THE TORT OF MOVING FAST AND BREAKING THINGS: A/B TESTING'S CRUCIAL ROLE IN SOCIAL MEDIA LITIGATION

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Social media has created an unregulated public health crisis. For a long time, social platforms have remained unchecked, mostly due to Section 230 of the Communications Decency Act, a controversial law which insulates online service providers from actions based on third party content. The general consensus was that suing these companies would "break the internet." Recently, however, as empirical evidence piles up showing the negative effects of the platform, this dogma is coming under fire. Forty-one states and the District of Columbia have come together to sue Meta, and a large-scale MDL has made it past a motion to dismiss in the Northern District of California. This essay argues that traditional product liability law is the most viable framework for holding social media platforms accountable. Looking at function over form, Meta manufactures a product, which it meticulously designs and markets to consumers. Further, the essay argues that focusing on the platform's use of A/B testing to tweak their addictive design will be imperative to the upcoming litigation. A/B tests can be used to demonstrate a platform's knowledge of the harmful effects of its design choices. Further, internal results of A/B tests could provide proof of causation. Building on this knowledge, the article provides a roadmap for litigating future claims against social media companies.

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INTRODUCTION

In July of 2022, Brianna Murden filed the first in what would end up being a litany of cases against Meta platforms. While Meta is no stranger to a lawsuit,[1] Brianna was not suing for privacy violations or defamation. She was suing for personal "injuries including, but not limited to, social media compulsion, an eating disorder[], depression, body dysmorphia, severe anxiety, multiple periods of suicidal ideation, self-harm . . . and a reduced inclination or ability to sleep."[2] The complaint alleges several claims of product liability, from design defect to failure to warn.[3] Brianna, now twenty-one, has been using the platform since she was ten years old.[4]

Unfortunately, Brianna's injuries are commonplace. Empirical evidence suggests that platforms have led to an increase in depression, insomnia, and eating disorders, which have the highest mortality rate of any mental health disease.[5] Teens themselves perceive social media as a threat to

1 *See, e.g.*, Jenny Gross, *How to Claim Your Share of Facebook's $725 Million Privacy Settlement*, N.Y. TIMES (Apr. 20, 2023), https://www.nytimes.com/2023/04/20/business/facebook-settlement-apply.html [https://perma.cc/3A65-ADFR]; *United States v. Meta Platforms, Inc., f/k/a Facebook, Inc. (S.D.N.Y.)*, CIV. RIGHTS DIV., U.S. DEP'T OF JUST., https://www.justice.gov/crt/case/united-states-v-meta-platforms-inc-fka-facebook-inc-sdny [https://perma.cc/YBY2-SDXD] (settlement agreement); Mary W. Roeloffs, *Twitter Threatens Lawsuit Against Meta Over 'Copycat' Threads App*, FORBES (July 6, 2023), https://www.forbes.com/sites/maryroeloffs/2023/07/06/twitter-threatens-lawsuit-over-metas-copycat-threads-app-report-says [https://perma.cc/9T22-L2V8].

2 Complaint at 22, Brianna Murden v. Meta Platforms Inc., No. 3:22-cv-01511 (S.D. Ill. July 13, 2022).

3 *Id.* at 23.

4 *See* Rachyl Jones, *A Massive Lawsuit Could Hold Social Media Platforms Liable for Harming Teen Girls*, OBSERVER (Jan. 13, 2023), https://observer.com/2023/01/a-massive-lawsuit-could-hold-social-media-platforms-liable-for-harming-teen-girls [https://perma.cc/SAC7-4AC5].

5 *See* James E. Sidani et al., *The Association Between Social Media Use and Eating Concerns Among US Young Adult*s, 116 J. ACAD. NUTRITION & DIETETICS, 1465, 1465–72 (2016); Kai Yuan et al., *Microstructure Abnormalities in Adolescents with Internet Addiction Disorder*, 6 PLOS ONE 7 (2011) ("[Internet addiction disorder] subjects had multiple structural changes in the brain."); Heather Cleland Woods & Holly Scott, *#Sleepyteens: Social Media Use in Adolescence is Associated with Poor Sleep Quality, Anxiety, Depression and Low Self-Esteem*, 51 J. ADOLESCENCE 41, 49 (2016); Dylan Walsh, *Study Social Media Use Linked to Decline in Mental Health*, MIT SLOAN (Sept. 14, 2022), https://mitsloan.mit.edu/ideas-made-to-matter/study-social-media-use-linked-to-decline-mental-health [https://perma.cc/59HG-J7BC] (finding causal link between Facebook use and increase in anxiety among college students).

their well-being and a form of addiction.[6] Solutions to this public health crisis have been percolating between academics, policymakers, and lawyers, but most are met with resistance from the tech community. Novel proposals in antitrust and public utility law have taken center stage, and commentators have even discussed creating new fiduciary duties.[7] But many of these ideas wrongly characterize the problem or use a sledgehammer to crack a nut.

Until recently, no one was pointing to product liability as an avenue for holding social media companies accountable. The thought was that a new problem needed new solutions. But the issues created by social media are not all that novel. Social media is a product that is designed by engineers and product managers.[8] The design has an inherent flaw: its intentionally addictive features have contributed to a growing health crisis in teens. There is a foreseeable risk posed by the product when it is used as intended and for its intended purposes.[9] The potential harm of social media use has been discussed at dinner tables nearly since its inception.[10] Sociologists began studying the effects of Facebook use years ago,[11] and popular culture has recently turned against the media companies as well.[12]

And yet, Meta and other social media platforms have largely evaded legal liability for the harms they have caused users, especially teenagers. This evasion is mostly due to Section 230 of the Communications Decency Act, a controversial law that insulates online service providers from actions based on third-party content. Section 230 states: "No provider or user of an interactive computer service shall be treated as the publisher or speaker of

6 *See* Michelle O'Reilly et al., *Is Social Media Bad for Mental Health and Wellbeing? Exploring the Perspectives of Adolescents*, 23 CLINICAL CHILD PSYCH. & PSYCHIATRY 601, 613 (2018).

7 *See* Jack M. Balkin, *Information Fiduciaries and the First Amendment*, 49 U.C. DAVIS L. REV. 1183, 1221 (2016) (proposing treating social media companies as information fiduciaries of their customers).

8 *See Product Manager (Leadership)*, META CAREERS (2023), https://www.metacareers.com/v2/jobs/300760325782735 [https://perma.cc/UYY6-AMUC] ("Meta Product Management Leaders work with cross-functional teams of engineers, designers, data scientists and researchers to build products.").

9 *See* LEWIS BASS & THOMAS PARKER REDICK, PRODUCTS LIABILITY: DESIGN AND MANUFACTURING DEFECTS § 4:3 (2d ed. 2023) (explaining that foreseeable misuse can cause liability when a manufacturer designed a product that intended the specific misuse).

10 *See Parental Controls*, AUSTRALIAN GOV'T, https://www.esafety.gov.au/parents/issues-and-advice/parental-controls [https://perma.cc/AJ5D-XN4E]; *see also* @must_be_between11, *Does Anyone Feel Like They Spend Too Much Time on the Internet and Are in a Mentally Dark Place*, REDDIT (Aug. 25, 2022), https://www.reddit.com/r/offmychest/comments/wxm1yv/does_anyone_feel_like_they_spend_too_much_time_on [https://perma.cc/BS7U-TZC5] (exchanging stories of increased depression due to time spent on Facebook).

11 *See* Sidani et al., *supra* note 5; Yuan et al., *supra* note 5; Woods & Scott, *supra* note 5.

12 *See, e.g.*, THE SOCIAL DILEMMA (Netflix 2020) (highlighting the pervasive and detrimental effects of these platforms on health, privacy, and democracy, thereby fostering growing public skepticism).

any information provided by another information content provider."[13] Providers of interactive computer services include sites like Facebook, Amazon, Google, and Snapchat. The clause immunizes them from liability stemming from third-party content uploaded on the web. If a TikTok star uploads nonconsensual pornography to the platform, the victim cannot sue TikTok.[14] However, if TikTok materially contributes to the creation of the content, they lose their shield.[15]

The courts, in a misguided attempt to spur technological innovation, have interpreted this immunity broadly, stretching the meaning of "publisher" to protect companies from a wide variety of claims.[16] Simultaneously, Facebook and similar social media platforms discovered that harmful content is economically valuable.[17] This broad immunity coupled with strong economic incentives to increase user engagement created fertile ground for harmful outcomes.

Recently, however, cases have begun to push past dismissal motions grounded in Section 230. Two of these cases pled product liability claims, sparking a renewed interest in tort law's regulatory function, and prompting the filing of dozens of tort suits against Meta, Snap, Byte Dance, and others. In October 2022, the suits were centralized in a multidistrict litigation (MDL) in the Northern District of California.[18] As the MDL unfolds, the companies will likely reach for the usual suspects: immunity on the basis of 230, denying that their platforms are products, or placing the blame on their users.

Some of these defenses have succeeded before, but in 2021, whistleblower and former product manager Frances Haugen disclosed thousands of documents which revealed that Facebook "knew its products

13 47 U.S.C. § 230(c)(1).

14 *See* Caraccioli v. Facebook, Inc., 700 F. App'x 588 (9th Cir. 2017) (holding that the victim cannot sue Facebook for its role as a "republisher" for material posted by a third party under the Communication Decency Act (CDA)).

15 *See, e.g.*, Fair Housing Council of San Fernando Valley v. Roommate.com, LLC, 521 F.3d 1157, 1166 (9th Cir. 2008) ("By requiring subscribers to provide the information as a condition of accessing its service, and by providing a limited set of pre-populated answers, Roommate becomes much more than a passive transmitter of information provided by others[.]").

16 *See* Rachel Reed, *Supreme Court Considers How Far Section 230 Should Go in Shielding Google, Twitter and Other Tech Companies*, HARV. L. TODAY (Feb. 13, 2023), https://hls.harvard.edu/today/supreme-court-considers-how-far-section-230-should-go-in-shielding-google-twitter-and-other-tech-companies [https://perma.cc/ND5R-NMN3] (discussing the history of Section 230 jurisprudence and arguing 230 is too broad).

17 *See* Michael D. Smith & Marshall Van Alstyne, *It's Time to Update Section 230*, HARV. BUS. REV. (Aug. 12, 2021), https://hbr.org/2021/08/its-time-to-update-section-230 [https://perma.cc/6SCZ-HJ75] ("Indeed we've discovered that providing socially harmful content can be economically valuable to platform owners while posing relatively little economic harm to their public image or brand name.").

18 *In re* Soc. Media Adolescent Addiction/Pers. Inj. Prod. Liab. Litig., 637 F. Supp. 3d 1377 (J.P.M.L. 2022).

were damaging teenagers' mental health, were fomenting ethnic violence . . . and were failing to curb misinformation before the 6 January Washington riots."[19]

This essay argues that these revelations coupled with an understanding of A/B testing, or split testing—a process by which product managers test alternate designs on users—makes product liability the right avenue for holding social media companies accountable. Part I discusses two recent product liability cases against online products that have survived motions to dismiss on the basis of Section 230. By comparing these cases with past failures, this Part explains what the new cases have gotten right about pleading product claims. Part II looks beyond Section 230, detailing how to bring a product case against Meta and its counterparts. This Part addresses the relevance of A/B testing to a design defect claim, arguing that the presence of split testing helps litigants prove several elements of a design defect claim, from product definition to causation. Finally, Part III argues that the meticulous design of the platforms makes product liability the best legal lever to pull to increase the safety of social media without putting it out of business.

I
FIREWALL: GETTING PAST SECTION 230

A. Decoding Section 230

The liability shield surrounding social media companies is almost impenetrable due to Section 230. The 1996 law came to be only three years after the World Wide Web became publicly available.[20] Lawmakers at the time could not possibly predict the trajectory of the internet or how broadly courts would interpret the law. As our online world has continued to evolve, a heated debate has emerged over the contours of Section 230.[21] As Olivier

19 Dan Milmo, *Frances Haugen: 'I Never Wanted to be a Whistleblower. But Lives Were in Danger'*, GUARDIAN (Oct. 23, 2021), https://www.theguardian.com/technology/2021/oct/24/frances-haugen-i-never-wanted-to-be-a-whistleblower-but-lives-were-in-danger [https://perma.cc/S6DN-E5FL].

20 *See World Wide Web (WWW) Launches in the Public Domain*, HIST. (Mar. 30, 2020), https://www.history.com/this-day-in-history/world-wide-web-launches-in-public-domain [https://perma.cc/TG6X-AWTA].

21 *See* Shira Ovide, *What's Behind the Fight Over Section 230*, N.Y. TIMES (Mar. 25, 2021), https://www.nytimes.com/2021/03/25/technology/section-230-explainer.html [https://perma.cc/P8CJ-6RC4] (providing an overview of the debate over Section 230); David Morar & Chris Riley, *A Guide for Conceptualizing the Debate Over 230*, BROOKINGS (Apr. 9, 2021), https://www.brookings.edu/articles/a-guide-for-conceptualizing-the-debate-over-section-230 [https://perma.cc/4SAM-TFJA]; *see also* Zach Schonfeld & Rebecca Klar, *Supreme Court Punts Section 230 Debate Back to Congress*, HILL (May 22, 2023), https://thehill.com/regulation/court-battles/4015525-supreme-court-punts-section-230-debate-

Sylvain put it, "The debate that the statute's mere mention generates in some circles these days is often hyperbolic and sometimes dispiriting and vitriolic—it tends to emit more heat than light."[22] Amid this building tension, the Supreme Court recently skirted an opportunity to opine on the matter in *Gonzalez v. Google*.[23]

While many argue that the law has enabled societal harm,[24] its origin story is not so nefarious. The Act was a response to *Stratton Oakmont v. Prodigy*, a contentious case which held Prodigy (an online service provider) liable for its users' speech due to its proactive content moderation.[25] This, of course, created a perverse incentive for providers to avoid moderating content at all. Enter Section 230, which was swiftly enacted after the decision in *Stratton Oakmont*, and included a Good Samaritan Provision to limit provider liability.

The liability-eradicating section states, "No provider or user of an interactive computer service shall be held liable on account of any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable."[26] The original intent of the act was to promote content moderation and protect children from accessing pornography online.[27]

This original spirit of the law has long been laid to rest. Ironically, the Good Samaritan Provision has been strained and stretched to safeguard the indifferent and the actively bad Samaritans,[28] protecting websites that knowingly facilitate harassment, sexual abuse, and discrimination.[29]

Of late, a growing majority acknowledges that "we significantly underestimated the cost and scope of harm that posts on social media can

back-to-congress [https://perma.cc/52Q3-TC8K] (explaining how the Supreme Court's decision to avoid ruling on liability shield for internet companies punted the issue back to Congress).

22 Olivier Sylvain, *Recovering Tech's Humanity*, 119 COLUM. L. REV. F. 252, 270 (2019).

23 Gonzalez v. Google LLC, 143 S. Ct. 1191 (2023) (per curiam).

24 *See* Danielle Keats Citron, *How to Fix Section 230*, 103 B.U. L. REV. 713, 718 (2023) ("Section 230 is why the United States is a haven for sites trafficking in intimate privacy violations. U.S.-based revenge-porn sites operate with impunity, thanks to § 230. When it comes to fabricated nude imagery like deepfake sex videos that amount to defamation, the law's immunity is ironclad.").

25 Stratton Oakmont Inc. v. Prodigy Servs. Co., 1995 N.Y. Misc. LEXIS 712 (N.Y. Sup. Ct. May 24, 1995).

26 47 U.S.C. § 230(c)(2)(A).

27 *See* Christopher Cox, *The Origins and Original Intent of Section 230 of the Communications Decency Act*, RICH. J.L. & TECH. (Aug. 27, 2020); Danielle Keats Citron & Benjamin Wittes, *The Internet Will Not Break: Denying Bad Samaritans § 230 Immunity*, 86 FORDHAM L. REV. 401, 403 (2017) ("The CDA was part of a broad campaign—rather ironically in retrospect—to restrict access to sexually explicit material online.").

28 *See* Citron & Wittes, *supra* note 27, at 409.

29 *See* Chi. Laws.' Comm. for C.R. Under L., Inc. v. Craigslist, Inc., 519 F.3d 666 (7th Cir. 2008); Jones v. Dirty World Entm't, 755 F.3d 398 (6th Cir. 2014).

cause."[30] This has led to a renewed call to reshape liability protections for internet companies. This essay does not take a strong stance on legislative reform but argues that even as it is written now, product liability lawsuits against social media companies should be able to survive motions to dismiss on the basis of Section 230. This is because these lawsuits are not treating platforms as the "publisher or speaker" of third-party content. Rightly characterized, the suits have little to do with users' posts and everything to do with the design of the platform. In the past, cases have failed to surpass the hurdle of Section 230, but recently two cases against platforms have cleared the obstacle.

B. Access Granted: Emerging Case Trends

In 2021 and 2022, *Lemonn v. Snap, Inc.*[31] and *A.M. v. Omegle.com, LLC*[32] made it past Section 230-based motions to dismiss. Two similar cases, *Herrick v. Grindr, LLC*[33] and *Force v. Facebook, Inc.*[34] failed to jump the Section 230 hurdle in the past. The discrepancy between these cases could be chalked up to courts responding to political pressure—with the recent two cases filed *after* whistleblower Frances Haugen exposed Facebook's knowing transgressions.[35] A closer look, however, suggests that the new cases have taken a different tack by better characterizing the platforms. What's more, the Facebook Papers helped users and lawyers understand the way in which the platforms are built, a process that had been opaque for years.

This Section analyzes the discrepancies between these cases in order to show what the new litigators have understood that the old litigators failed to see. After teasing out the differences in the doctrine, I argue that the internal practices of these companies point to the algorithm being a standalone, meticulously designed product, which should be subject to traditional tort law principles. While the new line of cases concerns simple communication applications (Omegle and Snapchat), the underlying idea behind them can be enriched in order to plead wider product liability claims against Facebook and Instagram.

Herrick v. Grindr was spawned by a story of abuse enabled by Grindr, the location-based dating application. Grindr is a geosocial app targeted at the LGBTQ+ community that allows users to upload pictures, then utilizes their location to generate potential matches nearby. Users browse profiles

30 Smith & Van Alstyne, *supra* note 17.

31 995 F.3d 1085, 1090 (9th Cir. 2021).

32 614 F. Supp. 3d 814 (D. Or. 2022).

33 765 F. App'x 586 (2d Cir. 2019), *cert. denied*, 140 S. Ct. 221 (2019).

34 934 F.3d 53 (2d Cir. 2019), *cert. denied*, 140 S. Ct. 2761 (2020).

35 Milmo, *supra* note 19 (explaining whistleblower's decision to come forward in 2021).

sorted by distance.[36]

Matthew Herrick's former partner exploited the app's features to harass Herrick. The ex-boyfriend created fake profiles of Herrick, directing potential suitors to his home and place of work. The profile stated that if Herrick resisted the approach, the suitor should push harder as part of the desired sexual fantasy,[37] making it increasingly difficult for Herrick to rid himself of these strangers.

Herrick notified Grindr of the harassment, but the application failed to respond. Herrick sued, alleging several causes of action, including product liability and negligent design. He argued that while "the information in a user's Grindr profile may be 'content,' his claims arise from Grindr's management of its users, not user content." Grindr quickly moved to dismiss, claiming the action was barred by Section 230. The court sided with Grindr, concluding that his ex-boyfriend's speech, and not Grindr's intervention, was the core of his product liability claim.

The same year, Facebook successfully utilized the same liability shield. In *Force v. Facebook*, plaintiffs sued Facebook following a terror attack perpetrated by Hamas in Israel. The plaintiffs, attack victims or representatives of attack victims' estates, claimed that Facebook unlawfully gave Hamas a platform to connect and coordinate.[38] While not a product liability case, the plaintiffs argued that the algorithm was defective because it matched potential terrorists to one another through the "friend suggestions" feature.[39] The case was appealed to the Second Circuit, where the majority immunized Facebook under Section 230.[40]

In arguing the case, the plaintiffs did not try to argue that the algorithm was a stand-alone product. Instead, plaintiffs attempted to prove that by using the algorithm, Facebook materially contributed to the content, thereby making Facebook the *de facto* speaker. Since Section 230 only protects companies from being treated as the speaker of third-party content, companies can still be liable for their own speech. The plaintiffs attempted to argue that Facebook was speaking through its algorithm. But attempting to construe Facebook as a speaker is unnecessary. In fact, it is better to view the algorithm as wholly separate from speech and independent of the content presented. The algorithm is a product that controls user experience on the

36 *See Settings*, GRINDR, https://help.grindr.com/hc/en-us/articles/1500011544001-Settings [https://perma.cc/HLP6-AJCY] (noting that profiles, sorted by distance, are visible to other users in the application).

37 *See* Carrie Goldberg, *Herrick v. Grindr: Why Section 230 of the Communications Decency Act Must Be Fixed*, LAWFARE (Aug. 14, 2019), https://www.lawfareblog.com/herrick-v-grindr-why-section-230-communications-decency-act-must-be-fixed [https://perma.cc/JJ23-54A4].

38 *See Force*, 934 F.3d at 59.

39 *Id.* at 65.

40 *Id.* at 70.

site.

Notably, in the dissent, Second Circuit Judge Katzmann recognized this flaw. He concluded that the majority misunderstood Facebook's role in the matchmaking:

> [C]onsider a 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. . . . 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?[41]

Katzmann staunchly rejected this hypothetical, suggesting that it would be incorrect to characterize Facebook as the publisher in this case.

In both of these cases, the plaintiffs focused on matchmaking features and failed to highlight the design aspects that aggravated the harm. These cases do not eliminate the possibility of bringing product liability claims against other features of the platforms. The useful element of product liability is that it allows for feature breakup and non-binary outcomes. Even if the courts were unwilling to acknowledge a defect in the matchmaking feature, claims against other features, including other algorithmic attributes, are not foreclosed.

Two new lawsuits—*A.M. v. Omegle* and *Lemmon v. Snap*—contrast with *Herrick* and *Force* by disentangling the harm from user speech and focusing more clearly on platform design. Both cases are narrowly tailored and point to hyper-specific aspects of the design in order to make their liability claims.

In *Lemmon*, a Ninth Circuit case, plaintiffs challenged Snap's "speed filter" feature. The feature allowed a person to apply a filter to show the speed they were driving at when taking a photo. The lawsuit was filed following a car crash that killed three boys in 2017.[42] The suit alleged that the interplay between Snap's reward system of trophies and social recognitions with the speed filter encouraged high-speed driving.

Snap brought a motion to dismiss on the basis of Section 230, arguing that the lawsuit treated them as the publisher of third-party content. The Ninth Circuit disagreed with this notion, concluding the lawsuit treats Snap as a "products manufacturer."[43]

In *A.M. v. Omegle*, the court largely relied on the Ninth Circuit's

41 *Id.* at 76.

42 Lemmon v. Snap, Inc., 995 F.3d 1085, 1088 (9th Cir. 2021) (detailing the facts of the crash).

43 *Id.* at 1092.

opinion in *Lemmon* to analyze another Section 230 challenge. Plaintiff A.M. brought a product liability claim against Omegle for connecting a minor with an adult man, Fordyce, who sexually abused her online. Omegle argued that it was the publisher of the communications between A.M. and Fordyce and therefore entitled to Section 230 immunity under the CDA. The court disagreed: "Omegle could have satisfied its alleged obligation to Plaintiff by designing its product differently . . . Plaintiff is not claiming that Omegle needed to review, edit, or withdraw any third-party content to meet this obligation."[44] This opinion seems to reject *Force v. Facebook*'s view of the matchmaking algorithm.

The difference between *Force* and *Omegle* was the manner in which the plaintiffs pled the harm. The *Force* plaintiffs focused on characterizing Facebook as the speaker of the information, while the *Omegle* plaintiffs focused on the design of the product, irrespective of the content: "[T]he combination of the website's user anonymity and the absence of age restrictions amount to a design defect. This design defect creates the predictable consequence of attracting both unsuspecting children and predatory adults, thereby facilitating and encouraging dangerous behavior and harm . . . ."[45] The cases seem to be in heavy conflict, but the reality is that they are tackling different questions.

The *Force* court was correct in stating that the matchmaking algorithm does not make Facebook the speaker of the content. The court focused on the fact that the algorithm is content-neutral, agreeing with the defendants' argument that Facebook's neutral algorithms "operate solely in conjunction with content that third parties choose to publish on the platform."[46] The court saw this content neutrality as protection against treating Facebook as a speaker of the information, but this neutrality and disconnect *from* the content is exactly what makes Facebook's algorithm a standalone product. Products often cannot cause harm without user intervention. A car's defects will not emerge without a driver, and cookware defects do not emerge without a chef.

Force and *Herrick* focused on the contribution of the user. *Omegle* and *Snap* finally shine a spotlight on the contribution of the platforms themselves. A product liability suit targeting this harm would not be holding Facebook liable for the fact that this content *exists* on the platform. It would be targeting Facebook's algorithm for connecting users to harmful content in order to increase engagement. To the extent that the design of the platforms and algorithm *aggravates* the harm of the third-party content, the

44 A.M. v. Omegle.com, LLC, 614 F. Supp. 3d 814, 819 (D. Or. 2022).

45 *Id.* at n.2.

46 Brief for Defendant-Appellee at 23, Force v. Facebook, Inc. 934 F.3d 57 (2d Cir. 2019), *cert. denied*, 140 S. Ct. 2761 (2020) (No. 18-397).

companies should be liable. That is what *Snap* and *Omegle* begin to articulate.[47]

II

DEBUGGING THE BLUEPRINT: MAKING A CASE FOR DEFECTIVE DESIGN

The baseline inquiry in a product liability case is whether the item at issue is a product.[48] This is rarely litigated in traditional product cases. No one spends time arguing that a car or a saw is not a product. However, as technology advances, the line between products and services has become blurred, and defense lawyers have utilized this uncertainty to evade product liability actions against software and other intangible commodities. The social media companies are availing themselves of this gray space and arguing that their platforms are not products and therefore cannot be held liable under product liability law. They argue that their "services are analogous to other services provided for decades—such as networking groups facilitating member interaction; book-of-the-month clubs deciding what literature to send subscribers; museums organizing and displaying art; and newspaper reviews[.]"[49] This argument entirely shuns the careful design of the platform and makes one wonder what the over 400 product managers at Facebook are getting paid for.[50] Looking at function over form, Meta manufactures a product, which it methodically designs and markets to consumers. When this product causes measurable harm in society, Meta, as the cheapest cost avoider, owes a duty to minimize said harm.[51]

47 Ralph Nader pointed to a similar idea in his book *Unsafe at Any Speed*: "The motor industry must face the fact that accidents occur. It is their duty, therefore, to so design the interiors of automobiles that when the passenger is tossed around, he will get an even break and not suffer a preventable injury." *See* RALPH NADER, UNSAFE AT ANY SPEED: THE DESIGNED-IN DANGERS OF THE AMERICAN AUTOMOBILE 252 (1965). Nader managed to bifurcate the causation element of the accident. He acknowledged that the consumers faulty driving was one piece but argued that the car's interior design greatly aggravated the issue. He saw accidents as two separate collisions—the car with the object, and subsequently the person with the car.

48 *See* Legal Tender Servs. PLLC v. Bank of Am. Fork, 506 P.3d 1211, 1219 (Utah Ct. App. 2022) ("[A] threshold question in a products liability claim is whether the item that allegedly failed actually qualifies as a product.").

49 Defendant's Joint Motion to Dismiss Plaintiffs' Priority Claims Asserted in Amended Master Complaint, *In re* Social Media Adolescent Addiction/Personal Injury Products Liability Litigation, MDL No. 3047 (J.P.M.L. 2023).

50 Josh Fechter, *Facebook Product Manager Salary: What is the Average?*, PROD. HQ (2023), https://producthq.org/career/facebook-product-manager/facebook-product-manager-salary [https://perma.cc/G5TK-U7FJ] ("There are almost 400 product managers working in different capacities across the US.").

51 In the context of an online platform, a "least cost avoider" refers to the entity best positioned to minimize the costs associated with accidents, including both the costs of the accidents themselves and the costs of preventing them. For online platforms like Amazon, this means they are considered the least cost avoider if they have the capacity to control and mitigate risks more effectively and at

Once they prove that the platforms are products, the plaintiffs then must prove that: (1) there was a defect in the design of the product; (2) the defect existed at the time the product left the defendant's control; and (3) the defect was the proximate cause of the plaintiff's injury.[52]

As Meta and its counterparts[53] gear up to react to the allegations in *In re Social Media*,[54] plaintiffs should consider the role of A/B testing in responding to their defenses. This method, which is further explained in the following Section, bolsters the argument against these companies on several fronts: it proves the platforms are products, it contributes to the question of whether they are defective, and post-discovery, it can help answer questions of proximate cause.

A. What is A/B Testing?

A/B testing is a way for software developers to track the effect of design changes to a website or application.[55] In order to conduct it with as little bias as possible, the experiment is randomized across the platform's users. Developers will "flip a switch" and suddenly half the users will be presented with a different version of the app.[56] Group A receives the control, and group B receives the change. Changes can be as minor as the size of the "like" button or the color of the screen. As version A and version B trickle out into the world, developers behind the scenes track how the changes affect engagement. The test asks, "Did this change increase or decrease user time

a lower cost compared to other entities involved, such as third-party vendors or consumers. *See* Catherine M. Sharkey, *Products Liability in the Digital Age: Online Platforms as "Cheapest Cost Avoiders"*, 73 HASTINGS L.J. 1327, 1334–35 (2022).

52 *See* Zsa Zsa Jewels, Inc. v. BMW of N. Am., LLC, 419 F.Supp.3d 490, 506 (E.D.N.Y. 2019).

53 This includes platforms such as TikTok, Instagram, and Snap.

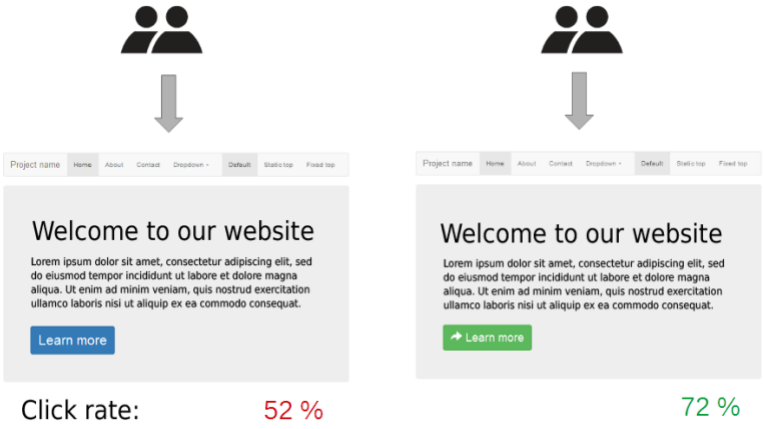
54 *In re Social Media Adolescent Addiction/Pers. Inj. Prods. Liab. Litig.*, MDL No. 4:22-md-3047 (N.D. Cal. 2022).

55 *See* Iavor Bojinov, Guillame Saint-Jacques, & Martin Tingley, *Avoid the Pitfalls of A/B Testing*, HARV. BUS. REV. (2020), https://hbr.org/2020/03/avoid-the-pitfalls-of-a-b-testing [https://perma.cc/KN9B-6XX2] ("Online experiments measuring whether A, usually the current approach, is inferior to B, a proposed improvement, have become integral to the product-development cycle, especially at digital enterprises.").

56 Several versions of A/B testing exist. Traditionally, companies segment users into two groups at random and show each group one of two versions of the app. Recently, testing has gotten more complex to account for confounding variables such as users noticing the test is occurring, or interactions between customers. To account for interactions between customers, companies conduct network-testing by ensuring that if a person is in group A, all the other users who could influence their behavior are also in group A. Companies have also begun to use time-series experiments, which randomly switch between exposing the whole market to version A and the whole market to version B. *See id.* ("[I]magine that LinkedIn develops a new algorithm for matching job seekers with job openings. To measure its effectiveness, LinkedIn would . . . expose all job postings and seekers in a given market . . . . It would continue this process for at least two weeks to . . . see[] all types of job search patterns.").

on the platform?" Most of the time, minor changes to ad creative (visual and textual elements of advertisements) or button placements go unnoticed by users.[57]

IMAGE 1. Shows that changing the button color from blue to green led to a 38.4% increase in the click rate (Wikipedia[58])



While A/B testing can focus on minor changes, it is also used for more major design checks, like algorithm differentiation.[59] C/D testing is a newly coined term to describe algorithmic split testing. A group of researchers explains, "Unlike typical forms of A/B testing, where two versions of the same website are presented to different users to evaluate interface changes, algorithm modification is a deeper form of testing where changes in program code induce user deception."[60] One example of this type of deception is Facebook's emotional contagion study. The study involved two parallel experiments that altered the presentation of content on users' News Feeds. In the reduced-positive condition, upbeat words were removed from user feeds, while in the reduced-negative condition, downbeat words were eliminated. The results showed that the reduced-positive group had a larger

57 This also raises ethical concerns about running experiments on non-consenting users. *See* Raquel Benbunan-Fich, *The Ethics of Online Research with Unsuspecting Users: From A/B Testing to C/D Experimentation*, 13 RSCH. ETHICS 200 (2016).

58 *A/B Testing*, WIKIPEDIA, https://en.wikipedia.org/wiki/A/B_testing [https://perma.cc/22VX-PCAY].

59 Although not the focus of this article, another area where A/B testing is used online is to create dark patterns. Dark patterns, or deceptive design patterns, are user interfaces designed to trick users into doing things (for example, accepting all cookies or subscribing to emails). For more on dark patterns, see Jamie Luguri & Lior Jacob Strahilevitz, *Shining a Light on Dark Patterns*, 13 J. LEGAL ANALYSIS 43 (2021).

60 Benbunan-Fich, *supra* note 57, at 200.

percentage of negativity in their own status updates.[61]

Facebook and Instagram have run these types of tests in other conditions, including during election cycles to test the efficacy of voting advertisements on political turnout.[62] Critiques of this app manipulation have focused on the ethics of non-consensual human behavior testing.[63] While this too is a problem, part of what this study uncovers is Facebook's exceptional ability to manipulate its News Feed algorithm to garner certain results. Sometimes these manipulations will be "content neutral," as applauded by the majority in *Force*.[64] The algorithm will be tweaked to automatically play videos, rather than have the user affirmatively click on a new video every time they want to watch it. Or the design will be changed to endlessly loop videos rather than stop them after a user has watched one time through.[65] These changes affect all users regardless of what videos they are watching, which make them "content neutral."[66]

The court sees this content neutrality as protection against treating Facebook as a speaker of the information, but this neutrality and disconnect from the content makes Facebook's algorithm a standalone product—a product that might create defective matches or addictive outcomes. The company is not providing a service to people; they are designing a product.[67]

B. Platform Queries: Product or Service?

The issue of defining products and services for the purpose of tort law is relatively new. Courts and commentators have struggled to categorize the new generation of algorithmic decision-makers.[68] There is a constraint in

61 *See* Robinson Meyer, *Everything We Know About Facebook's Secret Mood-Manipulation Experiment*, ATLANTIC (June 28, 2014), https://www.theatlantic.com/technology/archive/2014/06/everything-we-know-about-facebooks-secret-mood-manipulation-experiment/373648 [https://perma.cc/69JN-BSTK].

62 *See* Zoe Corbyn, *Facebook Experiment Boosts US Voter Turnout*, NATURE (Sept. 12, 2012), https://www.nature.com/articles/nature.2012.11401 [https://perma.cc/XG69-CLQJ].

63 *See* Benbunan-Fich, *supra* note 57, at 207–11.

64 Force v. Facebook, Inc., 934 F.3d 53, 70 (2d Cir. 2019).

65 *See* Sophia Petrillo, *What Makes TikTok So Addictive? An Analysis of the Mechanisms Underlying the World's Latest Social Media Craze*, BROWN UNDERGRADUATE J. PUB. HEALTH (Dec. 13, 2021) ("[T]he appeal and entertainment value of content posted on TikTok is a major factor in its popularity . . . . However, the platform's success is also heavily influenced by elements of the app itself . . . [and some argue] that certain app features drive the formation and sustenance of addictions to the platform.").

66 *See* Marshall's Locksmith Serv. Inc. v. Google, LLC, 925 F.3d 1263, 1271 (D.C. Cir. 2019) (holding that search engines that list scam locksmiths cannot be liable because the search results are produced by a neutral algorithm).

67 If the plaintiff fails to prove Facebook is a product, the case can still be pled on a negligent design theory.

68 *See generally* Karni A. Chagal-Feferkorn, *Am I an Algorithm or a Product? When Products Liability Should Apply to Algorithmic Decision-Makers*, 30 STAN. L. & POL'Y REV. (2019)

language itself, as we try to define commodities, like the Roomba or Waze GPS, which rely on inputs from users. There is a robust scholarly debate as to whether there is a need to develop entirely new legal frameworks to solve the issue of categorizing such commodities,[69] a debate that social media companies are exploiting to claim that they defy definitions and therefore defy the law. Yet, many aspects of Facebook or Instagram are built like products and function like products. Further, it is possible to sever certain features for liability analysis—identifying a flaw in Facebook's comment feature does not inherently implicate Facebook Marketplace. This severability is crucial because it acknowledges that a multifaceted platform can have distinct components, each with its own impact and legal considerations. The analogy of a full-service gas station illustrates this point: A customer that arrives at a gas station can receive service from the employees at the station, but if the gas pump explodes, the manufacturer of the pump might be liable. If the same company that develops the pumps owns the station, that company could be liable in tort for defect and in negligence for harmful service. The social media companies are akin to this full-service gas station.

Meta continues to argue that they are providing a single service. While this fact does not determine whether Meta can be sued on other grounds,[70] it is more apt to characterize the platforms as products. The companies place increasing emphasis on the fact that they are delivering an intangible good.[71] But the focus on tangibility is outdated. The Third Restatement of Torts states, "[M]ost but not necessarily all products are tangible personal property. In certain situations, however, intangible personal property and

(attempting to delineate between thinking and non-thinking algorithms for the purposes of product liability).

69 *See* Peter M. Asaro, *A Body to Kick, but Still No Soul to Damn: Legal Perspectives on Robotics*, *in* ROBOT ETHICS: THE ETHICAL AND SOCIAL IMPLICATIONS OF ROBOTICS 169, 178–80 (Patrick Lin et al. eds., 2012) (contemplating various approaches for how to treat robots under the law, such as creating an agency law-style framework for robots, considering comparisons to historical laws regarding enslaved persons, or viewing robots as analogous to animals or quasi-persons); Sam N. Lehman-Wilzig, *Frankenstein Unbound: Towards a Legal Definition of Artificial Intelligence*, 13 FUTURES 442, 451–52 (1981) (considering ways to frame robot-related liability through comparisons to children, agents and principals, and people in the legal realm); *cf. AI Act*, EUR. COMM'N, https://digital-strategy.ec.europa.eu/en/policies/regulatory-framework-ai [https://perma.cc/RHT9-HUWD] ("The AI Act is the first-ever comprehensive legal framework on AI worldwide.").

70 For example, for negligent design rather than strict product liability.

71 *See* Defendants' Joint Motion to Dismiss Pursuant to Rules 12(b)(1) and 12(b)(6) Plaintiffs' Priority Claims Asserted in Amended Master Complaint at 17, *In re* Social Media Adolescent Addiction/Personal Inj. Prods. Liab. Litig. (N.D. Cal. 2023) (MDL No. 3047, Case No. 4:22-md-03047-YGR-TSH) ("Plaintiffs' claims fail because they allege no injuries from tangible products.").

real property may be products."[72] The Restatement makes clear that certain intangibles, such as electricity and information in maps, can be products.[73] And courts have begun to classify software as a good governed by the UCC: "Defendant did have to produce 'deliverables' to Plaintiff, which Plaintiff refers to as an 'App.' And although the 'deliverables' that Defendant created are not tangible, they *could* be classified as goods under the UCC."[74] Further, it is not so clear that apps are intangible. There is an aspect that one can see and manipulate, unlike a pure service. Customers can press the "like" button and see the blue colors of the platform on the screen. There is a difference between virtual and intangible. It is not as cut and dry as the intangibility of a massage or counseling.

Characterizing the platforms as products is necessary in order to understand their role in society, both legally and economically. Olivier Sylvain has posited that "[t]he most prominent online services are shrewd enterprises whose main commercial objective is to collect and leverage user engagement for advertisers."[75] They are businesses that push a product to users. In their own terms and policies, Meta links to a page called "What are the Meta Products?"[76] The page states: "Meta products include: Facebook . . . [,] Messenger[, and] Instagram."[77] It is clear that Meta self-referentially refers to the platforms as products. It hires product designers, the job descriptions for which explain: "[P]roduct designer[s] at Meta . . . play a central role in the way we build *technologies*—ensuring they are valuable for people, easy to use and of the highest level of craft and execution. . . . [Responsibilities include] contribut[ing] to strategic decisions around the future direction of Facebook products."[78]

The defendants in the upcoming MDL against Meta, TikTok, Snap, and Instagram try to deny this characterization. In their motion to dismiss, the companies argue that "[t]he Court is 'not bound to accept as true' Plaintiffs' 'legal conclusion' that Defendants' services are products."[79] But, in

72 RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 19 cmt. b (AM. L. INST. 1998) (citations omitted).

73 *Id.*

74 NAC Consulting, LLC v. 3Advance, LLC, 650 F. Supp. 3d 441, 450 (E.D. Va. 2023) (citations omitted); *see also* Micro Data Base Sys., Inc. v. Dharma Sys., Inc., 148 F.3d 649, 654 (7th Cir. 1998) (considering the sale of software as a sale of a good).

75 *See* Olivier Sylvain, *Platform Realism, Informational Inequality, and Section 230 Reform*, 131 YALE L.J.F. 475, 476 (2021).

76 *What Are the Meta Products?*, FACEBOOK (2024), https://www.facebook.com/help/1561485474074139 [https://perma.cc/NXP7-GK59].

77 *Id.*

78 *Product Designer*, META CAREERS (emphasis added), https://www.metacareers.com/v2/jobs/1475970906481329 [https://perma.cc/B2ZD-P9DA].

79 Defendants' Joint Motion to Dismiss Pursuant to Rules 12(b)(1) and 12(b)(6) Plaintiffs' Priority Claims Asserted in Amended Master Complaint at 17, *In re* Social Media Adolescent

accepting the terms of use, plaintiffs believe they are signing a product contract. The defendants can claim that this has no significance, but the law differentiates between product and service contracts in other contexts. For example, consider the economic loss doctrine, which says that "a purchaser of a product cannot recover from a manufacturer on a tort theory for damages that are solely economic."[80] In many jurisdictions, the doctrine only applies to product contracts, not service contracts.[81] This distinction is especially relevant in the construction industry where plaintiffs are permitted to sue for purely economic loss in tort for service contracts, but not product contracts.[82] In these cases, courts analyze the terms of the agreement to decide what type of contract is at play.[83] The same is true when determining whether a transaction is governed by the UCC, which only covers the sale of goods and not services.[84] Courts look to the contract between the parties to decide what the parties bargained for. The companies may argue that internal nomenclature is meaningless, but these references are far from internal. Meta presents Facebook to the world as a product,[85] and customers believe and expect that Facebook is a product for the purposes of product liability law.

Further, these platforms are built like products. In the Terms of Service, Meta states, "We engage in research to develop, test, and improve our Products. This includes analyzing data we have about our users and understanding how people use our Products, for example by conducting surveys and testing and troubleshooting new features."[86] This is a reference to the A/B testing conducted by the company,[87] which helps the platform

Addiction/Personal Inj. Prods. Liab. Litig. (N.D. Cal. 2023) (MDL No. 3047, Case No. 4:22-md-03047-YGR-TSH) (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007)).

80 1325 N. Van Buren, LLC v. T-3 Grp., Ltd., 716 N.W.2d 822, 831 (Wis. 2006) (quoting Linden v. Cascade Stone Co., 699 N.W.2d 189, 192 (Wis. 2005)).

81 Wajiha Rais & Lindy Stevens, *Economic Loss Doctrine*, AM. BAR ASS'N (Mar. 22, 2021), https://www.americanbar.org/groups/construction_industry/publications/under_construction/2021/spring2021/economic_loss_doctrine [https://perma.cc/93RS-QKN2].

82 *Id.*

83 *See Linden*, 699 N.W.2d at 193 (explaining the predominant purpose test).

84 Aliki Foods, LLC v. Otter Valley Foods, Inc., 726 F. Supp. 2d 159, 166 (D. Conn. 2010).

85 *See supra* notes 75–78.

86 *Terms of Service*, FACEBOOK, https://m.facebook.com/legal/terms [https://perma.cc/S9YT-W3C8] (last reviewed July 26, 2022).

87 *See* Kay Zeng, *How Instagram's New A/B/C Testing May Hurt Users' Feelings*, MEDIUM (Nov. 20, 2020), https://uxdesign.cc/how-instagrams-new-a-b-c-testing-for-reels-and-shop-may-hurt-users-feelings-3434e50f1b74 [https://perma.cc/4D8M-2GVS] (chronicling a product designer's reaction to results of A/B/C testing on their Instagram); FE Tech Desk, *Facebook Testing Feature to Allow Users to Have Up to Five Profiles*, FIN. EXPRESS (July 15, 2022, 5:11 PM), https://www.financialexpress.com/life/technology-facebook-additional-profiles-feature-test-meta-platforms-2595469 [https://perma.cc/CCA2-MHB9] ("Facebook is testing a new feature that would allow some users to have multiple profiles . . . ."); Taylor Hatmaker, *Facebook Tests News Feed Controls That Let People See Less from Groups and Pages*, TECHCRUNCH (Nov. 18, 2021, 6:10 PM), https://techcrunch.com/2021/11/18/facebook-newsfeed-controls-test

"improve" features categorically across all users. It is not a personalized process that serves an individual, but rather a standardized one that mimics mass production.

After conducting these tests, social media companies file patents to protect their intellectual property. For example, Meta Platforms Inc. owns U.S. Patent No. 9,681,166 B2, "Techniques for emotion detection and content delivery," which describes a method for delivering content to a user based on their current emotional state.[88] U.S. Patent No. 6,288,717 B1 describes a "headline posting algorithm" that uses members' interests to determine what articles to present to each user.[89] U.S. Patent No. 7,822,636 B1 discusses "optimal ad selection for Web pages,"[90] and U.S. Patent No. 10,135,931 B2 explains how to recommend objects to a user of a social networking system based on the location of the user.[91] Meta might argue that these are method patents, which protect their "services." But these patents protect the method for building the Facebook product, and a close reading demonstrates the level of *intentional* control social media companies have over their users.

C. System Glitch: Defective Design

The next and most crucial part of a product liability claim is proving defective design. Methods for proving defect vary, but the two prevailing tests are the consumer expectations test and the risk-utility test.[92] Under the

[https://perma.cc/6GEB-EEE6] (describing how a test of new Facebook features "will affect 'a small percentage of people' around the world before the test expands gradually in the next few weeks"); Alice Hearing, *Facebook Has Secretly Been Draining Your Phone Battery to Test Features, Former Meta Employee Claims*, FORTUNE (Jan. 31, 2023, 8:09 AM), https://fortune.com/2023/01/31/facebook-secretly-draining-phone-battery-test-features-former-meta-employee-claims [https://perma.cc/98L9-M495] (discussing a former Facebook employee's claim (which Meta repudiated) that Facebook "us[ed] 'negative testing'" on an unknown quantity of users in a way that "drain[ed] users' phone batteries").

88 Techniques for Emotion Detection and Content Delivery, U.S. Patent No. 9,681,166 B2, at [57] (filed Feb. 25, 2014) (issued June 13, 2017).

89 Headline Posting Algorithm, U.S. Patent No. 6,288,717 B1, at [57] (filed Mar. 19, 1999) (issued Sept. 11, 2001).

90 Optimal Internet Ad Placement, U.S. Patent No. 7,822,636 B1, at [57] (filed July 1, 2000) (issued Oct. 26, 2010).

91 Recommendations Based on Geolocation, U.S. Patent No. 10,135,931 B2, at [57] (filed Jan. 12, 2016) (issued Nov. 20, 2018); *see also* Sahil Chinoy, *What 7 Creepy Patents Reveal About Facebook*, N.Y. TIMES (June 21, 2018), https://www.nytimes.com/interactive/2018/06/21/opinion/sunday/facebook-patents-privacy.html [https://perma.cc/FM72-UNLM] (describing patents that "[t]rack[] your routine" and "[i]nfer[] your habits").

92 The consumer expectations test establishes that "a product is defective in design . . . if the product has failed to perform as safely as an ordinary consumer would expect when used in an intended or reasonably foreseeable manner." Barker v. Lull Eng'g Co., 573 P.2d 443, 446 (Cal. 1978). By contrast, the risk-utility test demonstrates that "a product is defective in design . . . if, in

consumer expectations test, a product is defective if it fails to perform as an ordinary consumer would expect when used in a reasonably foreseeable way.[93] Under the Third Restatement's risk-utility test, a product is defective when "the foreseeable risks of harm posed by the product could have been reduced or avoided by the adoption of a reasonable alternative design . . . and the omission of the alternative design renders the product not reasonably safe."[94] The risk-utility test has dampened the strict liability regime in favor of a negligence-based approach,[95] making it a preferable test for defense attorneys.[96] Although the Third Restatement embraces the risk-utility test instead of the consumer expectations test, many jurisdictions still use it exclusively or in tandem with risk-utility.[97] However, the consumer expectations test is ill-suited for products that are highly technical or new to commerce and therefore do not generate reasonable consumer expectations.[98] Because an increasing number of jurisdictions are adopting the risk-utility test,[99] social media is a new product, and risk-utility is the

light of the relevant factors discussed below, the benefits of the challenged design do not outweigh the risk of danger inherent in such design." *Id.*

93 *See* RESTATEMENT (SECOND) OF TORTS § 402A cmts. g, i, *l* (AM. L. INST. 1965) ("The article sold must be dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it . . . .").

94 Annotation, *Burden of Proving Feasibility of Alternative Safe Design in Products Liability Action Based on Defective Design*, 78 A.L.R.4TH 154, § 4 (originally published 1990) (quoting RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 2(b) (AM. L. INST. 1998)).

95 *See generally* Cami Perkins, *The Increasing Acceptance of the Restatement (Third) Risk Utility Analysis in Design Defect Claims*, 4 NEV. L.J. 609 (2004).

96 *See* Tincher v. Omega Flex, Inc., 104 A.3d 328, 389–90, 394–95, 399 (Pa. 2014) (discussing difference, or lack thereof, between strict liability and negligence); RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 2(b) cmt. a (AM. L. INST. 1998) (discussing similarities between defective design claims, which include a potential "reasonable alternative design" element, and negligence claims).

97 Clayton J. Masterman & W. Kip Viscusi, *The Specific Consumer Expectations Test for Product Defects*, 95 IND. L.J. 183, 185, 187–89, 191, 196 (2020).

98 *See* Emily Frascaroli, John I. Southerland, Elizabeth Davis & Woods Parker, *Let's Be Reasonable: The Consumer Expectations Test Is Simply Not Viable to Determine Design Defect for Complex Autonomous Vehicle Technology*, 2019 J.L. & MOBILITY 53 (2019) (discussing the limitations of the consumer expectations test as applied to new technology and other products for which consumers cannot formulate expectations). There is a debate amongst scholars and courts as to the usefulness of the consumer expectations test. Because the test is more beneficial to plaintiffs, many courts refuse to abandon it completely and use a hybrid consumer-risk test or allow for the consumer expectations test for certain types of products. *See, e.g.*, Denny v. Ford Motor Co., 662 N.E.2d 730, 738 (N.Y. 1995) ("In view of the 'rigors of the risk utility test,' it has been suggested that it is 'worthwhile' to retain the consumer-expectation test and 'explor[e] solutions to [its] subjectivity problem' rather than simply abandoning it." (quoting Aaron D. Twerski & Alvin S. Weinstein, *A Critique of the Uniform Product Liability Law—A Rush to Judgment*, 28 DRAKE L. REV. 221, 232 (1978))).

99 *See* Traci T. McKee, *Florida Appellate Court Authorizes the Use of the Risk-Utility Test in Complex Medical Device Cases*, FAEGRE DRINKER (Oct. 15, 2020), https://www.faegredrinker.com/en/insights/publications/2020/10/florida-appellate-court-

more difficult test for plaintiffs,[100] this essay focuses on that standard.

D. Performance Metrics: The Risk-Utility Test

There are several factors that courts consider when assessing risk-utility. Dean John Wade is credited with the creation of the test, and his original seven factors have been highly influential.[101] Most courts adopt some version of these factors, with minor variations.[102] At the center of the test, for all courts, is the concept of reasonable alternative design.

The negligence-based inquiry balances economic as well as safety factors to determine whether an alternative design is feasible. Proof "of a reasonable alternative design . . . is not necessary in every case," but will be required "in most cases."[103] In states where the burden falls on the plaintiff to prove the feasibility of the design, the requirement can be tough to overcome. As shown in *Hollister v. Dayton Hudson Corp.*, success hinges on thoroughly proving the availability, cost-effectiveness, and functionality of safer alternatives, beyond demonstrating a product's inherent risks.[104] However, victory is not impossible. In most jurisdictions, at the motion to

authorizes-the-use-of-the-risk-utility-test-in-complex-medical-device-cases [https://perma.cc/VF79-HMPA]; Ferraro v. Hewlett-Packard Co., 721 F.3d 842, 844 (7th Cir. 2013) ("Under Illinois law, the risk-utility test 'trumps' in design defect cases if the two methods of establishing unreasonable dangerousness yield conflicting results.").

100 Perkins, *supra* note 95, at 613.

101 The factors as set out by Wade are: "(1) [t]he usefulness and desirability of the product"; (2) probability and magnitude of potential injury; (3) "availability of a substitute . . . [;] (4) [t]hemanufacturer's ability to eliminate the unsafe character . . . [;] (5) [t]he user's ability to avoid danger . . . [;] (6) the user's" probable awareness of the peril; and (7) the manufacturer's ability to "spread the loss[]." *See* Gary Myers, *Dean John Wade and the Law of Torts*, 65 MISS. L.J. 29, 31–32 (1995) (quoting John W. Wade, *On the Nature of Strict Tort Liability for Products*, 44 MISS. L.J. 825, 837–38 (1973) (discussing Dean Wade's contributions to tort law, including the risk-utility test)).

102 In Illinois, for example, the factors are "the availability and feasibility of alternate designs at the time of [a product's] manufacture, or [proof] that the design used did not conform with the design standards of the industry . . . or design criteria set by legislation or governmental regulation." Anderson v. Hyster Co., 385 N.E.2d 690, 692 (Ill. 1979); *see also* Calles v. Scripto-Tokai Corp., 864 N.E.2d 249, 260 (Ill. 2007) ("[A]lthough [*Anderson* and other cases] preceded the adoption of the risk-utility test in Illinois, we find the factors set forth in these cases are relevant when engaging in risk-utility analysis." (citing Blue v. Envt. Eng'g, Inc., 828 N.E.2d 1128, 1139 (Ill. 2005)). New York adopts a similar set of factors, including the plaintiff's capacity to have circumvented injury, "the likelihood that the product will cause injury, . . . the degree of awareness of the product's dangers . . . reasonably . . . attributed to the plaintiff, the usefulness of the product to the consumer as designed as compared to a safer design and the functional and monetary cost of using the alternative design." Scarangella v. Thomas Built Buses, Inc., 717 N.E.2d 679, 681–82 (N.Y. 1999) (citing Voss v. Black & Decker Mfg. Co., 450 N.E.2d 204, 209–08 (N.Y. 1983).

103 *See* RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 2 cmt. b (AM. L. INST. 1998).

104 *See* 201 F.3d 731, 738–39, 743 (6th Cir. 2000) (affirming dismissal of claim based on "failure to submit . . . evidence" regarding an alternative design).

dismiss stage, one must plead the existence of *any* alternative design.[105] At the summary judgment stage, the presence of competing expert testimonies can suffice to create a genuine issue of material fact.[106] Further, "[a] plaintiff with a design defect claim only needs to prove the manufacturer's product was not 'reasonably' safe, not that other design alternatives were completely safe."[107]

Economically, the plaintiff must prove that the alternative design is not unreasonably expensive. "Sometimes the cost of greater safety can be spelled out in testimony as cash costs. Evidence showing exceedingly small costs to avoid an occasional horrifying injury may suffice to get the plaintiff past a summary judgment or directed verdict."[108] Cost is not limited to the cost of producing the safer design but includes "[c]osts in loss of productive utility."[109] The defendant can submit proof that the addition of the safety feature would drastically reduce the product's ability to function. For example, "[i]f [an] industrial machine[] can be made safer only by slowing it to halfspeed, the costs in reduced production" are considered.[110] Ultimately, the question of defect is a question of fact left to the jury.[111]

In the case of the platforms, the internal A/B testing itself proves the existence of a reasonable alternative design. The Facebook Papers, especially when combined with further discovery disclosures, can reveal designs that would improve safety for teens with nearly zero increase in production cost—the magic of software development. In one released Facebook paper, Meta engineers explain that they "ran a small experiment in Feb[ruary] 2018 to change people's feeds to (roughly) chronological

105 *See, e.g.*, Ardoin v. Stryker Corp., No. 4:18-CV-2192, 2019 WL 4933600, at *3 (S.D. Tex. Oct. 7, 2019) ("Although Plaintiff's safer alternative designs are not particularly detailed, she provides alternative designs and alleges that they were economically and technologically feasible. These claims are pled well enough to survive a motion to dismiss.").

106 In *Barclay v. Techno-Design Inc.*, a disagreement between two experts about the design of a ravioli-making machine was sufficient to create a genuine issue of material fact. 129 A.D.3d 1177, 1179–80 (N.Y. App. Div. 2015).

107 Hrymoc v. Ethicon, Inc., 249 A.3d 191, 216 (N.J. Super. Ct. App. Div. 2021) (citations omitted) (quoting N.J. STAT. ANN. § 2A:58C-2 (West 1987)), *aff'd as modified*, 197 A.3d 1245 (N.J. 2023).

108 DAN B. DOBBS, PAUL T. HAYDEN & ELLEN M. BUBLICK, THE LAW OF TORTS § 457 (2d ed. 2024); *see, e.g.*, Grimshaw v. Ford Motor Co., 174 Cal. Rptr. 348, 360–61 (Cal. Ct. App. 1981) (noting that a car's manufacturing "vulnerabilit[ies] . . . could have been remedied by inexpensive 'fixes'" starting at $1.80 per car, but that "Ford produced and sold the Pinto to the public without doing anything to remedy the defects").

109 DOBBS, HAYDEN & BUBLICK, *supra* note 108, § 457 (emphasis omitted).

110 *Id.*

111 *Id.*

order."[112] The experiment quickly revealed "massive engagement drops."[113] After only ten days, the site "los[t] a substantial amount of engagement, posting and time spent: -20% sitewide MSI (meaningful social interaction) [and] . . . -6% video time."[114] As suspected, the chronological feed was never implemented site-wide. As to why it was only "roughly chronological," the experimenter explains that they did not want journalists to "recognize the experience and write a sensationalist article about what Facebook is experimenting with."[115]

In another Facebook Paper about the ranked News Feed (the algorithm that displays posts based on predicted relevance to the Facebook user) titled, "Is Ranking Good?" the poster explains:

> If a friend sends you an offensive text, you don't blame Apple or AT&T; you blame your friend. If an uncle inundates you with email hoaxes, you don't blame Gmail . . . you blame your uncle. But when that misinformation described above spreads on Facebook, people blame Facebook . . . . And sadly this isn't an entirely irrational reaction. With a ranked feed, Facebook decides what content spreads and what content doesn't.[116]

The poster goes on to say that "[a] ranked feed is a curated feed, and we are the curators" before going on to posit several potential design changes that could help mitigate the issue.[117]

Similarly, Instagram is aware that the "like" feature can cause mental health issues for teens. In 2020, Adam Mosseri, the CEO of Instagram, began

112 *What Happens If We Delete Ranked News Feed?*, *in* FACEBOOK PAPERS DIRECTORY (Gizmodo ed.) (Feb. 28, 2018) (emphasis omitted), https://www.documentcloud.org/documents/21748432-tier2_news_ir_0218 [https://perma.cc/BN7C-36S9]. In November 2021, Gizmodo partnered with a group of independent experts to review, redact, and publish the papers disclosed by Frances Haugen. *See* Dell Cameron, Shoshana Wodinsky, Mack DeGuerin & Thomas Germain, *Read the Facebook Papers for Yourself*, GIZMODO, https://gizmodo.com/facebook-papers-how-to-read-1848702919 [https://perma.cc/ZN49-ELRM] (providing a collection of all the documents released by whistleblower Frances Haugen).

113 *See* FACEBOOK PAPERS DIRECTORY, *supra* note 112.

114 *What Happens If We Delete Ranked News Feed?*, *in* FACEBOOK PAPERS DIRECTORY (Gizmodo ed.) (Feb. 28, 2018) (emphasis omitted), https://www.documentcloud.org/documents/21748432-tier2_news_ir_0218 [https://perma.cc/BN7C-36S9].

115 *Id.* (emphasis omitted).

116 *Is Ranking Good?*, *in* FACEBOOK PAPERS DIRECTORY (Gizmodo ed.) (May 6, 2018) (emphasis omitted), https://www.documentcloud.org/documents/21600996-tier2_rank_exp_0518 [https://perma.cc/49HK-R5HR].

117 *Id.* (emphasis omitted).

a "highly publicized"[118] campaign to remove the like feature.[119] In an interview with The New York Times, Mosseri admitted that he "ha[d] been concerned about the unanticipated consequences of Instagram as approval arbiter."[120] The story went on to say that, at the time of the interview, the company had been "'dog-fooding' (internal Insta-talk for testing) different variations of [a] new format" without likes.[121] But he also admitted that he did not want to "piss anyone off" and knew that "[b]rands would still need to count likes for their advertising."[122] The company did eventually roll out an A/B test on some users, and users immediately noticed, as Reddit exploded with customers questioning what happened and how they could "fix the bug."[123] Those whose "likes" were suddenly hidden assumed the app had broken, and Redditors exchanged experiences wondering why their apps suddenly functioned differently.[124] Some attempted to return likes to their profiles, while others asked how they too could access this feature or "bug."[125] But what users did not realize is that they were part of a companywide experiment to test the effect of the new feature.

Ultimately, likes returned to Instagram. Despite the highly publicized mental health campaign, the reasoning for abandoning the project was never disclosed by Facebook. Excerpts from the Facebook Papers revealed that the

118 Russell Brandom, Alex Heath & Adi Robertson, *Eight Things We Learned From the Facebook Papers*, VERGE (Oct. 25, 2021, 11:40 AM), https://www.theverge.com/22740969/facebook-files-papers-frances-haugen-whistleblower-civic-integrity [https://perma.cc/2HPW-TSXJ].

119 *See* Amy Chozick, *This Is the Guy Who's Taking Away the Likes*, N.Y. TIMES, https://www.nytimes.com/2020/01/17/business/instagram-likes.html [https://perma.cc/5DE8-9WE3].

120 *Id.*

121 *Id.*; *see also* Nora Caplan-Bricker, *If You Want to Talk Like a Silicon Valley CEO, Learn This Phrase*, NEW REPUBLIC (Oct. 28, 2013), https://newrepublic.com/article/115349/dogfooding-tech-slang-working-out-glitches [https://perma.cc/V8V5-8JQZ] ("'Eating your own dogfood,' or 'dogfooding,' as it's more commonly phrased, means using the software you make, often in beta form, to work out the kinks.").

122 *See* Chozick, *supra* note 119.

123 *See* @goal-oriented-38, *Why Can't I Hide My Likes in Instagram?*, REDDIT (July 25, 2021, 8:41 AM), https://www.reddit.com/r/Instagram/comments/orav07/why_cant_i_hide_my_likes_in_instagram [https://perma.cc/XE9R-YZB7] (discussing how some accounts could access hidden like feature while others could not); @HellsGoldenAngel, *Did Instagram Remove the "Liked By…" Feature?*, REDDIT (Aug. 12, 2022, 12:55 PM), https://www.reddit.com/r/Instagram/comments/wmq6qo/did_instagram_remove_the_liked_by_feature [https://perma.cc/7KGG-8BUP] (discussing how user was seeing Instagram pictures reflect number of "total likes instead of liked by"); @squishykiwi2, *Why Is Instagram Hiding My Likes Without My Consent?*, REDDIT (May 29, 2023, 11:52 AM), https://www.reddit.com/r/Instagram/comments/13uylic/why_is_instagram_hiding_my_likes_without_my [https://perma.cc/HT2U-MV38] (complaining that hidden likes feature prevents companies with whom user works from seeing user's social media engagement information).

124 *See* sources cited *supra* note 123.

125 *See* sources cited *supra* note 123.

change "never happened because testing the change hurt ad revenue and led to people using the app less."[126] These are just two examples of countless design tests that social media engineers run on their users daily.[127] The Facebook Papers also detail the issues leading up to January 6[128] and the unmistakable effect Instagram has on body image.[129] The control that social media companies exert over the platforms' features is clear, and further data is one discovery process away.

The existence of alternative designs is easy to prove; however, the companies can still argue the designs are not economically "reasonable." The upcoming litigation will likely center on questions of how these changes might affect costs. Because of social media's strange business model, the contours of the risk-utility test are a bit more difficult to outline than in a traditional model. Relevant stakeholders include the social media company, the brands that advertise on the platform, and the platform's users. This makes tracking risks and costs more difficult as it does not mirror the usual binary customer-seller relationship.

Consider a change to the ranked order of the News Feed; even if production costs are nearly nonexistent, Meta can argue that they will lose too much revenue if they make these changes. Lost revenue to the company is not considered directly, but if the revenue loss leads to an increase in the price of the product, that cost is weighed.[130] Further, revenue is used to estimate utility, as willingness to pay is often equated to product

126 Brandom, Heath & Robertson, *supra* note 118.

127 *See, e.g.*, Lawrence Bonk, *Meta Made an A/B Testing Tool to Help Users Optimize Their Reels on Facebook*, ENGADGET (Nov. 2, 2023), https://www.engadget.com/meta-made-an-ab-testing-tool-to-help-users-optimize-their-reels-on-facebook-171323994.html [https://perma.cc/JW4F-RUX4] (describing a tool Meta introduced to allow creators to use A/B tests on their followers); Sarah Perez, *Instagram Confirms Test of Unskippable Ads*, TECHCRUNCH (June 3, 2024, 9:49 AM), https://techcrunch.com/2024/06/03/instagram-confirms-test-of-unskippable-ads [https://perma.cc/SNJ5-XD67]; Jay Peters, *Instagram Tests a Verified-Only Feed*, THE VERGE (Oct. 23, 2023, 2:46 PM), https://www.theverge.com/2023/10/23/23929100/instagram-meta-verified-feed-test [https://perma.cc/46RX-NJUW].

128 *See* Craig Timberg, Elizabeth Dwoskin & Reed Albertgotti, *Inside Facebook, Jan. 6 Violence Fueled Anger, Regret over Missed Warning Signs*, WASH. POST (Oct. 22, 2021, 7:36 PM), https://www.washingtonpost.com/technology/2021/10/22/jan-6-capitol-riot-facebook/# [https://perma.cc/DR7T-T3R4]; *Teen Girls Body Image and Social Comparison on Instagram – An Explanatory Study in the US*, *in* FACEBOOK PAPERS DIRECTORY (Gizmodo ed.) (Mar. 26, 2020), https://www.documentcloud.org/documents/23590378-tier0_teen_ir_0320-compressed [https://perma.cc/7YQ2-PACK].

129 *See* Mariska Kleemens et al., *Picture Perfect: The Direct Effect of Manipulated Instagram Photos on Body Image in Adolescent Girls*, 21 MEDIA PSYCH. 93 (2016).

130 For example, in *Wilson v. Piper Aircraft Corp.*, plaintiffs provided evidence to showthat an alternative design would decrease the risk of an airplane icing, making it safer. 577 P.2d 1322, 1327 (Or. 1978). Yet the court declined to find defect, *id.* at 1328, because of a lack of evidence about the impact of such an alternative design on the "airplane's cost . . . [or] over-all performance." *Id.* at 1327.

desirability.[131] The issue with social media is that the companies do not charge their users, further complicating the economic inquiry.[132]

The second type of cost, costs in loss of productive utility, is also complicated by competing user interests. Meta will have no issue finding witnesses to testify that News Feed changes lead to "[c]osts in loss of productive utility" for a certain subset of customers.[133] Brands that rely on targeted advertising benefit from teens' increased time on the platform. But the same algorithm changes that increase the utility for advertisers decrease product utility for teens while increasing the risk of product abuse.[134] Ultimately, the risk-utility test asks the jury to decide what society deems valuable and the risks we are willing to endure to access that value.

While some will argue that this is not a question for a jury,[135] the average person has no input into the proliferation of social media, but must bear all the costs. Section 230 protects these companies from product liability in ways that it should not. Interpreting Section 230 to allow such litigation will not be as disastrous as the doomsayers will argue.[136] These lawsuits, as discussed more in Part III, are necessary to publicize design information, reveal the internal results of decades of A/B testing, and readjust how we view social media's role in society.

E. Traceback Analysis: Causation

The final hurdle is pleading causation.[137] This is the most difficult aspect

131 *See generally* Kim D. Larsen, *Strict Products Liability and the Risk-Utility Test for Design Defect: An Economic Analysis*, 84 COLUM. L. REV. 2045, 2054 (1984) ("The usefulness and desirability of the product are primary factors affecting consumer willingness to spend money for it . . . .").

132 *See* Katherine J. Strandburg, *Free Fall: The Online Market's Consumer Preference Disconnect*, 2013 U. CHI. LEGAL F. 95, 96 ("[T]he online market is complicated by the ubiquity of business models bundling advertising with products and services offered to consumers at zero monetary price [sic] Advertisers, not users, are these businesses' customers.").

133 *See* DOBBS, HAYDEN & BUBLICK, *supra* note 108 (emphasis omitted).

134 *See* Hilary Andersson, *Social Media Apps Are 'Deliberately' Addictive to Users*, BBC (July 3, 2018), https://www.bbc.com/news/technology-44640959 [https://perma.cc/L77C-JHKM] (noting that "Silicon Valley insiders" claim "[s]ocial media companies are deliberately addicting users to their products for financial gain," that teenagers spend significant amounts of their screen time on social media, and that "[s]tudies indicate there are links between overusing social media and . . . a host of . . . mental problems").

135 *See* William R. Darden, James B. DeConinck, Barry J. Babin & Mitch Griffin, *The Role of Consumer Sympathy in Product Liability Suits: An Experimental Investigation of Loose Coupling*, 22 J. BUS. RSCH. 65 (1991) (arguing that product liability outcomes are affected by sympathy for the plaintiff and are not just pure legal conclusions).

136 *See* Citron & Wittes, *supra* note 27 ("With modest adjustments to § 230, either through judicial interpretation or legislation, we can have a robust culture of free speech online without shielding from liability platforms designed to host illegality or that deliberately host illegal content.").

137 *Product Liability*, CORNELL L. SCH.: LEGAL INFO. INST.,

of the litigation because the platforms have the ability to point to many confounding variables. However, this step is another example in which A/B testing can help plaintiffs. The platforms themselves have access to tests that can show how certain features increase addiction and lead to more engagement with the site. Internally, programmers and managers have tracked the effect of Instagram on body image, including eating disorders, and concluded the effect is worse on Instagram than it is on other apps.[138] There are presumably hundreds, if not thousands, more tests that were run on users over the years, which include statistical modeling and causation analyses that would be relevant in proving causation in the upcoming litigation.[139] Meta itself funds academic research that quantifies the harm of social media use.[140]

Further, social scientists and psychologists have been studying the effects of social media for years, offering external insights into Instagram's effects.[141] The studies, while useful, are aggregate studies rather than individual case studies. In the case of product liability litigation, the causation inquiry is focused on the specific harm to this specific individual. In many injury cases, the analysis is clear—e.g., the lack of a safety mechanism on a machine led an employee to stick her arm in the blade, and the blade amputated her arm. There are not many other explanations for what happened in that scenario.[142] Here, it will be more difficult to show why

https://www.law.cornell.edu/wex/product_liability#:~:text=In%20order%20to%20succeed%20on,defect%20caused%20the%20plaintiff%27s%20injury [https://perma.cc/P56Q-9SU7].

138 *See Teen Girls Body Image and Social Comparison on Instagram*, supra note 128.

139 Milmo, *supra* note 19 (detailing Facebook whistleblower Frances Haugen's positions that the social media giant "never gives us details about how they are going to fix problems" and that the company, along with "the huge amounts of data it amasses internally, must face regular and ad hoc scrutiny by regulators").

140 *See Foundational Integrity Research: Misinformation and Polarization Request for Proposals*, META, https://research.facebook.com/research-awards/foundational-integrity-research-misinformation-and-polarization-request-for-proposals/#principal-areas-of-exploration [https://perma.cc/Y2Z5-FAXT] ("We welcome proposals that explore how we can best measure the harms that result from misinformation. In particular, we are interested in understanding more about how we could reliably quantify these harms through causal mechanisms . . . .").

141 *See* Pixie G. Turner & Carmen E. Lefevre, *Instagram Use Is Linked to Increased Symptoms of Orthorexia Nervosa*, 22 EATING & WEIGHT DISORDERS 277, 277, 281 (2017) ("[The researchers] found . . . higher Instagram use . . . associated with a greater tendency towards [orthorexia nervosa]. No other social media channels were found to have this effect . . . . [T]he large population of social media users, now over 500 million on Instagram alone, means that this is a meaningful effect at population level."); Rahmatullah Haand & Zhao Shuwang, *The Relationship Between Social Media Addiction and Depression: A Quantitative Study Among University Students in Khost, Afghanistan*, 25 INT'L J. ADOLESCENCE & YOUTH 780, 784 (2020) ("[T]his study reveals that social media addiction has a positive correlation with depression among university students in the Khost province of Afghanistan. In other words, the higher the student addiction level, the greater his/her depression level is.").

142 *See, e.g.*, Hadar v. AVCO Corp., 886 A.2d 225, 226–27 (Pa. Super. Ct. 2005) (noting that

TikTok or Instagram caused the anorexia, insomnia, or depression. However, one benefit of an online world is a digital footprint, and it is likely that harmed teenagers have documented their lives meticulously. Between Instagram, Facebook, and Snapchat, teens are leaving a virtual trail that many believe points to clear answers.[143]

III
SYSTEM UPGRADE: EVALUATING PRODUCT LIABILITY

The fact that these lawsuits may be legally possible does not mean they are normatively desirable. And any proposal regarding social media companies is bound to be contentious as many fear that you cannot apply old law to new problems. But the thought that social media is of such unprecedented nature that it eludes traditional categorization is misguided. Society has grappled with the issue of new technology before. There were no car accidents until there were cars and no industrial accidents before industry. In the history of product development leading to problem development, tort law has played an irreplaceable role. The common criticism of tort law is that it leads to ruinous liability,[144] but product liability has yet to eviscerate an entire category of utilitarian products. Instead, it has served as a catalyst for regulation, forced safety information to be publicized, and led to moderate tweaks of product designs.[145]

Whether or not these lawsuits succeed, this Part argues that allowing tort law to step in will be beneficial. A range of proposals have come down the pipeline for fixing the platforms. From antitrust to public utility law, scholars from every field have offered solutions. These other solutions, while interesting and novel, target the wrong aspects of media, or go too far for an initial solution.[146] Using tort law allows for a targeted intervention that leaves Section 230 intact, minimizing First Amendment concerns, and preventing overzealous legislation.

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the farmer brought suit after hand was mangled by corn husking rollers); Egelhoff v. Holt, 875 S.W.2d 543, 546 (Mo. 1994) (en banc) (noting that although plaintiff did not physically see what cut her hand, evidence was clear that she cut her hand on swimming pool post); Burke v. Spartanics, Ltd., 252 F.3d 131, 134 (2d Cir. 2001) (noting that the metal shearing machine severed plaintiff's fingers).

143 *See* Adam Satariano, *British Ruling Pins Blame on Social Media for Teenager's Suicide*, N.Y. TIMES (Oct. 1, 2022), https://www.nytimes.com/2022/10/01/business/instagram-suicide-ruling-britain.html [https://perma.cc/KT68-PP5J].

144 *See* Mitchell Polinsky & Steven Shavell, *The Uneasy Case for Product Liability*, 123 HARV. L. REV. 1437 (2010). *But see* John C.P. Goldberg & Benjamin C. Zipursky, *The Easy Case for Products Liability Law: A Response to Professors Polinsky and Shavell*, 123 HARV. L. REV. 1919 (2010).

145 *See infra* Part III.A.

146 *See infra* Part III.B.

A. Optimized Protocol: The Strengths of Tort

Product liability is a common tool for public health regulation. Consumers and scholars alike do not always appreciate the power of tort law, which was instrumental in improving vehicle safety and raising awareness about the deleterious effects of tobacco. Its role in catalyzing safety initiatives and revealing hidden information during discovery is especially pertinent in the case of social media companies, whose practices are shrouded in secrecy. For those who are skeptical of tort's successes, a process of elimination still suggests that it is the lesser of law's evils.

1. Catalyst for Regulation

Despite occupying two different theoretical spheres, tort and policymaking are intertwined. Tort law is often a catalyst for regulation, awakening both industry and government to the need for broader intervention. Tort law has been described as a "policy venue"—an institutional setting where policymaking takes place.[147] Others have argued that tort "works hand-in-glove with other governmental and private reforms and, indeed, provides the spark necessary to ignite complementary regulatory activity."[148]

The history of litigation against automobile manufacturers highlights tort law's role as a catalyst for policymaking. Litigation surrounding car crashes has been described as "the cultural archetype for civil litigation in late twentieth-century America."[149] When cases were first filed, critics argued that it was the driver, not the car manufacturer, who was the cause of the accident.[150] These arguments echo contemporary efforts of social media platforms to place the blame in the hands of their users. In the early years of the automobile industry, car accidents accounted for 30 percent of all

147 Policy venue is a term coined by political scientists Frank Baumgartner and Bryan Jones. The two describe policy change as a function of framing and venue: "When an issue is reframed, it may excite public interest and engender pressure for policy reform. When an issue falls under a different institutional jurisdiction, the change in venue may bring with it new ways of approaching the problem and different tools for responding to it." Timothy D. Lytton, *Using Tort Litigation to Enhance Regulatory Policy Making: Evaluating Climate-Change Litigation in Light of Lessons from Gun-Industry and Clergy-Sexual-Abuse Lawsuits*, 86 TEX. L. REV. 1837, 1840–41 (2008).

148 Nora Freeman Engstrom & Robert L. Rabin, *Pursuing Public Health Through Litigation*, 73 STAN. L. REV. 285, 361 (2021); *see also* W. Kipp Viscusi, *Product Liability and Regulation: Establishing the Appropriate Institutional Division of Labor*, 78 AM. ECON. REV. 300, 300 (1988) ("Such a piecemeal approach [to tort and regulation] may be necessary in some cases as an analytic convenience, but it neglects potentially important interactions of the two systems.").

149 Samuel R. Gross & Kent D. Syverud, *Getting to No: A Study of Settlement Negotiations and the Selection of Cases for Trial*, 90 MICH. L. REV. 319, 356 (1991).

150 *See The American Automobile*, N.Y. TIMES, Sept. 23, 1904, at 8 (The automobile "is dangerous only when run imprudently or recklessly—less dangerous, indeed, than horses ever were or are ever likely to be.").

accidental deaths on the road.[151] Society, however, was slow to understand the importance of vehicle design in driver safety: "At first, the automobile was perceived as a neutral device that merely responded to a driver's commands and could not cause an accident."[152] It took consumers speaking up, cloaked by the legitimacy of the court, for this perception to change.[153] Pivotal cases, such as *GM v. Melton*, also forced the National Highway Traffic Safety Administration (NHTSA) to act.[154]

Those who conclude that tort law had no role in vehicle regulation do not have the counterfactual of vehicle regulation flying solo. Product claims against vehicles began as early as the 1920s.[155] The first federal law regulating automobiles was only signed into law in 1966.[156] Assuming that it was entirely regulation that achieved the outcome ignores the instigating role of tort law.[157] Cars are just one of many models, "[i]n the case of asbestos, for example, the wave of asbestos litigation was followed by tightened OSHA regulation of asbestos, with an average cost per life saved of $89 million."[158]

Many of the arguments against product liability are stronger for products that have been on the market for a long time and are properly regulated by the government (like medical devices), but new technology

151 KENNETH S. ABRAHAM, THE LIABILITY CENTURY: INSURANCE AND TORT LAW FROM THE PROGRESSIVE ERA TO 9/11 71 (2008).

152 *Automobile Safety*, NAT'L MUSEUM OF AM. HISTORY, https://americanhistory.si.edu/ko/node/46940#:~:text=At%20first%2C%20the%20automobile%20was,that%20design%20flaws%20compromised%20safety [https://perma.cc/93AE-DQYC]; *see also* Evans v. General Motors Corp., 359 F.2d 822, 824 (1966) (holding that an automobile manufacturer must design a product reasonably fit for the purposes for which it was made and that "[t]he intended purpose of an automobile does not include its participation in collisions with other objects").

153 *See* Jon S. Vernick et al., *Role of Litigation in Preventing Product-Related Injuries*, 25 EPIDEMIOLOGIC REV. 90 (2003) (explaining that in many situations the public attention garnered by litigation forced motor vehicle companies to act despite the slow response of regulators). *See generally* NADER, *supra* note 47.

154 *See* Nora Freeman Engstrom, *When Cars Crash: The Automobile's Tort Law Legacy*, 53 WAKE FOREST L. REV. 293, 307–08 (2018) ("This case, and the information it revealed, undeniably facilitated NHTSA's adequate regulation and also prompted NHTSA to take steps to improve going forward.").

155 MacPherson v. Buick Motor Co., 111 N.E. 1050, 1051 (N.Y. 1916).

156 Richard Weingroff, *A Moment in Time: Highway Safety Breakthrough*, FED. HIGHWAY ADMIN. (2021), https://www.fhwa.dot.gov/highwayhistory/moment/highway_safety_breakthrough.cfm [https://perma.cc/M6J4-K3YC].

157 *See* Goldberg & Zipursky, *supra* note 144, at 1930–31 ("[L]itigation can itself focus[] consumer attention on alleged product dangers and attracts regulatory attention . . . it is almost certainly a mistake to posit that, once tort law is removed from the bundle of regulatory sticks, market and regulatory forces will have the same deterrent effect that they now have.").

158 Viscusi, *supra* note 148, at 300.

occupies a different social and economic sphere.[159] In the case of platforms, lawsuits are a way for consumers to express disutility and signal to the community writ large that there is a safety problem.[160] Already, the simple filing of the MDL has sparked considerable public debate on the matter and allowed non-insiders to express their opinions.[161] Further, the threat of liability could push the companies to lobby for preemptive regulation.[162]

2. Information Forcing[163]

The second benefit of tort law is its information-forcing function. When it comes to promoting safety, regulation and market forces can work, but they work under the assumption of perfect information.[164] In the case of social media companies, neither regulators nor consumers have a sufficient understanding of the product. In situations like this, tort lawsuits can correct

159 *See* Keith N. Hylton, *The Law and Economics of Products Liability*, 88 NOTRE DAME L. REV. 2457, 2458 (2013) ("Products liability law operates largely on products that have observable utility and hidden risks, relative to the safer alternatives available on the market . . . this combination of features is unlikely to be regulated well by the market.").

160 *See* Cristina Carmody Tilley, *Tort Law Inside Out*, 126 YALE L.J. 1320, 1320 (2017) (arguing tort law is concerned primarily with community and operates as a vehicle through which people communicate their values to their society).

161 *See* Ruth Reader, *Social Media Is a Defective Product, Lawsuit Contends*, POLITICO (Jan. 26, 2023, 4:30 AM), https://www.politico.com/news/2023/01/26/social-media-lawsuit-mental-illness-00079515 [https://perma.cc/KHH3-2MJN]; *see also* Sharyn Alfonsi, *More than 2,000 Families Suing Social Media Companies over Kids' Mental Health*, CBS NEWS (June 4, 2023, 6:57 PM), https://www.cbsnews.com/news/social-media-lawsuit-meta-tiktok-facebook-instagram-60-minutes-transcript-2023-06-04 [https://perma.cc/VG5A-V92P].

162 *See, e.g.*, Neema Singh Guliani, *Don't Be Fooled by the Tech Industry's Push for Federal Privacy Regulation*, ACLU (Oct. 5, 2018), https://www.aclu.org/news/privacy-technology/dont-be-fooled-tech-industrys-push-federal-privacy [https://perma.cc/5YD3-MVE2] ("This seeming willingness to subject themselves to federal regulation is, in fact, an effort to . . . weaken state-level consumer privacy protections."); Rob Waters, *Soda and Fast Food Lobbyists Push State Preemption Laws to Prevent Local Regulation*, FORBES (June 21, 2017, 10:22 AM), https://www.forbes.com/sites/robwaters/2017/06/21/soda-and-fast-food-lobbyists-push-state-preemption-laws-to-prevent-local-regulation [https://perma.cc/U5E7-9CUP]; Karl Evers Hillstrom & Rebecca Klar, *Corporate Lobbying Could Imperil Sweeping Data Privacy Bill*, HILL (Aug. 3, 2022, 5:20 AM), https://thehill.com/lobbying/3585322-corporate-lobbying-could-imperil-sweeping-data-privacy-bill [https://perma.cc/DAS6-UBGV] ("Business lobbyists argue that the bill must override state privacy laws so that companies can comply with a national standard rather than a patchwork of regulations.").

163 *See* Nora Freeman Engstrom, *Facilitating the Information-Forcing Function of Tort Law*, JOTWELL: TORTS (Mar. 22, 2022) (article review), https://torts.jotwell.com/facilitating-the-information-forcing-function-of-tort-law [https://perma.cc/EB5H-PWSJ] (framing the purpose of tort law not as monetary compensation but instead as a mechanism for mandatory information disclosure).

164 *See* Wendy Wagner, *When All Else Fails: Regulating Risky Products Through Tort Litigation*, 95 GEO. L.J. 693, 697 (2007) ("Individuals participate in regulatory decisions when they can access information that allows them to contribute in meaningful ways. The tort system sometimes fares better than the regulatory system at ensuring that this information is available to participants.").

the information asymmetry. In fact, recently scholars have begun to argue that tort "promotes safety, not only (and maybe not primarily) through the much-discussed path of cost internalization . . . but rather, by *triggering disclosures*."[165]

We can observe the pattern of increased disclosure via past product liability suits. For example, in the tobacco industry, product liability lawsuits were instrumental in revealing the addictive nature of cigarettes.[166] And the suits brought forth "evidence that tobacco executives engaged in a disingenuous pattern of conduct, in which they strove to conceal and misrepresent information about the addictive properties of nicotine."[167] Other lawsuits have achieved similar ends: "[P]ublic entities' opioid litigation triggered the disclosure of the ARCOS data—a previously confidential government database that mapped where every prescription painkiller originated and where it was sold."[168] And in the case of firearm litigation, "[d]iscovery has uncovered that gun manufacturers are further along in developing safer gun designs than their public statements suggest."[169]

Social media companies have been shielded from revealing information for years.[170] The Facebook papers are only the tip of the iceberg. The results of internal A/B testing would be a critical piece of discovery that could help redefine how we view the platforms' roles and ultimately how we regulate them.[171]

3. Risk Utility Test

A world without Facebook sounds like a utopian vision to some, but others see it as a suitable premise for an episode of *Black Mirror*. The truth

165 *See* Engstrom, *supra* note 163.

166 *See generally* STANTON A. GLANTZ ET AL., THE CIGARETTE PAPERS 237 (1996).

167 *See* Robert L. Rabin, *Tobacco Control Strategies: Past Efficacy and Future Promise*, 41 LOY. L.A. L. REV. 1721, 1733 (2008) (arguing that tobacco litigation increased public disapproval of tobacco which in turn made tobacco regulation more politically feasible).

168 Engstrom, *supra* note 163.

169 Lytton, *supra* note 147, at 1845; *see also* Wendy Wagner, *Stubborn Information Problems & the Regulatory Benefits of Gun Litigation*, *in* SUING THE GUN INDUSTRY: A BATTLE AT THE CROSSROADS OF GUN CONTROL AND MASS TORTS 271, 271, 285 (Timothy D. Lytton ed., 2005) (similarly finding that firearm litigation led to increased disclosure).

170 *See* Mekela Panditharatne, *Law Requiring Social Media Transparency Would Break New Ground*, BRENNAN CTR. FOR JUST. (Apr. 6, 2022), https://www.brennancenter.org/our-work/research-reports/law-requiring-social-media-transparency-would-break-new-ground [https://perma.cc/BP89-95BG] ("Social media companies often shield themselves from scrutiny of the harm they cause by refusing to disclose information.").

171 *See* Will Oremus, *Facebook Keeps Researching Its Own Harms — and Burying the Findings*, WASH. POST. (Sept. 16, 2021), https://www.washingtonpost.com/technology/2021/09/16/facebook-files-internal-research-harms [https://perma.cc/HF9A-QNXP] (highlighting Facebook's use of A/B testing on algorithm efficacy).

might lie somewhere in between, but it would be wrong to ignore the doomsayers. One article frames the issue by saying, "[t]he demise of a global online communication platform such as Facebook could have *catastrophic* social and economic consequences."[172] The piece, which tracks the hypothetical shutdown, cites several stakeholders who stand to lose access to vital messaging services,[173] personal data,[174] and a trove of information about society's shared history.[175] The article cites regulation as the most prominent risk to Facebook, with antitrust engendering the most fear.[176] Regulating through blunt instruments like antitrust could quickly lead to bankruptcy, but product liability does not pose the same risks. By definition, product liability attempts to find the risk-utility balancing point. The risk-utility test attempts to "achieve a level of risk that equates the incremental benefits of greater safety with the incremental costs."[177] As one scholar clarifies, "[t]he goal of tort law is not perfect safety and full compensation at all costs."[178] The goal of a product lawsuit is not to shut down production of the product, but rather to realign costs so they do not fall disproportionately on the consumer.

The risk-utility test does not only question what the seller could have done better, but also asks whether the consumer was using the product in a reasonably foreseeable manner. This can aid in drawing the line between harm that is inherent in the platform and harm wrought by misuse. Further, the test does not wade into First Amendment content moderation questions, or monopolistic behavior. It simply asks what societal benefits we are achieving and at what cost. The platforms will certainly argue that consumers *want* these algorithms and that they derive benefits from personalized feeds. They might pull on differential engagement data to prove that the more tailored the content, the more engaged the users. But this is a double-edged

172 Carl J. Öhman & Nikita Aggarwal, *What if Facebook Goes Down? Ethical and Legal Considerations for the Demise of Big Tech*, 9 INTERNET POL'Y REV. 1, 2 (2020).

173 *See* Jessica Goodfellow, *In Communist Laos PDR, Consumers and Advertisers Find Liberation Online*, CAMPAIGN ASIA (Aug. 20, 2019), https://www.campaignasia.com/article/in-communist-laos-pdr-consumers-and-advertisers-find-liberation-online/453738 [https://perma.cc/JU4A-VHVL] (describing how Laotians use social media for communication).

174 Öhman & Aggarwal, *supra* note 172, at 7 ("That is, the danger stems not only from losing access to the Facebook platform . . . but from future harms that users (active and passive) are exposed to as they lose control over their personal data.").

175 *See* Carl J. Öhman & David Watson, *Are the Dead Taking Over Facebook? A Big Data Approach to the Future of Death Online*, BIG DATA & SOC'Y, Jan.–June 2019, at 2 (arguing for the importance of digital preservation for the historical value of digital remains).

176 *Id.*

177 W. Kip Viscusi, *Does Product Liability Make Us Safer?*, CATO INST. (2012), https://www.cato.org/regulation/spring-2012/does-product-liability-make-us-safer [https://perma.cc/3WL7-K2TF].

178 Elizabeth A. Weeks, *Beyond Compensation: Using Torts to Promote Public Health*, 10 J. HEALTH CARE L. & POL'Y 27, 39 (2007).

sword for the companies if litigators can show that higher engagement is due to harmful addiction, not conscious preference.[179]

This back-and-forth is the appropriate starting point. It also allows for input from consumers themselves, diluting the effect of regulatory capture. The ultimate solution may very well be a federal regulation that preempts state tort actions, but tort is the right place to begin. This essay does not aim to dismiss federal intervention outright but points out that government intervention has not shown initial success. Section 230 itself has spawned problems and legislative attempts to fix it have fared worse than the original law, as discussed more below.[180]

Design defect also does not force a particular course of action. Regulation often imposes specific outcomes (seatbelts, airbags, pharmaceutical labeling), but tort highlights the problem while leaving the solution in the private actors' hands. So much so, to the point that if the cost of litigation is lower than the cost of changing the product, companies will not change the product.[181] Litigation is costly and can lead to reputational damage, so choosing to do nothing is unlikely.[182] It is a less prescriptive approach than federal regulation. Perhaps later federal regulation should preempt tort claims, but jumping straight to regulation can lead to unintended consequences. The goal is to ensure safety and accountability, not rush to solutions that do not address the underlying issues.

B. Legacy System Flaws: The Weaknesses of Other Solutions

For those less convinced by the benefits of product liability, this Part briefly outlines competing proposals. On balance, the existence of other solutions validates the need for a fix. To borrow the jargon of the tech world,

179 *See What Would Happen if Facebook Were Turned Off*, ECONOMIST (Feb. 14, 2019), https://www.economist.com/finance-and-economics/2019/02/14/what-would-happen-if-facebook-were-turned-off [https://perma.cc/V7ZH-48GU] ("Several weeks after the deactivation period, those who had been off Facebook spent 23% less time on it than those who had never left, and 5% of the forced leavers had yet to turn their accounts back on.").

180 *Infra* note 201 and related discussion.

181 *See* STEVEN GARBER, ECONOMIC EFFECTS OF PRODUCT LIABILITY AND OTHER LITIGATION INVOLVING THE SAFETY AND EFFECTIVENESS OF PHARMACEUTICALS 10 (2013) ("From an economic perspective . . . we should expect companies to consider modifying their planned behavior if and only if they believe that their savings in future liability costs (the financial benefits to the companies) would exceed the financial cost of modifying their behavior . . . ."); *see also* Catherine M. Sharkey, *Common Tort Law as a Transitional Regulatory Regime: A New Perspective on Climate Change Litigation*, *in* CLIMATE LIBERALISM 103, 104–08 (Jonathan H. Adler, ed., 2023) (outlining tort's role as a supplementary regulatory mechanism, suggesting that companies are likely to weigh lower immediate litigation costs over higher, but deferred, costs of product changes).

182 *See* John B. Henry, *Fortune 500: The Total Cost of Litigation Estimated at One-Third Profits*, CORP. COUNSEL BUS. J. (Feb. 1, 2008), https://ccbjournal.com/articles/fortune-500-total-cost-litigation-estimated-one-third-profits [https://perma.cc/5ULU-23EJ].

problem validation ensures you are developing a wanted solution. But, now that we have our problem statement, we need to find the best product/market fit. Other solutions, while interesting and novel, are either too heavy handed or not targeting the same harms.

1. Section 230 Reform

While Section 230 reformers are growing in number, every call for reform is still met with heavy criticism.[183] Advocates who think of freedom on the internet as critical to upholding an enlightened civilization view Section 230 as a holy grail.[184] They argue that any attempt by regulators to intervene with content moderation would destroy the diversity of online thought exchange.[185]

There is some merit to the criticism. Prior attempts to reform 230 have not quite succeeded. In 2018, the Fighting Online Sex Trafficking Act (FOSTA), made it a crime to knowingly assist or support sex trafficking.[186] The law also suspended Section 230 protections for online platforms that knowingly facilitated sex trafficking.[187] Suddenly, platforms were liable for third-party content that facilitated or supported trafficking. Prior to its enactment, prosecutors were unable to bring aiding and abetting charges against websites (especially classified ad websites) that were enabling sex trafficking.[188] The law that was passed was a "hodgepodge . . . with a number of moving pieces—few of which are clearly defined"[189] and led to aggressive over moderation. Classified ads sections shuttered all over the web. Danielle Citron, a vocal advocate for Section 230 amendments, acknowledges this in her bid for reform: "FOSTA has made life more difficult for prosecutors to pursue cases against sex traffickers and more dangerous for people engaged in consensual sex work . . . . Without question, FOSTA's shortcomings serve

183 *See* Eric Goldman, *Why Section 230 Is Better Than the First Amendment*, 95 NOTRE DAME L. REV. REFLECTION 33 (2019).

184 *See id.* at 34.

185 Aaron Terr, *Why Repealing or Weakening Section 230 Is a Very Bad Idea*, FIRE (Feb. 20, 2023), https://www.thefire.org/news/why-repealing-or-weakening-section-230-very-bad-idea?gad_source=1&gclid=EAIaIQobChMI9eSZ2qnFhgMVgFNHAR1mTQGhEAAYASAAEgLBevD_BwE [https://perma.cc/G4R3-DWZ6].

186 Allow States and Victims to Fight Online Sex Trafficking Act of 2017, Pub. L. No. 115-164, 132 Stat. 1253 (2018) (codified as amended at 18 U.S.C. § 2421A).

187 *Id.*

188 For example, Backpage.com, a classified ads section that hosted eighty percent of online advertising for illegal commercial seFerx was often the center of legal challenges, but managed to escape liability due to Section 230, despite many saying the website was specifically designed for illicit ads. *See* Danielle Keats Citron & Benjamin Wittes, *The Problem Isn't Just Backpage: Revising Section 230 Immunity*, 2 GEO. L. TECH. REV. 453, 453 (2018).

189 Quinta Jurecic, *The Politics of Section 230 Reform: Learning from FOSTA's Mistakes*, BROOKINGS INST. (2022), https://www.brookings.edu/articles/the-politics-of-section-230-reform-learning-from-fostas-mistakes [https://perma.cc/9Z6J-VMLB].

as a roadmap of what *not* to do."[190] However, Citron believes it is still possible to reform Section 230, with "care and caution."[191] With FOSTA's failure lurking in the background, it is not clear that this can be done.

Further, carving out exceptions could disproportionately affect marginalized communities.[192] The threat of liability based on user generated content could eliminate safe spaces on the internet. As Queer writers have observed, Reddit was instrumental in creating affirming spaces for the Trans community.[193] Many believe that these spaces would be harmed by imposing legal liability that hinges on active moderation.[194]

It might be that tailored legislative reform can appropriately address discrete issues,[195] but the political environment makes this a difficult task. Any focus on moderation is certain to raise vehement backlash.[196] And even if moderation were mandated, the algorithm would be free to execute other harms. It is imperative to separate user generated content from engineer designed features.

Separating the design from the content is responsive to First Amendment concerns. Supporters of Section 230 often point to its role in protecting all manner of speech.[197] If one is viewing Facebook as identical to the town square, the policy ideals underlying the First Amendment do point to lower government intervention.[198] However, the town square analogy is not entirely apt. To the extent that platforms do nothing but upload content, protection might be warranted. But even in the case of classified ad websites, the problem was not solely the upload. The site "also tailored its rules to protect[] practice[s] from detection, including allowing anonymized email and photographs stripped of metadata."[199] These websites are not the modern paragon of the town square. If anything, the internet as a whole could be

190 Citron, *supra* note 24, at 736–37, 742.

191 *Id.* at 746.

192 *See* Billy Easley, *Revising the Law That Lets Platforms Moderate Content Will Silence Marginalized Voices*, SLATE (Oct. 29, 2020), https://slate.com/technology/2020/10/section-230-marignalized-groups-speech.html [https://perma.cc/LVE5-H4X9].

193 *See* Emily St. James, *Trans Twitter and the Beauty of Online Anonymity*, VOX (Sept. 23, 2020), https://www.vox.com/culture/21432987/trans-twitter-reddit-online-anonymity [https://perma.cc/T2CH-7WKA].

194 Ari Ezra Waldman, *Disorderly Conduct*, 97 WASH. L. REV. 907, 964 (2022).

195 *See* Sylvain, *supra* note 75, at 501 (arguing for an amendment to Section 230 that would exempt protection for online material that violates civil rights).

196 *See, e.g.*, Goldman, *supra* note 183, at 33.

197 Jennifer Stisa Granick, *Is This the End of the Internet As We Know It?*, ACLU (Feb. 22, 2023), https://www.aclu.org/news/free-speech/section-230-is-this-the-end-of-the-internet-as-we-know-it [https://perma.cc/GD4U-9W6G].

198 *See* Melissa De Witte, *Four Questions: Evelyn Douek on What Section 230 Is and Why It Is Misunderstood*, STAN. REP. (Oct. 7, 2022), https://news.stanford.edu/2022/10/07/four-questions-evelyn-douek-section-230-misunderstood [https://perma.cc/GB7Y-NEFJ] (describing the free speech benefits of Section 230).

199 Citron & Wittes, *supra* note 188.

considered a town square, but each individual company is sitting on the square running its own business.

A great deal of the harm can be attributed to the design of the platform, irrespective of uploaded content. Focusing on the confines of Section 230 is the most politically burdensome path. Rather than continue to fight the content, reformers should begin by fighting the product.

2. Antitrust

Perhaps the most divisive solution calls on a reanimation of antitrust law. This strand of argumentation looks to Facebook's piranha-like acquisitions of competitors (such as Instagram and WhatsApp) and suspect privacy policies.[200] There is an abundance of literature on this point, with traditional antitrust scholars heavily rebuking the idea.[201] While these companies may well be engaging in anticompetitive behavior, curing this point will not address the teen health crisis and could make it worse by depleting companies' resources. Antitrust functions from a consumer welfare perspective that generally looks to price as a proxy for the benefits of competition.[202] Social media, however, offers its services for free.

One way to overcome this is to argue that consumers "pay" for the product with their personal data. But the transfer of data in exchange for use is not proven to signal user preferences, as discussed earlier.[203] As Katherine Strandburg argues: "Internet users do not know the 'prices' they are paying for products and services supported by behavioral advertising because they cannot reasonably estimate the marginal disutility that particular instances of data collection impose on them."[204] Users are bad at estimating the harm of data collection meaning it cannot reliably be used as a signal of willingness to pay.

200 *See* Jon Swartz, *Facebook's Acquisitions of Instagram and WhatsApp Are Antitrust Targets, but Its Metaverse Mergers May Be the Victims*, MARKETWATCH (Jan. 1, 2022), https://www.marketwatch.com/story/facebooks-acquisitions-of-instagram-and-whatsapp-are-antitrust-targets-but-its-metaverse-mergers-may-be-the-victims-11640644272 [https://perma.cc/H5WV-RCTW].

201 *See, e.g.*, Riitta Katila & Sruthi Thatchenkery, *The Surprising Consequences of Antitrust Actions Against Big Tech*, HARV. BUS. REV. (Feb. 4, 2023), https://hbr.org/2023/02/the-surprising-consequences-of-antitrust-actions-against-big-tech [https://perma.cc/555W-VTDG]; Fiona M. Scott Morton & David C. Dinielli, *Roadmap for an Antitrust Case Against Facebook*, 27 STAN. J.L. BUS. & FIN. 267 (2022).

202 *See* Herbert Hovenkamp & Fiona Scott Morton, *The Life of Antitrust's Consumer Welfare Model*, PROMARKET (Apr. 10, 2023), https://www.promarket.org/2023/04/10/the-life-of-antitrusts-consumer-welfare-model [https://perma.cc/A99P-49R9] ("'Consumer welfare' as an objective of antitrust law and regulation has its origins in several vague and even conflicting ideas of how to evaluate the impact of market consolidation. However, many of these ideas identify consumer welfare with higher market output and lower prices.").

203 *See* Strandburg, *supra* note 132.

204 *Id.* at 96.

There is a failure in the social media market, making it ideal for regulation. But this failure, as described by Strandburg, does not lead to the conclusion that antitrust is the appropriate regulatory model.[205] It is not clear antitrust law has the right tools for dealing with these business models. Stopping mergers and acquisitions does not give these platforms incentive to create less addictive products and might encourage newcomers on the market to create even more dangerous products in order to gain market share.[206]

TikTok—one of the worst offenders in terms of addictiveness—has provided some competition in the social media marketplace.[207] But their strategy was not to espouse more stringent privacy policies or promise safer community building. Instead, they capitalize on reward-based learning, infinite scroll, videos that consume the entire screen, and algorithmic manipulation, among other factors.[208]

Breaking up the platforms will not break up the algorithms. Further, if as a result of the remedies, the companies lose capital and human talent, it could become harder for them to institute consumer friendly changes. A smaller company with fewer resources will not be capable of more content moderation. Whistleblower Frances Haugen has voiced this view: "Facebook's consistent understaffing . . . is a national security issue . . . . If you split Facebook and Instagram apart . . . Facebook will continue to be this Frankenstein that is altering and endangering lives around the world. Only now there won't be money to fund it."[209]

3. Information Fiduciaries

Other scholars have pushed Section 230 aside in a search for novel solutions. For example, one argument suggests treating the platforms as

205 Strandburg, *supra* note 132, at 95.

206 *See* Karen Hao, *How Facebook Got Addicted to Spreading Misinformation*, MIT TECH. REV. (Mar. 11, 2021), https://www.technologyreview.com/2021/03/11/1020600/facebook-responsible-ai-misinformation [https://perma.cc/Y88X-MT9P] ("When you're in the business of maximizing engagement, you're not interested in truth. You're not interested in harm, divisiveness, conspiracy. In fact, those are your friends." (quoting Hany Farid, Professor at University of Califorinia, Berkeley)).

207 The real story is more complicated than this, as TikTok did spend a lot of money to advertise on Facebook and other platforms. *See Facebook's Monopoly Made TikTok Possible*, AM. ECON. LIB. PROJECT (Aug. 7, 2020), https://www.economicliberties.us/press-release/facebooks-monopoly-made-tiktok-possible [https://perma.cc/U4BX-YKXB].

208 *See* Petrillo, *supra* note 65 (describing the addictive methods TikTok uses); *see also* Jared Evitts, *TikTok-Addicted Students Delete App During Exams*, BBC (Sept. 4, 2022), https://www.bbc.com/news/uk-wales-62720657 [https://perma.cc/G57U-R634].

209 Hannah Towey, *Facebook's Week of Scandals Has Made It Easier than Ever to Argue for Its Downfall — Here's Why the Whistleblower Still Thinks It Shouldn't Be Broken Up*, BUS. INSIDER (2021), https://www.businessinsider.com/facebook-whistleblower-testimony-frances-haugen-antitrust-instagram-break-up-2021-10 [https://perma.cc/38QV-56JT].

information fiduciaries.[210] This approach seeks to establish a form of regulation that sidesteps First Amendment defenses. Professor Balkin, who is credited with the idea, states, "[T]he First Amendment has gradually been transformed into a bulwark of protection against business regulation."[211] The underlying supposition is correct. Social media companies have increasingly turned to the First Amendment for protection.[212] In 2021, Florida attempted to pass a law allowing politicians to sue social media companies who refuse to host their content and "prohibiting a social media platform from willfully deplatforming a candidate" for political office.[213] The Eleventh Circuit blocked the bill from taking effect, saying it unconstitutionally restricts the speech rights of private actors.[214] In another lawsuit, Clearview AI—a controversial facial recognition company—attempted to argue "that the capture of faceprints from public images and Clearview's analysis of the public faceprints is protected speech."[215] This was in response to a suit brought under Illinois's Biometric Information Privacy Act, a law designed to offer privacy protections for commercial use of biometric data.[216] The case settled, and the question of whether algorithmic analysis is protected speech is unresolved. However, it does substantiate Balkin's point that First Amendment protections can be an obstacle to regulation.

Balkin attempts to solve this problem by defining technology companies as information fiduciaries: "[I]nformation fiduciaries have special duties to act in ways that do not harm the interests of the people whose information they collect, analyze, use, sell, and distribute."[217] This lens shifts the focus from the content being collected to the relationships that produce such content. The First Amendment treats fiduciary relationships

210 *See* Balkin, *supra* note 7, at 1208 ("[I]n general, the duties of a fiduciary include duties not to use information obtained in the course of the relationship in ways that harm or undermine the principal, patient, or client, or create conflicts of interest with the principal, patient, or client.").

211 *Id.* at 1185.

212 *See* Will Oremus, *Want to Regulate Social Media? The First Amendment May Stand in the Way*, WASH. POST (May 30, 2022), https://www.washingtonpost.com/technology/2022/05/30/first-amendment-social-media-regulation [https://perma.cc/N5N5-23YY]; *see also* Thomas A. Berry & Nicole Saad Bembridge, *The First Amendment Protects Everyone, Even Facebook and Twitter*, CATO INST. (Nov. 22, 2021), https://www.cato.org/commentary/first-amendment-protects-everyone-even-facebook-twitter [https://perma.cc/3DMZ-RD4X].

213 S.B. 7072, 2021 Leg., Reg. Sess. (Fla. 2021).

214 There is currently a circuit split, as the Fifth Circuit previously upheld a similar law. *See* Daniel Lyons, *On Texas Social Media Law, It's the Fifth Circuit Versus the First Amendment*, AM. ENTER. INST. (Sept. 23, 2022), https://www.aei.org/technology-and-innovation/on-texas-social-media-law-its-the-fifth-circuit-versus-the-first-amendment [https://perma.cc/7JKS-FGEK]; *see also* Amy Howe, *Supreme Court Skeptical of Texas, Florida Regulation of Social Media Moderation*, SCOTUSBLOG (Feb. 26, 2024), https://www.scotusblog.com/2024/02/supreme-court-skeptical-of-texas-florida-regulation-of-social-media-moderation [https://perma.cc/A3ZZ-7HK6].

215 *In re* Clearview AI, Inc., Consumer Priv. Litig., 585 F. Supp. 3d 1111, 1120 (N.D. Ill. 2022).

216 *Id.* at 1118.

217 Balkin, *supra* note 7, at 1186.

(such as between doctor and patient) with more nuance than other speech.[218]

As a constitutional argument, it may have merit, but the solution does not prevent companies from creating destructive algorithms or addictive products. At most, it might create limited privacy protections for users. But this stance would legally cement the imbalance of power between users and developers. Lina Kahn and David Pozen argue that this idea is both underinclusive in coverage and in direct conflict with corporate law, which places duties on technology companies to do what is best for their shareholders, not their users.[219]

CONCLUSION

The upcoming litigation against social media companies is not sprouting in barren soil. Society has been discussing the problem of teen health since the inception of the platforms, and legal scholars have sown the seeds of new solutions. But an effective remedy has yet to emerge. Part of the problem has been the mischaracterization of social media. It is not a simple service or a virtual town square—platforms are products. New cases pleading product liability have managed to evade Section 230 challenges by properly distinguishing between the product and the third-party content. These tort suits are taking the right approach but would benefit greatly by focusing on the internal processes of these companies, which include A/B testing and other methods drawn from traditional product design.

218 *Id.*

219 Lina M. Kahn & David E. Pozen, *A Skeptical View of Information Fiduciaries*, 133 HARV. L. REV. 497, 508, 526 (2019).