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**Assessing principles for the regulation of online content:
Lessig's modalities of regulation**

In his essay "The Laws of Cyberspace," Lawrence Lessig defines regulation as that which "constrains behaviour".² Behaviour - the object of regulation according to Lessig - must be understood as encompassing anything that even indirectly affects people: regulating road signs is a way of regulating behaviour because it indirectly constrains how individuals are going to interact on roads in future. In the case of online content, which this paper focuses on, it is easy to see how those that create content, view it or display it contribute to "regulating" the content by influencing future behaviour such as the way such content will be presented or produced in future. My aim in this section is to understand what external constraints can serve to best regulate the way online content affects the end-viewer, and how end-viewers themselves constrain and shape the quality of online content.

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² (1998), available at:

http://www.lessig.org/content/articles/works/laws_cyberspace.pdf and see also his account of regulation in L. LESSIG, *Code: and other laws of cyberspace, Version 2.0*, NYC, Basic Books, 2006. In particular see Chapter 7, *What Things Regulate*.

To make sense of regulation Lessig identifies four modalities that can regulate behaviour: law that regulates «*by sanctions imposed ex post*»; social norms that «*direct and constrain*» behaviour through social persuasion; the market which «*regulates by price*»; and finally architecture which is the «*constraint of the world as I find it*» and it applies even in cases where the world as I find it has been artificially created or modified by humans, as for the internet.³ Lessig then argues that to make sense of his four constraints one must consider their effects jointly.

Lessig's formulation of the four constraints can be praised for its clarity and truthfulness but also criticized under a number of angles. Andrew Murray and Colin Scott, for instance, argue that Lessig focuses on top-down forms of regulation and ignores bottom-up community-based regulatory constraints.⁴ Their critique requires further examination. Notwithstanding its possible weaknesses, Lessig's account clarifies at least three important points that are key to any discussion of internet regulation: first, law is less easily enforceable on the internet than offline meaning it is easier to free-ride and avoid law enforcement in cyberspace; second, on the internet "code" and "architecture" can be more important than formal "laws", in other words the choices of computer scientists may have greater effect than the choices of legislators; third, on the internet a balance must be found between liberty and control, and while the balancing exercise is similar to that we operate offline, technology may exacerbate some threats to liberty.

On the first point, cyber-libertarians such as Johnson and Post⁵ and John Perry Barlow⁶ have argued that the internet is unregulable through law; that laws are unenforceable in cyberspace; and that only internal constraints can regulate the internet. While he does not

³ *Ibid.*

⁴ A. MURRAY and C. SCOTT, «Regulating the New Media: Hybrid Responses to New Forms of Power», *Modern Law Review*, vol. 65, July 2002, p. 491.

⁵ D. JOHNSON and D. POST, «Law and Borders--The Rise of Law in Cyberspace», 48 *Stan. L. Rev.*, 1367 (1995-1996).

⁶ J.P. BARLOW, *A Declaration of the Independence of Cyberspace*, available online at: <https://projects.eff.org/~barlow/Declaration-Final.html>

argue that cyberspace cannot be regulated through laws, Lessig shows that economics, social norms and architecture/design all “regulate” the web with the same authority as laws do. The question of the place of the law in the regulation of online content is an interesting one to ask. In his article “The Future of Expression in the Digital Age,”⁷ Jack Balkin argues that First Amendment law, as developed by the courts, is in a way becoming irrelevant to free speech practices because it does not offer satisfactory tools of interpretation for the «*key free speech battles of the future*».⁸ He sees the policy debates of the future as ones shifting toward «*questions of design... largely beyond judicial competence*» and considers the key actors who will maintain free speech values on the internet in future to be legislatures, administrative agencies, and technologists.⁹

Balkin’s idea that speech should be viewed within the framework of our democratic culture¹⁰ rather than through Alexander Meiklejohn’s progressivist «*democratic speech*»¹¹ approach is persuasive. However, his view of constitutional lawyers’ confined role in future appears too dismissive to be palatable. Most of the issues that arise in relation to the internet are commonly dealt with by lawyers and it is crucial individuals have a right to complain about these issues in a court of law. Online content, for instance, is regulated by laws on a variety of levels including the national private laws, statutes, national and international copyright laws and fundamental rights charters. [...] Even where an issue is too technical or polycentric for a court to adjudicate in the first instance,¹² it is important that courts be able to review the regulatory systems and solutions put in place by administrative authorities, companies and technologists to solve those issues. The decisions of regulatory authorities in

⁷ J. BALKIN, 36 *Pepp. L. Rev.* 427 (2008-2009).

⁸ *Ivi*, p.427.

⁹ *Ivi*, p.443.

¹⁰ J. BALKIN, *Digital Speech and Democratic*.

¹¹ See for instance A. MEIKLEJOHN, «The First Amendment is an Absolute», 1961 *SUP. CT. REV.* 245.

¹² On the question of polycentricity see L. FULLER, «The Forms and Limits of Adjudication», 92 *HARVARD L. REV.* 353 (1978-1979).

charge of antitrust, communications or data protection policy ought to be reviewable by a court of law.

Coming to the second reason why Lessig's account is important, "architecture" which Lessig calls "code" plays a greater role online than offline. Lessig's point is simple: cyberspace is not unregulable as cyberlibertarians argue, cyberspace is in fact more subject to external forms of control than the offline world is; this is because cyberspace not only can be regulated through the same four modalities of control that operate in any other environment, but it is entirely human created. His argument that in cyberspace code is the most powerful constraint is, in my view, persuasive. Code is *«the software and hardware that constitute(s) cyberspace as it is — the set of protocols, the set of rules, implemented, or codified, in the software of cyberspace itself, that determine how people interact, or exist, in this space»*.¹³ Code has a high degree of rigidity but can also be built in ways that allows it to be malleable. Lessig thus sees the fight for liberty on the internet as one which should be directed primarily by the policy-maker toward maintaining and increasing the network's architectural malleability.

Third, Lessig emphasizes in his work that regulation is about values and in particular about countering *«threats to liberty»* as he puts it.¹⁴ Yet threats to liberty change with time: the enhanced intrusiveness of new technologies and the growing importance of privacy laws resulting from the use of such technologies show it. What Lessig clarifies is the distinctive nature of threats to liberty on the internet where the battle over liberty is no longer a battle between state and citizens but rather takes the form of openness and free expression versus control and proprietary entitlements. It is a battle around the openness of code. Thus, for Lessig studying the internet is performing a constant scrutiny of when regulatory constraints hinder liberty excessively. In the case of online content, the question that needs answering is: which regulatory solutions limit speech and which instead allow artistic and cultural expression to flourish?

¹³ *Ivi supra* (1998).

¹⁴ See L. LESSIG, *op. cit.*, p. 121.

Lessig's underlying thesis in favour of greater malleability and openness of internet infrastructure is arguably extended by Jonathan Zittrain's notion of "generativity." Generativity, Zittrain says, is «*a system's capacity to produce unanticipated change through unfiltered contributions for broad and varied audiences*».¹⁵ According to Zittrain a system that is generative is more innovative because it enables changes in radically new and unanticipated directions. To establish whether a given program, mechanism or device is generative, Zittrain imagines five criteria.

(1) Leverage: the extent to which a system "leverages," makes easier, a number of possible tasks.

(2) Adaptability: the extent to which a system can be adapted to different tasks.

(3) Ease of mastery: how user-friendly a system is.

(4) Accessibility: how accessible the system is to those willing and able to use it.

(5) Transferability: how easily the skills and tools associated with the system can be transferred onto other less skilled individuals through the system.

If a system matches all five factors, it will likely be generative. If one or more of the factors is missing, the system will be less generative or not generative at all: cars are highly accessible, transferrable, and easy to master; however they are not so easy to leverage or adapt, thus not generative. The internet is perhaps the most generative system one could find and Zittrain consequently warns that threats to the internet's openness are threats to its generativity.

Applying the above principles of regulation to online content, the analysis shows that far from aiming at a purely unconstrained exercise of speech, regulators are well advised to impose certain constraints on speech if limitations on it are found to promote better and not simply more speech. This idea applies particularly well to online content, in that constraints

¹⁵ J. ZITTRAIN, *The Future of the Internet. And how to stop it*, New Haven, Yale University Press, 2008, p 67.

imposed on content quality may promote better speech and not be hindrances on speech generally.

To illustrate the idea that constraints can sometimes promote, and not only restrain liberty and autonomy, Yochai Benkler uses an episode of Greek mythology.¹⁶ When passing in front of the Sirens with his ship, Odysseus asks his men to tie him to the mast, so he can hear the Sirens' songs but is prevented to jump off the ship as all have done at the sound of the Sirens. He asks his men to plug their ears with wax so they can keep rowing past the Sirens without hearing them. Those two types of constraints, the tying and the wax, do not undermine the men's autonomy but enhance it: Odysseus and his men keep rowing and avoid a famous peril. Properly designed limitations are sources of construction rather than destruction. As an additional example, in *The Future of Ideas*¹⁷ Lessig also mentions the "classical form" in music as a constraint that helped Mozart and Beethoven emerge. The political climate in which an artist, writer or movie director finds his or her roots plays a crucial role in whether his creativity is enabled or restrained. This is not only true of music and art, it is also true in philosophy, academia and other professional pursuits: no great artist, painter, thinker, and probably no great online content creator's work can be "great" in a vacuum.

Regulatory constraints to the production, dissemination and display of online content are thus essential to promote content of good quality on the internet.

¹⁶ Y. BENKLER, *The Wealth of Networks*, New Haven, Yale University Press, 2007, p. 148-149.

¹⁷ *Ivi.*, p.104.