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**RESUMEN:** El Derecho natural en el mundo de las nuevas tecnologías ha sufrido una cierta conmoción como de todos es sabido y podemos constatar día a día en nuestro operativo científico cotidiano. La aparición de internet hace que tengan que definirse de nuevo las categorías éticas, legales y morales, aunque sea solo matizando lo que siempre han sido. La relación entre Ética y Derecho también presenta facetas nuevas. Villey no sabemos de qué forma habría reaccionado ante internet, lo que sí está claro es que hay un referente que no se puede modificar y este es el de la «obligación de respetar la grandeza de la persona humana y su libertad moral». La idea de bien común resulta igualmente paradigmática en el planteamiento de la filosofía de Michel Villey, quien la toma de Santo Tomás de Aquino. En una segunda parte del trabajo se abordan las tesis tomistas sobre el Derecho e internet. Continúa el artículo explicando los argumentos liberales en favor de la libertad en internet y, por otro lado, las posiciones conservadoras contrarias que postulan una regulación legal del funcionamiento y de los contenidos que se recogen en internet. La conclusión es clara, ya que partiendo del aristotelismo se puede construir un modelo moderno y perfeccionado del Derecho natural, centrado en las virtudes humanas.

**PALABRAS CLAVE:** Derecho Natural, Michel Villey, Internet, Santo Tomás.

**RESUM:** El Dret natural dins del món de les noves tecnologies ha sofert una certa commoció. L'aparició d'internet fa que hagin de definir-se de nou les categories ètiques, legals i morals, encara que sigui sol matisant el que sempre han estat. La relació entre ètica i dret també presenta facetes noves. Villey no sabem de quina forma hauria reaccionat davant internet, la qual cosa sí és clar és que hi ha un referent que no es pot modificar i aquest és el de la «obligació de respectar la grandesa de la persona humana i la seva llibertat moral». La idea de ben comuna resulta igualment paradigmàtica en el plantejament de la filosofia de Michel Villey, qui la presa de Sant Tomàs d'Aquino. En una segona part del treball s'aborden les tesis tomistes sobre el Dret i internet. Continua l'article explicant els arguments liberals en favor de la llibertat en internet i d'altra banda les posicions conservadores contràries que postulen una regulació legal del funcionament i dels continguts que es recullen en internet. La conclusió és clara, ja que partint de l'aristotelisme es pot construir un model modern i perfeccionat del Dret natural, centrat en les virtuts humanes

**PARAULES CLAU:** Dret Natural, Michel Villey, Internet, Sant Tomàs d'Aquino.

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## 1. Introduction

If we want to address contemporary problems such as those generated through the use of the Internet and, in particular the way social networks affect human life, we can find a number of sociological and psychological studies focused on descriptions of current modes of use. These researches often shed light on risks and dangers deriving from the abuse of the Internet (especially among the young) and from the wide-spread trend among young people to develop compulsive relationships with the Internet and a sort of pathologic Internet-dependency. However, most of us will be ready to accept the idea that we cannot just be content with describing these phenomena: we also want one or more proposals about how to guide our conduct with regard to these new phenomena. It is an ethical as much as a legal necessity.

From an ethical point of view, we are led to ask questions about what is right and good in our conduct with regard to the Internet. More specifically, possible areas of ethical reflection might be: (1) a question about the personal autonomy of people (especially young people) using Internet; (2) a question about the degree of free choice really available to Internet users; (3) a question about the real improvement in self-realization that can derive from the use of social networks.

From a legal point of view, the novelty of certain phenomena, like the construction of a web-identity, necessitates defining new legal categories, such as the crime of «theft of web-identity»<sup>1</sup>. However, in more general terms, following the natural law tradition, I take the law not only as an instrument for curbing crimes and vices but also, positively, as a useful instrument to induce the formation of moral virtues in citizens and, in the end, to improve the common good of a political community.

The question that now lies in front of us is the following: in what theoretical terms should we address these contemporary problems in order to provide some lines of orientation for the multitude of young people who regularly use the Internet? It is both an ethical question and a legal question but we take the two levels to be connected insofar as the law plays an important role in influencing human conduct.

In considering ethics and the law in our contemporary Western societies we should converge on two general trends of response on which there is agreement between people working in the legal and ethical field. Both responses are generated within liberal political rails, though the second may also encompass an extra-liberal ethical and legal area. The first response is usually taken to stem from the principle of neutrality: it assumes that all conceptions of the good are on the same level and that the state has no role in promoting the human good nor in 'making men moral'. According to the conception of liberal neutrality, each citizen must be free to live his own private life, free from interference from the state – and from his fellows.

By contrast, we can identify a common theoretical area in which we find people who give their allegiance to natural law theory and to liberal

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<sup>1</sup> We can speak of the "theft of web-identity" when our credit card code and password are stolen and someone else can transact on the web as if it were us. Cf. S. Rodotà, *La vita e le regole*, Feltrinelli, Milano, 2006, p. 76.

perfectionism. According to both views, the good life of citizens should not remain a purely private question but should also involve the public sphere. The law does not only fulfill the role of curbing the ‘bad man’s’ vices and passions but also can it deeply affect the good living of citizens and, more widely, the general standard of living and morality of the whole society.

Now, our two briefly sketched perspectives can offer very different answers to the problem previously introduced: how should we ethically and legally deal with the problems generated by the use of the Internet? Our route to approach this problem goes through a few steps: first a presentation of law and justice in the Thomistic tradition, according to Villey’s reconstruction; second, a discussion of the negative and positive roles of the law on Aquinas’ view, emphasizing his positive pedagogy, what he takes as the beneficial effects of the law on human flourishing; third, a consideration of certain responses to the problem in the liberal mainstream, taking stock from arguments used in other contexts but that can be adapted to the question of ‘Internet dependency’; finally, we should consider whether the Thomistic approach can achieve a better result in terms of human flourishing, without reducing the individual freedom, so cherished by liberal theories. To anticipate, my conclusion will be that Thomistic ethics may still provide us with a credible response to contemporary problems, insofar as it can balance considerations of justice and human wellbeing.

## 2. Villey on Natural Law.

In order to apply an ancient theory such as Thomistic ethics to contemporary problems we would be well-advised to try to shape as sharply as possible the plausible contours of its legacy. Insofar as our inquiry concerns normative considerations for the use of the Internet, we need a proper understanding of the notions of ‘law’ and ‘justice’ in Thomistic ethics to determine whether they can be of any help to our purposes. Michel Villey has presented a concise reconstruction of those notions in Thomistic (and Aristotelian) natural law which is trustworthy from an historical point of view. His point of departure is a critical stance against the modern notion of justice, taken as “either too vague, too fixed or too utopian”<sup>2</sup>. Villey sees modern practical philosophy as leaving too little space to justice beyond notions such as economic progress, the plural values of law or ‘the useful’. He places the roots of his dissatisfaction with Kantian subjectivism which locates at the peak of justice general maxims such as the “obligation to respect the grandeur of the human person and his moral liberty”<sup>3</sup>. According to Villey, it is the principle of respect due to the human person which has become the sum of contemporary justice.

However, we will not understand the core of justice – and law – if we neglect to look at the ancient notions which can give us useful clues. It is worth-noticing that Thomas Aquinas defines law (*jus*) as *id quod justum est* or *objectum justitiae*, with the relevant consequence that jurists should work to the service of justice whose definition, in Thomas’ view, relies much on the notion of the ‘common good’. Justice, we may say, is dependent on the common good and its understanding paves the way to a proper understanding of law. According to

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<sup>2</sup> M. Villey, “Epitome of Classical Natural Law”, *Griffith L. Rev.*, 74 (2000), p. 81.

<sup>3</sup> *Ibid.*, p. 80.

Aquinas, «law is a kind of direction and measure of human activity, through which a person is led to do something or held back»<sup>4</sup>. Since the direction and measure of human acts is reason, we have to conclude that law is an activity of reason. It may be said that reason is the law of the soul because it shows to the will the correct path to follow: the will tends to its objects according to the order of reason. As is well-known, the idea of a rational order is the common thread which runs through the various forms of law (eternal, divine, natural and human) that Aquinas discusses. In a nutshell, we may say that natural law participates in eternal law insofar as man's natural inclination to self-fulfilment is part of the universal plan of God, which is the common good in its grandest sense. Descending from this general perspective, we need human laws because natural law, though participating in the eternal law, is limited in not providing a guide for individual cases. Those particular arrangements that human reason arrives at are called 'human laws', provided they are directed to the common good, they are not beyond the authority of the law-giver, and they impose properly proportionate burdens<sup>5</sup>.

From these brief hints we can gather the idea that law is not – as many contemporary authors hold – a different thing from justice but that “the aims of justice coincide identically with those of law”<sup>6</sup>. Insofar as Villey sees in the pursuit of justice much more than the application of written rules, we should appreciate his capacity for going back to the Aristotelian roots of the concept, emphasizing at least two crucial aspects of justice. First, justice appears, under the guise of 'equity', as a corrective for the application of written rules and for adapting them to the circumstances of the case. From an objective point of view, justice/equity works from the inside of each law – which, as we know, has to be directed to the common good –, given that the variability of human circumstances requires slightly different responses each time. In turn, Villey is also careful enough not to neglect the subjective side of justice: justice as a social virtue. It is, as Aristotle – and Aquinas after him – taught, a virtue *ad alterum* which concerns relations between persons opposed to each other. It stands side by side with other neighbouring virtues, Villey says, such as religion towards God, piety towards parents, humanity and good faith.<sup>7</sup> In contemporary legal and political philosophy, still pervaded by a scepticism toward the virtues, it is worth-emphasizing that justice is a virtue that contributes to designate the inner equilibrium of man, well beyond being the corrective of laws. As it is well known, the just man is able to give each his own (*sum cuique tribuere*), to each person what he/she deserves in the right proportion to the other members of the social group.

In concluding on the relation between law and justice in Thomistic natural law, we should emphasize, following Villey, that law cannot be separated from justice without losing its *raison d'être*. The authority of legal rules would quickly dissolve if law did not receive the moral force of justice<sup>8</sup>. Of course, this is far from being an uncontroversial point but, before tackling critical positions, we should consider another important issue which partially follows from the identification of law and justice: the social pedagogy of Thomistic natural law.

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<sup>4</sup> *Summa Theologica*, I-II, q. 90, a.1.

<sup>5</sup> Cf. *S. T.*, I-II, q. 96, a. 4.

<sup>6</sup> Villey, “Epitome of Classical Natural Law”, cit., p. 88.

<sup>7</sup> Cf. *ibid.*, p. 83.

<sup>8</sup> Cf. *ibid.*, p. 90.

### 3. Aquinas' positive pedagogy and the Internet.

If the idea that law cannot be severed from justice seems acceptable, we should also be ready to accept the other Thomistic thesis, according to which law should not be severed from moral good and virtue. The first relation between law and justice is the well-known object of a plurisecular dispute between legal positivism and natural law but it does not attract the same harsh criticisms that from many quarters – liberal and non liberal – are directed at the relation between law and the moral good or virtue. Liberal authors may disagree among themselves about the paternalistic principle they want to attack (“legal paternalism”, “moralistic legal paternalism”, “benefitting-conferring legal paternalism”) but surely most of them agree upon rejecting legal measures (especially prohibitions) aimed at the moral good or virtue formation among citizens<sup>9</sup>. The risk is, according to liberal views, that the public pursuit of the moral good or virtue by means of legal measures endangers individual freedom.

It is quite easy to see that regulating the use of the Internet, practiced mostly in private places, may appear to be an intolerable impingement over one's freedom of expression and creativity. In the mainstream liberal culture of our society the burden of showing that it is possible to draw a different balance of reasons is on the supporters of the legal promotion of moral good and virtue. In the limited space we have cut off for reflection here – the use of the Internet – we have to carefully frame the arguments to be balanced in order to understand their respective nature and weight. In this area, as in others, our understanding requires a *quasi-phronetic* judgment, sensitive to the particulars of the case.

Two main theses, drawn from Thomistic ethics, confront each other with regard to the role of the law towards citizens' virtues and vices. The first stems from a quick reading of *Summa Theologica* q. 95-96 and concludes that the appropriate role for human law in moral education is that of checking the bad person's inclinations or vices. Once we leave aside decent or good-natured people for whom parental training and admonition may work as moral guidance and correction, we are left with those depraved and prone to vice. For these people words are not enough and they have to be restrained from evil by force and fear. In order to achieve political peace punishment through the discipline of the law is the most efficient means, as also Hobbes would agree.

So far the view expressed by Aquinas on the role of the law does not seem to go further than Justice O. W. Holmes' legal realism which conceives of the law from the perspective of the 'bad man'<sup>10</sup>. On this view the law is obeyed due to fear of sanctions, while its moral normativity is completely forgotten. By contrast, on Aquinas' view people restrained and tamed by legal punishments can perhaps be educated to some degree of virtue. Although this is not an easy task, the Aquinas, following Aristotle, is much more optimistic about the potentialities of human nature than Hobbes or the legal realists.

However, our story about the Aquinas' pedagogy does not end here: there is a positive side insofar as law can be presented as a guide for the already good-willed. For those inclined to good by nature, custom or grace, law can have a

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<sup>9</sup> Cf. J. Feinberg milestone work, *The Moral Limits of the Criminal Law*, 4 voll., Oxford, Oxford University Press, 1984-5-6-8; *Harm to Self* (vol. 3), p. XVI-XVIII.

<sup>10</sup> Cf. O. W. Holmes, *The Common Law*, Harvard University Press, Cambridge (Mass.), 1963.

teaching and improving function<sup>11</sup>. Thus, the good need good laws not only to compel the bad to leave them alone but also to favour positively the cultivation of virtues.

Following Mary Keys, we can verify the positive pedagogy that Aquinas predicates as stemming from every good law<sup>12</sup>. First, at times the moral evil and confusion of one's forebears and contemporaries within one's society can blind even those with good hearts and wills. Because of their ignorance, they may fall far behind the level of human fulfilment they might otherwise have achieved.

It is quite easy to apply these general considerations to the use of the Internet by young people – or even children – who are tempted to navigate through websites displaying pornography, excitation to violence or the recreational use of narcotics. In these cases – and in others – the likely absence of adult advice and guide may leave even the most good-natured youth and children in the utmost confusion about what is good to pursue. Laws which regulate the access to certain sites – or prohibit them in the most extreme cases – may have a useful pedagogic role.

Second, laws can improve the habituation necessary for the acquisition of virtues. They can expand the scope and variety of activities conducive to the virtues in question, providing reminders about, for example, employers' responsibility for employees' health or tax laws (a thorny case, especially in certain countries). Finally, insofar as laws are framed for the common benefit of citizens and the common good of society, they play a key role in guiding action in the political sphere. Laws are in this respect aimed at justice and inspire a just conduct in citizens, contributing to individual flourishing and to the flourishing of the whole community<sup>13</sup>.

It is worth mentioning that there is no general agreement on Aquinas' positive pedagogy among scholars of Thomistic ethics. Finnis' well-known attempt at reconceiving many Thomistic doctrines, for one, is rather explicit in denying a place to a positive pedagogy with regard to the role of the law. He says that, according to Aquinas, the end of human law is *temporalis tranquillitas civitatis*, which it achieves by coercively prohibiting external acts that can disturb the peace of the state<sup>14</sup>. Even in passages where Aquinas more explicitly seems to take the laws to induce *ad opera virtuosa*, Finnis' interpretation is that of seeing laws as aimed at “those virtuous actions which are required if the public weal is not to be neglected”<sup>15</sup> or peace violated. In Finnis' account, which is different from the original Thomistic source, the legislator aims at cultivating virtues in citizens only to the degree that it may contribute to maintaining justice and peace. He forgets the legislator's further end, which is central to Aquinas, of cultivating virtue for its own sake, that is for the individual flourishing of each citizen *and* for the flourishing of the political community. According to Finnis' account of Aquinas, then, there is a basic distinction between public and private which leads the law to be concerned not with the individual as such but with the

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<sup>11</sup> Cf. S. T., q. 101 a. 3.

<sup>12</sup> Cf. M. Keys, “Aquinas' Two Pedagogies: A Reconsideration of the Relation Between Law and Moral Virtue”, *Am. Journ. Pol. Sc.*, vol. 45, n. 3 (2001), p. 523-525.

<sup>13</sup> Cf. S. T., I-II, q. 90, a. 2.

<sup>14</sup> Cf. J. Finnis, *Aquinas: Moral, Political and Legal Theory*, Oxford University Press, Oxford, 1998, p. 224.

<sup>15</sup> *Ibid.*, p. 231.

individual *qua* citizen. Thus, the state has a direct concern only with the virtue of justice but no direct concern with full human virtue<sup>16</sup>.

Finnis' reductivist and quasi-liberal interpretation of the Thomistic ethics of virtues may lead, in my view, to a response to our problem regarding the regulation of the Internet which underplays the potentiality of the virtues. Very briefly, I take Finnis' concern with justice as favouring all those rules which prohibit the exploitation of people (e.g. certain pornographic sites) or prevent excitation to violence (e.g. websites promoting racial and anti-semitic hatred). A state that wants to maintain the distinction between public and private tries to induce just actions in its citizens and, indirectly, the formation of just persons. Aiming in this direction, Finnis' state would surely regulate the use of the Internet some steps beyond what a liberal state would authorize but would still fall short of considering the Internet a potential tool for human improvement in terms of education regarding the virtues. Among other things, ICTs (Information and Communication Technologies) may generate better informed people, an improvement in citizens' democratic participation in social networks such as Facebook may have the effect of regenerating or strengthening social ties that time or distance may have loosened, offering new occasions for the exercise of virtues such as friendship. Then, under these respects a thoroughly Thomistic state leaves more room for the promotion and exercise of the virtues than Finnis is disposed to accept.

#### 4. *Liberal Arguments in Favour of Internet Freedom.*

So far we have introduced arguments in favour of a Thomistic regulation of the use of Internet. Notwithstanding their persuasivity, they express by far a minority position in a debate dominated by liberal theorists. In liberal democratic societies we may expect a variety of positions inspired by liberal principles. They propose different attitudes toward the use of the Internet but, by and large, they are all characterized by the location of individual freedom at the center of their focus. In contrast with Thomistic attitudes, liberal attitudes are less inclined to the public regulation of Internet use. We should list and discuss a few liberal positions concerning our problem, describing their different proposals with regard to Internet regulation and emphasizing their common features which are in contrast with Thomistic flourishing-oriented approaches.

First, a utilitarian-oriented approach holds that the cyberspace should be free from regulation because such independence will maximize welfare. Multiple decentralized and independent sites for web communication enhance possibilities for flexible decision-making, transacting and for a more efficient allocation of resources than what is possible with centralized state regulation. Such a rich panoply of potentialities of communication brings about an increase in social benefit that no abuse of freedom of expression can outbalance. According to this view, centralized regulation of pornographic sites, for example, may constitute a reduction in freedom of expression, threatening decreases in the general welfare<sup>17</sup>.

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<sup>16</sup> Cf. M. Wright, "The Aim of Law and the Nature of Political Community: An Assessment of Finnis on Aquinas", *Am. Journ. Jurispr.*, 54 (2009), p. 145 ff.

<sup>17</sup> On the efficiency claim one can see M. A. Lemley, "The Law and Economics of Internet Norms", *Chi-Kent L. Rev.*, 73, 1998.

Second, a libertarian position opposes any kind of restriction on the use of the Internet: cyberspace should be freely navigated for any individual purpose whatsoever because there is, in principle, no legitimate concern that would justify possible limits on freedom of expression. As it is well known, libertarians recognize the power of the state to impose limits on freedom of expression only on the grounds of the “harm principle”: a certain activity is permitted to the extent that does not harm third parties. Thus, insofar as, for example, pornographic sites are going to be visited only by willing viewers (with some filter to exclude children), libertarians firmly support a ‘no regulation principle’ for the use of the Internet.

A further argument can be added to strengthen the libertarian position: it may be dubbed ‘the futility of regulation argument’. It holds that the character of Internet communication is so decentralized and globalized that any state regulation on the cyberspace would be arbitrary and would induce evasion<sup>18</sup>.

Third, there is the liberal argument which seems to realize most fully the liberal ideal of independence and self-governance. It holds that cyberspace embodies the liberal-democratic ideal of individual liberty and popular sovereignty, representing, at its best, a space where people can exchange a wealth of information, with instantaneous and inexpensive mass communication and with an almost infinite choice of virtual communities and discussion groups. In this argument we can distinguish a democratic subclaim according to which cyberspace is the best available mechanism for direct democracy, with the potential to serve as an electronic town hall where people can deliberate and vote on issues of mutual interest. The second subclaim is the argument from the liberal ideal of independence and derives from the anarchist emphasis on the freedom of movement and exit among diverse ‘rule-spaces’. So far as each individual is free to move and decide his/her more congenial cyber-home, anarchists have nothing to object to, even in the case of eventual autocratic groups within the net. *A fortiori* they have nothing to object to with regard to pornographic – or other controversial – sites, given that each viewer is free to exit when he chooses. The ideal of liberty and self-governance is well-served by the large extent of consumer choices in conditions close to perfect competition.

While previous arguments stress, one way or the other, the principle of individual autonomy central to all liberal perspectives, we should now consider a fourth and final liberal argument in which some communitarian strands also converge. It is a claim from community autonomy which focuses on group rights within the liberal state. It contends that within a truly liberal state communities have a right to be self-governing and virtual communities, even if autocratic, should be granted ample room for self-governance<sup>19</sup>. If we take this claim to self-governance, not as a strong claim to ethnic or religious self-governance, but as a weak claim in the way of civic associations and other groups that want to determine norms for a discrete set of mutual commitment, we have a useful example of what this claim to community autonomy may amount to in cyberspace. Some have contended that increasing the possibility of mutual recognition among members of such groups gathering in cyberspace may also

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<sup>18</sup> Cf. L. J. Gibbons, “No Regulation, Government Regulation or Self-Regulation: Social Enforcement or Social Contracting for Governing in Cyberspace”, *Cornel J. L. and Pub. Pol.*, 6, 1997.

<sup>19</sup> Cf. D. Post and D. Johnson, “The New ‘Civic Virtue’ of the Internet”, in *The Emerging Internet*, 23 (Inst. For Information Studies), 1998, p. 1393.

increase their sense of identity as a group. Others contend that intercommunity mobility improves the allocation of public goods, allowing individuals with similar tastes and interests for certain public goods to gather in groups<sup>20</sup>.

All these liberal arguments are important in the present debate over the use of the Internet but their full understanding requires a fair assessment of their weak sides. I want to proceed backwards now, starting my discussion from the last argument we have considered: the community autonomy argument. The main objection to this argument is in regard to self-governance: it can be objected that like-minded groups may bring about greater social consensus within, while threatening the common bases of the liberal state. Insofar as differently minded people can exchange opinions, discuss and even fight with regard to issues of common interest, they can later deliberate together to produce better collective decisions. This entails that every citizen should be exposed to materials he would not have chosen himself but, once the experience has been gained, it is advantageous for the person and for society overall. Such a sharing of communication is the basic ground for a viable liberal pluralism that by contrast would be thwarted by social fragmentation which tends to generate hatred and violence<sup>21</sup>.

We should now address the argument of liberal perfectionism in favour of the cyberspace, distinguishing two subclaims. The first is a typical liberal-perfectionist claim which holds that the free use of cyberspace can be conducive to individual development and to improving personal autonomy. The second is a democratic claim, according to which territorial representative government is a second best alternative determined by information and transaction costs. Once cyberspace is available with all its potentialities, online communication would allow people to govern themselves, from the 'bottom-up', as it were.

Each subclaim, in turn, should be confronted with its own objection in order to verify its persuasivity. In the first place, the supporter of the liberal-perfectionist claim has to consider, on the one hand, the problem of fragmentation that may thwart individual development, leading each citizen to exchange opinions only with like-minded people, neglecting the potentialities intrinsic to pluralism. On the other hand, the personal autonomy of Internet users seems at risk when their choices are partially hetero-directed by websites and their links (excluding, in turn, other links). Further, on social network sites the expression of participation in group events by the 'I like' option shows only a feeble personal involvement and a weak contribution to the development of personal autonomy.

In the second place, the liberal-democratic claim does not fare much better once we assume that: first, certain websites – such as those that sell pornography or gambling – necessarily require some degree of state regulation; second, others are not democracy-enhancing, insofar as they exclude certain viewpoints from online discussion groups, discriminating on the basis of certain characteristics of the would-be speaker; finally, web-based political movements,

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<sup>20</sup> Cf. Ch. Tiebout, "A Pure Theory of Local Expenditures", *Journ. Pol. Econ.*, 64, 1956.

<sup>21</sup> In 2001 at a level of Internet development much beneath the present level of technological sophistication and public diffusion C. Sunstein already advised about the dangers of cyber-fragmentation. Cf. C. Sunstein, *Republic. Com*, Princeton University Press, Princeton, 2001.

such as “Movimento 5 Stelle” in Italy, may show a small degree of internal democracy at the level of final decisions about political directions.

In our backward route, our third step is that of addressing the libertarian claim in favour of the Internet as a no-regulation zone because governance of the cyberspace would consist of the aggregate – and variable – results of a multitude of individual decisions. Further, eventual dissenters are free to find alternative sites or to establish new ones: free exit and mobility would guarantee individual liberty and consent.

This claim can be attacked from two directions. In the first direction, it is quite doubtful that Internet users express a modicum of meaningful, informed choice in selecting websites and rule regimes. Nor is it plausible to hold, following the neoclassical economics model of consumer sovereignty, that my failure to attempt to inform myself of the rules of cyberspace activity shows my choice to accept cyberspace rule regimes as they are. It is not plausible because the appraising of different rule regimes entails costs of acquiring and processing information, and discovering and evaluating eventual alternatives. The central value of the Internet is that of providing a panoply of information in a fraction of the time with regard to acquiring the same information offline. If users had to read and consider the conditions of use for each website, the advantages of the Internet would be lost. It would be no solution either to rely on the reduction of collective action costs for users thanks to Internet communication because, quite likely, collective action costs would remain significant enough to prevent any serious user intervention.

The second direction of criticism against the libertarian claim addresses mobility: the claim that the Internet allows near frictionless mobility among rule regimes and a limitless possibility for individual exit. A plausible objection to that claim is that the human tendency to place a greater value on what people already have in comparison with eventual gains from new moves is a well-known psychological phenomenon. The so called ‘status quo bias’ generates feelings of loyalty to Internet communities one already belongs to<sup>22</sup>.

In making up our minds on the real thrust of the mobility claim we should also recognize that, while at the low end the Internet will still be composed of a large variety of individual websites, such as blogs or common fora of discussion, at the high end the big websites will be controlled by media mega-conglomerates that have the power to control the crucial freedom of the Internet, that of producing and disseminating information. It is quite likely that for individual users it will be not easy to find ways out and alternative content from those proposed by the big medias (for example, we can think about Google and Facebook in different contexts of use of the Internet).

Finally, we come to the utilitarian claim according to which cyberspace independence will maximize welfare because decentralized and flexible decision-making may allocate resources more efficiently. My general objection to the utilitarian claim comes from the same direction pointed out earlier: the danger of large concentrations of media which may distort the allocation of resources and information. The benefits of a free cyberspace may be lost in a way similar to how the optimal results of a free market may be lost by the practice of monopolies.

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<sup>22</sup> Cf. R. Korobkin, “Inertia and Preference in Contract-Negotiation. The Psychological Power of Default Rules and Form Terms”, *Van. L. Rev.*, 51 (1998), p. 1583.

### 5. Conservative Arguments in Favour of Internet Regulation.

Liberal reasons in favour of the non-regulation of the Internet meet, as we have shown, enough counter-arguments to suggest a careful appraisal of the contrary position which supports some degree of regulation of the Internet for moral reasons. At this time we should not address a view within the liberal debate but a view which is traditionally considered as opposed to liberalism. I am referring to two controversial doctrines: *legal moralism* according to which “it can be morally legitimate to prohibit conduct on the ground that it is inherently immoral, even though it causes neither harm nor offense to the actor or others”; and *moralistic legal paternalism*, according to which “it is always a good reason in support of a proposed prohibition that it is necessary to prevent moral harm to the actor himself”<sup>23</sup>. I assume that plausible arguments in favour of Internet regulation can be advanced from each of these two doctrines and are commonly put forward from many quarters which judge unbounded freedom in the cyberspace as potentially dangerous for the social and moral tissue of contemporary society. From my point of view, these arguments require careful evaluation as typical ‘counterweights’ to liberal arguments. Although the latter expresses the prevailing view in our society, the former embodies a core of traditional and plausible ideas regarding the place of ethics which descend from natural law theory.

The first doctrine which deserves discussion is legal moralism because it embodies a principle supported by most conservatives. It legitimates the prohibition of certain conduct because it is *inherently immoral* rather than harmful or offense to others. Traditionally, some reasons put forward to justify prohibitions are the following: (a) the need to preserve a traditional way of life; (b) the need to implement morality; (c) the need to prevent an illicit gain; (d) the need to improve or perfect human character. Each of these reasons can be called on to justify restrictions on websites promoting pornography incitement to violence or gambling – to recall just a few controversial examples.

(a) is a communitarian reason according to which the social and moral integrity of a community can be endangered by the moral corruption generated, for example, by pornography or gambling. This argument becomes stronger when potential “victims” are especially young, as many usual Internet users are. Once we focus less on the inherent immorality than on the consequences of social disintegration deriving from moral corruption, we are using a consequentialist argument advanced in the '50s by Lord Devlin, who maintained the necessity of a legal regulation of prostitution and obscenity<sup>24</sup>.

(b) can also be presented as a (strong) communitarian argument, according to which society is a community of shared ideas regarding public morality and ethics. Society, Devlin notes “is held by the invisible bonds of common thoughts. If the bonds were too far relaxed the members would drift apart”<sup>25</sup>. We should emphasize that this argument was developed many decades ago to counter episodic and spatially identifiable cases, while today the pervasiveness

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<sup>23</sup> J. Feinberg, *Harm to Self*, cit., p. XVII.

<sup>24</sup> Cf. P. Devlin, *The Enforcement of Morals*, Oxford University Press, Oxford, 1965.

<sup>25</sup> *Ibid.*, p. 10.

of the Internet may threaten the 'bonds of our society' within the home of each citizen.

(c) is not simply a 'moral' reason, since illicit gains are usually prohibited by laws. Illicit gains may represent a signal of immoral activities such as online prostitution, pornography or gambling. The underlying immorality requires state regulation, even though there are no laws explicitly mentioning those activities. However, the economic side of these immoral activities is important insofar as they become more visible to the state that, so, takes a further interest in regulation.

Finally, (d) is a perfectionist argument that in the Aristotelian and Thomistic tradition allows the state to promote human character and development, eventually even by prohibitions. The Internet has such wide potentialities to lend itself to improving human development, if properly used. But it is also especially feared by all liberals who see in this technology a greater danger of freedom reduction or suppression. However, it is easy to conceive of many situations in which the perfectionist argument may legitimate state regulations to restrict – rather than free – the access to pornographic, etc. sites on the grounds of age. It is rather plausible to assume that visiting those sites may have negative effects on children and many young people whose personalities are still in the process of development. Insofar as psychological studies can give evidence of the dangers of exposure – for children and young people – to pornography, violence and gambling on the Internet, it seems well-founded to maintain some degree of state regulation, such as restrictions based on age. In turn, a public perfectionist view would allow only some degree of access discrimination with regard to sites that want to keep discussion within a group of like-minded people, provided that it is not a kind of discrimination which perpetuates historical stigmas.

We should now consider our second doctrine, that of moralistic legal paternalism, according to which the prevention of *moral harm* is always a good reason to justify prohibitions. The controversial concept of moral harm is often called on by conservative authors who want to justify prohibitions or restrictions on presumably immoral activities. This is a lively debated question with regard to 'obscenity', a concept which is quite difficult to define, although we often agree in recognizing cases of obscenity<sup>26</sup>.

In cases such as obscenity and others the call on 'moral harm' rather than 'inherent immorality' seems to rest on sounder ground because the latter may require some metaphysical foundation or, at least, a shared perception of what is morally correct, while the former wants to connect an empirically testable concept such as 'harm' with a non empirical idea, such as 'morality' which is usually open to subjective or social evaluations. From a liberal point of view, 'moral harm' is a dubious notion because it tries to smuggle a controversial notion of 'social morality' through the non-controversial notion of harm.

In trying to assess the plausibility of the notion of 'moral harm', we should first keep in mind that if the notion has some intuitive appeal with regard to real-life obscenities – and other phenomena – it seems even more plausible to use it with regard to virtual obscenities. Even though we may not have a well-defined

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<sup>26</sup> Cf. Justice Potter Stewart in *Jacobellis v. Ohio* 378, U.S., 184, 1964; see my comments on 'obscenity' in M. Mangini, "Atti osceni e danno morale", in *Diritto e questioni pubbliche*, n. 1 (2010), p. 390 ff.

concept of moral harm, there is a common fear among adults, especially parents, that while navigating the web children and young people may run into moral harm. Websites of the kinds already described may have negative effects on those whose characters and personalities are still in the process of formation. Certain images and contents may distort one's self-development and the development of her/his relations with others. In general, insofar as morality is inseparable from accurate perception, as Iris Murdoch claims<sup>27</sup>, virtual contacts with others may increase our separateness and differentness from other people. In particular, certain kinds of images – e.g. pornography, violence – may get people used to treating others as *something* rather than as persons with their own wishes and needs.

The risk of 'objectifying' human relations and persons is one of the reasons which may justify some degree of state regulation on the Internet, according to conservative positions. However, it is clear that concepts such as 'moral harm' may become a slippery slope argument which makes room for freedom-constraining rules that prevent even the free exchange of opinions on some issues, as it already happens in some non-liberal countries. As is well known, in China there is rigid state control on all fluxes of information on the web and some content such as material concerning 'human rights' or 'democracy' is banned without exception. The aforementioned moral concepts lend themselves to a high degree of repression of individual liberties, because a non-liberal political regime may extend its use of those concepts at ease. So, we may understand why liberal authors are usually very suspicious or clearly against the employment of those moral concepts.

#### 6. *A Perfectionist-Natural Law Proposal.*

Moral concepts of this kind have generated a great controversy over the last centuries because, on the one hand, liberals have been suspicious of their potentialities for repression – often due to their vagueness; while on the other hand, conservatives such as Lord Devlin legitimately fear the fragmentation of the moral tissue of society. In my view the harsh conflict between these two positions depends on a basic misunderstanding: both forget the rationale behind those concepts which can be traced back to the tradition of natural law.

The Aristotelian and Thomistic theories of ethics can be summed up to constitute a natural law-perfectionist model, centered around an idea of human flourishing and focused on the virtues<sup>28</sup>. I take the basic idea of this approach in terms of the overlapping of the good life and the moral life. In other words, moral virtues – and moral concepts in general – make sense insofar as their normative load can be understood in terms of the good life or human flourishing. A just or courageous act, just to make an example, is not only morally correct but is also constitutive of the good life of the agent. Thus, in this perspective morality is not a constraint from without which can eventually limit the agent's freedom, as liberals fear. Rather, conduct through the exercise of the (moral) virtues expresses the true nature of the agent and, consequently his freedom and autonomy.

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<sup>27</sup> Cf. I. Murdoch, *The Sovereignty of the Good*, Routledge, London, 1970, p. 66.

<sup>28</sup> Cf. my "Virtues, Perfectionism and Natural Law", in *Eur. Journ. Leg. Stud.*, vol. 3, 1, 2010.

On these grounds, then, we can argue that conservative theories make a distortive use of moral concepts when they use 'moral harm' or 'inherent immorality' just to thwart individual freedom, as history shows. In these cases the rationale stemming from the natural law-perfectionist model has been lost and morality is called on just to restore moral order in a fragmented and chaotic society. The conflict between the conservative interpretation of morality and liberal claims to freedom of expression has been common on the issue of 'obscenity'. On the one hand, conservatives have considered cases of obscenity as immoral forms of freedom of expression, underestimating the positive potential embedded within the free expression of sexuality (one can still recall Italian censorship of the '60s movie "Last Tango in Paris"). On the other hand, liberals, raising the banners of freedom in defence of any form of expression, have neglected the possibility that the display of some crude forms of sexuality or violence may have negative effects on the relational quality of people's lives, inducing distortions in the perception of 'the other', such as objectification. It seems to me that each side of the debate has, by and large, missed the good reasons of the other because neither has tried to ground its arguments on the idea of human flourishing. Re-conceiving the debate on 'obscenity' in terms of human flourishing does not offer a magical solution to harsh and long controversies but it can be of some help in clarifying what are the important questions at issue.

In an analogous way we should consider the debate over dangers coming from the Internet. Setting aside all pros and cons toward Internet at the political level, we should now focus on the moral 'thrust' of the Internet: this is to include not only the display of certain obscene or violent sites but also the growing use of social networks by young people.

The regulation of the former set of issues may benefit from the arguments and counterarguments put forward with regard to 'offline' displays. If they are worthy examples of freedom of expression, they deserve a high degree of protection from the state. If they are not worthy examples, obscene and violent sites should be carefully scrutinized in the light of an ideal of human flourishing, applying varying degrees of public regulation. This can range from suppression of sites displaying abuse of children to restriction of access according to age, to permission of free display of certain softer kinds of pornographic or violent materials that are less likely to induce effects of emulation on viewers. In general terms, public regulation should be discriminating among cases on the grounds of an ideal of human flourishing which according to the main tradition aims at the development of basic human capacities in essential spheres of conduct in which the virtues provide correct responses<sup>29</sup>. Differently from online cases, however, public regulation should take into account the great ease of access to Internet content that was unknown in previous non-Internet cases.

Finally, special attention should be directed at the use of social networks which is becoming so common among adults and adolescents alike and increasingly among children. As it is well-known, social networks have become a powerful instrument of communication through which people maintain existing relations or establish new ones: commercial, friendly or romantic. We are

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<sup>29</sup> Cf. M. Nussbaum, "Non-Relative Virtues", in *Midwest Studies in Philosophy*, Vol. XIII, University of Notre Dame Press, Notre Dame, 1988, p. 32-53.

especialmente interesados en las últimas dos categorías de relaciones porque son las más efectivas en la formación de la identidad personal. Las redes sociales – pero también el correo electrónico, el correo, etc. – permiten una mejora cuantitativa en la comunicación: la gente puede ponerse en contacto más fácilmente, más rápidamente y mantener relaciones con un mayor número de personas. Ahora es una pregunta legítima preguntarse si la mejora cuantitativa en las relaciones sociales a través de la comunicación virtual ha sido acompañada por una mejora cualitativa. ¿Podemos afirmar que tenemos mejores relaciones sociales gracias a las redes sociales y otras formas electrónicas de comunicación?

Una respuesta adecuada a esta pregunta requeriría un extenso estudio empírico destinado a analizar la diferencia cualitativa en las relaciones generadas por dispositivos electrónicos. Hasta ahora, solo podemos intentar formular una hipótesis. Desde los tiempos de Aristóteles, ciertas relaciones como la amistad y el amor han requerido pasar tiempo juntos, compartir actividades, involucramiento emocional y participación mutua. Estos aspectos constituyen la buena vida del individuo y contribuyen a definir su identidad. Si estas suposiciones tradicionales sobre las relaciones personales están bien fundamentadas en la naturaleza humana, el riesgo derivado de las relaciones en Internet es claramente el de perder el contacto humano, reduciendo incluso las relaciones personales íntimas a algo superficial e insignificante. Sin embargo, es justo decir que cuando los medios electrónicos de comunicación se utilizan solo para reforzar o ampliar relaciones existentes, sin sustituirlas, pueden ser útiles para permitir más oportunidades de comprensión mutua.

En conclusión, en la medida en que las relaciones interpersonales significativas son un elemento irremplazable en el desarrollo de la identidad y las actitudes éticas en la juventud (especialmente en los adolescentes), el modelo de perfeccionismo de la ley natural de la florecimiento humano a través del ejercicio de las virtudes no puede dejar relaciones interpersonales significativas en el ciberespacio. Como también Villey también lo haría, la sociedad se mantiene unida por la práctica de la ley y la moralidad y, por lo tanto, necesitamos contextos adecuados para el ejercicio de la justicia y las otras virtudes.

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