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The Unidentified Wrongdoer

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I am grateful to participants in the 38th Annual Conference of the European Association of Law and Economics (2021) for useful comments on an earlier draft and to the editors of the Georgia Law Review for their exceptional editorial work.

THE UNIDENTIFIED WRONGDOER

Ronen Perry[*]

This Article addresses the untheorized and under-researched problems of strong unidentifiability in tort law—namely the victim's occasional inability to identify the direct wrongdoer, or even an ascertainable group to which the wrongdoer belongs—and bring an action against them. It offers a systematic analysis and a general theoretical framework for the appraisal of possible solutions to strong unidentifiability problems, which undermine tort liability and frustrate its goals.

This Article first presents the main legal models developed and used to overcome these problems in different contexts and various legal systems: (1) adherence to direct liability with creative procedural identification tools, (2) indirect liability of a third party with some control over the unidentified wrongdoer's conduct, (3) residual indirect liability, and (4) no causation-based liability.

This Article then turns to an economic appraisal of the competing models. It argues that, when tailoring solutions to strong unidentifiability problems, lawmakers should focus on four types of costs: (1) the cost to the victim of identifying the unknown wrongdoer using advanced procedural tools, (2) the cost to a third party of obtaining and retaining information about the wrongdoer's identity, (3) the cost (and expected impact) of precautions that a third party could take to reduce the likelihood of the wrongdoing, and (4) the cost of failing to prevent the wrongdoing (i.e., non-enforcement).

This Article outlines the selection principle, explains that its application is context-, jurisdiction-, and time-specific, and applies it to four common cases of strong unidentifiability: intentional violations of bodily integrity, life, or liberty by unknown perpetrators; injuries caused by defective products whose manufacturers are unidentified; anonymous online wrongdoing; and hit-and-run accidents.

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I. INTRODUCTION

One of the most challenging obstacles to tort law enforcement is the victim's inability to identify the wrongdoer. Existing literature focuses on *weak* unidentifiability—i.e., cases in which the victim has reason to suspect, but cannot establish by a preponderance of the evidence, that a specific person's wrongdoing caused the victim's harm.[1] The law often solves such problems by shifting the burden of proof of causation (or wrongfulness) to the defendants, like under the alternative liability theory,[2] or by allocating the harm among several suspected injurers, as under the market share liability

[1] *See* ARIEL PORAT & ALEX STEIN, TORT LIABILITY UNDER UNCERTAINTY 58–69 (2001) (discussing cases in which the plaintiffs could not prove that the defendants caused the harm but could establish that the defendants belonged to a group that included the actual injurer); Stephen A. Spitz, *From* Res Ipsa Loquitur *to Diethylstilbestrol: The Unidentifiable Tortfeasor in California*, 65 IND. L.J. 591, 591 (1990) (same).

[2] *See, e.g.*, Summers v. Tice, 199 P.2d 1, 3 (Cal. 1948) (recognizing the alternative liability doctrine, which shifts the burden of proof of causation to the defendants if the plaintiff can prove that one of them caused the harm but cannot establish which one did so); RESTATEMENT (SECOND) OF TORTS § 433B(3) (AM. L. INST. 1965) (same); RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL & EMOTIONAL HARM §28(b) (AM. L. INST. 2010) (same); Mark A. Geistfeld, *The Doctrinal Unity of Alternative Liability and Market-Share Liability*, 155 U. PA. L. REV. 447, 453–59 (2006) (evaluating various rationales for the alternative liability doctrine); Jane P. Mallor, *Guilt By Industry: Industry-Wide Liability for Defective Products*, 49 TENN. L. REV. 61, 84–89 (1981) (same).

theory.[3] These problems and their solutions have been widely researched[4] and shall be put aside.

This Article instead addresses the untheorized and under-researched problem of *strong* unidentifiability: cases in which the victim cannot identify the direct wrongdoer, or even an ascertainable group to which the wrongdoer belongs, and therefore cannot bring an action against that person. The problem arises across the world in myriad tort settings, ranging from intentional violations of rights to pure accidents and from physical injuries to emotional distress. When a person is assaulted or wrongfully arrested by an unknown other, harmed by an unbranded defective product, or injured in a hit-and-run accident; when property is consumed by fire started by an unknown arsonist; or when a person's reputation or privacy is harmed by an anonymous speaker, the victim might be unable to find and sue the wrongdoer. Strong unidentifiability thus prevents liability and frustrates tort law's goals.

This Article offers a systematic analysis of possible legal solutions to strong unidentifiability problems and an efficiency-oriented framework for evaluating the proper use of these solutions. Part II presents the main legal models developed to overcome strong unidentifiability in different contexts and various legal systems. The first model is strict adherence to direct liability of the

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[3] *See* Sindell v. Abbott Labs., 607 P.2d 924, 937 (Cal. 1980) (recognizing the market share liability (MSL) theory, which apportions liability among different manufacturers of the generic product that harmed the plaintiff based on the manufacturers' respective shares of the relevant market when the plaintiff cannot identify the manufacturer of the specific product used); Hymowitz v. Eli Lilly & Co., 539 N.E.2d 1069, 1071–72 (N.Y. 1989) ("[W]e now . . . adopt a market share theory, using a national market, for determining liability and apportioning damages . . . ."); Geistfeld, *supra* note 2, at 448–49 ("To establish tort liability, the plaintiff must prove by a preponderance of the evidence that the defendant's tortious conduct caused the injury for which she seeks compensation."); Mallor, *supra* note 2, at 89–93 (detailing the development of the MSL theory and discussing MSL's similarities with and differences from concerted action and alternative liability); Allen Rostron, *Beyond Market Share Liability: A Theory of Proportional Share Liability for Nonfungible Products*, 52 UCLA L. REV. 151, 152–153 (2004) ("[MSL is] a theory under which a plaintiff unable to identify the manufacturer of the particular product that caused his injury can recover on a proportional basis from each of the manufacturers that might have supplied the product."). *But see* Mulcahy v. Eli Lilly & Co., 386 N.W.2d 67, 75–76 (Iowa 1986) (rejecting the MSL doctrine despite noting its appeal).

[4] *See supra* notes 1–3.

unidentified wrongdoer, facilitated by creative procedural identification tools.[5] This model has famously been used in cases of civil rights violations by unknown federal agents,[6] as demonstrated in the landmark Supreme Court case of *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*,[7] and in the exceptional treatment of anonymous online wrongdoing in the United States.[8] The second model is indirect liability of a third party who had some control over or other relation to the unidentified wrongdoer.[9] Indirect liability may be fault-based, as in the classic tort law case of *Kline v. 1500 Massachusetts Avenue Apartment Corp.*,[10] or strict, as in U.S. product liability law.[11] The third model is residual indirect liability, whereby only the wrongdoer can be held liable if a designated third party provides information about the wrongdoer's identity to the victim, and the third party is liable if it fails to provide such information.[12] This unique paradigm characterizes most product liability regimes around the world—the United States being a notable exception.[13] The fourth model is giving up causation-based liability and devising alternative means

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[5] *See infra* Section II.A.

[6] *See, e.g.*, Gillespie v. Civiletti, 629 F.2d 637, 642 (1980) ("[T]he plaintiff should be given an opportunity through discovery to identify the unknown defendants, unless it is clear that discovery would not uncover the identities, or that the complaint would be dismissed on other grounds."); Carol M. Rice, *Meet John Doe: It Is Time for Federal Civil Procedure to Recognize John Doe Parties*, 57 U. PITT. L. REV. 883, 895 & n.38 (1996) (observing the frequent use of this model in cases of civil rights violations).

[7] 403 U.S. 388, 390 (1971) (reversing the lower court's determination that the complaint against unknown agents failed to state a claim); *see infra* Section II.A.*1* for a discussion of this case.

[8] *See infra* Sections II.A.*2*.

[9] *See infra* Section II.B.

[10] 439 F.2d 477, 478 (D.C. Cir. 1970) (finding a landlord had a duty to take steps to protect tenants from foreseeable criminal acts committed by third parties). The case is mentioned or discussed in the following books, among others: RICHARD A. EPSTEIN & CATHERINE M. SHARKEY, CASES AND MATERIALS ON TORTS 534–43 (Rachel E. Barkow et al. eds., 12th ed. 2020); WARD FARNSWORTH & MARK F. GRADY, TORTS: CASES AND QUESTIONS 222–23 (3d ed. 2019); JOHN C.P. GOLDBERG, ANTHONY J. SEBOK, BENJAMIN C. ZIPURSKY, TORT LAW: RESPONSIBILITIES AND REDRESS 379–81 (Erwin Chemerinsky et al. eds., 4th ed. 2016).

[11] *See infra* Section II.B.*3*.

[12] *See infra* Section II.C.

[13] *See infra* Section II.C.*1*.

of victim compensation.[14] Currently, this model seems to be the near-universal approach to hit-and-run accidents.[15]

The analysis reveals not only the fact that different models are used in different contexts but also an interesting variance among legal systems in handling similar unidentifiability problems. Jurisdiction A may apply model M1 to setting S1 and model M2 to setting S2, while jurisdiction B applies model M2 to setting S1 and model M3 to setting S2. Part II could thus be structured in three ways—around the distinction between different models, different settings and contexts, or different jurisdictions. It takes the first path because its primary ambition is theoretical, rather than analytical or comparative.

Part III turns to an economic appraisal of the competing models. It argues that in tailoring solutions to strong unidentifiability problems lawmakers should focus on four types of costs: (1) the cost for the victim of identifying the unknown wrongdoer using advanced procedural tools; (2) the cost for an easily identifiable third party of obtaining and retaining information about the wrongdoer's identity; (3) the cost (and expected impact) of precautions a third party could take to reduce the likelihood of the wrongdoing; and (4) the cost of non-enforcement, which is roughly capped by the victim's expected harm (because without de facto liability no one has an incentive to prevent that harm).

According to the proposed selection principle, if the administrative cost of an action against the wrongdoer, including the cost of identification by the victim, is the lowest, the law should adhere to direct liability, provide advanced identification tools, and avoid indirect liability. If the administrative cost of such an action, including the cost of information for a third party and the reduced identification cost for the victim, is the lowest, the law should endorse a residual indirect liability regime. If the cost of prevention by a third party is the lowest, the law should impose exclusive indirect liability on the third party who could take the most cost-effective precautions against potential wrongdoing. If the above three costs are prohibitive, exceeding the cost of non-enforcement,

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[14] *See infra* Section II.D.

[15] *See infra* Section II.D.

lawmakers should give up causation-based liability and consider an external, easy-to-administer compensation scheme.

After laying down the selection principle, Part III explains that its application should be context-, jurisdiction-, and time-specific. Understandably, the relation between the four costs may yield different conclusions in different factual settings. Yet, the Article also argues that different jurisdictions may justifiably apply different models in similar settings due to legal, economic, and technological variance impacting the costs underlying the analysis. Furthermore, the ordering of these costs in a specific context within a single jurisdiction is not static, so different models may be reasonably preferred at different times. Finally, Part III applies the proposed framework to the four common scenarios introduced in Part II: unknown perpetrators of intentional torts against the person, unidentified manufacturers of defective products, anonymous speakers (usually committing dignitary torts), and hit-and-run-drivers.

II. THE LEGAL MODELS

A. DIRECT LIABILITY

1. Unknown Perpetrators of Intentional Torts Against the Person. The first and most straightforward legal approach to strong unidentifiability is insistence on direct liability of the wrongdoer, accompanied by institutional support for identification endeavors through recognition and implementation of special procedural tools. If the victim cannot identify the wrongdoer, courts can try to help, particularly by permitting actions against unnamed (John Doe) defendants and then issuing various orders to facilitate their identification.[16] Many jurisdictions have endorsed this solution in different contexts, although unknown wrongdoers might not be

[16] *See infra* notes 21–25 and accompanying text.

reasonably identifiable, even with advanced procedural tools in place.[17]

Generally, filing a lawsuit entails identification of the defendant to enable service.[18] Still, the idea of bringing an action against an unknown wrongdoer in exceptional cases is far from novel. The use of John Doe parties to allow plaintiffs to bring actions that they otherwise could not pursue is centuries old.[19] John Doe defendants initially stood for wholly fictitious parties, which were used to overcome technical barriers in the writ system.[20] Later on, John Doe evolved into a pseudonym for actual parties whose identities were unknown (or hidden).[21] The revolutionary New York Code of Civil Procedure of 1848 explicitly provided that if the plaintiff does not know the defendant's name, "such defendant may be designated in any pleading or proceeding, by any name; and when his true name shall be discovered, the pleading or proceeding may be amended accordingly."[22] This procedural rule has been embraced across the

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[17] *See infra* notes 55–63 and accompanying text.

[18] *See, e.g.*, Columbia Ins. Co. v. Seescandy.com, 185 F.R.D. 573, 577 (N.D. Cal. 1999) ("[T]he default requirement in federal court is that the plaintiff must be able to identify the defendant sufficiently that a summons can be served on the defendant.").

[19] *See* Rice, *supra* note 6, at 889 (noting that John Doe civil litigation was "firmly entrenched in the English common law by the 17th century").

[20] *See id.* at 884–885 (explaining that John Doe emerged as a wholly fictitious character to allow plaintiffs to file suits that would otherwise be precluded by legal technicalities).

[21] *Id.*

[22] Act of Apr. 12, 1848, ch. 379, § 150, 1848 N.Y. Laws 497, 526; *see also* Rice, *supra* note 6, at 890–92 (discussing the New York code, which permitted a plaintiff who did not know the name of the actual defendant to "designate that defendant by a fictitious name, such as John Doe" (citing Act of Apr. 12, 1848, ch. 379, § 150)).

United States through both legislation[23] and judge-made law,[24] with very few exceptions.[25]

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[23] *See, e.g.,* CAL. CIV. PROC. CODE § 474 (West 2021) (allowing the plaintiff to designate an unknown defendant by any name and allowing amendment when the defendant's true identity is discovered); O.C.G.A. § 9-11-10(a) (2021) (same); ME. REV. STAT. ANN. 14, § 651 (2021) (same); MASS. GEN. LAWS ANN. ch. 223, § 19 (2021) (same); MONT. CODE ANN. § 25-5-103 (2021) (same); NEB. REV. STAT. § 25-321 (2021 (permitting the plaintiff to designate an unknown defendant by any name, followed by the words "real name unknown"); N.H. REV. STAT. ANN. § 509:7 (2021) (allowing a plaintiff to use a fictious name for a unknown defendant and permitting amendment when the defendant becomes known); N.Y. C.P.L.R. 1024 (McKinney 2021) (allowing a plaintiff to proceed against an unknown defendant "by designating so much of his name and identity as is known" and permitting amendment); N.C. GEN. STAT. § 1-166 (2021) (allowing the plaintiff to designate an unknown defendant by any name and allowing amendment when the defendant's true identity is discovered); 9 R.I. GEN. LAWS § 9-5-20 (2021) (same); S.D. CODIFIED LAWS § 15-6-9(h) (2021) (same); WIS. STAT. § 807.12 (2021) (same). Other states allow John Doe pleadings in their rules of civil procedure. *See, e.g.*, ALA. R. CIV. P. 9(h) (2021) (permitting a party to designate any name for an unknown opposing party and allowing amendments when the opposing party's true identity is discovered); 16 ARIZ. R. CIV. P. 10(d) (2021) (same); HAW. R. CIV. P. 17(d) (2021) (permitting actions against unidentified defendants and use of fictitious names); IDAHO R. CIV. P. 10(d) (2021) (permitting a party to designate an unknown party by any name and the words "whose true name is unknown" and allowing amendment); IND. R. TRIAL P. 17(F) (2021) (permitting a party to designate any name for an unknown opposing party and allowing amendments when the opposing party's true identity is discovered); MINN. R. CIV. P. 9.08 (same) (2021); MISS. R. CIV. P. 9(h) (2021) (same); NEV. R. CIV. P. 10(d) (2021) (same); N.D. R. CIV. P. 9(h) (2021) (same); OHIO R. CIV. P. 15(D) (2021) (same); OR. R. CIV. P. 20(H) (2021) (same); S.C. R. CIV. P. 10(a)(1) (2021) (permitting a party to designate an unknown party by any name and the words "whose true name is unknown" and allowing amendment); UTAH R. CIV. P. 9(b) (2021) (permitting a party to designate any name for an unknown opposing party and allowing amendments when the opposing party's true identity is discovered); WASH. SUPER. CT. CIV. R. 10(a)(2) (2021) (same); WYO. R. CIV. P. 17(d) (2021) (same).

[24] *See, e.g.*, Farmer v. State, 788 P.2d 43, 49–50 (Alaska 1990) (permitting a plaintiff to bring a John Doe suit within the statute of limitations and then add the actual defendants by amendment after the tolling of the statute of limitations, provided certain conditions were met); Maddux v. Gardner, 192 S.W.2d 14, 18 (Mo. Ct. App. 1945) ("The petition discloses that it was the intention of plaintiff to sue the engineer of the train and, as there could have been no reason for her to have used the name 'John Doe' to designate the engineer, if she knew who was the engineer, it will be inferred that plaintiff did not know his name at the time of filing the petition."). Some states have no concrete ruling on the subject but allow John Doe defendants in practice. *See* State *ex rel.* Ferguson v. Kansas Super Motels, Inc., 398 P.2d 331, 331 (Kan. 1965) (permitting an action against a John Doe defendant without addressing the issue directly); Rollo v. State, 421 A.2d 1298, 1298 (Vt. 1980) (same); Padon v. Sears, Roebuck & Co., 411 S.E.2d 245, 245 (W. Va. 1991) (same).

[25] See Kerr v. Doe, 11 Conn. L. Rptr. 375, 375 (Conn. Super. Ct. 1994) (holding that actions against John Doe defendants are not allowed in Connecticut); Hutchison v. Fish Eng'g Corp.,

The second component of this model is judicial willingness and ability to order third parties to disclose information about John Doe defendants, thereby facilitating their identification. The U.S. Supreme Court recognized a victim's right to sue unknown defendants so as to obtain their identities through a judge-ordered disclosure in *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*.[26] In that case, unidentified federal agents entered and searched the plaintiff's apartment and used unreasonable force to arrest him without a warrant or probable cause, causing humiliation and mental suffering.[27] The Supreme Court famously recognized a federal civil cause of action for the violation of Fourth Amendment rights by federal agents despite the lack of specific congressional authorization.[28] More importantly for the purposes of this Article, the plaintiff was unable to identify any of the officers who had participated in his arrest.[29] The district court, allowing an action against unknown wrongdoers, ordered that the plaintiff's complaint be served upon "agents who it is indicated by the records of the United States Attorney participated in the . . . arrest."[30] The Supreme Court implicitly upheld this order in recognizing the plaintiff's right to recover damages for the violation of his rights by the unknown defendants.[31]

Bivens presents the first Supreme Court endorsement of the two-prong model: allowing an action against the unknown wrongdoers and issuing identification-oriented orders. This endorsement was critical for the plaintiff's success. Like many other victims of civil

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153 A.2d 594, 595 (Del. Ch. 1959) (same, in Delaware); Com. Union Ins. Co. v. Bringol, 262 So. 2d 532, 536 (La. Ct. App. 1972) (same, in Louisiana).

[26] 403 U.S. 388 (1971).

[27] *Id.* at 389–90.

[28] *See id.* at 389–92 (holding that a federal agent's violation of Fourth Amendment rights is a valid cause of action); *see also id.* at 399 (Harlan J., concurring) ("[F]ederal courts do have the power to award damages for violation of 'constitutionally protected interests' . . . ."). This ruling was extended to other constitutional violations in subsequent caselaw. *See, e.g.*, Carlson v. Green, 446 U.S. 14, 19–21 (1980) (holding that a violation of the Eighth Amendment prohibition against cruel and unusual punishment could underlie a *Bivens*-type action).

[29] *Bivens*, 403 U.S. at 390 n.2 (noting that the Federal Bureau of Narcotics agents were unidentified in the initial complaint).

[30] *Id.*

[31] *Id.* at 395–97.

rights violations,[32] the plaintiff could not name the specific officers who had unlawfully searched his apartment and arrested him without formal discovery.[33] Unfortunately, one cannot request formal discovery without filing a lawsuit.[34] Allowing the victim to file a civil action against unknown defendants and subsequently ordering third parties in possession of information about the wrongdoers' identities to provide this information facilitated direct liability of the alleged wrongdoers.[35]

Following *Bivens*, many federal courts permitted actions against John Doe defendants, especially in cases of civil rights violations by unknown federal agents.[36] State courts have allowed John Doe claims in different contexts, extending even to cases of unidentified manufacturers of defective products.[37] Unsurprisingly, the plaintiff may be required to satisfy certain conditions before a John Doe lawsuit is allowed.[38] For example, the plaintiff may need to

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[32] *See, e.g.*, Hogan v. Fischer, 738 F.3d 509, 513 (2d Cir. 2013) (noting that the plaintiff brought a Section 1983 complaint against various corrections officers, including seven "John Doe" corrections officers); Brandon v. City of New York, 705 F. Supp. 2d 261, 264 (S.D.N.Y. 2010) (listing the civil rights violations that the plaintiff alleged against unidentified police officers).

[33] *Bivens*, 403 U.S. at 390 n.2.

[34] *See* Columbia Ins. Co. v. Seescandy.com, 185 F.R.D. 573, 577 (N.D. Cal. 1999) ("As a general rule, discovery proceedings take place only after the defendant has been served . . . ."); Howard M. Wasserman, *Civil Rights Plaintiffs and John Doe Defendants: A Study in Section 1983 Procedure*, 25 CARDOZO L. REV. 793, 798 (2003) ("[The plaintiff] is unable to identify the individual officers and name them as defendants without the benefit of formal discovery, but cannot get formal discovery until after she files the lawsuit.").

[35] *See* Rice, *supra* note 6, at 885, 895–97 (discussing the popularity and advantages of John Doe defendants in modern federal civil practice).

[36] *See, e.g.*, Gillespie v. Civiletti, 629 F.2d 637, 642–43 (9th Cir. 1980) (allowing a plaintiff to sue John Doe defendants involved in an alleged violation of plaintiff's civil rights during his extradition); *see also* Rice, *supra* note 6, at 895 n.38 (observing the frequent use of John Doe defendants in civil rights suits).

[37] *See* Nurenberger Hercules-Werke GMBH v. Virostek, 822 P.2d 1100, 1103–06 (Nev. 1991) (allowing plaintiff to sue an unknown manufacturer because "meritorious causes of action should not be frustrated where . . . the true identity of culpable parties is uncertain or unknown to plaintiff or plaintiff's counsel"), *abrogated by* Costello v. Casler, 254 F.3d 631 (Nev. 2011).

[38] *See* Megan M. Sunkel, Comment, *And the I(SP)s Have It . . . But How Does One Get It? Examining the Lack of Standards for Ruling on Subpoenas Seeking to Reveal the Identity of Anonymous Internet Users in Claims of Online Defamation*, 81 N.C. L. REV. 1189, 1199 (2003) (identifying various courts' conditions for allowing cases to proceed against John Doe defendants).

demonstrate that she could not ascertain the defendant's identity through the exercise of reasonable diligence or a good-faith effort.[39] Additionally, the plaintiff may not be allowed to pursue the John Doe process if "it is clear that discovery would not uncover the identities, or that the complaint would be dismissed on other grounds."[40]

At times, John Doe lawsuits have been employed as an attempt to overcome the statute of limitations.[41] Assume that a cause of action expires one year after it accrues and that the victim cannot identify the wrongdoer within this time frame. By bringing an action against John Doe and hoping to eventually identify the wrongdoer and amend the pleading accordingly, the victim may try to stop the limitations clock. Such a tactic has rarely been successful in federal courts.[42] Specifically, Rule 15(c)(1) (formerly Rule 15(c)(3)) of the Federal Rules of Civil Procedure provides that the plaintiff can change the name of the party against whom the claim is brought through an amendment to the original pleading and that, when certain conditions are met, the amendment "relates back to the date of the original pleading."[43] Thus, the plaintiff can change the defendant's name after the limitations period has expired, and the claims in the amended pleading "'relate back' and are deemed filed as part of the original, pre-limitations filing."[44] But one of the key conditions for relating back is that the added party "knew or should

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[39] *See, e.g.*, Reed v. Gregory, 46 Miss. 740, 741 (1872) (authorizing lawsuits against unknown heirs of a party if the plaintiff exercised "reasonable diligence and due inquiry" in trying to ascertain the heirs' identities); Martin v. McCabe, 213 S.W.2d 497, 503 (Mo. 1948) (explaining that a plaintiff must have a good-faith belief that the parties are unknown in order to conduct a lawsuit against an unknown party); *Nurenberger Hercules-Werke GMBH*, 822 P.2d at 1103, 1106 (requiring that a plaintiff "exercise[e] reasonable diligence in ascertaining the true identity of the intended defendants" to proceed with a John Doe lawsuit); Berry v. Howard, 146 N.W. 577, 580 (S.D. 1914) (explaining how a plaintiff conducts due diligence in identifying an unnamed defendant).

[40] *Gillespie*, 629 F.2d at 642.

[41] *See* Rice, *supra* note 6, at 895 ("Use of the John Doe defendant to avoid a statute of limitations bar is a relatively modern phenomenon.").

[42] *See, e.g.*, Rendall-Speranza v. Nassim, 107 F.3d 913, 918 (D.C. Cir. 1997) ("A potential defendant who has not been named in a lawsuit by the time the statute of limitations has run is entitled to repose—unless it is or should be apparent to that person that he is the beneficiary of a mere slip of the pen, as it were.")

[43] FED. R. CIV. P. 15(c)(1).

[44] Wasserman, *supra* note 34, at 796.

have known that the action would have been brought against it, but for a mistake concerning the proper party's identity."[45] Most federal courts and scholars agree that "[a] mistake as to the identity of the proper defendant means an affirmative misapprehension, misstatement, or misunderstanding about the identity of the proper defendant,"[46] not lack of knowledge.[47] Typically, the plaintiff in a John Doe lawsuit does not make a mistake regarding the wrongdoer's identity; the plaintiff "just does not know it."[48] Such a plaintiff cannot expect a subsequent amendment of the defendant's name to relate back to the date of the original pleading. By contrast, some state courts allow an amendment to the John Doe defendant's name that relates back to the date of the filing.[49]

2. Anonymous Speakers. Web 2.0 enables people to contribute original content to websites and obtain mass exposure.[50] User-generated content may be defamatory, violate privacy, infringe copyright or trademark, intentionally inflict emotional distress, or be wrongful in some other way. Ideally, the wrongdoer should be held liable for the wrongdoing, but the creator of wrongful content

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[45] FED. R. CIV. P. 15(c)(1)(C)(ii).

[46] Wasserman, *supra* note 34, at 797.

[47] *See, e.g.*, Wayne v. Jarvis, 197 F.3d 1098, 1103 (11th Cir. 1999) (holding that inability to identify defendants is not a "mistake"); Barrow v. Wethersfield Police Dep't, 66 F.3d 466, 470 (2d Cir. 1995) (same); Wilson v. United States, 23 F.3d 559, 563 (1st Cir. 1994) (same); Worthington v. Wilson, 8 F.3d 1253, 1257 (7th Cir. 1993) (same); Wood v. Worachek, 618 F.2d 1225, 1230 (7th Cir. 1980) (same); Rice, *supra* note 6, at 927 ("A Doe allegation simply is not a mistake."); Wasserman, *supra* note 34, at 797 ("[A] mistake does not mean ignorance or lack of knowledge as to the defendant's identity. Commentators generally agree." (footnote omitted)); Sunkel, *supra* note 38, at 1205 ("In most Doe defendant cases, the plaintiff is not mistaken about the identity of the party . . . .").

[48] Sunkel, *supra* note 38, at 1205.

[49] *See, e.g.*, Nurenberger Hercules-Werke GMBH v. Virostek, 822 P.2d 1100, 1106 (Nev. 1991) (allowing "relation back" after amending an action against unnamed defendants).

[50] *See* Ronen Perry, *The Law and Economics of Online Republication*, 106 IOWA L. REV. 721, 731 (2021) (discussing different types of user contribution to Web 2.0); Ronen Perry & Tal Z. Zarsky, *Who Should Be Liable for Online Anonymous Defamation?*, 82 U. CHI. L. REV. DIALOGUE 162, 162 (2015) [hereinafter Perry & Zarsky, *Who Should Be Liable*] ("The advent of Web 2.0 technologies and applications has enabled average people—who were previously mere consumers of online content—to publish their own content on various websites . . . ."); Ronen Perry & Tal Z. Zarsky, *Liability for Online Anonymous Speech: Comparative and Economic Analyses*, 5 J. EUR. TORT L. 205, 206 (2014) [hereinafter Perry & Zarsky, *Liability for Online Anonymous Speech*] ("Web 2.0 enables average people to connect to the internet through Internet Service Providers (ISPs) and contribute content to websites.").

is often anonymous or pseudonymous.[51] Successful lawsuits against anonymous and pseudonymous wrongdoers entail recognition of John Doe lawsuits and a two-stage procedural identification mechanism. First, the online platform used for the publication of wrongful content must disclose the unique numerical identifier of the device used for the wrongdoing, namely the Internet Protocol (IP) address.[52] Second, once this information is obtained, the Internet Service Provider (ISP) linked to the wrongdoer's IP address must disclose the contact details of the person using this address at the relevant time.[53] Sometimes the IP address used for the wrongdoing cannot be attributed to a specific user, as in the case of a public or multi-user connection at a workplace, café, or library.[54] In such cases, a third stage of inquiry as to the wrongdoer's identity is necessary.

This complex process may raise technological, as well as legal, problems. On the technological level, wrongdoers may evade identification (and liability) by using tools that conceal their IP addresses[55] or by connecting through public hot spots that do not require personal identification.[56] Moreover, online platforms and ISPs might not retain the relevant records long enough for successful identification, as in the seminal *Zeran* case discussed below.[57] On the legal level, disclosure of user information might

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[51] *See* Perry & Zarsky, *Liability for Online Anonymous Speech, supra* note 50, at 206 (discussing situations where contributors make anonymous or pseudonymous statements on online platforms).

[52] *Id.* at 207–08; Nathaniel Gleicher, Note, *John Doe Subpoenas: Toward a Consistent Legal Standard*, 118 YALE L.J. 320, 328 (2008).

[53] Perry & Zarsky, *Liability for Online Anonymous Speech*, *supra* note 50, at 208; Gleicher, *supra* note 52, at 328.

[54] Perry & Zarsky, *Who Should Be Liable*, *supra* note 50, at 166; Perry & Zarsky, *Liability for Online Anonymous Speech*, *supra* note 50, at 230.

[55] *See* Doug Lichtman & Eric Posner, *Holding Internet Service Providers Accountable*, 14 S. CT. ECON. REV. 221, 233–34 (2006) (explaining that sophisticated wrongdoers can "conceal their tracks").

[56] The problem may be alleviated by imposing liability on hot spot operators, as is the case in Germany. *See* Marcel Rosenbach & Hilmar Schmundt, *Germany's Wireless Internet Problem,* SPIEGEL INT'L (July 4, 2013, 5:58 PM), https://www.spiegel.de/international/world/free-wifi-shortage-german-laws-make-it-hard-to-provide-wireless-internet-a-909288.html ("German law holds the operator of a public hotspot liable for everything its users do online.").

[57] Zeran v. Am. Online, Inc., 129 F.3d 327, 329 n.1 (4th Cir. 1997); *see infra* Section II.B.*1*.

jeopardize users' freedom of speech and privacy, which often hinge on anonymity. The ability to interact with others pseudonymously or anonymously "can foster open communication and robust debate" and enables users "to obtain information relevant to a sensitive or intimate condition without fear of embarrassment."[58] In the United States, the right to speak anonymously is deemed an important part of the freedom of speech protected by the First Amendment,[59] and its protection naturally extends to cyberspace.[60] Some countries deem the right to anonymous speech so fundamental that courts refuse to develop procedures for the identification of anonymous users.[61] Similarly, privacy concerns often translate into legal constraints on data retention,[62] hindering any attempt to obtain user information. Finally, the court's power to order disclosure might not extend to extraterritorial platforms and service providers.[63]

Nonetheless, courts in many jurisdictions try to facilitate identification through procedural tools, mirroring those used in *Bivens*-like cases. In the United States, the victim can sometimes bring an action against the unknown online wrongdoer as John Doe and then subpoena intermediaries, such as online platforms or ISPs, requesting identifying information about that wrongdoer.[64]

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[58] Columbia Ins. Co. v. Seescandy.com, 185 F.R.D. 573, 578 (N.D. Cal. 1999).

[59] *See* Buckley v. Am. Const. L. Found., Inc., 525 U.S. 182, 198–99 (1999) (holding that anonymity is an aspect of the protected freedom of speech); McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 341–42, 357 (1995) (same); Talley v. California, 362 U.S. 60, 64–65 (1960) (same).

[60] *See, e.g.*, Doe v. 2TheMart.com, Inc., 140 F. Supp. 2d 1088, 1092 (W.D. Wash. 2001) ("The right to speak anonymously extends to speech via the Internet.").

[61] *See, e.g.*, Perry & Zarsky, *Liability for Online Anonymous Speech*, *supra* note 50, at 218–19 (discussing how Israeli law protects anonymous posters).

[62] In 2014, the European Court of Justice held that the EU Data Retention Directive, Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or public communications networks and amending Directive 2002/58/EC, 2006 O.J. L105 at 54, which required telecom companies to store user data for up to two years, was invalid. Joined Cases C-293/12 & C-594/12, Digit. Rts. Ir., Ltd. v. Minister for Commc'n, ECLI:EU:C:2014:238 ¶¶ 32–37, 69, 73 (Apr. 8, 2014), https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:62012CJ0293.

[63] *See, e.g.*, Yelp, Inc. v. Hadeed Carpet Cleaning, Inc., 770 S.E.2d 440, 445–46 (Va. 2015) (vacating a John Doe subpoena issued to a company outside the court's jurisdiction).

[64] *See* Wasserman, *supra* note 34, at 857–58 ("Corporate plaintiffs frequently subpoena the ISP as a non-party discovery source through which to identify the individual who posted the

This process is usually subject to several preconditions, which may vary among jurisdictions.[65] First, the plaintiff may need to "identify the missing party with sufficient specificity," establishing that the defendant is a real person and ensuring the court's jurisdiction over that defendant.[66] Second, just as in more traditional John Doe processes discussed above, the plaintiff may be required to demonstrate a good faith or reasonable effort to identify the defendant.[67] Third, the plaintiff usually needs to establish the claim at a certain evidentiary level to avoid abuse of the exceptional procedure.[68] There is some controversy about the evidentiary standard that the plaintiff must meet.[69] Thus, the plaintiff may have to establish that he or she has a prima facie case,[70] that the claim can survive a summary judgment motion,[71] that it can withstand a motion to dismiss,[72] or merely that the plaintiff has a good faith basis to contend that he or she is a victim of an actionable

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defamatory statements."); Gleicher, *supra* note 52, at 325 ("John Doe subpoenas allow plaintiffs to discover the identity of anonymous online speakers from their ISP or from websites they visited."); Sunkel, *supra* note 38, at 1206 (explaining that plaintiffs usually file subpoenas on the anonymous defendant's ISP after filing their John Doe suit).

[65] *See* Sunkel, *supra* note 38, at 1207–13 (explaining that there is no uniform standard for filing ISP subpoenas and discussing the various approaches).

[66] Columbia Ins. Co. v. Seescandy.com, 185 F.R.D. 573, 578–79 (N.D. Cal. 1999).

[67] *See, e.g.*, VA. CODE ANN. § 8.01-407.1(A)(1)(b) (2021) ("[The plaintiff must show] other reasonable efforts to identify the anonymous communicator have proven fruitless."); *Columbia Ins.*, 185 F.R.D. at 579 (requiring "good faith effort"); Plant v. Does, 19 F. Supp. 2d 1316, 1320 (S.D. Fla. 1998) (requiring "a reasonably diligent search").

[68] *See, e.g.*, *Columbia Ins.*, 185 F.R.D. at 579 ("[P]laintiff should establish to the Court's satisfaction that plaintiff's suit against defendant could withstand a motion to dismiss . . . . [The] requirement is necessary to prevent abuse of this extraordinary application of the discovery process . . . ." (citing Gillsepie v. Civiletti, 629 F.2d 637, 642 (9th Cir. 1980))).

[69] Gleicher, *supra* note 52, at 325, 337, 340 (stating that John Doe subpoenas have no single standard and noting that at least seven cases that have expressed different standards).

[70] *See, e.g.*, Dendrite Int'l, Inc. v. Doe No. 3, 775 A.2d 756, 760 (N.J. Super. Ct. App. Div. 2001) (holding the plaintiff must set forth a prima facie case and produce sufficient evidence supporting each element of the cause of action prior to disclosure of the identity of the defendant).

[71] *See, e.g.,* Doe No. 1 v. Cahill, 884 A.2d 451, 457, 460 (Del. 2005) ("We conclude that the summary judgment standard is the appropriate test by which to strike the balance between a defamation plaintiff's right to protect his reputation and a defendant's right to exercise free speech anonymously.").

[72] *See, e.g., Columbia Ins.*, 185 F.R.D. at 579–80 ("[P]laintiff should establish to the Court's satisfaction that plaintiff's suit against defendant could withstand a motion to dismiss.").

wrong.[73] The evidentiary standard may vary depending on the nature of the speech.[74] Those favoring more lenient evidentiary standards may point to the need to protect potential victims' reputation, privacy, etcetera,[75] whereas those advocating stricter standards may exalt the freedom of speech.[76] Lastly, the plaintiff must usually prove that the discovery process is reasonably likely to generate relevant identifying information.[77]

In the European Union, Article 15(2) of the E-Commerce Directive allows Member States to oblige service providers to transfer users' identifying information to competent authorities, including courts.[78] Disclosure processes must comply with the General Data Protection Directive,[79] the E-Privacy Directive,[80] and national data protection laws, rendering these processes state-

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[73] *See, e.g.*, VA. CODE ANN. § 8.01-407.1(A)(1)(a) (2021) (requiring the requesting party make a material showing that one or more of the communications made by the anonymous communicator are tortious or illegal or that the requesting party has a "good faith" basis that he or she is the victim of "conduct actionable in the jurisdiction").

[74] *See In re* Anonymous Online Speakers v. U.S. Dist. Ct. of Nev. Reno, 611 F.3d 653, 661 (9th Cir. 2010) ("[W]e suggest that the nature of the speech should be a driving force in choosing a standard by which to balance the rights of anonymous speakers in discovery disputes." (first citing Perry v. Schwarzenegger, 591 F3d. 1147, 1160–61 (9th Cir. 2010); and then citing Doe v. Reed, 561 U.S. 186, 194–97 (2010))).

[75] *See, e.g.*, Danielle Keats Citron, *Cyber Civil Rights*, 89 B.U. L. REV. 61, 68–114 (2009) (discussing "cyber assaults that imperil, economically harm, and silence traditionally disadvantaged people" and the need to develop robust protection of cyber civil rights).

[76] *See, e.g.*, *Cahill*, 884 A.2d at 457 ("[S]etting the standard too low will chill potential posters from exercising their First Amendment right to speak anonymously.").

[77] *See* VA. CODE ANN. § 8.01-407.1(A)(1)(e) (2021) (requiring that "the individuals or entities to whom the subpoena is addressed are likely to have responsive information"); *Columbia Ins.*, 185 F.R.D. at 580 (requiring that the plaintiff show that "there is a reasonable likelihood that the discovery process will lead to identifying information about defendant that would make service of process possible").

[78] *See* Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market, 2000 O.J. (L 178) 13 (protecting the "automatic, intermediate and temporary storage of information, performed for the sole purpose of making more efficient the information's onward transmission to other recipients of the service upon their request").

[79] Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, 1995 O.J. (L 281) 31 (repealed by Regulation 2016/679).

[80] Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector, 2002 O.J. (L 201) 37.

specific.[81] In the United Kingdom, a former EU Member, *Norwich Pharmacal* orders serve to unveil unknown wrongdoers' identities.[82] The order derives its name from a 1974 case holding that an innocent party involved in another's wrongful conduct must provide relevant information to the victim.[83] The order was developed in a different context from the one under discussion,[84] but in recent years, it was issued to different types of internet intermediaries in various cases of anonymous online wrongdoing.[85] Still, as emphasized above, some jurisdictions do not recognize user-identification processes at all, usually due to a profound commitment to freedom of speech and user privacy.[86]

B. INDIRECT LIABILITY

1. Unknown Perpetrators of Intentional Torts Against the Person. The second legal approach to strong unidentifiability problems is imposition of liability on a third party who could arguably prevent or reduce the risk of misconduct by the unidentified wrongdoer. A prime example of this approach is the expansion of third-party liability for failure to prevent one person from intentionally

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[81] *See* THIBAULT VERBIEST, GERALD SPINDLER, GIOVANNI MARIA RICCIO & AURÉLIE VAN DER PERRE, STUDY ON THE LIABILITY OF INTERNET INTERMEDIARIES 73–82 (2007), https://ssrn.com/abstract=2575069 (compiling data protection laws from various European nations).

[82] *See* Eric S. Rein & John Guzzardo, *The Trustee and the Bitcoin: Identifying and Recovering International Cryptocurrency Assets*, 2018 AM. BANKR. INST. J. 34, 65 ("[A] Norwich Pharmacal order . . . requires (usually innocent) third parties to disclose information to identify a wrongdoer, trace funds or assist parties in determining whether a cause of action exists.").

[83] Norwich Pharmacal Co. v. Customs & Excise Comm'rs [1973] AC 133 (HL) 175 (UK) ("[I]f through no fault of his own a person gets mixed up in the tortious acts of others so as to facilitate their wrong-doing he may incur no personal liability but he comes under a duty to assist the person who has been wronged by giving full information and disclosing the identity of the wrongdoers.").

[84] A patent holder requested that the customs authorities provide information about an alleged infringing importer. *Id.* at 137–38.

[85] It is available against online platforms, as well as mere conduits. *See* Lockton Co. Int'l v. Persons Unknown [2009] QB 3423 (EWHC) (U.K.) (holding Google liable for Norwich Pharmacal relief); Daithí Mac Síthigh, *The Fragmentation of Intermediary Liability in the UK*, 8 J. INTELL. PROP. L. & PRAC. 521, 522 (2013) ("Norwich Pharmacal orders . . . are also available against mere conduits.").

[86] *See supra* note 61 and accompanying text.

inflicting physical injury on another.[87] To be sure, lawsuits against third parties for failing to prevent another person's misconduct may have various motivations, such as the greater likelihood of recovering from deep-pocketed institutional defendants than from blue-collar criminals.[88] Nonetheless, third-party liability may serve as a simple solution to strong unidentifiability problems. A victim who cannot identify the direct wrongdoer may attempt to recover from a third party who could take measures to reduce the risk of another person's wrongdoing. Civil liability for failure to prevent another person's criminal activity has developed through cases that frequently involve unidentifiable offenders,[89] even though courts have rarely paid heed to this unique feature. It may therefore be reasonable to assume that problems of strong unidentifiability motivated victims to seek out and push for such an alternative and played an important role in its evolution.

Historically, there was no duty to prevent another person's misconduct, and this has remained the default rule.[90] Thus, the Second Restatement of Torts provides that "[t]here is no duty so to control the conduct of a third person as to prevent him from causing physical harm to another."[91] Similarly, the Third Restatement of Torts stipulates that "[a]n actor whose conduct has not created a risk of physical or emotional harm to another has no duty of care to the other."[92] Over time, several exceptions emerged, in particular when a special relationship exists between the potential victim and

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[87] *See infra* notes 90–152 and accompanying text.

[88] *See* Martha Chamallas, *Gaining Some Perspective in Tort Law: A New Take on Third-Party Criminal Attack Cases*, 14 LEWIS & CLARK L. REV. 1351, 1373 (2010) ("There are multiple reasons for the shift [to suing third-party defendants over assailants], including, of course, the greater likelihood of collecting a judgment from an institutional third-party than from a criminal assailant.").

[89] *See infra* notes 100, 104–108, 114–118, 122–123, 125–129, 134–143 and accompanying text.

[90] *See, e.g.*, Kline v. 1500 Mass. Ave. Apartment Corp., 439 F.2d 477, 481 (D.C. Cir. 1970) ("As a general rule, a private person does not have a duty to protect another from a criminal attack by a third person."); L.A.C. v. Ward Parkway Shopping Ctr. Co., L.P., 75 S.W.3d 247, 257 (Mo. 2002) ("A duty to protect against the criminal acts of third parties is generally not recognized because such activities are rarely foreseeable.").

[91] RESTATEMENT (SECOND) OF TORTS § 315 (AM. L. INST. 1965).

[92] RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 37 (AM. L. INST. 2012).

the potential "defender," which gives the former a legitimate expectation of protection by the latter.[93] This special relationship was recognized, *inter alia*, between innkeepers and guests,[94] common carriers and passengers,[95] businesses and patrons,[96] and property owners and tenants,[97] enabling victims of crimes committed by unknown offenders to bring tort actions against third parties responsible for their safety.

The first type of relationship that gave rise to a duty to protect a distinct category of people from others' criminal activities in the common law of torts was probably that of innkeepers and guests.[98] An innkeeper must exercise reasonable care to protect its guests from harm caused by foreseeable conduct of third parties, such as the innkeeper's employees, other guests, and intruders.[99] This duty becomes crucial when a guest is harmed by an unidentifiable culprit

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[93] *See* RESTATEMENT (SECOND) OF TORTS § 315(b) (AM. L. INST. 1965) ("There is no duty . . . unless . . . a special relation exists between the actor and the other which gives to the other a right to protection.").

[94] RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 40(b)(2) (AM. L. INST. 2012); RESTATEMENT (SECOND) OF TORTS § 314A(2) (AM. L. INST. 1965).

[95] RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 40(b)(1) (AM. L. INST. 2012); RESTATEMENT (SECOND) OF TORTS § 314A(1) (AM. L. INST. 1965).

[96] RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 40(b)(3) (AM. L. INST. 2012); RESTATEMENT (SECOND) OF TORTS § 314A(3) (AM. L. INST. 1965).

[97] This Article uses the gender-neutral term "property owner." Traditionally, the common law used the term "landlord," the same convention used by the Third Restatement. *See, e.g.*, RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 40(b)(6) (AM. L. INST. 2012).

[98] *See generally* David S. Bogen, *The Innkeeper's Tale: The Legal Development of a Public Calling*, 1996 UTAH L. REV. 51 (discussing the origins of innkeepers' liability).

[99] *See, e.g.*, Kline v. 1500 Mass. Ave. Apartment Corp., 439 F.2d 477, 482 (D.C. Cir. 1970) ("[W]e place the duty of taking protective measures guarding the entire premises and the areas peculiarly under the landlord's control against the perpetration of criminal acts upon the landlord . . . ."); Miller v. Derusa, 77 So. 2d 748, 749 (La. Ct. App. 1955) (holding that an innkeeper has a duty to protect his guests); State v. Sterling, 265 P. 472, 473 (Wash. 1928) (holding a hotel owner liable where a guest assaulted another guest, after the owner had been expressly warned about the possibility of the assault and the assaulted guest had demanded protection). The duty in torts in this specific context is usually accompanied by an obligation under the implied contract between the innkeeper and the guest. *See Kline*, 439 F.2d at 482 (explaining that liability in the innkeeper-guest relationship can be based as a matter of law "by reason of a contract which some courts have implied from the entrustment by the guest of his personal comfort and safety to the innkeeper").

who cannot be sued.[100] The historical duty extended naturally to modern providers of lodging, such as hotels,[101] but it is also analytically linked to more recently recognized duties discussed in more detail below—that of apartment building owners to tenants (because an innkeeper provides a living space)[102] and that of business owners to patrons (because an inn is a guest-oriented business).[103]

Similarly, common carriers may be liable for failing to protect their passengers from criminal activities carried out aboard their vehicles or on their premises,[104] particularly by unidentified offenders. For example, in *Neering v. Illinois Central Railroad Co.*, the plaintiff was assaulted, robbed, and raped at a train station by an unknown person and brought a negligence action against the railway company.[105] The Supreme Court of Illinois held that a carrier must exercise ordinary care to keep the station reasonably safe for passengers.[106] Specifically, because the railway company was aware of the potential danger to passengers at the station due to the congregation of many vagrants, it reasonably ought to have foreseen the crime against the plaintiff and owed her a duty of care, which was breached.[107] The causal link was not broken, even though the injury was caused by the criminal act of another, because this act was reasonably foreseeable.[108]

More generally, business owners may owe a duty of care to their patrons to protect them from the reasonably foreseeable criminal activities of others.[109] The duty applies even to non-traditional

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[100] *See, e.g.*, Fortney v. Hotel Rancroft, Inc., 125 N.E.2d 544, 548 (Ill. App. Ct. 1955) (holding that a guest "has a right to rely upon the innkeeper doing all within his power to avoid or prevent" assaults by strangers in the room).

[101] *See id.* at 546.

[102] *See Kline*, 439 F.2d at 485 ("[T]he most analogous relationship to that of the modern day urban apartment house dweller is . . . that of innkeeper and guest.").

[103] *See infra* notes 110–123 and accompanying text.

[104] *See, e.g.*, Quigley v. Wilson Line of Mass., Inc., 154 N.E.2d 77, 79 (Mass. 1958) ("[A] common carrier owes to its passengers the highest degree of care in the anticipation and prevention of violence from its employees, other passengers, and even strangers . . . .").

[105] Neering v. Ill. Cent. R.R. Co., 50 N.E.2d 497, 499 (Ill. 1943).

[106] *Id.* at 501.

[107] *Id.* at 502–03.

[108] *Id.* at 503–04.

[109] RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 40(b)(3) (AM. L. INST. 2012); RESTATEMENT (SECOND) OF TORTS §§ 314A(3), 344 (AM. L. INST.

"businesses" (such as colleges)[110] and extends not only to the business buildings but also to its parking lot, where criminal activity may be more frequent.[111] This exception evolved through an expansion of the common carrier–passenger exception, although common carriers may still owe their patrons a greater level of care than other businesses once a duty is established.[112] Unsurprisingly, many tort actions against businesses for failing to prevent crime against their customers arise from criminal activities of unidentified wrongdoers.[113] For example, in *Atamian v. Supermarkets General Corp.*, the plaintiff was assaulted and raped in a supermarket parking lot by three unknown assailants and sued the supermarket owner in negligence.[114] Ruling on a motion to dismiss, the court held that the proprietor of business premises open to the public owes a duty of care to its invitees, based on the

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1965); *see also* Novak v. Cap. Mgmt. & Dev. Corp., 452 F.3d 902, 913–14 (D.C. Cir. 2006) (recognizing such a duty); Stevens v. Jefferson, 436 So. 2d 33, 34–35 (Fla. 1983) (same); Galloway v. Bankers Tr. Co., 420 N.W.2d 437, 438–39 (Iowa 1988) (same); D.C. *ex rel.* L.A.C. v. Ward Parkway Shopping Ctr. Co., 75 S.W.3d 247, 257–59 (Mo. 2002) (en banc) (same); Doud v. Las Vegas Hilton Corp., 864 P.2d 796, 799–801 (Nev. 1993) (same); Butler v. Acme Mkts., Inc., 445 A.2d 1141, 1143–44 (N.J. 1982) (same).

[110] *See, e.g.*, Peterson v. S.F. Cmty. Coll. Dist., 685 P.2d 1193, 1195, 1197–98 (Cal. 1984) (finding a community college liable for injuries sustained by a student in an attempted rape in defendant college's parking lot).

[111] *See, e.g.*, Madden v. C & K Barbecue Carryout, Inc., 758 S.W.2d 59, 61, 63 (Mo. 1988) (en banc) (recognizing that a business owner's duty to protect customers can extend to an adjoining parking lot); Clohesy v. Food Circus Supermarkets, 694 A.2d 1017, 1019, 1030 (N.J. 1997) (same); Doe v. Wal-Mart Stores, Inc., 479 S.E.2d 610, 617–19 (W.Va. 1996) (same). The duty does not normally extend to an adjacent parking lot not owned by the defendant business owner. *See, e.g.*, Rhudy v. Bottlecaps Inc., 830 A.2d 402, 405 (Del. 2003) ("Although a landowner's duty is not invariably confined to activity that occurs within the boundaries of the business premises, that duty does not encompass every hazard an invitee encounters en route to the landowner's establishment." (footnote omitted)).

[112] RESTATEMENT (SECOND) OF TORTS § 344 cmts. a, e (AM. L. INST. 1965).

[113] *See, e.g.*, *Peterson*, 685 P.2d at 1195, 1197–98 (finding a college liable for injuries sustained by a student due to an attempted rape by an unidentified man on campus); Lau's Corp. v. Haskins, 405 S.E.2d 474, 476–78 (Ga. 1991) (holding that plaintiffs presented a triable issue of material fact that a restaurant owner had reason to anticipate criminal acts by unknown assailants against its invitees and thus owed them a duty of care); Harris v. Pizza Hut of La., Inc., 455 So.2d 1364, 1367, 1371–72 (La. 1984) (finding a restaurant liable for deaths caused by three robbers, including one robber that died and another who was never apprehended); *Madden*, 758 S.W.2d at 60, 62 (holding that a restaurant owed a duty of care to a client who was kidnapped from the parking lot and raped by an unknown assailant).

[114] 369 A.2d 38, 39–40 (N.J. Super. Ct. Law Div. 1976).

foreseeability of criminal activity against them.[115] The court found that several assaults took place at the same parking lot, the defendants employed security guards, and there was inadequate lighting.[116] Thus, the defendant reasonably could have foreseen similar attacks on invitees, giving rise to a duty of care.[117] Again, the duty hinges on the foreseeability of the criminal activity, so it does not arise if the court concludes that the business owner could not anticipate the criminal activity by which an invitee was injured.[118]

Business owners' duty to protect patrons from criminal activity was explicitly endorsed by the Second Restatement of Torts[119] and reiterated in the Third Restatement of Torts.[120] The Third Restatement extends the duty to all "those who are lawfully on the premises" (including employees who are in imminent danger or have been rendered helpless due to injury or illness),[121] reflecting more recent caselaw. For example, in *Isaacs v. Huntington Memorial Hospital*, a doctor was shot in the hospital's parking lot by an unidentified criminal.[122] The Supreme Court of California relied on prior similar incidents and concluded that "an owner of land has a duty 'to take affirmative action to control the wrongful acts of third persons which threaten invitees where the [owner] has reasonable cause to anticipate such acts and the probability of injury resulting therefrom.'"[123]

The property owner–tenant exception is a relatively recent legal development.[124] The seminal case of *Kline v. 1500 Massachusetts*

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[115] *Id.* at 42.

[116] *Id.*

[117] *Id.*

[118] *See, e.g.*, Cornpropst v. Sloan, 528 S.W.2d 188, 190, 197–98 (Tenn. 1975) (denying recovery for injuries sustained by a customer who was attacked by an unknown assailant in the Defendants' parking lot for lack of foreseeability). For a discussion of the required foreseeability, see *infra* notes 145–152 and accompanying text.

[119] RESTATEMENT (SECOND) OF TORTS § 344 (AM. L. INST.1965).

[120] RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 40(b)(3) (AM. L. INST. 2012).

[121] *Id.* at §§ 40(b)(3)–(4).

[122] 695 P.2d 653, 654 (Cal. 1985).

[123] *Id.* at 657 (alteration in original) (quoting Taylor v. Centennial Bowl, Inc., 416 P.2d 793, 797 (Cal. 1966)).

[124] The Restatement (Second) of Torts did not explicitly mention the property owner-tenant exception among "special relations" which give rise to a duty to protect others from criminal

Avenue Apartment Corp.[125] illustrates property owners' potential liability for harm caused to tenants through criminal activities of unidentified parties.[126] In that case, a tenant sued the property owner after being assaulted and robbed by an unknown intruder in the common hallway of her apartment building.[127] The appellate court held that the property owner owed a duty of care to the tenant because it was aware of repeated criminal activity against tenants' persons and property on the premises within its control and could foresee further criminal activity.[128] The court then found that the duty was breached.[129] Following *Kline*, tenants injured by unidentified offenders at their apartment buildings have successfully sued their property owners, to the extent that these property owners could reasonably foresee the criminal events and failed to take the necessary measures to reduce the risk.[130] The Third Restatement of Torts officially endorsed the "landlord-tenant" relationship as a special one that can underlie a duty to protect some

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acts. *See* RESTATEMENT (SECOND) OF TORTS § 314A (AM. L. INST. 1965) (listing special relations giving rise to duty to aid or protect).

[125] 439 F.2d 477 (D.C. Cir. 1970).

[126] *Id.* at 376–79; *see also* Ramsay v. Morrisette, 252 A.2d 509, 512 (D.C. App. 1969) (holding, a year before *Kline*, that landlords owe at least a duty of reasonable or ordinary care to its tenants). *Kline* is considered the seminal and most influential case in this area of law. Barbara A. Glesner, *Landlords as Cops: Tort, Nuisance & Forfeiture Standards Imposing Liability on Landlords for Crime on the Premises*, 42 CASE W. RES. L. REV. 679, 682, 689–90 (1992).

[127] *Kline*, 439 F.2d at 478, 480.

[128] *Id.* at 481, 483–84.

[129] *Id.* at 478, 486–87.

[130] *See, e.g.*, Frances T. v. Vill. Green Owners Ass'n, 723 P.2d 573, 574, 576–86 (Cal. 1986) (finding that the plaintiff alleged sufficient facts to state a cause of action for negligence against a condominium association, like a landlord, for the rape and robbery of the plaintiff-tenant by an unidentified person in her apartment); Paterson v. Deeb, 472 So. 2d 1210, 1212, 1218–20 (Fla. Dist. Ct. App. 1985) (finding that the plaintiff stated a cause of action for negligence against her landlords for a sexual attack on the plaintiff-tenant by an unknown assailant); Hemmings v. Pelham Wood Ltd. Liab. Ltd. P'ship, 826 A.2d 443, 447, 453–55, 485 (Md. 2003) (allowing an action against landlord for death of a tenant shot by an unidentified intruder); Trentacost v. Brussel, 412 A.2d 436, 438, 440–41 (N.J. 1980) (finding an apartment building owner liable for injuries sustained by tenant attacked and robbed in the building's stairway by an unknown criminal); Burgos v. Aqueduct Realty Corp., 706 N.E.2d 1163, 1164 (N.Y. 1998) (recognizing a landlord's duty to protect tenants from robbery by an unidentified assailant).

people from the criminal activities of others,[131] but a few jurisdictions still reject such a duty.[132]

Some jurisdictions extend the property owner's duty to protect people from criminal activity on its premises to non-tenant guests, a crucial development given the lack of contractual privity between the parties in such cases.[133] For instance, in *Nallan v. Helmsley-Spear, Inc.*, the plaintiff was shot in the back by an unknown assailant, who was never caught, in the lobby of an office building.[134] The victim sued the building's owner and manager in negligence for failure to exercise reasonable care in keeping "the common areas of their building safe for tenants and their invitees."[135] The New York Court of Appeals held that a possessor of land has a duty to make public areas of the property "reasonably safe for those who might enter."[136] A duty to take measures to prevent intentional conduct by another arises only if the possessor knows or has reason to know that "there is a likelihood of conduct on the part of third persons . . . which is likely to endanger the safety of the visitor."[137] The plaintiff showed that more than one hundred crimes had occurred in the

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[131] RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 40(b)(6), 40 cmt. m (AM. L. INST. 2012).

[132] *See, e.g.*, Doe v. Grosvenor Props. (Haw.) Ltd., 829 P.2d 512, 514, 517 (Haw. 1992) (holding, in an unknown assailant case, that the landlord-tenant relationship is not a "special" one giving rise to a duty to protect from criminal acts of others); Rowe v. State Bank of Lombard, 531 N.E.2d 1358, 1364 (Ill. 1988) (same); Terrell v. Wallace, 747 So. 2d 748 (La. Ct. App. 1999) (same); Funchess v. Cecil Newman Corp., 632 N.W.2d 666, 674 (Minn. 2001) (same); Ward v. Inishmaan Assocs. Ltd. P'ship, 931 A.2d 1235, 1237–38 (N.H. 2007) (same); Feld v. Merriam, 485 A.2d 742, 747 (Pa. 1984) (same); Cramer v. Balcor Prop. Mgmt., Inc., 441 S.E.2d 317, 318–19 (S.C. 1994) (same); Miller v. Whitworth, 455 S.E.2d 821, 826–27 (W. Va. 1995) (same).

[133] In *Kline*, for example, the court found that the property owner was also in breach of contract. *Kline*, 439 F.2d at 485; *see also* RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 40(b)(6) cmt. m (AM. L. INST. 2012) ("The landlord also has an ongoing contractual relationship with the tenant, and the lease itself could allocate responsibility for exercising care.").

[134] 407 N.E.2d 451, 454–55 (N.Y. 1980).

[135] *Id.* at 455.

[136] *Id.* at 458 (first citing Kilmer v. White, 171 N.E. 908 (1930); then citing Junkermann v. Tilyou Realty Co., 108 N.E. 190 (1915); then citing WILLIAM L. PROSSER, LAW OF TORTS §63, at 403–08 (4th Ed. 1971); and then citing RESTATEMENT (SECOND) OF TORTS §§ 359–360 (AM. L. INST. 1965)).

[137] *Nallan*, 407 N.E.2d at 458 (omission in original) (quoting RESTATEMENT (SECOND) OF TORTS § 344 cmt. f (AM. L. INST. 1965)).

building in less than two years before the shooting, of which at least ten were crimes against the person, making an attack in the lobby reasonably foreseeable.[138]

Still, the extension of property owners' duty to non-tenants has its limits. First, even where extended, the owner owes a duty of care only to people who enter the property, not to members of the public injured in the vicinity thereof.[139] This qualification may apply even if the offender ultimately pulled the victim into the building. For example, in *Waters v. N.Y.C. Housing Authority*, a woman was attacked on the street and then forced into a building in which she was sodomized by an unknown man.[140] The Court of Appeals of New York agreed that a property owner "may have a duty to take reasonable precautionary measures to secure the premises if it has notice of a likelihood of criminal intrusions posing a threat to safety."[141] It concluded, however, that the duty is owed to tenants and visitors on the premises and not to "members of the public at large, with no connection to the premises, who might be victimized by street predators."[142] Second, the extension of property owners' duty to non-tenants is controversial and not universal.[143]

To overcome the unidentifiability of the direct wrongdoer by suing a third party, the victim needs to establish not only that a special relationship existed between the victim and the third party[144] but also that the latter could reasonably foresee the respective wrongdoing.[145] The standard whereby foreseeability is

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[138] *Nallan*, 407 N.E.2d at 458.

[139] *See, e.g.*, Bonner v. MRLS Constr. Corp., No. CV 89 0771 (ASC), 1991 WL 58285, at *1–2 (E.D.N.Y. Mar. 22, 1991) (finding that a woman raped by an unidentified offender at a construction site cannot sue the landowner because she had no association with the premises independent of the crime itself).

[140] 505 N.E.2d 922, 922 (N.Y. 1987).

[141] *Id.* at 923 (first citing Miller v. State, 467 N.E.2d 493 (N.Y. 1984); and then citing Nallan v. Helmsley-Spear, Inc., 407 N.E.2d 451 (N.Y. 1995)).

[142] *Id.* at 924.

[143] *See, e.g.*, Goldberg v. Hous. Auth. of the City of Newark, 186 A.2d 291, 291–92 (N.J. 1962) (holding that a housing project owner owed no duty to provide police protection to a milk deliverer assaulted on its premises while making a delivery, despite evidence of prior criminal occurrences).

[144] *See* supra notes 93–97 and accompanying text.

[145] *See, e.g.*, RESTATEMENT (SECOND) OF TORTS § 344 cmt. f (AM. L. INST. 1965) ("If the place or character of his business, or his past experience, is such that he should reasonably

determined in such cases differs among jurisdictions.[146] Some, such as Michigan and Virginia, require proof of the defendant's knowledge of a specific danger of injury to the plaintiff by a criminal act, as opposed to knowledge of similar past events.[147] In other jurisdictions, such as New York and Texas, foreseeability is determined through evidence of "specific previous crimes on or near the premises" (the prior similar incidents test).[148] In establishing foreseeability based on past criminal activity, courts consider its proximity to the defendant's premises; recency, frequency, and similarity (in nature) to the crime committed against the plaintiff; and salience (through media coverage and the like).[149] In a few jurisdictions, such as Connecticut and New Jersey, foreseeability is determined by the totality of circumstances test.[150] Relevant

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anticipate careless or criminal conduct on the part of third persons, either generally or at some particular time, he may be under a duty to take precautions against it . . . .").

[146] *See, e.g.*, Madison Shepley, Comment, *The Character of the Business: Looking Through "Broken Windows" for Liability in Mass Shootings & Other Third-Party Criminal Acts*, 42 SEATTLE U. L. REV. 1531, 1537 (2019) ("[C]ase law regarding third-party criminal liability is inconsistent across the state jurisdictions.").

[147] *See, e.g.*, Commonwealth v. Peterson, 749 S.E.2d 307, 311–12 (Va. 2013) (requiring "an imminent probability of injury" to the plaintiff from a third party criminal act (quoting Yuzefovsky v. St. John's Wood Apartments, 540 S.E.2d 134, 141 (Va. 2001))); Graves v. Warner Bros., 656 N.W.2d 195, 202 (Mich. Ct. App. 2002) ("*It is only a present situation on the premises, not any past incidents, that creates a duty to respond*.").

[148] Trammell Crow Cent. Tex., Ltd. v. Gutierrez, 267 S.W.3d 9, 12, 15 (Tex. 2008) (quoting Timberwalk Apartments, Partners, Inc. v. Cain, 972 S.W.2d 749 (Tex. 1998)); *see also* Ludovina S. *ex rel.* Jacqueline S. v. City of New York, 614 N.E.2d 723, 725–26 (N.Y. 1993) (relying on past criminal activity in the area to determine foreseeability).

[149] *See Jacqueline S.*, 614 N.E.2d at 726 (finding that foreseeability "depend[s] on the location, nature and extent of those previous criminal activities and their similarity, proximity or other relationship to the crime in question"); *Trammell Crow Cent*., 267 S.W.3d at 15–17 ("To determine whether the risk of criminal conduct is foreseeable, a court weighs the evidence of prior crimes using five factors: proximity, publicity, recency, frequency, and similarity." (citing *Timberwalk Apartments*, 972 S.W.2d at 759); *Timberwalk Apartments*, 972 S.W.2d at 757–59 (examining recency, frequency, similarity, and publicity of previous criminal conduct on or near the property); McKown v. Simon Prop. Grp., 344 P.3d 661, 669 (Wash. 2015) (en banc) ("[I]f the criminal act that injures the plaintiff is not sufficiently similar in nature and location to the prior act(s) of violence, sufficiently close in time to the act in question, and sufficiently numerous, then the act is likely unforeseeable as a matter of law . . . .").

[150] *See* Monk v. Temple George Assocs., 869 A.2d 179, 188 (Conn. 2005) (adopting the totality of the circumstances test); Delta Tau Delta v. Johnson, 712 N.E.2d 968, 972–73 (Ind.

circumstances include those considered under the prior similar incidents test, as well as the condition of the premises and their design (architecture, lighting, etc.), the nature of the business and its hours of operation, the known use of alcohol and drugs on the premises, prior warnings from law enforcement and employees, and the extent and quality of security measures taken by the owner.[151] Some jurisdictions are still undecided.[152]

2. Anonymous Speakers. As explained above, strong unidentifiability problems arise when wrongful content is published by an anonymous speaker. In such cases, the victim may attempt to sue a third party, usually the owner or the operator of the platform that enabled the publication. Traditionally, third-party liability for defamation, the time-honored speech tort, has been subject to a distinction between publishers, distributors, and common carriers.[153] "Publishers" of content created by others, such as newspapers or broadcast organizations, exercise significant control over published material and are subject to strict liability because they adopt the published material as their own.[154] "Distributors,"

1999) (same); Seibert v. Vic Regnier Builders, Inc., 856 P.2d 1332, 1339 (Kan. 1993) (same); Clohesy v. Food Circus Supermarkets, Inc., 694 A.2d 1017, 1023 (N.J. 1997) (same).

[151] *See Monk*, 869 A.2d at 188–89 (examining evidence of a similar incident on the premises and evidence of crimes in the immediate vicinity); *Delta Tau Delta*, 712 N.E.2d at 972 (considering all circumstances surrounding the event, "including the nature, condition, and location of the land, as well as prior similar incidents"); *Clohesy*, 694 A.2d at 1023 (examining the "place or character of [the possessor's] business" and "his past experience").

[152] *See, e.g.*, D.C. *ex rel* L.A.C. v. Ward Parkway Shopping Ctr. Co., L.P., 75 S.W.3d 247, 258 (Mo. 2002) (en banc) ("[T]his case does not require that we enter the fray concerning whether a 'prior similar incidents,' 'totality of the circumstances' or a 'balancing' test be adopted because the evidence set forth by plaintiff would satisfy any of the three."); Timothy A. Reuschel, *Here's Your Burrito and Watch Your Back: Does Missouri Really Want to Hold Businesses Liable for Attacks on Patrons?*, 65 MO. L. REV. 255, 258 (2000) ("In *Madden*, the court did not explicitly adopt the 'totality of the circumstances' test or the 'prior similar incidents' test for foreseeability.").

[153] *See* JOHN C.P. GOLDBERG & BENJAMIN C. ZIPURSKY, RECOGNIZING WRONGS 322–23 (2020) (discussing the distinction between publishers and distributors); Amanda Groover Hyland, *The Taming of the Internet: A New Approach to Third-Party Internet Defamation*, 31 HASTINGS COMMC'NS & ENT. L.J. 79, 96–97 (2008) (discussing the distinction between primary and secondary publishers).

[154] *See* DANIEL J. SOLOVE & PAUL M. SCHWARTZ, INFORMATION PRIVACY LAW 184 (4th ed. 2011) ("Repeating or publishing the libelous statements of others can give rise to 'publisher' liability."); Matt C. Sanchez, Note, *The Web Difference: A Legal and Normative Rationale Against Liability for Online Reproduction of Third-Party Defamatory Content*, 22 HARV. J.L.

such as newsstands, bookstores, and libraries, distribute content without control over it and are liable only if they knew or had reason to know that the relevant material consisted of defamatory statements.[155] "Common carriers" or "conduits," such as telephone companies, only transmit information and are not liable for defamation contained in transmitted material.[156]

This framework resulted in problematic rulings when courts began to apply it to online publications in the 1990s,[157] leading to the enactment of the notorious Section 230 of the Communications

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& TECH. 301, 303–04 (2008) ("The traditional standard of reproduction liability is that one who repeats a defamatory statement is liable as if she were the original speaker of publisher." (footnote omitted)).

[155] *See* RESTATEMENT (SECOND) OF TORTS § 581(1) (AM. L. INST. 1977) ("[O]ne who only delivers or transmits defamatory matter published by a third person is subject to liability if, but only if, he knows or has reason to know of its defamatory character."); Sewali K. Patel, *Immunizing Internet Service Providers from Third-Party Internet Defamation Claims: How Far Should Courts Go?*, 55 VAND. L. REV. 647, 651–52 (2002) (noting that "libraries, bookstores, and news vendors (distributors)" "are viewed as distributors of the information that they carry and are only liable for defamatory material if they had knowledge that the material was defamatory before they distributed it"); Sanchez, *supra* note 154, at 303–04 (discussing the differences between publisher liability and distributor liability under Section 230 of the Communications Decency Act); Benjamin C. Zipursky, *Online Defamation, Legal Concepts, and the Good Samaritan*, 51 VAL. U. L. REV. 1, 6, 20–21 (2016) ("Distributors—unlike publishers—cannot be held accountable in libel for the contents of the writings they lend, sell, or distribute, at least if they lack notice of its defamatory content." (citing Cubby, Inc. v. CompuServe, Inc. 776 F. Supp. 135, 139 (S.D.N.Y. 1991))).

[156] *See, e.g.*, Austin v. CrystalTech Web Hosting, 125 P.3d 389, 392 (Ariz. Ct. App. 2005) (explaining that conduits are not liable for defamation by customers); Anderson v. N.Y. Tel. Co., 320 N.E.2d 647, 648–49 (N.Y. 1974) (holding that the defendant phone company that leased recording equipment to a third party who created and distributed defamatory recordings could not be held liable); Patel, *supra* note 155, at 651 ("Telephone companies . . . generally have no risk of liability for defamatory statements communicated over phone lines . . . ."); Zipursky, *supra* note 155, at 21 ("The rather sparse case law on common carriers quite defensibly takes the view that common carriers *are not publishers and are not liable as if they were publishers*." (citing *Anderson*, 320 N.E.2d at 649)).

[157] *See* Perry & Zarsky, *Who Should Be Liable*, *supra* note 50, at 163–65 (discussing the rulings in Cubby, Inc. v. CompuServe Inc., 776 F. Supp. 135 (S.D.N.Y. 1991), and Stratton Oakmont, Inc. v. Prodigy Services Co., 1995 WL 323710 (N.Y. May 24, 1995), which "created an unwarranted incentive for content providers to avoid moderating online discourse[] because moderating content exposed them to risk of liability" (citing Zeran v. America Online, Inc., 129 F.3d 327, 331 (4th Cir. 1997))); Perry & Zarsky, *Liability for Online Anonymous Speech*, *supra* note 50, at 211–13 ("Alas, the joint ready of the *Cubby* and *Stratton Oakmont* decisions created a legal environment in which content providers had a strong *disincentive* to moderate online discourse, because moderating exposed them to risk of liability.").

Decency Act.[158] Under this Section, providers and users of interactive computer services shall not be considered publishers "of any information provided by another information content provider."[159] In *Zeran v. America Online, Inc.*, the court interpreted and applied this section, holding that a message board operator could not be found liable for defamatory postings by an anonymous user, even though the operator had relevant knowledge after a certain point and would have been considered a publisher under traditional defamation law.[160] Since *Zeran*, Section 230 has afforded online service providers immunity from liability for the publication of content created by others.[161] That immunity has been broadly interpreted. It forecloses liability irrespective of the defendant's level of editorial control (whether it is a publisher, a distributor, or a conduit);[162] it protects all kinds of online service providers, such as electronic mailing list operators and even interactive dating websites;[163] it covers most relevant torts, including defamation,

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[158] Telecommunications Act of 1996, 47 U.S.C. § 230.

[159] *Id.* § 230(c)(1).

[160] 129 F.3d 327, 330–33 (4th Cir. 1997).

[161] *See*, *e.g.*, David S. Ardia, *Free Speech Savior or Shield for Scoundrels: An Empirical Study of Intermediary Immunity Under Section 230 of the Communications Decency Act*, 43 LOY. L.A. L. REV. 373, 379–80, 409–12 (2010) (noting that Section 230 "grant[ed] operators of Web sites and other interactive computer services broad protection from claims based on the speech of third parties"). Still, empirical studies have shown that more than one third of such claims survive the Section 230 defense and about one quarter of such claims survived both the Section 230 defense and dismissal on other grounds. Thus, websites often engage in long and expensive legal battles. Ardia, *supra*, at 493.

[162] *Zeran*, 129 F.3d at 332–33; *see also* Blumenthal v. Drudge, 992 F. Supp. 44, 52 (D.D.C. 1998) ("Congress made no distinction between publishers and distributors in providing immunity from liability."); Doe v. Am. Online, Inc., 783 So. 2d 1010, 1014–17 (Fla. 2001) (holding that imposing distributor liability on internet service providers would frustrate the objectives of Section 230); Joshua Landau & Kate Willcox, *Within the Law: Dealing With Non-Confidential Sensitive Information in the Age of Online Legal Tabloids*, 23 GEO. J. LEGAL ETHICS 667, 680 (2010) (explaining that CDA immunity applies to both publishers and distributors and that courts draw no distinction between the two). The California Court of Appeals deviated from this position in *Barrett v. Rosenthal*, 9 Cal. Rptr. 3d 142, 166 (Ct. App. 2004), holding that distributor knowledge-based liability survived the congressional immunity. But the California Supreme Court aligned itself with *Zeran*. Barrett v. Rosenthal, 146 P.3d 510, 513 (Cal. 2006) ("[S]ection 230 prohibits 'distributor' liability for Internet publications."). Section 230 applies *a fortiori* to ISPs which "only transmit packets of data." GOLDBERG & ZIPURSKY, *supra* note 153, at 320, 320 n.32.

[163] Hyland, *supra* note 153, at 106–07 ("The universal application of section 230 to [web-related defendants] creates a landscape where virtually any web-related defendant would

infringement of privacy, and intentional infliction of emotional distress;[164] and at least in some states, it prohibits not only liability but also declaratory and injunctive relief.[165]

However—and this is crucial—the current U.S. position on online platform liability is exceptional from a global perspective. Most Western jurisdictions do allow victims of anonymous online speech to sue the platforms, based on traditional tort law principles. In many countries, this path coexists with procedural tools for the identification of anonymous wrongdoers. For example, as explained above, European Union Member States can oblige platforms to transfer users' identifying information to competent authorities, particularly courts.[166] Additionally, most of them allow victims of anonymous speech to bring actions against the enabling platforms under general liability regimes. The European Directive on Electronic Commerce imposes a certain limit on such liability, providing that some "intermediaries" are liable only if they knew about the wrongful statements and failed to remove them upon the victims' requests (a so-called "notice-and-takedown" rule).[167] Yet the European Court of Human Rights opined in *Delfi AS v. Estonia*, that

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qualify for section 230 protection, regardless of the degree of editorial control they possessed.").

[164] *See, e.g.*, Carafano v. Metrosplash.com, Inc., 339 F.3d 1119, 1122, 1125 (9th Cir. 2003) (extending Section 230 immunity to a case involving invasion of privacy, defamation, and misappropriation of the right to publicity); Anupam Chander, *How Law Made Silicon Valley*, 63 EMORY L.J. 639, 651, 653–55 n.58 (2014) (concluding that § 230 "largely immunized online service providers from secondary liability for most torts committed through their service"); Zipursky, *supra* note 155, at 9, 13–14 ("[Section 230] has been applied in scores of cases to undercut not only claims for defamation, but other common law tort speech claims—such as invasion of privacy—as well as a variety of state and federal statutory claims . . . .").

[165] *See, e.g.*, Hassell v. Bird, 420 P.3d 776, 789 (Cal. 2018) ("Where, as here, an Internet intermediary's relevant conduct in a defamation case goes no further than the mere act of publication—including a refusal to depublish upon demand, after a subsequent finding that the published content is libelous—section 230 prohibits this kind of directive." (first citing *Barrett*, 146 P.3d at 510; then citing *Zeran*, 129 F.3d at 327; and then citing Medytox Sols., Inc. v. Investorshub.com, Inc., 152 So. 3d 727 (Fla. Dist. Ct. App. 2014))); *Medytox Sols.*, 152 So. 3d at 731 ("An action to force a website to remove content on the sole basis that the content is defamatory is necessarily treating the website as a publisher, and is therefore inconsistent with section 230.").

[166] *See supra* notes 78–85 and accompanying text.

[167] Directive 2000/31/EC, of the European Parliament and of the Council of 8 June 2000 on Certain Legal Aspects of Information Society Services, in Particular Electronic Commerce, in the Internal Market, art. 14, 2000 O.J. (L 178) 1.

many Web 2.0 platforms are not "intermediaries" for this purpose and can therefore be liable under the general principles of tort law in each of the Member States (there, Estonia).[168] In particular, a news website enabling reader comments was a publisher of these comments, rather than a mere intermediary, and could be held liable for wrongful comments made by anonymous users.[169] In *MTE v. Hungary*,[170] the same court endorsed the view that online news portals can be liable for failing to screen unlawful comments made by anonymous users under the laws of a Member State.[171] It concluded, however, that the comments in question (as opposed to those in *Delfi*) were not "clearly unlawful"[172] and that under such circumstances a notice-and-takedown system would properly balance the competing rights.[173]

A few jurisdictions use third-party liability as the sole path for recovery in cases of anonymous speech. Israel is the prime example. At the moment, it does not have any de-anonymization mechanism like the John Doe subpoena.[174] Still, it allows victims of anonymous speech to sue enabling platforms under the general principles of tort law. In *Dubitzky v. Shapira,* an anonymous user set up a personal profile on a dating website under the plaintiff's name, presenting the plaintiff as a pedophile.[175] The Supreme Court of Israel

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[168] 2015-II Eur. Ct. H.R. 319 ¶¶ 112–17.

[169] *See id.* ¶¶ 115–16 ("The Court emphasizes that the present case relates to a large professionally managed Internet news portal run on a commercial basis which published news articles of its own and invited its readers to comment on them."); *see also* Mart Susi, *Delfi AS v. Estonia*, 108 AM. J. INT'L L. 295, 295–97 (2014) (discussing the court's earlier decision in *Delfi* and noting that the integration of comments into the defendant's website gave the defendant an economic interest as a publisher obligating them to take further steps to prevent offensive comments from being posted).

[170] Magyar Tartalomszolgáltatók Egyesülete v. Hungary, App. No. 22947/13, (Feb. 2, 2016), http://hudoc.echr.coe.int/fre?i=001-160314.

[171] *See id.* ¶ 51 ("[T]he provisions of the Civil Code made it foreseeable for a media publisher running a large Internet news portal for an economic purpose and for a self- regulatory body of Internet content providers, that they could, in principle, be held liable under domestic law for unlawful comments of third-parties."); *see also id.* at 24 (Kūris, J., concurring) (reaffirming the holding in *Delfi* and emphasizing that the facts of the cases differ).

[172] *Id.* ¶¶ 63–64, 66, 72, 74–77, 91.

[173] *Id.* ¶¶ 64, 91.

[174] CivA 9183/09 The Football Assoc. Premier League v. John Doe, 65(3) PD 521, 554–57 (2012) (Isr.); LCivA 4447/07 Mor v. Barak ITC–Int'l Telecommunications Corp., 63(3) PD 664, 688–700 (2010) (Isr.). Notes 174–85 were checked by editors using unofficial translations.

[175] LCivA 1700/10 Dubitzky v. Shapira, ¶ b Nevo Legal Database (May 20, 2010) (Isr.).

emphasized that the direct wrongdoer, whose identity was unknown, could not be sued in defamation.[176] Nonetheless, the court endorsed the trial court's conclusion that the website operator was negligent, primarily because he did not establish any mechanism for content screening or user-identity verification.[177] The court even upheld an award of punitive damages.[178] Lower courts have followed *Dubitzky*, holding that websites may be liable for failing to take reasonable measures to prevent wrongful publication by users.[179]

In addition to indirect fault-based liability, Israeli law imposes indirect strict liability in very limited contexts, which may include anonymous wrongdoing. Specifically, Section 11(a) of the Prohibition of Defamation Act provides that where a communications medium publishes a defamatory statement of another person, possibly anonymous or pseudonymous, the people who took part in the decision to publish it, as well as the entity responsible for the medium (such as a newspaper publisher), are strictly liable for the publication.[180] A "communications medium" includes newspapers, radio, and television.[181] There is still some controversy about whether user comment sections of online news platforms are covered by the definition of the term "newspaper,"[182] but it seems settled that other Web 2.0 platforms with no editorial supervision are not "newspapers" and cannot be liable under Section 11.[183] Section 30 of the Israeli Protection of Privacy Act similarly imposes indirect strict liability on newspaper publishers for the publication of content that infringes on privacy and was

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[176] *Id.* ¶ g.

[177] *Id.* ¶¶ b, g.

[178] *Id.* ¶¶ j–q.

[179] *See, e.g.* CivC (MC Hi) 45326-03-13 B.H. Ogen Project Mgmt. Ltd. v. Zucker, ¶ 21 Nevo Legal Database (Feb. 14, 2016) (Isr.); CivC (MC Kfar Sava) 7830/00 Borochov v. Poran, ¶¶ 44–46 Nevo Legal Database (July 14, 2002) (Isr.); CivC (MC TA) 37692/03 Sudri v. Stahlrid, ¶¶ 28–47 Nevo Legal Database (Aug. 1, 2005) (Isr.).

[180] 5755–1965, SH 240 (Isr.).

[181] *Id.* § 11(c).

[182] *See, e.g.*, CivC (MC TA) 51859/06 Diskin v. Haaretz Publ'g Ltd., ¶¶ 55–77 Nevo Legal Database (Oct. 28, 2008) (Isr.) (concluding that comment-sections are not "newspapers" covered by § 11).

[183] CivC (MC TA) 37692/03 Sudri v. Stahlrid, ¶¶ 14–22 Nevo Legal Database (Aug. 1, 2005) (Isr.) (holding that websites are not communications media); CivC (MC Kfar Sava) 7830/00 Borochov v. Poran, ¶¶ 38–43 Nevo Legal Database (July 14, 2002) (Isr.).

generated by others.[184] This may cover anonymous user comments on online newspaper websites.

3. Unidentified Manufacturers. In most jurisdictions, the manufacturer is liable for physical injuries (personal injuries and sometimes also property damage[185]) caused by a defective product.[186] Defective product cases usually arise against a backdrop of complex contractual chains, though, and the manufacturer's identity is often unknown to, and cannot be reasonably determined by, the end consumer. Consider a case in which a foreign mass producer of generic electrical appliances sells thousands of toasters to a local distributor, who sells a batch to an importer in a different country, who sells some of them to a wholesaler, who supplies them to a retailer, who offers the product to its customers. A customer who gets electrocuted using one of these toasters will sometimes be unable to tell who the manufacturer was.

In the United States, as opposed to many other countries,[187] the problem of unidentified manufacturers of defective products is resolved through parallel indirect liability of all sellers in the distribution chain.[188] Moreover, unlike many other indirect liability

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[184] 5741–1981, SH 128 (Isr.).

[185] *See, e.g.*, RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 1 cmt. d (AM. L. INST. 1998) ("The rule stated in this Section applies only to harm to persons or property, commonly referred to as personal injury and property damage.").

[186] *See, e.g.*, Greenman v. Yuba Power Prods., Inc., 377 P.2d 897, 900–01 (Cal. 1963) ("A manufacturer is strictly liable in tort when an article he places on the market, knowing that it is to be used without inspection for defects, proves to have a defect that causes injury to a human being."); RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 1 (AM. L. INST. 1998) ("One engaged in the business of selling or otherwise distributing products who sells or distributes a defective product is subject to liability for harm to persons or property caused by the defect."); RESTATEMENT (SECOND) OF TORTS § 402A (AM. L. INST. 1965) ("One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer or to his property . . . .").

[187] *See infra* Section I.C.*1*.

[188] The South African Consumer Protection Act of 2008 seems to adopt a similar, though not identical approach. Section 61(1) provides that "the producer or importer, distributor or retailer of any goods is liable for any harm . . . caused wholly or partly" by a defective product; however, the distributor and retailer are not liable if it is unreasonable to expect them to have discovered the defect. *Id.* § 61(4)(c); *see also* Enrique Barros Bourie, Anton Fagan, Mark Lunney & Ronen Perry, *Product Liability in the Rest of the World*, *in* PRODUCT LIABILITY: FUNDAMENTAL QUESTIONS IN A COMPARATIVE PERSPECTIVE 413, 417, 457–58 (Helmut Koziol,

regimes, the U.S. defective products model is based, at least with respect to manufacturing defects, on strict rather than fault-based liability.[189] The common view, as endorsed by the Third Restatement of Torts, is that "[o]ne engaged in the business of selling or otherwise distributing products who sells or distributes a defective product is subject to liability for harm to persons or property caused by the defect."[190] Put differently, all sellers in the chain of distribution (manufacturer, wholesaler, retailer, and other intermediaries) are liable when a defective product that they sold caused the plaintiff's injury,[191] even if they could do nothing to prevent the risk,[192] and can provide information about the identity of the seemingly unidentified manufacturer.[193] Thus, whenever the consumer cannot identify the manufacturer, a much simpler route is available: a lawsuit against the seller. In several states, legislation immunizes non-manufacturers from strict liability either generally[194] or when the manufacturer is solvent and subject to the

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Michael D. Green, Mark Lunney, Ken Oliphant, & Yang Lixin eds., 2017) (providing an example of the application of the South African Consumer Protection Act to a hospital).

[189] *See* RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2 (AM. L. INST. 1998) (providing that strict liability is imposed for manufacturing defects, whereas fault-based liability is imposed for design defects).

[190] RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 1 (AM. L. INST. 1998).

[191] *See, e.g.*, Vandermark v. Ford Motor Co., 391 P.2d 168, 171–72 (Cal. 1964) (imposing liability on a retailer); Canifax v. Hercules Powder Co., 46 Cal. Rptr. 552, 557 (Ct. App. 1965) (imposing liability on a wholesaler); Keener v. Dayton Elec. Mfg. Co., 445 S.W.2d 362, 365 (Mo. 1969) (imposing liability on a wholesaler); RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 1 cmts. c, e (AM. L. INST. 1998) ("[A]ll commercial sellers and distributors of products, including nonmanufacturing sellers and distributors such as wholesalers and retailers, are subject to liability for selling products that are defective."); RESTATEMENT (SECOND) OF TORTS § 402A cmt. f (AM. L. INST. 1965) ("[Liability] applies to any manufacturer of [a defective] product, to any wholesale or retail dealer or distributor, and to the operator of a restaurant.").

[192] *See* RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 1 cmt. e (AM. L. INST. 1998) ("Liability attaches even when such nonmanufacturing sellers or distributors do not themselves render the products defective and regardless of whether they are in a position to prevent defects from occurring.").

[193] *Infra* Section II.C.*1*. See *infra* note 199 for exceptions.

[194] *See* O.C.G.A. § 51-1-11.1(b) (2021) ("For purposes of a product liability action based in whole or in part on the doctrine of strict liability in tort, a product seller is not a manufacturer . . . and is not liable as such."); IDAHO CODE § 6-1407(1) (2021) (stating that "product sellers other than manufacturers shall not be subject to liability" if certain conditions are met); S.D. CODIFIED LAWS § 20-9-9 (2021) (immunizing "any distributor, wholesaler, dealer, or retail

court's jurisdiction.[195] Either way, the non-manufacturer can be held liable for negligence if it failed to take reasonable care.

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seller of a product" from strict liability unless the seller knew or should have known of the defective condition or the seller is also the manufacturer of the product).

[195] *See* COLO. REV. STAT. § 13-21-402 (2021) ("If jurisdiction cannot be obtained over a particular manufacturer of a product or a part of a product alleged to be defective, then that manufacturer's principal distributor or seller over whom jurisdiction can be obtained shall be deemed, for the purposes of this section, the manufacturer of the product."); 18 DEL. CODE ANN. tit. 18, § 7001(c)(2) (2021) (providing that immunity for suit is not available if "[t]he manufacturer is insolvent, immune from suit or not subject to suit in Delaware"); 735 ILL. COMP. STAT. 5/2-621(b)(3)–(5) (2021), *invalidated in part by* Best v. Taylor Mach. Works, 689 N.E.2d 1057 (1997) (stating that immunity is not available where the manufacturer is insolvent or not subject to the jurisdiction of the courts of the state); IND. CODE §§ 34-20-2-3, -4 (2021) (providing that, if a court does not have jurisdiction over a manufacturer, "then that manufacturer's principal distributor or seller over whom a court may hold jurisdiction shall be considered . . . the manufacturer of the product" for liability purposes); IOWA CODE § 613.18(1)(b) (2021) (immunizing non-manufacturers "upon proof that the manufacturer is subject to the jurisdiction of the courts of this state and has not been judicially declared insolvent"); KAN. STAT. ANN. § 60-3306(a)(4), (5) (2021) (providing immunity to a seller if the manufacturer is subject to service of process under the laws of the state or of the domicile of the plaintiff and if "any judgment against the manufacturer . . . would be reasonably certain of being satisfied"); KY. REV. STAT. ANN. § 411.340 (West 2021) (providing immunity to non-manufacturers if "the manufacturer is identified and subject to the jurisdiction of the court" and other conditions are met); MINN. STAT. § 544.41(2)(3) to (5) (2021) (withholding immunity if "the manufacturer no longer exists, cannot be subject to the jurisdiction of the courts . . . or, despite due diligence, the manufacturer is not amendable to service of process" or if the manufacturer is unable to satisfy any judgment or reasonable settlement); MO. REV. STAT. § 537.762(2) (2021) (providing immunity to a seller if "another defendant, including the manufacturer, is properly before the court and from whom total recovery may be had for plaintiff's claim"); N.C. GEN. STAT. § 99B-2(a) (2021) (withholding seller immunity if "the manufacturer of the product is not subject to the jurisdiction of the courts of this State or if such manufacturer has been judicially declared insolvent"); N.D. CENT. CODE § 28-01.3-04(3)(a) (2021) (providing that a seller can face liability if "the applicable statute of limitation bars a product liability action against the manufacturer of the product"); OHIO REV. CODE ANN. § 2307.78(B)(1), (2) (West 2021) (refusing immunity for a supplier of a product if the manufacturer is not subject to service of process in the state or manufacturer is insolvent); TENN. CODE ANN. § 29-28-106(4), (5) (2021) (stating that a seller may face liability if the manufacturer is not subject to service of process or if the manufacturer has been judicially declared insolvent); WASH. REV. CODE § 7.72.040(2)(a), (b) (2021) (allowing non-manufacturer liability if the manufacturer is insolvent); RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 1 cmt. e (AM. L. INST. 1998) ("[S]tatutes generally provide that the nonmanufacturing seller or distributor is immunized from strict liability only if: (1) the manufacturer is subject to the jurisdiction of the court of plaintiff's domicile; and (2) the manufacturer is not, nor is likely to become, insolvent.").

The Russian Civil Code endorsed a unique "exclusive or" liability model, whereby "[d]amage caused by defects of goods shall be compensated at the choice of the victim by the seller or the manufacturer of the goods."[196] In theory, the victim can sue either the seller or the manufacturer, but not both.[197] In practice, caselaw demonstrates that claimants usually "sue their immediate seller" even when the manufacturer's identity is known,[198] making the Russian model a de facto indirect strict liability regime.

C. RESIDUAL INDIRECT LIABILITY

1. Unidentified Manufacturers. Under residual indirect liability regimes, a designated third party is liable for the harm incurred by the victim if, and only if, the former does not provide information about the direct wrongdoer's identity. By providing information that enables the victim to sue the actual wrongdoer the designated third party can absolve itself from liability. The previous Section showed that in the United States cases of unidentified manufacturers of defective products are resolved through parallel indirect liability of sellers in the distribution chain.[199] Here too, the U.S. model is exceptional from a global perspective. In most jurisdictions, strong

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[196] GRAZHDANSKIĬ KODEKS ROSSIĬSKOĬ FEDERATSII [GK RF] [Civil Code] Art. 1096(1) (Russ.); Alexander Yagelnitskiy & Olesya Petrol, *Product Liability in Russia*, *in* PRODUCT LIABILITY: FUNDAMENTAL QUESTIONS, *supra* note 188, at 154.

[197] Yagelnitskiy & Petrol, *supra* note 196 at 157–58.

[198] *Id.* at 158.

[199] *But see* 18 DEL. CODE ANN. § 7001(c) (2021) (providing that the seller is not liable if the manufacturer is reasonably identifiable); 735 ILL. COMP. STAT. 5/2-621(b) (2021), *invalidated in part by* Best v. Taylor Mach. Works, 689 N.E.2d 1057 (1997) (requiring dismissal of strict liability claims against a non-manufacturer "once the plaintiff has filed a complaint against the manufacturer or manufacturers, and the manufacturer or manufacturers have or are required to have answered or otherwise pleaded"); KY. REV. STAT. ANN. § 411.340 (West 2021) (stating that the wholesaler, distributor, or retailer will not be held liable if the manufacturer is identified and subject to the court's jurisdiction); MINN. STAT. § 544.41(2) (2021) (requiring dismissal of strict liability claims against a non-manufacturer "[o]nce the plaintiff files a complaint against a manufacturer and the manufacturer has or is required to have answered or otherwise pleaded"); N.D. CENT. CODE § 28-01.3-04 (2021) (providing that the seller is not liable if the seller files an affidavit correctly identifying the manufacturer).

unidentifiability problems in defective product cases are handled through residual indirect liability.

In the European Union, the Product Liability Directive of 1985 provides that "[t]he producer shall be liable for damage caused by a defect in his product."[200] A producer is defined as the actual manufacturer of the product or any component thereof, the brand owner, or the importer.[201] According to Article 3(3), if the producer (including an importer) cannot be identified, then each supplier of the product is regarded as the producer "unless he informs the injured person, within a reasonable time, of the identity of the producer or of the person who supplied him with the product."[202] In the electrical appliance example provided above, the victim can ask the retailer to identify the manufacturer or a prior supplier. The retailer will be liable only if it does not provide this information. If it can identify the manufacturer, the victim must sue the latter. If the retailer can only identify the wholesaler, the victim may ask the wholesaler to identify the manufacturer or its own supplier, and so on.

The underlying goal of this model is "to pave the consumer's way to the controlling actor" by placing the burden "on those who ought to be in a position to provide information about the identity of the controlling actor."[203] Suppliers who retain proper records can "point the finger to the originator of the defect" and escape liability.[204] Alternatively, the supplier can pay damages to the victim and seek reimbursement from the manufacturer.[205] Either way, the burden is ultimately shifted to the manufacturer. Article 3(3) has been implemented in most EU Member States, including France,[206]

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[200] Council Directive 85/374/EEC, art. 1, 1985 O.J. (L 210) 29.

[201] *Id.* art. 3(1)–(2).

[202] *Id.* art. 3(3).

[203] Marshall S. Shapo, *Comparing Products Liability: Concepts in European and American Law*, 26 CORNELL INT'L L.J. 279, 287 (1993).

[204] *Id.*

[205] *See* Helmut Koziol, *Product Liability: Conclusions from a Comparative Perspective*, *in* PRODUCT LIABILITY, *supra* note 188, at 543 ("[T]he non-negligent retailer who compensates the victim has a right of reimbursement against the manufacturer or intermediate distributor.").

[206] Code civil [C. Civ.] [Civil Code] art. 1245-6 (Fr.).

Germany,[207] Italy,[208] Spain,[209] and the recently withdrawn United Kingdom.[210]

The European residual indirect liability regime has been followed in many non-EU jurisdictions around the world. For example, under the Australian product liability scheme, a victim who wishes to bring an action for injuries caused by a defective product but does not know the manufacturer's identity may request the supplier to provide this information.[211] If the supplier does not comply with the request within thirty days (a more rigid time frame than that used by the EU Directive), and the plaintiff does not have the relevant information, then the supplier is considered the product's manufacturer for the purposes of product liability.[212]

The same principle has been adopted in many Asian jurisdictions. For example, Articles 41 through 43 of the Chinese Tort Liability Law of 2009 set the basic principles of product liability.[213] Article 42(2) provides that if the seller cannot identify the defective product's manufacturer or supplier, then the seller is strictly liable for the resulting injuries.[214] If the manufacturer's identity is known to the victim, the seller can only be liable if its

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[207] Produkthaftungsgesetz [ProdHaftG] [Product Liability Act], Dec. 15, 1989, Bundesgesetzblatt [BGBI] at 1989 2198 I, § 4(3) (Ger.).

[208] Codice Consumo [Consumer Code] art. 116(1), Decreto Legislativo, 6 Settembre 2005, n. 229, in G.U. 8 Oct. 2005, n.235 (It.).

[209] Ley 22/94, de 6 de julio 1994, de responsabilidad civil por los daños causados por productos defectuosos, B.O.E. 161, 21738 (Spain); *see also* Michael Ansaldi, *The Spanish Products Liability Act of 1994*, 2 ILSA J. INT'L & COMP. L. 371, 400 (1996).

[210] Consumer Protection Act 1987, c. 43, § 2(3) (U.K.); *see also* Willem H. van Boom et al., *Product Liability in Europe*, *in* PRODUCT LIABILITY, *supra* note 188, at 297, 303.

[211] Competition and Consumer Act 2010 (Cth) sch 2 § 147 (Austl.).

[212] *Id.*; *see also* Bourie et al., *supra* note 188, at 414 ("In substance, the product liability regime in Australia largely mirrors that of the European Union . . . ."); Koziol, *supra* note 205, at 543 (stating Australian law follows "the same line as the EU Directive").

[213] Qin quan ze ren fa (侵权法) [Tort Liability Law] (promulgated by the Standing Comm. Nat'l People's Cong., Dec. 26, 2009, effective July 1, 2010) arts. 41–43, P.R.C. Laws (China).

[214] *Id.* art. 42; *see also* Yang Lixin & Yang Zhen, *Product Liability in China*, *in* PRODUCT LIABILITY, *supra* note 188, at 30 (discussing this provision); Mo Zhang, *Tort Liabilities and Torts Law: The New Frontier of Chinese Legal Horizon*, 10 RICH. J. GLOB. L. & BUS. 415, 482 (2011) ("[I]f no one can be blamed, the seller is held accountable so that the victim's claim is not left in limbo.").

fault caused the defect.[215] Similarly, Article 3(2) of the Korean Product Liability Act of 2001 holds the supplier liable if the manufacturer cannot be identified unless the supplier informs the victim of the identity of its supplier or the manufacturer within a reasonable period of time.[216] Section 68 of the Malaysian Consumer Protection Act of 1999 adopts a slightly narrower version whereby the victim can request that the supplier identify the manufacturer, and the supplier is liable if it fails to comply within a reasonable time.[217] As opposed to the Chinese and Korean versions, providing information about an intermediate supplier does not suffice.[218]

The Israeli Liability for Defective Products Act also defines "manufacturer" to include the actual manufacturer, the person "who represent[ed] himself as the manufacturer," and the importer (where relevant).[219] It then provides that if the identity of the actual manufacturer or the importer is unknown, the local supplier is deemed the manufacturer unless the supplier provides information about the identity of the manufacturer, the importer, or the person who sold it the product.[220]

2. Anonymous Speakers. Product liability is the primary, but not the only, context in which a residual indirect liability regime has been used to resolve strong unidentifiability problems. For example,

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[215] Qin quan ze ren fa (侵权法) [Tort Liability Law] (promulgated by the Standing Comm. Nat'l People's Cong., Dec. 26, 2009, effective July 1, 2010) art. 42, P.R.C. Laws (China); Lixin & Zhen, *supra* note 214, at 30.

[216] Product Liability Act art. 3(2), *amended by* Act No. 11813, May 22, 2013, art. 3(2) (S. Kor.), *translated in* Korea Legislation Research Institute's online database, https://elaw.klri.re.kr/eng_service/lawView.do?hseq=29469&lang=ENG (search required); So Jae-Seon & Song Jung-Eun, *Product Liability in Korea*, *in* PRODUCT LIABILITY, *supra* note 188, at 83.

[217] Consumer Protection Act, 1999, § 68(2), (4) (Malay.); *see* Anisah Che Ngah, Sakina Shaik Ahmad Yusoff & Rahmah Ismail, *Product Liability in Malaysia*, *in* PRODUCT LIABILITY, *supra* note 188, at 124, 131, 144 (providing a hypothetical example of how this provision functions).

[218] *See* Consumer Protection Act, 1999, § 68(1)–(2) (Malay.) (requiring the supplier to identify the producer and importer of the product).

[219] § 1, Liability for Defective Products Act, 5740–1980, LSI 34 92 (1979–80) (Isr.). The Act was enacted before the approval of the EU Directive, so it was neither based on nor inspired by the Directive itself. The legislature followed European unification attempts then manifested in the 1977 Convention on Products Liability in regard to Personal Injury and Death (the Strasbourg Convention). *See* Bourie et al., *supra* note 188, at 416 (discussing the legislative history of Israel's law).

[220] *Id.* §§ 1(3), 2(c).

the English Defamation Act of 2013 uses this model in the context of anonymous defamation.[221] Under Section 5, a website operator is generally protected from liability for defamatory statements that others posted on its website.[222] This defense is "defeated," however, if the victim cannot identify and bring an action against the poster, the victim gave the operator a "notice of complaint," and the operator did not respond in accordance with the applicable regulations.[223] Upon receiving a notice of complaint, the operator can contact the poster, who then needs to decide whether to allow removal of the statement or provide his or her name and address.[224] If the operator cannot contact the poster, if the poster does not respond or does not provide the required information, or if the poster agrees to removal, the operator must remove the allegedly defamatory content within forty-eight hours.[225] Otherwise, the operator need not remove the content. It may provide the poster's contact information to the victim if the poster consents or if a court orders it to do so.[226] If the operator fails to comply by removing the content or providing information about the poster, it faces the risk of a lawsuit. The operator, however, may still argue that the content is not defamatory or rely on general defenses in defamation law.[227] Thus, the operator's liability is a form of residual indirect liability: it depends on non-removal when the direct wrongdoer is unreachable.[228] There is no indirect liability if the poster's identity

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[221] Defamation Act 2013, c. 26 (UK), https://www.legislation.gov.uk/ukpga/2013/26/contents/enacted.

[222] *See id.* § 5(2), https://www.legislation.gov.uk/ukpga/2013/26/section/5/enacted ("It is a defence for the operator to show that it was not the operator who posted the statement on the website.").

[223] *Id*. § 5(3)–(4).

[224] The Defamation (Operators of Websites) Regulations 2013, SI 2013/3028, Sch. § 2 (UK), https://www.legislation.gov.uk/uksi/2013/3028/schedule/made.

[225] *Id*. Sch. §§ 3, 5–7.

[226] *Id*. Sch. § 8.

[227] *See, e.g.*, Defamation Act 1996, c. 31, § 1 (UK), https://www.legislation.gov.uk/ukpga/1996/31/section/1 (recognizing defenses); The Electronic Commerce (EC Directive) Regulations 2002, SI 2002/2013, § 19 (UK) https://www.legislation.gov.uk/uksi/2002/2013?timeline=false&view=extent (same).

[228] *See* The Defamation (Operators of Websites) Regulations 2013 at Sch. §§ 3, 5–6 (requiring removal by the operator within 48 hours if the operator cannot find the poster, the poster does not respond, or if the poster's response does not include all required information).

is known or if the operator takes steps to make an action against the poster possible.[229]

Section 10 offers an even more general formulation of residual indirect liability.[230] This section addresses the relation between direct and indirect liability for defamation, providing that a "court does not have jurisdiction to hear and determine an action for defamation brought against a person who was not the author, editor or publisher of the statement complained of unless the court is satisfied that it is not reasonably practicable for an action to be brought against the author, editor or publisher."[231] Thus, a victim cannot sue a third party other than the editor or commercial publisher of the defamatory content if the actual speaker can be reached through reasonable effort.[232]

The interrelation between Section 10 and Section 5 is somewhat unclear. First, Section 10 only applies where the online platform is not an "editor" or a "publisher."[233] If the online platform can be regarded as a commercial publisher of the user's defamatory statement, Section 10 does not preclude liability, and the platform is subject to the more rigid requirements of Section 5.[234] On the one hand, pre-enactment caselaw adopted an expansive interpretation of the term "publisher," potentially narrowing the applicability of the Section 10 defense to online platforms.[235] On the other hand,

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[229] *See id*. (providing the conditions that the operator must satisfy to avoid liability).

[230] Defamation Act 2013, c. 26, § 10 (U.K.), https://www.legislation.gov.uk/ukpga/2013/26/section/10/enacted.

[231] *Id*.

[232] The terms "author," "editor," and "publisher" carry the same meaning in Defamation Act 2013 as in Defamation Act 1996. Defamation Act 2013 §10(2) ("In this section 'author', 'editor' and 'publisher' have the same meaning as in section 1 of the Defamation Act 1996."). Thus, "'publisher' means a commercial publisher." Defamation Act 1996 § 1(2).

[233] Defamation Act 2013 § 10(1).

[234] *See id*. ("A court does not have jurisdiction to hear and determine an action for defamation brought against a person who was not the author, editor, or publisher of the statement complained of unless the court is satisfied that it is not reasonably practicable for an action to be brought against the author, editor, or publisher."); *id*. § 5 (stating requirements that operators of websites must meet to avoid liability).

[235] In Tamiz v. Google Inc., [2013] EWCA (Civ) 68 [7] (U.K.), blog posts and comments accused a politician of drug dealing, theft from his employer, and hypocrisy. The Court of Appeal held that Google, the blog host, was a "publisher" even though it had no editorial control over user-generated content. *Id.* at [22]. In principle, therefore, Google could be found

without a notice of a complaint, most Web 2.0 platforms may not be deemed editors or publishers, making the Section 10 defense applicable (and Section 5 redundant) in most cases.[236] Second, under Section 10, a non-publisher is liable only if "it is not reasonably practicable for an action to be brought against the author,"[237] and the term "reasonably practicable" is somewhat ambiguous.[238] To the extent that the court finds de-anonymization of the anonymous wrongdoer *not* reasonably practicable, though possible, Section 10 will not protect the online platform from tort liability, and only Section 5 will apply.[239] By contrast, if the court finds identification through *Norwich Pharmacal* orders reasonable, Section 10 will block the online platform's liability (assuming it is not deemed a "publisher"), once again making Section 5 redundant.[240]

D. NO CAUSATION-BASED LIABILITY

In some settings, strong unidentifiability problems are resolved by giving up causation-based liability altogether. Liability rules may formally remain intact, but it is understood that they are unenforceable because of the inability to identify the direct wrongdoer.[241] Under this model, the law neither provides

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liable for defamation after receiving an abuse report from the victim. *Cf.* David Rolph, *Defamation by Social Media*, 117 PRECEDENT 16, 19–20 (2013) (discussing the case).

[236] *See* Nick Armstrong, *Defamation Act 2013 Update: Website Operators*, MONDAQ (Sept. 23, 2013), https://www.mondaq.com/uk/libel-defamation/264406/defamation-act-2013-update-website-operators ("The majority of website operators may well be able to argue that they are not 'publishers'–at least until they are put on notice of a complaint.").

[237] Defamation Act 2013 §10(2).

[238] *See* Alastair Mullis & Andrew Scott, *Tilting at Windmills: The Defamation Act 2013*, 77 MOD. L. REV. 87, 101 (2014) ("Precisely what issues a court will consider in determining whether it was reasonably practicable to bring a claim against the primary publisher is not however clear."). For example, one may argue that "it is not reasonably practicable for an action to be brought" against the wrongdoer if he or she is insolvent or resides in a foreign country which is not expected to enforce a judgment against him or her. *Id.*

[239] *See* Defamation Act 2013 § 10(1) (asserting that a court does not have jurisdiction if the person is not the author, editor, or publisher "unless the court is satisfied that it is not reasonably practicable for an action to be brought against the author, editor or publisher").

[240] *See* Mullis & Scott, *supra* note 238, at 101 (explaining that if identification tools make identification reasonable, Section 5 is redundant).

[241] *See* Robert E. Sanders & Alexxandra P. Kwiatkowski, *Physical Contact: An Unreasonable Restriction on Victims' Rights to Recover*, 37 N. KY. L. REV. 323, 328–35 (2010)

identification tools nor imposes indirect causation-based liability on third parties.[242] To avoid the harsh consequences for victims, the legal system usually offers alternative sources of compensation.[243] This model seems to be almost universally preferred in the context of hit-and-run road accidents. Victims cannot practically sue anyone in tort but are not left empty-handed. The variance among jurisdictions revolves around the nature of the alternative source of compensation, which moves along the public-private continuum.

In the United States, hit-and-run accidents are handled, to a limited extent, through private insurance.[244] In most states, an automobile insurance policy must provide uninsured motorist coverage whereby the insurer is obliged to indemnify the insured for injuries caused by uninsured motorists.[245] Generally, uninsured motorist insurance covers only bodily injuries, though it may also cover damage to the car itself, and depends on the uninsured motorist's liability.[246] In many states, the term "uninsured motorist" (or vehicle) encompasses unidentified motorists under explicit

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(discussing issues that arise, specifically in hit-and-run scenarios, when the victim cannot identify the direct wrongdoer).

[242] *See id*. at 334 (mentioning compensation as an alternative theory, rather than imposing causation-based liability).

[243] *See infra* notes 244–285 and accompanying text.

[244] *See infra* notes 245, 249. A few exceptions exist. For example, in Michigan, victims of hit-and-run accidents can recover from the Motor Vehicle Accident Claims Fund through a lawsuit against the secretary of state acting as the fund's director. MICH. COMP. LAWS § 257.1112 (2021).

[245] *See, e.g.*, Sanders & Kwiatkowski, *supra* note 241, at 327 (noting that "Kentucky's Uninsured Motorist Statute states that insurers are required to provide uninsured motorist coverage," but noting that there is a loophole for hit-and-runs (citing KY. REV. STAT. ANN. § 304.20-020(1)–(2) (West 2010))); Robert K. Lewis, *The Physical Contact Rule for Uninsured Motorist Coverage in Arizona: Where We Were, Where We Are, and Where We Ought to Be*, 36 ARIZ. L. REV. 1033, 1034–35 (1994) ("The uninsured motorist coverage . . . is designed to protect an insured from bodily injury caused by a negligent uninsured motorist." (footnotes omitted)).

[246] *See* Lewis, *supra* note 245, at 1034–35 ("Generally, this coverage only applies to compensation for bodily injury, and is contingent upon liability resting upon the uninsured tortfeasor." (footnote omitted)).

statutory provisions[247] or judicial interpretation.[248] Moreover, some state legislatures directly mandate coverage of hit-and-run accidents by automobile insurance policies.[249] In practice, automobile insurance regularly covers injuries sustained by the insured in hit-and-run accidents even when not required by state law.[250] Consequently, a person injured by an unidentified vehicle can often recover under his or her own automobile insurance.[251]

This arrangement has two main weaknesses. First, many hit-and-run victims are not injured while driving and are therefore

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[247] *See, e.g.*, O.C.G.A. § 33-7-11(b)(2) (2021) ("A motor vehicle shall be deemed to be uninsured if the owner or operator of the motor vehicle is unknown."); MISS. CODE ANN. § 83-11-103(c)(v) (2021) (defining uninsured motor vehicle to include "[a] motor vehicle of which the owner or operator is unknown"); MO. REV. STAT. § 379.203(1), (5) (2021) (providing that the plaintiff's legal entitlement to compensation "exists although the identity of the owner . . . of the motor vehicle cannot be established"); N.J. STAT. ANN. § 17:28-1.1(e)(2)(c) (2021) (defining "uninsured motor vehicle" to include "a hit and run motor vehicle"); VA. CODE ANN. § 38.2-2206(B) (2021) ("A motor vehicle shall be deemed uninsured if its owner or operator is unknown."); *see also* ALASKA STAT. § 28.20.445(f) (2021) (limiting coverage for hit-and-run accidents under uninsured motorist insurance); CAL. INS. CODE § 11580.2(b) (West 2021) (limiting the application of uninsured motorist insurance where the vehicle owner or operator is unknown); TENN. CODE ANN. § 56-7-1201(e)(1) (2021) (limiting uninsured motorist coverage when the vehicle owner or operator is unknown); W. VA. CODE § 33-6-31(e)(3) (2021) (limiting coverage of hit-and-runs to instances with damage to property or physical injury due to physical contact).

[248] *See, e.g.*, Brown v. Progressive Mut. Ins. Co., 249 So. 2d 429, 430 (Fla. 1971) ("[T]he question to be answered is whether the offending motorist has insurance available . . . the test should not be simply whether or not the injured party can prove the offending party was uninsured, which is, in many instances, impossible in hit-and-run cases."); Simpson v. Farmers Ins. Co., 592 P.2d 445, 447–50 (Kan. 1979) (discussing the limits of protection of hit-and-run victims under the uninsured motorist coverage, under the assumption that hit-and-runs are covered); Farmers Ins. Exch. v. McDermott, 527 P.2d 918, 920 (Colo. App. 1974) ("While the language of the statute focuses on the problems of an uninsured motor vehicle, its applicability is not limited to those situations in which the identity of the negligent party is known.").

[249] *See, e.g.*, DEL. CODE ANN. tit. 18, § 3902(a) (2021) (requiring coverage of hit-and-runs); 215 ILL. COMP. STAT. 5/143a (2021) (same); IOWA CODE § 516A.1 (2021) (same); 24-A ME. STAT. ANN. tit. 24-A, § 2902 (2021) (same); MASS. GEN. LAWS ch. 175, § 113L(1) (2021) (same); NEV. REV. STAT. § 690B.020(1) (2021) (same); N.H. REV. STAT. ANN. § 264:15(I) (2021) (same); N.C. GEN. STAT. § 20-279.21(b)(3) (2021) (same); OKLA. STAT. tit. 36, § 3636(B) (2021) (same).

[250] *See, e.g.*, Ronald Whitney, Comment, *Uninsured Motorist Coverage for Hit-And-Run Vehicles: The Requirement of Physical Contact*, 49 LA. L. REV. 955, 956 (1989) ("Despite Louisiana's interpretation of the statute, most automobile policies do provide coverage for hit-and-run accidents . . . .").

[251] *Id.*

unable to recover under their own automobile insurance policy. In some states, a person's automobile insurance may include "personal injury protection" (PIP), which often covers injuries sustained by the insured as a pedestrian.[252] But such coverage is far from universal, limited in scope, and available only to car owners and possibly cohabiting relatives.[253] A pedestrian injured by an unidentified vehicle may also seek recovery under a medical insurance policy or a personal accident plan.[254] Still, uninsured pedestrians injured in hit-and-run accidents often lack any source of redress. [255]

Second, in some states, hit-and-run coverage requires proof of actual contact between the victim's car and the unidentified vehicle that fled the scene of the accident.[256] This requirement intended to

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[252] *See, e.g.*, DEL. CODE ANN. tit. 21, § 2118(a)(2)(d)–(e) (2021) ("The coverage required . . . shall also be applicable to the named insureds and members of their households . . . while a pedestrian . . . .").

[253] *See, e.g.*, *id.* (mandating coverage for "named insureds and members of their households"); Barbara J. Gilchrist, *Managed Care Takes to the Highway: Implications for Insureds*, 29 J.L. MED. & ETHICS 203, 204 (2001) ("[PIP coverage] under any automobile insurance policy [is] limited by time, dollar amount, or both.").

[254] *See, e.g.*, *id.* at 204–05 (discussing the interaction between PIP and health insurance policies).

[255] *See, e.g.*, Autry v. Nationwide Gen. Ins. Co., 948 F. Supp. 615, 615, 619–20 (S.D. Miss. 1996) (holding that a minor, who was covered by his parents' automobile insurance, was not entitled to uninsured motorist benefits when he suffered injuries while trying to avoid an unidentified vehicle because of lack of physical contact between the minor and the unidentified vehicle).

[256] *See, e.g.*, Ward v. Allstate Ins. Co., 514 S.W.2d 576, 578 (Mo. 1974) (noting that, where there is no evidence of actual contact, coverage will not be provided unless the other vehicle is known and identified); Motor Vehicle Accident Indemnification Corp. v. Eisenberg, 218 N.E.2d 524, 525 (N.Y. 1966) (noting that "section 617 of the Insurance Law requires . . . that the claimant establish an accident which 'arose out of physical contact of the motor vehicle'"); DeHart v. Wis. Mut. Ins. Co., 734 N.W.2d 394, 405–06 (Wis. 2007) (discussing the purpose of requiring contact in a hit-and-run accident for coverage determination); *see also* Jett v. Doe, 551 S.W.2d 221, 222–23 (Ky. 1977) (upholding a contractual physical contact requirement); Phelps v. Twin City Fire Ins. Co., 476 S.W.2d 419, 420–21 (Tex. Civ. App. 1972) (same); Sanders & Kwiatkowski, *supra* note 241, at 325 (discussing the "contact rule" in Kentucky law); David J. Marchitelli, Annotation, *Uninsured Motorist Indorsement: Construction and Application of Requirement that There Be "Physical Contact" with Unidentified or Hit-and-Run Vehicle; "Miss-and-Run" Cases*, 77 A.L.R. 5th 319 (2000) ("Uninsured and underinsured motorist provisions of automobile liability policies . . . commonly contain limitations restricting coverage to accidents arising out of physical contact between the insured and unidentified vehicles.").

prevent fraudulent insurance claims following accidents caused (or staged) by the insured.[257] Yet it penalizes victims for trying to avoid impact and therefore has been abandoned in most states.[258] A few states replaced the physical contact requirement with a corroborative evidence standard whereby, in the absence of physical contact, the victim needs to provide corroborating evidence from an independent third party who witnessed the hit-and-run accident.[259]

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[257] Lewis, *supra* note 245, at 1034, 1036.

[258] *See* Lowing v. Allstate Ins. Co., 859 P.2d 724, 732 (Ariz. 1993) (rejecting physical contact requirements); Farmers Ins. Exch. v. McDermott, 527 P.2d 918, 920 (Colo. App. 1974) (same); Streitweiser v. Middlesex Mut. Assur. Co., 593 A.2d 498, 502–03 (Conn. 1991) (same); State Farm Mut. Auto. Ins. Co. v. Abramowicz, 386 A.2d 670, 672–74 (Del. 1978) (same); Massa v. S. Heritage Ins. Co., 697 So. 2d 868, 870 (Fla. Dist. Ct. App. 1997) (same); DeMello v. First Ins. Co. of Haw., 523 P.2d 304, 308 (Haw. 1974) (same); Francis v. U.S. Fid. & Guar. Co., 653 So. 2d 45, 48 (La. Ct. App. 1995) (same); Lanzo v. State Farm Mut. Auto. Ins. Co., 524 A.2d 47, 50 (Me. 1987) (same); Royal Ins. Co. of Am. v. Austin, 558 A.2d 1247, 1250 (Md. Ct. Spec. App. 1989) (same); Surrey v. Lumbermens Mut. Cas. Co., 424 N.E.2d 234, 237–39 (Mass. 1981) (same); Hill v. Citizens Ins. Co. of Am., 403 N.W.2d 147, 149–52 (Mich. Ct. App. 1987) (finding that the "physical contact" provision in uninsured motor vehicle coverage can be satisfied even if there is no direct contact between the vehicles); Halseth v. State Farm Mut. Auto Ins. Co., 268 N.W.2d 730, 733 (Minn. 1978) (rejecting physical contact requirements); McGlynn v. Safeco Ins. Cos. of Am., 701 P.2d 735, 737–39 (Mont. 1985) (same); Soule v. Stuyvesant Ins. Co., 364 A.2d 883, 885 (N.H. 1976) (same); Com. Union Assur. Cos. v. Kaplan, 377 A.2d 957, 958 (N.J. Super. Ct. Law Div. 1977) (same); Demir v. Farmers Tex. Cnty. Mut. Ins. Co., 140 P.3d 1111, 1116 (N.M. Ct. App. 2006) (same); Biggs v. State Farm Mut. Auto. Ins. Co., 569 P.2d 430, 433–34 (Okla. 1977) (same); Webb v. United Servs. Auto. Ass'n., 323 A.2d 737, 743–44 (Pa. Super. Ct. 1974) (same); Pin Pin H. Su v. Kemper Ins. Cos./Am. Motorists Ins. Co., 431 A.2d 416, 419 (R.I. 1981) (same); Clark v. Regent Ins. Co., 270 N.W.2d 26, 31 (S.D. 1978) (same); Marakis v. State Farm Fire & Cas. Co., 765 P.2d 882, 885 (Utah 1988) (same); Buchanan v. Doe, 431 S.E.2d 289, 292–93 (Va. 1993) (same); Hartford Accident & Indem. Co. v. Novak, 520 P.2d 1368, 1371–74 (Wash. 1974) (same).

[259] *See, e.g.*, ARIZ. REV. STAT. ANN. § 20-259.01(M) (2021) (providing that, where there was no physical contact between the vehicles and the accident involved an unidentified motor vehicle, "the insured shall provide corroboration that the unidentified motor vehicle caused the accident"); O.C.G.A. § 33-7-11(b)(2) (2021) ("[P]hysical contact shall not be required if the description by the claimant of how the occurrence occurred is corroborated by an eyewitness to the occurrence other than the claimant."); KAN. STAT. ANN. § 40-284(e)(3) (2021) (permitting "evidence to prove the facts of the accident from a disinterested witness not making claim under the policy" where there is "no evidence of physical contact"); OR. REV. STAT. § 742.504(2)(g)(B) (2021) ("The facts of the accident can be corroborated by competent evidence other than the testimony of the insured or any person having an uninsured motorist claim resulting from the accident . . . ."); S.C. CODE ANN. § 38-77-170(2) (2021) (requiring physical contact or that the accident was "witnessed by someone other than the owner or operator of the insured vehicle"); Girgis v. State Farm Mut. Auto. Ins. Co., 662 N.E.2d 280,

In other countries, including Australia, several European Union Member States, and Israel, hit-and-run victims are generally entitled to compensation from special governmental entities under detailed legislative frameworks. In a typical Australian scheme, a statutorily defined Nominal Defendant (e.g., the Australian Capital Territory Insurance Authority[260] or the Queensland Insurance Commissioner[261]) is liable for personal injuries caused by unidentified vehicles,[262] paying victims what the fleeing vehicles' insurers would have paid.[263] An unidentified motor vehicle for this purpose is a vehicle that could not be identified after reasonable inquiry and search.[264] The costs are covered by a special fund based primarily on "Nominal Defendant lev[ies]" (an integral component of motor insurance premiums) and sums recovered from responsible drivers if caught.[265]

The Israeli legislature took a similar path. The Road Accident Victims Compensation Act imposes strict liability on any person using a motor vehicle for personal injuries caused to others "in a road accident in which the vehicle is involved."[266] The user's liability is generally covered by mandatory insurance.[267] The Act also established the Road Accident Victims' Compensation Fund called

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282 (Ohio 1996) (holding that the "corroborative evidence test" applies "in cases where an unidentified driver's negligence causes injury); Ellison v. Doe, 600 S.E.2d 229, 232 (W. Va. 2004) ("When the insured cannot show actual physical contact, to recover uninsured motorist coverage, the insured must show through sufficient corroborative evidence . . . .").

[260] Motor Accident Injuries Act 2019 (ACT) § 16(1) (Austl.).

[261] Motor Accident Insurance Act 1994 (Qld) § 16(2) (Austl.).

[262] Motor Accident Injuries Act 2019 (ACT) §§ 328(1)(b), 329(1)(c)(iii).

[263] Motor Accident Injuries Act 2019 (ACT) §§ 34(2), 232(d), 329(1)(a); Motor Accident Insurance Act 1994 (Qld) §§ 31(1)(d), 33.

[264] Motor Accident Injuries Act 2019 (ACT) § 327; Motor Accident Insurance Act 1994 (Qld) § 31(2).

[265] Motor Accident Insurance Act 1994 (Qld) § 29(1)–(2)(b); Motor Accident Injuries Act 2019 (ACT) §§ 330, 351(2).

[266] § 2(a)–(c), Road Accident Victims Compensation Act, 1975 SH 234 (Isr.); *see also* Izhak Englard, *Traffic Accident Victim Compensation in Israel: A Decade of Experience with No-Fault*, *in* COMPENSATION FOR PERSONAL INJURIES IN SWEDEN AND OTHER COUNTRIES 155, 157 (Carl Oldertz & Eva Tidefelt eds., 1988) (stating that the Road Accident Victim Compensation Act imposes "[a]bsolute liability . . . on the user of a vehicle for bodily injuries caused in road accidents in which the vehicle is involved"); Ronen Perry, *From Fault-Based to Strict Liability: A Case Study of an Overpraised Reform*, 53 WAKE FOREST L. REV. 383, 388 (2018) (same).

[267] Perry, *supra* note 266, at 388–89.

Karnit.[268] Karnit is a government corporation that compensates road-accident victims who are entitled to compensation under the Act but cannot recover from an insurance company because the user of the motor vehicle involved in the accident is unknown, uninsured, or covered by an insolvent insurer.[269]

The European Union Motor Insurance Directive[270] provides that "[e]ach Member State shall set up or authorise a body with the task of providing compensation, at least up to the limits of the insurance obligation for damage to property or personal injuries caused by an unidentified vehicle."[271] Victims of motor accidents caused by unidentified vehicles can recover from the compensation body in their country of residence.[272] In many Member States, compensation bodies are government entities, such as the Fonds de Garantie des Victimes in France,[273] the Fondo di Garanzia per le Vittime della Strada in Italy,[274] and the Consorcio de Compensación de Seguros in Spain.[275] Their obligations are specifically set by legislation, and their operations are funded primarily through levies on insurance premiums.[276]

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[268] §10, Road Accident Victims Compensation Act 1975 SH 234 (Isr.); Perry, *supra* note 266, at 389.

[269] *Id.* § 12(a)(1)–(3); Perry, *supra* note 266, at 389, 399–400 (discussing the establishment and purposes of Karnit).

[270] Directive 2009/103/EC of the European Parliament and of the Council of 16 September 2009 relating to insurance against civil liability in respect of the use of motor vehicles, and the enforcement of the obligation to insure against such liability, 2009 O.J. (L 263) 11.

[271] *Id.* art. 10(1).

[272] *Id.* art. 25(1).

[273] *The Mandatory Third-Party Liability Insurance Guarantee Fund (FGAO)*, FONDS DE GARANTIE DES VICTIMES, https://www.fondsdegarantie.fr/en/fgao-2/the-history-of-fgao/ (last visited Feb. 15, 2022).

[274] *Fondo di Garanzia per le Vittime della Strada*, CONSAP (Oct. 1, 2021), https://www.consap.it/fondo-di-garanzia-per-le-vittime-della-strada/.

[275] MINISTERIO DE ASUNTO ECONÓMICOS Y TRANSFORMACIÓN DIGITAL, GOBIERNO DE ESPAÑA, CONSORCIO DE COMPENSACIÓN DE SEGUROS: AN OVERVIEW 12 (2016), https://www.ibexinsure.com/uploads/docs/holiday-apartment/Consorcio-de-Compensacion-de-Seguros.pdf.

[276] *See* FONDS DE GARANTIE DES VICTIMES, *supra* note 273 (stating that the fund "is financed by the community of policy holders" and that it has "been placed under the supervision of the Ministry of Economy, Finance and Industry"); *Normativa*, CONSAP (Oct. 28, 2021), https://www.consap.it/fondo-di-garanzia-per-le-vittime-della-strada/normativa/ (listing the laws and regulations governing the fund); MINISTERIO DE ASUNTO ECONÓMICOS Y

Finally, the United Kingdom adopted a middle ground model—building on some level of cooperation between the private insurance industry and the government. Hit-and-run accidents are handled by a private insurers' consortium under agreement with the government, without a legislative framework.[277] The Motor Insurers' Bureau (MIB) is a not-for-profit company that was established in 1946 by private motor insurers and enters into agreements with the UK government to compensate victims of accidents caused by uninsured and untraced motorists.[278] The most recent agreement applicable to accidents caused by unidentified drivers is the Untraced Drivers Agreement made in 2017 for England, Scotland, and Wales.[279] Section 1(5) of this agreement defines an "unidentified person" as "a person who is, or appears to be, wholly or partly liable in respect of the claim and who cannot be identified."[280] A person who sustains personal injury or property damage in an accident caused by an unidentified person can make a direct claim against the MIB under the agreement.[281] The only statutory provision dealing with the MIB provides that every insurer that underwrites compulsory motor insurance must be a member of the MIB and contribute to its funding.[282] In summary,

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TRANSFORMACIÓN DIGITAL, *supra* note 275, at 4 (describing the origins of the fund and stating that "[i]ts income is derived from its premiums, its surcharges, and yields on investments").

[277] *See* Matthew Channon, *The Nature of the Motor Insurers' Bureau and Its Agreements*, 7 EUR. J. COMP. L. & GOVERNANCE 168, 172–74 (2020) (discussing the lack of legislative framework).

[278] *See* Channon, *supra* note 277, at 169, 172 (introducing the MIB and explaining that before its establishment these victims had no source of compensation); MOTOR INSURERS' BUREAU, YOUR GUIDE TO MAKING A MOTOR INSURERS' BUREAU CLAIM 4 (2007), https://www.mib.org.uk/media/216242/your-guide-to-making-an-mib-claim.pdf (introducing the MIB as a "non-profit making company set up by motor insurers").

[279] MOTOR INSURERS' BUREAU, UNTRACED DRIVERS AGREEMENT (2017), https://www.mib.org.uk/media/355104/amended-2017-untraced-drivers-agreement-england-scotland-and-wales_v10.pdf.

[280] *Id*. § 1(5).

[281] *See id.* §§ 10, 11(1) (setting for claim procedure and stating that "MIB shall . . . be obliged to make an award or interim payment only if it is satisfied . . . that the identified person would (had he been identified) have been liable to pay damages to the claimant").

[282] Road Traffic Act 1988, c. 52, § 145 (6) (U.K.) (explaining that "authorised insurers" must be members of the MIB); *see also* Channon, *supra* note 277, at 174 ("Insurers who wish to partake in motor insurance business in the UK must be a member of the MIB and contribute to its funding."); MOTOR INSURERS' BUREAU, *supra* note 278, at 4 ("The Road Traffic Act 1988

the alternative compensation scheme is afforded by a private entity with some state control through a dynamic agreement, crafted under a constant tacit threat of legislative intervention.[283] Note that in some EU Member States compensation bodies are associations of private motor liability insurers akin to the MIB (e.g., the Verkehrsopferhilfe in Germany),[284] but their obligations are set by law, not by agreement with the government.[285]

III. AN ECONOMIC PERSPECTIVE

A. THE PROBLEM

Part II presented four models commonly used to resolve strong unidentifiability problems: direct liability with procedural identification tools, parallel (yet practically exclusive) indirect liability, residual indirect liability, and no causation-based liability. Alas, the use of these models in different jurisdictions and contexts seems inconsistent, as the following table demonstrates.[286] Different jurisdictions employ different models in identical settings and identical models in dissimilar settings. This variance calls for theoretical appraisal. The main question that this variance presents is whether a preferred solution to strong unidentifiability problems exists and, if so, how it can be recognized. Derivative questions of practical importance may include whether the preferable solution is general or context-specific, whether variance among jurisdictions may be defensible, and whether the preference is dynamic. Part III aims to answer these questions.

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requires that every insurer that underwrites compulsory motor insurance must be a member of the MIB and must contribute to our funding.").

[283] *See* Channon, *supra* note 277, at 176–78 (discussing state control through the agreements and noting that "the agreements were made against backdrop of potential legislation, which could be a factor in negotiations").

[284] *See Compensation Fund*, VERKEHRSOPFERHILFE, http://www.verkehrsopferhilfe.de/en/garantiefonds/ (last visited Feb. 16, 2022) (introducing the association of insurers and its obligations).

[285] *See, e.g.*, *id.* (describing the Law on Compulsory Insurance, which sets out the obligations of the Verkehrsopferhilfe).

[286] *See infra* Table 1.

Table 1. Solutions to Strong Unidentifiability Problems

Model / Context	**Direct Liability + Identification Tools**	**Indirect Liability**	**Residual Indirect Liability**	**Giving Up Liability**
Unknown Assailant	US (*Bivens*)	US (*Kline*)		
Unidentified Manufacturer		US ("or"), Russia ("xor")	Asia, Australia, EU, UK	
Anonymous Speaker	EU, UK, US	EU	UK	
Hit-and-Run Driver				Asia, Australia, EU, UK, US

The main thesis of this Article is that the choice among the four solutions should follow a coherent, economically-oriented approach that takes into account four types of costs: (1) the cost for the victim of identifying the wrongdoer using procedural tools, (2) the cost for an identifiable third party of obtaining and retaining information about the wrongdoer, (3) the cost of preventing the wrong by an identifiable third party, and (4) the cost of failure to prevent the wrongdoing, which is roughly capped by the victim's expected harm.[287]

[287] If the cost for the wrongdoer of preventing the harm is negligible, the benefit of deterrence is the expected harm prevented. The cost of non-enforcement is determinative when it is lower than the costs of the alternatives. The expected harm is the upper limit of the cost of non-enforcement; if it is lower than other costs, so is the cost of non-enforcement. *See infra* Section III.B.

If the administrative cost of an action against the wrongdoer, including the identification cost for the victim, is the lowest, the law should insist on direct liability with advanced identification tools and avoid indirect liability. If the administrative cost of an action against the wrongdoer, including the cost for an identifiable third party of obtaining and retaining information about the wrongdoer and the reduced administrative cost of the victim's action against the wrongdoer, is the lowest, the law should endorse a residual indirect liability regime. If the cost of prevention by an identifiable third party is the lowest, the law should impose exclusive indirect liability. If the above three costs exceed the benefits of imposing liability in terms of cost-reduction, lawmakers should give up causation-based liability and consider an external compensation scheme. Once this is understood, the derivative questions can be easily answered: the choice of a legal solution is context- and jurisdiction-specific and may even be somewhat dynamic. Part III is structured in accordance with this roadmap.

B. THE SELECTION PRINCIPLE

1. The Costs in Play. The underlying assumptions of the analysis are that unidentified people or entities commit wrongful acts and that the legal system should respond to such wrongdoing in a way that can prevent future misconduct by unidentified perpetrators in the best possible manner. The modest economic goal would be the minimization of enforcement costs, namely the costs of the legal tools used to prevent the wrongdoing of unidentified perpetrators. To do so, one first needs to understand which costs may be associated with enforcement or lack thereof.

Four types of costs underlie the analysis. The first is the cost for the victim of identifying the wrongdoer using all available procedural tools. Consider the case of *Bivens*—an unconstitutional arrest by unknown federal agents.[288] The victim was unable to

[288] *See* Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics, 403 U.S. 388, 389–90, 397 (1971) (holding that the petitioner was "entitled to recover monetary damages for any injuries he has suffered as a result of the agents' violation of the [Fourth] Amendment").

identify the officers who had allegedly violated his rights.[289] However, with the procedural identification tools available to him, he easily obtained the relevant information.[290] He brought John Doe lawsuits, and the court ordered that the complaint would be served to the agents who the U.S. Attorney General records indicated had participated in the act complained of.[291] Thus, although the wrongdoers were unidentified, the cost of identification using advanced procedural tools was modest. By contrast, consider the case of *Kline*—an assault by an unknown intruder in the common hallway of the victim's apartment building.[292] It is unlikely that victims like Kline, with their limited resources, could do anything to identify their assailants,[293] even with advanced procedural tools. The cost of identification by the victim in these cases seems prohibitive. Lastly, consider victims of anonymous online wrongdoing, as in the *Zeran* case.[294] The plaintiff cannot discover the wrongdoer's identity without disclosure by a third party,[295] and the costs of this process may be exorbitant due to the inevitable legal complexity and the technological obstacles discussed in Section II.A.*2*.

The second cost is that of obtaining and retaining information about the wrongdoer's identity by a third party. Once a third party obtains and retains such information, it can be transferred to the victim, reducing the cost for the latter of obtaining the same information. Total identification cost then equals the cost for the third party of acquiring the information plus the cost of a transfer to the victim. In some contexts, a third party can acquire the necessary information at a relatively low cost, thereby reducing the cost for the victim considerably. For example, when the victim of anonymous online wrongdoing attempts to identify the wrongdoer,

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[289] *See id*. at 389–90, 390 n.2 (recounting the plaintiff's allegations against unidentified federal agents).

[290] *Id*. at 390 n.2.

[291] *Id.*

[292] Kline v. 1500 Mass. Ave. Apartment Corp., 439 F.2d 477, 478 (D.C. Cir. 1970).

[293] *Cf. id*. (describing the appellant's assailant only as "an intruder" and discussing the building's unguarded entrances).

[294] Zeran v. Am. Online, Inc., 129 F.3d 327, 328–29 (4th Cir. 1997).

[295] *See, e.g., id*. at 329 n.1 (noting that the appellee argued "that AOL made it impossible to identify" the wrongdoer because of inadequate record-keeping, but that that issue was not before the court on appeal).

the cost may be quite high, even with advanced procedural tools.[296] An online platform can lower this cost significantly by taking simple and inexpensive technological measures, such as requiring user registration or other forms of identity verification, blocking users connecting through public hotspots or anonymous proxy servers, and retaining user data.[297] Similarly, where the manufacturer of a defective product is unidentified, the identification cost for the victim may be high. The cost for any seller in the contractual chain of retaining information about its supplier is negligible,[298] and by doing so it can reduce total identification costs considerably. On the other hand, in cases of assault by unknown perpetrators (like *Kline*),[299] third parties such as property or business owners could not identify the perpetrators at a reasonable cost, at least at the time of the events (a qualification that will be further explored below).[300]

The third cost is that of precautions a third party could take to reduce the likelihood of the wrongdoing, considered in conjunction with the subsequent reduction in expected harm. If there are several promising candidates, one needs to consider and compare the cost of precaution and its impact on the likelihood of wrongdoing for each candidate. For example, if D1 can prevent another person's wrongdoing by taking precautions for $500, and D2 can prevent the same wrongdoing for $400, the minimal cost of prevention is $400, and D2 is better placed to prevent the wrongdoing. If D1's precautions reduce expected harm by $700 (net benefit $200), and D2's precautions reduce expected harm by only $500 (net benefit

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[296] *See supra* Section II.A.*2*; *see also* Perry & Zarsky, *Liability for Online Anonymous Speech*, *supra* note 50, at 229 ("[T]he cost of identifying an anonymous wrongdoer might be prohibitively high, dissuading the victim from bringing an action.").

[297] *See* Perry & Zarsky, *Liability for Online Anonymous Speech*, *supra* note 50, at 251 (suggesting cost-effective ways for content providers to gain knowledge of the speakers posting to their platforms).

[298] Many companies offer cost-effective tools for businesses to use to improve their supplier management and, thus, maintain their suppliers' information. *See, e.g.*, *What Is Supplier Management?*, IBM, https://www.ibm.com/topics/supplier-management (last visited Mar. 30, 2022) (discussing the benefits of supplier management and defining supplier information management as "the process of collecting, maintaining and applying data related to a business's suppliers, based on extensive communication received from those suppliers").

[299] Kline v. 1500 Mass. Ave. Apartment Corp., 439 F.2d 477, 478 (D.C. Cir. 1970).

[300] *See infra* Section III.C.

$100), then D1 would be the better cost avoider (assuming the combined effect of D1's and D2's precautions is not greater than that of each alone). Consider, again, cases like *Kline*. At least two candidates immediately come to mind when considering the prevention of the assault by third parties: the property owner/manager and the police. The court in *Kline* opined that the former is better placed to prevent the wrongful conduct.[301] The police would need to effectively patrol all common areas in every apartment building in their jurisdiction, which "[t]hey are neither equipped, manned, nor empowered to do."[302] The property owner, on the other hand, only has to guard the entrances to the building and in some cases use a simple technological surveillance system.[303]

By contrast, the cost of prevention by any third party in cases of anonymous online wrongdoing might be very high. The most promising third parties are online platforms enabling the wrongdoing.[304] These platforms have access to and control over the publication of user-generated content.[305] Alas, even for online platforms, the cost of precautions may be prohibitively high.[306] Human monitoring of user-generated content requires hiring and training staff to peruse that content, distinguish between legitimate and illegitimate user contributions, and respond accordingly.[307] The cost per user contribution is substantial and incurred with respect to all user-generated content (as opposed to the cost of identifying the anonymous wrongdoer, which is incurred only in the rare case of a wrongful contribution leading to a lawsuit).[308] Automated monitoring entails the development and implementation of

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[301] *Kline*, 439 F.2d at 484 ("[A]s between [the] landlord and the police power of government, the landlord is in the best position to take the necessary protective measures.").

[302] *Id.*

[303] *See id.* at 482 ("[W]e place the duty of taking protective measures guarding the entire premises and the areas peculiarly under the landlord's control against the perpetration of criminal acts upon the landlord . . . .").

[304] *See* Perry & Zarsky, *Liability for Online Anonymous Speech*, *supra* note 50, at 234 ("Content providers have some control over user-generated content, and frequently have the resources to compensate defamation victims.").

[305] *Id.*

[306] *Id.* at 244.

[307] *See id.* at 240 (explaining that human monitoring for content requires some additional logistics in comparison to automated monitoring, including costs and human staffing and training).

[308] *Id.*

technologies that preclude wrongful content while allowing legitimate speech.[309] Theoretically, once the mechanism has been developed, it can be applied to numerous user-generated contributions at a "low marginal cost."[310] However, automated systems require constant development.[311] Moreover, they still make judgment mistakes, and human correction mechanisms remain costly.[312] Alternatively, online platforms may employ a notice-and-takedown system, removing user-generated content when notified that it may be wrongful.[313] The main advantage of this method is that it reduces monitoring costs. Yet subjecting takedown requests to human discretion is, again, quite costly, whereas automatic notice-and-takedown systems involve considerable costs in terms of freedom of speech because they enable anyone with the desire to silence another's speech to do so easily and facilitate mass censorship.[314]

The fourth cost is that of non-enforcement—meaning failure to hold anyone responsible for the consequences of the wrongdoing—thereby allowing such conduct to occur. The upper limit of the cost of non-enforcement is the victim's expected harm, which no one (except for the potential victim) is incentivized to prevent or reduce in the absence of actual liability. Assuming an economic definition of wrongfulness,[315] the expected harm exceeds the cost of the measures that the direct wrongdoer could take to prevent it (and are also avoided by non-enforcement). Otherwise, failing to take these measures would not be economically wrongful. In some cases,

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[309] *Id.*

[310] *Id.*

[311] *Id.*

[312] *Id.* at 240–41.

[313] For example, a notice-and-takedown regime applies to online copyright infringements in the United States. *See* 17 U.S.C. § 512(c)(1)(C) (providing that a service provider is not liable if "upon notification of claimed infringement . . . [the provider] responds expeditiously to remove, or disable access to, the material that is claimed to be infringing").

[314] Cecilia Ziniti, Note, *The Optimal Liability System for Online Service Providers: How* Zeran v. America Online *Got It Right and Web 2.0 Proves It*, 23 BERKELEY TECH. L.J. 583, 606 (2008). For instance, empirical evidence shows that "more than a quarter of [Digital Millennium Copyright Act] takedown notices are either on shaky legal grounds or address cases in which no copyrights are violated." *Id.* at 605.

[315] *See* Ronen Perry, *Re-torts*, 59 ALA. L. REV. 987, 989–90 (2008) (presenting the economic definition of negligence as a "failure to take cost-justified precautions").

however, the cost of non-enforcement may be lower than one or more of the other three costs discussed herein.

2. The Competing Models. Once the relevant costs have been identified, we need to determine which costs are associated with each of the competing legal models. Under the first model, the legal system adheres to direct liability and provides procedural identification tools. In such a case, the victim may seek recovery from the direct wrongdoer, making use of the available identification tools. If the identification efforts are successful, the perpetrator will be brought to justice; the civil process will then lead to liability and the underlying goals of liability, economic and otherwise, will be achieved. The cost of securing prevention is the administrative cost of holding the unidentified wrongdoer liable, the most significant component of which is the cost of identifying that wrongdoer. If identification is impractical, no liability will ensue.

Alternatively, under the second model, the legal system gives up the wrongdoer's identification and imposes indirect liability on a third party who has some control over the likelihood of wrongdoing or its possible impact. This will presumably induce the third party to take cost-effective measures to reduce the likelihood of wrongdoing.[316] The third party needs to choose ex ante whether to take certain precautions to prevent wrongdoing or bear liability. It will take particular measures if their costs are lower than the party's expected liability for failing to take them. In such a case, the cost of securing prevention would be the cost of precautions that the third party could take to avoid the unidentified person's wrongdoing. If the cost of precautions exceeds the expected liability, the third party will not take them and instead choose to bear the risk of liability.

The third model is residual indirect liability: if a designated third party provides information about the wrongdoer's identity to the victim, the latter must seek recovery from the wrongdoer; otherwise, the third party is liable. Put differently, the third party

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[316] *See* STEVEN SHAVELL, ECONOMIC ANALYSIS OF ACCIDENT LAW 8–9, 12–16 (1987) (explaining that both strict liability with a contributory/comparative fault defense and all forms of negligent fault-based liability will induce cost-effective "socially optimal" behavior). Of course, third parties are not required to reduce the expected harm to the same level deemed optimal from the direct wrongdoer's perspective because the precautions available to them are different in cost and impact.

needs to choose ex ante whether to take measures to reduce identification costs or bear liability. The third party will take such measures if their cost is lower than the expected liability for the victim's harm. In such a case, the cost of securing prevention is the cost of these measures plus the administrative cost of an action against the wrongdoer, with the now reduced cost of identification by the victim. The third party will not take such measures if their cost exceeds expected liability. In such a case, the third party may still have an incentive to take cost-effective measures to reduce the likelihood of wrongdoing by unidentified others in the arguably rare case in which expected liability, though lower than the cost of identification by the third party, exceeds the cost of third-party precautions. Thus, the cost of enforcement under a residual indirect liability regime would be the lower of the administrative cost of an action against the wrongdoer, including total identification costs (the third party's and the victim's costs), and the third party's cost of precautions (assuming that expected liability is not lower than both costs so that the wrongdoing should be allowed to take place).

Lastly, the legal system can give up causation-based liability altogether. In such a case, neither the unidentified wrongdoer nor any third party has an incentive to avoid or prevent the wrongdoing, and no third party has an incentive to obtain information about the wrongdoer's identity. In this scenario, tort law is not enforced, and the social cost of non-enforcement is the expected cost of unprevented wrongdoing.

3. Legal Design. The selection principle can now be laid down. Lawmakers must consider, with respect to each context at a given time, the cost of identification by the victim (as part of the administrative cost of an action against the wrongdoer), the cost of identifying information for relevant third parties (again, as part of the administrative cost of direct liability), the minimal cost of precautions a third party could take against wrongdoing by unidentified others, and the cost of the wrongful conduct in the absence of enforcement. The economically preferred method to prevent wrongdoing is the one with the lowest enforcement costs. Thus, if the administrative cost of an action against the wrongdoer, including the identification cost for the victim, is the lowest, the preferred model is exclusive direct liability with identification tools. The victim cannot recover without identifying and suing the

wrongdoer and is therefore incentivized to take the efficient course of action.

If the minimal cost of third-party precautions against wrongdoing by unidentified others is the lowest, the preferred method is indirect liability. Liability must be imposed on the third party who could take the most cost-effective precautions against the wrongdoing of unidentified others. For example, if D1 could take precautions for $500, reducing expected injury by $1,000, and D2 could equally reduce expected injury for $400, D2 is the best cost avoider ($1,000−$400>$1,000−$500) and should be liable. If, on the other hand, D2's precautions would reduce expected injury by only $600, D1 would become the best cost avoider ($1,000−$500>$600−$400) and should bear liability. The victim can only seek recovery from the third party and is once again incentivized to take the efficient course of action.

If the sum of the cost for a third party of obtaining and retaining information about the wrongdoer and the reduced administrative cost of the victim's action against the wrongdoer (including the reduced cost of identification by the victim) is lowest, the preferred method is residual indirect liability. The third party is incentivized to obtain the necessary information because the cost is lower than the expected liability. The victim can then seek recovery only from the unidentified wrongdoer at a relatively low administrative cost using the information obtained by the third party. If the cost of third-party precautions is lower than the cost of obtaining and retaining information, residual indirect liability incentivizes the third party to take efficient precautions (again, the least-cost enforcement method).

If the cost of non-enforcement is lowest, the legal system should give up causation-based liability, possibly opting for alternative compensation schemes. In such cases, the cost of administering any causation-based liability model (direct, indirect, or residual-indirect) would exceed the benefit in terms of preventing the net cost of the wrongdoing. As explained in Section II.D, forgoing prevention through legal incentives is usually accompanied by alternative sources of compensation. This ensures that while some

of the underlying goals of tort liability, such as deterrence,[317] corrective justice,[318] or civil recourse,[319] cannot be achieved, at least two possible goals—compensation[320] and loss spreading[321]—will be achieved.

C. COMMENTS

This Section argues that the application of the selection principle should be context-, jurisdiction-, and time-specific. In other words, the comparison of the costs that underlies the selection of the applicable model may yield different conclusions in different contexts, in different jurisdictions, or at different times.

To begin, the lowest of the four costs may differ among contexts. For example, when strong unidentifiability problems arise in defective product cases, the cost for the seller of obtaining and retaining information about its supplier is generally negligible. Thus, the administrative costs of an action against the wrongdoer using third-party information may be the lowest of the four. Residual indirect liability would then be the appropriate solution. By contrast, when strong unidentifiability problems arise in unknown assailant cases, the cost of precautions that the property or business owner could take to prevent the wrongdoing might be lower than the cost of administering an action against the wrongdoer, which includes the costs of identification by the victim and third parties, making indirect liability the preferred model. The

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[317] *See, e.g.*, John C.P. Goldberg, *Twentieth-Century Tort Theory*, 91 GEO. L.J. 513, 544–48 (2003) (discussing the economic deterrence theory of tort law and noting that "[e]conomic deterrence theories of tort . . . assume that the purpose of tort law is to promote overall social welfare by deterring accidents in the future").

[318] *Id.* at 570–75 (discussing corrective justice theory of tort law and noting that, under this theory, "tort law is understood as aiming to restore an equilibrium that has been disturbed by the tortfeasor's conduct").

[319] *See, e.g.*, Benjamin C. Zipursky, *Civil Recourse, Not Corrective Justice*, 91 GEO. L.J. 695, 699, 735 (2003) (introducing the principle "that plaintiffs who have been wronged are entitled to some avenue of civil recourse against the tortfeasor who wronged them").

[320] *See* Goldberg, *supra* note 317, at 525 (discussing compensation, "one of the function[s] of tort law").

[321] *See, e.g.*, Guido Calabresi, *Concerning Cause and the Law of Torts: An Essay for Harry Kalven, Jr.*, 43 U. CHI. L. REV. 69, 73–76, (1975) (discussing the loss-spreading goal of tort law, which is "concerned with lessening the burdens of losses that have already occurred").

comparison of the four alternatives must be made with respect to each setting.

Perhaps more interestingly, the lowest of the four costs in a specific context may differ among jurisdictions due to legal, economic, and technological variance. Consider anonymous online speech. Where the protection of anonymous speech is generally stronger, any procedural tool that aims at user de-anonymization will be more complex and costly to use, if allowed at all. Additionally, if the legal system exalts privacy and data protection and limits online platforms' ability to retain user data, identification costs might increase dramatically. Any increase in identification costs, attributed to local circumstances, may make identification-based models relatively less attractive in the specific jurisdiction from an economic perspective.

The least evident comment is that the comparison between the four costs in a specific context in a single jurisdiction is not static, even though changes may be slow and infrequent. Consider, again, unknown assailant cases. At the moment, it seems more cost-effective for property owners to take measures against the intrusion of potential assailants than to identify intruders (something that even the police are often unable to do). Technological advances may gradually reduce the costs of third-party identification and prevention. The use of facial recognition systems, video surveillance, content analytics, geolocation technologies, etcetera, may have a greater impact on identification costs than on prevention costs, changing the preferred model. The implementation of new technological tools naturally must comply with domestic legal constraints that affect their costs and benefits, but these too can change over time. Similarly, for decades, and particularly when road accident compensation schemes evolved, hit-and-run drivers were rarely apprehended.[322] Without perceptive eyewitnesses, neither the police nor victims could identify the wrongdoers. Consequently, identification-based models were impractical. Also, because hit-and-run accidents occur at unexpected locations and times, it is difficult for third parties to prevent them. Under those circumstances, giving up causation-based liability was reasonable. Here too, new technologies, such as

[322] *See infra* note 357.

video surveillance and content analytics, may facilitate identification. The cost of identification may gradually decrease to a level that makes identification-based models superior to non-enforcement.

D. APPLICATIONS

1. Unknown Perpetrators of Intentional Torts Against the Person. At this point, it is helpful to turn back to the various settings discussed in Part II and consider whether existing law is consistent with the proposed theoretical framework. The first situation is that of intentional violation of bodily integrity, life, or liberty, as illustrated by cases like *Bivens*,[323] on the one hand, and *Kline*,[324] on the other. In *Bivens*, the victim was unable to identify the officers who had allegedly violated his rights but could easily obtain the relevant information from their employer through John Doe lawsuits.[325] Thus, the cost of identification using advanced procedural tools was negligible, and adherence to direct liability was justifiable. In *Kline*, the victim could do nothing to identify her assailant.[326] The cost of identification was high, making adherence to direct liability with procedural identification tools a problematic solution. The difference between the two cases is clear: in *Bivens*, the victim knew who the wrongdoers' employer was, whereas in *Kline* the victim had no lead whatsoever on the wrongdoer's identity.

In *Bivens*, the employer could very easily provide information about the wrongdoers to the victim. An employer knows who its employees are, so no real cost is involved in obtaining or retaining their identities. Still, employers do not need a special incentive in the form of residual indirect liability to obtain and retain information that they inevitably possess irrespective of any prospect of wrongdoing (here, their employees' identities). To generalize, in categories of cases where a known third party can readily identify

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[323] Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics, 403 U.S. 388 (1971).

[324] Kline v. 1500 Mass. Ave. Apartment Corp., 439 F.2d 477 (D.C. Cir. 1970).

[325] *Bivens*, 403 U.S. at 390 n.2.

[326] *See Kline*, 439 F.2d at 478–79 (identifying the appellant's assailant only as "an intruder" and noting the lack of any doormen or attendants in the building).

the wrongdoer because of a preexisting nexus between them, direct liability with procedural identification tools will suffice. In *Kline*, third parties could not identify the perpetrators of the assault at a reasonable cost. As explained below, the cost of third-party prevention was probably lower.[327] Therefore, residual indirect liability would not be the most efficient enforcement method. In sum, residual indirect liability seems inappropriate in both types of cases: in *Bivens*, because the relevant third party does not need any incentive to acquire information it inevitably possesses, and in *Kline*, because the cost for the third party of obtaining the necessary information is simply too high.

Finally, in both types of cases, a third party could probably take precautions to prevent the wrongdoing. In *Bivens*, the employer had some control over the employees.[328] Other parties could not do much. Still, relying on the employer's indirect liability would not be advised because the costs of identification by the victim are much lower than the cost of prevention by the employer.[329] In *Kline*, at least two parties—the property owner and the police—could take measures against intruders.[330] Yet the court observed that the property owner could prevent the wrongdoing at the lowest cost: "Not only as between landlord and tenant is the landlord best equipped to guard against the predictable risk of intruders, but even as between landlord and the police power of government, the landlord is in the best position to take the necessary protective measures."[331] The police cannot reasonably patrol all public areas in all apartment buildings, so "only the landlord could have taken measures which might have prevented the injuries suffered by appellant."[332] Identification costs are so high that indirect liability may be superior to direct and residual-indirect liability.

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[327] *See infra* notes 330–332 and accompanying text.

[328] *See Bivens*, 403 U.S. at 393 ("It appears, moreover, that the officers were under direction from the Governor to aid in the enforcement of federal law.").

[329] The employer may be concurrently liable under the rules of vicarious liability regardless of the unidentifiability problem. The justifications and proper boundaries of vicarious liability transcend the scope of this Article, but I contend that the employer's liability should not be exclusive.

[330] *Kline*, 439 F.2d at 484.

[331] *Id.*

[332] *Id.*

Given the severity and likelihood of harm, non-enforcement would generate a considerable cost and cannot be the preferred model in either *Bivens* or *Kline*. *Bivens*-like cases of wrongful conduct perpetrated by unknown parties in the service of known parties (as employees, agents, etcetera) easily fit the direct liability regime due to the very low identification costs. The victim should be incentivized to seek recovery from the direct wrongdoers, obtaining their identities from a known third party. There is no use for residual indirect liability because the third party does not need a special incentive to obtain and retain information that it inevitably and readily has. A court order in a John Doe lawsuit will swiftly transfer this information to the victim.[333] *Kline*-like cases of wrongful conduct perpetrated by unknown parties, who do not serve known parties, are different because identification costs are high for the victim and any third party (at least until new technologies facilitate such identification). The cost of ex ante precautions may truly be lower, justifying an indirect liability regime.

2. Unidentified Manufacturers. When the manufacturer of a defective product is unidentified, identification costs for the victim may be high, so a simple direct liability model might be inferior to the alternatives. By contrast, the cost for any seller in the contractual distribution chain of obtaining and retaining information about its supplier is negligible, and by providing such information, it can reduce total identification costs considerably. Put differently, it is quite easy for the supplier to identify the manufacturer or quickly acquire its identity, while it may be impossible for the buyer to find out the manufacturer's identity.[334] Thus, a residual indirect liability model is preferable to simple direct liability. Inability to provide information about one's supplier will result in liability, inducing each seller to obtain, retain, and quickly transfer such information to the injured end customer.

With regard to third-party precautions, no party other than a product's manufacturer can reasonably prevent injuries caused by

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[333] The employer has no incentive to withhold the information. Violation of the court order will carry penalties, while compliance will reduce the employer's potential liability under the respondeat superior doctrine (by shifting at least some of the burden to the actual perpetrators).

[334] Koziol, *supra* note 205, at 539, 543 (indicating that suppliers may be better suited to find a manufacturers' identities than buyers).

manufacturing and design defects unless they become known to any of the sellers in the supply chain (who can then avoid new sales and recall sold items). The cost of precautions for third parties is relatively high, so indirect liability, at least if intended to induce third parties to take measures to prevent the harm, seems to be a less desirable option. Yet this preliminary conclusion must be qualified. Imposing strict, as opposed to fault-based, liability on the seller can spawn ex ante contractual arrangements that shift the risk of liability for injuries caused by product defects from the seller to the manufacturer.[335] The combination of strict liability and a contractual chain may end up shifting the cost to its best avoider. The contractual allocation of risk operates much like a residual indirect liability regime: the seller acts in a way that ultimately transfers the burden to the manufacturer, unidentified by the victim, securing internalization of the harm by the direct injurer while saving the cost of identification by the victim. U.S. and Russian product liability laws use different versions of this model, as explained in Section II.B.*3*.

The cost of imposing the burden on the direct injurer, either through the identification of the unidentified manufacturer with the seller's help or through imposition of the burden on the seller expecting a contractual transfer to the manufacturer, is modest. It is undoubtedly lower than the expected harm caused by the defective product. Thus, both residual indirect liability and indirect strict liability are defensible solutions to strong unidentifiability problems in defective-product settings.

3. Anonymous Speakers. Next, consider victims of wrongful anonymous speech, particularly in cyberspace. The victim cannot discover the wrongdoer's identity without disclosure by a third party, and the costs of this process may be exorbitant due to technological and legal complexities.[336] As explained above, wrongdoers may evade identification by using tools that conceal their IP addresses or connecting through public hot spots that do not require personal identification.[337] Even when IP addresses can

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[335] *See* RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2 cmt. a (AM. L. INST. 1998) ("In most instances, wholesalers and retailers will be able to pass liability costs up the chain of product distribution to the manufacturer.").

[336] *See supra* Section II.A.*2*.

[337] *See supra* notes 55–56.

be obtained and attributed to specific people, online platforms and ISPs might not retain the data long enough.[338] From a legal perspective, data retention may be constrained, undercutting the availability of user information; de-anonymization processes must be cautious, and therefore costly, because disclosure of user information might jeopardize freedom of speech and privacy; and courts have limited power against exterritorial platforms and service providers.[339] To conclude, identifying anonymous online wrongdoers might be very difficult. When wrongdoers are not identified, they evade liability, the costs of anonymous wrongdoing are not fully internalized, and potential wrongdoers are not efficiently deterred. If, on the other hand, wrongdoers are identified through costly processes, wrongdoers may internalize the costs of their wrongdoing, but the administrative costs may outweigh the benefits in terms of cost-reducing deterrence. In conclusion, direct liability with identification tools might be too costly to implement.

The cost of third-party preventive measures might also be high, even for online platforms that have access to and control over the publication of user-generated content. Human monitoring of user-generated content requires hiring and training staff to review that content, distinguish between legitimate and illegitimate content, and respond accordingly.[340] The cost per user contribution is real, and unlike the costs of identification by the victim, it is incurred with respect to all user-generated content, not only in the rare case of a lawsuit. Automated monitoring entails development and implementation of technologies that preclude wrongful content and facilitate legitimate speech. Even when deployed, automated monitoring systems need constant development, as well as human supervision and correction mechanisms that keep the costs substantial.[341] Notice-and-takedown systems reduce monitoring costs, but human-based systems still require training and employing reviewers. Further, automated systems involve considerable costs in terms of freedom of speech because they enable people to easily silence others.[342]

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[338] *See supra* note 57.

[339] *See supra* notes 58–63.

[340] *See supra* note 307.

[341] *See supra* note 309.

[342] *See supra* note 314.

Moreover, anonymous online wrongdoing is the exception. Most user-generated content is socially beneficial: Web 2.0 users "create positive externalities enjoyed by advertisers, information providers, merchants, friends, and acquaintances."[343] Indirect liability for anonymous online wrongdoing makes online platforms internalize the expected harms caused by the relatively rare wrongful user contributions without capturing the full and enormous social benefits of their activities.[344] This may result in overdeterrence in the form of excessive monitoring and fervent censorship by platforms.[345]

Even if platforms employ the proper level of care, uncertainties may arise with respect to the wrongful nature of each user contribution. Platforms then need to choose between two types of potential errors: false negatives—i.e., identifying a wrongful contribution as non-wrongful—and false positives—i.e., identifying a non-wrongful contribution as wrongful.[346] Because indirect liability derives from users' wrongful contributions, false negatives carry the risks of litigation and liability while false positives do not.[347] Acting on a false positive (quick removal of suspicious contributions) does not have any real cost.[348] This imbalance might induce platforms to remove suspicious but non-wrongful contributions. To avoid liability, companies would rather err on the side of silencing speech.[349] In addition, they may be induced to block

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[343] Lichtman & Posner, *supra* note 55, at 225 (referring to ISP subscribers in general).

[344] Assaf Hamdani, *Who's Liable for Cyberwrongs?*, 87 CORNELL L. REV. 901, 917–18, 921 (2002).

[345] *See id.* at 917–18 ("Given this 'positive externalities' problem, the conventional prescription of economic analysis . . . would result in overdeterrence . . . ."); Neil Weinstock Netanel, *Impose a Noncommercial Use Levy to Allow Free Peer-to-Peer File Sharing*, 17 HARV. J.L. & TECH. 1, 13 n.30 (2003) ("ISPs do not fully share the benefits its subscribers derive from placing material . . . on the network. As a result, imposing liability on ISPs for subscribers' infringing material induces ISPs to overdeter, purging any material that a copyright holder claims is infringing." (citations omitted)).

[346] Perry & Zarsky, *Liability for Online Anonymous Speech*, *supra* note 50, at 248.

[347] *Id.*

[348] *Id.*

[349] *See* Zeran v. Am. Online, Inc., 129 F.3d 327, 333 (4th Cir. 1997) ("Because service providers would be subject to liability only for the publication of information, and not for its removal, they would have a natural incentive simply to remove messages upon notification, whether the contents were defamatory or not." (citing Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767, 777 (1986))).

provocative users, disable user contributions, or reduce demand for Web 2.0 technologies, thus impeding progress and innovation. These undesirable phenomena would add to the already high costs of indirect liability.

Residual indirect liability has a unique advantage in those circumstances. Recall that according to this principle, the direct wrongdoer is liable if the online platform provides identifying information, and the platform is liable only if it fails to provide such information. Let us examine the two courses of action available to the rational platform under this model. The platform can take measures to facilitate user identification—for example, requiring registration or ad hoc identity authentication (at least when an algorithm detects suspicious activity),[350] blocking contributions from users with unrecognized or unusual IP addresses, or retaining user information.[351] The cost of these measures is limited and decreasing, and by employing them, the platform considerably reduces total identification costs and secures enforcement against direct wrongdoers. At the same time, residual indirect liability saves the costs of monitoring and avoids other detrimental effects of a duty to monitor, such as overdeterrence caused by non-internalization of the economic benefits of Web 2.0 and by the asymmetric response to errors in judgment.[352] Alternatively, the platform can allow contributions by unidentifiable users and bear the risk of liability. The platform will only need to review the activity of unidentifiable users, limiting the cost of monitoring to a level deemed reasonable in comparison to the expected liability for failure to monitor.[353] A platform will choose this course of action only if the costs of monitoring are lower than the costs of obtaining

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[350] *See* Tal Z. Zarsky & Norberto Nuno Gomes de Andrade, *Regulating Electronic Identity Intermediaries: The "Soft eID" Conundrum*, 74 OHIO ST. L.J. 1335, 1351–53 (2013) (discussing the trend among online platforms to require the use of either "real names" or "stable pseudonyms").

[351] *See* Perry & Zarsky, *Liability for Online Anonymous Speech*, *supra* note 50, at 251 (discussing the various options content providers utilize to help improve identification).

[352] *See id.* at 253 ("[T]his [residual indirect] liability regime may eliminate the need for monitoring, reducing content providers' monitoring costs to zero, and preventing over-deterrence . . . .").

[353] *See id.* ([M]onitoring [under a residual liability regime] will be limited to content generated by unidentifiable speakers, so the cost will be much lower than in the case of exclusive indirect liability or concurrent liability.").

and retaining user information, and in such a case, a residual indirect liability regime will still prevent the wrongdoing at the lowest cost.

This method is not perfect, but its flaws are small and manageable. For example, collecting and transferring user information may jeopardize the right to speak with anonymity[354] and the right to privacy.[355] To mitigate these concerns, databases can and should be protected, and information may be disclosed only when a court determines that several preconditions—including a relatively high probability of the lawsuit's success—are met.[356] Another problem is that an online platform can evade liability by providing user information even when the wrongdoers are judgment-proof, and direct liability cannot secure efficient deterrence of wrongdoers or fair compensation to victims. Still, this problem seems minor: while online platforms may have deeper pockets than users, the scope of the harm caused by the typical online wrongdoing may not be beyond the speaker's compensation capacity. The harm may be particularly small in the case of anonymous wrongdoing, given the relatively weak reliability and credibility of anonymous speakers. If there are nonetheless settings in which speakers cannot normally compensate for the harm caused, an extension of online platforms' residual indirect liability may be appropriate.

4. Hit-and-Run Drivers. For decades, hit-and-run drivers have been hard to control ex ante and apprehend ex post. Rarely can eyewitnesses identify fleeing vehicles and report them to the police, and in most cases, a fleeing driver is never caught.[357] Prohibitive

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[354] *See supra* notes 58–61 and accompanying text.

[355] *See supra* note 62 and accompanying text.

[356] *See supra* notes 65–77 and accompanying text.

[357] *See, e.g.*, Dodd v. Sec'y of State, 213 N.W.2d 109, 110 (Mich. 1973) ("[T]he plaintiff was struck by a hit-run vehicle . . . . The driver of the vehicle was never found."); Samuel E. Plutchok, Note, *Is a "Hit-And-Wait" Really Any Better Than a "Hit-And-Run"?*, 45 HOFSTRA L. REV. 331, 345, 360, 363 (2016) (explaining that most hit-and-run drivers never get caught); Meredith Cohn, *Hit-and-Run Drivers Not Uncommon, but Not Well Understood*, BALT. SUN (Feb. 6, 2015, 7:18 PM), http://www.baltimoresun.com/health/bs-hs-hit-and-run-20150205-story.html ("[M]any hit-and-run drivers are never caught."); Mario Koran, *If You Hit Someone with a Car and Drive Away, You're Probably Not Getting Punished*, VOICE SAN DIEGO (Aug. 8, 2014), http://www.voiceofsandiego.org/hit-and-runs/if-you-hit-someone-with-a-car-and-drive-away-youre-probably-not-getting-punished ("San Diego drivers who kill or injure

identification costs made identification-based models (direct liability with identification tools and residual indirect liability) impractical. Third-party precautions also seem very costly. In some cases, third parties, such as the colloquial back-seat drivers, could exert some control over potential hit-and-run drivers before the accidents or reduce the likelihood of fleeing, but if the driver could not be found and sued, neither could the passenger. Also, the legal system could not rely on the infrequent and uncertain availability of such parties. For other third parties, the cost of precautions that can diminish expected harm from hit-and-run accidents is undoubtedly very high. From a third party's perspective, hit-and-run accidents occur at unexpected locations and times; both foreseeability and the ability to take effective precautions are fundamentally limited. Therefore, third-party investment in hit-and-run prevention is unreasonable, and indirect liability is undesirable. To the extent that identification costs and third-party prevention costs are very high, the possibility of non-enforcement (which allows low-probability accidents to occur) becomes relatively appealing. The near-universal tendency to resolve the problem through alternative compensation schemes seems defensible.

IV. CONCLUSION

This Article is the first to offer a systematic analysis and a general theoretical framework for the appraisal of possible solutions to strong unidentifiability problems, which undermine liability and frustrate its goals. Part II identified four commonly used solutions. Sometimes the law insists on direct liability of the wrongdoer and affords institutional support for identification endeavors, usually by permitting actions against unnamed defendants and issuing various orders to facilitate their identification. This method has been used in cases of civil rights violations by unknown federal agents in the United States, and more recently, in cases of online anonymous wrongdoing.

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someone with their car and just keep driving evade punishment almost nine out of 10 times."); Yang Wang, *More Than 50% of Drivers Get Away with Hit-And-Runs*, HOUS. CHRON. (Apr. 13, 2010), http://www.chron.com/news/houston-texas/article/More-than-50-of-drivers-get-away-with-1707226.php (reporting on Houston area hit-and-runs, where less than half of suspects within the surveyed time period were identified and "even fewer were arrested").

In some contexts, the law imposes indirect liability on third parties who could prevent or reduce the risk of misconduct by unidentified wrongdoers. Common law jurisdictions typically recognize a third party's duty to protect a potential victim from criminal activities of others if a special relationship, like that of a business and its invitees, exists between them. In many jurisdictions, but not in the United States, victims of online anonymous wrongdoing may also sue third parties, usually the platforms that enabled the publication. Finally, in the United States, but not in other jurisdictions, victims of defective products made by unidentified manufacturers can seek damages from the sellers.

The third possible solution is residual indirect liability. Under an EU Directive, which is also followed in many non-European jurisdictions, if the producer of a defective product cannot be identified, then each supplier of the product is regarded as the producer unless that supplier informs the victim of the identity of the producer or the person who supplied the product to said victim. The English Defamation Act similarly applies a residual indirect liability model to online platforms that enable users to publish wrongful content.

The last option is no causation-based liability. Under this model, the law neither helps the victim identify the wrongdoer nor places the burden on a third party who could prevent the wrongdoing. To avoid harsh consequences for victims, they are offered alternative sources of compensation. This model is universally preferred in the context of hit-and-run accidents.

Part III argued that the choice among these four models should follow a coherent and economically-oriented approach, taking into account four types of costs: the cost for the victim of identifying the wrongdoer using available procedural tools, the cost for a third party of obtaining and retaining information about the wrongdoer, the cost of preventing the wrong by a third party, and the cost of failing to prevent the wrongdoing.

If the administrative cost of an action against the wrongdoer, including the identification cost for the victim, is the lowest, the law should insist on direct liability with identification tools. If the sum of the cost for a third party of obtaining and retaining information about the wrongdoer and the reduced administrative cost of the

victim's action against the wrongdoer is the lowest, the law should endorse a residual indirect liability regime. If the cost of prevention by a third party is the lowest, the law should impose exclusive indirect liability. If the above three costs exceed the benefits of imposing liability in terms of cost reduction, lawmakers should give up causation-based liability and opt for external compensation schemes.

This Article maintained that the application of the proposed framework should be context-, jurisdiction-, and time-specific, and it then applied the framework to four common cases of strong unidentifiability: intentional violations of bodily integrity, life, or liberty by unknown perpetrators; injuries caused by defective products with unidentified manufacturers; anonymous online wrongdoing; and hit-and-run accidents. The analysis emphasized the interrelation between the law and the ever-changing technological and socioeconomic environment and laid the foundations for future consideration of unidentifiability by courts, policymakers, and scholars.