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Website Proprietorship Liability, Design and Two Regrettable Online Norms:

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Website Proprietorship Liability, Design and Two Regrettable Online Norms: A Proposal for Amending Section 230 of the Communications Decency Act

by

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Two regrettable norms have emerged online: the posting of content about others without their consent; and impulsive postings with little or no regard to their long term consequences. Website operators can either encourage or discourage these regrettable norms and influence their consequences through the design of their website and by the fostering of norms and codes of conduct. Unfortunately, section 230 of the Communications Decency Act as interpreted by courts provides websites with broad immunity. In a prior Article, I argued that a proprietorship standard should be imposed upon websites which would require them to take reasonable measures to prevent foreseeable harm. This Article further champions the concept of website proprietorship liability and proposes that section 230 should be amended to recognize such liability with provisions for the following "safe harbors" for website operators that: (1) permit only postings by identified posters; (2) have non-profit status and do not accept ad revenue; and (3) remove postings upon request of the victim. This Article also addresses anticipated objections which are based upon market concerns and free speech concerns.

*Professor, California Western School of Law. An early version of many of the arguments raised in this paper was discussed at the 47 U.S.C. section 230: A 15-Year Retrospective, Santa Clara Law School, Santa Clara, CA, March 4, 2011. I gratefully acknowledge the many helpful comments from the participants at that conference which informed this paper. I owe special thanks to Peter Swire for helping me to better analyze and reframe this project at an early stage and to Jacqui Lipton for reviewing a draft of this Article and providing me with much appreciated feedback.
# Website Proprietorship Liability, Design and Two Regrettable Online Norms: A Proposal for Amending Section 230 of the Communications Decency Act

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INTRODUCTION

This Article provides a comprehensive proposal to amend section 230 of the Communications Decency Act (the “CDA”), which is the controversial legislation that protects online intermediaries from civil liability for content posted by others.\(^1\) Many credit this provision of the CDA with enhancing the ability of ordinary citizens to express their thoughts, feelings and opinions on the Internet.\(^2\) Not surprisingly, some view efforts to limit or impinge upon expressive activity in this most innovative of forums with skepticism and suspicion.\(^3\) Others, however, alarmed by the unlawful nature of some online communication, have called for legal reform.\(^4\) While the right to free expression applies to Internet discourse, the parameters of that right have not been clearly established. The unique characteristics of online discourse complicate the analysis. One of the achievements of the Internet is that it enables ordinary people to share their views with countless others. Regulations that require prescreening or


\(^2\) This Article developed out of a conference specifically addressing this important piece of legislation. 47 U.S.C. section 230: A 15-Year Retrospective, Santa Clara Law School, Santa Clara, CA, March 4, 2011

\(^3\) Cecilia Ziniti, Note, The Optimal Liability System for Online Service Providers: How Zeran v. America Online Got it Right and Web 2.0 Proves It, 23 BERKELEY TECH. L. J. 583 (2008)(concluding that section 230 has “truly fostered the last ten years’ development of the web.”) Id. An online forum on the topic of cyber harassment on a popular legal blog garnered many heated comments about the pros and cons of limiting speech online. See www.concurringopinions.com/archives/category/cyber-civil-rights.

\(^4\) Danielle Keats Citron, Cyber Civil Rights, 89 BOSTON U. L. REV. 61, 114-125 (2009)(opposing blanket immunity for website operators); Daniel J. Solove, Speech, Privacy and Reputation on the Internet, in THE OFFENSIVE INTERNET 15, 23-27 (Saul Levmore and Martha C. Nussbaum, eds., 2010)(arguing for reformation of section 230); Brian Leiter, Cleaning Cyber-Cesspools: Google and Free Speech, in THE OFFENSIVE INTERNET, 155-56 (Saul Levmore and Martha C. Nussbaum, eds., 2010)(noting that the effect of section 230 has been “to treat cyber-cesspools wholly differently from, for example, newspapers that decide to publish similar material.”) Id. at 156.
content moderation may impose too great a burden on websites that may have millions of daily visitors. The popular online bulletin board craigslist, for example, claims to have over twenty billion page views per month. On the other hand, the very popularity of certain websites means that defamatory or personally intrusive content is viewed by more people, amplifying its harm. The large volume of postings and the ability to remain anonymous may lead some posters to believe they are "hidden" in the crowd, causing them to act out in offensive or unlawful ways.

Two regrettable online norms have emerged within the last decade. The first is posting of images or information about others without their consent or approval, which I will refer to in this Article as "third party posting". The other is the impulsive posting of images or information (about oneself or others) without consideration of societal context or long term implications, which for the sake of convenience I will refer to as "impulsive posting". The very characteristics of Internet communication that make it appealing (i.e. ease of publication, widespread dissemination) also make it unpredictable and potentially harmful given its other characteristics of permanence and irretrievability. This is not to say that these two norms - impulsive posting and third party posting - are regrettable in every instance. One might argue that impulsive postings, such as tweets, can spur dynamic conversations and facilitate important communications and observations. In some cases, third party posting may be useful as a means of alerting others to harmful behavior. But as behavioral norms, rather than exceptions, they

5 http://www.craigslist.org/about/factsheet

6 See Jeffrey Rosen, The End of Forgetting, NYT Magazine, July 25, 2010 (describing the "existential crisis" created by the impossibility of completely erasing one's digital past).

7 A tweet is a post on the popular micro-blogging site, Twitter. See http://en.wikipedia.org/wiki/Tweet.
also have negative long term social consequences. One of the harmful social consequences is the stifling effect on expression.

The free speech versus privacy debate goes to the very heart of what the First Amendment was intended to protect: expression and autonomy. The freedom to live one's life according to one's own beliefs is central to American society. A critical part of enjoying this freedom is the ability to explore and question one's beliefs and to try out different identities at different stages of one's life. Yet it is this very freedom - to explore new identities and viewpoints and to take risks - that is threatened by the two regrettable norms. Anupam Chander writes that many people will respond to the Internet's threat to privacy by "modifying either their private behavior - risking youthfulness - or their public behavior - avoiding positions that might lead to embarrassing disclosures."

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8 See ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES (3d ed. 2006)(noting that a "major rationale often expressed for protecting freedom of speech as a fundamental right is that it is an essential aspect of personhood and autonomy.") Id. at 929. While I focus on personal expression here, it also refers to political expression. Sean Scott observes, "The conflict that arises between the right of privacy and the First Amendment freedom of the press may not be one of individual versus society. The private facts tort does protect an individual’s interest in personhood or human dignity; it also promotes some of the same values protected by the First Amendment." Sean M. Scott, The Hidden First Amendment Values of Privacy, 71 WASH. L. REV. 684, 687 (1996).

9 See Julie E. Cohen, Examined Lives: Informational Privacy and the Subject as Object, 52 STAN. L. REV. 1373 (2000)(discussing need for autonomy-based approach to data privacy protection); Jacqueline D. Lipton, "We the Paparazzi": Developing a Privacy Paradigm for Digital Video, http://ssrn.com/abstract=1367314 (noting that "the exponential rise of online privacy-destroying technologies has led to increasing concerns about individual privacy in recent years" and that "it is time to consider a new multi-modal regulatory approach to protect individual privacy.")

10 Chander, supra note XXX, at 127
Online speech is a double-edged sword when it comes to expression since enabling one person to post may mean another person is forced to suppress herself.\(^\text{11}\) Let's assume that someone named Jane regularly posts photos from parties that she has attended to her Facebook account. At subsequent parties, other guests may refrain from drinking or dancing, to protect their reputation. Jane's posting activities stifle the enjoyment and expressive activity of other guests.\(^\text{12}\)

\(^\text{11}\) The nastiness of online comments may also have a silencing effect on more civilized participants. See Taffy Brodesser-Akner, *E Playgrounds Can Get Vicious*, NY TIMES, April 22, 2010, E8 (discussing the “torrent of anonymous maliciousness” and the effect it has on a writer).

\(^\text{12}\) James Grimmelman has discussed the unintended consequences and privacy violations that occur from information posted on Facebook. See James Grimmelmann, *Saving Facebook*, 94 IOWA L. REV. 1137 (2009)(explaining how Facebook users socialize on the site and misunderstand the risks involved); James Grimmelmann, *Privacy as Product Safety*, 19 WIDENER L. J. 793 (2010)(providing examples of how information posted on Facebook can be misused).

For a discussion of the complicated issues arising from privacy, autonomy and the power of technology to create new concerns, see Ruth Gavison, *Privacy and the Limits of Law*, 89 YALE L. J. 421 (1979). Gavison writes that the “identification of technological developments as a major source of new concern may be supported by the fact that modern claims concerning the secrecy and anonymity aspects of privacy have not been accompanied by new claims concerning physical access: technological advances have affected the acquisition, storage, and dissemination of information, but gaining physical access is a process that has not changed much. On the other hand, the increase in the number of people whose profession it is to observe and report, the intensified activity in search of publishable information, and the changes in the equipment that enables such enterprises, make it more likely that events and information will in fact be recorded and published.” *Id.* at 466. See also Anne Wells Branscomb, *Anonymity, Autonomy and Accountability: Challenges to the First Amendment in Cyberspaces*, 104 YALE L. J. 1639 (1994)(discussing the issues raised in cyberspace, particularly with respect to the First Amendment, anonymity, autonomy and accountability). *Id.* at 1641; Richard A. Epstein, *Privacy, Publication, and the First Amendment: The Dangers of First Amendment Exceptionalism*, 52 STAN. L. REV. 1003 (2000)(“Doctrinal analysis often requires us to reconcile traditional legal principle with modern technological innovation. Nowhere is this task of reconciliation more daunting than with cyberspace, where the speed and spread of information has been ratcheted up to levels that were unimaginable even a generation ago. And nowhere in cyberspace is it more important to tweak doctrine than on the general legal issue of privacy, which is here defined as the ability of individuals to keep private....information about themselves that could provide harmful or embarrassing to them if made public or placed in the wrong hands.”) *Id.* at 1004.
Time, too, plays an important role, shifting and often betraying with its passage. A poster may appreciate the swiftness with which her views are disseminated online, but may regret her impulsivity later when her attitude or views change. A teenager, for example, may enjoy chronicling his exploits online, but may regret divulging such secrets when they prevent him from getting a coveted job later or when they embarrass his future children.

Both norms together, i.e. impulsive, third party postings, can be particularly damaging. There are myriad websites that host naked pictures of ex-lovers, reveal secrets and spread lies. If the website operator refuses to remove the harmful posting, the victim is often left with no redress. The poster is often anonymous. Even if the poster can be identified, he or she may be

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13 Cautionary tales of online disclosure remorse abound. See, for example, Emily Gould, Exposed: What I Gained–and Lost–By Writing About My Intimate Life Online, N.Y. Times Mag., May 25, 2008

14See Jennifer Preston, Social Medial History Becomes a New Job Hurdle, N.Y.TIMES, July 21, 2011, B1 (discussing how information posted on social media sites may impinge a prospective job applicant’s chances of getting hired). Information posted online may also affect an applicant’s prospects of getting into graduate school. In a recent study of 123 top graduate schools of education, engineering, psychology and public administration conducted by Kaplan Test prep, 12% of admissions officers revealed that they were permitted to visit applicants’ social networking pages; of those, 29% had rejected an applicant based upon what they discovered. See Jacques Steinberg, The Next Gate, N.Y. TIMES, July 24, 2011, Education Life, p. 9.

15Anupam Chander, Youthful Indiscretion in an Internet Age, THE OFFENSIVE INTERNET 124 (2011)(“The Internet Age can place a person’s history, or worse, a fleeting episode from that history, at the world’s call. The past might haunt the twenty-first century child till the end of her days...Decisions in such a life require consideration not only of the reputation consequences via-a-vis families, friends and acquaintances, but also with respect to future employers, partners and even unborn children.”) Id. at 125. Helen Nissenbaum analyzes the important of context in private information disclosures more fully. See Helen Nissenbaum, Privacy as Contextual Integrity, 79 WASH. L. REV. 119 (2004). Nissembaum argues that contextual integrity should be a benchmark for analyzing privacy intrusions. Id. at 138. Under Nissenbaum’s theory, “a privacy violation has occurred when either contextual norms of appropriateness or norms of flow have been breached...personal information revealed in a particular context is always tagged with that context and never “up for grabs”). Id. at 143. See also Josh Blackman, Omniveillance, Google, Privacy in Public, and the Right to Your Digital Identity: A Tort for Recording and Disseminating an Individual’s Image Over the Internet, 49 SANTA CLARA L. REV. 313 (2009)(stating that where an image captured of a person engaging in an activity may easily be taken out of context, such a chance to explain the photograph is not a possibility, as the subject might not have even been aware he was recorded.” Id. at 343-44.
judgment proof and a lawsuit, even if successful, would only result in more traffic being directed to the damaging post.\textsuperscript{16}

Given the inadequacy of existing legal remedies to address the harm caused by online postings,\textsuperscript{17} the best strategy is prevention and deterrence. Website operators are in the best position to prevent and deter harmful online conduct;\textsuperscript{18} unfortunately, because they also have

\textsuperscript{16} See Nancy S. Kim, \textit{Website Proprietorship and Online Harassment}, 2009 UTAH L. REV. 993, 1008-1012 (outlining the inadequacy of existing legal remedies for online harassment); see also David S. Ardia, \textit{Reputation in a Networked World: Revisiting the Social Foundations of Defamation Law}, 45 HARV. CIV RIGHTS-CIV. L. REV. 261 (2010)(arguing that “defamation law suffers from significant doctrinal and practical limitations that preclude it from achieving its goal of protecting reputation.”); Lyrisa Barnett Lidsky, \textit{Silencing John Doe: Defamation & Discourse in Cyberspace}, 49 DUKE L. J. 855, 859 (2000)(noting that defendants in defamation actions may not have deep pockets and may be unable to satisfy a judgment).

\textsuperscript{17} The scholarly literature on the challenges that user generated content websites create for privacy law is vast. See, for example, Patricia Sanchez Abril, \textit{Recasting Privacy Torts in a Spaceless World}, 21 HARV. J. L. & TECH. 1 (2008)(analyzing the public disclosure tort and its suitability for online harms); Jacqueline D. Lipton, \textit{Mapping Online Privacy}, (examining different aspects of privacy to gain a comprehensive view of online privacy); DANIEL J. SOLOVE, \textit{THE FUTURE OF REPUTATION: GOSSIP, RUMOR AND PRIVACY ON THE INTERNET} (2007)(exploring the implications of user generated content on the reputation of others).

\textsuperscript{18} Douglas Lichtman captures the rationale for imposing liability on intermediaries in some situations in the following:

“The conventional economic account makes clear that private parties cannot create the optimal liability regime on their own in instances where the party directly responsible for the bad act is beyond the effective reach of the law, or in instances where transaction costs make contract negotiations implausible. The conventional account further stresses that liability should be considered in instances where one party has the ability to deter or detect the bad acts of another, and also where liability can serve to encourage a party to internalize some significant negative externality associated with its activities.” Douglas Lichtman, \textit{Holding Internet Service Providers Accountable}, REGULATION, Winter 2004-2005 54, 56.

\textit{But cf.} Jacqueline D. Lipton, \textit{Combating Cyber-Victimization}, BERKELEY TECH. L.J. (forthcoming, draft on file with author) (noting that "criminal law may be a better option than civil law for redressing many online wrongs" because it "seeks to punish and deter wrongdoing while civil law seeks to provide remedies that make a plaintiff whole." \textit{Id.} at 16.
broad immunity for content posted by their users, they may have no incentive to do so. In this Article, I further develop the concept of website proprietorship liability that I proposed in an earlier article. In Part I, I briefly summarize the rationale for website proprietorship liability and discuss the advantages of a reasonableness standard. In this section, I also analyze Section 230 of the CDA, which is the statute that has been interpreted by many courts as giving website operators broad immunity for hosting user content. I argue that the blanket treatment of website operators ignores differences among them and explain how both the underlying policy of the statute and its plain language support the recognition of proprietorship liability. Part I also explores the role that terminology plays in muddling the issues surrounding proprietorship liability.

In Part II, I propose an analysis of reasonableness in the context of website proprietorship liability that focuses on website design and culture. I explain how website operators can influence user behavior through user interface design and by fostering and encouraging a particular culture. As Jaron Lanier has observed, “the user interface designs that arise from the ideology of the computing cloud make people – all of us – less kind.” Some website operators design interfaces to elicit and inflame that unkindness. Both the design of a website and its

19 See Ann Bartow, Internet Defamation as Profit Center: The Monetization of Online Harassment, 32 HARV. J. L. & GENDER 383, 418 (2009)(noting that section 230 provides no incentive or obligation to remove harassing posts).

20 Nancy S. Kim, Web Site Proprietorship and Online Harassment, 2009 UTAH L. REV. 993. While I previously made a distinction between "publicly accessible" and invitation-only websites that require a password, I have disregarded that distinction for this Article. The concerns that I had about including invitation-only websites, such as certain social networking sites, are remedied by the safe harbor provisions that I propose in Part III. Furthermore, given the ease with which content can be copied and pasted from one site to another, the potential for harm is significant regardless of where the content was initially posted.

21 JARON LANIER, YOU ARE NOT A GADGET 61 (2010)
culture can exacerbate or mitigate the negative consequences of the two regrettable norms. This Article does not argue that website operators should necessarily discourage either impulsive or third party postings. Rather, website operators should examine the ways in which their website design and culture encourage and influence these norms, and they should respond (and perhaps, reconfigure their sites) accordingly.

In Part III, I introduce the following three "safe harbors" to website proprietorship liability: notice and takedown, identified postings and nonprofit status with no paid advertising. In essence, a website operator that qualifies for one of these safe harbors would establish de facto that it had acted reasonably to prevent foreseeable harm.

In Part IV, I address anticipated objections and arguments against my proposal for website proprietorship liability. I have organized them into two general categories. The first is based on market concerns. This category of objection argues that cyber harassment is the inevitable consequence of technological and societal changes. In order to accommodate Internet growth and innovation, we should relinquish supposedly outdated norms, such as privacy, and succumb to the changes that the Internet brings. The second type of argument is based on free speech concerns. I conclude that, despite the many legitimate concerns raised by opponents, the positive benefits of imposing liability along with the proposed safe harbors far outweigh the negative consequences.
I. Website Proprietorship Liability and Section 230 of the Communications Decency Act

Websites are not typically viewed as businesses unless they engage in retail transactions. In a prior article, I proposed that website operators should be treated as "proprietors" because they exercise control over their websites and have the potential to generate revenue from the operation of their website either directly, by selling goods on the site, or indirectly, by selling user information and advertising space or marketing and publicizing other ventures. Website operators also exert legal power over their users through the use of clickwrap agreements and terms of use. Yet, despite their proprietorship powers, generally website operators are immune from liability for any harm that arises from content posted by a third party under section 230 of the CDA.

A. Definitional Fuzziness and Cyber-Mystification

Section 230 of the Communications Decency Act provides as follows:

(c) Protection for “Good Samaritan” blocking and screening of offensive material

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22 Kim, supra note XXX, at 1034.

23 Id.

24 See Zeran v. America Online, Inc., 129 F.3d 327 (4th Cir. 1997) (holding that the Communications Decency Act immunized interactive computer service provider that hosted message board, even though it refused to remove false statement after notice); Carafano v. Metrosplash.com, Inc., 339 F.3rd 1119, 1123 (9th Cir. 2003)(doubts should be “resolved in favor of immunity”); Barrett v. Rosenthal, 146 P.3d 510, 529 (2006)(noting that section 230 “does not permit” Internet service providers or users to be sued as “distributors.”).
(1) Treatment of publisher or speaker

No 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.

(2) Civil liability

No provider or user of an interactive computer service shall be held liable on account of –

(A) any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing or otherwise objectionable, whether or not such material is constitutionally protected; or

(B) any action taken to enable or make available to information content providers or others the technical means to restrict access to material described in paragraph (1).\(^{25}\)

The statute does not explain what is meant by “treated as the publisher or speaker,” and does not mention immunity at all; yet courts have construed section 230 to mean that website operators are immune from liability as publishers and/or distributors for content posted on their websites by third parties as long as the website operators did not contribute to the creation of the content.\(^{26}\) In other words, section 230 (at least, as interpreted by the majority of courts) treats

\(^{25}\) The reference to paragraph 1 may be intended to read “(A).” Communications Decency Act of 1996, Pub. L. No. 104-104, 110 Stat. 133 (codified at 47 U.S.C. § 230 et. seq.)

website operators -- not like publishers or even distributors -- but like common carriers with no interest or liability in the content they transport.\textsuperscript{27}

Without the threat of liability, website operators are free to encourage the worst from their users. They may design their websites to capitalize on impulsivity and anonymity, removing architectural restraints (such as registration requirements or review periods) and goading users to write salacious material about others.\textsuperscript{28} For example, one gossip website encourages its collegiate users to “Go ahead, tell it like it is...always 100% anonymous.....”\textsuperscript{29} That same website hosted a contest which encouraged users to “think of something controversial” to win prizes:

\begin{quote}
\textbf{“THE GOSSIP POST THAT RECEIVES THE MOST VIEWS, AND THE MOST COMMENTS (REAL COMMENTS) TODAY WILL RECEIVE PRIZES FROM CAMPUSGOSSIP.COM! THINK OF SOMETHING CONTROVERSIAL, TELL YOUR FRIENDS IT'S POSTED ON OUR SITE, AND YOU'LL BE SURE TO WIN! WINNERS WILL BE ANNOUNCED TOMORROW AFTERNOON (THURSDAY) ON THIS SAME POST, SO LOOK FOR IT IN THE GOSSIP SECTION UNDER THE "RANDOM" SCHOOL SECTION! TO POST SOME GOSSIP SIMPLY CLICK "POST GOSSIP" ON THE RIGHT HAND SIDE OF THE PAGE!”}\textsuperscript{30}
\end{quote}

\textsuperscript{27}Elsewhere, I have argued that a reasonableness standard should be imposed upon website proprietors See Nancy S. Kim, Website Proprietorship and Cyber Harassment, UTAH L. REV. 993 (2009); see also Nancy S. Kim, Imposing Tort Liability Upon Websites for Cyber Harassment, 118 YALE L. J. POCKET PART 115 (2008); http://thepocketpart.org/2008/12/15/kim.html.

\textsuperscript{28}Jaron Lanier observes, “Behavior varies considerably from site to site. There are reasonable theories about what brings out the best or worst online behaviors....My opinion, however, is that certain details in the design of the user interface experience of a website are the most important factors.” LANIER, supra note 61.

\textsuperscript{29}http://www.campusgossip.com/

\textsuperscript{30}http://www.campusgossip.com/gossip/replies.php?id=1972&page=main
Websites that encourage users to post negative information about other target users, e.g. spurned lovers, college students, who are least likely to consider the long term implications of their posts.\(^{31}\) Not surprisingly, the targeted user may react by posting material in an emotionally charged state that he or she may later regret. Unfortunately, current law does not require website operators to remove postings even where requested to do so by the original, repentant poster. Benefitted by increased traffic and protected by section 230 immunity, the website operator has no incentive to respond to the original poster’s takedown request.

There is a tendency in conversations about online use to use blanket terms that conflate meanings. For example, the Internet is a network of computers in which the computers are capable of communicating with each other\(^{32}\) but it is also commonly used to describe the various websites and activities accessible using this network.\(^{33}\) The term “website” is also used in a singular way, to describe any site residing at a URL.\(^{34}\) Yet, websites differ in size, traffic, resources, and revenue models. At the time the personal computer and the Internet became available to the masses, catch-all, mystifying terms such as "cyberspace” and "the Net” reflected

\(^{31}\) www.dontdatehimgirl.com; www.thedirty.com


\(^{33}\) Dan Hunter \textit{Cyberspace as Place and the Tragedy of the Digital Anticommons}, 91 CAL. L. REV. 439, 453-54 (2003)(discussing how “everyone employs physical vocabulary to talk about events, transactions, and systems that exist or occur online.”)

\(^{34}\) Wikipedia defines "website" as "a collection of related web pages containing images, videos or other digital assets. A website is hosted on at least one web server, accessible via a network such as the Internet or a private local area network through an Internet address known as a Uniform Resource Locator. All publicly accessible websites collectively constitute the World Wide Web." http://en.wikipedia.org/wiki/Website
the discomfort of the public towards the novelty of the medium and with technology in general. Yet, the imprecise terminology used to describe online activity often leads to imprecise discussions or policy solutions that are over- or under inclusive. For example, legislation to combat "cyber harassment" often fails to address certain unlawful behavior or includes within its ambit too much lawful behavior.  

Another imprecise term, “interactive computer service provider,” is contained in section 230 itself. Section 230 defines "interactive computer service provider" as "any information, service, system or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions." Courts have interpreted "interactive computer service provider" to include all intermediaries. Yet, this definition does not distinguish between gossip sites that solicit damaging content, such as Campus Gossip, and internet service providers (ISPs) like AOL that function more like

35 For example, a recent proposed House of Representatives bill states as follows:

(a) Whoever transmits in interstate or foreign commerce any communication, with the intent to coerce, intimidate, harass, or cause substantial emotional distress to a person, using electronic means to support severe, repeated, and hostile behavior, shall be fined under this title or imprisoned not more than two years, or both.

The bill, however, does not provide standards or definitions for what constitutes, for example, coercion or intimidation. HR 1966; available at http://thomas.loc.gov/cgi-bin/query/z?c111:H.R.1966. The proposed bill provides for fines and incarceration for violation of the law.

36 Section 230(f)(2).

37 See Carafano v. Metrosplash.com, Inc., 207 F.Supp. 2d 1055, 1065-66 (C.D. Cal. 2002)(finding that an online dating site is an “interactive computer service”); Fair Housing Council, San Fernando v. Roommates.com, 521 F.3d 1157, 1161-63 (9th Cir. 2008)(analyzing an operator of a website matching landlords and tenants as an “interactive computer services” provider). The Ninth Circuit found that “the most common interactive computer services are websites.” Id. f.n. 6 at 1162.
passive conduits. The range of interactive computer service providers is wide. Some "interactive computer service providers" merely transport content. Other websites function like publishers and hold themselves out to the public as the place to go to read a particular type of content. Some message boards traffic in gossip and reputation smearing; others in facilitating the buying and selling of goods and services. Yet, courts fails to recognize these distinctions for purposes of determining section 230 immunity.

The definitional fuzziness of section 230 also extends to another subsection. Interactive computer service providers are immune for liability for content posted by another -- Section 230, however, does not protect website operators for content that the website operator itself posted or created. Under section 230 (f)(3), "information content provider" is defined as "any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service." Yet, as the Ninth Circuit noted in *Fair Housing Council of San Fernando v. Roommates.com*, a website operator can be both a service provider and an information content provider, and it can be liable as an information content provider "even if the information originated with a user." A website operator can "edit" content without liability, but it cannot "create" or "develop" it, either "in whole or in part" without losing immunity. Not surprisingly, the line between editing and

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38 Fair Housing Council, San Fernando v. Roommates.com, 521 F.3d 1157 (9th Cir. 2008) (noting that "grant of immunity" under section 230 applies "only if the interactive computer service provider is not also an 'information content provider'"). Id. at 1162.

39 Id. at 1165.

40 Id. at 1163 (noting that in passing section 230, "Congress sought to immunize the removal of user-generated content, not the creation of content."
developing and/or creating is often blurred. The Ninth Circuit, for example, recently adopted a distinction between passive transmitters of information and those who help develop content, but admitted the difficulties with its interpretation of "develop."  

B. Civil Liability and Website Proprietorship

In a prior Article, I argued that website operators should be subject to proprietorship liability, meaning that they should take reasonable measures to prevent foreseeable harms. In this Article, I clarify and develop the meaning of proprietorship liability to include all civil liability. Brick-and-mortar businesses are subject to standards of reasonableness in the way they conduct their business, such as being required to take "reasonable measures" to prevent "foreseeable harm." Online businesses should be subject to the same standard of

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41 For example, the Ninth Circuit interpreted development as "referring not merely to augmenting the content generally, but to materially contributing to its alleged unlawfulness. In other words, a website helps to develop unlawful content, and thus falls within the exception to section 230, if it contributes materially to the alleged illegality of the conduct." Id. at 1168.

42 These difficulties include that "the broadest sense of the term 'develop' could include any functions of an ordinary search engine - indeed, just about any function performed by a website." Id. at 1167.

43 See Nancy S. Kim, Website Proprietorship and Cyber Harassment, UTAH L. REV. 993 (2009). As noted earlier, most courts have found that section 230 does not permit civil liability. See, for example, Doe v. MySpace, 528 F. 3d 413 (2008)(finding that section 230 bars negligence and gross negligence claims). Id. at 422.

44 James Grimmelmann has analogized product safety with privacy safety on social networking sites such as Facebook. See James Grimmelmann, Privacy as Product Safety, 19 WIDENER L. J. 793 (2010). Grimmelmann notes that "good product design discourages or prevents particularly hazardous uses" and observes that "consumer expectations pervade products liability." Id. at 821. While he does not advocate the direct application of products liability law to online privacy, he suggests that products liability law might help shape online social privacy law. Id. 826-27.

45 RESTATEMENT (SECOND) OF TORTS, section 344 (1977)
reasonableness, although how that standard is applied (i.e. what is considered reasonable business conduct) should differ depending upon whether the business is online or offline.

The imposition of proprietorship liability deters socially harmful business practices and encourages socially beneficial innovation. A reasonableness standard enables courts to address discrepancies in types of businesses without being constrained by rules that will be quickly rendered anachronistic by technology and changes in the business environment. Size matters. Small businesses have different requirements than larger more established businesses. The nature of the business also matters. The concerns governing immunity of consumer review websites may be very different from those governing immunity of gossip sites. ISPs may have a much harder time prescreening content than lightly-trafficked websites. Even gossip sites should not all be lumped together. Gossip sites covering public figures such as celebrities and politicians should be treated differently from those gossip sites featuring college students or other private individuals. A reasonableness standard enables courts to recognize and parse those differences.

Unfortunately, the judicial interpretation of section 230 lumps all online entities together and focuses on whether the intermediary had a role in the development of content, which is relevant to the issue of whether it qualifies as a publisher or speaker. The issue of whether an intermediary is a publisher or speaker, in turn, is relevant where the cause of action requires a

46 Jacqueline Lipton writes that “traditional Property rights entail significant concurrent obligations or responsibilities imposed on the proprietary owner as an incident of their Property ownership. Historically, Property rights have never been absolute. They have always involved limitations, often in the form of legal duties owed to others.” Jacqueline Lipton, Information Property: Rights and Responsibilities, 56 FL. L. REV. 135, 148-49 (2004).
determination of status as a publisher or speaker, e.g. in a claim of defamation (although not only in cases of defamation). The publisher/speaker determination, however, is irrelevant where the cause of action is not based upon liability as a publisher or speaker, i.e. where it is based upon its status as a distributor or in other civil liability lawsuits. The language of section 230 avails itself of such an interpretation. Notably, section 230(c)(1) does not mention immunity for intermediaries. The only exculpatory language in all of section 230 is in subsection (c)(2) with respect to efforts to restrict access to objectionable materials. It is not the language of the existing legislation that is problematic but the expansive judicial interpretation and application of 230 immunity.

Contrary to how many courts have interpreted section 230, the plain language of the provision accommodates the recognition of tort liability. The caption for subsection (c) is “Good Samaritan” blocking and screening of offensive material. While headings should not be conclusive, it does suggest that what Congress intended to address in this subsection was blocking and screening activities of intermediaries. This seems particularly true when

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47 See Barnes v. Yahoo!, 2009 WL 1232367 (C.A. 9 (Or.))(noting that section 230(c)(1) “precludes courts from treating internet service providers as publishers not just for the purposes of defamation law, with its particular distinction between primary and secondary publishers, but in general. The statute does not mention defamation, and we decline to read the principles of defamation law into it.”) Id.

48 See, for example, Barrett v. Rosenthal, 146 P.3d 510 (2006)(finding no liability for posting an email created by a third party); Carafano v. Metrosplash.com, Inc., 339 F.3d 1119 (9th Cir. 2003)(finding no liability for matchmaking service for information posted by third party); Doe v. MySpace, Inc., 528 F.3d 413, 418-20 (5th Cir. 2008)(declining to recognize "virtual premises" liability); Zeran v. America Online, Inc., 129 F.3d 327 (4th Cir. 1997)(finding broad immunity)

49 The Ninth Circuit Court of Appeals and the Seventh Circuit Court of Appeals made the same observation when each court addressed the applicability and scope of section 230. See Fair Housing Council of San Fernando Valley v. Roommates.com, 521 F.3d 1157, 1163-64 (2008)("(T)he section is titled “Protection for ‘good samaritan’ blocking and screening of offensive material” and, as the Seventh Circuit recently held, the substance of section 230(c) can
considered in context. Subsection (c) was enacted, at least in part, in response to the ruling in Stratton Oakmont, Inc. v. Prodigy Servs. Co., which found an internet service provider liable for defamation as a publisher. The court held that because the defendant attempted to screen out offensive materials, it had assumed greater liability than if it had made no screening attempt whatsoever. If section 230 (c)(2) (with the caption “civil liability”) was intended to immunize ISPs from all civil liability that would by definition include civil actions based upon their status as a publisher or speaker. Section 230 (c)(1) (with the caption “treatment of publisher or speaker”) would then serve only to protect the ISP in state criminal actions where liability was based upon the provider’s status as a publisher or speaker since section 230 has no effect on federal criminal law or intellectual property law. If this was in fact what Congress intended, it would have drafted section 230(c)(1) more simply to indicate its applicability only to state criminal law prosecutions.

and should be interpreted consistent with its caption.”)(citing Chi. Lawyer’s Comm’n for Civ. Rights Under Law, Inc. v. Craigslist, Inc., 519 F.3d 666 (7th Cir., 2008)(quoting Doe v. GTE Corp., 347 F.3d 655 (7th Cir. 2003)).


“Section 230 was prompted by a state court case holding Prodigy responsible for a libelous message posted on one of its financial message boards. ...Under the reasoning of Stratton Oakmont, online service providers that voluntarily filter some messages become liable for all messages transmitted, whereas providers that bury their heads in the sand and ignore problematic posts altogether escape liability....In passing section 230, Congress sought to spare interactive computer services this grim choice by allowing them to perform some editing on user-generated content without thereby becoming liable for all defamatory or otherwise unlawful messages that they didn’t edit or delete.”

Id. at 1163-64.

51 Id. at 4-5.

52 Id.

53 section 230(e)(1) and section 230(e)(2).
Furthermore if Congress intended section 230 (c)(2) to exculpate website operators from all civil liability, they would not have carved out an exemption for particular acts, i.e. the good faith removal of obscene material. Given the way subsection (c)(1) was drafted, if Congress had intended for subsection (c)(2) to grant broad immunity, it would have drafted the language accordingly without elaborating on specific good faith acts of removal. A better interpretation would be that section (c)(1) prohibits claims against an interactive computer service provider which are based upon its status as a publisher or speaker. Where the civil claim is not based upon the its status as a publisher or speaker, the interactive computer service provider is not liable for “good faith” efforts to remove offensive material or to restrict access to such materials. By implication, the computer service provider may be liable for actions that are not efforts to limit access to offensive materials.

Another section, 230(e)(3), may help convince courts that the CDA does not provide absolute immunity for civil actions that are not based upon the status of a website operator as a publisher or speaker. That subsection, captioned "State law", specifically states that "(n)othing in this section shall be construed to prevent any State from enforcing any State law that is consistent with this section. No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section." But what other state law is there than state criminal law if the ISP has broad immunity in civil actions? Section 230(e)(1) states that section 230 has no effect on federal criminal law. Accordingly, if Section 230(e)(3) were intended to include only state *criminal* law, the drafters would have expressly so stated with a caption "State criminal law" rather than the broader "State law".
A better interpretation of section 230(e)(3) would be that the drafters intended to leave intact state laws, both criminal and civil, that did not impose publisher or speaker liability on website operators for content created by third parties. More specifically, a plaintiff could not sue a website operator as the original publisher or speaker for content posted by a third party, but it could sue a website operator for its negligence in conducting its business as an intermediary and distributor of content. Under this interpretation of section 230, no change to the statutory language would be necessary in order to recognize website proprietorship liability.

A couple of very influential courts have already recognized the potential limits of section 230 of the CDA. The Seventh Circuit cast doubt upon a reading of the statute that would provide website operators with absolute immunity. It referenced one of its previous opinions, Doe v. GTE Corp., in stating "why section 230(c) as a whole cannot be understood as a general prohibition of civil liability for web-site operators and other online content hosts." It hinted that section 230 may not mean broad immunity for all civil liability but only those based upon its status as a publisher or speaker: "(P)erhaps section 230(c)(1) forecloses any liability that depends on deeming the ISP a "publisher" - defamation law would be a good example of such liability - while permitting the states to regulate ISPs in their capacity as intermediaries."

The Ninth Circuit Court of Appeals also noted the limits of section 230 immunity. In Fair Housing Council of San Fernando Valley v. Roommates.com, LLC, it stated that the

54 Doe v. GTE Corp., 347 F.3d 655 (7th Cir. 2003)
55 Id. at 669.
56 Chicago Lawyers' Committee for Civil Rights Under Law., Inc. v. craigslist, Inc., 519 F.3d 666, 670 (7th Cir. 2008)
57 521 F.3d 1157 (9th Cir. 2008).
"Communications Decency Act was not meant to create a lawless no-man's land on the Internet." 58 It noted that "the substance of section 230(c) can and should be interpreted consistent with its caption" which reads "Protection for private blocking and screening of offensive material." 59 In a footnote, it observed that holding businesses liable for their own conduct did not seem to be unduly burdensome. 60

Both the Roommates and the Craigslist cases suggest that at least the Ninth Circuit and the Seventh Circuit courts recognize limits to section 230 immunity. These limits are based upon the statutory language itself which states that interactive computer service providers who are not content creators or developers shall not be treated as publishers or speakers. Both courts noted that the caption of section 230(c) references protection for "Good Samaritan" blocking and screening of offensive material. The Ninth Circuit, in particular, noted that the exemption from civil liability is with respect to actions taken to restrict access to objectionable content -- not the creation of content. 61

In determining whether to impose proprietorship liability in a given situation, a court should consider whether the website operator took reasonable measures to prevent foreseeable harm. This is the same standard adopted by courts to determine liability for premises-based

58 Id. at 1165.

59 Id. at 1164, citing to Chicago Lawyers' Committee for Civil Rights Under Law, Inc. v. craigslist, Inc., 519, F2d 666 (7th Cir. 2009).

60 Fair Housing Council of San Fernando Valley v. Roommates.com, LLC, 521 F.3d 1157, 1169, f.n. 24 (9th Cir. 2008)

61 Id. at 1163 (noting that "Congress sought to immunize the removal of user-generated content, not the creation of content.")
businesses. A reasonableness analysis should recognize the variations among businesses. It should consider the differences between online and offline businesses and differences among web based businesses, including the large volume of traffic on some sites, the difficulty of controlling user conduct, and the problems created by anonymity. The benefit of a reasonableness analysis is that it is an evolving standard and thus one that accommodates technological advancements, societal changes and adaptations to technology. For example, while a particular website may not be a mere conduit or a common carrier, prescreening content may be difficult and may cause undesirable delays. Yet, as the technology improves, it may be more realistic to expect website operators to employ prescreening tools. Furthermore, a website operator’s actions in light of the ability to airbrush out an image or the identity of a particular individual should be considered in a reasonableness analysis. Imagine, for example, that a user posts an image of her daughter’s ballet class. One of the girls in the class is wearing a light colored leotard which reveals too much of her developing body. The legal guardian of the girl requests that the daughter’s image be removed. The website operator can accommodate that


63 As the Fifth Circuit noted, “if posting has to be reviewed before being put online, long delay could make the service much less useful, and if the vetting came only after the material was online the buyers and sellers might already have made their deals.” Id. at 669.

64 Rob Frieden, Invoking and Avoiding the First Amendment: How Internet Service Providers Leverage Their Status as Both Content Creators and Neutral Conduits, 12 U. PA. J. CONST. L. 1279, 1311 (2010)(stating that “technologies for monitoring, filtering, and inspecting content have substantially improved” from when the CDA was first enacted). Frieden questions whether an ISP can “continue to qualify for safe harbor exemptions based on its lack of ability to monitor and manage content, or assumptions that content management would constitute an unreasonable operational or financial burden on ISPs.” Id. at 1312.
request without removing the entire team photo simply by cropping out or blurring the girl’s image or by requiring the poster to do so.

The recognition of website proprietorship liability would promote the objectives of both section 230 and tort law. The imposition of proprietorship liability recognizes the policy objectives of section 230 (to both encourage Internet growth and greater user control over offensive content) and encourages the development and use of the Internet in a socially beneficial manner. The current broad immunity promotes technological development that is lopsided in favor of growth without social responsibility. Website proprietorship liability, on the other hand, conforms to societal expectations of reasonable business practices. Far from being an unduly harsh burden on online businesses, it merely requires them to be accountable for the products and services that they release to the public.

65 Section 230 (b) states that the “policy of the United States” is as follows:

(1) to promote the continued development of the Internet, and other interactive computer services and other interactive media;

(2) to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation;

(3) to encourage the development of technologies which maximize user control over what information is received by individuals, families, and schools who use the Internet and other interactive computer services;

(4) to remove disincentives for the development and utilization of blocking and filtering technologies that empower parents to restrict their children’s access to objectionable or inappropriate online material; and

(5) to ensure vigorous enforcement of Federal criminal laws to deter and punish trafficking in obscenity, stalking, and harassment by means of computer

Most courts adjudicating section 230 cases have tended to focus on (1) and (2) and have largely ignored (3)-(5).

66 I use the term “businesses” in a calculated manner since I propose a safe harbor for non-profit sites. See Part III, infra.
II. Website Design and Culture and the Two Regrettable Norms.

In this section, I discuss two regrettable online norms. The first is impulsive posting which is the posting of content without deliberation of the long term consequences. The second regrettable norm, third party posting, is the posting of content about third parties without their consent. I explain how the choices that website operators make regarding site design and site culture can temper or exacerbate the consequences of these two regrettable norms.

A. Two Regrettable Online Norms.

In the past fifteen years or so, an online culture has emerged with two regrettable online norms. The lack of barriers to distribution and the speed of digital communication have resulted in a norm of impulsivity. Thoughtfulness and deliberateness have taken a back seat to speediness. Trigger happy emailers press send first and feel regret later, and seasoned journalists find themselves "scooped" by amateur bloggers who publish rumors and speculation. The pace of communication grows ever more swiftly, via text messaging, Twitter and Facebook. The barriers to publication have disappeared and with them, quality controls, fact checking, and proper grammar and spelling. There is an additional hazard that comes with speed and that is emotionalism. A rapid reply is often an emotionally charged one, with no counting to ten before posting. While there may be benefits to some impulsive postings -- such as timeliness and spontaneity and maybe, in some cases, a type of creativity that results from lack of contemplation -- those benefits should be considered against the potential harms, especially when combined with the second regrettable norm.
The second regrettable online norm is the posting of information about third parties, without their consent. As with impulsive posting, third party posting can be socially beneficial. The public may be warned about nefarious characters, hazardous products or fraudulent businesses. One can share good news about a friend on a social networking site, for example. But third party posting can also be very harmful. A malicious poster can reveal secrets and post private images. Third party posting, whether well intentioned or not, strips the subject of his or her autonomy in that he or she is no longer able to make the decision whether to share personal information.

Something combustible often occurs when these two regrettable norms coincide. Impulsive posting about third parties can be gossipy, mean, and vengeful. Even when it is simply thoughtless, misguided and clueless, such postings can cause reputational and emotional harm that cannot be entirely erased. The stakes are high and can affect the subject of the post for years to come. An unflattering post may affect one’s job prospects, for example, as more companies use social media to conduct background checks of potential employees.67 While some may argue that impulsive and/or third party posting is not always bad, thoughtful, deliberate posts are, normatively speaking, almost always better. Society benefits from self-editing. Self-editing is not the same as institutional or governmental censorship. Similarly, garnering consent from third parties prior to posting information about them is also better as a norm. Unfortunately, the two emergent norms have a self-reinforcing effect on the online culture, as users conform to their influence and thus perpetuate them.

67 See Jennifer Preston, Social Medial History Becomes a New Job Hurdle, N.Y.TIMES, July 21, 2011, B1 (discussing a company that “scrapes the Internet for everything prospective employees may have said or done online in the past seven years.”) Id. The information obtained by that company has resulted in job offers being withdrawn. Id.
As noted in Section I, a determination of reasonableness for purposes of website proprietorship liability should be fact- and context-based. The reasonableness of measures adopted by a leanly staffed start-up with little traffic should not be compared with the measures adopted by an online giant like Facebook or Google. Website operators affect the way users conduct themselves on a site through website design and the fostering of a particular culture. For example, a website that permits anonymous postings invites greater openness and less formality. Users may also exercise less self-restraint and inhibition. Website operators should be cognizant of the way design interacts with the two regrettable online norms. This does not mean that website operators should never permit impulsive or third party posting; what it does mean, is that they should anticipate and implement safeguards to prevent the negative consequences that so frequently accompany them. The next section discusses some of these safeguards.

B. Reasonable Proprietorship, Website Design and Culture

As previously discussed, website operators should take reasonable steps to prevent foreseeable harm. Where the website operator designs its site to facilitate or encourage one or both of the regrettable norms, it should anticipate certain bad behavior on the part of its users. For example, while most websites want more traffic, what they do to increase traffic and what they want from their users differs. A retailer, like Amazon, wants to encourage users to buy. A news-oriented website such as the Huffington Post wants users to read content, not only to generate more ad revenue but also to gain influence over public opinion. Some websites, such as Facebook or Youtube, want their users to create content. But even user generated content sites have different objectives. Facebook wants user generated content so that its members can better communicate with their friends. The objective is to extend and enhance social networks.
Accordingly, the traffic generated is to individual user's accounts on Facebook. Youtube, on the other hand, wants user generated content which entertains and draws a broad audience of strangers. Presumably Youtube benefits more from clips that appeal to a large cross section of the population rather than those of interest primarily to the poster and his or her friends. Facebook intends for user generated content to strengthen social bonds among friends and acquaintances whereas YouTube wants its user generated content to attract the attention of the masses. On both sites, there is no prescreening of content and users can post content easily. However, both Facebook and Youtube have tempered the negative effects of impulsive postings through the design of their sites. Both sites discourage impulsive postings by requiring registration prior to uploading content. Registration requires submission of an email address, a username, postal code, date of birth and gender. Even if posters use a pseudonym and are unknown to the general public, they are identifiable by the website or they must take affirmative steps to create a false identity by creating an email account. Each required step mitigates the impulsivity norm.

A site's motivations for registration may differ. In a book about the social networking site, My Space, Julie Angwin explains how the company made a conscious business decision to allow “Fakesters,” or members who use fake identities in order to cultivate an unrefined, irreverent culture. YouTube requires posters to be registered with the site, browsers are free to

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68 Youtube recently announced plans to create designated channels to highlight more professionally created content. See Ian Paul, YouTube Spending $100M to Compete with Broadcast TV available at http://www.pcworld.com/article/224523/youtube_spending_100m_to_compete_with_broadcast_tv.html

69 http://www.youtube.com/create_account; http://www.facebook.com

70 JULIE ANGWIN, STEALING MY SPACE, 59-63 (2009)
watch videos without registering. YouTube encourages viewers to browse by making it easy to do so, by listing popular videos on its home page, categorizing videos and creating personalized recommendations, and highlighting video trends. YouTube thus designs its website to encourage impulsive viewing and tempers the negative consequences of impulsive posting with a registration requirement. YouTube also employs software to screen out nudity. Facebook also requires registration to join the site. Postings after registration are intended to be instantaneous and frequent. The design of Facebook encourages impulsivity but the negative consequences of impulsivity are tempered by the nature of the site itself which discourages anonymity. A member's page can be either open to the public or closed but the member must be identified in order to attract viewers. If a member uses a pseudonym, he or she must still notify others in order for them to gain access to his or her Facebook postings. The site is designed to be searchable by member name, not content. Facebook also has a “safety center” to provide resources to address online safety concerns particular relating to juvenile users. One safety feature, the social reporting tool, addresses third party posting. This tool permits a user to

71 http://www.youtube.com

72 Id.

73 http://www.facebook.com/

directly ask another Facebook member to remove a post or photo, and remove as a friend or block an offending poster.\textsuperscript{75} The user can also request Facebook to remove the offensive post.\textsuperscript{76}

By contrast, gossip sites exploit both regrettable norms and specialize in getting users to impulsively post content about others. The gossip site the Dirty.com encourages users to "Submit Dirt" via a large button on the home page.\textsuperscript{77} Users are not required to register and can either email the website or upload the content directly. Another website, Campusgossip also makes posting content easy, including a button labeled, "Upload and Move On."\textsuperscript{78} Posters are not required to register and posting is fast and anonymous or pseudonymous. Just as registration and the possibility of identification encourage accountability, non-registration encourages impulsivity and a lack of accountability.

The culture established by each website can either mitigate or exacerbate the two regrettable norms. A website that purports to help you "connect and share with the people in your life"\textsuperscript{79} emphasizes a participatory culture that depends upon the user's identity and reputation, whereas a site that urges users to "submit dirt"\textsuperscript{80} with pictures on the home page of scantily clad women fosters a voyeuristic, misogynistic culture where posters and viewers can


\textsuperscript{76} Id.

\textsuperscript{77} http://thedirty.com/

\textsuperscript{78} http://www.campusgossip.com/

\textsuperscript{79} http://www.facebook.com/

\textsuperscript{80} http://thedirty.com/
mock and condemn without fear of their identities being revealed. The operator of the latter site adds denigrating comments to posted images of women, thereby encouraging the culture of online stone throwing.\textsuperscript{81}

Another way that site operators can establish a culture is through their terms of use or "community guidelines."\textsuperscript{82} Some sites, for example, forbid the posting of hate speech\textsuperscript{83} or sexually explicit content.\textsuperscript{84} Other sites tout their status as "gossip and satire" sites and expressly disclaim responsibility for posted information.\textsuperscript{85} A site can require a user to read the guidelines prior to posting, or may impose them in a more passive way, through a link on the site. A site that requires clicking “I agree” to the websites community guidelines prior to posting may ameliorate some of the negative effects of the two regrettable norms by inserting a delay in the posting process and by reminding the poster of behavioral expectations.

Websites that encourage impulsive postings and/or third party posting should expect that some users will upload content that they will later regret and wish to remove. Some websites temper impulsive postings by enabling the user to directly remove previously uploaded content.


\textsuperscript{82} http://www.youtube.com/t/community_guidelines

\textsuperscript{83} \textit{Id.}

\textsuperscript{84} \textit{Id.}

\textsuperscript{85} http://thedirty.com/terms-of-use/
Facebook, for example, gives users the ability to remove content that they posted. Other sites, however, don't give users control over their content once it is posted.86

Another way that site operators can cultivate a particular culture is by actively monitoring the site for inappropriate content. A website operator can, for example, delete posts that violate its terms of use or guidelines. On the other hand, an operator who wishes to foster a crude and vulgar site might refuse to monitor comments and may disclaim responsibility for content.

1. **A Reasonable Cyber Harassment Policy.**

   A foreseeable consequence of impulsive and third party posting is the posting of content that is defamatory or invasive of a third party's privacy. *All* websites that permit user generated content should anticipate complaints and requests from third parties for removal of content. Accordingly, these website operators should implement a harassment policy to address complaints in a timely manner. While prescreening may not be feasible in many cases, a website should have standards for internal review of content. Such a policy should be reasonable on its face and have a way of addressing common problems created by the two regrettable norms. The rest of this subsection provides examples of situations that should be anticipated by a website operator that permits posting of content by users.

   a. **Websites Should Take Down Material Upon Request of Poster**

   A website operator that permits user generated content on its site should anticipate the occasional remorseful poster, someone who has fallen victim to one or both of the regrettable norms.

86 See [www.thedirty.com](http://www.thedirty.com), [www.ripoffreports.com](http://www.ripoffreports.com)
norms and later wishes to retract a post. Under section 230, a website is not liable for such content, even if it is false or otherwise tortious. The original poster, however, is not immune from tort liability. Furthermore, the likelihood of harm (and potential magnitude of damages for which the poster is liable) increases the longer the material remains on the website. The views expressed may no longer reflect those of the poster. A reasonable cyber harassment policy should include taking down material upon request of the poster. The website operator has no expression interest in content posted by third parties. The burden on the website’s resources is minimal. A takedown request by the original poster does not require onerous prescreening or difficult subjective decisions on the part of the website operator. Posters can be contractually prohibited from requesting more than a specified number of takedown requests and repeat offenders can be banned from the website, thereby limiting the administrative burden of responding to these fickle or ambivalent posters. Given the lack of expressive interest and the minimal burden upon the website operator, a reasonable cyber harassment policy should include the removal of posting upon request of the original poster.

b. Websites Should Take Down Unauthorized Nude Images Upon Request of Subject.

Online postings are widely distributable and easily reproducible and nude images have the potential to create devastating harm. In *Barnes v. Yahoo! Inc.*, the plaintiff sued Yahoo! for failing to remove unauthorized “profiles” which included nude pictures of the plaintiff which had been posted by her ex-boyfriend. The plaintiff’s ex-boyfriend posed as the plaintiff in Yahoo’s online “chat rooms” and directed men to the profiles that he had created. As a result, strangers

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87 2005 WL 3005602 (D.Or.) rev’d on appeal 2009 WL 1232367 (C.A. 9 (Or.))

88 *Id.*
seeking sex bombarded the plaintiff with emails, phone calls and personal visits.\textsuperscript{89} Yahoo! failed to remove the profiles for several months, removing them only when the plaintiff filed the lawsuit.\textsuperscript{90} The federal district court held that section 230 barred plaintiff’s claim.\textsuperscript{91} The Ninth Circuit agreed with the district court that section 230 ordinarily barred claims like the plaintiff Barnes’, but held that Yahoo! may have altered the immunity provided under section 230 under the doctrine of promissory estoppel.\textsuperscript{92}

A reasonable cyberharassment policy should include a process by which unauthorized nude images are immediately removed upon request of the subject. The \textit{Barnes v. Yahoo!, Inc.} case illustrates the necessity of immediate action when unauthorized nude images are posted online. While a photographer may have an expressive right and a copyright in his or her photographs, an individual has a personal interest in his or her image. The website, however, has no rights in images posted by third parties unless it obtains those rights contractually (which it may via its website terms of use). If, as alleged, Yahoo! failed to remove the images of Barnes within a reasonable time after receiving notice (including receipt of a copy of her photo ID and a signed statement denying her involvement with the fraudulent profiles)\textsuperscript{93} from Barnes, Yahoo!’s conduct would be inexcusable. On the other hand, if the profiles were removed but were then re-

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\textsuperscript{89} 2009 WL 1232367 (C.A. 9 (Or.))

\textsuperscript{90} Id. at 2.

\textsuperscript{91} 2005 WL 3005602 (D.Or.)

\textsuperscript{92} \textit{Id.} at 2

\textsuperscript{93} Id. (noting that after Barnes requested that Yahoo! Remove the unauthorized profiles it allegedly “did not respond.”)
posted, the issue of reasonableness would depend upon whether the company was able to block the repostings by, for example, banning the ex-boyfriend from the site. 94

Unauthorized posting of nude images disproportionately harms those individuals who do not conform to mainstream society views of sexuality. I use here the term “sexuality harassment” to refer to situations where a perpetrator singles out for ridicule or aggression an individual on the basis of his or her sexuality. Sexuality’s meaning is broad and expansive.95 The term “sexuality” may refer to biological factors as well as societal constructs. It can refer to gender identification, sexual orientation, the sex act itself, and/or signals and signaling mechanisms to potential sexual partners or society at large. It captures the way an individual talks, dresses, walks and shakes his or her hair. Sexuality thus implicates core issues relating to self-expression, identity and self-actualization.

Although highly personal, sexuality extends beyond the individual and is shaped by and reflects political and social dynamics. A boy growing up in a traditional household in a conservative small town may be reluctant to express his sexual interest in other boys. A student at a large university in a cosmopolitan city may conceal her lack of sexual experience. A man may hide his desire to wear women’s underwear. In other words, sexuality harassment captures the harassment of an individual based upon his or her sexuality, and typically reflects a societal

94 Yahoo! should also have responded in a timely manner. Instead, the court found that a month after Barnes complained, the company still had not responded. Barnes v. Yahoo!, 2009 WL 1232367 (9th Cir., 2009).

95 Webster’s dictionary defines sexuality as “1. The condition of being characterized by sex. 2. Concern with or interest in sexual activity. 3. The quality of having a sexual character or potency.” WEBSTER’S II NEW COLLEGE DICTIONARY (1995)
judgment or normative bias against a particular expression of sexuality. In fact, it is societal
approbation that characterizes and distinguishes sexuality harassment.\(^{96}\)

Unfortunate sexual stereotypes and harsh societal realities make the consequences of
unauthorized nude postings different depending upon the subject.\(^{97}\) To make generalizations can
be dangerous, but consider the Barnes v. Yahoo!, Inc. case with roles reversed. It would be
difficult to imagine a scenario where a woman posts a nude picture of her ex-boyfriend which
results in women appearing at his doorstep to have sex with him.\(^{98}\) Harassment often depends
upon social norms and mores so that the perceptions of the victim are considered in light of how
closely they align with society’s views of the acceptability of the poster’s actions. If, for
example, someone posts an image of a woman with the comment, “What a beautiful woman!”
the actions of the poster ordinarily would not be considered harassment even if the individual
perceived the actions as demeaning. In other words, the characterization of an action as
harassment often depends upon society’s judgment of the action.

Similarly, the consequences of a harassing post are determined by society’s judgment of
the depicted act. If the victim’s sexuality, as depicted in the posting, does not conform to

\(^{96}\) Although sexuality harassment occurs offline, this Article specifically refers to online sexuality harassment to
distinguish it from sexual harassment in the context of employment.

\(^{97}\) Chander observes that “(t)he problem of intrusions with respect to sexual privacy may be more grave for women
than men, for at least two reasons. First, society has long allowed men greater latitude in sexual affairs than it
affords women....Second, women are more likely to be the subject of nude photographs.” Chander, \textit{supra} note
XXX, at 129.

\(^{98}\) Danielle Keats Citron notes that the harassment of women online is a “pernicious and widespread problem” and
has a “profound effect on targeted women” that causes significant harm. See Danielle Keats Citron, \textit{Law’s
mainstream or majoritarian social norms, the consequences are much more severe for the victim. The victim may suffer ridicule, ostracism and acts of physical aggression. In other words, the act must be viewed in societal context. Sexuality harassment is often directed toward women who do not conform to a certain narrow and constructed version of female sexuality. The founder of one gossip website claims that he is providing a service by holding the women posted on his website accountable for their actions.99 Postings on that site tend to malign women for their sexual behavior, the way they dress or for not conforming to certain physical expectations. One posting attacked a woman for “clubbing” and claimed that “she’s now spreading her legs to any guy she meet’s at the bars” and “spreading her legs like the slut she is”.100 The online stone throwing continues in the comments with misogynist statements such as “i hate this bitch!” and “this one is a major dirty whoremaster!!!”101 One user posted pictures of his ex-girlfriend in various states of undress, calling her a "sl*t going nowhere in life...Maybe this h*e should be a dirty celeb since shes such a wh*re.”102 The website operator adds his two cents, commenting that his site has "weight standards,"103 and comparing the woman to a "fat cow."104

99 See Kevin Engstron, The dirty on TheDirty.com: Founder claims woman trashing site 'needed' by society, above Canadian laws, WINNIPEG SUN, April 9, 2011.
100 http://thedirty.com/2011/03/winnipeg-trashiest-sloot. From the comments, it seems as the posting was fabricated by someone who had a dispute with the victim of the post over money: “haha stop posting these Karolina...I can’t believe you have the nerve to call Jill a slut and whore but now a thief! Lol she is lucky to have money something that you have ZERO of which I why you stole from her!! There is a police report for theft against Karolina from her landlord that she stole from as Well as Jill. Jill! I love you babe and please do something about this bitch screwing with your life she needs to stop now.”
101 Id.
103 Id. Women are routinely attacked for their size. One poster, for example, attacked a woman's "large gut" and "extreme amount of cellulite." Id. Comments like these are typical of those on the site.
The Internet has given ordinary individuals the power to harass and destroy the lives of other ordinary individuals and so threatens to fundamentally change the nature of our society. The rhetoric of freedom (especially of speech) is often used by those who choose to defend bullying and unethical behavior, but in a free society, one should be permitted to express oneself in an intimate setting without fear of being harassed, spied upon, or subjected to blackmail. As Anne Branscomb wrote, autonomy or control over one's personal information is the "flip side of freedom of speech": "This freedom not to speak simply protects the right not to have information disclosed without consent or in a manner that may be contrary to one's interests." Unfortunately, as stories proliferate about vengeful ex-partners and perverted stealth shutterbugs, some may react by tamping their naturally expressive selves, even in places and spaces that would typically be considered private. Without knowing whether a potential lover or roommate today may be a vindictive online poster tomorrow, some may keep themselves fully clothed and sexually inhibited even behind closed doors, in rooms darkened to foil imagined hidden cameras. A paranoid fantasy, perhaps. But one created by our culture.

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104 Id.


106 An article in the New York Times noted the increase in delusions relating to reality television or the Internet: "With Internet delusion, patients typically incorporate the Internet into paranoid thoughts, including a fear that the Web is somehow monitoring or controlling their lives, or being used to transmit photographs or other personal information. " Sarah Kershaw, "Look closely, Doctor. Can you see the Camera? NYT, August 27, 2008, available at http://www.nytimes.com/2008/08/28/fashion/28truman.html?_r=1&scp=1&sq=internet+paranoid+delusion+illness&st=nyt While many psychiatrists believe that these patients would be delusional anyways, "The more radical view is that this pushes some people over the threshold; the environment tips them over the edge. And if culture can make people crazy, then we need to look at it." (quoting Dr. Joel Gold, who is a clinical assistant professor of psychiatry at New York University). Id.
One possible, albeit incomplete, solution is to mandate that images of nude individuals which have been posted without the authorization of the subject be removed upon his or her request. In response to concerns about vagueness, nudity should be defined as images of an individual’s genitalia or buttocks, and images of a female subject’s breasts, where the subject individual is identifiable. Such images are likely to be invasive of privacy. Even where the subject consented to the taking of the photograph, he or she may not have consented to the online posting of the photograph. Individuals may consent to the taking of nude photographs within a specific context. For example, someone may consent to the taking of nude pictures within the context of a relationship. After the relationship ends, a vindictive ex-lover may post the photograph online as an act of revenge. Ann Bartow notes that amateur pornography may include “fairly transparently an effort to disgrace or damage the subject of the pornography. “Revenge” pornography appears to be a widespread phenomenon, very popular with pornography viewers attracted by the eroticization of acts of targeted personal humiliation.”

Even if taken in a public place, the nudity may have been highly context specific, such as at a

107 There are generally four types of privacy torts: intrusion upon the plaintiff’s seclusion or into his private affairs, public disclosure of embarrassing private facts about the plaintiff, publicity which places the plaintiff in a false light, and appropriation for the defendant’s advance of the plaintiff’s name or likeness. See William L. Prosser, Privacy, 48 CALIF. L. REV. 383, at 389 (1960).

108 See Helen Nissenbaum, Privacy as Contextual Integrity, 79 WASH. L. REV. 119 (2004)(arguing that the “benchmark of privacy is contextual integrity”). Id. at 130.

nude beach or campground. Given the highly personal nature of such photographs, immediate removal is warranted.\footnote{See also Matthew R. Porio, Off-Guard and Online: The Unwitting Video Stars of the Web and the Public Disclosure Tort, 18 SETON HALL J. SPORTS & ENT. L. 339, 367 (2008)(discussing an online video of a college student catching his roommate masturbating).}

The takedown policy regarding nude images should apply even where the subject is a public figure. For example, former Congressman Anthony Weiner was the subject of a highly publicized scandal when he inadvertently publicly distributed a lewd photograph of himself, via Twitter. Subsequently, a blogger released another image, this one of Weiner’s erect penis that the Congressman had emailed to a woman with whom he had been corresponding. The image was distributed on the Internet and eventually resulted in Weiner’s resignation. While the initial image was newsworthy, the publication of the image of Weiner’s erect penis crosses the line of decency and the public’s “need to know”. There is no justifiable reason for its release online. As indiscriminate as Weiner might have been about shooting and sending digital images from his computer, he clearly never intended the public to see a body part that is clearly private. Weiner’s online activity may be news, but the actual photograph of his penis should not be. While written descriptions of nude images are likely reasonable and legal, the actual image of a man’s erect penis in this context is simply pornographic and exploitative. Even public figures should be able to maintain a shred of privacy.
c. **Websites Should Take Down Unauthorized Images of Minors Upon Request of Legal Guardian.**

While many images of non-public figure minors are not as invasive of privacy as nude images, a reasonable cyber harassment policy should include the removal of images of identifiable minors upon request of their legal guardian. Minors are more impulsive and prone to peer pressure. They may post suggestive or revealing images without fully realizing the harmful effects of doing so.\footnote{Recent studies indicate that adolescents may not fully comprehend how personal information can be used in unintended ways. For a summary of the recent literature in this area, see Alice E. Marwick, Diego Murgia Diaz and John Palfrey, *Youth Privacy and Reputation*, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1588163} A picture of a minor in underwear or a bathing suit, for example, may attract the attention of sexual predators or the ridicule of peers. Studies indicate that the impulsivity exhibited by teenagers has a biological basis.\footnote{See for example, Sarah-Jayne Blakemore, *Development of the social brain during adolescence*, The Quarterly Journal of Experimental Psychology, 61:1, 40-49 (summarizing recent studies investigating social cognitive development during adolescence).} In an article reviewing some of these recent studies, Dr. Sarah-Jane Blakemore noted that one study suggests that "both emotion processing and cognitive appraisal systems develop during adolescence."\footnote{Id. at 46.} Another study suggests that certain neural changes occur during adolescence that may affect decision-making\footnote{"[T]he neural strategy for thinking about intentions changes between adolescence and adulthood. Although the same neural network is active, the relative roles of the different areas change, with activity moving from anterior (medial prefrontal) regions to posterior (temporal) regions with age."}
Given his or her peer group, it is not surprising that a minor is more likely to be the subject of cyberbullying. Children have created false Facebook profiles and sent emails and texts masquerading as their classmates. One mother, for example, reported finding a Facebook page with a photo of her son, along with comments harassing his classmates.\textsuperscript{115} After investigating the matter, she discovered that several of her son’s classmates had created a false account in her son’s name and used misappropriated photos.\textsuperscript{116}

A child may become the victim of cyber bullying merely for expressing himself privately.\textsuperscript{117} In one well-known example, a fourteen-year old boy recorded himself on video wielding a golf club like a warrior from a Star Wars movie.\textsuperscript{118} The video was discovered by his high school classmates who posted it to a file sharing website. The video spread virally and was viewed hundreds of millions of times.\textsuperscript{119} Even today, several years after the video was first disseminated, videos of the “Star Wars Kid” may be easily found online, accompanied by hostile and abusive remarks. A recent visit to the popular video sharing website, YouTube, found the following comments: “two words “retard nerd’,” “”poor pathetic fat little stupid cocksucking motherfucking shit with a “stick’,” “It’s very sad to see that fat loser trying to be a starwar hero…he should go to the shrink t help him out cos this fat ass has a serious problem with his


\textsuperscript{116}\textit{Id.}


\textsuperscript{118}http://en.wikipedia.org/wiki/Star_wars_kid

\textsuperscript{119}\textit{Id.}
personality...he is trying to be someone else...maybe he is not happy with himself...these are the kind of future serial killers...keep an eye on this guy..."120 This boy’s private act of expression became the object of global scorn and ridicule (as well as near-criminal misspellings and cheap psychoanalysis). 121

While any sentient human being would find this type of abuse unpleasant, children and adolescents are at a critical period of social and emotional development. Minors do not yet have the maturity or the social experience to contextualize public humiliation.122 The “Star Wars kid,” for example, dropped out of school and enrolled in a children’s psychiatric ward.123

Furthermore, minors have not yet developed a professional reputation to offset or counter the effect of embarrassing or otherwise negative posted images, which may hinder their future career opportunities.124 A website, which is treated as a common carrier under Section 230, lacks expressive interest in images of non-public figure minors and should immediately remove them upon request of the legal guardian. Some critics may charge that websites will be barraged with overprotective parents seeking removal of harmless photographs of their children. It’s more

120 Available at http://www.youtube.com/watch?v=HPPj6viBmU.

121 According to a lawsuit filed against the classmates who posted the video, the boy who was featured in the video may cause him to be “labeled as “mentally ill” and the “stigma could make it difficult for him to enroll in school or get a job, and may force him to change his name."Star Wars Kid Files Lawsuit, Wired News Report, July 24, 2003, available at http://www.wired.com/culture/lifestyle/news/2003/07/59757.

122 See notes 27-29. Ted Brodheim, the chief information officer for the New York City Department of Education, observed, "I don't think they (high school students) fully grasp that when they make some of these decisions, it's not something they can pull back from." Stephanie Clifford, Teaching About the Web, and Its Troublesome Parts, NYT, April 10, 2010.

123 Id.

124 The poster’s reputation may be negatively affected, too if his or her identity is revealed.
likely that parents will complain only if they feel that the images of their children are being misused, which they often are in disturbing ways.\textsuperscript{125} A researcher, for example, reports that an image of one child’s head was put on a pornographic picture depicting a sexual act.\textsuperscript{126} Many of that child’s classmates were directed to the online image.\textsuperscript{127}

Furthermore, a "takedown-upon-notice" regime might prevent more aggressive action. Recently, a couple called the police to have a man arrested for posting a video of their eight-year-old son spewing profanity.\textsuperscript{128} While the man claimed that he would have removed the clip if the parents had asked, it is understandable why the parents might not have been anxious to interact with a neighbor whom they felt compromised the morals of their son by allegedly encouraging him to swear for $1 and then posting the video online.\textsuperscript{129} (The man denied both encouraging the boy to swear and paying the boy money).\textsuperscript{130} Given the impossibility of ubiquitous parental supervision and control over the taking of digital images of their children, the powerlessness of children to prevent adults from taking their picture, and the substantial interest


\textsuperscript{126} Paul J. Fink, \textit{The case of a teenager who committed suicide after being bullied online shows that the Internet can be a weapon against the psychiatrically vulnerable. What can we do to help these patients?} CLINICAL PSYCHIATRY NEWS, February 2008, available at http://findarticles.com/p/articles/mi_hb4345/is_2_36/ai_n29416400/

\textsuperscript{127} \textit{Id.}


\textsuperscript{129} \textit{Id.}

\textsuperscript{130} \textit{Id.}
that parents have in the safety and well-being of their children, websites should defer to parental judgment.131

d. **Websites Should (Usually) Take Down Private Communication Upon Request of the Writer.**

The third party posting norm has resulted in an unfortunate but common scenario where communications intended to be private are instead forwarded or posted without the writer’s consent. A website that permits users to post content should be prepared to address what to do when a user posts private communication from a third party. Emails are often written quickly and have a different style and purpose than communications intended for a general audience. Furthermore, email communications are typically written using a language, style and references that have meaning only within the contextual framework of a preexisting relationship between the sender and the receiver. A study by the Pew Research Center found that the most common type of cyber bullying among teenagers was the forwarding or public posting of private communication without permission.132 Nearly 1 in 6 teens reported having had someone forward or post private communication.

In some cases, an intermediary may believe that the public posting of private communication serves a valid public purpose. In that case, the website operator’s actions should be subject to a reasonableness analysis. In other words, a decision by the website operator *not* to

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131 See also Chander, *supra* note XXX, 124-139 (discussing why a reinvigorated privacy tort is necessary to protect youthful indiscretion). Chander’s thoughtful essay explains why the Internet and online disclosures threaten to force children to live their lives "as if in a fishbowl" which may lead to youth adopting the "unfortunate strategies" of "excessive caution or foolhardy fearlessness." *Id.* at 124-25.

132 Pew Internet & American Life Project, Parents and Teen Survey, Oct-Nov. 2006. The survey was based upon 886 teenagers.
remove private third party communications does not necessarily mean that the website operator has acted in an unreasonable or tortious manner. It does mean that the third party may be able to pursue a tort or copyright action against the website operator. It doesn’t mean that the third party will prevail. Furthermore, the possibility of a lawsuit by a third party is mediated by the availability of the safe harbors set forth in Part III.

e. A Website’s Cyber Harassment Policy Must Implement a Reasonable Review Policy.

Finally, a cyber harassment policy should have a reasonable review process in place. Any site that permits user generated content should expect takedown requests and should be prepared to deal with them. A review process does not mean that the website operator must comply with the takedown request, only that the review process should be timely and reasonable. One website allegedly entertains takedown requests with the intent of publicizing them for ridicule or “lulz.” That, of course, would not constitute a reasonable review process.

Some websites exploit web design and section 230 immunity, appealing to its audience’s worst instincts. Gossip and voyeurism generate traffic and increase visibility, which may lead to more advertising revenue or notoriety that a website operator can parlay into other revenue

133 “Lulz” is a term that refers to the gratification of causing suffering to others through online activity. See JARON LANIER, YOU ARE NOT A GADGET (2010) (“The culture of sadism online has its own vocabulary and has gone mainstream. The common term “lulz,” for instance, refers to the gratification of watching others suffer over the cloud.”) Id. at 61. See also Mattathias Schwartz, The Trolls Among Us, N.Y. TIMES, Aug. 3, 2008, at MM24 (lulz means “the joy of disrupting another’s emotional equilibrium.”)
generating opportunities. On the other hand, many websites strive for a broad user base and a more congenial environment. Under a website proprietorship standard, courts would be able to make distinctions between and among different types of websites.

III. Liability Safe Harbors

This Article advocates the imposition of website proprietorship liability primarily because websites are generally in the best position to respond to harmful postings. Website operators are usually the only parties technically able to remove posts. Because postings are often anonymous, the victim of a harmful post may not be able to seek redress from the poster. Websites have the ability to profit from traffic on their site. Throughout this Article, I have deliberately used the term “businesses” and “proprietors” in describing website operators. Website operators have the option of profiting financially from their websites even if they choose not to exercise that option. More page views and a larger user base mean the potential for greater advertising revenue.

Yet, there are some instances where imposing website proprietorship liability on a website operator may be unfair or unwarranted. The threat of liability may stifle fledgling businesses. Some businesses may serve as quasi-public forums and enable users to virtually gather and discuss newsworthy issues. Given the lack of public forums on the Internet, these

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134 The use of images to increase traffic may create a right of publicity claim on the part of the individual whose image has been misappropriated. See Roberta Rosenthal Kwall, A Perspective on Human Dignity, the First Amendment, and the Right of Publicity, 50 BOSTON COLLEGE L. REV. 1345 (2009)(noting that the “right of publicity is a legal theory that enables individuals to protect themselves from unauthorized, commercial appropriations of their personas” but the “reality is that many actions based on the unauthorized use of personas involve both dignity and economic harms.”) Id. at 1346.
websites serve a socially beneficial function. The threat of liability may cause these quasi-public forums to disappear.

There are two primary arguments in favor of retaining section 230 immunity. The first is that it encourages innovation, economic growth, and the flourishing of the Internet. The second argument is that it protects free speech online. I address both types of arguments more fully in Part IV.

While each argument considers the advantages of section 230 immunity, neither argument addresses its disadvantages. While a social harm does not always justify a remedy that removes or diminishes associated benefits, neither does a social benefit justify a resultant or associated social harm. This Article proposes that one way to balance the benefits of section 230 with its burdens is to impose proprietorship liability yet create safe harbors. The language of section 230 (c)(1) regarding the treatment of websites as "publisher or speaker" has only generated confusion and provides little guidance. This Article proposes eliminating this language and replacing it with safe harbor provisions that balance the benefits and burdens of proprietorship liability. A website operator that falls under any one of these safe harbors would be deemed to have acted “reasonably.” These safe harbors would effectively immunize a website operator from proprietorship liability. Section D of this Part III proposes legislative language to amend section 230 to reflect both proprietorship liability and the safe harbors.

135 I will discuss both arguments in more detail in Part IV.
A. Identified Postings and Takedown Compliance.

One such safe harbor is for websites that require all postings be made by identified users. The poster would put their real name alongside the post and the poster’s contact information would be kept on file with the website. Many of the problems of online discourse stem from the lack of ownership of posted content. Postings are often made anonymous or pseudonymously. Jaron Lanier calls “effortless, consequence-free, transient anonymity”\(^{136}\) or “drive-by anonymity”\(^{137}\) an important design feature of a “troll-evoking” website.\(^{138}\)

As noted in Part II, some websites tout the ease with which postings may be made by unidentified sources, inciting defamatory or malicious postings. Even those sites that require registration prior to posting typically do not identify the user but maintain the user’s registration information solely for their own internal marketing purposes. Without responsibility for content, posters and intermediaries abandon discretion. Victims are left without recourse since posters may be difficult to identify and locate, and intermediaries are immune under section 230. A policy of requiring posters to be publicly identified with their postings may reduce the incidence of both impulsive and third party posting, and their negative consequences. One notable company has already recognized the potential benefits of identified postings in fostering a desirable culture. The new social networking site, Google +, requires the use of "real names."\(^{139}\)

\(^{136}\) Id. at 63.

\(^{137}\) Id.

\(^{138}\) Id.

The "real names" policy, which doesn't mean legal names, requires that users employ common names or names that they use in everyday life on their Google+ profile. Google's stated reason for this policy is to have a "nicer, more personal, community."141

Currently, an anonymous poster can publicly ruin a victim’s reputation with no association whatsoever with the act. Identified postings would associate the poster with the nature of his or her posting, thus more closely mirroring the consequences of spreading gossip in the offline world. The posting may lose credibility depending upon the reliability of the poster. Furthermore, the poster, and not just the subject of the post, may suffer from a malicious post. For example, an individual who posts private photographs or information of a former lover becomes associated with the act of betrayal, thereby diminishing his or her chances at future relationships. An increase in the social consequences of spreading harmful information might deter would-be malicious posters as well as provide an alternative to the legal system. As previously noted, the legal system with its focus on remedying rather than preventing harms, often leaves victims of online harassment without a satisfying remedy. Identified postings may enable the victim to bypass the legal system by using social pressure to persuade the poster to remove an offensive post. The victim would have the option of pursuing a civil action directly against the poster or of using social pressure to persuade the poster to seek removal of the harmful content.

140 Id.

141 https://plus.google.com/1110910895277277420853/posts/Fddn6rV8mBX#1110910895277277420853/posts/Fddn6rV8mBX

142 Daniel Solove notes that, by gossiping, a person may risk harm to his or her own reputation. DANIEL J. SOLOVE, THE FUTURE OF REPUTATION, supra note XXX, at 140-42.
It may be difficult for website operators to verify that a given name and contact information is genuine. The standard for verifying real names should be the listing of a first and last name and the retention by the website operator of contact information. In the event that a complaining party discovers that the given name and contact information of a poster is fake, the website operator must remove the posting if it is to continue to avail itself of this safe harbor. If the website operator removes the posting after discovery that the identity is false, it is immune from liability.

In order to qualify for this safe harbor, the website operator must promptly remove any content upon request by the original poster. The website operator has no expressive interest in content posted by another, and section 230 relieves it from liability. Unfortunately, some website operators exploit section 230 immunity and take advantage of the two unfortunate norms by refusing to remove content even where requested by the poster. For example, one consumer review website claims that it provides “a service to the world’s consumers.”143 This website, RipoffReport, states that it helps consumers “exercise your first amendment right to freedom of speech. By using our forum, you will have an opportunity to speak out against companies, businesses, government and individuals that have treated you unfairly.”144 It notes, however, that it will not remove posts by users “even if the original authors asks us to do so.”145 Yet, on a different page on its site, this same website notes that “it wants to be clear that it accepts no

143 www.ripoffreport.com/faq.aspx
144 Id.
liability for the speech of its users”\textsuperscript{146} and that the CDA prohibits a defamed subject “from holding us liable for the statements which others have written.”\textsuperscript{147} It throws its posters under the bus, adding, “You can always sue the author if you want, but you can’t sue Ripoff Report just because we provide a forum for speech.”\textsuperscript{148}

While one could make a strong argument that a company that seeks to provide a forum for the benefit of the public should have limited immunity, it would not qualify for this particular safe harbor.\textsuperscript{149} A policy that absolutely refuses to remove content upon poster request fails to consider the realities of the two unfortunate norms, and ignores that a user may post in a biased, emotional state that he or she later regrets. It also disempowers the poster and removes the value of autonomous decision-making from the act of expression. Finally, it leaves the poster vulnerable to lawsuits, sharing none of the responsibility for the post while maintaining total control over its continued publication.

\textbf{B. Takedown upon Notice/Right of Reply and Poster Identification.}

A website operator that receives a notice requesting the removal of content would be exempt from liability if it promptly complies with the request. A notice and takedown regime under section 230 has been proposed by others.\textsuperscript{150} Daniel Solove, for example, proposes that

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{146} \url{www.ripoffreport.com/ConsumersSayThankYou/WantToSueRipoffReport.aspx}
\item \textsuperscript{147} \textit{Id.}
\item \textsuperscript{148} \textit{Id.}
\item \textsuperscript{149} It may, however, fall under the “non-profit” safe harbor discussed in section XXX.
\item \textsuperscript{150} \textit{See} Bradley Areheart, \textit{Regulating Cyberbullies Through Notice-Based Liability}, 117 YALE L. J. POCKET PART 41 (2007)(proposing a notice and take down scheme similar to that available under the Digital Millenium Copyright Act); Daniel Solove, \textit{Speech, Privacy and Reputation on the Internet}, in the OFFENSIVE INTERNET 25
\end{enumerate}
\end{footnotesize}
section 230 be modified so that “(w)henever bloggers or website operators know that a comment posted by another is tortious, the law should create an incentive for them to remove it. If a person promptly removes a tortious comment after being notified, then that person would be immune. If the person fails to remove the comment, only then would the person be subjected to potential liability.”

The provision could be modeled after the Digital Millennium Circumvention Act (“DMCA”) provision regarding notice and takedown of allegedly infringing copyrighted material. Some critics argue that the DMCA takedown provision has been abused by copyright owners who use it to remove lawfully posted material and that such a provision under section 230 would be similarly abused. Daniel Solove tackles such criticisms, noting that while the DMCA is “fraught with problems, as zealous copyright owners are making overbroad takedown requests for material that is fair use,” a similar provision under section 230 is unlikely to be abused in that way:

“Would notice and takedown for defamatory or privacy-invasive speech run into similar problems? I do not believe it would for several reasons. First, abusing the notice-and-takedown system should be penalized. Those who wrongly issue takedown threats for material that is not defamatory or invasive of privacy should be punished for making unjustified claims. Second, the entities enforcing copyright law are often very wealthy, powerful and aggressive…In contract, most privacy or defamation plaintiffs are ordinary individuals, without the ability to hire armies of lawyers or to pursue cases relentlessly to the four corners of the globe. Most individuals who request information be taken down to protect their personal reputations lack the litigating power of the music or movie industry, and the stakes are much lower.”

(2010)(recommending that section 230 be modified to have a notice-and-takedown system rather than complete immunity).

151 Id. at 25.

152

153 Id. at 26.
Solove acknowledges that there is the possibility of excessive takedown and predatory lawsuits that aim to extort money. In response to predatory lawsuits, he proposes mandatory mediation and limits on damages. Solove’s response to the risk of excessive takedown, however, is less definitive. He states “(l)essening section 230 immunity is unlikely to increase the existing risk of excessive takedown in a dramatic fashion” but acknowledges that there are unanswered empirical questions regarding the impact of a takedown regime upon legitimate speech and that the “only way to find out for certain is to experiment.”

Some free speech advocates may find Solove’s response unsatisfying, especially given the lack of public forums on the Internet and the cultural primacy placed upon freedom of speech in American society. In an attempt to recalibrate the speech/privacy balance, this Article proposes that the notice and takedown safe harbor include a “response and identification” by the poster.

Upon receiving a takedown notice, the website operator may notify the poster and the poster may elect to stand by the posting by identifying him- or herself. The posting would then become an “identified” posting and the website operator would be immune from civil liability.

C. Non-profit Companies with No Site Advertising.

In some cases, a website may hold itself out to be a quasi-public forum, claiming that it serves a valuable social function by providing a virtual space to debate issues of public concern. The motivations of companies, however, may not be entirely pure. The argument about wishing

\[154 \text{Id.} \]

\[155 \text{Id.} \]

\[156 \text{Id.} \]

\[157 \text{Id. at 26-27.} \]
to serve as a public forum sounds disingenuous where the site discussions primarily involve private figures and where the site profits from page views\(^\text{158}\) or where the website charges a fee to provide services to “arbitrate” disputed postings.\(^\text{159}\) A company may claim to serve a public forum function \textit{and} make money doing so, but in that case, it should be willing to accept ordinary business risks, including the risks of proprietorship liability. This third safe harbor would protect those intermediaries that are organized as non-profits as long as they do not accept paid advertisements on their sites. This safe harbor distinguishes between those sites that serve public forum functions, and those which merely employ such rhetoric while running for-profit businesses.

There may be an ancillary but important benefit to providing a safe harbor for non-profits that don’t accept paid advertising. Some critics of online review sites, such as Yelp, claim that they manipulate their ratings system to favor businesses that advertise on their sites.\(^\text{160}\) This safe harbor then may enhance the reliability of some consumer review sites.

\(^{158}\) On a related issue about the dichotomous nature of intermediaries, Rob Frieden pointedly observes that internet service providers (ISPs) “toggle between claiming First Amendment-protected speaker rights and invoking “safe harbor” exemptions from liability for the content they carry...ISPs seemingly can turn on and off their speaker status to qualify for two different types of limits on government regulation of the content they deliver.” Rob Frieden, \textit{Invoking and Avoiding the First Amendment: How Internet Service Providers Leverage Their Status as Both Content Creators and Neutral Conduits}, 12 U. PA. J. CONST. L. 1279, 1281-82 (2010).

\(^{159}\) Ripoff Report, for example, provides a “V.I.P. Arbitration process” whereby a complaining party may seek to have a false statement redacted. \url{www.ripoffreport.com/ConsumersSayThankYou/WanttoSueRipoffReport.aspx}. The program is not free, however, as the site notes “there is a cost for participating in the program which covers the arbitrator’s fees and our administrative costs, but the program is not expensive compared with other alternatives.” \textit{Id}.

D. Proposed Legislative Amendment.

As previously discussed, section 230 of the CDA has been misinterpreted by courts to grant broad immunity to intermediaries. There is nothing in the legislative language that grants immunity to intermediaries. Furthermore, the only exculpatory language in the legislation is with regard to good faith efforts to remove or restrict access to objectionable material. Section 230(c)(1) merely defines the status of intermediaries in the negative; it does not explain what a publisher or speaker is, or in what context it would be appropriate to make such distinctions. The undivinable purpose of section 230(c)(1) is largely responsible for the judicial missteps with section 230 cases. Courts seems to have conflated the exculpatory language regarding good faith removal and restrictions efforts in section 230(c)(2) with the language about not treating intermediaries as publishers or speakers in section 230(c)(1), to perversely grant broad immunity to websites because they are publishers of content. Given the judicial madness created by subsection (1), this Article proposes that it be deleted and replaced with provisions that replace broad immunity with more targeted instances of immunity. In order to reflect these proposed safe harbors, and to clarify the imposition of civil liability, the language of section 230 of the Communications Decency Act should be amended as follows:

(c) Protection for “Good Samaritan” blocking and screening of offensive material

(1) Treatment of publisher or speaker

— No 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.

(2) Civil and criminal liability
No provider or user of an interactive computer service shall be held liable on account of –

(A) any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing or otherwise objectionable, whether or not such material is constitutionally protected; or

(B) any action taken to enable or make available to information content providers or others the technical means to restrict access to material described in paragraph (A)

(C) Nothing in this section shall be construed to limit the civil or criminal liability of an interactive computer service provider or user except that:

   i. no interactive computer service provider shall be liable for content provided by another information content provider if –

      1. upon notice of the content by a complaining party, the interactive computer service provider acts expeditiously to remove, or disable access to, the content or, alternatively, identifies the information content provider with information sufficient to permit the complaining party to contact the information content provider (such as an address, telephone number and an electronic mail address) and provided further that the website operator expeditiously removes content if so requested by the information content provider;

      2. all content posted on a website by information content providers are accompanied with a first and last name
identifying the information content providers, and provided further that upon request by a complaining party, the website operator identifies the information content provider with information sufficient to permit the complaining party to contact the information content provider (such as an address, telephone number and an electronic mail address) and provided further that: (i) the website operator expeditiously removes the content upon request of the information content provider; and (ii) the website operator expeditiously removes the content if the name or contact information of the information content provider is false or unverifiable;

3. the interactive computer service provider is a non-profit entity which does not earn any revenue or receive any monies from advertising on the website where the content that is the subject of a complaint is posted.

(e) Effect on other laws

(3) State law

Nothing in this section shall be construed to prevent any State from enforcing any State civil or criminal law that is consistent with this section. No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section.

(f) Definitions
(5) website operator

The term “website operator” means any person or entity, including any interactive computer service, that manages and has the ability to control the content on a website.

(6) website

The term “website” means a location on the Internet indicated by a Uniform Resource Locator or “URL.”

VI. Anticipated Objections

As previously noted, I anticipate two types of arguments to my proposals. The first category of argument has to do with Internet growth and business innovation. The second category involves free speech. Both of these objectives are reflected in the policy goals of the Communications Decency Act. In addition, I briefly address arguments that my proposals do not go far enough to address online harms.

A. Business Arguments in Favor of Section 230.

One argument in favor of section 230 immunity is that it promotes technological innovation and the growth of online businesses. The specter of tort liability for intermediaries would thus

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161 See, for example, Eric Goldman, In Defense of 47 U.S.C. section 230, draft on file with author. Goldman argues that, “Section 230 becomes a key contributor to the efficient functioning of our economy” because consumer review websites increase information flows and thus improve market efficiency. Furthermore, according to Goldman, section 230 “provides incentives for entrepreneurs to start or grow (user generated content) companies in the United States, creating new jobs and other economic opportunities in the United States.” See also Cecilia Ziniti, The Optimal Liability System for Online Service Providers: How Zeran v. America Online Got it Right and Web
have a chilling effect on Internet businesses and innovation.\textsuperscript{162} This Article expresses skepticism that the threat of liability is likely to significantly hinder the growth of the Internet. It is still much less costly to start a business online than it is to open a store or publish a book or magazine. The low costs of doing business online ensures that companies will continue to conjure up innovative online businesses. As the Ninth Circuit Court of Appeals remarked in a footnote in the \textit{Roommates} case, "(c)ompliance with laws of general applicability seems like an entirely justified burden for all businesses, whether they operate online or through quaint brick-and-mortar facilities."\textsuperscript{163} It further remarked that the vast reach of the Internet is "exactly why we must be careful not to exceed the scope of the immunity provided by Congress and thus give online businesses an unfair advantage over their real-world counterparts, which must comply with laws of general applicability."\textsuperscript{164} In a world where the Amazons are pushing the Borders out of business, and where print magazine and newspaper subscriber bases and advertising revenues are being siphoned away by online publishers, an immunity for online publishers that is unavailable for offline ones is simply unfair.

\begin{flushright}
2.0 Proves It, 23 BERKELEY TECH. L. J. 583 (2008)(noting that while it is unclear to what extent whether section 230 immunity assisted the development of Web 2.0, it poses less hurdles to it than alternatives).
\end{flushright}

\textsuperscript{162} Alex Kozinski and Josh Goldfoot recently wrote that the “argument that a legal holding will bring the internet to a standstill makes most judges listen closely…No one in a black robe wants to be responsible for anything like that….Closely related is the argument that, even if you don’t bring down the existing structure, the threat of liability will stifle innovation, so that the progress we have seen in recent years – and the gains in productivity and personal satisfaction – will stop because the legal structure has made innovation too risky or expensive.” Alex Kozinski and Josh Goldfoot, \textit{A Declaration of the Dependence of Cyberspace}, 32 COLUM. J. L. & ARTS 365, 370 (2009) One of the authors, Alex Kozinski, is the chief judge of the United States Court of Appeals for the Ninth Circuit. The authors conclude that the innovation argument is “partly right, but mostly wrong.” \textit{Id.}

\textsuperscript{163} \textit{Id.}

\textsuperscript{164} \textit{Id.} at f.n. 15.
Furthermore, not all businesses are good for society. There is a tendency to refer to Internet companies as a singular type when, as this Article has explained, there are a wide variety of business models, practices and policies. Society would be better off without websites that encourage defamatory content or content that invades the privacy of private citizens. Of course, there may be websites that serve a socially useful function that would be threatened by reducing the scope of section 230 immunity. Many legitimate consumer review websites, for example, might disappear or be forced to change their submissions policies.\(^{165}\)

It is doubtful that the disappearance of these websites would be tragic or notable. Companies have always had to assess risks, including the risks of litigation, with the potential upside of engaging in business. The extremely low barriers to entry have changed the typical Darwinian process of survival represented by a free market system. The result is more and more unreliable consumer review websites and an increasing scarcity of quality reporting. Readers of a traditional publication, such as the New York Times, are often familiar with a particular reviewer’s tastes and preferences. They trust that reviewer to be honest, even if they don’t agree with that reviewer’s opinion. They know, in other words, where that reviewer is coming from. It’s a different story with online review sites. The consumer searching for a recommendation is barraged with information, forced to sift through the offerings of many review websites and to assess the reliability of the often wildly-diverging reviews without knowing where the reviewers

\(^{165}\) Eric Goldman credits section 230 with the proliferation of consumer review publications: “Prior to the Internet, published consumer reviews were rare...Some publications, like Zagat’s, compiled consumer reviews for specific vertical markets...consumers had nowhere to go if they, on their initiative, wanted to share their opinions with other consumers...they had limited outlets for raising the profile of their views...Why didn’t more publications publish more consumer reviews prior to the Internet? There are many possible explanation, including that publications may not have considered consumer reviews to be as credible as professional reviews. Another explanation is that publications feared their liability for publishing consumer review.” Eric Goldman, 47 U.S.C. §section230 as Economic Policy, draft on file with author.
are coming from or whether their tastes and preferences align with the consumer. Furthermore, the reviews may be disingenuous or dishonest. Some of the negative reviews may be the result of vengeful and petty customers or competitors and some of the positive reviews may be from company employees. The reduction of online consumer review sites may actually assist consumers who already suffer from information overload. Companies may institute more rigorous review policies or may establish themselves in ways to qualify for a safe harbor provision. Far from sounding a death knell for consumer review sites, imposition of proprietorship liability may result in a decrease in their quantity but an increase in their quality, reliability and usefulness.

The Internet exceptionalist view exhibits an unfortunate tendency to refer to technology and innovation as characteristics specific to Internet based businesses. Yet, technology doesn’t happen only or even primarily online. There are many businesses that are working on products and services to improve human lives. Pharmaceutical companies are working on drugs to prevent cancer or alleviate pain. Cleantech companies are searching for alternative fuel sources and researching ways to reduce carbon emissions. Yet, these companies do not benefit from

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166 Eric Felten, *Lawsuits Fly Over Mean Online Reviews*, WALL ST. J., April 23, 2010 W11 (remarking that “even the most cursory perusal of online comments that rate products and services also discovers plenty of manufactured praise and malicious trash talk”). Not surprisingly, many people “question the honesty of online critiques.” *Id.*

167 The Haggler, the consumer advocate columnist for the New York Times, recently wrote about the problem of fake reviews on consumer review websites such as Yelp where businesses can pay to have someone post a favorable review about their company. David Segal, *A Rave, a Pan, or Just a Fake?* N.Y. TIMES, May 22, 2011.

168 Kenneth Frazier, the president and CEO of Merck & Co. recently wrote that “the life sciences are largely absent from most discussions about encouraging innovation, while the extensive research and development that stands behind each new vaccine of medicine is invisible to all but a few. Most Americans have no clue about the extraordinary scientific innovation and huge R&D investment embodied in the small pill or capsule their doctors prescribe.” Kenneth Frazier, *Will Washington Find the Cure for Cancer*, WALL ST. J., July 13, 2011, at A17.
broad immunity for their actions. Online consumer review sites such as Yelp are no more (and in this author’s opinion, a great deal less), socially beneficial than a biotech start-up working on a treatment for Alzheimer’s disease. If a few would-be online entrepreneurs decide to pursue alternative career paths because of the fear of tort liability, our society will survive. For-profit businesses have never been, and should never be, risk-free. As Chief Judge of the United States Courts of Appeals for the Ninth Circuit, Alex Kozinski and Josh Goldfoot write:

“(P)romoting innovation alone cannot be a sufficient justification for exempting innovators from the law. An unfortunate result of our complex legal system is that almost everyone is confused about what the law means, and everyone engaged in a business of any complexity at some point has to consult a lawyer. If the need to obey the law stifles innovation, that stifling is just another cost of having a society ruled by law. In this sense, the internet is no different that the pharmaceutical industry or the auto industry: they face formidable legal regulation, yet they continue to innovate.”

Companies have always engaged in a calculated analysis of the costs and benefits of engaging in a particular type of business. Section 230 immunity gives online intermediaries an unfair advantage over their offline counterparts. It also skews society’s sense of values and Wall Street’s valuation sense. Facebook may soon have a billion users but it is really more valuable to society than a company that is researching a cure for cancer? Given the potential for rich financial rewards, shouldn’t online companies be willing to bear some of the risks of their business models?

169 Kozinski and Goldfoot, supra note XXX, at 371.

170 Although Facebook is a private company as of the time of the writing of this Article, its shares trade in the secondary market at about $84 billion valuation. Is His Company Worth $100 Billion?, WALL ST. J., July 14, 2011, at B1.

171 One analyst predicted that Facebook would be worth $234 billion by 2015. Id.
The threat of liability may actually spur some types of innovation by creating a market need. Some companies may develop technologies that assist other companies in minimizing the risk of civil liability. For example, Facebook recently adopted Microsoft’s PhotoDNA technology to detect child pornography on its site. Many critics have argued that social networking sites should do more to prevent predators on their sites from exploiting children. Microsoft created the product to address a social problem and Facebook adopted the technology in response to market pressure. Similarly, proprietorship liability may create a market need that may, in turn, spur innovation as entrepreneurs create products that enable other companies to reduce the risk of liability.

On the other hand, broad immunity has the opposite effect – it may promote technology that is socially harmful. It may encourage the development of even sneakier ways to take unauthorized photographs and recordings or it may lower their cost and make the existing technology accessible to more consumers. There may be less consideration given to (and thus less effort to prevent) the negative consequences of technological innovations. As Kozinski and Goldfoot note:

“There is an even more fundamental reason why it would be unwise to exempt the innovators who create the technology that will shape the course of our lives: granting them that exemption will yield a generation of technology that will shape the course of our lives: granting them that exemption will yield a generation of technology that facilitates the behavior that our society has decided to prohibit. If the internet is still being developed, then

\[172\] Patricia Leigh Brown, In Oakland, Redefining Sex Trade Workers as Abuse Victims, NYT, May 23, 2011, A14 (“(T)here is an even darker side to innovation when it facilitates criminal activity, cruelty and power imbalances. The Internet has made sex trafficking, especially of children, easier. Much easier. By removing many of the barriers to access, it has created markets and increased, as economists like to say “economic efficiency.” ) Brown describes the problem of American-born minors lured into the sex trade as one that as “exploded with the Internet.” Id.
we should do what we can to guide its development in a direction that promotes compliance with the law.”

Facial recognition technologies, for example, have raised privacy concerns because they are being introduced into consumer goods and on social networking sites. Website operators may be more thoughtful about how and whether to employ such technologies if they lose their broad immunity.

The burdens of proprietorship liability should not be exaggerated. The standard is not a heightened one, but one of ordinary reasonableness. It merely permits an inquiry into the reasonableness for a website proprietor’s conduct. The Article proposes a reasonableness standard, not one of strict liability. By that standard, most of our cherished Internet companies would still be in business as they already strive to conform to socially acceptable business practices and are typically responsive to customer complaints. Google will continue to thrive; the dirty.com will not.

Finally, online entities have ways to reduce the risks of doing business and alleviate the burdens from lawsuits. They can require their users to indemnify the site from third party lawsuits arising out of content posted by the user. They can require visitors (and not just posters) to click to agree to certain contractual terms, such as mandatory arbitration, forum selection, and attorneys’ fees before accessing the site. The website operator may also avail itself of one of the proposed safe harbors by permitting content only by identified posters, responding to takedown requests or organizing itself as a non-profit and refusing to accept paid advertisements.

173 Id. at 371.

174 Emily Steel, A Face Launchs 1,000 Apps, W.S.J., August 5, 2011, B5 (noting the concern that privacy advocates have over how facial recognition technology is used by companies that employ them).
Eric Goldman argues that revising section 230 immunity is unnecessary because socially harmful businesses, such as gossip sites, will eventually be driven out of the marketplace by the “invisible hand”.\(^{175}\) This reliance on market forces, however, ignores the economics of the Internet. Web-based businesses generally have much lower start-up and operating costs than their counterparts in the offline world. For example, the founder of 4chan, a website created in 2003, which attracts mostly advertisers in the adult entertainment industry said that his site generates advertising revenue in the “low five figures.”\(^{176}\) Yet, he started the site when he was only fifteen years old and has been able to keep it running for nearly a decade. A publisher of books and magazines has much greater costs than an online publisher of content. Yet, book and magazine publishers are not immune from liability the way online publishers are under section 230. Section 230 puts an enormous thumb on the scale that typically weighs free market forces, tilting the balance in favor of online companies.

The invisible hand argument also ignores the multiplicity of ways that websites can result in monetary gain for its operators. Even if the websites themselves do not generate much revenue, the proprietors of these websites reap the benefits of high visibility and can receive book contracts, speaking invitations and offers to invest in future online ventures.\(^{177}\)


\(^{176}\) Jenna Wortham, Founder of a Provocative Web Site Forms a New Outlet, NYT, B1 (March 14, 2011) The NYT reported that 4chan is “one of the largest forums on the Internet” and considered “one of the darkest corners of the Web.” Id.

\(^{177}\) The founder of 4chan, for example, launched a career as public speaker, an investment fund adviser, and founder of a new, venture-backed Web site. Id.
More importantly, the invisible hand ignores the realities of online harm. Even if the invisible hand eventually drives some sites out of business, the content that was posted while they existed may remain searchable and accessible online. The “invisible hand” argument too easily dismisses the very real harm to the victims of these businesses. For them, any website that enabled the ruination of their lives was in business too long.178

B. Section 230 and Free Speech

A common protest raised whenever the issue of amending section 230 arises is that anything other than broad immunity would chill speech.179 Yet, First Amendment doctrine recognizes limits on speech.180 The salient issue then should be not whether limits to online speech should exist, but what those limits should be. As Cass Sunstein notes:

178 See Jacqui Lipton, We the Paparazzi, (noting that privacy invading digital recordings may have “serious long term consequences for many people”).

179 Danielle Keats Citron observes that limiting abusive online communications may protect First Amendment values such as democratic governance. Danielle Keats Citron, Cyber Civil Rights, 89 BOSTON UNIV. L. REV. 61, 101-103 (2009); Cass Sunstein notes that the goals of the First Amendment are “closely connected with the founding commitment to a particular kind of polity: a deliberative democracy among informed citizens who are political equals.” Cass Sunstein, The First Amendment in Cyberspace, 104 YALE L. J. 1757, 1800 (1995) He cautions that “(f)ree speech doctrine, with its proliferating tests, distinctions, and subparts, should not lose touch” with the purposes of the First Amendment and that “instead of allowing new technologies to use democratic processes for their own purposes, constitutional law should be concerned with harnessing those technologies for democratic ends – including the founding aspirations to public deliberation, citizenship, political equality, and even a certain kind of virtue.” Id.

180 See Citron, supra note 113, at 106-110 (explaining how First Amendment doctrine does not protect threats, defamatory statements and emotional distress claims). In re Verizon Internet Services, Inc., 257 F.Supp. 2d 244 (D.D.C. 2003), the Recording Industry Association of America sought the identity of an anonymous user of Verizon’s service who is alleged to have infringed copyrights by offering hundreds of songs for downloading. The court stated, “But when the Supreme Court has held that the First Amendment protects anonymity, it has typically done so in cases involving core First Amendment expression....The DMCA....does not directly impact core political speech, and thus may not warrant the type of “exact ing scrutiny” reserved for that context.”)
“New technologies have greatly expanded the opportunity to communicate obscene, libelous, violent, or harassing messages….Invasions of privacy are far more likely. The Internet poses special problems on these counts. As a general rule, any restrictions should be treated like those governing ordinary speech, with ordinary mail providing the best analogy. If restrictions are narrowly tailored, and supported by a sufficiently strong record, they should be upheld.”\textsuperscript{181}

But rather than recognizing the unique character of harms caused by online speech, the broad immunity of section 230 as (erroneously) applied by many courts ignores them, and then loosens offline speech restrictions. The First Amendment doctrine that has been crafted by the judiciary over the years to carefully balance free speech with societal harms has been jettisoned by section 230. Offline publishers have never been granted blanket immunity from liability for the works they publish. Even online, intermediaries are liable for copyright infringement where they fail to remove claimed copyrighted works after notice.\textsuperscript{182} The argument in favor of website proprietorship liability is not one that favors a new law – rather, it favors a return to the law, and the standard of reasonableness, that governs the rest of our society.\textsuperscript{183} It rejects the Internet exceptionalism that favors different rules and laws, or no laws, for online conduct.\textsuperscript{184} 


\textsuperscript{182} See Digital Millenium Copyright Act, codified as amended at 17 U.S.C. §§512, 1201-05, 1301-22 and 24 U.S.C. §4001, makes it unlawful to access a work protected by an anti-piracy measure but contains a notice and takedown provision for internet service providers.

\textsuperscript{183} See also Richard A. Epstein, \textit{Privacy, Publication, and the First Amendment: The Dangers of First Amendment Exceptionalism}, 52 STAN. L. REV. 1003, 1004 (2000)(noting the danger of “endowing the new challenges in cyberspace with such novelty that it becomes too easy to forget that the underlying problems have been with us for a very long time.”) Cf: Lyrissa Lidsky http://prawfsblawg.blogs.com/prawfsblawg/2011/04/hit-lists-is-cyber-incitement-different.html#comments (wondering whether the internet is a game changer for First Amendment doctrine).

\textsuperscript{184} Epstein also notes the problems created by what he calls “First Amendment exceptionalism,” that is “the belief that the First Amendment weights the scales above and beyond what a sensible theory of freedom of speech, understood as part of a general theory of freedom, would require.” \textit{Id.} at 1006.
publishers and distributors are, to varying degrees, subject to liability for the content they publish and distribute. No offline publisher has broad immunity akin to that enjoyed by their online counterparts. Not only do web publishers enjoy the lower costs of publication and distribution, they also are freed from many of the oversight and control responsibilities required of non-digital publishers.\textsuperscript{185} The vetting of content routinely undertaken by non-digital publishers which results in more accurate, better written content, is often absent from the sites of publishers which encourage the two regrettable norms. A reasonableness standard conforms to societal expectations of businesses while permitting adjustments to the way the law is applied where the online experience really is different from the offline one.

Often, the free speech argument is framed in terms of hard core libertarianism yet conveniently forgets that immunity was granted by government intervention. Whereas offline publishers and distributors bear some responsibility for the works they publish, online publishers have broad immunity which may encourage them to act in a socially irresponsible manner.\textsuperscript{186} Rather than proposing new legislation or regulation, this Article seeks to remedy the negative effects of existing legislation. Scaling back the scope of the CDA is actually a move against regulation since it is the existence of this regulation that is a major contributing problem to

\textsuperscript{185} As Richard Epstein notes:

“One recent question of some import concerns the liability of Internet operators for defamatory messages posted on their systems by others. The Communications Decency Act provides these web page operators with absolute immunity. The obvious points here are, first, that the plaintiff’s preferred defamation action should be directed against the party who posted the message, assuming that she can find him; next, that it becomes virtually impossible to ask the proprietor of the network to maintain a constant surveillance of the content posted on various sites by the wide range of subscribers, some of whom are certain to hold extreme, malevolent, or outlandish views. But that said, how different is the problem here from an attempt to hold a newspaper responsible for the content of personal advertisements, or a lending library responsible for the contents of the books it sends into circulation or a broadcast station for the defamation of one of its guests?” \textit{Id.} at 1005.

\textsuperscript{186} \textit{Wortham, supra} note 112.
socially harmful behavior online. Without the broad blanket immunity that section 230 provides, many of the most socially harmful websites would not survive, or they would have to redesign their websites in a way that forces greater accountability among its users.

C. Same Side of the Fence Criticisms.

I expect there will be some “same side of the fence” arguments from those who agree that limits should be placed on section 230 immunity, but believe that my proposals do not go far enough or object to some or all of the proposed safe harbors. Several scholars have made stronger proposals for a “notice and take down” regime similar to that currently applicable under the Digital Millenium Circumvention Act.\(^{187}\) Although such a regime is appealing for a variety of reasons, it may prove too burdensome for some website operators. Given the volume of postings on many websites and the difficulty of determining their lawfulness without a factual inquiry, a notice and take down regime may leave some website operators exposed. Accordingly, my proposals include safe harbors in addition to notice and takedown.

Admittedly, the proposals in this Article will not prevent every type of online harm and should not be expected to do so. What they do is carefully balance the harms of online postings and the two regretful norms against legitimate concerns raised by those who desire the retention of immunity. In this way, I hope to move the conversation regarding section 230 immunity “over the fence.”

\(^{187}\) See Bradley Areheart, Regulating Cyberbullies Through Notice-Based Liability, 117 YALE L. J. POCKET PART 41 (2007)(proposing a notice and take down scheme similar to that available under the Digital Millenium Copyright Act); Daniel Solove, Speech, Privacy and Reputation on the Internet, in the OFFENSIVE INTERNET 25
CONCLUSION

Some may argue that in order to accommodate Internet growth and innovation, we should relinquish norms, such as privacy, and succumb to the changes that the Internet brings. But this view is outdated, stuck in time circa 1994. The Internet is no longer a niche medium used by a handful of tech savvy citizens and it should not be treated as such. What happens online doesn’t stay online but affects human lives and our society’s norms of conduct and communication.188 The cyber exceptionalist argument ignores that not all change is good or inevitable. The path forged by the most trollish Internet users and the “free for all” nature of discourse is not predetermined or immutable. Change is organic and can be shaped and molded.

Critics of my proposed legislative amendment may object that the prospect of liability means that website operators would be required to make difficult subjective decisions about the legality and legitimacy of certain postings. As a result, a website operator would overreact and remove even constitutionally permissible content in response to takedown requests, thereby chilling speech. Thus, the argument goes, to avoid sliding down the slippery slope toward censorship, law and policy makers should leave the Internet to regulate itself.

Contrary to what this argument suggests, a takedown request is not "Big Brother" censoring what a private citizen can reveal about oneself, but an individual’s attempt to protect his or her privacy and right to expression against the intrusive or unwanted actions of another

188 Elias Aboujaoude has written about the ways that the online identifies of individuals has irrevocably damaged their offline selves. See generally ELIAS ABOUJADOUDE, VIRTUALLY YOU: THE DANGEROUS POWERS OF THE E-PERSONALITY (2011). He notes, for example, that “[t]he way we see and evaluate ourselves is changing as a function of new personality traits born and nurtured in the virtual world." Id. at 11.
private citizen. Furthermore, there is another slippery slope that is too often left unmentioned. As uncivil discourse increases, it threatens to weaken the girding that enables speech and expression. An example can be found in the tragic example involving a Rutgers student, Tyler Clementi. Clementi committed suicide after his roommate, Dharun Ravi, and Ravi's friend, Molly Wei, surreptitiously recorded Clementi having an intimate encounter and then posted it online. Friends of the perpetrators, expressed surprise that they would have engaged in such a heinous act. Their act of recording Clementi in an intimate moment, without his permission, was a level of intrusion that was unthinkable a decade ago. Ravi and Wei's offline demeanor did not correspond to their online one, which suggests an extreme disinhibition effect. Clementi, however, did not have the advantage of a different online "persona" to shield him from the public's glare. (In fact, neither neither did Ravi or Wei, as their identities were soon revealed on the Internet and national newspapers). What Ravi and Wei exposed by their treacherous act was a very private side of Clementi that he did not wish to share with just anyone, much less with everyone. Not only had Ravi and Wei invaded Clementi's privacy, they wrested away his autonomy, taking from him control over a very fundamental and personal part of his life. As Sean Scott writes:

189 See SOLOVE, THE FUTURE OF REPUTATION, supra note XXX, at vii (noting that “When it comes to gossip and rumor on the Internet...the culprit is ourselves. We’re invading each other’s privacy and we’re also invading our own privacy by exposures of information we later come to regret. Individual rights are implicated on both sides of the equation. Protecting privacy can come into tension with safeguarding free speech...”)

“Allowing the right to privacy to preempt the First Amendment may not be as harmful to First Amendment values as has been suggested by some courts. Indeed, recognizing the privacy interest at stake allows us to retain our autonomy, our dignity and facilitates this experiment called democracy.”

There are those who argue that rather than thinking of ways to punish and deter those like Ravi and Wei, we should "toughen up" those like Clementi. That presents the other, more dangerous, slippery slope. A failure to enforce minimal levels of civility opens up the very real danger of tumbling headlong into a society that sanctions bullying of its disempowered and its marginalized. Then, rather than tolerance and justice, treachery and abuse become societal norms. Danielle Keats Citron writes about the pernicious effects of trivializing the harmful effects of cyber harassment and argues that “(b)ecause law is expressive, it constructs our understanding of harms that are not trivial.”

Without a minimal level of security, citizens no longer feel free to express themselves, in public spaces or in the privacy of their own homes. Their inability to control the distribution of their expressive activity diminishes their very right to expression. Expression then becomes the privilege of those who are socially untouchable, because of their wealth or power, or because their expression is considered within acceptable social norms. As Jacqueline Lipton writes in the context of digital video invasions of privacy, “If we do not act now, privacy-destroying norms may become entrenched and it will be much more difficult to protect privacy in the future….There is little downside to considering regulatory action to protect privacy. Regulation,

191 Scott, supra note XXX, at 744.
192 Danielle Keats Citron, Law’s Expressive Value in Combating Cyber Gender Harassment, 108 MICH. L. REV. 373, 377 (2009)(referring to the law’s ability to recognize the distinct suffering of online gender harassment).
imperfect as it may be, can be revised later, but today’s video privacy incursions may have far-reaching and potentially devastating consequences.\textsuperscript{193} My proposals strive to recapture the autonomy that has been lost in recent years and aim to loosen the grip that the two regrettable norms have on online behavior.

\textsuperscript{193} Lipton, supra note XXX, \textit{We the Paparazzi}. 