Tortious Speech in the Digital Age

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The First Amendment to the United States Constitution provides unambiguously and without exception that "Congress shall make no law . . . abridging the freedom of speech."[1] Read literally, there is no room under the First Amendment for legislation protecting the public from *any* abuse of the right to free speech—including shouting "fire" in a crowded theater, child pornography, or manipulation of the public through vigorous disinformation campaigns. Yet before the First Amendment was incorporated against state law, the drafters of the Arizona Constitution took a more cautious approach: "Every person may freely speak, write, and publish on all subjects, *being responsible for the abuse of that right*."[2]

In recent years, the experience of widespread disinformation and hate speech has tested Americans' patience and sparked legitimate debate about the continued viability of an eighteenth-century concept of free speech—a concept developed before the ability to publish everything from critical facts to maliciously false propaganda to billions of people at zero cost had even become a fantasy. To make matters murkier, the purely textualist reading of the First Amendment has never found footing in the law, while state constitutional provisions like Arizona's have largely been ignored as federal constitutional overlays have shaped state tort actions.[3]

One in five American adults followed Donald Trump on Twitter in mid-2019.[4] Trump became a more prolific tweeter throughout his presidency,

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1. U.S. CONST. amend. I.

2. ARIZ. CONST. art. 2, § 6 (emphasis added).

3. *See, e.g.*, Schenck v. United States, 249 U.S. 47, 52 (1919) (holding statutory restriction on speech was constitutional where the speech was "used in such circumstances and [was] of such a nature as to create a clear and present danger"). *See infra* note 41 and accompanying text.

4. Stefan Wojcik, Adam Hughes & Emma Remy, *About One-in-Five Adult Twitter Users in the U.S. Follow Trump*, PEW RSCH. CTR. (July 15, 2019), https://www.pewresearch.org/fact-tank/2019/07/15/about-one-in-five-adult-twitter-users-in-the-u-s-follow-trump/ [https://perma.cc/V5N8-X86U]. Trump had more than eighty-eight million followers, though not all from the United States. *Id.*; *see also Donald Trump and Twitter—2009/2021 Analysis*, TWEETBINDER, https://www.tweetbinder.com/blog/trump-twitter/ [https://perma.cc/QWL8-GZRF].

penning an average of fewer than 10 tweets per day in 2017, about 20 tweets per day in 2019, and more than 30 tweets per day in 2020.[5]

Then-President Trump tweeted on November 1, 2020—two days before election day—that "Joe Biden called Black Youth SUPER PREDATORS. They will NEVER like him, or vote for him. They are voting for 'TRUMP.'"[6] Though Trump went on to lose both the electoral college and the popular vote, the tweet reached a wide audience.[7] Most importantly, tens of millions of Americans either believed the statement or were unconcerned with its accuracy.[8]

The tweet was provably false.[9] President Biden *had* used the term "predator" in a decades-earlier Senate floor speech, but not as Trump proclaimed; while advocating for a precursor to the Violent Crime Control and Law Enforcement Act of 1994, Biden had stated the country needed to focus on young people who lacked structure and opportunities, because some of them would "become the predators 15 years from now."[10] Biden never singled out "Black Youth" as Trump alleged.[11]

The month before the much-discussed Super Predators tweet,[12] President Trump's rhetoric was cast at a different target: Dr. Anthony Fauci, the director of the National Institute of Allergy and Infectious Diseases.[13] On October 13, 2020, Trump tweeted "Tony's pitching arm is far more accurate

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5. Adilbek Madaminov, *All the President's Tweets*, MEDIUM (Nov. 24, 2020), https://medium.com/swlh/all-the-presidents-tweets-e7d31fd1dbc6 [https://perma.cc/4AKE-MM9X].

6. Miriam Valverde, *No, Biden Did Not Call Black Youth 'Super Predators'*, POLITIFACT (Nov. 1, 2020) (repeating the text of the tweet, which has since been deleted), https://www.politifact.com/factchecks/2020/nov/01/donald-trump/no-biden-did-not-call-black-youth-super-predators/ [https://perma.cc/U6F9-CTBZ].

7. *See* Wojcik et al., *supra* note 4.

8. *Id.*

9. *See* Valverde, *supra* note 6.

10. *Id.*

11. *See id.*

12. The tweet was discussed by many media outlets. *See, e.g.*, Hayley Miller, *Trump Bashed for Falsely Claiming Biden Called Black Kids 'Super Predators'*, HUFFPOST (Nov. 1, 2020), https://www.huffpost.com/entry/trump-false-claim-biden-superpredators_n_5f9ee811c5b658b27c3b8e09 [https://perma.cc/45YL-VDC5]; Katelyn Caralle, *Trump Says 'Sources' Tell Him Joe Biden Repeatedly Uses the Term 'Super Predator' When Referring to Young Black Men—Despite Any Evidence Democrat Has Said It*, DAILY MAIL NEWS (Nov. 1, 2020), https://www.dailymail.co.uk/news/article-8902741/Trump-says-sources-tell-Biden-repeatedly-uses-term-Super-Predator-black-men.html [https://perma.cc/62XB-VP3D]; AFP USA, *Trump Falsely Claims Biden Called Black Youths 'Super Predators*,*'* AFP FACT CHECK (Nov. 2, 2020), https://factcheck.afp.com/trump-falsely-claims-biden-called-black-youths-super-predators [https://perma.cc/LN2G-9PMN].

13. *See Anthony S. Fauci, M.D., NIAID Director*, NAT'L INST. OF ALLERGY & INFECTIOUS DISEASES, https://www.niaid.nih.gov/about/director [https://perma.cc/V9LQ-5JBH].

than his prognostications."[14] This was no compliment—one week later, Trump clarified that Dr. Fauci "threw out perhaps the worst first pitch in the history of Baseball!"[15]

Unlike the Super Predator tweet, the Fauci baseball tweets were not provably false. Though many sports commentators rank the worst celebrity first pitches throughout a given season, decade, or all time, no objective criteria can prove (or disprove) that Dr. Fauci truly threw the worst first pitch in baseball's history.[16] Nor can the accuracy of one pitch compare laterally to forecasts about a global pandemic.

What recourse does the target of a Twitter insult have? An action for defamation by the victim of the speech is the traditional remedy for injury caused by speech, and under current law, the touchstone for such an action is not the insulting nature of the speech but rather its provable falsity.[17] In this era, one might reasonably ask whether private civil litigation over individual statements is the best remedy—or even a practical remedy—in a world deluged by millions of toxic electronic publications.

A party aggrieved by online speech must navigate the patchwork of U.S. Supreme Court cases that limit the types of statements that are actionable, including scienter requirements prescribed by the actual malice standard.[18] By statute, federal law further immunizes the publishers of this online speech, creating a safe haven where online bullying can flourish.[19] Supreme Court jurisprudence gives us the most basic structure to analyze a defamation claim arising out of a mean Tweet, but it falls short of addressing the tsunami of online speech published every day on social media and other platforms.

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14. Donald J. Trump (@realdonaldtrump), TWITTER (Oct. 13, 2020), *archived by* Kevin Quealy, *The Complete List of Trump's Twitter Insults (2015-2021)*, N.Y. TIMES: THE UPSHOT (Jan. 19, 2021), https://www.nytimes.com/interactive/2021/01/19/upshot/trump-complete-insult-list.html#anthony-fauci [https://perma.cc/NC7M-C9Z9].

15. Donald J. Trump (@realdonaldtrump), TWITTER (Oct. 19, 2020), *archived by* Kevin Quealy, *The Complete List of Trump's Twitter Insults (2015-2021): Dr. Anthony Fauci*, N.Y. TIMES: THE UPSHOT (Jan. 19, 2021), https://www.nytimes.com/interactive/2021/01/19/upshot/trump-complete-insult-list.html#anthony-fauci [https://perma.cc/Y2BA-8CEM].

16. *See, e.g.*, Jimmy Traina, *Traina Thoughts: Worst Celebrity MLB First Pitches of All Time*, SPORTS ILLUSTRATED (July 9, 2019), https://www.si.com/extra-mustard/2019/07/09/worst-mlb-first-pitches-all-time-videos [https://perma.cc/55D9-UNB4]; Mollie Walker, *The 10 Worst First Pitches Ever, From Dr. Fauci to 50 Cent*, N.Y. POST (July 24, 2020), https://nypost.com/list/worst-first-pitches-ever/ [https://perma.cc/6KYC-69GT].

17. *See, e.g.*, Turner v. Devlin, 848 P.2d 286, 294 (Ariz. 1993) (holding that the key inquiry for defamation cases is whether the challenged speech is "susceptible to proof of truth or falsity").

18. David A. Logan, *Tort Law and the Central Meaning of the First Amendment*, 51 U. PITT. L. REV. 493, 498 (1990).

19. *See infra* note 121.

Arizona's version of the First Amendment takes a more cautious approach: "Every person may freely speak, write, and publish on all subjects, being responsible for the abuse of that right."[20] We argue that this Constitutional guarantee should inform state courts when called upon to fill the gaps left by *Milkovich*[21] and the other *New York Times Co. v. Sullivan*[22] progeny, as well as the Communications Decency Act,[23] with new policy.[24] Part I defines actionable speech, as outlined by Arizona and Supreme Court jurisprudence. Part II explores the Communications Decency Act. Part III looks at tortious speech in the context of social media platforms. Part IV hypothesizes how a strict application of the Communications Decency Act would affect social media platforms. Finally, Part V proposes a solution.

I. BACKGROUND

A. Arizona's 1919 Libel Roots

Just seven years after Arizona became a state,[25] the Arizona Supreme Court heard its first defamation case.[26] The subject of the libel was Colonel Charles W. Harris, the adjutant general of the newly formed state.[27] The defendant newspaper, the *Arizona Republican*, published an article stating that the Governor had demanded Harris's resignation because Harris was involved in seditious activities, but Harris refused to resign.[28] With the ink on the Arizona Constitution still drying, the Arizona Supreme Court issued an opinion that painted its conception of actionable libel with broad strokes.[29] A publication did not necessarily have to make the libelous statement directly, but libel could be imputed through a suspicion, a comparison, or "a matter of hearsay, or answer, or exclamation," or use of irony or insinuation.[30] But at the same time, the court recognized the importance of the freedom of press,

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20. ARIZ. CONST. art. 2, § 6.
21. *See* Milkovich v. Lorain J. Co., 497 U.S. 1 (1990).
22. *See* 376 U.S. 254 (1964).
23. 47 U.S.C. § 230.
24. *See infra* p. 526.
25. Arizona was admitted to the United States in 1912. 37 Stat. 1728 (Feb. 4, 1912) (proclamation by President Taft of Arizona's statehood); *see also* Sean Newgent, *The Long Road to Arizona's Statehood*, KGUN NEWS (Feb. 14, 2021), https://www.kgun9.com/news/local-news/the-long-road-to-arizonas-statehood [https://perma.cc/4LU2-X7VJ].
26. *See* Ariz. Pub. Co. v. Harris, 181 P. 373 (Ariz. 1919).
27. *Id.* at 374.
28. *Id.* at 374–75.
29. *See id.* at 375–78.
30. *Id.* at 375 (citation and quotation omitted).

particularly as it relates to the press criticizing public officials—as long as it is not done maliciously.[31] To resolve this tension, the court held that truths, and not falsehoods, are privileged (or protected) by their publication because they serve a public interest.[32]

The court decided that Harris could recover against the newspaper unless the newspaper's statement was true or was privileged.[33] First, the defendant newspaper agreed that Harris never made a seditious report to the Governor.[34] Second, the court determined that the statement was not privileged because it was not published in good faith and because the newspaper published it with malice.[35] The contrast between a world in which public officials were expected to adhere to the highest standards of truthfulness in speech and today's world is stark indeed.

B. Defamation's Origins in Common Law

The communications torts include defamation, invasion of privacy, injurious falsehood, misrepresentation, tortious interference with business relations, intentional infliction of emotional distress, intentional alienation of affection, malicious prosecution, among others.[36] From these broad categories, the torts can be subdivided into different categories—each with unique elements.[37] For example, invasion of privacy has four sub-species: public disclosure of private facts, intrusion, false light, and commercial exploitation.[38] Defamation is commonly subdivided into libel and slander.[39] Though there is quite a bit of overlap in the communications torts, each protects a different interest and involves a different kind of speech.[40]

Defamation originated as a common law tort.[41] As a personal tort, an essential element of defamation was the plaintiff's emotional distress resulting from the defendant's defamatory statements.[42] Seditious speech, defined as "false, scandalous, and malicious" writings against the United

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31. *Id.* at 376–77.
32. *Id.* at 377.
33. *Id.* at 376.
34. *Id.*
35. *Id.* at 377.
36. David A. Anderson, *Tortious Speech*, 47 WASH. & LEE L. REV. 71, 72 (1990).
37. *Id.*
38. *Id.*
39. *Id.* The focus of this article is on the defamation torts; the remaining communication torts—while critically important—are beyond the scope of this article.
40. *Id.*
41. David A. Logan, *Tort Law and the Central Meaning of the First Amendment*, 51 U. PITT. L. REV. 493, 498 (1990).
42. *Id.*

States, was criminalized by the Sedition Act of 1798, which was short lived; it expired by 1801.[43]

In the case of third-party speech, the common law distinguished between publishers of defamatory speech, distributors of such speech, and mere common carriers of such speech.[44] A publisher who exercises editorial control is vicariously liable for the defamatory statements,[45] while a distributor (such as a library or newsstand) is only liable if it had actual or constructive knowledge of the defamatory nature of the statements.[46] A common carrier, such as a telephone company, is not liable for any information that it passively transmits.[47]

Only beginning in the 1960s did defamation take on a constitutional dimension with the seminal decision in *New York Times v. Sullivan*, which added, for the first time, a First Amendment component to defamation cases involving public officials.[48]

C. New York Times v. Sullivan: The Bedrock Libel Case

With *New York Times v. Sullivan*, the Supreme Court made a foray into regulating speech.[49] In this case, the New York Times ran a full-page advertisement on March 29, 1960, titled "Heed Their Rising Voices."[50] It described the non-violent protest efforts by Southern Black students, the resulting actions by "Southern violators," and ultimately appealed for funds for the Committee to Defend Martin Luther King and the Struggle for Freedom in the South.[51] Not all of the claims in the advertisement were strictly true; for example, the advertisement claimed Dr. Martin Luther King, Jr. had been arrested seven times by the Southern violators—the real number was four.[52] Sullivan, as Police Commissioner of the City of Montgomery, challenged the statements as libelous, arguing that the actions of the police

43. The Sedition Act of 1798, ch. 74, 1 Stat. 596–97 (1798).

44. Patricia Spiccia, Note, *The Best Things in Life Are Not Free: Why Immunity Under Section 230 of the Communications Decency Act Should Be Earned and Not Freely Given*, 48 VALPARAISO UNIV. L. R. 369, 378 (2018).

45. *Id.*

46. *Id.*

47. *Id.*

48. 376 U.S. 254 (1964).

49. *See* Mark Tushnet, New York Times v. Sullivan *Around the World*, 66 ALA. L. REV. 337, 338 (2014) (quoting the Australian High Court while describing, and criticizing, the U.S.'s approach to finding the "balance" between "free speech against protection of individual reputation").

50. *N.Y. Times Co.*, 376 U.S. at 256.

51. *Id.* at 256–57.

52. *Id.* at 258.

department could be imputed to him (despite the fact that it never mentioned his name).[53] The thrust of Sullivan's argument was that the ad implied he was responsible for actions of the police, and the ad damaged his reputation.[54]

The case proceeded to trial by jury, and the judge instructed the jury that the statements were libelous per se, but negligence was not evidence of actual malice on behalf of the newspaper.[55] The jury awarded Sullivan $500,000 in damages.[56] The Supreme Court of Alabama affirmed the trial judge's ruling and eschewed the newspaper's constitutional argument.[57] Moreover, the Alabama Court held that the jury could infer actual malice from the newspaper's "irresponsibility" in printing the ad when the newspaper should have known of its false nature given their extensive reporting on the demonstrations.[58]

The United States Supreme Court reversed the Alabama Supreme Court's judgment and ruled unanimously in favor of the *New York Times*.[59] The case established the "actual malice" standard.[60] It is not enough for a plaintiff to show that the statement is merely false, or untruthful, the Court held.[61] Rather, when the statement concerns a public official, the plaintiff must show that the libelous statement was made "with knowledge that [the statement] was false" or "with reckless disregard of whether it was false or not."[62]

The majority opinion, authored by Justice Brennan, focused on the constitutional hook of libel actions, confirming "[t]he [g]eneral proposition that freedom of expression on public questions is secured by the First Amendment" and holding that protection is needed to "assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people."[63] The Court noted that libel causes of action had to be decided "against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials"—in other

53. N.Y. Times Co. v. Sullivan, 144 So. 2d 25, 28–29 (Ala. 1962) [hereinafter N.Y. Times Co. Ala. Decision].

54. *See id.*

55. *N.Y. Times Co.*, 376 U.S. at 262.

56. N.Y. Times Co. Ala. Decision at 28.

57. *Id.* at 28, 40 ("The First Amendment of the U.S. Constitution does not protect libelous publications. . . . The Fourteenth Amendment is directed against State action and not private action.").

58. *Id.* at 51.

59. *N.Y. Times Co.*, 376 U.S. at 284.

60. *Id.* at 280.

61. *See id.* at 279–80.

62. *Id.* at 280.

63. *Id.* at 269 (quoting Roth v. United States, 354 U.S. 476, 484 (1957)).

words, the Court favored freedom of speech over a public official's right to privacy.[64]This momentous opinion—deemed "bold"[65] at the time—ushered in a wave of First Amendment litigation.[66]

D. Furthering the "Actual Malice" Standard

In *St. Amant v. Thompson*, the Court refined its definition of actual malice, requiring that the defendant "in fact entertained serious doubts as to the truth of his publication."[67] Moreover, the Court clarified that actual malice is not an objective standard, but rather a subjective one which puts a "premium on ignorance" by incentivizing a publisher not to inquire into the truth or falsity of the facts being published.[68] The Court maintained its focus on First Amendment protection for public figures (a term it defined loosely) rather than protection for "public questions."[69]

In *Gertz v. Robert Welch, Inc.*, the court clarified that the *New York Times* actual malice standard applied only to public officials and "public figures."[70] Justice Powell, writing for the majority, crafted a rule that allowed "the States [to] define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual."[71]

Ultimately, after several more decades of jurisprudence, the current status of the scienter necessary for defamation liability continues to hinge on the plaintiff's role as either a public figure or private citizen.[72] It remains a subjective standard and has often been criticized.[73] And actual malice—knowledge that the statement is false or with reckless disregard of whether it

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64. *Id.* at 270.

65. Arthur L. Berney, *Libel and the First Amendment—A New Constitutional Privilege*, 51 VA. L. REV. 1, 1 (1965).

66. *See* Logan, *supra* note 41, at 507.

67. 390 U.S. 727, 731 (1968); see also Curtis Publ'g Co. v. Butts, 388 U.S. 130 (1967), for more discussion on the Court's movement away from the common law of strict tort liability for defamation toward a First Amendment constitutional analysis of liability.

68. *St. Amant*, 390 U.S. at 731.

69. *See id.* at 732. *See generally* Logan, *supra* note 41, at 508 (comparing the focus in *Butts* on protection for public figures with the earlier focus in *N.Y. Times Co.* on protection for public questions).

70. 418 U.S. 323, 342 (1974) ("The *New York Times* standard defines the level of constitutional protection appropriate to the context of defamation of . . . [t]hose who . . . are properly classed as public figures and those who hold governmental office . . . .").

71. *Id.* at 347.

72. Logan, *supra* note 41, at 515.

73. *See* David A. Logan, *Rescuing Our Democracy by Rethinking* New York Times Co. v. Sullivan, 81 OHIO ST. L.J. 759, 778 (2020) (quoting criticisms of this subjective standard).

is false or truthful—remains the plaintiff's burden of proof for any defamation claim by a public official or public figure.[74]

The *Gertz* court itself stated that it was "lay[ing] down broad rules of general application."[75] These broad rules failed to adequately define who was a public figure and why, thus creating confusion in application of the *Gertz* rules in the lower courts.[76] This confusion was not resolved until the Court heard *Milkovich*.[77]

E. Milkovich Defines Actionable Speech

Building upon this foundation, the Court heard another defamation case in *Milkovich v. Lorain Journal Co.*[78] Michael Milkovich was a high school wrestling coach in Maple Heights, Ohio, where H. Don Scott was the Superintendent.[79] During a match, his team was involved in a fight with the opposing team and several people were injured.[80] Milkovich and Scott testified in front of the Ohio High School Athletic Association ("Athletic Association") at a hearing, and Milkovich's team was placed on probation for a year.[81] Later, several parents and students sued the Athletic Association, arguing they had been denied due process in that hearing.[82] Milkovich and Scott testified again.[83] The Ohio Court of Common Pleas overturned the Athletic Association's probation decision.[84]

The next morning, an Ohio newspaper published an article with a caption that read "TD Says."[85] The article stated that students at the school learned a lesson from Milkovich and Scott: "If you get in a jam, lie your way out."[86] The article also stated that "[a]nyone who attended the meet, whether he be from Maple Heights, [the rival school], or impartial observer, knows in his heart that Milkovich and Scott lied at the hearing after each having given his solemn oath to tell the truth."[87]

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74. *Id.* at 777–78.
75. *Gertz*, 418 U.S. at 343–44.
76. James Corbelli, *Fame and Notoriety in Defamation Litigation*, 34 HASTINGS L.J. 809, 832–33 (1983).
77. 497 U.S. 1 (1990).
78. *Id.* at 3.
79. *Id.* at 3–4.
80. *Id.* at 4.
81. *Id.*
82. *Id.*
83. *Id.*
84. *Id.*
85. *Id.*
86. *Id.*
87. *Id.* at 5.

Milkovich sued the author of the article for defamation, alleging that the article accused him of perjury.[88] The trial court granted summary judgment to the author of the article because "the article was an opinion protected from a libel action by 'constitutional law,'" and moreover, Milkovich failed to state a prima facie case of actual malice.[89] Milkovich appealed.[90]

The Supreme Court reversed the Ohio court's recognition "of a constitutionally required 'opinion' exception to the application of its defamation laws."[91] The Ohio court read the *Gertz* decision to draw a distinction between statements of opinion and fact, concluding that the decision rendered only defamatory statements of fact actionable.[92] The Court relied on a specific passage in *Gertz* and opined that it could not possibly be intended to carve out "a wholesale defamation exemption for anything that might be labeled 'opinion.'"[93] Ultimately, the Court could determine whether Milkovich actually committed perjury based on "a core of objective evidence" by comparing his testimony before the athletics board with his testimony before the trial court.[94] This is an objectively verifiable standard of proof that has been promulgated as a test of defamation.[95] Basically, the plaintiff in a defamation action must prove that the defamatory statement asserts an objectively verifiably defamatory fact.[96]

From *Milkovich*, then, comes the defining test of what constitutes actionable tortious speech: even where couched as an "opinion," statements on matters of public concern that reasonably imply false and defamatory information about public officials or figures are protected, except where the injured party can show that the statement was made with knowledge or reckless disregard as to their truth.[97] There is no special constitutional protection for the expression of purported facts couched as opinions.[98] *Milkovich* also drew a distinction between public figures and figures and private figures, reaffirming the *Gertz* rule.[99] A private person may recover in

88. *Id.* at 6.
89. *Id.* at 8.
90. *See id.* Scott also appealed a separate defamation action. *Id.*
91. *Id.* at 10.
92. *Id.* at 19.
93. *Id.* at 18.
94. *Id.* at 21.
95. *See, e.g.*, Rodgers v. Mroz, 479 P.3d 410, 418, 429 (Ariz. Ct. App. 2020) (citing *Milkovich*, 479 U.S. at 20).
96. *Id.*
97. *Milkovich*, 497 U.S. at 20.
98. *Id.* at 20–21.
99. *See id.* at 20.

a defamation action after showing the injurious statement was made with mere negligence.[100]

The *Milkovich* test of actionable speech has been shortened to ask whether the defendant's defamatory statements are "susceptible to proof of truth or falsity" and whether "they state matters that cannot reasonably be interpreted as actual facts."[101] If so, then the statements do not need to be analyzed under the *New York Times* actual malice framework.[102]

Against this backdrop of Supreme Court case law, Congress entered into the arena of speech regulation in 1996 with the Communications Decency Act.[103]

II. THE COMMUNICATIONS DECENCY ACT

With the intent of "promot[ing] the continued development of the Internet,"[104] Congress passed the Communications Decency Act ("CDA") Section 230 and companion Section 223 in the mid-1990s.[105] Though Section 223 was struck down by the Supreme Court as an unconstitutional First Amendment violation,[106] Section 230 remains in force.[107]

A. Communications Decency Act as a Safe Harbor

Section 230(c) of the CDA states "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider."[108] This language specifically overrules a 1995 New York state case, *Stratton Oakmont v. Prodigy Services, Co.*[109] In that case, an anonymous user posted statements on the Prodigy message board accusing Stratton of behaving fraudulently during its initial public offering.[110] The court analyzed Prodigy's role and determined that it exercised editorial control over some offensive

100. Gertz v. Robert Welch, Inc., 418 U.S. 323, 350, 353 (1974) (Blackmun, J., concurring).

101. Turner v. Devlin, 848 P.2d 286, 294 (Ariz. 1993).

102. *Id.*

103. 47 U.S.C. § 230.

104. *Id.* § 230(b)(1).

105. Telecommunications Act of 1996, Pub. L. No. 104-104, §§ 501–509, 110 Stat. 56, 133-39.

106. Reno v. ACLU, 521 U.S. 844, 859, 875 (1997) (holding that Section 223 impermissibly limited adults' access to content that the state might deem "indecent").

107. 47 U.S.C. § 230.

108. *Id.* § 230(c)(1).

109. No. 31963/94, 1995 WL 323710 (N.Y. Sup. Ct. May 24, 1995); *see also* 15B AM. JUR. 2D *Computers and the Internet* § 62 (2006).

110. *Stratton*, 1995 WL 323710, at *1.

content, so it was therefore a "publisher," (not just a distributor) and subject to defamation liability.[111] This conclusion contrasted with a similar New York case decided just four years earlier—*Cubby, Inc. v. CompuServe, Inc*.[112] *Cubby, Inc.* involved an online library that was deemed merely a distributor, exercising no editorial control, with no knowledge or reason to know of defamatory statements.[113] Thus, the library was free of liability.[114] When read together, these cases create a rule that imposes a seemingly strict liability standard on any content host who screens for offensive content, but imposes no liability on a content host who is willfully ignorant.

Congress was outraged by this apparent paradox.[115] To remove this discrepancy, Congress passed the "Good-Samaritan" rule in Section 230, which explicitly exempts providers *and* users of interactive computer services from being subjected to publisher liability for content created by someone else.[116] The CDA defines an "interactive computer service" as "any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server."[117]

The CDA explicitly tries to remove disincentives for developing blocking or filtering technologies, though the CDA imagines a limited universe where such "blocking and filtering technologies" are being used solely to "empower parents to restrict their children's access to objectionable or inappropriate online material".[118] Thus, the CDA attempts to protect under-screeners (i.e., the *Prodigy*-type situation) by expressly declaring so-called Good Samaritan screeners *not* to be publishers,[119] while also protecting over-screeners, who may filter or block "obscene, lewd, lascivious, filthy, . . . harassing, or otherwise objectionable" content, in good faith.[120]

Courts have taken a broad view on what falls under this "interactive computer service" definition. For example, courts have concluded that

111. *Id.* at *4.
112. 776 F. Supp. 135 (S.D.N.Y. 1991).
113. *Id.* at 138, 139–41.
114. *Id.* at 141.
115. Danielle Keats Citron & Benjamin Wittes, *The Problem Isn't Just Backpage: Revising Section 230 Immunity*, 2 GEO. L. TECH. REV. 453, 457 n.25 (2018).
116. *See* 47 U.S.C. § 230(c)(1); *see also id.* § 230(e)(3) (explicitly preempting state law).
117. *Id.* § 230(f)(2).
118. *Id.* § 230(b)(4).
119. *Id.* § 230(c)(1).
120. *Id.* § 230(c)(2).

everything from Amazon.com,[121] eBay,[122] and Matchmaker.com[123] to America Online,[124] online newsletters,[125] and Craigslist[126] are immune from tort liability. But the scope of this immunity—particularly with respect to third-party content—remains in flux.

The CDA has been construed broadly by courts and has created far-reaching immunity for online content hosts and websites.[127] Despite its name, origin, and stated policy goals, few court decisions applying the CDA focus on the Good Samaritan aspects of web platforms nor their role in keeping offensive material out of the hands of children.[128] Erring on the side of free speech, courts have allowed web platforms to enjoy sweeping immunity behind the safe harbor of the CDA.[129]

B. Wire Service Defense

Much defamation law only discusses the most critical players: the speaker (or publisher) and the plaintiff. But what happens when a third party gets involved, and republishes a defamatory statement? The wire service defense,[130] an affirmative defense outside of and separate from the CDA, arose in response to the 24-hour news cycle to address this gap.[131] This defense allows a republisher—typically an entity like the Associated Press—to rely on information supplied by other authors, news sources, agencies, wire services, freelance writers, or other reputable secondary sources to avoid liability for any defamatory material contained in the publication.[132] This avoidance of liability only goes so far though; the republisher is not protected where "the author has proven himself to be persistently inaccurate."[133]

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121. Schneider v. Amazon.com, Inc., 31 P.3d 37, 39, 43 (Wash. Ct. App. 2001).

122. Stoner v. eBay, Inc., No. 305666, 2000 WL 1705637, at *1 (Cal. Super. Ct. Nov. 1, 2000).

123. Carafano v. Metrosplash.com Inc., 207 F. Supp. 2d 1055, 1066 (C.D. Cal. 2002), *aff'd*, 339 F.3d 1119 (9th Cir. 2003).

124. Doe v. Am. Online, Inc., 783 So. 2d 1010, 1015 (Fla. 2001).

125. Batzel v. Smith, 372 F. Supp. 2d 546, 549 (C.D. Cal. 2005).

126. Dart v. Craigslist, Inc., 665 F. Supp. 2d 961, 965 (N.D. Ill. 2009).

127. Citron & Wittes, *supra* note 115, at 460.

128. *Id.* at 460–61; *see also* 47 U.S.C. § 230(b)(4).

129. Citron & Wittes, *supra* note 115, at 461.

130. *See* RODNEY A. SMOLLA, RIGHTS AND LIABILITIES IN MEDIA CONTENT § 6:54 (2d ed. 2021); *see also* Flowers v. Carville, 310 F.3d 1118, 1130 (9th Cir. 2002).

131. *See* Randall D. Nice, Note, *Reviving the Lost Tort of Defamation: A Proposal To Stem the Flow of Fake News*, 91 ARIZ. L. REV. 205, 205, 214–16 (2019).

132. *See* SMOLLA, *supra* note 130, § 6:54.

133. Nader v. de Toledano, 408 A.2d 31, 56 (D.C. 1979) (quoting Wash. Post Co. v. Keogh, 365 F.2d 965, 971 (D.C. Cir. 1966) (internal quotation omitted)).

The wire service defense has limited bounds, though, as illustrated by *Flowers v. Carville*.[134] In 1992, while Bill Clinton was campaigning for President, the ubiquitous celebrity gossip tabloid *Star* ran a story publicizing illicit details of an affair between Bill Clinton and a woman named Gennifer Flowers.[135] Clinton denied the story and appeared on *60 Minutes* with Hillary Clinton to rebut the infidelity rumors.[136] Flowers eventually sold her story to *Star* and played recordings of intimate phone calls from Clinton to the press.[137]

Flowers claimed that Hillary Clinton, James Carville, and George Stephanopoulos conspired against her to protect Bill Clinton's reputation during his presidential campaign.[138] Flowers filed a defamation and false light suit against Hillary Clinton, Carville, Stephanopoulos, and Stephanopoulos's publisher, asserting that they told the press and others that she had doctored the phone calls and lied in her interview with *Star*.[139] Flowers referred to the group as the "Clinton smear machine."[140]

The defendants raised the wire service defense, claiming that they repeated the information from a reputable news source (*Star*) without any reason to doubt its accuracy.[141] The defendants argued that they had not acted recklessly, so therefore they could not be liable.[142] The Ninth Circuit ruled against the defendants, recognizing the validity of the wire service defense, but holding that it does not immunize a person who independently acts with knowledge of the falsity of the statements or with reckless disregard of the statement's veracity.[143] Yet the Ninth Circuit commented on the difficulty of proving a case under the actual malice standard:

> Actual malice is a subjective standard that turns on the defendant's state of mind; it is typically proven by evidence beyond the defamatory publication itself. . . . It may be improbable that Flowers will find evidence to support her claims, but improbable is not the same as impossible. . . . If Flowers can prove that defendants were involved in manufacturing the two news stories, she may be able to persuade a jury that they knew the stories were false or

134. *See Flowers*, 310 F.3d 1118.
135. *Id.* at 1122.
136. *Id.*
137. *Id.*
138. *Id.*
139. *Id.*
140. *Id.*
141. *See id.* at 1130.
142. *Id.*
143. *See id.* at 1129, 1131.

> recklessly disregarded the truth. . . . To survive summary judgment, she will have to marshal clear and convincing evidence that defendants knew the [*Star*] news reports were probably false or disregarded obvious warning signs from other sources.[144]

This case elucidates two critical points. First, the wire service defense is still good law and provides a useful shield for defendants republishing information from reputable news sources. Second, even the courts recognize the seemingly insurmountable barrier that plaintiffs face in proving actual malice.

But where a source (reputable or not) is republished on an online forum, the plaintiff's burden of proving actual malice is impossible—thus, the perfect storm created by social media.

III. SOCIAL MEDIA: THE PERFECT STORM

The advent of a bevy of new social media platforms in the last three decades have brewed the perfect storm for First Amendment litigation. Each day, more than 1 trillion megabytes of data is created.[145] An average of half a million Tweets were published on Twitter each day in 2020.[146] Facebook generated four petabytes—equivalent to four million gigabytes—of data per *day* in 2020.[147] Data scientists hypothesize that this massive amount of data is on track to increase tremendously in the coming years.[148]

So how does this nearly incomprehensible amount of data, and each associated online publication, work with the CDA and defamation law? Defamation on social media platforms forces a reexamination of the traditional elements of a prima facie case of defamation. What constitutes publication on Twitter, Facebook, and Instagram? Can a plaintiff force an internet service provider to identify an anonymous poster making libelous statements? We explore this issue in three parts.

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144. *Id.* at 1131 (internal citations omitted).

145. Jacquelyn Bulao, *How Much Data Is Created Every Day in 2021?*, TECHJURY (Aug. 6, 2021), https://techjury.net/blog/how-much-data-is-created-every-day/#gref [https://perma.cc/8EAP-9FJP].

146. *Id.*

147. *Id.*

148. *Id.*

A. Social Media Sites and the CDA's Definitions of "Publisher"

Twitter, Facebook, and others are undoubtedly the publishers of the trillions of megabytes of data that are posted (or rather, published) on those sites each day. Under the Restatement of Torts, a publication for defamation purposes is completed as soon as the statement is communicated to a third party.[149] So, as soon as a Tweet, Instagram post, Snapchat story, Reddit thread, or YouTube comment is communicated to a third party—which is to say, instantaneously—it qualifies as a publication under the Restatement definition.[150] It is logical, then, that a social media site—Twitter, Instagram, or YouTube—is the publisher of the communication.[151]

But repeatedly, courts have held that Internet-based giants such as Twitter, Instagram, Reddit, and Facebook are largely protected from legal liability arising from defamatory content published by its users.[152] (We focus here on defamation and related torts that cause individual injury, but this focus of course ignores the collective harm done by the malicious communication of disinformation that is not targeted at an individual). This anomaly is a result of Congress's preemption of common law principles via the CDA.[153] How these sites fit under the CDA's definition is not obvious: Section 230(c)(1) states "[n]o provider . . . of an interactive computer service shall be treated *as the publisher* or speaker of any information provided by another information content provider."[154] With this phrasing, Twitter's or Facebook's (or a similar site's) liability for any defamatory content published to its site is effectively eliminated.[155] This single sentence has literally shaped the internet—it is the "most important law protecting internet speech," and it has been indispensable in allowing social media as we know it to flourish.[156]

So if not publishers, what are Twitter, Facebook, and the others? Certainly they cannot be categorized as common carriers in the vein of a telephone or telegraph company or a radio station.[157] Perhaps social media is more akin to

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149. *See* RESTATEMENT (SECOND) OF TORTS § 577 (AM. L. INST. 2021). Arizona has adopted this definition of publication. *See, e.g.*, Dube v. Likins, 167 P.3d 93, 104 (Ariz. Ct. App. 2007).

150. *See* RESTATEMENT (SECOND) OF TORTS § 577.

151. *See* Rodney A. Smolla, *Defamation and Social Media—A Growth Industry*, N.J. LAW., Dec. 2020, at 14.

152. *See supra* notes 118–129 and accompanying text.

153. *See* Smolla, *supra* note 151, at 14.

154. 47 U.S.C. § 230(c)(1) (emphasis added).

155. *See* Smolla, *supra* note 151, at 14.

156. *See* Casey Newton, *Everything You Need To Know About Section 230*, VERGE (Dec. 29, 2020), https://www.theverge.com/21273768/section-230-explained-internet-speech-law-definition-guide-free-moderation [https://perma.cc/26AS-3488].

157. *See* Robert Charles, *Computer Bulletin Boards and Defamation: Who Should Be Liable? Under What Standard?*, 2 J.L. & TECH. 121, 142–43 (1987).

a public forum.[158] As the Supreme Court has recently explained, a public forum—such as a shopping mall, private university campus, or homeowners' association—allows for the exchange of private expression.[159] Operators of a public forum are required to respect the free speech interests of speakers (or commenters) within their forum.[160] This treatment protects the interests of the social media platform itself while also protecting the free speech rights of each individual poster within the forum.

B. Analyzing Tweets, Posts, and Comments as Actionable Speech

Next, we turn to the daunting task of categorizing which social media posts are actionable as libel. It is easier to define statements by what they are not—a Tweet or Reddit comment expressing an "opinion" (a statement not susceptible to proof of objective falsity or reckless disregard for the truth) is not actionable as defamation.[161] A statement expressing a subjective view, interpretation, theory, conjecture, or surmise is not actionable.[162] But on a personal Twitter account, distinguishing a true opinion from a defamatory statement of fact prefaced by "I think" or "in my opinion" has been the center of recent litigation.

One recent "Twibel" (a portmanteau of Twitter + libel)[163] case likened the internet to the Wild West, and Twitter to the shooting gallery, "where verbal gunslingers engage in prolonged hyperbolic crossfire."[164] The case involved the defendant Louise Mensch "interject[ing] herself" into an ongoing conversation between Charles Ganske, an Associated Press journalist, and a third party.[165] Mensch Tweeted at Ganske: "To this xenophobic [T]weet of yours, sir, I fear we must tell @APCentral 'citation needed'. You clearly personally spread Russian bots on your own site; and [the third party's] work on it has sent you into a frenzy of Tweeting and trying to discredit him."[166]

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158. Smolla, *supra* note 151, at 15–16.

159. *See* Packingham v. North Carolina, 137 S. Ct. 1730, 1735 (2017) (stating that public forums are "essential venues for public gatherings to celebrate some views, to protest others, or simply to learn and inquire").

160. *See* Smolla, *supra* note 151, at 16.

161. *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 349 (1974) ("It is necessary to restrict defamation plaintiffs who [fail to offer such proof] to compensation for actual injury.").

162. *See* Milkovich v. Lorain J. Co., 497 U.S. 1, 16–21 (1990).

163. Pillsbury's Internet & Soc. Media Team, *Twibel Warfare: To Retweet or Not To Retweet Is Still the Question*, INTERNET & TECH. L. (Nov. 30, 2018), https://www.internetandtechnologylaw.com/twibel-warfare-to-retweet-or-not-to-retweet-is-still-the-question/ [https://perma.cc/5BDR-UHKC].

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

165. *Id.*

166. *Id.* at 548 (image).

Ganske filed suit for defamation, arguing that Mensch's Tweets contained defamatory statements because he never Tweeted xenophobic comments and he never spread Russian bots.[167] Ganske also alleged Mensch tagged his employer, the Associated Press, in an effort to interfere with his employment.[168] Ganske's employment with the Associated Press was terminated, which he alleged was the result of Mensch's Twitter harassment.[169]

The court ruled that Mensch's statements were non-actionable statements of "opinion," and not actionable statements of fact.[170] Citing *Gertz* and other cases (but not *Milkovich*), the court reasoned that the critical analysis is whether the Tweet included "a provable statement of fact."[171] Because, in the context of the publication ("generally informal and unedited"), readers expect a "freewheeling, anything-goes" writing style, a reasonable reader would conclude that the allegedly defamatory Tweet was merely Mensch's opinion and therefore was not actionable.[172] The court did consider other factors, such as the difficulty of precisely defining "xenophobic" and the fact that Mensch's inclusion of a hyperlink made it more likely that her Tweet was an opinion—but the crux of the court's decision was Twitter's informal nature.[173] Ultimately, Ganske's entire case was dismissed, despite the fact that he lost his job.[174]

This reasonable reader test has become the norm; the Ninth Circuit employs a three-part balancing test to determine what a reasonable reader would believe when assessing whether a statement is an opinion or a fact.[175] The test asks (1) whether the general tenor of the work gives off the impression that the defendant was asserting an objective fact; (2) whether the defendant used hyperbolic or figurative language; and (3) whether the statement can be proved true or false.[176]

From *Ganske* and the reasonable reader test, then, we conclude that in the "gunslinging" world of Twitter, not only is the platform itself protected by the broad sweeping immunity of Section 230, but content creators (individual accounts) can Tweet with impunity without fear of retribution. After all, a

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167. *Id.*
168. *Id.* at 548–49.
169. *Id.* at 550.
170. *Id.* at 551.
171. *Id.* at 551–52 (citation omitted).
172. *Id.* at 552–53.
173. *Id.* at 551–55.
174. *Id.* at 557.
175. *See* Obsidian Fin. Grp., LLC v. Cox, 740 F.3d 1284, 1293–94 (9th Cir. 2014).
176. *Id.* (citing Unelko Corp. v. Rooney, 912 F.2d 1049, 1053 (9th Cir. 1990)).

reasonable reader might expect *everything* on Twitter to be an opinion, and nothing a statement of fact.[177]

C. Does It Even Matter?

Examination of social media's intersection with defamation law and the CDA raises the ultimate question: does it even matter? Most certainly it does. As private companies, Twitter and others have recently begun regulating content themselves, with the much-discussed blocking and removal of former President Trump's account.[178] Twitter's stated motive for blocking the account was that two enumerated Tweets were "likely to inspire others to replicate the violent acts that took place on January 6, 2021, and that there are multiple indicators that they are being received and understood as encouragement to do so."[179]

Moreover, the 2020 election cycle demonstrated social media's powerful and ubiquitous presence in our lives, both nationally and in Arizona.[180] Even now, well after the election has ended, Arizona is a petri dish for misinformation about the election, and we are still witnessing first-hand in our state the results of the combination of social media and free speech for toxic purposes.[181] False information on Twitter and other platforms has led to very real consequences here in Arizona—even inspiring death threats.[182] As a community, we have a difficult time discerning between falsity, opinion,

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177. Treppel v. Biovail Corp., No. 03-CV-3002, 2004 WL 2339759, at *12 (S.D.N.Y. Oct. 15, 2004) ("[A]n opinion may be offered with such excessive language that a reasonable audience may not fairly conclude that the opinion has any basis in fact."); *see* Amy Mitchell et al., *Americans Who Mainly Got News via Social Media Knew Less About Politics and Current Events, Heard More About Some Unproven Stories*, PEW RSCH. CTR. (Feb. 22, 2021), https://www.journalism.org/2021/02/22/americans-who-mainly-got-news-via-social-media-knew-less-about-politics-and-current-events-heard-more-about-some-unproven-stories/ [https://perma.cc/N7CS-TBQJ].

178. Twitter, Inc., *Permanent Suspension of @realDonaldTrump*, TWITTER BLOG (Jan. 8, 2021), https://blog.twitter.com/en_us/topics/company/2020/suspension [https://perma.cc/BFY2-8KN3].

179. *Id.*

180. *See, e.g.*, Zeve Sanderson et al., *Twitter Flagged Donald Trump's Tweets with Election Misinformation: They Continued To Spread Both on and off the Platform*, HARV. KENNEDY SCH. MISINFORMATION REV. (Aug. 24, 2021), https://misinforeview.hks.harvard.edu/article/twitter-flagged-donald-trumps-tweets-with-election-misinformation-they-continued-to-spread-both-on-and-off-the-platform/ [https://perma.cc/V5DE-E7EN]; Gowri Ramachandran, *Twitter Is a Cauldron of Misinformation About the Arizona 2020 Vote Audit*, SLATE (May 14, 2021), https://slate.com/technology/2021/05/maricopa-county-arizona-2020-vote-recount-misinformation.html [https://perma.cc/9347-XV8G].

181. *See* Ramachandran, *supra* note 180.

182. *Id.*

and truth on Twitter and other social media platforms. It is reasonable to ask whether the distinction between falsity, opinion, and truth has become somewhat antique in our culture.

The recent Arizona State Court of Appeals case *Rogers v. Mroz* exposed Arizona's recent clash, and the court's forced reckoning, with defamation and misinformation online and in other formats.[183] Steve Smith was campaigning against Wendy Rogers in the run-up to the Republican primary for one of Arizona's federal congressional seats.[184] Before the campaign, Smith was a talent agent with ModelMayhem.com, a platform for both children and adults in the modeling industry.[185] Model Mayhem had acquired a reputation as a platform criminals used for the facilitation of sex trafficking and other crimes based on users' allegations, and ABC News ran a story alleging Model Mayhem was connected to crimes around the country.[186] Rogers capitalized on this reputation and ran attack ads against Smith on television, radio, and mailers.[187] She also created a website, www.slimysteve.com, which featured a blog post that "recite[d] 'facts' about Smith's job in bullet-point form."[188] Among these bullet points included allegations that Model Mayhem was "full of pornographic material" and "involved in human trafficking."[189] Rogers defeated Smith by a narrow margin in the primary election.[190]

The owner of Model Mayhem sued Rogers for defamation and false light invasion of privacy.[191] Rogers moved for summary judgment, which was denied by the superior court.[192] On review, the majority of the Court of Appeals held that the allegedly defamatory statements in the radio ad were substantially true and an opinion.[193] Additionally, a reasonable reader of the www.slimysteve.com blog would not conclude that Model Mayhem in fact facilitated or committed sex crimes, which made the statements nonactionable.[194]

The dissent noted the irony of concluding that the statement (and its associated implications regarding Model Mayhem's association with criminal activities) "could not be understood as a statement of provable fact

183. Rogers v. Mroz, 479 P.3d 410, 414 (Ariz. Ct. App. 2020), *review granted* May 4, 2021.
184. *Id.* at 415.
185. *Id.* at 414.
186. *Id.*
187. *Id.* at 415.
188. *Id.*
189. *Id.* at 416 (image).
190. *Id.*
191. *Id.*
192. *Id.*
193. *Id.* at 420–21.
194. *Id.* at 425.

while also finding the statement is substantially true."[195] Simply because the statements arose in the context of a political ad should not insulate them from liability.[196] The dissent would have the case presented to the jury, who would analyze the subtext, context, and attenuation of the situation in which the statements were made.[197]

IV. ANALYSIS

Many Republicans and Democrats agree on the pressing need to reform Section 230 of the CDA, in large part because of the issues outlined above.[198] Then-President Donald Trump issued an executive order on May 28, 2020 (before his permanent ban from Twitter), ostensibly limiting the scope of the liability limitations granted by Section 230.[199] This order was revoked by President Biden nearly a year later.[200] There is much conflict surrounding how to resolve this issue. This article identifies two possible solutions: the first is removal of the "publisher" immunity clause from Section 230, which would require strict application of common law principles of defamation to social media companies; the second (and more elegant) would have Arizona or federal legislatures draft a safe harbor provision for social media sites, as long as they meet certain benchmarks.

A. Strict Application of the CDA to Social Media

Imagine a world in which Congress struck the publisher immunity clause from Section 230: no longer could the social media giants (Facebook, Twitter, Instagram, Reddit, or their contemporaries) facilitate the dissemination of false speech with impunity, because they would fall squarely in the category of common law publishers. Of course, this approach, though not without its logical appeal, is unworkable.

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195. *Id.* at 428 (Cattani, J., dissenting).

196. *Id.*

197. *Id.* at 428–29.

198. *See* Isobel Asher Hamilton, *Here's What Could Happen to Section 230—The Internet Law Donald Trump Hates—Now that the Democrats Have Both Houses*, INSIDER (Jan. 9, 2021), https://www.businessinsider.com/future-of-section-230-democrats-both-houses-2021-1 [https://perma.cc/B5AR-U8EW] (explaining that then-President-elect Joe Biden was in favor of repealing Section 230, but likely his focus would be on other policy goals first).

199. Exec. Order No. 13,925, 85 Fed. Reg. 34,079 (May 28, 2020).

200. Exec. Order No. 14,029, 86 Fed. Reg. 27,025 (May 14, 2021).

1. Pros

The most obvious and immediate benefit of removing Section 230 immunity would be the instantaneous reckoning for purveyors of disinformation and the platforms that allow that disinformation to be spread. These media giants have been major players, if not the only players, in spreading "fake news" about elections, vaccines, and virtually every matter of public concern.[201] Holding them accountable through traditional common law principles could seem an attractive way to stem the flow of fake news that has plagued our democracy and culture.

2. Cons

In a world in which social media companies suddenly lost Section 230 immunity, a tidal wave of lawsuits would inevitably follow. The number of Tweets posted is staggering—more than 500,000 per day.[202] If Twitter were potentially liable for the content of each one, the platform simply could not function and would cease to exist. At such volumes, there are not enough workers to enable the review of every Tweet that spoke ill of an individual, and even with the most advanced algorithms fact checking the content of each of the 500,000 daily Tweets, the litigation costs alone would be prohibitive. And the potential for liability would be so crushing as to prevent any new social media companies from entering the field.

V. A LEGISLATIVE SHIFT

Today, we have developed a system that allows tortious speech and disinformation to flow into the stream of public debate with impunity—a result unintended in the development of the law. Repair of this problem requires speakers to be responsible for the content and effects of their speech.

We propose a system in which social media platforms would be treated as publishers and would be secondarily responsible for the harm done by tortious speech. Under this approach, online platforms would be able to transfer primary liability to the content creators, whose identity would be known to them. This approach would more closely resemble the traditional structure under which the law governing harmful speech was developed. It would also reflect the values of the free speech guarantee of the Arizona Constitution—each person would be free to speak and publish, being responsible for the abuse of that right.

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201. *See* Ramachandran, *supra* note 180.
202. Bulao, *supra* note 145.

Our proposal would enable social media platforms to secure indemnity from posters if they wished and could even absolve them of liability if the identities of the posters were made available to persons injured by the posts. Social media companies would be incentivized to screen posts automatically for potentially harmful or false content, and it would not be unreasonable to afford them full or partial relief from liability if they do so in good faith.

To be sure, there are those who would argue that there is a First Amendment right to anonymous speech. And there are those who have grown accustomed to free access to platforms that allow them to lob defamatory communications at massive audiences—free of charge and free of the risk of consequences. A change like the one we propose would upset these new norms. But there is no right under the First Amendment to harm others anonymously through platforms that are themselves immune from liability.

Many members of Congress have proposed reform bills, some proposing a complete repeal of Section 230, some proposing a slow rollback, and others creating new exceptions to liability.[203] Importantly, though, hate speech and vaccine misinformation would still proliferate on sites under these proposed solutions. Simply revamping the Section 230 immunity clause does not change the *Milkovich* definitions of actionable speech. To truly fight fake news and defamatory speech, the CDA must be more broadly redrawn to actively encourage platforms to engage in more meaningful content moderation—perhaps through a "notice and takedown" system, which would impose liability on a site that does not remove flagged content within a short time.

CONCLUSION

At bottom, Supreme Court jurisprudence failed to anticipate the crush of published statements on the internet every day. To adequately address this deluge, our system needs an overhaul. The urgent need for reform to Section 230 immunity is clear.[204] The courts and legislatures that developed modern protections against harmful speech never intended to create a system under which defamation could be published on a massive scale with impunity, and it is time to restore responsibility to public discourse.

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203. VALERIE C. BRANNON & ERIC N. HOLMES, CONG. RSCH. SERV., R46751, SECTION 230: AN OVERVIEW 30–31 (2021).

204. *See* Hamilton, *supra* note 198.