

# Power Without Responsibility: Intermediaries and the First Amendment

Rebecca Tushnet\*

## *Introduction*

At least since Alexander Meiklejohn wrote that “[w]hat is essential is not that everyone shall speak, but that everything worth saying shall be said,”<sup>1</sup> First Amendment theorists have debated the implications of speaker-focused versus audience-focused theories of free speech.<sup>2</sup> Jerome Barron’s classic article is, in this vein, deeply concerned with providing citizens greater access to conflicting viewpoints and nonmainstream subject matter, not because speakers with disruptive ideas have a right to be heard, but because we as a society have an interest in hearing them.<sup>3</sup>

Law and technology help constitute the audience for speech, shaping both what speech reaches an audience and what that audience can do in response.<sup>4</sup> An audience-centered theory of free speech, therefore, cannot accept that the First Amendment is satisfied by government nonintervention into the market. Indeed, the concept of nonintervention is incoherent from an audience-oriented perspective because the private property arrangements that law enables will determine what the audience hears and in what manner it will be able to respond. In this essay, I will discuss the law’s shaping role mainly in the context of intermediaries’ claims to control, and simultaneous denials of responsibility for, the content provided by end users.

As Barron recognized, the First Amendment rights of speakers and audiences must be evaluated in the contexts of their relationships to larger structures.<sup>5</sup> To the extent that there is a right to speak or a right to hear,

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\* Professor of Law, Georgetown University Law Center. Thanks to Mark Tushnet, Oren Bracha, Mike Seidman, and participants at the University of Virginia Law School Faculty Workshop and the Rutgers School of Law-Camden Faculty Workshop for helpful comments.

<sup>1</sup> ALEXANDER MEIKLEJOHN, *POLITICAL FREEDOM* 26 (1965).

<sup>2</sup> For examples of recent scholarship concerned with identifying the interests of speakers versus those of audiences, see generally Tom Bennigson, *Nike Revisited: Can Commercial Corporations Engage in Non-Commercial Speech?*, 39 *CONN. L. REV.* 379 (2006); Randall P. Bezanson, *Speaking Through Others’ Voices: Authorship, Originality, and Free Speech*, 38 *WAKE FOREST L. REV.* 983 (2003).

<sup>3</sup> Jerome A. Barron, *Access to the Press—A New First Amendment Right*, 80 *HARV. L. REV.* 1641, 1641, 1653–54 (1967).

<sup>4</sup> See generally LAWRENCE LESSIG, *CODE AND OTHER LAWS OF CYBERSPACE* (1999) (elaborating ways in which law and technology determine what people can do with speech).

<sup>5</sup> See Barron, *supra* note 3, at 1641–42, 1650–53.

who is on the other side of that right? The system of free expression is not atomized, but pervasively structured by conduits such as television broadcasters and Internet service providers (“ISPs”). Here I will focus on (potentially) harmful speech as it relates to claims for greater access to those conduits. Any effective proposal for access rights should deal with the recruitment of intermediaries to police and deter unlawful speech and the many and varied ways in which individual speakers will violate existing laws.

Creating incentives and obligations for intermediaries is a quintessentially legislative task, as Congress has already recognized by enacting various regulations of, and liability protections for, Internet intermediaries. The multiple competing interests involved help make the case that the legislature should be given substantial leeway by the courts in crafting solutions. It is this conclusion, perhaps, that makes access rights so difficult for individualist free speech theories: it would be much easier if there were one right answer that could be enforced by courts. The promise of systemic approaches such as Barron’s is that they reveal how speech works—or fails—in practice; the danger is that we lack the political power or will to structure that system in beneficial ways.

Part I of this essay reviews how Barron’s arguments about the vulnerability of individual viewpoints to corporate control remain salient in a vastly changed communications environment. The default of access to the means of expression has changed, in that it is easier than ever for individual speakers to find a platform that could in theory reach millions. But chokepoints remain. Rather than filtering out unpopular views entirely, Internet-based media are more likely to allow all content by default, but channel attention to favored content, and then suppress specific troublesome speech once it’s brought to the attention of corporate owners. Part I.A considers how Barron’s arguments fare online. Part I.B then recounts some decisions by a popular online journaling service, LiveJournal, that illustrate the continuing importance of intermediaries, and background law, in shaping individual speech.

Part II considers more generally how intermediary liability for users’ unlawful speech does and should affect individuals’ opportunities to reach audiences. Right now, intermediary liability is a patchwork of different rules for different substantive areas. Moreover, from the perspective of access rights, intermediary liability for users’ speech is largely uncoupled from intermediary control over such speech: intermediaries possess power over individual speakers, but they have no corresponding responsibility to individuals for the use or abuse of that power.

My main concern is to show that Congress is free, within rather broad

limits, to determine an appropriate intermediary liability regime. The First Amendment does not currently require a particular solution. That being said, if individuals' speech should not be attributed to intermediaries when it is unlawful, we should at least consider ways in which intermediaries could be deterred from interfering with it when it is lawful. The current regime privileges access providers over both individual speakers and third parties harmed by those speakers' speech. Sometimes that is a mistake, and it is not one that the First Amendment bars us from correcting. Without change, Barron's hope for communicative diversity may not be realized, even on the Internet.

### I. *Talking Together in Rented Rooms*

#### A. *Access to the WordPress:<sup>6</sup> The Role of the Intermediary*

Though Barron saw the press as a group of gatekeepers, he did not speak of them as intermediaries, as is more common today. Barron's terms were "the press" and individual "speakers."<sup>7</sup> The very term "intermediaries," as opposed to "the press," emphasizes that aggregators, compilers, and other more passive conduits are not themselves the source of speech, any more than the *New York Times* is the source of its ads, letters to the editor, or even stories written by employees or freelancers. As a corporate entity, the *Times* can adopt some of that speech as its own,<sup>8</sup> and its status as a publisher will impose certain legal duties on it,<sup>9</sup> but before the *Times* can fill its pages it ultimately needs people to provide speech. Starting from the proposition that speech comes from people, not companies, Barron argued that more and different people should have access to the apparatus of speech distribution in order to correct for predictable and harmful distortions in the deliberative process.<sup>10</sup> Indeed, he treated even major media outlets like the *Times* as conduits—profit-seeking entities that have no inherent interest in the particular speech they carry.<sup>11</sup>

Barron was concerned with those whose ideas were unacceptable to

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<sup>6</sup> WordPress allows individual users to create blogs without any programming skills; WordPress also provides website hosting services. See WordPress—Blog Tool and Weblog Platform, <http://wordpress.org> (last visited Apr. 5, 2008).

<sup>7</sup> Barron, *supra* note 3, at 1641–42, 1653.

<sup>8</sup> See Bezanson, *supra* note 2, at 1081, 1092–93.

<sup>9</sup> As a publisher that has selected particular speech to print, the *Times* will be subject to direct liability for copyright infringement, defamation, and so on, according to the substantive standards of the relevant laws.

<sup>10</sup> See Barron, *supra* 3, at 1647–50.

<sup>11</sup> See *id.* at 1646–47.

the mainstream media, and who therefore found it impossible to be heard in a public discourse dominated by a few large channels of communication.<sup>12</sup> In his account, the major media were not offering substantive debates about significant political, social, and economic matters.<sup>13</sup> Owners of mass media outlets were unwilling to present viewpoints that challenged the status quo—or, for that matter, supported it in explicitly ideological terms.<sup>14</sup> This was in large part because it was structurally disadvantageous for them to do so: controversy would threaten profitability.<sup>15</sup> Pandering to the part of people that enjoys mindless entertainment was easier and safer.

Accepting Barron's analysis, then, the Internet could solve some, but not all, of the problems he identified. Aside from his condemnation of the concentration of sources, Barron's critique of modern media, drawing on the work of Marshall McLuhan, had two related but analytically distinct components. First, visual media like television encourage style over substance, making them less valuable than media like newspapers for hashing out the issues of the day.<sup>16</sup> Second, modern media are so expensive to produce that they can only survive by appealing to the lowest common denominator.<sup>17</sup> As David Foster Wallace wrote,

television is [not] vulgar and dumb because the people who compose [the] [a]udience are vulgar and dumb. Television is the way it is simply because people tend to be extremely similar in their vulgar and prurient and dumb interests and wildly different in their refined and aesthetic and noble interests.<sup>18</sup>

The Internet and the “long tail”<sup>19</sup> of media promise to alleviate the

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<sup>12</sup> See *id.* at 1641.

<sup>13</sup> See *id.* at 1646–47.

<sup>14</sup> See *id.* at 1646.

<sup>15</sup> See *id.*

<sup>16</sup> See *id.* at 1645 (articulating McLuhan's view that modern media encourage “a high degree of nonintellectual and emotional participation and involvement”). First Amendment doctrine has recognized the special power of images to bypass extensive formal reasoning. See, e.g., *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 632 (1943) (observing that images act as a “short cut from mind to mind”); Amy Adler, *The Thirty-Ninth Annual Edward G. Donley Memorial Lectures: The Art of Censorship*, 103 W. VA. L. REV. 205, 211–13 (2000) (discussing the ways in which visual art has been seen as uniquely powerful and thus specially in need of regulation).

<sup>17</sup> Barron, *supra* 3, at 1645–46 (quoting DAN LACY, *FREEDOM AND COMMUNICATIONS* 69 (2d ed. 1965)).

<sup>18</sup> DAVID FOSTER WALLACE, *E Unibus Plurum: Television and U.S. Fiction*, in *A SUPPOSEDLY FUN THING I'LL NEVER DO AGAIN* 21, 37 (1997).

<sup>19</sup> CHRIS ANDERSON, *THE LONG TAIL: WHY THE FUTURE OF BUSINESS IS SELLING LESS OF MORE* 19–26 (2006) (describing “the Long Tail” as the large segment within many product and media markets that consists of a very large number of individual products,

problem of the lowest common denominator, enabling smaller producers to survive by targeting niche markets even in television and film. Decreased costs of production and distribution in the digital age enable widespread access to a greater variety of content. Amazon.com offers more books, by at least an order of magnitude, than even enormous physical bookstores.<sup>20</sup> Because listing a book costs Amazon very little compared to the costs to a physical bookstore of stocking a book that sells only one copy a year, and because Amazon sells nationwide, it can profit from books that ordinary bookstores can't afford to carry.<sup>21</sup> Those books naturally provide readers with access to more topics, from more viewpoints, than the relatively few popular works available in conventional bookstores.<sup>22</sup> Netflix and iTunes offer other examples of increased diversity through new business models.<sup>23</sup> Thus, more speakers can survive and thrive by finding the niche markets willing to pay for their speech, correcting the lowest common denominator problem one reader or viewer at a time.

Yet Barron identified another feature of modern media as also producing systematic distortions in discourse: the dominance of audiovisual media over text.<sup>24</sup> If, as McLuhan famously said, the medium is the message,<sup>25</sup> and if the message of film and television (not to mention video games and Internet video) is inherently antipolitical, then problems remain. An implication of Barron's view of audiovisual media is that the availability of political documentaries on Netflix that could never survive at the multiplex will not be sufficient to restore a healthy democratic public sphere.

Perhaps Barron's fears are better addressed by the explosion of blogging and other more text-based methods of communication used by millions of citizens on the Internet. Henry Jenkins, a media scholar at the Massachusetts Institute of Technology, has written extensively about the ways in which people—young people in particular—are using new media, and the connections they make through the Internet, to learn how to think and to write, as well as how to communicate in other ways.<sup>26</sup> Text is part

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where the demand for each individual product is extremely low, but the aggregate demand for all of them is very high).

<sup>20</sup> See *id.* at 23.

<sup>21</sup> See *id.* at 20–24, 47–49.

<sup>22</sup> See *id.* at 23–24.

<sup>23</sup> See *id.* at 24.

<sup>24</sup> See Barron, *supra* note 3, at 1645–46.

<sup>25</sup> MARSHALL MCLUHAN, UNDERSTANDING MEDIA 7 (1964).

<sup>26</sup> See HENRY JENKINS, CONVERGENCE CULTURE: WHERE OLD AND NEW MEDIA COLLIDE 169–239 (2006) (discussing the literary accomplishments of young Harry Potter fans who write their own stories and other content related to Harry Potter, as well as

of that process, but it need not have pride of place. Jenkins, and scholars like him, argue that new media regularly support significant political discourse even in the narrowest sense of “politics.”<sup>27</sup> At least after a new generation learns to use a medium’s particular features, that medium can provide complex and serious content as well as distracting entertainment.<sup>28</sup>

A related question is whether Barron is actually urging us to reclaim a culture that existed when information was transmitted through print or is instead imagining a utopia. Illiteracy, poverty, and—crucially—the denial of the franchise were significant historical limits on the ability of people to participate in the republic of letters.<sup>29</sup> The dominance of print didn’t equate

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political activism by people of all ages in virtual worlds); Henry Jenkins, *Media and Democracy: Introduction to Jon Katz Book Based on His “Voices from the Hellmouth” Columns*, <http://web.mit.edu/cms/People/henry3/Intro-Katz.html> (last visited Apr. 5, 2008) (“[S]tudents [who wrote to Slashdot about what was happening in their high schools] saw themselves as empowered by the web to share what was happening to them to a larger public, . . . they understood their personal experience as part of a much larger political debate, and . . . they felt the importance of forming an alliance, even if only temporarily, both with other students and with adults . . . . For every student who wrote, there were many[,] many more who read these accounts with recognition. . . . Today, these students understand the computer as a powerful resource for social change, for speaking to each other across great distances through channels not controlled by their teachers and their parents. . . . [T]hey are really ‘Generation.org,’ able to understand perhaps more fully than anyone else how networked communication offers an infrastructure for political resistance.”).

<sup>27</sup> See, e.g., JENKINS, *supra* note 26, at 206–39 (examining the role of new media in the 2004 presidential election as illustrative of the public’s expanding role in political discourse).

<sup>28</sup> See *id.* Jenkins links criticism of new media with fear of adolescents, who are the most eager adopters. See JENKINS, *supra* note 26. Teen culture seems meaningless and dangerous without an appreciation of its context. As he points out in recounting his experience with congressional hearings on the relationship of media violence to school shootings, “Senators were discussing with shock and outrage films they hadn’t seen, television shows they’d never watched, games they’d never played, and music they’d never listened to.” *Id.* Jenkins outlined the challenges for students—and others—in developing media literacy as audiences and creators in a white paper for the MacArthur Foundation. See generally HENRY JENKINS, *CONFRONTING THE CHALLENGES OF PARTICIPATORY CULTURE: MEDIA EDUCATION FOR THE 21ST CENTURY* (2006), [http://www.digitalllearning.macfound.org/atf/cf/%7B7E45C7E0-A3E0-4B89-AC9C-E807E1B0AE4E%7D/JENKINS\\_WHITE\\_PAPER.PDF](http://www.digitalllearning.macfound.org/atf/cf/%7B7E45C7E0-A3E0-4B89-AC9C-E807E1B0AE4E%7D/JENKINS_WHITE_PAPER.PDF).

<sup>29</sup> See, e.g., Cathy N. Davidson, *Towards a History of Books and Readers*, 40 *AM. Q.* 7, 10 (1988) (“Just who could, in fact, read at any particular time is one of the most basic questions in any study of the influence of printing and it is one of the most difficult to answer. The illiterate rarely leave historical traces nor can contemporaneous assessments of literacy be entirely trusted. John Adams, for example, liked to boast that ‘a native American who cannot read and write is as rare as a comet or an earthquake.’ Yet slaves in John Adams’ America were explicitly forbidden literacy and even Abigail Adams complained about the lamentable state of women’s literacy levels in her era.”); *id.* at 14 (“John Hope Franklin has estimated that in 1870 as many as eighty percent of all black Americans above

to a fully democratic society. Nor was print journalism immune from appeals to prejudice, short-circuiting rationality; “yellow journalism” got its name from newspaper circulation battles that slaveringly promoted war.<sup>30</sup> Because other media are capable of communicating valuable information—images from New Orleans after Hurricane Katrina, or the beating of Rodney King—the beneficiaries and losers from new modes of communication cannot simply be sorted into the categories of the thoughtless and the thoughtful, respectively.

Even if Barron’s deliberative ideal is ahistorical and discounts the value of images, however, it has many attractive features. The goal of easy access to diverse viewpoints on important political and social issues is normatively desirable. This leads back to Barron’s more extended criticism of mass media: its concentration and focus on profits, resulting in lack of interest in controversial topics other than celebrity gossip.<sup>31</sup>

Diversity of content might at first seem to solve this problem, but concentration comes in many forms. The long tail only works efficiently if there are major content aggregators.<sup>32</sup> iTunes, Amazon, Netflix, and others profit because they offer hits to attract numerous customers. Their customers’ second, third, and subsequent choices then increasingly diverge, creating the long tail.<sup>33</sup> There are still blockbusters, who in Barron’s terms

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the age of ten may have been illiterate or minimally literate. It must be remembered that, for the same time period, literacy for white men and women was well over ninety percent. When a prosperous and largely literate nation tolerates and even promotes pockets of both poverty and illiteracy, the history of the book must also address the political, social, and moral implications of that denial, both for those who perpetrated it and for those who endured it.” (footnote omitted)); Ronald J. Zboray, *Antebellum Reading and the Ironies of Technological Innovation*, 40 AM. Q. 65, 74–75 (1988) (noting that books remained too expensive for working-class readers even after major increases in book production in the mid-nineteenth century); cf. Siva Vaidhyanathan, *The Anarchist in the Coffee House: A Brief Consideration of Local Culture, the Free Culture Movement, and Prospects for a Global Public Sphere*, 70 LAW & CONTEMP. PROBS. 205, 205 (2007) (noting the gender and class limitations of the classic public sphere of eighteenth-century Europe).

<sup>30</sup> See Jessica E. Jackson, Note, *Sensationalism in the Newsroom: Its Yellow Beginnings, the Nineteenth Century Legal Transformation, and the Current Seizure of the American Press*, 19 NOTRE DAME J.L. ETHICS & PUB. POL’Y 789, 790–93 (2005) (describing origins of “yellow journalism”).

<sup>31</sup> See Barron, *supra* note 3, at 1646–47, 1660–62.

<sup>32</sup> See ANDERSON, *supra* note 19, at 88–89; see, e.g., Andrew Edgecliffe-Johnson, *YouTube Seals UK Music Royalty Deal*, FINANCIAL TIMES (London), Aug. 30, 2007, at 20, available at <http://www.ft.com/cms/s/0/1f66322c-5656-11dc-ab9c-0000779fd2ac.html> (quoting the managing director of the UK’s major performing rights organization as saying that “[t]he long-tail is not worth calculating,” and explaining that only the top five to ten percent of videos will be used to calculate royalty distributions in the organization’s deal with YouTube).

<sup>33</sup> See ANDERSON, *supra* note 19, at 9–10, 22–24; see also Clay Shirky, *Power Laws*,

still have substantial control over the topics of public discourse. Bill O'Reilly's books sell many more copies than an unknown's political rantings; *The Daily Show* gets many more viewers than an average original political satire on YouTube.<sup>34</sup> At the same time, those dominant channels can be evaded on occasion, and they may in some cases be prodded to address issues carried up through the capillaries of the Internet.<sup>35</sup> I do not mean to suggest that nothing has changed, only that there remain substantial concentrations of power over public discourse.<sup>36</sup>

It's not just that big hits remain profitable, or that they support the businesses that bring us the rest of the long tail. Concentration is more pervasive. The spaces in which people communicate—blogs, MySpace pages, message forums, and so on—are largely spaces they do not themselves own but are provided by ISPs whose policies may prioritize

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*Weblogs, and Inequality*, SHIRKY.COM, Feb. 10, 2003, [http://www.shirky.com/writings/powerlaw\\_weblog.html](http://www.shirky.com/writings/powerlaw_weblog.html) (making the same point about the varying popularity of weblogs, and asserting that “[d]iversity plus freedom of choice creates inequality, and the greater the diversity, the more extreme the inequality”). Businesses that depend on user-generated content nonetheless predict that active creators will be very rare, commentators only slightly more common, and readers, viewers, etc., will make up the vast majority of participants. See Bradley Horowitz, *Elatable, Creators, Synthesizers, and Consumers*, <http://www.elatable.com/blog/?p=5> (Feb. 17, 2006). Horowitz, until recently Vice President of Product Strategy at Yahoo!, offers a model in which one percent of users create content, ten percent comment on content, and the rest are “lurkers,” and points out that “[e]ven for Wikipedia (the gold standard of the genre) half of all edits are made by just 2.5% of all users. And note that in this context user means ‘logged in user[.]’ not accounting for the millions of lurkers directed to Wikipedia via search engine traffic for instance.” *Id.*

<sup>34</sup> See also Neil Weinstock Netanel, *New Media in Old Bottles*, 76 GEO. WASH. L. REV. (PAGE), {PINCITE: CC lines 159–349, 483–583} (2008) (making similar points about the competitive strengths of large media organizations); cf. C. EDWIN BAKER, *MEDIA CONCENTRATION AND DEMOCRACY: WHY OWNERSHIP MATTERS* 197 (2006) (pointing out that big corporations are good at winning the battle for attention because they can apply greater resources to the problem and may not be committed to any viewpoint or type of content); Jerome A. Barron, *Access to the Media—A Contemporary Appraisal*, 35 HOFSTRA L. REV. 937, 951 (2007) (noting that television continues to reach a far wider audience than Internet venues such as blogs).

<sup>35</sup> See YOCHAI BENKLER, *THE WEALTH OF NETWORKS: HOW SOCIAL PRODUCTION TRANSFORMS MARKETS AND FREEDOM* 219–33, 253–55 (2006) (describing ways in which the Internet enables information to filter up from individual sources to widespread public attention in both traditional and nontraditional media).

<sup>36</sup> For example, Oren Bracha and Frank Pasquale have addressed the ways in which search engines' market power means that they will not necessarily solve the market-concentration problems Barron identified, at least in the absence of government regulation. See generally Oren Bracha & Frank A. Pasquale III, *Federal Search Commission?: Access, Fairness and Accountability in the Law of Search* (Univ. of Tex. Sch. of Law Pub. Law & Legal Theory Research Paper No. 123, 2007), available at <http://ssrn.com/abstract=1002453>.



many things over users' ability to speak.<sup>37</sup> And in many categories, there are dominant providers with substantial market control. YouTube is a vehicle for new content to receive widespread attention, but other competing video sites lag far behind, and that means that YouTube's choices about what videos to host—screening out pornography and combat footage and limiting the length of videos—determine what most people will see.<sup>38</sup> Aesthetic complaints about YouTube are familiar from decades-old criticism of other popular media: by structuring itself around short and popular clips, the site creates stylistic expectations that make it harder for truly innovative works to thrive.<sup>39</sup>

If anything most clearly encapsulates the continued power of aggregation and selection, it is reality television—"amateur hour" in that the participants are not professional actors or scriptwriters but are nonetheless controlled by large media companies. The ideology is that the entertainment comes from amateurs, a special kind of user-generated

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<sup>37</sup> Even a blog hosted on a person's own website and read by fifteen people depends on the existence of intermediaries—domain name registrars, ISPs of the writer and the readers, etc. See Seth F. Kreimer, *Censorship by Proxy: The First Amendment, Internet Intermediaries, and the Problem of the Weakest Link*, 155 U. PA. L. REV. 11, 16–17 (2006) (identifying several levels of intermediaries who control access to most people's Internet speech); *id.* at 29–30 (exploring the dynamics that make intermediaries more vulnerable to the chilling effects of speech regulations than speakers themselves); Hannibal Travis, *Of Blogs, Ebooks, and Broadband: Access to Digital Media as a First Amendment Right*, 35 HOFSTRA L. REV. 1519, 1564 (2007) (discussing instances in which ISPs removed user-uploaded footage of combat in Iraq and pointing out that "[m]ost ISPs impose 'acceptable use policies' with vague language allowing them to shut down Web sites or remove content they disagree with or that 'people may find offensive'").

<sup>38</sup> See, e.g., Nick Douglas, *YouTube's Dark Side: How the Video-Sharing Site Stifles Creativity*, SLATE, July 18, 2007, <http://www.slate.com/id/2170651/nav/navoa> ("The Internet was supposed to make the video world egalitarian. No longer would an oligarchy of content providers—a few TV networks, a couple of major movie studios—control what we watch. The Web gives creative people a potential audience of millions, as well as countless venues to display their creations. But that's not how things turned out. Web video isn't an oligarchy, it's a dictatorship. You're either on YouTube or nobody's watching. This dominance has a downside: The popular misapprehension that YouTube and Web video are synonymous has limited our sense of what online video can be.").

<sup>39</sup> See *id.* ("The most popular videos in YouTube's history are music videos, TV clips, and lowbrow home-video footage; the same is true for this month's top clips, which include commercials, a TV interview, and a Timbaland video. . . . It's no accident . . . that the most prominent number on each YouTube page is the number of 'Views.' The site puts on a good front about the primacy of user-generated content, but YouTube's real message is that in the world of online video, quality is less important than mass appeal."). I am agnostic on whether YouTube's aesthetics are good or bad. Aesthetic innovation may just be bad art. And there will always be a fringe. YouTube's decisions, however, are not neutral: they affect how easy it will be for a particular video to succeed, especially as people whose tastes are largely satisfied by YouTube have little incentive to leave and seek out videos YouTube disallows.

content: “Television has been invaded by, and perhaps risks being overrun with, ordinary folk who have seeped through the screen much as Alice smushed through the looking glass. . . . The audience is the show, the show is the audience. . . .”<sup>40</sup> But the producers—professionals and repeat players—select and carefully position the members of the audience who get a chance at the big stage.<sup>41</sup> And, although they don’t like to talk about it, they edit footage together to create better narratives, script important moments, and give elaborate instructions so that the amateurs onstage will behave in the ways the producers want them to.<sup>42</sup> One significant result is to make advertising in the form of product placement seem more natural and honest, when in fact it is the result of careful planning and mandates.<sup>43</sup>

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<sup>40</sup> Tom Shales, *Amateur Power: Novices Steal the Show as Television Plays Who Wants to Be a Star*, WASH. POST, Sept. 2, 2007, at M1.

<sup>41</sup> See David Rupel, How Reality TV Works, <http://www.wga.org/organizesub.aspx?id=1091> (last visited Apr. 5, 2008) (“Just like making Joey and Chandler roommates was a deliberate choice the writers made on *Friends*; when I produced *Temptation Island*, I chose room assignments based on how I thought people would affect each other. Similarly, every time I select a location, develop a game, find a cast, look for appropriate music, it’s always based on story.”).

<sup>42</sup> See William Booth, *Reality Is Only an Illusion, Writers Say: Hollywood Scribes Want a Cut of Not-So-Unscripted Series*, WASH. POST, Aug. 10, 2004, at C1 (“Jokes are penned for hosts, banter for judges. Plot points and narrative arcs are developed. In some cases, lines are fed directly to contestants. . . . Not by accident, the scribes say, the reality stories have a beginning and middle and end, shaped by writers . . .”); Rupel, *supra* note 41 (“Real people don’t live their lives in carefully packaged scenes. . . . That means story producers must find creative ways to fill in the missing gaps of stories. This could mean: Searching for footage that may have happened days or weeks apart that are about the same topic. . . . ‘[C]reate’ a missing scene with interview bites and appropriate b-roll footage. . . . Find a scene that has many of the same emotional beats as the missing one, and use interview bites to shape it to be about the other topic.”).

<sup>43</sup> See WRITERS GUILD OF AMERICA, WEST & WRITERS GUILD OF AMERICA, EAST, “ARE YOU SELLING TO ME?": STEALTH ADVERTISING IN THE ENTERTAINMENT INDUSTRY, at 4–6 (2005), [http://www.wga.org/uploadedFiles/news\\_and\\_events/press\\_release/2005/white\\_paper.pdf](http://www.wga.org/uploadedFiles/news_and_events/press_release/2005/white_paper.pdf). The Writers Guild of America’s white paper offers numerous examples of more and less aggressive distortions of “reality” to achieve product placement goals, including the following:

Scott Miller, a story producer on *American Dream Derby* told us, “We had 15 minutes before crew was going on overtime and the director, he literally said, ‘go get my fucking Diet Dr. Pepper moment and get out of here.’ Contestants were talking about the competition, and we were trying to get storytelling elements and how they’ve got to beat this person tomorrow, and on top of that I had to do the integration, and I was literally handing people cans of Dr. Pepper under the camera. We had contestants saying on mike—‘I hate Dr. Pepper’ and ‘I liked it at first, but now I hate it.’ I told them to just hold it in their hand. But then we were told we had to make sure they drank it too.”

*Id.* at 5.

The fantasy that amateurs are in charge is a useful one, but it remains a Hollywood illusion.<sup>44</sup>

Reality television offers in concentrated form what the new media environment does more generally—the appearance of unstructured choice and cacaphony, coupled with extensive background control by large organizations. That control often may not be overtly exercised, but its existence is important both in terms of large media corporations' ability to focus attention and their power to suppress marginal speech. It is to the latter phenomenon—the suppression of a few voices in a speech environment that seems largely unfettered—that the next section turns.

### *B. Reading Lolita Online: The Case of LiveJournal*

A recent series of events related to the popular web journaling site LiveJournal illustrates the complex interplay between law, social forces, and intermediary control of speech. Known as “Strikethrough” to many journal writers, the controversy began when LiveJournal suspended and deleted, without warning, a number of user accounts for noncompliance with its content policies.<sup>45</sup> LiveJournal's concern was with sexual content. MySpace was—and remains—much in the news for the presence on its site of pedophiles trolling for targets.<sup>46</sup> While LiveJournal is a very different type of website, it still falls within the “social software” category, and its differences would not be significant to the reporters and regulators focused on pedophilia. Allegedly, an outside group (or perhaps a person posing as a group) threatened to contact advertisers about LiveJournal's supposed

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<sup>44</sup> See Shales, *supra* note 40, at M7 (“Even if the people plucked from obscurity are coached and prompted and rehearsed before their golden moment arrives, their presence on the air serves as some kind of reassuring authentication for the folks at home—at home for now, but awaiting their own turns on the tube.”).

<sup>45</sup> See Declan McCullagh, *Mass Deletion Sparks LiveJournal Revolt*, CNET NEWS.COM, May 30, 2007, [http://www.news.com/Mass-deletion-sparks-LiveJournal-revolt/2100-1025\\_3-6187619.html?tag=nefd.lede](http://www.news.com/Mass-deletion-sparks-LiveJournal-revolt/2100-1025_3-6187619.html?tag=nefd.lede). For a time line, see LiveJournal Conflicts Time Line, [http://community.livejournal.com/ljconfl\\_archive/711.html](http://community.livejournal.com/ljconfl_archive/711.html) (last visited Apr. 5, 2008). Kreimer identified that strikethrough followed the dynamic where public relations concerns dominated LiveJournal's behavior towards its users:

[W]here an intermediary is partially dependent on other revenue streams, whether from advertisers or other corporate affiliates, it may be vulnerable to pressures to which the primary speaker is immune. Putting the censorship decision in the hands of the intermediary allows commercially powerful blocs of customers a potential veto on the speech of others.

Kreimer, *supra* note 37, at 29–30 (footnote omitted).

<sup>46</sup> See, e.g., *Dateline: Why Parents Must Mind MySpace* (NBC television broadcast Jan. 27, 2006) (transcript available at <http://www.msnbc.msn.com/id/11064451>).

support for pedophilia.<sup>47</sup>

Initially, however, LiveJournal did not suspend users it had determined to be pedophiles. It neither examined users' writings nor cross-referenced identifying information with sex offender registries. Rather, according to the most common accounts, the targeted users had "interests"—phrases on their profile pages, designed to allow people to find like-minded journalers—dealing with illegal sexual conduct, such as rape and incest.<sup>48</sup> LiveJournal had initially conceived of "interests" as reflecting users' favorite things, but users had for a long time used the interests area of their profiles to identify topics of interest to them. So, for example, some abuse survivors listed incest as interests, as did a community dedicated to reading Nabokov's *Lolita* in an online book club.<sup>49</sup> They were caught up in LiveJournal's purge. LiveJournal's user base also includes a significant number of fan communities.<sup>50</sup> This became important because a Harry Potter fan community that included fan stories with adult content—including depictions of rape and incest—was also purged.<sup>51</sup>

The resulting outcry was intensive and sustained, and even attracted

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<sup>47</sup> See McCullagh, *supra* note 45 (reporting that LiveJournal asserted the deletions were undertaken in response to various activist groups including the "Warriors for Innocence").

<sup>48</sup> Not all journals listing these interests were deleted, but profile information appears to be why many of the journals that were deleted were targeted. See, e.g., Talkin' Blues, Strikethrough 2007, <http://talkinblues.net/wordpress/?p=224> (May 31, 2007) (discussing journals deleted for listing illegal activities in their "interests"); Posting of Stewardess to LiveJournal, How Six Apart's Greed Allied Them With Neo-Nazis REVISED, <http://stewardess.livejournal.com/261058.html> (June 2, 2007, 05:26 PDT) (same; suggesting that the deletions were done in haste, without content review, in order to make LiveJournal more attractive to investors); Posting of Ataniell93 to LiveJournal, My Boyfriend Saved the Whole Human Race and All I Got Was This Broken Heart, SO MUCH WTF—Suspended Journal Support Request, <http://ataniell93.livejournal.com/818441.html> (May 29, 2007, 14:51) (discussing one role-player's interaction with LiveJournal's support staff, in which LiveJournal indicated that it did not matter that suspended journals were written by people playing fictional villains, and quoting LiveJournal's statement that "if a journal profile contains interests that support illegal activity, we must suspend the journal"); Posting of Omen1x2 to LiveJournal, <http://omen1x2.livejournal.com/108023.html> (May 30, 2007, 11:23) (post on the subject from an abuse survivor).

<sup>49</sup> See McCullagh, *supra* note 45.

<sup>50</sup> See Ethan Zuckerman, My Heart's in Accra, Six Apart Casts "Evanesco". Fanfic Authors Cast "Expelliarmus"., <http://www.ethanzuckerman.com/blog/2007/05/31/six-apart-casts-evanesco-fanfic-authors-cast-expelliarmus> (May 31, 2007, 23:48) ("How big is the fandom community on LiveJournal? The 'fandomcounts' community, started yesterday, has 30,000 members already, and the explanation text for the page is available in 24 languages. That's a big set of people, one that a company like Six Apart would be ill-advised to ignore.").

<sup>51</sup> See McCullagh, *supra* note 45.

notice from outside.<sup>52</sup> Eventually, LiveJournal relented and reinstated many of the suspended users whose “interests” were as survivors or limited to fiction.<sup>53</sup> A few months later, however, LiveJournal again permanently banned certain users, this time for posting sexually explicit drawings featuring characters determined by LiveJournal’s staff to be below the age of eighteen.<sup>54</sup> Because the works at issue are drawn, rather than representing actual bodies, the difference between a sixteen-year-old and an eighteen-year-old is very much in the eye of the beholder. Artists thus argue they deserve leeway, while LiveJournal contends that an abundance of caution requires it to suppress material that appears to its staff to represent under-eighteen characters engaged in sexual activity.

This series of events, which is far from over, demonstrates some basic points about Internet intermediaries. First, LiveJournal’s initial miscalculation,<sup>55</sup> driven by a moral panic that turned into a business imperative, was based on the erroneous assumption that users deployed the category of “interests” in the way that LiveJournal initially intended, when in fact they had adapted it to better fit their goals of self-expression and connection to others. One reason that intermediaries shouldn’t be liable for everything their users do is that users do unexpected things.

Second, users are highly vulnerable to intermediaries. Because the suspensions affected a user’s entire account, not just objectionable entries, the suspended users lost, in some cases, years of writing and art. There are journal backup services available, but not everyone uses them—very few people expected to be suddenly banned. Moreover, because intermediaries bring people together, there are often significant switching costs. Even if a more user-friendly environment is available, if moving there means losing connections to many friends, the gains may not be worth the costs. Or, from an external perspective:

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<sup>52</sup> See *id.*; Posting of Michael Calore to Compiler, LiveJournal Hits “Undo” on Sex-Themed Site Suspensions, [http://blog.wired.com/monkeybites/2007/05/livejournal\\_hit.html](http://blog.wired.com/monkeybites/2007/05/livejournal_hit.html) (May 31, 2007, 13:56 PDT).

<sup>53</sup> See LiveJournal Conflicts Time Line, *supra* note 45.

<sup>54</sup> See *id.*; see also Posting of Randomsome1 to LiveJournal, (Hoping for) a Fistful of Change, <http://randomsome1.livejournal.com/147145.html> (Sept. 4, 2007, 16:29) (expanding on later events and the debate surrounding them); Anne Broache, *LiveJournal Users Fight Erotic ‘Harry Potter’ Deletions*, CNET NEWS.COM, Aug. 6, 2007, [http://www.news.com/8301-10784\\_3-9755616-7.html?tag=yt](http://www.news.com/8301-10784_3-9755616-7.html?tag=yt) (outside reporting on the battles over visual images).

<sup>55</sup> As the parent company’s CEO admitted, “we really screwed this one up.” Declan McCullagh, *LiveJournal Apologizes for Mass Deletion*, CNET NEWS.COM, May 31, 2007, [http://www.news.com/LiveJournal-apologizes-for-mass-deletion/2100-1025\\_3-6187960.html](http://www.news.com/LiveJournal-apologizes-for-mass-deletion/2100-1025_3-6187960.html) (quoting Barak Berkowitz, CEO of LiveJournal’s owner, Six Apart).

The salience of Internet communication is famously sensitive to marginal changes in availability. . . . To assure the presence of countervailing sources of cultural power, major actors are crucial because they stand astride the attention of the central mass of the population.

. . . Even if [excluded viewpoints] are available to the segments willing to expend the time, effort, and expertise to search for them, the balance of popular perception may be skewed away from a proper evaluation of the matters before the public for decision.<sup>56</sup>

Third, users generally recognized that LiveJournal had every right to create and enforce its own policies, even if they went beyond what the law requires. The questions were, rather, ones of fairness and governance—exactly the issues Barron addressed in his analysis of private ownership of the means of communication. For example, a blogger argued:

Current controversies . . . have one stark issue in common: the conflict between corporate desire to profit from users and the content they generate, and the users' own sense of ownership not only in their content and creativity, but in the hosted services they use to publish that content and to connect with others online.

. . . .

. . . [T]here's no such thing as "free speech" on Livejournal, because only a government with a constitutional mandate is required to provide its users with free speech. However, as civil liberties advocates have reminded us for years, the right to speech is only as good as the right to access to venues in which speech can be heard. And in an environment where public spaces are relatively rare, including the internet, there are strong arguments for corporate responsibility in voluntarily refraining from restrictions on user speech.<sup>57</sup>

As a result, the writer proposes measures to ensure user representation in corporate governance.<sup>58</sup> Substantive disagreements about policy might

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<sup>56</sup> Kreimer, *supra* note 37, at 40–41 (footnotes omitted).

<sup>57</sup> Posting of Erica L. George to LiveJournal, Writing in Clay—One More Dancing Woman with Dirty Feet, "User Generated Content" & Ownership: The User as Citizen, <http://elements.livejournal.com/11242.html> (June 2, 2007 07:28 UTC) (posting under the blog pseudonym "Elements").

<sup>58</sup> *Id.* ("I'd like to propose that any business entity that is primarily driven by and dependent on an active and content-generating user base be obligated to assign some share of real and actualized decision-making power to democratically chosen representatives of that user base.").

be mediated through democratic procedures, perhaps both for establishing ground rules for acceptable content within user communities<sup>59</sup> and also for providing due process for individual users whose speech is deemed unacceptable.<sup>60</sup>

These structural solutions share with Barron's proposals a focus on institutional design.<sup>61</sup> And they should also be possible by legislative mandate. Though such a law would affect the speech-related decisions of private companies, there is no inherent reason that private corporations must allow managers (or even shareholders) to make those decisions, given that their governance structures are creatures of state law.<sup>62</sup>

Legal requirements are never independent of social forces. With respect to adults seeking to engage in sexually explicit conversations or conduct with minors, legal pressures on social networking services have

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<sup>59</sup> Large user groups are unlikely to agree about proper rules of conduct, but they might be able to establish subcommunities with different policies.

<sup>60</sup> One defender of the current regime, H. Brian Holland, recognizes that power to regulate speech online is not generally held by individuals or by voluntarily organized communities, but instead by private commercial entities. H. Brian Holland, *In Defense of Online Intermediary Immunity: Facilitating Communities of Modified Exceptionalism*, 56 KAN. L. REV. 101, 130 (2008). There is currently a "gap" in which neither external legal norms nor internal communal norms can operate; site owners simply do as they will. *See id.* Holland argues, however, that communal norm enforcement has nonetheless emerged in spaces that host user-generated content. *See id.* at 130–32. Yet his key example, Wikipedia, is an extraordinary, noncommercial intermediary; the ordinary revenue-seeking ISP has very different incentives to assert control over its user-supplied content, usually including the desire to be attractive to advertisers. It may be that only law can ensure that affected communities have a voice in the private regulations that structure their speech.

<sup>61</sup> Barron's proposals centered on access rights, but his analysis was always attentive to access as it would structure media behavior, rather than access as an individual right. *See* Barron, *supra* note 3, at 1667–68 (arguing that an access right should be treated like advertising and letters to the editor, and that access rights should be more robust when media ownership is more concentrated); *cf.* Jack M. Balkin, *Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society*, 79 N.Y.U. L. REV. 1, 6, 52–54 (2004) (explaining the significance of infrastructure and institutional design for the fostering of free speech values); Jerome A. Barron, *Structural Regulation of the Media and the Diversity Rationale*, 52 FED. COMM. L.J. 555, 555 (2000) ("Structural regulations of the media—such as the multiple ownership rules—play a useful role in media governance in the United States.").

<sup>62</sup> *Cf.* *Davenport v. Washington Educ. Ass'n*, 127 S. Ct. 2372, 2378–79, 2382–83 (2007) (upholding state law providing that unions cannot use mandatory agency shop fees to influence elections or to operate political committees unless affirmatively authorized by individual members); *Austin v. Mich. State Chamber of Commerce*, 494 U.S. 652, 654–55 (1990) (upholding a law requiring corporations to limit their campaign spending to funds voluntarily contributed to a segregated fund by people associated with the corporation).

been applied at the state level. Attorneys general have pressured MySpace to disclose the identities, and even the private messages of, sex offenders who use its site.<sup>63</sup> We don't ban sex offenders from using the telephone,<sup>64</sup> but we are apparently eager to ban them from communicating over the Internet.<sup>65</sup> Access bans directed at potential child predators are already being implemented by sites like MySpace and LiveJournal, in part to ward off legal mandates.<sup>66</sup>

And this helps explain Strikethrough: the dynamics that prompted LiveJournal to act were based in part on the different, much less favorable treatment for intermediaries hosting or providing access to sexually explicit content as compared to copyright-infringing or defamatory content. Unsurprisingly, the legal regime tracks the social. The Communications Decency Act ("CDA")<sup>67</sup> protects ISPs from liability for most user-supplied content,<sup>68</sup> but it specifically excepts criminal laws relating to obscenity and

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<sup>63</sup> See Frederick Lane, *MySpace Struggles to Balance Privacy and Safety*, NEWSFACTOR.COM, June 5, 2007, [http://www.newsfactor.com/news/MySpace-Works-To-Identify-Offenders/story.html?story\\_id=0110010E62UC](http://www.newsfactor.com/news/MySpace-Works-To-Identify-Offenders/story.html?story_id=0110010E62UC) (discussing states' requests for stored information from accounts of MySpace users identified as sex offenders); Caroline McCarthy, *MySpace to Provide Sex Offender Data to State AGs*, CNET NEWS.COM, May 21, 2007, [http://www.news.com/MySpace-to-provide-sex-offender-data-to-state-AGs/2100-1030\\_3-6185333.html](http://www.news.com/MySpace-to-provide-sex-offender-data-to-state-AGs/2100-1030_3-6185333.html) (discussing MySpace's cooperation with state officials).

<sup>64</sup> Parole conditions on sex offenders may include restrictions on calling particular people or contacting minors by any means, and consent to monitoring phone numbers for incoming and outgoing calls, but Internet bans tend to sweep more broadly. See, e.g., MINN. STAT. ANN. § 243.055 (West 2003) (allowing telephone-related parole conditions and more extensive conditions on Internet use, including a flat ban). Because MySpace is a virtual "place" rather than an instrumentality of communication, excluding sex offenders from using it prohibits them from communicating with adults as well, like a ban on telephone use.

<sup>65</sup> See McCarthy, *supra* note 63 (noting laws enacted in several states and being considered by many more that require sex offenders to register e-mail addresses so that they could be barred from using sites like MySpace).

<sup>66</sup> See, e.g., Elise Young, *New Web Icon Helps Kids Fight Online Bad Guys: N.J. Pushes Safety Feature for Social Networking Sites*, N.J. RECORD, Sept. 28, 2007, available at [http://ro-i.redorbit.com/news/technology/1083561/new\\_web\\_icon\\_helps\\_kids\\_fight\\_online\\_bad\\_guys\\_/index.html](http://ro-i.redorbit.com/news/technology/1083561/new_web_icon_helps_kids_fight_online_bad_guys_/index.html) (discussing various social networking sites' compliance with New Jersey's voluntary abuse reporting procedures and investigation of user profiles to identify convicted sexual offenders); *Cyberspace: Make It Safe*, SAN BERNARDINO COUNTY SUN (CA), Jan. 18, 2008 (identifying voluntary agreements to purge sex offenders and otherwise protect children as useful, but opining that mandates could be necessary).

<sup>67</sup> Communications Decency Act of 1996, Pub. L. No. 104-104, 110 Stat. 133 (codified as amended in scattered sections of 18 and 47 U.S.C.).

<sup>68</sup> See 47 U.S.C. § 230(c)(1)-(2) (2000) (providing that users and providers of interactive computer services are not to be treated as the speaker or publisher of content on that service, and precluding liability against such providers and users for actions aimed at



child pornography (as well as laws governing intellectual property).<sup>69</sup> Congress determined that freedom of movement for intermediaries is too costly in this instance.

With anxiety rising about children's sexual vulnerability, and without any constitutional requirement that intermediaries be immunized for content provided by their users, more businesses may choose to act preemptively, as LiveJournal did. By contrast, ISPs are less likely to police for defamation, copyright infringement, or other socially detrimental expression such as that found in pro-anorexia communities, whose accounts LiveJournal repeatedly declined to suspend despite protests from numerous users.<sup>70</sup> The next Part addresses the ways in which liability regimes shape access in the absence of formal access rights.

## *II. Intermediary Control and Intermediary Liability: Power Without Responsibility?*

Current law often allows Internet intermediaries to have their free speech and everyone else's too. As just noted, § 230 of the CDA allows ISPs to set their own content standards and still avoid being treated like publishers.<sup>71</sup> In fact, under the CDA, ISPs can apparently continue to host defamatory content that the original author wishes to have removed.<sup>72</sup> Even common carriers face more potential liability than this.<sup>73</sup> This Part

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restricting access to "obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable" content, "whether or not such material is constitutionally protected").

<sup>69</sup> See *id.* § 230(e)(1).

<sup>70</sup> See, e.g., Comment by Coffeetchica on posting of TheIjstaff to LiveJournal, *Illegal and Harmful Content Policy Clarifications*, [http://community.livejournal.com/lj\\_biz/241884.html?thread=12454876#t12454876](http://community.livejournal.com/lj_biz/241884.html?thread=12454876#t12454876), (Aug. 7, 2007, 18:44) (followed by extensive arguments that pro-anorexia sites are harmful to users); LiveJournal Community, *World's Largest Pro Anorexia Site*, <http://community.livejournal.com/proanorexia> (last visited Apr. 5, 2008). LiveJournal has recently reversed course and proposed to ban such communities. See LiveJournal, *Draft Proposals: Abuse Policies and Procedures*, <http://www.livejournal.com/abuse/policy.bml?proposal=1#selfharm> (last visited Apr. 5, 2008).

<sup>71</sup> See 42 U.S.C. § 230(c)(1)–(2).

<sup>72</sup> See *Global Royalties, Ltd. v. Xcentric Ventures, L.L.C.*, No. 07-956-PHX-FJM, 2007 WL 2949002, at \*3–4 (D. Ariz. Oct. 10, 2007) (rejecting plaintiff's argument that a website operator, by declining to remove the posted material at the request of its original author, had itself become the creator or developer of the content under § 230).

<sup>73</sup> See RESTATEMENT (SECOND) OF TORTS § 612(2) (1977) (setting forth privilege for common carriers to transmit false and defamatory messages unless the original sender of the message is not actually privileged to send it and "the agent who transmits the message knows or has reason to know that the sender is not privileged to publish it"); Terri A.

explores the alternatives, and it argues that there is room for legislatures to maneuver in setting liability regimes that encourage—or discourage—various access policies.

Because the CDA protects ISPs from most tort claims, the standard example of a law governing Internet intermediaries' liability is the Digital Millennium Copyright Act ("DMCA").<sup>74</sup> Under the DMCA, ISPs can avoid monetary liability for copyright infringement by disabling access or removing links to material when they receive a properly formulated notice that it is infringing a copyright owner's rights.<sup>75</sup> Avoiding liability is a powerful incentive to comply with this notice-and-takedown procedure.

The DMCA also provides mechanisms for users to counternotify—i.e., inform the ISP that content it has removed was mistakenly identified as infringing another's copyright—and have material restored.<sup>76</sup> Nonetheless, most users who receive notice do not counternotify, even when they might have valid defenses.<sup>77</sup> The DMCA has, as intended, mobilized the power of intermediaries to control individual infringers—as well as a certain percentage of noninfringing uses. Because DMCA notice requirements are minimal and ISPs have no incentive to investigate, the notice-and-takedown process can be used to suppress critical speech as well as copyright infringement.<sup>78</sup> For a number of reasons, including the fact that

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Cutrer, *Computer Networks, Libel and the First Amendment*, 11 *COMPUTER/L.J.* 555, 567 (1992).

<sup>74</sup> Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 (1998) (codified at scattered sections of 17 U.S.C.).

<sup>75</sup> 17 U.S.C. § 512(c)–(d) (2000). The DMCA and the CDA define ISPs slightly differently, but for purposes of this discussion I will not parse the distinctions.

<sup>76</sup> *See id.* § 512(g).

<sup>77</sup> According to one report, the counternotification rate is nearly zero. Jens U. Nebel, *MED's Position Paper on Digital Technology and the Copyright Act: Legislation Without a Solution?*, 36 *VICTORIA U. WELLINGTON L. REV.* 45, 68 n.110 (2005) ("According to a survey, a striking feature of the notice-and-takedown procedure is that the infringement notifications are almost never disputed. The counter-notification rate of the study, which involved 47,000 cases, was less than 0.009 per cent." (citation omitted)); *see also* Jennifer M. Urban & Laura Quilter, *Efficient Process or "Chilling Effects"? Takedown Notices Under Section 512 of the Digital Millennium Copyright Act*, 22 *SANTA CLARA COMPUTER & HIGH TECH. L.J.* 621, 679 (2006) (reporting only seven counternotifications in a set of nearly 900 notifications of claimed infringement submitted to the Chilling Effects Clearinghouse, a very low number given that the submitters cared enough about the issue to send the notices on to the Clearinghouse).

<sup>78</sup> For discussion of the use of DMCA notices to achieve noncopyright or speech-suppressing objectives, *see* Urban & Quilter, *supra* note 77, at 681–93. As Kreimer noted, corporations are aware that DMCA notices can be used for noncopyright purposes, and *Forbes* even advised businesses to abuse the DMCA process to shut down critics, in the hope that ISPs would acquiesce to avoid trouble. *See* Kreimer, *supra* note 37, at 32–33 (citing Daniel Lyons, *Attack of the Blogs!*, *FORBES*, Nov. 14, 2005, at 128, 132).

most users aren't thinking about copyright or free speech when they choose providers, ISPs do not generally compete to protect user rights. As a result, ISPs serve as a chokepoint for copyright enforcement.

The government can target intermediaries in other ways in order to control speech, using that intermediary power to its own advantage.<sup>79</sup> Requiring libraries and schools to use filters intended to screen out indecent content in order to get federal funding is a particularly blatant example of such targeting,<sup>80</sup> with disproportionate effects on low-income users whose Internet access is more likely to depend on those institutions.<sup>81</sup> As the DMCA exemplifies, however, regulating the circumstances under which an intermediary is liable for a user's speech can be used to shape the overall marketplace of speech even without the use of the spending power.

The existence of the legal scheme set forth in the DMCA demonstrates that the CDA's policy of conferring complete immunity on ISPs is not inevitable and, most significantly, not currently understood as a First Amendment requirement. Though free speech is certainly an element of the policy debates over intermediary liability, Congress, like the courts that have applied congressional policy, has generally assumed that the First Amendment put few limits on calibrating secondary liability for Internet intermediaries. We have several different intermediary liability rules, depending on the substantive body of law: immunity for most state-law torts;<sup>82</sup> injunction-only safe harbors when an ISP follows the DMCA for copyright infringement;<sup>83</sup> common law secondary liability for noncopyright intellectual property torts such as trademark infringement;<sup>84</sup> and possible criminal accessory liability for obscenity and child pornography.<sup>85</sup> As their

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<sup>79</sup> See Kreimer, *supra* note 37, at 22–24 (discussing, among other things, government mandates for library filtering, attempts to make ISPs block access to child pornography and material harmful to minors, and the DMCA).

<sup>80</sup> See Children's Internet Protection Act, Pub. L. No. 106-554, §§ 1711–1712, 114 Stat. 2763, 2763A-337 to -343 (2000).

<sup>81</sup> See BILL & MELINDA GATES FOUND., TOWARD EQUALITY OF ACCESS: THE ROLE OF PUBLIC LIBRARIES IN ADDRESSING THE DIGITAL DIVIDE 4, 19–20 (2004), available at <http://www.gatesfoundation.org/nr/Downloads/libraries/uslibraries/reports/TowardEqualityofAccess.pdf>; PAUL HARWOOD & LEE RAINIE, PEW INTERNET & AM. LIFE PROJECT, PEOPLE WHO USE THE INTERNET AWAY FROM HOME AND WORK 1, 2 (2004) (noting that over a quarter of adult Internet users have used a library for access and only three percent depend entirely on libraries and similar places for access, but they are disproportionately poor, rural, and inexperienced Internet users).

<sup>82</sup> See 47 U.S.C. § 230(c)(1)–(2) (2000).

<sup>83</sup> See 17 U.S.C. § 512(g) (2000).

<sup>84</sup> See 47 U.S.C. § 230(e)(2) (excluding intellectual property from the CDA's protections for ISPs).

<sup>85</sup> See *id.* § 230(e)(1) (excluding criminal law from the CDA's protections for ISPs).

diversity suggests, these regimes are all optional, depending on the policies lawmakers have sought to implement.<sup>86</sup>

A. *The Constitutional Role of Intermediaries*

There is an alternate constitutional story one could tell, starting (as modern First Amendment law does) with *New York Times Co. v. Sullivan*.<sup>87</sup> *Sullivan* was a case about the *Times* as intermediary, displaying another entity's supposedly defamatory ad after only minimal screening.<sup>88</sup> What the actual malice standard protected was not the speech of the *Times* as such, but its business model—accepting the speech of others with only limited fact-checking.<sup>89</sup> The Court was quite clear that it endorsed the paper's business model as a means of implementing First Amendment values. Denying First Amendment protection to messages about the Civil

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<sup>86</sup> For an argument that the First Amendment requires some amount of freedom from copyright infringement liability for certain intermediaries, see generally Edward S. Lee, *Freedom of the Press 2.0* (Ohio State Pub. Law Working Paper No. 97, 2007), available at <http://ssrn.com/abstract=1008877>.

<sup>87</sup> *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964).

<sup>88</sup> As the Supreme Court's opinion recounted:

[T]he advertisement . . . was published by the Times upon an order from a New York advertising agency acting for the signatory Committee. The agency submitted the advertisement with a letter from A. Philip Randolph, Chairman of the Committee, certifying that the persons whose names appeared on the advertisement had given their permission. Mr. Randolph was known to the Times' Advertising Acceptability Department as a responsible person, and in accepting the letter as sufficient proof of authorization it followed its established practice. There was testimony that the copy of the advertisement which accompanied the letter listed only the 64 names appearing under the text, and that the statement, "We in the south . . . warmly endorse this appeal," and the list of names thereunder, which included those of the individual petitioners, were subsequently added when the first proof of the advertisement was received. Each of the individual petitioners testified that he had not authorized the use of his name, and that he had been unaware of its use until receipt of respondent's demand for a retraction. The manager of the Advertising Acceptability Department testified that he had approved the advertisement for publication because he knew nothing to cause him to believe that anything in it was false, and because it bore the endorsement of "a number of people who are well known and whose reputation" he "had no reason to question." Neither he nor anyone else at the Times made an effort to confirm the accuracy of the advertisement, either by checking it against recent Times news stories relating to some of the described events or by any other means.

*Id.* at 260–61.

<sup>89</sup> In its opinion upholding the initial verdict and damages award, the Alabama Supreme Court held that malice could be inferred, among other things, "from the Times' 'irresponsibility' in printing the advertisement while 'the Times in its own files had articles already published which would have demonstrated the falsity of the allegations in the advertisement.'" *Id.* at 263 (quoting *New York Times Co. v. Sullivan*, 144 So. 2d 25, 50 (Ala. 1962)).

Rights Movement because the paper was paid to run them, the Court held, would discourage newspapers from carrying “editorial advertisements” of this type, and so might shut off an important outlet for the promulgation of information and ideas by persons who do not themselves have access to publishing facilities—who wish to exercise their freedom of speech even though they are not members of the press. The effect would be to shackle the First Amendment in its attempt to secure “the widest possible dissemination of information from diverse and antagonistic sources.”<sup>90</sup>

And, as the Court had recognized before, intermediary liability has snowball effects in limiting the speech available to the public, making it particularly problematic.<sup>91</sup>

Consistent with this concern, *Sullivan*’s rules limiting defamation are especially useful for intermediaries. A printer reproducing his own words can more easily assess whether he has taken reasonable care to verify truth; the real speech-chilling effects of a negligence standard come when he must guess whether someone else who wants to use his press has also taken reasonable care. Moreover, the printer-intermediary is likely to be less committed to getting a message out than a printer-speaker; more inclined to doubt the truth of another’s claims than of his own, and thus not overconfident about his chances of success in a lawsuit; and overall more risk-averse than individual speakers, not least because of the likelihood that the printer has deeper pockets and is a more attractive defendant from a plaintiff’s perspective. *Sullivan*, though of course protecting individuals as well, removes barriers that disproportionately discourage intermediaries from carrying others’ speech.<sup>92</sup> A requirement that the plaintiff prove

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<sup>90</sup> *Id.* at 266 (quoting *Associated Press v. United States*, 26 U.S. 1, 20 (1945)) (other citations omitted). Ellen Goodman marks this as a shift to making diversity of expression a “principal instrumental goal, rather than merely an underlying value, of the First Amendment.” Ellen P. Goodman, *Media Policy and Free Speech: The First Amendment at War with Itself*, 35 *HOFSTRA L. REV.* 1211, 1230 (2007).

<sup>91</sup> See *Sullivan*, 376 U.S. at 278–79 (quoting *Smith v. California*, 361 U.S. 147, 153–54 (1959) (“[I]f the bookseller is criminally liable without knowledge of the contents, . . . he will tend to restrict the books he sells to those he has inspected; and thus the State will have imposed a restriction upon the distribution of constitutionally protected as well as obscene literature. . . . And the bookseller’s burden would become the public’s burden, for by restricting him the public’s access to reading matter would be restricted. . . . [H]is timidity in the face of his absolute criminal liability[] thus would tend to restrict the public’s access to forms of the printed word which the State could not constitutionally suppress directly. The bookseller’s self-censorship, compelled by the State, would be a censorship affecting the whole public, hardly less virulent for being privately administered.”)).

<sup>92</sup> We are far from the days in which a single person could put out a newspaper, but,

falsity, and some basic fault on the defendant's part, obviously encourages the speech even of individual speakers. But the extra protections—clear and convincing evidence and actual malice—constitutionalized by *Sullivan* are especially useful for national newspapers and other intermediaries. Thus, *Sullivan* analyzed what the *Times* knew about the truth of the statements at issue, not what the individual author of the ad knew.

But *Sullivan* has not generally been understood as a case about intermediary liability.<sup>93</sup> With the rise of the Internet and the appearance of multiple new business models, many of which relied on carrying unscreened-by-default content, it was unclear how far *Sullivan*'s rationale—protection for certain speech-based business models—would extend past its rule—no liability for defamation without actual malice. Specifically, before the CDA, ISPs appeared vulnerable to defamation suits, at least in instances in which they were given notice of defamatory content and subsequently refused to disable access to that content. The CDA was enacted on the theory that no ISP would accept the risk of standard *Sullivan*-type liability, given the massive amounts of user-generated content that the Internet allows.<sup>94</sup> The *Times* can scrutinize its

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although the corporate form is so familiar as to be transparent to modern lawyers, the same reasoning applies to content generated by newspaper employees or freelancers. Higher-ups within a newspaper organization have some of the same incentives to suppress stories as they would to suppress editorial ads, but the *Sullivan* rule makes it easier for them to rely on an editor's clearance of a story, even though it's the organization and not the editor that will be liable for a defamatory publication.

<sup>93</sup> I am not arguing that *Sullivan* is just about intermediaries, but that its reasoning supports rules that give intermediaries some extra protection against liability. The concurrences by Justices Black and Goldberg, by contrast to the Court's opinion, mention both individuals and newspapers in the course of arguing for absolute freedom to criticize government officials regardless of harm or falsity. See *Sullivan*, 376 U.S. at 296–97 (Black, J., concurring) (equating citizens and press); *id.* at 298 (Goldberg, J., concurring) (same). Once the majority determined that some cause of action for defamation of government officials would survive, however, the contours of that cause of action were shaped by the need of intermediaries to be able to rely on information provided by others. See *id.* at 286–88.

<sup>94</sup> See, e.g., H.R. REP. NO. 104-458, at 194 (1996) (Conf. Rep.), reprinted in 1996 U.S.C.C.A.N. 124, 208 (“One of the specific purposes of [§ 230] is to overrule . . . decisions which have treated such providers and users as publishers or speakers of content that is not their own . . .”). The specific argument that ISPs used to Congress was that, because of the potential costs, no ISP would self-regulate any content at all if self-regulation led courts to treat the ISP as a publisher, as one court had already reasoned. See *Stratton Oakmont, Inc. v. Prodigy Servs. Co.*, 23 Media L. Rep. (BNA) 1794, 1795–98 (N.Y. Sup. Ct. 1995) (holding that Prodigy was a publisher of its users' defamatory content because Prodigy monitored its services and had the ability to remove content). Congress responded by precluding publisher-type liability entirely and simultaneously protecting ISPs from liability to users based on any private censorship in which they engaged. Courts, however, have subsequently had many more opportunities to interpret the mandatory freedom from liability

stories, letters to the editor, and ads and make reasonable judgments about its libel exposure; Google cannot review its entire index. Absent a constitutional right to operate a search engine free of liability for the indexed content—something not much argued<sup>95</sup>—Congress believed that it needed to alter the common law, even more than it had been modified by the First Amendment, to give Internet intermediaries the chance to make their business models work.<sup>96</sup> In essence, the CDA, and even the DMCA,

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to third parties than to interpret Congress's encouragement of ISP monitoring of users. Naturally enough, judicial opinions have focused on the free-speech-promoting functions of § 230 immunity. See, e.g., *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 331 (4th Cir. 1997) ("Congress' purpose in providing the § 230 immunity was thus evident. Interactive computer services have millions of users. The amount of information communicated via interactive computer services is therefore staggering. The specter of tort liability in an area of such prolific speech would have an obvious chilling effect. It would be impossible for service providers to screen each of their millions of postings for possible problems. Faced with potential liability for each message republished by their services, interactive computer service providers might choose to severely restrict the number and type of messages posted. Congress considered the weight of the speech interests implicated and chose to immunize service providers to avoid any such restrictive effect." (citation omitted)).

<sup>95</sup> Before the CDA, the assumption in the law reviews tended to be that the *Sullivan* standard was the best to be hoped for as a constitutional matter. See, e.g., Philip H. Miller, *New Technology, Old Problem: Determining the First Amendment Status of Electronic Information Services*, 61 *FORDHAM L. REV.* 1147, 1147 (1993) ("[A]t some point in their development, most [new] media have sought to secure the sort of 'full' First Amendment protection that is afforded to print publishers—the fullest freedom from regulation afforded by the First Amendment's proscriptions against government restrictions on free speech and freedom of the press." (emphasis added)). Nonetheless, it is plausible that, had the CDA not been enacted, intermediaries would have developed constitutional arguments that, just as the *New York Times* required *Sullivan* to exist in its modern form, so did Internet intermediaries require a super-*Sullivan*. But First Amendment theorists didn't aspire to the CDA's near-absolute immunity from liability as a matter of constitutional law. See, e.g., Floyd Abrams, *First Amendment Postcards from the Edge of Cyberspace*, 11 *ST. JOHN'S J. LEGAL COMMENT.* 693, 704 (1996) ("It seems to me that a far more protective standard is needed than 'reason to know['] user-provided content is defamatory;] something like 'knowing,' more like 'actual knowledge.' It does not now exist as a matter of common law."). Under the CDA, even actual knowledge of falsity will not make an ISP liable for its users' speech. The DMCA's standard of "red flag" knowledge sufficient to knock an ISP out of the § 512 safe harbors might, however, approach what Abrams proposed. See 17 U.S.C. § 512(c)(1)(A)(ii) (an ISP must "not [be] aware of facts or circumstances from which infringing activity is apparent"); H.R. REP. NO. 105-551, pt. 2, at 57 (1998) (explaining that this standard requires evidence that an ISP "turned a blind eye to 'red flags' of obvious infringement"); cf. *Perfect 10, Inc. v. CCBill L.L.C.*, 488 F.3d 1102, 1114 (9th Cir. 2007) (holding that neither the domain names "illegal.net" and "stolencelebritypics.com" nor password-hacking websites were red flags of infringement).

<sup>96</sup> One way to explain § 230 is that it was enacted in the hope that ISPs would shut down speech that Congress couldn't constitutionally ban. From this perspective, § 230 largely backfired. Though analogies with real property can be problematic, what Congress did was like giving private landowners control over people present on their land in the hope that the owners would make socially optimal uses of the land, but also exempting them from

subsidize new intermediary models by protecting them from otherwise applicable law, but only as a matter of legislative grace.<sup>97</sup>

The flip side of this legislative grace is that the corporation's powers and freedoms stem from laws designed to give it special advantages,<sup>98</sup> but those need not include the ability to claim both speaker status as against the government and also immunity from treatment as a speaker as against private claimants. I am not arguing necessarily for greater intermediary liability for users' behavior. The basic protection against intermediary strict liability, and even against any requirement to mediate disputes about appropriate content, is an important protection against unanticipated and practically uncontrollable liability for torts committed by individual users.<sup>99</sup> Rather, I am arguing that if we limit intermediary responsibility, whether by § 230 or by the DMCA, we should also limit intermediary power to control speech. There is no reason that any speech rights that Internet intermediaries possess should be vested in intermediaries' management, rather than attributed to users only when those users misbehave.

#### *B. Balancing Power and Responsibility*

Individual users' speech *can* do harm, and absolute immunity for

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nuisance laws when visitors inflicted harms on third parties. Unsurprisingly, in such situations, private owners are often willing to ignore harms imposed on third parties.

<sup>97</sup> See *Blumenthal v. Drudge*, 992 F. Supp. 44, 49 (D.D.C. 1998) ("Whether wisely or not, [Congress] made the legislative judgment to effectively immunize providers of interactive computer services from civil liability in tort with respect to material disseminated by them but created by others. . . . While Congress could have made a different policy choice, it opted not to hold interactive computer services liable for their failure to edit, withhold or restrict access to offensive material disseminated through their medium.").

<sup>98</sup> *Austin v. Mich. State Chamber of Commerce*, 494 U.S. 652, 658–59 (1990) ("State law grants corporations special advantages—such as limited liability, perpetual life, and favorable treatment of the accumulation and distribution of assets—that enhance their ability to attract capital and to deploy their resources in ways that maximize the return on their shareholders' investments. These state-created advantages not only allow corporations to play a dominant role in the Nation's economy, but also permit them to use resources amassed in the economic marketplace to obtain an unfair advantage in the political marketplace." (internal quotation marks and citations omitted)).

<sup>99</sup> Numerous courts have found that § 230 requires them to hold that ISPs are not liable for user-created content. See, e.g., *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119, 1124 (9th Cir. 2003); *Green v. Am. Online*, 318 F.3d 465, 471 (3d Cir. 2003); *Ben Ezra, Weinstein & Co. v. Am. Online Inc.*, 206 F.3d 980, 986 (10th Cir. 2000); *Zeran*, 129 F.3d at 330; *Doe v. SexSearch.com*, 502 F. Supp. 2d 719, 722, 727–28 (N.D. Ohio 2007) (holding adult dating website immune from suit by a man charged with the statutory rape of a girl who misrepresented her age in her profile). *But see* *Fair Housing Council of San Fernando Valley v. Roommates.com, L.L.C.*, 489 F.3d 921, 927–29 (9th Cir.) (holding that § 230 did not apply to a discrimination claim against a site that suggested prohibited characteristics for users who were seeking roommates), *reh'g granted en banc*, 506 F.3d 716 (9th Cir. 2007).



ISPs—even those that refuse to remove content after the original speaker concedes liability, or even those that deliberately induce the creation of content for the ISP’s own advertising purposes—may go too far. The CDA’s protection against third-party suits need not depend on an ISP’s unfettered ability to do anything it wants to its users. We could, for example, make certain ISPs into common carriers, or something near, banning content discrimination and also ensuring that they wouldn’t be liable for what users did with that service.<sup>100</sup> Such a rule might help fulfill Barron’s ideal of access for even controversial and unpopular speech.<sup>101</sup> But because it is easy to predict that problems of unlawful user-supplied content will persist, a neutrality policy could not stop at requiring access *ex ante*. It would have to specify how intermediaries should deal with illegal speech once it was made available. Whereas Barron focused on equal access, intermediary liability draws our attention to unequal outcomes.

As a practical matter, recruiting intermediaries to police objectionable content is simply too popular to make any total immunity-plus-nondiscrimination law politically viable. Section 230, whose general liability provisions have become so vital to ISPs, is in fact titled “Protection for private blocking and screening of offensive material,”<sup>102</sup> and general immunity for user-supplied content was granted along with immunity from liability *to* users for “any action voluntarily taken in good faith to restrict access to or availability of material that [a] provider . . . considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected.”<sup>103</sup>

Section 230, that is, always attempted to further two objectives: protecting ISPs from liability and thus fostering free speech, and encouraging ISPs to monitor and suppress offensive speech.<sup>104</sup> But the

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<sup>100</sup> The assumption for common carriers like telephone companies generally has been that they are not speakers, and have no First Amendment right to discriminate against speech or speakers. *See Miller, supra* note 95, at 1163–64. Because they are not speakers, they are not liable for speech carried on their wires. *Id.* In other words, the treatment of privilege and liability has been equal, rather than disjoined as it is with Internet intermediaries.

<sup>101</sup> *See Barron, supra* note 3, at 1641–42.

<sup>102</sup> 47 U.S.C. § 230 (2000).

<sup>103</sup> *Id.* § 230(c)(2)(A).

<sup>104</sup> *See, e.g., Zeran*, 129 F.3d at 331 (stating that § 230 was designed to avoid a chilling effect on ISPs and encourage them to regulate offensive material themselves); *Donato v. Moldow*, 865 A.2d 711, 726 (N.J. Super. Ct. App. Div. 2005) (“Granting immunity furthers the legislative purpose of encouraging self-regulation to eliminate access to obscene or otherwise offensive materials while at the same time advancing the purpose of promoting free speech on the Internet, without fear of liability.”)

simultaneous support of freedom and suppression requires us to ignore the question of whose speech is supposed to be freed and whose suppressed.

Ironically—given § 230's title—immunity alone has not generally been sufficient to convince ISPs to monitor content. Thus, though there seems to be no immediate prospect of general legislative action, various commentators have proposed cutting back on ISP immunity to encourage them to act against unlawful speech, especially when the speaker is anonymous or difficult to identify. The DMCA's notice-and-takedown regime has seemed an obvious model for dealing with the situation of ISPs that transmit enormous amounts and types of speech and thus cannot be expected to detect unlawful speech without specific notice.<sup>105</sup> Looking beyond the DMCA, Mark Lemley has recently explored various possible safe harbors for ISPs who provide access to substantial amounts of content, some of which is predictably going to violate some law.<sup>106</sup> He argues that all such situations should be treated the same, and he endorses an intermediate standard that would limit the DMCA's incentives to overblock while being less freewheeling than the CDA.<sup>107</sup>

To the extent that such proposals cover all sorts of illegal speech, they make us confront the question of exactly what free speech rights an ISP ought to be able to assert. That is, if the government may only constitutionally punish threats when the speaker intends to communicate a threat, could an ISP be held liable for failing to remove a threatening post on a blog after proper notice? If the ISP is seen as the speaker, then it probably does not have the requisite intent. Yet if the ISP is not truly engaging in any process of selecting speech, then there may be no reason to impose an intent requirement before a court could order the speech to be

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<sup>105</sup> See, e.g., Olivera Medenica & Kaiser Wahab, *Does Liability Enhance Credibility?: Lessons from the DMCA Applied to Online Defamation*, 25 CARDOZO ARTS & ENT. L.J. 237 (2007) (proposing notice-and-takedown for defamatory speech); Michael L. Rustad & Thomas H. Koenig, *Rebooting Cybertort Law*, 80 WASH. L. REV. 335, 389–410 (2005) (proposing a notice-and-takedown scheme for all illegal speech); Bradley A. Areheart, *Regulating Cyberbullies Through Notice-Based Liability*, 117 YALE L.J. POCKET PART 41, 45–46 (2007), <http://thepocketpart.org/2007/09/08/areheart.html> (proposing a notice-and-takedown scheme for libel and public disclosure of private facts). Others advocate even less freedom for intermediaries. See, e.g., Doug Lichtman & Eric Posner, *Holding Internet Service Providers Accountable*, 14 SUP. CT. ECON. REV. 221, 222–25 (2006) (arguing for greater liability for Internet intermediaries on economic principles).

<sup>106</sup> See Mark A. Lemley, *Rationalizing Internet Safe Harbors*, 6 J. ON TELECOMM. & HIGH TECH. L. 101, 102–07 (2007). The European Union takes a blanket approach, though not the one Lemley advocates. See generally Council Directive 2000/31, 2000 O.J. (L 178) 1 (EC) (setting forth standards for ISPs' liability for unlawful content generally); cf. Lemley, *supra*, at 118–19 (criticizing the European Union's approach).

<sup>107</sup> See Lemley, *supra* note 106, at 115–16.

removed. A newspaper might report on a threat in the context of a story about the threat; in such a case, liability for the newspaper would be inappropriate. But ISPs don't routinely put threats in context.

More generally, ISPs may be agents of free speech, but that does not mean that they automatically take on the interests of every speaker whose speech they carry.<sup>108</sup> By default, access providers like America Online ("AOL") and Google do not select or approve content and are not generally understood to do so. Just as a telephone company is not engaging in speech of its own when its users speak, ISPs regularly facilitate others' speech rather than speaking for themselves. As conduits, ISPs' concerns are different than those of initial speakers. Free speech doctrine could be tailored to protect their interests as transmitters. A notice-and-takedown procedure or, as Mark Lemley suggests,<sup>109</sup> a scheme that protected all "innocent" ISPs would not impose the kind of affirmative monitoring costs that ISPs feared would drive them out of business. Another possibility worth exploring might be a modified notice-and-takedown with an arbitration component, in which a complainant would have to submit evidence supporting its assertion of illegality, rather than a bare claim (as suffices under DMCA).<sup>110</sup>

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<sup>108</sup> See Travis, *supra* note 37, at 1577–78 (“[A]ll broadband providers already allow users to access a plethora of offensive content with which they surely disagree as an editorial matter, undermining any suggestion that broadband companies are like the editors of newspapers. . . . [Broadband providers] would continue to carry the vast majority of Internet content whether required to by law or not.”). *Denver Area Educational Telecommunications Consortium, Inc. v. FCC* offers an example of the profound doctrinal troubles caused by conduits who occasionally, but only occasionally, seek to control the speech they disseminate; in that case, the Court produced six opinions with different theories of cable providers' speech rights as against speakers who might be carried on cable channels. See *Denver Area Educ. Telecomms. Consortium, Inc. v. FCC*, 518 U.S. 727, 732–838 (1996). It is at least possible to argue that the CDA's special grant of rights to ISPs to discriminate against offensive content subjects that grant to First Amendment scrutiny under *Denver Area*. For a useful discussion of the arguments network proprietors have made to characterize themselves as possessing editorial discretion and thus having rights against any content mandates, see Goodman, *supra* note 90, 1220–23.

<sup>109</sup> See Lemley, *supra* note 106, at 115–16.

<sup>110</sup> An affidavit could be used to establish falsity in defamation claims, for example, which could at least put the burden of production on the original speaker—or the ISP that decided to defend the speech—to show lack of fault. The model would be something like the Uniform Domain Name Dispute Resolution Procedure, which, though it as faults that should not be imitated, has allowed low-cost resolution of thousands of domain name disputes since its adoption. See Internet Corp. for Assigned Names & Numbers (“ICANN”), Uniform Name Dispute Resolution Policy (Oct. 24, 1999), <http://www.icann.org/udrp/udrp-policy-24oct99.htm>; Orion Armon, *Is This as Good as It Gets? An Appraisal of ICANN's Uniform Name Dispute Resolution Policy (UDRP) Three Years After*

The definition of ISP in the CDA is quite broad, extending well beyond Internet access providers like Comcast or AOL, and even covering bloggers insofar as their blogs allow comments.<sup>111</sup> Some bloggers might well have speech interests in hosting comments from others. But perhaps the definition of ISPs should be refined to take this into account, and those who claim a speech interest should be asked to take the bitter with the sweet: if they want to assert free speech claims on behalf of content provided by others, then the substantive standards for holding them liable for facilitating that speech should apply, rather than absolute immunity. Failure to comply with notice-and-takedown under the DMCA, for example, merely subjects an ISP to the underlying common law of secondary liability for copyright infringement, and the same would be true for defamation and other torts if the CDA were amended to be more like the DMCA. Given the underlying law of defamation, it might be difficult to hold a blogger responsible for a commenter's defamatory statements even without absolute immunity.<sup>112</sup>

In the past, the Supreme Court has been willing to tinker with the procedure, rather than the substance, of speech torts in order to balance the costs of harmful speech with the benefits of speech that is useful but vulnerable to chilling effects. Most notably, the Court determined that negligent defamation of private figures could constitutionally justify an award of actual damages, but presumed or punitive damages in such cases would only be available when actual malice was shown.<sup>113</sup> By reducing the size of the possible penalty, the Court believed that it decreased the chilling effect of a negligence rule to an acceptable level. Likewise, a regime that limited available remedies against ISPs to injunctive relief—whether conditioned on compliance with notice-and-takedown, as with the DMCA, or as a blanket rule for ISPs that lacked actual knowledge of illegality—would substantially decrease the chilling effect on ISPs of altering § 230.

If the DMCA model were extended, there would be a legitimate concern over chilling effects on individual recipients of takedown notices. Copyright owners have been aggressive enough using the DMCA; there is no reason to think that offended individuals acting on behalf of their own

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*Implementation*, 22 REV. LITIG. 99 (2003) (praising much of the UDRP and offering suggestions for improving on its weaknesses).

<sup>111</sup> See 47 U.S.C. § 230(f)(2) (2000).

<sup>112</sup> Justice Breyer's First Amendment jurisprudence, which has long focused on the ways in which structural regulations help some speakers and hurt others, offers a guide to shaping liability standards. See Goodman, *supra* note 90, at 1252–54 (describing Justice Breyer's balancing of the risks of private censorship with the speech interests of conduits).

<sup>113</sup> See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 349–50 (1974).

interests, rather than those of their copyrighted works, would be any more restrained.<sup>114</sup> Of course, when an individual speaker is identifiable, it is already possible to threaten her with a defamation suit, but more people might use notice-and-takedown than would threaten to sue. Under the DMCA, the recipient of a notice can counternotify and have the right to have the ISP return the challenged material unless the sender files suit within a short period.<sup>115</sup> In practice, very few people counternotify in DMCA cases, and it seems likely that this pattern would continue. But whether that would mean more benefits from the removal of ill-considered defamatory speech than costs in suppression of nondefamatory speech is more a matter of intuition than confident prediction.

Being threatened with a lawsuit definitely has a chilling effect, but not one that First Amendment doctrine has targeted. Possible proposals for reforming § 230 deal with intermediary behavior alone; the substantive standards for holding an individual speaker liable would remain stringent. To the extent that notice-and-takedown led to more implicit threats of lawsuits—that is, situations in which a recipient would perceive a likelihood of suit if she contested the notice by filing a counternotification, even if the notice sender had no real intention of taking the matter further—courts would have to confront the question of how to factor this into a First Amendment analysis. Formal legal doctrine is a rough tool for dealing with perceptions of the law, and to date First Amendment doctrine has only attempted to deal with the problem of chilling effects by making it harder to *win*, not harder to *threaten*. Doctrine might not be able to do much more than that, because it is almost always possible to threaten to sue, regardless of whether success is likely, and the threat is often a frightening one. Perhaps penalties for misuse of a notice-and-takedown procedure, as exist for the DMCA, could mitigate this risk.<sup>116</sup> Moreover, changes in ISP immunity should, as noted above, be accompanied by increasing the governance rights of users over the services they use. Without such changes, reforms in § 230 are likely to increase the number of sudden, surprising deletions of speech like those experienced by LiveJournal users. Thus, § 230 reforms must not focus only on ISP immunity from third-party claims, but must also address their immunity from user complaints about

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<sup>114</sup> See Lemley, *supra* note 106, at 114–15 (criticizing possible notice-and-takedown regimes for defamation and similar torts on this ground).

<sup>115</sup> See 17 U.S.C. § 512(g) (2000).

<sup>116</sup> Cf. *Online Policy Group v. Diebold, Inc.*, 337 F. Supp. 2d 1195, 1204–05 (N.D. Cal. 2004) (finding that company that misrepresented copyright infringement claim in a cease and desist letter violated the DMCA and was liable for damages under the statute for misusing the notice-and-takedown procedure).

censorship.

I want to be clear: there is no constitutional requirement that Internet intermediaries be regulated consistently. LiveJournal can have its cake and eat it too, even though I think it's a substantively worse solution than an alternative that tied immunity for users' speech to some type of procedural due process, democratic self-governance, or nondiscrimination rule. The flexibility the legislature has with respect to intermediary speech, and the resulting effects on individuals' speech, highlight the absence of a neutral background rule defining speakers' rights and duties.<sup>117</sup> Individualist theories of free speech cannot answer the pressing questions posed by intermediaries—and intermediaries are everywhere. “As a constitutional theory for the communication of ideas, laissez faire is manifestly irrelevant.”<sup>118</sup> Regardless of what we choose to do about it, we cannot pretend that our brave new online world has rewritten the rules of access. Therefore, we should be thinking carefully about the best regimes that will balance promoting speech with reducing the harm of unlawful speech. This menu of choices should include, at a minimum, alternatives for empowering users of major ISPs substantively and procedurally, as well as alterations in § 230 to better calibrate power and responsibility.

### *Conclusion*

The proliferation of content from new sources challenges the mass media, but new speakers remain dependent on larger organizations. While Barron wrote approvingly of the useful and valuable unheard perspectives lurking in the audience, waiting only for the opportunity to speak, current regulations concern themselves more with dangerous volunteers from the audience, creating a legal structure that protects intermediaries from third-party claims but provides them scant legal incentive to promote diversity of speech. Meanwhile, the same economic incentives Barron identified for mass media like newspapers and television stations push ISPs towards

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<sup>117</sup> Cf. Robert W. McChesney, *Freedom of the Press for Whom? The Question to Be Answered in Our Critical Juncture*, 35 HOFSTRA L. REV. 1433, 1441–42 (2007) (discussing the ways in which government policy has structured and necessarily must structure mass media entities); *id.* at 1447–48 (listing various government subsidies for media companies, including through educational spending, copyright law, and state-granted communications monopolies).

<sup>118</sup> See Barron, *supra* note 3, at 1656. A similar point can be made about the effect on democracy of control of employees' speech by private employers. See, e.g., Cynthia L. Estlund, *Free Speech and Due Process in the Workplace*, 71 IND. L.J. 101, 106 (1995). For powerful rebuttals to the argument that, if speakers truly desire free speech, the market will provide ISPs who more aggressively assert their customers' speech interests, see Kreimer, *supra* note 37, at 33–41.

promoting advertiser-friendly content. LiveJournal was willing to sacrifice individual users for a better image for advertisers and investors, and this pattern is likely to continue as aggregators attempt to monetize popular spaces such as Facebook and YouTube.

Online as well as offline, government determines who gets to structure speech, and thus who gets to speak. The CDA empowers LiveJournal to monitor content but allows it to ignore complaints of defamation. The DMCA sets out a separate rule for copyright infringement allowing copyright owners to send notices of claimed infringement and have accused material taken down. Another law requires libraries and schools to filter if they want federal money, which many must have to survive. These allocations of power are not required by the First Amendment, nor are they barred by it. Indeed, intermediaries' power to disseminate ideas and material is so highly structured by discretionary legal rules that nondiscretionary legal rules such as constitutional requirements cannot provide substantial guidance in dealing with intermediaries' power.

To say that an ISP's servers are its property, and thus so too the content stored on those servers, would ordinarily be to imply some responsibility when the content turned out to be unlawful. But the CDA and to a fair extent the DMCA uncouple those things. That is not a neutral policy (as if there ever was one). My version of Barron's argument, then, is a policy-based call for action, backed by a theory that the legislature can legitimately determine that free speech will be served by particular restraints on intermediaries' ability and incentives to interpose themselves between speakers and audiences.

I would be happier if the Constitution required my preferred allocation of speech rights. But in the absence of such a mandate, there are still important questions about the best way to fulfill our needs to talk and to listen.