

TERMS & ARTIFICIAL CONDITIONS: PROPOSING AN ATTRACTIVE-NUISANCE-SIZED HOLE IN SECTION 230'S BULWARK

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I. INTRODUCTION

47 U.S.C. § 230 (“Section 230”) has consistently quashed the hopes of injured families seeking redress from the deep pockets of social media giants.¹ Section 230 does so by barring claims against “interactive computer service providers or users” (ICSPs) when liability flows from the providers or users being “publishers.”² Section 230(c)(1), broadly construed as it is, routinely bars claims against providers or users in situations of harassment³ stalking,⁴ trafficking,⁵ and death⁶ caused by social media mis- and overuse.

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¹ See Matthew G. Jeweler, Note, *The Communications Decency Act of 1996: Why § 230 is Outdated and Publisher Liability for Defamation Should Be Reinstated Against Internet Service Providers*, 8 U. PITT. J. TECH. L. & POL'Y, no. 3, 2008, at 1, 21; Vanessa S. Browne-Barbour, *Losing Their License to Libel: Revisiting § 230 Immunity*, 30 BERKELEY TECH. L.J. 1505, 1534–35 (2015).

² 47 U.S.C. § 230(c)(1).

³ Doe v. Twitter, Inc., 555 F. Supp. 3d 889 (N.D. Cal. 2021), *rev'd on other grounds*, 2023 U.S. App. LEXIS 10808 (9th Cir. 2023).

⁴ Doe v. Kik Interactive, Inc., 482 F. Supp. 3d 1242 (S.D. Fla. 2020).

⁵ E.g., Doe ex rel. Roe v. Backpage.com, LLC, 104 F. Supp. 3d 149 (D. Mass. 2015), *aff'd*, 817 F.3d 12 (1st Cir. 2016); L.H. v. Marriott Intl., Inc., 604 F. Supp. 3d 1346 (S.D. Fla. May 23, 2022).

⁶ Peter Yankowski, *Instagram, Snapchat Sued in Death of 11-Year-Old Connecticut Girl*, CTINSIDER, <https://www.ctinsider.com/news/article/Instagram-Snapchat-sued-in-death-of-11-year-old-16794596.php> (Jan. 21, 2022 5:27 PM) [<https://perma.cc/M46H-9MCK>]. See also Second Amended Complaint for Wrongful Death and Survivorship, and for Violations of the California Unfair Competition Law, Bus. & Prof. Code ss17200, et. seq at ¶ 139, Rodriguez v. Meta Platforms, Inc., No. 3:22-cv-0401-JD (N.D. Cal. May 6, 2022), 2022 WL

By “minimally regulated social media overuse,” this Comment references the circumstances for many American children with virtually unmitigated access to social media platforms.⁷ Children as young as eight years old access social media, lying about their age to bypass the minimum age requirement of thirteen years.⁸ Increased screen time across a widening range of minors is owed in part to the coronavirus pandemic, which led parents and children alike to their screens for entertainment and socialization.⁹ Far from benign, though, this development corresponds with increased interest in protecting underage internet users from injury.¹⁰

2301951, at ¶¶ 1, 139–45 [hereinafter Rodriguez Second Amended Complaint] (alleging that the subject of Yankowski’s article, Selena Rodriguez, died because of defects in social media platforms). Since its initiation, Rodriguez’s case has been consolidated with other claims against social media defendants by the Judicial Panel on Multidistrict Litigation (J.P.M.L.). *In re Soc. Media Adolescent Addiction/Pers. Inj. Prods. Liab. Litig.*, MDL 3047, 637 F. Supp. 3d 1377, 1380 (U.S. J.P.M.L. 2022) [hereinafter Transfer Order I]. To date, the Northern District of California (the court to which the cases have been transferred) has issued a few dispositive orders at the motion to dismiss stage. *In re Soc. Media Adolescent Addiction/Pers. Inj. Prods. Liab. Litig.*, 702 F. Supp. 3d 809 (N.D. Cal. 2023) [hereinafter MTD Order] (granting and denying social media defendants’ motions to dismiss personal injury and wrongful death/survivorship claims on First Amendment and Section 230 grounds), *and dismissing in part*, 2024 U.S. Dist. LEXIS 200670 (granting and denying in part social media defendants’ motions to dismiss claims by school districts and governmental entities), *and granting*, 2024 U.S. Dist. LEXIS 204752 (granting Mark Zuckerberg’s motion to dismiss). Since these orders do not elaborate on the *Rodriguez* facts, this Comment draws factual allegations from the Rodriguez Second Amended Complaint, *supra*.

⁷ Melinda Wenner Moyer, *Kids as Young as 8 Are Using Social Media More Than Ever, Study Finds*, N.Y. TIMES (Mar. 24, 2022) <https://www.nytimes.com/2022/03/24/well/family/child-social-media-use.html> [https://perma.cc/BQX6-7LJA] (“Of particular concern to some . . . is an upswing in social media use among children ages 8 to 12, on platforms such as Instagram, Snapchat and Facebook, even though such platforms require users to be at least 13 because of a law that prohibits companies from collecting data from children.”).

⁸ John Anderer, *Kids Can Easily Bypass Age Restrictions on Social Media Platforms, Study Warns*, STUDYFINDS (Feb. 16, 2021) <https://studyfinds.org/kids-bypass-restrictions-social-media/> [https://perma.cc/6JQ7-M9SR]; *see also* CLIONA CURLEY, 2020 TECHNICAL REPORT: A REVIEW OF AGE VERIFICATION MECHANISM FOR 10 SOCIAL MEDIA APPS 43 (2020).

⁹ Moyer, *supra* note 7.

¹⁰ *See generally* Brian Contreras, *California Bill Would Let Parents Sue Social Media Companies for Addicting Kids*, LOS ANGELES TIMES (Mar. 16, 2022, 12:37 PM) <https://www.latimes.com/business/technology/story/2022-03-16/california-bill-would-let-parents-sue-social-media-companies-for-addicting-kids> [https://perma.cc/PEU6-JFMD].

Despite this increased interest, underage users continue to incur actionable injuries of all sorts.¹¹ Minor plaintiffs have tried holding platforms liable for, among other things, allowing predators to post pornographic material involving the plaintiffs.¹² Minor plaintiffs have tried holding platforms liable for failing to provide adequate warnings or protective measures against sexual predators.¹³ Parents have tried holding platforms liable for addictive designs and their contribution to the mental decline and eventual death of their minor children.¹⁴ Plaintiffs have tried again and again to impose negligence liability but have been consistently blocked by the wall of Section 230's immunity provisions.¹⁵

The wall of Section 230, however, is beginning to crack.¹⁶ In the face of new products liability theories—imposing strict liability instead of negligence—social media giants are turning their backs on Section 230's bulwark.¹⁷ Has the breadth of Section 230's immunity fallen out of favor, the First Amendment interests of a limited liability internet aside?

Perhaps not. If it is, however, this Comment proposes a narrow, negligence-based exception to Section 230's cracking façade. Specifically, this Comment focuses on social media platforms—ICSPs—as particularly

Sam Metz & Barbara Ortutay, *Utah Social Media Law Means Kids Need Approval from Parents*, APNEWS (Mar. 24, 2023, 1:37 AM) <https://apnews.com/article/social-media-utah-kids-84bd1f6481071726327bce25cf3e7522> [<https://perma.cc/Q28B-2VN9>]. Nate Raymond, *U.S. Judge Blocks Ohio Law Restricting Children's Use of Social Media*, REUTERS <https://www.reuters.com/legal/us-judge-blocks-ohio-law-restricting-childrens-use-social-media-2024-02-12/> (Feb. 13, 2024, 12:17 PM) [<https://perma.cc/K42Y-LZH5>]

¹¹ See *supra* notes 3–6.

¹² *Doe v. Twitter, Inc.*, 555 F. Supp. 3d 889, 893–94 (N.D. Cal. 2021), *abrogated in part* by *Doe v. Reddit, Inc.*, 51 F.4th 1137 (9th Cir. 2022), *cert. denied*, 143 S. Ct. 2560 (May 30, 2023).

¹³ *Doe v. Kik Interactive, Inc.*, 482 F. Supp. 3d 1242, 1244 (S.D. Fla. 2020).

¹⁴ Transfer Order I, *supra* note 6, at 1378.

¹⁵ David S. Ardia, *Free Speech Savior or Shield for Scoundrels: An Empirical Study of Intermediary Immunity Under Section 230 of the Communications Decency Act*, 43 LOY. L.A. L. REV. 373, 442 (2010) (“[A] number of claims, including . . . negligence . . . saw preemption rates approaching or equaling 100%.”); see also, e.g., *Zeran v. America Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997) (“Congress recognized the threat that tort-based lawsuits pose to freedom of speech in the new and burgeoning Internet medium.”).

¹⁶ Susannah Luthi, *A Legal Shield for Social Media Is Showing Cracks*, POLITICO, <https://www.politico.com/news/2022/07/14/legal-shield-social-media-facebook-00045226> (July 14, 2022, 3:42 PM) [<https://perma.cc/CPJ2-G6LF>].

¹⁷ *Id.*; see also cases discussed *infra* Part III.B.2.

attractive to children.¹⁸ This Comment draws from a well-established, child-centered exception within premises liability law: the attractive nuisance doctrine.¹⁹ By analogizing social media platforms and their features (livestreams,²⁰ the “metaverse,”²¹ servers in which to chat,²² and X’s “spaces”²³) to real property, this Comment proposes use of the attractive nuisance doctrine as a means of holding platforms responsible. This Comment acknowledges the plight of children who, by virtue of bypassing age restrictions or paywalls, “trespass” onto a social media platform’s “domain” and suffer injury thereon. To wit: the attractive nuisance doctrine, drawn from common law as a narrow theory of liability for land possessors, works around Section 230’s internet immunity.

Given the analogical reasoning this thesis entails, Part II.A opens with some conceptions of the internet and property law’s application to those conceptions. Part II.B provides background on the attractive nuisance doctrine and previews its application to internet “domains.”

Part III.A shifts to the background of Section 230, beginning with its legislative history in III.A.1 and ending with the judicial expansion of its immunity provisions in III.A.2. Part III.B discusses recent attacks on Section 230, starting with Congress’s immunity-narrowing attempts in III.B.1. Part

¹⁸ Rodriguez Second Amended Complaint, *supra* note 6, at ¶ 201 (“Defendants intentionally designed and marketed their social media platforms to be both attractive and harmful to underage users, sometimes referred to as [sic] ‘attractive nuisance.’”). To clarify, this Comment’s focus on social media companies has to do with the revived interest in protecting minor users, *see* Contreras, *supra* note 10. Whether the ICSP defendant is a social media company has no effect on the applicability of this Comment’s formulation of the attractive nuisance doctrine to non-social-media domain owners or possessors. The application proposed by this Comment exists independent of social media companies as ICSPs and their appeal to children. *See supra* notes 7–8.

¹⁹ RESTATEMENT (SECOND) OF TORTS, § 339 (AM. L. INST. 1965).

²⁰ Ilona Selina, *How to Host a Successful and Engaging Instagram Live*, PR COUTURE, <https://www.prcouture.com/5-steps-successful-instagram-live/> [https://perma.cc/B63L-2DXR] (“Hosting . . . an Instagram Live can help boost your discoverability on the app.”).

²¹ Dennis Mitzner, *The Rise of the Metaverse, NFTs and Immersive Commerce*, FORBES, (Oct. 26, 2022, 7:58 AM) <https://www.forbes.com/sites/dennismitzner/2022/10/26/the-rise-of-the-metaverse-nfts-and-immersive-commerce/?sh=545bf3001526> [https://perma.cc/D8R3-36WY].

²² *Group Chat That’s All Fun & Games*, DISCORD, <https://discord.com/> [https://perma.cc/3S2D-WZRJ] (“Stream like you’re in the same room.”).

²³ *About X Spaces*, <https://help.x.com/en/using-x/spaces> [https://perma.cc/MNQ7-Z7KB] (“[Y]ou can create and host a Space for your Community members to join.”).

III.B.2 discusses a few of Section 230's "cracks": legal theories such as "publication plus" in the *Gonzalez v. Google* case²⁴ in III.B.2.a and products liability in III.B.2.b. Cases of the latter treat social media companies as manufacturers instead of publishers, creating liability for failures to warn and deficient designs instead of mere publication of others' content.

Treating social media companies as possessors of cyberspace for the sake of attractive nuisance, Part IV addresses what an attractive nuisance theory of liability would look like in practice. Part IV.A outlines *Bennett v. Stanley*²⁵ to show the doctrine in action, and Part IV.B applies the doctrine to the facts of *Rodriguez v. Meta Platforms, Inc.*²⁶ Part IV.C concludes with logistical and policy-based advantages to the doctrine, focusing on the doctrine's status as a true work-around of Section 230 immunity.

Part V outlines drawbacks to recognition of the doctrine in the online context. The penultimate part first discusses constitutional concerns; social media company liability implicates the Free Speech rights of users and platforms (V.A) and the care, custody, and control rights of the users' parents. (V.B). Part V concludes with answers to technical arguments about differences in duties owed between publishers and land possessors (V.C), the dated holding of *Zeran v. America Online, Inc.*²⁷ (V.D), and the doctrine's requirement of merely reasonable care (V.E). Finally, Part VI summarizes advantages to the proposed cause of action, from updating courts' understanding of the internet in general to opening a dialogue among property owners as to the existence of property rights and attendant duties in today's increasingly digitized world.

II. CYBERSPACE AS PREMISES AND SOCIAL MEDIA PLATFORMS AS "ATTRACTIVE NUISANCES"

Before discussing the application of premises liability to social media platforms, this Comment must first establish its main analogy: the internet and real property.²⁸ Therefore, before getting to background sections on the attractive nuisance doctrine and Section 230 as wholly independent bodies of law, this Part opens with the semantics of the phrase "on the internet."

²⁴ *Gonzalez v. Google, LLC*, 2 F.4th 871 (9th Cir. 2021), *vacated*, 143 S. Ct. 1191 (2023).

²⁵ *Bennett v. Stanley*, 748 N.E.2d 41 (Ohio 2001).

²⁶ *Rodriguez Second Amended Complaint*, *supra* note 6.

²⁷ *Zeran v. America Online, Inc.*, 129 F.3d 327 (4th Cir. 1997).

²⁸ *Ardia*, *supra* note 15, at 377 ("[The internet] is layered on privately owned Web sites, privately owned servers, privately owned routers, and privately owned backbones.").

A. *Constructing “Domains”: Analogizing the Internet to Real Property*

Just as the internet’s ever-expanding borders have digitized nearly every facet of globalized society, so has litigation proliferated in a vain attempt to categorize the internet into a legally operative box.²⁹ Accessible from smartphones (which the Supreme Court has described as ostensibly inseparable from each of us), the internet permeates daily life.³⁰

Though this conception of the internet suggests it exists *around* us as a resource to be tapped into, we must acknowledge the extent to which we are *on* the internet and its platforms. Without getting too philosophical, the difference between the phrases “using the internet” and “being *online*” is merely one of style; both are grammatically correct.³¹ Though Oxford describes the phrase “on the internet” as a parallel to former means of communication (*a la* “on the air”), “on” also implies a surface.³²

Assume being “on the internet” could lead to the conception of the internet as a surface. What would such a surface resemble? One suitable descriptor might be “frontier.”³³

²⁹ See generally Dallin Robinson, *Click Here to Sue Everybody: Cutting the Gordian Knot of the Internet of Things with Class Action Litigation*, 26 RICH. J.L. & TECH. 4 (2020) (noting the digitization of the world and proposing proactive class action litigation to prevent economic collapse); *Brookfield Commc’ns, Inc. v. W. Coast Ent. Corp.*, 174 F.3d 1036, 1044 (9th Cir. 1999) (highlighting the internet’s importance in commerce, as companies are “racing to stake out their place in cyberspace.”).

³⁰ *Carpenter v. United States*, 585 U.S. 296, 311 (2018) (quoting *Riley v. California*, 573 U.S. 373, 385 (2014)). See also Gregory M. Dickinson, *Rebooting Internet Immunity*, 89 GEO. WASH. L. REV. 347, 392 (2021) (“The virtual world now encompasses nearly every variety of human conduct, making it difficult to develop a single rule to govern it.”)

³¹ Conor, *In the Internet or on the Internet? (English Grammar Lesson)*, ONE MINUTE ENGLISH, <https://oneminuteenglish.org/en/in-on-the-internet/> [<https://perma.cc/TFF2-SE4Q>].

³² WEBSTER’S NEW WORLD COLLEGE DICTIONARY 1007 (Agnes et al. eds., 4th ed. 2001). The definition provided for “on” labeled “16(b)” defines the word as “through the medium of,” (e.g., “on the phone, to act on TV”) whereas the definition labeled “2” defines the word as “in contact with (any surface); covering or attached to.” *Id.*

³³ See, e.g., Alfred C. Yen, *Western Frontier or Feudal Society?: Metaphors and Perceptions of Cyberspace*, 17 BERKELEY TECH. L.J. 1207 (2002) (criticizing the “western frontier” metaphor as artificially limiting regulation of “cyberspace” and arguing that the internet is instead more feudal in nature); Mitchel L. Winick et al., *Attorney Advertising on the Internet: From Arizona to Texas-- Regulating Speech on the Cyber-Frontier*, 27 TEX. TECH. L. REV. 1487 (1996) (comparing the barbed wiring of frontier lands in 19th-century Texas to the partitioning off of “cyberspace” today).

The internet presents an ever-expanding frontier of possibilities, distinguishing it from the radio waves, telephone signals, and satellite communications of old.³⁴ Insofar as the internet is a frontier, courts have also drawn the comparison of the internet to the “Wild West”³⁵ upon which users “are racing to stake out their place.”³⁶

Aside from Yen’s argument as to whether the “frontier” metaphor is the best one,³⁷ the term “frontier” calls to mind real property—land and things of value attached to it.³⁸ Indeed, the development of phenomena like the “metaverse” as a “virtual world” and “nonfungible tokens” (NFTs) as intangible, personal property to be traded thereon supports that suggestion.³⁹ The internet now resembles not just an expansive, Wild West frontier, but a sophisticated, privatized marketplace, with files and services traded by digital means.⁴⁰ While intangible personalty is certainly nothing new,⁴¹ NFTs and the platform-based metaverse have led to more and more internet–property comparisons in the courtroom.⁴²

Running with the “virtual world” concept a bit further leads to a familiar truism; property interests are recognized as circumscribed by prevailing interests of society, particularly the right to exclude others from one’s land

³⁴ *ACLU v. Reno*, 929 F. Supp. 824, 844–46 (E.D. Pa. 1996) (distinguishing internet from other forms of communication as “a unique and wholly new medium of worldwide human communication”), *aff’d sub nom.*, *Reno v. ACLU*, 521 U.S. 844 (1997).

³⁵ *Ganske v. Mensch*, 480 F. Supp. 3d 542, 545 (S.D.N.Y. 2020).

³⁶ *Brookfield Commc’ns, Inc. v. W. Coast Ent. Corp.*, 174 F.3d 1036, 1044 (9th Cir. 1999).

³⁷ *See Yen*, *supra* note 33, at 1213.

³⁸ *Real Property*, BLACK’S LAW DICTIONARY (11th ed. 2019).

³⁹ *Mitzner*, *supra* note 21.

⁴⁰ *Id.*; *see also Ardia*, *supra* note 15, at 377.

⁴¹ *See, e.g., Ayres v. French*, 41 Conn. 142, 149–52 (1874).

⁴² *See generally Doe v. Roblox Corp.*, 602 F. Supp. 3d 1243, 1251 (N.D. Cal. 2022) (calling Roblox’s game a “metaverse” in which users interact with a “virtual world”); *Epic Games, Inc. v. Apple Inc.*, 559 F. Supp. 3d 898, 935 (N.D. Cal. 2021) (understanding a metaverse to mimic “the real world by providing virtual social possibilities . . .”), *rev’d in part on other grounds*, 67 F.4th 946 (9th Cir. 2023); *Hermès Int’l v. Rothschild*, 603 F. Supp. 3d 98, 101 (S.D.N.Y. 2022) (reciting the defendant’s characterization of the “metaverse” as a place of displaying wealth via NFTs); *Notorious B.I.G. LLC v. Yes. Snowboards*, No. CV 19-1946-JAK, 2021 U.S. Dist. LEXIS 252735 at *9 (C.D. Cal. Dec. 22, 2021) (recognizing the value of non-fungible tokens—NFTs—as commercialization of another’s likeness).

or personal possessions.⁴³ This is where the “Wild West” metaphor becomes misleading, as today’s internet, unlike the Wild West’s “frontier,” is regulated fathoms beyond the “recognition of basic property rights.”⁴⁴

Not surprisingly, the internet is partitioned off into aptly titled “domains,” or collections of websites marked by unique names “somewhat analogous to a telephone number or street address.”⁴⁵ Organizations or individuals possess property rights as owners or tenants of the domain,⁴⁶ opening the website for others to use (usually in exchange for user data, which is later used for advertising and marketing).⁴⁷ In a real-property sense, possessors of domains “consent” to having members of the public *on* their property.⁴⁸ If one conceives domain possessors as having property interests

⁴³ Bethany R. Berger, *Eliding Original Understanding in Cedar Point Nursery v. Hassid*, 33 YALE J.L. & HUMAN. 307, 318 (2022).

⁴⁴ Yen, *supra* note 33, at 1229, 1239–48 (comparing domains as distributed to ISPs with manors from feudal Europe).

⁴⁵ *Multifab, Inc. v. Arlanagreen.com*, 122 F. Supp. 3d 1055, 1066 (E.D. Wash. 2015) (quoting *Brookfield Commc’ns, Inc. v. W. Coast Ent. Corp.*, 174 F.3d 1036, 1044 (9th Cir. 1999)).

⁴⁶ See generally *Louis Vuitton Malletier, S.A. v. Akanoc Sols., Inc.*, 591 F. Supp. 2d 1098, 1112 (N.D. Cal. 2008) (describing how defendants, as ISPs, “physically host websites on their servers and route internet [sic] traffic to and from [them],” deeming same as the “Internet equivalent of leasing real estate.”). For the purposes of this Comment, “domain owner,” “ISP,” “ICSP,” and like terms are used interchangeably, as courts have “haphazardly lump[ed] together web hosts, websites, search engines, and content creators into this amorphous category.” Michael L. Rustad & Thomas H. Koenig, *Rebooting Cybertort Law*, 80 WASH. L. REV. 335, 371 (2005). “ISP” and “ICSP” parallel Section 230’s wording, though “domain owner” more cleanly analogizes to the attractive nuisance doctrine in that physical land could also be said to be a land owner’s “domain,” see *infra* text accompanying note 48.

⁴⁷ Anas Baig & Maria Khan, *What Does User Consent Mean and Why Does it Matter?*, SECURITI, <https://securiti.ai/blog/user-consent/> (March 5, 2024) [<https://perma.cc/37WW-45ZE>].

⁴⁸ *Env’t Processing Sys., L.C. v. FPL Farming LTD.*, 457 S.W.3d 414, 426 (Tex. 2015) (clarifying that “consent” or lack thereof may be framed as either an affirmative defense to trespass or a necessary element to be shown by a trespass plaintiff, depending on state law). “Domain owners,” “ISPs,” “ICSPs,” and any other entities with control over a website are to be considered “possessors” of their domains for purposes of this Comment’s attractive nuisance analysis. This reflects the majority approach to premises liability, which assigns duties of care based on the *entrant’s* status, regardless of the real property *possessor’s* interest. RESTATEMENT (SECOND) OF TORTS, § 328E cmt. a (AM. L. INST. 1965).

in their domains, it then follows that internet users, by visiting websites, “enter” onto the digital equivalent of another’s real property.

What happens, then, when the possessor limits their consent to certain users? In the world of real property, the possessor may limit the scope and duration of their consent for others to enter the land, creating three distinct categories of entrants: invitees, licensees, and trespassers.⁴⁹ These categories (and the duties of care owed to each) have existed in United States jurisprudence since the Civil War.⁵⁰ Just as land possessors currently limit access via the right to exclude, so too do domain possessors limit access via exclusionary measures.⁵¹ A digital right to exclude, of sorts, may thus be exercised via age restrictions,⁵² paywalls,⁵³ or location-based bans.⁵⁴ Real-property limits on consent to enter come to mind, e.g., “no entrants below the age of 21,” or “admission cost of \$50 to enter,” etc.

⁴⁹ *Shump v. First Continental-Robinwood Assocs.*, 644 N.E.2d 291, 294–95 (Ohio 1994) (“It is axiomatic that, under the common law of premises liability, the status of the person who enters upon the land of another (*i.e.*, trespasser, licensee, or invitee) defines the scope of the legal duty that the responsible party owes the entrant.”); Vitauts M. Gulbis, Annotation, *Modern Status of Rules Conditioning Landowner’s Liability Upon Status of Injured Party as Invitee, Licensee, or Trespasser*, 22 A.L.R. Fed. 4th § 2[a] (1983). To date, most states impose duties of care on the land owner or possessor based on the entrant’s status as an invitee, licensee, or trespasser, *id.*

⁵⁰ See generally *Sweeny v. Old Colony & Newport R.R.*, 92 Mass. 368 (1865).

⁵¹ Compare *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063 (2021) (finding a California regulation that “appropriated” a “right to access” farmers’ property was a *per se* taking, abrogating the farmers’ right to exclude) and *Biden v. Knight First Amend. Inst. at Columbia Univ.*, 141 S. Ct. 1220, 1226 (J. Thomas, concurring) (analogizing social media platforms to common carriers and discussing limits to said carriers’ “right to exclude” in removing users based on constitutionally protected speech).

⁵² Katie Canales, *Silicon Valley Says Kids over the Age of 13 Can Handle the Big, Bad World of Social Media. Experts Say that’s the Result of a ‘Problematic’ 1990s Internet Law*, BUSINESS INSIDER (Jan. 14, 2022, 8:58 AM), <https://www.businessinsider.com/why-you-must-be-13-facebook-instagram-problematic-law-coppa-2022-1> [https://perma.cc/8LH2-B8HN]. See also CURLEY, *supra* note 8, at 43 (explaining how age restrictions on popular social media apps are bypassed “by simply lying about your age.”).

⁵³ *What Is a Paywall?*, IONOS (Aug. 17, 2022), <https://www.ionos.com/digitalguide/online-marketing/online-sales/paywall/> [https://perma.cc/JT3U-ND69].

⁵⁴ Vann Vicente, *Why Do Streaming Sites Geo-Block Their Content?*, HOW-TO GEEK (Oct. 31, 2021, 7:00 AM), <https://www.howtogeek.com/762231/why-do-streaming-sites-geo-block-their-content/> [https://perma.cc/WWN2-AFFV].

Just as with real property, breaches of consent—trespasses, one might say—lead to claims from domain owners or possessors on the internet as well.⁵⁵ Just as property has digitized, so too have plaintiffs’ theories been incorporated to redress property torts committed over the internet, including copyright infringement,⁵⁶ conversion,⁵⁷ and trespass to chattels.⁵⁸

Despite the above analogy of the internet to real property, one property-related theory of liability largely unpursued is premises liability. In the world of real property, negligence claims largely arise from premises liability law, which assigns the land possessor different duties of care based on the legal status of the entrant.⁵⁹ If someone is injured on another’s premises, the injured party may bring a negligence claim, arguing the land possessor breached their duty to maintain reasonably safe premises.⁶⁰ Simple enough for real-world premises, though not so much for online premises. In the digital world, negligence claims against ICSPs are largely barred by Section 230 immunity.⁶¹ Given the internet-real-property analogy, should not a liability theory for plaintiffs injured on another’s *real-world* “domain” necessarily imply a similar theory for another’s *online* “domain?”

Before getting into why Section 230’s overbroad construction has foreclosed this possibility, Part II.B explains the exception central to this Comment’s thesis: the attractive nuisance doctrine.

⁵⁵ Ardia, *supra* note 15 (compiling data from Section 230 decisions for claims based on defamation, privacy torts, negligence, business torts, tortious interference, and intentional infliction of emotional distress against online interactive services).

⁵⁶ *E.g.*, *Louis Vuitton Malletier, S.A. v. Akanoc Sols., Inc.* 658 F.3d 936, 947 (9th Cir. 2011) (holding that district court was within discretion to instruct jury that defendant allowing servers to remain open for domain owners engaged in trademark and copyright infringement could subject defendant to contributory liability for each).

⁵⁷ *E.g.*, *Kremen v. Cohen*, 337 F.3d 1024, 1030 (9th Cir. 2003) (reasoning that plaintiff pled a plausible conversion claim for his domain name being assigned to a different registrant, depriving him of all valuable use of the domain name); *Astroworks, Inc. v. Astroexhibit, Inc.*, 257 F. Supp. 2d 609, 618 (S.D.N.Y. 2003) (holding that plaintiff pled a plausible conversion claim for an early version of his website being converted by defendant).

⁵⁸ *See Compuserve Inc. v. Cyber Promotions, Inc.*, 962 F. Supp. 1015, 1027 (S.D. Ohio 1996) (reasoning that defendant’s spam emails sent to users of plaintiff’s online services constituted “trespass to plaintiff’s chattels” as action taken outside of plaintiff’s consent).

⁵⁹ 62 AM. JUR. 2D *Premises Liability* § 1, Westlaw (database updated Feb. 2025).

⁶⁰ *Id.*

⁶¹ Ardia, *supra* note 15, at 442 (“[A] number of claims, including . . . negligence . . . saw preemption rates approaching or equaling 100%”).

B. Linking Premises Liability to the Attractive Nuisance Doctrine

“Premises liability” refers to a subset of negligence liability entitling injured entrants to others’ land to money damages if the land possessor breaches the applicable duty of care.⁶² As noted above, the duty of care owed to injured entrants depends on the category to which they belong.⁶³ As also noted above, most states name three main categories: invitees, licensees, and trespassers.⁶⁴ In most states, landowners owe invitees on their land a duty of reasonable care for their protection while on the premises, whereas landowners only owe a duty to not willfully injure licensees and trespassers.⁶⁵ Possessors of land only owe trespassers a duty of care “so as not to endanger them.”⁶⁶

1. Policy of the Attractive Nuisance Doctrine: A Curious Foundation

As an exception to this anti-trespasser rule, the attractive nuisance doctrine establishes a duty of reasonable care owed to trespassing children, defining them as a separate “class” owed a duty of care different from adult trespassers.⁶⁷ The doctrine is best expressed in the Restatement (Second) of

⁶² *Premises Liability*, *supra* note 59, at § 1.

⁶³ *Shump v. First Continental-Robinwood Assocs.*, 644 N.E.2d 291, 294 (Ohio 1994).

⁶⁴ *E.g.*, *Smith v. Smith*, 563 S.W.3d 14, 17 (Ky. 2018) (citing RESTATEMENT (SECOND) OF TORTS, §§ 329–43). This Comment discusses the Restatement (Second) here for its status as the majority approach at the time of publication. The Restatement (Third) of Liability for Physical and Emotional Harms and its take on premises liability is beyond the scope of this Comment. RESTATEMENT (THIRD) OF LIABILITY FOR PHYSICAL AND EMOTIONAL HARMS, §§ 51–52 (2012). Critics have characterized the Restatement (Third) as more “novel legal policies” than “common law consensus.” Sherman Joyce, *ALI Oversteps with Expansive Restatement of Contract Law*, LAW360 (May 13, 2022, 6:23 PM), <https://www.law360.com/articles/1492905/ali-oversteps-with-expansive-restatement-of-contract-law> [<https://perma.cc/3H6K-7SD2>].

⁶⁵ *Smith*, 563 S.W.3d at 17–18 (quoting RESTATEMENT (SECOND) OF TORTS §§ 330, 332 (AM. L. INST. 1965)).

⁶⁶ RESTATEMENT (SECOND) OF TORTS, § 333. This lessened duty of care for trespassers comes not from the trespasser’s status as a wrongdoer but rather from a possessor’s reasonable expectation that people generally will not trespass on land rightfully belonging to the possessor. *Id.* cmt. b. This lessened duty is also not to be misconstrued as a privilege of the possessor to intentionally create dangerous conditions designed to cause harm to others “whom he recognizes as likely to trespass.” *Id.* cmt. d.

⁶⁷ *Id.* § 339; *Bennett v. Stanley*, 748 N.E.2d 41, 48 (Ohio 2001); *see also, e.g.*, *Estate of Zimmerman v. SEPTA*, 168 F.3d 680, 688 (3d Cir. 1999) (clarifying that attractive nuisance

Torts.⁶⁸ In order for a land possessor to be liable for harms sustained by minor trespassers, a plaintiff must demonstrate each of the following:

- (a) the place where the condition exists is one upon which the possessor knows or has reason to know that children are likely to trespass, and
- (b) the condition is one of which the possessor knows or has reason to know and which he realizes or should realize will involve an unreasonable risk of death or serious bodily harm to such children, and
- (c) the children because of their youth do not discover the condition or realize the risk involved in intermeddling with it or in coming within the area made dangerous by it, and
- (d) the utility to the possessor of maintaining the condition and the burden of eliminating the danger are slight as compared with the risk to children involved, and
- (e) the possessor fails to exercise reasonable care to eliminate the danger or otherwise to protect the children.⁶⁹

The plaintiff must first show a land possessor knew or should have known about the existence of an unreasonably dangerous condition on the possessor's land.⁷⁰ Not just knowledge of the condition's *existence*, though—a successful plaintiff must also show that the possessor expected that “children [were] likely to trespass.”⁷¹ After proving the danger posed by the artificial condition and the land possessor's knowledge of it, the plaintiff must then show the injured trespasser, due to their “youth,” either did not

doctrine is applicable to *children*, not adults with emotional disorders); *Foshee v. Consol. Rail Corp.*, 849 F.2d 657, 660 (D.C. Cir. 1988) (Wald, C.J., dissenting); *but see Colon v. Metro-North Commuter R.R.*, 242 F. Supp. 3d 65, 75–76 (D. Conn. 2017) (preserving issue of whether neurodivergent 26-year-old could be a “child” for attractive nuisance purposes).

⁶⁸ RESTATEMENT (SECOND) OF TORTS, § 339 cmt. b.

⁶⁹ *Id.*

⁷⁰ *Id.* (a)–(b). The Restatement clarifies that naturally occurring conditions and a possessor's conduct are both beyond the scope of the doctrine. *Id.* cmts. a, p.

⁷¹ *Id.* (a). The plaintiff need not show that the trespassing child's presence in the first place is owed to the “attractiveness of the condition” itself; abstract, “childish propensities to intermeddle or otherwise” are sufficient, *id.* cmt. e.

“discover . . . or realize the risk involved.”⁷² The plaintiff must then show the risk of bodily harm or death to children outweighs the utility the condition provides (if any) in the possessor’s use of the land.⁷³ If the plaintiff succeeds in proving all four requirements, the plaintiff must finally convince the jury that the land possessor failed to exercise reasonable care.⁷⁴

The point of the doctrine is thus to protect children from themselves; to incentivize land possessors to impose reasonable measures and thereby prevent children from falling victim to their own curiosity by trespassing and injuring themselves via an artificial condition.⁷⁵ The American Legal Institute clarified that the doctrine is designed to “protect children from dangers which they *do not appreciate* and not to protect them against harm resulting from their own immature recklessness in the case of known and appreciated danger.”⁷⁶ The doctrine further acknowledges some dangers, like those involving fire, water, and heights, as obvious to most free-roaming children.⁷⁷ Dangers discreet, whether natural or artificial, may still subject the land possessor to liability for child trespassers who are “too young to appreciate such dangers.”⁷⁸ As the Supreme Court of Ohio put it in its adoption of the doctrine, “[d]espite our societal changes, children are still children. They still learn through their *curiosity*. They still have developing senses of judgment. They still do not always appreciate danger. They still need protection by adults. Protecting children in a changing world requires

⁷² *Id.* cmt. c. A large body of case law spawns from this element, as attractive nuisance cases often hinge on whether the injured child could understand the danger to which they exposed themselves by trespassing. *See, e.g.,* Entergy Gulf States, Inc. v. Isom, 143 S.W.3d 486, 493 (Tex. App. 2004) (posthumously measuring a deceased thirteen-year-old as “mature” based on being good in school, active in sports, competent in driving an ATV, and generally aware of risks posed by reckless operation of an ATV).

⁷³ RESTATEMENT (SECOND) OF TORTS, § 339 cmt. n. *See, e.g.,* Stanley v. Mo. Pac. R. Co., 179 So.2d 490, 492 (La. Ct. App. 1965) (balancing the “social utility” of railroads, the difficulty of fencing off all “standing railroad vehicles,” and the “slight danger to children” to find no liability for a railroad when a six-year-old fell off an abandoned freight car).

⁷⁴ RESTATEMENT (SECOND) OF TORTS, § 339(e). This duty closely resembles the one imposed in ordinary negligence cases and is thus stricter than the “duty to refrain from willful and wanton conduct” imposed on land possessors for adult trespassers. *E.g.,* Hoesch v. Nat’l R.R. Passenger Corp., 677 A.2d 29, 32–33 (Del. 1996).

⁷⁵ *Bennett v. Stanley*, 748 N.E.2d 41, 48 (Ohio 2001).

⁷⁶ RESTATEMENT (SECOND) OF TORTS, § 339 cmt. m (emphasis added).

⁷⁷ *Id.* cmt. j.

⁷⁸ *Id.*

the common law to adapt.”⁷⁹ The motif of curiosity underpins cases involving this doctrine, the cases’ outcomes often depending on whether a trespassing child understood the danger of the artificial condition at issue.⁸⁰

2. *Trussing Attractive Nuisance Doctrine & Online “Spaces”*

Childlike curiosity, if it has led children to trespass onto real property, may also lead children to “trespass” onto internet domains, *i.e.*, children may bypass a website’s tailored admission requirements based on age or fees.⁸¹ This Comment focuses on a particularly profitable collection of domain possessors—social media companies.⁸² Social media terminology reflects real-property entry and intermeddling with conditions, but liability claims against social media companies typically fail.⁸³ As explored below, the main reason comes from the broad construction of immunity for ICSPs and internet service providers (ISPs) via Section 230.⁸⁴ Holding domain owners liable has a near-zero win rate for negligence plaintiffs.⁸⁵

Before discussing whether internet companies could or should be held liable based on an analogous attractive nuisance theory, Part III follows with a history of Section 230.

III. SECTION 230’S AUGMENTATION AND RECENT RUPTURES

Section 230 attempts to balance the interests of protecting children⁸⁶ and maintaining a First-Amendment friendly internet.⁸⁷ As a bar to liability, it

⁷⁹ *Bennett*, 748 N.E.2d at 48 (emphasis added).

⁸⁰ *See, e.g., Bonney v. Canadian Nat’l Ry. Co.*, 800 F.2d 274, 278–79 (1st Cir. 1986) (fifteen-year-old was owed no duty of care since he knew that the activity he engaged in had led to his classmate’s death eight months prior); *Harmon v. Billings Bench Water Users Ass’n*, 765 F.2d 1464, 1465–66 (9th Cir. 1985) (trial court erred by not allowing jury to consider whether five-year-old could understand danger of stepping into irrigation ditch).

⁸¹ *See Anderer, supra* note 8; *CURLEY, supra* note 8 (problematizing age limits).

⁸² Luke Barr, *Social Media Companies Prioritizing Profit over Harmful Content: Senate Report*, ABC NEWS (Nov. 16, 2022, 3:03 PM) <https://abcnews.go.com/Politics/social-media-companies-prioritizing-profit-harmful-content-senate/story?id=93360057> [<https://perma.cc/6CA9-MSUR>]. *See also supra* text accompanying note 18.

⁸³ *See Ardia, supra* note 15, at 442.

⁸⁴ 47 U.S.C. § 230(c)(1) (2018). *See infra* Part III.A for background of Section 230 and the policy underlying its immunity provisions.

⁸⁵ *Ardia, supra* note 15, at 442.

⁸⁶ *Reno v. ACLU*, 521 U.S. 844, 875 (1997).

⁸⁷ *Brown v. Ent. Merchs. Ass’n*, 564 U.S. 786, 790 (2011) (quoting *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 503 (1952)) (“And whatever the challenges of applying the

embodies the First Amendment's disfavor for imposing liability on speech.⁸⁸ Beyond the First Amendment concerns, Section 230's legislative history and caselaw reveal a hesitancy to hold internet companies liable when any users—not just children—incur injury.⁸⁹ This Part discusses why Congress passed Section 230, how courts have broadened Section 230 immunity, and how some good old, plaintiff's-bar ingenuity has worked around it.

A. *Creation and Expansion of Publisher-Based Immunity for ICSPs*

Like many modern amenities, the internet began as a military project and later became a household service by the late 1990s.⁹⁰ It developed relatively quickly.⁹¹ As is the regrettable truth with most communicative technology, the interest in rapid transmission of pornography and other lewd material explains the quickness.⁹² Observing this development, a Nebraska senator sought to regulate the internet out of concern over children accessing

Constitution to ever-advancing technology, 'the basic principles of freedom of speech and the press, like the First Amendment's command, do not vary' when a new and different medium for communication appears.”).

⁸⁸ *James v. Meow Media, Inc.*, 300 F.3d 683, 695 (6th Cir. 2002) (citing *New York Times v. Sullivan*, 376 U.S. 254, 265 (1964)).

⁸⁹ Andrew M. Sevanian, *Section 230 of the Communications Decency Act: A “Good Samaritan” Law Without the Requirement of Acting as a “Good Samaritan”*, 21 UCLA ENT. L. REV. 121, 123–26 (2014) (comparing the “sweeping,” pre-Zeran notice-based liability versus the passage of Section 230 and its role in “eradicating the . . . disincentive to self-regulation caused by [ICSP] intermediary liability”).

⁹⁰ Joseph Kershenbaum, *The Unillustrated Guide to Cyberspace*, 25-MAR VT. B.J. & L. DIG. 11, 11 (March 1999); Tony Lewis, *E-Volution*, 22-APR WYO. LAW. 6, 6 (April 1999).

⁹¹ See Shane Greenstein, *Commercialization of the Internet: The Interaction of Public Policy and Private Choice or Why Introducing the Market Worked So Well*, 1 INNOVATION POL'Y & ECON. 151, 173–74 (2000) (explaining the rapid commercial success of the internet as owed in part to the government's development of technologies and the immediate usefulness of the same technologies for commercial purposes).

⁹² Jonathan Coopersmith, *Does Your Mother Know What You Really Do? The Changing Nature and Image of Computer-Based Pornography*, 22 HIST. & TECH. 1, 1 (2006) (“Historically, pornography has tightly intertwined with the diffusion of new communication technologies, ranging from the printed book to the photograph and VCR.”).

lewd content.⁹³ The result has been an ongoing debate of the internet's role and relationship with free speech.⁹⁴

1. The Communications Decency Act and its Free-Speech Counterpart

The road to today's Section 230 began with Congress's passage of the Telecommunications Act of 1996.⁹⁵ Introduced by Senator James Exon, all but one of the Act's seven Titles had little to do with internet regulation and were drafted based on "extensive committee hearings" and reports.⁹⁶ In contrast, Title V—the Communications Decency Act of 1996 (CDA)⁹⁷—contained two sets of provisions added *after* hearings had concluded.⁹⁸

Some of Title V's last-minute additions prohibited the transmission of "obscene, lewd, lascivious, filthy, or indecent" communications on the internet.⁹⁹ These prohibitions amended 47 U.S.C. § 223 ("Section 223"), which criminalized misuses of communicative technology, like telephone harassment.¹⁰⁰ These prohibitions arose out of concern the internet would become a "red light district"¹⁰¹ of "obscene or indecent"¹⁰² and "patently offensive"¹⁰³ communications.¹⁰⁴ As the "under 18" language of Section 223

⁹³ Robert Cannon, *The Legislative History of Senator Exon's Communications Decency Act: Regulating Barbarians on the Information Superhighway*, 49 FED. COMM'NS L.J. 51, 53 (1996).

⁹⁴ See generally Abbey Stemler, *What is Section 230? An Expert on Internet Law and Regulation Explains the Legislation that Paved the Way for Facebook, Google and Twitter*, THE CONVERSATION (Aug. 2, 2021 8:38 AM), <https://theconversation.com/what-is-section-230-an-expert-on-internet-law-and-regulation-explains-the-legislation-that-paved-the-way-for-facebook-google-and-twitter-164993> [<https://perma.cc/94AQ-R44V>].

⁹⁵ Telecommunications Act of 1996, Pub. L. 104-104, tit. V, 110 Stat. 56 (1996) [hereinafter "Communications Decency Act"] (codified as amended at 47 U.S.C. §§ 223, 230).

⁹⁶ *Reno v. ACLU*, 521 U.S. 844, 858 (1997).

⁹⁷ Communications Decency Act, 110 Stat. at 133–36 (codified as amended at 47 U.S.C. §§ 223, 230).

⁹⁸ *Reno*, 521 U.S. at 858.

⁹⁹ Communications Decency Act, 110 Stat. at 133.

¹⁰⁰ 47 U.S.C. § 223.

¹⁰¹ 141 Cong. Rec. S1953 (daily ed. Feb. 1, 1995) (statement of Sen. Exon).

¹⁰² 47 U.S.C. § 223(a)(1)(B) (1996).

¹⁰³ *Id.* § 223(d)(1) (1996).

¹⁰⁴ See *id.* The statute's use of "telephone" was replaced with "telecommunications device" on February 8, 1996. Compare *id.* § 223 (1995) with *id.* § 223 (1996).

suggests, the CDA criminalized the knowing exposure of minors to obscene and indecent material.¹⁰⁵

Whereas the above provisions assign the job of internet speech regulation to the government, another set of provisions in the CDA referenced *private* regulation of similar speech.¹⁰⁶ Proposed by Representatives Christopher Cox and Ron Wyden, this latter set of provisions came from an amendment to the CDA titled “Online Family Empowerment,” a.k.a. the “Cox-Wyden Amendment.”¹⁰⁷ The provisions, *inter alia*, incentivized private self-regulation by ISPs and ICSPs, giving them “Good Samaritan” protection for good-faith efforts to remove content deemed harmful for children.¹⁰⁸ These provisions, immunizing private ISPs and ICSPs in their efforts to take down obscene, indecent, and similar material, became Section 230 as it is known today.¹⁰⁹

As a compromise (or perhaps deciding not to decide), Congress passed the CDA with both Exon’s criminal prohibitions and Cox and Wyden’s self-regulation incentives.¹¹⁰ Private and public means of regulation were passed simultaneously.¹¹¹ These alternative means of regulation coexisted only briefly, though, as civil rights plaintiffs immediately sued.¹¹² Plaintiffs argued that statutory sections containing Senator Exon’s provisions—§§ 223(a)(1) and (d)—were unconstitutionally vague; what communications were “indecent” or “patently offensive” under the First Amendment?¹¹³ A three-judge panel issued injunctions against the sections’ enforcement, and

¹⁰⁵ *Id.* § 223(a), (d) (1996).

¹⁰⁶ Communications Decency Act, 110 Stat. at 137–39. By “private,” I do not mean the faux “private” used by litigants attempting to work around “state action” and therefore Fourteenth Amendment applicability. *See, e.g.,* *New York Times v. Sullivan*, 376 U.S. 254, 265 (1964) (applying First Amendment even though the defamation case was “a civil lawsuit between private parties”). Instead, I mean “private” as in a non-governmental enforcement mechanism with private-sector funding and expertise. *See* Stephen B. Burbank et al., *Private Enforcement*, 17 LEWIS & CLARK L. REV. 637, 662 (2014).

¹⁰⁷ *Id.* *See also* *Gonzalez v. Google, LLC*, 2 F.4th 871, 940–41 (9th Cir. 2021) (Gould, J., concurring in part, dissenting in part) (citing 141 Cong. Rec. 22,044 (1996)), *vacated*, 143 S. Ct. 1191 (2023).

¹⁰⁸ Communications Decency Act, 110 Stat. at 137–39.

¹⁰⁹ *Compare id.* with 47 U.S.C. § 230.

¹¹⁰ *Gonzalez*, 2 F.4th at 941–42 (Gould, J., concurring in part, dissenting in part).

¹¹¹ *Id.* at 942.

¹¹² *Reno v. ACLU*, 521 U.S. 844, 861–62 (1997).

¹¹³ *Id.*

the Supreme Court affirmed in *Reno v. ACLU*.¹¹⁴ The Supreme Court found Section 223 (representing Exon's criminal prohibitions) to be unconstitutional as an overbroad¹¹⁵ "content-based blanket restriction on speech."¹¹⁶ *Reno* also extended a recurring theme in First Amendment jurisprudence to the internet: the government interest in protecting children from harmful materials cannot justify "unnecessarily broad suppression of speech addressed to adults."¹¹⁷

The *Reno* decision confirmed the Supreme Court's disdain for putting internet speech regulation in the government's hands, "leaving the new § 230 as the dominant force for securing decency on the Internet."¹¹⁸ Section 230's policy language derives from Cox and Wyden's Family Empowerment Amendment, stating the statute's intent "to promote the continued development of the internet and other interactive computer services and other interactive media [and] to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation."¹¹⁹ Thus, the Family Empowerment Amendment's rationale, to wit: empowering private parties to self-regulate removes the disincentive of "the people who might best help us control the Internet to do so."¹²⁰ This empowerment, in exchange for the responsibility of regulation, shields both ISPs and ICSPs from publisher liability incurred by their self-regulatory acts and omissions.¹²¹ Guided by this private interest, courts have broadly construed the definition of "interactive computer services providers or users" and Section 230(c)(1)'s aegis ever since.¹²²

In sum, the CDA contained both Sections 223 and 230 as drafted, though Section 223, embodying the CDA's introductory purpose, has been

¹¹⁴ *Id.* at 861–64.

¹¹⁵ *Reno*, 521 U.S. at 879.

¹¹⁶ *Id.* at 868.

¹¹⁷ *Id.* at 875; *see also* Denver Area Educ. Telecomms. Consortium, Inc. v. FCC, 518 U.S. 727, 759 (1996) (collecting cases in support of this premise). For discussion on the distinct issues raised by imposing tort liability on speech, *see infra* at Part V.A.1.

¹¹⁸ *Gonzalez*, at 942 (Gould, J., concurring in part, dissenting in part).

¹¹⁹ 47 U.S.C. § 230(b).

¹²⁰ *Gonzalez*, at 941 (Gould, J., concurring in part, dissenting in part) (citing 141 Cong. Rec. 22,045 (statement of Rep. Cox)).

¹²¹ 47 U.S.C. § 230(f)(2).

¹²² *See, e.g., Klayman v. Zuckerberg*, 753 F.3d 1354, 1357–58 (D.C. Cir. 2014) (Facebook is an "interactive computer service" and Mark Zuckerberg is a "provider" thereof).

repeatedly found unconstitutional under the First Amendment.¹²³ Section 230 thus remains as a First-Amendment-conscious counterpart of sorts to Section 223, argued by some to have obscured the CDA's original purpose of protecting children from online obscenity.¹²⁴ The statute does contain a mandate for ICSPs to provide notice of parental controls via Section 230(d),¹²⁵ though this Comment focuses on the immunity provisions of Section 230(c). Section 230(c)(1) mandates no ISP or ICSP shall be treated as a publisher for liability purposes; 230(c)(2) protects "Good Samaritan" ISPs or ICSPs who, in good faith, attempt to remove harmful content.¹²⁶

2. *Judicial Augmentation of Section 230's Immunity Provision*

Modern understandings of Section 230's vast immunity began with a suit brought against America Online (AOL).¹²⁷ In *Zeran v. America Online, Inc.*,¹²⁸ an unidentified third party provided plaintiff Kenneth Zeran's phone number under a false advertisement for shirts, bumper stickers, and keychains featuring "offensive and tasteless slogans" regarding the 1995 Oklahoma City bombing.¹²⁹ After being subjected to "an abusive phone call . . . every two minutes" and having his reputation tarnished, Zeran sued AOL for negligence, arguing AOL (the alleged ICSP) negligently failed to remove the defamatory advertisements linked to Zeran from one of the ICSP's hosted websites.¹³⁰ AOL asserted Section 230(c)(1) as a defense, arguing it could not be treated as a "publisher" for purposes of liability for failing to timely remove the ad.¹³¹

¹²³ See *Reno v. ACLU*, 521 U.S. 844, 885 (1997); *U.S. v. Pops*, 187 F.3d 672, 679 (D.C. Cir. 1999) (finding 47 U.S.C. § 223(a)(1)(C) unconstitutional as applied); *United States v. Weiss*, 475 F. Supp. 3d 1015 (N.D. Cal. 2020) (finding 47 U.S.C. § 223 (a)(1)(C) unconstitutional as applied), *rev'd on other grounds*, 2021 U.S. App. LEXIS 38136 (9th Cir. Dec. 27, 2021).

¹²⁴ E.g., *Force v. Facebook, Inc.*, 934 F.3d 53, 77 (2d Cir. 2019) (Katzmann, C.J., concurring in part, dissenting in part) ("[W]e 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.").

¹²⁵ 47 U.S.C. § 230(d).

¹²⁶ Compare 47 U.S.C. § 230(c)(1) with *id.* § 230(c)(2).

¹²⁷ *Zeran v. America Online, Inc.*, 129 F.3d 327 (4th Cir. 1997), *cert. denied*, 524 U.S. 937 (1998).

¹²⁸ *Id.*

¹²⁹ *Id.* at 329.

¹³⁰ *Id.* at 328–29.

¹³¹ *Id.* at 329–30.

After *Zeran*'s appeal from a verdict for AOL, the Court of Appeals for the Fourth Circuit unanimously held that Section 230 ought to be construed as granting ICSPs "federal immunity to *any* cause of action that would make . . . [them] liable for information originating with a third-party user of the service."¹³² Citing Congress's intent to preclude "tort-based lawsuits" as threatening First Amendment expression on the internet, the *Zeran* court concluded with remarks about the "practical implications of notice liability," posing hypotheticals about the need for "rapid investigation" into every received notice of "a potentially defamatory statement."¹³³ The *Zeran* court feared ICSPs having to investigate every instance in which an ICSP received notice of defamatory material on its website.¹³⁴ Investigating every notice of a "potentially defamatory statement," the *Zeran* court assumed, would be cost-prohibitive, therefore hindering the "robust nature of Internet communication"—an express goal of Section 230 as drafted.¹³⁵

The *Zeran* court also acknowledged Section 230 as a direct response to a New York court's judgment for defamed plaintiffs against a different domain host in which the host censored some inappropriate posts but not others targeting the plaintiffs, reasoning Section 230 served to "remove the disincentives" to self-regulation.¹³⁶ Courts have since applied Section 230 as a broad, "if not blanket immunity," creating a false dichotomy of sorts between ICSPs facing strict liability versus none whatsoever.¹³⁷

Described as the "fountainhead" of authority on Section 230, *Zeran* is the case for the proposition that ICSPs cannot be held liable for third-party content.¹³⁸ Commentators since *Zeran* have concluded the *Zeran* court's preference for broad construction of Section 230, in accordance with First-Amendment and commercial interests, has developed a liability-limitation clause¹³⁹ "now being used against the very class [(children)] the statute

¹³² *Id.*

¹³³ *Id.* at 330, 333.

¹³⁴ *Id.* at 333.

¹³⁵ Compare *id.* with 47 U.S.C. § 230(b).

¹³⁶ *Id.* at 331 (citing *Stratton Oakmont, Inc. v. Prodigy Servs. Co.*, No. 31063/94, 1995 WL 323710 (N.Y. Sup. Ct. May 24, 1995)).

¹³⁷ See Sevanian, *supra* note 89; Benjamin Volpe, *From Innovation to Abuse: Does the Internet Still Need Section 230 Immunity?*, 68 CATH. U. L. REV. 597, 618 (2019).

¹³⁸ Chi. Laws.' Comm'n for Civ. Rts. Under L., Inc. v. Craigslist, Inc., 461 F. Supp. 2d 681, 688 (N.D. Ill. 2006), *aff'd*, 519 F.3d 666 (7th Cir. 2008).

¹³⁹ *Id.* § 230(c)(1).

intended to protect.”¹⁴⁰ Broad application of 230(c)(1)’s liability bar has resulted in verdicts in favor of ISPs and ICSPs across a variety of factual circumstances.¹⁴¹ For example, succeeding on privacy tort claims against social media companies and other ICSPs has proven to be nearly impossible.¹⁴² Further, social media companies have avoided negligence liability for failing to remove terrorist content posted on their platforms.¹⁴³

Considered most poignant for this Comment are the suits alleging ICSPs facilitating or benefiting from use of their platforms for human trafficking.¹⁴⁴ The poignance of this line of cases comes from the contrast between the results (dismissing claims brought by trafficked, *minor* plaintiffs) and the minor-protective interest behind Section 230’s parent act, the CDA.¹⁴⁵

Even Section 230’s immunity provisions, however, have some exceptions. As the next subpart discusses, a few legislative and judicial workarounds have “cracked” Section 230’s broadly construed immunity.

¹⁴⁰ Peter Polack, Note, *Bad Actors and the Communications Decency Act of 1996: Lessons Learned from Our Nation’s Battle with Online Human Trafficking*, 37 CARDOZO ARTS & ENT. L.J. 767, 793 (2019).

¹⁴¹ Ardia, *supra* note 15, at 442 (“[A] number of claims, including *products liability*, *disclosure of trade secrets*, *negligence*, and *nuisance* claims, saw preemption rates approaching or equaling 100%.”) (emphasis added).

¹⁴² Rustad & Koenig, *supra* note 46, at 346.

¹⁴³ See, e.g., *Force v. Facebook*, 934 F.3d 53 (2d Cir. 2019); *Gonzalez v. Google LLC*, 2 F.4th 871 (9th Cir. 2021), *vacated*, 143 S. Ct. 1191 (2023); *Fields v. Twitter, Inc.*, 217 F. Supp. 3d 1116 (N.D. Cal. 2016), *aff’d*, 881 F.3d 739 (9th Cir. 2018).

¹⁴⁴ See, e.g., *Doe v. Twitter, Inc.*, 555 F. Supp. 3d 889 (N.D. Cal. 2021), *abrogated in part by* *Doe v. Reddit, Inc.*, 51 F.4th 1137 (9th Cir. 2022), *cert. denied*, 143 S. Ct. 2560 (May 30, 2023); *Doe v. Kik Interactive, Inc.*, 482 F. Supp. 3d 1242 (S.D. Fla. 2020). *Doe ex rel. Roe v. Backpage.com, LLC*, 104 F. Supp. 3d 149 (D. Mass. 2015), *aff’d*, 817 F.3d 12 (1st Cir. 2016); *L.H. v. Marriott Intl., Inc.*, 604 F. Supp. 3d 1346 (S.D. Fla. May 23, 2022); *Doe 1–6 v. Reddit, Inc.*, 51 F.4th 1137 (9th Cir. 2022), *cert. denied*, 143 S. Ct. 2560 (May 30, 2023). Of these cases, only the First Circuit’s opinion in *Backpage* discusses Section 230’s purpose, noting the importance of “broad construction” in preventing chilling effects on speech and permitting “continued development” of the internet without government interference. *Backpage.com*, 817 F.3d at 18–19 (citing 47 U.S.C. § 230(a)(4), (b)(2)). Before doing so, the *Backpage* court described the case as “hard” in that, despite the plaintiff’s circumstances “evok[ing] outrage,” the law required a denial of relief. *Id.* at 15.

¹⁴⁵ *Gonzalez*, 2 F.4th at 941 (2021) (Gould, J., concurring in part, dissenting in part) (quoting 141 Cong. Rec. 22,045 (statement of Rep. Wyden)).

B. Cracks in Section 230's Bulwark, Attempted and Actual

Though the interests underlying broad application of immunity may have had bipartisan support in *Zeran's* heyday, the breadth of Section 230 has since drawn bipartisan criticism.¹⁴⁶ Legislators at the state and federal levels have sought—with various success—means to work around Section 230 or otherwise provide ammunition for children interacting with ICSPs.¹⁴⁷ In addition to legislative efforts, inventive plaintiffs have employed various tort theories to work around Section 230(c)(1)'s bar to publisher liability.¹⁴⁸

1. Congress's Responses to Section 230's Augmentation

Given cases in which ICSPs have avoided liability for content contributing to terrorism and sex trafficking, Congress has attempted to limit the applicability of Section 230(c)(1).¹⁴⁹ For example, a law to prevent application of the immunity to internet companies profiteering off of sex trafficking passed through Congress in 2018.¹⁵⁰ The law, known as the Allow States and Victims to Fight Online Sex Trafficking Act of 2017 (FOSTA),¹⁵¹ added some clarifications to § 230(e)(5).¹⁵² § 230(c)(1), per these additions, was not designed to impair claims brought under Title 18 of the U.S. Code against entities facilitating human trafficking.¹⁵³

¹⁴⁶ Stemler, *supra* note 94 (“Section 230 is disliked on both sides of the aisle. Democrats argue that Section 230 allows platforms to get away with too much, particularly with regard to misinformation . . . Republicans, by contrast, argue that platforms censor user content to Republicans’ political disadvantage.”). See also Gregory M. Dickinson, *Beyond Social Media Analogues*, 99 N.Y.U. L. REV. ONLINE 109, 112–14 (2024).

¹⁴⁷ E.g., Allow States and Victims to Fight Online Sex Trafficking Act of 2017, Pub. L. No. 115-164, 132 Stat. 1253 (2018) [hereinafter “FOSTA”]; Contreras, *supra* note 10; Metz & Ortutay, *supra* note 10.

¹⁴⁸ See discussion *infra* Part Inspecting Recent Cracks in the 230's Bulwark III.B.2.

¹⁴⁹ FOSTA, 132 Stat. at 1253 (“[S]ection 230 . . . was never intended to provide legal protection to . . . websites that facilitate traffickers in advertising the sale of unlawful sex acts with sex trafficking victims . . .”).

¹⁵⁰ *Id.*

¹⁵¹ Allow States and Victims to Fight Online Sex Trafficking Act of 2017, Pub. L. No. 115-164, 132 Stat. 1253 (2018).

¹⁵² 47 U.S.C. § 230(e)(5)(A)–(C).

¹⁵³ *Id.*

Despite this intent, courts have since interpreted FOSTA as providing little to no limit to Section 230 immunity as presently understood.¹⁵⁴ For example, in *Does 1–6 v. Reddit, Inc.*, the Court of Appeals for the Ninth Circuit ruled against plaintiffs who alleged that Reddit failed to remove sexual depictions of themselves as minors despite “hundreds” of reports.¹⁵⁵ Instead of interpreting FOSTA as a means of abrogating Section 230 immunity in such cases, the court of appeals narrowly construed the law as a mere *mens rea* requirement.¹⁵⁶ The court of appeals found no liability for Reddit as an ICSP due to the plaintiffs’ failure to allege that Reddit *knowingly* assisted or benefitted from trafficking.¹⁵⁷ The court of appeals also reasoned that the combination of Section 230(e)’s plain language and the Trafficking Victims Protection Reauthorization Act (TVPRA) implied Reddit could only be liable “if its own conduct—not a third party’s—violate[d the TVPRA].”¹⁵⁸ In the court’s view, Reddit did not “knowingly” benefit from nor “actually” engage in trafficking; all they did was publish user content.¹⁵⁹ Reddit’s conduct thus amounted to mere publication (*i.e.*, within 230(c)(1)’s immunity), so the court of appeals dismissed the complaints.¹⁶⁰

Given the recency of *Reddit*, it remains to be seen whether FOSTA’s interpretation as a *mens rea* requirement instead of a lowering of the Section 230(c)(1) bar in circumstances indicating sex trafficking will stand.¹⁶¹ In the meantime, *Reddit* resembles a preservation of the *Zeran*-era norm of broad immunity under Section 230(c)(1).¹⁶²

¹⁵⁴ *Does 1–6 v. Reddit, Inc.*, 51 F.4th 1137, 1145–46 (9th Cir. 2022), *cert. denied*, 143 S. Ct. 2560 (May 30, 2023).

¹⁵⁵ *Id.* at 1139. This case and many others on internet liability arise from the Court of Appeals for the Ninth Circuit. This is due, in part, to the Ninth Circuit’s track record of qualifying Section 230 immunity. Eric Weslander, Comment, *Murky “Development”: How the Ninth Circuit Exposed Ambiguity Within the Communications Decency Act, and Why Internet Publishers Should Worry* [Fair Housing Council of San Fernando Valley v. Roommates.Com, LLC, 521 F.3d 1157 (9th Cir. 2008)], 48 WASHBURN L.J. 267, 282 (2008).

¹⁵⁶ *Reddit, Inc.*, 51 F.4th at 1144–45.

¹⁵⁷ *Id.* at 1145.

¹⁵⁸ *Id.* at 1141.

¹⁵⁹ *Id.* at 1145.

¹⁶⁰ *Id.* at 1142, 1146.

¹⁶¹ See Jill Steinberg & Kelly McGlynn, *Section 230 in 2022: The Increasing Responsibility of Online Platform Hosts to Address Human Trafficking and Child Exploitation*, 50 RUTGERS L. REC. 31, 53–58 (2022).

¹⁶² *Id.* at 55

This is not to suggest “cracks” in Section 230 do not exist and are beyond a court’s interpretation, however.¹⁶³ The next subpart puts recent “cracks” in Section 230’s bulwark into two main categories of case law: “publication plus” and products liability.

2. *Inspecting Recent Cracks in the 230’s Bulwark*

Perhaps not all roads lead to Rome.¹⁶⁴ The wall of Section 230 is beginning to crack.¹⁶⁵ A handful of plaintiffs have seen creative success against ICSPs, including social media giants, on the issue of liability.¹⁶⁶ This Comment focuses on cases treating domain owners as something other than “publishers;” as put by the Court of Appeals for the Ninth Circuit, “what matters is whether the cause of action inherently . . . treat[s] the [ICSP] as the ‘publisher or speaker’ of content provided by another.”¹⁶⁷ If a plaintiff alleges liability derived from the domain owner’s status as something other than a publisher, Section 230 cracks open.¹⁶⁸ One of two main characterizations have seen recent treatment: (1) an ICSP doing more than mere publication (the “publication plus” approach)¹⁶⁹ or (2) an ICSP, alleged to be a product or manufacturer thereof, negligently designing or failing to warn about the platform’s application (the “products liability” approach).¹⁷⁰

a. *“Publication Plus” and Gonzalez: Algorithms as Anchor Bolts in Section 230 Litigation*

An initial disclaimer: plaintiffs under this approach have seen success insofar as they have created dissent among federal judges.¹⁷¹ Plaintiffs have

¹⁶³ *Id.* at 51.

¹⁶⁴ Liz Stinson, *Here Are All the Roads that Lead to Rome*, WIRED (Dec. 14, 2015, 7:00 AM), <https://www.wired.com/2015/12/here-are-all-the-roads-that-lead-to-rome/> [<https://perma.cc/6MQN-WCT2>]. This citation covers the both uses of the phrase, idiomatic and literal (just in case).

¹⁶⁵ See Luthi, *supra* note 16; Steinberg & McGlynn, *supra* note 161, at 51.

¹⁶⁶ See, e.g., *Gonzalez v. Google, LLC*, 2 F.4th 871, 952 (9th Cir. 2021) (Gould, J., concurring in part, dissenting in part) (representing the “publication plus” approach), *vacated*, 143 S. Ct. 1191 (2023); *Lemmon v. Snap, Inc.*, 995 F.3d 1085, 1092 (9th Cir. 2021); Transfer Order I, *supra* note 6, at 1378 (representing the products liability approach).

¹⁶⁷ *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1101–02 (9th Cir. 2009).

¹⁶⁸ *Id.* at 1102.

¹⁶⁹ *Gonzalez*, 2 F.4th at 952 (Gould, J., concurring in part, dissenting in part).

¹⁷⁰ See, e.g., *Lemmon*, 995 F.3d at 1092 (2021); Transfer Order I, *supra* note 6, at 1378.

¹⁷¹ See generally *Fair Hous. Council of San Fernando Valley v. Roommates.Com, LLC*, 521 F.3d 1157, 1176 (9th Cir. 2008) (McKeown, J., concurring in part and dissenting in part);

not yet been able to secure verdicts out of this theory yet, but it has arguably led to the Supreme Court's recent consideration of Section 230 and the First Amendment in back-to-back grants of certiorari.¹⁷²

Section 230 decrees ICSPs (social media platforms as owners of “domains,” for the sake of this Comment) are not to be considered “publisher[s] or speaker[s] of any information provided by *another* information content provider” for liability purposes.¹⁷³ As put by the Court of Appeals for the Second Circuit, domain owners are immune under Section 230 if they (1) are an ICSP, (2) the claim against them is based on information provided by another party, and (3) the claim treats the domain owner as the publisher or speaker of that information.¹⁷⁴ This means domain owners cannot be liable as publishers for information posted on their platform by third parties.¹⁷⁵ This comports with Section 230's express policy rationale of allowing the internet to flourish “with a minimum of government regulation.”¹⁷⁶ So long as domain owners refrain from creating or developing the content complained of (and thereby assume publisher status), they retain immunity.¹⁷⁷

What if the domain owner *does* create or develop content of its own, though? ICSPs are careful to not accidentally do so in order to maintain their immunity under Section 230(c)(1).¹⁷⁸ Questions of content creation arise, however, when many ICSPs' business models hinge on manipulating third party data as a means of generating more ad revenue.¹⁷⁹ ICSPs have implemented sophisticated tools (like algorithms) to control data and, hence,

Force v. Facebook, Inc., 934 F.3d 53, 76 (2d Cir. 2019) (Katzmann, C.J., concurring in part, dissenting in part); *Gonzalez*, 2 F.4th at 919 (Gould, J., concurring in part, dissenting in part).

¹⁷² *Gonzalez*, 143 S. Ct. 1191, 1192 (2023); *Twitter, Inc. v. Taamneh*, 143 S. Ct. 1206, 1217 (2023); *see also* *Murthy v. Missouri*, 144 S. Ct. 1972 (2024); *Moody v. NetChoice, LLC*, 144 S. Ct. 2383 (2024).

¹⁷³ 47 U.S.C. § 230(c)(1) (emphasis added).

¹⁷⁴ *FTC v. LeadClick Media, LLC*, 838 F.3d 158, 173 (2d Cir. 2016).

¹⁷⁵ *Id.*; *Poole v. Tumblr, Inc.*, 404 F. Supp. 3d 637, 642 (D. Conn. 2019).

¹⁷⁶ 47 U.S.C. § 230(a)(4). *See* discussion *supra* at Part III.A.1.

¹⁷⁷ *Fair Hous. Council of San Fernando Valley v. Roommates.Com, LLC*, 521 F.3d 1157, 1162 (9th Cir. 2008) (citing 47 U.S.C. § 230(f)(3)).

¹⁷⁸ *Steinberg & McGlynn*, *supra* note 161, at 58 (citing *Roommates.Com*, 521 F.3d at 1169–70).

¹⁷⁹ *Gonzalez v. Google, Inc.*, 282 F. Supp. 3d 1150, 1155 (N.D. Cal. 2017) (citations omitted) (“Google targets ads to the viewer based upon algorithms that analyze and use data about the ads, the user, and the video posted.”).

what each user sees.¹⁸⁰ Emerging as a commercial tool long after Section 230's passage and the *Zeran* decision, algorithms may or may not resemble mere means of organizing information (a traditional, publisher job) or something more (accomplishing functions beyond that of a publisher and therefore falling outside of 230(c)(1) immunity).¹⁸¹

Federal judges have split on whether algorithms resemble “neutral tools” which merely reorganize and structure third parties’ information or something more.¹⁸² An early example of this distinction came from *Carafano v. Metrosplash.com*: a case involving a defamatory dating profile made by a third party portraying a celebrity plaintiff as unchaste.¹⁸³ At issue was whether the dating website could be liable for its match-making feature, *i.e.*, whether matching profiles based on user inputs constituted development of the defamatory content.¹⁸⁴ The *Carafano* court found 230 immunity for the domain owner on the ground that match-making, less than content development, resembled more of a means of usefully *structuring*, rather than *publishing*, third-party information.¹⁸⁵

The Court of Appeals for the Ninth Circuit expanded on the “neutral tools” approach from *Carafano* in the 2008 *Roommates.Com* case.¹⁸⁶ Housing councils sued Roommates.Com for violations of the Federal

¹⁸⁰ *Gonzalez v. Google, LLC*, 2 F.4th 871, 881 (9th Cir. 2021) (“Google uses computer algorithms to match and suggest content to users based upon their viewing history.”), *vacated*, 143 S. Ct. 1191 (2023).

¹⁸¹ See Transcript of Oral Argument at 10–11, *Gonzalez v. Google, LLC*, 598 U.S. 617 (2023) (No. 21-1333); *Twitter v. Taamneh*, 143 S. Ct. 1206, 1226–27 (2023) (concluding that algorithms are merely part of a social media platform’s “infrastructure” and therefore falling short of “active, substantial assistance” required to find aiding & abetting under the Antiterrorism Act). *But see* *Moody v. NetChoice, LLC*, 144 S. Ct. 2383, 2403–05 (2024) (equating social media platforms’ use of algorithms to editors’, cable operators’, and parade organizers’ “curation” of “a distinctive expressive offering” of posts, suggesting publication, *i.e.*, First Amendment protected activity) and *id.* at 2410 (Barrett, J., concurring) (suggesting that First Amendment protection may depend more on *how* the platform uses the algorithm than whether the platform uses an algorithm at all).

¹⁸² *Roommates.Com*, 521 F.3d at 1172 (citing *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119, 1124 (9th Cir. 2003)).

¹⁸³ *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119, 1121 (9th Cir. 2003).

¹⁸⁴ *Id.* at 1124–25.

¹⁸⁵ *Id.* at 1125.

¹⁸⁶ *Roommates.Com*, 521 F.3d at 1172 (citing *Carafano*, 339 F.3d at 1124 (9th Cir. 2003)).

Housing Act (FHA) and similar state anti-discrimination laws.¹⁸⁷ The councils claimed the website was engaging in unlawful housing discrimination, citing the website's required disclosures of users' sex, sexual orientation, and parental status.¹⁸⁸ The court of appeals found the required disclosures to be more than mere publication and closer to content creation contributive to the "alleged illegality"—housing discrimination.¹⁸⁹ The court of appeals distinguished *Carafano*, clarifying that mere classification of a user's given identities (editorializing) was not why the domain owner could be liable.¹⁹⁰ Liability attached to the domain owner's "aggressive use" of identities elicited by "developing . . . discriminatory questions, discriminatory answers and [a] discriminatory search mechanism."¹⁹¹ Housing discrimination (*using* the information) was the website's tort, not merely editing the information (as this would be less than creation).¹⁹²

Thus, *Roommates.Com* resulted in liability for a domain owner, despite Section 230, because the website was sufficiently involved in the *creation* of illegally discriminatory content.¹⁹³ At this point, federal courts had to begin addressing algorithms, defined as "a precisely defined set of mathematical or logical operations for the performance of a particular task."¹⁹⁴ While courts have acknowledged algorithms are "developed by programmers" who work for domain owners such as Meta, the question remains as to whether algorithms resemble mere means of organizing content (publisher activity with immunity) or developing content (not publisher activity, not immune).¹⁹⁵

¹⁸⁷ *Id.* at 1162.

¹⁸⁸ *Id.* at 1164.

¹⁸⁹ *Id.* at 1169. *See also* Chi. Laws.' Comm'n for Civ. Rts. Under L., Inc. v. Craigslist, Inc., 519 F.3d 666 (7th Cir. 2008) (finding Craigslist to be liable as more than just a publisher in posting discriminatory advertisements in violation of the Fair Housing Act).

¹⁹⁰ *Id.* at 1171–72; *cf.* *Moody v. NetChoice, LLC*, 144 S. Ct. 2383, 2400 (2024) ("So too we have held, when applying that principle, that expressive activity includes presenting a curated compilation of speech originally created by others.").

¹⁹¹ *Roommates.Com* at 1171–72.

¹⁹² *Id.*

¹⁹³ *Id.* at 1169–70.

¹⁹⁴ *Force v. Facebook, Inc.*, 934 F.3d 53, 58 (2d Cir. 2019) (citing Oxford English Dictionary (3d ed. 2012)).

¹⁹⁵ *Id.* at 58; *see also* Steinberg & McGlynn, *supra* note 161, at 71–72. The Supreme Court addressed this issue in *Moody v. NetChoice*, though the Justices disagreed somewhat on what algorithm use meant for First Amendment protection. *Compare Moody* at 2403–05 (describing social media platforms' use of algorithms as editorial and therefore deserving of

The Court of Appeals for the Second Circuit addressed algorithms in *Force v. Facebook*.¹⁹⁶ The *Force* plaintiffs attempted to hold Facebook liable under the Anti-Terrorism Act (ATA), a federal law that created a cause of action for victims of terrorist attacks to sue those entities materially contributing to the perpetrator(s).¹⁹⁷ At issue was whether Facebook's algorithmic suggestion of terrorist content to members of Hamas "materially contributed" to the terrorist organization's efforts.¹⁹⁸ The court of appeals found, 2–1, that using an algorithm did not constitute content creation sufficient to forfeit 230 immunity.¹⁹⁹ The majority reasoned that use of an algorithm constituted merely "arranging and displaying others' content," even if the content was not actively sought by users.²⁰⁰ Judge Katzmann, dissenting and arguing Facebook essentially published the Hamas content via use of its algorithm, posed the following hypothetical:

Suppose that you are a published author. One day, an acquaintance calls. "I've been reading over everything you've ever published," he informs you. "I've also been looking at everything you've ever said on the Internet. I've done the same for this other author. You two have very similar interests; I think you'd get along." The acquaintance then gives you the other author's contact information and photo, along with a link to all her published works. He calls back three more times over the next week with more names of writers you should get to know.

First Amendment protection) *with id.* at 2410 (Barrett, J., concurring) (suggesting that First Amendment protection may depend more on how the platform uses the algorithm than whether the platform uses an algorithm at all) *and id.* at 2411 (Jackson, J., concurring in part and in the judgment) (suggesting characterization of platforms' use of algorithms as premature, given the facial challenge) *and id.* at 2412 (Thomas, J., concurring in the judgment) (same) *and id.* at 2422 (Alito, J., concurring in the judgment) (same).

¹⁹⁶ *Force*, 934 F.3d at 57.

¹⁹⁷ 18 U.S.C. § 2333(a) (2018). The *Force* plaintiffs also argued the more recent Justice Against Sponsors of Terrorism Act, Pub. L. 114-222, 130 Stat. 852 (2016), as an enhancement to the civil liability creation statute, "impliedly narrowed or repealed Section 230(c)(1)." *Force*, 934 F.3d at 62.

¹⁹⁸ *Force*, 934 F.3d at 57, 68.

¹⁹⁹ *Id.* at 70.

²⁰⁰ *Id.* at 70 (citing *Marshall's Locksmith Serv. Inc. v. Google, LLC*, 925 F.3d 1263, 1269–71 (D.C. Cir. 2019)).

Now, you might say your acquaintance fancies himself a matchmaker. But would you say he's acting as the publisher of the other authors' work?²⁰¹

The hypothetical highlights the commonsense appeal in concluding “publisher” cannot possibly extend to Facebook when it *creates* new “connections” and *develops* “new social networks.”²⁰² In the dissent’s view, to call the above-referenced acquaintance a “publisher” “strains the English language” and further strays from Congress’s intent in passing Section 230.²⁰³ Chief Judge Katzmman also highlighted the contradiction between the law’s supposed purpose and the result reached by the *Force* majority.²⁰⁴ A law passed with the intent of incentivizing domain owners to “shield minors from obscene material” would now be understood as immunizing the same domain owners “allegedly connecting terrorists to one another.”²⁰⁵

The Court of Appeals for the Ninth Circuit reached a strikingly similar split in *Gonzalez* on strikingly similar facts.²⁰⁶ In that case, next of kin sued Google, Twitter, and Facebook under the ATA, just like in *Force*.²⁰⁷ Plaintiffs claimed the companies “provided material support” to ISIS by maintaining algorithm-infused platforms on which ISIS recruited members and issued threats.²⁰⁸ Plaintiffs argued *a la Force* that Google, by doing “more than merely republish[ing] content created by third parties,” developed the ISIS content, thereby providing material support to ISIS.²⁰⁹ The “developed” allegation was particularly important; not only did it implicate the platforms under the ATA,²¹⁰ but also it implied the platforms did more than publish third-party content, hinting at 230(c)(1) immunity.²¹¹

²⁰¹ *Id.* at 76 (Katzmann, C.J., concurring in part and dissenting in part).

²⁰² *Id.* at 77.

²⁰³ *Id.* at 76–77.

²⁰⁴ *Id.* at 77.

²⁰⁵ *Id.* at 77. The “law” being the Communications Decency Act of 1996, or, at least, Senator Exon’s provisions thereof. *See* discussion *supra* at Part III.A.1.

²⁰⁶ *See generally* *Gonzalez v. Google, LLC*, 2 F.4th 871 (9th Cir. 2021), *vacated*, 143 S. Ct. 1191 (2023).

²⁰⁷ *Id.* at 880; *Force*, 934 F.3d at 62.

²⁰⁸ *Gonzalez* at 881–82.

²⁰⁹ *Id.* at 892.

²¹⁰ 18 U.S.C. § 2333 (2018). This is the same civil liability statute employed in *Force*, 859 F.3d at 62.

²¹¹ *Gonzalez*, 2 F.4th at 892; 47 U.S.C. § 230(c)(1).

The Ninth Circuit Court of Appeals, 2–1, found algorithm use—suggesting content to users—was less than a “material contribution” to the terrorisms, meaning the platforms retained Section 230 immunity.²¹² The majority also cited to another binding case which, by categorizing an algorithm as one of a website’s many “features and functions,” found algorithms to be “tools meant to facilitate the communication and content of others” rather than “content in and of themselves.”²¹³

Two concurrences joined this majority holding, both of which viewed the result as abandoning Section 230’s original intent.²¹⁴ Judge Berzon, with language reminiscent of Judge Katzmman’s dissent in *Force*, noted that “the actions of the social network algorithms . . . are more analogous to the actions of a direct marketer, matchmaker, or recruiter than to those of a publisher” and thus “well outside the scope of traditional publication.”²¹⁵ Judge Gould, dissenting as to immunity, reasoned 230(c)(1)’s bar should not extend to domain owners “for serious harms knowingly caused by their conduct,” comparing the social media company to a product manufacturer.²¹⁶ Judge Gould also agreed with the *Force* dissent, reasoning that an algorithm represents affirmative development of content, *i.e.*, more than mere publication.²¹⁷ Judge Gould concluded by suggesting the Supreme Court take up the question as to 230 immunity’s scope, given the “rising chorus of judicial voices cautioning against an overbroad reading of the scope of Section 230.”²¹⁸

And so, the *Gonzalez* case made its way to oral argument before the Supreme Court.²¹⁹ The Justices spent almost three hours attempting to

²¹² *Gonzalez* at 892–93.

²¹³ *Id.* at 894 (citing *Dyroff v. Ultimate Software Grp., Inc.*, 934 F.3d 1093, 1098 (9th Cir. 2019)).

²¹⁴ *See generally id.* at 913–18 (Berzon, J., concurring); *id.* at 918–52 (Gould, J., concurring in part, dissenting in part).

²¹⁵ *Id.* at 914 (Berzon, J., concurring). Judge Berzon justified his reluctant joining of the majority opinion over Gould’s dissent by pointing out that the Ninth Circuit’s precedent, including *Dyroff* and *Roommates.Com*, was mandatory authority and therefore had to govern the *Gonzalez* case, *Force*’s dissent’s persuasiveness notwithstanding. *Id.* at 915–18.

²¹⁶ *Id.* at 919 (Gould, J., concurring in part and dissenting in part).

²¹⁷ *Id.* at 920–21 (Gould, J., concurring in part and dissenting in part).

²¹⁸ *Id.* at 925 n.9 (Gould, J., concurring in part and dissenting in part) (citing *Malwarebytes, Inc. v. Enigma Software Grp. USA, LLC*, 141 S. Ct. 13 (2020) (Thomas, J., statement regarding denial of certiorari); *F.T.C. v. Accusearch Inc.*, 570 F.3d 1187, 1204 (10th Cir. 2009) (Tymkovich, J., concurring)).

²¹⁹ Transcript of Oral Argument, *supra* note 181, at 1.

unpack Section 230 as, in the words Justice Elena Kagan, a “pre-algorithm statute” in a “post-algorithm world.”²²⁰ This tension served as only one of many sources of the Court’s confusion; out of that confusion came hesitation.²²¹ Some of the Justices were hesitant to rule *contra* Congress’s intent as expressed in Section 230.²²² A few Justices also remained confused as to whether algorithms truly represent neutral recommendations (implying neutrality would keep 230(c)(1) immunity intact).²²³ It remains difficult to say exactly how algorithmic neutrality, legislative intent (today versus at the CDA’s passage), and effects of the decision on future litigation will affect the Court’s application of Section 230.²²⁴

While it remains unclear as to what must be shown to lose Section 230 immunity under the “publication plus” approach, the next subpart reviews a category of cases representative of another means of working immunity.

²²⁰ Transcript of Oral Argument, *supra* note 181, at 9.

²²¹ Transcript of Oral Argument, *supra* note 181, at 34 (statement of Justice Alito) (“I’m afraid I’m completely confused by whatever argument you’re making at the present time.”). *See also id.* at 45–46 (statement of Justice Kagan) (“[T]here is a lot of uncertainty about [accepting algorithms as creating liability], in part, just because of the difficulty of drawing lines in this area and just because . . . once we go with you, all of a sudden we’re finding that Google isn’t protected.”).

²²² *See, e.g.*, Transcript of Oral Argument, *supra* note 181, at 46 (statement of Justice Kagan) (“And maybe Congress should want that system, but isn’t that something for Congress to do, not the Court?”); *id.* at 55 (statement of Justice Kavanaugh) (“[Problems alleged to follow from limiting 230 immunity] are serious concerns and concerns that Congress, if it were to take a look at this and try to fashion something along the lines of what you’re saying, could account for. We are not equipped to account for that.”).

²²³ *E.g.*, Transcript of Oral Argument, *supra* note 181, at 32 (statement of Justice Thomas) (“And I don’t understand how a neutral suggestion about something that you’ve expressed an interest in is aiding and abetting. I just don’t — I don’t understand it.”); *id.* at 24 (statement of Justice Sotomayor) (“I guess the question is, how do you get yourself from a neutral algorithm to an aiding and abetting [one]?”).

²²⁴ Amy Howe, “*Not, Like, the Nine Greatest Experts on the Internet*”: Justices Seem Leery of Broad Ruling on Section 230, SCOTUSBLOG (Feb. 21, 2023, 4:31 PM), <https://www.scotusblog.com/2023/02/not-like-the-nine-greatest-experts-on-the-internet-justices-seem-leery-of-broad-ruling-on-section-230/> [https://perma.cc/RU2J-VRL7] (“Google . . . warned . . . that a ruling against them could massively reshape legal liability for tech companies . . . the justices appeared wary of taking such a significant step.”); *see also supra* text accompanying note 181.

b. Products Liability: Social Media's Strict-Liability Setback

The second main “crack” in Section 230 immunity treats social media companies as “manufacturers” of a product rather than publishers of third-party information.²²⁵ Looking to the apps on which ICSPs provide services rather than the services themselves, those characterizing social media giants as manufacturers of their respective apps are seeing more success.²²⁶

Under this approach, the product is the app, and the ICSP is the manufacturer, exclusive of any “publisher” designation.²²⁷ 230(c)(1)’s immunity only mandates no ICSP liability for claims treating the ICSP as a *publisher*.²²⁸ Treating the ICSP as a manufacturer exclusively taps into the strict liability standards common in products liability law—a liability avenue against which Section 230’s bulwark cannot stand.²²⁹

One example of this different-duty-of-care workaround occurred when a Snapchat filter allegedly caused a fatal car accident in the *Lemmon v. Snap, Inc.* case.²³⁰ There, next of kin sought to work around Section 230 immunity by treating Snapchat not as a publisher, but instead as a manufacturer responsible for its negligently designed product.²³¹ After three young men (two 17-year-olds, one 20-year-old) lost their lives in an attempt to get one of Snapchat’s many “trophies, streaks, and social recognitions” by using the “Speed Filter” while driving over 113 MPH, next of kin sued under a

²²⁵ See generally *Lemmon v. Snap, Inc.*, 995 F.3d 1085 (9th Cir. 2021); Transfer Order I, *supra* note 6; *Doe v. Internet Brands, Inc.*, 824 F.3d 846 (9th Cir. 2016).

²²⁶ See cases cited *supra* note 225.

²²⁷ Allison Zakon, Note, *Optimized for Addiction: Extending Product Liability Concepts to Defectively Designed Social Media Algorithms and Overcoming the Communications Decency Act*, 2020 WIS. L. REV. 1107, 1124 (arguing social media platforms earn their status as “mass-marketed products” under UCC case law on software).

²²⁸ 47 U.S.C. § 230(c)(1).

²²⁹ Zakon, *supra* note 227, at 1135 (“[I]n the case of strict product liability, there is no duty element for the plaintiff to establish . . . liability does not arise from the posting, editing, or withdrawal of any specific piece of content.”).

²³⁰ *Lemmon*, 995 F.3d at 1087–88.

²³¹ *Id.* at 1092. This Comment owes much of its inspiration for the “characterization of the domain owner” premise to the *Lemmon* plaintiffs’ ingenuity and perseverance in securing this appeal. The author solemnly thanks Carly Lemmon, Michael Morby, Samantha Brown, and Marlo Brown and their attorney, Naveen Ramachandrappa. The author notes his condolences here regarding the family’s loss. Their efforts were and are not in vain.

“negligent design” theory.²³² Finding Snapchat’s “duty to design a reasonable safe product” to be “fully independent of Snap’s role” as a publisher of others’ content, the court of appeals reversed the district court’s dismissal of plaintiffs’ complaint on Section 230 grounds.²³³ The court of appeals denied a second motion to dismiss and ordered Snap to answer the plaintiffs’ complaint.²³⁴

The products-liability workaround’s potential can also be seen in a case called *Doe v. Internet Brands, Inc.* where the Court of Appeals for the Ninth Circuit reversed a district court’s grant of an ICSP’s motion to dismiss.²³⁵ In *Internet Brands*, an anonymous model argued the domain owner failed to warn her, as a user of the domain’s networking site, about rapists using the platform to schedule faux auditions and commit various sexual crimes.²³⁶ Because the model’s claim arose not from what the domain owner *published*, but instead what it *knew* and *failed to warn* her about, the court of appeals found dismissal of the complaint on Section 230 grounds to be improper.²³⁷

Lemmon and *Internet Brands* demonstrate how characterizing ICSPs as manufacturers whose defective designs or failures to warn caused bodily injury creates liability against which Section 230 is powerless. Social media addiction among adolescents may be another set of circumstances where manufacturer treatment and liability may be appropriate.²³⁸ Failing to warn

²³² *Id.* at 1088–92. For a factually analogous case brought under state law, see *Maynard v. Snapchat, Inc.*, 870 S.E.2d 739 (Ga. 2022).

²³³ *Lemmon*, 995 F.3d at 1093, 1095.

²³⁴ *Lemmon v. Snap, Inc.*, 2022 WL 1407936 at *12 (C.D. Cal. Mar. 31, 2022).

²³⁵ *Doe v. Internet Brands, Inc.*, 824 F.3d 846, 854 (9th Cir. 2016).

²³⁶ *Id.* at 848. *Cf.* *Estate of Ciotto v. Hinkle*, 145 N.E.3d 1013, 1022 (Ohio Ct. App. 2019) (rejecting plaintiffs’ premises liability claim based on criminal conduct occurring on the premises as being unforeseeable, meaning the land possessor owed no duty to prevent the deceased’s injuries proximately caused by said criminal conduct).

²³⁷ *Id.* at 851. See also *Beckman v. Match.com, LLC*, 668 Fed. App’x 759, 760 (9th Cir. 2016) (reversing district court’s dismissal of plaintiff’s failure-to-warn claim based on its treatment of Match.com not as a publisher, but as an entity with a duty to warn of harms foreseeable to be suffered by plaintiffs).

²³⁸ Matthew P. Bergman, *Assaulting the Citadel of Section 230 Immunity: Products Liability, Social Media, and the Youth Mental Health Crisis*, 26 LEWIS & CLARK L. REV. 1159, 1195 (2023) (quoting Zakon, *supra* note 227, at 1124) (“Since [algorithmic learning and data collection] categorize software as a good under commercial law, it would be ‘disconsonant to insist on a different standard’ in tort.”).

users of the addictive nature of a given product presents a textbook example of the failure-to-warn theory of products liability in practice.²³⁹

Many parents have sought to hold Meta Platforms, Inc., TikTok, and other platforms liable, alleging the platforms failed to warn them and their minor children of the apps' addictive design.²⁴⁰ Families in ongoing litigation seek damages for social media's alleged contribution to minor children's suicides, eating disorders, mental health decline, racial profiling, sexual abuse, and other harms.²⁴¹ The Judicial Panel on Multidistrict Litigation determined that social media defendants face a common question: whether they failed to warn users of the risk posed by their apps in encouraging "addictive behavior in adolescents."²⁴² As Schedule A of the Panel's transfer order reveals, 28 actions across 17 federal districts were consolidated in a "single, efficient, coordinated proceeding" in the Northern District of California before Hon. Yvonne Gonzalez Rogers.²⁴³ A subsequent transfer order added 20 more civil actions to the multi-district litigation only five days later.²⁴⁴ Orders from the Northern District of California and the Judicial Panel on Multidistrict Litigation have tacked more and more cases on.²⁴⁵ Over 163 cases—all held to hold common questions of fact—presently pend before Judge Rogers's docket.²⁴⁶

Section 230 immunity thus faces quite a gauntlet in the Northern District of California, as *Lemmon*, *Internet Brands*, and cases applying them govern.²⁴⁷ While the Northern District of California parses through the facts and injuries common to the "failure to warn" contention,²⁴⁸ perhaps the attractive nuisance doctrine ought to be considered.

Given recent developments and the increasingly cracked façade of Section 230, perhaps the merits of an attractive nuisance "crack" should be

²³⁹ *E.g.*, *Am. Tobacco Co., Inc. v. Grinnell*, 951 S.W.2d 420, 424 (Tex. 1997) (defining cigarette manufacturers' failure to warn users of the addictive nature of cigarettes—distinct from "health risks" arguably within "common knowledge"—as grounds for liability).

²⁴⁰ Transfer Order I, *supra* note 6, at 1378.

²⁴¹ Bergman, *supra* note 238, at 1200–01.

²⁴² Transfer Order I, *supra* note 6, at 1378.

²⁴³ *Id.* at *3–4.

²⁴⁴ *In re Soc. Media Adolescent Addiction/Pers. Inj. Prods. Liab. Litig.*, MDL No. 3047 2022 WL 13853848, at *1 (J.P.M.L. Oct. 11, 2022).

²⁴⁵ *E.g.*, *In re Social Media Adolescent Addiction/Pers. Inj. Prods. Liab. Litig.*, MDL No. 3047, 2025 U.S. Dist. LEXIS 13782, at *1 (J.P.M.L. Jan. 24, 2025).

²⁴⁶ *Id.*

²⁴⁷ *See generally Doe v. Internet Brands, Inc.*, 824 F.3d 846 (9th Cir. 2016).

²⁴⁸ Transfer Order I, *supra* note 6, at 1378.

explored. Part IV does so and notes some benefits. Part V acknowledges and answers some drawbacks to using the doctrine as a liability tool.

IV. ATTRACTIVE NUISANCE APPLIED TO SOCIAL MEDIA COMPANIES: A REASONABLE-CARE WORKAROUND OF SECTION 230

Given the two categories of “cracks” identified above, this Comment proposes the attractive nuisance doctrine as yet another workaround to Section 230 immunity. This Part argues for the attractive nuisance as such, beginning in Part IV.A with an explanation of a demonstrative case. The subpart briefly applies all five elements of the doctrine and explains a few of its key presumptions.²⁴⁹ After explaining an instance of the attractive nuisance doctrine applied to land, Part IV.B then applies the doctrine to a social media platform using the facts of the *Rodriguez* case.²⁵⁰ This subpart then ends with a defense of the legal soundness of the attractive nuisance doctrine as a workaround and policy advantages to recognizing same.

A. *Digitizing the Attractive Nuisance Doctrine: Bennett as an Example*

Before applying the attractive nuisance doctrine to the digital context, seeing a physical application would help. As mentioned above, the doctrine establishes a duty of reasonable care for trespassing children, treating them as a separate class owed a separate duty of care than adult trespassers.²⁵¹ The Supreme Court of Ohio recognized the doctrine as Ohio law in its 2001 *Bennett v. Stanley* decision.²⁵²

In *Bennett*, the plaintiff returned from work to discover his wife and stepson drowned in his neighbor’s abandoned, unfenced swimming pool.²⁵³ Plaintiff’s five-year-old stepson had trespassed onto the neighbor’s property (the unused swimming pool only being about 100 feet away) while playing with his stepsister, looking for frogs.²⁵⁴ The neighbors were aware the

²⁴⁹ RESTATEMENT (SECOND) OF TORTS, § 339 (AM. L. INST. 1965).

²⁵⁰ *Rodriguez* Second Amended Complaint, *supra* note 6.

²⁵¹ RESTATEMENT (SECOND) OF TORTS, § 339.

²⁵² *Bennett v. Stanley*, 748 N.E.2d 41, 43 (Ohio 2001). Following remand, a jury found for the neighbor defendants, though the Supreme Court of Ohio’s analysis remains pertinent to this discussion. *Bennett v. Stanley*, No. 90–TR–178, 2002 WL 34433020 (Washington Cnty. Ct. Com. Pl. Mar. 18, 2002).

²⁵³ *Bennett*, 748 N.E.2d at 43. The plaintiff’s wife drowned while trying to rescue her son after he, independent and unoccupied, had already trespassed onto the Stanleys’ property, *id.* at 44. In this sense, both the plaintiff’s wife and stepson were trespassers, and the stepson retained the status of a trespassing child for purposes of the attractive nuisance doctrine, *id.*

²⁵⁴ *Id.* at 43–44.

plaintiff's family, including their children, were living next door, although they "never had any concern about the children getting into the pool" and thus had no posted signs or fences.²⁵⁵

On these facts, the Supreme Court of Ohio held plaintiff could recover under the attractive nuisance doctrine per the Restatement (Second) of Torts.²⁵⁶ First, the doctrine requires the plaintiff to establish the "place where the condition exists is one upon which the possessor knows or has reason to know that children are likely to trespass."²⁵⁷ In *Bennett*, the "condition" was the neighbors' swimming pool, which had become "pond-like" with tadpoles, frogs, and algae.²⁵⁸ Further, though the defendant neighbors had never been concerned with the plaintiff's children getting into the pool, the defendants knew the children had been left outside before, unsupervised.²⁵⁹ This finding constituted the main "issue of fact" leading to remand.²⁶⁰ Second, the Ohio Supreme Court concluded the defendants knew or should have known their pool involved an "unreasonable risk of death or serious bodily harm"²⁶¹ to plaintiff's 5-year-old stepson, citing to the fact the defendants "allowed rainwater to accumulate . . . to a depth of over six feet."²⁶² The court also implied that plaintiff's child would not, due to his age, discover the risk posed by intermeddling with the swimming pool, that the burden of eliminating the danger posed by the pool was slight as compared to the drowning risk, and that the defendant neighbors failed to exercise reasonable care in leaving the pool unfenced and unattended.²⁶³ For consideration of all of these issues (particularly whether plaintiff's son's trespass onto the neighbor's property was foreseeable), the Supreme Court of Ohio remanded.²⁶⁴

Though the trial court found for the neighbors on remand,²⁶⁵ the court took the *Bennett* case as occasion to adopt the Restatement (Second)'s

²⁵⁵ *Id.* at 43.

²⁵⁶ *Id.* at 47.

²⁵⁷ RESTATEMENT (SECOND) OF TORTS, § 339(a) (AM. L. INST. 1965).

²⁵⁸ *Bennett*, 748 N.E.2d at 43.

²⁵⁹ *Id.*

²⁶⁰ *Id.* at 47.

²⁶¹ RESTATEMENT (SECOND) OF TORTS, § 339(b).

²⁶² *Bennett*, 748 N.E.2d at 43.

²⁶³ Reply Brief of Appellants, Rickey G. Bennett, Adm'r of the Est. of Cher D. Bennett, Deceased, et al. at 4–5, *Bennett v. Stanley*, 748 N.E.2d 41 (2001) (No. 00-108).

²⁶⁴ *Bennett*, 748 N.E.2d at 49.

²⁶⁵ *Bennett v. Stanley*, No. 90–TR–178, 2002 WL 34433020 (Washington Cnty. Ct. Com. Pl. Mar. 18, 2002).

attractive nuisance doctrine as Ohio law.²⁶⁶ In doing so, Ohio accepted some presumptions and rationales underlying the doctrine that, as explained below, are equally applicable to the online context.²⁶⁷

First, attractive nuisance cases, a large portion of which hinge on foreseeability of children trespassing and their subsequent injury, are largely fact-specific.²⁶⁸ Thus, a slight change in facts can completely change the result.²⁶⁹ The doctrine becomes even more fact-specific on the issue of whether the trespassing child had the intelligence to understand the danger posed by an artificial condition.²⁷⁰ As Part V.A explains, attractive nuisance caselaw can be readily distinguished on any one of the doctrine's five elements, making its precedential value remarkably narrow.²⁷¹

Second, the attractive nuisance doctrine's application hinges on the presence of an "artificial condition," *i.e.*, one created by humans, distinct from natural land.²⁷² If one replaces the doctrine's focus on land with cyberspace,²⁷³ what amounts to an "artificial condition?" As shown in Part V.A, the doctrine's flexibility could treat another user's post or a feature of the platform itself as an "artificial condition."²⁷⁴ That is the plaintiff's call.

Third, the doctrine renders responsible the premises possessor regardless of whether the possessor created the "artificial condition."²⁷⁵ The *Stanley* defendants would not be liable simply because they installed the swimming pool, but instead because they expected children could trespass onto their land and harm themselves by intermeddling with it.²⁷⁶ Part V.C

²⁶⁶ *Bennett*, 748 N.E.2d at 47.

²⁶⁷ *Id.* at 48.

²⁶⁸ Maija Liisa Varda, Note, *Torts: Childproofing the Gate to Landowner Liability: How Judges Misuse the Concept of Foreseeability to Keep Cases from the Jury*—Foss ex rel. Foss v. Kincade, 36 WILLIAM MITCHELL L. REV. 354, 358–59 (2009) ("Foreseeability is a particularly fact-intensive, case-by-case determination, and small changes in the facts can have a profound [e]ffect on what is, or is not, deemed foreseeable.").

²⁶⁹ *Id.*

²⁷⁰ Lisa Perrochet & Ugo Colella, *What a Difference a Day Makes: Age Presumptions, Child Psychology, and the Standard of Care Required of Children*, 24 PAC. L.J. 1323, 1363 (1993).

²⁷¹ For explanation on why this detail favors a digitized attractive nuisance doctrine, First Amendment concerns of Section 230 notwithstanding, see discussion *infra* Part V.A.

²⁷² RESTATEMENT (SECOND) OF TORTS, § 339 caveat (AM. L. INST. 1965).

²⁷³ See discussion *supra* Part II.A.

²⁷⁴ See discussion *infra* Part IV.C.

²⁷⁵ RESTATEMENT (SECOND) OF TORTS § 339 cmt. d.

²⁷⁶ *Id.*

elaborates on this distinction and explains how the attractive nuisance doctrine could hold a social media company liable, for example, for its failure to maintain its “domain” rather than its failure to exercise due care in publishing its terms or third-party content.²⁷⁷

Fourth, the doctrine presumes children are likely to go beyond their parent’s direction; *i.e.*, to trespass.²⁷⁸ In *Bennett*, it was a five-year-old trespassing into the neighbor’s pool, despite the parent’s instructions;²⁷⁹ in the online context, it might be a child lying about their age in order to access social media platforms, despite their parent’s instructions.²⁸⁰ Parts IV.C.2 and V.B each apply this concept to the role of parents in supervising their children’s social media use.²⁸¹

Fifth and finally, as the *Bennett* court specified, the doctrine only imposes a duty of reasonable care on the land possessor.²⁸² In adopting the doctrine, the *Bennett* court clarified that injury of a child on a possessor’s land would not “automatically” render the possessor liable.²⁸³ Thus, ICSPs would not be automatically liable for injuries sustained by minor users with unauthorized access to the domain. The doctrine would instead lead factfinders to consider whether a reasonable ICSP (*a la* the reasonable land possessor) would have acted in the way the defendant ICSP did.²⁸⁴ Part V.E discusses this “reasonable care” feature for social media platforms and other ICSPs within Section 230’s immunity provisions.²⁸⁵

With *Bennett* and these points of the attractive nuisance doctrine in mind, the following subpart demonstrates a step-by-step application of the doctrine to the facts of a pending case against social media platforms.²⁸⁶

B. Blueprinting: The Theory Applied to Rodriguez v. Meta Platforms, Inc.

The *Rodriguez* case pends, consolidated with other lawsuits, against social media platforms in federal court.²⁸⁷ The Judicial Panel on Multidistrict Litigation consolidated *Rodriguez* and cases like it nationwide to the

²⁷⁷ See discussion *infra* Part V.C.

²⁷⁸ RESTATEMENT (SECOND) OF TORTS § 339 cmt. i.

²⁷⁹ *Bennett v. Stanley*, 748 N.E.2d 41, 43–44 (Ohio 2001).

²⁸⁰ See Anderer, *supra* note 8 (suggesting children often act against parental direction).

²⁸¹ See discussion *infra* Parts IV.C.2, V.B.

²⁸² *Bennett*, 748 N.E.2d at 48.

²⁸³ *Id.*

²⁸⁴ RESTATEMENT (SECOND) OF TORTS, § 339 cmt. o (AM. L. INST. 1965).

²⁸⁵ See discussion *infra* Part V.E.

²⁸⁶ *Rodriguez* Second Amended Complaint, *supra* note 6.

²⁸⁷ Transfer Order I, *supra* note 6, at 1379–80 sched. A.

Northern District of California over the objections of multiple social media companies, including Meta (Facebook and Instagram), Snap, TikTok, YouTube, Google, and more.²⁸⁸ An analysis of the attractive nuisance theory, applied to the facts of *Rodriguez*, follows.²⁸⁹

Selena Rodriguez, an 11-year-old girl, took her own life on July 21, 2021, allegedly caused by her extreme “addiction” to Instagram and Snapchat.²⁹⁰ Tommy Rodriguez, Selena’s mother, sued in federal court, alleging defective design, negligence, and “inherently dangerous features” as having caused Selena’s suicide.²⁹¹ The wrongful death action also mentions Selena’s increased introversion following her use of Instagram and Snapchat, as well as Selena’s increased tendency to display violent behavior and remain “glued to her phone.”²⁹² Although the Northern District of California must adjudicate Selena’s case and others under products liability law,²⁹³ the facts of *Rodriguez* fit well within the attractive nuisance doctrine’s prerequisites and five-element test.²⁹⁴

Before listing five elements a plaintiff must show for a *prima facie* attractive nuisance case, the Restatement features a preamble to the elements as follows: “A possessor of land is subject to liability for *physical harm* to

²⁸⁸ *Id.* at 1377 nn.2–3.

²⁸⁹ *Id.* at 1378. Though *Rodriguez* involves “common questions of fact” as to whether the “platforms are defective because they are designed to maximize . . . screen time” and thereby “encourage addictive behavior in adolescents” along with other cases in the multi-district litigation, this Comment focuses on the *Rodriguez* facts for their salience and overall congruence with the attractive nuisance doctrine. *Id.*

²⁹⁰ Dorian Geiger, *Connecticut Mom Sues, Says Instagram, Snapchat Complicit in Tween Daughter’s Suicide*, OXYGEN (Feb. 4, 2022, 7:15 PM) <https://www.oxygen.com/crime-news/instagram-snapchat-sued-by-mom-over-11-year-olds-suicide> [<https://perma.cc/6QFX-3RC8>]. See also Yankowski, *supra* text accompanying note 6.

²⁹¹ Geiger, *supra* note 290; Rodriguez Second Amended Complaint, *supra* note 6, at ¶ 233.

²⁹² Geiger, *supra* note 290.

²⁹³ Transfer Order I at 1378 (“All parties agree that the claims involving Meta share questions of fact, including whether Meta’s platforms (Facebook and Instagram) encourage addictive behavior, fail to verify users’ ages, encourage adolescents to bypass parental controls, and inadequately safeguard against harmful content and/or intentionally amplify harmful and exploitive content.”).

²⁹⁴ RESTATEMENT (SECOND) OF TORTS, § 339 (AM. L. INST. 1965). Although the complaint does not contain an element-by-element analysis, it does generally allude to the social media platforms involved as an “attractive nuisance.” Rodriguez Second Amended Complaint, *supra* note 6, at ¶¶ 143, 201.

children trespassing thereon caused by an *artificial condition* upon the land”²⁹⁵ In *Rodriguez*, Selena allegedly passed as a result of her social media overuse, and death represents an oft-alleged physical harm in attractive nuisance actions.²⁹⁶ Although the complaint also seeks “emotional distress” and “reputational harm,” physical damage done in the form of “mental health conditions, medical expenses, [and] loss of income and earning capacity” are also sought (not to mention the mother’s loss of consortium).²⁹⁷ Further, Selena was 11 years old (well below the age of majority), implying she had developed her “addiction” to social media platforms at the age of 11 or younger.²⁹⁸ Selena could therefore be considered a child who “trespassed” onto the platforms of Snapchat and Instagram, both of which have minimum age requirements of 13 years old.²⁹⁹ Finally, as to the “artificial condition” prerequisite, the complaint designates features of the apps themselves as “unreasonably dangerous” (*a la* man-made conditions; here, the companies created them).³⁰⁰ The case thus resembles an attractive nuisance claim where a child trespassed and suffered physical harm due to intermingling with an artificial condition on the land.

After showing that a trespassing child suffered harm from a land possessor’s artificial condition, an attractive nuisance plaintiff must then show the condition was in a place in which the possessor knew or had reason to know children were likely to trespass.³⁰¹ Here, studies and common knowledge show that children can and will lie about their age for social

²⁹⁵ RESTATEMENT (SECOND) OF TORTS, § 339.

²⁹⁶ *E.g.*, *Bennett v. Stanley*, 748 N.E.2d 41, 43 (Ohio 2001) (alleging harm from son having drowned in neighbor’s pool); *Frankel v. Burke’s Excavating, Inc.*, 397 F.2d 167, 168 (3d Cir. 1968) (alleging harm from two sons drowning after falling through ice on unused water hole); *MacVane v. S.D. Warren Co.*, 641 F. Supp. 2d 54, 56 (D. Me. 2009) (alleging harm from son drowning after being shocked by high-voltage wiring).

²⁹⁷ *Rodriguez* Second Amended Complaint, *supra* note 6, at ¶ 178.

²⁹⁸ *Id.* at *2.

²⁹⁹ *CURLEY*, *supra* note 8, at 4. *See also* discussion *supra* at Part II.B.2.

³⁰⁰ *Geiger*, *supra* note 290; *Rodriguez* Second Amended Complaint, *supra* note 6, at ¶ 167.

³⁰¹ RESTATEMENT (SECOND) OF TORTS, § 339(a).

media access.³⁰² Beyond this observation, recent testimony before Congress revealed social media companies' role in marketing to children.³⁰³

On October 5, 2021, former Facebook employee Frances Haugen testified before the U.S. Senate on how social media use affects children.³⁰⁴ As pertinent here, the exposé mentioned research conducted by social media platforms with the goal of reaching audiences under 13 years old.³⁰⁵ As noted by Sen. Marsha Blackburn, how could Facebook or Instagram have deleted “600,000 accounts from children under age 13” without “turning a blind eye in the first place?”³⁰⁶ Assuming the findings of the hearing are true, Haugen’s testimony could show Meta has knowingly allowed children like Selena to bypass age restrictions on their platforms (*i.e.*, trespass).³⁰⁷

Not only do the “possessors” know children frequently trespass on their platforms; they know or should know that the conditions on their platforms pose an unreasonable risk of death or serious bodily harm to children.³⁰⁸ Meta’s “internal research” focuses not only on how to better reach younger audiences, but also on the “serious negative harm on a significant portion of teenagers and . . . children.”³⁰⁹ Again, assuming Haugen’s testimony is true, the former employee readily links Meta’s “amplification algorithms”—a feature Meta knowingly employs—to patterns of “problematic use” and “addiction” to its platform(s).³¹⁰ This mention of addictive use tracks

³⁰² See CURLEY, *supra* note 8, at 43; Anderer, *supra* note 8 (discussing the ease and incentive for children lying about their age to access social media apps).

³⁰³ Sheera Frenkel, *Key Takeaways from Facebook’s Whistle-Blower Hearing*, THE NEW YORK TIMES, <https://www.nytimes.com/2021/10/05/technology/what-happened-at-facebook-whistleblower-hearing.html> (Oct. 25, 2021) [<https://perma.cc/R9UD-43FH>].

³⁰⁴ *Id.*

³⁰⁵ *Id.*

³⁰⁶ *Facebook Whistleblower Frances Haugen Testifies on Children & Social Media Use: Full Senate Hearing Transcript*, at 20:13 (statement of Sen. Blackburn), REV (Oct. 5, 2021) <https://www.rev.com/blog/transcripts/facebook-whistleblower-frances-haugen-testifies-on-children-social-media-use-full-senate-hearing-transcript> [<https://perma.cc/594F-95QN>].

³⁰⁷ *Id.* (“[A]llowing users to create multiple accounts that Facebook does not delete and encouraging teens to create second accounts, they can hide from their parents”).

³⁰⁸ RESTATEMENT (SECOND) OF TORTS, § 339(b).

³⁰⁹ REV, *supra* note 306, at 37:11 (statement of Ms. Haugen).

³¹⁰ *Id.* at 37:34, 38:04 (statements of Ms. Haugen). Beyond attractive nuisance’s negligence-based liability, this scenario of intentional targeting sounds in intentional tort. See generally Todd A. Nist, *Finding the Right Approach: A Constitutional Alternative for Shielding Kids from Harmful Materials Online*, 65 OHIO ST. L.J. 451, 469 (2004) (arguing for a statutory means of protecting children from access to obscene, online materials, focusing

Selena's case, as well as societal and scholarly understandings of this topic.³¹¹ Meta knows of the harm threatened by children's trespassory access and does nothing about it, meeting the doctrine's second element.³¹²

The attractive nuisance doctrine's third element requires a showing that the children, because of their youth, "do not discover the condition or realize the risk involved in intermeddling with it or in coming within the area made dangerous by it."³¹³ As noted above, this fact-intensive element focuses on whether a reasonable child would have understood the condition's danger, as obvious dangers create no liability under the doctrine.³¹⁴ If a condition's danger is obvious, courts will dismiss the case or find for the defendant(s) on the essential premise that the child should have known better.³¹⁵

As the *Rodriguez* complaint points out, the intricacies of mental health and addiction are beyond the understanding of an 11-year-old child like Selena.³¹⁶ Children like Selena may know better than to mess with high ledges, fires, and swimming pools, but it remains doubtful that such children could understand the protracted, detrimental effects of addiction.³¹⁷ This element would ultimately depend on the facts of a tried case, but a lack of understanding of addiction on Selena's part could meet this element.

Assuming that all the above can be shown, another fact-intensive element of the attractive nuisance doctrine involves a risk-utility

not "on whether . . . a Web publisher posts material that a minor may access," but instead "on those actors who purposely seek out minors and solicit their business.").

³¹¹ *Rodriguez* Second Amended Complaint, *supra* note 6, at ¶¶ 168–72; *see also* Bruce Y. Lee, *Meta, TikTok, Others Being Sued, Here Are 10 Ways Social Media Can Hurt Kids' Mental Health*, FORBES, <https://www.forbes.com/sites/brucelee/2022/12/18/meta-tiktok-others-being-sued-here-are-10-ways-social-media-can-hurt-kids-mental-health/?sh=53dee0ed56a6> (Dec. 23, 2022, 12:34 PM) [<https://perma.cc/92JB-GYH4>]; *see also* Zakon, *supra* note 227, at 1108; Bergman, *supra* note 238, at 1164.

³¹² REV, *supra* note 306, at 06:14 (statement of Sen. Blumenthal) ("It is documented proof that Facebook knows its products can be addictive and toxic to children.").

³¹³ RESTATEMENT (SECOND) OF TORTS, § 339(c).

³¹⁴ *Id.* cmt. m; *see also* discussion *supra* at Part II.B.1.

³¹⁵ *Id.* cmt. i ("[Liability] does not extend to those conditions the existence of which is obvious even to children and the risk of which should be fully realized by them.").

³¹⁶ *Rodriguez* Second Amended Complaint, *supra* note 6, at ¶ 89 ("Defendants knowingly designed their social media products to be addictive to minor users and failed to include in their product design any safeguards to account for and ameliorate the psychosocial immaturity of their minor users.").

³¹⁷ RESTATEMENT (SECOND) OF TORTS, § 339 cmt. j.

balancing.³¹⁸ The plaintiff must show that “the utility to the possessor of maintaining the condition and the burden of eliminating the danger are slight as compared with the risk to children involved.”³¹⁹ In the social media context, this comes down to the “utility” of the app’s allegedly unreasonable condition (and its costs of maintenance) to the company as balanced against the risk that children will be injured as a result of intermeddling with it.³²⁰

As for this factor, Tommy Rodriguez alleges that Meta and other social media companies garner their “utility” (profits) by maintaining addictive features on their apps.³²¹ As similarly asserted in the Haugen hearing, “Facebook prioritizes profit over the wellbeing of children and all users.”³²² While a social media defendant would likely point to other “utility” generated by its app’s design(s), tort law generally (First-Amendment, free-access-to-information-concerns notwithstanding) does not support addictive schemes.³²³ Given Haugen’s characterization of social media companies, applying attractive nuisance would at least let companies rebut the understanding of their features as serving the the “utility” of profit only.³²⁴ In Selena’s case, the “utility” of profit by taking advantage of children’s lack of awareness of addictive features would likely not outweigh the risk of harm, First Amendment concerns notwithstanding.

Finally, as to the doctrine’s final element, a plaintiff must show that “the possessor fails to exercise reasonable care to eliminate the danger or otherwise to protect the children.”³²⁵ The Restatement acknowledges that a “warning” may be all a land possessor may be expected to do.³²⁶ That said, social media companies, given their position, can surely do more than a

³¹⁸ *Id.* § 339(d).

³¹⁹ *Id.*

³²⁰ *Cf. id.* cmt. n (“A particular condition is . . . regarded as not involving unreasonable risk to trespassing children unless it involves a grave risk to them which could be obviated without any serious interference with the possessor’s legitimate use of his land.”).

³²¹ Rodriguez Second Amended Complaint, *supra* note 6, at ¶ 149.

³²² REV, *supra* note 306, at 21:49 (statement of Sen. Blackburn); Barr, *supra* note 82.

³²³ *E.g.*, Am. Tobacco Co., Inc. v. Grinnell, 951 S.W.2d 420, 424 (Tex. 1997).

³²⁴ REV, *supra* note 306, at 26:44 (statement of Ms. Haugen) (“The company’s leadership knows how to make Facebook and Instagram safer but won’t make the necessary changes because they have put their astronomical profits before people.”).

³²⁵ RESTATEMENT (SECOND) OF TORTS, § 339(e).

³²⁶ *Id.* cmt. o.

“Terms & Conditions” agreement that nobody reads³²⁷ and a functionally empty age restriction that children can readily side-step.³²⁸ In Selena’s case, the complaint approaches reasonable care from the perspective of a reasonable social media company which ought to know about the “psychosocial [im]maturity” of its users relative to the risk of addiction.³²⁹

As shown by the above application, cases turn largely on fact-based determinations regarding issues like foreseeability, children’s intelligence levels, the utility of a given condition, and so on.³³⁰ As explored below, the most important benefit of the doctrine, for purposes of this Comment, is its status as a “crack” in Section 230, protective only of the most vulnerable.

C. *Reasons for the Reasonable-Care Workaround: Logistics and Policy*

This Comment proposes an attractive-nuisance-sized hole in Section 230 for cases where the ICSP does nothing about the present, demonstrable state of children bypassing age restrictions and sustaining injury caused by intermingling with posts or features never intended for them. In so doing, this Comment first addresses some logistical and policy benefits to recognition of the doctrine in the digital context and addresses concerns counseling against recognition. This subpart first defends the doctrine as a sound workaround of 230(c)(1) immunity, explaining how the doctrine fits outside a modern formulation of 230(c)(1) immunity. This subpart continues by highlighting the parallels between the policies underlying the attractive nuisance doctrine and the Communications Decency Act as originally enacted. Finally, this subpart concludes with some thoughts on how recognizing the doctrine as a workaround may lead courts to update understandings of the relationship between the internet and property law.

1. *Logistics: the Attractive Nuisance Doctrine as “Force-Resistant”*

Attractive nuisance’s workaround comes from its compatibility with Section 230’s immunity.³³¹ As mentioned above, the *Force* court filtered

³²⁷ William W. Fisher III, *Property and Contract on the Internet*, 73 CHI.-KENT L. REV. 1203, 1245 (1999) (“Customers commonly do not read the “terms and conditions” they are agreeing to.”).

³²⁸ See CURLEY, *supra* note 8, at 43; Anderer, *supra* note 8 (averring age limits on social media apps are ineffective, given the ease with which children may lie about their age).

³²⁹ Rodriguez Second Amended Complaint, *supra* note 6, at ¶ 166.

³³⁰ See generally RESTATEMENT (SECOND) OF TORTS § 339.

³³¹ At least until Section 230’s words, or their meaning, change. This is not the case yet. 47 U.S.C. § 230(c)(1) (2025); *Gonzalez v. Google LLC*, 143 S. Ct. 1191, 1192 (2023) (*per curiam*) (“We therefore decline to address the application of § 230 to a complaint that appears

Section 230's immunity down to three prongs: "Section 230(c)(1) thus shields a defendant from civil liability when: (1) it is a 'provider or user of an interactive computer service . . . ' (2) the plaintiff's claims 'treat[]' the defendant as the 'publisher or speaker' of information . . . and (3) that information is 'provided by' an 'information content provider . . . ' other than the defendant"³³² This three-prong test derives its breadth mostly from the second prong.³³³ "What matters," as the second prong suggests, "is whether the cause of action inherently requires the court to treat the defendant as the 'publisher or speaker' of content provided by another."³³⁴ The second prong affords wide immunity by broadly construing the term "publisher."³³⁵ Thus, courts bar any claim that plausibly treats the social media company as a "publisher" by its "ordinary meaning."³³⁶

The attractive nuisance doctrine concededly satisfies the *Force* test's first and third elements. The defendant would likely be a "provider or user of an interactive computer service," as many social media companies have been found before.³³⁷ As to the third element, the attractive nuisance doctrine

to state little, if any, plausible claim for relief."); *Murthy v. Missouri*, 144 S. Ct. 1972, 1997 (2024) (finding no standing for plaintiffs before reaching Section 230's effect, if any, on platforms "suppressing" speech at state actors' behest); *Moody v. NetChoice, LLC*, 144 S. Ct. 2383, 2394 (2024) (reversing on lower courts' failure to apply the standard of review applicable to First-Amendment facial challenges, omitting mention of Section 230). For a summary, see *Doe v. Snap, Inc.*, 144 S. Ct. 2493, 2493–94 (2024) (J. Thomas, dissenting).

³³² *Force v. Facebook*, 934 F.3d 53, 64 (2d Cir. 2019).

³³³ *Id.* See also *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1100–01 (9th Cir. 2009); *Herrick v. Grindr, LLC*, 306 F. Supp. 3d 579, 588 (S.D.N.Y. 2018); *Dyroff v. Ultimate Software Grp., Inc.*, 934 F.3d 1093, 1097 (9th Cir. 2019); *Doe v. Kik Interactive, Inc.*, 482 F. Supp. 1242, 1248 (S.D. Fla. 2020); *Doe #1 v. MG Freesites, LTD*, 676 F. Supp. 3d 1136, 1153 (N.D. Ala. 2022).

³³⁴ *Barnes*, 570 F.3d at 1102. Though *Barnes* restated the 230(c)(1) immunity in this three-prong formulation before *Force*, citation to *Force* keeps the "*Force*-Resistant" subsection title intact. Just let the author have this.

³³⁵ *Force*, 934 F.3d at 64 (collecting cases) ("In light of Congress's objectives, the Circuits are in general agreement that the text of Section 230(c)(1) should be construed broadly in favor of immunity.").

³³⁶ *Id.* at 65 (collecting cases).

³³⁷ *Id.* at 64; 47 U.S.C. § 230(c)(1); e.g., *Klayman v. Zuckerberg*, 753 F.3d 1354, 1357–58 (D.C. Cir. 2014) ("Facebook qualifies as an interactive computer service"); *Lemmon v. Snap*, 995 F.3d 1085, 1091 (9th Cir. 2021) ("The parties do not dispute that Snap is a provider of an 'interactive computer service,' and we agree that Snap qualifies as one given the CDA's 'expansive' definition of that term."); *Fields v. Twitter*, 217 F. Supp. 3d 1116,

would also hold the company liable for information as provided by an “information provider,” *i.e.*, parties other than the company itself.³³⁸ Attractive nuisance liability therefore must fit outside 230(c)(1)’s immunity by falling outside the *Force* test’s second prong. It could do so, for example, by treating the social media company as a land possessor instead of a publisher, both actually and constructively.³³⁹ Thankfully, this is precisely what the attractive nuisance doctrine does; it is thus “*Force*-resistant.”³⁴⁰

Applying the attractive nuisance does not actually treat the social media company as a publisher, but instead as a possessor of real property. To be clear, this Comment does not suggest holding companies liable as common carriers,³⁴¹ distributors,³⁴² or product manufacturers,³⁴³ but instead as possessors of internet domains resembling real property. As the land possessor’s duty arises from the land and the understanding that children may trespass onto it, so does the social media company’s duty under attractive nuisance arise from their domain ownership and understanding that children may bypass age restrictions and thereby trespass onto it.³⁴⁴

Not only does the attractive nuisance doctrine avoid *actually* treating the social media company as a publisher, but also it avoids doing so *constructively*. Since *Zeran*, courts have been wary of publisher-based liability suits “artfully” pled as negligence.³⁴⁵ Courts thus preclude plaintiffs

1121 (N.D. Cal. 2016) (“Plaintiffs do not dispute that Twitter is an interactive computer service provider . . .”).

³³⁸ This Comment does not foreclose the option of holding a company liable for its *own* information or features, but it narrows the discussion to the *Force* test’s second prong.

³³⁹ “Constructively” in that the theory may not even attempt to treat the company as something other than publisher in name but as a publisher in practice. *See, e.g., Zeran v. America Online, Inc.*, 129 F.3d 327, 332 (4th Cir. 1997) (“[E]very one who takes part in the publication . . . is charged with publication.”).

³⁴⁰ RESTATEMENT (SECOND) OF TORTS § 339 cmt. a (AM. L. INST. 1965).

³⁴¹ *NetChoice, LLC v. Paxton*, 49 F.4th 439, 473 (5th Cir. 2022) (“Texas permissibly determined that the [social media p]latforms are common carriers subject to nondiscrimination regulation.”), *vacated*, 144 S. Ct. 2383 (2024).

³⁴² *Zeran*, 129 F.3d at 332 (“Even distributors are considered to be publishers for purposes of defamation law . . .”).

³⁴³ *Lemmon*, 995 F.3d at 1092 (“[The] negligent design lawsuit treats Snap as a products manufacturer, accusing it of negligently designing a product . . . with a defect . . .”).

³⁴⁴ RESTATEMENT (SECOND) OF TORTS, § 339 cmt. i. *See discussion supra* at Part IV.A.

³⁴⁵ *E.g., Doe v. MySpace, Inc.*, 474 F. Supp. 2d 843, 849 (W.D. Tex. 2007) (“No matter how artfully Plaintiffs seek to plead their claims, the Court views Plaintiffs’ claims as directed

from pleading “around” Section 230’s immunity by looking beyond what plaintiffs call their claim and to the claim’s underlying assertions.³⁴⁶ The *Zeran* court looked beyond the pleadings on the plaintiff’s “negligence” claim and concluded that 230(c)(1) barred the claim for its underlying assertions basing liability on AOL’s status as a publisher more than anything else.³⁴⁷ Courts since *Zeran* have looked to assertions underlying claims against ICSPs and concluded that the claims, regardless of their facial designations, treat the ICSPs as publishers, triggering 230(c)(1).³⁴⁸

First, the *Zeran* court focused on the tort claim’s attribution of significance to the act of publication and the defendant’s involvement therewith.³⁴⁹ The court, noting that the plaintiff traced AOL’s liability to the company’s “negligent” delay in “removing defamatory messages,” opined that the plaintiff essentially faulted AOL for failing to timely remove a defamatory statement, sounding in publication itself.³⁵⁰ The *Zeran* court broadly defined “publisher” to include authors, editors, those negligently communicating defamatory statements, *and* those failing to remove a known, defamatory statement already communicated.³⁵¹ Therefore, the *Zeran* court concluded that AOL was “legally considered to be a publisher” by the plaintiff’s claim, making Section 230 immunity applicable.³⁵²

The attractive nuisance doctrine, on the other hand, seeks to hold the social media company liable otherwise. The doctrine, though a flavor of “negligence,” does not impose liability for failure to remove known, *defamatory* material from one’s land, let alone social media platform.³⁵³ Rather, the attractive nuisance doctrine imposes liability on companies for failure to remove (or otherwise protect children from) *dangerous* material,

toward MySpace in its publishing, editorial, and/or screening capacities.”), *aff’d*, 528 F.3d 413 (5th Cir.), *cert. denied*, 555 U.S. 1031 (2008).

³⁴⁶ *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1102 (9th Cir. 2009).

³⁴⁷ *Zeran*, 129 F.3d at 332.

³⁴⁸ *Myspace*, 474 F. Supp. 2d at 849 (“Plaintiffs argue this suit is based on MySpace’s negligent failure to take reasonable safety measures to keep young children off of its site and not based on MySpace’s editorial acts.”); *but see Lemmon*, 995 F.3d at 1092 (citing *Barnes*, 570 F.3d at 1107) (“Thus, the duty that Snap allegedly violated ‘springs from’ its distinct capacity as a product designer.”).

³⁴⁹ *Zeran*, 129 F.3d at 332.

³⁵⁰ *Id.* at 328, 332.

³⁵¹ *Id.* at 332.

³⁵² *Id.*

³⁵³ RESTATEMENT (SECOND) OF TORTS, § 577 (AM. L. INST. 1965) (explaining liability for land possessors who knowingly fail to remove defamatory material from their premises).

whether in the form of enticements children do not understand the consequences of, features of the app with unknown effects on the minor user's mental health, or other infohazards.³⁵⁴ The *Zeran* court focused on the shared significance of terms like “publisher” and “distributor” in both defamation law and the plaintiff's complaint; these words are of no moment under attractive nuisance.³⁵⁵ Attractive nuisance requires land possessors to keep their premises reasonably safe for trespassing children and requires nothing of publishers or distributors.³⁵⁶

Second, the *Zeran* court focused on how the plaintiff's claim attributed significance to the defendant's acts as also typically done by a publisher.³⁵⁷ Though the claim did not overtly designate AOL as a publisher, the *Zeran* court found that the complaint constructively did so by faulting AOL for negligently communicating defamatory statements made by others and failing to timely remove them.³⁵⁸ Since *Zeran*, other common publisher tasks and editorial decisions, such as arranging content in a desired way³⁵⁹ or editing,³⁶⁰ have also been found sufficient 230(c)(1) “publisher” purposes.

The attractive nuisance doctrine distinguishes itself from publisher liability in this respect as well, mainly by treating the social media company as a possessor of premises to maintain. Treating the social media company as a land possessor makes its “failure to remove” a dangerous post or feature closer to failing to remove a known dangerous condition than a known defamatory statement. Attractive nuisance liability comes from the condition's physical injury of a minor child, not from injuring a minor

³⁵⁴ The types of “dangerous material” mentioned here are hypothetical and in no way limit what an attractive nuisance plaintiff could allege to be a “dangerous condition” for purposes of the doctrine. For a conceptualization of truthful information causing harm by its dissemination alone (“infohazards”), see Nick Bostrom, *Information Hazards: A Typology of Potential Harms from Knowledge*, 10 REV. CONTEMP. PHIL. 44 (2011).

³⁵⁵ *Zeran*, 129 F.3d at 332.

³⁵⁶ Cf. RESTATEMENT (SECOND) OF TORTS, § 577 (providing separate liability for land possessors who knowingly fail to remove defamatory material from their premises).

³⁵⁷ *Zeran*, 129 F.3d at 332–33.

³⁵⁸ *Id.*

³⁵⁹ *Shiamili v. Real Est. Grp. of New York, Inc.*, 952 N.E.2d 1011, 1020 (N.Y. 2011) (Lippman, J., dissenting); *Moody v. NetChoice, LLC*, 144 S. Ct. 2383, 2399–2403 (collecting cases) (2024). “[E]xpressive activity includes presenting a curated compilation of speech originally created by others.” *Id.* at 2400.

³⁶⁰ *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1102 (9th Cir. 2009). See also cases collected by *Moody*, 144 S. Ct. at 2399–2403.

child's reputation or offending them.³⁶¹ In a sense, analogizing an internet domain to a land parcel turns "editorial decisions" into maintenance decisions for the ICSP's platform. Reckless maintenance of an ICSP's "premises" could create or leave open unreasonably unsafe conditions. This could—and should—subject the domain possessors to premises liability.³⁶²

Finally, the *Zeran* court applied immunity over the plaintiff's objection because the plaintiff sought to hold AOL liable as a distributor instead of a publisher.³⁶³ The *Zeran* court's broad construction of "publisher" for Section 230 purposes allowed "publisher" to swallow the meaning of "distributor," rendering the distinction powerless to overcome 230(c)(1)'s bar.³⁶⁴

Attractive nuisance, however, imposes a wholly distinct duty of care on the social media company as a land possessor. Although liability for both land possessors and publishers depend on a showing of knowing act or omission, the similarities end there.³⁶⁵

In fact, proving a platform's knowledge of foreseeable harm or injury may be easier than proving a platform's knowledge of a post's status as actionably defamatory. Attractive nuisance liability turns in part on whether the condition involves "an unreasonable risk of death or serious bodily harm."³⁶⁶ The doctrine is riddled with questions of fact.³⁶⁷ Attractive nuisance liability thus contrasts with defamation liability, as the latter presents the factfinders with less intuitive terms of art like "publication,"³⁶⁸ "actual malice," and "reckless disregard."³⁶⁹ Whether a feature or post, on

³⁶¹ Liability for a land possessor for leaving up defamatory statements, also recognized under the Restatement (Second), is a separate basis for liability with a distinct duty of care imposed. Compare RESTATEMENT (SECOND) OF TORTS § 339 with *id.*, § 577.

³⁶² *Id.* § 339 cmt. d.

³⁶³ *Zeran*, 129 F.3d at 332.

³⁶⁴ *Id.* at 331–32.

³⁶⁵ Compare RESTATEMENT (SECOND) OF TORTS, § 339(b) with *Zeran*, 129 F.3d at 331–32.

³⁶⁶ RESTATEMENT (SECOND) OF TORTS, § 339(b).

³⁶⁷ *Sioux City & P.R. Co. v. Stout*, 84 U.S. (17 Wall.) 657, 661 (1873) (“[I]f . . . it might justly be inferred by the jury that the defendant . . . had omitted that care . . . which prudent and careful men ordinarily bestow, the jury . . . [could] find for the plaintiff.”).

³⁶⁸ *Sullivan v. Baptist Mem’l Hosp.*, 995 S.W.2d 569, 571 (Tenn. 1999) (“‘Publication’ is a term of art meaning the communication of defamatory matter to a third person.”).

³⁶⁹ *Scripps NP Operating, LLC v. Carter*, 567 S.W.3d 1, 22 (Tex. Ct. App. 2016) (“‘Actual malice’ in a defamation case is a term of art . . . ‘Reckless disregard’ is also a term of art.”).

balance, unreasonably risks harm to children is a factual determination.³⁷⁰ A liability-conscious social media company could establish guidelines with which to self-regulate the danger posed by posts hosted on their app or the app's features. By contrast, deciding whether a post is actionably defamatory is a question of law, *i.e.*, a type of question that the *Zeran* court prudently noted as inappropriate for ICSPs and their agents.³⁷¹

A court wishing to apply the attractive nuisance doctrine to a social media company may hesitate to set imprudent precedent on reasonableness analysis in the social media context.³⁷² Unlike many questions of fact in cases of first impression, however, “unreasonably dangerous” here could be self-executing under a social media defendant’s terms and conditions.³⁷³ A court could thus impute knowledge of reasonableness in accordance with the defending ICSP’s terms and conditions,³⁷⁴ for example. Essentially all social media companies could be imputed with knowledge as to which posts are appropriate versus inappropriate, secure versus unsecure, and—for purposes of attractive nuisance—reasonably safe versus unreasonably dangerous.³⁷⁵

³⁷⁰ *Sexton v. Travelers Indem. Co. of Conn.*, 22-546, p. 8 (La. App. 3 Cir. 02/23/23); 357 So. 3d 947, 952 (“[T]he trier of fact must decide whether the social value and utility of the hazard outweigh, and thus justify, its potential harm to others.”).

³⁷¹ Whether a post is defamatory resembles a “legal judgment,” which the *Zeran* court reasoned ICSPs should and could not make for themselves. *Zeran*, 129 F.3d at 333.

³⁷² T. Hunter Jefferson, Note, *Constitutional Wrongs and Common Law Principles: The Case for the Recognition of State Constitutional Tort Actions Against State Governments*, 50 VAND. L. REV. 1525, 1540 (1997) (linking courts’ hesitation and fear of “unending liability”).

³⁷³ *Kukovec v. Estée Lauder Co.*, No. 22 CV 1988, 2022 U.S. Dist. LEXIS 202212, at *15 (N.D. Ill. Nov. 7, 2022) (“[R]equir[ing] users to scroll all the way to the bottom to even become aware of the site’s terms and conditions, then requires them to click on a buried link to learn the content [thereof] . . . , does not put a user on constructive notice.”).

³⁷⁴ *E.g.*, *Information for Parents and Minor Users*, X CORP., <https://help.x.com/en/rules-and-policies/information-for-parents-and-minor-users> [<https://perma.cc/P8BU-TS7F>] (“We recognize that minors are a more vulnerable group by virtue of their age. The X Rules enable minors to participate in the public conversation freely and safely, and minors should rely on the X Rules (and report to X) in order to protect themselves.”); YOUTUBE’S COMMUNITY GUIDELINES, <https://support.google.com/youtube/answer/9288567?hl=en#> [<https://perma.cc/9DSL-RED9>] (“We hope to protect viewers, creators, and especially minors.”); TERMS OF USE, <https://help.instagram.com/581066165581870> [<https://perma.cc/U923-3AW7>] (“We can refuse to provide or stop providing all or part of the service to you . . . immediately to protect our community or services . . .”).

³⁷⁵ X CORP., *supra* note 374.

Similarities of the “social media as real property” concept and imposing liability for defamatory material posted on one’s land notwithstanding, the attractive nuisance doctrine distinguishes itself from the defamation-based liability of *Zeran*, making it “Force-resistant.” In addition to imposing liability outside of the *Force* test’s second prong, the doctrine contributes to the balance struck between the policy goals of the Communications Decency Act of 1996 (CDA) and the First Amendment.

2. *Policy: “Protecting Children” as the Shared Cornerstone of Attractive Nuisance and the Communications Decency Act*

The attractive nuisance workaround also derives support from its congruence with the CDA’s statutory remnant, Section 223.³⁷⁶ As discussed above, Section 223 criminalizes, among other things, knowingly sending, displaying, or making available obscene material or child pornography to minors.³⁷⁷ The Supreme Court in *Reno* found the provisions protecting minors from obscene material online to be unconstitutionally overbroad because of the section’s use of the word “indecent” as an impermissible, “content-based blanket restriction on speech.”³⁷⁸ Though Section 223 has seen some enforcement as amended to prohibit the sending and displaying of material that is “obscene or child pornography,” parts of the law still using the “indecent” descriptor unconstitutionally burden free expression.³⁷⁹

Section 223 has seen little to no enforcement for its purpose of, as Senator Exon put it, protecting “children from sexually explicit internet content.”³⁸⁰ For CDA proponents who acknowledge its First Amendment problems, the attractive nuisance doctrine represents a specialized means of furthering the paramount policy of protecting children.³⁸¹

The CDA and the attractive nuisance doctrine share the chief policy goal of protecting children.³⁸² Though the *Reno* court opined that children need some level of “sophistication” with which to access the internet, modern

³⁷⁶ 47 U.S.C. § 223.

³⁷⁷ *Id.* § 223(a), (d).

³⁷⁸ *Reno v. ACLU*, 521 U.S. 844, 868 (1997).

³⁷⁹ Compare 47 U.S.C. § 223(a), (d) (prohibiting transfer of material found to be “obscene or child pornography”) with *id.* § 223(b)(2)(A) (reserving liability, for making “indecent communication[s] for commercial purposes . . . to any person under 18 years of age . . .”).

³⁸⁰ *FTC v. LeadClick Media, LLC*, 838 F.3d 158, 173 (2d Cir. 2016) (citing 141 Cong. Rec. S1953 (daily ed. Feb. 1, 1995) (statement of Sen. Exon)).

³⁸¹ See discussion *supra* Part II.B.2; *Reno*, 521 U.S. at 875.

³⁸² Compare Communications Decency Act, 110 Stat. at 140 with *Bennett v. Stanley*, 748 N.E.2d 41, 48 (Ohio 2001).

realities of social media marketing aimed at younger audiences demonstrates how minor children have developed that sophistication writ large.³⁸³ Aligning policy goals in this way may also redirect application of Section 230 to a narrower caveat focused ultimately on the CDA's original purpose of shielding minors from obscene material, thereby quelling the "growing chorus" of federal judges on Section 230 immunity's overbreadth.³⁸⁴

While the attractive nuisance doctrine may not prevent injury from unreasonable dangerous conditions (as opposed to Section 223's *ab initio* prohibition), it may incentivize social media companies to change their policies and procedures in the interest of avoiding liability.³⁸⁵ Recognition of the doctrine also puts the doctrine's begged questions of (1) what harm social media inflicts, (2) what harm is contained in the prerequisite of "physical," and (3) what constitutes "reasonableness" in the social media context before the tribunal, sidestepping the *Reno*-reminiscent concerns of overbroad legislative acts and their statutory language.³⁸⁶

3. *Foundations & Futures: the Internet and Property Law Today*

In addition to Section 230 immunity's inapplicability and political congruence with the attractive nuisance doctrine, a cause of action would also increase judicial knowledge of developments in internet-property mutualism.³⁸⁷ Of course, the Internet of Things and new forms of intangible property, such as NFTs, have inspired some judicial discussion of property interests online.³⁸⁸ This discussion has, contrary to the attractive nuisance doctrine's focus on *real* property, largely focused on *personal* property interests.³⁸⁹ Recognition of the attractive nuisance doctrine, therefore,

³⁸³ *Reno*, 521 U.S. at 854; Anderer, *supra* note 8.

³⁸⁴ *Gonzalez v. Google, LLC*, 2 F.4th 871, 913 (9th Cir. 2021) (Berzon, C.J., concurring), *vacated*, 143 S. Ct. 1191 (2023).

³⁸⁵ See RESTATEMENT (SECOND) OF TORTS § 339 (AM. L. INST. 1965) (presupposing, before listing elements, the land possessor is liable for damages owed for "physical harm to children trespassing . . .").

³⁸⁶ *Cf. Contreras, supra* note 10. California's "Social Media Platform Duty to Children Act" may have died in committee for this same overbreadth reason. *Id.*

³⁸⁷ Elizabeth P. Stedman, *MySpace, but Whose Responsibility? Liability of Social-Networking Websites When Offline Sexual Assault of Minors Follows Online Interaction*, 14 VILL. SPORTS & ENT. L.J. 363, 393–94 (2007).

³⁸⁸ See Mitzner, *supra* note 21; see also cases cited *supra* note 42.

³⁸⁹ *E.g., Hermès Int'l v. Rothschild*, 603 F. Supp. 3d 98, 101 (S.D.N.Y. 2022) ("Because NFTs can be easily sold and resold with a transaction history . . . , NFTs can function as investments that can store value and increase value over time.").

presents a new topic: what effect recognition of the internet as a “digital marketplace” or a “Wild West frontier” has on liability for negligence claims brought against ISPs and ICSPs.³⁹⁰ What is to be expected of a “reasonable” ISP or ICSP?³⁹¹ What does an “open and obvious danger” look like online?³⁹² What *should* one look like? As a few mentions in the literature indicate, the attractive nuisance doctrine has yet to be faithfully applied in the internet liability context.³⁹³ Questions like these can be answered by applying the doctrine to an ICSP asserting Section 230 immunity.

As seems to be the case with any new means of working around Section 230(c)(1)’s immunity, however, confusion leads to hesitation.³⁹⁴ Having defended the legal soundness and policy of the doctrine, the next Part attempts to curb confusion by answering concerns regarding the First Amendment, the role of parents, and internet liability case law.

V. DRAWBACKS OF APPLYING ATTRACTIVE NUISANCE TO SOCIAL MEDIA PLATFORMS

Section 230 and its broad application have fallen in Congressional crosshairs, especially with the relatively recent politicization of social media company’s “fact checking” third party posts.³⁹⁵ Both sides of the aisle want to keep Section 230 for one reason (*e.g.*, its protection of tech business and internet speech) and modify Section 230 for another (*e.g.*, allowing social media companies to “censor” users and do essentially nothing about harmful content).³⁹⁶ The law’s continued existence, amendment, and broad

³⁹⁰ Stedman, *supra* note 387, at 393–94; Byrin Romney, *Screens, Teens, and Porn Scenes: Legislative Approaches to Protecting Youth from Exposure to Pornography*, 45 VT. L. REV. 43, 112–13 (2020). See also discussion *supra* Part II.A.

³⁹¹ RESTATEMENT (SECOND) OF TORTS § 339(e) (AM. L. INST. 1965).

³⁹² See *infra* text accompanying note 462.

³⁹³ Romney, *supra* note 390, at 113 (“Though this doctrine has not been applied to the internet, it provides a useful example of society’s tolerance for child-protection measures.”).

³⁹⁴ See discussion of *Gonzalez* *supra* Part III.B.2.a.

³⁹⁵ Irina Ivanova, *Justice Department Moves to Make It Easier to Sue Internet Companies*, CBS NEWS: MONEYWATCH (Sept. 24, 2020, 6:54 AM) <https://www.cbsnews.com/news/department-of-justice-proposes-legislation-making-it-easier-to-sue-facebook-twitter/> [https://perma.cc/C4WJ-CAYB].

³⁹⁶ Dan Patterson, *What Is “Section 230,” and Why Do Many Lawmakers Want to Repeal It?*, CBS NEWS: MONEYWATCH (Dec. 16, 2020, 10:59 AM) <https://www.cbsnews.com/news/what-is-section-230-and-why-do-so-many-lawmakers-want-to-repeal-it/> [https://perma.cc/T4AC-TNK6].

application suggest fear of outright removal, calling to mind “unknown and far-reaching consequences.”³⁹⁷

In a spirit of compromise, this Comment’s proposed cause of action uses the attractive nuisance doctrine to work around Section 230 immunity with (at least, some of) these consequences in mind. Part V.A avers that, while the doctrine might appear to be a publisher-based liability scheme on its face,³⁹⁸ its fact-intensive nature would not punish ICSPs for removing some posts but for leaving similar posts alone. In addition to preserving the First Amendment’s protection of user- and ICSP-generated speech, the doctrine would also account for the role of the parent in their child’s use of social media, which Part V.B elucidates. Part V.C then distinguishes between a domain possessor’s duty versus a publisher’s duty. Finally, Parts V.D and V.E address anticipated judicial hesitation to recognize the doctrine *a la Zeran*’s “impossible burdens” resulting from internet liability.³⁹⁹

A. *The First-Amendment Concerns*

Can speech itself be unreasonably dangerous? An attractive nuisance plaintiff might sue a social media defendant based on a dangerous condition resembling speech, *i.e.*, a user’s post that unreasonably risks and causes harm to a minor user. This subpart therefore opens with the problem of liability based on speech, arguing that the doctrine either (a) falls outside of First-Amendment scrutiny as generally applicable or (b) satisfies scrutiny by conditioning liability on at least a showing of negligence. It then discusses the doctrine’s workability with 230(c)(2): the “Good Samaritan” provision. It then focuses on the fact-intensive nature of attractive-nuisance application and uses same to quell fears of one user-post-takedown being used to categorically remove other posts without distinction. This subpart concludes by clarifying that plaintiffs could plead “artificial condition” as whatever they would like (a user’s post, a platform feature, etc.).

1. *Attractive Nuisance’s Attachment of Liability to Artificial Conditions, not Speech*

The first concerns with recognizing any cause of action against a social media company arises from the First Amendment.⁴⁰⁰ Given Section 230’s

³⁹⁷ *Id.*

³⁹⁸ See *Stratton Oakmont, Inc. v. Prodigy Servs. Co.*, No. 31063/94, 1995 WL 323710 at *5 (N.Y. Sup. Ct. May 24, 1995) (“[T]o the extent computer networks . . . [exercise editorial discretion], they must also accept the concomitant legal consequences.”).

³⁹⁹ *Zeran v. America Online, Inc.*, 129 F.3d 327, 333 (4th Cir. 1997).

⁴⁰⁰ U.S. CONST. amend. I.

origin as a First-Amendment-conscious counterpart to the CDA, it is no surprise that any Section 230 debate necessarily centers on the first of the Constitution's many.⁴⁰¹ The *Reno* court struck down certain provisions of the CDA for their content-based restrictions on online speech, rejecting the application of "patently offensive" and "indecent" standards as overbroad.⁴⁰² Section 230—the CDA's constitutional remnant—does not restrict speech but instead precludes ISP or ICSP liability for claims that treat them as publishers.⁴⁰³ This immunity prevents the imposition of liability on speech published by ISPs or ICSPs and advances the First Amendment's disfavor for speech liability.⁴⁰⁴ Before explaining how the attractive nuisance doctrine works around Section 230, this subpart tackles the a priori question of how attractive nuisance liability does not violate the First Amendment.

Imposing liability on speech amounts to state action and must satisfy the First Amendment as incorporated against the states by the Fourteenth Amendment.⁴⁰⁵ The state, vis-à-vis a plaintiff's tort claims, may not impose liability on speech unless circumstances of the parties and the speech satisfy certain criteria.⁴⁰⁶ For example, a public figure cannot win on a

⁴⁰¹ Nicole Phe, Note, *Social Media Terror: Reevaluating Intermediary Liability under the Communications Decency Act*, 51 SUFFOLK U. L. REV. 99, 130 (2018); Robert A. Gomez, *Protecting Minors from Online Pornography Without Violating the First Amendment: Mandating an Affirmative Choice*, 11 SMU SCI. & TECH. L. REV. 1, 20–21 (2007); Anna Elisabeth Jayne Goodman, *When You Give a Terrorist a Twitter: Holding Social Media Companies Liable for Their Support of Terrorism*, 46 PEPP. L. REV. 147, 191–93 (2018).

⁴⁰² *Reno v. ACLU*, 521 U.S. 844, 880 (1997).

⁴⁰³ *Gonzalez v. Google, LLC*, 2 F.4th 871, 942 (9th Cir. 2021) (Gould, J., concurring in part, dissenting in part), *vacated*, 143 S. Ct. 1191 (2023). Narrowly construed restrictions on speech continue to exist in the current Section 223. *See generally* 47 U.S.C. § 223. This Comment mentions speech restriction here to distinguish the attractive nuisance doctrine's First Amendment issues as applied here from those of a "typical" challenge. *E.g.*, *United States v. Weiss*, 475 F. Supp. 3d 1015, 1026–38 (N.D. Cal. 2020) (analyzing Section 223 under overbreadth and as-applied arguments).

⁴⁰⁴ *James v. Meow Media, Inc.*, 300 F.3d 683, 695 (6th Cir. 2002) (citing *New York Times v. Sullivan*, 376 U.S. 254, 265 (1964)).

⁴⁰⁵ *Sullivan*, 376 U.S. at 276–77.

⁴⁰⁶ *See id.* at 279–80 (requiring a showing of "actual malice" to impose defamation liability for falsehood about public official's official conduct); *Hustler Mag. v. Falwell*, 485 U.S. 46, 56–57 (extending same to liability for intentional infliction of emotional distress); *Snyder v. Phelps*, 562 U.S. 443, 456–59 (2011) (precluding liability for intentional infliction of emotional distress for speech made about a private party about a matter of public concern).

defamation⁴⁰⁷ or intentional infliction of emotional distress (IIED)⁴⁰⁸ claim unless they show the defendant published falsehoods with “actual malice.” A private figure cannot win on an IIED claim if the defendant’s statement occurs in a public place and bears “on a matter of public concern.”⁴⁰⁹

For purposes of this Comment, attractive nuisance imposes a duty of reasonable care on ICSPs to maintain reasonably safe platforms, a duty satisfied by, among other actions, monitoring and editing users’ speech.⁴¹⁰ The doctrine survives scrutiny on this fundamental First Amendment issue for two reasons, the first being its nature as a neutrally applicable property tort doctrine that, at best, incidentally burdens speech. Even if First Amendment scrutiny applies, the doctrine requires the plaintiff to show the ICSP’s negligence, *i.e.*, all the First Amendment requires between private parties regarding private matters.

a. Attractive Nuisance as Neutrally Applicable Property Doctrine

An exception to the usual limits on speech liability can be found in *Cohen v. Cowles Media Co.*⁴¹¹ In that case, plaintiff Dan Cohen exchanged juicy details about a political candidate to newspapers for a “promise of confidentiality.”⁴¹² When the newspapers breached this promise, Cohen sued them in state court for “fraudulent misrepresentation and breach of contract.”⁴¹³ The newspapers continuously claimed immunity under the First Amendment.⁴¹⁴ The case eventually reached the Minnesota Supreme Court, which held that enforcement of Cohen’s promissory estoppel theory, on balance, violated the newspapers’ First Amendment rights.⁴¹⁵

Granting certiorari on the “First Amendment implications” of the case, the U.S. Supreme Court held that imposing liability did not violate the First Amendment because the “generally applicable” promissory estoppel theory

⁴⁰⁷ *Sullivan*, 378 U.S. at 279–80.

⁴⁰⁸ *Falwell*, 485 U.S. at 56–57.

⁴⁰⁹ *Snyder*, 562 U.S. at 454–55 (quoting *Connick v. Myers*, 461 U.S. 138, 146 (1983))

⁴¹⁰ *Cf.* RESTATEMENT (SECOND) OF TORTS, § 339 (AM. L. INST. 1965). *See also supra* text accompanying note 354 about possible “artificial conditions.”

⁴¹¹ 501 U.S. 663 (1991).

⁴¹² *Id.* at 665.

⁴¹³ *Id.* at 666.

⁴¹⁴ *Id.* at 666–67.

⁴¹⁵ *Id.* at 666–67 (quoting *Cohen v. Cowles Media Co.*, 457 N.W.2d 199, 205 (Minn. 1990)). Cohen’s claims morphed into promissory estoppel after suggestion by one of the Minnesota Supreme Court Justices at oral argument. *Id.*

incidentally burdened the newspapers' speech.⁴¹⁶ As a "generally applicable" law, Minnesota's promissory estoppel doctrine applied equally to the newspaper defendants as it did to "all the citizens of Minnesota."⁴¹⁷ The newspaper defendants could not hide behind the First Amendment to escape liability for violations of generally applicable criminal, tax, antitrust, or copyright laws just because compliance would burden the press.⁴¹⁸ The newspapers could be liable because promissory estoppel did not "single out" the press when it required the newspapers to pay Cohen their breached promises.⁴¹⁹ Neither did promissory estoppel liability "punish" the speakers for reputational or emotional harm caused by the torts of defamation and IIED, respectively; it only compensated for the newspapers' breach.⁴²⁰

Substitute newspaper for social media company.⁴²¹ A social media company could not use the First Amendment as a defense, for example, against liability for its unauthorized publication of copyrighted work.⁴²² Enforcement of copyright law—generally applicable, furthering intellectual property interests, and not targeting speech—creates only an "incidental[] and [therefore] constitutionally insignificant" burden on a social media company's free-speech right to arrange its platform as it wishes.⁴²³

What goes for intellectual property liability should go for real property liability. The attractive nuisance doctrine, requiring land possessors to keep their premises free of unreasonably unsafe conditions, incidentally burdens

⁴¹⁶ *Id.* at 669.

⁴¹⁷ *Id.* at 670.

⁴¹⁸ *Id.* at 669–70.

⁴¹⁹ *Id.* at 670–72.

⁴²⁰ *Id.*

⁴²¹ Social media platforms, mixing news and entertainment, are entitled to First Amendment protection. *See* *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 578 (1977) ("There is no doubt that entertainment, as well as news, enjoys First Amendment protection."); *Moody v. NetChoice*, 144 S. Ct. 2383, 2400, 2403–05 (2024). *Cohen's* language regarding the application of generally applicable laws "against the press" does not detract from its applicability to other publishing defendants. *Lovell v. Griffin*, 303 U.S. 444, 452 (1938) ("The liberty of the press is not confined to newspapers and periodicals. It necessarily embraces pamphlets and leaflets."). The First Amendment does not grant immunity to publish in violation of generally applicable laws. *Zacchini* at 573 (comparing Ohio's "right to publicity" with generally applicable copyright law).

⁴²² *See* *Cohen*, 501 U.S. at 669; *contra* *Hunley v. Instagram, LLC*, 73 F.4th 1060, 1077 (9th Cir. 2023) (news outlet embedding a copyrighted photo does not amount to "primary infringement," so Instagram faced no "secondary [copyright] liability").

⁴²³ *Cohen*, 501 U.S. at 672.

the land possessor's right to use their land as they wish.⁴²⁴ To fully extend attractive nuisance would be to apply a law equally applicable to a domain owner as to a land possessor, *i.e.*, a "law of general applicability."⁴²⁵ Real property tort law—furthering land ownership interests and not targeting speech—prohibits the press from "break[ing] and enter[ing] an office or dwelling to gather news."⁴²⁶ If the press trespassers were children, the land possessor in the hypothetical would bear the generally applicable burden of maintaining reasonably safe conditions.⁴²⁷ The land possessor could not point to the First Amendment as an excuse to exercise less than reasonable care just because doing so would incidentally burden their speech; such is an "obligation shared by all citizens" who possess real property.⁴²⁸

Further, like promissory estoppel in *Cohen*, attractive nuisance remedies a harm distinct from defamation and IIED's reputational and emotional harms as caused by speech.⁴²⁹ By treating a social media post as an artificial condition instead of speech, the attractive nuisance doctrine is a generally applicable law exempt from First Amendment scrutiny.⁴³⁰

b. Attractive Nuisance as Gertz-friendly Negligence Standard

Even if First Amendment scrutiny applies, the attractive nuisance doctrine satisfies the private-persons-private-matters test put forth in *Gertz v. Robert Welch*.⁴³¹ In *Gertz*, prominent lawyer Elmer Gertz brought a

⁴²⁴ RESTATEMENT (SECOND) OF TORTS § 339 (AM. L. INST. 1965). Similar to attractive nuisance, common-law nuisance claims also incidentally and constitutionally burden speech minus a showing of content-based, discriminatory enforcement. *Black Rock City, LLC v. Pershing Cnty. Bd. of Comm'rs*, No. 3:12-cv-00435-RCJ-VPC, 2013 U.S. Dist. LEXIS 60072, at *22 (D. Nev. Apr. 26, 2013). *See also* *Lucas v. S. Carolina Coastal Council*, 505 U.S. 1003 (1992) (holding that "background principles of the State's law of property and nuisance" are constitutional; they are incidental as "already place[d] upon land ownership").

⁴²⁵ *Cohen*, 501 U.S. at 670.

⁴²⁶ *Id.* at 669.

⁴²⁷ *Compare id.* with RESTATEMENT (SECOND) OF TORTS § 339.

⁴²⁸ *Cohen*, 501 U.S. at 669.

⁴²⁹ *Compare id.* at 671 with *New York Times v. Sullivan*, 376 U.S. 254, 272–73 (1964) (reputational harm) and *Hustler Mag. v. Falwell*, 485 U.S. 46, 50 (emotional harm). *See also* *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 572–73 (1977) (finding distinctions between harms remedied by "right of publicity" and "false light" significant for purposes of First Amendment affirmative defense).

⁴³⁰ RESTATEMENT (SECOND) OF TORTS § 339 (AM. L. INST. 1965). For an argument that the *Zeran* court's feared "chilling effect" does not apply to the doctrine, see *infra* Part V.A.3.

⁴³¹ 418 U.S. 323 (1974).

wrongful death claim against a police officer.⁴³² A magazine cited Gertz's involvement in the litigation as evidence of his role as the "architect" of a Communist conspiracy to discredit local law enforcement.⁴³³ The magazine published this characterization and Gertz sued for libel, claiming the falsehoods "injured his reputation as a lawyer and a citizen."⁴³⁴ The magazine defended on First Amendment grounds, citing the *Sullivan* case to exempt them from liability for their speech about Gertz as "a public figure" concerning "an issue of public interest and concern."⁴³⁵ The trial and appellate courts accepted the magazine's argument that, minus a "clear and convincing" showing of "actual malice," Gertz could not recover, "public figure" or not.⁴³⁶

The Supreme Court reversed, holding that *Sullivan*'s clear-and-convincing-evidence-of-actual-malice standard did not apply to Gertz's libel claim.⁴³⁷ The *Gertz* court found Gertz, despite his participation in "community and professional affairs" as a lawyer, to be less than a "public figure."⁴³⁸ The Court treated Gertz as a private individual instead of a public figure and refused to apply *Sullivan*'s heightened standard.⁴³⁹ Because *public* figures "voluntarily expose[]" themselves to public comment, the First Amendment affords more protection for the average commentator against liability.⁴⁴⁰ By contrast, the First Amendment affords more "latitude" to states protecting the reputation of *private* individuals.⁴⁴¹

To comply with *Gertz*, a state must at least require a private plaintiff to prove that a defamation defendant negligently published an injurious "defamatory falsehood."⁴⁴² The attractive nuisance doctrine's duty of

⁴³² *Id.* at 325.

⁴³³ *Id.* at 325–26.

⁴³⁴ *Id.* at 326–27.

⁴³⁵ *Id.* at 327–28 (citing *New York Times v. Sullivan*, 376 U.S. 254 (1964)).

⁴³⁶ *Id.* at 328–32 (quoting *Sullivan*, 376 U.S. at 280).

⁴³⁷ *Id.* at 332.

⁴³⁸ *Id.* at 351–52.

⁴³⁹ *Id.* at 343–46.

⁴⁴⁰ *Id.* at 345–46.

⁴⁴¹ *Id.* See also *Cohen v. Cowles Media Co.*, 501 U.S. 663, 678–79 (1991) (Souter, J., dissenting) ("One can conceive of situations in which the injured party is a private individual, whose identity is of less public concern than that of [Dan Cohen]; liability there might not be constitutionally prohibited.").

⁴⁴² *Gertz*, 418 U.S. at 347 ("We hold that, so long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual.").

reasonable care corresponds to *Gertz*'s floor of negligence.⁴⁴³ In cases involving social media posts on matters of private concern, the attractive nuisance doctrine imposes the constitutionally required duty of reasonable care.⁴⁴⁴ Attractive nuisance liability complies with the speech-liability line of cases and comports with Section 230's self-regulation purpose.

2. *The "Good Samaritan" Provision and the Free Speech Implications of Attractive-Nuisance Self-Regulation*

The attractive nuisance cause of action also impacts ICSPs' self-regulation of speech—a practice largely made possible by Section 230's "Good Samaritan" provision.⁴⁴⁵ The "Good Samaritan" provision—230(c)(2)—provides that ICSPs cannot be liable for "any action voluntarily taken in good faith to restrict access to or availability of material that the provider . . . considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected."⁴⁴⁶ This oft-overshadowed shield within Section 230 incentivizes ICSPs to self-regulate by protecting them from liability for moderating content per their content moderation guidelines.⁴⁴⁷

Suppose that a social media platform receives a report from one user alleging that another user's post is unreasonably harmful in that it promotes terrorism.⁴⁴⁸ Rife with political undertones by definition,⁴⁴⁹ suppose also the post does not directly incite lawless action.⁴⁵⁰ Suppose further that the post complained of is of a familiar type to the moderator charged with reviewing the report.⁴⁵¹ Is a social media company at risk of liability for choosing to delete or deprioritize the politically charged, arguably terrorist speech?

⁴⁴³ RESTATEMENT (SECOND) OF TORTS § 339(e) (AM. L. INST. 1965).

⁴⁴⁴ *Id.*

⁴⁴⁵ 47 U.S.C. § 230(c)(2).

⁴⁴⁶ *Id.* § 230(c)(2)(A).

⁴⁴⁷ *Force v. Facebook, Inc.*, 934 F.3d 53, 79 (2d Cir. 2019) (Katzmann, J., concurring in part, dissenting in part).

⁴⁴⁸ *Cf. id.*, 934 F.3d at 59; *Gonzalez v. Google, LLC*, 2 F.4th 871, 886 (9th Cir. 2021), *vacated*, 143 S. Ct. 1191 (2023).

⁴⁴⁹ "Terrorism," as used in cases brought under the Anti-Terrorism Act (ATA), refers to activities involving violent acts dangerous to human life which would constitute criminal violations if done within U.S. borders, intended to intimidate, influence, or affect civilians and the government. *See generally* 18 U.S.C. § 2331(1).

⁴⁵⁰ *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).

⁴⁵¹ After all, posts are monitored both algorithmically and personally every day. *Force*, 934 F.3d at 60–61.

Of course not. Congress added the “Good Samaritan” provision to shield ICSPs (not state actors) from immunity if they exercised editorial discretion in removing some posts but not others as “lascivious, filthy, excessively violent,” and so on.⁴⁵² The whole point of Section 230(c)(2)—incentivizing self-regulation over government regulation of online platforms—precludes the flood of First-Amendment litigation feared by Section 230 proponents.⁴⁵³

The attractive nuisance theory, as applied to social media companies, leaves the Good Samaritan provision intact. By its own language, the provision acknowledges “otherwise objectionable” speech as removable by social media companies regardless of constitutional protection.⁴⁵⁴ The post complained of could be both “otherwise objectionable” and involve “an unreasonable risk of death or serious bodily harm.”⁴⁵⁵ Social media companies therefore would not incur publisher liability from users whose posts would be removed pursuant to a judgment ordering same from a theoretical attractive nuisance plaintiff. An attractive nuisance cause of action would thusly leave Section 230’s First-Amendment conscience intact.

3. *Attractive Nuisance as Less Than a Prior Restraint*

The attractive nuisance doctrine would not lead to unconstitutional prior restraints, *i.e.*, judgments preemptively banning speech.⁴⁵⁶ A hypothetical attractive nuisance plaintiff could, of course, secure an injunction ordering removal of a post alleged to be unreasonably dangerous.⁴⁵⁷ Such an injunction would not, however, set precedent for a category of removable speech.⁴⁵⁸ Discussions of the doctrine—replete with distinctions drawn

⁴⁵² Adam Candeub & Eugene Volokh, *Interpreting 47 U.S.C. § 230(c)(2)*, 1 J. FREE SPEECH L. 175, 188 (2021).

⁴⁵³ *Id.* at 185 (“The legislators appeared to believe that giving platforms . . . legal protection for moderating content would create family-friendly alternatives that users who wanted such alternatives could choose.”).

⁴⁵⁴ 47 U.S.C. § 230(c)(2)(A).

⁴⁵⁵ Compare *id.* with RESTATEMENT (SECOND) OF TORTS, § 339(b) (AM. L. INST. 1965).

⁴⁵⁶ *Alexander v. United States*, 509 U.S. 544, 550 (1993).

⁴⁵⁷ The judgment need not, though. The attractive nuisance doctrine, like most tort doctrines, aims to make the injured party whole. John C. Cherundolo, *Tort Law*, 64 SYRACUSE L. REV. 895, 951 (2014). This line of argument assumes the speech itself would be the unreasonably dangerous condition, though it need not be, *see supra* note 354 and discussion *infra* Parts V.B, V.C.

⁴⁵⁸ Specifically, an injunction to remove a certain post(s) would not serve the same prohibited purpose as a “prior restraint” in First Amendment terms, used here to describe an “administrative [or] judicial order[] forbidding certain communications when issued in

between each of its five elements, most of which involve fact-intensive reasonableness and foreseeability determinations—have minimal value as precedent.⁴⁵⁹ Most attractive nuisance defendants are not winning on summary judgment because of a binding case in their favor, but instead because of the plaintiff's failure to make a *prima facie* case.⁴⁶⁰ As a result, any theoretical injunction removing a third party's post (speech) could be distinguished by a subsequent removal, pointing to factors such as the child's ability to understand the dangers of social media in general,⁴⁶¹ the content of the speech being different, and perhaps the online equivalent of "obvious dangers."⁴⁶² What is found to be unreasonably dangerous for one plaintiff may not be so for another, and the doctrine's five elements allow for multifarious factual disputes on a case-by-case basis.

4. *The Flexibility of Attractive Nuisance's "Condition" Requirement*

One concerned with the First Amendment implications of acknowledging attractive nuisance as a cause of action against ICSPs need not presuppose that third parties' speech—the words comprising the post

advance of the time that such communications are to occur." *Alexander*, 509 U.S. at 550. An injunction to render safe the unreasonably dangerous condition would necessarily "target imminent harm or harm that already has occurred" and therefore likely satisfy First Amendment requirements. Shelley Ross Saxer, *Zoning Away First Amendment Rights*, 53 WASH. U. J. URB. & CONTEMP. L. 1, 99 (1998).

⁴⁵⁹ Varda, *supra* note 268, at 358–59. See, e.g., *Bennett v. Stanley*, 748 N.E.2d 41, 47 (Ohio 2001) (distinguishing cases based on foreseeability of children trespassing); *McCormick v. Custom Pools, Inc.*, 376 N.W.2d 471, 477 (Minn. Ct. App. 1985) (distinguishing cases based on intelligence of the trespassing children).

⁴⁶⁰ E.g., *Laster ex rel. Laster v. Norfolk S. Ry. Co.*, 13 So.3d 922, 938 (Ala. 2009) (affirming summary judgment where plaintiff failed to prove minor did not appreciate danger posed by stopped train); *Jesko v. Turk*, 219 A.2d 591, 592 (Pa. 1966) (affirming judgment for defendant where plaintiff failed to prove utility of unmaintained wall as outweighed by risk posed to children).

⁴⁶¹ "The duty to look out for the safety of a trespassing child ends where the child's capacity to understand and avoid the danger begins." D. E. Buckner, Comment Note, *Age and Mentality of Child as Affecting Application of Attractive Nuisance Doctrine*, 16 A.L.R. 3d 25 § 3[c] (1967).

⁴⁶² Applying the attractive nuisance doctrine to social media platforms would likely lead to the development of an online equivalent of "open and obvious dangers." "When a danger is open and obvious . . . [t]he doctrine of attractive nuisance does not apply and the landowner owes a child no duty in . . . that the risk of harm is or should be foreseeable to the child." *Mayle v. McDonald Steel Corp.*, 2011-Ohio-5234, ¶ 46 (11th Dist.) (collecting Ohio cases).

complained of—need always be construed as the doctrine’s unreasonably dangerous condition. Even assuming the speech-as-dangerous-condition construction as impermissibly burdensome of First Amendment freedoms, the doctrine is not so inflexible as to limit its definition of “unreasonably dangerous condition” to the speech itself. In theory, user-generated posts share enough in common with an ICSP’s algorithms and other features to be considered “conditions” in attractive nuisance terms. First, they are all “artificial” as man-made or otherwise not naturally occurring.⁴⁶³ Second, all of the above are independently extant on the company’s platform at the time any user accesses the platform, distinguishing them from “activities of the possessor,” which are beyond the scope of the doctrine.⁴⁶⁴ An attractive nuisance plaintiff could treat a third party’s post as an artificial condition just as readily as they could treat a domain’s feature as an artificial condition.

In practice, the latter of these two conceptualizations would probably be more successful in sidestepping the First Amendment altogether. This Comment, in the spirit of staying largely theoretical, continues by addressing another batch of concerns related to the parent’s role in controlling their child’s social media use.

B. The Parent’s Role in their Child’s Social Media Use

Social media platforms and other ICSPs may defend in part by pointing to the parents’ failure to reasonably control their minor child’s social media use. To be sure, questions of parental supervision arise in almost any negligence suit with injured minor children.⁴⁶⁵ In the social-media-causing-injury context, an ICSP may argue that the parent ought to be liable, given the traditional assumption that parents can and should reasonably control their minor child’s activity.⁴⁶⁶ Why should the social media company have to make the minor child whole when the child’s parents ignored the

⁴⁶³ See generally RESTATEMENT (SECOND) OF TORTS, § 339 caveat, cmt. a (AM. L. INST. 1965).

⁴⁶⁴ *Id.* cmt. a.

⁴⁶⁵ Lauren J. Wolter, Note, *The Parental Immunity Doctrine: Should It Shield Parents from Being Apportioned Fault in Products Liability Cases Where Their Negligent Supervision Resulted in Their Child Sustaining Harm from a Product that Presents Obvious Dangers, and Can the Consumer Product Safety Commission Recall the Product?*, 41 QUINNIPIAC L. REV. 135, 147–48 (2022).

⁴⁶⁶ *E.g.*, Clayton v. Morgan Cnty. Sheriff’s Dep’t, 95 N.E.3d 189, 192–93 (Ind. Ct. App. 2018).

company's in-app parental controls?⁴⁶⁷ Is the ICSP to stand *in loco parentis*? § 230(d) obligates ICSPs to provide "customers" with notice of parental controls.⁴⁶⁸ If a social media company reasonably notifies its "customers" of in-app filters "that may assist . . . [them] in limiting access to material that is harmful to minors," isn't that enough?⁴⁶⁹

In short, § 230(d) operates on false premises regarding today's ICSPs, particularly social media companies. The provision's obligation of ICSPs to provide parental controls and notice thereof was added in 1998.⁴⁷⁰ It has thus functionally been there since the start, having joined the U.S. Code with a nascent understanding of "online communities" like "Bolt" and "Open Diary."⁴⁷¹ As such, asserting that § 230(d) adequately notifies today's social media users (who are thirteen years old, if perfectly honest) of parental controls is naïve at best and ignorant at worst.⁴⁷²

First, § 230(d) narrows the obligation of providing notice of parental controls to "the time of entering an *agreement* . . . for the provision of interactive computer service and *in a manner deemed appropriate by the provider*."⁴⁷³ Not only may the ICSP lump in notice of such controls with the rest of its terms and conditions, but it may also do so "in a manner deemed appropriate" by its own terms.⁴⁷⁴ As of this Comment's publication, nobody reads the "terms and conditions" embedded in apps downloaded and used, including social media apps.⁴⁷⁵ Though courts order⁴⁷⁶ as though this is not the case—lest the enforceability of contracts cease altogether—a separate issue comes from how these oft-ignored "agreements" are

⁴⁶⁷ Eldar Haber & Tammy Harel Ben Shahr, *Algorithmic Parenting*, 32 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1, 23–25 (2021).

⁴⁶⁸ 47 U.S.C. § 230(d).

⁴⁶⁹ *Id.*

⁴⁷⁰ Compare 47 U.S.C. § 230(d) (1997) and 47 U.S.C. § 230(d) (1998).

⁴⁷¹ Lucia Peters, *Before We Had Social Media, We Had These Sites*, BUSTLE (Mar. 11, 2016), <https://www.bustle.com/articles/147351-7-90s-social-media-sites-from-before-social-media-was-a-thing> [<https://perma.cc/UMY5-QD5L>].

⁴⁷² CURLEY, *supra* note 8, at 45.

⁴⁷³ 47 U.S.C. § 230(d) (emphasis added).

⁴⁷⁴ *Id.*

⁴⁷⁵ Fisher, *supra* note 327, at 1245.

⁴⁷⁶ *E.g.*, Meyer v. Uber Techs., 868 F.3d 66, 78–79 (2d Cir. 2017) ("While it may be the case that many users will not bother reading the additional terms, that is the choice the user makes; the user is still on inquiry notice.").

“accepted” by minor users.⁴⁷⁷ To say that a “reasonable” thirteen-year-old could understand the legalese of an app’s “Terms and Conditions” (perhaps in “legalese” precisely because of the leeway granted to the ICSP via § 230(d)’s “in a manner deemed appropriate” clause) belies reason.⁴⁷⁸

Second, as suggested above, the “customer” may very well be a minor user, whether they waited until the age of thirteen to create an account or lied about their age to bypass the age restriction.⁴⁷⁹ This means the parent’s access to any helpful control falls entirely in the minor’s somehow-competent-to-contract hands. So long as the minor user understands “parental controls” to be a limit on their liberty to access the entirety of what they just gained access to, the likelihood that a parent will assume control over the minor’s use is understandably low.⁴⁸⁰ One does not tell on oneself.

Third, even if parents do have access to controls, the common law of parental liability recognizes the fact that constant parental supervision is not feasible.⁴⁸¹ The attractive nuisance doctrine presupposes that curious children, by virtue of being at-large, will not always have the benefit of parental supervision to prevent physical injury from befalling them.⁴⁸² That is, in a sense, the entire point of the doctrine—to protect children from their own curiosity while intermeddling outside of their parent’s care.⁴⁸³ Were the slightest mistake in parental supervision able to abrogate a land possessor’s liability altogether, no attractive nuisance claim would ever succeed.

⁴⁷⁷ Michelle A. Sargent, Note, *Misplaced Misrepresentations: Why Misrepresentation-of-Age Statutes Must Be Reinterpreted as They Apply to Children’s Online Contracts*, 112 MICH. L. REV. 301, 308–09 (2013) (“[C]hildren making agreements online are more vulnerable than ever and require the protection of the infancy doctrine.”).

⁴⁷⁸ 47 U.S.C. § 230(d); see also Sargent, *supra* note 477, at 323.

⁴⁷⁹ See generally CURLEY, *supra* note 8, at 43; Anderer, *supra* note 8.

⁴⁸⁰ See Wolter, *supra* note 465, at 160–62.

⁴⁸¹ Alberto Bernabe, *Setting Parental Controls: Do Parents Have a Duty to Supervise Their Children’s Use of the Internet?*, 31 J. MARSHALL J. INFO. TECH. & PRIV. L. 309, 314 (2014) (aligning the theoretical duty to supervise the child’s online activity with the supervisory duties of parents per standards of “reasonable care,” *i.e.*, less than constant supervision, as would be unreasonable); see also Wolter, *supra* note 465, at 159.

⁴⁸² *Bennett v. Stanley*, 748 N.E.2d 41, 48 (Ohio 2001) (“Despite our societal changes, children are still children. They still learn through their curiosity They still do not always appreciate danger. They still need protection by adults.”).

⁴⁸³ Compare *id.* with RESTATEMENT (SECOND) OF TORTS § 339 cmt. i (AM. L. INST. 1965).

This not to say that parents should not be liable at all for failure to reasonably supervise their minor children or control their behavior.⁴⁸⁴ Rather, it is to emphasize that parental fault operates more as an affirmative defense than as a reason to preclude recognition of an attractive nuisance cause of action against ICSPs. Assuming the Restatement's drafters' omissions were intentional, one must conclude that attractive nuisance liability depends not "upon a showing that the child's trespass was *not* due to parental negligence in failing to properly supervise the child."⁴⁸⁵ The availability of a defense does not foreclose the possibility of acknowledging a claim at all; likely victory is not needed to recognize a cause of action.⁴⁸⁶ Opponents of applying the doctrine to ICSPs should save the "parental fault" argument for a test case rather than preclude attractive nuisance altogether.

Before addressing further concerns as to ICSPs' fault and the impact of the doctrine on ICSPs more generally, a policy question persists: who are parents to say whether their minor child is "harmed" by social media, anyway? If a cause of action for injury caused by the child's access to unreasonably dangerous conditions on social media were to be recognized, who would define the injuries? Should courts require an expert's blessing?⁴⁸⁷

This concern, political in nature, precludes a statutory form of this Comment's proposed cause of action more than it counsels against a court's recognition of same.⁴⁸⁸ Proposing a cause of action assumes that courts will look to controlling attractive nuisance jurisprudence (if not competent, expert evidence before them in a test case) to determine what "damages" are for ICSPs, perhaps venturing to expand their understanding of injury.⁴⁸⁹

⁴⁸⁴ See, e.g., *Sears, Roebuck & Co. v. Huang*, 652 A.2d 568, 573 (Del. 1995) (holding in premises liability action that "when parental negligence is relevant but not actionable, a defendant may introduce evidence to establish that parental negligence was the *supervening* case of a minor child's injury") (emphasis in original); Bernabe, *supra* note 481, at 312.

⁴⁸⁵ *Coe v. Schneider*, 424 A.2d 1, 2 (Del. 1980) (emphasis added).

⁴⁸⁶ So long as the cause of action proposed is a "nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law," at least. FED. R. CIV. P. 11(b)(2).

⁴⁸⁷ *A la* medical negligence claims in Ohio. OHIO REV. CODE § 2323.451(B).

⁴⁸⁸ In the spirit of disclosure, this Comment began as a statutory proposal to amend Section 230 to account for attractive-nuisance-esque claims. Given concerns with mingling state law issues with federal ones, constitutional concerns of Congress's authority, the CDA's rough past, and the pending litigation surrounding social media liability, this Comment abandoned the statutory route. See *generally* Contreras, *supra* note 10.

⁴⁸⁹ Whether mental illnesses and disorders ought to be considered under classical classifications of physical injury applicable to the attractive nuisance doctrine is beyond the

Beyond the inevitable questions that Section 230 raises on the First Amendment and the parent's role, other concerns raised by the attractive nuisance doctrine implicate more general questions of to whom a duty of care is owed, whether recognition would truly render ICSPs unprofitable, and what "reasonable care" would look like in a hypothetical case. The next three subparts deal with each concern in turn.

C. Duties of a Publisher vs. a Land Possessor: a Brief Clarification on How the Attractive Nuisance Theory "Works Around"

If a social media defendant did not point to the First Amendment or the parents' fault to defend a hypothetical attractive nuisance case, it might instead point to its status as an interactive computer *service* provider, not *information* provider.⁴⁹⁰ Assuming that the plaintiff's unreasonably dangerous condition is merely a third party's post, the company could argue that it is not responsible in that, by merely hosting the domain, it did not create the dangerous condition; liability therefore rests with the poster, not the possessor of the domain.⁴⁹¹

This Comment does not suggest an agency relationship between an ICSP and its platform's users. Rather, this Comment proposes a new workaround via classic premises liability law to hold an ICSP *directly* liable for its *own* negligence, not *vicariously* liable for the negligent, intentional, or otherwise wrongful creation of an unreasonably dangerous post.

Thus, the attractive nuisance doctrine's *coup de grace*: social media negligence under attractive nuisance comes not from the social media company's breach of a duty to publish and editorialize in any specific way, but rather its breach of "reasonable care not to inflict foreseeable harm" to children trespassing on its platform.⁴⁹² Similar to how the status of an entrant

scope of this Comment. *But see* Narbeh Bagdasarian, *A Prescription for Mental Distress: The Principles of Psychosomatic Medicine with the Physical Manifestation Requirement in N.I.E.D. Cases*, 26 AM. J.L. & MED. 401, 422–23 (arguing that physical manifestation ought to be kept for N.I.E.D. liability but that "psychosomatic doctrine," as linking "certain physical complaints and bodily symptoms to the mental state of a person," should govern for courts to modernly acknowledge the physiological effects of psychiatric trauma).

⁴⁹⁰ 47 U.S.C. § 230(f)(2).

⁴⁹¹ *Fair Hous. Council of San Fernando Valley v. Roommates.Com, LLC*, 521 F.3d 1157, 1162 (9th Cir. 2008)

⁴⁹² RESTATEMENT (SECOND) OF TORTS, § 339 cmt. b (AM. L. INST. 1965). *See also id.* cmt. i ("The duty which . . . this Section imposes upon the possessor of land is based upon the well-known tendency of children to trespass upon the land of others and the necessity of protecting them . . . trespassers, from their childish lack of attention and judgment.").

determines the appropriate standard of care for land possessors in most jurisdictions, so does the status of the “possessor” determine the source of the duty, so to speak.⁴⁹³ Regardless of whether the posting user was negligent or wrongful, the ICSP—analagized to a land possessor in attractive nuisance terms—owes children trespassing on its domain a duty of reasonable care to eliminate dangers “or otherwise to protect the children.”⁴⁹⁴

Bringing the attractive nuisance analogy to its conclusion requires recognition that the doctrine works around § 230(c)(1) immunity not by removing the immunity, but by treating the social media company as a premises owner rather than a publisher. The doctrine, like rules imposing liability for failure to remove defamatory material posted on one’s land⁴⁹⁵ or failure to repair dangerous conditions created by former occupants of the land,⁴⁹⁶ shifts the duty from that of a reasonable publisher to that of a reasonable land possessor. Who posted does not matter; what matters is that the post, as an artificial condition, exists while the domain owner reasonably expects that children will trespass on the domain.⁴⁹⁷

Should a court refuse to recognize an action treating a third party’s post as an unreasonably dangerous condition, the doctrine may still be viable upon allegation that a feature of the ICSP’s platform is an unreasonably dangerous condition. This sidesteps the argument that the social media company would not be directly negligent; indeed, an ICSP’s platform’s features are its own installations.⁴⁹⁸

⁴⁹³ See Gulbis, *supra* note 49.

⁴⁹⁴ RESTATEMENT (SECOND) OF TORTS § 339(e).

⁴⁹⁵ *Id.* § 577 cmt. p (explaining land possessors may be liable for knowingly failing to remove defamation posted on their land, as the “basis of the liability is [the possessor’s] duty not to permit the use of [their] land or chattels for a purpose damaging to others outside of the land.”).

⁴⁹⁶ *Id.* § 362(c) (imposing liability on landlords who fail to exercise reasonable care in remedying a dangerous condition left on the landlord’s land by another).

⁴⁹⁷ *Id.* § 339 cmt. d (“It is not necessary that the . . . artificial condition shall have been created by the possessor, or that he shall have done anything active to maintain it. It is enough that it has been created by some third person . . . [even by another trespasser] and that he knows or has reason to know of its existence and realizes or should realize its danger to children.”).

⁴⁹⁸ This Comment expounds on the “post-as-dangerous-condition” route more than the “platform-feature-as-dangerous-condition” route to conceptualize attractive nuisance’s prerequisite of an “artificial condition” broadly and distinguish it from a product liability approach. In practice, the latter would likely be pled in the alternative, likely arguing that

D. The “Impossible Burden” of Zeran and Progeny

Assuming that conceptualizing ICSPs as land possessors would allow plaintiffs to seek damages from social media companies and other ICSPs based on their failure to maintain reasonably safe domains, another policy question persists: would recognizing this cause of action subject ICSPs to endless liability, thereby disincentivizing social media companies from self-regulating and frustrating the very goal Congress sought to achieve by enacting Section 230 in the first place?⁴⁹⁹

Perhaps not. This sentiment, as has been repeatedly cited to show Congress’s “intent” to shield ICSPs from *any* notice-based liability,⁵⁰⁰ was articulated a quarter-century ago by the *Zeran* court.⁵⁰¹ As described above, the *Zeran* holding is a Supreme-Court-blessed expansion of Section 230 immunity based on dated understandings of both (1) Congress’s intent as beyond the actual words of § 230(c)(1) itself and (2) the capabilities of ICSPs to regulate their own platforms.⁵⁰²

First, the *Zeran* court, reasoning that the administrative burden of screening a platform’s own posts would be impossible, assumed that notice-based liability would freeze or disincentivize ICSP self-regulation.⁵⁰³ That is all it did, though. *Assumed*.⁵⁰⁴ The *Zeran* court gleaned Congress’s intent from Section 230’s language at the time and summarily concluded that Congress’s intent expanded beyond Section 230’s plain meaning.⁵⁰⁵ What has resulted is unchecked expansion of Section 230 immunity that Congress has attempted to curtail for years since.⁵⁰⁶

some feature of a social media platform’s app, as a product, was unreasonably dangerous. *See generally* Lemmon v. Snap, Inc., 995 F.3d 1085 (9th Cir. 2021).

⁴⁹⁹ *Zeran v. America Online, Inc.*, 129 F.3d 327, 333 (4th Cir. 1997).

⁵⁰⁰ *See, e.g.,* Hepp v. Facebook, 14 F.4th 204, 221 (3d Cir. 2021) (Cowen, J., concurring) (finding 230 immunity for social media platforms in state-law “right of publicity” action); Perfect 10, Inc. v. CCBill LLC, 488 F.3d 1102, 1118 (9th Cir. 2007) (finding 230 immunity for webhosting services for state-law right of publicity, unfair competition, and false advertising claims); Almeida v. Amazon.com, Inc., 456 F.3d 1316, 1321 (11th Cir. 2006) (finding 230 immunity, as a matter of first impression, for state-law right of publicity claim).

⁵⁰¹ *Zeran*, 129 F.2d at 333.

⁵⁰² Volpe, *supra* note 137, at 611–14.

⁵⁰³ Volpe, *supra* note 137, at 613; Jeweler, *supra* note 1, at 27.

⁵⁰⁴ Volpe, *supra* note 137, at 613; *see also* *Zeran*, 129 F.2d at 331.

⁵⁰⁵ Indeed, concluding such with but a single page. *Zeran*, 129 F.3d at 333.

⁵⁰⁶ *See* discussion *supra* at Parts III.A.2, III.B.1.

Beyond *Zeran*'s judicial expansion of Congress's express words, technology since *Zeran* has problematized the decision's reasoning, as website monitoring has become increasingly manageable, given the advent of AI monitoring and self-regulation via Community Guidelines and the like.⁵⁰⁷ Indeed, recent jurisprudence on Section 230 boasts of platforms' abilities to automatically detect and review user content violative of the platforms' terms and conditions.⁵⁰⁸ The *Zeran* court's concern on behalf of ICSPs having to wade through "the sheer number of postings" and the attendant "impossible burden" is thus anything but applicable today.⁵⁰⁹

In fact, notice-based liability, deemed inconceivably unmanageable in terms of defamatory statements under *Zeran*, became—less than a whole year later—the exact model used to report online violations of copyright.⁵¹⁰ What the *Zeran* court had just declared impossible had just become Congress's solution to handling online copyright infringement.⁵¹¹ The Digital Millennium Act sidesteps the "disincentive" concern from *Zeran* by lowering the cost of web content monitoring; it shifts the burden onto the "complaining party to give initial notice . . . [providing] protection for [ICSPs] against 'uncertain and crippling damages, which would curtail the development'" thereof.⁵¹² *Et voila*: Section 230's policy goal.⁵¹³ While notice-based liability has its drawbacks in the copyright infringement context, recognition of an attractive nuisance cause of action against an ICSP is unlikely to trigger such drawbacks.

It would seem the *Zeran* court's concern regarding ICSPs' "impossible burden" is just as artificial as the conditions to which the attractive nuisance doctrine applies.⁵¹⁴ The next and final subpart explains how the doctrine's standard of "reasonable care" resembles less of a threat than anticipated.

⁵⁰⁷ See, e.g., *Force v. Facebook*, 934 F.3d 53, 60–61 (2d Cir. 2019).

⁵⁰⁸ *Id.*

⁵⁰⁹ *Zeran*, 129 F.3d at 333.

⁵¹⁰ Digital Millennium Copyright Act (DMCA), Pub. L. No. 105-304, 12 Stat. 2878, § 512, Oct. 28, 1998; Volpe, *supra* note 137, at 615.

⁵¹¹ See *Costar Grp., Inc. v. Loopnet, Inc.*, 164 F. Supp. 2d 688, 698 (D. Md. 2001) (explaining that the "[DMCA] shields service providers . . . unless they have knowledge of infringement by users or are notified by copyright owners of alleged infringements.").

⁵¹² Volpe, *supra* note 137, at 618 (quoting Donald P. Harris, *Time to Reboot?: DMCA 2.0*, 47 ARIZ. ST. L.J. 801, 803–04 (2015)).

⁵¹³ Volpe, *supra* note 137, at 604 n.42.

⁵¹⁴ *Zeran*, 129 F.3d at 333.

E. Attractive Nuisance's Imposition of "Reasonable Care"

"Endless" liability floweth not from the attractive nuisance doctrine in general, given its imposition of mere reasonable care.⁵¹⁵ The doctrine's duty of care, distinct from the stricter duties of care imposed on domain owners as publishers under *Stratton Oakmont* and product manufacturers under *Lemmon*, could be met.⁵¹⁶ ICSPs, including social media companies, could satisfy their duty of reasonable care with relative ease via warnings, express instructions, or age-restriction enforcement of higher quality or quantity.⁵¹⁷ Given the capabilities of today's social media platforms and the circumstances of ailing age restrictions and convoluted user agreements, the meaning of "reasonable care" would be entrusted to the factfinder and need not be spelled out here.⁵¹⁸

Application of the attractive nuisance doctrine to ICSPs would not "kill" social media companies by subjecting them to endless liability. Again, this Comment proposes an attractive-nuisance-sized hole in Section 230 for cases in which the social media company should have known minor users were bypassing age restrictions and nonetheless failed to maintain a reasonably safe platform.⁵¹⁹

VI. CONCLUSION

The ubiquity of social media and the simultaneous increase in property rights acknowledged by association presents more and more questions regarding damages for property torts in the virtual world.⁵²⁰ Recognizing the attractive nuisance doctrine as a cause of action against social media companies and other ICSPs provides a workaround to the overbroad

⁵¹⁵ RESTATEMENT (SECOND) OF TORTS, § 339(e) (AM. L. INST. 1965).

⁵¹⁶ Compare *id.* § 339 cmt. o ("[T]here is liability only if the possessor fails to take the steps which a reasonable man would take under such circumstances.") with Volpe, *supra* note 135, at 607 ("*Stratton Oakmont* became known for its application of a strict liability publisher standard to an Internet [sic] service provider") and *Lemmon v. Snap, Inc.*, 995 F.3d 1085, 1092 (9th Cir. 2021) ("Manufacturers have a specific duty to refrain from designing a product that poses an unreasonable risk of injury or harm to consumers.").

⁵¹⁷ See RESTATEMENT (SECOND) OF TORTS, § 339 cmt. o ("There are some conditions . . . [where] the most that can be done as a practical matter is to warn trespassing children, and so far is reasonably possible to exclude them.").

⁵¹⁸ *Id.* ("Under some circumstances, a warning to the children is all that can be expected of a reasonable man *in the defendant's position*." (emphasis added)).

⁵¹⁹ See discussion *supra* Part IV.C.

⁵²⁰ Mitzner, *supra* note 21. See also cases collected *supra* note 42.

immunity afforded by Section 230 while keeping the law's First Amendment concerns intact.⁵²¹ The doctrine also answers common objections regarding the parent's role and liability's impact on ICSPs with a form of liability tailored to the factual context of children accessing content online while outside of their parents' reasonable control.

As is the issue in all matters internet, courts could use a reinvigoration of doctrines asking questions of technological advance.⁵²² Recognition of the doctrine presents an opportunity to not only update Section 230 caselaw, but also to inspire greater judicial notice of innovations in the digital property context, specifically in the commercialization of social media.⁵²³ Further, attractive nuisance may find its place among the recent "cracks" in Section 230 immunity, along with the hopeful "publication plus" and product liability routes to liability.⁵²⁴

This Comment calls for the legal community to do something about Section 230's overbroad, outdated, cracking immunity.⁵²⁵ In the name of those minor children and their representatives who have been barred from remedy by Section 230's bulwark, suffer the attractive nuisance doctrine a seat at the table; if not as a "crack," then as a workaround.⁵²⁶

⁵²¹ See discussion *supra* at Parts VI.C, V.A.

⁵²² Compare *Jeweler*, *supra* note 1, at 38 ("The nature of the Internet has changed drastically since Congress enacted § 230 and yet the law has remained idle.") with *Bennett v. Stanley*, 748 N.E.2d 41, 48 (Ohio 2001) ("Despite our societal changes, children are still children. They still learn through their curiosity. They still have developing senses of judgment. They still do not always appreciate danger. They still need protection by adults. Protecting children in a changing world requires the common law to adapt.").

⁵²³ Stan Schroeder, *Twitter May Soon Launch Coins, Allowing You to Reward Creators*, MASHABLE (Jan. 11, 2023) <https://mashable.com/article/twitter-coins> [<https://perma.cc/H2PR-4J3H>].

⁵²⁴ See discussion *supra* Parts III.B.2.a, III.B.2.b.

⁵²⁵ Gregory M. Dickinson, *The Internet Immunity Escape Hatch*, 47 BRIGHAM YOUNG U. L. REV. 1435, 1443 (2022) ("Section 230 now presides over a very different internet from the one it was designed to govern [in 1996].").

⁵²⁶ See *supra* notes 3–6; see also Contreras, *supra* note 10.