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Content Providers' Secondary Liability: A Social Network Perspective

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*Ph.D. University of Haifa-Faculty of Law. This Article is drawn from my dissertation titled, “Social Context, Law and Technology—Rethinking Intermediaries' Liability for Speech Torts,” written under the supervision of Tal Zarsky. I am grateful for his insightful guidance. This project also benefitted from valuable comments of Jonthan Lewy and from conversations with Jack Balkin, Gustavo Mesch, and Guy Pessach. I also thank the participants of the Intermediaries' Liability Symposium, University of Haifa (May, 2012). Finally, I am much grateful to Katie Rosenberg, Elizabeth Walker and their colleagues on the Fordham IPLJ for outstanding work that profoundly improved the quality of this Article.

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work theory and analysis, which is neutral to technological advances. This framework distinguishes between different technological settings based on the strength of social ties formed in each context. The Article explains that the strength of such ties influences the social context of on-line interactions and flow of information. The strength of ties is the best tool for designing different liability regimes; such ties serve as a proxy for the severity of harm that defamatory online speech might cause, and the social norms that might mitigate or exacerbate speech-related harm.

The proposed taxonomy makes it possible to apply a sociological analysis to legal policy and to outline modular rules for content providers' liability at every juncture. This Article does so while taking into account basic principles of tort law, as well as freedom of speech, reputation, fairness, efficiency, and the importance of promoting innovation.

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INTRODUCTION

A lawyer found out that his name was tainted in various online platforms, where it was stated that he is “a crook.” These defamatory expressions were published in the comments sections following an article on lawyer malpractice. The comments were written by unknown Internet users in news portals. They were also echoed in reviews in user-review websites, on blogs, discussion forums, and social networks. The lawyer claimed that these were false statements. Yet, he did not know who published them because of the anonymity or pseudonymity of the users. He turned to the relevant content providers, asked them to take down the expressions, and filed a libel suit against them. How should the law regulate content providers’ liability for defamation? Should the law outline a standard liability regime for regulating all types of content providers? Should the law distinguish between them? This Article focuses on these questions and aims to provide answers.

New digital technologies create a wealth of ideas and content, which is easily and freely accessible to everyone. Technology reduces the costs of interaction and distribution, enabling beneficial communication dynamics. It allows end users to spread ideas easily and quickly to a large audience. These advances empower individuals and promote important social objectives. Yet, they also reduce the cost of antisocial and destructive activities.¹ The chances for speech-related torts harm and abuse to participants or external users increase manifolds.² These technological advances create a new variety of legal questions and challenges to government policy.

¹ This Article focuses on the problem of abuse, in which users generate negative-value content. On the four main problems of user-generated content, see James Grimmelman, *The Virtues of Moderation*, 17 YALE J.L. & TECH. 42, 53 (2015).

² On anti-social behavior online, see LORI ANDREWS: I KNOW WHO YOU ARE AND I SAW WHAT YOU DID: SOCIAL NETWORKS AND THE DEATH OF PRIVACY 72-73 (2012); DANIELLE KEATS CITRON, HATE CRIMES IN CYBERSPACE 57, 62-63, 66, 69 (2014) [hereinafter CITRON, HATE CRIMES IN CYBERSPACE]; Danielle Keats Citron, *Civil Rights in Our Information*, in THE OFFENSIVE INTERNET: SPEECH, PRIVACY, AND REPUTATION 31 (Saul Levmore & Martha C. Nussbaum eds., 2010) [hereinafter Citron, *Offensive Internet*]; Danielle Keats Citron, *Cyber Civil Rights*, 89 B.U. L. REV. 61, 62-64 (2009) [hereinafter Citron, *Cyber Civil Rights*].

The law allows two ways to deal with online speech related torts: (1) filing an action against the end user (the speaker)³ and (2) filing an action against the intermediary (the content provider), which facilitated the harmful exchange.⁴ This Article focuses on the second, suggesting a model for regulating content providers' indirect liability for speech torts.

The liability of intermediaries has been the focus of legislation, judicial decisions, and scholarly work. Uniform liability regimes, with regard to overall immunity, notice-and-takedown safe haven, and negligence, have been outlined. These policy models are often considered either over- or under-inclusive. Unlike these models, this Article suggests a new and unique innovative regulation model: a nuanced regulation rule that depends on various online social contexts.

More than fifty years ago, media scholar Marshall McLuhan said that “the medium is the message.”⁵ The medium might be more significant than the message itself.⁶ This statement is even truer in the Internet age.⁷ Different online settings form different contexts, which may influence speech within them. Treating cyberspace as a monolithic entity is a mistake. Different social ties are formed on different types of online platforms. These ties affect users' digital conduct as well as their credibility and importance. I believe that social context is as important as the content itself. Therefore, different online platforms must be categorized accord-

³ Users often mask their identities and publish texts anonymously. In these cases, the plaintiff has to unmask the identity of the user in the preliminary stage before filing a suit against him.

⁴ On the pros and cons of these two options (direct action against the user and indirect action against the content provider), see Ronen Perry & Tal Zarsky, *Liability for Online Anonymous Speech: Comparative and Economic Analyses*, 5 J. EUR. TORT L. 2, 7–11 (2014) [hereinafter Perry & Zarsky, *Liability for Online Anonymous Speech*]; Ronen Perry & Tal Zarsky, *Who Should Be Liable for Online Anonymous Defamation?* 82 U. CHI. L. REV. DIALOGUE 162 (2015).

⁵ See, e.g., MARSHALL MCLUHAN, UNDERSTANDING MEDIA: THE EXTENSIONS OF MAN 7 (1964).

⁶ MARSHALL MCLUHAN & QUENTIN FIORE, THE MEDIUM IS THE MESSAGE: AN INVENTORY OF EFFECTS 8 (1967).

⁷ NICHOLAS CARR, THE SHALLOWS: WHAT THE INTERNET IS DOING TO OUR BRAINS 6 (2010).

ing to the social structures formed within them. Understanding social networks will allow a more nuanced, context-specific liability regime. Keeping this goal in mind, this Article is divided into the following parts:

Part I outlines an overview of the regulatory regimes in different traditional intermediaries outside the web. Historically, the medium of communication has played a significant role in assessing liability;⁸ different intermediaries are governed by different regulatory regimes according to their distinctive characteristics. Afterwards, I examine different liability models for content providers in different countries, discussing normative considerations from wide perspectives, such as free speech considerations.

In Part II, I draw the distinctions among various web-based activities, which are then divided into three categories based on the strength of social ties that users form while conversing in a particular online platform. Instead of relying on technology-based distinctions, I utilize a sociological approach, which is indifferent to technological advancements. Instead, it relies on insights from “network theory.” It focuses on parameters that are designed to predict the strength of social ties, which are formed online and offline. As such, it explains social dynamics and provides invaluable insights. Basing a liability regime on social ties is natural. Speech torts are affected by the flow of information within social contexts. As a result, it stands to reason that policy should take this context into account and relate to it. Following sociological studies, I identify three distinctive categories of digital conversations: (1) “free style”; (2) “peer production”; (3) “deliberation and structuring communities.”

Part III focuses on the intersection between network theory and the liability of content providers, applying the sociological insights to the law. I offer a differential model for regulating the liability of intermediaries. This model suggests different liability regimes for different content providers based on the abovementioned categories, while balancing competing interests and policy considerations.

⁸ Anthony Ciolli, *Chilling Effects: The Communications Decency Act and the Online Marketplace of Ideas*, 63 U. MIAMI L. REV. 137, 141 (2008).

I also address objections and challenges arising from the proposed model. Applying the model would promote accuracy, certainty, and the proper balance among human rights, fairness, and efficiency.

I. INTERMEDIARIES' LIABILITY AND SPEECH TORTS: THE LAW, A NORMATIVE ANALYSIS, AND A CALL FOR CHANGE

Different traditional offline intermediaries are ruled by different regulatory regimes according to their distinctive characteristics. This Part overviews, in a nutshell, the regulatory regimes governing different media outlets. I examine the similarities between these outlets and online content providers. After this comparison, I deal with the desirable liability regime for regulating content providers. I describe existing models in different countries and discuss a wide range of normative considerations for liability. Finally, I propose a critical analysis of the standard liability models and suggest a new path instead: a particular differential regulatory regime.

A. Traditional Intermediaries and Liability Regimes

The debate on intermediaries' liability in speech torts is not new. The law differentiates between the traditional intermediaries and regulates them with particular regimes.

The printing press is subjected to legal rules and ethical norms regulating its activities. For example, newspapers are liable whether they authored the defamatory text or not.⁹ Journalists have asserted themselves to act in the public interest. The Code of Ethics of the Society of Professional Journalists, for example, provides that journalists "should be free of obligation to any interest other than the public's right to know," and they should avoid "conflicts of interest, real or perceived" and "refuse gifts, favors, fees, free travel, and special treatment."¹⁰

The obligations of newspapers likely stem from their perceived role as a watchdog, thus owing a fiduciary duty of sorts to the pub-

⁹ RESTATEMENT (SECOND) OF TORTS §§ 578 cmt. b, 581(2) (AM. LAW INST. 1977); see also Ciolli, *supra* note 8, at 144.

¹⁰ See Ellen P. Goodman, *Stealth Marketing and Editorial Integrity*, 85 TEX. L. REV. 83, 123 (2006).

lic. Press organizations use their social and economic capital to check the government, and they function as political institutions on their own, vying for power from a position of power.¹¹ Thus, the press is often dubbed the “fourth estate.”¹² Traditionally, newspaper editors had a significant amount of editorial control and discretion over content. They frequently devoted a significant amount of time and expense in vetting stories for publication. This often conveyed a sense of authority among readers. Consistent with this perception, courts treat newspapers as if they have adopted the statements they published as their own. Consequently, they are subject to speech torts liability.¹³

Media programming is even more central to the public discourse than newspapers. As a result, it is subjected to more comprehensive restrictions and limitations. The Federal Communications Commission (“FCC”) is the regulating authority of telecommunication media; among other duties, it has the authority to issue broadcast licenses.¹⁴ Public interest obligations ensure that informative and educational programming remains on our screens, accessible to the general populace and ensure diversity.

Regulation was required because of spectrum scarcity. The government’s goal was to balance freedom of speech and an array of political views with a limited number of channels. The particular means chosen to attain this end was the fairness doctrine.¹⁵ This

¹¹ See TIMOTHY E. COOK, GOVERNING WITH THE NEWS: THE NEWS MEDIA AS A POLITICAL INSTITUTION, 12 (1998).

¹² See Goodman *supra* note 10, at 122 n.231. The term “fourth estate” was coined by Thomas Carlyle in 1841 to refer to reporters in the British House of Commons who exhibited autonomy from the government and assumed a duty to speak the truth. *Id.*

¹³ Jonathan Zittrain, *A History of Online Gatekeeping*, 19 HARV. J.L. & TECH. 253, 258 (2006); see Ciolli, *supra* note 8, at 144–45.

¹⁴ Communications Act of 1934, 47 U.S.C. §§ 151–615b (2006). Section 309 of the Act requires the Commission to consider, in determining the eligible parties to whom licenses may be granted, whether “the public interest, convenience, and necessity will be served” by such grants. *Id.* § 309; see also Note, *Tilling the Vast Wasteland: The Case for Reviving Localism in Public Interest Obligations for Cable Television*, 126 HARV. L. REV. 1034, 1037–38, 1049 (2013).

¹⁵ This doctrine aimed at advancing the public interest by imposing a standard duty comprised of two essential elements: (1) “the making of reasonable provision for the discussion of controversial issues of public importance in the community served” and (2) the presentation of “different attitudes and viewpoints concerning these vital and often

doctrine came under constitutional attacks and was eventually abandoned.¹⁶

The legal authority granting the FCC regulatory powers over cables differs. Unlike broadcasters, whose licenses are awarded pursuant to regulatory procedures defined and managed by the FCC, cable companies must petition municipal boards. The passage of the Cable Television Consumer Protection and Competition Act of 1992,¹⁷ which compels cable companies to apportion up to one-third of their channel capacity for the transmission of local broadcast, marked a significant move by the FCC in the direction of structural, local regulation. For example, in *Turner Broadcasting System, Inc. v. FCC*, the Supreme Court upheld the constitutionality of these so-called “must-carry” provisions.¹⁸ After remanding this case upon first review for further evidentiary development, the Court ultimately concluded that a “must-carry [provision] serves the Government’s interests in a direct and effective way” by “ensuring that a number of local broadcasters retain cable carriage, with the concomitant audience access and advertising revenues needed to support a multiplicity of stations.” Communication diversity is the core value guiding communication policy and therefore wins in this case.¹⁹

The FCC also regulates the responsibility of broadcasters regarding the identification of sponsors,²⁰ and prompts disclosure

controversial issues.” See Note, *supra* note 14, at 1038; see also *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 375, 390 (1969).

¹⁶ Over time, the FCC’s steadfast adherence to the fairness doctrine waned, as journalists and other members of the public complained of the chilling effects that attended compulsory ideological equity. The doctrine was formally abandoned in 1985. See *In re Inquiry into Section 73.1910 of the Communication Rules and Regulations Concerning the Gen. Fairness Doctrine Obligations of Broad. Licensees*, 102 F.C.C.2d 142, 147 (1985); ANGIE A. WELBORN & HENRY COHEN, CONG. RES. SERV., REGULATION OF BROADCAST INDECENCY: BACKGROUND AND LEGAL ANALYSIS 22 (2005).

¹⁷ See Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (codified as amended in scattered sections of 47 U.S.C.); Note, *supra* note 14, at 1040–52.

¹⁸ *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622 (1994).

¹⁹ See *id.*; *Turner Broad. Sys., v. FCC*, 520 U.S. 180 (1997); Bill D. Herman, *Opening Bottlenecks: On Behalf of Mandated Network Neutrality*, 59 FED. COMM. L.J. 103, 116 (2006).

²⁰ See 47 U.S.C. §§ 317(a), 508 (2006).

obligations.²¹ Editorial responsibility exists also in this media form, and as a result, TV and radio editors are liable for slander just as newspaper editors are liable for publishing defamatory content.

Broadcasters are subject to strict liability. Even “live broadcast” is not an hermetic defense in court, because of the availability of delaying technologies, which allow editors an overview of live feeds, and the ability to block harmful speech.²² Liability for “live broadcast” must balance the value of watching programs and news in real time,²³ and the need to avoid harmful speech.²⁴ As for cable TV, different laws and liability regimes apply.²⁵

The rationale behind holding media liable for defamatory content is derived from several normative arguments. First, the printing press and programming media possess a significant amount of editorial control over the content they disseminate. Second, the spectrum of broadcasting is limited. Thus, it has been argued that the media holds a public responsibility for using a limited resource.

²¹ Broadcasters must disclose the identity of sponsorships and sponsors to consumers. See Goodman, *supra* note 10, at 109; Zahr Said, *Embedded Advertising and the Venture Consumer*, 89 N.C. L. REV. 99, 102 (2010).

²² See Ira P. Robbins, *Digitus Impudicus: The Middle Finger and the Law*, 41 U.C. DAVIS L. REV. 1403, 1449–50 (2008). In the United States, live broadcast is not an hermetic defense. The difficulty to review the program beforehand is just one consideration for exemption. See Broadcast Decency Enforcement Act of 2005 § 3, Pub. L. No. 109-235, 120 Stat. 491; WELBORN & COHEN, *supra* note 16, at 15; Jenifer L. Marino, *More “Filthy Words” but No “Free Passes” for the “Cost of Doing Business”*: *New Legislation Is the Best Regulation for Broadcast Indecency*, 15 SETON HALL J. SPORTS & ENT. L. 135, 137, 153 (2005).

²³ On the importance of immediate real-time broadcast of sport matches, see Mark Conrad, *Fleeting Expletives and Sports Broadcasts: A Legal Nightmare Needs a Safe Harbor*, 18 J. LEGAL ASPECTS SPORT 175–76, 188, 191, 199 (2008).

²⁴ Other countries have chosen different liability regimes for live broadcast. In Israel, for example, broadcasters are held liable for live broadcasts as distributors. See Israeli Defamation Act, §§ 12, 15 (1965). Thus, passive conduits that still maintain control over the dissemination of information after publication might still face liability if they choose to continue to disseminate defamatory content after being aware of it. See *id.*

²⁵ Scholars criticized the difference between broadcast and cable TV. See Lindsay LaVine, *Legislative Update: The Lion, the Witch (Hunt) and the Wardrobe Malfunction: Congress’s Crackdown on Television Indecency*, 15 DEPAUL-LCA J. ART & ENT. L. 385, 407–08 (2005). It has been asserted that most people pick up the remote control and pay little attention to whether they are watching pay stations or regular television as they surf through channels. Thus, the regulation is only partial. See *id.*

Third, programming media is more accessible for the public and tends to influence viewers more than other traditional intermediaries. Consequently, these reasons justified the strict liability governing this type of media.

Common carriers, such as telephone and telegraph companies, differ from the printing press and broadcasters. Common law imposed on them a special duty to offer their services to anyone on just and reasonable terms without discrimination.²⁶ The status of “common carriers” was later recognized in telecommunication regulations.²⁷

The law imposes liability on common carriers that discriminate content without cause. It requires that all customers be served.²⁸ Common carriers traditionally enjoyed immunity for defamatory statements over their networks since they have no editorial control.²⁹

B. Online Content Providers: Features and Comparison to Traditional Intermediaries

The Internet has brought new challenges for providers' liability. This new medium is fundamentally different from traditional intermediaries both in its architecture and in its applications. Content is almost unlimited; and it is created by active participation of users. Readers are not only passive consumers, but authors of con-

²⁶ James B. Speta, *A Common Carrier Approach to Internet Interconnection*, 54 FED. COMM. L.J. 225, 252, 261 (2002).

²⁷ For the definition of “common carrier,” see 47 U.S.C. § 153(11) (2012); FCC v. Midwest Video Corp., 440 U.S. 689, 699–701 (1979).

²⁸ See *In re Edwards Indus., Inc.*, 74 F.C.C.2d 322, 328 (1979); Phil Nichols, *Redefining “Common Carrier”: The FCC’s Attempt at Deregulation by Redefinition*, 1987 DUKE L.J. 501, 503 (1987). It should be noted that the law restricts only entities defined under “common carriers” status from discriminating content. See *Verizon v. FCC*, 740 F.3d 623, 628 (D.C. Cir. 2014). However, a reform strives to change classification. See Rebecca R. Ruiz & Steve Lohr, *F.C.C. Approves Net Neutrality Rules, Classifying Broadband Internet Service as a Utility*, N.Y. TIMES (Feb. 26, 2015), <http://www.nytimes.com/2015/02/27/technology/net-neutrality-fcc-vote-internet-utility.html> [<https://perma.cc/PL8F-RR2L>].

²⁹ See *Anderson v. N.Y. Tel. Co.*, 320 N.E.2d 647, 649 (N.Y. 1974); Ciolli, *supra* note 8, at 145.

tent as well. Unlike other intermediaries, the Internet is mostly decentralized, without traditional editing.³⁰

At first glance, it would appear as if common carriers are analogous to online content providers. They offer a platform to users: providers do not create the content itself, but rather serve as a passive conduit of transmission. Therefore, one could argue that content providers should be exempt from liability, as common carriers are. However, a closer look reveals that this analogy is imprecise. Internet content providers are not mere conduits, but they possess the ability to control third-party content,³¹ as they often do when they screen content. Moreover, unlike telephone conversations, the content Internet providers carry is usually available to the public; it is easily accessible and as a result, may cause severe damage to one's good name. Thus, content providers do not fit in the same category as telephone companies.

The wide public access to the content and the ability of content providers to control it is tangent to broadcasters. Like broadcasters, content providers reach a wide audience. However, the analogy ends there. Broadcasters use a limited public resource (the broadcast spectrum). Their liability stems from the influence this medium holds and its credibility. Being a watchdog has its price.³² In contrast, content providers do not use limited public resources. The Internet is a decentralized medium, and the influence of a single content item is limited. Additionally, many providers do not employ editors for user-generated content. Users publish most of their content in real-time, and the amount of content can be tremendous.³³ Therefore, pre-screening content may require signifi-

³⁰ DON TAPSCOTT & ANTHONY D. WILLIAMS, WIKINOMICS: HOW MASS COLLABORATION CHANGES EVERYTHING 37 (2008).

³¹ See Assaf Hamdani, *Who's Liable For Cyberwrongs?*, 87 CORNELL L. REV. 901, 945 (2002).

³² KARINE NAHON & JEFF HEMSLEY, GOING VIRAL 56 (2013) (explaining that the public still turns to traditional intermediaries because of their ascribed credibility). The public also turns to traditional intermediaries because of the medium's ability to deal with the problem of information overload. *Id.*

³³ See, e.g., Chris Welch, *YouTube Users Now Upload 100 Hours of Video Every Minute*, VERGE (May 19, 2013), <http://www.theverge.com/2013/5/19/4345514/youtube-users-upload-100-hours-video-every-minute> [<https://perma.cc/862L-YMA4>].

cant financial resources and time commitment. It is difficult to expect providers to invest the time and effort to that end.³⁴

Live broadcasters and online-content providers are comparable in some ways: similar to live broadcasting, user-generated content is uploaded and accessed in real time without editing. However, this analogy is not complete. In contrast to a live broadcast, user-generated content remains on the platform and can be located by search engines.³⁵ Whereas a live broadcast can be recorded for later viewing,³⁶ the end-user controls the recording, not the broadcaster. On the Internet, content providers retain control over their content.

To sum up: online-content providers do not fit traditional categories of intermediaries. Analysis of liability regimes applying to traditional media outlets reveals that different liability regimes regulate different mediums in light of different characteristics. Matching the liability regime to the medium's features is an appropriated conceptual model that should be adopted.

C. Content Providers' Liability: Comparative Perspective

1. The United States

In the United States, lawsuits against online-content providers are usually blocked.³⁷ Section 230(c) (1) of the Communications Decency Act ("CDA") directs that "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider."³⁸ Under this subsection, Congress declared that online service providers could not be treated as publishers for material they do not develop.³⁹ Congress thus sought to promote self-

³⁴ See JACQUELINE LIPTON, *RETHINKING CYBERLAW: A NEW VISION FOR INTERNET LAW* 120 (2015); Ciolli, *supra* note 8, at 145.

³⁵ There are exceptions; for example, updates via RSS or mailing lists are similar to live broadcasts because it is difficult to turn the wheel back after the messages were sent.

³⁶ New technologies, such as TiVo converters for example, enable continuous recording of broadcasts.

³⁷ See 47 U.S.C. § 230 (2012).

³⁸ *Id.* § 230(c)(1).

³⁹ *See id.*

regulation and free speech.⁴⁰ While doing so, it allowed vibrant Internet enterprises to prosper.⁴¹ Congress explicitly departed from common law defamation jurisprudence, which determined an actor's liability for third-party content, based on the level of control the actor exercised over it.⁴² The fact that a party exerted or could exert control over third-party content led to the application of stricter liability standards.⁴³

By passing § 230 of the CDA, Congress sought to overrule *Stratton Oakmont, Inc. v. Prodigy Services Co.*,⁴⁴ in which an unidentified user defamed an investment firm on Prodigy's "Money Talk" bulletin board.⁴⁵ The New York court decided that Prodigy acted as a publisher when it screened some areas of its site to make it family-friendly.⁴⁶ Under common law defamation principles, the court held that Prodigy, as a publisher, was liable for third-party messages on its board, despite the lack of contribution to, notice of, or knowledge of the postings' improper nature.⁴⁷ Prodigy's good-faith efforts to monitor its site resulted in increased liability.⁴⁸ Legislators recognized the injustice of *Stratton Oakmont* and exempted content providers from traditional publishers' liability.⁴⁹

Courts have interpreted § 230 broadly. Under § 230(c)(1), online service providers, including website operators, have enjoyed immunity from primary and secondary liability for a wide variety of claims. For example, in *Zeran v. America Online*, defamatory remarks against Zeran were posted on an AOL message board.⁵⁰ An

⁴⁰ See *id.*

⁴¹ *Id.* § 230(b)(1)–(2), (c)(1); Anupan Chander, *How Law Made Silicon Valley*, 63 EMORY L.J. 639, 652 (2014); Cecilia Ziniti, *The Optimal Liability System for Online Service Providers: How Zeran v. America Online Got It Right and Web 2.0 Proves It*, 23 BERKELEY TECH. L.J. 583, 585 (2008).

⁴² See Ziniti, *supra* note 41, at 584.

⁴³ *Id.*

⁴⁴ See *Stratton Oakmont, Inc. v. Prodigy Servs. Co.*, 1995 N.Y. Misc. LEXIS 229, at *1 (Sup. Ct. May 25, 1995).

⁴⁵ *Id.* at *3.

⁴⁶ *Id.* at *18.

⁴⁷ See *id.*

⁴⁸ *Id.* at *2, *5, *7.

⁴⁹ See 47 U.S.C. § 230(c)(1) (2012).

⁵⁰ *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 328–29, 332 (4th Cir. 1997).

anonymous user advertised that Zeran was selling shirts glorifying the Oklahoma City bombing.⁵¹ The Fourth Circuit decided that distributors were a subset of publishers and were thus immune from liability, according to § 230.⁵² Under this reading, providers maintain they have immunity, afforded by § 230, even if they refrained from taking an action after learning about potential illegal content on their site.⁵³

After *Zeran*, § 230 repeatedly shielded web enterprises from lawsuits in a plethora of cases.⁵⁴ Courts have found that content providers that host harmful content are immune to liability,⁵⁵ even if they failed to screen harmful content,⁵⁶ and even after being notified of the harmful content.⁵⁷ In *Carafano v. Metrosplash.com*, the Ninth Circuit relied on § 230 to deny Carafano's lawsuit against the owner of the dating website "Matchmaker" for speech torts, despite the serious and utterly deplorable consequences that occurred.⁵⁸ Many times, courts have found content providers im-

⁵¹ *Id.* at 329.

⁵² Distributors fell under a category of defendants who faced liability upon knowledge of offending content they distributed. The court held that § 230 precluded not just strict liability as a publisher; it also precluded the application to website operators from intermediate liability for distributors. *Id.* at 330.

⁵³ As the Fourth Circuit noted in *Zeran*, a notice-and-takedown rule would lead companies to remove controversial statements, rather than face liability. *Id.* at 333.

⁵⁴ See Chander, *supra* note 41, at 653.

⁵⁵ See *Ricci v. Teamsters Union Local 456*, 781 F.3d 25, 27 (2d Cir. 2015); *GoDaddy.com, LLC v. Toups*, 429 S.W.3d 752, 756 (Tex. App. 2014).

⁵⁶ See *Hupp v. Freedom Commc'ns, Inc.*, 221 Cal. App. 4th 398 (2013) (applying immunity to defamatory comments in an online edition of a newspaper, although the content provider supervised the comments). Section 230 has protected Yelp, a consumer reviews peer production site, from liability for user reviews. See *Obado v. Magedson*, No. 13-2382, 2014 WL 3778261, at *5 (D.N.J. July 31, 2014) ("[Section] 230 immunity extends to the service provider's decisions about how to treat potentially objectionable material."); see also *Westlake Legal Grp. v. Schumacher*, No. 1:14-cv-564, 2014 WL 4097643 (E.D. Va. Aug. 19, 2014).

⁵⁷ See *Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc.*, 591 F.3d 250, 254 n.4 (4th Cir. 2009); *Doe v. Am. Online, Inc.*, 783 So. 2d 1010, 1017 (Fla. 2001). Content providers that delayed removing harmful content after learning about it were found immune. See *Klayman v. Zuckerberg*, 753 F.3d 1354, 1355 (D.C. Cir. 2014); *Caraccioli v. Facebook, Inc.*, No. 5:15-cv-04145, 2016 WL 859863 (N.D. Cal. Mar. 7, 2016).

⁵⁸ See *Carafano v. Metrosplash.com* 339 F.3d 1119, 1120 (9th Cir. 2003). This case involves not only defamation, but also impersonation. See *Tal Z. Zarsky & Norberto*

immune even when they were negligent.⁵⁹ Content providers were also immune to liability when they knowingly declined requests of the original publisher to remove the harmful content.⁶⁰

Some judges criticized the immunity and tried to narrow it down.⁶¹ They also tried to sidestep the immunity by employing various strategies.⁶² However, the immunity remains broad.

2. Europe

The framework for content providers' liability in Europe is dictated by article 14 of Directive 2000/31/EC ("E-Commerce Directive"), which provides that intermediaries engaged in "hosting" are not liable, unless they have actual knowledge of illegal state-

Nuno Gomes de Andrade, *Regulating Electronic Identity Intermediaries: The "Soft eID" Conundrum*, 74 OHIO ST. L.J. 1335, 1369 (2013).

⁵⁹ See, e.g., *Ben Ezra, Weinstein & Co., Inc. v. Am. Online Inc.*, 206 F.3d 980, 988 (10th Cir. 2000). Courts have also found content providers immune even if they paid third parties to write columns on their platforms, which contained defamatory speech, and even when they bought information from third parties and this information was erroneous. See *id.*; *Blumenthal v. Drudge*, 992 F. Supp. 44, 51, 53 (D.D.C. 1998).

⁶⁰ See *Giordano v. Romeo*, 76 So. 3d 1100, 1103 (Fla. Dist. Ct. App. 2011); *Glob. Royalties, Ltd. v. Xcentric Ventures, LLC*, 544 F. Supp. 2d 929, 932 (D. Ariz. 2008).

⁶¹ See the criticism of Judge Easterbrook in *Doe v. GTE Corp.*, 347 F.3d 655, 660 (7th Cir. 2003). According to Judge Easterbrook, the *Zeran* decision is flawed because its interpretation frustrates the CDA's stated purpose of encouraging self-regulation by granting blanket immunity to Internet service providers regardless of their efforts. See *id.* Judge Easterbrook provided an alternative interpretation for § 230, treating it as a definition clause rather than immunity to liability. See *id.*

⁶² See, e.g., *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1105–06 (9th Cir. 2009). The *Barnes* court refused to hold Yahoo! liable for false accounts featuring Cecilia Barnes' name and nude pictures created by her ex-boyfriend, pursuant to § 230. *Id.* at 1105. However, the court held Yahoo! liable for promissory estoppel, a subset theory of recovery based on a breach of contract. *Id.* at 1109. In another famous case, the Ninth Circuit held that the design of drop-down menus and other features contributed materially to an illegal action and was essentially causing third parties to commit speech torts. *Fair Housing Council v. Roommates.com, LLC.*, 489 F.3d 921 (9th Cir. 2007), *rev'd en banc*, 521 F.3d 1157 (9th Cir. 2008). Lately, the Ninth Circuit outlined a "failure to warn" exception to § 230 immunity. See *Doe No. 14 v. Internet Brands, Inc.*, 767 F.3d 894 (9th Cir. 2014), *reh'g granted, opinion withdrawn*, 778 F.3d 1095 (9th Cir. 2015); see also David S. Ardia, *Free Speech Savior or Shield for Scoundrels: An Empirical Study of Intermediary Immunity Under Section 230 of the Communications Decency Act*, 43 LOY. L.A. L. REV. 373, 459 (2010); Varty Defterderian, *Fair Housing Council v. Roommates.com: A New Path for Section 230 Immunity*, 24 BERKELEY TECH. L.J. 563, 547 (2009).

ments or refuse to remove them upon obtaining that knowledge.⁶³ In other words, content providers (hosts) are subjected to a notice-and-takedown rule, namely an obligation to remove problematic content once a potential plaintiff brings its existence to their attention. According to article 15(1), member states should not impose a *general* obligation on hosts to monitor the content they transmit and store.⁶⁴ These provisions impose a liability should the court find that a content provider, regarded as a “host,” failed to promptly comply with takedown requests or had actual knowledge of the wrongdoing.⁶⁵ Moreover, the Directive Recitals (article 47 and 48), indicate that Member States can impose *specific*—as opposed to general—monitoring obligations and, even more importantly, subject hosts to duties of care, “which can reasonably be expected from them and which are specified by national law, in order to detect and prevent certain types of illegal activities.”⁶⁶ Lastly, the Directive is somewhat dated and its classification might no longer be comprehensive. Many content providers may not be “hosts” at all.⁶⁷ In such cases, the Directive’s restrictions would not apply.

Outside the scope of the E-Commerce Directive, the potential liability of content providers is extensive. Thus, for example, the Estonian Supreme Court found the popular Delfi news website liable for defamatory statements about a famous Estonian business

⁶³ Directive 2000/31/EC, of the European Parliament and of the Council of 8 June 2000 on Certain Legal Aspects of Information Society Services, in Particular Electronic Commerce, in the Internal Market, 2000 O.J. (L 178) 1 [hereinafter E-Commerce Directive]. The directive was absorbed into particular legislation of the member states. See Broder Kleinschmidt, *An International Comparison of ISP’s Liabilities for Unlawful Third Party Content*, 18 INT’L J.L. & INFO. TECH. 332, 345–48 (2010); Joris van Hoboken, *Legal Space For Innovative Ordering: On the Need to Update Selection Intermediary Liability in the EU*, 13 INT’L J. COMM. L. & POL’Y 1, 8 (2009).

⁶⁴ See Case C-70/10, *Scarlet Extended SA v. SABAM*, 2011 E.C.R. I-12006; see also Perry & Zarsky, *Liability for Online Anonymous Speech*, *supra* note 4.

⁶⁵ See E-Commerce Directive, *supra* note 63, at 6.

⁶⁶ *Id.*; THIBAUT VERBIEST ET AL., STUDY ON THE LIABILITY OF INTERNET INTERMEDIARIES 5 n.22 (2007).

⁶⁷ See Perry & Zarsky, *Liability for Online Anonymous Speech*, *supra* note 4; Peggy Valcke & Marieke Lenaerts, *Who’s Author, Editor and Publisher in UGC Content? Applying Traditional Media Concepts to UGC Providers*, 24 INT’L REV. L. COMPUTERS & TECH. 119, 126 (2010).

executive.⁶⁸ Anonymous users posted the statements on the comment section following an article about his business ventures.⁶⁹ The court here interpreted the Directive narrowly and found Delfi liable even though it followed the notice-and-takedown practice and complied with the requirements of the E.U. Directive.⁷⁰ The court held that Delfi could not benefit from the safe haven of the directive because by allowing comments from unregistered users the site is liable as a publisher.⁷¹

Delfi filed a complaint against the decision to the European Court of Human Rights (“ECtHR”), claiming that its right to freedom of expression was violated.⁷² The First Section of the ECtHR disagreed.⁷³ It upheld the Estonian court’s ruling and found it a proportional interference with freedom of expression according to article 10 of the European Convention on Human Rights.⁷⁴

Delfi appealed to the Grand Chamber.⁷⁵ In a very long decision, the appellate court confirmed the previous chamber decision.⁷⁶ The decision generated substantial confusion regarding the distinc-

⁶⁸ Delphi AS v. Estonia (*Delphi I*), App. No. 64569/09, Eur. Ct. H.R. (2013).

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *See id.* The court here applied a narrow interpretation for intermediaries’ technical functions. For expansion on this, see Martin Husovec, *ECtHR Rules on Liability of ISPs as a Restriction of Freedom of Speech*, 9 J. INTELL. PROP. L. & PRAC. 108, 109 (2014).

⁷⁵ The Helsinki Foundation for Human Rights and Digital Media Association joined to the appeal as amicus curiae. *See* Brief for The Helsinki Foundation for Human Rights as Amicus Curiae Supporting Petitioners, *Delphi I*, App. No. 64569/09, Eur. Ct. H.R.; Brief for European Digital Media Association, CCIA, and EuroISPA as Amicus Curiae Supporting Respondents, *Delphi I*, App. No. 64569/09, Eur. Ct. H.R. Other organizations, such as Access, Article 19, and Media Legal defense, also intervened as third parties. *See* Delphi AS v. Estonia (*Delphi II*), App. No. 64569/09, Eur. Ct. H.R. (2015).

⁷⁶ *See Delphi II*, App. No. 64569/09, Eur. Ct. H.R. After assessing the lawfulness of intervention with freedom of expression, its legitimacy, and the necessity of interference in a democratic society, the Grand Chamber affirmed the outcome and the reasoning of the lower court, albeit not unanimously. *Id.* at paras. 120–39.

tions between online 'publishers' and mere intermediaries.⁷⁷ The extent of notice-and-takedown provisions also remains unclear.⁷⁸

After *Delfi*, in *Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt v. Hungary*, the ECtHR reached a different conclusion regarding the violation of article 10. Yet, it did not retreat from the decision in *Delfi*. Rather it differentiated the nature of the comments which were published from the comments in *Delfi*.⁷⁹ As reflected by other tribunal's decisions the E-Commerce Directive's safe haven is eroding.⁸⁰

The difference between the laws in the European Union and the United States reflects a divergent understanding of freedom of speech. This difference was also reflected in the liability of search engines and the interpretation of Directive 95/46/EC ("Data Protection Directive").⁸¹ The European Court of Justice backed the "right to be forgotten"⁸² in *Google Spain SL v. Agencia Española de*

⁷⁷ See Perry & Zarsky, *Liability for Online Anonymous Speech*, *supra* note 4, at 16.

⁷⁸ See *id.*

⁷⁹ See *Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt v. Hungary*, App. No. 22947/13, Eur. Ct. H.R. 135 (2016). The court noted that the nature of the comments was different, regarded the article as a matter of public interest and the fact that the article did not provoke the offensive comments. *Id.* at para. 72. Thus, the conclusion and result of exempting the intermediary from liability may be confined to the individual circumstances of this particular case. *Id.* at para. 64; *id.* at para. 4 (Kuris, J., concurring).

⁸⁰ See *Italy Fines TripAdvisor €500,000 over False Reviews*, GUARDIAN (Dec. 23, 2014), <http://www.theguardian.com/travel/2014/dec/23/italy-fines-tripadvisor-500000> [<https://perma.cc/7DB9-EXP6>]. The antitrust authority found that insufficient efforts were made to stop false reviews after hoteliers and consumer group complained. *Id.*

⁸¹ Directive 95/46/EC, of the European Parliament and of the Council of 24 October 1995 on the Protection of Individuals with Regard to the Processing of Personal Data and on the Free Movement of Such Data, 1995 O.J. (L 281) 31 [hereinafter Data Protection Directive].

⁸² This right, now branded as the "right to erasure," was represented as one of the "four pillars" of the new Regulation in the European Union. In October 2013, the European Parliament Committee on Civil Liberties, Justice, and Home Affairs considered and consolidated nearly four thousand proposed amendments to the Commission Proposal into a new proposal that was adopted by the Committee.

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), COM(2012)0011 – C7-0025/2012 – 2012/0011(COD) (Oct. 17, 2013). For more expansion, see NEIL RICHARDS, INTELLECTUAL PRIVACY: RETHINKING DIGITAL LIBERTIES IN THE DIGITAL AGE 91 (2015); Steven C. Bennett, *The "Right to Be Forgotten": Reconciling EU and US Perspectives*, 30 BERKELEY J. INT'L L. 161,

Protección de Datos.⁸³ The court here ruled that search engines are responsible for search results linking to personal data, which appears on webpages published by third parties.⁸⁴

The court reached this conclusion by broadly interpreting the term “controller” in from the Data Protection Directive.⁸⁵ The court affirmed that search engines are data processors and controllers when they index personal data published on websites.⁸⁶ However, the decision referred the Data Protection Directive, not the E-Commerce Directive.⁸⁷

The relation between the obligations of a search engine provider as a controller and the safe haven principles of the E-Commerce Directive is not elaborated and the scope of providers’ liability remains unclear.⁸⁸

169 (2012); Ignacio Cofone, *Google v. Spain: A Right To Be Forgotten?*, 15 CHI-KENT J. INT’L & COMP. L. 1, 9–10 (2015); Cooper Mitchell-Rekurt, *Search Engine Liability Under the Libe Data Regulation Proposal: Interpreting Third Party Responsibilities as Informed by Google Spain*, 45 GEO. J. INT’L 861 (2014); Abraham L. Newman, *What the “Right to be Forgotten” Means for Privacy in a Digital Age*, SCI. 1 (2015); see generally Jeffrey Rosen, *The Right to Be Forgotten*, 64 STAN. L. REV. ONLINE 88 (2012).

⁸³ Case C-131/12, *Google Spain SL v. Agencia Española de Protección de Datos*, 2014 E.C.R. 317.

⁸⁴ To comply with the judgment, Google offered E.U. citizens the ability to file data removal requests. See Anupan Chander & Uyên P. Lê, *Free Speech*, 100 IOWA L. REV. 501, 541 (2015). Within twenty-four hours, the search engine received right to be forgotten requests from at least twelve thousand individuals. See *id.*

⁸⁵ Data Protection Directive, *supra* note 81.

⁸⁶ See *Google Spain SL*, 2014 e.C.R. 317, at para. 41 (“Article 2(b) and (d) of Directive 95/46 are to be interpreted as meaning that, first, the activity of a search engine consisting in finding information published or placed on the internet by third parties, indexing it automatically, storing it temporarily and, finally, making it available to internet users according to a particular order of preference must be classified as ‘processing of personal data’ within the meaning of Article 2(b) when that information contains personal data and, second, the operator of the search engine must be regarded as the ‘controller’ in respect of that processing, within the meaning of Article 2(d).”).

For criticism on the interpretation of the European Court of Justice, see Javier Aparicio Salom, “*A Third Party to Whom Data are Disclosed*”: *A Third Group Among Those Processing Data*, INT’L DATA PRIVACY L. 1, 11 (2014).

⁸⁷ *Google Spain SL*, 2014 E.C.R. 317.

⁸⁸ See Ioannis Iglezakis, *The Right to Be Forgotten in the Google Spain Case (Case C-131/12): A Clear Victory for Data Protection or an Obstacle for the Internet?*, 4th INT’L CONF. INFO. L. (2014); Miquel Peguera, *The Shaky Ground of the Right to be Delisted*, 18 VAND. J. ENT. & TECH. L. 507 (2016). Characterizing search engines as controllers imply that they are not neutral and passive enough to be eligible for the protection of the safe haven. Yet,

a) England

England presents a unique model due to the new Defamation Act of 2013.⁸⁹ Section 5 of the Act states that a victim who can file an action against the speaker may not be permitted to sue the content provider as well.⁹⁰ The section provides that a website operator is not liable for a defamatory statement posted on the website if it did not post that statement.⁹¹ This defense can be defeated, however, if the victim has insufficient information to identify and bring proceedings against the speaker; or if the victim gave notice of complaint, and the content provider did not respond to the victims' complaint.⁹² Thus, content providers' liability is residual and generally they will not be liable for the defamatory speech if they did not act as publishers.⁹³

However, in *Tamiz v. Google, Inc.*,⁹⁴ which was decided shortly before the law was passed, the court took an expansive view of the term "publisher."⁹⁵ It determined that an operator of a blog service might be responsible for a comment on a blog post, even if the

the "right to be forgotten" is limited in scope, the European Court of Justice confined the discussion to searches made by the name of an individual and asserted only a right to delist the link—as opposed to a right to remove the information from the search engine's index altogether. *See id.*

⁸⁹ Defamation Act 2013, c. 26 (Eng.). This law came into force on January 1, 2014. *See* MATTHEW COLLINS, COLLINS ON DEFAMATION 1.41-.61, 15.01-.16 (2014).

⁹⁰ Defamation Act, § 5.

⁹¹ *Id.*

⁹² *Id.*

⁹³ Section 5 provides that a website operator is generally not liable for a defamatory statement posted on the website if it was not the one who posted that statement. The [defense] can be defeated, however, if the victim has insufficient information to identify and bring proceedings against the speaker, the victim gave notice of complaint, and the content provider did not respond to the victim's complaint in accordance with the Defamation (Operators of Websites) Regulations. If the content provider cannot contact the speaker, if the speaker does not respond or does not provide the required information (including personal name and address), or if he or she agrees to removal, the allegedly defamatory content should be removed immediately. Otherwise, the content provider need not remove the content, and may provide the speaker's contact information to the victim if the former consents or if a court orders it to do so. Perry & Zarsky, *Liability for Online Anonymous Speech*, *supra* note 4, at 19.

⁹⁴ *Tamiz v. Google, Inc.* [2013] EWCA (Civ) 68 [34]-[36] (Eng.).

⁹⁵ *Id.*

blogger removed the harmful content.⁹⁶ The court stated that the operator of a blog (Google) might be liable for the defamatory comment from the time it received a notice about the harmful content until it was removed from the service.⁹⁷ The court reasoned that since Google allowed users to design blogs, and it made profits from advertisements, it is also liable.⁹⁸ Yet, in this specific case, the court found that given the limited time between notification and removal, there had been no substantial damage.⁹⁹ The court's broad recognition of publisher liability undermined the arrangement in the Defamation Act. Thus, it might be possible to sue content providers without taking an action against the original speaker.¹⁰⁰

3. Canada

Canada does not have a legal framework as the above-mentioned E.U. Directive. Therefore, content providers do not benefit from any safe haven. Liability is regulated by common law and the rules applying to distributors.¹⁰¹ Accordingly, the "innocent dissemination" defense protects those who play a secondary role in the chain of distribution. This defense absolves distributors from liability, provided they have had no knowledge of the defamatory nature of the statement, and that their failure to detect the de-

⁹⁶ See *id.* In this case, the victim of a comment on "Blogger" notified Google of a defamatory comment about him. *Id.* ¶ 2. After a few e-mail exchanges between Google and the specific blogger, the latter removed the comment voluntarily. *Id.* However, five weeks passed from the exchanges to the removal. *Id.* ¶ 35. The court stated that, regarding this time period, Google might be liable as a publisher. *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ The court did not find the content provider liable because by the time the plaintiff sent his notification, the defamatory comments had receded into history by other comments. *Id.* ¶ 50. Therefore, any damage that may have been caused to the appellant's reputation was trivial. See *id.*

¹⁰⁰ See Perry & Zarsky, *Liability for Online Anonymous Speech*, *supra* note 4, at 6. Broadly speaking, where an Internet intermediary knows or ought to be aware of the content of the article, and has a realistic ability to control publication of such content, the intermediary is considered the publisher of the content. See CLERK & LINDSELL ON TORTS ¶¶ 22-60 (21st ed., 2014).

¹⁰¹ Corey Omer, *Intermediary Liability for Harmful Speech: Lessons from Abroad*, 28 HARV. J.L. & TECH. 289, 305 (2014).

famatory content was not due to negligence.¹⁰² The burden of proof is on the defendant.¹⁰³

Different countries applied different liability regimes for regulating content providers. Even in the same country, the courts can apply different standards of liability. A lack of a coherent legal thesis explains the different approaches towards the issue. Deciding when content providers should be liable for defamatory speech on their platforms involves policy considerations, which I will discuss in the following Sections.

D. Normative Considerations

Liability of content providers lies on the junction of several branches of law. It balances constitutional rights and general tort considerations. In addition, the technological context involves special considerations.

1. Constitutional Balance and the Base of Speech Torts

The civil rights concerning content providers liability in speech torts are: human dignity, reputation interests, and freedom of speech. The standard of liability shapes civil rights online and strikes the balance between the right to free expression and human dignity.

The first consideration is the dignity of the persons affected by the offensive speech, namely their social standing, their recognition as equals, bearers of human rights, and constitutional entitlements. Liability for defamation brings to public awareness “the basic elements of each person’s status, dignity, and reputation as a member of society.”¹⁰⁴

¹⁰² *Id.* at 305–06.

¹⁰³ *See id.*; Niemela v. Malamas, 2015 BCSC 1024, at paras. 94–99 (Can.); Crookes v. Newton, [2011] 3 S.C.R. 269 (Can.); DAVID A POTTS, CYBERLIBEL: INFORMATION WARFARE IN THE 21ST CENTURY 279–81 (2011); Andrew Bernstein & Rima Ramchandani, *Don’t Shoot the Messenger! A Discussion of ISP Liability*, 1 CAN. J.L. & TECH., no. 2, 2002, at 77, 79.

¹⁰⁴ Peter G. Danchin, *Defaming Muhammad: Dignity, Harm, and Incitement to Religious Hatred*, 2 DUKE F.L. & SOC. CHANGE 5, 17 (2010).

The other consideration is the right to free speech. The right to free speech protects public communication and shields against government censorship.¹⁰⁵ But now, many scholars believe that free speech is threatened by private entities as well.¹⁰⁶ In the United States, the freedom of speech is protected more than in other western democracies.¹⁰⁷ Courts and scholars have developed numerous theories about why free speech should receive special protection.¹⁰⁸

The first rationale supporting free speech is that it promotes *individual autonomy* and self-fulfillment. It allows the self-determination of an individual.¹⁰⁹ As a result, freedom of speech must be assured to anyone. The content is left to the discretion of the speaker.¹¹⁰ Censorship expresses disapproval of particular speech and the way of life of the speaker.¹¹¹ The second rationale for protecting free speech is the *search for truth*. The freedom ensures that every expression enters the marketplace of ideas.¹¹² The third rationale is the understanding that free speech is crucial for maintaining a *democracy*. Freedom of speech is required to assure the effectiveness of the democratic process by informing the governed of the acts of government and guaranteeing that policy is reached intelligently.¹¹³ Contemporary theories of democracy focus on protecting and promoting a *democratic participatory culture*. Freedom of speech is required to assure an individual's ability to participate in the production and distribution of culture.¹¹⁴ These

¹⁰⁵ Michael D. Birnhack, *More or Better? Shaping the Public Domain, in THE FUTURE OF THE PUBLIC DOMAIN* 59, 64 (2006).

¹⁰⁶ *Id.*

¹⁰⁷ RICHARDS, *supra* note 82, at 10.

¹⁰⁸ See generally Joseph Raz, *Free Expression and Personal Identification*, 11 OXFORD J. LEGAL STUD. 303 (1991).

¹⁰⁹ *Id.* at 303, 313–16.

¹¹⁰ Birnhack, *supra* note 105, at 66.

¹¹¹ Raz, *supra* note 108, at 312.

¹¹² JOHN STUART MILL, ON LIBERTY 5–9 (1869); JOHN MILTON, AREOPAGITICA: A SPEECH FOR THE LIBERTY OF UNLICENSED PRINTING (1958). The theory was popularized by Oliver Wendell Holmes' famous dissent in *Abrams v. United States*, 250 U.S. 616 (1919). See also RICHARDS, *supra* note 82, at 35; Birnhack, *supra* note 105, at 68.

¹¹³ Birnhack, *supra* note 105, at 71; ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT (1965).

¹¹⁴ Jack Balkin, *Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society*, N.Y.U. L. REV. 1, 3 (2004); Birnhack, *supra* note 105, at 71.

theories stress both individual liberty and collective self-governance.

The digital age places freedom of speech and its underlying justifications in a new light. It pushes the freedom of expression to the forefront, reminding the public of old concerns regarding expression that has become central and relevant to policy-issue makers.¹¹⁵

The law often limits the liability of content providers for the speech they carry, because by imposing liability on them, they might be induced to filter out questionable content. A content provider loses little from the removal of user-generated content. Yet, each comment increases his or her exposure to liability. Thus, he or she would rather remove suspected items than face penalties.¹¹⁶ This “collateral censorship” risk would lead to the suppression of lawful, even highly beneficial, speech and could result in a “chilling effect.”¹¹⁷

The Internet, however, can also reduce the cost of destructive activities and minimize the cost of anti-social behavior. It allows geographically disparate people to combine their efforts into powerful force and amplify the severity of harm. Thus, libel on the Internet might cause even more severe damage to a person’s reputation and dignity. Exempting content providers from liability would deny victims their ability to engage with others as equals, which might in some cases even suppress a free public debate. In fact, exempting content providers from liability would not only harm victims’ autonomy, but also the free market of ideas and public participation.¹¹⁸ Thus, the balancing act of this tort must also include the victims’ freedom of expression and the constitutional rights in question are related to both parties.

¹¹⁵ Balkin, *supra* note 114, at 3.

¹¹⁶ See Hamdani, *supra* note 31, at 931; Mark A. Lemley, *Rationalizing Internet Safe Harbors*, 6 J. TELECOMM. & HIGH TECH. L. 101, 114 (2007).

¹¹⁷ See Jack M. Balkin, *Old-School/New-School Speech Regulation*, 127 HARV. L. REV. 2296, 2309 (2014); Felix T. Wu, *Collateral Censorship and the Limits of Intermediary Immunity*, 87 NOTRE DAME L. REV. 293, 318 (2011).

¹¹⁸ See CITRON, HATE CRIMES IN CYBERSPACE, *supra* note 2, at 191–200. These conclusions are reinforced due to the magnitude of information that is being transmitted.

2. Theories of Traditional Tort Law

a) Corrective Justice

A central justification for imposing liability is corrective justice. According to Aristotelian philosophy, corrective justice is defined as a rectification of harm, *wrongfully caused* by one person to another, by means of a direct transfer of resources from the injurer to the victim.¹¹⁹ Accordingly, every particular interaction embodies correlative rights and duties that are imposed on both parties. This deontological non-consequentialist concept focuses on bilateral interactions, which are not reliant on external values.

Corrective justice theorists offer explanations regarding the duty of rectification. For example, Jules L. Coleman concentrates on fault and rights.¹²⁰ Ernest J. Weinrib and Stephen R. Perry concentrate on responsibility.¹²¹ George P. Fletcher claims that the basis for liability is non-reciprocal risk.¹²² Thus, liability exists when a respondent generates a disproportionate, excessive risk for harm, relative to the victim's risk-creating activity. The entitlement to recover a loss is given to all those injured by utilizing *non-reciprocal* risks. The goal is to distinguish between the risks that violate individual interests and *background risks* that must be borne by society.¹²³ Theorists explain that causation is not enough for imposition

¹¹⁹ ARISTOTLE, NICOMACHEAN ETHICS 1130 (William David Ross trans., 1980).

¹²⁰ See Jules L. Colman, *Risks and Wrongs*, YALE L. SCH. LEGAL SCHOLARSHIP REPOSITORY, Jan. 1, 1992, at 324–60; Benjamin C. Zipursky, *Civil Recourse, Not Corrective Justice*, 91 GEO. L.J. 695, 718 (2003).

¹²¹ Weinrib highlights correlativity by pointing out that tort doctrine constructs the tort relationship because liability treats the parties as doer and sufferer of the same injustice. See Ariel Porat, *Questioning the Idea of Correlativity in Weinrib's Theory of Corrective Justice*, 2 THEORETICAL INQUIRIES L. 161, 169 (2001); Stephen R. Perry, *The Moral Foundations of Tort Law*, 77 IOWA L. REV. 449, 489–94 (1992); Stephen R. Perry, *The Impossibility of General, Strict Liability*, 1 CAN. J.L. & JURIS. 147, 151 (1998); Ernest J. Weinrib, *Correlativity, Personality, and the Emerging Consensus on Corrective Justice*, 2 THEORETICAL INQUIRIES L. 107, 110 (2001).

¹²² George P. Fletcher, *Fairness and Utility in Tort Theory*, 85 HARV. L. REV. 537, 537–64 (1972).

¹²³ *Id.*

of liability.¹²⁴ Consequently, fault (negligence or moral fault) must exist in order to justify compensation for the harm caused.¹²⁵

In light of the bilateral correlative nature of torts, the literature on corrective justice tended to focus on “first order” liability (the liability of those who most directly and wrongfully caused an injury) and not on “second order” liability. However, one may argue that content providers create the framework for risk by allowing the activity and assisting it. Therefore, providers should be liable for the consequences alongside the direct wrongdoer, because a corrective justice concept is also feasible when several wrongdoers caused the harm.¹²⁶

On the other hand, one may argue that designing and operating platforms is merely a background risk. As such, content providers (platforms as Yelp and Facebook) do not commit speech torts themselves, and, therefore, they bear no fault to the harm caused. Instead, the user who defamed the third party would be at fault. According to this approach, it is not fair and just to impose liability on content providers.

b) Efficiency

This significant perspective focuses on the maximization of wealth and the efficient allocation of risks. In general, it does not take into account deontological considerations.¹²⁷ According to this

¹²⁴ See *supra* note 121.

¹²⁵ Theorist Richard Epstein believes that harm justifies compensation. Richard Epstein, *A Theory of Strict Liability*, 2 J. LEG. STUD. 151, 157 (1973). This theory of strict liability, which focuses on factual causality, is unacceptable and came under criticism. See Izhak England, *The System Builders: A Critical Appraisal of Modern American Tort Theory*, 9 J. LEGAL STUD. 27, 63–68 (1980).

¹²⁶ Richard W. Wright, *Allocating Liability Among Multiple Responsible Causes: A Principled Defense of Joint and Several Liability for Actual Harm and Risk Exposure*, 21 U.C. DAVIS L. REV. 1141, 1162 (1988). In that case, every wrongdoer is liable to the plaintiff's damages and can claim subrogation from other wrongdoers.

¹²⁷ Richard Allen Posner, *The Ethical and Political Basis of Efficiency Norm in Common Law Adjudication*, 8 HOFSTRA L. REV. 487, 492 (1980).

perspective, legal rules aim to incentivize efficient conduct ex-ante and promote welfare maximization ex-post facto.¹²⁸

Scholarly literature usually deals with the economic analysis of direct liability, but shies away from discussing third party liability. However, in some cases expanding liability to third parties is required when: (1) the enforcement of liability on the direct tortfeasor fails (for example, when the direct tortfeasor cannot be detected); (2) the third-party can monitor and control the direct wrongdoers; (3) sufficient incentives do not exist for private ordering and non-legal strategies; and (4) a legal rule can be applied at reasonable a cost.¹²⁹ While third-party liability is well established, little is known about its appropriate scope. Specifically, legal scholarship has little to say about the standard of liability that should apply to third parties.¹³⁰

In our context, enforcement failure might occur,¹³¹ because the speaker might be anonymous, and even if he is identified, he might not be deep-pocketed. To whom should liability be allocated? Who is the cheapest cost avoider? Who should bear the burden of minimizing speech torts' harms? In the following subsections, I shall examine whether efficiency considerations support imposing liability on content providers, considering the alternative of letting the victim bear the damage. I will refer to the implication of assigning liability on content providers and focus on three types of traditional

¹²⁸ John R. Hicks, *The Foundations of Welfare Economics*, 49 *ECON. J.* 646 (1939); Nicholas Kaldor, *Welfare Propositions for Economics and Inter Personal Comparisons of Utility*, 49 *ECON. J.* 549 (1939).

¹²⁹ Douglas G. Lichtman & Eric Posner, *Holding Internet Service Providers Accountable* (John M. Olin Program in L. & Econ., Working Paper No. 217, 2004); see also Reinier H. Kraakman, *Gatekeepers: The Anatomy of Third-Party Enforcement Strategy*, 2 *J.L. ECON. & ORG.* 53, 53 (1986); Alan Sykes, *The Boundaries of Vicarious Liability: An Economic Analysis of the Scope of Employment Rule and Related Legal Doctrines*, 101 *HARV. L. REV.* 563, 564 (1988); Alan Sykes, *An Efficiency Analysis of Vicarious Liability Under the Law of Agency*, 91 *YALE L.J.* 168, 168 (1981).

¹³⁰ Asaf Hamdani, *Gatekeeper Liability*, 77 *S. CAL. L. REV.* 53, 57 (2003).

¹³¹ Matthew Schruers, *The History and Economics of ISP Liability for Third Party Content*, 88 *VA. L. REV.* 205, 233 (2002).

costs associated with it: primary costs of deterrence, secondary costs of loss spreading,¹³² and administrative litigation costs.

One may argue that content providers are the cheapest cost avoiders of speech torts. They can easily control content on their platform. Imposing liability would incentivize providers to monitor content on their platform and filter out offensive materials. This would improve enforcement and minimize libel that causes more harm than good.¹³³ Waiving the liability of content providers in fact disincentivizes them from taking precautions, which is reflected in inefficient enforcement.¹³⁴ In addition, content providers have deeper pockets than individuals in theory and, therefore, are better suited than the victim to reduce secondary costs by bearing the loss or spreading it on their users. An increase in administrative litigation costs should be expected, but imposing liability on content providers is better than the alternative of leaving the victim without a remedy. This alternative will not bring an efficient deterrence and may impose on the victim heavy secondary costs.

However, in-depth examination reveals that efficiency considerations fail to provide answers regarding the allocation of liability. When taking into account overall market characteristics, content providers are not the cheapest cost avoiders. Unlike traditional media, Internet content providers do not have the time or the resources to review and check every expression on their platform in real time.¹³⁵ Since user-generated content is great and existing models are based on extensive accessibility of information, liability would burden the rapid flow of information and free speech, thus

¹³² Secondary costs are the costs associated with bearing losses. See GUIDO CALABRESI, *THE COSTS OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS* 38 (1970). Significant losses borne by one person are more likely to result in secondary losses (arising from the initial damage) than allocating a series of small losses to many people, or large sum of losses to deep-pocketed entities. *Id.*

¹³³ See Elizabeth M. Jaffe, *Imposing a Duty in an Online World: Holding the Web Host Liable for Cyberbullying*, 35 HASTINGS COMM. & ENT. L.J. 277 (2013).

¹³⁴ See DANIEL J. SOLOVE, *THE FUTURE OF REPUTATION: GOSSIP, RUMOR, AND PRIVACY ON THE INTERNET* 159 (2007); Lichtman & Posner, *supra* note 129.

¹³⁵ For illustration, YouTube users now upload 100 hours of video every minute. See *supra* note 33.

harming aggregated wealth.¹³⁶ Therefore, the existing model should be preserved and the allocation of risks should fall on the victim's shoulders. Expanding responsibilities to content providers (third parties) is not desirable because the utility achieved by improving deterrence in the relevant market would be probably lower than its costs.

Imposing legal liability on content providers might not be necessary, since the reputation of a provider is damaged when a user disseminates defaming speech on their platforms. Reputation loss often translates into profit loss, fear of which might provide sufficient incentives for private ordering content review.

Allocating liability to content providers may also increase secondary costs of spread loss. Erroneous assessment of secondary liability risks may lead content providers to increase their service prices disproportionately. Content providers are not born equally, and they do not all have deep pockets. For example, it would be inefficient to impose liability on non-commercial providers. As noted above, allocating liability to content providers would cause an increase in legal action and rising administrative costs. These different considerations make it difficult to assess the most efficient allocation of liability.

c) Efficiency and Technological Innovation

In the digital age, I cannot discuss allocation of liability without referring to technological innovation. The liability regime taxes innovation and influences its course.¹³⁷ The expected liability outcome ex post facto influences investments in certain types of tech-

¹³⁶ New technology can filter some forms of speech automatically, but it is prone to making mistakes and sometimes over-filtering because expression depends on context. See Lital Helman & Gideon Parchomovsky, *The Best Available Technology Standard*, 111 COLUM. L. REV. 1194, 1234 (2011).

¹³⁷ Evidence shows that under liberal liability regimes, innovation thrives; too heavy of a burden of liability may stifle innovation. See Kyle Graham, *Of Frightened Horses and Autonomous Vehicles: Tort Law and its Assimilation of Innovations*, 52 SANTA CLARA L. REV. 1241, 1241 (2012); Gideon Parchomovsky & Alex Stein, *Torts and Innovation*, 107 MICH. L. REV. 285, 314 (2008); Guy Pessach, *Deconstructing Disintermediation: A Skeptical Copyright Perspective*, 31 CARDOZO ARTS & ENT. L.J. 833, 864 (2013). The liability regime may affect market innovation and social innovation. See Tal Zarsky, *The Privacy-Innovation Conundrum*, 19 LEWIS & CLARK L. REV. 115, 126 (2015).

nologies and the adopted business models,¹³⁸ both of which play an important role in determining efficiency.

One might argue that a liability rule enabling freedom and openness incentivizes entrepreneurs to invest in technological ventures and digital markets. Exempting content providers from liability would incentivize the development of many platforms and promote efficient diversity and optimal investment decisions. Stricter liability, however, might stifle innovation. It might impede the significant technological progress witnessed in recent years, including the increase in productivity and personal satisfaction.¹³⁹

Yet, a counter argument might point out that anyone who conducts business of any complexity must consult with a lawyer at some point regarding the liability risks. In some cases, despite formidable legal regulations, innovation continues. Thus, the concern of impeding innovation might be over-stated.¹⁴⁰ Since it is impossible to tell which technologies are abandoned due to the adopted liability rule, I would leave this question open without a conclusion.¹⁴¹

E. Interim Summary: From a Global to a Particular Regulation

The examination of various liability regimes in different countries reveals that they are either over- or under-inclusive. Allowing complete immunity to providers is difficult to defend, since it

¹³⁸ See Dotan Oliar, *The Copyright Innovation Trade-off: Property Rules, Liability Rules and Intentional Infliction of Harm*, 64 STAN. L. REV. 951, 1000 (2012); Pessach, *supra* note 137, at 864 (noting that YouTube's success was due to the copyright liability regime (notice-and-takedown)). By and in itself, such a regime does not prevent the popularity of a platform and the variety of popular copyrighted content that it hosts on the site.

¹³⁹ See ANUPAN CHANDER, *THE SILVER SILK ROAD* 57 (2013); Yochai Benkler, *Decentralization, Freedom to Operate & Human Society*, in *THE NEXT DIGITAL DECADE: ESSAYS ON THE FUTURE OF THE INTERNET* 257, 263 (Berin Szoka & Adam Marcus eds., 2011); Michael A. Carrier, *Copyright and Innovation: The Untold Story*, 2012 WIS. L. REV. 891, 942 (2012); *see generally* Chander, *supra* note 41.

¹⁴⁰ Alex Kozinsky & Josh Goldfoot, *A Declaration of the Dependence of Cyberspace*, in *THE NEXT DIGITAL DECADE: ESSAYS ON THE FUTURE OF THE INTERNET*, *supra* note 139, at 176.

¹⁴¹ See Carrier, *supra* note 139, at 893.

might be over-inclusive¹⁴² and might also cause disincentives for better behavior by those in the best position to minimize harm. Such immunity can foster irresponsibility, increase harm to reputation, and undermine the victims' freedom of expression.¹⁴³

Distributor-style negligence liability is over-inclusive.¹⁴⁴ It might cause over deterrence and undermine free speech, efficiency, and innovation. Negligence standards are open standards. Interpreting them involves cumbersome litigation and high administrative costs. In addition, courts are prone to decide inconsistently, and they might find it difficult to conduct cost-benefit analyses, resulting in uncertainty.¹⁴⁵ Negligence regime may also lead to hindsight and outcome biases, because reasonable action is normally decided after the fact.¹⁴⁶ Consequently, courts may conclude that the content provider had been negligent even if he could not predict the harm *ex ante* and acted reasonably. The end result of this regime might lead to a serious chilling effect of a defensive take-down policy, or switching off reader comments sections.¹⁴⁷

¹⁴² See Lichtman & Posner, *supra* note 129, at 28. Shifting the full costs of accidents to content providers' subscribers would inefficiently reduce their incentives to take care, even when the gravity of harm is high.

¹⁴³ See CITRON, HATE CRIMES IN CYBERSPACE, *supra* note 2, at 193–99; Citron, *Cyber Civil Rights*, *supra* note 2, at 119; Solove, *supra* note 134, at 159. With blanket immunity, content providers would have no reason to remove false material, or to collect and retain the identities of posters. As a result, defamatory posts remain online and often migrate across the web, while plaintiffs are unable to recover damages.

¹⁴⁴ These regimes may lead to heavy responsibility, including taking down harmful content before getting a complaint from victims.

¹⁴⁵ Guido Calabresi & Jon T. Hirschof, *Toward a Test for Strict Liability in Torts*, 81 YALE L.J. 1055, 1076 (1972).

¹⁴⁶ See Yoed Halbersberg & Ehud Guttel, *Behavioral Economics and Tort Law*, in THE OXFORD HANDBOOK OF BEHAVIOR ECONOMICS AND LAW 405, 412 (Zamir & Teichman eds., 2014); Baruch Fischhoff, *Hindsight Is Not Equal to Foresight: The Effect of Outcome Knowledge on Judgment Under Uncertainty*, 1 J. EXPERIMENTAL PSYCHOL.: HUM. PERCEPTION & PERFORMANCE 288 (1975).

¹⁴⁷ The ambiguity regarding liability in Europe has probably led many intermediaries to switch off reader comments. See *supra* Section I.C.2; see also Paul McNally, *Guardian Digital Chief: Killing Off Comments 'A Monumental Mistake'*, NEWS:REWired (Feb. 3, 2015, 10:32 AM), <https://www.newsrewired.com/2015/02/03/guardian-digital-chief-killing-off-comments-a-monumental-mistake/> [<https://perma.cc/6CFL-6NXS>].

Publisher-style strict liability would cause over-deterrence as well and would increase the cost of efficient conduct.¹⁴⁸ This liability regime is not suitable for online content providers;¹⁴⁹ and in fact, it would lead to a severe “chilling effect” in comparison to other regimes.

A safe-haven provision for entities that take specific precautionary steps (“notice and takedown”) is a compromise that offers many advantages. Under this regime, content providers do not have to filter content and are not liable to harmful content they were not informed about. Content providers who fail to remove harmful materials after notification are exposed to liability. This legal framework incentivizes content providers to implement private enforcement measures. However, this regime might result in the removal of any content in response to complaints, even if it is not defamatory. The chilling effect of this system may manifest itself in the form of a veto power granted to anyone who has an interest to silence speech, including legitimate criticism. And it may also promote mass censorship.¹⁵⁰ For example, rating and review websites would turn into praise websites under this regime, thereby making them irrelevant. As a result, consumers will probably lose an important and efficient tool in their decision-making process.

Technological and regulatory mechanisms may solve the abovementioned problems in various liability regimes: for example, imposing transparency obligations on content providers. These obligations would require providers to articulate the rules for filtering content. This strategy might decrease distortions caused by filtering and enable users to understand the extent of censorship. Subjected to transparency and disclosure, content providers might reduce unnecessary filtering in order to preserve their reputation as a

¹⁴⁸ Richard Allen Posner, *A Theory of Negligence*, 1 J. LEG. STUD. 29, 30 (1972).

¹⁴⁹ For these differences, see *supra* Section I.C.

¹⁵⁰ Niva Elkin-Koren, *After Twenty Years: Copyright Liability of Online Intermediaries*, in *THE EVOLUTION AND EQUILIBRIUM OF COPYRIGHT IN THE DIGITAL AGE* (Susy Frankel & Daniel J. Gervais eds., 2014) (referring to the problem in tangent context of copyrighted content and notes that empirical data collected over the past decade confirms this concern); Mark D. Quist, *Plumbing the Depths of the CDA: Weighing the Competing Fourth and Seventh Circuit Standards of ISP Immunity Under Section 230 of the CDA*, 20 GEO. MASON L. REV. 275, 280–81 (2012); Cecilia Ziniti, *supra* note 41, at 604–07.

rich market of ideas.¹⁵¹ In addition, rules might require content providers to implement mechanisms, which enable users to participate in regulation, such as interfaces for labeling and reporting harmful content.¹⁵² However, the efficiency of these measures is doubtful.¹⁵³

I believe that a single, overarching regime regulating content providers' liability cannot balance properly the above-mentioned normative considerations. It would be insensitive to different online contexts and lead to distortions and improper consequences. Instead, context-based regimes are more useful in this regard. Liability influenced by context has been recognized in legal thinking for many years, and perhaps it should be applied online as well.¹⁵⁴

¹⁵¹ Tal Zarsky, *Transparency in Content Filtering: A Plan of Attack*, 2 HEBREW U. L.J. LEGIS. 133, 158–59 (2010). On the importance of imposing transparency obligations on online intermediaries in a broader context, see FRANK PASQUALE, *THE BLACK BOX SOCIETY: THE SECRET ALGORITHMS THAT CONTROL MONEY AND INFORMATION* 59–101 (2015).

¹⁵² This type of moderation is ex-post organization. See Grimmelman, *supra* note 1, at 68.

¹⁵³ Transparency requirements might solve the problem of over-filtering because of content providers' private or commercial interests. However, these requirements do not solve the problem of over-filtering controversial topics due to the incentive of reducing liability risks. In addition, transparency requirements have limitations, and many scholars found that mandated disclosure is ill suited to this end. See OMRI BEN-SHAHAR & CARL E. SCHNEIDER, *MORE THAN YOU WANTED TO KNOW: THE FAILURE OF MANDATED DISCLOSURE* 33–59 (2014); Florencia Marotta-Wurgler, *Even More Than You Wanted to Know About the Failures of Disclosure*, 11 JERUSALEM REV. LEGAL STUD. 63, 63–74 (2015). Regarding mandated reporting and labeling options so that users may participate in regulation, this regime might improve regulation in some online contexts. However, in other contexts, it may increase distortions in information markets. A broad policy that relies exclusively on users recommendations to remove harmful content invites flame wars and flag wars, in which competing political activists flag the other sides' content as inappropriate. The result might be removing every non-consensual speech. See SIVA VAIDHYANATHAN, *THE GOOGLIZATION OF EVERYTHING AND WHY WE SHOULD WORRY* 39 (2011). On flagging harmful content on Facebook, which may lead to odd results, see RICHARDS, *supra* note 82, at 171–72; Kate Crawford & Tarleton L. Gillespie, *What Is a Flag for? Social Media Reporting Tools and the Vocabulary of Complaint*, NEW MEDIA & SOC'Y (2014).

¹⁵⁴ I noted in Section I.A that law distinguishes between different traditional intermediaries and applies nuanced context-based rules for regulating activities. In addition to the differentiation between commercial speech and political speech, it also grants different levels of protection to facts and opinions. See Burt Neuborne, *The First Amendment and Government Regulation of Capital Markets*, 55 BROOK. L. REV. 5, 28–29

In the following pages, I shall distinguish between online contexts and suggest different nuanced liability regimes, leading to an optimal balance between constitutional rights, fairness, economic efficiency, and technological innovation.

II. SOCIAL NETWORK PERSPECTIVE: STRONG TIES, WEAK TIES, SOCIOLOGICAL DISTINCTIONS, AND TYPES OF DISCOURSE

Since an overarching regime regulating content providers' liability is flawed, it is necessary to distinguish between the types of content providers and outline the possible differential liability regimes. I offer a descriptive taxonomy based on sociology rather than technology. It distinguishes online platforms based on the strength of ties formed within them.

A sociological analysis facilitates an understanding of social networks and the strength of ties formed within. It also helps to predict which online settings form strong ties. This new taxonomy serves as the first step towards applying a differential regime for regulating content providers liability, which shall culminate in a practical method to settle fundamental legal dilemmas.

A. A Basic Network Perspective: Towards a Contextual Taxonomy

Social networks seem to organize social life today.¹⁵⁵ They spread happiness, generosity, and love. They are always there, exerting both subtle and dramatic influence over our choices, actions, thoughts, feelings, and even our desires. Social networks can affect the full spectrum of human experience. The ties formed within them are crucial to understanding how networks function and the way information is shared and circulated within them.¹⁵⁶ Through

(1989); see also Musetta Durkee, *The Truth Can Catch the Lie: The Flawed Understanding of Online Speech in In re Anonymous Online Speakers*, 26 BERKELEY TECH. L.J. 773, 777 (2011).

¹⁵⁵ Manuel Castells, *Afterword: Why Networks Matter*, in NETWORK LOGIC: WHO GOVERNS IN AN INTERCONNECTED WORLD? 221 (2004).

¹⁵⁶ NICHOLAS A. CHRISTAKIS & JAMES FOWLER, CONNECTED: THE SURPRISING POWER OF OUR SOCIAL NETWORKS AND HOW THEY SHAPE OUR LIVES 7–9 (2009).

the prisms of social networks, a new understanding of social dynamics and information can be identified.

Network theory describes the relations between discrete objects: how they connect and how those connections are created, grow, and change.¹⁵⁷ Sociologists are concerned with social networks and their effect on communication patterns. Their focus is on the ties between individuals rather than what they think or do on their own.¹⁵⁸ These ties influence interactions and information exchanges between individuals. The strength of these ties range from weak to strong.

A few decades ago, researchers identified various ties of different strengths, mapping their features and meaning. Mark Granovetter, a pioneer in this field, laid the foundation for the distinction between strong and weak ties.¹⁵⁹ Strong ties are characterized by four factors: (1) time and duration of the relationship; (2) emotional intensity; (3) intimacy (social confiding); and (4) reciprocity. Each of these factors is independent of the other, though the set is intra-related.¹⁶⁰ The strength of ties influences characteristics of relationships and implicates information flows through them.

Weak ties are usually circumstantial and connect heterogeneous acquaintances from different social circles. Strong ties, on the other hand, usually connect homogenous individuals, characterized by social similarity and overlapping social circles. Different ties

¹⁵⁷ I focus here on social networks and sociological theory. On networks from the exact sciences perspective, see ALBERT-LÁSZLÓ BARABÁSI, LINKED: THE NEW SCIENCE OF NETWORKS 199-214 (2002); DUNCAN WATTS, SIX DEGREES: THE SCIENCE OF A CONNECTED AGE 43-68 (2009).

¹⁵⁸ BARABÁSI, *supra* note 157; CHARLES KADUSHIN, UNDERSTANDING SOCIAL NETWORKS: THEORIES, CONCEPTS, AND FINDINGS 27 (2011); LEE RAINIE & BARRY WELLMAN, NETWORKED: THE NEW SOCIAL OPERATING SYSTEM 42 (2012); Caroline Haythornthwaite, *Social Networks and Internet Connectivity Effects*, 8 INFO. COMM. & SOC'Y 125, 127 (2005).

¹⁵⁹ Mark S. Granovetter, *The Strength of Weak Ties*, 78 AM. J. SOC. 1360, 1361 (1973). A decade later, another study confirmed these conclusions. See Mark S. Granovetter, *The Strength of Weak Ties: A Network Theory Revisited*, 1 SOC. THEORY 201, 201 (1983). "The strength of weak ties" has become a canonical text in the study of social networks. *Id.*

¹⁶⁰ Alongside weak and strong ties, a network may contain intermediary ties. See Lior Jacob Strahilevitz, *Social Norms from Close-Knit Groups to Loose-Knit Groups*, 70 U. CHI. L. REV. 359, 365 (2003).

thus fulfill different functions. Weak ties are particularly instrumental. They function quite well at bridging non-overlapping information pools and facilitating searches for impersonal stand-alone information.¹⁶¹ Information carried through them is widespread. However, they are not a particularly successful means of transmitting complex personal knowledge. In contrast, information transmitted via strong ties might be complex and personal. It generally spreads less quickly, but is more accurate and credible.¹⁶²

B. *Sociology: Not Technology*

This Article focuses on digital networks. Yet, the proposed taxonomy is based on sociological analysis, rather than technology. At first glance, this strategy might seem surprising. A technology-based approach, imposing liability rules depending on technology, might appear more effective. However, this is not the case for three reasons. First, technology develops unexpectedly and changes faster than the legislative process.¹⁶³ A technology-based regulation is bound to become obsolete and might not fit the next innovation. The outcome would result with uncertainty and confusion. Second, a technology-based approach might have a negative effect on innovation and bar progress.¹⁶⁴ Third, a technology specific regulation might promote technological solutions that would circumvent statutory limitations.¹⁶⁵

¹⁶¹ Weak ties are particularly important in spreading gossip and news. The chief advantage of information diffusion through weak ties stems from the rapidity with which information is transmitted between different close-knit groups. See Lior Jacob Strahilevitz, *A Social Networks Theory of Privacy*, 72 U. CHI. L. REV. 919, 955 (2005).

¹⁶² See Strahilevitz, *supra* note 161, at 956.

¹⁶³ NICHOLAS CARR, *THE GLASS CAGE: AUTOMATION AND US* 40 (2014); Peter F. Drucker, *The New Society of Organizations*, HARV. BUS. REV., Sept.-Oct. 1992, at 95, 96 ("It is the nature of knowledge that it changes fast and that today's certainties always become tomorrow's absurdities.").

¹⁶⁴ See Michael Birnhack, *Reverse Engineering Information Privacy Law*, 15 YALE J. L. & TECH. 24, 39 (2013).

¹⁶⁵ For example, The U.S. recording industry's trade association sued Napster. See Zittrain, *supra* note 13, at 274. The lengthy litigation itself spawned a number of new technologies to fill in Napster's shoes, which resulted in a new round of lawsuits designed to stymie Napster's successors. See *id.*

The preference of the sociological approach is not arbitrary. On the contrary, applying social network theory to assist regulating speech torts is natural. In fact, there are significant justifications for preferring social context based taxonomy to any other classification. Speech torts are not committed in a vacuum. In most circumstances, we hear the social context of speech, as much as we understand the content of communication. Thus, defamation is often in the ear of the listener, depending on context.¹⁶⁶

Reliance on social contexts is rooted in defamation law.¹⁶⁷ When determining the level of damages, courts take into account the seriousness of defamation and the nature and extent of publication.¹⁶⁸ Other relevant factors include the prominence of the publication, the credence recipients ascribe to it and the parties' (speaker and victim) conduct.¹⁶⁹ These factors are fundamentally related to the structure of the network and social contexts of the flow of information. The strength of the social ties affects social structures and influences the perception of speech by the recipients. The speaker and recipient's conduct is also affected by social dynamics within the social network. Thus, the strength of ties affects the gravity of the harm to reputation.

¹⁶⁶ See, e.g., *Ollman v. Evans* 750 F.2d 970, 979 (D.C. Cir. 1984). The *Ollman* test requires consideration of a statement's precision, verifiability, literary context and social context when separating fact from opinion. See COLLINS, *supra* note 89, at 8.43–.55 (addressing the role of context in interpreting defenses); see also Brooks Fuller, *Evaluating Intent in True Threats Cases: The Importance of Context in Analyzing Threatening Internet Messages*, 37 HASTINGS COMM. & ENT. L.J. 37, 40 (2015) (noting the importance of context in interpreting a threatening Internet message); Rodney W. Ott, *Fact and Opinion in Defamation: Recognizing the Formative Power of Context*, 58 FORDHAM L. REV. 761, 762 (1990); Robert C. Post, *The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation, and Hustler Magazine v. Falwell*, 103 HARV. L. REV. 603, 640 (1990). Recently, the Supreme Court overturned a conviction regarding online threats, preferring narrow subjective interpretation of context. See *Elonis v. United States*, 135 S. Ct. 2001, 2016 (2015). However, this narrow approach stems from the focus on general criminal principles. See *id.*

¹⁶⁷ See COLLINS, *supra* note 89, at 6.29 (noting that the context in which the statement made is relevant in ascertaining whether it conveys defamatory meaning). Thus, even offensive, appalling, and outrageous statements may have no capacity to affect the attitude of others towards a claimant if those to whom they were published dismissed them as part of a rough tumble of the context in which they were made. See *id.*

¹⁶⁸ See *id.*

¹⁶⁹ See *id.* at 21.4–7.

C. *The Quality of Online Ties*

Networks have always existed, but the networks we form today exploit different tools and operate in a different environment. The triple revolution of the Internet, mobile phones, and social network sites upgraded our ability to stay in touch with one another. This revolution afforded new opportunities to form social ties, share ideas, form communities, and engage in diverse social dynamics anywhere, anytime.¹⁷⁰

After showing that strong ties can be formed online,¹⁷¹ sociologists characterized the factors that online ties depend on. Based on empirical studies and findings, Professors Gustavo Mesch and Ilan Talmud mapped three social factors affecting the quality of online ties: (1) social similarity (homophily); (2) duration of the relationship; and (3) multiplexity (different dimensions of relationship).¹⁷² Thus, online ties, similarly to offline ties, include many types of interactions and allow emotional support. Ongoing relationships generate a shared history, and they reinforce a sense of belonging, shared identity, as well as trust.¹⁷³

The Internet is not a monolithic medium. It consists of many platforms and different types of ties. Applying the social factors laid by Mesh and Talmud (similarity, duration, and multiplexity) enables one to predict the strength of ties formed in practice within different platforms and online contexts. Thus, platforms facilitating

¹⁷⁰ See CHRISTAKIS & FOWLER, *supra* note 156, at 275; RAINIE & WELLMAN, *supra* note 158, at 126.

¹⁷¹ See Sara Kiesler & Lee Sproul, *Reducing Social Context Cues: Electronic Mail in Organizational Communication*, 32 MGMT. SCI. 1492, 1497 (1986) (reaching the conclusion that the creation of strong ties is impossible online). On the other hand, many studies concluded that strong ties can be formed on the Internet. See, e.g., Richard L. Daft & Robert H. Lengel, *Organizational Information Requirements Media Richness and Structural Design*, 32 MGMT. SCI. 554 (1986); see also Miller McPherson, Lynn Smith-Lovin & James M. Cook, *Birds of a Feather: Homophily in Social Networks*, 27 ANN. REV. SOC. 415, 418 (2001). For an extensive review, see Gustavo Mesch, *Online Communities*, in HANDBOOK OF COMMUNITY MOVEMENTS AND LOCAL ORGANIZATION 227, 236 (Ram A. Cnaan & Carl Milofsky eds., 2007).

¹⁷² Gustavo Mesch & Ilan Talmud, *The Quality of Online and Offline Relationships The Role of Multiplexity and Duration of Social Relationships*, 22 INFO. SOC'Y 137, 137 (2006).

¹⁷³ Strahilevitz, *supra* note 161, at 952-53; Caroline Haythornthwaite, *Strong, Weak, and Latent Ties and the Impact of New Media*, 18 INFO. SOC'Y 385, 388 (2002).

anonymity require meeting unknown people constantly. These platforms hinder the potential for forming strong ties. In contrast, facilitating traceable pseudonymity enables an interaction with consistent personalities, with whom we can transact directly and carry out two-way conversations.¹⁷⁴ This option offers a potential for forming strong ties. The following discussion will outline an innovative taxonomy of digital conduct and conversation premised on the social factors mentioned above. Afterwards, I will apply the taxonomy to tort law.

D. From General Principles to Specific Application: A Contextual Taxonomy

Various applications, tools, and social platforms dominate the new online generation dubbed “Web 2.0.” This new generation relies on constant contributions and social interactions, and it encourages the flow of information.¹⁷⁵ Different strengths of ties have structured central junctures for information dissemination.¹⁷⁶ However, the context of the information and its dissemination vary depending on the technology used. Distinguishing between different strengths of ties is very important; but applying the sociological insights to the law is complex. Courts seem to lack the tools to distinguish between platforms based on the strength of ties on a case-by-case basis. They should not wait for a comprehensive sociological study on the ties formed in a specific platform. Drawing on sociological insights, I outline a descriptive innovative taxonomy of online platforms.

I believe that three different categories of platforms can be identified according to the strength of ties. The first is freestyle

¹⁷⁴ Grimmelman, *supra* note 1, at 76; Tal Z. Zarsky, *Thinking Outside the Box: Considering Transparency, Anonymity and Pseudonymity as Overall Solutions to the Problems of Information Privacy in the Internet Society*, 58 *MIAMI L. REV.* 1301, 1340–44 (2004).

¹⁷⁵ See CLAY SHIRKY, *HERE COMES EVERYBODY: THE POWER OF ORGANIZING WITHOUT ORGANIZATION* 81 (2008); Shmuel I. Becher & Tal Z. Zarsky, *E-Contract Doctrine 2.0: Standard Form Contracting in the Age of Online User Participation*, 14 *MICH. TELECOMM. & TECH. L. REV.* 303, 330 (2008).

¹⁷⁶ Strahilevitz, *supra* note, 161 at 956 (commenting that information dissemination through the wider society often depends on weak ties). However, there will be certain types of information that do not lend themselves to communication via weak ties. *See id.*

conversation, which is conducted in an open spontaneous format (such as message boards) without supervision and guidance. The platform is a juncture for information dissemination while the ties among the participants are weak. The second is peer production, which connects distant heterogeneous participants to a common goal by sharing and creating information in a decentralized peer based model. Most social ties in these platforms are weak. However, embedded technical interfaces allow the aggregation, the integration, and the review of the shared information. The third category is deliberation and structuring communities, which are created by specific users. This category carries out two-way conversations and can transmit complex and personal information. In this context, strong and intermediary ties may form.

This taxonomy focuses on central conversation types and does not purport to encompass all platforms or future platforms. Even if new online platforms evolve, the same methodology could still be used and assist in formulating proper liability rules. The analysis would map new conversation contexts adjusting them to the existing taxonomy, which would, in turn, determine the scope of liability.

1. Freestyle Conversation

“Mega scum bag! . . . Cockroach! . . . Someone who knows”¹⁷⁷ [routine and representative of many comments in freestyle conversation].

A popular type of online conversations is “freestyle.” It is spontaneous and immediate without central supervision and guidance. It is broadly accessible, and it is directed at a non-specific audience.¹⁷⁸ The platform offers an equal and non-hierarchical environment.¹⁷⁹ Often, a large number of speakers participate in a conversation, which is held in real time. In most cases, the conversa-

¹⁷⁷ See *Krinsky v. Doe*, 159 Cal. App. 4th 1154, 1159 (2008).

¹⁷⁸ See Roy Goldshmidt, *Talk-backs in the Israeli Public Discourse*, (Knesset Research and Info. Dep't, 2006); Yuval Karniel, *Defamation on the Internet: A New Approach to Libel in Cyberspace*, 2 J. INT'L MEDIA & ENT. L. 215, 216 (2009).

¹⁷⁹ The absence of constant pseudonyms prevents hierarchy. All participants are equal, and everyone can equally answer back.

tion is anonymous, and no registration is required to participate. Thus, most users use monikers rather than their real names or constant pseudonym. Every participant speaks at will, expresses himself in front of the general audience, and usually posts comments with little thought or preparation. At present, some content providers allow real name comments, by integrating social media plugins.¹⁸⁰ However, even in these situations participants comment freely, without constraints. The magnitude and frequency of comments affects the quality of conversation, and the information diffused is a mixture of facts and opinions.¹⁸¹

Freestyle conversation characterizes “talkbacks”—comments to an online article, especially in news sites; online message boards; websites devoted to public comments; and open-wide forums.¹⁸² Absence of significant mediation reinforces the spontaneous dimensions and increases the pleasure derived from participating.¹⁸³ Participants of these conversations are not professional reporters and are not subjected to ethical norms or disciplinary rules. They have no defined goals or commitments to other participants and do not form virtual communities.

a) Strength of Ties in Freestyle Conversation

Freestyle conversation is optimized to support weak ties. The formation of strong ties should not be assumed within this online setting. As illustrated below, this conclusion is consistent with the

¹⁸⁰ Currently, there are two classes of freestyle comments. See Brian Honigman, *6 Effective Ways to Integrate Social Media with Your E-Commerce Website*, SMB & E-COMMERCE TRENDS (Nov. 13, 2013), <http://blog.sumall.com/journal/integrate-social-media-e-commerce.html> [<https://perma.cc/AN5B-EQLM>]. The first is the traditional class of comments. This class is characterized by anonymity and absence of hierarchy. The second class is social based comments. Speakers are connected to their social networks profiles and participate via real names (ostensibly). In this case, speakers can delete their comments themselves after the fact. Some content providers define participants who respond frequently as “leading commentators.” See *id.*

¹⁸¹ SHIRKY, *supra* note 175, at 90; Goldshmidt, *supra* note 178; Grimmelman, *supra* note 1, at 72.

¹⁸² For example, see the comment sections of *The Boston Globe* and *The Delfi*.

¹⁸³ See Yaacov Hecht, *The Struggle for Supremacy in the Online Content Market the Case of Talkbacks*, ISRAELI INTERNET ASS'N (Nov. 2003), www.isoc.org.il/magazine/index.html [<https://perma.cc/Y5EL-5QD8>] (discussing the special nature of discussions in talkbacks).

factors laid by Mesch and Talmud (similarity, duration and multiplexity) for evaluating the strength of social ties. These factors will be discussed below.

First, with the similarity factor, conversation does not appeal to specific audience and participants are often random users. Furthermore, it is not characterized by in-depth discussions. The network of participants is very large and heterogeneous.¹⁸⁴ In cases where conversation is held anonymously, it is near impossible to characterize the participants.

Next, with the duration factor, conversation is spontaneous and held ad hoc, in the heat of the moment. It is characterized by immediacy and does not last long.¹⁸⁵ Furthermore, the number of participants is large.¹⁸⁶ It is also hard to evaluate the reputation of the participants in this setting.¹⁸⁷

Lastly, with the multiplexity factor, the conversation revolves around general topics (for example, comment to an online story). The content of conversation is impersonal and does not generate intimacy; the participants are not connected in multiple activities.

These characteristics affect the credibility attributed to the speech published in the various settings. They are perceived by Internet users as low-level and even weightless.¹⁸⁸ Surveys indicate

¹⁸⁴ In exceptional cases, when conversation has a specific and focused subject, the participants might be homogeneous. However, even in these cases, strong ties will not form due to the absence of the other factors: duration and multiplexity.

¹⁸⁵ Thus, participants post their comments, talkbacks, within comment sections right after the online story is published. The conversation is held ad hoc and, therefore, ongoing interactions are not expected.

¹⁸⁶ See SHIRKY, *supra* note 175, at 90 (noting that the number of participants implicates the potential for bi-directional conversation).

¹⁸⁷ The platform might define "leading participants" in cases of social-based comment systems, connected to social network profiles, and enable to track participation. See Strahilevitz, *supra* note 160, at 360. However, this definition cannot signal the value and quality of comments. See *id.* It only signals that the participant is generally active and posts comments frequently. See *id.* In light of these characteristics, intermediary ties are also not expected to form in this type of conversation. See *id.*

¹⁸⁸ See Karniel, *supra* note 178, at 216; see also Jacob Rowbottom, *To Rant, Vent and Converse: Protecting Low Level Digital Speech*, 71 CAMBRIDGE L.J. 355, 377 (2012) (referring to the case *Clift v. Clarke*). In *Clift v. Clarke*, two users of the defendant's website posted comments, which the court found to be flippant, unserious comments. *Clift v. Clarke* [2011] EWHC (QB) 1164 [36] (Eng.) ("The postings are in reality, it seems to me, no

that most Internet users do not read comments at all and conceive them as worthless.¹⁸⁹ This perception does not change even when commentators use their real identities. Despite the negative perception, this form of conversation has value in promoting free speech. The absence of strong ties among participants emphasizes the autonomy of the individual speaker and promotes self-fulfillment. In addition, freestyle conversation promotes the market of ideas and participatory democracy.¹⁹⁰ As noted above, information flows in freestyle conversations have been discussed in the legal literature¹⁹¹ and in judicial rulings.¹⁹² However, the focus was not on the strength of ties.

2. Peer Production

This was by far the worst experience I have ever encountered with a locksmith. Do not go through this company The gentlemen on the phone told me that a technician would be out ASAP and quoted me \$50 for the service After the technician finally showed up, he was trying to charge me \$35 for the service call and \$175 for the lock Call this business at your own risk. –Sara K.¹⁹³ [one of many diversified reviews on the famous review platform Yelp].

more than ‘pub talk,’ as it has sometimes been described, and I consider it fanciful to suggest any reasonable sensible reader would construe them in any other way.”). Similarly, in the United States, some courts considered this conversation as unreliable and, therefore, declined to unmask defaming anonymous speakers. *See Krinsky v. Doe 6*, 159 Cal. App. 4th 1154, 1175 (“In this case, Doe 6’s messages, viewed in context, cannot be interpreted as asserting or implying objective facts.”).

¹⁸⁹ A survey conducted by the Geocartography Institute found that most Internet users do not take an interest in online comments. Adar Shalev, *New Poll: Most Users Do Not Read Talkbacks*, YNET (July 11, 2007), <http://www.ynet.co.il/articles/0,7340,L-3468737,00.html> [<https://perma.cc/7BMK-QQ8X>].

¹⁹⁰ Freestyle conversations fuel rumors, but they also potentially promote the search for truth. They also facilitate information flows about government. This realm is equally accessible to everyone and encourages participatory culture. Thus, freestyle leads to the materialization of the constitutional right of free expression.

¹⁹¹ *See Karniel, supra note 178; Rowbottom, supra note 188, at 374, 377.*

¹⁹² *See, e.g., supra note 188.*

¹⁹³ *See Kimzey v. Yelp Inc.*, 21 F. Supp. 3d 1120, 1121–22 (2014).

In this form of communication, thousands of volunteers collaborate in sharing their contributions in a decentralized peer-based model, rather than on market- or hierarchy-based production. Information is formed and governed by participants, but each contribution is produced independently of the others.¹⁹⁴ This model depends on many heterogeneous individuals animated by diverse motivations.¹⁹⁵ An important advantage of this type of conversation is the ability to aggregate, accumulate, and integrate information from different sources at a low cost.

Technical interfaces embedded within platforms enable the integration of contributions from different sources. These systems, combined with the participants' efforts, facilitate reputation mechanisms and enable efficient judgment of quality, trustworthiness, and relevance. These mechanisms add weight to the text and reduce judgment biases.¹⁹⁶ They also allow users to see the overall market of ideas regarding specific issues.

Ubiquitous computer communication networks cause a dramatic change in the scope, scale, and efficacy of peer production throughout the information and cultural production systems. Thus, many online peer-production projects are formed.¹⁹⁷ Wikipedia, a multilingual encyclopedia coauthored by volunteers who create, edit, and correct entries on familiar topics, is one particularly effec-

¹⁹⁴ YOCHAI BENKLER, *THE WEALTH OF NETWORKS* 59–62 (2006) [hereinafter BENKLER, *WEALTH OF NETWORKS*]; TAPSCOTT & WILLIAMS, *supra* note 30, at 296; Yochai Benkler, *Coase's Penguin, or Linux and the Nature of the Firm*, 112 *YALE L.J.* 369, 426 (2002) [hereinafter Benkler, *Coase's Penguin*].

¹⁹⁵ For more on the importance of heterogeneity and diversity, see JEFF HOWE, *CROWDSOURCING: WHY THE POWER OF THE CROWD IS DRIVING THE FUTURE OF BUSINESS* 131 (2009); SCOTT E. PAGE, *THE DIFFERENCE: HOW THE POWER OF DIVERSITY CREATES BETTER GROUPS, FIRMS, SCHOOLS, AND SOCIETIES* 133–97 (2007); CASS R. SUNSTEIN & REID HASTIE, *WISER: GETTING BEYOND GROUPTHINK TO MAKE GROUPS SMARTER* 148 (2015).

¹⁹⁶ Online feedback mechanisms, such as on eBay, enable a better evaluation of information. These mechanisms, also known as reputation systems, are building trust among strangers and fostering cooperation in online marketplaces. See HOWARD RHEINGOLD, *SMART MOBS: THE NEXT SOCIAL REVOLUTION* 113, 126 (2002); Benkler, *Coase's Penguin*, *supra* note 194, at 390–96; Chrysanthos Dellarocas, *The Digitization of Word of Mouth: Promise and Challenges of Online Feedback Mechanisms*, 49 *MGMT. SCI.* 1407, 1418 (2003).

¹⁹⁷ See BENKLER, *WEALTH OF NETWORKS*, *supra* note 194, at 68.

tive example. Entries about breaking events appear almost instantly, and volunteers can correct any given error in Wikipedia in a heartbeat. This correction mechanism turns Wikipedia into a robust model of reasonably reliable information.¹⁹⁸

Many websites are based on peer-production models for aggregating and sharing information. Slashdot, a news-aggregating website, is a decentralized system for coproducing opinions and sharing knowledge on technology with hundreds of thousands of active users. The submissions are typically a link to an off-site story, coupled with commentary from the person who submits the piece. Slashdot facilitates peer recognition. In the comments section, it forms accreditation of peer review after the fact. Filtering and accreditation of comments on Slashdot are based on peer ratings of comments and allow users to filter out low quality comments. Together these mechanisms allow for distributed production of both relevance and accreditation.¹⁹⁹

Peer production is the economic engine of user-based review sites and rating services, such as Yelp²⁰⁰ and RateMyProfessors.²⁰¹ These platforms gather reviews, aggregate, and display them. They are commonly characterized by transparency, thus, participants can easily view recent activities on the site.²⁰² Crowd-sourced methods are typically in use to rank the reviews. These voting me-

¹⁹⁸ See *id.* at 71 (pointing out that the journal *Nature* compared forty-two articles from *Wikipedia* to the standard set by *Encyclopedia Britannica*, and the journal concluded that the difference in accuracy was not particularly great); JONATHAN L. ZITTRAIN: THE FUTURE OF THE INTERNET AND HOW TO STOP IT 137 (2008); Grimmelman, *supra* note 1, at 79.

¹⁹⁹ See BENKLER, WEALTH OF NETWORKS, *supra* note 194, at 76–77, 255; SLASHDOT, <http://slashdot.org> [<https://perma.cc/2Q6W-FWRU>] (last visited Mar. 4, 2016).

²⁰⁰ Yelp is a popular American website for customers' recommendations on small businesses. See YELP, <http://www.yelp.com> [<https://perma.cc/8S33-UJBD>] (last visited May 22, 2016).

²⁰¹ Rate My Professors is a peer-production platform for professor reviews and ratings based on student feedback. See RATE MY PROFESSORS, <http://www.ratemyprofessors.com> [<https://perma.cc/97HP-4V8C>] (last visited Mar. 1, 2016).

²⁰² For example, Yelp's homepage displays the recent reviews contributed to the platforms and allows other participants to disagree with them. On the importance of transparency for correcting errors, see BETH SIMONE NOVECK, WIKI GOVERNMENT: HOW TECHNOLOGY CAN MAKE GOVERNMENT BETTER, DEMOCRACY STRONGER, AND CITIZENS MORE POWERFUL 80–82 (2009).

chanisms enable participants to flag reviews as useful and credible. Furthermore, some review sites also enable participants to attach a list of users they rely on. These mechanisms and strategies enable participants to establish online reputation, improve the quality of contributions and allow a better evaluation of their credibility. Despite the nuanced differences between the platforms, all of them aim to achieve a similar goal: peer-production creation and the aggregation of information.

a) The Strength of Ties in Peer-Production Platforms

Peer-production conversation is optimized to support weak ties at best. The formation of strong ties cannot be assumed within this online setting. However, among clusters of repeat players, forming small-world networks within the network,²⁰³ intermediary ties might be formed. In the following Section, I shall discuss this method of communication, evaluating the strength of social ties that could be formed. Below, I will discuss the factors established by Mesch and Talmud in this peer-production context.

Regarding the similarity factor, the number of volunteers contributing to this type of conversation is large. It includes different participants characterized by variety of goals and motivations. In light of this, I conclude the network is heterogeneous.

With the duration factor, some peer-production platforms do not allow participation with constant user names. Consequently, opportunities for continuing interactions are denied and participants are unable to identify one another. Instead, they connect randomly. Other platforms enable registration and participation via pseudonym or real names; however, most participants are not repeat players.²⁰⁴ Conversations are held ad hoc, not directed at anyone in particular. Thus, it is not characterized by reciprocity or continuance. However, I would like to note that in some cases, core participants might contribute to the project regularly and generate

²⁰³ BARABÁSI, *supra* note 157, at 51; KADUSHIN, *supra* note 158, at 128; WATTS, *supra* note 157, at 54.

²⁰⁴ See SHIRKY, *supra* note 175, at 122. Most of the participants are one-time shooters, and every one adds a small contribution. However, within this “small world,” there might be repeat players.

opportunities for continuing interaction among themselves. These core participants constitute a “small world” of repeat players active on the platform that is not characterized by long-term interaction.²⁰⁵ This group might influence the overall interaction of the conversation medium.

Finally, with the multiplexity factor, conversation is focused on the topic of production rather than on diversified or personal topics. Since most users are not repeat players, there is a low probability for developing a personal dimension in the conversation.

I would like to reiterate in conclusion that strong ties are not likely to form in this type of conversation. When a platform allows participation via constant user names and bi-directional conversation, intermediary ties might form among repeat players. However, in the absence of similarity and due to the focus on specific production project, the formation of strong ties is not likely. Peer-production conversations are important for promoting free speech. Absence of strong ties among participants, combined with the platform’s features of aggregating heterogeneous contributions creates a de facto “market of ideas.” In addition, peer-production conversation promotes autonomy and democracy.²⁰⁶

3. Deliberation and Structuring Communities

Can’t believe what a snake my boss is . . . I know, I know everyone warned me . . . it’s hard to explain . . . basically, the MRI tech is getting paid for doing MRI even though he’s not registered and myself, nor the CT tech are getting paid for our

²⁰⁵ *Id.* at 212–24; KADUSHIN, *supra* note 158, at 66–67.

²⁰⁶ In addition to promoting the search of truth and free market of ideas, peer-production conversation reflects autonomy because every contribution reflects the beliefs of the individual volunteer who posted it. The promotion of democracy is another byproduct of peer-production conversation. In this conversation, individuals acquire a lot of information and are exposed to diverse opinions. This information might assist them in reaching decisions that are more efficient or criticize the government. This type of conversation also reflects participatory dimension since every volunteer contributing to the project shapes this realm and develops democratic culture.

areas And he needs to keep his creepy hands to himself –Sara DeBord²⁰⁷ [a post on Facebook].

Howard Rheingold, one of the pioneering sociologists of online culture, defined virtual communities as social aggregations that emerge from the Internet when enough people carry on public discussions long enough, displaying sufficient human feeling to form webs of personal relationships.²⁰⁸ Conversations whose foci are deliberation and structuring communities fit this definition. This category is not monolithic and incorporates several online communication channels. In general, this type of conversation is characterized by specific audience of repeat players, bi-directional communication, and ongoing interaction among participants. Platforms supporting this type of conversation normally allow registration via constant pseudonym or real names, and as a result, hierarchy among the participants might form. Conversation is characterized by mutual feedback and social approval. It revolves around specific topics or particular participants. This conversation type structures social relationships, reciprocal social norms, and trust. The Internet facilitates the formation of diversified social communities. The following are the three main categories of this conversation type: online forums, weblogs, and microblogs.

First, online forums allow conversations on specific topics and might be attended by hundreds of participants. Every participant may open a discussion or join ongoing conversations. In many forums, moderators and community managers assist in organizing and guiding discussions.²⁰⁹ Different forums appear to include different attributes and traits,²¹⁰ but all forums promote deliberations

²⁰⁷ DeBord v. Mercy Health Sys. of Kansas, Inc., 737 F.3d 642, 648 (10th Cir. 2013). The plaintiff in this case wrote a post claiming her boss corrupted and overpaid certain employees. *Id.* The claims regarding overpayment were investigated by human resources and found to be false. *Id.* at 649. The plaintiff tried to use this post to support a harassment claim, but failed. *Id.* at 655.

²⁰⁸ See generally HOWARD RHEINGOLD, *THE VIRTUAL COMMUNITY: HOMESTEADING ON THE ELECTRONIC FRONTIER* (2000).

²⁰⁹ They aspire to organize discussion, form stability, and guard the boundaries of community. See Karine Barzilai-Nahon, *Gatekeepers, Virtual Communities and the Gated: Multidimensional Tensions in Cyberspace*, 11 INT'L J. COMM. L. & POL'Y 1, 5, 15 (2006).

²¹⁰ There are different types of forums, such as conversation forums and support forums. Furthermore, different forums revolve around different topics, affecting the

and hold a potential of forming strong ties among community participants. Most of these online platforms require participants to register via constant name—real name or regular pseudonym. This enables the ongoing discussions of repeat players. The participants are interested in the same topic and tend to be relatively homogenous. Thus, intimacy within this conversation type is likely.²¹¹

Second, blogs (weblogs) consist of posts typically displayed in reverse-chronological order themed on a variety of topics and sub topics (personal experiences, news, politics, etc.),²¹² for different purposes and audiences.²¹³ Participants can read these posts, then comment and discuss their content. At first glance, it seems that the individual author is at the center and the blog focuses on him. However, a closer look reveals that blogs are normally characterized by regular and occasional commentators and function within a network of other blogs that link each other.²¹⁴ Thus, chains of blogs organize around specific topics and communities of interest.²¹⁵ This type of conversation platform is characterized by a con-

interaction. See, e.g., SUPPORTGROUPS.COM, <http://www.supportgroups.com/> [<https://perma.cc/3G2N-MBNV>] (last visited Mar. 4, 2016).

²¹¹ Studies have shown that a high degree of intimacy exists in support forums and, to a lesser degree, in conversation forums. See, e.g., Azy Barak & Orit Gluck-Ofri, *Degree and Reciprocity of Self-Disclosure in Online Forums*, 10 CYBERPSYCHOL. & BEHAV. 407, 407 (2007). Strong ties may form within online forums, and the interaction might even cross the virtual boundaries. See, e.g., RHEINGOLD, *supra* note 208, at xvi–xix (describing his social experiences at the WELL community).

²¹² Blogs are very popular worldwide, with more than 77% of Internet users reading blogs and more than 133 million blogs appearing in the Internet search engine “Technocrati.” See *Power to the People Social Media Tracker Wave 3*, UNIVERSAL MCCANN 3, 18 (2008).

²¹³ See generally Michael A. Stefanone & Chyng-Yang Jang, *Writing for Friends and Family: The Interpersonal Nature of Blogs*, 13 J. COMPUTER-MEDIATED COMM. 123 (2008) (describing blogs that are used for social purposes and the preservation of interpersonal relations). Another example is the political blog that challenges traditional media. See Thomas J. Johnson, Barbara K. Kaye, Shannon L. Bichard & W. Joann Wong, *Every Blog Has Its Day: Politically-Interested Internet Users’ Perceptions of Blog Credibility*, 13 J. COMPUTER-MEDIATED COMM. 100, 102 (2007).

²¹⁴ For example, the popular blog Daily Kos created a progressive political community. See DAILY KOS, <http://www.dailykos.com/diaries> [<https://perma.cc/J393-ASPR>] (last visited Mar. 1, 2016).

²¹⁵ Blogs usually link to similar blogs. See CASS R. SUNSTEIN, *REPUBLIC.COM 2.0* 146–50 (2007).

stant specific audience of readers and commentators, using their real names or regular pseudonyms.²¹⁶

Finally, alongside traditional blogs, microblogging services have evolved. Twitter is a prominent example of such a service. It is primarily directed to mobile devices. It allows users to post and read texts of up to 140 characters, known as “tweets,” and it updates users that choose to follow a particular person. Twitter functions as an online social network. It enables users to attach tweets, repeat them (“retweet”), share links, and foster social ideas. The immediacy and accessibility of the service have led to its proliferation.²¹⁷

Social networks are web-based services that allow individuals to (1) construct a public or semi-public profile within a bounded system; (2) articulate a list of other users with whom they share a connection; and (3) view and traverse their list of connections and those made by others within the system. The nature and nomenclature of these connections may vary from site to site.²¹⁸

The design and interfaces of the network has significant implications on the types of social interactions.²¹⁹ Members of social networks can generate ties of different strengths and are motivated to join these sites to connect with friends and strengthen ties with new acquaintances. Thus, many ties are formed because of mutual interests or shared activities.²²⁰ In contrast to online forums and blogs that revolve around certain topics and communities of interest, social networks are structured on personal—or “egocen-

²¹⁶ The blogger is a repeat player and has a constant identity, pseudonym, or real name. The commentators are usually composed of repeat players. The blog allows a blogger to form a more direct relationship with friends and new people. See Dario De Notaris, *Social Networks Sites and Life-Sharing*, 5 POSTMODERN OPENINGS 103, 110 (2011).

²¹⁷ See *id.*

²¹⁸ Danah Boyd & Nicole Ellison, *Social Network Sites: Definition, History, and Scholarship*, 13 J. COMPUTER-MEDIATED COMM. 210, 211 (2008); James Grimmelmann, *Saving Facebook*, 94 IOWA L REV. 1137, 1142 (2009).

²¹⁹ See IAN BROWN & CHRISTOPHER T. MARSDEN, REGULATING CODE: GOOD GOVERNANCE AND BETTER REGULATION IN THE INFORMATION AGE 118 (2013); Grimmelmann, *supra* note 218, at 1143.

²²⁰ Sebastián Valenzuela, Namsu Park & Kerk F. Kee, *Is There Social Capital in a Social Network Site?: Facebook Use and College Students' Life Satisfaction, Trust, and Participation*, 14 J. COMPUTER-MEDIATED COMM. 875, 876 (2009).

tric” — networks, with the individual at the center of his or her own community. This mirrors unmediated social structures more accurately, where the world is composed of networks rather than groups.²²¹ Persistent usage of these platforms amplifies users’ life satisfaction, reciprocity, social trust, and civic participation.²²² Social networks also allow the promotion of collective initiatives of civic value.²²³

As of today, the most prominent social network is Facebook.²²⁴ This social network is composed of regular repeat players, who are rather homogenous. Communication is bi-directional and applies to a regular, constant audience. Social networks are popular and relevant more than ever:²²⁵ new applications, developed for mobile devices, such as smartphones and tablets, allow constant extensive connection to social network platforms in real time, increasing their appeal and popularity.²²⁶

a) The Strength of Ties in Online Realms for Deliberation and Structuring Communities

Formats that promote deliberations and communities are optimized to facilitate strong ties. In the following Section, I shall demonstrate how the conditional factors for the formation of strong ties are reflected in this conversation’s characteristics. As conducted in

²²¹ See DANAH BOYD, *IT’S COMPLICATED: THE SOCIAL LIVES OF NETWORKED TEENS* 7–8 (2014); Boyd & Ellison, *supra* note 218, at 219.

²²² See Valenzuela, *supra* note 220, at 881.

²²³ Technical tools embedded within social networks, combined with motivation and social norms, have brought the promotion of public involvement, cooperation, and civic engagement. These tools enable the removal of barriers to collective action. For expansion on this point, see CLAY SHIRKY, *COGNITIVE SURPLUS: CREATIVITY AND GENEROSITY IN A CONNECTED AGE* 175 (2010).

²²⁴ See Grimmelman, *supra* note 218, at 1144.

²²⁵ Participation in social networks is the most popular activity on the Internet. See *What Americans Do Online: Social Media and Games Dominate Activity*, NIELSON (Aug. 2, 2010), <http://www.nielsen.com/us/en/insights/news/2010/what-americans-do-online-social-media-and-games-dominate-activity.html> [<https://perma.cc/M65G-2XVR>].

²²⁶ See RAINIE & WELLMAN, *supra* note 158, at 18; De Notaris, *supra* note 216. Application for mobile devices enables constant availability. There are also applications that form social networks aimed only for mobile devices, such as “WhatsApp.” However, in this case, the intermediary’s roles are different; they function as mere passive conduits, and their liability is beyond this Article’s scope.

previous Sections, I will evaluate the similarity, duration, and multiplexity factors in deliberation communities.

With the similarity factor, participants gather around specific topics, or particular individuals and social groups. They connect together and share common denominators. Consequently, homogeneity of users is likely to exist in this format.

With the duration factor, conversation is characterized by constant and repeat players. In most forums, registration is a condition for participation and this allows the identification of repeat players and facilitates ongoing conversations. As for blogs, the blogger is a repeat player and in most cases, a network of commentators forms around his posts, sorting into identifiable communities. Social network platforms allow individuals to construct a personal profile within the system. In most cases, this profile represents their real identity.²²⁷ Conversations are held by defined specific participants, apply to a particular audience and are characterized by repeat players. These characteristics enable bi-directional reciprocal communication and opportunities for repeat interaction.

Regarding the multiplexity factor, the conversation's topics are varied (personal, social, political, and cultural). Furthermore, conversations might expand to topics over time. In addition, similarity among participants and ongoing reciprocal conversation increase the likelihood for kinship and intimate discussions over the platform.

The special characteristics of this conversation platform allow the definition of collective goals and promote special aspect of free

²²⁷ Many social networks, including Facebook, require their users, within the terms of service, to construct a profile that reflects their real identity ("real name policy") and use their "real" offline names when interacting within this realm. *Statement of Rights and Responsibilities*, FACEBOOK, <https://www.facebook.com/terms> [<https://perma.cc/NT4L-6TTP>] (last visited Mar. 1, 2016) ("Facebook users provide their real names and information You will not provide any false personal information on Facebook The content provider has discretion to disable or delete profiles reflecting inaccurate personal information."). For expansion on identity intermediaries, see Zarsky & Gomes de Andrade, *supra* note 58.

speech in advancing democratic culture. As a byproduct, it also increases autonomy and promotes a free market of ideas.²²⁸

Table I summarizes the different kinds of conversation platforms in view of the strength of ties formed among their participants.

Table I: Summary of Online Conversation Platforms & Strength of Ties

<i>The Conversation Platform</i>	<i>Examples</i>	<i>Social Factors Affecting the Strength of Online Ties</i>			<i>The Strength of Ties</i>
		<i>Similarity</i>	<i>Duration</i>	<i>Multiplexity</i>	
<i>Freestyle</i>	*Talk-backs Comment sections in news sites The <i>Boston Globe</i> The Delfi web portal of Estonia	(-) Large and heterogeneous crowd of participants.	(-) A large crowd of non-specific participants. In most cases anonymous. It is hard to track repeat players. Speech is expressed ad hoc.	(-) General topics Not diversified Not personal	Weak ties at most
	*Bulletin boards Yahoo! Message board				
<i>Peer Production</i>	*Peer production projects consist of many small contributions of volunteers. Wikipedia	(-) Large and heterogeneous group of volunteer with diversified motivation	(+/-) Ongoing interaction might exist only among The “small world” of repeat players.	(-) The topic is focused on the peer production project It is not personal and not diversified.	Mostly weak ties There might form intermediary ties at the “small world of repeat players.
	*Platforms for co-producing opinions and sharing knowledge Slashdot *User review sites and rating services. Yelp				

²²⁸ This conversation platform promotes extensive opportunities for political expression and reflects the participatory level of free expression whereas it develops the culture. It also reflects the individual’s autonomy, as reflected in every speech. This discourse enhances information flows, brings to the surface new information, and enriches the market of ideas.

<i>The Conversation Platform</i>	<i>Examples</i>	<i>Social Factors Affecting the Strength of Online Ties</i>			<i>The Strength of Ties</i>
		<i>Similarity</i>	<i>Duration</i>	<i>Multiplexity</i>	
<i>Deliberation and Constructing Communities</i>	*Narrow Forums: Supportgroups+	(+)	(+)	(+)	Likelihood for Strong Ties
	*Blogs Daily Kos *Social Networks Facebook Twitter	Conversation Revolves around specific topic or specific individuals	Pseudonym or Real names. Specific audience. Bi-directional on-going communication .	Diversified topics that might be personal.	

III. CONNECTED: TIES, CONTEXTS, AND CONTENT PROVIDERS' LIABILITY TOWARDS A NEW MODEL

“Context has always been part of the expression, because expression becomes meaningless if the context becomes arbitrary Meaning is only ever meaning in context.”²²⁹

Speech over the Internet does not take place in a void, but rather in various contexts. Each context facilitates distinctive kinds of expressions, interactions, and activities among users.²³⁰ Differences among conversation platforms (“online social contexts”) influence speech. As I demonstrated above, the strength of ties implies on the scope of information diffusion and credibility. Based on the described taxonomy, I wish to propose a model of differential liability regimes. This model would distinguish between conversation platforms and different group contexts.

Studies proposed that courts should consider the online context when referring to liability for online speech.²³¹ However, they neither refer to the strength of ties nor do they outline clear distinctions between online contexts.²³² Their focus was not on content

²²⁹ JARON LANIER, *YOU ARE NOT A GADGET* 136 (2010).

²³⁰ See Durkee, *supra* note 154, at 777.

²³¹ Jacob Rowbottom, *To Rant, Vent and Converse: Protecting Low Level Digital Speech*, 71 *CAMBRIDGE L.J.* 1, 18 (2012).

²³² See *id.*

providers' liability.²³³ As far as I know, this is the first attempt to bind a descriptive social technological model, based on social contexts to normative legal structure.

While resting on social online contexts as a central factor for determining content providers' liability, we must also outweigh the nature of liability in every context. Liability is derived from several central factors related to balancing rights and interests at the base of speech torts. These factors depend on the social context formed in different conversation platforms. They are: (1) the gravity of harm; (2) private ordering (social norms that might mitigate or exacerbate speech-related harms); and (3) the victim's setting as internal or external to the conversation platform. Analysis reveals that different conversation platforms and different network settings embody different levels of harm. The likelihood for a successful private ordering also varies depending on these contexts. In addition, different aspects of freedom of expression are highlighted in different online contexts.

Context-specific regulatory regimes may provide courts a simple rule of thumb for defining content providers' scope of liability. This regime also grants content providers and entrepreneurs more certainty, which would facilitate efficient risk management *ex ante* and fairness *ex post facto*. I shall review these factors (gravity of harm, private ordering, and the victim's setting) in the following Sections.

A. Gravity of Harm

Defamation law already takes into account the gravity of harm. In determining the level of compensation, the law considers the nature and extent of publication, the degree of credibility recipients ascribe to it, and the parties' (both of the speaker and victim) conduct.²³⁴ The conversation platform affects the social network's context and the incorporation of these factors.

²³³ *Id.* at 19; *see also* CLERK & LINDSELL ON TORTS, *supra* note 100, at 1546 (noting that in the case of the Internet, words may take on a different interpretation because of the way people treat and react to bulletin boards); Durkee, *supra* note 154 (focusing on unmasking anonymous speakers).

²³⁴ *See* COLLINS, *supra* note 89, at 21.4-7.

First, conversation platform affects the nature of information it transmits. Alongside conversation platforms that facilitate searches for impersonal stand-alone information, other platforms allow transmitting complex detailed information. As conversation platforms facilitate flows of complex detailed information, greater harm might occur. Second, different conversation platforms affect information flows in varied ways. Conversation platforms' context formulates the social structures and the composition of participants in the social network. It also affects the characteristics of the audience (constant and particular or occasional) and the extent of publicity. Thus, conversation platforms might affect the likelihood of reaching the threshold for support and acceptance of speech and the choice to repeat it in a continuous chain of distribution. The more individuals evaluate information as credible and accept it, the greater the gravity of harm it might cause.²³⁵ Third, different contexts of conversation platforms affect the speaker's reputation within the network and the degree of credence recipients ascribe to it. As shown, in conversation platforms characterized by occasional participants, acquiring reputation is not likely. However, there are platforms characterized by repeat players where speech originates from a reputable source and is more reliable than anonymous speech. Thus, conversation platforms, which allow one to acquire reputation, might cause more extensive harm.

I conclude that different contexts of conversation platforms influence the scope of speech-related harm. The importance of regulating content providers' liability increases whenever the gravity of harm is extensive. Understanding social contexts and distinguishing between them allows a better recognition of circumstances

²³⁵ Conversation platforms, which allow the formation of strong ties, might lead to biases and informational and reputational cascades. These influences affect the likelihood of reaching thresholds for accepting the defamatory speech. See CASS R. SUNSTEIN, CONSPIRACY THEORIES & OTHER DANGEROUS IDEAS 15–20 (2014); CASS R. SUNSTEIN, INFOTOPIA: HOW MANY MINDS PRODUCE KNOWLEDGE 88–92 (2006) [hereinafter SUNSTEIN, INFOTOPIA]; CASS R. SUNSTEIN, ON RUMORS: HOW FALSEHOODS SPREAD, WHY WE BELIEVE THEM, AND WHAT CAN BE DONE (2009) [hereinafter SUNSTEIN, RUMORS]; Mark S. Granovetter, *Threshold Models of Collective Behavior*, 83 AM. J. SOC. 1420, 1433 (1978).

when harm is made. It also outlines a rule of thumb for regulating content providers' liability in these situations.

B. *Likelihood of Private Ordering*

Laws are not the most significant constraints on behavior. Alongside them, there are other regulating forces.²³⁶ As I have demonstrated above, traditional intermediaries have assumed codes of conduct on their own. The outlines norms are enforced in varied degrees of success.²³⁷ Private ordering and non-legal strategies are more important online. In this Section, I focus on private ordering from the bottom up.²³⁸ This ordering is formed in a distributed and transparent way among participants by social norms.²³⁹

In an online platform, the participants composing a social network commonly outline and enforce the social norms. This model was found to be effective in many contexts as attested in an important body of scholarship. Many studies have explored settlements of cooperation and private ordering in communities regulated by reciprocal social norms.²⁴⁰ They found that coordinated ordering might emerge through social norms.²⁴¹ Additionally, private ordering can be tailored specifically to the idiosyncratic needs and transactional challenges of a particular context and can lead to improved

²³⁶ See LAWRENCE LESSIG, CODE VERSION 2.0 120–137 (2006); BROWN & MARSDEN, *supra* note 219, at 7 (addressing four main factors for regulating a behavior: laws, social norms, markets, and code); Tal Zarsky, *Social Justice, Social Norms and the Governance of Social Media*, 35 PACE L REV. 138, 155 (2015) (referring to four models of government in social media: code, contract, law, and social norms).

²³⁷ See *supra* Section I.A.

²³⁸ On the differences between “top-down” private ordering by code and terms of services and “bottom-up” private ordering by social norms and on the benefits and shortcomings of public and private ordering, see Zarsky, *supra* note 236.

²³⁹ See Grimmelman, *supra* note 1 (referring to types of moderation: exclusion, price, organization, and norm setting).

²⁴⁰ See, e.g., ROBERT C. ELLICKSON, ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES 167 (1991); ELINOR OSTROM, GOVERNING THE COMMONS: THE EVOLUTION OF INSTITUTIONS FOR COLLECTIVE ACTION 74 (1990); Lisa Bernstein, *Opting Out of the Legal System: Extralegal Contractual Relations in the Diamond Industry*, 21 J. LEGAL STUD. 115, 138 (1992).

²⁴¹ See *supra* note 240.

efficiency.²⁴² Studies explain that actors are more willing to comply with norms they outline themselves rather than external rules.²⁴³ Thus, in many contexts, private informal regulation has been proven to be much more efficient than public ordering.

As I outline a model for regulating content providers' liability for speech torts, I wish to strike a proper balance between public and private ordering. One important guiding insight is that in some contexts, private ordering is sufficient, while in others, the law is required. Whenever efficient social norms apply within a conversation platform, formal public regulation is unnecessary.²⁴⁴ In these cases, formal regulation might even harm efficiency by "crowding out" intrinsic motivations for regulating interactions by social norms.²⁴⁵ However, when private regulation fails, formal public regulation should be required.

The context of a conversation platform and the strength of ties are closely linked to the internal social structures that may promote private ordering. Private ordering varies among conversation platforms. In some online contexts, social norms and the "wisdom of

²⁴² Private ordering relies on reputation, which can induce members of a specific community to comply at a relatively low cost in comparison to public ordering. See Avery Katz, *Taking Private Ordering Seriously*, 144 U. PA. L. REV. 1745, 1758 (1996); Barak D. Richman, *Essay: Firms, Courts, and Reputation Mechanisms: Towards a Positive Theory of Private Ordering*, 104 COLUM. L. REV. 2328, 2342 (2004).

²⁴³ YOCHAI BENKLER, *THE PENGUIN AND THE LEVIATHAN: HOW COOPERATION TRIUMPHS OVER SELF-INTEREST* 179 (2011); Elinor Ostrom, James Walker & Roy Gardner, *Covenants with and Without a Sword: Self-Governance Is Possible*, 86 AM. POL. SCI. REV. 404, 413-14 (1992); Richard R. Ryan & Edward L. Deci, *Self-Determination Theory and the Facilitation of Intrinsic Motivation, Social Development, and Well-Being*, 55 AM. PSYCHOL. 68, 69 (2000). Individuals tend to have an innate need for autonomy. They need to feel that they are in control of their own preferences. So, when they feel controlled by external rewards and punishment, their sense of autonomy may be threatened, and they tend to rebel by refusing to obey. In contrast, private ordering can preserve autonomy and bring more efficient obedience and enforcement at a low cost.

²⁴⁴ See Ryan & Deci, *supra* note 243, at 71-73.

²⁴⁵ The phenomenon of "crowding out" exists in particular when extrinsic incentives are enforced by sanctions, such as fines or punishments. However, this phenomenon also applies when the extrinsic motivation is positive, like in the case of rewards. See BENKLER, *supra* note 243, at 169, 173-74; SHIRKY, *supra* note 223, at 131-35; Edward L. Deci, *Intrinsic Motivation, Extrinsic Reinforcement and Inequity*, 22 J. PERSONALITY & SOC. PSYCHOL. 113, 118-19 (1972); Uri Gneezy & Aldo Rustichini, *A Fine is a Price*, 29 J.L. STUD. 1, 15 (2000).

the crowd” allow efficient private ordering.²⁴⁶ However, in other platforms, social context might bring to informational and reputational cascades, exacerbate speech harms, and undermine efficient private ordering.²⁴⁷

I shall explain the connection between the conversation platform and the likelihood of private ordering in detail below, focusing on two central dimensions. First, social context influences the potential to counter speech by victims and allow them to clear their names.²⁴⁸ Second, social context affects the participants’ composition and the social dynamics. I will demonstrate that some dynamics can mitigate speech related harms when participants oppose the defaming speech and correct it. In contrast, other social dynamics may validate the defaming speech and exacerbate speech related harms.

C. *Internal and External Victims*

In addition to the gravity of harm and likelihood of private ordering, I shall distinguish between two kinds of victims: the internal victim, a community member who chose to take part in a conversation and was defamed while interacting with other participants; and the external victim, an individual outside the social network, who was defamed in a conversation he did not take part in.²⁴⁹

²⁴⁶ See JAMES SUROWIECKI, *THE WISDOM OF CROWDS: WHY THE MANY ARE SMARTER THAN THE FEW AND HOW COLLECTIVE WISDOM SHAPES BUSINESS, ECONOMICS, SOCIETIES, AND NATIONS* 22 (2005).

²⁴⁷ Informational cascades are formed when individuals follow the statements or actions of predecessors and do not express their opposing opinions because they believe their predecessors are right. As a result, the social network does not obtain important information. Reputational cascades are formed because of social pressures. In these cases, people think they know what is right, or what is likely to be right, but they nonetheless go along with the crowd in order to maintain their status. See Cass R. Sunstein & Reid Hastie, *Four Failures of Deliberating Groups* (Univ. of Chi. Law School, Working Paper No. 215, 2008).

²⁴⁸ The idea of counter speech was established in the case of *New York Times Co. v. Sullivan*, 376 U.S. 254, 270. See also RICHARDS, *supra* note 82, at 37–39; Robert D. Richards & Clay Calvert, *Counterspeech 2000: A New Look at the Old Remedy for “Bad” Speech*, B.Y.U. L. REV. 553, 553–55 (2000).

²⁴⁹ For similar distinctions between inner and outer environments, see Tal Zarsky, *Law and Online Social Networks: Mapping the Challenges and Promises of User-Generated Information Flows*, 18 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 741, 774 (2008).

The victim's social setting, whether it is external or internal, affects the gravity of harm. Therefore, the setting should be taken into account when a model for content providers' liability is formulated. The severity of harm of an internal victim is lower than the external. An internal user might enjoy the protection of private ordering, unlike the external user, since he is an outsider to the social dynamic of the group. As a result, in this case, public regulation might be required.

An internal victim has participated in the conversation. Therefore, he can counter the defamatory speech immediately after its publication, thus restoring his image. He is aware of the social norms of conversation, so he can conduct an efficient self-risk management assessment regarding whether he wants to take part in a particular conversation. He can also decide to quit the conversation platform. Or, he can attempt to change and improve his social standing within the community.²⁵⁰ In contrast, an external victim would probably find out about the defamatory utterance long after publication. As a result, he would not have a fair opportunity to respond.²⁵¹ In many conversation platforms, participants do not have to use their real names.²⁵² Therefore, internal actors can control their exposure to risk by using pseudonyms.²⁵³ External victim, however, cannot control the level of exposure to potential damage to his reputation, which might extend beyond the specific conversation realm.

The likelihood for private ordering is also linked to the victim's setting; interpersonal and group dynamics might enhance regulation. Members of the community might publish rules regarding be-

²⁵⁰ See ALBERT HIRSCHMAN, EXIT VOICE AND LOYALTY: RESPONSES TO DECLINE IN FIRMS ORGANIZATIONS AND STATES 15 (1972). In organizations and communities, members respond by exiting when the organization demonstrates a decrease in quality (withdrawing from the relationship), or, alternatively, they improve the relationship through communicating a complaint.

²⁵¹ Delayed counter speech might not mitigate harm and can fail to restore the victim's reputation efficiently.

²⁵² Online social networks are usually an exception to this rule. See *supra* note 227.

²⁵³ Whenever internal actors use pseudonyms, the extent of harm is limited to the group context. Thus, even if the defamatory speech can be republished and diffused outside the specific group, it cannot be linked to his real name and identity offline.

havior, develop social norms, and enforce them to the benefit of internal users. Other participants might sanction participants who harm the community and infringe communal culture and norms.²⁵⁴

Thus, group contexts lead to self-governance and have a restraining effect. In contrast, the external victim does not belong to the community and the restraining social norms described above do not apply to him. In some contexts, social interactions within a community might have an adverse effect and even exacerbate his harm.²⁵⁵

This analysis leads to the following conclusion: whenever the severity of harm is low and there is a substantial likelihood for private ordering, formal regulations are unnecessary. Whenever discussions in a platform lead to severe harm alongside substantial likelihood for private ordering, it must be examined whether the harm can be mitigated in this fashion. One should take into account whether the victim was internal or external to the setting. In online contexts, which lead to successful private ordering, formal regulation is redundant.

D. Severity of Harm and Private Ordering in Light of Different Conversation Platforms

1. Freestyle Conversation

Freestyle conversation platform is characterized by weak ties; thus, the *potential of harm* is low. The information diffused in this realm is composed of small, stand-alone items, and it does not facilitate the diffusion of in-depth personal information. In contrast to peer-production platforms, this platform does not integrate infor-

²⁵⁴ These participants might experience gatekeeping. See Karine Barzilai-Nahon, *Gatekeeping in Virtual Communities: On Politics of Power in Cyberspace*, 6 HICSS-39 135 (2006).

²⁵⁵ Group identity motivates participants to identify and sacrifice their interests in favor of the group. However, there is a flip side; solidarity usually results in a mentality of “us” against “them.” Group members treat themselves differently than they treat outsiders. Solidarity among group members might lead to indifference towards others, xenophobia, and intolerance of strangers. Thus, a coherent group might unite against the external individual. See BENKLER, *supra* note 243, at 89–95; CASS R. SUNSTEIN, GOING TO EXTREMES: HOW LIKE MINDS UNITE AND DIVIDE 103–07 (2009); Samuel Bowles & Herbert Gintis, *Persistent Parochialism: Trust and Exclusion in Ethnic Networks*, 55 J. ECON. BEHAV. & ORG. 1, 2 (2004).

mation from different sources. *The audience* is non-specific; speech is not directed at defined recipients; and the platform forms a juncture for information diffusion. If a conversation is held anonymously, it might be impossible to identify participants. Heterogeneity of participants is also very likely. Even when participants use their real identity (when the content provider integrates social media plugins in the platform),²⁵⁶ conversation is still conducted ad hoc, and the audience is non-specific. Thus, it is unlikely that the participants will create a reputation for themselves.²⁵⁷

Information is disseminated to a large audience; however, participants are independent with no discernable hierarchy. Thus, it is unlikely that participants would organize an attack on a single victim. Since numerous comments are expressed in a short period of time, a specific comment is generally followed by many others. As a result, a specific defamatory comment is less public, and it is improbable that significant number of readers will access it.²⁵⁸ The seriousness of a specific defamatory expression in this context is weak.²⁵⁹ Moreover, in the absence of ongoing discussions and in light of the spontaneity and immediacy of speech, in-depth conversations are not held. Therefore, statements made within this conversation *are not considered credible*, they do not leave any real impression, and Internet users consider them insignificant.²⁶⁰

²⁵⁶ In Section II.D.1, I discussed social plugins that enable participants to express freestyle comments using their social network profile. *See supra* note 180 and accompanying text.

²⁵⁷ Commentators via social plugin build certain reputations when they interact in a social network platform. However, this reputation does not follow them to the freestyle conversation platform. Celebrities might be an exception because their general reputation follows them everywhere.

²⁵⁸ *See* Tamiz v. Google, Inc. [2013] EWCA (Civ) 68 [50] (Eng.).

²⁵⁹ Rowbottom, *supra* note 188, at 373 (noting that the focus should be directed at the audience of the platform, and also on the attention the comment will gain because multiplicity of comments obscures the attention to a specific defamatory comment and diminishes the gravity of harm).

²⁶⁰ *See* Karniel, *supra* note 178, at 233 (stating that talkbacks and chat rooms on the Internet do not leave any real impression); Shalev, *supra* note 189; *see also* Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt v. Hungary, App. No. 22947/13, Eur. Ct. H.R. 135 (2016): “For the Court, the expressions used in the comments, albeit belonging to a low register of style, are common in communication on many Internet

The possibility of causing harm in freestyle online conversation is marginal even to an *external victim*, whose identity is known, due to the superficial format, and low credibility ascribed to it. In addition, multiplicity of comments obscures the prominence of a specific defamatory comment.

The same goes to the *internal victim*, who takes part in the conversation (usually anonymously) and is offended by speech directed at him (for example, “to commentator 59”). The victim controls his online persona and can respond anonymously. The speech is not linked to his identity offline, and harm is usually limited to momentary discomfort. Even when participants use social plugins, commenting via social network profiles that reveal their real identity, they control their statements and can delete them after the fact to reduce harm.²⁶¹

Private ordering can repair the minor harm mentioned above. In these conversation formats, the victim can respond and mitigate the damage. The *internal victim* can respond immediately, correct the impressions formed by the defamatory statement, and clear his name.²⁶² In the absence of strong ties, this conversation format is characterized by a wide range of heterogeneous ideas which might serve as a counterweight for the defamatory speech by correcting it. Thus, readers would be exposed to diverse opinions. The *external victim* can also counter the defamatory statement if he learns about it soon after publication.

The attributes of this conversation format diminish concerns to severe violation of autonomy; defamatory statements should not lead to suppression of speech. Although speech in this format does not leave behind it significant impression, it has positive aspects in promoting the autonomy of the speakers and self-fulfillment. The minor harms and the likelihood for private ordering regarding both

portals – a consideration that reduces the impact that can be attributed to those expressions.” *Id.* at para. 77.

²⁶¹ In such cases, after the victim deleted his speech, although the defaming speech remains in conversation, it is detached from the full context and is considered meaningless.

²⁶² For the efficiency of the counter-speech doctrine, explaining that “bad speech” can be effectively countered or cured with more speech, see Richards & Calvert, *supra* note 248.

internal and external victims lead to the conclusion that the law should exempt content providers from liability for users' defamatory statements in this conversation format.

Exempting content providers from liability fits well with the normative considerations for liability and reflects a proper balance.²⁶³ Alternative liability standards that were discussed above²⁶⁴ do not lead to optimal balance among normative considerations. They would lead content providers to remove socially beneficial speech from their platform even though the harm is minor at most. The outcome would cause a chilling effect, injustice, and inefficiency.²⁶⁵ In view of this, exempting content providers reflects the optimal balance in this conversation platform.

2. Peer Production

In this conversation platform, the majority of participants are not repeat players, and weak ties connect them. However, at the core of this platform, "small worlds" might form, and in this particular clustering, intermediary ties might exist.²⁶⁶ This conversation platform embodies extensive severity of harm. The unique platform facilitates aggregation and integration of information from different sources and enables the *dissemination of complex in-depth information*.

The *audience* is extensive, even though the speech is not referred to specific recipients; however, discussions among the core

²⁶³ First, in light of the minor harm of this conversation platform, an exemption for content providers reflects the proper balance between the speaker's right to free speech and the victim's rights for speech and dignity, while enhancing autonomy and self-fulfillment. Second, an exemption for content providers of this conversation platform is justified by corrective justice because content providers do not cause speech-related harms themselves. In addition, the operation of platforms is just a background risk. Third, economic considerations also justify exempting content providers' liability in this conversation platform in light of the minor harm and the high prevention costs that exceed their benefits; deterrence through liability is inefficient. Innovation considerations justify exemption from liability and avoid hampering technological developments.

²⁶⁴ See *supra* Section I.E (discussing alternative liability regimes: notice-and-takedown, negligence, and strict liability).

²⁶⁵ See *supra* Section I.E (noting that other liability regimes cause over-deterrence and result in the removal of non-defamatory beneficial content).

²⁶⁶ For an explanation of the small world phenomenon, see *supra* Section I.D.2.

participants are bi-directional and refer to specific members. In this platform, discussions are not ad hoc but are held in unique environments for peer-production projects. Despite the absence of strong ties among participants, statements made in these conversation platforms are considered credible.²⁶⁷ This outcome is partly due to the technical interfaces. The architecture enables writing entries or submitting reviews on specific topics, the integration of contributions, and online feedback mechanisms affect the weight ascribed to statements in this conversation platform. This might lead to extensive harm for external and internal victims.

Although most participants aspire to contribute in peer-production projects and add credible information, some of them prefer their self-interest to the project's success and publish false defamatory statements. As to an *external victim*, the aggregation of information from many sources to a consolidated output that specifically refers to an identified victim can cause extensive harm. As studies emphasize, rating and review websites can have a big impact on the success—or failure—of a business.²⁶⁸ Thus, negative reviews about a specific business on a rating and review website are likely to bring customers to avoid its services, and this results in loss of economic opportunities. However, participants of this conversation platform are heterogeneous, each user acts independently from the other,²⁶⁹ thus creating a diverse “market of ideas.”²⁷⁰ As

²⁶⁷ Statements expressed in peer-production conversation are perceived credible. For instance, the journal *Nature* reviewed Wikipedia and found it was as accurate as the encyclopedia Britannica. See *supra* note 198. Review websites and rating services were also found credible. For example, Professor Lior Strahilevitz introduced findings, which showed that quality control often elicits helpful and reasonably accurate feedback. Professors' feedbacks correlate with scores on in-class student evaluations of teaching performance. See Lior Jacob Strahilevitz, *Pseudonymous Litigation*, 77 U. CHI. L. REV. 1239, 1247–50 (2010).

²⁶⁸ See ERIK BRYNJOLFSSON & ANDREW MCAFEE, *THE SECOND MACHINE AGE* 118 (2014); Michael Luca, *Reviews, Reputation, and Revenue: The Case of Yelp.com* (Harv. Bus. Sch., Working Paper No. 12-016, 2011). The number of stars a restaurant has on its Yelp profile closely correlates to the amount of business it receives. Consumers' reviews thus present a new way of disseminating information over the Internet, and they are becoming a substitute for traditional forms of reputation building.

²⁶⁹ Heterogeneity and the independence of speakers are kept in spite of the potential for intermediary ties among the core repeat players. In contrast to conversation platforms that facilitate strong ties, the peer-production platform is not characterized by

a result, the likelihood that the participants unite against one victim decreases.

Offensive defamatory statements might harm an *internal victim* in peer production projects. In some cases, participants even attack others personally and violate the platform's policy and terms of service.²⁷¹ However, most participants usually use pseudonyms and separate themselves from their real identity. Thus, the gravity of harm is limited to the internal setting.²⁷² Discussions on the peer-production project are neither personal nor multiplex. Furthermore, in light of the participants' heterogeneity, the likelihood that many participants unite against one victim decreases in this setting. Nevertheless, internal victims might bear emotional harm, and their reputation might be damaged within the community, although the gravity of harm is lower than the external victim's harms.

In this conversation platform, social forces facilitate private ordering. These forces mitigate harm and support the exemption of content providers from liability. In the absence of strong ties, peer-production conversation platforms contain a variety of ideas. In addition, technical interfaces within platforms (feedback and rating mechanisms), promote private ordering via "wisdom of the

homogeneity or personal discussions. It focuses on the peer-production project and the topic at hand. It is not characterized by multiplexity. Therefore, strong ties will not form even among the core repeat players. Intermediary ties are different from strong ones and will not exacerbate the gravity of harm. See generally Strahilevitz, *supra* note 160.

²⁷⁰ See, e.g., *Reit v. Yelp!, Inc.*, 907 N.Y.S.2d 411, 412-13 (Sup. Ct. 2010). In this case, a dentist's business Yelp page included favorable reviews alongside negative reviews. *Id.*

²⁷¹ In many peer-production platforms, content providers restrict their participants' behavior. See *Terms of Service*, YELP, <http://www.yelp.com/static?p=tos&country=US> [<https://perma.cc/XDM6-G5KL>] (last visited Mar. 2, 2016) ("You agree not to, and will not assist, encourage, or enable others to use the Site to . . . Threaten, stalk, harm, or harass others, or promote bigotry or discrimination."); *Policies and Guidelines*, WIKIPEDIA, http://en.wikipedia.org/wiki/Wikipedia:Policies_and_guidelines [<https://perma.cc/5RAC-KG2Z>] (last visited Mar. 2, 2016).

²⁷² To the extent that participants link their online identity with their real one (for instance, in cases when participants connect themselves to their real identity by registering to the peer-production platform via their real names), they choose to expose themselves to defamation risks. Furthermore, the risk of harm in this conversation realm is limited in view of heterogeneity and the focus on the peer-production project. The absence of strong ties implicates the gravity of harm.

crowd,”²⁷³ and allow efficient judgment of quality, trustworthiness, and relevance of content. In addition, the absence of strong ties reduces the likelihood of social pressures among participants. Thus, independence and diversity are maintained.

Private ordering mitigates the internal victim’s harms. Heterogeneity and independence of participants enable equal opportunity for a victim to counter defamatory speech. Furthermore, the participant’s commitment to the project incentivizes them to take part in private ordering and correct mistakes. Intermediary ties among members of the core of repeat players might facilitate a reciprocity dynamic, social monitoring, and enforcement. These dynamics enhance the potential of private ordering.²⁷⁴

Private ordering is also sufficient for protecting the interests of external victims. Although this type of victim cannot respond with counter speech in real time, social forces within this conversation platform mitigate the harm. More than a decade ago, a famous software engineer proposed: “Given enough eyeballs, all bugs are shallow.”²⁷⁵ Analogically, in the absence of strong ties and in view of the platform’s attributes, participants would correct errors in order to improve the peer-production project and outputs. They might even bring to the removal of defamatory statements on platforms.²⁷⁶ I shall illustrate below how some technological and sociological mechanisms improve social ordering of external and internal victims. To do so, I will refer to popular content providers of this conversation platform: Wikipedia and Yelp.

Wikipedia created its own policies, enforcement schemes, and norms,²⁷⁷ and well-functioning core members enforce social

²⁷³ See SUROWIECKI, *supra* note 246 (referring to four characteristics that make a group smart: diversity, independence, decentralization, and coordination).

²⁷⁴ See Elinor Ostrom, *Toward a Behavioral Theory Linking Trust, Reciprocity and Reputation*, in TRUST & RECIPROCITY: INTERDISCIPLINARY LESSONS FOR EXPERIMENTAL RESEARCH 19, 41 (Elinor Ostrom & James Walker eds., 2005).

²⁷⁵ ERIC S. RAIMOND, THE CATHEDRAL & THE BAZAAR: MUSINGS ON LINUX AND OPEN SOURCE BY AN ACCIDENTAL REVOLUTIONARY 19 (2001).

²⁷⁶ In some platforms, participants might bring the removal of harmful content by flagging it as offensive. See *supra* note 153.

²⁷⁷ See Zittrain, *supra* note 198, at 144.

norms.²⁷⁸ Private ordering mechanisms diminish the likelihood of severe harm for the internal victim. Participants can represent their controversial views on discussion pages. They can report impolite, uncivil, or other difficult communications on special notice boards.²⁷⁹ Moreover, Wikipedia has an official dispute-resolution system starting with talking to one another and commenting, following by mediation and ending with an arbitration committee.²⁸⁰ This committee can sanction participants who do not operate according to the norms and guidelines and may even ban members of the community who make life unpleasant for their fellow users and behave in an anti-social manner.²⁸¹ Technology facilitates enforcement and enables a ban of participants from editing certain articles or totally blocking their IP addresses. Enforcement mechanisms also diminish the likelihood of defamation or misinformation for external victims. Reciprocal monitoring within the vast community enables the publication of neutral undistorted entries that improve the project. In general, private ordering mechanisms on Wikipedia are efficient.²⁸²

²⁷⁸ Wiki tools do not govern themselves according to official private ordering process, but the social norms of the core repeat player and the peers' obligation to the project keep users in line. A Wikitorial experiment conducted by the *Los Angeles Times* failed even though it used similar Wiki tools. In this experiment, the conversation was "freestyle." See Grimmelman, *supra* note 1, at 87.

²⁷⁹ David A. Hoffman & Salil K. Mehra, *Wikitruth: Through Wikiorder*, 59 EMORY L.J. 151, 173 (2010) (detailing the guiding principles of Wikipedia).

²⁸⁰ This system performs two different functions simultaneously. First, it removes those who would destroy Wikipedia through their failure to abide by its norms. Second, it provides guidance to those who value Wikipedia as a community, but disagree as to proper conduct, so that they can coordinate their behavior within a common framework of norms and rules. *See id.* at 175.

²⁸¹ *See id.* at 194. Wikipedia is a divide between substance and process. It ascribes great severity for anti-social behavior more than violations of editing policies. The severe sanctions are reserved for anti-social behavior. As for the content, Wikipedia commonly trusts participants to correct mistakes. Thus, the sanctions for policy violations are usually less radical. *Id.*

²⁸² In cases where defamatory speech remains uncorrected, it is probably due to the fact that few people take notice of it. Thus, in these cases, harm is insignificant. For instance, a prankster had made an edit to the Wikipedia article about journalist John Seigenthaler, suggesting that he had been involved in the assassinations of John F. Kennedy. The statement is false but did not appear as vandalism. The article sat unchanged for four months until a friend alerted Seigenthaler to it. The defamatory expression would have been corrected if more people took notice of it. *See Zittrain, supra* note 198, at 138.

In rating websites and review services, the environment is less charged than it is on Wikipedia.²⁸³ Every participant can contest a review by writing a new review, describing a different experience. He can also use the option to “talk” and open a conversation about a particular review.²⁸⁴ The heterogeneity and independence of participants allow the successful use of counter speech. Moreover, participants can report offensive comments and the content provider may remove them.

In review websites, the rights of an external victim are protected by private ordering, and wisdom of the crowd mitigates harm. Diversified reviews are aggregated in one platform and allow a balanced market of ideas. Moreover, heterogeneity of participants enables efficient feedback by voting and reputation mechanisms.²⁸⁵ These private ordering schemes enable the website’s users to estimate a review’s credibility. The option to start “talks” also plays an important role in the external context. Participants can refer to particular reviews, express their opinion regarding their fairness and counter speech.

I conclude that in this conversation platform, social forces and the platform’s ability to aggregate diverse expressions facilitate a balanced conversation. They also promote efficient private ordering for both internal and external victims. In most cases, private ordering is an efficient method that can mitigate speech tort’s harms. The law, therefore, should exempt content providers from liability to speech related harms for both types of victims in this conversation platform. An exemption from liability would promote an efficient market of ideas and bring to optimal exercise of the right to freedom of speech in this conversation platform. This conclusion remains true even when there are only few participants.

²⁸³ In contrast to Wikipedia mechanisms, review website and rating services do not enable participants to edit other participants’ reviews. Thus, the likelihood for extensive disputes is relatively low. Additionally, in light of this platform’s architecture, reviews cannot be vandalized, as opposed to vandalism of entries in Wikipedia.

²⁸⁴ See *Talk*, YELP, <http://www.yelp.com/talk> [<https://perma.cc/DY2X-JN2K>] (last visited May 22, 2016).

²⁸⁵ The platform notes the number of reviews every participant wrote and the participants who trusts him. In addition, voting mechanisms facilitate efficient feedback by participants.

One might argue that in an environment with few users, private ordering might not be sufficient. However, few opinions do not reduce the efficacy of private ordering.²⁸⁶ Liability rules that exempt content providers are superior to other liability regimes. In this conversation platform, other liability regimes, such as notice-and-takedown, negligence, and strict liability, are far from ideal and negatively affect the quality of information products, undermining the purpose of these types of platforms. Hence, in this online context, exempting content providers from liability is the best alternative to other liability regimes.²⁸⁷ This conclusion is in line with the discussed normative considerations.²⁸⁸

3. Deliberation and Structuring Communities

In this conversation platform, the gravity of harm is extensive in light of the strong ties formed between participants. This conversation platform facilitates in-depth discussions and enables the dissemination of complex information. The participants are repeat players who deliberate among themselves. The audience characterized by homogeneity and their opinions are likely to be uniform.²⁸⁹

²⁸⁶ The fact that only few people participate does not undermine heterogeneity of participants and balanced responses. Additionally, when there are only few participants, the reliance on the information published material also decreases and the gravity of harm is relatively low. For instance, one uncorrected review affects less than many uncorrected reviews. Moreover, the fact that there are only few reviews might indicate that only few people use the website. Thus, the defamatory speech has less exposure.

²⁸⁷ Imposing liability on content providers would cause the removal of expressions from the platforms even if they are not defamatory. Content providers cannot determine whether expressions are true or false and whether they fall under defamation laws. Since they would like to limit their exposure to liability, content providers would take precautionary actions and remove expressions. This results in over-deterrence.

²⁸⁸ See *supra* Section I.D. Exemption of content providers from liability makes an ideal balance between free speech and dignity in this conversation realm. Exemption would reduce a possible chilling effect; the likelihood for private ordering mitigates harm to an individual's dignity and reputation. Hence, the exemption of liability balances constitutional considerations properly. Exemption of liability fits well with conservative theories of tort law. Content providers do not cause the defamatory expression. In light of private ordering, cost-benefit analysis also justifies exemption. This outcome will also promote innovation and development of advanced peer-production platforms without being concerned of liability. *Id.*

²⁸⁹ See SUNSTEIN, *INFOTOPIA*, *supra* note 235, at 9 (describing homogenous communities as "echo chambers" and self-reinforcing "information cocoons"). This

Consequently, continuing mass attacks directed at specific individuals is probable. The strength of ties and hierarchy among community members increases social pressure, and group dynamics might lead to extremism.²⁹⁰ These dynamics intensify the scope of defamatory speech and amplify the gravity of harm.²⁹¹ In addition, statements made in this conversation platform are considered credible. Strong ties among participants and continuing conversations among repeat players that gain personal reputation increase an expression's credibility relatively to anonymous interactions.²⁹² These characteristics lead to severe harm for specific individuals.

The potential harm to an internal victim because of violations of proper conversation norms is extensive. Even if we ignore the potential of mass attacks against a specific individual, the internal victim's emotional harm is more extensive than in other conversation platforms. The reasons are the strength of ties and the audience of the defamatory statements.²⁹³ In this conversation platform, most participants are repeat players. Defamation harm might be continuous, ruin the internal victim's reputation, and undermine his status within the community. However, in light of his ability to control his online reflection and identity, he can represent himself by a pseudonym before joining the platform. Thus, he can limit his harm only to the internal context. The ability to refrain from using one's real identity is an important policy consideration for not imposing liability on content providers when the victim

reciprocal reinforcement among community members facilitates powerful attacks, and the group's identity reduces self-awareness and self-control. See Tom Postmes & Russel Spears, *Deindividuation and Antinormative Behavior: A Meta-Analysis*, 123 PSYCHOL. BULL. 238, 254 (1998). Evidence of uniformity and homogeneity in this conversation realm were also found lately. For instance, mapping conversations in online social networks led to the conclusion that social networks lead to self-enforcement and polarization. See Gilad Lotan, *Israel, Gaza, War & Data*, MEDIUM (Aug. 4, 2014), <https://medium.com/i-data/israel-gaza-war-data-a54969aeb23e> [<https://perma.cc/M2SB-7WXR>].

²⁹⁰ See SUNSTEIN, *INFOTOPIA*, *supra* note 235, at 88–92; SUNSTEIN, *RUMORS*, *supra* note 235, at 21–27.

²⁹¹ See Grimmelman, *supra* note 218, at 1177.

²⁹² See Strahilevitz, *supra* note 161, at 964.

²⁹³ In conversation platforms that promote deliberation and communities, the audience of a defaming speech directed at an internal victim is composed of participants of his own virtual community. Because of the social ties between the victim and his surroundings, the gravity of harm is more extensive.

chose to reveal his real identity. In other words, one may argue that the victim has consented to the risk of harm, and there is a voluntary assumption of risk.²⁹⁴

An exception to this rule is social networks, where the practice is that participants reflect their real identity. Some social networks, such as Facebook, require registration and identifying in real names.²⁹⁵ One may argue that in these cases an alternative balance is required. However, a closer look shows this is not the case. When the rule is that participants reveal their real identity—the victim would be able to file a suit against the speaker who is directly responsible to harm and the justifications to content providers' liability weakens. The victim can be compensated, and the speaker could remove the defamatory speech, whereas in social networks, the participants themselves can delete their statements after the fact.²⁹⁶ Additionally, the victim can report to the content provider about the violation of terms of service whenever an individual do not reveal his real identity. In response, the content provider might remove the speaker's profile.²⁹⁷

²⁹⁴ See James Fleming, *Assumption of Risk: Unhappy Reincarnation*, 78 YALE L.J. 185, 196 (1968). This defense is limited in scope and will not apply to a bilateral level, in a suit between the victim and the speaker. Nevertheless, I think this principle should be applied in the context of third-party liability.

At this point, one can argue that considering the victim's ability to control his online persona as part of a model for legal liability conveys a normative message that it is inappropriate for individuals to reveal themselves and reflect their real identity online. The result of depriving remedies from these victims may encourage anonymity online. However, despite this outcome, I think that the principle of voluntary assumption of risk is appropriate. Anonymity has many positive implications. It enables participants to mitigate their risks and protect themselves in many contexts. Additionally, it facilitates self-disclosure. Concealing one's real identity does not necessarily harm civilized dialogs. In these cases participants are repeat players and the reputation of their pseudonym is important to them. Hence, it is likely that they fit in to acceptable social norms.

²⁹⁵ This practice is called "real names policy." See *supra* note 227.

²⁹⁶ In this context, I reviewed the legal regime in England, where the liability of content providers is residual. See *supra* Section I.C.2.a. I do not believe that a residual liability regime is ideal in every online context particularly because the content provider can remove the defamatory content, whereas the main remedy from the speaker is compensation. However, in the context of social networks this regime might be appropriate especially in light of the speaker's technical ability to delete his statements after the fact.

²⁹⁷ See Zarsky, *supra* note 58, at 1337 (referring to the possibility of removing or blocking profiles that do not reflect a real identity). See, e.g., *This Woman Changed Her Name Just*

The damage to the external victim is more extensive than the internal one. Strong ties among participants and their homogeneity affects the social dynamic of the group. It leads to solidarity within the group; yet, there is a flip side. It may lead to indifference towards outsiders, xenophobia, and intolerance.²⁹⁸ As a result, it is more likely that participants will unite against external victims.²⁹⁹ Thus, falsehoods may become conventional wisdom and cause severe harm. Unfortunately, this has occurred more than a few times.³⁰⁰

Nevertheless, it would be an oversight to conclude the discussion at this point. In this conversation platform, the likelihood for strong ties among participants is high. Strong ties form homogenous social structures that produce cohesion among participants. In this conversation platform, private ordering is extremely important. Private ordering can mitigate the damage and should affect the preferred liability policy. However, in this online platform, there is a gap in the manner external and internal victims are treated. As will be shown in the following Sections, the efficacy of clearing one's name depends on the social status of the user.

Users in internal settings appreciate the strong ties with other participants; they form homogenous social structures, which support continuing relationships and closeness. These structures promote empathy, solidarity, and considerable willingness to cooperate.³⁰¹ Strong ties between participants lead to social norms of reciprocity and trust. These norms preserve social control; and as a

So She Could Log in to Facebook, TIME (July 13, 2015), <http://time.com/3955056/facebook-social-media-jemma-rogers-uk/> [<https://perma.cc/QUQ3-84C4>].

²⁹⁸ For an explanation of the implications of a group's identity, see *supra* note 255.

²⁹⁹ See, e.g., *Hispanics United of Buffalo, Inc.*, 359 NLRB No. 37 (Dec. 14, 2012). A woman posted a status on her Facebook page criticizing a colleague's comment regarding her treatment of clients. *Id.* at *1. She called her fellow co-workers to comment, and four employees responded by posting messages objecting to the idea that their work performance was deficient and attacked the colleague that made the statement. *Id.*

³⁰⁰ See *Boston v. Atheran*, 329 Ga. App. 890, 890 (2014). On external victim's speech related harm, see CITRON, HATE CRIMES IN CYBERSPACE, *supra* note 2. Defamatory posts usually spread among like-minded participants. They can also cause defamatory comments, which support the original post, and exacerbate the external victim's harm.

³⁰¹ See BENKLER, *supra* note 243, at 89-92. The homogeneity and solidarity sustain cooperation.

result, they are normally more efficient than public formal ordering.³⁰² In most cases, community members conform to the shared values and social norms. They follow their own internal code, and they strive to achieve common goals.³⁰³ In addition, they also fear social sanctions.³⁰⁴ The internal victim is an integral part of the community. Being aware of the social norms of the conversation, he should decide accordingly whether he wants to take part in the conversation, in his attempt to clear his name. Or, he may opt to withdraw from the conversation and limit his damage.³⁰⁵

The external victim, in contrast, is disadvantaged by the social context, which increases the chances for unsuccessful private ordering. The participants may not remedy the damage, but might exacerbate it. Strong ties create group identity and an isolated community suspicious of outsiders. This context leads to polarization and enhances social pressures.³⁰⁶ It increases the likelihood that participants unite against the external victim.³⁰⁷ The likelihood for balancing comments to counter the defamatory speech is low. Consequently, the impression of the defamatory comments shall remain unilaterally negative. The likelihood for an external victim to clear his name by countering the defaming speech is negligible, since the victim is not part of the conversation. Even if the defamatory comment becomes immediately known to the victim, the social dynamic of the group limits his ability to counter the speech

³⁰² A large body of scholarship describes efficient private ordering and successful mechanisms for dispute resolution optimally adjusted to the needs of the group. The strength of ties actually isolates the group from other communities and allows an efficient self-government. Social norms allow private ordering and wealth maximization. See Ostrom, Walker & Gardner, *supra* note 243.

³⁰³ See BENKLER, *supra* note 243, at 20.

³⁰⁴ The members of the community function as gatekeepers. They cope with internal offenders who infringe communal culture successfully. See Barzilai-Nahon, *supra* note 254, at 6.

³⁰⁵ See HIRSCHMAN, *supra* note 250; SUNSTEIN, *supra* note 255, at 44.

³⁰⁶ Studies suggest that group polarization is more likely and is heightened when people have a sense of shared identity and belong to a tight-knit group or a club. Shared identities can be a breeding ground for both confidence and extremism. See SUNSTEIN & HASTIE, *supra* note 195, at 85–86.

³⁰⁷ See BENKLER, *supra* note 243, at 92–95; SUNSTEIN, *supra* note 255, at 107.

efficiently.³⁰⁸ As a result, private ordering in this setting is inadequate.³⁰⁹

I have reached the conclusion that participants' social norms and internal social sanctions mitigate the risks for uncontrolled harm to the internal victim. Thus, the potential for private ordering reduces speech-related damage. Additionally, the internal victim can control his online identity by using pseudonyms that would reduce the potential for harm. Alternative liability regimes might cause over-deterrence and result in a chilling effect. Top-down intervention might affect the social structure of the group changing the motivations in this type of conversation platform, which might crowd out the intrinsic motivations to comply with social norms.³¹⁰ In order to preserve the incentive to private ordering, the law should exempt content providers from liability for the damage caused to internal victims. Especially since the victim holds the option to file a civil suit against the direct speaker.³¹¹

The social context may increase the damage to the reputation of an external victim. Due to social dynamics and the failure of private ordering, the law should not allow an overall exemption to content providers. Instead, the optimal liability regime in this online setting is notice-and-takedown. This rule allows content providers to benefit from relative certainty. By removing defamatory

³⁰⁸ When a group is homogenous, it may hold a prejudice regarding the credibility of a corrective statement, which may in fact backfire, by increasing people's commitment to original defamatory statement. See Edward Glaeser & Cass R. Sunstein, *Does More Speech Correct Falsehoods?*, 43 J. LEGAL STUD. 65, 68 (2014).

³⁰⁹ The participants unite against the victim, resulting in an imbalanced dissemination of information. For example, this private ordering limitation is reflected in hate group pages on Facebook. These groups spread falsehoods, inspire hate, and send powerful message to readers. In these cases, the external victim does not stand a chance to counter speech equally. See Danielle Keats Citron & Helen Norton, *Intermediaries and Hate Speech: Fostering Digital Citizenship for Our Information Age*, 91 B.U. L. REV. 1435, 1447-48, 1450 (2011).

³¹⁰ In many cases, complying with social norms is derived from the community's desire to preserve its independence. See Barzilai-Nahon, *supra* note 254, at 6. For expansion on crowding out, see *supra* note 245.

³¹¹ If the victim proves his claims in court, the content provider will remove the defamatory speech according to the decision. Currently content providers are not bound by court decisions against direct speakers. See *Blockowicz v. Williams*, 630 F.3d 563, 569 (7th Cir. 2010). I believe that in this conversation realm, the result should be different.

content from their platforms after receiving a complaint, they would be exempt from liability.

A notice-and-takedown regime is superior to negligence-based regime. Applying negligence-based regime in this context is possible, but at a cost. Under negligence, content providers might be held liable even if they did not receive notice regarding a defamatory statement; instead, they might be held liable if they have failed to anticipate and prevent the damage. A negligence-based regime results in a legal ambiguity regarding the required liability standard. It might be difficult for content providers to anticipate a court's interpretation of the tort—through negligence, casual connection, and policy considerations—and as a result, they would be unable to predict the scope of their liability. This legal ambiguity would lead to a defensive strategy that may limit free speech disproportionately. Therefore, a notice-and-takedown regime is superior and sets better balances between free speech and dignity. The conclusions outlined by the model regarding both categories of victims are in-line with the reviewed normative consideration.³¹²

Table II below summarizes the model and the liability regimes for regulating content providers.

³¹² Exempting the liability of content providers from the damage caused to internal victims and applying a notice-and-takedown regime for external victims sets the optimal balance between constitutional rights and speech torts. Social norms and the ability of the internal user to counter speech mitigates the damage; therefore, in this setting, exempting content providers from liability is desirable and prevents a disproportional chilling effect. The external victim's damage is exacerbated by social dynamics. Therefore, a different balance should be found for this setting. A notice-and-takedown regime is a proper balance. Corrective justice justifications also support this conclusion, since the content provider did not cause the damage to the victim; the operation of the platform is only a background risk. It might appear as if a notice-and-takedown regime does not fit well with corrective justice justifications. Yet, this liability regime outlines a conditioned exemption. Therefore, this regime is not contradictory to corrective justice justifications. These rules are also efficient economically. The costs of prevention of the proposed rule to internal victims are relatively low in relation to the damage. However, the severity of damage to the external user may be extensive. Therefore, from the perspective of cost-benefit analysis, deterrence might be more efficient. Exempting content providers would reduce liability risks and incentivize innovation. It might appear as if a notice-and-takedown regime would stifle innovation and might even deter entrepreneurs from developing platforms, but this is doubtful. Proportional liability would not impede the development of these platforms as long as profits can be generated from such settings.

Table II: Summary of the Model

The Conversation Platform	The Strength of Ties	Severity of Harm		Private Ordering		Content Providers' Liability	
		Internal Victim	External Victim	Internal Victim	External Victim	Internal Victim	External Victim
Freestyle Conversation	Weak ties, at most	(-)	(-)	(+)	(+)	(-)	(-)
		Marginal harms, Stand-alone expressions Heterogeneous one-time Participants, Low credibility, Immediate & spontaneous, Mostly anonymous, Only few readers	Marginal harms, Stand-alone expressions Heterogeneous one-time participants, low credibility, immediate & spontaneous, mostly anonymous, only few readers.	Market forces Variety of opinions, countering speech with more speech	Market forces Variety of opinions, countering speech with more speech	Exemption from liability	Exemption from liability
Peer Production	Mostly weak ties; Intermediary ties among core participants form "small worlds"	(+)	(+)	(+)	(+)	(-)	(-)
		Intermediary gravity of harm; detailed in-depth information; heterogeneous participants; mostly one time players; credible information; on the other hand, conversation is not focused on personal information and most participants do not use their real identity thus harm is limited.	Extensive gravity of harm; the platform aggregates information to a complex product; heterogenous participants; mostly one time players; credible information; the defaming statements are directed towards the victim's real identity.	Heterogeneous balanced conversation Formal or informal dispute resolution mechanisms Reciprocal social control	Heterogeneity and Diversity brings to a balanced outcome Correction by other participants Feedback and Reputation mechanisms	Exemption From liability	Exemption From liability

<i>The Conversation Platform</i>	<i>The Strength of Ties</i>	<i>Severity of Harm</i>		<i>Private Ordering</i>		<i>Content Providers' Liability</i>	
		<i>Internal Victim</i>	<i>External Victim</i>	<i>Internal Victim</i>	<i>External Victim</i>	<i>Internal Victim</i>	<i>External Victim</i>
<i>Deliberation and Structuring Communities</i>	Potential for strong ties	(+)	(+)	(+)	(-)	(-)	(+)
		Extensive gravity of harm. In-depth information, Homogeneity Repeat players, Credibility. Emotional harm. However, the harm for participants who choose not to reflect their real identity would be limited.	Extensive gravity of harm. In-depth Information, Homogeneity Repeat players, Credibility. Mass attacks against specific victims, Informational and reputational cascades.	Private ordering by social norms within the community Awareness of victims to social norms and self-risk management	Strong ties result in social pressure and informational and reputational cascades that exacerbate harm Failure of private ordering	Exemption From liability	Notice and Take-down regime

E. The Proposed Model and Law: Bridging the Gaps

The proposed model outlines context-specific liability regimes for content providers. These liability regimes take into account the severity of harm, the potential for countering social forces, private ordering, and the victim's setting (internal or external) in every conversation platform. It offers an optimal balance between free speech and reputation. This model refrains from utilizing a negligence liability regime and promotes a free market of ideas. Yet, the model attempts to mitigate a victim's harm whenever severity is extensive and private ordering is lacking.

The current law provides an extensive shield for content providers' immunity to civil liability for speech torts. Therefore, courts neither account for context-specific considerations nor distinguish between conversation platforms. This overall immunity scheme was constructed when the web was in its infancy. As the

web matures, this regime must be reconsidered and refined. An overall analysis points at deliberation and community platforms as a crucial juncture where change in the current legal infrastructure is needed.³¹³ Such a change will likely call for amending the relevant law, such as § 230 of the CDA. This would be done by adding an exception to the immunity by outlining a notice-and-takedown regime for external victims harmed by speech in conversation platforms aimed for deliberations and communities. In these online settings, courts would have the discretion to deny motions to dismiss, allowing lawsuits to proceed from the preliminary stages if the content provider did not remove the defamatory speech after receiving proper notice.

Enabling court discretion in regards to external victims would allow a legal flexibility to an ever-changing setting. This proposal offers content providers the benefit of relative certainty without undermining the value of immunity. It would also enable courts to adjust to changing social contexts, resulting in fair and just outcomes. This model will not cause a legal revolution because today secondary liability lawsuits against content providers advance beyond the preliminary stages.³¹⁴ For example, there are plaintiffs that bypass § 230 of the CDA by raising direct and contributory claims that exceed a trivial secondary liability framework.³¹⁵ In

³¹³ This change is needed given the high risk of potential damage and the low chance for countering social forces and private ordering.

³¹⁴ Today, more than a third of the claims already survive a § 230 defense. *See Ardia supra* note 62, at 493.

³¹⁵ For instance, plaintiffs here might bring contractual claims, failure-to-warn claims, and even fraud claims. *See Doe No. 14 v. Internet Brands, Inc.*, 767 F.3d 894, 895 (9th Cir. 2014), *reh'g granted, opinion withdrawn*, 778 F.3d 1095 (9th Cir. 2015) (basing their claim on negligence theory); *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096 (9th Cir. 2009) (basing her claim on a contractual claim); *Moore v. Angie's List, Inc.*, 118 F. Supp. 3d 802, 807 (E.D. Pa. 2015) (basing their claim on fraud). In addition, I would like to note that some lawsuits regarding content providers' liability for speech-related torts are not barred on preliminary stages in light of courts' interpretation of the terms "creation" and "development of information" in § 230 of the CDA. Thus, content providers are already exposed to liability risks when plaintiffs file claims based on direct or contributory liability theories. These claims exceed this discussion, since I focus on secondary liability. Immunity is, therefore, very broad, but not hermetic. *See Fair Housing Council v. Roommates.com, LLC.*, 489 F.3d 921, 932 (9th Cir. 2007), *rev'd en banc*, 521 F.3d 1157 (9th Cir. 2008) (concluding that the content provider developed content by designing

some of these cases, the value of immunity is undermined. In stark contrast, the model I propose here outlines specific guidelines that do not cause liability ambiguity, yet they are not revolutionary. From a normative perspective, the proposed framework brings to an optimal balance between constitutional rights, leads to more just results, and promotes efficiency and innovation.

F. Addressing Criticism and Objections to the Proposed Model

The model exempts content providers from secondary liability to speech-related torts in freestyle and peer-production conversation platforms. It also exempts content providers from the liability for the damages caused to the internal victim in deliberation and community platforms. External victims, however, will be protected by a notice-and-takedown regime. After drawing out this context-specific framework for content providers' liability, the following Sections will acknowledge several objections to the model and will address challenges arising from the proposed model and respond them.

First, a possible outcome of the notice-and-takedown liability regime is that entrepreneurs would focus their investments in freestyle and peer-production ventures. In order to minimize liability risks, they might refrain from investing in deliberation and community platforms, which is an undesirable outcome.

This possibility, however, is not realistic because of the business model of such websites. Most content providers are guided by economic considerations and profits garnered by advertisements on their sites.³¹⁶ These conversation platforms are magnets of online

discriminatory drop-down menus); *see generally* Jones v. Dirty World Entm't Recordings, LLC, 965 F. Supp. 2d 818 (E.D. Ky. 2013), *rev'd and vacated*, 755 F.3d 398 (6th Cir. 2014) (demonstrating that even though the content provider was ultimately exempt from liability, the litigation was extensive and passed through number of courts).

³¹⁶ Content providers compete for viewers' eyeballs and aim to profit from commercial advertisements on their platform. Today, technology enables advertisers to know how many eyeballs viewed the advertisements. It can also customize content. Content providers can display advertisements related to the content on their websites. They can also target advertisements to particular Internet users. These advertisements may be generated based on the user's history, his preferences, his location, and the composition of his social network. Content providers gain more profit from advertisements as users pay attention to them and engage with click-through advertising. The success of online

participation. Participants of these platforms are homogenous and tend to be repeat players that are interested in certain subjects. These characteristics allow targeting advertisements efficiently.

Advertisers can utilize these characteristics including the power of social influence and context in advancing their aims. Therefore, they would pay higher prices for advertising in these platforms. In order to attract more users and garner more profits, cost-benefit analysis would bring content providers to invest resources in dealing with complaints and removing defamatory content, or else they would expose themselves to liability. They will not refrain from investing in these platforms.³¹⁷ This analysis does not apply to non-commercial content providers, but non-profit sites are normally driven by ideology and would not forgo their investment just because of this exposure, since the liability is limited. Thus, non-commercial content providers should not lose their incentive to invest in their platform, nor should the regime cause a chilling effect to their innovation.

The second objection might be raised in a jurisdiction governed by different laws.³¹⁸ One might argue that exempting content providers from liability in freestyle and peer-production conversation platforms is undesirable. This regime might disincentivize voluntary regulation by content providers. It would allow users to disseminate defamatory speech irresponsibly without interference.³¹⁹

I believe that such concerns are excessive. In many cases, the motive for voluntary regulation by content providers is economic

advertising depends on the degree of customer acceptance and corresponding click-through rate. See JOSEPH TUROW, *THE DAILY YOU: HOW THE NEW ADVERTISING INDUSTRY IS DEFINING YOUR IDENTITY AND YOUR WORTH* 102 (2012); Yung-Ming Li et al., *Enhancing Targeted Advertising with Social Context Endorsement*, 19 INT'L J. ELECTRONIC COMM. 99, 99–128 (2014); see generally NICHOLAS CARR, *THE BIG SWITCH: REWIRING THE WORLD, FROM EDISON TO GOOGLE* 57–154 (2009).

³¹⁷ A comparative overview proves that Facebook flourishes even in legal systems that do not provide immunity to content providers, such as in Germany and Israel. See Zarsky, *supra* note 236.

³¹⁸ In Europe and Canada, other regimes regulate content providers' liability. These regimes apply to all conversation platforms and are not tailored to a specific context. See *supra* Section I.C.

³¹⁹ See CITRON, *HATE CRIMES IN CYBERSPACE*, *supra* note 2, at 193–99 (criticizing the immunity regime in general); Citron, *Cyber Civil Rights*, *supra* note 2, at 119.

and not driven by legal considerations. In other words, they voluntarily regulate defamatory content as part of their business model. They are motivated by concern about the potential business, moral, and instrumental costs of digital offensive speech, and they see this speech as a potential threat to profit. Other content providers are motivated to address offensive speech based on their sense of corporate social responsibility.³²⁰

Indeed, in certain cases the incentives for voluntary ordering would be lost in light of the exemption from liability outlined by the model. However, despite possible negative effects of exemption in freestyle and peer-production conversation platforms, this regime still offers the optimal balance from all other policy possibilities. Due to the low severity of harm in these conversation platforms, the outcome of voluntary regulation is the best alternative.

The third objection is directed specifically against the exemption from liability in peer-production conversation platforms. The severity of harm in this conversation platform is extensive.³²¹ However, countering social forces mitigate the harm and cause an efficient private-ordering scheme. One might argue that the severity of harm remains extensive despite private ordering. This argument rests on the “negativity bias” and the greater power of bad events, information, or feedbacks over good ones.³²² Balancing social forces might not hold defamation at bay because negative expressions have more gravitas than positive ones. Thus, even if negative speech can be countered by positive speech, the correction would not be effective. As a result, negative hearsay would outweigh the counter-positive expressions, and the defamatory remarks would continue to spread rapidly and harm a person’s reputation.

This argument is valid; but, as I shall explain below, it does not undermine the argument for exemption, since it is the best alterna-

³²⁰ See Citron & Norton, *supra* note 309, at 1453–57 (2011) (describing content providers that see aggressive approaches to offensive speech as essential to securing online advertising); see also LIOR JACOB STRAHILEVITZ, INFORMATION AND EXCLUSION 128 (2011).

³²¹ The platform aggregates the participants donations into a complex and credible product directed at specific victims. See *supra* Section III.D.2.

³²² On this psychological bias, see Roy Baumeister et al., *Bad is Stronger Than Good*, 5 REV. GEN. PSYCHOL. 323, 323–70 (2001).

tive compared to the other liability regimes. Countering negative speech may indeed mitigate speech-related harm only partially.³²³ As a result, readers might still have the wrong impression of victims and avoid engagement with them, which would undermine efficient transactions. Exclusive reliance on private ordering would allocate part of the harm to the victim; this outcome is not optimal. Yet, alternative regimes would be even more inefficient and unjust. Potential liability concerns would lead content providers to remove every negative speech from their platform in response to every complaint, when applying the notice-and-takedown regime. Alternatively, under the negligence regime, content providers might extensively remove negative speech at their own initiative, including true negative statements. This would lead to reliance on partial information while making decisions. Thus, users might make inefficient transactions leading to negative experiences that could be avoided given full disclosure of the facts. These inefficient engagements would bring individuals to bear all the harm stemming from inefficient transactions.³²⁴ Everything being equal, allocating partial harm to the victim is a better option than removing true negative statements from platforms.

Feedback and reputation mechanisms are embedded in peer-production platforms. These mechanisms might further mitigate speech-related harm.³²⁵ Thus, despite the negativity bias, only limited credibility would be ascribed to the defamatory speech when the two corrective methods are utilized. I, therefore, conclude that exempting content providers from liability in peer-production con-

³²³ Full correction would materialize only when the correcting speech has more gravitas both quantitatively and qualitatively. A lot of positive correcting elements might correct negative falsehoods efficiently despite the negativity bias. See David Hoffman & Dawn Ash, *Building Bridges to Resolve Conflict and Overcome the "Prisoner's Dilemma": The Vital Role of Professional Relationships in the Collaborative Law Process*, 2010 J. DISP. RESOL. 271, 294 (2010).

³²⁴ For example, removing negative true reviews about a hotel on a review site would mislead Internet users about their future stay. Users would not be privy to the information from former guests who did not enjoy their stay. As a result, they would not avoid spending their vacation in the hotel. In light of the negativity bias, bad experiences caused by inefficient transactions that could be avoided, would be remembered for long periods.

³²⁵ On these mechanisms, see *supra* note 196 and accompanying text.

versation platforms is superior to other liability regimes, and it promotes the best solution to just and efficient outcomes considering the alternatives.

The fourth objection might be directed at the exemption of content providers for the damages caused to internal victim. The internal victim can control his network personality, use pseudonym, or totally refrain from participation and should not be entitled to remedies from the content provider. One might argue that a liability exemption would result in aggressive conversation norms, lack of accountability, and self-exclusion of many participants from these realms, thus infringing the freedom of speech.³²⁶

Due to the diversity of conversation platforms, the infringement is not stark. We should bear in mind that self-exclusion from conversation platforms may occur outside the Internet. Online, the implications of self-exclusion are actually mitigated due to the availability of other platforms, making this option tolerable.³²⁷ The victim can quit participating and find another platform that fits his needs. In addition, he can establish a conversation platform himself and enforce his preferred deliberation culture.³²⁸

Indeed, some communities have no substitute, such as learning communities or online workplace communities. As a result, opting out from these platforms might prevent users from receiving im-

³²⁶ Exempting content providers from liability might cause frequent self-exclusion of actual and potential participants. Witnessing aggressive conversation norms, individuals would opt out or refrain from opting in a discussion platform. If content providers would not provide them with a relief, few users would remain on the platform. See CITRON, HATE CRIMES IN CYBERSPACE, *supra* note 2, at 195; Citron, *Cyber Civil Rights*, *supra* note 2, at 132 (referring to defamation and harassment online directed at disadvantaged groups in society and leading to self-exclusion, which undermines the victim's right to free speech).

³²⁷ The wealth of conversation platforms mitigates the problem of self-exclusion. Online, everyone can find the optimal conversation platform for himself. Internal defamation victims can exit the offensive conversation platform and move to another. The lock-in effect and the difficulty to exchange conversation platform is mitigated online. On the lock in effect, see Ruben Rodrigues, *Privacy on Social Networks: Norms, Markets, and Natural Monopoly*, in THE OFFENSIVE INTERNET: PRIVACY, SPEECH, AND REPUTATION, *supra* note 2, at 237, 246.

³²⁸ Any speaker can establish a personal blog on a commercial website or an independent platform optimal for his needs.

portant professional updates. These special communities might justify specific exceptions to the model and a more flexible analysis. However, these special communities are mere exceptions to the general rule outlined.

The model assumes that individuals can anticipate the risks of participation in advance. It also assumes they can opt out from conversations and exit the social community. However, one may argue that participants' autonomy is not absolute due to peer pressure.³²⁹ In response to this argument, I claim that the right to autonomy is varied by degrees and depends on context.³³⁰ Thus, the right to autonomy is not absolute.

Perhaps special considerations should be made for minors. Adults certainly find it difficult to evaluate future risks when participating in a specific conversation platform; yet they can opt out of a conversation and minimize their harm. Adults are assumed to have the autonomy to a degree that would allow them to make the right decisions for themselves. Exiting online communities is easier than quitting conversations offline because on the Internet participants have many alternative conversation platforms.

Minors, unlike adults, are less rational and tend to be more influenced by social pressures. Hence, the social dynamics might affect them differently, and they might stay in a destructive community despite being defamed. Therefore, in this context, it might be advisable to impose additional duties on content providers by specific regulation pertaining to age.³³¹ However, this suggestion is complementary to the model and does not undermine it.

³²⁹ Individuals are subjected to cognitive biases. Thus, at the time of the decision to participate, they might be over-optimistic and not evaluate social pressures and other anticipated risks. *See* SUNSTEIN, RUMORS, *supra* note 235, at 21–30. Extensive research addressed the limits of autonomy. Accordingly, individuals materialize their autonomy only if society enables them. Therefore, individuals should be protected from external influences in order to enable them to materialize their autonomy. *See* ISAIAH BERLIN, TWO CONCEPTS OF LIBERTY: AN INAUGURAL LECTURE DELIVERED BEFORE THE UNIVERSITY OF OXFORD ON 31 OCTOBER 1958 (1959).

³³⁰ *See* JULIE E. COHEN, CONFIGURING THE NETWORKED SELF: LAW, CODE AND THE PLAY OF EVERYDAY PRACTICE 16–21 (2012).

³³¹ The law already protects minors online by specific regulation in the context of privacy. *See* Children's Online Privacy Protection Act of 1998, 15 U.S.C. §§ 6501–6506 (2006). Additional regulation might be needed in order to protect minors from

The fifth objection to the model concerns search engines. One might argue that in light of the option to find information using search engines, distinctions between conversation platforms is meaningless. The search results reflect specific expressions and get them out of the conversation platform's context. Search engines blur the line between internal and external settings. Thus, exposure to a statement regarding the internal victim via search engines does not enable the users to witness private-ordering dynamics.

Indeed search engines show specific statements independently, detached from their original conversation platform and group context. However, this does not change the suggested taxonomy. Search engines get expressions out of context only on the first layer of search results (this layer includes short quotations in the results page). However, when an individual has an interest in a specific search result, he would not be satisfied with the partial quotation and would follow the link, which would expose him to the private-ordering dynamics of the group. Hence, search engines do not undermine the distinctions between conversation platforms and group contexts as far as content providers' liability is concerned.³³²

CONCLUSION AND THE PATH FORWARD

Technologies enable vast opportunities to carry out speech-related torts. Content providers are highly visible "choke points" for online speech. Therefore, the legal discussion turns to their liability and the ability to collect damages from these deep-pocketed,

defamatory statements. Terms of Service in popular social networks do not allow minors under thirteen years old to participate. Therefore, a partial solution to the problem is enforcing the Terms of Service and imposing content providers to verify participants' ages. Cf. *How Old Do You Have To Be To Sign Up for Facebook?*, FACEBOOK, <https://www.facebook.com/help/210644045634222> [https://perma.cc/J9D8-LDPV] (last visited Mar. 2, 2016) (requiring users to be at least thirteen years old).

³³² This conclusion does not stand in line with the ruling in the European Union regarding the "right to be forgotten." See Case C-131/12, *Google Spain SL v. Agencia Española de Protección de Datos, A.N.*, 2014 E.C.R. 317, at para. 91. However, I believe this ruling is too extensive. In the United States, there is no general "right to be forgotten." See *Garcia v. Google, Inc.*, 786 F.3d 733, 745-746 (9th Cir. 2015); *Google, Inc. v. Vpxnction Order*, 441 S.W.3d 644, 647 (Tex. App. 2014).

ever-present entities that facilitate the harmful exchange. This Article aspired to take initial steps to address content providers' liability for speech torts. I laid theoretical and practical outlines to a new innovative model for regulating content providers' liability. This model is based on a sociological approach and emphasizes the importance of the conversation platforms' contexts, rather than the content of the expressions themselves. Coming from this approach, I focused on the strength of ties between participants, their social dynamics, and interactions, rather than on the content of the speech.

Basing this study on network theory studies, I classified online conversation to three main categories, creating an innovative taxonomy knotted to social structures. I translated this taxonomy to legal terms. This framework distinguishes between conversation platforms and group contexts. It shows that in some contexts, private ordering mitigates harm efficiently, whereas in others, it is insufficient. As a result, some formal legal intervention is needed. This model aims to structure judicial discretion and assist courts to accommodate just and efficient policy in determining content providers' liability for speech torts. The model is not abstract and refrains from relying on open-ended standards, such as severity of harm, private ordering, and the victim's setting. Rather, it outlines modular rules that serve as a proxy to these standards.

This model might appear less accurate in comparison to an open-ended based model that enables broad judicial discretion or reference to a specific circumstance, such as the characteristics of a specific platform. The model's benefits are certainty and clarity. It allows courts to apply simple rules of thumb, avoiding cumbersome litigation since it determines the scope of liability based on social dynamics and contexts. These rules of thumb would contribute and improve judicial processes and direct courts to systematic and consistent decisions. This would also enable content providers, who are often repeat-players in court, efficient risk management. I believe that this model is superior to the legal regime that exists to-

day, since it offers just and efficient outcomes, and it promotes the social values discussed throughout this Article.³³³

This Article is not the last word on this topic. It leaves several questions unanswered: Can this taxonomy be applied to unmasking anonymous speakers? What is the speakers' direct liability? Should this model regulate the direct liability of speakers? Another challenge concerns the spread of falsehoods, sharing and diffusing defamatory speech among different conversation platforms, and the implications on content providers' liability. What liability regime should apply to content providers that get defamatory speech out of the original social context, and share and republish it on other platforms governed by different liability regimes? And how should the law regulate users' social sharing of falsehoods between different conversation platforms?³³⁴ These challenges and others should be discussed in future studies.

³³³ A modular model for determining content providers' liability reduces concerns of inconsistency and different rulings in similar cases. The outcome of applying these rules of thumb would enhance fairness, efficiency, and promote innovation. As I explained, applying this model would bring the proper balance between human rights and speech torts. It would also prevent disproportional reputation harms in an environment that espouses free speech.

³³⁴ New innovative technologies facilitate the distribution of content among different platform in a click of a button, for example, by using social-based comment systems and Application Programming Interface technology. Sharing content between platforms is common nowadays. The model in this Article outlines different liability regimes for different conversation realms. However, sharing content among different conversation realms get them out of their original social context.