

ASSAULTING THE CITADEL OF SECTION 230 IMMUNITY:
PRODUCTS LIABILITY, SOCIAL MEDIA, AND THE YOUTH
MENTAL HEALTH CRISIS

by
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The exponential rise in social media use among minors since 2008 is responsible for a precipitous increase in youth mental health injuries and suicides. These harms result from the design of social media platforms which elevate maximizing user engagement over providing minors with a safe online experience, yet social media companies benefit from broad construction of § 230 immunity to evade liability. Courts' expansive interpretation of § 230 is historically analogous to the application of the privity doctrine in the 19th century to shield manufacturers from liability for designing dangerously defective products. The demise of the privity doctrine and rise of strict product liability in the mid-20th century ameliorated the social costs of the Industrial Revolution by placing the duty of safe design on product manufacturers which resulted in safer consumer goods. Today, application of strict products liability principles to social media platforms will incentivize companies to design safer online platforms by internalizing the costs of safety within the cost of production and help reverse the mental health crisis ravaging American youth.

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INTRODUCTION

Social media has transformed public and private life. The worldwide proliferation of social media since 2000 has had an equivalent social impact as the adoption of the printing press in the 1500s.¹ Social media usage among Americans has grown from 5% in 2005 to 72% in 2021.² Among teenagers, 95% have access to a smartphone, 95% use some form of social media, and 46% say they are online “almost constantly.”³ Social media companies have billions of subscribers⁴ and reap enormous profits, with Meta Platforms, Inc. (former Facebook) earning \$39 billion in net income in 2021.⁵

While social media has brought people together and furnished safe spaces for marginalized groups, it has also caused political polarization in societies and psychological injury among many users.⁶ Among minors, the adverse impact of social media on adolescent mental health has been well documented by academic researchers,

¹ Compare BILL KOVAARIK, *REVOLUTIONS IN COMMUNICATION: MEDIA HISTORY FROM GUTENBERG TO THE DIGITAL AGE* (2d ed. 2016), with MARSHALL McLUHAN, *THE GUTENBERG GALAXY: THE MAKING OF TYPOGRAPHIC MAN* (1962).

² *Social Media Fact Sheet*, PEW RSCH. CTR. (Apr. 7, 2021), <https://www.pewresearch.org/internet/fact-sheet/social-media/>.

³ Emily A. Vogels, Risa Gelles-Watnick & Navid Massarat, *Teens, Social Media and Technology 2022*, PEW RSCH. CTR. (Aug. 10, 2022), <https://www.pewresearch.org/internet/2022/08/10/teens-social-media-and-technology-2022/>.

⁴ Felix Richter, *Meta Reaches 3.6 Billion People Each Month*, STATISTA (Oct 29, 2021), <https://www.statista.com/chart/2183/facebooks-mobile-users/>.

⁵ Press Release, Meta Platforms, Inc., *Meta Reports Fourth Quarter and Full Year 2021 Results 1* (Feb. 2, 2022), https://s21.q4cdn.com/399680738/files/doc_financials/2021/q4/FB-12.31.2021-Exhibit-99.1-Final.pdf.

⁶ See generally *Theorising Social Media, Politics and the State: An Introduction*, in *SOCIAL MEDIA, POLITICS AND THE STATE: PROTESTS, REVOLUTIONS, RIOTS, CRIME AND POLICING IN THE AGE OF FACEBOOK, TWITTER AND YOUTUBE 3* (Daniel Trotter & Christian Fuchs eds., 2015).

decried by legislators and regulators, and popularized through shocking disclosures by company insiders. Yet despite the nearly universal consensus that social media products are injurious to young users, social media platforms remain largely unregulated by government authorities and courts.

Section 230 of the Communications Decency Act⁷ immunizes social media providers from liability for third-party content posted on its platforms. Enacted in 1996, § 230 declares that “[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.”⁸ In the 25 years since its enactment, courts have broadly interpreted § 230 to immunize online platforms from virtually any injury arising from social media platforms. Section 230 has been held to immunize online advertisers of child sex trafficking,⁹ platforms that match drug dealers to customers,¹⁰ and networking sites that post messages from recognized terrorist groups promoting and celebrating terrorist acts against civilians.¹¹ These decisions have erected a veritable citadel of immunity that social media companies assert protects them from virtually any legal claim for injuries in any way related to the use of their platforms.

This Article argues that products liability theory provides the most viable legal vehicle to overcome § 230 immunity, to hold social media companies legally accountable for the harm their products inflict on users, and to create economic incentives for companies to design safer platforms in the future. The Author argues that the broad immunity that social media companies currently enjoy under § 230 is historically analogous to the protection that 19th-century courts accorded to product manufacturers under the privity doctrine. Social media companies’ invocation of § 230 to eschew responsibility for injuries sustained through the use of their platforms is comparable to 19th-century manufacturers’ use of the privity doctrine to shield them from injury claims by consumers injured from defects in their products.

American courts’ rejection of the privity doctrine in the early 20th century and subsequent adoption of strict products liability forced manufacturers to act proactively to anticipate product dangers and design safer products. By pushing manufacturers to internalize the cost of safety into the cost of production, strict products liability has, over the past 50 years, significantly enhanced the safety of consumer goods and greatly reduced serious injuries and deaths from defective products. This Article argues that courts should apply this historical example by using products

⁷ Communications Decency Act of 1996, 47 U.S.C. § 230.

⁸ *Id.* § 230(c)(1).

⁹ *See, e.g., Doe v. Backpage.com, LLC*, 817 F.3d 12 (1st Cir. 2016); *In re Facebook, Inc.*, 625 S.W.3d 80 (Tex. 2021), *cert. denied sub nom. Doe v. Facebook, Inc.*, 142 S. Ct. 1087 (2022).

¹⁰ *See, e.g., Dyroff v. Ultimate Software Grp., Inc.*, 934 F.3d 1093 (9th Cir. 2019).

¹¹ *See, e.g., Force v. Facebook, Inc.*, 934 F.3d 53 (2d Cir. 2019); *Gonzalez v. Google LLC*, 2 F.4th 871 (9th Cir. 2021).

liability theory to overcome § 230 immunity and permit victims to hold social media accountable for foreseeable harms arising from defects in their platforms. The application of strict products liability will incentivize social media companies to redesign their platforms to eliminate unreasonable hazards from their platforms. Holding social media companies accountable in this manner will restore § 230 to its intended legislative purpose, force social media companies to act proactively to design safer platforms, and uphold tort law's public policy purpose of deterring negligent conduct.

I. SOCIAL MEDIA HARMS

The term “social media” refers to “a computer-based technology that facilitates the sharing of ideas, thoughts, and information through virtual networks and communities.”¹² Social media provides users with instantaneous electronic communication of various types of content, including personal information, documents, videos, and photos. Users access and engage with social media through desktop computers, tablets, or (increasingly) smartphones.¹³ While widely used for socializing and entertainment, social media has also played a significant role in political expression and protest, as well as government surveillance and genocide.¹⁴

Social media use has increased exponentially over the past two decades. In 2005, Pew Research Center found that 5% of American adults used at least one social media platform.¹⁵ By 2011, that number had risen to half of all Americans, and by 2021, just over 70% of the public used some type of social media.¹⁶ Although social media is pervasive in the United States and Europe, Asian countries lead the

¹² Maya Dollarhide, *Social Media: Definition, Effects, and List of Top Apps*, INVESTOPEDIA (Aug. 31, 2021), <https://www.investopedia.com/terms/s/social-media.asp>.

¹³ *Id.*

¹⁴ See Alcides Velasquez & Hernando Rojas, *Political Expression on Social Media: The Role of Communication Competence and Expected Outcomes*, SOC. MEDIA + SOC'Y, Jan.–Mar. 2017, at 1–13; Killian Clarke & Korhan Kocak, *Launching Revolution: Social Media and the Egyptian Uprising's First Movers*, 50 BRIT. J. POL. SCI. 1025 (2020); Jaramie D. Scott, *Social Media and Government Surveillance: The Case for Better Privacy Protections for Our Newest Public Space*, 12 J. BUS. & TECH. L. 151 (2017); Neema Hakim, *How Social Media Companies Could Be Complicit in Incitement to Genocide*, 21 CHI. J. INT'L L. 83 (2020).

¹⁵ PEW RSCH. CTR., *supra* note 2.

¹⁶ *Id.*

list in social media consumption.¹⁷ As of October 2022, more than 4.7 billion people use social media.¹⁸ Among Americans, YouTube and Facebook are the most commonly used online platforms, and the demographics of their user bases are the most broadly representative of the population as a whole.¹⁹ However, younger users more frequently turn to more fast-paced platforms such as Instagram, Snapchat, and TikTok.²⁰

Social media companies employ a financial model in which consumers are not directly billed for their use of social media platforms. Instead, social media companies sell advertising on their platforms based on specific users' demographic profile and internet browsing history.²¹ Companies also sell their users' personal data to consumer product and service providers.²² Hence, the more time that users are engaged on a particular social media platform, the greater their exposure to advertising and the greater the profits earned by the particular social media platform. Unsurprisingly, like traditional television networks, social media companies seek to maximize user screen time (and exposure to advertising) by offering users attractive and interesting content. However, unlike television networks, which are subject to robust regulation by the Federal Communications Commission, social media platforms target their advertising to each individual user and operate virtually free from regulation of the content they design and publish, i.e., the means with which they attract users.²³

Bereft of regulation, social media companies have developed sophisticated computer algorithms that rely on artificial intelligence and “operant conditioning” to maximize the amount of time that users spend on their platforms.²⁴ These algo-

¹⁷ *Social Media: What Countries Use It Most & What Are They Using?*, DIGIT. MKTG. INST. (Nov. 2, 2021), <https://digitalmarketinginstitute.com/blog/social-media-what-countries-use-it-most-and-what-are-they-using> (reporting that the Philippines has the highest social media usage rate in the world).

¹⁸ *Global Social Media Statistics*, DATAREPORTAL, <https://datareportal.com/social-media-users> (last visited Nov. 17, 2022).

¹⁹ PEW RSCH. CTR., *supra* note 2.

²⁰ *Id.*

²¹ Samuel M. Roth, *Data Snatchers: Analyzing TikTok's Collection of Children's Data and Its Compliance with Modern Data Privacy Regulations*, 22 J. HIGH TECH. L. 1, 19–22 (2021).

²² *Id.*

²³ Wayne Unger, *How the Poor Data Privacy Regime Contributes to Misinformation Spread and Democratic Erosion*, 22 COLUM. SCI. & TECH. L. REV. 308, 323 (2021).

²⁴ Bill Davidow, *Skinner Marketing: We're the Rats, and Facebook Likes Are the Reward*, ATLANTIC (June 10, 2013), <https://www.theatlantic.com/technology/archive/2013/06/skinner-marketing-were-the-rats-and-facebook-likes-are-the-reward/276613/> (discussing B.F. Skinner's theory of operant conditioning).

rithms are individualized to each user; they anticipate the content that will be attractive to the user and are intentionally designed to be habit-forming.²⁵ As users become satiated with one type of content, the algorithms direct them to progressively more psychologically disturbing content, which triggers a greater dopamine reaction in response to the new stimuli.²⁶ Because the algorithms are designed solely to maximize user engagement, whether or not the content selected is helpful or harmful to the user is irrelevant to the social media companies. So long as users remain habituated to the social media platform, the algorithmic design is successful.

The addictive potential of social media was observed by medical professionals as early as 2009.²⁷ Subsequent research confirmed an addictive paradigm in many social media users' behavior,²⁸ particularly adolescents, and the Bergen Social Media Addiction Scale²⁹ is now widely used by researchers and mental health professionals to identify and quantify addictive social media behavior.³⁰ In November 2021, the *Wall Street Journal* revealed in The Facebook Files³¹ that Facebook, Inc.'s own internal research identified 12.5% of its users engaging in "compulsive" use of social media that impacted their sleep, work, parenting, or relationships.³² Recent reports have also demonstrated severe psychological injury and self-harm resulting from excessive social media use in all age groups.³³ However, the most impactful evidence is

²⁵ See generally NIR EYAL WITH RYAN HOOVER, *HOOKED: HOW TO BUILD HABIT-FORMING PRODUCTS* (2014).

²⁶ Unger, *supra* note 23, at 323 (citing Ronald J. Deibert, *The Road to Digital Unfreedom: Three Painful Truths About Social Media*, J. DEMOCRACY, Jan. 2019, at 25, 29–30).

²⁷ See, e.g., Chih-Hung Ko, Ju-Yu Yen, Sue-Huei Chen, Ming-Jen Yang, Huang-Chi Lin & Cheng-Fang Yen, *Proposed Diagnostic Criteria and the Screening and Diagnosing Tool of Internet Addiction in College Students*, 50 COMPREHENSIVE PSYCHIATRY 378 (2009).

²⁸ Hunt Allcott, Matthew Gentzkow & Lena Song, *Digital Addiction* 29 (Nat'l Bureau of Econ. Rsch., Working Paper No. 28936, 2022) (finding that "self-control problems magnified by habit formation might be responsible for 31 percent of social media use").

²⁹ Cecilie Schou Andreassen, Torbjørn Torsheim, Geir Scott Brunborg & Ståle Pallesen, *Development of a Facebook Addiction Scale*, 110 PSYCH. REPS. 501 (2012).

³⁰ See, e.g., Chung-Ying Lin, Anders Broström, Per Nilsen, Mark D. Griffiths & Amir H. Pakpour, *Psychometric Validation of the Persian Bergen Social Media Addiction Scale Using Classic Test Theory and Rasch Models*, 6 J. BEHAV. ADDICTIONS 620 (2017).

³¹ See generally *The Facebook Files*, WALL ST. J., <https://www.wsj.com/articles/the-facebook-files-11631713039> (last visited Jan. 2, 2023). The Facebook Files is a compilation of *Wall Street Journal* articles describing Facebook's harms and is "based on a review of internal Facebook documents, including research reports, online employee discussions and drafts of presentations to senior management." *Id.*

³² Georgia Wells, Deepa Seetharaman & Jeff Horwitz, *Is Facebook Bad for You? It Is for About 360 Million Users, Company Surveys Suggest*, WALL ST. J. (Nov. 5, 2011, 11:09 AM), https://www.wsj.com/articles/facebook-bad-for-you-360-million-users-say-yes-company-documents-facebook-files-11636124681?mod=hp_lead_pos7.

³³ See, e.g., Mesfin A. Bekalu, Rachel F. McCloud & K. Viswanath, *Association of Social Media Use with Social Well-Being, Positive Mental Health, and Self-Rated Health: Disentangling*

the strong relationship between social media use and adverse impacts on minor users.

In December 2021, the U.S. Surgeon General issued an advisory, *Protecting Youth Mental Health*, warning of a mental health crisis among young adults caused in part by their overuse of social media.³⁴ The Centers for Disease Control reported a 146% increase in rates of suicide in the 12 to 16 age group since 2008³⁵ and a 57% increase in the 10 to 24 age group overall.³⁶ A number of authorities have noted a causal relationship between social media and teen suicide.³⁷ Moreover, the causal

Routine Use From Emotional Connection to Use, 46 HEALTH, EDUC. & BEHAV. 695 (2019) (documenting the negative health outcomes of social media use in American adults).

³⁴ The U.S. Surgeon General found that:

In these digital public spaces, which [are] privately owned and tend to be run for profit, there can be tension between what's best for the technology company and what's best for the individual user or for society. Business models are often built around maximizing user engagement as opposed to safeguarding users' health and ensuring that users engage with one another in safe and healthy ways. **This translates to technology companies focusing on maximizing time spent, not time well spent.**

In recent years, there has been growing concern about the impact of digital technologies, particularly social media, on the mental health and wellbeing of children and young people. . . .

. . . .

Importantly, the impact of technology almost certainly varies from person to person, and it also matters what technology is being used and how. **So, even if technology doesn't harm young people on average, certain kinds of online activities likely do harm some young people.**

U.S. SURGEON GEN., ADVISORY: PROTECTING YOUTH MENTAL HEALTH 25 (2021) (citations omitted) .

³⁵ *Fatal Injury Reports, National, Regional and State, 1981–2020*, CTRES. FOR DISEASE CONTROL: WEB-BASED STAT. QUERY & REPORTING SYS., <https://wisqars.cdc.gov/fatal-reports> (last visited Nov. 17, 2022) (for “Year Range/Census Region,” select “1999 to 2020 (ICD-10), National and Regional”; for “Intent or manner of the injury,” select “Suicide”; for “Cause or mechanism of the injury,” select “All injury”; under “Select specific options,” choose “2008” to “2020” from “Year(s) of Report” dropdowns; then under “Advanced Options,” select “Custom Age Range” and choose “12” to “16” from dropdowns; then under “Select output group(s),” select “Year”; and then click “Submit Request”).

³⁶ *Id.* (for “Year Range/Census Region,” select “1999 to 2020 (ICD-10), National and Regional”; for “Intent or manner of the injury,” select “Suicide”; for “Cause or mechanism of the injury,” select “All injury”; under “Select specific options,” choose “1999” to “2020” from “Year(s) of Report” dropdowns; then under “Advanced Options,” select “Custom Age Range” and choose “10” to “24” from dropdowns; then under “Select output group(s),” select “Year”; and then click “Submit Request”).

³⁷ See, e.g., Jean M. Twenge, A. Bell Cooper, Thomas E. Joiner, Mary E. Duffy & Sarah G. Binau, *Age, Period, and Cohort Trends in Mood Disorder Indicators and Suicide-Related Outcomes in a Nationally Representative Dataset, 2005–2017*, 128 J. ABNORMAL PSYCH. 185, 196–97 (2019); Rosemary Sedgwick, Sophie Epstein, Rina Dutta & Dennis Ougrin, *Social Media, Internet Use and Suicide Attempts in Adolescents*, 32 CURRENT OP. PSYCHIATRY 534–35, 537, 540 (2019).

relationship with other severe mental health outcomes among teens has been generally accepted by behavioral health research.³⁸ The U.S. Surgeon General's advisory further reported:

From 2009 to 2019, the proportion of high school students reporting persistent feelings of sadness or hopelessness increased by 40%; the share seriously considering attempting suicide increased by 36%; and the share creating a suicide plan increased by 44%. Between 2011 and 2015, youth psychiatric visits to emergency departments for depression, anxiety, and behavioral challenges increased by 28%. Between 2007 and 2018, suicide rates among youth ages 10-24 in the US increased by 57%.³⁹

Scientists have developed various hypotheses to explain these findings.⁴⁰ Researchers on adolescent depression have described a sort of U-curve in which moderate social media usage is beneficial to adolescents, but that depression increases sharply with increased social media usage.⁴¹ Academic findings by pediatricians and psychologists were confirmed in The Facebook Files, which revealed that Meta, Inc. was aware that female users of its Instagram platform suffered from greatly increased rates of eating disorders⁴² and garnered bipartisan calls for legislative action.⁴³

The hazards of social media platforms to the mental and physical health of American youth were publicized by dramatic congressional testimony by social media CEOs and company whistleblowers.⁴⁴ The Federal Trade Commission has conducted investigations and imposed fines on Facebook, Inc. and other companies for

³⁸ See, e.g., Jean M. Twenge, Jonathan Haidt, Jimmy Lozano & Kevin M. Cummins, *Specification Curve Analysis Shows that Social Media Use Is Linked to Poor Mental Health, Especially Among Girls*, 224 ACTA PSYCHOLOGICA, Apr. 2022, at 8–10, Art. No. 103512.

³⁹ U.S. SURGEON GEN., *supra* note 34, at 8 (citations omitted).

⁴⁰ See Jean M. Twenge, *Increases in Depression, Self-Harm, and Suicide Among U.S. Adolescents After 2012 and Links to Technology Use: Possible Mechanisms*, 2 PSYCHIATRIC RSCH. CLINICAL PRAC. 19 (2020).

⁴¹ *Id.* at 21.

⁴² Georgia Wells, Jeff Horwitz & Deepa Seetharaman, *Facebook Knows Instagram Is Toxic for Teen Girls, Company Documents Show*, WALL ST. J. (Sept. 14, 2021, 7:59 AM), https://www.wsj.com/articles/facebook-knows-instagram-is-toxic-for-teen-girls-company-documents-show-11631620739?mod=hp_lead_pos7&mod=article_inline.

⁴³ Press Release, Sen. Richard Blumenthal, Blumenthal & Blackburn Introduce Comprehensive Kids' Online Safety Legislation (Feb. 16, 2022), <https://www.blumenthal.senate.gov/newsroom/press/release/blumenthal-and-blackburn-introduce-comprehensive-kids-online-safety-legislation>.

⁴⁴ *Protecting Kids Online: Instagram and Reforms for Young Users: Hearing Before the Subcomm. on Consumer Prot., Prod. Safety, & Data Sec. of the S. Comm. on Com., Sci., & Transp.*, 117th Cong. (Dec. 8, 2021) (statement of Adam Mosseri, Head of Instagram, Meta Platforms Inc.); *Protecting Kids Online: Testimony from a Facebook Whistleblower: Hearing Before the S. Subcomm. on Consumer Prot., Prod. Safety, & Data Sec.*, 117th Cong. (Oct. 4, 2021) (statement of Frances Haugen).

data privacy breaches;⁴⁵ however, the agency currently lacks funding commensurate with the problem.⁴⁶ Similarly, several state attorney generals have filed legal actions.⁴⁷

In August 2022, the California legislature passed the California Age-Appropriate Design Code Act, explicitly requiring platforms to “prioritize the privacy, safety, and well-being of children over commercial interests” when the two conflict in cases involving users under 18.⁴⁸ The same month, the Senate Committee on Commerce, Science, and Transportation reported out the Kids Online Safety Act,⁴⁹ bipartisan legislation aimed at curbing many of the hazards posed by social media products to children.⁵⁰ While the Bill failed to garner a vote by the full Senate in the waning days of the 117th Congress, similar legislative efforts are anticipated in 2023.⁵¹ While legislative enactment and administrative enforcement may force social media companies to curb the most egregious hazards of their platforms, such efforts will do nothing to compensate victims of social media product defects and very little to create enduring economic incentives for companies to proactively research and design safer products.

II. THE EMERGENCE OF STRICT PRODUCTS LIABILITY

A. *Rise and Fall of the Privity Doctrine*

Justice Roger Traynor led the judicial adoption of modern products liability law, a process he described as “the transition from industrial revolution to a settled industrial society.”⁵² The Industrial Revolution produced new manufacturing technologies and production methods that disrupted traditional relationships between

⁴⁵ See, e.g., Press Release, Fed. Trade Comm’n, FTC Imposes \$5 Billion Penalty and Sweeping New Privacy Restrictions on Facebook (July 24, 2019), <https://www.ftc.gov/news-events/news/press-releases/2019/07/ftc-imposes-5-billion-penalty-sweeping-new-privacy-restrictions-facebook>.

⁴⁶ *Hearing on Protecting Consumer Privacy Before the S. Comm. on Com., Sci., & Transp.*, 117th Cong. 3–5 (Sept. 29, 2021) (statement of David C. Vladeck).

⁴⁷ See, e.g., Complaint at 2, *Ohio Pub. Emps. Ret. Sys. v. Meta Platforms, Inc.*, No. 3:21-cv-08812, 2022 WL 3571995 (N.D. Cal. July 26, 2022) (“This matter arises from an egregious breach of public trust by Facebook, which knowingly exploited its most vulnerable users—including children throughout the world—in order to drive corporate profits.”).

⁴⁸ CAL. CIV. CODE § 1798.99.29(a), (b) (West 2022).

⁴⁹ Kids Online Safety Act, S. 3663, 117th Cong. (2022).

⁵⁰ See *id.*

⁵¹ Rebecca Klar, *Bills to Boost Kids’ Online Safety Advance in Senate with Bipartisan Support*, HILL (July 27, 2022), <https://thehill.com/policy/technology/3576234-bills-to-boost-kids-online-safety-advance-in-senate-with-bipartisan-support/>.

⁵² Roger J. Traynor, *The Ways and Meanings of Defective Products and Strict Liability*, 32 TENN. L. REV. 363, 363 (1965).

master and servant, borrower and lender, and manufacturer and consumer.⁵³ As the Author has argued previously, in periods like the Industrial Revolution, when new technologies disrupt social and economic relationships, customary bonds of legal obligation must be loosened to permit social and economic change to occur.⁵⁴ During the Industrial Revolution, for example, the holistic lifetime obligations between master and servant were reduced to a circumscribed contractual relationship between the factory owner and hourly worker.⁵⁵ Similarly, 19th-century courts facilitated the growth of industry by limiting the duty of product manufacturers.⁵⁶ However, once societies absorb new technologies and define new social and economic relationships, legal systems expand to establish new legal obligations to ameliorate the social and economic disruption of technological change.⁵⁷ This process, as Traynor explained, is the “transition” that gave birth to modern products liability law.

In the field of manufacturing, this slackening of legal obligations is demonstrated in the widely followed 1842 case of *Winterbottom v. Wright*.⁵⁸ In *Winterbottom*, a coachman was severely injured by a defective stagecoach.⁵⁹ Critically, the *Winterbottom* court explicitly found all the elements of a modern products liability claim:

[T]he said mail-coach being then in a frail, weak, and infirm, and dangerous state and condition . . . and unsafe and unfit for the use and purpose aforesaid, and from no other cause, circumstance, matter or thing whatsoever, gave way and broke down, whereby the plaintiff was thrown from his seat, and in consequence of injuries then received, had become lamed for life.⁶⁰

Nevertheless, the court refused to find the coach manufacturer liable for the coachman’s injuries because he had not purchased the defective stagecoach himself and therefore lacked privity of contract with the manufacturer.⁶¹

At the height of the Industrial Revolution, the *Winterbottom* judges were vitally concerned that manufacturing could not grow and prosper if manufacturers were

⁵³ See DAVID S. LANDES, *THE UNBOUND PROMETHEUS: TECHNOLOGICAL CHANGE AND INDUSTRIAL DEVELOPMENT IN WESTERN EUROPE FROM 1750 TO THE PRESENT* (1969).

⁵⁴ Matthew P. Bergman, *Status, Contract, and History: A Dialectical View*, 13 CARDOZO L. REV. 171 (1991) (during periods of economic transformation, legal systems operate to limit obligations).

⁵⁵ *Id.* at 206–08.

⁵⁶ Traynor, *supra* note 52, at 363.

⁵⁷ Bergman, *supra* note 54, at 181.

⁵⁸ *Winterbottom v. Wright* (1842) 152 Eng. Rep. 402; 10 M. & W. 109.

⁵⁹ *Id.* at 403; 10 M. & W. at 110.

⁶⁰ *Id.*

⁶¹ *Id.* at 403; 10 M. & W. at 110–11.

obliged to compensate victims for injuries caused by their defective products.⁶² Writing for the court, Lord Abinger foresaw “the most absurd and outrageous consequences, to which I can see no limit” if a manufacturer who contracted to furnish a product to a person would be liable to a third party for its failure to produce the product in conformity with the contract.⁶³ Lord Alderson concurred, reasoning that “[i]f we were to hold that the plaintiff could sue in such a case, there is no point at which such actions would stop.”⁶⁴ Lord Rolfe, though recognizing the harsh consequences of the court’s holding, also concurred, reasoning as follows:

This is one of those unfortunate cases in which there certainly has been *damnum*, but it is *damnum absque injuria*;⁶⁵ it is, no doubt, a hardship upon the plaintiff to be without a remedy, but by that consideration we ought not to be influenced. Hard cases, it has been frequently observed, are apt to introduce bad law.⁶⁶

Traynor tartly observed that *Winterbottom*’s holding “rested on the oft-disproved notion that wheels operate at peak efficiency when unattended by brakes.”⁶⁷ Nevertheless, the contractual privity doctrine enunciated in *Winterbottom* was adopted in courts throughout the United States and effectively precluded injured plaintiffs from recovering against product manufacturers for the next 70 years.⁶⁸

Justice Benjamin Cardozo’s 1916 opinion in *MacPherson v. Buick Motor Co.*⁶⁹ was the first published case to reject *Winterbottom*’s restrictive holding. In *MacPherson*, a motorist was injured when the wooden spokes on the wheels of his Buick collapsed.⁷⁰ He sued the manufacturer of the allegedly defective vehicle.⁷¹ Relying on *Winterbottom*, Buick argued that it was immune from liability because the plaintiff had purchased the automobile from through a dealer not from Buick directly; thus, under *Winterbottom*, the plaintiff lacked the contractual privity to impose liability on the manufacturer.⁷² Writing for the majority of the New York Court of Appeals, Cardozo rejected this argument, holding that if it was foreseeable that a product would be used by someone other than the direct purchaser, “then, irrespective of contract, the manufacturer of this thing of danger is under a duty to make it

⁶² Traynor, *supra* note 52, at 363–64.

⁶³ *Winterbottom*, 152 Eng. Rep. at 405; 10 M. & W. at 114–15.

⁶⁴ *Id.* at 405; 10 M. & W. at 115–16.

⁶⁵ Latin for “loss or damage without injury.”

⁶⁶ *Winterbottom*, 152 Eng. Rep. at 405–06; 10 M. & W. at 116.

⁶⁷ Traynor, *supra* note 52, at 364.

⁶⁸ Kenneth S. Abraham, *Prosser’s The Fall of the Citadel*, 100 MINN. L. REV. 1823, 1826–28 (2016).

⁶⁹ *MacPherson v. Buick Motor Co.*, 111 N.E. 1050 (N.Y. 1916).

⁷⁰ *Id.* at 1051.

⁷¹ *Id.*

⁷² *Id.* at 1054–55.

carefully.”⁷³ Cardozo explicitly rejected *Winterbottom*'s holding as obsolete in light of modern economic and social life:

[T]he defendant would have us say that [the auto dealer] was the one person whom it was under a legal duty to protect. The law does not lead us to so inconsequent a conclusion. Precedents drawn from the days of travel by stage-coach do not fit the conditions of travel to-day. The principle that the danger must be imminent does not change, but the things subject to the principle do change. They are whatever the needs of life in a developing civilization require them to be.⁷⁴

In the subsequent years, Cardozo's decision “swept the country,” and within a few years, almost every state had jettisoned the privity doctrine.⁷⁵

B. *Emergence of Strict Products Liability*

Although the court's decision in *MacPherson* marked the beginning of the end of the privity doctrine, Cardozo's reasoning did not challenge the negligence standard for proving liability. Under the negligence theory, it was not sufficient that plaintiffs prove that their injuries resulted from a design defect that rendered the manufacturer's product unreasonably dangerous. Rather, the plaintiff had to prove that the manufacturer knew, or in the exercise of reasonable care should have known, that its product was hazardous to ordinary users and nevertheless failed to take reasonable steps to ameliorate this hazard.⁷⁶ And while *MacPherson* inspired state courts throughout the country to reject the privity doctrine as a shield to manufacturer's liability, actually proving that a manufacturer knew or should have known its product was defective remained a near-insurmountable barrier through the first half of the 20th century.

The concept of strict products liability was first promoted in academic circles by Professor Karl Llewellyn in the 1930s.⁷⁷ However, no jurist adopted the doctrine

⁷³ *Id.* at 1053.

⁷⁴ *Id.*

⁷⁵ William L. Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099, 1100–02 (1960) (“During the succeeding years this decision swept the country, and with the barely possible but highly unlikely exceptions of Mississippi and Virginia, no American jurisdiction now refuses to accept it.”).

⁷⁶ See, e.g., *Lockwood v. AC & S, Inc.*, 744 P.2d 605, 615 (Wash. 1987). In *Lockwood*, the court approved the following jury instruction pertaining to negligence: “A manufacturer's duty to exercise ordinary care is bounded by the foreseeable range of danger. In order to recover on the theory of negligence, plaintiff must prove that the defendant should have anticipated an unreasonable risk of danger to him or to other workers of his class.” *Id.* app. at 624.

⁷⁷ See KARL N. LLEWELLYN, *CASES AND MATERIALS ON THE LAW OF SALES* (1930); K.N. Llewellyn, *On Warranty of Quality, and Society*, 36 COLUM. L. REV. 699, 744, 704 n.14 (1936); see also John B. Clutterbuck, Note, *Karl Llewellyn and the Intellectual Foundations of Enterprise Liability Theory*, 97 YALE L.J. 1131 (1988).

until Traynor's 1944 concurrence in *Escola v. Coca Cola Bottling Co.*⁷⁸ The Supreme Court of California laid out the facts in *Escola* as follows:

Plaintiff, a waitress in a restaurant, was injured when a bottle of Coca Cola broke in her hand. She alleged that defendant company, which had bottled and delivered the alleged defective bottle to her employer, was negligent in selling "bottles containing said beverage which on account of excessive pressure of gas or by reason of some defect in the bottle was dangerous . . . and likely to explode."⁷⁹

The jury found for the plaintiff, and the manufacturer appealed.⁸⁰ The Supreme Court of California affirmed, finding that the evidence supported a reasonable inference that the bottle had not been damaged after delivery, but rather it was in some manner defective at the time the defendant relinquished control "because sound and properly prepared bottles of carbonated liquids do not ordinarily explode when carefully handled."⁸¹

Traynor concurred in the judgment but wrote separately to posit for the first time that "the manufacturer's negligence should no longer be singled out as the basis of a plaintiff's right to recover."⁸² Instead, Traynor argued that "it should now be recognized that a manufacturer incurs an absolute liability when an article that he has placed on the market, knowing that it is to be used without inspection, proves to have a defect that causes injury to human beings."⁸³ Rejecting negligence as the sole basis for the manufacturer's liability, Traynor reasoned:

[P]ublic policy demands that responsibility be fixed wherever it will most effectively reduce the hazards to life and health inherent in defective products that reach the market. It is evident that the manufacturer can anticipate some hazards and guard against the recurrence of others, as the public cannot. Those who suffer injury from defective products are unprepared to meet its consequences. The cost of an injury and the loss of time or health may be an overwhelming misfortune to the person injured, and a needless one, for the risk of injury can be insured by the manufacturer and distributed among the public as a cost of doing business. . . . Against such a risk there should be general and constant protection and the manufacturer is best situated to afford such protection.⁸⁴

⁷⁸ *Escola v. Coca Cola Bottling Co.*, 150 P.2d 436, 440–44 (Cal. 1944) (Traynor, J., concurring).

⁷⁹ *Id.* at 437 (majority opinion).

⁸⁰ *Id.*

⁸¹ *Id.* at 439.

⁸² *Id.* at 440 (Traynor, J., concurring).

⁸³ *Id.*

⁸⁴ *Id.* at 440–41.

Professor Keith Hylton observes that Traynor's concurring opinion in *Escola* articulated the public policy rationale for strict products liability: deterrence, reliance, insurance, and administrative costs.⁸⁵ The deterrence rationale posits that "strict products liability provides an incentive for the party best able to control product accidents to take steps to minimize their occurrence."⁸⁶ This presupposes that consumers are unable to accurately evaluate the level of risk presented by a specific product and that, in the absence of strict liability, manufacturers will not undertake sufficient care.⁸⁷ Relatedly, the reliance rationale posits that strict products liability is more appropriate than negligence under modern production and marketing because consumers rely on the assurances of manufacturers.⁸⁸ The insurance rationale provides that "strict products liability is desirable because it spreads the risks of injuries caused by defective products."⁸⁹ This theory posits that, because consumers have limited information to distinguish between safe and unsafe products, through strict products liability they, in effect, purchase an insurance policy along with the product.⁹⁰ As Judge Richard Posner explains, "Strict liability in effect impounds information about product hazards into the price of the product, resulting in a substitution away from hazardous products by consumers who may be completely unaware of the hazards."⁹¹ Finally, the administrative costs rationale provides that strict products liability achieves the same objectives as negligence but does so in a more efficient fashion.⁹²

Although Traynor's concurrence in *Escola* articulated the intellectual basis for modern products liability law, "its largest immediate impact [was] in the arena of ideas rather than in the case law."⁹³ Despite his lack of judicial followers, Traynor's reasoning was widely promoted by Berkley Law School Dean William Prosser in his 1960 article *The Assault Upon the Citadel*,⁹⁴ as well as by other scholars advocating for a more modern concept of strict liability. Prosser's *Assault Upon the Citadel* remains one of the most frequently cited law articles in history.⁹⁵ In it, he discussed the rationale of strict liability over negligence:

⁸⁵ Keith N. Hylton, *The Law and Economics of Products Liability*, 88 NOTRE DAME L. REV. 2457, 2463 (2013).

⁸⁶ *Id.*

⁸⁷ *Id.* at 2465.

⁸⁸ *Id.*

⁸⁹ *Id.* at 2465–66.

⁹⁰ *Id.* at 2466.

⁹¹ RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* § 6.6, at 166 (3d ed. 1986).

⁹² Hylton, *supra* note 85, at 2466.

⁹³ *Id.*; Robert E. Keeton, *In Tribute to Roger Traynor*, 2 HOFSTRA L. REV. 451, 453–54 (1974).

⁹⁴ Prosser, *supra* note 75, at 1120.

⁹⁵ Fred R. Shapiro, *The Most-Cited Articles from The Yale Law Journal*, 100 YALE L.J. 1449, 1470–71 (1991); Abraham, *supra* note 68, at 1833–34.

The public interest in human life, health and safety demands the maximum possible protection that the law can give against dangerous defects in products which consumers must buy, and against which they are helpless to protect themselves; and it justifies the imposition, upon all suppliers of such products, of full responsibility for the harm they cause, even though the supplier has not been negligent. . . . The supplier, by placing the goods upon the market, represents to the public that they are suitable and safe for use; and by packaging, advertising or otherwise, he does everything that he can to induce that belief. He intends and expects that the product will be purchased and used in reliance upon this assurance of safety; and it is in fact so purchased and used.⁹⁶

Prosser's observation that "[t]he assault upon the citadel of privity is proceeding in these days apace"⁹⁷ proved prescient because the same year the New Jersey Supreme Court in *Henningsen v. Bloomfield Motors, Inc.*⁹⁸ became the first court to adopt strict products liability. *Henningsen* involved injuries from a single car accident, with evidence that the accident was caused by a defect in the steering mechanism.⁹⁹ The court expressly embraced Traynor's goal of internalizing the cost of safety to the manufacturer such that "the burden of losses consequent upon the use of defective articles is borne by those who are in a position to either control the danger or make an equitable distribution of the losses when they do occur."¹⁰⁰ Following Cardozo's mandate that tort law must adapt to contemporary economic reality, the court held that strict liability was necessary to protect consumers from defective products:

Under modern conditions the ordinary layman, on responding to the imporing of colorful advertising, has neither the opportunity nor the capacity to inspect or to determine the fitness of an automobile for use; he must rely on the manufacturer who has control of its construction

. . . .

Accordingly, we hold that under modern marketing conditions, when a manufacturer puts a new automobile in the stream of trade and promotes its purchase by the public, an implied warranty that it is reasonably suitable for use as such accompanies it into the hands of the ultimate purchaser.¹⁰¹

⁹⁶ Prosser, *supra* note 75, at 1122–23.

⁹⁷ *Id.* at 1099 (quoting *Ultramares Corp. v. Touche*, 174 N.E. 441, 445 (N.Y. 1931)).

⁹⁸ *Henningsen v. Bloomfield Motors, Inc.*, 161 A.2d 69 (N.J. 1960); *see* William L. Prosser, *The Fall of the Citadel (Strict Liability to the Consumer)*, 50 MINN. L. REV. 791, 793–94 (1966).

⁹⁹ *Henningsen*, 161 A.2d at 75.

¹⁰⁰ *Id.* at 81.

¹⁰¹ *Id.* at 83–84.

Three years later, in *Greenman v. Yuba Power Products, Inc.*,¹⁰² Traynor, having recently been elevated to chief justice, adopted his reasoning in *Escola* as the opinion of the full court. Writing for the court, Traynor held:

To establish the manufacturer's liability it was sufficient that plaintiff proved that he was injured while using the [product] in a way it was intended to be used as a result of a defect in design and manufacture of which plaintiff was not aware that made the [product] unsafe for its intended use.¹⁰³

In advancing the public policy justifications for strict products liability, Traynor's opinion made multiple citations to Prosser's *Assault on the Citadel*.¹⁰⁴

In his 1966 article *The Fall of the Citadel (Strict Liability to the Consumer)*,¹⁰⁵ Prosser characterized *Henningsen* and *Greenman* as "twin landmarks" of "the most rapid and altogether spectacular overturn of an established rule in the entire history of the law of torts."¹⁰⁶ However, Prosser's influence on the rise of strict products liability extended far beyond the role of an academic spectator. As the sole reporter for the American Law Institute's *Restatement (Second) of Torts*, Prosser sought to shape the emerging products liability jurisprudence to encompass the arguments he had been advancing for decades.¹⁰⁷ Indeed, critics have even charged that Prosser's promulgation of § 402A was not so much a restatement of the existing law as advancing new law.¹⁰⁸

Traynor's influence also extended beyond authoring opinions; he served as an advisor to the American Law Institute.¹⁰⁹ From the mid-1950s to the mid-1960s, Prosser, Traynor, and other luminaries had gathered for biannual three-day sessions of deliberations over all issues in the field of torts.¹¹⁰ Prosser and Traynor's collaboration culminated in 1965 when the American Law Institute approved and adopted a new section in the *Restatement (Second) of Torts* providing for strict liability untethered to the concept of "warranty."¹¹¹ Section 402A represented the first effort at a general statement of products liability law.¹¹²

¹⁰² *Greenman v. Yuba Power Prods., Inc.*, 377 P.2d 897 (Cal. 1963).

¹⁰³ *Id.* at 901.

¹⁰⁴ *See id.* at 900–01 (citing Prosser, *supra* note 75, at 1124–34).

¹⁰⁵ Prosser, *supra* note 98.

¹⁰⁶ *Id.* at 793–94, 803.

¹⁰⁷ Abraham, *supra* note 68, at 1835–36.

¹⁰⁸ *See, e.g.,* George L. Priest, *The Invention of Enterprise Liability: A Critical History of the Intellectual Foundations of Modern Tort Law*, 14 J. LEGAL STUD. 461, 514 (1985).

¹⁰⁹ *Id.* at 512.

¹¹⁰ Keeton, *supra* note 93, at 451.

¹¹¹ RESTATEMENT (SECOND) OF TORTS § 402A cmt. m (AM. L. INST. 1965).

¹¹² *See* James A. Henderson, Jr. & Aaron D. Twerski, *A Proposed Revision of Section 402A of the Restatement (Second) of Torts*, 77 CORNELL L. REV. 1512, 1526–27 (1992).

§ 402 A. Special Liability of Seller of Product for Physical Harm to User or Consumer

(1) 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, if

(a) the seller is engaged in the business of selling such a product, and

(b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

(2) The rule stated in Subsection (1) applies although

(a) the seller has exercised all possible care in the preparation and sale of his product, and

(b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.¹¹³

Henningsen, Greenman, and the *Restatement* were influential in persuading courts around the country to reject the privity doctrine and impose strict liability for defective product sellers.¹¹⁴ Today, most states have adopted § 402A, or a doctrine of strict products liability similar to that proposed in § 402A.¹¹⁵

C. Modern Strict Products Liability

The late 1970s marked the high-water mark of strict products liability. While the concept of strict liability to manufacturers of defective products was generally accepted, business and insurance groups resisted the imposition of strict liability on product sellers who were not involved in the manufacturing process.¹¹⁶ Manufacturers also complained of the inconsistent interpretation of § 402A among state

¹¹³ RESTATEMENT (SECOND) OF TORTS § 402A.

¹¹⁴ Abraham, *supra* note 68, at 1833–34.

¹¹⁵ By 1978, 31 states had adopted § 402A. Roger Dean Graham, *Products Liability and Tort Risk Distribution in Government Contract Programs*, 20 A.F. L. REV. 331, 342 (1978). As of 2021, “Most states have adopted the products liability approach recommended in the Restatement (Second), Torts § 402A.” Cecilia Plaza, *Cutting Out the Middleman: Empirically Testing the Continued Applicability of the Learned Intermediary Rule in the Age of Direct-to-Consumer Advertising of Prescription Pharmaceuticals*, 24 QUINNIPIAC HEALTH L.J. 393, 399 (2021); *see also infra* text accompanying notes 119–21.

¹¹⁶ *See* CONG. RSCH. SERV., R40148, PRODUCTS LIABILITY: A LEGAL OVERVIEW 13 (2014); Victor E. Schwartz & Mark A. Behrens, *The Road to Federal Products Liability Reform*, 55 MD. L. REV. 1363, 1365, 1373 (1996) (discussing the work of a federal task force, advocacy groups, and “scores of small business owners” in pushing for federal products liability reform).

courts.¹¹⁷ In 1979, the Department of Commerce issued the Model Uniform Product Liability Act (UPLA) to resolve uncertainties in the tort litigation system.¹¹⁸ The most controversial aspect of products liability litigation had been the issue of defining the basic standards of responsibility to which product manufacturers are to be held. Section 402A focuses primarily on manufacturing defects and not on defects concerning design or the duty to warn. The UPLA sought to dispel some of this confusion by setting forth express criteria relating to the basic standards of responsibility to be imposed on manufacturers of a defective product. The UPLA provides that strict liability may be imposed when:

- (A) The product was unreasonably unsafe in construction;
- (B) The product was unreasonably unsafe in design;
- (C) The product was unreasonably unsafe because adequate warnings or instructions were not provided; [or]
- (D) The product was unreasonably unsafe because it did not conform to an express warranty.¹¹⁹

By the mid-to-late 1980s, at least 16 state legislatures had replaced common law products liability under § 402A with express products liability statutes.¹²⁰ Most of these statutes were based on the UPLA,¹²¹ while some states simply codified § 402A.¹²² The UPLA curtailed the wide liability conferred by § 402A, generally relieving product sellers of the strict liability restricted to manufacturers. The UPLA also added a risk–utility test to determine product defects. However, while most states no longer impose strict liability on product sellers, strict liability on product manufacturers is firmly entrenched in our jurisprudence and adopted by common law or statute in all 50 states.¹²³

¹¹⁷ See Sydney Knell Leavitt, *Death by Chicken: The Changing Face of Allergy Awareness in Restaurants and What to Do When Food Bites Back*, 42 U. TOL. L. REV. 963, 969 (2011).

¹¹⁸ Model Uniform Product Liability Act, 44 Fed. Reg. 62,714, 62,714 (Oct. 31, 1979); Connie Kemp Jobe, *The Model Uniform Product Liability Act: Basic Standards of Responsibility for Manufacturers*, 46 J. AIR L. & COM. 389, 389–90, 417 (1981).

¹¹⁹ Model Uniform Product Liability Act, 44 Fed. Reg. at 62,721.

¹²⁰ Fairfax Leary, Jr. & David Frisch, *Uniform Commercial Code Annual Survey: General Provisions, Sales, Bulk Transfers, and Documents of Title*, 39 BUS. LAW. (ABA) 1851, 1869 n.77 (1984) (citing *Williams v. W. Penn Power Co.*, 467 A.2d 811, 817 n.18 (Pa. 1983)).

¹²¹ See, e.g., Philip A. Talmadge, *Washington's Product Liability Act*, 5 U. PUGET SOUND L. REV. 1 (1981) (analyzing the state of Washington's Tort and Product Liability Reform Act, which was modeled after the UPLA).

¹²² See, e.g., OR. REV. STAT. § 30.920 (2021) (“It is the intent of the Legislative Assembly that . . . this section shall be construed in accordance with the Restatement (Second) of Torts sec. 402A, Comments a to m (1965).”).

¹²³ See PRODUCT LIABILITY DESK REFERENCE: A FIFTY-STATE COMPENDIUM (Morton F. Daller & Nicholas G. Daller eds., 2022).

Modern products liability has three bases on which liability may be imposed: design defect, manufacturing defect, and failure to warn. The design defect theory “asserts that the manufacturer’s design is itself unreasonably dangerous.”¹²⁴ Courts have applied two tests to evaluate design defects claims: the “consumer expectations” test and the “risk–utility” test. Under the consumer expectations test, the plaintiff must prove “that the product failed to conform to the safety expectations of the ordinary consumer.”¹²⁵ Under the risk–utility test, the plaintiff must prove that the reduction in accidents resulting from an alternative design far exceeds the cost associated with implementing the alternative design.¹²⁶ A manufacturing defect, on the other hand, results from an error specifically in the fabrication process, as distinct from an error in the design process.¹²⁷

Even if a product suffers neither a manufacturing nor design defect, a manufacturer still may be strictly liable under a failure to warn theory.¹²⁸ Under the UPLA, a product may be defective if it failed to contain adequate instructions or warnings regarding the dangers and safe use of the product, considering the characteristics of the product, and ordinary customer knowledge of a consumer who purchases the product.¹²⁹ Courts have found defendants liable “where the burden of providing a warning is less than the foreseeable harms to the consumer.”¹³⁰

Thirty years after the adoption of the Model Product Liability Act, which curtailed strict liability to non-manufacturer defendants and standardized the bases to prove a product defect, products liability has been fully integrated into civil justice jurisprudence. Most significantly, the social objectives of strict products liability articulated by Traynor in *Escola* and Prosser in his *Assault Upon the Citadel* have largely been achieved.

¹²⁴ Hylton, *supra* note 85, at 2469.

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Brazil v. Janssen Rsch. & Dev. LLC*, 196 F. Supp. 3d 1351, 1358 (N.D. Ga. 2016); *Seattle-First Nat’l Bank v. Tabert*, 542 P.2d 774, 776 (Wash. 1975).

¹²⁸ *Brazil*, 196 F. Supp. 3d at 1359–60; *Battersby v. Boyer*, 526 S.E.2d 159, 162 (Ga. Ct. App. 1999).

¹²⁹ Model Uniform Product Liability Act, 44 Fed. Reg. 62,714, 62,717, 62,721 (Oct. 31, 1979).

¹³⁰ Hylton, *supra* note 85, at 2470.

III. SECTION 230: PRIVACY DOCTRINE OF THE INTERNET AGE

Historians and commentators have characterized the emergence of the internet over the past 30 years as analogous to the Industrial Revolution in terms of its political, social, economic, and cultural impacts.¹³¹ Like the Industrial Revolution in the 19th century, the digital revolution has caused wide scale disruption of social and economic relationships, as new manufacturing technologies and marketing relationships have transformed the nature of work, finance, and commerce. Like the advent of the steam engine in the early 1800s, the emergence of the internet age was initially hailed with euphoria and optimism as the harbinger of a new economic and political era. Just as 19th-century courts sought to remove legal constraints on manufacturers that were the deliverers of new technology, in the late 20th century, courts and legislators sought to liberate online companies from traditional legal obligations that curtailed expansion in the new digital economy.¹³²

A. Origins of Section 230

The Communications Decency Act (CDA) was enacted in 1996 when just 7% of Americans had access to the internet, Netscape was the dominant search engine, Google did not exist, and Facebook's launch was eight years away.¹³³ Enacted at the height of optimism over the transformative potential of the internet, CDA sought "to promote the continued development of the Internet and other interactive computer services" and "preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation."¹³⁴ However, as the late Chief Judge Katzman observed "[t]he

¹³¹ See THOMAS L. FRIEDMAN, *THE WORLD IS FLAT: A BRIEF HISTORY OF THE TWENTY-FIRST CENTURY* 202–04, 323 (2005); KLAUS SCHWAB, *THE FOURTH INDUSTRIAL REVOLUTION* 11–13 (2016).

¹³² See generally SCHWAB, *supra* note 131.

¹³³ Farhad Manjoo, *Jurassic Web: The Internet of 1996 Is Almost Unrecognizable Compared with What We Have Today*, SLATE (Feb. 24, 2009, 5:33 PM), <https://slate.com/technology/2009/02/the-unrecognizable-internet-of-1996.html>.

¹³⁴ 47 U.S.C. § 230(b)(1), (2). Section 230 was enacted in response to *Stratton Oakmont, Inc. v. Prodigy Services Co.*, No. 31063/94, 1995 WL 323710 (N.Y. Sup. Ct. May 24, 1995), where a New York court held that an online bulletin board could be held strictly liable for third parties' defamatory posts. The court rejected the defendant's argument that it was a mere "distributor" of third-party content, holding that the defendant's screening and editing of posts made it a primary publisher and therefore vicariously liable for defamatory content on its platform. *Id.* at *4–6.

text and legislative history of [§ 230(c)(1)] shout to the rafters Congress’s focus on reducing children’s access to adult material.¹³⁵ Entitled “Protection for private blocking and screening of offensive material,” § 230 reflected a Congressional finding that “it is the policy of the United States to remove disincentives for the development and utilization of blocking and filtering technologies that empower parents to restrict their children’s access to objectionable or inappropriate online material.”¹³⁶ In furtherance of this policy, § 230(c)—entitled “Protection for ‘Good Samaritan’ blocking and screening of offensive material”—provides that “[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.”¹³⁷

In adopting § 230, Congress was also motivated to override a recent decision of a New York trial court in *Stratton Oakmont, Inc. v. Prodigy Services Co.*¹³⁸ In *Stratton*, an internet service provider was held liable for a third party’s libelous statements posted on its computer bulletin boards.¹³⁹ Then-representatives Christopher Cox and Ron Wyden proposed an amendment to the draft CDA (the Cox–Wyden Proposal).¹⁴⁰ The Cox–Wyden Proposal sought to address the dilemma *Stratton* created by removing traditional forms of publisher liability for internet service providers that acted in good faith to restrict access to offensive content.¹⁴¹ Under § 230, plaintiffs may hold liable the person who creates or develops unlawful content, but not the interactive computer service provider that merely *enables* such content to be posted online.¹⁴² Section 230 represents congressional optimism that, unfettered by artificial restrictions, the internet would usher in a new era of social and economic progress.

B. Broad Construction of Section 230

Early appellate decisions applied an expansive interpretation of § 230 to confer broad immunity for online platforms. Just as Prosser described the “citadel” of con

¹³⁵ *Force v. Facebook, Inc.*, 934 F.3d 53, 88 (2d Cir. 2019) (Katzman, C.J., dissenting in part) (citing legislative history); *see also* *Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157, 1163 (9th Cir. 2008) (en banc) (explaining that § 230 was enacted to protect interactive content providers who *restrict* access to objectionable material).

¹³⁶ 47 U.S.C. § 230(b)(4).

¹³⁷ 47 U.S.C. § 230(c)(1).

¹³⁸ *Stratton Oakmont, Inc.*, 1995 WL 323710.

¹³⁹ *Id.* at *7.

¹⁴⁰ 141 CONG. REC. 22,044 (1995) (statements of Rep. Christopher Cox and Rep. Ron Wyden).

¹⁴¹ *Id.*

¹⁴² *Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc.*, 591 F.3d 250, 254 (4th Cir. 2009) (construing § 230(c)(1)).

tractual privity to protect manufacturers from liability for their injurious products, Professors Danielle Keats Citron and Benjamin Wittes observe that “courts have built a mighty fortress protecting platforms from accountability for unlawful activity on their systems.”¹⁴³

The Fourth Circuit’s 1997 decision in *Zeran v. America Online, Inc.*¹⁴⁴ had a similar impact on the internet revolution that *Winterbottom* had on the Industrial Revolution. *Zeran* arose out of a series of anonymous posts on America Online, Inc. (AOL) falsely claiming that the plaintiff, Zeran, was selling consumer products with “offensive and tasteless slogans related to the April 19, 1995 bombing of the Alfred P. Murrah Federal Building in Oklahoma City,” and instructing purchasers to call the plaintiff’s home number if they wanted to place an order.¹⁴⁵ As a result of this anonymous prank, Zeran was deluged with angry and derogatory messages, including death threats.¹⁴⁶ Zeran made repeated calls to AOL requesting that the derogatory posts be removed and that AOL post a retraction, but was unable to obtain prompt relief.¹⁴⁷

Zeran filed suit alleging that “AOL unreasonably delayed in removing defamatory messages posted by an unidentified third party, refused to post retractions of those messages, and failed to screen for similar postings thereafter.”¹⁴⁸ AOL argued that, because the plaintiff’s injury arose out of online content posted by third parties, his claim was barred by § 230. The district court dismissed the case on its pleadings, and the Fourth Circuit affirmed.¹⁴⁹

Decided at a time when courts felt the need to explain what the internet is,¹⁵⁰ the Fourth Circuit adopted a triumphalist view of new technology, concluding that “interactive computer services ‘have flourished, to the benefit of all Americans.’”¹⁵¹ Selectively quoting from the statute, the court held that § 230 was enacted “to maintain the robust nature of Internet communication [as] . . . ‘a forum for a true

¹⁴³ Danielle Keats Citron & Benjamin Wittes, *The Internet Will Not Break: Denying Bad Samaritans § 230 Immunity*, 86 *FORDHAM L. REV.* 401, 406 (2017).

¹⁴⁴ *Zeran v. Am. Online, Inc.*, 129 F.3d 327 (4th Cir. 1997).

¹⁴⁵ *Id.* at 329.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* at 328.

¹⁴⁹ *Id.* at 328–30.

¹⁵⁰ *See id.* at 328 (“The Internet is an international network of interconnected computers, currently used by approximately 40 million people worldwide.” (quoting *Reno v. Am. C.L. Union*, 521 U.S. 844, 849 (1997))).

¹⁵¹ *Id.* at 330 (quoting 47 U.S.C. § 230(a)(4)).

diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity.”¹⁵² Armed with the munificent purpose, the Fourth Circuit expanded the plain meaning of § 230 to confer “immunity to any cause of action that would make service providers liable for information originating with a third-party user of the service.”¹⁵³ Thus, “[a]lthough the text of § 230(c)(1) grants immunity only from ‘publisher’ or ‘speaker’ liability, the [court in *Zeran*] held that it eliminates distributor liability too—that is, § 230 confers immunity even when a company distributes content that it *knows* is illegal.”¹⁵⁴ Because *Zeran* sought to hold AOL liable for defamatory speech initiated by a third party, his claims were barred by § 230.

Zeran also argued that irrespective of the conduct of third parties, AOL possessed actual knowledge of false and defamatory content posted on their platforms.¹⁵⁵ He contended that notwithstanding the third-party origin of the defamatory content, AOL was subject to independent liability for failing to remove the postings once it learned of their falsity and the consequent harassment and death threats.¹⁵⁶

The Fourth Circuit rejected this argument as anachronistic under the “practical implications” of liability in the internet age.¹⁵⁷ Echoing the concerns in *Winterbottom* that holding manufacturers liable for their defective products would hobble economic progress, the Fourth Circuit held that imposing a duty on online platforms to remove content that they knew to be harmful would have a chilling effect on free online speech:

If computer service providers were subject to distributor liability, they would face potential liability each time they receive notice of a potentially defamatory statement—from any party, concerning any message. Each notification would require a careful yet rapid investigation of the circumstances surrounding the posted information, a legal judgment concerning the information’s defamatory character, and an on-the-spot editorial decision whether to risk liability by allowing the continued publication of that information. Although this might be feasible for the traditional print publisher, the sheer number of

¹⁵² *Id.* (quoting 47 U.S.C. § 230(a)(3)).

¹⁵³ *Id.*

¹⁵⁴ *Malwarebytes, Inc. v. Enigma Software Grp. USA, LLC*, 141 S. Ct. 13, 15 (2020) (Thomas, J., statement respecting denial of certiorari) (citing *Zeran*, 129 F.3d at 331–34).

¹⁵⁵ *Zeran*, 129 F.3d at 331–32.

¹⁵⁶ *Id.* at 329, 331.

¹⁵⁷ *Id.* at 333.

postings on interactive computer services would create an impossible burden in the Internet context. . . . Thus, like strict liability, liability upon notice has a chilling effect on the freedom of Internet speech.¹⁵⁸

Following *Zeran*, “courts have ‘consistently . . . held that § 230 provides a ‘robust’ immunity, and that all doubts must be resolved in favor of immunity.”¹⁵⁹ While § 230 does not define “publisher” or “speaker,” state and federal courts have generally held that those terms should also be “construed broadly in favor of immunity.”¹⁶⁰ Keats Citron and Wittes observe that these holdings have “produced an immunity from liability that is far more sweeping than anything the law’s words, context, and history support.”¹⁶¹

With this broad construction of § 230, internet providers “have been protected from liability even though they republished content knowing it might violate the law, encouraged users to post illegal content, [and] changed their design and policies for the purpose of enabling illegal activity.”¹⁶² One of the most infamous examples is *Doe v. Backpage.com, LLC*,¹⁶³ which involved a lawsuit by three women who, beginning at age 15, were sex trafficked through advertisements posted on the “Adult Entertainment” section of the Backpage website. Two of the child victims, who were each raped over 900 times, alleged that “Backpage’s rules and processes governing the content of advertisements are designed to encourage child sex trafficking.”¹⁶⁴ These advertisements included photographs of the plaintiffs and coded terminology such as “brly legal” or “high schl” meant to refer to underage girls.¹⁶⁵ Backpage argued that, because the plaintiffs’ claims arose from its publication of the sex traffickers’ third-party content, the plaintiffs were barred by § 230, and the First Circuit

¹⁵⁸ *Id.*

¹⁵⁹ *Internet Brands, Inc. v. Jape*, 760 S.E.2d 1, 3 (Ga. Ct. App. 2014) (quoting *Holomaxx Techs. Corp. v. Microsoft Corp.*, No. 10-cv-04924, 2011 WL 3740813, at *2 (N.D. Cal. 2011)).

¹⁶⁰ *Force v. Facebook, Inc.*, 934 F.3d 53, 64 (2d Cir. 2019); *see, e.g., Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc.*, 591 F.3d 250, 254 (4th Cir. 2009) (“[C]ourts have generally accorded § 230 immunity a broad scope.”); *Universal Comm’n Sys., Inc. v. Lycos, Inc.*, 478 F.3d 413, 419 (1st Cir. 2007) (“Section 230 immunity should be broadly construed.”); *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119, 1123 (9th Cir. 2003) (“[R]eviewing courts have treated § 230(c) immunity as quite robust.”).

¹⁶¹ Keats Citron & Wittes, *supra* note 143, at 408.

¹⁶² *Id.*

¹⁶³ *Doe v. Backpage.com, LLC*, 817 F.3d 12 (1st Cir. 2016).

¹⁶⁴ *Id.* at 16–17.

¹⁶⁵ *Id.*

agreed.¹⁶⁶ In language reminiscent of *Winterbottom*, the court reasoned that “websites that display third-party content may have an infinite number of users generating an enormous amount of potentially harmful content, and holding website operators liable for that content ‘would have an obvious chilling effect’ in light of the difficulty of screening posts for potential issues.”¹⁶⁷ Because the plaintiffs’ claims related to the structure and operation of Backpage’s website, they sought to hold Backpage liable for “choices about what content can appear on the website and in what form,” which the court held to be “editorial choices that fall within the purview of traditional publisher functions.”¹⁶⁸ In reaching this holding, the First Circuit adopted the Fifth Circuit’s analysis in *Doe v. MySpace, Inc.*,¹⁶⁹ where a minor was sexually assaulted by a predator she met through the defendant’s website. The plaintiff in *MySpace* argued that the website operator “fail[ed] to implement basic safety measures to protect minors,” but the Fifth Circuit rejected the plaintiff’s claims on the basis that the claims were “merely another way of claiming that [the website operator] was liable for publishing the communications and they speak to [the website operator’s] role as a publisher of online third-party-generated content.”¹⁷⁰

C. *Growing Dissent*

Public outcry over the *Backpage* and *MySpace* decisions led to the introduction of the Stop Enabling Sex Traffickers Act¹⁷¹ and the Allow States and Victims to Fight Online Sex Trafficking Act of 2018,¹⁷² which eliminated § 230 as a defense for websites that knowingly facilitate sex trafficking.¹⁷³ The legislation, passed with wide bipartisan support and signed into law in April 2018,¹⁷⁴ provides that § 230 should not be “construed to impair or limit” victims of commercial sex acts from bringing civil actions against online platforms.¹⁷⁵ However, this amendment did not

¹⁶⁶ *Id.* at 20–22.

¹⁶⁷ *Id.* at 19 (quoting *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 331 (4th Cir. 1997)).

¹⁶⁸ *Id.* at 21.

¹⁶⁹ *Id.* (construing *Doe v. MySpace, Inc.*, 528 F.3d 413, 418–20 (5th Cir. 2008)).

¹⁷⁰ *MySpace, Inc.*, 528 F.3d at 419–20.

¹⁷¹ S. 1693, 115th Cong. § 2 (2018) (enacted); S. REP. NO. 115-199, at 2 (2018) (citing *Doe v. Backpage.com, LLC*, 817 F.3d 12 (1st Cir. 2016)).

¹⁷² Allow States and Victims to Fight Online Sex Trafficking Act of 2017, Pub. L. No. 115-164, 132 Stat. 1253 (2018).

¹⁷³ § 2, 132 Stat. at 1253; S. REP. NO. 115-199, at 2.

¹⁷⁴ See 164 CONG. REC. S1290, 1291 (2018).

¹⁷⁵ 47 U.S.C. § 230(e)(5).

quell the growing recognition among leading jurists,¹⁷⁶ legal scholars,¹⁷⁷ public commentators,¹⁷⁸ and government officials¹⁷⁹ that the broad interpretation of § 230 accorded by courts contravenes its actual legislative intent and is contrary to public policy.

Force v. Facebook, Inc. arose out of attacks against five American citizens in Israel by the Hamas terrorist organization.¹⁸⁰ The plaintiffs alleged that Facebook's algorithms provided Hamas with a forum to promote terrorism and recruit followers.¹⁸¹ Specifically, the plaintiffs claimed that the algorithms that suggested content to users, performed "matchmaking" with other users, and provided targeted "newsfeed" of third-party content most likely to interest users, made Facebook, Inc. a non-publisher under § 230.¹⁸² A majority of the Second Circuit disagreed, holding that "we find no basis . . . for concluding that an interactive computer service is not the 'publisher' of third-party information when it uses tools such as algorithms that are designed to match that information with a consumer's interests."¹⁸³ Chief Judge Katzmann agreed that § 230 protected Facebook, Inc. from liability for allowing Hamas content to be posted on its platform, but dissented from the majority's holding that Facebook's friend- and content-suggestion algorithms constituted protected publishing activity under § 230.¹⁸⁴ Katzmann argued that it "strains the English language to say that in targeting and recommending [content] to users . . . Facebook is

¹⁷⁶ See, e.g., 164 CONG. REC. S1849, 1860; Danielle Keats Citron & Benjamin Wittes, *The Problem Isn't Just Backpage: Revising Section 230 Immunity*, 2 GEO. L. TECH. REV. 453, 461 (2018) (discussing Chief Judge Frank Easterbrook's majority opinion in *Chi. Laws. Comm. for C.R. v. Craigslist*, 519 F.3d 666 (7th Cir. 2008)).

¹⁷⁷ See, e.g., Keats Citron & Wittes, *supra* note 176, at 458–59; Daniela C. Manzi, *Managing the Misinformation Marketplace: The First Amendment and the Fight Against Fake News*, 87 FORDHAM L. REV. 2623, 2642–43 (2019). But see Jeff Kosseff, *Defending Section 230: The Value of Intermediary Immunity*, 15 J. TECH. L. & POL'Y 123, 145–48 (2010).

¹⁷⁸ See, e.g., Mike Wacker, Opinion, *Repeal Section 230 for Child Porn*, NEWSWEEK (Sept. 6, 2022, 6:30 AM), <https://www.newsweek.com/repeal-section-230-child-porn-opinion-1739141>; Kalev Leetaru, *A Call to Amend Section 230 for Social Media Transparency*, DAILY WIRE (Oct. 16, 2021), <https://www.dailywire.com/news/a-call-to-amend-section-230-for-social-media-transparency>; Nate Hochman, *Conservatives Should Support Section 230 Reform*, NAT'L REV. (Oct. 16, 2021, 6:30 AM), <https://www.nationalreview.com/2021/10/conservatives-should-support-section-230-reform/>; Abbey Stemler, Opinion, *What Is Section 230 and What Lies Ahead for Social-Media Reform?*, SEATTLE TIMES (Aug. 3, 2021, 2:30 AM), <https://www.seattletimes.com/opinion/what-is-section-230-and-what-lies-ahead-for-social-media-reform/>.

¹⁷⁹ See, e.g., Rebecca Kern, *White House Renews Call to 'Remove' Section 230 Liability Shield*, POLITICO, <https://www.politico.com/news/2022/09/08/white-house-renews-call-to-remove-section-230-liability-shield-00055771> (Sept. 9, 2022, 12:39 PM).

¹⁸⁰ *Force v. Facebook, Inc.*, 934 F.3d 53, 57 (2d Cir. 2019).

¹⁸¹ *Id.* at 59, 65.

¹⁸² *Id.* at 65.

¹⁸³ *Id.* at 66.

¹⁸⁴ *Id.* at 76–77, 82–83 (Katzmann, C.J., concurring in part and dissenting in part).

acting as ‘the *publisher* of . . . information provided by another information content provider.’¹⁸⁵ The recommendation of a defendant “conveyed a message from the defendant itself, and thus was not merely publishing content treated by another party.”¹⁸⁶

Katzmann undertook an extensive analysis of § 230’s legislative history, arguing that there is no basis for concluding that algorithmic content recommendations designed to match content with users constituted the publishing activity that Congress sought to protect.¹⁸⁷ Katzmann reasoned:

It would be one thing if congressional intent compelled us to adopt the majority’s reading. It does not. Instead, we today extend a provision that was designed to encourage computer service providers to shield minors from obscene material so that it now immunizes those same providers for allegedly connecting terrorists to one another. Neither the impetus for nor the text of § 230(c)(1) requires such a result. When a plaintiff brings a claim that is based not on the content of the information shown but rather on the connections Facebook’s algorithms make between individuals, the CDA does not and should not bar relief.¹⁸⁸

While acknowledging that posting terrorist propaganda online is protected activity, Katzmann observed that:

[P]laintiffs’ claims do not seek to punish Facebook for the content others post, for deciding whether to publish third parties’ content, or for editing (or failing to edit) others’ content before publishing it. . . . Instead, they would hold Facebook liable for its affirmative role in bringing terrorists together.¹⁸⁹

Katzmann’s partial dissent was favorably invoked by Justice Clarence Thomas in his statement accompanying the U.S. Supreme Court’s denial of certiorari in *Malwarebytes, Inc. v. Enigma Software Group USA, LLC*.¹⁹⁰ In *Malwarebytes*, the Ninth Circuit declined to apply § 230 to a dispute where “defendant, Malwarebytes Inc., [had] configured its software to block users from accessing [plaintiff] Enigma’s software in order to divert Enigma’s customers.”¹⁹¹ Thomas agreed with the Supreme Court’s decision not to take up the case, but wrote to urge that “in an appro-

¹⁸⁵ *Id.* at 76–77 (quoting 47 U.S.C. § 230(c)(1)).

¹⁸⁶ Petition for Writ of Certiorari at 14, *Gonzalez v. Google LLC*, No. 21-1333 (U.S. Apr. 4, 2022), 2022 WL 1050223, at *14.

¹⁸⁷ *Force*, 934 F.3d at 77–80.

¹⁸⁸ *Id.* at 77.

¹⁸⁹ *Id.*

¹⁹⁰ *Malwarebytes, Inc. v. Enigma Software Grp. USA, LLC*, 141 S. Ct. 13, 17 (2020) (Thomas, J., statement respecting denial of certiorari).

¹⁹¹ *Enigma Software Grp. USA, LLC v. Malwarebytes, Inc.*, 946 F.3d 1040, 1044, 1051 (9th Cir. 2019).

priate case, we should consider whether the text of this increasingly important statute aligns with the current state of immunity enjoyed by Internet platforms.”¹⁹² Reciting the legislative history of § 230, Thomas castigated lower courts for relying “on policy and purpose arguments to grant sweeping protection to Internet platforms.”¹⁹³ He pointed out that, while § 230 only references publishers and speakers, courts have extended immunity to distributors as well.¹⁹⁴ Thomas further argued that courts have improperly extended § 230 to immunize internet platforms for their own content and conduct.¹⁹⁵ Referencing the *Backpage* and *Force* decisions, Thomas castigated lower courts for extending § 230 publisher immunity to bar claims alleging that platforms promoted terrorism and facilitated sex trafficking of minors.¹⁹⁶ He explained:

A common thread through all these cases is that the plaintiffs were not necessarily trying to hold the defendants liable ‘as the publisher or speaker’ of third-party content. Nor did their claims seek to hold defendants liable for removing content in good faith. Their claims rested instead on alleged product design flaws—that is, the defendant’s own misconduct.¹⁹⁷

Thomas acknowledged that *Malwarebytes* was not the vehicle for “[p]aring back the sweeping immunity courts have read into § 230,” but urged that “in an appropriate case, it behooves us to do so.”¹⁹⁸

D. Gonzalez v. Google: Pathway for Expanding Products Liability Exception to Section 230 Immunity

In *Gonzalez v. Google LLC*,¹⁹⁹ the Ninth Circuit considered whether § 230 barred claims against Google for aiding and abetting ISIS terrorist attacks by recommending ISIS content to users. The plaintiffs alleged that Google used computer algorithms to match and suggest terrorist videos to users based on their viewing history, that these recommendations “were critical to the growth and activity of ISIS,” and “that Google officials were well aware that the company’s services were

¹⁹² *Malwarebytes*, 141 S. Ct. at 14 (Thomas, J., statement respecting denial of certiorari).

¹⁹³ *Id.* at 15.

¹⁹⁴ *Id.* (citing *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 331–34 (4th Cir. 1997)).

¹⁹⁵ *Id.* at 16.

¹⁹⁶ *Id.* at 17.

¹⁹⁷ *Id.* at 18 (citing 47 U.S.C. § 230(c)(1)–(2)).

¹⁹⁸ *Id.*

¹⁹⁹ *Gonzalez v. Google LLC*, 2 F.4th 871 (9th Cir. 2021). The Ninth Circuit opinion addressed three appeals concerning the liability of Google, Twitter, and Facebook in connection with acts of terrorism in Paris, Istanbul, and San Bernardino. The plaintiffs in the *Gonzalez* appeal were the family members of an American student who was killed at a Paris café in 2015 in an attack perpetrated by the Islamic States of Iraq (ISIS). *Id.* at 879–81.

assisting ISIS.”²⁰⁰ However, the plaintiffs did not allege that Google had targeted ISIS content specifically or designed its website to support terroristic videos or ideals.²⁰¹

Writing for the court, Judge Morgan Christen followed the Second Circuit’s analysis in *Force*, holding that Google’s algorithmic recommendations were protected by § 230 because “Google provided a neutral platform that did not specify or prompt the type of content to be submitted, nor determine particular types of content its algorithms would promote.”²⁰² The court explained that:

[A] user’s voluntary actions inform Google about that user’s preferences for the types of videos and advertisements the user would like to see. . . . Google matches what it knows about users based on their historical actions and sends third-party content to users that Google anticipates they will prefer. This system is certainly more sophisticated than a traditional search engine, which requires users to type in textual queries, but the core principle is the same: Google’s algorithms select the particular content provided to a user based on that user’s inputs.²⁰³

Judge Marsha Berzon agreed that the court’s holding was compelled by Ninth Circuit precedent but wrote separately to “join the growing chorus of voices calling for a more limited reading of the scope of section 230 immunity.”²⁰⁴ Adopting the reasoning “compellingly given” in Katzmann’s partial dissent in *Force*, Berzon explained that:

[I]f not bound by Circuit precedent I would hold that the term ‘publisher’ under section 230 reaches only traditional activities of publication and distribution—such as deciding whether to publish, withdraw, or alter content—and does not include activities that promote or recommend content or connect content users to each other.²⁰⁵

She urged the Ninth Circuit to “reconsider our precedent *en banc* to the extent that it holds that § 230 extends to the use of machine-learning algorithms to recommend content and connections to users.”²⁰⁶

²⁰⁰ *Id.* at 882; Petition for Writ of Certiorari, *supra* note 186, at 10–12, 2022 WL 1050223, at *10–12.

²⁰¹ *Gonzalez*, 2 F.4th at 895.

²⁰² *Id.* The court clarified that, “we do not hold that ‘machine-learning algorithms can *never* produce content within the meaning of Section 230.’ We only reiterate that a website’s use of content-neutral algorithms, without more, does not expose it to liability for content posted by a third-party.” *Id.* at 896 (quoting *id.* at 913 (Berzon, J., concurring)).

²⁰³ *Id.* at 895.

²⁰⁴ *Id.* at 913 (Berzon, J., concurring).

²⁰⁵ *Id.* (citing with approval *Force v. Facebook, Inc.*, 934 F.3d 53 (2d Cir. 2019) (Katzmann, C.J., concurring in part and dissenting in part)).

²⁰⁶ *Id.* at 917.

Judge Ronald Gould dissented in part on the ground that § 230 was not intended to immunize “companies providing interactive computer services from liability for serious harms knowingly caused by their conduct.”²⁰⁷ Gould agreed with Katzmann’s “cogent and well-reasoned opinion” in *Force*, which he attached to his partial dissent.²⁰⁸ However, he went further in positing that § 230 does not “wholly immunize[] a social media company’s role as a channel of communication for terrorists in their recruiting campaigns and as an intensifier of the violent and hatred-filled messages they convey.”²⁰⁹ Rejecting the hair-splitting distinctions used by prior courts in finding algorithms to be content-neutral tools, Gould argued that where a website “(1) knowingly amplifies a message designed to recruit individuals for a criminal purpose, and (2) the dissemination of that message . . . give[s] rise to a probability of grave harm, then the tools can no longer be considered ‘neutral.’”²¹⁰

Moving beyond narrow questions of statutory construction, Gould addressed the larger public policy issues implicated by the court’s interpretation of § 230. Echoing Traynor, he acknowledged that “at the dawn of the Internet era,” it was appropriate to “give protection to Internet companies to facilitate growth. But it is quite another thing to provide broad immunity at a time such as now when such companies are remarkably large.”²¹¹ While agreeing it would be “preferable if the social media companies monitored their own activities sufficiently to protect the public,” Gould suggested that it was “not realistic to anticipate that social media companies will self-police adequately in the face of their incentives to maximize profits by maximizing advertising revenues.”²¹² Noting that “[s]ociety for centuries has known that it is folly to ask the fox to guard the henhouse,” he argued that it makes no sense to entrust the responsibility of protecting the public “to the self-interested proclamations of CEOs or other employees of the various social media companies.”²¹³

Looking at the historical foundations of tort law, Gould observed that tort law emerged “to provide a doctrinal basis for remedy in the case of injuries from harmful and unreasonable conduct.”²¹⁴ Applying this principle to the *carte blanche* immunity that social media companies enjoy under § 230, he urged that they “be held to some reasonable standard of conduct when they have failed to regulate their own

²⁰⁷ *Id.* at 920 (Gould, J., concurring part and dissenting in part).

²⁰⁸ *Id.* at 920, 938 attach. A (citing with approval *Force*, 934 F.3d 53 (Katzmann, C.J., concurring in part and dissenting in part)).

²⁰⁹ *Id.* at 920–21.

²¹⁰ *Id.* at 923.

²¹¹ *Id.* at 936; see Traynor, *supra* note 52.

²¹² *Gonzalez*, 2 F.4th at 936 (Gould, J., concurring in part and dissenting in part).

²¹³ *Id.*

²¹⁴ *Id.* at 937 (citing FREDERICK POLLOCK, *THE LAW OF TORTS: A TREATISE ON THE PRINCIPLES OF OBLIGATIONS ARISING FROM CIVIL WRONGS IN THE COMMON LAW* 19–20 (4th ed. 1895)).

actions in the interests of the public.”²¹⁵ Applying traditional products liability theory, Gould argued that “when social media companies in their platforms use systems or procedures that are unreasonably dangerous to the public . . . then there should be a federal common law claim available against them.”²¹⁶ Gould reasoned:

[M]anufacturers are responsible in tort if they make unreasonably dangerous products that cause individual or social harm. Section 402A states: “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 user or a third party. Here and similarly, social media companies should be viewed as making and “selling” their social media products through the device of forced advertising under the eyes of users. Viewed in this light, they should be tested under a federal tort principle with a standard similar to and adapted from this *Restatement* language under a federal common law development. If social media companies use “neutral” algorithms that cause unreasonably dangerous consequences, under proper standards of law with limiting jury instructions, they might be held responsible.²¹⁷

Nevertheless, recognizing the difficulty of these issues, Gould urged that “it would be desirable for the Supreme Court to take up the subject of Section 230 immunity.”²¹⁸

The plaintiffs petitioned for rehearing en banc. Gould and Berzon voted to grant the petition, and Christen voted to deny it.²¹⁹ The Ninth Circuit held a vote on whether to rehear *Gonzalez* en banc, but the decision failed to receive a majority of the votes of the non-recused active judges.²²⁰ Gould dissented from the order, incorporating by reference his partial dissent in *Gonzalez*.²²¹

The *Gonzalez* plaintiffs petitioned for certiorari on the question of whether § 230 “immunize[s] interactive computer services when they make targeted recommendations of information provided by another information content provider, or only limit[s] the liability of interactive computer services when they engage in traditional editorial functions (such as decided whether to display or withdraw) with regard to such information.”²²² The plaintiff–petitioners focused on Katzmann’s “exceptionally detailed and scholarly” partial dissent in *Force*, and Gould’s partial dissent and Berzon’s concurrence in *Gonzalez*, observing that “[e]very member of

²¹⁵ *Id.* at 937–38.

²¹⁶ *Id.* at 938.

²¹⁷ *Id.* at 938 (citing RESTATEMENT (SECOND) OF TORTS § 402A (AM. L. INST. 1965)).

²¹⁸ *Id.* at 937.

²¹⁹ *Gonzalez v. Google LLC*, 21 F.4th 665 (9th Cir. 2022) (mem.).

²²⁰ *Id.*

²²¹ *Id.* (incorporating by reference *Gonzalez*, 2 F.4th at 918–52 (Gould, J., concurring in part and dissenting in part)).

²²² Petition for Writ of Certiorari, *supra* note 186, at i, 2022 WL 1050223, at *i.

the panel below expressed misgivings about the increasing breadth with which section 230 has been construed by the lower courts.²²³ Google opposed the petition for certiorari arguing, “no circuit suggests, much less holds, that section 230 exempts ‘targeted recommendations’ from coverage. . . . The continued uniformity among the circuits over both the question presented and broader questions about section 230 are reason enough to deny review.”²²⁴ Google observed that the Court “has already denied numerous section 230 petitions, including two recent petitions raising virtually identical questions,”²²⁵ and that the uniform conclusion among the federal circuits that § 230 applies to neutral algorithms displaying recommended content is manifestly correct.²²⁶ Google urged the Court to “not lightly adopt a reading of section 230 that would threaten the basic organizational decisions of the modern internet.”²²⁷ Undaunted by this prospect, the U.S. Supreme Court granted certiorari on October 3, 2022.²²⁸

IV. APPLICATION OF PRODUCTS LIABILITY THEORY TO CHALLENGE UNREASONABLY DANGEROUS SOCIAL MEDIA PLATFORMS

Traynor’s characterization of products liability law as ameliorating the rampages of the Industrial Revolution²²⁹ is equally applicable to the current transition from an industrial to a post-industrial society. As Gould observed in his partial dissent in *Gonzalez*, strict products liability provides a viable legal vehicle to counter the harsh social costs of the computer revolution and to reverse the growing social harms arising from virtually unregulated social media use. Social media platforms operate on complex computer algorithms invisible and incomprehensible to ordinary consumers. Traynor’s public policy imperative—that liability be affixed on the party in the best position to reduce the hazards to life and health posed by dangerous products—is particularly applicable considering the wide disparity of information between social media platforms and their users.²³⁰ Based on their design, operation, and monitoring algorithms that fuel consumers’ use of their products, social media

²²³ *Id.* at 4–5, 16, 20, 2022 WL 1050223, at *4–5, *16, *20.

²²⁴ Brief in Opposition at 13–14, *Gonzalez v. Google LLC*, No. 21-1333 (U.S. July 5, 2022), 2022 WL 2533118, at *13–14.

²²⁵ *Id.* at 9 n.1, 14, 2022 WL 2533118, at *9 n.1, *14.

²²⁶ *Id.* at 20–22, 2022 WL 2533118, at *20–22.

²²⁷ *Id.* at 22, 2022 WL 2533118, at *22.

²²⁸ *Gonzalez v. Google LLC*, No. 21-1333, 2022 WL 4651229 (U.S. Oct. 3, 2022).

²²⁹ Traynor, *supra* note 52, at 364.

²³⁰ *See, e.g., Escola v. Coca Cola Bottling Co.*, 150 P.2d 436, 440 (Cal. 1944) (noting that the defendant had “exclusive control over both the charging and inspection of the bottles”).

companies can anticipate many hazards and guard against the recurrence of others while the public cannot.²³¹

The mental health epidemic currently ravaging American youth demonstrates that those suffering injury from defective social media products are unprepared to meet its consequences.²³² The overwhelming cost of injury can be insured by social media product manufacturers “as a cost of doing business.”²³³ “Against such a risk, there should be general and constant protection, and the manufacturer is best situated to afford such protection.”²³⁴

Strict liability to social media product manufacturers serves not only the interest of public policy, but also the interest of economic efficiency. Scholars generally agree that, from a legal and economic standpoint, an efficient and effective products liability regime accomplishes two goals: “First, it would encourage parties to prevent all preventable accidents (the ‘deterrence’ goal). Second, it would efficiently allocate the risk of prevented accident costs (the ‘insurance’ goal).”²³⁵ Professor Daniel Jones explains that, “From an economic point of view, negligence law attempts to shift the burden of the negative externality caused by the tortfeasor’s actions from the victim to the tortfeasor.”²³⁶ He further observes:

[T]here are two general types of costs: the costs the tortfeasor can recognize (internal/precaution costs) and the costs imposed on other people as a result of the tortfeasor’s actions (external/accident costs). The “external costs” are [those] borne by the plaintiff and any other member of society affected by the tortfeasor’s actions. “Internal costs” are primarily the costs associated with the level of precaution incorporated by the tortfeasor.²³⁷

As Hylton explains:

Under strict products liability, the risk cost is internalized to the producer, so that the unit profit of selling the risky model is reduced by the expected liability. . . .

Thus, under strict liability, the producer will choose the risky design if the incremental utility is greater than the incremental risk. It follows that strict products liability optimally regulates design choice.²³⁸

²³¹ See *id.* at 440–41 (Traynor, J., concurring).

²³² See *supra* notes 26–41 and accompanying text.

²³³ *Escola*, 150 P.2d at 438 (Traynor, J., concurring).

²³⁴ *Id.* at 441.

²³⁵ Jon D. Hanson & Kyle D. Logue, *The First-Party Insurance Externality: An Economic Justification for Enterprise Liability*, 76 CORNELL L. REV. 129, 135 (1990).

²³⁶ Daniel Jones, *An Economic Analysis of Montana Products Liability*, 71 MONT. L. REV. 157, 158 (2010).

²³⁷ *Id.* at 159.

²³⁸ Hylton, *supra* note 85, at 2478 (emphasis omitted).

Similarly, Jones notes that “[a]s long as the manufacturer is forced to internalize the external costs its actions impose upon society, the manufacturer will have an incentive to minimize both the expected accident costs and its internal precaution costs.”²³⁹

The economic imperative to internalize safety costs is particularly acute where a wide disparity of information exists between the manufacturer and consumer. A decade before the advent of the internet, Posner and Professor William Landes observed that “[t]he growth in the technical complexity of products . . . has been accompanied by a decline in the technical knowledge of consumers as consumers.”²⁴⁰ Posner and Landes asserted that as the complexity of products increases, the cost to the consumer of obtaining relevant information about the product rises. And as the cost of acquiring useful information about the product goes up, consumers’ ability to rely on their own due care to protect themselves from design defects or inherent hazards is reduced.²⁴¹

Consumers that lack sufficient knowledge about a product’s dangers are unable to optimally factor the risk of harm into their market activity.²⁴² Indeed, Posner noted that “strict liability in effect impounds information about product hazards into the price of the product, resulting in a substitution away from hazardous products by consumers who may be completely unaware of the hazards.”²⁴³ The positive economic theory of strict products liability embraced by Landes, Posner, Hylton, and Jones maps precisely onto the normative case for applying strict liability to social media platforms. The reason is simple: the complexity of social media products and the inherent hazards in their design create a high transactional cost for consumers to obtain the information they would need to use the product safely.

²³⁹ Jones, *supra* note 236, at 163.

²⁴⁰ William M. Landes & Richard A. Posner, *A Positive Economic Analysis of Products Liability*, 14 J. LEGAL STUD. 535, 548 (1985).

²⁴¹ *Id.* at 547–51.

²⁴² *Id.* at 550. Hylton explained the merits of products liability principles to the consumer as follows:

In the absence of products liability there is likely to be overconsumption of risky products and an excessive tendency on the part of producers to choose designs with hidden risks. . . . If a new product design appears on the market, and its incremental risks are obviously greater than its incremental utility, relative to some safer alternative available, consumers will tend not to purchase the new product. . . . In contrast, consumers do not have sufficient information on the risk characteristics of complicated products to be able to take the precise risks into account in purchasing decisions. It follows that the products on the market that have risks in excess of benefits to consumers (relative to safer available alternatives) are likely to be those for which the risks are unobservable or in some sense likely to be passed over by the consumer until it is too late.

Hylton, *supra* note 85, at 2501.

²⁴³ POSNER, *supra* note 91, § 6.6, at 166.

The significant technical complexity of social media platforms effectively eliminates consumers' capacity to avoid the design hazards inherent to the product. For products with such expensive information asymmetry, the most efficient outcome is achieved when strict liability attaches to the party with the lowest-cost access to relevant information about the product's harmful attributes. In most cases, that party is the manufacturer; in this case, it is the social media platform. For example, one of the fundamental characteristics of social media platforms is an artificial intelligence (AI) recommendation function that determines what content consumers will be shown next. These algorithmic engines "learn" consumer preferences and deploy that information to keep users engaged, and they operate at the core of social media platform revenue streams.²⁴⁴

The basic economic model of a social media platform is simple: advertisers purchase space on the platform, and the algorithms work behind the scenes to connect consumers with advertisements specifically tailored to their interests. And because advertising revenue is generated by user engagement (views, clicks, etc.), social media platforms and their content-recommendation algorithms are designed to keep consumers coming back for more—described by one developer "as if they're taking behavioral cocaine and just sprinkling it all over your interface . . . to make it maximally addicting."²⁴⁵ However, because the nature of the product's inherent risk is not readily apparent to consumers—the harmful element of social media platforms, i.e., the exploitation of human psychology to generate revenue, is part of their design—there is no reason to assume that users have accepted a known risk.²⁴⁶

This is particularly true because social media platforms are readily available to children, and the platforms are not subject to any regulatory safeguards in place to prevent abuse. In fact, early regulation of the internet created liability shields for these companies that allow them to avoid accountability for harms perpetrated by third parties on their platforms. Today, social media companies are permitted to not just host but, in fact, *guide* minor users toward grotesquely harmful content—including predatory communications, online bullying, and child sex trafficking—under § 230's expansive immunity.

Finally, while Congress and regulatory agencies are considering legislation to make social media platforms safer for users, there is reason to doubt that these efforts

²⁴⁴ See Pasquale Lops, Marco de Gemmis & Giovanni Semeraro, *Content-Based Recommender Systems: State of the Art and Trends*, in RECOMMENDER SYSTEMS HANDBOOK 73, 79–80 (Francesco Ricci, Lior Rokach, Bracha Shapira & Paul B. Kantor eds., 2010).

²⁴⁵ Hilary Andersson, *Social Media Apps Are 'Deliberately' Addictive to Users*, BBC (July 4, 2018), <https://www.bbc.com/news/technology-44640959> (quoting Aza Raskin, inventor of the infinite scroll feature).

²⁴⁶ Allison Zakon, *Optimized for Addiction: Extending Product Liability Concepts to Defectively Designed Social Media Algorithms and Overcoming the Communications Decency Act*, 2020 WIS. L. REV. 1107, 1129 (2020).

will be sufficient in the absence of civil justice remedies to curb the hazards of such products. Hylton explains:

Given the low likelihood that regulatory agencies could manage the scale of activity reviewed under products liability law, or could craft rules that target with precision the product risks that should be controlled, products liability law performs a regulatory function that could not be supplanted by regulators.²⁴⁷

While regulation will furnish an important role in curbing the harms, particularly to children, from social media use, only a regime of products liability can fully incentivize optimal safety in platforms. By definition, regulations are promulgated based on government regulators' current knowledge of regarding product hazards and safer alternatives.²⁴⁸ In contrast, under traditional products liability, manufacturers are held to the knowledge and skill of an expert, meaning that "at a minimum he must keep abreast of scientific knowledge, discoveries, and advances and is presumed to know what is imparted thereby. But even more importantly, a manufacturer has a duty to test and inspect his product."²⁴⁹ Thus, a products liability regime that places the burden of safety on the manufacturer will always provide greater protection to the consumer than regulation alone.

V. ASSAULTING SECTION 230 THROUGH PRODUCTS LIABILITY

The broad construction of § 230 has generally focused on internet platforms as services, with relatively little emphasis on their status as product manufacturers. Although social media platforms are economically and technologically complex, the case for their treatment as a product, rather than a service, is a strong one.

A. *Social Media Platforms Are Products*

Products liability case law has steadily progressed toward recognizing intangible goods, such as computer software, as products. A district court in California summarized this development: "Generally, courts have found that mass-produced, standardized, or generally available software, even with modifications and ancillary

²⁴⁷ Hylton, *supra* note 85, at 2503.

²⁴⁸ *Tort Liability Versus Insurance and Regulation*, JUSTIA, <https://www.justia.com/injury/docs/us-tort-liability-primer/tort-liability-versus-insurance-and-regulation/> (Oct. 2022). ("Whereas tort claims arise after specific injuries occur, efficient regulation requires before-the-fact information about risks of injury, types of precaution, and the costs and benefits associated with particular regulatory standards."). See generally Susan Rose-Ackerman, *Regulation and the Law of Torts*, 8 AM. ECON. REV. 54 (1991).

²⁴⁹ *Borel v. Fibreboard Paper Prods. Corp.*, 493 F.2d 1076, 1089–90 (5th Cir. 1973).

services included in the agreement, is a good that is covered by the UCC.”²⁵⁰ Indeed, social media companies explicitly describe their platforms as “products” that are both standardized and generally available.²⁵¹

Recommendation algorithms are components of software that operate at the core of social media platforms.²⁵² Personalization of the platform to each consumer’s preferences is a function of the product’s algorithmic learning and data collection. Since these traits categorize software as a good under commercial law, it would be “disconsonant to insist on a different standard” in tort.²⁵³

Moreover, social media companies affirmatively present their platforms as products. Facebook, Inc. itself proclaimed that “[t]o build a *product* that connects people across continents and cultures, we need to make sure everyone can afford it.”²⁵⁴ This feature of social media leads to one possible economic distinction: most platforms are not purchased by consumers in the traditional sense. Facebook, for example, is free to use and requires only that users sign a lengthy set of terms and conditions that relinquishes, *inter alia*, any right they might have had to the ownership and privacy of information generated by their use of the platform.²⁵⁵ This exchange provides consideration for the agreement, yet social media user agreements, in fact, flip the script. By using the product, consumers generate information that the social media platform can either sell to advertisers directly, use to target consumers with highly personalized advertisements, or both.

B. *Judicial Application of Products Liability to Social Media Platforms*

Several courts have recognized social media platforms as “products” for the purposes of establishing liability for defective design elements. The first case to distinguish products liability claims from § 230 immunity was *Maynard v. Snapchat Inc.*, a decision by the Georgia Court of Appeals.²⁵⁶ *Maynard* arose out of a high-

²⁵⁰ *Simulados Software, Ltd. v. Photon Infotech Priv., Ltd.*, 40 F. Supp. 3d 1191, 1199 (N.D. Cal. 2014).

²⁵¹ Rob Goldman, *Hard Questions: What Information Do Facebook Advertisers Know About Me?*, META (Apr. 23, 2018), <https://about.fb.com/news/2018/04/data-and-advertising/>.

²⁵² Zakon, *supra* note 246, at 1111–12.

²⁵³ *Id.* at 1124.

²⁵⁴ Goldman, *supra* note 251 (emphasis added).

²⁵⁵ *Terms of Service*, FACEBOOK, META, <https://www.facebook.com/terms.php> (last visited Nov. 4, 2022) (“Specifically, when you share, post, or upload content that is covered by intellectual property rights on or in connection with our Products, you grant us a non-exclusive, transferable, sub-licensable, royalty-free, and worldwide license to host, use, distribute, modify, run, copy, publicly perform or display, translate, and create derivative works of your content (consistent with your privacy and application settings.)”).

²⁵⁶ *Maynard v. Snapchat, Inc.*, 816 S.E.2d 77 (Ga. Ct. App. 2018).

speed auto collision in which the driver was using Snapchat at the time of the accident.²⁵⁷ The court described the platform as follows:

Snapchat is an application made for mobile devices that allows users to take temporary photos and videos, also known as “Snaps,” and share them with friends. Snapchat creates “filters” that allow users to include captions, drawings, and graphic overlays on a user’s photos or videos. One of these filters is a speedometer that shows the speed at which a user is moving and allows for that speed to be superimposed to a Snap before sending it out over the application.²⁵⁸

The plaintiffs claimed that the driver was using Snapchat while driving more than 100 mph at the time of the crash; as a result, the plaintiffs sued Snapchat, Inc., alleging that its product “encourages” dangerous speeding, and thus contributed to the crash.²⁵⁹

The trial court dismissed the action, holding that Snapchat, Inc. was immune to suit under § 230 because the company was merely the publisher, rather than the creator, of third-party content.²⁶⁰ The court of appeals acknowledged the “robust immunity” conferred on social media platforms by § 230.²⁶¹ Nevertheless, the court reasoned that because the plaintiff’s claim arose from the design of the product, rather than from third-party content, § 230 did not bar the claim:

[T]here was no third party content uploaded to Snapchat at the time of the accident and the Maynards do not seek to hold Snapchat liable for publishing a Snap by a third-party that utilized the Speed Filter. Rather, the Maynards seek to hold Snapchat liable for its own conduct, principally for the creation of the Speed Filter and its failure to warn users that the Speed Filter could encourage speeding and unsafe driving practices. Accordingly, we hold that CDA immunity does not apply because there was no third-party user content published.²⁶²

The Ninth Circuit’s recent decision in *Lemmon v. Snap, Inc.*²⁶³ rejected the expansive interpretation of § 230 on similar grounds. *Lemmon* arose from a fatal car accident involving two 17-year-olds and a 20-year-old who drove off the road while driving in excess of 100 mph. Shortly before the fatal accident, one of the boys was using the Speed Filter on his Snapchat.²⁶⁴ The court explained that “[t]o keep its

²⁵⁷ *Id.* at 78–79.

²⁵⁸ *Id.* at 79.

²⁵⁹ *Id.*

²⁶⁰ *Id.*

²⁶¹ *Id.* at 80 (quoting *Internet Brands, Inc. v. Jape*, 760 S.E.2d 1, 3 (Ga. Ct. App. 2014)).

²⁶² *Id.* at 81.

²⁶³ *Lemmon v. Snap, Inc.*, 995 F.3d 1085 (9th Cir. 2021).

²⁶⁴ *Id.* at 1088.

users engaged, Snapchat rewards them with ‘trophies, streaks, and social recognitions’ based on the Snaps they send.”²⁶⁵ Many users, like victims of the crash, believe that sending Snaps that record a 100 mph or faster speed using the Speed Filter will lead to these rewards.²⁶⁶

The boys’ parents sued Snap, Inc., alleging that the company encouraged the victims to speed and that the company’s negligent app design caused the victims’ deaths.²⁶⁷ Snap, Inc. moved to dismiss the parents’ claim under § 230, arguing that the harm arose from Snapchat’s posting of third-party content on its platform.²⁶⁸ The district court agreed and dismissed the action for failure to state a claim;²⁶⁹ however, the Ninth Circuit reversed, holding that the claim was not barred by § 230.²⁷⁰ The Ninth Circuit rejected the argument that the parents sought to hold Snap, Inc. responsible as a publisher or speaker; rather, the court found that they merely sought to “hold Snapchat liable for its own conduct, principally for *the creation* of the Speed Filter.”²⁷¹ Specifically, the parents sought to hold Snap, Inc. liable for its allegedly “unreasonable and negligent” design decisions by which the Speed Filter and the incentive system “worked in tandem to entice young Snapchat users to drive at speeds exceeding 100 MPH.”²⁷² Rather than challenge the content of the communications, the parents’ claims sounded in traditional principles of products liability law:

The Parents thus allege a cause of action for negligent design—a common products liability tort. This type of claim rests on the premise that manufacturers have a “duty to exercise due care in supplying products that do not present an unreasonable risk of injury or harm to the public.”

. . . .

It is thus apparent that the Parents’ amended complaint does not seek to hold Snap liable for its conduct as a publisher or speaker. Their negligent design lawsuit treats Snap as a products manufacturer, accusing it of negligently designing a product (Snapchat) with a defect (the interplay between Snapchat’s reward system and the Speed Filter). Thus, the duty that Snap allegedly violated “springs from” its distinct capacity as a product designer. This is further evidenced by the fact that Snap could have . . . [taken] reasonable measures

²⁶⁵ *Id.*

²⁶⁶ *Id.* at 1089.

²⁶⁷ *Id.* at 1087.

²⁶⁸ *Id.* at 1090.

²⁶⁹ *Id.*

²⁷⁰ *Id.* at 1087.

²⁷¹ *Id.* at 1093 (quoting *Maynard v. Snapchat, Inc.*, 816 S.E.2d 77, 81 (Ga. Ct. App. 2018)).

²⁷² *Id.* at 1091–92.

to design a product more useful than it was foreseeably dangerous—without altering the content that Snapchat’s users generate.²⁷³

However, the same month that the Ninth Circuit in *Lemmon* restricted § 230 to exempt products liability claims, the Texas Supreme Court in *In re Facebook, Inc.*²⁷⁴ reached an opposite conclusion. The plaintiffs, three minor girls, alleged they were victims of sex trafficking and became “entangled” with their abusers through Facebook.²⁷⁵ In each case, the plaintiffs alleged that they were contacted on Facebook or Instagram by adult males, groomed to send naked photographs which were sold over the internet, and ultimately lured into sex trafficking.²⁷⁶ The plaintiffs sued Facebook, Inc. under state common law negligence claims, statutory claims prohibiting the sexual exploitation of minors, and products liability claims under the theory that “[a]s a manufacturer, Facebook is responsible for the defective and unreasonable characteristics in its . . . product[s],” contending that these products were “marketed to children under the age of 18, without providing adequate warnings and/or instructions regarding the dangers of ‘grooming’ and human trafficking.”²⁷⁷ Following the district court’s rulings, Facebook, Inc. sought mandamus relief in the court of appeals to dismiss the entire action under § 230. The Texas Supreme Court permitted the plaintiffs’ statutory human-trafficking claims, but dismissed their common law negligence and products liability claims.²⁷⁸

The plaintiffs argued that: “their common-law claims do not treat Facebook as a ‘publisher’ or ‘speaker’ because they ‘do not seek to hold the company liable for exercising any sort of editorial function over its users’ communications.”²⁷⁹ The

²⁷³ *Id.* at 1092 (first quoting LEWIS BASS, PRODUCT LIABILITY: DESIGN AND MANUFACTURING DEFECTS § 2.5 (2d ed. Supp. 2020); and then quoting *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1107 (9th Cir. 2009)).

²⁷⁴ *In re Facebook, Inc.*, 625 S.W.3d 80 (Tex. 2021), *cert. denied sub nom.* *Doe v. Facebook, Inc.*, 142 S. Ct. 1087 (2022).

²⁷⁵ *In re Facebook, Inc.*, 625 S.W.3d at 82–84.

²⁷⁶ *Id.* at 84–85. One of the plaintiffs described her ordeal as follows:

Plaintiff was fourteen years old in 2017 and was a user of both Facebook and Instagram, which Facebook owns. She was contacted via Instagram by a male user who was “well over” eighteen years of age. Using “false promises of love and a better future,” he lured Plaintiff “into a life of trafficking through traffickers who had access to her and sold her through social media.” Her traffickers used Instagram to advertise Plaintiff as a prostitute and to arrange “‘dates’ (that is, the rape of [Plaintiff] in exchange for money).” As a result, Plaintiff was raped numerous times. Following Plaintiff’s rescue from the trafficking scheme, traffickers continued to use her profile to attempt to entrap other minors in the same manner. Plaintiff’s mother reported these activities to Facebook, which never responded.

Id. at 84.

²⁷⁷ *Id.* at 85.

²⁷⁸ *Id.* at 83, 85–86.

²⁷⁹ *Id.* at 93.

Texas Supreme Court followed *Zeran* and “abundant judicial precedent” in concluding that the duty that the plaintiffs alleged Facebook, Inc. to have violated derived from Facebook’s protected status as a publisher or speaker of that content.²⁸⁰ Based upon this reasoning, the Texas Supreme Court concluded that the plaintiffs’ products liability claims were similarly barred by § 230:

Plaintiffs’ products-liability claims are likewise premised on the alleged failure by Facebook to “provid[e] adequate warnings and/or instructions regarding the dangers of grooming and human trafficking” on its platforms. Like Plaintiffs’ other common-law claims, these claims seek to hold Facebook liable for failing to protect Plaintiffs from third-party users on the site. For that reason, courts have consistently held that such claims are barred by section 230. This has been the unanimous view of other courts confronted with claims alleging that defectively designed internet products allowed for transmission of harmful third-party communications.²⁸¹

In reaching this holding, the Texas Supreme Court was clearly sympathetic to the plaintiffs’ legal arguments, citing favorably to Thomas’s dissent from the denial of certiorari in *Malwarebytes*.²⁸² However, because both statutory interpretations were possible, the court declined to part ways with federal appellate courts.²⁸³

The call by the Texas Supreme Court for a more restrictive interpretation of § 230 was taken up by a bipartisan assembly of 24 state attorney generals who filed an amicus brief in support of certiorari.²⁸⁴ The amici argued that because failure-to-warn and products liability claims do not rely on Facebook Inc.’s status as a publisher or speaker, § 230 does not bar the plaintiffs’ claims.²⁸⁵ Nevertheless, the Supreme Court denied certiorari on March 7, 2022.²⁸⁶

In his statement respecting the denial of certiorari, while agreeing that review was premature, Thomas excoriated the broad construction of § 230:

[T]he Texas Supreme Court afforded publisher immunity even though Facebook allegedly “knows its system facilitates human traffickers in identifying and cultivating victims,” but has nonetheless “failed to take any reasonable steps to mitigate the use of Facebook by human traffickers” because doing so

²⁸⁰ *Id.* at 90–93 (citing *Force v. Facebook, Inc.*, 934 F.3d 53, 64 (2d Cir. 2019)).

²⁸¹ *Id.* at 94.

²⁸² *Id.* at 90–91 (construing *Malwarebytes, Inc. v. Enigma Software Grp. USA, LLC*, 141 S. Ct. 13 (2020) (Thomas, J., statement respecting denial of certiorari)).

²⁸³ *Id.* at 91.

²⁸⁴ Brief for the State of Texas and 24 Other States as Amici Curiae in Support of Petitioner, *Doe v. Facebook, Inc.*, 142 S. Ct. 1087 (2022) (No. 21-459).

²⁸⁵ *Id.* at 2.

²⁸⁶ *Doe v. Facebook, Inc.*, 142 S. Ct. 1087 (2022) (No. 21-459).

would cost the company users—and the advertising revenue those users generate.²⁸⁷

Once again, he urged his colleagues to clarify § 230's scope "in an appropriate case."²⁸⁸ Seven months later, the U.S. Supreme Court granted certiorari in *Gonzalez*.²⁸⁹

C. *Recent Developments in Social Media Products Liability Litigation*

In denying certiorari in *Facebook*, the U.S. Supreme Court foreclosed the prospect of a swift and definitive resolution of whether products liability claims against social media companies are preempted under § 230. Nevertheless, although not expressly pleaded as a products liability case, *Gonzalez* will furnish an opportunity for the Court to consider whether algorithmic recommendations are protected publishing activity under § 230. The ruling anticipated in the spring of 2023,²⁹⁰ will be instructive—if not dispositive—on the growing number of products liability cases pending against social media platforms.

Since January 2022, over 100 products liability cases have been filed in state and federal courts throughout the United States against social media companies in cases involving children injured or killed through social media addiction and abuse.²⁹¹ These cases are brought on behalf of minors who fell victim to suicide, accidental death, attempted suicide, suicidal ideation, eating disorders, severe anxiety and depression, racial profiling, sexual abuse, and sex trafficking, in connection with their social media use; in all cases, the plaintiffs renounce any claim based on the social media platforms' status as a publisher or distributor of third-party content.²⁹² The complaints assert both design defect claims, identifying numerous design defects in the algorithms that power the defendants' social media platforms, as

²⁸⁷ *Id.* at 1088 (Thomas, J., statement respecting denial of certiorari) (citations omitted).

²⁸⁸ *Id.*

²⁸⁹ *Gonzalez v. Google LLC*, No. 21-1333, 2022 WL 4651229 (U.S. Oct. 3, 2022).

²⁹⁰ *Gonzalez v. Google LLC*, SCOTUSBLOG, <https://www.scotusblog.com/case-files/cases/gonzalez-v-google-llc/> (last visited Nov. 20, 2022).

²⁹¹ *See, e.g., In re Soc. Media Adolescent Addiction/Pers. Inj. Prods. Liab. Litig.*, MDL No. 3047, 2022 WL 5409144, at *3 sched. A (J.P.M.L. Oct. 6, 2022).

²⁹² *See, e.g., Complaint* at 10–11, *Rodriguez v. Meta Platforms, Inc.*, No. 3:22-cv-00401 (N.D. Cal. Jan. 22, 2022) (products liability action involving suicide of 11-year-old girl who became addicted to social media at age 9 and suffered sexual exploitation and bullying online); *Complaint* at 13–15, *Doffing v. Meta Platforms, Inc.*, No. 1:22-cv-00100 (D. Or. Jan 20, 2022) (products liability action involving 15-year-old girl with numerous mental health conditions resulting in multiple inpatient psychiatric admissions, eating disorder, self-harm episodes, and physically and mentally abusive behaviors toward family); *Complaint* at 110–13, *Spence v. Meta Platforms, Inc.*, No. 4:22-cv-03294 (N.D. Cal. June 6, 2022) (products liability action involving 13-year-old girl who developed life-threatening eating disorder after becoming addicted to Instagram and being repeatedly directed to content promoting anorexic behavior and negative

well as failure to warn claims, based on the allegedly undisclosed hazards arising from foreseeable product use.²⁹³ On October 6, 2022, the U.S. Judicial Panel on Multidistrict Litigation consolidated these cases under 28 U.S.C. § 1407 and transferred them to the Northern District of California before Judge Yvonne Gonzalez Rogers.²⁹⁴ On December 7, 2022, the Judicial Council of California coordinated approximately 30 product liability actions pending against social media companies in six California counties pursuant to California Code of Civil Procedure § 404,²⁹⁵ and on January 5, 2023, assigned the coordinated proceeding to Los Angeles County Superior Court, which appointed Judge Caroline Kuhl as the coordination trial judge. As these federal and state consolidated proceedings get underway, the number of similar cases will inevitably increase.²⁹⁶

CONCLUSION

In the two generations that have elapsed since the advent of the internet, the triumphalist ardor over a new world order has been tarnished by the social divisions, political polarization and mental health crises that social media has wrought on our country and our culture. Like the automobile in the early 20th century, the digital transformation is irreversible, and society can no more relinquish social media as it could have dispensed with the automobile in the 1920s. However, just as Cardozo adapted tort law from the stagecoach era to the automotive age,²⁹⁷ legal precedents established when social media did not exist and only 7% of Americans had online access must adapt to an environment where 95% of Americans use social media and online activity animates virtually every aspect of public and private life. The judicial expansion of § 230 beyond its statutory language and legislative mandate was based on a naïve and utopian view of the internet that is wholly irreconcilable with the harsh realities of the current era. The deadly mental health crisis ravaging American

body image); Complaint at 17–23, *Smith v. TikTok, Inc.*, No. 22STCV21355 (Cal. App. Dep’t Super. Ct. June 30, 2022) (products liability action for the wrongful death of behalf of two children, ages 8 and 9, who died of self-strangulation after viewing the “blackout challenge” on TikTok).

²⁹³ Complaint at 12–19, *Rodriguez*, No. 3:22-cv-00401; Complaint at 15–27, *Doffing*, No. 1:22-cv-00100; Complaint at 123–33, *Spence*, No. 4:22-cv-03294; Complaint at 23–31, *Smith*, No. 22STCV21355.

²⁹⁴ *In re Soc. Media Adolescent Addiction/Pers. Inj. Prods. Liab. Litig.*, MDL No. 3047, 2022 WL 5409144, at *1, *3 (J.P.M.L. Oct. 6, 2022).

²⁹⁵ See *Civil Case Coordination Proceeding (JCCP) Log*, JUD. COUNCIL OF CAL., https://www.courts.ca.gov/documents/CivilCaseCoord_2018toPresent_JCCPLog.pdf (last visited Nov. 20, 2022) (providing case information on JCCP No. 5255 “Social Media Cases” and JCCP No. 5256 “Instagram Cases”).

²⁹⁶ Order Assigning Coordinating Trial Judge, Jud. Council Coordinating Proc. Nos. 5255, 5256 (C.D. Cal. Jan. 5, 2023).

²⁹⁷ See *MacPherson v. Buick Motor Co.*, 111 N.E. 1050 (N.Y. 1916).

youth and the pervasive sexual abuse being inflicted on vulnerable children through social media cry out for legal redress. Section 230 can no longer be used as a citadel to protect social media companies from the foreseeable harms and known consequences of their deliberate design decisions.

In the mid-20th century, Justice Traynor saw products liability law as a legal bridge “from industrial revolution to a settled industrial society.”²⁹⁸ Today, as Judge Gould observed, products liability law can effectuate a similar transition from the computer revolution to the current post-industrial society by ameliorating the social harms of disruptive social media technologies.²⁹⁹ Application of products liability principles to social media platforms will not throttle free speech, stifle innovation, nor deprive consumers of the tangible benefits that social media provides. Rather, by internalizing safety costs within the economic entities that design and profit from unreasonably dangerous platforms, strict products liability will simply subject social media platforms to the same risk–utility analysis as any other consumer good. And holding social media companies liable for foreseeable harms caused by negligently designed platforms merely imposes the same duty of reasonable care that is born by any other product manufacturer.

Judges and scholars increasingly recognize that the expansive interpretation of § 230 over the past 25 years has incentivized social media companies to elevate profits over public safety, and that products liability provides a sound legal vehicle to promote corporate accountability and consumer safety. In *Gonzalez*, the U.S. Supreme Court is poised to adopt the admonitions of Thomas, Katzmann, Berzon, and Gould, to confine § 230 to its statutory language and legislative intent, and to hold social media companies to the same standard of reasonable care as any other corporate citizen while the Ninth Circuit’s holding in *Lemmon* represents the vanguard of this judicial trend. Meanwhile, the hundreds of cases currently being litigated in federal and state courts provide bountiful opportunities for further legal development. To paraphrase Prosser, the assault upon the citadel of § 230 immunity is proceeding in these days apace!³⁰⁰

²⁹⁸ Traynor, *supra* note 52, at 363.

²⁹⁹ *Gonzalez v. Google LLC*, 2 F.4th 871, 920 (9th Cir. 2021) (Gould, J., concurring in part and dissenting in part).

³⁰⁰ Prosser, *supra* note 75, at 1099.