* 245 (1993).

175. *Id.* at 244.

176. *Id.* at 255.

177. *Id.* at 244.

178. *Id.* at 243.

179. *Id.* at 241.

180. *Id.* at 242.

181. *Id.* at 245.

functioning deliberative process.”¹⁸² Deliberative processes, in other words, shape rights, which, in turn, shape deliberative processes. The boundaries of our collective agreements and 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.¹⁸³

In *The Concept and the Rule of Law*, 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.¹⁸⁴ 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—for which, in turn, their responsibility can be demanded.¹⁸⁵ It is only by affirming itself as a public resource that law can “pay [. . .] respect to those who live under it, conceiving them now as bearers of individual reason and intelligence.”¹⁸⁶ Recognizing 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.¹⁸⁷

It is a requirement 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 requirement ought to be seen as a fundamental aspect of the fairness and, in everything, of the *integrity* of the normative life of our information environment. It is also currently a regulatory challenge—a central one in our time—yet a treatable one, beyond the illusion of automatic choices that, in one direction or another, ignore values fundamental to one’s self-constitution. It is a challenge we can tackle if only we do not 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

182. CASS SUNSTEIN, *THE PARTIAL CONSTITUTION* 137 (1993).

183. *Id.*

184. Jeremy Waldron, *The Concept and the Rule of Law*, 43 GA. L. REV. 1, 31 (2009).

185. *Id.* at 24.

186. *Id.* at 36.

187. *See id.* at 35–36.

public good of assurance that things should be otherwise. As Luciano Floridi remarks, “We live in an improvable infosphere, where moral agents have a *duty* to exercise their ethical stewardship.”¹⁸⁸ 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

As noted above, the responsibility of Internet intermediaries should neither be precluded nor taken to be strict. Rather, it should reflect a commitment of applying the best efforts reasonable—within intermediaries’ particular economic and technological possibilities—to get the facts and the law straight. 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 this Article also notes that intermediaries becoming institutionally detached from the normative community—the community of rights—that we all inhabit is unacceptable.¹⁸⁹ What still needs to be examined, 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. This Section takes up this task. As this author will suggest, not only is our proposal compatible with the system of corrective justice, but it is also required by such a system.

Before putting this suggestion forward, a clarification is necessary. From a theoretical standpoint, this Part has not so far approached the responsibility of intermediaries from the particular perspective of corrective justice, of which tort law is a part. Rather, it has been approaching the problem from the broader perspective of what may, more simply, be called 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).¹⁹⁰ Both

188. LUCIANO FLORIDI, *THE ETHICS OF INFORMATION* 130 (2013).

189. *See supra* Section III.B.

190. 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

conceptions, as any conception of justice, are normative,¹⁹¹ 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. This Article so far has 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, the Article has 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 resource-allocative concerns that mark both of 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 discuss why corrective justice, in particular, requires that we move beyond the normatively detached approaches of Part II. This Article then concludes with an explanation of how corrective justice requires us to approach the responsibility of intermediaries instead.

The important point to be made 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 than on either of its poles.¹⁹² 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

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 n.31 (2d ed. 2013). Although this controversy will not in itself concern us here, the vision of corrective justice we expound is indeed an embedded one.

191. See EARNEST J. WEINRIB, *CORRECTIVE JUSTICE* 17 (2012) (“To think of something as an injustice is not to refer to a brute event but to make a normative ascription.”).

192. *Id.* at x.

the mirror image of the other's."¹⁹³ This notion of correlativity, in turn, is irreconcilable with the systems of either exemption of liability or strict liability that Part II discussed. 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 unavoidably 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.”¹⁹⁴ As John Gardner observes, “In 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.”¹⁹⁵ Or, in Tony Honoré's view, they are forms of liability that have a place when the “conduct of the harm doer carries a special risk of harm.”¹⁹⁶

Making these exceptions into rules violates the justification of private law as a normative system, instead turning it into a servant of the outcomes of factual controversies. It fulminates the normative coherence¹⁹⁷ and the very self-understanding¹⁹⁸ of private law as a

193. *Id.* at xi.

194. *Id.* at 10.

195. John Gardner, *Obligations and Outcomes in the Law of Torts*, in *RELATING TO RESPONSIBILITY: ESSAYS FOR TONY HONORÉ ON HIS EIGHTIETH BIRTHDAY* 125 n.17 (Peter Cane & John Gardner eds., 2001).

196. TONY HONORÉ, *RESPONSIBILITY AND FAULT* 27 (1999).

197. 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

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”¹⁹⁹—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, “Throughout, 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.”²⁰⁰ 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 embeds a standard of reasonable care in defamation taken from negligence liability²⁰¹—even if this intention is defeated by the strictness of assuming knowledge of the unlawfulness of the content.²⁰² One particular set of defenses, however, seems most

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).

198. 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.

199. *Id.* at 147.

200. *Id.* at 168.

201. 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) (U.K.) on the negligence foundations of the innocent dissemination defense. *See also* JAN OSTER, *MEDIA FREEDOM AS A FUNDAMENTAL RIGHT* 59 (2015); MATTHEW COLLINS, *THE LAW OF DEFAMATION AND THE INTERNET* 295–96 (3d ed. 2010).

202. *See supra* Section II.A (discussing how to the innocent dissemination defense only exempts one who is not a commercial publisher *if he takes reasonable steps to take defamatory*

successfully apt to tackle the problem of intermediary liability—that of qualified privilege, known before as the Reynolds defense, 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 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. Specifically, the publication must be of a matter of public interest and one that the defendant reasonably believes 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.²⁰³ 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,”²⁰⁴ a general privilege is recognized regarding 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 connecting both sides of a communication cycle. Some cases exist in which “the status and activities of certain bodies are such that members of the public are entitled to know of their proceedings.”²⁰⁵ Here the privilege will derive from the subject matter alone. Other realms require the totality of normative circumstances to be considered in determining the reasonableness of one’s expectation of privacy. That is the case in privacy generally, and it also holds true here: where the reciprocal—or correlative—normative context of the parties determines whether the “publication on matters of public interest” defense holds good. These are both very clear instantiations of the more general idea of correlativity in private law.

Was the responsible communication defense to be applied to intermediaries, as this Article suggests below, it would instill a sense of subjective responsibility that redeems the coherence between intermediary liability and private law in general. Through this defense, intermediaries would be normatively recast as responsible members of a self-understanding system that seeks to pursue the best justifications possible for its decisions in light of the integrity of its

content down upon obtaining knowledge of it, regardless of how difficult it is to ascertain the defamatory nature of the content). Reasonable care, in this sense, 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 United Kingdom.

203. See WEINRIB, *supra* note 1, at xiv (noting that “correlativity constitutes the structuring idea . . . for the correction of the injustice through liability”).

204. Reynolds v. Times Newspapers Ltd. [1999] UKHL 45, [2001] 2 A.C. 127, at 194.

205. *Id.* at 196.

norms.²⁰⁶ 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 anathema to the granularity 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 in that structure. Insofar as there is risk, any action, no matter how accomplished (or, indeed, how not²⁰⁷), 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 in this structure! 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.”²⁰⁸ In both general systems, of exemption and of strict liability, what happens is 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. 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 is operated. Simply put, there is no corrective justice. Precisely there is none here where, given the

206. See WEINRIB, *supra* note 191 and accompanying text.

207. See Gardner, *supra* note 195, 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”).

208. WEINRIB, *supra* note 1, at 152.

normative centrality of the actors in question, one would most expect it.

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. An example will help to introduce the point. Consider the language of 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.”²⁰⁹

Notice what the Act does here. It recognizes the possibility that an injunction be granted against a party that is entirely outside the bonds of the substantive legal relationship brought before the court. That is so because, let us remember, the Defamation Act 2013 established a system of virtually unqualified exemption of liability for Internet intermediaries, lifting them from a legal relationship that the system went on to determine exists exclusively between the author of the defamatory content and its victim. Now, in allowing for such injunctions, the system seeks to reconstruct procedurally a legal relationship that it has extinguished substantively.

This the aforementioned gimmick, and the *second perspective* from which current exemption systems ought to be approached as a violation of the notion of correlativity: the attempt to reconstruct a legal relationship with a party which, were it not for this reconstruction, 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 in the Defamation Act—an injunction to a party that is entirely outside the bonds of correlativity?²¹⁰ It could seem that, once a judgment has been issued, a new relationship is formed with the intermediary, based on the now-proclaimed illegal nature of the content. But such a conclusion would be unwarranted. First, the content would have been illegal all along; it would not have its nature transformed solely by virtue of the court judgment. Second, there is no provision recognizing a liability of the intermediary *towards the victim* of the defamatory content. If the court order is not

209. Defamation Act 2013, c. 26, § 13(1)(a) (U.K.).

210. In Lord Watson’s words in *White v. Mellin*, “Damages 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.

complied with, the remedy will not be a remedy within tort law, but rather simply one within the realm of contempt.²¹¹ This second point makes it very clear that there are no underlying reasons based on which a duty for the intermediary may be established.²¹²

Here it is important to have in mind what John Gardner has called the *continuity thesis* in tort law—an explanation for the secondary obligations tort law is based on and their underlying rationales. 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.”²¹³ 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.²¹⁴ So, what are the primary reasons on which the requirement that intermediaries comply with a court order is based? Simply, there are

211. 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 [72] (UK) (noting that the doctrine reflected in *Attorney-General v. Newspaper Publishing PLC*, 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).

212. Notice, also, that Section 13(1)(a) 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.

213. John Gardner, *What is Tort Law For? Part 1. The Place of Corrective Justice*, 30 L. AND PHIL. 1, 33 (2011).

214. 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 114–15 (Francois-Xavier Martin trans., 1802) (“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] 97 Eng. Rep. 676 (K.B.); 2 Burr 1005. See Peter Birks, *English and Roman Learning in Moses v. Macferlan*, 37 CURRENT LEGAL PROBLEMS 1, 17 (1984) (U.K.); see also Duncan Sheehan, *Natural Obligations in English Law*, LLOYD’S MAR. AND COM. L. Q. 172, 178 (2004) (U.K.).

none. In exempting intermediaries of liability, the law has extinguished any possible primary reasons. Thus, secondary obligations have no reasons on which to be based.

The power granted to courts by the Defamation Act 2013 is not founded in the law of torts. It merely addresses a case of injunctions issued against innocent third parties and seeks to render normal what is, in fact, an abnormal event. As Basil Markesinis and Simon Deakin point out, “In 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.”²¹⁵ Note that while in defamation cases before the 2013 Act an injunction against the intermediary was part of the dynamics of defamation law, this was only the case when—and because—the intermediary was itself liable for a wrong under the law. That is no longer the case, as the Defamation Act 2013 exempts the intermediary from liability.

Now it is true that, outside of the general principle noted by Markesinis and Deakin, 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. However, there had been no more than four cases²¹⁶ by the time a committee chaired by Lord Neuberger MR issued its Report of the Committee on Superinjunctions in 2011.²¹⁷ In addition, the Report made very strict recommendations for the further granting of such injunctions. Recognizing in them a derogation from the principle of open justice,²¹⁸ the Report recommended they be issued only when *strictly necessary*, kept to the *absolute minimum* and subjected to *intense scrutiny*²¹⁹—and, critically, noted that a super-injunction “ceases to have any effect” after a “final determination of the parties’ substantive rights.”²²⁰ These recommendations are the absolute opposite of what happens with the injunction rule currently

215. SIMON DEAKIN, ANGUS JOHNSTON, AND BASIL MARKESINIS, *MARKESINIS AND DEAKIN’S TORT LAW* 874 (7th ed. 2013) (“An 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.*”) (emphasis added).

216. *Id.* at 879.

217. Lord Neuberger of Abbotsbury, Report of the Committee on Super-Injunctions: Super-Injunctions, Anonymised Injunctions and Open Justice (May 20, 2011) [hereinafter Report of the Committee on Super-Injunctions].

218. 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.

219. Report of the Committee on Super-Injunctions, *supra* note 217, at 12.

220. *Id.* at 18.

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.”²²¹ 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 both 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 intermediaries’ activities, as they (at times monumentally) do, should intermediaries be expected just to move their proverbial “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; it would not be a problem that intermediaries, once notified they host illegal content, would be expected to proceed expeditiously to purge the content. 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 content down.

A second answer holds 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 in reflecting upon the content, rather than

221. *Bolton v. Stone* [1951] UKHL 2, [1951] 850 AC (HL) 867 (appeal taken from Eng.). The situation is different in the United States, where the Learned Hand formula is applied. *See supra* note 214 and accompanying text.

just simply taking it down. One should, in this sense, recognize that it is indeed tremendously difficult for intermediaries to reach 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 content according to underdeterminate normative standards. This author calls this response to such a concern the “*no normative-negligence* approach.” Specifically, this 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 tentative answers do not engage with each other. They approach the problem of liability from entirely disconnected dimensions. And they reflect, as might be suspected, the two extremes discussed in Part II—that is, the extreme of strict liability and the extreme of exemption of liability. The former discourages reflection by rendering the intermediary liable for whatever normative outcome accrues if the intermediary does not assume the responsibility 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 only 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, there is an alternative approach worth considering regarding the burdens of reasonable care, besides the takedown-negligence and the no normative-negligence approaches. This author calls this 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.”²²² 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.”²²³ What this author would suggest is an approach that, differently from both approaches above, transcends the factual dimension of content takedown to focus on the matter of how an Internet intermediary lives up to its normative commitments: how rightly or wrongly it traverses

222. WEINRIB, *supra* note 1, at 157.

223. *Id.* at 164.

the normative space of his duty of care. The normative negligence approach recognizes the difficulties in interpreting the facts (the nature of content) in light of the normative order (its illegality or illegality). Yet, while paying heed to this difficulty, this approach 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 artifacts intermediaries 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 United States. On one hand, the normative negligence approach runs afoul of the specific discipline of intermediary liability in both jurisdictions, which reflects the problems discussed throughout this Article. 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 might not seem to be the case, particularly in reference to Lord Reid's ideas. Recall that Reid asserted that, in general, the burdens of precaution ought not to be considered in negligence law. Yet, this Article suggests 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. In contrast to the *Bolton v. Stone* approach,²²⁴ the United States uses the famous Learned Hand formula that 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 for avoiding the accident.²²⁵ 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 the risk.²²⁶ 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

224. See *supra* note 210 and accompanying text.

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

226. *Id.*

of permissible risk creation.”²²⁷ 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 of this Part is that the burdens to be attenuated are not economic burdens of precaution only but also 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. Yet, this is not the *only* way these burdens can be accounted for. Technologies, while empowering people to the extent people can master them,²²⁸ can also operate as constraints when people do not.²²⁹ 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 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 they 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 Section III.A, often operate in a tacit way.

Understanding the complexity of the interplay above 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 both the different possibilities of mastery of technological reasons and the constraints these possibilities impose

227. *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. 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.

228. See generally MARSHALL MCLUHAN, UNDERSTANDING MEDIA: THE EXTENSIONS OF MAN (1964); see also THE NETWORK SOCIETY: A CROSS-CULTURAL PERSPECTIVE 11 (Manuel Castells, ed., 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).

229. 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, *supra* note 132, 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).

may seem to open Pandora's box. It may seem so because the same points this Article makes about technological reasons may also reasonably be made with regard to legal and cultural reasons more broadly. 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 artifacts 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, when one considers their existence between moral autonomy and socially determined forms. Tort law's focus on *moral* autonomy may, in the end, have happened at the expense of the much more granular value of *personal* autonomy.

But this problem is too large to examine here, and one may still be able to address the central question of this Article even if she does 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 fundamental to understand as we resolve the inquiry in this Article, 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, the reasons within each of these disputes will vary in ways that may be more or less—some completely—detached from Google's own evaluative powers and capabilities. There is no predictability as to what sorts of disputes will arise concerning actors and 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 particular concern in this Article. 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 import. All normativity—and indeed, the responsibility towards it—is conversational.²³⁰ But, in each settlement of normative

230. See MICHAEL MCKENNA, CONVERSATION AND RESPONSIBILITY 2–3 (2012) (noting, based on Strawson, that “moral responsibility is essentially interpersonal,” in that “facts about

questions and in embedding these settlements in the use plans of the artifacts they design, intermediaries carry on a normative dialogue with other actors whose center 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 should one 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 the idea of responsible communication on matters in the public interest. Normative negligence here would simply mean the placing of a conceptual 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 escape when they fail to get the facts straight—insofar as they *reasonably*, or *responsibly*, believe that the publication furthers 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 Chief Justice McLachlin noted for the court in *Grant v. Torstar Corp.*:

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").

[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.²³¹

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

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 Lord Justice Nicholls in *Reynolds*, one must not exaggerate the extent of the uncertainty of the responsible communication test.²³² First, courts can issue guidelines—in our case strengthened by an emerging case law practiced by intermediaries themselves. Second, in Nicholls L.J.’s words, “The common law does not seek to set a higher standard than that of responsible journalism, a standard the media themselves espouse,”²³³ and which in our case should surely be within the purview of intermediaries as well due to the inevitability of their making decisions in one direction or another. The converse conclusion, as examined above, would entail 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 deserve particular reverence:

It could be seen as rather ironic 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 which society requires of others, should not also to this extent be required of the news media.”²³⁴

Note, also, that media ought to be interpreted expansively in the case of the responsible communication defense. As Lord Hoffman made

231. Grant v. Torstar Corp., 3 S.C.R. at 675.

232. Reynolds v. Times, [1999] UKHL 45 at [202].

233. *Id.*

234. Lange v. Atkinson [1998] 3 NZLR 424 at 477 (NZ). (cited with approval by Nicholls L.J. in *Reynolds*).

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:

[T]he 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.²³⁵ . . .

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.”²³⁶

It is clear from the excerpt above that the court in *Grant* considered it appropriate to extend the responsible communication defense to bloggers and other news disseminators of the present. There is no reason why the same conclusions above should not apply to Internet intermediaries—that is, like all other occupations, theirs assigns them duties to take reasonable care and use responsibly their powers and capacities, on pain of being held in negligence otherwise. Such duties are particularly accentuated when actors have the capacity to cause considerable harm and distress if their powers are not responsibly used, a capacity which intermediaries doubtlessly have.²³⁷

But beyond the boundaries of each incident, the lack of expectations that Internet intermediaries behave responsibly provokes perturbations of a more broadly normative nature. The negligence of intermediaries matters for the intelligibility and coherence of private law itself; their responsibility ought to be recognized as a normative one within this largest context as well. Intermediaries, must accordingly 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

235. *Grant v. Torstar Corp.*, 3 S.C.R. at 685.

236. *Id.* at 669–79.

237. 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.

“between controversies and their resolutions.”²³⁸ Intermediaries, indeed, ought to 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—indeed, as in the law of negligence more broadly—this obligation by intermediaries is an obligation to try. 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.”²³⁹ 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*, “People 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.”²⁴⁰ But they must be entitled at least to the commitment that others will try responsibly to reflect the truth and serve the public interest when publishing or knowingly disseminating information about them.

Critically, as in the responsible communication defense, the normative negligence approach to intermediary liability does not take trying to entail a *purely factual commitment*. Rather, such a commitment means that intermediaries ought to reach the best *normative interpretation* possible regarding the disputes they 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)²⁴¹—these are all factors of strongly normative nature, more so as they become part of a coherent

238. *Id.* at 12.

239. Gardner, *supra* note 195, at 13.

240. *Grant v. Torstar Corp.*, 3 S.C.R. at 685.

241. *Id.* at 694.

whole of past decisions, which intermediaries ought to take into account.

At the same time, however, such factors are all procedural ones, 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. This variance 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, unlike the general case in tort law, where the standard of care is of an objective nature, the standard of care for the liability of intermediaries may, ultimately, 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,”²⁴² decisions in cases settled by intermediaries will rest on interpretations to whose undertaking courts should give a wide margin of appreciation. These decisions will involve a complex range of factors of technological, legal, and, in all this, cultural dimensions. The one responsibility the public 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

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 company? We saw that, in *Google Spain*, the Court of Justice of the European Union alluded to taking the powers and capabilities of the intermediary into account.²⁴³ Does this consideration mean that responsibility should vary according to the technological and cultural possibilities of the agent? This Article has only been able to hint at answers to these questions. Answering them is necessary to provide a more fully systematized approach to intermediary liability in light of tort law. This is particularly because some of these answers might seem to place intermediary liability in dissonance with the general approach of negligence law.

The factors highlighted towards the end of the preceding Section²⁴⁴ offer a template that can be applied not only to defamation but to some extent to privacy as well. Their assessment depends on a

242. *Id.* at 118.

243. *See supra* note 120 and accompanying text.

244. *See supra* Section IV.C.

capacity for inquiry that seems unfair to demand different intermediaries to reflect on an objectively uniform basis, “regardless of [their] individual abilities or disabilities”²⁴⁵—though this is the path traditionally taken in the common law of negligence. This author believes this contradiction is only apparent. Further scholarship will show that 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 accommodate within tort law theory the burdens that contemporary technological development places on both practical reason and 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 Article was to highlight the *normative dimension* of intermediary responsibility. What matters, in this sense, is not purely whether content is taken down or not, which is something 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 presented at the beginning of this Article,²⁴⁶ intermediaries change our world through action. Their actions come via the design of use plans of technological artifacts, which have great consequence on how other actors author their lives. Such consequences both 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. Specifically, it should be judged 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 thus communicate what, in their tremendously significant views, is proper or improper within the use plans they enact. There is great responsibility in reaching such decisions. Beyond the miniscule 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

245. DEAKIN ET AL., *supra* note 215, at 203.

246. See WEINRIB, *supra* note 1 and accompanying text.

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 to which we all must be personally committed.