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Social Media Harms and the Common Law

Leslie Y. Garfield Tenzer

INTRODUCTION

The framers of the US Constitution and those who developed the early common law were no strangers to printed media. They could not, however, have anticipated the widespread ability of average people to communicate instantaneously with large audiences via platforms like Facebook, Instagram, and Twitter. Despite this new technology, courts have been reluctant to extend principles of pre-social media precedent, rules of law, and the Constitution to confront civil and criminal social media misconduct. On the one hand, relying on existing law is a good thing; it reaffirms the judiciary's commitment to precedent and *stare decisis*. On the other hand, clinging onto court reasoning in pre-social media precedent shows a lack of appreciation for the gravity of emotional and mental harm these posts can cause and prevents courts from furthering social media norms.

Since its inception in 1997,¹ social media has become problematic. Individuals have committed harms using social media that cross all disciplines of law. Interestingly, social media harm was the furthest thing from the minds of Congress when it provided what is essentially immunity from liability for users' inappropriate conduct.² Free from any threat of liability,

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¹ *The Evolution of Social Media: How Did It Begin, and Where Could It Go Next?*, MARYVILLE UNIV., <https://online.maryville.edu/blog/evolution-social-media/> [https://perma.cc/N7LJ-T3HY].

² 47 U.S.C § 230.

social media sites, including Twitter and Facebook, have neglected to set social media use norms.³

Social media harms date back to its emergence. One of the first social media harms to gain national attention concerned the case of Lori Drew, a forty-seven-year-old woman whose targeted post on the MySpace platform factored into a thirteen-year-old girl's suicide.⁴ It was not long before actors engaged in harms that touched on every area of the law.⁵ In instances of criminal wrongs, prosecutors and judges were often guided by state legislation.⁶ In areas like tort law and constitutional law, however, judges often faced issues of first impression.⁷

A review of civil and criminal court decisions considering social media harms reveals that most judges take a hands-off approach to social media abuses. These judicial responses may not stem from a disinterested or even deferential attitude toward social media. Instead, state and federal courts have looked to pre-social media case law to resolve social media disputes for the sake of maintaining principles of precedent and *stare decisis*.⁸ Indeed, courts should be applauded for embracing the founders' model of using existing case law to guide novel controversies, particularly at a time when the ideals of precedent seem threatened. However, in doing so, these courts fail to shape normative behavior for social media conduct—a failure that may not be in the best interest of society at large.⁹

³ See *Social Media Giants 'Shamefully Far' from Tackling Illegal Content*, BRIT. BROAD. CO. (May 1, 2017), <https://www.bbc.com/news/technology-39744016>; see also Majid Yar, *A Failure to Regulate? The Demands and Dilemmas of Tackling Illegal Content and Behaviour on Social Media*, 1 INT'L J. CYBERSECURITY INTEL. & CYBERCRIME 5, 6–9 (2018) (describing how the expansion of internet use and ability to share information over social media has increased user ability to commit crimes online and has been met with little resistance by social media giants). Some argue that social media algorithms set those norms. Companies are aware that those norms are horrible, but they are also quite deliberate because they encourage the most traffic. See Joanna Stern, *Social-Media Algorithms Rule How We See the World. Good Luck Trying to Stop Them*, WALL ST. J. (Jan. 17, 2021), <https://www.wsj.com/articles/social-media-algorithms-rule-how-we-see-the-world-good-luck-trying-to-stop-them-11610884800>.

⁴ See *infra* Part II.

⁵ See *infra* Section II.A.

⁶ See *infra* Part II.

⁷ See *infra* Part IV.

⁸ See *NetChoice, LLC v. Paxton*, 142 S. Ct. 1715, 1717 (2022) (Alito, J., dissenting) (“It is not at all obvious how our existing precedents, which predate the age of the internet, should apply to large social media companies.”); see also William H. Rehnquist, *The Notion of A Living Constitution*, 54 TEX. L. REV. 693, 698–99 (1976) (“Because of the general language used in the Constitution, judges should not hesitate to use their authority to make the Constitution relevant and useful in solving the problems of modern society.”).

⁹ This article concedes that ideally the legislature can best regulate conduct. Legislatures, however, have remained largely silent in adopting statutory guidelines for civil social media harms. In its absence, the judiciary's development of common law must play a role in setting the boundaries of acceptable societal behavior.

This article finds fault with the judiciaries' failure to create a set of common law norms for social media wrongs. In cases concerning social media harms, the Supreme Court and lower courts have consistently adhered to traditional pre-social media principles, failing to use the power of the common law to create a kind of Internet Justice.

Part I of this article reviews social media history and explores how judicial decisions created a fertile bed for social media harm to blossom. Part II illustrates social media harms across several doctrinal disciplines and highlights judicial reluctance to embrace the realities of social media harms between citizens, choosing instead to bury these harms within the reasoning of pre-social media precedent. Part III explores the powers and limitations of decision-making bodies, specifically the precedential constraints on the judiciary and the power of courts to shape social norms through the common law. Finally, Part IV details the judicial shortsightedness of court decisions that refuse to acknowledge social media harms. Society relies on common laws to shape normative human behavior. The courts' oversight of social media's uniqueness compared to the media that gave rise to existing precedent, fails to signal the boundaries of acceptable behavior and comes at a significant cost to society.

Some individuals have weaponized social media, causing harm through the content they post.¹⁰ Legislatures, through laws and regulations, have communicated societal norms for cybercrimes that result from nasty posts. The judiciaries' reluctance to rework the law in response to new technology has caused an absence of judicial guidance for social media civil wrongs. Adjudicating these wrongs with case law that predates social media has yielded uneven results, skewing unfairly in favor of the wrongful social media user. In relieving these individuals of liability, courts lose the opportunity to deter others from committing similar harms. With the prevalence of unaddressed and unpunished social media harms quickly increasing, courts must create a kind of Internet Justice by adopting a body of case law that reflects social media's uniqueness.

I. THE HISTORY OF SOCIAL MEDIA

Social media is a family of interactive technologies that allows people to share or create content, ideas, and interests. Users connect via social media websites, sharing posts that

¹⁰ See *infra* Part II.

range from their activities to their attitudes. In its earlier years, some user posts proved particularly problematic, leading courts to hold sites responsible for wrongful user content. Congress responded to what has become broad social media liability by enacting 47 U.S.C. § 230, which provides Interactive Computer Services (ICS) blanket immunity from wrongful posts.¹¹ Over time, case law extended the definition of ICS to include social media websites.¹²

Andrew Weinreich developed the first social media site in 1997.¹³ The site, SixDegrees, was based on web contacts and allowed friends and family users to list friends, family members, and acquaintances both on the site and externally.¹⁴ Users could send messages and post bulletin board items to people in their first, second, and third degree of connections and see their connection to any other user on the site.¹⁵ The site failed by 2000 in large part because a majority of folks had yet to embrace the World Wide Web (the Web).¹⁶

The Web, an information retrieval system with hyperlinks to “websites,” was only about a decade old when Weinreich launched his website.¹⁷ Legal issues surrounding the use of the Web quickly filled the courts.¹⁸ Many of these cases

¹¹ 47 U.S.C. § 230.

¹² See *infra* Section I.B.3.

¹³ See Danah M. Boyd & Nicole B. Ellison, *Social Network Sites: Definition, History, and Scholarship*, 13 J. COMPUT.-MEDIATED COMM’N 210, 214 (2008).

¹⁴ See *id.* (explaining the site’s effort to build subscribers by inviting external contacts to join).

¹⁵ Fahim Arsad Nafis, *World’s First Social Media*, TECH TEASER (Mar. 25, 2021), <https://medium.com/tech-teaser/worlds-first-social-media-1088bc351e01> [<https://perma.cc/W2LG-684C>].

¹⁶ See *id.*

¹⁷ See Evan Andrews, *Who Invented the Internet?*, HIST. (Oct. 28, 2019), <https://www.history.com/news/who-invented-the-internet> [<https://perma.cc/XES8-WW75>] (explaining that “[t]he first workable prototype of the Internet” was created in the late 1960s, but it was not until 1990 that “Tim Berners-Lee invented the World Wide Web.”). Around the same time, “the National Science Foundation launched a more robust, nationwide digital network known as the NSFNET.” *The Evolution of Social Media: How Did It Begin, and Where Could It Go Next?*, *supra* note 1.

¹⁸ See *Hernandez v. Phoenix*, 432 F. Supp. 3d 1049, 1054, 1062 (D. Ariz. 2020) (finding that a police sergeant’s social media posts including memes concerning Islam and Muslims did not involve a matter of public concern under the First Amendment); see also *Davison v. Facebook*, 370 F. Supp. 3d 621, 626 (E.D. Va. 2019), *aff’d*, 774 F. App’x 162 (4th Cir. 2019) (finding that a social media user did not allege an injury in fact, as required to have standing to sue school board for alleged harms); Dale M. Cendali et al., *An Overview of Intellectual Property Issues Relating to the Internet*, 89 TRADEMARK REP. 485, 488–523 (1999) (explaining property issues concerning the use of the internet including watermarks, domain names, and cybersquatting); Lindsay S. Feuer, *Who Is Poking Around Your Facebook Profile?: The Need to Reform the Stored Communications Act to Reflect a Lack of Privacy on Social Networking Websites*, 40 HOFSTRA L. REV. 473, 487 (2011) (explaining the rise of Facebook and privacy issues concerning social medias).

resulted from third-party posts appearing on an Internet Service Provider's (ISP) web page.¹⁹

A. *Smith v. California and the Distinction Between Publishers and Distributors for the Purpose of Liability*

By the late 1980's, members of the general public began to comfortably communicate with each other via ISPs, including CompuServe and Prodigy. These ISPs hosted chatrooms where groups shared their views on topics.²⁰ Quite often, these communications included potentially slanderous material posted by third-party members of the chatrooms. According to governing common law, in particular the Supreme Court's 1959 decision in *Smith v. California*, plaintiffs could hold ISPs liable for content generated by their users on hosted chat rooms.²¹ *Smith* concerned a Los Angeles ordinance prohibiting any bookseller from having obscene material in their possession, regardless of knowledge or awareness about the materials' content.²² Lawyers on behalf of the booksellers successfully

¹⁹ See *infra* Sections I.A, I.B. The Web came into being as a result of the protocols and rules computer scientists Vinton Cerf and Robert Kahn are credited with developing. Andrews, *supra* note 17. The collection of protocols and rules are considered the Internet, and the Web is the superhighway that runs on the Internet. *Id.*; see Nelson Drake, *Going Rogue: The National Telecommunication and Information Administration's Transfer of IANA Naming Functions to ICANN*, 3 ADMIN. L. REV. ACCORD 83, 86–88 (2018). Despite their distinct purposes individuals often use the word Internet when referring to the Web. See Andrews, *supra* note 17.

²⁰ See GWS Team, *The Origins and History of Social Media*, GWS MEDIA (Oct. 4, 2017), <https://www.gwsmedia.com/articles/where-does-social-media-come> [<https://perma.cc/9SXXN-P8LX>] (explaining how chatrooms were a precursor to the social media sites).

²¹ See *Stratton Oakmont, Inc. v. Prodigy Servs. Co.*, 1995 WL 323710, at *7 (N.Y. Sup. Ct. May 24, 1995) (holding that the Prodigy employee was acting as an agent for the company when posting on Prodigy's "Money Talk" online bulletin board creating liability for Prodigy); *Smith v. California*, 361 U.S. 147 (1959); see also *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 73, 78 (1994) (citing *Smith*'s holding that the defendant must have knowledge at least of the nature and character of the materials, and that this knowledge element extends to explicit materials); see generally *American-Arab Anti-Discrimination Comm. v. City of Dearborn*, 418 F.3d 600, 610–12 (6th Cir. 2005) (holding the city ordinance violated the First Amendment like that in *Smith*). But see *Cubby, Inc. v. CompuServe, Inc.*, 776 F. Supp. 135, 140–41 (S.D.N.Y. 1991) (finding that CompuServe was a "distributor" of the daily newsletter Rumorville and therefore not liable for Rumorville's actions because it neither knew nor had reason to know of the allegedly defamatory statements posted on Rumorville).

²² *Smith*, 361 U.S. at 148–50.

[O]rdinance is § 41.01.1 of the Municipal Code of the City of Los Angeles. It provides:

"Indecent Writings, Etc.—Possession Prohibited:

It shall be unlawful for any person to have in his possession any obscene or indecent writing, book, pamphlet, picture, photograph, drawing, figure, motion

argued that these sellers were distributors and not publishers and that it would be unreasonable to expect distributors to have a full understanding of the contents of each book they sold. The *Smith* court agreed and held that a publisher would be expected to have an awareness of the material it was publishing, and thus, could be held liable for any illegal content it published. Conversely, a distributor would likely not be aware of the material and thus, would be immune.²³ The Court labeled *Smith* a distributor and thus, immune from liability.²⁴

The issue raised in *Smith* became seminal to the role that ISPs played in hosting chat rooms, particularly in two important cases. The first was *Cubby, Inc. v. CompuServe, Inc.*²⁵ CompuServe hosted an online news forum that was managed by Rumorville USA (Rumorville), a daily newsletter.²⁶ In 1990, Rumorville published defamatory content about a competitor newsletter run by Robert Blanchard and Cubby Inc.²⁷ CompuServe agreed that the language was defamatory but argued that, under *Smith*, the ISP was immune from liability because it was a distributor and not a publisher.²⁸ The United States District Court for the Southern District of New York

picture film, phonograph recording, wire recording or transcription of any kind in any of the following places:

1. In any school, school-grounds, public park or playground or in any public place, grounds, street or way within 300 yards of any school, park or playground;
2. In any place of business where ice-cream, soft drinks, candy, food, school supplies, magazines, books, pamphlets, papers, pictures or postcards are sold or kept for sale;
3. In any toilet or restroom open to the public;
4. In any poolroom or billiard parlor, or in any place where alcoholic liquor is sold or offered for sale to the public;
5. In any place where phonograph records, photographs, motion pictures, or transcriptions of any kind are made, used, maintained, sold or exhibited."

Id. at 148 n.1.

²³ *See id.* at 153–55.

²⁴ *Id.*

²⁵ *Cubby, Inc. v. CompuServe, Inc.*, 776 F. Supp. 135 (S.D.N.Y. 1991).

²⁶ *Id.* at 137.

²⁷ *Id.* at 138.

Plaintiffs claim that, on separate occasions in April 1990, Rumorville published false and defamatory statements relating to Skuttlebut and Blanchard, and that CompuServe carried these statements as part of the Journalism Forum. The allegedly defamatory remarks included a suggestion that individuals at Skuttlebut gained access to information first published by Rumorville 'through some back door'; a statement that Blanchard was 'bounced' from his previous employer, WABC; and a description of Skuttlebut as a 'new start-up scam.'

²⁸ *Id.* at 138–39.

agreed and found that CompuServe was not at fault for allowing all content to go unmoderated.²⁹ In reaching its conclusion, the court reasoned that ISPs were distributors, and thus, not responsible for libelous content posted by users.³⁰

In a case with similar facts, *Stratton Oakmont, Inc. v. Prodigy Services Co.*, a New York trial court reached a different conclusion.³¹ In October 1994, an unidentified user of Prodigy's *MoneyTalk* bulletin board created a post claiming that Stratton Oakmont, a Long Island securities investment banking firm, and its president Danny Porush, had committed criminal and fraudulent acts in connection with the initial public offering of stock of Solomon-Page, Ltd.³² Stratton Oakmont brought defamation claims against Prodigy and the anonymous poster.³³ At trial, the plaintiffs proved that Prodigy exercised an editorial role concerning customer content.³⁴ Because Prodigy had a hand in what appeared on its web pages, the court ruled that it was a publisher and thus, legally responsible for libel committed by its customers.³⁵

B. Section 230 of the Communications Decency Act and the Expansion of Internet Immunity from Liability

The *Stratton Oakmont* and *Cubby* cases caught the attention of two congressmen, Chris Cox (R-CA), and Ron Wyden (D-OR), who were concerned that holding ISPs responsible for user generated content would chill the Internet's growth.³⁶ The threat of constant legal action would deter innovators from developing and growing websites,³⁷ a consequence that the congressmen believed would be detrimental to the future of this relatively new technology.³⁸ That year, Congress was debating other issues arising from the quick proliferation of the Internet, most importantly, the easy access it gave to child pornography. To regulate pornography, Congress passed the Communications

²⁹ *Id.* at 143.

³⁰ *See id.*

³¹ *Stratton Oakmont, Inc. v. Prodigy Servs. Co.*, 1995 WL 323710 (N.Y. Sup. Ct. May 24, 1995).

³² *Id.* at *1.

³³ *Id.*

³⁴ *Id.* at *4.

³⁵ *Id.* at *6-7.

³⁶ Quinta Jurecic, *The Politics of Section 230 Reform: Learning from FOSTA's Mistakes*, BROOKINGS INST. (Mar. 1, 2022), <https://www.brookings.edu/research/the-politics-of-section-230-reform-learning-from-fostas-mistakes/> [<https://perma.cc/MKE8-J4CE>].

³⁷ William J. Broad, *Does the Fear of Litigation Dampen the Drive to Innovate?*, N.Y. TIMES (May 12, 1987), <https://www.nytimes.com/1987/05/12/science/does-the-fear-of-litigation-dampen-the-drive-to-innovate.html>.

³⁸ Jurecic, *supra* note 36.

Decency Act of 1996 (CDA).³⁹ The CDA imposed criminal sanctions on individuals who transmitted or viewed child pornography.⁴⁰ The CDA also criminalized the transmission of “obscene or indecent” materials to persons known to be under the age of eighteen.⁴¹

Cox and Wyden slipped a provision into the CDA which would combat the stifling effect that ISP liability for third-party posts would have on the free flow of Internet information. Out of a desire to facilitate Internet growth, the congressmen proposed the language of Section 230 of the CDA.⁴² The provision, which one author labeled the “[t]wenty-[s]ix [w]ords [t]hat [c]reated the Internet,”⁴³ relieved all ICS from liability for the information that a third-party posted on its sites.

In a somewhat ironic twist, the Supreme Court struck down the core of the CDA in *Reno v. American Civil Liberties Union*,⁴⁴ holding that the CDA’s restrictions on Internet pornography violated the Constitution’s first amendment right to free speech.⁴⁵ However, the Court failed to address the legality of Section 230, and thus the section remained in effect. Since then, several legal challenges have validated the constitutionality of Section 230.⁴⁶

³⁹ Communications Decency Act of 1996, Pub. L. No. 104–104, 110 Stat. 133 (codified as amended in scattered sections of 18 and 47 U.S.C.).

⁴⁰ 47 U.S.C. § 223 (“(d) . . . Whoever—(1) in interstate or foreign communications knowingly—(A) uses an interactive computer service to send to a specific person or persons under 18 years of age, or (B) uses any interactive computer service to display in a manner available to a person under 18 years of age, any comment, request, suggestion, proposal, image, or other communication that is obscene or child pornography . . . shall be fined under title 18 or imprisoned not more than two years, or both.”).

⁴¹ See Communications Decency Act § 502.

⁴² 47 U.S.C. § 230. According to the statute’s legislative purpose § 230 would “promote the continued development of the Internet” and “preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services.” *Id.*

⁴³ JEFF KOSSEFF, *THE 26 WORDS THAT CREATED THE INTERNET* (1st ed. 2019).

⁴⁴ *Reno v. ACLU*, 521 U.S. 844, 874 (1997).

⁴⁵ *Id.* at 882 (“We agree with the District Court’s conclusion that the CDA places an unacceptably heavy burden on protected speech, and that the defenses do not constitute the sort of ‘narrow tailoring’ that will save an otherwise patently invalid unconstitutional provision.”).

⁴⁶ See *Nitke v. Gonzales*, 413 F. Supp. 2d 262, 272 (S.D.N.Y. 2005) (holding that the Plaintiff did not meet their burden of proof with respect to their claim the CDA was too broad); see also *Klayman v. Zuckerberg*, 753 F.3d 1354, 1355 (D.C. Cir. 2014) (holding the CDA was valid and shielded Zuckerberg from any liability in the suit).

1. *Zeran v. AOL*

The Federal Circuit Courts, through a series of rulings, further expanded Internet immunity from liability.⁴⁷ What began as envisioning limited liability for web hosts developed into immunity for social media sites in almost every instance. The first case to interpret Section 230, *Zeran v. AOL*, concerned America Online's (AOL) liability for third-party anonymous posts that caused great emotional and professional harm to the plaintiff.⁴⁸ In late April 1995, Kenneth Zeran, a film maker and real estate agent, received many harassing calls to his home phone.⁴⁹ The calls began after anonymous posts on AOL advertised "Naughty Oklahoma T-Shirts,"⁵⁰ and instructed those interested in purchasing them to call Zeran at his home in Seattle, Washington. Zeran was surprised by the calls and the posts, as he had nothing to do with them or their contents.⁵¹

An anonymous person or group designed the T-shirts in response to Timothy McVeigh's April 19, 1995 Oklahoma Bombing of the Alfred P. Murrah Federal Building, which killed 163 people and injured many others.⁵² Shortly after the messages were posted, Zeran began receiving a barrage of "angry and derogatory messages" on his answering machine.⁵³ He contacted AOL to explain his predicament and request that AOL remove the posts along with a retraction.⁵⁴ AOL removed the posts shortly thereafter, but pursuant to its policy, refused to post a retraction.⁵⁵

On April 26, the day after AOL removed the posts, a second round of T-shirt advertisements appeared with a new set of slogans and told callers to "ask for 'Ken' and to 'please call back if [the lines were] busy' due to high demand."⁵⁶ Zeran again

⁴⁷ See *Batzel v. Smith* 333 F.3d 1018, 1030, 1034 (9th Cir. 2003) (extending immunity to an Interactive Computer Service that was involved with publishing the content on its site).

⁴⁸ *Zeran v. Am. Online, Inc.*, 129 F.3d 327 (4th Cir. 1997).

⁴⁹ *Id.* at 329.

⁵⁰ *Id.* The District Court opinion specifies the T-Shirt slogans at issue. *Zeran v. Am. Online, Inc.*, 958 F. Supp. 1124, 1127, n.3 (E.D. Va. 1997) (referencing T-Shirts slogans such as, "Visit Oklahoma... It's a BLAST!!!", "Putting the kids to bed... Oklahoma 1995", and "McVeigh for President 1996").

⁵¹ See *Zeran*, 129 F.3d at 329 (noting that the advertisement listed Zeran's home phone number, which was also his main form of communication for work).

⁵² Stuart W.G. Derbyshire, *The Execution of Timothy McVeigh: Must See TV?*, 322 BMJ 1254 (2001) (explaining that the bombings were the first large-scale domestic terrorist killing).

⁵³ *Zeran*, 129 F.3d at 329.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

called AOL to ask it to remove the new posts, which only seemed to multiply.⁵⁷ Mark Shannon, a conservative radio talk show host at radio station KRXXO in Oklahoma City,⁵⁸ communicated the T-shirt advertisement's contents "and urged the listening audience" "to call 'Ken' at Zeran's home phone number."⁵⁹ Despite repeated requests to both AOL and the radio station, the calls did not subside until "an Oklahoma City newspaper published a story exposing the shirt advertisements as a hoax and . . . [the radio station] made an on-air apology."⁶⁰

Zeran sued AOL for negligence, arguing that it had unreasonably delayed removing the anonymous defamatory posts, refused to make retractions of those posts, "and failed to screen for similar postings thereafter."⁶¹ "The district court granted [summary] judgment for AOL," reasoning that Section 230 shielded AOL from liability.⁶² The Fourth Circuit agreed, noting that Section 230 "plainly immunizes computer service providers like AOL from liability for information that originates with third parties."⁶³ The court found support for its decision in the language of Section 230, which "encourage[s] [ISPs] to self-regulate."⁶⁴ The fact that the anonymous posts occurred prior to Congress' adoption of Section 230 was of little consequence to the court.⁶⁵

Zeran argued that, in this instance, AOL was acting as a distributor, making the information concerning the T-shirts available on its web page to AOL viewers. The Fourth Circuit rejected drawing such a sharp distinction and concluded that AOL was a publisher in this instance.⁶⁶ In reaching its conclusion, the court cited Congress' intent to allow the new medium to thrive.⁶⁷ This broad interpretation of Section 230

⁵⁷ *Id.* (explaining that Zeran also called the FBI). "By April 30, Zeran was receiving an abusive phone call approximately every two minutes." *Id.*

⁵⁸ *Conservative Oklahoma Radio Talk Show Host Mark Shannon Dies*, NEWS 9 (May 9, 2010), <https://www.news9.com/story/5e35b4c983eff40362bef640/conservative-oklahoma-radio-talk-show-host-mark-shannon-dies> [<https://perma.cc/U932-AMXD>].

⁵⁹ *Zeran*, 129 F.3d at 329.

⁶⁰ *Id.*

⁶¹ *Id.* at 328.

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.* at 331.

⁶⁵ *Id.* at 335.

⁶⁶ *Id.* at 332 (noting that "[e]ven distributors are considered to be publishers for purposes of defamation law"). The court also rejected Zeran's claim that the court should not apply § 230 retroactively. *Id.* at 335.

⁶⁷ *Id.* at 330.

planted the seed that allowed Internet web sites, including social media sites, to flower.⁶⁸

2. *Blumenthal v. Drudge*

If *Zeran* planted the seed for social media to proliferate free from liability, *Blumenthal v. Drudge* supplied the fertilizer that allowed social media to flourish.⁶⁹ In 1994, Matt Drudge, a manager at the CBS Studios gift shop in Hollywood California,⁷⁰ founded what he called the “Drudge Report,” a series of emails that contained political and Hollywood gossip.⁷¹ The Drudge Report grew in size and by 1997, it had about eighty-five thousand subscribers.⁷² AOL, sensing an opportunity to offer content that could grow its subscribership, entered into a license agreement with the Drudge Report and distributed it on its website.⁷³ Through publication on AOL, the conservative and harsh Drudge Report reached nine million members.⁷⁴

In 1997, Drudge reported that Sidney Blumenthal, a White House assistant in the Clinton Administration, had beaten his wife and that the White House was covering it up.⁷⁵ Drudge retracted the statement, but Blumenthal filed a \$30 million defamation lawsuit in the US District Court for the

⁶⁸ *Id.* at 334. *Zeran* also claimed that Section 230 should not apply since it was adopted after AOL posted the anonymous posts. The court rejected this claim, finding that in § 230(d)(3) of the CDA, Congress clearly expressed that, “[n]o cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section.” *Id.* (citing § 230(d)(3)).

⁶⁹ *Blumenthal v. Drudge*, 992 F. Supp. 44, 46 (D.C. Cir. 1998).

⁷⁰ Virginia Chamlee, *Meet the Former Gift Shop Manager-Turned-Internet Personality Who Broke Clinton’s Lewinsky Affair*, PEOPLE (Sept. 24, 2021, 1:19 PM), <https://people.com/politics/who-is-matt-drudge-who-broke-the-clinton-lewinsky-affair-bombshell/> [<https://perma.cc/6UTA-7NJT>].

⁷¹ *Blumenthal*, 992 F. Supp at 47.

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.* at 47 n.3.

⁷⁵ *Id.* at 46 (“The DRUDGE REPORT has learned that top GOP operatives who feel there is a double-standard of only reporting republican shame believe they are holding an ace card: New White House recruit Sidney Blumenthal has a spousal abuse past that has been effectively covered up. The accusations are explosive. There are court records of Blumenthal’s violence against his wife, one influential republican, who demanded anonymity, tells the DRUDGE REPORT. If they begin to use [Don] Sipple and his problems against us, against the Republican Party . . . to show hypocrisy, Blumenthal would become fair game. W’sn’t [sic] it Clinton who signed the Violence Against Women Act? [There goes the budget deal honeymoon.] One White House source, also requesting anonymity, says the Blumenthal wife-beating allegation is a pure fiction that has been created by Clinton enemies. [The First Lady] would not have brought him in if he had this in his background, assures the wellplaced [sic] staffer. This story about Blumenthal has been in circulation for years. Last month President Clinton named Sidney Blumenthal an Assistant to the President as part of the Communications Team. He’s [sic] brought in to work on communications strategy, special projects themeing [sic]—a newly created position. Every attempt to reach Blumenthal proved unsuccessful.”).

District of Columbia against Drudge and AOL.⁷⁶ The case came shortly after the decision in *Zeran*. AOL moved for summary judgment, citing protection under Section 230.⁷⁷

Presiding Judge Paul Friedman figured that AOL would be responsible since it worked in tandem with Drudge and the Drudge Report and retained editorial rights over the material.⁷⁸ Congress' adoption of Section 230, however, mandated that the court follow the statute and not create its own interpretation of the facts.⁷⁹ Judge Friedman observed that Congress

made a different policy choice by providing immunity even where the interactive service provider has an active, even aggressive role in making available content prepared by others. In some sort of tacit *quid pro quo* arrangement with the service provider community, Congress has conferred immunity from tort liability as an incentive to Internet service providers to self-police the Internet for obscenity and other offensive material, even where the self-policing is unsuccessful or not even attempted.⁸⁰

The Blumenthal decision secured a safe harbor for Internet companies, freeing them from liability in every instance. It created, according to one author, "an impenetrable shield for Internet companies."⁸¹

3. The Expansion of Immunity to Social Media Sites

Section 230 relieved ICS of liability for third-party postings. At the time that Congress adopted Section 230 in 1996, ICS were almost exclusively ISPs, companies such as AOL and CompuServe that provided home and business users with access to the Internet.⁸² In the early aughts, social media sites began to

⁷⁶ Dan Mitchell, *Drudge, AOL Hit with \$30 Million Libel Suit*, WIRED (Aug. 27, 1997), <https://www.wired.com/1997/08/drudge-aol-hit-with-30-million-libel-suit/> [<https://perma.cc/DB5P-9XN5>].

⁷⁷ *Blumenthal*, 992 F. Supp. at 48–50.

⁷⁸ *See id.* at 51 ("If it were writing on a clean slate, this Court would agree with plaintiffs. AOL has certain editorial rights with respect to the content provided by Drudge and disseminated by AOL, including the right to require changes in content and to remove it; and it has affirmatively promoted Drudge as a new source of unverified instant gossip on AOL.").

⁷⁹ *Id.* at 53.

⁸⁰ *Id.* at 52.

⁸¹ KOSSEFF, *supra* note 43, at 102.

⁸² Interactive Computer Services refers to (1) "information service, system, or access software provider," (2) providing "access by multiple users to a computer server," and (3) a "system that provides access to the Internet." 47 U.S.C. § 230(f)(2).

populate the web. LinkedIn,⁸³ Myspace,⁸⁴ and Friendster⁸⁵ were the first to gain traction in the early 2000s. Other sites followed, including Facebook in 2004,⁸⁶ Twitter in 2006,⁸⁷ Instagram in 2010,⁸⁸ Snapchat in 2011,⁸⁹ and TikTok in 2016.⁹⁰ In time, courts assessing challenges to social media sites from liability for third-party postings broadened their interpretations of ICS to include social media sites. Courts interpreting these challenges hung their hats on the word interactive.

The Ninth Circuit played a key role in expanding the umbrella of ISPs to include social media sites. In *Carafano v. Metroplash.com*, the court excused a dating website from liability for profiles posted by a third party.⁹¹ Similarly, in *Fair Housing Council of San Fernando Valley v. Roomates.com*, the court ruled that a social media site that connected individuals looking for roommates operated as an ICS, free from liability

⁸³ See *About LinkedIn*, LINKEDIN, <https://about.linkedin.com/> (last visited Nov. 16, 2022) (noting that LinkedIn was founded in 2002, and officially launched May 5, 2003).

⁸⁴ *Myspace*, ENCYCLOPEDIA BRITANNICA (Feb. 23, 2022), <https://www.britannica.com/topic/Myspace> [<https://perma.cc/WZ4L-RF9D>] (reporting that Myspace was launched in 2003).

⁸⁵ Ulunma, *Before Facebook There Was . . . Friendster? Yes, That's Right!*, HARV. BUS. SCH. DIGIT. INITIATIVE (Mar. 21, 2020), <https://digital.hbs.edu/platform-digit/submission/before-facebook-there-was-friendster-yes-thats-right/> [<https://perma.cc/YTJ4-9QPS>]. Friendster was launched in March 2002 by Jonathan Abrams. After gaining traction, they received several offers, from Google and various VC firms. Selecting an offer from a VC, Abrams rejected a \$30 million offer from Google. This is now considered to be one of the biggest sale blunders in tech. *Id.*

⁸⁶ Mark Hall, *Facebook American Company*, ENCYCLOPEDIA BRITANNICA (Nov. 9, 2021), <https://www.britannica.com/topic/Facebook> [<https://perma.cc/M34L-W2RC>].

⁸⁷ *Twitter Microblogging Service*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/topic/Twitter> [<https://perma.cc/YE6Q-9427>].

⁸⁸ Raisa Bruner, *A Brief History of Instagram's Fateful First Day*, TIME (July 16, 2016), <https://time.com/4408374/instagram-anniversary/>.

⁸⁹ Sophia Bernazzani, *A Brief History of Snapchat*, HUBSPOT (Feb. 10, 2017), <https://blog.hubspot.com/marketing/history-of-snapchat> [<https://perma.cc/N8SJ-ZGT3>].

⁹⁰ See Joe Tidy & Sophia Smith Galer, *TikTok: The Story of a Social Media Giant*, BBC NEWS (Aug. 5, 2020), <https://www.bbc.com/news/technology-53640724> (explaining that the app was originally “called Musical.ly, which launched in Shanghai in 2014”); see also William L. Hosch, *YouTube*, ENCYCLOPEDIA BRITANNICA (last updated Aug. 4, 2022), <https://www.britannica.com/topic/YouTube> [<https://perma.cc/U4JQ-HPVG>] (explaining that YouTube was started in 2005); see also *How was Reddit Developed?*, WIREDELTA (June 9, 2020), <https://wiredelta.com/how-was-reddit-developed/> [<https://perma.cc/AG6A-2HXU>] (explaining Reddit was founded in 2005 by “two university students”); Nicholas Carlson, *Pinterest CEO: Here's How We Became the Web's Next Big Thing*, INSIDER (Apr. 24, 2012), <https://www.businessinsider.com/pinterest-founding-story-2012-4> [<https://perma.cc/ZN9S-A6EP>] (explaining that Pinterest was founded in 2010); Ellen Huet & Brody Ford, *Clubhouse's Founder Is in a State of Perpetual Motion*, BLOOMBERG (Mar. 16, 2021), <https://www.bloomberg.com/news/articles/2021-03-16/who-made-clubhouse-app-paul-davison-a-founder-in-perpetual-motion> [<https://perma.cc/HR5Z-4FHH>] (explaining that Clubhouse was released in 2012).

⁹¹ See *Carafano v. Metroplash.com*, 339 F.3d 1119, 1120, 1124 (9th Cir. 2003) (explaining that the internet service was not legally responsible for false content in a dating profile provided by someone posing as another person).

posted by third parties.⁹² However, the court clarified that the website would be responsible when it operated as an Internet content provider, developing its own content for posting.⁹³

In *Batzel v. Smith*, the Ninth Circuit further extended the scope of this immunity to an ICS that had a hand in the content published on its site.⁹⁴ The operator of the Museum Security Network (MSN), a website that connected individuals concerned with unearthing lost or stolen art, posted a letter that he had received suggesting the plaintiff owned stolen artwork.⁹⁵ Before posting the letter, a member of MSN's staff reviewed the letter and edited it to create a well-written document on its website.⁹⁶ Batzel argued that MSN was a publisher and not a distributor.⁹⁷ The Ninth circuit agreed but also held

a service provider or user is immune from liability under § 230(c)(1) when a third person or entity that created or developed the information . . . furnished it to the provider or user under circumstances in which a reasonable person in the position of the service provider or user would conclude that the information was provided for publication on the Internet or other [ICS].⁹⁸

After *Batzel*, it became clear that all ICS, both those who published third-party content and those who edited the content of third-party work, were free to use Section 230's shield. *Batzel* reaffirmed, and arguably even extended, Section 230's shield.

In 2015, the District Court for the Northern District of California, in *Pennie v. Twitter*, summarized the existing law on the matter and set forth a three-pronged test for deciding whether any website, including social media sites, was entitled Section 230 immunity.⁹⁹ The court considered each of the three elements under a § 230, which "protects from liability only (a) a provider or user of an interactive computer service; (b) that the plaintiff seeks to treat as a publisher or speaker (c) of information provided by another information content provider."¹⁰⁰ Under this analysis, the court ruled that three online "social media services" were entitled to Section 230

⁹² Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC, 521 F.3d 1157, 1162–63, 1175 (9th Cir. 2008).

⁹³ *Id.* at 1162–64, 1166. In this case, Roommates.com allowed users to post limitations and requests regarding ethnic, race, and sexuality preferences for roommates. *Id.* at 1161.

⁹⁴ *Batzel v. Smith*, 333 F.3d 1018, 1021 (9th Cir. 2003).

⁹⁵ *Id.* at 1022, 1026.

⁹⁶ *Id.* at 1022.

⁹⁷ *Id.* at 1027 n.10.

⁹⁸ *Id.* at 1034.

⁹⁹ *Pennie v. Twitter, Inc.*, 281 F. Supp. 3d 874 (N.D. Cal. 2017).

¹⁰⁰ *Id.* at 888 (citing 47 U.S.C. § 230(c)(1)).

immunity against a police officer who challenged the sites for allowing third parties to post information radicalizing a terrorist who killed five officers.¹⁰¹ The same court, in *Federal Agency of News, LLC v. Facebook*, also ruled that Facebook was an ICS within the meaning of the statute.¹⁰² And in *Franklin v. X Gear 101, LLC*, the District Court for the Southern District of New York extended the same level of immunity to Instagram and GoDaddy.com.¹⁰³

As interpreted by federal courts, the term ICS extends to content publishers including social media sites.¹⁰⁴ The broad definition of ICS reaches beyond the scope of what regulators likely intended when they adopted the CDA. In 1996, the first social media site had been a year away from creation;¹⁰⁵ ICS had then existed to provide individuals access to the Internet.

When Congress adopted the CDA, it had an optimistic view of the Internet's potential. In its findings, Congress observed that the previously unregulated Internet had allowed the medium to thrive to the benefit of American citizens.¹⁰⁶ Congress intended the legislation to assure that ICS could continue to provide easy access to the Internet, which it argued, would only occur if ICS were unencumbered by the threat of litigation.¹⁰⁷ Congress' optimistic enthusiasm was realized to the extent that the Internet has provided unfettered access to information. However, Congress failed to recognize that this new technology would result in a significant number of social media linked societal harms.¹⁰⁸

¹⁰¹ *Id.* at 876–77, 886 (N.D. Cal. 2017) (explaining the suit that was brought against Twitter, Facebook, and Google).

¹⁰² *Fed. Agency of News, LLC v. Facebook, Inc.*, 432 F. Supp. 3d 1107, 1117 (N.D. Cal. 2020).

¹⁰³ *Franklin v. X Gear 101, LLC*, 17 Civ. 6452 (GBD) (GWG), 2018 WL 3528731, at *19 (S.D.N.Y. Aug. 28, 2018).

¹⁰⁴ *See, e.g.*, *Doe v. Twitter*, 555 F. Supp. 3d 889, 932 n.2 (N.D. Cal. 2021) (“Here, it is undisputed that Twitter is an interactive computer service provider.”); *Force v. Facebook*, 934 F.3d 53,64 (2d Cir. 2019) (“The parties agree that Facebook is a provider of ‘an interactive computer service.’”).

¹⁰⁵ *See Gonzalez v. Google LLC*, 2 F.4th 871, n.8 (9th Cir. 2021) (noting that Six Degrees, “the very first social networking site[,]” launched in 1997).

¹⁰⁶ 47 U.S.C. § 230(a)(3).

¹⁰⁷ Section 230 findings observed and concluded that “[t]he Internet and other interactive computer services offer a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity,” that “[t]he Internet and other interactive computer services have flourished, to the benefit of all Americans, with a minimum of government regulation,” and that “[i]ncreasingly Americans are relying on *interactive media for a variety of political, educational, cultural, and entertainment services.*” 47 U.S.C. § 230(a)(3)–(5) (emphasis added).

¹⁰⁸ Social Media has been linked to decline in mental health an egregious number of times. Studies have shown a link between social media and “increased risk for depression,” loneliness, self-harm and suicidal thoughts. Negative experiences like inadequacy about life or appearance, fear of missing out or “FOMO”, isolation, depression

II. SOCIAL MEDIA HARMS

Sadly, individuals were swift to use the Internet as a weapon. The harms actionable posts yielded, and still yield, have led to a significant amount of litigation. Indeed, plaintiffs and states define social media harms across many legal doctrinal disciplines. Courts, however, have responded to those who are a party to social media harm challenges in a manner that favors unfettered Web use. For example, courts have almost unanimously rejected plaintiff's tort claims, particularly defamatory posts, for failure to meet the standard of harm to the plaintiff's reputation.¹⁰⁹ Courts have protected defendants of social media harms, citing the First Amendment or the limits of protected student speech.¹¹⁰ In contrast to civil wrongs, state legislatures have sought to curtail unacceptable Web behavior by enacting various cyber harm crime statutes.¹¹¹ State bars have similarly sided with plaintiffs' interests when considering inappropriate social media behavior in the courtroom setting. The cases cited in this section differ in the wrongs they interpret; however, they share the same reliance on pre-social media case law to reach their conclusions.

The earliest social media wrongs to gain national attention resulted from deceitful Internet posts that ended in death. One of the first incidents occurred in 2006 when thirteen-year-old Megan Meier committed suicide.¹¹² That year, forty-eight-year-old Lori Drew,¹¹³ learned that Megan Meier was spreading rumors about her family on MySpace.com, one of the earliest social media sites.¹¹⁴ To prove her theory, Drew

and anxiety, cyberbullying, and self-absorption are all promoted by social media. See Lawrence Robinson and Melinda Smith, *Social Media and Mental Health—Teen Issues*, HELPGUIDE, <https://www.helpguide.org/articles/mental-health/social-media-and-mental-health.htm> [<https://perma.cc/KG7N-V4HQ>]; see also Shamard Charles, *Social Media Linked to Rise in Mental Health Disorders in Teens, Survey Finds*, NBC NEWS (Mar. 14, 2019), <https://www.nbcnews.com/health/mental-health/social-media-linked-rise-mental-health-disorders-teens-survey-finds-n982526>.

¹⁰⁹ See *infra* at Section II.A.1. For a full discussion of court reluctance to find for plaintiffs in social media defamation cases, see Leslie Y. Garfield (Tenzer), *The Death of Slander*, 35 COLUM. J.L. & ARTS 17 (2011).

¹¹⁰ See *infra* Section II.A.2.

¹¹¹ See *infra* Section II.B.

¹¹² Jennifer Steinhauer, *Verdict in MySpace Suicide Case*, N.Y. TIMES (Nov. 26, 2008), <https://www.nytimes.com/2008/11/27/us/27myspace.html>; see *Parents: Cyber Bullying Led to Teen's Suicide*, ABC NEWS (Feb. 19, 2009), <https://abcnews.go.com/GMA/story?id=3882520&page=1> [<https://perma.cc/4L87-C73M>].

¹¹³ *Parents Want Jail Time for MySpace Hoax Mom*, ABC NEWS (Feb. 19, 2009), <https://abcnews.go.com/GMA/story?id=3929774&page=1>.

¹¹⁴ Gordon Tokumatsu & Jonathan Lloyd, *MySpace Case: "You're the Kind of Boy a Girl Would Kill Herself Over"*, NBC LOS ANGELES (last updated Jan. 26, 2009, 1:25 PM), <https://www.nbclosangeles.com/local/woman-testifies-about-final-message-sent-to->

set up a fake Myspace account posing as a fictitious sixteen-year-old boy named Josh Evans.¹¹⁵ Drew, posing as “Josh,” flirted with Meier enough to attract Meier.¹¹⁶ Then, on October 16, 2006, Drew, again as “Josh,” posted to Meier, “You are a bad person and everybody hates you . . . The world would be a better place without you.”¹¹⁷ After reading the post, Megan engaged in a heated exchange with Drew and that afternoon, Meier killed herself.¹¹⁸

The Missouri County where Meier’s death occurred did not prosecute Drew, finding that the state lacked laws to cover this action.¹¹⁹ The federal government prosecuted Drew for four counts: one count of conspiracy to use interstate commerce to defraud and “three counts of violating a felony portion of the [Computer Fraud and Abuse Act].”¹²⁰ The federal jury acquitted Drew of three counts and was deadlocked on the fourth. Drew escaped without punishment.¹²¹ With the rapid growth of social media, a series of social media harms followed that current laws were ill-equipped to regulate.¹²² Lacking judicial or legislative social media laws, courts looked to existing precedent to resolve emerging issues.¹²³

In 2010, Dharun Ravi, a freshman at Rutgers College, secretly video recorded Tyler Clementi, his freshman roommate, having sexual relations with a young man.¹²⁴ At the time, Clementi had not publicly declared his sexual orientation.¹²⁵

teen/2096421/ [https://perma.cc/SD76-UU4P]; Amanda Laine, *The First Social Media Platform: The History of Social Media*, PUBLER, https://publer.io/blog/the-first-social-media-platform/ [https://perma.cc/9ZKJ-BVW8].

¹¹⁵ See *Parents: Cyber Bullying Led to Teen’s Suicide*, *supra* note 112 (“Evans claimed to be a 16-year-old boy who lived nearby and was home schooled.”); Steinhauer, *supra* note 112.

¹¹⁶ Christopher Maag, *A Hoax Turned Fatal Draws Anger but No Charges*, N.Y. TIMES (Nov. 28, 2007), https://www.nytimes.com/2007/11/28/us/28hoax.html.

¹¹⁷ Steinhauer, *supra* note 112; *Megan’s Story*, MEGAN MEIER FOUND., https://www.meganmeierfoundation.org/megans-story [https://perma.cc/Q3UX-UFVR].

¹¹⁸ See Lauren Collins, *Friend Game*, NEW YORKER (Jan. 21, 2008), https://www.newyorker.com/magazine/2008/01/21/friend-game [https://perma.cc/935N-N4NR] (“Megan had committed suicide after an exchange of hostile messages with a boy who had befriended her on MySpace.”).

¹¹⁹ Scott Michels, *Prosecutors Bringing Charges Under Law Inspired by Megan Meier Suicide*, ABC NEWS (Dec. 23, 2008, 6:04 PM), https://abcnews.go.com/TheLaw/story?id=6520260&page=1 [https://perma.cc/4H22-S5A7].

¹²⁰ *United States v. Drew*, 259 F.R.D. 449, 452 (C.D. Cal. 2009).

¹²¹ *Id.*

¹²² See *infra* Section II.A.2.

¹²³ See *infra* Section II.A.1.

¹²⁴ Ian Parker, *The Story of a Suicide*, NEW YORKER (Jan. 29, 2012), https://www.newyorker.com/magazine/2012/02/06/the-story-of-a-suicide [https://perma.cc/WEW9-AZRJ]; see *State v. Ravi*, 147 A.3d 455, 480 (N.J. Super. Ct. App. Div. 2016).

¹²⁵ *Ravi*, 147 A.3d at 459–60 (explaining that Ravi had only made assumptions based on internet findings that Clementi was homosexual).

Ravi then tweeted, “Roommate asked for the room till midnight. I went into [friend’s] room and turned on my webcam. I saw him making out with a dude. Yay.”¹²⁶ He then encouraged his friends and Twitter followers to view Clementi and his partner on Ravi’s webcam.¹²⁷ Three days later, Clementi jumped off the George Washington bridge, killing himself.¹²⁸ The state charged Ravi with fifteen counts, ranging from invasion of privacy to bias intimidation.¹²⁹ A jury found Ravi guilty of invasion of privacy, hindering apprehension, witness tampering, and all four of the bias intimidation counts.¹³⁰

The unavailability of serious crimes with which prosecutors could charge Drew or Ravi left society clamoring for regulations.¹³¹ Decades after these social media wrongs and one quarter century since the launch of the first social media site, the United States still lacks solid guidelines for punishing those who use social media as a weapon. To be fair, many legislatures

¹²⁶ *Id.* at 461. Molly Wei resided in the dorm room across from Ravi and the two were friends from high school. Wei and Ravi communicated on various occasions about the situation with Clementi. *Id.* at 459–60; see Parker, *supra* note 124. Wei was arrested along with Ravi but entered a pre-trial intervention program in order for the charges against her to be dropped. Megan DeMarco, *Molly Wei Testimony: Dharun Ravi Was ‘Shocked’ to See Tyler Clementi Kissing a Man*, NJ.COM (Feb. 27, 2012), https://www.nj.com/news/2012/02/molly_wei_testifies_in_dharun.html [<https://perma.cc/T9TN-ZRCE>].

¹²⁷ *Ravi*, 147 A.3d at 463–66. Note that the videotapes did not work.

¹²⁸ *Id.* at 468.

¹²⁹ *Id.* at 457–59. Ravi appealed all fifteen counts to the Superior Court of New Jersey which ultimately held that evidence that had been introduced by the State to support the bias intimidation charge tainted the State’s case requiring reversal of Ravi’s convictions. The Superior Court held that the law the jury based their bias intimidation charges on, NJSA 2C:16-1(a)(3), was no longer good law therefore those charges (2,4,6 & 8) were dismissed with prejudice. The evidence the State introduced to support the bias intimidation charges focused on the victim’s state of mind and not the defendant’s intent. The court held that this evidence tainted the juror’s minds, and they were not able to render a fair verdict. *Id.* at 264, 266, 289, 300.

¹³⁰ Diane Herbst & Dahvi Shira, *Dharun Ravi Found Guilty of Invasion of Privacy, Hate Crimes in Tyler Clementi Case*, PEOPLE (Mar. 16, 2012, 12:15 PM), <https://people.com/crime/tyler-clementi-case-dharun-ravi-guilty-of-invasion-of-privacy/>. In 2016, Ravi plead guilty to the invasion of privacy charges and completed thirty days in prison, three years of probation and 300 hours of community service. See Alex Napoliello, *Dharun Ravi Pleads Guilty to Attempted Invasion of Privacy in Tyler Clementi Case*, NJ.COM (last updated Oct. 27, 2016, 4:08 PM), https://www.nj.com/middlesex/2016/10/dharun_ravi_court_appearance.html [<https://perma.cc/NDZ8-4MAB>].

¹³¹ See Steinhauer, *supra* note 112 (“Keep in mind that social networking sites like MySpace did not exist until recently This case will be simply another important step in the expanded use of this statute to protect the public from computer crime.”) (internal quotation marks omitted) (quoting Nick Akerman, “a New York lawyer who has written and lectured extensively on [the Computer Fraud and Abuse Act]”); Kate Zernike, *Judge Defends Penalty in Rutgers Spying Case, Saying It Fits Crime*, N.Y. TIMES (May 30, 2012), <https://www.nytimes.com/2012/05/31/nyregion/judge-defends-sentence-imposed-on-dharun-ravi.html> (“Mr. Ravi’s sentencing . . . prompted national attention, and divided many gay rights advocates, with some arguing that 30 days was . . . a slap on the wrist, and others arguing that his conduct, while despicable, did not merit the same punishment as . . . violent or threatening behavior typically associated with bias crimes.”).

have expanded existing criminal laws, including stalking, harassment, and theft, to include a technology component.¹³² Still, in other legal areas, particularly in the tort and constitutional realms, those with the power to regulate, such as the judiciary, have failed to create a meaningful body of common law that articulates acceptable social norms.

The abyss left by a lack of legal doctrine has not deterred parties from bringing actions against those who cause social media harm. When these actions are brought, however, courts are left to rely on pre-social media precedent to resolve post-social media disputes. In the next Section, I will discuss legislative, judicial, and administrative resolutions to social media harms, often in the absence of social media regulation.

A. *Judicial Review of Social Media Harms*

Plaintiffs have been quick to bring causes of action against parties who they believe wronged them through social media posts.¹³³ Defendants have claimed that the laws used to punish them for social media harms were unconstitutional violations of their due process rights.¹³⁴ In almost every instance, when resolving these disputes, courts have relied on precedent that predates social media.

1. Defamation

The judiciary's failure to find fault when users post libel on sites like Facebook and Twitter has created the misconception that social media dilutes harm.¹³⁵ The

¹³² See *infra* Section II.B.

¹³³ See Kylie Ora Lobell, *Social Media Struggles*, LEGAL MGMT. (June 2019), <https://www.legalmanagement.org/2019/june/features/social-media-struggles> [<https://perma.cc/YK75-HTP2>] (providing one example the various legal harms a plaintiff has brought for social media wrongs).

¹³⁴ See, e.g., *Packingham v. North Carolina*, 137 S. Ct. 1730 (2017); *Elonis v. United States*, 135 S. Ct. 2001 (2015).

¹³⁵ See *Stolatis v. Hernandez*, 77 N.Y.S.3d 473, 476 (2018) (finding that a property owner's allegedly libelous statements on social media, which referred to company member's actions in causing the demolition of historic landmark building on the company's neighboring property "as a 'crime' and referred to the plaintiff as a 'vampire,' constituted nonactionable opinion or rhetorical hyperbole."); see also Associated Press, *Courtney Love Settles Twitter Defamation Lawsuit for \$430,000 with Designer Dawn Simorangkir*, N.Y. DAILY NEWS (Mar. 4, 2011), <https://www.nydailynews.com/entertainment/gossip/courtney-love-settles-twitter-defamation-lawsuit-430-000-designer-dawn-simorangkir-article-1.116619> [<https://perma.cc/6DMW-G2S5>] (explaining that Love had to pay \$430,000.00 to Simorangkir for damages); Owen Thomas, *Courtney Love in MySpace Libel Suit*,

Restatement Second of Torts defines libel, the written form of defamation, as a false statement published by a third party causing emotional or reputational harm to the subject of the statement.¹³⁶ Generally, plaintiffs must show the defendant acted negligently when making the statement.¹³⁷ If the statement concerns a public figure, the plaintiff must prove the defendant acted with malice, which the Supreme Court, in *NY Times v. Sullivan*, defined as requiring that the defendant know the defamatory statement was false or was reckless when deciding to publish the statement.¹³⁸

In one of the first defamation cases involving social media, a California appellate court upheld a trial court's decision in favor of the lead singer of Hole, and Kurt Cobain's widow, Courtney Love.¹³⁹ Love hired Rhonda Holmes, an attorney, to represent her in an issue involving missing funds from Kurt Cobain's estate. Holmes charged Love with defamation following Love's Twitter post:¹⁴⁰ "I was f***ing devastated [sic] when Rhonda J. Holmes Esq. of San Diego was bought off."¹⁴¹

The jury listened to eight days of testimony and statements, and then deliberated for just three hours.¹⁴² They determined that, although Love's statement "had a natural tendency to injure" Holmes' business, Love's post was for the

GAWKER (Mar. 28. 2009, 3:06 PM), <https://www.gawker.com/5188571/courtney-love-in-myspace-libel-suit> [<https://perma.cc/82TB-GK4F>] (quoting one of Love's tweets as saying "wwd. someone who will NEVER grace your pages the felonious Dawn/Boudoir Queen witnessed stealing 2 MASSIVE army bags out of the chat at 4am"); Sheila Marikar, *Courtney Love's 'Malicious' Twitter Rants Revealed*, ABC NEWS (Mar. 26, 2009, 5:57 PM), <https://abcnews.go.com/Entertainment/AheadoftheCurve/story?id=7219953> [<https://perma.cc/6HCQ-PP77>] (quoting one of Love's tweets as saying "as one of her many bullied victims smashes her face soon as she's sic an assault addict herself (there's apparently prostitution in her record too)").

¹³⁶ RESTATEMENT (SECOND) OF TORTS § 558 (AM. L. INST. 1977); see *City of Costa Mesa v. D'Alessio Investments, LLC*, 154 Cal. Rptr. 3d 698 (Ct. App. 2013) (allowing recovery upon proof of reputational harm); *Bowling v. Mead*, No. CV010066544, 2002 WL 31461043 (Sup. Ct. Conn. Oct. 16, 2002) (basing recovery for libel on emotional harm).

¹³⁷ RESTATEMENT (SECOND) OF TORTS § 558 (AM. L. INST. 1977).

¹³⁸ *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279–80 (1964). For an interesting discussion of defamation and social media, see generally Leslie Y. Garfield, *The Death of Slander*, 35 COLUM. J.L. & ARTS 17 (2012).

¹³⁹ *Gordon v. Love*, No. B256367, 2016 WL 374950, at *3 (Cal. Ct. App. Feb. 1, 2016).

¹⁴⁰ See CAL. CIV. CODE §§ 44–46 (West, Westlaw current with urgency legislation through Ch. 997 of 2022 Reg. Sess.). Under California law, defamation is a false statement purporting to be fact; publication or communication of that statement to a third person; fault amounting to at least negligence; and damages, or some harm caused to the person or entity who is the subject of the statement with malice when a private person.

¹⁴¹ *Gordon*, 2016 WL 374950, at *2.

¹⁴² Anthony McCartney, *Jury Sides with Courtney Love in Trial over Tweet*, ASSOCIATED PRESS (Jan. 24, 2014), <https://apnews.com/article/05c00ded298146c39108be1b2c9a9370> [<https://perma.cc/H7XQ-38WS>].

purpose of venting and did not possess the type of malice necessary for establishing liability.¹⁴³

In a more recent case, a court refused to side with an apartment building manager whose neighbor had called him a slumlord. Richard Bauer sued Bradley Brinkman in Iowa after Brinkman posted derogatory comments on Facebook about Brinkman, the owner of a neighboring building.¹⁴⁴ Bauer was upset that his local city council had allowed a dog grooming operation to open in the space adjacent to his apartment building.¹⁴⁵ Brinkman, in response to Bauer's complaints about the dog groomer, wrote on Facebook:

It is because of s**** like this that I need to run for mayor! [grinning emoji] Mr. Bauer . . . you sir are a PIECE OF S****!!! Let's not sugar coat things here people. [K.L.] runs a respectable business in this town! You sir are nothing more than a Slum Lord! Period. I would love to have you walk across the street to the east of your ooh so precious property and discuss this with me!¹⁴⁶

Bauer argued that the word "slumlord" was defamatory, and the court noted that "a statement that is precise and easy to verify is more likely a fact than an opinion."¹⁴⁷ In a vacuum, the slumlord label might harm a landlord's reputation. Nevertheless, the court noted that a *prima facie* element of the traditional common law tort of defamation is that the words must tend to injure the defendant's reputation.¹⁴⁸ Where social media is concerned, context matters. The Supreme Court of Iowa noted that "[t]oday, the 'most important place . . . for the exchange of views' is cyberspace, especially social media."¹⁴⁹ In the context of a Facebook post, the court found that the words expressed were merely the author's viewpoint. Because Brinkman's comments appeared on social media and expressed emotional and hyperbolic sentiments, the court reasoned readers likely regarded them as opinion and not fact.¹⁵⁰ As a result, the court found for the defendant.¹⁵¹

Courts considering whether the word "slumlord" is defamatory outside a social media context have reached a different conclusion. In contrast to *Bauer*, a United States

¹⁴³ *Gordon*, 2016 WL 374950, at *1, 3.

¹⁴⁴ *Bauer v. Brinkman*, 958 N.W.2d 194, 197 (Iowa 2021).

¹⁴⁵ *Id.* at 196–97.

¹⁴⁶ *Id.* at 197.

¹⁴⁷ *Id.* at 199 (citing *Jones v. Palmer Constr.*, 440 N.W.2d 884, 891 (Iowa 1989)).

¹⁴⁸ *Id.* at 198.

¹⁴⁹ *Id.* at 200 (citing *Packingham v. North Carolina*, 137 S. Ct. 1730, 1735–37 (2017)).

¹⁵⁰ *Id.* at 201.

¹⁵¹ *Id.* at 202.

District Court, in *Lal v. CBS*, granted the defendant's motion for a directed verdict, rejecting the plaintiff's argument that the word "slumlord" had a defamatory meaning. The plaintiff sued the defendant, a local news affiliate, for broadcasting a report that portrayed him as a slumlord.¹⁵² In *Near East Side Community Organization v. Hair*,¹⁵³ an Indiana appeals court seemingly rejected the defendant's argument that statements made in a public meeting are generally regarded as hyperbole when affirming the denial of the motion to dismiss.¹⁵⁴ These cases illustrate the court's propensity to discount words posted on the Web.

Love and *Bauer* exemplify a kind of "Twitter defense," the idea that words posted on the Internet are more opinion than fact. Recent courts have readily dismissed defamation claims brought from social media postings, ruling posted statements are opinion rather than fact.¹⁵⁵ Ruling that social media is only a vehicle for public opinion is problematic. Under these circumstances, it seems nearly impossible for one to succeed in a social media defamation claim. The ability to escape liability rewards people who choose to voice their potentially harmful statements online¹⁵⁶

2. Student Speech

A Snapchat post made at a local convenience store on a Saturday led to the first student speech case that the Supreme Court chose to hear in almost fifty years.¹⁵⁷ In 1969, the Supreme Court in *Tinker v. Des Moines Independent Community School District*, ruled that students' First Amendment rights do not end when they enter the schoolhouse door.¹⁵⁸ In reaching its conclusion, the Court struck down a high school policy that prohibited students from wearing armbands on campus in protest of the Vietnam War.¹⁵⁹ According to the *Tinker* Court, schools

¹⁵² *Lal v. CBS, Inc.*, 726 F.2d 97, 99 (3d. Cir. 1984).

¹⁵³ *Near E. Side Cmty. Org. v. Hair*, 555 N.E.2d 1324, 1330–31 (Ind. Ct. App. 1990).

¹⁵⁴ *Id.* at 1331.

¹⁵⁵ *See, e.g.*, *Boulger v. Woods*, 306 F. Supp. 3d 985, 1001–02 (S.D. Ohio 2018); *Bauer v. Brinkman*, 958 N.W. 2d 194, 197 (Iowa 2021); *Mirage Ent., Inc. v. FEG Entretenimientos S.A.*, 326 F. Supp. 3d 26, 36–37 (S.D.N.Y. 2018).

¹⁵⁶ *See, e.g.*, *Bellavia Blatt & Crossett, P.C. v. Kel & Partners LLC*, 151 F. Supp. 3d 287, 295 (E.D.N.Y. 2015) ("New York courts have consistently protected statements made in online forums as statements of opinion rather than fact."); *Mirage Ent., Inc.*, 326 F. Supp. 3d at 36–38 (dismissing a defamation action for contextual reasons).

¹⁵⁷ *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969).

¹⁵⁸ *Id.* at 506.

¹⁵⁹ *Id.* at 508, 510, 514.

cannot regulate student speech unless there is a material and substantial disruption to the school or student body.¹⁶⁰

A half century later, in 2021, the Court revisited the issue of student speech in *Mahanoy Area School District v. B.L.* when it considered whether the First Amendment prohibits public school officials from regulating off-campus student speech.¹⁶¹ “The issue arose from an incident involving Brandi Levy (B.L.), who, after learning she had not made her school’s varsity Cheerleading squad, posted a picture of herself on Snapchat with the caption ‘Fuck school fuck softball fuck cheer fuck everything.’”¹⁶² “She made the post on a weekend while hanging out at a local convenience store.”¹⁶³

Levy’s Snapchat was scheduled to disappear after twenty-four hours, and only about 250 people saw the post during that time.¹⁶⁴ But one person took a screenshot of it and

¹⁶⁰ *Id.* at 509.

¹⁶¹ *Mahanoy Area Sch. Dist. v. B.L.*, 141 S. Ct. 2038, 2043 (2021). Students have a right to feel secure on campus, and therefore a school sometimes has the power to discipline off-campus speech, even at the expense of a student’s right to free speech. Courts have applied this idea in a way that was favorable to the school to instances involving Internet chatter. See *Rosario v. Clark Cnty. Sch. Dist.*, No. 2:13–CV–362 JCM (PAL), 2013 WL 3679375, at *3–5 (D. Nev. July 3, 2013) (upholding a school administration’s decision to discipline a student for posting an obscene tweet, while at a restaurant after school hours, about his basketball coach); see also *Kowalski v. Berkeley Cnty. Schs.*, 652 F.3d 565, 567 (4th Cir. 2011) (ruling that a school did not violate a student’s free speech rights by suspending her for creating and posting to a webpage that ridiculed fellow students). On the other hand, in instances where students could prove in court that their off-campus social media did not substantially disrupt the school, the student has prevailed. See *Layshock ex rel. Layshock v. Hermitage Sch. Dist.*, 650 F.3d 205, 207 (3d Cir. 2011) (ruling that the school infringed on a student’s First Amendment rights by suspending him for posting an online parody of the principle); *J.S. v. Blue Mountain Sch. Dist.*, No. 307CV585, 2007 WL 954245, at *3 (M.D. Pa. Mar. 29, 2007) (holding that the student needed to demonstrate substantial disruption of school operations or interference with the rights of others, and finding insufficient evidence of such to succeed on the merits).

But to date, among Federal Circuit Courts, only the Third Circuit has sided with the school in instances of off-campus online speech. And even those cases suggest that there are instances where a school can appropriately infringe on a student’s First Amendment Rights. In response to *J.S.* and *Layshock*, Judge Kent Jordan of the Third Circuit stated: “The issue is whether the Supreme Court’s decision in *Tinker*, can be applied to off-campus speech. I believe it can, and no ruling coming out today is to the contrary.”

Leslie Tenzer, *Is There Such a Thing as Off-Campus Anymore?*, PACE UNIV.: SOC. MEDIA LEGALITY (May 31, 2021), [https://socialmediablwg.blogs.pace.edu/2021/05/\[https://perma.cc/2AHG-6PM2\]](https://socialmediablwg.blogs.pace.edu/2021/05/[https://perma.cc/2AHG-6PM2]) (quoting *Layshock*, 650 F.3d at 220 (Jordan, J., dissenting)).

¹⁶² Tenzer, *supra* note 161; *Mahanoy*, 141 S. Ct. at 2043; Arin Gloria Ryan, *The “Fuck Everything” Cheerleader Gets How the World Works. The Supreme Court Justices Do Not*, DAILY BEAST (Jan. 24, 2021, 6:43 AM), <https://www.thedailybeast.com/the-fuck-everything-cheerleader-gets-how-the-world-works-the-supreme-court-justices-do-not> [<https://perma.cc/4AFJ-JXKY>].

¹⁶³ Tenzer, *supra* note 161; *Mahanoy*, 141 S. Ct. at 2043; Ryan, *supra* note 162.

¹⁶⁴ Robert Barnes, *A Cheerleader’s Snapchat Rant Leads to ‘Momentous’ Supreme Court Case on Student Speech*, WASH. POST (Apr. 25, 2021, 7:34 PM), <https://www>

showed it to the daughter of one of the school's cheerleading coaches.¹⁶⁵ The coaches decided Levy's snap violated team and school rules, which Levy had acknowledged before joining the team, and she was suspended from the squad for a year.¹⁶⁶ Levy and her parents sued the school under 42 U.S.C. § 1983, arguing that the school's suspension violated her First Amendment right to free speech and that the school disciplinary rules were overly broad.¹⁶⁷ The district court agreed with Levy, and the US Court of Appeals for the Third Circuit affirmed.¹⁶⁸ The school district then petitioned for a writ of certiorari.¹⁶⁹

On January 8, 2021, the Supreme Court granted certiorari,¹⁷⁰ and ruled on June 23, 2021.¹⁷¹ The case presented the Court with the first post-Internet decision concerning regulated school speech. Applying the *Tinker* test, the Court simply needed to decide whether Levy's Snapchat posed a substantial disruption to the school or other students.¹⁷²

While *Tinker* ruled on students' constitutional rights once they enter "the schoolhouse gate," *Mahanoy* ruled on students' rights after they leave the schoolyard. Justice Breyer, on behalf of an eight-member majority, noted that schools lose their special status to regulate student speech when it occurs off campus. Since Levy's post took place off campus and did little more than cause distracting discussions on campus, "[Levy's conduct] was not substantially disruptive" and her public high school lacked the authority to punish her for the post.¹⁷³

washingtonpost.com/politics/courts_law/supreme-court-cheerleader-first-amendment/2021/04/25/9d2ac1e2-9eb7-11eb-b7a8-014b14aeb9e4_story.html [https://perma.cc/P4DK-DB8X].

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ *B.L. v. Mahanoy Area Sch. Dist.*, 964 F.3d 170, 176 (3d Cir. 2020).

¹⁶⁸ *Mahanoy Area Sch. Dist. v. B.L.*, 141 S. Ct. 2038, 2043–44 (2021) (noting that because Levy posted the speech in question "off campus," the school did not have the power to punish it).

¹⁶⁹ *Id.*

¹⁷⁰ *Mahanoy Area School District v. B.L.*, OYEZ, <https://www.oyez.org/cases/2020/20-255> [https://perma.cc/6DLY-C6MV].

¹⁷¹ *Id.*; *Mahanoy*, 141 S. Ct. at 2038.

¹⁷² *See id.* at 2044–45 (citing *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506, 513 (1969)).

¹⁷³ *Id.* at 2044, 2048.

Rather, the record shows that discussion of the matter took, at most, 5 to 10 minutes of an Algebra class "for just a couple of days" and that some members of the cheerleading team were "upset" about the content of B. L.'s Snapchats. But when one of B. L.'s coaches was asked directly if she had "any reason to think that this particular incident would disrupt class or school activities other than the fact that kids kept asking . . . about it," she responded simply, "No." As we said in *Tinker*, "for the State in the person of school officials to justify prohibition of a particular expression of opinion, it must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and

Observers hoped that the Court would provide guidance on schools' abilities to regulate students' social media posts.¹⁷⁴ *Tinker* was decided well before the Internet was integral to daily life. *Mahanoy* offered the Court the opportunity to provide much needed direction to school administrators who walk a tight rope, balancing between respecting First Amendment rights and protecting the right of their students to learn in a conducive educational environment.

Still, the *Mahanoy* decision did little more than keep the status quo. Justice Breyer, in his majority opinion, noted that *Mahanoy* does not "set forth a broad, highly general First Amendment rule stating just what counts as 'off campus' speech."¹⁷⁵ Rather, the Court identified three instances in which public school regulation of student speech would contravene the First Amendment's intent.¹⁷⁶ Ultimately, *Mahanoy* merely retained the *Tinker* standard by reaffirming the already identified distinction between permissible and impermissible student speech. Its ruling failed, however, to give a usable shape to this unnecessary distinction. Consequently, *Mahanoy* does nothing to set acceptable guidelines for the well-documented cyberbullying that schools must contend with on a daily basis.¹⁷⁷

3. Other Free Speech Outside the Classroom

Other than *Mahanoy*, the Supreme Court has only heard two cases challenging social media harms, both of which concerned issues of free speech. In each instance, given the novel issue presented, the Court was forced to rely on pre-social media

unpleasantness that always accompany an unpopular viewpoint." The alleged disturbance here does not meet *Tinker*'s demanding standard.

Id. at 2047–48 (internal citations omitted) (quoting *Tinker*, 393 U.S. at 509).

¹⁷⁴ See Arthur L. Carter Journalism Institute, *The Supreme Court Case That Could Define the Next Era of Student Speech Rights*, FIRST AMEND. WATCH (Apr. 27, 2021), <https://firstamendmentwatch.org/the-supreme-court-case-that-could-define-the-next-era-of-student-speech-rights/> [<https://perma.cc/232R-WH4Y>]; see also Martha McCarthy, *Social Media, Students, and the Law*, 10 LAWS 81 (2021) (providing guidance to schools on regulating cyberbullying post-*Mahanoy*).

¹⁷⁵ *Mahanoy*, 141 S. Ct. at 2045.

¹⁷⁶ *Id.* at 2046. First, schools may not stand "*in loco parentis*" when it comes to off-campus speech since such speech "fall[s] within the zone of parental . . . responsibility." Second, allowing schools to regulate off-campus speech runs the risk of 24-hour regulation. Third, schools should promote rather than limit both on and off-campus speech since to do otherwise would stymie America's "market place of ideas." In this particular instance, the court found that Levy's parents were in the best position to "[teach] good manners," the limited discussion about the post did not disrupt school and there was no evidence that her post disrupted school extra-curricular activities. *Id.* at 2047–78.

¹⁷⁷ *Stop Bullying on the Spot*, STOPBULLYING.GOV, <https://www.stopbullying.gov> [<https://perma.cc/W8VP-YZUZ>].

precedent to reach its conclusions. But, like in *Mahanoy*, the Court failed to set legal limitations on inappropriate social media use and move the law forward.

First, in *Elonis v. United States*, the Court ruled in favor of a man who posted threatening words on Facebook that prosecutors claimed were aimed at his wife.¹⁷⁸ Elonis, a self-proclaimed aspiring rap artist, posted rap lyrics on Facebook that the local authorities believed were directed at his wife:

If I only knew then what I know now . . . I would have smothered your
ass with a pillow, dumped your body in the back seat, dropped you off
in Toad Creek and made it look like a rape and murder.¹⁷⁹

You know your s***'s ridiculous

when you have the FBI knockin' at yo' door

Little Agent lady stood so close

Took all the strength I had not to turn the b**** ghost

Pull my knife, flick my wrist, and slit her throat

Leave her bleedin' from her jugular in the arms of her partner

[laughter]

So the next time you knock, you best be serving a warrant

And bring yo' SWAT and an explosives expert while you're at it

Cause little did y'all know, I was strapped wit' a bomb

Why do you think it took me so long to get dressed with no shoes on?

I was jus' waitin' for y'all to handcuff me and pat me down

Touch the detonator in my pocket and we're all goin'

[BOOM!]¹⁸⁰

A judge issued a criminal court order of protection for his wife.¹⁸¹ Federal agents charged Elonis under 18 U.S.C. § 875 for transmitting material containing a threat, a law first adopted in 1948.¹⁸² The district court denied Elonis' motion to dismiss, and

¹⁷⁸ *Elonis v. United States*, 575 U.S. 723 (2015).

¹⁷⁹ *Id.* at 747.

¹⁸⁰ *Id.* at 730.

¹⁸¹ *Id.* at 728–29.

¹⁸² 18 U.S.C. § 875(c). The actions led to Elonis's indictment by a grand jury on five counts of threats to park employees and visitors, local law enforcement, his estranged wife, an FBI agent, and a kindergarten class that had been relayed through interstate communication. *United States v. Elonis*, No. 11-13, 2011 WL 5024284, at *1 (E.D. Pa. Oct. 20, 2011).

after a full jury trial, Elonis was convicted and sentenced to forty-four months in prison and three years of supervised release.¹⁸³ Elonis appealed his case to the Supreme Court.¹⁸⁴

The Supreme Court ruled in favor of Elonis on the narrow issue of whether the statute demanded proof of intent.¹⁸⁵ The Court looked to the early common law requirement that statutes imposing punishment oblige the prosecution to prove a minimum level of intent.¹⁸⁶ The majority chose not to address the First Amendment issue, ultimately overturning Elonis' conviction and remanding the case for further interpretation of the proper level of intent.¹⁸⁷ Justice Alito, however, noted that he would have removed First Amendment protection from the lyrics Elonis posted. He opined, "[s]tatements on social media that are pointedly directed at their victims," are likely to be viewed as true threats.¹⁸⁸ The failure to condemn these types of threats leaves open the possibility of posters to "dress up a real threat in the guise of" a social media post.¹⁸⁹

The majority's decision to sidestep the First Amendment issue raised in the case was another missed opportunity for adopting social media norms. This is particularly curious given that the Court should evade constitutional questions *unless* unavoidable in deciding a case. Its silence, in theory, suggests the Court's unwillingness to carve out First Amendment exceptions for the kind of hate speech that so frequently appears on social media websites. Like the *Love* and *Bauer* decisions, *Elonis* represents judicial acceptance that social media posts do

¹⁸³ *Elonis*, 575 U.S. at 731–32.

¹⁸⁴ *Id.* at 732 (arguing on appeal of his conviction to the Third Circuit Court of Appeals that the trial court improperly failed to instruct the jury that intent was an element of the crime). The Third Circuit affirmed, and Elonis petitioned for writ of certiorari to the Supreme Court, which was granted. *Id.* at 732.

¹⁸⁵ *Id.* at 740.

¹⁸⁶ *Id.* at 740; *see also id.* at 740–46. The Court did not identify what the appropriate *mens rea* would be. Samuel Alito, concurring in part and dissenting in part, opined that while agreeing that *mens rea* was required and specifically that showing negligence was not sufficient, the court should have ruled on the question of recklessness. *Id.* at 744–45 (Alito, J., concurring in part and dissenting in part). He further opined that recklessness was sufficient to show a crime under that provision on the basis that going further would amount to amending the statute, rather than interpreting it. *Id.* at 745.

¹⁸⁷ *Id.* at 742. United States v. Elonis, 841 F.3d 589, 601 (3d Cir. 2016) ("conclud[ing] beyond a reasonable doubt that Elonis would have been convicted if the jury had been properly instructed" and reinstating his conviction).

¹⁸⁸ *Elonis*, 575 U.S. at 747 (Alito, J., concurring in part and dissenting in part); Justice Thomas acknowledged that in this instance the Court should not extend the defendant First Amendment protection in light of the nature of Elonis' words. *See id.* at 751 (Thomas, J., dissenting).

¹⁸⁹ *Id.* at 747 (Alito, J., concurring in part and dissenting in part).

not carry the same harmful weight as spoken words or those written on papers.

In *Packingham v. North Carolina*, the Court continued to favor individual access to social media. In this case, the Court struck down a statute that prohibited convicted sex offenders from accessing sites routinely visited by minors.¹⁹⁰ The *Packingham* Court considered the constitutionality of a N.C. Gen. Stat. Ann. § 14-202.5, which made it a felony for sex offenders to use social media sites that permitted children to join.¹⁹¹ After his release from prison, Lester Gerard Packingham, a registered sex offender, posted on Facebook, under the pseudonym J.R. Gerard, concerning a North Carolina county's decision to dismiss his traffic ticket. His comment read: "Man God is Good! How about I got so much favor they dismissed the ticket before court even started? No fine, no court cost, no nothing spent Praise be to GOD, WOW! Thanks JESUS!"¹⁹²

Packingham argued that the North Carolina statute violated his First Amendment right to free speech and demanded that the court invalidate the statute.¹⁹³ The case made its way to the Supreme Court which unanimously reversed the lower courts' decisions, overturning the North Carolina statute.¹⁹⁴ The Court subjected the statute to intermediate scrutiny and found that North Carolina could protect children through less restrictive means that directly target the contacting of minors.¹⁹⁵ The Court reaffirmed the fundamental principle of the First Amendment to grant individuals "access to places where they can speak and listen, and then, after reflection,

¹⁹⁰ *Packingham v. North Carolina*, 137 S. Ct. 1730 (2017).

¹⁹¹ *Id.* at 1733.

¹⁹² *Id.* at 1734.

¹⁹³ *Id.*; see N.C. GEN. STAT. ANN. § 14-202.5 (West, Westlaw through S.L. 2022-75 of the 2022 Reg. Sess. of the Gen. Assembly) (creating a felony for any person on the State's registry of sex offenders to "access" a wide array of websites-including social media websites).

¹⁹⁴ *Packingham*, 137 S. Ct. at 1735. A North Carolina Superior Court judge ruled that the state had a right to enact the statute based on its "interest in the protection of minors" and convicted Packingham. Packingham appealed to the North Carolina Court of Appeals, which reversed the trial court's decision and invalidated the statute as a violation of the First Amendment. *State v. Packingham*, 777 S.E.2d 738, 742 (N.C. 2015). The state of North Carolina appealed to the North Carolina Supreme Court, which sided with the trial court, ruling that the statute's "limitation on conduct" did not infringe on Packingham's First Amendment rights. *Id.* at 744. Packingham filed a petition for a writ of certiorari with the Supreme Court of the United States and the Court granted certiorari. See *Packingham*, 137 S. Ct. at 1735.

¹⁹⁵ See *Packingham*, 137 S. Ct. at 1737 (offering that North Carolina could protect children through less restrictive means, such as prohibiting "conduct that often presages a sexual crime, like contacting a minor or using a website to gather information about a minor"). A statute passes intermediate scrutiny when the court determines that it furthers "an important governmental [interest]" by means "substantially related to" that interest. *Clark v. Jeter*, 486 U.S. 456, 461 (1988).

speak and listen once more.”¹⁹⁶ Justice Kennedy, writing for the majority, likened the Internet to a public square, noting that it has become the principle place for the exchange of information.¹⁹⁷ The North Carolina law barred the defendant, and others, from access to this public forum, violating his constitutional rights. Citing *Ashcroft v. Free Speech Coalition*, Kennedy noted the well-established rule that governments “may not suppress lawful speech” in their effort to prohibit unlawful speech.¹⁹⁸

Justice Alito, in a concurrence, observed that the First Amendment demands that social media be considered a protected space.¹⁹⁹ He wrote, “if the entirety of the internet or even just ‘social media’ sites are the 21st century equivalent of public streets and parks, then States may have little ability to restrict the sites that may be visited by even the most dangerous sex offenders.”²⁰⁰ Justice Alito then defined social media broadly to include those sites that are traditionally considered social media sites, like Facebook, together with e-commerce and news sites including Amazon.com, *The Washington Post*, and WebMD.²⁰¹ In overruling the statute, the court found that North Carolina could protect children in ways that were less restrictive than imposing wholesale limitations of the Internet on convicted sex offenders.²⁰²

The lack of statutory guidance and the relative newness of social media has left courts, committed to the ideal of precedent, with little option but to rely on pre-social media law. These cases illustrate how laws decided before the advent of the Internet hold up against new social media challenges. But those old laws have yielded dated results that fail to recognize the harmful consequences that occur when individuals use a new kind of medium to deliver old kinds of harms.

¹⁹⁶ *Packingham*, 137 S. Ct. at 1735.

¹⁹⁷ *Id.* at 1737.

By prohibiting sex offenders from using those websites, North Carolina with one broad stroke bars access to what for many are the principal sources for knowing current events, checking ads for employment, speaking and listening in the modern public square, and otherwise exploring the vast realms of human thought and knowledge.

Id.

¹⁹⁸ *Id.* at 1738 (quoting *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 255 (2002)).

¹⁹⁹ *See id.* at 1740–43 (Alito, J., concurring).

²⁰⁰ *Id.* at 1743 (Alito, J., concurring).

²⁰¹ *Id.* at 1741–53 (Alito, J., concurring).

²⁰² *See, e.g., id.* at 1737.

B. *Legislative and Administrative Review of Social Media Harms*

In some instances, legislatures and administrative bodies have guided judicial decision makers in their evaluation of social media harms. Every state has adopted a catalogue of cybercrimes. Administrative bodies have adopted codes, developed rules, and set administrative boundaries for behavior as it relates to the administration of justice.

1. Cybercrime Statutes

Legislatures have been swift to codify cybercrimes. Most states have adopted laws prohibiting cyberbullying,²⁰³ online harassment,²⁰⁴ online theft,²⁰⁵ and, at the federal level, cyberpornography.²⁰⁶ In most instances, these laws expand the existing criminal code to include a cyber element.²⁰⁷ In other cases, the crime stands separately from its pre-social media counterpart, providing for separate punishment.²⁰⁸ Although cybercrimes have

²⁰³ See, e.g., MICH. COMP. LAWS ANN. § 750.411x (West, Westlaw current through P.A. 2022 No. 227, of the 2022 Reg. Sess., 101st Leg.).

²⁰⁴ See, e.g., WASH. ADMIN. CODE 132S-100-205 (West, Westlaw current with amendments adopted through 22-20 Wash. State Reg., dated Oct. 19, 2022).

²⁰⁵ See, e.g., UTAH CODE ANN. § 13-40-401 (West, Westlaw current with laws through the 2022 3d Special Sess.).

²⁰⁶ See, e.g., 18 U.S.C. § 2252A.

²⁰⁷ See, e.g., MINN. STAT. ANN. § 609.795 (West, Westlaw current with all legis. from the 2022 Reg. Sess.)

Letter, telegram, or package; opening; harassment

Subdivision 1. Misdemeanors.

Whoever does any of the following is guilty of a misdemeanor:

(1) knowing that the actor does not have the consent of either the sender or the addressee, intentionally opens any sealed letter, telegram, or package addressed to another; or

(2) knowing that a sealed letter, telegram, or package has been opened without the consent of either the sender or addressee, intentionally publishes any of the contents thereof; or

(3) with the intent to harass or intimidate another person, repeatedly mails or delivers or causes the delivery by any means, including electronically, of letters, telegrams, or packages and thereby places the other person in reasonable fear of substantial bodily harm; places the person in reasonable fear that the person's family or household members will be subject to substantial bodily harm; or causes or would reasonably be expected to cause substantial emotional distress as defined in section 609.749, subdivision 2, paragraph (a), clause (4), to the other person.

²⁰⁸ Compare TEX. PENAL CODE ANN. § 21.19 (West, Westlaw current through the end of the 2021 Reg. and Called Sess. of the 87th Leg.) ("Unlawful Electronic Transmission of Sexually Explicit Visual Material") with TEX. PENAL CODE ANN. § 21.16

risen over time,²⁰⁹ criminal convictions for them remain relatively infrequent.²¹⁰ This may be due to an issue of “[u]nder-reporting of both cyber-dependent and cyber-enabled crimes.”²¹¹ A report by the Internet Crime Complaint Center found that, in 2016, only 15 percent of all estimated cybercrime victims reported the crimes that had been committed against them.²¹²

Defendants who challenge cybercrime convictions do so largely based on First Amendment principles. In *State v. Bishop*, North Carolina convicted Bishop for violating its newly enacted cyberbullying statute.²¹³ The defendant challenged the statute as unconstitutionally vague.²¹⁴ The Supreme Court of North Carolina agreed with the defendant, finding that the statute restricted protected speech and was not the least restrictive means of accomplishing its goal of protecting minors from potential harm.²¹⁵ Around the same time, the New York Court of

(West, Westlaw current through the Reg. and Called Sess. of the 87th Leg.) (“Unlawful Disclosure or Promotion of Intimate Visual Material”).

²⁰⁹ Chris Joseph, *FBI: 5,853 Cybercrime SC Victim Complaints in 2020, Experts Warn Situation is Getting Worse*, WMBF NEWS (last updated June 8, 2021, 7:24 PM), <https://www.wmbfnews.com/2021/06/10/fbi-5853-cybercrime-sc-victim-complaints-2020-experts-warn-situation-is-getting-worse/> [<https://perma.cc/FL36-KU4K>].

²¹⁰ See Ashley Podhradsky et al., *Digforce: Digital Forensics for Cyber Enforcement at Dakota State University Working Towards Public-Private Cybercrime Investigations*, 65 S.D. L. REV. 589, 589–90 (2020); Roger A Grimes, *Why Internet Crime Goes Unpunished*, CSO (Jan. 10, 2012, 6:00 AM), <https://www.csoonline.com/article/2618598/why-internet-crime-goes-unpunished.html>.

²¹¹ Christine LiCalzi, *Computer Crimes*, 54 AM. CRIM. L. REV. 1025, n.8 (2017) (quoting MIKE MCGUIRE & SAMANTHA DOWLING, CYBER CRIME: A REVIEW OF THE EVIDENCE, HOME OFFICE RESEARCH REPORT 75 (2013), https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/246749/horr75-summary.pdf [<https://perma.cc/CC23-ZE3D>]) (describing that in the U.K., this trend of under-reporting “is an issue amongst the general public and businesses”); John Esterbrook, *Many Hack Attacks Go Unreported*, CBS NEWS (Apr. 7, 2002, 1:11 PM), <http://www.cbsnews.com/news/many-hack-attacks-go-unreported/> [<https://perma.cc/LH6L-HNG3>] (describing an FBI survey of large corporations and government agencies finding that “90% of respondents detected computer security breaches in the past year but only 34% reported those attacks to authorities” (quoting LiCalzi, *supra*, at 1027 n.8)); see *Cybercrime Convention: A Positive Beginning to a Long Road Ahead*, 2 J. HIGH TECH. L. 101, 101, 103 (2003); see generally Al Baker, *An ‘Iceberg’ of Unseen Crimes: Many Cyber Offenses Go Unreported*, N.Y. TIMES (Feb. 5, 2018), <https://www.nytimes.com/2018/02/05/nyregion/cyber-crimes-unreported.html> (noting that cybercrimes are underreported in part because law enforcement reporting systems are usually outdated and thus inadequate when measuring the types of cybercrimes being committed or their frequency).

²¹² INTERNET CRIME COMPLAINT CTR., 2016 INTERNET CRIME REPORT 3 (2016), https://www.ic3.gov/Media/PDF/AnnualReport/2016_IC3Report.pdf [<https://perma.cc/HX2U-32RE>].

²¹³ N.C. GEN. STAT. ANN. § 14-458.1(a)(1)(d) (West, Westlaw current through S.L. 2022-75 of the 2022 Reg. Sess. of the Gen. Assemb., subject to changes made pursuant to direction of the Revisor of Statutes) (stating it is “unlawful for any person to use a computer or computer network to . . . [w]ith the intent to intimidate or torment a minor . . . [p]ost or encourage others to post on the Internet private, personal, or sexual information pertaining to a minor”), *invalidated* by *State v. Bishop*, 787 S.E.2d 814 (N.C. 2016).

²¹⁴ *Bishop*, 787 S.E.2d at 816.

²¹⁵ *Id.* at 817.

Appeals struck down its own cyberbullying statute for violating the Free Speech Clause of the First Amendment when it decided *People v. Marquan M.*²¹⁶ In 2010, the New York legislature enacted the Dignity for All Students Act as a means of preventing bullying on school grounds.²¹⁷ In 2012, the legislature expanded the act to include cyberbullying.²¹⁸ That same year, the defendant, Marquan M., anonymously posted sexual information about fellow classmates on Facebook,²¹⁹ and the state prosecuted him. In overruling the statute, the court applied strict scrutiny²²⁰ and found that the statute was not supported by any compelling governmental interest.²²¹

Legislative statutory schemes set forth punishments for offenders. The punishments for cybercrimes embrace important deterrent and retributive punishment ideologies. These measures clearly communicate unacceptable behaviors and societal norms to those who engage on the Internet, and where appropriate, to those who commit social media wrongdoing. Legislative mandates relieve the judiciary from the pressure of communicating acceptable social media behavior. Courts concerned with issues not governed by legislative mandate, such as privacy and dignitary torts, however, need to look to rules of precedent to regulate the conduct. Because precedent available to courts to regulate noncriminalized harms predates social media, decisional courts lack the toolset to announce acceptable social media conduct.²²²

2. Courtroom Matters

Judges, juries, and the attorneys who argue before them are governed by administrative regulations aimed at curbing

²¹⁶ *People v. Marquan M.*, 19 N.E.3d 480, 488 (N.Y. 2014).

²¹⁷ *The Dignity Act*, NEW YORK STATE EDUC. DEP'T (Aug. 1, 2022), <https://www.p12.nysed.gov/dignityact/> [<https://perma.cc/WZH4-B5EF>]; N.Y. EDUC. LAW § 10 (McKinney, Westlaw current through L.2022, chapters 1 to 599).

²¹⁸ DIGNITY ACT TASK FORCE, THE NEW YORK STATE DIGNITY FOR ALL STUDENTS ACT (DIGNITY ACT): A RESOURCE AND PROMISING PRACTICES GUIDE FOR SCHOOL ADMINISTRATORS AND FACULTY 4 (2017) ("In June 2012, the Legislature . . . amended the Dignity Act . . . to, among other things, include cyberbullying as part of the definition of 'harassment and bullying' (Education Law § 11[7], [8]) and require instruction in safe, responsible use of the Internet and electronic communications.").

²¹⁹ *Marquan M.*, 19 N.E.3d at 485.

²²⁰ The strict scrutiny test requires the challenging party to prove that the state legislation was not narrowly tailored to meet a compelling governmental interest. See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 220 (1995).

²²¹ *Marquan M.*, 19 N.E.3d at 487–88.

²²² Ken Strutin, *Social Media and the Vanishing Points of Ethical and Constitutional Boundaries*, 31 PACE L. REV. 228, 228 (2011) ("Still, the bulk of legal authority and ethical guidance is rooted in precedent based on antecedent technologies, which has little resemblance to the emerging social centers of cyberspace.").

inappropriate social media use. Jurors who post or read social media posts about the trial on which they are sitting threaten a defendant's sixth amendment constitutional rights.²²³ Attorneys violate ethics codes when posting inappropriate comments.²²⁴ Judges, too, raise ethical violations when engaging in particular social media posts.²²⁵ Because discipline for these wrongs can be normalized through administrative regulations and ethical codes, administrative agencies and Bar associations seeking to set social norms can do so in a much more swift manner than their judicial counterparts. As a result, individuals engaged in the courtroom and its environs clearly understand acceptable social media behavior.

a. Juror Misconduct

The Sixth Amendment guarantees criminal defendants the right to a fair trial by a jury of their peers. Defendants can move to overturn a conviction if jurors violate judges' instructions in a way that affects the outcome of the defendant's trial.²²⁶ Since the advent of the Internet, courts have included instructions warning jurors not to view websites while empaneled.²²⁷ These instructions have expanded to include social media sites. Today, a typical jury instruction includes language like that of the federal model jury instructions:

To remain impartial jurors . . . you must not communicate with anyone about this case, whether in person, in writing, or through email, text messaging, blogs, or social media websites and apps (like Twitter, Facebook, Instagram, LinkedIn, YouTube, WhatsApp, and Snapchat).²²⁸

Thus, in addition to not having face-to-face discussions with fellow jurors or anyone else, jurors cannot communicate

²²³ See *infra* Section II.B.2.a.

²²⁴ See *infra* Section II.B.2.b.

²²⁵ See *infra* Section II.B.3.

²²⁶ See *Reed v. State*, 547 So.2d 596, 597 (Ala. 1989) (citing *Ex parte Troha*, 462 So.2d 953, 954 (Ala. 1984)); *Roan v. State*, 143 So. 454, 460 (Ala. 1932); *Leith v. State*, 90 So. 687, 690 (Ala. 1921)) ("The test for determining whether juror misconduct is prejudicial to the defendant and, thus, warrants a new trial is whether the misconduct might have unlawfully influenced the verdict rendered.")

²²⁷ See, e.g., JUD. COMM'N OF NEW S. WALES, CRIMINAL TRIAL COURTS BENCH BOOK § 1-470 (2002), https://www.judcom.nsw.gov.au/publications/benchbks/criminal/the_jury.html [<https://perma.cc/L4D9-6MD6>] (suggesting opening instructions to the jury "that they should ignore any media reporting of the trial"); *Commonwealth v. Morrison*, 150 N.E.3d 826, 836 (Mass. Ct. App. 2020) (involving a juror who "posted several comments during the trial and the jury's deliberations to his Facebook page, in violation of the trial judge's daily instructions").

²²⁸ JUD. CONF. COMM. ON CT. ADMIN. & CASE MGMT., PROPOSED MODEL JURY INSTRUCTIONS 2 (2020), https://www.uscourts.gov/sites/default/files/proposed_model_jury_instructions.pdf [<https://perma.cc/AD6D-2X8M>].

with anyone about the case in any way, whether in writing, or through email, text messaging, blogs, comments, or social media platforms. Many of today's jurors have a difficult time adhering to these instructions, which has prompted courts to overturn convictions.²²⁹ In *People v. Neulander*, courts at the trial, appellate, and highest level struggled with juror social media use.²³⁰ Here, the state charged Dr. Robert Neulander with murder for the death of his wife, Leslie.²³¹ Johnna Lorraine was one of the jurors empaneled to hear the case.²³² At trial, the judge instructed the jurors to refrain from "discussing the case outside the courtroom."²³³ Despite this, Lorraine repeatedly scrolled through news sites covering the trial.²³⁴ After the jury delivered its verdict, an alternate juror reported Ms. Lorraine's conduct to the court.²³⁵

In response to Lorraine's communication and conduct, Neulander moved to dismiss the case.²³⁶ The trial judge denied the motion. Although he agreed that Lorraine had engaged in juror misconduct, the judge found that her texting and article reading did not affect the outcome of the trial. Neulander appealed to the Fourth Department, which narrowly reversed the trial judge.²³⁷ The state appealed to the New York Court of Appeals, which affirmed the intermediate court, ruling that Lorraine's conduct was improper and "may have affected the substantial rights of the defendant."²³⁸

²²⁹ See e.g., *Social Media and Its Impact on Trials*, LAW CPD (Sept. 5, 2022), <https://lawcpd.com.au/blog/social-media-and-its-impact-trials/> (last visited Nov. 16, 2022); *People v. Neulander*, 135 N.E.3d 302 (N.Y. 2019) (overturning murder conviction after juror sent hundreds of texts about the progress of the case and checked local news sources during trial).

²³⁰ *People v. Neulander*, 80 N.Y.S.3d 791, 797 (App. Div. 2018), *aff'd*, 135 N.E.3d 302 (N.Y. 2019).

²³¹ *Id.*; Douglass Dowty, *How Alleged Juror Misconduct in Dr. Neulander Murder Trial Came to Light*, SYRACUSE.COM (last updated Mar. 22, 2019, 5:27 AM), https://www.syracuse.com/crime/2015/05/how_alleged_juror_misconduct_in_dr_neulander_murder_trial_came_to_light.html [<https://perma.cc/ENP9-XDU7>].

²³² Dowty, *supra* note 231.

²³³ *Neulander*, 80 N.Y.S.3d at 796.

²³⁴ See Ed Shanahan, *After Juror Exchanged 7,000 Texts, Murder Verdict Is Overturned*, N.Y. TIMES (Oct. 31, 2019), <https://www.nytimes.com/2019/10/31/nyregion/robert-neulander-wife-murdered.html>; Leslie Y. Garfield Tenzer, *The Gen Z Juror*, 88 TENN. L. REV. 173, 174 (2020).

²³⁵ *Neulander*, 135 N.E.3d at 304.

²³⁶ Dowty, *supra* note 231.

²³⁷ Two of the five judges opined that Lorraine's conduct was not demonstrated to be prejudicial so as to warrant setting aside the verdict. *Neulander*, 80 N.Y.S.3d at 798–99 (Winslow, J. & Smith, J., dissenting).

²³⁸ *Neulander*, 80 N.Y.S.3d at 795 (emphasis omitted).

b. Attorney Ethical Violations

The American Bar Association Model Rules of Professional Conduct have set guidelines that courts have interpreted to regulate attorney social media abuse and misuse. Ethical boards and courts have applied Rule 8.4 to situations of social media misuse and abuse in their jurisdictions.²³⁹ Rule 8.4 defines professional misconduct as including any instance in which an attorney “violate[s] or attempt[s] to violate the Rules of Professional Conduct [by] knowingly assist[ing] or induc[ing] another to do so, or [by] do[ing] so through the acts of another.”²⁴⁰

Consider the case of Winston Sitton, a lawyer in Tennessee who answered the plea of a “Facebook friend,” a woman he had not met in person.²⁴¹ The “friend,” Lauren Houston, posted about her fear that her ex-husband might kill her.²⁴² Sitton responded with his own post:

If you want to kill him, then lure him into your house and claim he broke in with intent to do you bodily harm and that you feared for your life. Even with the new stand your ground law, the castle doctrine is a far safer basis for use of deadly force.²⁴³

A Tennessee ethics board found that Mr. Sitton’s conduct violated Tennessee Rule of Professional Conduct 8.4.²⁴⁴ His suggestion of ways in which Houston might avoid prosecution for criminal conduct ran afoul of state ethics rules.²⁴⁵ A panel charged with sanctioning Sitton recommended that he receive a sixty-day suspension.²⁴⁶ Sitton appealed, but the Supreme Court of Tennessee agreed with the ethics board, holding that Sitton

²³⁹ See, e.g., *Att’y Grievance Comm’n of Maryland v. Vasiliades*, 257 A.3d 1061 (Md. Ct. App. 2021); see also *In re McCool*, 172 So.3d 1058, 1075 (La. 2015).

²⁴⁰ Tennessee Rule of Professional Conduct 8.4(a)–(d) mirrors Model Rule 8.4(a)–(d), which states in part:

It is professional misconduct for a lawyer to: (a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another; (b) commit a criminal act that reflects adversely on the lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects; (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation; [or] (d) engage in conduct that is prejudicial to the administration of justice.

MODEL RULES OF PRO. CONDUCT r. 8.4 (AM. BAR ASS’N 2011); see TENN. SUP. CT. R. 8, RPC 8.4.

²⁴¹ *In re Sitton*, 618 S.W.3d 288, 290 (Tenn. 2021).

²⁴² *Id.*

²⁴³ *Id.* at 291.

²⁴⁴ *Id.*

²⁴⁵ *Id.* at 298.

²⁴⁶ *Id.*

violated the rule and increasing his sentence to a suspension of four years from the practice of law.²⁴⁷

Similarly, in *In re Gamble*, the Supreme Court of Kansas found that the state's Board for Disciplining Attorneys was too lenient in suspending an attorney for sixty days after he sent misleading Facebook messages aimed at manipulating the outcome of a custody case.²⁴⁸ Attorney Eric Gamble represented an eighteen-year-old father who objected to his child's mother's decision to allow a couple to adopt the child.²⁴⁹ Gamble sent a private Facebook message to the birthmother explaining why she should not place her child up for adoption, attaching the documentation necessary for her to relinquish her rights and urging her to sign the document.²⁵⁰ Ultimately, the Board ruled Eric Gamble's inappropriate social media use violated Kansas Rule of Professional Conduct 8.4.²⁵¹ Gamble appealed the state Board ruling, and the court, incensed by Gamble's conduct, chose to extend his punishment to a six-month suspension.²⁵²

Both Sitton and Gamble engaged in conduct that violated Rule 8.4. The medium of communication in each instance is somewhat incidental. Each attorney's conduct was equally reprehensible regardless of whether communicated on an ICS or face-to-face. The lenient sentences each attorney received by its state ethics board suggests that they tend to discount the harmful impact of social media. However, in response, the state courts departed from the notion that words posted on social media do not carry the same weight as those that are spoken or written. By increasing each attorney's sentence, the courts communicated to fellow lawyers that there are serious consequences to violating Rule 8.4 on social media.

3. Judicial Misconduct

While judges are considered arbiters of bad behavior, sometimes they are the folks who engage in it. A Wisconsin state appellate court ruled that a judge committed judicial bias when he accepted a Facebook request from a litigant in his

²⁴⁷ *Id.* at 308. This included only one year of active suspension and another three on probation.

²⁴⁸ *In re Gamble*, 338 P.3d 576, 586 (Kan. 2014) (per curiam), *reinstatement granted sub nom*; *In re Gamble*, 382 P.3d 850 (Kan. 2016).

²⁴⁹ *Id.*

²⁵⁰ *Id.* at 577–78.

²⁵¹ *In re Gamble*, 338 P.3d at 577. Kansas Rule of Professional Conduct 8.4(a)–(d) mirrors Model Rule 8.4(a)–(d). See KAN. R. PRO. CONDUCT 8.4(a)–(d).

²⁵² *Id.* at 586.

courtroom.²⁵³ The New York State Commission on Judicial Conduct formally reprimanded a town court judge for posting comments that favored law enforcement over underrepresented minority groups.²⁵⁴ The Supreme Court of South Carolina suspended a probate judge for his Facebook post soliciting donations for the Red Cross.²⁵⁵ The suspension followed a prior six-month suspension for Facebook posts that endorsed a presidential candidate and sought funds for his local church.²⁵⁶

While states have been quick to codify cybercrimes and cyberthefts, and administrative bodies have enacted regulations for social media use, neither institution has adopted private causes of action for individual civil social media harms. Common law works by accretion, and it is necessarily a very slow process. Litigation takes a long time. Meanwhile, the damage being done by social media seems to be meteorically quick. In the absence of legislation, courts, including the Supreme Court, can no longer remain hesitant to move precedent forward and instead, must change with the times. The way individuals use social media demands that precedent evolve rather than erode.

Our common law system allows reviewing courts to adapt to situations that past courts have not yet contemplated. Over time, and through a series of institutionalized opinions, courts create a body of unwritten laws. Developing common law to address new behavior does not have to come at the expense of diluting traditional notions of precedent and *stare decisis*.

III. JUDICIAL DECISION MAKING

While the origins of *stare decisis* and precedent are murky, their meaning and impact are crystal clear. *Stare decisis*, the Latin term for “let the decision stand” requires courts to follow previously decided case law.²⁵⁷ Previously decided cases, called precedent, make up one part of the body of law that courts must follow. English courts have embraced the twin doctrines of *stare decisis* and precedent from the earliest moments of their

²⁵³ *In re Paternity of B.J.M.*, 925 N.W.2d 580, 580–82 (Wis. App. Ct. 2019).

²⁵⁴ *In re Knutsen, Stipulation* (N.Y. Comm’n on Jud. Conduct [May 26, 2021]), <https://cjc.ny.gov/Determinations/K/Knutsen.Kenneth.C.2021.05.26.STIP.pdf> [<https://perma.cc/CK6V-RBE8>] (stating that Knutsen posted anti-LGBTQ and anti-Muslim comments on his Facebook page).

²⁵⁵ *In re Johns*, 864 S.E.2d. 546, 547 (2021).

²⁵⁶ Debra C. Weiss, *Judge Is Suspended Once Again for Social Media Posts—This Time for Soliciting Hurricane Donations*, A.B.A. J. (Oct. 20, 2021, 9:05 AM), <https://www.abajournal.com/news/article/once-again-judge-is-suspended-for-social-media-posts-this-time-for-soliciting-hurricane-donations> [<https://perma.cc/V5KJ-E7D2>].

²⁵⁷ *Stare Decisis*, BRITANNICA (last updated May 3, 2022), <https://www.britannica.com/topic/stare-decisis> [<https://perma.cc/W399-2GNS>].

judicial system.²⁵⁸ American courts set up the same system of jurisprudence.²⁵⁹

The principles of *stare decisis* and precedent are only applicable when there is a body of common law on which to base new decisions. Thus, in the earliest days of the American judiciary, courts looked to the English common law.²⁶⁰ Principles like defamation and the Rule Against Perpetuities migrated across the pond when American courts had to consider issues of false public condemnation or theft of property.²⁶¹

It was not until the mid-1800s that American courts developed enough law to create their own body of common law.²⁶² It is this common law to which our current cases can be traced. In *Vazquez v. Hillery*, the Court highlighted the importance of precedent and *stare decisis*.²⁶³ These ideals, according to the court, favor principled and intelligent decision-making and guard against erratic change.²⁶⁴ For the most part, precedent and *stare decisis* remain a cornerstone of our judicial system.²⁶⁵ “Respecting *stare decisis*,” Judge Kagan wrote for the majority, “means sticking to some wrong decisions.”²⁶⁶ Lower courts are equally bound by this principle.²⁶⁷ The Fifth Circuit, in *Lefebure*

²⁵⁸ See generally William B. Stoebuck, *Reception of English Common Law in the American Colonies*, 10 WM. & MARY L. REV. 393 (1968) (noting the prevalence of precedent in early colonial law and English common law).

²⁵⁹ *Id.*

²⁶⁰ *Id.*

²⁶¹ *Neumann v. Liles*, 369 P.3d 1117, 1120 (2016) (noting English common law recognized formation of defamation prior to creating of the American republic); *Wash. State Grange v. Brandt*, 148 P.3d 1069, 1074 (Wash. App. 2006) (“The rule against perpetuities has its origin in English Common Law.”).

²⁶² See e.g., *United States v. Causby* 328 U.S. 256, 260–61 (1946) (noting the absence of the *ad coelum* doctrine in the modern legal world).

²⁶³ *Vasquez v. Hillery*, 474 U.S. 254, 265–66 (1986).

²⁶⁴ *Id.* at 265–66.

²⁶⁵ See, e.g., *Kimble v. Marvel Ent., LLC*, 135 S. Ct. 2401, 2404 (2015) (“The doctrine of *stare decisis* provides that today’s Court should stand by yesterday’s decisions.”). But see Nina Varsava, *Precedent on Precedent*, 169 U. PA. L. REV. ONLINE 118, 120–22 (2020) (explaining the complexities of precedent which can allow wrong decisions to continue to dominate throughout the courts). In *Kimble*, the court reaffirmed a 50-year-old law that prohibited the enforcement of contracts to pay royalties for a patented product beyond the expiration of the patent. The half-century rule, announced in *Brulotte v. Thys Co.*, was largely criticized. *Kimble*, 135 S. Ct. at 2404. Nevertheless, the Court reaffirmed the rule, largely based on the principle of *stare decisis*. *Id.* at 2415. *Lefebure v. D’Aquila* observed a lower court’s obligation to follow precedent “whether we like it or not.” *Lefebure v. D’Aquila*, 15 F.4th 650, 663 (2021).

²⁶⁶ *Kimble*, 135 S. Ct. at 2409; BENJAMIN N. CARDOZO, *THE NATURE OF JUDICIAL PROCESS* 20 (1921).

²⁶⁷ See *Ashe v. Swenson*, 397 U.S. 436, 440 n.4 (1970) (“However persuasive the dissenting opinions . . . it is the duty of this Court to follow the law as stated.”); see also *United States v. Manubolu*, 478 F. Supp. 3d 32, 46 (D. Me. 2020) (quoting *Ramos v. Louisiana*, 140 S. Ct. 1390, 1416 n.84 (2020) “[T]he state courts and the other federal courts have a constitutional obligation to follow a precedent of [the United States Supreme Court] unless and until it is overruled by [the Supreme Court itself].”).

v. D'Aquila, observed a lower court's obligation to follow precedent "whether we like it or not."²⁶⁸

To be fair, there are instances in which contemporary cases stretch back to early common law to resolve disputes. For example, in *CompuServe Inc. v. Cyber Promotions, Inc.*, the District Court for the Southern District of Ohio considered whether an email marketing professional was responsible for hampering an ISP's ability to provide Internet service to its users when it flooded users' email accounts with unwanted email messages.²⁶⁹ The court, finding no present-day cause of action for which it could hold the defendant responsible, reached back to the early common law tort of trespass to chattel.²⁷⁰ The technological advances of email, coupled with the lack of an available civil remedy, demanded that the tort evolve to meet contemporary needs. The court assured recovery for a novel fact pattern despite lacking precedent of legislation concerning the relatively new phenomenon of email.²⁷¹

The Supreme Court took a similar approach in *Mahanoy*. Rather than recognize a new type of student speech that could take place off-campus but immediately reach the campus through technology, the Court refashioned fifty-year-old *Tinker*.²⁷² Unlike the *CompuServe* Court, the *Mahanoy* Court did not acknowledge the fact that the speech in question was the result of technological advancements not present at the time the Court decided earlier student speech cases.

The principles of precedent and stare decisis, however, do not mandate that courts strictly adhere to previously decided case law. As a general rule, our judiciary must be flexible enough to, as Thomas Jefferson wrote, "keep pace with the times."²⁷³

²⁶⁸ *Lefebure*, 15 F.4th at 663.

²⁶⁹ *CompuServe Inc. v. Cyber Promotions, Inc.*, 962 F. Supp. 1015, 1017 (S.D. Ohio 1997).

²⁷⁰ *Id.* at 1020. This case also introduced the word "spam" as a term referring to junk email.

²⁷¹ See *ASIS Internet Servs. v. Azoogole.com*, 357 F. App'x 112, 113 (9th Cir. 2009) (claiming spam and emails were an assault on plaintiff "under the Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003 ('CAN-SPAM'), 15 U.S.C. § 7701"); see also *Deering v. CenturyTel, Inc.*, No. CV-10-63-BLG-RFC, 2011 WL 1842859, at *1 (D. Mont. May 16, 2011); *Marquez v. Reyes*, No. 10-CV-01281-BNB, 2010 WL 2364435, at *1 (D. Colo. June 10, 2010) (alleging assault by the Internet where information sent through the Internet served as a weapon to harm plaintiff); *Shlien v. Bd. of Regents of Univ. of Neb.*, No. 575, 1999 WL 34995572, at * 11-12 (D. Neb. Feb. 17, 1999); Clay Calvert, *Fighting Words in the Era of Texts, IMs and E-Mails: Can a Disparaged Doctrine Be Resuscitated to Punish Cyber-Bullies?*, 21 DEPAUL J. ART, TECH. & INTELL. PROP. L. 1, 45 (2010) (looking for common law crimes available to punish cyberharms).

²⁷² See *supra* notes 171-177 and accompanying text.

²⁷³ See *Quotations on the Jefferson Memorial*, MONTICELLO, <https://www.monticello.org/site/research-and-collections/quotations-jefferson-memorial> [<https://perma.cc/GU4K-DRFZ>] ("I am not an advocate for frequent changes in laws and

Almost two centuries later, Chief Justice Rehnquist agreed, observing that the role of the Court is to keep the country abreast of the times while maintaining the principles of precedent and *stare decisis*.²⁷⁴ Judges, therefore, at every level, are tasked with sculpting common law principles rooted in previously decided case law. Consequently, precedents should evolve to meet contemporary belief systems and social norms.²⁷⁵

Through these decisions, at both the Supreme Court and lower court levels, citizens receive common law messaging about the limits of acceptable social behavior. Take, for example, common law duties that define the boundaries of negligent conduct. Although there is no bright-line test for assessing the duty prong of liability, negligence cases, read as a whole, articulate the outer limits of social responsibility. Through these cases, courts define standards of care that can communicate acceptable behaviors without overruling the long-standing precedent of negligence principles.²⁷⁶ Similarly, state criminal courts have articulated a common law standard of care for criminal liability and its limitations. For example, parents owe a duty to a child, while innkeepers owe a duty to their guests. However, under these collective rules, in most jurisdictions, a stranger can watch another drown in a pool and yet, he has no duty to help. These cases have come to define societal norms and expectations.²⁷⁷

To those who strictly adhere to precedent and *stare decisis*, social media harms present a particular problem. *NetChoice, LLC v. Paxton* clearly illustrates this point. This case arose from a challenge to Texas's 2021 adoption of HB20, a law that prohibits large social media platforms from removing or

constitutions, but laws and institutions must go hand in hand with the progress of the human mind. As that becomes more developed, more enlightened, as new discoveries are made, new truths discovered and manners and opinions change, with the change of circumstances, institutions must advance also to keep pace with the times.”)

²⁷⁴ William H. Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693, 698–99 (1976).

²⁷⁵ See, e.g., *Plessy v. Ferguson*, 163 U.S. 537, 544, 548 (1896) (finding that racial segregation under the guise of “separate but equal” was valid and constitutional), compare *Brown v. Bd. of Educ. of Topeka*, 347 U.S. 483, 494–95 (1954) (overturning the *Plessy* outcome, and the “separate but equal” conclusion).

²⁷⁶ See, e.g., *Kinzer v. Fid. & Deposit Co. of Md.*, 572 N.E.2d 1151, 1153 (Ill. App. 1991) (discussing common-law duty of public official doctrine).

²⁷⁷ 30 U.S.C. § 826(a) (“No person shall bring an action against any covered individual or his or her regular employer for property damage or an injury (or death) sustained as a result of carrying out activities relating to mine accident rescue or recovery operations.”). *But see* VT. STAT. ANN. tit. 12, § 519 (West, Westlaw current through Chapters 186 (end) and M–19 (end) of the Adjourned Sess. of the 2021–2022 Gen. Assemb. (2022)) (“A person who knows that another is exposed to grave physical harm shall, to the extent that the same can be rendered without danger or peril to himself or herself or without interference with important duties owed to others, give reasonable assistance to the exposed person unless that assistance or care is being provided by others.”).

restricting users' content based on user viewpoint.²⁷⁸ NetChoice and CCIA²⁷⁹ sought an injunction to prevent enforcement of the law until a court could hear the case on the merits.²⁸⁰ The injunction issue reached the Supreme Court, which granted the petition to stay the injunction.²⁸¹ Justice Alito, considered by many to be a strict constructionist,²⁸² dissented and noted that it was unclear how courts could apply pre-social media precedent to large social media companies.²⁸³ Under this reasoning, courts do not have any precedent available to them to reach legal conclusions on social media harms.

Despite Justice Alito's concerns, the tenets of our judicial system do not allow courts to refuse cases of first impression. Our jurisprudence allows reviewing courts to adapt to situations not contemplated by past courts.²⁸⁴ Consider, for example *CompuServe Inc. v. Cyber Promotions, Inc.*, in which a federal district court reached back to the ancient common law tort of conversion to resolve what it defined as "novel issues regarding the commercial use of the Internet."²⁸⁵ In this case, the court ruled that a marketing company was liable for trespass to chattels, which evolved from conversion, when it flooded a computer servicer with unsolicited emails.²⁸⁶ Similarly, in *Sluss v. Commonwealth*, the Kentucky Supreme Court relied on traditional issues of Sixth Amendment trial principles to resolve a case of first impression concerning the interaction on Facebook

²⁷⁸ H.B. 20, 87th Leg., S. Comm. (Tex. 2021).

²⁷⁹ "CCIA" is an abbreviation for The Computer and Communications Industry Association. Both NetChoice and CCIA are not-for profit organizations whose missions are to promote technological freedom.

²⁸⁰ A federal judge in Texas granted the preliminary injunction and blocked HB20, holding that the law violates the social media platforms' First Amendment right to moderate user-submitted content, restricts discretion, and puts burdens on the platforms to implement new operational requirements. *NetChoice, LLC v. Paxton*, 573 F. Supp. 3d 1092, 1107, 1109–10 (W.D. Tex. 2021). The state of Texas appealed to the United States Court of Appeals for the Fifth Circuit, which lifted the injunction. *NetChoice, LLC v. Paxton* No. 21-51178, 2022 WL 1537249 (5th Cir. May 11, 2022) (per curiam).

²⁸¹ *NetChoice, LLC v. Paxton*, 142 S. Ct. 1715, 1715–16 (2022).

²⁸² See Stephen Henderson & Dean Strang, *Double Jeopardy's Dual Sovereignty: A Tragic (and Implausible) Lack of Humility*, 18 OHIO ST. J. CRIM. L. 365, 376 (2020).

²⁸³ *NetChoice*, 142 S. Ct. at 1717 (Alito, J., dissenting).

²⁸⁴ See James Chen, *Common Law: What It Is, How It's Used, and How It Differs From Civil Law*, INVESTOPEDIA (May 20, 2022), <https://www.investopedia.com/terms/c/common-law.asp> [<https://perma.cc/M82H-FNA9>] ("The value of a common-law system is that the law can be adapted to situations that were not contemplated at that time by the legislature.")

²⁸⁵ *CompuServe Inc. v. Cyber Promotions, Inc.*, 962 F. Supp. 1015, 1017, 1020–21 (S.D. Ohio 1997).

²⁸⁶ *Id.* at 1020–21, 1027.

between jurors and persons closely affiliated with the trial.²⁸⁷ Thus, courts may decide novel issues using pre-social media case law. They are free to recognize the uniqueness of social media harms and shape new normative behavior without straying from the most sacred principles of our judicial system.

IV. JUDICIAL FAILURE TO SET SOCIAL NORMS

The lack of precedent considering social media harms is no excuse for courts to dismiss these claims. Centuries of American jurisprudence reflect courts' institutional advancement of societal norms. In these instances, courts extended liability to present-day situations, and in doing so, communicated a new set of common law acceptable norms. Official and unofficial reporters are replete with cases that adopt forward-thinking principles based on previously decided case law.²⁸⁸ Both state and federal courts have demonstrated that new rules can emerge without trampling precedent.²⁸⁹

Courts have regulated human behavior in several instances. The common law duty of care for omission liability in homicide is one illustration.²⁹⁰ Through the courts' ability to punish, individuals recognize certain obligations under the law. Society understands, for example, that a parent owes a legal duty to their child,²⁹¹ and a landlord owes a duty to a tenant.²⁹² Judicial reasoning in court decisions has also similarly

²⁸⁷ *Sluss v. Commonwealth*, 381 S.W.3d 215, 224–26 (Ky. 2012) (concerning “the first time that the Court has been asked to address counsel’s investigation of jurors by use of social media”).

²⁸⁸ *See, e.g., Shor v. Billingsley*, 158 N.Y.S.2d 476 (Sup. Ct. 1956), *aff’d*, 169 N.Y.S.2d 416 (App. Div. 1957) (permitting application of libel law to defamatory television broadcasts not read from a script).

²⁸⁹ *See Whorton v. Bockting*, 549 U.S. 406, 421 (2007) (acknowledging the Supreme Court’s power to create “new rules”); *Harper v. Virginia Dep’t of Tax’n*, 509 U.S. 86, 123 (1993) (O’Connor, J., dissenting) (quoting *Ariz. Governing Comm. for Tax Deferred Annuity and Deferred Compensation Plans v. Norris*, 463 U.S. 1073, 1109 (O’Connor, J., concurring)) (“[E]ven a decision that is ‘controlled by the . . . principles’ articulated in precedent may announce a new rule, so long as the rule was ‘sufficiently debatable’ in advance.”). Note: State Supreme Court decisions may be applied in other cases on both direct and collateral review, if it is an “old rule” dictated by existing precedent; however, a new rule is generally applicable only to cases that are still on direct review. *See Whorton*, 549 U.S. at 416; *see generally State v. Kelly*, 478 A.2d 364 (N.J. 1984) (among first cases recognizing battered women’s syndrome).

²⁹⁰ *See, e.g., United States v. Knowles*, 26 F. Cas. 800, 802 (N.D. Cal 1864) (finding a breach of a legal duty in the captain’s failure to rescue crewmember).

²⁹¹ *See, e.g., Holodook v. Spencer*, 324 N.E.2d 338, 342 (N.Y. 1974).

²⁹² *See, e.g., Shump v. First Continental-Robinwood Assoc.*, 644 N.E.2d 291, 296 (Ohio 1994).

recognized the common-law duty of animal owners to keep others free from harm.²⁹³

Further, courts have created social expectations regarding acceptable conduct when considering cases of first impression due to technological advances. In *Shor v. Billingsly*, a New York court extended libel to broadcasts, despite precedent that had only considered the tort in the context of print media.²⁹⁴ There are also several cases that considered driver liability at the dawn of the age of cars, including the duty a driver owes to his passenger and the obligation of drivers to make sure their tires are safe for the road.²⁹⁵ These cases corralled the potential harm new technology posed by creating common law duties. Today's decisional courts, however, have passed up the chance to signal normative behavior for social media use.

Today, over 59 percent of middle school and high school students have experienced some type of online bullying.²⁹⁶ The Drew and Meier cases are only two of many examples that illustrate how off-campus cyberbullying can lead to student suicide or death.²⁹⁷ Cyberbullying, which the Centers for Disease Control and Prevention defines as a form of violence,²⁹⁸ reaches exponentially more individuals than word of mouth. For instance, when a hateful message spreads through TikTok, it is likely to reach more people and humiliate and harm the victim more than words spoken on school grounds. Despite this alarming harm, the *Mahanoy* Court declined the opportunity to provide guidance regarding normative online student speech. Instead, it clung onto the half-century-old concept that schools

²⁹³ See *Lieberman v. Powers*, 873 N.E.2d 803, 807–08 (Mass. App. Ct. 2007); *Overview of the "One Bite Rule"*, KENNETH M. PHILLIPS DOG BITE L., <https://dogbitelaw.com/one-bite-rule/overview-of-the-one-bite-rule> [<https://perma.cc/VT68-5AGB>].

²⁹⁴ *Shor v. Billingsley*, 158 N.Y.S.2d 476, 486–87 (Sup. Ct. 1956), *aff'd*, 169 N.Y.S.2d 416 (App. Div. 1957).

²⁹⁵ See, e.g., *Massaletti v. Fitzroy*, 118 N.E. 168, 177 (Mass. 1917) (a driver owes a duty to his passenger); *Delair v. McAdoo*, 188 A.181, 184 (Pa. 1936) (a driver has a duty to inspect his tires).

²⁹⁶ Monica Anderson, *A Majority of Teens Have Experienced Some Form of Cyberbullying*, PEW RSCH. CTR. (Sept. 27, 2018), <https://www.pewresearch.org/internet/2018/09/27/a-majority-of-teens-have-experienced-some-form-of-cyberbullying> [<https://perma.cc/8W6T-N6NY>].

²⁹⁷ See *supra* notes 112–123 and accompanying text; see also *S.H. v. Issaquah Sch. Dist.*, No. 2:21-CV-00137-DGE, 2022 WL 279139, at *4 (W.D. Wash. Jan. 31, 2022); *Byrne v. Springfield Sch. Dist.*, No. CV 21-3199, 2021 WL 4847804, at *3 (E.D. Pa. Oct. 14, 2021).

²⁹⁸ *Fast Fact: Preventing Bullying*, CDC (Sept. 2, 2021), <https://www.cdc.gov/violenceprevention/youthviolence/bullyingresearch/fastfact.html> [<https://perma.cc/X9HG-FSTC>].

are limited to regulating off-campus speech that causes a substantial disruption on campus.²⁹⁹

The *Mahanoy* decision ignored the fact that off-campus speech in the current digital age has a much greater reach than it did during pre-social media times. In doing so, the Court seemed to reject, on a factual level, the line of lower court cases finding substantial harm for off-campus posts. In *Doe v. Hopkinton Public Schools*, the First Circuit denied the plaintiff's claim when they were suspended for participating in a group chat that directly encouraged others to bully a peer.³⁰⁰ Likewise, in *Bell v. Itawamba Cnty. Sch. Bd.*, the Sixth Circuit ruled that a student's off campus online rap recording posted on Facebook and YouTube threatening his coach could have caused substantial disruption to the school.³⁰¹ It reasoned that the school was justified in punishing the student, even though the social media post did not result in the kind of disruption the school sought to prevent.³⁰²

Both the students in *Bell* and *Mahanoy* used offensive language to threaten coaches. Bell's language was more graphic, and perhaps more offensive, than B.L.'s,³⁰³ but in each instance, the message was basically the same: "f**** the coaches." In his lone dissent in *Mahanoy*, Justice Thomas reacted to the majority's reluctance to acknowledge the uniqueness of digital communication by recognizing the real-life practicalities of the decision.³⁰⁴ He chastised the majority for failing to consider the need for schools to have more authority given the ephemeral nature of social media.³⁰⁵ The general post-*Mahanoy* rule is that schools cannot discipline student social media harm absent proof of "substantial disruption."³⁰⁶ Had the court not demanded such a heightened level of threat or at least recognized the disruption

²⁹⁹ See *supra* notes 173–Error! Bookmark not defined.175 and accompanying text.

³⁰⁰ *Doe v. Hopkinton Pub. Schs.*, 19 F.4th 493 (1st Cir. 2021) (finding that the school had legitimate interest in punishing student who impermissibly video-taped and photographed student, and then circulated the media in a group chat, where they encouraged others to bully the victim); see also *A.V. v. Plano Indep. Sch. Dist.*, No. 4:21-CV-00508, 2022 WL 467393, at *10–11 (E.D. Tex. Feb. 14, 2022).

³⁰¹ *Doe*, 19 F.4th at 493.

³⁰² *Bell v. Itawamba Cnty. Sch. Bd.*, 799 F.3d 379 (5th Cir. 2015).

³⁰³ The song language that he posted included, "betta watch your back / I'm a serve this n[****] like I serve the junkies with some crack" and "middle fingers up if you want to cap that n[****] / middle fingers up / he get no mercy n[****]." *Id.* at 384–85.

³⁰⁴ *Mahanoy Area Sch. Dist. v. B.L.*, 141 S. Ct. 2038, 2059–63 (Thomas, J., dissenting). "[W]e do not believe the special characteristics that give schools additional license to regulate student speech always disappear when a school regulates speech that takes place off campus." *Id.* at 2045.

³⁰⁵ *Id.* at 2062.

³⁰⁶ See *supra* notes 172–173 and accompanying text.

to student learning that occurs when students are barraged with harmful social media posts, its ruling would have had a beneficial, rather than a deleterious effect.

Following *Mahanoy*, schools have even less ability to limit students' social media use or their engagement in cyberbullying on school grounds than it did prior to the advent of social media.³⁰⁷ The result is what the American Psychiatric Association calls a depreciation of student rights.³⁰⁸ Not only was *Mahanoy* wrongly decided, but the court missed the opportunity to limit *Tinker* in a way that would have granted school administrators more power to harness the growing incidents of harmful student social media speech.

If the Supreme Court failed to endorse normative conduct among school-age children, state and federal courts have failed to signal acceptable behavior among all social media users. The Pew Research Center recently found that four in ten individuals are subject to online harassment.³⁰⁹ 41 percent of all US adults report experiencing online harassment.³¹⁰ More than half the country considers the problem a plague in the digital space.³¹¹

Court decisions, however, are messaging that online bullying is nothing more than a nuisance with which society must contend. The *laissez-faire* attitude the *Love* and *Bauer* courts exhibited by dismissing outrageous and harmful words posted on social media sites messaged that those who engage in similar conduct will suffer little or no consequences. The *Bauer* court found that the plaintiff was not liable for calling the defendant a "slumlord" on Twitter.³¹² Whereas courts ruled that a jury had the right to consider whether the same words were defamatory when the defendants announced them at a community meeting.³¹³ When courts fail to rule in favor of a plaintiff harmed by online speech, the courts forfeit the chance for deterrence. Even more, when those same courts fail to set consequences for online speech

³⁰⁷ See Edwin C. Yohnka, *Should Schools Punish Off-Campus Cyberbullying?*, N.Y. TIMES UPFRONT (Oct. 9, 2017), <https://upfront.scholastic.com/issues/2017-18/100917/should-schools-punish-off-campus-cyberbullying.html#1140L> [<https://perma.cc/GBK4-FQMH>] (discussing the prevalence of cyberbullying and the need for schools to address off-campus bullying).

³⁰⁸ Dewy G. Cornell & Susan Limber, *Do U.S. Laws Go Far Enough to Prevent Bullying at School?*, 47 AM. PSYCH. ASS'N 64 (2016), <https://www.apa.org/monitor/2016/02/ce-corner> [<https://perma.cc/GK56-JTC6>].

³⁰⁹ Emily Vogels, *The State of Online Harassment*, PEW RSCH. CTR. (Jan. 13, 2021), <https://www.pewresearch.org/internet/2021/01/13/the-state-of-online-harassment/> [<https://perma.cc/SR9R-7TNK>].

³¹⁰ *Id.*

³¹¹ *Id.*

³¹² *Bauer v. Brinkman*, 958 N.W.2d 194, 202 (Iowa 2021).

³¹³ *Near E. Side Cmty. Org. v. Hair*, 555 N.E.2d 1324, 1326 (Ind. Ct. App. 1990).

but rule that the exact words are actionable when published or said in a public forum, the message to individuals is that online speech is without legal boundaries.

Cases that rely on pre-social media law are setting a destructive precedent by signaling to society that words on the Web are more hyperbolic than harmful. They also suggest that these words are not capable of causing the same level of injury as those that appear on more traditional media, like newspapers or the airwaves. Lower courts' failure to adapt precedent "to keep pace with the times" has cost society the chance to understand the limits of social media outrageous conduct.³¹⁴ Those in a position to evaluate whether posts are actionable have come to treat them as statements made with a wink and a nod; their ferocity is diluted by the societal sense that posts made on social media do not carry with them the potential for the emotional or economic harm equal to statements on print or broadcast media.

The *Elonis* decision further supports the notion that an absence of common law pronouncements allows for conduct that is against social norms. The *Elonis* Court failed to address First Amendment claims, which would have given the Court a chance to address Web hate speech. The *Packingham* Court expanded the use of social media freedom. Over the objection of the North Carolina government, the Court allowed a sexual predator access to websites that are frequented by those under the age of sixteen. The facts of *Packingham* may have justified the reversal—*Packingham* posted about a traffic violation—but striking down the statute aimed at keeping child predators off Internet sites frequented by children sends the message that social media use is more important than its harms.

Social media has a relative newness, particularly when considering the time it takes for cases to make their way through the court system. As a practical matter, many recent cases have resolved issues concerning social media harms with a blind eye toward the relative uniqueness of the harm, holding dearly to the confines of previous case law. These courts have boxed social media ills into pre-social media precedent. They did not have to go this route. Both state and federal courts have established that new rules can emerge without trampling on old precedent.³¹⁵ The

³¹⁴ *Quotations on the Jefferson Memorial*, *supra* note 273.

³¹⁵ *Whorton v. Bockting*, 549 U.S. 406, 406 (2007) (stating Supreme Court decision may be applied in other cases on both "direct and collateral review" if it is an "old rule" dictated by existing precedent; however, new rule is generally applicable only to cases that are "still on direct review"); *see also Harper v. Va. Dep't of Tax'n.*, 509 U.S. 86, 123 (1993) (O'Connor, J., dissenting) (acknowledging the Court's power to create new

demonstrated harm of repugnant social media posts, coupled with the current trend of dismissiveness toward content posted on the Web, demand that the judiciary change course and rule in a way that communicates acceptable social media norms.

CONCLUSION

It has been a quarter of a century since the advent of the earliest social media sites. Legislatures have acted swiftly to consider social media harms in the criminal context. Courts have failed to keep lockstep in the civil space. To be sure, courts act much more slowly than do legislatures. Ultimately, while we are at the beginning of understanding social media's vast potential for harm, courts have a duty and responsibility to change with the times. Failure to do so is a disservice to society. The judiciary must be more forward thinking when deciding cases concerning social media harms. Bluntly stated, courts need to do their fair share to assure Internet Justice as failure to so do will prevent the ability to punish the ever increasing number of social media harms.

rules, stating "even a decision that is 'controlled by the . . . principles' articulated in precedent may announce a new rule, so long as the rule was 'sufficiently debatable' in advance." (quoting *Ariz. Governing Comm'n for Tax Deferred Annuity and Deferred Comp. Plans v. Norris*, 463 U.S. 1073 (1983) (O'Connor, J., concurring)).

